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STATELESS IN SHANGRI-LA: MINORITY RIGHTS, CITIZENSHIP, AND BELONGING IN BHUTAN

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I. INTRODUCTION

It could be said that modern Bhutan sprang from a dream.

In the early 17th century, a monk named Zhabdrung Ngawang Namgyal of the Ralung monastery in western Tibet clashed with rival religious leaders over who was the true reincarnation of the founder of their Drukpa school of Buddhism. Violence between the claimants seemed imminent, but omens told the Zhabdrung to flee his native land and head south to the area then known as *Lho Mon*, or the Southern Land of Darkness. In one dream, the Zhabdrung saw a protective deity in the form of a black raven steering him south to where there were many Drukpa monasteries in which he could teach Buddhism. In 1616 at the age of 23, he heeded the spirit guide and left his homeland, settling in the area that is now Bhutan. Until then, the land was governed by a disparate mesh of family elites and Buddhist

principalities, but the Zhabdrung instigated radical political changes. He centralized governing authority for the first time in Bhutan's history, united the leading families under him, promulgated a legal code, strengthened the country against threats of invasion, and built a network of fortresses, or *dzongs*, that continue to dot the forested countryside.¹ As an illustration of the Zhabdrung's lasting influence, to this day the figure of the bird who guided him is carved into the golden Raven Crown worn by Bhutan's monarch.²

Given the course of later events, it is ironic that the man who established Bhutan as a distinct and sovereign entity—who is considered the country's "first great historical figure"³—was a foreigner. Often in its history, and especially in recent decades, Bhutan has withdrawn from the outside world—banning foreign television transmissions until 1999,⁴ discouraging mass tourism,⁵ and acting with hostility toward residents who do not meet the country's demanding requirements of citizenship.⁶ About the size of Switzerland and similarly landlocked, Bhutan is bordered by China (Tibet) to the north and west and by India to the east, southwest (Sikkim), and south (see Figure 1 in Appendix for a map). Mountainous, verdant, and rural,⁷ Bhutan—known as *Druk Yul*, or Land of the Thunder Dragon to Bhutanese⁸—was never colonized and lived in self-imposed isolation for much of its modern history.⁹ With a population estimated at about 700,000¹⁰ and vulnerably

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¹ This account draws on: MICHAEL HUTT, UNBECOMING CITIZENS: CULTURE, NATIONHOOD, AND THE FLIGHT OF REFUGEES FROM BHUTAN 17–19 (2003); Harald Nestroy, *Bhutan: The Himalayan Buddhist Kingdom*, 35 ASIAN AFF. 339, 340 (2004); Marian Gallenkamp, *The History of Institutional Change in the Kingdom of Bhutan: A Tale of Vision, Resolve, and Power* 3–4 (Heidelberg Papers in S. Asian & Comparative Politics, Working Paper No. 61, 2011). "Zhabdrung" is an honorific.

² Thierry Mathou, *The Politics of Bhutan: Change in Continuity*, 3 J. BHUTAN STUD. 228, 236 n.25 (2000); Nestroy, *supra* note 1, at 340.

³ 2 RAMESH CHANDRA BISHT, INTERNATIONAL ENCYCLOPEDIA OF HIMALAYAS 13 (2008).

⁴ See, e.g., Peter de Jonge, *Television's Final Frontier*, N.Y. TIMES MAG., Aug. 22, 1999, at 42 (describing the ceremony in June 1999 when Bhutan welcomed television, becoming "one of the very last countries on the planet to get plugged in").

⁵ For many years, Bhutan remained all but closed to the outside world. Only 274 tourists visited the country in 1974, growing to 13,626 in 2005 to 2006. Thierry Mathou, *How to Reform a Traditional Buddhist Monarchy: The Political Achievements of His Majesty Jigme Singye Wangchuck, the Fourth King of Bhutan (1972–2006)*, 2008 THE CENTER FOR BHUTAN STUD. 13 (2008) (citing news reports). In recent years, the government has sought to increase the number of wealthy, well-educated tourists. About 60,000 tourists visited Bhutan in 2011, eighty percent of whom had college degrees. Gyalsten K Dorji, *A 'Numbers' Album of In-depth Snapshots*, KUENSEL ONLINE (May 03, 2012), <http://www.kuenselonline.com/2011/?p=30649>.

⁶ See Part II, *infra*. "Citizenship" in this Note is defined narrowly "as a formal legal status articulating the relationship between the individual and the state. So understood, citizenship is used interchangeably with 'nationality.'" James A. Goldston, *Holes in the Rights Framework: Racial Discrimination, Citizenship, and the Rights of Noncitizens*, 20 ETHICS & INT'L AFF. 321, 321 n.1 (2006).

⁷ *The World Factbook: Bhutan*, U.S. CENT. INTELLIGENCE AGENCY (Dec. 20, 2011), <https://www.cia.gov/library/publications/the-world-factbook/geos/bt.html> (describing climate and land use).

⁸ Nestroy, *supra* note 1, at 340; Barbara Crossette, *Now Tries to Be Then in Land of Thunder Dragon*, N.Y. TIMES, June 3, 1990, available at 1990 WLNR 3023096.

⁹ See, e.g., Ramakant & R.C. Misra, *Introduction to BHUTAN: SOCIETY AND POLITY* 11–12 (Ramakant & R.C. Misra eds., 1996) (partly attributing Bhutan's isolation to its physical inaccessibility).

sandwiched between two great powers,¹¹ Bhutan's monarchy has feared threats both from abroad and from what it considers internal social disharmony and cultural dilution. "We are a small country between giant and powerful neighbors," Bhutan's King Jigme Singye Wangchuk said in 1992. "We have no resources, we have only our culture and identity."¹²

In light of this perceived vulnerability, over the past several decades, Bhutan has instituted increasingly restrictive laws on citizenship and embarked on an aggressive effort to build an "ideolog[y] of peoplehood,"¹³ fortifying a conception of national identity around the characteristics of Bhutan's politically dominant ethnic group, the Drukpas.¹⁴ For instance, the government declared a national language in 1961,¹⁵ mandated a national dress in 1988,¹⁶ and retroactively limited birthright citizenship to those born to two Bhutanese parents in 1985—effectively denationalizing ethnic minorities who were citizens under previous laws.¹⁷

The government has justified these actions to protect Bhutan from "demographic inundation."¹⁸ Before a United Nations human rights panel,¹⁹ the government argued that "given our tiny population and fragile culture, [migration] is a question of our survival as a nation state, and, therefore, one of national security as well. Under these circumstances, our nationality and citizenship laws are our only safeguards, as well as our sovereign duty to our people."²⁰

The government frames such efforts as protecting a singular culture despite

to the outside world).

¹⁰ *The World Factbook: Bhutan*, *supra* note 7 (estimating a population of 708,000 as of July 2011).

¹¹ Nestroy, *supra* note 1, at 339 (Bhutan is a "David . . . sandwiched between the two 'Goliaths,' India and China").

¹² Michael Hutt, Letter, *His Majesty King Jigme*, HIMAL, July 1992, available at <http://www.himalmag.com/component/content/article/3192-Comments-from-readers.html>.

¹³ Richard G. Fox, *Introduction to NATIONALIST IDEOLOGIES AND THE PRODUCTION OF NATIONAL CULTURES 3* (Richard G. Fox ed., 1990) (defining ideologies of peoplehood as "ideologies of common ('national') culture").

¹⁴ See generally Mathou, *supra* note 5, at 9 (referring to this process as one of "Bhutanization").

¹⁵ Rhoderick Chalmers, *Nepal and the Eastern Himalayas*, in LANGUAGE AND NATIONAL IDENTITY IN ASIA 98 (Andrew Simpson ed., 2007) (noting the government also banned the use of Nepali in schools in 1989).

¹⁶ Ben Saul, *Cultural Nationalism, Self-Determination and Human Rights in Bhutan*, 12 INT'L J. REFUGEE L., 322, 331 (2000) ("Men had to wear the *gho*, a wrap-around, coat-like, knee-length garment, with a narrow belt. Women had to wear the *kira*, an ankle-length dress made of a rectangular piece of cloth held at the shoulders with a clip and closed with a woven belt at the waist, over a long-sleeved blouse.") (internal quotations omitted) (italics added).

¹⁷ Richard W. Whitecross, *Migrants, Settlers and Refugees: Law and the Contestation of 'Citizenship' in Bhutan*, in SPATIALIZING LAW: AN ANTHROPOLOGICAL GEOGRAPHY OF LAW IN SOCIETY 63 (Franz von Benda-Beckmann et al. eds., 2009) (describing effect of restrictive 1985 law); see also Bernice Carrick, *The Rights of the Nepali Minority in Bhutan*, 9 ASIA-PAC. J. HUM. RTS. & L., 13, 16 (2008) (same).

¹⁸ H.E. Lyonpo Kinzang Dorji, Special Envoy of the Prime Minister of Bhutan, Opening Statement at the Universal Periodic Review of Bhutan 5 (Dec. 4, 2009) (transcript available at <http://www.mfa.gov.bt/wp-content/uploads/2010/02/opening-statement-to-working-group.doc>).

¹⁹ The Universal Periodic Review occurs every four years under the auspices of the UN Human Rights Council and involves a review of the human rights records of all 192 UN Member States. *The Universal Periodic Review*, OFF. OF HIGH COMM'R FOR HUM. RTS. (Apr. 28, 2011), <http://www.ohchr.org/en/hrbodies/upr/pages/uprmain.aspx>.

²⁰ Dorji, *supra* note 18, at 6.

the fact that “the kingdom is multi-ethnic, multi-religious, and multi-lingual.”²¹ The population is divided between three main ethno-linguistic groups: the Ngalongs “of the west; the Sharchhops of the east; and the Lhotshampas (or ‘Nepali Bhutanese’) of the extreme south.”²² The Ngalongs are the politically and economically dominant group.²³ “The Ngalongs, the central Bhutanese and the Sharchhops practice a Tibetan style of Buddhism, which is supported by the state: they and the other Buddhist communities of northern Bhutan are therefore usually known collectively as ‘Drukpas,’ and intermarriage is common between them.”²⁴ The Nepali Bhutanese,²⁵ however, “are in terms of religion, language and culture completely distinct from the first two ethnic groups.”²⁶ They are mostly Hindu, and speak Nepali.²⁷ Of Bhutan’s ethnicities, they have suffered the greatest as a result of the state’s narrowing conception of belonging; it has been estimated that one-sixth of all Nepali Bhutanese lost their citizenship as a result of the 1985 law.²⁸ The large Nepali diaspora in the region coupled with the significant Nepali minority in Bhutan triggered government fears of cultural dilution and political challenge,²⁹ leading to a rising hostility that reached an apex in the early-1990s when as many as 100,000 Nepali Bhutanese emigrated from Bhutan to refugee camps in Nepal, either through official inducement, coercion, or force.³⁰

Figures for the demographic composition of Bhutan vary widely: “[R]ecent estimates have ranged from 10 percent to 28 percent for the Ngalong; from 30 percent to 44 percent for the Sharchhop, and from 25 percent to 53 percent for the Lhotshampa.”³¹ About 75 percent of the population, irrespective of ethnicity,

²¹ Mathou, *supra* note 5, at 9.

²² Michael Hutt, *Ethnic Nationalism, Refugees and Bhutan*, 9 J. REFUGEE STUD. 397, 398 (1996).

²³ HUTT, *supra* note 1, at 4 (“Although the Ngalong are acknowledged to be a minority overall, they and the central Bhutanese [who have no specific ethnonym]—with whom extensive intermarriage has taken place at the elite level over centuries—are politically dominant”); Saul, *supra* note 16, at 325 (“The Ngalongs hold power in Bhutan . . .”).

²⁴ Hutt, *supra* note 22, at 398; *see also* Carrick, *supra* note 17, at 15 (“[T]he Sharchhops, like Ngalong, speak a Tibeto-Burman language and are also Buddhists.”); Saul, *supra* note 16, at 325; Satya Shrestha-Schipper, *Bhutanese Nepalis or Nepali Bhutanese?*, INT’L INST. ASIAN STUD. NEWSL. # 41, Summer 2006, at 16.

²⁵ Many sources refer to the “Nepali Bhutanese” as “Lhotshampas” or “people of the southern border.” Hutt, *supra* note 22, at 398–400. The nomenclature can carry political meaning. As Hutt writes: “‘Lhotshampa’ is sometimes used by the Bhutanese government to denote the ‘legal’ or ‘loyal’ Nepali-speaking community that remains within the kingdom, to distinguish its members from those who have departed, while ‘Bhutanese Nepali’ denotes a Bhutanese sub-set of a larger Nepali entity.” *Id.* at 400. For the sake of consistency, this Note uses the term “Nepali Bhutanese.”

²⁶ Carrick, *supra* note 17, at 15.

²⁷ Hutt, *supra* note 22, at 400; Saul, *supra* note 16, at 325.

²⁸ Carrick, *supra* note 17, at 20.

²⁹ Lok Raj Baral, *Bilateralism Under The Shadow: The Problems of Refugees in Nepal-Bhutan Relations*, 20 CONTRIBUTIONS TO NEPALESE STUD. 197, 197 (1993).

³⁰ *See generally* HUTT, *supra* note 1, at 1–13 (summarizing book, which provides an extensive discussion of the flight of refugees from Bhutan). Authors debate if the Nepali were forcibly removed or left voluntarily. *See* Gallenkamp, *supra* note 1, at 15 n.20. Exactly how many fled the country is also contested, although most sources look to the number who entered the refugee camps. *See, e.g.*, HUTT, *supra* note 1, at 258 (97,750 Bhutanese refugees were registered in the Nepalese camps at the end of January 2000); Baral, *supra* note 29, at 198 (more than 85,000 reside in the camps); Saul, *supra* note 16, at 322 (“Since 1990, over 96,000 people have fled from Bhutan to refugee camps in Nepal, or were born in exile to refugee parents.”); Gallenkamp, *supra* note 1, at 15 (referencing “the flight and eviction of approximately 100,000 people from Bhutan between 1989 and 1992”).

³¹ HUTT, *supra* note 1, at 7; *see also* Saul, *supra* note 16, at 325 (“Bhutan claims 20 percent of the

practices Buddhism.³² While it is beyond the scope of this Note to determine the precise ethnic make-up of Bhutan, the Nepali Bhutanese constitute—at the least—a substantial minority population that does not share the language, religion, or ancestry of the dominant ethnic group.

Bhutan's efforts "to encourage a particular mode of national imagining" that reaffirms the privileged position of its elite³³ have proceeded as the government has curtailed its long-practiced isolation and moved from an absolute monarchy to a constitutional one over the past fifteen years.³⁴ These reforms culminated in the adoption of a constitution in 2008, which establishes the state as a constitutional monarchy and enshrines many principles of liberal governance, including fundamental rights, checks on executive authority, and separation of powers.³⁵ The constitution, however, affirms in the state's foundational document the restrictive citizenship policies that preceded it.³⁶ It also establishes dual polities: one for full-blooded ethnic Bhutanese who qualify as "citizens" and enjoy a panoply of rights and duties and one for non-Bhutanese "persons," many of whom may have lived in the country for generations but are excluded from the Bhutanese polity, are denied political and economic equality, and are essentially stateless.³⁷

Bhutan has been called "probably the most understudied country in South Asia,"³⁸ and the new constitution's democratic deficit has largely escaped scholarly attention.³⁹ This Note adds to the existing literature by examining the citizenship rights (or lack thereof) of those minorities who remain within the country but are not considered nationals under the constitution. It shows that while "ethnic

population are northern Ngalongs . . . 37 percent Sharchhops . . . and 30 percent Lhotshampas By contrast, refugee leaders argue that the population comprises 16 percent Ngalongs, 31 percent Sharchhops and 53 percent Lhotshampas." CIA's *The World Factbook* subsumes the Ngalongs and the Sharchhops under one ethnonym (Bhote), reporting it constitutes as much as 50 percent of the population while the Nepali Bhutanese account for 35 percent. *The World Factbook: Bhutan, supra* note 7. *Accord* Nestroy, *supra* note 1, at 338.

³² *The World Factbook: Bhutan, supra* note 7.

³³ HUTT, *supra* note 1, at 269; *see also* Saul, *supra* note 16, at 330 ("discriminatorily limiting nationality . . . is a very effective method of preserving the dominance of an existing cultural group").

³⁴ *See generally* Marian Gallenkamp, *Democracy in Bhutan: An Analysis of Constitutional Change in a Buddhist Monarchy*, 24 INST. PEACE & CONFLICT STUD. RES. PAPERS 2 (Mar. 2010) (describing Bhutan's political transition).

³⁵ BHUTAN CONST. art. VII, §§ 1–23 (defining fundamental rights); art. II, §§ 20–24 (establishing process by which Parliament can force the king to abdicate); art. I, § 13 (establishing separation of powers between the Executive, Legislative, and Judiciary). All references herein are to the English version of the constitution, which is "regarded as equally authoritative" as the Dzongkha one. *Id.* art. XXXV, § 4.

³⁶ *Id.* art. VI, §§ 1–6 (defining citizenship narrowly).

³⁷ *See generally id.* art. VII §§ 1–23 and Part III(B), *infra*. Exactly how long the Nepali Bhutanese have resided in Bhutan is contested, although, according to many sources, major migration began at about a century ago. *See* Hut, *supra* note 22, at 401 ("[I]t appears that Nepali farmers did not begin to settle in southern Bhutan in significant numbers until after about 1880."); Saul, *supra* note 16, at 325 ("Some refugees argue that Nepalis began settling in Bhutan as early as 1624 CE, with large migration occurring in the second half of the 19th century Many historical accounts suggest however that most settlers arrived from 1890 to 1920"); Whitecross, *supra* note 17, at 59 ("The first wave of migration in Bhutan, by Nepalese, began in the late nineteenth century"); *cf.* Nestroy, *supra* note 1, at 348 (two major phases of Nepali migration were at the turn of the 20th century and after 1961).

³⁸ Gallenkamp, *supra* note 1, at 1.

³⁹ Whitecross, *supra* note 17, is a notable exception.

nationalism”⁴⁰ is not unique to Bhutan, the government’s actions are hypocritical given its full-throated embrace of international human rights norms. These policies are also likely inconsistent with international law—specifically the Convention on the Rights of the Child, which Bhutan has ratified—and under customary international law, more generally.

Finally, this Note shows how the constitution contains sufficient ambiguity to allow for dynamic interpretation. It is the first publication to suggest capitalizing on Bhutan’s doctrine of universal standing⁴¹ and its Supreme Court’s purposive approach to interpretation⁴² to use three provisions in the constitution—one establishing Buddhism as the state’s “spiritual heritage,”⁴³ one ensuring equal protection before the law,⁴⁴ and one dedicating the state to fostering “respect for international law”⁴⁵—to argue for establishing a category of de facto permanent residency for long-term, non-ethnically Bhutanese. This status would guarantee them basic civil rights, ameliorate the constitution’s greatest weakness, and provide a political status to an otherwise stateless people.

II. BHUTAN AND THE BHUTANESE: A HISTORY OF CITIZENSHIP AND THE STATE

A. *From Disorder to Dynasty: The Rise of the Wangchuk Dynasty, 1651-1977*

Bhutan has always been “conscious of its precarious existence”⁴⁶ and—dating from the consolidations of the Zhabdrung Ngawang Namgyal—has looked to strong leaders to protect its sovereignty from external threats and internal instability. To that end, the government kept the Zhabdrung’s 1651 death secret for fifty-four years, lest his absence lead to chaos.⁴⁷ Without a single figure to fill the political vacuum, that is exactly what ensued when the news broke: religious and civil elites battled for control, leading to “constant civil war, plots, and counterplots, and no less [sic] than 54 *Druk Desis* [civil administrators] held office between 1651 and 1907.”⁴⁸ During this period, Bhutan lost “a brief but fierce war”⁴⁹ against the British Empire in 1864–65, which ended with the Treaty of Sinchula, whereupon Bhutan surrendered part of its territory in Sikkim, Assam, and Bengal in exchange for an annual subsidy.⁵⁰ Concerned with protecting the northern borders of Tibet, by the turn-of-the century, the British military launched expeditions into Tibet

⁴⁰ Jerry Z. Muller, *Us and Them: The Enduring Power of Ethnic Nationalism*, 87 FOREIGN AFF. 18, 20 (2008) (“The core of the ethnonationalist idea is that nations are defined by a shared heritage, which usually includes common language, a common faith, and a common ethnic ancestry.”).

⁴¹ BHUTAN CONST. art. VII, § 23.

⁴² *Cf. id.* art. I, § 11.

⁴³ *Id.* art. II, § 1.

⁴⁴ *Id.* art. VII, § 15.

⁴⁵ *Id.* art. IX, § 24.

⁴⁶ Whitecross, *supra* note 17, at 59.

⁴⁷ HUTT, *supra* note 1, at 19.

⁴⁸ Gallenkamp, *supra* note 1, at 6 (internal citations omitted).

⁴⁹ Gallenkamp, *supra* note 34, at 3.

⁵⁰ *Id.*; see HUTT, *supra* note 1, at 20; Nestroy, *supra* note 1, at 342; Gallenkamp, *supra* note 1, at 6; *The World Factbook: Bhutan*, *supra* note 7.

accompanied by a rising, young Bhutanese provincial leader named Ugyen Wangchuk.⁵¹ Like the Zhabdrung centuries earlier, Wangchuk successfully consolidated control of Bhutan's fractious provinces,⁵² and—faced with growing Chinese pressure to the north and Indian consolidation to the south—he realized “it was necessary to cooperate with British India, if Bhutan was to maintain its independence.”⁵³ Wangchuk “secure[d] the support of British India to establish a hereditary monarchy”⁵⁴ and in late 1907, “an assembly of leading Buddhist monks, government officials, and heads of important families unanimously chose Ugyen Wangchuk as the hereditary king of the country.”⁵⁵

The ascension of the first king of the Wangchuk dynasty was a seminal moment in Bhutanese history. First, it created the monarchy that remains the revered center of Bhutan's political and cultural life to this day.⁵⁶ Second, by ushering in a period of “unprecedented stability,”⁵⁷ it probably reflected popular will⁵⁸ and established the monarchy as the protector of the country's unity and tranquility. Third, by gaining the support of the British Empire without falling within its ambit, the Wangchuk dynasty was able “to embark on an independent, sovereign, and unfettered path of development.”⁵⁹ The first *Druk Gyalpo*, or Dragon King, further secured Bhutan as a sovereign, if inward-looking state, with the Treaty of Phunaka signed with the British in 1910, which affirmed Bhutan's political independence and its full control over its domestic affairs while granting to the British crown de facto control of its external relations.⁶⁰ Ugyen Wangchuk's son, Jigme Wangchuk—the Second Druk Gyalpo—ascended to the throne in 1926 and reached an almost identical agreement with (then-independent) India in 1949.⁶¹

With the ascension of the Third Druk Gyalpo, Jigme Dorji Wangchuk in 1952, “a new era began in the history of Bhutan.”⁶² Under his reign from 1952 to 1972, the country saw major social and political reforms, the beginnings of political consciousness among the Nepali minority, state-sponsored integration efforts, and Bhutan's first law governing citizenship.

The king took a number of proto-democratic actions: he created a National

⁵¹ HUTT, *supra* note 1, at 20; Gallenkamp, *supra* note 1, at 6; *see also* Christopher G. Wells, Unity in Transformation: The Constitution of Bhutan 5–6 (Jan. 9, 2009) (unpublished paper) (on file with author).

⁵² HUTT, *supra* note 1, at 20; Gallenkamp, *supra* note 34, at 4; Gallenkamp, *supra* note 1, at 6–7.

⁵³ Gallenkamp, *supra* note 1, at 6.

⁵⁴ *Id.* at 7 (noting Britain bestowed the title of “King Commander of the Indian Empire” on “Sir Ugyen”); *see* HUTT, *supra* note 1, at 20–21; Mathou, *supra* note 2, at 229–30.

⁵⁵ Gallenkamp, *supra* note 34, at 4.

⁵⁶ *See, e.g.*, Brook Larmer, *Bhutan's Enlightened Experiment*, NAT'L GEOGRAPHIC, Mar. 2008, available at <http://ngm.nationalgeographic.com/2008/03/bhutan/larmer-text> (“Reverence for royalty runs deep in Bhutan” even after the establishment of democracy).

⁵⁷ Nestroy, *supra* note 1, at 343.

⁵⁸ Gallenkamp, *supra* note 34, at 5; Mathou, *supra* note 2, at 230 (“[T]he decision to establish the monarchy appeared to have been genuinely popular not only among those responsible for taking it but also with the public at large.”) (internal quotations omitted); Gallenkamp, *supra* note 1, at 7.

⁵⁹ Gallenkamp, *supra* note 34, at 6.

⁶⁰ *Id.* at 5; Nestroy, *supra* note 1, at 343.

⁶¹ Nestroy, *supra* note 1, at 343 (“[T]he new Government of India recognized Bhutan as an independent state, and the Indo-Bhutanese Treaty, adopting almost unchanged the text of the Treaty of 1910 with the Anglo-Indian Government, was signed in 1949.”); *see* Gallenkamp, *supra* note 34, at 6.

⁶² Nestroy, *supra* note 1, at 344.

Assembly in 1953, over which he had a veto until 1968, and introduced a triennial vote of confidence and two consultative councils.⁶³ 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.”⁶⁴ Bhutan also joined a number of international organizations during this period, including the United Nations in 1971.⁶⁵

Developments both internally and externally likely prompted these reforms, particularly a growing Nepali political activism within the region and the formation of a political party—the Bhutan State Congress—by members of the Nepali Bhutanese community to promote political reforms.⁶⁶ A popular Nepalese movement had already toppled the hereditary regime in Nepal in 1951,⁶⁷ and the Third Druk Gyalpo had reason to fear for his own future. 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.⁶⁸ Because most of the Nepali Bhutanese were farmers, “the provision of ownership of land was clearly inserted with them in mind.”⁶⁹ If the applicant was not a landowner, a person was eligible for citizenship if he or she “had served the Government for five years and had resided in Bhutan for ten years.”⁷⁰ 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.⁷¹ Dual citizenship, however, was prohibited.⁷²

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.⁷³ “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.”⁷⁴

⁶³ Gallenkamp, *supra* note 34; Gallenkamp, *supra* note 1, at 10–11.

⁶⁴ Gallenkamp, *supra* note 34, at 6; Shrestha-Schipper, *supra* note 24, at 16.

⁶⁵ Nestroy, *supra* note 1, at 347 n.4 (Bhutan also joined the Colombo Plan (1962); the Universal Postal Union (1969); and the “Group of 77” (1971)); *see also* Blythe Austin, *Bhutan and International Law* 24–26 (Jan. 2012) (unpublished paper) (on file with author) (listing international organizations of which Bhutan is a member).

⁶⁶ HUTT, *supra* note 1, at 125 (noting the Bhutanese State Congress “signally failed” in its attempt to mobilize the peasantry); Whitecross, *supra* note 17, at 59; Gallenkamp, *supra* note 1, at 9 (arguing the Third Druk Gyalpo’s close relationship to Indian Prime Minister Nehru gave the king “the necessary support (and probably also courage) to embark on this important path of modernization”).

⁶⁷ Whitecross, *supra* note 17, at 60; *Nepal*, *ENCYCLOPEDIA BRITANNICA ONLINE ACAD. EDITION* (May 02, 2011), <http://www.britannica.com/EBchecked/topic/409152/Nepal>.

⁶⁸ Saul, *supra* note 16, at 326; Whitecross, *supra* note 17, at 61.

⁶⁹ Tang Lay Lee, *Refugees from Bhutan: Nationality, Statelessness and the Right to Return*, 10 INT’L J. REFUGEE L. 118, 129 (1998).

⁷⁰ Saul, *supra* note 16, at 326.

⁷¹ Baral, *supra* note 29, at 200.

⁷² Lee, *supra* note 69, at 128.

⁷³ Hutt, *supra* note 22, at 402; Shrestha-Schipper, *supra* note 24, at 16.

⁷⁴ Hutt, *supra* note 22, at 402.

Before 1958, “citizenship as a legal concept was absent” from Bhutan.⁷⁵ 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.”⁷⁶ The government’s commitment to territorially-based citizenship and cultural integration of the country’s minorities proved to be strikingly short-lived.

B. The Narrowing Path: Growing Restrictions on Citizenship, 1977-2008

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.⁷⁷ 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”⁷⁸ The events in “Sikkim had a lasting impact on the Bhutanese psyche.”⁷⁹ A new king, the Fourth Druk Gyalpo, Jigme Singye Wangchuk, had ascended to the throne in 1972 at the tender age of 17,⁸⁰ and he and the government feared that a similar popular movement of the Nepali Bhutanese could threaten Bhutan’s sovereignty.⁸¹

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.⁸² 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.⁸³ It also required prospective nationals to have “some knowledge” of Bhutan’s history and of Dzongkha.⁸⁴ 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.⁸⁵ “With the amendments to the eligibility for citizenship set out in the 1977 Act,” one scholar wrote, “we can see the intertwining of legal processes and requirements with an increasingly exclusionary vision of what it meant to be ‘Bhutanese.’”⁸⁶

⁷⁵ Whitecross, *supra* note 17, at 61.

⁷⁶ *Id.*

⁷⁷ *Id.* at 62; JOHN LEWIS GADDIS, *THE COLD WAR: A NEW HISTORY* 147 (2005) (placing the number of dead in the Cultural Revolution at between 400,000 and 1,000,000).

⁷⁸ Saul, *supra* note 16, at 326; Whitecross, *supra* note 17, at 62.

⁷⁹ Matthew Joseph C, *Political Transition in Bhutan*, 41 *ECON. & POL. WKLY.* 1311, 1312 (2006).

⁸⁰ Gallenkamp, *supra* note 34, at 8.

⁸¹ Whitecross, *supra* note 17, at 62.

⁸² Baral, *supra* note 29, at 200; Whitecross, *supra* note 17, at 62.

⁸³ HUTT, *supra* note 1, at 147.

⁸⁴ *Id.*; Chalmers, *supra* note 15, at 98; HUTT, *supra* note 1, at 147 (describing the Dzongkha requirement as an “early sign[] of government anxiety over matters of culture”).

⁸⁵ Whitecross, *supra* note 17, at 62.

⁸⁶ *Id.* at 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.⁸⁷ 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.⁸⁸ It was common for Nepali Bhutanese near the Indian border to marry foreign women, and this provision seemed aimed at discouraging that practice.⁸⁹

The government went further in 1985 when another Citizenship Act overrode the previous laws and further tightened citizenship granted by birth, registration, and naturalization.⁹⁰ First, it narrowed the *jus sanguinis* requirements: citizenship could now only be acquired automatically if both parents were citizens, instead of just the father.⁹¹ 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 Affairs⁹²; “documentary proof ‘was a nearly impossible requirement in a country with widespread illiteracy, which only recently adopted administrative procedures.’”⁹³ 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.⁹⁴ Naturalization applicants also had to be able to read and write Dzongkha “proficiently,”⁹⁵ “have no record of having spoken or acted against the King, Country and People of Bhutan in any manner whatsoever,”⁹⁶ and take an oath of allegiance to the same.⁹⁷ The government also reserved the right to reject any application for naturalization “without assigning any reason.”⁹⁸ Finally, citizenship could be terminated if a citizen acquired citizenship of another country⁹⁹ or showed “by act or speech to be disloyal in any manner whatsoever to the King, Country and People of Bhutan.”¹⁰⁰

In light of these retroactive restrictions, especially the new requirement that

⁸⁷ HUTT, *supra* note 1, at 148.

⁸⁸ *Id.*

⁸⁹ *Id.* at 148–49; Joseph C, *supra* note 79, at 1313 (“The worst affected [by the Marriage Act] were the people of Nepali origin, as many of them marry from the Nepali communities in India and Nepal.”); *see also* U.S. DEP’T OF STATE, 2010 HUMAN RIGHTS REPORT: BHUTAN 6 (2011), <http://www.state.gov/documents/organization/160057.pdf>.

⁹⁰ Bhutan Citizenship Act, 1985 (June 10, 1985), *available at* <http://www.unhcr.org/refworld/docid/3ae6b4d838.html>.

⁹¹ *Id.* § 2.

⁹² *Id.* § 3.

⁹³ Saul, *supra* note 16, at 328–29 (citing 1996 U.S. State Department Report). Saul also notes wryly that the Home Ministry was not established until 1968. *Id.* at 328; *see also* Lee, *supra* note 69, at 134 (“Refugee leaders have pointed out that the ministry of Home Affairs was only set up much later.”).

⁹⁴ Bhutan Citizenship Act, 1985, *supra* note 90, § 4(c) (requiring such residence to be recorded by the Department of Immigration and Census).

⁹⁵ Proficiency was to be ascertained through written tests. *Id.* § 4(d).

⁹⁶ *Id.* § 4(g).

⁹⁷ *Id.* § 4(h).

⁹⁸ *Id.*

⁹⁹ *Id.* § 6(a).

¹⁰⁰ *Id.* § 6(c).

both parents be Bhutanese, many Nepali Bhutanese “went to sleep as Bhutanese citizens and awoke the next morning as stateless persons.”¹⁰¹ The retroactive operation of its provisions made the act “in essence, a denationalization decree . . . specifically aimed at the Nepali-speaking [Bhutanese].”¹⁰² The government sought to apply the new citizenship act by conducting a census of only the southern areas of Bhutan in 1988.¹⁰³ 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.”¹⁰⁴

The census “marked a major escalation”¹⁰⁵ 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”¹⁰⁶ intended “to foster the nation’s identity” in-line with the Fourth King’s vision of a homogenous national integration.¹⁰⁷ 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 Namzhag*.¹⁰⁸ Dzongkha was promoted,¹⁰⁹ and, in 1989, Nepali instruction was dropped from schools.¹¹⁰ To discourage inter-ethnic marriage, the government also reportedly offered cash bonuses to Bhutanese to marry other Bhutanese.¹¹¹

In light of the “growing sense of cultural marginalization among the Nepali Bhutanese,”¹¹² dissent grew in the following years, leading to violence and demonstrations.¹¹³ Because the Citizenship Act allowed the termination of

¹⁰¹ Jennifer Gibson, *Bhutan’s Constitution: Fundamental Rights and Duties* 28 (Nov. 2011) (unpublished paper) (on file with author).

¹⁰² Lee, *supra* note 69, at 141; see Carrick *supra* note 17, at 20 (“An estimated one-sixth of the country’s ethnic Nepali lost their citizenship in this manner.”). Hutt argues that one-sixth of the population of Bhutan and probably half of its Nepali Bhutanese left the country in the years that followed. Hutt, *supra* note 22, at 416. However, as noted in Part I, *supra*, population demographics are highly contested.

¹⁰³ Hutt, *supra* note 22, at 402; Whitecross, *supra* note 17, at 62.

¹⁰⁴ Hutt, *supra* note 22, at 402; Whitecross, *supra* note 17, at 62; see 2010 HUMAN RIGHTS REPORT, *supra* note 89, at 9 (“Implementation of a nationwide government census in 1985 resulted in the denationalization of many ethnic Nepalese in the country because land ownership documents from 1958 were required to receive citizenship.”). The census classified the population into seven categories: F1 – Genuine Bhutanese; F2 – Returned emigrants; F3 – Dropout cases (that is people not around at the time of the census); F4 – Children of Bhutanese father and non-national mother; F5 – Non-national father married to Bhutanese mother and their children; F6 – Adopted children; F7 – Non-nationals. Hutt, *supra* note 22, at 402. Hutt writes that many who did not have the required paperwork were categorized as F2 or F7. *Id.*

¹⁰⁵ Whitecross, *supra* note 17, at 62.

¹⁰⁶ Saul, *supra* note 16, at 330.

¹⁰⁷ Gallenkamp, *supra* note 34, at 8 (describing the creation of a “concept of national ideology” as one of the king’s “main pillars”).

¹⁰⁸ Hutt, *supra* note 22, at 403; Mathou, *supra* note 5, at 9; Saul, *supra* note 16, at 332. See generally HUTT, *supra* note 1, at 165–70.

¹⁰⁹ Saul, *supra* note 16, at 331.

¹¹⁰ Chalmers, *supra* note 15, at 98; Hutt, *supra* note 22, at 404; Saul, *supra* note 16, at 331.

¹¹¹ Saul, *supra* note 16, at 333.

¹¹² Hutt, *supra* note 22, at 404

¹¹³ *Id.* at 406.

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.¹¹⁴ The strife led to the massive emigration from southern Bhutan to Nepalese refugee camps beginning in 1989 and 1990 noted above (and described at greater length elsewhere).¹¹⁵ In the years that followed, international talks to allow a return of the refugees to Bhutan have failed.¹¹⁶ Refused citizenship in Nepal¹¹⁷ and unable to return to Bhutan, after about a decade in the camps, the refugees have begun resettling elsewhere.¹¹⁸ As of March 2012, about 60,000 refugees had been resettled abroad, with about 50,000 immigrating to the United States.¹¹⁹

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.¹²⁰ 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.¹²¹ 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”¹²² that would bring Bhutan under Nepalese control.¹²³

In recent years, the overt threat of a mass movement forcibly toppling the Bhutanese monarch 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.”¹²⁴

As the monarchy has liberalized, it has continued to promote a particular

¹¹⁴ 2010 HUMAN RIGHTS REPORT, *supra* note 89, at 9–10; Hutt, *supra* note 22, at 406.

¹¹⁵ HUTT, *supra* note 1, chs. 12 & 13 (providing a thorough account).

¹¹⁶ *Id.* at 256–63; Hutt, *supra* note 22, at 413–16; Whitecross, *supra* note 17, at 70–71.

¹¹⁷ Goldston, *supra* note 6, at 327.

¹¹⁸ Whitecross, *supra* note 17, at 71 (noting refugees are being sent to the United States, Canada, and Norway, in particular).

¹¹⁹ Kai Bird, *The Enigma of Bhutan*, THE NATION, Mar. 26, 2012, available at <http://www.thenation.com/article/166667/enigma-bhutan> (Of the 60,000 already resettled abroad, “more than 50,000, have gone to the United States, with the rest resettling in Australia, Canada, Denmark, the Netherlands, New Zealand, Norway and Britain.”); see 2010 HUMAN RIGHTS REPORT, *supra* note 89, at 8; see also Pamela Constable, *A Giant Leap of Faith & Culture*, WASH. POST, Dec. 18, 2011, at C05 (describing the fish-out-of-water story of Nepali Bhutanese refugees resettled in the Washington, DC suburbs).

¹²⁰ Hutt, *supra* note 22, at 401–02; see Saul, *supra* note 16, at 326.

¹²¹ Hutt, *supra* note 22, at 402; Mathou, *supra* note 5, at 10.

¹²² Baral, *supra* note 29, at 200; Hutt, *supra* note 22, at 402; Saul, *supra* note 16, at 334.

¹²³ Baral, *supra* note 29, at 206 (quoting speech from Bhutanese foreign minister); see Hutt, *supra* note 22, at 416 (“The Drukpa Bhutanese are a majority within their own country, but think of themselves as a threatened minority in the broader regional context.”).

¹²⁴ Larmer, *supra* note 56 (quoting newspaper interview).

Bhutanese identity—in part to assuage public anxiety over modernization¹²⁵ and in part to fortify the polity from the potentially toxic effects of foreign influence¹²⁶—while deriving benefits from modernity. 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.

III. THE 2008 CONSTITUTION: THE CREATION OF DUAL POLITIES

A. *Constitutionalizing a High-Bar to Citizenship*

The Fourth King’s influence on Bhutan’s modern course may have been as great as that of the Zhabdrung’s four centuries earlier. The Fourth Druk Gyalpo pursued Bhutanization—with all of its negative consequences for the Nepali Bhutanese discussed *infra*—instituted a unique development concept called “Gross National Happiness,” which assesses all government action on whether it promotes sustainable development, environmental protection, cultural preservation, and good governance,¹²⁷ and—most notably—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.¹²⁸ An earlier ban on political parties was modified to allow for parties that were not based on race, religion or ethnicity, and, in the country’s first post-abdication National Assembly elections in March 2008, the Druk Phuensum Tshogpa (DPT) party won forty-five seats while two went to the opposition party, the People’s Democratic Party (PDP).¹²⁹

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.¹³⁰ It establishes Dzongkha as the “National Language,” the king as the head of state and “symbol of unity of the Kingdom,” and Buddhism as the “spiritual heritage of Bhutan.”¹³¹ Buddhism is not the state religion, and the

¹²⁵ Wells, *supra* note 51, at 19.

¹²⁶ See, e.g., Larmer, *supra* note 56 (according to one teacher worried about growing foreign influence: “Some kids have become so Westernized that they’ve forgotten their own cultural identity.”).

¹²⁷ See, e.g., Mathou, *supra* note 5, at 5–6; Simon Denyer, *In Pursuit of Happiness*, WASH. POST, Oct. 31, 2011, at C01; Larmer, *supra* note 56.

¹²⁸ See generally Gallenkamp, *supra* note 34, at 8–12 (providing an overview of the king’s role in the modernization effort). *But see* Joseph C, *supra* note 79, at 1311 (arguing “the slow but definite transformation of Bhutan into a constitutional monarchy is the outcome of political struggles waged by the people of the country since [the] late 1920s onward” not merely “a gift of the monarch to the citizens of Bhutan”). This is not a widely-held view.

¹²⁹ Gallenkamp, *supra* note 1, at 18–19. The Election Commission reported 253,012 votes were cast with zero votes registering as invalid, which I find hard to believe, although I have know of no evidence of vote-rigging. *Id.* at 19.

¹³⁰ BHUTAN CONST. art. II, §§ 20–24 (forced abdication); *id.* art. XXI, §§ 1–2 (Supreme Court); *id.* art. XXVII, §§ 1–6 (anti-corruption commission); *id.* art. IX, § 21 (free public health care); *id.* art. IX, § 7 (equality); *id.* art. IX, § 9 (sustainable development). To conserve the country’s natural resources, “a minimum of sixty percent of Bhutan’s total land shall be maintained under forest cover for all time.” *Id.* art. V, § 3.

¹³¹ *Id.* art. I, § 8 (Dzongkha); *id.* art. II, § 1 (king as head of state); *id.* art. III, § 1 (spiritual heritage).

king is “the protector of all religions in Bhutan,”¹³² but 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”¹³³

The constitution also formalizes the high bar to citizenship established by the 1985 Citizenship Act.¹³⁴ (See Figure 2 in Appendix for the full text of Article 6.) Like the 1985 act, the constitution restricts citizenship 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.¹³⁵ 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.¹³⁶ 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 Tsawasum [king, country, or people],” renounce the citizenship of any foreign state, and take an oath of allegiance.¹³⁷ A citizen automatically loses his citizenship if he becomes a citizen of another state or a dual citizen.¹³⁸

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.”¹³⁹ In response to criticism of this record by human rights 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.”¹⁴⁰ Although it made that claim in the context of trumpeting its support for naturalization, 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

¹³² *Id.* art. III, § 2.

¹³³ *Id.* art. III, § 3.

¹³⁴ Whitecross, *supra* note 17, at 66. (Whitecross mistakenly refers to the article in the constitution addressing citizenship as “Article 5” when it is in fact Article 6.)

¹³⁵ BHUTAN CONST. art. VI, § 1 (citizenship by birth); *id.* art. VI, § 2 (registration).

¹³⁶ *Id.* art. VI, § 3.

¹³⁷ *Id.* art. VI, § 3(b) (criminal record); *id.* art. VI § 3(c) (Dzongkha); *id.* art. VI, § 3(d) (knowledge of culture); *id.* art. VI, § 3(e) (Tsawasum); *id.* art. VI, § 3(f) (renounce foreign citizenship); *id.* art. VI, § 3(g) (oath).

¹³⁸ *Id.* art. VI, § 5.

¹³⁹ Whitecross, *supra* note 17, at 72; *see also* Wells, *supra* note 51, at 27 (“Given the breadth of the political conflict of the 1990s, the clause could be construed to include hosts of Lhotshampas with an otherwise legitimate claim to citizenship.”). Carrick makes this point about the effects of the 1985 law. Carrick, *supra* note 17, at 17.

¹⁴⁰ Dorji, *supra* note 18, at 6.

reason that tens of thousands of long-term Bhutanese residents are not considered citizens under the constitution,¹⁴¹ and are, therefore, stateless under international law.¹⁴²

B. Civic Republicanism for “Citizens”; Limited Rights and Duties for “Persons”

Having set such a high bar for citizenship, the constitution specifies in Article 7 the fundamental rights accorded to “citizens” and non-citizen “persons.”¹⁴³ (See Figure 3 in the Appendix for a side-by-side comparison of the rights afforded to each group.) 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,¹⁴⁴ but given the plain meaning of the terms, the canon of statutory construction of *expressio unius est exclusio alterius*—when one thing of a class is expressly mentioned, others of the same class are excluded¹⁴⁵—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.¹⁴⁶

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.¹⁴⁷ However, persons are entitled to a

¹⁴¹ While nine Nepali-speaking National Assembly candidates were elected in the first parliamentary elections in 2008, “Human Rights Watch reported that the government excluded 13 percent of the Nepali-speaking population from voting because they were considered ‘non nationals’” 2010 HUMAN RIGHTS REPORT, *supra* note 89, at 10. As discussed above, estimates of the Nepali Bhutanese population run from 25 percent of the population of Bhutan (708,000) to 53 percent, meaning that the number disenfranchised could be as few as about 23,000 or as great as about 48,800. See HUTT, *supra* note 1, at 7 (demographic estimates).

¹⁴² “[T]he term ‘stateless person’ means a person who is not considered as a national by any State under the operation of its law.” Convention Relating to the Status of Stateless Persons art. 1, Sept. 28, 1954, 360 U.N.T.S. 117, available at <http://www.unhcr.org/3bbb25729.html>.

¹⁴³ BHUTAN CONST. art. VII.

¹⁴⁴ As of this writing, Bhutan’s Supreme Court has decided only one constitutional case, wherein the opposition party won a challenge to a tax on motor vehicles that the National Assembly had adopted without a vote. See Phuntsho Wangdi, *High Court Verdict Upheld*, KUENSEL ONLINE (Feb. 25, 2011), <http://www.kuenselonline.com/2011/?p=16970>.

¹⁴⁵ WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION 854 (4th ed. 2007) (“[T]he enumeration of certain things in a statute suggests that the legislature had no intent of including things not listed or embraced.”).

¹⁴⁶ In American jurisprudence, the provisions of the Fourteenth Amendment—which refers to any “person” and not any “citizen”—were found to apply “to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality” *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

¹⁴⁷ BHUTAN CONST. art. VII, § 2 (expression); *id.* art. VII § 4 (religion); *id.* art. VII, § 11 (equal pay); *id.* art. VII, § 6 (right to vote); *id.* art. VII, § 8 (right to opportunity to join the Public Service); *id.* art. VII, § 3 (right to information).

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”¹⁴⁸ and to be free from capital punishment¹⁴⁹ and “cruel, inhuman or degrading treatment,”¹⁵⁰ but only citizens “have the right to freedom of speech, opinion and expression”¹⁵¹ and “freedom . . . of religion.”¹⁵² In contrast, a person is only protected from being “compelled to belong to another faith.”¹⁵³ Given the challenge the Hindu-practicing Nepali Bhutanese pose to the Buddhist Bhutanese’s conception of homogeneity, the distinction can carry significant meaning.¹⁵⁴ 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,”¹⁵⁵ 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”¹⁵⁶ Given that most Nepali Bhutanese are farmers, this provisions likely restricts them to leaseholding 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,”¹⁵⁷ 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,¹⁵⁸ and any citizen who is married to a non-Bhutanese is automatically disqualified from both standing for election and holding an elective office.¹⁵⁹

In addition to being granted rights, citizens are also charged with “fundamental duties” under the constitution that are dissimilar from those ascribed to persons. (See Figure 4 in the Appendix for a side-by-side comparison of the duties ascribed to each group.) Citizens are expected to “preserve, protect and defend the sovereignty . . . and unity of Bhutan,”¹⁶⁰ “preserve, protect and respect

¹⁴⁸ *Id.* art. VII, § 1.

¹⁴⁹ *Id.* art. VII, § 18.

¹⁵⁰ *Id.* art. VII, § 17.

¹⁵¹ *Id.* art. VII, § 2.

¹⁵² *Id.* art. VII, § 4.

¹⁵³ *Id.*

¹⁵⁴ *Cf.* Wells, *supra* note 51, at 23 (“On the surface, the constitution adopts a position of tolerance in its protection of religious freedom for citizens. But the effect of this protection may be undermined by the fact that many Lhotshampas are not citizens.”).

¹⁵⁵ BHUTAN CONST. art. VII, § 13.

¹⁵⁶ *Id.* art. VII, § 9. Bhutan is not alone in limiting land ownership to citizens. See generally Stephen Hodgson et al., *Land Ownership and Foreigners: A Comparative Analysis of Regulatory Approaches to the Acquisition and Use of Land by Foreigners 2* (FAO Legal Papers Online No. 6, Dec. 1999), available at www.fao.org/legal/prs-ol/lpo6.pdf (“A majority of the states reviewed discriminate against foreign ownership and, less frequently, foreign use of land through various restrictions and regulations.”).

¹⁵⁷ BHUTAN CONST. art. VII, § 10.

¹⁵⁸ *Id.* art. XXIII, § 3(a).

¹⁵⁹ *Id.* art. XXIII, § 4(a).

¹⁶⁰ *Id.* art. VIII, § 1.

the environment, culture, and heritage of the nation”¹⁶¹—an oblique reference to the country’s Buddhist “spiritual heritage”—and “foster tolerance, mutual respect and . . . brotherhood” among all of Bhutan’s people.¹⁶² Much is also expected of “persons,” although of a different degree. They are expected to respect the flag,¹⁶³ refrain from “terrorism” or harming others,¹⁶⁴ safeguard public property,¹⁶⁵ pay taxes,¹⁶⁶ “uphold justice and act against corruption,”¹⁶⁷ and “respect and abide by . . . this Constitution,”¹⁶⁸ 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.”¹⁶⁹ In Bhutan, citizens “are called to stern and important tasks which have to do with the very sustaining of their identity.”¹⁷⁰ 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.”¹⁷¹ 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.”¹⁷²

IV. INTERNATIONAL LAW AND BHUTAN’S CITIZENSHIP RESTRICTIONS: THE CHALLENGES OF HIGH EXPECTATIONS AND CONCRETE COMMITMENTS

Why object to Bhutan’s approach to minority rights, citizenship, and belonging? After all, ethnic nationalism has assumed a “profound and lasting role

¹⁶¹ *Id.* art. VIII, § 2.

¹⁶² *Id.* art. VIII, § 3.

¹⁶³ *Id.* art. VIII, § 4.

¹⁶⁴ *Id.* art. VIII, § 5.

¹⁶⁵ *Id.* art. VIII, § 7.

¹⁶⁶ *Id.* art. VIII, § 8.

¹⁶⁷ *Id.* art. VIII, § 9.

¹⁶⁸ *Id.* art. VIII, § 11.

¹⁶⁹ Adrian Oldfield, *Citizenship and Community: Civic Republicanism and the Modern World* (1990), reprinted in *THE CITIZENSHIP DEBATES* 79 (Gershon Shafir ed., 1998).

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 81; Cass R. Sunstein, *Beyond the Republican Revival*, 97 *YALE L.J.* 1539, 1539 (1988) (“Various strategies of exclusion—of the nonpropertied, blacks, and women—were built into the republican tradition.”). Sunstein goes on to propose a new form of “liberal republicanism” that is characterized by commitments to deliberation in politics, equality of political actors, universalism, and citizenship “manifesting itself in broadly guaranteed rights of participation,” which are far more inclusive than the traditional civic republicanism described by the likes Oldfield. *Id.* at 1541.

¹⁷² Anthony D. Smith, *Ethnic Nationalism and the Plight of Minorities*, 7 *J. REFUGEE STUD.* 186, 195 (1994). Smith is speaking of minority groups in general, but his description applies here. Hutt made the connection between Smith’s thesis and Bhutan’s situation. Hutt, *supra* note 22, at 397–98.

in modern history”¹⁷³ and while Americans tend to regard “differential treatment on the basis of ethnicity to be a violation of universalist norms . . . , in the global context, it is the insistence on universalist criteria that seems provincial.”¹⁷⁴ Traditionally, international law has also afforded states “broad discretion to define the contours of, and delimit access to, citizenship”¹⁷⁵—discretion states around the world have used to restrict citizenship and protect perceived national identities.

In Dubai, for instance, the economy is built (almost literally) on the backs of Asian expatriate laborers who have few rights.¹⁷⁶ No more than 10 percent of the population holds Emirati citizenship “with all the rights and privileges that come with it, including substantial government subsidies and a distinct preferential treatment.”¹⁷⁷ The Democratic Republic of Congo effectively stripped a Rwandan ethnic group who had lived in eastern Congo for more than two centuries of citizenship status with a 1981 law.¹⁷⁸ And, in the 1990s, Côte d’Ivoire promoted a concept of cultural protection called “Ivoirité” (similar to Bhutanization) through citizenship laws that restricted birth-right citizenship to those born to two nationals, effectively denationalizing Muslim northerners.¹⁷⁹

Such laws are hardly an African phenomenon. Japan rejects citizenship based on territorial presence and, instead, grants it only to a child born to a Japanese mother or father. An applicant may naturalize if he can show, among other requirements, that he is of “upright conduct.”¹⁸⁰ In practice, Japan’s naturalization policies have disfavored ethnic minorities, particularly “hundreds of thousands of long-resident ethnic Koreans and other foreigners [who] have been denied citizenship”¹⁸¹

In Europe, for much of its post-World War II history, the Federal Republic of Germany embraced “an ethnoculturalist understanding of nationhood as prior to and independent of the state.”¹⁸² German citizenship was based “exclusively on descent”¹⁸³ as a way of “controlling access to citizenship (and therefore to permanent settlement) on the part of recently arrived immigrants.”¹⁸⁴ In 2000, the law changed to allow for naturalization after an applicant had resided in Germany for eight years and several other criteria had been met.¹⁸⁵ Germany—like many countries, from Australia to the United States—still imposes language proficiency

¹⁷³ Muller, *supra* note 40, at 19.

¹⁷⁴ *Id.* at 33.

¹⁷⁵ Goldston, *supra* note 6, at 323.

¹⁷⁶ See, e.g., Mohammad Masad, *Dubai: What Cosmopolitan City?*, *STUD. ISLAM MOD. WORLD REV.*, Autumn 2008, at 10, 11.

¹⁷⁷ *Id.* at 10.

¹⁷⁸ Goldston, *supra* note 6, at 333–34.

¹⁷⁹ *Id.* at 334.

¹⁸⁰ The Nationality Law [of Japan] (last amended 2008), art. 5(3), available at <http://www.moj.go.jp/ENGLISH/information/tnl-01.html>.

¹⁸¹ Goldston, *supra* note 6, at 335.

¹⁸² Rogers Brubaker, *Immigration, Citizenship, and the Nation-State in France and Germany* (1990), reprinted in *THE CITIZENSHIP DEBATES*, *supra* note 169, at 131.

¹⁸³ *Id.* at 151.

¹⁸⁴ *Id.* at 152.

¹⁸⁵ Nationality Act [of Germany] (last amended 2011), § 10, available at http://www.bmi.bund.de/SharedDocs/Gesetzestexte/EN/Staatsangehoerigkeitsgesetz_englisch.pdf.

requirements.¹⁸⁶

Bhutan is, thus, not alone in setting a high bar for citizenship. However, what is striking is the gap between Bhutan's full-throated embrace of the international human rights regime and its actions excluding a large population from the benefits and duties of full citizenship. For instance, 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."¹⁸⁷ 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."¹⁸⁸ 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."¹⁸⁹ 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 3,¹⁹⁰ which emphasizes the "protection of human rights and dignity."¹⁹¹

In light of these pronouncements, Bhutan clearly seeks to portray itself as a steward of universalist norms—more like Germany, with its revised nationality law, than the Democratic Republic of Congo, with its race-based discrimination. 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.¹⁹² Generally, this denationalization may also qualify as impressible racial discrimination under international customary law¹⁹³ and may violate the Universal Declaration of Human Rights (UDHR), which the government claims to venerate.

Of note, 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

¹⁸⁶ Goldston, *supra* note 6, at 337.

¹⁸⁷ Dorji, *supra* note 18, at 1.

¹⁸⁸ *Id.* at 2 (emphasis added).

¹⁸⁹ *Id.* at 7.

¹⁹⁰ Lyonpo Sonam Tobgye, Chief Justice of Bhutan, Keynote Speech on Religious Values and Human Rights 3 (Feb. 20, 2009) (transcript available at <http://www.unct.org/bt/wp-content/uploads/2009/03/keynote-speech-by-chief-justice-20-feb09.pdf>).

¹⁹¹ BHUTAN CONST. art. IX, § 3.

¹⁹² See a list of reservations at Convention on the Rights of the Child, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en. Given the list of counterfactuals above, it is worth noting that the United Arab Emirates ratified the CRC with a reservation that "the acquisition of nationality is an internal matter." *Id.*

¹⁹³ 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." BARRY E. CARTER ET AL., INTERNATIONAL LAW 3 (5th ed. 2007) (quoting § 102 of the American Law Institute's Restatement of the Foreign Relations Law of the United States (Third) (1987)).

into by Bhutan, . . . shall continue in force”¹⁹⁴ so long as they are not “inconsistent with this Constitution.”¹⁹⁵ 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”¹⁹⁶ is affirmed as a principle of state policy in the constitution.

Bhutan is probably in violation of four sections of the CRC. First, Article 3(1) states that in “all actions concerning children . . . the best interests of the child shall be a primary consideration.”¹⁹⁷ Article 7(1) states that a child “shall have . . . the right to acquire a nationality”¹⁹⁸ and Article 7(2) states that parties “shall ensure the implementation of these rights . . . in particular where the child would otherwise be stateless.”¹⁹⁹ Finally, Article 8(1) commands state parties to “undertake to respect the right of the child to preserve his or her identity, including nationality . . . without unlawful interference.”²⁰⁰ Bhutan’s 1985 Citizenship Act, which retrospectively stripped children of mixed-nationality marriages of their citizenship,²⁰¹ is likely in breach of this article.²⁰² Denying a child a nationality can hardly be said to be in the child’s best interest, especially if it results in statelessness. Furthermore, Section 6(d) of the 1985 act, which holds that if both parents “and in case of the children” leave Bhutan of their own accord, they are “not [to] be considered as citizens of Bhutan,”²⁰³ may violate Article 8(1), since it seems to violate the state’s duty to preserve a child’s nationality without lawful interference. The rejoinder is that this provision was “lawful”; however, given that the Nepali Bhutanese refugees who emigrated to Nepal in the late 1980s were not granted citizenship rights there,²⁰⁴ automatically stripping children of their nationality when they left the country at the behest of their parents violates Bhutan’s duty under Article 7(2) to act in a manner that does not render children stateless. Such an act, therefore, cannot be lawful.

In addition to violating specific international commitments under the CRC, the denationalization policies Bhutan has implicitly endorsed in the constitution “may also constitute racial discrimination in international customary law.”²⁰⁵ While international customary law does not carry the same saliency as an explicit treaty commitment, “international custom, as evidence of a general practice accepted as law” is considered grounds on which to submit claims to the International Court of Justice.²⁰⁶ Racial discrimination has been condemned or prohibited by the

¹⁹⁴ BHUTAN CONST. art. X, § 25.

¹⁹⁵ *Id.* art. I, § 10.

¹⁹⁶ *Id.* art. IX, § 24.

¹⁹⁷ Convention on the Rights of the Child, 28 I.L.M. 1448 (1989), art. 3, § 1, *reprinted in* BARRY E. CARTER, INTERNATIONAL LAW: SELECTED DOCUMENTS 491 (2009–10 ed., 2009).

¹⁹⁸ *Id.* art. 7, § 1, at 492.

¹⁹⁹ *Id.* art. 7, § 2.

²⁰⁰ *Id.* art. 8, § 1, at 492.

²⁰¹ Part II (B), *supra*.

²⁰² Carrick, *supra* note 17, at 17; Lee, *supra* note 69, at 144.

²⁰³ Bhutan Citizenship Act, 1985, *supra* note 90, § 6(d).

²⁰⁴ Goldston, *supra* note 6, at 327.

²⁰⁵ Carrick, *supra* note 17, at 18.

²⁰⁶ Statute of the International Court of Justice, 59 Stat. 1055 (1945), art. 38, §1(b), *reprinted in* INTERNATIONAL LAW: SELECTED DOCUMENTS, *supra* note 197, at 36.

UDHR,²⁰⁷ the International Convention on the Elimination of All Forms of Racial Discrimination (Race Convention)—which Bhutan has signed but not ratified²⁰⁸—and several other major conventions.²⁰⁹ “As a result of this widespread acceptance, the International Court of Justice has stated that racial discrimination is prohibited under international customary law.”²¹⁰ The Race Convention defines “racial discrimination” as:

any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.²¹¹

As we have seen, the 1985 Citizenship Act impaired substantial rights—both political and economic—of the Nepali Bhutanese population by stripping many of them of their citizenship retroactively. The fact that the 1988 census was conducted only in the south resulted in the disenfranchisement of the Nepali Bhutanese almost exclusively.²¹² Such a race-based restriction can only withstand scrutiny under customary law if it is reasonable or justified.²¹³ While the government has claimed the law was necessary to fight illegal immigration, the selective application of the census, the requirement of proof of registration with the government from decades earlier, and the arbitrary cut-off date of 1958 all suggest the resulting distinction was unjustified and unreasonable.²¹⁴ The constitution abets this selective disenfranchisement by formalizing the 1958 time limit. Its requirements that naturalization applicants speak Dzongkha and know Bhutanese history may also be unreasonable if the requirements are applied in a way that requires unnecessarily high fluency or comprehension, especially when such a large proportion of the population does not speak Dzongkha.²¹⁵

Finally, with regard to citizenship, the UDHR establishes: “[e]veryone has the right to a nationality,”²¹⁶ and “[n]o one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.”²¹⁷ As the UDHR is nonbinding, its nationality provisions have been called “a right without a

²⁰⁷ University Declaration of Human Rights, art. 2, *reprinted in* INTERNATIONAL LAW: SELECTED DOCUMENTS, *supra* note 197, at 414.

²⁰⁸ Lee, *supra* note 69, at 142; Austin, *supra* note 65, at 27.

²⁰⁹ Carrick, *supra* note 17, at 18 (providing list).

²¹⁰ *Id.* at 18–19 (citing 1972 I.C.J. ruling).

²¹¹ International Convention on the Elimination of All Forms of Racial Discrimination, 5 I.L.M. 352 (1966), art. 1, §1, *reprinted in* INTERNATIONAL LAW: SELECTED DOCUMENTS, *supra* note 197, at 456.

²¹² Carrick, *supra* note 17, at 20.

²¹³ *Id.* at 21.

²¹⁴ *Id.*

²¹⁵ *See id.* at 22.

²¹⁶ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), art. XV, § 1, *reprinted in* INTERNATIONAL LAW: SELECTED DOCUMENTS, *supra* note 197, at 416.

²¹⁷ *Id.* art. XV, § 2.

remedy.”²¹⁸ But, as one scholar has observed, “international law has moved in the direction of establishing a presumptive right to citizenship in the state of habitual residence.”²¹⁹

While Bhutan may argue that the UDHR and the international customary law norms against racial discrimination are not binding, the government’s insistence—in the constitution itself and in public forums²²⁰—that international law and human rights are guiding principles suggests it accepts these customary norms and expects to be held accountable under them. If Bhutan hopes to “create a modern democratic nation that would meet the highest standards in upholding the full range of rights,”²²¹ it should not for long accept a constitution with such a striking democratic deficit. The key to resolving this hypocrisy may lie in the text of the constitution itself.

V. A POSSIBLE APPROACH: EXPLOITING AMBIGUITY TO REMEDY THE CONSTITUTION’S DEMOCRATIC DEFICIT

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;²²² 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.”²²³ 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.²²⁴ 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.²²⁵ 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.

²¹⁸ Goldston, *supra* note 6, at 339.

²¹⁹ Diane F. Orentlicher, *Citizenship and National Identity*, in *INTERNATIONAL LAW AND ETHNIC CONFLICT* 323 (David Wippman ed., 1998); *see also* T. ALEXANDER ALENIKOFF & DOUGLAS KLUSMEYER, *CITIZENSHIP POLICIES FOR AN AGE OF MIGRATION* 63 (2002) (“Liberal democracies have steadily moved from citizenship to personhood, or at least presumptive permanence, when allocating social rights.”).

²²⁰ Tobgye, *supra* note 190, at 3.

²²¹ Dorji, *supra* note 18, at 2.

²²² BHUTAN CONST. art. VI–VII.

²²³ *Id.* art. IX, § 1.

²²⁴ While Nepali Bhutanese refugees may also have a valid claim to some kind of residency status, the focus here is solely on those denationalized minorities who remain in Bhutan.

²²⁵ Technically, the High Court—an appellate court below the Supreme Court—also has jurisdiction over constitutional claims, although the Supreme Court may “withdraw any case pending before the High Court involving a substantial question of law of general importance relating to the interpretation of the Constitution and dispose of the case itself.” *Id.* art. XXI, § 9. I assume that a case challenging Bhutan’s citizenship laws will reach the Supreme Court either in this manner or through appeal.

This kind of permanent residency status would provide citizenship to thousands of currently stateless Bhutanese, obviate the international law claims discussed *supra*, and grant such residents some civil rights 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.²²⁶ And such a permanent residency need not apply to all—or even most—non-citizens in Bhutan, for “some line is essential”²²⁷ 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. The aim here is merely to sketch, for the first time, such an argument.

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.”²²⁸ The constitution also explicitly grants to the Supreme Court the power of final judicial review²²⁹ and guarantees universal standing to all people, not just citizens, to bring claims “for the enforcement of the rights conferred” by Article 7.²³⁰

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.”²³¹ 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,²³² 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?²³³

Second, such a litigation strategy would look to Article 7, Section 15: “[a]ll 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.”²³⁴ 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—let alone purpose—of

²²⁶ Cf. Goldston, *supra* note 6, at 323 (“[I]nternational law grants noncitizens virtually all rights to which citizens are entitled, except the rights to vote, hold public office, and exit and enter at will.”). I think Goldston goes too far with that claim, but given the customary norms discussed *supra*, his opinion may not be far off.

²²⁷ *Matthews v. Diaz*, 426 U.S. 67, 83 (1976) (holding that the U.S. Congress may condition a resident alien’s eligibility for participation in a federal medical insurance program on continuous residence in the U.S. even if the differentiation between those who are eligible and ineligible triggers “apparently arbitrary consequences”).

²²⁸ *Tobgye*, *supra* note 190, at 3.

²²⁹ BHUTAN CONST. art. I, § 11 (“The Supreme Court shall be the guardian of this Constitution and the final authority on its interpretation.”).

²³⁰ *Id.* art. VII, § 23.

²³¹ *Id.* art. III, § 1.

²³² See, e.g., Dorji, *supra* note 18, at 1.

²³³ See also HUTT, *supra* note 1, at 273 (“Drukpa culture contains its own traditions of rapprochement and conciliation . . .”).

²³⁴ BHUTAN CONST. art. VII, § 15.

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.²³⁵ Sometimes discriminatory purpose has been shown by the magnitude of the discriminatory effects—“a clear pattern, unexplainable on grounds other than race.”²³⁶ In Bhutan’s case, the effects of denationalization are sufficiently great as to evince discriminatory intent,²³⁷ 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;²³⁸ 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 excise 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.”²³⁹ 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 *supra* 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

²³⁵ *Washington v. Davis*, 426 U.S. 229 (1976) (proof of discriminatory impact is insufficient, by itself, to show the existence of a racial classification). *But see Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886) (“[T]he facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion, that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities . . . with a mind so unequal and oppressive as to amount to a practical denial by the State of equal protection of the laws.”).

²³⁶ *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (finding for plaintiffs challenging facially neutral rezoning decision); *see Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (finding redrawn city boundaries that excluded all but a handful of African-Americans showed legislative intent to discriminate).

²³⁷ *See, e.g., Carrick, supra* note 17, at 20 (1985 Act denationalized one-sixth of the Nepali Bhutanese population).

²³⁸ Ugyen Penjore, *The Making of the Constitution*, KUENSEL ONLINE (July 24, 2008), <http://www.kuenselonline.com/modules.php?name=News&file=article&sid=10850>.

²³⁹ *Id.* art. IX, § 24.

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.

VI. CONCLUSION

To the extent that Bhutan is known beyond the Himalayas, it is often romanticized as “the last Shangri-la”²⁴⁰—a place of nearly boundless happiness,²⁴¹ pristine natural vistas, and a benevolent, handsome, and recently-wed young king.²⁴² It is also frequently lauded for its unique approach to development and its emphasis on cultural and environmental protection, which seem like a welcomed antidote to Western materialism.²⁴³ In recent years, its deliberate, peaceful transition to a constitutional monarchy has also won it plaudits “for one of the most astonishing and unique transitions to democracy witnessed by scholars so far.”²⁴⁴ Bhutan has much to be proud of: its economy is growing while its natural resources remain largely unspoiled, illiteracy and infant mortality rates have fallen, it is at peace with its neighbors, and recently held a successful, largely-democratic election.²⁴⁵

But enthusiasm for what Bhutan has accomplished should not expunge its shortcomings. Motivated by a sense of vulnerability dating from its founding and a desire to protect the culture and status of its dominant group, Bhutan has, for decades, discriminated against non-citizens, leaving tens of thousands in refugee camps abroad and tens of thousands of Nepali Bhutanese stateless within Bhutan itself. While it is not the only country to practice aggressive ethnic nationalism, Bhutan has done so at the very time it has sought to join the modern, liberal-democratic world. And it has pursued these policies even as they contravene explicit commitments Bhutan has made to international treaties, notably the Convention on the Rights of the Child. “Citizenship is not simply a form of belonging but also an important agency through which fundamental principles of fairness and justice in a polity are institutionalized and guaranteed,” two scholars

²⁴⁰ Larmer, *supra* note 56.

²⁴¹ See Marina Kamenev, *Rating Countries for the Happiness Factor*, BUS. WK., Oct. 11, 2006, available at http://images.businessweek.com/ss/06/10/happiest_countries/source/9.htm (ranking Bhutan the eighth “happiest nation in the world” citing “an unusually strong sense of national identity . . . beautiful scenery and a largely unspoiled culture, thanks to strict governmental limits on tourism, development, and immigration.”). See generally LISA NAPOLI, *RADIO SHANGRI-LA: WHAT I LEARNED IN BHUTAN, THE HAPPIEST KINGDOM ON EARTH*, xii (2010) (disenchanted forty-something describes her “midlife crisis . . . and how I wrestled with and then transcended it, thanks to a chance encounter that led me to a mysterious kingdom in Asia few have visited [Bhutan].”). The *Business Week* story, like most magazine rankings, sacrifices rigorous analysis for glibness, misstating (for instance) the population of Bhutan as 2.3 million. Napoli’s book is one of personal self-discovery that elides thorny citizenship issues; the Nepalese refugee problem gets mentioned once at 191.

²⁴² See, e.g., Simon Denyer, *In Himalayan kingdom, a Wedding to Remember*, WASH. POST, Oct. 14, 2011, at A06 (noting the 31-year-old king earned the moniker “‘Prince Charming’ when mobbed by female admirers on a trip to Thailand.”).

²⁴³ See, e.g., Adam Platt, *Bhutan or Bust!*, CONDÉ NAST TRAVELER, Nov. 2011, at 196, 219 (expressing awe at Bhutan’s GNH measures and describing the country’s “good-natured sense of xenophobia”).

²⁴⁴ Gallenkamp, *supra* note 34, at 2.

²⁴⁵ Larmer, *supra* note 56; *World Factbook: Bhutan*, *supra* note 7.

wrote recently. "How a polity administers citizenship then is a power measure of its core commitments."²⁴⁶ Unfortunately for Bhutan, its policies have 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. 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 country's most glaring injustice.

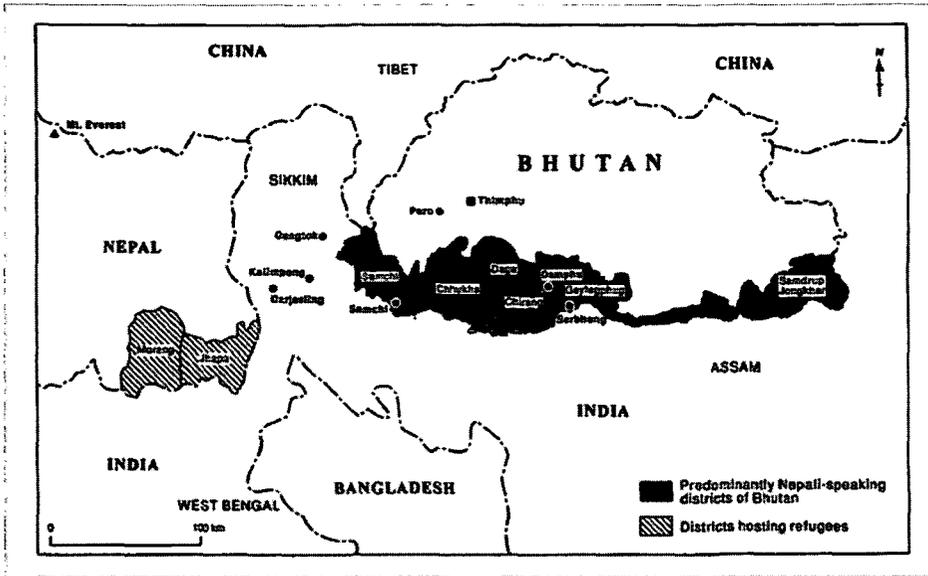
Mesmerized by Bhutan's beauty and serenity, one visitor remarked recently: "This really is as close to Shangri-la as you can get. It will be interesting to see how long it lasts."²⁴⁷ What is proposed here is not a wholesale change in Bhutan's approach to the world, but a measured response to an injustice that has persisted for decades against residents who are entitled to a nationality and basic civil rights. If this inequity is resolved, Bhutan could truly be a Shangri-La for all its people.

²⁴⁶ ALEINIKOFF & KLUSMEYER, *supra* note 219, at 1.

²⁴⁷ Platt, *supra* note 243, at 219 (quoting a Singaporean visitor).

Appendix

Figure 1: Bhutan and its Neighbors



Source: Reprinted from Michael Hutt, *Ethnic Nationalism, Refugees and Bhutan*, 9 J. REFUGEE STUD. 397, 399 (1996).

Figure 2: The Constitution of the Kingdom of Bhutan, Article 6 “Citizenship”

1. A person, both of whose parents are citizens of Bhutan, shall be a natural born citizen of Bhutan.
2. A person, domiciled in Bhutan on or before the Thirty-First of December Nineteen Hundred and Fifty Eight and whose name is registered in the official record of the Government of Bhutan shall be a citizen of Bhutan by registration.
3. A person who applies for citizenship by naturalization shall:
 - (a) Have lawfully resided in Bhutan for at least fifteen years;
 - (b) Not have any record of imprisonment for criminal offences within the country or outside;
 - (c) Be able to speak and write Dzongkha;
 - (d) Have a good knowledge of the culture, customs, traditions and history of Bhutan;
 - (e) Have no record of having spoken or acted against the Tsawa-sum;
 - (f) Renounce the citizenship, if any, of a foreign State on being conferred Bhutanese citizenship; and
 - (g) Take a solemn Oath of Allegiance to the Constitution as may be prescribed.
4. The grant of citizenship by naturalization shall take effect by a Royal Kasho [decree] of the Druk Gyalpo.
5. If any citizen of Bhutan acquires the citizenship of a foreign State, his or her citizenship of Bhutan shall be terminated.
6. Subject to the provisions of this Article and the Citizenship Acts, Parliament shall, by law, regulate all other matters relating to citizenship.

Source: BHUTAN CONST. art. VI

Figure 3: Rights Afforded to Citizens and Persons in The Constitution of the Kingdom of Bhutan, Article 7, "Fundamental Rights"

§ Rights Afforded to "Citizens"	§ Rights Afforded to "Persons"
2 A Bhutanese citizen shall have the right to freedom of speech, opinion and expression.	1 All persons shall have the right to life, liberty and security of person and shall not be deprived of such rights except in accordance with due process of law.
3 A Bhutanese citizen shall have the right to information.	4 No person shall be compelled to belong to another faith by means of coercion or inducement. [§ 4 second sentence]
4 A Bhutanese citizen shall have the right to freedom of thought, conscience and religion. [§ 4 first sentence]	13 Every person in Bhutan shall have the right to material interests resulting from any scientific, literary or artistic production
6 A Bhutanese citizen shall have the right to vote.	14 A person shall not be deprived of property except for the public purpose and on payment of fair compensation
7 A Bhutanese citizen shall have the right to freedom of movement and residence within Bhutan.	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.
8 A Bhutanese citizen shall have the right to equal access and opportunity to join the Public Service.	16 A person charged with a penal offence has the right to be presumed innocent until proven guilty in accordance with the law.
9 A Bhutanese citizen shall have the right to own property, but shall not have the right to sell or transfer land or any immovable object to a person who is not a citizen of Bhutan	17 A person shall not be subjected to torture or to cruel, inhuman or degrading treatment or punishment.
10 A Bhutanese citizen shall have the right to practice any lawful trade, profession or vocation.	18 A person shall not be subjected to capital punishment.
11 A Bhutanese citizen shall have the right to equal pay for work of equal value.	19 A person shall not be subjected to arbitrary or unlawful interference with his or her privacy . . . nor to unlawful attacks on the person's honour or reputation.
12 A Bhutanese citizen shall have the	20 A person shall not be subjected to

<p>right to freedom of peaceful assembly and freedom of association, other than membership of associations that are harmful to the peace and unity of the country</p>	<p>arbitrary arrest or detention.</p> <p>21 A person shall have the right to consult and be represented by a Bhutanese Jabmi [attorney] of his or her choice.</p> <p>23 All persons in Bhutan have the right to initiate proceedings in the Supreme Court or High Court for the enforcement of the rights conferred by this Article</p>
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Source: BHUTAN CONST. art. VII

Figure 4: Duties of Citizens and Persons in The Constitution of the Kingdom of Bhutan, Article 8, "Fundamental Duties"

§ Duties of "Citizens"	§ Duties of "Persons"
1 A Bhutanese citizen shall preserve, protect and defend the sovereignty, territorial integrity, security and unity of Bhutan and render national service when called upon to do so by Parliament.	4 A person shall respect the National Flag and the National Anthem.
2 A Bhutanese citizen shall have the duty to preserve, protect and respect the environment, culture and heritage of the nation.	5 A person shall not tolerate or participate in acts of injury, torture or killing of another person, terrorism, abuse of women, children or any other person and shall take necessary steps to prevent such acts.
3 A Bhutanese citizen shall foster tolerance, mutual respect and [a] spirit of brotherhood amongst all the people of Bhutan transcending religious, linguistic, regional or sectional diversities.	6 A person shall have the responsibility to provide help, to the greatest possible extent, to victims of accidents and in times of natural calamity.
	7 A person shall have the responsibility to safeguard public property.
	8 A person shall have the responsibility to pay taxes in accordance with the law.
	9 Every person shall have the duty to uphold justice and to act against corruption.
	10 Every person shall have the duty to act in aid of the law.
	11 Every person shall have the duty and responsibility to respect and abide by the provisions of this Constitution.

Source: BHUTAN CONST. art. VIII

