Problems with the Kofi Annan Advisory Commission Recommendations on Citizenship for the Rohingya

"There are three types of citizens at present as said earlier. There will be only one type in our country at some time in the future." General Ne Win 8 October 1982.

Derek Tonkin[1] - 16 December 2018

At a lecture in Singapore on 21 August 2018, State Counsellor Daw Aung San Suu Kyi told her invited audience that Myanmar had already implemented 81 of the 88 recommendations of the late Kofi Annan's Advisory Commission report on Rakhine State. I am not aware that we have been told which seven recommendations have not yet been implemented, but I would hazard the guess that Nos. 11-17, seven in number, on the reform of citizenship in Myanmar might well be among the seven not yet implemented, if not the actual seven.

Why this is so should not be too difficult for us to divine. Citizenship (and the related concept of "nationality") are the very essence of statehood. States generally determine by law who are its nationals. The Advisory Commission report indeed acknowledges that:

> "The issue of citizenship rights remains a broad concern, and a major impediment to peace and prosperity in Rakhine.
>
> "The challenges associated with rights [not defined] and citizenship in Myanmar was [were] one of the most difficult issues with which the Commission was confronted, and was [were] the subject of intense debate."

Citizenship and nationality generally coincide, but are not in all countries identical. Thus my current British passport informs me that only British citizens have the right of abode in the UK, which is not enjoyed, for example, by British nationals who are citizens of British Overseas Dependent Territories, nor by certain other British nationals. In the case of Myanmar, their "nationals" would seem to include "citizens" of all three classes.

I was reminded of this when I read in the Advisory Commission's report:

> "Although Myanmar is not the only country that has different categories of citizenship, in other countries more than one category in only allowed for very specific

[1] Derek Tonkin, former British Ambassador to Thailand, Vietnam and Laos, has conducted wide-ranging independent research into colonial, diplomatic and contemporary archives on the problems of Rakhine State.

circumstances. Having just one citizenship category is generally preferable. It meets the important objective of equal rights for all citizens."

It may come as a considerable surprise to many to know that this too is the declared objective of the 1982 Citizenship Law. In a speech on 8 October 1982 delivered shortly before the Law was presented to Parliament and almost certainly written by his principal legal adviser and the architect of the 1974 Constitution Dr Maung Maung, Chairman General Ne Win gave a detailed explanation of this to the Central Committee of the Burma Socialist Programme Party, concluding:

"Although there are three types of citizens at present - *eh-naing-ngan-tha* [associate citizens]*, naing-ngan-tha-pyu-khwint-ya-thu* [naturalised citizens] and pure citizens - the grand children of *eh-naing-ngan-tha* and *naing-ngan-tha-pyu-khwint-ya-thu* will become full citizens. Then there will be only one type of citizen."

The main reason why there is little likelihood that the Myanmar Government will agree to "the abolition of distinctions between different types of citizens" set out in the 1982 Law as recommended *inter alia* in Recommendation No. 17 is precisely for this reason, that the Law itself makes clear - whatever its implementation - that these distinctions are of a transitional nature only and that with the third generation full citizenship would be generally available to all those descended from associate or naturalised grandparents, regardless of ethnicity - whether included among the eight ethnic groups or not, and hence whether included among the 135 "national races" first published in 1990 or not.

Indeed, if the provisions of the Law had been applied to Muslims in Rakhine State in the same manner as they have already been applied to Muslims generally in Myanmar, most of those who now wish to be known as "Rohingya" would already enjoy full, associate or naturalised citizenship as do the many tens of thousands of Muslims of Chittagonian-Bengali origin who live outside Rakhine State, who are careful not to claim to be "Rohingya", yet as "Burmese Muslims", their chosen designation, generally enjoy full citizenship.

In this context I would note that "The Guardian" of Rangoon reported on 3 August 1960 that speakers at a meeting of "Ruhangya" (one of several precursor designations of the eventual "Rohingya") in Rangoon claimed that there were some 700,000 "Ruhangya" in Burma, of whom 300,000 lived outside Arakan, as Rakhine State was then known. The latter 300,000 and their descendants have seemingly had little difficulty in renewing their IDs after the 1982 Law came into force, no doubt because they did not claim to be Ruhangya/Rohingya.

Indeed, nothing could have been more detrimental to the citizenship aspirations of the Rohingya than the decision of their political and religious leaders in the 1960s to plump for the designation "Rohingya" in a vain attempt to gain acceptance like the Kaman as part of the Rakhine ethnic group embodied in the 1982 Law and to seek recognition as a "pre-1823" national race in a situation where the majority of Arakan Muslims arrived in Arakan during British rule (1824-1948) and had no previous or only remote connections with Arakan.

A criticism frequently made of the 1982 Law is that its provisions are discriminatory. The Advisory Commission are of the view that in several respects the Law is not in compliance with international standards and norms - such as the principle of non-discrimination under international law. The Advisory Commission notes:

> "The 1982 law and the accompanying 1983 procedures define a hierarchy of different categories of citizenship, where the most important distinction is that between 'citizens' or 'citizens by birth' on the one side, and 'naturalised citizens' on the other. 'Citizenship by birth' is limited to members of 'national ethnic races', defined as the Kachin, Kayah, Karen, Chin, Burman, Mon, Rakhine and Shan and ethnic groups which have been permanently settled in the territory of what is now Myanmar since before 1823 (in 1990, an official list of 135 'ethnic races' was made public)."

Given the intended transitional nature of this distinction, its importance should not be overstated. It should also not be forgotten that other countries in the region like China, Philippines, Thailand and Vietnam use ethnicity as a basis for nationality. China, for example, provides in Article 2 of its 1980 Nationality Law, which is mainly based like Myanmar legislation on *jus sanguinis* [right of blood], that: "The People's Republic of China is a unitary multinational state; persons belonging to any of the nationalities in China shall have Chinese nationality."

The Advisory Commission might with benefit have drawn attention to the equally important distinction between citizens by birth and associate citizens, who are surprisingly not mentioned anywhere in the Advisory Commission report. Associate citizenship deals with original applications for the one class of full citizenship under both1948 Acts: the Union Citizenship Act and the Union Citizenship (Election) Act which by 1982 had not yet been processed, possibly some 80,000-90,000 according to the Australian Embassy in a report to Canberra dated 16 November 1982. These outstanding applications might have been multiple and would of course not have included later descendants.

Foreign governments have generally not sought to criticise Myanmar for failing to process over a period of more than 30 years many thousands of citizenship applications made under

the 1948 Acts and for then instituting for these applicants a controversial verification process which has hardly got off the ground more than 30 years later. Over half a century of forlorn waiting (1948-2018) surely merits closer attention by the UN Security Council and General Assembly.

In 1982 General Ne Win summarised the position in his speech of 8 October that year as follows:

> "Beginning now, up to a certain point in the future, there will be three classes of citizens. Racially, only pure-blooded nationals will be called citizens. As for those foreign settlers who came here before Independence and who could not go back and who have applied for citizenship under the two laws mentioned before, we will scrutinise their applications and will grant them *eh-naing-ngan-tha* (associate citizenship) if all conditions are satisfied. For those who have not applied for citizenship out of ignorance, we will tell them to apply for citizenship and consider them as *naing-ngan-tha-pyu-khwint-ya-thu* (naturalised citizens) if all conditions are met."

The significance of the term for associate citizens will be understood by those who read Burmese: the element "*eh*" means "guest", so *eh-naing-ngan-tha* means "guest citizens".

In this context, British Ambassador Charles Booth, in commenting in a letter to the Foreign and Commonwealth Office dated 12 May 1982 on the draft Law, concluded by saying that: "Its immediate concern, I assume, is with illegal Bengali immigration into Arakan", while his Deputy Roger Freeland, in reporting on the Law as finally approved in a letter dated 25 November 1982 expressed the view, which some may now find surprising, that although it was "blatantly discriminatory on racial grounds…..it would be possible to argue that the new Law is a generous and far-sighted instrument to resolve over a period of time an awkward legacy of the colonial era".

The Advisory Commission report refers to "national ethnic races" in quotation marks as though this description is taken from the 1982 Law. I have checked the text, and can confirm that the words "race" or "races" do not appear anywhere in the Law. All this might reflect some uncertainty among members of the Advisory Commission about the significance of terms used in the Law. It should be noted that the reference to "ethnic groups" in Clause 3 of the Law is paralleled by Clause 3(1) of the 1948 Citizenship Act. "Ethnic groups" is a very loose association, indeed a misnomer. The Rakhine group, for example, as we know from the list first published in 1990, includes "national races" of differing ethnicities, such as the

mainly Muslim Kaman whose roots are mostly in Afghanistan, while the Shan Group of 33 “national races” includes several which are not directly related ethnically to the (Tai) Shan, such as the Wa, Kokang, Pa-O, Yao and Akha. The Salon, or Sea Gypsies living in the Mergui Archipelago, are of Malay ethnic stock and speak a Malay dialect, yet are included as a “national race” of the Bamar (Burman) ethnic group, with whom they have nothing in common.

The Advisory Commission may well have missed an excellent opportunity to support pressures even within Myanmar after the 2014 Census to revise the whole basis of the bizarre allocation of the 135 “national races”, made mainly on the basis of geographical co-location, to the 8 main ethnicities listed in the 1982 Law: four historical kingdoms (Burman, Mon, Shan and Rakhine) and the remaining four main ethnicities Kayin [Karen], Kayah [Karenni], Chin and Kachin. The Advisory Commission might also have noted that, although over 36 years ago General Ne Win promised in his 8 October speech that “we will extend them (associate and naturalised citizens) rights to a certain extent. We will give them the right to earn according to their work and live a decent life”, the limited rights to be accorded have still to be published, if indeed they have yet been drafted. Those offered lesser than full citizenship might reasonably expect to know what these lesser rights might be before accepting.

The sensitivity of this issue is reflected in the decision of the Government to withhold, for the present, publication of the ethnic tables compiled during the 2014 Census. In his seminal work on “The Tribes of Burma” published in 1919, the Ethnographic Survey Superintendent for Burma, Cecil Lowis, examined 162 indigenous minorities found in Burma but made it clear that he was excluding native residents of the four historical kingdoms. The 162 he divided into three broad, non-geographical ethnic groups: Tibeto-Burman, Mon-Khmer and Siamese-Chinese, arguably a much better and scientifically defensible division than the eight ethnic groups of the 1948 and 1982 citizenship legislation.

Another omission in the Advisory Commission report is any reference to the “Three Generations” principle which lies at the heart of Myanmar citizenship legislation since independence. President Thein Sein explained this principle to António Guterres on 11 July 2012 when the present UN Secretary-General was the UN High Commissioner for Refugees. The President invited the UNHCR to assist in the resettlement of Muslims who had entered Rakhine State illegally, but the UNHCR declined to assist, presumably accepting that Myanmar had every right to expel illegal migrants back into Bangladesh from where they would have come and needed no help from the UNHCR in this context. There

was unfortunately no official English version of the record of this conversation, and the international press almost universally reported the meeting as a request by the President for the entire community of Arakan Muslims claiming to be "Rohingya" to be placed under UNHCR's protection, whereas in fact the President was referring solely to the minority of post-1948 illegal migrants, who even so had at that stage not been identified and so could not be "refugees" needing UNHCR protection.

The practical example of the "Three Generations" principle given to António Guterres was the right of the descendants of all migrants from Bengal under British rule [1824-1948] to apply for Myanmar citizenship at the third (grandchild) generation, as Myanmar regarded these migrants as legal migrants. The Burmese language programme of Radio Free Asia correctly, and uniquely, reported this in the following terms on 12 July 2012:

> " In his statement, Thein Sein outlined the legal distinction between those who came to Burma before the country's independence in 1948 - often called 'Bengalis' - and those who came after. 'In Rakhine state now, there are two distinct generation groups. The first group is those born from the pre-1948 Bengalis. Another generation group, under the name Rohingya, came to Burma later.' He said those who were brought over to Burma during British rule between 1824 and 1948 were welcome in the country. 'Before 1948, the British brought Bengalis to work on the farms, and since there were ample opportunities to make a living here compared to where they came from, they didn't leave,' he said. 'According to our laws, those descended from [the Bengalis] who came to Burma before 1948, the 'Third Generation,' can be considered Burmese citizens, he said."

The "Third Generation" principle has even been mentioned by Myanmar Ministers as a possible solution to the problem of illegal migrants. Radio Free Asia, again in their Burmese Service, reported Minister of Immigration Khin Yi on 12 September 2012 in these terms:

> "Rohingyas born in Burma are eligible to apply for citizenship if at least two generations of their families have lived in the country, Immigration Minister Khin Ye said Wednesday, following criticism from international rights groups over the government's discrimination of the minority group."

Finally, this principle is the basis of Clause 8 of the 1982 Law which provides for full citizenship at the third generation for the descendants of newly associate and naturalised citizens.

The Advisory Commission report examines the issue of citizenship in two sections. The first section concerns the much criticised citizenship verification process now taking place. The 6 recommendations (Nos 11-16) are reasonable and unexceptionable, but stand little chance of support from the Myanmar Government, not because of any known objections to their intrinsic content but because the second, related section on the 1982 Citizenship Law is characterised by lack of clarity, technical inaccuracy and a weak historical understanding of the objectives and intentions of the Law. As a result, not only is the 7-point Recommendation No. 17 on the Citizenship Law unacceptable to the Myanmar Government, but this unacceptability is bound to influence detrimentally the admissibility of Recommendations Nos. 11-16, however sensible they may seem in themselves.

There can surely be little doubt that the "factual flaws and deficiencies" in the Advisory Commission's report to which Senior General Min Aung Hlaing referred on 25 August 2017 at his meeting with Kofi Annan primarily concern the chapter of the report on citizenship. These flaws are not detailed, but the relevant sentence is immediately followed by the Senior General's comments on the importance of observing the process set out in the 1982 Citizenship Law. The linkage is intended.

So are we stuck in an irreconcilable impasse, or are they ways in which the international community might help the Rohingya? A point of departure might be the reality that successive Myanmar Governments have been acutely aware, privately embarrassed, yet rarely challenged that unacceptable delays occurred in processing applications made under the 1948 Acts, in issuing IDs to residents who did not need to make application under the Acts as they were Burmese by birth, and in implementing the 1982 Law in Rakhine State. It may be impossible in practical terms to adjudicate on the citizenship claims of the 900,000 or so Rohingya refugees currently in Bangladesh before they return to Myanmar. But the Myanmar Government might be encouraged to create an atmosphere of confidence among refugees in Bangladesh by giving them public reassurances that, on their return to Myanmar:

1. All refugees who held Myanmar citizenship prior to the 1982 Law will have this restored to them and their descendants with the minimum of fuss, on the basis of official records held in Myanmar, whether or not after their traumatic experiences they still have in their possession the documentation to prove this.

2. All those who do not qualify under the present citizen verification process will not face the threat of expulsion where it can be shown from local records such as the annual house registration lists that they are third generation residents of Myanmar.

3. The Myanmar Government will undertake as a matter of priority a review of the designation of “national races” in Myanmar, which would include a reassessment and if possible re-inclusion of all quasi-indigenous Muslim ethnicities used at the time of both the 1953-54 and 1973 Censuses, but later removed with the publication in 1990 of the currently smaller list of 135 “national races”.

I hope that the reservations about a single aspect of the Advisory Commission report expressed in this article will not be misunderstood in any way as disrespect for the excellent work which the late Dr Kofi Annan and his colleagues have performed and whose report has been generally welcomed by the Myanmar Government as a guide to action. I would only comment that, from my own diplomatic experience, issues of citizenship and nationality are an unusually complex branch of international jurisprudence and that, had there been time, an in-depth, specialist and historical study might have contributed to a better understanding of Myanmar law.

While the rule of law matters, it is apparent that it is not so much the law itself as the failure to implement, over a period of the seventy years from 1948 to 2018, the provisions of the law in Rakhine State which lies at the heart of the present impasse over citizenship for the Rohingya.

PTO

Comment by Derek Tonkin on his article "Problems with the Kofi Annan Advisory Commission Recommendations on Citizenship" published on 16 December 2018 at:

http://www.networkmyanmar.org/ESW/Files/Problems-Annan-Citizenship.pdf

I realise, not least from comments already made to me, that I might usefully have spent more time on the dichotomy between "nationality" and "citizenship". Nationality is the attribute required by international law to define a person's relationship to the State, whereas citizenship is a narrower concept defining the rights and responsibilities of nationals of a particular State. "Nationality" is highlighted in international protocols, such as the Universal Declaration of Human Rights and the Convention on the Rights of the Child, but "citizenship" is only rarely mentioned. Nationality is normally based on such matters as birth, marriage and descent, but citizenship sets out the status available to eligible nationals. However, for many States the two terms are synonymous.

Myanmar has only ever had "citizenship" laws, which might leave open the question of who is a Myanmar "national" if this is nowhere defined. Most close neighbours of Myanmar like China, India, Thailand and Vietnam have "nationality" laws. In the case of Myanmar, however, the term "nationalities" is used to define certain ethnic groups, some of whom were once Nation States in their own right (such as Mon, Rakhine, Shan, Bamar), which is no doubt why the current Upper House is called the Amyotha Hluttaw or House of Nationalities, like the Lumyozu Hluttaw or Chamber of Nationalities of 1948-1962. In a sense, Myanmar might be said to have appropriated the term "national" for its own purposes. Myanmar may also have been influenced by discussions during 1946 and 1947 on the British Nationality Act 1948 which introduced the concept of citizenship for the United Kingdom and was needed to cope with the new status of the peoples of India and Pakistan, and probably Burma/Myanmar as well.

Derek Tonkin - 19 December 2018