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ABSTRACT

This paper analyses the surge of dissent in democracies across the Asia Pacific.¹ In light of the COVID-19 pandemic, countries in the Asia Pacific have seen a significant rise in public protests and widespread dissent, perhaps as a reaction to the rising authoritarianism peddled by their respective governments. This paper rests on the premise that the reduction of democratic processes over time, has resulted in increasingly violent forms of protests and collective action. This paper envisions a five-step process by which authoritarianism and protests have proliferated in countries of the Asia Pacific in recent times. In a nutshell, autocratic leaders who wish to consolidate their power, use the democratic machinery available to them to fulfill increasingly authoritarian goals. This consequently triggers increasingly violent public protests, which justifies further autocratic action in an attempt to quell violence and maintain public order. This may further lead to an increasing illiberalism of sorts that hastens democratic backsliding. This paper considers six countries of the Asia Pacific with varying degrees of liberal democratic functioning, in order to comprehensively map out the increasing democratic erosion in recent times.

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¹ The countries chosen in this paper have been categorised as democracies according to the Economist Intelligence Unit's Democracy Index for 2020.

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I. INTRODUCTION

Despite global decline in the quality of democracy world over, democratic processes and institutions of that process are often crucial for autocrats itching for greater executive power. In fact Adam Chilton and Mila Versteeg argue that modern autocrats find constitutional documents useful in holding elections and maintaining nominally democratic institutions, including constitutional courts and liberal bills of rights, in order to appear democratically legitimate.² They find that constitutional rights do not protect the public simply by virtue of their existence, and it is only when the public coalesce with organisations (like trade unions, human rights groups, civil liberty unions and the like) that rights encroachment by an increasingly autocratic government be better resisted.³ Ultimately however, they assert that if a government is committed to restricting rights, the exercise of constitutional rights alone is insufficient to stop them: this is so because governments, and especially autocratic governments at that, generally monopolise state force and possess dramatically more power than the citizens that constitutional rights seek to protect.⁴ Therefore, when a government's interest and a constitutional rule are opposed, a government is not likely to respect constitutional boundaries that it has the power to ignore.⁵

This is crucial in 2020, when global democracy was dealt a collective blow: the Economist Intelligence Unit's Democracy Index for 2020, analysed that the tumultuous year spent struggling with the COVID-19 pandemic, resulted in a massive retraction of civil liberties world over, fuelling large-scale intolerance towards dissent in otherwise democratic set-ups.⁶

² Adam Chilton and Mila Versteeg, *How Constitutional Rights Matter*, (Oxford University Press 2020) at 10

³ Adam Chilton and Mila Versteeg, *How Constitutional Rights Matter*, (Oxford University Press 2020) at 8

⁴ Adam Chilton and Mila Versteeg, *How Constitutional Rights Matter*, (Oxford University Press 2020) at 7

⁵ Adam Chilton and Mila Versteeg, *How Constitutional Rights Matter*, (Oxford University Press 2020) at 7

⁶ Economist Intelligence Unit, 'Democracy Index 2020: In Sickness and in Health' (The Economist 2021) <<https://www.eiu.com/n/campaigns/democracy-index-2020/>> accessed 2 August 2021, at 3, 14

The object of this paper rests on the premise that this reduction of democratic processes has resulted in increasingly violent forms of protests and collective action. This presents an interesting chronology that counters a simplistic good v. bad view of democratic protests: governments looking to consolidate their power often use democratic instruments to fulfill increasingly authoritarian goals, which consequently triggers increasingly violent public protests. Even as the public retaliate by falling back on their constitutional rights safeguards, or by organising collectively or both in order to protest publicly, autocratic governments seek to quell these protests instead of responding to them directly. In the face of increasing illiberalism, there is a predictable tussle between the autocrats and the people, where as Adam Chilton and Mila Versteeg predict, the public is not entirely able to stop autocrats from seizing more power and curtailing rights.

Before this paper proceeds further, a few caveats are necessary. First, the proliferation of democracies across the world has resulted in widely differing definitions and meanings of the term. In order to avoid these definitional troubles, this paper relies on the Economist Intelligence Unit's Democracy Index 2020, in order to choose democracies, which have experienced some form of democratic backsliding in recent years. The Democracy Index assigns a numerical value to each country, indicating the quality of its democracy, based on five categories: electoral process and pluralism, the functioning of government, political participation, political culture, and civil liberties. On the basis of these scores, it then categorises countries into one of four groups—full democracies, flawed democracies, hybrid regimes and authoritarian regimes—in order to provide a progressive and quantifiable scale as to the quality of democracy of countries across the world.⁷ All six of the countries discussed in this paper have been considered as democracies by the Democracy Index 2020.

⁷ Economist Intelligence Unit, 'Democracy Index 2020: In Sickness and in Health' (The Economist 2021) <<https://www.eiu.com/n/campaigns/democracy-index-2020/>> accessed 2 August 2021, at 28

For clarity, this paper examines two countries which are labeled “flawed democracies”, two which are considered “hybrid regimes” and two which are “authoritarian regimes”, based on the classification of the Democracy Index 2020.

Second, this paper briefly explores the concept of illiberal democracies because even as these six countries are united by the democratic backsliding they have experienced in recent years, the ways in which their constitutional processes have been limited do differ. It is necessary therefore, to disclaim that there are certain core elements of democracies, that countries imbibe, or aspire to imbibe, that earn them some repute as democracies, however flawed or illiberal they may otherwise be. In its most expansive interpretation, democracy is nothing more than a political procedure for the filling of offices through contested elections, held at suitably frequent intervals, decided by the majority on the basis of universal adult suffrage.⁸ However, despite its varied forms,⁹ these common elements include: free and fair elections, separation of powers and fundamental political rights.¹⁰

In the Asia Pacific, democratic backsliding has been accelerated by using the process of law and cloaking authoritarian actions with seemingly democratic legitimacy.¹¹ In fact, Nancy Bermeo finds that democracy in the modern era has been subverted not by military *coups* that bring about instantaneous democratic erosion, but rather through incremental means using the

⁸ George Kateb, *The Inner Ocean: Individualism and Democratic Culture* (Cornell University Press, 1992) 52. See also, Daniel Bell, David Brown, Kanishka Jayasuriya, and ors, *Towards Illiberal Democracy in Pacific Asia* (Palgrave Macmillan, St Martin’s Press 1995), at 2

⁹ Charles Tilly, *Democracy* (Cambridge University Press, 2007) at 1-25

¹⁰ Steven Levitsky & Lucan A. Way, *Competitive Authoritarianism: Hybrid Regimes After the Cold War* (Cambridge University Press, 2010) at 5-6

¹¹ Kim Lane Scheppele, ‘Autocratic Legalism’ (2018) 85 University of Chicago Law Review 545; See Amal Sethi, ‘Judging Under Extreme Conditions—A Court’s Role in National Crisis’ (2021) 2(1) Keele Law Review (forthcoming)

veneer of law and legitimacy.¹² Taking this idea forward, Richard Albert and Yaniv Roznai opine that one of the most foundational issues for a democracy to grapple with in a crisis, is its ability to protect its democratic order from the very crisis that threatens to undermine it.¹³ Reports corroborate that the COVID-19 crisis is the first large scale crisis to coincide with the rapid democratic backsliding world over, allowing a certain autocraticism to creep into functioning democracies by centralizing power, silencing government-targeted criticism and weakening accountability of institutions central to the democratic process.¹⁴

In light of these caveats, this paper seeks to highlight the complicated relationship between dissent and democracy, by analysing recent examples of public dissent in the Asia Pacific. This paper adopts a five-step order within which it examines democratic backsliding. The first step to be identified in this order is the creation of a government-controlled narrative that large sections of the public may even buy into. The second is the reduction in democratic processes, done most significantly by introducing a legislative or executive measure that is perceived to be autocratic and almost anti-democratic. The third is the ensuing public protests by which the public marks its displeasure with the government. The fourth is the consequent retaliatory government action, often made by putting into action the very legislative or executive measure that was being protested in the first place to quell violent agitations of the public under the shield of maintaining public order and peace. The fifth, and last item in this

¹² Nancy Bermeo, 'On Democratic Backsliding' (2016) 27(1) *Journal of Democracy* 5; See Amal Sethi, 'Judging Under Extreme Conditions—A Court's Role in National Crisis' (2021) 2(1) *Keele Law Review* (forthcoming)

¹³ Richard Albert and Yaniv Roznai, *Constitutionalism Under Extreme Conditions: Law, Emergency, Exception* (Springer, 2020); Sarah Repucci and Amy Slipowitz, 'Democracy Under Lockdown: The Impact of COVID-19 on the Global Struggle for Freedom' (Freedom House, 2020) <<https://freedomhouse.org/report/special-report/2020/democracy-under-lockdown>> accessed 2 August 2021

¹⁴ Sarah Repucci and Amy Slipowitz, 'Democracy Under Lockdown: The Impact of COVID-19 on the Global Struggle for Freedom' (Freedom House, 2020) <<https://freedomhouse.org/report/special-report/2020/democracy-under-lockdown>> accessed 2 August 2021

order may be a subsequently un-democratic treatment of such dissent by the government, often by using increasingly violent means infringing on the human rights of its people.

In pursuit of this aim, this paper is divided into six sections. Part II of the paper briefly discusses the rise in illiberal democracies of the Asia Pacific, and the role of the Democracy Index 2020's classification in this paper. Part III addresses the democratic backsliding in two of the "flawed democracies" identified by the Democracy Index 2020: India and Thailand. Part IV considers the fundamental quest for democratic rule in two of the "hybrid regimes" of the Democracy Index 2020: Hong Kong and Nepal. Part V analyses the cases of Afghanistan and Myanmar, which have recently turned into "authoritarian regimes" as classified by the Democracy Index 2020, despite democratic functioning. Part VI concludes this paper by underscoring the dilution of democratic process in countries of the Asia Pacific that has resulted in the introduction of autocratic elements into democratic functioning through seemingly legitimate democratic means.

II. HOME OF ILLIBERAL DEMOCRACIES: THE TROUBLE WITH THE ASIA PACIFIC

The Asia Pacific has seen a significant rise in democratic economies in recent years, with countries struggling to achieve some sort of democratic structure despite the military, colonial or autocratic regimes that flourish at their administrative centers. Malaysia, for instance, marked its adoption of democratic governance as recently as 2018, while Sri Lanka returned to democratic rule in 2015, after a second hiatus. Of the 12 countries that turned to democracy after 1975, only 2 have been able to sustain democratic rule. Cambodia collapsed into non-democratic rule in 2018; while Myanmar succumbed to military rule in 2021, only ten short years after declaring itself a democracy. Others like India, the Philippines and

Indonesia, although democratic, regularly experience the kind of democratic erosion that raises eyebrows at the quality of their democracy: a phenomenon that has increased at the behest of the autocratic governments that helm these countries today.¹⁵ In the 2020 Democracy Index, the Asia and Australasia region recorded the biggest divergence in scores, providing a fertile landscape in which to assess democratic backsliding beyond its theoretical principles.¹⁶ The Asia Pacific has increasingly been touted as the home of illiberal democracies, representing one of the most difficult regions in which to establish rule of law.¹⁷

An illiberal democracy is described as an apparently democratic country where democratically elected governments routinely ignore constitutional limitations on their power and deprive citizens of basic rights.¹⁸ When Fareed Zakaria first qualified the term as a growth industry in 1997, he forewarned that illiberal democracies gain legitimacy and strength from the fact that they are reasonably democratic, posing grave danger to the authenticity of liberal democracy itself.¹⁹ Several scholars appreciate the rise of illiberal democracies in the Asia Pacific, interpreting democratisation in the region as a grafting of democratic practices and institutions onto societies with an alternative culture baggage, with different ways of organizing economic life, and with distinctive answers to the question of who counts as 'we the people'.²⁰ These scholars highlight specific characteristics of an Asian democracy: (1) the interventionist role of the state in dominating most aspects of social and

¹⁵ 'The Global State of Democracy: Addressing the Ills, Reviving the Promise' (IDEA International 2019) <<https://www.idea.int/sites/default/files/publications/chapters/the-global-state-of-democracy-2019-CH4.pdf>> accessed 2 August 2021, ch 4

¹⁶ Economist Intelligence Unit, 'Democracy Index 2020: In Sickness and in Health' (The Economist 2021) <<https://www.eiu.com/n/campaigns/democracy-index-2020/>> accessed 2 August 2021, at 28

¹⁷ Daniel Bell, David Brown, Kanishika Jayasuriya, and David Martin Jones, *Towards Illiberal Democracy in Pacific Asia* (Palgrave Macmillan, St Martin's Press 1995), at 2

¹⁸ Fareed Zakaria, *The Future of Freedom: Illiberal Democracy at Home And Abroad* (Rev edn, W. W. Norton & Company 2007) at 17; Anthony J Gaughan, 'Illiberal Democracy: The Toxic Mix of Fake News, Hyperpolarization, and Partisan Election Administration' (2017) 12 *Duke Journal of Constitutional Law & Public Policy* 57-139 <<https://scholarship.law.duke.edu/djclpp/vol12/iss3/3/>> accessed 2 August 2021

¹⁹ Fareed Zakaria, 'The Rise of Illiberal Democracy' (1997) 76(6) *Foreign Affairs* <<https://www.foreignaffairs.com/articles/1997-11-01/rise-illiberal-democracy>> at 24 & 42.

²⁰ Daniel Bell, David Brown, Kanishika Jayasuriya, and David Martin Jones, *Towards Illiberal Democracy in Pacific Asia* (Palgrave Macmillan, St Martin's Press 1995), at 2

economic life; (2) a concomitant absence of a free public space; and (3) the ever-present possibility of a 'reversion' to more crude methods of social control; all of which suggest that illiberal Asian political systems are likelier to withhold individual rights and liberties when these may conflict with the collective aims of the state.²¹

These predictions hold water in the context within which this paper is written: where governments in the Asia Pacific have inadvertently manufactured the necessity of protest as a response to increasingly illiberal tendencies of the government, but because of their increasing monopoly on state power do not feel compelled to respond to public action. Democratisation is not simply the empowerment of civil society but has been viewed as an attempt to renegotiate the relationship between political elites and national capital.²² Each of the six countries explored in this paper has taken to democratic protest as a means of renegotiating the existing relationship between the political elites and national capital in their country. In flawed democracies like India or Thailand, the question is of specific issues that national capital is used to finance, while in hybrid regimes, protests question the consolidation of complete power, of which national capital is one strand, by the political elite. There is certain delicateness in renegotiating such fundamental relationships, because these changes harken back to the very understanding of constitutionalism on which democracy in these countries is founded.

Central to the idea of a liberal democracy invoked earlier, is that of constitutionalism or the creation of a complicated system of checks and balances designed to prevent the

²¹ Daniel Bell, David Brown, Kanishika Jayasuriya, and David Martin Jones, *Towards Illiberal Democracy in Pacific Asia* (Palgrave Macmillan, St Martin's Press 1995), at 16

²² Daniel Bell, David Brown, Kanishika Jayasuriya, and David Martin Jones, *Towards Illiberal Democracy in Pacific Asia* (Palgrave Macmillan, St Martin's Press 1995), at 108

accumulation of power and the abuse of office.²³ Mark Tushnet and Madhav Khosla suggest that democracies in Asia are characterized by an unstable constitutionalism i.e. although countries appear committed to the idea of constitutionalism, they struggle to put into practice a stable institutional structure embodying a form of constitutionalism that is appropriate for their nation.²⁴ Admittedly the idea that a different kind of constitutionalism is applicable in democracies of the Global South, has long been popular.²⁵ In the context of the Asia Pacific region specifically, most countries struggle with, as Zakaria puts it, the implementation of creative institutions and imaginative constitutions for transnational countries.²⁶ In countries like Myanmar and Afghanistan, there is an authoritarian constitutionalism at play, by which autocrats tend to use the constitutional documents available to them to legitimise their authoritarian roles.

III. DEMOCRATIC BACKSLIDING IN FLAWED DEMOCRACIES: CLAMPING DOWN ON DISSENT IN INDIA AND THAILAND

The Democracy Index 2020 recorded about 10 flawed democracies in the Asia Pacific region.²⁷ While the broad parameters of democratic functioning are met, such as largely free and fair elections, or basic civil liberties that are generally not compromised, there are weaknesses in other aspects of government functioning that inhibit these countries from

²³ Fareed Zakaria, 'The Rise of Illiberal Democracy' (1997) 76(6) Foreign Affairs <<https://www.foreignaffairs.com/articles/1997-11-01/rise-illiberal-democracy>> accessed 2 August 2021, at 41.

²⁴ Mark Tushnet and Madhav Khosla (eds) *Unstable Constitutionalism: Law and Politics in South Asia* (Cambridge University Press 2015), at 7

²⁵ Daniel Bonilla Maldonado, *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia* (Cambridge University Press 2013)

²⁶ Fareed Zakaria, 'The Rise of Illiberal Democracy' (1997) 76(6) Foreign Affairs <<https://www.foreignaffairs.com/articles/1997-11-01/rise-illiberal-democracy>> accessed 2 August 2021, at 41

²⁷ Economist Intelligence Unit, 'Democracy Index 2020: In Sickness and in Health' (The Economist 2021) <<https://www.eiu.com/n/campaigns/democracy-index-2020/>> accessed 2 August 2021, at 3

being considered as full democracies.²⁸ Some of these weaknesses include problems in governance, an underdeveloped political culture and low levels of political participation. A significant observation in national responses to the COVID-19 pandemic—which triggered significant democratic backsliding across the world—is that in both full democracies and flawed democracies, governments did not involve the public in a national discussion, and imposed a top-down strategy of extraordinary measures.²⁹

A. DISSUADING DISSENT IN INDIA: INTO THE WORLD’S LARGEST DEMOCRACY

While India has long held the position of a flawed democracy, it began recording a serious decline in democratic functioning since Prime Minister Narendra Modi came to power in 2014.³⁰ The Democracy Report 2021, published by the V-Dem Institute, labeled India as an electoral autocracy from its previous position as an electoral democracy.³¹ The report suggests that autocratisation largely follows a similar pattern: beginning with incumbents attacking media and civil society, autocrats encourage a wide polarisation of society by disrespecting opponents and engaging in widespread misinformation and culminating in undermining elections.³² Statistically speaking, the Democracy Report 2021 noted that on the Liberal Democracy Index scale, India’s level of liberal democracy at the end of 2020 had sunk to 0.34, from its much higher level of 0.57 in 2013, just before Prime Minister Modi

²⁸ Economist Intelligence Unit, ‘Democracy Index 2020: In Sickness and in Health’ (The Economist 2021) <<https://www.eiu.com/n/campaigns/democracy-index-2020/>> accessed 2 August 2021, at 57

²⁹ Economist Intelligence Unit, ‘Democracy Index 2020: In Sickness and in Health’ (The Economist 2021) <<https://www.eiu.com/n/campaigns/democracy-index-2020/>> accessed 2 August 2021, at 20

³⁰ Younis Dar, ‘Why EIU Called India A ‘Flawed Democracy’ & Termed Rival Pakistan A ‘Hybrid Democracy?’’ *The Eurasian Times* (10 February 2021) <<https://eurasianimes.com/why-eui-called-india-a-flawed-democracy-termed-rival-pakistan-a-hybrid-democracy/>> accessed 2 August 2021

³¹ Nazifa Alizada, Rowan Cole, Lisa Gastaldi and ors., ‘Autocratization Turns Viral: Democracy Report 2021’ (V-Dem Democracy Institute, University of Gothenburg) <<https://www.v-dem.net/en/publications/democracy-reports/>> accessed 2 August 2021, at 13

³² The Wire Staff, ‘India Is No Longer a Democracy but an ‘Electoral Autocracy’: Swedish Institute’ *The Wire* (New Delhi, 11 March 2021) <<https://thewire.in/rights/india-no-longer-democracy-electoral-autocracy-v-dem-institute-report-bjp-narendra-modi>> accessed 2 August 2021

came to power.³³ This is a result of the government censorship of the media, the repression of civil society organisations, the diminishing autonomy of the Election Commission of India and a dramatic fall in academic and religious freedoms.³⁴

1. *Creating a Narrative: of Polarisation, and the Politics of Othering*

Since gaining political power in 2014, Prime Minister Modi pursued a distinct policy of ideological divide that has resulted in wide-scale polarisation of the Indian people,³⁵ seven years into his tenure.³⁶ Scholars suggest that democracies are likelier to breakdown in environments of severe polarisation,³⁷ because such polarisation divides people into rigid camps with irrevocable ideological differences,³⁸ where one group pits its identity and mobilises against the so-called other.³⁹ While part of that rhetoric is increasingly religious,⁴⁰ the Modi-led government has taken bold, legislative steps that oftentimes subvert democratic process to fulfill increasingly authoritarian goals.

³³ Nazifa Alizada, Rowan Cole, Lisa Gastaldi and ors., 'Autocratization Turns Viral: Democracy Report 2021' (V-Dem Democracy Institute, University of Gothenburg) <<https://www.v-dem.net/en/publications/democracy-reports/>> accessed 2 August 2021, at 20

³⁴ The Wire Staff, 'India Is No Longer a Democracy but an 'Electoral Autocracy': Swedish Institute' *The Wire* (New Delhi, 11 March 2021) < <https://thewire.in/rights/india-no-longer-democracy-electoral-autocracy-v-dem-institute-report-bjp-narendra-modi>> accessed 2 August 2021

³⁵ Soutik Biswas, 'How Narendra Modi has reinvented Indian Politics' *BBC News* (24 May 2019) <<https://www.bbc.com/news/world-asia-india-48293048>> accessed 2 August 2021

³⁶ Niranjan Sahoo, 'Mounting Majoritarianism and Political Polarization in India' in Thomas Carothers, Andrew O'Donohue (eds) *Political Polarization in South and Southeast Asia: Old Divisions, New Dangers* (Carnegie Endowment for International Peace 2020)

³⁷ Christopher Hare and Keith T. Poole 'The Polarization of Contemporary American Politics.' (2014) 46(3) *The Journal of the Northeastern Political Science Association* 411

³⁸ Baldassari, Delia and Andres Gelman. 'Partisans Without Constraint: Political Polarization and Trends in American Public Opinion' (2008) 114 (2) *American Journal of Sociology* <<https://www.journals.uchicago.edu/doi/abs/10.1086/590649>> accessed 2 August 2021

³⁹ Jennifer McCoy, Tahmina Rahman, Murat Somer, 'Polarization and the Global Crisis of Democracy: Common Patterns, Dynamics, and Pernicious Consequences for Democratic Polities' (2018) 62 (1), *American Behavioral Scientist* 16

⁴⁰ Jeffrey Gettleman, Kai Schultz, Suhasini Raj and Hari Kumar, 'Under Modi, a Hindu Nationalist Surge Has Further Divided India' *The New York Times* (New Delhi, 4 April 2019) <<https://www.nytimes.com/2019/04/11/world/asia/modi-india-elections.html>> accessed 2 August 2021

In December 2019, the Modi-led government introduced the Citizenship (Amendment) Act, 2019, (hereinafter “CAA”) which relaxed citizenship norms for persons belonging to six non-Muslim religious minorities (Hindus, Sikhs, Buddhists, Jains, Parsis and Christians) of three Muslim-majority countries neighboring India (Pakistan, Bangladesh, Afghanistan) who may have entered India illegally before 31 December 2014.⁴¹ Effectively the CAA acts as a religio-political sieve, to save the non-Muslim individuals who found themselves on the NRC, while rendering Muslims stateless.⁴²

Yet, many of these legislative exclusions have preceded the CAA. Five years before the CAA, in December 2014, long-term visas were granted to Pakistani Hindus, Sikhs, Christians and Buddhists, with no mention of Muslims, Jains and Parsis.⁴³ Similarly, the penalties for overstaying visa permits in India were relaxed for Hindus, Sikhs, Buddhists, Jains, Parsis and Christians from Pakistan, Bangladesh and Afghanistan, while the same penalties for Muslims were disproportionately exacerbated.⁴⁴ Even in the thick of the COVID-19 pandemic, in April 2020, the government made amendments to its foreign direct investment laws, decreeing that investments from entities or individuals situated in countries which shared a land border with India (leaving Pakistan, Bangladesh, Afghanistan, Nepal, Bhutan, Myanmar

⁴¹ The Citizenship (Amendment) Act, 2019, Section 2

⁴² K. L. Daswani, ‘The Citizenship (Amendment) Act, 2019: A Crisis of Statelessness’ [2021] (forthcoming)

⁴³ Racheal Chitra and Partha Sinha, ‘Before CAA, String of Government Orders made it Impossible for Muslim Migrants to get Citizenship’ *The Times of India* (Bengaluru/Mumbai, 22 January 2020) <<https://timesofindia.indiatimes.com/india/before-kaa-string-of-government-orders-made-it-impossible-for-muslim-migrants-to-get-indian-citizenship/articleshow/73516606.cms>> accessed 2 August 2021

⁴⁴ Suvodit Bagchi, ‘India’s New Visa Penalty Discriminates on Religious Lines, say Bangladesh Officials,’ *The Hindu* (Kolkata, 10 December 2019) <<https://www.thehindu.com/news/national/change-in-visa-penalty-irks-bangladesh/article30260941.ece>> accessed 2 August 2021

and China as the most accessible options)⁴⁵ could only be made subject to prior government approval.⁴⁶

A second long-standing point of ideological divide for the Modi-led government has been the state of Jammu and Kashmir, which functions with special autonomy under Indian rule. In 2019, Modi enacted a series of constitutional somersaults to amend specific provisions of the Constitution of India⁴⁷ that ultimately allowed him to fully integrate Jammu and Kashmir into India, bringing it under the federalist oversight of the central government like all other states.⁴⁸ Almost immediately after promulgating such an order, harsh curfews and a statewide lockdown was imposed on the region,⁴⁹ in addition to arresting opposition leaders,⁵⁰ shutting down telecommunications and the internet,⁵¹ and deploying military troops in Kashmir.⁵² An

⁴⁵ Gaurav Dayal and ors, 'Restrictions on FDI from Bordering Countries' *International Law Office* (9 September 2020), <<https://www.internationallawoffice.com/Newsletters/Corporate-FinanceMA/India/Lakshmikumaran-Sridharan/Restrictions-on-FDI-from-bordering-countries>> accessed 2 August 2021

⁴⁶ Department of Economic Affairs, Notification, F. No. 01/05/EM/2019-Part (1), on 22 April 2020, Ministry of Finance, Government of India, available at <<https://egazette.nic.in/WriteReadData/2020/219107.pdf>> last accessed 2 August 2021; Department of Promotion of Industry and Internal Trade, Consolidated Foreign Direct Investment Policy Circular 2020, DPIIT File Number 5(2)/2020-FDI Policy, on 15 October 2020, Ministry of Finance, Government of India, available at <<https://dipp.gov.in/sites/default/files/FDI-PolicyCircular-2020-29October2020.pdf>> accessed 2 August 2021; Department of Promotion of Industry and Internal Trade, Consolidated Foreign Direct Investment Policy Circular 2017, D/o IPP F. No. 5(1)/2017-FC-1, on 28 August 2017, Ministry of Finance, Government of India, at para 3.1.3 (a), available at <https://dipp.gov.in/sites/default/files/CFPC_2017_FINAL_RELEASED_28.8.17_1.pdf> accessed 2 August 2021

⁴⁷ Gautam Bhatia and Vasudev Devadasan, 'The Article 370 Amendments: Key Legal Issues' *Indian Constitutional Law and Philosophy* (5 August 2021) <<https://indconlawphil.wordpress.com/2019/08/05/the-article-370-amendments-key-legal-issues/>> accessed 2 August 2021

⁴⁸ 'Article 370: What happened with Kashmir and why it matters' *BBC News* (6 August 2019) <<https://www.bbc.com/news/world-asia-india-49234708>> accessed 2 August 2021

⁴⁹ 'Kashmir Under Lockdown: All the Latest Updates' *Al Jazeera* (27 October 2019) <<https://www.aljazeera.com/news/2019/10/27/kashmir-under-lockdown-all-the-latest-updates>> accessed 2 August 2021

⁵⁰ Rifat Fareed, 'Key Kashmir political leaders arrested by India since August 5' *Al Jazeera* (Srinagar, Indian-administered Kashmir, 17 August 2019) <<https://www.aljazeera.com/news/2019/8/17/key-kashmir-political-leaders-arrested-by-india-since-august-5>> accessed 2 August 2021

⁵¹ Niha Masih, Shams Irfan and Joanna Slater, 'India's Internet shutdown in Kashmir is the longest ever in a democracy' *The Washington Post* (New Delhi, 16 December 2019) <https://www.washingtonpost.com/world/asia_pacific/indias-internet-shutdown-in-kashmir-is-now-the-longest-ever-in-a-democracy/2019/12/15/bb0693ea-1dfc-11ea-977a-15a6710ed6da_story.html> accessed 2 August 2021

⁵² 'Kashmir in lockdown after autonomy scrapped' *BBC News* (6 August 2019) <<https://www.bbc.com/news/world-asia-india-49246434>> accessed 2 August 2021

incensed citizenry across the nation took to protesting the plight of the people of Kashmir,⁵³ but without much effect.⁵⁴

2. *Diluting Democracy: Legislative Measures to Foster Illiberalism*

Even before the onslaught of the COVID-19 pandemic in India, the Modi-led government had sown the legislative seeds for a highly polarised society, divided along several socio-religious issues. With the COVID-19 pandemic, the autocratic imposition of several laws further incensed an already simmering section of the public. Known for its flippant data privacy infringements long before the pandemic necessitated contact-tracing,⁵⁵ the Modi-led government sought to mandatorily impose its data-collecting app, the *Aarogya Setu*, on the Indian public,⁵⁶ even as the country had no real data protection legislation in place to protect individuals against privacy violations.⁵⁷ Nationwide furor broke out when the government's pandemic response strategy left millions of migrant labourers and workers in a lurch,⁵⁸

⁵³ Sumit Ganguly, 'What's behind the protests in Kashmir?' *The Conversation* (16 August 2019) <<https://theconversation.com/whats-behind-the-protests-in-kashmir-121833>> accessed 2 August 2021

⁵⁴ Lauren Frayer, 'Nearly 4 Weeks into India's Clampdown, Kashmiris Describe Protests, Jail, Uncertainty' *NPR* (31 August 2019) <<https://www.npr.org/2019/08/31/755439584/nearly-4-weeks-into-indias-clampdown-kashmiris-describe-protests-jail-uncertain>> accessed 2 August 2021

⁵⁵ The Wire Staff, 'Privacy Bill Will Allow Government Access to 'Non-Personal' Data' *The Wire* (New Delhi, 10 December 2019) <<https://thewire.in/government/privacy-bill-non-personal-data-voluntary-user-verification>> accessed 2 August 2021

⁵⁶ Ministry of Home Affairs, No. 40-3/2020-DM-I(A), (1 May 2020) Annexure 1 Guideline 15 <<https://www.mha.gov.in/sites/default/files/MHA%20Order%20Dt.%201.5.2020%20to%20extend%20Lockdown%20period%20for%20%20weeks%20w.e.f.%204.5.2020%20with%20new%20guidelines.pdf>> accessed 15 June 2021; Ministry of Home Affairs, No. 40-3/2020-DM-I(A), (17 May 2020) Guideline 9 <https://www.mha.gov.in/sites/default/files/MHAOrderextension_1752020_0.pdf> accessed 15 June 2021; The Wire Staff, 'New Guidelines see Home Ministry ease up on Compulsory use of Aarogya Setu in Offices', *The Wire* (17 May 2020) <<https://thewire.in/government/in-new-guidelines-home-ministry-eases-up-on-compulsory-use-of-aarogya-setu-in-offices>> accessed 2 August 2021

⁵⁷ Gautam Bhatia, 'The Mandatory Imposition of the Aarogya Setu App Has No Legal or Constitutional Basis' *The Wire* (4 May 2020) <<https://thewire.in/law/the-mandatory-imposition-of-the-aarogya-setu-app-has-no-legal-or-constitutional-basis>> accessed 2 August 2021

⁵⁸ FE, 'Supreme Court stays MHA Order', *Financial Express*, (15 May 2020) <<https://www.financialexpress.com/india-news/lockdown-news-supreme-court-wages-full-payment-workers-employers-prosecution-coronavirus-update/1959905/>> accessed 2 August 2021

unable to go home to their villages from their workplaces in India's major cities,⁵⁹ as a consequence of repeated nationwide lockdowns. The Modi-led government turned a largely prejudiced eye towards free speech during the thick of the pandemic,⁶⁰ imposing a severe possibility of imprisonment,⁶¹ and a firm bar on contrary reportage,⁶² without qualifying what fake news, or disinformation actually entailed.⁶³ Another reason for mounting public ire was the acute shortage in food supply that disproportionately affected the lower socioeconomic strata of society during national lockdowns.⁶⁴ All in all, Modi's top-down autocratic handling of the COVID-19 pandemic,⁶⁵ not only betrayed a subversion of democratic process,⁶⁶ but also contributed to the large scale discontent brewing against him and his administration.⁶⁷

The Modi-led government has also used the pandemic as a guise to push for reform without due deliberation from the legislature. In September 2020, it rushed a spate of agrarian reform

⁵⁹ Jawhar Sircar, 'A Long Look at Why and How India has Failed its Migrant Workers', *The Wire* (29 May 2020) <<https://thewire.in/labour/lockdown-migrant-workers-policy-analysis>> accessed on 15 June 2021.

⁶⁰ Varghese George, 'Almond Milk, Fake News and the Pandemic' *The Hindu* (19 May 2020) <<https://www.thehindu.com/opinion/op-ed/comment-almond-milk-fake-news-and-the-pandemic/article31624698.ece>> accessed 2 August 2021

⁶¹ The Indian Penal Code 1860, Section 505(1)(b); Ministry of Home Affairs, 'Order No. 40-3/2020-DM-I(A)', (29 June 2020) Guideline 10, <https://www.mha.gov.in/sites/default/files/MHAOrder_29062020.pdf> accessed 2 August 2021

⁶² Vindu Goel and Jeffrey Gettleman, 'Under Modi, India's Press is Not so Free Anymore' *The New York Times* (New Delhi, 2 April 2020) <<https://www.nytimes.com/2020/04/02/world/asia/modi-india-press-media.html>> accessed 2 August 2021

⁶³ European Commission, 'Press Release: EU Strengthens Action to Tackle Disinformation', (10 June 2020) <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1006> accessed 2 August 2021

⁶⁴ Scroll Staff, 'Make PDS Entitlements Universal to Avoid Starvation', *Scroll* (10 April 2020) <<https://scroll.in/latest/958786/coronavirus-make-pds-entitlements-universal-to-avoid-starvation-activists-urges-centre>> accessed 2 August 2021; Siraj Hussain, 'COVID-19 Lockdown: How India Can Provide Food Grains to Stranded Migrant Labourers', *The Wire* (18 April 2020) <<https://thewire.in/rights/covid-19-lockdown-india-food-grains-stranded-migrants>> accessed 15 June 2021; Kabir Agarwal, 'Six Charts Show That India Needs to (and Can Afford to) Universalise PDS', *The Wire* (18 April 2020) <<https://thewire.in/food/covid-19-lockdown-food-pds-india>> accessed 2 August 2021

⁶⁵ Perna Singh, 'India has become an 'electoral autocracy.' Its covid-19 catastrophe is no surprise.', *The Washington Post* (5 July 2021) <<https://www.washingtonpost.com/politics/2021/07/05/india-has-become-an-electoral-autocracy-its-covid-19-catastrophe-is-no-surprise/>> accessed 2 August 2021

⁶⁶ Gaurav Dhir, 'COVID-19 & the end of Democracy: The Indian Perspective' *The Tribune* (30 July 2020) <<https://www.tribuneindia.com/news/schools/covid-19-the-end-of-democracy-the-indian-perspective-112353>> accessed 2 August 2021

⁶⁷ Aparna Alluri, 'India's Covid crisis delivers a blow to brand Modi' *BBC News* (New Delhi, 8 May 2021) <<https://www.bbc.com/news/world-asia-india-56970569>> accessed 2 August 2021

bills through parliament,⁶⁸ which effectively allowed farmers to sell outside the hitherto mandated produce markets or *mandis*, facilitated contract farming and lifted restrictions off of the storage of grains and foodstuffs.⁶⁹ While the substantive effect of the farm bills has been found to be generally positive,⁷⁰ the procedural impropriety with which they were enacted raises questions. Given India's federalist structure,⁷¹ agriculture is a subject on which individual state governments are empowered to make laws⁷²—it does not fall within the purview of the Modi-led central government.⁷³ Several scholars believe the Modi-led government has taken advantage of the legislative power shared between central and state governments in respect of trade and commerce in agriculture including the production, supply and distribution of foodstuffs,⁷⁴ to promulgate the farm bills. While the implementation of the bills has been temporarily stayed,⁷⁵ the legislative failure to take into account the apprehensions of farming community, or involve them in meaningful discussion, has raised questions of democratic legitimacy.⁷⁶

3. *A Rise in Violent Protests: From anti-CAA demonstrations to the Farmers Protests*

⁶⁸ Pramod Kumar, 'The farmers' protest began a year ago. How has it lasted this long?' *The Indian Express* (23 June 2021), <<https://indianexpress.com/article/opinion/columns/farmers-protest-punjab-farm-laws-7371125/>> accessed 2 August 2021

⁶⁹ Priscilla Jebaraj, 'Who gains and who loses from the farm Bills?' *The Hindu* (27 September 2020) <<https://www.thehindu.com/news/national/the-hindu-explains-who-gains-and-who-loses-from-the-farm-bills/article32705820.ece>> accessed 2 August 2021

⁷⁰ Jyotika Sood, 'Explained: Are New Farm Bills Anti-Farmer? All You Need to Know' *Outlook* (21 September 2020) <<https://www.outlookindia.com/website/story/india-news-the-farm-bills-and-quandary/360640>> accessed 2 August 2021

⁷¹ Urvi Shrivastav, 'India's Federal Structure, How Does It Affect Agriculture?' *Business World* (10 January 2021) <<http://www.businessworld.in/article/India-s-Federal-Structure-How-Does-It-Affect-Agriculture-/10-01-2021-363889/>> accessed 2 August 2021

⁷² Constitution of India, Seventh Schedule, List II, Entries 14, 18, 28, 30, 45-48

⁷³ Constitution of India, Seventh Schedule, List I, Entries 82, 86, 87, 88 (mention taxation and duties on income and assets, while specifically excluding those in respect of agriculture)

⁷⁴ Constitution of India, Seventh Schedule, List III, Entry 33(b)

⁷⁵ DTE Staff, 'As told to Parliament (March 9, 2021): Implementation of farm laws stayed till further orders' *Down to Earth* (9 March 2021) <<https://www.downtoearth.org.in/news/agriculture/as-told-to-parliament-march-9-2021-implementation-of-farm-laws-stayed-till-further-orders-75862>> accessed 2 August 2021

⁷⁶ Vivek Kaul, 'Why are farmers protesting against laws which will supposedly 'help them'? And why is no one talking about the details of implementation?' *Firstpost* (1 December 2020) <<https://www.firstpost.com/india/why-farmers-are-protesting-against-laws-which-will-supposedly-help-them-9068761.html>> accessed 2 August 2021

Several of these legislative measures have been marked by fiery public demonstrations, dissenting against the erosion of the democratic process in India.⁷⁷ Thousands took to protest in Kashmir,⁷⁸ against the increasing autocracy of the Modi-led government, even as the region went into mandatory lockdown.⁷⁹ While the rage over Kashmir did not translate into nationwide protests,⁸⁰ fervent anti-CAA protests broke out shortly thereafter.⁸¹ Students read out sections of the Constitution;⁸² signed memoranda,⁸³ and organised marches.⁸⁴ Women felt the fear of being disenfranchised far more keenly than men,⁸⁵ given that in India, women across economic strata often do not possess the documents necessary to prove their citizenship.⁸⁶ They wrote postcards and letters to the Prime Minister of India,⁸⁷ and organised

⁷⁷ Constitution of India, Seventh Schedule, List III, Entry 33(b).

⁷⁸ Devjyot Ghoshal and Fayaz Bukhari, 'Thousands protest in Indian Kashmir over new status despite clampdown' *Reuters* (Srinagar, 9 August 2019) <<https://www.reuters.com/article/us-india-kashmir-idUSKCN1UZ00T>> accessed 2 August 2021

⁷⁹ Azhar Farooq and Rebecca Ratcliffe, 'Kashmir city on lockdown after calls for protest march' *The Guardian* (Srinagar 23 August 2019) <<https://www.theguardian.com/world/2019/aug/23/kashmir-city-srinagar-india-lockdown-calls-protest-march>> accessed 2 August 2021

⁸⁰ Bharat Bhushan, 'Rehearsed in Kashmir, played out in rest of India' *Business Standard* (30 December 2019) <https://www.business-standard.com/article/opinion/rehearsed-in-kashmir-played-out-in-rest-of-india-119123000255_1.html> accessed 2 August 2021

⁸¹ Zoya Hasan, 'An anatomy of anti-CAA protests' *The Hindu* (1 January 2020) <<https://www.thehindu.com/opinion/op-ed/an-anatomy-of-anti-cao-protests/article30446145.ece>> accessed 2 August 2021

⁸² Press Trust of India, 'Delhi Protesters Read Constitution at India Gate After Crackdown at Jamia' *The Times of India* (16 December 2019) <<https://www.ndtv.com/india-news/delhi-protesters-read-constitution-at-india-gate-after-crackdown-at-jamia-2149857>> accessed 2 August 2021

⁸³ Vatsala Gaur, 'AMU students send memorandum to CJI Bobde to declare CAB unconstitutional' *The Economic Times* (13 December 2019) <<https://economictimes.indiatimes.com/news/politics-and-nation/amu-students-send-memorandum-to-cji-bobde-to-declare-cab-unconstitutional/articleshow/72548637.cms>> accessed 2 August 2021

⁸⁴ Press Trust of India, 'Students protest at Mandi House against CAA, NRC' *India Today* (New Delhi, 20 January 2020) <<https://www.indiatoday.in/india/story/students-march-against-cao-mandihouse-cao-nrc-1638562-2020-01-20>> accessed 2 August 2021

⁸⁵ Anuj Kumar, 'Women playing prominent role in anti-CAA, NRC protests' *The Hindu* (Ghaziabad 9 February 2020) <<https://www.thehindu.com/news/national/other-states/women-playing-prominent-role-in-anti-cao-nrc-protests/article30777618.ece>> accessed 2 August 2021

⁸⁶ Sangbida Lahiri, 'We Are Seeing, For The First Time, A Sustained Countrywide Movement Led by Women' *The Wire* (8 March 2020) <<https://thewire.in/women/cao-nrc-protests-women>> accessed 2 August 2021

⁸⁷ Zeyad Masroor Khan, 'How Shaheen Bagh became a Symbol of Dialogue and Solidarity', in Seema Mustafa (ed) *Shaheeh Bagh and the Idea of India: Writings on a Movement for Justice, Liberty and Equality* (Speaking Tiger, 2020)

sit-ins at historically significant sites.⁸⁸ The anti-CAA brigade was met by an equally fervent pro-CAA brigade,⁸⁹ highlighting the polarised politics in India, resulting in severe clashes that often turn violent.⁹⁰ Stone pelting,⁹¹ injuries⁹² and deaths,⁹³ erupted in several protest sites.

Physical demonstrations and mass protests thinned when India went into national lockdown against the COVID-19 pandemic,⁹⁴ until the contentious farm laws were promulgated in September 2020. Thousands of farmers participated in peaceful demonstrations against the legislations that summarily changed their entire livelihoods,⁹⁵ without so much as consulting them in the course of democratic process.⁹⁶ Farmers from the surrounding states of Punjab and Haryana,⁹⁷ held tractor rallies during India's Republic Day parade,⁹⁸ and occupied large

⁸⁸ Press Trust of India, 'Students protest at Mandi House against CAA, NRC' *India Today* (New Delhi, 20 January 2020) <<https://www.indiatoday.in/india/story/students-march-against-cao-mandihouse-cao-nrc-1638562-2020-01-20>> accessed 2 August 2021

⁸⁹ Saurabh Trivedi, 'Pro and anti-CAA groups clash in Delhi' *The Hindu* (New Delhi 23 February 2020) <<https://www.thehindu.com/news/cities/Delhi/anti-cao-protest-entry-exit-gates-of-delhis-jaffrabad-metro-station-closed/article30894157.ece>> accessed 2 August 2021

⁹⁰ 'Police Uses Tear Gas as Pro-CAA, Anti-CAA Protesters Clash in Delhi's Maujpur' *News 18* (New Delhi 24 February 2020) <<https://www.news18.com/news/india/police-uses-tear-gas-as-pro-cao-anti-cao-protesters-clash-in-delhis-maujpur-2513187.html>> accessed 2 August 2021

⁹¹ Web Desk, 'Anti-CAA protest turns violent in Delhi's Jaffrabad' *The Week* (23 February 2020) <https://www.theweek.in/news/india/2020/02/23/anti-cao-protest-turns-violent-in-delhi-jaffrabad-metro-station-closed.html?trc_geo=IN> accessed 2 August 2021

⁹² India Today Web Desk, 'https://www.indiatoday.in/india/story/up-anti-cao-citizenship-law-violence-clashes-dead-police-injured-ig-1630398-2019-12-21' *India Today* (21 December 2019) <<https://www.indiatoday.in/india/story/up-anti-cao-citizenship-law-violence-clashes-dead-police-injured-ig-1630398-2019-12-21>> accessed 2 August 2021

⁹³ Express News Service, '22 people died in violence during anti-CAA protests: UP govt to HC' *Indian Express* (Lucknow, 19 February 2020) <<https://indianexpress.com/article/cities/lucknow/22-people-died-in-violence-during-anti-cao-protests-up-govt-to-hc-6275092/>> accessed 2 August 2021 ; The Wire Staff, 'These Are The 25 People Killed During Anti-Citizenship Amendment Act Protests' *The Wire* (New Delhi, 23 December 2019) <<https://thewire.in/rights/anti-cao-protest-deaths>> accessed 2 August 2021

⁹⁴ India Today Web Desk, 'Year-ender: 2020 in protests, riots, scams and scandals in India' *India Today* (New Delhi, 16 December 2020) <<https://www.indiatoday.in/india/story/202-coronavirus-cao-protest-farmers-protest-sushant-singh-rajput-1749923-2020-12-16>> accessed 2 August 2021

⁹⁵ Bilal Kuchay, 'Indian farmers continue anti-farm law protests amid COVID surge' *Al Jazeera* (New Delhi, 26 April 2021) <<https://www.aljazeera.com/news/2021/4/26/indian-farmers-continue-anti-farm-law-protests-amid-covid-surge>> accessed 2 August 2021

⁹⁶ Gaurav Vivek Bhatnagar, 'Agriculture Ministry's Claim on Farm Bill 'Consultations' Runs Contrary to its RTI Reply' *The Wire* (New Delhi, 12 January 2021) <<https://thewire.in/government/farm-laws-consultation-rti-agriculture-ministry>> accessed 2 August 2021

⁹⁷ Lauren Frayer, 'India's Farmer Protests: Why Are They So Angry?' *NPR* (Nashik, 2 March 2021) <<https://www.npr.org/sections/goatsandsoda/2021/03/02/971293844/indias-farmer-protests-why-are-they-so-angry>> accessed 2 August 2021

roads in Delhi in protest.⁹⁹ Not only were certain metro stations shut down, and internet blockages put into place,¹⁰⁰ but also, several farmers were killed as violence erupted in protests that were largely designed to be peaceful.¹⁰¹ Given that these agrarian reforms may actually modernise India's agricultural economy,¹⁰² these protests highlight just how necessary democratic processes are in the implementation of new laws. Mass protests have been generally understood to be a significant threat to autocratic regimes,¹⁰³ often because autocratic durability rests on how secure the people believe a given leader's power really is.¹⁰⁴ With democratic protests opposing the increasingly autocratic legislations the Modi-led government has sought to impose, the path to authoritarianism has been somewhat questioned.

4. *Quelling Dissent: Modi's Crackdown on Democratic Protests*

The Modi-led government has not been tolerant of the upsurge in public demonstrations and criticism in the last two years. Internet bans have become rampant: mobile data and internet services were suspended in Assam following the promulgation of the CAA,¹⁰⁵ and Kashmir

⁹⁸ Jariel Arvin, 'India's farmers are still protesting — and things are turning violent' *Vox* (26 January 2021) <<https://www.vox.com/2021/1/26/22242395/india-farmer-protest-republic-day-delhi>> accessed 2 August 2021

⁹⁹ Jariel Arvin, 'India's farmers are still protesting — and things are turning violent' *Vox* (26 January 2021) <<https://www.vox.com/2021/1/26/22242395/india-farmer-protest-republic-day-delhi>> accessed 2 August 2021

¹⁰⁰ Eric Ballman and Rajesh Roy, 'Violence Erupts at Indian Farmers' Latest Protest Against Agricultural Law Changes' *The Wall Street Journal* (26 January 2021) <<https://www.wsj.com/articles/violence-erupts-at-indian-farmers-latest-protest-against-agricultural-law-changes-11611664480>> accessed 2 August 2021

¹⁰¹ 'Farmers protest live updates: Delhi cops gives nod to farmers' Republic Day tractor rally, union leaders say' *The Times of India* (23 January 2021) <<https://timesofindia.indiatimes.com/india/farmers-protest-in-delhi-live-updates-22-january-2021/liveblog/80397766.cms>> accessed 2 August 2021

¹⁰² Remya Nair, 'India can still become a \$5-tn economy by 2024, PM Modi shows hope despite Covid setback' *The Print* (New Delhi, 29 October 2020) <<https://theprint.in/economy/india-can-still-become-a-5-tn-economy-by-2024-pm-modi-shows-hope-despite-covid-setback/533044/>> accessed 2 August 2021

¹⁰³ Nikolay Marinov and Hein Goemans, 'Coups and Democracy' (2014) 44(4) *British Journal of Political Science* 799

¹⁰⁴ Gordon Tullock, *Autocracy* (Springer 1987); Erin Baggott Carter and Brett L. Carter, 'Propaganda and Protest in Autocracies' (2020) 65(5) *Journal of Conflict Resolution* 1

¹⁰⁵ Shaheen Ahmed, 'On Protests and Internet Suspension in Assam - A Look at India's Digital Tactics in Suppressing Dissent' *Australian Institute of International Affairs* (23 January 2020) <<https://www.internationalaffairs.org.au/australianoutlook/on-protests-and-internet-suspension-in-assam-a-look-at-indias-digital-tactics-in-suppressing-dissent/>> accessed 2 August 2021

faced 18 long months without any internet connectivity.¹⁰⁶ Police violence has become common: from *lathi* charges and beating up students at anti-CAA protests at the Jamia Millia Islamia University and the Aligarh Muslim University;¹⁰⁷ to attacking peaceful farmers marches with tear gas.¹⁰⁸ During the anti-CAA protests, police personnel have vandalized university property,¹⁰⁹ preventing ambulances and medical support from treating injured protestors,¹¹⁰ and sexually harassing¹¹¹ female Muslim students.¹¹² The Modi-led government clamped down harder with the ongoing farmers protests, blocking publications and journalists from using social media to engage in online dissent.¹¹³

From taking action against political cartoonists,¹¹⁴ to launching charges of sedition against activists and journalists,¹¹⁵ the Modi-government is keen to stamp out any dissent. Several

¹⁰⁶ Anuradha Bhasin Jamwal, '4G Is Back in J&K After 18 Months, But it Can't Compensate for What We Lost' *The Wire* (7 February 2021) <<https://thewire.in/rights/jammu-and-kashmir-4g-internet-costs>> accessed 2 August 2021

¹⁰⁷ Vijayta Lalwani, 'A year later, where are the Jamia women in the viral video protecting their friend from police?' *Scroll* (10 December 2020) <<https://scroll.in/article/980425/a-year-later-where-are-the-jamia-women-in-the-viral-photo-protecting-their-friend-from-police>> accessed 2 August 2021

¹⁰⁸ 'Thousands of farmers march to Indian capital defying tear gas' *Aljazeera* (27 November 2020) <<https://www.aljazeera.com/news/2020/11/27/indian-farmers-clash-with-police-in-protest-over-market-reform>> accessed 2 August 2021

¹⁰⁹ Aranya Shankar, '25 broken CCTVs in Jamia's Rs 2.66-crore damage bill to HRD' *The Indian Express* (27 February 2021) <<https://indianexpress.com/article/india/jamia-violence-police-cctv-hrd-6274992/>> accessed 2 August 2021; NH Web Desk, 'Police launched unprovoked & brutal attack on students and staff in Jamia: PUDR report' *National Herald* (26 December 2019) <<https://www.nationalheraldindia.com/india/pudr-fact-finding-team-says-2-attacks-on-jamia-protesters>> accessed 2 August 2021

¹¹⁰ Ahan Penkar, 'At AIIMS, doctors and police treated detained Jamia protestors with hostility, ridicule' *The Caravan* (17 December, 2019) <<https://caravanmagazine.in/politics/jamia-millia-islamia-cab-caa-aiims-student-protest>> accessed 2 August 2021

¹¹¹ Tanushree Pandey, 'Cops hit us in our private parts: Over 10 Jamia students admitted after scuffle with police' *India Today* (Feb.11, 2020) <<https://www.indiatoday.in/india/story/female-jamia-students-private-parts-delhi-police-anti-kaa-protest-1645059-2020-02-10>> accessed 2 August 2021

¹¹² Citizens Against Hate, *The Dismantling of Minority Education*, November 2020, page 1-2.

¹¹³ Sheikh Saaliq and Krutika Pathi, 'India clamps down on free speech to fight farmer protests' *AP News* (5 February 2021) <<https://apnews.com/article/narendra-modi-media-social-media-india-9777a8af9a08aa6dac64e7f8ee227872>> accessed 2 August 2021

¹¹⁴ Ismat Ara, 'Network 18 Suspends Cartoonist Manjul Days After He Gets Twitter Notice' *The Wire* (New Delhi, 10 June 2021) <<https://thewire.in/media/network-18-suspends-cartoonist-manjul-days-after-he-gets-twitter-notice>> accessed 2 August 2021

¹¹⁵ Shaju Philip, 'Sedition case against Lakshadweep activist Aisha Sultana for calling administrator Patel 'bio-weapon'' *The Indian Express* (Thiruvananthapuram, 11 June 2021) <<https://indianexpress.com/article/india/sedition-case-against-lakshadweep-activist-for-calling-administrator-patel-bio-weapon-7353587/lite/>> accessed 2 August 2021; Sheikh Saaliq, 'Critics of India's Modi Government Face Sedition Charges' *The Diplomat* (6 March 2020) <<https://thediplomat.com/2020/03/critics-of-indias-modi-government-face-sedition-charges/>> accessed 2 August 2021

student activists, who participated in anti-CAA protests, were released on bail almost a year later.¹¹⁶ Even as lockdowns become the norm, there has been an enormous crackdown on social media.¹¹⁷ The newly amended Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, were promulgated to control the largely superfluous nature of social media.¹¹⁸ From dubious provisions relating to the traceability of originators of information,¹¹⁹ a matter that is currently under review before the Supreme Court of India,¹²⁰ to the proposed proxy regulation of digital news media and OTT media platforms,¹²¹ the rules are intrusive,¹²² unconstitutional,¹²³ and vague enough to restrict free speech.¹²⁴

5. *Increasing Illiberalism: Electoral Autocracy under the Cover of a Pandemic*

Even as India inches towards greater autocratic functioning under Modi's rule, its courts have stood as a somewhat reliable bulwark against the largely populist national fervor that has

¹¹⁶Bismee Taskin and Bhadra Sinha, '“Feels unreal to see sky”: Natasha Narwal, Devangana Kalita, Asif Tanha leave Tihar on bail' *The Print* (New Delhi, 17 June 2021) <<https://theprint.in/india/feels-unreal-to-see-sky-natasha-narwal-devangana-kalita-asif-tanha-leave-tihar-on-bail/679972/>> accessed 2 August 2021

¹¹⁷Shirin Affrey, 'A major battle over free speech on social media is playing out in India during the pandemic' *Vox* (1 May 2021) <<https://www.vox.com/recode/22410931/india-pandemic-facebook-twitter-free-speech-modi-covid-19-censorship-free-speech-takedown>> accessed 2 August 2021

¹¹⁸'Our Social Media Rules mustn't gag Free Speech' *Live Mint* (28 February 2021) <<https://www.livemint.com/opinion/online-views/our-social-media-rules-mustn-t-gag-free-speech-11614526649875.html>> accessed 2 August 2021

¹¹⁹Internet Freedom Foundation, 'Explainer: How the New IT Rules Take Away Our Digital Rights' *The Wire* (26 February 2021) <<https://thewire.in/tech/explainer-how-the-new-it-rules-take-away-our-digital-rights>> accessed 2 August 2021

¹²⁰Antony Clement Rubin v. Union of India, 2019 SCC OnLine Mad 11786

¹²¹Internet Freedom Foundation, 'Explainer: How the New IT Rules Take Away Our Digital Rights' *The Wire* (26 February 2021) <<https://thewire.in/tech/explainer-how-the-new-it-rules-take-away-our-digital-rights>> accessed 2 August 2021

¹²²Scroll Staff, 'Four reasons to be worried about India's new IT rules that are supposed to regulate Big Tech' *Scroll* (4 March 2021) <<https://scroll.in/article/988448/four-reasons-to-be-worried-about-indias-new-it-rules-that-are-supposed-to-regulate-big-tech>> accessed 2 August 2021

¹²³Shambhavi Sinha and Nirmal Mathew, 'Why the New IT Rules Beg Urgent Judicial Review' *The Wire* (2 March 2021) <<https://thewire.in/government/digital-platforms-intermediary-it-rules-india-freedom-of-speech-internet-control>> accessed 2 August 2021

¹²⁴M.K. Venu, 'Invoking Free Speech Violations Over New IT Rules, Big Media Finally Goes to Court' *The Wire* (25 June 2021) <<https://thewire.in/government/invoking-free-speech-violations-over-nw-it-rules-big-media-finally-goes-to-court>> accessed 2 August 2021

taken the country by grips. With due regard to the inherent complexities of any democracy,¹²⁵ newer democracies are likelier to be plagued by democratic erosion, poor functionality exacerbated by low quality political representation, accountability and capacity, and a stark absence of constitutional culture.¹²⁶ Despite 74 years of democratic functioning, these symptoms certainly exist in India, leading to the Supreme Court's expanding mandate of being a sort of 'good governance' court.¹²⁷ While it is necessary for courts to play this role,¹²⁸ the courts are also compelled to preserve the rule of law and prevent democratic erosion, without clashing constantly with the executive.¹²⁹

Perhaps one aspect of increasing illiberalism in India, is the majoritisation of the judiciary, which is largely expected to be a counter-majoritarian institution. In India judges have largely been able to escape political repercussions due to constitutional structuring.¹³⁰ With the incumbent government, the judiciary seems far more pliant and far less independent.¹³¹ In fact, constitutional courts are meant to serve as institutional barriers to majoritarian abuse,¹³² to prevent the executive from consolidating into its focal centre, all state functions, from the economic to the military.¹³³ And yet the path that the Supreme Court of India seems to have

¹²⁵ David Collier & Steven Levitsky, 'Democracy with Adjectives: Conceptual Innovation in Comparative Research' (1997) 49(3) *World Politics* 430

¹²⁶ David Landau, 'A Dynamic Theory of Judicial Role' (2014) 55(5) *Boston College Law Review* 1501, at 1505

¹²⁷ Nick Robinson, 'Expanding Judiciaries: India and the Rise of the Good Governance Court' (2009) 8(1) *Global Studies Law Review* 8

¹²⁸ Bruce Ackerman, 'The New Separation of Powers', (2000) 113(3) *Harvard Law Review* 633

¹²⁹ Rosalind Dixon and Tom Ginsburg, 'Constitutions as Political Insurance: Variants and Limits' in Erin F Delaney and Rosalind Dixon (eds), *Comparative Judicial Review* (Edward Elgar Publishing 2018)

¹³⁰ Hartosh Singh Bal, 'India's Embattled Democracy' *The New York Times* (New Delhi, 30 May 2018) <<https://www.nytimes.com/2018/05/30/opinion/india-democracy.html>> accessed 2 August 2021

¹³¹ Grant Wyeth, 'Is the Indian Judiciary Independent Anymore?' Australian Institute of *International Affairs* (15 October 2020) <<https://www.internationalaffairs.org.au/australianoutlook/is-the-indian-judiciary-independent-anymore/>> accessed 2 August 2021

¹³² Sarah Wright Sheive, 'Central and Eastern European Constitutional Courts and the Antimajoritarian Objection to Judicial Review' (1995) 26 *Law and Policy in International Business* 1201–34

¹³³ Samuel Issacharoff, 'Constitutional Courts and Democratic Hedging' (2011) 99 *GEO. L.J.* 961

increasingly chosen is that of judicial moderation,¹³⁴ at a time when it might just need to fall back on its activist roots.¹³⁵ What this path of judicial moderation may mean for India's democracy in the future, only the political engagement of its citizens can determine.

B. IN SEARCH OF DEMOCRACY: STRONGER CONSTITUTIONALISM FOR THAILAND

One of the biggest recorded democratic regressions of the Asia Pacific region has been in Thailand.¹³⁶ Although it upgraded from its previously held position as a 'hybrid regime' to a 'flawed democracy' in 2019 following largely successful general elections, the tightening clamps on freedom of speech and association, coupled with the arbitrary dissolution of opposition political parties, has thrown the Thai democratic regime in turmoil.¹³⁷ In February 2020, the Thai Constitutional Court banned the second largest opposition party in the country, the Future Forward Party (hereinafter "FFP"), sparking nationwide protests.¹³⁸

1. *Creating a Narrative: The Military Might of the Monarchy*

Thailand has been a constitutional monarchy, but has fallen to military coups at several points in the past.¹³⁹ However, several scholars describe the Thai political order as a 'network monarchy' or a 'deep state', with the military having synonymized the monarchy with the

¹³⁴ Rosalind Dixon and Tom Ginsburg, 'Constitutions as Political Insurance: Variants and Limits' in Erin F Delaney and Rosalind Dixon (eds), *Comparative Judicial Review* (Edward Elgar Publishing 2018)

¹³⁵ Manoj Mate, 'Elite Institutionalism and Judicial Assertiveness in the Supreme Court of India' (2014) 28 *Temple International & Comparative Law Journal* 361

¹³⁶ Dr. James Gomez, 'COVID-19 Accelerates Democratic Regression in Southeast Asia' *Australian Institute of International Affairs* (9 December 2020) <<https://www.internationalaffairs.org.au/australianoutlook/covid-19-accelerates-democratic-regression-in-southeast-asia/>> accessed 2 August 2021

¹³⁷ Economist Intelligence Unit, 'Democracy Index 2020: In Sickness and in Health' (The Economist 2021) <<https://www.eiu.com/n/campaigns/democracy-index-2020/>> accessed 2 August 2021, at 31

¹³⁸ Post Reporters, 'Constitutional Court disbands FFP' *Bangkok Post* (22 February 2020) <<https://www.bangkokpost.com/thailand/politics/1862889/constitutional-court-disbands-ffp>> accessed 2 August 2021

¹³⁹ Rahul Jacob, 'Why 2020 is Thailand's year of living dangerously' *Live Mint* (Bengaluru, 30 October 2020) <<https://www.livemint.com/news/world/why-2020-is-thailand-s-year-of-living-dangerously-11603961066050.html>> accessed 2 August 2021

nation.¹⁴⁰ Consequently defending the monarchy is an extension of defending the nation, which given its inherent purpose, has assured the military its place in Thailand's rigid hierarchy.¹⁴¹ Although the monarchy was formally abolished as early as 1932,¹⁴² it continues to coexist with the Westminster parliamentary system with a bicameral legislature that was brought into force in 1946, and sustained in the 2017 Constitution of Thailand.¹⁴³ This co-existence reflects the existence of a volcanic constitution, propelled largely by the struggle between a multiplicity of constitutional ideas: while liberal democratic order fosters pluralism, the monarchy strives to constrain it.¹⁴⁴ Thailand's volcanic constitution indicates the conflict between different layers of constitutional authorities of equal weight, which if continued unabated would lead the entire system to a breaking point.¹⁴⁵ And the breaking point it appears, has arrived in 2020, following a spate of increasingly autocratic measures at the hands of the country's reigning monarch, King Maha Vajiralongkorn, and the Thai military.¹⁴⁶

Although the 2019 elections allowed for some democracy,¹⁴⁷ they were by no means entirely free or fair.¹⁴⁸ Before the election, the military government introduced constitutional amendments to ensure the reservation of seats in the Upper House to military personnel; and

¹⁴⁰ Pavin Chachavalpongpun, 'Constitutionalizing the Monarchy: Uncompromising Demands of Thai Protesters' (2020) 73(2) *Journal of International Affairs* 163

¹⁴¹ Pavin Chachavalpongpun, 'Constitutionalizing the Monarchy: Uncompromising Demands of Thai Protesters' (2020) 73(2) *Journal of International Affairs* 163

¹⁴² Pavin Chachavalpongpun, 'An Unfinished Revolution: The Trajectory of Thailand's Current Protests' 2021 27(2) *The Brown Journal of World Affairs* 255

¹⁴³ Apinop Atipiboonsin, 'Volcanic Constitutions' in Jaclyn Neo and Bui Ngoc Son (eds), *Pluralist Constitutions in Southeast Asia* (Hart Publishing 2019) at 230

¹⁴⁴ Apinop Atipiboonsin, 'Volcanic Constitutions' in Jaclyn Neo and Bui Ngoc Son (eds), *Pluralist Constitutions in Southeast Asia* (Hart Publishing 2019) at 236, 239

¹⁴⁵ Apinop Atipiboonsin, 'Volcanic Constitutions' in Jaclyn Neo and Bui Ngoc Son (eds), *Pluralist Constitutions in Southeast Asia* (Hart Publishing 2019) at 226

¹⁴⁶ Masayuki Yuda, 'Thailand's untouchable monarchy comes under unusual scrutiny' *Nikkei Asia* (Bangkok, 10 November 2020) <<https://asia.nikkei.com/Spotlight/Asia-Insight/Thailand-s-untouchable-monarchy-comes-under-unusual-scrutiny>> accessed 2 August 2021

¹⁴⁷ Jonathan Head, 'Thailand election: A vote for a hybrid democracy' *BBC News* (Bangkok, 20 March 2019) <<https://www.bbc.com/news/world-asia-47620749>> accessed 2 August 2021

¹⁴⁸ 'Thailand: Structural Flaws Subvert Election' *Human Rights Watch* (New York, 19 March 2019) <<https://www.hrw.org/news/2019/03/19/thailand-structural-flaws-subvert-election>> accessed 2 August 2021

requiring the prime minister to be appointed jointly by both houses of parliament, giving the military considerable sway in choosing a prime ministerial candidate.¹⁴⁹ Similarly the government also amended the electoral rules,¹⁵⁰ by replacing a mixed member majoritarian system with a mixed member proportional system.¹⁵¹ By making party-list seats under the new system mandatory, the military government sought to specifically hurt popular political parties who won a large number of constituency seats but were not granted any party-list seats.¹⁵² Even during the 2019 elections, there were allegations, though without evidence, of electoral irregularities like fake voter identification and ballot-stuffing.¹⁵³ Consequently, many thought the elections had been brokered, and were not entirely democratic.¹⁵⁴

King Vajiralongkorn's autocratic measures of the recent past too have contributed to rising ire against the monarchy.¹⁵⁵ In 2016, he reorganized the Privy Council,¹⁵⁶ which functioned as an advisory body in the network monarchy of Thailand, replacing serving councilors with his own confidants.¹⁵⁷ He amended the Constitution of Thailand,¹⁵⁸ to permit himself to continue residing in Germany without having to appoint a regent (usually the president of the

¹⁴⁹ Joel Sawat Selway, 'Green in the Heart of Red: Understanding Phayao Province's Switch to Palang Pracharat in Thailand's 2019 General Election' (2020) 42(3) *Contemporary Southeast Asia* 398

¹⁵⁰ Joel Sawat Selway, 'Green in the Heart of Red: Understanding Phayao Province's Switch to Palang Pracharat in Thailand's 2019 General Election' (2020) 42(3) *Contemporary Southeast Asia* 403

¹⁵¹ Siripan Nogsuan Sawasdee, 'Electoral Integrity and the Repercussions of Institutional Manipulations: The 2019 General Election in Thailand' (2020) 5(1) *Asian Journal of Comparative Politics* 58

¹⁵² Allen Hicken and Joel Sawat Selway, 'Estimating the True Decline in Support for Pheu Thai: The Effect of Electoral Reform' (*Thai Data Points*, 8 May 2019) <<https://www.thaidatapoints.com/post/post-1-3-estimating-the-true-decline-in-support-for-pheu-thai-the-effect-of-electoral-reform>> accessed 2 August 2021

¹⁵³ Pavin Chachavalpongpun, 'Fraud, Irregularities, and Dirty Tricks' (Forces of Renewal Southeast Asia Report on Thailand's 2019 Elections FORSEA, 2019), <<https://forsea.co/wp-content/uploads/2019/05/FORSEA-Election-Report-2019.pdf>> accessed 2 August 2021

¹⁵⁴ Cleve Arguelles, Jayantha Dehi, Aththage Karel and ors, 'The 2019 Thai General Election: A Missed Opportunity for Democracy' (The Asian Network for Free Elections 2019) <<https://anfrel.org/anfrel-2019-thai-general-election-mission-report/>> accessed 2 August 2021

¹⁵⁵ 'Thailand protests: Risking it all to challenge the monarchy' *BBC News* (14 August 2020) <<https://www.bbc.com/news/world-asia-53770939>> accessed 2 August 2021

¹⁵⁶ Yukako Ono, 'Thailand's new king appoints his privy council' *Nikkei Asia* (Bangkok 6 December 2016) <<https://asia.nikkei.com/Politics/Thailand-s-new-king-appoints-his-privy-council>> accessed 2 August 2021

¹⁵⁷ Pavin Chachavalpongpun, 'An Unfinished Revolution: The Trajectory of Thailand's Current Protests' 2021 27(2) *The Brown Journal of World Affairs* 255, at 259

¹⁵⁸ 'Thai parliament backs constitutional changes allowing king easier travel' *DW* (13 January 2017) <<https://www.dw.com/en/thai-parliament-backs-constitutional-changes-allowing-king-easier-travel/a-37121671>> accessed 2 August 2021

Privy Council) to oversee royal affairs in Thailand.¹⁵⁹ In 2018, he transferred assets of the Crown Property Bureau into his sole custody;¹⁶⁰ and in 2019, he placed two army units under his direct command,¹⁶¹ thereby mobilizing his political power. King Vajiralongkorn handpicked not only the Chief of Army,¹⁶² but also the Deputy Secretary of the Royal Palace and the Deputy of the Crown Property Bureau from his supporters.¹⁶³ These measures have the cumulative effect of ensuring that the monarchy holds more power than it did in 1932, built specifically around the military's capacity for repression.¹⁶⁴

2. *Diluting Democracy: Triggering the Pro-Democracy Protests of 2020*

Despite the growing authoritarianism in Thailand since King Vajiralongkorn claimed the throne, the 2020 protests culminated as a consequence of two major events. Thailand cemented its reputation as a 'deep state',¹⁶⁵ when its Constitutional Court disbanded the FFP, an opposition party that offered a progressive counter-agenda to the military's autocratic might and resonated with Thai youth, and many of its first-time voters.¹⁶⁶ Despite being a

¹⁵⁹ James Wise, *Thailand: History, Politics and the Rule of Law* (Marshall Cavendish Editions 2019), at 212

¹⁶⁰ 'Thai king takes control of some \$30bn crown assets' *BBC News* (16 June 2018)

<<https://www.bbc.com/news/world-asia-44507590>> accessed 2 August 2021; Sunil Jagtiani, 'Thai King now holds Crown Property Bureau's Billions in Assets' *Bloomberg* (17 June 2018)

<<https://www.bloomberg.com/news/articles/2018-06-16/thai-king-now-holds-crown-property-bureau-s-billions-in-assets>> accessed 2 August 2021

¹⁶¹ Reuters Staff, 'Thailand's king takes personal control of two key army units' *Reuters* (1 October 2019)

<<https://www.reuters.com/article/us-thailand-king-idUSKBN1WG4ED>> accessed 2 August 2021

¹⁶² Marwaan Macan-Markar and Masayuki Yuda, 'Thai king's favorite to take over army, as PM's choice ignored' *Nikkei Asia* (Bangkok, 18 September 2020) <<https://asia.nikkei.com/Politics/Thai-king-s-favorite-to-take-over-army-as-PM-s-choice-ignored>> accessed 2 August 2021

¹⁶³ Online Reporters, 'King appoints Gen Apirat deputy director of Crown Property' *Bangkok Post* (19 November 2020) <<https://www.bangkokpost.com/thailand/general/2022259/king-appoints-gen-apirat-deputy-director-of-crown-property>> accessed 2 August 2021

¹⁶⁴ Kevin Hewison, "Managing Vajiralongkorn's Long Succession," in *Coup, King, Crisis: A Critical Interregnum in Thailand*, Monograph #68, ed. Pavin Chachavalpongpun (New Haven: Yale Southeast Asia Studies, 2020), 133

¹⁶⁵ Eugenie Merieau, 'Thailand's Deep State, Royal Power and the Constitutional Court (1997-2015)' (2016) 46(3) *Journal of Contemporary Asia* 446

¹⁶⁶ Duncan McCargo and Anyarat Chattharakul, 'Future Forward: The Rise and Fall of a Thai Political Party' (Nordic Institute of Asian Studies, 2020)

new entrant into the Thai political arena, the FFP polled third in the 2019 elections.¹⁶⁷ The Constitutional Court found a loan furthered to the FFP by its leader,¹⁶⁸ billionaire Thanathorn Juangroongruangkit, was in fact an illegal donation that contravened the national laws.¹⁶⁹ Unsurprisingly, Juangroongruangkit faced charges of sedition in 2019.¹⁷⁰

Interestingly enough, the judiciary is complicit in furthering the might of the monarchy:¹⁷¹ during the political impasse in the wake of the 2006 elections, on the direction of the then-monarch, the Supreme Court nullified an earlier election where a pro-democracy candidate had commanded the popular vote by a significant margin.¹⁷² Scholars have observed that because courts are granted the presumptive legitimacy of institutions acting legally rather than politically, autocratic regimes attempt to play off that presumptive legitimacy in order to blunt domestic and international opposition to authoritarian actions.¹⁷³

The second event that triggered the 2020 protests was the apparent disappearance of the political satirist, Wanchalearm Satsaksit, who had retreated to Cambodia in 2014.¹⁷⁴ While

¹⁶⁷ Chachavalpongpan, Pavin. "An Unfinished Revolution: The Trajectory of Thailand's Current Protests." *Brown Journal of World Affairs*, vol. 27, no. 2, Spring/Summer 2021, p. 255-272. at page 260.

¹⁶⁸ 'Future Forward: Thai pro-democracy party dissolved over loan' *BBC News* (21 February 2020) <<https://www.bbc.com/news/world-asia-51585347>> accessed 2 August 2021

¹⁶⁹ Rebecca Ratcliffe, 'Thai court dissolves opposition party Future Forward' *The Guardian* (Bangkok, 21 February 2020) <<https://www.theguardian.com/world/2020/feb/21/thai-court-dissolves-opposition-party-future-forward>> accessed 2 August 2021

¹⁷⁰ Reuters 'Thailand: party leader charged with sedition after strong poll showing' *The Guardian* (6 April 2020) <<https://www.theguardian.com/world/2019/apr/06/thailand-party-leader-charged-with-sedition-after-strong-poll-showing>> accessed 2 August 2021

¹⁷¹ Eugénie Mérieau, 'Seeking more power, Thailand's new king is moving the country away from being a constitutional monarchy' *The Conversation* (3 February 2017) <<https://theconversation.com/seeking-more-power-thailands-new-king-is-moving-the-country-away-from-being-a-constitutional-monarchy-71637>> accessed 2 August 2021

¹⁷² Jonathan Head, 'How King Bhumibol shaped modern Thailand' *BBC News* (Bangkok, 13 October 2016) <<https://www.bbc.com/news/world-asia-33956560>> accessed 2 August 2021

¹⁷³ David Landau and Rosalind Dixon, 'Abusive Judicial Review: Courts against Democracy' (2020) 53 *UC Davis Law Review* 1313, at 1335-1336

¹⁷⁴ George Wright & Issariya Praithongyaem, 'Wanchalearm Satsaksit: The Thai satirist abducted in broad daylight' *BBC News* (2 July 2020) <<https://www.bbc.com/news/world-asia-53212932>> accessed 2 August 2021

this evoked national outrage,¹⁷⁵ several exiled dissidents have met with the same fate in the recent past.¹⁷⁶ While this ties in with the monarchy's crackdown on dissent and free speech, it has become an increasingly frequent phenomenon in the Asia Pacific.¹⁷⁷

3. *A Rise in Non-Violent Protests: The Power of the People*

When the protests initially began in July 2020, three key demands were made: the dissolution of the existing parliament and the holding of fresh elections; key democratic reforms in the constitution; and investigations into the abductions and killings of Thai dissidents overseas.¹⁷⁸ Soon after, the protests coalesced to present an organised ten-point agenda, which included among others, the revocation of the transfer of crown assets into King Vajiralongkorn's possession and the recall of the army units deployed under his command.¹⁷⁹ By calling for reduced revenue on the monarchy and the cessation of monarchic propaganda, the people sought to curtail the seemingly limitless power of the King.¹⁸⁰

The protests themselves organised in a three-pronged manner: in July 2020, university groups came together under the banner of "Free Youth" to stage protests; by August 2020, these groups widened to include artists, social workers, people from the LGBTQIA+ community,

¹⁷⁵ Leah Carter, 'Thailand: Exiled activist's disappearance sparks calls for justice' *DW* (17 June 2020) <<https://www.dw.com/en/thailand-exiled-activists-disappearance-sparks-calls-for-justice/a-53843034>> accessed 2 August 2021

¹⁷⁶ Panu Wongcha-um, Patpicha Tanakasempipat, 'Thai exiles in fear after murders and disappearances' *Reuters* (Bangkok, 24 May 2019) <<https://www.reuters.com/article/us-thailand-rights-exiles-insight-idUSKCN1SU0DV>> accessed 2 August 2021

¹⁷⁷ James Lovelock, 'Nowhere to hide: SE Asian nations conspire as dissidents disappear' *UCAnews* (Vientiane, 27 August 2020) <<https://www.ucanews.com/news/nowhere-to-hide-se-asian-nations-conspire-as-dissidents-disappear/89293>> accessed 2 August 2021

¹⁷⁸ Post Reporters, 'Protesters reiterate 3 key demands' *Bangkok Post* (9 October 2020) <<https://www.bangkokpost.com/thailand/politics/1998947/protesters-reiterate-3-key-demands>> accessed 2 August 2021

¹⁷⁹ 'Demonstration at Thammasat Proposes Monarchy Reform' *Prachatai* (11 August 2020) <<https://prachatai.com/english/node/8717>> accessed 2 August 2021

¹⁸⁰ Apornrath Phoonphongphiphat and Masayuki Yuda, 'Thailand protesters call for probe into king's wealth and spending' *Nikkei Asia* (Bangkok, 26 November 2020) <<https://asia.nikkei.com/Politics/Turbulent-Thailand/Thailand-protesters-call-for-probe-into-king-s-wealth-and-spending>> accessed 2 August 2021

labourers among others under the banner of “Free People” and; by mid-October 2020, both these groups merged into the People’s Party.¹⁸¹ Spurred on by decentralized and virtual advantages, the 2020 protests have co-opted several elements of pop culture to escape increasingly stringent anti-freedom laws.¹⁸² From high-schoolers running around like hamsters from the Japanese manga *Hamtaro*,¹⁸³ to dressing up as characters from the Harry Potter franchise,¹⁸⁴ the Thai protests have been increasingly integrated with their democratic goals. Unlike the violent and divisive protests of 2006 and 2014,¹⁸⁵ not only were peacekeepers specifically appointed at the 2020 protests, but also protestors themselves used an array of non-violent methods, deftly managing any potential clashes with the police.¹⁸⁶

Much of the public dissent has also occurred digitally:¹⁸⁷ while physical spaces for protest are almost always government controlled, digital spaces redistribute those power dynamics, as they are ultimately controlled by third parties like international technology companies.¹⁸⁸ Consequently digital activism has helped take the Thai pro-democracy protests to the world.

4. *Quelling Dissent: The Monarchy’s Attempts to Silence its Citizens*

¹⁸¹ Janjira Sombatpoonsiri, ‘From Repression to Revolt: Thailand’s 2020 Protests and the Regional Implications’ [2021] German Institute of Global and Area Studies

¹⁸² Emmy Sasipornkarn, ‘Thailand protests: Humor and creativity amid repression’ *DW* (25 November 2020) <<https://www.dw.com/en/thailand-protests-humor-and-creativity-amid-repression/g-55721064>> accessed 2 August 2021

¹⁸³ ‘Japanese cartoon ‘Hamtaro’ used by Thai protesters to mock government’ *Nikkei Asia* (Bangkok, 27 July 2020) <<https://asia.nikkei.com/Politics/Japanese-cartoon-Hamtaro-used-by-Thai-protesters-to-mock-government>> accessed 2 August 2021

¹⁸⁴ Reuters, ‘Thailand protesters openly criticise monarchy in Harry Potter-themed rally’ *The Guardian* (4 August 2020) <<https://www.theguardian.com/world/2020/aug/04/thailand-protesters-openly-criticise-monarchy-harry-potter-themed-rally>> accessed 2 August 2021

¹⁸⁵ Associated Press in Bangkok, ‘Thailand reels from bombings as political violence escalates’ *The Guardian* (19 January 2014) <<https://www.theguardian.com/world/2014/jan/19/thailand-bombings-political-violence-bangkok>> accessed 2 August 2021

¹⁸⁶ Janjira Sombatpoonsiri, ‘From Repression to Revolt: Thailand’s 2020 Protests and the Regional Implications’ [2021] German Institute of Global and Area Studies

¹⁸⁷ Tracy Beattie, Albert Zhang and Elise Thomas, ‘The power dynamics of Thailand’s digital activism’ *The Strategist* (14 December 2020) <<https://www.aspistrategist.org.au/the-power-dynamics-of-thailands-digital-activism/>> accessed 2 August 2021

¹⁸⁸ Elise Thomas, Tracy Beattie and Albert Zhang, ‘#WhatsHappeningInThailand: the power dynamics of Thailand’s digital activism’ (Australian Strategic Policy Institute 2020)

Despite the creativity and non-violence of the pro-democracy protests, the military government has met protestors with force: water cannons laced with toxic agents, tear gas, and rubber bullets are a few methods of violent state-retaliation.¹⁸⁹ The military government uses a plethora of draconian laws to keep protestors in check: sedition,¹⁹⁰ defamation,¹⁹¹ the Emergency Decree imposed in the wake of the COVID-19 pandemic,¹⁹² and martial law imposed after the military coup of 2014,¹⁹³ to name a few.

Although protestors have claimed that protesting for the monarchy to behave constitutionally is not illegal,¹⁹⁴ there is widespread rage against Thailand's *lèse-majesté* laws. The *lèse-majesté* laws forbid insults against certain members of the royal family, with detractors facing up to 15 years of imprisonment for violations.¹⁹⁵ Although the law was discontinued in 2017,¹⁹⁶ it was brought back in 2020, as a legislative weapon against protestors critical of the monarchy.¹⁹⁷ Similarly the Computer Crime Act,¹⁹⁸ bars individuals from criticizing certain

¹⁸⁹ 'Thailand protests: Riot police fire water cannon as protesters defy rally ban' *BBC News* (16 October 2020) <<https://www.bbc.com/news/world-asia-54573349>> accessed 2 August 2021

¹⁹⁰ Reuters Staff, 'Thai protest leaders go on trial for sedition, royal insults' *Reuters* (Bangkok, 15 March 2021) <<https://www.reuters.com/article/us-thailand-protests-idUSKBN2B70E2>> accessed 2 August 2021

¹⁹¹ SCMP Reporters, 'Thailand's young protesters hit by royal defamation law, as pro-democracy movement wanes' *South China Morning Post* (17 February 2021) <<https://www.scmp.com/week-asia/politics/article/3122051/thailands-protest-movement-ebbs-young-people-are-caught-teeth>> accessed 2 August 2021

¹⁹² 'Thailand Under State of Emergency After Massive Anti-Government Protests' *VOA News* (15 October 2020) <<https://www.voanews.com/east-asia-pacific/thailand-under-state-emergency-after-massive-anti-government-protests>> accessed 2 August 2021

¹⁹³ 'Thailand crisis: Army declares martial law' *BBC News* (20 May 2014) <<https://www.bbc.com/news/world-asia-27480845>> accessed 2 August 2021

¹⁹⁴ 'Government Official Files Royal Defamation Complaint Over Harry Potter Protest Speech' *Prachatai* (5 August 2020) <<https://prachatai.com/english/node/8698>> accessed 2 August 2021

¹⁹⁵ David Streckfuss, 'Truth on Trial in Thailand: Defamation, Treason, and Lèse-Majesté' (Routledge, 2011)

¹⁹⁶ Michael Ruffles, 'Lèse-majeste is dead. Long live lese-majeste' *The Sydney Morning Herald* (22 November 2018) <<https://www.smh.com.au/world/asia/lese-majeste-is-dead-long-live-lese-majeste-20181121-p50hbz.html>> accessed 2 August 2021

¹⁹⁷ 'Thailand revives lese majeste ahead of rally over royal fortune' *Al Jazeera* (25 November 2020) <<https://www.aljazeera.com/news/2020/11/25/thailand-revives-royal-insult-law-as-mass-rallies-planned>> accessed 2 August 2021

¹⁹⁸ 'Thailand: Cyber Crime Act Tightens Internet Control' *Human Rights Watch* (New York, 21 December 2016) <<https://www.hrw.org/news/2016/12/21/thailand-cyber-crime-act-tightens-internet-control>> accessed 2 August 2021

institutions, including those covered under the *lèse-majesté*, in addition to criminalizing fake news and misinformation.¹⁹⁹

5. *Increasing Illiberalism: Thailand as a Flawed Democracy*

Samuel Issacharoff has observed that democratic uncertainty results from four institutional challenges to the liberal democratic constitutional order: the accelerated decline of political parties, a paralysis of the legislature; a loss of social cohesion and a decline in state competence.²⁰⁰ In Thailand, weakening political parties are unable to stand up to the collective might of the military and the monarchy, even as public protests rage in the streets.²⁰¹ With the monarchy rolling about constitutional amendments and legislative changes to suit its fancy, the legislative arena, which theoretically is the clearest arena for democratic deliberation,²⁰² is severely compromised. As scholarship tends to show, legislations that are democratically deliberated upon, are considered to be legitimate, because they are produced by a procedure that tends to yield correct decisions.²⁰³ In Thailand, not only is this legislative deliberation compromised but also, the possibility of strong judicial intervention does not exist. Consequently, it is up to the citizenry and the quality of their political engagement to salvage what is left of a nascent democratic order.

IV. THE SURVIVAL OF DEMOCRATIC RULE IN HYBRID REGIMES: A STUDY OF HONG KONG AND NEPAL

¹⁹⁹ Wasant Techawongtham, 'Does govt fear 'fake news', or the truth?' *Bangkok Post* (12 June 2021) <[https://www.bangkokpost.com/opinion/opinion/2131171/does-govt-fear-fake-news-or-the-truth->](https://www.bangkokpost.com/opinion/opinion/2131171/does-govt-fear-fake-news-or-the-truth-) accessed 2 August 2021

²⁰⁰ Samuel Issacharoff, 'Democracy's Deficits' (2018) 85 *University Chicago Law Review* 485, at 488

²⁰¹ Pavin Chachavalpongpun, 'Constitutionalising the Monarchy' (2020) 73(2) *Journal of International Affairs*, 163

²⁰² Joshua Cohen, *Deliberation and Democratic Legitimacy*, in Alan Hamlin and Philip Pettit (eds), *The Good Polity: Normative Analysis of the State* (Basil Blackwell 1989); Samuel Issacharoff, 'Democracy's Deficits' (2018) 85 *University Chicago Law Review* 485, at 498

²⁰³ David M. Estlund, *Democratic Authority: A Philosophical Framework* (Princeton 2008)

The Democracy Index 2020 identifies 35 countries of 167 as hybrid regimes, which are set apart by a series of characteristics that are coming increasingly apparent in the Asia Pacific region.²⁰⁴ These are: dwindling rule of law, a typically weakened form of civil society, widespread corruption, tremendous governmental pressure on opposition or other political parties, irregular elections, limited journalistic freedom and a judiciary that is not independent from the power of the incumbent government.²⁰⁵ A hybrid regime is a nondemocratic regime that contains both democratic and authoritarian characteristics.²⁰⁶ In the past few years, these countries have undergone a considerable subversion of democratic processes, triggering counterclaims for the very survival of democratic rule that their increasingly authoritarian governments seek to subvert.

A. DEMOCRACY ON A DEADLINE: HONG KONG AFTER 2047

In 2020 Hong Kong was relegated to a hybrid regime, from its earlier position as a flawed democracy in the 2019 Democracy Index.²⁰⁷ Scholars have identified two sources of this hybridity: first, the evolving relationship between the central government in Beijing and the semi-autonomous government of Hong Kong; and second, is the co-existence of civil

²⁰⁴ Economist Intelligence Unit, 'Democracy Index 2020: In Sickness and in Health' (The Economist 2021) <<https://www.eiu.com/n/campaigns/democracy-index-2020/>> accessed 2 August 2021, at 3

²⁰⁵ Economist Intelligence Unit, 'Democracy Index 2020: In Sickness and in Health' (The Economist 2021) <<https://www.eiu.com/n/campaigns/democracy-index-2020/>> accessed 2 August 2021, at 56

²⁰⁶ Julius Yam, 'Approaching the Legitimacy Paradox in Hong Kong: Lessons for Hybrid Regime Courts' (2020) 46(1) Law & Social Inquiry 153; Steven Levitsky and Lucan A. Way, *Competitive Authoritarianism: Hybrid Regimes after the Cold War* (Cambridge University Press 2011); Andreas Schedler, *The Politics of Uncertainty: Sustaining and Subverting Electoral Authoritarianism* (Oxford University Press 2013)

²⁰⁷ Economist Intelligence Unit, 'Democracy Index 2020: In Sickness and in Health' (The Economist 2021) <<https://www.eiu.com/n/campaigns/democracy-index-2020/>> accessed 2 August 2021, at 5, 28

liberties demanded by a proactive citizenry with executive domination encouraged from China.²⁰⁸

The Hong Kong Special Administrative Region (“HKSAR”) is considered a highly developed common law system existing within the authoritarian civil law system of China, which also displays so-called socialist characteristics.²⁰⁹ The defining feature of China’s unique brand of socialism is the monopoly of political and constitutional power wielded by the Chinese Communist Party, and since unification, scholars have increasingly perceived China to have dragged Hong Kong towards their own brand of authoritarianism.²¹⁰ Benny Tai, an authority on constitutional law in Hong Kong and the propagator of the Occupy Central with Love and Peace protests in 2014, espoused the idea that the appropriate litmus test for either authoritarianism or democracy is in the nature of the electoral process itself, i.e. whether there is a real chance for the opposition to be in power.²¹¹ In the course of this section, it becomes increasingly apparent how Hong Kong fares on said litmus test: with little to no criticism tolerated against the Chinese Communist Party, members of opposition are disallowed from standing for elections and proponents of Hong Kong independence are silenced entirely.

1. *Creating a Narrative: A History of Protests in Hong Kong*

²⁰⁸ Edmund Cheng, Hong Kong’s Hybrid Regime and its Repertoires, in Ching Kwan Lee and Ming Sing (eds) *Take Back Our Future: An Eventful Sociology of the Hong Kong Umbrella Movement*, (Cornell University Press 2019), at 168

²⁰⁹ Han Zhu, ‘Beijing’s “Rule of Law” Strategy for Governing Hong Kong, China Perspectives’ (2019) 1 French Centre for Research on Contemporary China 23, at 33

²¹⁰ Fu Hualing, ‘One Country, Two Systems: A Critical Analysis of Benny Tai’s Account, Social & Legal Studies’ in Benny Tai, Scott Veitch, Fu Hualing and or (eds) *Pursuing Democracy in an Authoritarian State: Protest and the Rule of Law in Hong Kong XX(X)* at 24

²¹¹ Fu Hualing, ‘One Country, Two Systems: A Critical Analysis of Benny Tai’s Account, Social & Legal Studies’ in Benny Tai, Scott Veitch, Fu Hualing and or (eds) *Pursuing Democracy in an Authoritarian State: Protest and the Rule of Law in Hong Kong XX(X)* at 24

As early as 1968, Richard Hughes argued that it was the British who introduced a system of fundamental authoritarian legality into HKSAR, which continued long after its handover to China in July 1997.²¹² Per the tradition that all private land in Hong Kong is held under long-term leases granted by the government,²¹³ Britain itself held most parts of Hong Kong on a ninety-nine year lease from China that expired on 30 June 1997.²¹⁴ The uncertainty over the question of land leases, which formed part of the Sino-British negotiation process, created a deadlock of sorts, eventually culminating in the Joint Declaration of 1984, which among other issues, permitted Britain to extend and renew land leases falling beyond 30 June 1997, provided their expiration date fell no later than 30 June 2047.²¹⁵

As the People's Republic of China gained international recognition,²¹⁶ and a legitimate seat in the United Nations,²¹⁷ they pursued a policy of unification with respect to Taiwan, Macau and Hong Kong.²¹⁸ The 'One Country, Two Systems' policy was originally intended for Taiwan, but was first implemented in Hong Kong.²¹⁹ This came to be enshrined in the Basic Law, which promises that the socialist system will not be practiced in the HKSAR, and that the previous capitalist system and way of life shall remain unchanged for 50 years.²²⁰ The

²¹² Richard Hughes *Borrowed Place Borrowed Time: Hong Kong and Its Many Faces*, (Andre Deutsch 1976) ; Richard Cullen, 'Response to Benny Tai, Social & Legal Studies' in Benny Tai, Scott Veitch, Fu Hualing and or. (eds), *Pursuing Democracy in an Authoritarian State: Protest and the Rule of Law in Hong Kong XX(X)* at 29

²¹³ 'Hong Kong Land Lease Reform, Part 1' (Webb-site Reports 2010), <<https://webb-site.com/articles/leases1.asp>> accessed 2 August 2021; Danny Gittings, 'What Will Happen to Hong Kong after 2047' (2011) 42(1) *California Western International Law Journal* 37, at 42

²¹⁴ Robert Cottrell, *The End Of Hong Kong: The Secret Diplomacy Of Imperial Retreat* (John Murray Publishers Ltd 1993)44-47 (1993).

²¹⁵ Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong (with Annexes), U.K.-China, Annex I, § 1, Dec. 19, 1984, 1399 U.N.T.S. 33 [hereinafter Joint Declaration]

²¹⁶ Ma Zhengang, 'China-U.S. Relations: A Sober-Minded Assessment with High Expectations' (2009) 18 *China International Studies*, at 57-58

²¹⁷ United Nations, General Assembly Res. 2758 (XXVI) (Oct. 25, 1971)

²¹⁸ Danny Gittings, 'What Will Happen to Hong Kong after 2047' (2011) 42(1) *California Western International Law Journal* 37, at 42

²¹⁹ Danny Gittings, *Introduction To The Hong Kong Basic Law* (2nd ed, Hong Kong University Press 2016), at 219-222

²²⁰ The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, 1 July 1997, Article 5

Basic Law effectively serves as the *de facto* constitutional document of the HKSAR. Coupled with the expiration date of the British land leases, it lends an almost apocalyptic importance to 30 June 2047, after which the very fabric of democracy in the HKSAR hangs in balance.

The first organized large-scale protest in post-handover Hong Kong occurred in 2003, when citizens came together to protest the imposition of a national security law.²²¹ Not only did democratic dissent prevent the government from forging ahead with the legislation,²²² but also it began a tradition of democratic protest,²²³ creating new political groups and alternative media.²²⁴ In 2013, legal scholar Benny Tai proposed peacefully occupying the main streets in the city's financial district, Central, to force the government to concede to greater democratic reform.²²⁵ The Occupy Central protest, as it came to be known, was met with state force right at the outset, spurring the creation of the much larger Umbrella Movement of 2014.²²⁶ Eventually however, by employing the strategy of attrition, the government allowed the inconveniences of the occupation to accumulate, bringing the movement to a natural end.²²⁷ In fact, the occupation was declared to be a tortious act of public nuisance, when a minibus management company brought legal action against protestors who had occupied the public highways.²²⁸ Ultimately, the nine ringleaders of the Umbrella Movement were found guilty

²²¹ Ngok Ma, 'Civil Society in Self-defense: The Struggle against National Security Legislation in Hong Kong' (2005) 14(44) *Journal of Contemporary China*, at 465–482

²²² Francis L. F. Lee, Samson Yuen, Gary Tang and Ors, 'Hong Kong's Summer of Uprising' (2019) 19(4) *The China Review* 1

²²³ Dennis K. K. Leung, 'Alternative Internet Radio, Press Freedom and Contentious Politics in Hong Kong' (2015) 22 (2) *Javnost-the Public* 196

²²⁴ Edmund W. Cheng, 'Street Politics in a Hybrid Regime: The Diffusion of Political Activism in Post-colonial Hong Kong' (2016) 226 *The China Quarterly* 383

²²⁵ Francis L. F. Lee, Samson Yuen, Gary Tang and Ors, 'Hong Kong's Summer of Uprising' (2019) 19(4) *The China Review* 1

²²⁶ Edmund W. Cheng and Wai-Yin Chan, 'Explaining Spontaneous occupation: Antecedents, contingencies and spaces in the Umbrella Movement' (2017) 16(2) *Social Movement Studies* 222; Gary Tang, 'Mobilization by images: TV screen and mediated instant grievances in the Umbrella Movement' (2015) 8(4) 338

²²⁷ Samson Yuen and Edmund W. Cheng, 'Neither Repression nor Concession? A Regime's Attrition against Mass Protests' (2017) 65(3) *Political Studies* 611

²²⁸ *Chiu Luen Public Light Bus Co. Ltd. v. Persons Unlawfully Occupying or Remaining on the Public Highway, Namely, the Westbound Carriageway of Argyle Street Between the Junction of Tung Choi Street and*

of conspiracy, incitement to commit public nuisance and incitement to incite public nuisance.²²⁹

2. *Diluting Democracy: Introducing the Extradition Bill, 2019*

The 2019 protests in Hong Kong exemplify what Dworkin termed the ‘paradox of civil society’²³⁰ which indicated the dilemma a so-called liberal state faced in justifying coercion against its subjects who themselves were morally autonomous.²³¹ An immediate objection here is the fact that Hong Kong is not by any qualification a liberal state.²³² However scholars attest that Hong Kong has a sufficiently high form of autonomy that for the purposes of governance, allow it to operate as the single autonomous government of the HKSAR, making legitimate claims that require obedience to its laws similar to that of a democratic liberal regime.²³³ Legitimacy here signifies the moral authority of a state or regime to generate obligations on morally autonomous subjects, including obligations to obey laws.²³⁴ Every legitimacy claim therefore comprises three elements: first, a constitutional moral axiom claimed by the state; second, a posited law that is allegedly consistent with such constitutional moral axiom; and third, a requirement for obedience with said law.²³⁵

Portland Street and/or Other Persons Hindering or Preventing the Passing or Repassing of Argyle Street, (2014) 2086 H.K.L.R.D. paras 4, 5 (C.F.I.) (H.K.). HKCFI 1891; HCA 2086/2014

229 Francis L. F. Lee, Samson Yuen, Gary Tang and Ors, ‘Hong Kong’s Summer of Uprising’ (2019) 19(4) *The China Review* 1

230 Ronald Dworkin, *Justice for Hedgehogs* (Harvard U Press 2011)

231 Joseph Raz, *The Morality of Freedom* (Oxford University Press 1986) at 38–48

232 Robert Morris, ‘Forcing the Dance: Interpreting the Hong Kong Basic Law Dialectically’ in Hualing Fu, Lison Harris, and Simon Young (eds) *Interpreting Hong Kong’s Basic Law: The Struggle for Coherence* (Palgrave Macmillan 2007)

233 Ian Holliday, Ma Ngok and Ray Yep, ‘A High Degree of Autonomy? Hong Kong Special Administrative Region, 1997–2002’ (2002) 73 *Political Quarterly*, at 455–464; Hsin-Chi Kuan and Siu-Kai Lau, ‘Between Liberal Autocracy and Democracy: Democratic Legitimacy in Hong Kong’ (2010) 9(4) *Democratization*, at 58–76; Zhenmin Wang, ‘China’s Decision on Universal Suffrage in Hong Kong and Its Significance’ (*Hong Kong Journal* 2011) <https://web.archive.org/web/20110624000902/http://www.hkjjournal.org/PDF/2008_summer/1.pdf> accessed 2 August 2021

234 Michael Sevel, ‘Obeying the Law’ (2018) 24(3) *Legal Theory* 191

235 Greenwood-Reeves, ‘The Democracy Dichotomy: Legitimacy Counterclaims as an Inchoherent Constitutional Morality’ [2020] *The Asia Pacific Journal of Human Rights and the Law* 35, at 53

Consider this in the context of the amendments to the Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill, 2019 (hereinafter “extradition bill”), which sought to introduce a special surrender arrangement designed to do away with the restrictions against extraditing suspects from HKSAR to mainland China.²³⁶ Considering the poor quality of human rights in mainland China, coupled with the fact that China followed an entirely different criminal system than judicially-independent HKSAR, protestors saw this as a direct affront to the liberal democratic regime of HKSAR. Effectively, the extradition bill represents a failed legitimacy claim, and could not command the obedience of law that it should have been able to.²³⁷ The Chief Executive of HKSAR attempted to justify the extradition bill on grounds of regional autonomy and preservation of the rule of law in certain criminal cases,²³⁸ which did not align with the constitutional moral axioms of the Basic Law. The extradition bill failed not only because it was promulgated without a satisfactory democratic mandate,²³⁹ but also because its claim to obedience relied on the underlying illiberal and non-democratic governance and political supremacy of China.²⁴⁰ Consequently, even after the extradition bill was withdrawn,²⁴¹ the protests

²³⁶ Helier Cheung & Roland Hughes, ‘Why are there protests in Hong Kong?’ *BBC News* (21 May 2020) <<https://www.bbc.com/news/world-asia-china-48607723>> accessed 2 August 2021

²³⁷ Greenwood-Reeves, ‘The Democracy Dichotomy: Legitimacy Counterclaims as an Incoherent Constitutional Morality’ [2020] *The Asia Pacific Journal of Human Rights and the Law* 35, at 56

²³⁸ Christy Leung, ‘Extradition bill not made to measure for mainland China and won’t be abandoned, Hong Kong leader Carrie Lam says’ *South China Morning Post* (1 April 2019) <<https://www.scmp.com/news/hong-kong/politics/article/3004067/extradition-bill-not-made-measure-mainland-china-and-wont>> accessed 2 August 2021

²³⁹ Holmes Chan, ‘Democrats decry ‘coup’ as pro-Beijing lawmaker seeks to take over vetting of China extradition bill’ *Hong Kong Free Press* (6 May 2019) <<https://hongkongfp.com/2019/05/06/democrats-decry-coup-pro-beijing-lawmaker-seeks-take-vetting-china-extradition-bill/>> accessed 2 August 2021

²⁴⁰ Verna Yu, ‘China says Hong Kong violence ‘totally intolerable’ *The Guardian* (Hong Kong, 2 July 2019) <<https://www.theguardian.com/world/2019/jul/02/chinese-media-calls-for-zero-tolerance-after-violent-hong-kong-protest>> accessed 2 August 2021

²⁴¹ ‘Hong Kong formally scraps extradition bill that sparked protests’ *BBC News* (23 October 2019) <<https://www.bbc.com/news/world-asia-china-50150853>> accessed 2 August 2021

continued to flourish as a wider counterclaim to the perceived legitimacy failure of the Chief Executive and the administration of the HKSAR.²⁴²

3. *The Rise in Violent Protests: Police-Protestor Clashes beyond the Extradition Bill*

The Civil Human Rights Front organised several protests against the extradition bill in early 2019, without protestor turnout going as high as one million citizens before the second reading of the extradition bill.²⁴³ One such organized protest, on 1 June 2019, turned militant as protestors stormed and vandalised the administrative building of the Legislative Council, and issued a five-demand manifesto that included among other issues, withdrawing the extradition bill, investigating into police abuse of power, and implementing popular elections for the entire Legislative Council, including elections for the seat of the Chief Executive.²⁴⁴ These protests were met with fierce police violence, including tear gas and rubber bullets.²⁴⁵ On 21 July 2019, while thousands protested peacefully, certain violent elements, dressed in white shirts attacked citizens leaving the rally at Yeun Long Station.²⁴⁶ Spurred on by the police ferocity against protestors, and clamouring for greater democratic reform, protests continued even after the extradition bill was withdrawn on 4 September 2019. A local survey

²⁴² Greenwood-Reeves, 'The Democracy Dichotomy: Legitimacy Counterclaims as an Inchoherent Constitutional Morality' [2020] *The Asia Pacific Journal of Human Rights and the Law* 35, at 58

²⁴³ Francis L. F. Lee, Samson Yuen, Gary Tang and Ors, 'Hong Kong's Summer of Uprising' (2019) 19(4) *The China Review* 1, at 2

²⁴⁴ Francis L. F. Lee, Samson Yuen, Gary Tang and Ors, 'Hong Kong's Summer of Uprising' (2019) 19(4) *The China Review* 1, at 2

²⁴⁵ Casey Quackenbush and Gerry Shih, 'Behind the Barricade, Hong Kong protestors turn a University into a fortress' *The Washington Post* (Hong Kong, 14 November 2019) <https://www.washingtonpost.com/world/asia-pacific/behind-the-barricade-hong-kong-protesters-turn-a-university-into-a-fortress/2019/11/14/7d03d9f6-06a3-11ea-9118-25d6bd37dfb1_story.html> accessed 2 August 2021

²⁴⁶ Francis L. F. Lee, Samson Yuen, Gary Tang and Ors, 'Hong Kong's Summer of Uprising' (2019) 19(4) *The China Review* 1, at 11

found that 75.7% of respondents believed the withdrawal of the extradition bill to be insufficient in the broader context of preserving the democratic functioning of the HKSAR.²⁴⁷

The protests also continued partly to express dissatisfaction with the police's handling of the protestors.²⁴⁸ The government reacted to protests by cancelling celebratory activities for National Day on 1 October 2019, sparking further protests.²⁴⁹ On 4 October 2019, the Chief Executive announced the Prohibition on Face Covering Regulation, a bill that banned people from covering their faces in public meetings, processions regulated under the Public Order Ordinance and unlawful assemblies like riots, as the anti-extradition bill protests were characterized.²⁵⁰ This prevented citizens from protesting anonymously, allowing a greater crackdown on individual protestors.²⁵¹

As increasingly radicalized forms of protest began to take root, HKSAR recorded the highest voter turnout during its District Council elections on 24 November 2019²⁵²—considered to be a *de facto* referendum on the ongoing pro-democracy movement²⁵³—with democrats winning control of 17 of the HKSAR's 18 District Councils by gaining over 340 of the 452

²⁴⁷ Francis L. F. Lee, Gary Tang, Samson Yuen, and ors, 'Onsite Survey Findings in Hong Kong's Anti-Extradition Bill Protests,' Centre for Communication and Public Opinion Survey' (The Chinese University of Hong Kong, August 2019) <<https://sites.google.com/view/antielabsurvey-eng>> accessed 2 August 2021

²⁴⁸ *ibid.*

²⁴⁹ Francis L. F. Lee, Samson Yuen, Gary Tang and or., 'Hong Kong's Summer of Uprising China Review' (2019) 19(4) Chinese University Press 1, at 12

²⁵⁰ 'Anti-Mask Law Gazetted' *News.Gov.Hk* (4 October 2019) <https://www.news.gov.hk/eng/2019/10/20191004/20191004_181429_379.html /> accessed 2 August 2021

²⁵¹ 'HK top court rules anti-mask law completely constitutional, 'an important step in restoration of rule of law' *Global Times* (22 December 2020) <<https://www.globaltimes.cn/content/1210602.shtml>> accessed 2 August 2021; Tu Yunxin, 'The Question of 2047: Constitutional Fate of "One Country, Two Systems" in Hong Kong' (2020) 21 *German Law Journal* 1481, at 1502

²⁵² K.K. Rebecca Lai and Jin Wu, 'Hong Kong Election Results Mapped' *The New York Times* (24 November 2019) <<https://www.nytimes.com/interactive/2019/11/24/world/asia/hong-kong-election-results.html>> accessed 2 August 2021

²⁵³ Shibani Mahtani, Simon Denyer, Tiffany Liang and ors, 'Hong Kong's Pro-Democracy Parties Sweeping Aside Pro-Beijing Establishment set aside in Local Elections' *The Washington Post* (24 November 2019) <https://www.washingtonpost.com/world/record-turnout-in-hong-kong-election-seen-as-a-referendum-on-the-pro-democracy-protest-movement/2019/11/24/31804b00-0df5-11ea-8054-289aef6e38a3_story.html> accessed 2 August 2021

seats.²⁵⁴ Scholars have found experiential education of this nature to be most effective in fostering civic engagement,²⁵⁵ and in creating a democratic call for universal suffrage in the HKSAR.²⁵⁶

4. *Quelling Dissent: Bringing in the National Security Law, 2020*

The HKSAR administration clamped down on the growing protests by promulgating the National Security Law (hereinafter “NSL”), emboldened by the Chinese Communist Party administration in mainland China, which could not tolerate acts of potential secession, subversion, terrorism and/or collusion with foreign powers, all of which are considered offences under the NSL.²⁵⁷ The enactment of the NSL, which the people have resisted since 2003,²⁵⁸ is a significant blow to the democratic integrity of the region. The NSL has created an entirely new office, called the Office for Safeguarding National Security of the Central People’s Government in Hong Kong Special Administrative Region, which functions outside the jurisdiction of the HKSAR. It exercises exclusive jurisdiction over cases concerning national security if their complexity is due to the involvement of a foreign country or other external elements, if the HKSAR administration is unable to effectively enforce the NSL or if

²⁵⁴ Tony Cheung, ‘Hong Kong Elections: Pro-Beijing Collapse Shows Identity Politics More Important than Community Issues for District Council Success, Analysts Say’ *South China Morning Post* (25 November 2019) <<https://www.scmp.com/news/hong-kong/politics/article/3039201/hong-kong-elections-pro-beijing-collapse-shows-identity>> accessed 2 August 2021

²⁵⁵ Shucheng Wang, ‘Hong Kong’s Civil Disobedience under China’s Authoritarianism’ (2021) 35 *Emory International Law Review* 21, at 42-42

²⁵⁶ ‘Hong Kong Protest: Nearly Two Million Join Demonstration’ *BBC NEWS* (17 June 2019) <<https://www.bbc.com/news/world-asia-china-48656471>> accessed 2 August 2021

²⁵⁷ Law of the People’s Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (promulgated by the Standing Comm. Nat’l People’s Cong., June 30, 2020, effective June 30, 2020) (China)

²⁵⁸ Ngok Ma, ‘Civil Society in Self-defense: The Struggle against National Security Legislation in Hong Kong’ (2005) 14(44) *Journal of Contemporary China* 465

a major and imminent threat to national security has occurred.²⁵⁹ Not only are the provisions of the NSL suspiciously ambiguous in their construction,²⁶⁰ with the right of final interpretation resting with the National People's Congress Standing Committee in Beijing,²⁶¹ but also, decisions taken under the NSL are not subject to judicial review by courts of the HKSAR.²⁶² The NSL seeks to punish those demanding independence for HKSAR, and those protestors who have committed violent actions.²⁶³ However it also precludes people from protesting nonviolently and criticising the Chinese Communist Party, both of which have hitherto been permitted in the HKSAR.

While the NSL effectively appears to be a draconian gag order, it is not necessarily unconstitutional: Article 23 of the Basic Law itself requires the HKSAR to enact laws on treason, secession, sedition, subversion, and the protection of state secrets.²⁶⁴ Although this clashes with guarantee of freedoms under both the Basic Law and the Joint Declaration of 1984,²⁶⁵ the HKSAR would not be very different from most liberal democracies of the world who also have stringent national security laws even while protecting individual freedoms.²⁶⁶

²⁵⁹ Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (promulgated by the Standing Comm. Nat'l People's Cong., June 30, 2020, effective June 30, 2020) (China), Article 55

²⁶⁰ Stuart White, 'Here are Some of the Most Controversial Points of Hong Kong's Dreaded Security Law' *Vice* (July 1, 2020) <<https://www.vice.com/en/article/pkyk7y/here-are-some-of-the-most-controversial-points-of-hong-kongs-dreaded-security-law>> accessed 2 August 2021

²⁶¹ Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (promulgated by the Standing Comm. Nat'l People's Cong., June 30, 2020, effective June 30, 2020) (China), Article 65; Shucheng Wang, 'Hong Kong's Civil Disobedience under China's Authoritarianism' (2021) 35 *Emory International Law Review* 21, at 59

²⁶² Article 14, NSL; Shucheng Wang, 'Hong Kong's Civil Disobedience under China's Authoritarianism' (2021) 35 *Emory International Law Review* 21, at 59

²⁶³ Rana Mitter, 'One Country, Two Systems?', (2020) 166 (2) *The Royal Society For Arts, Manufactures And Commerce Journal* 42

²⁶⁴ The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, 1 July 1997, Article 23

²⁶⁵ Joint Declaration of 1984, Article 3(2); Inbal Sansani, 'The Threat of Article 23 to Civil Liberties in the Hong Kong Special Administrative Region' (2003) 10(3) *Human Rights Brief* at 28,30

²⁶⁶ Tu Yunxin, 'The Question of 2047: Constitutional Fate of "One Country, Two Systems" in Hong Kong' (2020) 21 *German Law Journal* 1481, at 1498

There are very real consequences, for institutions and individuals alike, who choose to oppose the Chinese Communist Party and by extension, the Central People's Government in China. For example, the Court of First Instance of the HKSAR had originally found the Prohibition on Face Covering Regulation unconstitutional,²⁶⁷ following which the National People's Congress Standing Committee in Beijing immediately issued a non-binding statement threatening to remove constitutional review powers from judges in the HKSAR.²⁶⁸ Ultimately, the Prohibition on Face Covering Regulation was declared constitutional before the Court of Final Appeal, the highest court of the HKSAR judicial system.²⁶⁹

5. *Increasing Illiberalism: The Puzzling Question of Hong Kong after 2047*

The future of democracy in Hong Kong, rests on what is likely to happen of Article 5 of the Basic Law, and of the 'One Country, Two Systems' doctrine after 30 June 2047. Some scholars consider it a transitory arrangement with an expiry date,²⁷⁰ designed to ease HKSAR's reintegration into China, after which it is to be treated as any other part of the country.²⁷¹ Benny Tai, on the other hand, considers it viable for the constitutional game of HKSAR to continue under the Basic Law even after 2047.²⁷² While some scholars believe 2047 will bring an end to the Basic Law itself,²⁷³ others believe that the crux is to determine

²⁶⁷ Kwok Wing Hang v Chief Executive in Council (No 2) [2020] 1 HKLRD 1

²⁶⁸ Julius Yam, 'Approaching the Legitimacy Paradox in Hong Kong: Lessons for Hybrid Regime Courts' (2020) 46(1) Law & Social Inquiry 153, at 17

²⁶⁹ 'HK top court rules anti-mask law completely constitutional, 'an important step in restoration of rule of law' *Global Times* (22 December 2020) <<https://www.globaltimes.cn/content/1210602.shtml>> accessed 2 August 2021

²⁷⁰ Kenneth Ka-Lok Chan, 'Taking Stock of "One Country, Two Systems,"' in Yiu-chung Wong (ed), *"One Country, Two Systems" in Crisis* (Lexington Books 2004) 35, at 54

²⁷¹ Danny Gittings, 'What Will Happen to Hong Kong after 2047' (2011) 42(1) California Western International Law Journal 37, at 39

²⁷² Benny Y.T. Tai, 'Basic Law, Basic Politics: The Constitutional Game of Hong Kong', (2007) 37 Hong Kong Law Journal 503, at 577

²⁷³ Robert J. Morris, 'The "Replacement" Chief Executive's Two- Year Term: A Pure and Unambiguous Common Law Analysis' (2005) 35 Hong Kong Law Journal at 17, 22, 24

whether the end goal is to retain two equally thriving but different systems, or to assimilate Hong Kong into mainland China.²⁷⁴

Even as the debate around the NSL and the Article 23 controversy rages, scholars find it to be in keeping with the ‘One Country, Two Systems’ doctrine.²⁷⁵ Doreen Weisenhaus had made the fundamental argument that any legislation brought under Article 23 would serve to determine whether the ‘two systems’ model can really protect ‘one country’.²⁷⁶ Considering that since the 2003 protests, China has steadily adopted a policy that focuses on ‘one country’ instead of ‘two systems’,²⁷⁷ the newly enacted NSL is simply an instance of the proverbial chicken coming home to roost. What is interesting is that even as illiberalism flourishes in the HKSAR, the very legislations that are used to exert China’s authoritarianism—the NSL, the Prohibition on Face Covering Regulation, the Public Order Ordinance and even the Basic Law to a certain extent—are instruments of democracy created with due process.

B. CAPTURING DEMOCRATIC INSTITUTIONS: A CLASH OF REGIMES IN NEPAL

The Democracy Index 2020 identifies Nepal as a hybrid regime, as a consequence of both the democratic and authoritarian elements that are interspersed in its governance.²⁷⁸ Nepal has continued as a hybrid regime since 2016, as a consequence of the dwindling trust in public

²⁷⁴ Johannes Chan, *Civil Liberties Rule of Law and Human Rights: The Hong Kong Special Administrative Region in its First Four Years* in Siu kai Lau (ed) *The First Tung Chee-Hwa Administration: The First Five Years of the Hong Kong Special Administrative Region* at 89, 116 (The Chinese University Press 2002)

²⁷⁵ Tu Yunxin, ‘The Question of 2047: Constitutional Fate of “One Country, Two Systems” in Hong Kong’ (2020) 21 *German Law Journal* 1481, at 1498

²⁷⁶ Doreen Weisenhaus, ‘Article 23 and Freedom of the Press: A Journalistic Perspective’ In Carole J. Petersen and Simon N. M. Young (eds) *National Security and Fundamental Freedoms: Hong Kong’s Article 23 Under Scrutiny* (Hong Kong University Press 2005)

²⁷⁷ Jie Cheng, ‘The Story of a New Policy’ [2009] *Hong Kong Journal* <<http://www.hkbasiclaw.com/Hong%20Kong%20Journal/Cheng%20Jie%20article.htm>> accessed 2 August 2021; Danny Gittings, *Introduction to The Hong Kong Basic Law* (2nd ed. Hong Kong University Press 2016) at 219,222 and 308

²⁷⁸ Economist Intelligence Unit, ‘Democracy Index 2020: In Sickness and in Health’ (The Economist 2021) <<https://www.eiu.com/n/campaigns/democracy-index-2020/>> accessed 2 August 2021, at 29

institutions and elected public officials.²⁷⁹ But the real challenge to Nepal's hybridity came in December 2020, when its incumbent Prime Minister, Khadga Prasad Sharma Oli, unilaterally, and unconstitutionally, dissolved its Parliament and then moved to capture key constitutional bodies that foster the democratic functioning of the government.²⁸⁰ Consequently, anti-government protests have erupted in Nepal, calling for the resignation of the Prime Minister.²⁸¹ Politically, the ruling party, the Communist Party of Nepal, has been split into its two original factions—the Communist Party of Nepal-Maoist (hereinafter “CPN-M”) and the Communist Party of Nepal-United Marxist Leninist (hereinafter “CPN-UML”)—and is struggling to win the support of an incensed public.²⁸² The objective of such dissolution appears to be to force fresh elections, as infighting motivated Oli to seek a more popular mandate.²⁸³ Reverberating with one of the most intense sets of protests Nepal has seen since it ceased to be a constitutional monarchy, its reliance on democratic processes plays out very differently in 2021.

1. Creating a Narrative: Nepal's History of Political Instability and Regime Changes

At different points in time, Nepal has experienced a multitude of political orders before it democratized for its people. The rule of the last monarchical family, the Shah Hindu monarchy, began in 1769 and continued until 2008, when the Interim Constitution of Nepal

²⁷⁹ Naresh Koirala, 'Four regime types' *The Kathmandu Post* (2 August 2020) <<https://kathmandupost.com/opinion/2017/08/02/four-regime-types>> accessed 2 August 2021

²⁸⁰ Peter Gill, 'Nepal's Democracy in Crisis' *The Diplomat* (6 February 2021) <<https://thediplomat.com/2021/02/nepals-democracy-in-crisis/>> accessed 2 August 2021

²⁸¹ 'Several injured in anti-government clash in Nepal' *The Times of India* (11 February 2021) <<https://timesofindia.indiatimes.com/world/south-asia/several-injured-in-anti-government-clash-in-nepal/articleshow/80867479.cms>> accessed 2 August 2021

²⁸² 'Several injured in anti-government clash in Nepal' *The Times of India* (11 February 2021) <<https://timesofindia.indiatimes.com/world/south-asia/several-injured-in-anti-government-clash-in-nepal/articleshow/80867479.cms>> accessed 2 August 2021

²⁸³ 'Nepal protests: Thousands march against move to dissolve parliament' *BBC News* (29 December 2020) <<https://www.bbc.com/news/world-asia-55479586>> accessed 2 August 2021

was formally adopted.²⁸⁴ Although the first democratic elections were held in 1959, the elected government lasted only eighteen months, falling to a royal *coup d'état*.²⁸⁵ The establishment of a *panchayat* system without political parties, constitutionalized the power of the ruling monarch.²⁸⁶ Taxed with the *panchayat* system, a nationwide protest led to the adoption of multiparty elections, and the creation of a constitutional monarchy in 1991.²⁸⁷ But while Nepal had begun to democratize, much of the power was held by the landed classes: data at the time suggests that while 72% of the population lived below the poverty line, close to 50% of national income was controlled by 10% of the population.²⁸⁸ Consequently, communist forces came to power to oppose the entrenched structure of the state by demanding single party communist rule.²⁸⁹ The Communist Party of Nepal eventually ended the civil war in 2006 by integrating Maoist insurgents into its fore,²⁹⁰ and brought forth the Interim Constitution of Nepal.²⁹¹ The Constituent Assembly was formed in

²⁸⁴ Mara Malagodi, 'The Rejection of Constitutional Incrementalism in Nepal's Federalisation' (2018) 46(4) Federal Law Review 521, at 524

²⁸⁵ Rama Devi Pant, 'First General Elections in Nepal—I, Recent Political Trends' *The Economic Weekly* (21 February 1959) <https://www.epw.in/system/files/pdf/1959_11/8/first_general_elections_in_nepalirecent_political_trends.pdf> accessed 2 August 2021

²⁸⁶ Rama Devi Pant, 'First General Elections in Nepal—I, Recent Political Trends' *The Economic Weekly* (21 February 1959) <https://www.epw.in/system/files/pdf/1959_11/8/first_general_elections_in_nepalirecent_political_trends.pdf> accessed 2 August 2021

²⁸⁷ 'Nepal Conflict Report' U.N. Office of the High Comm'r for Human Rights, (2012), https://www.ohchr.org/Documents/Countries/NP/OIICHRNepalConflictReport_2012.pdf [hereinafter Nepal Conflict Report] (describing the violence that occurred throughout Nepal in connection with the decade-long conflict from 1996 to 2006); Arjun Karki & David Seddon, *The People's War in Historical Context*, in *THE PEOPLE'S WAR IN NEPAL: LEFT PERSPECTIVES* (Arjun Karki & David Seddon eds., 2003).

²⁸⁸ Babu Ram Bhattarai, 'The Political Economy of the People's War', in Arjun Karki & David Seddon (eds) *The People's War in Nepal: Left Perspectives* (Adroit Publisher 2003) at 129, 150

²⁸⁹ Mukunda Kattel, 'Introduction to "The People's War" and Its Implications' in Arjun Karki & David Seddon (eds) *The People's War in Nepal: Left Perspectives* (Adroit Publisher 2003) at 51

²⁹⁰ Comprehensive Peace Agreement between the Government of Nepal and the Communist Party of Nepal (Maoist) (United Nations Peacemaker 2006) <https://peacemaker.un.org/sites/peacemaker.un.org/files/NP_061122_Comprehensive%20Peace%20Agreement%20between%20the%20Government%20and%20the%20CPN%20%28Maoist%29.pdf> accessed 2 August 2021; Nikhil Narayan, 'Restoring the Rule of Law in Nepal: Can Transitional Justice Deliver without Criminal Justice' (2019) 11 Drexel Law Review 969

²⁹¹ 'Timeline of Nepal's civil war' *Al Jazeera* (8 April 2021) <<https://www.aljazeera.com/news/2008/4/8/timeline-of-nepals-civil-war-2>> accessed 2 August 2021

2008, proportionally representing not just the landed classes but also the marginalized communities, to create a constitution for modern Nepal.²⁹²

Modern day constitution making is particularly challenging—in its 68 years of constitutional development, Nepal has had 7 different constitutions.²⁹³ As a political process, constitution-making requires a special body, a constituent assembly with proper representation, and a specific mandate to argue, debate and draft the constitution.²⁹⁴ Even with all of these factors largely in place, the Constituent Assembly of Nepal struggled to create consensus between the major political parties as to what a constitutional document for Nepal should include.²⁹⁵ Although the Interim Constitution was extended four times, the term of the Constituent Assembly expired in 2012, without much success.²⁹⁶ Interestingly while the judiciary as a typically counter-majoritarian institution, is removed from the constitution-making process, in entertaining a challenge to the Interim constitution, the Supreme Court of Nepal found that the consecutive extensions violated the commitment to periodic elections as set out in the preamble, and declared them *ipso facto* void.²⁹⁷ This catalysed fresh elections, under the supervision of a new government constituted under the chairmanship of the Chief Justice of the Supreme Court of Nepal,²⁹⁸ for the Second Constituent Assembly, which was eventually adopted.²⁹⁹

²⁹² Chandra Kanta Gyawali, 'Electoral System and Representative Democracy' (2020) 14 NJA Law Journal 67

²⁹³ 'Here are things you need to know about the 7 constitutions of Nepal' *Kathmandu Post* (Kathmandu, 24 September 2015) <<https://kathmandupost.com/miscellaneous/2015/09/24/here-are-things-you-need-to-know-about-the-7-constitutions-of-nepal>> accessed 2 August 2021

²⁹⁴ David Dyzenhaus, 'The Politics of the Question of Constituent Power', in Martin Loughlin and Neil Walker (eds) *The Paradox Of Constitutionalism: Constituent Power And Constitutional Form* (Oxford University Press 2007), at 129

²⁹⁵ Guobin Zhu and Antonios Kouroutakis, 'The Role of the Judiciary and the Supreme Court in the Constitution-Making Process: The Case of Nepal' (2019) 55(1) *Stanford Journal of International Law* 69

²⁹⁶ Guobin Zhu and Antonios Kouroutakis, 'The Role of the Judiciary and the Supreme Court in the Constitution-Making Process: The Case of Nepal' (2019) 55(1) *Stanford Journal of International Law* 69

²⁹⁷ *Bharatmani Jungam v. Office of the President*, Writ No. 68-ws-00 14, at 4-5 (2011)

²⁹⁸ 'International Idea, Nepal's Constitution Process: 2006-2015' (International IDEA 2015) <<https://www.idea.int/publications/catalogue/nepals-constitution-building-process-2006-2015>> accessed 2 August 2021

²⁹⁹ Akhilesh Tripathi, 'Court Vs Constituent Assembly' *New Business Age* (17 July 2017)

2. *Diluting Democracy: How to Dissolve a Parliament*

In 2018 legal scholars Aziz Huq and Tom Ginsburg coined the term ‘constitutional retrogression’ to denote an incremental but ultimately substantial decay in three basic predicates of democracy i.e. competitive elections, liberal rights to speech and association, and adjudicative and administrative rule of law necessary for democracy to thrive.³⁰⁰ Huq and Ginsburg explain that retrogression effectively risks a larger shift towards an illiberal democracy,³⁰¹ or even towards an uncompetitive, one-party democratic system.³⁰² Nepal’s dilution of democracy has occurred progressively since democratic elections were first conducted in 2017.

The CPN-M and the CPN-UML campaigned together for the 2017 elections, winning close to two-thirds of the seats in Parliament.³⁰³ With Oli headed the CPN-UML faction while Pushpa Kamal Dahal headed the CPN-M faction, both agreed to share chairmanship of the CPN, and rotate terms of prime ministership.³⁰⁴ Since 2017, Oli has taken steps to consolidate power into his own hands in an increasingly authoritarian manner.

Oli assigned the Prime Minister’s office wide-ranging powers which earlier belonged to other ministries: it took over corruption control from the Ministry of Women, Children and Social

<<https://www.newbusinessage.com/MagazineArticles/view/1231>> accessed 2 August 2021

³⁰⁰ Aziz Huq and Tom Ginsburg, 'How to Lose a Constitutional Democracy' (2018) 65 UCLA Law Review 78, at 83

³⁰¹ Aziz Huq and Tom Ginsburg, 'How to Lose a Constitutional Democracy' (2018) 65 UCLA Law Review 78, at 97

³⁰² Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (University of Oklahoma Press 1993) at 266-267

³⁰³ Peter Gill, 'Nepal's Democracy in Crisis' *The Diplomat* (6 February 2021) <<https://thediplomat.com/2021/02/nepals-democracy-in-crisis/>> accessed 2 August 2021

³⁰⁴ Robin Sharma and Hardik Subedi, 'Nepal's Constitution Is in Danger as Oli Moves Closer to Authoritarianism' *The Wire* (23 December 2020) <<https://thewire.in/south-asia/nepal-kp-oli-parliament-dissolution-constitution>> accessed 2 August 2021

Welfare; controlled the National Investigation Department, the Department of Revenue Investigation and the Department of Money Laundering Investigation and sought to direct, control and conduct Nepal's governance system.³⁰⁵ Given its increasing intolerance against journalistic free speech,³⁰⁶ the government put forth three pieces of legislation negatively impacting the media, with a view to curb dissent and criticism.³⁰⁷ While the Electronic Transactions Act, 2006, was used to detain journalists and others who chose to criticize the government, the Information Technology Bill, 2019, allowed the government to arbitrarily censor material online and impose harsh punishments on those who fell within its vaguely worded provisions.³⁰⁸

Like many world leaders who sought the cover of the COVID-19 pandemic to further their own authoritarian goals,³⁰⁹ Oli promulgated two ordinances in rapid succession at the start of the pandemic, amending the Political Parties Act, 2017.³¹⁰ For a political party to split, it hitherto required a minimum 40% consensus from both the parliamentary party and the party central committee—however, after the amendment it required only a 40% consensus from

³⁰⁵ Anil Giri & Mukul Humagain, 'Govt assigns PMO all-out authority' *Kathmandu Post* (Kathmandu, 2 March 2018) <<https://kathmandupost.com/national/2018/03/02/govt-assigns-pmo-all-out-authority>> accessed 2 August 2021

³⁰⁶ 'An increasingly intolerant government targets journalists' *The Record* (Kathmandu, 2 May 2020) <<https://www.recordnepal.com/an-increasingly-intolerant-government-targets-journalists>> accessed 2 August 2021

³⁰⁷ Aliya Iftikharh, 'Nepal's hard-fought press freedom at risk amid restrictive bills, government pressure' *Committee to Protect Journalists* (26 December 2019) <<https://cpj.org/2019/12/nepal-press-freedom-risk-legislation-restricted/>> accessed 2 August 2021

³⁰⁸ 'Nepal: Information Technology Bill threatens freedom of expression' *Amnesty* (16 January 2021) <<https://www.amnesty.org/en/latest/news/2020/01/nepal-information-technology-bill-threatens-freedom-of-expression/>> accessed 2 August 2021

³⁰⁹ Antony Blinken, 'Authoritarianism and nationalism are on the rise around the world: Blinken' *Business Standard* (Washington, 4 March 2021) <https://www.business-standard.com/article/international/authoritarianism-and-nationalism-are-on-the-rise-around-the-world-blinken-121030400036_1.html> accessed 2 August 2021; 'Will The Legacy of Covid-19 Include Increased Authoritarianism?' *Transparency International* (29 May 2020) <<https://www.transparency.org/en/news/will-the-legacy-of-covid-19-include-increased-authoritarianism>> accessed 2 August 2021

³¹⁰ <https://kathmandupost.com/politics/2020/04/23/how-oli-aimed-ordinances-at-splitting-parties-but-instead-led-to-their-merger> accessed 2 August 2021

either of the two, thereby relaxing the norms for a party split.³¹¹ In the face of severe criticism, the government quietly withdrew both ordinances, sans consultation.³¹² However, the increasing call for his resignation,³¹³ led to Oli preemptively dissolving the parliament with fresh elections scheduled for early 2021.³¹⁴ Nonetheless, Oli did not win the trust vote of the lower house, losing his position of elected Prime Minister and assuming the capacity of a caretaker Prime Minister until the next set of elections.³¹⁵

3. *The Rise in Violent Protests: When Democracy fails to Work*

Even as the COVID-19 pandemic continues to ravage Nepal,³¹⁶ an incensed citizenry has taken to the streets in violation of pandemic precautions to register their ire against Oli and his government.³¹⁷ From former prime ministers of the country who took to mass rallies,³¹⁸ to

³¹¹ Anil Giri & Tika R Pradhan, 'Oli's sudden issuance of two ordinances raises concerns of a party split in the making' *Kathmandu Post* (Kathmandu, 2 April 2020) <<https://kathmandupost.com/national/2020/04/20/oli-s-sudden-issual-of-two-ordinances-raises-concerns-of-a-party-split-in-the-making>> accessed 2 August 2021

³¹² Anil Giri, 'Repealing the ordinances might quell dissent but Oli still faces moral questions' *Kathmandu Post* (Kathmandu 24 April 2020) <<https://kathmandupost.com/politics/2020/04/24/repealing-the-ordinances-might-quell-dissent-but-oli-still-faces-moral-questions>> accessed 2 August 2021

³¹³ Anil Giri, 'Tough times ahead for Oli as party likely to ask him to choose between leading the country and leading the party' *Kathmandu Post* (Kathmandu 27 April 2020) <<https://kathmandupost.com/politics/2020/04/27/tough-times-ahead-for-oli-as-party-likely-to-ask-him-to-choose-between-leading-the-country-and-leading-the-party>> accessed 2 August 2021

³¹⁴ 'Nepal president dissolves parliament, new election in November' *Al Jazeera* (22 May 2021) <<https://www.aljazeera.com/news/2021/5/22/nepal-president-dissolves-parliament-new-election-in-november>> accessed 2 August 2021; Robin Sharma and Hardik Subedi 'Nepal's Constitution Is in Danger as Oli Moves Closer to Authoritarianism' *The Wire* (23 December 2020) <<https://thewire.in/south-asia/nepal-kp-oli-parliament-dissolution-constitution>> accessed 2 August 2021

³¹⁵ Shirish B Pradhan, 'Nepal PM Oli loses vote of confidence in House of Representatives' *Business Standard* (Kathmandu, 11 May 2021) <https://www.business-standard.com/article/international/nepal-pm-oli-loses-vote-of-confidence-in-house-of-representatives-121051000900_1.html> accessed 2 August 2021

³¹⁶ Lauren Frayer, 'How COVID Spiraled Out of Control in Nepal' *NPR* (4 June 2021) <<https://www.npr.org/sections/goatsandsoda/2021/06/04/993878560/covid-is-crushing-nepal-from-remote-villages-to-kathmandu-to-mt-everest>> accessed 2 August 2021

³¹⁷ 'Nepal protests: Thousands march against move to dissolve parliament' *BBC News* (29 December 2020) <<https://www.bbc.com/news/world-asia-55479586>> accessed 2 August 2021

³¹⁸ 'Thousands in Nepal protest against dissolution of Parliament' *Al Jazeera* (22 January 2021) <<https://www.aljazeera.com/news/2021/1/22/thousands-in-nepal-protest-against-dissolution-of-government>> accessed 2 August 2021

student led demonstrations,³¹⁹ Oli's move to dissolve parliament and force fresh elections has generally been decried as unconstitutional. Given Nepal's history with a host of political regimes, much of these demonstrations have been politically motivated: the students protests, for instance have largely been organized by the student wing of the CPN-M.³²⁰ Nepal's right wing parties, in consonance with pro-monarchy groups, have their own political goals to fulfill by protesting.³²¹ The political uncertainty of Oli's move has also given pro-Hindu and pro-monarchy groups the chance to mobilise for the restoration of the monarchy and the establishment of a *Hindu Rashtra*.³²²

Unlike in other protest movements in other countries that this paper considers, the preservation of democracy is not the ultimate focus of the protests. The focus, as it were, differs as political inclinations change. Not only has Nepal's fledgling democracy suffered from geopolitical tensions with India and China,³²³ (tensions that have sparked protests of their own),³²⁴ but also from the government's mishandling of the COVID-19 crisis that has plagued Nepal.³²⁵ With growing discontent over government inefficiency and a general feeling that the pandemic response has been mishandled,³²⁶ the future of democracy looks

³¹⁹ 'Students protesting against Nepal parliament dissolution clash with police' *ANI* (1 February 2021) <<https://www.aninews.in/news/world/asia/students-protesting-against-nepal-parliament-dissolution-clash-with-police20210201235149/>> accessed 2 August 2021

³²⁰ <https://www.aninews.in/news/world/asia/student-union-of-nepal-communist-party-faction-stages-protest-in-kathmandu20201225005607/> accessed 2 August 2021

³²¹ Arun Budhathoki, 'Nepal nationwide protests to call for restoration of monarchy' *Nikkei Asia* (2 December 2020) <<https://asia.nikkei.com/Politics/Nepal-nationwide-protests-to-call-for-restoration-of-monarchy>> accessed 2 August 2021

³²² Vishnu Sharma, 'Battle Royal: The fight against a Hindu Rashtra in Nepal' *Caravan Magazine* (1 April 2021) <<https://caravanmagazine.in/essay/hindu-rashtra-nepal-secularism>> accessed 2 August 2021

³²³ Robin Sharma and Hardik Subedi, 'Nepal's Constitution Is in Danger as Oli Moves Closer to Authoritarianism' *The Wire* (23 December 2020) <<https://thewire.in/south-asia/nepal-kp-oli-parliament-dissolution-constitution>> accessed 2 August 2021

³²⁴ Press Trust India, 'Students stage demonstration outside Chinese embassy in Nepal' *Deccan Herald* (Kathmandu, 7 July 2020) <<https://www.deccanherald.com/international/students-stage-demonstration-outside-chinese-embassy-in-nepal-858285.html>> accessed 2 August 2021

³²⁵ Shraddha Pokharel, 'Nepal's Summer of Discontent' *The Diplomat* (16 July 2020) <<https://thediplomat.com/2020/06/nepals-summer-of-discontent/>> accessed 2 August 2021

³²⁶ Sounak Mitra, 'Nepal: Students Protest Against Govt Over Corruption, 'inefficiency' In Handling Outbreak' *Republic World* (16 June 2020) <<https://www.republicworld.com/world-news/rest-of-the-world-news/students-protest-against-government-over-corruption-in-nepal.html>> accessed 2 August 2021

uncertain. While Nepal's democratic transition has been regarded as an unfinished project, the impending elections might simply prove to be an inroad back to Nepal's politically unstable part.³²⁷

4. *Increasing Illiberalism: The Future of Nepal*

In 2021, Oli's attempt to dissolve the parliament in December 2020 was declared to be unconstitutional by the Supreme Court of Nepal.³²⁸ While the dissolution of the parliament has its own murky precedent in Nepal,³²⁹ even as early as 1990, the Supreme Court of Nepal reinstated the parliament, cautioning against the circumvention of parliamentary process by the summary dissolution of an elected government.³³⁰ According to Article 76 of the Constitution of Nepal, 2015, the parliament may only be dissolved upon the Prime Minister's recommendation, when the President has exhausted all efforts to form a government either by the leader of the party commanding majority, or by the leader of a coalition of parties, or by the leader of the single largest party or by '*any member*' with the potential to command majority.³³¹ To that extent, the Court found that the ability to dissolve the parliament was not a prerogative right that vested in the Prime Minister, to be exercised to settle intra-party disputes.³³²

³²⁷ Dinesh Bhattarai, 'Nepal's ongoing political limbo' *IPS* (22 March 2021) <<https://www.ips-journal.eu/topics/democracy-and-society/nepals-young-democracy-faces-its-biggest-challenge-yet-5064/>> accessed 2 August 2021

³²⁸ Hardik Subedi and Robin Sharma, 'Nepal: By Reversing Oli's Actions, The SC Has Upheld Constitutional Values' *The Wire* (5 March 2021) <<https://thewire.in/south-asia/nepal-supreme-court-oli-bhandari-constitution-democracy>> accessed 2 August 2021

³²⁹ Anil Giri, 'This dissolution and those dissolutions: Looking for parallels to Oli's move in history' *Kathmandu Post* (Kathmandu, 21 December 2020) <<https://kathmandupost.com/politics/2020/12/21/this-dissolution-and-those-dissolutions-looking-for-parallels-to-oli-s-move-in-history>> accessed 2 August 2021

³³⁰ Rabi Raj Bhandari and Ors vs Prime Minister Manmohan Adhikari and Ors (Writ no. 3105 of 2052, decision 2052/05/12 BS [1995/05/28])

³³¹ Constitution of Nepal, 2015, Article 76.

³³² Hardik Subedi and Robin Sharma, 'Nepal: By Reversing Oli's Actions, the SC Has Upheld Constitutional Values' *The Wire* (5 March 2021) <<https://thewire.in/south-asia/nepal-supreme-court-oli-bhandari-constitution-democracy>> accessed 2 August 2021

While the courts have been heralded as the last standing bulwark between authoritarianism and Nepal's fragile democracy,³³³ Oli once again sought to have the House of Representatives dissolved in May 2021 after failing to be re-appointed as Prime Minister.³³⁴ This has created a certain constitutional dithering between the government and the courts. Ultimately, the Supreme Court of Nepal, reinstated the dissolved House of Representatives, even as Nepal prepares to go into early elections by the end of 2021.³³⁵

Given this kind of vacillation, Nepal's ability to conform to the criteria of a liberal constitutional democracy is under severe threat. Every liberal constitutional democracy possesses key identifiable traits: a democratic electoral system that fosters periodic, free and fair elections; sufficiently liberal rights to speech and association and a demonstrable rule of law practiced by its legal institutions.³³⁶ Even in the context of constitutional retrogression, Oli's attempts at curbing free speech and association, or by passing ordinances meddling with the checks and balances envisaged by a democratic system, are acts that trigger democratic backsliding. After all one way of identifying such backsliding, as scholars suggest, is by the decay of liberal democratic institutions into fluid and ill-defined arrangements,³³⁷ much like those Oli has attempted to precipitate.

V. THE SCALES HAVE TIPPED TO AUTHORITARIANISM: A FIGHTING CHANCE FOR DEMOCRACY IN AFGHANISTAN AND MYANMAR

³³³ Hardik Subedi and Robin Sharma, 'Nepal: By Reversing Oli's Actions, the SC Has Upheld Constitutional Values' *The Wire* (5 March 2021) <<https://thewire.in/south-asia/nepal-supreme-court-oli-bhandari-constitution-democracy>> accessed 2 August 2021

³³⁴ 'In a midnight drama, Nepal President dissolves House and calls polls for November 12 and 19' *The Kathmandu Post* (22 May 2021) <<https://kathmandupost.com/politics/2021/05/22/president-dissolves-house-calls-snap-polls-for-november-12-and-19>> accessed 2 August 2021

³³⁵ Press Trust of India, 'Nepal's SC reinstates dissolved House for second time in five months' *Business Standard* (Kathmandu, 12 July 2021) <https://www.business-standard.com/article/international/nepal-s-sc-reinstates-dissolved-house-for-second-time-in-five-months-121071200511_1.html> accessed 2 August 2021

³³⁶ Marc F. Plattner, 'From Liberalism to Liberal Democracy' (1999) 10(3) *Journal of Democracy* 121

³³⁷ Nancy Bermeo, 'On Democratic Backsliding' (2016) 27(1) *Journal of Democracy* 5, at 6; Aziz Huq and Tom Ginsburg, 'How to Lose a Constitutional Democracy' (2018) 65 *UCLA Law Review* 78, at 119

The Democracy Index 2020 identifies 57 countries as being under authoritarian leadership, with Asia Pacific region, accounting for 7 such regimes.³³⁸ Authoritarian regimes are characterized as regimes where political pluralism is conspicuously absent. While many are outright dictatorships, even where formal institutions of democracy exist, they are used to manipulate the citizenry to suit the authoritarian incumbent. As a result, elections are engineered, civil liberties restricted, the media is generally muzzled and a state-controlled press takes centre-stage where any criticism of the incumbent is suppressed and there exist little to no check and balances on the incumbents.³³⁹ These countries do display some level of democratic choice, having experienced some form of constitutional democracy in the past, and oppose the authoritarian regimes that have taken over.

A. IN PURSUIT OF PEACE: RE-CONSIDERING DEMOCRACY IN AFGHANISTAN³⁴⁰

Afghanistan, an authoritarian regime, was one of the lowest ranking countries in the 2020 Democracy Index,³⁴¹ in the Asia Pacific, ranking just above entirely totalitarian regimes like China and North Korea. Afghanistan's tryst with democracy began in 1963 when its then-monarch brought forth a constitution that guaranteed his people social and civil freedoms while simultaneously limiting the influence of the ruling family.³⁴² From 1923 to 2004, Afghanistan saw a series of constitutions attempt to govern the country with varying levels of

³³⁸ Economist Intelligence Unit, 'Democracy Index 2020: In Sickness and in Health' (The Economist 2021) <<https://www.eiu.com/n/campaigns/democracy-index-2020/>> accessed 2 August 2021, at 3, 26

³³⁹ Economist Intelligence Unit, 'Democracy Index 2020: In Sickness and in Health' (The Economist 2021) <<https://www.eiu.com/n/campaigns/democracy-index-2020/>> accessed 2 August 2021, at 57

³⁴⁰ The section on Afghanistan was written before the Afghan government fell to the Taliban, after the Taliban forces successfully captured Kabul, on 15 August 2021.

³⁴¹ Economist Intelligence Unit, 'Democracy Index 2020: In Sickness and in Health' (The Economist 2021) <<https://www.eiu.com/n/campaigns/democracy-index-2020/>> accessed 2 August 2021, at 5, 29

³⁴² Emran Feroz, 'When Afghanistan Almost Worked' *Foreign Policy* (26 April 2021) <<https://foreignpolicy.com/2021/04/26/afghanistan-shafiq-amin-shah-cold-war/>> accessed 2 August 2021

success.³⁴³ Officially declared a democracy in 1978,³⁴⁴ Afghanistan has had a bloody and violent history with war and insurgency.³⁴⁵ Public protests for social justice, therefore, have been rare in Afghanistan,³⁴⁶ but the demonstrations that followed its 2019 presidential election question the very plausibility of democracy as a form of functional governance, especially in light of the impending end of United States' war against the *Taliban* in Afghanistan.³⁴⁷

1. *Creating a Narrative: The Stronghold of Traditional Political Institutions in Afghanistan*

Afghanistan has been described as a country where no one rules, but many fight.³⁴⁸ Bernard Fall notably observed that a country was subverted not when it was out-fought by insurgent forces, but in fact when it was out-administered.³⁴⁹ The counterinsurgency in Afghanistan consequently, is in part a competition for government with both the government of Afghanistan as the state, and the *Taliban*, as the insurgent power trying to mobilise and control the population.³⁵⁰ The winning ticket rests with the group that can establish a more resilient system of control that gives the people security and ultimately wins their favour.³⁵¹ Some scholars hypothesize that the *Taliban* is able to provide some security because it is able to out-govern the state at a grassroots level by establishing a functional ombudsman system

³⁴³ Shamshad Pasarlay and Mohammad Qadamshah, 'The Durability of Constitutional Solutions to Religious Conflicts in Divided Societies: Lessons from the Constitutional History of Afghanistan' (2018) 18 Chicago-Kent Journal of International and Comparative Law

³⁴⁴ <https://www.pbs.org/newshour/politics/asia-jan-june11-timeline-afghanistan> accessed 2 August 2021

³⁴⁵ Whit Mason, *Rule of Law in Afghanistan: Missing in Inaction* (Cambridge University Press, 2011)

³⁴⁶ Rustam Ali Seerat, 'The Social Justice Discourse in Afghanistan' *The Diplomat* (6 June 2016) <<https://thediplomat.com/2016/06/the-social-justice-discourse-in-afghanistan/>> accessed 2 August 2021

³⁴⁷ 'America's war in Afghanistan is ending in crushing defeat' *The Economist* (10 July 2021) <<https://www.economist.com/leaders/2021/07/10/americas-longest-war-is-ending-in-crushing-defeat>> accessed 2 August 2021

³⁴⁸ Whit Mason, *Rule of Law in Afghanistan: Missing in Inaction* (Cambridge University Press, 2011), at 17

³⁴⁹ Bernard B. Fall, 'The theory and practice of insurgency and counterinsurgency' (1965) 18(3) *Naval War College Review*

³⁵⁰ Joel S Migdal *Strong Societies and Weak States: State-Society Relations and State Capabilities in the Third World* (Princeton University Press 1988)

³⁵¹ David J. Kilcullen, 'Deiokes and the Taliban' in Whit Mason (ed), *Rule of Law in Afghanistan: Missing in Inaction*, (Cambridge University Press, 2011), at 40

of sorts and by adhering to their own internal code of conduct called the *layeha*, that the local population is both aware of and can rely upon.³⁵²

However, the fundamental question for the survival of a democratic Afghanistan comes from its own political institutions. Afghanistan has long operated with a duality of regimes: a formal legal system that is largely inaccessible in rural areas and generally regarded as elitist and corrupt,³⁵³ and a customary traditional system, known as the *pashtunwalli*,³⁵⁴ that has survived despite war, a centralized legal system, communist opposition, *mujahideen* resistance and in 2011, the *Taliban*'s attempt to introduce religious *Shari'a* courts.³⁵⁵ The existence of the *pashtunwalli* and other traditional political institutions effectively undermine the legitimacy of state-based law in Afghanistan.³⁵⁶ Traditional political institutions are effectively those whose legitimacy is based on their association with customary modes of governing a community.³⁵⁷ Although there is little scope for electoral accountability for such institutions,³⁵⁸ not only do traditional and democratic institutions frequently co-exist, but also traditional institutions are likely to have constitutional recognition in democracies.³⁵⁹ In Afghanistan, the trouble is with the possibility of such co-existence. For the *Taliban*, liberal

³⁵² David J. Kilcullen, *Deiokes and the Taliban in Whit Mason, Rule of Law in Afghanistan: Missing in Inaction*, (Cambridge University Press, 2011), at 47

³⁵³ Nazif M. Shahrani, 'State building and social fragmentation in Afghanistan: A historical perspective' in Ali Banuazizi and Myron Weiner (eds), *The State, Religion, and Ethnic Politics: Afghanistan, Iran, and Pakistan* (Syracuse University Press 1988); Ali Wardak, 'Building a post-war justice system in Afghanistan' (2004) 41 *Crime, Law & Social Change* 319

³⁵⁴ William Malley, 'The Rule of Law and the Weight of Politics in Whit Mason (ed), *Rule of Law in Afghanistan: Missing in Inaction* (Cambridge University Press, 2011) at 61

³⁵⁵ Christina Jones-Pauly and Neamat Nojumi, 'Balancing relations between society and state: Legal steps towards national reconciliation and reconstruction of Afghanistan' (2004) 52(4) *American Journal of Comparative Law*, at 825– 57

³⁵⁶ William Malley, 'The Rule of Law and the Weight of Politics' in Whit Mason (ed), *Rule of Law in Afghanistan: Missing in Inaction* (Cambridge University Press 2011) at 69

³⁵⁷ Kate Baldwin and Katherina Holzinger, 'Traditional Political Institutions and Democracy: Reassessing their Compatibility and Accountability' (2019) 25(12) *Comparative Political Studies* 1, at 3

³⁵⁸ Adam Przeworski, Susan C. Stokes and Bernard Manin (eds), *Democracy, Accountability, and Representation* (New Cambridge University Press 1999)

³⁵⁹ Kate Baldwin and Katherina Holzinger, 'Traditional Political Institutions and Democracy: Reassessing their Compatibility and Accountability' (2019) 25(12) *Comparative Political Studies* 1, at 7-8

and democratic values are often anti-Islamic.³⁶⁰ They view the 2004 Constitution as produced in the shadow of the B-52 warplanes,³⁶¹ in context of America's role in Afghanistan's civil war, and have frequently put changes to the Constitution at the forefront of prospective peace talks.³⁶² The 2004 Constitution establishes a parliamentary system with a democratically elected president as the head of state. The draft constitution laid forth by the *Taliban*, on the other hand, envisions Afghanistan as an Islamic Emirate under the leadership of the self-designated *Amir al-Mominin*.³⁶³

2. *Diluting Democracy: The Illusion of Free and Fair Elections*

The lynchpin in Afghanistan's political future has been the democratic backsliding evident during the 2018 parliamentary elections, and the 2019 presidential election. Elections play out differently in democracies viz. authoritarian regimes: in democracies, elections signify political choice and the transfer of political responsibilities whereas in authoritarian regimes, elections are fronts for elite management, distribution of patronage and regime legitimation.³⁶⁴ At the outset, records suggest that the Afghani people support a democratic

³⁶⁰ Antonio Giustozzi, 'The Taliban and the 2014 elections in Afghanistan' (United States Institute of Peace 2014) <<https://www.usip.org/publications/2014/04/taliban-and-2014-elections-afghanistan>> accessed 2 August 2021, at 9,13

³⁶¹ Shamshad Pasarlay, Mohammad Qadamshah, & Clark B. Lombardi, 'Reforming the Afghan Electoral System: The Current Debate and its implications for the Plans to Amend the Afghan Constitution' (*Blog of the International Journal of Constitutional Law* 8 May 2015) <<http://www.iconnectblog.com/2015/05/reforming-the-afghan-electoral-system-the-current-debate-and-its-implications-for-the-plans-to-amend-the-afghan-constitution/>> accessed 2 August 2021

³⁶² Sean Kane, 'Talking with The Taliban: Should The Afghan Constitution Be Point of Negotiations?' (United States Institute of Peace 2015) <<https://www.usip.org/sites/default/files/SR356-Talking-with-the-Taliban-Should-the-Afghan-Constitution-Be-a-Point-of-Negotiation.pdf>> accessed 2 August 2021; Thomas Rutting, 'Qatar, Islamabad, Chantilly, Ashgabad: Taleban Talks Season Again?' *Afghanistan Analysts Network* (31 December 2012) <<https://www.afghanistan-analysts.org/qatar-islamabad-chantilly-ashgabad-taleban-talks-season-again-amended/>> accessed 2 August 2021

³⁶³ Sean Kane, 'Talking with The Taliban: Should The Afghan Constitution Be Point of Negotiations?' (United States Institute of Peace 2015) <<https://www.usip.org/sites/default/files/SR356-Talking-with-the-Taliban-Should-the-Afghan-Constitution-Be-a-Point-of-Negotiation.pdf>> accessed 2 August 2021, at 8-9

³⁶⁴ Lee Morgenbesser 'In Search of Stability: Electoral Legitimation Under Authoritarianism' (2015) 14(2) *Journal of East Asian Studies* 163

political system.³⁶⁵ In a 2020 survey on intra-Afghan peace talks between the government of Afghanistan and the *Taliban*, an overwhelming 70% of respondents preferred a republic system as opposed to a slim 7% who preferred an Islamic Emirate.³⁶⁶

Although the 2004 Constitution and the first presidential election that followed, cemented the idea that democratic and formalized elections should be the mainstay of distributing political power in Afghanistan, the highly centralized presidential election is a high-stakes, winner-takes-all system that is often manipulated and distorted to suit political elites.³⁶⁷ When neither of the two candidates managed to secure the 50% majority requirement in the first round of the 2014 presidential election, a second-round runoff election decisively declared Ashraf Ghani as the presidential choice of the people. His political rival, Abdullah Abdullah disputed the outcome on grounds of electoral fraud,³⁶⁸ and the matter was ultimately resolved through the creation of a power-sharing agreement with Ghani as president and Abdullah in a newly created extra-constitutional chief executive capacity. A compelling similarity occurred in the 2019 presidential election, which was riddled with its own set of discrepancies, when Ghani was elected to a second term by a slim margin of 0.64% above the 50% requirement.³⁶⁹ Abdullah, trailing behind with 39.5% of the final vote, attempted to hold a parallel inauguration ceremony.³⁷⁰ Abdullah conceded to the outcome of the election only once he

³⁶⁵ Fizza Batool, 'Peace through Democracy the Role of Pakistani Political Parties in Afghanistan's Future' (Stimson Center 2021)

³⁶⁶ 'Survey of Afghan Political Preferences relevant to Intra-Afghan Peace Negotiation' (Heart of Asia Society 2020) <https://heartofasiasociety.org/wp-content/uploads/2020/09/HAS-Political-Survey_English_Sep-15-2020-1.pdf> accessed 2 August 2021, at 2

³⁶⁷ Colin Cookman, 'Assessing Afghanistan's 2019 Presidential Election' (Peaceworks 2020), at 4

³⁶⁸ Erin Cunningham and Ernesto Londono, "Abdullah Mobilizes supporters, Vows to Challenge Afghan Election Results," *Washington Post* (8 July 2014) <www.washingtonpost.com/world/asia_pacific/abdullah-mobilizes-supporters-vows-to-challenge-afghan-election-results/2014/07/08/3fd4bd0c-0690-11e4-8a6a-19355c7e870a_story.html> accessed 2 August 2021

³⁶⁹ Abdul Qadir Sediqi and Orooj Hakimi, 'Ghani Named Winner of Disputed Afghan Poll, Rival Also Claims Victory' *Reuters* (Kabul, 18 February 2020) <www.reuters.com/article/us-afghanistan-election/ghani-named-winner-of-disputed-afghan-poll-rival-also-claims-victory-idusKBN20C1PZ> accessed 2 August 2021

³⁷⁰ Mujib Mashal, Fatima Faizi, and Najim Rahim, 'Ghani takes the Oath of Afghan President, His Rival Does, too,' *The New York Times* (9 March, 2020) <www.nytimes.com/2020/03/09/world/asia/afghanistan-president-inauguration-ghani-abdullah.html> accessed 2 August 2021

was appointed to head the High Council for National Reconciliation newly created to handle peace talks with the *Taliban*.³⁷¹ The observation that the 2014 presidential election represented a clash between the win-loss logic of democratic elections and the give-and-take logic of elite negotiation, with the latter winning out over the former,³⁷² also holds true in 2019.

Effectively what has occurred in Afghanistan due to its top-down approach of democratizing a deeply divided society,³⁷³ is the isomorphic mimicry of democratic institutions: these institutions exist within a particular form, but have little function.³⁷⁴ In conditions of fragility, it is easier to rapidly build the ‘form’ of a capable state by passing civil service legislation, or articulating ‘development plans’ or in case of Afghanistan, by organising elections, than it is to assess performance and allow an organic process in which the forms adapted emerge organically from functional success.³⁷⁵ The 2019 elections sparked a series of peaceful and violent public protests not only because of the inconsistencies in its outcome, but also because of the irregularities of procedure that continued to plague its execution.

3. *The Rise in Protests: Calling for Democracy*

³⁷¹ Abdul Qadir Sediqi and Hamid Shalizi, ‘Afghan President and Rival Strike Power-sharing Deal after Months of Feuding’ *Reuters* (Kabul, 17 May 2020) <www.reuters.com/article/us-afghanistan-politics/afghan-president-rival-close-in-on-power-sharing-deal-sources-idusKBN22t08J> accessed 2 August 2021

³⁷² William A. Byrd, ‘Understanding Afghanistan’s 2014 Presidential Election: The Limits to Democracy in a Limited Access Order’ (United States Institute of Peace, 2015) <www.usip.org/publications/2015/04/understanding-afghanistans-2014-presidential-election> accessed 2 August 2021

³⁷³ Noah Coburn and Anna Larson, ‘*Derailing Democracy in Afghanistan: Elections in an Unstable Political Landscape*’ (Cambridge University Press 2013), at 50; Whit Mason, ‘*Rule of Law in Afghanistan: Missing in Inaction*’ (Cambridge University Press, 2011), at 17

³⁷⁴ Staffan Darnolf and Scott S. Smith, ‘Breaking, Not Bending: Afghan Elections Require Institutional Reform’ (US Institute of Peace 2019), at 5

³⁷⁵ Lant Pritchett and Franke de Weijer, ‘Fragile States: Stuck in a Capability Trap?’ (World Development Report 2011 Background Paper, World Bank 2010) <<http://documents.worldbank.org/curated/en/681031468337197655/Fragile-states-stuck-in-a-capability-trap>> accessed 2 August 2021

The 2019 election, which took place after a slew of electoral reforms—instituted as early as 2016³⁷⁶—was riddled with discrepancies with the consequence that the votes of the September 2019 election were finalised only in February 2020.³⁷⁷ Large sections of Abdullah’s supporters took to protesting electoral discrepancies, alleging electoral fraud.³⁷⁸ For instance, of the 5373 voting centers which were to function during the 2019 election, only 4647 were fully opened.³⁷⁹ 431 voting centers were closed for security purposes, as a consequence of which, voters registered in those centers were disenfranchised completely.³⁸⁰ Initial reports immediately after the election, recorded provisional figures of 2.69 million votes cast, which were revised to 1.93 biometrically verified vote records.³⁸¹ Shortly thereafter, the technology provider removed approximately 86000 duplicate biometric vote signatures, saddling the Independent Election Commission with the onerous task of differentiating between provisional tallies and vote counts backed up by unique biometric signatures.³⁸² Part of the protest demands, spurred on by supporters of Abdullah, included invalidating all those polling station with out of hours votes, votes which were initially

³⁷⁶ Ali Yawar Adili, ‘Afghanistan’s 2019 Elections (3): New Electoral Commissioners, Amendments to the Electoral Law’ *Afghanistan Analysts Network* (5 March 2019) <www.afghanistan-analysts.org/afghanistans-2019-elections-3-new-electoral-commissioners-amendments-to-the-electoral-law> accessed 2 August 2021; Ali Yawar Adili and Martine van Bijlert, ‘Afghanistan’s Incomplete New Electoral Law: Changes and Controversies’ *Afghanistan Analysts Network* (22 January 2017) <www.afghanistan-analysts.org/afghanistans-incomplete-new-electoral-law-changes-and-controversies> Accessed 2 August 2021; Mujib Mashal, ‘Afghan Parliament’s term Is Extended after squabbles Delay Elections’ *The New York Times* (19 June 2015) <www.nytimes.com/2015/06/20/world/asia/afghan-parliaments-term-is-extended-after-squabbles-delay-elections.html> accessed 2 August 2021

³⁷⁷ Ehsanullah Amiri and Sune Engel Rasmussen, ‘Afghanistan Confirms Ashraf Ghani Has Won Second Term as President’ *The Wall Street Journal* (18 February 2020) <<https://www.wsj.com/articles/afghanistan-confirms-ashraf-ghani-has-won-second-term-as-president-11582042973>> accessed 2 August 2021

³⁷⁸ Ayaz Gul, ‘Vote Recount Protests Erupt in Afghan Capital’ *VOA News* (29 November 2019) <<https://www.voanews.com/south-central-asia/vote-recount-protests-erupt-afghan-capital>> accessed 2 August 2021

³⁷⁹ ‘431 Polling Centers to Be closed on Election Day: MoI’ *Reportly* (28 August 2019) <<http://reporterly.net/live/newsfeed/wednesday-august-28/431-polling-centers-to-be-closed-on-election-day-moi/>> accessed 2 August 2021

³⁸⁰ Colin Cookman, ‘Assessing Afghanistan’s 2019 Presidential Election’ (Peaceworks 2020), at 13

³⁸¹ Colin Cookman, ‘Assessing Afghanistan’s 2019 Presidential Election’ (Peaceworks 2020), at 23

³⁸² Ali Yawar Adili, ‘Afghanistan’s 2019 Election (24): Disputed Recount, threats Not to Accept Results, and some Interesting New Data’ *Afghanistan Analysts Network* (21 November 2019) <<https://www.afghanistan-analysts.org/en/reports/political-landscape/afghanistans-2019-election-24-disputed-recount-threats-not-to-accept-results-and-some-interesting-new-data/>> accessed 2 August 2021; Jelena Bjelica and Ali Yawar Adili, ‘Afghanistan’s 2019 Election (23): Disputed Biometric Votes Endanger Election Results’ *Afghanistan Analysts Network*, (7 November 2019) <www.afghanistan-analysts.org/en/reports/political-landscape/afghanistans-2019-election-23-disputed-biometric-votes-endanger-election-results> accessed 2 August 2021

quarantined due to discrepancies between device and memory card biometric records, polling stations which were initially missing biometric records—all of which estimated 300,000 votes.³⁸³ Even after the Abdullah led-opposition called for an audit, discrepancies continued to appear. Although introducing the biometrically verified votes was meant to curb individual level voter fraud, 611 voting centers reflected an increase in votes when published primary results were compared to pre-audit biometric vote totals, amounting to nearly 14,865 additional votes.³⁸⁴

But perhaps the most damaging aspect of the elections has been the model of single non-transferable votes adopted, as opposed to a system of proportional representation that has in turn been promoted by consecutive incumbent governments.³⁸⁵ Not only does this system allow candidates to win majorities by extremely small margins, but also this system inhibits the development of political parties.³⁸⁶ While this system benefits individual candidates, thus shoring up political power between a select few members of the political elite, it leaves large sections of the voting population without representation.³⁸⁷ A second systemic issue with the elections has been the traditional over-representation of urban areas over rural constituencies. In the absence of comprehensive consensus data, seats have been allocated to provinces in

³⁸³ Siyar Sirat, 'Abdullah Blasts IEC for 'Ignoring' Candidates' Demands' *TOLO News* (17 November 2019) <<https://tolonews.com/afghanistan/abdullah-blasts-iec-%E2%80%98ignoring%E2%80%99-candidates%E2%80%99-demands>> accessed 2 August 2021

³⁸⁴ Colin Cookman, 'Assessing Afghanistan's 2019 Presidential Election' (Peaceworks 2020), at 29

³⁸⁵ Andrew Reynolds and John Carey, 'Fixing Afghanistan's Electoral System: Arguments and Options for Reform' (Afghanistan Research and Evaluation Unit 2012) <<https://cpb-us-e1.wpmucdn.com/sites.dartmouth.edu/dist/2/109/files/2013/02/RC-Fixing-Afghanistans-Electoral-System-AREU-2012-FINAL.pdf>> accessed 2 August 2021; 'Afghanistan's parties in transition' (International Crisis Group 2013) <<https://www.crisisgroup.org/asia/south-asia/afghanistan/afghanistan-s-parties-transition> <<https://www.files.ethz.ch/isn/166110/b141>> accessed 2 August 2021

³⁸⁶ Nafay Choudhary, 'Afghan Parliamentary Elections: Huffing and Puffing, But Missing the Bigger Picture' *The Diplomat* (28 November 2017) <<https://thediplomat.com/2017/11/afghan-parliamentary-elections-huffing-and-puffing-but-missing-the-bigger-picture/>> accessed 2 August 2021

³⁸⁷ A. Farid Tookhy, 'Legislature and Legislative Elections in Afghanistan: An Analysis' (US Institute of Peace 2020) at 5

proportion to estimates of their population creating constituencies of varying size.³⁸⁸ While 45% of elected members of parliament from the 2018 parliamentary elections lived in one of Afghanistan's five major cities, these cities accounted only for 19% of the national population.³⁸⁹ As a result, the pro-democracy protests, following the troubles of the 2019 elections hint at the preservation of something larger—institutions which are threatened by the very ideological divide that separates Afghanistan as a country.

4. *Increasing Illiberalism: State-Building in post-war Afghanistan*

State-building in Afghanistan, since 2004, has been characterized by simultaneous processes of change and compromise: the establishment of basic democratic machinery was constantly undermined by ongoing conflict and the instability it created.³⁹⁰ Reviewing the 2009 and 2010 elections, scholars observed that their failure to foster representative government in Afghanistan had little to do with either the dominance of one party or the rejection of democratic rule—instead the concentration of political and economic power into the hands of an elite few, prevented a more democratic distribution of political power.³⁹¹ The 2018 and 2019 elections re-emphasize the very crux of this paper: democratization is essentially an attempt to renegotiate the relationship between political elites and capital.³⁹²

³⁸⁸ A. Farid Tookhy, 'Legislature and Legislative Elections in Afghanistan: An Analysis' (US Institute of Peace 2020) at 10

³⁸⁹ National Statistics and Information Authority, 'Afghanistan Statistical Yearbook 2018–19' (2019) <www.nsia.gov.af:8080/wp-content/uploads/2019/11/Afghanistan-Statistical-yearbook-2018-19.pdf> accessed 2 August 2021

³⁹⁰ Noah Coburn and Anna Larson, '*Derailing Democracy in Afghanistan: Elections in an Unstable Political Landscape*' (Cambridge University Press 2013), at 48

³⁹¹ Noah Coburn and Anna Larson, '*Derailing Democracy in Afghanistan: Elections in an Unstable Political Landscape*' (Cambridge University Press 2013), at 219

³⁹² Daniel Bell, David Brown, Kanishika Jayasuriya, and ors, *Towards Illiberal Democracy in Pacific Asia* (Palgrave Macmillan, St Martin's Press 1995), at 108.

State-building itself is predicated on building institutional potentials so as to strengthen the nation as an integrated social structure with a unified identity.³⁹³ Scholars characterise weak states with weak executive power, low tax revenues, an inability to satisfy public needs or enforce laws, and a loose legitimacy in the eyes of the people.³⁹⁴ In Afghanistan, dwindling legitimacy becomes an issue of paramount importance as the United States seeks to withdraw its armed forces from the war against the *Taliban* by September 2021.³⁹⁵ The *Taliban* has been eager to fill the power vacuum: from controlling 73 of Afghanistan's 407 districts in May 2021, they now control 157 as of June 2021.³⁹⁶ With the government controlling only 79 of Afghanistan's districts outright, its capacity to sustain the government as the *Taliban* continues to advance politically, is diminishing.³⁹⁷ Without a conditions-based peace agreement that keeps the United States in Afghanistan in some form,³⁹⁸ Afghanistan's fight for democracy may literally turn into civil war, with the stakes determining which side of the ideological divide the country finally falls on.

B. LEGITIMISING A COUP: CAPTURING DEMOCRATIC RULE IN MYANMAR

³⁹³ Abdol Ali Qavam and Afshin Zargar, *State-building, Nation-Building, and International Relations Theory* (Islamic Azad University 2008)

³⁹⁴ Monty G Marshal and Benjamin Cole 'Global Report on Conflict, Governance and State Fragility' (2008) 18(1) Cambridge University Press 1

³⁹⁵ 'America's war in Afghanistan is ending in crushing defeat' *The Economist* (10 July 2021) <<https://www.economist.com/leaders/2021/07/10/americas-longest-war-is-ending-in-crushing-defeat>> accessed 2 August 2021

³⁹⁶ Stanly Johny, 'What lies ahead for Afghanistan after U.S. exit?' *The Hindu* (4 July 2021) <<https://www.thehindu.com/news/international/what-lies-ahead-for-afghanistan-after-us-exit/article35125897.ece>> accessed 2 August 2021

³⁹⁷ Stanly Johny, 'What lies ahead for Afghanistan after U.S. exit?' *The Hindu* (4 July 2021) <<https://www.thehindu.com/news/international/what-lies-ahead-for-afghanistan-after-us-exit/article35125897.ece>> accessed 2 August 2021

³⁹⁸ Helene Cooper, Thomas Gibbons-Neff and Eric Schmitt, 'Biden to Withdraw All Combat Troops from Afghanistan by Sept. 11' *The New York Times* <<https://www.nytimes.com/2021/04/13/us/politics/biden-afghanistan-withdrawal.html>> accessed 2 August 2021

In 2020 Myanmar dropped to an authoritarian regime, from its earlier position as a hybrid regime in the 2019 Democracy Index,³⁹⁹ following a military *coup* that overthrew the democratically elected government by way of elections held in November, 2020. Myanmar also signifies the biggest downgrade in the Asia Pacific region, falling by 13 positions in the global rankings, as a consequence of the mass voter suppression at the hands of its military.⁴⁰⁰

Even before the coup formalised in early 2021, the irregularities in the 2020 elections hinted at authoritarian influences despite the resounding victory of the National League for Democracy (hereinafter “NLD”) and the return of global icon and Myanmar state counselor, Aung San Suu Kyi as its de facto leader. Elections were restricted in several townships, several groups of people were disenfranchised from voting, entire voting constituencies were simply cancelled and both the NLD and the military extensively relied on Myanmar’s sweeping defamation law to control criticism against the government.⁴⁰¹

1. Creating a Narrative: Authoritative Constitutionalism in Myanmar

Emerging as an erstwhile colony of the British empire, Myanmar did not ease into democracy like her other sister colonies:⁴⁰² instead, the transition to a limited form of constitutional democracy occurred as late as 2008, after nearly two decades of direct rule under its military,

³⁹⁹ Economist Intelligence Unit, ‘Democracy Index 2020: In Sickness and in Health’ (The Economist 2021) <<https://www.eiu.com/n/campaigns/democracy-index-2020/>> accessed 2 August 2021, at 5, 28

⁴⁰⁰ Economist Intelligence Unit, ‘Democracy Index 2020: In Sickness and in Health’ (The Economist 2021) <<https://www.eiu.com/n/campaigns/democracy-index-2020/>> accessed 2 August 2021, at 28

⁴⁰¹ Economist Intelligence Unit, ‘Democracy Index 2020: In Sickness and in Health’ (The Economist 2021) <<https://www.eiu.com/n/campaigns/democracy-index-2020/>> accessed 2 August 2021, at 30.

⁴⁰² Hugh Tinker, ‘Burma’s Struggle for Independence: The Transfer of Power Thesis Re-Examined’ (1986) 20(3) *Modern Asian Studies* 461

called the *Tatmadaw*.⁴⁰³ The *Tatmadaw* effectively ruled Myanmar without a formal constitution until 2011, when the 2008 Constitution of the Republic of the Union of Myanmar was enacted by successful referendum.⁴⁰⁴ And yet, ten years of declared democratic rule has not done away with the authoritarian power of the *Tatmadaw*.

Melissa Crouch asserts that constitutions and constitution making processes are critical features of many authoritarian regimes, including the *Tatmadaw*, as they facilitate authoritarian resilience by enabling transitions from one form of military rule to another.⁴⁰⁵ Several scholars justify manipulation of constitutional processes to further authoritarian goals while undermining democracy, as authoritarian or abusive constitutionalism.⁴⁰⁶ Authoritarian constitutionalism effectively represents the disintegration or manipulation of democracy to perpetuate the dominance of one political party over others.⁴⁰⁷ This can be done by deliberately designing a constitution that furthers authoritarian resilience.⁴⁰⁸ The 2008 Constitution does so in several respects.

For instance, it reserves 25% of seats in each legislative house of parliament for the military,⁴⁰⁹ granting them an automatic veto over any constitutional amendment,⁴¹⁰ and allowing the military to preserve their constitutionally mandated privileges.⁴¹¹ Although the

⁴⁰³ Catherine Renshaw, 'Myanmar's Genocide and the Legacy of Forgetting' (2020) 48(2) *Georgia Journal of International and Comparative Law* 425

⁴⁰⁴ Melissa Crouch, 'Preemptive Constitution Making: Authoritative Constitutionalism and the Military in Myanmar' (2020) 54(2) *Law & Society Review* 487, at 488

⁴⁰⁵ Melissa Crouch, 'Preemptive Constitution Making: Authoritative Constitutionalism and the Military in Myanmar' (2020) 54(2) *Law & Society Review* 487

⁴⁰⁶ Mark Tushnet, 'Authoritarian Constitutionalism' (2015) 100(2) *Cornell Law Review* 391; David Landau, 'Abusive Constitutionalism' (2013) 47(1) *UC Davis Law Rev* 189

⁴⁰⁷ Ozan O Varol, 'The Military as the Guardian of Constitutional Democracy' (2013) 51(3) *Columbia Journal of Transnational Law* 547

⁴⁰⁸ Robert R. Kaufman and Stephan Haggard, 'Dictators and Democrats: Masses, Elites and Regime Change' (Princeton University Press 2018)

⁴⁰⁹ "Constitution of the Republic of the Union of Myanmar" (2008), Articles 109, 141

⁴¹⁰ "Constitution of the Republic of the Union of Myanmar" (2008), Article 436

⁴¹¹ Jonathan T. Chow & Leif-Eric Easley, Myanmar's Democratic Backsliding in the Struggle for National Identity and Independence, in Gilbert Rozman (eds) *Democratization, National Identity and Foreign Policy in*

president and the two vice-presidents are elected by an electoral college of members from both legislative houses,⁴¹² the *Tatmadaw* controls the executive via the National Defense and Security Council which includes the president, both vice-presidents, speakers of both legislative houses, the commander-in-chief and the deputy commander-in-chief of the *Tatmadaw*, along with the ministers of foreign affairs, home affairs, defence and border affairs.⁴¹³ Of the president and the two vice-presidents, one is nominated from the *Tatmadaw* itself.⁴¹⁴ Members of the *Tatmadaw* can further be appointed to other ministerial posts, increasing their influence.⁴¹⁵ Not only does the commander-in-chief of the *Tatmadaw* appoint the ministries of home affairs, defence and border affairs but also he retains control of the armed forces, including militias, paramilitary forces and intelligence agencies.⁴¹⁶ The judiciary is subject to the authority of the *Tatmadaw*, primarily because they control the appointments to the judiciary via the President's office.⁴¹⁷ Similarly the Constitutional Tribunal has limited powers of judicial review and is largely ineffective.⁴¹⁸ For all the control that it exercises in the executive however, the *Tatmadaw* retains complete control of its own affairs.⁴¹⁹

The *Tatmadaw* has effectively used the 2008 Constitution to entrench itself as the guardian of national politics, in order to prevent an entirely representative civilian government from

Asia, at 171

⁴¹² Constitution of the Republic of the Union of Myanmar Article 60(b).

⁴¹³ Constitution of the Republic of the Union of Myanmar Article 201

⁴¹⁴ Constitution of the Republic of the Union of Myanmar Article 60

⁴¹⁵ Constitution of the Republic of the Union of Myanmar Article 232(b)

⁴¹⁶ Andrew Selth, 'Myanmar's Armed Forces and the Rohingya Crisis' [2018] United States Institute for Peace, at 140

⁴¹⁷ Melissa Crouch, 'Preemptive Constitution Making: Authoritative Constitutionalism and the Military in Myanmar' (2020) 54(2) *Law & Society Review* 485, at 508

⁴¹⁸ Melissa Crouch, 'Democrats, Dictators and Constitutional Dialogue: Myanmar's Constitutional Tribunal' (2018) 16(2) *International Journal of Constitutional Law* 421

⁴¹⁹ Marco Bünte, 'Ruling but not Governing: Tutelary Regimes and the Case of Myanmar, Government and Opposition' [2021] 1

taking power.⁴²⁰ By portraying itself as an institution above the competition of political parties,⁴²¹ and committed to safeguarding the 2008 Constitution the *Tatmadaw* has established itself as a legalist autocrat, strategically turning democracy against the principle of constitutionalism by misusing or removing constitutional limits on government power in the name of populism.⁴²²

2. *Diluting Democracy: The Creation of a Coup*

The entire constitution-making exercise of 2008 reflects the *Tatmadaw*'s strategy of coercive centralism by which it controls the way different branches of government interact with each other and with the *Tatmadaw*.⁴²³ Expanding constitutionalism beyond the rule of law, ensures that authoritarian constitutionalism is sustained through the administration, whose power is centralized in the hands of the *Tatmadaw*.⁴²⁴ The *Tatmadaw*'s increasingly popular image as a tutelary institution has found new ground in light of the 2020 elections in Myanmar: although the election was competitive, the power of the government when elected was constrained by a non-elected, tutelary power i.e. the *Tatmadaw*.⁴²⁵ The foremost example of the *Tatmadaw*'s tutelary interference is in Myanmar's self-proclaimed transition to a discipline flourishing democracy in 2008, which was orchestrated by the *Tatmadaw* itself, and not precipitated by external forces or a regime breakdown.⁴²⁶

⁴²⁰ Melissa Crouch, 'Premeptive Constitution Making: Authoritative Constitutionalism and the Military in Myanmar', *Law & Society Review*, Volume 54, Number 2 (2020): 487–515, page 495.

⁴²¹ Mya Win, *Tatmadaw's Traditional Role in National Politics* (News and Periodicals Enterprise 1992)

⁴²² Kim Lane Scheppele, 'Autocratic Legalism' (2018) 85 *University of Chicago Law Review* 545

⁴²³ Melissa Crouch, 'Premeptive Constitution Making: Authoritative Constitutionalism and the Military in Myanmar' (2020) 54(2) *Law & Society Review* 487, at 505

⁴²⁴ Melissa Crouch, 'Premeptive Constitution Making: Authoritative Constitutionalism and the Military in Myanmar' (2020) 54(2) *Law & Society Review* 487, at 505

⁴²⁵ Marco Bünte, 'Ruling but not Governing: Tutelary Regimes and the Case of Myanmar, Government and Opposition' [2021] at 14

⁴²⁶ Mary Callahan, 'The Opening in Burma: The Generals Loosen Their Grip' (2012) 23(4), *Journal of Democracy* 120

The 2020 elections in particular marked a resounding victory for the NLD, which defeated the *Tatmadaw*-backed Union Solidarity and Development Party by a wide margin and cemented global icon Aung San Suu Kyi's return to power as State Counselor for Myanmar.⁴²⁷ Although Myanmar is a well-documented authoritarian regime, this illustrates a pervasive preference for democracy among the people of Myanmar reflective of democratic choice,⁴²⁸ unlike the farcical elections of other authoritarian regimes.⁴²⁹ This is not to suggest that the 2020 elections were entirely free of authoritarian undercurrents.⁴³⁰ elections were cancelled in 56 townships situated in purported conflict zones (for comparison, in 2015, elections were cancelled in 5 such townships);⁴³¹ religious and ethnic minorities were disenfranchised;⁴³² and significant malapportionment favoured rural areas over urban ones.⁴³³ Nonetheless the meteoric popularity of Aung San Suu Kyi seems to have raised concerns with the *Tatmadaw*,⁴³⁴ leading them to seize control of the government on 1 February 2021.⁴³⁵ Even as the *Tatmadaw* threw senior members of the NDL, including Aung San Suu Kyi, into *incommunicado* detention,⁴³⁶ it sought to maintain an outward appearance of

⁴²⁷ 'Myanmar: Aung San Suu Kyi's party Wins majority in election' *BBC News* (13 November 2020) <<https://www.bbc.com/news/world-asia-54899170>> accessed 2 August 2021

⁴²⁸ Marco Bünte, 'Ruling but not Governing: Tutelary Regimes and the Case of Myanmar, Government and Opposition' [2021] 1

⁴²⁹ Andreas Schedler, The Logic of Electoral Authoritarianism in Andreas Schedler (ed.), *Electoral Authoritarianism: The Dynamics of Unfree Competition* (Lynne Rienner 2006), at 1–23

⁴³⁰ Marco Bünte, 'Ruling but not Governing: Tutelary Regimes and the Case of Myanmar, Government and Opposition' [2021] 1

⁴³¹ EU EOM 'EU Election Observation Mission Myanmar General Elections Final Report' (European Commission, EU Election Missions 2016) <<https://ec.europa.eu/info/strategy/relations-non-eu-countries/types-relations-and-partnerships/election-observation/mission-recommendations-repository/missions/91>> accessed 2 August 2021

⁴³² Nick Cheeseman, 'How in Myanmar 'National Races' Came to Surpass Citizenship and Exclude Rohingya' (2017) 47(3) *Journal of Contemporary Asia* 461

⁴³³ Kai Ostwald and Constant Courtin, 'Malapportionment in Myanmar's Elections: A Slumbering Menace' (2020) 42(2) *Contemporary Southeast Asia* 145

⁴³⁴ Thant Myint-U, 'Myanmar's youth hold the country's future in their hands' *Financial Times* (12 February 2021) <<https://www.ft.com/content/5a496043-7ccc-4ccf-a6ef-ea9bfc836c8c>> accessed 2 August 2021

⁴³⁵ Alice Cuddy, 'Myanmar coup: What is happening and why?' *BBC News* (1 April 2021) <<https://www.bbc.com/news/world-asia-55902070>> accessed 2 August 2021

⁴³⁶ Reuters Staff, 'Myanmar military seizes power, detains elected leader Aung San Suu Kyi' *Reuters* (1 February 2021) <<https://www.reuters.com/article/myanmar-politics-int-idUSKBN2A11W6>> accessed 2 August 2021

legitimate rule by appointing one of its own members as interim president.⁴³⁷ Interestingly this has allowed the *Tatmadaw* to invoke the emergency powers conferred on the president, transferring all executive, legislative and judicial powers to the commander-in-chief of the *Tatmadaw*.⁴³⁸ The *Tatmadaw* intends to retain power for the next year, riding out the full constitutional limit for a period of emergency.⁴³⁹ Although the *Tatmadaw* has subverted democracy itself by capturing the 2020 elections, it continues to use the 2008 Constitution to legitimise its *coup d'état*.⁴⁴⁰ In fact, the *Tatmadaw* appears to legitimise its power on the basis of its own performance legitimacy,⁴⁴¹ promising to establish what it calls a discipline flourishing democracy in Myanmar.⁴⁴²

3. *The Rise in Violent Protests: Twelve Years of Democracy is Not Enough*

The *Tatmadaw's coup d'état* was met with public resistance, with peaceful public demonstrations and strikes by civil servants and private-sector employees.⁴⁴³ Reports suggest that the *Tatmadaw* largely ignored the first stream of anti-coup demonstrations, with the hope that an exhausted public would eventually need to return to work.⁴⁴⁴ The turning point in the *Tatmadaw's* strategy occurred with soldiers raiding a shipyard in Madalay in order to break

⁴³⁷ 'Responding to the Myanmar Coup' (International Crisis Group 2021) <<https://www.crisisgroup.org/asia/south-east-asia/myanmar/b166-responding-myanmar-coup>> accessed 2 August 2021, at 3

⁴³⁸ Constitution of the Republic of the Union of Myanmar §417 and §418(a).

⁴³⁹ Order No. 1/2021, Office of the President, 1 February 2021

⁴⁴⁰ Sharan Grewal and Yasser Kureshi, 'How to Sell a Coup: Elections as Coup Legitimation' (2018) 63(4) *Journal of Conflict Resolution* 1001-1031, at 1002

⁴⁴¹ Stephen White, 'Economic Performance and Communist Legitimacy' (1986) 38(3) *World Politics* 462

⁴⁴² Sharan Grewal and Yasser Kureshi, 'How to Sell a Coup: Elections as Coup Legitimation' (2018) 63(4) *Journal of Conflict Resolution* 1001-1031 4

⁴⁴³ 'Responding to the Myanmar Coup' (International Crisis Group 2021) <<https://www.crisisgroup.org/asia/south-east-asia/myanmar/b166-responding-myanmar-coup>> accessed 2 August 2021, at 6; Richard Horsey, 'A Close-up View of Myanmar's Leaderless Mass Protests' (International Crisis Group 2021) <<https://www.crisisgroup.org/asia/south-east-asia/myanmar/close-view-myanmars-leaderless-mass-protests>> accessed 2 August 2021

⁴⁴⁴ 'The Cost of the Coup: Myanmar Edges to State Collapse' (International Crisis Group 2021) <<https://www.crisisgroup.org/asia/south-east-asia/myanmar/b167-cost-coup-myanmar-edges-toward-state-collapse>> accessed 2 August 2021, at 4.

up an ongoing strike. When demonstrators sought to protect the workers, the *Tatmadaw* opened fire.⁴⁴⁵ As the *Tatmadaw* proceeded to adopt harsher methods of quelling dissent, certain sections of protestors have taken to weapons like Molotov cocktails, fireworks and swords to fight back against the regime.⁴⁴⁶ Other protestors have sought military training, while some have gone as far as to arm themselves to engage in urban warfare against the regime.⁴⁴⁷

The anti-*coup* protests are largely leaderless, de-centralised and loosely coordinated—factors that have ensured their continuation well after the *Tatmadaw* has actually seized power. Conscious of the economic, financial and social fallout of their dissidence, protestors have set up informal support mechanisms to assist workers and their families.⁴⁴⁸ While the poorest sections of society have accepted that they may be hit the hardest in an economic collapse, reports suggest that these protestors are some of the most determined participants against the *Tatmadaw*'s authoritarian regime.⁴⁴⁹ As the protests coincide with the raging COVID-19 pandemic, paramedics used Facebook to launch a civil disobedience movement on 2 February 2021, immediately after the *Tatmadaw* seized power.⁴⁵⁰

⁴⁴⁵ Richard C. Paddock, 'Myanmar Security Forces Open Fire on Protesters, Killing 2' *The New York Times* (20 February 2021) <<https://www.nytimes.com/2021/02/20/world/asia/myanmar-protesters-killed.html>> accessed 2 August 2021

⁴⁴⁶ 'The Cost of the Coup: Myanmar Edges to State Collapse' (International Crisis Group 2021) <<https://www.crisisgroup.org/asia/south-east-asia/myanmar/b167-cost-coup-myanmar-edges-toward-state-collapse>> accessed 2 August 2021, at 12

⁴⁴⁷ 'The Cost of the Coup: Myanmar Edges to State Collapse' (International Crisis Group 2021) <<https://www.crisisgroup.org/asia/south-east-asia/myanmar/b167-cost-coup-myanmar-edges-toward-state-collapse>> accessed 2 August 2021, at 12

⁴⁴⁸ 'As civil disobedience movement grows, so do efforts to shore up resistance' *Myanmar Now* (16 February 2021) <<https://www.myanmar-now.org/en/news/as-civil-disobedience-movement-grows-so-do-efforts-to-shore-up-resistance>> accessed 2 August 2021; 'Underground funding networks blossom in support of CDM' *Frontier Myanmar* (7 March 2021) <<https://www.frontiermyanmar.net/en/underground-funding-networks-blossom-in-support-of-cdm/>> accessed 2 August 2021

⁴⁴⁹ 'The Cost of the Coup: Myanmar Edges to State Collapse' (International Crisis Group 2021) <<https://www.crisisgroup.org/asia/south-east-asia/myanmar/b167-cost-coup-myanmar-edges-toward-state-collapse>> accessed 2 August 2021, at 9

⁴⁵⁰ 'After coup, medical workers spearhead civil disobedience campaign' *Frontier Myanmar* (2 February 2021) <<https://www.frontiermyanmar.net/en/after-coup-medical-workers-spearhead-civil-disobedience-campaign/>> accessed 2 August 2021

4. *Quelling Dissent: The Military and its Might*

The *Tatmadaw* has orchestrated deadly daily crackdowns on protestors since February 2021, with the objective of stamping out every last vestige of dissent against itself.⁴⁵¹ This has done by attacking protestors with brute force to deter them from dissenting, and by actively preventing them from accessing the online and physical spaces from which to dissent. On 27 March 2021, even as Myanmar celebrated Armed Forces Day, troops shot 158 unarmed civilians dead across the country.⁴⁵² Protestors were shot while mourning the casualties of the massacre on Armed Forces Day.⁴⁵³ The *Tatmadaw* purportedly attacked those rendering first aid or pulling victims out of the line of fire, beaten and killed paramedics and other first responders, and shot at ambulances.⁴⁵⁴ The *Tatmadaw* began a reign of nightly terror, raiding residential neighborhoods—throwing sound grenades, firing rubber bullets, conducting door-to-door searches and lining up citizens in the street.⁴⁵⁵ It also threatened and shot volunteers who manned street barricades to warn against the arrival of the troops.⁴⁵⁶

⁴⁵¹ Reuters Staff, ‘At least 18 killed in Myanmar on bloodiest day of protests against coup’ *Reuters* (28 February 2021) <<https://www.reuters.com/article/us-myanmar-politics-idUSKCN2AS018>> accessed 2 August 2021 ; ‘Myanmar: End Lethal Force against Protesters’ *Human Rights Watch* (Bangkok, 3 March 2021) <<https://www.hrw.org/news/2021/03/04/myanmar-end-lethal-force-against-protesters>> accessed 2 August 2021; ‘A Yangon township reels from an assault on young lives and human decency’ *Myanmar Now* (6 March 2021) <<https://www.myanmar-now.org/en/news/a-yangon-township-reels-from-an-assault-on-young-lives-and-human-decency>> accessed 2 August 2021 ; ‘They are only children’: Grief, defiance on display at funerals for fallen heroes’ *Frontier Myanmar* (9 March 2021) <<https://www.frontiermyanmar.net/en/they-are-only-children-grief-defiance-on-display-at-funerals-for-fallen-heroes/>> accessed 2 August 2021 ; and ‘A day of tragedy and terror in Hlaing Thar- yar’ *Frontier Myanmar* (17 March 2021) <<https://www.frontiermyanmar.net/en/a-day-of-tragedy-and-terror-in-hlaing-tharyar/>> accessed 2 August 2021

⁴⁵² Nicholas Coppel, ‘Myanmar’s protests now a revolutionary cause’ *AsiaLink* (16 June 2021) <<https://asialink.unimelb.edu.au/insights/myanmars-protests-now-a-revolutionary-cause>> accessed 2 August 2021

⁴⁵³ Reuters Staff, ‘Troops fire at funeral as Myanmar mourns bloodiest day since coup’ *Reuters* (28 March 2021) <<https://www.reuters.com/article/us-myanmar-politics-idUSKBN2BK00T>> accessed 2 August 2021; ‘A nurse, an architect and a striking police officer among 169 people murdered by junta over the weekend’ *Myanmar Now* (30 March 2021) <<https://www.myanmar-now.org/en/news/a-nurse-an-architect-and-a-striking-police-officer-among-169-murdered-by-junta-over-the-weekend?page=1>> accessed 2 August 2021

⁴⁵⁴ The Cost of the Coup: Myanmar Edges to State Collapse’ (International Crisis Group 2021) <<https://www.crisisgroup.org/asia/south-east-asia/myanmar/b167-cost-coup-myanmar-edges-toward-state-collapse>> accessed 2 August 2021, at 5

⁴⁵⁵ The Cost of the Coup: Myanmar Edges to State Collapse’ (International Crisis Group 2021)

Eager to stamp out dissent entirely, the *Tatmadaw* has also taken steps to ensure that it is difficult for the protesting public to converge and coordinate their protests. Since large troops of the *Tatmadaw*'s Light Infantry Division have infiltrated Myanmar's major cities, they have set up camp in hospitals, schools, universities and monasteries.⁴⁵⁷ Not only does access to these large public spaces allow the *Tatmadaw* to station their vehicles and equipment, but it also renders them ineffective for protestors who may use these public spaces to organise for protests.⁴⁵⁸ The *Tatmadaw* has also been quick to suspend mobile and internet services across the country, with periodic shutdowns occurring on 3 February,⁴⁵⁹ 6 February,⁴⁶⁰ and 15 February,⁴⁶¹ before ordering a total shutdown of mobile internet services on 15 March 2021.⁴⁶² Consequently, protestors have found it difficult to mobilise and coordinate their

<<https://www.crisisgroup.org/asia/south-east-asia/myanmar/b167-cost-coup-myanmar-edges-toward-state-collapse>> Accessed 2 August 2021, at 6; 'Soldier kills 7-year-old girl as she sits in her father's lap during raid on Mandalay home' *Myanmar Now* (24 March 2021) <<https://www.myanmar-now.org/en/news/soldier-kills-7-year-old-girl-as-she-sits-in-her-fathers-lap-during-raid-on-mandalay-home>> accessed 2 August 2021

⁴⁵⁶ The Cost of the Coup: Myanmar Edges to State Collapse' (International Crisis Group 2021) <<https://www.crisisgroup.org/asia/south-east-asia/myanmar/b167-cost-coup-myanmar-edges-toward-state-collapse>> accessed 2 August 2021, at 6; 'Volunteer night guard shot dead by military' *Myanmar Now* (12 March 2021) <<https://www.myanmar-now.org/en/news/volunteer-night-guard-shot-dead-by-military>> accessed 2 August 2021

⁴⁵⁷ "Military de- ploys troops to public buildings around the country", Myanmar Now, 8 March 2021; "Occupation of Schools by Security Forces in Myanmar is a Serious Violation of Children's Rights", joint statement by Save the Children, UNESCO and UNICEF, Yangon, 19 March 2021.

⁴⁵⁸ 'The Cost of the Coup: Myanmar Edges to State Collapse' (International Crisis Group 2021) <<https://www.crisisgroup.org/asia/south-east-asia/myanmar/b167-cost-coup-myanmar-edges-toward-state-collapse>> accessed 2 August 2021, at 7

⁴⁵⁹ 'Directive to temporarily block social media service Facebook' <<https://www.telenor.com/sustainability/responsible-business/human-rights/mitigate/human-rights-in-myanmar/directives-from-authorities-in-myanmar-february-2021/>> accessed 2 August 2021; 'Directive to block social media services Twitter and Instagram, until further notice' *Telenor* (5 February 2021) <<https://www.telenor.com/sustainability/responsible-business/human-rights/mitigate/human-rights-in-myanmar/directives-from-authorities-in-myanmar-february-2021/>> accessed 2 August 2021

⁴⁶⁰ 'Directive to temporarily shut down data network' *Telenor* (6 February 2021) <<https://www.telenor.com/sustainability/responsible-business/human-rights/mitigate/human-rights-in-myanmar/directives-from-authorities-in-myanmar-february-2021/>> accessed 2 August 2021

⁴⁶¹ Associated Press, 'Myanmar Protests Resume After Second Night of Internet Shutdown' *The Diplomat* (16 February 2021) <<https://thediplomat.com/2021/02/myanmar-protests-resume-after-second-night-of-internet-shutdown/>> accessed 2 August 2021

⁴⁶² 'Any news from the internet?': Fear and rumour in villages forced offline' *Frontier Myanmar* (10 April 2021) <<https://www.frontiermyanmar.net/en/any-news-from-the-internet-fear-and-rumour-in-villages-forced-offline/>> accessed 2 August 2021; Gwen Robinson, 'Myanmar shutdown of wireless internet fuels fears of news' blackout' *Nikkei Asia* (Yangon, 2 April 2021) <<https://asia.nikkei.com/Spotlight/Myanmar-Crisis/Myanmar-shutdown-of-wireless-internet-fuels-fears-of-news-blackout>> accessed 2 August 2021; Simon Kemp, 'Digital 2021: Myanmar' *Data Reportal* (12 February 2021) <<https://datareportal.com/reports/digital->

demonstrations, or even gain further information about the *Tatmadaw*'s measures.⁴⁶³ In fact one of their first legislative efforts after taking power, was a draft Cyber Security Law that required technology companies to onshore their data on national security grounds, and introduced provisions criminalizing the spread of misinformation.⁴⁶⁴ However, the public opposition to such a draconian law was so strong, that the regime rolled it back and enacted amendments to the existing Electronic Transactions Law,⁴⁶⁵ while borrowing from the less harsh sections of the draft Cyber Security Law. These legislative efforts have not stopped the *Tatmadaw* from searching civilians' mobile phones for evidence of dissidence,⁴⁶⁶ routinely destroying privately owned CCTV cameras,⁴⁶⁷ satellite dishes of a Thai broadcasting company⁴⁶⁸ and even disabling internet services in townships before cracking down on its residents.⁴⁶⁹

5. *Increasing Illiberalism: The Future of Democracy in Myanmar*

With the *Tatmadaw* in power for the foreseeable future, it appears that its strategy for the upcoming year is to tilt the playing field in its favour by neutralizing Aung Sang Suu Kyi and

2021-myanmar> accessed 2 August 2021

⁴⁶³ 'Myanmar's Military Struggles in a Virtual Battlefield' (International Crisis Group 2021) <<https://www.crisisgroup.org/asia/south-east-asia/myanmar/314-myanmars-military-struggles-control-virtual-battlefield>> accessed 2 August 2021, ch IV 'The Post-Coup War Technology' at 7

⁴⁶⁴ 'Civil society, businesses condemn junta's draft Cyber Security Law' *Frontier Myanmar* (11 February 2021) <<https://www.frontiermyanmar.net/en/civil-society-businesses-condemn-juntas-draft-cyber-security-law/>> accessed 2 August 2021; 'Telenor Group's response to proposed Myanmar Cyber Security Bill' *Telenor* (15 February 2021) <<https://www.telenor.com/media/press-release/telenor-groups-response-to-proposed-myanmar-cyber-security-bill>> accessed 2 August 2021

⁴⁶⁵ State Administration Council Law No (5/2021), Law Amending the Penal Code and State Administration Council Law No (6/2021), Law Amending the Code of Criminal Procedure.

⁴⁶⁶ 'Myanmar's Military Struggles in a Virtual Battlefield' (International Crisis Group 2021) <<https://www.crisisgroup.org/asia/south-east-asia/myanmar/314-myanmars-military-struggles-control-virtual-battlefield>> accessed 2 August 2021, ch IV 'The Post-Coup War Technology' at 18

⁴⁶⁷ 'Myanmar's Military Struggles in a Virtual Battlefield' (International Crisis Group 2021) <<https://www.crisisgroup.org/asia/south-east-asia/myanmar/314-myanmars-military-struggles-control-virtual-battlefield>> accessed 2 August 2021, ch IV 'The Post-Coup War Technology' at 18

⁴⁶⁸ See also "Myanmar junta limits internet, seized satellite dishes", *The Associated Press*, 9 April 2021.

⁴⁶⁹ 'Myanmar's Military Struggles in a Virtual Battlefield' (International Crisis Group 2021) <<https://www.crisisgroup.org/asia/south-east-asia/myanmar/314-myanmars-military-struggles-control-virtual-battlefield>> accessed 2 August 2021, ch IV 'The Post-Coup War Technology' at 18

the NDL as political threats.⁴⁷⁰ Part of the process has already begun by filing dubious charges against her and other senior members, which if sustained could result in the eventual dissolution of the NDL as a political party entirely.⁴⁷¹ This hints at the very coercive centralism that forms the bedrock of the *Tatmadaw*'s power.

The *Tatmadaw* is fully prepared to use the apparently democratic mechanisms at its disposal to further its own authoritarian regime. Even where the internet shutdowns are concerned, the *Tatmadaw* has justified their necessity by citing rule of law and the maintenance of stability in Myanmar.⁴⁷² While its *coup d'état* can have devastating effects on the national economy, scholars suggest that the *Tatmadaw* is prepared to fall back on national resources, characteristic of the socialist military rule of the first twenty years after British decolonization, in order to consolidate its power entirely.⁴⁷³

VI. CONCLUDING REMARKS

Asia in general has been described as a kaleidoscopic collection of constitutional experiments, where constitutional dynamism and the consequent resistance to it, has been spurred

⁴⁷⁰ 'Responding to the Myanmar Coup' (International Crisis Group 2021) <<https://www.crisisgroup.org/asia/south-east-asia/myanmar/b166-responding-myanmar-coup>> accessed 2 August 2021, at 6

⁴⁷¹ There is a recent precedent for such a move: on 17 October 2020, the election commission announced that the United Democratic Party would dissolve, following its chairman's arrest, on the grounds that it had received foreign funds. 'Responding to the Myanmar Coup' (International Crisis Group 2021) <<https://www.crisisgroup.org/asia/south-east-asia/myanmar/b166-responding-myanmar-coup>> accessed 2 August 2021, at 7

⁴⁷² 'Myanmar's Military Struggles in a Virtual Battlefield' (International Crisis Group 2021) <<https://www.crisisgroup.org/asia/south-east-asia/myanmar/314-myanmars-military-struggles-control-virtual-battlefield>> accessed 2 August 2021, ch IV 'The Post-Coup War Technology' at 19

⁴⁷³ 'The Cost of the Coup: Myanmar Edges to State Collapse' (International Crisis Group 2021) <<https://www.crisisgroup.org/asia/south-east-asia/myanmar/b167-cost-coup-myanmar-edges-toward-state-collapse>> accessed 2 August 2021, at 13

on by state-building, economic development, and globalisation.⁴⁷⁴ To this effect, Samuel Issacharoff's claim that the superior competence of democracies lies not in the process of governance itself but instead in the deliberation, that is naturally slower and more complex than decree,⁴⁷⁵ rings true. But then so do his subsequent words of caution: when deliberation is no longer a process of citizen inputs it becomes a public-choice nightmare where vested sectional interests marshal resources to overwhelm the passive majority.⁴⁷⁶ Nothing encapsulates the spirit and contexts of the countries this paper better than this academic observation.

In every country examined, democracy is at a crossroads: in India, a religiously ideological crisis is brewing, instigated by a leader who has conveniently twisted democratic processes to suit his authoritarian agenda; in Thailand, people are protesting for democracy even as the twin forces of the monarchy and military use democratic instruments to stifle dissent. In Hong Kong, the future of democracy rests on the future of the region itself, which is a constitutional conundrum after the year 2047. In Nepal, communist forces distort democratic institutions and process to commandeer complete control of government machinery. Myanmar and Afghanistan bring up the most volatile contexts for the survival of a democratic order: Myanmar, characterized for so long by military rule, fell to a military coup after ten years of democracy while Afghanistan, ravaged by decades of civil war, might just follow.

⁴⁷⁴ Jaclyn Neo and Bui Ngoc Son, 'Pluralist Constitutions and the Southeast Asia context' in Jaclyn Neo and Bui Ngoc Son (eds) *Pluralist Constitutions in Southeast Asia* (Hart Publishing, Bloomsbury Publishing Plc 2019) at 3

Jaclyn L Neo Jaclyn Neo and Bui Ngoc Son, *Pluralist Constitutions in Southeast Asia* (Hart Publishing 2019)

⁴⁷⁵ Samuel Issacharoff, 'Democracy's Deficits' (2018) 85 *The University of Chicago Law Review* 485, at 514

⁴⁷⁶ Samuel Issacharoff, 'Democracy's Deficits' (2018) 85 *The University of Chicago Law Review* 485, at 514

Indeed, each country considered in this paper has faced varying degrees of democratic erosion in the last two years but each country also provides a distinctly unique and real context in which one can see the sheer adaptability of a liberal democratic constitutionalism play out. The common denominators, among these countries, not only include the sheer force of authoritarians (varying though its intensity might be) but also the power of the people to protest and rise up against Issacharoff's public-choice nightmare. By doing so, it is the people, representing the force of democratic might, who have the power to prevent vested sectional interests from overwhelming the majority.