



“DEMOCRACY, CONSTITUTIONS & DEALING WITH THE WORLD”

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Session 2: Status of International Law in Domestic Law: The Bhutanese Context

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1. How are treaties entered into in your country? Where relevant, use the Paris Agreement on Climate Change as an example.

As per the Article 10(25) of the Constitution of the Kingdom of Bhutan, for a treaty to enter into force domestically, it must be “duly acceded to by the Government” and must be ratified by the Parliament. The expression “duly acceded to” requires that all procedures prescribed in the *Rules of Procedure for Treaty Making 2016* are followed.

The Rules of Procedure of Treaty Making require the agency proposing the treaty be entered into to conduct stakeholder consultations and a preliminary national interest analysis prior to making a submission to Cabinet for review. If the proposal is approved by the Cabinet, the actual drafting and negotiation process is initiated. Once the text is finalized, it must again go through a final national interest analysis and then be approved by Cabinet. The Cabinet shall then table the text before the Parliament for ratification, which is the same procedure or legislative process as used for ordinary legislation. Finally, if approved by both houses of Parliament, the treaty must be submitted to the King for Royal assent. If Royal assent is received, then the treaty has completed the process of ratification and enters into force.

This process is in addition to the international process of signature and ratification or accession. For example, Bhutan signed the Paris Agreement in April 2016, but only completed the domestic ratification process only in mid-2017 and was then able to submit its international ratification.

2. Is it relevant to distinguish treaties from other forms of international agreements for this purpose, or to distinguish between different types of treaties?

No distinction is made between treaties and other forms of international agreements, in terms of the procedure for how treaties are made and entered into force in Bhutan. Generally, all treaties whether bilateral or multilateral are treated the same and have to go through the same process of ratification.

The only exception is that, in the case of multilateral treaties, if Bhutan is not a party to negotiation of the treaty or if the signature process is closed, some steps in the ratification process can be skipped. Specifically, the steps relating to negotiation and drafting of the treating text can be skipped. However, the concerned agency will have to initiate the treaty proposal and conduct stakeholder consultations and submit preliminary national interest analysis for the Cabinet’s review

and approval of the treaty proposal.¹ Once the Cabinet approves proposal, then the final the final national interest analysis is conducted based on the already-agreed text.² That analysis will then be sent to Cabinet for final approval. Once approved by the Cabinet, the treaty will then be tabled in the Parliament for ratification and the instrument of accession will be submitted internationally once Parliament has signed off on the treaty.

3. How are these procedures reflected in the Constitution?

There is no detailed procedure reflected in the 2008 Constitution regarding the ratification and domestication of treaties. Article 10(25) only mentions that “all international Conventions, Covenants, Treaties, Protocols and Agreements” must be “duly acceded to by the Government” and must be ratified by the Parliament. The expression “duly acceded to by the Government” includes both signature and accession by the competent representative of the Government of Bhutan. The Rules of Procedure for Making Treaty 2016 were developed by the Cabinet (not endorsed by the Parliament because no such practice exists currently in Bhutan) to provide clearer guidance in support of Article 10(25).

However, Bhutan has entered into many international treaties—both bilateral and multilateral. It could be argued that the practice of entering into such treaties have attained the status of constitutional convention and that the Rules of Procedure simply captured that process in writing. Procedures have not changed after the adoption of the written constitution in 2008 or the development of the Rules of Procedure in 2016.

4. Is there any debate in your country on the adequacy of the procedures entering into treaty commitments and other forms of international agreements from the standpoint of transparency and accountability? Is there any pressure for change?

There is no visible debate in Bhutan on the adequacy of the procedures entering into treaty commitments and other forms of international agreements from the standpoint of transparency and accountability or otherwise. However, in public forums there has been some critique of the Government’s common practice of entering into treaties without any reservation. Some have also raised concerns that the Government often has no clear plan as to how such treaties obligations are to be fulfilled or implemented. While the procedure for ratification is well defined, it appears that there are some implementation issues. Therefore, there are calls from some sections of the society to improve on treaty implementation and monitoring processes.

¹ According to the Rules of Procedure for Treaty Making, the Preliminary National Interest Analysis on the treaty proposal must include: (1) Subject matter; (2) Main obligation, if applicable; (3) Time consideration; (4) Ministerial responsibility; (5) Advantages and disadvantages; (6) Tentative cost analysis of entering into the treaty; (7) Social, economic, cultural, environmental and political implications; (8) Possible effect on domestic laws; (9) Any other associated instruments on the same subject; and (10) Report of the multi-stakeholder consultation.

² According to the Rules of Procedure for Treaty Making, the Final National Interest Analysis must include: (1) Subject matter; (2) Ministerial responsibility; (3) Time considerations; (4) Associated instruments; (5) Advantages and disadvantages; (6) Obligations and proposed text of reservations, if any; (7) Financial cost of entering into the treaty; (8) Action plan to fulfill the treaty obligations; (9) Social, economic, cultural, environmental and political implications; (10) Need for implementing legislation either by way of amendment of existing laws or enactment of a new legislation; (11) Any other associated instruments on the same subject; and (12) Report of the multi-stakeholder consultation.

5. What is the status of international law in domestic law in your country? Is this specified in the Constitution? Is it relevant to distinguish between different forms of international law for this purpose?

The 2008 Constitution, under Article 9(24) imposes a duty on the Bhutanese State to promote goodwill and cooperation with nations, foster respect for international law and treaty obligations, and encourage settlement of international disputes by peaceful means in order to promote international peace and security. Further, as per Article 7(22), the State can impose reasonable restrictions through law on the fundamental rights of citizens when it concerns “the interests of friendly relations with foreign States.” These objectives can be met only through respect for international law. Therefore, Bhutan considers international law very important.

Textually, once the international conventions, covenants, treaties, protocols and agreements are duly acceded to by the Government, such international law documents are “deemed to be the law of the Kingdom” upon ratification by the Parliament. As such, international law is accorded the status of any other ordinary legislation in Bhutan once ratified by the Parliament, and do not in theory require legislation to be incorporated into domestic law.

However, international law (international conventions, covenants, treaties, protocols and agreements) must not be inconsistent with the Constitution as per the Article 10(25). Any law including international law if inconsistent with the Constitution is considered null and void as per the Article 1(10) of the Constitution.³ This means that the Constitution has an overriding effect over international law. International law does not trump the domestic Constitution—meaning Bhutan adopts the principle of constitutional supremacy. Those international law norms in contravention of the Bhutanese Constitutional norms will be considered ultra vires.

6. Does the implementation of international law in domestic law create any theoretical or practical problems?

Theoretically, Bhutan adopts certain aspects of the monist approach to the implementation of international law with Parliament needing to approve any treaty, in advance of the executive formally ratifying the treaty internationally. Additional legislation is not required unless it is impossible to implement the treaty without adopting domestic legislation.

Practically, international treaties remain in abeyance until domestic legislation are adopted to give effect to such treaties. However, this does not mean Bhutan has no respect for international treaties. In most cases, Bhutan with scarce resources and a smaller economy faces huge practical challenges in implementing international law. For example, while Bhutan is committed to the implementation of key human rights treaties such as the Child Rights Convention, implementing programs such as probation, counselling and diversion require huge investment in human resources and facilities and has proved challenging.

³ All laws in force in the territory of Bhutan at the time of adopting this Constitution shall continue until altered, repealed or amended by Parliament. However, the provisions of any law, whether made before or after the coming into force of this Constitution, which are inconsistent with this Constitution, shall be null and void.

7. *Is there any debate in your country about the ways in which international law is absorbed into domestic law?*

The debate persists as to whether Bhutan adopts the dualist or monist approach to relationship between international law and domestic law, in terms of the constitutional requirements for ratification. The status of international law and domestic law will evolve as Bhutan's constitutional system evolves and as Bhutan's international engagement increases over time. It has only been 13 years since Bhutan adopted a written constitution. The modern legal system was introduced in the 1950s and Bhutan only opened to the wider world only in the 1970s.

While reading Article 10(25), the expression "deemed to be the law of the Kingdom" upon ratification by the Parliament suggests that international treaties acquire the status of domestic law upon ratification by Parliament and then the Executive, without having to enact specific domestic legislation to that effect. This understanding is further supported by the Rules of Procedure for Making Treaty 2016. Chapter VI of the Rules of Procedure states that, upon ratification, "the treaty shall be the law of the Kingdom of Bhutan and national implementation shall be carried out in accordance with its provisions." On this basis, Bhutan adopts a monist approach. In other words, the ratification process in practice doesn't involve passing separate domestic legislation to give effect to the international law (treaties). Ratification is instead achieved through a practice that can be characterised as ratification by parliamentary resolution, where the treaty itself is tabled in the Parliament like any other ordinary domestic legislations and the Parliament vote to approve or disprove the treaty.

However, there are some cases where implementation through national legislation is required – specifically, when a treaty cannot be implemented without adopting more detailed domestic legislation. On this basis, some claim that Bhutan adopts a dualist approach.

While it is difficult to prove in absence of relevant literature or case laws, there appears to be a mismatch between theory and practice, where legislation is in practice required in order to give legal force to international agreements in domestic law. There is no evidence to show that courts in Bhutan have applied international law directly to settle cases. Courts seem to recognize domestic legislation as a source of law over international law. Practically, international law is always implemented through national legislation. For example, the Convention on the Rights of Child (CRC) has been implemented through adoption of the *Child Care and Protection Act 2011*, and amendments in provisions of other laws such as penal law regarding rape (making sexual intercourse with child below 18 years of age an offence of rape) and the marriage law (changing marriageable age to 18 years for both male and female).

8. *Are there any other aspects of the experience of your country with the entry into international arrangements and their implementation and activation, which might throw light on the issues raised by this theme?*

One interesting relationship between some aspects of international law and Bhutanese domestic law is that some international law norms are incorporated in domestic law without formal signing, acceding, or ratifying the international treaties or conventions. For example, while Bhutan is not party to or ratified many international human rights treaties, all generations of human rights have found their place in the Bhutanese Constitution. For example, Article 7 guarantees civil and political rights, and Article 9 guarantees socio-economic and cultural rights. There seems to be *silent incorporation* (without formal entry into international treaties) of international law norms in

domestic laws when such international law norms fit well within the Bhutanese context and value system.

Some might see such incorporation as a direct borrowing or transplant from international law to domestic law, but for Bhutan it seamlessly blends with the constitutional convention of the Gross National Happiness (GNH) framework.⁴ The GNH framework is the policy framework was adopted by the Bhutanese Government to promote conditions that allow citizens to pursue happiness as the ultimate human goal. The goal of the pursuit of happiness is now recognized as “a” fundamental human goal, if not “the” fundamental human goal, through UN General Assembly resolution. This goal recognizes the need for a more inclusive, equitable and balanced approach to economic growth that promotes sustainable development, poverty eradication, happiness and well-being of all people. One of the important means of achieving this goal is promotion of socio-economic, cultural and ecological justice through recognition of socio-economic, cultural and environmental rights. Likewise, the GNH framework is based on four pillars: equitable and sustainable socio-economic development, environmental protection, preservation and promotion of culture and good governance. The Government has also identified nine domains and thirty-three indicators that make these pillars measurable.

Although human rights were not traditionally recognized (the expression “rights” was not commonly used) in Bhutan, the GNH framework mandated the Government to create conditions that would enable citizens to pursue happiness. In this context, the UN’s Sustainable Development Goals framework and international human rights norms (particularly socio-economic, cultural and environmental rights) fit very well with the GNH framework. Incorporation of human rights within the domestic law reinforces the GNH framework. While speculative, the relevance of international law norms to GNH goal may be the reason why human rights found an important place in the Bhutanese Constitution though Bhutan has not actually ratified most international human rights treaties. Such silent incorporation or activation provides us with another understanding of the relationship between international law and domestic law.

While recently listening to the Former Chief Justice of Bhutan, who was also the Chairperson of the Constitution Drafting Committee, he suggested that transplantation without translation (contextualisation) does not work. Foreign ideas work when they are used to support or compliment domestic ideas or values. Domestication of international human rights works because there is a connection that we can draw with Buddhist conception of freedom. Likewise, many international law norms concerning environmental protection and sustainability find prominent place in Bhutanese domestic law because such norms connect well with the GNH framework which require harmonious coexistence with the natural environment.

Biography: *Nima Dorji is Assistant Professor of Comparative Constitutional Law and Bhutanese Constitutional Law at Jigme Singye Wangchuck School of Law (JSW School of Law) in Bhutan. He is one of the founding faculty members of Bhutan’s first law school and a PhD candidate at the University of Victoria. Prior to joining JSW School of Law, he worked as a Legal Officer at Bhutan National Legal Institute (BNLI), Bhutan’s Judicial Academy, and he was one of the founding staff of the institute. Nima received his Master of Laws from University of Canberra in Australia and Bachelor*

⁴ <https://www.adb.org/publications/experience-gross-national-happiness-development-framework>

of Law and Arts from NALSAR University of Law in India. Nima's research examines the intersection between law and happiness more generally and in particular the relationship between happiness and constitutionalism. Nima was a founding editorial member of Bhutan's first law journal (Bhutan Law Review), and he is Editor-in-Chief of the recently launched Journal of Gross National Happiness (GNH) and Law published by JSW Law Publishing Series.