How does statelessness affect the 'right to health'? An examination of the stateless Rohingya in Rakhine State, Myanmar

By Melanie Waite

Statelessness Working Paper Series

No. 2016/04

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Statelessness Working Paper Series No. 2016/04

June 2016

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An examination of the stateless Rohingya in Rakhine State, Myanmar*

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Author biography

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Keywords

statelessness – right to health – citizenship – Rohingya – Myanmar – Rakhine State - international law – nationalism

Abstract

There is a dearth of academic research on the relationship between statelessness and the right to health. This paper aims to fill this gap by examining how statelessness renders individuals legally disenfranchised and vulnerable to health right violations, with a particular focus on the Muslim Rohingya in Rakhine State. My discussion will centre on Myanmar's 1982 Citizenship Law that has failed to accept the Rohingya as a valid ethnic group and bars them from citizenship. As non-citizens of Myanmar, and without legal protection under domestic law, the government has imposed restrictions on the Rohingya that would not be legally justifiable towards citizens who are protected under the Myanmar Constitution. The discriminatory policies imposed on the Rohingya have had negative ramifications on their capability to realise an effective right to health. Examples of restrictive policies include: restrictions on the amount of children the Rohingya can have, prohibition of travel outside townships without permission, and being barred from employment in the health sector. This paper will demonstrate that citizenship, although not a definitive means to secure a right to health, is an important first step in having the legal validity to champion health rights when domestic constitutions violate their safeguarding responsibilities.

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* This paper is based on earlier pieces that were published online at the Global Health Journal https://theghjournal.wordpress.com

1. Introduction

At present there are over 10 million people worldwide who are not recognised as citizens of any country, although the true number of stateless persons is likely to be significantly higher.[1] This precarious situation is commonly referred to as statelessness. Confusion surrounding precise figures of statelessness are due to problems with mapping the issue, accruing accurate evidence, and remedying gaps in data.[2] The international legal definition of statelessness is set out in Article 1 of the 1954 Convention that defines a stateless individual as a person "not considered as a national by any State under the operation of its law".[3] This definition describes a certain type of statelessness characterised by the formal, legal lack of a nationality commonly known as *de jure* statelessness. There have been two legal instruments created by the United Nations (UN), in the form of conventions, which have sought to both protect stateless individuals, and prevent levels of statelessness from proliferating throughout the world. The first was the 1954 Convention relating to the Status of Stateless Persons, to which there are now 80 signatories.[4] The second was the 1961 Convention on the Reduction of statelessness,[5] which today has 55 countries endorsing its recommendations.[6]

1.1 Protection of stateless persons under international law

Despite the 1954 Stateless Convention sharing the same overall approach as the 1951 Convention relating to the Status of Refugees, there remain several significant differences.[7] For instance, there is no prohibition against *refoulement* (Article 22, 1951 Convention) in the statelessness conventions—which refers to the forcible return of refugees to a country where they are liable to be persecuted—no protection against penalties for illegal entry (Article 3, 195 Convention), and both the right to employment and the right of association provide for a lower standard of treatment[8] than the equivalent provisions in the 1951 Convention. In short, refugees benefit from a stronger and better ratified convention than their stateless counterparts.[9] Having explored the legal differences between the refugee and stateless conventions, the question remains whether stateless individuals can find further protection under the broader scope of international human rights law. It is important to note that within international law, regardless of whether an individual is a citizen or non-citizen, everyone has an equal right to human rights protection.[10] General Comment No. 15, on 'The Position of Aliens Under the Covenant', adopted at the Human Rights Committee of 1986, reiterates this idea of equality when it states:

> the rights set forth in the International Covenant on Civil and Political Rights (ICCPR) apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness … [T]he general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens.[11]

In conjunction, there is a substantial body of international law that documents the importance of nationality laws being consistent with the governing principles of international law. For example, Article 15 of the Universal Declaration of Human Rights (UDHR) declares that "everyone has the right

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[1] United Nations High Commissioner for Refugees (UNHCR), *Introduction to Statelessness* (2015)
[2] Ibid
[3] United Nations, *1954 Convention relating to the status of stateless persons* (1954)
[4] ibid
[5] United Nations, *1961 Convention on the Reduction of Statelessness* (1961)
[6] United Nations High Commissioner for Refugees (UNHCR), *UN Conventions on Statelessness* (2014)
[7] United Nations High Commissioner for Refugees (UNHCR), *Handbook on protection of stateless persons* (2014)
[8] United Nations High Commissioner for Refugees (UNHCR), *The 1951 Refugee Convention* (1951)
[9] K Perks & A de Chickera, 'The Silent Stateless and the Unhearing World: Can Equality Compel Us to Listen?' (2009) 3 The Equal Rights Review
[10] United Nations Economic and Social Council (UN ECOSOC), *Final Report of the Special Rapporteur to the Sub-Commission on Prevention of Discrimination, The Rights of Non-Citizens* (2003)
[11] Human Rights Committee (HRC), *General comment No. 15: The position of aliens under the Covenant* (1986)

to a nationality" as well as discouraging the arbitrary removal of that right.[12] Furthermore, Article 24(2) of the 1976 International Covenant on Civil and Political Rights (ICCPR)[13] outlines obligations to prevent the denial of citizenship by insisting on birth registration, whilst Article 7(1) of the 1989 Convention on the Rights of the Child (CRC)[14] declares that every child has a right to acquire a name and nationality.[15]

However, there remains a large disjuncture between the rights that International Human Rights Law (IHRL) affords to non-citizens and the realities that stateless individuals must face. The main problem with protecting stateless persons is not that the international legal safeguards are not in place, but that they are often ignored by domestic constitutions.[16] The result of this is that individuals are often left vulnerable to the systematic degradation of their basic human rights.[17]

2. The "right to health: Its origins & relationship to Statelessness

2.1 The meaning of the "right to health" & its legal protections

The unification of 'health' with the idea of 'rights' finds its preliminary locus in the 1946 World Health Organisation (WHO) Constitution which advocated that the "enjoyment of the highest attainable standard of health is one of the fundamental *rights* of every human being."[18] This sentiment was echoed within Article 25 of the 1948 Universal Declaration of Human Rights (UDHR) which contended that "everyone has the right to a standard of living adequate for the health and well-being of himself and his family," including medical care.[19] However, the WHO Constitution does not form part of the corpus of IHRL, therefore, the core formulation of the right to health is outlined within Article 12 of the 1976 International Covenant on Economic, Social and Cultural Rights (ICESCR)[20] where it asserts the right to the "highest attainable standard of physical and mental health"[21] and then outlines provisions for the progressive realisation of this goal.

In order to operationalize this provision, the UN Committee on Economic, Social and Cultural Rights issued General Comment 14 on the Right to Health in 2000. General Comment 14's interpretation of Article 12 of the ICESCR can be applied to stateless populations in several ways. Firstly, it demonstrates the need for equitably distributing the underlying determinants of health in a non-discriminatory manner to realise equal enjoyment of the right to health. Secondly, it opposes discriminatory practices relating to women's health status and needs. Thirdly, it promotes the provision of non-discriminatory health care accessibility; and finally, it proscribes acts of commission—for instance the revoking of citizenship by law—and omission, such as excluding a child from birth registration, which may cause statelessness.[22]

2.2 The right to health: A tool for health equity and justice

[12] United Nations, *The Universal Declaration of Human Rights* (1948)
[13] United Nations, *International Covenant on Civil and Political Rights* (1976)
[14] United Nations, *Convention on the Rights of the Child* (1989)
[15] BK Blitz, 'Statelessness, protection and equality' (2009) 3 Forced Migration Policy Briefing, Refugee Studies Centre
[16] R Howard-Hassman, 'Introduction: The Human Right to Citizenship', in R Howard-Hassman & M Walton-Roberts (eds) *The Human Right to Citizenship: A Slippery concept* (UP Press, 2015), 1-18
[17] Z Albarazi & L Van Waas, 'Towards the abolition of gender discrimination in nationality laws' (2014)46 FMR; Georgetown Law Human Rights Institute, *Left Behind: How Statelessness in the Dominican Republic Limits Children's Access to Education* (2014) Human Rights Institute Fact-Finding Project
[18] World Health Organisation (WHO), *World Health Organisation Constitution* (1946)
[19] United Nations, *The Universal Declaration of Human Rights* (1948)
[20] United Nations, *International Covenant on Economic, Social and Cultural Rights* (1976)
[21] A Yamin, *Imagining a different world: reflection on what applying a human rights framework to health means and why we should care* (2010) Beloit College. Available at: https://www.youtube.com/watch?v=Pd-WREXfr9A
[22] L Kingston, E Cohen, & C Morley, *Debate: Limitations on universality: the "right to health" and the necessity of legal nationality* (2010) BioMed Central International Health and Human Rights

The power of labelling health as a 'right' lies in the assumption that it is within the realm of human influence; when health becomes a right it challenges the lottery of genetic fate and instead places a duty upon the state and civil society to respect, uphold and guarantee the realisation of that right.[23] Yamin argues that:

> …if there is a right to health then the state has some responsibility for levelling the playing field, for ensuring not just a fair distribution of access to care, but also the social determinants of health.[24]

The right to health's role in 'levelling the playing field' is important when we look at its relationship to statelessness. Stateless persons are often rendered stateless due to discriminatory measures embedded in the societal structures of their given country; this is where the power of the right to health comes to the fore. In promoting and strengthening health equity, the right to health pushes us to go beyond the 'immediate causes of disease to the 'causes of the causes', namely, the structures of social hierarchy and the unequal conditions these create, in which people live, work and age.[25] The right to health is an indispensable, justiciable tool that has the power to challenge the health injustices suffered by stateless persons and expose the unequal health capabilities between citizens and non-citizens of a state.

2.3 Failure to uphold the right to health (i): The legal process & international responsibility

Having examined the signification of the 'right to health' I now want to analyse what happens when countries do not uphold this right. When stateless individuals have no legal status it allows states to use domestic laws, which render no state responsibilities towards the stateless, to circumvent their role in protecting the right to health. Regardless of whether the country is a signatory or not to the international conventions enshrining the right to health, if the international community believes the human rights of individuals are being violated, it has the capacity to demand an independent investigation. This can be commissioned by the UN Security Council, UN Human Rights Council, UN General Assembly or UN Secretary General.[26] An investigation can determine whether human rights abuses have taken place, in which case the UN Security Council can either refer the situation to the International Criminal Court, or alternatively issue recommendations to the country in question outlining measures to uphold higher standards of human rights, with potential sanctions if they fail to do so.

It is important to acknowledge that these legal mechanisms are in existence and have the capacity to hold to account those who flout the right to health. However, can one really 'demand' such an investigation when it is a violation of *health* rights? The right to health is inextricably linked to core human rights instruments, such as the International Convention on the Elimination of All Forms of Racial Discrimination[27], where individuals can either not be given healthcare due to their race, or administered a lower standard of care to other racial groups. The international legal framework for accountability exists, and the protection of health rights remains an imperative right for the international community to safeguard.

2.4 Failure to uphold the right to health (ii): Ramifications on the health of the stateless

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[23] A Yamin, 'Defining Questions: Situating Issues of Power in the Formulation of a Right to Health under International Law' (1996) 18(2) HRQ 398

[24] A Yamin, *Imagining a different world: reflection on what applying a human rights framework to health means and why we should care* (2010) Beloit College. Available at: https://www.youtube.com/watch?v=Pd-WREXfr9A

[25] M Marmot, 'Social Determinants of Health in Asia and the Pacific' (2007) World Health Organisation (WHO)

[26] R Wagely, 'The Quiet Audience: U.S Responsibility to Call for an International Investigation Into Crimes Against Muslims in Burma' (2015) 28(1) Emory Int'l L Rev

[27] United Nations, *International Convention on the Elimination of All Forms of Racial Discrimination* (1969)

Having understood the practical legal processes of enforcing the right to health when countries fail to uphold it, I now want to outline the effects on health care accessibility when a justiciable right to health is violated. Firstly, when a country does not seek to uphold the equal realisation of health rights between citizens and non-citizens, a lack of documentation such as a birth certificate can inhibit subsidized vaccination programmes, or may lead to higher fees that patients with citizenship do not have to cover. For instance, in 20 countries children without a birth certificate cannot be legally vaccinated.[28] Another example can be found in Macedonia where the stateless Roma are explicitly excluded from Macedonian citizenship, and are consequently ineligible for state health insurance; 50% of Roma have no documentation pertaining to citizenship, health insurance or health care.[29] The Roma's lack of health insurance has been associated with high rates of premature births, chronic measles, lice infestation and a life expectancy far lower than the national average.[30] Statelessness allows states to render these individuals invisible, and uses this judicial disenfranchisement as a means to deny the right to access health care on equal terms to that of full or naturalised citizens.

3. The 1982 Citizenship Law: Why was it created and how does it protect the "right to health"?

3.1 Myanmar and Human Rights: An Overview

Before examining the signification of the 1982 Citizenship law, it is imperative to give an overview of the current human rights situation in Myanmar. At present there are 27 political prisoners, as well as 200 others who are incarcerated[31]; these range from peaceful critics to land protestors[32] and journalists. In conjunction, since 2010 there have been more than 100 documented cases of rape, committed by Myanmar's army, against women in the Kachin and Shan districts of North-Eastern Myanmar.[33] In addition, in the last three years more than 120,000 Rohingya have boarded ships to flee persecution, rendering them vulnerable to extortion from human traffickers.[34] On 1 May 2015 a military police taskforce found 30 mass graves at an abandoned human trafficking camp in the Songkhala province, close to the Thai-Malaysian border.[35] The bodies of those were indicated to be Rohingya from Myanmar and Bangladesh who had either starved to death or died of disease whilst awaiting ransom payments.

3.2 The Muslim Rohingya and Buddhist Rakhine Conflict: The Buddhist Perspective and Historical Context

The contemporary conflict between Rohingya and Buddhist's in Rakhine State is premised upon fear; this fear is founded on three threats that the Buddhist Rakhine believe the Rohingya pose. The first being a demographic threat, namely, that the Buddhist Rakhine could soon become a minority in their own state.[36] The second being the prospect of *socio*-cultural dilution, where Muslim Rohingya customs oppose the Buddhist way of life; for example, halal slaughter is deemed to be incompatible with the tenets of Buddhism.[37] The final and third being an economic threat, where the Rakhine feel the economic opportunities afforded by Myanmar's financial growth are dominated by the Rohingya, who have opened small local businesses and consequently rendered the Rakhine poorly-placed to reap the

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[28] L Kingston, E Cohen, & C Morley, *Debate: Limitations on universality: the "right to health" and the necessity of legal nationality* (2010) BioMed Central International Health and Human Rights

[29] B Pavlovski, *Health, Health care and the Impact of the Health of the Roma in the Republic of Macedonia* (2009) Skopje: ESE Report

[30] European Roma Right Center (ERRC), *Ambulance Not On The Way: The Disgrace of Health Care for Roma in Europe* (2009)

[31] Human Rights Watch (HRW), *World Report 2015: Burma* (2015)

[32] Human Rights Watch (HRW), *Burma: Land Rights Activists Are Newest Political Prisoners* (2015)

[33] TIME magazine, 'Rape Is a Weapon In Burma's Kachin State, but the Women of Kachin are Fighting Back' (2014)

[34] E Ng & T Doksone, 'Mayalsia turns away 800 boat people; Thailand spots 3rd boat (2015) Yahoo! News Online

[35] Human Rights Watch (HRW), 'Thailand: Mass Graves of Rohingya Found in Trafficking Camp' (2015)

[36] Fortify Rights, 'Policies of Persecution: Ending Abusive State Policies Against Rohingya Muslims in Myanmar (2014)

[37] International Crisis Group, *Myanmar: The Politics of Rakhine State* (2014) Asia Report No. 261

benefits of this economic expansion.[38] This contemporary fear suggests that the Muslim faith is a new invading virus into the heart of Myanmar. However, the Muslim religion, the individuals who follow it, and the customs that accompany them, are all historically entwined with the history of Rakhine State, dating back to as early as the 11th century.[39]

Anti-Rohingya violence was notably displayed in 1978 when President Ne Win begun *Operation Nagamin* (Dragon King) to tackle illegal immigration, authorising sweeping checks of identity papers throughout the country in order to purge illegal foreigners. Acts of violence, murder, and arson were committed by the Burmese military, forcing 250,000 Rohingya to flee to Bangladesh for refuge.[40] Following this mass departure, the uninhabitable conditions in Eastern Bangladesh defined by squalor, limited humanitarian aid and subjection to arrest rendered it necessary for thousands of Rohingya to risk returning back to Myanmar. Once returned, the majority of Rohingya still had no citizenship papers following Operation Nagamin, and the creation of Myanmar's Citizenship law in 1982 further eroded the legal rights of many Muslims, rendering thousands stateless. At present there are at least 1.33 million Rohingya in Myanmar; all but 40,000 are stateless.[41]

3.3 Myanmar's citizenship transition: The repeal of the 1948 Citizenship Act

Even though one stateless Rohingya would be one individual too many, the fact that just under *one million* Rohingya face statelessness makes one question *how* the 1982 Citizenship Act legally disempowered this ethnic group on such an expansive scale? In order to answer this question it is important to acknowledge that the 1982 Citizenship Act was preceded by a 1948 Citizenship Act. The 1948 Act bestowed citizenship to those under four categories, namely those: born to parents belonging to any of the indigenous races of Myanmar; born within Myanmar and have at least one grandparent from the accepted indigenous races; descended from individuals who made Myanmar their permanent home for two generations where the individual and their parents were all born in Myanmar; or born within Myanmar after the 4th January 1948 and have at least one parent who is a citizen.[42] This act also permitted applications for citizenship through the process of "naturalisation" if they had lived in Myanmar for five years prior to their application; this facilitated a route to citizenship if they were not eligible under the main four provisions of the 1948 Act. However, the 1948 Citizenship Act was repealed in 1982 to create a more restrictive law founded upon three tiers of citizenship: Full, Associate and Naturalised, which afford varying degrees of entitlements.

3.4 The 1982 Citizenship Act: Eligibility & 8 key provisions which protect the "right to health"

The eligibility criteria for citizenship under Myanmar's 1982 Citizenship Act[43] is segregated into three tiers:[44]

Tier One: Full Citizenship

- Available to: Nationals of 135 named ethnic groups who settled in Myanmar before 1823 (the start of the British colonisation of Rakhine State). Valid groups include the Kachin, Kayah, Karan, Chin, Burman, Rakhine and Shan

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[38] International Crisis Group, *Myanmar: The Politics of Rakhine State* (2014) Asia Report No. 261

[39] M Walton, 'Myanmar Needs a New Nationalism' (2013) Asia Times Online

[40] Human Rights Watch (HRW), *"All You Can Do is Pray": Crimes Against Humanity and Ethnic Cleansing of Rohingya Muslims in Burma's Arakan State* (2013)

[41] Human Rights Watch (HRW), *"All You Can Do is Pray": Crimes Against Humanity and Ethnic Cleansing of Rohingya Muslims in Burma's Arakan State* (2013); Fortify Rights, *Policies of Persecution: Ending Abusive State Policies Against Rohingya Muslims in Myanmar* (2014)

[42] International Crisis Group, *Myanmar: The Politics of Rakhine State* (2014) Asia Report No. 261

[43] *Myanmar Citizenship Law* (1982)

[44] Burma Campaign, *Burma's Treatment of the Rohingya and International Law* (2013)

- Barriers to Rohingya securing citizenship: Rohingya are not acknowledged as an official ethnic group, barring them from conferral of Full citizenship.

Tier Two: Associate Citizenship

- Available to: Available to those who applied for citizenship under 1948 Citizenship Act, and before deadline of 15th October 1982. New applications can no longer be made.
- Barriers to Rohingya securing citizenship: Few Rohingya were aware of the deadline's existence, or its signification in conferring citizenship. Consequently, few applied prior to the deadline

Tier Three: Naturalised Citizenship:

- Available to: Individuals who can produce "conclusive evidence" that they entered and resided in Myanmar prior to 4th January 1948.
- Barriers to Rohingya securing citizenship: The Rohingya lack the capacity to furnish this type of evidence. Most had their identity papers stolen, burnt during the 2001 riots in Sittwe, or misplaced them due to continuous displacement. Many only have a family list indicating names and dates of each household member, but this is not sufficient proof as it fails to record place of birth

Having outlined the exhaustive barriers to citizenship for the Rohingya, it is important to now examine the rights afforded to those who are citizens of the State. This is informative for two main reasons: firstly, it is essential to highlight how citizenship places responsibility on the State to fulfil certain protections under the Myanmar Constitution, and secondly, to outline the negative repercussions that accompany an absence of these protections, with specific reference to its effects on the right to health. This will be done by examining Chapter Eight of the Myanmar Constitution, entitled 'Citizenship, Fundamental Rights and Duties of Citizens.'[45]

There are eight key guarantees, afforded to citizens under Chapter Eight of the Myanmar Constitution[46], which are essential to a successful realisation of the right to health:

- Provision 3: The State shall enable any citizen to enjoy equal rights before the law and shall equally provide legal protection.
- Provision 4: The State shall not discriminate against or in favour or any citizen based on race, birth, religion, official position, status, culture, sex and wealth.
- Provision 5 (a) and (b): Citizens shall enjoy equal rights in the following areas: (a) civil service (b) occupation.
- Provision 7: Mothers, children and expectant women shall enjoy rights as prescribed by law.
- Provision 9: Nothing shall, except in accord with existing laws, be detrimental to the lives and personal freedoms of any citizen.
- Provision 24: Every citizen, in accord with the education policy laid down by the Union, shall: (a) have the right to education.
- Provision 25: Every citizen, in accord with the health policy laid down by the State, shall have the right to health care.
- Provision 36: Every citizen shall have the right to apply to the Supreme Court of the Union through appropriate proceedings to enjoy the rights guaranteed under this Chapter

The above eight protections afford Myanmar citizens an effective opportunity to realise a secured right to health, and to hold the state to account if they fail to uphold these very same protections. Although Provision 5(b) and 24(a) may at first seem unrelated to health, the freedom to attend and be educated at medical school as well as the opportunity to be employed in the health care sector, which the Rohingya are barred from, should not be underestimated. How can the Rohingya have an

[45] Myanmar Constitution (2008) *Chapter VIII: Citizenship, Fundamental Rights and Duties of Citizens*
[46] Ibid.

effective system of healthcare if they are not only prohibited from accessing hospitals outside of their township, but in addition cannot build up their own internal medical work force? Health professionals, such as doctors and nurses, are a fundamental pillar to any effective health care system and Myanmar's restrictive provisions barring them from education and employment in this arena directly undermines the Rohingya's capacity to realise positive health outcomes.

4. The stateless Rohingya and the challenges to their right to health

4.1 The right to reproductive freedoms (i): The two child policy

Both the national government of Myanmar and the local governments within Rakhine State have facilitated a system that subjects the Rohingya to restrictions that could not be legally applied to citizens of the state, both compromising their right to health and basic freedoms. One example of this is the prohibitive two-child policy instigated in 2005; although it came into place 10 years ago, it is still believed to be enforced in certain townships within Rakhine State.[47] In 2005, the local authorities within the townships of Maungdaw and Buthidaung—two towns with predominantly Rohingya populations—imposed a strict two-child policy. Fortify Rights, a human rights organisation, obtained a leaked document from the Township Peace and Development Council in Maungdaw, entitled 'Regional Order 1/2005', which revealed a key tenet of the policy that "those who have permission to marry must limit the number of children, in order to control the birth rate so that there is enough food and shelter."[48] In conjunction to *Regional Order 1/2005*, another addendum was created to outline enforcement mechanisms for this policy which instruct that:

> …if there is suspicion of someone being substituted [in the family registry] children in the household will be compared in age and in appearance. If the child is an infant, the mother will be made to breastfeed the child. Young children will be questioned separately.[49]

These restrictions contravene norms of international law and preclude substantive equality for women.[50] The significance of 'reproductive rights' was set out at the UN's International Conference on Population and Development in 1994, which outlined the need for states to ensure that "couples and individuals have a basic right to decide freely and responsibly the number, spacing and timing of all their children…and the right to attain the highest standard of sexual and reproductive health."[51]

Myanmar has dismissed the international human rights norms that protect the right to health and reproductive rights for both citizens and non-citizens, and have consequently fostered widespread fear and angst amongst stateless Rohingya women. Brad Adams, executive director of the Asia Division within Human Rights Watch, states that "fear of punishment under the two-child rule compel far too many Rohingya women to risk their lives and turn to desperate and dangerous measures to self-induce abortions."[52] Induced abortions are illegal within Myanmar and safe modern birth control options are often difficult to access. Therefore, many Rohingya women have no other option than to pursue an abortion in an unsanitary environment, commonly using the 'stick method'; this process involves the insertion of a stick into the uterus to terminate the pregnancy. When post-abortion complications arise, many women are too afraid to consult medical professionals in case they are exposed for having had an abortion, or for living with their partner without marriage permission. Both of which are

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[47] Fortify Rights, 'Policies of Persecution: Ending Abusive State Policies Against Rohingya Muslims in Myanmar (2014)

[48] Township Peace and Development Council, *Regional Order 1/2005*. 8th Day of the Waning Moon of Dagoo 1367, Maungdaw (2005)

[49] Addendum to internal order 1/2005. 2005. *Drawing Maps, Making a Record of Buildings, and Reviewing Household Registration*. Letter No: 3/24-1/U 6. 1057. Number 5, on file with Fortify Rights

[50] Office of the High Commissioner for Human Rights (OHCHR), *The Right to Health: Fact Sheet 31* (2008)

[51] United Nations, *Programme of Action for the UN International Conference on Population and Development (ICPD)* (1994)

[52] Human Rights Watch (HRW), 'Burma: Revoke 'Two-Child-Policy' For Rohingya' (2013)

punishable by harsh fines or imprisonment for up to 10 years according to Myanmar Criminal Law, Section 188.[53]

There remains a dearth of statistics pertaining to maternal mortality in Rakhine State as a result of abortions, however, an assessment shared with Fortify Rights reveals that 14.3 per cent of Rohingya women in Northern Rakhine have undergone at least one abortion and 26 per cent of those have had multiple abortions due to the restrictions on child birth; these figures are likely to be significantly higher in reality.[54]

4.2 The right to reproductive freedoms (ii): The Population Control Healthcare Bill

The two child policy, allowed to thrive amongst the stateless Rohingya, has been compounded by a recently passed law entitled *The Population Control Healthcare Bill.* The bill is one of four in a package of "Race and Religion Protection Laws" introduced in Myanmar's parliament in November 2014.[55] The Bill instructs the government to "organise married couples to practice birth spacing" in which women must have a "36 month interval between one child birth and another".[56] It also permits local state governments to request a presidential order to limit reproductive rates if they believe there to be an 'imbalance between population and resources', a high level of 'food insufficiency,' or a significant amount of 'low socio-economic indicators' to warrant an invocation of this law.[57] How these methods will be enforced in practice remains largely absent from local Myanmar coverage on this issue.

The Population Control Healthcare Bill creates a legal basis for discrimination through coercive and uneven applications of birth control policies and differing standards of care for different communities. The new Bill will compound the disparities of reproductive health already felt within Myanmar, where women located in rural areas of Eastern Myanmar, particularly in the Shan district, also struggle to have an effective realisation of reproductive rights even as citizens of the state.[58] Without citizenship, the Myanmar government has placed Rohingya women in a particularly vulnerable position for systemic violations and degradations of their reproductive health. For instance, having legal recognition as a citizen would arm Rohingya women with the judicial leverage to pursue provision 36 of Chapter Eight of the Myanmar Constitution, namely, the right to apply to the Supreme Court if their domestic rights have been ignored and undermined. This would permit them to hold the state to account for violating provisions 4, 7 and 9, namely that the state shall not discriminate based on sex, that the state will permit mothers to enjoy rights as prescribed by law and that nothing shall be detrimental to the personal freedoms of any citizen.[59] However, whilst the Rohingya remain stateless, their capacity to use the law for health right protection remains virtually impossible.

4.3 The right to access healthcare services: The restriction of movement policy

Having outlined the unethical policies enforced by Myanmar regarding reproductive rights, the next area of analysis will centre on the prohibition of free movement. The government of Myanmar has a long implemented a restrictive movement policy upon the Rohingya which prohibits them from travelling within or between townships without local authority authorisation. In order to get this they must obtain travel-authorisation Form Number 4 from township authorities, at least seven days prior to domestic travel; the legal foundation of this remains unclear.[60] This policy is in direct breach of

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[53] Fortify Rights, 'Policies of Persecution: Ending Abusive State Policies Against Rohingya Muslims in Myanmar (2014)

[54] Ibid.

[55] Irrawaddy Online, 'Union Parliament Passes Population Control Bill' (2015); ABC News Online, 'Myanmar population control bill signed into law despite concerns it could be used to persecute minorities' (2015)

[56] Human Rights Watch (HRW), 'Burma: Reject Discriminatory Population Bill' (2015)

[57] Irrawaddy Online, 'Union Parliament Passes Population Control Bill' (2015)

[58] Burma Medical Association, National Health and Education Committee, 'Diagnosis: Critical Health and Human Rights in Eastern Burma' (2010)

[59] Myanmar Constitution (2008) *Chapter VIII: Citizenship, Fundamental Rights and Duties of Citizens*

[60] Fortify Rights, 'Policies of Persecution: Ending Abusive State Policies Against Rohingya Muslims in Myanmar (2014)

Article 13.1 of the Universal Declaration of Human Rights (1948) that specifies that "everyone has the right to freedom of movement and residence within the borders of each State."[61]

The negative ramifications of this policy on the right to health lie in the Rohingya's inability and difficulty to access health care services. The right to health encompasses *access* to timely, acceptable, and affordable health care and without the freedom to access medical assistance, the Rohingya's right to health remains severely compromised.[62] For instance, if Rohingya's residing in Maungdaw require medical care in the township of Buthidaung they have to first obtain permission which is often either denied, or realised at great financial expense.[63] This problem is often exacerbated by the severe lack of medical professionals within Northern Rakhine State. For instance, in 2010 Ojea Quintana identified that there were only three doctors per 430,000 people in Maungdaw and two per 280,000 in Buthidaung[64]; this lies in stark contrast to the Buddhist-majority Sittwe Township where there is one physician for every 681 persons.[65]

The policy prohibiting the Rohingya's freedom of movement is neither imposed on the ethnic Rakhine nor on other Myanmar citizens. If the Rohingya were granted citizenship, this policy would not be domestically enforceable due to its contravention of provisions 4, 9 and 25 of Chapter 8 of the Myanmar Constitution; namely, that the state shall not discriminate against citizens based on race, that nothing shall be detrimental to the *personal freedoms* of any citizen and that every citizen shall have the *right to health care* [italics added].[66] It is these types of securities and protections, which are offered by the conferral of citizenship, that remain fundamental to successfully realising the right to health, and the freedom to access health care.

4.4 The right to health literacy: Prohibitions on health employment and education

In addition to restricting freedom of movement, the Myanmar government have also inhibited the Rohingya's capacity to be employed as health professionals or enjoy education at university level. As non-citizens the Rohingya are barred from occupation in the health sector, where they are strictly prohibited from partaking in health training courses, such as training for auxiliary midwives.[67] In addition, Sittwe has the only university in Rakhine State, yet Rohingya students are actively prohibited from studying medical sciences on the premises. Without citizenship, the protections afforded under the Myanmar Constitution such as provisions 5b and 24a, which endorse the equal right to occupation and the right of every citizen to education, remain out of reach to thousands of stateless Rohingya. Kickbusch asserts that "health literacy is a right of citizenship, and remains an imperative skill to function in modern society".[68] This sentiment is echoed by Kawachi who argues that "health literacy is a building block to health and is a foundation for modern citizenship. It is a critical component of social capital".[69] Health literacy skills include patient competency in navigating the health system, as well as having a knowledge of health rights, advocating for health issues and participating in patient and health organisations.[70] By prohibiting the Rohingya's access to health information and education,

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[61] United Nations, *The Universal Declaration of Human Rights* (1948)

[62] World Health Organization (WHO), *The Right to Health: Fact Sheet No. 323* (2013)

[63] Fortify Rights, 'Policies of Persecution: Ending Abusive State Policies Against Rohingya Muslims in Myanmar (2014)

[64] Office of the High Commissioner for Human Rights (OHCHR), *Progress report of the Special Rapporteur on the situation of human rights in Myanmar* (2010)

[65] Rakhine Inquiry Commission, *Final Report of Inquiry Commission on Sectarian Violence in Rakhine State* (2013) Republic of the Union of Myanmar

[66] Myanmar Constitution (2008) *Chapter VIII: Citizenship, Fundamental Rights and Duties of Citizens*

[67] C Lewa, 'Northern Arakan/Rakhine State: A Chronic Emergency' (2008)

[68] I Kickbusch, S Wait & D Maag, 'Navigating Health: The role of Health Literacy' (2006) London: Alliance for Health and the Future

[69] LF Berkman & I Kawachi, 'Social cohesion, social capital and health', in LF Berkman & I Kawachi (eds) *Social Epidemiology* (OUP, 1999)

[70] I Kickbusch, S Wait & D Maag, 'Navigating Health: The role of Health Literacy' (2006) London: Alliance for Health and the Future

consequently weakening their capacity to transform this into social capital, the Myanmar Government has undermined the opportunity for health empowerment, which is intrinsic to health literacy.[71]

In conclusion, I am not arguing that citizenship is the sole answer to the complex political problems facing the Rohingya in Rakhine State. Nor am I suggesting that if citizenship is conferred upon the Rohingya, that they will automatically achieve a perfect realisation of the right to health. However, what I am contending is that citizenship is an imperative first step for the Rohingya to improve their realisation of the right to health, and consequently achieve better health outcomes. Citizenship bestows enforceable rights under domestic law that render the state accountable and responsible for the citizens within its territory. It also allows individuals to become active participants of the state, rather than onlookers, and acknowledges their right to have their right to health protected under domestic law.

5. The future of the stateless Rohingya – Where do we go from here?

5.1 The theory of natural human rights: A useful or ineffective way of viewing citizenship and the "right to health?"

In order to examine the future of the Rohingya it is important to firstly understand the contentious theory of natural human rights, namely the notion that human rights *arise* by virtue of our humanity.[72] For instance, Paine in *The Rights of Man* argued that, "natural rights are those which appertain to man in right of his existence."[73] In conjunction, the American Declaration of Independence in 1782 proclaimed that all men "are endowed by their Creator with certain inalienable rights."[74] In light of these assumptions, and if we apply this ideology of natural rights to citizenship, human rights become an *attribute* of citizenship, rather than stemming from its attainment. The reason this topic is relevant to the plight of the stateless Rohingya, is that it provokes the question of whether relying on humanity as the primary locus of human rights, although a worthy ideal in theory, truly does promote an effective realisation of health rights in reality.

5.2 Legal barriers to the "right to health" (i): Domestic jurisdiction over the Rohingya – A tale of contradiction

Indeed, being human is enough to bestow rights under international law, however, it fails to be sufficient grounds to administer protection under Myanmar domestic law.[75] The treatment of the Rohingya by the Myanmar government is one defined by contradiction. On the one hand, national and local authorities impose stringent restrictions upon the Rohingya, suggestive of a tie between the two where one has the jurisdiction to reign supreme over the other; a bond in the negative sense, but a bond nonetheless. On the other hand, these very same authorities ardently deny these individuals as citizens and consequently circumvent any political responsibility towards them. This exemplifies a grey area for international law, whereby the protections afforded within the international legal system cannot effectively be applied to individuals under a domestic jurisdiction that fails to abide by international principles of conduct.

The forthright manner in which Myanmar impose discriminatory restrictions on the Rohingya, when as non-citizens the Rohingya have no duties towards the State, creates a system of double standards. This, in my opinion, is a clear example of how humanity is not sufficient ground to bestow fundamental protections. It is citizenship, rather than humanity, that domestic Myanmar law favours in its

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[71] P Makara, 'Social cohesion and health literacy: Understanding the concept of social cohesion' (2010) Council of Europe

[72] J Locke, *Two Treatises of Government* (The Lawbook Exchange, 2010)

[73] T Paine, *Rights of Man* (originally published in 1791, republished in 2000)

[74] *Declaration of Independence: In Congress, July, 4, 1776, The unanimous Declaration of the thirteen united States of America* (1776) US History Online

[75] H Arendt, *Origins of Totalitarianism*. (Benediction Books, 2009)

applications of rights; therefore, it is citizenship that will play a fundamental role in facilitating the Rohingya's pursuit of the right to health.[76]

5.3 Legal barriers to the "right to health" (ii): Amending the 1982 Citizenship Law

Having discussed the importance of legal recognition found in citizenship, the practicalities of changing the 1982 Law must be examined. In short, the 1982 Citizenship Law needs to be repealed, or at least significantly amended, to ensure the Rohingya are acknowledged as an eligible ethnic group for citizenship.[77] Although rescinding the 1982 Citizenship Law sounds like a simple solution in the abstract, in reality it is far more complex. The first barrier to repealing the 1982 Citizenship Law is the newly drafted Rakhine State Action Plan, serving as a general blueprint for post-conflict reconstruction in Myanmar.[78] Part IV of the plan entitled 'Citizenship assessment of Bengalis' promotes measures to continue Myanmar's assessment of citizenship through the criteria enshrined in the 1982 Citizenship Law; thereby halting any sense of amending the discriminatory nature of this Act.

Provision 7.1 of Part IV of The Rakhine State Action Plan reveals that the new assessment process will assign 'Bengalis' (Rohingya) into three different categories: those previously recorded in registers, those not recorded previously but willing to go through the assessment process according to Myanmar's existing laws, and those who reject the definition in the existing law. It goes on to state in provision 9 of the Action Plan that authorities will 'deal with the Bengalis' who reject the pejorative term of Bengali, as opposed to Rohingya, in the existing law. The signification of the term 'deal with' remains unknown.[79] The troubling Rakhine Action Plan is reflective of Myanmar's ardent intent to keep the discriminatory 1982 Citizenship Act active and enshrine statelessness as a 'national policy.'[80]

5.4 Legal solutions to protect the "right to health: A new administrative system & the role of empirical data

Therefore, in light of these seemingly entrenched legal barriers, does any hope remain for the Rohingya in their quest for citizenship? Although the Myanmar government are vehemently opposed to changing the Citizenship law, there remain possibilities for improvement. However, it should be noted that even within these potential solutions, obstacles and complexities remain. The Rohingya's lack of material proof to acquire citizenship has previously been, and remains to be, a sticking point and major barrier in their quest for citizenship under the 1982 Law.[81] In light of this, the first suggestion for securing citizenship for the Rohingya is to reformulate the specific rules pertaining to paperwork required for citizenship approval. Rather than attempting to overhaul the 1982 Citizenship Law in its entirety, which at present seems unlikely, international pressure should be put on Myanmar to reformulate the smaller discriminatory provisions within the law.

One solution could be the implementation of a short-term administration procedure with greater leniency and amenability than its predecessor, permitting family lists or other types of proof of historical lineage, to have greater legal weight as a mechanism to obtain citizenship. This would require domestic experts in both law and administrative procedures to formulate a system that respected Myanmar's sovereignty in creating its own process of citizenship, but also permitted international experts, as neutral observers, to oversee the process ensuring due diligence was being paid to non-discrimination. One other alternative solution, to bolster a new type of administration system, would be to conduct research in Rakhine State and gain empirical data on who gets citizenship

[76] Human Rights Council (HRC), *Report of the Special Rapporteur on the situation of human rights in Myanmar* (2015) Twenty Eighth Session

[77] M Zarni & A Cowley, 'The Slow-Burning Genocide of Myanmar's Rohingya' (2014) 23(3) Pac Rim L & Pol'y J

[78] Human Rights Watch (HRW), 'Burma: Government Plan Would Segregate Rohingya – Force Resettlement, Discriminatory Citizenship Creates Dangers' (2014)

[79] Ibid

[80] Human Rights Watch (HRW), 'Burma: Amend Biased Citizenship Law' (2015)

[81] S Aung, 'Burmese Govt Resumes Citizenship Verification of Rohingyas' (2014) Irrawaddy Online

and through which methods. For instance, Myanmar authorities in 2014 conducted a pilot phase of the citizenship verification process in Myebon where out of the 1,094 Muslims who took part, 209 were found eligible for citizenship. These included individuals from other ethnic groups such as Kaman Muslims, those who self-identified as Bengali, and an "unspecified number who were accepted as Rohingya."[82] Therefore, although this 'unspecified number' remains unknown, and on the condition that this number is not zero, it does suggest there remains some methods of acquiring citizenship for the Rohingya, and thereby, the capacity to realise an effective right to health.

5.5 Political barriers to the right to health (i): The contentious term 'Rohingya'

Having examined the judicial barriers and solutions to citizenship, the focus will now turn to the *political* obstacles hindering an effective "right to health" for the Rohingya. The first of which is the term 'Rohingya' itself. There is widespread controversy within Myanmar surrounding the historical origins of the term[83], the ethnic group it refers to[84], and its role as a political tool for legal accommodation.[85] Accepting the term 'Rohingya' or coming to an agreed consensus on an alternative term, is imperative to promoting the Rohingya's chance of obtaining citizenship, and with it a safeguarding of their health rights. However, even if these historical and political contentions could be agreed upon, there remains the issue that even some Rohingya's themselves do not associate with the term.[86] This creates great difficulties in uniting this marginalised group and galvanising internal pressure to create legal safeguards under this term.

An interview with a 12-year old Rohingya boy from the Maungdaw Township, conducted by the organisation Arakan Project, demonstrates the complexity of the issue. When asked about his understanding of citizenship the boy responded:

> I am a Muslim and my country is Burma; so I am a Burmese Muslim. I don't feel that I am a Rohingya. I have never heard of the word Rohingya in Burma . . . I don't understand the difference between a Rohingya and a Burmese Muslim. We look the same and we speak the same language. But my identity is that I am a Burmese.[87]

This definitional confusion amongst the Rohingya themselves is exacerbated by contrasting references to this particular group such as Rakhine Muslims[88], Rohingya Muslims[89], Muslim Arakanese[90], Burmese Muslims, as well as Bengalis.[91] The most inflammatory of these terms has been the reference to the Rohingya as 'Bengalis'. This is suggestive that the Rohingya are illegal immigrants from Bangladesh whose identification as Rohingya, a Muslim group with historical ties to Arakan State (former name for Rakhine State), is merely an artificial and invented concept. The official spokesperson of the Rakhine State Government, Win Myaing, echoed this stance when he responded to questions about the maltreatment of Rohingya: "How can it be ethnic cleansing? They are not an ethnic group?"[92]

The recent refusal to accept this term is blighted by irony when one looks to the years following Myanmar's independence where the term Rohingya was recognised as a legitimate ethnic group

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[82] Human Rights Watch (HRW), 'Burma: Government Plan Would Segregate Rohingya – Force Resettlement, Discriminatory Citizenship Creates Dangers' (2014)
[83] F Buchanan, *A Comparative Vocabulary of Some of the Languages Spoken in the Burma Empire* (1799; Asiatic Press, reprinted in School of Oriental and African Studies, Burma Press 2003)
[84] J Leider, 'Rohingya. The name. The movement. The quest for identity. Nation Building in Myanmar' (2014) Myanmar Egress and the Myanmar Peace Center
[85] D Tonkin, 'The R-word and its ramifications' (2014) Democratic Voice of Burma
[86] Arakan Project, *Issues to Be Raised Concerning The Situation of Stateless Rohingya Children in Myanmar* (2012)
[87] Ibid
[88] M Smith, 'The Muslim Rohingya of Burma' (1995) Conference of Burma Centrum Nederland
[89] M Charney, *A History of Modern Burma.* (CUP, 2009), 184-5
[90] N Zaw, 'Population Control Bill Could 'Stop The Bengalis': Wirathu' (2015) The Irrawaddy Online
[91] Arakan Project, *Issues to Be Raised Concerning The Situation of Stateless Rohingya Children in Myanmar* (2012)
[92] J Szep, *Special Report - In Myanmar, Apartheid Tactics Against Minority Muslims* (2013) Reuters

deserved of a homeland in Burma,[93] both on radio by the then Prime Minister U Nu who referred to the political loyalty of the Rohingya Muslims[94] to Myanmar, as well as the official 1964 Encyclopaedia which noted that Rakhine State was "seventy-five per cent Rohingya"[95], not Bengali. It is not the Rohingya's eligibility for citizenship or health rights that has changed since the outbreak of WWII, but rather the internal political landscape of Myanmar.[96] Galache corroborates this sentiment when he argues that the Rohingya identity is no more 'invented' than any other, but rather the "story of its ethnogenesis does not fit easily in the all too narrow concept of 'national races' as is currently understood"[97] in Myanmar.

5.6 Political barriers to the right to health (ii): Buddhist Nationalism and the anti-Islamic narrative

It could be argued that present day Buddhism and nationalism in Myanmar have become almost inseparably intertwined, a common trend amongst countries which practice the Theravada Buddhism subdivision of Buddhism.[98] Historically, the well-being of the Buddhist community was viewed as a revealing indication of the strength of the nation as a whole; therefore, one can assume that a threat to Buddhism acts simultaneously as a threat to the fabric of Myanmar society and nationhood.[99]

In 2012 Ashin Wirathu, a well-respected Monk amongst Buddhists who is infamous for his radical anti-Muslim views, demonstrated his desire to 'protect' Myanmar by calling citizens to support President Thein's proposal of removing 800,000 Rohingya to a new country of residence to terminate their threat to the "Motherland" of Myanmar.[100] This modern sense of nationalism, which has aligned itself with anti-Muslim rhetoric, is inherently linked to the barring of citizenship for Rohingya and acts as one of the greatest obstacles towards improving access to health care and safeguarding the health rights of Rohingya. Whilst Buddhist narratives of nationalism, vocalised by influential and highly respected monks, are entrenched with anti-Muslim sentiments the chances of the Rohingya being accepted as national citizens remains significantly diminished. It is within the political landscape of Myanmar, characterised by Islamophobia, where the nexus of citizenship, nationalism, and religion are most acutely felt, and pose the greatest threat to the Rohingya's securing of the right to health through citizenship.

5.7 Solutions to the political problems affecting the right to health: Open communication & the reformulation of Buddhist nationalism

Therefore, in light of these political difficulties, will the Rohingya ever have the opportunity to secure an effective right to health? In short, yes. Opportunities of hope do remain for the Rohingya to procure health right protection, and there remain three potential solutions to facilitate this safeguarding and heighten ethnic acceptance within Myanmar. Firstly, there is great need for open discussion on the subject of the Rohingya's plight, as well as the political space to facilitate this. In conjunction, it is fundamental that Myanmar fosters inter-community and inter-faith dialogue that respectfully permits members of the public and lower-ranking monks to question the interpretations of Buddhist teaching from other high-ranking monks. This is essential if the narrative of hate, suspicion and islamophobia, which has infiltrated the Myanmar consciousness at present, is to be undermined and dismantled.

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[93] U Gyi, 'Transcript of Speech by Deputy Commander-in-Chief Brigadier General Aung Gyi' (1961) Ahlin Newspaper, 5-6; M Zarni & A Cowley, 'The Slow-Burning Genocide of Myanmar's Rohingya' (2014) 23(3) Pac Rim L & Pol'y J

[94] U Nu, 'Lessons from the Religious Conflict for the State in Myanmar' (1954) Radio Address to the Nation of Myanmar on September 25. On file with M Zarni & A Cowley

[95] *Myanmar Encyclopedia*, (1964) Union of Myanmar

[96] D Tonkin, 'The R-word and its ramifications' (2014) Democratic Voice of Burma

[97] C Galache, 'Rohingya and national identities in Burma' (2014) New Mandela

[98] BBC, *Religions: Theravada Buddhism* (2012) Online

[99] M Walton, 'Myanmar Needs a New Nationalism' (2013) Asia Times Online

[100] Ibid

Secondly, Myanmar needs to face its problematic history which has formulated the present national sentiment of fearing the 'foreign' and in doing so needs to discuss ways in which the Buddhist community can adapt to the present reality of a multi-cultural Myanmar, without forsaking its distinctive core values or 'discounting its pervasive influence' on Burmese culture as the majority religion in the country.[101] Thirdly, even if Myanmar do eventually transform or reformulate the national sentiment to accommodate the human rights of the Rohingya, it could take years for this to come into place. Therefore, in light of this, what role can non-governmental organisations (NGOs) or non-state actors play in the meantime to improve the Rohingya's right to health? In short, it is imperative that NGOs continue to lobby for improved health conditions and health rights for the stateless Rohingya through international media. For instance, at present, Myanmar only spends 2% of its total government expenditure on health, leaving it in 150th position in the United Nation's Development Program's Human Development Report.[102] Therefore, pressure from the international community needs to be placed on Myanmar to improve its commitment to health by advocating for improved health facilities, clean water supplies, and access to medical staff; all of which are key components of the right to health.

6. Conclusion

Having acknowledged that citizenship may not be the final answer for the Rohingya to secure an effective right to health, and that ethnic tensions and Myanmar nationalism pose the greatest obstacles to health equality, one then questions whether further academic research on this subject should be directed towards the role that national identity plays, and has played, in affecting non-citizens right to health. If citizenship, although an important first step to realising an effective right to health, is not the ultimate answer to its security, we must look to other potential solutions. An analysis of the political policies and discursive behaviours stemming from national identity would not only be an informative line of enquiry, but may also offer the best means to create effective long term solutions for stateless individuals and their health rights.

[101] M Walton, 'Myanmar Needs a New Nationalism' (2013) Asia Times Online

[102] United Nations Development Programme (UNDP), *Human Development Report* (2014)