

**TOWARDS
AN INCLUSIVE CITIZENSHIP
IN A FEDERAL DEMOCRATIC
MYANMAR**

BRIEFING PAPER

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This brief is based on legal and qualitative research conducted in Myanmar between 2017 and 2020. A forthcoming report by the Institute on Statelessness and Inclusion (ISI)¹ is due to be published in August 2021 titled: ‘Navigating without a map: Access to citizenship documents in Myanmar’. The research focuses on experiences of arbitrariness² and discrimination in accessing citizenship documents in Myanmar.

At this critical time in Myanmar, in the aftermath of the February 2021 military coup d’etat, important conversations have opened up within Myanmar and among diaspora and exiled people, about equality and inclusion in a future federal democracy. Envisaging a fair and inclusive Citizenship Law is a central component in this process of change. This brief presents some of the findings from the research to invite reflection on the impact of the current Citizenship Law on people across Myanmar. It has been drafted with the Myanmar peoples’ struggle for peace and justice in mind, in the hope that it will contribute in a small way towards re-imagining of a more equal and inclusive future.

WHY IS A NEW CITIZENSHIP LAW IMPORTANT IN ESTABLISHING A FEDERAL DEMOCRACY?

A future citizenship law in Myanmar should be contextualised within the decades long conflicts which are closely connected to the question of equitable federal power-sharing and democracy. A new Myanmar Citizenship Law should protect the individual right to nationality, meet international standards of non-discrimination, non-arbitrariness etc. and should also complement the wider political vision of a democratic Myanmar. The success of federal democracies depends largely on the balance that is found and preserved between the individual, the state government and the federal government. In this balance, the question of nationality is something which should be seen as a unifying factor for the whole country, connecting the residents of all states under a common national identity that affirms individual rights and celebrates Myanmar’s diversity. The forthcoming research report shows that citizenship based on ethnic criteria has compounded inequalities and increased ethnic divides. The entrenching of nationality along ethnic lines in a federal system can also be counter-productive and raises on-going concerns from a non-discrimination perspective. Successful citizenship frameworks for fed-

eral democracies, including in states that have diverse ethno-religious make-ups, use objective criteria for citizenship, which affirm the national identity, rather than emphasising ethnic differences.

WHO IS DISCRIMINATED AGAINST UNDER THE CURRENT CITIZENSHIP FRAMEWORK IN MYANMAR?

Based on ISI’s research findings between 2017 and 2020, lack of access to citizenship and citizenship documents impacted people of all backgrounds across Myanmar. Citizenship deprivation disproportionately affected the people in the border areas. Discrimination resulted from both the Citizenship Law itself and from the inconsistent and discriminatory way the citizenship rules have been applied. Some people were excluded directly through the law and others by corrupt, opaque and discriminatory administrative practices.

According to research, the following groups were more likely to be denied citizenship documents:

- **Minority groups who are not included in the list of 135 ‘national ethnic groups’.** This includes, but is not limited to, Rohingyas, Gurkhas, Tamils and ethnic Chinese.
- Myanmar **Muslims, Hindus, speakers of Bengali or Indian dialects and persons of South Asian appearance.**
- Persons of **mixed ethnic or religious parentage.**
- Members of **Ethnic Armed Organisations (EAOs) and civilians** living in conflict or cease-fire areas.
- **IDPs** and IDP returnees.
- **Former refugees** who have returned to Myanmar from neighbouring countries.
- **Disabled persons** including those with mental disabilities.
- **Persons from rural areas** with limited financial resources.
- **Women and girls** in vulnerable situations.

¹ Institute on Statelessness and Inclusion is an independent non-profit organisation committed to an integrated, human rights based response to the injustices of statelessness and exclusion through a combination of research, education, partnerships and advocacy.

² Arbitrariness describes decision-making that is based on personal discretion, without due regard to legal standards, rules or principles. In order to not be arbitrary, a decision must be made with a legitimate purpose, provided by law, necessary, proportionate, non-discriminatory and in accordance with procedural safeguards.

THE 1982 CITIZENSHIP LAW

Myanmar's 1982 Citizenship Law has been widely criticised both domestically and internationally. It is sometimes described as a relic of the military junta era. The law is not grounded in a democratic mandate of any sort. It was drafted and implemented without consulting Myanmar's diverse multi-ethnic and multi-religious peoples, and served the military's own agenda to consolidate power, exclude specific groups and create a hierarchy of belonging.

UN and other actors have criticised it as failing to comply with international standards. The current citizenship framework in Myanmar does not meet international standards in the following ways:

1) Discrimination on the Grounds of Race/Ethnicity

Under the 1982 Citizenship Law, nationality in Myanmar is primarily acquired on the basis of race or ethnicity rather than objective, non-discriminatory criteria. The ethnic criteria is not adequately balanced by other avenues through which to acquire nationality for those with strong ties to the country. As such, those who do not belong to the 135 'national ethnic groups' recognised by the state are disadvantaged and discriminated against. The prohibition of race discrimination is a norm of customary international law.³ Since the 1990s, international experts including UN Special Rapporteurs have recommended replacing race/ethnicity in Myanmar's Citizenship Law as a determining factor for citizenship with objective criteria, such as the passing of citizenship through parents who are citizens or as a result of birth within the territory. The citizenship laws of most countries in the world base acquisition of citizenship on such objective criteria, while also making provisions for people to naturalise on the basis of residence, marriage or other criteria.

The groups included on the list of 'national ethnic groups' are decided at the complete discretion of the Council of the State (section 4), without consultation with Myanmar's peoples. This has created an arbitrary and artificial system of ethnic categorisation that exacerbates exclusions. It does not reflect the history or demographic realities in Myanmar and does not allow the diverse peoples of Myanmar to self-identify. This process has resulted in groups with long histories in Myanmar

being excluded from Myanmar citizenship. The focus on such ethnic categorisation has also led to confusion, discrimination and arbitrariness in the categorisation of persons of mixed-ethnic or religious heritage. All people from Myanmar should be able to enjoy the right to Myanmar citizenship, without being excluded because of their ethnicity or being forced to claim only part of their mixed heritage in order to be included.

Additionally, the 1982 Citizenship Law has a tiered system of citizenship. 'Full citizenship' in Myanmar is reserved for those who belong to one of the 'national ethnic groups' who are listed by the state as having settled in Myanmar before 1823, or before British colonial rule (section 3) and for the children of citizens. 'Naturalised' and 'Associate' citizens – those who do not meet the threshold for full citizenship but can prove multiple generations of ties to Myanmar - have fewer rights. They cannot transmit citizenship to their children easily, and their citizenship can be revoked more easily. Further, 'naturalised citizenship' is acquired through an application process which is characterised by decision-making processes that are discretionary, arbitrary and corrupt. This results in the exclusion of many applicants.

2) Failure to Prevent Childhood Statelessness

Under the 1982 Citizenship Law, children born of a parent who is not recognised as a member of one of the 'national ethnic groups' are discriminated against on the basis of their ethnicity. There is no legislation in place for children to acquire nationality where they would otherwise be stateless, violating a child's right to acquire a nationality (CRC Art 7). In cases where a parent's citizenship is revoked, a child's citizenship is also revoked (Section 29), violating the child's right to retain their nationality. These factors result in the number of children born into statelessness in Myanmar spiralling or increasing over time. The Committee on the Rights of the Child has made recommendations on the right to nationality and childhood statelessness in Myanmar, including the removal of discriminatory categories of citizenship, addressing the gaps in the law that lead to statelessness and removing ethnic and religious identities from ID cards.⁴

3) Lack of Naturalisation Provisions

The 1982 Citizenship Law's approach to 'naturalisation' is very different to how naturalisation is understood

³ The Tunis Conclusions stated that "loss or deprivation of nationality may not be based on discrimination on any ground prohibited in international human rights law, either in law or in practice." The UN High Commissioner for Refugees (UNHCR), Expert Meeting - Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality ("Tunis Conclusions"), March 2014, available at: <https://www.refworld.org/docid/533a754b4.html>.

⁴ Committee on the Rights of the Child, Concluding Remarks: Myanmar, 59th session, 2012, CRC/C/MMR/CO/3-4 (CRC 2012) https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/C/MMR/CO/3-4&Lang=en; CEDAW Concluding observations on the fourth and fifth periodic reports on Myanmar, 2016, CEDAW/C/MMR/CO/4-5 para 32 and 33 available: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fMMR%2fCO%2f4-5&Lang=en.

and applied by all other countries of the world. In other countries, naturalisation provides avenues to citizenship for people with strong ties to a country, such as through marriage or residence. There are no provisions within the 1982 Citizenship Law to acquire nationality through marriage or through long-term residence after 1982. Instead, ‘naturalised’ citizenship in Myanmar is applied to persons who can prove multiple generations of ties to Myanmar since before independence. Over three generations, ‘associate’ and ‘naturalised’ citizens should, in principle, be able to acquire ‘full citizenship’ in Myanmar. However, this is rarely the case in practice. This is considered to be an excessively long period over which the descendants of naturalised citizens will ultimately acquire full citizenship rights.

To ensure equality and non-discrimination, provisions should be included in the law to allow people to acquire Myanmar nationality through criteria such as birth, marriage and permanent residence, as is the case in most other countries of the world.

4) The Revocation of Citizenship

The 1982 Citizenship Law gives overly broad powers to the State to revoke citizenship from those with ‘associate’ and ‘naturalised’ citizenship (Section 8b). The law lists wide-ranging circumstances in which citizenship can be revoked including communicating with a member of an organisation hostile to the state and serving more than one year in prison for an act of ‘moral turpitude’ (section 35). Under the law, no consideration is given as to whether revocation of citizenship will lead to statelessness. Further, since dual nationality is not permitted (section 13), there is an increased likelihood that the revocation of citizenship will result in statelessness. These rules are discriminatory and arbitrary and contravene basic principles of international law.

Arbitrary Deprivation of Nationality

The 1982 Citizenship Law provided for Myanmar citizens to maintain their citizenship (under the previous citizenship framework) when the new law came into force. As part of a nation-wide scrutiny exercise from 1989 onwards a new colour-coded ID system was introduced. Prior to this time, much of the population held National Registration Certificates (NRCs) which, in practice, functioned as evidence of Myanmar citizenship. Many people who held NRCs were not provided with evidence of their citizenship under the new ID card system. As a result, they were excluded from citizenship in an arbitrary and discriminatory manner which went against the

provisions of the 1982 Law. Further, members of various minority communities cannot establish their claim due to their previous citizenship and residence documents being confiscated by state authorities or being lost due to forced displacement.

MYANMAR’S CITIZENSHIP FRAMEWORK UNDER THE 1947 CONSTITUTION AND THE 1948 UNION CITIZENSHIP ACT: A SUITABLE FRAMEWORK FOR A FEDERAL DEMOCRACY?

The forthcoming research report, ‘Navigating without a map: Access to Citizenship Documents in Myanmar’ provides a detailed comparison of the 1947/48 framework and the 1982 Citizenship Law. This section provides a short summary of the findings.

The 1948 citizenship framework was similar to that of many other countries in the same period, in particular, countries which had recently obtained independence after colonisation. It was based on a mixed system of descent and birth on the territory. It was largely inclusive in its attempt to strike a balance between the place of indigenous groups in the country and the right to automatic acquisition of nationality for those with sufficient links to the country. As such, it enabled individuals with strong links to the country to acquire and preserve their citizenship whilst still addressing the imbalances and injustices of the colonial era. The criteria for membership of ‘national ethnic groups’ was less rigid and more open-ended allowing for a broader more inclusive interpretation of citizenship. The framework also had a naturalisation process for those who fulfilled certain criteria such as marriage to a citizen or long-term residence.

Since 1948, international human rights standards have grown stronger. Migration and holding dual or multiple citizenship has become more common. Citizenship based predominantly on ethnicity and race-based criteria has often led to discrimination. We have seen examples of fairer citizenship laws, as well as fairer ways to legally redress the negative consequences of discriminatory laws. For example, the post-independence nationality laws of Malaysia and Sri Lanka, excluded communities of Indian origin – resulting in their statelessness. Law reforms in both countries have largely addressed these issues.

⁵ For more information, see the Principles on Deprivation of Nationality as a National Security Measure, available at: <https://files.institutetsi.org/PRINCIPLES.pdf>

Although the 1948 citizenship framework was more inclusive than the 1982 Citizenship Law, in order to ensure equality in the current context, it is important that Myanmar moves forwards with a new framework that can account for today's demographic realities and international standards. A new law would also need to account for events that have occurred since Myanmar's independence including conflict in ethnic minority areas, the production of refugees and a large diaspora over decades and the arbitrary deprivation of nationality during military rule.

Important Issues for Discussion in Drafting a New Citizenship Law

- Developing a new citizenship framework through processes that are **genuinely inclusive**.
- Providing one **equal citizenship** for all.
- Ensuring **equality and non-discrimination** in citizenship acquisition.
- Ensuring other international standards are upheld including protections against **statelessness**, protection against **arbitrary deprivation of nationality** and protection of other **basic human rights**.
- Ensuring that **refugees from Myanmar, former refugees and diaspora** are able to access citizenship in Myanmar.
- Ensuring access to citizenship for those who have been **arbitrarily deprived or denied citizenship** under the 1982 Citizenship Law.
- Ensuring those who **lack evidence of their right to citizenship** due to conflict, displacement or persecution are not disadvantaged in acquiring citizenship.
- Creating **fair rules of evidence and transparent procedures**, to maximise access to citizenship.
- Allowing for **dual nationality** to ensure those living overseas and their children can continue to contribute to Myanmar's future.
- Including **fair and transparent naturalisation provisions** for those with significant links to Myanmar, for example through marriage or residence.
- Establishing adequate **transitional and bridging provisions** to facilitate smooth transition between the 1982 Law and its replacement.