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SUBJECT.

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THE BURMA CITIZENSHIP LAW

.... The Chairman of the Council of State promulgated the Burma
Citizenship Law on 15 October 1982. The Law had been passed by the
third session of the Third Pyithu Hluttaw (People's Congress) which
ended on 14 October (M.RA6516). Attached (for all addressees) is a
copy of the official English translation of the Law.

Background

2. The need to repeal the 1948 Union Citizenship Act and replace
it with a new Law responding to Burma's current needs was first given
official expression in 1976. At that time there was considerable
concern that the new Law would discriminate against non-ethnic residents.
The rumour mill had it that Chinese and Indians would be stripped of
their property and businesses and relegated to menial jobs. Since that
time there have been several drafts of the proposed legislation and
extensive discussion of these drafts both in public forums and within
the Government and Party administrations. The length of time it has
taken to agree on the terms of the Law suggests that significant
differences existed amongst its framers. The principal draftsman has
been a member of the Council of State, Dr Maung Maung, who is the
author of a learned study on Burma's 1948 Constitution and one of the
principal framers of the 1974 Constitution. But U Ne Win has also
been heavily involved in the elaboration of the new Law.

3. In April 1982 the Government circulated a draft of the
Citizenship Law. Detailed comments on this draft were provided in
M.RA5921 of 3 May. That memorandum also reported the critical comments
of the Indian and Chinese missions. The final version of the
Citizenship Law is, however, significantly different from the April
draft. It is therefore necessary to embark upon a full description
of the new Law drawing attention to noteworthy variations over the
previous drafts.

General Description

4. A number of Burmese contacts have commented to us, with
undisguised relief, that the new Law is relatively liberal in its
operation and that the original fears that the Law would have a
discriminating and confiscatory impact were unfounded. It is difficult
to endorse these comments. What can be said is that the new Law is
a far more subtle document than the earlier drafts. While distinctions
based on race are incorporated in the legislation, overt discrimination
is kept to a minimum. But the discretion given to the executive branch
of government, unchecked by even the possibility of judicial review,
means that judgement must be reserved until there has been an
opportunity to assess the spirit in which the Law will be implemented.

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5. The most striking feature of the Law is that it creates three types (classes?) of citizens; citizens, associate citizens and naturalised citizens. A closer examination of the Law reveals that a fourth type exists; citizens by birth. The most generous aspect of the Law is that it foresees a time when only one category of citizenship will exist. Thus, at some future time, membership of a particular race will have no bearing on the citizenship question. But this is a "best case" situation and even so would not arise for three generations. In the meantime attention tends to focus on the more invidious aspects of the Law. One of these is that it draws distinctions based on race. Mere membership of one of the ethnic groups of Burma confers citizenship, non-membership would appear to confine the individual to the lesser categories of citizenship. There is however a grey area here which will be dealt with below. Another invidious aspect is that the Law visits upon the children the sins of the fathers. Thus an individual whose father or grandfather was stripped of his associate or naturalised citizenship may also lose the right to retain or be granted such citizenship. This brazen injustice is only partly balanced by the fact that the reward for good behaviour is that the child could qualify for full citizenship.

6. It is intended to proceed to a fuller description of the types of citizenship noting the qualifications for membership and the limitations associated with each category. In so doing references to the previous situation governed by the 1948 Constitution and citizenship laws are unavoidable. The Citizenship Law, unlike the April draft, was not accompanied by an official commentary. However the Chairman of the Burma Socialist Programme Party (BSPP), U Ne Win, in an 8 October 1982 address to the seventh meeting of the BSPP Central Committee spoke at length about the new Law. This speech sheds considerable light on the intentions of the framers of the legislation and must be employed as an aid in the interpretation of the Law.

Citizens and Citizens by Birth

7. The 1948 Constitution granted citizenship to members of "the indigenous races of Burma" (Article 11(I)) but is also allowed for the possibility of foreigners of long residence to be granted naturalisation (Article 11(IV)). The Constitution made no distinction between a natural-born citizen and a naturalised citizen. Chapter II of the 1982 Law replaces the term "indigenous races" with a non-exhaustive listing of ethnic groups which settled in Burma prior to 1823 (Section 3). The date refers to the first Anglo-Burmese War, after which very lax controls on immigration existed. It would appear that one need not prove that one's ancestors lived in Burma prior to 1823, an impossible task for most people, it suffices to prove that one is a member of one of the ethnic groups of Burma listed in Section 3 or accepted as "national" by the Council of State (Section 4). Race therefore plays a central role in determining the grant of citizenship. U Ne Win flatly stated that "racially, only pure blooded nationals will be called citizens". The reference to "pure blooded nationals" is disturbing. The Law itself is silent on the test of how much indigenous blood is required before one is considered a "national". U Ne Win's remark suggest a strict interpretation could apply and people with some foreign blood could be disqualified from being considered as Karens, Burmans, etc.

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8. In fact, U Ne Win's remark is not accurate. The Law provides for the granting of citizenship to the grandchildren of associate and naturalised citizens (Section 7) and thus, eventually, blood will not be a determining factor. Further, the Council of State is given power to confer citizenship, associate citizenship or naturalised citizenship "on any person" (Section 8(a)). Finally, existing citizens, some of whom are not "pure blooded", appear to retain their citizenship (Section 6).

9. The grey area mentioned above arises because of Section 6. That section safeguards the citizenship of persons who are already citizens. When one considers that full citizenship was more liberally granted under the 1948 instruments, it is important to know whether those non-nationals who were previously granted citizenship will retain it. On the surface a positive reply is required. Chastened by U Ne Win's remark it will be necessary to monitor the application of this section. A key factor in this respect will be the official attitude on the possession of a certificate of citizenship. Under the 1948 instruments there was only one class of citizen but there were two ways of achieving this status. A foreigner had to apply for such a certificate either under the provisions of the 1948 Union Citizenship Act or the 1948 Union Citizenship (Election) Act (under which British nationals resident in Burma for a number of years could elect to become Burmese citizens - this twilight legislation was extinguished in 1955). Application was a necessary precondition and the grant of a certificate was conclusive proof of citizenship. The present law would appear to recognise these citizens. The other way of qualifying as a citizen under the 1948 instruments was simply to meet certain tests laid down in Article 11 of the 1948 Constitution and given further elaboration in the Union Citizenship Act. For instance a person born in Burma, at least one of whose grandparents belonged to the indigenous races, was considered to be a natural-born citizen. Such a person did not need to apply for a certificate to perfect his citizenship status, his status as a citizen flowed from the legislation itself. Nevertheless he had a right to apply for a citizenship certificate under Section 6 of the Union Citizenship Act if "a doubt exists" about his status. A commentary on this section states that "persons who are already (emphasis added) citizens of the Union may require to arm themselves with a certificate of citizenship to avoid any controversy as to their status". Prudent persons would have followed this advice. Others, noting the facultative nature of Section 6, may not have bothered. Some of these people not armed with certificates do not fall within the citizenship category of the 1982 Law. It is submitted that they will have considerable difficulty in sheltering under Section 6. It is likely that Section 6 will most probably be read to refer only to those persons holding certificates of citizenship.

10. As noted above, within the category of "citizen" there is a sub-category of "citizens by birth" who are persons born of parents, both of whom are nationals (Section 5). There is no separate Chapter dealing with citizens by birth but this category enjoys one crucial right over all other categories including "citizens"; their citizenship cannot be revoked by the Council of State (Sections 8(b) and 17). These "pure blooded" nationals can therefore be seen as forming a separate category. Indians and Chinese granted citizenship under the 1948 instruments and retaining their citizenship under Section 6 of the present Law are still not citizens by birth. Should the Council of State decree that it is in the interests of the State they can have their citizenship revoked (Section 8(b)). It should be noted that this disability will be suffered even by those of the third generation granted citizenship under Section 7. The legislation thus has a permanent in-built provision discriminating in favour of members of the indigenous racial groups.

11. Of the other sections in Chapter II, two are noteworthy. As is the case with associate citizens (Section 31) and naturalised citizens (Section 54), a citizen may not acquire dual nationality (Section 13). But, as will be seen below, unlike the other two categories, citizens enjoy all the rights prescribed by the Law (Section 12(c)).

Associate Citizens

12. Chapter III concerning "associate citizens" is a new part of the Law which did not appear in previous drafts. It deals with a limited category of persons who applied for citizenship under the 1948 Union Citizenship Act but, presumably, have not yet been granted it. We have been told that there are 80,000-90,000 such applicants who, for one reason or another, have not had their applications processed. It is likely that bureaucratic inertia is a major contributing factor in this state of affairs.

13. Harking back to the discussion above on certificates of citizenship, it would appear that "associate citizenship" has been framed for those persons who were required to lodge an application in order to become citizens. It does not appear to apply to those citizens who applied for a certificate for the sake of certainty. Yet it would not be surprising if, for the purposes of the present Law, all applications were lumped into the same category.

14. The most disquieting aspect of this Chapter is the degree of discretion given to the executive arm of government. Throughout the Chapter the technique employed is not to grant rights to putative associate citizens but rather to empower the executive to grant such rights if it so wishes. Accordingly the term "may" appears in crucial areas (e.g. Sections 23 and 25). Ominously, an unfettered discretion is given to the Council of State to abrogate the rights of associate citizens (Section 30(c)). Should the Council of State decide to limit the economic rights of associate citizens, it could do so under this section. Persons of Chinese descent will therefore be on guard after U Ne Win's disparaging remark that "we are aware of their penchant for making money by all means and knowing this, how could we trust them in our organisations that decide the destiny of our country?" Persons of Indian or Bangladeshi origin will take no comfort in U Ne Win's statement that "we are not in a position to drive (them) away" especially when that statement was followed by the remark that "if they were to betray us we would be in trouble".

15. What limitations are placed on associate and naturalised citizens? This Law is silent on the question. The 1974 Constitution has a Chapter on the Fundamental Rights and Duties of Citizens. It is an open question whether the term "citizen" will be interpreted to include all categories of citizens. Article 177 of the Constitution limits membership of the Pyithu Hluttaw to "citizens born of parents both of whom are also citizens". This tends to exclude persons belonging to the lesser categories of citizenship. The April draft listed an additional disability; "the right to serve as the head of the Bodies of Public Services". The present Law is far more subtle and does not mention such disabilities. Limitations however can be quietly instituted in a piecemeal fashion by the Council of State. U Ne Win's comments and the provisions of earlier drafts of the Law may constitute early warning signs of the administration's intentions.

16. Associate citizenship may be revoked "in the interests of the State" by the Council of State (Section 8(b)). It can also be revoked by the Central Body, consisting of three Ministers for any one of a number of reasons (Section 35). One of these reasons is simply showing "disaffection or disloyalty to the State by any act or speech or otherwise".

Naturalised Citizens

17. According to Section 42, persons who lived in Burma prior to 4 January 1948 but who did not apply for citizenship, may now apply for naturalised citizenship. Section 43 extends this class of persons to offspring of naturalised persons. One of the qualifications for naturalised citizenship is the ability "to speak one of the national languages" (Section 44(c)). It is to be hoped that this does not turn into a latter day version of the infamous Australian "dictation test". Finally a person married to any category of citizen at the date of the entry into force of the Citizenship Law and who holds a Foreigner's Registration Certificate, may also apply for naturalised citizenship (Section 45).

18. Naturalised citizens enjoy similar rights as associate citizens. They also are subject to the same possibility of the discretionary curtailment of these rights (see especially Section 53(c)). As is the case with associate citizens (Section 29), the children of naturalised citizens who have transgressed, may cease to be naturalised citizens (Section 51).

Other Provisions

19. The Law provides that only the executive arm of government shall administer the Law, the courts are excluded (Section 74). The day-to-day administration of the Law is conferred upon the Central Body comprising the Ministers of Home and Religious Affairs, Defence and Foreign Affairs. The previous draft did not include the Foreign Minister in this panel. His inclusion could add an element of sensitivity to Chinese, Indian and Bangladeshi concerns which might otherwise have been missing. Appeals from the Central Body are to the Council of Ministers. It is most unlikely that the Council of Ministers would overrule their colleagues' decisions. The Council of State, a body elected by the Pyithu Hluttaw and charged with safeguarding the Constitution, is given considerable discretionary power. It is made up largely of former Ministers who have been "kicked-upstairs". It is likely, as with the other two bodies, to be subservient to the BSPP. Therefore when the veil of Constitutionality is lifted from the Law, it seems quite clear that a person refused citizenship or stripped of it or rights associated with it has no effective recourse. It is also likely that all decisions on these questions will be taken by the Party and merely carried out by the other bodies.

20. Finally, the Law contains lacunae. There are no provisions on statelessness (there was in the April draft) or refugees. Burma is not a party to the 1951 Refugee Convention or its 1967 Protocol. Refugees enter this country at their own risk. It is difficult to predict whether Burma would consider itself bound by the duty of non-refoulement. Probably not. To its credit it allowed many of the persons who recently fled to Bangladesh to return to Burma. But this is not necessarily a precedent. It is also difficult to see what the attitude will be about foreigners who came to Burma after 1948 and who are not married to a citizen. It seems they are denied all rights to citizenship of any sort. To be fair, it must be pointed out that at least the Law arms the Council of State with the right to confer citizenship on any person (Section 8(a)). One cannot be optimistic that this power will be liberally employed.

Comment

21. The Burma Citizenship Law forms part of U Ne Win's legacy to the Burmese. Its aim is to safeguard the State from what U Ne Win once described as those "newly-arrived stronger races oppressing, overwhelming and mixing blood with the original races". It springs from the mood of national introversion bordering on xenophobia which colours so many of Burma's policies under the present administration. Yet the Law, in its final draft, provides evidence that the Burmese Government is alive to the possibility of foreign criticism and is sensitive about such a possibility. Objectionable features of previous drafts have therefore been muted. The Law also brings an element of certainty to this area which the 1948 Laws did not achieve. But, by employing subtle drafting techniques and leaving scope for wide discretionary powers, the Law can still be used in a discriminatory and confiscatory manner. The worst case situation remains possible.

22. We have heard that Dr Maung Maung is currently engaged in drafting the procedures foreshadowed in Section 75. It is claimed that these procedures will contain sharp teeth but that they will never be published. These assertions will have to be tested. The true test of the Citizenship Law will only come with its implementation. We will therefore continue to monitor the situation as best we can.

23. To date, the only public criticism of the Law has come from the Burmese Communist Part (BCP). In a 25 October Voice of Burma broadcast, the BCP claimed that the Law struck against "people who have naturally crossed borders frequently because they resided in densely forested and hilly border areas". This is a convenient accusation given the fact that the BCP draws or press-gangs its recruits from just such areas. The criticism lacks foundation. It is true that Section 3 only lists the major ethnic groups, but the list is not exhaustive. Furthermore there is a long history of regarding the minor ethnic group as indigenous under the 1948 Constitution. There is no evidence that these minor ethnic groups will not be regarded as "national".

24. We will take advantage of available opportunities to discuss the Law with members of the Bangladeshi, Chinese and Indian Embassies and report their comments.

25. We have copied this memorandum to Geneva in the unlikely event that the issue arises before human rights forums.



(Roland Rich)
Second Secretary