

CRIMINAL PROCEDURE IN BHUTAN

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I. INVESTIGATION

The main organization responsible for criminal investigation in Bhutan is the Royal Bhutan Police (RBP) which consists of twelve field divisions covering the twenty districts of Bhutan. Each field division is headed by a Senior Superintendent/Superintendent of Police and comprises various police stations under it as per the area of jurisdiction. Each police station is headed by an Officer Commanding and consists of other investigation officers, non-commissioned officers and constables. A police station is responsible for investigation of criminal offences committed within its jurisdiction. Every investigation is directly supervised by the respective Superintendent of Police in case of heinous offences and the Officer Commanding in other cases, and an investigation team shall consist of a minimum of eight personnel.¹ After thorough investigation of a case, the investigation report, consisting of the details of the case, brief facts, findings and charges against the offender, is prepared by the investigation officer.

In cases of misdemeanor offences (1 year to 3 years imprisonment) and above, the investigation report is handed over to the Office of the Attorney General (OAG) for the prosecution of the case. After receipt of the investigation report from the police, the case is deliberated by the Office of the Attorney General and a prosecutor for the prosecution of the case is assigned. The OAG frames the charges based on the investigation report of the police and shall coordinate with the concerned investigation officer for any assistance. After the charges are framed, the case is forwarded to the jurisdictional court of law for trial by the OAG. However, the arrest and detention of the suspect, any searches and seizures, remand, extension of remand, production of the suspect to the court whenever required, custody of the evidence, etc., shall be the responsibility of the police in coordination with the OAG prosecutor. The OAG as the prosecutor on behalf of the state has the right to question and investigate on the case handed over to them by the police for prosecution but they cannot command the RBP directly in criminal investigation. Normally, the OAG bases its action on the investigation report submitted to them by the police, and any doubts or ambiguity in the investigation is cleared by the police investigation officer. The RBP provides as much assistance and support as possible to the OAG for the smooth prosecution of a criminal case. In case the OAG, after deliberation, decides to return a case to the RBP without forwarding to the court, it may do so in writing stating the reasons for the non-acceptance. In such cases, the RBP shall respect the decision of the OAG if it is satisfied with the reasons for non-acceptance of the case. However, if the reasons stated by the OAG are not very satisfactory, the legal division of the RBP shall seek clarity from the Attorney General of Bhutan and accordingly apprise the Chief of Police.

On the other hand, cases of petty misdemeanor offences (1 month to 1 year imprisonment) and below, are prosecuted by the police by the police prosecution units of respective police stations around the country. In such cases, the investigation officer prepares the investigation report including the charges and forwards the case to the court for trial. Such cases are prosecuted by the police prosecutors.

The arrest and pre-indictment detention procedure shall be as per the provisions of the Civil and

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¹One investigation officer, two first responders, two forensic experts including a photographer, one crime clerk, one prosecution unit, and the CCIS unit.

155TH INTERNATIONAL TRAINING COURSE
PARTICIPANTS' PAPERS

Criminal Procedure Code of Bhutan (CCPCB) and the Royal Bhutan Police Act (RBPA). As per Article 7 (Fundamental rights) of the Constitution of Bhutan, a person shall not be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence nor to unlawful attacks on the person's honour and reputation, and a person shall not be subjected to arbitrary arrest or detention. As per the CCPCB, no person shall be subjected to arrest or detention, except in accordance with this Code and a person arrested shall not be subjected to more restraint than is reasonably necessary to prevent his/her escape.

The CCPCB also provides that a person shall not be subjected to torture/cruelty/inhumane/degrading treatment/punishment, and a person suspected of carrying out such activity shall be subjected to criminal prosecution. A statement/pleading/testimony given under such circumstances shall be inadmissible. As per section 163 of the CCPCB, a Court is empowered to issue a warrant of arrest upon request by the police for criminal offences in accordance with this Code or other laws. The Court upon receipt of the crime report may direct the police to carry out additional investigation if reasonable cause of guilt has not been satisfactorily established. The warrant shall empower the police to arrest a person in a lawful manner. Section 164 of the CCPCB provides that the warrant of arrest shall state: (a) the name and address of the accused; (b) the crime with which he/she is charged; (c) the name of the Issuing Court; and (d) bear the seal of the Court and the warrant shall remain valid until it is executed or cancelled by the Issuing Court. Arrest warrants may be executed within Bhutan, beyond the jurisdictional boundary of the Issuing Court. If a warrant of arrest is to be enforced outside the territorial jurisdiction of the Issuing Court, the police shall: (a) obtain an endorsement from the Court having territorial jurisdiction; or (b) upon arrest, inform the Court having territorial jurisdiction. No line of appeal or judicial review shall vest in the Receiving Court with regard to any warrant from an Issuing Court, and the right to assert a motion for improper arrest or improper issuance of a warrant shall vest directly with the suspect and his/her *jabmi* (lawyer). The section also provides that a warrant may be served by the intervention of a foreign state, where the suspect to be served is outside Bhutan and in a country with which the right of extradition has been established by treaty, convention or mutual agreement.

Section 165 of the CCPCB provides that a police officer may arrest without a warrant in a public place if any person is reasonably believed to be: (a) abusing or physically assaulting another person; (b) attempting to forcibly dishonour a female; (c) suspected of dealing in illegal business; (d) in possession of illegal arms/ammunition, etc.; (e) using false weights and measures; (f) dealing in harmful drugs; (g) causing harm to public property such as telephone lines, lamp posts, roads, water pipes, etc. (h) wanted criminals; (i) a deserter from the uniformed services; (j) fishing and hunting on prohibited days and months under the Laws of Bhutan; (k) a receiver of stolen property; (l) obstructing police in the execution of lawful duties; (m) willfully and indecently exposing one's person or disgracing or committing nuisance, or exposing a contagious disease to the general public or contaminating drinking water; or (n) neglecting to fence in or duly protect any dangerous tank or other dangerous place or structure. The power of the arresting Police officer to enter a private dwelling to effect an arrest without warrant is limited to instances of immediate necessity or other exigent circumstances. As per section 167 of the CCPCB, a citizen may arrest or cause to be arrested any person whom he/she reasonably believes: (a) has committed or intends to commit a criminal offence; or (b) is wanted by the law for the commission of an offence. A person so arrested shall be handed over to the police or in the absence of police, relevant public official without delay.

As per section 184 of the CCPCB, immediately following arrest, an arrested person shall be informed of the charge for which he/she is being arrested and subsequent to arrest, the police shall make reasonable attempts to inform the parent, guardian or member of the family of the person so arrested and detained as soon as possible. As per section 186 of the CCPCB, the Court may order an accused to be remanded to police/judicial custody if there exists reasonable cause that he/she has perpetrated a crime. As per section 188 of the CCPCB, any person arrested and detained with/without warrant shall be produced before a Court within twenty-four hours of the arrest exclusive of the time necessary for the journey from the place of arrest and the Government holidays. As per the RBPA, a police officer shall have power to arrest a person upon obtaining warrant from a competent court and subject to the Civil and Criminal Procedure Code of Bhutan, a police officer may, without warrant, arrest a person for an offence if the Police officer believes on reasonable grounds that the person has just committed

or is committing the offence or is wanted for any criminal offence.

Another agency which investigates criminal offences is the Anti Corruption Commission (ACC), which is governed by the Anti-Corruption Act (ACA) of Bhutan. The ACC has all the powers of investigation of corruption offences and is supported by other law enforcement agencies such as the RBP. However, the ACC has the power to investigate only corruption offences provided by the ACA. After completion of investigation of a corruption offence, the ACC hands over the case to the Office of the Attorney General for prosecution.

Investigators' interviews of suspects are sometimes recorded on video and produced before the court in case the suspect retracts his statement. Such video recordings are produced at the court to show that the statement of the suspect was recorded as per the legal requirements and that no unfair or illegal means were used to record the statement. The recording is also used to refresh the memory of the suspect. However, to qualify as evidence in a court of law, the video recording should be supported and corroborated by other evidence proving the guilt of the suspect.

A suspect's attorney may attend an interview conducted by the investigative organizations, especially in case of minor suspects whereby it is mandatory. However, if the investigative organization justifies that the presence of the suspect's attorney during the interview is likely to hamper the investigation, the suspect's attorney can be excluded from the interview after justifying and providing the reasoning in writing.

After the interview, the oral statement of the suspect is converted into writing either by the suspects themselves or by the investigator if the suspect is illiterate. The statement is recorded on a statement form, which is signed by the suspect and a witness. Therefore, since the written statement is either recorded by the suspect themselves or by an investigator as told by the suspect, the suspect shall have the opportunity to confirm and correct mistakes by countersigning or by recording new statements.

The procedure for searches and seizures is provided by the CCPCB and the RBPA. As per section 168 of the CCPCB, a Court may issue a search warrant to the police to conduct a search for criminal evidence. A search warrant shall only be issued upon showing probable cause of a criminal offence to the Court. The police requesting a search warrant shall present to the Court: (a) the name of the accused and address; (b) the suspected criminal offence; (c) the place of search; and (d) the facts establishing probable cause for the search. As per section 169 of the CCPCB, all search warrants shall be executed within twenty-one days of their issuance, unless the Issuing Court has granted an extension. Section 170 of the CCPCB provides that a search warrant may be executed within Bhutan, beyond the jurisdictional boundary of the Issuing Court. If a search warrant is to be enforced outside the territorial jurisdiction of the Issuing Court, the police shall: (a) obtain an endorsement from the Court having territorial jurisdiction; or (b) upon search, inform the Court having territorial jurisdiction. In accordance with this Code, the Receiving Court shall ensure that the search warrant from the Issuing Court is enforced. As per section 171 of the CCPCB, a search shall be made in the presence of *Chimi/Gup/Chipon/* member of *Dzongkhag and Geog Yargye Tshokchung/*witness. A police officer executing the warrant shall: (a) announce that he/she is a police officer; and (b) show a search warrant. Where there is a danger of destruction of evidence and/or the distances from the Court to the places to be searched are substantial, police on the scene may conduct the search without having a search warrant. As per section 176 of the CCPCB, a police officer has, upon arrest of a suspect without a warrant, the right to search the area under the suspect's immediate control/possession. A police officer making any arrest shall seize from the person arrested any weapon, contraband or any other evidence of an offence carried on his/her person. As per section 180 of the CCPCB, a police officer may seize any property, which may be alleged or suspected to have been stolen or which may be found under circumstances, which create suspicion of the commission of an offence. The police shall prepare a list of all the articles taken into possession at the time of the search, and the copy shall be given to the owner or the person in occupation of the premise, as the case may be. The list shall be signed and dated by the officer making the search, the owner of the premise or person in occupation of the premise and by a witness present at the time of search. When an article discovered is of such a nature that its immediate destruction is necessary for public safety, it shall be lawful for the police officer making the search to destroy or have the same destroyed. A police officer making a search shall turn over all evidence to the police station with

155TH INTERNATIONAL TRAINING COURSE
PARTICIPANTS' PAPERS

labeling where it shall be maintained until required by the Court with jurisdiction over the case. If the police, prosecutor or the Court deems that a specific item is irrelevant to a case, the item shall be returned to the owner without delay. As per the RBPA, every police officer shall have the power to seize or search a person or a place upon obtaining a warrant from a Court of law. However, any police officer may search any place, dwelling, store, conveyance or any person, without warrant if he has sufficient reasons or grounds to believe that such a search is indispensable for the successful detection of a crime, subject to the CCPCB.

II. TRIAL

After thorough investigation of a case, the suspect is charged with the appropriate provisions of the law and the investigation report is forwarded to the court for prosecution either by the police in cases of petty misdemeanor and below, or by the Office of the Attorney General in cases of misdemeanor and above.

Before the registration of the case with the Registry division of the Court, the Court shall conduct miscellaneous hearings expeditiously. The Chief Justice in High Court, Chief Judge/Judge in the *Dzongkhag* (District) Court and the Judge in *Dungkhag* (Sub-district) Court hear the miscellaneous hearing. Hearings are conducted strictly in accordance with the CCPCB. Each Bench clerk maintains a Bench book. The Bench book enumerates the order as to how the hearing should proceed. During the miscellaneous hearing, the court shall make an initial determination whether sufficient legal cause exists to admit the case for proceedings according to the law. The Court shall give written reasons if the petition of a party is dismissed. The hearing is always conducted within the prescribed period and in accordance with the CCPCB. After the miscellaneous hearing, accordingly, the petition if registered by the registry is distributed to the Benches and a bench clerk is identified. After that, a preliminary hearing is conducted within ten days of registration in criminal cases and one hundred and eight days of registration in civil cases. The purpose of the preliminary hearing is to enable the Court to entertain challenges to pleadings based on cause, procedure and jurisdiction and clarify substantive or procedural legal issues. Furthermore, the Court shall conduct the judicial process in accordance with the CCPCB as follows:

Registry of a complaint => Miscellaneous Hearing => Preliminary Hearing => Production before Judge => Show Cause => Opening Statement => Defence Reply => Rebuttal => Evidence => Independent Testimony => Exhibit => Cross Examinations => Judicial Investigation => Closing Statement => Judgement.

There is a system of plea bargaining in Bhutan. As per section 197 of the CCPCB, with agreement to provide information to the prosecution and in lieu of a full criminal trial, a suspect may choose to plead guilty to an offence lesser than the offence charged and be sentenced accordingly. The prosecution may consider a plea bargain in exchange for evidence deemed critical for prosecution against other criminal suspects. Discretion as to whether or not to consider a plea bargain rests fully with the prosecution which shall, among other factors, consider: (a) the nature of the offence; (b) the circumstances under which the crime was committed; (c) the person's prior criminal record and status; and (d) whether it is voluntary in nature. Before confirming a plea bargain, the prosecution shall determine whether the defendant is mentally competent and is a child in conflict with law, and if so, whether the child is represented by parent/member of a family/legal guardian/*jabmi*, and understands: (a) the nature of the charges emanating from the plea bargain; (b) the mandatory minimum and maximum penalties provided by law, if any; (c) that a plea bargain may be made as well during the course of the criminal trial; and (d) that if the prosecution accepts the plea bargain, the defendant waives his/her right to a trial.

All the evidence and documents which are relevant to the case and are the facts in issue are referred to the judge after indictment. However, the evidence and documents which are not relevant to the case are filtered by the prosecutor.

The confession of a suspect is admissible in a court of law if it was taken as per the legal requirements and if it is corroborated by other evidences. As per section 84 of the Evidence Act of

Bhutan (EAB), any statement made at any time by a person charged with a crime stating or suggesting that the person committed the crime shall be the confession of the person. Section 85 of the EAB states that the Court shall not consider any confession to be valid unless the confession is proven to be: (a) made voluntarily; (b) given independently; and (c) made without duress, coercion, undue influence or inducement. As per section 86 of the EAB, if the confession is made to the police officer or any other police official, it shall not be valid unless the confession is proven to be made after the police officer or the police official had: (a) warned the person that anything he says can be used against him in a legal proceeding; (b) notified that he has a right to a *jabmi* (lawyer); and (c) informed that, if he cannot afford a *jabmi*, the Government will provide him with a *jabmi*. Section 88 of the EAB provides that a confession made to a police officer or other police official shall not be admissible without corroborating evidence of the validity of the confession. When a person confesses to a police officer, the police officer must follow the procedure set forth in this Act. As per section 91 of the EAB, a confession made by any person is irrelevant and inadmissible in a criminal proceeding if the making of the confession appears to the Court to have been caused by any: (a) inducement; (b) threat; (c) promise; (d) intoxication; or (e) incompetence or incapability. As per section 92 of the EAB, the Court shall proceed further if a person: (a) had confessed and then denies the confession; or (b) has made counter-charges. In instances where a confession is retracted or denied, the person shall be: (a) examined in the Court; (b) warned of the consequence of giving false information; (c) called upon to remember whether the person has or has not consciously committed the offence; (d) liable to be charged of perjury; and (e) investigated for the difference between the statement and words given or spoken before and after.

All the relevant evidence collected through investigation is permitted to be submitted to the court to prove or disprove the case. However, evidence which is irrelevant or which is likely to mislead the court and waste time may not be permitted. As per Section 32 of the EAB, although relevant, evidence may be excluded if: (a) its probative value is substantially outweighed by the danger of unfair prejudice; (b) it could cause undue confusion of the issues; (c) it could mislead the Court; (d) it could cause undue delay or a waste of time; or (e) it is cumulative.

The hearsay-rule in Bhutan is provided by the EAB. As per section 76 of the EAB, hearsay is an out of court statement made by a person who is not examined as a witness. As per section 77 of the EAB, the following types of oral statements are not hearsay — when a prior statement by the witness: (a) who is giving oral evidence and the prior statement is inconsistent with the statement made while giving oral evidence or was made in another legal proceeding or was written down in a document that is available for inspection by the Court and the parties; (b) giving oral evidence is consistent with a statement given by the witness while giving oral evidence and is offered to rebut an expressed or implied charge against the witness of fabrication or improper influence or motive; or (c) giving oral evidence is one of identification of a person made after seeing or perceiving the person. As per section 78 of the EAB, the following types of written statements are not hearsay: (a) records of regularly conducted business activity made at or near the time of that activity by a person with knowledge of that activity and kept in the course of the regularly conducted business; (b) records maintained by the Government that are generally available to the public for inspection or sale; (c) entries in any public or official book, register or record made by a public servant in the regular course of official duties; or (d) published maps, charts, and plans offered for public sale and made under the authority of the Government. Section 79 of the EAB provides that hearsay evidence is not admissible except with leave of the Court in considering whether: (a) it would have been reasonable and practicable for the party by whom the evidence was introduced to have produced the maker of the original statement as a witness; (b) the original statement was made contemporaneously with the occurrence or existence of the matters stated; (c) the statement involves multiple hearsay; and (d) any person involved in the statement had any motive to conceal or misrepresent the matters involved in the statement.

In Bhutan, during trial, victims and witnesses are protected whenever the court deems it necessary for such protections. As per section 33 of the EAB, no person's identification shall be revealed if the person is the source of evidence or a witness to the issue and the Court believes that his identification needs to be protected. As per section 198 of the RBPA, the Royal Bhutan Police shall provide physical protection to any state witness vulnerable to any real security threats to his life and property. Section 112 of the RBPA states that no Police person shall disclose any personal source of information under any circumstance to any person or authority. As per section 68 of the EAB, the Court shall exercise

reasonable control over the mode and order of questioning of witnesses and presenting evidence so as to: (a) make the questioning and presentation effective for the ascertainment of the truth; (b) avoid needless consumption of time; and (c) protect a witness from harassment or undue embarrassment.

III. CONCLUSION

The Bhutanese legal system is based on the adversarial (Accusatorial or the Common law system) principle of procedure with some elements of the inquisitorial system (Continental or the Civil law system). The courts take no sides and the judges are umpires of the litigants. The judges allow uninterrupted hearing to the litigants or their *jabmis* (lawyers). They are given the opportunity to make presentation to the Court and answer questions posed by the judges. The plaintiff and the defendant or their *jabmis* can submit evidence to substantiate their legal contentions, and the courts decide cases based on the facts and issues submitted by the parties. Thus, *onus probandi* or the burden to prove beyond reasonable doubt lies on the prosecutor in a criminal case and on the plaintiff to prove his case by a fair preponderance of the credible evidence in a civil action. The adversarial principle is well enshrined in the *Bardo Thodrel* (Book of the Dead — *Garun Puran*), which is performed on the third day of the *Tshechu* (religious festival in Bhutan) every year all over the country and dates back to the 8th century.

Thus, after thorough investigation of a criminal case by the jurisdictional investigative organizations, the investigation report of the case is forwarded to the prosecuting agency. The prosecuting agency in turn forwards the case to the court of law having jurisdiction and after registration of the case at the court of law, the trial procedure begins with the miscellaneous hearing. Thereafter, the judicial process of preliminary hearing, production before judge, show cause, opening statement, defence reply, rebuttal, evidence, independent testimony, exhibit, cross examinations, judicial investigation, and closing statement commences. The trial procedure ends with pronouncement of the judgement.