

USCIRF Hearing on Citizenship Laws and Religious Freedom

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Excluding some members of the community

The concept of universal rights is important both at international and national levels – and it is no surprise that this concept is so often challenged by authoritarian regimes and movements.

The post-WW2 legal framework sought to both define a minimum standard of human rights and to prevent states stripping their citizens of full citizenship. The latter is of real importance and one reason why it is, in international law, impossible to make someone stateless. We know what happens if this occurs – after the First World War people were trapped, unable to cross the new frontiers as they belonged to no longer existing states ... until the often maligned League of Nations stepped in to create a basic travel document (the Nansen passport offered no rights of abode but did offer the right to move in search of safety).

Equally it was no surprise that regimes such as Stalin's Russia or Nazi Germany took great care to ensure those they saw as having no rights (on the basis of birth or ethnicity) lost their entitlement to be citizens of the state in which they were born.

Unfortunately in many states, including Myanmar and India we are seeing the consequences of governments seeking to treat identifiable communities within their polity as no longer being citizens.

The impact and consequences of the 1982 Citizenship Act in Burma/Myanmar

On independence, Burma placed the Rohingya in a special category – excluding them from the long list of 'national' ethnic groups. But they were given National Registration Certificates (NRC), allowed to vote and in practice treated as any other ethnic group. By 1974, the Socialist regime (that came to power in the early 1960s) was facing economic collapse and was looking for ready scapegoats. The Rohingya as a Muslim, non ethnic Burmese community, were an easy target and their NRC were replaced by Foreign Registration Cards to emphasise that the Rohingya did not belong in Burma.

The 1982 Act went further and allocated the Rohingya to the category of 'foreigner'. It also deliberately removed the path to citizenship of having been born in Burma (as all the Rohingya had been) as their parents were already deemed to be foreigners (so this removed the possibility of gaining citizenship by appeal).

The 2008 constitution – in other words the current law – went further and insisted that citizenship would only be granted to individuals "*born of parents both of whom are nationals of the Republic of the Union of Myanmar*".

As foreigners, the Rohingya have no rights and no means to gain citizenship. This is amplified by long term claims by the Myanmar elite (and in this the NLD is the same as the old military regime), that the Rohingya really are 'Bengalis' who arrived in Burma after 1824 (this is the issue that underpins their exclusion from the list of approved ethnic groups).

As an identifiable group with no rights, and subject to well orchestrated vilification, the Rohingya have effectively been expelled from their country of birth in the period 2013-2018.

Echoes in India

This pattern of using legal changes to mask religious discrimination and strip identifiable groups of citizenship is also a feature of Modi's BJP government in India. The new citizenship law is aimed at Muslims and those from the poorest sections of India's caste system, undermines the non-confessional basis of the Indian constitution and, as in Myanmar, will create identifiable groups who are denied the basic right of citizenship.

There are two strands to Modi's approach. First he is trying to define who might be an acceptable refugee. This is problematic but it is more serious as the new law is retrospective and will affect many who fled from what was E Pakistan in the early 1970s to live in Assam. Worse, the new census law will remove citizenship from many who cannot provide the appropriate paper work. Those who are Hindus or Buddhists will then be able to appeal for citizenship under Modi's Citizenship law, those who are Muslims are denied this route.

In effect, families who have lived in India for 40-70 years are about to find themselves declared stateless and threatened with deportation.

Supporting Notes

Citizenship Laws in Burma since 1948

This section expands on the presentation to cover the details of how the Rohingya have been treated in Myanmar since independence as, uniquely among Burma's many ethnic groups, they were not given full citizenship in 1948¹. There is ample evidence in the Burmese legal framework² and in the practical decisions that were made that the Rohingyas were not seen as being especially different³ to any other ethnic minority in the period of democratic rule up to 1962⁴. They are described as Rohingyas in the 1961 census⁵ indicating an ongoing recognition of their existence as an ethnic group with that description.

Consideration of citizenship and who did, or did not, have the right of residence had been an important part of British colonial rule⁶ in the period when Burma was ruled as part of the province of India. Of this set of legislation the 1864 Foreigners Act⁷ makes the distinction now drawn in contemporary Burmese law between citizens and foreigners.

The 1947 Constitution⁸ placed considerable stress on the question of citizenship and Article 11 (iv) of the 1947 Constitution drew a distinction between Indian migrants who were denied citizenship and the Rohingya who were given National Registration Certificates with full legal and voting rights⁹.

This gave some rights, even if full citizenship was withheld. However, subsequent nationality and citizenship legislation has steadily removed even these limited rights. The 1974 Constitution of the

¹ Constituent Assembly 1947. *The Constitution of the Union of Burma*. Rangoon: Foreign Office, FIDH 2000. Burma: repression, discrimination and ethnic cleansing in Arakan. International Federation of Human Rights Leagues.

² Pugh, C. L. 2013. *Is Citizenship the Answer? Constructions of belonging and exclusion for the stateless Rohingya of Burma*. Oxford: International Migration Institute.

³ Citizenship Election Officer 1948. *Indigenous Race Recognition*.

⁴ Lwin, N. S. 2012. *Making Rohingya Stateless* [Online]. Rangoon: New Mandala. Available: <http://asiapacific.anu.edu.au/newmandala/2012/10/29/making-rohingya-statelessness/> [Accessed 8 July 2015].

⁵ Min, U. K. 2012. *An Assessment of the Question of Rohingya's Nationality: Legal Nexus between Rohingya and the State*. Rangoon.

⁶ Verma, S. 1961. *The Law relating to Foreigners and Citizenship in Burma*. Mandalay.

⁷ refworld. 1864. *Burma: Foreigners Act*, [Online]. UNHCR. Available: <http://www.refworld.org/docid/3ae6b54c4.html> [Accessed 28 February 2014].

⁸ Constituent Assembly 1947. *The Constitution of the Union of Burma*. Rangoon: Foreign Office.

⁹ Pugh, C. L. 2013. *Is Citizenship the Answer? Constructions of belonging and exclusion for the stateless Rohingya of Burma*. Oxford: International Migration Institute.

Socialist Republic of the Union of Burma¹⁰ defined citizenship (in article 145) as: *“All persons born of parents both of whom are nationals of the Socialist Republic of the Union of Burma are citizens of the Union”*. This was a critical step as, since the Rohingya were not treated as citizens in 1947, they could not be citizens of the state. Their National Registration Certificates (from the 1947 legislation) were replaced with Foreign Registration Cards, i.e. non-national cards.

The next legal step was the 1982 Burmese Citizenship Law¹¹ which created four categories of citizenship: citizen; associate citizen; naturalized citizen; and, foreigner. Citizenship was defined as:

“Nationals such as the Kachin, Kayah, Karen, Chin, Burman, Mon, Rakhine or Shan and ethnic groups as have settled in any of the territories included within the State as their permanent home from a period anterior to 1185 B.E., 1823 A.D. are Burma citizens.

The Council of State may decide whether any ethnic group is national or not”

Thus, citizenship was linked to membership of defined ethnic groups that were deemed to have lived in Burma before 1823. In effect, any other ethnicity is deemed to be a foreigner¹².

In the 1982 law, naturalization was offered if:

“Persons who have entered and resided in the State anterior to 4th January, 1948, and their offsprings born Within the State may, if they have not yet applied under the union Citizenship Act, 1948, apply for naturalized citizenship to the Central Body, furnishing conclusive evidence”

The conditions for naturalisation were set out in Sections 42 to 44 as:

42. Persons who have entered and resided in the State prior to 4th January, 1948, and their children born within the State may, if they have not yet applied under the Union Citizenship Act, 1948, apply for naturalized citizenship to the Central Body, furnishing conclusive evidence.

43. The following persons, born in or outside the State, from the date this Law comes into

¹⁰ Government of the Union of Burma 1974. The Constitution of the Socialist Republic of the Union of Burma. Rangoon.

¹¹ refworld. 1982. *Burma Citizenship Law* [Online]. UNHCR. Available: <http://www.refworld.org/docid/3ae6b4f71b.html> [Accessed 2014 28 February].

¹² This is in direct contravention of the Universal Declaration of Human Rights, art. 15(2) (“No one shall be arbitrarily deprived of his nationality”); International Convention on the Elimination of all Forms of Racial Discrimination, art. 5(d)(iii) (governments shall “undertake ... to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in ... the right to nationality”); International Covenant on Civil and Political Rights, art. 26 (“The law shall ... guarantee to all persons equal and effective protection against discrimination on any ground such as race,...”).

force, may also apply for naturalized citizenship: (a) persons born of parents one of whom is a citizen and the other a foreigner; (b) persons born of parents, one of whom is an associate citizen and the other a naturalized citizen; (c) persons born of parents, one of whom is an associate citizen and the other a foreigner; (d) persons born of parents, both of whom are naturalized citizens; (e) persons born of parents, one of whom is a naturalized citizen and the other a foreigner.

44. An applicant for naturalized citizenship shall have the following qualifications: (a) be a person who conforms to the provisions of section 42 or section 43; (b) have completed the age of eighteen years; © be able to speak well one of the national languages; (d) be of good character; (e) be of sound mind¹³.

In turn, paragraph 58 goes to considerable length to set out the various reasons why this form of citizenship can be revoked.

Under the 1982 legislation the Rohingya were denied full citizenship due to the ethnic classifications used¹⁴. In addition, the legal structures are vague, with substantial amounts of administrative discretion and the few legal rights were undermined by the regular passing of Martial Law legislation¹⁵. Further acts in the 1990s imposed increasing restrictions on foreigners¹⁶ including limiting the number of children to two and introduced forced birth control and restrictions on marriage. This led to restrictions on the formation of family units and the number of children, the result is a regime of invasive spot checks and house entry by officials¹⁷.

In addition, Rohingya had no automatic rights to travel, even between townships in Arakan and Rakhine without authorisation. Permission to leave the region and travel elsewhere in Burmawas very rarely granted.

If this legislation was simply a historic legacy of the period of military rule and dictatorship, it might be possible to hope the situation would correct as the democratic process developed. However, the

¹³ Human Rights Watch. 2000. *Malaysia/Burma: Living in Limbo* [Online]. Available: <http://www.hrw.org/reports/2000/malaysia/maybr008-01.htm> [Accessed 28 February 2014].

¹⁴ Pugh, C. L. 2013. *Is Citizenship the Answer? Constructions of belonging and exclusion for the stateless Rohingya of Burma*. Oxford: International Migration Institute.

¹⁵ ARTICLE 19 1996. *Burma: Beyond the Law*. London: Global Campaign for Free Expression.

¹⁶ Asian Human Rights Commission 2011. *Diagnosing the un-rule of law in Burma: A submission to the UN Human Rights Council's Universal Periodic Review Hong Kong*.

¹⁷ Ibid.

2008 Constitution of the Republic of the Union of Myanmar¹⁸ repeated the citizenship restriction of the 1982 Act in Article 345:

“All persons who have either one of the following qualifications are citizens of the Republic of the Union of Myanmar:

(a) person born of parents both of whom are nationals of the Republic of the Union of Myanmar;

(b) person who is already a citizen according to law on the day this Constitution comes into operation”

In reality, this legislation is even more restrictive than the 1982 act as it effectively restricts citizenship to those already deemed to be citizens or children born to two parents who are already citizens.

In consequence of this legislation, an identifiable ethnic group is denied membership of the country they live in and are subject to direct persecution in their daily lives. This is in open breach of the UN 1961 Convention on the Reduction of Statelessness where Article 1 states: "A Contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless"¹⁹. The government in Myanmar is aware of the implications of these policies and has complained:

“Through international media, Bengali [Rohingya] groups are widely publicizing the extent of government controls over them. Whilst the Government deems such measures as necessary in the context of the country’s situation and the non-citizen status of this group, the international community condemns these measures as violations of fundamental rights. This...has undermined the country’s reputation and affected its international relations.” — The Rakhine Inquiry Commission, final report, July 8, 2013²⁰

The emerging situation in India

¹⁸ Myanmar 2008. Constitution of the Republic of the Union of Myanmar.

¹⁹ Human Rights Watch. 1996. *Burma: The Rohingya Muslims: Ending a Cycle of Exodus?* [Online]. UNHCR. Available: <http://www.refworld.org/cgi-bin/tehis/vtx/rwmain?page=printdoc&docid=3ae6a84a2> [Accessed 28 February 2014].

²⁰ Rakhine Investigation Committee 2013. Summary of Recommendations. Government of Myanmar.

The BJP has a long history of attacking Muslims, seeing them as having no rightful place in India²¹. This has taken the form of encouraging communal strife²², a deep seated opposition to India's secular constitution and using the ideology of Hindutva to mobilise electoral support.

This approach is now being given legal force using two related tools: The 2019 Citizenship Amendment Act; and, the planned census.

Modi and his government present the act as seeking to simplify the process by which refugees from Muslim majority countries (Afghanistan, Pakistan and Bangladesh)²³ would be granted Indian citizenship as long as they were not Muslims. The old Indian law in this regard allowed anyone who had lived in India for 11 years to gain citizenship. The new act defines six religious identities (deliberately excluding Muslims) and, if the person can prove they fled from Pakistan, Afghanistan or Bangladesh, they can become eligible for citizenship in six years.

At the same time, the rules around the Overseas Citizen of India (OCI) cards have been changed. These allowed many foreigners to work in India but can now be rescinded for even minor breaches of local laws.

However, this is not just an attack on the rights of refugees and the intent is to remove citizenship for those already living in India. This is being done using a revised census. Originally introduced in Assam this requires people to produce documentation that is lacking, or has simple errors²⁴, with the result that initially some 4 million people in Assam were removed from the register. This included a substantial number of Bengali Hindus (who have often voted for the BJP in the past), in turn, this group were able to gain citizenship under the new legislation (they had historically fled East Pakistan) as they were Hindus while any Muslims were permanently denied citizenship, even when their parents had both been Indian citizens.

At the moment, this primarily has been applied in Assam but the BJP intend to create a National Population Register this year²⁵ and this will include questions about place of birth of parents as well as an expectation that key documents can be produced. Again, any non-Muslim caught up by this, can then use the new act to regain their citizenship, an approach deliberately denied to Muslims.

²¹ Andersen, W. K. & Damle, S. D. 1987. *The Brotherhood in Saffron: The Rashtriya Swayamsevak Sangh and Hindu Revivalism*, Delhi, Vistaar Publications, Frykenberg, R. E. 2008. *Hindutva as a Political Religion: An Historical Perspective*. In: Griffin, R., Mallett, R. & Tortorice, J. (eds.) *The Sacred in Twentieth-Century Politics: Essays in Honour of Professor Stanley G. Payne*. London: Palgrave Macmillan UK, Graham, B. D. 1990. *Hindu Nationalism and Indian Politics: The Origins and Development of the Bharatiya Jana Sangh*, Cambridge, Cambridge University Press

²² Mander, H. 2019. *2002 Gujarat riots: Why the 'clean chit' given to Narendra Modi does not absolve him* [Online]. Scroll.in. Available: <https://scroll.in/article/920939/2002-gujarat-riots-why-the-clean-chit-given-to-narendra-modi-does-not-absolve-him> [Accessed 17 September 2019].

²³ Schultz, K. 2020. *Modi Defends Indian Citizenship Law Amid Violent Protests* [Online]. New York: New York Times. Available: <https://www.nytimes.com/2019/12/22/world/asia/modi-india-citizenship-law.html> [Accessed 1 March 2020].

²⁴ Siddiqui, Z. 2018. *In India's citizenship test, a spelling error can ruin a family* [Online]. Reuters. Available: <https://www.reuters.com/article/us-india-politics-religion-insight/in-indias-citizenship-test-a-spelling-error-can-ruin-a-family-idUSKBN1L206H> [Accessed 29 February 2020].

²⁵ Shankar, S. 2020. *India's Citizenship Law, in Tandem With National Registry, Could Make BJP's Discriminatory Targeting of Muslims Easier* [Online]. The Intercept. Available: <https://theintercept.com/2020/01/30/india-citizenship-act-caa-nrc-assam/> [Accessed 1 March 2020].

The 2011 census indicates a Muslim population of India of 138 million²⁶ and their rights as citizens of India are now under direct threat. Any errors in paperwork (from a society that was largely illiterate until recently²⁷), or missing documentation will be enough for them to lose their citizenship on the basis of experience in Assam. If they are non-Muslim then they have the redress of citizenship via the 2019 act, for Muslims this option is denied. In effect, their status will be dependent on the bureaucratic whims of a hostile government. And one that talks enthusiastically about deportation and people having to return to their own countries²⁸.

In Myanmar we have clear evidence where denial of citizenship takes us. Over the last few years the Rohingya have mostly been expelled apart from those held in internal camps. Modi is planning to remove citizenship from the bulk of almost 140 million people.

²⁶ Ministry of Home Affairs 2013. 2011 Census Data: Religion. New Delhi: Office of the Registrar General & Census Commissioner, India.

²⁷ Census. 2019. *Literacy in India* [Online]. Delhi. Available: <https://www.census2011.co.in/literacy.php> [Accessed 14 September 2019].

²⁸ Shankar, S. 2020. *India's Citizenship Law, in Tandem With National Registry, Could Make BJP's Discriminatory Targeting of Muslims Easier* [Online]. The Intercept. Available: <https://theintercept.com/2020/01/30/india-citizenship-act-caa-nrc-assam/> [Accessed 1 March 2020].

References:

- Andersen, W. K. & Damle, S. D. 1987. *The Brotherhood in Saffron: The Rashtriya Swayamsevak Sangh and Hindu Revivalism*, Delhi, Vistaar Publications
- ARTICLE 19 1996. Burma: Beyond the Law. London: Global Campaign for Free Expression.
- Asian Human Rights Commission 2011. Diagnosing the un-rule of law in Burma: A submission to the UN Human Rights Council's Universal Periodic Review Hong Kong.
- Census. 2019. *Literacy in India* [Online]. Delhi. Available: <https://www.census2011.co.in/literacy.php> [Accessed 14 September 2019].
- Citizenship Election Officer 1948. Indigenous Race Recognition.
- Constituent Assembly 1947. The Constitution of the Union of Burma. Rangoon: Foreign Office.
- FIDH 2000. Burma: repression, discrimination and ethnic cleansing in Arakan. International Federation of Human Rights Leagues.
- Frykenberg, R. E. 2008. Hindutva as a Political Religion: An Historical Perspective. In: Griffin, R., Mallett, R. & Tortorice, J. (eds.) *The Sacred in Twentieth-Century Politics: Essays in Honour of Professor Stanley G. Payne*. London: Palgrave Macmillan UK.
- Government of the Union of Burma 1974. The Constitution of the Socialist Republic of the Union of Burma. Rangoon.
- Graham, B. D. 1990. *Hindu Nationalism and Indian Politics: The Origins and Development of the Bharatiya Jana Sangh*, Cambridge, Cambridge University Press
- Human Rights Watch. 1996. *Burma: The Rohingya Muslims: Ending a Cycle of Exodus?* [Online]. UNHCR. Available: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=printdoc&docid=3ae6a84a2> [Accessed 28 February 2014].
- Human Rights Watch. 2000. *Malaysia/Burma: Living in Limbo* [Online]. Available: <http://www.hrw.org/reports/2000/malaysia/maybr008-01.htm> [Accessed 28 February 2014].
- Lwin, N. S. 2012. *Making Rohingya Stateless* [Online]. Rangoon: New Mandala. Available: <http://asiapacific.anu.edu.au/newmandala/2012/10/29/making-rohingya-statelessness/> [Accessed 8 July 2015].
- Mander, H. 2019. *2002 Gujarat riots: Why the 'clean chit' given to Narendra Modi does not absolve him* [Online]. Scoll.in. Available: <https://scroll.in/article/920939/2002-gujarat-riots-why-the-clean-chit-given-to-narendra-modi-does-not-absolve-him> [Accessed 17 September 2019].
- Min, U. K. 2012. An Assessment of the Question of Rohingya's Nationality: Legal Nexus between Rohingya and the State. Rangoon.
- Ministry of Home Affairs 2013. 2011 Census Data: Religion. New Delhi: Office of the Registrar General & Census Commissioner, India.
- Myanmar 2008. Constitution of the Republic of the Union of Myanar.
- Pugh, C. L. 2013. *Is Citizenship the Answer? Constuctions of belonging and exclusion for the stateless Roningya of Burma*. Oxford: International Migration Institute.
- Rakhine Investigation Committee 2013. Summary of Recommendations. Government of Myanmar.
- refworld. 1864. *Burma: Foreigners Act*, [Online]. UNHCR. Available: <http://www.refworld.org/docid/3ae6b54c4.html> [Accessed 28 February 2014].
- refworld. 1982. *Burma Citizenship Law* [Online]. UNHCR. Available: <http://www.refworld.org/docid/3ae6b4f71b.html> [Accessed 2014 28 February].
- Schultz, K. 2020. *Modi Defends Indian Citizenship Law Amid Violent Protests* [Online]. New York: New York Times. Available: <https://www.nytimes.com/2019/12/22/world/asia/modi-india-citizenship-law.html> [Accessed 1 March 2020].
- Shankar, S. 2020. *India's Citizenship Law, in Tandem With National Registry, Could Make BJP's Discriminatory Targeting of Muslims Easier* [Online]. The Intercept. Available: <https://theintercept.com/2020/01/30/india-citizenship-act-caa-nrc-assam/> [Accessed 1 March 2020].

- Siddiqui, Z. 2018. *In India's citizenship test, a spelling error can ruin a family* [Online]. Reuters. Available: <https://www.reuters.com/article/us-india-politics-religion-insight/in-indias-citizenship-test-a-spelling-error-can-ruin-a-family-idUSKBN1L206H> [Accessed 29 February 2020].
- Verma, S. 1961. *The Law relating to Foreigners and Citizenship in Burma*. Mandalay.