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**THE 2008 CONSTITUTION OF MYANMAR: LEGAL IMPACT
ON THE PEACE PROCESS**

Bachelor's thesis

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I hereby declare that I have compiled the thesis independently and all works, important standpoints and data by other authors have been properly referenced and the same paper has not been previously presented for grading.

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ABSTRACT

Academically ‘residing’ in the field that interlinks legal studies and international relations, this research work focuses on one of the biggest politico-legal challenges of the Asia-Pacific region, which is directly related to Myanmar and its perpetual geo-strategic instability. This paper assumes that the country’s decades-long militaristic political system had a chance to be redesigned after 2008, when the new Constitution came into force. At the same time, considering the fact that a multi-disciplinary study on Myanmar is a rare example in the field, there is a certain academic legitimacy in a scholarly attempt to observe the Constitution’s compatibility with the level of the country’s social and political development. This research argues that Tatmadaw’s objective to maintain the authoritarian state power is intentionally secured in the Myanmar’s 2008 Constitution and these authoritarian elements also set the terms for the peace process and constitutionally seals the decades-long claims of the EAOs out of their reach. Qualitative methodology, process tracing method and critical legal discourse analysis, is enacted in the thesis. The official English translation of the 2008 Constitution by the Government of Myanmar is used as a primary source. Secondary sources consist of several articles by social science scholars, reports from international organisations and news articles.

Keywords: Myanmar, Constitution, legal discourse, area studies, international relations, legal norms.

INTRODUCTION

The Republic of the Union of Myanmar (hereafter, Myanmar) is a sizeable independent state in Southeast Asia, exhibiting a long and complicated history, with an arguably unresolved process of politico-legislative formation. On the top of everything, the region-bound process of nation-building has naturally led in Myanmar (formerly known as Burma) to one of the world's longest internal armed conflicts,¹ which has not yet been finalised in any positively effective way yet. Despite Myanmar's efforts to develop itself into a sustainable polity (for example, the country's successful bid to join ASEAN, opening up for the global market economy,² its state counselor's Aung San Suu Kyi's Nobel Peace Prize in 1991 for her non-violent struggle for democracy and human rights,³ and some noticeable moves towards democratisation), the country keeps suffering from ongoing violent conflicts with no positively practical solution in sight. In addition to the internal conflict between the military and some of the country's ethnic groups, the alleged genocide against Rohingya Muslims has risen to international awareness in recent years, and this humanitarian crisis lacks solutions as well as justice to the victims.⁴ Since 1962, Myanmar has been under the direct or unilateral rule of the military junta, also known as Tatmadaw. Back in time, Burma became independent from British colonial rule in 1948, and since then political instability has dominated the country, with the ruling army and several different ethnic groups fighting against each other by seeing the social and political future of the independent state in a completely different way.⁵

Objectively, a significant milestone in Myanmar's political history was reached when political reunification was enshrined legally during 2008-2011, with the entry into force of the nation's new Constitution in 2008 and the formation of the first elected government under the new supreme law in 2011.⁶ The idea of a constitution might create the impression that political and social rebuilding

¹ Beehner, L. (2018). State-building, Military Modernization and Cross-border Ethnic Violence in Myanmar. *Journal of Asian Security and International Affairs*, 5(1), 1.

² Bernhardt, T., Dickenson-Jones, G., & De, S. (2017). New Kids on the ASEAN Block: Myanmar SMEs and Regional Economic Integration. *Journal of Southeast Asian Economies*, 34(1), 4-38.

³ The Nobel Prize. All Nobel Prizes. The Nobel Peace Prize 1991, Aung San Suu Kyi, "for her non-violent struggle for democracy and human rights."

⁴ Brooten, L., Ashraf, S., & Akinro, N. (2015). Traumatized victims and mutilated bodies: Human rights and the 'politics of immediation' in the Rohingya crisis of Burma/Myanmar. *The International Communication Gazette*, 77(8), 717-734.

⁵ Maizland, L. (2022, January 31). Myanmar's Troubled History: Coups, Military Rule, and Ethnic Conflict. *Council on Foreign Relations*.

⁶ Kyaw, N. (2019). Putting Their Guns on the Scale: Constitution-Making in Burma/Myanmar under Military Command. *The Chinese Journal of Comparative Law*, 7(2), 310.

can begin, and at home, as well as internationally, this reform was expected to have great positive effects.⁷ However, as argued, the country has been ruled by the army since 1962 and the 2008 Constitution has not changed this matter, the Tatmadaw's supreme power only took on a new form. Keeping this factor in mind, this research opts to also assume that Myanmar's decades-long militaristic political system had a chance to be redesigned after 2008. Therefore, the situation deserves taking a multi-disciplinary look into it, which is a rare approach taken when a study on Myanmar is getting done.

The politico-historic setting for this research is as follows. From the early years of Myanmar's democratisation onwards, there have been many analytical reports and scholarly research conducted in the field to argue that the 2008 Constitution and all related efforts for political integration have inevitably led to a stalemate from the outset, especially due to its undemocratic drafting process and the content that is protecting military's authority.⁸ It seems, that incorporating the Tatmadaw's authoritarian status into Myanmar's Constitution has been an explicit goal to safeguard its own interests despite future's election results (for example, twenty-five percent of the parliamentary seats are secured to the military⁹). The 2008 Constitution hinders the realization of liberal democracy and makes it more difficult to resolve the core issues of the peace process. For the Tatmadaw, their most important responsibility is to protect the 2008 Constitution.¹⁰ The Ethnic Armed Organizations (hereafter EAOs) on their side, however, experience discrimination and betrayed promises from the central government. Their primary demand of the governing authorities, and by this from the Tatmadaw also, has been the same from the beginning of the country's independence, to be allowed for more autonomy status, federal state system and tolerance for different cultures.¹¹ The demand of EAOs about federal system and the 2008 Constitution are in straight discrepancy, and this is the matter in the center of this thesis.

⁷ UN News. (2019, 7 February). Parliamentary bid to democratize Myanmar constitution a 'positive development' says UN rights expert. *United Nations*.

⁸ See e.g., Christensen, D., Nguyen, M., & Sexton, R. (2019). Strategic Violence during Democratization: Evidence from Myanmar. *World Politics*, 71(2), 332–366., Ganesan, N. (2017). Appraising Myanmar's Democratic Transition and Evolving Challenges. *Japanese Journal of Political Science*, 18(1), 196–215., Myoe, M. (2014). The soldier and the state: The Tatmadaw and political liberalization in Myanmar since 2011. *South East Asia Research*, 22(2), 233–249., 11. Kyaw, N. (2019). Putting Their Guns on the Scale: Constitution-Making in Burma/Myanmar under Military Command. *The Chinese Journal of Comparative Law*, 7(2), 309–332.

⁹ Crouch, M. (2020). Pre-emptive Constitution-Making: Authoritarian Constitutionalism and the Military in Myanmar. *Law & Society Review*, 54(2), 493.

¹⁰ Myoe, M. (2014). The soldier and the state: The Tatmadaw and political liberalization in Myanmar since 2011. *South East Asia Research*, 22(2), 238.

¹¹ Beehner, L. (2018). *supra nota* 1, 6.

Today, the 2008 Constitution is widely understood to be problematic and undemocratic among scholars and preventing the peace process effectively proceeding.¹² The problematic nature of the Constitution is recognised but it conveys the impression that the degree of compatibility in legal norms with the country's social and political development is under researched in many different disciplines. Studies do not seem to go deep enough to the legal norms and those relation to the social reconciliation that the country urgently needs. Thus, the data-gathering process for this thesis is to be departed from the main pieces of the theme-focused scholarly research, predominantly concentrates on relationships between the problematic factors in political reconciliation and the peace process in Myanmar. For example, closer to the legal context, Melissa Crouch researched the Constitution of Myanmar in several different studies and examined its implications from different perspectives. Crouch has argued that Myanmar's political nature has features of authoritarian constitutionalism, and she further researched the relation of federalism, peace process and constitution making to each other. In her research she examines the peace process, Myanmar's political environment and several agreements and constitutions in multiple contexts. Crouch's findings has made it possible to focus on this thesis even more detailed to the legal norms of the 2008 Constitution and how the content of the 2008 Constitution has affected in the peace negotiations.¹³

The thesis argues that Tatmadaw's objective to maintain the authoritarian state power is intentionally secured in the Myanmar's 2008 Constitution and these authoritarian elements also set the terms for the peace process and constitutionally seals the decades-long claims of the EAOs out of their reach. The thesis attempts to find what is the linkage between the most prominent reasons for the ongoing conflict by identifying the final demands for EAOs to negotiate peace and the main reasons for the Tatmadaw to keep controlling the country? How the Tatmadaw infiltrated its power into the 2008 Constitution, and how these legal and constitutional matters affect to the peace process from legal perspective? These questions are used as guidelines when testing the main hypothesis of the thesis. Also, future prospects are discussed. Assessing the peace process from a constitutional perspective must consider the Tatmadaw's continued efforts to maintain its authoritarian status. This is because in the peace process, federalism as a state model is the main

¹² Christensen, D., Nguyen, M., & Sexton, R. (2019). Strategic Violence during Democratization: Evidence from Myanmar. *World Politics*, 71(2), 339.

¹³ See e.g., Crouch, M. (2020). Constitutional touchstones: Peace processes, federalism, and constitution-making in Myanmar. *International Journal of Constitutional Law*, 18(4), 1350-1372., Crouch, M. (2018). Dictators, democrats, and constitutional dialogue: Myanmar's constitutional tribunal. *International Journal of Constitutional Law*, 16(2), 421-446., Crouch, M. (2020). Pre-emptive Constitution-Making: Authoritarian Constitutionalism and the Military in Myanmar. *Law & Society Review*, 54(2), 493.

goal of the EAOs, while the Tatmadaw's conception of the state model is completely authoritarian. For this reason, the Tatmadaw's authoritarian status has been thoroughly assessed as it is tied to and legitimized by the Constitution. As the current Constitution covers all areas of state regulation, this thesis is focused on the most important matters of peace process in relation to the 2008 Constitution and how Tatmadaw has constitutionally prevented these demands to come true. Therefore, the issue in this thesis is limited to the drafting of the Constitution as a protective tool for military's autocracy and the most problematic features of the 2008 Constitution precisely in terms of resolving internal conflict. It is not intended to examine the Constitution and its implementation in terms of promoting democracy, although the issue is very related to the topic and is sidelined in another context of this thesis. The arguments and the research questions arisen in this thesis have been developed as a prolongation, based on several research results, as well as multiple other sources presented in the thesis. This enables to focus into the literal content and wording of the 2008 Constitution and to be able to analyse the effect in even more detail as this information of legal norms seems to be unresearched in Myanmar's case. This thesis has formulated a legitimate claim to test the data collected to see the degree of Constitution's non-capability to the peace process.

The thesis is structured as follows. The first chapter provides review of the history of internal conflict and the causal relationship to the current situation, as well as the stages and progress of the peace process since 2011. In addition, the main requirements of EAOs and the main motives of Tatmadaw are presented. As Myanmar's internal situation has radically changes since military seized the power in 2021 February and is also linked to the 2008 Constitution, this factor will also be considered. The second chapter discusses the content of the 2008 Constitution and the drafting process from the perspective of authoritarian constitutionalism, as well as the role of the most problematic features of the Constitution in relation to the peace process. The most controversial articles are individually examined in order to assess their effect to the possibilities of the peace process. In the third chapter the credibility of the argument is analysed in three parts. In this chapter Tatmadaw's authoritarian status is analysed by authoritarian constitutionalism and how this entity is affecting to the peace process from constitutional perspective. After this the Constitution is analysed as a part of the government-led peace process and at the end of the chapter the controversiality of the specific articles in relation to the peace process and EAOs demands are analysed, and how these articles have affected to Tatmadaw's authoritarian rule and its position in peace process.

To tackle the argument presented in the thesis, the following pluralistic qualitative methodology has been employed. Through process tracing it will be possible to combine the main causes and their consequences when we indicate at the peace process in Myanmar, as well as the constitution drafting and the implications of this legal document for the further societal situation. The benefit of process tracing is that the causal relationship of mechanisms to individual or multiple variables and their effect on the outcome can be assessed using this method. Process tracing allows to accurately examine how a variable or variables produce a particular outcome, rather than just examining correlations and associations. Tracing a process can be used to explain the outcome of a particular event or to test for the presence of a hypothesized causal mechanism in a particular case.¹⁴

In this thesis, the discussion is limited to the content and drafting of the 2008 Constitution and the peace process in Myanmar since 2011 onwards. In addition, the history of Myanmar is briefly discussed so that the above discourses can be linked. Discourse analysis is a simplified analysis of the language in use. Because discourse analysis is not limited to the formal characteristics of language, it can also be used in social and cultural contexts. As critical discourse analysis is a multidisciplinary approach¹⁵, it enables the use of critical legal discourse analysis, which have been enacted in this thesis. Critical legal discourse analysis refers to an approach that identifies the underlying attributes of problem structures. This makes it possible to consider more deeply at the content of the text in relation to its social environment and to identify less visible factors and meanings.¹⁶ In the case on this thesis, the Constitution is a principle, which is applied to the specific scenario, which in this case is the peace process in Myanmar.

The primary source of the thesis is the official English translation of the 2008 Constitution by the Government of Myanmar has been used. The secondary source of the thesis consists of articles by several international relations scholars, as well as legal scholars. In addition, reports and articles from various international organisations have been used to support the overall picture of the social and political situation in Myanmar. Mark Tushnet's theory about authoritarian constitutionalism

¹⁴ Pedersen, R. B., & Beach, D. (2010). Observing causal mechanisms with process-tracing methods—the benefits of using a ‘mechanism’ understanding of causality. 3-4.

¹⁵ Kamalu, I., & Osisanwo, A. (2015). Discourse analysis. *Issues in the Study of Language and Literature (Theory and Practice)*. Ibadan: Kraft Books. 170, 190-192.

¹⁶ White, N. J. (2019). Legal Analysis: There's a Template for that!. *ALSB Journal of Business Law & Ethics Pedagogy*, 2(1). 4.

is used, when evaluating Myanmar's 2008 Constitution as a legal framework.¹⁷ The sources contain mutually supportive analyses that are relevant to the arguments presented in this thesis.

¹⁷ Tushnet, M. (2015). Authoritarian constitutionalism. *Cornell Law Review*, 100(2), 391-461.

1. INTERNAL CONFLICT IN MYANMAR

Tatmadaw's motives for consolidating its power through the Constitution and the demands of the EAOs for their part can only be understood through history. This first chapter traces the root causes of the current political and armed conflict between Tatmadaw and EAOs and links this history to the peace process and the current demands of the parties of the conflict. Also the peace process led by two different government are discussed. In order to understand the implications of the Constitution or in what scale it is an obstacles to the peace process, it is essential to identify the root causes of the conflict. On which the efforts of both parties to the conflict today are based and above all, why? Only on the basis of this information can the impact of the Constitution on the peace process be assessed.

1.1. Emergence of the conflict

Myanmar is home to as many ethnic groups as one of the longest-running armed conflicts in the world. From 1948 onwards, several conflicts have been present in the post-colonial and independent Burma.¹⁸ After the independence in 1948, the lack of credible commitments, unfair distribution of natural resources, inequality and and security dilemmas arising from distrust at the local level leading to open conflict between the ethnic groups and the central government.¹⁹ Ethnic groups organized by arms and demanded equal rights with the ethnically dominant Burman population, as well as a more autonomous status for the regions inhabited by ethnic minorities from the civilian government. Military seized the power from civilian government in 1962 and established a one-party state led by the Burmese Socialist Program Party (BSPP), as they saw that the civilian government had failed to handle the ethnic minority issues.²⁰

Tatmadaw, has seen its supremacy since independence as necessary for the country and the Union of Myanmar to remain united. The history of present-day Myanmar's geographical region is seen by Tatmadaw as a common history, and that all the peoples of this region would have lived in peace and harmony before the British colonial era. Ethnic minorities do not see this as such and feel that ethnic nationalities did not join the Burmese Union until 1948. Ethnic groups see that

¹⁸ Beehner, L. (2018). *supra nota* 1, 2.

¹⁹ *Ibid.*, 6.

²⁰ Kipgen, N. (2016). *Myanmar: A political history*. Oxford University Press. 39–45.

before the independence, the minority groups lived apart from the majority Burman people,²¹ who have established the kingdoms and nations in the region since 1044 CE.²²

The agenda for the resistance movement of ethnic armed groups against government since 1948 has been to promote the formation of a federalism state based on democratic principles, to get the government to recognize and protect ethnic minorities' culture, and above all the fair exploitation and distribution of natural resources. The biggest problems from the perspective of Myanmar's ethnic groups are related to the lack of influence in political decision-making, a poor basic services and economic situation in ethnic border lands, while central governments exploited valuable natural resources on the border lands and reaped benefits for the political and Burman elites. Since independence, ethnic groups have seen the actions of the central government as discriminatory by restricting cultures, religious freedom, and other rights.²³

1.2. Peacebuilding process in Myanmar

When looking at the impact of the 2008 Constitution on the peace process, it is necessary to identify the main factors in the whole peace process that have influenced the direction in which the negotiations have progressed. This chapter examines the main obstacles to the peace and the stalling factors of the negotiations in order to assess the 2008 Constitution specifically in the context of the peace process. First the EAOs main demands are discussed as well as Tatmadaw's main motives to oppose EAOs' demands. After this the peace process is divided into two, events during the President Thein Sein's government with majority of Union Solidarity and Development Party (USDP) and his successor's government formed by the state chancellor Aung San Suu Kyi and her party National League for Democracy (NLD). At the end of the chapter, the 2021 coup is discussed.

1.2.1. Demands of EAOs and the motives of the Tatmadaw

Several EAOs have long built an administration in their territories that seeks to build and provide vital services, as well as a community. Ashley South calls this approach the EAOs 'demands for

²¹ Kramer, T. (2021). 'Neither war nor peace': Failed ceasefires and dispossession in Myanmar's ethnic borderlands. *The Journal of Peasant Studies*, 48(3), 479.

²² Douglas, G. (2013). Performing ethnicity in southern Shan State, Burma/Myanmar: The ozi and gong traditions of the myelat. *Ethnomusicology*, 57(2), 185-206.

²³ Kramer, T. (2021). *supra nota* 21, 479.

an “emergent” phenomenon, where a system like federalism is built from the bottom up. The most important effort, the establishment of a federal state, should be promoted by supporting EAOs’ efforts to build local public administrations. This could facilitate the transition to a more decentralized form of government. However, the final official decentralized administration will need a constitutional change.²⁴ Throughout the peace process, the military has avoided developments in the debate on the management of natural resources and land, which would, however, be very important in supporting political federalism. The structure of the government is centralized so that ethnic groups do not have the possibility legally to manage their own territories and resources. This structure is also enshrined in the 2008 Constitution.²⁵ The principles of the Myanmar’s peace process lack solutions for land and resource management.²⁶ So far, the EAO’s have had the right to continue to exploit resources and generate revenue during ceasefires but has no right to manage revenue and resources.²⁷ A more autonomous management of natural resources has been a key demand and goal of the EAOs and ethnic civil society stakeholders since the beginning of the independence.²⁸

The peace process launched in 2011 has sought to stabilize the state and promote transition to liberal democracy. Nonetheless, throughout the peace process, land and natural resource laws and developments have further centralized control over the central government (Vacant, Fallow and Virgin (VfV) Land Law (2012) and the Forest Law (2018)).²⁹ The generation of natural resource revenues and the decision on how revenues are collected and paid in the Union budget are highly centralized and have little correlation with the number of natural resources accumulated by any borderland region. This is a source of tension for the EAOs, which has made a critical demand for centralized governance and management rights in the negotiations.³⁰

From the Tatmadaw’s side, the 2008 Constitution is seen as a prerequisite for the development of democracy, not an obstacle. According to Tatmadaw's Commander-in-Chief, Min Aung Hlaing, Tatmadaw has protected Myanmar from external threats that could lead to the disintegration of the

²⁴ South, A. (2021). Towards “Emergent Federalism” in Post-coup Myanmar. *Contemporary Southeast Asia*, 43(3), 439.

²⁵ Woods, K. M. (2019). Natural resource governance reform and the peace process in Myanmar. *Forest Trends: Forest Policy Trade and Finance Initiative Report*, 7.

²⁶ *Ibid.*, 5.

²⁷ Kramer, T. (2015). Ethnic Conflict and Lands Rights in Myanmar. *Social Research*, 82(2), 365.

²⁸ Woods, K. M. (2019). *supra nota* 25, 5.

²⁹ Kramer, T. (2015). *supra nota* 27, 365.

³⁰ Woods, K. M. (2019), *supra nota* 25, 7.

Union, the disintegration of national solidarity, and the threat to sovereignty.³¹ However, Tatmadaw has made it clear that there is no tolerance for changes that would reduce their institutional statehood, due to this progress for political liberalism and political reconciliation should be made to the extent permitted by the 2008 Constitution.³²

Speaking of Tatmadaw's compelling need to hold on to the power handle, the question arises as to what is the real motive? It would appear that the objectives of the EAOs and Tatmadaw are largely the same. Management of natural resources and land. Myoe argues that despite Tatmadaw's constitutional status, it could become more relinquished in the future.³³ Darin Christensen, Mai Nguyen and Renard Sexton, for their part, argue that Tatmadaw has used violence to incite conflict, especially in jade mining areas, including in the state of Kachin³⁴, where there were still active and widespread clashes just at the time of the National Ceasefire Agreement (NCA) was under negotiation.³⁵ Tatmadaw has spoken since the beginning of its military regime about the unity of Myanmar and the need to protect the entire nation from its internal and external threats.³⁶ In the 2008 Constitution, Tatmadaw seals this role, which it had been directly or indirectly represented for decades. The purpose of federalism would be specifically to transfer, in addition to the exploitation of natural resources, in their areas, the entire management for the EAOs. Tatmadaw is clearly not ready for this. Tatmadaw has always been aware of the causes of the conflict and the EAOs' demands for political solution. In any case, Tatmadaw has defined itself in the 2008 Constitution as the guardian and protector of the entire state, which is why peace, democracy, and any issue of considering the whole society from constitutional point of view can only be completed if Tatmadaw lets it to come true.

1.2.2. Peace process since 2011 under Thein Sein's government

Thein Sein started extensive reforms when elected to the government in 2010 and launched the peace process in 2011. Thein Sein publicly committed to measures aimed at developing Myanmar into a more modern and democratic state, as well as established The Myanmar Peace Center (MPC)

³¹ Myoe, M. (2014). *supra nota* 10, 238.

³² *Ibid.*, 234.

³³ *Ibid.*, 248.

³⁴ Christensen, D., Nguyen, M., & Sexton, R. (2019). *supra nota* 12, 333.

³⁵ South, A. (2021). Towards "Emergent Federalism" in Post-coup Myanmar. *Contemporary Southeast Asia*, 43(3), 444.

³⁶ Myoe, M. (2014). *supra nota* 10, 234.

in 2012, to better navigate the peace negotiations between parties.³⁷ However, the public was very wary of this, as the USDP is a well-known military-backed party and several of its politicians are former military officers. Maung Aung Myoe argues that during the Sein's government, Tatmadaw allowed several political steps forward, such as the release of political prisoners and the restoration of press freedom and refrained from interfering in party politics within the framework of its constitutional authority. Of these steps to promote democratic liberalism, however, his conclusion is that, despite Tatmadaw's support for the civilian government, it is not ready for structural changes that would undermine its political role.³⁸

The peace negotiations started in 2011 under Sein's government did show, through several different negotiating meetings, that the government, as well as the EAOs, were committed to working together to achieve social balance through agreements and political discussions. While the Sein's government's efforts for peace seemed to be on promising track, there were also significant challenges.³⁹ Since the beginning of the peace process, EAOs have experienced distrust of the government. Thein Sein's government, which consisted mainly of former military officials, did not get ten of the EAOs to sign the NCA in 2015. In the background, it was precisely the fact that several of these groups had fought against the Myanmar army.⁴⁰ Some EAOs refused to sign the NCA specifically because of a lack of trust in the government.⁴¹ Thein Sein, as well as Aung San Suu Kyi, have emphasized the importance of trust, and more precisely, its lack in the peace process.⁴² The government of Thein Sein did agree to take the principle of federal union forward. This in itself was progress, as this is the main goal of the EAOs. Nevertheless, the question is whether Tatmadaw is ready to take the matter forward and in which terms.⁴³

A new approach from the Sein's government to the negotiations was to allow EAOs in the negotiations even before any ceasefire was signed. Negotiations that took place during direct military rule always required some sort of ceasefire to be agreed upon first. In addition, no disarmament was required to participate in the negotiations, and negotiations also took place outside Myanmar, contrary to previous requirements of Tatmadaw. During the timeframe of the

³⁷ Ganesan, N. (2017). Appraising Myanmar's Democratic Transition and Evolving Challenges. *Japanese Journal of Political Science*, 18(1), 198-199.

³⁸ Myoe, M. (2014). *supra nota* 10, 249.

³⁹ Kipgen, N. (2015). Ethnic Nationalities and the Peace Process in Myanmar. *Social Research*, 82(2), 413.

⁴⁰ International Crisis Group. (2020). *Rebooting Myanmar's Stalled Peace Process*. International Crisis Group.

⁴¹ South, A. (2018). "Hybrid Governance" and the Politics of Legitimacy in the Myanmar Peace Process. *Journal of Contemporary Asia*, 48(1), 56.

⁴² Kipgen, N. (2015). *supra nota* 39, 415-416.

⁴³ *Ibid.*, 412.

Sein's government, a multi-part plan was drawn up to promote peace, which also included government's guidelines. The most important and significant of these has been that all the parties must accept the 2008 Constitution, and if the necessary changes need to be made, they must be enacted by a majority in Parliament, people must live and work in accordance with the Constitution and coordinate the existence of a unified force in accordance with the Constitution.⁴⁴

One reason for the effective cooperation between the USPD government and Tatmadaw has certainly been that both the president and the Commander-in-Chief share a common institutional background.⁴⁵ While the competition between Aung San Suu Kyi and the current Commander-in-Chief has been clearly featured in state policy.⁴⁶ Indeed, Maung Aung Myoe argues in his article that, after all, the bilateral relations between Tatmadaw and the leaders of civilian administrations and their functioning are of great importance. According to him, only after sufficient confidence can Tatmadaw potentially ease its involvement in national politics. Nonetheless, given the real situation since the Constitution came into force, it is very unrealistic to expect Tatmadaw to relinquish its role as the supreme protector of the state.⁴⁷ If Tatmadaw expects patience from EAOs to build trust, it should be prepared to concretely implement its sincerity to advance EAOs.

1.2.3. Aung San Suu Kyi and NLD: stalled peace process

The dichotomous history between the National League for Democracy (NLD) and Tatmadaw goes far. The NLD was established in 1988 as an opposition movement that overthrew the army-run socialist one-party system and eventually led directly to military power. The NLD won the 1990 elections, the outcome of which Tatmadaw ultimately virtually nullified in the process of drafting the Constitution. The NLD opposed the 2008 Constitution and did not run in the 2010 election as a protest. The NLD has been in opposition since 2012 and won the 2015 election as well as the 2020 election.⁴⁸

The majority government of the NLD from 2016 onwards failed to take the progress in building trust just further. In their article, Ardeth Maung Thawngmung and Saw Maung call the NLD-era government a 'two-headed government'. A decade of mistrust was now materializing in a

⁴⁴ Kipgen, N. (2015). *supra nota* 39, 401–402.

⁴⁵ Myoe, M. (2014). *supra nota* 10, 247

⁴⁶ International Crisis Group. (2020). *Rebooting Myanmar's Stalled Peace Process*. International Crisis Group, 4.

⁴⁷ Myoe, M. (2014). *supra nota* 10, 247.

⁴⁸ Thawngmung, A., & Htoo, S. (2022). The Fractured Centre: 'Two-headed government' and threats to the peace process in Myanmar. *Modern Asian Studies*, 56(2), 514-515.

government where the NLD sought to strengthen its own position at the expense of Tatmadaw's power. A concrete constitutional example of this is that the election of Aung San Suu Kyi as president has been made impossible by the article 59(f) of the 2008 Constitution, a person with children with a foreigner can never become elected president. This article is considered to be directly related to Aung San Suu Kyi. However, Suu Kyi invented a constitutional way to circumvent this, and made itself a 'state Counselor', which is comparable to a prime minister in a Parliamentary system. This is how *de facto* power passed to her. During her reign, Aung San Suu Kyi avoided formal discussions with the state's highest security body. Aung San Suu Kyi's actions have been seen as a clear sign to lower the military's influence and unwillingness to recognize their authority.⁴⁹

The NLD's misjudgment has been to put itself in a somewhat neutral position between the Tatmadaw and EAOs. Many ethnic minorities see NLD and the government more broadly, as they are dominated by ethnic Burman. In addition, the NLD gave priority to formal discussions and did not give weight or space to more informal discussions between the conflict parties. This already frustrated the EAOs that signed the NCA, as no progress was made due to the bureaucracy required by the NLD.⁵⁰ During its term, the NLD has also focused on constitutional changes that would allow for Aung San Suu Kyi's presidency and changes that could bypass the military's so-called veto over constitutional changes. All these and several other actions have reduced the contact between civilian and military authorities, including in the peace process. The NLD has admitted that promoting democracy is more important than promoting federalism.⁵¹ Which is in itself opposite what EAOs aspire, as many of them have prioritized that the continuation of peace process goes above all, not who is in charge.

The NDL's goals for changes to the 2008 Constitution at the beginning of the government's term were the basis for showing interest in and prioritizing the peace process. The goal of the peace process was a political solution. For EAOs, this clearly stated political solution was a system of federalism and a more decentralized form of government, not promoting necessarily democracy. As enabling such a model would require significant changes to the 2008 Constitution, the NLD hoped to seize the opportunity and at the same time push for other constitutional changes it wanted, particularly the reduction of political power of the the military. NLD wanted to guarantee their

⁴⁹ Thawngmung, A., & Htoo, S. (2022). *supra nota* 48, 518-519.

⁵⁰ International Crisis Group. (2020). *supra nota* 42, 3.

⁵¹ Thawngmung, A., & Htoo, S. (2022). *supra nota* 48, 523.

political goals under the pretense of the peace process, constitutional changes which are not actually straight linked to the peace process. In the process, it ended in a failure to negotiate peace. In addition to this, the political competition between Aung San Suu Kyi and Commander-in-Chief Min Aung Hlaing further weakened coordination between the government and the military. The NLD's lack of commitment to the peace process for its own political gain has further fueled mistrust and resentment from EAO groups.⁵²

1.2.4. The 2020 Election and the 2021 Military coup

1st of February in 2021, Tatmadaw staged a coup following the November 2020 election results. The reason, according to Tatmadaw, is the fraudulent election in which the party backed by the military lost to the NLD. No evidence of electoral fraud has been presented.⁵³ On the morning of February 1st, Tatmadaw arrested NLD chairman and state counselor Aung San Suu Kyi and President Win Myint, the Internet access in the country was shut down and soldiers were sent to several strategic locations just hours before the elected parliament were scheduled to meet for the first time. Following the arrest of President Win Myint, Vice President Myint Swe, a former general, was appointed interim president, after which he declared a state of emergency by handing over executive, legislative, and judicial authority to the Chief-in-Commander Min Aung Hlaing, in full compliance with Articles 417 and 418 (a) of the Constitution.⁵⁴ In its report, the International Crisis Group estimates that the Tatmadaw's concern in this situation has not been a hybrid model of civilian-military government, but the popularity of NLD leader Aung San Suu Kyi. The same report estimates that Tatmadaw, in drafting the Constitution, and to secure its power, would not imagine a scenario in which one person, Aung San Suu Kyi, is gaining so much popularity as to be able to take a central role in the presidential election. The election of the president has been a key strategy for the Tatmadaw to hold on to the grip of power. However, since 2016, Aung San Suu Kyi, as the chancellor of the state, has been able to play a key role in the appointment of the president, which led to her close party colleague being named as a president.⁵⁵ Tatmadaw has two options on how to proceed after their coup. Either they hold new elections, as promised, and endure the fact that the NLD is likely to win these elections as well. Or they will have to denigrate the Constitution they have drafted themselves and change the election or parliamentary arrangements. In any case, it could be suggested that 2020 elections have shown Tatmadaw that the Constitution

⁵² International Crisis Group. (2020). Rebooting Myanmar's Stalled Peace Process. *International Crisis Group*, 4.

⁵³ Goldman, R. (1 February 2021). Myanmar's Coup, Explained. *New York Times*.

⁵⁴ International Crisis Group. (2021). Responding to the Myanmar Coup. *International Crisis Group*. 3.

⁵⁵ *Ibid.*, 4.

they drafted is not entirely incontrovertible and has driven them into a certain kind of crisis with their own legitimate documentary.⁵⁶

The roots of Myanmar's internal conflict are multifaceted and long-standing, and, one could suggest, sustainable. The conflict is combined by both ethnic differences and economic benefits and problems. Central to the conflict has been the views on post-independence Myanmar state-building. The ruling military Tatmadaw has sought to maintain power over areas inhabited by ethnic minorities, among other things because of their abundant natural resources. For this reason, Tatmadaw has promoted the idea of a single state of Myanmar, although ethnic groups have not felt they have ever fully belonged into that. However, the unification of ethnic groups in the pursuit of independence has bound the people together, even though the actual common social and ethnic history is not fully shared in terms of nationality. Ethnic groups, on the other hand, feel entitled to more autonomy status and feel betrayed when promises of autonomy and ethnic equality were ignored when the military seized power from the first civilian government in 1962. Since then, ethnic groups have experienced discrimination and exclusion from political decision-making and internal conflict remains unresolved. Since 2011, both governments have sought to take the peace process forward. It has been clear from the outset that a quick and simple solution is not promised and that the 2008 Constitution will play a key role in every major goal that the debate has sought to achieve, be it a state model, a government, or a constitutional amendment in the name of democracy or peace.

⁵⁶ International Crisis Group. (2021). *supra nota*, 4.

2. THE CONSTITUTION OF THE REBUPLIC OF THE UNION OF MYANMAR

In this chapter the 2008 Constitution drafting process is shortly evaluated in order to argue that the process was not democratic and that Tatmadaw's intention was never to let the civilian government to set the rules for the Constitution. After this the Constitution text is opened, the overall authoritarian features are identified as well as the articles mostly affecting to find the compromise between conflict's parties. At the end of the chapter the 2008 Constitution and Tatmadaw together are examined from the perspective of authoritarian constitutionalism.

2.1. A generation-long period of drafting the 2008 Constitution

The process explained next characterizes how the 2008 Constitution has been turned into a tool and tactic to effectively secure and maintain the military's authoritarian status also after the transfer to the nominal democracy. Myanmar's Constitution was finalised in 2008, but the process began up to two decades earlier in 1988. Looking back, the process of drafting the Constitution was being manipulated by the ruling military Tatmadaw so that the power will continue to be concentrated for the military, despite the result of any election and that the constitutional changes will need military's permission. The purpose of drafting the Constitution was to move from the decades lasted junta to democracy.⁵⁷ How that process was carried out, whose interests were actually pursued and what the outcome was in 2008 will be significant when we look at the importance of the Constitution in resolving the current conflict in Myanmar. The parties have remained more or less the same, and even today it is very important to identify, in the face of past events and upheavals, whose interests and successes have in fact been sought to be protected in the 2008 Constitution or in opposition to it.

In 1988, dissatisfaction with the economic policies of 'Burmese-style socialism', non-existent democracy, and human rights abuses escalated into a nationwide movement that was bloodily repressed by the military. At the same time also NLD was first established. As a result of the protests, the BSPP was disbanded and Tatmadaw replaced it by the State Law and Order Restoration Council (SLORC), which then initiated and oversaw the process of drafting the future

⁵⁷ Kyaw, N. (2019). *supra nota* 6, 310.

constitution.⁵⁸ The state was now ruled by direct military power, and not even a nominal government existed.⁵⁹ National League for Democracy (NLD) won a majority of seats in 1990 election that SLORC itself had organized and permitted to be held. However, the transfer of power to the elected parliament from SLORC was planned in two parts. The Constitution would be drafted by an elected parliament, but the transfer of the power was not defined. At the request of the SLORC, the NLD drafted a Constitution, but after it, the SLORC stated that the Constitution should not be a one-sided affair, but that the entire nation should be consulted. The result of the 1990 elections was completely ignored and the NLD was given only a passive role in the constitution drafting process.⁶⁰ The SLORC set an agenda for the drafting of the Constitution, which permanently modified the process and the content of the adopted text.

The National Committee (NC) was established by the SLORC in April 1992 to operate the Constitution drafting. The composition of the NC was questionable in terms of independence and autonomy, with 15 members being active military officers and the rest civilian government officials.⁶¹ In 1992, the SLORC published six basic principles for drafting the Constitution: (i) the indivisibility of the union; (ii) the failure to dismantle national solidarity; (iii) strengthening and preserving sovereignty; (iv) the emergence of genuine multi-party democracy; (v) the development of the eternal principles of justice, freedom, and equality in the State; and (vi) Tatmadaw's (military) involvement in the future leading role of state national politics. The last two of the above articles is the most important. The military will continue to be involved in policy-making in the future, also after the new constitution is executed. This is blatantly contrary to the principle of democracy and seals the attempt to keep the military undemocratically permanently involved in decision-making. The fifth paragraph is relevant in the sense that the result of the 1990 elections held by SLORC itself is annulled in the article.⁶²

In 2003, over ten years later, the junta drew up a roadmap for drafting a constitution. Founded in 1992, NC was convened. The Constitution should be drafted within the framework of the requirements set out above and final approval would be given by referendum. Parliamentary elections would be held under the new Constitution. In 2008, the NC drafted the Constitution

⁵⁸ Kyaw, N. (2019). *supra nota* 6, 315.

⁵⁹ Huang, R. (2013). Re-thinking Myanmar's political regime: Military rule in Myanmar and implications for current reforms. *Contemporary Politics*, 19(3), 247.

⁶⁰ Kyaw, N. (2019). *supra nota* 6, 318.

⁶¹ Kramer, T. (2021). *supra nota* 21, 318.

⁶² *Ibid.*, 319.

within a very tight timeframe, leaving no time to check the compatibility of the paragraphs or otherwise discuss the content of the Constitution. Through a referendum, the constitution was enacted.⁶³ In 2010, the Union Solidarity and Development Party (USDP) subsequently won a fraudulent election and formed the first government under the new Constitution.⁶⁴ Myanmar was seemingly democratised and much was expected of the future, both at home and abroad, despite the fact that several parties expressed doubts precisely because of the content and the process of the Constitution and as well as its content.⁶⁵

2.2. The 2008 Constitution

The transition from military junta to nominal-democracy was made under the rule military had set. No other party really had any possibility to effect to the process and outcome. This section discusses the most problematic articles and how military's juridical supremacy is incorporated to the 2008 Constitution. The articles discussed considers the duties and responsibilities of the military, the formation of the government, the amendment of the Constitution, and finally the constitutional factors concerning land and natural resources that are at the heart of EAOs requirements.

2.2.1. Controversial articles

Defense Services

The three main clauses in Myanmar's Constitution come from Tatmadaw's ideology, which was born to prevent a more decentralized regime, or federalism, already in the early years of independence. The three clauses have been translated as follows: Non-disintegration of the Union. Non-disintegration of national solidarity. The perpetuation of Sovereignty. These clauses are written in the basic principles of Article 6(a-c) of the Constitution, and Article 20(e) of the Defense Service, i.e., the Defense Service, meaning the military, is constitutionally specifically intended to protect these paragraphs 6(a-c). Article 20(f) specifically instructs the Defense Service primarily to protect the Constitution of the Union.

⁶³ Kyaw, N. (2019). *supra nota* 6, 325.

⁶⁴ *Ibid.*, 322.

⁶⁵ UN News. (2019, 7 February). Parliamentary bid to democratize Myanmar constitution a 'positive development' says UN rights expert. *United Nations*.

The basic principles of the constitutional drafting process ensured the involvement of the military in decision-making in the future as well. This is also added to the 2008 Constitution as Article 6(f) of the 2008 Constitution ensures ‘enabling the Defense Services to be able to participate in the role of National political leadership of the State.’⁶⁶ The above article has its roots in the process of drafting the Constitution. The guidelines set by the SLORC for the National Committee to draft the Constitution had to be followed throughout the drafting process. In this context, the SLORC was able to arbitrarily secure the military's participation in future decision-making by adding a sixth and final paragraph to these guidelines: (vi) Tatmadaw's (military) involvement in the future leading role of state national politics.⁶⁷

Defense Service's supreme personnel Chief-in-Commander is no higher dignified than the president. Despite this, he has possibly the most power in his hands than any other individual in Myanmar. According to the 2008 Constitution, the army has twenty-five percent of the seats in both houses, which cannot be changed by vote. These twenty-five percent in both houses are appointed exclusively by decision of the Chief-in-Commander under Article 74(a-b). In addition, The National Defense and Security Council (NDSC), which has special power to influence security decisions, is made up of 11 individuals, six of whom are appointed by the Chief-in-Commander. This is significant because although the Constitution does not allow Tatmadaw to intervene directly in the formation or dissolution of the government, it can, through the NDSC, influence the declaration of a state of emergency,⁶⁸ which in turn would lead to the declaration of a military regime stated in the Constitution, and make Chief-in-Commander the highest executive and judicial powers which is stated in the article 40. This scenario occurred as a result of the 2020 election, which led to Tatmadaw's coup in February 2021.⁶⁹ In addition, according to the article 20(c) Chief-in-Commander is the supreme commander of all the armed forces, not the president. According to the constitutional structures overall, Tatmadaw's real influence in policymaking has been maintained, although there is no possibility under the Constitution to influence political competition. However, Tatmadaw has made it certain that there is no legal way for civilians to monitor or influence Tatmadaw's strategy.

⁶⁶ ပြည်ထောင်စုသမ္မတမြန်မာနိုင်ငံတော်ဖွဲ့စည်းပုံအခြေခံဥပဒေ ၅၂၉/၂၀၀၈, Constitution of the Republic of the Union of Myanmar, 29 May 2008.

⁶⁷ Kramer, T. (2021). *supra nota* 21, 320.

⁶⁸ Myoe, M. (2014). *supra nota* 10, 239.

⁶⁹ BBC News. (2021, 17 May). Myanmar election: No evidence fraud in 2020 vote, observers say. *BBC News*.

The Pyidaungsu Hluttaw: The Amyotha Hluttaw and The Pyithu Hluttaw (add Article 74)

Pyidaungsu Hluttaw is *de jure* national-level bicameral legislature of Myanmar, which consist two houses, the 224-seat Upper House of Nationalities (The Amyotha Hluttaw) and the 440-seat Lower House (The Pyithu Hluttaw). The Pyithu Hluttaw is defined in Article 109(b) of the Constitution and 110 of the seats are assigned for Defense Services personnel. Article 141(b) defines The Amyotha Hluttaw from 56 of the seats to the Defense Services personnel. These seats are binding despite the election result. The election result only applies to Article 141(a) and Article 109(a), which specify that the seats will be filled by ballot. By these amounts of seats, in both houses Defense Service Personnel hold 25 per cent of the seats. Defense Services personnel positions are designated exclusively by the Commander in Chief of the Defense Services.

Constitution Amendment

Article 433 defines the amendment of the Constitution. The process proceeds as follows. Twenty percent of Pyidaungsu Hluttaw's representatives must submit the bill (Article 434), after which the bill must be submitted to Pyidaungsu Hluttaw to be assessed. The Constitution can only be amended by a majority of more than seventy-five percent of the votes of Pyidaungsu Hluttaw. In both houses, the percentage of seats for Defense Services personnel is one quarter. Thus, in theory, a constitutional amendment would require the support of at least from one person who is appointed by Commander-in-Chief of Defense Services.

Article 436(a) of the Constitution allows, “with the prior approval of more than seventy-five percent of all the representatives of the Pyidaungsu Hluttaw, after which in a nation-wide referendum only with the votes of more than half of those who are eligible to vote.” Article 436(a) covers only parts of the Constitution. Article 436(b) also states that other parts of the Constitution can be amended by a seventy-five percentage of majority, but these parts do not require a referendum first. These three articles constitute constitutional protection or security for the military, so that it is impossible to legally amend the constitution without the support of at least one member of the defense service personnel.⁷⁰

⁷⁰ Constitution of the Republic of the Union of Myanmar 29 May 2008.

Article 37 of Myanmar's 2008 Constitution states that the Union: (a) is the ultimate owner of all lands and all natural resources above and below the ground, above and beneath the water and in the atmosphere in the Union; (b) shall enact necessary law to supervise extraction and utilization of state-owned natural resources by economic forces. This is a very relevant article because several studies have linked the connection between the main mining and natural resource areas to the conflicts between Tatmadaw and armed groups. For example, in their research, Darin Christensen, Mai Nguyen and Renard Sexton argues that Tatmadaw would even use violence to control certain areas of land important to natural resources. The resource management issue is also particularly central to the federal state objective. One of the main reasons for promoting federalism on the part of the EAOs has been to be able to manage the land and the proceeds in addition to its utilization. At present, all economic management of natural resources is centralized in the hands of the central government.⁷¹

2.3. Authoritarian Constitutionalism in Myanmar

The Constitution is a means of limiting, dividing, and regulating power and balancing the political environment. However, through constitutional democracy, it is possible to manipulate order in such a way that the constitution itself strengthens or promotes authoritarian status.⁷² Mark Tushnet embraces authoritarian constitutionalism by placing it in a perspective that the power and government is limited in the Constitution. In this way he outlines the normative features of authoritarian constitutionality as follows. First, he believes that authoritarian constitutional systems should be seen as a separate type, rather than describing such a system as a transitional government, assuming they are an intermediate point on the road to liberal democracy.⁷³ He suggests that authoritarian constitutionalism can best be defined by making moderately strong normative commitments to the constitutionality that govern these states.⁷⁴ Under authoritarian constitution, liberal freedoms are protected at the central level and elections are reasonably free and fair. This definition lies between the absolute authoritarian system and liberal democracy as its own type.⁷⁵ In their efforts to understand the drafting of the Constitution in authoritarian

⁷¹ Christensen, D., Nguyen, M., & Sexton, R. (2019). *supra nota* 12, 332-366.

⁷² Crouch, M. (2020). *supra nota* 9, 489.

⁷³ Tushnet, M. (2015). *supra nota* 17, 394–395.

⁷⁴ *Ibid.*, 397.

⁷⁵ *Ibid.*, 396.

regimes, scholars are widely concerned about three interrelated issues: the process of drafting the Constitution, the content of the Constitution, and the real role of the Constitution in authoritarian regimes.⁷⁶

There are several concepts and starting points for manipulating the Constitution to ensure the power of authoritarian rule. The deterioration of constitutional law can be seen as a so-called illiberal recession, but this only includes the notion that we are moving from liberalism to a more authoritarian form. In Myanmar, the military junta has been in power since 1962, so there has been no pre-constitutional liberal democracy. Indeed, in her research, Melissa Crouch discusses the constitutionality of Myanmar from the opposite direction, as a 'Pre-emptive Constitution-Making', that is, when the authoritarian elite anticipates a democratic political transition by adopting a new constitution. According to Crouch, the Constitution was used and manipulated for a concrete and deliberate conversion from direct military rule to a military state to prevent democracy.⁷⁷

It took 20 years to draft Myanmar's present Constitution, during which Tatmadaw ruled the country under direct military rule, without any form of legal document.⁷⁸ During this 20 years Tatmadaw made sure to prevent the transfer of actual power to the civilian government and to keep the military as the supreme political force. The 2008 Constitution can, in fact, be seen as facilitating the role of the Tatmadaw in leading the Union. After the 2008 Constitution was in force, the military junta gave permission to the election. 2010 general election in Myanmar has been argued to be sham what comes to international standards.⁷⁹ The 2015 general election, which NLD won, has been considered fair and free election and electoral fraud has not been alleged to have taken place on behalf of impartial bodies, first time in five decades.⁸⁰ Also the 2020 general election, which NLD won as well, said to be honest according to electoral observers, but received allegations of dishonesty and electoral fraud from opposition and military. This led to civil disobedience and for military coup in 2021. Tatmadaw has said that new election will be held, once the state emergency is over.⁸¹ This is interesting, as Tatmadaw already allowed to hold free election twice but after the second one they ended up claiming the fraud. Two free general elections in a row however supports Tushnet's assessment that authoritarian constitutional regimes often

⁷⁶ Crouch, M. (2020). *supra nota* 9, 490.

⁷⁷ *Ibid.*, 488.

⁷⁸ Huang, R. (2013). *supra nota* 59, 247.

⁷⁹ Lidauer, M. (2012). Democratic Dawn? Civil Society and Elections in Myanmar 2010–2012. *Journal of Current Southeast Asian Affairs*, 31(2), 87.

⁸⁰ Kim, Y. (2016). The 2015 parliamentary and 2016 presidential elections in Myanmar. *Electoral Studies*, 44, 419.

⁸¹ BBC News. (2021, 17 May). *supra nota* 69.

allow elections to take place accordingly, as by this can made a conclusion that the authoritarian party can rely on that, that the real power is already enshrined in the Constitution.

Crouch assesses how past ceasefire agreements and constitutional reform debates have affected existing treaties and documents. She concludes that the aspirations for peace and constitutional reform in Myanmar's history will inevitably shape future efforts for peace and renewal. According to Crouch, one of the reasons why the peace process is unable to foster a strong dialogue is that the Constitutional Court has no role in the peace process, which undermines the chances of resolving the conflict through dialogue during and after the peace agreement. The Constitution, as a legal document and the Constitutional Court, should be independent of the parties to the conflict for the peace process to be defined as constitutional, which is not the case in Myanmar. As stated earlier, the Constitution of Myanmar, the Treaty of the Union, is in the hands of Tatmadaw himself in a kind of crisis. It is still impossible to say in which direction the Constitution will drive the current political situation in Myanmar. In assessing the future, it is worth understanding how the Constitution and the associated peace process and conditions for peace have driven Myanmar's integration and political change.⁸²

The model and purpose of the 2008 Constitution is urgent to conceptualize when we are talking about the peace process in relation to the 2008 Constitution. This whole concept is very interlinked with the democratisation process and how this Constitution also systematically tries to restrict or prevent liberal democracy. However, as EAOs most prominent demand is federal system, which means, radical decline of Tatmadaw's power, the 2008 Constitution process, its content, and its implementation is directly connected to the prospects of peace process, not just to the negotiations.

⁸² Crouch, M. (2020). Constitutional touchstones: Peace processes, federalism, and constitution-making in Myanmar. *International Journal of Constitutional Law*, 18(4), 1350-1372.

3. ANALYSING THE PEACE PROCESS AND THE 2008 CONSTITUTION

The third chapter analyses the credibility of the argument presented in the introduction, Tatmadaw's objective to maintain the authoritarian state power is intentionally secured in the Myanmar's 2008 Constitution and these authoritarian elements also set the terms for the peace process and constitutionally seals the decades-long claims of the EAOs out of their reach.

Tushnet's definition of authoritarian constitutionalism as a theory, and Crouch's analysis of Myanmar set into this theory, helps to understand Tatmadaw's objectives and the current position in Myanmar's political environment. By authoritarian constitutionalism it can be argued that Tatmadaw has indeed took advantage of constitutional reform and the literal content of the Constitution and manipulated itself into a constitutional authoritarian position that has led to a situation where the military has in February 2021 'legally' taken control of the executive, legislative, and judicial authority. In other words, Tatmadaw reached a situation in February 2021 where the power of the current military junta is constitutionally justified. In addition to prevent the political integration, the Constitution has been identified as a key obstacle to the peace process, constitutionally blocking the fair possibilities to discuss about the EAOs' last goals.

The discussion of the argument of the thesis is divided into three parts. Firstly, Tatmadaw's efforts to constitutionally maintain its authoritarian status and its impact on the progress of the peace process, as well as on the future are considered. After this government-led peace negotiations in relation to the Constitution are analysed. At the end, the impact of controversial articles of the 2008 Constitution on the peace process in relation to terms of peace are discussed.

3.1. Tatmadaw's authoritarian constitutionalism and the effect to the peace process

The features of authoritarian constitutionalism can be clearly seen in the constitutional process and the text itself, as it was originally designed to protect the Tatmadaw's influence in every aspect of Myanmar's policy. Tatmadaw has succeeded in manipulating its power over the Constitution so that the ultimate purpose of a democratic constitution, the restriction of power in the state treaty, has been reversed so that limited supremacy cannot be changed without a process of constitutional change. The Constitution has been used as a means of survival under internal and external

pressures. Widespread unrest demanded a response to the difficult political situation in the late 1980s, and Tatmadaw had to figure out how, by relinquishing direct military power, power could still be maintained. The result of the 20-year drafting process is an authoritarian constitution in favor of Tatmadaw, which not only prevents democracy from taking place, but also slows down and now also halted the peace process. It has come clear, that Tatmadaw will not allow any attempts to reduce its power, so even if the constitutional amendment would legally go through, Tatmadaw has shown, that the state emergency is possible to execute when they consider that the state security is threatened, and by state security, Tatmadaw clearly means their own security. In constitutional terms, in theory and in practice, the rules for peace are centralized in Tatmadaw's hands, as EAOs' demands for peace are controversial in relation to the Constitution.

The review of the latest events in relation to the Constitution shows that the situation might not be so favorable for Tatmadaw. Myanmar is in a situation where, despite an authoritarian constitution, the popularity of the NLD and Aung San Suu Kyi is causing for Tatmadaw a feeling of a threat as a supreme state power. Tatmadaw has declared that it will protect the Constitution and allow the process of state reconciliation and peace permitted in the Constitution. However, Tatmadaw has caused for itself a situation what comes to the following events after the 2021 February coup in terms of Constitution and the peace as well. Tatmadaw must either accept that even after the new elections, which it has promised to be held at some point, the NLD will very likely win again and it will keep challenging Tatmadaw as a supreme power, or Tatmadaw must accept the weakness of its own Constitution as a means of safeguarding its own authoritarianism and denigrating the Constitution and somehow change the electoral system to more regulated, in which way the NLD, or any other unfavorable party, can never achieve such a major electoral victory.

This is significant when looking at the peace process and EAOs requirements from the perspective of legal norms. If Tatmadaw was to change the Constitution, for example in terms of voting and election in general, it would directly weaken the weight of the Constitution at the theoretical level and the EAOs could seize the opportunity when Tatmadaw itself demonstrates the inaction of the Constitution. The future of Myanmar shows what Tatmadaw will next strive for and how a particularly difficult and violent civil war will develop. The problematic nature of the Constitution in the current situation in Myanmar is crucial if the peace process in Myanmar is to continue. Today, however, it is impossible to say what role the Constitution will play in Myanmar in the future as the internal situation remains very unstable and unpredictable.

3.2. Constitution as part of government-led peace negotiations

An important factor for the peace process would also seem to be which party fills the seventy-five per cent of the seats elected. The NLD has had lack of commitment to the peace process at the expense of its own political viability, which increased the lack of trust. Sein's peace process respected Tatmadaw's Constitution, and Sein's military background has increased trust with Tatmadaw as experiencing Sein as an ally. Although Thein Sein approved the promotion of federalism in 2015, it all still depends on how the Tatmadaw views the idea. The NLD's constitutional changes to reduce military influence have taken time, attention, and the military's trust in civilian rule. In addition, the constitutional changes pushed by the NLD would contribute to the realization of democracy, but these changes do not directly meet the demands of EAOs. Of course, through a functioning liberal democracy, things could be decided in such a way that EAOs would have better opportunities to participate in political decision-making at the parliamentary level. In Myanmar, however, this is not yet realistic. Even though the influence of Tatmadaw could in theory be reduced by amendments to the Constitution, Tatmadaw has clearly expressed its unwillingness to reduce its power, and as we have seen, Tatmadaw is willing to militarily protect its authority. Ethnic issues since independence are also interlinked. Discrimination against state-level minorities has caused mistrust in the entire government for decades, even after 2011. By increasing the status of autonomy, regions could reduce the feeling of ill-treatment as they could better influence the cultural traditions and way of life of their own communities in general.

It should be noted, however, that during the Sein's government, the ceasefire agreements partly lasted, although some clashes continued. The dialogue was open and there was a real effort on the part of each party to take peace forward sustainably. It can therefore be said that under the Constitution, the promotion of peace is possible, but lasting political stability would require some changes in the law. Also, several EAOs have succeeded in building and developing regional governance that would contribute to achieving a more autonomous status. The EAOs have not directly called for a constitutional amendment, but it has been precisely a matter of the possibility of a more autonomous status and management of natural resources. If these demands could be met to the extent permitted by the current Constitution, there would be an opportunity to take a step forward in building a more lasting peace. Therefore, it should be considered, as liberal democracy is not either of the conflict parties last demand, if it is the best way move forward to promote democracy and peace or should these be separate negotiations and processes. However, given the

content of the Constitution and given the lack of trust between political parties within Myanmar, a lasting solution would sooner or later require a new Union treaty.

3.3. The controversial articles of 2008 Constitution in relation to the peace process

The final constitutional document and its literal content will be significantly affected by the wording chosen during its drafting process. The six guidelines set by the SLORC for NC for drafting the new Constitution already guaranteed the permanent presence of the military in all major decision-making areas in Myanmar's future policy. The 2008 Constitution has succeeded in flooding the Defense Services everywhere so that virtually all key activities are overseen and decided by the Defense Service, i.e., Tatmadaw. The Chief-in-Commander can influence to all key factors, the formation of both houses of parliament, and the appointment of members of The National Defense and Security Council (NDSC) who are collectively responsible for the military and Chief-in-Commander. Tatmadaw has assigned for itself its most important duty, the Defense Service's obligation to protect the Constitution of Myanmar and, more specifically, the three national clauses, which the 'non-disintegrations of the Union', is worded specifically against federalism. This is not to say that the model of federalism in the state is not negotiable in theory; However, it is precisely this clause that Tatmadaw interprets as anti-federalism. These three clauses date back to the reign of Tatmadaw in the early years of independence, with the same motive then and now, preventing the sharing of power with ethnic groups.

The quotas for upper and lower houses seats are clearly undemocratic, but also at variance with peace process. EAOs have expressed that promoting peace is paramount, not who is in power. However, it is precisely Tatmadaw's quota in parliament that will prevent any constitutional changes without the consent of the Defense Services, and by constitutional changes, EAOs could have possibility to discuss about their claims. Parliament's quota seats and the peace process are therefore directly linked. When an amendment to the Constitution requires more than seventy-five percent of the vote, the Defense Service can prevent it with their twenty-five percent presence. If Tatmadaw is unwilling to amend these articles, a constitutional amendment by legal processes is impossible. The exclusive ownership of natural resources by the state is significant. And when we talk about the state, it is already clear that the supreme ruler is Tatmadaw. This factor, in turn, is directly linked to the peace process in that EAOs' goal of more decentralized governance and federalism is precisely the ability to manage and own the natural resources of the areas they inhabit.

So far, it has not been possible to take the matter forward, in fact, during the Sein government, the laws on natural resources were increasingly centralized in the central government. The literal content of the articles described above is significant. These articles in themselves seal the authoritarian features of the legal norms in the State Treaty of Myanmar, which must be respected in the name of democracy. In other words, Tatmadaw's authoritarian status is literally secured in the articles so that a state that wants to abide by the Constitution has to abide by an authoritarian Constitution. In the midst of the conflict, this puts the parties in an unequal position when discussing future terms of peace.

CONCLUSION

The purpose has been to recognize the impact of the 2008 Constitution as a state treaty on the peace process. In particular, the thesis focuses on the root causes of the conflict and the political aspirations of the opposing parties, as well as on how the 2008 Constitution, from a legal point of view, puts the ruling party Tatmadaw in a more favorable position in peace negotiations. The thesis provides an overview of the social policy situation in Myanmar at the state level and its relationship to the 2008 Constitution. It has come evident that the 2008 Constitution is legally a disadvantage to the peace process by creating an unequal setting for peace negotiations. Peace negotiations under the 2008 Constitution show that the peace can be promoted, and the open debate is possible. Nevertheless, the authoritarian status directly affects the literal content of the Constitution. As a result, the Constitution also restricts the peace process within legal norms in favor of Tatmadaw.

The thesis integrates international relations and legal studies on a practical level through the case study of Myanmar's. Studying with the case of Myanmar reveals that the consideration of the Constitution of Myanmar in the context of the peace process requires a combination of theories and methods of legal studies and as well of international relations. The framework is able to take into account the legal perspective when discussing the peace process in the context of the Constitution. The two disciplines integrated have made it possible to build a comprehensive understanding that allows the legal norms and social policy problems to be seen in the same context and conclusion. The thesis underscores the need to integrate different disciplines when assessing the construction of pre- and post-conflict states as well as researching the impact of legal norms and state contracts, also in the future research considering Myanmar but as well with other conflict nations.

To evaluate the credibility of the arguments presented, it can be claimed that Tatmadaw's objective to maintain the authoritarian state power is intentionally secured in the Myanmar's 2008 Constitution and these authoritarian features also set the terms for the peace process and constitutionally seals the decades-long claims of the EAOs out of their reach. However, it is important to look at the peace process and the constitutional process from different perspectives. Constitutionally, a compromise seems impossible in the light of current requirements. However, in practice peace process can be taken forward, and the Constitution itself as a legal document does not fully prevent peacebuilding. Although the constitution allows only seventy-five percent of seats to be elected, it would seem to have great importance who fills those seats chosen by the

people. This matter will need further research especially considering the argument that if the Constitution is not fully preventing the progressing the peace, in what scale it is possible to promote the demands of EAOs and create more equal setting when discussing of the terms for peace and how the elected government should participate to the peace process. It is important to evaluate these arguments and the results of the thesis in the future peace process in Myanmar. Tatmadaw's authoritarian constitutional objectives so far cannot be ignored when defining the terms of peace. Similarly, future discussions must take into account the extent to which a majority government can have an impact on Myanmar's future, despite the fact that constitutional changes cannot be made without Tatmadaw's consent.

At the time of the continuum of peace process it is absolute for all the parties to discuss which would be the first step. If EAOs are willing to compromise with not demanding more democratic Constitution, it would be reasonable for Tatmadaw to meet at some point and make some substantial actions for EAOs favor. After the coup in early 2021, it would be a priority to get all parties back to the negotiating tables. After that, the Constitution, the peace process, the composition of the government and the goals of all parties should be discussed from a whole new perspective. Although the Constitution hinders the realization of democracy, it is essential for peace to consider whether full democracy is the only first step forward in the very difficult and complex political situation in Myanmar. The Constitution has a particularly important role to play in the peace process and political integration. Democracy's efforts with the peace process are tied to these authoritarian traits represented by the Constitution. As Myanmar is again subject to direct military rule by Tatmadaw and to an even more violent conflicts it is difficult to say what role the Constitution will have in the future, whether it will continue to be the same, whether it will be renewed again, or whether some changes will be made. In any case, the impact of all these factors on the situation in Myanmar must be recognized as alternative solutions are discussed.

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