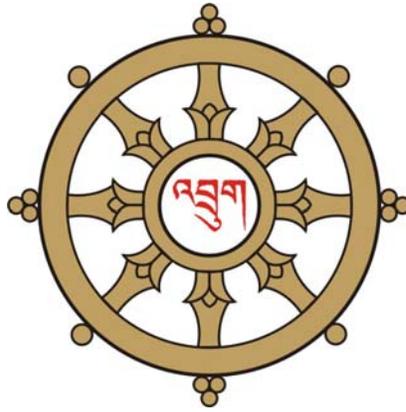


DRAFT CONSTITUTION OF BHUTAN:
SUGGESTIONS FOR A BETTER FUTURE



Druk National Congress
New Delhi

INDIA

B-125, 1st Floor, Dayanand Colony
Lajpat Nagar-IV, New Delhi-110024
Ph: +91-11-55641453, 55643748
Fax: +91-11-26216888
Email: dnc@ndf.vsnl.net.in

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PREFACE

The unveiling of Draft Constitution of Bhutan on the 26th of March 2005 is a landmark in the political history of Bhutan. On 6 September 2005, His Majesty the King of Bhutan informed the Cabinet that the Constitution of Bhutan would be formally adopted in 2008. Nation-wide consultations will also be held on the Draft Constitution after the monsoon season is over. We take this step to be a very positive move forward.

The Druk National Congress welcomes the unveiling of the draft Constitution of the Kingdom of Bhutan on the 26th of March, 2005. This is a very positive development towards establishing democracy in Bhutan under Constitutional Monarchy. A detailed study of the draft Constitution is underway and recommendations, if any, will be submitted, hoping to be given due consideration.

Since 1994, the Druk National Congress has been ardently campaigning for the establishment of democracy in Bhutan under Constitutional Monarchy. It has also been strongly advocating for the drafting of a written Constitution in order to safeguard the rights of the Bhutanese people. As well as enshrining the guidelines for realization of a democratic, vibrant, responsible and accountable society, -- a society of equal opportunity, a society that respects the rule of law, cares adequately for its underprivileged and its minorities, is devoted to preserving the country's rich cultural heritage and is committed to protecting the security and sovereignty of the Bhutanese Nation.

The unveiling of the Draft Constitution is an irretrievable step towards realization of evolving Bhutanese aspirations, encouraging all Bhutanese to collectively continue pursuing the well-being of Bhutan and the Bhutanese people.

Druk National Congress also urges the Royal Government of Bhutan to resume the refugee verification process, stalled in 2003 as soon as possible, in order to bring a lasting solution to the decade long refugee imbroglio through the eventual repatriation of genuine Bhutanese refugees. This is the only way forward to avert inevitable adverse consequences that result when such problems are left unattended.

Rongthong Kunley Dorji

President

Druk National Congress

1. DRAFT CONSTITUTION AND DRUK NATIONAL CONGRESS

The natives of Bhutan were confined to their locality due to hostile topography of the steep terrain of the Himalayas and dense forest in Bhutan and people continued to live in primitive state for several hundreds years. Bhutan was then divided into several principalities and each had their own code to follow. As in history, the wishes of powerful men have always been exerted upon the unsuspecting masses to show their dominance and to continue their legacy, and this practice is no exception in Bhutan. People of Bhutan were never given an opportunity to get together to establish “law”, since jurisdiction was limited, courtesy hostile topography. With Guru Rinpoche’s arrival in Bhutan in the 8th Century and the subsequent spread of Buddhism, religious code of law came into existence and later several “Lamas” established religious laws in their own religious style.

By the seventeenth century, Zhabdrung Ngawang Namgyal, founder of Bhutan, instituted the first ever-Bhutanese law as per the tradition of the Drukpa Karyupa religious code, “Michoe Tsangma Chudrug” based on Buddhist philosophy. The Zhabdrung’s code was in force until the 63rd Deb Raja. Even after the establishment of hereditary monarchy institution in Bhutan, first King Ugyen Wangchuck and second King Jigme Wangchuck continued to follow the “Zhabdrung’s Code”.

Only after the enthronement of the 3rd King Jigme Dorji Wangchuck, a modern justice and political system evolved in Bhutan with the institution of National Assembly in 1953 at Punakha, the then capital of Bhutan. In 1958, the first ever comprehensive codified law code, “Thrimzhung Chhenpo” was enacted in Bhutan. Thrimzhung Chhenpo is still followed in Bhutan, as basis of law, under which no fundamental rights of the citizens are recognized. The recent Draft Constitution (Tsa Thrim Chhenpo) contains the basic structure of Thrimzhung Chhenpo with few additions such as fundamental rights and constitutional monarchy, etc.

In 1970, the 3rd King issued a Royal decree to the National Assembly that a two-third’s majority of the National Assembly could force the King to abdicate his Throne. This decree was used twice in National Assembly in the early 1970s. In the first instance, three votes were cast in favor of King’s abdication and second time, this number rose to thirteen votes. The 3rd King also ordered the National Assembly that a Privy Council consisting of representatives from the Dratsang Lhentshog (Monastic Body), the Lhengye Zhungtshog (Cabinet), the Lodeo Tshode (Royal Advisory Council) and a Royal family member will govern the country until the Crown Prince attained twenty one years of age. Even the ministers’ post was subjected to election in the National Assembly after every five years.

The Present King, Jigme Singye Wangchuck became the King of Bhutan when he was seventeen years of age, and promised to uphold the principles set by his father, and to continue political reforms. It is sad to expose that his promises are proving to be empty and utterly disrespectful of his father’s wishes. The election of ministers after every five years, and the provision for the King’s possible abdication was made invalid. Instead, ministers continue to hold office for as long as the King desires. It is apparent now that the King never wanted to share his father’s governance policy.

The Druk National Congress (DNC) since its inception in 1994 has campaigned vigorously that there is no written Constitution in Bhutan. Finally on 26 March 2005, RGOB reciprocated our call by unveiling the written Draft Constitution to the world and the Druk National Congress welcomed this positive development. DNC’s comments on the Draft Constitution were released on 16 June 2005 and they are presented in this text. In overview, Constitution Drafting Committee (DCC) has letdown the aspiration of Bhutanese people. The power of Prime Minister is relegated to a nominal player and very basis of Constitutional Monarchy is made mockery, where King could sack the Prime Minister and Cabinet if they lose the confidence of King by the Draft Constitution provision Article 20 (7). Instead, DCC has

offered extensive and exclusive power to King who will still wield the existing absolute authority and will be above law. Total and absolute immunity is granted vide Article 2 (Institution of Monarchy) at this consultative stage.

The Druk National Congress suggests that Constitution should be such that it not only safeguards the rights of people but also of the King and the institution of monarchy. In order to achieve this, the Constitution should be above all, including the *Tsa-Wa Sum (King, Country and People)*. Both people and the King must uphold and respect the Constitution. The marriage between these two crucial provisions will ensure peace, stability and safeguard the sovereignty and integrity of Bhutan. The new codified law of Bhutan drawn from the Constitution will no doubt be in a better position to usher an era of peace and prosperity in Bhutan.

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2. THE DRAFT CONSTITUTION OF BHUTAN: SOME THOUGHTS

On the 6th of September 2005, His Majesty the King informed the Cabinet that the Constitution of Bhutan would be formally adopted in 2008. It is important for every Bhutanese citizen to comprehend the importance of the Constitution, to understand its contents and its implications, and seize this opportunity to take an active part in the consultation process. Since the formal adoption of the new Constitution is due only in 2008, every citizen has ample time to gain a deep understanding of the Draft Constitution, expand their political knowledge, and contribute constructively towards the adoption of a Constitution that is best suited to Bhutanese needs. Apart from protecting the rights of the people, the Constitution should also essentially facilitate, through active public participation in the governance process, the coordination of the three integral branches of the country: the legislature, the judiciary and the executive. This will result in an effective system of governance, which is efficient, beneficial, accountable and transparent.

Systems of governance evolve over a period of time, guided and adopted by necessity, driven by the aspirations of the people. Since it is guided by the needs of the people concerned, different assemblies of people have adopted different systems of governance. And because it is evolutionary, no system of governance can claim to be perpetually perfect, and this needs continuous improvement and amendments in relation to the changing times.

Examples of different systems of democratic governance are in practice in various forms all over the world. Neighbouring countries like India, Nepal and Bangladesh have instituted democratic set-ups, but are at the same time constantly working towards improving it according to the need of the hour.

In Bhutan, during the time of the Zhabdrung, the system of governance was based on the tenets of Buddhist philosophy, but largely focused on the interest of the clergy. However, the sovereignty of the country, and law and order was maintained. It was the 3rd King, Jigme Dorji Wangchuck, who brought sweeping political changes in Bhutan, when he established a new system of government, and enacted a codified law, the Thrimzhung Chenpo, in 1958, as mentioned earlier. Subsequently, socio-economic development was adopted as the central theme of the State's policy, and modern development activities were implemented with utmost dedication. He abolished Bhutanese social evils, like serfdom, slavery and the caste system that was intricately embedded in the society. The most significant contribution of the 3rd King was *the legal recognition of the equality of Bhutanese people*. The Bhutanese were unfortunate to be deprived of the dynamic and farsighted leadership of the 3rd King when he passed away at a young age.

Economic development in Bhutan has progressed to greater heights under His Majesty the King, but unfortunately, due to various reasons, the benefits by and large didn't trickle beyond the satellite towns and its peripheries, and a large portion of the rural population are still deprived of the basic necessities of life, and continue to reel under poverty.

The reasons for these fallouts are obvious. An essential component of good governance and adoption of beneficial policies is peoples' participation, from which emanates policy decisions that are an outcome of continuous contribution of unfiltered information coming in from the widest possible spectrum of individual citizens, analysis thereof, and responses drawn from there. If such an infrastructure does not exist, the fallout is - inadequacies in planning, formulating and implementing responses. This invariably results in the creation of a system that ends up serving the vested interests of a select few, at the merciless expense of the common citizen. While at the very top of the ladder, there is often abject ignorance of ground level realities, and hence a delusionary sense of security.

The Druk National Congress was formed precisely to address and seek solutions to these issues as they adversely affect the Bhutanese population. It has stood firm in its conviction, that democratic governance is the only solution to all the problems that Bhutan faces today and is also the only means to ensure that the process of improving the well-being of Bhutan and the Bhutanese people, continues into the future.

While we have been, and still are critical, of many policies of the Royal Government of Bhutan, it has been with a motive to facilitate improvement in the lives of the Bhutan people. At the same time, we have also continuously reiterated, that Constitutional Monarchy is one of the pillars of the institution of democratic governance that we have proposed. We have a passionate conviction and a sacred duty, to protect the well-being of our people, our country, and we strongly believe it is this well-being, that ensures not only the stability of Bhutan, but also the institution of monarchy.

It would be a dangerous misconception to imagine, that the army or the bureaucracy alone, can protect the country or the institution of monarchy. It must be remembered, that the individuals engaged in these institutions, are also drawn from the masses, and anything that adversely affects their families and homes, affects them too. Unequal distribution of wealth and development, and a justice system that is partial, not only angers the masses, it also creates a nervous sense of insecurity among the privileged, due to their lack of trust in the same system that provides these benefits to them. It isn't difficult to conclude what could go wrong, if we fail to fulfil the aspirations of the people, and if trust is lost in the system of governance.

While utmost attention must be given to ensure and safeguard the rights of the common people, protection of Bhutan's sovereignty, and the preservation of Bhutan's rich heritage, the democratic set-up must also inevitably take into account the different traditions and beliefs in Bhutan, that are the essence and strength of its society. The upliftment of the disadvantaged is most crucial for democracy to have any meaning, and it should be the sacred duty of any democratic government to ensure the protection of the marginalized and the disadvantaged, and to achieve a progressive Bhutan that is economically self-reliant and politically sovereign.

Above all, ***while examples of other democratic set-ups in the world as a reference may be taken, it is important to be clearly conscious of the type of set-up we want for ourselves.*** Discussions should be conducted at all levels, whether in private or in public, to gain a wider understanding. A family discussing these issues over a meal in their homes is as contributory as a discourse taking place in a street corner, or a debate in a forum. ***Everyone should discuss, debate and make up their minds as to what is best for us and our country - amendments, additions or deletions, everything that will suit us best.***

Last but not the least, lesser the political dramatization of this issue, the better it will be. It will not serve any purpose and not benefit anyone. Let the discussions continue freely and without

interference. Let the people decide for themselves and out of their own free will. And, let the majority decision be supreme. This is not a game to decide the victors and the vanquished. This is the deciding cornerstone of the future well-being of a nation and all its inhabitants, man or woman, young or old, rich or poor, royal or common. The damage that can result of a decision prompted by influence, than out of a genuine concern for one's own and the nation's well-being, can be devastating. This has happened elsewhere and it should be ensured that it is not repeated in Bhutan.

What we come up with in the form of a draft constitution might not be perfect, but it must lay a firm foundation for constructive improvement in governance when called for. Let us commit ourselves to bringing about a change that our future generations can look back and be proud of. Let us leave a legacy that will inspire one and all.

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3. SUGGESTIONS FOR DRAFT CONSTITUTION OF BHUTAN

The Druk National Congress is engaged in an in-depth and critical study of the Draft Constitution to draw up the final draft of its recommendations and is of the view that it would be relevant to put forward provisional comments on a few pertinent issues. DNC does not expect that all the points raised should be automatically accommodated. However, it would be glad to clarify and debate any amendment, addition or deletion, which will be beneficial for the people of Bhutan.

The Druk National Congress's Central Committee met in Delhi, India on 16 June 2005, under the chairmanship of its President Rongthong Kunley Dorji and deliberated on the Draft Constitution of the Kingdom of Bhutan, released on 26 March 2005. The discussions revealed that a number of subjects in the Draft Constitution need to be amended and these are being given here briefly.

I. BASIC PRINCIPLES

1.1. The Constitution proceeds on the basis of following principles:

Principle 1

The genius of the Bhutanese people should be reflected in the final Constitution.

Principle 2

The institution of the monarchy should be retained, inclusive of all its privileges but subject to the retirement of an incumbent till the age of 65.

Principle 3

The principle of representative-democracy with responsibility to people through elections is to be given its due place.

Principle 4

Clear recognition should be given to guaranteed Fundamental Rights to be read with, but not subordinate to the provisions on Fundamental Duties and the Directive Principles of State Policy.

Principle 5

An independent judiciary shall uphold the rule of law, democracy and civil liberties.

Principle 6

Provisions dealing with emergency shall ensure that 'emergent' powers shall be exercised within the rule of law, democratic principles and with due respect of fundamental rights. The censure of preventive detention is not under lined.

Principle 7

Due reference shall be given to guarding against arbitrariness and corruption.

Principle 8

Local government shall be part of the dispensation of the Constitution itself.

Principle 9

People's participation shall be ensured through periodic elections and national referenda.

Principle 10

While accepting the role of political participation, the Constitution shall place the national interest above party political interests.

1.1 Although these broad principles are generally acceptable, various concerns have been expressed other than those relating to the genuineness of the exercise; and the need for an active and responsive consultation.

II. PRINCIPLE AREAS OF CONCERN

1.2 There are various broad areas of concern

A. The spiritual heritage of Bhutan should include Nyingmapa and Kagyupa. Following points must be looked upon. i.e; –

- (i) Article 3(3) separates religion from politics and places religious institutions and personalities above politics. Article 3(4-5) goes on to empower the King to appoint the Je Khenpo [Article 3(4)] and four Lopens [Article 3(5)] and Article 3(7) to provides the state funding of Dratsang Lhentshog in the direct contravention of section 3 against the separation of religious and politics. Thus, all religious institutions should register and function as Trusts. Drukpa Kargyupa Institution (Dratsang Lhentshog) should also function as a Trust and be given complete freedom to function as per their own tradition. The four Principal Lopons should select the Je Khenpo and there should be no government/King interference in the selection process. The King being the upholder of the ‘Chhoe Sid’ may as a matter of tradition only solemnize the appointment.

B. Third,

- (i) While tradition may require the retention of the Monarchy, there may be a need to examine two crucial areas –
 - (a) The extent of privileges to be retained.
 - (b) The King’s continuing hold on governance.
- (ii) As far as the continuing Royal privileges are concerned, these will be monitored by the Privy Council (and a regency where the Monarch is not of age) with extensive powers with two persons nominated by the King and one person nominated by the Prime Minister (Article 2(14)). But the powers of the Privy Council shall extend to “royal projects” (sub clause (e)) and “any other matter commanded by the...King” (sub-clause (f)). Since many commercial activities are being taken up by the Royals and the ‘any other clause’ is wide, this is an ever expanding set of clauses.
- (iii) As far as the King’s constitutional powers are concerned, there are several areas that need clarification –
 - (a) The Prime Minister and Cabinet shall be responsible both to the King as well as Parliament (Article 20(7)). This has wide ranging implications including the possible power of the King to sack his Prime Minister or cabinet.
 - (b) The King’s legislative powers are extensive, including his independent power to send messages (Article 10(8)), convene extraordinary sessions (Article 10(12)), power to nominate eminent persons constituting 20% of the other house (Article 11(1)(b)), power to block bills even if passed by both legislatures (Article 13(10)&(11)).
 - (c) Residuary legislative power is vested in the King (Article 2(16)(e)).
 - (d) Article 2(26) that prohibits the parliament from amending the King’s Constitutional power (or whole of Article 2) needs redrafting to impart flexibility to Article 2.
- (iv) King’s appointments powers are partly disciplined by advice, but not always so.

(Note the provisions of Article 2(19) on various appointments, Article 11 (on nominations to the National Council), Article 19 (Interim Government – inevitably so), Article 24 (Royal Audit Authority), Article 26(2) (Anti-Corruption Committee), Article 28 (Attorney General) – all holders of constitution office (Article 30(2))).

- C. Fourth, principle of federalism concerning local government deal with a devolved structure to be devised by Parliament. There may be a need to introduce this provision with the Constitution – with a list indicating the powers of the local government.
- D. Fifth, the principle of accountability is damaged if, as pointed out earlier, the King has residuary powers not provided in the Constitution and under any law (Article 2(16)(e)).
- E. Sixth, the emergency power provisions are too wide and are not limited by a time clause (Article 34).
- F. Seventh, there are some concerns about the independence of the judiciary, which need re-drafting. Presence of the Chief Justice in recommendation group for the appointment of Chief Election Commissioner, The Auditor General, The Chairperson and members of the Royal Civil Service Commission, The Chairperson and members of the Anti-Corruption Commission, will surly affect the fair discharge of Justice.
- G. Eight, fundamental rights clause are overbroad in places and needs examination.
- H. Ninth, the principles of political party de-politicisation is unevenly worked out. While the Constitution recognizes ‘political Parties’ (Article 15), the Opposition party (Article 18) and anti-defection provisions (Article 15(9)), the Oppositions role may have been over-circumscribed (Article 18) and leave the parties vulnerable to being dissolved (Article 15(10)). Article 11(3)[‘All the candidates for membership to the National Council shall neither belong nor have affiliation to any political parties], *non-political representation* in upper house makes the upper house undemocratic in spite of being the elected since there is *no opposition* and no consensus. Upper House can pass the bill irrespective of Lower House and also the “review house”, an extra power irrespective of Lower House [Article 11(2)] and Article 15(3) pose some serious concerns.
- I. Tenth, there has been some concern about the election process (Article 23), the disqualification of person if, ‘terminated from Public service’ [Article 23(10)(c)], age limit of 65[Article 23(9)(e)], ‘is convicted for any criminal offences and sentenced to imprisonment’ [Article 23(10)(d)], ‘ is in arrears of taxes to govt...’ Article 23(10)(e)], and “Article 23(10)(f)”. The provisions for election disputes and disqualification. The Article 15(5 and 6) should be changed into single-phase election. Article 12(2) on delimitation of elected member for the National Assembly and Article 17(5) on the delimitation on the ministerial post is undemocratic. After all, a democracy ideally operates on a one-man-one vote principle. Although, the Article 11(1)(a) deviates this provision on the ground of federalism representation reasoning and to some extent acceptable since it is the National Council. For example, Tashi Gang has 168,000 people comparative to Gasa, which has 4000 people. By the virtue of Article 12(2), then the every voter in Gasa will be equivalent to about 12 voters

from Tashi Gang. Which gives each voter from smaller sized constituency a greater voice than one in a larger constituency.

The issue of electoral delimitation was also discussed and hence it is important to include concerns over this subject.

Electoral Delimitation.

The Drafting Committee members have limited the electoral advantage of the majority as delimitation of elected members of National Assembly is restricted to minimum of 2 and maximum of 7 vide Article 12(3) in the Draft Constitution. For example, Haa District or Pema Gatshel has a population of only 9000, where as Tashi Gang has 168,000. By the virtue of Article 12(3), one constituency in Haa district has 4,500 people where as a single constituency of Tashi Gang constitute a population of about 37,000. Finally when democracy and exercise of adult franchise will become the tool to voice their community's interests, the DCC has cleverly denied the people this advantage. There are always discrepancies in the delimitation of electoral constituencies in other countries due to various reasons like regular population increases, migrations etc., but such disadvantage is well compensated by development activities in that constituency.

The constitutional right to an electoral advantage for the majority in Bhutan is founded in profound, genuine and rational reason. In Bhutan, the populous communities have to toil for free and have contributed tremendously to nation building. A mandatory free-labour service to the State was prevalent during early stages of the building of modern Bhutan. Free-labour forces from populous communities have built Tongsa Dzong, Punakha Dzong, Wangdicholing Dzong, Tashi Chhodzong (Government Headquarters), Kunga Rabten Palace, Tashi Chholing (Domkhar, Bumthang) Palace, Dechencholing Palace, Lami Gonpa Dzong, Wangdi Phodrang Ma-Khang (Military Compound), Younphu-la Ma-Khang(Military compound) and infrastructure like roads and bridges are all built with Dug-dum, Sum-dum and Chunni-Dum, Zhabtolemi - a free-labour workforce. Zhabtolemi, voluntary labour service to the State is still prevalent in Bhutan and many district officers including ministers misused this service. Although, it nomenclatures "voluntary service", the Government interprets it as mandatory, as a result thrust upon the ignorant public.

The populous communities have spent their blood, sweat and toil for nation building and denying them electoral advantage will be totally unjust and unfair. DCC has obviously acted partially and on biased grounds. Democracy operates on a basis of a 'one-man, one vote' norm, hence such partial provisions will be unacceptable to people of populous communities.

At the end of this meeting a resolution was adopted and passed unanimously to bring these shortcomings to the knowledge of the people of Bhutan.

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