

# Re-imagining Myanmar citizenship in times of transition

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## Re-imagining Myanmar citizenship in times of transition

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### Author biography

Dr. José-María Arraiza (Madrid, 1973) has researched and worked on minority issues (including language, citizenship, civil documents and land issues) in conflict, post-conflict scenarios and complex emergencies for agencies such as the UN (East Timor, Kosovo) and the Organisation for Security and Cooperation in Europe (the Office of the High Commissioner on National Minorities in The Hague and the OSCE Mission in Kosovo) and the Norwegian Refugee Council. He has a PhD in comparative public law on the relation between autonomy design and minority rights (Åbo Akademi, Finland), an L.L.M. in Peace Support Operations, and the European Master's Degree in Human Rights and Democratisation. He is a member of the Statelessness Network Asia Pacific (SNAP).

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### Abstract

The ongoing transition towards more democratic governance and peace of Myanmar requires a revision of its citizenship legislation. Such a revision implies a re-imagining and re-conceptualisation of nationhood in Myanmar coherent with democratic principles with a view to allow longstanding Myanmar inhabitants to become full citizens in line with the “stakeholder principle”. Currently, the citizenship legal framework is based on the 1982 Citizenship Law, which was enacted during General Ne Win’s military regime. The law, a highly ethnified act, removed naturalisation and *jus soli* provisions from its predecessor, the 1948 Union Citizenship Law, with the aim to exclude from full citizenship persons who did not descend from a defined list of national groups considered to be indigenous. As a result of its highly burdensome procedures, millions of persons in Myanmar lack access to civil documents and a million of them are stateless, not being recognised as nationals by any state. A revision of the 1982 Citizenship Law would help address the historical anomaly of the military era legislation in consonance with the democratic transition. It could include *jus soli* provisions, regular naturalisation procedures and safeguards for children to be granted Myanmar citizenship if otherwise they would become stateless.



## 1. Introduction

The democratisation of Myanmar will necessarily require addressing its citizenship crisis. Addressing Myanmar's decades-old statelessness question (a record number of one million persons without citizenship) will require significant changes in the way its law and policy makers—as well as their fellow citizens—understand its root causes.<sup>1</sup> In order to find some clues that enrich and expand the debate a good point of departure may be an analysis of both its legal framework in relation to the way Myanmar nationhood has been recently conceptualised. 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.<sup>2</sup> 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 like Myanmar where statelessness is significantly present, 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 an enabler for access to 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>3</sup> Conceptions of nationhood have then a role in shaping citizenship laws.<sup>4</sup>

In recently created or post-colonial states (which sometimes are also what Rogers Brubaker would call ‘nationalising states’) polities are often in a deep search for their own national identity.<sup>5</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>6</sup> The legislator aims to define, in other terms, who is part of the *polis* and who is not, where only those considered ‘autochthonous’ or ‘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 a problem of demography (i.e., high birth rate of a particular ethnic group) 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 South East Asia, such as Thailand, Malaysia, Indonesia, immigrants were incorporated into certain areas of society but excluded from others (social welfare, political participation). The concept of ‘indigeneity’ was hence constructed to distinguish the local inhabitants from ‘others’, outsiders who are considered a threat. In this sense, citizenship regimes are used

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<sup>1</sup> 938,000 persons according to UNHCR, Global Trends 2015, p. 58.

<sup>2</sup> A first version of this paper was presented during the *Conference on Addressing Statelessness in Asia and the Pacific, 24-26 November 2016, Kuala Lumpur, Malaysia*

<sup>3</sup> Michael Rosenfeld, *Just Interpretations, Law between Ethnicity and Politics*, Berkeley, 2008, 217–218. Emma Jones and John Gaventa, “Concepts of Citizenship: a Review”, *Institute of Development Studies*, 2002, 4,5.

<sup>4</sup> Rogers Brubaker, *Citizenship and Nationhood in France and Germany* (Cambridge, 1992).

<sup>5</sup> Rogers Brubaker, *Nationalism Reframed, Nationalism and the Nation Question in the New Europe*, Cambridge University Press, Cambridge, 1996.

<sup>6</sup> Ernest Gellner, *Nations and Nationalism*, Cornell University Press, New York, 2008.

primarily as an instrument of exclusion.<sup>7</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>8</sup> In the worst cases this may lead to statelessness, meaning the status of those persons who are not considered as national by any state under the operation of its law.<sup>9</sup> Needless to say, lacking citizenship leads to a myriad of other human rights violations and seriously hampers the life opportunities of anyone.

## 2. General Ne Win's citizenship law

Twenty years after taking power and after various episodes of inter-ethnic and inter-religious violence, including the 1978 'Operation Dragon King' in Rakhine which led to mass forced displacement of Muslims across the border of the recently independent Bangladesh, the military regime of General Ne Win enacted the 1982 Citizenship Law. The law sought to further define the country's 'indigeny' 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 such indigenous population to a lower citizenship status. The law signified a considerable shift towards an exclusively ethnic conception of citizenship from the 1947 Constitution of Burma and the 1948 Union Citizenship Law, which defined belonging to the indigenous races as criteria for accessing citizenship, but also allowed naturalisation through residence. Between 1947 and 1982, foreigners could also apply for naturalisation under certain conditions.<sup>10</sup> *Jus soli* provisions benefitted persons whose four grandparents were permanent residents and whose parents and themselves were born in (the then called) Burma.<sup>11</sup>

Ne Win's law removed such inclusive provisions and established a fully ethnicised regime which up until today discriminates against citizens not belonging to the recognised national groups.<sup>12</sup> The 1982 law established that, with a number of exceptions, only persons belonging to eight national groups were full citizens (Bamar, Chin, Kayah, Kayin, Kachin, Mon, Rakhine, and Shan, which were later subdivided into 135 sub-groups through an administrative instruction).<sup>13</sup> For those not belonging to such groups, the law created an *ad hoc* category of second class citizenship, called *naing-ngan-tha-pyu-khwint-ya-thu* and translated into English as 'naturalised citizens'. In reality, the definition of 'naturalised citizen' as per the 1982 law means a person not belonging to the recognised national groups and who descends from pre-independence residents of Myanmar. In addition, the law also created the category of *eh-naing-ngan-tha*, translated to English as 'associate citizens', meaning persons not belonging to the eight recognised national groups who had applied for citizenship within

<sup>7</sup> Lian Kwen Fee, "Citizenship Regimes and the Politics of Difference in South East Asia", Working Paper No. 8, Institute of Asian Studies, Universiti Brunei Darussalam, 2013, 4.

<sup>8</sup> *Ibid.* 5.

<sup>9</sup> Article 1, 1954 United Nations Convention Relating to the Status of Stateless Persons.

<sup>10</sup> A foreigner could apply if he or she had reached the age of majority, five years of continuous residence in the country, good character, able to speak any of the indigenous languages, intention to reside in the country after naturalisation or to enter or continue in state service, take an oath of allegiance, and renounce all foreign citizenships Arts. 7 and 11 of the 1948 Union Citizenship Act.

<sup>11</sup> Art. 5 (a), *Ibid.* Overall, the 1947 Constitution of Burma and the 1948 Union Citizenship Act permitted the automatic acquisition of citizenship at birth in three cases: persons belonging to the "indigenous races", persons who had at least one grandparent who belonged to one of the "indigenous races" and persons whose four grandparents were permanent residents and whose parents and themselves were born in Burma.

<sup>12</sup> In the case of *Girls Yean and Bosco v. the Dominican Republic*, the Inter-American Court of Human Rights indicated that citizenship legislation should not use ethnic criteria in a discriminatory manner. *Girls Yean and Bosco v. the Dominican Republic* 8 September 2005, Inter-American Court of Human Rights in Gerard-René de Groot & Olivier Willem Vonk, *International Standards on Nationality Law, Texts, Cases and Materials*, WLP, Oisterwijk (2015) p. 681.

<sup>13</sup> Art. 3, Myanmar 1982 Citizenship Law. The exceptions are described in Arts. 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 where 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.

the 1948 Union Citizenship law framework but where a decision had not yet been issued upon the entry into force of the 1982 law. In both cases, their rights were unjustifiably restricted vis-a-vis full citizens. The law does not only deny naturalised and associated citizens' full participation rights, but also access to the liberal professions and higher education. Discriminatory practices often take place regardless of a persons' official citizenship status.

The 'non-national' groups to be excluded are not only the descendants of British colonial workers but in practice extend to a wide variety of indigenous Muslim and Hindu communities, ethnic Chinese groups, descendants of Gurkha soldiers and others, all of different origins and history.<sup>14</sup> Giving these persons a right to participate in the *polis* would—according to Ne Win's line of argument—amount to alien rule. The exclusionary objective—based on a highly entrenched and commonly accepted post-colonial 'us' and 'them' narrative—of the 1982 Citizenship Law was made clear during its introduction. While presenting the law on 8 October 1982 General Ne Win stated that, "[r]acially, only pure blooded nationals will be called citizens". The law would not treat equally the rest of Myanmar inhabitants – which he referred to as 'guests or mixed blood'. For those, he stated, "[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>15</sup>

Ne Win's narrative follows a strong essentialist orientation, where the authenticity of the 'indigenous races' is stressed against the 'others', who are in essence outsiders: 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'. According to such narrative, during the colonial times, a large number of 'foreigners' entered the territory of Myanmar seeking economic opportunities. Hence, the law follows a *sui generis* ethnicised *jus sanguinis* approach where citizenship applicants need to prove they descend from one of the recognised national groups (and/or its 135 sub-groups). Naturalisation of foreigners through residence is hardly possible (requiring residence before 1948).<sup>16</sup> In absence of adequate naturalisation procedures, members of some communities, particularly ethnic Chinese, were relegated to 'foreigner national' status despite their longstanding presence and up to now hold Foreigner Registration Cards (FRCs).

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".<sup>17</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>18</sup> It is worth noting 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>19</sup> Children with one parent full citizen and the other associate or naturalised citizen are also entitled to citizenship.<sup>20</sup> Moreover, third generation naturalised and associated citizens are also supposed to attain full citizenship.<sup>21</sup> The thinking behind

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<sup>14</sup> Elayne Linn-Ee Ho & Lynette J. Chua, "Law and Race in the Citizenship Space of Myanmar, Spatial Strategies and the Political Subjectivity of the Burmese Chinese", 39(5) *Ethnic and Racial Studies*, 896–916.

<sup>15</sup> Speech of General Ne Win presenting the 1982 Citizenship Law, 8 October 1982.

<sup>16</sup> 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>17</sup> Brubaker, 1996, 13–15.

<sup>18</sup> The Irrawaddy, "The Mon Wong face Backlash" <<http://www.irrawaddy.com/news/burma/the-mong-wong-burmas-newest-citizens-face-backlash.html>>, 6 May 2016.

<sup>19</sup> Art. 6, 1982 Citizenship Law.

<sup>20</sup> Art. 7 (b) and (c), *Ibid.*

<sup>21</sup> Art. 7 (d), (e) (f), *Ibid.*

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.

### 3. Uneven application 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 color-coded ID-Card: pink means full citizenship, green naturalised citizenship and blue associate citizenship. While the 1982 law sought to create second-class citizens, not stateless persons in Rakhine, an uneven application of the law had statelessness as a consequence. Persons holding National Registration Cards proving citizenship were not given full citizenship even though they were legally entitled to it.<sup>22</sup> Moreover, the communities refused to participate in a process which denied their right to identify themselves as they wished and identified them as 'Bengali' (in practice, foreigners). 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 Temporary White Cards, more recently Interim Cards for National Verification) pending a decision on 'citizenship scrutiny'.

### 4. The need for reform

Leaving aside Rakhine, all applicants need to prove their 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 discrepancy between the current legal framework and society's needs in modern Myanmar is apparent when looking at the result of the 2014 census: 11,000,207 persons lack adequate identification documents.<sup>23</sup> 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.

The need for reform is indeed obvious and the only reason it does not take place is out of 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 hold the key to any substantial reform.<sup>24</sup> 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 today's Myanmar but rather the military regime it was born under.

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<sup>22</sup> According to Article 6 of the 1982 Citizenship Law, persons who were citizens at the time of the entry into force continue to be citizens.

<sup>23</sup> 2014 Myanmar Housing and Population Census, The Union Report, page 207.

<sup>24</sup> Aleksandra Maatsch, *Ethnic Citizenship Regimes, Europeanisation, Post-war Migration and Redressing Past Wrongs*, (Palgrave Macmillan, 2011), p. 24.

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>25</sup> Claims for recognition by these marginalised groups have led to a straight forward rejection by their opponents. The debate is highly polarised and rigid where both sides seem to leave aside the longstanding principle that the existence of minorities is a matter of fact, not of law.<sup>26</sup>

## 5. The Stakeholder Principle

Fortunately, we are in 2017 and not in 1982. 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 has called for a fairer and more accountable implementation of the 'national verification' process in its interim report and is likely to call for reforms in the area of citizenship.<sup>27</sup> 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 organised society have a moral claim to be recognised 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>28</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 granting of citizenship, to fully include long-term residents, stakeholders, in 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, efficient and inclusive in the future would not only prevent future unrest and displacement but also improve human rights protection and integration throughout Myanmar.

## 6. Conclusion

Myanmar's transition would benefit from a more democratic conceptualisation of its nationhood and a re-design of its citizenship laws. There are various options for reforming the current legal framework on citizenship in Myanmar. It is up to the national legislator to come up with an adequate, reasonable regime which respects international principles. The law could be improved by ensuring that citizenship is granted solely on descent (from a citizen or a permanent resident). It could include safeguards for

<sup>25</sup> United Nations Human Rights Committee, General Comment 23 on Article 27, the Rights of Minorities, para. 5.2.

<sup>26</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>27</sup> "Rakhine Advisory Commission Interim Report", available at: <http://www.rakhinecommission.org/>

<sup>28</sup> Rainer Bauböck, "The Stakeholder's Principle: an Idea whose Time has Come?" Migration Policy Institute (2008), p.4. <<http://www.migrationpolicy.org/research/stakeholder-citizenship-idea-whose-time-has-come>>.

children to be granted Myanmar citizenship if otherwise they would become stateless (in line with Myanmar's obligations towards the Convention on the Rights of the Child).<sup>29</sup> Objective criteria such as double *jus soli* (being born in the territory where one of the parents was also born in Myanmar) or birth in the territory prior to a particular date could be introduced to reduce the current stateless population, re-introducing a procedure for naturalisation such as the one existing in the 1948 Union Citizenship Law.

Going back to the 1940's, 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 that the future Constitution of Burma should be that of an independent sovereign republic." 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>30</sup> Seven decades later, perhaps, the law and policy makers of Daw Aung San Suu Kyi's government may begin to consider whether or not it would make sense to redress the historical anomaly of General Ne Win's era citizenship legislation by advancing towards more inclusive models, such as the one supported—at least in its principles—by her father, the national hero General Aung San.

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<sup>29</sup> Art. 7, United Nations Convention on the Rights of the Child. Myanmar is a party since 1991.

<sup>30</sup> Josef Silverstein, *The Political Legacy of General Aung San*, Cornell South East Asia Programme, 1993, p. 72. (emphasis added)