Vehicle for Democratic Transition or Authoritarian Straightjacket?
Constitutional Regression and Risks in the Struggle to Change Myanmar’s Constitution

Melissa Crouch

Note: this is an early version of a draft chapter; please do not distribute or cite. This work draws on a research project and field research that has been going for some years, with forthcoming publications including (2018) ‘Democrats, Dictators and Constitutional Dialogue: Myanmar’s Constitutional Tribunal’ 18(2) ICON; book manuscript “The Constitution of Myanmar: A Contextual Analysis” (Hart Constitutions of the World Series), and monograph on “The Dark Side of Constitutional Endurance: The Making of Constitutions in Myanmar.”

Introduction
In 2017, a group of university students compiled a song to voice their demands to amend the 2008 Myanmar Constitution during the annual Buddhist Thingyan water festival. The students were from the Student Union of Taungoo in Bago Region (central Myanmar), although student unions still technically remain illegal in Myanmar. The military took offence at the students’ song that expressed their views in support of amending the Constitution. The lyrics of the song included statements that the Student Union would not accept the 2008 Constitution unless and until it was amended. The students also wore shirts that depicted the Constitution up in flames. The military alleged that these sentiments and actions undermined political and social stability. Two of the students were charged with the crime of intending to cause fear among the public, influencing...
others to disrupt social order, or committing a crime against the state under the Penal Code.\(^3\) One student has been arrested while the other remains on the run. The students could face up to two years jail and/or a fine. The risk of a jail sentence is indicative of the sensitivities over proposing formal constitutional amendment or the need for a new constitution in Myanmar.

Since the referendum that approved the 2008 Constitution, many scholars of comparative politics have sought to understand and explain Myanmar’s political transition after decades of seemingly indefatigable military rule.\(^4\) There has been less focus scholarly on the politics of constitutional reform in Myanmar. This chapter advocates taking law seriously in authoritarian regimes and builds on a line of more recent scholarship that examines the role of courts and constitutions in authoritarian regimes.\(^5\) My question here is this: what are the options and risks for democratic actors seeking reform of the 2008 Constitution?

There is a paradox in a situation like Myanmar where a constitution drafted under authoritarian rule facilitates a political transition. The constitution can be understood as a ‘transformative authoritarian constitution’, which Ginsburg argues is a sub-type of authoritarian constitutions that can be seen at work in a range of countries from Chile to Taiwan.\(^6\) Ginsburg finds evidence to suggest that such constitutions may lead to democratic transformation. However, this finding should not cause us to dismiss the very real risks to democratic actors that seek to change a transformative authoritarian constitution. By its very nature, such a constitution is not designed to change, and any change that does occur is likely to be highly contained and controlled. I assume that the risks associated with changing a transformative authoritarian constitution are

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\(^3\) Section 505(b) “Whoever makes, publishes or circulates any statement, rumour or report ... b) with intent to cause, or which is likely to cause, fear or alarm to the public or to any section of the public whereby any person may be induced to commit an offence against the State or against the public tranquility...shall be punished with imprisonment which may extend to two years, or with fine, or with both”


\(^6\) Tom Ginsburg (forthcoming) Fruit of the Poisoned Vine? Some Comparative Observations on Chile’s Constitution, submitted to Centro de Estudios Públicos (CEP), Santiago de Chile.
higher than the risks to change a democratic constitution. In this respect, I seek to focus on risk-taking under authoritarian constitutions.

The potential risks are related to the different strategies available to pro-democratic actors who seek greater social and political transformation through constitutional change in Myanmar. I suggest there are three main strategies: to draft a new constitution, amend the constitution formally, or attempt informal amendment. These options are potentially open to both pro-democratic actors such as the National League for Democracy (NLD), and to undemocratic actors such as the military. The least likely option, given present political conditions in Myanmar, is revolution and the drafting of a new constitution. The reason this is near impossible is because the 2008 Constitution was designed as a permanent and lasting structure that conditions and limits politics in the new regime. There is little political space or tolerance towards efforts to draft a new constitution.

Another option is for pro-democratic actors to push for formal constitutional amendment through the required procedure under the 2008 Constitution. This option means that pro-democratic actors must subject themselves to the authority of the Constitution and the specific requirements it mandates for change. The third option for constitutional change is for pro-democratic actors to make efforts towards informal constitutional amendment. While there may be many ways in which informal constitutional change takes place, I focus on two means of informal amendment in Myanmar: by the legislature passing a law that empowers the administration to do something that does not appear to fit within the existing constitutional order; and informal amendment through judicial interpretation. I seek to show that both formal and informal amendment of Myanmar’s transformative authoritarian constitution has attracted certain *risks* and led to *constitutional regression*.

In the first part of my chapter I introduce the contours of Myanmar’s 2008 Constitution in order to demonstrate that it can be considered an example of a transformative authoritarian constitution. I then consider the different strategies that have been used to change the 2008 Constitution – formal constitutional amendment proposals in 2013-2015; informal constitutional change through judicial interpretation in the Constitutional Tribunal; and informal constitutional

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7 In this chapter, I use a very thin definition of ‘democratic actors’ – ie those who advocate for a democratically elected government. This thin definition does not mean these democratic actors are necessarily pro-rights or equality, as we will see in the case of the NLD and prevailing views towards the Rohingya.
change in the form of legislative innovation with the Office of the State Counsellor. I identify the various risks pro-democratic actors have suffered for these actions, and the forms of constitutional regression that have occurred. I conclude by considering the broader implications for the study of risk-taking and constitutional change in transitional regimes.

Myanmar’s Transition under the 2008 Constitution

The beginning of 2011 marked the initiation of a new political and legal system in Myanmar. This system is regulated and framed by the 2008 Constitution. My approach in this chapter to the study of Myanmar’s Constitution is intentionally qualitative and based on extensive field research. I agree with eminent Southeast Asianist Dan S Lev who argued that ‘In order to understand, legal systems in the midst of political transformation, we must examine them from the ground up to find out what sort of political and social space is allotted to them, what kinds of functions they are permitted to serve, encouraged to serve, and forbidden to serve.’ The need to base the study of constitutional law and politics in Myanmar on ground up studies of Burmese language texts, understood within the wider social and political context, is critical.

I begin by identifying key elements of the 2008 Constitution and political practice that suggest this can be considered as a transformative authoritarian constitution. The first striking feature of Myanmar’s Constitution is the way it centralises and affirms the role of the military in the governance of the country. This is evident from the first chapter on Basic Principles, where the military is given prime position in the future political system and is central to the objectives of

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8 I do not have space to go into the drafting process of the 2008 Constitution. In brief, the National Convention was held from 1993-1997 and 2004-2007. Representatives were chosen by the military, although initially some of these were members who had been democratically elected in the 1990 elections. However, the drafting of the constitution was subject to increasing criticisms and overall is perceived to be a highly undemocratic process, which taints perceptions of the 2008 Constitution as the outcome of this process.

9 The eminent Professor Dan S Lev once referred to the ‘vacuity of studies of law in new states that take statutory provisions and legal structures at face value’, We could also add to this studies that take constitutional provisions at face value: Lev (1972), Islamic Courts in Indonesia: A Study in the Political Bases of Legal Institutions. University of California Press p 1.

10 Lev (1972), p 2.

11 This is particularly the case because the Burmese version is declared to be the only authoritative version, and the English language translation of the 2008 Constitution is inaccurate, inconsistent and incorrect in part. This creates a potential problem for case studies of Myanmar that presume the accuracy of the English language translation of the Constitution [in addition, existing quantitative studies appear to have inaccurately identified a 1962 Constitution. There was never a 1962 Constitution in Myanmar so it is unclear what these studies are referring to].
protecting national unity, maintaining territorial unity and guaranteeing the sovereignty of the nation. These principles mirror the previous slogans of the former military regime, upgrading them from military slogans to constitutional principle. The Basic Principles chapter subverts the very idea of a fundamental principles chapter, as it is used to entrench military governance.\textsuperscript{12} The chapter on Basic Principles is explicitly required to guide the parliament in its role in drafting laws, and also the courts in its role in interpreting both the Constitution and other laws. This feature of the Constitution has been overlooked and understudied in analyses of Myanmar’s Constitution.\textsuperscript{13}

It is within this principled context of military governance that the rest of the political system needs to be viewed. While the Constitution does establish a bi-cameral union parliament, 25 percent of the seats in parliament are unelected and constitutionally reserved for the military. What is more, the military has adopted a deliberate practice of rotating military officers, so that they are not in parliament long enough to build connections with, be influenced by or form allegiances with other political actors such as the NLD or ethnic political parties. The NLD has protested against this practice, arguing that at the very least military officers appointed to parliament should be required to serve the full five-year term rather than being subject to constant rotations. These complaints have been ignored.

The reservation of 25 percent of parliamentary seats does not enable the military to block legislative proposals. The reserved seating system does ensure that the military members of parliament can infiltrate and monitor democratically elected members of parliament, as well as participate in various high-level appointments. For example, the military members of parliament, along with the upper house and lower house, each appoint a candidate for the positions of president and vice-president. This means that, at the very least, the military members of parliament get to appoint a vice-president. In addition, the constitutional amendment clause requires more than 75 percent approval in parliament, thus giving the military members of parliament veto power over any future constitutional amendment proposal.

The next indication of the dominance of the military over the most important and influential areas of government administration is the designation of three important Ministries - Home Affairs, Defence, Border Affairs – who are unilaterally appointed by the Commander in Chief of

\textsuperscript{12} This is contrary to the usual focus in comparative constitutional studies on Fundamental or Basic Principles in democracies such as the India and Irish Constitutions.

\textsuperscript{13} For a detailed discussion see Crouch (forthcoming) \textit{The Constitution of Myanmar: A Contextual Analysis}. Hart.
the military. These ministerial positions are important because the police fall under the Ministry of Home Affairs, and so effectively remain under military control. In addition, the General Administration Department also lies under the Ministry of Home Affairs, and its role as the core lifeblood of the government administration at the state and region level. The Ministry of Defence is in full control of all aspects of the army, navy and air force, and is not subordinate to the executive. The Ministry of Border Affairs has historically been used to control and contain areas on the territorial periphery of the country that are more prone to ethnic armed insurgencies. The Constitution also creates a National Defence and Security Council, in which military officers or military appointees hold a majority of the seats. Although the president has the power to call a meeting of the Council, he must consult the Council on any decision to declare a state of emergency.

Despite the military’s pervasive role, the Constitution still offers significant, highly centralized powers to any party that can win a majority of seats in the union parliament, as the NLD did in 2015. The Constitution introduces a President as the head of state, although the constitutional requirements for the position of President have attracted controversy. A presidential candidate must be familiar with military affairs, which was initially thought to mean that the person must have worked in the military. However, the appointment of U Htin Kyaw (once Suu Kyi’s driver) by the NLD in 2016 appears to have dispelled this assumption. The second point of controversy is that the presidential candidate cannot hold foreign citizenship (nor can their spouse or children, s59f), and this is commonly understood as barring Aung San Suu Kyi from this post because her children and deceased husband are UK citizens.

The person who is elected as President does have the power to appoint many key political, administrative and judicial posts. The election of the heads (known as ‘chief ministers’) of the 14 states and regions is not a democratic or direct election, but remains the decision of the President. This stunts any independence that the states/regions might have and limits future possibilities for decentralization or federalism.

The courts and other key independent agencies are also subject to the control of the government of the day. The President and the Parliament get to appoint all nine members to the Constitutional Tribunal, whose term of office is conveniently tied to the term of the government (5 years). The President and Parliament also get to elect representatives to the Union Election Commission, again who serve the same term as the government. In effect, the governing party has
a near monopoly on the civilian dimension of the political system. However, this same governing party is entirely dependent on the military for security and to implement policy through the government administration.

The Constitution does provide for a bicameral national parliament with an upper house (Amyotha Hluttaw) with ethnic representation, but in the end the will of the more numerous lower house (Pyithu Hluttaw) prevails in any decisions made by the Pyidaungsu Hluttaw (Union Parliament) sitting jointly. The Constitution includes a Bill of Rights and Duties chapter, but this chapter is hedged by qualifications and in practice has delivered no practical benefits or protections for individuals. Despite the re-introduction of the constitutional writs and the potential to use these remedies for the enforcement of individual rights, the writs applications have largely been stymied in the court system.

The outcome of the 2008 Constitution is to introduce a highly centralized and militarized semi-competitive authoritarian regime. I deliberately qualify the competitive nature of politics in Myanmar because the extent of electoral representation is constitutionally limited, and the 2015 elections suffered from clear limitations (which I consider in more detail later). In addition to limitations on elections, Myanmar’s contemporary political regime is animated by other tensions common to competitive authoritarian regimes. Pro-democratic actors still face significant threats. Limited forms of opposition are now permitted, such as the formation of political parties and unions. Yet the situation remains precarious for democratic actors – particularly student activists and journalists - who remain targets of surveillance, harassment, punishment and detention.

There also remains rampant abuse of state resources through the opaque nature of state-owned enterprises, the omnipotent presence of major military-run corporations, and the cartels of cronies in natural resources such as jade, rubies, oil and gas. Land claims and complaints of land grabbing remain among the top concerns of abuse of state power. This is all the more pressing given that a large percentage of the population depends on agriculture for their livelihood. Further, the semi-competitive authoritarian regime in Myanmar remains plagued by media restrictions. In 2012, media restrictions were lifted, censorship regulations were removed and papers were allowed to publish daily (rather than weekly). Yet practical restrictions remain, and this is evident

\[\text{\footnotesize 14 On the concept of competitive authoritarianism, see Steven Levitsky and Lucan A Way (2010) \textit{Competitive Authoritarianism: Hybrid Regimes After the Cold War}. Cambridge University Press.}\]
These factors suggest that the concept of competitive authoritarianism is useful to capture the nature of Myanmar’s current political regime. I use the term ‘semi’-competitive authoritarianism to indicate that Myanmar is something of a ‘diminished subtype’ of competitive authoritarianism. This maintains connection to the original concept of Levitsky and Way, but also differentiates Myanmar from fully competitive authoritarianism. I have shown that there are major institutional forms of constraint on democratic governance under the Constitution, through the areas carved out for the military as well as the highly centralized powers given to the government of the day. It is for these reasons that it can be understood as a transformative authoritarian constitution.

Understanding the system that the 2008 Constitution puts in place and the privileges it grants to actors such as the military enables us to better appreciate how constitutional change may be perceived as a threat that endangers the leading and centralized role of the military in governance. Constitutional change threatens the centrality of the military in governance, politics, security and the administration. It threatens the military with the potential loss of their immunity provisions under the existing Constitution. It also threatens to deny or limit the military’s ability to engineer a constitutional takeover, as justified in the extensive emergency powers chapter, if or when needed. In order to mitigate the perception of these threats, I suggest that the NLD chose formal constitutional amendment to demonstrate their willingness to work within the current system.

**Formal Constitutional Change after Transition**

Formal constitutional change is a means of working *within* the system for social and political change. It requires actors to demonstrate a sense of commitment to and recognition of the existing political and legal order, regardless of how it came into existence. This was particularly difficult for the NLD and other parties who won seats in the 1990 elections, but were later told by the

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military that the election was to appoint a Constituent Assembly to draft a new constitution, rather than an election for a new and democratic Parliament. The NLD held out until they finally agreed to run in the 2012 bi-elections. In doing so, the NLD has demonstrated that it is willing to work within the boundaries of the Constitution. Reinforcing this approach, the NLD has also shown that it is willing to go through the arduous constitutional amendment requirements as set out in the Constitution. In doing so, I show that the NLD’s proposals were largely ignored, and instead the bills submitted to parliament contained a range of proposed amendments that would instead have reinforced regime interests. By engaging in this process, democratic actors have suffered various risks and triggered constitutional regression.

The official process to initiate formal constitutional amendment began in 2013 after the NLD and 88 Generation had campaigned widely on the issue. In 2013, a Constitutional Review Committee was established by parliament. The Committee was responsible for proposing constitutional amendments to promote peace, national unity and democratic reforms in Myanmar. The Committee consisted of existing members of parliament. Most were from the USDP, ethnic-based political parties or the military itself. All of these members of parliament (except for the military officers) were elected in the 2010 elections, which were not considered to be free and fair. The Committee did include seven NLD members, who were elected in the 2012 by-election which was considered to be free and fair.

In advocating for formal amendment, the NLD first organized a series of peaceful demonstrations as well as education campaigns across the country. In late 2013, the public was given the opportunity to make written submissions to the Committee. The NLD’s formal submission emphasized democracy, federalism and civilian control over the military. I discuss their proposal here in order to contrast it with the Committee’s 2014 Report and with the 2015 proposed bill for amendment. The NLD sought to emphasise that the Union should be identified as a federal Union. The NLD’s proposals aimed to reinforce the principle of democracy by removing the word ‘disciplined’ which currently qualifies the principles (ie ‘disciplined democracy’). This emphasis was related to their proposal to remove the role of the military from politics and remove its influence over any political appointments. This included removing military members of parliament, and removing the militaries power to appoint a vice-president and other ministerial positions. This was highly controversial, although the NLD submission admitted this
may need to be done gradually. They also suggested reforms to separate the military from the police.

The NLD did suggest a range of proposals that would have added limits on executive power. They suggested that the term of office of the President and Vice-presidents should be limited to just one term. Rather than leave many decisions in the sole power of the president, the NLD suggested balancing the power of the President by requiring him to make certain decisions together with the Speakers of the upper and lower house. The NLD proposed to bring all cabinet positions (President, Vice-President, and all Ministers) back into parliament, allow them to retain their status as an active member of a political party. They also proposed that only elected representatives can be appointed as Ministers (currently unelected persons can be appointed to these positions). They sought to change the balance of power in the National Security and Defence Council by adding in the Speakers of the upper and lower house as members, which would mean that the government of the day, rather than the military, would have a majority on the council.

In terms of central-local relations, the NLD proposed to change the balance of power and reporting lines slightly at the sub-national level. Instead of the Ministers of State/Region Hluttaws being responsible to the President, they suggested that they be responsible to the Chief Minister. The Chief Minister would be appointed by a major of votes of the Ministers of that state/region parliament. to these positions).

In terms of the courts, there were several key changes proposed. The NLD wanted to change the centralized judicial appointment processes so that the Chief Justice of the Supreme Court, together with Chief Ministers of the States/Regions, appointed the High Court judges (instead of the President). They also wanted the Supreme Court to be the highest court (ie the military court would be subordinate to it), and they proposed to abolish the Constitutional Tribunal and give these powers to the Supreme Court. In terms of individual rights, the main change was a proposal to make the Basic Principles in chapter 1 judicially enforceable (they are currently unenforceable in a court), because they felt this would better protect individual rights.

They wanted to change the constitutional amendment provision so that proposals could be approved by a two-thirds vote of civilian members of parliament in the Pyidaungsu Hluttaw (ie excluding military members from the vote. They wanted to change the constitutional amendment provision so that proposals could be approved by a two-thirds vote of civilian members of parliament in the Pyidaungsu Hluttaw (ie excluding military members from the vote). They also
wanted to delete section 59f (to allow Suu Kyi to be elected as president), and amend section 59d so that a presidential candidate did not have to have military experience.

The Committee received a large number of submissions. In January 2014, the Committee released its report in public, yet it failed to identify any proposals for constitutional amendment. It was emphatic that some provisions of the Constitution should not be amended. The most controversial aspect was the report’s reference to key aspects of the Constitution that should not be amended, based on a petition signed by 106,102 people (which was presumed to be organized by the USDP and military). These recommendations ran directly contrary to the NLD’s main proposals for change. The petition recommended that three key aspects of the Constitution be retained: the role of the military in politics, the prohibition on presidential candidates holding foreign citizenship in section 59f, and section 436 on the process for amendment that gives veto power to the military. This was the first major sign that the NLD’s efforts at formal constitutional amendment would not only fail to be put to parliament but lead to constitutional regression.

In mid-2015 two bills were finally proposed in parliament, one containing provisions that required both parliamentary approval and a nationwide referendum, and the other that only required approval by more than 75 percent in parliament. The main proposal that did address concerns raised by the NLD but that did not go far enough was the extent to which the President should have control over appointments and responsibilities of state/region parliaments. The current system is highly centralized, and democratic actors wanted to decentralize control to an extent. The NLD’s proposal for Chief Ministers be appointed by a vote in the State/Region parliament was not accepted. Instead, the proposed bill suggested that the Union Parliament should decide together with the President on the appointment of the Chief Ministers of the States and Regions (rather than the President alone).

On the courts, the proposed bill would have led to undemocratic reforms by suggesting five year terms for judges of the Supreme Court and High Courts. This would change the current system of retirement at a set age to instead effectively tying the judges to the term of the government. The proposal did not agree with changes to the appointment process for judges as the NLD had suggested, but instead allowed Speakers of upper and lower house to decide together with the president on certain appointments. This was another minor concession to balance the power of the President with that of parliament. The proposed bill sought to retain the Constitutional Tribunal, unlike the NLD which wanted it abolished.
Regarding the constitutional amendment proposal, the NLD’s suggestions again were ignored. The only change was that for provisions that also require a constitutional referendum, it would require more than half of those who voted to agree (rather than half of all eligible voters). This proposal failed to receive approval.

There were only two proposed amendments that were actually approved by parliament, and neither have brought about democratic transformation. The first was to change the wording of section 59(d) on presidential requirements, so that a president must be familiar with ‘defence’ matters rather than ‘military’ affairs. This distinction between defence/military is subtle, and suggests that a presidential candidate does not actually have to come from the military. To be fully approved, this provision requires a referendum to be held, which has not occurred to date. The only other proposal that was approved and did not require a referendum was the clarification of legislative and taxation powers as set out in the Schedules to the Constitution. The proposal clarified the ability of the 14 States and Regions to collect income tax, customs duties and stamp duty, and levies on services (tourism, hotels, private schools and private hospitals) and resources including oil, gas, mining and gems. In short, the constitutional amendments suggest that the Constitutional Tribunal does not have power to interpret the schedules to the Constitution and instead the Union Parliament must clarify or expand the list via formal amendment. This appears to be based on a misunderstanding that legislative power can only be clarified or changed by the parliament, rather than interpreted by the Tribunal. In this way, the formal amendment detracted further from the power of the Tribunal as a check on parliament.

There has been no formal proposal for constitutional amendment in parliament since the NLD took office in 2016. The outcome of the 2015 proposals for amendment suggest that the NLD’s strategic choice to pursue formal constitutional amendment within the existing system has backfired. Many individuals, including the students mentioned at the start of this chapter, have faced personal risks such as being arrested and tried for criminal offences. Efforts towards formal constitutional amendment have reinforced limits on democratic reform, rather than open up greater social and political transformation. The NLD’s proposals for formal constitutional amendment failed to even be reflected in the bills submitted to parliament. This may make it harder in the future for the NLD to generate social and political support for new proposals for formal amendment. In addition, the Committee’s first report reinforced three central elements of the Constitution that favour military interests, and the contents of the bills proposed in parliament
affirm the interests of a highly centralized and militarised political system. The NLD’s decision to pursue formal amendment has led to *constitutional regression*.

**Informal Constitutional Change through Judicial Endorsement**

Aside from formal constitutional change, there are a range of ways that actors may seek informal constitutional change after the initial point of transition. For pro-democratic actors, judicial interpretation may be an opportunity to attempt to surpass the initial or original intentions of the drafters of the constitution. The courts are potentially a means to push for a new or more expansive interpretation in light of changing social and political circumstances. The potential risk is that if pro-democratic opposition forces do not take up the opportunity that judicial interpretation presents, then the courts may instead be used by the regime forces to bolster their existing position. In Myanmar, it is pro-military forces, that is, the USDP, military officers and to a lesser extent some ethnic political parties, that have been willing to use the courts to seek informal change through judicial interpretation. I identify how the failure of pro-democratic forces like the NLD to take up the opportunity that judicial interpretation offers has instead allowed room for regime forces to take full advantage of the courts to bolster their existing constitutional position.

This is exemplified in the mass disenfranchisement of temporary identity card holders (once known as ‘white cards’) prior to the historic 2015 elections in Myanmar. In a country going through a transition from authoritarian rule, there is inevitable controversy over who is a citizen of the state and how the rules of citizenship are determined.\(^\text{16}\) The issue of citizenship and who can vote remains a heated debate in Myanmar. Although the general international perception is that the 2015 elections in Myanmar were the first free and fair elections for over 50 years, there remained significant limitations to the elections.\(^\text{17}\) Pro-regime forces used the Constitutional Tribunal to support its agenda of disenfranchising over 1.3 million people who held temporary


identity cards, most of whom are Rohingya Muslims. I discuss the background to this case and the way the Tribunal was implicated in the restriction of the right to vote below.

In 2015, the Citizenship Case raised the issue of the right to vote in the Constitution. The question before the Tribunal was not whether legislation had failed to protect the constitutional right to vote and to be elected, but rather whether it had gone beyond the legal scope of the constitutional right. In effect, the applicants were seeking to restrict the constitutional right to vote and to be elected to parliament, in order to deny temporary identity card holders (many of whom are Muslim) from enjoying this right. The Tribunal case came in wake of several years of violence, discrimination and efforts to marginalize and exclude the Rohingya and Muslims more broadly, as well as attempts to discredit the NLD by painting them as ‘pro-Muslim’. Although Myanmar is a Buddhist-majority country, it has a Muslim population of four percent according to the 2014 census. An additional 1.3 million Muslims were not recorded in the census. Myanmar does however have a history of Muslim political participation. In the 2010 election and 2012 bi-election temporary identity card holders were able to vote and to run in the elections. Three Muslim candidates were successful in winning seats in elections during this period. The political parties that these members of parliament represent have never been based on an Islamist ideology and do not advocate for the institutionalisation of Islamic law. However, from 2011-2015, the three Rohingya members of parliament in northern Rakhine State were questioned over their citizenship status and hounded out of parliament.

This effort coincided with the rise of radical Buddhism and the ensuing violence against Muslims in Myanmar. This has been a critical issue since 2012 when large scale conflict broke out in northern Rakhine State and spread to many major towns across Myanmar. While the initial targets in Rakhine State were largely Rohingya Muslims, the conflicts that broke out in other parts of Myanmar targeted Muslim communities more broadly. In short, by 2014, this led to overt anti-

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18 Citizenship Case 2014.
23 For a recent collection of articles on communal violence in Myanmar, see Nick Cheesman (2017).
Muslim campaigns and attempts to smear the NLD in the lead up to the 2015 elections for being perceived as ‘pro-Muslim’. In 2014, the President issued a notification requiring all temporary identity card holders to hand in their cards. In late 2014, parliament amended several electoral laws so that temporary identity card holders – many of who are Muslim and from Rakhine State (who may identify as Rohingya) – could not vote or run for elections. In 2015, a law was passed in parliament to set out the process for a referendum on constitutional amendment, although it did allow white card holders to vote.  

As a result, an application was brought to the Constitutional Tribunal challenging the provision by arguing that it was unconstitutional to allow white card holders to vote in a referendum. The case was brought by Dr Aye Maung, an ethnic Rakhine Buddhist and leader of the Arakan National Party, and other members of the Amoytha Hluttaw (the Upper House). The applicants challenged the provision of the Law on the Constitutional Referendum concerning who could vote in a referendum. The applicants relied on the constitutional provisions on the right to vote and to be elected, and also referred to the process and eligibility of a citizen to vote. They argued that the Constitution did not mention the phrase ‘temporary identity card holders’ but only use the term ‘citizens’, and so under s 198(a) the provision of the law was inconsistent with the Constitution and the Constitution should prevail. The application also referred to the definition of a citizen in the Constitution that limits the concept of ‘citizen’ to a person whose parents were born in Myanmar, or a person who had already been granted citizenship at the time the Constitution came into force. The applicants emphasised the constitutional provision stating that sovereign power resides in citizens, and argued that only citizens should have the right to vote in a referendum on constitutional amendment. Instead of conceiving sovereign power as residing in ‘the people’ in a broad sense, it was argued that sovereign power was restricted to citizens.

The Tribunal noted that the 1982 Citizenship Law allows associate citizens and naturalised citizens to have the same rights as citizens, unless this right is limited by the state. The Tribunal observed that the law does not, however, offer the same rights to temporary card holders. The Tribunal held that the provision of the Law on the Constitutional Referendum was invalid because it was inconsistent with the provisions on the right to vote in the Constitution.

25 [Add law] [in Burmese].
26 [Add law].
27 2008 Constitution, s 345.
The Tribunal’s decision contributed to the disenfranchisement of over one million people. White card holders were explicitly denied the right to vote in an election and denied the right to run for political office. While it was not just the Tribunal decision that triggered this legislative reversal against electoral rights for individuals with white cards, it was one more justification for the parliament to pass legislative amendments to the electoral laws. This demonstrates that the right to vote in the 2008 Constitution is a fragile and highly contingent right.\textsuperscript{28} This case is an instance of informal constitutional change for \textit{undemocratic} means, that is, the exclusion of a particular group from the right to vote that reinforces regime interests.\textsuperscript{29}

\textbf{Informal Constitutional Change through Legislative Reform}

Another type of informal constitutional change that has occurred in Myanmar is change through legislative reform and executive action. Although the NLD has failed to formally amend the Constitution to date, it has been able to effect informal constitutional change in the creation of a defacto leader for the government. I focus on the example of the legislative creation of the Office of the State Counsellor created under the NLD.\textsuperscript{30} This example demonstrates that pro-democratic forces may seek informal constitutional amendment to get around provisions of the Constitution that do not allow them to rule directly in the way they want. I will show that this is a high risk option, particularly when informal constitutional change is perceived to be an underhanded means of changing the constitution.

In early 2016, as the NLD was poised to take over government, there was clearly overwhelming public support for Aung San Suu Kyi to lead the country. The question that the NLD had to resolve was how this could be constitutionally justified. At first, a prominent lawyer and legal advisor to the NLD, U Ko Ni, argued that the parliament could appoint Suu Kyi as

\textsuperscript{28} This is important to note, as some quantitative comparative constitutional law scholars are currently trying to argue that Myanmar is an example of a Constitution where the right to vote is protected. The reality of mass disenfranchisement, the social pressure not to vote for Muslims, and the absence of elections in areas of ongoing conflict, show otherwise.

\textsuperscript{29} I leave aside the issue of whether the NLD agreed that white card holders should not be allowed to vote, but this does raise the question of how proposals for constitutional change are affected when those who claim to be democratic actors are less than democratic.

\textsuperscript{30} There are other examples, such as some actions that Suu Kyi took while chair of the ad hoc Rule of Law Committee in parliament, which were not within the remit of the legislative committee.
president if parliament first suspended section 59(f) of the Constitution (the provision that is regarded as barring Suu Kyi from becoming president). This option was risky and did not have a clear constitutional basis.

An alternative option advocated by U Ko Ni was a law to establish a new and unprecedented executive position. The first law proposed by the NLD government was for the creation of the position of State Counsellor. This option was justified based on the constitutional power of parliament to pass laws, and the power of the President to delegate executive power to anyone he chose. In this way it could be argued that the law did not to betray the constitutional text. Yet the military members of parliament were under no illusion that this reform amounted to constitutional change and threatened the system they had created. They raised objections in parliament and at one point, there were indications that the military members of parliament may challenge the constitutionality of the State Counsellor law in the Constitutional Tribunal, although this has not occurred to date. Their objections were ignored and the law was passed by the majority NLD government.

The State Counsellor’s Office is an innovative use of legal text to achieve the goal of Suu Kyi serving as leader of the government. There are several reasons why this innovation can be understood as informal constitutional change. This legislative reform enabled Suu Kyi to become the de-facto leader of the government and to the international community, the defacto leader of the country. The creation of the State Counsellor role re-adjusted the way people understand the role of the President in Myanmar, giving the President a more symbolic and ceremonial function. The State Counsellor draws attention and authority away from the Office of the President. The Office of the State Counsellor is specific to Aung San Suu Kyi, so no other person can occupy this office unless the law is changed. The stated purpose of the role of the State Counsellor is to foster a market economy, to enhance democracy, to promote peace and development, and to work towards federalism. The goals of building a market economy and promoting peace and development are consistent with the wording and intentions of the 2008 Constitution. However, the goal of fostering democracy may be at odds with the 2008 Constitution’s more qualified version of ‘disciplined

31 [cite law].
32 This can also be understood as a constitutional workaround, see Mark Tushnet (2009) ‘Constitutional Workarounds’, 87(7) Texas Law Review 1499.
democracy’; and the goal of working towards a federal system is arguably inconsistent with the 2008 Constitution, which does not explicitly claim to uphold federalism as a fundamental principle.

The State Counsellor has appropriated and adopted many leadership functions that may otherwise have been undertaken by the president. The law requires the State Counsellor to make recommendations and report to the Union Parliament, and in doing so to work within the existing Constitution. In this role, Aung San Suu Kyi has established and spearhead the new 21st Century Panglong Peace Process (a reference to the 1947 Panglong Agreement orchestrated by her father General Aung San). She is the chairperson of the Union Peace Dialogue Joint Committee that facilitates and manages the ongoing peace talks. She also occasionally issues announcements, such as granting an amnesty for political prisoners, which is a task former President Thein Sein previously undertook. She is the chairperson of the Central Committee on the Implementation of Peace, Stability and Development of Rakhine State. She plays a significant role in international relations, meeting with foreign ambassadors and other foreign dignitaries, although she also wears the hat of Minister of Foreign Affairs and Minister of the President’s Office. It is not always clear which capacity she is acting. Further, the international community clearly sees Suu Kyi, rather than the President, as the leader of Myanmar. A clear example of this is the Rakhine State crisis in August 2017, when the international community called upon Suu Kyi to speak out in support of the Rohingya and to acknowledge and address the grave humanitarian crisis. No one in the international community implored the President, U Htin Kyaw, to speak out in support of human rights on this issue.

The angst and controversy that the Office of State Counsellor has attracted has come at a great price to the NLD. On 30 January 2017, U Ko Ni, the lawyer mentioned earlier who was considered to be one of the architects of the State Counsellor law, was brutally assassinated. Despite his ordinary background as a traditional civil and criminal law lawyer, he had taken the risk to speak out against the undemocratic elements of the Constitution and to advocate for the constitutionality of Suu Kyi’s position as State Counsellor. There were no doubt multiple reasons for his death – U Ko Ni was also a Muslim and he had been outspoken on other controversial law reforms such as the need for a hate speech law. He had also spoken about the need to draft a new constitution. Yet his role in the creation of the Office of State Counsellor was certainly one of the reasons for his assassination. The trial against the four accused (two of whom who are former

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military officers) continues with no end in sight and no clear explanation for their motives. Myanmar lost its most articulate lawyer on constitutional reform, a tragic and untimely loss for efforts at democratic transformation.

In fragile political contexts such as Myanmar, the costs of informal constitutional amendment via legislative reform and executive action may be high, particularly if legislative change is perceived to be an underhanded means of constitutional change. The death of U Ko Ni also suggests a highly targeted campaign against those most visibly involved in advocating for constitutional change. U Ko Ni was firstly a lawyer, and his death was a warning to legal advocates involved in constitutional and rights reform to back down. U Ko Ni was affiliated with the NLD and pro-democratic actors, and so his death was a warning to them and a stark reminder that the current NLD government is extremely vulnerable without the protection of the police or military. The third group U Ko Ni represented in a symbolic sense was minorities, both Muslims but also other ethnic groups or non-Buddhists. His death was aimed at silencing those seeking to advocate for greater equality in constitutional reform.

Conclusion
Constitutions drafted under authoritarian rule that facilitate a new political era present a particular dilemma for pro-democratic actors. My chapter has focused specifically on the case of Myanmar and the desire of democratic actors to change the Constitution. I began by dismissing the option of drafting a new constitution, which remains unrealistic in Myanmar’s current political climate. Instead, I identified that the two main options pro-democratic actors have pursued are formal amendment or informal constitutional change.

Formal constitutional amendment under the new Constitution means that the NLD and other pro-democratic actors had to submit to the authority of the Constitution and work to achieve the required approval threshold it mandates for change. In doing so, they faced the strategic question of what kind of proposals they should seek and only put forward a series of limited proposals. Yet the outcome of the process in fact reinforced limits on democratic reform and

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resulted in constitutional regression. The NLD was unable to obtain sufficient support for its proposals. It then had to watch as the Committee Report identified three key no-go zones in terms of amendment, and then in 2015 a range of undemocratic proposals were put forward in the bills to parliament. The Report and the subsequent proposals were a form of constitutional regression in that they sought to reaffirm and tighten the Constitution’s commitment to protection of authoritarian interests. The failure of the NLD’s campaign for formal amendment may also make it harder to gain support to use this mechanisms in the future. In addition, there are clearly risks for those who advocated for change, particularly on the no-go zones such as the section 436 amendment formula, as the students I mention at the beginning of the chapter found out.

The NLD, once in government, engaged in informal constitutional amendment through the creation of the Office of State Counsellor. The military’s opposition to this legislative reform made clear that they perceived this as an underhanded means of informal constitutional change. The NLD has ultimately paid a high price for the creation of the Office of State Counsellor with the assassination of prominent lawyer U Ko Ni. The option of informal constitutional change through the Constitutional Tribunal represents an untapped potential for democratic actors in Myanmar. Given that the NLD appointed all nine Tribunal members (who serve five year terms), now is a better time than any to use this mechanism. I suggested that the NLD’s failure to use the Constitutional Tribunal while in opposition (2012-2016) in fact ceded ground to anti-democratic actors and left the courts wide open for use by regime supporters, as illustrated in the Citizenship Case.

I have shown that attempts at constitutional change of a transformative authoritarian constitution such as Myanmar’s 2008 Constitution may attract a range of risks including personal risks, such as the risk of arrest, torture, disappearance or death (as in the case of the students mentioned at the beginning of the chapter); institutional risks such as the surveillance or deregistration of a political party; or the risks may be political, that is, a decline in public support and a loss of votes in a future election. Yet the broader ideological risk is that of constitutional regression, with efforts at change by democratic actors being met and overpowered by efforts are undemocratic change by regime supporters.

In this chapter, I have suggested that we need to pay attention and understand the triggers for potential risks that pro-democratic actors may be exposed to if they seek to change a transformative authoritarian constitution that facilitated a political transition. This focus on risk-
taking in constitutional change is an area ripe for further comparative study. This is not least because international and foreign actors engaged in the education and constitutional advice industry may increase the risks faced by local actors seeking democratic constitutional change.

References


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