

CONSTITUTION AND BUDDHISM
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The Constitution is the Supreme Law of a State, which defines the relationship of different entities within a state entailing their powers and responsibilities. It is a document expressed in language which the ordinary people could understand to address the complex issues. It is a principle like the guiding Northern Star to direct and guide the diverse nature of a state and its citizens. It responds to changing and unknown situations. It is the mother of all laws with an ever expanding family of laws that keep the nation and its people's diverse behaviour within the bounds of the Constitution's philosophy. It has a philosophical basis of internal freedom with external symbiotic existence. It manifests many overt and latent attributes of human nature beside those functional objectives of the Constitution as espoused by Aristotle and the utilitarian objectives put forward by Bentham. Buddhist ethics is founded partly on the notion of social concern and partly on the notion of the perfectibility of the individual. Therefore, a Constitution has both worldly and intellectual characteristics.

History and meaning of constitution

Historically, 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 (It is from the laws of Draco that we have the term 'draconian'). Rejection or abrogation of bad laws was enunciated by Lord Buddha as:

*"... that doctrines are evil and unjustified, that they are condemned by the wise and that when they are accepted and lived by, they conduce to ill and sorrow, then you should reject them."*¹

The idea of "the constitution" spread slowly around the world though it should be noted that of the 190 countries with constitutions, only 20 of those pre-date 1950. Etymologically, the term *constitution* comes from the Latin word *constitutio*, used for regulations and orders. We must marvel at the latent power of that simple word which has inspired people and nations around the World.

Objectives of Constitution

The Constitution is not only a set of fundamental laws² that form the basis of the governance of the country, but it embodies and reflects certain values, philosophies and objectives that are held very dear by the people of a country. These values find expression in various articles and provisions of the Constitution. Constitution is neither abandonment of the past nor resistance to change. It must respect and build on the past shaped by history. Provisions of the Constitution should firstly be preservative to maintain certain existing practices to avoid deterioration,

¹ Digha Nikaya I,P,T. S. ., page.3

² K.N. Jayatilleke writes in his book that "*Buddhism resembles modern scientific humanism*". See K.N. Jayatilleke, *Dhamma Man and Law*, 2000,p.3.

secondly reformative to usher in certain aspirations and thirdly interventionist to uphold and protect the spirit of the Constitution.

Beside functional and utilitarian³ objectives, the Constitution must promote progress, stability and values. Constitution expresses human desire to build a better society in the future. We are all acquainted with the idea that the destiny of our societies depend largely on having good constitutions. In that sense, the Constitution is a political, creative, and foundational document that connects the origins of our society to its future.

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

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 constitution, Colonial constitution, the Neo-liberal constitution, the Classic Constitution and the French Constitution, etc. Further, many constitutional scholars have discussed the limited form of constitutionalism⁴ or controlled constitution, as a form of reaction to the prevailing situations.

Constitutional Values

Constitutions have values. Constitutional values can be classified as (i) Constitutional core values, which generally are human dignity, sovereignty of a country, social justice etc, (ii) Supporting values comprising freedom and equality, (iii) Structural values which includes democracy and rule of law, (iv) Embedded values and principles (Eg. Magna carter) and (v) Neutral values, which include freedom, equality, democracy and freedom of choice. Constitution also highlights other values such as patriotism, nationalism, humanism, environmentalism, harmonious living, scientific temper and collective excellence.

Constitutional Principles

³ KN Jayatilleke, *Dharma Man and Law* ‘- A utilitarian and pragmatic motive behind the legislation is that “their aim is the attainment of some practical end”.

⁴ 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 principles consist of (i) The Rule of Law which demands that both the people and the government must obey all laws;⁵ (ii) The Separation of powers as advocated by Montesquieu, Burke, Engels, Locke and John Mill, which requires that oppression on part of any organ of government must be checked for the preservation of liberty and the prevention of tyranny. However, it is worth noting that 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) A Representative government which promotes and confirms the participation of people in the functioning of the government; (iv) The inclusion of checks and balances so that no branch of the government should have undesirable domination over another; (v) The principles of equality, individual rights, freedoms, federalism and civilian control over the military; and (vi) The principles of justice. Many forms of justice are punitive, deterrent, reformative, commutative⁶, compensatory⁷, distributive, expiatory, institutive, social⁸, political, economic, popular and pure procedural justice. Lord Buddha said:

“the wheel of power turns in dependence on the wheel of justice” (bala-cakram hi nisraya dharma-cakram pravartate).⁹

Rule of Law

Dicey’s rule of law encompasses both the material rule of law and the formal rule of law. The material rule of law requires the realization of a just legal order, and the formal rule of law requires the state activities 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 as under:¹⁰

- (a) *The absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power;*
- (b) *Equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary courts; and*
- (c) *The law of the constitution as a consequence of the rights of individuals as defined and enforced by the courts.*

In Buddhism, *Dhammanuvatti* enjoins living in conformity with righteous laws and principles, both in personal life and in work. Laws must be in accord with moral and ethical values,¹¹ which encompass cardinal¹², spiritual, cultural, ethical (normative, positive, descriptive and meta-ethics) legal and moral values. These values are reinforced by Lord Buddha in *Silasamannata* as:

“...harmonious moral conduct: maintaining a level of conduct that meets community standards; adhering to community rules, not making oneself an object of distrust in the eyes of the community; refraining from conduct which would be detrimental to the

⁵ Hobbes stated that one ought to obey the law either because it is the law or because it reflects to some extent the divine will (theocracies) or again because it is right to do so (natural law theories).

⁶ Commutative, corrective or refractory justice concern with persons especially fairness of goods and fulfilment.

⁷ Right to compensation.

⁸ Social justice conforms to a moral principle such as that all people are equal.

⁹ *Mahavastu*.

¹⁰ A.V Dicey, *Introduction to the study of the law of Constitution*, Tenth Edition, (2003), p. 202-203.

¹¹ William Blackstone, *Law is the embodiment of the moral sentiment of the people*.

¹² Cardinal values of Plato include justice, wisdom, courage and self-control.

community; contributing to a homogenous and equal respect for the community laws and compliance therein”.

The Buddha asked his followers to treat the Dhamma (doctrine of righteousness) and Vinaya¹³ (the Constitution and the Code of Laws) as their teacher when the Lord Buddha would not be there. According to the doctrine of righteousness, one may sometimes escape social sanction or punishment, but the ethical basis nevertheless results in punishment in this life or the next. In a Buddhist democracy, the rule of law requires not only consistency in the expression of the law but also in its application. Good law conforms to moral righteousness.

It was proclaimed by Guru Rinpoche that *“The powerful must know the limit of their power.”*¹⁴ The rule of law is the recognition of the supremacy of law, elimination of discrimination, due process of law, and judicial review of administrative action. It conforms to the Buddhist philosophy of:

“Upekkha, impartiality, fairness, and understanding that all beings experience good and evil in accordance with the karma they have created; steadfastness in maintaining laws that are righteous”.

Equality

The leftist thinkers, such as Rousseau and Marx hate inequalities. Leftist thinkers generally define freedom as something positive and affirmative. For them freedom means being able to realize certain higher goods (such as to free and equal participation in political activities, freedom from alienation, etc). In order for people to have the ability and opportunity to achieve these higher goods, the society has to create certain conditions for people. One of the key conditions is equality as said by Rousseau and Marx.

The justice system adopted for the community of monks begin with the premise that everyone is equal before the law. Lord Buddha had said *“I preach the Law equally.”* Equality¹⁵ is one of the true supporting values of a Constitution. He further mentioned *“On my path, all are considered equal”*¹⁶. He also said to Suneeet:

“...the caste and creed find no place in the path of Sambodhi. Just as rivers lose their identity after falling into the sea, all are equal in our doctrine and there cannot be discrimination against them.”

Buddha even appointed a woman as a judge according to Dr. B.B. Singh who said:

¹³The Vinaya Laws.- Of all the monastic laws, the Vinaya laws are most extensive as well as intricate and reveal the legal aptitude as also the common sense on the part of the Buddhists. They are obviously vivid and run into minutest details, so that even a partial knowledge of them gives us a fair idea of the monastic life of the early Buddhists. They are systematically and scientifically arranged, though their classification may fall short of the modern methods. The principle underlying the classification is the motive and magnitude of the offence.

¹⁴Pema bka'thang, page. 150(back page).

¹⁵Freedom and equality mean different things to different thinkers. For example, leftist thinkers emphasize equality, while rightist thinkers favor freedom. Nietzsche, who likes aristocracy and does not value equality, is a philosopher to the extreme right. In fact, Nietzsche thought that democratic equality was an impediment to human excellence because it builds “herd morality” that puts people down and promises less than what they deserve. In order for human excellence to develop freely, says Nietzsche, there should not be any equality constraint on people: a noble heart should not be put down in order to make it equal to a base heart, people should be allowed to compete freely for power and, naturally, noble people will win the competition and become rulers of human society.

¹⁶bka'-'gyur sutra, zhapa, page 240(back page).

“...the Buddha had entrusted Visakha, a lay-woman of repute, the responsible task of judicial investigation into a disputed matter and also to give her judgment. Though Visakha was an exceptional personality elevating the women in the public life to the extent that they could act as judges...”¹⁷

Buddhist teachings regard every individual as equal and personally responsible for all the volitional acts which he commits. It was reiterated in *Dharmasangiti Sutra* as:

“The Law is equal for all beings. For low or middle or high the law cares nothing. The Law has no regard for the pleasant. Impartial is the Law...The Law does not seek refuge. The refuge of all the world is the Law...The Law has no preferences. Without preference is the Law. So I must make my thought like the Law.”¹⁸

Due Process of Law

Due process of law is a fundamental feature of the Buddhist legal system. It means adopting those measures authorized by law which ensure, for example, lawful arrests and searches, access to a fair trial and hearing, access to legal remedies and the elimination of unnecessary delays in the court process.

Procedural law, a sub-component of organizational justice describes enforcement of rights and responsibilities enacted by the Legislature. Procedural law or adjective law is the rules for a court to hear and determine in civil law suit, criminal trial or administrative proceedings. Violation of procedural laws may cause a judgment to be overturned. Thus, Lord Buddha decreed:

“There are the twelve cases of a proceeding (Kamma) which is against the law... when a Tagganiya-kamma is characterized, it is against the Dhamma and against the Vinaya...” Some of these cases are:

- (a) *“When it has not been carried out in a full assembly of properly qualified persons, according to law and justice;*
- (b) *“When it has been carried out without the accused person having been heard;*
- (c) *“When it has been carried out without the accused person having confessed himself guilty;*
- (d) *“When it has been carried out although no fault has been committed;*
- (e) *“When it has been carried out for a Paragika or a Samghadisesa offence;*
- (f) *When it has been carried out though the fault has been confessed;*
- (g) *“When it has been carried out without the accused person having been warned;*
- (h) *When it has been carried out without the accused person having been called upon to remember (whether he has or has not committed the offence);*
- (i) *“When it has been carried out without the accused person having been convicted; and*
- (j) *A Tagganiya-kamma, O Bhikkhus, characterised (as before or down to) settled.”*

In summary, the Buddhist law encompasses procedural justice. Procedural justice is connected to due process in the USA, fundamental justice in Canada, procedural fairness in Australia and

¹⁷ *Buddhism and the Women Uplift in India.*

¹⁸ World Scripture: Comparative Anthology of Sacred Texts, Volume 1991, Part 2.

natural justice in other Common law jurisdictions. John Rawls in *A Theory of Justice* mentioned that Perfect procedural justice has two characteristics:

(1) "An independent criterion for what constitutes a fair or just outcome of the procedure, and (2) a procedure that guarantees that the fair outcome will be achieved. Imperfect procedural justice shares the first characteristic of perfect procedural justice--there is an independent criterion for a fair outcome--but no method that guarantees that the fair outcome will be achieved. Pure procedural justice describes situations in which there is no criterion for what constitutes a just outcome other than the procedure itself."

The modern concepts of procedural justice were practiced even during the time of Buddha. Buddha had incorporated the concept of hearing all the parties before a decision is made. Lord Buddha enjoined:

"the four ways of falling into injustice or untruth – cattari agatigamanani, are prejudice, hatred, ignorance and fear ... when a dispute arises he should pay equal attention to both parties to it, and hear the arguments of each and decide according to what is right. He should not act out of favouritism, hatred, fear or folly. He should hear the arguments of each side and act according to what is right" – the Mahavastu

Some theories of procedural justice hold that fair procedure leads to equitable outcomes, even if the requirements of distributive or restorative justice are not met.

Buddhism has polytheistic religious traditions. It is less absolute. Thus, in Buddhism, the intention of the individual and the circumstances should be accounted for to determine if an action is right or wrong. The Buddhist procedural laws are comprehensive and it includes:

- (a) *They ought to be warned and when they have been warned, they ought to be reminded if they offend the Rule in the Patimokkha. It is similar to Miranda warning;*
- (b) *After that, they ought to be charged with the (particular) offence. It is similar to Part III section 14(3) of the International Covenant on Civil and Political Rights. They have to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;*
- (c) *When they have been charged with the offence, some discreet and able Bhikkhu ought to lay the matter before the Samgha, saying, "Let the venerable Samgha hear me... If the time is fit for the Samgha (to do so) let the Samgha carry out the Tagganiya-Kamma against the Bhikkhus"; and*
- (d) *The accused may confess it and then deny, or make counter-charges.*

Under Buddhism, the rules regarding the settlement of cases are as follows:

- (a) *"the Proceeding in presence must be performed; or*
- (b) *the Proceeding for the consciously innocent; or*
- (c) *the Proceeding in the case of those who are no longer out of their mind; or*
- (d) *the Proceeding on confession of guilt; or*
- (e) *the Proceeding by majority of the chapter; or*
- (f) *the Proceeding for the obstinate; or*
- (g) *the Proceeding by covering over as with grass."*

Further, the groundless charge in Buddhism has been mentioned as stated herein:

“Whatsoever Bhikkhu, in harshness, malice, or anger, shall harass (another) Bhikkhu by a groundless (charge of having committed) a Paragika offence, thinking to himself; and

“Perchance I may (thus) get him to fall from this religious life'- Then at some later time, either when he is pressed, or without his being pressed, the case turns out to be groundless, and the Bhikkhu confesses his malice-that is a Samghadisesa.”

Right to be reviewed is a part of natural justice and constitutional right. It is incorporated in Lord Buddha's law as *pratijnakaraka-vinayana* (Appeal). Violation of *Nati* and process without conviction is irregular according to Buddhism. Similarly, under *Upali*, declaration without investigation is unlawful.¹⁹ The investigation should be of:

- (a) *Investigating publicly with proof, evidence and arguments;*
- (b) *Investigating by deliberating upon proof and evidence; and*
- (c) *Investigating upon the difference between the statement/words given or spoken before and after.*

Upali has two types of spirit and letter as under:

*“There are the following two kinds, Upali, of re-establishment of concord among a Samgha: Concord may be re-established, Upali, in the letter, but not in the spirit, and concord may be re-established both in the spirit and in the letter.”*²⁰

The synthesis, the stages of the judicial process encompass: Production before Judge => Legal Counsel - *trnastaraka-vinayana* => Opening Statement – *purvapaksah* => Defense Reply *codyam or pariharah* => Rebuttals (*Jatih* and *Jatyuttarah*, evasive, futility and *Vitanda, ad absurdum*) => Evidence => Witnesses (*smrti-vinayana*) => Independent Testimony => Exhibit => Cross Examinations (*sammukha -vinayana*) => Judicial Investigation => Closing Statement (*Nigamanam or Upasamharah*) => Judgment (*Iyadhuyasikiya-vinayana*), Appeal – (*pratijnakaraka - vinayana*), Reconciliation - *tatsvabhaisya-vinayan*.

His Eminence Jamgon Kongtrul Rinpoche²¹ said:

“Satisfy both loser and the winner through impartial and due process”.

Fundamental Rights

Rights are the empowerment of the people that will be preserved with knowledge and vigilance by the people.

The rights enshrined in the Constitution of different countries are broadly classified into civil, political, substantive, social, economic, positive, negative, corrective, distributive, perfect,

¹⁹ Refer *Vinaya*, p. 322.

²⁰ *Vinaya Texts- Vol. 20, Part III.*

²¹ A Tibetan saint (1813 – 1889)

imperfect rights, etc. In addition to these, there are rights *in rem, in personam* and proprietary rights. Therefore, we must be conscious of the national aspirations, as well as the existence of perfect rights, which are recognized and enforced by law '*ubi jus ibi remedium,*' (where there is right, there is remedy).

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, act as a barricade against tyranny of the majority and provide security against arbitrary action by the government. It enhances individual's freedom for development to his and her fullest potentiality.

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

- (a) Absolute rights;
- (b) Civil rights;
- (c) Political rights;
- (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 (including freedom of speech and press as proposed by Bentham);
- (j) Inalienable rights (equality before law and the right to life). In almost all of its variants, constitutional liberalism²² 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 life²³, liberty, economic freedom and the pursuit of happiness;
- (l) Inherent rights (right to life);
- (m) Negative and positive rights as described by Spencer;
- (n) Perfect rights²⁴ and Imperfect rights²⁵;
- (o) Personal rights;
- (p) Progressive rights;
- (q) Proprietary rights; Lord Buddha said – the happiness of the average man depend on his economic security (*atthi-sukkhā*), the enjoyment of ones's wealth (*bhoga*);
- (r) Sovereignty and natural rights as classified by Rousseau;
- (s) Standing rights, such as access to justice;
- (t) Defensive rights;
- (u) Substantive rights which include rights to education and employment; and
- (v) Non-derogable rights. These provide the assurance for the protection of civil liberties, which in many countries is not expressly provided for.

²²Constitutional 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.

²³Hylozoism by Cudworth – the theory that life is inherent in all matters.

²⁴ Perfect right is recognized and enforced by law "*ubi jus ibi remedium*" where there is right, there is remedy.

²⁵ Imperfect rights are recognized but not enforced by law – time based or declarations of principles of state policies.

Constitution must incorporate protection against torture and other forms of degrading treatment incorporating the essence of the UN Convention against torture, and capital punishment. These are progressive guarantees of inalienable human rights. The Fundamental rights or Bill of Rights provide vertical rights of an individual against the State and also cater to the horizontal rights among individuals. Dr. B.R Ambedkar stated:

“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.”

Further, the Constitution confers the First Generation Rights in the nature of civil and political rights; the Second Generation Rights concerning the right to economic, social and cultural rights; and the Third Generation Rights pertaining to solidarity rights such as the right to peace, happiness and a 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 though the extent to which it can be enforced must be a matter of careful judgment. There are certain rights, which are non-derogable rights. Even in emergencies, these rights cannot be trampled upon or suspended. K.N. Jayatilleke mentioned:

“...The ideal state is a democracy working for the material and spiritual welfare of the people, guaranteeing political, religious and personal freedoms as well as economic security with full employment.”²⁶

Fundamental Duties

Rights go with responsibilities and ‘Fundamental Duties’ demands of its citizens to foster tolerance, mutual respect transcending religious, linguistic, regional or sectional diversities. Additional duties of citizens are to help victims of accidents and natural calamity, to pay taxes and to fight corruption. The Constitution confers duty to acknowledge corruption as an evil and empowers the people to play a part in this noble effort, uphold justice and to act against Corruption. Lord Buddha said *“All know the way; few actually walk it.”*

Fundamental duties are based on Buddhism and also on Jenks²⁷ and Austin’s²⁸ 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 the duties espoused by Lord Buddha. Conscious duties make a responsible human being. K.N Jayatilleke also mentioned:

“...Buddhist ethics has also been stated from a deontological standpoint, where men in society, including monks and nuns, are said to have certain duties to perform by virtue of the stations in life they occupy, although the fundamental obligation of all should be to seek finally to attain Nirvana for it is only then that one’s obligations are over (kata-

²⁶ K.N. Jayatilleke, *Dharma Man and Law*, p.87.

²⁷ Jenk’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).

²⁸ Austin’s duties are religious duties which conform with the principle of utilitarian.

karaniya). Man's social duties are to be performed not merely out of a sense of duty but as far as possible out of a spirit of service (gaga), love (metta) and understanding (panna), the opposite of greed, hatred and ignorance."²⁹

The combination of the Fundamental Rights and the Fundamental Duties of every citizen and of the State are required to realize the Constitutional promise. Amartya Sen rightly noted:

*"This is where Gautama Buddha's argument, presented in Sutta-Nipata (discussed in Chapter 9, 'Plurality of Impartial Reasons'), becomes directly and immediately relevant. Since we are enormously more powerful than other species, we have some responsibility towards them that links with this asymmetry of power. ..."*³⁰

The Buddhist theory stated that each person had certain hereditary functions to perform by virtue of his birth called "one's own duty" (*svadharma*).³¹ John Locke said "*in the state of nature, there is freedom and reciprocity.*" Modern constitution must combine both of them. Every person should bear a moral duty to have self-limitation and to enjoy the conferred rights. Lord Buddha said:

*"Let no one forget his own duty for the sake of another's, however great; let a man, after he has discerned his own duty, be always attentive to his duty."*³²

Thomas William Rhys Davids said:

*"The Buddha's doctrine of love and goodwill between man and man is here set forth in a domestic and social ethics with more comprehensive detail than elsewhere. And truly we may say even now of this Vinaya or code of discipline, so fundamental are the human interests involved, so sane and wide is the wisdom that envisages them, that the utterances are as fresh and practically as binding to-day and here as they were then at Rajagaha. 'Happy would have been the village or the clan on the banks of the Ganges where the people were full of the kindly spirit of fellow-feeling, the noble spirit of justice which breathes through these naïve and simple sayings."*³³

Liberty

Liberty was prized by the Classical Greeks such as Aristotle, Demosthenes, Cicero and Tacitus. It is classified into positive, negative, individual and collective liberties. 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."

²⁹ K.N. Jayatilleke, *Dharma Man and Law*, Page 52.

³⁰ The Idea of Justice, page 251.

³¹ *Dharma Sutras* (pronouncements on duty and justice) from the six Angas.

³² Refer Sacred Books of the East, Vol. 10: The Dhammapada and Sutta Nipata, by Max Müller and Max Fausböll, [1881], at sacred-texts.com.

³³ (<http://www.tipitaka.net/tipitaka/study/pageload.php?book=004&page=01>) The Layman's Code of Discipline, Sigalovada Sutta.

The growth of liberty, prosperity and representative government is part of the inexorable progress of human institutions that began with Greek democracy. After the Revolution of 1848 in France, 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 Engels, 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:

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

Liberty is made up 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, includes 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.

Isaiah Berlin’s concept of liberty mentions that negative liberty is where an individual has immunity from arbitrary interference except in accordance with law, and the positive liberty is the exercise of civil liberty. According to Russell, individual liberty is the greatest good and Thomas Hobbes advocated a blend of individual and collective liberty. However, Rousseau and Spencer said that the individual is subordinate to the State.

The establishment and the maintenance of human freedoms, dignity and rights are suggested by Buddhist teachings. The rule of righteousness recognizes liberty in its three dimensions, i.e. liberty of thought, liberty of speech and liberty of action. According to Buddhism, liberty of thought depends on the freedom of mind, liberty of speech on what we could express in words, and liberty of body on all external actions. Bob Thurman³⁴ mentioned that the Buddhist principles of enlightenment, education, individualism, altruism and egalitarianism are realized through democracy.

Freedom

Freedom is a right and a supreme good. Lord Buddha said “*from bondage to freedom (vimuta)*”. Freedom and liberty under the Constitution through the sovereignty of the people and country is absolute. Historically, the birth of freedom is held by many to have happened on 21st September 490 BC in Athens. Russell mentioned that freedom is the supreme good. Buddhism is based on social reforms and freedom for all. Lord Buddha taught eight freedoms and ten advantages. Types of freedom are:

- (a) **Personal Freedom:** the right to think and act without government control;
- (b) **Political Freedom:** the right to participate in the political process;
- (c) **Economic Freedom:** the right to buy, sell and trade private property and the right to employment without government interference. Lord Buddha said, “*A correct economic policy should be based on voluntary participation;*”

³⁴ Professor of Indo-Tibetan Studies at Columbia University, President of Tibet House US, and President of the American Institute of Buddhist Studies (AIBS), NYC and Woodstock, NY .

- (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 philosophers such as Spinoza and Enlightenment philosophers such as Montesquieu. He advanced the “opportunity” and “process” aspects of freedom;
- (e) **Positive Freedom:** the possibility of developing human capabilities and enlarging abilities to contribute to common good;
- (f) **Intellectual Freedom:** Spinoza was against state interference and asked for intellectual freedom; and
- (g) **Freedom of Choice:** the Classical Greeks 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 is wrong.

Negative freedom and positive freedom (which could be seen as self-determination³⁵ or autonomy) were distinguished by Kant. Negative freedom consists of the absence of coercion and the absence of interference from other people.

Democracy

Historically, Cleisthenes invented democracy in 508 BC. The word “democracy” combined the Greek 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 acceptable to the modern Western mind than Plato’s because he comes closer to approving of democracy. However, long before democracy flourished in ancient Greece, the concept took root in the independent republic of *Vaishali*.³⁶ We recorded forty-three types of democracy most of which were responses to changing times and changing situations.³⁷

In Buddhism, the brotherhood of monks was established on democratic foundations with a constitution and code of law governing their conduct.³⁸ The day to day affairs were governed by a liberal culture of equalitarian inter personal relations, advocacy and integrative social and international relations.

Democracy without the right to freedom of speech, opinion and expression has been ineffective to the groaning anguish of the people. Censorship and suppression of publication discourages all true scholarship and learning. However, the concept is not new. Lord Buddha had enunciated the same concept in *Praj Parimitra*, *sMra-bsam brjod-g.sum* and *‘Du-byed-g.sum*³⁹ comprising of *Yid-kyi-‘du-byed*, *Ngag-gi‘du-byed* and *Lus-kyi ‘du-byed*.

³⁵ Article 1 of Part 1 of the covenant of social and political rights.

³⁶See, Parsa Venkateshwar Rao Jr, *Vaishali, A Most Ancient Democracy*:

³⁷Major 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 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.

³⁸Refer *International Journal of Buddhist Thought & Culture*, Volume 11.

³⁹ *bka’-‘gyur* sutra, *Ngapa*.

Buddhist monastic governance is a deliberative form of democracy. The principles and practices governing the organization of the monastic community (the *sangha*) have implied affect to social philosophy and political governance in the Buddhist countries. The monastic community was governed and regulated by a well formulated code of conduct (the *Vinaya*), which formed an integral part of the Buddhist teaching. The day to day affairs of the *sangha* were governed by a liberal culture of equalitarian based on the seniority of ordination in the monkhood.⁴⁰ The monastic body stipulates living in communal harmony, with communal property and a bare minimum of one's private material possessions. It also has the responsibility towards the wider society of public in general. Lord Buddha mentioned that if any institution or country wished to maintain its independence, it should strengthen its democratic forms of governance.⁴¹

In Buddhism, within the monastic community, a practice of debating and discussion amongst equals was recognised. Lord Buddha mentioned that the truth needs to be discovered by a process of rational inquiry untrammelled by faith or tradition.⁴² He asked the disputants to adopt a dispassionate and critical attitude, employing logic and reason in resolving religious and philosophical disputes. Therefore, Buddhism adopted the logical and rationale form of governance, a 'deliberative democracy' which was participatory and accommodating differences of opinion and even dissent without imposing majoritarian decision making principles. In juridical history, personal rights like the right to vote⁴³, freedom of speech, thought, conscience and personal liberty occupied a higher status in the hierarchy of values than property rights.

Objective of Democracy

Democracy is to be '*the rule of public opinion*' in the form of individual and self-determination. Similarly, Lord Buddha mentioned about respect for public opinion in *lokadhipateyya*.⁴⁴ The Constitution must advance both individual and national potentials. Gandhiji explained:

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

Alex de Tocqueville mentioned that "*Democracy does not create strong ties between people. But it does make living together easier.*" The British philosopher Russell commented "*democracy makes social progress possible.*"

In Bhutan, His Majesty the King was keen to ensure the participation and involvement of the people of Bhutan in the evolution of the democratic process. The First Draft of the Constitution was publicly distributed and simultaneously launched on the Internet in both Dzongkha and

⁴⁰The Buddha's own son when ordained as a monk took his place in the monastic community according to seniority. The *Brahmajala* Discourse No 3 which enumerates some 62 types of 'religions and philosophies' (Walshe 1987). *Laksiri Jayasuriya: Buddhism, Politics, and Statecraft*.

⁴¹ Mishra (2004), in his succinct and readable account of this episode, draws attention to an inherent conservatism in governance (e.g., paying heed to custom along-side other more liberal features such as participatory decision making. This indicates the functional and pragmatic nature of governance. *International Journal of Buddhist Thought & Culture*.

⁴² Refer the *Kalama Sutta* or the *Charter of Free Inquiry* (Bhikku Soma 1963).

⁴³The Buddhist concept of "*Tsa Trampa*" was synonymous to the modern concept of election. Historical records show that not only clay tablets were used for voting, but also sticks were used for voting by putting them in a ballot box. The counting and the declaration of the results of such voting were done and displayed before the public for transparency and fairness.

⁴⁴ Anguttara Nikaya I.P.T.S. p. 149.

English.⁴⁵ After receiving feedbacks and comments, the Second Draft was distributed⁴⁶ 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 King in person conducted nationwide consultations to discuss the Constitution with the people of all twenty Districts.⁴⁷ It was a crucial move towards the creation of an *'inclusive democracy'* recognizing the people's participatory role in governance.

Democracy must provide personal choice, common decision making and must stabilize rights with responsibility. However, democracy has its own negative side. Rousseau held that perfect democracy was not for Man. He said *"Where the people are Gods, their government would be democratic."* Alex 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 *'blubbing 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."* Winston Churchill made the famous remark that *"the best argument against democracy is a five minute conversation with the average voter."*

Bhutanese Constitution

I was very fortunate to be the Chairman of the Constitution Drafting Committee. 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),"*⁴⁸ which is similar to the social contract theory⁴⁹. 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."

In order to fulfill national objectives and the pursuit of individual rights and liberties, the Drafting Committee considered the various political theories, principles, references and

⁴⁵On 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.

⁴⁶The second draft of the Constitution was distributed on 18th August 2005.

⁴⁷The 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.

⁴⁸See, Francis Fukuyama, *The Origins of Political Order*, 2011.

⁴⁹Refer, 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.

comments and carried out a study of the different types of constitutions. Consequently, the Drafting Committee studied:

- (a) Royal decrees and edicts, laws of Bhutan, speeches of His Majesty and policies of the Kingdom;
- (b) The religious, cultural, philosophical and political bases of the constitution;
- (c) The history of the evolution of constitution;
- (d) The meaning of constitution;
- (e) The objectives of constitution;
- (f) The nature of constitution;
- (g) Different types of constitution, (we studied around hundred constitutions, out of which twenty were studied in detail);
- (h) Constitutional values⁵⁰ 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) The history of democracy;
- (n) Types of democracy;
- (o) Democratic values⁵¹, democratic traditions⁵² and democratic culture⁵³;
- (p) Emerging legal paradigms, social and ethical control mechanisms;
- (q) Types of sovereignty;
- (r) Interest theories;
- (s) Theories on social, political and public moralities;
- (t) Lessons from numerous constitutional crises 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 reform documents, landmark judgments and constitutional writings; and
- (w) Buddhist and western philosophies.

Preamble

The Preamble is an introductory statement or preliminary explanation of the purpose, directives, and the philosophy of the Constitution. It clarifies the Constitution, states its source and the nature of polity. The Preamble enshrines the values and aspirations of the nation and its people. The Preamble of almost all constitutions begins with the proclamation "We the people"

⁵⁰ *The Significance of Constitutional Values*, Prof Hiroshi Nishihara LLD Waseda University (Tokyo/JAPAN).

⁵¹ Democratic values include life, liberty, equality and dignity.

⁵² Democratic tradition includes rights and responsibilities, separation of power, a change from absolutism and the divine right of kings to constitutionalism.

⁵³ According 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.

representing the collective will of the people. Commenting on the Preamble of the Constitution of Bhutan, Justice Michael Kirby⁵⁴ said:

"In the preamble to the Constitution of Bhutan there are poetical and beautiful words. and one word I fixed my eye upon is 'happiness.'. It's a most wonderful idea really and today we have an obligation to contribute to the happiness of everybody; to contribute to kindness to everybody and I think this is an essential teaching of the Buddha; that we should re-chart in love and amity with everybody, that we should try to bring down inter-conflict strife and war and live together in peace and harmony."

The collective noun, "People" is conceived as a collective body with independent action. "We" denote people as collective body capable of independent and consensual action. Democracy entails the primacy of the people.⁵⁵ It validates the ultimate "will" of the people, which is the product of our common past, the continuity of the present and our shared concern for the future.

The third paragraph is the soul of the Preamble. It reaffirms the sovereign status of Bhutan with a solemn pledge of every Bhutanese to "strengthen the sovereignty of Bhutan." It emphasizes the aspiration of the people to secure for all citizens "liberty" - the liberty of being born in a country of fortunes where individual and collective freedom shall prevail. It affirms to secure and enhance social, economic and political justice, and the equality of status and opportunity.

The Constitution aims to secure perpetual happiness for posterity by laying the broad foundations of government founded upon the principles of justice. It further emphasizes the declaration to enhance the unity amongst the people and promote happiness, peace, tranquility and the well-being of the people for all time to come.

Happiness is a virtue whilst peace is one of the conditions for happiness and progress. Therefore, the basic purpose of our Constitution is to ensure the sovereignty and security of the nation and the well-being of the people for all time to come with continued peace, prosperity, and justice. Lord Buddha said:

"Every living being deserves to enjoy a sense of security and well-being. We should protect life and bring happiness to others."

The success of the past must be ensured for future by the Constitution and the policies of the future must also be strengthened by the Constitution.⁵⁶ The Constitution embodies our best achievements, which have contributed to peace, economic progress and peaceful political transformation.

Checks and balances

⁵⁴ Justice Kirby, the former Justice of the High Court of Australia delivered his talk on 14th & 15th of December 2010 in conjunction with a series of lectures on constitutionalism and democracy organized by the Judiciary of Bhutan with the adoption of the Constitution and the establishment of a Democratic Constitutional Monarchy.

⁵⁵ Schmitt: 'under the democratic theory of the people's constitution-making power, the people stand as the bearer of the constitution-making power outside of and above any constitutional norm'.

⁵⁶ During the Royal audience with the members of the Constitution Drafting Committee, 19th November 2001.

The Bhutanese Constitution has inbuilt checks and balances with the objectives of protecting liberties, freedoms,⁵⁷ and rights by 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. Secondly, functional splitting is enshrined through the separation of power between the three branches of the Government. 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. Constitution has the constitutional remedies. Buddha said:

“Power abused is not all gain, Power is often folly’s bane”.

Environment

It is the fundamental duty of every citizen to contribute to the protection of the natural environment and the prevention of ecological degradation. The Constitution of Bhutan expressly makes every Bhutanese citizen a trustee of the environment and imposes a duty on the State to preserve it. Section 3 of Article 5 mandates that a minimum of 60% of Bhutan’s total land area be maintained under forest cover for all time. The Bhutanese Constitution also incorporates therein the doctrine of sustainable use of natural resources in order to maintain inter-generational equity, based on the doctrine that we hold the environment in trust for future generations. Soli Sorabjee explained:

“When we respect the environment, then nature will be good to us. When our hearts are good, then the sky will be good to us. The trees are like our mother and father, they feed us, nourish us, and provide us with everything; the fruit, leaves, the branches, the trunk. They give us food and satisfy many of our needs. So we spread the dharma (truth) of protecting ourselves and protecting our environment, which is the dharma of the Buddha.”

Principles of State Policy

Article 9 of the Bhutanese Constitution enacts the Principles of State Policy. The provisions under the Principles of State Policy are similar to the creation of a welfare state in pursuit of the goal of Gross National Happiness (GNH).⁵⁸ The concept of GNH advocated by His Majesty the Fourth King encapsulates the vision of a welfare state. His Majesty clarified that:

⁵⁷The 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 Spinoza 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.

⁵⁸Hedonism- pleasure is the highest good. Eudaimism – “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

“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 it 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 and cause discontentment and unhappiness.”

One of the most important provisions of Article 9 is the effort of the State to introduce and carry out policies to minimize inequalities of income and to discourage the concentration of wealth among a few citizens. Lord Buddha said that he is *“born for the welfare and happiness of mankind”* (*manussa-lokehita-sukhataya jato*) and explained dependence on his economic security (*atthi-sukha*), the enjoyment of one’s wealth (*bhoga-sukha*), freedom from debt (*anana-sukha*) and the blameless moral and spiritual life (*anavajja-sukha*). Lord Buddha said:

“Every living being deserves to enjoy a sense of security and well-being. We should protect life and bring happiness to others.”

Salutatory provisions of our Constitution

Some of the salutary provisions of our Constitution are:

- (a) No immunities are granted to members of Parliament to cover their corrupt acts;
- (b) Any member of the National Council belonging to any political party is disqualified from being a member of the National Council;
- (c) Change of political parties by an elected member after election is also forbidden. Its aim is to prevent post-election horse-trading. In the absence of a clear electoral verdict, small parties or independent candidates would disrupt the whole democratic essence of Parliament as Palkhiwala wrote:

“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.”

- (d) Election campaign funding is provided by the State to curb malpractices and to promote political morality;

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.”

- (e) Membership of Parliament is an 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 of five years;
- (f) The Constitution may not be amended during an emergency, and the constitutional remedy for enforcement of the non-derogable civil liberties cannot be suspended; etc.

Survival of Constitution & Democracy

Many philosophers believed that the 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 degenerate forms of government. To minimize casualties and facilitate transition, Bhutan looked into Aristotle's political cycle comprising six forms or 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 flexible⁵⁹ enough to be dynamic in order to embrace changes in time or context. It goes well with the Buddhist principle of impermanence and temporariness of things. The Buddha believed that even socio-political phenomena are under constant change. When the Buddha and his disciples established the Buddhist Sangha, they developed many improvements and reforms. The laws governing the monks were also changed from time to time. On the day of his death, the Buddha had said:

*“When I am gone, Ananda, let the order, if it should so wish, abolish all the lesser and minor precepts.”*⁶⁰

Therefore, it shows that change is not only inevitable but is also necessary. But the changes should be introduced 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, in the opinion of Harvard Professor Prof. Mark V. Tushnet, the opposition would not be destructive. However, we must be ever mindful of Aristotle's warning 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 amendment⁶¹ 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, although unconstitutional with respect to the procedure by which it has been enacted⁶², 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

⁵⁹The flexible constitution lays down a special process for its amendment. It does not distinguish between a constitutional law and an ordinary law.

⁶⁰ F. Max Muller (ed.), *Sacred Books of the East*, Vol. XI, trans., 1965, p. 112.

⁶¹ “If the Sangha so desires, it may abolish the minor rules of the Community after my death”, Digha Nikaya.

⁶² “Enacted a code of rules or precepts” (*pananattam sikkhapadam*) Vinaya Pitaka III.

creation of a legalized dictatorship. The entrenched clauses are often challenged by their opponents as being undemocratic. But these entrenched clauses in reality form the basic structure of the Constitution and its Immutable principles. Truly, amending the constitution is not unlimited⁶³.

A Constitution must deliver the constitutional goals and contribute to social and political stability. It must maintain stability and peace in times of bewildering change. We have a system of election in which a party that loses the election must not feel that it has been permanently defeated, and this point has been demonstrated beyond doubt in our second election. It should not therefore adopt a policy of aggressive opposition to the governing party. The constitution must allow the governance of the elected government to pursue those goals for the nation that the Constitution and the governing party identify. It needs to establish social, political and legislative morality⁶⁴ as well as 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 but at the same time, in the words of Rousseau ‘the constitution is a law engraved on the hearts of the citizens. The objective of the Constitution is to provide a sacred refuge and give guidance to the nation as Lord Buddha said:

“...for the welfare and happiness of mankind (manussa-loke hita-sukhataya jat)”⁶⁵

Constitution is not an ordinary law. It is the statement of the fundamental rights of the citizens, which normally form 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. 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 (*koinos nomos*), the partial skepticism⁶⁶ of the Sophists, and the epochs of Cynicism, Rationality, Humanism⁶⁷, Renaissance, Enlightenment (the Age of Reason), Empiricism⁶⁸, Romanticism,

⁶³ The Supreme Court of India in *Kesavananda Bharati v. State of Kerala* has espoused the “basic structure” doctrine which holds that the Indian Constitution (Article 368) does not allow the Parliament to “alter its basic structure or the framework of the Constitution.” Over the years, through other landmark cases such as *Minnerva Mills*, *Waman Rao and I.R Coelho cases*, the Supreme Court has determined the “basic structure” to include unwritten principles of rule of law, federalism, democracy, secularism and judicial independence.

⁶⁴ Raja Dharma with Lessons on Raja Neeti Second Edition Justice Dr. M. Rama Jois “*Supremacy of law at work*: - There is an illuminating instance related in *Rajatarangini*, as to how Chandrapida, the king of Kashmir (680-688 A.D), upheld the rule of law. [*Rajatarangini*, IV 55-70]... *Rajatarangini* IV 59-60: If we, who are the judges of what is right and what is not right, act unlawfully, who then would abide by law?”

⁶⁵ Anguttara Nikaya.

⁶⁶ *ajnana-vadin, amaravikkhepika*

⁶⁷ K.N. Jayatilleke writes in his book *Dharma-Man and Law* that “Buddhism resembles modern scientific humanism”.

⁶⁸ Lord Buddha said “*my statements should be accepted only after critical examination and not out of respect for me*”– *Tattvasamgraha*.

Postmodernism, all the way to today's complex and technological world, were reactions, counter-actions, often revolutionary, so that individual freedoms, a harmonious society and the sovereignty of the nations will not perish. Philosophies and spirituality expressed through constitutions and anchored on the various schools of thought such as teleology, deontology, consequentialism and realism act as self-correcting and self-imposed restraints. K.N. Jayatilleke in his book *Dharma Man and Law* explains that:

“We see that the Buddhist ethical theory is teleological in so far as its conceptions of right and wrong are goal-determined by the notions of the Summum Bonum and the good of mankind. At the same time Buddhist ethics has also been stated from a deontological standpoint, where men in society, including monks and nuns, are said to have certain duties to perform by virtue of the stations in life they occupy, although the fundamental obligation of all should be to seek finally to attain Nirvana for it is only then that one's obligations are over (kata-karaniya). Man's social duties are to be performed not merely out of a sense of duty but as far as possible out of a spirit of service (gaga), love (metta) and understanding (panna), the opposite of greed, hatred and ignorance.”

Therefore, Constitution embodies hope for survival and reassurance for our future in the grand quest for the national vision of ever greater public will. Collective dreams and common aspirations for a unifying vision expressed in this document will address common misery and shared anguish to assuage human suffering and lead a nation to glory.

Thank You and Trashi Delek!