

1 INTRODUCTION

On 8 February 2012, National Council (NC) wrote to the Election Commission of Bhutan (ECB) seeking its views concerning incumbent Members of National Council who may wish to contest future parliamentary elections. Election Commission of Bhutan did not provide a written response to the letter but published a notification in a newspaper on 13th February 2012. It stated that *“In order that there is free and fair elections and level playing field for all candidates at every stage of electoral process, a serving Member of Parliament who is interested to contest election has to resign from the post of the Member of Parliament upon issue of The Royal Decree calling Parliamentary Elections.”* Following another enquiry seeking a direct response to National Council, the Election Commission of Bhutan reiterated its position through a letter addressed to the Secretary General, National Council and attached the same public notification.

Although it is not conclusive, it seems likely that many serving National Council members might consider running for a second term. In order to do so, ECB now requires them to resign before the completion of their tenure. This would have deep ramifications on the existence and functioning of National Council and of upholding Constitutional provision concerning National Council as a continuous House.

The Chairperson along with the Secretary General of the National Council arranged a meeting with the Chief Election Commissioner on 1st June 2012 and shared a copy of the position paper prepared by the National Council. It was agreed that the Election Commission of Bhutan after going through the paper would convey its decision on the above issue. In view of the fact that ECB has not responded and the next elections are drawing close, and that a common national understanding has to be established in preparation for all future National Council elections, it is imperative that a question of law arising now is appropriately addressed.

2 BACKGROUND

Article 24 Section 5 of the Constitution of the Kingdom of Bhutan states that *“Parliament shall, by law, ensure that the Election Commission holds elections so that the National Assembly and Local Governments are re-constituted within ninety days after its dissolution.*

Provided that in the case of the National Council, elections shall be held so that it is re-constituted on the date of expiry of the term. In the case of the Dzongkhag

National Council as a Continuous House

Tshogdu, the Gewog Tshogde and the Thromde Tshogde being dissolved prematurely, it shall be re-constituted within ninety days after its dissolution”.

The implication of this Section is that while the National Assembly (NA) and the Local Governments are constituted through an electoral process that takes place within ninety days after the expiry of their terms or after premature dissolutions, National Council must be re-constituted on the same day that the term of the current members expire. This means that elections to National Council must be initiated and conducted within three months before the expiry of the members' term. Section 192 of the Election Act states, *'The Election Commission shall, not later than ninety days, before the date of expiration of duration of the National Council, announce the date on which the Druk Gyalpo shall issue by Royal Decree the notification calling the election and setting the process of election in motion so as to ensure that a new National Council is reconstituted on the date of expiration of duration of the existing National Council.'*

3 IMPORTANCE OF A CONTINUOUS NATIONAL COUNCIL

These sections from the Constitution and the Election Act cited above suggest that the National Council has been designed as a continuous House. While there is always a ninety-day interim period after the expiry of term or premature dissolution of the National Assembly, there is no period in time when the National Council does not exist. This has been intentionally designed in the Constitution so as to provide stability and continuity to the overall governance process. There is no formal government and no National Assembly during this ninety-day election period and as provided for in Section 4 Article 19 of the Constitution, an Interim Government performs only the *“routine functions of the Government.”* However, by not having such an interim period for National Council, it ensures that at least one House of Parliament is perpetually existent. If it were not, the functions of government will be stalled since National Assembly on its own cannot pass any bill.

A major advantage that a monarchical form of government offers is political stability because it does not entail major changes in the governance structure over relatively long periods of time. Conversely, in spite of its many advantages, one inherent weakness of an electoral democracy is the instability that it brings every five years (in case of Bhutan) when a new government has to be elected, and possibly more often if and when there is premature dissolution of National Assembly. In order to minimize problems that may arise out of such instability, National Council has been designed as a continuous House. It can always be called upon to fulfill its part of the legislation process as soon as a new

National Council as a Continuous House

Government is formed. It not only provides a sense of stability to governance but also ensures that the business of government is not hindered simply because there is no National Council to complete the law-making process.

Furthermore, situations could arise in future when the functioning of the Interim Government might need to be reviewed and checked. As provided for in Section 4 Article 19 of the Constitution, the Interim Government can only carry out routine functions but is not authorized to *“take any policy decisions or enter into any agreement with foreign governments or organizations.”* The National Council would be necessary to ensure that the Interim Government conducts its affairs within the limitations imposed by this Constitutional provision. Therefore, it is crucial that National Council is maintained as a continuous House as stipulated in the Constitution. How can the continuity of National Council then be maintained?

4 ACCOMPLISHING A CONTINUOUS HOUSE

The National Council can exist and function as a continuous House only if, at any given time, there is a minimum of two-third of the total members of the House, i.e. 17 members. Two-third of members is required to constitute the quorum and enable the House to discharge its functions. In many other countries, continuity is achieved through a staggered election process where one-third of the members resign and new members elected so that two-third of the total members are always in office to constitute a quorum. Such a staggered election process has not been designed in Bhutan. Hence, the only way to achieve a continuous House is by requiring at least two-third of the incumbent members to serve the full term of office. If there is no such requirement, the continuity of the House as envisaged in the Constitution stands compromised.

Article 10 Section 24 of the Constitution states that *“The National Assembly and the National Council shall continue for five years from the date of the first sitting of the respective Houses. While the National Council shall complete its five-year term, premature dissolution of the National Assembly may take place on the recommendation of the Prime Minister to the Druk Gyalpo or in the event of a motion of no confidence vote against the Government being passed in the National Assembly or in accordance with Section 12 of Article 15”*. The phrase *“While the National Council shall complete its five-year term.....”* is generally understood to mean that National Council is a continuous House not subject to dissolution like the National Assembly. It may also be interpreted to mean that individual members should be allowed to complete their full term of five years, with resignations before expiry of term being voluntary but not obligatory.

National Council as a Continuous House

Resignations are voluntary and possible. Section 20 of the National Council Act states, *'Any person holding a seat in the National Council may resign through a declaration made in writing under the hand and seal of that person before two witnesses...'* If members resign six months or one hundred and eighty days before the expiry of their term, there are provisions for bye-elections. In this case, even if a member resigns, a new member would be elected in his/her place in a bye- election so that a quorum is constituted. However, if the remainder of a member's term is less than one hundred and eighty days or six months, a bye- election cannot be held. Therefore, if more than one-third of the members resign in the last six months of their term, a bye-election cannot be held and hence, a quorum to constitute National Council would not exist.

ECB's notification that requires serving National Council members to resign after the issue of royal decree calling for parliamentary elections directly suggests that the resignation of National Council members must happen in the last six months or specifically within three months before the expiry of their term. As such, there would be no bye-elections as provided for in Section 579 of Election Act. Without bye-elections, National Council would not be able to constitute a quorum if more than one-third of the members resign. As stated in the beginning, it seems likely that more than one-third of the serving National Council members might seek re-elections. There is no doubt then that National Council cannot exist and function as a continuous House. So ECB's objective of upholding the Constitutional provision of enabling free and fair elections by providing a level playing field for all candidates also effectively becomes instrumental in undermining another Constitutional objective of having a continuous National Council.

The question that arises is the question of primacy. Can the provision of National Council Act which provides for voluntary and rightful resignation of members take primacy or precedence over the Constitutional requirement for National Council to complete its term? Obviously, the Constitutional provision must take primacy. As such, it implies that at least two-third of National Council members, if not all, must complete their term. Only then can a continuous House be accomplished. It suggests that the issue of members' resignation does not arise.

If it is accepted that the Constitutional provision of National Council completing its full term can only be accomplished by requiring at least two-third or all of its members to serve their full term, it leads to another important question. Should those serving members interested to run again against new candidates in future National Council elections then be allowed to re-contest or not? ECB's

answer to this question is that serving members will not be allowed in order to ensure free and fair elections. Otherwise, they must resign. It reasons that serving National Council members would have an undue electoral advantage over new candidates through their direct and official connection with National Council. The deeper ramification of this answer is that it risks becoming instrumental in undermining another Constitutional objective of having a continuous National Council. Therefore, it is important to consider both these scenarios and see how they can be addressed. What are the ways forward?

5 POSSIBLE WAYS FORWARD

5.1 Scenario 1 – Allowing Serving Members to Re-contest

Neither the Constitution nor other electoral laws explicitly require Members of Parliament to resign in order to re-contest. The assumption that serving National Council members may have to resign in order to re-contest arises by way of comparison with civil servants, who must resign if they intend to contest for Local Government or Parliamentary seats. Section 179 of the Election Act states that “*A person shall be disqualified as a candidate or a member holding an elective office under the Constitution, if he/she: (j) Is working as a civil servant.*” Likewise, a person holding an Office of Profit must resign before contesting for elective offices since holding of such an office at the time of contesting an election is disallowed by the electoral laws. However, the Election Act does not consider the posts of MPs and Ministers, along with some others, as Offices of Profit. Section 166 of the Election Act states that “*The following persons shall not be deemed to be holding an Office of Profit: (a) Any Minister or a Member of Parliament or a Local Government, notwithstanding anything contained in section 164;*” The need for National Council members to resign in order to contest for re-elections would arise only if the office of MPs were considered to be an Office of Profit. Since this does not arise, serving members could be allowed to re-contest.

However, the primary argument against allowing incumbent National Council members to re-contest future elections against new candidates is that it could violate the spirit of “*free and fair*” elections that is guaranteed by the Constitution and other electoral laws. This spirit is based on the principle that one Bhutanese citizen should not possess any undue advantage, both psychological and material, over another Bhutanese citizen while contesting for any public office. This ensures that regardless of race, gender, social or economic status, every citizen who fulfils the criteria and qualification for the position, is treated equally by the

National Council as a Continuous House

electorate. This is an extremely important principle and value that must be protected in our country.

The question that arises is whether serving National Council members - who are about to complete their term – actually possess any undue electoral advantage while simultaneously serving the remaining two to three months of their term and re-contesting for their seats? A National Council member does not possess any executive power and is therefore, unlikely to be able to exert any influence over local governments and other state functionaries as might be possible in the case of National Assembly elections where the Executive and political parties could exert undue influence unless they resign from their official positions. Any advantage that accrues to a serving National Council member is likely to be only psychological.

What is the way forward then to address ECB's concerns? It is to strictly implement the following provisions of Election Act:

Section 292 - No person including candidates or the members of the political parties shall wear their Kabney during the electoral campaign in public.

Section 300 - No elected representative in Parliament, including Ministers, or Members of Local Government shall combine his/her official visit with electioneering work or make use of official machinery or personnel during the electioneering work or use any government transport for the furtherance of the interest of any party or candidate at an election.

These provisions of the Election Act have been designed to neutralize any undue advantage that might accrue to a person holding office. As long as these are strictly monitored by election officials, serving National Council members are unlikely to possess any undue electoral advantage by continuing to serve the remainder of their term and seeking re-election. Naturally, incumbent members may campaign based on their own personal achievements during their term in office. This is an advantage inherent in any position but it can also work to their disadvantage if members have not performed well. Besides, the anti-incumbency factor, which is an aspect of electoral politics, could work to the disadvantage of serving members. The argument advanced here is that both the advantage and disadvantage of serving National Council members will be there, regardless of whether they have resigned from their posts or not in order to seek re-election.

5.2 Scenario II – Disallowing Serving Members to Re-contest

If the Election Commission of Bhutan still insists that the above provisions of the Election Act would not be effective enough to ensure free and fair elections, the only other option is to disallow serving members to re-contest at all. In other words, serving National Council members then cannot resign and must complete their full term. This may seem to address the two above concerns. First, National Council would complete its term and have a continuous House. Second, there would be no issue of members having undue electoral advantage since they cannot re-contest. National Council elections would be over the moment they complete their term. However, disallowing serving National Council members to re-contest entails certain risks as elaborated below.

5.2.1 Loss of Accountability

Transparency and accountability are considered to be key factors that determine the performance of any office or position. There are different means of achieving accountability designed for different types of offices. In elected positions, the primary means of ensuring accountability is the election itself. The benefits of winning the next elections and the fear of losing it act as the primary incentive for elected officials to perform their duties for larger interest. Therefore, if serving National Council members are not allowed to re-contest, it would mean that their term is limited to a single five-year term. Without any prospects of re-election, it is highly probable that a member would use those five years for his/her personal gain rather than for larger public good.

In other positions such as the civil service or Constitutional posts, the fear of removal or other administrative actions such as reprimands, transfers or demotions act as other means of enforcing accountability. However, such measures do not apply to elected members and without the mechanism of re-elections to enforce accountability, it seems highly likely that National Council members may not be motivated to carry out their duties in the interest of the nation and the people.

5.2.2 Loss of Continuity

As mentioned above, National Council is designed as a continuous House to bring stability and continuity to Parliament. So, while National Assembly is dissolved after expiry of its term or through premature dissolution, National Council is a permanent House that provides a sense of stability in an otherwise changing political environment. However, if incumbent members are forbidden to contest re-elections, it would mean that every five years National Council would have totally

National Council as a Continuous House

new members. Therefore, while the House itself would become continuous, its members would always be new with no sense of what has occurred in the past. In a staggered election process, two- third of the members are always serving. This allows the House to continue its functions in a stable manner. In a House with totally new members, it may be difficult to retain any semblance of continuity and this would then negate the very purpose of having a continuous National Council. It would also result in the lack of a core competent National Council due to the short-term turnovers.

5.2.3 Politicization of National Council

The independence and efficacy of National Council is based primarily on the fact that the National Council is an apolitical House with no affiliations to any political party. Due to this apolitical character, National Council is able to remain objective and neutral to partisan politics and thus be an effective institution of review and of check and balance to the government and partisan National Assembly. It is quite certain that any politicization of National Council would weaken its objectivity and neutrality and become vulnerable to influences of political parties. Therefore, any issue that threatens to tarnish the apolitical character of National Council must be avoided at all costs.

Forbidding serving members from re-contesting elections to National Council would mean that a large number of members would naturally gravitate towards National Assembly simply because of a lack of other options. Once a person has entered the sphere of elections, it is impossible to return to the civil service and difficult to seek opportunities elsewhere. The obvious choice would be to run for seats in National Assembly if re-contesting for National Council were disallowed. Elections to National Assembly require a candidate to be a member of a political party and in order to strengthen their possibilities of getting elected to National Assembly, it is highly likely that a National Council member would covertly and even overtly seek affiliations with the two political parties in National Assembly or other existing political parties. With most National Council members affiliated to political parties, the apolitical character of National Council would be totally lost. National Council may then as well be written off as a House of Review since its members would instead be taking orders from those very political masters that they are supposed to check and balance. They would not be in a position to review the actions and policies of the Executive.

What is the way forward then to prevent loss of accountability, loss of continuity (with all National Council members elected anew), and politicization of National Council?

National Council as a Continuous House

All or at least two-third of incumbent National Council members should be required to serve their full term. Otherwise, National Council as an institution may exist with less than two-third of its members but it cannot function without the quorum. The ability to exist without the ability to function is pointless. The requirement to serve their full term must not prevent a serving member from seeking re-election for a new term. So long as members fulfill the qualification criteria laid out in the Election Act, running for public offices is their political right. Since the five-year tenure would have to be completed in order to ensure that National Council is both continuous and functional, re-contesting for a second term can only be possible for members while simultaneously serving the remaining few months of their first term. The criteria for disqualifications of candidates to elective office as stipulated in the Election Act do not state that a sitting National Council member has to resign in order to contest the next elections. Such a way forward would ensure that the National Council remains accountable, continuous and apolitical.

6 CONCLUSION

The Constitution has designed National Council to be a continuous House. However, since neither the Constitution nor other electoral laws have devised a staggered election process to achieve continuity of National Council, the only way to achieve this in our country is by requiring all or at least two-third of National Council members to serve their full five-year term. This has raised the question of whether serving members should then be eligible to re-contest the next elections. Permitting them to re-contest against new members raises the concerns of propriety and whether such serving members would accrue any undue electoral advantage thus undermining the spirit of free and fair elections. Not permitting them to re-contest carries certain risks that could undermine the very heart and character of National Council that enables it to carry out its mandates objectively and effectively. For both concerns, possible ways forward have been suggested. One, strictly enforce certain provisions of the Election Act that deter any undue electoral advantage of incumbent members against new candidates. Two, require all or at least two-third of serving members to complete their term in order to fulfill the constitutional objective of a continuous National Council and allow these members to re-contest while in office.

Therefore, in accordance with Article 11 Section 2 of the Constitution of the Kingdom of Bhutan, the National Council has the great honour to submit this matter to His Majesty the King for His consideration.