States of Legal Denial: How the Rohingya Lost the Right to Vote and the Role of Legal Denial in Myanmar

Melissa Crouch

Law School, University of New South Wales

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Introduction

On September 19, 2017, Aung San Suu Kyi addressed the United Nations (UN) and gave her opinion as the State Counsellor of Myanmar regarding the grave conflict and displacement crisis in Rakhine State (OSC 2017). Her speech was widely criticised by the international community for failing to acknowledge the reality of the humanitarian and displacement crisis that had been unfolding since August 25 (ICG 2017). In early 2018, the UN estimated that over 700,000 Rohingya had fled to Bangladesh, joining the 300,000 displaced who were already there since 2012. Numerous studies estimate that more than 9,000 people may have died in the conflict. On the same day as Suu Kyi's speech to the UN, protests were held by pro-Aung San Suu Kyi supporters across major towns in Myanmar. In addition, the Burmese (Burman) diaspora organised demonstrations at sites around the world, such as in front of the Australian parliament house in Canberra. These demonstrations were organised under the slogan of "We Stand with Daw Suu". The message was clear: many people in Myanmar support Aung San Suu

Kyi and her position of denial on the crisis in Rakhine State. These events suggest a major disconnect and polarisation between the views of the global community and local perspectives. The international community has been confounded by the strong, united response from within Myanmar that largely denies the state of suffering of the Rohingya, a minority Muslim religious and ethnic community, displaced both within Myanmar and across the border in Bangladesh. The National League for Democracy government and the military deny the scale, scope and legitimacy of the suffering and the urgency of a response to the humanitarian crisis. This raises the question: what explains this collective denial of the suffering of the Rohingya in Myanmar? What forms does denial take and to what effect? How do officials use law and legal institutions to effect and perpetuate denial?

Scholarly inquiries into the Rohingya crisis focus on the issue of citizenship and ethnicity (Holliday 2014; Ferguson 2015; Thawnghmung 2016), which is one example of the use of law to deny the Rohingya as a part of the political community. Although it is in the *application* of the law, as Cheesman (2017) notes, and not the mere enactment of the citizenship law, that many Rohingya are denied citizenship. Notions of race and ethnicity in Myanmar have been interrogated and the inherent privileges that come with being ethnic Burman have been identified (Walton 2008, 2013). The creation of ethnic categories of difference has been historicised and traced to the early years of authoritarian rule from 1964 (Cheesman 2017). Anthropologists such as Anwar (2013) have looked beyond the borders of the nation-state to consider Rohingya communities in Pakistan and the attendant challenges they face to citizenship in light of discourses of illegality. Kyaw Zeyar Win (2018) considers the securitisation of the Rohingya. My article seeks to shift attention to the broader phenomenon of legal denial as a means employed by the state to

deny the suffering of the Rohingya, and issues such as citizenship are but one example of this. My article also adds to the emerging interdisciplinary interest on Islam and the state in Myanmar (Selth 2004; Wen-Chin Cheng 2014; Nyi Nyi Kyaw, 2016, 2017; Crouch 2016a; Berlie 2008).

I am concerned with how acts of denial operate to exclude the Rohingya from the political community, and the role law plays in this process. The methodological presumption of my article is that law is a key tool in the process of interpretive denial, as identified by sociologist Stanley Cohen in his seminal text on *States of Denial* (2001). I set the ground work for this inquiry by first revisiting Cohen's three forms of states of denial - literal, interpretative and implicatory. I expand upon his passing reference to the use of law to explain how law is often *central* to acts of state denial. I use the term "legal denial" to refer to acts of denial by the state that specifically use law and legal institutions to effect modes of denial. I illustrate Cohn's forms of denial through analysis of official government and military responses to the violence that has taken place between 2012–2018, as reported in various public mediums.

I then focus specifically on legal denial in Myanmar. Cohen suggests that "the dominant language of interpretation (interpretive denial) is *legal*" (Cohen 2001, 106). I draw a link between Cohen's understanding of interpretation as denial and the violence of legal interpretation (Cover 1985; Minow 1995). I explore three forms of legal denial: constitutional reform; legislative reform; and judicial decision-making. On the first level, I return to the 1950–60s debate over a proposal to amend the Constitution to create Arakan (Rakhine) State. Through this debate, and the subsequent decision under Ne Win to recognise Arakan State in the 1974 Constitution, I show how constitutional reform acts as a means of legal denial. In doing so I destabilise the concept of "Rakhine State" as a

given entity. On the second plane, I consider the role of parliament and its dialogue with the Constitutional Tribunal over the decision to narrow the definition of who has a right to vote and run for office to exclude the Rohingya. This legislative reform amounted to mass disenfranchisement and was another means of legal denial that excludes the Rohingya from the political community of Myanmar. This focus on law-making builds on Robert Cover and my earlier work on the violence of law reform in Myanmar (Crouch 2016). A third mechanism of denial is the targeted use of political trials to perpetuate certain narratives of legal denial about who is responsible for the conflict in Rakhine State. Judicial decision-making as interpretive denial can be seen at work in the 2017–2018 trial of two local Reuters journalists who were investigating a massacre in Rakhine State, the importance of which I explain against the backdrop of the government decision to designate the Arakan Rohingya Solidarity Organisation (ARSA)[1] as a terrorist organisation.

By offering an alternative perspective on the political exclusion of the Rohingya, I show the centrality of legal denial in responses to contemporary suffering.[2] This opens new possibilities for identifying and explaining how law and legal institutions are employed by the state in the act of denial.

Suffering, Violence and States of Denial

The official narrative of the state and society in Myanmar is based upon certain notions about who is a majority and who is a minority. The majority in Myanmar are Burman Buddhists, or Buddhists more generally.[3] Burmans are recognised as the preeminent national race in Myanmar (Walton 2013). The state in Myanmar has for decades placed its stakes on a racialised national ideology, an ideology of national races. This governance

act of staking all on a particular racialised national ideology is the tipping point for repression of minorities (Appadurai 2006). The concept of national races in Myanmar is a form of racialised nationalist ideology (Appadurai 1998), or as Cheesman (2017) has argued, the '*tainyintha* (national race) truth regime'. This racialised nationalist ideology recognises 134 other races besides the Burmans. These national races are divided into seven sub-groups, and the Arakan are one of these seven. Outside of these official majority and minority groups are the invisible minorities. The Rohingya are one such invisible minority. The invisible nature of the broader Muslim communities in Myanmar dates to the colonial era and British perceptions of who belonged in Burma (Keck 2008, 2015).

One way to understand how this regime of majority-minority recognition is reinforced is through state responses of denial. Cohen (2001) articulates a compelling thesis as to why unspeakable atrocities, violence and suffering are invisible to, or rendered invisible by, some people. A statement of denial includes declarations that something is incorrect or false, did not occur, or in fact does not exist (Cohen 2001, 3). States of denial encompass reactions of avowal, refutation and defiance. I suggest that Cohen's exploration of what we do with our knowledge of suffering, and what suffering does to us, offers to shed light on the complex case of the Rohingya and the way domestic reactions compound the difficulties of action by the international community. In addressing the question of how people face and are faced by suffering, Cohen identifies three types of denial: literal, interpretative and implicatory. I expand on Cohen's articulation of states of denial by focusing specifically on responses by government officials to violence and displacement in Rakhine State between 2012–2018. I draw here on Facebook posts, official government websites, state-run media, parliamentary records,

court records and my own field notes. Some scholars have focused on how law *understands* the suffering of others (Sarat 2001, 2014). My project instead considers how law rejects, hides, obfuscates and ignores the suffering of others and contributes to violence (Sarat and Kearn 1993). I am concerned with how the framework of denial helps us to understand how officials in Myanmar respond to the knowledge of the suffering of the Rohingya. In this section I deal with denial generally, while in the later section I deal specifically with the role of law in denial.

The Power of Literal Denial

The first and simplest form of denial is literal denial. Literal denial involves the blanket rejection of known and proven facts (Cohen 2001, 7). Such a response amounts to the outright refusal to acknowledge the facts of a situation. It is often a reactive and defensive position. Such blanket denial can be difficult to sustain in the face of evidence proving otherwise. There are many levels on which literal denial is at work in relation to the Rohingya.

Before I consider denial in respect of the conflict in Rakhine State, it is necessary to explain the preliminary act of denial in terms of the rejection of the identity marker 'Rohingya' that this group uses to identify themselves (COI 2013, 55). The common state approach in Myanmar is to denial the use of the term 'Rohingya' and instead insist either on the designation of these people as 'Bengali' or simply as 'Muslim'. There are numerous contemporary examples of literal denial by state officials of the 'Rohingya' identity. One example is parliamentary debates in 2018 (PH2018-7:12) in which members of parliament denied that there had ever been any official use of the term 'Rohingya' (Cheesman 2017, 473). Many officials have repeated the belief that these people are

‘Bengali’ and that there is no official recognition or designation of ‘Rohingya’ as an identity in Myanmar. Prominent monks of the Buddhist nationalist movement espousing violence and hate speech, such as Wirathu, have suggested that the international community refers to the Bengali as Rohingya because it supports an agenda to Islamise Myanmar (*Frontier Myanmar*, October 15, 2018).

One act of literal denial may help pave the way for another act of denial. The act of literal denial on the term ‘Rohingya’ facilitates a second claim, which is to deny that because they are considered to be ‘Bengali’, not Rohingya, they do not belong in Myanmar. The implication is that Bengalis belong in Bangladesh. This form of denial is often linked to the association between the Rohingya and the idea and fears of the “Muslim world” (Amil 2017). The political weight and persuasive value of this act of denial domestically has affected how commissions that have been set up to deal with the conflict have addressed the issue. For example, the most high-profile local commission was headed by Kofi Annan, former Secretary General of the UN. The Kofi Annan Commission Report (2017) was released on August 24, and the next day in response the Arakan Rohingya Solidarity Army (ARSA) launched its attacks on police stations. One key way in which the Kofi Annan Commission perpetuates the literal denial of the Rohingya as an identity marker is to instead choose the term ‘Muslim’. Although the Report explicitly chose *not* to use the term ‘Bengali’ (2017, 12), its rendering of Rohingya as Muslims reduces their identity status to their religion, a religion perceived to be at odds with the Burman Buddhist majority.

The events of 2017–2018 are a telling example of literal denial on multiple levels. On August 25, 2017, attacks took place against numerous police and border guard stations in Rakhine State and this was followed by serious retaliation from the military. Hundreds

of thousands of Rohingya began to flee to Bangladesh from late August onwards. The initial response of government officials was to simply *deny* that the numbers of Rohingya being displaced were as large, as foreign media suggested. Reports on the website of the Commander-in-Chief, Senior General Min Aung Hlaing, claimed that foreign media reports were simply *exaggerating* how many people fled to Bangladesh (MAH 2017a). This example of literal denial carried added weight because it was reported on the website of the Commander-in-Chief himself.

The use of literal denial is employed in other ways in relation to Rakhine State and is a common response by government officials to the claims of foreign news agencies.[4] For example, Senior General Min Aung Hlaing's website alleges that the foreign press is *ignorant* of the real situation in Rakhine State and that they are spreading false news (MAH 2017b). In this way, officials have questioned the credibility of media outlets reporting on events in Rakhine State in order to deny the very events themselves. As reports began to emerge of serious injuries caused by land mine explosions of those who were fleeing to Bangladesh, Myanmar government officials, such as the Rakhine State Security and Border Affairs Minister, categorically *denied* the existence of land mines (*Channel News Asia*, September 9, 2017). This was despite survivors in Bangladesh showing injuries consistent with those incurred from the explosion of land mines.[5] The questions this evidence raises was not whether land mines exist, as the response of literal denial suggests, but who laid them, when and why. Literal denial functions to allow officials to ignore these questions. The flat denial of how many fled is a clear instance of literal denial.

Literal denial functions not only as an act of disengagement but may then cast doubts on the source of the claims being denied. Literal denial, even in an age of post-

truth, can be relatively easy to detect and expose, and therefore harder to credibly sustain. The case of Myanmar shows the persistence of the power of literal denial in a society that has only in recent years emerged from extreme political and social isolation from the global community.

The Flexibility of Interpretive Denial

The second type of denial Cohen identifies, interpretative denial, is about how meaning is given to facts. A situation may be interpreted in such a way as to deny the suffering and pain that has taken place. This has resonance with the work of Robert Cover, and his classic summation that "legal interpretation takes place in a field of pain and death" (Cover 1985). Interpretive denial is often employed when literal denial is no longer plausible (Cohen 2001, 7).

Related to the above discussion on literal denial, it became apparent in the months following August 25 that the government could no longer deny the number of Rohingya who had fled to Bangladesh. This led to public debate about the reasons *why* the Rohingya were fleeing to Bangladesh. Government officials offered a range of explanations as to why the Rohingya fled to Bangladesh in order to deny the possibility that they were fleeing from conflict or violence. For example, officials have suggested that the movement of Rohingya may be motivated by feelings of linguistic, racial or cultural solidarity with Bengalis (MAH 2017a). Perhaps one of the most publicised acts of interpretive denial on this issue is Aung San Suu Kyi's speech to the United Nations and the global community, less than a month after the conflict began (OSC 2017). Suu Kyi suggested that the reason why the Rohingya were leaving was in fact *unknown* and puzzling because some Rohingya (or "many Muslims" as she put it) had still decided to

stay. Her rendering of the Rohingya's flight as unnecessary promoted an interpretation that favoured the decision of the Rohingya who stayed (a number that rapidly diminished in the months following her speech), regardless of where they lived or the possible reasons why they were prevented from leaving. The position of the person enacting the interpretive denial is important and adds gravity and weight to the interpretation itself. Suu Kyi's position as a person of moral and political influence in Myanmar is derived from her status as a Noble Peace Prize winner, former political prisoner, State Counsellor, Minister for Foreign Affairs, member of the National League for Democracy and, perhaps most importantly, as daughter of General Aung San, Myanmar's independence hero and martyr. Suu Kyi's status lends credence domestically to the interpretation that the Rohingya were unnecessarily fleeing their homes.

Another example of interpretive denial and the violence it encodes is official government responses to satellite imagery of entire villages burnt down in Rakhine State, as documented by groups such as Human Rights Watch (2017). When foreign journalists were permitted to go on a state-run tour of Rakhine State several weeks after the conflict, there was evidence of houses and villages still burning long after people had fled and well into the monsoon season when heavy rains would quickly dampen any fire (*BBC*, September 7, 2017b). Government officials no longer deny that houses were being burnt down (literal denial), as the destruction had been clearly captured by both international and domestic media. Instead, the official response to the aerial photography and video footage is that the Rohingya might have burnt down their own houses before they fled (Head 2017). Interpretive denial in this example does not have to make logical sense and the question why someone would burn down their own home is left open. It also does not need to offer a reason to justify the interpretive denial. In this regard, interpretive denial

can be just as untenable as literal denial may be to certain audiences, in this context external audiences.

Interpretive denial may promote an interpretation that is favourable to that person or institution, but it may also go further in that it may specifically cast blame or fault on those who are also victims. For example, some officials in Myanmar have denied the rape of Rohingya women. While this denial in part has seeds of literal denial, at the same time the response of some government officials is to offer an interpretive denial couched in disbelief or indignation at the idea that someone would want to rape a Rohingya woman (Head 2017). Such a response is a form of interpretive denial, the implication being that Rohingya women are undesirable and inferior in some way and that they could not possibly be the victim of rape. This is also evidence of the Burman ('white') privilege at work in Myanmar, a privilege that casts all non-Burmans as inferior (Walton 2018).

Finally, to return to the example of land mines, rather than literally deny that there were no land mines, a form of interpretive denial is to allege that it must have been the Rohingya, rather than the military, who planted the land mines. Zaw Htay, the spokesperson for Aung San Suu Kyi, hinted that the Rohingya could be responsible for the laying of the mines (*BBC*, September 6, 2017a). This would be unusual since the landmines were planted along the border with Bangladesh, preventing the only safe or reliable escape route by land in the event of conflict. Again, like literal denial, interpretive denial does not necessarily have a plausible basis for its claims.

The above examples of interpretive denial show several characteristics. Interpretive denial is employed either in conjunction with literal denial or when literal denial is no longer viable. The persuasiveness of interpretive denial, at least to some audiences, may be bolstered by the person doing the public denial. Interpretive denial

may still be logically untenable, and individual victims may become caught up in collective efforts of state denial.

Implicatory Denial and the Relationship between Forms of Denial

Finally, a third form of denial is implicatory denial. Implicatory denial is unlike literal denial in that there is no effort to deny the facts. Implicatory denial is distinct from interpretive denial in that the accepted or common interpretation is not disputed. Rather it is the denial of the need for action, or as Cohen puts it “the psychological, moral or political implications” of suffering. It is about the ways in which people remain unmoved and unaffected by suffering. Interpretive denial includes silence and a failure to act. Cohen (2001, 8) suggests that implicatory denial is at work when there is a refusal to acknowledge the possibility that suffering has occurred and therefore no response is required. Implicatory denial is about the effect that the knowledge of suffering has, or more to the point does not have, on the person, institution or group.

Many of the above examples of interpretive denial have elements of implicatory denial. For example, the fact that over 900,000 Rohingya are now displaced in Bangladesh due to conflict since 2012 is not disputed. This does not necessarily lead to *action* by the Myanmar state in terms of humanitarian aid or realistic prospects of having their land, homes and livelihoods returned. In 2018, one year on from the onset of the conflict on August 25, UN agencies still did not yet have meaningful access to distribute aid in northern Rakhine State (McPherson 2018). Although some action has been taken to begin the process of returning refugees to Myanmar, through the signing of a memorandum of understanding between Bangladesh and Myanmar, there are concerns this will not offer meaningful or safe prospects for return. In this instance, the government

remains unmoved – psychologically, morally and politically – by the knowledge of suffering of either refugees in Bangladesh or internally displaced people in Rakhine State. Further, the fact that the Rohingya are stateless is not denied, but implicatory denial means that the citizenship verification process that the Myanmar government has attempted to implement since 2015 would be likely to exclude many Rohingya.

Understanding these states of denial is particularly pertinent in Myanmar as a society emerging from several decades of direct military rule. The contemporary expressions and modes of official denial are not confined to the present, but act to obstruct a particular view of the past and to revise the narrative of Rakhine State. Cohen suggests that in restricting the historical narrative, the state increases the risk for those who attempt to speak or act in ways that acknowledge this suffering, past or present (Cohen 2001, 10). The official denial in Myanmar is not just about the denial of suffering in 2016–18, or concerning other periods of mass displacement from 1942, 1978, 1992, or 2012. It is about the entire state project of the rewriting of history, a project that has written the Rohingya out of the official narrative. This historical revision has facilitated and enabled denial of the present suffering. The state itself, or in this case the military-state (Crouch forthcoming 2019b), makes it dangerous to admit to both the suffering of the present and the reality of past existence.

The state plays an important role in denial as the act of denial is not limited to the individual but is group-based. According to Cohen, denial has a corporate state identity: "denial is thus not a personal matter but is built into the ideological façade of the state" (Cohen 2001, 10). One example is Cheesman's work on citizenship in Myanmar, which demonstrates how the concept of 'national races' has been built into the ideology of national races (Cheesman 2017). In offering a genealogy of race in Myanmar, Cheesman

argues that the constructed concept of national races has superseded that of citizenship. He argues that this places the Rohingya in a bind, because to be recognised by the state, the Rohingya must play into this game of seeking recognition, the very game that operates to exclude them. This is the politics of national race identity in Myanmar that relies on several modes of denial as a strategy to exclude and ignore.

Legal Denial

I have broadly canvassed and illustrated Cohen's three forms of denial – literal, interpretive and implicatory – above. I now turn to legal denial as the use of law and legal institutions – whether constitutional, legislative, administrative or judicial – to deny suffering. While my concept of 'legal denial' is closest to Cohen's notion of interpretive denial, it can also be seen as encompassing literal and implicatory denial. I am particularly concerned with the ways in which state actors use law and legal institutions as an instrument in interpretive denial, though of course non-state actors are also involved in these modes of legal denial. I first turn back to history to explore the role of constitutional reform in interpretive denial and the legal creation of Rakhine (Arakan) State. I then return to the contemporary period to consider manifestations of legislative reform and judicial decision-making as forms of interpretive denial. These are illustrative, and not exhaustive,[6] cases that show the multifaceted ways that the state uses law and legal institutions to deny the inclusion of the Rohingya in the political community of Myanmar.

Constitutional Reform as Legal Denial: The Creation of Rakhine (Arakan) State[7]

Legal acts of denial can be important to territorial claims of belonging and efforts to exclude. Debate about who the are Rohingya is related to the question of where they

belong, and references to Rakhine State as a given entity go unquestioned. The contemporary certainty about the existence of Rakhine State is in contrast to its contested history. The current division of 14 Regions and States in Myanmar is neither self-evident nor a historical fact. These internal borders are creations of politics. I offer an historical reflection that identifies the *resistance* by the Rohingya to the creation of Rakhine (Arakan) State through parliamentary proposals to amend the 1947 Constitution, and the eventual incorporation of Rakhine State in the 1974 Constitution. I identify the proposals put forward by the Rohingya (who also refer to themselves as Arakan Muslims) about how northern Rakhine State should be constituted territorially, and the objections of the Rohingya to the proposal by Arakan Buddhists for a 'Rakhine State'. My intention is not to exhaustively review the history of this region, but rather consider the modes of legality at work since independence from colonial rule and the ways constitutional reform operates to render the Rohingya invisible.

The independence Constitution of 1947 grants territorial recognition to some ethnic groups who were part of the Frontier Areas during colonial rule and not under direct British rule. Ethnic groups from the former Frontier Areas were given some forms of special constitutional recognition. The Arakan region was classified as part of lower or Ministerial Burma, and so the Arakanese were not given territorial recognition under the independence Constitution.[8] The Arakan, along with the Karen and the Mon, used the early years of independence to agitate for separate states named after their respective ethnic groups. In 1948 the Regional Autonomy Inquiry Commission was formed to consider the creation of states for the Karen, Arakan and Mon. The Arakanese had five representatives on this 28-member Commission. This was part of broader public debate on whether and how these ethnic groups should be recognised territorially by the state.

The general election of 1951 proved decisive, as 17 Arakanese members were elected. All but three candidates from the Anti-Fascist People's Freedom League who contested these seats lost. The Arakanese members of parliament, led by Ba Myaing and Kyaw Min, formed what was known as the Independent Arakanese Parliamentary Group and articulated a clear platform for a separate Arakan State (Tinker 1959, 68-9). Around the same time, the Rohingya articulated their own competing demands for independence.

The proposal favoured by those who identified as 'Arakanese Muslims' or Rohingya was for the existing Mayu Frontier District (the northern most area sharing a border with Bangladesh) to become a Muslim State and that this would be distinct from the creation of Arakan State (*The Nation*, October 27, 1960). That is, the Mayu Frontier District with its Muslim-majority would not be subordinate to or subsumed by a new Arakan State with a Buddhist-majority. Like some other ethnic groups, the British had promised the Arakan Muslims that they would support the creation of a Muslim state in return for their efforts to fight with the British in World War II (Yegar 1972, 95–6). In this way the idea of a Muslim state predated Burma's independence and is connected to colonial rule. In fact some Rohingya had pushed for two townships (Buthedaung and Maungdaw) to become part of east Pakistan (Tinker 1956, 357), although this effort failed.

By the 1950s, Arakan Muslims began to articulate their demands for constitutional reform. They sought to form a 'free Muslim state' that would have similar powers and status as areas such as Shan State, Karenni State or the Chin Hills (Arakan Muslim Conference 1951). They sought a representative in the Chamber of Nationalities (upper house) to be called the Minister for Muslim Affairs. Their demands ranged from equal representation of Muslims in a range of government offices and agencies (Arakan

Muslim Conference 1951), to compensation for Muslim shops and houses that were destroyed or looted in the 1942 violence that broke out during the Japanese occupation. This proposal was soon perceived to be connected to the mujahid group that had taken up arms against the government (*The Sunday Nation*, June 13, 1954).

Another, less dramatic, option proposed by Arakan Muslims was to form a united Arakan State to appease the Arakan Buddhists, but to grant the Mayu Frontier District clear and meaningful protections within Arakan State as enshrined by law and the Constitution.

In contrast to the proposals to recognise the Mayu Frontier, either separately or as part of Arakan State, Arakan Buddhists demanded the creation of an Arakan State *without* recognition of the Mayu Frontier District. It has been suggested that as early as the London Roundtable Conference of 1930 and again after the passage of the Government of Burma Act 1935 that some Arakan Buddhists proposed the formation of an Arakan State. In 1947, this was proposed in terms of demands for the formation of 'Arakanistan' (Ministry of Culture 2011, 117). Buddhist monks played an active and leading role in the push for statehood for Arakan (Smith 1965, 251). From 1948, the Arakanese waged a separatist movement led by the monk Sayadaw U Seinda (Smith 1965, 198). In the early 1950s, monks also staged protests and demonstrations in Rangoon (as Yangon was then known) in support of Arakan State and against Burman rule (Smith 1965, 1999).

In early years of independence, the Arakanese were divided on this issue, with the Regional Autonomy Inquiry Commission receiving mixed responses as to whether there should be an Arakan State. By the mid to late 1950s, Arakan Buddhist members of parliament were more united. Their constitutional proposal for an Arakan State sought to

deny autonomy to the Muslim-majority area in the north (*The Nation*, October 27, 1960; *Guardian Daily*, August 3, 1960).

In 1956, Ba Myaing, an Arakanese member of parliament representing Ramree, proposed a constitutional amendment bill for the creation of Arakan State (Ministry of Culture 2011). This proposal was supported by the Arakanese (Buddhist) National Unity Organisation (Yegar 1972, 101). The stated objectives of the constitutional amendment were threefold. First, the creation of an Arakan state government was said to reflect the desire of residents of Thandwe, Kyaukphyu and Sittwe Districts (areas that are not part of the northern Mayu Frontier District and where the majority of residents were Arakanese Buddhists). Second, it was argued that four ethnic groups - the Shan, Kayin, Kachin and Kayah – had already been recognised through the creation of states in the 1947 Constitution. By analogy, it was argued that the Arakan (Buddhists) deserve such territorial recognition. This claim overlooks the fact that the area had been considered part of lower Burma and under direct rule during the colonial era, whereas the other four ethnic states had been part of upper Burma or the Frontier Areas and not subject to direct rule. The third objective was that the establishment of Arakan State would enhance the cohesion of the Union, though it was left unstated how such unity would be achieved.

In terms of the institutional structure of the proposal by these Arakan members of parliament, the creation of an Arakan State Council was recommended, along the lines of the then existing Council for Karenni State. This State Council would have the power to pass law, and these laws would then require the approval of the president. The president could not refuse a bill, but he could refer the bill to the Supreme Court to consider whether part, or all, of the bill was inconsistent with the Constitution.[9] A bench of at least three Supreme Court judges was required to respond in a timely manner, within 30 days. Only

if the Supreme Court found part of the bill unconstitutional could the president return the bill to the State Council for reconsideration. This granted the State Council relatively robust legislative powers and ensured there would be little unwarranted interference by the central executive.

The constitutional amendment proposal by the Arakan members of parliament also sought to reserve 12 seats in the Chamber of Nationalities (upper house) for Arakan State.[10] The leader of the Arakan State Council was to be appointed in a consultative process whereby the Council would choose from among themselves, this person would be nominated by the Prime Minister and then formally appointed by the President. The head was to be known as the Minister for Arakan State Council. The proposal also vested executive power in the Minister for the Arakan State Council and extended to matters over which the State Council had legislative power. Other details of the proposal concerned the operation of the State Council, its fiscal powers, the formation of a cabinet and the requirement that the head of the Council only act after consultation with the Council.

The proposal for Arakan State failed to gain sufficient support to be approved in the national parliament, in part, because of objections from the Muslim community of Buthidaung and Maungdaw in northern Arakan State. Their basic fear was that they would become a minority among the Arakan Buddhist-majority area. They were concerned that as an ethnic and religious minority they would not have their rights and interests protected, and that this constitutional amendment would be detrimental to their community. This is also admitted in records compiled by the later military (read: Burman) regime (Ministry of Culture 2011, 13–14, 136). These records do not acknowledge the earlier 1951 proposal by Arakan Muslims for a Muslim free state. The military's history

of this period adopts Burman overtones of superiority by suggesting that the Arakan Buddhists were fortunate to have had the privilege to even introduce such an amendment in parliament, stating ‘it was noteworthy that the privilege of introducing the Constitution (Amendment) Bill was ever permitted’ (Ministry of Culture 2011, 138).

The debates about whether to create Arakan State constitutionally persisted throughout the era of parliamentary democracy (1948–1962). By 1957, discussions about a proposal for an Arakan State were again raised. In March 1957, U Kyaw Min gave a controversial speech in parliament supporting the creation of an Arakan State. Efforts were made to redact the speech, but it became common knowledge after the British Ambassador reported on the matter.[11] In 1958, the Constitution (amendment) Bill was again proposed. This time, the proposal was submitted by Hla Htun Phyu, member for Myoehuan, although the content remained the same. On February 18, 1958, this proposal again failed.[12] U Nu, the then prime minister of Burma, did in principle agree to the future creation of Arakan State and this was to be in exchange for the guaranteed political support of the Arakan (Buddhist) National United Organisation and the Arakan insurgent group (Smith 1999, 176). Discussion over the creation of Arakan State continued into the early 1960s. Around this time, a bill for constitutional amendment to create Mon State was also proposed. Similarly, the large Muslim minority in that region (who do not identify as Rohingya) opposed the creation of Mon State for fear of becoming a minority within that area.

The debate over the creation of Arakan State took place not only in parliament, but also in the broader public. Some Muslims voiced concerns that Arakan should not become its own state because it would lead to dominance of minorities by the Buddhist majority (Ali 1960). In the lead up to the 1960 elections, U Nu pledged his support for

the creation of a state for Arakan and the Mon (Tinker 1956, 92). Yet by May 1st, 1961, the government (now back under civilian control) appeared to grant concessions to Arakan Muslims through the creation of the Mayu Frontier Administration Area. The area included Buthidaung, Maungdaw and parts of Rathedaung, abutting what was then known as East Pakistan (today's Bangladesh) (Tha Htu 1962). This designated area was directly under military control. It was seen as a concession to Arakan Muslims and was preferred to living under the control of Arakanese Buddhists. In 1962, a new Constitution Bill for Arakan State was again put forward and proposed in parliament (Ministry of Culture 2011, 181). Before this third constitutional amendment proposal could go to a vote, on March 2, 1962, General Ne Win took over by military force in the name of socialism or, as it was later called, the 'Burmese Way to Socialism'. The Mayu Frontier Administration Area had a short lifespan and by 1964, two years after the coup, it was discontinued by Ne Win's socialist regime.

It was not until twelve years into General Ne Win's rule that Arakan State was recognised in the 1974 Constitution (art 31(k)). The 1974 Constitution took a homogenising approach. No longer were different ethnic groups treated differently. Now all major national races were to be treated the same. Each of the seven major minority ethnic groups would have a territorial State named after them. The Rohingya became a minority within Arakan State. This was an act of legal denial that recognised the Arakanese to the exclusion of other peoples, namely the Rohingya.

The designation of Arakan – now 'Rakhine' - State is retained in the 2008 Constitution as part of the division between seven ethnic-based States and seven-Burman dominated Regions. Some other ethnic groups do in fact have special recognition within a State or Region if they form the majority in two adjacent townships, which are known

as self-administered zones or divisions. However, this option was only open to official national races and was primarily granted to ethnic armed organisations that had agreed to ceasefires with the military. If the Rohingya were an official race, the townships of Buthidaung, Maungdaw and Rathedaung would have met the test of having a majority population in at least two adjacent townships to be designated as a self-administered zone. There is no indication of changes to either the territorial division between states and regions, nor of the designation of self-administered zones, in contemporary Myanmar.

Legislative Reform as Legal Denial: How the Rohingya Lost the Right to Vote

The right to vote is a core component of citizenship (Shaw 2017). It is considered to be an integral part of political freedoms as protected under international law. It is also acknowledged more widely as indicia of citizenship (Baubock 2005). There are, however, some countries where the right to vote is permitted for non-citizen residents (Shaw 2017), allowing them voice in the political community. There are over 60 countries, many concentrated in the European Union, that permit voting in local elections by residents without citizenship (Baubock 2005, 684). Only a small number of countries allow voting by resident non-citizens in a national election (Shaw 2017). Myanmar was one of those countries until 2015.

Yet there are also histories of the weak and poor, the marginalised and minorities, being disenfranchised. Stalin's Soviet State is one of the most historically prominent examples (Alexopoulos 2003), but there are many others. Given that the right to vote constitutes a key part of political belonging, symbolically and practically, I focus on the disenfranchisement of 'white card' holders in Myanmar. In a set of calculated legal moves, the parliament, the Constitutional Tribunal and the Union Election acted to ensure

that ‘white card’ holders (that is, primarily the Rohingya) could not vote in the 2015 elections. In the emerging literature on Myanmar’s new parliament (Kearn 2014), scholars such as Chit Win and Kearn (2017, 21) suggest that in the period 2011-2015, parliament was “relatively ineffectual, neither acting as a peacebuilder nor source of violent conflict”. However, their approach focuses on overt responses to conflict and does not consider the ways parliament is involved in acts of legal denial and violence. Contrary to their argument, I suggest that the role of parliament in amending the law to disenfranchise white card holders was in itself an act of violence and denial that has excluded the Rohingya from the political community. I briefly contextualise the right to vote in Myanmar before considering the series of events from 2013–2015 that constitute legal denial.

The international community celebrated the 2015 Myanmar elections and the success of the National League for Democracy and its political icon Aung San Suu Kyi. The elections were hailed as a victory for democracy and human rights. It was remarkable that the NLD was then allowed to take office, given the history of the NLD being denied the right to form a government after the 1990 elections (Lidauer and Saphy 2014; Lidauer 2014). However, just prior to the 2015 elections, the Rohingya were excluded from the political community by the parliament, the Constitutional Tribunal and the Union Election Commission. Their disenfranchisement was the final stage in their formal legal exclusion from the political community of Myanmar. This was executed through the deliberate denial of the right to vote or run for political office for those who held temporary identity cards. I show how the Rohingya lost their right to vote through an act of legal denial.

It is important to note that the right to vote is socially significant and politically loaded in Myanmar. After the demise of the socialist regime, in May 1990, the military held elections that were presumed to be for the purpose of appointing a new parliament. Some Rohingya candidates ran in the elections. The National League for Democracy (NLD) won by a significant margin. This was a shocking and humiliating defeat for the military. However, on July 27, 1990, General Khin Nyunt claimed that a National Convention would be established (rather than a parliament) and it would have the sole task of drafting a new constitution. In effect, the military regime decided it would not convene parliament, but rather mandate that a new constitution be drafted as a prior condition to parliament. The military warned that the process may take five to ten years (Linter 1989). In response, the NLD demanded that parliament should be formed by September 1990. The military ignored this demand and refused to step down. None of the elected members of parliament could take office, and many were arrested and put in prison.[13] The 2008 Constitution is silent on this and the results of the 1990 elections were officially annulled.

The first elections for 20 years were held on 2010, although conditions were not considered to be free and fair (UN Office 2011). The election was ostensibly held according to the procedures and rules set out in the 2008 Constitution, although manipulation of the 2010 election result in a range of ways was clear (Lidauer and Saphy 2014). From 2010 to 2015, the law in Myanmar permitted citizens, associate citizens, naturalized citizens and "other persons" eligible according to the law to vote. This appears slightly at odds with the Constitution, that requires candidates for parliament to be full citizens (that is, for both parents to have full citizenship, s 120). Nevertheless, in 2010 and 2012, it appears that temporary identity card holders were permitted to vote and to

run in the elections (Farrelly 2016). In 2010, there were reports that some Rohingya were specifically given cards to ensure that they could vote (Aye Nai 2010). The actual possibilities of the Rohingya participating in the election appear to have varied depending on their location, and some found they were barred from contesting the elections despite being approved to run in the 1990 election (UKN 2013, 62). In 2010, three Rohingya members were elected to the Union Parliament as members of the USDP to represent constituencies in northern Rakhine State.[14]

Against this political history, and the re-emergence of violence and displacement in 2012, concerted efforts arose to ensure that the Rohingya would not be able to vote. These official efforts can be traced to the rise of the Buddhist nationalist movement (Nyi Nyi Kyaw 2016) and its influence on politics. In August 2013, Aye Maung, the chairperson of the Buddhist Rakhine National Development Party, proposed amendments to section 10(a) of the Political Parties Registration Law No 2/2010 (AH2013-7:26). The bill proposed removing the right of naturalized and associate citizens, as well as temporary registration card holders (white cards) to be members of a political party or to vote. This proposal was suggested at a time when Rakhine State remained under a constitutional state of emergency, and anti-Muslim violence had spread to many major towns outside Rakhine State (Crouch 2017). In short, the broader political environment was hostile towards Muslims (with many non-Rohingya Muslim communities affected) and there were few if any efforts by law enforcement agencies or the military to prevent violence.

In September 2014, the amendment was passed to ensure that only citizens or naturalized citizens have the right to run for political office (Ye Saning 2014). In November 2014, a separate bill was submitted for the holding of a referendum on

amendments to the 2008 Constitution in anticipation of a referendum in 2015. This bill would have allowed white card holders to vote in a constitutional referendum. Due to opposition by the Rakhine National Development Party, the provision was removed (Ei Ei Toe Lwin 2014). The bill was sent by parliament to the President's Office for approval. On February 9, 2015, the President returned the bill to the Union Parliament on the basis that white card holders *should* be allowed to vote because they voted in the 2008 Constitution. This statement demonstrated that there was still some willingness at the elite level to permit white card holders to vote.

There was however at the same time a separate parliamentary motion under consideration to abolish white cards and instead undertake a final verification process. On February 11, 2015, the President's Office announced that white cards would no longer be valid effective from May 31. On the same day, the Speaker of the Pyidaungsu Hluttaw requested an opinion from the Constitutional Tribunal, a new judicial institution, on the matter of citizenship and the right to vote (PDH2015-12:14, 448–449). The Constitutional Tribunal hears and adjudicates on matters of constitutional dispute raised by select political elites (Crouch 2018).

In the same month, Law No 2/2015 ('the Referendum Law') was passed in parliament to set out the process for a referendum on constitutional amendment and permitted white card holders to vote. As a result, a letter was sent to the Constitutional Tribunal challenging this provision on the basis that allowing white card holders to vote in a referendum was unconstitutional. The provision in question was section 11(a) of the Referendum Law. The Pyidaungsu Hluttaw sought clarification of the constitutional provisions concerning the right to vote, which mention that not only citizens but other persons may have this right (Constitution, ss 390-391).

On February 16, 2015, the Constitutional Tribunal responded in a written opinion to the Pyidaungsu Hluttaw, which is recorded in the parliamentary minutes. The Advisory Opinion of the Tribunal is short and was only signed by the chairperson (not all nine members). The Constitutional Tribunal noted that its approach to interpretation must be guided by the provisions in the Basic Principles in Chapter I of the Constitution. The Constitutional Tribunal held that sovereign power comes from 'citizens' and that only citizens have the right to vote and to be elected. The Constitutional Tribunal determined that "persons who have the right to vote" was only intended to mean other qualified citizens (such as associate citizens), but not temporary identity card holders. The Constitutional Tribunal declared section 11(a) of the Referendum Law inconsistent with the Constitution. Questions were then raised about whether the Constitutional Tribunal's advisory opinion was final and binding. Some members of parliament were unsatisfied with this advisory decision and applied for a full decision to the Constitutional Tribunal.

Meanwhile, on March 20, 2015, the Election Commission issued an order that required every political party to expel white card holders and associate citizens from parties (Ye Mon and Lu Min Mang 2015). This was an effective purge of white card holders from the political system, as well as demolition of political parties that consisted primarily of white card holders. Even the NLD had to expel 8,000 members from its party, although the NLD claimed it would help expelled members try to gain citizenship.

A case in the Constitutional Tribunal was then brought by Dr Aye Maung, the same member of parliament mentioned earlier who initiated the proposal for legislative reform in 2013, and other members of the Amoytha Hluttaw. The applicants challenged the provision of the Referendum Law concerning who could vote in a referendum (s 11a). It was anticipated that a constitutional referendum may need to be held in 2015 if

parliament approved amendments to the Constitution that required a referendum of the people. The applicants sought clarification of the constitutional provisions on the right to vote and to be elected, and the process and eligibility of a citizen to vote. They argued that the Constitution did not mention "temporary identity card holders" only citizens and so the Referendum Law was inconsistent with the Constitution and the Constitution should prevail.

The applicants noted that sovereign power resides in *citizens* (Constitution, s 4). On this basis, they argued that only citizens should have the right to vote in a referendum on constitutional amendment as an exercise of sovereign power. Further, they emphasised that under the Burma Citizenship Act 1982, both associated and naturalised citizens must swear an oath of *loyalty* and allegiance to the state, (ss 24, 46(a)). Temporary card holders have not sworn an oath of loyalty to the state. These arguments resonate with Walton's (2013, 13) concern that non-Burmans are always potentially subject to claims of disloyalty.

There was a difference of opinion among state officials and institutions. The Ministry for Immigration and Population argued that white card holders *should* be allowed to vote. The Union Attorney General's Office also made a submission that referred to the six categories of people who have no right to vote, including members of a religious order and those in jail (Constitution, s 392). The Attorney General pointed out that temporary identity card holders are not specifically listed in section 392 of the Constitution as a category of persons who have no right to vote. This could be taken to imply that temporary identity card holders can vote, but the Tribunal did not come to this conclusion. Instead, the Constitutional Tribunal noted that the 1982 Citizenship Law allows associate citizens and naturalized citizens to have the same rights as citizens,

unless this right is limited by the state. It observed that the law does not, however, offer the same rights to temporary card holders. The Tribunal held that the provision of the Referendum Law was invalid because it was inconsistent with ss 38(a) and 391(a)–(b) of the Constitution.

The political outcome of this case was that the Constitutional Tribunal lent its authority to those in parliament pursuing an anti-Muslim, anti-Rohingya and anti-NLD agenda in the lead up to the 2015 elections. The decision paved the way for parliament to amend the law to disenfranchise white card holders. The Constitutional Tribunal decision was one more justification for the parliament to pass amendments to enact this form of legal denial over who could vote. As mentioned earlier, my point is not that all Rohingya had a meaningful right to vote in practice before 2015, although some did. But rather, those intent on denying the Rohingya the right to vote felt that it was necessary to amend the law to ensure there was no possible legal opening for the right to vote.

Courts as a Forum of Legal Denial: Terrorism, Massacres and Journalists

The third form of legal denial is judicial decision-making. The courts are a public forum in which claims of legal and interpretive denial can be made and recorded. These acts of legal denial can have real and lasting consequences for those accused of crimes, and also send a broader message about how particular events should be interpreted. That is, courts operate to legitimise a narrative of denial as first articulated and pursued by the administration. This is important to note because in Myanmar, the courts are a subordinate institution. Criminal cases may involve the police and administration department. Both are accountable to the Ministry of Home Affairs, and the Minister for Home Affairs is selected by the Commander-in-Chief (Crouch forthcoming 2019b). Turning to the

suffering of the Rohingya, the courts have been drawn into this interpretive battle as the government administration seeks to impose its rhetoric of denial at a broad level. Part of this denial and the space for courts relates to the passage of the Anti-Terrorism Law by parliament and the designation of ARSA as a terrorist organisation. I begin by reflecting on how legislative reform and administrative pronouncements enable new forms of legal denial and compels courts to enact these denials.

Terrorism and Administrative Modes of Legal Denial

Periodic concerns of terrorism among the Rohingya has been a perceived concern of the state in Myanmar. Linked to the discussion of territory earlier, one of the reasons that a mujahid armed group emerged in the lead up to independence in the 1940s was because the proposal to include two townships as part of Pakistan rather than Burma failed (Tinker 1956, 357).[15] This armed group was overpowered by the military by 1954 (Tinker 1956, 56), however the perception of an Islamic threat in Myanmar has continued to function as a convenient official discourse. Here I focus specifically on the recent emergence of a new armed Rohingya group and the response of state officials.

On August 25, 2017, I was in the capital city, Naypyidaw, when reports emerged of a wave of attacks launched against 30 Border Guard Posts in northern Rakhine State, Myanmar. Some police officers and border force guards were killed, although reports were clear that many of these attacks were crudely carried out through the rudimentary use of sticks and swords. Responsibility for the attacks was claimed by the Arakan Rohingya Solidarity Association (ARSA), a relatively unknown group. Some of ARSA's leaders are said to be foreigners or Rohingya from outside Myanmar (ICG 2017). This occurred after the period from Oct 2016 to August 2017 when ARSA was said to have

coerced villagers to join their cause or kill off local administrators and Rohingya leaders who refused to comply. As I spoke to a range of actors in the capital, Naypyidaw, a common thread emerged, typified in the following conversation. After discussing the grave violence and humanitarian crisis, one of my interlocutors alluded several times to '9/10'. Initially I thought he was referring directly to '9/11', the 2001 attacks on the World Trade Centre in New York. But he persisted in referring to '9/10'. "What do you mean by '9/10'?" I asked. "I mean 9 October 2016, the date of the first attacks",[16] he replied, "This is our 9/11". The parallel drawn between 9/11 and 9/10 in Myanmar is a form of interpretive denial. By casting these events as primarily a terror attack, this enables the denial of the primacy of the humanitarian crisis that followed. The initial October 2016 attacks, and the subsequent August 2017 violence, is perceived by the state to be Myanmar's 9/11 moment and is used to justify the response of the military.

The Arakan Rohingya Salvation Army (ARSA) was quickly declared to be a terrorist organisation. This is the first time a group has been declared a terrorist organisation under the Anti-Terrorism Law. The declaration of ARSA as a terrorist organisation has far-reaching consequences and enacts new modes of denial. Even in the text of the law itself, particular modes of denial are evident. While some of the provisions are translations from a global model, many recommended safeguards are absent in Myanmar. The Anti-Terrorism Committee is headed by the Minister of Home Affairs, who in Myanmar is chosen by the military. In this respect the Anti-Terrorism Committee is not an independent body but is closely aligned to both the military and the government administration. The law envisions the Committee's mandate as expansive and this provides room for interpretive denial in its role. There are no requirements to be a member of the Committee, nor any limit on how many members the Committee can have. This

places few restrictions on who might have power to enact the modes of denial encoded in the Anti-Terrorism Law. The term of office of the members of the Committee is unspecified. The extent, or more importantly the *limits*, of their powers are unknown. It remains unclear what investigative or evidential basis is needed to justify declaring a group to be a terrorist organisation.

Further, Anti-Terrorism Committee members, or in fact any member of the public, stands to gain financial rewards if they report a terrorist. This is an unusual incentive structure, as it presumes Committee members many not otherwise have an incentive to do the job required by their position. The law presumes that there will not be any need for the military nor Committee members to be held accountable, as the law contains blanket immunity clauses for both. The consequences for individuals accused under the law are severe, with some offences attracting the death penalty. There is also evidence to suggest that people accused of being complicit in the conflict in northern Rakhine State (ie Rohingya) are also being sentenced to death under other laws (Moe Myint 2017). As Cover has noted, the death penalty itself is an interpretive act of violence (Cover 1985, 1622). The death penalty forms one of the most visible and obvious acts of legal violence (Cover 1985, 1608). In this way the decision of a judge in handing down a death sentence is an interpretive act of violence.

The designation of ARSA as a terrorist organisation also means that it cannot be recognised as an insurgent group that has a right to participate in the ongoing peace process. The legislative introduction of the Anti-Terrorism Law opens the potential for future court prosecutions. More specifically, by casting ARSA as terrorists and enemies of the state, this allows the state to pursue the prosecution of individuals, such as

journalists, who are in possession of documents that allegedly relate to ARSA, as I explain next.

The Role of the Judge in Legal Denial

The situation in northern Rakhine State has led to ongoing claims of denial that are difficult to challenge because of restrictions that the government places on journalists in Rakhine State. It has been difficult if not impossible for journalists to report accurately or comprehensively on the conflict that has taken place in Rakhine State, the extent or scale of the violence and displacement, or the number of alleged (Rohingya) perpetrators arrested and detained or on trial. This makes it difficult to focus on trials of alleged perpetrators of conflict and the way these trials may enact legal denial. Instead, I consider the high-profile court case in Yangon of two local journalists from Reuters who had been investigating and reporting on the conflict in Rakhine State (Fullerton and Goldberg 2018). This case clearly illustrates the role of the judge in legal denial, as submissions and court decisions are available. Two journalists had been investigating the massacre of eight Muslim men and two boys in one particular village. I show how the media and journalists are caught up in acts of legal denial through court proceedings. When journalists seek to challenge the role of the military in Rakhine State, they may find themselves put on trial as a spectacle and warning not to disturb the dominant narrative about who are the perpetrators and who are the victims.

On December 12, 2017, Wa Lone and Kyaw Soe Oo, two local journalists with Reuters, met with police on the pretext that the police were going to provide them with documents concerning a massacre that took place in Rakhine State. Instead, the two journalists found themselves arrested and detained for being in possession of the very documents the police had just handed to them. The two journalists were charged under

section 3(1)(c) of the Official Secrets Act for obtaining official documentation that is classified as secret and that could be of some use to an enemy. The enemy here is presumed to be ARSA as a designated terrorist organisation. Despite this case, on February 8, 2018, Reuters proceeded to publish the findings of its investigation into the killing of ten Rohingya men, with the journalists as two among four of the attributed authors (Wa Lone et al 2018). According to state officials, the ten victims were allegedly involved with ARSA. Because the two local journalists worked for Reuters, a global media outlet, their trial quickly received widespread coverage.

As this court case developed, there were a number of twists in the narrative. A police officer in fact gave evidence during the course of the hearing that he and his colleagues in the police force were acting under orders to set a trap for the journalists. The police were allegedly told by their superiors to arrange to meet the two journalists under the pretense of handing over secret documents regarding the Inn Dinn massacre. This police officer was then himself prosecuted under the Police Disciplinary Act and sentenced to one year in prison.

In a further twist, the military *admitted* that its soldiers were responsible for the massacre that the two journalists had been investigating, and a courts' martial was established. The courts martial are a separate and independent judicial body with absolute jurisdiction over Tatmadaw personnel (Constitution, s 343). The officers of the courts martial come from the Judges' Advocates Office of the Ministry of Defence, and the Minister of Defence is selected by the Commander-in-Chief. The courts martial are therefore perceived to be closely related to the military and the Commander-in-Chief. The entire process of courts martials' is under the control of the military. In this case, seven military officers were convicted for their role in killing the ten victims and sentenced to

ten years in prison with hard labour (*The Myanmar Times*, February 12, 2018). There is no right to appeal from the courts martial to the Supreme Court. A courts martial hearing is one indication that the military wanted to deal with this case quickly and on its own terms.

Returning to the case of the journalists, the law under which the two journalists were charged, the Official Secrets Act, dates to the colonial era and similar laws can be found in localities across the former British empire.[17] Many of these acts still remain in force, although some have been subject to revisions.[18] One of the most high-profile cases in which the Official Secrets Act has been used in Myanmar is the 2014 case of the editors of Unity Journal who were prosecuted under this law after publishing a report on a weapons factory allegedly run by the military (Unity Journal Case 2014). In the case of the two Reuters journalists, on September 3, 2018, the judges found them guilty of breaching the Official Secrets Act and sentenced them to seven years in prison. As Cover suggests, judicial decision-making is a form of "interpretive artefact" (Cover 1985, 1629). This judgment is in many ways an artefact of interpretive denial concerning the Rohingya and the Rakhine State conflict. While judges are deemed to be authoritative voices, the act of legal denial occurs within the bounds of the jurisdictional role. Cover observes that judges are "bound at once to practical application and to the ecology of jurisdictional roles" (Cover 1985, 1617). In their judicial roles, the judges pronounce this authoritative interpretation, and leave it to the police and prison guards to enact this legal denial.

The case of Wa Lone and Kyaw Soe Oo is simultaneously a story of how legal denial deters truth-seeking. As journalists, they were seeking to uncover the truth of who was behind the massacre and how it occurred. For the authorities, the case was instead part of the broader complex of legal denial and the suffering of the Rohingya. The case

implicated judges in this act of legal denial and compelled them to carry out the plan of setting up these two journalists. This is one example, among others,[19] of ways in which the courts are part of the system of legal denial.

Conclusion

We need to attend to legal denial as the embodiment of modes of denial by the state through law and legal institutions. Like Cohen, I am concerned with the "the social organization of legal violence". I have shown how legal violence against the Rohingya takes place through acts of state-sanctioned legal denial. While legal denial is similar to Cohen's concept of interpretative denial, many acts of interpretive denial may be non-legal. I suggest that acts of legal denial embody connection between law and violence (Cover 1985) and carry the authoritative and coercive force of the state.

There are many levels on which the international community and scholarly inquiry should be concerned about the situation of the Rohingya in Myanmar. I have sought to draw attention to the different forms of denial at work, the reality that the official narrative may shift from one form of denial to another, and the particularly pervasive use of legal denial to reject the scale, scope and severity of the suffering of the Rohingya. The use of law as a means of interpretive denial was identified with clarity in the seminal work of Cohen (2001). I have shown the enduring relevance of this frame for contexts such as Myanmar and extended our understanding of legal denial and the way it illustrates suffering as a core part of legal life (Sarat 2014). I have done so by grounding legal denial in three particular realities.

The first is the use of constitutional reform as an instrument of legal denial. Rereading Myanmar's legal history destabilises the territorial concept of Rakhine State,

which forms such a core part of arguments over the position of the Rohingya. The Rohingya are not only part of the Muslim minority in a Buddhist-majority state. They are an ethnic minority among the majority Arakanese Buddhists of Rakhine State. We know that 'minorities are not born but made' (Appadurai 2006). Appadurai suggests that the existence of a minority is a reminder of the failure of the state project, and of the betrayal of the classical nation-building process. In this light, we can see frames of legal denial at work to deny the suffering of this minority group. The very creation of Rakhine State created the foundations for the political marginalisation of the Rohingya.

The second reality is the use of legislative reform as a means of political exclusion. By interpreting the right to vote and run for office as solely the prerogative of citizens, who have sworn loyalty to the state, the parliament and the Constitutional Tribunal have reversed a previously held right. The case study of the right to vote illustrates the leadership role that parliament played in this debate. Parliament initiated the debate, members initiated a request for an advisory opinion and then a decision of the Constitutional Tribunal. The disenfranchisement of the Rohingya prior to the 2015 elections constituted the final means of legal exclusion of the Rohingya from the political community. My point is not that all Rohingya had a meaningful right to vote in practice prior to 2015, but that those who opposed the Rohingya thought that it was necessary to amend the law to ensure there was no possible basis to allow them to vote.

Finally, the third reality is the use of courts as a forum for enacting and reinforcing political narratives of legal denial. While acknowledging the subordinate and weak nature of the courts in Myanmar, in comparison to military, police and administrative authorities, I show through the trial of two journalists the way that this legal denial is played out. These forms of denial also highlight that responsibility for legal denial and violence is

shared. When parliament agrees to pass a law, this is a collective act of interpretation. When a new constitution is made, this act is shared by the constitution-drafters. When judges pass sentence in criminal proceedings that were brought by the police and prosecutor and will be enforced by jailers, this is a collective act of denial.

In sum, states of denial offer a lens through which to understand the response of the Myanmar government to the Rohingya and the conflict in Rakhine State. Acts of legal denial operate to exclude the Rohingya from the political community and delegitimise their suffering. Legal actors use constitutional reform, legislative reform and judicial decision-making as means of denial. These legal acts of denial have particular force given the connection between law and violence, and operate to reinforce the exclusion of this minority community.

Notes

[1] One account of the emergence of ARSA can be found in ICG 2017. However, it must be noted that since then some have speculated whether ARSA even exists.

[2] My purpose in this article is not to suggest that the Rohingya are always victims nor that suffering has only been on one side. However, I focus on state narratives of denial because of the added weight that state agencies and instruments lend to statements of denial.

[3] The 2014 census identifies 89 percent of the population as ethnic Burman.

[4] In relation to the media, Cohen's book largely focuses on how a Western audience uses strategies of denial to deal with images of suffering such as pictures of famines, war or genocide.

[5] This was widely reported, see for example Amnesty International (2017). The clearing of villages and then the laying of land mines (to prevent return) is a well-known strategy of the Tatmadaw, see for example Selth; Maung Aung Myoe 2009).

[6] I also acknowledge that acts of denial may of course be used by the state against a range of other ethnic or religious minority communities and vulnerable groups. I focus on the Rohingya in this article as illustrative of the broader ways in which legal denial is employed and is at work.

[7] In this section I refer to 'Rakhine State' as 'Arakan State'. In 1989, the name of the state was changed from Arakan State to Rakhine State by the military regime, though it is worth noting that the military often projects this new terminology back in time in histories of the region.

[8] There was recognition of 'Arakan Division' at this time, but this was not in the Constitution.

[9] This is the same as the procedure for Karenni State (ss 185-186) and Kachin State (ss 169-170) in the 1947 Constitution.

[10] According to the Second Schedule to the 1947 Constitution, there were 125 seats in the Chamber of Nationalities and these were apportioned to different ethnic groups.

[11] Dispatch 10114/7/57, British Embassy, Rangoon, R H S Allen.

[12] Parliamentary Proceedings 1958, Vol IV Meeting No 25.

[13] One record of the criminal charges against NLD elected representatives is found in ABSDF, 1996.

[14] Political parties run by Muslims in Myanmar have never been based on an Islamist ideology and do not advocate for the institutionalisation of Islamic law, unlike Islamist political parties in the region (Crouch 2016).

[15] It should be kept in perspective that at this time there were also armed communist groups and armed Arakan Buddhist groups fighting against the government in Rakhine State.

[16] In October 2016, the group was initially known as Harakah al-Yaqin and later changed its name to the Arakan Rohingya Solidarity Association.

[17] On the modern developments in British state and its preoccupation with secrecy, see Moran 2012.

[18] In 2017 the UK Law Commission launched an inquiry and review of the Official Secrets Act (Law Commission 2017).

[1919] Nick Cheesman (2016) offers an important example of how the Citizenship Law has been used against political opponents. Kyaw Min was voted into office in the 1990 elections but never permitted to hold office. Instead he and his family were found guilty and sentenced to prison for have falsely obtained citizenship as Bengalis, despite Kyaw Min's insistence that they are Rohingya.

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