

Myanmar Constitutional Assembly

Chair:

Jesse Hartery

Vice Chairs:

Noah Powers

Joanna Morrison

Yasmina Male



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Myanmar Constitutional Assembly

Dear delegates,

I want to start by welcoming you all to the Myanmar Constitutional Assembly committee of SSUNS 2017. Each of you will have the opportunity to consider, debate and confront the pressing constitutional challenges Myanmar (also known as Burma) faces as it continues its transition to a fully functioning democracy. The current peace process has as its end-goal to amend the 2008 Constitution to adopt a truly federal Constitution. In that sense, our committee is set in the future and will encourage you to discuss Myanmar's institutional design, its division of powers between the national government and the federated entities, and its approach to minority rights and individual freedoms. Your greatest challenge will be to confront these constitutional issues without jeopardizing the democratic gains made in recent years. It is this balance that will characterize the debates during SSUNS 2017.

I have the privilege to work with three great Vice-Chairs to prepare this committee. They bring a wide range of Model UN experience and academic interests to the table, which means this promises to be an interesting experience for all of you. Our team has definitely been working hard to make sure this is a SSUNS experience to remember.

Let me start by introducing Noah Powers, a third-year double majoring in Psychology in the Faculty of Science and Urban Systems Geography in the Faculty of Arts. Noah is originally from Toronto where he was first introduced to Model UN through his high school's travelling team. While on the team, Noah travelled to the University of Chicago for MUNUC and Vanderbilt University for VUMUN. This is Noah's third time staffing SSUNS and his second as a Vice-Chair. He is interested in urban planning and geopolitics and loves cooking and gardening.

Our second Vice-Chair, Joanna Morrison, is a second-year student majoring in Environment, and minoring in Indigenous Studies and Computer Science. Born in a small town on Vancouver Island, British Columbia, Joanna's MUN journey began at McGill as a staffer in SSUNS 2016. Since then, she has jumped at the chance to staff any Model UN Conferences organized in Montréal, and is thoroughly looking forward to being involved in SSUNS once again. In her spare time, Joanna can be found reading up on environmental justice cases, making multimedia art, or running in the rain.

Our last Vice-Chair, Yasmina Male, is a second-year Political Science and Women's Studies student in the Faculty of Arts. This is her second year as a SSUNS staffer, having worked in a literary crisis committee last year. In high school, she attended many MUN conferences, including SSUNS, and was involved in her school board in Toronto as student trustee for two years. On a personal note, Yasmina is an accomplished seamstress, an avid traveller and has a passion for literature and dance.



Myanmar Constitutional Assembly

Finally, a little about myself. I am currently a third-year law student. I previously earned an Honours B.A. in History with a minor in Asian Studies from the University of Ottawa. I had the opportunity to work in federal politics before settling in at McGill in September 2015. Since coming to McGill, I have been a Research Assistant to Professor Johanne Poirier, the inaugural holder of the Peter MacKell Chair in Federalism. In March of 2017, I had the pleasure of participating in events organized by the Forum of Federations in Myanmar to discuss federalism and the democratization process. I was introduced to MUN in high school and had the opportunity to attend SSUNS three times as a delegate. This is my third time staffing SSUNS and my second as Chair. In my spare time, I teach martial arts and do my part to advance LGBT rights.

I hope your experience in this committee will have a profound impact. I remember learning about Burma for the first time in high school. Since then, I have been obsessed with the country and its struggle to guarantee the protection of basic freedoms and to establish the democratic institutions we take for granted. I hope your research and the debates you will have during this Conference demonstrate that democracy is fragile. It takes people dedicated to the cause of freedom, liberty and self-determination to sustain democratic principles and our human rights. In Myanmar, these people have generally paid the ultimate price by losing their lives at the hands of an authoritarian military regime. We should never forget the sacrifice made by those around the world for the basic freedoms we enjoy. I hope that you will come out of this committee with a greater understanding of the Southeast Asian region in general, constitution-making and the history of Myanmar. Of course, I want you to have fun as well! I know I am doing my best to make sure that is the case.

Added to this, our committee is partnering with the Peter MacKell Chair in Federalism to offer one of you a scholarship. On top of drafting your position papers, you will have the opportunity to write a short opinion piece about federalism in Myanmar that could earn you the MacKell Chair Prize worth \$200. Dr. Johanne Poirier, the inaugural holder of the Peter MacKell Chair in Federalism and a constitutional law professor at McGill, will be awarding the prize to the best entry.

Please do not hesitate to contact me at jesse.hartery@mail.mcgill.ca should you have any questions regarding the background guide or the Conference in general. It would be a pleasure for me to answer your questions.

We look forward to meeting you all soon!

Sincerely,

Jesse Hartery
Chair, Myanmar Constitutional Assembly
SSUNS 2017



Topic #1: Institutional Design & Separation of Powers

From a constitutional standpoint, Myanmar, also known as Burma, has been through it all: monarchy, colony, democracy, military dictatorship and a return to semi-democracy. We ask you to understand this history and draw from it when proposing alternatives to the current system.

In this section, we will focus on the separation of powers under the current Constitution. In most states, the legislative branch enacts laws, while the executive branch is tasked with their execution. The judicial branch, however, must adjudicate disputes between citizens and interpret laws to ensure the executive is acting pursuant to its statutory mandate.¹ In federal states, since legislative powers are divided between the central and regional legislatures, the judicial branch must also resolve constitutional disputes between the central authority and federated entities.²

Myanmar's Colonial History

Prior to British occupation, both the monkhood and the state benefited from one another. Royal patronage of Burmese Buddhism provided both financial and moral support, which helped extend the legitimacy and authority of religious institutions.³ However, after the Third Anglo-Burmese War in 1885, the British sought to eliminate the monarchy, detach the government from religious affairs, and get rid of the office of the patriarch of the Buddhist clergy.⁴

Those who felt threatened by this change resorted to guerrilla warfare against the British army of occupation, who were known for sternly punishing anyone who aided the rebels, carrying out mass executions and committing other atrocities. Since the monarchy and Buddhism were so interconnected, the fight against the British to reimplement a monarchy often included a religious aspect. Therefore, from an early stage, Buddhism and nationalism were bound together by a common enemy: British imperialism.⁵

In the 1920s, the issue of political reform became more publicised. Many Burmese began to doubt that political freedom could be attained by peaceful protest alone. Continued dissatisfaction with the colonial government acted as a breeding ground

Figure 1: British territorial acquisitions in Burma



Source: *Encyclopaedia Britannica*, s.v. "Myanmar," by Michael Aung Thwin, David Steinberg and Maung Aung, accessed June 15, 2017, <https://www.britannica.com/place/Myanmar>.

¹ Patrick J. Monahan and Byron Shaw. *Constitutional Law* (Toronto: Irwin Law, 2013), 56 and 83.

² *Ibid.*, 107.

³ *Encyclopaedia Britannica*, s.v. "Myanmar," by Michael Aung Thwin, David Steinberg and Maung Aung, accessed April 30, 2017, <https://www.britannica.com/place/Myanmar>.

⁴ *Ibid.*

⁵ David I. Steinberg. *Burma/Myanmar: What Everyone Needs to Know* (Oxford: Oxford University Press, 2010), 35.



for nationalist groups to form. One of these groups was the Thakins (also known as Dobama Asiayone), a student group, who frequently organized protests.⁶ With time, they emerged as leaders in the place of the British-educated Burmese elite, and welcomed Thakin Nu (later Prime Minister U Nu after independence), and Aung San (father of Burma's independence from Britain) into their group.⁷

During the Second World War, after more than a century of British control, a small group of Burmese men led by Aung San went to Japan to receive military training.⁸ This training allowed them to return to Burma and overthrow British rule with the help of the Japanese in 1942.⁹ When it became clear that Japan was intent on controlling Burma as Britain had done, Aung San sought to negotiate a military intervention with British authorities and fought for Japan's downfall.¹⁰

In the years following the war, Aung San made clear to British Prime Minister Clement Attlee that only complete independence was acceptable.¹¹ This included transitioning to a democratic state built on federal principles where ethnic and religious minorities had a seat at the table. The Panglong Conference of 1947, a gathering of ethnic minority leaders and members of the majority Burman population led by Aung San, stands as the gold-standard for cooperation in Myanmar.¹² The product of this Conference and a constituent assembly was the 1947 Constitution.

On this road to independence, Aung San was tragically assassinated in July of 1947, along with a number of his proposed cabinet members.¹³ Despite the loss of their revered leader, the Burmese people continued their march towards independence under the leadership of U Nu.

Constitution of 1947

The Constitution of 1947 established a parliamentary democracy.¹⁴ It was a union built on federal principles comprised of a central order and federated entities (non-Burmese areas were organized as the Shan, Kachin, Kayah, Karen somewhat later, and Chin Special Division).¹⁵

At the federal level, the bicameral legislature was called the Union Parliament, which consisted of a Chamber of Deputies (Pyithu Hluttaw) based in principle on representation by population, and a 125-seat Chamber of Nationalities (Lumyozu

⁶ *Encyclopaedia Britannica*, s.v. "Myanmar," by Michael Aung Thwin, David Steinberg and Maung Aung, accessed April 30, 2017, <https://www.britannica.com/place/Myanmar>.

⁷ *Ibid.*

⁸ *Ibid.*

⁹ Michael Aung-Thwin and Mairii Aung-Thwin, *A history of Myanmar since ancient times: traditions and transformations* (London: Reaktion Books, 2012), 231.

¹⁰ Maung Htin Aung, *The Stricken Peacock* (The Hague: Martinus Nijhoff, 1965), 113.

¹¹ Maung Maung, *Aung San of Burma* (The Hague: Martinus Nijhoff, 1962), 104.

¹² Angelene Naw, *Aung San and the struggle for Burmese independence* (Chiang Mai: Silkworm Books, 2001), 248.

¹³ Aung-Thwin & Aung-Thwin, *A history of Myanmar*, 237.

¹⁴ Steinberg, *Burma/Myanmar*, 52-53.

¹⁵ John Funston, *Government and Politics in Southeast Asia* (New York: Palgrave, 2001), 211.



Myanmar Constitutional Assembly

Hluttaw) based on regional representation.¹⁶ The federated entities did not have their own elected legislatures. Rather, each state had a State Council composed of the members of the Union Parliament representing a specific state. Each Council had the power to make laws for their specific region. However, these laws had to be approved by the President of the Union to have effect.¹⁷

Again, at the federal level, the executive branch was led by the President of the Union. The President was elected by the Parliament and was tasked with appointing a Prime Minister and other members of the Union Government. No person could become President unless they were a citizen of the Union who was, or both of whose parents were, born in any of the territories of the Union.¹⁸ Of note, in this period, the President ethnically rotated.¹⁹ The appointed Union Government was responsible to the Chamber of Deputies, though in practice Prime Minister U Nu's party had a large majority of seats which meant its power was never in question. At the regional level, the executive branch was led by the Head of a State – an individual appointed by the President.²⁰

Justice throughout the Union was administered in courts established by the Constitution, or by law and by judges appointed in accordance therewith. The courts comprised a Court of First Instance and a Court of Appeal. The Court of First Instance was the High Court which had original and appellate jurisdiction and power to determine all matters and questions whether of law or of fact. The final Court of Appeal was called the Supreme Court. Its members were appointed by the President with the approval of both Chambers of the Union Parliament. Their responsibilities included adjudicating disputes between the Union and a federated entity or between federated entities themselves.²¹

Military Rule

Between 1948-1958 and 1960-1962, Myanmar experienced democratic governance, however, both periods ended with a military coup. During the first in 1958, the military approached Prime Minister U Nu and proposed a coup to avoid civil war. Rather than allow an illegal coup, U Nu agreed to pass legislation that allowed the military to govern lawfully. They ended up keeping power for less than two years, before setting the stage for the 1960 elections.²²

Figure 2: Burma's military junta ruled from 1962-2011



Source: "Myanmar country profile", BBC News, last modified May 2, 2017, accessed June 15, 2017, <http://www.bbc.com/news/world-asia-pacific-12990563>.

¹⁶ Constitution of the Union of Burma, 1947, section 87.

¹⁷ Ibid, sections 92, 154, 156, 160, 166 and 169.

¹⁸ Ibid, section 49.

¹⁹ Steinberg, *Burma/Myanmar*, 57.

²⁰ Constitution of the Union of Burma, 1947, sections 160 and 173.

²¹ Ibid, sections 133-153.

²² Steinberg, *Burma/Myanmar*, 54-56, 59-60.



Myanmar Constitutional Assembly

During the second coup, General Ne Win justified his intervention by declaring that parliamentary democracy was not suitable for Burma.²³ Moreover, in the military's view, a state built on federal principles was a threat to the integrity of the country and could bring secession. Suspending the 1947 constitution, they ruled the country with a Revolutionary Council (RC).²⁴ The RC proceeded to abolish the Parliament, Supreme Court and High Court, and created a military controlled one-party system in which their cadre party, the Burma Socialist Programme Party (BSPP) – and later the State Law and Order Restoration Council (SLORC) – could rule.²⁵

Military rule led to decades of repression. It was not until 1988 that the military's monopoly on power began to seriously be questioned.²⁶ In the wake of various pro-democracy uprisings, Aung San Suu Kyi, the only daughter of Aung San, was caught up in the opposition to the military regime and became involved with the National League for Democracy (the "NLD") – a political party wedded to the cause of self-determination for the Burmese people. She ultimately became its main spokesperson.²⁷ For the crime of attempting to discontinue military rule and undermining its legitimacy by peaceful means, she was sentenced to house arrest on-and-off until 2010.²⁸ Others suffered a worse fate – human rights abuses, torture and death being the norm.

In the face of uprisings in the 1980s, the military agreed to hold multi-party democratic elections in 1990. While Suu Kyi was not allowed to campaign given that she was under house arrest, her party won about 80% of the seats.²⁹ Despite expectations that the NLD should govern the Southeast Asian state, the military ultimately decided to maintain its grip on power. There was no peaceful transition of power.

After decades of sanctions and in an attempt to repair relations with the international community, Myanmar created a "roadmap to democracy" in 2003 with concrete steps to improve the country's political processes and institutions. Finally, in

Figure 3: Aung San Suu Kyi has spent long periods under house arrest



Source: "The Lady of Burma: Aung San Suu Kyi", Latitudes Media, March 4, 2013, <https://latitudes.nu/%E2%80%98the-lady%E2%80%99of-burma-aung-san-suu-kyi/>.

²³ John Funston, *Government and Politics in Southeast Asia* (New York: Palgrave, 2001), 211.

²⁴ Ibid.

²⁵ *The Constitution of the Socialist Republic of the Union of Burma 1974* (Rangoon: Printing and Publishing Corporation, 1974); John Funston, *Government and Politics in Southeast Asia* (New York: Palgrave, 2001), 211-212.

²⁶ "Myanmar profile – Timeline", *BBC News*, May 2, 2017, <http://www.bbc.com/news/world-asia-pacific-12992883>.

²⁷ "Profile: Aung San Suu Kyi", *BBC News*, December 5, 2016, <http://www.bbc.com/news/world-asia-pacific-11685977>.

²⁸ "Aung San Suu Kyi 'released from house arrest'", *The Guardian*, November 13, 2010, <https://www.theguardian.com/world/2010/nov/13/aung-san-suu-kyi-released>.

²⁹ Steinberg, *Burma/Myanmar*, 92.



2008, a draft was presented to citizens in a referendum but was widely critiqued since it gave enormous power to the military. There was widespread harassment of voters at polls by government officials which resulted in 92% approval.³⁰

The NLD boycotted the 2010 general election because of the undemocratic Constitution and the election laws which barred anyone with a criminal record from participating. Since most pro-democracy activists, including Suu Kyi, faced criminal charges after the 1988 uprisings, this effectively barred many of them from seeking election.³¹ Ultimately, the military-backed Union Solidarity and Development Party (USDP) won an overwhelming majority of seats in the federal legislature and Thein Sein, a former general, became the President. Aung San Suu Kyi was only released from house arrest following this general election.³²

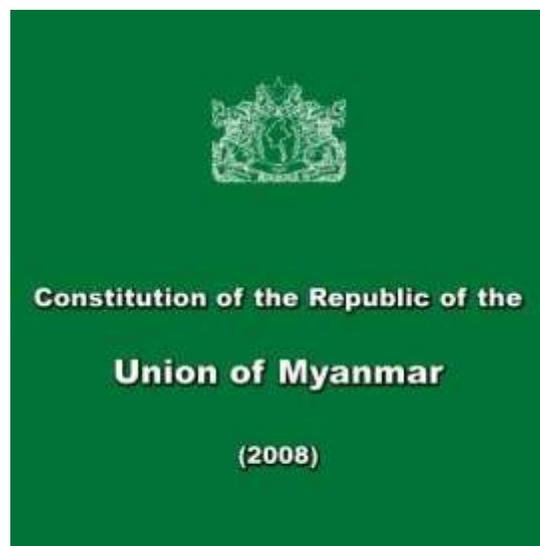
After years of hard work, Suu Kyi's party ran in the 2015 general election and won a landslide victory.³³ Under her leadership, the NLD started a peace process by bringing together the 21st century Panglong Conference, which began on August 31, 2016. It has as its end-goal to amend the 2008 Constitution and adopt a truly federal Constitution.

The Constitution of 2008 and Current Issues

The Constitution of 2008 established a semi-democratic republic. It has federal features (it is considered quasi-federal) and is comprised of a central order and federated entities (seven regions, seven states, one union territory and six self-administered zones).³⁴

It provides for a bicameral legislature at the federal level, named the Assembly of the Union (Pyidaungsu Hluttaw). The 224-seat House of Nationalities (Amyotha Hluttaw) represents the states and regions, while the 440-seat House of Representatives (Pyithu Hluttaw) represents the townships and the people.³⁵ All members, regardless of chamber, serve five-year terms. Three-fourths of the members are directly elected, while the remaining are appointed by

Figure 4: Constitution of 2008



Source: Constitution of the Republic of the Union of Myanmar (Rangoon: Printing & Publishing Enterprise, 2008).

³⁰ "Myanmar/Burma: World Directory of Minorities and Indigenous Peoples," Minority Rights Group International, accessed May 14th 2017, <http://minorityrights.org/country/myanmarburma/>.

³¹ "Suu Kyi's NLD party to boycott Burma election", *BBC News*, March 29, 2010, <http://news.bbc.co.uk/2/hi/asia-pacific/8592365.stm>.

³² "Burma: Chronology of Aung San Suu Kyi's Detention", *Human Rights Watch*, November 13, 2010, <https://www.hrw.org/news/2010/11/13/burma-chronology-aung-san-suu-kyis-detention>.

³³ "Myanmar's 2015 landmark elections explained", *BBC News*, December 3, 2015, <http://www.bbc.com/news/world-asia-33547036>.

³⁴ Marcus Brand, "Achieving 'Genuine Federalism'? Myanmar's Inexorable Path Towards Constitutional Devolution and Decentralised Governance", in Andrew Harding & Khin Khin Oo, ed., *Constitutionalism and Legal Change in Myanmar* (Oxford: Hart Publishing, 2017).

³⁵ *Constitution of the Republic of the Union of Myanmar* (Rangoon: Printing & Publishing Enterprise, 2008).



the military, and therefore represent the army. Each state or region has its own elected unicameral legislature (Hluttaw). There are two types of elected members: two by each township and one by each national ethnicity (defined as a population of at least 0.1% of the population of the state or region), the rest are non-elected members drawn from the Armed Forces and nominated by the Commander-in-Chief.

All executive power at the federal level is vested in a President who is elected by the Assembly. Each of the three groups from the two houses (representatives from states and regions, representatives from townships, and Armed Forces representatives from the two houses) elect a person as Vice-President and the houses sitting together will elect one of the candidates as President, the other two remain Vice-Presidents. Of note, Article 59 of the Constitution prohibits anyone with a foreign nationality or who has relatives of a foreign nationality from running for President.³⁶ This excludes Aung Sung Suu Kyi from running because her children and deceased husband are British citizens.³⁷ The President is tasked with appointing a Cabinet of Ministers. These ministers are not accountable to the legislature as in a parliamentary system. Moreover, the military has a constitutionally protected number of seats in the executive branch. Three of the most important ministries are afforded to military members nominated by the Commander-in-Chief: defence, home affairs and border affairs.

At the state/regional level, the executive branch is led by a Chief Minister. This Chief Minister is not chosen based on regional votes or by the regional legislature. Instead, this person is appointed by the President of the Union. This can create democratic distortions. For example, in Rakhine State, the Chief Minister is from the NLD, even though the Arakan National Party won 44 of the 77 contested seats in that state in the 2015 elections.³⁸

The judiciary includes the Supreme Court, the courts martial and the Constitutional Tribunal. The Constitutional Tribunal is composed of nine judges appointed for five years: three chosen by the President, three chosen by the Speaker of the House of Representatives and three chosen by the Speaker of the House of Nationalities. They are then submitted to the Assembly for approval, though they can only constitutionally reject a nominee in extreme circumstances. The states and regions have no role in appointing judges. The Tribunal is tasked with ensuring all state officials and branches act according to their duties as outlined in the Constitution. It also adjudicates disputes related to the division of legislative powers between the Union and a state or region. However, there is actually no judicial service commission in place to appoint or dismiss judges.³⁹ It must also be noted that since all nine members of the

³⁶ Ibid.

³⁷ *Constitution of the Republic of the Union of Myanmar* (Rangoon: Printing & Publishing Enterprise, 2008).

³⁸ "NLD govt announces 13 new chief ministers; angers Rakhine party", *Myanmar Now*, March 28, 2016, <http://www.myanmar-now.org/news/i/?id=0bf27037-c8d7-4f63-8021-b04cf2a76be3>.

³⁹ *Constitution of the Republic of the Union of Myanmar* (Rangoon: Printing & Publishing Enterprise, 2008).



Myanmar Constitutional Assembly

Tribunal were impeached in 2012 for handing down a ruling that military members did not like, the new members do not act as a serious check against the legislature.⁴⁰

Despite the collapse of military dictatorship, the military still tightly controls Burmese politics.⁴¹ The Constitution effectively provides a separate regime for it with special privileges, immunities and representation in state institutions. Also, unlike in many countries where the head of the executive is normally the Commander-in-Chief of the armed forces in line with the principle of civilian control of the military, the President in Myanmar is not the Commander-in-Chief of the army.⁴² This position is retained by the military that effectively displaces the President in times of national emergency threatening national unity. In essence, the military sits outside the state, and has the capacity to exercise another coup d'état with relative ease.

Case Studies

In this committee, we will ask you to consider the experience of other federalist states when proposing amendments to Myanmar's 2008 Constitution. More specifically, we will ask you to draw from the experiences of India and Nigeria. As the most populous democracy in the world, India is a model for federalism in Asia. Nigeria, as a multi-ethnic country that has recently transitioned away from military dictatorship, is particularly insightful as Myanmar continues its transition to democracy.

On this specific topic, it is important to understand the role of the separation of powers in creating a federalist state. Checks and balances in the executive, legislative, and judicial branches ensure that each branch behaves in an equitable and balanced way, while also guaranteeing that some functions are not exercised by the same people. In analyzing Nigeria and India, this committee can begin to think about how the separation of powers may be conceptualized in a federal state.

i. Nigeria

The government of the Federal Republic of Nigeria governs the country according to the Constitution of 1999. That Constitution concentrates legislative, fiscal, executive, and judicial powers at the federal level.⁴³ This hyper-centralization is reminiscent of Nigeria's system under military rule, and after four elections (1999, 2003, 2007, 2011), it is clear that the Fourth Republic, despite its attempts to restore democratic rule, is still heavily flawed.⁴⁴

⁴⁰ Dominic Jerry Nardi, "How the Constitutional Tribunal's Jurisprudence Sparked A Crisis", in Andrew Harding & Khin Khin Oo, ed., *Constitutionalism and Legal Change in Myanmar* (Oxford: Hart Publishing, 2017).

⁴¹ Simon Lewis, "5 Challenges Facing Burma's New Civilian Government," *TIME Magazine*, March 30, 2016, <http://time.com/4275928/burma-myanmar-civilian-government-challenges/>.

⁴² *Constitution of the Republic of the Union of Myanmar* (Rangoon: Printing & Publishing Enterprise, 2008).

⁴³ Nicholas Aroney and John Kincaid, *Courts in Federal Countries* (Toronto: University of Toronto Press, 2017), 294.

⁴⁴ Leke Oke, "Democracy and Governance in Nigeria's Fourth Republic," in *An International Multi-Disciplinary Journal*, no.4 (2010), <https://www.ajol.info/index.php/afrev/article/view/60142/48393>.



The President of Nigeria is elected through universal suffrage, and is assigned both the role of Head of State and Head of Government. Contrary to Myanmar, he also holds the office of Commander-in-Chief.⁴⁵ One of his responsibilities includes appointing ministers to each federal ministry. The Senate ensures that at least one member from each of the 36 states is represented in the President's cabinet.⁴⁶ The states each have an elected Governor, who heads the executive branch.⁴⁷

The 1999 Constitution provides for a bicameral National Assembly. The two chambers are the 109-member Senate, and the 360-member House of Representatives.⁴⁸ Members of the Senate are elected for four-year terms in 36 three-seat constituencies (plus one seat from the capital, Abuja), while members of the House of Representatives are elected from single-seat constituencies based on the principle of representation by population.⁴⁹ The Constitution mandates a national political party system in order to avoid the creation of sectional parties.⁵⁰ Each state has a unicameral legislature, but elections for the executive and legislative branches at the federal and state level are held separately, unlike in Myanmar.⁵¹ To be clear, the military is not guaranteed any seats in the central or state legislatures.

Nigeria's judicial branch is headed by the Supreme Court.⁵² It is composed of not more than 21 justices from the various regions and has original jurisdiction to hear questions of constitutional law, including the division of powers. These judges are appointed by the President following a recommendation by the National Judicial Council. To ensure regional input, these appointments must first be confirmed by the Senate.⁵³

ii. India

The Indian Constitution is a well-known success story of how a multi-plural state can live in relative harmony, plus, it defies the notion that low-income countries are unable to sustain a democracy.⁵⁴ It is a federal parliamentary democracy with a central government and twenty-nine (29) states and seven (7) union territories.⁵⁵

Governed by a parliamentary system of government, the executive is directly accountable to the legislature. The President of India, the head of state, is elected by the federal Parliament and the members of the state legislatures. The elected Prime Minister is the head of the Cabinet. All Cabinet Ministers hold office at the pleasure of the Prime Minister, as in the Westminster system.

⁴⁵ Aroney and Kincaid, *Courts in Federal Countries*, 295.

⁴⁶ *Constitution of the Federal Republic of Nigeria* (1999).

⁴⁷ Johanne Poirier, Cheryl Saunders and John Kincaid. *Intergovernmental Relations in Federal Systems* (Oxford: Oxford University Press, 2015), 274.

⁴⁸ *Constitution of the Federal Republic of Nigeria* (1999).

⁴⁹ *Ibid.*

⁵⁰ Aroney and Kincaid, *Courts in Federal Countries*, 295.

⁵¹ Poirier, Saunders and Kincaid, 274.

⁵² Aroney and Kincaid, *Courts in Federal Countries*, 298.

⁵³ *Ibid.*, 300.

⁵⁴ Howard Handelman, *Challenges of the Developing World* (Lanham: Rowman & Littlefield: 2017), 50.

⁵⁵ Aroney and Kincaid, *Courts in Federal Countries*, 229-230.



Myanmar Constitutional Assembly

Each state and each Union territory of India has its own government, with a Governor acting as head of the federated entity and a Chief Minister as the head of government.⁵⁶ The Governors are appointed by the President, but generally act on the advice of the Chief Minister of their states.⁵⁷ Despite this autonomy, the Constitution has brought some problems because it provides the President with the right to approve or disallow laws adopted by state legislatures.

The federal Parliament is bicameral. It has a House of People (Lok Sabha) with 545 seats elected for 5-year terms in single-seat constituencies and a Council of States (Rajya Sabha) with 245 seats elected for 6-year terms by state and territorial assemblies using the single-transferable vote system. Some state legislatures are bicameral, while others are unicameral. Of note, those with bicameral legislatures elect one-third of the members of the upper house (equivalent to the Council of States) every 2 years for 6-year terms. This is similar to the American model.

The judicial branch ensures that nobody oversteps the bounds set by the Constitution. At the apex is the Supreme Court, whose 31 judges are appointed by the President on the advice of the Chief Justice of India, the Governor of a State and the Chief Justice of a state's High Court. Generally, judges are appointed from the various states of the Union.⁵⁸

Questions to Consider:

- 1) Should the military's role in the executive and legislative branches at the national and state/regional level be diminished?
- 2) Should individual states have a say in the appointment of judges to the Constitutional Tribunal?
- 3) Should the states be able to choose their own Chief Ministers?

⁵⁶ Ibid.

⁵⁷ Poirier, Saunders and Kincaid, 239.

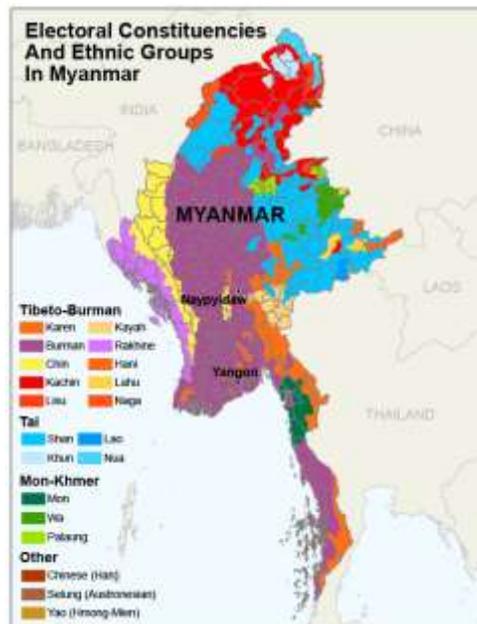
⁵⁸ Aroney and Kincaid, *Courts in Federal Countries*, 240.



Topic #2: Division of Powers and Regional Diversity

Myanmar is a country with extreme diversity, having over 100 minority ethnic groups.⁵⁹ This diversity has been at the centre of policies initiated by State Counsellor Aung San Suu Kyi to reduce conflict in minority regions. Essentially, the move towards a federal state is seen as a way to alleviate ethnic tensions.

Figure 5: Ethnic Diversity in Myanmar



Source: Sanford, Luke. 2014. "Doctored Numbers, Religious Violence and the Census Form". *The Journal for International Policy Solutions*. March 1. Accessed June 20, 2017. <http://internationalpolicysolutions.blogspot.ca/2014/02/doctored-numbers-religions-violence-and.html>.

In this section, we will focus on the division of legislative powers under the current Constitution and invite you to consider how this should be modified so as to create a federal state built on mutual sovereignty of the central government and the federated entities. In the first section of this background guide, we discussed the separation of powers (executive, legislative and judicial branches) and how each branch of government is designed. Now, we ask you to explore the division of legislative powers. Essentially, in a federal state, power to make laws is shared by the central government and the federated entities. The question becomes: Who should do what and

⁵⁹ Ghai, Yash. 2008. "The 2008 Myanmar Constitution: Analysis and Assessment." *Burma Library*. April 9. Accessed May 18, 2017. https://www.google.ca/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwjtx4iZsvrTAhVQzWMKHTJJBf4QFggqMAA&url=http%3A%2F%2Fwww.burmalibrary.org%2Fdocs%2F2008_Myanmar_constitution--analysis_and_assessment-Yash_Ghai.pdf&usg=AFQjCNHxIR4is5-



why? This section is less about how to pass laws and who should have the authority to pass laws, but rather what specific subjects federal and regional legislators should have jurisdiction over.

The concern over a lack of true federalism in Myanmar, which creates a decentralized state with a federal government that has jurisdiction over national affairs, while each region/state has a local government that controls its own affairs, forms the basis of this topic. We will also ask you to examine the role of the military, which is always present and can exercise legislative powers in emergency circumstances.

A History of Ethnic Division

The current ethnic strife has a long history starting with the British Empire's colonial rule of Myanmar. As outlined above, Myanmar was a British colony for almost 100 years before declaring independence after the Second World War.⁶⁰ When the British colonized Burma, they instituted a system of 'divide and rule' between regions. This included a different governing system for the ethnic majority Bamar group than the non-Bamar groups. Overall, ethnic nationalities were privileged. This led to widespread ethnic conflict during WWII, as the ethnic nationalities remained loyal to Great Britain, while the Burmese Independence Army led by Aung San was loyal to the Japanese who occupied Myanmar at the time (this later changed as outlined in topic 1).⁶¹

On the road to independence, ethnic minorities demanded a true federal union be written into the new Constitution. While the 1947 Constitution had important federal principles, it remained a highly-centralized state in practice. This was the case because while the minorities had their own governments, they had very limited resources.⁶² The spirit of cooperation and decentralized governance, exemplified by the talks that occurred at the Panglong Conference of 1947, started slowly drifting away after Aung San's assassination. The central government sought to maintain the British extractive institutions that were in place and kept almost complete control over the states. This disregard of true federalism led to ethnic revolts and secessionist movements, which the military moved to suppress with incredible violence.⁶³

The military coup of 1962 led to the replacement of the parliamentary system with a military dictatorship that was based on an isolationist foreign policy with a socialist economic program. This put a complete end to any type of federalism, whether in theory or in practice. During this military period, insurrections and armed rebellions were the norm. Minorities have been fighting any state control by the centre ever since.⁶⁴

The military regime was dissolved in 2011, paving the way for democratic elections that saw the election of the current NLD government in 2015. The NLD has

⁶⁰ Xu, Beina, and Eleanor Albert. 2016. "Understanding Myanmar." *Council on Foreign Relations*. March 25. Accessed May 18, 2017. <https://www.cfr.org/background/understanding-myanmar>.

⁶¹ Chia, Jasmine, Yan Min Aung, and Kareng Brang Shawng. 2016. "Myanmar's Nascent Democracy Depends on Federalism." *Kennedy School Review*. March 23. Accessed May 18, 2017. <http://harvardkennedyschoolreview.com/myanmars-nascent-democracy-depends-on-federalism/>.

⁶² Steinberg, *Burma/Myanmar*, 57.

⁶³ *Ibid*, 56-60.

⁶⁴ *Ibid*, 70.



century Panglong Conference, which has met twice so far, with the goal of reforming the 2008 Constitution to create a truly federal Constitution.⁶⁵ begun the 21st

Division of Powers under the Constitution of 1947

i. Culture

As per the Constitution, the official education curriculum was imposed by the central government.⁶⁶ While in theory this could have allowed for asymmetrical delivery of education to respect minority languages and cultures, official education was, in practice, completely in Burmese (the language of the majority Bamar population). Local languages were not permitted in these educational institutions, which meant minority groups had to resort to private institutions to learn their language and culture.⁶⁷

Minority culture was not completely excluded, however. On the anniversary of the Panglong Conference, for example, the democratically elected government brought together ethnic minorities to celebrate the various customs, songs and dances of the Union. This celebration of diversity stopped after the military coup.⁶⁸

ii. Spending and Financial Capacity

The Constitution provided a significant amount of taxation powers to the central government (including on the sale of goods, companies, income, capital of companies, estate duties, customs duties, etc.), which meant it had virtually all the financial resources of the Union. The minority governments were not given sufficient funding for their own programs. This was implemented despite being promised by Aung San that “if the Burman area got one kyat, the minorities would get one kyat.”⁶⁹ Without adequate funding and redistribution of taxes, a greater centralization of power naturally ensued. Minority areas even tried to get funding from international aid agencies, but were blocked by the central government.⁷⁰

State system under the Constitution of 2008

Myanmar is divided into 21 administrative areas, including: seven regions (Ayeyarwady, Bago, Magway, Mandalay, Aungmye, Tanintharyi, Yangon), seven states (Chin, Kachin, Kayah, Kayin, Mon, Rakhine, Shan), one union territory (the capital city of Nay Pyi Daw) and six self-administered zones (Danu, Kokang, Naga, Pa’O, Pa Laung, Wa). The administrative systems that govern each area differ: regions and states have legislatures (Hluttaw), Nay Pyi Daw (the capital) is under the direct administration of the

⁶⁵ Nyan Hllaing Lynn, “Panglong, then and now, and the promise of peace”, *Frontier Myanmar*, March 9, 2017, <http://frontiermyanmar.net/en/panglong-then-and-now-and-the-promise-of-peace>.

⁶⁶ Pre-university education was, however, devolved to the states, subject to language restrictions from the federal Parliament: David C. Williams, “A Second Panglong Agreement: Burmese Federalism for the Twenty-first Century”, in Andrew Harding & Khin Khin Oo, ed., *Constitutionalism and Legal Change in Myanmar* (Oxford: Hart Publishing, 2017).

⁶⁷ Steinberg, *Burma/Myanmar*, 57-58.

⁶⁸ Steinberg, *Burma/Myanmar*, 58.

⁶⁹ The kyat is Myanmar’s currency.

⁷⁰ Steinberg, *Burma/Myanmar*, 58.



President, but day-to-day functions are carried out on the President's behalf by the Nay Pyi Daw Council and self-administered zones are administered by a leading body that consists of ten members and includes state or regional Hluttaw members, and elected members from the armed forces.⁷¹ Generally, the seven regions and the union territory are inhabited by the ethnic-Bamar majority (68% of the population), while the seven states and six self-administered zones are primarily inhabited by ethnic minorities (32% of the population).

Division of Powers under the Constitution of 2008

i. General

There is a unique hierarchy to the division of powers between the Union, states or regions, and self-administered zones. Union powers include: defense and security, foreign affairs, financial planning, the economy, agriculture, energy and mining, industry, transport and communication, social sector, and 'management' (of state secrets, prisons, village and urban areas, citizenship, drug enforcement, the census, the judicial system).⁷²

States and regions generally have the same list of powers, except defense, security or foreign affairs. Moreover, they have significantly less powers in the industrial, transport or social sectors.⁷³ This means that without true federalism, the Union legislature can dictate the terms of the extraction of resources across the nation, which mimics colonial era practices. Moreover, many areas of state/regional jurisdiction are made subject to not being contrary to the policies prescribed by the federal Assembly. In essence, there is broad overlap, which means the federal Assembly can, at any time, impose its will on state/regional legislatures by simply passing a law.⁷⁴ Under the 2008 Constitution, the states are given substantially less power than was provided in the 1947 Constitution.⁷⁵

Self-administered zone powers include: planning, construction and repair, public health, development plans, fire prevention, pasture, forest protection and environmental conservation, water and electricity, and town and village markets. They are significantly limited by the Constitution.

Any residual powers are vested in the Union.⁷⁶ The stark division of powers and problems that arise with the current system can be clearly seen in the allocation of emergency powers discussed below.

ii. Culture

As in the 1947 Constitution, the 2008 Constitution provides that the educational curriculum across the country is subject to federal legislation. However, the 2008 Constitution goes even further by making private schools and training subject to federal control. Essentially, whereas after 1947 ethnic minorities could learn their languages and

⁷¹ Ghai, *The 2008 Myanmar Constitution: Analysis and Assessment*, 21-39.

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ See generally: *Constitution of the Republic of the Union of Myanmar* (Rangoon: Printing & Publishing Enterprise, 2008).

⁷⁵ David C. Williams, "A Second Panglong Agreement", 64-65.

⁷⁶ Ghai, 21-39.



cultures in private schools, this Constitution makes these same private schools subject to the whims of a federally elected government and legislature.

In addition, the development of traditional medicine science and the management of cultural and historical sites and traditions is primarily controlled by the federal Assembly. The states/regions can legislate on traditional medicine and on the preservation of their cultural heritage, provided they do not contradict federal legislation. Section 198 of the Constitution expressly stipulates that if any provision of a law enacted by a state/regional legislature is inconsistent with a law enacted by the federal Assembly, the law adopted by the federal Assembly prevails.⁷⁷

iii. Spending and Financial Capacity

The financial structure of the Union provided by the 2008 Constitution is quite similar to the 1947 Constitution. The central government is well placed to tax and spend on its programs as it wishes. Federal tax powers include income taxes, commercial taxes, stamp duties and customs duties. The regions and states can tax land (and other municipal-type taxes) and impose excise duties on everything but narcotic drugs. The self-administered zones have absolutely no taxation powers. All this naturally has the same centralizing effect as the 1947 Constitution because funds are not adequately redistributed to regional and state governments.⁷⁸

Emergency Powers

There are three types of emergencies outlined in the current Constitution: when it is not possible to carry out constitutional executive functions in certain areas, when there is a situation that endangers life and property, and when there is a threat of disintegration of the union or national solidarity or loss of national sovereignty.⁷⁹ In type one emergencies, legislative functions of the regions are handed over to the President. In type two emergencies, a declaration of martial law might be in order which transfers all administrative and judicial powers to the Commander-in-Chief of the Army. Type three emergencies transfer Union legislative, executive and judicial powers to the Commander-in-Chief and all houses and legislative bodies are terminated. In all types of emergencies, fundamental rights can be suspended in their entirety, which is a unique addition to the current Constitution.⁸⁰ Emergencies in Myanmar have a long precedent of mismanagement (Cyclone Nargis), it is therefore crucial that this committee find an efficient and fair way to govern the country in times of disaster to limit the economic and human impacts.

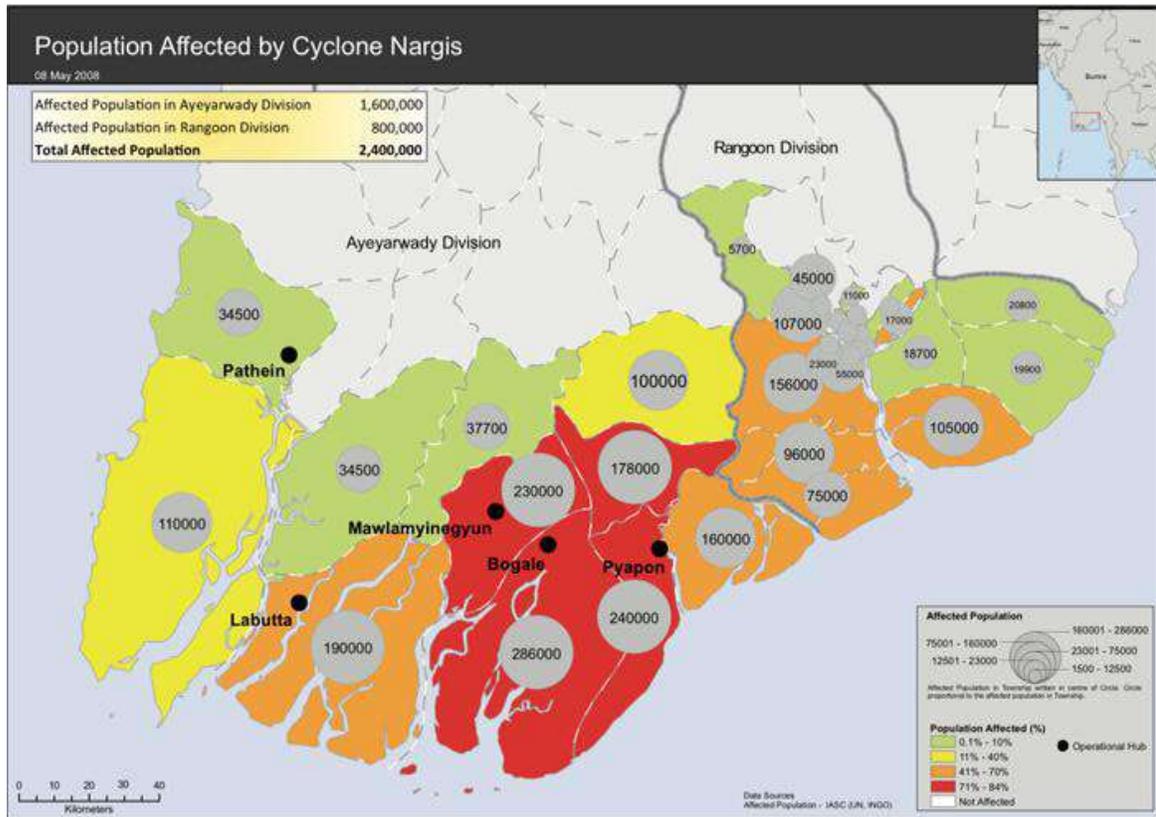
⁷⁷ See generally: *Constitution of the Republic of the Union of Myanmar* (Rangoon: Printing & Publishing Enterprise, 2008).

⁷⁸ Ibid.

⁷⁹ Ghai, *The 2008 Myanmar Constitution: Analysis and Assessment*, 21-39.

⁸⁰ Ibid.

Figure 6: Population affected by Cyclone Nargis



Source: Human Rights Watch Asia Division. 2010. "I Want to Help My Own People: State Control and Civil Society in Burma after Cyclone Nargis". *Human Rights Watch*. April 28. Accessed on June 20, 2017. <https://www.hrw.org/report/2010/04/28/i-want-help-my-own-people/state-control-and-civil-society-burma-after-cyclone>.

Case Studies

The current issues in the Constitution brought up by human rights groups and international constitutional scholars criticize the lack of an actual federal system. The amount of power that the Union, the President and the Commander-in-Chief hold over states, regions and self-administered regions has been considered too far reaching, especially in declarations of emergencies. This committee must determine whether to modify the allocation of powers between the Union, states, regions and self-administered zones.

This committee must also debate the issues surrounding the immense regional diversity of the nation and consider whether asymmetrical federalism in which certain states/regions are given more powers than others is pertinent. This committee must create a new Constitution that addresses the multitude of issues that arise surrounding the division of powers. We encourage you to look at the case studies below for inspiration while writing your new Constitution and encourage you to work across parties and allegiances to create a fair Constitution for all of Myanmar.



i. Nigeria

Nigeria has been transitioning from military rule to civilian rule since 1999 and modelled their constitutional system on the United States of America mainly due to the close economic ties between the two countries. Their federation is both dualist and integrated. It is dualist because the federal and state legislatures implement their own laws and programs. It is also integrated in the sense that states are also tasked with implementing federal initiatives and legislation. It differs from the American model in the sense that there is no exclusive state list of powers. There is an exclusive list of federal powers and a list of concurrent powers between the states and the central legislatures. Moreover, in almost all cases, the powers assigned to the states are made subject to the overriding powers assigned to the National Assembly.⁸¹

Emergency powers in Nigeria are entirely vested in the President who declares the emergency. An emergency is declared when the Federation is at war, there is a threat of war, there is the breakdown of public order, during and after natural disasters, or there is any other threat that challenges the existence of the Federation or endangers the public. Constitutionally, after the declaration is made, an Administrator is assigned who governs the affected areas during the period of the emergency. The specific details of the powers of the President are vague in the Constitution, and many constitutional scholars have argued that decisions made by the President (such as the closing of international borders) during states of emergencies are unconstitutional as no such powers exist under the Constitution.⁸²

Federal powers include: defense, foreign affairs, economy, banking, trade and taxation (including customs and excise duties, and income and profit taxes). State powers include: public health and safety, state-wide trade and education. This means that states can make and enforce separate laws from the federal order, at least in theory. However, since the federal government has exclusive control of oil (85% of the all revenue), the states are essentially dependent on federal transfers of money to develop their own programs and policies.⁸³

ii. India

In the Indian Constitution, legislative powers are divided into three separate lists: federal, state and concurrent. Federal powers include: defense, energy, foreign affairs including declaration of wars/maintenance of peace, citizenship, transportation and communication, currency, trade, inter-state trade and commerce, and extractive industries.⁸⁴ State powers are exclusive and include: law and order, ancient and historical monuments, police, healthcare, transport, land policies, electricity in state, town administration. However, there are some situations where the federal government can overrule on these items.⁸⁵ Besides those situations, federal interference in exclusive state

⁸¹ Poirier, Saunders and Kincaid, 275.

⁸² James Kanyip, "Proclamation of State of Emergency in Nigeria: A Constitutional Flaw", August 8, 2015, <https://jkanyip.wordpress.com/2015/08/08/proclamation-of-state-of-emergency-in-nigeria-a-constitutional-flaw/>

⁸³ Poirier, Saunders and Kincaid, 276.

⁸⁴ The Constitution of India, Part V, Ch. I, sec. 52,53

⁸⁵ Ibid, Part VI, Ch. II



jurisdiction will be sanctioned by the courts.⁸⁶ Residual powers remain with the federal legislature. There is also a list of concurrent powers including: marriage, education, civil procedure, drugs, and economic and social planning.⁸⁷ In that sense, federal legislation relating to education can be imposed on the states.

In regard to emergency powers, when an emergency is declared (either a National, State or Financial Emergency) there are four main changes to governance of the country. First, the executive power of every state in India is to be exercised in accordance with the direction of the Union. Secondly, the Parliament gains unlimited power to make laws for the whole or any part of the country. Third, the President may (by order) make alterations in the distribution of funds between the Union and individual state governments. Lastly, the six fundamental rights listed in Article 19 of the Constitution (expression, assembly, associations, movement, or profession etc.) are automatically suspended.⁸⁸

The federal Parliament can collect income taxes, excise and customs duties, corporate taxes, and sales taxes. The state legislatures can collect land taxes, excise on alcoholic liquors, taxes on agricultural income, sales, goods and luxury taxes, taxes on professions, taxes on mineral rights, and estate duties in respect of agricultural land. There are no taxation powers provided in the concurrent list, though sales taxes are evidently concurrent since they appear in both exclusive lists. Moreover, the Constitution mandates that the revenue raised by the central government be shared with the states in certain circumstances: sharing of proceeds from the income tax, grants-in-aid, etc. In that sense, the states are provided a great deal of fiscal autonomy, which allows them to implement the programs and policies they see fit.⁸⁹ That said, overall, the central government receives almost two thirds of all tax revenue in the country, with the other third going to states.⁹⁰

Questions to Consider:

- 1) What powers should each state/region hold?
- 2) Should the federal government be able to pass laws that overlap with state/regional jurisdiction?
- 3) In the event of an emergency, should states, regions and self-administered zones be able to maintain their autonomy? Should emergency powers even exist?
- 4) What level of government should hold residual powers?

⁸⁶ Aroney and Kincaid, *Courts in Federal Countries*, 245.

⁸⁷ The Constitution of India, Ch II, Part V

⁸⁸ Kamal Rana, "Emergency Powers of the President of India", *Important India*, September 23, 2014, <http://www.importantindia.com/12231/emergency-powers-of-the-president-of-india/>

⁸⁹ Poirier, Saunders and Kincaid, 260.

⁹⁰ H. Rajashekara, *The Nature of Indian Federalism: A Critique* (Berkeley: University of California Press, 1997), 251.



Topic #3: Minority Rights, Individual Freedoms and the Peace Process

Myanmar is the second largest nation in Southeast Asia. Its population is varied, in terms of ethnic, linguistic and religious diversity. The seven most important ethnic groups are: the Bamar (68%), the Shan (9%), the Karen (7%), the Rakhine (4%), the Chinese (3%), the Indian (2%) and the Mon (2%). The official language is Burmese – the language spoken by the ethnic-Bamar majority. The minority ethnic groups also have their own languages. Three of the main world religions are also represented: Buddhism (87.9%), Christianity (6.2%), and Islam (4.3%).⁹¹

In this section, we will ask you to consider the place of minority rights in Myanmar and the political freedoms currently afforded to the Burmese people as a whole. The first topic asks you to consider how the executive, legislative and judicial branches should be constituted at the federal and state/regional levels. The second topic asks you to consider what legislative powers each level of government should exercise. This last topic asks you to consider whether certain things should fall outside the scope of legislative action by the central and state/regional governments and whether new states or regions should be created. Essentially, what rights and freedoms should be afforded to minority groups and to society at large? Should state interference be limited?

Rights & Freedoms After Independence

Minorities in Myanmar have been denied rights for decades and their interests have not been taken into account in public decision making. Nevertheless, before the official formation of Burma as a state, Aung San had negotiated a deal, called the Panglong Agreement⁹², to give certain minority groups a degree of autonomy within the country's governance. Unfortunately, he was assassinated before the agreement could come to fruition.⁹³

After the failed communist rebellion of 1948⁹⁴, many minority groups fought for a more representative union which would work to recognize the country's diversity and attempt to use it as an asset. Others, however, were pessimistic about the possibility of large scale positive change, thus they held increasingly violent demonstrations. Over a decade later, when the military junta regained power, widespread oppression returned and the removal of the few minority rights provisions followed. The Buddhist majority in Burma was clearly the most powerful group at this time⁹⁵, and many new government policies demonstrated this. More uprisings followed in order to show public dissent for the new policies.

⁹¹ "Burma", *CIA Factbook*, May 10, 2017, <https://www.cia.gov/library/publications/the-world-factbook/geos/bm.html>.

⁹² Myanmar/Burma

⁹³ Ibid.

⁹⁴ Ibid.

⁹⁵ Ibid.



Myanmar Constitutional Assembly

Over the years that followed, the military continued to revoke powers given to minorities, most prominently within the structure of the military itself. They would not accept educational degrees from non-Burmese speaking institutions⁹⁶, and used brute force against citizens, leading to a humanitarian crisis which forced populations to flee.⁹⁷ The Shan and Karen groups were the most persecuted, and more refugees (either internally, or those who have gone to Thailand), are members of either of these ethnic groups.⁹⁸

After repeated human rights violations continued into the early 2000s, many countries and international organizations such as the EU imposed sanctions on Myanmar. As outlined above, in an attempt to repair relations with the international community, Myanmar created a “roadmap to democracy” in 2003 with concrete steps to improve the country’s political processes and institutions.

Figure 7: Myanmar is transitioning towards democracy. The National League for Democracy has recently formed government



Source: “Myanmar to Create New Post for Aung San Suu Kyi, Cementing Her Power”, *The New York Times*, March 31, 2016, <https://mobile.nytimes.com/2016/04/01/world/asia/myanmar-aung-san-suu-kyi.html?referer=>.

Rights & Freedom Since 2008

i. Freedom of Religion

The 2008 Constitution does provide protection for religious freedom in principle. However, this freedom is “subject to public order, morality or health and to the other provisions of the Constitution.”⁹⁹ Moreover, the exercise of religion is permitted as long as it is not “contrary to the laws, enacted for Union security, prevalence of law and order, community peace and tranquility or public order and morality.”¹⁰⁰ While there is no state religion, the Constitution clearly “recognizes the special position of Buddhism as the faith professed by the great majority of the citizens”.¹⁰¹ Essentially, freedom of religion is illusory. It should be noted, however, that the Constitution does make discrimination on the basis of religion unconstitutional.¹⁰² This protection only applies to discrimination by

⁹⁶ Ibid.

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ *Constitution of the Republic of the Union of Myanmar* (Rangoon: Printing & Publishing Enterprise, 2008), section 6(34).

¹⁰⁰ Ibid, section 354.

¹⁰¹ Ibid, section 361.

¹⁰² Ibid, section 348.



Myanmar Constitutional Assembly

the government
(as is the case for all constitutional documents which protect negative rights¹⁰³).

There have been reports that Islamic and Christian ceremonies and events are subject to heightened scrutiny by local authorities. Often, this entails obtaining approval before moving forward with such ceremonies and events. At one point, a nationwide Islamic conference was cancelled because local authorities in Yangon believed it would affect “peace and stability”. Since Buddhist nationalists carry much sway in Myanmar, these incidents are not uncommon.¹⁰⁴

The treatment of Rohingya Muslims by Myanmar’s military stands as the best example that religious difference remains a cause of friction. Most argue these people are indigenous to Rakhine state. The government of Myanmar, on the other hand, has argued for decades that they are illegal immigrants. Their abuse at the hands of the military has been long-standing and includes going from house-to-house killing children.¹⁰⁵ These types of policies and actions are often fed and amplified by Buddhist nationalists.¹⁰⁶

This conflict is ongoing, and there have been many developments in recent months. To date, 400 000 Rohingya Muslims have fled Myanmar (though many argue that this is an underestimation)¹⁰⁷, and the UN has deemed the crisis as “ethnic cleansing”.¹⁰⁸

In late August, a Rohingya militant group attacked and killed officials in 25 army posts in the state of Rakhine, which mobilized Buddhist vigilantes to carry out violent attacks on Muslim groups.¹⁰⁹ Hundreds of Rohingya have been killed, and thousands left the country in the hopes of escaping the violence at home. Suu Kyi, in a televised speech, said that Myanmar “was ready to welcome back Rohingya refugees”.¹¹⁰ She also addresses the accusations of human rights abuses, and expressed condemnation of this and other violence occurring in Myanmar. But, she left out criticism for the country’s military.¹¹¹ Suu Kyi said that “[a]ction will be taken against all peoples regardless of their religion, race or political position who go against the laws of the land and who violate human rights as accepted by our international community”, despite the fact that none of the military abuses in Rakhine State have gone punished.¹¹² She has also recently made

¹⁰³ Negative constitutional rights are rights that oblige inaction on the part of the state (ex: freedom of speech means the state cannot limit your right to freedom of expression). Positive rights oblige action by the state (ex: a right to education means the state must provide education to its citizens).

¹⁰⁴ “Burma 2015 International Religious Freedom Report”, *United States State Department*, <https://www.state.gov/documents/organization/256305.pdf>.

¹⁰⁵ May Bulman, “Burma: Rohingya Muslim babies and children ‘being slaughtered with knives’, UN warns”, *The Independent*, February 3, 2017, <http://www.independent.co.uk/news/world/asia/burma-rohingya-muslim-babies-children-slaughtered-knives-massacre-genocide-un-warns-a7561711.html>.

¹⁰⁶ Annie Gowen, “Myanmar Buddhist monks threaten democracy with support for anti-Muslim laws”, *National Post*, November 7, 2015, <http://news.nationalpost.com/news/world/muslims-are-dangerous-myanmar-buddhist-monks-threaten-democracy-with-support-for-anti-muslim-laws>.

¹⁰⁷ Koutsoukis, Jason and Lisa Beyer, “Myanmar’s Rohingya Refugee Crisis, Explained”, *Bloomberg Politics*, September 15, 2017: <https://www.bloomberg.com/news/articles/2017-09-15/myanmar-s-rohingya-refugee-crisis-explained-quicktake-q-a>.

¹⁰⁸ Koutsoukis.

¹⁰⁹ Koutsoukis.

¹¹⁰ Koutsoukis.

¹¹¹ Koutsoukis.

¹¹² Jonathan Head, “Rohingya crisis: Are Suu Kyi’s Rohingya claims correct?”, *BBC World News Asia*, September 19, 2017: <http://www.bbc.com/news/world-asia-41312931>.



comments about the “misinformation” surrounding the crisis, and has insinuated that incorrect information is being spread in order to create divisions in society.¹¹³

Severe damage has been done to Aung San Suu Kyi’s reputation as a result of this conflict, so much so that some are calling for her Nobel Peace Prize to be revoked.¹¹⁴ Criticism has also been leveled at Myanmar’s military, although it has largely been ignored by the international community.^{115,116}

At Suu Kyi’s request, the Kofi Annan Foundation worked with her office on dealing with the crisis, and formed the Rakhine Advisory Commission to tackle “issues involving: rule of law; inter-communal relations; security; economic development; and the social sector.” Among the many recommendations made by the Commission is a review of the 1982 citizenship law. Following the Commission’s report, the President has created the Committee for the Implementation of Recommendations on Arakan [Rakhine] State which is, among other things, tasked with closing down all internally displaced persons camps in Rakhine State.^{117,118}

ii. Freedom of Speech

Prior to the adoption of the new Constitution, internet censorship was prevalent in Myanmar, whether that be in the political or social spheres.¹¹⁹ However, following Aung San Suu Kyi’s release from house arrest and under the leadership of the new “civilian” government of President Thein Sein (a former general), these censorship rules were relaxed.

Moreover, in 2012, the Ministry of Information ended a requirement dating back to 1962 that demanded news organisations submit their materials to the government before publication. This requirement was not changed for films.¹²⁰ That being said, the ban on any publication that jeopardizes the “security of the state” continues and journalists must submit their articles to the government for post-publication analysis.

A more pressing threat is section 66(d) of the *Telecommunications Law* introduced by President Sein’s government in 2013. The section states that anyone

¹¹³ Koutsoukis.

¹¹⁴ Koutsoukis.

¹¹⁵ Jesse Hartery, “Stuck in Myanmar’s Constitutional Straitjacket”, *McGill International Review*, July 28, 2017: <http://mironline.ca/stuck-myanmars-constitutional-straitjacket>.

¹¹⁶ Mark Farmaner, “Only One Person Can Stop Ethnic Cleansing in Myanmar, And It’s Not Aung San Suu Kyi”, *The Huffington Post*, September 13, 2017: http://www.huffingtonpost.com/entry/myanmar-rohingya-aung-san-suu-kyi_us_59b83175e4b02da0e13cf59f.

¹¹⁷ Paing Soe, “Implementation Committee arrives in Arakan; several schools reopen”, *DVB News*, September 19, 2017: <http://www.dvb.no/news/implementation-committee-arrives-arakan-several-schools-reopen/77462>.

¹¹⁸ Democratic Voice of Burma, “Myanmar: President appoints body to implement Annan Commission recommendations”, *ReliefWeb Blog*, September 14, 2017: <https://reliefweb.int/report/myanmar/myanmar-president-appoints-body-implement-annan-commission-recommendations>.

¹¹⁹ Jillian C. York, “Internet freedom in Myanmar: A curse or an opportunity?”, *Al Jazeera*, April 11, 2014, <http://www.aljazeera.com/indepth/opinion/2014/04/internet-freedom-myanmar-curse--201441095932371441.html>.

¹²⁰ “Burma abolishes media censorship”, *BBC News*, August 20, 2012, <http://www.webcitation.org/6A3ccOvmY?url=http://www.bbc.co.uk/news/world-asia-19315806>.



Myanmar Constitutional Assembly

“extorting, coercing, restraining wrongfully, defaming, disturbing, causing undue influence or threatening any person by using any Telecommunications Network” faces prosecution and a possible prison sentence of up to three years.¹²¹ This has been used to attack political speech.¹²² Recently, this law was used to prosecute the secretary of the NLD for criticizing the military’s behaviour as it relates to the human rights abuses being perpetrated against the Rohingya Muslims.¹²³

The Peace Process

After a negotiation lasting two years, the government of Myanmar signed a ceasefire with 8 ethnic groups in 2015. This was meant to bring an end to the many lasting and violent conflicts in the country. That said, the lack of trust in the military government led almost half of the armed groups in the country not to sign the ceasefire, as well as differences of opinion regarding which groups should be involved.¹²⁴ This action was led by former President Thein Sein, who is often credited with creating a more peaceful Myanmar, as was his main goal while in office.¹²⁵

Although the Nationwide Ceasefire Agreement (NCA) was called “a road to future peace in Myanmar”¹²⁶ by the President, it did not bring about the widespread and universal liberation that it was aimed to. Some groups still live under extreme duress and persecution. Signatories included the Karen National Union (KNU), whose conflict with the nation’s military has spanned over 50 years and is one of the oldest armed groups in the country. However, the United Wa State Army, who was viewed as the best equipped armed group, and the Kachin Independence Organization which has a large portion of the northeast region of the country under its control, and who were a part of a separate ceasefire that broke down in 2011, did not sign the agreement.¹²⁷ There are rumours that China influenced the decision made by the armed groups, which are denied by the nearby country. Former President Sein mentioned that he would continue his efforts to get more groups involved in the ceasefire at a later time.¹²⁸ The groups who have signed the ceasefire are on their way to joining the legitimate political sphere, and have been removed from the list of Unlawful Associations, which was conceived in the colonial period to persecute individual associates of armed and violent groups.¹²⁹ Despite this, the country is still a very dangerous place for Rohingya Muslims, who are persecuted and preyed on by armed groups based on their faith. There is a particular threat for them from radicalized Buddhist groups, who have gained traction in recent years.

¹²¹ Lun Min Mang, “Section 66(d), the newest threat to freedom of expression in Myanmar?”, *Myanmar Times*, November 23, 2016, <http://www.mmmtimes.com/index.php/national-news/23843-section-66-d-the-newest-threat-to-freedom-of-expression-in-myanmar.html>.

¹²² Ibid.

¹²³ Poppy McPherson and Cape Win Diamond, “Free speech curtailed in Aung San Suu Kyi’s Myanmar as prosecutions soar”, *The Guardian*, January 9, 2017, <https://www.theguardian.com/world/2017/jan/09/free-speech-curtailed-aung-san-suu-kyis-myanmar-prosecutions-soar>.

¹²⁴ Slodkowski, A. “Myanmar signs ceasefire with eight armed groups”, *Reuters*, October 15, 2015, <http://www.reuters.com/article/us-myanmar-politics-idUSKCN0S82MR20151015>

¹²⁵ Fisher, J. (2016, March 30). Myanmar: Thein Sein leaves legacy of reform. *BBC News*. Retrieved from: <http://www.bbc.com/news/world-asia-35916555>

¹²⁶ Slodkowski

¹²⁷ Ibid.

¹²⁸ Ibid.

¹²⁹ Ibid.



This NCA occurred under some outside pressure, particularly from the Obama Administration. The US government of the time was pushing for greater protection of minorities in Myanmar as well as an end to the ongoing civil unrest, and viewed this move as a step in the right direction.¹³⁰

Case Studies

In order to better understand the issues of minority rights and political freedoms in Myanmar, it is helpful to look to other countries that may have faced similar hurdles to compare their policies and best practices. Nigeria and India are two such countries who have chosen power sharing systems so that minorities are better represented in the political sphere and their concerns are heard at a local level. In addition, both Nigeria and India have entrenched rights and freedoms into their constitutional documents. A look at how these rights are articulated will be informative.

i. Nigeria

Nigeria as we know it today was formed by British colonialists, who brought two separate and distinct regions together to create the new country. The populations living in these regions were very different, and their unification created inequality in the newly formed nation. The events that occurred in the aftermath of Nigeria's formation followed the common course of events of decolonization. The elite who were given roles as colonial officers during the colonial era were the only ones with any experience in politics, so they were at the helm of the political structure that emerged in the early post-colonial period. This continued to enforce the social and economic hierarchy that had existed for centuries, and did not provide minorities or the working class with many opportunities to take on any major role in the political sphere. The issues that this caused persist today, but there have been political changes made to attempt to make up for the reinforced political inequality and lack of representation that existed as a result. These changes have been met with criticism, and the best way to manage the enormous diversity of the nation is still up for debate.

The federal system in Nigeria was implemented toward the end of the colonial era by the British, who believed that this would be the most effective way to manage the diverse state that they had created, as well as its size. They divided powers in this way to attempt to "hold together" the varied interests and points of view of their population. They divided it initially by the three most distinct ethnic (and linguistic) groups in the country: the Hausa-Fulani, Yoruba, and Igbo, which were regionally distinct for the most part, the then Northern, Western, and Eastern Regions. After the colonial era ended, the now independent country split further to make up for the over-simplification of the British model, adding another region.¹³¹ After this, and after a period of political turmoil, the government of General Yakubu Gowon chose to create twelve states, replacing the four provinces of the past. Subsequent governments made smaller changes to the federal makeup of the country until 1996. All of these changes provided minority ethnic groups in states with powerful majority groups more control over their own affairs. One example

¹³⁰ Ibid.

¹³¹ Dele Babalola, *Nigeria: Federalism Works*, (New York: IBI Global Conservatory, 2014), accessed March 21st 2017, <https://theglobalobservatory.org/2014/08/nigeria-federalism-works/>.



of this is the Ijaw ethnic group in the Bayelsa State, who were given more autonomy in the late nineties when the Rivers State was created.¹³²

Nigeria has taken many other steps to give more autonomy to the various ethnic groups who suffer under the powerful governance of certain majority groups. One of the most far reaching of these measures was entrenched in the Nigeria constitution in 1979. It stated that the composition of the country's federal system and its states needed to reflect the diversity of the nation, and that the institutions working within that system would be held to the same standards of representation as the states. Part of its aim is to avoid a single ethnic group (or the central government) being in charge of an agency or institution, and thus the potential domination of that group in a given sector, for example. Scholars have argued that while this objective may still be in the process of being met, the policy has been generally effective at ensuring that power is distributed between the states and is not too centralized.

The federal system in Nigeria has allowed the country to manage its varied interests given the diversity of its population, while still being unified and maintaining its national interests and identity. Though there has been undeniable political turmoil in this nation, the system that is currently in place and the constitutional provisions to protect it mean that one can be generally, albeit cautiously, optimistic about the future of minority rights in Nigeria.

In Nigeria, freedom of the press and freedom of expression are among the priorities of the newest government, which gained power in an election that was reportedly free of illegal interference.¹³³ However, there are still frequent assaults on journalists in the country, particularly those who are reporting critically on certain powerful groups. Journalists in the north of the country have recently gained greater access to the region since the military have partially driven out the terrorist group Boko Haram.¹³⁴ In the areas where the group still holds power, Sharia Law is widely in effect and the laws around expression are very strict. This applies particularly to journalists, who face serious threats of violence in the areas where the terrorist group is in power.¹³⁵

Freedom of religion is also enshrined in the Nigeria Constitution, as well as the right not to be educated religiously, and to think freely without coercion.¹³⁶ There is also a stipulation which ensures that all types of religious education are protected, and that religious denominations are free to teach and share their religious teachings with their communities without outside interference or intervention.¹³⁷ Given the presence of Boko Haram in the north, religious communities outside of Islam can be targets of persecution, and the constitutional values are rarely upheld in these cases.¹³⁸

ii. India

¹³² Ibid.

¹³³ Nigeria. (2016). Nigeria. *Freedom House*. Retrieved from: <https://freedomhouse.org/report/freedom-press/2016/nigeria>

¹³⁴ Ibid.

¹³⁵ Ibid.

¹³⁶ Ibid.

¹³⁷ Ibid.

¹³⁸ Ibid.



Cultural pluralism plays a very important role in political culture and the structure of a given political system has the potential to make diversity an asset, or a hindrance to development. Although this type of pluralism creates significant competition for power both economically and politically, multiculturalism can make a country more vibrant if the political apparatus around it fosters it. Because of the power that one group can wield, ethnic identity can easily be politicized and used to rally supporters. Dismissing identity in politics can be misguided since the common experiences of members of the same community create more representative parliaments. In turn, this creates legislation that has been informed by the experiences of members of many different groups, and will respond to the needs of the population.

India was under British colonial rule from 1858 to 1947¹³⁹, which was established after the prior trading relationship that the British Empire had in Southeast Asia. As a region with a wealth of resources, the British had clear interests when taking a hold of the territory. When the British began to occupy India, they grossly oversimplified the vast religious and linguistic traditions that were found in the large territory, which created even more tension after British rule ended almost a century later. This came at a point when religious conflict between the Muslims and Hindus in India was at its most volatile, and resulted in the hasty division of India to East and West Pakistan, often called “partition”. The separation of the states was done with the goal of ending the violent conflict between the two groups. This is an example of secession, which is one of the more extreme ways that a country can deal with large scale ethnic conflict.

India is a diverse country with unique regions that are far apart and different in many aspects such as language and religion.¹⁴⁰ Under the federal system currently in place, each region is given at least a degree of autonomy in governance. The federal system was established in the first article of the constitution, which stipulates that India is and shall be a “Union of States”.¹⁴¹ This system allows each individual state to have governing authority over most of the policy being enacted within it, but the central government is allowed a veto.¹⁴² The central government’s ability to disallow state policies means that the former’s views and cultural biases could hinder the policy that could benefit certain ethno-cultural groups. Both the economic power that the central government holds, and their ability to disallow state policies demonstrates the scope of their influence in India. Because of this, regional parties are getting stronger and more vocal in order to defend their particular interests.¹⁴³ It could be speculated that this rise in state identity could lead to more violence and for the peace to be perturbed in this country. If this were to occur, it would go against one of the primary aims of the federal system, and might spark more conflict between ethnic groups.

¹³⁹ Chandrika Kaul, *From Empire to Independence: The British Raj in India 1858-1947* (London: British Broadcasting Corporation, 2011), accessed May 15th, 2017, http://www.bbc.co.uk/history/british/modern/independence1947_01.shtml.

¹⁴⁰ Rajashekara, 245.

¹⁴¹ M. Rao and N. Singh, *A Historical Review of Indian Federalism in the Political Economy of Federalism in India* (Oxford: Oxford University Press, 2006), accessed March 23, 2017, <http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780195686937.001.0001/acprof-9780195686937-chapter-3, 27>.

¹⁴² Rajashekara, 247.

¹⁴³ *Ibid*, 253.



The federal political system is one of the possible governmental structures that can respond to cultural and regional needs by giving them the attention they deserve. A shortcoming of the federal system, though, is that not all members of a given group find themselves in one region, so a federal system may just force the same ethnic conflicts seen on a national level to be dealt with on a smaller scale.

Arguably, the federal system has allowed India to remain democratic and to operate in a generally peaceful manner. Before this system was put in place, there were many violent outbreaks by several different Indian ethnic groups, but now their voices are heard more clearly by the government, and their interests are better represented.¹⁴⁴

India, like many democratic countries, has a right to freedom of speech engrained in its Constitution, and this right is a fundamental one. It is outlined in Article 19(1) of the third part of the Constitution.¹⁴⁵ Although, immediately thereafter, this right is restricted to “reasonable” circumstances, particularly situations where the country’s sovereignty, security or order is in question.¹⁴⁶ After the amendment which allowed for these restrictions, the government has much more power regarding limiting their citizens’ freedom of speech and expression.¹⁴⁷ That said, it must be acknowledged that as the most populous democracy, India does have a broad array of political parties, all of which are free to express their political opinions in the public square.¹⁴⁸

In recent years, there has been a decline in public trust in political reporting, since journalists have been persuaded one way or another not to publish stories critical of certain influential politicians or their policies. The most severe punishment for what is referred to as “sedition” for journalists is life in prison.¹⁴⁹ In many cases, reporters have understood the consequences of publishing critical articles and not written them to begin with. There have also been sites blocked from view on the internet in order to minimize the possibility of political unrest. In the same vein, the *Information Technology Act*, implemented in 2000 prohibits “offensive” messages from being sent online.¹⁵⁰ This Act has commonly been viewed as a form of light censorship, or a way for the government to

Figure 8: India is the most populous democracy



Source: “Voting starts in India: what about the women?”, *The City*, April 7, 2014, <http://wearthecity.in/voting-starts-india-women/>.

¹⁴⁴ Ibid, 251.

¹⁴⁵ India. (2016). India. *Freedom House*. Retrieved from: <https://freedomhouse.org/report/freedom-world/2016/india>

¹⁴⁶ Ibid.

¹⁴⁷ Ibid.

¹⁴⁸ Poirier, Saunders and Kincaid, 239-269.

¹⁴⁹ India. (2016). India. *Freedom House*. Retrieved from: <https://freedomhouse.org/report/freedom-world/2016/india>

¹⁵⁰ Ibid.



subvert the freedom of expression laws in order to silence prominent political dissenters. One important concern in India is the lack of enshrined privacy laws in the Constitution. This allows programs such as the Central Monitoring System launched in 2013 to have a far broader and potentially more dangerous reach.¹⁵¹

Though India is a secular state, Hindus make up the vast majority of its population, and a radical few have persecuted the minority groups around the country on news outlets and in other ways. This has been aimed primarily at the Muslim minority, a group with whom Hindus in India have often clashed. India's Constitution guarantees equal rights regardless of religious beliefs, and condemns discrimination based on religion. The Constitution claims to have certain resources in place to protect minorities from being persecuted, but it is clear based on events that have transpired in the country that there is not enough in place to protect vulnerable minorities, particularly in individual states. Moreover, reports have shown that this lack of support falls below international expectations set out by the UN Declaration of Human Rights. Laws around this issue are often too vague to be used in the scenarios in which they are needed, and can be circumvented. As a result, since 2014 there have been many more religiously fuelled hate crimes.

Questions to Consider:

- 1) Is it important for minority groups to have their voices heard in the political sphere? Why?
- 2) Why would majority groups who already have political power be interested in including more varied points of view in their policy making?
- 3) Should certain subjects fall outside the scope of legislative action?
- 4) Which level of government should minority groups engage with primarily?

¹⁵¹ Ibid.



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