



Seek Truth & Ensure Justice

**ESTABLISHMENT
OF
THE INTERNATIONAL AFFAIRS AND
ENVIRONMENT DIVISION**

DECEMBER 2021



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ABSTRACT

In fulfilling His Majesty's vision to strengthen the Attorney General's Office in keeping pace and excelling with the rapidly modernizing state and its international developments and practices, the creation of an International Affairs and Environment Division had been a long aspiration of the Office to develop expertise in Public and International Law for Bhutan.

With the increasingly interdependent and connected world necessitating more and more effective cooperation and a dynamic shift to a multilateralism world, the requirement for a specialized division for public international law was found imperative. The Office expects a multitude of MoUs, bilateral and multilateral agreements, and having to deal with legal issues such as matters of transnational organized crimes including cybersecurity threats, issue of human rights beyond borders and protection of its citizens abroad, illegal migration, dispute resolutions, and climate change, etc., that would need to be diligently addressed.

It is also opportune to pursue the establishment and expansion of Bhutan as an international environment law hub given the uniqueness of Bhutan's Constitution in the world that ensures a minimum of sixty percent of Bhutan's total land to be maintained under forest cover for all time and having environment conservation as one of the pillars of Gross National Happiness underlying all our development activities. Moreover, Bhutan has been successful in gaining recognition for its holistic development and contributing as one of the pioneers in influencing the development of international environmental law.

The Attorney General as the Chief Legal Officer is entrusted to be the legal advisor and legal representative of the Government and has the constitutional mandate to carry out the roles and responsibilities within the domain and authority of the Government, and such other

legal matters entrusted to it including the right to appear before all courts including outside, and appear and express legal opinions on any legal question in Parliament. In carrying out the responsibilities the International Affairs and Environment Division will be responsible to assist the Attorney General in advising the Government including Ministries, Agencies, and Statutory bodies on international instruments such as International Conventions, Covenants, Treaties, Protocols, and Agreements and serving as a central repository of treaties entered by the Government and information to Bhutan's treaty practice understanding that the Rules of Procedure for Treaty Making (Revised) 2016 confers the location to transmit only the treaties to which Bhutan is a party is to be found at the Ministry of Foreign Affairs official website or Gazette.

This foundational paper, therefore, reflects the basis on why the International Affairs and Environment Division was founded and provides the conceptual idea for the International Affairs and Environment Division.

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I Title

This is the *Foundational Paper for the Establishment of the International Affairs and Environment Division (IAED)* under the Department of Legal Services of the Office of the Attorney General.

II Introduction

The Attorney General's Office serves as the legal arm of the executive branch of the Government and has a central role in upholding the Rule of Law and facilitating good governance as the Office strives to preempt the Government in its daily affairs.

Under the *Office of the Attorney General Act 2015* the Office has three primary roles:

1. State prosecutor/Civil litigator (section 10-50);
2. Legal advisor (section 51-53); and
3. Drafter/Reviewer of legislation and delegated legislation. (section 54-60)

The Office of the Attorney General (OAG) currently executes its responsibilities under the two departments: The Department of Justice that deals with State prosecution and civil litigation, and judgment enforcement; and the Department of Legal Services, which encompasses OAG's role as legal advisor to the Government and drafter/reviewer of legislation and delegated legislation.

In fulfilling its mandates, it has been the Office policy that all new appointee Attorneys are initially placed under the Prosecution and Litigation Division for at least two years to ensure they have adequate legal practice before few of the Attorneys are pulled into the workings of the Department of Legal Services that comprises: The Legal Services

Division; and the Drafting and Review Division- an allocation of five Attorneys including the Chief Attorney to constitute these divisions.

As a government legal advisor working under the Legal Services Division, the legal opinion referred to the Office comprised of:

1. governance matters: constitutional, administrative law, criminal, land acquisition, intellectual property law, competition law, and legal vetting and signing of MoUs;
2. civil matters: contract, public finance, partnerships, drafting and vetting of contracts and legal documents, investment agreements, loan agreements, etc.;
3. criminal matters: alleged offenses committed on foreign soil; and
4. international matters: international dispute settlement, international trade law, international investment law, civil aviation law, international criminal law, diplomatic privileges and immunities, international human rights law, the law of the sea, international environmental law, and the law relating to the United Nations.

The Office received a total of 60 legal opinions in the year 2017, out of which 31 legal opinions comprised of international instruments; 61 legal opinions in the year 2018, wherein 34 comprised of international instruments; 92 legal opinions in the year 2019, wherein 66 comprised of international instruments; and 80 legal opinions in the year 2020 wherein 45 of the legal opinions comprised of international instruments despite the Covid-19 pandemic situation. This data is exclusive of the legal opinions received and rendered by the Office of seeking to join memberships in international forums and opinions that were provided with regard to international declarations.

The functioning of the Legal Services Division with a restricted number of Attorneys approved under the division, and having to deal with an innumerable subject matter and engage in many tasks was transitive to limit what the Attorneys were able or allowed to do. And in contrast to other state practices that establish distinctive divisions and identify various specific branches of international law found pertinent and beneficial for them to engage in, the Practice of Bhutan set an impediment for the Office to pursue any specialization brought about naturally as a matter, of course, a generic legal competence construct.

Moreover, the Office would not have the capacity to lead the treaty formulation, negotiations, amendment, and implementation of treaties if the Lhengye Zhungtshog directed the OAG to initiate any treaty proposal. And, often found itself excluded from the treaty-making process until the very last stage where legal opinion is sought from this Office.

A. Purpose

Deriving from the above background, the purpose of this paper is to showcase that there are practical reasons to substantiate the theoretical aspects to segregate international law instruments and in how the Office engages with the international instruments referred to the Office.

B. Methodology

The methodology adopted for this foundational paper for the International Affairs and Environment Division officially established in September 2021 involves both quantitative and qualitative research. Firstly, the data and reports of past legal opinions rendered by the Office have been analyzed. Secondly, the state practices adopted by the Attorney General's Chamber, Singapore, Department of Justice of the Federal Government, the United States, and the Attorney General's

Department, Australia have been comparatively studied. Thirdly, the relevant primary sources such as the Constitution, Office of the Attorney General Act 2015, Rules of Procedure for Treaty Making (Revised) 2016, and the Rules of Procedure for Rendering Legal Opinion (Revised) 2018 were reviewed and referred upon. Based on these approaches the rationale for creating a distinct division for international matters has been concluded.

III International State Practices

Looking into international state practices the specialization of International Law and treaties figure is emerging as a necessary feature in governing state rights akin to domestic law. Particularly, as International law and Customs are ever-evolving adding onto a horizontal enlargement of international activities that would be borne accepted norms by nations, that the rest will be expected to adhere to. And, therefore engagement in the international discourse forms a critical aspect for developing nations as Bhutan making it relevant to develop expertise in international law as part of its progressive development.

The paper presents the study of three selective state practices in view of the fact that they are matured economies in the world today that paves an example for Bhutan to become a self-reliant nation and contribute greatly in the international law discourse in the development of international law:

1. Attorney General Chambers (AGC), the Republic of Singapore;
2. Department of Justice, the United States; and
3. Attorney General Department, Australia.

A. Attorney General Chambers (AGC), Singapore

The AGC in Singapore has four roles: Government Legal Advisor; Public Prosecutor, International Law Advisor, and Drafter of Laws and accordingly constitutes distinctive divisions to serve these roles.

The International Affairs Division (IAD) provides:

- i. Legal advice to all Government departments, Ministries, and Statutory boards on international law issues;
- ii. Represents Singapore at bilateral and Multilateral negotiations and in international disputes, trade-related proceedings, and at other international forums;
- iii. Negotiating and drafting multilateral and bilateral legal instruments;
- iv. Assisting in the translation of Singapore's international obligations into domestic legislation;
- v. Advising on the domestic implementation of Singapore's international obligations; and
- vi. Handling and processing all formal requests for mutual legal assistance and extradition

The IAD work covers a diverse range of matters including:

- i. international dispute settlement;
- ii. international trade law;
- iii. international investment law;
- iv. civil aviation law;
- v. international criminal law;
- vi. diplomatic privileges and immunities;

- vii. international human rights law;
- viii. law of the sea;
- ix. international environment law; and
- x. law relating to the United Nations.

The IAD's role includes the development of international law expertise for Singapore and the establishment of Singapore as an international law hub. These efforts are driven by Developing

International Law Expertise Secretariat (DILES) within IAD, whose primary objective is to develop international law expertise across the whole-of-Government.

In addition, the Treaties Section within the IAD serves as the central coordinating body for all treaty-making activities undertaken by the Singapore Government. In this regard, the Treaties Section looks into streamlining and standardizing the procedures involved in the treaty-making process. The Treaties Section also serves as the central repository of treaties made by the Singapore Government and information relating to Singapore's treaty practice.

B. Department of Justice of the Federal Government, the United States

The Department of Justice (DoJ) in the United States encompasses a multitude of divisions, Offices, programs, and initiatives that deal with the aspects of international law throughout their works.

The Office of International Affairs (OIA) is focused on the security of its citizens at home and abroad by ensuring criminals are held accountable for their actions. As DoJ's nerve center for international criminal law enforcement coordination, OIA's efforts in pursuit of this aim are carried out through five principle works streams: extradition

and removal of fugitives, transfer of sentenced persons, international evidence gathering, providing legal advice to the Department of Justice leadership and prosecutors, and international relations and treaty matters.

On matters affecting DOJ's international law enforcement mission, OIA attorneys negotiate and provide expert counsel regarding treaties and other agreements. OIA attorneys also represent DOJ in a multitude of multilateral fora, where they formulate law enforcement strategies to promote the U.S. government's law enforcement interests.

C. Attorney General's Department, Australia

The Office of International Law (OIL) within the Attorney-General's Department provides international law advice to the Australian Government. This includes legal and policy advice across government on issues involving public international law, and domestic and international litigation involving public international law. OIL also develops and implements law projects within the Attorney-General's responsibilities and assists in treaty negotiations.

The areas of work undertaken by the Office of International Law include:

- i. General international law: Air and space law (e.g. Jurisdiction on aircraft, international aviation standards), the law of the sea and maritime boundaries (e.g. freedom of navigation, access to maritime resources, safety at sea), border protection issues involving refugee law and asylum seekers, double taxation and banking, international environment law (e.g. climate change, conservation, fisheries), international organizations (e.g. United Nations), Offshore constitutional settlement, Antarctic law, Treatment and jurisdiction over Australian overseas, resolution of international disputes

to which Australia is a party, Foreign State Immunity, application of section 51 (xxix) of the Constitution (external affairs power).

- ii. International security law: Legal constraints on the use of military force, international humanitarian law (e.g. rules of engagement, means, and methods of warfare, detention of persons during armed conflict), other legal obligations relating to Australia's military, police, and civilian deployments (e.g. privileges and immunities), international law related to aviation, maritime, space and cyber security (e.g. air security officer arrangements, piracy), disarmament, non-proliferation, counter-proliferation and safeguarding of conventional weapons and weapons of mass destruction (e.g. civil nuclear cooperation agreements, United Nations Security Council sanctions and autonomous sanctions), international law aimed at countering terrorism, international criminal law (e.g. war crimes and the operation and jurisprudence of international criminal tribunals such as the International Criminal Court).
- iii. International trade law: International trade law, investment law, and intellectual property.
- iv. International Human Rights Law: compatibility of Australian legislation with Australia's international human rights obligations, international human rights law, including in relation to the right to equality and non-discrimination (e.g. on the basis of sex, race, disability, or other relevant ground), other civil and political rights (e.g. fair trial rights, freedom of expression, freedom of religion, right to life, freedom from torture and cruel, inhuman or degrading treatment, non-refoulment), economic, social and cultural rights (e.g. rights to education, health, an adequate standard of living), and children's rights.

IV Discussion on Bhutan's Practice

In accordance to the past established practice of the Office, the Legal Services Division was tasked with a vast subject matter encompassing both national and international affairs, mandated to render legal opinions; preempt the Government in its daily functions to the State, and simultaneously prepare press releases for the Office in putting forth the stand of the Office, and clarifying any misconstrued opinion of the public in legal matters; vetting on MoUs, agreements, treaties entered into by the Government and its statutory bodies; involved in the treaty-making process of the Government; providing legal expertise representation as a focal person/committee member to various stakeholder consultations including national interest analyses, policy reforms and thematic studies; development of strategies, SoPs, guidelines, etc.; besides also shouldering the ancillary responsibility of the Office in developing expertise for attorneys at the OAG and the government legal officers under the OAG as the Parent Agency; and disseminating legal information to the public.

A. Challenges

- v. The wide range of subject matter and lack of segregation of the nature of instruments referred to the Office had the Attorneys manage multiple responsibilities and tasks that limited the scope to pursue any specialization and delineation of roles within the division. In absence of delineating roles, it left for no continuity on the progression of the instruments that would again be referred back to the Office. For e.g., MoU & agreement renewals, supplementary instruments such as protocols to a convention. Also due to the lack of proper succession planning a concerned attorney assigned would have to initiate thorough research and study of the instrument previously undertaken.

- vi. The Office also found it as a concern that it was sporadically involved during the treaty-making process by the concerned agencies until the last stage when a legal opinion was sought from the OAG that greatly impacted the efficient and effective rendering of legal opinions by the Office without an understanding of the negotiations and parameters set by the Lhengye Zhungtshog and the foreign policy of the Government in addition to the challenges faced with the lack of accessible database to facilitate informed decision making.
- vii. Further, considering that this Office may require to initiate any treaty proposal in the future if the Lhengye Zhungtshog directs the OAG as the relevant agency to undertake the necessary treaty-making processes, it would require a designated division such as the International Affairs and Environment Division to lead the treaty formulation, negotiations, amendment, and implementation of treaties under paragraph 39 in accordance to section 8 of the Rules of Procedure for Treaty Making 2016. The Office did not have the human capacity nor the requisite expertise without the assignment of delineating roles, segregation of instruments, and development of expertise render such undertakings defunct in the future.
- viii. Also, at present we do not have any legal representation/ deputation of Senior Attorneys in our Embassies, Consulates, and Missions in contrast to the practice occurring in most United Nations member states, securing to be a tactical advantage. Although, Bhutan does not seem to have many situations or matters arisen in the past, needing to be dealt with and overcome. There have been recent referrals to the Office by the Ministry of Foreign Affairs routed through the Lhengye Zhungtshog concerning a case filed by a foreign contract employee employed in the Permanent Mission

to the UN in Geneva against Bhutan at the Conciliation Authority of the Labour Court, Canton Geneva that forewarns the Government to consider sending legal professionals as part of the delegations to our Embassies, Consulates, and Missions.

Analysis

- i. The Office found it difficult to arrive at a conclusive legal opinion with a simple desk review as the review of judgments passed by Swiss courts with regard to similar contract disputes were found accessible only in Switzerland's official languages that comprises of German, French, Italian, and Romansh. Thus, there was no communication possible without intermediaries, even with the engagement of a foreign legal counsel incurring huge cost implication, the matter wasn't conclusively settled even then as the assessment report required to be carefully exchanged back home to dictate how situation or agenda would proceed, as from a position of authority resting with the Ministry of Foreign Affairs, and while conventionally the legal vetting rests solely with the Attorney General's Office as the legal advisor to the Government.
- ii. It is not possible to identify one clear, specific majority test for whether foreign States are immune in such disputes as employment contracts. The practice of States remains quite diverse, regarding the extent of immunity recognition granted to the United Nations Offices and its Missions. To address the challenges in reformulating and harmonizing¹ the rules and exceptions to the Doctrine of State immunity, the International Law Commission (ILC) developed the United Nations Convention on Jurisdictional Immunities

¹ United Nations Charter 1945.

of States and Their Property² that is not yet in force. The Convention takes account of developments in state practices with regard to jurisdictional immunities of states and their property that would enhance the Rule of Law, legal certainty, and uniformity. The Convention provides provisions for 'Proceedings in which state immunity cannot be invoked' that include contracts of employment with exceptions listed when it does not apply. Although this mandates state parties who are signatories to this Convention not to act contrary to the intention of the Convention and offers certain guidance, and certainty, Bhutan is not a party to this Convention.

- iii. Under CIL, countries are normally immune from legal proceedings in another state unless the actions of states convene norms of Jus Cogens (compelling law) where a norm is generally accepted by the international community of States.³ For e.g., Jus Cogens ban genocide, torture, wars of aggression, etc.
- iv. In such a scenario, the foreign policy of a nation secures the national interest in its international relations, including the damaging effect that noncompliance to accepted state practices may cause and the risk of a country's reputation in the international domain. However, to minimize any adverse legal consequence including financial implication and liability, it entails the engagement of legal expertise. And in the absence of any legal representation in the Embassies, Consulates, and Missions, it is found thus, imperative to engage a foreign local legal counsel to look into the extent of immunity recognition granted by the particular state to the United Nations Offices and Missions in considering various state practices. Recent developments in international law

² *United Nations Convention of Jurisdictional immunities of States and Their Property*, Opened for signature 17 January 2005, UN Doc A/RES/59/38 (Not entered into Force).

³ Hilary Charlesworth and Christine Chinkin, *'The Gender of Jus Cogens'* (1993) Human Rights Quarterly.

suggest countries are moving from an absolute theory of immunity to a restrictive immunity⁴ relying on the principle of sovereignty in adopting domestic legislation such as a Foreign States Immunities Act with the effect of providing exemptions/grounds for state immunity.

- v. As advised by the Attorney General's Office of similar cases that may arise and require regulations to ensure the standardization of benefits throughout the Embassies, Consulates, and Missions for similar policies, the Office was also shortly involved in a legal intervention seeking pre-emptive measures pertaining the contract terms and conditions for local recruits in Embassies, Consulates, and Missions by the Ministry of Foreign Affairs.

B. Opportunities

In order for the Office to develop specialization in the diverse areas of laws in keeping with international developments and international state practices, the delineation of roles and functions was imperative to assign separate divisions as the International Affairs and Environment Division to look into international instruments severally.

i. Render quality legal services to the Government competently including in the international sphere

The International Affairs and Environment Division will headway in the following directions to deliver efficient and effective legal opinions:

- a. creating the branches of international law pertinent and beneficial to Bhutan such as International Environmental Law, International Human Rights Law, International Economic

⁴ Pierre-Hugues Vedier ad Erik Voeten, 'How Does Customary International Law Change? The Case of State Immunity' (2015) International Studies Quarterly.

Law, International Law and Relations, International Trade Law, etc.;

- b. creating specialized Units;
- c. segregating of the instruments into International Conventions, Covenants, Treaties, Protocols, and Agreements;
- d. segregating by regional and international locations;
- e. country profiling;
- f. establishing MoU between states;
- g. developing Rules of Procedures for rendering legal opinions, initiating treaty proposals and manuals; and
- h. serving as a central repository of treaties entered by the Government and information to Bhutan's treaty practice.

ii. Develop expertise of Public International Law for Bhutan

As authorized by section 51 (2) and (3) of the Office of the Attorney General Act, the Office is granted permission to educate legal personnel and disseminate information to enhance awareness of laws among the people. By developing expertise of Public International Law, the knowledge and expertise developed by the OAG in international and environmental matters will directly benefit the ten Ministries, Government Agencies, Dzongkhags, and Thromdes, which collectively constitute the executive government and local government as well. The International Affairs and Environment Division will develop expertise, be the nodal point and primary source of legal advice in its field, and provide training to the government legal officers to which OAG is a parent agency. The ripple positive impact of the OAG developing expertise in international law and environmental law will have a wider reach, and benefit the State enormously.

iii. Scope of Senior Attorneys being attached in embassies, consulates, and missions

Like the state practices in the United Nation member state nations, the Office hopes to prepare officials for the Government to consider in attaching Senior Attorneys in embassies, consulates, and missions as direct intermediaries reporting to the Attorney General if any legal dispute or issue or concern arises where diligent legal vetting/representation is required. Also, the deputation of such relevant officials would serve as a crucial service particularly when legal expertise is found imperative, such as for drafting and review of agreements, declarations, MoUs, and contracts and notices for local recruits involved in administrative tasks as is still being widely practiced. At present, Bhutan has her embassy in Dhaka, New Delhi, India, Bangkok Thailand, Brussels, and recently established in Australia; and Permanent mission to the UN in Geneva and the United States.

By the exchange of knowledge, information, and state's practices in interaction with legal attaches from different States, the Office foresees a great opportunity for the Division to develop legal expertise in the law relating to the United Nations and in Human rights particularly if Senior Attorneys are attached with the permanent mission of the Kingdom of Bhutan in Geneva and the United States.

V Recommendations and Proposed Way Forward

At present, since the inception of the International Affairs and Environment Division (IAED) in August 2021, one Senior Attorney namely, Deki Zam Dorji from the Legal Services Division was internally transferred to carry forth the foundational works of the division while performing the primary mandates of rendering legal opinions on international instruments and being involved in the treaty-making process. Deki has a Master's degree in Public and International Law from the University of Melbourne Law School, a recipient of the

Australia Awards Scholarship in 2019. The Office looks to foregather requisite expertise and competence from the relevant Ministries and Agencies including the in-house Senior Attorneys at the Attorney General's Office in setting up the human resource for the new division.

The International Affairs and Environment Division proposes the creation of two units namely, the International Affairs Unit, and the Environment Affairs Unit. The Units will be tasked with the following responsibilities:

- i. Render any legal services pertaining to international and environmental matters;
- ii. Granted the functional autonomy to seek relevant documents from the Government;
- iii. Lead the treaty formulation, negotiation, amendment, and implementation of treaties, if identified as the concerned agency by the Lhengye Zhungtshog;
- iv. Guide and advise bilateral and multilateral negotiations, international disputes, trade-related proceedings, and at other international forums;
- v. Guide and review the process of negotiation, and drafting of bilateral and multilateral legal instruments;
- vi. Facilitate adoption of Bhutan's international obligations into domestic legislation;
- vii. Legally advise domestic implementation of Bhutan's international obligations;
- viii. Participate in the periodic reporting of the International Conventions Bhutan is a party to;
- ix. Attend subcorpora if expertise is requested;

- x. Assist the prosecution if Public International law is involved;
and
- xi. Train the government lawyers in Public International law.

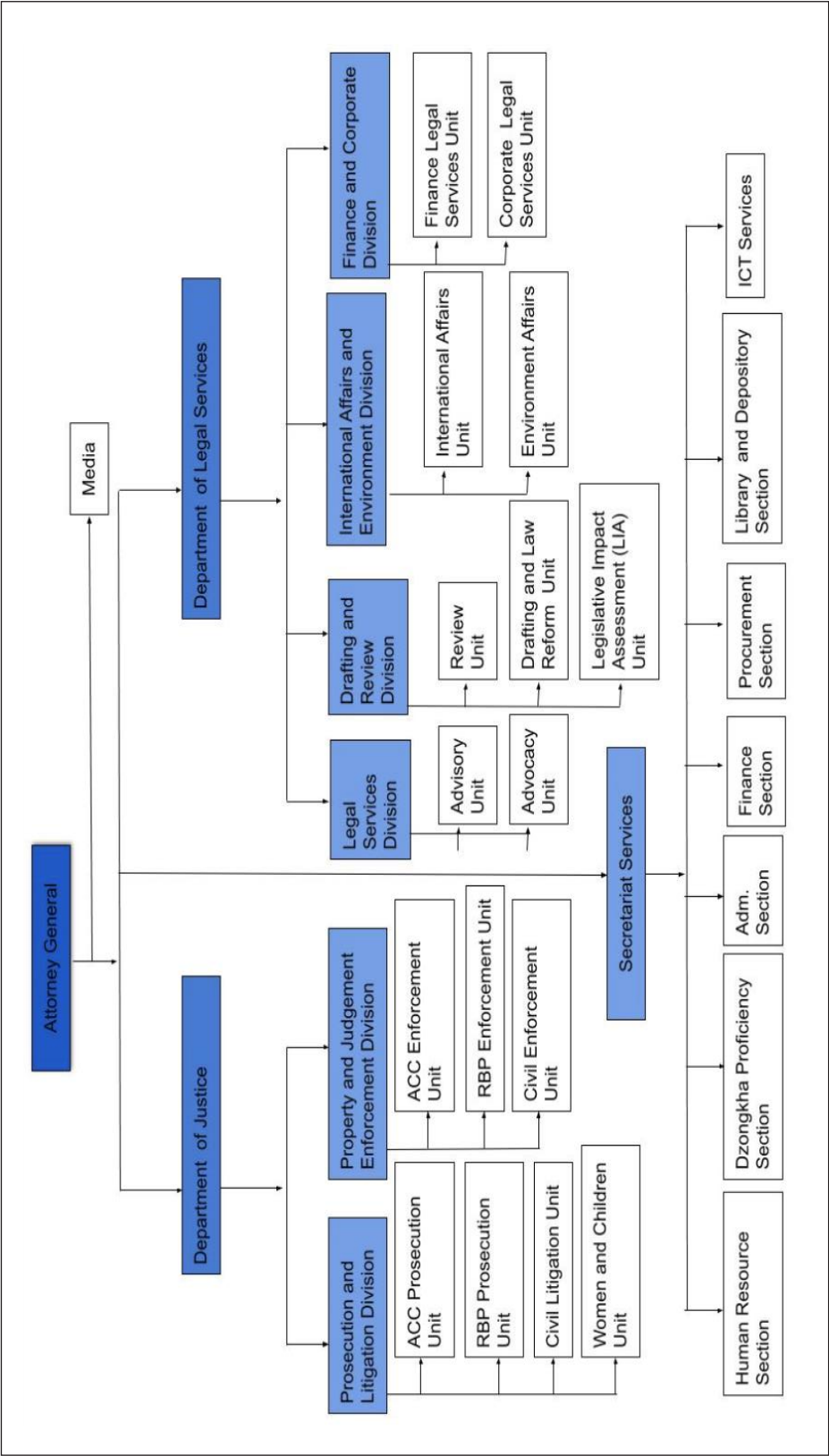
The Office also looks forward to developing institutional linkages with other Attorney General Offices through this division in the future and developing the requisite expertise to render its mandates expertly.

VI Conclusion

International law or alternately known as Public international law today constitutes the legal basis of international relations that is a rapidly developing complex matter. A commitment to the international rule of law is a necessary feature in state foreign policies and for this reason, it has become important to cultivate a reputation that is consistent and credible on global issues as a nation. Otherwise, we risk becoming non-existent in a literal sense by not being part of the international discourse and identifying new customary rules.

Recognizing this importance, the Attorney General's Office has taken upon pursuing this specialization and developing expertise in Public International law for Bhutan to reaffirm its commitment that 'Rule-Based Order' provides collective benefit while respecting the sovereign equality of all the states.

Schedule 1: Organogram





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