

Chapter IV

Citizenship and Rights of Minorities in Bhutan: Acts and Laws

4.1 Introduction

This chapter deals with the various laws and acts imposed by the government of Bhutan regarding citizenship, along with those relating to marriage and customs which had both direct and indirect impact on the citizens of Bhutan. The first part of the chapter deals with citizenship in Bhutan and traces the various acts and laws regarding citizenship against the backdrop of the historical developments in the country. The second part of the chapter deals with the constitutional provisions of Bhutan regarding citizenship and minorities and tries to uncover the inherent deficit in those provisions. By addressing to these acts and laws, the chapter tries to explore the socio-economic consequences they had on the citizens of Bhutan, especially to its minorities. As such, the chapter attempts to make detailed analysis of these acts and laws exploring the shortcomings within the constitution of Bhutan with regard to citizenship and minority rights.

4.2 Citizenship in Bhutan

In simple terms, citizenship is the status enjoyed by a person as a member of a political community (Yegen, 2004: 51-66) As such, citizenship not only provides people with a sense of belonging and identity, it also gives them an entitlement to the protection of the state and a legal basis for the exercise of many civil and political rights (United Nations High Commissioner for Refugees, 1997). The concept of citizenship varies according to the emphasis that is put on its various elements. For instance, for liberals, citizenship is a legal status which is based on nationality which is granted by a state at birth or through naturalization and which also grants specific rights and responsibilities in relation to that state (Nash, 2009: 1067). Similarly, for republicans, citizenship provides political participation in the form of formal procedures of voting, lobbying, and standing for office, and political mobilizations in civil society (Nash, 2009: 1067). There is a popular notion that citizens are bound together by virtue of the nation to which they together belong to, and the memories, values and purposes they share (Nash, 2009: 1067-1068). However, this notion that there is a close relationship between citizenship and nation has come under

scrutiny in recent times, due to the fact that processes of globalization has transcended the nature of political participation beyond the limits of national territory (Nash, 2009: 1068). The bond between citizenship and political community is an established fact but this does not mean there could be no other form of close political association other than a nation-state society (Yegen, 2004: 52). On the other hand, large-scale migration and settlements in states which were previously inhabited by citizens with relatively homogeneous racial and cultural background bring into question the exclusionary basis of national political community (Nash, 2009: 1068). This is more so in the case of minorities living in a country over a long period of time, which makes the act of privileging a particular category of persons as citizens within a political community because of their skin color and ethnicity unjust (Nash, 2009: 1698).

Regarding the question of citizenship in Bhutan, the country's Ministry of Home and Cultural Affairs issues seven different categories of the citizenship ID cards to its citizens (Arora, 2014). Category 1 is given to "genuine Bhutanese citizens"; category 2 is for southerners who left Bhutan once and then returned; category 3 is for those who were not around when the 1988 census was held; category 4 is given to non-national women married to Bhutanese men, and their children; category 5 is for non-national men married to Bhutanese women, and their children; category 6 is for legally adopted children; and lastly, category 7 is for those considered non-nationals (The Royal Government of Bhutan, Census Handbook, 1993: 29). As such, not every citizen of Bhutan enjoys the same rights as they are segregated into various categories which provide some citizens more privileges and rights than others.

The question of evolution and development of citizenship in Bhutan necessitates the exploration the political-institutional transition of the country. Bhutan was not a unified polity until the 1950s (Hutt, 2005). Before 1950s, the country had different systems of administration in different parts (Hutt, 2005). Similarly in southern Bhutan, there were local contractors and their descendants who remained the authority. The revenue raise in certain southern districts was submitted not to the central government but to a local governor based across the Indian border in Kalimpong (Hutt, 2005).

It was only during the early 1950s that the entire kingdom was brought under a single administrative system, with Thimpu as its capital. The then King Jigme Dorji Wangchuk and his Prime Minister Jigme Palden Dorje¹ started a number of programmes of political institution-building and infrastructure development. They included a land reform programme, the establishment of an elected National Assembly in 1953, the freeing of serfs, the enactment of the Nationality Law of Bhutan in 1958, and the establishment of a Royal Advisory Council (Hutt, 2005). All these programmes were a result of the political events that unfolded in Bhutan during that period.

The freedom movement in India which resulted in the departure of the British and the creation of two successor states of Indian Union and Pakistan inspired the democratic elements among the Nepali-Bhutanese within Bhutan. Simultaneously, the Anti-Rana movement and the formation of political parties in Nepal inspired D.B. Gurung to organize Bhutan's first political party, the Bhutan State Congress in 1952 (Pal and Banerjee, 2017: 182). However, it brought a popular agitational programme fighting for civil and political rights, abolition of landed estates, establishment of a responsible government etc., which were all thwarted by the despotic monarchy (Pal and Banerjee, 2017: 182). All sorts of political agitation were banned by the Bhutanese government (Pal and Banerjee, 2017: 182). Nonetheless, the failed political agitation and the persistent demand for democratic reforms in Bhutan made King Jigme Dorji Wangchuk realize the need to take a proper stance on the situation, which he thought could be done by introducing representation of Nepalese in the National Assembly and their appointment to the Royal Civil Service (Pal and Banerjee, 2017: 182). He further conferred citizenship rights to the Nepalese under the National Act of 1958 (Census Handbook, 1993: 3-5).

¹ Prime Minister Jigme Palden Dorji was assassinated in April 1964. He handled most of the specifics on Bhutan's modernization process and since he lived in Kalimpong, he was influenced by the modern world and his idea appealed to the younger generations more than the older ones. Many of the latter did not understand the changes, or feared that their position would be undercut, especially as in influx of hardworking *Nepalis* helped transform the malarial forests of southern Bhutan into its trade corridor. In the absence of the Third King, some of the decisions of the Prime Minister were interpreted as a push for power, backed by young upstarts and foreigners.

4.3 The Nationality Law of 1958

With the ascension of the Third Druk Gyalpo, Jigme Dorji Wangchuk in 1952, “a new era began in the history of Bhutan” (Nestroy, 2004: 344). Under his reign from 1952 to 1972, the country saw major social and political reforms, the beginnings of political consciousness among Nepali minority, state-sponsored integration efforts, and Bhutan’s first law governing citizenship.

The Nationality Law of 1958 paved way for a vast majority of Nepalese Bhutanese residents to emerge themselves into the Bhutanese polity. This law was one of the major reforms taken by the Third *Druk Gyalpo*, Jigme Dorji Wangchuk in 1952 (Nestroy, 2004: 339-340). In addition to providing for citizenship, during this period the government recognized Nepali culture and dress, allowed the teaching of the Nepali languages in schools, encouraged inter-ethnic marriages, and trained Nepali Bhutanese for government service. In 1961, Bhutan inaugurated its first Five-Year Plan. It was followed by the construction of a road linking Thimpu with India in 1963. As a result of these reforms, the economy and administration of the south integrated with those of the rest of Bhutan, which brought the *Lhotshampa* population deeper into the national mainstream (Hutt, 2003: 127-44). They began to play an important part in the national life of Bhutan, as increasing numbers of *Lhotshampas* entered government service (Hutt, 2005).

The king took a number of proto-democratic actions: he created a National Assembly in 1953, over which he had a veto until 1968, and introduced a triennial vote of confidence and two consultative councils (Gallenkamp, 2011: 1-11). Socially, he abolished slavery and serfdom in 1956, and instituted land reforms in 1952 that “allowed tenant farmers, most of whom were Bhutanese Nepalis, to acquire up to 25-30 acres”(Gallenkump, 2010: 6). Bhutan also joined a number of international organizations during this period including the United Nations in 1971 (Nestroy, 2004: 347).

Developments both internally and externally likely prompted these reforms, particularly a growing Nepali political activism with the region and the formation of political party –the Bhutan State Congress –by members of the Nepali Bhutanese community to promote political reforms (Hutt, 2004: 125). A popular Nepalese movement

had already toppled the hereditary regime in Nepal in 1951, and the Third *Druk Gyalpo* had reason to fear for his own future (Whitecross, 2009: 60). However, unlike later efforts to counter Nepali Bhutanese political movements with exclusionary tactics, the government welcomed the vast majority of the Nepali Bhutanese residents into the emerging Bhutanese polity through the Nationality Act of 1958.

Under the Act, the king extended Bhutanese citizenship to any person who lived in Bhutan for ten years and owned agricultural land (Whitecross, 2009: 61). Because most of the Nepali Bhutanese were farmers, ‘the provision of ownership of land was clearly inserted with them in mind’ (Lee, 1998: 129). If the applicant was not a landowner, the person was eligible for citizenship if he or she ‘‘had served the Government for five years and had resided in Bhutan for ten years’’ (Saul, 2000: 326). Citizenship also passed to a child if his father was a Bhutanese national (regardless of the nationality of the mother) and to a non-national woman if she married a Bhutanese (Baral, 1993: 200). Dual citizenship, however, was prohibited (Lee, 1998: 128).

In addition to providing for citizenship, during this period the government recognized Nepali culture and dress, allowed the teaching of the Nepali language in schools, encouraged inter-ethnic marriages, and trained Nepali Bhutanese for government service (Hutt, 1996: 402). ‘‘Thus, the Nepali Bhutanese began to play a more important role in national life, occupying some senior positions in the administration and sometimes even representing the kingdom overseas’’ (Hutt, 1996: 402).

Before 1958, citizenship as a legal concept was absent from Bhutan (Whitecross, 2009: 61). The Nationality Act defined that idea broadly, not merely as membership in an ethno-linguist group but ‘‘in relation to the territorial space of Bhutan’’ (Whitecross, 2009: 61). However, the government’s commitment to territorially-based citizenship and cultural integration of the country’s minorities proved to be strikingly short-lived. This was because the 1958 Nationality law was superseded by the Bhutan Citizen Act of 1977 and 1985. From the mid-1980s, the impetus towards the integration of the *Lhotshampas* began to slow down. Some powerful members of the elite were skeptical of this assimilation process and felt that the newly admitted *Lhotshampas* were bringing with them democratic claims and values. These apprehensions were greatly heightened by the violence of the

Gorkhaland-movement² in the Darjeeling district of West Bengal, especially between 1986 and 1988, and by the success of the democratic movement in Nepal in 1990 (Hutt, 2005).

4.4 Changes and Restrictions on Citizenship

In the two decades that followed the 1958 Nationality Act, South Asia was rocked by political and social turmoil that drove Bhutan's monarchy away from a citizenship policy based on territorial presence and toward an increasingly restrictive one based on ethnic, *Drukpa* identity. In 1959, the People's Republic of China invaded Tibet, and in 1965, it embarked on a violent and chaotic Cultural Revolution (Whitecross, 2009: 62). To the west, in 1975, India annexed Sikkim, a semi-independent kingdom with a large ethnic Nepali migrant population that "had actively pressed for the merger" (Saul, 2000: 326; Whitecross, 2009: 61). The events in "Sikkim had a lasting impact on the Bhutanese psyche" (Joseph, 2006: 1311-1312). A new king, the Fourth *Druk Gyalpo*, Jigme Singye Wangchuk, had ascended to the throne in 1972 at the tender age of 17, and he and the government feared that a similar popular movement of the Nepali Bhutanese could threaten Bhutan's sovereignty (Gallenkump, 2010: 8; Whitecross, 2009: 62).

4.5 Adoption of the Bhutan Citizen Act, 1977 and Marriage Act of Bhutan, 1980

Accordingly, among the king's first major actions was to adopt the Citizenship Act of 1977. Applying retroactively, the act doubled the length of time required for residency to twenty years for those working the land and tripled the requirement to fifteen years for those serving in the government (Baral, 1993: 200). A non-national wife of a Bhutanese national was no longer automatically eligible for citizenship and now had to apply for it like any other non-national (Hutt, 2004: 147). It also required prospective nationals to have "some knowledge" of Bhutan's history and of Dzongkha (Hutt, 2004: 147). For the first time, it also required each applicant to pledge not to act against the Tsa Wa Sum, or King, Nation, and People, to promote loyalty to the monarchy instead of an ethnicity or region (Whitecross, 2009: 62). "With the amendments to the eligibility for citizenship set out in

² The Nepali-speaking population known as "*Gorkhas*" demanded a new state to be carved out of Darjeeling District and the adjoining Dooars at the southern fringe of Bhutan. From 1986 to 1988, the region observed a violent movement for *Gorkhaland* under the leadership of Subash Ghising and the *Gorkha National Liberation Front* which resulted in the formation of the autonomous *Darjeeling Gorkha Hill Council*.

the 1977 Act,” one scholar wrote, “we can see the intertwining of legal processes and requirement with an increasingly exclusionary vision of what it meant to be ‘Bhutanese’” (Whitecross, 2009: 63).

That vision grew more restrictive when the government adopted the Marriage Act of 1980, which retroactively introduced punitive measures against Bhutanese who married non-nationals (Hutt, 2004: 148). Government servants in mixed marriages could not be promoted; no one who married a non-national could be employed in the foreign or defense ministries and any citizen who married a non-national forfeited his right to educational assistance (Hutt, 2004: 148). It was common for Nepali Bhutanese near the Indian border to marry foreign women, and this provision seemed aimed at discouraging that practice (Hutt, 2004: 148-149).

4.6 The Bhutan Citizen Act, 1985

The Bhutan Citizen Act came into force on June 10, 1985. This law overrode the previous laws and further tightened citizenship granted by birth, registration, and naturalization (Bhutan Citizenship Act, 1985). First, it narrowed the *jus sanguinis* requirement: citizenship could now only be acquired automatically if both parents were citizens, instead of just the father (Bhutan Citizenship Act, 1985). Second, if a person could show he was domiciled in Bhutan on or before December 31, 1958, he could register as a citizen, but the applicant had to have been registered at that time with the Ministry of Home Affairs; documentary proof was a nearly impossible requirement in a country with widespread illiteracy, which only recently adopted administrative procedures (Bhutan Citizenship Act, 1985; Saul, 2000: 328-329). Third, it allowed for naturalization if the applicant had been in residence for fifteen years for government servants and for those with only one citizen parent, and twenty years for others (Bhutan Citizenship Act, 1985). Naturalization applicants also had to be able to read and write Dzongkha “proficiently”, “have no record of having spoken or acted against the King, Country, and People of Bhutan in any manner whatsoever,” and take an oath of allegiance to the same (Bhutan Citizenship Act, 1985). The government also reserved the right to reject any application for naturalization “without assigning any reason” (Bhutan Citizenship Act, 1985). Finally, citizenship could be terminated if a citizen acquired citizenship of another country or showed “by act or speech

to be disloyal in any manner whatsoever to the King, Country and People of Bhutan” (Bhutan Citizenship Act, 1985).

In light of these retroactive restrictions, especially the new requirement that both parents be Bhutanese, many Nepali Bhutanese became stateless persons overnight. The retroactive operation of its provisions made the act “in essence, a denationalization decree.. specifically aimed at the Nepali-speaking Bhutanese” (Lee, 1998 : 141). The government sought to apply the new citizenship act by conducting a census of only the southern areas of Bhutan in 1988 (Hutt, 1996: 402). Citizenship cards that had been issued a few years earlier by the government were no longer accepted as proof of Bhutanese nationality, and many Nepali Bhutanese did not have records dating from 1958; accordingly, the census proclaimed about 100,000 residents “illegal immigrants” (Hutt, 1996: 402).

The census marked a major escalation in the tensions between the Nepali Bhutanese and the Bhutanese government, as the government now had “proof” of the influx of a large number of illegal migrants who supposedly constituted an existential danger to Bhutan’s *Drukpa* heritage. The census was part of a larger project of “cultural protection measures” intended “to foster the nation’s identity” in-line with the Fourth King’s vision of a homogenous national integration (Saul, 2000 : 330; Gallenkump., 2010: 8). For instance, in 1987, Bhutan introduced a “One Nation, One People” policy that included a mandatory code of traditional *Drukpa* dress and etiquette called *Driglam Namzha* (Hutt, 1996: 403). Dzongkha was promoted, and, in 1989, Nepali instruction was dropped from schools (Saul, 2000: 333; Hutt, 1996: 404). To discourage inter-ethnic marriage, the government also reportedly offered cash bonuses to Bhutanese to marry other Bhutanese (Saul, 2000: 333).

In light of the “growing sense of cultural marginalization among the Nepali Bhutanese,” dissent grew in the following years, leading to violence and demonstrations (Hutt, 1996: 404, 406). Because the Citizenship Act allowed the termination of citizenship of any person who showed disloyalty “in any manner whatsoever”, even those who had been classified as full citizens found themselves denationalized for assisting dissident “anti-nationals” in their protests (U. S. Dept of State, 2010 Human Rights Reports: 9-10; Hutt 1996: 406). The strife led to the massive emigration from southern Bhutan to

Nepalese refugee camps beginning in 1989 and 1990 (Hutt, 2004). In the years that followed, international talks to allow a return of the refugees to Bhutan have failed. Refused citizenship in Nepal and unable to return to Bhutan, after about a decade in the camps, the refugees have begun resettling elsewhere (Whitecross, 2009: 71). As of March 2012, about 60,000 refugees had been resettled abroad, with about 50,000 immigrating to United States (Bird, 2012; U.S. Dept. of State, 2010 Human Rights Report: 8).

As with earlier government action against ethnic minorities, Bhutan's efforts over the past twenty years to define nationality narrowly were actuated by the monarchy's sense of political and cultural fragility. From 1986 to 1988, a popular movement by the Nepalese Gorkha National Liberation Front (GNLF) advocating for an autonomous Nepali state in north Bengal, India turned violent, claiming 200 lives (Hutt, 1996: 401-402; Saul, 2000: 326). The Bhutanese elite probably feared that Nepali-led activism could threaten Bhutan's sovereignty, much as it had to the monarchy in Sikkim a decade earlier (Hutt, 1996: 402). The monarchy thought the Nepali Bhutanese could be Fifth Columnists who would align with the Nepalese across the region and advocate for a "Greater Nepal" that would bring Bhutan under Nepalese control (Baral, 1993: 200, 206).

In recent years, the overt threat of a mass movement forcibly toppling the Bhutanese monarchy and replacing it with a pan-Himalayan Nepali state has receded, but the monarchy's fear of a demographic threat has remained. The government has come to see the survival of its selective cultural identity as tied directly to its sovereignty. "We cannot play a dominant international role because of our small size and population, and because we are a landlocked country," the Fourth King said. "The only factor which can strengthen Bhutan's sovereignty and our different identity is the unique culture we have" (Larner, 2008).

As the monarchy has liberalized, it has continued to promote a particular Bhutanese identity –in part to assuage public anxiety over modernization and in part to fortify the polity from the potentially toxic effects of foreign influence – while deriving benefits from modernity (Wells, 2009; Larner, 2008). This tension – of trying to embrace political progressivism without diluting what it considers its singular culture –has been embodied in the country's new constitution and its approach to citizenship.

The Fourth *Druk Gyalpo* pursued Bhutanization, with all of its negative consequences for the Nepali Bhutanese, instituted a unique development concept called “Gross national Happiness”, and led the transition to a constitutional monarchy before abdicating the throne in 2006 in favor of his son, the Fifth *Druk Gyalpo* King, Jigme Khesar Namgyel Wangchuk (Mathou, 2008; Gallenkump, 2010: 8-12).

4.7 The Issue of Democratic Deficit in the Constitution of Bhutan

The constitution adopted in July 2008 contains many liberal democratic provisions: allowing the parliament to force the abdication of the king, creating an independent judiciary headed by a Supreme Court, establishing an anti-corruption commission, and specifying equality and sustainable development as principles of state policy, among others (Royal Government of Bhutan, The Constitution of the Kingdom of Bhutan, 2008, Articles 2, 21, 28, 9 and 5). It also establishes Dzongkha as the “National Language,” the king as the head of the state and “symbol of unity of the Kingdom,” and Buddhism as the “spiritual heritage of Bhutan” (Royal Government of Bhutan, The Constitution of the Kingdom of Bhutan, 2008, Articles 1, 2 and 3). Buddhism is the state religion” and the king is “the protector of all religions in Bhutan” (Royal Government of Bhutan, The Constitution of the Kingdom of Bhutan, 2008, Articles 3). It is also “the responsibility of religious institutions and personalities to promote the spiritual heritage of the country while also ensuring religion remains separate from politics” (Royal Government of Bhutan, The Constitution of the Kingdom of Bhutan, 2008, Articles 3).

In case of the issue of citizenship, the constitution formalizes the high bar to citizenship established by the 1985 Citizenship Act. Like the 1985 act, the constitution restricts by birth to those born to two Bhutanese parents and entitles a person who was domiciled in Bhutan before December 31, 1958 – “whose name is registered in the official record of the Government” – to citizenship by registration (Royal Government of Bhutan, The Constitution of the Kingdom of Bhutan, 2008, Articles 6). The period of residency required for naturalization is reduced from twenty years to fifteen, although no special allowance is made for those who work for the government (Royal Government of Bhutan, The Constitution of the Kingdom of Bhutan, 2008, Articles 6). An applicant must have a clean criminal record both in Bhutan and elsewhere, be able to speak and write *Dzongkha*,

have knowledge of Bhutanese culture, have “no record of having spoken or acted against the *Tsa-wa-sum* (king, country, or people),” renounce the citizenship of any foreign state, and take an oath of allegiance (Royal Government of Bhutan, The Constitution of the Kingdom of Bhutan, 2008, Articles 6). A citizen automatically loses his citizenship if he becomes a citizen of another state or a dual citizen (Royal Government of Bhutan, The Constitution of the Kingdom of Bhutan, 2008, Articles 6).

The constitution’s limitations on citizenship, like the 1985 act before it, mean that thousands of Nepali Bhutanese living in Bhutan who were legal citizens under previous laws are ineligible for citizenship. By requiring fifty-year-old documentation for registration, denying citizenship to children of inter-ethnic marriages, and denying citizenship to anyone who ever agitated against the monarchy, “whole families of several generations are unable to seek legal recognition as ‘full citizens’ of Bhutan” (Whitecross, 2009: 72). In response to criticism of this record by human right groups, the government in 2009 pointed to its naturalization record: “in the last few years, 588 individuals of Nepalese origin, 930 Tibetans, and 222 individuals of other nationalities have been granted Bhutanese citizenship through naturalization” (Dorji, 2009: 6). However, the figures are minute considering the 100,000 “illegals” disenfranchised in 1988. Precise figures of the disenfranchised are not known, but given the estimated size of the ethnic Nepali population, the scope of the political unrest, and the difficulty in maintaining records from decades ago, it stands to reason that tens of thousands of long-term Bhutanese residents are not considered citizens under the constitution, and are, therefore, stateless under international law (U. S. Dept. of State, 2010 Human Rights Report: 10).

Having set such a high bar for citizenship, the constitution specifies in Article 7 the fundamental rights accorded to “citizens” and non-citizen “persons” (The Royal Government of Bhutan, the Constitution of the Kingdom of Bhutan, 2008, Article 7). While the constitution does not say so explicitly, a fair reading of the text suggests that all citizens are persons –and are entitled to the rights afforded to both persons and citizens – but not all persons are citizens and are, instead, afforded only those rights ascribed to those who live in Bhutan but do not qualify for citizenship. The textual distinction has yet to be litigated, but given the plain meaning of the terms, the canon of statutory construction of

expression unius est exclusio alterius –when one thing of a class is expressly mentioned, others of the same class are excluded –and the history of Nepali Bhutanese exclusion from the political process, it seems plain that this distinction reflects a purposeful choice on behalf of the drafters.

The constitution theoretically protects a comprehensive range of civil, political, and economic rights for citizens that are in some instances greater than those protected by Western constitutions –from freedom of expression to freedom of religion, from a right to equal pay to a right to vote, from access to government employment to free access to information (The Royal Government of Bhutan, the Constitution of the Kingdom of Bhutan, 2008, Article 7). However, persons are entitled to a much narrower band of rights, mostly limited to physical protections and some civil rights but not political or economic ones. For instance, persons have “the right to life, liberty, and security” and to be free from capital punishment and “cruel, inhuman or degrading treatment,” but only citizens “have the right to freedom of speech, opinion and expression” and “freedom... of religion” (The Royal Government of Bhutan, the Constitution of the Kingdom of Bhutan, 2008, Article 7). In contrast, a person is only protected from being “compelled to belong to another faith.” Given the challenge the Hindu-practicing Nepali Bhutanese pose to the Buddhist Bhutanese's conception of homogeneity, the distinction can carry significant meaning. Under a fair reading of the text, it would be constitutional for the legislature to pass laws banning a non-citizen from publishing a newspaper, posting a handbill, or lecturing.

With regard to economic rights, while a person is guaranteed the right “to material interests resulting from any scientific, literary or artistic production,” only citizens have the right to own real property, and they may not “sell or transfer land or any immovable object to a person who is not a citizen...” Given that most Nepali Bhutanese are farmers, this provisions likely restricts them to lease-holding and sharecropping. It is also a striking retrogression from the 1958 and 1977 citizenship laws that favored those who worked the land. Citizens alone are also granted the “right to practice any lawful trade, profession, or vocation,” establishing the basis for laws that could bar non-citizens from some professions, similar to the restrictions placed on inter-ethnic couples by the 1980 Marriage Act. Only citizens can stand for elective office,” and any citizen who is married to a non-

Bhutanese is automatically disqualified from both standing for election and holding an elective office (The Royal Government of Bhutan, the Constitution of the Kingdom of Bhutan, 2008, Article 23).

In addition to being granted rights, citizens are also charged with “fundamental duties” under the constitution that are dissimilar from those ascribed to persons. Citizens are expected to “preserve, protect and defend the sovereignty... and unity of Bhutan,” “preserve, protect and respect the environment, culture, and heritage of the nation” “ – an oblique reference to the country's Buddhist “spiritual heritage” – and “foster tolerance, mutual respect and ...brotherhood” among all of Bhutan's people. Much is also expected of “persons,” although of a different degree. They are expected to respect the flag, refrain from “terrorism” or harming others, safeguard public property, pay taxes, “uphold justice and act against corruption,” and “respect and abide by...this Constitution,” among other obligations.

Essentially, the constitution charges citizens with safeguarding Bhutan's sovereignty and distinctiveness, which – as we have seen – the monarchy has often felt was under threat. Less is expected of persons; they, basically, are directed not to disturb the harmony and peace of the state in which they are lucky to live. Under this scheme, the constitution has created a kind of civic republicanism for its citizens in which “citizenship is an activity or a practice, and not simply a status, so that not to engage in the practice is, in important senses, not to be a citizen.” In Bhutan, citizens “are called to stem and important tasks which have to do with the very sustaining of their identity.” Indeed, the very exclusivity embraced by Bhutan's constitution finds a home in this theory of citizenship, for “at the heart of the civic-republican tradition” is the thought that “[i]n choosing an identity for ourselves, we recognize both who our fellow citizens are, and those who are not members of our community, and thus who are potential enemies.” Non-citizens are denied fundamental rights granted to full members of this community, despite their territorial presence and previous status; instead, “[a]s indigestible minorities in their own homes, they suddenly find themselves deprived of a homeland.”

For Bhutan to embrace the international human rights regime but at the same time exclude a large population from the benefits and duties of full citizenship is contradictory

and ironic. Before a UN human rights panel, Bhutan's Special Envoy Lyonpo Kinzang Dorji explained the welfare of Bhutan's "citizens[,] indeed, of all sentient beings, has been the guiding principle of Bhutan's governance since the time of *Zhabdrung* Ngawang Namgyal" (Dorji, 2009: 5) . The "main goal" of his country's recent "political transformation is to create a modern democratic nation that would meet the highest standards in upholding the full range of rights of its people" (Dorji, 2009: 2). Bhutan was determined, he said, in its pursuit of the realization "of the full range of human rights and fundamental freedoms for Bhutanese in accordance with our international human rights treaty obligations" (Dorji, 2009: 7). In 2009, the Chief Justice of Bhutan Lyonpo Sonam Tobgye also noted that "[m]any provisions of the Universal Declaration of Human Rights have been incorporated in our Constitution," pointing to Article 9, Section 3, which emphasizes the "protection of human rights and dignity."³ In light of these pronouncements, Bhutan clearly seeks to portray itself as a steward of universalist norms. But such high-minded rhetoric sounds hypocritical when Bhutan's restrictive approach to citizenship is evaluated against its international law commitments. In terms of specific obligations, the denationalization that followed the 1985 Citizenship Act – and is now affirmed in the constitutional provisions on citizenship – contravenes the Convention on the Rights of the Child (CRC), which Bhutan ratified in August 1990 without reservation.⁴ Generally, this denationalization may also qualify as inexpressible racial discrimination under international customary law and may violate the Universal Declaration of Human Rights (UDHR), which the government claims to venerate.⁵

Bhutan's constitution recognizes the validity of international law. While any future international agreements must be ratified by Parliament, "existing International Conventions, Covenants, Treaties, Protocols and Agreements entered into by Bhutan, ...shall continue in force" so long as they are not "inconsistent with this Constitution" (The Royal Government of Bhutan, the Constitution of the Kingdom of Bhutan, 2008, Article

³ See: <http://www.unct.org.bt/wp-content/uploads/2009/03/keynote-speech-by-chief-justice-20-feb09.pdf> accessed on 11/11/2016

⁴ See: <http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsgno=IV-11&chapter=4&lang=en> accessed on 09/08/2016

⁵ Customary international law is accepted as a source of international law and "results from a general and consistent practice of states followed by them from a sense of legal obligation." Carter, Barry E. et. al., *International Law* 3, 5th ed. 2007

1). The inconsistency clause may provide an escape hatch for some international obligations, but it is difficult to argue that the protection of children is inconsistent with the constitution. Furthermore, Bhutan's commitment to “foster(ing) respect for international law and treaty obligations” is affirmed as a principle of state policy in the constitution.

4.7.a Constitutional Deficit Regarding the Minorities

Bhutan has not only been geographically and historically speaking an isolated state, it has to some degree isolated itself also from the global human rights regime since it is at the extreme bottom list of states in terms of the international human rights treaties ratified: only two.⁶ Its historical and legal isolation has probably meant that, while many of the officials and leaders in Bhutan may favour some movement towards greater democracy and changes in society to modernize it, there must necessarily be a great deal of ignorance or at least misunderstanding as to what entails a truly democratic and open society, committed to global ideals of justice and tolerance and for a rights based approach in development planning.

Especially when dealing with minorities, there may have been the mistaken belief that there are no standards applicable to Bhutan since it has not ratified the *International Covenant on Civil and Political Rights* (ICCPR) which is main international treaty that contains a specific minority provision, Article 27.⁷ To put this in very simple terms: no Article 27, therefore no minority rights.

Most of what people would recognize today as “minority rights” is undoubtedly part of the corpus of human rights in international law. In matters of religious and linguistic preferences and restrictions, for example, minorities are protected by freedom of religion, freedom of expression, and especially non-discrimination. These are fundamental human rights, pillars in the global human rights regime. Whether dealing with situations involving the use of a minority language by public authorities, stopping the government from banning the private use of a language, removing restrictions on religious activities,

⁶ Bhutan has ratified only these two treaties: *Convention on the Rights of the Child* (CRC) and the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW)

⁷ Article 27 states: ‘In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.’

teaching in a public school in a minority language, or obtaining financial support for private schools for a religious minority, it is not Article 27 that has been used successfully, but usually one of the other fundamental rights such as non-discrimination, freedom of religion or freedom of expression.

The reason this is important is that Bhutan having (only) ratified both the *Convention on the Rights of the Child* (CRC) and the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW) cannot discriminate against these two groups and generally must ensure that the basic human rights of women and children are applied. This would apply to women and children who also happen to be members of a minority, and especially to Nepali-speaking individuals. Additionally, because fundamental rights and freedoms such as freedom of religion and the prohibition of racial discrimination are also part of customary law, Bhutan must comply with these regardless of the status of its ratification of a particular treaty.

Moreover, the CRC contains a minority provision as well,⁸ similar to that contained in the ICCPR, thus establishing a legally binding obligation on the Royal Government of Bhutan to comply with the human rights of children belonging to minority groups. Given that a high proportion of the Bhutanese population is below the age of 15 (42 per cent), there is real scope for reaching many people through this provision.

Bhutan's efforts in many areas of development and poverty reduction, among others, emphasize the importance of 'respect for human rights such that rights to education, health and livelihoods complement abstract rights of equality before law'; 'drawing into the mainstream marginalized and vulnerable groups with all efforts to strengthen grass roots organization such that people make well-informed decisions on their roles in development'; and 'human rights, transparency, accountability, participatory development' (International Monetary Fund, Bhutan: Poverty Reduction Strategy Paper, IMF Country Report No. 04/246, August 2004).

⁸ Article 30 states: 'In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language.'

What is missing from those official pronouncements and in the laws and Constitution of Bhutan, however, is any significant reference to the particular situation of minority groups. Non-Buddhist minorities are nearly invisible in the detail of any government policies or programmes.⁹ There may be a passing reference at the most to the presence of a Hindu or of other religious minorities, but these are subsequently often neglected in any substantive regard. No noticeable consideration is evident of any attempt in government policy or the newly-adopted ‘democratic’ constitution to take into account the ethnic, religious and linguistic diversity of Bhutan outside of the Buddhist/*Drukpa* spheres. There is an almost complete disregard for any possible correlation between this diversity and minority issues and poverty. Some effort is made to account for ‘vulnerable groups’ but official documents suggest that this is understood to encompass at most only women, children and persons with disabilities. Other groups, such as minorities or refugees, are not mentioned. For example, the Royal Government of Bhutan does not acknowledge that discrimination is a factor in poverty nor does it list any special provision for education for linguistic minorities.

As such, official documentation is largely bereft of any type of recognition of non-*Drukpa* minorities in Bhutan. It is arguably not a situation of benign neglect, but one of intentional policy and discriminatory rules to maintain the dominance of the Buddhist and Dzongkha-speaking population. In this sense diversity in Bhutan is simply not admitted – indeed it is perhaps not even tolerated – outside of the officially sanctioned Mahayana Buddhist character of the state apparatus as will be shown later. The portrayal of Bhutan is therefore absent of almost all references to non-Buddhist minorities, even though they represent a third of the population. While on the one hand Bhutan is sometimes presented

⁹ A few exceptions include the following reference: ‘Religion remains part of every aspect of Bhutanese life. Buddhism is still practiced by a majority; of other religions, Hinduism is most prevalent’ in National Human Development Report 2000: Gross National Happiness and Human Development – Searching for Common Ground, Planning Commission, Royal Government of Bhutan, Thimpu, 2000, at p. 11; Household Income and Expenditure Survey 2000 (Pilot), Report on Income and Expenditure, Poverty management, and Socioeconomic Profile of Households, Central Statistical Organization, Planning Commission, Royal Government of Bhutan, Thimpu, October 2001, p. 30 which gives the distribution of households by religion (and a total of 21.09% Hindu for the country.); and at p. 2 of the Ninth Plan Main Document (2002-2007), Planning Commission, Royal Government of Bhutan, Thimpu, 2002, ‘While there are several language groups and communities, the country is essentially composed of two broad ethnic groups, the *Drukpas* who are mongoloid and are of Buddhist faith making up 80 percent of the population, and people of ethnic Nepalese origin who are mainly Indo-Aryan and of Hindu faith.’

as innovative with its development being guided by the philosophy of Gross National Happiness which emphasizes ‘a balance between material well-being and the spiritual, emotional and cultural well-being of an individual and the society’, this is in the end nullified by government policies, legislation and constitution which deny any consideration of the needs that are not those of traditional Buddhist, majority ethnic Bhutanese (The Royal Government of Bhutan, 2004: 3).

Official documentation and government policies all present Bhutan as a Mahayana Buddhist kingdom to the almost complete exclusion of all others. While emphasizing the importance of preserving and promoting the state’s historical and cultural traditions, these are seen and presented from a Buddhist perspective with the official *Dzongkha* language playing a central unifying role. There is at most a passing reference to ‘others’, such as in the Ninth Main Document (2002-2007) of the Royal Government of Bhutan’s Planning Commission, which enumerates various measures for the protection and restoration of ancient Buddhist temples, monasteries and *stupas*, then adds that in addition to supporting *Dzongkha*, adequate provisions will be made for ‘other traditional regional languages and dialects’. Arguably, even this is not much as a concession, as these ‘traditional’ languages and dialect could be interpreted to exclude the Nepali language, since it might be relegated as a non-traditional importation.

Many other examples can be given, but suffice to mention just a few:

The emergence of Bhutan as a nation state has been dependent upon the articulation of a distinct Bhutanese identity, founded upon our Buddhist beliefs and values, and the promotion of a common language. These have been defining elements in our history and they have made it possible to unify the country and to achieve national homogeneity and cohesion among various linguistic and ethnic groups. This identity, manifest in the concept of ‘one nation, one people’, has engendered in us the will to survive as a nation state as well as the strength to defend it in the face of threats and dangers. It is a unity that binds us all together and enables us to share a common sense of destiny. (Planning Commission, Royal Government of Bhutan, *Bhutan 2020: A Vision for Peace, and Happiness*, 1999, p. 17.)

Access to monks and lamas for performing religious activities and enriching the spiritual aspects of a person’s life, is essential for a Bhutanese. Further, the monastic institutions of the country also play an important role in supporting the poor. (Planning Commission, Royal Government of Bhutan, *Poverty Assessment and Analysis Report 2000*, Thimpu, p. 105.)

While some documents do refer to diversity and cultural heritage, this actually means a singular culture, religious and linguistic background without consideration of any ‘others’:

Our independence, sovereignty and security will continue to be dependent upon the assertion of our distinctive Bhutanese identity. This has provided the key to our survival as a nation state and it will continue to be so in the future. This requires us to continue to articulate an unambiguous cultural imperative in all that we do and to actively promote an awareness and appreciation of the continued relevance of our cultural heritage. It also requires us to continue to stress the importance of Dzongkha as a national and unifying language. We must also recognize the importance of our system of beliefs and values in a world of change, increased aspirations and rising expectations. (Planning Commission, Royal Government of Bhutan, *Bhutan 2020: A Vision for Peace, Prosperity and Happiness*, 1999, Part II, p. 8)

The Constitution of the Kingdom of Bhutan reinforces the pre-eminence of the Buddhism and certain entitlements to Buddhist religious institutions, merely mentioning that the *Druk Gyalpo* is ‘the protector of all religions’ (Article 3(2)), and the country’s national anthem acknowledges the Lord Buddha. Only the Dzongkha language is given any status (Article 1 (8)), and nowhere is there any mention of other linguistic, religious or ethnic minorities, nor of minorities having any rights in the Kingdom. The constitutional provisions that refer to culture (for example, Article 4) are worded in such a way as to not acknowledge any diversity. At most it seems to suggest culture is seen as mainly those from Buddhist and Tibeto-Burman traditions.

4.7.b. Constitutional Deficit Regarding Human Rights of Minorities in Bhutan

The human rights record of the Royal Government of Bhutan is poor, and human rights are not protected to any significant degree in the country. While the Constitution contains a number of human rights provisions, the document itself – and even its human rights provisions – is highly discriminatory and reflects extreme forms of ethnic and racial preferences. Some of the most basic of individual human rights unanimously recognized as universal in international law – including freedom of expression, freedom of religion, freedom of movement, right to work, and the right to own property are only available to ‘citizens’. This is a rather startling breach of the most basic of human rights standards since it is absolutely clear that in international law these rights must be made available to ‘any person’ within a state’s jurisdiction and cannot be limited to a ‘citizen’.

The Constitution of the Kingdom of Bhutan systematically enshrines the violation of some of the most fundamental of human rights, many of which are also part of international customary law. A number of provisions of the two treaties which Bhutan has ratified are also violated: in the case of the Convention on the Rights of the Child, the Constitution is clearly inconsistent with, for example, Article 7(2) (freedom of expression), Article 7(4) (freedom of religion), Article 7(12) (freedom of association), etc. as these are under the treaty available to any child, not only children who are already citizens as restricts the country's Constitution. These are the most severe obstacles for many thousands of individuals.

Furthermore, the concept of citizenship in Bhutan is not race or ethnically neutral: the Constitution's Article 6 indeed recognizes two broad categories of citizens: natural and by naturalization. Unless a person is able to show that both parents hold Bhutanese citizenship –and this would affect many ethnic Nepalese in all likelihood –they are not considered 'natural' citizens of the country. Almost all of the Nepalese refugees outside of Bhutan need to be naturalized. Very few of them are able to satisfy the stringent and ethno-centric requirements such as the ability to speak and write Dzongkha (which a majority of Bhutanese probably cannot write in any event); 'have a good knowledge of the culture, customs, traditions and history of Bhutan', and 'no record of having spoken or acted against the *Tsa-wa-Sum*'.

In other words, a huge range of rights are effectively denied to a large percentage of the country's minority population which may find it next to impossible to establish or obtain citizenship because of these religious, linguistic and cultural aspects in the citizenship and fundamental rights provisions that are highly suspect and discriminatory. This will automatically, almost irreversibly, have serious flow-on consequences in terms of land rights, access to services, as well as to employment and even educational opportunities. In essence, there is only a refugee problem because Bhutan has created one by a definition of citizenship that is discriminatory. In practice, mainly, Hindu Nepali-speaking individuals are rejected under legislation and the Constitution of Bhutan.

It should be made clear at this point that there is in international law no general and automatic right to citizenship of a particular State. However, as with any other State

activity, once a government decides to ‘act’ or provide an ‘advantage’ or ‘privilege’, it must do so in a non-discriminatory way. In other words, once a government decides to grant citizenship to individuals through a naturalization process or any other procedure, it must respect fundamental international human rights law and especially non-discrimination. On the one hand, it is true that States are free to impose language and other requirements as part of their naturalization processes, since the decision on whether or not to grant citizenship is clearly a prerogative of the State. On the other hand, since non-discrimination is a basic human right in international law, it applies also to language, religious and cultural requirements for citizenship or naturalization purposes. If these requirements are unreasonable or unjustified given the situation existing in a particular State, then it would be discriminatory if it can be shown that these unreasonable or unjustified requirements were intended or had the effect of denying citizenship to individuals on the basis of their language, religion or race. As indicated earlier, the issue of citizenship is particularly important for minorities and their rights since by denying citizenship to a large number of individuals, some States have been able to deny to large segments of their inhabitants a variety of rights and privileges. This of course is especially true in the case of Bhutan and members of the *Lhotshampas*.

The Constitution is also in all likelihood discriminatory in its naturalization requirements. As confirmed in international decisions, it is of course possible perhaps even natural to have linguistic naturalization requirements. However, these can be from a legal point of view ‘unreasonable’ and therefore discriminatory if they are unconnected to ‘the specific conditions of the society in which the people live’. A naturalization policy which shows a marked preference for the official language would generally not be in breach of non-discrimination. However, if a substantial percentage of the State’s own inhabitants who belong to a minority cannot become citizens, some aspects of the naturalization laws could arguably be said to ‘operate in a vacuum’ and therefore be unreasonable if they do not take into account the social, historical and demographic realities of the State. The requirements of having to be able to speak and write Dzongkha (which a majority of Bhutanese probably cannot write in any event); to ‘have a good knowledge of the [presumably Buddhist] culture, customs, traditions and history of Bhutan’, and to have ‘no record of having spoken or acted against the *Tsa-wa-sum*’ are, to say the least, extreme and

would have the effect to excluding a large number of individuals from specific minority groups – namely, non-Buddhist non-*Drukpa* groups – from being able to be naturalized. In the circumstances, the terms would almost certainly be deemed unreasonable and unjustified, and therefore prohibited from the point of view of discrimination in international law.

There are other breaches of the standards one would normally not expect in a state under the rule of law consistent with basic human rights and democratic principles. Despite the multicultural composition of the population of the country, the Government of Bhutan has essentially adopted an ethnic philosophy for the Kingdom which takes the form of an official policy from 1989 of *Driglam Namzha*. Covered both inner attitudes and outward behaviour, it requires all citizens, including minorities, to wear the traditional dress of highland Bhutan (*'gho'* for men; *'kira'* for women) in all public places, and strictly enforced this law for visits to Buddhist religious buildings, monasteries, government offices, in schools, and when attending official functions and public ceremonies. As part of a 'Bhutanization' process but also linked with one of the nine policy objectives in Bhutan's Five-Year Plans - the promotion of national identity - it imposes one set of cultural norms on individuals even if these are from an ethnic minority, preventing them from enjoying their own culture with other members of their community in a manner which would appear discriminatory.

Even the Marriage Act, 1980 (amended in 1996) has a discriminatory impact on minorities. Individuals married to a non-Bhutanese could not obtain certain promotions in the civil service, could not work in the defence department or in the Ministry of Foreign Affairs, were not entitled to a range of services such as 'distribution of land', 'cash loans', 'seeds for cultivation', 'treatment abroad', etc. The children from these 'mixed' marriages were not automatically entitled to citizenship and would not automatically be admitted to schools. The impact of this legislation was most noticeably visible among members of the Nepali-speaking minority.

No human rights groups established by ethnic Nepalese exiles are permitted to operate in Bhutan, contrary to freedom of association, as the Royal Government of Bhutan

considers them to be political organizations. Indeed, NGOs are officially registered in Bhutan.

While there is no law barring ethnic Nepalese children from attending school, it should be noted that many primary schools in southern areas where the Nepalese are mainly concentrated were closed in 1990, and most still remain so till this day. Teaching in the Nepali language was also banned in schools after 1990. A system of security clearance forms severely limits a number of opportunities available to ethnic Nepalese children and youth, since the children of parents who have been deemed ‘anti-nationals’ will be denied security clearance. The security clearance forms in their effect and implementation are highly discriminatory, impacting as they do disproportionately against the Nepalese minority and are creating for them quite severe obstacles in terms of access to some jobs and services.

Access to employment opportunities in the civil service is also arguably discriminatory against many minorities as aspirants to the civil service must demonstrate some written fluency in Dzongkha, a language preference which in the context of Bhutan is probably disproportionate and unreasonable.

Freedom of movement is also still restricted, and it too has an ethnic dimension in practice which could be deemed discriminatory. Members of the *Lhotshampas* minority in particular may have difficulty obtaining a security clearance certificate because of their or their relatives’ past ‘anti-national’ behaviour, and therefore have difficulty getting a driving license. This also means they may have problems travelling in or out of the country.

While some of the major Hindu religious days are public holidays, this is almost the extent of the acceptance of religious diversity. There are continued reports on limits to the freedom of religion of non-Buddhists, mainly Hindus and Christians, as well as discriminatory practices against members of these religious minorities:

Religious communities must secure government licenses before constructing new places of worship. Reports by ethnic Nepalese citizens suggested that this process was biased toward Buddhist temples. The Government provided financial assistance for the construction of *Drukpa Kagyupa* and *Nyingmapa* Buddhist

temples and shrines. Monks and monasteries of the *Nyingmapa* school also received some state funding. NGOs reported that the Government rarely granted permission to build a Hindu temple; however, the Government provided some scholarships for Sanskrit studies at Hindu-language universities in India. Followers of religions other than Buddhism and Hinduism generally were free to worship in private homes, but they could not erect religious buildings or congregate in large groups in public. There were no Hindu temples in Thimphu, despite the migration of many ethnic Nepalese to the capital city. However, the King has declared major Hindu festivals to be national holidays, and the royal family participates in them. NGO representatives living outside of the country reported that *Drukpa Kagyupa* and *Nyingmapa* Buddhist religious teaching is permitted in schools, but that other religious teaching is not (International Religious Freedom Report 2004, Bureau of Democracy, Human Rights, and Labor, US State Department, 15 September 2005).

This is unlikely to change despite the supposed movement towards more direct democracy under the Constitution. No political party which might support specific minority, region, language or religion would be permissible under Article 15(4). Ironically, this does not apply to the clear dominance of the Dzongkha language, Buddhism and other cultural attributes of the Tibeto-Burman majority which are elevated throughout the Constitution – to the exclusion of all others.

Arguably, the policy objective of ‘one nation, one people’ which some of the Bhutanese policies espouse is one which at first glance would seem to disregard the diversity of the country’s cultures in favour of imprinting, as part of the Kingdom’s cultural imperative, a *Drukpa* national identity which is essentially Buddhist, linked by one language (Dzongkha) and culture. In linguistic terms, the (apparent) exclusive use of Dzongkha as the language of government is quite unreasonable and unjustified in the context of Bhutan, where a very large segment of the population, perhaps even a majority, cannot speak or write it fluently. In effect, using exclusively one language to the exclusion of all others may be considered discriminatory in international law if it has the effect of excluding or disadvantaging individuals in terms of access to services or benefits, unless justified in the circumstances (UN Human Rights Committee, 2000). While linguistic and cultural diversity are values that ought to be reflected in the policies and programmes of the Royal Government of Bhutan, it is additionally clear that linguistic, religious and cultural preferences cannot be discriminatory. Given that large number of speakers of non-*Dzongkha* languages are disadvantaged and completely excluded, only mandating the

official use of *Dzongkha* in the name of cultural integrity and safeguarding the national language is contrary to non-discrimination.

The effects of this discriminatory language policy for the exclusive use of *Dzongkha* cannot be minimized. In terms of education, it means that children from non-*Dzongkha* backgrounds would tend to be disadvantaged. Studies in the area of education show clearly that overall, and especially in primary years of education, students benefit most when they are taught in their maternal language. A non-discriminatory language policy is one where a minority language is taught roughly in school in proportion to its numerical importance and concentration.

In social and economic terms, having one's language used by state officials is a benefit: it creates on one hand employment opportunities for those who are fluent in it, as well as shows that the government is responsive to the needs of that segment of the population and acknowledges their presence and importance. On the reverse side, not using at all a minority language despite its large population within a state means less employment opportunities for those who are not fluent in the official and exclusive state language, less social mobility in the higher echelons of the public service where official language skills are at a premium, and possibly difficulty if not exclusion from being able to access and enjoy a wide-range of public, social and even health services which may be premised to some degree on official language ability. In other words, the language regime in Bhutan risks pushing a large number of non-*Dzongkha* speakers into a vulnerable and disadvantaged position within Bhutanese society, with accompanying risks of marginalization and exclusion.

Broadly speaking, many laws and policies of Bhutan have a huge discriminatory impact, tend to exclude any recognition of cultural diversity, impose an ethnic concept of the state that marginalizes or excludes many minorities, especially those of a non-Buddhist background, and may result in limited access to land, services or employment for these minorities.

As for the Constitution, in addition to the major concerns outlined previously where it clearly breaches fundamental human rights standards, there are a number of other

sections that seemed inconsistent with what is expected under international human rights law. Article 3 on the country's spiritual heritage clearly states that this is meant as Buddhism to the exclusion of all other religious beliefs. This is in effect declaring Buddhism as the state's official religion, which in itself is not automatically contrary to the global human rights regime and international law. However, Article 3 goes on to state that 'It shall be the responsibility of religious institutions and personalities to promote the spiritual heritage of the country while also ensuring that religion remains separate from politics in Bhutan. Religious institutions and personalities shall remain above politics.' While it remains to be seen how exactly this provision is going to be interpreted and applied in practice, it would at first glance seem to impose a duty on even non-Buddhist religious leaders and institutions to promote Buddhism since only Buddhism is identified as being part of the country's spiritual heritage – something which in all likelihood would not only be resisted but also inherently appear suspect in light of freedom of religion and non-discrimination. The prohibition against anything 'political' is also dangerous and would also appear to breach freedom of opinion and expression if it prevents individuals and religious institutions from voicing legitimate concerns only because they are deemed 'political'.

Article 4 of the Constitution would also be discriminatory in that it seems to portray only Buddhist/*Drukpa* culture as warranting protection and promotion. While it is not absolutely clear what this provision entails, and there may be scope to include other cultures within its purview, its wording appears to indicate that Bhutanese authorities might protect and financially support only Buddhist/*Drukpa* manifestations of culture. This would in effect be discriminatory.

As indicated earlier, Article 6 of the Constitution on naturalization is extraordinarily harsh and exclusionist, with requirements that could permit rejecting the naturalization of almost anyone who has even criticized the King or government or 'people' of Bhutan. From a human rights basis, these and the unusual language requirement – given its actual usage in the country by so few people overall – make this provision clearly discriminatory in effect, as it will serve to exclude large number of people on what is in truth an ethnic or racial basis.

All of the fundamental rights in Article 7 of the Constitution that are limited to citizens are in breach of international law except the right to vote and to hold elected office may be legitimately limited to citizens from an international human rights point of view. Indeed, it appears beyond any reasonable doubt that the Constitution is perpetuating a form of ‘disguised’ racial discrimination: since mainly non-Buddhist/*Drukpa* cannot be naturalized, the limitation of the exercise of these rights to citizens in the Constitution perpetuates “formalized” racial (as well as religious, cultural and linguistic) preferences that would be deemed unreasonable and unjustified, and thus discriminatory.

The Constitution is particularly troubling in Article 7(9) where it limits the right to own property to citizens, but also restricts the sale or transfer of land to non-citizens. Given the racial preferences in the naturalization provisions of Bhutan, this once again has a racial and exclusionist effect against minorities in particular. Mainly members of minorities, especially Nepali-speaking Hindus, will lose or not be able to own property, which in some cases they may have been holding for generations. Loss of property rights is one of the prime factors in poverty affecting minorities in many countries, and this discriminatory provision will thus have hugely negative impact and risk creating a poor sub-class of society among some of the country’s minorities.

The strict restrictions on the formation of political parties in Bhutan in the Constitution’s Article 15 are also inconsistent with international law and the global human rights regime. It not only limits the political scene in Bhutan to a maximum of two parties: one forming the government, and one in opposition essentially, it prevents any of these political parties from taking up the cause of particular minorities since its membership cannot be based on region, sex, language, religion or social origin, it must be broad-based ‘with cross-national membership and support and is committed to national cohesion and stability’, and it cannot ‘receive money or any assistance from foreign sources, be it governmental, non-governmental, private organizations or from private parties or individuals’. This imposes a significant restriction on the freedom of association which would not be permissible in international law.¹⁰ In practice, it also may mean minorities

¹⁰ Freedom of association is a universal right guaranteed in all major international human rights documents: Article 20 of the Universal Declaration of Human Rights, Article 22 of the International Covenant for Civil and Political Rights, and Article 11 of the European Convention on Human Rights. Freedom of association

are unable to effectively participate in the political affairs of the state, since their voices and concerns run the risk that they will simply always be outvoted and therefore marginalized by the majority.

Finally, the Constitution's Article 23 on elections has a restriction which is in effect probably discriminatory: the requirement 'not be married to a person who is not a citizen of Bhutan' would mainly affect minorities, especially Nepali-speaking Hindus, who for a number of reasons have historically often had spouses from outside Bhutan. Combining this with the discriminatory citizenship provisions means that a significant segment of this minority population is disenfranchised and unable to run for office and be elected under the Constitution.

4.8 Possible Approach to Remedy the Ambiguities of the Constitution

A close reading of the constitution reveals that it contains numerous ambiguities and contradictions. On one hand, it establishes a high bar to citizenship and distinguishes between the rights of citizens and persons; on the other, it declares that the state shall endeavor "to create a civil society free of oppression, discrimination and violence, based on the rule of law, protection of human rights and dignity, and to ensure the fundamental rights and freedoms of the people." It is possible to exploit the contradictions in the constitution to assert a persuasive constitutional claim against its restrictive citizenship policies. This section highlights three constitutional provisions that could be used to bring such a claim on behalf of a denationalized Nepali Bhutanese living in Bhutan.

The aim would be for the Supreme Court to read a *de facto* status –perhaps a permanent residency –into the constitution that would grant long-term residents of Bhutan a nationality. The crux of the argument is that the constitution, through its broad language regarding tolerance, equality before the law, and fidelity to international agreements, supports such a status and that denationalization on the scale now practiced in Bhutan is, itself, unconstitutional. This kind of permanent residency status would provide citizenship to thousands of currently stateless Bhutanese, and grant such residents some civil rights

for minorities is enshrined in the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities at Article 2.4 and 2.5.

that are currently only afforded to citizens such as the right to free expression, to religion, and to practice any lawful profession. This kind of permanent residency need not carry with it all the rights afforded to citizens, such as the right to vote and hold public office. And such a permanent residency need not apply to all –or even most –non-citizens in Bhutan, for “some line is essential” between them. It will be for other writers to argue what precise rights should be afforded to these permanent residents and to whom they should apply.

To begin with, Bhutan's Chief Justice has acknowledged that “the rights in the Constitution are not ceremonious but are enforceable in the Court of law.” The constitution also explicitly grants to the Supreme Court the power of final judicial review and guarantees universal standing to all people, not just citizens, to bring claims “for the enforcement of the rights conferred” by Article 7.

Any claim that mass denationalization and discrimination is unconstitutional should begin with Article 3, Section 1: “Buddhism is the spiritual heritage of Bhutan, which promotes the principles and values of peace, non-violence, compassion and tolerance.” By emphasizing this clause, a Nepali Bhutanese petitioner could turn Bhutan's claim of ethnic particularism in his favor: If Buddhism is the heritage of the nation, and if it values compassion and tolerance as Bhutanese ministers have claimed, then a policy that cares for the dispossessed would find vindication in Bhutan's overarching, ethno-religious self-conception. Who needs to be shown greater compassion and tolerance than those sharing the same territory but lacking the fundamental rights of a nationality, freedom of speech, and freedom of religion?

Second, such a litigation strategy would look to Article 7, Section 15: “all persons are equal before the law and are entitled to equal and effective protection of the law and shall not be discriminated against on the grounds of race, sex, language, religion, politics or other status.” As elaborated in Part IV, *supra*, the 1977 and 1985 citizenship laws, the 1988 Census, and the citizenship provisions of the constitution all have the discriminatory effect of disenfranchising “persons” based on their race, language, and religion. Bhutan has no case law as such, but American courts have found that a facially neutral law can be invalidated if it has a racially discriminatory effect and if the petitioner can show it was

passed to further a discriminatory purpose. Sometimes discriminatory purpose has been shown by the magnitude of the discriminatory effects-” a clear pattern, unexplainable on grounds other than race.” In Bhutan's case, the effects of denationalization are sufficiently great as to demonstrate discriminatory intent, even if evidence of such intent could not be found in government pronouncements.

While the American experience is merely advisory here, Bhutan's constitutional drafters reviewed about 100 foreign constitutions when writing their own, drawing on provisions from the constitutions of the United States, India, Nepal, and others it stands to reason that the Supreme Court may look to foreign jurisprudence when interpreting these provisions in a case of first impression. If the Supreme Court agrees that the denationalization decrees were discriminatory, a suitable remedial step would be to allow the victims to contest their denationalization before a neutral arbiter and for the creation of a permanent residency status for those who fall short of the Article 6 citizenship provisions but who, otherwise, would be without nationality. This way, the Court would not eliminate parts of the constitution but merely expand upon its provisions.

Third and finally, a petitioner challenging these citizenship provisions should invoke Article 9, “Principles of State Policy,” Section 24: “[t]he State shall endeavour to promote goodwill and co-operation with nations, foster respect for international law and treaty obligations, and encourage settlement of international disputes by peaceful means in order to promote international peace and security.” As discussed in Section IV, supra, the citizenship policies the constitution affirms probably contravene Bhutan's international law obligations, specifically the CRC, and more generally international norms against racial discrimination and the arbitrary deprivation of nationality. Bhutan does a disservice to this principle of state policy when it violates the very law it is supposed to foster. This clause speaks in aspirational terms (“shall endeavour to promote”); however, that should not bar the Supreme Court from ordering remedial action to further that aspiration. The petitioner could argue, in the first instance, for the right of all denationalized residents to appeal their loss of citizenship and, failing that, could use the CRC argument developed to contend that all children who were denationalized as a result of the 1985 act should be granted the right of appeal and be afforded either citizenship or permanent residency. This way, these

children would not be made stateless, Bhutan would not be in violation of the CRC, and the Supreme Court would fulfill its mandate as the guardian of the constitution and all that it aspires to be.

4.9 Conclusion

The chapter highlights the major loopholes in the policies of Bhutan which has shown a marked weakness in its commitment to the principles of fairness and justice, even though it has expressed support for such ideals in its constitution. The political developments that took place in Bhutan and the various acts and laws regarding citizenship imposed by the Bhutanese government directly coincide with the systematic exclusion of minorities of the country, mainly the *Lhotshampas*. The 1958 Nationality Law of Bhutan was a measure of integration of the *Lhotshampas* into the *Drukpa* nationality by the third King, Jigme Dorji Wangchuk. It provided the *Lhotshampas* citizenship, allowing them to emerge into the Bhutanese polity. However, due to skepticism on the assimilation process from the elites of the country, this law was superseded by the Bhutan Citizen Act of 1977 and later revised again in 1985. These acts imposed more stringent clauses regarding citizenship and a large chunk of the *Lhotshampa* population forfeited their Bhutanese citizenship and eventually left the country, mostly forcibly, as refugees.

The acts and law which followed the 1977 Bhutan Citizen Act, including the Marriage Act of 1980, as such were mechanisms to deny the rights to citizenship to a large number of the southern Bhutanese of ethnic Nepali descent. Similarly, the constitution of Bhutan does not favour the rights of minorities either. There are various provisions in the Bhutanese constitution which reflects a very inclusive character and marginalizes those ethnic groups who belong to different ethnicities than the *Drukpas*, and follow a different religion than Buddhism.

But, as described above, the constitution contains the seeds of its own renewal. The democratic deficit outlined here can likely be addressed through constitutional litigation that seeks to create a permanent residency status for non-nationals who have lived in Bhutan for generations and were denationalized through the arbitrary requirements of

earlier laws. By appealing to the constitution's Buddhist traditions and its commitments to equal protection and to international law, it can resolve the *Lhotshampa* issue.