

Pre-emptive Constitution-Making: Authoritarian Constitutionalism and the Military in Myanmar

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Constitutions are an important feature of many authoritarian regimes. But what role do they in fact perform in processes of authoritarian regime stabilization and legitimation? Much of the contemporary literature focuses on authoritarian constitutionalism in transitions away from constitutional democracy. This article considers the opposite scenario: pre-emptive constitution-making as a mechanism of authoritarian constitutionalism to contain a potential transition toward constitutional democracy. This is illustrated through the case of Myanmar. Since the 1960s, Myanmar has experienced successive periods of direct military rule without a constitution, followed since 2011 by a new constitution. Adding to the comparative literature on constitutions in authoritarian regimes, this article explains how pre-emptive constitution-making limits a transition to liberal democracy and contributes to authoritarian-regime resilience. This article further identifies “military-state” constitutionalism as a variation of authoritarian constitutionalism in Myanmar. The case of Myanmar offers comparative insights into the ways constitutions are used to contain transitions to constitutional democracy and illustrates the varieties inherent in authoritarian constitutionalism.

Constitutions and constitution-making processes are critical features of many authoritarian regimes. Authoritarian regimes can use constitutions pre-emptively to limit the possibility of transition to constitutional democracy. While authoritarian legality can take many forms (Corrales 2015; Scheppele 2018), scholars of constitutional law and politics have focused on the ways authoritarian regimes make, remake, and use constitutions. Scholars have identified the manipulation of constitutional change mechanisms to further authoritarian ends and undermine democracy and liberalism. The terms “authoritarian constitutionalism” (Isiksel 2013; Somek 2003; Tushnet 2015) or “abusive constitutionalism” (Landau 2013) are used to describe the manipulation of the constitutional order by authoritarian rulers through constitutional

I would like to thank Theunis Roux, Bronwen Morgan and Benjamin Schonhal for their comments and the three anonymous reviewers and the editor for their useful suggestions. I would like to thank the participants of the Comparative Constitutional Law Roundtable at the University of New South Wales in December 2018 for their comments on this article, including Luis Weis, Tarun Khaitan, Will Partlett, and Ros Dixon.

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Law & Society Review, Volume 54, Number 2 (2020): 487–515
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means. These concepts assume that there is, or was, a democratic constitutional order.¹ I am concerned instead with countries where there are successive periods of authoritarian rule.

Many countries introduce constitutions as part of political transitions that do not fit a linear model of authoritarianism-to-democracy or democracy-to-authoritarianism. Some countries have introduced a constitution after periods of rule when the constitution was either suspended or abolished, such as Algeria, Burundi, Iran, and Cuba. This was the case in Myanmar from 1988 when the military ruled directly without a constitution until 2011 when the 2008 Constitution was enacted. These situations raise questions about authoritarian resilience through constitutional rule. Since the 1960s, Myanmar has experienced several decades of socialist-military rule, and so there was no recent departure from a democratic constitutional order. The Constitution is not simply a sham or façade, as some scholars have characterized constitutions in authoritarian regimes. Instead, the Constitution was used to make a specific and deliberate turn away from direct military rule to a military-state to preempt democracy.

My aim is to show how the 2008 Constitution has been used to contain a transition to constitutional democracy through pre-emptive constitution-making. I trace the relationship between the Constitution and politics, affirming Nonet and Selznick's (2001) approach to law in authoritarian regimes as closely intertwined with politics and political power. I also aim to illustrate the variations of authoritarian constitutionalism through a consideration of military-state constitutionalism in Myanmar. The military-state facilitates the coexistence of military and civilian actors and institutions. It has three key parts expressed through the Constitution—the political leadership of the military; a national ideology used to the advantage of the military; and rule by a centralized administration. The attraction of this model is that rather than capture one institution or branch of government, the military is able to infiltrate all branches of government while maintaining its own autonomy. As a mode of authoritarian constitutionalism, the military-state demonstrates that constitutions may contribute to authoritarian resilience and that authoritarian rulers can use constitution-making pre-emptively. That is, constitution-making can facilitate authoritarian resilience by enabling a transition from one form of military rule to another.

¹ The broader literature on democratic decay is large and is not the primary focus of this article, but an important early contribution is Linz and Stephan (1978).

1. Authoritarian Constitutionalism

1.1 The Role of Constitutions and Legality in Authoritarian Regime Resilience

Scholars are now alert to the importance of constitutions in authoritarian settings. In the past, scholars often consigned authoritarian constitutions to categories such as “nominal” or even “fake” constitutions (Loewenstein 1957; Sartori 1962). This approach was dismissive of the reasons why or how authoritarian regimes use constitutions. In recent decades, however, a new generation of scholarship has driven inquiry into the role and function of constitutions in authoritarian regimes (e.g., Barros 2002; Brown 2002; Ginsburg & Simpser 2014; Ginsburg & Moustafa 2008; Moustafa 2014). Law and society scholars have also called attention to the fact that failed or fragile states are not necessarily lawless states, but rather places where law matters (Massoud 2013; see also Garth & Sarat 1998). Similarly, constitutions matter in authoritarian regimes, and scholars have turned to consider how and why, or under what conditions, constitutions matter.

This article explores the idea of authoritarian constitutionalism and its variations. Constitutionalism is both a means of distributing and limiting power, and a means of regulating and stabilizing politics (Klug 2000: 23). Regimes that manipulate the constitutional democratic order and slide into a form of constitutionalism that furthers authoritarian ends are of particular concern.² A political system that uses the constitution to validate and facilitate the abuse of public power has been described variously as “authoritarian constitutionalism” (Isiksel 2013; Somek 2003; Tushnet 2015), or “abusive constitutionalism” (Landau 2013). This focus on *disintegration* or manipulation of democracy to facilitate authoritarian rule is also captured in the use of the term “stealth authoritarianism” to denote ways that an ostensibly democratic system can be used in favor of perpetuating the dominance of one political party or group over others (Varol 2014). What these approaches share in common is a focus on the decline or misuse of democracy and constitutionalism, that is, illiberal backsliding, which is important but only captures one process that leads to authoritarian constitutionalism. Authoritarian constitutionalism can also result from the intentional use of constitution-making to design a constitution that furthers authoritarian

² A range of studies uses large quantitative data sets to explain authoritarian regimes and their variations (Geddes et al. 2018; Haggard and Kaufman 2018; Svobik 2012). These studies generally are not focused on the constitution and its role in authoritarian regimes. As Klug (2000: 5) observes, “most analyses of political transition do not recognize the role of law in the reconstitution of the state.”

resilience.³ In this scenario, liberal democracy does not necessarily constitute the starting point for change. I refer to this as “pre-emptive constitution-making,” that is, when elites preempt a democratic political transition by introducing a new constitution.

The scholarly focus on authoritarian constitutionalism considers both the constitutional and legal techniques of “legalist autocrats,” particularly in regimes once considered to be consolidated democracies such as Hungary, Poland, and Venezuela (Corrales 2015). Rajah (2012) is concerned with techniques of “authoritarian rule of law” as illustrated by the case of Singapore. Similarly, Corrales develops the concept of “autocratic legalism” as the use, abuse or nonuse of law to influence politics toward authoritarian ends, as has occurred in Venezuela (Corrales 2015). Scheppele (2018), building on Corrales, uses the concept of “legalist autocrats” for authoritarian rulers who claim to work in the name of the people but in fact upend democracy and its associated ideals of liberalism. This tactic turns democracy against the principle of constitutionalism by misusing or removing constitutional limits on government power in the name of populism (Scheppele 2018). Many of the legal and constitutional techniques that contemporary legalist autocrats use—from extending presidential term limits to changing judicial appointment rules to packing courts—are techniques that have been used by authoritarian rulers in a range of contexts, such as across Africa (Chanock 2016; Okoth-Ogendo 1993).

In such authoritarian settings, constitution-making can become an illiberal exercise of legalist autocrats. In seeking to understand constitution-making in authoritarian regimes, scholars are broadly concerned with three related matters: the process of constitution-making, the substance of the constitution, and the actual function of constitutions in authoritarian regimes. On the process, authoritarian regimes in Latin America have been found to introduce a new constitution in the *immediate* years after taking power as a means to consolidate their rule (Negretto 2012; 2013). However, some authoritarians may choose to impose a new constitution at the *end* of their rule as a means of ensuring their legacy and reaching beyond the grave (Osakwe 1979: 1364).

The substance and function of a constitution is also important to authoritarian regimes because constitutions function as a “power map” (Duchaek 1973). Elkins et al. (2014) expand on the functions of authoritarian constitutions to identify its role as an operating manual, a billboard, as window-dressing or as an

³ Much of the political science literature takes democracy as the focal point, see for example Haggard and Kaufman (2018) who structure their argument around “pathways to democratic rule” and “reversions from democracy rule,” which omits the puzzle of transitions from one form of authoritarian rule to another.

aspirational blueprint and plan for future action. This approach implicitly acknowledges that the function of a constitution needs to be understood in its social, political and economic context. There are claims that some constitutions, so-called “sham” constitutions, fail to live up to a relative standard of rights protection based on comparative quantitative analysis (Law and Versteeg 2013). Qualitative research has been able to offer a contextualized analysis and pay close attention to local debates and the conditions that enable courts to protect rights claims in authoritarian regimes, from Egypt to Pakistan and Chile (Barros 2002; Hilbink 2007; Moustafa 2003; 2007; 2014; Newberg 1995).

The literature on authoritarian constitutionalism in contexts where the military is a key political actor departs from traditional assumptions about the role of a military. Expectations of the role of the military in a transition from authoritarian rule are often conditioned by expectations of the military in a liberal democracy. A liberal democratic view of the role of the military in a country in a transition from authoritarian rule to democracy is that the military must be subordinate to civilian executive control (Huntington 1957; Nordlingger 1977; Perlmutter 1977). Discussions of the military assume its subordination to the executive and often take place in relation to constitutional emergency powers as an exceptional idea. This cannot be assumed in authoritarian regimes. Indeed, sometimes the reason for the absence of a constitution is direct military rule, while in other regimes, a military may maintain a preexisting constitution but use it for its own purpose. The military may set about drafting a new constitution to distinguish itself from the old regime, as has occurred in the past across Latin America (Negretto 2013). Some scholars have observed that a constitution in an authoritarian regime may confer a special role on the military (Albertus & Menaldo 2012). In the context of Africa, Hutchful (1991) has identified military constitutionalism. Parts of Africa have witnessed constitution-making by authoritarian rulers as a constitutive act that in fact results in a constitution *similar* to previous constitutions (Chanock 2016: 20; Okoth-Ogendo 1993: 78). In this situation, it is the symbolism of the act of constitution-making, rather than any major changes in substance, that is used to reinforce authoritarian rule. In contrast, regimes in a transition to democracy are expected to take steps to *remove* any constitutional privileges of the military, reassert the authority of the civilian executive over the military, and affirm a separation between the military and police, such as in the case of Indonesia (Horowitz 2012).

The literature on the intersection between militaries and constitutional power is often concerned with the role of coups and the extent to which a coup by the military can facilitate a return to

civilian rule.⁴ Where a coup has taken place, the military may be understood as a guardian of the constitution, as illustrated in the cases of Turkey, Egypt and Portugal. Varol (2013) has gone further to suggest that in these cases the military could in fact be an effective guardian not just of a constitution in an instrumental sense, but of a more substantive constitutional democracy. Varol (2013) has written against the prevailing view that the military cannot facilitate a transition to democracy after a military coup. He suggests that a military coup can facilitate a constitutional transition under certain conditions. One limitation on the application of Varol's approach is that it is conditional upon the military representing a broad-based coalition of various social groups, that is, the military cannot be dominated by one particular ethnic, linguistic or religious group. Varol's argument is tempered by cases such as Pakistan where, as Aziz acknowledges (Aziz 2018: 89), the autonomy of political actors remained constrained, even after the military returned power to elected representatives. The influence of militaries in governance and constitutionalism thus extends far beyond coups.

Though global trends reveal new forms of decay of constitutionalism and democracy, older forms of authoritarian constitutionalism persist. Past scholarship has focused on how militaries make constitutions, either radically or symbolically, soon after assuming power to consolidate their position. Instead, I consider the pre-emptive function of constitution-making in regimes that may have endured for many years without a constitution but, in the face of new potential threats, turn to constitution-making as a technique to stave off threats of constitutional democracy.

2. Pre-emptive Constitution-Making in Myanmar

Myanmar was ruled for 36 years—first from 1962 to 1974 and then from 1988 to 2010—without a constitution. The latter period was an era of direct military rule by decree, although the military claimed to be a transitional government. My aim is to show how the 2008 Constitution has been used to contain a transition to constitutional democracy through pre-emptive constitution-making. I also aim to illustrate the variations of authoritarian constitutionalism through a consideration of military-state constitutionalism in Myanmar. I show that the military-state relies on the 2008 Constitution to enable and sanction the leadership role of the military in governance; to endorse a national ideology favorable to the military; and to maintain a centralized and coercive administrative

⁴ The political science literature on coups and the role of the military is large. For a recent restatement and clarification on what is known about coups see Geddes et al. (2018: 47–60).

structure. In this way, the military-state pre-empts the risk of a fully democratically elected government; it pre-empts the idea of federalism in favor of national unity; and it pre-empts the division of power and accountability for powerholders, instead preferring a centralized and coercive form of organization. Myanmar's 2008 Constitution is revealed as a form of pre-emptive constitution-making from records produced by the military and the government.

2.1 Methods and Approach

This research draws upon archival materials from both sources in Myanmar and those available online. At the Union Parliament Library in Naypyidaw, the capital city, I reviewed newspaper archives reporting on the speeches and proceedings of the National Convention to draft the constitution from the 1990s to early 2000s when constitution-making was a high priority for the military regime. These newspapers, which have been part of the propaganda campaign of the military regime, include *The New Light of Myanmar (Myanma Alin)*⁵ and *The Mirror (Kyemon)*. I also located government-sponsored publications dating from the 1990s to the present, which outline the military's view of history and progress of the country. In a regime that carefully guards public media and information, these sources, even if incomplete in their presentation of facts, give vital insights into the goals and ideologies of an authoritarian government. Despite media reforms since 2012, publications like *The New Light of Myanmar* still remain a progovernment and promilitary outlet. When reporting on issues related to the Constitution, it therefore offers an insight into how the military understands the Constitution.

Since the advent of social media in Myanmar, scholars have another source of primary material for examining the propaganda of the military, Facebook. When examining events from 2010 onwards, I also reference speeches of the Commander-in-Chief as reported in the media, as well as on his Web site and Facebook page.⁶ I focus on the Commander-in-Chief as the head of the military because his power derives from the Constitution

⁵ The name of the paper has changed several times. Up until 1993, it was known as *The Working People's Daily*. It was then changed to *The New Light of Myanmar*, until 2013 when the English version was changed to *The Global New Light of Myanmar*.

⁶ I downloaded various speeches from his Facebook page, although some were also simultaneously posted on his website. On 26 August 2018, the Commander-in-Chief General Min Aung Hlaing was banned from Facebook. This came just days after the United Nations Fact Finding Mission released its report concerning allegations of genocide in Myanmar (Facebook 2018).

United Nations. 2018. Report on Independent International Fact-Finding Mission in Myanmar (A/HRC/39/64), 25 August. <https://reliefweb.int/report/myanmar/report-independent-international-fact-finding-mission-myanmar-ahrc3964-advance> (accessed 26 August 2018).

and the institutional independence of the military, which is not accountable to the executive.

A third cache of primary sources derives from the records of the legislature, as a new government institution that commenced in 2011. These records are useful for capturing how the Constitution is discussed and understood by both civilian and military members of the legislature.⁷ Between 2011 and 2015, 13 legislative hearings were held. These sittings varied in duration and lasted between 2 days and 89 days. Sittings were held for each of the three houses, resulting in 39 sets of records spanning an average of 20–30 days each.⁸ I obtained these electronic records in person from the National Library of Australia. The records are in TIF (photo format) and cannot be searched easily both because the text itself is not electronically searchable, but also because there is no subject matter index or table of contents. To overcome these difficulties, I created a list of key legislative and constitutional debates available from media sources, such as the house that the matter was debated in and the time period in which the debate occurred and then used this list to identify legislative sessions where members of the legislature expressed opinions about the Constitution. My search of legislative records fell within five broad themes: constitutional amendment; executive power (including presidential power); the relationship between government institutions; the electoral system; and the judiciary, including the Constitutional Tribunal as the court established since 2011 to hear cases of judicial review and interpret the Constitution.

I had followed the Burmese news daily during this time and so relied on my knowledge of contemporary debates about the Constitution. Due to the time-intensive nature of identifying and reviewing constitutional debates in legislative records, I worked closely with a research assistant. A particular focus of attention was the constitutional amendment debates in the legislature of 2014–2015 because this was when members of the legislature openly expressed views for or against particular aspects of the Constitution. Sometimes the legislative records were simply a useful affirmation of opinions that had also been captured in the media. On some debates, the legislative records offer more

⁷ At the time of my search, the 2016 records were not available. I would like to thank the National Library of Australia for access to these parliamentary records. I cite legislative records by abbreviations: “PH” stands for Pyithu Hluttaw (lower house); “PDH” stands for Pyidaungsu Hluttaw (Union Parliament) and “AH” stands for Amyotha Hluttaw (upper house). Abbreviated citations identify the house, year, session and day, and where relevant page number, of the legislative records.

⁸ This amounts to hundreds of thousands of pages, in part because Burmese language can take up to twice the space of the same English language text.

extended discussions and alternative points of view on interpretations of the Constitution.

These documentary sources combined with fieldwork between 2010 and 2019, which included teaching in Myanmar,⁹ offer a unique portrait of authoritarian constitutionalism in Myanmar. Attention was also paid to how the previous military regime translated some Burmese sources and published them for an international, English language readership. Burmese and English language media produced by the former military regime in the 1990s–2000s directly inform this article because the media was the primary way that the regime publicized and disseminated information on the constitution-making process. Post-2011, it has been a combination of print media, online media and legislative debates that contain key records of how actors in Myanmar understand the ideas contained in the Constitution.

2.2 The Military as Supreme Political Leader

Myanmar's Constitution designates the military as having a leading role in the state. Distinct from Corrales (2015) idea of "legalist autocrats" as leaders who simply misuse or abuse the law, and from Scheppele's (2018) emphasis on legalist autocrats who use law in the name of populism, Myanmar's Tatmadaw has designed a system of law that sanctions its role in governance for the sake of guarding "national politics."

Pre-emptive constitution-making in Myanmar is motivated by a desire to prevent a fully representative civilian government taking power and permits the military to retain its role as supreme political force. The first element of military-state constitutionalism in Myanmar is that the military—known as the Tatmadaw—has a primary role in governance as sanctioned by the Constitution. The military-state is distinct from direct military rule because there are two sets of actors—an unelected military and elected civilian legislators, but the military maintains the veto vote in any effort at constitutional amendment. The political leadership of the

⁹ From late 2006 to early 2012, I volunteered several times per week with various social and community-based organizations working with Burmese refugees living in my neighborhood in Melbourne. Between 2008 and 2010, I spent two summers in (Burmese) refugee camps in Mae Sot, Thailand. From 2010 until 2019, I traveled regularly to Myanmar, with trips ranging in duration between 2 months and 1 week. These trips were for fieldwork, archival research and also for teaching. I attended a wide range of social settings for participant observation, such as constitutional amendment rallies, gatherings of lawyers, workshops, law firms and chambers, courts and legislative proceedings.

state ultimately rests with the Tatmadaw. A core goal of the Union as stated in the Constitution is to facilitate the role of the Tatmadaw in leading the Union (s 6(f)). The Tatmadaw has used the Constitution, which it drafted, to secure for itself the leading role in governance.

The inclusion of the military's leadership role in the Constitution is pre-emptive of efforts to reintroduce a more democratic constitution. In 1990, the National League for Democracy (NLD) won in the national elections. If they had been allowed to take office, they would have potentially controlled any future constitution-making process. In order to prevent the NLD from taking office and the potential of losing control over constitutional reform, the military instead decided to initiate a constitution-drafting process. The military depicts its leading role in "national politics" in opposition to "party politics." The Tatmadaw insists on the distinction in Burmese between "party politics" and "national politics" as a way to retain its role in governance.¹⁰ According to the Tatmadaw, it cannot be involved in *party politics*, that is, it does not need to be elected and it cannot have an official military political party.¹¹ There is no explicit Tatmadaw political party, although the United Solidarity Development Party (USDP) consists of former military officers and is therefore known as a proxy party for the Tatmadaw.

At the same time, the Tatmadaw uses the history of political fragmentation in Myanmar to suggest that political parties, as partisan bodies and elected representatives, are subject to infighting and fragmentation. For example, in 1958, General Ne Win took over to lead the caretaker government after the fragmentation of the major political party at that time. The Tatmadaw has used the idea that political parties cannot be trusted to maintain a stable government in order to justify the role of unelected military officers in the legislature today. The 2008 Constitution reserves 25 percent of the legislative seats for military officers. The Tatmadaw claims that because political parties cannot be trusted to protect the unity of the country, this justifies the Tatmadaw's role in governance as the guardian of "*national politics*." The Tatmadaw portrays itself as an institution that is above the competition, rivalry and factionalism of political parties (see e.g., Win 1992: 77–8).

¹⁰ This is distinction between ပါတီ နိုင်ငံရေး (party politics) and အမျိုးသားနိုင်ငံရေး (national politics). See Tin Maung Maung Than (2007: 393); for the relationship between these ideas and Burmese Buddhist thought, see Walton (2017: 65–95).

¹¹ This distinction can be traced back to the early 1990s, when Lieutenant General Myo Nyunt gave an opening speech to the National Convention in which he noted the distinction between national politics and party politics (TNLM 1993).

As the leading body of the state, the Tatmadaw demands loyalty and obedience from the people, denying an independent civilian sphere.¹² The Tatmadaw is not subordinate to civilian control and has a monopoly on coercion, with a privileged position to access and influence state resources and power. The Tatmadaw and its interests are intertwined with the interests of the state.

The Tatmadaw repeatedly claims that it plays a “leading role” in politics, the economy and society. In communist regimes, the rhetoric of the “leading role” of the party is common and is a means for the party to mask its monopoly of power (Brown 2009: 2). In the same way, the Tatmadaw’s role overseeing politics is cast as a necessity. The Tatmadaw is depicted as the “vanguard,” with this socialist-era language still employed even after the official end of the socialist regime in 1988 (Min Maung Maung 1993).

The Tatmadaw led the country directly from 1988 to 2010, and prior to that played a central role under General Ne Win’s socialist regime from 1962. Particularly since 1988, there has been a process of the militarization of governance that involves the direct and indirect influence of Tatmadaw personnel, institutions and practices of legality on civilian governance. The Tatmadaw has control and influence over matters that are usually considered to be under civilian control. The military has gained direct structural advantages under the 2008 Constitution. The classic example is the constitutional amendment rule that requires the support of military legislators due to the threshold of more than 75 percent approval in the legislature.¹³ The Tatmadaw also has indirect structural advantages, defined by its informal capture of state institutions and the loyalty it commands from its retired and former officers, which enables the Tatmadaw to shape and control the daily administration of governance. The key example is the Tatmadaw’s practice of transferring military officers into the civilian administration, for example, transferring military officers into civilian positions in the judiciary or into a government ministry such as the Ministry of Health (for more, see Crouch 2018b: 19; Pyae Thet Phyo and Swan Ye Htut 2015; Selth 2017: 12). The loyalty of former military officers transferred into civilian positions allows the Tatmadaw an informal means to monitor and capture civilian institutions.

The Tatmadaw’s indirect influence is felt through the USDP and its members who are perceived to be Tatmadaw loyalists, exchanging their Tatmadaw uniforms for the civilian longyi (Burmese sarong). The indirect influence of the Tatmadaw is

¹² Huntington (1957: 83) notes that one characteristic of a civilian state is that the military has no independent existence.

¹³ 2008 Constitution, section 436.

facilitated by geography and territorial design. The Tatmadaw has an extensive network of military outposts throughout the country. The leading role of the Tatmadaw has both explicit and implicit dimensions, as facilitated by the Constitution.

References to the leading role of the Tatmadaw, as affirmed in section 6(f) of the Constitution, are common in military speeches and have been debated in the legislature. For example, on the 70th Anniversary of Armed Forces Day, the Commander-in-Chief referred to section 6(a) of the Constitution and the Tatmadaw's role in political leadership of the Union (TGNLM, 27 March 2015). The strongest supporters of section 6 of the Constitution are the Tatmadaw and the USDP, and, to a lesser extent, ethnic political parties. In the legislature, military lawmakers argue that the Tatmadaw upholds democracy and plays a supportive role in national politics (PDH2014-11:29, 407–10). For example, Lieutenant Colonel Nyi Nyi Lwin argues that the Constitution should not be abolished simply because it was drafted during the period of military rule. USDP legislators, such as Pyithu Hluttaw representative U Zaw Myint Pe (PDH2014-11:29, 405–7), have urged the legislature to accept the role of the Tatmadaw in national politics. He suggests that removing the Tatmadaw from politics, or demilitarizing governance, would be detrimental for the country.

Some members of ethnic political parties do not explicitly call for an end to the role of the Tatmadaw in national politics and appear more resigned to, or at least diplomatic about, the role of the Tatmadaw in politics. For example, Dr. Banyar Aung Soe of the All Mon Region Democracy Party, argues that the role of the Tatmadaw in section 6 of the Constitution is necessary for now but there may be a need for amendment in the future (PDH2014-11:27, 298–300), such as reducing or removing military officers from the legislature. Similarly, some members of ethnic political parties, such as U Sai Thant Zin of the Shan Nationalities Democratic Party and Pyithu Hluttaw, argue that deleting the provision on the role of the Tatmadaw in national politics would not solve the problem of Tatmadaw involvement in politics. He argues that section 6(f) seems unnecessary (PDH2014-11:32, 517–9), which is an indirect means of criticizing the role of the Tatmadaw in national politics.

The leading role of the Tatmadaw is rarely challenged directly either by the NLD or ethnic political parties and attempts in the legislature to amend the Constitution to remove the role of the Tatmadaw in national politics has been unsuccessful. The NLD has been the main political party in favor of abolishing or amending section 6(f) and removing the military's leading role. NLD member of parliament U Win Myint of the Pyithu Hluttaw argues that the Tatmadaw's leading role in national politics (s 6(f))

contradicts several other provisions in the Constitution (PDH2014-11:25, 193–5). One of Myanmar’s leading constitutional lawyers, U Ko Ni, suggests that the Tatmadaw’s role in national politics is inconsistent with a role in the legislature or executive—that is, section 6(f) is inconsistent with the designation of military seats in the legislature and appointments in the executive (Ko Ni 2013: 53–4). Ko Ni expands on the importance of this distinction, noting that section 7 of the Constitution uses the term “party politics” (p 54). He suggests that when the military performs its duties as legislators, they are in fact participating in party politics and that this is inconsistent with section 6(f) (Ko Ni 2013: 55). Ko Ni further suggests that the Union Solidary and Development Association (USDA) was formed with the objective of being involved in “national politics” in order to avoid “party politics.” Yet the USDA later expressly declared its intention to instead be involved in “party politics” and changed its name to the USDP (Ko Ni 2013: 58). The USDP ran for elections in 2010 and formed government, and since 2016 has been a minor party in opposition.

The leading role of the Tatmadaw is further reinforced by the constitutional protection of a national ideology that favors unity and order over the perceived risks of federalism, which I consider next.

2.3 Constitutional Protection of National Ideology

While scholars have emphasized the way that authoritarian leaders may use law in the name of populism (Corrales 2015; Scheppele 2018), my discussion draws attention to the ways authoritarian leaders may construct new ideologies of unity around the military to prevent a potential transition to constitutional democracy. A further motivation for pre-emptive constitution-making in Myanmar was to endorse a national ideology that would prevent the right to self-determination, federalism and secession, and consolidate the military’s role in maintaining political and territorial unity.

Authoritarian constitutionalism in Myanmar is grounded in a national ideology known as the Three Main National Causes. This ideology was developed by the military to pre-empt demands for federalism and secession that were perceived to threaten the unity and order of the country. This national ideology was frequently employed under direct military rule (1990s–2000s) and is repeated in contemporary constitutional provisions and public rhetoric (Figure 1). In English translations published by the government, these three principles are often distilled as:

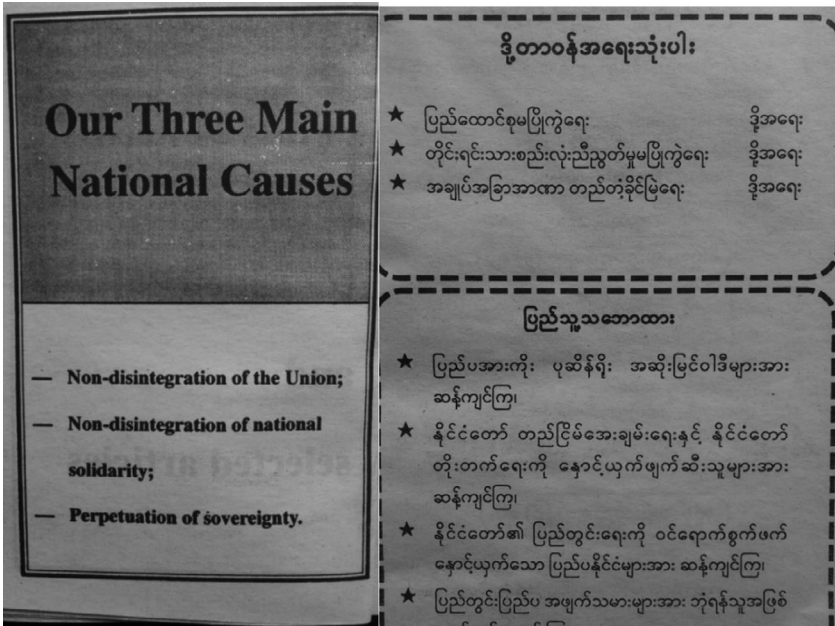


Figure 1. Example of Front Cover Matter of all Publications during the Military Regime, when the Censorship Board Mandated Inclusion of the Three Main National Causes (along with other Slogans such as the Four Political, Economic and Social Objectives, and the People’s Desires).

- Non-disintegration of the Union.
- Non-disintegration of national solidarity.
- The perpetuation of sovereignty.

These three principles first appear in the preamble and Chapter I on the Basic Principles of the Constitution. The principles are listed as a core responsibility of the Tatmadaw (Constitution, ss 6, 20(e)). Citizens have the responsibility to uphold and protect these principles. In addition, the principles are contained in the oath sworn by the president, vice-presidents, and for all legislators. There is a constitutional requirement that all political parties include these principles in their party objectives.

The principles’ origins can be traced to the prodemocracy uprising of 1988 and the subsequent takeover by the military regime. In the aftermath of 1988, with many prodemocracy activists killed, injured, missing, in prison or hiding in the border regions, the Tatmadaw ruled by issuing a series of short military orders and decrees. Aung San Sue Kyi and her then newly formed political party, the National League for Democracy (NLD), were critical of the actions of the military.

In response, the Tatmadaw set up a Committee for Writing Slogans for Nationals to justify its role in national governance (Houtman 1999: 46, 67).¹⁴ For example, in numerous military orders,¹⁵ the Tatmadaw justified its decision to prevent the NLD from taking office after its electoral victory on the need to maintain the Three National Causes, as follows¹⁶:

[para. 10] The State Law and Order Restoration Council has, since assuming its duties, consistently acted for the non-disintegration of the Union, non-disintegration of national solidarity and the perpetuation of sovereignty...¹⁷

The junta went on to note that it was focused on defending and upholding the Three National Cases while a new constitution was being drafted.¹⁸

The Three National Causes were required to be printed on the inside cover of every book and publication under the censorship regime enforced by the Tatmadaw (1990s–2012s) (see Figure 2). In 1999, the first public defense policy issued by the Tatmadaw includes reference to the Three Main National Causes (Maung Aung Myoe 1999; 2009: 1, 34). The principles were promulgated over the radio, taught in schools and printed in newspapers. In its own publications, the military listed the Three Main National Causes as a core focus and priority of the Tatmadaw, before peace and reconciliation, and before the establishment of a democratic system (Office of the Tatmadaw Archives 2000: B-6 and B-7). The Tatmadaw has emphasized the ways that the Three National Causes are upheld and the centrality of these ideals to the National Convention to draft the constitution (Office of the Tatmadaw Archives 2002). In 2015, the Tatmadaw issued its first Defence White Paper that set out “Our Three Main National Causes” as its national priorities.¹⁹

¹⁴ Callahan (1998) notes that the military slogans that emerged after 1989 were from the training some officers had received in the 1950s on counterinsurgency from the US.

¹⁵ See for example, SLORC Declaration No. 1/90, 27 July 1990; SLORC Order 13/1992, 2 October 1992. Variations in English include “Our Three Main Causes,” “Our Three Main National Causes,” or just “the Three National Causes.”

¹⁶ See SLORC Declaration 1/1990, art 10.

¹⁷ Declaration (1/90) dated 27 July 1990, issued by State Law and Order Restoration Council.

¹⁸ An earlier articulation of military ideology can be found in Ministry of Defence (1960).

¹⁹ See *The Union of Myanmar* 2015: 13, 16–18, 24, 49, and 68.

The NEW LIGHT OF MYANMAR

Established 1914

Volume XV, Number 263

11th Waning of Nadaw 1369 ME

Friday, 4 January, 2008

Four political objectives	Four economic objectives	Four social objectives
<ul style="list-style-type: none"> Stability of the State, community peace and tranquility, prevalence of law and order National reconciliation Emergence of a new enduring State Constitution Building of a new modern developed nation in accord with the new State Constitution 	<ul style="list-style-type: none"> Development of agriculture as the base and all-round development of other sectors of the economy as well Proper evolution of the market-oriented economic system Development of the economy inviting participation in terms of technical know-how and investments from sources inside the country and abroad The initiative to shape the national economy must be kept in the hands of the State and the national peoples 	<ul style="list-style-type: none"> Uplift of the morale and morality of the entire nation Uplift of national prestige and integrity and preservation and safeguarding of cultural heritage and national character Uplift of dynamism of patriotic spirit Uplift of health, fitness and education standards of the entire nation

Senior General Than Shwe sends Independence Day message

All national brethren urged to firmly uphold five objectives of 60th Anniversary Independence Day 2008

Realize objectives with Union Spirit and patriotism while making firm resolve to build a new, peaceful, modern and developed discipline flourishing democratic nation

NAU PRT Taw, 4 Jan—The following is a translation of the message sent by Chairman of the State Peace and Development Council Senior General Than Shwe on the occasion of the 60th Anniversary Independence Day.

On this auspicious 60th Anniversary Independence Day of the Union of Myanmar, I with love and respect would like to greet all the national people residing in the nation.

It has been 60 years since Union-born national races have regained independence and sovereignty of the Union of Myanmar from the colonialists

after sacrificing lots of blood, sweat and lives.

Throughout history, national brethren including Kachin, Kayah, Kayin, Chin, Bamar, Mon, Rakhine and Shan had the fine tradition of living in amity, unity, mutual compassion and understanding and through thick and thin based on Union Spirit. And with that fine tradition and noble spirit, the national brethren were vigorously and daringly safeguarding the State for the perpetuation of the nation and sovereignty. Hence, the nation stood tall in the world with dignity as a sovereign and independent state under the rule of her monarchs throughout the past successive eras.

In the late 19th Century, Myanmar monarchy met its end and the nation lost independence and sovereignty due to colonialist aggression. Naturally, Myanmarans are gifted with the spirit to make sacrifices for the nation and race, the spirit to cherish and value own nation, race, sovereignty, literature and traditions and culture and the spirit to never tolerate any acts that will harm national dignity. Hence, they fought back he international sacrificing lots of blood, sweat and lives and regained independence and sovereignty.

(See page 8)

Figure 2. Independence Day Address by General Than Shwe as an Example of the Historical Narrative of the Military.

The Tatmadaw remains an active promoter of this doctrine, although members of the Union legislature have debated the necessity of the constitutional provision that requires every citizen to uphold the Three National Causes (s 383). In 2015, NLD legislator Dr. Myo Aung of the Pyithu Hluttaw suggested that this provision should be removed because these are the tasks of the *government* and not of individual citizens (PDH2014-11:30, 436–8). This may have been a strategic move as he did not seem to disagree with the Three National Causes in principle, simply who was responsible for them. Military legislators disagree, arguing that the obligation on individuals to uphold the Three Main National Causes (in s 383) was necessary in addition to the obligation on the Union in section 6 (PDH2014-11:30, 449–52).

These principles appear on nine separate occasions in the Constitution, asserting inclusivity through the emphasis on “*Our*,” co-opting the people in the Tatmadaw’s mission, priority as the “*Main*” or preeminent principles of the state, and intimately connected to the state as “*National Causes*,” blurring the lines between the state and the Tatmadaw. Loyalty to these principles is required from the people, political parties, Tatmadaw officers, the

administration, the judiciary and members of the legislature. In short, all branches of government, as well as the people, are bound by these three principles.

The first element, *non-disintegration of the Union*, (Constitution, s 6(a)) embodies the territorial unity of the country. This principle represents the rejection and denial of the secessionist and separatist demands of ethnic groups. The Tatmadaw has long rallied against groups that take up arms against the government, whether it be communist insurgents or ethnic armed groups. Independent Burma struggled to contain both insurgency by the Communist Party of Burma and the armed struggles of ethnic organizations for territory and recognition (South 2009). The unusual constitutional option in the 1947 independence Constitution of secession from the country for certain ethnic groups after 10 years was never realized, and this became a rallying point for ethnic grievances. The principle of non-disintegration is a reference to the territorial integrity of the country and is inherently anti-secessionist, an exhortation to resist and prevent state fragmentation or collapse. The potential threat of the splintering of state territory is designed by the Tatmadaw to invoke fears of crisis and chaos if ethnic groups do not adhere to the unity of the state.

The second element, the *non-disintegration of national solidarity*, (Constitution, s 6(b)) overlaps with the first principle but also imagines a certain people or nation that is the subject of the Constitution. The Constitution does not use the term “the people” but rather preferences the more limited term “national races” (*tainyinthá*), which must stand in unanimity and harmony. Recognition as a national race confers legitimacy as a citizen and inclusion in the state. The absence of recognition as a national race leads to exclusion from citizenship and, at worse, statelessness (Crouch 2020b). The concept of national races has changed over time and the mid-1960s onwards saw the rise to prominence of national races as a classification system in Myanmar (Cheesman 2017). The national races classification—or “truth regime” (Cheesman 2017)—is based on a fixed and rigid notion of identity, although it has antecedents in Soviet ideas of nationalities. No national race should attempt to secede from the state, according to the Tatmadaw.

Third, the *perpetuation of sovereignty* (Constitution, s 6(c)) is a reference to the permanence of the Union. It relates to the perceived need to fend off internal and external interference in the Union. Foreign interference in matters of state sovereignty was a constant source of paranoia for the military regime, though also a convenient justification to legitimize its rule. This fear of foreignness had multiple manifestations but includes resistance to

colonial rule, fear of communist insurgents, fear of the international community, and fear of its two most populous and powerful neighbors China and India. The principle of the consolidation of sovereignty is related to the continuity of the Union and its main political actor, that is, the role of the Tatmadaw in protecting national sovereignty.

The Three National Causes limit the ability of ethnic groups, civil society, political parties, elite political actors, and citizens to assert their rights and participate in politics, but do not limit the power of the strongest institution, the Tatmadaw. The principles feature frequently in speeches on days of national significance: the commemoration of the signing of the historic Panglong Agreement with several ethnic groups in 1947, known as Union Day; the commemoration of independence from British colonial rule on 4 January, known as Independence Day; and the commemoration in March each year of Armed Forces Day, as well as specific addresses to military personnel such as in addresses to new recruits to the Defence Services Academy (Commander-in-Chief 2016). For example, at a speech to the 59th intake of officers to the National Defence Services Academy, the Commander-in-Chief urged those present to undertake Our Three Main National Causes (Eleven Myanmar 2017). The Three Main National Causes are the responsibility of all national races (Commander-in-Chief 2017d).

Since 2012, a nation-wide peace process has been in progress and a National Ceasefire Agreement was signed by some (though not all) parties in 2015. As part of this process, under the NLD government, several Union Peace Conferences have been held known as the 21st Century Panglong (a reference to the historic 1947 agreement mentioned above). The Three Main National Causes feature in the speeches at the Union Peace Conference. For example, at the Union Peace Conference on 2 September 2016, the Commander-in-Chief affirmed that the peace process is taking place based on the Three Main National Causes (TGNLM, 2 Sept 2016). The Commander-in-Chief not only emphasized the duty of the Tatmadaw to promote these causes, but also reiterated that the Three Main National Causes are a responsibility and obligation of *all* people (Commander-in-Chief 2017b). On 15 October 2017, the second anniversary of the Nationwide Ceasefire Agreement, the Commander-in-Chief referenced the Three Main National Causes repeatedly. While noting that the Nationwide Ceasefire Agreement aims to work toward a Union based on democracy and federalism, he also reiterates that this is to take place while upholding the Three National Causes. The Commander-in-Chief reminded signatories to the National Ceasefire Agreement that the agreement includes adherence to the Three Main National Causes (Commander-in-Chief 2017a).

Further, the Three Main National Causes feature in legislative debates over constitutional amendment. A National Unity Party member of the Pyithu Hluttaw argued that the Three National Causes are necessary because they are the foundation for national unity (PDH2014-11:29, 399–400). The Three National Causes have also been reinforced by military legislators, who occupy 25 percent of all seats. For example, Lieutenant Colonel Kyaw Myint argues that constitutional amendments should only be done in a manner that does not infringe the Three Main National Causes (PDH2014-11:29, 400–2).

The leadership role of the Tatmadaw in its national ideology is operationalized through state administration based on coercive centralism, which is the third element of the military-state I turn to next.

2.4 Coercive Centralism of State Administration

The Tatmadaw's third motivation for pre-emptive constitution-making in Myanmar has been to ensure the concentration and centralization of power. The growth in constitution-making and constitutionalism globally since the 1990s has often defined constitutionalism in close relation to the role of constitutional courts and bills of rights (Klug 2000; Tate & Vallinder 1995). By expanding the definition of constitutionalism beyond the role of courts, authoritarian constitutionalism can be sustained primarily through the administration. Military-state constitutionalism embodies this idea of constitutionalism through a powerful administration and a subordinate judicial branch. The 2008 Constitution, as a detailed document of the institutions and powers of the state, organizes and allocates power with an implicit emphasis on coercive centralism. This means that rather than being animated by the idea of the separation of powers, power is shared and overseen in ways that minimize dissent and ensure cooperation with the agenda of the central Union government and the Tatmadaw. The idea of coercive centralism pre-empts any role for the courts in checking abuses of political power or protecting individual rights.

Coercive centralism is implicit throughout the Constitution in the way that the central Union government allocates power to different actors and enables the military to maintain watch over all branches of government. Coercive centralism is embodied in two ideas contained in Chapter 1 of the Constitution, such as the concept of a *disciplined* or limited democracy (s 7) and the political basis of the state as a *Union* (s 8). Coercive centralism concerns the relationship between the military as the leading body and its relationship to the other branches of government. It conditions how

the branches of government interact, and how the legislature, executive and judiciary relate to the military.

The leading role of the Tatmadaw allows it to act as a coercive force to secure compliance from state institutions and the people, distorting any meaningful system of checks and balances, as there is no check on the power of the Tatmadaw. The term “coercive centralism” bears similarities to “democratic centralism” of socialist regimes.²⁰ In a party-state, democratic centralism in its actually existing form allows the party to control the decisionmaking and election process, so that law offers no institutional restraints on the party (Krygier 1991; 1999). A strong culture of coercive cooperation exists among the institutions of the military-state in Myanmar.

Coercive centralism describes the relationship both between and within the branches of government, and between Union level branches and State/Region level branches. The Constitution facilitates the centralized design of the institutions of governance. Power is highly concentrated at the Union level. Among the branches of government there is an expectation of cooperation, rather than conflict and competition. The Constitution is replete with references and exhortations to loyalty to the Union and implies an absence of disagreement. Section 11(a) of the Constitution is the earliest reference in the text to the three branches of government and a division of powers among them. The dominant conception of the relationship between the judicial, legislative and executive branch is of centralized collaboration and coordination. While the legislature has played a robust role (EgretEAU 2016; Kean 2014; Win 2016; Win & Kean 2017), it is the joint sitting of the two houses that frequently acts as a centralized legislative body. Viewed in light of the Constitution as a whole, the three branches of government are subordinate to the Tatmadaw.

The Constitution is based on the idea of “the Union” and constructs the country as a united entity. There has been significant debate among political actors over if, or to what extent, the Constitution allows for a limited form of federalism. The Constitution preferences the term “Union” as a *deliberate* choice and to the exclusion of the term “federalism” (e.g., Kaungbon 1994: 180). Constitution-makers sought to exclude and deny federalist demands. Crucial to coercive centralism is that appointment processes and lines of accountability are highly centralized at the

²⁰ Myanmar is absent from the study of comparative communism (Brown 2009: 2) and has only occasionally been noted as a “borderline” case of socialism (Kornai 1992: 6). One reason is that the military first gained political experience as the caretaker government in 1958–1959, and then, from 1962 to 1988, controlled power through the guise of the Burma Socialist Programme Party (BSPP) (Nakanishi 2013), while it was fighting against the Burma Communist Party (Linter 1990).

Union level. The concept of the Union is contrasted with the idea of federalism. Some socialist regimes claimed to be federal, although this claim generated debate over whether it was real federalism or simply a means for the central government to contain and appease national minority groups (e.g., Ramet 1992; Uibopuu 1979). In the past, the Tatmadaw equated federalism in Myanmar with the risk of secession. Talk of federalism for decades after Ne Win's coup in 1962 was taboo. Since the peace process commenced in 2012, discussions about federalism between the three key actors—the Tatmadaw, the NLD and ethnic armed groups—have become normalized. The peace process dialogue has detached federalism from secession and provides space for a broader understanding of the term connected to demands for the end of conflict. In 2015, the National Ceasefire Agreement specifically utilizes the language of federalism (albeit that federalism is a loan word from English into Burmese). Federalism also appears as a prominent part of the mandate of the State Counselor, Aung San Sue Kyi.²¹ Yet there have been no challenges to the centralized structure of administration in Myanmar as a Union.

Coercive centralism entails no horizontal separation of powers between the branches of the state. In a party-state, emphasis is often placed on the *unity* of powers, rather than a separation of powers. In other words, democratic centralism is said to be consistent with the absence of a separation of powers (Uibopuu 1985: 695). In a similar vein, in Myanmar, there is no vertical separation between different levels of government. Through powers of appointment and processes of accountability, the Union government and President dominate over the 14 subnational governments. According to the Constitution, the leadership of the subnational governments are appointed by the Union government, report to the Union government and receive their duties from the Union government.

The Tatmadaw is committed to a strict separation of powers between the legislature and executive, and between the executive and judiciary at the Union level, but not to separation between itself and other branches of government. Despite the Tatmadaw's attempts to divide the political realm, Nonet and Selznick's (2001) claim that in authoritarian regimes law is never autonomous from politics holds as the Myanmar Constitution in this environment is not autonomous from politics. Governance in Myanmar has long been centralized. The socialist regime of 1962–1988 did refer explicitly to socialist ideas such as democratic centralism; however, the centralizing and centralist tendency overpowered any

²¹ See the Law on the Office of the State Counsellor No. 1/2016. See Crouch 2020a.

modicum of democracy (Tin Maung Maung Than 2004: 193). While elections were held several times during this era, generally only one candidate per seat ran for office. At this time, the Burma Communist Party was in armed struggle against the socialist-military state. Documents of the Burma Communist Party employed the language of the “leading body” or the “vanguard” of the working class to describe the party, and the idea of “democratic centralism” was also in use (see Fleishmann 1989). Beyond the socialist regime and into military rule post-1988, the socialist term “vanguard leaders” was still used to refer to the Tatmadaw leadership.²²

In contemporary Myanmar, the Constitution does not conceive of the courts acting as a check and balance on the power of the legislature or executive. To the contrary, the Union legislature acts as a check on the executive and on the courts. That the legislature acts as a check on the courts runs counter to the assumption built into liberal ideas of constitutionalism that the courts act as a check on the power of the executive and the legislature. Instead, this model of military-state constitutionalism emphasizes that the courts should work closely with the other branches of government. Subordinate to the executive and legislature, and indirectly controlled by the military, the judiciary is the branch least threatening to the Tatmadaw.

Authoritarian constitutionalism in Myanmar grants little room for the courts as a check on the power of the state. Although a new Constitutional Tribunal was established in 2011, the Tribunal cannot receive individual complaints from citizens and it has heard just fourteen cases in 8 years (Crouch 2018a; Zan 2012). The small but growing academic scholarship on the role of the courts in Myanmar past and present (Cheesman 2012; 2015; 2017; Crouch 2018a; 2019; Zan 1999; 2012) emphasizes the nature and challenges of criminal legality. Here I am concerned with the prospects for constitutional review and the Constitutional Tribunal as a result of the political transition. The notion of coercive centralism encapsulates the reality that the courts are subordinate to the other branches of government and to the Tatmadaw, as the most powerful and pervasive institution. The Constitutional Tribunal is too closely aligned with the President’s Office because the government of the day dominates the appointment process. This structural bias limits the possibilities for constitutional review

²² In English language texts written by Burmese authors or academics, it is often unclear if these scholars are using terms such as “vanguard” as their own terms or whether they are repeating terms used by the military to refer to itself, see for example Tin Maung Maung Than (2004: 188).

through the Constitutional Tribunal to be used as a mechanism to check the power of the executive.

Further military-state constitutionalism limits political participation. While the 2008 Constitution does permit political parties to form and compete in elections, political participation in Myanmar is circumscribed by the idea of disciplined democracy (Cheesman 2015; Walton 2017: 65–95). In a similar way, the concept of democratic centralism promised to promote popular participation in the state, while at the same time ensuring that power is centralized in the party that maintains ultimate control over state power (Gillespie 2018: 48–9; see also Biddulph 2018). Democratic centralism enables and consolidates central party control over regional officials; similarly, coercive centralism enables and consolidates centralized Union control over subnational governments. In Myanmar, subnational governments remain dependent upon and subordinate to the Union government, and the Union government has the power to assign responsibilities to subnational governments. The existence of subnational governments in Myanmar is not so much a sign of the deconcentration of power as it is a demonstration of the continuing dominance of the Union over subnational actors.

3. Conclusion

Myanmar presents a case of a legally constituted military-state and of authoritarian resilience through constitutionalism. That is, the military has used constitution-making as a device to prevent a transition to constitutional democracy and to entrench the role of the military in governance as a form of pre-emptive constitution-making. In this approach, constitution-making is a preventative tactic by authoritarian rulers to stave off a potential political transition to constitutional democracy. In this article, I have shown the centrality of the Constitution to the Tatmadaw's plans to create and sustain its new political order post-2011.

Authoritarian constitutionalism in Myanmar is characterized by the coexistence of military and civilian authorities while at the same time maintaining the preeminence of the military. The idea of a military-state with its three key elements—military political leadership; national ideology favorable to the military; and centralized administrative control—demonstrates one variant of authoritarian constitutionalism. Part of the attraction of a military-state for elites is that the role of the military is not limited to any one branch of government but in fact permeates all branches of government. The military-state blurs the assumed lines between military and civilian authorities and institutions. The Constitution is a key part of how the military rules Myanmar.

The concept of coercive centralism ultimately helps us to understand the position and role of the courts in relation to the other branches of government. While cases like Egypt show that democracy is certainly not a precondition for the judicialization of politics (Moustafa 2003; 2007), the courts in Myanmar have no independence and therefore play a minor and subordinate role in politics. This is because the courts are subject to interference from the executive, legislature and military. Instead, the administration and the legislature play a heightened role in maintaining military-state constitutionalism.

Acknowledging the use of pre-emptive constitution-making for authoritarian ends and the ways a resulting constitution limits the democratizing potential of political transitions offers a promising line of comparative inquiry. Certainly, understanding how and under what conditions countries with a liberal constitution experience democratic decay, and the use and abuse of the constitution by the new regime for authoritarian ends remains of pressing scholarly concern. But authoritarian constitutionalism does not only result from formerly liberal countries falling into democratic decay. There is a longer history of countries that move from one constitution to another, or from unconstitutional rule to constitutional rule (and sometimes back again), without undergoing a political transition toward constitutional democracy. The case of Myanmar is a reminder of this. The literature on authoritarian constitutionalism calls us to consider the importance of constitutional texts to authoritarian regimes and the imperative to interrogate when and why law matters. My article has focused on authoritarian constitutions as pre-emptive devices to arrest a threatened transition to constitutional democracy and to stabilize, in this case, military control.

Going forward, scholarly inquiry must interrogate the relationship between militaries and constitutions, rather than presume that the military is either subordinate to executive power or focused on state-capture of the executive only. The military remains a key political actor in countries around the world from Egypt and Turkey to Pakistan, Thailand and Venezuela. In authoritarian regimes, the military may be central to the process and substance of constitution-making. I have explored pre-emptive constitution-making as a means of exploring when and why authoritarian regimes may engage in acts that seek to stabilize and legitimize authoritarian rule in the face of a potential threatened transition to constitutional democracy. The precise nature of the threat, or the aspects of constitutionalism that pose a risk, will vary depending on local context. In the case of Myanmar, constitution-making was designed to prevent three particular threats: the threat of a fully democratic and representative

parliament as embodied in an NLD-elected government; the threat of a federal structure with the risk of secession as opposed to a unitary structure; and the threat of the decentralization of power and the courts as a potentially meaningful check on public power. The possibilities for a shift to constitutional democracy, or overcoming the roadblocks put in place by pre-emptive constitution-making, depend precisely upon addressing these issues.

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