

Law and Justice in Bhutan

A Review of the Book *The Constitution of Bhutan: Principles and Philosophies*

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It is now seven years since Bhutan adopted a written Constitution as part of a series of far-reaching reforms commenced in 2001 by the Fourth King, Jigme Singye Wangchuck. His Majesty aimed to, among other things, provide Bhutan with ‘a democratic system of government best suited for the future well-being of the nation’.¹

The introduction of a system of participatory democracy—based on universal adult franchise under a constitutional monarchy—as a key component of these reforms was particularly striking in that the impetus for it came, not from popular demand or revolutionary pressures, but from a carefully argued case, articulated by the king, who also drew the attention of his subjects to the fact that

[i]n 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.²

One school of thought within Bhutan maintained that the Constitution was nothing less than a ‘gift’ from a benevolent and caring king to his people—and a gift which the people were reluctant to accept.³

This theory generated some academic discourse outside Bhutan—including criticisms that it reinforced feudal attitudes of subjugation;⁴ it also triggered a debate among local politicians on the propriety of discussing the proposals because that would be seen as questioning a gift.⁵

¹Kuensel, 05 November 2005.

²King Jigme Singye Wangchuck’s speech to his Council of Ministers et al, 04 Sep 2001, cited at pp. 21–22. In fact, as Tobgye has explained elsewhere, there was active opposition to the idea of popular democracy and the public misgivings had to be overcome by royal assurances about the need for a transfer of power from the monarch to the people: see, Sonam Tobgye and Thrimchi Lyonpo, ‘The Making of the Constitution and Democracy in Bhutan’, Kuensel, 4, 6, 7 & 8 September 2012, also accessible at <http://www.bhutan-research.org/wp-content/uploads/2012/09/2012-THE-MAKING-OF-THE-CONSTITUTION-AND-DEMOCRACY-IN-BHUTAN.pdf>.

³Note, for example, the observation of the Speaker of the National Assembly in 2005: ‘In Bhutan the sacred command came even as the people pleaded with His Majesty not to devolve his power’ – Kuensel, 22 June 2005.

⁴See, e.g. Winnie Bothe, ‘The Monarch’s Gift: Critical notes on the constitutional process in Bhutan’, (2012) 40 European Bulletin of Himalayan Research 27–58.

⁵See, Sonam Kinga, ‘The Constitution – the King’s Gift: Defiling and Sanctifying a Sacred Gift’, accessible at: www.bhutanstudies.org.bt/publicationFiles/ConferenceProceedings/DemocracyConference2009/05TheConstitutionbySonamKinga.pdf.

The theory was, however, given a quiet burial when the monarch himself made it clear that the Constitution is not a gift from the king to the people but it is the responsibility of all sections of the Bhutanese people to draft a Constitution which will be relevant and beneficial for Bhutan.⁶

Challenges of Democracy

The seven years since the adoption of the Constitution have seen significant developments in this mountain kingdom, including two general elections, a decisive but smooth transition of power from one political party to another, and the relinquishment by Jigme Singye Wangchuck of the Crown in favour of his then 28-year-old son, Jigme Khesar Namgyel Wangchuck.

Those seven years have also seen Bhutan grapple with many of the challenges that come with democracy, including questions involving separation of powers, ambit of fundamental rights, independence of constitutional authorities, powers and privileges of legislators, and entitlements to the loaves and fishes of public office. Central to many of the challenges were questions concerning the interpretation of the Constitution—a subject that is as thorny as it is unavoidable in any country, let alone a nascent democracy.

Against this backdrop, the appearance of a book which offers as authoritative a commentary on the philosophical moorings, principles, and prescriptions of the Constitution as can be expected at this stage of the evolution of democracy in Bhutan cannot but be welcome. The book deserves particular attention because it is authored by someone who has played a pivotal role in the birth of the Constitution, viz. the chairman of the Constitutional Drafting Committee and a close adviser to the Fourth King.

Sonam Tobgye was also, of course, Bhutan's Chief Justice for nearly a quarter of a century. Though not a professional lawyer, his stewardship of the judiciary has been commended, not least for ensuring that this institution occupies its rightful place as one of the pillars of modern Bhutan. The book provides an opportunity to examine a number of issues relevant to the state of law and justice in Bhutan and reflect on the possible future role that the judiciary can play in shaping the destiny of this wondrous nation.

The bulk of the book is devoted to an Article-by-Article exposition of the Constitution. By the standards of similar works elsewhere, the commentary is, it has to be said, brief. Part of the reason for this is, of course, that no case law is included.

⁶Kuensel, 23 March 2005.

That is not surprising, partly because constitutional litigation has not yet taken root in Bhutan and partly because it was only as recently as 2010 that the highest court of the land, the Supreme Court (which would be expected to generate authoritative constitutional jurisprudence), was established.

Even so, the non-inclusion of those few challenging cases that have come up so far, such as the one decided by the High Court in 2010 (popularly called the *Leader of the Opposition* case) which concerned the constitutional validity of a tax imposed by the government, will be seen by many as an opportunity missed.

Philosophical Basis

An understanding of the philosophical basis of the Constitution is important for any meaningful interpretation of its provisions. Quite clearly, Bhutan's long-standing Buddhist heritage cannot be lost sight of in this context. Tobgye rather cryptically describes the philosophical basis of the Constitution as 'internal freedom with external symbiotic existence'⁷—a description which, in the absence of elaboration, may leave many readers puzzled.

But why the compelling need for a written Constitution when an unwritten one has proved adequate for years not only in Bhutan but in other countries, including those which have had a glorious and long-standing tradition of democracy, freedom and the rule of law such as the United Kingdom? There is not much in the book by way of exegesis on this point, either.

A number of practical objectives for the Constitution were, however, offered by the Fourth King, and Tobgye refers to them frequently, e.g. protection of the sovereignty and security of the country and promotion of the national interest and the welfare of the people.⁸ Elsewhere, the author has made reference to what he calls the 'immutable principle' of the Constitution, viz. that 'the form of Government shall be that of a Democratic Constitutional Monarchy'.

This implies, in Tobgye's view, that sovereignty vests in the people (and not in the monarch or even in Parliament) and that the form of government cannot be abrogated or changed except through a national referendum. In that sense, the enactment of the Constitution marked a watershed moment for the country: It was a decisive step towards transferring sovereignty from the king to the people, and that can be seen as reasonable justification for the move towards a written Constitution.

⁷p. 11.

⁸Remarks by His Majesty Jigme Singye Wangchuck, 09 Dec 2002, cited in Tobgye, p. 25.

Readers would have profited if the book had captured the apprehensions that were expressed within Bhutan about the potential implications of popular democracy. That there were nagging fears among a sizeable section of the community on this score was evidenced by numerous comments which appeared in the media at the time. Sample this observation by a member of the Constitutional Drafting Committee and chairman of the Royal Advisory Council:

...the people are concerned about how the Constitution would affect the Monarchy and they are disturbed by the idea of political parties, believing that party politics will be unhealthy for a small country like Bhutan.⁹

Remarks such as these, with their implied undertone of worries about instability, corruption and ethnic polarisation, may yet turn out to be prescient—and therefore worthy of notice—given the dismal record that party politics has had in many countries, particularly in Bhutan’s neighbourhood. Bhutan still enjoys a comparatively good reputation for being a ‘clean’ polity,¹⁰ but that may yet change.¹¹ A discussion of this important debate would, therefore, have greatly enhanced the value of Tobgye’s commentary.

King’s Vision

Part of that debate also showed another interesting aspect of Bhutanese society, viz. an unflinching loyalty on the part of most people to their monarch which meant that they were unwilling to question the king’s vision in the matter of constitutional reform. Published material, including editorial comment in the state-owned media, suggests that any criticism of, or dissent against, the proposed changes was muted, including among the educated middle classes and the elite in society.¹²

Bhutan’s Constitution-making process was noteworthy for the absence of a traditional forum—such as a Constituent Assembly—in which rival views and assessments of what was on offer would have been debated in full public glare. Had such a forum existed, Tobgye’s task of capturing the whole range of opinions on the draft proposals would have, in some respects, been made easier. Such indeed was the case in neighbouring India whose constitutional historians have chronicled

⁹Kuensel, 13 December 2002.

¹⁰In 2014 Transparency International, which monitors corruption around the world, ranked Bhutan as the 30th least corrupt country in a league table of 175 countries, giving it a score of 65 out of 100 (with 100 representing the highest achievable score) – see, www.transparency.org/country#BTN.

¹¹Already, there are frequent complaints amongst Bhutanese people about a growing ‘VIP culture’ which manifests itself in politicians and others with connections to the Establishment engaging in objectionable behaviour such as jumping queues at airports and expecting complimentary upgrades on the national airline.

¹²See, e.g. ‘The constitution: much to learn’, editorial, Kuensel, 29 October 2005 in which it is possible to read a veiled admission that many people were less forthcoming with their views than they might have been.

and dissected the exchanges in that country's Constituent Assembly at such length and in such detail that those wanting to learn about them have a wealth of material to turn to.

Supremacy of the Constitution

A key feature of the Constitution which finds explicit mention in the document¹³ but which has not received the width or depth of analysis in Tobgye's commentary that it deserves concerns the supremacy of the Constitution. This principle has often been a subject of severe contestation in many developing countries, especially when the elected representatives of the people begin to flex their collective muscle on the strength of large majorities in parliament. In the case of Bhutan a further question arises, viz. to what extent can the monarch exercise law-making powers on his own?

Even in mature democracies, it is not uncommon for some powers to be reserved to the monarch. In England, for example, the queen enjoys what are called 'prerogative powers'—which includes the power to confer honours and to go to war—although most of such powers are exercised on the advice of the executive branch of government. Interesting questions have arisen about whether actions taken under the prerogative powers are amenable to judicial review (the short answer to which is in the affirmative, though the courts are reluctant, for policy reasons, to second-guess the decision-maker's judgment in certain areas such as national security).¹⁴

Tobgye draws attention to the provisions in the Bhutanese Constitution which provide for prerogative powers to be exercised by the king, and notes that some of those powers are in the nature of 'absolute power' and others in the nature of 'nominal power' (to be exercised on the advice of the Prime Minister and his cabinet) or 'residual power' (to be used in emergencies). Some examples of the circumstances in which each of those powers may be exercised, and their relative status in the face of the principle of constitutional supremacy would have been welcome.

Readers would also have liked greater elucidation on the scope of judicial review more generally. As the Bhutanese public become more litigious—as they inevitably will in the coming years—the courts are bound to be faced with increasingly complex questions involving scrutiny of governmental actions and decisions. The Constitution deals with judicial review but in relatively brief terms.

Article 21, Section 10, for instance, adopts the language of most English common law countries and states that 'the Supreme Court and the High Court may issue such

¹³Article 1, Section 9.

¹⁴See, e.g. *Council of Civil Servants Union v. Minister for the Civil Service* [1983] UKHL 6.

declarations, orders, directions or writs as may be appropriate in the circumstances of each case', but it is not clear if the fairly intricate rules and procedures that have been developed by common law courts apply in Bhutan, given that Bhutan has not had a history of British colonial rule.

That is an issue which has a wider resonance as well. As a country which has not, at least in modern times, been colonised and, therefore, come under the influence of any foreign legal system, relying instead on traditional Buddhist principles of law and justice (notably the 17th century *Tsa Yig* code and the *Thrimzhung Chhenmo* established by the Third King in 1953), the overlay in recent years of legislation drafted by western consultants trained in the American, British, or other European tradition, can lead to some confusion. How the judges will cope with conflicting perspectives in key areas—or even, at a more basic level, with divergent approaches to legislative drafting—remains to be seen.

Role of the Judiciary

That the judiciary will play a dominant role in the affairs of Bhutan in the next phase of the country's evolution is a reality which cannot be ignored. It is also a reality which is also fraught with serious implications which politicians, civil servants, judges, and everyone else concerned with governance will have to come to grips with sooner rather than later.

The enactment of a written Constitution—coupled with the growth of a 'rights' culture, partly engendered by domestic law and partly encouraged by outside influences—means that many issues which in the past were either settled through informal or traditional systems of dispute resolution or subjected to royal adjudication will now fall in the lap of judges. That development will, as well as turning the spotlight on an institution which has historically enjoyed a relatively low profile, subject judges to unprecedented strains.

A properly resourced and independent judiciary performs many vital functions: as well as administering justice to citizens without fear or favour, it is the ultimate protector of rights; it provides the last word in the interpretation of laws and, in many countries, makes law where parliament has either failed or neglected to make law; the judiciary is also the supreme protector of the constitution.

These important functions cannot be discharged unless the judiciary is adequately resourced, treated with the respect it deserves, kept free of all undue pressures and influences, and staffed with judges who are competent, well-trained, and imbued with a high degree of integrity, impartiality, and independence of mind.

For a developing country like Bhutan, the challenges in this area are formidable. In the absence of full-fledged facilities for legal education at university level, most aspirants for the Bar and Bench rely on India for their law degrees. While India has, traditionally, had an enviable reputation in the field of legal education, recent decades have seen a precipitous fall in standards at Indian universities. This is notwithstanding the emergence in the past few years of a number of national law schools amidst much promise; unfortunately, that promise is not matched by performance of any commendable standard, as any objective assessment of these institutions will confirm.

The causes for this malaise are too numerous and too complex to go into presently, but many of the observations made by the Law Commission of India as far back as 1958 hold true even today. That body, then chaired by one of India's leading jurists, M.C. Setalvad, referred despairingly to the phenomenon of a 'plethora of ... half-baked lawyers, who do not know even the elements of law' being 'let loose upon society as drones and parasites in different parts of the country'.¹⁵

Another stark reality of the Indian legal education system which makes its graduates highly suspect and less than fit for legal practice, let alone for a future career on the Bench, is that, for nearly two generations now, India has not had any decent system of vocational training for its lawyers. India is one of the few countries in world where a law graduate, fresh from college often with a third-class degree acquired after part-time study, is able to start practising immediately and without having to sit a professional entrance examination or other quality control processes.

India also has the dubious distinction of not requiring its legal practitioners to renew their practising certificates at regular intervals (in a sharp and scandalous departure from global best practice), with the result that even the Bar Councils—the official recognition body—does not have either any control over those who appear in the courts up and down that vast country or any tally of the actual number of practising lawyers. For many years now India has become increasingly detached from the mainstream of legal education and practice around the world.

It is against this background that Bhutan must consider whether it is doing itself any favours by relying too much on the Indian law colleges for the education of its lawyers and judges. Pending the establishment of proper indigenous facilities for the education of lawyers—and the recent announcement, in this context, that

¹⁵Law Commission of India, 14th Report (1958), at p. 523 (based on evidence taken from an experienced law teacher and member of the Union Public Service Commission).

a Royal Institute of Law is planned with American support in the near future deserves at least a cautious welcome¹⁶—the Bhutanese authorities must consider urgent measures to upskill its Indian-educated lawyers and judges with additional training and refresher courses at both academic and vocational levels.

Judicial Ethics

Yet another matter concerning the judiciary deserves serious attention before it becomes too late. It has to do with judicial ethics and conduct. Bhutan is blessed with a historical tradition, rooted in Buddhism, which emphasises humility, grace, and good behaviour. Those qualities need to be ingrained in every occupant of the judicial office. Sadly, the experience of South Asia in this regard is far from heartening. More often than not, judges in the subcontinent behave as if they hold a monopoly of wisdom. They tend to be dismissive of others and exhibit boorish behaviour which makes them stand out at international gatherings.

Their conduct is reminiscent of a cartoon that appeared in the *New Yorker* magazine some years ago in which a judge was shown looking down from the Bench and saying to three lawyers appearing before him: ‘First, understand that from up here, you all look like a bunch of ants’. That is exactly the kind of behaviour that judges need to avoid.

The judiciary wields enormous power, but with power comes responsibility. As Justice Jackson of the US Supreme Court once said about himself and his colleagues, ‘We are not final because we are infallible, but we are infallible only because we are final’. The risks of a judge who wallows in his own importance or ability cannot be overstated. Many of the criticisms that have been made in recent years about judicial activism in countries like India flow from judicial egotism or the insatiable urge on the part of a judge to see himself in the limelight. Bhutanese judges need to guard themselves against this tendency at all times.

Sonam Tobgye recognises the importance of judicial restraint and argues against excessive judicial activism. He also refers to the need for judicial accountability and points helpfully to the concepts of *Dhamma* (righteousness) and *Vinaya* (modesty) in Buddhism. The value of his commentary on the judiciary would have been enhanced if he had made reference to one of the arguments that reportedly took place during the consideration of the draft constitution, namely, the correct title by which the Chief Justice should be known.

¹⁶Cautious because considerable thought needs to be given to whether an American-style legal education would be appropriate for Bhutan whose history, geography and culture have very little North American orientation and whose legal system, insofar as it is influenced by any foreign legal system, has more to do with English common law than any other.

It appears that, in the Dzongkha version of the document, the phrase '*brug gi kbrims spyi blon po*' (Minister Chief Justice of Bhutan) had been used, on the twin grounds that the Chief Justice enjoyed a rank that was equivalent to a cabinet minister and that he also donned an orange scarf in much the same way as a cabinet minister does.

However, it was pointed out to the committee considering the constitution that, given the importance that was being attached to the concept of separation of powers, it was unwise to use the word 'minister' in relation to the chief justice and that the title in Dzongkha should be '*bgrug gi kbrims spyi*' (Chief Justice of Bhutan, as in the English version). Although this argument was accepted, the older version of the title was apparently reinstated at the last minute.¹⁷ It would have been interesting to know Tobgye's views on this unexplained volte face.

Those familiar with the law and practice on judicial appointments are likely to take issue with Tobgye on an aspect of Bhutan's Constitution which is as unique as it is difficult to understand. Article 21, Section 6(a) limits the tenure of the Chief Justice of Bhutan to five years or less.¹⁸ Tobgye justifies this cap on tenure by arguing, firstly, that '[a] tenure and age bar is required to avoid entrenched interest and acquired bias' and, secondly, that whatever good work that an incumbent chief justice wants to do can be done within five years if he is 'capable'. Many would find the latter assumption ambitious, to say the least. Even in countries with highly developed judiciaries and efficient systems of government, limiting the tenure of a chief justice to five years will be seen as harsh.

The unreasonableness of this clause becomes even more apparent if it is realised that a person may be appointed to the office of chief justice at a relatively young age, say in his early fifties, and would have to effectively see his career reach a dead end by his mid-fifties because, by the very nature of his office, a judge cannot seek employment in any capacity after he steps down from the Bench. Apart from denying the judge his legitimate expectations to self-fulfilment, this retrograde provision also has the potential to contribute to a huge waste of talent which a developing country like Bhutan can ill afford. It is to be hoped that wiser counsel will prevail and this irrational provision is revisited by Parliament.

Concluding Remarks

As Bhutan's infant democracy evolves, the judiciary will be buffeted by many currents and cross-currents. To withstand these, the institution needs to be

¹⁷See, Sonam Kinga, *supra* note 5, at p. 144-5.

¹⁸If the incumbent has attained the age of 65 before he completes the five year period, he will have to step down as soon as he reached that age.

continuously strengthened from within and outside. Of the key challenges, finding suitable judges who bring to bear those qualities of independence, integrity, wisdom and competence that are a *sine qua non* for the survival of the rule of law will rank very high on the nation's agenda.

What should also not be lost sight of in this context is the need for continuing professional development of the judges, which means, in practical terms, the provision of high-quality training in a range of areas, which for the Bhutanese judiciary will have to, at least for the foreseeable future, come from outside, including from beyond the subcontinent. Bhutanese judges should not be afraid of learning from external experts, just as they should not hesitate to politely but firmly turn down ideas and proposals—especially ones based on politically correct fashions of the day—that are not suited to the local environment.

No less important will be the role of the Bar in building and promoting the rule of law. Bhutan should redouble its efforts to create a cadre of well-educated, properly trained lawyers who will, in turn, contribute to strengthening the judiciary in the decades to come. Of particular significance in this context will be the establishment of independent professional bodies (e.g. bar associations) and a robust regulator to encourage the highest possible ethical standards of conduct among lawyers. The legal and judicial communities cannot earn the trust and respect of the people they serve unless they set a good example themselves.

Tobgye has rendered a signal service to his beloved country through his book. As with most such works, there is always room for improvement and it is to be hoped that he will, in his well-deserved retirement, come up with a second edition which is more comprehensive than the current offering.