

Constitutionalism, Rule of Law & Democracy

The idea that “constitutionalism and rule of law” is the foundation of modern states and civilizations has recently become, even more talismanic than that of democracy. The rule of law is not an arid legal doctrine but is the foundations of a fair and just society, a guarantee of responsible government, and an important contributor to economic growth, as well as offering the best means of securing peace and co-operation.

The institutions fashioned by the constitution – parliament, executive and the judiciary are intended to bring about a form of government that will guarantee that democracy and liberty are not empty promises.

In a democracy, enduring institutions depend upon the enduring support of ordinary citizens and citizens are more likely to support those institutions they understand.

Constitutionalism¹, Rule of law², and promoting a Just Society³ essential for achieving GNH⁴ and laying a sound foundation for democracy⁵:

1. Constitutionalism:

Constitutionalism has often been defined as the struggle for sovereignty and fundamental rights, and as is the case in most countries forged in the fire of bloodshed and violence.

His Majesty the King on the occasion of the 105th National Day commanded that *“in other nations, difficult moments in their history were met with strife, violence and conflict as people sacrifice national interest in order to achieve individual ambitions. In Bhutan such acts and events have never occurred. Our way of life, our heritage, loyalty and values remain strong in the hearts of our people and our people stand ready even in times of great personal hardship, to place national interest above self. I am so proud of our people and offer my deep gratitude for the love you have shown for your Nation”.*

In the context of Bhutan, the political transition from Monarchy to a democratic government was formalized in a unique ceremony on 18th July, 2008 when HM the King and the representatives of the people signed the country’s first written constitution. At the ceremony HM the King said, *“The highest achievement of 100 years of Monarchy has been the constant nurturing of Democracy...I hereby return to our People the powers that had been vested in our Kings by our*

¹ Article 1 section 1 – sovereign power belongs to the people, Article 1 section 9 – Constitution supreme law of the state, Article 1 section 11 - supreme court final arbiter of the constitution, Article 1 section 13 – separation of powers, Article 21 section 1- independence of the judiciary, and Article 7 section 6 and Article 23 section 2 – right to vote and universal suffrage.

² Article 7 section 15 – equal before the law.

³ Article 8 – fundamental duties and Article 9 section 3 – civil society.

⁴ Article 9 section 2 – pursuit of GNH.

⁵ Article 1 section 2 – democratic constitutional monarchy.

forefathers 100 years ago". HM added, *"As King, henceforth, it is my sacred duty to ensure the success of our new democracy so that it fulfills the aspirations of our people always"*. In a gracious gesture HM the King descended from the Throne and shook hands with the Prime Minister, Ministers and Parliamentarians. It was recognition of the origin of the Monarchy in a democratic manner in 1907 and continuity in its new avatar of a Democratic Constitutional Monarchy.

Therefore, the authority to govern offered to our first Monarch in 1907 by our ancestors (historic genja – oath of allegiance) was graciously and voluntarily handed back to the people by our benevolent Kings after 100 years - a century of benevolent Monarchy, which itself originated by a democratic process. The Bhutanese democracy is thus, truly a gift from our monarchs, and not the reward of a revolution.

Even though His Majesty the King while addressing the Constitution Drafting Committee on 30th November, 2001 commanded that *"I have always maintained that the destiny of the country lies in the hands of our people. 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. The Constitution should not be considered as a gift from the King to the people, it is my duty to initiate the constitutional process so that our people can become fully involved in shaping and looking after the future destiny of our country."*

His Majesty the King in his address to the nation on the occasion of the 105th National Day (2012) stressed that "we have made a good start in our transition to democracy but much remains to be done." His Majesty however said that achieving democracy is not the goal "the real fruits of our efforts should be that democracy brings greater unity, harmony and prosperity to our Nation. Democracy must be able to fulfill the aspirations of our people."

Democratic and Liberal Reforms initiated by the Monarchy

Robert Mackenzie in 1880 wrote that: *"Human history is a record of progress – a record of accumulating knowledge and increasing wisdom, of continual advancement from a lower to a higher platform of intelligence and well-being. Each generation passes on to the next the treasures which it inherited, beneficially modified by its own experience, enlarged by the fruits of all victories which itself has gained..."*

The Monarchy's love for the people and conviction that peace and happiness is crucial to people which must depend on law and order and the protection of basic rights is amply demonstrated in the patronage accorded to the judiciary and the establishment of democratic institutions. There is a saying in Bhutanese that it is the good fortune of the people to be blessed with benevolent monarchs – Bhutan has been blessed with progressive and democratic kings. Their Majesties worked tirelessly to establish very important democratic institutions and initiated timely

reforms to strengthen the judicial system in the country. Many acts, legal ordinances and Royal decrees were promulgated to protect basic rights of the people and to create a “fair and just society”, on the basis of which all the people of Bhutan stand equal before the law today⁶.

Chronology of Events related to democratic reforms:

1616	Arrival of Zhabdrung Ngawang Namgyal
1651	Established a dual system of governance – Chhoesid - temporal powers handed to the 1 st Deb, Umzed Tenzin Drugyel and spiritual powers to Pekar Jungney designated as Je Khenpo – separation of the Church and State
1652	Codification of Zhabdrung’s customary laws and traditional laws, both temporal and spiritual, Tsa Yig denotes the separation of spiritual and temporal authority, signified by the golden yoke and the silken knot
1730 - 1737	10 th Desi, Mipham Wangpo consolidated and amended certain portions of the Zhabdrung’s Code
1744 - 1764	Zhabdrung’s code further amended during the reign of the 13 th Desi Choegyel Sherab Wangchuk
1907 - 1952	The 1 st & 2 nd Druk Gyalpo’s made further modifications to the Code
1953	Establishment of the National Assembly of Bhutan
1957	Thrimzhung Chhenmo enacted during the reign of the 3 rd hereditary monarch after discussion during several sessions of the National Assembly since early 1950’s
1960	Appointment of Drangpoens
1965	Establishment of the Royal Advisory Council
1967	Establishment of the High Court
1968	Establishment of Lhengye Zhungtshog (cabinet)
1974 onwards	Major changes initiated by His Majesty the fourth Druk Gyalpo with regard to enactment of new laws and institution building to keep pace with the rapid socio-economic development in the country
1976	Establishment of the annual National Judicial Conference
1978	Establishment of the Law Reform Committee (tasked with the mandate of amending and drafting separate Acts for Land, Marriage, Inheritance, Loan etc. which were previously all contained in the Thrimzhung Chhenmo
1978	Establishment of Dungkhag Thrimkiduensa’s (Court)
1981	Establishment of the DYT
1985	Appointment of the Chief Justice
1990	Establishment of a separate Judicial Cadre – JC 01
1991	Candidates sent to India and abroad to pursue courses in Law (LL.B/LL.M)
1991	Establishment of the GYT

⁶ 79th Session of the National Assembly June 2001.

1994	Research and Training Bureau established under the aegis of High Court
1995	Establishment of the National Legal Course
1997	Bench Clerks professionally trained
1998	Devolution of power to an elected cabinet during the 76 th session of the National Assembly
1999	Mechanism for a vote of confidence in the monarch endorsed by the 77 th session of the National Assembly
2001	Civil & Criminal Procedure Code of Bhutan enacted
2001	His Majesty the King commanded drafting of a Constitution of Bhutan under the chairmanship of the Chief Justice of Bhutan
2003	National Judicial Commission constituted
2004	Capital punishment abolished by royal decree, March 20, 2004
2004	Bhutan Penal Code enacted
June 30, 2007	Royal Decree of His Majesty the Druk Gyalpo on the conduct of the first Parliamentary Elections. His Majesty Decreed that the Parliamentary Elections be conducted “as per the provisions of the draft Constitution, Electoral Bills, Rules and Regulations”.

Origins of the Constitution of Bhutan:

His Majesty the Third King’s liberalism led to the formation of the National Assembly in 1953, enactment of the Thrimzhung Chhenmo (1957); establishment of: the Royal Advisory Council (1965), High Court (1967), Lhengye Zhungtshog – Cabinet (1968), and Universal Adult Franchise etc. The true spirit of democracy recognizing the dignity and worth of the individual was ingrained in Bhutan’s cultural ethos of a constitutional monarchy⁷.

His Majesty the Fourth Druk Gyalpo has prepared the people of Bhutan steadily to embrace a democratic form of governance by instituting new mechanism/institutions in the governance of the Kingdom in addition to the already existing democratic institutions established by His Late Majesty the Third King.

In 1981 His Majesty commanded the establishment DYT and GYT in 1991 thereby, inducting a programme of administrative and political decentralization to enhance democratic powers, social responsibilities, transparent process and decision making at the grass roots level.⁸ The greatest change in the devolution of power took place during the 76th Session of the National Assembly in 1998. Through a royal edict, the then existing Lhengye Zhungtshog (Cabinet) was dissolved and the members of the National Assembly elected a new Council of Ministers by secret ballot to whom full executive powers were devolved with the position of Prime Minister (head of Government) being rotated annually amongst the Ministers⁹. The 77th Session with

⁷ Traditional Democratic Polity of Bhutan, CJI JS Verma.

⁸ Governance, Bhutan in Focus, at 12.

⁹ Similar to the Swiss system of Head of State.

reluctance debated and endorsed a mechanism for a vote of no-confidence in the monarch.

In 2001 His Majesty the Fourth King commanded the drafting of the Constitution with the conviction that ***“Monarchy is good as long as the monarch is good”***. During the audience granted to the SAARC Chief Justices in June 2005, His Majesty commanded to the Chief Justices’ – ***“you are where you are because of your merit, but I am where I am, a king by birth.”*** His Majesty the Fourth King commanded that ***“The basic purpose of the constitution is to ensure the sovereignty and security of the nation and the well being of the Bhutanese people for all time to come. The political system of the country must evolve so that people would continue to enjoy peace and prosperity, justice, and the fundamental rights which have always been enshrined in the Bhutanese system”***¹⁰.

The Constitution is the embodiment of the most gracious and benevolent testimony of handing back power to the people by an absolute, enlightened Monarch. It hence, embodies the vision of His Majesty to ensure rule of law, encourage sound political morality and give the country a political system that will provide good governance and fulfill the aspirations of the Bhutanese people. The constitution embodies the pursuit of peace, economic progress and political transformation in the Kingdom.

Objectives of the Constitution:

His Majesty advised the Constitution Drafting Committee, that ***“the Constitution must create a political framework that will make democracy effective and vibrant in our country. It must embody the hopes and aspirations of the people, draw on the existing system and laws and on the lessons learnt from countries around the world. Bhutan is in a unique position today and time and opportunity are in our favor, to develop a system of governance that will be in the best interests of the Bhutanese people and the country. It is of utmost importance for us to utilize this opportunity to frame a Constitution that will create a dynamic system of governance, which will uphold the true principles of democracy. The Constitution must become the golden pillar that will support and enable the political system in Bhutan to safeguard the sovereignty of the country and the rights of the people”***.

Synopsis of the Constitutional Provisions:

The objectives specified in the Preamble ***“... to strengthen the sovereignty of Bhutan, 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”*** contains the basic structure and philosophy behind the drafting of the Constitution as commanded by His Majesty the Druk Gyalpo, Jigme Singye Wangchuck.

The Constitution of the Kingdom of Bhutan, is the supreme law of the land (Article 1 §§9&10). It establishes a Democratic Constitutional Monarchy (***Article 1 §2***), with

¹⁰ His Majesty the King Jigme Singye Wangchuck, 2001.

the separation of the Executive, Legislature and the Judiciary which shall exercise only the powers specified in the constitution itself (*Article 1 §13*). All other powers are reserved by the Constitution to the people (*Article 1 §1*) ***sovereign power belongs to the people of Bhutan.***

The *Fundamental Rights*¹¹ (*Article 7*) ***guarantees the people protection against improper acts by the government.*** The rights protected include such matters as free speech, freedom of peaceful assembly, freedom to seek redress of grievances, security of person, right to privacy (freedom from unreasonable searches and seizures), due process of law, protection against seizure of property without just compensation, right to information, freedom from arbitrary arrest or detention etc.

The provisions as to Fundamental Duties (Article 8) cannot be enforced by writs; they can be promoted only by constitutional methods. But they can be used for interpreting ambiguous statutes or while interpreting equivocal statutes which admit of two constructions. The fundamental duties may be particularly invoked in litigation concerning environment, on the principle that as the duties are obligatory on citizens, the state should also observe them.

The Constitution also outlines the aspiration for a welfare State under the Principles of State Policy (Article 9) as being fundamental principles in the governance of the kingdom and it shall be the duty of the State to apply these principles in making laws and governance of the country. However, the Directives do not confer any enforceable rights and their illegal breach does not invalidate any law, nor does it entitle a citizen to complain of its violation by the state so as to seek mandatory relief against the state. The Directives may be however, deemed to have a positive aspect and held to supplement fundamental rights in achieving a welfare state.

The Constitution provides that representation in the National Assembly shall be by ***two political parties (Article 15 §5)*** established through a primary round of election after expiry of the term of the National Assembly, in which all registered parties may participate. The party that wins a majority of seats in the National Assembly in the general elections is declared as the ***Ruling Party*** and the other as the ***Opposition Party (Article 15 §8)***. In order to prevent horse trading and to provide a stable government, the Constitution provides that the members of the National Assembly belonging to one party shall not defect to the other party either individually or en bloc (***Article 15 §10***). Adequate provisions have also been included in the Constitution, to ensure that political parties are not based on regionalism, ethnicity and religion, so that it is broad based with cross-national membership and support and is committed to national cohesion and stability (***Article 15 §3***).

¹¹ It is in consonance with the rights enumerated in the UN Civil & Political Rights and the Optional protocols.

The Constitution also adequately provides for safe guarding the *Institution of Monarchy (Article 2), Spiritual Heritage (Article 3), unique Culture (Article 4), and Environment (Article 5)* of the Kingdom.

The Constitution establishes three separate branches of government - *Legislature (Article 10), Executive (Article 20), and Judiciary (Article 21)*. The three branches of the government are to operate within a constitutional system known as “checks and balances.” Each branch is formally separate from the other two, and each has certain constitutional authority to check the actions of the others.

The Legislative Branch [Articles 10, 11, 12, and 13]

Parliament (Dey-tshog), the national legislature of the Kingdom of Bhutan, is composed of two houses - the *National Council (Gelyong Tshogdey)* and the *National Assembly (Gelyong Tshogdu)*.

The total membership of the *National Council is 25*. Each of the 20 Dzongkhags has one representative elected as a councilor for a five-year term and the remaining members are nominated by His Majesty the Druk Gyalpo. Members of the National Council shall neither belong to nor have affiliation to any political party (*Article 11 §3*)¹².

Members of the *National Assembly (maximum of 55 members)* are to be elected from the Dzongkhags. Each Dzongkhag receives a number of representatives in proportion to its population (delimitation - to be reviewed every 10 years). The entire house is to be elected every five -years, however, unlike the National Council; the National Assembly may be prematurely dissolved on the recommendation of the Prime Minister to the Druk Gyalpo or in the event of a motion of no confidence vote against the government being passed in the National Assembly.

*To become law, proposed legislation must be passed by both houses and approved by His Majesty the Druk Gyalpo*¹³. If His Majesty the Druk Gyalpo does not sign or vetoes, a bill, it may still be enacted, but only by a two-thirds vote of the total number of members of both houses present and voting in a joint sitting and the Druk Gyalpo is required to grant assent¹⁴. Money bills and financial bills can originate only in the National Assembly, whereas, any other legislative bills may originate in either house.

The Constitution establishes a *parliamentary/two party system of government* with the executive power vested in the Lhengye Zhungtshog consisting of ministers

¹²Therefore, it is important that the National Council remains apolitical in the next elections to enable it to continue playing the role of a House of Review effectively as envisaged in the Constitution.

¹³ Article 10 section 1 – explicit non-delegation doctrine vested with Parliament in the enactment of laws.

¹⁴ Article 13 section 11 – the Druk Gyalpo is required to grant assent to bills endorsed by a joint sitting of Parliament.

headed by the Prime Minister who must all be elected members of the National Assembly¹⁵.

Each house of Parliament may also provide for *appointment of Committees* to carry out the business of Parliament, organized by subject-matter, that draft laws, exercise general oversight over government agencies and programs, enact appropriation bills to fund government operations, and monitor the operation of government programs.

The Executive Branch [Article 20]

The leader/nominee of the party, which wins a majority of seats in the National Assembly is appointed as Prime Minister to head the Lhengye Zhungtshog¹⁶, after every general election (five years) and may serve no more than two terms in office. The Druk Gyalpo appoints ministers from among the members of the National Assembly as members of the Lhengye Zhungtshog on the recommendation of the Prime Minister¹⁷. No more than two members elected from the electoral constituencies of the same Dzongkhag are entitled to be appointed as ministers¹⁸.

The Lhengye Zhungtshog and other members of the administration are responsible for operating the executive branch of the Royal Government and for executing and enforcing the laws. The Attorney General¹⁹, who is the chief legal officer of the Royal Government, is responsible for all criminal prosecutions, for representing the government's legal interests in civil cases and providing necessary legal advice to the government.

The Judicial Branch [Article 21]

The Judiciary (Royal Court's of Justice) is a totally separate, self governing branch of the government. *The Constitution designates the Supreme Court as part of the Royal Court of Justice, as being the guardian of the Constitution and the final authority on its interpretation because its rulings protect the rights and liberties guaranteed by the Constitution. Through fair and impartial judgments, the Royal Court's of Justice must determine facts and interpret the law to resolve legal disputes.*

The Courts do not make the laws. That is the responsibility of Parliament. Nor do the courts have the power to enforce the laws. That is the role of the Prime Minister/ Lhengye Zhungtshog and the many executive branch departments and agencies. But the judicial branch has the authority to interpret and decide the constitutionality of national laws and to resolve other disputes over the national laws.

¹⁵ Unlike in the U.S. where neither the President nor any members of the Cabinet sits in the Congress, besides, the President's political party does not need to hold a majority of seats in the Congress to stay in office

¹⁶ Article 17 section 1.

¹⁷ Article 17 section 3.

¹⁸ Article 17 section 5.

¹⁹ Article 29 – Attorney General.

The members of the Constitution Drafting Committee have considered an independent judiciary essential to ensure fairness and equal justice to all citizens of the Kingdom of Bhutan. The Constitution promotes judicial independence of the Supreme Court and High Court in two principal ways. First, judges appointed under *Article 21, §§ 4, 5, 11 and 12* of the Constitution can be removed from office only by way of impeachment or may be censured or suspended only by a command of the Druk Gyalpo on the recommendation of the National Judicial Commission for proven misbehavior, which, in the opinion of the Commission does not deserve impeachment. Second, the Constitution provides that judges salary and benefits shall not be varied to their disadvantage after appointment (*Article 31, § 7*), which means that neither the Executive nor Parliament can reduce the salary of judges holding constitutional office, although it can be eroded by inflation. These two protections help an independent judiciary to decide cases free from popular passion and political influence.

The automatic appeal system up to the level of the larger bench of the High Court is designed to correct errors in decision making by the lower judiciary. Judicial accountability is ensured through impeachment in the higher judiciary and disciplinary actions initiated by the National Judicial Council for the lower judiciary. The matter related to immunity provided to the judges ensures that judges are not liable to an action for damages, so that a judge may be able to do his duty with complete independence and free from fear.

It is imperative for the people to understand the functioning of the judiciary, its role in protecting the constitution and the related need for judicial independence.

Provisions of several Articles of the Constitution end with the words “in accordance with law” or “shall be regulated by law” is an indication that, laws must be framed if not already existing to frame and embody the idea of the constitutional Articles. A Constitution does not ensure that the State will abide by it nor will it prevent a dictatorship from emerging if the separations of powers, checks and balances enshrined in the Constitution is not applied or implemented with the constitutional bodies remaining ineffective. Egypt had a constitution in place for several decades and yet despite that, Hosni Mubarak and his predecessors managed to co-opt it to build their authoritarian regimes. A constitution alone does not guarantee a democracy. While a flawed Constitution does not mean a country’s future will be bereft of a vibrant democracy – it is in the hands of the people.

2. Rule of Law:

The rule of law protects the citizen from an arbitrary government. In legal and political theory, the rule of law is a political ideal that demands that government and its officials shall be ruled by law and be subject to it. The ideal is often expressed in the phrase “government by law and not by men”, and has its roots in England’s transition from absolute monarchy to parliamentary governance. The actions of government officials, ministers, judges, bureaucrats and police must be

governed by a duly enacted general law, and should not be guided by personal whims and fancies.

It is the undisputed supremacy of law, that envisages a state of things in which everyone, respects the law; where law is to be followed by everyone collectively and individually by the citizens as well as the state; decisions must be made by the application of the established principles and rules. “Howsoever high you may be the law is above you”. The only exception being His Majesty the King as provided under Article 2 section 15 “the Druk Gyalpo shall not be answerable in a court of law for His actions and His person shall be sacrosanct”.

The criminal justice system, comprising, chiefly, the police, the prosecution and the judiciary, is the arm of the state closest to the citizen. This proximity should not empower the organs of State to violate the rule of law. If a police officer wrongly arrests or tortures a citizen, if a rich or powerful person escapes punishment for a crime by bribing the prosecution, or if a minister interferes in the criminal justice machinery to secure partisan goals, the ideal is compromised.

An independent and easily accessible judiciary which fearlessly tries people, irrespective of power, wealth, status or political affiliations is a sine qua non for the rule of law. The rule of law also demands an independent police organization and an independent prosecution service, which are free from political interference in their day to day functioning while being accountable for their actions. In this respect, the design of public institutions should be informed by the rule of law.

"Rule of Law" refers to a rules-based system of self-government with a strong and accessible legal process. It features a system based on fair, publicized, broadly understood and stable laws; and diverse, competent and independent lawyers and judges. The rule of law is the foundation for sustainable communities as it provides opportunities based on equality and equity.

Rule of law embodies the basic principles of equal treatment of all people before the law, fairness, and both constitutional and actual guarantees of basic human rights. Today everybody professes to the rule of law as a solution to any trouble²⁰.

There are “Rule of Law” and “Rule by Law” regimes. The distinction between the Rule of law and Rule by law is a condition where all sections have respect for the laws of land and the other being law or code imposed on society by a dictator respectively (rule of law-developed countries and rule by law-developing countries)²¹.

²⁰With the growth of roughly comparable judicial institutions across the world, and with ever increasing similarity in the fundamental problems they face, there is much to be learned from the judicial solutions adopted by other nations and adapt it to suit the needs and circumstances existing in Bhutan.

²¹If the rule of law is the rule by judges (as it is frequently said to be), and the rule by law is the rule of the elected representatives in Parliament without any possibility of that rule being questioned by the judicial

Crime and punishment are not only intuitively interesting, but also complex:

For example: imagine that two men, Dorji and Karma, are plotting to steal a sack of rice from a woman. Dorji originally had the idea for the robbery, and convinced Karma to distract the woman as Dorji stole rice from her. If the two men are later caught, should they receive the same punishment? What if Dorji is about to steal the rice, and then decides not to? What if the men did not plot to steal the woman's rice, but merely thought the rice belonged to them and took it by mistake? What if because the two men stole the rice, the woman's child starved and died – should the two men be held responsible for the death of the child?

Actus non facit reum, nisi mens sit rea (digpa yenla zhi): mens rea and actus reus; accomplice liability; attempt; justification & excuse; mistake (law and fact) and causation.

Rule of law:

- (a) Utilitarian moral reasoning – Jeremy Bentham: maximizing happiness for as many as possible, if necessary at the expense of the minority;
- (b) Categorical moral reasoning - Emmanuel Kant: an action is always good or bad, regardless of the consequences; and
- (c) Consequential moral reasoning - an action is moral if the consequences of it are good.

Examples:

- (a) Train track switch point level where the track divide into two tracks – choice between lives of 5 workers on one track and a single life on another track;
- (b) Instead of a divided track a single straight track – lives of five worker can be saved by pushing one fat man on to the tracks (man going to die by cardiac arrest in a year) or by flicking a switch that opens a trap door on which the man is standing;
- (c) Doctor transplant surgeon in a country where involuntary euthanasia is legal and compatible blood types – five ill persons requiring organs and one healthy person;
- (d) “Saving private Ryan” – Tom Hanks (Captain) and four others all die to save one private Ryan.

Role of the Judiciary in promoting the Rule of Law:

The role of the judiciary is central to the concepts of justice and the rule of law²². Therefore, the Judiciary of Bhutan must evolve into an effective branch of social service, and strive to maintain confidence of the Bhutanese people in the legal and judicial process. The Judiciary must uphold and protect the freedom and rights of

arm of the State, I for one can definitely say that I would prefer to live under a rule of law dispensation rather than under a rule by law regime – Fali S. Nariman, Before memory Fades at p. 377.

²² Article 21 section 1 “The judiciary shall safeguard, uphold, and administer justice fairly and independently without fear, favor, or undue delay in accordance with the rule of law to inspire trust and confidence and to enhance access to justice”.

the citizens against the power of the state, the wealthy and the powerful. The Rule of Law administered by the Courts must effect a reconciliation of individual liberty commensurate with the socio-economic progress achieved by Bhutan. To achieve this aim, the machinery and administration, infrastructure and facilities of the Courts must evolve, adapt and keep pace with the changing times.

A predictable legal system with fair, transparent and effective judicial institutions is essential. The judicial branch after all, is the final arbiter of the constitution (Article 1, section 11). Ideally, through the application of judicial or constitutional review, judges can, not only mediate conflicts between political actors but also prevent the arbitrary exercise of government power. In fulfilling this role, the weakest branch of government assumes an important role in ensuring the submission of state to the laws of the land. Nevertheless, the ability of the courts to fulfill this role is by no means automatic. Regular and timely reforms are necessary for its success. Rule of law is considered a fundamental component of a democratic system. Judicial reforms must promote the rule of law.

In the Royal Address to the 19th National Judicial Conference 11th June, 2010, His Majesty the King stated that *“preservation of culture and traditions must be ensured, the judiciary must initiate reforms and ensure progress with Bhutanese values and tradition being the essence of any change and that law must be developed as a tool for ensuring social harmony and social justice under the matrix of Rule of Law”*.

3. Democracy:

Common features of Democracy: Some Common features of Democracy are (a) having a Constitution; (b) Separation of Powers between Legislative, Executive and Judiciary; (c) Laws debated and passed by the parliament; (d) Decision by the government based on laws; (e) Elections; (f) Political Parties; and (g) Referendums.

*Democracy in a complex society may be defined as a political system which supplies regular constitutional opportunities for changing the governing officials. It is a social mechanism for the resolution of the problem of societal decision-making among conflicting interest groups which permits the largest possible part of the population to influence these decisions through their ability to choose among alternative contenders for political office*²³. This definition abstracted from the work of Joseph Schumpeter and Max Weber²⁴ implies a number of specific conditions:

- (a) A “political formula” a system of beliefs, legitimizing the democratic system and specifying the institutions – parties, a free press, etc. which are legitimized and accepted as proper by all;
- (b) One set of political leaders in office; and

²³ Some Social Requisites of Democracy, Seymour Martin Lipset p 71

²⁴ Joseph Schumpeter, Capitalism, Socialism and Democracy (New York: Harper and Bros., 1947), pp 232-302; Max Weber, Essays in Sociology, New York: Oxford University Press, 1949) p.226

- (c) One or more sets of leaders, out of office, who acts as a legitimate opposition attempting to gain office.

The need for these conditions is clear:

- *First, if a political system is not characterized by a value system allowing the peaceful “play” of power – the adherence by the “outs” to decisions made by “ins” and the recognition by “ins” of the rights of the “outs” – there can be no stable democracy;*
- *Second, if the outcome of the political game is not the periodic awarding of effective authority to one group, a party or stable coalition, then unstable and irresponsible government rather than democracy will result;*
- *Third, if the conditions facilitating the perpetuation of an effective opposition do not exist, then the authority of officials will be maximized, and popular influence on policy will be at a minimum.*

Democracy is related to economic development, this means that the more well-to-do a nation, the greater the chance that it will sustain democracy.²⁵ Economic development involving industrialization, urbanization, high educational standards, and a steady increase in overall wealth of the society, is a basic condition sustaining democracy, it is a mark of the efficiency and legitimacy of the political system.

Political liberalism may be defined simply as a rule of law that recognizes certain individual rights or freedoms from government control. Democracy on the other hand, is the right held universally by all citizens to have a share of political power, that is, the right of all citizens to vote and participate in politics. The right to participate in political power can be considered a liberal right – and it is for this reason that liberalism has been closely associated historically with democracy.²⁶

Constitutions are devices for enabling a people to act and constraining the people and those who govern on their behalf in order to protect democracy and the rule of law. Additionally, consider the following three points:

- (1) *Constitutions first of all comprise enabling rules both specifically and in general. Madison: if we can take for granted certain procedures and institutions fixed in the past, we can achieve our present goals more effectively than we could if we were constantly being sidetracked by the recurrent need to establish a basic framework for political life.*
- (2) *Constitutional provisions for separating powers are necessary, if not sufficient condition of liberty; an absence of separation of powers promotes tyranny (Montesquieu). Separation of powers is also a form of division of labor, permitting a more efficient distribution and organization of governmental functions.*

²⁵ Some Social Requisites of Democracy: Economic Development and Political Legitimacy, Seymour Martin Lipset, p. 76

²⁶ The End of History & the Last Man, Francis Fukuyama, p. 43.

- (3) *Constitutions are self-imposed restraints securing the conditions of public debate.*

The assumption of popular sovereignty is the prevailing mode of legitimizing the exercise of power: “we the people.” This presupposes a-demos organized as a nation-state. The rule of the people in practice means the rule of those who have the right to vote. Since the 19th century, the right to vote has been radically “democratized” throughout the world and extended to all adults. However, it is usually not inhabitants who vote but citizens.

Every country which prides itself as independent stresses, either in its name or in its constitution, that it is democratic. However, at times democracy is hijacked by authoritarian governments. For example - were the elections of Nov. 7, 2010 in Burma truly free and fair as required by the tenets of democracy and universal suffrage? President Obama condemned this latest sham election, saying *“it is unacceptable to steal elections, as the regime in Burma has done again for the entire world to see”*. This is not the only case of such fake elections by authoritarian governments, viz: 1977 and 1984 Mobutu Sese Seko, Zaire (Democratic Republic of Congo); Chile’s Augusto Pinochet to Egypt’s Hosni Mubarak had their rule rubber stamped in single candidate referendums; 1995 Uzbekistan’s Islam Karimov and five years later won 92% of the votes – where his sole opponent revealed that he had cast his ballot for Karimov.²⁷

For Ronald Dworkin²⁸, “statistical democracy” – mere majority rule – has to be complemented by “communal democracy” where political decisions must treat everyone with equal concern and respect, and each individual must be guaranteed fundamental civil and political rights.

Democratic rule means primarily rule by a majority. Modern democracy is ordinarily representative democracy, but with elements of direct democracy in, e.g., Switzerland, California, Bhutan (provisions for national referendum).

In representative government, majority rule means a majority of representatives as organized by means of a political party or a coalition of parties. Whom and what representatives represent is one of the most controversial questions in political theory and reality. What their individual mandate is, most of the time is elusive. In practice, the rule of citizens entitled to vote means a majority of those who actually vote. If in a district there are one thousand eligible voters and only 50% vote, 251 votes constitute the “majority.”

In most democracies, there is no legal obligation to vote and voter participation is generally declining. In the American congressional elections of 2002, the participation rate was 37%, in the 2004 European Parliament elections 46%, in the new member states 27%.

²⁷ Brief History, Sham Elections Time November 22, 2010.

²⁸ Laws Empire (1986), Ronald Dworkin, Harvard Law University Press, Cambridge, pp. 61-63

In real life, majority formation depends on electoral systems, voter registration rules, apportionment, number of political parties, number of candidates, first past the post rules, minimum thresholds (5%).

There is disagreement over which electoral system is best. Consider the respective advantages and disadvantages of first-past-the-post district representation and proportional representation. In Bhutan, because of the electoral system, the People's Democratic Party has only two seats in the National Assembly, though it received 33% of the popular vote.

We also need to remind ourselves that representative democracies frequently aim at representing something other than mere "majorities." In democracies such as the US, where the legislature consists of two differently conceived houses, the concept of majority rule becomes very opaque. For instance, in the United States, the equal representation of states with different size populations heavily qualifies the principle of one person-one vote (compare Wyoming 03 electoral seats – California – 55 electoral seats). Consider the National Council with one representative each from the 20 Dzongkhags and a minimum of two and a maximum of seven representatives in the National Assembly from each Dzongkhag.

Furthermore, constitutional democracy is constituted in such a way as to prevent majorities from suppressing basic rights and minorities. Constitutions accomplish this by an array of mechanisms ranging from parliamentary rules to presidential or royal vetoes to judicial review.

Democracy depends on the competition of political candidates and parties. The constitutional rules of the game are crucial: freedom of speech, freedom of the press, freedom of association and assembly, a certain equality of opportunities. In order to have a free press, you need competitive media (Berlusconi, Thaksin). In addition to specific rights that enable the maintenance of democracy, it is increasingly assumed that rule of law in general is a sine qua non of democracy.

You need an engaged public, you need quality among those willing to go into politics, and you need civil society (Anna Hazare graft agitation?).

Assuming that in a given country political competition is free and robust and that there are changing majorities, the question is: a majority for whom and for what. Will Bhutan be able to achieve its aims by having a primary round of elections to choose two political parties prior to a national election?

Elections:

Most important office in a democracy is not the office of the Prime Minister or the President, but the office of the citizen. Voting in a democracy is the most basic right and a moral obligation on the citizens to vote.

His Majesty the King on 15th November, 2012 at Samtse College of Education commanded that “It is essential to ensure that everyone above the age of 18 years participates in democracy and the election process. Apathy is dangerous - care must be taken not to create differences and divisions in society because of politics.” As stated above the most important office in a democracy is the office of the citizen and therefore, it is the moral responsibility of every citizen to participate in the election process meaningfully by casting their votes and to engage in the democratic process. It is the least that citizens can do towards fulfilling the aspirations of His Majesty in laying a firm foundation for democracy in Bhutan.

Further, in the address to the Nation on the occasion of the 105th National Day (2012) His Majesty commanded that “today the most important duty for us is the upcoming 2013 parliamentary elections. I would like to say that we – all of us – are new to this democratic transition. We have all equally acquired four and a half years of experience in democracy. Experience comes with participation, so I urge you all to come forward as candidates, members of parties and voters for 2013.”

While calling the people to participate meaningfully in the democratic process His Majesty called on people not to be divided on ethnic, religious, regional or political lines and commanded that “You must vote for the right reasons for a strong and dynamic nation, which will safeguard the interest of all Bhutanese today and for generations to come.”

In the Royal Decree (9/3/2013) commanding the conduct of National Council elections by the ECB His Majesty the King reiterated that “... it is important that all voters take their right and duty seriously, exercise their franchise and choose the most competent and deserving candidate as their representative.”

The main function of voters is the direct or indirect choice of a government. Practically, that means choosing those who will lead the government. However, even voters who have the necessary education often lack the incentives to make them-selves knowledgeable. These days, it is also not sufficient to choose a position on a spectrum from left to right because for the solution of multi-dimensional problems, the differentiation between left and right is frequently irrelevant.

All of this, of course, is not to say that issues play no role in elections. But what their role is in motivating the tiny group of voters who shift preferences and thus “decide” elections and determine “mandates” is, frequently, very difficult to determine.

In a democratic system conflict must be expected and where there is conflict it is a sign of good health that the democratic system is functioning. However, where conflicts emerge it must be channelized towards the Constitution and its provisions; - the Constitution must become the symbol of unity, similar to the person of His Majesty, the National Flag and the National anthem.

- Democratic system:-

- It unleashes creative opportunities;
- Increases happiness (GNH) of ordinary citizens (it also increases expectations leading to more complaints);
- Improves material wealth and circumstances of the ordinary citizens.
- ***Democracy is difficult to control unless inbuilt systems of check and balances are incorporated in the democratic system;***
- American context: separation of powers did not work, George Washington as the first President, being a very popular individual resulted in the Presidency becoming the most powerful branch of government; Madison designed the approach to make the Party large to curb the power of the Presidency also failed – making the Legislature large failed to have the desired effect;
- ***Political parties are an absolute necessity – provides for organized interest groups, political parties change the nature of politics to policies and agenda;***
- ***Established political parties with propagated policies and agenda will take care of the uncertainty – candidates chosen based on their policy stand, voters have the confidence that candidates from other parts of the country belonging to the same party will have the same policy stand, and confidence exists that if the party wins it will be able to implement its policies – in the event of disagreements there exists the outlet of the next elections;***
- ***Democracy translates into empowerment which leads to conflict – there must be a robust CSO, channel conflict towards the Constitution, be generous towards the minorities [freedom to preserve culture, share the common wealth] and political parties (CSO Act enacted 2007 –);***
- ***Role of Courts: judicial review*** Marbury v. Madison to Dred Scott case, affirms the role of the Supreme Court as guardian of the constitution, conflict between Courts and the other branches of government is inevitable – with the courts established for the purpose of setting limits on what government can do and cannot do (Law and policies are different as law pertains to interpretation and policy pertains to making of law);
- ***Post WWII new constitutions in Europe had judicial review structured into the constitutions; provided for establishment of constitutional courts [judges appointed by the political branch of the government, with staggered one term appointments] balance independence and accountability;***
- ***Interpretation of the constitution may not always be efficient if based on the intent of the drafters. There must be flexibility in understanding the constitution with the ability to adjust and adapt – example choice in the purchase of a sofa where there existed a blue wall which dictated the purchase of a red sofa, however, in time the wall flaked and was repainted in a different color which changed the circumstances and made the color of the sofa out of sync with the new color of the wall – therefore, the need to adjust and adapt to the existing / changed circumstances may be more prudent²⁹;***
- Once people get a taste of democracy or democracy is set in motion it is difficult to be undone;

²⁹ Larry Kramer, Dean, Stanford Law School.

- *Democracy slow and messy – may not be the best system of governance, but there exists no other better system – “Winston Churchill”.*

4. Conclusion:

How do we assess the quality of constitutional democracy? This is actually a very difficult question. Let us just consider one aspect: rule of law.

Diamond and Morlino:

A “good” (or in essence, a liberal) democracy has a strong, vigorous, diffuse, and self-sustaining rule of law in the following respects:

1. *The law is equally enforced toward everyone, including all state officials; no one is above the law.*
2. *The legal state is supreme throughout the country, leaving no areas dominated by organized crime, local oligarchs, or political bosses who are above the law.*
3. *Corruption is minimized, detected, and punished, in the political, administrative, and judicial branches of the state.*
4. *The state bureaucracy at all levels competently, efficiently, and universally applies the laws and assumes responsibility in the event of an error.*
5. *The police force is professional, efficient, and respectful of individuals’ legally guaranteed rights and freedoms, including rights of due process.*
6. *Citizens have equal and unhindered access to the justice system to defend their rights and to contest lawsuits between private citizens or between private citizens and public institutions.*
7. *Criminal cases and civil and administrative lawsuits are heard and resolved expeditiously.*
8. *The judiciary at all levels is neutral and independent from any political influence.*
9. *Rulings of the courts are respected and enforced by other agencies of the state.*
10. *The constitution is supreme, and is interpreted and defended by the Supreme Court.*

What further distinguishes and completes a “democratic rule of law,” O’Donnell argues, is that the legal system defends the political rights and procedures of democracy, upholds everyone’s civil rights, and reinforces the authority of other agencies of horizontal accountability that ensure the lawfulness and propriety of official actions. Even liberal democracies have serious problems. It is not because of inherent flaws in the principles of freedom and liberty, but because of incomplete implementation of the twin principles.

To enjoy political equality, citizens must also have some measure of equality in income, wealth, and status.

Philosophically as well, some insist that democracy must be judged by the extent to which it achieves over time greater social rights that include the right to:

1. *health (mental and physical);*
2. *assistance and social security;*

3. *work and to strike;*
4. *study and to an education;*
5. *healthy and clean environment; and*
6. *Housing.*

Constitutions vary in the extent to which they formally acknowledge and guarantee these rights, but newer democratic constitutions are increasingly explicit about them.

According to Professor Gerhard Casper, “*constitutional democracy is not a spectator sport but calls on citizens to participate*”. *Citizens must not be reduced from being active participants to a mere spectator - citizens must actively and intelligently participate in a democracy which is a legitimate source of authority granted as a gift from the Throne by our benevolent Monarchs.*

In the ultimate analysis, the success of democracy will be based on the perception of the people. That is, whether the Government, Parliament and the Judiciary have succeeded in its quest to achieve GNH and a just society with respect for the rule of law and constitutionalism.

Julius Caesar, Act I, Scene II. Shakespeare:

“Men at some time are masters of their fate,
The fault, dear Brutus, is not in our stars,
But in ourselves, that we are underlings”.

In conclusion, if democracy fails, the people of Bhutan must jointly assume responsibility. Inclusive democracy entails public participation and not exclusion – everybody is accountable in a democracy. Ultimately the will of the people is unstoppable and is responsible for shaping the destiny of the nation and its history.

His Majesty the King in his address to the nation on the occasion of the 105th National Day (2012) stressed that “in the future whatever challenges came only Bhutanese citizens can protect and safeguard Bhutan.”

Thank You and Tashi Delek