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# *Refugees from Bhutan: Nationality, Statelessness and the Right to Return*

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## Introduction

Repatriation is the main concern of refugees from southern Bhutan. Since the end of 1990, over 100,000 refugees have fled or were evicted from Bhutan. At the beginning of 1998, some 90,000 are in camps in Nepal while the remainder manage on their own, either in India or Nepal. Almost half the refugees in Nepal camps are women and girls,<sup>1</sup> while about one third of the total population are school-age children.<sup>2</sup>

Yet repatriation remains elusive as seven rounds of bilateral talks between Nepal and Bhutan have yielded very little apart from a refugee categorisation.<sup>3</sup> Observers maintain that, as it stands, the refugee categorisation is unlikely to result in the repatriation of most of the refugees. According to the refugee categorisation, only genuine Bhutanese nationals forcibly evicted will be allowed to return. Those who have 'voluntarily' migrated, 'anti-nationals' and non-nationals will not be

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<sup>1</sup> As at 31 August 1995, the total camp population was 88,613, 45,175 were male and 43,438 were female. Statistics provided by the Refugee Coordination Unit of the Ministry of Home, Nepal. In February 1998, UNHCR put the estimated total number of refugees at 93,000 refugees, living in seven camps in the eastern Nepal districts of Khapa and Morang. See <http://www.unhcr.ch/world/asia/nepal.htm>.

<sup>2</sup> According to the second quarterly report of the UNHCR in Kathmandu, a total of 30,360 children were enrolled in the primary school programme and another 587 in the secondary school programme, both run by Caritas Nepal. See UNHCR Kathmandu, 'Situation Report on Bhutanese Refugees and Asylum-Seekers in Nepal Covering the period 1 April-30 June 1995', No. 2/95, Jul. 1995, 16.

<sup>3</sup> Bhutan refused to include any third party in the talks even though India's role was seen as crucial to the final outcome and UNHCR was ready to assist. The bilateral talks started in November 1992 and in October 1993, the Joint Ministerial Committee agreed on the refugee categorisation.

allowed to return. The Bhutanese Government has accused a number of refugee leaders, many of whom used to hold high positions in government, of being anti-nationals. It reflects Bhutan's insistence that most of the refugees in the camps in Nepal are illegal immigrants who had overstayed their contracts in Bhutan,<sup>4</sup> or Bhutanese who had left the country of their own accord for various reasons.<sup>5</sup> Bhutan has accused Nepal of making refugees out of illegal immigrants. The other host and key player, India, claims that it cannot interfere under the terms of the 1949 India-Bhutan Treaty, as this is a domestic affair of Bhutan.<sup>6</sup> Nepal retorts that India is the country of first asylum.<sup>7</sup>

Many refugees, however, claim that they have been in Bhutan for several generations. Although UNHCR has declared voluntary repatriation to be the preferred option for refugees today, it has been unable to remove the obstacles in the way of this group of their return. Bhutanese nationality emerges as the key issue, and possible statelessness as the grim reality for a large number of the refugees.

Frustrated with five long years of ineffectual diplomatic efforts to hammer out a solution to their situation, the refugees have taken matters into their own hands. A flurry of activities began in early January 1996, culminating in over 1,000 refugees marching into India, in batches, en route to Bhutan. They appealed to their king, Jigme Singye Wangchuck, to restore human rights in Bhutan and to permit early repatriation of the refugees.<sup>8</sup> Their actions revived international attention, but a permanent solution still depends on the political will of the States concerned.

<sup>4</sup> See interview by fax with Lyonpo Dawa Tsering, Foreign Minister of Bhutan in *Himal*, Vol. 7 No. 4, Jul.-Aug. 1994, 22. See also Kinley Dorji, Editor of *Kuensel*, the Bhutanese Government-run and only paper, in 'The View from Thimpu—Hoping for a Gentler Judgment', reproduced in *Himal*, Jul.-Aug. 1992, 39.

<sup>5</sup> See 'Meandering Talks, Lingered Refugees' in HUROB, *Bhutan: Right and Refugees, Report '94*, 1994, 2-3.

<sup>6</sup> Art. 2 of the 1949 Treaty states that 'The Government of India undertakes to exercise no interference in the internal administration of Bhutan. On its part the Government of Bhutan agrees to be guided by the advice of the Government of India in regard to its external relations'.

<sup>7</sup> See interview with Nepalese Foreign Minister Prakash Chandra Lohani in 'The Shuttlescock Refugees', *Asiaweek*, 1 Mar. 1996.

<sup>8</sup> An Appeal Movement for 'The Restoration of Fundamental Human Rights in Bhutan and the Early Repatriation of Bhutanese Refugees' was launched on 7 Sept. 1995 by the Appeal Movement Coordinating Council (AMCC) with a petition to the King appealing for national reconciliation. Since the petition elicited no response from the King, the refugees initiated a march from the camps to Thimpu, capital of Bhutan, on 14 Jan. 1996; this was preceded by a marathon cycle rally organised by the SUB (Students Union of Bhutan), member of the BCDM (Bhutanese Coalition for Democracy Movement) from Siliguri to Jaigaon, both in India. Both events have brought the refugees into conflict with the law in India for ostensibly contravening s. 144 of the Indian Penal Code (illegal assembly).

## 1. Historical Background

Bhutan is a landlocked country, some 47,000 square kilometres large, nestling against the majestic Himalayan range with China to its north and India flanking all the other sides. It is famous for its lama Buddhist religion and culture. The present King, Jigme Singye Wangchuck, ascended the throne at the age of 16 in 1972.<sup>9</sup>

### 1.1 Population and ethnicity

In 1991 the Bhutanese Government estimated its population at 600,000. Refugee leaders dispute this, placing the figure at between 700,000 and 800,000,<sup>10</sup> for the Government's figure implies that the refugees in Nepal and India are not of Bhutanese nationality. When Bhutan joined the United Nations in 1971, however, the Government gave the population figure as 1.2 million, while the 1990 Statistical Yearbook of Bhutan gave the total population as 1,461,853.<sup>11</sup> Nevertheless the dispute over the total population figures is peripheral.

The bone of contention remains the Nepali-speaking population in the south. The official figures are 20 per cent Ngalongs, the ruling ethnic group, 37 per cent Sarchops and 30 per cent Nepali-speakers. Refugee leaders prefer 53 per cent Nepali-speakers, 31 per cent Sarchops and 16 per cent Ngalongs.<sup>12</sup> The Ngalongs, of Tibetan origin, speak Dzongkha and adhere to Mahayana Buddhism which is the State religion. The Sarchops, of Indo-Mongoloid descent, are also Mahayana Buddhists and speak their own language, Tsangla. The Nepali-speakers live in the southern belt and are referred to by the Government of Bhutan as Llotshampas,<sup>13</sup> that is, people who live in the south. While some still speak their own languages, Nepali would be the common language among

<sup>9</sup> See Parmanand, *The Politics of Bhutan: Retrospect and Prospect*, Pragati publications, Delhi, 1992, 92–107, for a brief personal history of the king, Jigme Singye Wangchuck, his induction to statecraft and his monarchical style. For a more critical view of the tight political control wielded by the king, see Dhakal, D.N.S. & Strawn, C., *Bhutan: A Movement in Exile*, Nirala Publications, New Delhi, 1994, 83–105 (hereafter Dhakal & Strawn, *Movement in Exile*).

<sup>10</sup> See 'Population Politics' in *Himal*, Jul.–Aug. 1992, 17.

<sup>11</sup> See Basu, G.K., *Bhutan: The Political Economy of Development*, South Asian publishers, New Delhi, 1996, 98 (hereafter Basu, *Political Economy*).

<sup>12</sup> Ibid. See van Driem, G., 'Language Policy in Bhutan' in Aris, M. & Hutt, M., *Bhutan: Aspects of Culture and Development*, Kisdale, United Kingdom, 1994, 92, where undated figures are given of number of speakers of the various languages in Bhutan according to linguistic affinity and not ethnicity: Dzongkha, 160,000; Nepali, 156,000; and Tshangla, 138,000. The reliability of these figures is discounted by Dhakal & Strawn, *Movement in Exile*, 47–51, in light of other academic sources and van Driem's position as an employee of the Bhutanese Government.

<sup>13</sup> Since Nepali may connote a single ethnicity and Nepalese may give the impression of one nationality, I use the term Llotshampa to denote the Nepali-speakers who reside in southern Bhutan.

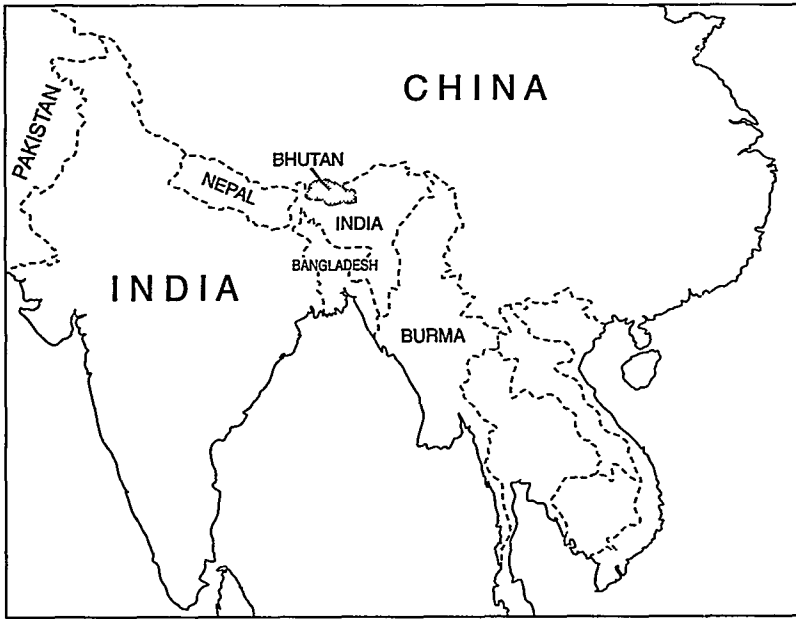


Figure 1

all. The Llotshampas are mainly Hindus, although with some Buddhists among them.<sup>14</sup>

Historical accounts place immigration of the Llotshampas to Bhutan largely at the turn of this century, and their population was estimated at about 60,000 in 1932.<sup>15</sup> This would substantiate refugee claims that the Llotshampa population numbered about 200,000 by the mid- or late 1980s. The refugees contend that roughly half the southern population is now in refugee camps in Nepal.

## 1.2 King Jigme Dorji Wangchuck

Bhutan's hereditary monarchy was established in 1907 with support from the British.<sup>16</sup> Jigme Dorji Wangchuck, the father of the present king,

<sup>14</sup> See Sinha, A.C., *Bhutan: Ethnic Identity and National Dilemma*, Reliance Publishing House, New Delhi, 1991, 21-42, for a detailed account of the ethnic groups and their geographic locations. See also Dhakal & Strawn, *Movement in Exile*, 41-7. Among the Nepalese, the Brahmans and Chhetris belong to the higher caste while other ethnic groups, rather than tribes, include the Rai, Tamang, Gurung, Magar, Sunwar, all of which were represented among the refugees interviewed by the writer. For a fascinating overview of the ethnic groups in Nepal, see 'Ethnicity', the theme focus of *Himal*, May-Jun. 1992.

<sup>15</sup> Dhakal & Strawn, *Movement in Exile*, 118.

<sup>16</sup> *Ibid.*, 70.

initiated major reforms and introduced democracy in the 1950s and 1960s. The first 5-Year Development Plan was set in motion in 1961, financed by India.<sup>17</sup> The educational system was expanded nation-wide and revamped in 1964 when English replaced Hindi as the medium of instruction.<sup>18</sup> Health facilities were likewise expanded and improved.

Witnessing the inexorable advance of China upon Tibet, Jigme Dorji turned to India for some measure of protection. In 1949, Bhutan entered into a Treaty with India and two years later, the invasion of Tibet by China was complete. The Treaty created a porous border between India and Bhutan.<sup>19</sup>

Inspired by the Indian National Congress' struggle for independence from the British in India, the Bhutan State Congress was formed in the 1950s to press for democracy and abolition of discriminatory policies against the settlers in the south.<sup>20</sup> The failed attempt moved Jigme Dorji to adopt several measures to redress the situation.<sup>21</sup> A major step was the grant of citizenship to the people in the south under the 1958 Nationality Act.

### 1.3 Non-nationals

The 1949 Treaty opened the gates for people from north east India to enter Bhutan and the 1958 Law was an added incentive. With the launch of the first 5-Year Plan in 1961, Bhutan recruited foreign skilled workers and workers from India and Nepal to fill the labour shortage. National assembly resolutions in the 1960s and 1970s indicated that the Government remained aware of the importance of controlling foreign labour.<sup>22</sup> In 1982, World Bank estimates set the number of non-citizen workers in Bhutan at about 35,000.<sup>23</sup> During the 1988 census, the Government claimed to have discovered 100,000 non-nationals in the

<sup>17</sup> Ura, K., 'Development and Decentralisation', in Aris, M. & Hutt, M., *Bhutan: Aspects of Culture and Development*, 35.

<sup>18</sup> See van Driem, G., 'Language policy in Bhutan' in Aris, M & Hutt, M., *Bhutan: Aspects of Culture and Development*, 95. See also 'The Facts Behind Recent Developments in Southern Bhutan' in INSEC & ICLD, *The Bhutan Tragedy — When will it end?*, INSEC & ICLD, Kathmandu, 1992, 148.

<sup>19</sup> Above note 6. See Rose, L.E. 'Bhutan' in Blaustein, A.P. & Flanz, G.H., *Constitutions of the Countries of the World*, Oceana Publications, N.Y., 1974. Art. 7 of the Treaty provides that subjects of one country residing in the other's territory would enjoy 'equal justice' on a level with its own citizens.

<sup>20</sup> See Basu, *Political Economy*, 95; Dhakal & Strawn, *Movement in Exile*, 135-41.

<sup>21</sup> See Basu, *Political Economy*. Llotshampas were represented in the newly formed National Assembly and eligible for civil service.

<sup>22</sup> See Resolutions no. 12 of the 24th Session of the National Assembly of Bhutan in 1966, no. 36 of the 32nd Session in 1970, no. 32 during the 34th Session in 1971, nos. 2 and 10 of the 35th Session in the same year and no. 20 of the 49th Session.

<sup>23</sup> See Basu, *Political Economy*, 54. According to the World Bank figures, in 1982, Bhutan had 35,527 non-nationals in the labour force comprising 6,532 in the public sector, 1,732 in the private sector and 27,263 casual labourers.

workforce.<sup>24</sup> Refugee leaders rebutted this, saying that Nepali road labourers who overstayed work permits had been deported between 1986 and 1988.<sup>25</sup> Nevertheless, non-national labour remains a feature of Bhutanese development plans, and the number of non-national workers in 1995 was estimated at 30,000, including 10,000 Nepalese ethnic people.<sup>26</sup>

The Bhutan Government also argued that non-nationals were attracted by the free education and health facilities in the south. In 1989, 23 per cent of the students in the southern schools were non-nationals.<sup>27</sup> Since the Government had stated that there were some 10,000 marriages between Bhutanese and foreigners, children of such marriages would probably account for a certain proportion of non-nationals in school.<sup>28</sup>

### 1.3.1 Nationality laws: tightening up

The Bhutan Government began in the late 1970s to distinguish between nationals and non-nationals among the people in the south. The Government was alarmed at population developments in the south because of the 1975 merger of Sikkim and India and the bloody 1986–88 Gorkha National Liberation Front (GNLF) uprising.<sup>29</sup> Nepalese ethnic groups were instrumental in pressing the merger and the GNLF demanded a separate Nepali State in North Bengal.

In 1977, the Bhutanese Government tightened the nationality laws. The 1985 law purported to fix 1958 as the cut-off date for immigrants to southern Bhutan. This was followed by a census in 1988 which was criticised on various counts. First, it was conducted only in the south. Secondly, people were classified into 7 categories but in reality, only those who fell into the first category were considered genuine Bhutanese.<sup>30</sup>

<sup>24</sup> See Dhakal & Strawn, *Movement in Exile*, at 186, where Dago Tshering the then Deputy Home Minister is quoted as saying that over 100,000 non-nationals were in the country employed mainly in development projects and comprising 80% of the workforce.

<sup>25</sup> See 'The Dragon bites its tail' in *Himal*, Jul-Aug 1992, 17–18; and Dhakal & Strawn, *Movement in Exile*, 185–7.

<sup>26</sup> Kuensel, 'Translation of the Proceedings and Resolutions of the 73rd Session of the National Assembly of Bhutan held from August 10–September 2, 1995' in 'National Assembly Supplement', 18.

<sup>27</sup> See Department of Information, 'Anti-National Activities in Southern Bhutan: A Terrorist Movement,' Bhutan, 1991, 21. In the towns of Phuntsoling, Pugli, Gomtu and Samchi, the Government stated that 50% of the students in primary schools were non-nationals. See also Dhakal & Strawn, *Movement in Exile*, 165, for a critique of the government's allegations that southern Bhutanese enjoy better access to the education facilities than northerners. Dhakal, however, is silent on the issue of non-nationals in the southern schools.

<sup>28</sup> See Dhakal & Strawn, *Movement in Exile*, 193–4.

<sup>29</sup> *Ibid.*, 406–38. For an account of the role played by Nepalis in the merger, see *ibid.*, 407–19 and for a brief history of the GNLF: *ibid.*, 426–38.

<sup>30</sup> INHURED, *Bhutan: An Iron Path to Democracy*, Kathmandu, 1992, 6. The seven categories were F-1, genuine Bhutanese nationals, namely, those with 1958 land tax receipts; F-2, returned immigrants; F-3, those not present at the time of the census; F-4, non-national wife and Bhutanese husband; F-5, non-national husband and Bhutanese wife; F-6, legal adoption cases; F-7, non-nationals, that is, migrants and settlers.

Thirdly, the census was said to have been arbitrarily implemented. Some people were stripped of their nationality even though they had lived in Bhutan for generations, simply because they were unable to produce the requisite 1958 land tax receipt.

### 1.3.2 *Southerners protest and Government reactions*

In September and October 1990, demonstrations swept through the southern belt of Bhutan, in protest against two main issues. One was the unfair implementation of the 1988 census<sup>31</sup> based on the 1985 Citizenship Act. The other was the imposition of Dzongkha as the national language and 'driglam namsha', the Ngalong code of values and conduct, on the rest of the population in the name of creating a national identity as part of the sixth Five-Year Plan.<sup>32</sup> The concurrent decision of the Government to drop Nepali from the school curriculum, ostensibly based on the recommendation of a UNICEF report, was ill-timed and fanned the ire of the southerners.<sup>33</sup>

Reprisal was swift. The Government labelled the dissidents as 'ngolops', or anti-nationals, and accused them of criminal and terrorist activities ranging from extortion and robbery to hijacking, kidnapping and murder.<sup>34</sup> Schools, development projects and hospitals in the south were closed down while the army moved into the villages. Southerners were required to produce a No Objection Certificate (NOC) for work and school. Organisers of the demonstrations and those suspected of supporting them were arrested.

<sup>31</sup> See petition dated 8 Apr. 1988 to the King by two southern Royal Advisory Councillors, Teknath Rizal and B.P. Bhandari in Dhakal & Strawn, *Movement in Exile*, 592, which sets out some of the problems faced by the people during the census. They also proposed changes to the 1985 Citizenship Act to alleviate the hardships suffered by the people. Both were subsequently detained for presenting a seditious petition. They were released soon after but Teknath Rizal was kidnapped from Nepal and redetained. He has been under detention in Bhutan since mid-1989 and is an Amnesty International prisoner of conscience.

<sup>32</sup> Four of the twenty-nine refugees interviewed by the writer cited 'driglam namsha' as one factor leading to their flight from Bhutan; at least one was unhappy with the implementation of the 1988 census, while three others were categorised as non-nationals under F-4, F-5 and F-7. See also Dhakal & Strawn, *Movement in Exile*, 171. Refugees, mainly Brahman and Chhetri, told the writer that they found it irksome to wear the gho and kira, heavy traditional Drukpa clothing for men and women respectively, even when they were working in the field. Penalties for failing to comply with the policy aggravated the southerners' resentment. See AHURA Bhutan, *Bhutan: A Shangrila without Human Rights*, AHURA Bhutan, 1993, 12.

<sup>33</sup> See van Driem, G., 'Language policy of Bhutan' in Aris, M. & Hutt, M., *Bhutan: Aspects of Culture and Development*, 99-102, for a favourable comparison of the Bhutanese policy with language policies of European countries. It is evident from van Driem that behind the UNICEF report one of three reasons for dropping Nepali from the school curriculum was that it encouraged illegal immigrants to take advantage of the free educational facilities in Bhutan.

<sup>34</sup> See *Anti-national Activities in Southern Bhutan*, Sept. 1991, 3.



### 1.3.3 Refugee outflow

A trickle of people left the country in 1990.<sup>35</sup> By mid-1991, the trickle became a flood. People reportedly left because of eviction, intimidation or harassment by government officials, and rape,<sup>36</sup> torture, beatings by the army and police.<sup>37</sup> Refugees also reported confiscation of citizenship cards, land tax receipts and other documents, being videotaped signing migration forms forced upon them, receiving inadequate or no compensation for their land and having their houses burnt down.<sup>38</sup>

At first, the refugees flocked to West Bengal and Assam in India where permission was given to set up refugee camps. However, Indian police harassment forced the people to move into Nepal.<sup>39</sup> This was a crucial move, as it allowed India to claim that it was an internal matter of Bhutan. In late 1991, Nepal enlisted the help of the UNHCR which provided emergency assistance to the swelling numbers of refugees.

The evidence indicates that the truth lies somewhere in between the opposing claims of the Bhutan Government and the refugee leaders. Nevertheless, according to refugee leaders and a survey conducted by the Nepal Government, at least half the households in the camps signed 'voluntary' migration forms which indicate, ironically, that the refugees concerned used to hold Bhutanese nationality.

## 2. The Legal Issues

The main issue is whether the Llotshampa refugees have a *right* to return to Bhutan, that is, claim parallel to the duty of a State to admit its

<sup>35</sup> See also Dhakal & Strawn, *Movement in Exile*, 243–4. One refugee told the writer that he had fled in late 1990 because army soldiers had accused him of giving money to the 'party' and beaten him up.

<sup>36</sup> See Sharma, S., Lama, S., Ale, S. & Maharjan, J., 'Rape Survivors: Nepal district management of refugees' in *Torture*, Denmark, 2/95, 8–10, describing the work of the Centre for Victims of Violence (CVICT), a Nepalese non-governmental organisation, with 235 rape victims in the camps by Nov. 1994. 178 had suffered multiple rape by army soldiers, 3 by the police and 12 by civilians.

<sup>37</sup> See also Dhakal & Strawn, *Movement in Exile*, 253. The reasons given by 29 refugees interviewed by the writer were accusations of helping dissidents, beatings by army or police, imprisonment, being forced to sign voluntary migration forms, confiscation of citizenship cards, being unable to produce certificate of origin, dissatisfaction with the dress code, fear of human rights violations, involvement in the demonstrations, threats and general insecurity in the village, eviction. CVICT stated that by 31 Jan. 1995, of 2,331 persons in their care, 1,842 were men (including boys) and 489 were women (including girls).

<sup>38</sup> Of the 29 refugees interviewed, 5 claimed that their citizenship cards were confiscated, 6 reported confiscation of land tax receipts and other documents, 5 claimed they were forced to sign voluntary migration forms while 2 claimed they were videotaped signing the forms or testifying to the voluntariness of their departure, 2 claimed no compensation for the land and two reported their houses were burnt or destroyed. See Amnesty International, 'Bhutan: Forcible Exile', ASA 14/04/94, Aug. 1994 for further details and reports of refugees' experiences prior to their departure; Guragain, G., 'Refugees Unwelcome', in *Himal*, Jul./Aug. 1993, for data on documents in the possession of refugees when the population was 38,874. Only 332 households out of a total of 13,237 did not have any documents.

<sup>39</sup> See Dhakal & Strawn, *Movement in Exile*, 267–73.

nationals in international law; this approach places the nationality issue clearly in a human rights context.<sup>40</sup> The fourfold refugee categorisation insisted on by Bhutan to establish who are its citizens, and who have been forcibly evicted, is rooted in the concept that regulation of nationality matters is within the sole competence of the sovereign State. A closer look at developments in international law indicates that this no longer holds true.

The discussion begins with an analysis of the nationality laws of Bhutan within the context of municipal law. The legality and constitutionality of the nationality laws, both retroactive or otherwise, to effect discriminatory denationalisation on the basis of ethnicity, sex or other grounds, will be presented as a challenge for the legal system evolving in Bhutan, which is modelled on the common law system but incorporates legal traditions based on Buddhist religious traditions.

The discussion continues with reference to international law, in order to identify the limits on a State's power to deprive individuals of nationality. Of immense relevance is the development of the concept in the first half of this century that the State is prohibited from engaging in mass denationalisation on discriminatory grounds, followed by expulsion of those concerned. The situation of the Llotshampa refugees will be examined against this principle of international law which is delicately poised as much on the concept of the territorial supremacy of the State as it is on the human rights principle of non-discrimination. In this connection too, the use of 'voluntary migration forms' as an indirect means of mass denationalisation and expulsion will also be examined. The issue of denationalisation will be analysed from the vantage point of the treaty obligations of Bhutan, in particular, but also of Nepal and India, with reference to the Convention on the Elimination of Discrimination Against Women (CEDW79) and the Convention on the Rights of the Child (CRC89), to protect the rights of the Llotshampa refugee women and children to a nationality.

The right of the Llotshampa refugees to return to Bhutan will be examined from the perspective of those who have been rendered stateless through deprivation of nationality. The fact that neither Nepal, Bhutan nor India is party to the 1951 Refugee Convention raises the issue of the relevance of the Convention, and whether the right of stateless refugees to return to their country of former habitual residence is either of persuasive authority or has attained force of customary international law.

Discussion on the right of the Llotshampa refugees as stateless persons to return to their own country will begin with the protection accorded to the general right to return under the Universal Declaration of Human

<sup>40</sup> See Chan, J.M.M., 'The Right to a Nationality as a Human Right', 12 *Human Rights Law Journal*, No. 1-2, 1-14.

Rights (UDHR48) and the International Covenant for Civil and Political Rights (ICCPR66). Observations on the trend towards recognition of a general right to return to one's own country will take account of declarations in international fora since UDHR48, and since ICCPR66 came into force. One focus will be whether the concept of one's country extends to the country of former habitual residence of stateless persons or to the situation where people have been deprived of the nationality of their country in order to prevent their return.

A bird's eye view of the nationality laws of Nepal and India helps to ascertain whether the refugees who are determined not to be Bhutanese nationals are in fact nationals of Nepal or India, before concluding that they are stateless.

## 2.1 The legal system of Bhutan

Before examining in depth the nationality issues affecting the Llotshampa refugees, a brief account of the legal system in Bhutan will help to explain the approach being taken regarding interpretation of the legislation at hand. The legal traditions of Bhutan are rooted in the religious laws of Buddhism. It is said that 'religious laws are like a silken knot and pressed down with state laws as with the weight of a golden yoke'.<sup>41</sup> The primary concern of the state laws is with truth and honesty as contrasted with the English common law tradition of *stare decisis*, *res judicata* and precedent.<sup>42</sup> At the same time, the legal system is developing in Bhutan, apparently along the lines of the separation of powers similar to that of the British legal system.<sup>43</sup> The nationality laws appear to be based on English or perhaps Indian statutory instruments, or may simply derive from the assistance or advice of Indian or English legal experts. In any event, two entirely different legal traditions must be reconciled. Nationality is a relatively new concept and certainly new to Bhutan, a monarchy emerging from the Middle Ages with traditional ideas of subjecthood. At the same time, Bhutan is seeking its place in the new world order of nation-States by its attempt to define its citizenry. While the legal traditions of truth and honesty would assist in the practice of determining the application of the nationality laws to individual cases, it would appear that the methods of statutory interpretation developed in the English common law tradition may bring a greater measure of efficacy.

<sup>41</sup> See Aris, M., *Sources for the History of Bhutan*, Wiener Studien zur Tibetologie und Buddhismuskunde, Heft 14, Vienna, 1986—the Bhutan law code of 1729, 122–68, at 129.

<sup>42</sup> *Ibid.*, especially 143, 147. Since Bhutan shares religious and legal traditions similar to those of Tibet, for a extremely instructive account of the jurisprudence of truth in the legal cosmology of Buddhist Tibet, see French, R.R., *The Golden Yoke*, (Uncorrected Proof) Cornell University Press, London, 1995, 137–45.

<sup>43</sup> See Ura, K., 'Development and Decentralisation' in Aris, M. & Hutt, M., *Bhutan: Aspects of Culture and Development*, 40.

*2.1.1 Nationality issues*

The provisions of the 1985 Citizenship Act were purportedly implemented during the 1988 census without reference to the 1958 Nationality Law and the 1977 Citizenship Act. It was assumed that the 1985 Citizenship Act wholly repealed the earlier legislation. However, nothing in the 1985 Citizenship Act supports this assumption. Section 1 of the 1985 Citizenship Act provides that in 'case of conflict between the provisions of this Act and the provisions of any previous laws, rules and regulations relating to citizenship, the provisions of this Act shall prevail.' Contrast this with the language of the operative clause in the 1958 Nationality Law which repeals all previous laws. Section 9 reads 'This law supersedes all laws, rules and regulations relating to the acquisition and forfeiture of nationality from the day of its commencement.' The 1977 Bhutanese Citizenship Act also prevails in case of conflict between its provisions and those of the 1958 Nationality Law.<sup>44</sup> So in practice the relationship between the three sets of nationality laws has not been at all clear. The following questions may help to clarify the relationship among the three sets of legislation as well as the relevance of the nationality laws of Nepal and India.

First, is the person a national of Bhutan? If the person is a national of Bhutan under the 1958 Nationality Law, the 1977 Citizenship Act or the 1985 Citizenship Act, did he or she lose such nationality pursuant to any of these laws? Is the 1985 Citizenship Act or some of its provisions invalid under Bhutanese domestic law or international law, practice, custom or convention? If the person is not a national of Bhutan, is he or she a national either of India or of Nepal? Or is he or she a dual national of Bhutan and either India or Nepal? If the person is not a national of Bhutan, India or Nepal, then is he or she a stateless person under the Stateless Persons Conventions, or generally as that concept is understood in international law? In addition, to such technical issues as arise from municipal nationality laws, the situation of women and children also calls for separate examination, due account being taken of CEDW79 and CRC89.

**2.2 Bhutanese nationality laws**

Bhutan's three sets of nationality laws prohibit dual nationality for Bhutanese nationals.<sup>45</sup> The 1958 law is clearly prospective, as is the 1977 amendment except where citizenship requirements overlap with the 1958

<sup>44</sup> Citizenship Act of 1958 as amended by the Lhengyel Shungtshog (Council of Ministers), 22 Mar. 1977, section THA.1.

<sup>45</sup> *Ibid.*, s. 2 under Eligibility and Power, which begins 'Any applicant holding the Citizenship of another country . . . shall not be granted Citizenship even if all the other required conditions are fulfilled.' It is silent on those who obtain the nationality of another country afterwards although this should still be covered by section 6 of the 1958 Law. See also s. the 1985 Bhutan Citizenship Act.

law. The 1985 Act largely overrides the 1977 amendments in terms of citizenship requirements but its retroactive tenor requires deeper analysis.

### *2.2.1 Acquisition of Bhutanese nationality*

Under the 1958 Nationality Law of Bhutan, a person acquires Bhutanese nationality if he has resided more than 10 years in Bhutan and owns agricultural land, has reached the age of majority and takes an oath of loyalty to the King after the petition to the King's official has been accepted.<sup>46</sup> Since most of the Llotshampas are farmers, the provision for ownership of land was clearly inserted with them in mind. As an alternative to land ownership, an adult person is eligible for Bhutanese nationality if that person has served the Bhutanese Government for at least 5 years and resided ten years in Bhutan.<sup>47</sup> However, the law does not provide that residence or ownership of land should commence at a certain time. Those who settled in southern Bhutan in or before 1948 immediately qualified for Bhutanese nationality if they were of the age of majority. But an adult who came later, say in 1965, would only be eligible in 1975 if he owned agricultural land. The benefit of citizenship is not extended to sharecroppers and landless people.

For a grant of citizenship under the 1977 Citizenship Act, the period of residence was dramatically increased from 10 years to 20 years for those not in government service,<sup>48</sup> whereas the period of government service was also increased from 5 to 15 years.<sup>49</sup> A significant difference from the earlier Act is that the requirement of land ownership was dropped. However, a new requirement was inserted to the effect that the applicant should be able to speak and write the Bhutanese language, Dzongkha, and have some knowledge of Bhutan.<sup>50</sup> This requirement is a deterrent since literacy among the Llotshampas is not high, even in Nepali, let alone Dzongkha. The cumulative effect of these requirements is to restrict the number of Llotshampas qualifying for Bhutanese nationality.

Since the language of the 1977 Citizenship Act does not indicate otherwise, it is prospective legislation with effect from 22 March 1977. Such an interpretation is supported by section THA.1 of the 1977 Citizenship Act, which envisages that provisions of the 1958 could exist side by side with the 1977 amendments. Those who came as late as 21 March 1967 could still qualify under the 1958 Nationality Law but those who came after that would be caught by the requirements of longer periods of residence and government service.

According to the 1985 Citizenship Act, a person who is 21 years old

<sup>46</sup> Nationality Law of Bhutan, 1958, s. 4(1).

<sup>47</sup> *Ibid.*, s. 5.

<sup>48</sup> 1977 Citizenship Act, s. 2 under Conditions required for the grant of Citizenship.

<sup>49</sup> *Ibid.*, s. 1 under Conditions required for the grant of Citizenship.

<sup>50</sup> *Ibid.*, s. KA.3. under Conditions required for the Grant of Citizenship.

or 15 if either parent is a Bhutanese citizen, and is of sound mind may apply for naturalisation if the following additional criteria are met. Government employees must prove 15 years' residence while those not in government service must have one parent who is a Bhutanese citizen, as well as 20 years residence. In addition, the period of residence must be in the census records.<sup>51</sup> The most stringent requirement is a sound knowledge of Bhutanese history, culture, customs and traditions and the ability to speak, read and write Dzongkha well. The other additional requirements are a good moral character and no criminal record. Lastly, if all these requirements have been met, the applicant should not have any record of disloyalty to the King, Country and People, and must pledge an oath of allegiance to the King, Country and People.<sup>52</sup> In effect, this means that a person should have arrived in Bhutan at the latest by 10 June 1965 in order to qualify for citizenship under the 1985 Citizenship Act. However, such a person would have already qualified for Bhutanese nationality by 10 June 1965, twenty years before the 1985 Citizenship Act came into force. A grey area thus exists for those who arrived between 10 June 1965 and 21 March 1977. In principle, it would be inequitable and unjust to insist on the application of the 1985 Citizenship Act to them, and against the principle of statutory interpretation which seeks to minimise the negative impact of legislation on those affected. According to this principle, the citizenship requirements of the 1958 and the 1985 laws under discussion should co-exist with the 1958 Act remaining effective until 21 March 1977. At the same time, the 1985 provision is in clear conflict with section KA of the 1977 Citizenship Act. The residency and service periods clearly overlap, such that this provision of the 1985 Citizenship Act would prevail with effect from 22 March 1977.

In summary, the individual and cumulative effects of the citizenship requirements of the 1958 law did not amount to a one-time conferment of nationality on the southern Bhutanese, but rather paved the way for integration of each generation of immigrants mainly in the south. If it did, the enabling section 4(a) should have specified a deadline for eligibility to avoid ambiguity. Seen in perspective, the Llotshampas, mainly land-owning farmers, easily acquired citizenship under the 1958 Nationality Law until 1967. Few would have acquired citizenship under the 1977 amendments because of the overriding provisions of the 1985 Citizenship Act.

### *2.2.2 Loss and deprivation of nationality*

In general terms, those who acquired citizenship under the 1958 and 1977 Acts could lose their citizenship pursuant to provisions in both laws,

<sup>51</sup> Bhutan Citizenship Act, 1985, s. 4.

<sup>52</sup> *Ibid.*

and until the 1985 Act became operative. The question is whether certain provisions of the 1958 Act and the 1977 Act on this issue remains valid even after 1985. Deprivation of citizenship is found in all three statutes, which therefore merit comparison and analysis in view of the voluntary migration forms signed by many. Still, the main issue remains, whether section 3 of the 1985 Act retroactively and unfairly deprived a large proportion of the Llotshampas of their Bhutanese citizenship.

### *2.2.3 Loss of nationality*

Two provisions of the 1958 law on loss of nationality survive the 1977 and 1985 laws, and both are relevant to the refugees: Loss of nationality is thus provided for in section 6(d), in the case of anyone registered as a Bhutanese national who has left his agricultural land; and secondly, in section 6(e), in the case of anyone who, being a bona fide national, fails to observe the laws of the Kingdom. This is supported by section NGA.1 of the 1977 law which provides for re-application of citizenship by a Bhutanese citizen who returns after having left the country for an unspecified period of time. Renunciation of Bhutanese nationality is not required if one has settled in a foreign country.<sup>53</sup>

The 1985 Act provides that a person who acquires another citizenship loses Bhutanese citizenship but the spouse and children remain Bhutanese if they are domiciled in Bhutan and registered with the Home Affairs Ministry.<sup>54</sup> If the children of Bhutanese parents leave the country voluntarily and without the knowledge of the Bhutanese Government and where their names are not also recorded in the citizenship register of the Home Ministry, they also lose their citizenship.<sup>55</sup> This provision is puzzling because it is not clear whether 'children' means those who have yet to attain the age of majority, that is, 21 under Bhutanese law, or all children including adult children. In either case, this presents an artificial choice for minor children who are still dependent on their parents.

### *2.2.4 'Voluntary migration forms'*

Section NGA.2 of the 1977 Act provides that:

A foreigner who has been granted Bhutanese Citizenship may apply to the Royal Government for permission to emigrate with his or her family. Permission will be granted after an investigation of the circumstances relating to such a request. After grant of permission to emigrate, the same person may not re-apply for Bhutanese citizenship. In the event of adult family members of any person permitted to leave the country, who do not wish to leave and makes an application to that effect, the Home Minister will investigate the matter and will permit such

<sup>53</sup> 1977 Citizenship Act, s. CHA.3. under Procedure for Acquisition of Citizenship read with Thrimshung KA 12-2.1.

<sup>54</sup> S. 6(a).

<sup>55</sup> *Ibid.*, s. 6.d.

persons to remain in the country after ascertaining that the country's interest is not harmed.

The term 'foreigner' is not defined in the Act, but the context of this section suggests that it refers to a person not originally from Bhutan who qualified for and obtained Bhutanese citizenship under either the 1958 Act or the 1977 amendments. Arguably, children and descendants who obtained nationality by birth under section 3(b) of the 1985 Act should not be included in the definition of 'foreigner'. Since the section forbids such a foreigner to re-apply for citizenship, it indicates that the term does not include those who obtained citizenship by birth. Another issue is the definition of the term 'family'. Does this include only the nuclear family comprising parents and all unmarried children or does it mean the extended family? What about adopted children? In the social and cultural context of the Llotshampas, the term may well refer to the nuclear family, since it appears that the custom is to set up a separate household once a person is married. In any event, voluntary migration forms signed by Bhutanese nationals who obtained citizenship by birth under the 1958 Act would appear to be invalid and illegal.

During the course of interviews with refugees conducted by the author, many such certificates of approval for emigration were examined and found to carry the statement in Dzongkha that 'This court on verification found above applicant to have done so on his own will.'<sup>56</sup> The implication then is that migration is a serious matter since re-application for Bhutanese citizenship by the same person is forbidden. Hence, evidence that the application was made as a result of any inducement, threat or promise from sources capable of harming the applicant or his family would be relevant. Allegations that coercion was used to induce the signing of voluntary migration forms therefore need to be thoroughly investigated, including any independent evidence that coercion was used, such as periods of detention, beating and torture of applicant prior to signing the voluntary migration forms.<sup>57</sup> Evidence of threats by persons in authority, such as police or army personnel, which are just as likely to be taken seriously, must also be carefully assessed.

Another reason for regarding the signed voluntary migration forms with caution is section NGA.3 of the 1977 Act which provides:

If anyone, whether a real Bhutanese or a foreigner granted citizenship, applies for permission to emigrate during times of crises such as war, the application shall be kept pending until normalcy returns.

Although situations other than war are not spelled out, it is reasonable

<sup>56</sup> The same official document sanctioned the migration in accordance with KA9(14)2/87/909, pursuant to the order of the Ministry of Home Affairs. It was unclear on what legal provision this order is based.

<sup>57</sup> The records of CVICT, above note 37, would be useful independent information.



to assume that situations of civil war, internal conflict, unrest and general insecurity would fall within the definition of 'crises'. The protests and demonstrations in late 1990 had certainly resulted in a situation of unrest and general insecurity. Thus the grant of permission to migrate during that period of general insecurity, whether to a Bhutanese or to a foreigner, seems to be in direct contradiction to this provision. On the strength of this provision alone, the validity of the voluntary migration forms is also in grave doubt.

For those who left Bhutan without signing such voluntary migration forms and who had left agricultural land behind in Bhutan, section 6(d) of the 1958 Citizenship Act appears to be the operative provision. This is likely to affect a large number of the Llotshampa refugees who were farmers in Bhutan. Since the refugees did not leave under normal circumstances, the section should not operate so as to result in the loss of Bhutanese nationality.

The above discussion on loss of Bhutanese nationality reveals the difficulties not only with the relationship of the nationality laws in practice, but also with the interpretation of particular sections and inadequate guidance from the legislation on the definition of terms. In the author's view, the voluntary migration forms are invalid. Moreover, in the light of the abnormal circumstances of unrest and general insecurity surrounding the refugees' departure, the other sections of the 1958 and 1985 Acts should not operate to the prejudice of the Llotshampa.

### *2.2.5 Deprivation of nationality*

Under the 1985 Act only naturalised citizens who are disloyal to the King, Country and the People will be deprived of nationality.<sup>58</sup> This provision overrides similar provisions in the 1958 and 1977 laws.<sup>59</sup> Support for this interpretation may be derived from the fact that Bhutanese by birth, as opposed to those who acquired Bhutanese nationality, are subject to capital punishment under the law on treason and anti-nationals.<sup>60</sup>

The application of the 1985 Act means that only the Llotshampa refugees who are naturalised citizens may be deprived of Bhutanese nationality for disloyalty to the King, Country and People of Bhutan. What amounts to disloyalty is not spelt out, but certainly a full inquiry into all the allegations would be necessary. An explanation by the person whose Bhutanese nationality is in jeopardy is equally important to establish the truth of the matter before deprivation of citizenship is ordered. In view

<sup>58</sup> 1985 Citizenship Act, s. 6.c.

<sup>59</sup> See s. 7(b)i of the 1958 law and section TA.1. of the 1977 law.

<sup>60</sup> 1977 Amendment Act, s. 7(b)i. The Thrimshung Chhenpo Tsa-Wa-Sum is the law on treason and anti-nationals which is still in force. In Dzongkha, Tsa-Wa means King, Kingdom and Government while Sum means three. The National Assembly of Bhutan confirmed and approved the death penalty for offences against Tsa-Wa-Sum during its 69th session, 19-26 Mar., 1990.

of the impasse between the Bhutanese Government and the Llotshampa refugees, it is highly probable that deprivation of nationality for disloyalty would be an issue for a small but perhaps significant number of the refugee leaders.

### 2.2.6 *Retrospective deprivation*

The most controversial provision is section 3 of the 1985 Act which purports to lay down a 31 December 1958 cut-off date for those entitled to citizenship by registration.<sup>61</sup> Not only must the person prove permanent domicile on or before the given date, his or her name must also be on the census register maintained by the Ministry of Home Affairs.<sup>62</sup> Refugee leaders have pointed out that the Ministry of Home Affairs was only set up much later.<sup>63</sup> Whether or not all the census records kept by the Mandals (village headmen) prior to its establishment have been properly replicated and forwarded to the Ministry is a moot point.

### 2.2.7 *Presumption against retrospective laws*

Retrospective legislation is possible in virtue of the principle of the supremacy of Parliament in English common law.<sup>64</sup> The courts have developed certain principles to restrain the exercise of this wide-ranging power in order to strike a balance between the effects on the individual and the claims of public interest. First, there is a presumption against retrospectivity when legislation is under scrutiny. In general, an ambiguous law will have prospective application, but where the intention of the legislature is clear, such legislation will be retrospective. In applying the presumption against retrospectivity distinctions have been developed between vested rights and existing rights, past events and present characteristics, beneficial and prejudicial consequences, substance and procedure.<sup>65</sup> In civil matters, the presumption against retrospectivity has been applied in cases involving penalties, while it is strongest in relation

<sup>61</sup> See Dorji, K., 'A View from Thimpu' in Aris, M., & Hutt, M., *Bhutan: Perspectives on Conflict and Dissent*, Kisdale, United Kingdom, 1994, 83, where the claim is made to the effect that 'judicial officials also explain that 1958 was not a blind cut-off year. It was the year when the country's first Citizenship Act was passed by the National Assembly to grant Bhutanese citizenship to ethnic Nepalis who had been in the country for at least ten years and owned agricultural land'.

<sup>62</sup> 1985 Citizenship Act, s. 3.

<sup>63</sup> INSEC, *The Bhutan Tragedy — When Will It End?*, 9, where it seems that census records date back only to 1972.

<sup>64</sup> See Enright, *Constitutional Law*, (1977), 75; Wade and Phillips, *Constitutional and Administrative Law*, (9th ed., 1977), 588.

<sup>65</sup> Driedger, E.A., 'Retroactive Retrospective Reflections' in 56 *Can. Bar Rev.* 264, (1978); Burrows, J.F., 'The Retrospective Effect of Changes in the Law', in *New Zealand Law Journal*, (1976), 343.

to criminal and penal statutes.<sup>66</sup> This means that laws prejudicial to the individuals concerned are seldom given retrospective effect.<sup>67</sup>

Section 3 of the 1985 Citizenship Act changes the criteria of eligibility for those who qualified for citizenship in 1958 only. The naturalisation criteria of land ownership and ten years' residence for those who came after 1958 remains unchanged until 21 March 1977, after which section 4 of the 1985 Act became operative. Section 3 of the 1985 Act could well be interpreted as the missing section of the 1958 Act on citizenship, which deemed a section of the population as nationals according to the given criteria. If it had been an express provision of the 1958 Act, it would have made perfect sense. But to introduce it thirty years late, for whatever reason, was bound to create a host of unfortunate consequences. A careful examination of its requirements reveals the difficulties inherent in a retroactive provision. Section 3 uses domicile and census records with the Home Ministry as proof of eligibility in 1958. Domicile is a concept in English law, meaning a permanent home or place where a person lives with the intention of remaining there for an indefinite period of time.<sup>68</sup> It is different from residence, which implies merely the physical fact of being and living in a particular place; it is residence coupled with an intention to live indefinitely in the place. So a person who has lived in Bhutan for two years and intends to stay would qualify in theory provided his or her name is on the census records, and whether or not he or she owned land. In practice, many factors are usually taken into consideration in determining the domicile of a person. In theory, even if the people no longer had the requisite documents by the 1980s, or other proof of domicile, the records of the Mandals kept for the purpose of tax and labour duties should contain sufficient proof of their nationality status. Those unable to prove that they were domiciled in Bhutan in 1958 would still be able to claim citizenship under the other provisions of the 1958 Act or the 1977 Act, especially if they had been issued citizenship cards after the 1980 census.

In practice, reports of the 1988 census indicated that not only did the implementation of section 3 leave much to be desired, but the erroneous if not arbitrary interpretation of the 1985 Act vis-à-vis the earlier Acts caused a great deal of confusion and fear among the southerners. The seven categories of the 1988 census did not reveal clearly the interpretation and the relation of the three successive citizenship laws.<sup>69</sup>

<sup>66</sup> *Halsbury's Laws of England*, vol. 44, 'Statutes', (4th ed., 1983), para. 923.

<sup>67</sup> While some may attempt to distinguish between retroactive and retrospective laws, it seems rather artificial in that the outcome is the same in either case. For present purposes, it is sufficient to say that legislation which has an effect on past events or their consequences is retrospective. The terms retroactive and retrospective are used interchangeably here. See Burrows, above note 65, 343.

<sup>68</sup> Singh, M.P., *V.N. Shukla's Constitution of India*, (9th ed., 1994), 12.

<sup>69</sup> Above note 31.

After the 1990 protests, there were reports of people being coerced to sign voluntary migration forms.<sup>70</sup> Other reports alleged further arbitrary implementation of the provisions of the 1985 Act. One refugee woman explained to the author that during the 1991 census, her father-in-law was classified under F-5 (non-national man married to a Bhutanese woman), whereas her husband was put into F-1. This was because her father-in-law could verify where her husband was born, but there was no one to verify where her father-in-law was from. She was classified under F-4 (non-national woman married to Bhutanese man), because she could not obtain a certificate of origin from her parents' village in Bhutan. As a result, her citizenship card was confiscated. Another refugee woman told how her parents were categorised as non-nationals under F-7 during the 1992 census, because they could not produce any documents and the village elders were not asked to identify and vouch for the people in their village. However, she and her husband were both categorised, as genuine Bhutanese nationals as were her children. The implication is that provisions of the 1958 and 1977 Acts pertaining to citizenship by birth and naturalisation do apply; or that application of the 1985 Act was arbitrary. A third refugee woman married to an Indian national said that her citizenship card was confiscated by immigration and census officials who claimed that her father's name was different from that in their records. Another refugee woman recounted that her husband was classified as a returned migrant under F-2 during the 1989 census, because he had been away for two months visiting relatives in Nepal just prior to the count. Apparently, he was subsequently threatened with imprisonment or fine of 5,000 rupees unless he signed an agreement that he alone would leave Bhutan. He signed and left in December 1990. The same woman stated that eventually the Dungpa, or Subdivision Officer, forced her and her father-in-law to leave in April 1991.

### 2.3 Municipal remedies

Section 4(3) of the 1958 Nationality Law states that:

If any person has been deprived of his Bhutanese Nationality or has renounced his Bhutanese Nationality or forfeited his Bhutanese nationality, the person cannot become a Bhutanese National again unless His Majesty the Druk Gyalpo grants approval to do so.

In the context of the hereditary monarchical system of Bhutan, the sovereign is the final arbiter on the important issues affecting Bhutanese

<sup>70</sup> Eight of the refugees interviewed by the author claimed that they had been forced to sign voluntary migration forms. See also AHURA, *A Shangrila without Human Rights*, Nepal, 1993, 61, 76, 88, 99, giving personal accounts of refugees being forced to sign voluntary migration forms from 1991–1993.

people and Bhutanese life, which implies that this provision overrides later legislation regarding restoration of Bhutanese nationality.

The 1958 Act does not provide the mechanism for obtaining the approval of the King for the restoration of nationality. It may well suffice to petition the King directly with the facts and evidence of the illegal deprivation or forfeiture of nationality in order to appeal for restoration of nationality.

#### 2.4 Constitutionality of retrospective legislation

The constitutionality of the retrospective provision of the 1985 Act is a delicate issue. Ura presents a rosy picture of Bhutan developing in terms of the concept of the separation of powers.<sup>71</sup> Parmanand lauds Bhutan's method of government as being based on an unwritten Constitution not unlike that of Britain.<sup>72</sup> Dhakal and Strawn criticise this comparison, arguing that unlike Britain, basic freedoms are not guaranteed in Bhutan.<sup>73</sup> They assert further that the issue is not whether the constitution is written or unwritten, but rather whether rights and freedoms are respected and protected in the laws of the land.

Bhutan to this day is an absolute monarchy even though constitutional changes are underway. In practice, the King wields supreme power since he can return bills to the National Assembly for further consideration, and even though the National Assembly has had the power since 1969 to remove the monarchy by a two-thirds majority vote.<sup>74</sup> There is no doubt that the National Assembly, with the assent of the King, can pass laws with retrospective effect. The issue is whether there are any checks on this form of parliamentary supremacy in Bhutan, and whether citizens of Bhutan have fundamental rights from which there can be no derogation.

#### 2.5 1985 Citizenship Act and international law

Since the Llotshampa refugees are not in Bhutan, municipal remedies are beyond their reach. As the implementation of the 1985 Act may have effected mass denationalisation of a section of Bhutan's population now encamped in Nepal, it is necessary to discuss the validity, effectiveness and legality of such denationalisation from the perspective of international law.

<sup>71</sup> See Ura, K., 'Development and Decentralisation' in Aris, M. & Hutt, M., *Bhutan: Aspects of Culture and Development*, 40.

<sup>72</sup> See Parmanand, *The Politics of Bhutan: Retrospect and Prospect*, 68.

<sup>73</sup> See Dhakal & Strawn, *Movement in Exile*, 84–7. Refugee leaders often cite the criticism of Eric Sottas, Director of SOS Torture in *Development and Human Rights*, that people in Bhutan do not enjoy as a matter of right, freedom of speech and expression, to dissent, to publication and a free press, of association and organisation, of civil and political rights, of equality and freedom from discrimination, of cultural, economic and social rights.

<sup>74</sup> Dhakal & Strawn, *Movement in Exile*, 94–7.

### 2.5.1 Denationalisation: Municipal and international law

Citizenship matters are usually perceived as falling within the realm of domestic jurisdiction, with the municipal law of a country determining who are nationals. Yet, this proposition itself is one of international law, not municipal law, and so far as international law regulates relations between States, so there may be limits on State rights in matters of nationality.

Deprivation of nationality or denationalisation by a State on certain grounds have been considered acceptable by other States, at least since the nineteenth century. A person who enters foreign civil or military service or accepts foreign distinction, departs or sojourns abroad or is convicted for certain crimes may find themselves denationalised under the municipal laws of his or her country.<sup>75</sup> The nationality laws of Bhutan reflect this practice.

Denationalisation on political grounds, such as subversion against the State or collaborating with the enemy, is also common to municipal legislation. Denationalisation on political grounds occurred on a large scale with the Russian decrees of the 1920s, when some two million people were deprived of their citizenship. Mass denationalisation on racial grounds was practised by Nazi Germany, Hungary and Italy in the 1930s, targeting the Jews from or in these countries. This was followed by mass denationalisation on national grounds of Germans and Hungarians in the 1940s in Czechoslovakia, Poland and the former Yugoslavia.

The validity of these decrees was considered by the municipal courts of various countries including the United Kingdom, Switzerland, Israel, Poland and the United States of America, and generated considerable debate among legal scholars of the day.<sup>76</sup> On one view, nationality is a matter entirely within the domestic law of a country to the extent that States have to accept the effect of denationalisation by another State even though it may be oppressive, shocking one's sense of propriety and morality, or be condemned as barbaric.<sup>77</sup> This was the approach of the

<sup>75</sup> See Weis, P., *Nationality and Statelessness in International Law*, Sijthoff & Noordoff, Netherlands, (rev'd 2nd ed., 1979), 117-9 concerning grounds for denationalisation of all or only naturalised citizens.

<sup>76</sup> *Ibid.*, 120-3. Weis discusses, among others, the Swiss decision of *Lempert v. Bonfol* and the Polish decision of *Rajdberg v. Lewi* concerning the Soviet Decree of 1921, two other Swiss decisions, *Levita v. Federal Department of Justice and Police* and *Rosenthal v. Eidg. Justiz- und Polizeidepartment*, as well as the United Kingdom decision in *Oppenheimer v. Cattermole*, regarding the validity of German denationalisation decrees. See also Donner, R., *The Regulation of Nationality in International Law*, Transnational Publishers Inc, N.Y., 2nd ed., 1994, 165-8, 171-6.

<sup>77</sup> See Mann, F.A., 'Present Validity of Nazi Nationality Laws' in 89 *LQR* 194, 201-2 (1973), on the difference between validity of an offensive denationalisation law and its effectiveness. He concludes that 'According to the true German law the whole of the Hitler regime was, in matters of the relevant kind, no more than a regime of gangsters, incapable of creating law, only to inflict invalid acts of wrong and injustice. This is not a case in which the law of Germany or, indeed, the law of mankind attributes any vindicating authority to facts or effectiveness.'

Swiss courts in the case of *Lempert v. Bonfol*,<sup>78</sup> which considered the nationality of a child whose mother was Swiss and whose father had been denationalised by the Soviet Decree of 1921. The child would have had Swiss nationality if the father had been stateless. The Canton of Berne challenged the legality of the Soviet Decree as contrary to international law, in that a State could not simply deprive of their nationality citizens who are out of sympathy with the regime and so force them on other States. The court declined to consider whether international law contained such precise principles and instead decided the case on the principle of effectiveness. This contrasts with the view expressed by the House of Lords in *Oppenheimer v. Cattermole*.<sup>79</sup> The legality of a 1941 German Decree fell to be considered in the course of determining whether Mr Oppenheimer was a national of the United Kingdom only or a national of both Germany and the United Kingdom. If he were a dual national, he would be exempt from English income tax on two pensions paid to him by the West German Government. The majority opinion of the House of Lords was that the German Decree, which was based on racial grounds and deprived the Jews of their German nationality, was both contrary to international law and such a serious violation of rights that it should not be regarded as law.

As a general proposition, the duty of a State to admit its own nationals and not to expel them is inherent in the concept of nationality. And the concept of nationality is itself based on the territorial supremacy of States. It follows that this duty of admission is not owed to non-nationals except in very special circumstances. Thus, Paul Weis argued that if States were free to expel their nationals or refuse to re-admit them it could amount to a violation of the territorial supremacy of the receiving States, because the latter would be forced to keep on their soil aliens whom they have the right to expel under international law.<sup>80</sup> This argument merits consideration in a situation where expulsion takes place before or after a denationalisation which is en masse and discriminatory.<sup>81</sup>

### 2.5.2 Denationalisation: Territorial supremacy and human rights

The issue is whether international law imposes any limits on the right of States to withdraw nationality from natural persons. Denationalisation is almost always a unilateral act by the State of nationality and has been

<sup>78</sup> Official Collection of Decisions, 60; *Annual Digest*, 1933–34, Case No. 115.

<sup>79</sup> (1975) 1 All ER 538; (1975) WLR 347 (H.L.)

<sup>80</sup> See Weis, above note 75, 46–7, 126, on the duty of admission and of non-expulsion of nationals. See also van Panhuys, H.F., *The Role of Nationality in International Law*, 163, where the issue of large-scale denationalisation based on race discrimination is discussed; Fisher Williams, J., 'Denationalisation', 8 *BYIL* 45, 61 (1927), to the effect that 'There will be general agreement that a State cannot, whether by banishment or by putting an end to the status of nationality, compel any other State to receive one of its own nationals whom it wishes to expel from its territory.'

<sup>81</sup> Weis, above note 75, 242.

generally accepted by other States where the grounds are perceived as reasonable and the numbers have been small enough to be absorbed if expulsion followed. But this century has witnessed the phenomenon of denationalisation on discriminatory grounds which affected massive numbers of people. As Weis pointed out, denationalisation coupled with denial of residence or expulsion poses serious difficulties for other States and the persons expelled. Even if a State can 'validly' denationalise its citizens under its municipal laws, it may nevertheless be in violation of its international obligations towards other States. Customary international law does not address the issue of denationalisation adequately, but developments in treaty obligations, especially in regard to human rights, are quite significant.<sup>82</sup> An approach premised on the violation of the territorial sovereignty of receiving States and on the violation of individual rights under various human rights instruments is the most compelling argument, representing convergence of traditional international law, where States are the only subjects, and modern law, where there is growing recognition of individual rights. In view of its obligations towards other States, the denationalising and expelling State should act with justification and for reasonable cause. Equally, the power of expulsion and denationalisation should be exercised with due regard for the individual and his or her rights. Therefore, denationalisation which is either arbitrary or discriminatory is contrary to international law.<sup>83</sup>

### 2.5.3 Human rights law and the principle of non-discrimination

The rapid development of human rights law after the Second World War was a response to the realisation that protection for individual rights and dignity was essential to prevent the recurrence of the sorts of grave atrocities witnessed both before and during the war. The proscription against arbitrariness in article 15 of UDHR48 is widely recognised as a limitation on the power of a State to denationalise its citizenry. Article 9 of the 1961 Convention on the Reduction of Statelessness provides that 'A Contracting State may not deprive any person or group of persons of their nationality on race, ethnic, religious or political grounds.' Although few States are party to this Convention, it articulates the fundamental principle of non-discrimination which has become intrinsic to international

<sup>82</sup> See Ko Swan Sik, 'Nationality in Public and Private International Law', 29-30 *Netherlands International Law Review* (1982-3), 100, 101. Ironically, the existence of the 1954 Convention on the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness supports the proposition that customary international law does not prohibit denationalisation.

<sup>83</sup> Art. 15 UDHR48 states that everyone has the right to a nationality and that no one shall be arbitrarily deprived of his nationality. See Henckaerts, J., *Mass Expulsion in Modern International Law & Practice*, International Studies in Human Rights, Martinus Nijhoff Publishers, Netherlands, 1995, 86-7; also Goodwin-Gill, G.S., 'Mass Expulsion: The Legal Aspects', Working Group of Experts on the Problem of Mass Expulsion, Institute of Humanitarian Law, San Remo, Italy, Oct. 1984.



law.<sup>84</sup> Hence it sets a standard by which the legitimacy of State conduct can be measured.

#### *2.5.4 Bhutanese nationality laws, denationalisation and mass expulsion*

It is impossible to escape the conclusion that the 1985 Citizenship Act is, in essence, a denationalisation decree in the retroactive formulation of section 3 and the retroactive operation of its provisions on the acquisition of nationality. It is denationalisation based on racial or ethnic grounds, specifically aimed at the Nepali-speaking Llotshampas. This was followed by the departure and expulsion of those denationalised. Its effects mirror the description by Weis, whereby Nepal is currently burdened with the responsibility of assisting a large number of aliens on its territory who, under international law, it has a right to expel but is unable to do so because of the purported denationalisation.

Bhutan also refuses to re-admit those who left after signing voluntary migration forms. These people form perhaps half the refugee population in the camps. Strictly speaking, denationalisation is an act of the State, whereas loss of nationality through voluntary expatriation is an act of the individual. Nevertheless, there is good reason to suppose that indirect denationalisation<sup>85</sup> has been effected, where there are compelling reasons to believe that voluntary migration forms were signed under duress.

The refugee categorisation proposed by Bhutan as a basis for determining which of the Llotshampa refugees are entitled to return as Bhutanese nationals is ambiguous. If Bhutan insists that the category of genuine Bhutanese nationals should be determined according to the 1985 Citizenship Act implemented since the 1988 census, then it affirms thereby the validity of the denationalisation, effected both directly and indirectly. The irresistible conclusion is that Bhutan has breached its obligations towards other States under international law.

<sup>84</sup> See Weis, above note 75, 125, for the view that the principle of non-discrimination may be now regarded as a rule of international law or a general principle of international law, and for the view that prohibition of discriminatory denationalisation on racial grounds should extend to discrimination on other grounds mentioned in the Charter of the United Nations, that is, sex, language and religion. His views on the principle of non-discrimination are supported by the development of human rights law and practice to this day. See also Schram, G.G., *The Right to Nationality and the Problem of Statelessness*, University of Iceland, Reykjavik, 1992 — basing himself on the Proviso to art. 1 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, the author argues that States no longer have the unilateral and unequivocal right to enact nationality laws at will. Proviso 1 declares that such a nationality law 'shall be recognised by other States in so far as it is consistent with international conventions, international custom and the principles of law generally recognised with regard to nationality.' His view is also based on legal developments since the 1930 Hague Convention.

<sup>85</sup> See Henckaerts, above note 83, 109: 'situations in which the government tolerates, or even abets such indirect measures by private persons or groups would also impose liability on a government for not having prevented a mass expulsion.' This explanation of indirect expulsion is pertinent to the Llotshampa refugees as in their case, denationalisation and expulsion were achieved by the same means. On indirect measures that compel aliens to leave as a group including outright civil war to subtle forms of pressure, see *ibid.*, 109.

## 2.6 Bhutan and international conventions

Bhutan became a member of the United Nations in 1971, under the sponsorship of India.<sup>86</sup> In 1973, it signed the 1965 Convention on the Elimination of All Forms of Racial Discrimination but has yet to ratify it.<sup>87</sup> It ratified without reservations the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDW79) on 31 August 1981 and the 1990 Convention on the Rights of the Child (CRC89) on 1 August 1990.<sup>88</sup> 1995. Bhutan has not signed any other major international instruments.

The drafters of the *Convention on the Elimination of All Forms of Discrimination Against Women Convention* (CEDW79) were preoccupied with ensuring that women attain equality with men in regard to their own nationality<sup>89</sup> and that of their children.<sup>90</sup> It is assumed that if women do not receive equal treatment with men, then that amounts to discrimination. But even where inequality with men is not obvious, women may nevertheless face discrimination for which they may not find adequate redress. Developments in the law of gender discrimination, however, have outstripped the notion of simple equality with men as the yardstick or the solution. The test articulated by the Canadian courts in 1989, for example, defines discrimination in terms of disadvantage without reference to a comparator, male or otherwise:

If a person is a member of a persistently disadvantaged group and can show that a distinction based on personal characteristics of the individual or group not imposed on others continues or worsens that disadvantage, the distinction is discriminatory whether intentional or not. Disadvantage is determined contextually by examining the plaintiff's social, political and legal reality...<sup>91</sup>

The incorporation of this ingredient of the Canadian test is essential for more effective protection to the woman's right to a nationality in article 9 of CEDW79.

Article 9.1 stresses that a woman should not automatically assume her husband's nationality upon marriage. The implication is that she should have a choice which she may truly exercise, rather than accept the imposition of her husband's nationality. She is not to be rendered stateless by her marriage to a foreigner, but should have the right to retain her nationality if she so wishes. Equally, a woman who marries a foreigner

<sup>86</sup> See Das, B.S., *Mission to Bhutan: A Nation in Transition*, 89.

<sup>87</sup> See *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1994*, 91.

<sup>88</sup> See *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1992*, ST/LEG/SER.E/11, 1993, 162, 187 respectively.

<sup>89</sup> Art. 9.1 CEDW79.

<sup>90</sup> Art. 9.2 CEDW79.

<sup>91</sup> As stated in *Andrews v. Law Society of British Columbia*, 1SCR 143 (1989); cited in Mahoney, K.E., 'Canadian Approaches in the Courts', Cook, R.J., *Human Rights of Women—National & International Perspectives*, University of Pennsylvania Press, USA, 1994, 445-6.

should not be forced to adopt the nationality of her husband, or to change her nationality if her husband changes his in the course of the marriage.

Read on its own, the 1985 Citizenship Act could be said to satisfy the non-discriminatory requirement of article 9 CEDW79. But given the history of the nationality laws and the socio-political reality of Bhutan, the conclusion reached is otherwise. Women, both Bhutanese and non-Bhutanese face discrimination in regard to nationality. Women in Bhutan were very much dependent on their fathers and husbands for their Bhutanese nationality under the 1958 laws because land holdings were usually held by men. They were not entitled to Bhutanese nationality in their own right. The retroactive provision in the 1985 law defining a cut-off date for citizenship by registration aggravated the discrimination against Bhutanese women because they could not prove Bhutanese citizenship in their own right, and in practice, Bhutanese women married to non-nationals were not classified as Bhutanese citizens during the implementation of the 1985 Act. Those Bhutanese women who left with their spouses or left to join their spouses may now be rendered stateless by reason of loss of nationality under section 6(d) of the 1985 Act, or as a result of signing voluntary migration forms. In such circumstances, they could be forced to take on the nationality of their husbands.

Non-Bhutanese women were formally able to acquire Bhutanese nationality easily under the 1958 Act, but in effect because of discrimination in favour of the patrilineal orientation of Bhutanese society; foreign husbands of Bhutanese women, for example, were not eligible for Bhutanese nationality under section 4(2) of the 1958 law. However, the situation of non-Bhutanese women deteriorated with the later nationality laws containing prohibitive requirements for acquisition of Bhutanese nationality even by the spouse of a Bhutanese national. Under the 1985 Act, non-Bhutanese women would be treated equivalently to non-Bhutanese men. Worse yet, those women who managed to acquire Bhutanese nationality under earlier nationality laws were stripped of their nationality by the retroactive application of naturalisation requirements under the 1985 Act. In practice, non-Bhutanese women and their families were encouraged, if not forced, to leave Bhutan in the aftermath of the 1990 protests. Bhutanese women married to non-Bhutanese have been consistently discriminated against by the later laws. The 1958 and 1977 Acts clearly discriminated against Bhutanese women with non-national spouses in regard to the nationality of their children.<sup>92</sup> Section 2 of the 1985 Act provides that children whose parents are both Bhutanese shall be deemed to be Bhutanese, and appears to treat women and men equally. But in fact, the retroactive operation of this provision continued

<sup>92</sup> For example, s. 3(b) of the 1958 Nationality Law provides that a child shall be a Bhutanese citizen wherever born of a Bhutanese *father* after the commencement of the Act.

the discrimination against these Bhutanese women, such that their children will never achieve Bhutanese nationality. It also retroactively deprived children of non-Bhutanese women married to Bhutanese men of their Bhutanese nationality. The nationality laws of Bhutan, particularly the 1985 Act, in theory and in practice, reveal clear breaches of Bhutan's obligations under the CEDW79. Denationalisation on discriminatory grounds of these women and children was followed by direct or indirect expulsion, and could possibly also render them stateless.

Article 7.1 of the 1989 *Convention on the Rights of the Child* provides, among others, that the child shall have the right to acquire a nationality, while article 7.2 enjoins State Parties to implement these rights according to their national law and obligations under relevant international instruments to prevent the child from becoming stateless. Article 8.1 further provides that State Parties undertake to respect the right of the child to preserve his or her nationality as recognised by law without 'unlawful interference', while article 8.2 declares that State Parties shall provide assistance and protection to a child 'legally deprived' of, in this case, nationality, with a view to its speedy restoration.

Van Bueren argues that consonant with the best interests of the child, the child's right to a nationality arises at birth as the enabling clause is sandwiched between two other clauses consisting of rights that clearly commence from birth, namely, the right to a name and the right to know and to be cared for by the parents.<sup>93</sup> Article 8 contemplates that the right of the child to preserve his or her nationality could invite 'lawful interference' as opposed to 'unlawful interference'. The term is not defined in the Convention. On the other hand, there is a hint of difference between 'lawful' and 'legal' in article 8.2, where reference is made to a child being 'legally' deprived of nationality. It would seem that what is 'legal' may not be 'lawful', so that even if a child is legally deprived of nationality, State Parties are enjoined to assist and protect the child and to speedily restore his or her nationality under article 8.2. The Convention is silent, however, on the child's remedies if there has been illegal or unlawful deprivation of nationality. This may be a gap in the protection for the child's right to a nationality unless article 8.2 is read to cover such a situation.

The 1985 Act, which provides for citizenship by birth where both parents are Bhutanese, could lead to a violation of article 7.2 if children of a non-Bhutanese mother and a Bhutanese father or vice versa are rendered stateless because the nationality laws of the country of the non-Bhutanese parent do not provide for acquisition of nationality from birth. Loss of citizenship under section 6(d) of the 1985 Act, where children of

<sup>93</sup> Van Bueren, G., *The International Law on the Rights of the Child*, Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1994, 367.

Bhutanese parents are purported to have left Bhutan voluntarily, may also violate article 7.2 where statelessness results. As section 1 of the 1985 Act has operated retrospectively to deprive Bhutanese children of nationality obtained under the 1958 Act, a breach of article 8.1 of CRC89 is also possible. The retrospective deprivation of citizenship which results in statelessness of the child arguably amounts to 'unlawful interference' or illegal deprivation by Bhutan, which is bound by its obligations under CRC89 to restore the nationality of children rendered stateless by operation of law.

### 3. Llotshampa refugees: Statelessness and the right to return

In some cases, it is a short step from denationalisation to statelessness, and that in turn is a stark reality for a large proportion of the Llotshampa refugees. They could be stateless refugees under the 1951 Refugee Convention or stateless persons under the 1954 Convention Relating to the Status of Stateless Persons.<sup>94</sup> Unless they have acquired or continue to hold another nationality, they are likely to be *de jure* stateless. The issue of their status is central to determining which State is responsible for admitting them, and relevant also from the perspective of their right not just to a nationality but to return to their country. The possibility that some of them possess another nationality cannot be disregarded, since there are couples of mixed nationalities in the camps. India signed CEDW79 with reservations on 30 July 1980 and Nepal ratified it on 22 April 1991. Nepal ratified CRC89 with reservations on 14 September 1990, and India ratified it on 11 December 1992.<sup>95</sup> All three countries are bound by these two conventions to protect the nationality rights of the women and children who are now refugees in Nepal and India, and to prevent them from becoming stateless. The nationality laws of India and Nepal will be referred to after the discussion on the Llotshampa refugees' right to return to their country under international law.

#### 3.1 Right to return and the 1951 Refugee Convention

The 1951 Refugee Convention implicitly recognises the right of stateless refugees to return to the country of their former habitual residence. The

<sup>94</sup> Art. 1A(2) of the 1951 Convention provides that a stateless refugee is 'any person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, ... not having a nationality and being outside the country of his former habitual residence ... is unable or owing to such fear, is unwilling to return to it.' Art. 1.1 of the 1954 Convention relating to the Status of Stateless Persons reads: 'For the purpose of this Convention, the term "stateless person" means a person who is not considered as a national by any State under the operation of its law.'

<sup>95</sup> See *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1992*, ST/LEG/SER.E/11, 162, 187 respectively.

popular assumption is that this Convention provides only for cessation of refugee status under certain circumstances,<sup>96</sup> but does not deal with repatriation or the right to return. Given that the right to return to the country of nationality or of habitual residence is not explicitly mentioned, the consequence is that the refugee who has a nationality loses international protection upon regaining or resuming national protection under the cessation clauses. The refugee who is without a nationality, however, stands to lose international protection without regaining something resembling national protection. If so, the cessation clauses may never apply with respect to stateless refugees, if their right to return to the country of former habitual residence is not protected. For refugees rendered stateless by denationalisation prior to departure, this adds insult to injury. By way of illustration, refugees A and B are from country C. Due to fundamental change of circumstances in country C, A returns to C because he is a national of C. B is not permitted to return because she is a non-national and is unable to go anywhere else because she is stateless.<sup>97</sup> Does it mean that the cessation clause article 1C(6) will never apply in the case of stateless refugees because of the inability to return to the country of habitual residence? Is there, then, a gap in the 1951 Refugee Convention concerning protection for stateless refugees?<sup>98</sup>

The thrust of article 1C(6) is to ensure that stateless refugees should not be in the position to refuse to return to the country of their former habitual residence unless they have compelling reasons arising out of past persecution for refusing to do so.<sup>99</sup> It is a fallacy to say that the 1951 Convention does not deal with the right to return. Article 1C(4) expressly provides for the cessation of refugee status upon re-establishment of the

<sup>96</sup> Art. 1C(1)–(5) of the 1951 Convention Relating to the Status of Refugees.

<sup>97</sup> This is the explanation in the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*, Geneva, 1979, regarding the position of a stateless refugee who may not be able to return to his country of former habitual residence even though there has been a fundamental change of circumstances. See also Grahl-Madsen, A., *The Status of Refugees in International Law*, vol.1, Sijthoff, Leyden, 1966, 405–6, to the effect that art. 1.C(6) should not operate against a stateless refugee who is not in possession of a valid re-entry permit. Grahl-Madsen did not explain his assumption that a stateless refugee does not have a right to return to the country of former habitual residence, and other comments suggest the contrary; cf. *ibid.*, 375.

<sup>98</sup> This seems to be implied in Hathaway, J., *The Law of Refugee Status*, Butterworths, Toronto, 1991, 59–63, but the argument does not appear to have any legal or historical foundation; cf. Goodwin-Gill G.S., *The Refugee in International Law*, Clarendon Press, Oxford, 2nd ed., 1996, 41, note 43.

<sup>99</sup> See Goodwin-Gill, above note 98, 41–2, on the implications of statelessness in the refugee definition; also, *ibid.*, note 40, recalling that the *Ad hoc* Committee had concluded that ‘unable’ in the refugee definition and in the draft Convention as a whole refers more to stateless refugees but also includes those refugees with a nationality refused passports or protection by their governments. The inference then is that art. 1C(6) is conditional on the stateless refugee obtaining the relevant permit to return from the State authorities. Art. 1C(5) does not make a similar provision for refugees with a nationality refused passports or permission to return which supports the proposition that the concern of the drafters was to provide for those refugees, stateless or otherwise, who did not wish to return to the country of origin owing to reasons of past persecution.

refugee in the country of origin. Such re-establishment cannot occur without the refugee first returning to assess whether or not to stay. One could say that re-establishment is predicated on repatriation. Hence the right to return is implicit in this provision of the cessation clauses whether in the case of a refugee who is a national of the country of origin or one who is a stateless former habitual resident. Granted the *travaux préparatoires* are silent on the specific right to return of refugees, stateless or otherwise,<sup>100</sup> but there are at least two good reasons for asserting that the right to return of refugees, including those stateless, are implicit in article 1C(4) of the 1951 Convention.

The development of the concept of the right to return parallels the development of human rights law after the Second World War, as it began in the Universal Declaration and as it evolved in the 1966 International Covenant on Civil and Political Rights. The 1951 Refugee Convention paved the way for the development of the concept in theory and in practice. The phrase 'right to return' is associated with both UDHR48 and ICCPR66 but its effect clearly stems from the latter which is binding on a large number of States.

The context which gave rise to the rights and freedoms protected by UDHR48, including the right to return, reveals that the practice preceded the concept. There were an estimated 30 million refugees and stateless persons in Europe after the Second World War. While a comparatively small number were resettled, some within Europe and most abroad, the majority, both refugees and stateless persons, found their way home. In May and June 1945 alone, 5.25 million persons were repatriated.<sup>101</sup> In 1946, the General Assembly affirmed that the main task concerning displaced persons was to encourage and assist in every way possible their early return to the countries of origin, excepting war criminals and Germans being transferred to Germany from other States or who fled to other States.<sup>102</sup> In light of the prior mass denationalisation of the Jews and other minorities by Nazi Germany and its satellites, it is clear that the prevailing practice was that those who were denationalised and rendered stateless were entitled, if they so wished, to return home. Hence, the fact that they were stateless in no way impeded their return to their homeland. The practice was confirmed by article 1C(4) of the 1951 Refugee Convention. This phenomenon was entirely contrary to the international law principles on nationality and statelessness at the time.

<sup>100</sup> Takkenberg, A. and Tahbaz, C.C., *The Collected Travaux Préparatoires of the 1951 Convention relating to the Status of Refugees*, Dutch Refugee Council/European Legal Network on Asylum, 1988.

<sup>101</sup> See Marrus, M.R., *The Unwanted: European Refugees in the Twentieth Century*, Oxford University Press, New York, 1985, 297-8, 310.

<sup>102</sup> See Goodwin-Gill, G.S., 'Different Types of Forced Migration Movements as an International and National Problem', in Rystad, G., ed., *The Uprooted: Forced Migrations as an International Problem in the Post-War Era*, Lund University Press, Sweden, 1990, 15, 24.

It signalled a departure from established principles, in order to accommodate the new phenomena of mass denationalisation and statelessness. The plight of the residual number of stateless persons who were unable or unwilling to return to their home led to further debate and eventual adoption of the Conventions, one for Stateless Persons and the other for the Reduction of Statelessness.

In view of the above, the Llotshampas, as stateless refugees who have been discriminatorily denationalised, have an implicit right to return to Bhutan as the country of their former habitual residence. Although this right of stateless refugees is implicit in the 1951 Refugee Convention to which neither Bhutan nor Nepal is party, it is compelling authority in all refugee situations caused by mass denationalisation and expulsion. In terms of the number of accessions and the prominent role of the UNHCR in implementing the terms of the Convention in the proliferation of refugee situations since its inception, certain concepts manifest in the provisions of the 1951 Refugee Convention could now be part of customary international law. Certainly, the voluntary re-establishment of refugees in their country of origin and the implicit right to return could reflect relevant rules of customary international law.

### **3.2 Right to return and the 1966 International Covenant on Civil and Political Rights**

The concept of the right to return home in article 13(2) of the Universal Declaration speaks particularly to those who have been denationalised and expelled from their country: 'Everyone has the right to leave any country, including his own, and to return to his country.' This right is now codified in the 1966 Covenant on Civil and Political Rights, article 12(4) of which provides: 'No one shall be arbitrarily deprived of the right to enter his own country.'

The key words are 'arbitrarily deprived' and 'his own country'. The word 'arbitrarily' is not defined here, but has been defined in relation to arbitrary arrest or detention. It is more than 'illegal'. It is arbitrary if it is not in accordance with procedures established by law or where the enabling provision is one which does not respect the right to liberty and security of the person.<sup>103</sup> Accordingly, arbitrary deprivation would arise in a situation where denial of return is not based on criteria or procedures laid down by law, but to achieve some other objective. In terms of the alternative definition, the provision of law in question is one which is not

<sup>103</sup> See Hannum, H., *The Right to Leave and Return in International Law and Practice*, Martinus Nijhoff, The Netherlands, 1987, 44–5, citing a 1964 UN study on this issue: '... the committee has come to the opinion that "arbitrary" is not synonymous with "illegal" and that the former signifies more than the latter ... [A]n arrest or detention is arbitrary if it is (a) on grounds or in accordance with procedures other than those established by law, or (b) under the provision of a law the purpose of which is incompatible with respect for the right and security of person.'



consonant with freedom of movement of the person. It remains to be seen whether this test is relevant to a situation of deprivation of the right to return to one's country, such as that of the Llotshampa refugees.

Hannum argues that the ordinary meaning of the words 'his own country' must mean something different from 'the country of which he is a national'.<sup>104</sup> The possible categories of persons included are nationals, citizens and permanent residents. This is the interpretation favoured by Jagerskiold, while the narrower interpretation of 'nationals' is preferred by Weis. Both interpretations can claim support from Ingles' study of the Universal Declaration. However, the interpretation of 'nationals' includes those who have been denied the right to enter by the arbitrary deprivation of their nationality.<sup>105</sup> Since ICCPR66, there has been much debate in different fora over the scope and content of the right to return, but there appears to be a convergence of views on the right of stateless persons to return.

Article II of the Draft Principles on Freedom and Non-Discrimination in respect of the Right of Everyone to Leave Any Country, including His Own, and to Return to His Country specifically addressed the situation where arbitrary deprivation or forced renunciation of nationality was used to prevent the person from return:

- (a) Everyone is entitled, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, marriage or other status, to return to his country.
- (b) No one shall be arbitrarily deprived of his nationality or forced to renounce his nationality as a means of divesting him of the right to return to his country.<sup>106</sup>

Article II(b) identifies two policies used to prevent the return of a person to his or her country. A person relying on this provision must still prove that the deprivation of nationality is arbitrary or that the renunciation was forced. While 'forced' is not defined, it must surely include undue pressure, intimidation and threats if not actual physical violence.

Article 12 of the Declaration on the Right to Leave and the Right to Return adopted by the Uppsala Colloquium in 1972 reads:

<sup>104</sup> See also Zedalis, R.J., 'Right to Return: A Closer Look', 6 *Geo. Imm. L. J.* 504-7 (1992), supporting the broader interpretation by reference to the debate preceding the adoption of art. 13(2) UDHR48.

<sup>105</sup> See Hannum, above note 102, 56-9, for discussion of the interpretation of the term 'his own country' and the difference between 'return' in art. 13 UDHR48 and 'enter' in art. 12(4) ICCPR66, based on Ingles' study of the Universal Declaration and the *travaux préparatoires* of art. 12.

<sup>106</sup> Article II of the Draft Principles adopted by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Res. 2B(XV): UN doc. E/CN.4.1846 (1963), 40.

The re-entry of long-term residents who are not nationals, including stateless persons, may be refused only in the most exceptional circumstances.<sup>107</sup>

Although 'exceptional circumstances' is not defined, it is likely to refer to public order and security considerations.<sup>108</sup> There appears to be an attempt to balance the right of stateless persons to return with the broader interests of the State. While that is the reality, it is important to recognise that unless the problem of stateless persons, especially where the numbers are large, is resolved, these broader considerations will be affected. 'Statelessness is a source of political and socio-economic tension which affects the country of origin, the country of residence and neighbouring countries.'<sup>109</sup> The basis for stateless persons to return to their country is acknowledged by the 1986 Strasbourg Declaration on the Right to Leave and Return, which refers to their 'bona fide links' with that State.<sup>110</sup>

Although Bhutan is not party to the Covenant, it has obligations as a member of the United Nations, and it is widely acknowledged that both the Universal Declaration and the 1966 Covenant may now have binding force of law by their universal acceptance and application. Bhutan should respect the right of its nationals and former nationals who have been arbitrarily deprived of Bhutanese nationality to return home. If there are permanent residents of Bhutan among the refugee population, it is an issue which could be amicably resolved by the inclusion of India in the talks. Bhutan may determine under its own nationality laws who are its nationals, but it may not impute any other nationality to those deemed not to be Bhutanese nationals. It is for India and Nepal to decide, according to their own nationality laws, whether some of the refugees are their nationals.<sup>111</sup>

<sup>107</sup> Uppsala Colloquium, Uppsala, Sweden, 21 June 1972, Appendix E, in Hannum, above note 102, 150-3. See identical provision in *Report and Conclusions of the Conference of Jurists on 'Right to Freedom of Movement'*, ICJ, Indian Commission of Jurists and Mysore State Commission of Jurists, International Year of Human Rights, The Eastern Press, Bangalore, India, 1968, 87: Article 7 'Right to Enter A Country'—'(a) The right of a citizen to enter his own country should be recognised without limitation. The re-entry of long-term residents, including stateless persons, may be refused only in the most exceptional circumstances.' This provision acknowledges the recurring and growing problem of stateless persons even after the Second World War. Although it is a qualified right, the effective links of long-term residents, including stateless persons to the country of origin appear to be the primary consideration. Art. 7(b) continues: 'Deprivation of citizenship should not be used for the purpose of circumventing this right.' This is in *pari materia* to art. 10 of the Declaration adopted at the Uppsala Colloquium: 'No person shall be deprived of his nationality for the purpose of divesting him of the right to return to his country.'

<sup>108</sup> See Hannum, above note 102, 27-32, where both considerations are discussed in relation to the right to leave articulated in art. 12 ICCPR66.

<sup>109</sup> See *Winning the Human Race? The Report of the Independent Commission on International Humanitarian Issues*, Zed Books, London, 1988, 114-5 where the Commission also emphasised that regional organisations should work to resolve the problem and that regional mechanisms to control human rights could serve to ensure respect for the nationality, choice of residence and freedom to enter one's country and freedom from expulsion from one's country.

<sup>110</sup> Art. 8 of the Declaration in Hannum, above note 102, Appendix F, 154-8, 156. See also Frelick, B., 'The Right to Return', 2 *IJRL* 444-5 (1990) on why the right to return is so fundamental.

<sup>111</sup> See Mann, F.A., 'Present Validity of Nazi Nationality Laws' in 89 *LQR* 194, 196 (1973).

### 3.3 Llotshampa refugees and Indian nationality

Indian citizenship laws do not recognise dual citizenship for Indian citizens.<sup>112</sup> A person who acquired Indian citizenship under Part II of the 1949 Constitution<sup>113</sup> after India gained independence from Britain will lose it if he migrated to Bhutan in 1950 and subsequently adopted Bhutanese citizenship under the 1958 Act. However, he or she could be a citizen under the 1955 Indian Citizenship Act,<sup>114</sup> move to Bhutan in 1965 and still retain Indian citizenship if he or she were a citizen by birth or by descent. But a citizen by registration<sup>115</sup> may be deprived of Indian citizenship after 7 years' residence outside India if he or she fails to register annually at the consulate.<sup>116</sup> A woman of Indian origin could become a Bhutanese national under the 1958 law. But if she were to marry after the 1977 Act came into force, it would be much harder for her to adopt Bhutanese nationality. And her husband could not become an Indian citizen if they continue to reside in Bhutan. A person of Indian origin married to a Bhutanese woman could retain his Indian nationality or if he fails to register with the Indian consular authorities, he may be stateless. The children from such a marriage will be in a similar situation. Since there are persons of Indian origin among the refugees in the camps in Nepal, India's involvement would be important to ascertain their nationality status to determine responsibility for their protection.

### 3.4 Llotshampa refugees and Nepalese nationality

The 1952 Citizenship Act, the 1964 Citizenship Act and the 1992 Citizenship Amendment Act prohibit dual nationality for Nepalese

<sup>112</sup> Art. 9 of Part II of the 1949 Constitution of India and s. 8(1) of the 1955 Indian Citizenship Act provide for renunciation of Indian citizenship upon acquisition of foreign nationality. S. 8(2) also provides for loss of citizenship of minor child of male person renouncing Indian nationality although such child could resume Indian citizenship by means of declaration within one year of attaining age of majority.

<sup>113</sup> Art. 5, 1949 Constitution of India, which applies to people born before the Constitution, stipulates domicile as a requirement whether for citizenship by birth, citizenship by descent where either parent born in India or citizenship by residence where person has resided for 5 years in India before the enactment of the Constitution. Art. 8 provides that a person whose either parent or grandparent was born in India will be an Indian citizen if the person is registered with Indian consular or diplomatic representative in the country of residence.

<sup>114</sup> Citizenship Act of India, s. 3(1) which applies to those born on or after 26 January 1950, provides for citizenship by birth in India on or after 26 January 1950 unless the person's father is a diplomat or an enemy alien and the person was born in a place held by the enemy. S. 4 provides for citizenship by descent where the person is born outside India after 26 January 1950 of an Indian father provided the child is registered within one year of birth or of the Act at the Indian consulate or the father is in Government Service.

<sup>115</sup> S. 5 of the 1955 Citizenship Act provides for citizenship by registration where a person is of Indian origin, is resident outside India but has been ordinarily resident in India for 6 months before making the application. The wife and minor children of an Indian citizen may also obtain citizenship by registration under s. 5(1)(c) and (d) respectively. A person of Indian origin is defined as one whose either parent or either grandparent was born in undivided India.

<sup>116</sup> S. 10(2)(e) 1955 Citizenship Act.

nationals.<sup>117</sup> Part II of the 1990 Constitution also does not recognise dual nationality.

A woman who is a citizen of Nepal under the 1952 Act<sup>118</sup> and migrates to Bhutan in 1953 has two choices. Either she becomes a national of Bhutan under the 1958 Act, whereupon she will lose her Nepalese nationality, or she is free to retain her Nepalese nationality. If she marries a Bhutanese husband but retains her Nepalese nationality, their children can be Nepalese nationals. Under the 1964 Act<sup>119</sup> and the 1990 Constitution,<sup>120</sup> the children of a Nepalese woman and her Bhutanese husband are not entitled to Nepalese citizenship, whereas the children of a Nepalese father and a Bhutanese woman have Nepalese nationality. The Bhutanese wife is eligible for Nepalese nationality if she surrenders her Bhutanese nationality,<sup>121</sup> but not the Bhutanese husband of a Nepalese wife. The 1964 Act is similar to the Bhutanese 1958 Act in this respect. As a general rule, Nepalese nationals and their descendants do not lose their nationality because of absence from Nepal for any period of time.<sup>122</sup> However a Nepalese citizen will lose Nepalese citizenship by renunciation on acquiring Bhutanese nationality. Other than the Bhutanese wife of a Nepalese citizen, it seems that such a former citizen of Nepal may acquire the citizenship of Nepal after renouncing Bhutanese nationality.<sup>123</sup> This option appears to be open to some of the Llotshampa refugees. The children of a Bhutanese father and a Nepalese woman who have left Bhutan may either acquire Nepalese nationality after 2 years' residence,<sup>124</sup> or be rendered stateless.

<sup>117</sup> See s. 8 of the 1952 Citizenship Act. 1964 Citizenship Act of Nepal, s. 6(1)(c) provided for steps in surrendering foreign citizenship but was amended in 1992 to surrender of the foreign citizenship as a precondition before application for Nepalese citizenship. See also s. 9(1) which provides for automatic loss of Nepali citizenship upon acquiring foreign citizenship.

<sup>118</sup> Citizenship Act of Nepal, 1952, s. 4(a) provides that children of Nepalese parents living outside but who have not acquired citizenship of that country will have Nepalese citizenship by birth. S. 2 provides that a resident in Nepal who was born there has Nepalese citizenship. Alternatively, a resident, one of whose parents is a Nepalese national and submits a written declaration making Nepal his home also has Nepalese citizenship.

<sup>119</sup> 1964 Citizenship Act, Nepal, s. 3(1) provides that those born after commencement of the Act of Nepalese father will have Nepalese citizenship.

<sup>120</sup> Constitution of Nepal, 1990, art. 9(1) provides that those born after the commencement of the Constitution of Nepalese father will have Nepalese citizenship.

<sup>121</sup> 1964 Citizenship Act of Nepal, s. 6(1)(f). This was amended by s. 4 of the Nepal Citizenship (Fifth Amendment) Act 1992, which provided in new s. 6(2) for submission in prescribed form of application and evidence of steps taken to renounce foreign nationality. It is similar to the first limb of art. 9(5) of Part II of the 1990 Constitution.

<sup>122</sup> *Ibid.*, s. 10(3)(b) provides for deprivation of citizenship where a naturalised citizen other than one of Nepali origin for being absent from Nepal for more than seven years. See also Nepal Citizenship (Fifth Amendment) Act, 1992, s. 6 of which replaced 'persons of Nepali origin' in s. 10(3)(b) by 'son, daughter, or descendant of a Nepali national'.

<sup>123</sup> Art. 9(5) of Part II of the 1990 Constitution.

<sup>124</sup> Art. 9(6) of Part II of 1990 Constitution provides that the child or descendant of a Nepali citizen except one who was naturalised, is eligible for Nepalese citizenship after 2 years' residence in Nepal.

One could be tempted to sidestep the issue of the right of the Llotshampa refugees to return to Bhutan by reference to the option open to some to adopt Nepalese citizenship. This would completely ignore the factors which caused their flight or expulsion from Bhutan and the principles of international and municipal law relevant to this and other similar situations.

#### 4. Conclusions and Recommendations

The right of the Llotshampa refugees to return to Bhutan is clouded by many issues, principally the survival of the Ngalong ruling ethnic community in the geo-political context of a Nepali-speaking diaspora in the Himalayan region. A pessimistic view is that politics will govern the solutions for the Llotshampa refugees. A positive approach suggests that principles of municipal and international law could assist the political process for a genuine resolution to the situation of the Llotshampa refugees. This paper was an attempt to clarify the legal principles applicable to issues of nationality, statelessness and the right to return.

Clearly, one must be alert to the pitfalls of the fourfold refugee categorisation proffered by Bhutan. To accept the refugee categorisation as it stands, without first clarifying the criteria determining nationality and the application of the nationality laws, would result in, at best, utter chaos or, at worst, grave injustice. Bhutan's ratification of CEDW79 and CRC89 establishes the validity of international standards to be met by the refugee categorisation, particularly in the interests of women and children. Without doubt, the refugee categorisation would benefit from being so refined as to be non-discriminatory, just and efficacious in application.

The participation of India in talks about solutions is plainly necessary because of Bhutan's allegations that the majority of the people in the camps are illegal immigrants from Nepal and the neighbouring states of India, the actual presence of an unknown number of Indian nationals in the camps, and ultimately, because this is a geo-political problem involving India, Bhutan and Nepal. Should it be determined that some or all of the refugees are stateless, it is finally a regional issue requiring a regional resolution. India's continued protestations of non-intervention in the domestic affairs of Bhutan are belied by the treatment meted out to the refugee marchers in India on their way to Bhutan. Being a party to both CEDW79 and CRC89, India should be mindful of its obligations to the refugee women and children of Indian origin.

The alliance of India and Bhutan on many fronts, including the implications of the Nepali-speaking diaspora in the Himalayan region, needs to be taken into account in any attempt to include India in the talks to resolve the Llotshampa refugee issue. India's participation will

not automatically result in an equitable and just settlement, either for the refugees or Nepal. Realistically, even if a majority of the refugees were found to be stateless, they simply join the ranks of groups of stateless persons in the South Asian subcontinent, thereby aggravating statelessness as a regional issue with an explosive potential in the future. It may make much better political sense to contain and resolve the Llotshampa refugee issue as soon as possible.

In the circumstances, therefore, it may help to bring in an independent fourth party as mediator in the event of disagreement between the three parties, or where two parties oppose the third party on any issue throughout the whole verification process. This would ensure that the international obligations of the three countries under the various international conventions and general international law are duly observed. Ideally, the mediator should be an expert on international law, particularly on women and children and their nationality and statelessness. He or she might usefully consult with a panel of five representatives, one each appointed by the refugees and the governments of Bhutan, Nepal and India, and the UNHCR, before arriving at any decision on the issue. The government representatives would also need to be conversant with the municipal laws of Bhutan, India or Nepal, especially with regard to nationality issues and constitutional matters. The refugee representative would ideally be familiar with the nationality laws of Bhutan, but more importantly should possess a thorough knowledge of the practical reality of nationality and residence matters in the lives of the refugees. The UNHCR representative, finally, would need to be fully conversant with the question of statelessness at international law.<sup>125</sup> Harmonisation of the municipal and international laws and the conflicting interests of the parties could well be achieved through such a mechanism.

A more appropriate categorisation of the population would recognise Bhutanese, Nepalese, Indian and stateless. There should also be a separate category for those families of mixed nationalities. The nationality status criteria would be the nationality laws of each country which accord with the international obligations of Bhutan, India and Nepal, especially under

<sup>125</sup> See UNGA res. 50/152, 5 Feb. 1996, entrusting UNHCR with the task of continuing efforts on behalf of stateless persons pursuant to UNGA resolutions 3274 (XXIX), 10 Dec. 1974 and 31/36, 30 Nov. 1976. The High Commissioner's Office was requested actively to promote greater number of accessions to the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness, and to provide relevant technical and advisory services on the preparation and implementation of nationality legislation to interested States. Further, States were urged to adopt nationality legislation with a view to reducing statelessness, consistent with fundamental principles of international law, particularly by preventing arbitrary deprivation of nationality, and by eliminating provisions which permit renunciation of nationality without the prior possession or the acquisition of another nationality. See also Executive Committee Conclusion 78 (XLVI-1995), requesting UNHCR actively to 'promote the prevention and reduction of statelessness through the dissemination of information, and the training of staff and government officials; and to enhance co-operation with other interested organizations'.

CEDW79 and CRC89. The nationality laws of Bhutan need not be an insurmountable hurdle, if the above interpretations are accepted. Under the category for Bhutanese nationals, two sub-categories could include those who did not sign the voluntary migration forms and those who did. For the former sub-category, it would be relevant to consider whether they acquired Bhutanese nationality under the 1958 nationality law, given the deadline of 21 March 1977. Secondly, those without documentary proof of being in Bhutan in 1958 could present other proof, documentary or otherwise, of Bhutanese nationality under the 1958 or 1977 Acts, provided the 1985 Citizenship Act is retroactive in the narrow sense proposed. For those who signed the voluntary migration forms, procedures for verifying the context and circumstances leading to signing need to be established in view of the provisions of the 1977 Act. Those who signed when the security situation in southern Bhutan was fragile would appear to have a good claim to retain their Bhutanese nationality. Those who are able to prove imprisonment or torture in connection with signing the forms could call on the Bhutanese authorities to rebut their evidence of coercion. Unless a general amnesty is granted, refugee leaders and others deemed to be anti-nationals disloyal to King, Country and People who are not at the same time naturalised citizens, could face charges of treason if ever they be allowed to return to Bhutan. Naturalised citizens deprived of their Bhutanese nationality would appear to have no channel to seek redress under the law of Bhutan should they wish to question the legality of such deprivation. Women and children stripped of their Bhutanese nationality or declared stateless under these procedures could assert their rights under the CEDW79 and CRC89 vis-à-vis Bhutan, Nepal or India. Where the refugees are unable to provide satisfactory proof of their nationality or former habitual residence in Bhutan, they would remain the joint responsibility of Bhutan, Nepal and India. In view of the numbers who signed voluntary migration forms, others who possess documentary proof of Bhutanese nationality and those families of mixed nationalities, the residual numbers are unlikely to be too numerous for India and Nepal to welcome to their territory.

The search is not for a perfect resolution. The quest is for a resolution which embodies the spirit of regional responsibility and resonates the refugees' yearning for justice, equity and a place to call home.