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# REPORT ON CITIZENSHIP LAW: MYANMAR

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# Report on Citizenship Law

## Myanmar

*José María Arraiza and Olivier Vonk\**

### 1. Introduction

Myanmar is an immensely diverse country from an ethnic perspective. Since its independence it has been immersed in an intense process of nation-building which heavily links ethnic identity and citizenship issues. Indeed, ethnic civil strife and tensions between the Bamar-dominated central plains and its hilly ethnic borderlands have defined much of its recent history. The country's inhabitants have suffered the longest civil war to date since its independence, involving dozens of ethnic armed groups against the army and the central government. An ongoing peace process, led by the country's *de facto* president, the Nobel Prize winner Aung San Suu Kyi, is aiming at putting an end to such conflicts. In addition, being home to the largest stateless population worldwide, conflicts related to citizenship continue to destabilise further its political situation. Thus, the democratisation of Myanmar will necessarily require addressing its citizenship crisis. Resolving Myanmar's decades-old statelessness problem will require significant changes in the way its law and policy makers – not the least their fellow citizens– understand its root causes.<sup>1</sup>

The Myanmar framework on nationality constitutes a unique, exclusive, ethnic citizenship regime.<sup>2</sup> Acquisition of nationality follows almost exclusively ethnic and *ius sanguinis*, descent-based criteria with barely any possibility for naturalisation of foreigners (which in other jurisdictions is often present through marriage, adoption, or habitual residence). Indeed, the legal meaning of “naturalised citizen” in Myanmar in practice relates primarily to descent-based criteria (from the country's *indigene*) and not to naturalisation

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The country currently known as Myanmar was called Burma until 1989, when the State Law and Order Restoration Council (SLORC) decided on a name change as part of an identitarian move to break with the country's colonial past.

<sup>1</sup> 938,000 persons according to UNHCR, “Global Trends 2015”, 58. These numbers do not reflect the mass displacement across the border to Bangladesh which began after the Myanmar security forces' reaction to an armed attack by insurgents against 30 army and security posts on 25 August 2017. The number of refugees was above 429,000 persons as of late September 2017.

<sup>2</sup> Maatsch; Lian Kwen Fee, 4.

procedures. In essence, one of the main characteristics of a “naturalised” or an “associate” citizen in Myanmar is that he or she does not belong to one of the eight legally recognised ethnic groups (Bamar, Chin, Karen, Kayah, Kayin, Mon, Rakhine, Shan, later sub-divided into 135 groups through an administrative instruction), considered to be genuine citizens.<sup>3</sup> The official policies on legal identity in Myanmar reflect a “thick” nationalist, post-colonial attempt at nation-building based on a highly exclusive understanding of ethnic belonging.<sup>4</sup> It establishes group differences through legal and bureaucratic means, and these in turn constitute an affirmation of what cultural differentiations between groups are supposed to be in reality. Such a prescriptive enterprise may be distant from facts, but the distance between myths and reality gets lost once a legal understanding of groups becomes widely accepted.<sup>5</sup>

The problem arises when such an approach leads to restrictions on the rights of important segments of its permanent population—who would normally be considered full citizens—in the name of protecting a set of exclusive, fixed and homogeneous ethnic identities (the eight recognised ethnic groups which compose the Myanmar citizenry according to the law). These are understood in essentialist terms, which often does not correspond to social realities, particularly in border areas. Essentialists in this sense generally maintain that the force of ethnic or “ancient” ties, as primordial or essential categories, is stronger than the civic ties created by modern states, as opposed to a constructivist approach which considers ethnicities a historically contingent social construction.<sup>6</sup> To compound the problem further, the Myanmar legal framework lacks adequate safeguards against statelessness, in contradiction with Myanmar’s obligations under international law.<sup>7</sup>

Since the 1970s, citizenship policies have been the source of considerable social and political conflict in the country, particularly but not exclusively in Rakhine State, on the border with Bangladesh. The key shift in policy leading to such problems took place under the regime of General Ne Win (1962-1988), which, via an “otherisation exercise”, aimed to “scrutinise” the population in order to determine who were “full citizens” and who were simply “guests” (e.g., descendants of unrecognised minorities and migrants). This has been since undertaken through a law-making process reflected most recently by the 1982 Citizenship Law and its 1983 procedures. Under this framework, only full citizens have the possibility of enjoying the protection of a complete set of rights, while the “others” – naturalised and associated citizens – are in practice banned from higher positions in public office, full access to the liberal professions, and certain areas of higher education.<sup>8</sup> A large number of permanent residents do not even gain access to these lesser forms of citizenship and remain undocumented or stateless.

The stated aim of Ne Win’s 1982 Citizenship Law was to create a two-tiered system, which excluded from full citizenship persons whose ancestors were deemed to have settled in

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<sup>3</sup> Regular naturalisation in Myanmar is only possible from a theoretical perspective for persons who have entered and resided in its territory before 4 January 1948 (Article 42 of the 1982 Citizenship Law).

<sup>4</sup> Christian Joppke makes a distinction between “thick and cultural” and “thin and procedural” qualities of citizenship. Joppke, 18.

<sup>5</sup> Arraiza (2012), 80. In Myanmar, the word for ethnic group, “taiyintha myo su”, is widely perceived as meaning “official ethnic groups” (the 135 recognised ethnic groups exclusively).

<sup>6</sup> Varshney, 280–282.

<sup>7</sup> Amongst other treaties, Myanmar is a signatory to the 1989 UN Convention on the Rights of the Child (CRC), whereby children’s identity, including nationality, should be protected and safeguards against statelessness should be in place (Articles 7 and 8, CRC).

<sup>8</sup> Ho and Chua, 440.

Myanmar after the First Anglo-Burmese War (1824–26).<sup>9</sup> The idea behind this was the notion that only pre-colonial communities were authentic Burmese citizens (and that certain communities such as the Muslims of Rakhine were newcomers and hence not genuine citizens). The objective aimed at creating an exclusive notion of Burmese national identity based on a pre-colonial primarily Buddhist population, while also providing for a temporary safeguard given that only third-generation descendants of naturalised and associated citizens were, pursuant to certain criteria, in principle meant to become full citizens (although in practice this is not always the case).<sup>10</sup> Hence the 1982 Law contains a rigid entrenchment of identities, adopting an essentialist and dichotomist understanding of Burmese society which pursues nation-building through the exclusion of the ethnic “other” (particularly persons of Indian descent—both Muslim, Hindu, Sikh and other religions) who are considered an inheritance of Burma’s colonial past as a province of British India.<sup>11</sup> Such an approach based on a nation-state scheme has prevented the development of a more inclusive civic national identity that would incorporate the existing ethnic and religious diversity of Myanmar.<sup>12</sup>

It is worth noting that according to the 2014 Union of Myanmar census, up to 11,000,207 persons did not have a valid identification document (27.3 per cent of persons over the age of 10).<sup>13</sup> The discrepancy between the current legal framework and society’s needs in modern Myanmar is apparent when looking at such data. This situation results in persons being vulnerable to discrimination and in the worst cases either stateless or at the risk of statelessness. In fact, this is the reality of a considerable number of displaced persons in Myanmar and its refugees in other countries.

## 2. Historical background

The territory of today’s Myanmar, formerly known as Burma, was, according to Burmese historiography, ruled by successive dynasties of monarchs. Some of the immediate pre-colonial Burmese sources of law included the *Dhammathat*, a collection of Pali and vernacular written legal treaties whose origins dated back to the ancient Laws of Manu, and the *Yasathat*, a set of precedents, religious teachings and rules established by various kings.<sup>14</sup> The British fully colonised the Burmese territories in 1885. During British rule, the laws enacted for British India were also applicable in what today constitutes Myanmar. At a later stage, in 1935, the Government of Burma Act was passed and the territory of Burma became a separate administrative unit within the British Empire.

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<sup>9</sup> While presenting the law on 8 October 1982 General Ne Win stated that, “[w]e will therefore not give them full citizenship and full rights. Nevertheless, we will extend those rights to a certain extent. We will give them the right to earn according to their work and live a decent life. No more”.

<sup>10</sup> Article 7(d-e), 1982 Citizenship Law.

<sup>11</sup> However, the 1982 Law does not establish any formal interrelations between religious affiliation and citizenship. Moreover, Article 362 of the 2008 Constitution recognises Islam, Hinduism, Buddhism, Christianity and Animism as existing religions in Myanmar.

<sup>12</sup> Thant Myint-U, 245–254.

<sup>13</sup> 2014 Myanmar Housing and Population Census, The Union Report, 207.

<sup>14</sup> Hall, 138; Maung Maung.

After Burma became independent from Britain in 1948, the legislative, executive and judicial powers were vested in the people in accordance with the 1947 Constitution of the Union of Burma.

In 1962, the Revolutionary Council, led by military officers, took over the legislative as well as executive authority. During the Revolutionary Council regime, several laws that promoted socialism were passed. In 1974, a new constitution written by the Burma Socialist Programme Party was adopted and the legislative power of the state was solely vested in the House of Representatives (*Pyithu Hluttaw*), which delegated executive and judicial powers of the State to central and local organs of state power.

After the pro-democracy movement in 1988 which brought to an end the rule of General Ne Win, a “State Law and Order Restoration Council” (SLORC) led by military officers seized power. In 1997, it changed the name of the party to the “State Peace and Development Council” (SPDC). During this regime, a new Constitution was drafted and adopted in 2008. The general election, held in 2010 according to the 2008 Constitution of the Republic of the Union of Myanmar, shifted partially the legislative authority to a civilian led government. Of note, the 2008 Constitution restricts the position of Head of State to persons whose relatives do not owe allegiance to any foreign power, thereby excluding the Nobel Prize winner Aung San Suu Kyi from such position.<sup>15</sup> 56 out of 224 seats of the National Assembly and 110 seats out of 440 in the People’s Assembly are reserved to the Military (*Tatmadaw*), which also retains the ministries of Defence, Home Affairs (including Immigration and the General Administration Department) and Border Affairs.<sup>16</sup>

### **3. Nationality Legislation in Historical Perspective**

#### **3.1. Pre-colonial Period**

Burmese historiography often refers to the dynasties of monarchs existing prior to British colonial rule as the Bagan Era, the First Burma, the Second Burma, and the third Burma, which were home to different ethnic groups (including some Muslim communities) who lived in its territory.<sup>17</sup>

#### **3.2. The British Colonial Era (1826 – 1947)**

The First Anglo-Burmese war (1824-26) ended with the signing of the Treaty of Yandabo on 24 February 1826, when the monarch agreed to cede the Arakan (Rakhine) and Tenasserim (Thanintaryi) provinces to the British, thus marking the beginning of British rule in Myanmar. After the Second Anglo-Burmese War of 1852, the British conquered the cities of Pegu (Bago) and Rangoon (Yangon), resulting in a territory under British administration

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<sup>15</sup> Aung San Suu Kyi was married to a British national, the late Michael Aris, and her children hold British citizenship.

<sup>16</sup> Article 59(f) and 201, 2008 Constitution.

<sup>17</sup> Myint Thein, as an example, lists more than eleven Muslim ethnic groups existing in Myanmar. See Thein, 4.

called ‘Lower Burma’. The entire country would ultimately come to fall under British rule after the third Anglo-Burmese war of 1885.

The first laws relating to foreigners and citizenship were only enacted in 1864, when the British government passed the Foreigners Act and defined the term “foreigner” for the first time in the Burmese context (the term for “citizen” was not defined). The purpose of the law was “to prevent the subjects of Foreign States from residing or sojourning in the Union of Burma, or from passing through or travelling therein, without the consent of the President of the Union”.<sup>18</sup> People were free to travel in and out of Myanmar and they did not need passports to enter Myanmar until 1920, when the British enacted a Passport Act.<sup>19</sup> The Passport Act is still in force.

In 1940, the British enacted the Registration of Foreigners Act, which came into force on 23 March 1940. It required foreigners to report and register themselves with the relevant authority. After registration, foreigners were issued a Foreigner Registration Certificate (FRC). These would be later used in some cases to assign a foreign status to members of unrecognised minorities. The term for “foreigner” was defined referring to the previous definition from the Foreigners Act, 1864.<sup>20</sup> Again, the term for “citizen” was not included in the Act.

### 3.3. The Parliament Democracy Era (1948 – 1962)

The 1947 Constitution of the Union of Burma recognised the principles of *ius sanguinis* and *ius soli*. According to Section 11, the following persons were citizens of Burma:

- I. “Every person, both of whose parents belong to any of the indigenous races of Myanmar;
- II. every person born in any of the territories included within the Union, at least one of whose grandparents belong or belonged to any of the indigenous races of Myanmar;
- III. every person born in any of the territories included within the Union, of parents both of whom are, or if they had been alive at the commencement of this Constitution would have been, citizens of the Union;
- IV. every person who was born in any of the territories which at the time of his birth was included within His Britannic Majesty’s dominions and who has resided in any of the territories included within the Union for a period of not less than eight years in the ten years immediately preceding the 1st January 1942 and who intends to reside permanently therein and who signifies his election of citizenship of the Union in the manner and within the time prescribed by law”.

Automatic acquisition of citizenship under the subsequent 1948 Union Citizenship Act, which entered into force on 4 January 1948, included: a) permanent residents whose grandparents had resided in Burma permanently, b) children born in the Union after 4

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<sup>18</sup> The Foreigners Act, India Act III, 1864 (12 February 1864).

<sup>19</sup> The Myanmar Passport Act, India Act XXXIV, 1920 (9 September 1920).

<sup>20</sup> The Registration of Foreigners Act, Burma Act VII, 1940 (23 March 1940).

January 1948 one of whose parents was a citizen and c) children born outside Burma and one of the parents was a citizen serving for the state authorities of the Union.<sup>21</sup> Citizens could apply for a “Union Certificate of Citizenship” (UCC) as proof of citizenship of the Union, but this was not mandatory as later confirmed by national jurisprudence.<sup>22</sup> Indeed, only foreigners were required to register under the Registration Foreigners Act, 1940.

The 1948 Union Citizenship Act already attempted to define the new country’s *indigene*. It further defined the term “indigenous races”. According to Article 3 of the Union Citizenship Act these were “Arakanese, Burmese, Chin, Kachin, Karen, Kayah, Mon or Shan race and such racial group as has settled in any of the territories included within the Union as their permanent home from a period anterior to 1823 A.D. (1185 B.E.)” – that is, the First Anglo-Burmese War. However, this section mentioned only the major ethnic groups and did not elaborate on the term “such ethnic group”, which was not defined in the law.

Naturalisation requirements included: majority of age, five years of residence in the Union, good character and knowledge of an indigenous language, the intention to reside in the Union, renounce all foreign citizenships, and a declaration of loyalty.<sup>23</sup> Persons who had served in the Union armed forces for three years could also apply for naturalisation.<sup>24</sup> Moreover, the Union Citizenship (Election) Act of 1948 provided for non-automatic *ius soli* for persons born within His Britannic Majesty’s dominions and residing in the territory of the Union for eight years in the decade preceding January 1948.<sup>25</sup>

According to Nyi Nyi Kyaw, despite the existence of those two acts, the Anti-Fascist People’s Freedom League (AFPFL) government only issued a total of 8,496 UCCs between 4 January 1948 and 30 April 1957, and the Restoration Council government issued 12,937 certificates between 1 June 1957 and 6 February 1959. Therefore, in the 21 years following independence, only 21,433 UCCs were issued. Hence, the immense majority of Burmese in the 1950s did not have a citizenship certificate issued under the Union Citizenship Act or the Union Citizenship (Election) Act.<sup>26</sup>

In 1949, for the first time the state required the citizens to register through the Residents of Myanmar Registration Act. After registration, citizens were issued with a National Registration Card (NRC). Males were issued with green cards and females with pink cards. By the end of 1960, the government claimed to have registered most of the population and have issued them with 18 million NRCs. While these NRCs were not strictly speaking citizenship certificates, they were so *de facto*, as foreigners were registered through the Registration of Foreigners Act.<sup>27</sup>

In addition to the NRCs, there were also Temporary Registration Cards (TRCs), widely known as the “White Card”. TRCs were issued only temporarily and with a fixed deadline in cases of loss, damages or pending applications in order to provide with a document while the new one was processed. The TRCs would later be used to document unrecognised minorities during the 1990s.

<sup>21</sup> Article 5(a-c), 1948 Union Citizenship Act (Act LXVI, 8 November 1948).

<sup>22</sup> In 1965, the Supreme Court found in *Peer Mohamed v. Union of Burma* that citizens who automatically acquired citizenship under the 1948 Citizenship Law, section 4(2), were not bound to produce a UCC issued as per Article 6(2) of the Law in order to prove their nationality. Supreme Court of the Union of Burma, *Peer Mohamed v. Union of Burma*, 1965 B. L. R. (C.C.) 51.

<sup>23</sup> Article 7(1), Union Citizenship Act (No. LXVI of 1948).

<sup>24</sup> Article 13.

<sup>25</sup> Article 3, Union Citizenship (Election) Act (No. XXVI of 1948).

<sup>26</sup> Nyi Nyi Kyaw, 276.

<sup>27</sup> *Ibid.*

### 3.4. The Revolutionary Council era (1962 – 1974)

The Revolutionary Council, formed and led by General Ne Win and other senior military officers, took over control of the country's institutions in 1962. From then until 1974, when the new Constitution came into force, the 1948 Union Citizenship Act and the 1948 Union Citizenship (Election) Act regulated the acquisition and loss of citizenship.<sup>28</sup>

### 3.5. The Myanmar Socialist Programme Party Era (1974 – 1988)

The 1974 Constitution of the Socialist Republic of the Union of Burma gave a new definition of “citizen”. According to its Article 145, “All persons born of parents both of whom are nationals of the Socialist Republic of the Union of Burma are citizens of the Union. Persons who are vested with citizenship according to existing laws on the date this Constitution comes into force are also citizens”. The 1948 citizenship legal framework continued to be in force, which is important as the subsequent 1982 Citizenship Law recognised the citizenship of all of those who were citizens at the time it entered into force.<sup>29</sup>

The persecution of unrecognised minorities increased as the regime characterised them as a foreign threat to the nation. This happened through a series of increasingly repressive legal policies. Of note, up to 1962, self-identified “Rohingya” Muslims were to a certain extent recognised institutionally, with a “Rohingya Students Union” in Rangoon University and several MPs identifying as such (some of them remaining even after the military coup). This period seems to witness the inception of the official argument that most Muslims in Rakhine were primarily a monolithic group of Bengali illegal migrants (rather than a more complex mosaic of ethnic groups with different historical origins settled over different periods). Paradoxically, such narrative resembles the modern portrayals of the Muslims in Rakhine as a single, homogeneous and fixed group identity (*i.e.*, the “Rohingya”).

The making of the nations' physical boundaries, the borders, required identifying who did or did not belong within them and acting accordingly.<sup>30</sup> Hence, the government created “Operation *Naga Min* (Dragon King)”, a census conducted by security authorities *inter alia* to identify illegal migrants in border regions such as Kachin, Shan and Rakhine and other entry points (e.g., ports in Mon and Rangoon). In 1978, Naga Min led to mass forced displacement of thousands of Muslims from Rakhine across the border to the recently independent Bangladesh.<sup>31</sup>

In this conflict-ridden context, the military regime of General Ne Win enacted the 1982 Citizenship Law. The law sought to further define the country's *indigene* by addressing what the regime perceived as a historical wrong: the incoming of migrants during the colonial area and to relegate anyone not belonging to the indigenous population to a lower citizenship status. The law signified a further shift towards an exclusively ethnic conception of citizenship when compared to the 1947 Constitution of Burma, the 1948 citizenship legal

<sup>28</sup> The Union Citizenship Act, 1948 (Act No. LXVI of 1948), enacted on 8 November 1948 and the Union Citizenship (Election) Act, 1948 (Act No. XXVI of 1948), enacted on 8 May 1948.

<sup>29</sup> Article 6, 1982 Citizenship Law.

<sup>30</sup> Sahlins.

<sup>31</sup> Nyi Nyi Kyaw describes how despite the government's claim about large numbers of illegal migrants, in total only Naga Min allegedly found less than 2,000 individuals country wide. A state newspaper stated that 230 illegal Bengalis from Chittagong were found in Maungdaw Township, which is most populated in terms of Muslim population (Working People's Daily of 24 May 1978). See Nyi Nyi Kyaw, 274-5.

framework, which had defined belonging to the indigenous races as criteria for accessing citizenship, but had in addition provided for naturalisation through residence as well as *ius soli*.

The 1982 Citizenship Law created three categories of citizens, whereby only full citizens enjoyed full citizenship rights and the other two types were disenfranchised. The categories are as follows:

a) Full citizens. These consist primarily of the members of eight ethnic groups presumed to have settled in Myanmar's territory before 1823 (the First Anglo-Burmese War).<sup>32</sup> These eight ethnic groups were later categorised into 135 sub-types through an administrative instruction.<sup>33</sup> Full citizenship is also accessible for a) persons who were citizens on the date the law entered into force, b) persons both of whose parents hold a category of citizenship (including at least one parent full citizen), c) third generation offspring of associate and/or naturalised citizens.<sup>34</sup>

b) Associate citizens: associate citizens are those who applied for citizenship under the 1948 Union Citizenship law and before the enactment of the 1982 Citizenship Law, but do not belong to the abovementioned 135 groups.

c) Naturalised citizens: these are persons who do not belong to the recognised ethnic groups and acquired citizenship after 1982.<sup>35</sup> General Ne Win explained the difference as follows:

“Who are the *eh-naing-ngan-tha* (associate citizens)? They are those who arrived in Burma before Independence and satisfy all conditions laid down in those two laws and who already applied for citizenship. They are *eh-naing-ngan-tha* (associate citizens). What is the difference between *eh-naing-ngan-tha* (associate citizens) and *enaingngan-tha-pyu-khwint-ya-thu* (naturalized citizens)? Both came here in similar circumstances –before Independence, January 1948. The difference lies in whether they applied for citizenship or not. Those who have not yet applied for citizenship are, let us say, a bigger problem”.<sup>36</sup>

Associate and Naturalised citizens –often still referred to as being of “mixed blood”– have lesser rights concerning political participation, education, health, freedom of movement and property.<sup>37</sup> What started as an exclusive nation-building and “otherisation exercise” by the military became state policy and defined the legislation and policy up to the present. Of note, the rule of law and the access to claim and exercise one's rights is hampered by a degree of arbitrariness and lack of accountability embedded in the 1982 Citizenship law. Article 71 states that “[N]o reasons need to be given by organizations invested with authority by this law in matters carried out under this law”.

<sup>32</sup> Article 3, 1982 Citizenship Law. In addition, Article 6 of the law foresees granting full citizenship to persons who were already citizens at the time of enactment. However, such provision has not been applied consistently.

<sup>33</sup> A list of the 135 ethnic groups, a subdivision of the eight groups mentioned in the 1982 Citizenship Law, has been published in official books. It is often on display at the Township Offices of Immigration and Populations.

<sup>34</sup> Articles 5-7, 1982 Citizenship Law.

<sup>35</sup> Articles 23 and 42, 1982 Citizenship Law. The 1982 Law and its 1983 procedures provide for some other exceptions. Persons born of parents both of whom have a type of citizenship (including full citizenship) can also become full citizens. Third generation associated and naturalised citizens can also acquire full citizenship.

<sup>36</sup> Speech by General Ne Win at the meeting held in the Central Meeting Hall, President House, Ahlone Road, 8 October 1982, provided in *The Working People's Daily* on 9 October 1982.

<sup>37</sup> Articles 53(c) and 30(c), 1982 Citizenship Law.

### 3.6. State Law and Order Restoration Council (or) State Peace and Development Council Era (1988 – 2001)

After the 1988 uprising in Yangon and the political instability which ensued, the State Law and Order Restoration Council (SLORC) formed by military officers seized all the powers of the country and reformed the judiciary system by enacting the Judiciary Law and Attorney General Law.<sup>38</sup> The SLORC decided in 1989 that their country, up until then internationally referred to as Burma, should be referred to in English as Myanmar in an identitarian move to break further from the colonial past. Myanmar is taken from the literary form of the language, while Burma is derived from the spoken form. In 1997, the SLORC became the State Peace and Development Council (SPDC).

In 1989, the former NRCs issued under the Residents of Burma Registration Act, 1949 were replaced by three different types of “Citizenship Scrutiny Cards”. The new cards were color-coded to facilitate the categorisation of the citizenship status of the bearer – pink cards for full citizens, blue cards for associate citizens and green cards for naturalised citizens (there were also other colours, such as brown cards for monks).<sup>39</sup> It became mandatory for all citizens to be registered in the family “Household List”.<sup>40</sup>

As part of the effort to consolidate control of the borderlands, the new regime’s policy included scaling up the militarisation of border and ethnic minority areas. In Rakhine state, this led to a new wave of forcible displacement with over 250,000 persons crossing into Bangladesh as of March 1991.<sup>41</sup> Many of them later returned thanks to a bilateral agreement with Bangladesh.

Later on, in 1995, TRCs were given to large numbers of Muslims in Rakhine as well as persons of Chinese and Indian descent across the country. This was a clear example of the flexibility and political expediency used in citizenship matters and the tendency to find temporary, legally uncertain solutions to the massive problem of lack of documentation. While the legal and policy grounds for this move and the status of TRC holders remained unclear, the TRCs were treated *de facto* as an official ID Card which allowed its holders to vote in subsequent elections.<sup>42</sup>

Then in February 2015, still under the Union State and Democracy Party (USDP), the TRCs were subsequently withdrawn along with the voting rights that went with it, thus disenfranchising large portions of the population. TRC holders were only given a receipt –not an ID card– in exchange.<sup>43</sup> In December 2015, under the new National League for Democracy government, new “Identity Cards for National Verification” (ICNVs) were introduced as an interim card in the National Verification process with the aim “to scrutinize whether the applicant meets the eligibility to become a citizen of Myanmar and to identify them as residents of Myanmar during the citizenship verification process” (not including voting rights). A large number of such documents were issued in the war-torn Kokang self-

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<sup>38</sup> U Kyaw Myint, 19.

<sup>39</sup> Myint Thien, 245.

<sup>40</sup> The Family Household List, also known as “Form-66/6”, is issued under the Residents of Myanmar Registration Act, 1949. However, details on the implementation of the process are not publicly known. It is assumed, nevertheless, that there was internal guidance on the procedures to be followed.

<sup>41</sup> Nyi Nyi Kyaw, 276.

<sup>42</sup> Nyi Nyi Kyaw, 279.

<sup>43</sup> Lall et. al, 18; International Crisis Group, 14. Presidential Notification 15/2015 Announcing Temporary Registration Cards Expiry on 31 March 2015.

administered zone of the northern Shan borderland.<sup>44</sup> The citizenship status of ICNV holders is to date uncertain.

#### 4. Acquisition and loss of citizenship<sup>45</sup>

While all citizenship laws are intrinsically Janus-faced tools of both exclusion and inclusion, a reasonably inclusive framework based on citizenship as equal membership is necessary to ensure democratic governance. As Lord Acton famously stated, “[T]he most certain test by which we judge whether a country is really free is the amount of security enjoyed by minorities”. Thus, in countries where statelessness is significantly present, like Myanmar, reforms towards more inclusive legal frameworks concerning nationality are an essential component of advocacy efforts for the prevention and reduction of statelessness.

Citizenship is a clear legal bond between an individual and a state, and is thus important in fostering a sense of belonging to a political community. However, citizenship is not only a legal status, it is also a bundle of rights and duties as well as a civic, law and customs-abiding attitude. Finally, it represents also a collective identity. And such identity may be defined in more ethnicised, *blood*-based links or more civic and voluntarist ones. A distinction is often used between civic conceptions of citizenship and ethnic ones, where the latter invoke the image of a tightly woven organic community –often perennial– with a unanimously shared conception of the good.<sup>46</sup> Conceptions of nationhood have then a role in shaping citizenship laws.<sup>47</sup>

In recently created or post-colonial states (“nationalizing states” in Rogers Brubaker’s terms) polities are often in a deep search for their own national identity.<sup>48</sup> If, as proposed by Ernest Gellner, nationalism is the political principle that seeks to make the political and the national congruent, the will of a nationalising state’s citizenship law aims to define the membership of the “national” or the “indigenous” in the ethnic sense of the term, excluding any element which is not understood as part of the political community.<sup>49</sup> The legislator aims to define, in other terms, who is part of the *polis* and who is not, where only those considered “indigenous” have a right to belong and be full citizens. Such a definition of “us” and “them” is the cornerstone of ethnic identity politics.

From such point of view, populists and far right groups often frame problems of citizenship as one of demography (*i.e.*, the high birth rate of a particular ethnic group), defence of the borders or danger of demographic invasion leading to alien rule, rather than the problems of individuals who need to access basic rights. In post-colonial countries in Southeast Asia, such as Thailand, Malaysia and Indonesia, immigrants were incorporated into certain areas of society but excluded from others (social welfare, political participation). The concept of “indigency” was hence constructed to distinguish the local inhabitants from

<sup>44</sup> Republic of the Union of Myanmar, State Counsellor’s Notification, 27 December 2016, para. 7.

<sup>45</sup> This section draws heavily from José-María Arraiza, “Re-imagining Myanmar citizenship in times of transition”, Statelessness Working Paper Series no. 2017/01, [http://www.institutesi.org/WP2017\\_01.pdf](http://www.institutesi.org/WP2017_01.pdf).

<sup>46</sup> Rosenfeld, 4-5.

<sup>47</sup> Rogers Brubaker (1992).

<sup>48</sup> Rogers Brubaker (1996).

<sup>49</sup> Gellner.

“others” who are considered a threat. In this sense, citizenship regimes are used primarily as an instrument of exclusion.<sup>50</sup> Such exclusion has taken place through legal means (e.g., refusal of naturalisation and differential rights of citizens and secondary citizens) or through discriminatory practices.<sup>51</sup> In the worst cases this may lead to statelessness, meaning the status of those persons who are not considered as a national by any state under the operation of its law.<sup>52</sup> Needless to say, lacking citizenship leads to a myriad of other human rights violations and seriously hampers the life opportunities of anyone.

#### 4.1. General Ne Win’s citizenship law

It was seen in Section 1 above that between 1947-1982, foreigners in Burma could apply for naturalisation under certain conditions. Moreover, *ius soli* provisions benefitted persons whose four grandparents were permanent residents and whose parents and themselves were born in (the then called) Burma. In contrast, the 1982 Citizenship Law lacks almost entirely *ius soli* provisions. The only exception is for those who entered and resided in the State prior to Myanmar’s independence on 4 January 1948. The principle of *ius sanguinis* is since 1982 the overarching principle that governs citizenship in Myanmar.

Ne Win’s law removed previous inclusive provisions and established a fully ethnicised regime which up until today discriminates against citizens not belonging to the recognised ethnic groups.<sup>53</sup> As mentioned earlier, the 1982 Law established that, with a number of exceptions, only persons belonging to the eight national groups previously mentioned in the 1948 legal framework and the 1974 Constitution are full citizens.<sup>54</sup>

The ethnified character of the 1982 Law was well reflected in the speech General Ne Win delivered during its introduction.<sup>55</sup> Indeed, Ne Win’s narrative follows an essentialist orientation, where the authenticity of the “indigenous races” is stressed against the “others”, who are in essence outsiders to be excluded: a social inheritance of the colonial past. In this sense, the law aims to redress colonial immigration, considered to be a historical wrong due to the influx of “others”.

In the absence of adequate naturalisation procedures, numerous members of unrecognised communities were relegated to either holding TRCs (later its receipts, or

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<sup>50</sup> Lian Kwen Fee, 4.

<sup>51</sup> *Ibid.*, 5.

<sup>52</sup> Article 1 of the 1954 United Nations Convention Relating to the Status of Stateless Persons.

<sup>53</sup> In the case of *Girls Yean and Bosco v. the Dominican Republic* of 8 September 2005 the Inter-American Court of Human Rights indicated that citizenship legislation should not use ethnic criteria in a discriminatory manner. See De Groot and Vonk, 681.

<sup>54</sup> Article 3, 1982 Citizenship Law. The exceptions are described in Articles 5, 6 and 7 of the law and can be summarised as follows: full citizens are also those who were citizens on the date the 1982 Law entered into force; those persons of whom at least one of the parents is a citizen, and the grandchildren of naturalised and associate citizens whose parents are naturalised or associate citizens as well.

<sup>55</sup> In reference to what General New Win called “mixed blood” individuals he stated: “[r]acially, only pure blooded nationals will be called citizens” (...) “[w]e will therefore not give them full citizenship and full rights. Nevertheless, we will extend those rights to a certain extent. We will give them the right to earn according to their work and live a decent life. No more”.

ICNVs) or worse, “foreigner national” status, despite their longstanding presence and up to now hold “Foreigner Registration Cards” (FRCs) without opportunities to naturalise.<sup>56</sup>

It is worth noting, as mentioned earlier, that the 1982 Law leaves open other avenues for citizenship acquisition. Persons who were citizens at the time the law was enacted are supposed to retain their full citizenship.<sup>57</sup> Children with one parent full citizen and the other associate or naturalised citizen are also entitled to citizenship.<sup>58</sup> Moreover, third generation naturalised and associated citizens are also supposed to attain full citizenship.<sup>59</sup> The thinking behind such provisions of the 1982 Citizenship Law was that after three generations the “others” would integrate in the Myanmar society and thus become full citizens. However, the application has been more restrictive and access to full citizenship is often denied on unclear grounds despite applicants fulfilling the basic legal requirements.

In all, the 1982 Law imagines a Myanmar where only members of certain essentialised groups have a right to be part of the *polis*. For some reason these oddly defined 135 ethnic groups have been widely accepted as “categories of analysis”. The term “ethnic group” is understood to mean exclusively “officially recognised ethnic group”.<sup>60</sup> Hence, all of the “others” are often despised as “mixed blood”, and automatically presumed to come from elsewhere. The definition of which group is or is not recognised is needless to say primarily based on political expediency: for example, the ethnic Chinese Mon Wong from Shan State were partially recognised by the outgoing government in March 2016 allegedly in return for their military support against insurgents.<sup>61</sup> In the most extreme cases, lack of legal recognition of groups and the will to make the political and national boundaries coincide ultimately exposes communities to forced displacement, as reflected in the 1978, 1991–2 and 2016–17 forced mass population movements across the border with Bangladesh.

The distinction between full citizens, associate citizens and naturalised citizens also applies to the grounds for loss of citizenship in Myanmar. Thus, associate or naturalised citizens may lose citizenship under the 1982 Law if they have assisted the enemy in a war in which Myanmar was engaged;<sup>62</sup> have committed an act involving moral turpitude, such as adultery;<sup>63</sup> have endangered the sovereignty and security of Myanmar or have shown disloyalty in act or speech;<sup>64</sup> have acquired citizenship by fraud;<sup>65</sup> or the person is the minor child of associate or naturalised citizens who lose their citizenship.<sup>66</sup>

Additionally, Myanmar provides for the automatic loss of citizenship for any citizen who voluntarily acquires a foreign citizenship;<sup>67</sup> who requests a passport or similar certificate of another country;<sup>68</sup> and who permanently leaves Myanmar.<sup>69</sup> Finally, Myanmar allows for the voluntarily renunciation of citizenship.<sup>70</sup>

<sup>56</sup> Naturalisation of foreigners through residence is hardly possible, requiring residence before 1948. Article 7 and 45 of the 1982 Law open the possibility of naturalisation for foreigners who have entered and resided in Myanmar prior to 1948 and for foreign spouses of citizens in some cases.

<sup>57</sup> Article 6.

<sup>58</sup> Article 7(b)-(c).

<sup>59</sup> Article 7(d)-(f).

<sup>60</sup> Brubaker, 1996, 13–15.

<sup>61</sup> The Irrawaddy, “The Mon Wong face Backlash”, May 2016, <http://www.irrawaddy.com/news/burma/the-mong-wong-burmas-newest-citizens-face-backlash.html>.

<sup>62</sup> Articles 35(a)-(b) and 58(a)-(b).

<sup>63</sup> Articles 35(f) and 58(f).

<sup>64</sup> Articles 35(a)-(e) and 58(a)-(e).

<sup>65</sup> Articles 18, 36 and 59.

<sup>66</sup> Articles 29 and 51.

<sup>67</sup> Articles 13, 16-17, 34 and 57.

<sup>68</sup> Articles 16-17, 34 and 57.

## 5. Uneven application of the legal framework leading to statelessness

In order to implement the 1982 Law, Myanmar undertook, starting in 1989, a “national verification” process to determine the citizenship status of its inhabitants and provided them with a colour-coded ID-Card: pink means full citizenship, green naturalised citizenship and blue associated citizenship.

While the 1982 Law sought to create a temporary class of less empowered citizens, not necessarily stateless persons, an uneven application of the law has had statelessness as a consequence. Hence, arguably a rule of law abiding application of the law would have significantly reduced the number of persons with an unclear citizenship status. For example, often persons holding NRCs (*de facto* proof of citizenship) but not belonging to the recognised groups were not given access to full citizenship even though they were arguably entitled to it.<sup>71</sup> Moreover, the Muslim communities in Rakhine generally refused to participate in a process which denied their right to identify themselves as they wished and named them as “Bengali” (in practice, foreigners) in line with the official narrative that originated during Ne Win’s regime.<sup>72</sup> The Muslim community argued that they were already citizens and refused to participate in the “national verification process” unless their self-identifier was included in their ID-Cards. However, the policy in Rakhine State and elsewhere has been to deny such option while offering to provide temporary documentation with unclear legal status (first “white” TRCs and more recently interim ICNVs) pending a final decision on the “citizenship scrutiny”. A large portion of these communities has been forcibly displaced across the border with Bangladesh without such verification taking place.<sup>73</sup>

## 6. The need for reform and compliance with the rule of law

Leaving Rakhine State aside, any applicant for citizenship documentation in Myanmar must prove his or her belonging to the national groups through a highly bureaucratic process which often does not take place due to the difficulties in accessing governmental services in an underdeveloped rural scenario. Access to citizenship (and equal treatment and opportunities) for many other Myanmar inhabitants is a distant dream.

The need for reform is indeed obvious, however it is not taking place. Some of the reasons for lack of reforms include fear of the far right religious groups, which are highly effective in vetoing liberalising reforms (in Myanmar and elsewhere) and the position of the Army –which thanks to the 2008 Constitution holds the key to any substantial reform.<sup>74</sup>

<sup>69</sup> Articles 16-17, 34 and 57.

<sup>70</sup> Articles 14, 32 and 55.

<sup>71</sup> According to Article 6 of the 1982 Law, persons who were citizens at the time of the entry into force of the law continue to be citizens.

<sup>72</sup> The idea was also reflected in a 2014 Draft Rakhine State Action Plan. See Nyi Nyi Kyaw, 270.

<sup>73</sup> As of 22 September 2017, the UNHCR referred to at least 429,000 newly arrived Myanmar refugees in Bangladesh, escaping from Rakhine State during the months of August and September 2017.

<sup>74</sup> Maatsch, 24.

Solutions to the lack of documents of large portions of the population are, as described above, only temporary and therefore legally problematic (the TRCs, receipts and ICNVs issued to date). A more normal framework concerning access to citizenship would help guide Myanmar in its democratic transition. This would mean a set of transparent and accountable norms on citizenship acquisition and loss, based on the notion of equal rights and the idea that all those who have a genuine link with and a stake in the future of the state have a moral claim to be recognised as its citizens and to be represented in democratic self-government. The law and its procedures are become anachronistic in light of the rapid changes that Myanmar is undergoing. A paper-based system sits awkwardly in the digital age. Moreover, it does not reflect the democratic principles which should guide the Myanmar of 2017 but rather the military regime it was born under.

The debate on nationality in Myanmar is complicated further due to the mix of claims concerning the right to a nationality with claims for the recognition of a particular ethnic category. In this sense, the denial of the right to a nationality is linked to the denial of self-identification, becoming both a nationality rights and minority rights problem.<sup>75</sup> Claims for recognition by these marginalised groups have led to a straightforward rejection by their opponents. The debate is highly polarised and rigid where different sides seem to leave aside the longstanding principle that the existence of minorities is a matter of fact, not of law.<sup>76</sup>

Thirty-five years after the enactment of the 1982 Law, Myanmar is in the middle of multiple transitions, seeking peace and democracy and re-imagining itself. Within this process, there is some agreement that the legal framework will need to be reformed, at least eventually. In Rakhine State, the Advisory Commission led by Secretary General Kofi Annan called for a fairer and more accountable implementation of the “national verification” process in its interim report and for reforms in the area of citizenship. The recommendations on citizenship start by calling for Myanmar’s cultural diversity to be celebrated and aim at bringing it in line with international standards (including non-discrimination and Articles 7 and 8 of the Convention on the Rights of the Child) as well as including naturalisation provisions and safeguards against statelessness. Interestingly, the Commission urges the authorities to “re-examine the current linkage between citizenship and ethnicity”.<sup>77</sup>

Indeed, a more realistic legal framework would include more orthodox naturalisation provisions, following more liberal standards. Perhaps innovative ideas such as Rainer Bauböck’s stakeholder principle should guide new law and policy. The stakeholder principle basically states that those who have a stake in the polity’s future due to the circumstances of their life should have access to citizenship. In Bauböck’s terms: “[i]f we define citizenship as equal membership in a self-governing political community, then the most plausible answer to this question is that all those, and only those individuals, who have a stake in the future of a politically organized society have a moral claim to be recognized as its citizens and to be represented in democratic self-government. (...) Stakeholdership in this sense is not a matter of individual choice, but is determined by basic facts of an individual’s biography”.<sup>78</sup>

Promoting an inclusive citizenship policy, together with the recognition and respect for the rights of minorities, is both an integration and a conflict prevention measure. Inclusion would mean naturalisation and the granting of citizenship in order to fully include long-term

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<sup>75</sup> United Nations Human Rights Committee, General Comment 23 on Article 27 (the Rights of Minorities), para. 5.2.

<sup>76</sup> UN Human Rights Committee, General Comment 23 on Article 27 (the Rights of Minorities), para. 5.2. Permanent Court of International Justice, the Greco-Bulgarian Communities, Series B, No 17, 31 July 1930.

<sup>77</sup> Advisory Commission on Rakhine State, 31-32.

<sup>78</sup> Bauböck, 4.

residents and other stakeholders in the political life based on their links to the State. In this sense, a first step forward may simply be to support a more informed debate on the adequacy of the current framework to the ongoing reforms in Myanmar as well as increased public awareness on the dire consequences and hardships that stateless persons endure. The possibility of making the current laws and procedures and/or its application more accessible, rule of law-abiding, efficient and inclusive would not only prevent future unrest and further displacement but also improve human rights protection and integration throughout Myanmar.

## 7. Conclusion

Myanmar's troubled and uneven transition would benefit from a more democratic conceptualisation of its nationhood and a re-design of its citizenship laws, as well as a rule of law-abiding application of its current framework in the interim. There are various options for reforming the current legal framework on citizenship in Myanmar so that it provides sustainable and clear solutions for its large undocumented population. It is up to the national legislator to come up with an adequate, reasonable regime that respects international principles. The law could be improved by ensuring that citizenship is granted by descent based on reasonable, objective criteria. It could include safeguards for children to be granted Myanmar citizenship if otherwise they would become stateless (in line with Myanmar's binding obligations under the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities).<sup>79</sup> Criteria such as double *ius soli* (being born in the territory where one of the parents was also born) or birth in the territory prior to a particular date could be introduced to reduce the current stateless population. So could the re-introduction of naturalisation avenues such as the ones existing under the 1948 Union Citizenship Law.

Going back to the 1940s, historical records describe how on 16 June 1947, the Honourable Aung San, Deputy Chairman of the Governor's Executive Council, "amid cheers, moved in the Constituent Assembly [and stated] that the future Constitution of Burma should be that of an independent sovereign republic".<sup>80</sup> The seven-points resolution approved stated that Burma would "guarantee and secure to all the peoples of the Union (...) equality of status", that "the Constitution shall provide adequate *safeguards for minorities*" and that "this Historic Land of Burma shall attain its rightful and honoured place in the world, make its full and willing contribution to the advancement and welfare of mankind and affirm its devotion to the ideal of peace and friendly co-operation amongst nations *founded on international justice and morality*".<sup>81</sup> Following such principles, the making of a nation's citizenship rules, including the consolidation of its legal and physical boundaries should not lead to the exclusion of unrecognised minorities or render them vulnerable to forced displacement.

Seven decades later, perhaps, the law and policy makers may begin to consider whether or not it would make sense to redress the historical anomaly of General Ne Win's era citizenship

<sup>79</sup> Article 7, United Nations Convention on the Rights of the Child. Myanmar acceded on 15 July 1991. Article 18, United Nations Convention on the Rights of Persons with Disabilities, Myanmar acceded on 7 December 2011.

<sup>80</sup> Silverstein, 72

<sup>81</sup> Emphasis added. *Ibid.*, 72.

legislation –and its even more repressive legal policies– by advancing towards more inclusive models. Modernising the civil registration and vital statistics system, promoting integration through the recognition of minority identities, ensuring equal rights and preventing statelessness are better ways to transition towards democratic governance than struggling to maintain an anachronistic and costly legal framework.

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