

**Making of the Constitution and
Democracy in Bhutan**
By
Chief Justice

His Majesty Jigme Singye Wangchuck astounded the nation and bewildered the Council of Ministers, the Chief Justice of Bhutan, the Speaker and the Chairman of the Royal Advisory Council on 4th of September 2001 by the pronouncement of the need to draft a written Constitution.¹ Sitting on a simple wooden chair behind the plain table, which were inherited from his late father, His Majesty commanded that:

“Bhutan, through good fortune and fate, could not hope for a better moment than now for this historical development and would never find another opportunity like this to introduce a Constitution that would provide a democratic system of government best suited for the future well-being of the nation. Today the King, government, clergy and the people in all sections of society, enjoyed unprecedented level of trust and fidelity. The security of the country was ensured and the people enjoyed peace and stability. Bhutan’s relations with its close friend and neighbour had reached a new height and the country also enjoyed growing relations with its developmental partners as well as other countries that appreciated the Kingdom’s wholesome policies for development and change. In many countries, Constitutions were drafted during difficult times, under pressure from political influences and interests, but Bhutan was fortunate that the change came without any pressure or compulsion.”

From that plain and simple, yet symbolic and sacred chair, I have seen history being made and unfold. On that chair, I saw His late Majesty Jigme Dorji Wangchuck and His Majesty Jigme Singye Wangchuck. From that chair, I heard historic pronouncements of the installation of the Fourth King as the Trongsa Penlop. From that chair, I heard the command of the devolution of power to the elected Council of Ministers and the drafting of the Constitution. Many memorable moments and historic pronouncements, which reverberated to all the corners of the country, moved the Nation and the citizens of Bhutan were made from that chair.

The entry in my diary on that day recorded that I had mixed feelings. I felt sad thinking of the uncertain future. Many questions and thoughts crossed my mind. Will there be a smooth transition? How would the people of Bhutan accept a Constitution? However, I was comforted by His Majesty’s assurance that time was appropriate to draft a constitution.

Appointment of the Chairman and the Committee

While I was in Trongsa on official tour, Lyonpo Khandu Wangchuk, the then Chairman of the Council of Ministers, telephoned me conveying Royal Assent of Chairmanship of the Drafting Committee upon me. I was humbled by the honour and responsibility bestowed on me. Thereafter, a thirty-nine member Drafting Committee was formed.

¹ A two page document was circulated consisting of: Introduction/Preamble, Fundamental Rights and Duties, Relevant Articles relating to the role and responsibilities of His Majesty the King, Relevant Articles relating to the Executive, Relevant Articles relating to the Legislature (Reforms and re-organizations of the National Assembly and the Lodroe Tshogdue), Local Governments (Dzongkhag Yargay Tshogchungs and Gewog Yargay Tshogchungs), Relevant Articles relating to the Judiciary including the establishment of the Supreme Court of Bhutan, Other Articles covering the Auditor General, Anti-Corruption Commission, Royal Civil Service Commission etc, Other Articles for the Constitution which are necessary and beneficial to the Country, Government and People; and Provisions for amendment of the Constitution.”

The Drafting Committee was broad based and comprised of representatives from all sections of the society. It consisted of two venerable Lopens appointed by His Holiness the Je Khenpo, the Speaker of the National Assembly, twenty elected representatives (one from each Dzongkhag) and representatives of the Royal Advisory Council, the Judiciary and the Government.

Constitution and its objectives

The Royal Proclamation had responsibilities. We had to draft a Constitution that is best suited for Bhutan. We had to know the latent power of that simple word. Tracing its roots etymologically, the term *constitution* comes through French from the Latin word *constitutio*, used for regulations and orders.

Historically, Solon, the ruler of Athens had the Solonian Constitution in 594 BC. Members were the ruling class, which was based on wealth (plutocracy). Aristotle was the first to make a formal distinction between ordinary law and constitutional law. The most basic definition he used was “*the arrangement of the offices in a state*”.

Constitutions are classified as Written Constitution, Unwritten Constitution, Enacted Constitution, Federal Constitution, Unitary Constitution, Flexible Constitution and Rigid Constitution. Further, many constitutional scholars have enumerated, as a form of reaction to the prevailing situations, a limited form of constitutionalism or Controlled Constitution. 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.²

Constitutions have become major carriers of values, institutions and procedures around the world. It is not an ordinary law. It has the statement of fundamental rights of the citizens. James Bryce defined the Constitution as “... *the whole body of fundamental rules, written and unwritten, legal and extralegal, according to which a particular government operates*”. Therefore, the objective of the Constitution is to provide a sacred refuge and guidance to the nation.

Beside functional and utilitarian objectives, the Constitution must promote progress, stability and values. Bhutan being a small nation, security and sovereignty are of paramount importance. Hence, His Majesty briefed the Committee that the important objectives to be borne in mind while drafting the Constitution are the sovereignty and security of the country, and the national interest and well-being of the people.³ Therefore, to fulfill the national objectives and pursuit of the individual rights and liberties, the Committee considered the following references and comments while drafting the Constitution:

- (a) Types and objectives of the Constitution;
- (b) Types of democracy;

² Mostly from Yash Ghai’s “*A Journey Around Constitutions Reflecting on Contemporary Constitutions.*”

³ His Majesty the King delivered at the Throne Room to the Constitutional Drafting Commission on 9.12.2002.

- (c) Constitutional values, principles, doctrines and justice;
- (d) Religious, cultural, philosophical and political basis of the Constitution;
- (e) Emerging legal paradigms and social and ethical control;
- (f) Interest theories,
- (g) Kashos (decrees and edicts), Acts of Bhutan, Speeches of His Majesty and policies of the Kingdom;
- (h) Comments from anonymous, pseudonym and Kuenselonline;
- (i) Comments from international agencies, individuals and the Ministries of the Royal Government;
- (j) The transcripts of minutes of the Committee and public consultation;
- (k) Lessons learned from numerous constitutional crises around the world; and
- (l) Clauses, sentences, provisions, prescriptive and non prescriptive rights, declaratory dictums of many constitutions. Landmark judgments and constitutional articles were also considered.

Immutable principle

The immutable principle of the Constitution of Bhutan is that *“the form of Government shall be that of a Democratic Constitutional Monarchy.”*⁴ Immutable principle is also known as the basic structure of the constitution. In Bhutanese context, it can be either abrogated or amended only *“through a National Referendum”*⁵ or plebiscitary democracy. It was explained by His Majesty to the public of Trashigang during the public consultation that *“Bhutan had intentionally vested the power of sovereignty in the people.”* Parliament will not have power to change the basic structure of the Constitution, but the People of Bhutan would have such power. In a representative democracy, Parliament does not have the power to amend the basic structure of the Constitution. Therefore, in the case of Bhutan, the power to amend the basic structure of the Constitution, through a referendum, is vested with the people because sovereign power belongs to the people of Bhutan under section 1 of Article 1. According to His Majesty, the sovereignty of the people is the principle of the Constitution, which rests with the people, whilst the legislative sovereignty is bestowed to the representative Parliament by the Constitution. This is the original will of the Constitution.

Drafting process

- (a) On 30th November 2001, His Majesty the Fourth Druk Gyalpo formally inaugurated the process of drafting the Constitution.
- (b) The first meeting was convened from 30th November to 14th December 2001 at the Royal Banquet Hall, Thimphu, followed by eight consecutive meetings held at Punakha, Bumthang and Thimphu.
- (c) The First Draft of the Constitution was submitted to His Majesty on 9th December 2002.
- (d) The Second Draft of the Constitution was submitted to His Majesty on 11th June 2003.
- (e) Mr. K.K. Venugopal, Senior Advocate, Supreme Court of India was the constitutional advisor. He concluded his correction by recording *“Here ends the most modern Constitution with maximum fundamental rights.”*
- (f) The Draft was then submitted to His Majesty the Druk Gyalpo and distributed to every household and to international organizations based in Thimphu on 18th August, 2005.

⁴ Refer The Constitution of Bhutan, Section 2 of Article 1.

⁵ *Ibid* Section 26 of Article 2.

- (g) The Draft Constitution was publicly distributed and launched on the Internet simultaneously on 26th March 2006.

During the first meeting of the Committee, it deliberated for three days without an agenda. The members expressed their aspirations, ideas and dreams freely and exhaustively. Thereafter, the first draft of the Constitution had headings based on the discussion of the first meeting. Relevant excerpts from the Kashos, Acts, speeches and policies of their Majesties were incorporated. It ensured national pride. Objections were overruled, when I quoted the sources from the Kashos. The draft was then compared with the provisions of the constitution of the other countries.⁶ This method strengthened the provisions of the Constitution, incorporated its omissions, deleted the irrelevant sections and avoided opposition from many foreign countries. We also referred to many Buddhist and Western philosophies as the Constitution must satisfy Bhutanese aspirations, global conformities and have spiritual and philosophical basis. If the context and words fail, principles and philosophical basis must give purposive interpretation. One UN staff called “*the Bhutanese of drafting constitution.*” This method ensured incorporation of Bhutanese values, distilled wisdom from global experiences. Simultaneously, Bhutan avoided undue foreign experiences. Ideologies can often be a form of enslavement.

The Constitution of Bhutan mentions the word, ‘constitutional’ fifteen times. It is used as an adjective. It means that the government is controlled or limited by the Constitution, hence recognizing the rule of law and not the rule of individual. His Majesty explained that our democracy is founded on the principles enshrined in the Constitution with enunciation of democracy therein.

Bhutan’s Constitution is one of the examples of the elements enumerated in Rousseau’s remark. Rousseau once called the Constitution a law engraved in the hearts of the citizens. It is not an ordinary law. Its most distinguishing mark is the statement of fundamental rights of the citizens, which normally forms part of modern written Constitutions. Some of the salient features of Bhutan’s Constitution are:

- It is based on popular sovereignty. Hence, the Constitution ordains “*Bhutan is a Sovereign Kingdom*”.⁷ In fact, the defense of sovereignty is the supreme law and sacred duty.
- Sovereignty of people and legislative sovereignty.
- Freedom of choice, a rational-choice model of collective action, public approbation of choice, public choice, radical choice, arbitrary choice or purely preferential choice, social choice, etc.
- Social public and political morality.
- It also has provision for a referendum on the proposed amendment in order to elicit popular reaction. It is direct and popular democracy.

⁶ Besides the knowledge, I had to counter my critics to vilify the draft. One Cabinet Minister said that the Maldivian and Finish Constitutions were the best. One Committee member said that the Chinese and Thai were the best. A few mentioned the Saudi Arabian Constitution. Other mentioned that the latest Afghan Constitution was the best.

⁷Refer The Constitution of Bhutan, Section 1 of Article 1.

- The Constitution of Bhutan is not a Federal Constitution. It is a Unitary Constitution with decentralized Local Government.
- It has an independent Judiciary, which is established to interpret and expound the Constitutional provisions.
- It has adopted the doctrine of explicit unlike other written Constitutions, which are generally rigid and ambiguous.
- It is also a limited Constitution. Hence, discretionary executive and legislative decisions are circumscribed through judicial review.⁸
- It has a special procedure to amend the Constitution. Amendment by the legislature either with a specific quorum of members or dissolution followed by a general election or a majority of the two Houses in joint session. Here, it would be wise to remember Aristotle, who warned *“Even the most minor changes to constitution must be opposed because overtime the small changes will add up to a complete transformation”*.⁹

Cross checking

The Constitution of Bhutan is comprehensive with brevity. It combines tradition with modernity to usher the nation into the 21st century as the harbinger of peace and advocating scientific temper with a spirit of humanism. Our Constitution has several unique features. Firstly, it is among the fifteen shortest constitutions in the world. Secondly, the words were compared with many constitutions and most of the words whether Dzongkha or English have their sources.¹⁰ A few words have inherited inspiring meanings. Thirdly, after the numeric of the words, the phrases with principles and doctrines were incorporated, for example terms and phrases such as “informed choice”, “general will of the people” were used with their sources and epistemology as well as political philosophy. Furthermore, His Majesty told the first public consultation meeting in Thimphu that he *“had studied more than 100 different Constitutions, not to copy their contents, but to draw from them and make the contents of the Bhutanese Constitution more meaningful.”* Finally, every section of the Bhutanese Constitution is compared with the respective clauses of the Constitutions of twenty-two countries. These were done in obedience to the Royal Command that *“our draft constitution is one of the best constitutions from many constitutions around the world”*.

DEMOCRACY

His Majesty the Fourth Druk Gyalpo proclaimed that Bhutan would embrace democracy. With that Royal Proclamation, we surveyed the meaning, birth and dynamics 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”.

Types and choice of democracy

There are three types of democracy; (a) Direct Democracy; (b) Representative Democracy; and (c) Presidential or Parliamentary Democracy. Direct Democracy is achieved through *direct*

⁸ *Ibid* Sections 10 & 11.

⁹ *Ibid* Section 2 of Article 34.

¹⁰The Committee had compiled glossaries.

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 democracy such as: Athenian democracy¹¹ or classical democracy, Anticipatory democracy,¹² Defensive democracy,¹³ Deliberative democracy,¹⁴ Democratic centralism,¹⁵ Dominant-party system,¹⁶ Economic democracy,¹⁷ Grassroots democracy,¹⁸ Illiberal democracy,¹⁹ Jacksonian democracy,²⁰ Liberal democracy,²¹ Market democracy,²² Multiparty democracy,²³ Non-partisan democracy,²⁴ Participatory democracy,²⁵ Social democracy,²⁶ Sortition,²⁷ Totalitarian democracy, Westminster democracy,²⁸ Procedural democracy,²⁹ Substantive democracy,³⁰ etc.

Bhutan opted for parliamentary democracy with many other democratic features,³¹ whereby the executive branches of a Parliamentary Government is a cabinet headed by a Prime Minister. Responsibility of executive branch is assessed daily and periodically. Daily assessment is being done through questions, resolutions, no confidence motion, adjournment and debate in Parliament. Periodic assessment is done by the electorate.³²

The Constitution adopted Deliberative Democracy to debate policy alternatives and providing time to research and elicit public opinion. Simultaneously, Bhutan envisaged Democratic centralism. The political parties under Article 15 section 1 is required to ensure national interest over all other interest.

In an organizational method, members of a political party will discuss and debate matters of policy and direction. Once the decision is made by majority vote, all members are expected to follow that decision in public. For stability of a Government, the Constitution may have the dominant party system, whereby, only one political party can realistically become the government, by itself or in a coalition government at the primary election. Primary election allows participatory democracy, which involves consent or consensus decision-making and offers greater political representation. Multi-party democracy or a two-party system requires voters to align themselves in larger blocs, sometimes so large that they cannot agree on any overarching principles. This system was to ensure fractured mandate.

¹¹Refer The Constitution of Bhutan, Article 34.

¹²*Ibid* Article 9.

¹³*Ibid* Section 22 of Article 7.

¹⁴*Ibid* Article 10.

¹⁵*Ibid* Sections 11 & 15 of Article 10.

¹⁶*Ibid* Sections 5 & 6 of Article 15.

¹⁷*Ibid* Article 9.

¹⁸*Ibid* Article 22.

¹⁹Countered by Rule of Law under Article 9 section 3 and Article 21 section 1.

²⁰Refer The Constitution of Bhutan, Section 13 of Article 1.

²¹*Ibid* Article 7.

²²*Ibid* Sections 7 & 10 of Article 9.

²³*Ibid* Sections 5 & 6 of Article 15.

²⁴*Ibid* Sections 1 & 2 of Article 23.

²⁵*Ibid* Article 7 section 6, Article 23 section 2 & *Zomdue*

²⁶*Ibid* Article 9

²⁷Aristotle - based on the drawing of lots as opposed to election by vote.

²⁸Refer Article 20 of the Constitution of Bhutan.

²⁹*Ibid* Articles 22 & 23

³⁰Public accountability of representative and the democratization of economic, social and other domains of collective human life under Article 20, section 6 and Article 11 section 2.

³¹Hobbes wanted to restore the absolute monarchy; Locke wanted to establish parliamentary democracy and Rousseau wanted to achieve a democratic revolution in France.

³²Refer The Constitution of Bhutan, Section 5 of Article 18.

The important consideration for the choice of party system was stability, which is relevant for Bhutan. Thus, Bhutan has democratic executive, who satisfies a stable government and responsible executive. At the same time, the Constitution has liberal democracy or a form of representative democracy with protection for individual liberty and property – an offshoot of rule of law. It is indirect democracy where sovereignty is held by the people’s representatives. It has been balanced by vertical, horizontal and institutional check and balance to counter the tyranny of majority. To remedy the tyranny of majority, we considered and recommended consociationalism, which advocates power sharing and rejects majoritism.

There were suggestions for a three party system, a one party system and also independent candidates. Three party systems may dictate the two larger parties thereby, diluting the majority. Smaller voice must not drown the larger sound. The suggestions of one party or monistic democracy will clash with pluralist reality. Having one party system, may tantamount to neo-liberal Constitution, which is either military or one party system.

For Local Governments under Article 22, the Constitution has certain features of direct democracy or classically termed *Pure Democracy*. His Majesty’s policies of decentralization integrate grass root democracy emphasizing in decentralized units of Gewog to make decision at the local level binding.

Buddhist Democracy

A unique feature of Buddhism is that it is a doctrine of human beings, by human beings, and for human beings.³³ Being a Buddhist country, we must remember what Buddha spoke about applying the Way to political life. His Sangha, monastic community was based on democracy. He said that the Way could illuminate the realm of politics, assisting those involved in governing the kingdom to bring about social equality and justice. He said,

“If you practice the Way, you will increase your understanding and compassion and better serve the people. You will find ways to bring about peace and happiness without depending on violence at all. You do not need to kill, torture, or imprison people, or confiscate property. This is not an impossible ideal, but something which can be actually realized... When a politician possesses enough understanding and love, he sees the truth about poverty, misery, and oppression. Such a person can find the means to reform the government in order to reduce the gap between rich and poor and cease the use of force against others... My friends, political leaders and rulers must set an example. Don't live in the lap of luxury because wealth only creates a greater barrier between you and the people. Live a simple, wholesome life, using your time to serve the people, rather than pursuing idle pleasures. A leader cannot earn the trust and respect of his people if he does not set a good example. If you love and respect the people, they will love and respect you in return. Rule by virtue differs from rule by law and order. Rule by virtue does not depend on punishment. According to the Way of Awakening, true happiness can only be attained by the path of virtue.”

The Bhutanese Democracy

³³ Dr. Phramahachanya Khongchinda, THE BUDDHA’S SOCIO-POLITICAL IDEAS

There were many textures of democratic values in Bhutan. Bhutan had decentralized systems of the Government with power devolved to the *Ponlops* and *Dzongpons*. The elections of Desis were based on democratic values. Bhutanese village society is fundamentally democratic in nature and that the village *zomdu* could be given due consideration as a traditional institution. Membership of the village *zomdu* comprise of one member from each household. Bhutan had the conditions that Rousseau had described “*people may be readily assembled and where each citizen may easily know all the others*”.

His Majesty Jigme Dorji Wangchuck initiated key processes of democratic institutionalization in 1953 by establishing the National Assembly. It was a representative democracy. By enacting the Thrimzhung Chenmo (Supreme Laws), the National Assembly became a legislative body. His Majesty separated Drangpon from Dzongda. Separation of the Judiciary is the basic principle of democracy. On 15th February 1969, Kuensel reported that:

“On royal command, the judiciary and the executive are being separated in the districts of Thimphu, Paro, Wangdiphodrang, Punakha, Tongsa, Byakar, Mongar, Shemgang and Tashigang... The High Court and the Royal Advisory Council hope that this reorganisation will enable all cases to be settled expeditiously in the above nine districts, and will also prevent large numbers of cases being referred to the High Court at Thimphu by the District Officers. The separation of the judiciary from the executive will, it is hoped, also ensure better administration of justice in the districts.”

The Lhengye Zhungtsog, which is the Cabinet, was established in 1968. On 30th June 1968, Kuensel reported that;

“The change over to a ministerial form of government initiated by His Majesty the King during the last Spring Session of the National Assembly will be further continued until the present monarchical form of Government in the country is changed to that of a constitutional monarchy. His Majesty the King is extremely keen that the people should have a greater voice in the government of the country and to that extent His Majesty is voluntarily prepared to forego some of the absolute powers so far vested in him by the people... In the stage of development in which we were placed at that juncture, this was a bold step, for the vision of the people were limited to the affairs of the village or the valley in which they lived as a result of centuries old isolation from the outside world, and they found it difficult to look at a wider horizon and express themselves on matters of national interest and policy.”

His Majesty Jigme Singye Wangchuck initiated peoples' participation, decentralization through the establishment of Dzongkhag Yargay Tshogdue and the Gewog Yargay Tshogchung. On June 1998, His Majesty relinquished his role as Head of Government to the elected Council of Ministers and empowered the National Assembly to pass a no-confidence vote on the monarch. His Majesty said;

“During the past years of my reign, I have made constant efforts to empower the people by delegating authority, resources and responsibility to them. Reforms on decentralization and delegation of powers have been a continuous process with the establishment of Dzongkhag Development Committees and Gewog Development

Committees, and the devolution of executive power to an elected Council of Ministers. While promoting people's participation in the decision making process, I have always placed full trust in our people to make the best choices for their own interest as well for the nation. My kingship cannot be worthy of the people if it is not based on mutual trust and confidence. We must have full faith in their commitment and loyalty to the Pelden Drukpa and their ability to ensure the well being and security of our country. I have always maintained that the destiny of the country lies in the hands of our people.”

Aim Sinpeng wrote “Bhutan’s transition to democracy is an exceptionally unique case that will help enrich the overall literature on democracy as well as further enhance our understanding of the most studied political system in the world can the recent regime change in Bhutan be contributed to a classical modernisation theory, the structuralist school of thought, the voluntarist school of thought...”³⁴

Challenges and measures under the Constitution

Although His Majesty has pronounced that “*The time has come for us now to draw up a written Constitution and establish a political system which will enable the Bhutanese people to shoulder this sacred responsibility,*” people did not want it. However, people’s opposition for a constitution was successfully pacified by their Majesties. Having drafted the Constitution, the Constitutional Drafting Committee had to study the survival of it. History is replete with earthly reminder of tumultuous truth created and echo of danger of instabilities, abrogation of constitutions, confrontation and unending amendments. Inconsistency was not our aim. History is the best source to act as a guide to the future. Consequently, having adopted the Constitution, it must endure over some significant period of time. The Constitution should contribute to social and political stability and avoid social and political disruptions. It must allow the governance or the government to pursue the goals for the nation that the constitution, governing parties or the governing coalition identifies.

Further, democracy must not divide people and fracture the society through election. Therefore, the Constitution has the challenge of devising a uniting and healing mechanism. The Constitution must ensure protection from retribution – *Santio*. If there is retribution, the principle of free and fair would be derailed and the purpose of the Constitution would be defeated. The insurance theory of constitutional regime is to be secured after losing office to an opposition.

Aristotle’s political cycle classified six forms of states and believed that these keep revolving in a cyclic order. The cycle begins with monarchy that soon gets perverted into tyranny, which gets replaced by aristocracy – the rule of a few wise and able people. Aristocracy soon gets perverted into oligarchy – the rule of the rich, to be replaced by the rule of the people or majority – polity. Polity gets perverted into democracy – the mob rule. Democracy in the final turn gets replaced by monarchy and the cycle begins all over again.’ Similarly, Polybius has defined three 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 is rigid to establish normative values and

³⁴ Journal of Bhutan Studies, Volume 17, Winter 2007, Democracy from Above: Regime Transition in the Kingdom of Bhutan

flexible to be dynamic to embrace changes. There are provisions for political morality. One of them is the tenure of certain posts to prevent them from becoming despots³⁵.

Public education helps to create ownership and dissemination imbibes values. Constitutional democracy is one of them. It is in line with Aristotle's view of "*in preserving a constitution is education: if all citizens are aware of law, history and the constitution, they will endeavour to maintain a good government.*" Constitutional democracy is the day-to-day actions that create a democratic way of life based on democratic values and principles enshrined in the Constitution. In a constitutional democracy, government is by majority rule with promotion and equal protection under the fundamental rights. A government must be based on the foundations of popular consent and majority rule. It is constitutional because a supreme law limits the power of the majority to rule.

In constitutional democracy, the Court uses its power of judicial review to adjudicate issues in specific cases concerning limits on majority rule or on minority rights. In the *West Virginia Board of Education vs Barnette* case, 319 U. S. 624, 1943, Justice Robert Jackson argued that a person's rights to liberty, such as the right to free exercise of religion, "*are beyond the reach of majorities.*" They may not, he wrote, "be submitted to vote," and "they depend on the outcome of no elections." Constitutional democracy does not confer unbridled power. It is limited by the higher law of the Constitution in order "*to secure the blessings of liberty, to ensure justice and tranquility and to enhance the unity, happiness and well-being of the people for all time*" in accordance with the preamble of the Constitution. Constitutional democracy connotes limited and not an unlimited democracy.

Bhutan wanted a stable government by majority rule, but the majority's power is limited by the higher law of a written constitution. The Drafting Committee shared the apprehension of a tyrannical majority that James Madison and other framers of the American Constitution had harboured. The Constitution is opposed to absolutism or total power. It has inbuilt system to counter the tyranny of the few over the many or tyranny of the many over the few.

Rule of law

Democracy is not absolutism. It is not a license to do anything and everything. It is governed by Rule of law. A liberal democracy has self-sustaining rule of law and democracy must entail progress, which is ensured by stability and security as ordained in the preamble of our Constitution. In this connection, we can see that in the world of today, democracy has become successful in those countries where people follow the path of discipline. On the other hand, democracy has failed in most of the countries where it has no discipline.

Democracy needs the shield of the rule of law. Plato said that democracy was grounded in divine reason and so inherent in the natural order. The contrast between the *rule of men* and the *rule of law* is first found in Plato's *Statesman* and *Laws* and subsequently in Aristotle's *Politics*, where the rule of law implies both obedience to positive law and formal checks and balances on rulers and magistrates. The rule of law protects the citizen from an arbitrary government. According to Thomas Aquinas, an Italian philosopher and theologian, a valid law is 'in keeping with reason,

³⁵ Refer The Constitution of Bhutan, Section 2 of Article 17, Section 6 of Article 21, Section 13 of article 21, Section 3 of Article 24, Section 3 of Article 25, Section 3 of Article 26.

established by a proper authority, for the purpose of achieving good and properly communicated to all.’

We 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 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.

“Rule of Law” is not a new concept to Bhutan. The concept was very well enshrined under the Thrimzhung Chhenmo (the Supreme Law). Our religion and culture have precepts which provide that the ruler should deliver his wisdom through impartial judgment. Our Constitution has incorporated “Rule of Law” in Section 3 of Article 9 and Section 1 of Article 21.

Conclusion

The Constitution “gives way to a more democratic form of government, which His Majesty has benevolently bestowed upon the people of Bhutan. No doubt, the modern edifice of Bhutan will still bear the hallmark of the Wangchuck dynasty, but those of us who had the supreme honor of serving His Majesty King Singye Jigme Wangchuck, will continue to cherish the unique moments which we had experienced under His dynamic leadership. When we finally take leave of the arena in 2008, we will take with us some of the fondest memories of our association with each other under His Majesty and we shall consecrate these in our hearts as a constant reminder of the glorious reign of His Majesty under whom we had the honor to serve.”³⁶ These heartfelt sentiments were shared by many Bhutanese. While we exalt the past, we must remember the sacred words of His Majesty the Druk Gyalpo, who said,

“...the efforts and sacrifices of past Kings and generations of Bhutanese, culminating in the dramatic changes over 33 years of His Majesty’s reign has created a special nation that is now being handed over to the youth of today. Grasp this opportunity with both hands, with complete strength, vigour and confidence. The future is yours. Exactly 153 years ago in Trongsa, Trongsa Penlop Jigme Namgyel paved the way for monarchy to bring stability, peace and prosperity to the nation. Today, the foundations built for Bhutan’s future by our Kings is now symbolized by the Constitution in your hands today. After a century during which it had nurtured the people, the Monarchy wants democracy. As His Majesty places this Constitution and, with it, the future of the nation in your hands, you must remember that the worth of a good idea, the efficiency of a good

³⁶ Kasho of Paro Penlop, HRH Namgyal Wangchuck dated 7 September 2006 to the Chairman of the Council of Ministers.

machine, the strength of any law, all depend on the will and commitment of the people in whose hands they have been placed.”³⁷

His Majesty devolved his power to the people without their demand. It was a courageous act to face the overwhelming opposition to draft the Constitution. It is exemplary and worthy to emulate this shining example of detachment. In Henrik Ibsen’s words, “*the strongest man in the world is he who stands alone.*”³⁸ No artist can faintly glimpse his contribution. No song can express his love for the Nation and no historian can comprehend his transcendental greatness. His Majesty is the peerless embodiment of greatness.

I/We pray that the Constitution will inspire in our future generations, a more ardent love for their country, an unquenchable thirst for liberty, and greater reverence for the Constitution. It has enshrined the rights of the people under a democratic system, which has been designed to perpetuate happiness, ensure security and guarantee liberty for all. It has been ordained by the will of the people, and can be changed only by the sovereign command of the people. During the first Royal Audience granted to the Drafting Committee, His Majesty the Fourth Druk Gyalpo decreed that

“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”.

Monday, September 03, 2012

³⁷ Refer Kuensel dated 27 May 2006.

³⁸Henrik Ibsen, *An Enemy of the People*, (Farquharshan Sharp trans, 2001) 100 <<http://www2.hn.psu.edu/faculty/jmanis/h-ibsen/enemy-people.pdf>