



A legal analysis of the citizenship issue surrounding Rohingya in connection with the congress hearing, where lawmakers stressed that they cannot support National Unity Government unless it recognizes the citizenship of the Rohingya minority; and, why the Rohingya should be granted Myanmar citizenship

Preamble

On Tuesday, Myanmar’s ambassador to the United Nation, U Kyaw Moe Tun, called for increased sanctions against the military council at the Congress hearing. Legal Aid Network (LAN) acknowledged his bold step. Nevertheless, he was unable to provide a comprehensive answer about whether the citizenship rights of Rohingya minority would be granted.¹ To their dismay, some members of the Congress expressed that they will oppose efforts for the United States to support the NUG unless it recognizes the citizenship of Rohingya minority.² In this regard, we submit a brief analysis paper from the perspectives of International Human Rights Law, International Law, Constitutionalism and domestic laws.

Citizenship

A citizen is a subject of a nation or a member of a particular political group. In other words, a citizen is a person who has the right to participate in political activities and serve in a particular political group. Being a citizen of a country makes a person entitled to civil, political, social rights and protection of the country.

The Universal Declaration of Human Rights (UDHR) guarantees the right to citizenship, saying “*Everyone has the right to a nationality; and, no one shall be arbitrarily deprived of his*

¹ Once the military regime is over, U Kyaw Moe Tun said, the NUG will be better positioned to address the issues “in line with international norms and standards” on human rights and humanitarian law. When the NUG makes way for a permanent government, there will be an inclusive dialogue to find ways to solve the problem, Kyaw Moe Tun said.

<https://www.devex.com/news/experts-outline-actions-us-should-take-to-respond-to-myanmar-coup-99836>

² Ibid.

nationality nor denied the right to change his nationality.”³ Every citizen has, among other rights, the right to vote and the right to stand for election.⁴ Nonetheless, an alien may be excluded from enjoying political rights in a State but is entitled to basic human rights. Citizenship and civil rights are indispensable for sustaining democracy. It is even more important for a multinational state where diverse ethnic nationalities inhabit side by side. Moreover, the rights to citizenship are explicitly recognized in international instruments.⁵

Conventional wisdom is that, each state is responsible to comply with human rights norms and standards under international legal framework, and these norms, including the right to citizenship and the right to nationality, must be reflected in domestic laws of each state. As such, States are obliged to protect the people living within their territory from the peril of losing citizenship and becoming stateless through domestic laws in line with the international practices.

Moreover, the right to nationality is extensively safeguarded in international laws: article (20) of The American Convention on Human Rights 1969 said, “Every person has the right to nationality and the right to nationality of the State in whose territory he was born if he does not have the right to any other nationality. No one shall be arbitrarily deprived of his nationality or the right to change it.” Article (6) of the African Charter on the Rights and Welfare of the Child affirms, “Every child has the right to be named and registered at birth and the right to acquire a nationality. States Parties to the Charter shall undertake to ensure that their constitutional legislation recognizes the principles according to which a child shall acquire the nationality of the State in the territory in which he was born if, at the time of the child’s birth, he is not granted nationality by any other State in accordance with its laws.”⁶

In fact, Burma/Myanmar is a state party to several conventions such as Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Convention on the Rights of the Child (CRC), Convention on the Rights of Persons with Disabilities (CRPD) which ensure

³ Universal Declaration of Human Rights (UDHR) Article (15).

⁴ Ibid; Article (21) “Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

⁵ For instance, Article (15) of the Universal Declaration of Human Rights 1948; Convention on the Nationality of Married Women 1957; The 1965 Convention on the Elimination of All Forms of Racial Discrimination; International Covenant on Civil and Political Rights-ICCPR; 1979 Convention on the Elimination of All Forms of Discrimination Against Women-CEDAW; The 1989 Convention on the Rights of the Child-CRC; etc.

⁶ Nationality and Statelessness: A Hand Book for Parliamentarians <https://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=4dac01ed2>

that the right to nationality of women, child and disabled persons are safeguarded without any discrimination. Besides, Burma/Myanmar has responsibility to comply fully with the UDHR given that major parts of which are considered as customary international law. However, opposing the minimum standards for human rights, under the incumbent 1982 Citizenship Law of Myanmar, different types of citizenship are categorized, depending on the membership of national races, in a discriminatory manner. The law recognizes three categories of citizenship namely citizens, associate citizens and naturalized citizens and each group comes with different rights, privileges, protection as well as different penalties.

According to article (3) of the stated law, only members of the nationals such as Kachin, Kayah, Karen, Chin, Burman, Mon, Rakhine and Shan are entitled to full citizenship. However, those who do not belong to one of the national races are designated as associate and naturalized citizens lowering their status into secondary citizens. Despite generations of residence, they have been excluded from full citizenship and deprived of their human rights. Unlike those holding full citizenship, the 1982 Citizenship Law makes associate citizens and naturalized citizens vulnerable to termination of their citizenship by vague and general charges such as defamation of State and treason.

The article 11, chapter 2 of the 1947 Constitution provided that every person, both of whose parents belong or belonged to any of the indigenous races of Burma; every person born in the territories of the Union, at least one of whose grand-parents belong or belonged to any of the indigenous races; every person born in any of territories of the Union, of parents both of whom are, or if they had been alive at the commencement of this Constitution would have been, citizens of the Union and every person who was born in any of the territories which at the time of his birth was included within His Britannic Majesty's dominions and who has resided in any of the territories included within the Union for a period of not less than eight years in the ten years immediately preceding the date of the commencement of this Constitution or immediately preceding the 4th of January 1942 and who intends to reside permanently there in, shall be a citizen of the Union. This means that every person residing in the territory of Burma since independence and who are born in the territory of Burma should be a citizen of Burma according to the 1947 Constitution.

The citizenship issue is not new to Burma/Myanmar; in fact, the issue was not imminent until 2008 due to the complicated political situations. It extensively erupted after the 2008 Constitution was enforced. Contrary to the 1947 Constitution, the 2008 Constitution⁷ and the 1974 Constitution⁸ impose tremendous restrictions on citizenship rights; the two constitutions go even further to threaten the citizenship of the naturalized citizens.

According to article (345) of the 2008 Constitution, any person born of parents both of whom are nationals of the Republic of the Union of Myanmar; and any person who is already a citizen according to law on the day this Constitution comes into operation are citizens. In the light of this provision, the 1982 Citizenship Law was activated invoking article (346).⁹ Accordingly, discriminatory practices were conducted, depriving non-indigenous races of their citizenship rights, which obviously are not in line with international standards. As a consequence, when someone's racial identity is suspected,¹⁰ even if he or she had already acquired citizenship by law, the validity of his or her citizenship status was challenged. The suspected persons' citizenship status was at times terminated. Under these circumstances, civil rights of the citizens, born in the territory of Burma/Myanmar and reside continuously therein, were infringed;¹¹ and, the marginalized non-indigenous races have long been deprived of their political rights, *inter alia*, the right to be elected.

For instance, the election law of Myanmar¹² denied the rights to stand for election in violation of article (395) of the 2008 Constitution, which stipulates, "Every citizen who is not disqualified by the provisions under this Constitution or the provisions of the election law shall have the right to stand for election to any legislative assembly, known as *Hluttaw*." As such, the election law adds more barriers for such secondary citizens to enjoyment of the right to stand for elections.

⁷ The 2008 Constitution, Article 345 and 346.

⁸ The 1974 Constitution, article (145) and (146).

⁹ The 2008 Constitution, Article 345: Citizenship, naturalization and revocation of citizenship shall be as prescribed by law.

¹⁰ <https://www.myanmar-now.org/mm/news/4358> ဖိအားပေးခံရ၍ မွတ်စလင်အမတ်လောင်းကို ပယ်ချခဲ့ဟု မောင်လမြိုင်ခရိုင်ရွေးကောက်ပွဲထွက်သည့်

¹¹ "ဒီမိုကရေစီပြင်ဖို့ လုပ်တာလား၊ လူမျိုးတစ်မျိုးကို ဖိနှိပ်ဖို့လုပ်တာလား" <https://www.myanmar-now.org/mm/news/4284>

¹² State and Regional Hluttaw Election law; Article 10 (E).

There are over one million Rohingya Muslims continuously residing in Rahkine State before and after the country's independence. The successive governments had denied their rights to citizenship by providing the 1982 Citizenship Law, which excludes the Rohingya from the list of national races (Kachin, Kayah, Karen, Chin, Mon, Burman, Rahkine and Shan) and thereby depriving of their basic rights and the right to freedom of movement. Most of them are forced to live in overcrowded camps and have very limited access to basic healthcare, education and livelihood. Moreover, they have been suffering from atrocities caused by deprivations of civil rights, equality before the law and the right to live with dignity as a result of the denial of their citizenship.¹³

The children born of the Rohingya parents within the territory of the country should naturally be citizens in accordance with international human rights law, albeit, the parents are not eligible for citizenship prohibited under the draconian law. Besides, Burma/Myanmar has been a State Party to the Convention on the Rights of the Child since 1991. Nevertheless, the Child Rights Law 1993 effectively denied the citizenship rights of the Rohingya children. Article (10) of the Child Rights Law states that every child has the right to acquire citizenship as prescribed by the effective laws while such laws exclude marginalized groups from full citizenship. This provision would not be problematic in the event that domestic laws are compatible with international standards. Nevertheless, under the 1982 Citizenship Law, any child, born within the territory of the country, will never be a citizen if he or she is not a descendant of the officially recognized national races.

In fact, States are obliged to address the right to citizenship and adopt measures to prevent the violation of rights linked to citizen irrespective of race, religion, color, social status and any kind of discrimination to be in line with the international standards. Thus, it is not acceptable for States to enact the laws denying the rights to citizenship of those who deserve to become citizens; and such discriminatory laws must be repealed.

Therefore, the Federal Constitution (Second Draft) and the Provisional Constitution Draft¹⁴ Chapter (9) guaranteed, based on the updated norms of citizenship, that every person born in and

¹³ ဘဇဝန် နိုင်ငံသားဥပဒေကို ပြင်ဆင်ရန်ရရှိခဲ့သည့်အကြံပေးကော်မရှင်က အကြံပြု (Frontier Myanmar) <https://bit.ly/3br4zPA>

¹⁴ https://drive.google.com/file/d/1K0JVX84HI_LbOzV-SufU3JOr-jLjoCC/view?usp=sharing

outside of the Federal Union shall be protected from the risk of becoming stateless persons and secure the right to apply for citizenship. The Federal Constitutions ensure that every citizen be equally entitled to civil rights regardless of differences with regard to race, culture, language, religion, birthplace and sexual orientation.

Hence, in order to safeguard citizenship rights of the citizens of the Federal Union, the newly formed National Unity Federal Government (NUFG)¹⁵ should implement the abovementioned provisions of the Federal Constitutions while fighting against the military dictatorship.

The Federal Constitution (Second Draft) and the Provisional Constitution Draft explicitly specify the rights and duties of the citizens in Chapter (2) such as, equality before the law, freedom of expression, freedom of press, freedom religion, freedom of assembly and procession, the right to seek political asylum and gender equality.¹⁶ None of these rights¹⁷ are exactly guaranteed in the CRPH's Federal Democracy Charter. Based on the gender equality concept, the provisional constitution (revised draft) provides 30% reservation of seats for female representatives in the federal legislative assembly,¹⁸ federal government,¹⁹ federal supreme court and federal commissions.²⁰

Unlike Federal Democracy Charter, the two Federal Constitutions further bestow each citizen with freedom of movement, freedom to travel abroad and re-enter, right to marry, right to vote and stand in election for office, freedom of association as civil and political rights,²¹ the right to property, the right to work, right to pursue a living, rights to invention and intellectual property, right to own traditional inheritance, right to domicile, right to education and health, culture rights

¹⁵ Apparently, "National Unity Government" is used, which in fact, should be the National Unity Federal Government. It is important for every minister to keep in mind that the federal principles should be uphold in executing day-to-day government businesses.

¹⁶ Article 15 to 23.

¹⁷ Para 25, part 1 of the CRPH's Federal Democracy Charter prohibits discrimination based on gender but it does not guarantee the gender equality as was the case in Article 16 of the FCDCC Federal Constitution (second draft).

¹⁸ The Provisional Constitution (Revised Draft), Article 97 & 99.

https://drive.google.com/file/d/1K0JVX84HI_LbOzV-_SufU3JOr-jLjoCC/view?usp=sharing

¹⁹ Ibid, Article 160 (6)

²⁰ Ibid, Article 102 (d)

²¹ Article 24 to 28.

and environmental rights as economic, social and culture rights,²² child rights, workers' rights, farmers' rights and protection of equal rights as affirmative action rights.²³

Not surprisingly, the prominent congressmen were disappointed by the elusive response of U Kyaw Moe Htun. The potential to achieve the recognition of the NUG by the United States is doomed to failure. As a matter of fact, in this regard, rather than U Kyaw Moe Htun, the CRPH/NUG is more responsible. Since March 5, Legal Aid Network has relentlessly urged the CRPH to temporarily adopt a Federal Constitution (second draft) and approve a provisional constitution in a way, inter alia, that legitimacy can be sought somewhat effectively. Unfortunately, it chose to overlook the constitutions with the promulgation of the so-called Federal Democracy Charter. Despite the fact that some valuable principles are included, the Charter is neither sufficient nor valid. The international community, including the United States, would never be convinced that the Charter could safeguard the citizenship rights of the Rohingya minority.

Apparently, U Kyaw Moe Htun failed in the important part of an examination. How is he going to deal with such pivotal questions to come? U Kyaw Moe Htun and other NUG members may possibly be obliged to endure more questions, addition to those relating to Rohingya's citizenship issue, surrounding human rights, democracy, federalism, constitutionalism and rule of law. The questions remain a daunting task for the NUG unless they are well prepared by upholding the constitutionalism.

Simultaneously, the NUG also has the responsibility to salvage the people suffering from the fatal suppression of the CDM movement and those injured mentally and physically due to the Myanmar Army's offensive against the KIO, the KNU and other Ethnic Resistance Organizations (EROs) using excessive force. It can be construed that over half of the task to overthrow the military council and uproot the military dictatorship would have been achieved if the international community – including the United Nations, the United States and some democratic countries – formally recognize the legitimacy of the NUG. If the CRPH/NUG is planning to draw up another new constitution, the process will take some years. Without necessity, time should not be wasted as, from today on, the following six months might be a decisive period.

²² Article 29 to 45.

²³ Article 46 to 50.

Therefore, it is time now for the CRPH/NUG to step up from Federal Democracy Charter to Constitution; adopt the Federal Constitution (Second Draft) for the time being, and then approve the Provisional Constitution, drawn up invoking core structures of the Federal Constitution (Second Draft) and valuable principles of the Federal Democracy Charter, and make changes as necessary without damaging their essence. In so doing, the NUG will definitely earn confidence of the Ethic Resistance Organizations and remove their doubts on the CRPH/NUG. There is nothing more sure way to gain legitimacy for the NUG other than adopting the Provisional Constitution, establishing a Federal Union Army and occupying territories. Then, the military dictatorship and the military council would certainly be eliminated.

If the US government formally recognizes the legitimacy of the NUG, the latter will at least gain access to a billion US dollar, deposited by the previous regimes of Burma in the US, in addition to other assistance. With that money, all civil servants doing CDM can be paid, reparations can be provided to those severely affected by CDM movement and Tatmadaw's offensive; and above all, the Federal Union Army and the People's Defense Force could procure arms and ammunition in order to fight the military council effectively. To these ends, All Burma Students' Union, University of Yangon Students' Union, Mandalay University Students' Union as well as parts of the Generation Z who are fighting at the forefront of CDM movement have been demanding for adoption of a Provisional Constitution as soon as possible. Thus, Legal Aid Network urges the CRPH/NUG to listen to the voices of the people.

Legal Aid Network

5 May 2021

For More information, please contact:

Mr. Aung Htoo, M.A (Human Rights) R.L., Human Rights Lawyer
Program on Teaching Human Rights Law, Columbia University, New York, USA.
Founder of Legal Aid Network (LAN) and Principal of Federal Law Academy
E.mail: legalaiddnetwork@gmail.com
Website: legalaiddnetwork.org
Tel: (46) 76 1156 215

Mr. Adalgiso Montinari: M.A Conflict Studies and Human Rights, University of Utrecht, The Netherlands.
Senior Researcher & Program Facilitator - Legal Aid Network (LAN)
E.mail: legalaiddnetwork@gmail.com

Mr. Kyaw Kyaw, B.Sc (Geology)
Strategy & Policy Consultant
Legal Aid Network (LAN)
E.mail: kyawkyaw@legalaidnetwork.org

Ms. Lu Awng (LL.B, B.A Com Arts)
Advocacy Coordinator, Legislative Assemblies
Legal Aid Network (LAN)
Email: lu.awng@legalaidnetwork.org

Ms. Ja Nu Pan (LL.B, LL.M, Ph.D)
Advocacy Coordinator for Legal and Constitutional Campaign
Legal Aid Network (LAN)
E.mail: janupan@legalaidnetwork.org

Mr. Lahpai Naw San (LL.B, D.L)
Advocacy Coordinator to Ethnic Resistance Organizations
Legal Aid Network (LAN)
E.mail: lahpai.nawsan@legalaidnetwork.org

Ms. Roi San Awng (LL.B, DBL, DML)
Advocacy Coordinator to National Legal Communities
Legal Aid Network (LAN)
E.mail: roisanawng@legalaidnetwork.org