# CONSTITUTIONAL ANALYSIS OF MYANMAR'S 1982 CITIZENSHIP LAW

DECEMBER 2018

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## EXECUTIVE SUMMARY

The report provides a legal analysis of the constitutionality of Myanmar's 1982 Citizenship Law ("1982 Law"). Myanmar's immigration and citizenship legal regime generates a high risk of statelessness among the country's population. Through formal laws, most notably the 1982 Law, as well as the discriminatory implementation of those laws, the Myanmar State has wound back access to citizenship and identity documentation, particularly for ethnic and religious minorities. Although many members of minority groups enjoyed citizenship rights under post-independence laws, the Myanmar State has chipped away at those rights, favoring instead the recognized "national races" that make up the majority of the population.

The 1982 Law serves as the central pillar of the current discriminatory citizenship regime. The purpose animating the 1982 Law at the time of enactment was the view that certain "national races" ("*taing-yin-tha*") were true citizens, while others were only "guests or mixed bloods," not deserving of equal citizenship rights.[1] As a result, a defining feature of the 1982 Law is that it created a hierarchy of three distinct classes of citizenship: full citizenship, associate citizenship, and naturalized citizenship. The latter two classes only apply to individuals who are not *taing-yin-tha* and has resulted in lesser rights for those minority citizens.

To qualify for full citizenship, the primary avenue is through ethnicity—as a recognized *taing-yin-tha*.[2] Non-*taing-yin-tha* may also qualify for full citizenship: for example, all those who had citizenship under post-independence laws retained their citizenship.[3] But only *taing-yin-tha* are considered "citizens by birth,"[4] a privileged class of full citizens whose citizenship cannot be revoked[5] and who generally face the least practical difficulty in obtaining citizenship documentation.[6] Due to the elevation of ethnicity as a key criterion of full citizenship, non-*taing-yin-tha* are more likely to face discrimination in the implementation of the law, hindering access to citizenship rights and identity documents.[7] As a result, those of non-*taing-yin-tha* status (actual or perceived) who should qualify for full citizenship are at risk of being incorrectly relegated to associate or naturalized citizenship or being denied recognition of citizenship rights altogether.

Due to a growing interest in the reform of Myanmar's discriminatory citizenship laws, an important subject for research is the constitutionality of the 1982 Law. The 2008 Constitution guarantees certain fundamental rights, including equal protection before the law,[8] non-discrimination on the basis of protected characteristics such as race and religion,[9] and due process of law.[10] Notwithstanding such guarantees, the 2008 Constitution falls short of international standards in a number of ways. As a result, it

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[1] *See* Speech by General Ne Win, Central Meeting Hall, President House, Ahlone Road published in *The Working People's Daily* (9 October 1982); *see also* Jose Maria Arraiza & Olivier Vonk, "Report on Citizenship Law: Myanmar," European University Institute, at 7 (October 2017).
[2] 1982 Citizenship Law, Sections 3, 4.
[3] *Id.* Section 6.
[4] *Id.* Section 5.
[5] *Id.* Section 8(b).
[6] *See, e.g.*, Norwegian Refugee Council et al., "A Gender Analysis of the Right to Nationality in Myanmar," at 14–15 (March 2018); Smile Education and Development Fund (SEDF) & Justice Base, "Access to Documentation & Risk of Statelessness," (December 2017).
[7] *See id.*
[8] 2008 Constitution, Section 347.
[9] *Id.* Section 348.
[10] *Id.* Section 381.

is important to bear in mind that the 2008 Constitution may impose on the 1982 Law a less exacting standard than would apply in the international human rights context.

Nonetheless, under the 2008 Constitution, the 1982 Law is inconsistent with the fundamental rights to equality, non-discrimination, and due process of law, as well as the principle of separation of powers. First, the 1982 Law fails to comply with the rights to equality and non-discrimination based on race by providing for a three-tiered hierarchy of citizenship status, where the lesser two categories of citizenship only apply to non-*taing-yin-tha* groups and result in lesser rights for those citizens. The law also violates these rights through indirect discrimination on the basis of race and religion in the biased implementation of the law.

Second, the 1982 Law fails to adhere to the constitutional principle of separation of powers, which *inter alia* enables the judiciary to check executive authority in order to protect fundamental rights.[11] While separation of powers protects court jurisdiction over decisions of a judicial nature, the 1982 Law's administrative procedural mechanisms bar judicial review of administrative decisions regarding citizenship status. Finally, the 1982 Law violates the right to due process in two ways: (1) the 1982 Law's administrative procedures fail to meet the standards of basic procedural fairness, and (2) the biased implementation of the 1982 Law uses unfair procedures, including inconsistent and unpredictable processes, unreasonable delays, procedures lacking in transparency, and decisions given without justification, particularly for minority applicants.

A challenge for any constitutional analysis arises from the fact that Myanmar's Constitutional Court has had little opportunity to interpret any of the provisions of the 2008 Constitution. As a result, the legal analysis in this report relies on post-independence era jurisprudence of the Supreme Court of Myanmar ("Supreme Court"), as well as well-established principles of fundamental rights from other common law jurisdictions.

Finally, a note on terminology: as used herein, "citizen" refers to citizens of all categories. The terms "full citizen," "associate citizen," "naturalized citizen," and "citizen by birth" are used to distinguish among the citizenship categories created under the 1982 Law. In addition, the term "national race," or *taing-yin-tha*, is also translated in Myanmar law as "indigenous race" or sometimes simply as "national." The Myanmar term *taing-yin-tha* will primarily be used to avoid confusion among English translations.

[11] *See, e.g.*, 2008 Constitution, Section 11(a) ("The three branches of sovereign power namely, legislative power, executive power and judicial power are separated, to the extent possible, and exert reciprocal control, check and balance among themselves."); *see id.* Sections 18(c), 296, 378 (judicial authority to issue writs to protect fundamental rights).

# I. BACKGROUND

Prior to the 1982 Law, citizenship was a single, unified category under Myanmar law. Citizenship was granted automatically through a broader range of criteria—including multigenerational residency and descent from members of a national race—while citizenship could also be elected after a residency period.[12] However, with the institution of the 1982 Law, the primary means to citizenship—at least in practice—became membership in a national race. The law also divided citizenship into a hierarchy of three unequal categories, with only certain non-*taing-yin-tha* ethnic groups relegated to the lesser two categories of citizenship. Further, these three categories provided a framework for discrimination against minorities in accessing other rights, such as political rights, higher education, employment, and freedom of movement.

To better understand the discriminatory purpose and effect of the 1982 Law, this section provides an overview of the evolution of Myanmar's citizenship legal regime, including: the 1947 Constitution, the 1948 Citizenship Act and other post-independence documentation laws, the 1974 Constitution, the 1982 Citizenship Law, and the 2008 Constitution.

## 1. Constitution of the Union of Burma, 1947

Under the post-independence citizenship regime, Myanmar had only one category of citizenship.[13] The 1947 Constitution provided that individuals could obtain citizenship via three different avenues: (1) those automatically granted citizenship by descent under the Constitution, (2) those permitted to elect citizenship based on residency of at least eight years, and (3) those granted automatic citizenship under laws that Parliament was empowered to create.

First, under Section 11(i)-(iii), the Constitution created automatic citizenship by descent (*jus sanguinis*). This category applied to those born in Myanmar and descended from two citizen parents, or those who had parents or a grandparent who belonged to an "indigenous race" (*taing-yin-tha*)—a term left undefined.[14] Second, under Section 11(iv), the Constitution also guaranteed anyone else the right to elect citizenship, regardless of their ethnicity, provided that they satisfied an eight-year residency requirement and were born in any British territory.[15]

Third, the Constitution granted Parliament the authority to "make such laws as it thinks fit in respect of citizenship," including the "admission" or "termination" of "new classes of citizens."[16] Because Parliament was empowered to create other classes of citizenship by statute, the grounds for citizenship

[12] *See* 1947 Constitution, Section 11; 1948 Union Citizenship Act, Section 4(2).
[13] Section 10 of the 1947 Constitution states: "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." This provision refers to citizenship of a unitary state, rather than a federalist system in which individuals also have regional or state level citizenship. But throughout the 1947 Constitution, it is also clear that there was but a single category of citizenship at the Union level, in direct contrast to the three categories created under the 1982 Law.
[14] 1947 Constitution, Section 11(i)–(iii). Those who qualify for citizenship based on having at least one grandparent of an indigenous race must also have been born within Myanmar. Those with both parents of an indigenous race are not subject to the requirement of being born in Myanmar.
[15] *Id.* Section 11(iv).
[16] *Id.* Section 12 ("Nothing contained in section 11 shall derogate from the power of the Parliament to make such laws as it thinks fit in respect of citizenship and alienage and any such law may provide for the admission of new classes of citizens or for the termination of the citizenship of any existing classes.").

provided for in Section 11 were only a "floor"—the bare minimum of classes of people who qualified as citizens. While Parliament could not lower the floor and deprive individuals of constitutionally guaranteed citizenship, it had broad authority to establish additional grounds to grant citizenship to others.

Regardless of how citizenship was obtained, all those who qualified enjoyed the same citizenship status. Further, all citizens were guaranteed the rights of equality and non-discrimination in Section 13 of the 1947 Constitution: "All citizens irrespective of birth, religion, sex, or race are equal before the law; that is to say there shall not be any arbitrary discrimination between one citizen or class of citizens and another."[17]

## 2. 1948 Union Citizenship Act and Post-Independence Documentation Laws

In the 1948 Union Citizenship Act ("1948 Act"), Parliament not only further elaborated on the categories of citizenship in Section 11 of the Constitution, but also exercised its authority under Section 12 to create an important new category of citizenship based on multigenerational residency in Burma. First, the 1948 Act defined the term "indigenous races" (*taing-yin-tha*) that appeared in Section 11 of the 1947 Constitution. The 1948 Act stated:

> For the purposes of section 11 of the Constitution 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 has settled in any of the territories included within the Union as their permanent home from a period anterior to 1823 A. D. (1185 B.E.).[18]

While providing for eight *taing-yin-tha* groups, this definition was not further clarified to specify which other groups had "settled in any of the territories included within the Union" prior to 1823, the year marking the first Anglo-Burmese war. A very similar definition later reappeared in the 1982 Law,[19] where it was used to grant certain *taing-yin-tha* groups greater rights on the basis of race.

Second, based on parliamentary authority under Section 12 of the Constitution, the 1948 Act also granted automatic citizenship to a new section of the population on the basis of residency in Burma's territories for two generations—grounds unrelated to a person's ethnicity. Section 4(2) of the Act stated that: "Any person descended from ancestors who for two generations at least have all made any of the territories included within the Union their permanent home and whose parents and himself were born in any of such territories shall be deemed to be a citizen of the Union."[20] While this new criterion for citizenship was also descent-based (*jus sanguinis*), ancestors had to be residents of Burma, rather than members of a particular *taing-yin-tha.* In addition, the 1948 Act provided other means to automatic citizenship, including that a child born after 1948 to one citizen parent would also be a citizen, as would a child born outside of Burma to a citizen parent in the employ of the state.[21] Naturalization was available under the 1948 Act to those 18 years or older who had resided continuously in Burma for five years, had good

[17] *Id.* Section 13.
[18] 1948 Act, Section 3(1).
[19] In the 1982 Law, the term "Arakanese" was replaced with "Rakhine." *See* 1982 Law, Section 3.
[20] 1948 Act, Section 4(2).
[21] *Id.* Section 5; *see* Arraiza & Vonk, "Report on Citizenship Law: Myanmar," at 6.

character, and could speak an indigenous language.[22] Finally, the 1948 Act provided that the government could issue a Union Certificate of Citizenship (UCC), although few were issued in practice.[23]

Two other laws are relevant for citizenship status and identity documentation in the post-independence era. First, the Registration of Foreigners Act 1940 and the corresponding 1948 Rules required foreigners to register with the government and receive a Foreigner Registration Certificate (FRC).[24] The Act defined a foreigner as anyone who was not a citizen,[25] which in turn, required reference to the 1948 Citizenship Act.[26] Second, and by contrast, citizens received National Registration Cards (NRCs) pursuant to the Burma Residents Registration Act 1949 and Burma Residents Registration Rules 1951.[27] While NRCs were not technically citizenship documents, they served as *de facto* citizenship cards given that foreigners (i.e. non-ciitzens) were issued FRCs.[28] NRCs did not indicate ethnicity or religion, underscoring the fact that these characteristics were not relevant to citizenship status.[29] The 1949 Registration Act and 1951 Rules also provided for temporary registration certificates (TRCs), or replacement cards for NRCs of limited duration.[30]

## 3. Constitution of the Socialist Republic of the Union of Burma, 1974

Following the coup by General Ne Win in 1962, he utilized the political construct of *taing-yin-tha* as a tool for state building: certain ethnic groups were construed as "true nationals" united for the good of the nation, while other ethnic groups were cast as outsiders and illegal immigrants.[31] The codification of this vision advanced with the 1974 Constitution of the Socialist Republic of the Union of Burma ("1974 Constitution"), which prescribed the state's responsibility for "constantly developing and promoting unity, mutual assistance, amity and mutual respect among the national races."[32]

The 1974 Constitution still provided for only one category of citizenship, but it altered the 1947 Constitution's language regarding citizenship eligibility. Replacing the broad citizenship criteria in the 1947 Constitution, Section 145(a) of the 1974 Constitution afforded only one avenue: "All persons born of parents both of whom are *taing-yin-tha*" are citizens of the Union.[33] However, Section 145(b) ensured that the new Constitution did not significantly alter the citizenship regime, providing: "Persons who are vested with citizenship according to existing laws on the date this Constitution comes into force are also citizens."[34] Thus, the 1974 Constitution preserved the citizenship laws under the 1948 Act, including

[22] 1948 Act, Section 7(1); *see* Arraiza & Vonk, "Report on Citizenship Law: Myanmar," at 6.
[23] 1948 Act, Section 6; *see also* Arraiza & Vonk, "Report on Citizenship Law: Myanmar," at 6; Nyi Nyi Kyaw, "Unpacking the Presumed Statelessness of Rohingyas," 15:3 *J. Immigrant & Refugee Studies*, 269, 276 (2017).
[24] Foreigner Registration Rules 1948, Sections 5–6; *see* Foreigner Registration Act 1940, Section 5.
[25] Foreigner Registration Act 1940, Section 2(a) (referencing the definition of foreigner in the Foreigners Act 1864, Section 1).
[26] *See* S.L. Verma, *The Law Relating to Foreigners and Citizenship in Burma,* at 20 (1961), http://www.burmalibrary.org/docs19/Verma-Foreigners-ocr-600-tu-bal.pdf.
[27] *See* Residents of Burma Registration Act 1949, Section 4; Residents of Burma Registration Rules 1951.
[28] Arraiza & Vonk, "Report on Citizenship Law: Myanmar," at 6.
[29] Nick Cheesman, "How in Myanmar 'National Races' Came to Surpass Citizenship and Exclude Rohingya," *J. Contemporary Asia*, at 11 (15 March 2017).
[30] Residents of Burma Registration Act 1949, Section 4; Residents of Burma Registration Rules 1951, Sections 2, 13.
[31] Cheesman, "How in Myanmar 'National Races' Came to Surpass Citizenship and Exclude Rohingya," at 5.
[32] 1974 Constitution, Section 21(a); *see* Cheesman, "How in Myanmar 'National Races' Came to Surpass Citizenship and Exclude Rohingya," at 6.
[33] 1974 Constitution, Section 145(a).
[34] *Id.* Section 145(b).

automatic citizenship under Section 4(2) based on multigenerational residency. The 1974 Constitution again granted the government the authority to change citizenship laws: "Citizenship, naturalisation and revocation of citizenship shall be as prescribed by law."[35] Although the Constitution also provided for fundamental rights of citizens, including the rights to equality and non-discrimination,[36] the Constitution was suspended in 1988 after the State Law and Restoration Council seized power in a coup.

## 4. The 1982 Citizenship Law

The 1982 Citizenship Law was the culmination of General Ne Win's construction of *taing-yin-tha*—rather than the role of citizen—as the core component of Myanmar political identity.[37] As he articulated in a 1982 speech, the purpose of the law was to distinguish "pure-blooded nationals" or "true nationals," from those who were only "guests or mixed bloods."[38] Because "true nationals" could not "trust [guests] in our organisations that decide the destiny of our country," Ne Win specified that the law would "not give [guests] full citizenship and full rights" but only "rights to a certain extent."[39] On this basis, the drafters created the three categories of citizenship: full citizenship, associate citizenship, and naturalized citizenship. While "only pure-blooded nationals will be called citizens," those "guests" who are "not trustworthy at present" were relegated to the lesser categories of associate citizenship ("*eh-naing ngan-tha*," i.e. guest citizenship) and naturalized citizenship ("*naing ngan-tha-pyu-khwint-ya-thu*").[40]

Full citizenship ("*Naing-ngan-tha*") is granted on the basis of several grounds, the most important of which is membership in a *taing-yin-tha*. The definition of *taing-yin-tha* closely follows the definition from 1948 Act: "Nationals such as the Kachin, Kayah, Karen, Chin, Burman, Mon, Rakhine or Shan and ethnic groups as have settled in any of the territories included within the State as their permanent home from a period anterior to 1185 B.E., 1823 A.D." are citizens.[41] The 1982 Law grants the government the authority to decide "whether an ethnic group is national or not."[42] Although the government later created a list of 135 recognized *taing-yin-tha*—which notably left out certain groups included on older census lists[43]—these national ethnic groups are not enumerated in the 1982 Law. Nevertheless, the 1982 Law elevates the status of *taing-yin-tha*, even among full citizens, because those with two *taing-yin-tha* parents are considered "citizens by birth" ("*mwe-ya-pa naing-ngan-tha*").[44] Citizens by birth enjoy a special status under the law, as they are the only individuals whose citizenship status cannot be revoked by the government,[45] unless they become a citizen of another country or leave Myanmar permanently.[46]

Despite the special status of *taing-yin-tha*, the 1982 Law also grants full citizenship on two other bases. Critically, the law recognizes the citizenship of anyone "who is already a citizen on the date this Law comes into force,"[47] which means that all those who were citizens pursuant to the 1948 Act—including

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[35] *Id.* Section 146.
[36] *Id.* Section 147.
[37] Cheesman, "How in Myanmar 'National Races' Came to Surpass Citizenship and Exclude Rohingya," at 10–12.
[38] Speech by General Ne Win, Central Meeting Hall, President House, Ahlone Road published in *The Working People's Daily* (9 October 1982).
[39] *Id.*
[40] *Id.*
[41] The definition in the 1982 Law replaced the term "Arakanese" with "Rakhine." *See* 1982 Law, Section 3.
[42] *Id.* Section 4.
[43] Cheesman, "How in Myanmar 'National Races' Came to Surpass Citizenship and Exclude Rohingya," at 9.
[44] 1982 Law, Section 5; *see* Nyi Nyi Kyaw, "Alienation, Discrimination, and Securitization: Legal Personhood and Cultural Personhood of Muslims in Myanmar," 13:4 *Review of Faith & Int'l Affairs* 50, 55 (15 December 2015).
[45] 1982 Law, Section 8(b).
[46] *Id.* Sections 16–17.
[47] *Id.* Section 6.

those who qualified due to multigenerational residency under Section 4(2)—remain full citizens after 1982. The second alternative basis for full citizenship is on the grounds of descent from parents who have a specific citizenship status. An individual is eligible for full citizenship if at least one of her parents has full citizenship, while the other parent has full citizenship, associate citizenship, or naturalized citizenship.[48] Even where an individual does not have a parent with full citizenship, she is eligible for full citizenship provided that she is the third generation descended from any combination of associate and/or naturalized citizen parents and two grandparents.[49]

The second and third classes of citizenship were created under the 1982 Law for the purpose of restricting the rights of "guests or mixed bloods."[50] Associate citizenship ("*eh-naing-ngan-tha*"),[51] the second category of citizenship, covers those who applied for citizenship pursuant to the 1948 Act prior to October 1982, but whose application result was still pending when the 1982 Law came into effect.[52] As a result, associate citizenship applies to a limited group of people and is the least common category of citizenship.[53]

The third class of citizenship created under the 1982 law is naturalized citizenship ("*naing-ngan-tha pyu-kwin-ya-thu*").[54] The term "naturalized" does not refer to the common legal understanding of the naturalization process. Instead, this type of citizenship may be acquired only by non-*taing-yin-tha* who "furnish[] conclusive evidence" that they or their ancestors resided in Myanmar prior to 1948 but did not apply for citizenship under the 1948 Act by 1982.[55] Naturalized citizenship is also available to those who do not qualify for full citizenship, but have parents who both hold naturalized citizenship, or a combination of naturalized and associate citizenship, or have one foreigner parent and one parent with any of the three classes of citizenship.[56] Any foreigner married to a naturalized citizen may also apply for naturalized citizenship, provided that they held a Foreigner Registration Certificate and were married prior to 1982.[57] Applicants for naturalized citizenship must also meet other requirements, including that they are at least 18 years old, are able to speak a national language well, have a good character, and are of sound mind.[58]

Apart from "citizen by birth," any other full citizen, associate citizen, or naturalized citizen may have their citizenship revoked "in the interest of the State."[59] Associate and naturalized citizens have even lesser rights with regard to revocation. The Myanmar State may revoke their citizenship for vague reasons

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[48] *Id.* Section 7.
[49] *Id.*
[50] Speech by General Ne Win, Central Meeting Hall, President House, Ahlone Road published in *The Working People's Daily* (9 October 1982).
[51] *See* Nyi Nyi Kyaw, "Alienation, Discrimination, and Securitization: Legal Personhood and Cultural Personhood of Muslims in Myanmar," at 50, 55.
[52] 1982 Law, Section 23.
[53] According to 2014 census data, only 37,429 individuals (0.1% of the population) have ACSCs. *See* Department of Population, Ministry of Immigration and Population, "The 2014 Myanmar Population and Housing Census: The Union Report," v. 2, at 2 (May 2015), https://unstats.un.org/unsd/demographic-social/census/documents/Myanmar/MMR-2015-05.pdf.
[54] *See* Nyi Nyi Kyaw, "Alienation, Discrimination, and Securitization: Legal Personhood and Cultural Personhood of Muslims in Myanmar," at 55.
[55] 1982 Law, Section 42.
[56] *Id.* Section 43.
[57] The applicant for naturalized citizenship must also have been married and resided in Myanmar for at least three years and be the sole husband or wife of their spouse. *See* 1982 Law, Section 45.
[58] 1982 Law, Section 44.
[59] *Id.* Section 8.

including communicating with enemies of the state, showing disloyalty to the state, or committing an offence of moral turpitude.[60]

The 1983 Procedures Act implements the 1982 Law and provides for three types of scrutiny cards that correspond to the three classes of citizenship: a Citizenship Scrutiny Card (CSC) for full citizens; an Associate Citizenship Scrutiny Card (ACSC); and a Naturalized Citizenship Scrutiny Card (NCSC).[61] Under the procedures, a scrutiny card must include both the race and religion of the card holder, and an applicant for a scrutiny card is required to include his race and religion—and that of family members—on certain application forms.[62] During the citizenship scrutiny process that took place in the 1990s, the Myanmar State replaced the NRCs of many citizens with CSCs. However, the state issued TRCs instead of CSCs to certain ethnic minorities—most notably the Rohingya, as well as many individuals of Chinese and Indian backgrounds.[63]

## 5. 2008 Constitution of the Republic of the Union of Myanmar

In 2008, the Myanmar military government drafted a new constitution, which transferred some power to a civilian government while maintaining significant military control. As to citizenship, the 2008 Constitution borrowed provisions from the 1974 Constitution. Accordingly, under Section 345, those born of two *taing-yin-tha* parents were granted citizenship, as were those who were already citizens under the law when the new constitution came into effect.[64] However, the law in effect in 2008 was markedly different from that in 1974, as the 1982 Law had repealed the 1948 Citizenship Act and had promoted the significance of race as a defining feature of Myanmar's citizenship regime.

The 2008 Constitution also borrowed language from the 1974 Constitution that granted the government the authority to "prescribe[] by law" grounds for "citizenship, naturalization and revocation of citizenship."[65] However, the government's authority to "prescribe[] by law" is not unlimited. Instead, under the principle of constitutional supremacy, no law may contradict or be inconsistent with the Constitution. Indeed, Sections 446 and 447 of the 2008 Constitution specify that "existing laws," as well as "rules, regulations, by-laws, notifications, orders, directives and procedures" will only continue to operate "in so far as they are not contrary to this Constitution."[66] Thus, the principle of constitutional supremacy requires citizenship laws to be consistent with all provisions of the 2008 Constitution, including a number of fundamental rights, in order to remain in effect. Such fundamental rights include the rights to equality and non-discrimination,[67] as well as the right to due process of law.[68] It follows that if the 1982 Law is "contrary to this Constitution"[69] and the rights provided therein, it is rendered null and void.

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[60] *Id.* Sections 35, 58.
[61] *See* 1983 Procedures to the Myanmar Citizenship Law, Procedures Relating to Citizenship, No. 13/83 (20 September 1983); Procedures Relating to Associate Citizenship, No. 14/83 (20 September 1983); Procedures Relating to Naturalized Citizenship, No. 15/83 (20 September 1983).
[62] *See id.*
[63] *See* Arraiza & Vonk, "Report on Citizenship Law: Myanmar," at 9.
[64] 2008 Constitution, Section 345.
[65] *Id.* Section 346
[66] *Id.* Sections 446, 447.
[67] *Id.* Sections 347, 348.
[68] *Id.* Section 381.
[69] *Id.* Sections 446, 447.

## II. ANALYSIS: 1982 CITIZENSHIP LAW IS UNCONSTITUTIONAL UNDER THE 2008 CONSTITUTION

Myanmar's 1982 Citizenship Law is unconstitutional. First, the law violates the rights to equality and non-discrimination in Sections 347 and 348 of the 2008 Constitution. The hierarchy of three distinct categories of citizenship established by the law—full citizenship, associate citizenship, and naturalized citizenship—are directly contrary to these principles, as only non-*taing-yin-tha* racial groups are relegated to the lesser categories of citizenship. Further, the 1982 Law indirectly discriminates among citizens on the basis of race and religion due to its biased, inconsistent and unpredictable implementation. On these grounds, the 1982 Law could be unconstitutional in its entirety, and thus null and void, because the affected provisions are not severable and fundamental to the Law as a whole.

Second, the 1982 Law also fails to adhere to the constitutional principle of separation of powers and the right to due process. First, administrative procedural mechanisms in the 1982 Law bar judicial review, and in doing so, these provisions violate the principle of separation of powers, which protects court jurisdiction vis-à-vis executive decisions where fundamental rights are at stake.[70] Finally, the 1982 Law also violates the right to due process.[71] The administrative procedures in the Law fail to satisfy the requirements of fundamental procedural fairness. Moreover, implementation of the 1982 Law utilizes additional arbitrary and unfair procedures, which lack transparency, are subject to delays, and include unclear, burdensome requirements—particularly for minorities.

### 1. 1982 Law Violates the Rights to Equality and Non-Discrimination

The 1982 Law violates the rights to equality and non-discrimination guaranteed in Sections 347 and 348 of the 2008 Constitution. Section 347 provides that "[t]he Union shall guarantee any person to enjoy equal rights before the law and shall equally provide legal protection." Under Section 348, "The Union shall not discriminate [against] any citizen of the Republic of the Union of Myanmar, based on race, birth, religion, official position, status, culture, sex and wealth."

Specifically, the 1982 Law directly discriminates on the basis of race by using race to determine certain citizenship statuses, while the biased implementation of the Law indirectly discriminates on both the grounds of race and religion. To prove a violation of the right to non-discrimination, Section 348 requires the demonstration of the following three-part test:[72] whether (1) one or more individuals suffers discrimination (2) on the basis of a constitutionally protected status, and (3) the differential treatment

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[70] *See, e.g.*, 2008 Constitution Section 11(a) ("The three branches of sovereign power namely, legislative power, executive power and judicial power are separated, to the extent possible, and exert reciprocal control, check and balance among themselves."); *id.* Sections 18(c), 296, 378 (judicial authority to issue writs to protect fundamental rights).

[71] *Id.* Section 381.

[72] Because Myanmar courts have not interpreted the rights to equality and non-discrimination under the 2008 Constitution, the tests for Sections 347 and 348 are derived from the constitutional jurisprudence of other common law states. When courts conduct a legal inquiry into an alleged violation of these rights, a common feature of this jurisprudence is that the inquiry goes a step beyond determining whether discrimination or differential treatment has occurred. The next step requires courts to examine whether the differential treatment is nonetheless fair and reasonable within a specific context or circumstances. *See, e.g.*, *Khosa & Ors v. Minister of Social Development & Ors*, 2004 (6) BCLR 569 (Constitutional Court of South Africa); *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1 (Supreme Court of Canada); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (Supreme Court of the United States).

lacks a reasonable and objective basis.[73] A test for a violation of the right to equality under Section 347 would be identical, except that it would not include the second step of determining whether the discrimination was due to a protected status such as race or religion.[74]

Before applying the test, it is worth observing why it does not include the additional element of requiring the affected individual to be a *citizen*, even though this is specified in Section 348. The Supreme Court has previously concluded that both citizens and non-citizens enjoy fundamental rights, notwithstanding the explicit constitutional guarantee of those rights to citizens. As the Court observed in a 1958 case, even though the 1947 Constitution also guaranteed certain rights to "citizens," this language "does not mean that [rights] are denied to aliens."[75] Instead, the Court reasoned that "most rights are assured to citizen and alien alike and their full enjoyment is unrestricted; and such rights are not to be denied without legal authority."[76] Specifically with regards to non-discrimination and equal protection, Section 347 of the 2008 Constitution guarantees equal rights before the law to all people. As equal protection and non-discrimination are two sides of the same coin, constituting a single legal doctrine,[77] it would be an absurd interpretation to construe the Constitution as providing non-citizens with equal protection of law while denying them protection from discrimination. The Supreme Court's analysis harmonizes Sections 347 and 348: freedom from discrimination for citizens does not preclude non-citizens from enjoying the same fundamental rights, which are assured to all.[78]

### 1.1 THE 1982 LAW DIRECTLY DISCRIMINATES ON THE BASIS OF RACE

The 1982 Law violates the principles of equality and non-discrimination in the 2008 Constitution by providing for a three-tiered hierarchy of citizenship status that uses race to determine certain lesser citizenship statuses, which, in turn, are afforded restricted rights under other laws.

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[73] Constitutional analysis of discrimination claims may further divide the second prong—"on the basis of a constitutionally protected status"—into two separate inquiries. First, it requires a *legal* inquiry to determine whether a specific status, such as race or gender, is constitutionally protected. Second, it may require an extensive *factual* inquiry to determine whether the discrimination occurred "on the basis of" that status, particularly for cases of indirect discrimination. For example, in a claim for discrimination in employment on the basis of gender, a court would first determine whether gender is a legally protected status, before conducting a factual inquiry to determine whether the claimant was terminated on the basis of gender instead of on the basis of a permissible ground such as job performance.

[74] Specifically, Section 347 requires consideration of the following two-part test: whether (1) under the law one or more individuals suffer differential treatment from similarly situated individuals (2) that is not reasonable or objective. Section 348 requires the additional step of determining whether the discrimination was due to a protected status. The legal effect of this difference between the tests for Sections 347 and 348 is that, when the additional step of the inquiry under non-discrimination is concluded in the affirmative (*e.g.*, discrimination on the basis of race exists), it becomes all the more difficult for the government to demonstrate that there is a reasonable and objective basis for the discrimination.

[75] S.L. Verma, *The Law Relating to Foreigners and Citizenship in Burma*, at 39–40 (1961) (citing Kasi Vishwanathan Chettiar v. The Official Assignee and One: 1958 B. L. R. 74 S.C.).

[76] *Id.*

[77] *See, e.g.*, International Covenant on Civil and Political Rights, art. 26; Human Rights Committee, *Ibrahima Gueye et al. v. France*, Communication No. 196/1985, U.N. Doc. CCPR/C/35/D/196/1985 (1989) (discrimination based on nationality).

[78] The conclusion of the Supreme Court is consistent with Myanmar's international legal obligation to ensure the right to non-discrimination for all, as required by the following conventions which Myanmar has ratified: International Covenant on Economic, Social, and Cultural Rights, art. 2(2); Convention on the Elimination of All Forms of Discrimination Against Women, art. 2; Convention on the Rights of the Child, art. 2; Convention on the Rights of Persons with Disabilities, art. 5.

This analysis will consider a claim for non-discrimination under Section 348, given the centrality of racial groups to the 1982 Law.[79] Because race is a constitutionally protected status, enumerated in Section 348, the middle element of the test for a violation of the right to non-discrimination is easily satisfied. Accordingly, the next step is to consider the first element: whether individuals suffer direct discrimination on the basis of race under the 1982 Law.

#### 1.1.1 Direct Discrimination on the Basis of Race Through the Three Categories of Citizenship in the 1982 Law

The text of the 1982 Law discriminates among citizens on the basis of race because only non-*taing-yin-tha* individuals are relegated to the lesser categories of associate and naturalized citizenship. The racially discriminatory intent of the drafters of the 1982 Law is clear, as articulated by General Ne Win at the time of drafting in his 1982 speech. As explained *supra*, the three classes of citizenship were created in order to separate "pure-blooded nationals" from "guests or mixed bloods," while restricting the rights of those seen as "guests or mixed bloods."[80]

This racially discriminatory intent is apparent throughout the 1982 Law and is most explicitly codified in the sections related to *taing-yin-tha.* Section 3 of the Law prioritizes full citizenship on the basis of *taing-yin-tha* status: "Nationals such as the Kachin, Kayah, Karen, Chin, Burman, Mon, Rakhine or Shan and ethnic groups . . . settled prior to 1823" are citizens.[81] As the 1983 Procedures elaborate, this definition not only has a racial component (e.g. identity as Kachin, Kayah, etc.), but makes the distinct requirement that any racial group which shares one of these identities must have also settled in the territory of Myanmar before 1823.[82] The list in Section 3 is not exhaustive, and the 1982 Law grants the government the authority to determine "whether an ethnic group is national or not."[83] While the government later created a list of 135 recognized *taing-yin-tha*[84] under unclear circumstances, the full list is not enumerated in the 1982 Law.

Nonetheless, the text of the 1982 Law is directly discriminatory without including a complete list of recognized *taing-yin-tha*. Unlike other countries that use ethnic criteria as a means to extend citizenship to certain individuals residing in other countries,[85] the 1982 Law uses ethnic criteria as a means to exclude a significant proportion of Myanmar's population who have lived in its territory for generations. First, the law excludes any citizen who is not currently recognized as *taing-yin-tha* from "citizen[ship] by birth"

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[79] *See supra* n.72 for an explanation of the derivation of this test based on the constitutional jurisprudence of other common law states.

[80] Speech by General Ne Win, Central Meeting Hall, President House, Ahlone Road published in *The Working People's Daily* (9 October 1982).

[81] 1982 Law, Section 3.

[82] *See* 1983 Procedures Relating to Citizenship, Section 5 ("Ethnic groups bearing the same identity and name who have entered and settled into the State after 1823 are not Myanmar Nationals, moreover, they are not citizens by birth.") (unofficial translation). This limitation on who may qualify as *taing-yin-tha* does not mitigate the direct discrimination in the 1982 Law. Citizenship by birth is still limited to *taing-yin-tha*, however narrowly defined, while the lesser categories of associate and naturalized citizenship only apply to non-*taing-yin-tha*. Further, given evidentiary difficulties, there is reason to doubt that date of settlement in the territory of Myanmar during the late 19th or early 20th centuries is a meaningful criterion in practice for *taing-yin-tha* status.

[83] 1982 Law, Section 4.

[84] *See, e.g.*, *The Working People's Daily*, "Our Union of Myanmar Where 135 National Races Reside," (26 September 1990).

[85] *See, e.g.*, Serbian Nationality Law, art. 23 (providing that under certain conditions, "[a] member of Serbian or another nation or ethnic group from the territory of the Republic of Serbia, who is not residing in the territory of the Republic of Serbia, can be admitted to citizenship . . . ."); Greek Citizenship Code, art. 4, (providing that "foreign nationals of Greek origin" may acquire Greek citizenship by enlisting in the armed forces).

(*mwe-ya-pa naing-ngan-tha*).[86] As discussed above, a "citizen by birth" is limited to those who are *taing-yin-tha* or born of two *taing-yin-tha* parents[87] and are the only type of citizen who may not have their citizenship revoked by the state.[88]

Second, because *taing-yin-tha* always qualify for full citizenship, only non-*taing-yin-tha* minorities (actual or perceived) are relegated to the lesser categories of associate and naturalized citizenship. Thus, two categories of citizenship are determined by race, notwithstanding the fact that many non-*taing-yin-tha* are also full citizens, such as those descended from statutory citizens under Section 4(2) of the 1948 Act.[89] Both the purpose and effect of the creation of the two inferior categories of citizenship was to afford lesser rights to certain citizens on the basis of race, as "guests or mixed bloods" rather than "pure-blooded nationals."[90] Associate citizenship and naturalized citizenship, in turn, correspond to lesser rights both in others law and in practice (*see* Sections 1.1.2 and 1.2).

This distinction on the basis of race is contrary to the 2008 Constitution notwithstanding the guarantee of citizenship to *taing-yin-tha* in Section 345(a).[91] The Constitution does not support the 1982 Law's creation of three categories of citizenship, with the lesser categories of citizenship defined by race. Instead, Section 345(b) also provides citizenship to all those "already a citizen according to law."[92] Sections 345(a) and (b) are best read as creating two pathways to one, unified category of citizenship. These two criteria in Section 345 are identical to the provisions of the 1974 Constitution,[93] at which time there was only one, unified category of citizenship. Thus, the 2008 Constitution is internally consistent: in Section 345, it provides a general guarantee of citizenship that includes *taing-yin-tha* and non-*taing-yin-tha* which—read in harmony with the right to non-discrimination in Section 348—provides no support for 1982 Law's three-tiered hierarchy of citizenship.

### 1.1.2 Discrimination on the Basis of Race in Other Laws Arising from Three Categories of Citizenship

The three categories of citizenship under the 1982 Law established a framework for discrimination in other Myanmar laws that has further restricted the rights of minorities. For example, associate and naturalized citizens are not guaranteed the same political rights as full citizens. Under the 2014 Political Parties Registration Law, only full citizens are entitled to form political parties,[94] while only full citizens and naturalized citizens are allowed by law to become members of political parties. These restrictions were imposed in 2014, prior to which the Political Parties Registration Law gave anyone who was a "citizen, an associate citizen, a naturalized citizen or a temporary certificate holder" the right to form a political party and to become a party member.[95] Through the 2014 amendments to the Political Parties Registration Law, citizenship status—as an associate citizen, naturalized citizen, or TRC holder—was

[86] 1982 Law, Section 5.
[87] *Id.*
[88] *Id.* Section 8(b) ("The Council of State may, in the interest of the State revoke the citizenship or associate citizenship or naturalized citizenship of any person except a citizen by birth.").
[89] *See id.* Section 6 ("A person who is already a citizen on the date this Law comes into force is a citizen.").
[90] Speech by General Ne Win, Central Meeting Hall, President House, Ahlone Road published in *The Working People's Daily* (9 October 1982).
[91] 2008 Constitution, Section 345(a) ("All persons who have either one of the following qualifications are citizens of the Republic of the Union of Myanmar: (a) person born of parents both of whom are nationals [*taing yin tha*] . . . .").
[92] *Id.* Section 345(b).
[93] 1974 Constitution, Section 145.
[94] Political Parties Registration Law, Pyidaungsu Hluttaw Law No. 38/2014, Sections 4(a), 10(a) (30 September 2014).
[95] Political Parties Registration Law, Law No. 2/2010, Sections 4(a), 10(a) (8 March 2010).

used as a proxy to restrict the political rights of certain ethnic minorities.[96] As a result, these minorities are denied rights related to freedom of association that are guaranteed under the Constitution.[97]

Different categories of citizens are also subject to direct and indirect discrimination in the areas of education and government employment. Though the Constitution also guarantees that "[e]very citizen . . . has the right to education,"[98] universities have required students to present CSCs—indicating full citizenship—in order to receive their diplomas at graduation.[99] Discrimination in higher education against those categories of citizens without CSCs is then compounded after graduation, as those without diplomas face disadvantages in employment. Other forms of discrimination in employment are found directly in the law, notwithstanding the Constitution's additional guarantee that "citizens shall enjoy equal opportunity in . . . public employment."[100] For example, in order to qualify for employment as a ward or village tract administrator, an individual must be a "citizen born[] of citizen parents."[101] This requirement excludes associate and naturalized citizens as well as some types of full citizens.

In conclusion, the first element of the test for a violation of Section 348 is satisfied: the 1982 Law discriminates on the basis of race by creating three classes of citizenship, with the lesser two categories only applying to certain non-*taing-yin-tha*. This hierarchy generates a framework for discrimination pursuant to other laws and practices, which use the lesser two categories of citizenship as a proxy to restrict the rights of certain minorities. In the absence of adequate safeguards to prevent statelessness, the three categories of citizenship have created a large population at risk of statelessness due largely to the discriminatory implementation of the law, as discussed further in the next section.

### 1.2 Indirect Discrimination on the Basis of Race and Religion

The first element of the test for a violation of Section 348 is also satisfied due to indirect discrimination on the grounds of race and religion through the implementation of the 1982 Law and related laws and procedures. Such discrimination occurs well beyond the direct discrimination in the text of the 1982 Law itself, despite the protection from discrimination that citizens enjoy on bases of both race and religion under Section 348 of the Constitution.

The creation of three categories of citizenship that discriminate on the basis of race generates ample opportunity for additional forms of indirect discrimination not explicitly sanctioned by the 1982 Law. Indeed, there is a clear pattern of state officials discriminating against racial and religious minorities when those individuals attempt to obtain citizenship documentation. Racial and religious minorities—both actual and perceived—face significant barriers in obtaining the appropriate scrutiny cards under the 1982 Law. In particular, Muslims, Christians, and Hindus, as well as any individuals of perceived South Asian

[96] The Election Laws only allow citizens who are born from two citizen parents to run as candidates for the Pyithu Hluttaw, Amyotha Hluttaw, and regional or state hluttaws. Despite the Election Laws' discriminatory restrictions on the political rights of some citizens, the Constitution also requires a member of the hluttaw to be a "citizen who was born of both parents who are citizens." *See* 2008 Constitution, Sections 120, 152, 169; Pyithu Hluttaw Election Law, Sections 8(b), 10(e), 10(m); *see also* Pyithu Hluttaw Election Bylaw 2010, Ch. 6, Section 27(c) (explaining that if one or both parents are not citizens when an individual is born, then that individual is not eligible to run as a candidate).
[97] *See* 2008 Constitution, Section 354.
[98] 2008 Constitution, Section 366.
[99] *See* U.N. Human Rights Council, "Report of the Special Rapporteur on the situation of human rights in Myanmar, Yanghee Lee," A/HRC/28/72, para. 55 (23 March 2015) (noting with concern that 300 students did not receive diplomas at a graduation ceremony from Yangon University in December 2014 because they lacked CSCs).
[100] 2008 Constitution, Section 349(a).
[101] The Ward or Village Tract Administration Law, Section 5(a).

heritage, suffer discriminatory treatment including: demands for additional paperwork and greater evidence of family members' citizenship status, higher informal fees, longer processing times, and an overall risk of the state denying them the documentation they are entitled to by law.[102]

When the government began to implement the 1982 Law in the 1990s, Buddhists were generally able to exchange their NRCs for CSCs, while Muslims had great difficulty engaging in the exact same process,[103] as did some individuals of Chinese and Indian heritage.[104] For example, while Rohingya Muslims had their NRCs confiscated and replaced by TRCs—a tactic to deny them access to citizenship rights—many other Muslims who held NRCs also faced challenges in obtaining the CSCs they were entitled to under the 1982 Law. Muslims were often told by immigration officials that they were "mixed-blood," which triggered a process of bureaucratic delay and obfuscation that has left many Muslims still holding NRCs.[105]

Indeed, a 2017 study found that Muslim, Christian, and Hindu applicants for scrutiny cards in Pathein and Mawlamyine most commonly faced discrimination from immigration officials.[106] Minority applicants frequently reported that they were unable to self-identify their racial or religious group on the application forms, but instead were assigned a race based on the biased perception of the immigration officer.[107] For example, for Muslims who self-identify as "Myanmar" (i.e. Bamar), immigration officials commonly categorized them as "Bengali," "Pakistani," or "Indian," insisting that it was not possible for a Muslim to be ethnically Myanmar.[108] These actions by state officials is often first reflected on a family's household list, and then may have a direct impact on both the length and difficulty of the scrutiny card application process and could potentially impact whether an applicant receives a CSC at all. Further, those who have a CSC containing an ethnic label such a "Bengali" may face greater difficulty in securing CSCs for their children, despite the child's legal right to citizenship under the 1982 Law.[109]

In another example, government programs to improve the citizenship application process through the education system also discriminate against student applicants on the basis of perceived race and religion.[110] The same study found that schools would only process the applications of students of certain ethnicities, while "mixed blood" and religious minorities—including Muslim, Hindu, and Christian youth—did not have their applications processed and were sometimes instructed that they would have to go to the Immigration and National Registration Department ("INRD") offices.[111] Some minority applicants received an NRC rather than the scrutiny cards afforded under the 1982 Law and 1983 Procedures.[112] This racial and religious discrimination by officials occurred even though the applicants'

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[102] Smile Education and Development Fund (SEDF) & Justice Base, "Access to Documentation & Risk of Statelessness," at 31–34 (December 2017).
[103] *See* Thomas Manch, "For Muslims across Myanmar, citizenship rights a legal fiction," *Frontier Myanmar* (29 December 2017), https://frontiermyanmar.net/en/for-muslims-across-myanmar-citizenship-rights-a-legal-fiction.
[104] Arraiza & Vonk, "Report on Citizenship Law: Myanmar," at 9.
[105] *See* Manch, "For Muslims across Myanmar, citizenship rights a legal fiction," *Frontier Myanmar*.
[106] SEDF & Justice Base, "Access to Documentation & Risk of Statelessness," at 5.
[107] *Id.* at 5, 35–38.
[108] *Id.*
[109] Any applicant with a full citizen parent is also entitled to full citizenship, regardless of which citizenship category the second parent possesses. The only exception applies when the second parent is a foreigner, in which case the applicant is still entitled to naturalized citizenship. The parent's ethnic group, as listed on his or her CSC, should have no impact on this analysis under the 1982 Law. Accordingly, the denial of a CSC to the applicant constitutes discrimination on the basis of race and religion. *See* 1982 Law, Sections 7, 43.
[110] SEDF & Justice Base, "Access to Documentation & Risk of Statelessness," at 34–35.
[111] *Id*.
[112] *Id.*

parents may have been in possession of CSCs and/or NRCs, which indicate that the children are very likely full citizens under the 1982 Law and eligible for a CSC.[113]

The study also found that many racial and religious minority applicants for scrutiny cards waited for months or years while their applications were pending, sometimes without receiving any decision.[114] With unpredictable processing times, some applicants had to return many times to the INRD office and pay bribes or unofficial fees to immigration officials. The fees—many times higher than the amounts specified in the 1983 Procedures—were very burdensome to applicants and one of the most significant barriers to access to documentation.

The consequence of this ongoing discrimination in the implementation of the 1982 Law is that many racial and religious minority citizens are denied recognition of the citizenship rights afforded to them under the 1982 Law, both temporarily and permanently. In the absence of adequate safeguards to prevent statelessness, discrimination in combination with the legal regime related to the three categories of citizenship has resulted in a large stateless population. Further, the loss of access to documentation and the inability to claim citizenship rights compounds discriminatory treatment against racial and religious minorities under other laws, including in the areas of political participation, education, and employment, as discussed *supra*. Indeed, in any area of law where citizens enjoy greater rights or where citizenship documentation is required, the discrimination that minorities face in accessing citizenship radiates out to create barriers to numerous other rights.[115] Thus, the first element of the test for a violation of Section 348 is also satisfied because the 1982 Law indirectly discriminates on the basis of race and religion.

### 1.3 1982 Law Lacks a Reasonable and Objective Basis for Differential Treatment

Finally, the last prong of the test under Section 348 is whether the racial and religious discrimination has a reasonable and objective basis. Whether there is a reasonable and objective basis for a law's differential treatment depends on how the law divides individuals and groups. This comes from the basic principle of equality that comparable individuals—those who are similarly situated—should receive identical treatment.[116] Jurisprudence on equality and non-discrimination also considers how the line dividing individuals is drawn, with classifications such as those listed in Section 348—*inter alia* race, religion, and sex—being much harder to justify. Because people of different races, religions, and sexes are nearly always similarly situated, laws that treat people differently on these bases are very unlikely to be reasonable and objective, unless, for example, the laws are intended to provide affirmative action for a disadvantaged minority group.

Here, the 1982 Law falls far short: there is no reasonable and objective basis upon which the 1982 Law may grant lesser citizenship rights to certain racial and religious minorities. As described *supra*, the intent of the drafters of the 1982 Law was to deny "guests and mixed bloods" full citizenship rights on the basis of race. While this purpose in itself is the antithesis of a reasonable and objective basis, there is an additional factor at play. The 1982 Law's creation of three categories of citizenship tied to racial discrimination has given immigration officials a carte blanche to discriminate even further in refusing to recognize the citizenship rights of minorities. The implementation of the law has more successfully achieved Ne Win's vision of racial discrimination than anything in the text of the 1982 Law. The law

[113] *Id.*
[114] *Id.* at 5, 25–27.
[115] *See, e.g.*, Political Parties Registration Law 2014; National Education Law 2014; Vacant, Fallow and Virgin Lands Management Law 2012; Farmland Law 2012.
[116] By contrast, differential treatment among other classifications, such as job or profession, may be easy to justify given that, for example, teachers, doctors, and taxi drivers, are generally not similarly situated.

need not explicitly deny citizenship to certain minority groups for this result to be one of its defining features. Instead, the 1982 Law's creation of a complicated regime tied to race has given the government free range to deny citizenship rights to minorities through bureaucratic obfuscation and other discriminatory tactics.

Because the 1982 Law has no reasonable and objective basis for discriminating on the basis of race and religion, the law violates Section 348 of the 2008 Constitution.

### 2. The 1982 Law Violates the Principle of Separation of Powers and the Right to Due Process of Law

Two additional claims for the unconstitutionality of the 1982 Law can be made on the grounds that the law fails to adhere to the constitutional guarantees of separations of powers and the right to due process. First, certain administrative procedural mechanisms in the 1982 Law bar judicial review, and in doing so, these provisions violate the principle of separation of powers, which protects court jurisdiction over petitions for writs where fundamental rights are at stake. Second, the 1982 Law also violates the right to due process in two ways: (1) the text of the 1982 Law provides for administrative procedures that do not satisfy the requirements of fundamental procedural fairness, and (2) the implementation of the Law violates due process, because procedures suffer from unreasonable delays and lack transparency, with the state making decisions without sufficient explanation, particularly for minority applicants.

#### 2.1 Lack of Judicial Review in 1982 Law Violates Separation of Powers

The 1982 Law denies judicial review of citizenship decisions in violation of the constitutional principle of separation of powers. Under the 2008 Constitution, the principle of separation of powers requires the clear separation of "legislative power, executive power and judicial power," maintained through "reciprocal control" and "check[s] and balance[s]" among the three branches.[117] Critically, the principle of separation of powers enables the judiciary to hold the executive accountable in matters that affect fundamental rights.

Under the 1982 Law, decisions related to citizenship status are administrative (i.e. executive power), and certain provisions appear to deny applicants access to judicial review of administrative decisions. Specifically, the law grants the Central Body decision-making authority related to citizenship, including the power to determine whether an individual falls under one of the three types of citizenship and to terminate or revoke citizenship.[118] The determination of the Central Body may be appealed only to the Council of Ministers, whose decisions are "final" and thus, arguably not subject to judicial review.[119]

However, this provision conflicts with the 2008 Constitution, which empowers the Supreme Court to issue writs to ensure the protection of constitutional rights.[120] Of particular relevance, the Court may issue a writ of certiorari, through which it may quash or cancel the decision of a lower court, government official, or agency that is in violation of the law.[121] Accordingly, a person who believes that the Central

[117] *See* 2008 Constitution, Section 11(a) ("The three branches of sovereign power namely, legislative power, executive power and judicial power are separated, to the extent possible, and exert reciprocal control, check and balance among themselves.").
[118] 1982 Law, Section 68.
[119] *Id.* Section 70.
[120] 2008 Constitution, Section 378; *see also id.* Sections 18(c), 296.
[121] Melissa Crouch, "Access to Justice and Administrative Law in Myanmar," USAID: Promoting the Rule of Law Project, at 2 (October 2014).

Body or Council of Ministers wrongly decided his case may submit a petition for a writ of certiorari to the Supreme Court, which has the authority to review the merits of the case and issue the writ to quash the decision where the case was incorrectly decided.

A second type of writ, a writ of mandamus, gives the Court the authority to compel a lower court, government official, or agency—including the Central Body and Council of Ministers—to reconsider its decision or take some other action.[122] Unlike certiorari, mandamus cannot compel the official or agency to reach a specific decision or outcome, but this writ may still be useful to address due process violations such as inaction or a refusal to give a reasoned explanation for a decision.[123]

The Supreme Court's jurisdiction over petitions for writs is clear, as articulated in its jurisprudence on writs in the immigration context.[124] In *Youn Yun Saung v. Immigration Department and 2 Others*, 1958 B.L.R. 102. S.C., the government attempted to challenge the Supreme Court's jurisdiction to hear an application for a writ with regard to an order for deportation.[125] Following a series of rulings in which the Supreme Court quashed the deportation orders for individuals who had not been prosecuted for an offense per immigration laws, Parliament gave the president the authority to issue a deportation order "in lieu of prosecution" against a foreigner believed to have violated the Burma Immigration (Emergency Provisions) Act.[126] The Court determined that it maintained jurisdiction to hear the writ application, because the government's decision to issue the deportation order was of a judicial nature, rather than an administrative decision.[127] Because the Court had jurisdiction, it determined the disposition of the case on the merits.

As in *Youn Yun Saung*, the Supreme Court retains jurisdiction to hear petitions for writs related to decisions of citizenship under the 2008 Constitution, notwithstanding the 1982 Law's attempt to bar judicial review. Like deportation orders, decisions in regard to citizenship are also judicial in nature.[128] The Constitution explicitly provides for a *judicial* remedy—the issuance of writs by the Supreme Court—in cases of violations of the fundamental rights guaranteed under Chapter VIII.[129] Accordingly, the Supreme Court has previously exercised jurisdiction over petitions for writs challenging the denial of

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[122] *Id.*

[123] Another writ that may be relevant is that of habeas corpus. Habeas corpus provides an avenue through which an individual may challenge an unlawful arrest or detention. *See id.* An individual who is detained and awaiting deportation as a foreigner unlawfully residing in Myanmar may file a petition for a writ of habeas corpus to the Supreme Court on the grounds *inter alia* that they are actually a citizen by law.

[124] Although the 1948 Citizenship Act does not contain the same restrictions on judicial review as the 1982 Law, *Youn Yun Saung* is still relevant because it addresses whether legislation may bar judicial review, albeit legislation other than the 1948 Act. Specifically, the Court concluded it maintained jurisdiction over petitions for writs after Parliament attempted to deny judicial review in the Burma Immigration (Emergency Provision) Act. *See* S.L. Verma, *The Law Relating to Foreigners and Citizenship in Burma,* at 77–78 (1961) (citing *Youn Yun Saung v. Immigration Department and 2 Others*, 1958 B.L.R. 102. S.C.).

[125] *Id.*

[126] Burma Immigration (Emergency Provisions) Act, Section 7(2).

[127] S.L. Verma, *The Law Relating to Foreigners and Citizenship in Burma,* at 77–78 (1961) (citing *Youn Yun Saung v. Immigration Department and 2 Others*, 1958 B.L.R. 102. S.C.). This decision was based on Section 150 of the 1947 Constitution, which provides "Nothing in this Constitution shall operate to invalidate the exercise of limited functions and powers of a judicial nature by any person or body of persons duly authorized by law to exercise such functions or powers notwithstanding that such person or such body or persons is not a judge or a Court appointed or established as such under this Constitution."

[128] Although the principle of separation of powers in the 2008 Constitution may also require some level of judicial review over *administrative* decisions, it is not necessary to address that question for purposes of this analysis. Because citizenship is a fundamental right, decisions in regard to citizenship are *judicial*, and the Supreme Court maintains jurisdiction to hear petitions for writs on the deprivation of this right.

[129] 2008 Constitution, Sections 377, 378.

citizenship under the 1948 Act by the Ministry of Immigration and National Registration.[130] In *Hashim Ahmed Wahid v. The Secretary of the Ministry of Immigration and National Registration*, 1958 B.L.R. 198 S.C., the Supreme Court, on a petition for a writ of certiorari, reversed the decision of the Secretary to deny citizenship to the petitioner, concluding that the Secretary had applied an incorrect legal standard in determining whether the petitioner satisfied a permanent residency requirement.[131]

A final argument in support of the judicial nature of decisions on citizenship could potentially be made based on the fact that the 1982 Law requires the Central Body to "give the right of defence to a person against whom action is taken."[132] Critically, the fundamental right to a defense is expressly described in the Constitution as a "*judicial* principle."[133] Moreover, the right to a defense described in the Constitution does not appear to be limited to the criminal context: it is within the sphere of the judiciary to "guarantee in all cases" this right.[134]

For these reasons, the 1982 Law violates the constitutional principle of separation of powers to the extent it is interpreted to deny judicial review over citizenship decisions by the Central Body and Council of Ministers. Accordingly, the Supreme Court maintains jurisdiction to hear petitions for writs and may review and decide citizenship status under the 1982 Law.

### 2.2 THE 1982 LAW VIOLATES THE RIGHT TO DUE PROCESS

The 1982 Law violates the right to due process. First, the administrative procedures in the 1982 Law related to the Central Body and Council of Ministers fail to satisfy the requirements of fundamental procedural fairness that the right to due process demands. Second, the implementation of the 1982 Law also violates due process because application procedures suffer from unreasonable delays and lack transparency, with the state making decisions without sufficient explanation, particularly for minority applicants.

#### 2.2.1 Due Process Violation in the Text of the 1982 Law

Citizens are guaranteed the right to due process of law under the 2008 Constitution. Section 381 provides that "no citizen shall be denied redress by due process of law for grievances entitled under law," except in certain emergency situations.[135] However, the administrative procedures in the 1982 Law are inadequate to satisfy the requirements of due process in Section 381. The right to due process refers to the notion of fair procedures and encompasses a number of procedural rights in order to ensure that the deprivation of any right is fair. Due process provides for a reasonable opportunity to be heard,[136] meaning in a

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[130] Unlike the 1982 Law, the 1948 Act does not contain provisions that bar judicial review. Nonetheless, the principles of constitutional supremacy and separation of powers were well-established during the post-independence era, allowing the Supreme Court to issue writs even where laws attempted to prevent judicial review, as demonstrated with the Burma Immigration (Emergency Provision) Act in *Youn Yun Saung*. *See supra* n.124.

[131] S.L. Verma, *The Law Relating to Foreigners and Citizenship in Burma*, at 152 (1961) (citing *Hashim Ahmed Wahid v. The Secretary of the Ministry of Immigration and National Registration*, 1958 B.L.R. 198 S.C.).

[132] 1982 Law, Section 69; *see also* 2008 Constitution, Section 375 ("An accused shall have the right of defence in accord with the law.").

[133] 2008 Constitution, Section 19 ("The following are prescribed as judicial principles: . . . (c) to guarantee in all cases the right of defence and the right of appeal under law.")

[134] *Id.*

[135] *Id.* Section 381.

[136] *See, e.g.*, S.L. Verma, *The Law Relating to Foreigners and Citizenship in Burma*, at 83 (1961) (quoting *Hasan Ali v. Union of Burma*, S. C. Criminal Miscellaneous Cases No. 155 & 156 of 1959) (observing that denying individuals under deportation orders the "opportunity" to prove they are citizens is "a violation of fundamental

meaningful time and manner,[137] and it requires the decision maker to articulate reasons for the decision it reaches, among other guarantees.

Section 71 of the 1982 Law is a clear violation of the right to due process as it expressly provides that the Central Body and Council of Ministers "shall give *no reasons* in matters carried out under this Law."[138] Such a prohibition is antithetical to due process, which requires the decision maker to carefully weigh evidence in a reasoned manner that is free from bias. By refusing to provide reasons, the state denies an applicant any protection from the decision maker relying on arbitrary, extra-legal, or unconstitutional reasons for the outcome, such as racial animus.

At the same time, the stated reasons are also necessary for judicial review, which is not only a principle of separation of powers, but also an important component of the right to due process. Judicial review of all administrative decisions may not be required to satisfy due process, but in general, the more important a legal right, the stricter the procedures required to ensure that a fair and accurate disposition is reached.[139] Citizenship, the right at issue here, is one of the most fundamental rights under Myanmar law. According to the Supreme Court, the expulsion of a Myanmar citizen from the country—based on the incorrect conclusion that the citizen is actually a foreigner—is of the gravity of a death sentence.[140] Due to the importance of the right at issue, akin to the deprivation of life, greater procedural protections are demanded in order to ensure fair process. As a result, the Constitution explicitly guarantees that individuals may submit a petition for a writ to the Supreme Court in order to protect their fundamental rights, as discussed *supra*.[141] A petition for a writ is a key procedure to ensure that any deprivation of rights is fair and is thus protected under an individual's right to due process of law.

Accordingly, the 1982 Law violates the right to due process through the administrative procedures of the Central Body and Council of Ministers that deny judicial review and bar the issuance of reasons for a decision. These provisions of the 1982 Law are thus unconstitutional and may be rendered void and without effect.[142]

### 2.2.2 Due Process Violation in Implementation of 1982 Law

The arbitrary implementation of the 1982 Law—including through unreasonable delays, procedures lacking in transparency, and decisions given without justification—also constitutes a violation of the fundamental right to due process of law. As discussed in the previous section, due process encompasses the opportunity to be heard in a meaningful time and manner. Procedures must be transparent and free

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rights")); *see also Maneka Gandhi v. Union of India*, 1978 AIR 597, 1978 SCR (2) 621 (Supreme Court of India) (finding violation of "reasonable opportunity to be heard").

[137] *See, e.g.*, *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (Supreme Court of the United States) (opportunity to be heard must be "at a meaningful time and in a meaningful manner").

[138] 1982 Law, Section 71 (emphasis added).

[139] *See, e.g.*, *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350, 2007 SCC 9, para. 25 (Supreme Court of Canada) ("[T]he greater the effect on the life of the individual by the decision, the greater the need for procedural protections to meet the common law duty of fairness and the requirements of fundamental justice under [the Charter]") (citation omitted)); *Mathews v. Eldridge*, 424 U.S. 319 (1976) (Supreme Court of the United States).

[140] *See* S.L. Verma, *The Law Relating to Foreigners and Citizenship in Burma*, at 84 (1961).

[141] 2008 Constitution, Section 378.

[142] The Supreme Court could find Sections 70(b), 71, and 74 of the 1982 Law null and void on these grounds, in addition to finding jurisdiction over applications for writs. *See* 1982 Law, Section 70(b) ("The decision of the Council of Ministers is final."); *id.* Section 71 ("Organizations conferred with authority under this Law shall give no reasons in matters carried out under this Law."); *id.* Section 74 ("Except on penal matters, all matters relating to this Law shall be decided by the only organizations which are conferred with authority to do so.").

from bias, and the decision maker must carefully consider the evidence and articulate reasons for the decision it reaches. Further, due process must be provided *equally*, with the same procedures applying to all similarly situated individuals.[143]

The 1982 Law is implemented so arbitrarily in practice that it denies applicants the right to due process. Any individual, including Bamar Buddhists, may face unfair procedures in applying for a scrutiny card that fail to live up to the guarantees of due process. But violations of due process are often most acute for religious and ethnic minority applicants. For example, as discussed *supra*, the application procedures are unclear and lack transparency, with immigration officials demanding more or different documents from different applicants. Although due process requires administrative decisions to take place within a reasonable time, many applicants for scrutiny cards are subject to lengthy and unpredictable processing times of months or even years.[144] Unpredictable processing times often require applicants to make numerous trips to the INRD office and pay bribes to immigration officials that can be highly burdensome. The payment of a bribe or unofficial fee in any amount violates the constitutional guarantee of equal rights before the law in Section 347. It can also deny individuals due process, as they may receive lengthier processing times, lack of attention to the application, or even an unfavorable decision based on their inability to pay.

Immigration officials also make arbitrary decisions throughout the process that can have a profound impact on an applicant's rights, but there is no process available for the applicant to contest those decisions, nor is there transparency as to how the decisions are made. For example, as discussed *supra*, a 2017 study found that immigration officials often assign applicants ethnic identities based on the officials' own perception or bias, such as categorizing Muslim applicants who self-identify as "Myanmar" instead as "Bengali."[145] Given that such a decision may directly affect citizenship eligibility, the lack of opportunities for the applicant to provide evidence or contest the decision is a violation of due process. In sum, the implementation of the 1982 Law also violates the right to due process in a number of ways including through unreasonable delays, procedures lacking in transparency, demands for bribes, and decisions given without justification.

[143] Specifically, the state guarantees the right of "any person to enjoy equal rights before the law" and will "equally provide legal protection." *See* 2008 Constitution, Section 347.
[144] SEDF & Justice Base, "Access to Documentation & Risk of Statelessness," at 5, 25–27.
[145] *Id.* at 5, 35–37.

## III. CONCLUSION

The 1982 Citizenship Law violates the 2008 Constitution. First, the 1982 Law fails to comply with the principles of equality and non-discrimination by providing for a three-tiered hierarchy of citizenship status that results in lesser rights for certain citizens, which are exclusively from non-*taing-yin-tha* minority groups. The 1982 Law also violates the rights to equality and non-discrimination by discriminating indirectly on the basis of race and religion through the implementation of the law. These are the most likely bases upon which the 1982 Law is unconstitutional in its entirety, and a court could find it null and void.

The 1982 Law also fails to adhere to the constitutional principle of separation of powers and the right to due process. First, the administrative procedures in the 1982 Law that bar judicial review violate the principle of separation of powers, which protects court jurisdiction vis-à-vis executive decisions where fundamental rights are at stake. In addition, an individual's right to due process of law is infringed by the lack of judicial review, as well as the denial of the provision of reasons for a decision. Finally, the implementation of the 1982 Law also violates the right to due process through unreasonable delays, procedures lacking in transparency, and decisions given without justification, particularly for minority applicants.