

THE ENDURING VALUES OF THE CONSTITUTION

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It is indeed a great pleasure and honour for me to visit this historic place. I would like to express my deep appreciation and gratitude for bestowing me with this rare honour of sharing the exalted dais with the most accomplished legal luminaries and towering personalities. I am deeply honoured to be with a legendary champion of law and justice, Hon'ble Justice Ruma Pal, Mr. K.K. Venugopal and other distinguished guests. May the National University of Juridical Sciences, under the dynamic leadership of Shri Ishwara Bhat, continue to blaze the trail of recognition and excellence.

I. BHUTAN

Bhutan is a small country sandwiched between two giants, China in the north and India in the south. Economic and political modernity of Bhutan can be attributed to the Indo-Bhutan friendship, which commenced with the visit of Prime Minister Jawaharlal Nehru in 1958. He traversed the country on foot, yak and horseback with his daughter, Mrs. Indira Gandhi to meet His Majesty the Third King and addressed the people of Bhutan. He declared that:

“India and Bhutan are members of the same Himalayan family and should live as friendly neighbours helping each other.”

Nehru's statement defined the spirit of friendship between the two countries. The exchange of visits between the leaders and the people to people interaction further cemented the friendship. The constant interaction at all levels

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has promoted a better appreciation for each other's culture and has reinforced the existing bond. Writing to Mr. K.K Venugopal, the illustrious son of M.K. Nambiar to acknowledge his contribution to the Constitution Drafting, His Majesty the Fourth King said:

“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.”

Bhutan has benefitted immensely from the wisdom, experience and nobility of Mr. K.K Venugopal. Therefore, it is a privilege and honour for me to be here at this august gathering of elevated personalities summoned by the soul of the great son of India, Mr. M.K. Nambiar. I would like to pay my obeisance to him in the words of Benjamin Disraeli, who said:

“The wisdom of the wise and the experience of the ages are perpetuated by quotations.”

As we immortalise the wisdom of wise and the experiences of ages, I entreat upon you in the celestial words of the Rig Veda:

“O wielder of the adamantine justice, these powers, who readily obey you, are very generous, extensive and strong. You and powers, both divinities, at their pleasure dominate over heaven and earth.”

II. DRAFTING THE CONSTITUTION OF BHUTAN

The origin of Bhutan as a nation state resulted from a democratic process in 1907 by electing a hereditary monarch akin to *“the Great Chosen One (Mahasammatta)”*¹, which is similar to the social contract theory. The democratic process in Bhutan culminated, a century later in 2008 with the adoption of the Constitution. His Majesty Jigme Singye Wangchuck, the Fourth King himself was instrumental in developing and ushering in democratic Constitution. The drafting of the Constitution of Bhutan began in 2001, when His Majesty astonished the Nation with the proclamation that Bhutan would embrace democracy. His Majesty said:

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

With that Royal Proclamation to initiate drafting of the Constitution, we were reminded of the monumental work of Dr. B.R. Ambedkar. We

¹ FRANCIS FUKUYAMA, THE ORIGINS OF POLITICAL ORDER (2011).

studied the meaning, birth, types and dynamics of democracy and constitution of other countries. The Drafting Committee considered the various political theories, principles, references, case laws and comments including the study of different types of constitutions.²

The first Constitution in the world was written by Solon, an Athenian lawmaker and reformer, as a reaction to Draco's harsh laws of 621 BC. His Constitution was adopted in 495 BC by the Greek ruling class, a group based on wealth (plutocracy). Thereafter, the idea of "the constitution" engulfed the world. However, till 1950, only 20 of the 190 countries had written constitutions. Etymologically, the term constitution comes from the Latin word *constitutio*, used for regulations and orders. We must know how the latent power of that simple word, inspired peoples and nations across the World.

III. DEMOCRACY AND BHUTAN

Constitutions of nations generally promote democracy. Historically, Cleisthenes invented democracy in 508 BC. The word "democracy" combined the elements demos, which means "people", and krátos, which means "a force" or "power". Aristotle was a thinker of the classical Greek period whose political theories, like those of Plato, set the bounds of political discourse throughout the middle ages. His work still exercises a profound influence on modern political and social thought. Aristotle's political ideas are more immediately acceptable to the modern Western mind than Plato's because he comes closer to approving democracy. Long before democracy flourished in ancient Greece, the concept took roots in the independent republic of Vaishali.³ We recorded forty-three types of democracies.⁴ Democracy is '*the rule of public opinion*' in the form of individual and self-determination. Gandhiji elucidated:

² We studied different constitutions such as the Written Constitution, Unwritten Constitution, Enacted Constitution, Federal Constitution, Unitary Constitution, Flexible Constitution and Rigid Constitution, Old constitutions, Colonial constitutions, the Neo-liberal constitutions, the Classic constitutions and the French Constitution, etc. Further, many constitutional scholars have enumerated, as a form of reaction to the prevailing situations, limited form of constitutionalism or controlled constitution. See YASH GHAI, A JOURNEY AROUND CONSTITUTIONS: REFLECTIONS ON CONTEMPORARY CONSTITUTIONS (2009).

³ See Parsa Venkateshwar Rao Jr., *Vaishali: The Ancient Hub of Democracy*, SANSKRITI MAGAZINE, Aug. 26, 2016, <http://www.sanskritimagazine.com/history/vaishali-the-ancient-hub-of-democracy/>.

⁴ Major democracies are (a) Direct Democracy; (b) Representative Democracy; and (c) Presidential or Parliamentary Democracy. Direct Democracy is achieved through direct participation of all citizens, whereas representative democracy involves a body of elected representatives and within the group of representative democracies, the focus may be on a strong president (Presidential Democracy) or on a strong parliament (Parliamentary Democracy). Apart from these basic types of democracy there are other various types of democracies such as: Athenian democracy or classical democracy, Anticipatory democracy, Defensive democracy, Deliberative democracy, Democratic centralism, Economic democracy, Grassroots democracy, Illiberal democracy, Jacksonian democracy, Liberal democracy, Market democracy,

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

His Majesty was keen to ensure participation and involvement of the people in the democratic process. The First Draft of the Constitution was publicly distributed and simultaneously launched on the Internet.⁵ After receiving feedbacks and comments, the second draft was distributed⁶ to every household and to every institution in the country, as well as to all international organisations based in Thimphu, the capital city of Bhutan. Moreover, His Majesty the Fourth King and His Majesty Jigme Khesar Namgyal Wangchuck conducted nationwide consultations to discuss the Constitution with the people of all twenty Districts.⁷ It was a crucial move towards the creation of ‘*inclusive democracy*’ recognizing the people’s participatory role in governance. Democracy provides personal choice, common decision-making and stabilising results with responsibility. In the first session of Parliament on May 10, 2008, 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 forefathers 100 years ago.”

As a witness to the past and global experiences, Bhutan ushered in a multifaceted democracy ingrained in “*natural democracy*” as noted by Prof. Katsu Masaki. During the drafting of the Constitution of Bhutan, the Drafting Committee studied:

- (a) Around hundred Constitutions (out of which fifty were studied in detail);
- (b) Royal decrees and edicts, Acts of Bhutan, Speeches of His Majesty and policies of the Kingdom;

Multiparty democracy, Non-partisan democracy, Participatory democracy, Social democracy, Sortition, Totalitarian democracy, Westminster democracy, Procedural democracy, Substantive democracy, etc.

⁵ On Mar. 26, 2005. Friends, critics, adversaries and the public were given sufficient time to express their views, make comments and provide suggestions regarding provisions in the draft Constitution. We received about 40 pages of comments from the online readers including comments from the experts.

⁶ On Aug. 18, 2005.

⁷ The first public consultation meeting was held in Thimphu district on Oct. 26, 2005 and the last meeting ended at the historic place of Trongsa on May 24, 2006.

- (c) Democratic values⁸, democratic traditions⁹ and democratic culture¹⁰ so that the Constitution would not be incongruent to the basic philosophies;
- (d) Religion, cultural, philosophical and political basis of the Constitution;
- (e) Emerging legal paradigms and social and ethical control mechanism;
- (f) Lessons from numerous constitutional crisis around the world;
- (g) The comments from international agencies, individuals and the Ministries of the Royal Government;
- (h) Clauses, sentences, provisions, prescriptive and non-prescriptive rights, declaratory¹¹, dictums of many constitutions, constitutional reform documents, landmark judgments and constitutional writings;
- (i) Human Rights conventions, treaties, protocols, covenants and other international and regional instruments; and
- (j) Constitutional values¹², principles¹³ and justice.

⁸ Democratic values include life, liberty, equality and dignity.

⁹ Democratic tradition includes rights and responsibilities, power of separation, a change from absolutism and the divine right of kings to constitutionalism.

¹⁰ According to Jack Balkin, a democratic culture is a culture in which individuals have a fair opportunity to participate in the forms of decision-making that constitute them as individuals. Democratic culture is about individual liberty as well as collective self-governance; it concerns each individual's ability to participate in the production and distribution of culture and enter into public debate about cultural quality wherever it is manifested across all three spheres of publicly funded, commercial, and home-made culture - in opera, crime writing, ballet, salsa, art galleries, TV, etc.

¹¹ According to declaratory theory, judges only declare law. Reference can be made to declaratory and original law making theories by Bacon, Hale, Blackstone, Dicey, Salmond, etc. But judges play a creative role in the making of the law. However, Austin and Bentham criticised it. Constitutive leads to errors and regulative leads to a derogable advancement of knowledge.

¹² Constitutional Values: It can be divided into (i) Constitutional core values, which generally are human dignity, sovereignty of a country, social justice etc., (ii) Supporting values comprising of freedom and equality, (iii) Structural values include democracy and rule of law, (iv) Embedded values and principles and (v) Neutral values, which include Freedom, equality, democracy and freedom of choice.

¹³ Constitutional principles comprise of (i) Rule of law (Both people and the government must obey all laws), (ii) Separation of powers (Montesquieu, Burke, Engels, Locke, Mill proposed that oppression on part of any organ of government may be checked for preservation of liberty and prevention of tyranny. It was opposed by Plato, Bodin, Hobbes, and Madison. Madison theorised that the organs of government should be connected and blended so far as to give each a constitutional control over the other), (iii) Equality, individual rights, freedom of religion, federalism and civilian control over the military.

IV. PREAMBLE

The Preamble of the Constitution of Bhutan declares the objectives to be achieved by its provisions. The basic constitutional values are incorporated in the Preamble. The Economist on 9th November wrote:

“Easy search should save time and effort for the business of drafting. That can produce workman like prose – or something more exotic. Bhutan’s constitution kicks off with: “Blessed by the Triple Gem, the protection of our guardian deities, the wisdom of our leaders, the everlasting fortune of the Pelden Drupka, and the guidance of His Majesty.””

Justice Verma commented:

“The Preamble of the Constitution of Bhutan declaring the objectives to be achieved by its provisions indicate its republican character like that of the Constitution of India. It begins with the words “We, the people of Bhutan” and ends with “Do hereby ordain and adopt this Constitution”; like the opening words in the Indian Constitution, “We the People of India”¹⁴ and ending with “Do Hereby Adopt Enact and Give to Ourselves This Constitution.” “We”, the people is conceived as a collective body capable of an independent act and political legitimacy of constitution making.”

Justice Kirby of Australia commented:

“In the preamble to the Constitution of Bhutan there are poetic and beautiful words.”

V. ARTICLE 1

Article 1 of the Bhutanese Constitution expressly provides that the sovereign power belongs to the people of Bhutan and the form of government is a “Democratic Constitutional Monarchy”. It is an immutable principle of the Constitution of Bhutan. It can only be abrogated or amended “through a National Referendum” or plebiscitary democracy. The power to amend the basic structure of the Constitution, through a referendum is vested in the people.

¹⁴ Sir Earnest Baker wrote, “In a brief and pithy form the argument of much of the book, and it may accordingly serve as a key note.”

According to His Majesty, the sovereignty of the people is the principle of the Constitution, which rests with the people, whilst the legislative sovereignty¹⁵ is bestowed to the Parliament in line with Hans Kelsen's doctrine.

The Constitution should have inbuilt checks and balances with the objective of protecting liberties, freedoms¹⁶ and rights incorporating the doctrine of separation of power at three levels. Firstly, territorial splitting has been done through the unitary system with constitutional guarantees for local government to deal with local issues under Article 22. Secondly, functional splitting is enshrined through the separation of powers between the three branches of the Government under section 13 of Article 1. Thirdly, individual institutions are separated through the establishment of both 'political' and 'professional' offices within the executive. Further, the Constitutional bodies have been established to ensure good governance and compliance with the rule of law.

VI. ARTICLE 2

Article 2 deals with the institution of Monarchy. There is a provision that the King of Bhutan (Druk Gyalpo) has to abdicate and hand over the Throne at the age of 65 years to his successor. The King must also abdicate for wilful violation of the Constitution or for permanent disability in a motion passed by the joint session of the Parliament. It is a salutary provision. The provision that the Monarch will step down proves that the political sovereignty

¹⁵ Dicey (1835-1922) differentiated the legal sovereignty of law making by the legislature and electoral sovereignty of the people as the political sovereignty. Dicey's proposed two kinds of sovereign – the legal and the political. The legislature is the legal sovereign as it has the power of law making. The electorate is the political sovereign and the legal sovereign acts in accordance with the wishes of the political sovereign.

¹⁶ The birth of freedom can be traced to "the gray dawn of 21st September, 490 B.C., 9000 citizen-soldiers of Athens formed ranks on a plain by the Bay of Marathon." Initially freedom was not universal and pervasive. The slaves were denied freedom. Freedom can be negative freedom as espoused by Spencer, positive freedom, self-determination or autonomy freedom as advocated by Kant, freedom of religion by scientific humanist Espinoza and religious toleration advocated by Montesquieu. However, freedom must have rational action as Bentham said:

Source freedom is valuable for more opportunity to pursue objectives that we value and importance to the process of choice itself. Freedom is to be found in rational action. Rational action cannot be based on a single individual's personal desires but to be a universal law ... a person shares with the whole community. He extended this community to all rational beings.

Kant insisted that actions resulting from desires cannot be free. He differentiated the 'opportunity aspect' from the 'process aspect.' Freedom is valuable for more opportunity to pursue objectives that we value and importance of the choice itself. 'Apart from the other freedoms, our Constitution guarantees six important freedoms: (a) The freedom of speech and expression; (b) The freedom of assembly; (c) The freedom to form associations and unions; (d) The freedom of movement' (e) The freedom to reside in any part of the territory of the country; and (f) The freedom of profession, occupation, trade and business.

is vested in the people. It is the people's representative who can sit in judgment over the King's conduct. It is people's Sovereignty¹⁷ or Popular Sovereignty¹⁸ in action.¹⁹

VII. ARTICLE 5

There is a separate Article on environment (Article 5), which encompasses the fundamental duty of every citizen to contribute to the protection of natural environment and prevention of ecological degradation. During the Stockholm Declaration in 1972, India was the first country to make amendments in the Constitution by incorporating Article 48A as one of the directive principles imposing a duty in the State to protect and improve environment, etc. Similarly, the Constitution of Bhutan expressly makes every Bhutanese citizen a trustee and imposes a duty on the State for its preservation. Section 3 of Article 5 mandates a minimum of 60% of Bhutan's total land to be maintained under forest cover at all times. So the combination of Articles 48A and 51(a)(g) of the Indian Constitution are provided in this Article. The Bhutanese Constitution also incorporates therein the doctrine of sustainable use of

¹⁷ According to the principle of people's sovereignty, all state power comes from the people. This means that all power exercised by the state has to be legitimised by the people. The principle of people's sovereignty does not demand citizens take part directly in all decisions of state (as in a referendum). It does however, demand that all those exercising state power hold office as a result of the will of the people; this means the election of representatives either indirectly (e.g. members of parliament) or directly (e.g. in a parliamentary democracy or civil servants appointed by it). People's sovereignty is also known as political sovereignty – Locke (1634 - 1704) provides the principle that political sovereignty comes only from the consent of the governed.

¹⁸ Humanist's teaching on sovereignty emphasized strong, centralized rule, dynastic continuity and consolidation of royal power. Henry VIII was influenced by the followers of humanists, who were Erasmus (author of *The Praise of Folly*), Blount, Thomas More, Mount Joy, Thomas Linacre, William Grocyn and John Colet, Bertrand Russell. Bentham followed the theory of Hobbes and advanced an absolute monarchy. John Locke (1634 - 1704) gave all natural rights to an absolute monarch.

¹⁹ His Majesty Jigme Singye Wangchuck said,
 ... the sovereign power of the Kingdom has been purposely left to the Bhutanese people. This is because we can never ensure the capability of a future Kings/Monarchs to look after the welfare of the People. Therefore, if a King is incapable of performing his duties as a Monarch, the people of Bhutan a move a secret vote of no confidence and if three-fourth of the people support such a motion, the King has to resign and give the Kingship to the next capable one. Thus, the sovereign power has been kept with the people in trust. In our country, the people should know whether their King is capable or not capable to rule the country or whether the King is good or not. For this reason, if in the National Referendum, the people decide against the King, the King has to resign immediately. Hence, in the Constitution, it was purposely intended not to give the sovereign power both to the people and the King jointly. In other countries, where there is a case of, the King or the Queen sharing equal power, it is because the people cannot dethrone the King or Queen through secret voting. However, our Constitution is a different Constitution. Our Constitution is drafted by reposing trust and confidence upon the people of Bhutan.

natural resources and to inter-generational equity or the doctrine of public trust for environment preservation.

VIII. ARTICLE 7

The growth of liberty, prosperity and representative government is an inexorable progress of human institutions that began with Greek democracy. After the Revolutions of 1848, in Western Europe, the doctrine of individual liberty²⁰ developed. This was preceded by the 1789 Declarations of the Rights of Man and the Citizen, whereby the idea of human rights and civil rights advanced. Liberty is classified into negative and positive liberties. Thinkers such as Engels, Marx, Nietzsche and Freud criticised the concept of “individual liberty”. They viewed equality as a main component of a society’s grade of liberty. Liberty without equality, anarchist’s argue-to this day, is only the “*freedom of the powerful to exploit the weak*”. Fried Hayek countered the argument:

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

The constitutional guarantee for civil liberties and their enforcement are enshrined under Article 7 of the Constitution of Bhutan.²¹ This is an assurance for the protection of civil liberties, which is the essence of democracy. Fundamental Rights protect the dignity of an individual as a human being. Protection of fundamental rights is the best way to promote a just and tolerant society. Article 7 guarantees standing right that enables a citizen to sue for breach of their rights. Under Part III of the Constitution of India, civil liberties have an entrenched constitutional guarantee from the inception for their protection through the ‘rights’ with the constitutional remedy (Article 32) for their enforcement. The United States remedied their lacunae in the Bill of Rights by judicial activism or juridification.

Section 17 of Article 7 guarantees protection against torture and other forms of degrading treatment incorporating the substance of the UN Convention against Torture, and Section 18 provides for progressive guarantee of inalienable human rights, and abolishes capital punishment. The provisions under Article 7 provide vertical rights of an individual against the State

²⁰ Liberty was prized by the Classical Philosophers like Aristotle, Demosthenes, Cicero, Isaiah Belin (Positive and Negative liberties), Thomas Hobbes (Negative liberty and blend of individual and collective liberty). According to Rousseau and Spencer, individual is subordinate to the state.

²¹ The freedom and liberty under the Constitution is that the sovereignty of the people and country is absolute. Freedom can be of various kinds – (i) Personal Freedom- the right to think and act without government control, (ii) Political freedom- the right to participate in political process, and (iii) Economic Freedom- the right to buy, sell and trade private property and the right to employment without government interference.

and also cater to the horizontal rights among individuals. Dr. B.R. Ambedkar stated:

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

The Constitution confers the First Generation of Rights in the nature of civil and political rights; the Second Generation of Rights concerning the right to economic, social and cultural rights; and the Third Generation of Rights pertaining to solidarity rights such as right to peace, happiness and clean environment. The interest of the society may be predominant over an individual interest because the larger and public interest must far outweigh the smaller one. But there are certain rights, which are non-derogable rights. Even in emergencies, these rights cannot be trampled upon or suspended. In almost all of its variants, constitutional liberalism²² argues that human beings have certain natural (or “inalienable”) rights and that government must accept a basic law, limiting its own powers to secure them. This right is the assurance for protection of civil liberties, which in many countries, is not expressly provided.

IX. ARTICLE 8

Rights go with responsibilities and Article on ‘fundamental duties’ under Article 8 demands its citizens to foster tolerance, mutual respect transcending religious, linguistic and regional or sectional diversities. Gandhiji said that, “the true source of rights is duty.” Article 8 is similar to Article 51A of Part IVA of the Indian Constitution. Additional duties of citizens under the Bhutanese Constitution are provided under sections 6, 8 and 9, to help victims of accidents and natural calamity, to pay taxes, and to fight corruption respectively. Fundamental duties are based on Buddhist precepts and Jenks’ and Austin’s concepts. Sir David Ross’s list of prima facie duties, the concepts of universal duties, general duties and particular duties by Jenks and Austin’s *vinculum juris* or bond of legal obligation, relative and absolute duties reflect Lord Buddha’s duties. Conscientious duties make a responsible human being and Sir David Ross mentioned,

²² Constitutional Liberalism emphasizes the value of individual’s rights of equality and of individual freedom of choice and freedom from interference supported by Locke, Montesquieu, Adam Smith and Kant. The Bhutanese Constitution has civil rights (freedom of state), political rights (interference and freedom to participate), substantive rights (education and employment), inalienable rights (the right to life, equality before law), inherent rights (right to life), social rights, economic rights, standing rights, positive rights, negative rights, corrective rights, distributive rights, proprietary rights, personal rights, perfect rights etc.

“non-maleficence is apprehended as a duty distinct from that of beneficence, and a duty of a more stringent character.”

The combined efforts of Fundamental Rights and Fundamental Duties of every citizen and the State are realising the Constitutional promise. It is so reflected in the French Declaration of 1789:

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

X. ARTICLE 9

Similar to Directive Principles of State Policy in Part IV of the Indian Constitution, Article 9 of the Bhutanese Constitution enshrines the Principles of State Policy. Dr. B.R. Ambedkar mentioned:

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

XI. GROSS NATIONAL HAPPINESS (GNH)

Gross National Happiness is enshrined in Article 9 of the Constitution. The Principles of State Policy under that Article are directions given to the Government to establish a just society and to promote those conditions that will enable the pursuit of Gross National Happiness. It enshrines the active obligations of the State while framing policies and laws. The Government must secure the greatest degree of happiness to the people. It is the immutable responsibility of the Government as John Adams rightly said, “the happiness of society is the end of government”. I had the honour of being reminded by His Majesty:

“He had introduced this concept at a time when the world was interpreting development as the concept of Gross National Product. That narrow focus on consumerism has now proven to be disastrous, on the earth and on human development. Bhutan wanted to raise the level of human contentment and well-being with a holistic approach to

development and change. Sustainable economic development is necessary to free the people from poverty. Culture is necessary to strengthen national identity and preserve traditional values. Spiritual development strengthens moral and ethical values that laws cannot substitute. The environment is the natural legacy and it is our responsibility to preserve it for future generations. Bhutan has always preserved this holistic balance and the interdependent existence of all life forms. A disturbance of any of them will destroy the natural balance and cause discontentment and unhappiness.”

Bhutan enjoins gross and not necessarily net happiness. It is national and not individual. John Stuart Mill said that, to concentrate on individual happiness, interests might be disastrous as a public policy. Being national, it must be for common pursuit or common good and shared values. Lord Buddha said, *‘Happiness is made to be shared’*. It may reflect Bentham’s utilitarian view, *“The greatest happiness of the greatest number”*. Happiness should be the general object to augment the total happiness of the community. Bentham confirmed the Eudaimonism view that happiness is the highest good. Without this policy, tyrannical will, vaulting ambition, and insatiable greed of every individual will trample freedom, right, liberty and justice that the Constitution promised us. Psychological egoism of human selfishness is totally unjustifiable and irresponsible defiance of the public interest. However, the concept of national is neither necessarily negation nor contradiction of the individual rights. The fundamental rights enshrined in the Constitution balances it. It has a harmonious blend of individual and collective rights. In short, Gross National Happiness has a national objective and personal relevance.

Gross National Happiness also echoes Antisthenes’ philosophy of the ideal life. Acting well, especially in overcoming adversity is a virtue, which produces happiness. As Spinoza stated, *“Happiness is a virtue, not its reward”*. The insightful editorial of New York Times published on 6th October 2005 wrote:

“Does the United States strike you as a happy country? July 1776, when Thomas Jefferson claimed the pursuit of happiness as a basic human right, might have been the last time that happiness was officially proposed as a national objective. But in Bhutan - as reported in the Science Times on Tuesday - the question of national happiness is still up for discussion, thanks to a monarch who insisted, nearly a generation ago, that gross national happiness is more important than, gross national product.”

Personally, happiness is being sovereign and independent. A Buddhist saint said, *“Rang wang namni gawalo, zhen wang namni du nyel lo”*, which means to be independent is happiness; but to be under others is misery.

“... The blessings of liberty, to ensure justice and tranquillity and to enhance happiness and well-being of the people for all time ...” are sculptured in the Constitution and engraved in the hearts of the Bhutanese. All these are indelible ingredients of inalienable Happiness.”

The concept of Gross National Happiness encapsulates the vision of a welfare state. Bhutan’s concept of Gross National Happiness is the synthesis of the constitutional philosophies. The Indian concept of ‘*Vasudhaiv Kutumbakam*’ and ‘*Sarve Bhavantu Sukhinah*’ are the same, and so are the modern world-wide human rights slogans- ‘*World is one family*’ and ‘*All human rights are for all*’. The American Declaration pronounced:

“All men are equal, that they are endowed by their Creator with certain unalienable rights that among these are life, liberty, and pursuit of happiness.”

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

XII. ARTICLE 15

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

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

XIII. ARTICLE 16

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

XIV. ARTICLE 17

Article 17 prescribes the essential qualification for the office of Prime Minister to ensure true representation of the people. The Constitution states that the Prime Minister should be a natural born citizen of Bhutan. This rule has been extended to persons holding all the constitutional posts under Article 31 and those holding elective offices under Article 23. Such provisions tend to promote political morality. Mahatma Gandhi named politics without morality as one of the seven deadly sins. Dr. B.R. Ambedkar mentioned:

“Constitutional morality is not a natural sentiment. It has to be cultivated. We must realise that our people have yet to learn it. Democracy in India is only atop-dressing on an Indian soil, which is essentially undemocratic.”

By constitutional morality Grote meant,

“... a paramount reverence for the forms of the Constitution, enforcing obedience to authority acting under and within these forms yet combined with the habit of open speech, of action subject only to definite legal control, and unrestrained censure of the very authorities as to all their public acts combined too with a perfect confidence in the bosom of every citizen amidst the bitterness of party contest that the forms of the Constitution will not be less sacred in the eyes of his opponents than in his own.”

XV. ARTICLE 21

“Article 21 deals with the Judiciary. It is the guardian of the Rule of Law²³, for which its independence²⁴ is secured by suitable provisions

²³ We realised the value of the democratic society and the need to respect one's rights and others, ensuring supremacy of the “rule of law” that embodies the basic principles of equal treatment of all people before the law, fairness, and both constitutional and actual guarantees of basic human rights. The rule of law is the foundation for sustainable communities based on opportunity and equity. Dicey's rule of law has the material rule of law and the formal rule of law. The material rule of law requires the realisation of just legal order, and formal rule of law requires that the state activities are to be based on laws that are consistent with the constitution. In his treatise, “Law of the Constitution”, he identified three principles which together establish the rule of law: (1) the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power; (2) equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary courts; and (3) the law of the constitution as a consequence of the rights of individuals as defined and enforced by the courts.

²⁴ We adhered to the Statutory protection of Independence; Personal Independence and Integrity (ability to not be swayed by personal bias and extraneous influence); Professional Independence; Investigatory Independence; Reporting Independence; and Resources Independence.

relating to security of tenure, funding provisions, conditions of service and the essence of separation of power. Appointment of judges is made on the recommendation of the National Judicial Commission. The significance of Judiciary in Bhutan is a great assurance for the working of its democracy. The Judiciary has a seminal role in a democracy.”

XVI. ARTICLE 33

Article 33 provides that the Constitution shall not be amended during emergency, and the constitutional remedy for enforcement of the non-derogable civil liberties cannot be suspended.

XVII. SURVIVAL OF CONSTITUTION & DEMOCRACY

Many philosophers believed that political cycle was harmful. The transitions would often be accompanied by violence and turmoil, and a good part of the cycle would be spent to degenerate forms of government. To minimise casualties and facilitate transition, Bhutan looked into Aristotle’s political cycle comprising of six forms of stages and believed that these keep revolving in a cyclic order. Similarly, Polybius defined four basic forms of government as democracy, aristocracy, oligarchy and tyranny, and Plato mentioned that the five forms of government are aristocracy, timocracy, oligarchy, democracy and tyranny. Having studied them, we created an interlocking system and enshrined principles, doctrines and legal paradigms in the Constitution. The Constitution of Bhutan is rigid to establish normative values and flexible²⁵ enough to be dynamic in order to embrace changes. The Constitution should contribute to social and political stability and introduce changes without disrupting the ongoing operation of the system. It means that society will over a period of time face social and political disruptions of various sorts in the political domain and the opposition party may gain sufficient power to become troublesome or disruptive and may take power and displace the government. However, Prof. Mark V. Tushnet from Harvard said that the opposition would not be destructive.

XVIII. AMENDMENT

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

²⁵ The flexible constitution lays down a special process for its amendment. It does not distinguish between a constitutional law and ordinary law.

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

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

Over the years, the Constitution of Bhutan has endured the constitutional goals, contributed to social and political stability without disrupting them and the governance to pursue goals for the nation. It has maintained stability and peace in bewildering changing times. In a system of election, a party that loses the election must not feel that it has been permanently defeated. It should not therefore go into serious opposition to the new governing party. The Constitution must allow the governance or the elected government to pursue the goals for the nation that the Constitution and the governing party identifies.

XIX. CONCLUSION

Series of Shri M.K. Nambiar Lectures in NUJS provide us a day for renewal and revival. He is a beacon of inspiration. He reminded India in particular and humanity in general, to humanise law and to uphold the sacrosanct human rights. He resonated Upanishad book III that states:

“Law is the honey of all beings; all beings are the honey of law.”

Shri M.K. Nambiar worked and lived to humanise law and liberate by his appearance and arguments in the first seminal significance case of *A.K. Gopalan v. State of Madras*²⁶, as well as the *Golak Nath case*²⁷ regarding implied limitations. Rightly, Kania C.J. in his judgment in *Gopalan* paid tribute to Nambiar:

²⁶ AIR 1950 SC 27.

²⁷ *Golak Nath v. State of Punjab*, AIR 1967 SC 1643.

“The Court is indebted to the learned counsel for the applicant [that is Nambiar] and the Attorney-General for their assistance in interpreting the true meaning of the relevant clauses of the Constitution.”

Lecture series established by his illustrious son are occasions for affectionate remembrance and acknowledgement of debts to Mr. M.K. Nambiar, who continues to inspire us. Some moment has the power to create history; some idea has the power to inspire millions and some person has the power to change a nation. Mr. M.K. Nambiar had that power. His illustrious son, Mr. K.K. Venugopal, who is a great scholar and philanthropist, and NUJS have the power and duty to keep the flame burning to illuminate and energise the entire nation and the legal world. His words, deeds, and spirit remind me of a memorable Sanskrit verse, *Yasokaaya the body of fame shall endure all ravages of time.*

Thank You and Tashi Deleg.