

## Exploring the Root Causes of the Persecution Policy Against Rohingya People: A Study Based on Three Constitutions of Burma/Myanmar

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### ABSTRACT

This article presents and analyzes the complex case of the Rohingya, a large group that allegedly migrated from the Bengal area and has been deprived of citizenship through the sociopolitical measures of the Myanmar government, thereby making them *de facto* stateless people in Myanmar. Through archival research investigating extensive historical records in Myanmar with a particular focus on the three constitutions of the country, this study attempted to identify and analyse the sociopolitical reasons and underlying sociocultural rationale for why Rohingya migrants are deprived of citizenship in Myanmar, treated as illegal immigrants, and subjected to criminal prosecution and oppression under Myanmar's military rule. While violence against the Rohingya people should be condemned, the Buddhist nationalism of the majority of Myanmar citizens and the concern about territorial sovereignty of the Myanmar government must be well understood before effective tutelary measures can be contemplated for the Rohingya people.

**Keywords:** Rohingya, Buddhist nationalism, Territorial sovereignty, Social exclusion

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### 1. Introduction

In 2018, the Fact-finding Mission on Myanmar of the United Nations (UN) released a report reprimanding the Myanmar military forces for their crackdown on the Rohingya people as an act of genocide and recommended that the top generals be tried for crimes against



humanity.<sup>1</sup> This act of violence was also condemned by the UN Human Rights Council (HRC) as “a textbook example of ethnic cleansing.”<sup>2</sup> In August 2020, UN Secretary-General Antonio Guterres expressed concern about the well-being of the Rohingya refugees and called for measures to address the root causes of the Rohingya genocide.<sup>3</sup> The UN Secretary-General’s concern reflects the eminent need to look into the causes of the tragedy, an inherently challenging area that is currently under-explored.

Mainstream research on the Rohingya tragedy has focused on the history, processes, and outcomes related to how these *de facto* stateless people have been persecuted and outcast by the Myanmar military government.<sup>4</sup> As an alternative approach to studying this issue, this article endeavors to provide an in-depth analysis of the root causes of the Rohingya tragedy. Through the adoption of archival research that investigates original historical records in Myanmar, this article takes a deeper look at the sociohistorical background of the Rohingya crisis, scrutinizes the sociolegal aspects of immigration and citizenship laws imposed by the Myanmar government, and analyzes the conflicts between the Rohingya people and the Myanmar government to present a different but realistic perspective on the origin and causes of the tragic situation in Rohingya.

The Burma/Myanmar<sup>5</sup> government has persistently claimed that the Rohingya people are illegal immigrants from the Bengal area. It rejects them as one of the nation’s 135 official ethnic groups, arguing that the ‘Bengalis’ migrated from Bengal to the Rakhine state from 1824 to 1948 due to the British colonial migration policy.<sup>6</sup> The government’s claim that Rohingya are illegal immigrants from the Bengal area is supported by the people in the country. Most people in Myanmar, including Aung San Suu Kyi,<sup>7</sup> deny the name “Rohingya” and instead call them either “Bengalis,” which literally means “people from Bengal,” or “Bangladeshis”, which means “people from Bangladesh”.

According to a United Nations High Commissioner for Refugees (UNHCR) report published in August 2018, over 723,000 Rohingya refugees had fled to Bangladesh since August 25, 2017.<sup>8</sup> In addition to about 400,000 Rohingya in Myanmar, it was estimated that in August 2018, there were over one million Rohingya refugees in Bangladesh, 500,000 in

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<sup>1</sup> UN Human Rights Council, ‘Report of the Independent International Fact-Finding Mission on Myanmar’ (12 September 2018) A/HRC/39/64.

<sup>2</sup> ‘UN Rights Chief Denounces Myanmar’s Ethnic Cleansing’ *Aljazeera* (Geneva, 12 Sep 2017) <<https://www.aljazeera.com/news/2017/09/myanmar-crisis-textbook-ethnic-cleansing-170911081528888.html>>. Also reported by M Safi, ‘Myanmar Treatment of Rohingya Looks Like Textbook Ethnic Cleansing, says UN’ *The Guardian* (Geneva, 11 September 2017) <<https://www.theguardian.com/world/2017/sep/11/un-myanmars-treatment-of-rohingya-textbook-example-of-ethnic-cleansing>>.

<sup>3</sup> ‘Address Root Causes of the Rohingya Refugee Crisis, Urges UN Chief’ *UN News* (26 August 2020).

<sup>4</sup> Ken MacLean, ‘The Rohingya Crisis and the Practices of Erasure’ (2019) 21 *Journal of Genocide Research* 83.

<sup>5</sup> The official name of the nation was changed from ‘Burma’ to ‘Myanmar’, or the ‘Republic of the Union of Myanmar’ in 1989.

<sup>6</sup> Kyaw Thet (ကျော်သက်), *History of the Union of Burma* (ပြည်ထောင်စု မြန်မာနိုင်ငံ သမိုင်း) (Inwa Taik 1962).

<sup>7</sup> Aung San Suu Kyi, *Letters from Burma* (Penguin Books 2010).

<sup>8</sup> ‘Rohingya Emergency’ (*UNHCR Malaysia*) <<http://www.unhcr.org/rohingya-emergency.html>>.

Saudi Arabia, 400,000 in Pakistan, 350,000 in Malaysia, and 200,000 in other Asian countries.<sup>9</sup> This is an issue that needs to be addressed for the sake of humanity.

Many researchers have agreed that the Rohingya are a group of helpless people who have modestly solicited the basic need for citizenship and fundamental human rights.<sup>10</sup> However, a genuine question exists as to whether the Myanmar government will ever grant citizenship to the Rohingya people. The legal construction of citizenship status as members of mainstream Burmese society is an uphill battle for these people. The deeply embedded sociopolitical conflicts between Rohingya and Myanmar have made this modest request for citizenship an almost impossible task.<sup>11</sup>

By investigating archival records in Myanmar, some of which are written in Burmese, this article strives to analyze the sociolegal aspects of the provisions of the Burma/Myanmar constitutions of 1947, 1974, and 2008, plus three crucial citizenship laws related to the Rohingya people: the Burma Immigration (Emergency Provisions) Act of 1947, the Union Citizenship Act of 1948, and the Burma Citizenship Law of 1982. The study closely examines the legality paradox of Rohingya citizenship<sup>12</sup> and the implications of these immigration and citizenship laws that are related to the precarious political contentions and religious, ideological, ethnic, and social conflicts between the Rohingya and Myanmar civilians as well as between the Rohingya and the Myanmar government.<sup>13</sup> Through an analysis of the underlying rationale and root causes of the Rohingya crisis, this study elucidates conceivable and realistic remedies to ease the inhumane suffering arising from the presumed illegality of the Rohingya people.

## **2. Theoretical Framework: Social Exclusion Theory**

According to the Myanmar government, the recurring tragedies of the Rohingya are significant impediments to national peace and stability in Myanmar and a significant obstacle to the country's economic development.<sup>14</sup> A series of constitutional reforms, together with the enactment of various citizenship laws, support the national policy in resolving the problem of conflicts arising from what Myanmar has described as "illegal immigration". In this article, the root causes of these crises are explored and analyzed in

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<sup>9</sup> 'WHO Appeals for International Community Support; Warns of Grave Health Risks to Rohingya Refugees in Rainy Season' (ReliefWeb, 29 March 2018) <<https://reliefweb.int/report/bangladesh/who-appeals-international-community-support-warns-grave-health-risks-rohingya>>.

<sup>10</sup> Nick Cheesman, 'How in Myanmar 'National Races' Came to Surpass Citizenship and Exclude Rohingya' (2017) 47 *Journal of Contemporary Asia* 461.

<sup>11</sup> Krishnadev Calamur, 'The Misunderstood Roots of Burma's Rohingya Crisis', (*The Atlantic*, 25 September 2017) <<https://www.theatlantic.com/international/archive/2017/09/rohingyas-burma/540513/>>.

<sup>12</sup> AKM Ahsan Ullah, 'Rohingya Crisis in Myanmar: Seeking Justice for the 'Stateless'' (2016) 32 *Journal of Contemporary Criminal Justice* 285.

<sup>13</sup> Benedict Rogers, *Burma: A Nation at the Crossroads* (rev edn, Rider 2015).

<sup>14</sup> Harrison Akins, 'The Two Faces of Democratization in Myanmar: A Case Study of the Rohingya and Burmese Nationalism' (2018) 38 *Journal of Muslim Minority Affairs* 229.

greater depth with the help of a theoretical framework, the social exclusion theory. Based on this theory, this article will show that the Myanmar military junta, despite its low popularity in Burmese society, is supported by most civilians in Myanmar with respect to its Rohingya exclusion policy.<sup>15</sup> An analysis of the root causes of the Rohingya crisis must consider both political and social factors in Myanmar.

Social exclusion is a multidimensional concept that can be “operationalized as a combination of material deprivation; insufficient access to social rights; a low degree of social participation; and a lack of normative integration.”<sup>16</sup> It is commonly defined as a dynamic process of progressive multidimensional rupturing of the social bond at the individual and collective levels, which can take many forms, including but not limited to elimination, abandonment, segregation, assistance, marginalization, and discrimination.<sup>17</sup> As Silver (2007) stated, “At a more macro-level, groups, communities, and societies also may undergo a process of social exclusion from larger collectives in which progressive isolation and a decline of solidarity give rise to new social boundaries – exclusion lines, so to speak – between insiders and outsiders.” Social exclusion is not the only type of exclusion that exists in societies and groups.<sup>18</sup> Exclusion can also occur in the form of “political exclusion,” which includes “the denial of citizenship rights such as political participation and the right to organize, and also of personal security, the rule of law, freedom of expression and equality of opportunity”; “economic exclusion,” which includes a “lack of access to labor markets, credit and other forms of ‘capital assets,’”; and “cultural exclusion,” which refers to “the extent to which diverse values, norms and ways of living are accepted and respected.” A combination of these various forms of exclusion, for instance, sociopolitical and sociocultural exclusion, is often not just feasible but can lay the foundation for a more comprehensive understanding of the rationale and justification of the exclusion process.

In the Rohingya case, social exclusion, coupled with other forms of exclusion, can denote two distinctive but complementary aspects of the issue.<sup>19</sup> First, sociopolitical exclusion involves government-based components such as the enactment of related citizenship laws supported by administrative procedures as legal instruments. Second, sociocultural exclusion refers to the social-relational dimension of diversity in ethnicity, religion, etc., in states or regions of domicile.<sup>20</sup> These two hybrid forms of social exclusion

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<sup>15</sup> *ibid.*

<sup>16</sup> Hilary Silver, ‘Social Exclusion: Comparative Analysis of Europe and Middle East Youth’ (2007) Middle East Youth Initiative Working Paper 15.

<sup>17</sup> Jean-François Ravaud and Henri-Jacques Stiker, ‘Inclusion/Exclusion: An Analysis of Historical and Cultural Meanings’ in G Albrecht, K Seelman and M Bury (eds), *Handbook of Disability* (Sage 2001).

<sup>18</sup> Charles Tilly, ‘Poverty and the Politics of Exclusion’ in D Narayan and P Petesch (eds), *Moving out of Poverty: Vol. 1. Cross-Disciplinary Perspectives on Mobility* (World Bank 2007) 45.

<sup>19</sup> Hilary Silver, ‘Social Exclusion and Social Solidarity: Three Paradigms’ (1994) 133 *International Labour Review* 531.

<sup>20</sup> Hilary Silver, Gerry Rodgers and Charles Gore, *Social Exclusion: Rhetoric, Reality, and Responses* (International Institute for Labor Studies 1995).

correspond to the two types of conflict between the Rohingya and the Myanmar government and between Rohingya and the Buddhist people of Myanmar.

Sociopolitical exclusion explains why changes in government policy and legislature can lead to the withdrawal of citizenship status from the Rohingya people. The acquisition of citizenship and its possible subsequent loss are both defined and confined by internal legal frameworks within the sovereignty of Burma/Myanmar.<sup>21</sup> The various versions of constitutions and citizenship laws enacted by the government of Burma/Myanmar seek to exclude the Rohingya people based on this form of sociopolitical exclusion.

Sociocultural exclusion is the background cause of the hostile conflicts between the Buddhists in Rakhine and the Rohingya Muslims. It explains why most Burmese people, even those who are against the military government, support its activities, even if they are brutal and violent, in persecuting and expelling the Rohingya people from the country.<sup>22</sup> The combined effects of sociopolitical and sociocultural exclusion have had a significant impact on the perceived Rohingya threat, which is exemplified by the withdrawal of their citizenship.

### **3. Research Approach: How the Root Causes Were Explored**

The history, processes, and outcomes of the Rohingya tragedy have been extensively researched and investigated in the mainstream literature based on Western perspectives.<sup>23</sup> This article provides a different perspective by looking into the root causes of the Rohingya genocide crisis in Myanmar based on an archival approach that investigated original historical records in Myanmar about the Rohingya crisis. The author of this article spent seven months researching from September 2019 to March 2020 in Myanmar by going through books, newspapers, and other public records in local libraries and archive repositories in major cities such as Yangon, Mandalay, and Pakokku in the Magway region. Some of the records were written in Burmese and have been translated into English by engaging local interpreters. The root causes of the Rohingya conflicts in Myanmar remain an under-explored area that deserves more attention. Many reports and studies have merely put forward direct and obvious reasons for the crisis, rather than examining the root causes of the Rohingya issue more deeply, as they have claimed.<sup>24</sup>

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<sup>21</sup> *ibid.*

<sup>22</sup> Afroza Anwary, 'Atrocities Against the Rohingya Community of Myanmar' (2018) 31 *Indian Journal of Asian Affairs* 91.

<sup>23</sup> Nurul Islam, 'Rohingya: A People under Endless Tyranny' (2021) 48 *Asian Affairs: An American Review* 14; Nehginpao Kipgen, 'The Rohingya Crisis: The Centrality of Identity and Citizenship' (2019) 3 *Journal of Muslim Minority Affairs* 61.

<sup>24</sup> Kyaw Win, 'The Root Cause of Rohingya Persecution' *New Mandala* (15 September 2015) <<https://www.newmandala.org/the-root-cause-of-rohingya-persecution/>>; Champa Patel, 'Root Causes of Rohingya Crisis Must Not be Ignored' *Chatham House* (28 September 2017) <<https://www.chathamhouse.org/2017/09/root-causes-rohingya-crisis-must-not-be-ignored>>.

As an essential investigative tool in qualitative research,<sup>25</sup> the archival approach adopted in this study can contribute to research on the Rohingya issue by exploring previously concealed matters, ideas, and concepts through the application of appropriate theoretical frameworks.<sup>26</sup> This article addresses this knowledge gap in the research on the Rohingya crisis. It can facilitate the analysis of various Myanmar-specific political and cultural factors directly contributing to the Rohingya tragedy.

This study analyzed the Rohingya crisis based on a sociolegal perspective by examining the three constitutions and related laws concerning the Rohingya people who have been systematically excluded from mainstream society in Burma/Myanmar. Based on this approach, the following four eras of the sociopolitical and sociocultural exclusion of the Rohingya were identified according to the three different constitutions and three related citizenship laws:

Era 1: The colonial era

Era 2: The post-colonial era (the first constitution of 1947)

Era 3: The junta era (the second constitution of 1974)

Era 4: The reform era (the third constitution of 2008)

In Myanmar, the general sentiment and attitude of the people and government are set against the Rohingya people. Since its independence in 1948, Burma has continuously imposed restrictions on immigrants and foreigners. The rejection and persecution of the Rohingya people have been a consistent and legitimate policy of the Burmese people and government since 1948, as these constitutions reflect. Some researchers<sup>27</sup> have suggested that the most significant enduring effect on the legality of the citizenship of the Rohingya in Myanmar, in addition to the provisions of the Burmese constitutions,<sup>28</sup> is created by immigration and citizenship laws such as the Burma Immigration (Emergency Provisions) Act of 1947, the Union Citizenship Act of 1948, and the Burma Citizenship Law of 1982. A review of the various related constitutions and immigration and citizenship laws is presented in the subsequent paragraphs.

#### **4. Era 1: The Colonial Era of Burma**

After the third Anglo-Burma war in 1886, Burma became a British colony, and Arakan, where most Rohingya settled, was made a province of India.<sup>29</sup> The Rohingya are mostly

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<sup>25</sup> Alvin Hoi-Chun Hung and Aung Myo Min, 'I'm afraid': The Cultural Challenges in Conducting Ethnographic Fieldwork and Interviews in Myanmar' (2020) 21 *Qualitative Research Journal* 113.

<sup>26</sup> Maria Tamboukou, 'Archival Research: Unravelling Space/Time/Matter Entanglements and Fragments' (2014) 14 *Qualitative Research* 617.

<sup>27</sup> Cheesman (n 10).

<sup>28</sup> Archana Parashar and Jobair Alam, 'The National Laws of Myanmar: Making of Statelessness for the Rohingya' (2019) 57 *International Migration* 94.

Muslims residing in the northern part of the Rakhine State<sup>30</sup> (previously known as “Arakan” but changed to “Rakhine” in 1990)<sup>31</sup> in western Myanmar.<sup>32</sup> Official statistics of Myanmar state that Rakhine’s population was about three million in 2014. Between the coast of Rakhine State and the Central Myanmar Basin, the Rakhine Mountains isolate the state from other parts of Myanmar, making it one of the most exclusive and secluded areas in Myanmar.

Arakan was initially an independent state known as the Kingdom of Mrauk U<sup>33</sup> for a long time before the 18th century when it was conquered and annexed by the Konbaung dynasty of Burma in 1785.<sup>34</sup> While some journalists and academic researchers have claimed the Rohingya established the Kingdom of Mrauk U and that their ancestors were natives of Rakhine as early as the 8th century, evidence suggests otherwise.<sup>35</sup> Historical records show that this independent coastal kingdom located in the region of Mrauk U in Arakan, along the eastern coast of the Bay of Bengal, existed for over 350 years (1429 to 1785).<sup>36</sup> Archival studies have shown that all kings of the Mrauk U dynasty were Buddhists, and they built many Buddhist temples,<sup>37</sup> not Islamic mosques, in their kingdom.<sup>38</sup> This suggests that the native Indigenous Arakan people were mostly Buddhists, not Muslims, in line with all these kings’ Buddhist beliefs.

Since the 18th century, in response to the British colonial government’s desire to capitalize on the cheap labor of the Bengali Muslims to develop the Indian colony, people in the Bengal area were encouraged to migrate to Arakan to further agricultural and infrastructural development.<sup>39</sup> These people, mostly Muslims, settled in Arakan and developed their own distinct culture and civil lives. As a result of the migration, the population in Arakan increased by slightly more than 100% within a span of 50 years, from 1881 to 1931.<sup>40</sup>

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<sup>29</sup> Clive J Christie, *A Modern History of Southeast Asia: Decolonization, Nationalism and Separatism* (IB Tauris Publishers 1998) 165.

<sup>30</sup> The original word ‘Rakhine’ in Burmese is ရခိုင်ပြည်နယ် (rahkinepyinaal).

<sup>31</sup> Michael W Charney, *A History of Modern Burma* (Cambridge University Press 2009).

<sup>32</sup> ‘The 2014 Myanmar Population and Housing Census’ (Myanmar Ministry of Immigration and Population, May 2015) 17.

<sup>33</sup> The original version of ‘Kingdom of Mrauk U’ in Burmese is called မြောက် ဦး အိန်ငံတော် (myawwat u eat ninengantaw).

<sup>34</sup> ‘Konbaung dynasty’ is translated from the Burmese: ကုန်းဘောင်မင်းဆက် (konebhaung mainnsaat).

<sup>35</sup> William J Topich and Keith A Leitich, *The History of Myanmar* (Greenwood 2013) 17.

<sup>36</sup> Hugh Chisholm (ed), ‘Arakan’ *Encyclopædia Britannica* (11th edn, Cambridge University Press 1911) 315.

<sup>37</sup> Some well-known Buddhist temples as tourist attractions in Rakhine are Shite-thaung Temple, Htukkanthein Temple, Maha Muni Temple, Koe-thaung Temple, and Le-myet-hna Temple.

<sup>38</sup> Topich, *The History of Myanmar* (Greenwood 2013).

<sup>39</sup> William Cornwell, *History of Mrauk U* (Lexington Books 2004).

<sup>40</sup> The data come from the comparison between two reports – (1) *Report on the Census of British Burma, Part I: The Enumeration and Compilation of Results 1881*; (2) *Census of India 1931, Vol XI: Burma, Part I: Report 1933*.

From 1942 to 1945, during the chaotic circumstances of WWII, Arakan Muslims supported the British soldiers, while Arakan Buddhists backed the Japanese army. Both peoples suffered violence and torture, and consequently, there has been widespread hatred against each other ever since.<sup>41</sup> During this chaotic and violent period, about half a million Indians and Muslims fled to Arakan of Burma, and the population in this region grew to exceed one million.<sup>42</sup> It has been reported that the Arakan Muslims, as allies of the British military force fighting the Imperial Japanese Army, were promised a Muslim state by the British colonial government in return for their loyalty.<sup>43</sup> However, according to the records of British Army Liaison Officer Anthony Irwin, the participation of the local Muslim voluntary forces in battles against the Japanese in Arakan was discredited by the British commanders.<sup>44</sup> Irwin (1945) reported that, instead of fighting against the Japanese, the Arakan Muslim volunteers destroyed Buddhist monasteries and pagodas, burned down houses in the Buddhist Arakanese villages, and massacred thousands of Arakanese civilians in Arakan towns and villages.<sup>45</sup> Later, it was revealed that the British authority's promise of a Muslim state to the Muslims in Arakan never materialized.<sup>46</sup>

In 1948, following the decolonization of Burma, Arakan became part of the newly independent Union of Burma. In a country where Buddhism is the dominant religion, the Rohingya, mostly Muslims, found themselves in irreconcilable disagreement with the new ruling government of Burma.<sup>47</sup> In the same year, they demanded to become a part of East Pakistan (now Bangladesh) and later turned to revolt, which was immediately suppressed by Burmese military forces.

## **5. The Three Constitutions of Burma/Myanmar**

A constitution is an aggregate of fundamental principles or established precedents that constitute the legal basis of a polity, organization, or other entity type and commonly determines how that entity is to be governed.<sup>48</sup> A country's constitution is essential to its people because it sets out the people's values, the rights of the people, how Parliament and the other legislatures work, how the national and provincial executives are chosen, and how the courts work.<sup>49</sup> The current constitution of Myanmar<sup>50</sup> is the third constitution of the country since its independence from colonial rule in 1948.

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<sup>41</sup> Carlos S Galache, *Rohingya and National Identities in Burma* (New Mandala 2014).

<sup>42</sup> Charney, (n 31).

<sup>43</sup> 'Who are the Rohingya?' *Radio Free Asia* (12 April 2010).

<sup>44</sup> Anthony Irwin, *Burmese Outpost (Memoirs of a British Officer who fought in Arakan with the Arakanese V Forces during the Second World War* (London: Collins 1945), 7, 16.

<sup>45</sup> Aye Chan, 'The Development of a Muslim Enclave in Arakan (Rakhine) State of Burma (Myanmar)' (2005) 3 SOAS Bulletin of Burma Research 396.

<sup>46</sup> Chan (n 45).

<sup>47</sup> Christie (n 29).

<sup>48</sup> Erin McKean (ed), *The New Oxford American Dictionary*, (2nd edn, Oxford University Press 2005).

<sup>49</sup> 'Why the Constitution is So Important' (Parliament of South Africa).



These constitutions correspond to three separate eras of political regimes in Burma/Myanmar at different times: the Union of Burma (1947–1974), the Socialist Republic of the Union of Burma (1974–1988), and the Republic of the Union of Myanmar (1988–present).<sup>51</sup> Each of these three separate constitutions of Burma/Myanmar has some very significant implications for the rights and privileges of the Rohingya people.

## **6. Era 2: The Post-Colonial Era (The First Constitution of 1947)**

After gaining independence from British colonial rule, the government of the Union of Burma enacted its first constitution in 1947. The incorporation of the term “union” in the full name of the country represents the need to coordinate the interests of various stakeholding states (such as the Shan and Kachin states) and thus establish a “quasi-federal system of ethnic states.”<sup>52</sup> To ensure the national unity of the independent sovereign republic, the constitution refrained from any specific classification of citizens into various states or different ethnicities.

According to the 1947 Constitution, there shall be “but one citizenship throughout the Union; that is to say, there shall be no citizenship of the unit as distinct from the citizenship of the Union.”<sup>53</sup> The definition of a citizen in Burma was stipulated in four provisions in Section 11 of the constitution:

- (i) every person, both of whose parents belong or belonged to any of the indigenous races of Burma;
- (ii) every person born in any of the territories included within the Union, at least one of whose grand-parents belong or belonged to any of the indigenous races of Burma;
- (iii) every person born in any of the territories included within 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;
- (iv) 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 January 1, 1942, and who intends to reside permanently therein and who signifies his election of citizenship of the Union in the manner and within the time prescribed by law, shall be a citizen of the Union.

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<sup>50</sup> The original version of the “Burma Constitution” in Burmese is called မြန်မာနိုင်ငံခြားပုဂ္ဂိုလ်အခြေခံဥပဒေ (myanmarninengan hpwalhcaeponeaahkyayhkanupaday).

<sup>51</sup> Christina Fink, ‘Myanmar: Religious Minorities and Constitutional Questions’ (2018) 49 *Asian Affairs* 259.

<sup>52</sup> Kenneth Panton, *Historical Dictionary of the British Empire* (Rowman & Littlefield Lanham 2015).

<sup>53</sup> The Constitution of the Union of Burma, 24 September 1947, Effective 4 January 1948.

In brief, in terms of the classification and definition of a Burmese citizen, the 1947 constitution provided a very general description. It was therefore immediately supplemented and qualified by the Union Citizen Act of 1948 to provide a more specific identification of the concept of citizen in Burma. Nevertheless, under this constitution, many Rohingya, although they did not belong to any of the stipulated Indigenous groups, qualified for citizenship if they had settled in British Burma at least eight years prior to 1942.

Since 1945, as the British colonists retreated from Asia, decolonization spread to Southeast Asia and the Indian continent. These decolonized countries, including, among others, Burma, India, Pakistan, and Bangladesh, all enacted immigration and citizenship laws to restrict foreigners from entering these states. State independence in these decolonized countries was often accompanied by the deportation of non-native populations with the enactment of immigration and citizenship laws that served this purpose.<sup>54</sup>

Although the constitution of 1947 and the Burma Immigration (Emergency Provisions) Act of 1947 provided the necessary legal framework and support to displace and expel deemed illegal immigrants in Arakan, only a small group of Rohingya managed to keep the legal status of foreigners in Burma.<sup>55</sup> The Burma Immigration (Emergency Provisions) Act of 1947 was an emergency measure originally intended to regulate the entry of foreigners into Burma immediately before its emergence as an independent sovereign state as well as to impose necessary conditions on their stay in Burma.<sup>56</sup> The Act did not allow the restriction or expulsion of foreigners born in Burma or who had entered Burma before its enactment and who continued to reside in Burma.<sup>57</sup> However, given its broad coverage, many Rohingya were persecuted under the 1947 Immigration Act, among other laws.<sup>58</sup> As most Rohingya do not have sufficient proof of residence or place of birth for them to be qualified as legal immigrants or residents in Rakhine, the Act effectively empowers law enforcement agencies in Myanmar to treat most Rohingya as illegal immigrants who are subject to displacement and expulsion.<sup>59</sup>

The Union Citizenship Act was enacted on January 4, 1948, to further complement and supplement the Constitution of the Union of Burma of 1947. Article 3(1) of the Act stipulates, “for section 11 of the Constitution, that the expression ‘any of the indigenous races of Burma’ shall mean the Arakanese, Burmese, Chin, Kachin, Karen, Kayah, Mon or Shan race and such racial group as have settled in any of the territories included within the Union as

<sup>54</sup> Alison Bashford, ‘Immigration Restriction: Rethinking Period and Place from Settler Colonies to Postcolonial Nations’ (2014) 9 *Journal of Global History* 26.

<sup>55</sup> ‘Myanmar’s Rohingya’ *The Economist* (20 October 2012).

<sup>56</sup> Trevor Gibson, Helen James and Lindsay Falvey (eds), *Rohingyas: Insecurity and Citizenship in Myanmar* (TSU Press 2016).

<sup>57</sup> S L Verma, *The Law Relating to Foreigners and Citizenship in Burma* (2nd enlarged edn, Rishi Raj 1961) 70.

<sup>58</sup> United States Department of State, *Country Reports on Human Rights Practices for 2011* (Bureau of Democracy, Human Rights and Labor 2012).

<sup>59</sup> The Burma Immigration (Emergency Provisions) Act, 1947 came into force with effect from the 13th June 1947, vide Judicial Department Notification No 214, dated the 13th June 1947. This Act therefore does not affect the entry of persons who entered the Union of Burma prior to this date.

their permanent home from a period anterior to 1823” or such “racial group as has settled in any of the territories included within the Union as their permanent home from a period anterior to 1823.”

The year 1823 was one year before the first Anglo-Burmese War, also known as the First Burma War, which took place from March 1824 to February 1826.<sup>60</sup> The war was decisively won by the British military force, which took complete control of a large part of Burma, including the Arakan province. After the war, Burma was required to sign a trade treaty that opened up the Burmese market and paid an indemnity of one million sterling pounds to the invader.<sup>61</sup>

As defined by the 1947 Constitution, citizens are those people who belong to an “indigenous race” having a grandparent from an “indigenous race”, or are children of citizens, or those who lived in British Burma before 1942. The Rohingya people were, unfortunately, not considered to be an Indigenous group and were therefore disqualified from being citizens of the country. A supplementary act, the Union Citizenship (Elective) Act 1948, enacted along with the Union Citizenship Act 1948 to support its implementation, required qualified people in Burma to apply for and obtain a “certificate of citizenship” as the sole evidence of Burmese citizenship. Most Rohingya people were unaware of the provision requiring such a citizenship certificate. The failure to comply with the regulation turned most Rohingya people into illegal immigrants.

The Burma Citizenship Act of 1948 and the Burma Immigration (Emergency Provisions) Act of 1947 are two of the most prominent examples of an anti-foreigner attitude being codified into law. It restricted non-Burmese people from entering the country without proper documentation. Derived from the people’s Buddhist nationalism, the Act enhanced national identity and thus united the people of Burma. This Act was later replaced by the Burma Citizenship Law of 1982.<sup>62</sup>

Furthermore, Buddhism had been the country’s dominant religion for centuries, although other religions were also allowed to prevail in Burmese society.<sup>63</sup> Under the leadership of a relatively weak civilian government, Burma chose not to become a member of the Commonwealth, a political union that most other former British colonies joined. This policy shows how Burma, after its independence, deliberately isolated itself from the rest of the world to preserve its own cultural and religious identity. The exclusion of the Rohingya people is an extension of this exclusionary policy.

Shortly after Myanmar’s independence in 1948, many “rebellious” organizations, such as the Rohingya Solidarity Organization (RSO), Muslim Liberation Organization (MLO) (founded by Zaffar Kawal), and Mujahid Party (founded by the famous Muslim singer, Jafar

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<sup>60</sup> Thomas Campbell Robertson, *Political Incidents of the First Burmese War* (Richard Bentley 1853) 252.

<sup>61</sup> Maung Htin Aung, *A History of Burma* (Cambridge University Press 1967).

<sup>62</sup> Verma (n 57).

<sup>63</sup> *ibid*, 86.

Hussain,) erupted, demanding social and political independence in Arakan.<sup>64</sup> The primary objective of these organizations was to create a Muslim autonomous state, called “Arakanistan”, which would coalesce and cooperate more closely with East Pakistan (now Bangladesh). The Mujahid Party had the slogan, “Pakistan Zindabad, Allah Mujahid” (Long live victorious Pakistan under the guidance of Allah), and gradually gained power and spread quickly when the Burmese government was engaged with the rebellions in other parts of the country.<sup>65</sup> The party sent an open letter to the government on June 9, 1948, demanding independent legal status and the creation of an autonomous Muslim State in Arakan. Given the risks involved in Burma’s territorial sovereignty, the government formed the Burma Territorial Force (BTF) with Arakan ethnic group members under the direction of the Deputy Commissioner of Sittwe (capital of Arakan) to suppress the rebellion, with a view to eliminating the Mujahid Party.<sup>66</sup>

In the 1950s, the Burmese government fiercely suppressed the Mujahid Party in Arakan. The Rohingya movement subsequently went underground and became dormant for many years after General Ne Win took power in 1962.<sup>67</sup>

On July 15, 1972, a congress of all Rohingya parties was held at the Burma-Bangladeshi border to call for the “Rohingya National Liberation”, which was immediately regarded as an illegal organization by the Burmese government.<sup>68</sup> The conflict between the Rohingya people and the Myanmar government became more than simply a controversial issue of legal or illegal immigration but rather, an issue of territorial sovereignty. Many countries, including Myanmar, have imposed various immigration and citizenship laws to prosecute and expel illegal immigrants to avoid possible challenges to these countries’ territorial sovereignty.<sup>69</sup>

According to the theory of territorial sovereignty, and the territory-object (*Eigentumstheorie*) approach, in particular, the state is a kind of “property of international law, that is, an exclusive power of disposing of a territory as is the power to dispose of goods.”<sup>70</sup> State sovereignty is therefore the “recognition by internal and external actors that the state has the exclusive authority to intervene coercively in activities within its territory.” In administrative law, the essence of sovereignty is that the state “decides for itself how it

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<sup>64</sup> As reported by Chan (n 45).

<sup>65</sup> Islamic Human Rights Commission Myanmar’s Muslims, *The Oppressed of the Oppressed* (London 2005).

<sup>66</sup> Haradhan Kumar Mohajan, ‘History of Rakhine State and the Origin of the Rohingya Muslims’ (2018) 2 IKAT: The Indonesian Journal of Southeast Asian Studies 19.

<sup>67</sup> Mya Win, ‘If We Appraise the Attempts Made to Sow Enmity against Myanmar Naing-ngan’ *Working Peoples’ Daily* (25 January 1992).

<sup>68</sup> Based on a report prepared by the British Foreign Office about the ‘Mujahid Revolt’ in Arakan around the time of Burmese independence. It provides good background on the Rohingya issue.

<sup>69</sup> Rachel Blomquist, ‘Ethno-Demographic Dynamics of the Rohingya-Buddhist conflict’ (2016) 1 Georgetown Journal of Asian Affairs 94.

<sup>70</sup> Giovanni Distefano, ‘Theories on Territorial Sovereignty: A Reappraisal’ (2010) 41 Journal of Sharia and Law 25.

will cope with its internal and external problems.”<sup>71</sup> In international law, state sovereignty expresses itself “both as the exercise of the real right over the territory and as the manifestation of the exclusive power of government on the territorial community.”<sup>72</sup> The importance of a nation’s sovereignty has been emphasized by the United Nations on several occasions. For instance, the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty was adopted by the United Nations on December 21, 1965, to follow “the principle of equal rights and self-determination of peoples and [...] the obligation of its Members to refrain from the threat or use of force against the territorial integrity or political independence of any State.”<sup>73</sup> Furthermore, in 1970, the United Nations confirmed that the adoption of the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations could “contribute to the strengthening of world peace and constitute a landmark in the development of international law and of relations among States, in promoting the rule of law among nations and particularly the universal application of the principles embodied in the Charter.”<sup>74</sup>

The history of the Rohingya in Burma/Myanmar clearly portrays the concern of the Burma/Myanmar government about accepting them as citizens in Myanmar and the fear that they would demand autonomous power in the Rakhine state, which would then become more affiliated with neighboring Muslim countries such as Bangladesh and Pakistan. Worst of all, this might incubate a possible staging area for militant groups, such as the Arakan Rohingya Salvation Army (ARSA). The government was afraid this ethnic and religious minority group would destabilize or break up the country. This explains why the Rohingya have been discredited and demonized as an enemy of the Burmese people for so many years by the Myanmar government through publicity and education in schools, media, business contracting, and legal proceedings.<sup>75</sup> Here, the issue of territorial sovereignty plays an essential role in explaining the underlying reason for the frequent over-reaction of the Burma/Myanmar government through military actions.

### **7. Era 3: The Junta Era (The Second Constitution of 1974)**

On March 2, 1962, the military junta took control of Burma by overthrowing the civilian government through non-democratic means<sup>76</sup>— basically a “coup d’état.”<sup>77</sup> Since then, the government has been under direct control of the military junta.

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<sup>71</sup> Kenneth Waltz, *Theory of International Politics* (Addison-Wesley 1979) 96.

<sup>72</sup> Court of Appeal of Rome, 23 (25) June 1965, as quoted in Paolo Picone and B Conforti, *La giurisprudenza italiana di diritto internazionale pubblico. Repertorio 1960-1987* (Naples, Jovene, 1988) 110.

<sup>73</sup> Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty (adopted 21 December 1965 UNGA Res 2131 (XX)).

<sup>74</sup> Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (adopted 24 October 1970 UNGA Res 2625 (XXV)).

<sup>75</sup> Cheesman (n 10).

Between 1962 and 1974, Myanmar was ruled by a revolutionary council headed by the junta generals. Socialism was practiced in the country, all businesses and media were nationalized, and the economy of Burma deteriorated significantly. The new government of General Ne Win enacted the second constitution of Burma on January 3, 1974.<sup>78</sup> In addition to specifying that Burma was a socialist democracy, the new constitution demarcated 14 ethnic states and divisions (Kachin State, Kayah State, Karen State, Chin State, Sagaing Division, Tenasserim Division, Pegu Division, Magwe Division, Mandalay Division, Mon State, Arakan State, Rangoon Division, Shan State, and Irrawaddy Division).<sup>79</sup> Regarding citizenship in Burma, Article 145 of the Constitution<sup>80</sup> stipulated that:

- (a) All persons born of parents both of whom are nationals of the Socialist Republic of the Union of Burma are citizens of the Union.
- (b) Persons who are vested with citizenship according to existing laws on the date this Constitution comes into force are also citizens.

This provision had a direct and imminent impact on the citizenship of the Rohingya people. The 1974 Constitution superseded the provisions of the 1947 Constitution that allowed people to gain citizenship on the basis that they either had a grandparent from an Indigenous race or had lived in British Burma prior to 1942. Under this new provision, a large number of Rohingya residents in Arakan were disqualified from citizenship based on two essential aspects: first, the Rohingya were not regarded as an Indigenous group, and second, most Rohingya parents did not qualify as nationals of Burma.<sup>81</sup> Worse, at the time of the enactment of the 1974 Constitution, most Rohingya, who rarely received basic education, were not aware of the need to seek evidence to prove they qualified for Burmese citizenship.

From 1947 to 1971, the Rohingya people could have become citizens of Pakistan instead of Burma. Most Rohingya people migrating into Arakan belonged to a Muslim minority group living in majority Hindu regions in the Bengal area of India before its independence.<sup>82</sup> When Pakistan had grievous social, political, and religious conflicts with India in 1947, many people from India, mostly Muslims, fled to East Pakistan and became a linguistic minority among the Bengali people. They were full citizens of Pakistan until 1971, when the Bengali majority in East Pakistan began their struggle for an independent Bangladesh. During this struggle for independence, the people in Arakan sided with Pakistan, not Bangladesh. After

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<sup>76</sup> Matthew J Walton, 'Ethnicity, Conflict, and History in Burma: The Myths of Panglong' (2008) 48 *Asian Survey* 889.

<sup>77</sup> A coup d'état, according to Wikipedia, is an illegal, unconstitutional seizure of a government's power by a military faction, usually under the rule of a dictator.

<sup>78</sup> Shakila Devi Konsam, 'Myanmar under the Military Rule 1962-1988' (2014) 3 *International Research Journal of Social Sciences* 46.

<sup>79</sup> Constitution of the Union of Burma (1974), arts 31(a)-(n).

<sup>80</sup> Constitution of the Union of Burma (1974), arts 145(a)-(b).

<sup>81</sup> MA Alam, *Marginalization of the Rohingya in Arakan State of Western Burma* (Kaladan Press 2011).

<sup>82</sup> 'Stateless in Bangladesh and Pakistan' <<https://web.archive.org/web/20070221171846/http://www.statelesspeopleinbangladesh.net/home.php>>.

the independence of Bangladesh, the Rohingya people were not accepted for citizenship by either Pakistan or Bangladesh.<sup>83</sup>

The Burmese government amended and promulgated the Emergency Immigration Act of 1947 in 1974 to oblige all citizens in Burma to carry an identity card, namely a “National Registration Certificate.”<sup>84</sup> The amended Act specified that the Rohingya were ineligible for these cards and were merely eligible for a “Foreign Registration Card” that provided only limited rights meant for foreigners. Few Rohingya were able to secure a Foreign Registration Card due to a failure to provide evidence of foreign identity. Under this Act, most Rohingya people became *de facto* stateless people.

Moreover, the independence of East Pakistan to become Bangladesh in 1972 caused a massive outflow of refugees to nearby countries, especially Arakan of Burma.<sup>85</sup> Starting in 1979, together with the existing Muslims in Arakan, these refugees were expelled vigorously by the Burmese government.<sup>86</sup> A few years after the Rohingya refugee repatriation in 1979, the Burmese government introduced a new Citizenship Law in 1982, which deprived almost all the Rohingya people of citizenship.

The Burmese government enacted the Burma Citizenship Law of 1982,<sup>87</sup> which effectively and formally refuted the legality of the citizenship of almost all Rohingya. The Burma Citizenship Law of 1982 was essentially based on the criterion of *jus sanguinis* (Latin: the right of blood).<sup>88</sup> The citizenship law identified three categories of citizens: “Citizen”, “Associate Citizen” and “Naturalized Citizen”. These citizens were issued with color-coded identity cards, carrying different sets of rights. “Citizens” referred to persons who were citizens by birth<sup>89</sup> by belonging to one of 135 “national races” in Burma before 1823 as well as those already recognized as citizens under the previous 1948 Union Citizenship Act.<sup>90</sup> “Associate citizens” were those whose application for citizenship under the 1948 Act was still pending when the 1982 law came into force. According to the Burma Citizenship Law, access to naturalized citizenship applied only to those “who have entered and resided in the State anterior to January 4, 1948, and their offspring born within the State may, if they have not yet applied under the Union Citizenship Act, 1948, apply for naturalized citizenship to

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<sup>83</sup> Based on the quotation, ‘They were abandoned by Pakistan upon Bangladesh’s independence, as Pakistan argued that a mass influx of this minority would destabilize an already fragile and culturally mixed population. Bangladesh, on the other hand, scorned them for supporting the enemy’ <<http://www.nationalityforall.org/bangladesh>>.

<sup>84</sup> Myint Sein, Zin Win and Ei Wai, ‘Authentications of Myanmar National Registration Card’ (2013) 1(2) Indonesian Journal of Electrical Engineering and Informatics 53.

<sup>85</sup> Gibson, James and Falvey (eds) (n 56).

<sup>86</sup> Ullah (n 12).

<sup>87</sup> The Burma Citizenship Law (Pyithu Hluttaw Law No 4 of 1982) was enacted by the third session of the Third Pyithu Hluttaw on 15 October 1982.

<sup>88</sup> *Jus sanguinis* (Latin: right of blood) is a principle of nationality law by which citizenship is not determined by place of birth but by having one or both parents who are citizens of the state.

<sup>89</sup> Burma Citizenship Law (Pyithu Hluttaw Law No 4 of 1982) Chapter II, Section 3.

<sup>90</sup> Burma Citizenship Law (Pyithu Hluttaw Law No 4 of 1982) Chapter II, Section 6.

the Central Body, furnishing conclusive evidence.”<sup>91</sup> Although many Muslims settled in Arakan for generations, they were unable to provide proof of their residence. As a result of their illiteracy and poor record-keeping, they did not qualify as “Naturalized Citizens.” After the Burma Citizenship Law of 1982 was enacted, most Rohingya people were effectively stripped of their Burmese citizenship.

Although many Rohingya people came from the Bengal area, Bangladesh would not accept them as Bengali because the Rohingya language was considered substantially different from the modern Bengali language spoken by the natives of Chittagong in the Bengal areas of Bangladesh.<sup>92</sup> Therefore, after Burma had enacted its citizenship law, the Bangladesh government revised its Citizenship Law of 1951 and later amended the Citizenship Order in 1982 to officially declare all the Rohingya refugees non-nationals in almost the same way that the Burmese government had announced that all Bengalis in Burma were foreigners without legal status.<sup>93</sup> Thus, the Rohingya experienced difficulty obtaining citizenship in Burma after the Burma Citizenship Law of 1982 was enacted, and they were not able to become Bangladesh citizens after the Citizenship Order in 1982 was declared. They became *de facto* stateless people.<sup>94</sup> As of February 2016, according to the report of the United Nations High Commissioner for Refugees (UNHCR),<sup>95</sup> most of the 1.5 million Rohingya Muslims were not entitled to citizenship under the 1982 law,<sup>96</sup> and the majority of those who resided in this part of Burma did not show any wish to apply for associate or naturalized citizen status.<sup>97</sup>

While quite a number of researchers have suggested that the Burmese immigration and citizenship laws, such as the Burma Citizenship Law of 1982, are the causes of the Rohingya crisis,<sup>98</sup> this article argues that, from a sociolegal perspective, the fundamental underlying reasons for the Rohingya’s sociocultural and sociopolitical exclusion, which led to their stateless status, was the concern of the government and people about Buddhist nationalism and territorial sovereignty in Myanmar, respectively. The Burma Immigration (Emergency

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<sup>91</sup> Burma Citizenship Law (Pyithu Hluttaw Law No 4 of 1982) Chapter IV, Section 42.

<sup>92</sup> Jobair Alam, ‘The iImpacts of the Burmese Citizenship Law on the ‘Rohingyas’: A Critical Appraisal’ (2015) 9 *Society & Change* 61.

<sup>93</sup> Ridwanul Hoque, Report on Citizenship Law: Bangladesh (EUDO Citizenship Observatory Robert Schuman Centre for Advanced Studies 2016).

<sup>94</sup> Md Mahbulul Haque, ‘1982 Citizenship Law in Burma and the Arbitrary Deprivation of Rohingyas’ Nationality’ (2014) 35 *South Asian Journal of Policy and Governance* 23.

<sup>95</sup> UNHCR, ‘Myanmar Fact Sheet’ (2016).

<sup>96</sup> A South, *Ethnic Politics in Burma: States of Conflict* (Routledge 2009).

<sup>97</sup> Reported by Martin Smith, ‘The Muslim Rohingya of Burma’ (Conference of Burma Centrum Nederland, Amsterdam, December 1995).

<sup>98</sup> See, for example, (1) I Ahmed, *The Rohingyas: From Stateless to Refugee* (University of Dhaka 2009); (2) International Crisis Group (ICG), ‘Myanmar: The Military Regime’s View of the World’ *ICG Asia Report*, No 28 (ICG 2001); (3) Muang Zarni and A Cowley, ‘The Slow-Burning Genocide of Myanmar’s Rohingya’ (2014) 23 *Pacific Rim Law & Policy Journal* 683.



Provisions) Act of 1947, Burma Citizenship Act of 1948, and Burma Citizenship Law of 1982 were the consequences, not the causes, of these concerns.

In summary, the Burma Citizenship Law of 1982 was enacted after the independence of Bangladesh from Pakistan to limit citizenship to those who were considered actual Burmese and to reject unwelcome foreigners residing in Myanmar, such as the Rohingya, who were seen as remnants of British colonialism, which was a threat to the country. The law served the clear purpose of excluding unwanted non-Buddhist foreigners from residing in Burma.

#### **8. Era 4: The Reform Era (The Third Constitution of 2008)**

The power of the Burmese government was taken over by the newly formed State Law and Order Restoration Council (SLORC) in 1988, and martial law was immediately imposed.<sup>99</sup> The SLORC was renamed the State Peace and Development Council (SPDC)<sup>100</sup> in 1997 by replacing “law and order restoration” with “peace and development,”<sup>101</sup> indicating a modest change in the military government’s policy toward relatively more open and lenient governance.

Increased sanctions from the West drove the Myanmar government to seek reform, and in 2003, the new seven-step “roadmap to discipline-flourishing democracy” was announced but was not well accepted by the people in Myanmar.<sup>102</sup> A series of protests labeled the “Saffron Revolution”<sup>103</sup> were triggered by the removal of fuel subsidies, and Buddhist monks were at the forefront of the protests and demonstrations in 2007. In the following year, after the deadly Cyclone Nargis swept through Myanmar, killing over 130,000 people and leaving over two million homeless, a new constitution was approved and enacted in 2008.

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<sup>99</sup> According to Makhdoom Ali Khan’s report, *The Burmese way: to where? – a report of a mission to Myanmar*, published by the International Commission for Jurists in 1991, the State Law and Order Restoration Council (SLORC) was formed to assume all legislative, executive, and judicial power. A curfew was imposed, gatherings of more than five people were prohibited, demonstrators were shot, and streets cleared of all protesters and opposition. Thousands of students fled to the borders, while others sought refuge in neighboring countries.

<sup>100</sup> The State Peace and Development Council (SPDC) (Burmese: နိုင်ငံတော် အေးချမ်းသာယာရေး နှင့် ဖွံ့ဖြိုးရေး ကောင်စီ) is the official name of the military government of Burma, which seized power under the rule of Saw Maung in 1988.

<sup>101</sup> The State Peace and Development Council (Burmese: နိုင်ငံတော် အေးချမ်းသာယာရေး နှင့် ဖွံ့ဖြိုးရေး ကောင်စီ) was the official name of the military government of Burma that succeeded the State Law and Order Restoration Council (SLORC) in 1997.

<sup>102</sup> Burma’s roadmap to democracy (Burmese: ဒီမိုကရေစီလမ်းပြမြေပုံ ၇ ချက်) officially the Roadmap to Discipline-flourishing Democracy), announced by General Khin Nyunt on August 30, 2003 in state media, provided a seven-step process in restoring democracy in the country.

<sup>103</sup> ‘Saffron Revolution’ is the protest by Buddhist monks who objected to the military government’s decision to raise oil and gas prices in 2007. The color saffron alludes to the traditional color of monks’ robes. Reported by David Steinberg ‘Globalization, Dissent, and Orthodoxy: Burma/Myanmar and the Saffron Revolution’ (2008) 9 *Georgetown Journal of International Affairs* 127.

A new version of the Constitution of the Republic of the Union of Myanmar<sup>104</sup> was passed on May 29, 2008. According to this new Constitution, only those persons born of parents who were both nationals of the Republic of the Union of Myanmar or who were already citizens according to the law after the new Constitution came into effect are citizens of the Republic of the Union of Myanmar.<sup>105</sup>

According to the 2008 Constitution, all persons who have either 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.

Unlike the previous two constitutions, the 2008 Constitution required the Rohingya to prove that their parents were citizens or that they themselves were already citizens to qualify for citizenship. This was not easy, as most Rohingya did not hold any valid documents to substantiate their claim to citizenship in Myanmar. This constitution effectively reinforced the legislature's effort to reject the possibility for most Rakhine Muslims from the Bengali area to become legitimate citizens of Myanmar.

The exclusion of most Rohingya people from citizenship in Burma/Myanmar by the 2008 Constitution was, to some extent, the response of the Burmese government to a series of revolts by the Rohingya people, who had formed various groups of armed forces, i.e., the Rohingya Liberation Army (RLA) (1972–1974), Rohingya Patriotic Front (RPF) (1974–1986), Rohingya Solidarity Organization (RSO) (1982–1998), Arakan Rohingya Islamic Front (ARIF) (1986–1998), and Arakan Rohingya National Organization (ARNO) (1998–2001).<sup>106</sup> These militant organizations fought against Myanmar government soldiers in their struggle for the political autonomy of the primarily Rohingya-populated region in northern Arakan.<sup>107</sup> This series of confrontations led to unstoppable conflicts between the Rohingya and the Burmese government and people, who considered this group of people dissidents and rebels. Subsequent massive displacements also occurred in 2012, 2015, and 2017, with over one million Rohingya being forced to leave Myanmar.<sup>108</sup>

In 2009, the Arakan Army (AA) was founded by a group of politically active Rohingya, and the ARSA was formed later. Militant actions took place in 2012, 2015, and 2016, and more than 80% of the Rohingya houses were destroyed, while hundreds were killed in the violent conflicts. As an expression of the exclusion policy, in the 2014 Myanmar national census, which was backed by the UN, the Rohingya could only register as "Bengali." In early

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<sup>104</sup> The original version is in Burmese: ပြည်ထောင်စုသမ္မတမြန်မာနိုင်ငံတော် ဖွဲ့စည်းပုံအခြေခံဥပဒေ.

<sup>105</sup> Constitution of the Republic of the Union of Myanmar (2008), ch VII, art 345.

<sup>106</sup> Elliot Brennan, 'The Rohingya And Islamic Extremism: A Convenient Myth.' (The Diplomat 2015).

<sup>107</sup> 'The Rohingya And Islamic Extremism: A Convenient Myth' (The Diplomat 1992).

<sup>108</sup> Ullah (n 12).

2017, under international pressure, the Burmese government set up the Advisory Commission on Rakhine State, which was chaired by Kofi Annan,<sup>109</sup> the late UN Secretary-General. The Commission issued several recommendations, including a review of the 1982 Citizenship Law. However, it was mostly ignored when ARSA resumed its military action and the ethnic cleansing against the Rohingya that took place in 2017.<sup>110</sup>

While the Burma/Myanmar government has played a notable, significant, and leading role in the oppression of the Rohingya people, their action could never be effective and legitimate in Myanmar without the recognition, support, and help of ordinary Burmese people.<sup>111</sup> The Myanmar government has publicized resentment against the Rohingya as a way to mobilize the support of the people. There is widespread dislike and even hatred toward the Rohingya in Myanmar.<sup>112</sup> According to Wai Nu, a human rights and peace activist from the Rohingya community, Rohingya people were frequently called “Kalar” by Buddhist Burmese, a derogatory name imposed on them by Rakhine and Bamar people.<sup>113</sup> “Kalar” is a racist word used to insult a person that highlights inferiority attributable to skin color or foreign ancestry.<sup>114</sup> This should definitely be reprimanded in modern civil societies.

According to the United States Department of State’s report released in 2009, 89% of Myanmar’s population was Buddhist, and all other non-Buddhists were considered “minority ethnic groups.” Social tensions continue between the Buddhist majority and the minority ethnic groups. In particular, there is widespread prejudice and discrimination against Rohingya Muslims due to the Burma/Myanmar people’s Buddhist nationalism. According to a study by Leider,<sup>115</sup> since the British colonial era, Buddhists in Rakhine, together with the local authorities, have been oppressing the Rohingya people by ousting Muslims from their jobs and replacing them with Buddhists; closing Islamic mosques, schools, and other Islamic organizations; confiscating their property; imprisoning or exiling Muslim leaders outside their home countries; and inciting Buddhists to kill Muslims and prove that they are terrorists.

Buddhism has always been closely associated with Burma/Myanmar’s national identity. During the British colonial era, the colonial government built many Buddhist institutions, such as schools and monasteries, thereby creating animosity toward non-Buddhists. After the independence of Burma, the new military government reinforced the social status of Buddhism in an attempt to gain the support and recognition of the Burmese people. The extreme nationalistic tendencies that took root after Burma’s independence resulted from a

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<sup>109</sup> Annan was the Secretary-General of the United Nations from 1997 to 2006.

<sup>110</sup> ‘Myanmar Rohingya: What You Need to Know about the Crisis’ *BBC News* (24 April 2018).

<sup>111</sup> *ibid.*

<sup>112</sup> Ashley South, *Ethnic Politics in Burma: States of Conflict* (Routledge 2009).

<sup>113</sup> Wai Nu, ‘Why Rohingya? Equality and Identity in Myanmar’ *Myanmar Times* (20 May 2016).

<sup>114</sup> Department of Myanmar Language Commission, *Myanmar-English Dictionary* (Myanmar Ministry of Education 1993).

<sup>115</sup> Jacques P Leider, ‘Arakan Studies: Challenges and Contested Issues, Mapping a Field of Historical and Cultural Research’, *Arakan Historical Seminar* (Kaladan Press 2007).

fear that intervention in the country by foreign powers might continue after the termination of colonialism.<sup>116</sup>

Buddhism plays an essential role in Burmese society, and the government has reinforced the spiritual leadership role of Buddhist monks. These monks have been actively involved in widespread violence against the Rohingya in Myanmar, with one notable example being the Buddhist nationalist group, the “969 Movement.”<sup>117</sup> This group of monks is known for its anti-Muslim sentiment, and they aim to protect Myanmar’s Buddhist society by rejecting the Muslim minority.<sup>118</sup> Although the international community condemns these activities, the Myanmar government has done very little to restrain these anti-Muslim activities.

## **9. Conclusion and Recommendations**

It is difficult to give a solid, clear-cut, and unequivocal conclusion about the highly controversial Rohingya situation. By examining original sociohistorical records in Burma/Myanmar, this article clarifies several myths and misunderstandings about the root causes, background, and history of Rohingya. It contributes to the literature through a critical evaluation of the sociolegal aspects of the Rohingya crisis based on an analysis of the Burmese Constitutions of 1947, 1974, and 2008 and the immigration and citizenship laws enacted in 1947, 1948, and 1982. The adoption of social exclusion theory supports the analysis based on multifaceted sociopolitical and sociocultural perspectives of the conflicts between the Rohingya people, Burmese Buddhists, and Myanmar government regarding Buddhist nationalism and territorial sovereignty. Evidence to substantiate the analysis was sought through archival research of extensive records in Myanmar. However, even if this analysis is convincing, the formulation of practical recommendations to alleviate the Rohingya situation is undeniably a difficult task.

The Rohingya crisis has become a humanitarian emergency of international concern. In this connection, Gambia filed a suit against Myanmar in the International Court of Justice (ICJ) for violating the Convention on the Prevention and Punishment of the Crime of Genocide<sup>119</sup> on November 11, 2019.<sup>120</sup> While the case had not concluded at the time of the

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<sup>116</sup> Raphael Boon, ‘Nationalism and the Politicization of Identity: The Implications of Burmese Nationalism for the Rohingya’ (Undergraduate thesis, Universiteit Leiden 2015).

<sup>117</sup> The 969 Movement (Burmese: ၉၆၉ ငှက်အဖွဲ့) is a nationalist movement against Islamic expansion in Buddhist Burma. The numbers ‘969’ symbolize the virtues of the Buddha, Buddhist practices, and Buddhist community. Reported by Andrew RC Marshall in ‘Special Report: Myanmar Gives Official Blessing to Anti-Muslim Monks’ *Reuters* (27 June 2013).

<sup>118</sup> Peter A Coclanis, ‘Terror in Burma: Buddhists vs Muslims’ (2013) 176 *World Affairs* 25.

<sup>119</sup> The Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) UNGA Res 260 A (III).

<sup>120</sup> ‘Developments in Gambia’s Case Against Myanmar at the International Court of Justice’ (Human Rights Watch, 14 February 2022) <<https://www.hrw.org/news/2022/02/14/developments-gambias-case-against-myanmar-international-court-justice>>.

writing of this article, the ICJ subsequently ordered the government of Myanmar to take measures to protect the Rohingya people.

According to the study by Azad and Jasmin (2013),<sup>121</sup> there are three possible long-term solutions to the Rohingya refugee problem: *voluntary repatriation, local integration, and resettlement*. Unfortunately, none of these options work well in the context of the Rohingya crisis. Voluntary repatriation of Rohingya was conducted between 1978 and 2005 but was stopped, as most repatriations were involuntary and had to be executed by military forces. In 2005, the United Nations High Commission for Refugees (UNHCR) acknowledged that it was not a viable solution for Rohingya refugees.<sup>122</sup> Local integration and resettlement of Rohingya are complex due to their unique culture and religion. Many countries, such as Bangladesh, are developing countries, and they do not have sufficient resources to help a large number of refugees settle there. Nevertheless, something needs to be done to help the Rohingya people.

There is no simple way to resolve the Rohingya crisis, yet the inhumane situation in Rakhine should not be allowed to continue indefinitely. Of course, the most urgent issue is how to adequately address the massive humanitarian needs of Rohingya refugees. In this connection, the UNHCR requires the help of countries throughout the world to provide enough supplies to meet these needs. However, unless the conflicts between the Rohingya and the government and people of Myanmar can be overcome, the return of these people to Myanmar will incur many problems. In the face of the continued resentment of the Myanmar government and Burmese people, the Rohingya cannot return to Myanmar safely, or with dignity. The rule of law in Myanmar today seems to be “in danger of being reduced to a substitute for substantive politics through the work of international organizations.” Unless the root causes of the violence in the Rakhine state are addressed, and Myanmar revises the Burma Citizenship Law of 1982, it will be challenging for the Rohingya to return and become legal citizens of Myanmar. Unfortunately, most nearby ASEAN countries are unwilling to accept many Rohingya immigrants into their countries. As a result, the Rohingya in Myanmar and other places in Asia are considered “stateless refugees”<sup>123</sup> and “self-settled undocumented” people<sup>124</sup> by the Myanmar government and people. It seems evident that no legal rules facilitate their access to permanent residence or citizenship anywhere in the world.

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<sup>121</sup> Ashraful Azad, Fareha Jasmin, ‘Durable Solutions to The Protracted Refugee Situation: The Case of Rohingyas In Bangladesh’ (2013) 1 *Journal of Indian Research* 25.

<sup>122</sup> UNHCR ‘Refugee Consultations: Bangladesh Report’ (March 2007).

<sup>123</sup> Sumit Sen, ‘Stateless Refugee and the Right to Return: The Bihari Refugees of South Asia’ (2000) 12 *International Journal of Refugee Law* 41.

<sup>124</sup> EUDO (European Union Democracy Observatories) Citizenship Observatory, *Report on Citizenship Law: Bangladesh*, (Robert Schuman Centre for Advanced Studies in collaboration with Edinburgh University Law School 2016).

The UN has provided several guides (i.e., conventions) to help such people. The 1954 Convention relating to the Status of Stateless Persons<sup>125</sup> and the 1961 Convention on the Reduction of Statelessness are the international conventions addressing statelessness. They are complemented by international human rights treaties and provisions relevant to the right to a nationality.

The 1954 Convention was designed to ensure that stateless people enjoy a minimum set of human rights. It establishes the legal definition of a stateless person as someone who is “not recognized as a national by any state under the operation of its law.” The 1954 Convention establishes minimum treatment standards for stateless people regarding several rights, including education, employment, housing, identity, travel documents, and administrative assistance.

The 1961 Convention aimed to prevent and reduce statelessness over time. It establishes an international framework to ensure people’s right to a nationality. It requires that states’ nationality laws prevent statelessness at birth and later in life by ensuring that children can acquire the nationality of the country where they are born if they do not have any other nationality. Loss or renunciation of nationality should also be avoided and only in minimal situations in which states can deprive a person of their nationality, even if this would leave them stateless. The UN must convince Myanmar and Bangladesh to follow the 1954 and 1961 conventions to ensure that future generations of Rohingya, at least, will have a better chance of becoming legalized citizens.

To help these stateless Rohingya, references are made to the final report of the Advisory Commission on Rakhine State<sup>126</sup> chaired by the late Kofi Annan, which provides several important recommendations. These include the suggestion to enhance communication among stakeholders to reduce the tension and suffering arising from the conflicts faced by the Rohingya.<sup>127</sup> The governments of Myanmar and Bangladesh are requested to communicate more effectively with the involvement of UNHCR to offer the possibility of resettlement and citizenship for the Rohingya in either Myanmar or Bangladesh, particularly those seeking family reunions. Both countries need to honor the decision of individuals to seek proper citizenship, education, a healthy environment, and an economically viable livelihood.

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<sup>125</sup> UNHCR, 1954 Convention relating to the Status of Stateless Persons. The 1954 Convention provides the definition of a ‘stateless person’ and the foundation of the international legal framework to address statelessness; the UNHCR, 1961 Convention on the Reduction of Statelessness. The 1961 Convention is the leading international instrument that sets rules for the conferral and non-withdrawal of citizenship to prevent statelessness.

<sup>126</sup> Advisory Commission on Rakhine State, *The final report of the Advisory Commission on Rakhine State: Towards a Peaceful, Fair and Prosperous Future for the People of Rakhine* (Advisory Commission on Rakhine State 2017).

<sup>127</sup> Michael W Charney ‘Buddhism in Arakan: Theories and Historiography of the Religious Basis of Ethnonyms’ (The Forgotten Kingdom of Arakan: A Public Seminar on the People of Present Day Arakan State of Myanmar, Bangkok, November 2005).

The report also calls for an acceleration of the citizenship verification process in line with the 1982 Citizenship Law. The Myanmar government should develop a clear strategy and timeline communicated through a broad outreach campaign. Those who have already been verified should be allowed to enjoy all benefits associated with citizenship. Those who have not been granted citizenship should be provided with fundamental rights such as freedom of movement, communal participation and representation, dignified living conditions in camps, including improved shelter, water and sanitation, education, and access to livelihood opportunities. The report also suggests that other countries, especially ASEAN countries, be more humane and proactive in their treatment of the Rohingya and solicit the assistance of international organizations, such as the UN, whenever necessary.<sup>128</sup> However, the implementation of these recommendations remains with the Myanmar government, people, and international community. As Myanmar is an ASEAN member, the Association has a significant role to play. ASEAN countries need to formulate and implement a more coordinated sociopolitical response to handle refugees, with a clear legal framework to distinguish refugees from regular migrants.<sup>129</sup> They should engage in more dialogue with Myanmar to reach a practical resolution.

The Rohingya refugees in Asian countries, particularly Bangladesh, will need recognition and legitimization by these governments. According to the UN refugee agency, Bangladesh moved forward in June 2018 by promising, for the first time, an individual identity document to Rohingya refugees to consolidate “a unified database for protection, identity management, documentation, provision of assistance, population statistics and ultimately solutions for an estimated 900,000 refugees who have fled from Myanmar to Bangladesh in successive waves of forced displacement.”<sup>130</sup> The verification exercise will play a key role in establishing refugees’ identities. This proper recognition of Rohingya refugees may be a start to resolving the tragic status of “statelessness” of the Rohingya people.

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<sup>128</sup> Allison Joyce, ‘Rohingya Cannot Become ‘Forgotten Victims’, Says UN Chief Urging World to Step up Support’ *UN New* (11 July 2018).

<sup>129</sup> Thomas Fuller and Patrick J Lyons, ‘How Myanmar and Its Neighbors Are Responding to the Rohingya Crisis’ *The New York Times* (14 May 2015).

<sup>130</sup> ‘New Identity Cards Deliver Recognition and Protection for Rohingya Refugees in Bangladesh’ *United Nations News* (9 July 2018).

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