

**A PERSPECTIVE ON THE PHILOSOPHICAL
BASIS OF THE BHUTANESE CONSTITUTION**

(21st March RIGGS)

BY

THE CHIEF JUSTICE OF BHUTAN

Delivering this lecture on my perspective on the philosophical basis of the Bhutanese Constitution” in such a prestigious and dynamic institution as RIGSS is a huge honour and a privilege for me. To be associated with the vision of His Majesty as expressed through this institute of excellence is an achievement that I cannot claim repeatedly.

The Bhutanese Constitution is one of the few which has references to both national and international legal, political, social, cultural and spiritual philosophies and principles. The legal and philosophical basis of the Constitution is the historic “*genja*” of 1907. The establishment and election of the Monarchy with inherent succession of responsibility through public choice¹ had democratic imprimatur. It was a rational choice for collective action. In addition, the history of our nation state, the philosophical perspectives concerning the working of human relationships, the resulting social order, the past and existing political institutions, the sacrifices made by our forefathers, and the norms, values, principles and ideals espoused by and through the words and actions of our benevolent monarchs also formed the basis of our Constitution. We understood that constitution making is an elaborate and delicate, yet elegantly complex process. It is a privilege for me to be speaking on this important subject this evening.

Let me take this opportunity to congratulate the course participants for having been selected for this second Senior Executive Leadership Program. You are taking part in the unfolding of a farsighted vision that embraces the past wisdom, present experiences and prepares us for the future. As senior leaders of the country, I am confident that you will fulfill the RIGSS’s vision of providing excellence in governance, leadership and strategic studies.

Drafting the Constitution of Bhutan

The origin of Bhutan as a nation state resulted from a democratic process in 1907 by electing a hereditary monarch akin to “*the Great Chosen One (Mahasammatta)*,”² which is similar to the

¹ Buchanan.

² See, Francis Fukuyama, *The Origins of Political Order*, 2011.

social contract theory³. The democratic process in Bhutan culminated, a century later in 2008 with the adoption of the Constitution. The Monarch himself was instrumental in developing and ushering in this democratic Constitution.

Drafting of the Constitution of Bhutan began in the year 2001, when His Majesty Jigme Singye Wangchuck, the Fourth King astonished the Nation with the proclamation that Bhutan would embrace democracy. His Majesty cautioned:

“That the destiny of the nation lies in the hands of the people. We cannot leave the future of the country in the hands of one person.”

With that Royal Proclamation to initiate drafting of the Constitution, the Constitution Drafting Committee studied the meaning, birth, types and dynamics of democracy and constitution. We were cautious of critical scrutiny by our own citizens, criticism from the foreigners and deflected antagonism from our friends. Moreover, we were under the blinding glare of history. We could not fail and falter. Consequently, the Drafting Committee studied:

- (a) Royal decrees and edicts, Laws of Bhutan, Speeches of His Majesty and policies of the Kingdom;
- (b) Religious, cultural, philosophical and political basis of the constitution;
- (c) History of the evolution of constitution;
- (d) The meaning of constitution;
- (e) Objectives of constitution;
- (f) Nature of constitution;
- (g) Types of constitution;
- (h) Constitutional values⁴ and principles;
- (i) Constitutional justice;
- (j) Salutary provisions of constitution;
- (k) Human rights conventions, treaties, protocols, covenants and other international and regional instruments;
- (l) Types of rights, liberty and freedom;
- (m) History of democracy;
- (n) Types of democracy;
- (o) Democratic values⁵, democratic traditions⁶ and democratic culture⁷;

³ Refer, Social contract theories of Thomas Hobbes and the writings of the enlightenment philosophers like Locke, Rousseau, etc. and *The Social Contract or Principles of Political Rights*, 1926 by Rousseau.

⁴ THE SIGNIFICANCE OF CONSTITUTIONAL VALUES Prof Hiroshi Nishihara LLD Waseda University (Tokyo/JAPAN)

- (p) Emerging legal paradigms, social and ethical control mechanism;
- (q) Types of sovereignty;
- (r) Interest theories;
- (s) Theories on social, political and public moralities;
- (t) Lessons from numerous constitutional crisis around the World;
- (u) The comments from international agencies, individuals and the Ministries of the Royal Government;
- (v) Clauses, sentences, provisions, dictums of many constitutions, constitutional reforms documents, landmark judgments and constitutional writings;
- (h) Buddhist and western philosophies; and
- (i) Around hundred constitutions (out of which twenty were studied in detail).

It is my pleasure to state that Bhutan could be one of the few, if not the only country in the World to have based many of the provisions of its Constitution on different philosophies. The Constitution must satisfy Bhutanese aspirations, have global conformities and, spiritual and philosophical basis. If the context and words fail, principles and philosophical basis must give purposive interpretation. Philosophies encompass explosion of thoughts with tolerance. It gives immortal thoughts and sublime aspirations of humanity. Anaxagoras said,

“To philosophy, I owe my worldly ruin and my soul’s prosperity”

Our Constitution is a simple text with the Epicurean philosophy of the document being easily intelligible and expressed in language, which the ordinary people could understand to address the complex issues. It is a principle like the guiding northern star (constellations of stars) for the diverse nature of a state and its citizens. It responds to the changing and unknown situations. It is the mother of all laws with expanding family that keep the nation and its people’s diverse behaviour with uniform living. It has a philosophical basis of internal freedom with external symbiotic existence. It has many manifested and latent attributes of human nature beside functional objectives of the Constitution espoused by Aristotle and utilitarian objectives by Bentham. Therefore, the Constitution of Bhutan has both worldly prosperity and soaring intellectual pursuit.

⁵Democratic values include life, liberty, equality and dignity.

⁶Democratic tradition includes rights and responsibilities, power of separation, a change from absolutism and the divine right of kings to constitutionalism.

⁷According to Jack Balkin, a democratic culture is a culture in which individuals have a fair opportunity to participate in the forms of decision-making that constitute them as individuals. Democratic culture is about individual liberty as well as collective self-governance; it concerns each individual’s ability to participate in the production and distribution of culture and enter into public debate about cultural quality wherever it is manifested across all three spheres of publicly funded, commercial and home-made culture...in opera, crime writing, ballet, salsa, art galleries, TV, etc.

History and meaning of constitution

The first constitution in the world was written by Solon, an Athenian lawmaker and reformer, as a reaction to Draco's harsh laws of 621 BC. His Constitution was adopted in 495 BC by the members, who were all of the Greek ruling class, a group based on wealth (plutocracy). Thereafter, the idea of "the constitution" engulfed the world. Only 20 of the 190 countries with constitutions pre-date 1950.

Etymologically, the term *constitution* comes from the Latin word *constitutio*, used for regulations and orders. We must know the latent power of that simple word that inspired peoples and nations across the World.

Objectives of constitution

Beside *functional and utilitarian objectives*, the Constitution *must promote progress, stability and values*. The vision and spirit of the Constitution is at the root of what His Majesty said:

Our Constitution has been drafted, for the long-term interest of the sovereignty and security of the country, for the welfare of our people, to strengthen and improve the system of decentralization of power, and to provide a good democratic system with specific objective to benefit the people of our country. The Constitution must go beyond mere words and become the golden pillar which will support and enable the political system to safeguard the sovereignty of the country and the rights of the people.

In order to fulfill the national objectives and pursuit of individual rights and liberties, the Drafting Committee considered the various political theories, principles, references and comments including the study of different types of constitutions. His Majesty acknowledged that:

In the process of making the Constitution, the Drafting Committee has studied many different Constitutions of the world, and finally the Government has come up with a very good Constitution for the well-being of the nation.

Nature of constitution

Constitutions can be monist, dualist, abrogative, constitutive, and declaratory. The principles derived from case-laws are only constitutive. According to the declaratory theory by Kant,

judges do not create new law. Judges only declare the law. However, under the declaratory and original law making theories advocated by Bacon, Hale, Blackstone, Dicey and Salmond, judges play a creative role in making the law. Similarly, Austin and Bentham said that by interpreting laws and giving new shape, judges make laws. Kant mentioned that constitutive analogy leads to errors and regulative posture leads to a desirable advancement of knowledge. His Majesty said:

The Supreme Court is the Guardian of the Constitution and must ensure its credibility and relevance in perpetuity. As the Guardian, the Supreme Court must truly understand the significance and purpose of the Constitution as a guiding principle, interpret its content with incontestable clarity, and preserve it as a living document with unfailing vigilance. As the final authority on the interpretation, the Supreme Court must not allow the Constitution to be undermined through misinterpretation at any time, it must inspire the trust and confidence of the people in the Constitution by safeguarding its integrity as the fountain of legislative wisdom, and it must maintain the independent authority of the Constitution from all other power centers and institutions in the land.

This command and wisdom of His Majesty enshrines constitutional democracy and the principle of dualism as enjoined in sections 9 and 10 of Article 1, and section 25 of Article 10 of the Constitution.

Types of Constitution

Constitution can be of different types such as the Written Constitution, Unwritten Constitution, Enacted Constitution, Federal Constitution, Unitary Constitution, Flexible Constitution and Rigid Constitution, Old constitutions, Colonial constitutions, Neo-liberal constitutions, Classical Constitution, French Constitution, Independence Constitutions, Communist Constitutions, Liberal Democratic Constitutions, Ethnic Constitutions, Trans-national Constitution (EU) and Military Constitutions (Fiji) etc. Further many constitutional scholars have discussed the limited form of constitutionalism⁸ or controlled constitution, as a form of reaction to the prevailing situations. Generally, constitution can be preservative, conservative and interventionist.

Constitutional values

⁸ Constitutionalism is the struggle for sovereignty and fundamental rights. Scholars have also talked and written about Western constitutionalism, the modern western form, the Contemporary constitutional processes, Old constitutions, Colonial constitutions, the Neo-liberal constitutions which were replaced by either military rule, Liberal democracy (particularly in parts of Europe), Constitutional rule through 'consociationalism', Rational-legal state, Patrimonial state, Patriarchal, or the Classic constitutions set up political institutions, and the French constitution, etc.

Constitutional values comprises of (i) Constitutional core values, which generally are human dignity, sovereignty of a country, social justice etc., (ii) Supporting values comprising of freedom and equality, (iii) Structural values which includes democracy and rule of law, (iv) Embedded values and principles and (v) Neutral values, which include Freedom, equality, democracy and freedom of choice. Hence, His Majesty explained that:

Democracy is not about politics alone. Democracy is inherently about values and principles.

Constitutional principles

Constitutional principles comprise of (i) Rule of Law: It enshrines that both the people and the government must obey all laws; (ii) Separation of powers: advocated by Montesquieu, Burke, Engels, Locke and John Mill mentions that oppression on part of any organ of government may be checked for preservation of liberty and prevention of tyranny. It was opposed by Plato, Bodin, Hobbes and Madison. Madison mentioned that the power of each organ of government should be so far connected and blended as to give each a constitutional control over the other; (iii) Representative government which confirms the participation of people in the functioning of the government; (iv) Checks and balances that no one branch should dominate the other; and (v) The principle of equality, individual rights, freedoms, federalism and civilian control over the military.

Cultural basis of constitution

Cultural relativism is the view that those who belong to one culture cannot form a valid judgment of any custom, institution and belief. Edmund Burke's principle of

"Respect for inherited rights and for established customs ... no single generation has the right to destroy the agreed and inherited fabric of society."

Indeed, culture is the product of tested experiences and distilled belief of the people to promote self-determination and self-defense. Therefore, Mark R. Thomson said,

'...like Montesquieu, Hegel believed that the best constitution for a nation derived from its own specific cultural, historical, climatic and geographical conditions.'

Constitution is neither an abandonment of the past nor resistance to change. The constitution must respect and build on the golden past shaped by the situations. Provisions of the Constitutions should be preservative to maintain certain existing practices to avoid deterioration, reformative to usher in certain aspirations and interventionist to uphold and protect spirit of the Constitution. Royal decrees, acts of Bhutan, speeches of Their Majesties and policies reflect the wisdom of ages and lessons for the future. Thus, His Majesty reminded that:

Our country is very small, less populated and landlocked. Therefore, our culture and heritage plays important role as our identity and also for the sovereignty and security of our country. Our tradition and culture are the true identity of our country's sovereignty. That is why culture and tradition of Bhutan is the foundation of our country's sovereignty and security.

Fundamental Rights

Rights are the empowerment of the people that will be preserved with a general knowledge and vigilance by the people. Law should be for the welfare of society as a whole and rights of the individual should be protected and respected. Fundamental Rights protect the dignity of an individual as a human being. Protection of fundamental rights is the best way to promote a just and tolerant society. Fundamental rights limit the power of Legislature, secure individual liberty, barricade from tyranny of the majority and provide security against arbitrary action by the government. It enhances individual's freedom for development to his/her fullest potentiality.

Our Constitution incorporates vertical rights of an individual against the State and horizontal rights among individuals such as:

- (a) Absolute rights under 7(18) & 7(19) such as Protection from arbitrary and unlawful interference;
- (b) Civil rights (freedom of state);
- (c) Political rights (non-interference and freedom to participate);
- (d) Social and Cultural rights;
- (e) Corrective rights;
- (f) Distributive rights;
- (g) Divine rights legitimized by Thomas Hobbes;
- (h) Economic rights such as the right to buy, sell and trade private property and the right to employment without the government interference;

- (i) Emergent rights (freedom of speech and press by Bentham);
- (j) Inalienable right (equality before law and the right to life). In almost all of its variants, constitutional liberalism⁹ argues that human beings have certain natural (or “inalienable”) rights and that government must accept a basic law, limiting its own powers to secure them.
- (k) Individual Rights as advocated by Bentham: Each individual has the fundamental right to life¹⁰, liberty, economic freedom and the pursuit of happiness;
- (l) Inherent rights (right to life);
- (m) Negative and positive rights by Spencer;
- (n) Perfect rights¹¹ and Imperfect rights¹²;
- (o) Personal rights;
- (p) Progressive rights;
- (q) Proprietary rights;
- (r) Sovereignty and natural rights as classified by Rousseau;
- (s) Standing rights, such as access to justice;
- (t) Defensive rights as enshrined under Article 7(22);
- (u) Substantive right under Article 9 which includes rights to education and employment; and
- (v) Non-derogable rights. It is the assurance for protection of civil liberties, which in many countries, is not expressly provided.

Mr. K.K. Venugopal, Senior Advocate, Supreme Court of India concluded his correction of the draft Constitution of Bhutan by recording “*Here ends the most modern Constitution with maximum fundamental rights.*” Under our Constitution, the constitutional guarantee for civil liberties and their enforcement are enshrined under Article 7. This is the assurance for protection of civil liberties, which is the essence of democracy. Fundamental Rights protect the dignity of an individual as a human being. Protection of fundamental rights is the best way to promote a just and tolerant society. Article 7, Section 23 is a standing right that enables a citizen to sue for breach of their rights. The United States remedied their lacunae in the Bill of Rights by judicial activism or juridification.

⁹Constitutional Liberalism emphasizes the value of individual’s rights of equality and of individual freedom of choice and freedom from interference supported by Locke, Montesquieu, Adam Smith and Kant.

¹⁰Hylozoism by Cudworth – the theory that life is inherent in all matters.

¹¹ Perfect right is recognized and enforced by law “*ubi jus ubi remedium*” where there is right, there is remedy.

¹² Imperfect rights are recognized but not enforced by law – time based or declarations of principles of state policies.

Section 17 of Article 7 guarantees protection against torture and other forms of degrading treatment incorporating the substance of the UN Convention against Torture and section 18 abolishes capital punishment. These are progressive guarantees of inalienable human rights. The provisions under Article 7 provide vertical rights of an individual against the State and also cater to the horizontal rights among individuals. Dr. B.R Ambedkar stated that,

“The real distinction between the two is that non-Fundamental Rights are created by agreement between parties while Fundamental Rights are the gift of the law. Because Fundamental Rights are the gift of the State it does not follow that the State cannot qualify them.”

Our Constitution confers the First Generation of Rights in the nature of civil and political rights; the Second Generation of Rights concerning the right to economic, social and cultural rights; and the Third Generation of Rights pertaining to solidarity rights such as right to peace, happiness and clean environment. The interest of the society may be predominant over an individual interest because the larger and public interest must far outweigh the smaller one. But there are certain rights, which are non-derogable rights. Even in emergencies, these rights cannot be trampled upon or suspended. In almost all of its variants, constitutional liberalism¹³ argues that human beings have certain natural (or “inalienable”) rights and that government must accept a basic law, limiting its own powers to secure them.

Jeremy Waldron mentioned ~~of~~ about the deliberative entitlement and the epistemic capacity of the rights holder. According to him, under the Deliberative Entitlement, Waldron seeks to derive from the basic fact that we are rights-bearing creatures and a claim of moral entitlement. As rights-bearers, we are all entitled to participate in the process of rights contestation on equal terms. In the process of contestation of rights, we are indeed entitled to be treated as equal members of our political community, and that proposition does seem intrinsic or at least closely connected to the logic of rights. Under the Epistemic Capacity he said that if we think of ourselves as entitled to rights, it follows that we should think of ourselves as having the capacity to make sound judgments about the rights we have. If we trust ourselves to exercise the discretion to choose among courses of action that rights confer upon us, we ought to, in turn, trust ourselves to reflect upon, debate, and ultimately come to conclusion about what rights we

¹³Constitutional Liberalism emphasizes the value of individual’s rights of equality and of individual freedom of choice and freedom from interference supported by Locke, Montesquieu, Adam Smith and Kant.

all have. He mentioned that we are creatures seized with the capacity to make judgments about rights, and that we are entitled to participate in the process of deliberating about rights on equal terms.

Liberty

The growth of liberty, prosperity and representative government is an inexorable progress of human institutions that began with Greek democracy. After the Revolutions of 1848 in Western Europe, the doctrine of individual liberty developed. This was preceded by the 1789 Declarations of the Rights of Man and the Citizen, whereby the idea of human rights and civil rights advanced. The concept of “individual liberty” was criticized by thinkers such as Engles, Marx, Nietzsche and Freud. They viewed equality as a main component of a society’s grade of liberty. Liberty without equality, anarchists argue to this day, is only the *“freedom of the powerful to exploit the weak”*. Fried Hayek countered the argument that,

“...liberty, far from being improved by social justice and equality, was in fact endangered by socialist regimes.”

Liberty comprises of civil, political and economic liberties. The right to liberty protects the physical liberty of the person through a cluster of interrelated rights such as the right against arbitrary arrest or detention, the right to be secure from unreasonable search and seizure, including the right to information and access to legal advice, the right to be brought promptly before a judge, and the right to be treated with humanity and respect.

Liberty was prized by the Classical Greek like Aristotle, Demosthenes, Cicero and Tacitus. It is classified into negative, positive, individual and collective liberties. Isaiah Belin’s concept of liberty mentions that the negative liberty is that individual has immunity from arbitrary interference except in accordance with law, and the positive liberty is exercise of civil liberty. According to Russell, individual liberty is the greatest good and Thomas Hobbes advocated blend of individual and collective liberty. However, Rousseau and Spencer said that individual is subordinate to the State.

Fundamental Duties

Rights go with responsibilities and Article 8 on ‘fundamental duties’ demand its citizens to foster tolerance, mutual respect transcending religious, linguistic, regional or sectional diversities. Additional duties of citizens under the Bhutanese Constitution are provided under sections 6, 8

and 9 that is, to help victims of accidents and natural calamity, to pay taxes and to fight corruption. Fundamental duties are based on Buddhism and Jenks¹⁴ and Austin's¹⁵ concepts. Sir David Ross's list of *prima facie* duties, the concepts of universal duties, general duties and particular duties by Jenks and Austin's *vinculum juris* or bond of legal obligation, relative and absolute duties reflects Lord Buddha's duties. Conscious duties make a responsible human being and Sir David Ross mentioned that "*non-malfesance is apprehended as a duty distinct from that of beneficence, and a duty of a more stringent character.*" The combined efforts of Fundamental Rights and Fundamental Duties of every citizen and the State are realizing the Constitutional promise. It is so reflected in the French Declaration of 1789:

"Liberty consists of the power to do whatever is not injurious to others; thus the enjoyment of the natural rights of every man has for its limits only those that assure other members of society the enjoyment of those same rights; such limits may be determined only by law."

John Locke said that "in the state of nature, there is freedom and reciprocity." Bhutan combined both of them. Consequently, His Majesty noted that:

The Article on fundamental duties is one of the unique features of our Constitution. Although other countries have thought about the same they have not been able to provide it in their Constitutions. They are now discussing about its incorporation.

In our case, Article 7 and 8 were both commanded by His Majesty. His Majesty has time and again explained to the people that the fundamental rights and duties are very essential for our people. Hence, it is incorporated in our Constitution.

Freedom

Freedom is right and supreme good. The freedom and liberty under the Constitution is the sovereignty of the people and country is absolute. The birth of freedom is on 21st September 490 BC in Athens. Russell mentioned that freedom is the supreme good. Types of freedom are:

- (a) **Personal Freedom**: the right to think and act without government control;
- (b) **Political Freedom**; the right to participate in political process;

¹⁴Jenk's Universal duty (binding on all normal members of the community), General duty (binding on normal persons) and Particular duties (binding on a person who have undertaken them)

¹⁵Austin's duties are religious duties that conform to the principle of utilitarian.

- (c) **Economic Freedom:** the right to buy, sell and trade private property and the right to employment without the government interference;
- (d) **Freedom of Religion:** The right to practice any or no religion without persecution by the government. Freedom of religion was advocated by Scientific and humanist philosopher like Spinoza and Enlightenment like Montesquieu. He advanced the “opportunity” and “process” aspects of freedom;
- (e) **Positive freedom:** possibility of developing human capabilities and enlarged ability to contribute to common good;
- (f) **Intellectual freedom:** Spinoza was against state interference and asked for intellectual freedom; and
- (w) **Freedom of choice:** The Classical Greek supported by Hegel and Kant mentioned that internal freedoms of choice and human nature produce rational and good choice. Plato said that no man can ever freely choose what’s wrong.

Negative freedom and positive freedom (same as self-determination¹⁶ or autonomy) were distinguished by Kant. Negative freedom consists in the absence of coercion and the absence of interference from other people.

Democracy

Constitutions of nations promote democracy. Thus, we surveyed epistemology and the evolution of democracy. Historically, Cleisthenes invented democracy in 508 BC. The word “democracy” combined the elements *dêmos* which mean “people” and *krátos* a “force” or “power”. Aristotle was a thinker of the classical Greek period whose political theories, like those of Plato, set the bounds of political discourse throughout the middle ages. His work still exercises a profound influence on modern political and social thought. Aristotle’s political ideas are more immediately acceptable to the modern Western mind than Plato’s because he comes closer to approving of democracy. Long before democracy flourished in ancient Greece, the concept took root in the independent republic of *Vaishali*.¹⁷ In response to the changes and different situations, we recorded forty-three types of democracy.¹⁸

¹⁶ Article 1 of Part 1 of the covenant of social and political rights.

¹⁷ See, Parsa Venkateshwar Rao Jr, *Vaishali, A Most Ancient Democracy*:

¹⁸ Major democracies are (a) Direct Democracy; (b) Representative Democracy; and (c) Presidential or Parliamentary Democracy. Direct Democracy is achieved through *direct* participation of all citizens, whereas representative democracy involves a body of elected representatives and within the group of representative democracies, the focus may be on a strong president (Presidential Democracy) or on a strong parliament (Parliamentary Democracy). Apart from these basic types of democracy there are other various types of democracies such as: Athenian democracy or classical democracy, Anticipatory democracy, Defensive democracy, Deliberative democracy, Democratic centralism, Economic

In Bhutan, democracy and constitutionalism were shaped in the historical settings of the country. Election of Debs and *Zomdue*, the National Assembly, the decentralization policy, the DYT and GYT, the council of ministers, etc created a political system in which every Bhutanese citizen became member of the government. Bhutan had both participatory and representative democracy in which all citizens took part in the day to day administration of the state through the GYT, DYT and the National Assembly. Although “pure” and “direct” democracies are viewed as impractical, the *Zomdue*, the DYT, GYT and the National Assembly were institutions that in certain respects resembled direct democracy. The election districts were small, elections were held frequently and the representatives elected were often men of humble agrarian origins who knew the needs and aspirations of the common people.

Objective of democracy

Democracy is to be *‘the rule of public opinion’* in the form of individual and self-determination. The Constitution must advance individual and national potential. Gandhiji elucidated that

“My notion of democracy is that under it the weakest shall have the same opportunities as the strongest.”

Alex Tocqueville mentioned that *“Democracy does not create strong ties between people. But it does make living together easier.”*

Russell commented that *“democracy makes social progress possible.”* His Majesty was keen to ensure participation and involvement of the people of Bhutan in the democratic process. The First Draft of the Constitution was publicly distributed and simultaneously launched on the Internet.¹⁹ After receiving feedback and comments, the second draft was distributed²⁰ to every household and to every institution in the country, as well as to all international organizations based in Thimphu. Moreover, Their Majesties the Fourth and Fifth Kings conducted nationwide consultations to discuss the Constitution with the people of all twenty Districts.²¹ It was a crucial move towards the creation of an *‘inclusive democracy’* recognizing the people’s participatory role in governance. During the adoption of the Constitution on July 18, 2008, His Majesty the King said,

democracy, Grassroots democracy, Illiberal democracy, Jacksonian democracy, Liberal democracy, Market democracy, Multiparty democracy, Non-partisan democracy, Participatory democracy, Social democracy, Sortition, Totalitarian democracy, Westminster democracy, Procedural democracy, Substantive democracy, etc.

¹⁹On 26th March, 2005 friends, critics, adversaries and the public were given sufficient time to express their views, make comments and provide suggestions regarding any provision in the draft Constitution. We received about 40 pages of comments from online readers including comments from the experts.

²⁰The second draft of the Constitution was distributed on 18th August 2005.

²¹The first public consultation meeting was held in Thimphu district on 26th October 2005 and the last meeting ended at the historic place of Trongsa on 24th May 2006.

“The highest achievement of 100 years of Monarchy has been the constant nurturing of democracy...I hereby return to our People the powers that had been vested in our Kings by our forefathers 100 years ago”.

As a witness to the past and global experiences, Bhutan ushered in a multifaceted democracy ingrained in “*natural democracy*” as noted by Prof. Katsu Masaki. Democracy provides personal choice, common decision making and stabilizing results with responsibility.

However, democracy has its own negative side as Rousseau held that perfect democracy was not for Man. *‘Where there are people of Gods, their government would be democratic.’* De Tocqueville concluded that democracy led to a dead level of mediocrity. Sir Henry Maine was afraid that popular government would *‘inaugurate an era of stagnation.’* Locke regarded democracy as too meddlesome and antithetical to liberty. Bismarck scoffed at democracy as *‘blubbering sentimentality’*. The well-known French writer, Faquet, described democracy as *‘the cult of incompetence’*. To Nietzsche, democracy was *‘a degenerating form of political organization.’* Voltaire was against democracy because he compared the people to oxen *‘which need a yoke, a goat and hay’*. In our own times, Bernard Shaw regards Lincoln’s definition of democracy as *‘romantic nonsense’*. Shaw writes, *“The People have obstructed government often enough; they have revolted; but they have never really governed.”* Prof. Lenard J. Davis remarked that:

“Democracy is more than a form of government; it is a social ideal, and the difficulty of the ideal is commensurate with its nobility.”

John Stuart Mill commented that *“The supreme merit of democracy lies in the fact that it promotes a better and higher form of national character than any other polity whatever.”*

Preamble

The Preamble of the Constitution of Bhutan has incorporated the concept of Romanticism²², and that of historical school²³ of law. The Preamble begins with the words *“We, the people of Bhutan”* and ends with *“Do Hereby ordain and adopt this Constitution”*; and ending with *“Do Hereby Adopt, Enact and Give To Ourselves This Constitution”*.²⁴ “We”, the people is conceived

²² Emphasis of emotion

²³ Fredrich Karl Von Savigny is universally recognized as the founder of historical school of law. For him a legal system was part of the culture of a people, law was not the result of an arbitrary act of a legislator but developed as a response to the impersonal powers to be found in the people’s national spirit which he termed as *‘Volkgeist’*, *‘Volksgeist’* was, Savigny believed, to the biological heritage of people, Law is found. It cannot be made, Law, like language grows and evolves and has deep roots in the social, economic and other factors, Henry Maine was the founder of the English Historical School of law, Maine made a distinction between ‘Static’ and ‘Progressive’ Societies, According to the Historical School of Law custom is the most important source of law.

²⁴ Sir Ernest Barker wrote that “in a brief and pithy form the argument of much of the book, and it may accordingly serve as a key-note.”

as a collective body capable of an independent act and political legitimacy of constitution making and “adopt” denotes the sovereignty of people.

The basic constitutional values incorporated in the Preamble are: blessings of the Triple Gem (*Buddha, Dharma and Sangha*), everlasting fortunes of Pelden Drukpa (rich heritage of glorious Bhutan), guidance of Druk Gyalpo (benevolent monarchy with republicanism), sovereignty, liberty, justice and tranquility, unity, and happiness of the people.²⁵ Justice Kirby from Australia commented that “*in the preamble to the Constitution of Bhutan there are poetical and beautiful words.*”

Territorial integrity of Bhutan

Article 1 of the Bhutanese Constitution expressly provides that the sovereign power belongs to the people of Bhutan and the form of government is a “Democratic Constitutional Monarchy”. It is the immutable principle of the Constitution of Bhutan. It can neither be abrogated nor amended except “*through a National Referendum*” or plebiscitary democracy. The power to amend the basic structure of the Constitution, through a referendum, is vested in the people. According to His Majesty, the sovereignty of the people is the principle of the Constitution, which rests with the people, whilst the legislative sovereignty²⁶ is bestowed to the representative Parliament in line with Hans Kelsen’s doctrine. This is the original will of the Constitution.

Checks and balances

Our Constitution has inbuilt checks and balances with the objectives of protecting liberties, freedoms,²⁷ and rights incorporating the doctrine of separation of power at three levels. Firstly, territorial splitting has been done through the unitary system with constitutional guarantees for local government to deal with local issues under Article 22. Secondly, functional splitting is enshrined through the separation of power between the three branches of the Government under

²⁵ The Economist on Nov 9th 2013 wrote, “Easy search should save time and effort for the business of drafting. That can produce workmanlike prose—or something more exotic. Bhutan’s constitution kicks off with: “Blessed by the Triple Gem, the protection of our guardian deities, the wisdom of our leaders, the everlasting fortunes of the Pelden Drukpa, and the guidance of His Majesty”. How to tag that?”

²⁶ Dicey (1835 – 1922) differentiated the legal sovereignty of law making by the legislature and electoral sovereignty of the people as the political sovereignty. Dicey’s two kinds of sovereign – the legal and political. The legislature is the legal sovereign as it has the power of law-making. The electorate is the political sovereign and the legal sovereign acts in accordance with the wishes of the political sovereign.

²⁷ The birth of freedom can be traced to “*the gray dawn of 21st September, 490 B.C., 9,000 citizen-soldiers of Athens formed ranks on a plain by the Bay of Marathon.*” Initially, freedom was not universal and pervasive. The slaves were denied freedom. Freedom can be negative freedom as espoused by Spencer, positive freedom, ‘self-determination or autonomy freedom as advocated by Kant, freedom of religion by scientific humanist Espinoza and religious toleration advocated by Montesquieu. However, freedom must have rational action as Bentham said: “*Source freedom is valuable for more opportunity to pursue objectives that we value and importance to the process of choice itself. Freedom is to be found in rational action. Rational action cannot be based on a single individual’s personal desires but to be a universal law... a person shares with the whole community. He extended this community to all rational beings.*” Kant insisted that actions resulting from desires cannot be free and he differentiated the ‘opportunity aspect’ from the ‘process aspect.’ Freedom is valuable for more opportunity to pursue objectives that we value and importance to the process of choice itself. Apart from other freedoms, our Constitution guarantees six important freedoms: (a) The freedom of speech and expression; (b) The freedom of assembly; (c) The freedom to form associations and unions; (d) The freedom of movement; (e) The freedom to reside in any part of the territory of our country; and (f) The freedom of profession, occupation, trade and business.

section 13 of Article 1. Thirdly, individual institutions are separated through the establishment of both ‘political’ and ‘professional’ offices within the executive. Further, the Constitutional bodies have been established to ensure good governance and compliance with the rule of law.

Monarchy

Article 2 deals with the institution of Monarchy. There is a provision that the King of Bhutan (Druk Gyalpo) has to abdicate and hand over the Throne at the age of 65 years to his successor. The King shall also abdicate for willful violation of the Constitution or for the permanent disability in a motion passed by the joint session of Parliament. It is a salutary provision. The provision that the Monarch will step down proves that the political sovereignty is vested in the people. It is the people’s representative who can sit in judgment over the King’s conduct. It is sovereignty of people²⁸ or Popular Sovereignty²⁹ in action³⁰. Hegel embraced constitutional monarchy, who is above political fray and Thomas Hobbes said that monarchy provides stability.

Environment

There is a separate Article on environment under Article 5, which encompasses the fundamental duty of every citizen to contribute to the protection of natural environment and prevention of ecological degradation. The Constitution of Bhutan expressly makes every Bhutanese citizen a trustee and imposes a duty on the State for its preservation. Section 3 of Article 5 mandates a minimum of 60% of Bhutan’s total land to be maintained under forest cover for all time. The Bhutanese Constitution also incorporates therein the doctrine of sustainable use of natural resources and to maintain inter-generational equity or the doctrine of public trust for environment preservation.

²⁸According to the principle of people’s sovereignty, all state power comes from the people. This means that all power exercised by the state has to be legitimized by the people. The principle of people’s sovereignty does not demand that citizens take part directly in all decisions of state (as in a referendum). It does, however, demand that all those exercising state power hold office as a result of the will of the people; this means the election of representatives either indirectly (e.g. members of parliament) or directly (e.g. in a parliamentary democracy or civil servants appointed by it). People’s sovereignty is also known as political sovereignty - Locke (1634 – 1704) provides the principle that political sovereignty comes only from the consent of the governed.

²⁹Humanist’s teaching on sovereignty emphasized strong, centralized rule, dynastic continuity and consolidation of royal power. Henry VIII was influenced by the followers of humanists, who were Erasmus, Blount, Thomas More, Mountjoy, Thomas Linacre, William Grocyn and John Colet, Bertrand Russell, Erasmus’s book of in praise of Folly. Bentham followed the theory of Hobbes and advocated absolute monarchy. John Locke (1634-1704) gave all natural rights to an absolute monarch.

³⁰His Majesty Jigme Singye Wangchuck said, ‘... the sovereign power of the Kingdom has been purposely left to the Bhutanese people. This is because we can never ensure the capability of future Kings/Monarchs to look after the welfare of the People. Therefore, if a King is incapable of performing his duties as a Monarch, the people of Bhutan can move a secret vote of no confidence and if three-fourth of the people supports such a motion, the King has to resign and give Kingship to the next capable one. Thus, the Sovereign power has been kept with the people in trust. In our country, the people should know whether their King is capable or not capable to rule the country or whether the king is good or not. For this reason, if in the National Referendum, the people decide against the King, the King has to resign immediately. Hence, in the Constitution, it was purposely intended not to give the sovereign power both to the people and the King jointly. In other countries, where there is a case of, the King or the Queen sharing equal power, it is because the people cannot dethrone the King or Queen through secret voting. However, our Constitution is a different Constitution. Our Constitution is drafted by reposing trust and confidence upon the people of Bhutan.’

Principles of State Policy

Article 9 of the Bhutanese Constitution enacts the Principles of State Policy. In the words of Dr. B.R Ambedkar:

“In the Draft Constitution of India the Fundamental Rights are followed by what are called “Directive principles”. It is a noble feature in a Constitution framed for Parliamentary Democracy... He cannot ignore them. He may not have to answer for their breach in a Court of Law. But he will certainly have to answer for them before the electorate at election time. What great value these Directive Principles possess will be realized better, when the forces of right contrive to capture power.”

The provisions under the Principles of State Policy are similar for the creation of a welfare state towards the pursuit of the goal of Gross National Happiness (GNH).³¹ The concept of GNH advocated by His Majesty the Fourth King encapsulates the vision of a welfare state. His Majesty elucidated that:

The concept was at a time when the world was interpreting development as the narrow concept of Gross National Product. That narrow focus on consumerism has proven to be disastrous, on the earth and on human development. Bhutan wanted to raise the level of human contentment and well being with a holistic approach to development and change. Sustainable economic development is necessary to free the people from poverty. Culture is necessary to strengthen national identity and preserve traditional values. Spiritual development strengthens moral and ethical values that laws cannot substitute. The environment is the natural legacy that is our responsibility to preserve for future generations. Bhutan has always preserved this holistic balance and the interdependent existence of all life forms. A disturbance of any of them will destroy the natural balance that and cause discontentment and unhappiness.

One of the most important provisions of Article 9 is the effort of the State to execute policies to minimize inequalities of income and concentration of wealth among citizens.

Political Parties

³¹Hedonism- pleasure is the highest good. Eudainism – “happiness is the highest good” Bentham “it is the greatest happiness of the greatest number that is the measure of right and wrong”, Hedonistic Epicurus - only pleasure is good. Baruch Spinoza - Happiness is a virtue, not its reward. Bertrand Russell - Happiness is not best achieved by those who seek it directly. Buddha - Happiness is made to be shared. Jeremy Bentham - The general object which all laws have, or ought to have, is to augment the total happiness of the community. John Adams – the happiness of society is the end of government, Locke believed that “[t]he negation of nature is the way toward happiness.”

Article 15 relating to Political Parties contains some salutary provisions. It confines the final election to the National Assembly to only two political parties—a party in government and another in opposition, which would prevent post-election horse-trading. In the absence of a clear electoral verdict, small parties or independent candidates will disrupt the whole democratic essence. Palkhiwala wrote that,

“The voice of a small minority is today mistaken to be the voice of the majority, simply because it is loud and vociferous, while the still, small voice of reason is not heard. So long as thinking men will not take the trouble to give public expression to their views, they should be reconciled to the thought of living under an administration of which the distinguishing feature is that it places ‘the lives of wise men at the mercy of fools.’”

State funding

Article 16 enshrines State funding for elections. From the experience of elections in other countries, where money and muscle power play a dominant role, Bhutan adopted that the State will provide funds for election campaigns to candidates and political parties in a non discriminatory manner.

Executive

Article 17 prescribes the essential qualification for the office of Prime Minister to ensure true representation of the people. The Constitution states that the Prime minister should be a natural born citizen³² of Bhutan. This rule has been extended to persons holding all the constitutional posts under Article 31 and those holding elective offices under Article 23. Such provisions tend to promote political morality. Dr. B.R Ambedkar mentioned that,

“Constitutional morality is not a natural sentiment. It has to be cultivated. We must realize that our people have yet to learn it. By constitutional morality Grote meant ‘... a paramount reverence for the forms of the Constitution, enforcing obedience to authority acting under and within these forms yet combined with the habit of open speech, of action subject only to definite legal control, and unrestrained censure of the very authorities as to all their public acts combined too with a perfect confidence in the bosom of every citizen amidst the bitterness of party contest that the forms of the Constitution will not be less sacred in the eyes of his opponents than in his own.’”

³²Ref. Article 2, Section 1, Clause 5 of the Constitution of the USA.

Judiciary

Article 21 deals with the Judiciary. It is the guardian of the Rule of Law³³, for which its independence³⁴ is secured by suitable provisions relating to security of tenure, conditions of service and the essence of separation of power. Appointment of judges is made on the recommendation of the National Judicial Commission. The significance of Judiciary in Bhutan is a great assurance for the working of its democracy. The Judiciary has a seminal role in a democracy.

The Supreme Court of Bhutan is not a constitutional court but a court of general jurisdiction and last resort. We have not followed diffused system in contrast to a concentrated system (propounded by Hans Kelsen). Bhutan follows the middle path – the High Court is designated as the court of first instance for constitutional cases which provides for one step appeal to the Supreme Court in keeping with the relevant laws related to appeal and the principles of natural law.

The Judiciary of Bhutan must rise to the challenges and meet those expectations of the people in the administration of justice and enable the rule of law to continue to thrive. Therefore, there are various aspects of judicial independence are Institutional independence³⁵, Personnel independence, entrenched judicial independence³⁶, jurisdictional monopoly³⁷, financial and the independent administration of constitutional office holders³⁸. Salary and benefits cannot be varied³⁹ and the independence of the Judiciary was further strengthened with the enactment of the Judicial Service Act in 2007. His Majesty personally formulated the amendment section as under:

“The amendment of this Act by way of addition, variation or repeal may be effected only when the Commission or the Council submit a motion to Parliament, subject to the

³³We realized the value of the democratic society and the need to respect one’s right and others, ensuring supremacy of the “rule of law” that embodies the basic principles of equal treatment of all people before the law, fairness, and both constitutional and actual guarantees of basic human rights. The rule of law is the foundation for sustainable communities based on opportunity and equity. Dicey’s rule of law has the material rule of law and the formal rule of law. The material rule of law requires the realization of just legal order and formal rule of law requires that the state activities are to be based on laws that are consistent with the constitution. In his treatise, “Law of the Constitution”, he identified three principles which together establish the rule of law: (1) the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power; (2) equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary courts; and (3) the law of the constitution as a consequence of the rights of individuals as defined and enforced by the courts.

³⁴We adhered to the Statutory protection of Independence; Personal Independence and Integrity (not sway by personals bias and extraneous influence); Professional Independence; Investigatory Independence; Reporting Independence; and Resources Independence.

³⁵ Section 13 Article 1 of the Constitution of Bhutan provides that, “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.”

³⁶ Section 1 of Article 32 of the Constitution of Bhutan.

³⁷ Section 2 of Article 21 of the Constitution of Bhutan and Article 3 of Basic Principles on the Independence of the Judiciary Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan. “3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.” Article 3 of the Basic Principles of Basic Principles on the Independence of the Judiciary endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

³⁸ Section 13 of Article 14 under the Constitution.

³⁹ Section 7 of Article 31 under the Constitution

*requirement that amendments shall not undermine the effectiveness of the Judicial Service.*⁴⁰

Further, the court building manifests physical separation of power affirming the principle of independence, cardinal to the doctrine of equal protection as enshrined under the Constitution.

Salutatory provisions of our Constitution

Some of the salutary provisions of our Constitution are:

- (a) The King is to voluntarily step down in favor of His successor at the age of 65 years and he shall abdicate for willful violation of the Constitution or for the permanent disability in a motion passed by the joint session Parliament. It is an extraordinary provision.
- (b) No immunities granted to members of Parliament to cover corrupt acts.
- (c) Any member of the National Council belonging to any political party is disqualified from being a member of the Council.
- (d) Article 15 relating to Political Parties confines the final election to the National Assembly to only two political parties, which would prevent post-election horse-trading otherwise with small parties or independents for power in the absence of a clear electoral verdict that is usual elsewhere. Defection after election is also forbidden.
- (e) Election campaign funding is provided to curb malpractices and to promote political morality.
- (f) Article 17 prescribes membership of the National Assembly as the essential qualification for the office of Prime Minister to ensure true representation of the people in that office. Also no person shall hold office as Prime Minister for more than two terms.
- (g) Article 27 states that the State will not use military force against a foreign State except in self-defense or for the purpose of maintaining its security, territorial integrity and sovereignty.
- (h) Article 33 provides that the Constitution shall not be amended during emergency, and the constitutional remedy for enforcement of the non-derogable civil liberties cannot be suspended.

Survival of Constitution & Democracy

Many philosophers believed that political cycle was harmful. The transitions would often be accompanied by violence and turmoil, and a good part of the cycle would be spent with

⁴⁰ Section 230 of the Judicial Service Act, 2007

degenerate forms of government. To minimize casualties and facilitate transition, Bhutan looked into Aristotle's political cycle comprising of six forms of stages and believed that these keep revolving in a cyclic order. Similarly, Polybius has defined four basic forms of government as democracy, aristocracy, oligarchy and tyranny, and Plato mentioned that the five forms of government are aristocracy, timocracy, oligarchy, democracy and tyranny. Having studied them, we created interlocking system and enshrined principles, doctrines and legal paradigms in the Constitution. The Constitution of Bhutan is rigid to establish normative values and flexible⁴¹ enough to be dynamic in-order to embrace changes. The Constitution should contribute to social and political stability and introduce changes without disrupting the ongoing operation of the system. It means that society will over a period of time face social and political disruptions of various sorts in the political domain and the opposition party may gain sufficient power to become troublesome or disruptive and may take power and displace the government. However, Harvard Professor Prof. Mark V. Tushnet said that the opposition would not be destructive.

The Constitution of Bhutan has survived for the last seven years without any amendment. It has passed the first cycle and in the future it will be tested as we move with the change of time. However, we must be mindful for Aristotle warned that:

“Even the most minor changes to basic laws and constitutions must be opposed because over time the small changes will add up to a complete transformation.”

Any amendment to a basic law or constitution which would not satisfy the prerequisites enshrined in a valid entrenched clause would lead to so-called “unconstitutional constitutional law”, i.e. an amendment to constitutional law text which would appear to be constitutional law only by its form, albeit being unconstitutional as with respect to the procedure in which it has been enacted, or as to the material content of its provisions. The objective is to prevent amendments which would pervert the fundamental principles enshrined in it, in particular to prevent the creation of a legalistic dictatorship. But entrenched clauses are often challenged by their opponents as being undemocratic. It is also known as the basic structure of the Constitution and Immutable principle.

During the last seven years, the Constitution of Bhutan has endured the constitutional goals, contributed to social and political stability without disrupting them and the governance to pursue goals for the nation. It has maintained stability and peace in bewildering changing times. In a system of election in which a party that loses the election must not feel that it has been

⁴¹The flexible constitution lays down a special process for its amendment. It does not distinguish between a constitutional law and an ordinary law.

permanently defeated. It should not therefore go into serious opposition to the new governing party. The constitution must allow the governance or the elected government to pursue the goals for the nation that the constitution and the governing party identifies. It needs to establish social, political and legislative morality including the institutional morality as Fali S. Nariman stated:

“... Constitution is founded on the rule of law, and the rule of law embodies a principle of institutional morality, a principle which suggests feasible limits on power, to constrain abuses which occur even in the most compassionate administration of the laws.”

Conclusion

The Constitution must ensure the realization of the constitutional promise. Constitutions have become major sources of values, institutions and procedures around the world. Constitutions are losing their national specificity. Rousseau once called the constitution a law engraved on the hearts of the citizens. The objective of the Constitution is to provide a sacred refuge and guidance to the nation. It is not an ordinary law. It is the statement of fundamental rights of the citizens, which normally forms part of modern written constitutions. Bhutan considered and incorporated intellectual, philosophical, spiritual and cultural values to make the Constitution, an inclusive Constitution.

As opined by Aristotle, Democracy is the most complex and difficult forms of government. Democracy is never a finished product, but is always evolving because humanity itself is evolutionary with molting process. From self-help to common defense, time and history responded positively. The human urge for better and greater lives, from the Greek’s conception of universal law, the partial skepticism of the Sophists, and the epochs of Cynicism, Rationality, Humanism, Renaissance, Enlightenment (Age of Reason), Empiricisms, Romanticism, Postmodernism, etc to modern era were reactions, counter-actions and often revolutionary so that individual freedom, harmonious society and sovereignty of the nations will not perish. Philosophies and spiritualism expressed through constitutions and anchored on the various schools of thought such as teleology, deontology, consequentialism and realism act as self-correction and self-imposed restraint.

The Constitution embodies hope for survival and reassurance for our future and the national vision of greater and general public interest. Collective dreams and common aspirations for a unifying vision expressed in this document will address the common misery and shared anguish to assuage human suffering and lead a nation to glory. His Majesty said that:

“This Constitution is the most profound achievement of generations of endeavor and service. As it is granted to us today, we must remember that even more important than the wise and judicious use of the powers it confers, is the unconditional fulfillment of the responsibilities we must shoulder. Only in understanding our duties will the exercise of our powers be fruitful... Lastly, this Constitution was placed before the people of the twenty dzongkhags by the King. Each word has earned its sacred place with the blessings of every citizen in our nation. This is the People’s Constitution.”

Thank You and Trashi delek