

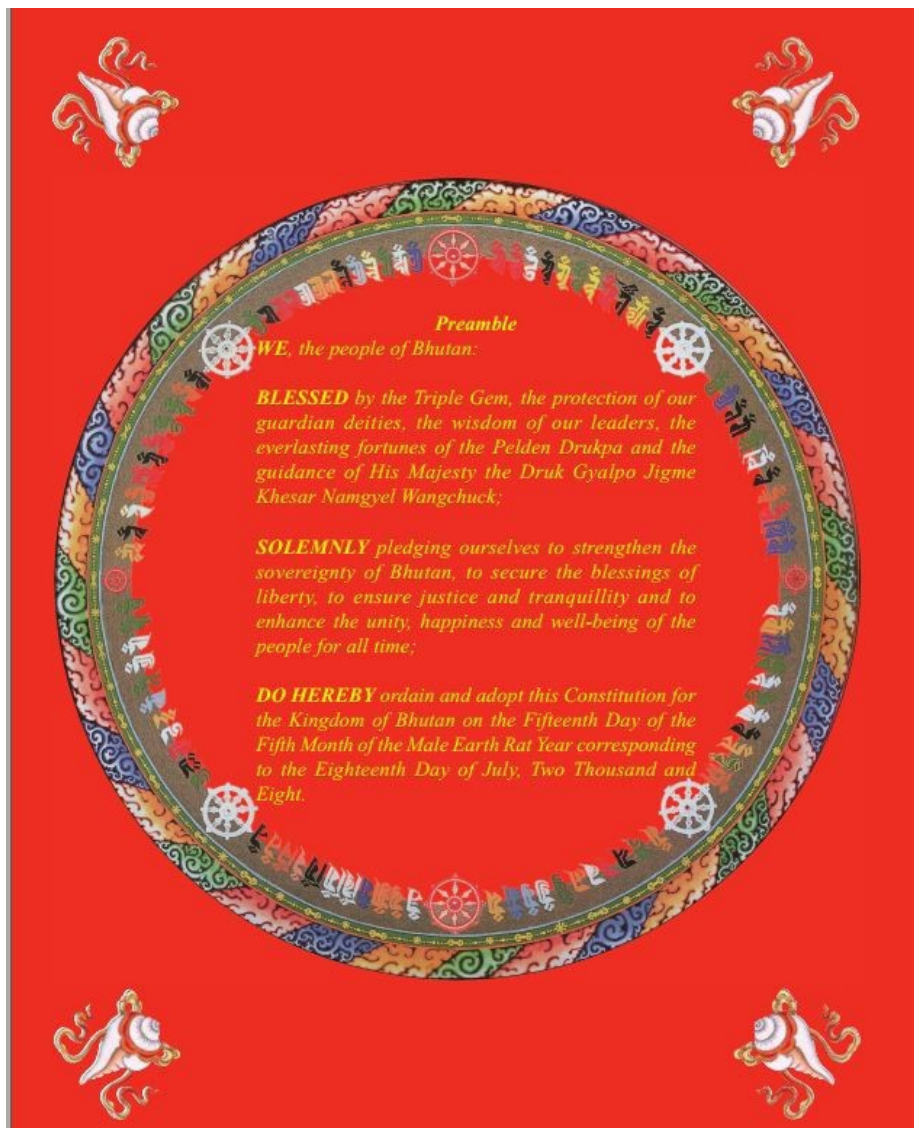
*We dedicate this Issue
to the Tsa - Wa - Sum:
King, Country, People
and with shared Values
And in unity, we shall move forward.*



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The Preamble of the Constitution



Preface

The Constitution is the master document; and the highest law of the state, which spells out the structures of the government, the principles of the state, political processes and rights of citizens. It provides mechanism as to how we share power and govern ourselves. The Constitution implies that the government's authority to govern people comes from the person themselves; which in turn means that the government is limited - in the way that it can only act within the bounds set by the Constitution. Not only that the governmental power is restricted, but it is divided among the legislative, executive, and judicial branches of the government, to ensure that there's no concentration and abuse of power – the checks and balances. It contains a set of fundamental legal-political rules, binding on all in the state. It is an inter-section of legal, political and social systems of a country. In order to provide the stability, constitution cannot be changed by ordinary legislative acts, like other laws.

Having drawn inspiration from several other constitutions, the Bhutanese constitution contains all the above requisites. The Constitution of Kingdom of Bhutan was unveiled on 18 July 2008, after seven years of extensive drafting exercise and nation-wide public consultations. The initiative came at the most peaceful time from a dynamic leader at the height of His popularity.

The Constitution is the most profound achievement of our recent times, which will go a long way into the future, shaping the lives of the people; and the advancement of Bhutanese civilization. It reflects the vision of His Majesty the Fourth Druk Gyalpo, and that of His Majesty the King for the country and people – to protect, promote and preserve a precious piece of land called *Druk Yul* – Bhutan; and a handful of most fortunate people called the *Drukpas* – the Bhutanese.

As the Kingdom celebrates 10 years of adoption of the Constitution, it is with considerable pride that the Bhutan National Legal Institute, the Research and Training arm of the Royal Court of Justice, Judiciary of Kingdom of Bhutan under the leadership and guidance of Her Royal Highness, Princess Sonam Dechan Wangchuck, the Honourable President presents the 10th Volume of the *Bhutan Law Review* – Kingdom's maiden law journal, as a Special Edition dedicated to the evolution of Constitutionalism, Democracy and Rule of Law in the Kingdom.

10 years is not a very long time in the life of a country or a Constitution. However, given the rapid pace of development and long political strides, we undertook, the Constitution was put to tests; and it did endure and survive the challenges, and stayed aloft in the ocean of changes and development we witnessed.

The words and thoughts of our writers and contributors in this volume mainly echo the making, meaning, role, value, significance, interpretation and future of our Constitution in particular, and the other laws in general. It is heartening that many of us are aware of, engaged in, and contributing to the growth and development of Bhutanese laws, jurisprudence and constitutionalism.

Befitting the occasion and to remind ourselves of the importance of the Constitution, we reproduce and sacred *Kupar* (Royal photograph) of His Majesty the King while affixing his signature on the Constitution, along with His Majesty's Speech delivered on 18 July 2008.

Constitution is the founding text by which the society reflects the aspirations and values they aim to achieve and identify the country with. The purpose of a written constitution is to prevent concentration of power in one hand. The core elements of modern constitutionalism is the supremacy of the constitution. In this light, we have published the lecture delivered by the Hon. Chief Justice of Bhutan, Lyonpo Tshering Wangchuck as a visiting faculty to various institutions on the Constitution, Democracy and Rule of law.

Justice Sonam Tobgye (ret'd.), the former Chief Justice of Bhutan and the Chairman of the Constitution Drafting Committee recalls the crucial masterstrokes and the wise words, guidance and commands of His Majesty the Fourth Druk Gyaplo, the Father of the Constitution, during the constitution-drafting exercise. He elucidates the constitutional history, taking us back in time; and recounts the careful crafting of the document, which has bearing on the fate, fortune and future of our country and generations of Bhutanese people.

Michael Piel compares the Constitution of Bhutan with that of the United States of America and the Republic India at 10 years – indicating that our Constitution has done well, reflecting the farsightedness and the legal acumen of our Monarchs; the members of the Constitution Drafting Committee, and the Bhutanese people themselves, being the

People's Constitution. Nima Dorji dwells on the challenges of people and institutions remaining truly apolitical. Yeshey Dorji elucidates the salient features of the Constitution. The other contributors echo judicial reforms and the growth and journey of our Constitution in the last 10 years. We have also included a Book Review for our readers.

However, having accepted the 'gift' of rights and privileges granted by the Constitution; it is now time for us to perform our duties and responsibilities to be worthy of the gifts and the privileges. Secondly, constitution is an ideal and a mute document – into which we must breathe life and actions. The Constitution is a promise we made 10 years ago that we will conduct ourselves and run our country as we agreed then.

The Constitution has not changed and it won't and shouldn't, at least frequently. But, as His Majesty the King reminds us often, we are good in planning and talking - it's the implementation where we need to work on. Besides, it is often the people who need to change, not the system itself; for what use is of the best system in the world, if the people who operate the system are not dedicated, committed and determined?

The Constitution is a road-map in today's parlance. It only enshrines the basic or the fundamental Bhutanese values and dreams. In fact, the Constitution is a continuation of our laws – not a drastic departure from the customary norms and nuances, save creation of a few institutions. The Constitution drafters, learned as they were, could not be expected to have foreseen all the probable problems we could face in future. When we say that the Constitution has endured 10 years, we must mean that we have planned well with the visionary foresight in the constantly-changing world – not really resisting or ignoring the changes, or maintaining the *status quo* for the sake of it.

The Exposition of Constitutional Kuthangs

The Constitution of Bhutan was born out of the enlightened vision of His Majesty the Fourth Druk Gyalpo Jigme Singye Wangchuck. It laid a clear path for the people of Bhutan and reflects the selfless and extraordinary leadership of our kings. The Constitution inspires our people with the blessings of liberty, justice, unity, peace and happiness. As a tribute to His Majesty the Fourth Druk Gyalpo on His 60th glorious birth anniversary, the Supreme Court of Bhutan and the Bhutan National Legal Institute, under the noble guidance of Her Royal Highness Princess Sonam Dechan Wangchuck initiated the painting of 34 Kuthangs corresponding to 34 Articles of the Constitution. Each Kuthang captures the essence of the Article, its significance and the purpose. The Bhutan Law Review aspires to embrace such profound representation of wisdom in its successive Volumes as a continued tribute to His Majesty the King, His Majesty the Fourth Druk Gyalpo and then Tsa-Wa-Sum.

Article 3 - Spiritual Heritage



*The Protector who reigns over the realm of spiritual and secular traditions,
He is the King of Bhutan, the precious sovereign¹.*

*The Druk Gyalpo is the protector of all religions in Bhutan², thus the Raven-headed
Crown occupies the topmost place in the Kuthang.*

*It shall be the responsibility of religious institutions and personalities to promote the
spiritual heritage of the country while religious institutions and personalities shall
remain above politics.³*

Zhabdrung Rinpoche proclaimed:⁴

I who turn the wheel of temporal and spiritual laws,

I am the supreme refuge to all.

I am the spiritual ruler of Glorious Drukpa.

I am the subduer of those who falsify the teachings of Drukpa School.

I who accomplished writing like the Goddess of Learning;

I am the sacred source of moral precepts.

I am the origin of unlimited thoughts.

I confound those with false view.

I am the fountainhead of the power of Debate;

Where is the man who never trembles before me.

I annihilate the hordes of evil beings;

Where is the strong man who can bear up against my power.

I am mighty in speeches that expand religion.

I am wise in all science.

I am the divine manifestation spoken of by the superior ones and

I am the destroyer of false incarnations.⁵

1 National Anthem of Bhutan

2 Article 3, section 2

3 Article 3, section 3

4 See *Yang Zab bLa Na Med pa'i dGongs bCud'*

5 This is called 'The Fearless Speech of Lion Roar' or 'The Wheel of Universal Goodness Official Seal of 16 'Is' of Zhabdrung Ngawang Namgyel.

One who is empowered with the accomplishment of the Nine Noble Attitudes

Is elevated to the truly high level of the Seven Noble Richness.

It symbolizes absence of worldly distractions and possession of the nine qualities of a noble person (ruler, king), viz. Wisdom, Compassion and Power; Intelligence, Diligence and Goodness; Teaching, Debating and Writing skills.



His Majesty the King's Address to the Nation at the Launch of the Constitution



Thimphu

18 July 2008

On this day of destiny, in the blessed land of Pelden Drukpa we, a fortunate People and King, hereby resolve to bring into effect the root and foundation - the very source - of all law in our nation.

On such an auspicious occasion, on behalf of the people I offer gratitude to His Majesty the Fourth Druk Gyalpo. During his reign His Majesty built a strong nation and secured the hopes and aspirations of the people through the process of democratization and the enlightened vision of Gross National Happiness. His Majesty has also laid a clear path for our future through this Constitution.

The significance of His Majesty's unique achievements as leader has transcended the experiences of our country and been acknowledged by the world. In our own country, many generations into the future, the Constitution will continue to inspire our people as it stands testimony to a selfless and extraordinary leadership.

This Constitution is the most profound achievement of generations of endeavor and service. As it is granted to us today, we must remember that even more important than the wise and judicious use of the powers it confers, is the unconditional fulfillment of the responsibilities we must shoulder. Only in understanding our duties will the exercise of our powers be fruitful. If we can serve our nation with this knowledge and in this spirit, then an even brighter future awaits our country.

It is my fervent prayer that through this Constitution we will, with our body, speech and mind work with complete commitment and conviction as we strengthen the sovereignty and security of Bhutan; secure the blessings of liberty; ensure justice and peace and enhance the unity and happiness of all Bhutanese, now and always.

Lastly, this Constitution was placed before the people of the twenty dzongkhags by the King. Each word has earned its sacred place with the blessings of every citizen in our nation. This is the People's Constitution.

And today, through this, my Hand and Seal, I affix on to the Constitution of the Kingdom of Bhutan, the hopes and prayers of my People.

Tashi Delek.

Constitution, Rule of Law and Democracy in Bhutan¹

Introduction

The idea that “Constitutionalism and Rule of Law” is the foundation of modern states and civilizations have 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 – the 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 support of ordinary citizens, and the citizens are more likely to support those institutions they understand. Constitutionalism², Rule of Law³, and promoting a just society⁴ are essential for achieving Gross National Happiness (GNH)⁵ and laying a sound foundation for democracy⁶:

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

1 Justice Tshering Wangchuk, Chief Justice of Bhutan. The Paper is the summary of H.E.’s various Lectures on the topics.

2 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.

3 Article 7 section 15- Equal before the law

4 Article 8- Fundamental duties and Article 9 section 3- Civil Society

5 Article 9 section 2 – Pursuit of GNH

6 Article 1 section 2 – Democratic Constitutional Monarchy

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 18 July 2008 when His Majesty the King and the representatives of the people signed the country's first written Constitution. At the ceremony, His Majesty 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 fore fathers 100 years ago...as the 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, His Majesty 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 *Gyenja* – 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 through 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 Fourth King while addressing the Constitution Drafting Committee on 30 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 in 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 – are 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 Bhutan 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 people of Bhutan stand equal before the law today⁷

Chronology of Events in the Evolution of Laws and Legal Reforms

1616	Zhabdrung Ngawang Namgyal arrived in Bhutan.
1651	Zhabdrung Rimpoche established a dual system of governance – <i>Chboesid</i> - 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

⁷ 79th Session of the National Assembly, June 2001.

	traditional laws, both temporal and spiritual, <i>Tsa Yig</i> during the reign of Desi Tenzin Drugyel – separation of spiritual and temporal authority, signified by the <i>Golden Yoke</i> and the <i>Silken Knot</i> .
1730 - 1737	10 th Desi Mipham Wangpo consolidated and amended certain portions of the Zhabdrung's Code.
1744 - 1764	Zhabdrung's code was further amended during the reign of the 13 th Desi Choegyel Sherab Wangchuk.
1907 - 1952	The 1 st and the 2 nd Druk Gyalpo's made further modifications to the Code.
1953	Establishment of the National Assembly of Bhutan.
1957	<i>Thrimzhung Chhenmo</i> enacted during the reign of the Third hereditary monarch after discussion during several sessions of the National Assembly since early 1950s.
1960	Appointment of the Drangpoens.
1965	Establishment of the Royal Advisory Council.
1967	Establishment of the High Court.
1968	Establishment of Lhengye Zhungtshog (Cabinet).
1968	Stamp Act enacted.
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 (Sub-district) Court – separation of powers completed after adoption of the Constitution
1981	Establishment of the Dzongkhag Yargye Tshogchung (DYT)
1985	Appointment of the Chief Justice
1990	Establishment of a separate Judicial Cadre in the Civil Service (JC-01)
1991	Candidates sent to India and abroad to pursue courses in Law
1991	Establishment of the Gewog Yargye Tshogchung
1994	Research and Training Bureau at the 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 and 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
2007(June 30)	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, and 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 monarchy.⁸ His Majesty the Fourth Druk Gyalpo has prepared the people of Bhutan steadily to embrace a democratic form of governance by instituting new mechanism and 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 (Dzongkhag Yargye Tshogchung or the District Development Board)) and GYT (Gewog Yargye Tshogchung or the Block Development Board) in 199; thereby, inducting a programme of administrative and political decentralization to enhance democratic powers, social responsibilities, transparent processes and decision making at the grass roots level.⁹ 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

⁸ J.S.Verma, Chief Justice of India, *Traditional Democratic Polity of Bhutan*.

⁹ Governance, Bhutan in Focus, at 12

of Government) being rotated annually amongst the Ministers.¹⁰ The 77th Session with 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(South Asian Association for Regional Cooperation) 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”*¹¹

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”*.

¹⁰ Similar to the Swiss system of Head of State

¹¹ His Majesty the King Jigme Singye Wangchuck, 2001

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.¹² It establishes a Democratic Constitutional Monarchy¹³, with the separation of the Executive, Legislature and the Judiciary which shall exercise only the powers specified in the constitution itself¹⁴. All other powers are reserved by the Constitution to the people¹⁵ sovereign power belongs to the people of Bhutan.

The *Fundamental Rights*¹⁶ 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 pertaining to the Fundamental Duties.¹⁷ They 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 two or more 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 Policy¹⁸ as being fundamental principles in the governance of the kingdom and it shall be the duty of the State to apply

12 Article 1, sections 9 and 10

13 Article 1, section 2

14 Article 1, section 13

15 Article 1, section 1

16 Article 7. It is in consonance with the rights enumerated in the UN Civil and Political Rights and the Optional Protocols

17 Article 8

18 Article 9

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 parties¹⁹ 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.²⁰ 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 bloc²¹. 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.²²

The Constitution also adequately provides for safeguarding the Institution of Monarchy,²³ Spiritual Heritage,²⁴ unique Culture,²⁵ and Environment²⁶ of the Kingdom. The Constitution establishes three separate branches of government – Legislature,²⁷ Executive,²⁸ and Judiciary.²⁹ 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.

19 Article 15, section 5

20 Article 15, section 8

21 Article 15, section 10

22 Article 15, section 3

23 Article 2

24 Article 3

25 Article 4

26 Article 5

27 Article 10

28 Article 20

29 Article 21

The Legislative Branch³⁰

Parliament, 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.³¹

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 population³². 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.³³ If His Majesty the Druk Gyalpo does not sign or vetoes a bill, it may still be enacted, but only by a two-third 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 assent.³⁴ 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* (Cabinet) consisting of ministers headed by the Prime Minister who must all be elected members of the National Assembly.³⁵ Each house of

30 Articles 10, 11, 12, and 13

31 *Article 11, section 3*. Therefore, it is important that the National Council remains apolitical to enable it to continue playing the role of a House of Review effectively as envisaged in the Constitution.

32 Delimitation of constituencies to be reviewed every 10 years.

33 Article 10 section 1- explicit non-delegation doctrine vested with Parliament in the enactment of law

34 Article 10 section 11- the Druk Gyalpo is required to grant assent to bills endorsed by a joint sitting of Parliament.

35 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.

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 Branch³⁶

The leader, nominee of the party, which wins a majority of seats in the National Assembly is appointed as the Prime Minister to head the *Lhengye Zhungtshog*³⁷, 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 Minister.³⁸ No more than two members elected from the electoral constituencies of the same Dzongkhag are entitled to be appointed as ministers.³⁹

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 General,⁴⁰ 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 Branch⁴¹

The Judiciary (Royal Court 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 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

36 Article 20

37 Article 17 section 1

38 Article 17 section 3

39 Article 17 section 5

40 Article 29- Attorney General

41 Article 21

the Prime Minister, the *Lhengye Zhungtshog* and the executive 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.

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 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.⁴² Second, the Constitution provides that judges salary and benefits shall not be varied to their disadvantage after appointment, which means that neither the Executive nor Parliament can reduce the salary of judges holding constitutional office, although it can be eroded by inflation.⁴³ 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 power checks and balances enshrined in the Constitution is not applied or implemented with the constitutional bodies

⁴² Article 21, sections 4, 5, 11 and 12 of the Constitution

⁴³ Article 31, section 7

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.

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. Article 2 Section 15 states that, “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 rule-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 trouble.⁴⁴

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* are mostly witnessed in developed countries, while *Rule by law* are experienced in developing countries.⁴⁵

The Complexity of Crime and Punishment

To understand the complexities of crime and punishment, let us take the example that two men, Dorji and Karma, who 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 women’s child starved and died – should the two men be held responsible for the death of the child? Here, the question of *Actus non facit reum, nisi mens sit rea* – *mens rea* and *actus reus*; *accomplice liability*; *attempt*; *justification and excuse*; *mistake (law and fact)* and *causation* are few complex issues of criminal intention and criminal action to deal with.

44 With 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.

45 If 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 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

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 law.⁴⁶ 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 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

⁴⁶ 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 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, fair, transparent and effective judicial institutions

The judicial branch after all, is the final arbiter of the constitution.⁴⁷ 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*”.

Democracy

Democracy is characterized by having a Constitution; existence of the Separation of Powers between Legislative, Executive and Judiciary; where laws are enacted through thorough process of debate before the Parliament. Democracy ensures that decision by the government is based on laws. Other features include Elections; the existence of Political Parties; including the 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.⁴⁸ This definition abstracted from the work of Joseph Schumpeter

⁴⁷ Article 1, section 11.

⁴⁸ Seymour Martin Lipset, *Some Social Requisites of Democracy*, p.71

and Max Weber⁴⁹ 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
- (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:

- 1. 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;
- 2. 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;
- 3. 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.⁵⁰ 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.

49 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

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

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.⁵¹

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. James Madison said that 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. Separation of powers is also a form of division of labor, permitting a more efficient distribution and organization of governmental functions.
- (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*.” 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

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

7 November 2010 in Burma truly free and fair as required by the tenets of democracy and universal suffrage? President Barack 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, for instance in 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; in 1995, Uzbekistan’s Islam Karimov won 92% of the votes – where his sole opponent revealed that he had cast his ballot for Karimov.⁵²

For Ronald Dworkin,⁵³ “*statistical democracy*” which is punctuated by 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, e.g., Switzerland, California, Bhutan, with provisions for national referendums.

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% of them votes, 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%, and in the *European Parliament* elections in 2004, the rate of participation was 46%.

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%).

⁵² Brief History, Sham Elections, Time November 22, 2010

⁵³ Ronald Dworkin, *Laws Empire* (1986), Harvard Law University Press, Cambridge, pp.61-63

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 United States, where the Legislature consists of two differently conceived houses, the concept of majority rule becomes very opaque. For instance, the equal representation of states with different population sizes heavily qualifies the principle of one person-one vote (compare Wyoming 3 electoral seats – California's 55 electoral seats). Consider the National Council with one representative from each of 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. 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, with quality personnel among those willing to go into politics, and a strong Civil Society.

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 citizens. Voting in a democracy is the most basic right and a moral obligation on the citizens.

His Majesty the King on 15 November 2012 at the 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 in 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 the people to not 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 Decree⁵⁴ commanding the conduct of National Council elections by the Election Commission of Bhutan (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.

54 on 9 March 2013

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 existence of positive conflicts signifies the healthy functioning of the democratic system. 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 unleashes creative opportunities; increases happiness of ordinary citizens (it also increases expectations leading to more complaints). It helps to improve material wealth and circumstances of the ordinary citizens. However, democracy is difficult to control unless inbuilt systems of check and balances are incorporated in the democratic system. In America, when the separation of powers did not work, George Washington as the first popular President 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, which was unsuccessful, making the Legislature ineffective.

1. Political parties are an absolute necessity – provides for organized interest groups, political parties change the nature of politics to policies and agenda;
2. 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;
3. Democracy translates into empowerment which leads to conflict – there must be a robust Civil Society Organizations channel conflict towards the Constitution, be generous towards the minorities [freedom to preserve culture, share the common wealth] and political parties;⁵⁵

55 Civil Society Organization Act was enacted in 2007

4. Role of Courts - Judicial review is an important component of democracy. In *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.
5. 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;
6. 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. Therefore, the need to adjust and adapt to the existing or changed circumstances may be more prudent⁵⁶
7. Once people get a taste of democracy, or democracy is set in motion, it is difficult to be undone; It is said that at first, democracy is slow and messy; may not be the best system of governance, but there exists no other better system as Winston Churchill surmised.

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 said that a “good” (or in essence, a liberal) democracy has a strong, vigorous, diffused, 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.

⁵⁶ Larry Kramer, Dean, Stanford Law School

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*,” as 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. The problems do not arise from the inherent flaws in the principles of freedom and liberty, but because of the 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 in 2012 stressed that “*in the future whatever challenges came only Bhutanese citizens can protect and safeguard Bhutan.*”

His Majesty Jigme Singye Wangchuck: The Master Strokes and Words of Wisdom of the Father of the Constitution of Bhutan¹

Introduction

When we look back, we find that the seed of democratic governance was sown by His Majesty the Fourth Druk Gyalpo Jigme Singye Wangchuck long time ago, even as far as His Coronation Day, 2 June 1974, when the teenager Monarch commanded that the King, Government and the People must work together; ‘that a small effort on the part of the people will be far more effective than that of a big step of the government’. In this journey of constant nurturing of democracy, 1998 was a watershed year. Devolving the Royal power to a council of minister, His Majesty Jigme Singye Wangchuck promulgated:

The time has now come to promote even greater people’s participation in the decision making process. Our country must be ensured to always have a system of government which enjoys the mandate of the people, provides clean and efficient governance, and also has an inbuilt mechanism of checks and balance to safeguard our national interest and security. As an important step towards achieving this goal, the Lhengyel Shungtsbog should now be restructured into an elected Council of Ministers that is vested with full executive powers to provide efficient and effective governance of our country.

This Article relives some of the moments in the history of Constitution making, highlighting the master strokes of a prophetic monarch at the height of his popularity and power.

The Conception

4 September 2001 was a historic day. On that day, His Majesty Jigme Singye Wangchuck commanded the Council of Ministers, the Chief Justice of Bhutan and the Chairperson of the Royal Advisory Council to draft a written Constitution for the country. Not only did His Majesty conceive

¹ Contributed by Justice Lyonpo Sonam Tobgye (retd.), former Chief Justice of Bhutan; and the Chairman of the Constitution Drafting Committee.

and share the idea of drafting a Constitution for the Country, but He already had in His mind what was to be included in it for the best interest and the wellbeing of the Bhutanese people, and security and sovereignty of Bhutan. His Majesty provided the guidelines and promulgated the following constitutional principles and the basic elements, amongst others:

1. The Preamble;
2. Fundamental Rights and Duties;
3. Roles and responsibilities of the King;
4. Roles and responsibilities of the Executive;
5. Legislative reforms and re-organization of the National Assembly and the Royal Advisory Council;
6. Local Governments (*Dzongkhag Yargay Tshogchungs* and *Genyog Yargay Tshogchungs*);
7. Roles and responsibilities of the Judiciary including the establishment of the Supreme Court of Bhutan;
8. Roles and responsibilities of the Royal Audit Authority, Anti-Corruption Commission, Royal Civil Service Commission, etc.;
9. Amendment of the Constitution; and
10. Other matters which are essential for the country, government and people.

Formation of the Constitution Drafting Committee

The constitution is the highest law of the country that would determine the destiny of the Palden Drukpa for generations to come. It was not a simple document to be drafted overnight by one clever individual. His Majesty issued a Royal Decree to constitute a thirty-nine-member Constitution Drafting Committee on 4 September 2001.² Pursuant to the Royal Decree, the Chairperson of the Council of Ministers wrote a letter³ to His Holiness

2 The initial discussion was whether to form a “Committee” or a “Commission”. The group decided to form a “committee” than “commission” for the simple reason that the word “committee” would mean and connote wider representation of the Bhutanese society whereas “commission” would mean a group of professional who are homogeneous. The Committee felt that since it had representations from all sections of the society, the phrase “Constitution Drafting Committee” was more befitting.

3 Refer to the letter of Chairperson, Council of Ministers dated 22nd September 2001 to the His Holiness the Je Khenpo.

the Je Khenpo⁴ and the Chief Justice of Bhutan⁵ requiring them to nominate representatives for the formation of the Drafting Committee on 22 September 2001. The Drafting Committee was formed with representations from all sections of the society under the chairmanship of the Chief Justice of Bhutan.⁶ The Committee consisted of representatives from the country's twenty Dzongkhags who were directly elected by the people,⁷ two members from the Dratshang,⁸ the Speaker of the National Assembly,⁹ seven members from the Royal Advisory Council,¹⁰ three from the Judiciary,¹¹ and six from the government¹². The Chief Justice of Bhutan chaired the thirty-nine member committee.¹³

4 The Chief Abbot of the Central Monastic Body of Bhutan.

5 Refer to the letter of Chairperson, Council of Ministers dated 22nd September 2001 to the Chief Justice of Bhutan which states as "Your Honour is requested to nominate three representatives from the judiciary to the drafting committee. Commensurate with the sacred and profound nature of the task, Your Honour is solicited to nominate representatives who will be able to make contributions through their competence, knowledge and wisdom and their understanding of the Laws of the Land. Beyond these qualities, it is imperative that the representatives so nominated are of high moral stature with the highest sense of patriotism."

6 I was deeply beholden to have been appointed the Chairperson of the Constitution Drafting Committee by His Majesty the King.

7 Jampel (Member from Bumthang), PaldenDorji (Member from Chukha), Dorji (Member from Dagana), Ugyen (Member from Gasa), Lhakpa (Member from Haa), Khamtula (Member from Lhuentse), PemaDorji (Member from Mongar), Wangdi (Member from Paro), GuchuWangdi (Member from PemaGatsel), NamgyalPhuntsho (Member from Punakha), DechenWangchuk (Member from SamdrupJongkhar), Chandra BahadurGhaley (Member from Samtse), Thakur Prasad Homagai (Member from Sarpang), ThinleyDorji (Member from Thimphu), JangchubDorji (Member from Trashigang), LobzangTshering (Member from Trashigang), Chophel (Member from Trongsa), PhurgyeDrukpa (Member from Tsirang), SigayDorji (Member from Wangdue Phodrang) and DechenWangdi (Member from Zhemgang).

8 Venerable Drabi Lopon Kuenley Gyeltshen and Venerable Yangbi Lopon Chimmi.

9 DashoUgyen Dorji.

10 Dasho Rinzin Gyaltsen (Zhung Kalyon), Dasho Jamyang (Councilor from Chhukha), Dasho Chador Wangdi (Councilor from Trashigang), Dasho Gyeltshen (Councilor from Paro), Dasho Sonam Wangchuk (Councilor from Zhemgang), Dasho Adap Passang (Councilor from Wangdue Phodrang) and Dasho Leki Pem (Councilor from Dagana).

11 Lyonpo Sonam Tobgye, the Chief Justice, High Court, Drangpon Lungten Dubgyur (Phuentsholing Court), Pasang Wangmo, (Registrar, Wangdue Phodrang Court).

12 Dasho Meghraj Gurung (Managing Director, Bhutan Post), Dasho Tashi Phuntsog (Secretary, National Assembly), Lopon Lungten Gyatso (Principal, Institute of Language and Cultural Studies, Semtokha), Dasho Karma Ura (Director, Centre for Bhutan Studies), Dr. Dechen Tsering, (Head, Policy Coordination Division, National Environment Commission), Dasho Kuenlay Tshering (Director, Office of Legal Affairs, as the Member Secretary to the Constitution Drafting Committee).

13 Lyonpo Sonam Tobgye, Chief Justice of Bhutan.

Sources of the Constitution

The Constitution Drafting Committee spared no effort and left no stone unturned in exploring the best models of constitution, the principles, rights and safeguards. However, the following form the primary sources of the Constitution:

- (a) His Majesty Jigme Singye Wangchuck's Decree of 4 September 2001 to the Council of Ministers, the Chief Justice and the Zhung Kalyon;
- (c) The Guidelines and the Constitutional principles decreed by His Majesty Jigme Singye Wangchuck;
- (d) The Royal Decree and Key-note Addresses of His Majesty on various policies and rights; A total of some 49 Kashos and 43 Speeches were referred;
- (e) Historical documents and law codes in addition to the laws enacted by the National Assembly, including the *Thrimzhung Chhenmo*;
- (f) Bhutanese literature and Buddhist texts;
- (g) The constitutions of more than 20 different countries;
- (h) International Conventions;
- (i) Political philosophies;
- (j) The Bhutanese customs and traditions; and
- (k) The formal and informal comments received by the Secretariat of the Constitution Drafting Committee. The Secretariat received comments from the United Nations Development Programme, Thimphu, HELVETAS, Switzerland, Centre for Human Rights, Germany, DANIDA, Denmark, Speaker of the National Assembly of Bangladesh, UNICEF, Thimphu, Mr. Chandrashekar, Mr. John Wilson of Hongkong and Bhutanese scholars, civil servants, judges, lawyers, jurists and academicians. The Secretariat also collected comments from the editorials and press clippings of the *Kuensel* and *Kuenselonline*.

Reference to other Constitutions

In order to ensure an ideal constitution and include the best aspects of the highest law of the country, the Drafting Committee studied various political theories, principles and comments including analysis of the constitutions of several constitutions. Hence, His Majesty Jigme Singye Wangchuck acknowledged it in the following words:

*In the process of making the Constitution, the government has studied many different constitutions of the world, and finally the government has come up with a very good Constitution for the well-being of the nation. The political system in Bhutan must work well for the country and fulfill the aspirations of the people.*¹⁴

Meetings of the Drafting Committee¹⁵

A total of nine Constitution Drafting Committee Sessions were held from the first Session convened from 30 November to 14 December 2001 to the ninth Session of the Constitution Drafting Committee convened from 14 to 26 May 2003. During each Session, vigorous debates and discourses on various aspects of the Constitution were held. The first Meeting was held at the Royal Banquet Hall, Thimphu; the Second at Punakha; third at the Royal Banquet Hall, Thimphu; fourth at Royal Banquet Hall, Thimphu; fifth at Bumthang; the sixth at the Royal Banquet Hall, Thimphu; seventh at Royal Banquet Hall, Thimphu; eight at Royal Banquet Hall, Thimphu; and the ninth at Royal Banquet Hall, Thimphu

Public Apprehension

Having flourished in the peace and tranquility of the successive kings, people were really apprehensive of the devolution of royal power to the elected people in the democratic set up under the constitution. People said Constitution and democracy were coming too early to Bhutan. That the political authorities and institutions would not be as affective and equitable as the monarchy in terms of addressing the wellbeing and welfare of the people.

¹⁴ Refer *Kuensel* dated 12 November 2005.

¹⁵ 165 tape recorded cassettes and 463 pages of the verbatim records of the deliberations and debates during the nine consecutive meetings of the drafting of the Constitution. The interventions made during the various meetings. It has been observed that 3,742 interventions were made.

It is at this time, and in response to such misplaced apprehension and fear that His Majesty Jigme Singye Wangchuck commanded that:

Bhutan, through good fortune and fate, could not hope for a better moment than now for this historic development and would never find another opportunity like this to introduce a Constitution that would provide a democratic system of government best suited for the future well-being of the nation. Today the King, government, clergy and the people in all sections of society, enjoy unprecedented level of trust and fidelity. The security of the country has been ensured and the people enjoy peace and stability. Bhutan's relations with its close friend and neighbor have reached a new height and the country also enjoys growing relations with its developmental partners as well as other countries that appreciate the Kingdom's wholesome policies for development and change. In many countries, constitutions were drafted during difficult times, under pressure from political influences and interests, but Bhutan is fortunate that the change came without any pressure or compulsion.¹⁶

Challenges faced by the Committee

Besides allaying the public fear, apprehension and distrust, the members of the Constitution Drafting Committee faced several challenges and dilemmas during the courses of the several drafting sessions with the heated debates and discussions among the members. Following constitute some topical ones:

- (a) To ensure that varying theories, models of choice and sovereignty (i.e. collective choice, informed choice, reciprocal altruism, public approbation, freedom of choice, public choice, preferential choice, social choice, territorial sovereignty, popular sovereignty and legal and political sovereignty), were considered and incorporated as relevant;
- (b) To integrate in a single document, the doctrines and philosophies relating to the freedom of choice (related to the general will, the majority rules and the greater common good), social, political and legislative morality and constitutional rights and duties;
- (c) To guarantee security under the new power structure, assess competing interests and protect against any encroachment through extra-constitutional means;

¹⁶ Kuensel, 5 November 2005.

- (d) To decentralize and distribute power at the policy, supervisory and operational levels under the implied principles of delegation of power;
- (e) To craft the most appropriate type of Constitution, which was rigid enough to establish and protect the embedded constitutional values and; flexible enough to allow and evolve with the necessity of change;
- (f) To ensure vertical, horizontal and institutional checks and balances to counter any misuse or usurpation of power by any individual, political party, branch of government or agency;
- (g) To ensure democratic participation, accountability and oversight through free, fair and periodic elections;
- (h) To design a system of election, which rewards good governance, and avoids the domination of a single governing party;
- (i) Taking objective views of the comments made through the media and letters submitted by many governments, institutions, multi-lateral agencies¹⁷ and individuals;
- (j) Taking balanced views submitted by the agencies and individuals and incorporating them into the draft to avoid institutional bias and strengthen institutional integrity;
- (k) To choose and consider the comments made by many governmental and international organizations. We had to be mindful to protect ourselves from externally imposed ideologies; and
- (l) A few Bhutanese individuals desired and even tried incorporation of their own individual drafts over those of the Committee; which could not be entertained.

Constitutional Expert

Amongst the few learned constitutional experts consulted by the Constitution Drafting Committee was Mr. K.K.Venugopal of India. Thanking him for his work, His Majesty wrote on 27 October 2004:

¹⁷ Liberal citizenships. Changing “A Bhutanese” to “All persons” (Sections 3 to 12) and section 22 of Article 7.

I would like to inform you that I would be presenting the draft Constitution of the Kingdom of Bhutan to our Cabinet in November this year. The draft Constitution will then be distributed to the twenty districts of our country for the input and views of the people. In framing the Constitution, my consideration has been to introduce a democratic political system that is best suited for Bhutan, a system that will ensure good governance and fulfill the aspirations of the Bhutanese people. While I realize that a large section of our people, especially in rural Bhutan, may not understand the functioning of parliamentary democracy, it is necessary to take full advantage of the unique opportunity provided by the peace and stability we enjoy today to introduce the new political changes.

As an internationally eminent lawyer from India, a country which is our closest neighbour and friend, you have been most forthcoming and sincere in sharing your views and expertise with our Constitution Drafting Committee. It gives me great pleasure to recognize your valuable legal advice in a task of great national importance for us, the drafting of our nation's Constitution. Our Drafting Committee was indeed privileged to receive your friendship and benefited immeasurably from your counsel and wisdom in the constitution making process.

I would like to express my deep appreciation to you for the distinguished service you have rendered to Bhutan and for your valuable contributions in further strengthening the close ties of friendship and goodwill between our two countries.

Review of the draft

After incorporating relevant changes based on the recommendations and comments received from the different sources, a special session of the *Lhengye Zhungtshog* was convened on 21 March 2005. His Majesty shared his views on the draft Constitution with the members, which was the last formal discussion on the draft before distribution to the people of Bhutan.¹⁸

Public Distribution of the Draft Constitution

The first draft of the Constitution was publicly distributed to every household, government officials, students, institutions and foreign agencies based in the country from the Full Bench of the Royal Court of Justice, the High Court of Bhutan (then the highest court in the country, before the establishment of the Supreme Court of Bhutan) on 26 March 2005. On that auspicious day, a Buddhist ritual Conch was blown to mark the significance, as the draft Constitution was handed over to the representatives

¹⁸ Kuensel dated 23 March 2005.

of the all the four (*mKha Bzhi*) ‘doors’ or the ‘gateways’ of the country - the *Sbar* Dungsamkha (the eastern ‘gateway’ Samdrup Jongkhar), *Nub* Dalikha (the western ‘gateway’ of Samtse), *Jang* Taksikha (the northern ‘gateway’ of Gasa) and *Lho* Pasakha (the southern ‘gateway’ Chhukha).¹⁹ This was a symbolic tradition established by Zhabdrung Ngawang Namgyal in the 17th century, while demarcating the Bhutanese territorial boundary. Thereafter, the representatives of Dratshang (the monk body), Ministries and other institutions received the draft Constitution.

Simultaneously, on 26 March 2005 the draft Constitution was made publicly available online - by uploading it on the Internet. This was another master stroke of His Majesty Jigme Singye Wangchuck to seek the views and opinions of the Bhutanese living abroad and; any other people in the world who might be interested in commenting or criticizing the draft Constitution.

One of the public responses was that the language or the vocabulary used in the constitution was difficult or incomprehensible to the common people. Consequently, His Majesty Jigme Singye Wangchuck commanded that the Dzongkha²⁰ text be simplified without diluting the meaning of the provisions to enhance popular understanding. The Dzongkha version was thus reviewed and simplified and it was distributed on 18 August 2005 to every household and institution in the country; and to all international organizations based in Thimphu.

The Inclusive Document

His Majesty Jigme Singye Wangchuck devoted considerable time on improving the document and meticulously studied every word, phrase and sentence, of each section and article of draft Constitution. Thereafter, His Majesty sent the revised draft to the Chairperson of the Constitution Drafting Committee on 15 October 2004 to be reviewed by the Legal Committee²¹ formed under the Chairperson of the Constitution Drafting Committee. The Chairperson submitted the corrections to His Majesty in the form of “*submissions*” with justifications, analysis and background. The first submission was made on 4 December 2004. There were more

¹⁹ *Sbar* means east, *Nub* means west, *Jang* means north and *Lho* means south.

²⁰ The National Language of Bhutan.

²¹ Drangpon Lungten Dubgyur, Drangpon Kinley Namgay, Registrars Gembo Tashi, Pelden Wangmo and Ugyen Tshering.

than four hundred submissions.²² Meanwhile, His Majesty Jigme Singye Wangchuck sent the draft to the Council of Ministers on 1 November 2004. A copy of the corrected draft was submitted to His Majesty²³ by the Council of Ministers, which was received by the Committee on 19 January 2005. The Legal Committee incorporated relevant changes based on their recommendations and comments.²⁴ After the submission of the improved draft, a special session of the Council of Ministers was convened on 21 March 2005, which held the last formal discussion on the draft.²⁵ The process of correcting the draft generated interactive discussion during which the differences were resolved with positive suggestions, objective criticism and conclusive remarks.

Public Consultations

His Majesty Jigme Singye Wangchuck commenced the process of public consultation from Thimphu on 26 October 2005. He personally participated in public consultation in seven Dzongkhags. His Majesty Jigme Khesar Namgyel Wangchuck conducted his first public consultation in Lhuentse on 24 December 2005. He covered thirteen Dzongkhags namely Lhuentse, Trashigang, Pemagatshel, Dagana, Tsirang, Sarpang, Chukha, Samtse, Samdrup Jongkhar, Zhemgang, Gasa, Bumthang and Trongsa. His Majesty Jigme Khesar Namgyel Wangchuck concluded the public consultation at Trongsa on 24 May 2006. The draft Constitution was translated and read in three dialects namely Dzongkha, Tshanglakha and Lhotshamkha.²⁶ Some

22 The process of correction was participatory. Drafts and corrections of Their Majesties were conveyed to me with reasons. However, I was unable to record all their profound thoughts as I was not so fast enough to note down everything. I was commanded to study the draft and corrections and submit my submissions either agreeing or respectfully disagreeing. It was the most humbling and exciting opportunity contrary to my earlier apprehension. General Vestop Namgyel, Military Secretary to His Majesty was helpful to me while conveying the corrections and the comments. His stupendous service without public acclaim and recognition are extraordinary.

23 Dasho Pema Wangchen conveyed the Command that I should accept the corrections, which are acceptable and reject others. I was dreading the situation and the plight to make choice. My hope was rekindled; as there was an opportunity of redressing wrongs and fulfilling His Majesty's often repeated vision of "the best Constitution".

24 The corrections and proposals of the Council of Ministers provided valuable contributions in giving the final shape to the sacred document. Most of the corrections have been either accepted in whole or were incorporated with modifications and consolidated within the framework of the draft. Drangpon Damcho Dorji has been of great help to me during the corrections.

25 *Kuensel*, 23 March 2005.

26 Drangpon Rabjam Rinzin Wangdi translated the draft Constitution into *Tshangla* and it was read by Dasho Sherub Gyeltshen during the Public Consultation. Similarly,

327 people submitted their opinions on the draft Constitution during the public consultation process. Through this process, every citizen became familiar with their Constitution and; the people indeed actually participate in the making of their Constitution – making it truly a People’s Constitution.

Parliamentary Debates

The Members of the Parliament discussed and debated the provisions of the draft Constitution Article-by-Article. There were about 192 interventions by the Parliamentarians during 10 days parliamentary debate on the draft Constitution. The Chairperson clarified about 60 issues excluding remarks by the Hon’ble Speaker. The parliamentary debates were televised live on the *Bhutan Broadcasting Service*.

Birth of the Constitution

The Constitution of the Kingdom of Bhutan was adopted on 18 July 2008. Affixing his historic signature, His Majesty Jigme Khesar Namgyel Wangchuck said:

[T]his Constitution was placed before the people of the twenty Dzongkhags by the King. Each word has earned its sacred place with the blessings of every citizen in our nation. This is the People’s Constitution.

This “People’s Constitution” was the result of a peaceful process of democratization in Bhutan. It manifested the principle of participatory democracy. Thus, His Majesty Jigme Singye Wangchuck informed the National Assembly:

We can draw much satisfaction that during this period Bhutan has achieved rapid socio-economic development, which has brought about a better quality of life for our people, and its status as a sovereign, independent country has also been greatly strengthened.

It has also been my endeavour to encourage and prepare our people to participate actively and fully in the decision making process of our country. To this end a policy of decentralization was launched and Dzongkhag Yargay Tshogchungs were established in all our Dzongkhags in 1981. This policy was given a further

Drangpon Rabjam Bhola Nath Dhahal translated the draft Constitution in *Lhotshamkha* and Dasho Karma Sherpa read it. Dasho Tashi Phuntsog read the Dzongkha version of the Constitution.

impetus in 1991 with the establishment of Geog Yargay Tshogchungs in all 202 gewogs.

Today, our country is progressing well on the path of socio-economic development and the people are also playing an increasingly active role, through the Dzongkehag Yargay development programmes and in bringing forward issues of national concern for discussion in the Tshogdu Chhenmo.

Endurance of the Constitution and deepening of the Democracy

During the last ten years, the Constitution endured the changing times the country passed through. It contributed to social and political stability in the country. It maintained stability and peace in bewildering changing times. A party that loses the election must not feel that it has been permanently defeated. Therefore, the losing party should not go into serious opposition to the new governing party. Thus, this system allows the governance or the elected government to pursue the goals for the nation that the Constitution and the governing party identifies. The first government was replaced by the Opposition through a peaceful election process; the trend is set, rest is there for people to observe and ensure that we act as we agreed in the Constitution – our highest law, made by us, for us, and of us. Peaceful democratic competition and seamless transfer of power is to be expected as in the last elections. In this regard, His Majesty Jigme Khesar Namgyel Wangchuck acknowledged:

Party politics was an entirely new concept for Bhutan. Yet, we managed to steer our country in the right direction from the very beginning and, in the course of eight years, we have gained invaluable experience and built a stable democracy.

Conclusion

The Constitution enshrines the form of government, principle of State policies, rights and duties of citizens. It ensures separation of power, religious pluralism, and political neutrality of the civil service; and autonomy of the constitutional offices. The institution of local governance and decentralization enhance unity, sovereignty, greatness and prosperity of our nation.

Addressing the first democratic Parliament session, His Majesty Jigme Khesar Namgyel Wangchuck said:

The highest achievement of one hundred years of Monarchy has

been the constant nurturing of democracy. This has culminated today with the first sitting of Parliament and the start of democracy, whereby my father the Fourth Druk Gyalpo and I, hereby return to our People the powers that had been vested in our kings by our forefathers one hundred years ago. We do so with absolute faith and confidence, offer our complete support and our prayers for the success of democracy.

Tenth year of the Constitution, we acknowledge the timeless wisdom and peerless services rendered by His Majesty Jigme Singye Wangchuck. We must pledge ourselves to the nation building by following his sterling stewardship engraved in the Constitution. Obedience to the Constitution would be the greatest tribute to the King, who is admired and worshiped by his people.

Comparing Apples and Apples: Ten Years of Constitutional Experience in Bhutan, India and the United States¹

Introduction

Bhutan's Constitution turns ten this summer. The first decade of the Constitutional Democratic Monarchy has been characterized by remarkable institutional growth, as well as a number of historical firsts: the first Elections, the first Constitutional Case before the Supreme Court, and the institution of formal democracy. It has also been marked by numerous challenges, including foreseen and unforeseen wrangling between and among the branches of government and the constitutional bodies.

There has been a tendency among Bhutanese observers – in print, in conversation, and on social media – to focus on the challenges, rather than the successes. While remaining faithful to the confidence His Majesty the Fourth King displayed through the institution of the democratic form of governance by transitioning into a Constitutional Monarchy, such critics wonder whether the constitutional experiment will be successful in Bhutan.

I worry that these critics, consciously or unconsciously, are holding Bhutan's young democracy to an inappropriate and unattainable standard. Specifically, they seem to compare Bhutan's young democracy to much more established democracies in Europe, in the Americas and other older democracies.

In this article, I attempt to more appropriately cast the comparison. Rather than, say, comparing 2018 Bhutan to the United States² or India in 2018, I

1 Contributed by Michael Peil, Vice Dean and Associate Professor of Law, Jigme Singye Wangchuck School of Law, Thimphu, Bhutan. The author warmly thanks his colleague, Professor Nima Dorji of JSW Law, for numerous lessons about Bhutanese legal and constitutional history. Opinions expressed in this article are my own, and do not reflect official positions of the School of Law; mistakes in this article are my own, and do not reflect upon the excellent tutelage of Professor Nima.

2 As an American citizen and lifelong member of the American Democratic Party, I'll quietly note, here in the footnotes, that the U.S. constitutional experience under its current President is not heartening. However, democracies are resilient, and I maintain hope that, while individual politicians and political movements come and go, the American democratic experiment will adjust, improve, and adapt.

propose to compare Bhutan's Constitutional Democratic Monarchy at ten years old to those of the United States and India at the same age. In the case of the United States, this means 1791 – the tenth anniversary of the ratification of the Articles of Confederation.³ In the case of India, this was in 1959 – the tenth anniversary of the ratification of the Constitution of India.⁴

I believe that once we compare “apples and apples” – three young constitutions at the same point in their development – critics of the Bhutanese democratic experience will recognize how much Bhutan has accomplished in ten short years.

The United States of America 1781 to 1791

First and foremost, it should be noted that the first United States Constitution, unlike its counterparts in Bhutan and India, was *torn up and replaced* only eight years after it came into force. The Articles of Confederation lacked a strong central government – Article II guaranteed that each of the signatory states “retains its sovereignty, freedom, and independence. . . .” The Articles created instead a loose affiliation of sovereign States. In particular, the central government lacked the power to raise its own funds – direct taxation was reserved to the several states, and national customs and tariffs could only be imposed by unanimous consent.⁵ Thus, the central government was forced to *ask* the several states for contributions to the national budget.

In 1791, the United States was a very different country than it is today. Its eight-year war of Independence from Great Britain only concluded in 1783, with the Treaty of Paris. According to a census in the previous year, the population of the young country was only 39,29,214, roughly the same

3 While most readers are likely intimately familiar with the United States' current Constitution, which was ratified in 1787, I have chosen instead to take as the start date the entry into force of America's *first* Constitution, the Articles of Confederation, which were drafted in November 1777 and ratified on 1 March 1781.

4 Although Indian independence was formally granted by the Indian Independence Act 1947, and that Act performed the functions of a constitution between 1947 and 1950, it was at heart always an act of the *British* Parliament. Indeed, until the ratification of the Constitution and the declaration of the Republic of India, India was formally an independent “dominion” of the British Commonwealth of Nations. As a product of the Indian Constituent Assembly, the November 1950 Constitution of India was the first indigenous Constitution for and by India.

5 As it happened, unanimous consent was never given: Rhode Island, the smallest of the 13 states, vetoed a national tariff.

as the modern-day Indian state of Meghalaya. Its land area was just under 23,00,000 square kilometers, comparable to present-day Algeria, in Africa.

In the realm of law, the American Constitutional Order was still in its infancy. Of course, criminal and civil litigation continued: each of the former colonies, by legislative act or by state Constitution, simply adopted then-existing English Common Law as the law of the land. Therefore trials and even appeals continued, and such rights as jury trial in criminal cases survived, even in the absence of specific (American) constitutional or statutory authority.

On the other hand, the U.S. federal judiciary and, at its apex, the United States Supreme Court was a product of the 1789 Constitution, not the Articles. Its first sitting was in February 1790, nine years into America's constitutional experience. The case which resulted in the Court's first decision, *West v. Barnes*,⁶ had only made its way to the Court in the summer of 1791; a decision would follow in August of that year. Needless to say, there were no major constitutional cases before the United States Supreme Court during this period. In particular, Justice Marshall's landmark decision in *Marbury v. Madison*, which established the power of the Court to review the constitutionality of Legislative Acts, was still twelve years in the future.

The first ten years of the constitutional experiment in North America were also marked by armed uprisings. Chief among these were Shay's Rebellion (1786-87) and the Pennsylvania Mutiny (1783), spearheaded by veterans of the War for Independence and aimed at overthrow of the central government. Indeed, the latter Mutiny drove the American central government from its then-capital in Philadelphia to New York City where it settled for seven years before returning to Philadelphia in 1790.⁷

One success occurred in March 1791, with the admission of the state of Vermont to the Union. This marked the first test of Article IV, Section 3, of the Constitution, which provided for admission of new states. (Vermont was the 14th state – the first 13 joined at the inception.)⁸

6 2 U.S. (2 Dall.) 401 (1791). The case, concerning whether paper currency could (or must) be used to pay a land mortgage, was decided on procedural grounds: the appellant had filed his appeal with the clerk of the lower court, rather than the clerk of the Supreme Court, as was then required.

7 The return to Philadelphia was part of the same legislative compromise that would move the permanent capital to its present home in Washington, D.C., in 1800.

8 By this time, Congress had also approved the admission of Kentucky – the 15th state and the author's boyhood home – to the Union. However, Kentucky was not formally

Indeed, if we take 1 March 1791 – the tenth birthday of the Articles of Confederation – as our snapshot, the United States had not even ratified the ten Amendments to the Constitution that constitute the famous “*Bill of Rights*.” That is, as of its tenth birthday, the United States Constitution contained *no provision* for protection of individual civil or political rights (to say nothing of economic, social, and cultural rights, which would need to wait another 200 years – or more – to be judicially interpreted into the Constitution).

As far as the legislative branch, the American democracy was likewise still getting set up. The Articles of Confederation meant that the power of the unicameral American Congress during 1781 to 1789 was limited to foreign and military affairs; all other powers were reserved to the several states.

Once the 1789 Constitution entered into force, the new bicameral Congress set to work. By March 1791, most of the 75 Legislative Acts of Congress had the appearance of “setting up shop” in the new nation. The first Congress established government departments, set up pay scales for elected and appointed officials, set up federal courts, and resolved financial and territorial issues which arose under the Articles. Apart from the first intellectual property laws and the first federal penal code, however, the young American legislature was not yet proactively legislating.⁹

At ten years old, the politics and laws of the constitutional order of the United States were still untested and unproven. With the benefit of hindsight, we see that the false-start of the Articles of Confederacy gave way to a Constitution that would stand for more than 200 years.¹⁰

The Republic of India 1949 to 1959

India gained its hard-earned independence in 1947, only after 90 years of agitation and open rebellion against the British Raj. The Constituent Assembly of India ratified the nation’s first Constitution on 26 November 1949, and the Constitution entered into force on 26 January 1950 – celebrated as Republic Day in India. Consistent with my treatment of the

admitted as a state until June of 1792.

9 For an index and full text of the Acts of the first Congress (____), see online at <https://www.loc.gov/law/help/statutes-at-large/1st-congress/c1.pdf>.

10 But note that the greatest fault of the 1789 Constitution – the compromise on human slavery – would not be resolved for another seventy-five years, at the cost of a Civil War that nearly destroyed the nation.

other two examples, I shall use the 1949 date (first ratification of a national Constitution) as my starting-point.

Like many of the newly decolonized States that followed, the terms of its independence, and its very borders, were set in stone by the departing colonial power. In the case of India, this meant Partition – a previously-unified Indian subcontinent was divided into two (later three) independent states – Pakistan (including East Pakistan, which became the independent People’s Republic of Bangladesh in 1972) and India. It also meant the open question of the Princely (or Indian) states, which had been separately classified by the Raj.¹¹

The latter distinction was enshrined in the 1950 Constitution, which created three categories of “States” within India: nine former governor’s provinces (for example, West Bengal and Uttar Pradesh); eight States composed of former Princely States (for example, Hyderabad and Jammu & Kashmir); and 10 former commissioner’s states (which included, in some cases, former Princely States – for example, Bhopal and Himachal Pradesh).

This arrangement was unworkable almost from the start. In 1953, following the famous hunger strike of Potti Sreeramulu, India carved a Telugu-speaking state (Andhra) from the Madras state. Other small adjustments were made in the 1950s, before the Seventh Amendment (1956) and States Reorganisation Act, 1956 sundered the entire then-existing categorization of States, replacing it with 14 states and six Union territories, organized along linguistic lines. The issue was not resolved in the Constitution’s first decade, however, as India has created fourteen new states since 1956, most recently was the creation of the state of Telangana in 2014.

Another consequence of attempting to build a state along the lines imposed by the former colonial power was the “Armed Forces Special Powers Act.” The AFSPA enables the central and state governments to impose extensive security measures in “disturbed areas.” The first AFSPA was the Armed Forces Special Powers (Assam and Manipur) Act, 1958 was enacted in response to separatist agitation in Nagaland, and was followed by two other Acts, one for Punjab and Chandigarh (enacted in 1983, repealed in

11 See Interpretation Act, 1889, at sections 18(4) & (5), *available online at* https://www.legislation.gov.uk/ukpga/1889/63/pdfs/ukpga_18890063_en.pdf, which draws a legal distinction between “British India” and “India,” the latter of which includes “British India together with any territories of any native prince or chief under the suzerainty of Her Majesty exercised through the Governor-General of India. . . .”

1997), and one for Jammu & Kashmir (enacted in 1990). The first ASFPA remains in force in Nagaland, Assam, and Manipur.¹²

Meanwhile, Partition, the second territorial legacy from the colonial days, has remained a thorn in India's side to the present day – not least of which in Kashmir, where the boundaries imposed by the hastily-departing Raj created a region whose boundaries were disputed not only by Pakistan and India, but also by (until 1963) the People's Republic of China. During the period in question, India normalized central control over “its” portion of Jammu and Kashmir: following the first Indo-Pakistani war of 1947, Jammu and Kashmir held Constituent Assembly elections in 1947 and 1951, and a Legislative Assembly election in 1957, confirming and re-confirming J&K's accession to the Union (and later Republic) of India; each of these elections were protested by Pakistan on the international stage, and each were marked by “irregularities.” Indo-Pakistan relations have been strained by this (and numerous other) factors since independence, not least of which India's strong support for Bangladeshi separatists during the Bangladesh Liberation War of 1971.

As for the Constitution itself, it became clear from the outset that the Indian Constitution – unlike its American (or Bhutanese) counterpart – was designed and intended to be amended. In its first ten years, the Constitution witnessed seven amendments – four by Parliamentary supermajority and three by joint Parliamentary supermajority and ratification by 50% of the state legislatures.¹³ The subjects of early Constitutional amendments included the introduction of “Schedule 9” to the Constitution – which provided protection from judicial scrutiny – especially as regards denial of fundamental rights – certain legislative acts. (Schedule 9 continues to face scrutiny to the present day, with the Indian Supreme Court ruling in the 2007 *I.R. Coelho v. State*

12 The 1958 AFSPA was repealed with respect to Meghalaya from 1 April 2018. See “What is AFSPA, and where is it in force?” *The Hindu*, 23 April 2018, available online at <http://www.thehindu.com/news/national/what-is-afspa-and-where-is-it-in-force/article23648102.ece>.

13 This was a sign of things to come; if anything, the pace has picked up. In its first decade, the Constitution was amended, on average, once every seventeen months. In the 58 years since, the Constitution has been amended at better than twice that rate, every 7.4 months.

Presidency of Rajendra Prasad and three governments of Jawaharlal Nehru dominated the entire period. India's bicameral Parliament was much busier (and much more sophisticated) than its American counterpart in its first ten years, passing nearly a thousand Acts, including comprehensive federal crime codes, ratification of multilateral treaties, and (like the Americans) harmonization of pre-existing state laws into federal standards. During its first two years, India held two general elections, each re-confirming the post-independence power structures.

Like that of the United States, the Indian Constitutional experience in its first ten years was one of nation-building. The government focused on securing and defining its international and internal borders and on creating a national polity. The economic and diplomatic successes that have marked India's rise to regional superpower would have to wait for several more decades.

The Kingdom of Bhutan 2008 to 2018

The Bhutanese constitutional experience enjoyed three major advantages over its American and Indian counterparts. First, it occurred more than two hundred years after the pioneering American Constitution, and more than sixty years after India's. Second, it was forged in peace, rather than conflict. The Constitution of Bhutan was – perhaps unprecedented in the human history¹⁴ which was a result of decades of careful preparation by their Majesties to introduce a popular rule- through a Constitutional Monarchy. It built upon the fifty years of proto-democratic institutions – including a representative National Assembly (instituted in 1953), a Royal Advisory Council (1965, which under the Constitution would be transformed into the National Council), an independent judiciary (1967), and the Council of Ministers (1968).

The Constitution of Bhutan of 2008 formalized and standardized these pre-existing bodies and created new institutions. Particularly, the institution of the Supreme Court of Bhutan was notable milestone in the Constitutional and judicial history of Bhutan. The Supreme Court has the exclusive power to interpret and enforce the Constitution and is the highest appellate authority in the country.

14 If any reader is aware of another example, please contact the author.

The Supreme Court has exercised its power of *Constitutional Review* sparingly, arguably deciding only two cases of Constitutional import. In the first,¹⁵ the Court determined that the Opposition Party had standing to sue the Government for alleged violation of separation of powers, and that taxation, appropriation, and budget actions are “bills” which require tabling before both Houses of the Parliament. In the second, the Court exercised extra-constitutional (though arguably statutorily granted)¹⁶ powers to authorize the Bhutan Narcotics Control Authority – over express language in the Narcotic Drugs, Psychotropic Substance and Substance Abuse Act of Bhutan 2015 – to list Spasmo Proxyon Plus (SP+) in the statutory schedule of controlled substances.

The Bhutanese Constitution contained, in Articles 7 through 9, an express list of Fundamental Rights, Fundamental Duties, and “State Policies.” The Fundamental Rights of Article 7 are a fairly complete list of the civil and political rights enumerated in the International Covenant on Civil & Political Rights (1959), while the State Policies set out in Article 9 are a nearly complete list of economic, social and cultural rights enshrined in the International Covenant on Economic, Social & Cultural Rights (1959). Emergency powers, like those exercised in India’s AFSPA, are expressly cabined by Article 33 of the Constitution, which limits the power to declare a state of emergency to the Druk Gyalpo, upon the written advice of the Prime Minister, with extensive procedures for Parliamentary review; Article 33 also enumerates a short list of fundamental rights which may be suspended in case of emergency and, by implication, protects the remaining rights under Article 7 as non-derogable. The Supreme Court has not adjudicated any significant cases on Fundamental Rights, Fundamental Duties, or State Policies during its first ten years.

Politically, Bhutan has enjoyed two national parliamentary elections – it is currently in the midst of its third. Particularly, the 2013 election saw Bhutan pass the first test of a young democracy: the peaceful and democratic handover of power from its first ruling government to another political party. The significance of this election – and the ensuing transition – should not be understated. When Druk PhuensumTshogpa

15 Judgment No. SC (Hung 11-1)

16 Relying upon Section 28.1 of the Civil & Criminal Procedure Code of Bhutan, 2001: “...Where any section [of an Act] is ambiguous or there exists lacuna, the decision of the majority [of] Judges of the Supreme Court/High Court shall prevail.” Available online at http://www.nationalcouncil.bt/assets/uploads/docs/acts/2014/Civil_and_criminal_Act_2001Eng.pdf.

(DPT) peacefully handed power to the current Peoples Democratic Party (PDP) government, Bhutan survived a test of its democratic process that has confounded numerous other young democracies.

That is not to say that Bhutan has settled all existing Constitutional questions. The 2014 dispute between the Prime Minister and the Committee of Secretaries (CoS) pointed up a potential conflict between the professional Civil Service and the elected government. In that case, the Prime Minister sought the dismissal of several Ministry Secretaries for overstepping their foreign-affairs authority. In response, the Royal Civil Servant Commission (RCSC) and the Opposition Party noted that the Prime Minister lacks the authority to directly discipline or dismiss Ministry Secretaries, the highest-ranking civil servants. In that instance, the crisis was averted by compromise among the parties – the RCSC took on the matter as an administrative matter, at the application of the Prime Minister.¹⁷ Likewise, controversies concerning Fundamental Rights surrounding the third Parliamentary elections have arisen in particular, the refusal of the Election Commission of Bhutan to register *Druk Gaki Tshogpa* and the investigation and referral for prosecution of a DPT organizer in Tsirang for criticism of the electoral process is mentionable.¹⁸

Finally, Bhutan continues to face the usual challenges of a Least-Developed Country (LDC), including development of a sustainable infrastructure, management of international relations and trade, the emergence of a robust (though fledgling) private sector, and balancing national culture with the demands of modernity. At least with respect to the first two governments, these challenges appear to be matters of policy and politics, rather than structural and constitutional.

Conclusion

The first ten years of Bhutan's constitutional history is compared favorably to those of the world's two largest democracies, the United States and India. A glance at more recent experiences in Africa, Eastern and Central Europe, and Asia, suggest that Bhutan is making sustainable progress compared to other young democracies.

¹⁷ In the end, the RCSC subjected them to reassignment, determining that greater punishment – dismissal or penalty – was unwarranted on the facts.

¹⁸ My information about all three matters comes entirely from publicly available sources – for example, *Kuensel*. The author claims no specialized knowledge of the CoS matter or either of the ECB matters.

The comparison between Bhutan on the one hand and the United States on the other is deeply imperfect. The United States was one of the world's first constitutional democracies, and much of its Constitutional experience was a voyage into uncharted waters; by contrast, Bhutan (and India) were able to draw upon dozens (if not hundreds) of other States' experiences. The Constitutions of India *and* the United States were products of decolonization and, importantly, of sustained conflicts with their colonial powers in Europe. By contrast, Bhutan was, before and after the Constitution, a fully sovereign and independent State, with existing proto-democratic institutions.

In the end, I chose these two examples because they are the ones that most commonly come up in conversations or critiques of Bhutan's constitutional experience. I recommend to future authors that a more apt comparison might be that of the Republic of Singapore in the 1960s and 1970s or of Nepal in the present day.

Nonetheless – and not surprisingly – this short comparison demonstrates that Bhutan has much to be proud of in its first ten years under the Constitution, and many challenges ahead as the Constitutional experiment enters its second decade.

The Politics of Apoliticality: In the Conflict between Political Rights and Political Neutrality, Facelessness Wins¹

Introduction

2018 marks a decade of successful democracy and constitutional regime in Bhutan. It is also the year for another round of national elections. In ten years of democracy, one of the issues that have persisted is the rigid imposition of “*apoliticality*” or political neutrality on civil servants.² As we are in the midst of the election year, civil servants and other public servants are confronted with the rising walls of the politics of *apoliticality*. The wall that is so thin yet unbreakable. ‘Thin’ because it is a concept that is not definitively established. When there is passion to participate in a democracy meaningfully, but one’s passion is clouded by the fear of uncertain consequences, the only resort is to put on a mask to bypass the consequences. Social media in Bhutan is now overwhelmed with anonymous accounts and users expressing unusually bold and unsubstantiated allegations and accusations. Such facelessness has become very handy for many Bhutanese. However, the tragedy is, the moment a person becomes faceless, the facelessness takes control of him or her. This facelessness, then act as a translucent veil to healthy communication that is one of the important prerequisites for the harmonious and happy coexistence in a society.

Participation of citizens is vital to democracy. In this light, completely restraining civil servants from all forms of political participation is quite undemocratic, and is an infringement of their civil and political rights guaranteed by the Constitution. On the other hand, it is important that the civil service be able to retain its legitimacy as an impartial and politically neutral public service agency for the benefit of the people. To balance these two fundamental competing interests, we need to develop or adopt befitting definition of the *apoliticality* that allows civil servants to exercise reasonable political rights without undermining the neutrality of the civil

1 Contributed by Nima Dorji, Lecturer, JSW Law, currently pursuing Ph.D. at the University of Victoria, Canada.

2 Although some literature differentiates between the concepts of “apolitical” and “political neutrality”, these two concepts are used interchangeably in this article.

service. We need to explore the concept in greater detail to adopt a suitable model of *apoliticality* for Bhutan.

‘Apoliticality’ and ‘Political Neutrality’

The concept of apoliticality is a relatively new concept in Bhutan. The issue of its effects in Bhutanese society and polity is often raised by politicians and the civil servants. The way it is implemented is contested by many. However, this problem transcends all jurisdictions and it still continues to exist in many countries including those where the concept first developed.

The origin of the concept of *political neutrality* is attributed to the late American President Woodrow Wilson, who was at the centre of the movement for American civil service reform and introduction of a merit-based civil service in the United States.³ He distinguished between politics and administration – politicians decide on public policy and set the tasks for administration and public servants are the scientific instruments of program implementation.⁴ However, he said the civil service is not merely a passive instrument: it has the power and discretion to choose the means to implement policies to promote efficiency and reduce costs.⁵ The nineteenth-century German jurist and sociologist Max Weber also supported the separation between politics and bureaucracy.⁶ According to Weber, implementation of political goals should be based on facts.⁷ To meet this political goal, there is a need for a bureaucracy that employs systematic technical analysis and calculates the suitability of available means.⁸ In the traditional sense, political neutrality required strict separation between policy making and policy execution.⁹ Since then, the concept has continued to evolve with the introduction of new governance systems. According

3 John Uhr, “Ethics and Public Service” (1988) XLVII:2 *Australian Journal of Public Administration* 114.

4 *Ibid.*

5 Susan D. Brace, “The role of bureaucracy during the war on terror” (2011) *Theses and Dissertations* 538, <http://utdr.utoledo.edu/theses-dissertations/538>, 3; John Uhr, “Ethics and Public Service” (1988) XLVII:2 *Australian Journal of Public Administration* 114.

6 Susan D. Brace, *Ibid* at 3-4.

7 Peter Triantafyllou, “The Politics of Neutrality and the Changing Role of Expertise in Public Administration” (2015) 37:3 *Administrative Theory & Praxis* 175; Simon Baddeley and Kim James, “From Political Neutrality to Political Wisdom” (1987) 7:2 *Politics* 37

8 *Ibid.*

9 Theophilus Olumuyiwa, “Bureaucratic politics and policy development: Issues and challenges” (2016) 10:2 *African Journal of Political Science and International Relations* 19.

to the former Australian Academician and Senior Civil Servant Chris Williams, bureaucratic or political neutrality has eight elements. Those elements can be either general or party-political elements, and they may relate to either politician's role or public service's role.¹⁰ He identifies three elements relating to politician's role. The first is a general element, and the second and third are partisan political elements. Namely:

1. Public service is subordinate to political control: Public service is accountable to and subject to control of the parliament.
2. Public service not to be used for party political purposes.
3. Appointment, promotion, tenure of public servants to be independent of party political influence.

Williams also identifies five elements describing public service's role. Amongst them, the fourth, sixth and seventh are categorised as general elements, and the fifth and eighth as partisan political elements:

4. Public service activity is to be limited: public servants to maintain anonymity and are restricted from commenting on government policies in the public.
5. Party political activity of public servants to be limited.
6. Public servants to serve loyally any government and not to impose their own views.
7. Public servants' relation with public or interest groups to be fair and impartial.
8. Party political affiliations not to influence public service and party-political affiliations of either public service or public not to affect public service.

¹⁰ Chris William, "The Concept of Bureaucratic Neutrality" (1985) XLIV:1 *Australian Journal of Public Administration* 48.

A political scientist, Kenneth Kernaghan identified six key principles of political neutrality:¹¹

1. Politics and policy are separated from administration.
2. Public servants are appointed and promoted on the basis of merit rather than on party affiliation or contributions.
3. Public servants do not engage in partisan political activities.
4. Public servants do not express publicly their personal views on government policies or administration.
5. Public servants provide up-front and objective advice to their political masters in private and in confidence, and in return political executives protect the anonymity of public servants by publicly accepting responsibility for the decisions.
6. Public servants execute policy decisions loyally irrespective of the government in power or their personal opinions.

We can identify three comments and important elements in William's and Kernaghan's formulations: (1) public servants are restricted from taking part in political activities; (2) the executive government or party politics should not influence or play with the public service; and (3) politics and policy should be separate from administration.

Approaches to Political Neutrality

Drawing upon his eight elements, Williams examines three common attitudes towards political neutrality: (1) Traditionalists; (2) Equivocators; and (3) Pragmatists. Traditionalists strongly believe that there must be strict separation between politics and administration. Traditionalists tie neutrality to "the conventions of ministerial responsibility, secrecy, and the anonymity, loyalty, permanence and restricted political rights of public servants."¹² Traditionalists expect civil servants to provide policy advice

11 Lorne Sossin, "Defining Boundaries: The Constitutional Argument for Bureaucratic Independence and its Implication for the Accountability of the Public Service (2006), *Sponsorship Affair (Gomery Inquiry)*, available at SSRN: <https://ssrn.com/abstract=1911245>" 29-30; Chimi Dorji, "Civil Servants: No Political Strings Attached" (2015) 3 *Bhutan Law Review* 33-34.

12 Chris Williams, *Supra* note 9.

or implement policies without political bias; should anything go wrong, the (political) minister is accountable, not the civil servants. This is not the convention Bhutan follows: most of the time, civil servants are held accountable for their official actions.

Equivocators define neutrality as “service to governments of any political leaning with equal dedication and efficiency.”¹³ Even if a civil servant disagrees with the government’s policy, she is required to refrain from expressing her disagreement. However, Equivocators acknowledge that absolute political control is not possible, that the civil servants might exercise their political rights for political purposes, and civil service is not absolutely free from political patronage and other influences.¹⁴

Pragmatists believe that neutrality is a myth protected by secrecy, that there is no such thing as politically neutral advice. They insist that what we mean by “*apoliticality*” is in fact non-partisanship – neutrality as between and among competing political parties.¹⁵ They argue that civil servants play a huge role in policy making and must be responsible professionally and accountable to the public. According to them, it is impossible for civil servants to serve any government with absolute loyalty without imposing their personal views. To ask civil servants for such loyalty would be to ignore reality. Bhutan’s choice among these three approaches will be examined later. However, to enable such examination, there is need for us to understand other important features and concepts around political neutrality.

The role of Political Neutrality

Understanding the importance of political neutrality will not only help us understand the concept of political neutrality, but also help us adopt or design appropriate model to meet that purpose. The most visible function of political neutrality is to protect public servants from politicisation and to depoliticise the public service. The principle of political neutrality is held to be a right of the public at large to be served by a politically neutral civil service.¹⁶ It is developed to shield the public service from overt political control.¹⁷ It serves as a mechanism for checks and balances on the power

13 Chris Williams, *Ibid* at 52.

14 Chris Williams, *Ibid*.

15 Chris Williams, *Ibid* at 54.

16 Lorne Sossin, *Supra* note 10, at 36.

17 B. Guy Peters and Jon Pierre, *The Politicization of the Civil Service in Comparative Perspective*:

relationship between the public service and the elected government in two important ways. First, neutrality limits the government's influence on public service, which in turn enhances legitimacy of the public service, for example, removing political patronage from appointment to the public service.¹⁸ Second, it restricts public servants from refusing to provide policy advice or implement lawful government policies based on their political beliefs. Both play important roles in ensuring continuity in public service delivery without interruption from the government, and in provision of uninterrupted policy advice by the public servants to the government of the day. Political neutrality is also seen as a stabilizing force in the face of rapid modernization and change, and conditions of the continuous competition between political forces.¹⁹

Thus, political neutrality is not an end in itself; it is a means to an end, namely to enhance the efficiency of the public service and ensure that they transact with the citizens on the beliefs of fairness to promote effective delivery of service; securing the happiness and well-being of the people. Apolitical civil service is considered as a vehicle for the pursuit of the common good.²⁰ The politicisation of public service affects service delivery in two ways: (1) a public servant is not able to provide free, fair and open public policy advice to the government through neutral political stands and (2) a public servant is not able to provide fair services to citizens because of the differences in their political ideology, views of the party or candidates they support. Therefore, the concept of apoliticality or political neutrality is developed as an instrument to stop politicisation of the public service in order to ensure fairness in the delivery of public services.

How does politicisation happen?

If the objective of apoliticality is to stop politicisation of the public service, then we first need to understand how or in what ways politicisation

A Quest for Control, 1st ed., (Routledge, 2004) 2; UK House of Commons Public Administration Committee, "Politics and Administration: Ministers and Civil Servants" No.1 (March 15, 2007) *Third Report of Session 2006-07* 8-9, online: <https://publications.parliament.uk/pa/cm200607/cmselect/cmpubadm/122/122i.pdf>.

18 Greg McCarry, "An Uneven Playing Field: Executive Public Servants and the Public Interest" (1991) 13 *Sydney L. Rev.* 499.

19 Simon Baddeley and Kim James, "From Political Neutrality to Political Wisdom" (1987) 7:2 *Politics* (35-40) 37-39; Jacek Czaputowicz, "The Civil Service in Poland – between Politicisation and Professionalization" in *The Polish Yearbook of the Civil Service* (2005) 23-45. Online: <https://portal.uw.edu.pl/documents/10843903/11367021/Czaputowicz+-+2005+-The+Civil+Service+in+Poland.pdf>.

20 Jacek Czaputowicz, *Ibid.*

happens in order to ensure that the apoliticity approach we adopt meets that goal. Politicisation happens in two ways: (1) politicians' influence or involvement in public administration; and (2) public servants' voluntary involvement in political activities. In the former, politicisation happens when public service is used for party political purposes by the politicians. That is, political criteria replace merit-based criteria in the appointment, promotion and tenure of public servants.²¹ It is found that handing out public sector jobs to friends and supporters of politicians led to corruption in the United Kingdom.²² In the latter, politicisation happens when public servants use their position, office and public resources to further their own political career or to support partisan politics, and when their decision is influenced by political biases.

Political Purposes and Activities

Politicisation happens when politicians use the public service for political purposes or when public servants engage in political activities. These two are the two sides of a same political coin. That is, they have same effects, resulting in politicisation. One involves politicisation by politicians and the other by public servants themselves. In essence, politicisation is use of public service either by politicians or public servants for carrying out political activities.

"Political activity" can be defined as activity in support or, in opposition to a political party or a candidate before or during an election period.²³ Some examples include participating as a party candidate or a voter, fundraising for a candidate or a party, campaigning for or against a party or parties, attending party events, and sharing personal views in support of or opposition to, a candidate or a party.

It is simply not possible to have a public service that does not have some level of political involvement.²⁴ The public service as an important part of governance system cannot be absolutely apolitical. Most dictionaries

21 B. Guy Peters and Jon Pierre, *The Politicization of the Civil Service in Comparative Perspective: A Quest for Control*, 1st ed., (Routledge, 2004) 2.

22 Linda Colley, "The Politics of an Apolitical Public Service", In B. B. Simon Blackwood, Cath Rafferty & Cameron Allan (Ed.), *Work and Strife in Paradise: the history of Labour relations in Queensland 1859 to 2009* (pp. 163–181). Australia: The Federation Press.

23 Canadian definition of the political activity at <https://www.canada.ca/en/public-service-commission/services/political-activities/political-activities-not-related-candidacy.html>.

24 B. Guy Peters and Jon Pierre, *Supra* note 20.

define “apolitical” as not having interest or involving in politics. To not have some interest or involvement is too much to ask for, therefore, *Collins Dictionary* partly defines “apolitical” as being “politically neutral.” Neutral can be interpreted as taking no side, therefore, to be politically neutral is to take no side in partisan politics. Apoliticality is designed to remove public service from direct forms of partisan control or influence affecting the impartiality of the public service. Apoliticality limits politicisation of the public service by controlling the political activities that affects or seen to be affecting the impartial policy implementation or public service delivery by the public service.

Political Neutrality v. Political Rights

With all these in mind, let us now examine Bhutan’s implementation of apoliticality. Constitutionally, the Civil Service,²⁵ the Constitutional Post Holders,²⁶ National Council,²⁷ religious institutions and personalities,²⁸ Dzongdags,²⁹ and candidates and members of Local Governments³⁰ are required to remain apolitical or are restricted from having political affiliations. *The Election Act* adds the members of the Royal Family and civil servants to the list.³¹ *The Civil Service Act* further adds the members of the Royal Civil Service Commission (RCSC) into the list.³² These groups are subjected to varying degrees of political neutrality. It is not only civil servants who are depoliticised by the law. However, in implementation, the civil servants seemed to be completely curtailed from all forms of political affairs. The Election Commission of Bhutan and the RCSC have rigidly and rigorously reinforced the status of apoliticality of the civil servants.

Meanwhile, the Constitution while granting the neutral status to the civil service on one hand seemingly retracts it with the other. The Constitution provides for a non-partisan committee to recommend the appointment of the Chairperson and Commissioners of the RCSC.³³ However, the Constitution also confers sole power upon the Prime Minister to

25 *The Constitution of the Kingdom of Bhutan*, 2008, Art.26(1).

26 *The Constitution of the Kingdom of Bhutan*, 2008, Art.31(3).

27 *The Constitution of the Kingdom of Bhutan*, 2008, Art.11(3).

28 *The Constitution of the Kingdom of Bhutan*, 2008, Art.3.

29 *The Constitution of the Kingdom of Bhutan*, 2008, Art.22(20).

30 *The Constitution of the Kingdom of Bhutan*, 2008, Art.22(17).

31 *The Election Act of the Kingdom of Bhutan*, 2008, s.183 and s.179 respectively.

32 *The Civil Service Act*, 2010, s.10.

33 *The Constitution of the Kingdom of Bhutan*, 2008, Art.26(2).

recommend the appointment of the Cabinet Secretary, and to recommend appointments of government Secretaries and Dzongdags upon nomination from the RCSC.³⁴ Therefore, the Constitution of Bhutan seemingly allows a certain degree of politicisation of the civil service.

Article 26(1) of the Constitution mandates the RCSC to promote and ensure an independent and *apolitical* civil service to discharge public duties in an efficient, transparent and accountable manner. What does the term “apolitical civil service” mean in the Bhutanese context? The definition to this question is neither provided in the Constitution, but partly section 97.2 of the *Civil Service Act* elucidates “apolitical” as not linked with political parties or engaged in any political activities. *Bhutan Civil Service Rules 2018* expands this definition to “impartial, neutral and not linked with political parties or engaged in any political activities.” These provisions can be interpreted as prohibiting civil servants from contesting elections or becoming members of a political party, and from engaging in political activities such as holding post in political party, canvassing for the political party or a candidate.³⁵ Although political activity is not explicitly defined, additional political activities listed in *BCSR, 2018* include attending political party meetings, supporting or carrying out activities related to parties, including campaigning in support or against a candidate or a party, expressing any opinion on politics/political parties either explicitly or implicitly, performing or neglecting his or her duty based on political views, imposing or influencing political views, communication on elections, political views, making campaign contribution in support of or against a candidate or a political party, and in activities that can be understood to be in support or against a candidate or a political party.³⁶

The list provided by *BCSR* is very exhaustive. The list is also very stifling. The Constitution could not have intended to call back those fundamental rights it provides. While some prohibitions are reasonable, most of them are in direct conflict with right to vote,³⁷ right to freedom of speech, opinion and expression,³⁸ right to freedom of assembly and association,³⁹ and right to information.⁴⁰ The right to vote cannot be interpreted as the right to

34 *The Constitution of the Kingdom of Bhutan*, 2008, Art.2(19)(m), (p), (q).

35 *The Civil Service Act*, 2010, s.38.

36 *Bhutan Civil Service Rules*, 2018, r.3.3.5.2.

37 *The Constitution of the Kingdom of Bhutan*, 2008, Art.7(6).

38 *The Constitution of the Kingdom of Bhutan*, 2008, Art.7(2).

39 *The Constitution of the Kingdom of Bhutan*, 2008, Art.7(12).

40 *The Constitution of the Kingdom of Bhutan*, 2008, Art.7(3).

press the ballot button only. Various courts in the United States have held that right to vote includes the right to participate in elections equally with other citizens,⁴¹ the right to cast an effective vote,⁴² and to have one's vote counted,⁴³ and includes the right to an undiluted vote,⁴⁴ that is, the right to cast a ballot equal among voters.⁴⁵ The right to vote also necessarily includes the right to be free from restrictions that deny the franchise or render its exercise very difficult and inconvenient amounting to denial of the right to vote;⁴⁶ any restrictions on this right strikes at the heart of a representative government.⁴⁷ However, the lists provided by *BCSR 2018*, channelizes civil servants towards casting their votes with blinded eyes. Political participation is one of the important features of a successful democracy. Without the overt freedom of opinion, speech and expression, freedom of assembly, and right to information,⁴⁸ one cannot exercise one's right to vote effectively. The unreasonable restriction of civil servants from attending party meetings or forums, restraint from communicating or expressing opinion relating to elections or politics is both intrusive and cold-shoulders their political rights basic fundamental rights.

The Facelessness

Let us face it: If we have the political rights guaranteed by the Constitution; if those rights are completely taken away from us, what do we do? Politics is a ubiquitous affair, but if we are to remain indifferent by silencing ourselves, by not employing our faculties of reason and analysis, can that be an objective criterion to cast our votes responsibly? This leads to anonymous masking of our identities, where people choose to hide behind the mask – embracing anonymous modes of communication. The irony is, we are forced to put on a mask and hide behind a curtain of concealment to exercise rights already given to you. Unfortunately, once masked, it hides our true identity and individuality protruding bogus fidelity and commitment. This disregards discretion and restraint that edifices for

41 *Givorns v. City of Valley*, 598 So.2d 1338 (Ala. 1992).

42 *Anderson v. Celebrezze*, 460 U.S. 780, 103 S. Ct. 1564, 75 L. Ed. 2d 547 (1983).

43 *In re Gray-Sadler*, 164 N.J. 468, 753 A.2d 1101 (2000).

44 *Ibid*.

45 *Shaw v. Hunt*, 517 U.S. 899, 116 S. Ct. 1894, 135 L. Ed. 2d 207 (1996)

46 *Greidinger v. Davis*, 988 F.2d 1344 (4th Cir. 1993).

47 *Perez v. Marti*, 770 So.2d 176 (Fla. Dist. Ct. App. 3d Dist. 2000).

48 While right to information is not completely blocked, prohibiting from participating party meetings, forums, or discussions filter information they need for exercising their right to vote.

the unity and harmony in a small and interconnected society like ours. That is when the democracy that is supposed to bring people together to make informed decision divides society. It is very disheartening to read social media posts and reports all authored by faceless individuals. Most of the posts are very vindictive and divisive encouraged by their mysterious enthusiasm and identity. It erodes our values of community bonding, human-hood, tolerance and compassion, which is fast disappearing through such faceless interactions of blame and vindications. In a democracy, as envisioned by our Kings, we must be able to sit together respecting one another's sentiments and resolve issues together for our own good.

Apoliticity Now and Beyond

There is need for us to redefine the concept of apoliticity. It is time we look at apoliticity from a practical perspective. Our civil servants should be able to see apoliticity not as a limitation but rather as an empowerment. To do this, we need to be mindful of the following:

1. The absolute separation between policy making and policy implementation is not possible.⁴⁹ The civil servants/public servants help shape legislation and also play leading roles in drafting regulatory and policy instruments.⁵⁰
2. Apoliticity is not meant to target or suppress civil servants. It is a tool for the civil service to shield from overt political control and influences. The duty to ensure impartial and neutral civil service is not placed just on civil servants: politicians particularly, and the executive government in general, has an affirmative responsibility to make sure that the civil service is not used for party-political purposes.
3. Apoliticity is an interconnected concept. Separating the concept of apoliticity from its benefits or importance has led to misconceptions. We need to remember why impartiality and neutrality of the civil service is important.

49 Theophilus Olumuyiwa, "Bureaucratic politics and policy development: Issues and challenges" (2016) 10:2 *African Journal of Political Science and International Relations* 20-21.

50 Lorne Sossin, "Defining Boundaries: The Constitutional Argument for Bureaucratic Independence and its Implication for the Accountability of the Public Service (2006), *Sponsorship Affair (Gomery Inquiry)*, available at SSRN: <https://ssrn.com/abstract=1911245>" 30-31.

4. Civil servants do not owe respect or obedience to their political masters, in the same sense that private employees do not owe such duties to their employers. Private employers cannot make their employees do illegal acts, and private employees owe no duty to loyally execute illegal orders. Similarly, civil servants' loyalty cannot be mistaken to mean to implement unlawful executive orders.⁵¹ They are required to be loyal only to the extent permitted by the rule of law.⁵² Loyalty in political neutrality is not obedience, but morality.⁵³ Therefore, the civil servants have the duty to question and, if required, to decline to follow instructions which are motivated by partisan interests.⁵⁴
5. Apoliticality should exist in harmony with political rights of the civil servants. It should not impose unreasonable restrictions on the exercise of their political rights provided by the Constitution. Article 7(22) of the Constitution lists circumstances in which the State can impose "reasonable" restrictions. If the restrictions are unreasonable, the restrictions imposed can never be justiciable.

Conclusion

In practice, and through legislation and regulations, Bhutan appears to have adopted combination of traditionalists' view on absolute separation of politics and administration, and limitation of their political rights and pragmatists' approach of civil servants' responsibility and accountability. While traditionalists place responsibility on the (political) minister by trading between absolute loyalty and anonymity of civil servants, the practice in Bhutan appears to call for absolute loyalty of civil servants without any incentive of maintaining their anonymity. Instead, they are required to be loyal yet professionally responsible and accountable to the public, and their political rights almost absolutely limited. Such an approach is very suppressive and impractical in the world of technologically advanced society.

The Constitution, however, seems to adopt a pragmatic approach to apoliticality. First, the Constitution requires RCSC to discharge public duties in an efficient, transparent and accountable manner, unlike traditionalists'

51 Greg McCarry, "An Uneven Playing Field: Executive Public Servants and the Public Interest" (1991) 13 *Sydney L. Rev.* 504.

52 Lorne Sossin, *Supra* Note 48.

53 M. W. Jackson, "The Eye of Doubt: Neutrality, Responsibility, and Morality" (1987) 46 *Australian Journal of Public Administration* 280.

54 Lorne Sossin, *Supra* Note 48.

view where public servant is required to maintain secrecy and anonymity.⁵⁵ Second, the Constitution envisions a certain degree of politicisation by permitting the Prime Minister to recommend appointment of higher-ranking civil servants. Third, the Constitution confers exhaustive civil and political rights to all citizens including civil servants, and although some of those rights can be suspended at the time of emergency, many of them cannot be unreasonably restricted. Therefore, constitutionally, apoliticality in Bhutan is restriction imposed on politicisation of the civil service either by using civil service for political purposes by politicians or by civil servants' engagement in political activities.

Apoliticality in the Bhutanese context requires balancing between political neutrality and civil servants' political rights. Civil servants should be permitted reasonable exercise of their political rights. While reasonably restricting them from contesting as a candidate in election, becoming members of a political party, contributing financially and in kind, in support or against a candidate or a party, campaigning for or against a candidate or a political party, they should be allowed to engage in regulated political activities. Regulated political activities may include:

1. Attending political party meetings at the time of elections. Allowing civil servants to know more about political parties and their plans would help serve the winning government efficiently.
2. Expressing politically neutral (that is, non-partisan) opinions on election, politics and parties.
3. Engaging in activities related to elections, politics or parties organised by politically neutral agencies such as the Election Commission. As some politicians suggest, political activities can be apoliticized by allowing neutral agencies to organise or assist political parties to organise joint-party activities. RCSC, Dzongdags, and Gups can still maintain their apolitical status by providing equal support and services in terms of providing meeting venues and gathering crowds for all political parties.⁵⁶
4. Engaging in activities which are not in support of either a candidate or a political party.

⁵⁵ *The Constitution of the Kingdom of Bhutan*, 2008, Art.26(1).

⁵⁶ MB Subba, "What's being apolitical?" *Kuensel* (May 18, 2018) Online: <http://www.kuenselonline.com/whats-being-apolitical/>.

Constitution of Kingdom of Bhutan: Ten Salient Features ¹

Introduction

Constitution has been defined as “the organic and fundamental law of a nation or state, which may be written or unwritten, establishing the character and conception of its government, laying the basic principles to which its internal life is to be conformed, organizing the government, regulating, distributing and limiting functions of its different departments, and prescribing the extent and the manner of the exercise of sovereign powers. Its a charter of government deriving its whole authority from the governed.”² In other words, it is the supreme law of the land known in Bhutan as the *Tsa-Thrim-Chenmo*, the mother of all laws, “which is a sacred document that placed the power of governance and the future of the nation in the hands of the people”³

The Constitution of Bhutan is one of the shortest in the world. It is the “the most modern Constitution with maximum fundamental rights”⁴ The aim of this Paper is to identify the most important salient features of our Constitution which form the supporting pillars of the national sovereignty and security, and the well-being of the Bhutanese people. It will first dwell on the background of the making of the Constitution of Bhutan; followed by look at the fundamental principles; and elucidates ten salient features

Devolution of Power

The introduction of Parliamentary Democracy and the adoption of a written Constitution was the culmination of the noble deeds of our monarchs in devolving power to the people. The process of democratisation can be said to have begun from the reign of the Third Druk Gyalpo. In 1953, the

1 Contributed by Yeshey Dorji, Law Graduate, interning at the Royal Court of Justice, Phuntsholing Dungkhag Court.

2 *Black's Law Dictionary*, 6th ed. West Publishing Co., p.311.

3 His Majesty the Fourth Druk Gyalpo Jigme Singye Wangchuck.

4 See Tobgye S. *The Constitution of Bhutan - Principles and Philosophies* (Kuensel Corporation Ltd., p.40.)

National Assembly (*Tshogdu*) was established as the legislative body in the country. This effectively transferred the law-making power of the King to the *Tshogdu*, which was an entity representative of the people. His Majesty the Third King established the *Lhengye Zhungtshog* (the Cabinet) in 1968. The *Kuensel* reported that:⁵

His Majesty the King is extremely keen that the people should have a greater voice in the government of the country and to that extent, His Majesty is voluntarily prepared to forego some of the absolute powers so far vested in him by the people.

His Majesty the Fourth Druk Gyalpo continued on the path of modernising Bhutan. Ensuring people's participation in decision-making is a hallmark in the early period of His reign through the medium of *Dzongkhag Yargay Tshogchung* and *Genog Yargay Tshogchung*. This clearly shows the fulfilment of the substantive principle of democracy that is a government *of* the people, *by* the people and *for* the people (emphasis added). His Majesty took transformative step in 1998 when he relinquished His role as the head of government to a Council of elected Minister; and empowered the *National Assembly* to pass a no-confidence vote on the monarch. Thus, His Majesty the Fourth King prepared people for the democracy.

History of Legislation

Laws in every human society should reflect the collective morality of its people. Long before the coming into force of the Constitution, we have had laws informed by timeless Buddhist principles. The principle of *karma* dictates that virtuous deeds lead to happiness while non-virtuous deeds bring suffering. Our laws were in harmony with the law of *karma*. Zhabdrung Rinpoche established the *Chhoesid Lugnyi*, or the Dual system of laws known as *Gyalthrim Sergyi Ngashing* (Temporal laws) and *Chhoethrim Dhargyi Dudphoed* (spiritual laws) based on the Buddhist principles of *Lha Chhoe Gyawa Chu*, the ten pious acts and *Mechhoe Tsangma Chudru*, the sixteen deeds of social piety.

Our leaders have built upon the laws of Zhabdrung Rinpoche, which

⁵ *Kuensel* (15th February, 1969).

form the foundation for the modern laws. During the reign of His Majesty the Third Druk Gyalpo Jigme Dorji Wangchuck⁶ the National Assembly (*Tshogdu*) enacted the *Thrimzhung Chenmo* – the *General Law* of Bhutan. However, the maximum number of laws were enacted during the reign of His Majesty, Druk Gyalpo Jigme Singye Wangchuck⁷ the Fourth King of Bhutan. The *Land Act 1979*, *Marriage Act 1980*, *Inheritance Act 1980*, *Civil and Criminal Procedure Code 2001*, *Penal Code of Bhutan 2004* and other laws were enacted during the reign of His Majesty the Fourth Druk Gyalpo. The National Assembly also ratified several international treaties, conventions and protocols during the reign of His Majesty the Fourth Druk Gyalpo.

Buddhism is well known for its message of peace, tolerance, compassion and wisdom. In Bhutan, it informs the social morality as to the difference between right and wrong, and provides substance to what are otherwise barren laws. It was with immense compassion for His people, that His Majesty the Fourth Druk Gyalpo initiated establishment of Parliamentary democracy in Bhutan and commanded the drafting of the Constitution in 2001. He persistently proclaimed 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”⁸

Product of Peace

History reveals that in many countries, the Constitutions are often drafted in the times of turmoil as a result of revolt for power. In sharp contrast, the Constitution of Bhutan is a product of peace. It was initiated by the Fourth Druk Gyalpo, an absolute monarch, at the peak of his popularity, enjoying deep respect from his subjects. In a peerless showing of detachment and renunciation, the Fourth Druk Gyalpo, in his Royal command decreed:

Bhutan, through good fortune and fate, could not hope for a better moment than now for this historical development and would never find another opportunity like this to introduce a Constitution that would provide a

6 His Majesty Druk Gyalpo Jigme Dorji Wangchuck, the Third King of Bhutan is known as ‘Father of the Modern Bhutan.’

7 His Majesty Druk Gyalpo Jigme Singye Wangchuck, the Fourth King of Bhutan is known as the ‘Father of the Constitution’.

8 Sharma, G. (2002). *Constitution of SAARC Nations*. p. 788, citing His Majesty the Fourth Druk Gyalpo Jigme Singye Wangchuck.

*democratic system of government best suited for the future well-being of the nation. Today the King, government, clergy and the people in all sections of society, enjoyed unprecedented level of trust and fidelity. The security of the country was ensured and the people enjoyed peace and stability. Bhutan's relations with its close friend and neighbour had reached a new height and the country also enjoyed growing relations with its developmental partners as well as other countries that appreciated the Kingdom's wholesome policies for development and change. In many countries, Constitutions were drafted during difficult times, under pressure from political influences and interests, but Bhutan was fortunate that the change came without any pressure or compulsion.*⁹

Constitution Drafting

His Majesty the Fourth King decreed to the Constitution Drafting Committee:

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 favour, 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.

Otto Von Bismarck said, “Only a fool learns from his own mistakes. The wise man learns from the mistakes of others”¹⁰ Therefore, to devise a constitution best suited to our own needs, the Constitution Drafting Committee reviewed a total of 122 Constitutions of which 22 were studied in detail. Thus, Bhutan benefitted from their wisdom and knowledge, averted the criticisms and acceded to universal values.¹¹

9 His Majesty the Fourth Druk Gyalpo, Drafting of Constitution of Bhutan, 4 September, 2001.

10 Otto Von Bismarck, Chancellor of the German Empire (1871-1890).

11 Tobgye, S. *The Constitution of Bhutan – Principles and Philosophies*. Kuensel Corporation Ltd., p.29.

Democracy is a government of the people, by the people and for the people¹². The preamble of the Constitution begins with “We the People of Bhutan”. The people are the ultimate beneficiary of the state, and thus our Constitution is people-centric. This was achieved through the public consultations chaired by their Majesty the Kings in all the 20 Dzongkhags. This ensured that the people understand the meaning and significance of each word in the constitution.

Adoption

The Constitution of the Kingdom of Bhutan was adopted on 18 July 2008 with His Majesty the King and the representative of the people signing the country’s first written Constitution. Validating the constitutional provisions, His Majesty Jigme Khesar Namgyel Wangchuck addressing the nation on the day declared that:

The people and the King, on such a day of destiny, resolved to bring into effect the root and foundation – the very source – of all law in the nation. His Majesty said that the Constitution would inspire the people because it stood as a testimony to selfless and extraordinary leadership. The Constitution was placed before the people of the 20 Dzongkhags by the King and each word had, therefore, earned its sacred place with the blessings of every citizen in our country, it is therefore the people’s Constitution.

Core Principles

Sovereignty and security of the country are our core constitutional principles. Great Britain’s for instance, is the parliamentary sovereignty. India’s is dignity. This is based on the practical realities of the countries. India is cast-ridden society¹³. The United Kingdom, has no written constitution¹⁴ has empowered the Parliament to make and unmake laws.¹⁵ Bhutan, being sandwiched between the two largest countries in the world by demography and size, sovereignty and security are the most important principles along with the well-being of our people.¹⁶

12 Lincoln, Abraham. “The Gettysburg Address”. 19 Nov.1863.9

13 Constitution of India, Article 17, 39 (a) & 42.

14 Stephen, L. *The Science of Ethics*, p.145 (1882).

15 Fassbender, B. (2016). International Constitutional Law: Written or Unwritten?. *Chinese Journal of International Law*, 15(3, 1 September), pp.489-515.

16 Royal Audience by His Majesty Jigme Singye Wangchuck on 9 December 2002.

Salient Features

1. Spiritual Heritage

Buddhism is the spiritual heritage of Bhutan, not the state religion. Buddhism is a religion of peace with a universal message of love, tolerance, acceptance and non-violence. It does not coerce followers and believers. It is an inner science of mind that is more a way of life in accordance with principles of truth, than a religious dogma.¹⁷ It does not impose its precepts based on blind faith and external influences. Buddhism has earned its rightful place in the Constitution. We can only expect Buddhism to guide us constantly on a path of peaceful and sustainable progress. Zhabdrung Rinpoche derived his laws derived from and inspired by Buddhist teachings. His Majesty the Fourth Druk Gyalpo said:

I am indebted to Yum for my birth and nurture in this life and for your pious to the Triple Gem. Like an adage, "If anything inhabits near the golden mountain, the surrounding will also turn into gold." Yum gave me advice on the sublime teachings of the Buddha at a tender age. I have been able to receive teachings and initiations from His Holiness Dilgo Khyentse Rinpoche, and have thus turned my mind to the righteous path of Buddha's teachings. The strong determination that I have today of ruling the country based on the dual system is due to your inspiration, for which I am deeply grateful.¹⁸

In spite of being majority Buddhist nation, there has been no record of discrimination against minorities in the provision of conditions services and necessary for growth and prosperity. as prosperous and free people, long before the Constitution was adopted. For example, education and healthcare services are given to all citizens irrespective of race, religion, sex, ethnic origin etc.

17 K.N. Jayatilleke writes in his book Dharma-Man and Law that "Buddhism resembles modern scientific humanism"

18 His Majesty the Fourth Druk Gyalpo. (2012). *Yeenwong*, (2012).

2. Fundamental Rights

The preamble of the Constitution reads “Solemnly pledging ourselves to strengthen the sovereignty of Bhutan, to secure the blessings of liberty, to ensure justice and tranquillity and to enhance the unity, happiness and well-being of the people for all time”. There is logic in the chronological order of the two values enshrined therein. Sovereignty and security of the nation precedes the well-being of the people because only a strong and competent State can protect the fundamental rights of its people.

Fundamental rights are defined as “those rights which have their source, and are explicitly or implicitly guaranteed, in the constitution”¹⁹ by virtue of these rights being intrinsic to human nature. Article 7 provides vertical rights of an individual against the State and horizontal rights among individuals, some rights such as right to life are absolute while certain rights such as free speech may be limited in the public interest.²⁰

His Majesty the Fourth King Jigme Singye Wangchuck said that:

*The fundamental rights enshrined in the Bhutanese Constitution are more comprehensive than those granted under the constitutions of most countries. The vision of Bhutan is to have a vibrant democracy.*²¹

Constitution of Bhutan has been described as a modern Constitution with the maximum fundamental rights,²² which includes amongst others, the right to life, speech, thought, religion, trade and liberty. But, we never had to fight for these rights, since they formed parts of Buddhist precepts and principles. We respect life and condemn killing. Even an insect cannot be harmed. The United States is considered to be one of the most mature or liberal democracies in the world. But the capital punishment exists. Here in Bhutan the capital punishment has been abolished. We believe in giving opportunities to repent, reform or change for better. This is in consonance with the convention against cruel and degrading treatment of

19 Black’s Law Dictionary, 6th ed. West publishing co., p. 764.

20 *Constitution of Bhutan*, Article 7, s 22(a)

21 Public Consultation in Thimphu, 26th October 2005.

22, Ibid.

human beings. Moreover, we believe virtuous actions lead to liberation, the equivalent of liberty in western philosophy.

Moreover, we believe rights must go hand in hand with the duties. The sense of duty is very important for a country of small population. His Majesty Jigme Khesar Namgyel Wangchuck, when asked about what was the single most thing he admired about the late Prime Minister of Singapore, Lee Kuan Yew, His Majesty said, “If there is just one word, it would be duty, a sense of duty.”²³

Duty has been defined as “A thing due, that which is due from a person; that which a person owes to another. An obligation to do a thing.”²⁴ Right is the foundation which allows the performance of duty. Whether or not we act upon our duties, more than our rights will determine the future of our nation.

3. Royal Abdication

In other countries where monarchy is in practice, Kings and Queens usually remain in power for lifetime. This is justified by the divine mandate that the monarch is chosen by god to rule. Here, the Kings assume the responsibility of a monarch to serve the people. This is been demonstrated by the exemplary conduct of His Majesty the Fourth King.

His Majesty shouldered the responsibility of the whole kingdom during an era of uncertainty, at a tender age of 16. His Majesty showed that the self-sacrifice is a higher duty than self-preservation²⁵ as the supreme commander-in-chief by defending the country from the insurgents. He abdicated the Throne at the peak of his popularity.²⁶

23 Channel News Asia (2015). *Channel News Asia caught up with His Majesty and spoke with Him for a short interview.* [video] Available at: <<https://www.drukair.com.sg/news/king-of-bhutan-visited-singapore-to-pay-his-respect-to-mr-lee-kuan-yew>> [Accessed 8 Jun. 2017].

24 *Black's Law Dictionary*, 6th ed. west publishing co., p. 505.

25 Slujs Populiest Suprema Lex: Self- preservation is a duty but sacrifice is a higher duty.

26 HRH Jigyel Ugyen Wangchuck (2014). Long Live His Majesty K4. [video] Available at <<https://www.facebook.com/search/top/?q=dasho%20jigyel%20ugyen%20wangchuck>> [Accessed 17 Jun. 2017].

His Majesty explained His decision in incorporating Section 6 of Article 2 of the constitution:

If the King continues to occupy the Throne till death then as the King grows old he will not be able to carry out his duties to the nation. It is of paramount importance that a King should be able to deliver his responsibility to the best of his ability for the benefit of the country. After we introduce the democratic system, it is very important for a King to carry more responsibility without any hindrance. Therefore, the provision that a King should step down at the age of 65 years was included for the benefit of the country and I personally decided that it be included in the draft Constitution...Future is important....²⁷

The salience of this provision has been captured by Justice J.S. Verma:

The first one, I find is the King is to voluntarily step down in favour of His successor at the age of 65 years and He shall abdicate for wilful violation of the constitution ... Now I am not aware of any other place where anyone in power is prepared to step down voluntarily unless there is a divine mandate. The provision that the monarch will step down and what more to prove the political sovereignty vested in the people²⁸

4. National Referendum

The people of Bhutan have the power to alter the basic provisions of the constitution through a national referendum.²⁹ Article 34 section 1 states that, "The will of the people shall be expressed in a National referendum..."³⁰ This is a democratic practice which is termed as direct democracy. Constitutional amendments and a Bill of national importance which is not passed in a joint sitting of Parliament can be resolved by way of a national referendum. His Majesty the Druk Gyalpo,³¹ the Parliament and

27 Public consultation in Thimphu, 26 October 2005

28 Lecture delivered by J.S. Verma, the Former Chief Justice of India on 13 October 2010 to Judges and Legal Fraternity of Bhutan.

29 *Kuensel* dated 23 March 2005.

30 *Constitution of Bhutan*, Article 34, section 1.

31 *Ibid*, section 2 (a).

the people through the members of Dzongkhag Tshogdues³² may initiate the process of national referendum. There are two types of referenda which are Obligatory and Optional referenda prevalent in countries like Switzerland³³. The Constitution has, therefore, incorporated the principle of direct democracy while it is representative democracy with a bicameral Parliament.

His Majesty Jigme Singye Wangchuck explained that:

*If any provision requires an amendment, it can be done in two ways. First, three-fourths of votes from the total members of parliament can amend a provision of the constitution. Second, National Referendum can amend any provision of the Constitution with simple majority of votes. If the people are of the opinion that any provision of the Constitution needs to be amended for the benefit of the people and the country, the national referendum can be called in all twenty Dzongkhags and, if more than 50 percent agree on the amendment, the constitution will be amended.*³⁴

5. Apolitical House of Review

The Constitution provides that “A candidate to or a member of the National Council shall not belong to any political party.”³⁵ This provision makes the Bhutanese system different from most democracies where the members of the other chamber of parliament belong to the same political party or parties either in government or in opposition. For instance, the United States House of Representatives is divided on party lines with 52 Senators affiliated to the majority party Republican, while 46 seats belong to the minority party Democrat.³⁶ The intent of this provision is to serve the best interest of the people.

Since, partisan politics almost certainly carries the risk of politicising

32 Ibid, section 2 (b).

33 Ruppen, P. (n.d). Direct Democracy in Switzerland. [online] Available at <http://www.iniref.org/swiss-dd.html> [Accessed 17 Jun. 2017].

34 Public Consultation in Paro, 9 November 2005.

35 *Constitution of Bhutan*, Article 11, section 3.

36 United States Senate. (n.d.). *Party Division*. [online] Available at: < <https://www.senate.gov/history/partydiv.htm> [Accessed on 17 Jun.2017]>

issues affecting the common good, the National Council as an apolitical House was envisioned to allow its members to debate and decide in a non-partisan manner, without any vested interest.³⁷ The *prima facie* merits of this provision are in the fact that their views are far more likely to be based on the common good and general interest of the Bhutanese people. The issue that concerned the creation of Business Opportunity and Information Centre (BOIC) by the ruling government can be taken as an example. In the absence of an Act of parliament providing for its establishment, the National Council in an act shouldering its apolitical mandate had pointed out its illegality (unconstitutional).³⁸ The National Council opined that, although the intent behind its establishment may be beneficial for small business start-ups, in the long run it was setting up a bad precedent for future governments. Thus, the National Council as the House of wisdom was seen to be fulfilling the vision of His Majesty and the common aspiration of the people.

6. Rule of Law

The rule of law is the basis of good governance; and it is enshrined in the Constitution as a matter of state policy. It is provided as a mechanism to ensure “a civil society free of oppression, discrimination and violence, protection of human rights and dignity and freedoms of the people.”³⁹ In a democracy, it is of paramount importance that citizens take active part in the democratic life of the country so that they can have an impact on the decisions that affect their livelihood. This comes in the form of right to vote and in the exercise of their fundamental freedoms as a vehicle to make known their righteous views.

Dicey based the rule of law on three principles:⁴⁰

- a) The absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power;

37 Lyonpo Tobgye, S. *The Constitution of Bhutan - Principles and Philosophies*. Kuensel Corporation Ltd., p.231

38 Kinga, S.(2015). BoiC..a story often edited. Kuensel. [online] Available at: <http://www.kuenselonline.com/boic-a-story-often-edited> [Accessed 17 Jun. 2017].

39 *Constitution of Bhutan*, Article 9, section 3.

40 Dicey, A. V. (2003). *Introduction to the study of the Law of Constitution*. pp.202-203

- 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 line with these standard principles, the Constitution of Bhutan deals with the rule of law in the following provisions:

1. Article 10 of the Constitution vests all legislative powers in the Parliament of Bhutan which consists of the Druk Gyalpo, the National Council and the National Assembly. This ensures the supremacy of regular law as opposed to the influence of arbitrary power.
2. Article 20 of the Constitution requires the Executive to promote an efficient Civil administration based on the Democratic values and principles enshrined in this constitution.⁴¹ The most important value of a democracy being the rule of law, it dictates that the executive must function in accordance with the law and must ensure that civil administration benefits everyone impartially and that they conduct their affairs in accordance with the highest standard of honesty, loyalty and professional excellence. Furthermore, it also provides a citizen with remedial measures by invoking this provision for the failure of the government to perform on this basis.
3. Article 21 of the Constitution entrusts the Judiciary with the sacred responsibility of upholding and defending the rule of law to ensure the administration of justice without fear, favour, and undue delay and by enhancing access to justice.⁴² Moreover, section 3 of Article 9 read in conjunction with section 11 of Article 1 grants the Judiciary the power of judicial review.⁴³ The courts under this principle can decide the Constitutionality of an executive action or for that matter the constitutionality of a law.

⁴¹ *Constitution of Bhutan*, Article 20, section 6.

⁴² *Constitution of Bhutan*, Article 9, section 2.

⁴³ *Ibid*, Article 9, section 3 & Article 1, section 11.

Bhutan has always respected the rule of law. In addition, as a peace-loving State, the Constitution incorporates the core objective of the United Nations providing that “The State shall endeavour to promote goodwill and cooperation with nations, foster respect for international law and treaty obligations, and encourage settlement of international disputes by peaceful means in order to promote international peace and security”.⁴⁴ If there is respect for the rule of law, it will also automatically act as a check on the proper functioning of the separation of power among the three branches of government.

On the other hand, a lack of respect for the rule of law creates both internal and external strife. For example, it has been argued that the rise of terrorism in the world is attributable to State actions driven by material greed that are not in accordance with the rule of law.⁴⁵ Therefore, it can be said that the rule of law provides a crucial antidote to a nation’s unquenchable thirst for materialistic development. This is proven beyond doubt by Bhutan’s enlightened policy of sustainable development guided by strict moral and legal principles as will be seen in the sections to follow.

7. Gross National Happiness

His Majesty King Jigme Singye Wangchuck has laid the foundation of Bhutan’s development by enunciated a unique development paradigm called the ‘Gross National Happiness (GNH).’ This emphasises the balanced and sustainable development than the gross material development. Happiness is a core objective beginning from the preamble and other provisions.⁴⁶

His Majesty Jigme Khesar Namgyel Wangchuck describes GNH as development with values. GNH offers a dynamic means to achieve happiness. GNH implies that a development concept should be holistic. Material progress is but one aspect of progress, it is not the sole indicator. If it were so, materially affluent Western societies should now be more

⁴⁴ *Constitution of Bhutan*, Article 9, section 24.

⁴⁵ Chengu, G. (2014). America Created Al-Qaeda and the ISIS Terror Group. [Blog] *Global Research*. Available at: <<http://www.globalresearch.ca/america-created-al-qaeda-and-the-isis-terror-group/5402881>> [Accessed 17 Jun. 2017].

⁴⁶ *Constitution of Bhutan*, Article 9, section 2.

than content and happy, but the truth remains that, problems plaguing their societies are growing. Thus, GNH is gaining a global perspective. It is beginning to inspire scholars, academics and leaders around the world who are taking interest in adopting it as a progressive concept for policy.⁴⁷

Thus, GNH is the supreme goal for the Kingdom of Bhutan in making its people realise that material prosperity alone does not necessarily lead to happiness and contentment and hence they should imbibe a way of life based on the sound principles enshrined in the Buddhist philosophy and seek true solace and happiness therefrom. It is a concept meant to guide us towards holistic development encompassing material and spiritual progress.

8. Protection of Environment

Today the world is confronted with global warming, climate change, rise of sea level, endangering and extinction of the rare species of flora and fauna. In the recent global climate conference held in Paris, His Excellency the Prime Minister Tshering Tobgay convinced everyone that Bhutan was not carbon neutral, it was carbon negative. He asserted that our entire country generated 2.2 million tons of carbon dioxide but that our forests sequester about three times that amount, making us a carbon sink for more than 4 million tons of carbon dioxide each year.⁴⁸ Currently, our forest cover stands at 72.6%, the Constitution guarantees a figure not less than 60% for all time to come.⁴⁹ For the pioneering leadership in environmental preservation Bhutan is identified as one of the few Biodiversity hot spots of the world.

Intergenerational equity is seen in practice in Bhutan. We rely on hydropower for our energy which mitigates the inevitable damage done to our environment on our path to development, which is why it is said that we produce clean energy. As a result, the people are constitutionally

47 Lyonpo Tobgye, S. *The Constitution of Bhutan - Principles and Philosophies*. Kuensel Corporation Ltd., p. 186.

48 Ted Talks (2016). 'This country isn't just carbon neutral – it's carbon negative', Tshering Tobgay [video] Available at < <https://www.youtube.com/watch?v=7LcdlVrg5M> > [Accessed on 17 Jun. 2017]

49 Constitution of Bhutan, Article 5, section 3.

enjoined to conserve and improve the environment. Article 5 section 1 makes it clear that “Every Bhutanese is a trustee of the Kingdom’s natural resources for the benefit of the present and future generations....”⁵⁰

Therefore, our Constitution walks the talk. As His Majesty the Fourth King stated: “The Constitution must go beyond mere words and become the golden pillar, which will support and enable the political system to safeguard the sovereignty of the country and the rights of the people”⁵¹

9. Social Services

According to Article 9 Section 16 “The State shall provide free education to all children of school going age up to tenth standard and ensure that technical and professional education is made generally available and that higher education is equally accessible to all on the basis of merit”. Bhutan had long recognised that the key to development is education. The Royal Government’s policy of free education is an important factor which accelerated the growth and development of the country. His Majesty commands that what we lack in numbers, we must make up with our talent, talent guided by concern for our fellow citizens. Recalling historical events His Majesty Jigme Khesar Namgyel Wangchuck has said:

*In our country, our people are the biggest and the most important wealth. In other countries, some have oil and petroleum wealth while some have mineral resources such as gold pearls, gemstones etc. Since we do not have such wealth, our people are our prized and the most important wealth. In order to make the people more beneficial and helpful for the country, it is vital to provide good education to the people. If the people are firm and stable, then the country will also be firm and stable.*⁵²

Although Bhutan is a developing country, the Royal government has taken the obligation as a State Policy to provide free health care to the Bhutanese. Those patients who cannot be treated in the country are referred to hospitals outside the country. The incorporation of such a policy in the Constitution

⁵⁰ *Constitution of Bhutan*, Article 5, section 1.

⁵¹ His Majesty the Fourth Druk Gyalpo during the first Royal Audience granted to the Constitution Drafting committee.

⁵² Public Consultation in Bumthang, 21 May 2006.

is a testimony of the commitment in the social welfare of its people. The Constitution provides that: “The State shall provide free access to basic public health services in both modern and traditional medicines”.⁵³ The people have benefitted immensely from the social services provided at the State cost.

10. Cultural Heritage

A separate article has been dedicated to our culture since it is one of the most important aspects of our identity, independence and sovereignty. There is no mention of culture in any constitution of other countries, making it a salient feature of Bhutanese constitution. His Majesty the Fourth Druk Gyalpo succinctly articulated the vitality of the provision to our country’s security and sovereignty:

Firstly, we have mentioned the importance of preserving and protecting cultural heritage, and secondly, we have incorporated the provisions regarding the promotion and strengthening of our cultural heritage. We are a very small country with rich cultural heritage. If the neighbouring countries pose a threat to our national sovereignty and security, we have no other defence but our unique cultural identity.

When we say ‘rich’ cultural heritage it is important to reflect on what ‘richness’ really entails, and on how it helps secure our sovereignty. Culture and tradition, it includes our language, national attire and code of etiquette among others. These are rich and unique, but they only amount to an external manifestation of our inner richness, one that is guided by the values of Buddhism. Buddhism as a path of peace is based on principles of good neighbourliness⁵⁴ and most importantly, one of the two fundamental principles of Buddhism that is compassion which is in holding self-sacrifice as a higher duty than self-preservation. In this way, the people of Bhutan are wise in being respectful of our elders, and by extension we treat our neighbouring countries similarly and try to learn from their experiences while we still hold strong to our internal values.

⁵³ Ibid, section 21.

⁵⁴ Buddhist’s consider skillful means and Wisdom as prerequisites for attaining enlightenment

The fact that Bhutan was the first country to recognise Bangladesh's independence, our friendly ties with India while still maintaining a cordial relation with China, and our strong bonds with other countries such as Thailand, Japan, Kuwait, Britain and Singapore inspired by our successive Kings' deep and genuine admiration for their leaders and country is a testimony to our mastery in skilful means coupled with compassion, in the conduct of our internal and external governance.

Conclusion

The birth of our Constitution and democracy was a result of hard work and determination of our successive monarchs. This process of empowerment of public for democratic decision-making started long time ago – as far as the reign of His Majesty the Third Druk Gyalpo. We now have a Constitution which endured for 10 years without amendment. It has many unique features. This Paper attempted to elucidate 10 of them.

First, Buddhism is the spiritual heritage of Bhutan, not a State religion; it would be wrong and futile according to Buddhism itself to impose it on others without proper grounding on its philosophies. **Second**, Buddhism recognises that human beings are born free endowed with the capacity to attain full liberation, thus the importance of fundamental rights could not be over stated. **Third**, Buddhism in its purest sense is not a religious dogma; it is a way of life personified by living Bodhisattvas. One such Bodhisattva was His Majesty the Fourth King whose legacy inspires detachment from power and using freedom to fulfil one's duty to the service of others. Thus, Constitution provides the King to abdicate at the age of sixty-five years. **Fourth**, everything is subject to change, and impermanence is the eternal law. Thus, to allow for amendments in due process without chaos, the Constitution provides for a National referendum to alter the Constitution including its basic provisions.

Fifth, wisdom by definition is that which sees beyond personal biases, thus we have an apolitical National Council. **Sixth**, Guru Rinpoche said that the "powerful must know the limit of their power".⁵⁵ The law of causality makes no distinction, so it has been said "what you sow you shall reap".

55 *Pema Kathang*, p. 150.

Thus, respect for the rule of law is the most important structural value of the constitution that safeguards our democracy. **Seventh**, Buddhism classifies truth into conventional and ultimate truth. Both are necessary on our path to liberation. Likewise, GNH is a holistic approach to national development that emphasises on both material and spiritual progress for our happiness. **Eighth**, the preservation of environment is not merely ideal; it is indispensable as shown by global efforts in warding off climate change. Sentient beings live in interdependence to their environment; in this field Bhutan has been an undisputed global leader. **Ninth**, in spite of being a developing country the State ensures free social services such as free education and healthcare. **Tenth**, the peaceful and respectful nature of the Bhutanese manifested in our code of etiquette is what earns us admiration and ensures friendly relations from fellow nations around the world. This in turn secures and strengthens the sovereignty and security of Bhutan and the well-being of its people.

Highlights of the Timeline in the Drafting of the People's Constitution ¹

Bhutan strengthened its security and sovereignty on 17 December 1907. On this day, people placed full faith and sought protection under the rule of Gongsar Ugyen Wangchuck. Little over 100 hundred years on 18 July 2008, His descendants gifted us with a modern Bhutan, and a sacred written Constitution, which marks a historic and a giant stride in the legal and political history of Bhutan. After a series of decentralization activities empowering the people, there was an effective devolution of power of governance, democratization and modernization from the Throne culminating in the introduction of Democracy in the Country.

His Majesty the Fourth Druk Gyalpo is the creator, the architect, and therefore the 'father of the Constitution of Kingdom of Bhutan'. With the ardent desire of introducing Constitutional Democracy, His Majesty the Fourth Druk Gyalpo decreed formation of a Committee to draft a written Constitution for Bhutan on 4 September 2001. The Drafting Committee was constituted with representatives from all sections of the society which included the Speaker of the National Assembly along with representative of each twenty districts, two members of the clergy, seven members of the Royal advisory Council, five Government nominees, three lawyers and the Chief Justice of Bhutan as the Chairman of the Committee.

The Committee researched, analysed and contextualized ideas and concepts of several Constitutions around the world. Amongst the expert and eminent scholars consulted by the Committee was K.K. Venugopal, Senior Advocate, Supreme Court of India.² After years of extensive meetings and deliberations, His Majesty the Fourth King and the Crown Prince led Public Consultations in all the country's twenty provinces. This was done with the primary objective of hearing, learning and integrating the values, principles, concerns and wisdom of the entire population in the sacred document – thereby constituting a People's Constitution.

¹ Contributed by Tshering Pem, Legal Officer, Bhutan National Legal Institute.

² The Constitutional Advisor is now the Attorney General for India.

This Paper intends to take the readers back in time and relieve the journey traversed by the constitution Drafting Committee, especially those of us who were less fortunate to be a part of this historic process that shaped the destiny and future of Bhutan. The timeline highlights milestones beginning with the issues of the Royal Decree in 2001 up till the adoption of the Constitution in 2008. Much thought and analysis has been invested in the time span covered Six years and Ten months from 4 September 2001 to 18 July 2008 to create a 35-Article-352-section and 13500-words document.

4 September 2001

His Majesty the Fourth Druk Gyalpo Jigme Singye Wangchuck decreed that a written Constitution be promulgated for the Country. His Majesty desired that the Constitution be written and adopted in times of peace to establish a democratic system which would be in the best interest of the Bhutanese people.

30 November 2001

Bhutan must move with the time to ensure that the nation not only overcomes all internal and external threats, but continues to prosper in an atmosphere of peace and stability.

These were the words of Druk Gyalpo Jigme Singye Wangchuck on 30 November 2001, during the launching ceremony of the drafting of the Constitution.

The First Constitutional Drafting Session was convened from 30 November to 14 December 2001 at the Royal Banquet Hall in Thimphu. His Majesty Jigme Singye Wangchuck commanded that the Royal Banquet Hall would be the main venue for the drafting of such a historic and important document. The Committee, amongst others began deliberating on ‘the Right to freedom of thought, conscience and speech.’ From the fourth day, the Committee discussed the essence of the broad guidelines given by His Majesty in His Command on 4 September 2001.

4 February 2002

The Second Constitutional Drafting Session was convened at Punakha – the abode of Zhabdrung Ngawang Namgyal who introduced the glorious rule of Palden Drukpa in the 17th century. Moreover, it was at Punakha that the people of Bhutan enthroned their first King and instituted the system of Monarchy. The meeting was held from 4 to 8 February 2002, which coincided with Puna Dromchhe. The Committee deliberated on the ‘Structure of the Constitution’, ‘the Separation of Powers between the three arms of the government’, ‘Constitutional Bodies,’ ‘ Rights and Duties,’ ‘Social goals,’ ‘ Freedom of the Press’ and ‘the Local Government.’

27 March 2002

The Third Constitutional Drafting Session was convened from 27 March to 11 April 2002 at the Royal Banquet Hall in Thimphu. The Minutes of the proceedings of the earlier Sessions were deliberated during the Third Session in the context of the speeches and policies enunciated by His Majesty and the prevailing laws.

10 June 2002

The Fourth Constitutional Drafting Session was conducted from 10 to 19 June 2002 at the Royal Banquet Hall to review the draft made in the third session.

9 October 2002

The Fifth Constitutional Drafting Session was held from 9 to 18 October 2002 in Bumthang. Bumthang was chosen due to its religious and historical significance in the country. The meeting was conducted in front of the magnificent image of the Guru Rimpoche, under his gage and guide and spiritual guidance. The members for the first time discussed comprehensively the design of a political system and the need to incorporate it in the draft Constitution. Thus, the third draft was further improved, leading to the fourth draft.

23 November 2002

The Sixth Constitutional Drafting Session was convened from 23 to 25 November 2002 in Thimphu. The meeting was technically devoted upon the improvement of the fourth draft and endorsed the fifth draft. The members finalized the first official draft Constitution for its submission to the Royal government.

9 December 2002

After intense debates and emotional discussions on the Draft, the Constitution Drafting Committee formally submitted the first Draft of the Constitution of the Kingdom of Bhutan to His Majesty Jigme Singye Wangchuck on 9 December 2002. His Majesty expressed His pleasure and satisfaction with the quality of the draft. He commended the Committee members for their work and indicated his keen interest in receiving the final draft. He thanked them for their effort in fulfilling the sacred and historic task that was entrusted upon them. His Majesty said:

I have not either monitored or intended to know the proceedings and activities of the Committee that took place over the last one year. Contrary to the opinion that might be held by some of the members of the committee, I did not have preview of any drafts for I did not accept any of them before the one handed on this occasion. I have seen it for the first time today.

12 March 2003

The Seventh Constitutional Drafting Session was held from 12 to 14 March 2003 in Thimphu, followed by the Eighth Constitutional Drafting Session held from 7 to 11 April 2003. The Committee deliberated on the various draft bills relating to establishments of various constitutional bodies such as Election, Audit and Anti-Corruption.

14 May 2003

The Ninth Constitutional Drafting Session of the Constitution Drafting Committee was convened from 14 to 26 May 2003. In this session, the

Recommendations and Comments of the Council of Ministers (CCM) on the draft Constitution were reviewed.

11 June 2003

The Constitution Drafting Committee further deliberated and formally submitted the Second Draft of the Constitution to His Majesty the Druk Gyalpo Jigme Singye Wangchuck on Tuesday 11 June 2003.

22 November 2004

His Majesty the Fourth Druk Gyalpo presented the draft Constitution to Lhengye Zhungtshog, at the Cabinet Hall in Trashichhodzong.

26 March 2005

The Draft Constitution was released publicly. To ensure participation and involvement of the people of Bhutan, the first draft of the Constitution was widely distributed to the members of the Dzongkhag Yargye Tshogdu, Gewog Yargye Tshogchungs, Bhutan Chamber of Commerce and Industry, educational institutions, and the judiciary; and every household, government officials, students, institutions and foreign agencies based in the country. The people were given opportunity to express their opinions freely. About 40 pages of comments were received from online readers including comments from European experts. After incorporating the feedback of the public, the simplified Draft was circulated on 18 August 2005.

20 April 2005

His Majesty the Fourth Druk Gyalpo commanded a simplification of the language in the Dzongkha Draft. His Majesty commanded that the language be simplified to the extent possible without diluting the content. This was based on the feedback that the people were finding difficult to understand the Dzongkhag Draft.

26 October 2005

The first public consultation meeting of a sacred Constitution with the people of Bhutan was held at Lungtenphu, Thimphu. His Majesty the Fourth King personally participated in public consultation in seven Dzongkhags of Thimphu, Haa, Paro, Punakha, Wangduephodrang, Mongar and Trashigang.

24 May 2006

The Crown Prince Jigme Khesar Namgyel Wangchuck chaired the Public Consultations in other Dzongkhags and concluded it at Trongsa on 24 May 2006. The draft Constitution was translated and read in three dialects namely Dzongkha, Tshangla and Lhotsamkha. During the whole consultation process, there were about 327 persons who submitted their opinions on the draft Constitution. Some of the opinions received led to corrections and modification in the language of the final document.

9 May 2008

The Chairman of the Constitution Drafting Committee, Lyonpo Sonam Tobgye presented the general overview, background, and objectives of the Constitution of the Kingdom of Bhutan to the Parliament. The Speaker and the members of the Parliament expressed profound gratitude and appreciation to the Chairman and the members of the Committee on the formulation of the Draft Constitution. While some members of the Parliament expressed, that the Constitution need not undergo elaborate deliberations or bring about amendments to such sacrosanct document since the members of the Drafting Committee explicitly formulated the Constitution as desired by His Majesty the fourth King and subsequently discussed with the people of twenty Dzongkhags, majority of the members of Parliament shared the importance of elaborate deliberations before endorsing it, since the Constitution was the ultimate legal framework for the country. There were about 192 interventions by the Parliamentarians during 10 days parliamentary debate on the draft Constitution and the Chairperson clarified about 60 times.³

3 Ibid at p.46.

18 July 2008

The historic Constitution was signed by His Majesty the King in the presence of His Majesty the Fourth Druk Gyalpo, Geduen Dratshang, Royal Families, Members of the National Assembly, Members of the National Council, and representatives of international organizations and the representatives of the Bhutanese communities addressed the nation on the occasion of signing of the Constitution on 18 July 2008 at 10:40 a.m. in Tashi-chodzhong Kuenrey. After the golden signing of the Constitution, a special signing ceremony of the Constitution by the members of the Parliament led by Prime Minister in Tashichodzhong Kuenrey followed by *Zhugdrel Phuensum Tshogpai Tendrel*. Thereafter, the Constitution was presented for public viewing.

Conclusion

From November 2001 to October 2003, six special meetings were held and 165 cassettes and 463 pages of the verbatim records were made. During the various meetings, 3,742 interventions were observed, 40 pages of comments on the Constitution from online readers were observed. A notable feature of the drafting process was placing of the draft Constitution in the public forum for feedback and comments.

Today, the Constitution of Kingdom of Bhutan has 35 Articles with 352 sections and comprises of 13500 words being the 17th least voluminous Constitution. The adoption of Constitution further cemented the fundamental rights that we have always enjoyed as Bhutanese under the reign of our successive monarchs. On the other hand, it also serves to remind us about our fundamental duties as citizens in upholding the sovereignty and security of our nation, while furthering the noble vision of Gross National Happiness.

The Constitution is indeed a gift from the monarch to his people. It empowers the people with rights as well as duties, and enshrines articles that will ensure the sovereignty of the nation and unity, happiness and well-being of the people along with delivery of justice. The Constitution also ensures the preservation and promotion of spiritual and cultural heritage. Of all, the Bhutanese constitution offers a democratic form of government to the people.

The Court-Annexed Mediation: Enhancing Access to Justice through In-House Court Mediation Services in Bhutan¹

Introduction

As much as it is undesirable, litigations are inevitable; they are stressful, costly, lengthy, public exhibition of differences, leading to a great deal of ill-will between the litigants. In contrast, Alternative Dispute Resolution (ADR) processes are usually faster, less expensive, less time-consuming and more conclusive. Bhutan has by and large been a non-litigious society, and to some extent litigious people are still frowned upon. Owing to its rugged terrain, interdependent society and Buddhist values of harmony, peace and compassion, it has used negotiation and mediation to resolve the disputes informally and amicably in the past. The court was used as the last resort to resolve the disputes.²

For its advantages of confidentiality and privacy of not having to ‘wash the dirty linen in the public’, it is called *Nangkha Nangdrig* - literally, an internal or confidential treatment or cure of the wounds of disputes. Therefore, the resolution of disputes in the Courts is in fact the ‘alternative’ means or forum for the dispute resolution in Bhutan – the mediation being the main system.³ Being the ‘people’s court’ the *Nangdrigpas* or the mediators came from all walks of life, e.g. the learned priests, retired civil and military personnel, village elders and community leaders - but mostly those people whose words carried weight in the society for their age, experience, fairness and justice.⁴

1 Contributed by Lobzang Rinzin Yargay and Sangay Chedup, Bhutan National Legal Institute.

2 See Michael Aris (1994), ‘Conflict and Conciliation in Traditional Bhutan.’ In *Bhutan: A Perspectives on Conflict and Dissent in Bhutan*, (eds.) M.Hutt, Gartmore: Kisadale Asia Research Series No.5 p7-42. Also see K.Ura (1994), ‘Decentralisation and Development in Medieval and Modern Bhutan.’ In *Bhutan: Aspects of Culture and Development* (eds.) M.Hutt, Gartmore: Kisadale Asia Research Series No.4 pp.25-49.

3 Tshering Wangchuk, ‘Alternative Dispute Resolution (Out of Court Settlement/Mediation): Nangkha Nangdrig in Bhutan’ (2000). Paper presented at the Seminar on *Alternative Dispute Resolution in the SAARC Region*, Thimphu, Bhutan.

4 See Richard M Whitecross (2018), ‘Thrims khang and the Setting for Justice: The

As in Confucian philosophy-infused China, which has the long history of using ADR rather than courts for mutual social security, where it is, “better to die of starvation, than become a thief”; where, “it is better to be vexed to death, than bring a law suit.”⁵ - the courts, for its unpredictable outcomes and adversarial and divisive impacts have been the institutions of last resort for dispute resolution in Bhutan, which is apparent from the saying such as ‘it is better to lose or compromise in the communities than win in the castle of justice.’ Rights-based litigations were considered disruptive of the social harmony; in fact Bhutan is still more of a duty-based society, the concepts of rights and individual claims having just emerged in the recent decades, being a collective and welfare society. Sadly, there is an increasing tendency of entangling ‘enemies’ in protracted litigations through successive courts – leading to embittered relations between parties, families and communities – the very antithesis of a harmonious, Buddhist and a GNH (Gross National Happiness) state.

Lately, for various reasons, this customary amicable dispute resolution system ran the risks of being relegated to the ‘alternative or the options’ in the Bhutanese dispute resolution spectrum, as the words *yDam kha Chen* connote – with the attendant danger of decline, disuse and loss altogether in the long run. Sensing this, Her Royal Highness, Princess Ashi Sonam Dechan Wangchuck, the President of the Institute stepped in with the timely intervention of revitalising and institutionalising the customary system of mediation with a series of consultative meetings and trainings organised for the key community and Local Government leaders on the skills and techniques of the community dispute mediation. Starting with the first Local Government election in 2012, the nation-wide mediation outreach program trained all the community and local government leaders of the entire country. The establishment of the Alternative Dispute Resolution Centre is expected to further strengthen Mediation and other

Spatial Evolution of the Courts of Justice in Bhutan,’ In *Buddhism, Culture and Society in Bhutan*, (ed.) Seji Kumagai. Nepal, Vajra Books, pp.100-101.

5 See Justice Rober F. Utter, ‘Dispute Resolution in China’ *Washington Law Review*, 62(1987) 383-396, p383. According to the author, the K’ang -Hsi emperor (1662-1772) is quoted to have said “The law suits would tend to increase to a frightful amount, if people were not afraid of the tribunals, and if they felt confident of always finding in them ready and perfect justice....I desire, therefore, that those who have recourse to the tribunals should be treated without any pity, and in such a manner that they shall be disgusted with law, and tremble to appear before a magistrate.”

ADR systems for the effective and efficient resolution of the disputes and enhance access to justice.

While a lot of disputes are being mediated in the communities, there are people who are not able to benefit from the community dispute mediation services for various reasons. Often, people are driven to courts due to non-availability of the mediation services and skilled mediators. Increasing literacy and growing legal awareness of the power and right-based adversarial litigations; breakdown of family and community values, growing power-imbalance, shortage of skilled mediators and slackening of social sanctions contribute to the decline in the use of customary legal tools such as mediation, negotiation and conciliation to resolve disputes in the communities.⁶

In the current scenario, laws allow mediation of disputes even after the registration of the cases in the courts. The Courts are mandated to afford opportunities to the parties to try mediating the disputes after registration, before commencement of the Hearing; or at any stage of the Hearing before the judgment is rendered. But then, even if the parties have no desire to pursue litigation and prefer mediation, they have to find their own mediators or mediation service out of the courts. In fact, as of now, there are no trained or certified professional mediators in the country.

Therefore, in addition to the present practices of encouraging Out-of-Court Mediation (OCM) or the settlement of disputes through mediation out of the courts, with the aid of external, private or freelance mediators, the time is ripe for Bhutan to experiment Court-annexed Mediation(CAM) or the In-house Court Mediation(ICM) Service system to facilitate the consenting parties to mediate their disputes after registration of the case, during the course of litigation, at any stage of Hearing, within the courts. Such a system has been already successfully instituted in India, Thailand, China, Japan and other countries. This has taken a significant number of cases off the dockets; as well as benefitted the people.

⁶ See Lobzang Rinzin Yargay, 'Mediation in Bhutan: Raising Heads and Saving Faces', *Bhutan Law Review*, 4(2015).

With the impending introduction and institutionalisation of Court-annexed Mediation or the In-house Court Mediation Services in the Bhutanese Courts, this Paper elucidates the advantages of ADR and mediation in general, and the Out-of-Court Mediation and Court-annexed Mediation, or the In-house Court Mediation in particular, with reference to the Thai and other Models.

Mediation in the existing Bhutanese Laws

The importance and the utility of mediation is amply demonstrated by the provisions related to the ADR in our successive laws. Although long-established, the first legislative recognition of the practice of mediation was made in the 1957 during the reign of His Majesty the Third King. The enactment of the *Thrimzhung Chhenmo* (the Supreme Laws of Bhutan) was a milestone in the Bhutanese legal history. It codified existing procedural and substantive laws of the Kingdom. The *Thrimzhung Chhenmo* allowed Out-of-Court settlement of all types of cases, except cases pertaining to theft, armed robbery, murder and treasons. According to James Duffy, “the wide scope for alternative dispute resolution afforded by the *Thrimzhung Chhenmo* reflects the strong cultural legitimacy that mediation had (and continues to have) in Bhutan”.⁷

Drawing on the concepts and principles enshrined in the *Thrimzhung Chhenmo*, several specific legislations were enacted during the reign of His Majesty the Fourth King. The importance of mediation of civil disputes continued to be echoed in the successive laws. For instance, the *Civil and Criminal Procedure Code of Bhutan* (CCPC) enacted in 2001 dedicates the entire Chapter 23 to the ‘Adjudication without Proceedings.’⁸ In addition, other legislations such as the *Land Act of 2007*,⁹ *Local Government Act of*

⁷ See James Duffy, ‘Nangkha Nangdrik in the land of the Thunder Dragon: Psychology, Religion and the Potential of Mediation in the Kingdom of Bhutan’ (2012) *Asian Journal of Comparative Law* 7, pp. 319-344.

⁸ See Section 150 (Negotiated Settlement) of the *Civil and Criminal Procedure Code of Bhutan, 2001* which provides for the reference to non-judicial adjudication of disputes even after the cases are registered in the courts.

⁹ *Land Act of Bhutan 2007*, Section 56 provides that “The parties to a dispute may settle land disputes amicably before taking any legal recourse”.

2009;¹⁰ and *Alternative Dispute Resolution Act of 2013*¹¹ also make reference to non-judicial resolution of the disputes.

The most notable legislative recognition of alternative dispute resolution was made by the Constitution, adopted in 2008. It requires establishment of Administrative Tribunals and Alternative Dispute Resolution Centres.¹² Implicitly, the Constitution also charges the Judiciary of Bhutan, the task of enhancing access to justice, and fair and efficient administration of justice, through such measures.¹³ This, according to James Duffy, “..is a task that is made easier when the formal court system sensibly co-exists with a strong (and well-published) body of alternative dispute resolution forums”.¹⁴

Therefore, it is mandatory for the courts, before the commencement of the judicial proceedings, to inform the parties of the rights and opportunities to mediate the disputes, out of courts; before Hearings are commenced, or at any stage of the Hearings, but before the pronouncement of the judgment.¹⁵ The parties may get their cases mediated with the help of the external mediators and submit the *Nangdrig Gyenja* (settlement agreement or the compromise agreements) containing the “financial compensation, restoration, restitution of properties, forgiveness and emotional reconciliation for endorsement by the court as the decree of the court”.¹⁶ The plaintiffs may also withdraw their cases and mediate out of courts. They may approach the courts with settlement agreements for enforcement where the parties fail or refuse to comply with the terms and conditions of the settlement agreements.

10 Sections 84(1) of the *Local Government Act of 2009* requires Local Government Leaders (*Mangmis* in particular) to mediate minor civil disputes referred to the Gewogs by the people.

11 See Chapter XII of the *ADR Act of Bhutan 2013* which provides the provisions of ‘negotiated settlement’.

12 *The Constitution of the Kingdom of Bhutan*, Article 21 (16) provides that “Parliament may by law, establish impartial and independent Administrative Tribunals as well as Alternative Dispute Resolution Centers.

13 See *Constitution of the Kingdom of Bhutan*, Article 21(1).

14 See James Duffy, ‘Nangkha Nangdrik in the land of the Thunder Dragon: Psychology, Religion and the Potential of Mediation in the Kingdom of Bhutan’ (2012) *Asian Journal of Comparative Law* 7, pp. 319-344.

15 Section 150 of the CCPC provides that “At any stage of the proceedings, it shall be open to the parties to take the help of a *Chimi, Gup, Chipon, Mangmi or Barmi* as mediators for mutual settlement of a civil case in accordance with the requirements of this Code.

16 See Lungten Dubgyur, *The Parasol of Silken Knot*, (Royal Court of Justice 2005) p. 94.

What was missing was the In-house Court Mediators or Judicial Mediation Services. Once this is instituted, the parties may be spared of the ‘hunting’ for the ‘mediators’ outside the courts, which are non-existent or in short supply. This will also give people one more opportunity to mediate the disputes without adversarial procedures and win-lose outcomes – in the Courts by the judicial officials or court-appointed mediators.

The Mediators

Mediation is a private process in which an impartial third party, the mediator, facilitates communication between the disputing parties and promotes voluntary decision-making by the parties to the dispute. The neutral third person simply assists the parties to tailor mutually acceptable solutions with which the parties are both happy. Thus, mediation is a third party-assisted negotiation; where the mediator has control only over the processes, the actual outcome of the mediation being controlled by the parties themselves.¹⁷ Therefore, mediation is a party-centered process where the focus is on bringing a win-win solution based on the needs and interests of the parties.¹⁸

Mediation of disputes or fostering mediation between the hostile parties in contentious issues is not easy. Therefore, one of the important factors in the success of the mediation is the qualities, roles and conduct of the mediators. Based on the increasing complexities of the disputes which come up for mediation, the mediators must not only be qualified, experienced and respectable, but should possess leadership, communication and human skills. They should have knowledge of laws, and be aware of legal developments in the society.¹⁹

Though the parties are responsible for tailoring mutually acceptable solutions, the mediators play key roles in facilitating the processes and dialogues between the disputing parties in mediation. However, the society and the parties to disputes often do not fully appreciate the skills and

17 See Mediation and Conciliation Project Committee, *Mediation Manual of India* (Supreme Court of India).

18 See Andrew M. Pardiek, ‘Virtuous Ways and Beautiful Customs: The Role of Alternative Dispute Resolution in Japan’, *Temple International and Comparative Law Journal*, 11(1997), 31

19 See above note 6.

diligence of mediators, since much of what skilful mediators do is invisible. What seems like an ‘easy’ mediation to the parties may, in fact, pose considerable professional challenges to the mediators. Therefore, public should be educated on the processes of mediation, and the knowledge and skills mediators require in brokering or facilitating mutually acceptable compromise, which the parties can both honour and comply with.²⁰

In countries such as Thailand and India, mediators are generally trained and certified people, who have undergone a series of training programs. In the Thai System, the courts of respective jurisdiction maintain a list of mediators who may be lay qualified person, court officials or the judges.²¹ They are invited to sit in the mediation proceedings based on their expertise and nature of cases. They offer their services on a *pro bono* basis with pride and honour, of having brought peace and happiness between the contesting parties, as well as the society.²²

Bhutan may similarly empanel senior citizens, retired civil servants, private law practitioners, law professors, civil servants; and eminent, qualified and experienced people from the corporate, private and public sectors as lay qualified mediators, on a *pro bono* basis. However, they must be well-trained in skills and techniques of professional mediation and ADR system to inspire public trust and confidence in the system.

The Mediation Process

Mediation is no doubt an informal process compared to the rigid judicial procedures. However, it is not a chaotic or a lawless process. It has certain structure and stages to be followed. It begins, like any other work with preparations for the mediation, keeping in mind the nature and complexity of the disputes. The mediation in general, including Thai system and

20 See Tenzin, ‘Amicable Resolution of Community Disputes: Appraisal of the impact and the State of the Mediation (*Nangkeha Nangdrig*) Trainings’, *Bhutan Law Review*, 8(2017), 31.

21 See, Vichai Ariyanuntaka, ‘Court-Annexed ADR: A New Challenge’ (2002). A Paper presented at the WIPO ASIA-PACIFIC Regional Colloquium for the Judiciary on Intellectual Property, February 6-8, 2002, New Delhi, India < <https://www.coj.go.th/en/pdf/AlternativeDisputeResolution03.pdf> > accessed on 13 July 2018.

22 See International Affairs Division, Office of the Judiciary of Thailand, *Mediation* [Translated by Sorawit Limparangsri, Judge of the Office of the President of Supreme Court, LL.B. (Hons.)Thammasat University, Barrister at Law, LL.M. University of Michigan at Ann Arbor], p.6.

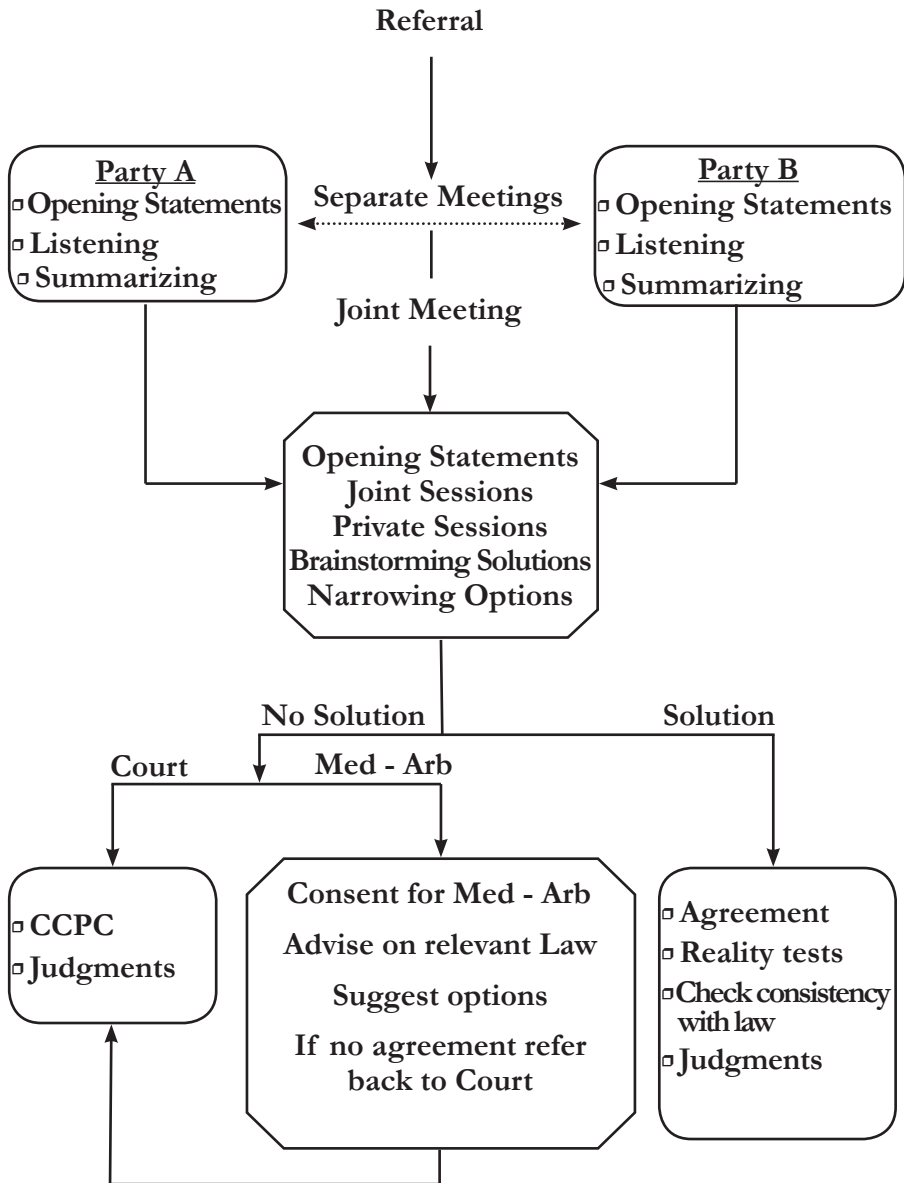
the *Thuenlam Model of Mediation* developed by the Bhutan National Legal Institute generally involves the following procedures:²³

- (i) In the *Preparation stage*, the mediator studies dispute, gathers basic information, facts and evidence of the dispute from the case files or inquire the disputing parties. The mediator ascertains that persons representing the parties have authority to settle the disputes.
- (ii) In the *Opening stage*, the mediator makes his or her opening statement which includes introduction of himself or herself and the persons participating in the mediation, building up the amicable atmosphere, explaining his or her roles and the mediation process as well as all necessary ground rules.
- (iii) In the *Interest-finding stage* the mediators listen to the stories and grievances of the parties. The mediators find out the needs and interests of the parties from the information and facts given at the caucus of the disputing parties or the joint meeting of the parties.
- (iv) In the *Brainstorming or the Solution-finding stage*, the mediator tries to reduce the number of disputed issues, and exploring possible options for the solution.
- (v) Finally, the *settlement agreement* is drawn based on the mutually-agreed solutions, terms, and conditions for the fulfilment of their commitments.

23 More on mediation process, see Albert Fiadjoe, *Alternative Dispute Resolution: A Developing World Perspective* (Cavendish Publishing Limited 2004). Also see Ashish Kumar, *Role of Mediation in the Justice Delivery System of India: A Critical Study*, Chapter IV, pp 170-185, Thesis submitted to the University of Delhi in March, 2015 and awarded in January, 2016. Also see International Affairs Division, Office of the Judiciary of Thailand, *Mediation* [Translated by Sorawit Limparangsri, Judge of the Office of the President of Supreme Court, LL.B. (Hons.)Thammasat University, Barrister at Law, LL.M. University of Michigan at Ann Arbor], p.4.

Figure 1 – *Thuenlam* Model of Mediation designed by Bhutan National Legal Institute in 2013

Thuenlam Mediation Model



Disputes which can be Mediated

Generally, all civil cases can be mediated. For instance, the *Civil Procedure Code of Thailand* empowers the court to order mediation in cases which are the subject of a civil dispute when the court deems it appropriate, or by the request of the parties. However, recently the Judiciary of Thailand has started to put criminal cases on the mediation table.²⁴ Cases of compoundable criminal offence and criminal cases which are able to be filed or made a prosecution by ordinary people can be mediated.²⁵

Bhutanese judiciary promotes, and the laws allow negotiated settlement or mediation of all cases except criminal cases.²⁶ Lately, minor criminal cases pertaining to domestic violence cases can be settled out of court.²⁷ Chapter 11 (Da)²⁸ of the *Thrimzhung Chhenmo* allowed Out-of-Court settlement of all types of cases, except those prohibited by the laws such as the theft, armed robbery, murder and treasons. Only the court of law had jurisdiction to try criminal cases, and continues to be so, except for the minor domestic violence cases. However, in the face of increasing criminal cases, this situation merits consideration by the legislative bodies so that the minor,

24 See Tidarat Narintarangkul Na Ayudhaya and Netipoom Maysakun, *Framework for Judicial Cooperation in Case Management: The experience of Thailand* <<https://www.aseanlawassociation.org/11GAdocs/workshop2-thailand.pdf>> access 15 July 2018. Also see, Montri Sillapamahabundit 'Victim-Offender Mediation: A Place in the Criminal Justice System?' (25 February 2011) 2nd AMA Conference on Rediscovering Mediation in the 21 Century, <<http://asian-mediationassociation.org/ama/wp-content/uploads/2018/06/14.VICTIMOFFENDERMEDIATION.pdf>> accessed 15 July 2018.

25 Refer Article 4 of the *Regulation of the Judicial Administration Commission on Mediation in Criminal Cases B.E. 2560 (2017) of the Thailand*. Also, see, Thammanoon Phitayaporn, 'Strengthening the Independence and Efficiency of the Judiciary in Thailand' (*Thailand Law Forum*, 2003). A paper presented at the 8th ASEAN Law Association General Assembly, November 29, 2003 – December 2, 2003, Singapore. < <http://www.thailawforum.com/articles/strengthening3.html#23>> accessed on 13 July 2018.

26 See Richard M Whitecross (2018), 'Thrim's khang and the Setting for Justice: The Spatial Evolution of the Courts of Justice in Bhutan,' In *Buddhism, Culture and Society in Bhutan*, (ed.) Seji Kumagai. Nepal, Vajra Books, p.100.

27 *Domestic Violence Prevention Act of Bhutan 2013*, Section 22 states "If the offence is of misdemeanour and below, and the defendant is not a recidivist, a police personnel may release the defendant on surety if detained or may allow the matter to be settled mutually if the victim so desires,".

28 See Section Da 3.1 and Da 3.2 of the *Thrimzhung Chhenmo*. The essence of these provision was transplanted after more than fifty in *Civil and Criminal Procedure Code, 2001*. Section 145 states that "At any stage of the proceedings, it shall be open to the parties to take the help of a Chimi, Gup, Chipon, Mangmi, or Barmi as mediators for mutual settlement of a civil case in accordance with the requirements of this Code."

non-felonious criminal cases could be mediated for the benefit of both the offenders and the law enforcement agencies.²⁹ This will require legislative intervention and amendment of the relevant laws allowing mediation of minor criminal cases, especially those which are compoundable – that is offences where *Thrimthue* (monetary fines and compensation) can be paid.

³⁰

Out-of-Court Mediation (OCM) of Disputes

The Out-of-Court mediation is a non-judicial dispute settlement system, where parties opt out of litigation after the cases are registered in the courts. Even after the complaints have been filed and the disputes are being heard, the disputing parties can request the courts to halt the Hearing and opt out for Out-of-Court mediation by appointing neutral third person to facilitate them in finding a mutually acceptable solution. In the Bhutanese system, parties can opt out for mediation at any stage of the Hearing, and even before the Hearing is commenced, but before the delivery of the judgments. In the Thai System, there is Pre-Trial Out-of-Court of Court Mediation and, the Mediation after the Hearing has commenced. In the Thai system, the parties may request the Mediation Centre, the Alternative Dispute Resolution Office, the office of the Judiciary to provide the necessary services.

Out-of-Court mediation system is widely used in Bhutan. The cases are being withdrawn after registration, for mediation, at any stage of the Hearing, before judgments, especially after parties become aware of the strengths and weakness of their cases. Most often, the parties do not claim costs and expenses, since most of the cases are *pro se*, with no legal counsels involved.

Some parties, instead of withdrawing the cases, request adjournment of the cases while they try mediating their cases. If the cases are mutually resolved Out-of-Court, the parties withdraw the cases; or they submit the compromise agreements the courts, which contain the rights and obligations to be complied by the parties – to be endorsed as the decrees

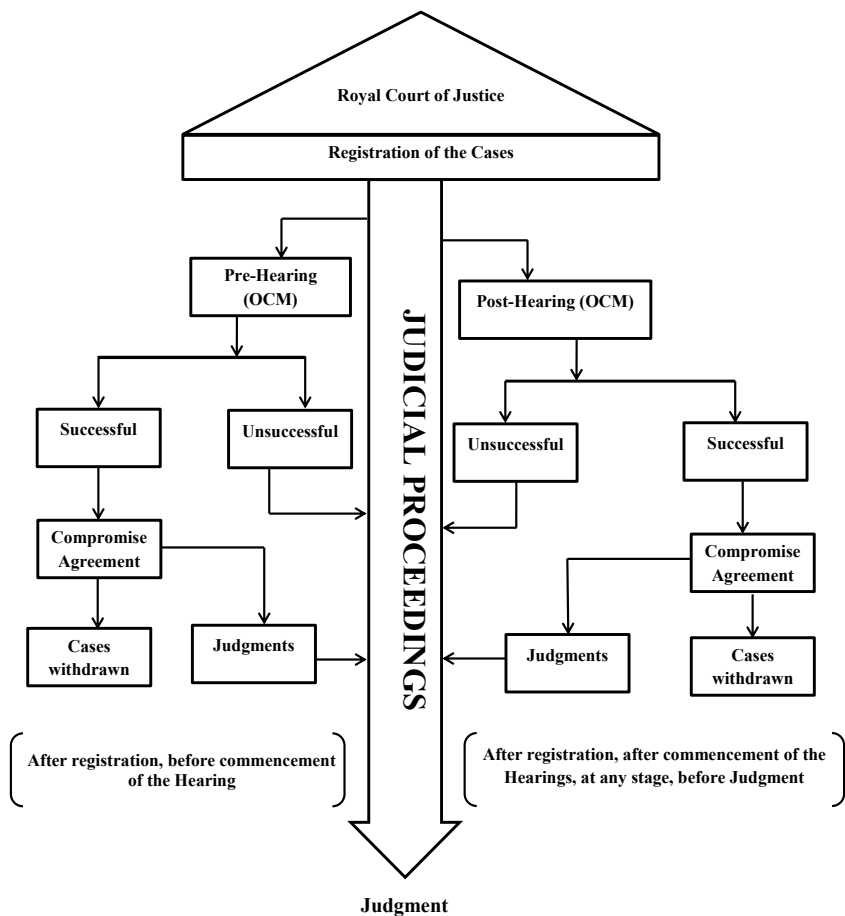
²⁹ Section 150 of the *Civil and Criminal Procedure Code of Bhutan 2001* allows mediation of the civil disputes thus, disallowing the mediation of criminal offences, even a petty offence.

³⁰ See *Bhutan Penal Code*, Section 28 which provides for *Thrimthue*. It states: “Except for the recidivist and accustomed or habitual offender, the Court may make an order to pay fine in lieu of imprisonment, if the offence is not a felony”. Thus, if the offence is not a felony crime, the defendant can be released upon the payment of *Thrimthue*.

of the courts. If any party refuses or fails to comply with the compromise agreement, it will be a basis for enforcement procedure against such party.³¹

Based on the experience of the authors, the current system of Out-of-Court Mediation of Disputes in Bhutan may be graphically represented as follows.

Figure 2– The graphical representation of the current system of Out-of-Court Mediation of Disputes in Bhutan. The same procedures apply to the In-House Court Mediation or the Court-Annexed Mediation, except that the venue in the latter is within the court house, the Mediation Unit.



³¹ *ADR Act 2013*, Section 177 provides “The settlement agreement shall be enforced by the court of competent jurisdiction in accordance with the laws in force in Bhutan”.

The Court-Annexed Mediation (CAM) System

The processes for the In-House Court Mediation (ICM) services or the Court-Annexed Mediation services are same as the Out-of-Court Mediation services, except for the venue. In the latter, the mediation takes place inside the court premises or court complex. Here, the mediation services is offered by the court, i.e., the cases are mediated by judicial officials. In the Thai system, judicial officials including judges sit on the mediation panel, in addition to the panel of mediators maintained by the mediation centre of the Courts.³²

The OCM system was in practice since the inception of the court system in Bhutan. People not only tried mediating their cases in the communities before approaching the courts, but the laws mandated the courts to provide mediation opportunities, even after the registration of the cases, at any stage of the Hearings. What we lack is the ICM or the Court-annexed Mediation system, which have been instituted in other countries.

The other difference is that, unlike the involvement of external or freelance mediators in OCM, in the ICM, the courts maintains list of mediators including judicial officials and lay qualified people. However, the judges who try the cases cannot sit on the mediation of the same cases. Therefore, in the ICM system, the judges, lawyers and litigants take part in the process which gives a feeling of joint ownership and success. When a judge refers a case to the court annexed mediation service, he or she keeps eyes on the process, which means the case is still within the courts under judicial scrutiny – being mediated by internal or court-appointed mediators. The cases are not referred out of the court, but retained within the courts. The parties and their lawyers continue to negotiate before the mediators within the same set-up. Moreover, unlike the reactive adversarial litigation, the

³² *The Practice Guidance on Court-annexed Conciliation and Arbitration of 1996*, issued by the President of the Supreme Court of Thailand states that “Where a speedy settlement is achieved, the court may consider returning the court fees to the parties”. At present the court fees stand at 2.5% of the amount in dispute but not exceeding 200,000 baht (approximately US\$ 5,300) payable at the filing of the Claim. This may be returned to the parties if there is a speedy settlement reached between the parties.

litigants play participatory or positive role in the resolution of disputes - giving a larger public acceptance for the process as well as the ownership of the solutions.³³

ICM is conducted while the cases are pending in the courts. The parties may agree to enter into the mediation process, or the courts may deem appropriate to conduct the mediation prior to the Hearing dates, the day of determination of disputed issues or the day of taking evidence, or later dates. Mediation may be arranged by the courts to find a mutually acceptable solutions for the pending cases. If parties reach an agreement as a result of the mediation, the parties may then withdraw the petitions or enter into compromise agreements. The agreements are submitted to the judges who render judgments on agreed-terms. In case the parties are able to settle only some of the issues in dispute, the court will conduct the proceeding for the remaining issues. In the Thai System, any party who desires to enter into the mediation can contact the Mediation Centres of the Courts of Justice nationwide, and request the Centres to conduct the mediation either before the hearing date or during the court trial, at all levels of the courts.³⁴

In the Court-Annexed Mediation system, the parties may request the court to render a judgment on the agreed-terms which can be enforced without initiation of the new lawsuit, if a party fails to comply with the terms of the settlement.³⁵ When the disputes are settled by ways of compromise, withdrawal of a petitions or judgment on agreed-terms, the lawsuit are consequently terminated.³⁶ If the dispute referred to mediation is not settled, or the mediation fails, the disputing parties are required to appear before the Court as per the summons; and the defendant has to file a written answer to the plaint within the stipulated time.³⁷ The parties may request extension of time if the mediation is ongoing.³⁸

33 See International Affairs Division, Office of the Judiciary of Thailand, *Mediation* [Translated by Sorawit Limparangsri, Judge of the Office of the President of Supreme Court, LL.B. (Hons.)Thammasat University, Barrister at Law, LL.M. University of Michigan at Ann Arbor], p.6.

34 See *Thailand Arbitration Center Rule on Mediation*, B.E. 2557 (2014).

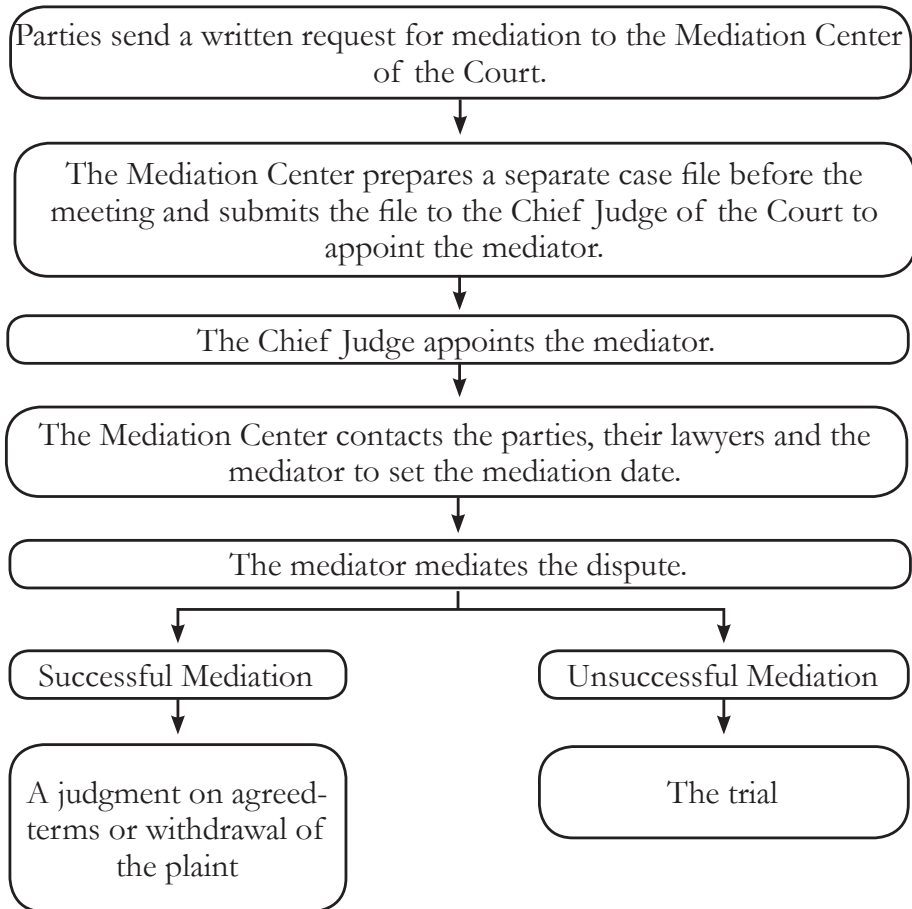
35 *ibid.*

36 *ibid.*

37 *ibid.*

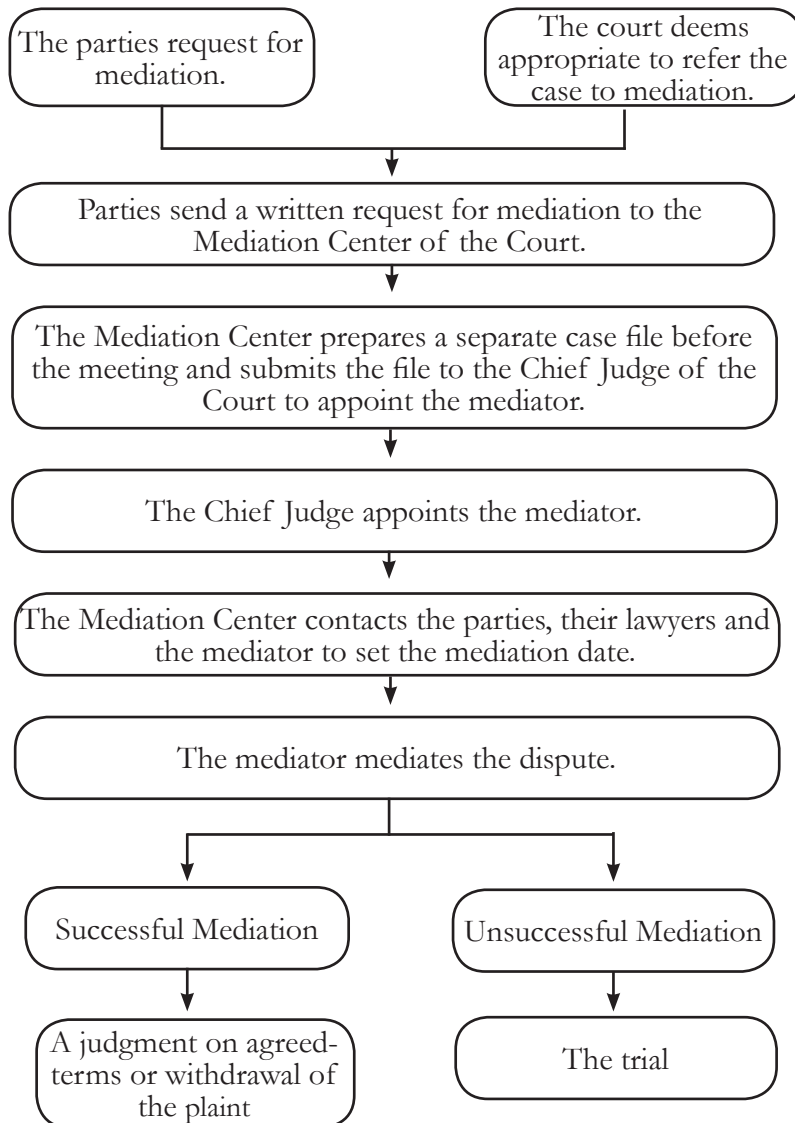
38 *ibid.*

Figure 3 - Graphical representation of Thai Model for Pre-Hearing Mediation in ICM³⁹



³⁹ See International Affairs Division, Office of the Judiciary of Thailand, *Mediation* [Translated by Sorawit Limparangsri, Judge of the Office of the President of Supreme Court, LL.B. (Hons.)Thammasat University, Barrister at Law, LL.M. University of Michigan at Ann Arbor], p.12.

Figure 4 - Graphical representation of Thai Model for post-Hearing Mediation in ICM⁴⁰



⁴⁰ See International Affairs Division, Office of the Judiciary of Thailand, *Mediation* [Translated by Sorawit Limparangsri, Judge of the Office of the President of Supreme Court, LL.B. (Hons.)Thammasat University, Barrister at Law, LL.M. University of Michigan at Ann Arbor], p.13.

Benefits of Mediation

In addition to the advantages of time and resource efficiency, mediation proceedings are highly confidential or private, with no access to the public and media. Unless otherwise agreed by the parties, all facts and evidence tendered during the mediation cannot be referred in the court proceedings in failed mediations.⁴¹ In fact, confidentiality of the process is the key benefit of the mediation for people, agencies and institutions, where premium is attached to the name, fame and reputation⁴². Unless otherwise agreed by the parties, both the mediator and the disputing parties are not allowed to disclose any information or specific conditions negotiated in the mediation to any third person.

Mediation is a dispute resolution mechanism that can enable a convenient, speedy and efficient settlement. The disputing parties may achieve a mutually satisfactory settlement in which there is no loser. Both the parties can emerge with a win-win solution that can preserve their long-term relationship. The settlement of dispute by mediation also lead to a more peaceful and harmonious society, reduce the number of cases going through the trial process, and provide a chance for people to participate in the dispute settlement process.

In the Buddhist context, mediation is a middle-path strategy where parties compromise and collaborate for a win-win results leading to preservation of relationship and harmony in the community. Therefore, mediation of disputes has several benefits to the parties, courts and the community.⁴³

41 *Evidence Act of Bhutan 2005*, Section 30, provides that “Evidence about failed attempts to resolve a legal proceeding, all non accepted offers of settlement and statements made during negotiations are not admissible in a legal proceeding.”

42 Section 169 of the *ADR Act Bhutan* states that “The parties or any other third person, including those involved in the administration of the negotiated settlement proceeding, shall maintain confidentiality with respect to all events that transpired during the settlement proceedings and shall not in arbitral, judicial or similar proceedings rely on, introduce as evidence or give testimony...”.

43 See International Affairs Division, Office of the Judiciary of Thailand, *Mediation* [Translated by Sorawit Limparangsi, Judge of the Office of the President of Supreme Court, LL.B. (Hons.)Thammasat University, Barrister at Law, LL.M. University of Michigan at Ann Arbor], p.12.

Benefits to the Courts

1. Enhances the efficiency of the court performance;
2. Saving of judicial resource;
3. Lack of public criticism of the decisions;
4. Saving time and cost;
5. Reducing the number of disputed issues;
6. Being not prejudice to the parties' rights to continue court proceedings;
7. Reducing the number of cases proceeding to the hearing Stage;
8. Reducing workload of the judges,
9. Facilitating the continuous trial; and
10. Reducing the number of appeal cases.

Benefits to the parties

1. Save time and money, with no need to attend courts for long duration;
2. Tailor a solution suitable for the parties' needs and interests;
3. Preserving relationship between the disputing parties;
4. Confidentiality of mediation process;
5. Obtaining an enforceable settlement agreement; and
6. Return as friends and neighbours and live in peace.

Challenges

The concept of the mediation, as a part of judicial system is comparatively and fairly a new idea being tried out. The Judiciary of Thailand and India have taken several years for introduction of the system. It requires additional resources - infrastructural facilities, administrative staff and fund. The successful implementation of such a transformative legal reform will require legal vision and political will.

Besides the necessary legal framework and policy, in the Bhutanese context, both the referring judges and the judicial mediators need to be trained in the art and science of mediation and ADR. Gradually, a separate unit may need to be set up with separate staff, within the court. The judges need to be knowledgeable and conversant with the mediation processes. A few trained judicial staff and additional logistic facilities will be required, and the judges will be required to guide and monitor the mediators.

If the ICM system is successful, while such reforms will reduce the dockets and enhance access to justice, there is a risk of people thronging the court for judicial mediation, abandoning the age-old customary practice of mediation of disputes in the communities. Therefore, we need to continue building the capacity of the community leaders – the *Tshogpas*, *Mangmis*, *Gups* and relevant people so that their services continue to inspire public trust and confidence, and the people continue to avail community mediation services, which will entail provision of periodic trainings, besides provision of basic facilities, infrastructure, and human resource. There must also be effective monitoring and evaluation of the utility of the services, as well as the knowledge and skills of the service providers and mediators.

Conclusion

Mediation of disputes is suitable for resolution of community disputes, though some individual disputes may be arbitrarily handled by unscrupulous, overzealous and untrained mediators. However, despite deployment of varying tools and strategies, the common goal of the mediation is the reconciliation of the parties and restoration of the harmony in the community. Making amends for the socially disruptive behavior and re-integration into the society, with token saying of ‘sorry’ or hosting a drink or dinner for the wronged and the community has dissolved the disputes and normalised the relations in the past.⁴⁴ In today’s context, it makes less sense to win law suits and lose money, even if relationship is of less significance in the increasingly individualistic and anonymous urban settings.

With the introduction of the ICM, Bhutan will have three types of mediation services in the country. The *first* is the customary *pro bono* mediation conducted in the communities before the cases are taken to the courts, including the ones mediated by the legal and paralegal firms in the urban areas for fees. The *second* is the OCM – the mediation resorted to by the parties after the cases are registered in the courts, at any stage of the Hearing of the cases, before the judgments are rendered. This takes place out of the courts, and the parties chose their own mediators – it might also involve payment of certain fees and charges to the private,

⁴⁴ See Justice Rober F. Utter, ‘Dispute Resolution in China’ *Washington Law Review*, 62(1987) 383-396, p383; also see, Lobzang Rinzin Yargay, ‘Mediation in Bhutan: Raising Heads and Saving Faces’, *Bhutan Law Review*, 4(2015).

external or freelance mediators. The *third* type is the mediation referred to by the Courts where the cases are registered - that is, the In-house Court Mediation, or the Court-Annexed Mediation. Here the mediators are nominated by the Courts, which include judicial officials and other lay qualified mediators. While the conventional mediation and the OCM have been popularly used by the people, the utility and popularity of the ICM is yet to be tested. But given its advantages of being mediated by judicial officials within the courts, the ICM is expected to be used well by the people in the civil cases pertaining to disputes related to marriages, loans, land, rental and contractual matters.

However, the courts of justice are primarily charged with the administration of justice through adjudication of cases and controversies placed before them. Thus, the primary goal of the courts is to settle disputes fairly and expeditiously. Therefore, in the Bhutanese context, one should not be surprised if the ICM system takes some time before people become familiar with, or accept the concept and the practice of judicial mediation or the mediation of disputes in the courts, by the judicial officials. This system is expected to solve the problems of finding mediators and mediation facilities out of the court. It will however, require advocacy and publicity programs so that people become aware of the services and avail them readily.

The ICM creates another forum and alternative to access justice for the people. The service is provided right in the court under the guidance and supervision of the judges. The process of mediation and the skills required of the mediators remain the same – except that the venue and the institution which facilitates it is different - courts.

With current court logistics and human resources, the ICM system will be a challenge in the beginning; but in the long run the people and the country will benefit. The introduction of the ICM or the Court-annexed Mediation in the Bhutanese legal system will be an important milestone in the Bhutanese legal history, which will contribute toward maximisation of peace and happiness of our people. With the revival and strengthening of the customary practice of dispute resolution, both within and out of the courts, we can not only keep friends, but win victory and forever live in harmony and peace.

Dorje and Drillbu: The Buddhist Ritual Icons become Symbols of Justice in Bhutan¹

Introduction

The formal Bhutanese Judiciary is over fifty years old this year – marking the establishment of the High Court by His Majesty the Third Gyalpo Jigme Dorji Wangchuck in 1968. In response to the changing needs of the society and challenges posed by the new times and changes, the Judiciary is undergoing continuous structural and institutional reforms. In the recent past, all the courts were housed in the Dzongs and the Dzongkhag headquarters. Judges came from all walks of life. Today, most of the courts have their own independent buildings and court houses. The courts are manned by professional judges and trained judicial personnel. The judicial processes are systematic, transparent and efficient, making the courts more accessible and friendly. It is gradually garnering public trust and confidence with uniform interpretation and application of laws. A significant milestone was laid in the judicial history of the country on Saturday 27 January 2018. This Paper looks at the significance and symbolism of the Buddhist ritual icons entering the Bhutanese courtrooms instead of the ubiquitous gavel. The occasion assumes the added significance as this happens on the eve of commemoration the 10 years of adoption of the Constitution of Bhutan.

The Wisdom and the Method

The judiciary officially adopted the Buddhist *Dorje* and *Drilbu* for the judicial proceedings on Saturday 27 January 2018. In an elaborate ceremony the Yonten Lopen, Truelku Thinley Lhendup consecrated and handed over a set of *Dorje* and *Drilbu* to the judges of Bhutan in the presence of the Chief Justice, Lyonpo Tshering Wangchuk, judges of the Supreme Court and High Court. A user's manual was also issued containing the guidelines, procedures, rationale and the significance and symbolism of the Buddhist objects chosen for the judicial proceedings and the the judiciary - to disseminate justice and promote truth with the dual combination of *Dorje* (*Vajra* in Sanskrit) signifying skillful method (*Thabs* in Dzongkha), and *Drilbu* (*Ghanta* in Sanskrit) signifying wisdom (*Shes rabs* in Dzongkha).

1 Contributed by Jangchuk Norbu, Legal Officer, Bhutan National Legal Institute.

The Rimpoche then gave a long discourse on the origin and external (*phyi*), internal (*nang*) and subtle (*gSang*) significance of the ritual objects in Buddhism and Buddhist practices – The *Dorje*, held in the right hand represents skillful means, and the *Drilbu*, held in the left, represents wisdom. Together they symbolises the inseparability or interdependency of wisdom and means to achieve any goal— especially the enlightened ends. The word *Dorje* means the diamond or the ‘lord of stones’ (the hardest, indestructible or the most permanent), known as the *Vajra* in Sanskrit.

No place for the ubiquitous Gavel

With no significant influence from the two major world legal systems – the Common Law and the Civil Law systems – the Bhutanese legal system does not resemble either of the two major legal systems, save the universal principles and practices associated with any dispensation of justice, litigation or contest involving two or more parties trying to win over the ruling of the neutral third person presiding over the proceeding, in their favor.

Unlike in other countries, the Bhutanese judges do not wear the traditional wigs, the robes and the related Anglo-Saxon paraphernalia. For that matter, unlike the Western, and for that matter the Indian courts, judges in Bhutan did not use the gavel to guide or regulate judicial proceedings. The Bhutanese courts are not imbued with the usual dramatic thrill and suspense with the attendant histrionics of the opposing legal counsels, with their ‘mi lord’ and ‘objection your honour’ interjections. The use of the gavel was not at least sanctioned officially in the country, though some extrovert judges could have indulged in its use thrilled by its novelty and sanctity of the objects attached to the authority of the judges and court room. This is noteworthy considering our close ties to Common Law system following-India where the Anglo-Saxon judicial objects and cultures are used and promoted.

The origin and usage of the Gavel

The Gavel is synonymous with the courts and judges, almost universally. It is a ubiquitous instrument in many court rooms across the globe. It is believed that the practice began in the medieval England - where the pounding of the gavel meant sealing of the deal, finality or closure of the proceedings. Today, the gavel is used by the judges in the courtrooms for

a variety of reasons such as, to call order when opposing parties and their counsels indulge in unruly conducts and to call for silence and order to maintain court decorum. The gavel is the judge's personal way of asserting dominance and authority inside their courtroom.²

The presiding judge makes use of the gavel in bringing attention back to the bench when attorneys, witnesses, jurors and even the audience strays outside the decorum of the trial proceedings. Most of us have seen judges portrayed in television and movies demanding “*order in the court!*” while banging the gavel against its wooden striking base – made of wood resting on the canvass cushion. Banging of the gavel is said to have the same effect as the Western Sheriff firing his gun into the air when breaking up a room brawl.

Judges are cautioned to use the gavels sparingly so that the authority is not diminished. It is used very often in bringing order to the court for the first time. If an attorney or witness strays far afield of the judge's instructions or rulings and continues to banter on, the judge's use of the gavel at that time is a stern warning. First, there will be a verbal warning; then, if the lawyer continues, either a second, more harsh verbal warning or use of the gavel; and, if the lawyer still continues the judge will make use of the gavel along with a serious threat of ending his direct or cross examination, or, even contempt of court. Some judges are definitely more patient in this regard; some not in the least patient. When the trial proceedings are concluded, most judges will announce that this trial or proceeding is concluded and strike the gavel as the exclamation point. In our case, the judges will ring the bell.

Stephen C.O'Neill, a Massachusetts historian, wrote in an article for Massachusetts Legal History, a journal of that state's Supreme Judicial Court. An understanding of its history, however, shows that it deserves “*far more attention and respect*” than it has ever received. “*Gavels are the most common implement of authority and order associated with the judiciary. Judges are so frequently portrayed using gavels in the movies and on television in their courtrooms that it is hard to imagine modern-day trials occurring without them,*”

2 Rachel Wood, ‘Where Did The Courtroom Gavel Come From?’ (2014) Salt Lake City News <<https://www.newscastic.com/news/where-did-the-courtroom-gavel-come-from-1801789/>> accessed on 11 February 2018.

3 See <http://www.tned.uscourts.gov/doc>.

O'Neill noted that while the gavel is commonly associated with the American courtroom, its use is not limited to the courtroom, explaining that a gavel is used to bring meetings of organizations to order, and "*even auction houses conclude every successful sale with a single, loud rap of a gavel.*" However, O'Neill concluded that "*even the origin of the term 'gavel' is unknown*"; but, he went on to state "*the most plausible explanation for the use of gavels ... can be found in the traditions and rituals of Freemasonry.*"

George Washington used a Masonic gavel at the ceremony placing the cornerstone of the Capitol Building, which gavel can still be viewed on display at the Visitor's Center. The gavel is a Masonic symbol of authority along with the square, level, trowel and plumb and can be traced to Masonic origins of Medieval guilds of stonemasons. Masonic rituals adopted the tools of working stonemasons, of which the gavel - "*a wooden hammer used to chip off pieces of a stone block and gently set the block into place, representing the power to control and finish a work*" [O'Neill, *supra*] gave the symbol of the authority to the presiding Master Mason at meetings.⁴

Buddhist Symbolism of *Dorje* and *Drilbu*

According to Buddhism, everything in cyclic existence is illusory and impermanent. The *Drilbu* is the female part of the Tantric polarity, symbolizing wisdom. The *Vajra* scepter is the male part of the Tantric polarity symbolizing means. The *Dorje* symbolizes the skillful means of transforming this ordinary experience to one that will propel us on our spiritual path and enlightenment – *Moksha* or *nirvana*. The *Dorje* has five extraordinary characteristics. It is impenetrable, immovable, immutable, indivisible, and indestructible. Therefore, the *Dorje* scepter is the indestructible weapon and a symbol of spiritual authority of the peaceful deities.

Drilbu is a Buddhist ritual tool which is always paired in Tantric rituals with the *Dorje*. It represents the feminine power, wisdom, receptiveness, and the voice of the Buddha. The base of the *Drilbu* is always round, and the handle is always topped with a closed *Vajras*. In the handle is a depiction of *Prajnaparamita* ("Perfect wisdom"), a symbolic representation of the collective wisdom of the Buddhas. A ritual gesture is performed crossing the *Dorje* and *Drilbu* over the chest, representing completeness in the union

⁴ See <https://www.quora.com/Why-do-judges-hit-a-gavel-What-is-the-history-behind-this>

of the male and female principles⁵. The *Dorje* and *Drilbu* are ubiquitous reliquaries among the symbolic tools of Vajrayana Buddhism. The Bell and *Dorje*, or thunderbolt, are inseparable ritual objects in Tibetan Buddhism.

By its sound, the bell invites or attracts the deities to attend or participate, and warns or drives away obstructive forces. The ringing of the bell reminds one of the emptiness of phenomena or brings the mind into greater awareness. As a musical instrument, its sound can be an offering to the Buddha and *Bodhisattvas*. The sound emanating from the *Drilbu* symbolizes harmonious *Dharma* which is deemed to please Buddha and enlightened beings of the ten directions. It is said to awaken all sentient beings from the deep slumber of ignorance and lead them to the perfect comprehension of reality and truth. The *Drilbu* is used while offering libation to the guardian deities, reciting mantras, receiving blessings and initiations, and offering gratitude to the deities. It is also used at the end of prayers that are repeated three, seven, twenty one and hundred and eight times. The ringing of *Drilbu* also marks the changing of prayers and tune during religious ceremonies.

Figures and motifs on the *Drilbu*

In the eyes of initiated Buddhists, the Bell encompasses the whole universe. The Disc of Space – is the outer rim of the bell which represents the outer disc of space. The Necklace of Light - as the bell tapers in mandala shape, the first ring of *Malas* or rosaries (pearls or conch) represent the outer protection circle of the Necklace of Light - protecting the mandala from conflagration (the poison of aggression), earthquakes (the poison of ignorance), and floods (poison of desire). The *Vajra* Fence - the second protective circle of the mandala as 32 or 65 upright *Dorjes* (*Vajras*). The Lotus Womb - the upper level of pearls or *malas* (surmounting the *Vajras*) is the third protective circle. The Earth Disk - above the Lotus Womb is an open, unadorned area, representing the disk of earth. Eight Great *Bodhisattvas* - wrapped in a wondrous arcs and loops of jewels and pearls are the emblems of the eight great *Bodhisattvas*. Eight Faces of Glory - above the *Bodhisattvas* are eight faces of glory, and hanging from their fierce mouths are strings of pearls and jewels. These *kirtimukha* faces represent the eight *makara* heads of the immense *Vishva Vajra* (double *Dorjes* crossed) that supports

5 **Prajñāpāramitā** means «the Perfection of (Transcendent) Wisdom» in Mahāyāna Buddhism. *Prajñāpāramitā* refers to this perfected way of seeing the nature of reality, as well as to a particular body of sutras and to the personification of the concept in the *Bodhisattva* known as the “Great Mother” (Tibetan: Yum Chenmo).

the central mandala palace. In *Chod* practice, the eight faces also represent the eight great charnel grounds or cemeteries. Offering Goddess Platform: the two rows of pearls above the eight faces represent the decorations of the offering goddess platform and walls. The *Vajra* Platform - The horizontal *Vajras* above the Goddess Platform represent the eight or sixteen emptiness's and also the indestructible *Vajra* Platform, the material of the mandala's central dais. The Eight-Petal Lotus: On the upper area of the bell is the lotus of the mandala's central dais. On each petal is a seed syllable. The four cardinal syllables around the Lotus represent the Four Mothers, the consorts of the four directional Buddhas - Mother *Tara* (*Tam*), Mother *Locana* (*Lam*), Mother *Mamaki* (*Mam*), Mother *Pandara* (*Pam*). The Eight Male *Bodhisattvas* - Each petal of the Lotus represents the eight great male *Bodhisattvas*. The Eight Offering Goddesses - represented by the eight seed syllables (seed syllable English transliteration in brackets) between each petal of the Lotus -

- *Lasya* (*Tam*) offering beauty (east or front)
- *Pushpa* (*Mam*) offering flowers (southeast)
- *Mala* (*Lam*) offering garlands (south)
- *Dhupa* (*Pam*) offering incense (southwest)
- *Gita* (*Mam*) offering song (west)
- *Aloka* (*Tam*) offering light (northwest)
- *Nritya* (*Pam*) offering dance (north)
- *Gandha* (*Bhrum*) offering perfume (northeast)

Inside the lotus, surrounding the stem of the bell, is a smaller lotus of 24 or sometimes 32 spokes, representing the lotus-throne of the mandala's central deity - you can visualize either *Prajna Paramita*, the face of the Perfection of Wisdom who adorns the bell, or the mandala of your *Yidam* deity. At the base of the handle, and under the crowning *Vajra* (which always tops the bell), are six more rings, representing the six perfections of the *Prajna Paramita*. Between the three top rings and the three bottom rings is a square or round base, representing the longevity vase of nectar. Above the vase, is the very face of wisdom, the ultimate wisdom Mother *Prajna Paramita*, wearing a five-wisdom jeweled crown and with her hair bound, representing the binding of all diverse views into a single non-dual reality. Above the Goddess is the lotus base of the *Vajra* crown. The *Vajra* crown is the very embodiment of the Five Wisdom Buddhas: *Akshobhya*, *Amitabha*, *Amoghisiddhi*, *Vairochana*, and *Ratnasambhava*.

There are three types of *Drilbu*. The *Dorje Sempa Drilbu*. It is the *Drilbu* of wisdom. It has nine prongs or spokes. The *Pawo Drilbu* has five or nine prongs. It is associated with eight goddesses belonging to the lotus family; and *Drilbu* associated with different clans of Buddha's disciples with five prongs. The meaning and significance of the sacred *Dorje* and *Drilbu* are indeed deep and vast, with no scope for doing justice to it in a short Paper such the present one.

The arrival of the *Dorje* and *Drilbu* in the Courtroom is a significant reform. Although it may soon be relegated as the ubiquitous court tool to signify the beginning, recess or adjournment or conclusion of the Court proceedings, the sanctity of the Buddhist icon will certainly evoke awe, reverence and regard to the law, court and the judges, besides, restoring order when litigants commit a breach of the courtroom rules and etiquette.

It also is going to be synonymous with the office of the judges as the presiding officer of the court and the head of the judiciary in their respective jurisdictions. In that, the outgoing judges are required to handover the *Dorje* and *Drilbu* to the incoming judges, symbolizing handing over of the charges of the courts.

The Supreme Court Guidelines highlights the significance, purposes, practices and usage of the *Dorje* and *Drilbu* by all the judges:

1. It is a symbol of authority and right to act officially in the capacity of a presiding officer;
2. It attracts attention and call the Court proceeding to order, or to mark the commencement and ending of court proceedings, for which the bell is to rung three times;
3. Maintain order and restore it when breached by litigants in the course of the proceedings – signaled by sharp or vigorous rings;
4. Indicate pronouncement of decisions and orders by the Court session – the tongue of the bell should strike towards oneself (inward) for the beginning of the the judicial proceedings, and outward for the conclusions;
5. In the Courts with more than one Bench, the Bench Clerk shall place the *Dorje* and *Drilbu* on the *Thri* of the senior or the presiding judge;

6. Symbolize handing taking over of office or to be handed over to officiating officers as a symbol of authority; and
7. The outgoing judges are required to wrap the *Dorje* and *Drilbu* with *Tashi Khadbar* (silk scarf) and handover over to his successor or officiating officer - signifying an orderly succession of judicial authority⁶.

Inscription (*Zung-Tshig*) on the *Drilbu*

The sacred verses (*Zhung Tshig*) inscribed on the base of the *Drilbu* composed by His Holiness the Je Khenpo, Trulku Ngawang Jigme Chhoedrak on 14 Wednesday 2016 translates as:

May the sound of the bell of wisdom, dispel emptiness. Having awakened from the slumber of immoral delusion, let the realization of righteousness arise in our minds, so that all may attain the state of perfect peace.

Conclusion

The *Dorje* and *Drilbu* are ubiquitous Buddhist reliquaries found in the homes and altars of every Bhutanese people. Their symbolism is deep and vast. Now having earned their places in the Bhutanese courtrooms, the latter really turn into divine temples of justice. Their presence in the courtrooms will evoke awe, reverence and respect in the minds of the contesting opponents, as well as the judicial personnel and the judges. In placing these sacred tools of justice in the hands of our professional and competent judges at all tiers of the judiciary, it can only be hoped that the bells get rung more often for the triumph of justice; and seamless transition of judicial power; rather than condemnation of the scorned and the convicts. 27 January 2018 is indeed a historic day – the day our courtrooms shut doors to the gavel forever and, welcomed the *Dorje* and *Drilbu*.

6 See The Guidelines for the usage of the *Dorje* and *Drilbu*, Supreme Court.