

# THE RELATIONSHIP BETWEEN BHUTAN'S GNH PILLARS AND THE ENVIRONMENTAL RULE OF LAW

NAYSA AHUJA\*  
STEPHEN J. TURNER\*\*

**Abstract:** Bhutan's national principle of Gross National Happiness (GNH) has led to a framework for assessing critical government decisions on policies, legislation and individual projects. Human well-being such as that envisaged through the pursuit of GNH can, in part at least, be achieved through the implementation of the rule of law relating to environmental protection. In recent years, the concept of the 'Environmental rule of law' (ERoL) has evolved as a framework to consider the principle of the rule of law within the environmental context. It aims to link environmental governance and sustainability with fundamental rights and duties. It draws on a broad range of rights and duties relevant to the protection of the environment, and as such has relevance to the principle of GNH and its application.

This article examines Bhutanese approaches to environmental governance inspired by GNH in order to better understand how they may coincide with those principles and concepts that are incorporated within the concept of ERoL. It draws upon the iteration of ERoL developed within UNEP's ERoL Framework (2019) and considers the relationship that specific aspects of the Framework have with Bhutan's approach. Three aspects of Bhutan's laws and system of environmental governance are considered. Firstly, it considers the Constitution of Bhutan to evaluate the provisions that it contains relating to the rule of law and the protection of the environment. Second, it examines the institutional arrangements and practice for implementing and enforcing environmental protection. Finally, it considers access to justice and the role of the judiciary in achieving GNH within the environmental context.

The article seeks to highlight the relationship that the good governance and environmental conservation pillars of GNH have

---

\* Naysa Ahuja is an environmental lawyer from India, currently working as Environmental Governance Specialist (Consultant), The World Bank.

\*\* Stephen Turner is a Senior Lecturer at the School of Law, University of Essex, UK.

Any errors are those of the authors. The authors wish to thank Anna Magri for valuable research assistance for this article.

with key components of the concept of ERoL. It does so to share insights that may be of use in furthering the implementation of environmental law in Bhutan and which may also demonstrate the benefits of adopting Bhutanese approaches to environmental protection more broadly.

## I. Introduction

This article considers the relationship between Gross National Happiness (GNH) and the emerging concept of the Environmental Rule of Law (ERoL) within the context of certain legal and institutional developments that have taken place in Bhutan over the past 15 years. The concept of ERoL has made its way into debate relating to environmental governance relatively recently. It is based on the centuries old concept of the 'rule of law',<sup>1</sup> but with specific application to the protection of the environment, and arguably has an important role to play in legal reform, the strengthening of institutions, and the implementation of environmental law in practice.<sup>2</sup> The importance of the application of the rule of law within an environmental context is seen by many as being crucial if environmental rights and duties are to be realised.<sup>3</sup> This recent focus has led to discussion relating to the possible contents of ERoL and different iterations of what the term means have been given.<sup>4</sup> This analysis will use the version of ERoL provided in the first global report produced by the United Nations Environment

---

<sup>1</sup> It can be noted that the Sustainable Development Goals (SDGs) refer specifically to the importance of the 'rule of law'. See SDG 16–Peace, Justice and Strong Institutions–Access to justice for all and building effective accountable institutions at all levels: United Nations, <https://www.un.org/sustainabledevelopment/> (last visited Jul. 21, 2020).

<sup>2</sup> Jessica Scott, *From Environmental Rights to Environmental Rule of Law: A Proposal for Better Environmental Outcomes* 6(1) Michigan Journal of Environmental and Administrative Law 203 (2016); Rule of Law for Nature: New Dimensions and Ideas in Environmental Law (Christina Voigt ed., 2013).

<sup>3</sup> *Id.*; see also Andy Raine & Emeline Pluchon, *UN Environment–Advancing the Environmental Rule of Law in the Asia Pacific* 3(1) Chinese J. Env'tl. L. 117 (2019).

<sup>4</sup> See for example the IUCN, *World Declaration on the Environmental Rule of Law*, 2016, <https://www.iucn.org/commissions/world-commission-environmental-law/wcel-resources/wcel-important-documentation/environmental-rule-law> (last visited Feb. 14, 2020).

in 2019 (ERoL Report) as its basis.<sup>5</sup> It is recognised that it is likely that as the concept of ERoL evolves, so too will the understanding and definition of its contents.

The concept as enunciated in the ERoL Report has potential relevance both to the manner in which environmental law is developed and implemented in Bhutan as well as to GNH itself. Of the four pillars that make up the concept of GNH, the concept of ERoL has particular relevance to the environmental conservation and good governance pillars for obvious reasons.<sup>6</sup> Precisely what the relationship is between the concept of ERoL and GNH, is a question that requires detailed analysis if a deeper understanding is to be attained.

Prior to embarking on this analysis, it is worth clarifying the core components of both the concept of ERoL and GNH as they relate to the environment and governance. The ERoL Report describes ERoL as being the status when laws are widely understood, respected, and enforced and the benefits of environmental protection are enjoyed by people and the planet.<sup>7</sup> A key component of the report focuses on the need for environmental law to be clear and comprehensive and to be properly implemented and enforced.<sup>8</sup> It notes the significant 'implementation gap' that exists within many countries, whether developed or developing in status, in terms of the impact of laws on human health and well-being.<sup>9</sup> It provides a breakdown of the elements that are at the core of ERoL which is as follows:

- a) Fair, Clear and Implementable Environmental Laws.
- b) Access to Information, Participation and Access to Justice.
- c) Accountability and Integrity of Institutions and Decision-Makers.
- d) Clear and Coordinated Mandates and Roles, Across and Within Institutions.

---

<sup>5</sup> United Nations Environment Programme, Environmental Rule of Law: First Global Report 1 (2019).

<sup>6</sup> UNGA, '2030 Agenda for Sustainable Development' (2015).

<sup>7</sup> UNEP, *supra* note 5.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

- e) Accessible, Fair, Impartial, Timely and Responsible Dispute Resolution Mechanisms.
- f) Recognition of Mutually Reinforcing Relationship between Rights and the Environmental Rule of Law.
- g) Specific criteria for the Interpretation of the Environmental Law.<sup>10</sup>

At the core of the concept of ERoL is the aim of fostering increased compliance among governments, industry, and civil society collectively with environmental laws.<sup>11</sup> As an important part of this, it seeks to improve the institutional practice and governance related to the protection of the environment.<sup>12</sup>

When considering GNH in this context, it is important to bear in mind that GNH is not intended to have the same role or function that the concept of ERoL has. It is based on Mahayana Buddhist philosophy, and provides a broad set of principles and policies, that government and society should be seeking to attain and maintain. Those principles, policies and goals are encapsulated in its four pillars which are good governance, sustainable socio-economic development, cultural preservation, and environmental conservation. The ultimate goal of GNH is to advance and maximize the collective happiness of the Bhutanese people.<sup>13</sup> It is clear that GNH has a much broader purpose than the concept of ERoL, however it is also clear that there is a potential overlap between their purposes. As of 2015, in accordance with the GNH Survey Report, the governance pillar of GNH has been broken down into three main categories which are: political participation, people's perception of government performance, and fundamental rights and freedom.<sup>14</sup> The 'environmental conservation' pillar of GNH encompasses areas such as pro-environmental beliefs and behaviours of the people, environmental issues faced by people, human-wildlife conflicts,

---

<sup>10</sup> UNEP (n 5) 20-6.

<sup>11</sup> *Id.* at 13.

<sup>12</sup> Scott, *supra* note 2, at 222.

<sup>13</sup> Lyonpo Sonam Tobgye, *The Constitution of Bhutan: Principles and Philosophies* 188-189 (2015).

<sup>14</sup> Centre for Bhutan Studies and GNH Research, *A Compass Towards a Just and Harmonious Society—2015 GNH Survey Report* 188 (2016).

and fuel uses.<sup>15</sup> These areas of GNH clearly correlate with some of the core elements of the concept of ERoL.

It is not possible within this context of this article to provide a complete analysis of all aspects of environmental governance in Bhutan vis-à-vis the ERoL Report. Therefore, specific core components have been selected to provide a representative evaluation. As such the authors have selected the national Constitution,<sup>16</sup> certain key institutions that play an important role within government and governance of the environment, and the laws and processes relating to access to justice in environmental matters. Within these areas of law and governance, the analysis itself is focused on three areas of enquiry. Firstly, it examines the extent to which those laws, principles, institutions and practices within Bhutan demonstrate a clear overlap and consonance between GNH policy and the approaches advocated within the ERoL Report. Secondly, it considers aspects of the ERoL Report that could potentially have application in supporting Bhutan in furthering GNH through its laws, principles, institutions and practice. Thirdly, it focuses on those environmental laws, principles, institutions and practices that are part of GNH policy, which either appear to go further in protecting the environment than the implicit or explicit values found within the concept of ERoL or which demonstrate lacunae or gaps in the version of ERoL found in the ERoL Report itself.

## **II. Constitution**

This section focuses on the national Constitution. It proceeds by analysing the relevant provisions of the Constitution and considers the overall impact of GNH as a developmental policy. The 2008 Constitution itself represented an important point in Bhutanese political history where the nation took a concrete step to move from the former absolute monarchy to a

---

<sup>15</sup> *Id.* at 211.

<sup>16</sup> The Constitution for the Kingdom of Bhutan 2008, [https://www.nab.gov.bt/en/business/constitution\\_of\\_bhutan](https://www.nab.gov.bt/en/business/constitution_of_bhutan) (last visited Aug. 2, 2020).

democratic constitutional monarchy.<sup>17</sup> Under the leadership of the Third King, Jigme Dorji Wangchuk (1952-72), a period of reform had taken place in the country which included significant modernisation of the political system and the introduction of a 130 member legislature.<sup>18</sup> It also resulted in increased contact with other countries and membership of the United Nations in 1971.<sup>19</sup> Following this period, the Fourth King, Jigme Singye Wangchuk (1972-2008) continued this process with further steps that included greater participation of the people in government and a programme of change that had the aim of modernising the country without it losing its culture and spiritual heritage.<sup>20</sup> Significantly he introduced the concept of GNH as an approach to economic and societal development in 1972.<sup>21</sup> In 2001 the King made the decision that a national constitution should be drafted which resulted in an extensive consultation process prior to its ultimate adoption.<sup>22</sup> As such the analysis in this section requires an approach that takes into account the spiritual heritage of the country, the role of the Monarchy as well as the approach that the Royal Government of Bhutan (RGoB) takes to economic development and 'well-being'.<sup>23</sup>

Although Buddhism is not recognised in the Constitution as the 'national religion', Art. 3(1) states that, 'Buddhism is the spiritual heritage of Bhutan, which promotes the principles and values of peace, non-violence, compassion and tolerance.'<sup>24</sup> In

---

<sup>17</sup> Sarish Sebastian, *Parliamentary Democracy in Bhutan—A Journey from Tradition to Modernity* 112 (2015); also Whinnie Bothe, *The Monarch's Gift: Critical notes on the constitutional process in Bhutan* 40 *European Bulletin of Himalayan Research* 27, 54 (2012).

<sup>18</sup> Shera Lhundup, *The Genesis of Environmental Ethics and Sustaining its Heritage in the Kingdom of Bhutan* 14 *Geo. Int'l Env'tl. L. Rev.* 693, 699 (2001-2); Leo E. Rose, *The Politics of Bhutan* 126 (1977).

<sup>19</sup> Lhundup, *Id* at 699.

<sup>20</sup> Sebastian, *supra* note 17 at 68-84.

<sup>21</sup> Sebastian, *supra* note 17 at 69; Wen Chen Chang, Li-ann Thio, Kevin Y.L. Tan and Jiunn-rong Yeh (eds) *Constitutionalism in Asia – Cases and Materials* 107 (Hart Publishing 2014); Dhurba Rizal, *The Royal Semi-Authoritarian Democracy of Bhutan* 71 (2015).

<sup>22</sup> Sebastian, *supra* note 17 at 11; Lhundup *supra* note 18 at 699.

<sup>23</sup> Stephen J. Turner, *The Constitution of Bhutan: A Quantitative Environmental Standard in Environmental Rights – The Development of Standards* 324-7 (S.J. Turner et al eds., 2010).

<sup>24</sup> The Constitution for the Kingdom of Bhutan. art. 3 § 1.

particular, Mahayana Buddhism is a branch of Buddhism that respects all forms of life and is prohibitive of hunting and fishing.<sup>25</sup> This affects the views that the RGoB and the people of Bhutan have relating to nature, the environment and the way that it should be treated.<sup>26</sup> Therefore there is a very strong and natural relationship between Buddhism and the principle of GNH. Priesner states that, 'Buddhism is the single most important determinant for...the core concept for 'Gross National Happiness'.<sup>27</sup> The Fourth King introduced the concept of GNH itself in 1972 and it clearly embodied a reflection of the spiritual heritage and values of the country.

In terms of the direct relationship between ERoL and GNH within the Constitution, it can be noted that GNH is recognised in Art. 9(2) of the Constitution as a 'fundamental principle'.<sup>28</sup> GNH has a number of functions within and for the Government, however for the purposes of this article, the key role that it plays is in acting as a determinant in decisions relating to the environment whether they be in law, general policy or planning.<sup>29</sup> This is reflected in the Government renaming the Planning Commission as the 'Gross National Happiness Commission' in 2008.<sup>30</sup> The concept of ERoL is relatively new and therefore it would not be expected to be referred to in national constitutions at this point. However, the concept of the 'Rule of Law' itself is mentioned twice. It appears with reference

---

<sup>25</sup> Lhundup, *supra* note 18, at 699.

<sup>26</sup> RGoB–Ministry of Agriculture, 'Biodiversity Action Plan for Bhutan', (final draft), Ministry of Agriculture, Royal Government of Bhutan, 2002  
<http://www.biodiv.be/bhutan/convention-biological-diversity/reports/biodiversity-action-plan-2002/download/en/1/Biodiversity%20Action%20Plan%202002.pdf?action=view>, 34 (last visited Jul. 21, 2020).

<sup>27</sup> Stefan Priesner, *Gross National Happiness: Bhutan's Vision of Development and its challenges in Indigeneity and Universality in Social Science: A South Asian Response* 212, 223 (Partha Nath Mukherji & Chandan Sengupta eds., 2004).

<sup>28</sup> Art. 9(2) states that, '[t]he State shall strive to promote those conditions that will enable the pursuit of Gross National Happiness.'

<sup>29</sup> See Gross National Happiness Commission, <https://www.gnhc.gov.bt/en/> (last visited Jul. 21, 2020).

<sup>30</sup> Executive Order PM/01/08/895 (January 24, 2008), <https://www.gnhc.gov.bt/en/> (last visited Jul. 21, 2020).

to the responsibilities of the judiciary,<sup>31</sup> and also within Art. 9 that refers to the 'Principles of State Responsibility' where it states that Bhutan should endeavour to, 'create a civil society free of oppression, discrimination and violence, based on the rule of law, protection of human rights and dignity, and to ensure the fundamental rights and freedoms of the people.'<sup>32</sup>

The Constitution also contains in Art. 5, a number of provisions that are all dedicated to the protection of the environment. When considering the contents of Art. 5, it is clear that it corresponds in many respects to environmental provisions that are included in other constitutions around the world.<sup>33</sup> Arts. 5(1) and 5(2) relate to the duties of Bhutanese citizens and the Government respectively to protect the environment and Arts. 5(4) and 5(5) refer to the responsibility of Parliament in creating legislation and its right to declare protected areas and national parks respectively. There are also other provisions within the constitution that have an environmental dimension. For example, Art. 7(1) contains the 'right to life'<sup>34</sup> and Art. 1(12) relates to the State's rights of ownership of the mineral resources, rivers, lakes and forests.<sup>35</sup> These provisions would not look out of place in the constitutions of many other countries.

However, Art. 5(3) is remarkable and unique as it provides a high quantitative standard relating to a specific aspect of the environment.<sup>36</sup> It requires that, '[t]he Government shall ensure that, in order to conserve the country's natural resources and to prevent degradation of the ecosystem, a minimum of 60 percent of Bhutan's total land shall be maintained under forest cover for all time.'<sup>37</sup> This policy had been introduced in the 1970s and therefore the provision in the constitution did not change the prior approach to forest

---

<sup>31</sup> The Constitution for the Kingdom of Bhutan, art. 21 § 3. See section 4 below.

<sup>32</sup> The Constitution for the Kingdom of Bhutan, art. 9 § 3.

<sup>33</sup> See generally J.R. May & E. Daly, *Global Environmental Constitutionalism* (2014); also in relation to Asia specifically see Wen-Chen Chang et al., *Constitutionalism in Asia—Cases and Materials* 1019-22 (2014).

<sup>34</sup> The Constitution for the Kingdom of Bhutan, art. 7 § 1.

<sup>35</sup> The Constitution for the Kingdom of Bhutan.

<sup>36</sup> Turner, *supra* note 21, at 323-41.

<sup>37</sup> The Constitution for the Kingdom of Bhutan.



conservation but re-affirmed and strengthened it. However, provisions in national constitutions are normally stated in oblique qualitative terms that leave much room for interpretation.<sup>38</sup> It appears that the only other nation that has incorporated anything similar is Kenya, which in its 2010 constitution included a provision that required the country to work to achieve and maintain 10 percent of the country under forest cover.<sup>39</sup>

It could be argued that the emphasis on environmental protection and GNH in the Constitution affects the interpretation and application of other provisions. For example, Art 9(10) states that the Government should, 'foster private sector development through fair market competition and prevent commercial monopolies.' In the context of commercial activity, Bhutan's approach is influenced by GNH and as such is different to that of many western economies. This can be illustrated by the example of the Gedu plywood factory which had been financed by a loan from Kuwait.<sup>40</sup> In spite of the significant projected economic benefits of the project, the Forest Department severely limited the number of trees that could be felled to supply the factory to the extent that it could only operate at 15 percent of capacity. This meant that it was unable to operate profitably and ultimately had to close.<sup>41</sup>

Where the Government has taken careful measures to protect the environment, its approaches have been to exercise direct state control of natural resources such as forests, to adopt and implement Five-Year plans and incorporate strict

---

<sup>38</sup> Turner, *supra* note 35; also T.P. Wangdi et al, *An Analysis of Forestry Policy, Acts and Rules of Bhutan to Mainstream Climate Change Adaptation. Regional Climate Change Adaptation Knowledge Platform for Asia*, Stockholm Environment Institute, Partner Report Series No. 13, 2013, <https://www.weadapt.org/sites/weadapt.org/files/legacy-new/knowledge-base/files/521c8788e61b3bhutan-serie-13-cs5-v7-for-web.pdf> (last visited Aug. 2, 2020).

<sup>39</sup> The Constitution of Kenya (2010) art. 69 § b.

<sup>40</sup> *Gedu Plywood Factory Shut Down* 4(1) *The Bhutan Review Monthly* 1(1996), [http://himalaya.socanth.cam.ac.uk/collections/journals/bhutanreview/pdf/BR\\_04\\_01.pdf](http://himalaya.socanth.cam.ac.uk/collections/journals/bhutanreview/pdf/BR_04_01.pdf) (last visited Aug. 2, 2020)

<sup>41</sup> Stefan Priesner, *Gross National Happiness – Bhutan's Vision of Development and its Challenges in Gross National Happiness*: Discussion Papers 24, 50 (1999), [http://crossasia-repository.ub.uni-heidelberg.de/320/1/GNH\\_Ch3\\_Priesner.pdf](http://crossasia-repository.ub.uni-heidelberg.de/320/1/GNH_Ch3_Priesner.pdf) (last visited Aug. 2, 2020).

regulation of private enterprise. These approaches to environmental protection are not consistent with many of the approaches taken to environmental protection that are evident in 'western democracies' where market mechanisms and the use of non-mandatory governance approaches appear to have much greater influence. It is here that there is a discernible difference between the approach adopted by Bhutan through its application of the principle of GNH to that which is implicit or explicitly stated within the ERoL Report.

The ERoL Report does not provide the same type of challenge to the consumption of natural resources that the approach adopted through GNH and Bhutan's Constitution does. As such it does not explicitly or implicitly warn against the unfettered consumption of natural resources in the way that the Bhutanese Constitution provides constraint.<sup>42</sup> For example the ERoL Report states that ERoL serves to encourage "inclusive equitable economic growth; support investment and promote competition; provide access to information and markets for the poor and marginalized; secure land and property title; and provide mechanisms for equitable commercial dispute resolution."<sup>43</sup> While there may be truth in this, it is clear also that economic growth is often responsible for levels of consumption that lead to widespread degradation of the environment through increased greenhouse gas emissions, increased levels of pollution, increased losses of biodiversity and increased levels of waste.<sup>44</sup>

The ERoL Report states that,

[a]n extensive body of empirical studies and literature documents the critical importance of strong institutions to growth; in fact, institutions are the key determinant of economic growth, more important than trade integration or

---

<sup>42</sup> With the exception of the Foreword, the text of the ERoL Report does not make reference to ecological 'planetary boundaries'.

<sup>43</sup> UNEP, *supra* note 5, at 18; see also International Development Law Organisation, *Doing Justice to Sustainable Development Integrating the Rule of Law into the Post-2015 Development Agenda* (2014).

<sup>44</sup> J. Rockstrom et al., *A Safe Operating Space for Humanity* 461 *Nature*, 472-5 (2009).

geographic variables.<sup>45</sup> Studies estimate that a one-standard deviation jump in the quality of institutions in a country results in a four-to six-fold increase in per-capita income.<sup>46</sup> Other research similarly links strong institutions to better development outcomes, including higher per capita income.<sup>47</sup>

It can be argued that while strong institutions are desirable, they are only effective in protecting the environment if they are integrated with approaches to economic development that genuinely lead to positive outcomes for the environment. This aspect of the drafting of the ERoL Report is one which comparison with the Bhutanese Constitution and experience exposes.

A final example of the dissonance between the economic assumptions made within the ERoL Report and the Bhutanese approach to economic growth through the principle of GNH, is found in its affirmation of Gross Domestic Product (GDP) as a measure of successful economic growth. It states, '[t]his connection between environmental rule of law and economic growth is reflected in various development indices that link different elements of environmental rule of law both to growth in gross domestic product and to a decrease in inflation and inequality.'<sup>48</sup> The adoption of GNH as an alternative approach to GDP and as an indicator of socio-economic progress by Bhutan, demonstrates the significant gap in the objectives that are assumed within the ERoL Report when compared to Bhutan.

---

<sup>45</sup> Douglass C. North, *Institutions, Institutional Change, and Economic Performance* (1990); see also Douglass C. North et al, *Governance, Growth, and Development Decision-making* (2008).

<sup>46</sup> Dani Rodrik et al, *Institutions Rule: The Primacy of Institutions over Integration and Geography in Economic Development*, NBER Working Paper No. 9305 (2002), Cambridge, MA: National Bureau of Economic Research, [https://www.nber.org/system/files/working\\_papers/w9305/w9305.pdf](https://www.nber.org/system/files/working_papers/w9305/w9305.pdf) (last visited Feb. 12, 2021).

<sup>47</sup> UNEP, *supra* note 5, at 38; see also Kaufmann, Kraay & Zoido-Lobaton, *Governance Matters Working Paper WPS 2196*. World Bank, Washington, DC (1999), <https://documents.worldbank.org/en/publication/documents-reports/documentdetail/665731468739470954/governance-matters> (last visited Feb. 12, 2021).

<sup>48</sup> UNEP, *supra* note 5, at 18; see also, Daniel Kaufmann & Aart Kraay, *Governance Indicators: Where Are We, Where Should We Be Going?* 23(1) *The World Bank Research Observer* 1, 10 (2008).

Through the ecological limits on economic growth that are inherent in the principle of GNH, it can be argued that GNH goes much further than the ERoL Report itself does in recognising ecological planetary boundaries and responding appropriately.<sup>49</sup>

These observations do not represent criticisms of the concept of ERoL itself, but they raise questions of the types of economic systems or economic developmental models that are explicitly or implicitly represented as being favourable within the ERoL Report. They also demonstrate the importance of key provisions within Bhutan's national constitution that go further than many other national constitutions in providing constraints against the over-consumption of natural resources.

### **III. Institutions**

An important aspect of the principle of 'rule of law' itself is the relationship that it has with institutions. Bugge emphasises that, 'the rule of law is the principle that law is the supreme factor in the relationship between the authorities and the citizen as well as between citizens with conflicting interests. It means that all persons, institutions and entities, public and private, including the state itself, are governed by established laws and accountable to legal institutions.'<sup>50</sup> It is therefore of little surprise that in the emerging concept of ERoL, the function that institutions play in the creation, implementation and enforcement of environmental law is of crucial importance.<sup>51</sup> Enforcement and implementation of environmental law in particular, have long been challenging issues for governments, communities and citizens, as they often highlight gaps between

---

<sup>49</sup> Ritu Verma, *Gross National Happiness: meaning, measure and degrowth in a living development alternative* 24(1) *J. Political Ecology* 476 (2017).

<sup>50</sup> Hans Christian Bugge, *Twelve Fundamental Challenges in Environmental Law: An Introduction to the Concept of Rule of Law for Nature in Rule of Law for Nature: New Dimensions and Ideas in Environmental Law* 105 (Christina Voigt ed., 2013).

<sup>51</sup> Scott, *supra* note 2, at 221.

the intention of a legislature and the reality of environmental governance in practice.<sup>52</sup>

Environmental institutions, such as national environment ministries and other sector-specific ministries are the most prominent institutions in this regard as they can have environmental legal development, standard setting and enforcement functions but it must be noted that other executive branches of government such as ministries of finance and education can also play important roles.<sup>53</sup> It is clear that in any jurisdiction, the failure of institutions to implement and enforce environmental law in whichever field of governance or sector concerned, can potentially lead to 'broader institutional weakness'<sup>54</sup> and result in both degradation of the environment and human suffering. This was clearly recognised at the United Nations Conference on Environment and Development (UNCED) in 1992 through the recommendations of Agenda 21 which stated that, 'the ability of a country to follow sustainable development paths is determined to a large extent by the capacity of its people and its institutions....'.<sup>55</sup> All countries have specific challenges in this regard which are determined by economic, developmental, cultural, geographical and ecological

---

<sup>52</sup> LeRoy C Paddock et al., *Compliance and Enforcement of Environmental Law – Towards More Effective Implementation* (2011); Paul Martin & Amanda Kennedy, *Implementing Environmental Law* (2017); Martina Padmanabhan & Volker Beckmann, *Institutions and Sustainability: Introduction and Overview in Institutions and Sustainability – Political Economy of Agriculture and the Environment – Essays in Honour of Konrad Hagedorn* 1, 17 (Volker Beckmann & Martina Padmanabhan eds., , 2009).

<sup>53</sup> Naysa Ahuja et al., *Advancing human rights through environmental rule of law in Human Rights and the Environment* 18 (James May & Erin Daly eds., 2019).

<sup>54</sup> Daniel Kaufmann, *Evidence-Based Reflections on Natural Resource Governance and Corruption in African Africa at a Fork in the Road: Taking Off or Disappointment Once Again* 239-60 (Oliver Ernest Zedillo & Haynie Wheeler eds., 2015), <https://ycsg.yale.edu/sites/default/files/files/africa.pdf> (last visited Feb 14, 2021).

<sup>55</sup> United Nations Sustainable Development 1992, *Agenda 21*. United Nations Conference on Environment & Development, Rio de Janeiro, Brazil, 3 to 14 June 1992, <https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf>, para 37.1 (last visited Feb. 12, 2021).

factors. This is no less the case in South Asia in general and Bhutan itself also faces its own challenges.<sup>56</sup>

This section will examine key institutions that are responsible for upholding environmental law and policy in Bhutan. First, it assesses the role of the Gross National Happiness Commission (GNHC) as a direction-setting apex body that underscores sustainability, environmental protection, and good governance to promote collective happiness. Second, it reviews the powers and functions of the National Environment Commission (NEC) to identify any implementation gaps in the enforcement of the National Environmental Protection Act (NEPA), and to explore how application of some of the elements that the ERoL Report contains could potentially assist in improving institutional practice. Lastly, it briefly mentions the relevance of the Anti-Corruption Commission and the role that it plays in institutional integrity across all public agencies including those dealing with environmental matters.

### **A. Gross National Happiness Commission**

The GNHC ensures that socio-economic development policies and overall national plans and programs are guided by the 'overarching philosophy' of GNH and its four pillars.<sup>57</sup> This key national planning and executing agency was first established as the Planning Commission in the 1970s. When it was re-named in 2008, its role in fulfilling Art. 9(2) of the Constitution was emphasized.<sup>58</sup> From its direction-setting role in the development of policy formulation and Five-Year Plans, to a body that reviews, surveys, monitors and evaluates efficient implementation of policies and plans, the GNHC Secretariat undertakes different functions at various levels of policy and program-making to ensure that Bhutan develops in accordance with the principles of GNH.<sup>59</sup> As Andelman puts it, '[e]very Government initiative,

---

<sup>56</sup> Parvez Hassan, *Good Environmental Governance: Some Trends in the South Asian Region* 18 Asia Pac. J. Intl. L. 169 (2016).

<sup>57</sup> Gross National Happiness Commission (GNHC), *About us* (2020) [https://www.gnhc.gov.bt/en/?page\\_id=47](https://www.gnhc.gov.bt/en/?page_id=47) (last visited Jul. 22, 2020).

<sup>58</sup> Executive Order PM/01/08/895 (Jan. 24, 2008), <https://www.gnhc.gov.bt/en/> (last visited Jul.21, 2020).

<sup>59</sup> GNHC, *supra* note 58.

every law, every investment must be run past the GNH Commission. If it doesn't pass muster, it doesn't happen.<sup>60</sup> The GNHC is also responsible for the development of governmental budgets and for monitoring the allocation of resources for the Five-Year Plans.<sup>61</sup>

With good governance recognized as one of the main pillars of GNH<sup>62</sup> and the rule of law recognized by the Constitution,<sup>63</sup> the GNHC will be expected to promote the rule of law vis-à-vis its overarching policy goals. It has been argued within the context of Bhutan that the obligation of the State is to create a free, democratic society founded on the rule of law, and that, '[a] king loves his people; his people desire happiness; the source of people's happiness is rule of law.'<sup>64</sup> The GNHC itself highlighted the strong link between the GNH pillar of good governance and the rule of law in 2002 by stating that, '[g]ood governance describes a government that promotes the greatest well-being and happiness for its citizens, and it also entails integrity, accountability, and transparency in governmental practices.'<sup>65</sup>

One objective of the GNHC is to strengthen the environmental pillar which clearly intersects with that relating to sustainable economic development.<sup>66</sup> It could therefore be argued that the role of the GNHC, by implication, is to promote ERoL and improve the governmental practice of environmental institutions. It is possible to point to examples where the stated purposes of the GNHC and that of the concept of ERoL as set out in the ERoL Report do correspond. One example relates to the official function of the GNHC to, 'ensure cross sectoral coordination and resolution of issues for effective

---

<sup>60</sup> David A. Andelman, *Bhutan, Borders and Bliss* 27(1) World Policy Journal 103, 110 (2010).

<sup>61</sup> *Id.*, see 'Functions'.

<sup>62</sup> The Bhutanese, *Good Governance, Main Pillar of GNH*, The Bhutanese, June 21, 2014, <https://thebhutanese.bt/good-governance-main-pillar-of-gnh/> (last visited Aug. 1, 2020).

<sup>63</sup> The Constitution for the Kingdom Bhutan 2008, art 9 § 3.

<sup>64</sup> Tobgye, *supra* note 13, at 189.

<sup>65</sup> Michael S. Givel, *Gross National Happiness in Bhutan: Political Institutions and Implementation*, *Asian Affairs* 102, 111 (2015) .

<sup>66</sup> GNHC, *supra* not 58, see 'Objectives'.

implementation of policies and plans.<sup>67</sup> As the ‘apex strategic body’,<sup>68</sup> the GNHC ‘ensures cohesion between sectoral policies and alignment with the national development objectives and GNH’.<sup>69</sup> The GNHC has the Prime Minister as the chairperson, the Minister of Finance as the vice-chair, and the GNHC Secretariat has representative members throughout all of the key ministries including the NEC.<sup>70</sup> Further, the 12<sup>th</sup> Five-Year Plan (2018-2023) envisages improvement in inter-ministerial (horizontal integration) across different levels of governance (vertical integration), coordination and collaboration.<sup>71</sup> By integrating cross-cutting issues of governance and environmental protection in policies, plans, and program, the GNHC’s practices correspond with some of the recommendations of the ERoL Report which highlights the need for co-ordination across sectors as well as multi-agency and multi-level coordination.<sup>72</sup>

As the central executing agency responsible for advancing GNH, an important function of the GNHC is to lead monitoring and evaluation processes to track the progress of national development goals and to provide feedback and early warning on a timely basis. These functions similarly are consistent with the recommendations of the ERoL Report.<sup>73</sup> The National Monitoring and Evaluation System (NMES) was instituted by the GNHC for the above purposes, but these efforts have been marred with implementation gaps due to lack of data and limited technical capacity. Ineffective functioning of the NMES during the 11<sup>th</sup> Five-Year Plan reportedly resulted in the GNHC not carrying out annual monitoring of planned activities, producing inconsistent documentation and inaccurate reporting on performance indicators for national and sectoral key

---

<sup>67</sup> GNHC, *supra* note 58.

<sup>68</sup> Givel, *supra* note 66, at 113 (citing Dasho Karma Ura).

<sup>69</sup> GNHC, *supra* note 55.

<sup>70</sup> GNHC, *supra* note 58, see ‘Secretariat Composition’; see also Givel, *supra* note 69.

<sup>71</sup> Gross National Happiness Commission, *Twelfth Five Year Plan 2018–2023* (Main Document, Vol. 1, Thimphu, Bhutan 2018).

<sup>72</sup> UNEP, *supra* note 5, at 35, 52-55.

<sup>73</sup> *Id.* at 63-9.



results.<sup>74</sup> The Royal Audit Authority highlighted the relevance of rigorous stakeholder consultative processes in the development of monitoring tools to ensure effective implementation consistent with national goals.<sup>75</sup> It is possible that as is the case in many countries, the capacity of governmental bodies in Bhutan to fulfil all of their functions effectively is subject to resource limitations.

From an international perspective, it can be seen that the GNHC is an unusual type of governmental body in that it has the function of promoting and integrating a country specific approach to social, economic, environmental and cultural development throughout the breadth of the ministries of the country. While the ERoL Report does stress the need for coordination between ministries and government agencies in relation to the environment, it does not specifically refer to the type of model (represented through the GNHC) that Bhutan has adopted.<sup>76</sup> As such further work would be required to assess the comparative advantages and disadvantages in the coordination of environmental law and policy that is adopted by Bhutan. It is certainly true that in many countries environmental agencies or ministries are given a lower profile, less resources and less power than other ministries. Therefore, the model of the GNHC in Bhutan, with the role that it has in relation to the environmental and governance pillars of GNH, presents a very interesting alternative that should arguably be explored.

## **B. National Environment Commission**

The National Environment Commission (NEC) is the high-level autonomous agency of the Royal Government of Bhutan.<sup>77</sup> It is mandated to look after all matters relating to the environment in Bhutan, including the regulation of environmental impacts and

---

<sup>74</sup> Kuensel, *11th Plan monitoring and evaluation tool defunct during plan period*, Kuensel Online, March 6, 2020, <https://kuenselonline.com/11th-plan-monitoring-and-evaluation-tool-defunct-during-plan-period/> (last visited Jul. 27, 2020).

<sup>75</sup> *Id.*

<sup>76</sup> UNEP, *supra* note 5, at 52-55.

<sup>77</sup> National Environment Protection Act (NEPA) 2007 § 20.

the promotion of sustainable environment.<sup>78</sup> The NEC was established in 1990 to further the broad principles of the Paro Resolution on Environment and Sustainable Development, in other words to balance economic development with environmental protection and sustainable use of natural resources.<sup>79</sup> In order to ensure that environmental issues become central to Bhutan's development agenda, the NEC has been responsible for drafting and coordinating the National Environment Strategy of 1998 entitled 'The Middle Path',<sup>80</sup> the 'Bhutan 2020 Vision' development plan,<sup>81</sup> and other key national instruments such as the National Environmental Protection Act of 2007 (NEPA).

In a way, the role of NEC is closely tied to the principles embodied in these key national instruments which emphasize Bhutan's 'middle path' approach to development and which recognize GNH as the central development concept. The Bhutan 2020 Vision development plan identified the need to improve technical capacity and institutional arrangements to undertake environmental impact assessments as a means to achieve its goal elaborated as follows:

Gross National Happiness does not regard economic growth as being unimportant. On the contrary, it is an important means for achieving higher ends. The challenge is one of finding the balance between material and non-material dimensions of development.<sup>82</sup>

---

<sup>78</sup> National Environment Commission (NEC), *The Middle Path – National Environmental Strategy 2020*, NES, 2019, [http://www.nec.gov.bt/necs/wp-content/uploads/2020/10/NES-English\\_web.pdf](http://www.nec.gov.bt/necs/wp-content/uploads/2020/10/NES-English_web.pdf) (last visited Feb. 6, 2021); see also National Environment Commission, 2021, <http://www.nec.gov.bt/necs/vision-mission/> (last visited Feb. 6, 2021), (search for 'Mandate' and 'Mission').

<sup>79</sup> NEC, *The Middle Path–National Environmental Strategy for Bhutan 14* (1998).

<sup>80</sup> *Id.*

<sup>81</sup> Planning Commission Secretariat, *Bhutan 2020: A Vision for Peace, Prosperity and Happiness–Part I*, 1999, <https://www.ircwash.org/resources/bhutan-2020-vision-peace-prosperity-and-happiness> last visit Feb. 6, 2021).

<sup>82</sup> Planning Commission Secretariat, *Bhutan 2020: A Vision for Peace, Prosperity and Happiness–Part II* (RGoB 1999) Available at:

With the purpose of ‘finding the balance’, the NEC was first enshrined under the Environmental Assessment Act 2000 (EAA),<sup>83</sup> followed by NEPA 2007, the Waste Prevention and Management Act 2009 (WPMA),<sup>84</sup> and the Water Act 2011 (WA)<sup>85</sup> as the key agency responsible for enforcing environmental legislative provisions. The Preamble to NEPA notes that environmental sustainability is an important element of GNH philosophy and recognizes a need to create institutional mechanisms to protect the fragile ecosystem,<sup>86</sup> and thus, the NEC is also responsible for promoting GNH in the country.

The NEPA is core to the functioning of environmental protection in Bhutan.<sup>87</sup> It does not specifically mention the concept of ERoL, however, it recognizes various principles that correspond with those emphasised in the EROL Report.<sup>88</sup> It includes the substantive right to safe and healthy environment,<sup>89</sup> and procedural rights such as the rights to information,<sup>90</sup> access to justice,<sup>91</sup> and public participation in environmental decision-making.<sup>92</sup> In fact, to widen the civic space in environmental matters, the NEC membership also includes three representatives from civil society.<sup>93</sup> Therefore, together the NEC and the NEPA are central to operationalizing and advancing a number of the principles and laws that are understood to form part of the concept of ERoL.

---

<<https://docplayer.net/amp/22916529-Bhutan-2020-a-vision-for-peace-prosperity-and-happiness.html> (last visited Feb. 6, 2021).

<sup>83</sup> Environment Assessment Act 2000, Chapter V.

<sup>84</sup> Waste Prevention and Management Act 2009, Chapter V.

<sup>85</sup> Water Act of Bhutan 2011, Chapter 3.

<sup>86</sup> NEPA 2007, Preamble.

<sup>87</sup> NEPA 2007.

<sup>88</sup> NEPA 2007, Ch. II [recognizes principle of inter-generational equity (§6), sustainable development (§4 and 7), public participation (§ 18), precautionary principle (§8), polluter pays principle (§12)].

<sup>89</sup> NEPA 2007 § 5.

<sup>90</sup> NEPA 2007 §15. (See also § 87) [NEC is required to operate an environmental information system and produce a report on the status of environmental conditions in the country on a regular basis].

<sup>91</sup> NEPA 2007 § 16.

<sup>92</sup> NEPA 2007 § 86.

<sup>93</sup> NEPA 2007 § 21(c).

However, the ERoL Report goes further in elaborating on specific characteristics that environmental institutions should exhibit to demonstrate that they can function in accordance with the concept of ERoL.<sup>94</sup> This potentially provides a useful basis for any environmental institution to conduct self-assessment and review. It highlights a number of characteristics as being particularly important to inculcate effective implementation and enforcement of environmental law and policy. These characteristics include: clear and appropriate mandates, institutional and personnel capacity, independent audit and performance reviews, the collection and use of reliable data, coordination across sectors and institutions, fair and consistent enforcement of law, and leadership to fight corruption and build compliance.<sup>95</sup> The following provides comment on some of these within the context of the NEC and other associated agencies in Bhutan.

### *1. Clear and appropriate mandates*

Clear and appropriate mandates that delineate the extent of an institution's authority, functions, and goals are arguably vital in the implementation and enforcement of environmental law.<sup>96</sup> They help institutions prioritize their efforts, they provide clarity to other agencies on their purposes, and they assist citizens in holding institutions to account.<sup>97</sup> The NEC is the apex executive body responsible for environmental matters and clearly, its primary responsibility is to enforce and administer the provisions of NEPA.<sup>98</sup> The NEC's functions are set out in NEPA,

---

<sup>94</sup> UNEP, *supra* note 5, at 45.

<sup>95</sup> *Id.* at 44-80, describes the seven key characteristics of effective environmental institutions, provides supporting empirical studies, and illustrates different forms in which environmental institutions across the globe demonstrate such characteristics.

<sup>96</sup> Kai Wegrich & Vid Štimac, *Coordination Capacity in The Problem-Solving Capacity of the Modern State: Governance Challenges and Administrative Capacities* (Martin Lodge & Kai Wegrich eds., 2014).

<sup>97</sup> UNEP, *Manual on Compliance with and Enforcement of Multilateral Environmental Agreements*, Nairobi, Kenya (UNEP, 2006) illustrates Jamaica's institutional arrangement for environmental governance with clear jurisdictional boundaries on specific environmental issues.

<sup>98</sup> NEPA 2007 § 31.

and other aforementioned legislation. These include taking specific measures to prevent environment harm;<sup>99</sup> adopting a list of projects requiring project screening and environmental clearance;<sup>100</sup> designating expert agencies as 'Competent Authorities' to conduct project screening, environmental assessments and issue or deny clearances; enforcing and implementing policies, plans and programs for environmental protection, among others.<sup>101</sup> NEPA empowers the NEC to establish an environmental tribunal if it decides to do so.<sup>102</sup> While this power could potentially advance access to justice, NEPA does not provide any specific criteria for the NEC to do so. Interestingly, NEPA also empowers the NEC to assume the role of a civil court when hearing cases before it.<sup>103</sup> This confluence of executive and judicial functions within one agency deviates from the democratic principle of separation of powers enshrined in the Bhutanese Constitution.<sup>104</sup> Such overlap of powers within NEPA could potentially contaminate the sanctity of these roles and legitimacy of the institution, and thus, weaken the rule of law. There is another conflict of interest in the dual mandates of the competent authorities that are required to advance economic development in their sectors but also to manage environmental risk of projects.<sup>105</sup>

## 2. *Independent audit and performance review*

---

<sup>99</sup> NEPA 2007 § 53 and 54.

<sup>100</sup> EAA 2000 § 33.1. See also NEC list of activities identified by NEC that require the competent authorities to screen and issue environmental clearance, <http://www.nec.gov.bt/wp-content/uploads/2019/04/Activities-exempted.pdf> (last visited Feb. 7, 2021).

<sup>101</sup> NEPA 2007 § 30 (a-g).

<sup>102</sup> NEPA 2007 § 36.

<sup>103</sup> *Id.*

<sup>104</sup> The Constitution for the Kingdom of Bhutan 2008, art. 1 §13: 'There shall be separation of the Executive, the Legislature and the Judiciary and no encroachment of each other's powers is permissible except to the extent provided for by this Constitution.'

<sup>105</sup> Antonia Gawel & Irum Ahsan, *Review and Compendium of Environmental policies and laws in Bhutan* 10 (Asian Development Bank, 2014), <https://www.adb.org/sites/default/files/publication/150136/review-compendium-environmental-policies-and-laws-bhutan.pdf> last visited Aug. 1, 2020).

This identifies the role of independent audit and review mechanisms to evaluate the effectiveness of implementation and enforcement processes as being crucial to improve institutional practice.<sup>106</sup> Agency audits and performance reviews are conducted in a number of ways in Bhutan. According to new guidelines, the annual performance rating of agencies leading the national development agenda under the 12<sup>th</sup> Five-Year plan is conducted against 'Agency Key Results Areas' and corresponding 'Performance Indicators'.<sup>107</sup> In addition, the Royal Audit Authority carries out performance,<sup>108</sup> regulatory, financial,<sup>109</sup> and compliance audits.<sup>110</sup> Such audits can clearly help to identify institutional limitations, analyse the efficiency of government programs and regulatory approaches, as well as curb resource misuse, misconduct and corruption within agencies.<sup>111</sup>

### 3. *Collection and use of reliable data*

The collection and use of reliable data, refers to the need for institutions to undertake this function for the purpose of adopting regulations and environmental standards as well as for determining compliance and improving environmental

---

<sup>106</sup> UNEP, *supra* note 55, at 77; see also, OECD, *Supreme Audit Institutions and Good Governance: Oversight, Insight and Foresight*, OECD Public Governance Reviews (2016), <http://dx.doi.org/10.1787/9789264263871-en> (last visited Feb. 7, 2021).

<sup>107</sup> Royal Government of Bhutan, 12<sup>th</sup> Five Year Plan Guidelines (2017), <https://www.gnhc.gov.bt/en/wp-content/uploads/2017/05/Finalized-Guideline.pdf> (last visited Jul. 27, 2020).

<sup>108</sup> The Constitution for the Kingdom of Bhutan 2008, art. 25 § 1 and The Audit Act of Bhutan 2018 § 68. (independent review of government program, operations, or management system to ensure appropriate use of resources and the improvement in public services performance).

<sup>109</sup> The Audit Act of Bhutan 2018 § 73: (reviews compliance of financial statement of agencies with financial reporting standards and regulatory framework).

<sup>110</sup> The Audit Act of Bhutan 2018 § 74: (compliance audit focuses on a range of issues related to entity's compliance with law, regulations, policies and other suitable and agreed upon criteria).

<sup>111</sup> Ahuja, *supra* note 53, at 27.

performance.<sup>112</sup> Greater transparency and the disclosure of environmental information also have the effect of garnering public trust.<sup>113</sup> Unfortunately due to the lack of adequate environmental baseline data, it is difficult to monitor the progress of projects and changes in environmental conditions in Bhutan.<sup>114</sup> While the NEC recognizes the right to information and the secretariat publishes periodic state of the environment reports<sup>115</sup> and other related information, the approach of information sharing may be largely top-down. However, initiatives such as the 'Government-to-Citizen Application' offer innovative approaches to improve citizens' access to government information in a non-discriminatory, time-efficient, and cost-effective way.<sup>116</sup> Such initiatives in turn may improve public appreciation of changes in environmental quality due to government interventions and grow public confidence.

#### 4. *Coordination across sectors and institutions*

It has already been emphasised in section 3.1 that Bhutan has incorporated particular methods of achieving meaningful

---

<sup>112</sup> UNEP International Advisory Council for Environmental Justice, *Environmental Rule of Law: Critical to Sustainable Development*, Issue Brief 47 (2015), <https://wedocs.unep.org/bitstream/handle/20.500.11822/10664/issue-brief-enrol.pdf> (last visited Feb. 12, 2021)

<sup>113</sup> Norbert Henninger et al., *Closing the Gap: Information, Participation, and Justice in Decision-Making for the Environment* (2002), [http://www.wri.org/sites/default/files/pdf/closing\\_the\\_gap.pdf](http://www.wri.org/sites/default/files/pdf/closing_the_gap.pdf). (last visited Feb. 12, 2021); see generally UNITAR (United Nations Institute for Training and Research), *Collection of International Guidance Materials on Pollutant Release and Transfer Registers 3* (2017):[describes the relevance of pollutant release and transfer registries to highlight effectiveness, or lack thereof, in the current pollution management systems]; See also United Nations Economic Commission for Europe, *The Aarhus Convention: An Implementation Guide 115* (2014), [https://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus\\_Implementation\\_Guide\\_interactive\\_eng.pdf](https://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf).

<sup>114</sup> Gawal & Ahsan, *supra* note 107.

<sup>115</sup> NEPA 2007 § 15

<sup>116</sup> Sithar Dorji, *E-government Initiatives in Bhutan: Government to Citizen (G2C) Service Delivery Initiative—A case study*, Murdoch University, 2012, <https://core.ac.uk/download/pdf/11241963.pdf> (last visited Aug. 1, 2020).

coordination across agencies at multiple-levels and multiple sectors. There are compelling arguments that tackling this issue can improve a government's effectiveness by unifying efforts and pooling expertise.<sup>117</sup> In many countries, coordination among environmental institutions has been particularly difficult due to the creation of separate ministries for different natural resources competing for limited resources.<sup>118</sup> As a cross-ministerial independent decision-making body, the NEC can call upon specialized ministries or agencies (designated as 'Competent Authorities') for assistance in fulfilling its mandate, including the coordination and monitoring of cross-sectoral issues related to the use of natural resources.<sup>119</sup> 'Competent Authorities' are designated by the NEC at both the national and the Dzongkhag level which may facilitate vertical and horizontal coordination among these agencies.<sup>120</sup> This cross-ministerial yet autonomous nature of the NEC is a defining feature of Bhutan's environmental institutional framework. It allows it to respond to multi-dimensional and interconnected aspects of the environment while avoiding fragmented jurisdiction or regulatory overlap or underlap that could undermine its overall objectives.

It can be argued that this analysis demonstrates that Bhutan could potentially use the concept of ERoL as elaborated in the ERoL Report to analyse existing institutional practices. The process could be used as a tool to advance the GNH principles relating to environmental protection and associated governance.

### **C. Anti-Corruption Commission**

---

<sup>117</sup> Scott Fulton and Antonio Herman Benjamin, *Foundations of Sustainability* 28(6) Environmental Forum 28 32-6 (2011); See also, Carl Bruch et al., Public Participation in the Governance of International Freshwater Resources. (2005): [illustrates co-management between national and local authorities for fisheries management in Kenya]; See also, Kai Wegrich & Štimac, *supra* note 98: [describes vertical and horizontal coordination among institutions].

<sup>118</sup> UNEP, *supra* note 5, 53.

<sup>119</sup> NEPA 2007 § 30(b).

<sup>120</sup> NEPA 2007 § 44.



In terms of the effective implementation of environmental law, the ERoL Report provides commentary relating to methods of tackling corruption which will be noted here, and related to the steps taken by Bhutan in this regard. The ERoL Report emphasizes that strong leadership is essential to create more transparent and accountable environmental institutions that prevent and penalize corruption.<sup>121</sup> Because corruption is of great national concern, the Anti-Corruption Commission (ACC) was enshrined in the Constitution as an independent authority. In fact, the ACC was established in 2005 by a Royal Decree to proactively address corruption before parliamentary democracy was fully adopted.<sup>122</sup> In this regard, Bhutan aims to lead by example, and mandates the ACC to mainstream integrity, ethics, and anti-corruption as the key institutional norms through capacity-building, education, and value creation among leaders and public servants.<sup>123</sup> The Constitution also places a duty upon citizens to act against corruption.<sup>124</sup> In addition specific legislation provides for the protection of witnesses, complainants, and whistle-blowers.<sup>125</sup> It has been argued that the country could go further in terms of legislation to protect journalists and the press in general from reprisals and defamation cases.<sup>126</sup> As part of its investigative functions, the ACC also conducts independent expert investigations in order to detect and deter malfeasance.<sup>127</sup> The findings from ACC investigations provide the basis for the prosecution of

---

<sup>121</sup> UNEP, *supra* note 5, at 78-79. (In order to achieve environmental rule of law, three aspects of leadership are critical, namely: 1) political will to implement environmental law, 2) leadership to fight corruption, and 3) management techniques to inspire and incentivize good performance.); See also, Petter Langseth et al., *The Role of a National Integrity System in Fighting Corruption* (1997).

<sup>122</sup> Anti-Corruption Commission of Bhutan (ACC), Royal Government of Bhutan, 2005, [www.acc.org.bt](http://www.acc.org.bt) (last visited Jul. 22, 2020).

<sup>123</sup> *Id.*

<sup>124</sup> The Constitution for the Kingdom of Bhutan 2008, Art 8 § 9.

<sup>125</sup> Anti-Corruption Act of Bhutan 2011, Chapter 7.

<sup>126</sup> Joshua Birch et al., *The State of Whistleblower and Journalist Protections Globally: A Customary Legal Analysis of Representative Cases*, American University,

2015, <https://www.ohchr.org/Documents/Issues/Opinion/Protection/AmericanUniversitySchool.pdf> (last visited Jul. 22, 2020).

<sup>127</sup> Anti-Corruption Act of Bhutan. 2011 § 25 (1) (f) & (g).

individuals, parties, or organizations and are undertaken by the Office of Attorney General.<sup>128</sup>

The role of an independent auditing and review mechanism is complementary to ensure implementation and enforcement of anti-corruption practices. Further, since 2009, four National Integrity Assessments (NIA) have been also conducted through an institutional collaboration between the ACC and the National Statistics Bureau (NSB) to assess the internal integrity, fairness, and transparency in the services provided by public agencies.<sup>129</sup> The 2019 NIA report highlights the key factors of weak institutional practice: these can include nepotism and favouritism in public service, the disregard for standard procedures and code of conduct by public servants, and a weak accountability culture *vis-à-vis* corrective action against abuse of power and whistle-blower protection.<sup>130</sup> All of these concerns with weak mechanisms for redress can potentially dilute public trust in agencies and weaken their capacity to achieve their objectives.

It appears that the steps that Bhutan has taken in this regard are generally consistent with the concept of ERoL as elaborated in the ERoL Report. However, it is not possible within the scope of this paper to provide comprehensive or in-depth analysis.

#### **IV. Access to Justice**

Another core aspect of the concept of ERoL as elaborated in the ERoL Report relates to access to justice and the extent to which dispute resolution mechanisms are accessible, fair, impartial and effective.<sup>131</sup> This section considers the ways that Bhutan has put in place measures to achieve access to justice in relation to challenges and disputes concerning environmental matters. Prior to analysing the relevant law and institutions, it is

---

<sup>128</sup> The Constitution for the Kingdom of Bhutan 2008, Art 27 § 5.

<sup>129</sup> ACC, National Integrity Assessment 2019 (2020): (“The services provided by public agencies were assessed to define the level of integrity and corruption based on the perception and experiences of service users and providers”).

<sup>130</sup> *Id.*

<sup>131</sup> UNEP, *supra* note 5, at 192 ff.

necessary to consider the cultural context within which this area must be viewed. The first major factor that needs to be borne in mind is that the court system under the national Constitution is relatively new. The second is that traditionally it was less likely for Bhutanese citizens to challenge authority than may have been the case in some other cultures; though this may now be gradually changing.<sup>132</sup> Thirdly, it is important to note that the principle of GNH itself influences the approach of the judiciary to the environment itself and that can potentially affect their responses to issues related to access to justice in environmental matters. These aspects will be highlighted in the following analysis.

Of fundamental importance to the 'rule of law' and correspondingly the concept of ERoL, is the establishment of an independent judiciary. Art. 21(1) of the Constitution states that, '[t]he Judiciary shall safeguard, uphold, and administer Justice fairly and independently without fear, favour, or undue delay in accordance with the Rule of Law to inspire trust and confidence and to enhance access to Justice.' Art. 21(18) states that, '[e]very person has the right to approach the courts in matters arising out of the Constitution or other laws subject to section 23 of Article 7.'<sup>133</sup> The absence of environmental cases being heard by the Supreme Court to date, is an indication that as yet this provision has not been properly tested.

While there could be questions of interpretation as to the extent to which citizens are entitled to bring environmental cases before the court, they appear to have been answered through specific developments that took place in 2016.<sup>134</sup> That year it was announced that there were plans to permit public interest litigation (PIL) solely for environmental issues to a 'green bench' of the High Court.<sup>135</sup> The establishment of a 'Green Bench' to hear environmental cases including class actions was

---

<sup>132</sup> Lhundup, *supra* note 19, at 696.

<sup>133</sup> The Constitution for the Kingdom of Bhutan.

<sup>134</sup> Pema Seldon, *Supreme Court to Allow Public Interest Litigation for Environmental Issues*, Business Bhutan, March, 19, 2016.

<sup>135</sup> *Id.*

in itself a signal of intent by the Government.<sup>136</sup> The Supreme Court also enshrined special procedures for the 'Green Bench' in order to render speedy, fair and just adjudication of all environmental disputes.<sup>137</sup> Those procedures state explicitly that, 'a citizen has the constitutional right to seek remedy and compliance for the violation of the responsibility enshrined in the Constitution.'<sup>138</sup> The NEC and numerous other state authorities have the power to bring environmental matters before the court which means that an infrastructure is in place to respond to environmental claims and violations of the law.

To date there have not been any cases heard before the 'Green Bench' of the High Court. Therefore, to understand the approach that is being adopted towards environmental litigation by the judicial branch of government, it is necessary to analyse the 'Draft Green Benchbook' which provides an indication of the judicial processes that are under consideration. It includes interesting provisions related to *locus standi* and the environmental principles that may prevail.<sup>139</sup>

In its current form, the Draft Green Benchbook confirms that the High Court would be the designated court of first instance in all environmental matters,<sup>140</sup> and that the Supreme Court may *sua sponte* or on an application by the Attorney General or a party, withdraw a case pending before the High Court involving a substantial question of law of general importance to dispense of the case itself.<sup>141</sup> It states that in departure from the established requirement of individual legal standing, PIL 'may be filed relating to all environmental cases'. The 'Green Bench' is empowered to determine the appropriateness of PIL in a given case at the conclusion of a show cause hearing.<sup>142</sup>

---

<sup>136</sup> See Irum Ahsan & Gregorio Rafael P. Bueta, *Proceedings of the Third Asia Judicial Roundtable on Environmental Justice for Sustainable Development* 11 (Colombo, Sri Lanka 8-9 August 2014); Seldon, *supra* not 136, at 1 & 15.

<sup>137</sup> The Royal Court of Justice, *The Draft Green Benchbook*, Royal Court of Justice, [http://www.judiciary.gov.bt/index.php/Welcome/get\\_pages?id=65](http://www.judiciary.gov.bt/index.php/Welcome/get_pages?id=65) (last visited Feb. 14, 2021).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

Where the Draft Green Benchbook illustrates Bhutan's individual approach to environmental cases, it proposes that the 'Green Bench' would be expected to apply the principles and country priorities in their judgments. It states that, all inquiries, proceedings, and trials shall be conducted expeditiously in accordance with section 75(a) of the Civil and Criminal Procedure Code.<sup>143</sup> It then states quite significantly that, '[t]he Judiciary shall endeavour to ensure that judges have the right values and attitudes in giving effect to constitutional and legal rights and ensure the tools and techniques to develop preventive jurisprudence to avert irreversible environmental damage.'<sup>144</sup> This particular feature does appear to lend a sense of priority to the protection of the environment. These provisions combined could be seen as a manifestation of the principle of GNH and would also appear to be consistent with the concept of ERoL in relation to access to justice.

However, the most prominent guidance to judges in the Draft Green Benchbook that arguably indicates consistency with the concept of ERoL with regards to access to justice is found in 'Salient Feature No. 7,' which states that,

[p]rocedure for the Green Bench shall be guided by the principles of natural justice and not be bound by the rules of evidence in the Evidence Act of Bhutan, 2005. In applying the precautionary principle, polluter pays principle the burden of proof shall be shifted to the person or body interfering with ecology to prove no adverse impact.<sup>145</sup>

More than any other provision, this clearly indicates the intention to ensure that the judiciary follows principles in their application of justice that are consistent with GNH and the concept of ERoL. To dictate that the principles of 'natural justice' rather than the Evidence Act should be adhered to would provide the 'Green Bench' with a significant level of discretion in terms of the evidence that they could admit, the eligibility of witnesses able to give evidence and the manner in which evidence would be put to the court. Additionally, in shifting the burden of proof from the

---

<sup>143</sup> *Id.*, (Salient Feature 6).

<sup>144</sup> *Id.*, (Salient Feature 9).

<sup>145</sup> *Id.*

complainant to the person or body 'interfering with ecology,' the Draft Green Benchbook provides a more direct pathway to justice than in other jurisdictions, where environmental complainants bear the burden of proof. A defining concept found in the ERoL Report is the expectation that environmental law should respond not only to actual harm, but also to potential risks and the likelihood of harm to the human environment and non-human species.<sup>146</sup> Therefore the inclusion of the precautionary and preventive principles within the procedures of the Draft Green Benchbook illustrates the consonance that exists between the Bhutanese approach and that is stated in the ERoL Report. Having said this, the lack of cases through which these principles can be analysed in practice does mean that the potential of the Green Bench has yet to be observed or realised in practice.

Finally, in this section consideration will be given to the sole precedent heard by the Supreme Court relating to a challenge based on a provision of the Constitution. It came about in the case of *The Government of Bhutan v Opposition Party (2011)*,<sup>147</sup> and it highlighted the role of the Opposition Party under the Constitution. In the case, which related to vehicle taxes, the Opposition Party challenged the introduction of a specific tax. What is pertinent in this case is that the Supreme Court held that the Opposition Party, under its responsibilities found in Art. 18(1) of the Constitution which requires it *inter alia* to, 'play a constructive role to ensure that the Government and the ruling party function in accordance with the provisions of this Constitution', was able to make this particular type of challenge as the tax had been levied without tabling it as a bill in Parliament. The Supreme Court determined that the Opposition Party does not need to show that it is 'aggrieved' and as such it was able to file such cases to ensure that it could carry out its democratic function.<sup>148</sup> Although this case does not relate to the

---

<sup>146</sup> UNEP, *supra* note 5, at 17-18.

<sup>147</sup> Judgement No.SC (Hung 11-1), <http://www.judiciary.gov.bt/html/case/Judg/2011/englishj.pdf> (last visited Nov. 5, 2016).

<sup>148</sup> Judgement No.SC (Hung 11-1), Para. 5.1. of the 'Court Findings', <http://www.judiciary.gov.bt/html/case/Judg/2011/englishj.pdf> (last visited Nov. 5, 2016).

environmental pillar of GNH, it does demonstrate the Supreme Court's intention to realise the rule of law in Bhutan in a way that could be applied to the environmental context.

## V. Conclusion

The analysis in this article has highlighted different aspects of the relationship between GNH and the concept of ERoL within the context of certain representative components that make up the system of environmental law and governance in Bhutan. The following summarises the main findings from this research in response to the three categories of enquiry that were posed in the introduction.

Firstly, it is clear that there are laws, principles, institutions and practices in Bhutan that are entirely consistent with those that are advocated within the ERoL Report. These include the rights-based approach to environmental protection and human health that is found within the national constitution and national law. It also includes the development of institutions that adopt cross-sectoral approaches to environmental decision-making, and environmental laws and policies that include well-established principles of environmental law.

Secondly, the concept of ERoL as iterated in the ERoL Report provides a tool for reviewing environmental institutions. This can be useful in analysing the functions of institutions and in this instance the very basic review that was undertaken suggested that *prima facie* at least, there are areas where further work is needed. For example, the lack of clarity and confluence of judicial and executive functions of the NEC, has the potential to undermine its effectiveness if it is carrying out functions that run contrary to the principle of separation of powers. Also, the extent to which the constitutional right to information has been realised in practice appears to be only in the early stages of development. This demonstrates the usefulness of the concept of ERoL in analysing the functioning of institutions methodically.

Thirdly, there are aspects of the approach adopted by Bhutan in a range of areas that go beyond what is explicitly or implicitly advocated in the ERoL Report. By adopting an alternative approach to measuring successful government

(through GNH), Bhutan's outlook and commitment to environmental protection as a means to collective happiness and well-being go further than those assumed or expected within the ERoL Report. For instance, the strict constitutional protection of Bhutan's national forests through the national constitution is unique. Furthermore, the Buddhist belief of respecting and honouring life in all forms that informs the GNH environmental pillar goes beyond the socio-economic and political considerations found in the ERoL Report. Bhutan in adopting these policies has achieved negative carbon emissions, high levels of biodiversity protection, and low levels of pollution. Therefore, in this regard, the analysis shows that there are lessons that other countries can learn from Bhutan's approach to environmental protection. It also demonstrates that assumptions relating to economic development made within the ERoL Report quite possibly need to be revisited.

Notwithstanding the limitations of this brief survey examining the relationship between GNH and the concept of ERoL, certain tentative conclusions can be drawn. It does appear that the concept of ERoL as stated in the ERoL Report can usefully be applied to certain institutional aspects of environmental governance in Bhutan to further GNH objectives. All the same, the concept of ERoL, which has its core focus on implementation and enforcement, is not a panacea to achieving protection of the environment on its own. This survey also notes that the assumptions about developmental trajectories embedded in the ERoL Report may not apply to a country like Bhutan and other countries that have a unique and/or more holistic approach to sustainable development. It has also demonstrated that in specific aspects of environmental governance, Bhutan has demonstrated clear leadership and in this regard the concept of GNH potentially has much to offer future iterations of the concept of ERoL.

It is clear that further research is required to analyse this relationship and to fully appreciate the synergies between the two frameworks.