

Judicial Loyalty to the Military in Authoritarian Regimes: How the Courts Are Militarized in Myanmar

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While scholars have considered the role of courts in authoritarian regimes generally, less attention has been paid to judicial-military relations. In this article I consider how courts are militarized and made subordinate and loyal to military rule. In military regimes, the courts are at risk of militarization and the process of rendering judges loyal to the military through practices such as career path socialization, selection, and restructuring of the courts. This raises an entry-exit dilemma for judges. The dilemma lies in the fact that if judges committed to civilian rule do not join the bench, they are potentially leaving the judiciary to military partisans with little prospect for reform. Yet joining the judiciary means the danger of being co-opted and adding legitimacy to the military regime or the risk of being forced out if politics shifts from civilian to military rule. Through a case study of judicial profiles in Myanmar, I explore how the loyalty of judges to the military depends on whether they are military insiders, military affiliates, civilian affiliates, or civilian outsiders. The case of Myanmar is a vivid reminder to scholars of judicial behavior that in military authoritarian regimes, judges face an entry-exit dilemma.

INTRODUCTION

Studies of judicial profiles and the courts primarily focus on judicial decision making. Less attention has been paid to judicial profiles in military regimes as a particular kind of authoritarian regime. Periods of military rule may lead to the militarization of the state and society, including the courts. In military regimes, the profile of individual judges and of the bench collectively is one indication of the court's relationship to the military. In this article, I focus on the case of Myanmar, a country whose judicial and legal system has been affected by decades of military authoritarianism. Like many postcolonial countries in the Global South, Myanmar has cycled in and out of direct military rule. Yet in 2011 the military reintroduced elections and a legislature and made

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structural reforms to the courts. So how have the courts in Myanmar remained militarized, that is, captured and rendered loyal to the military?

To address how courts become and remain militarized, I focus on the idea of judicial loyalty in military regimes, that is, the perception that judges are subordinate and compliant to the military, compromising their independence. The militarization of the courts is the process of rendering judges loyal to the military through practices such as selection, socialization, and restructuring of the courts. I analyze judicial profiles to explore who becomes a judge in Myanmar and how regime change influences who becomes or stays a judge. Judicial profiles offer one indication of loyalty to the military. Through this analysis, my study contributes to ethnographic research on law and the courts (Geertz 1973, 1983; Scheppele 2004). My approach is sociolegal and constitutive, rather than causal (McCann 1996), and aims to develop new explanations of the role of the judiciary in the Global South (see, for example, Zheng, Ai, and Liu 2017; Wang and Liu 2019).

In this article I explore the individual and institutional dimensions of judicial loyalty to the military. The individual dimension of loyalty begins with the entry-exit dilemma, that is, whether a person chooses to be appointed as a judge under military rule and whether judges appointed under civilian rule remain in their role or exit the court when regime change leads to military rule.¹ I identify four types of judges based on their profile and relationship to the military: military insiders, military affiliates, civilian affiliates, and civilian outsiders. In courts where judges cannot issue individual judgments, the institutional dimension of loyalty is particularly affected by the leadership of the court and whether the court has a majority of civilian or military members.

The militarization of the courts in Myanmar has a long past and persists in the present.² I examine 141 profiles, including thirty-nine judges of the Union Supreme Court (1988–2022) and 102 judges of the subnational apex courts, the fourteen state and region high courts (2011–2022). I show that political reforms since 2011 did not aim to end military influence over the courts, but rather to entrench it. Structural reforms to the courts, specifically the creation of new subnational apex courts, extended the control of the military over subnational courts, rather than civilianize the courts or decentralize judicial power. Courts are militarized through the persistence of the informal practice of closed recruitment, even though open recruitment is possible, as well as extra-legal measures that disrupt the choice of entry-exit. Through the case study of Myanmar, I advance knowledge of the processes of militarization of the courts and the importance and limits of the entry-exit dilemma for judges in military authoritarian regimes.

CONCEPTUALIZING COURTS AND JUDGES IN AUTHORITARIAN REGIMES

Revisiting the Literature on Courts in Authoritarian Regimes

Sociolegal studies of courts have long acknowledged that courts cannot be studied in isolation from society (Shapiro 1981) but are best understood in context. There has

1. My use of exit and loyalty differs from Hirschman's (1970) classic study of exit, voice, and loyalty in that I use entry and exit as indicators of the perception of loyalty or absence of it.

2. In this article, Myanmar is used for the country post-1989 and Burma for pre-1989.

been a call to go beyond national apex courts (Silbey 1981), beyond courts in the Global North (Shapiro 1981), and beyond the usual democratic suspects of the Global South such as India, Colombia, and South Africa (Hirschl 2014). Our theories of courts must be wide enough to explain the range of actually existing institutions that call themselves courts (Shapiro 1981). One area that has received less attention is the composition and role of courts in military regimes.

In recent decades, scholars of law, politics, and society have turned their attention to the role of courts in authoritarian regimes (Moustafa 2003, 2007, 2014; Ginsburg and Moustafa 2008; Rajah 2012; Ginsburg and Simpser 2014; Hamad 2018). While some studies of courts have incorporated analysis of the military, the way in which courts are affected by the variety of authoritarian regimes deserves further attention. Military authoritarian regimes are one type of authoritarian regime where the military holds political control, either for a short or extended period, through corporate rule or more personalist rule by a military leader. Courts are affected by military regimes and by regime change where the military is a key actor.

There are two strands of thinking in the existing literature on courts in authoritarian regimes. The first is scholarship that considers how courts and constitutions are compromised, co-opted, and manipulated under authoritarian regimes. This is reflected in the literature on authoritarian constitutionalism (Tushnet 2015) and abusive constitutionalism (Landau 2013). Broadly, this is the idea that the institutions and mechanisms of a constitution are misused for illiberal and undemocratic ends. Similarly, scholarship on the decline of democracy has developed the idea of autocratic legalism, that is, the use and misuse of law by autocrats (Corrales 2015; Scheppele 2018). One example of this is courts in the 1970–80s in military regimes across Latin America. At this time, courts in countries such as Peru, Bolivia, and Ecuador continued to exist under authoritarian rule but had no independence from the regime. Although the courts were not abolished, neither did the courts have any independence; such co-opted courts can be understood as minimalist courts (Verner 1984, 494–96).³

The second strand of literature on courts in authoritarian regimes demonstrates that some regimes may grant the courts judicial independence in a strategic move to boost foreign investment or facilitate a transition to a market economy. This idea has been used to illustrate the function of courts in places such as the rule-by-law state of Singapore (Rajah 2012; Tushnet 2015) and Egypt, among others (for example, Moustafa 2003, 2007; but see Hamad 2018). An extension of this scholarship is the idea that judges have space to defy dictators, so to speak, as was the case with the Supreme Court under General Musharraf in Pakistan (Kureshi 2021b). This second strand of literature is not directly relevant to some jurisdictions, from Sudan to Myanmar, where judicial independence may be a facade or mere lip service and where investors deliberately avoid the domestic courts in favor of international arbitration (Massoud 2014; Bonnitcha 2019).

The literature that specifically examines judicial profiles focuses on identifying how judges decide cases in court.⁴ Yet the literature is the subject of significant debate and

3. Verner was referring here to courts in countries such as Peru, Bolivia, and Ecuador, among others.

4. This literature is large but a concise review of the field of judicial politics, and the emphasis in US scholarship is on the liberal/conservative divide and the relationship to judicial votes; see Roux (2013).

the limitations of its findings are well noted (for example, Segal 2011; Staton 2017; Howard and Randazzo 2018). One limitation is that the study of judicial behavior assumes we can identify the decisions of individual judges, which is not the case in some legal systems. Another limitation is that the literature generally does not consider judges' decisions other than decisions in a court case. This overlooks the fact that other types of decisions may be indicative of loyalty—such as the crucial decision to choose to become a judge or whether to stay a judge when a military regime takes over. What is also lacking in the literature is consideration of the processes by which judges and courts become compromised, that is, the social processes by which courts are militarized.

In this article, I focus on what kind of judges decide to enter or exit the bench, and how, in Myanmar's military regime. Drawing attention to judicial profiles, and the circumstances under which a judge enters or leaves the court, helps us better understand the relationship between the military and the courts.

The Militarization of the Courts

In much of the literature on courts in authoritarian regimes and civil-military relations, the process of the militarization of the courts is only addressed implicitly. Seeking to make the process of the militarization of the courts explicit, I show how the ideal of a civilian regime is set in contrast to a military regime, when in fact the lines between civilian and military institutions or regimes are often blurred in authoritarian regimes. I then explain the militarization of the courts as the process of rendering judges individually, or the courts as an institution, loyal to the military through practices such as socialization, selection, and restructuring. This raises conceptual and practical challenges of how to demilitarize the courts.

Scholarship on courts often presumes that courts exist within a civilian state. A civilian regime is a government that is run by officials who are civilians and who have control over the military. A core characteristic of a democratic civilian state is that the military's authority is derivative of the political authority of an elected government; the military has no independent source of authority (Huntington 1957, 83). The power of the military is dependent on the civilian government. There are different kinds of civilian regimes, from liberal to illiberal varieties. Civilian regimes are therefore not necessarily synonymous with liberalism and the struggle for political liberalism in the legal complex occurs in regimes that range from liberal legal to despotic orders (Halliday, Karpik, and Feeley 2007; Halliday and Karpik 2012).

Civilian rule is usually set in contrast to military rule (Huntington 1957; Nordlinger 1977; but see Perlmutter 1977), but in reality the legacy of past military regimes may blur the contemporary line between civilian and military institutions and personnel. An appreciation for regime change from military to civilian rule (or vice versa) needs to take into account histories of civil-military relations and the personal profiles, including career trajectories, of judges. The military's influence

For a review of the history of this field in the United States, see Whittington (2000); see also Roux (2018, 16–34) for a review of the differences between comparative constitutional law and comparative judicial politics. For a review of the judicial profiles literature beyond the Global North, see Dressel, Sanchez-Urribarri, and Stroh (2017) and Kureshi (2021a).

over civilians increases when its officers (active, nonactive, or retired) maintain positions within civilian institutions (Huntington 1957, 89). For example, in Indonesia post-1998, former military officers have been elected to the legislature or executive, not least of these a former military officer dishonorably discharged from the military and accused of human rights violations—Prabowo Subianto, who is the Minister of Defence (2019–).

The military is a persistent and important actor in politics in many postcolonial societies (Finer 2002; Brooks 2019). In a military regime, the military has full or partly independent authority from civilian institutions and actors, in contrast to the subordination of the military to a civilian government in a civilian regime. Military regimes may be led by a personalist leader from the military, or they may be more corporatist in nature, where officers have some control over the leader (O'Donnell 1973; Remmer 1989; Geddes, Frantz, and Wright 2014). Military interference with the courts can occur under either type of military regime.

A catalyst or accelerator in the process of militarization is military takeover, such as through a coup. In the twentieth century there was a high frequency of coups in postcolonial societies (Powell and Thyne 2011). Many societies still experience coups or coup attempts and periods of direct military rule (Chin, Carter, and Wright 2021). In the twenty-first century, coups have occurred in Thailand in Southeast Asia; in Ecuador, Venezuela, Honduras, and Bolivia in Latin America; in Sri Lanka in South Asia; in Fiji in the Pacific; and in Sudan, Mali, and Niger in Africa (for example, Massoud 2020), among other countries. In response to the persistence of coups, there is renewed scholarly interest in the role of the military in regime change and coups (Geddes, Frantz, and Wright 2014; Chin, Carter, and Wright 2021). When regimes shift between different types of illiberal rule, or to military rule, institutions such as the courts risk becoming militarized.⁵

Courts are militarized when their independence from the military is compromised, both individually as judges and institutionally. The militarization of the courts leads to the military capture of the courts. This may occur slowly, through processes of socialization in legal education and the career trajectories of judges and bureaucrats. It may also occur through processes of selection of judges or restructuring of the courts, including the creation of new or special courts. Packing of the courts, either through removals and replacements, or through expanding the bench, is a common strategy of authoritarian actors and well-documented across many jurisdictions in the past and in the contemporary era. Further, militarization may occur through military pressure on judges to decide important cases in certain ways.

The literature has focused on comparing how the military across Latin America uses law and courts to further authoritarian rule (Barros 2002; Pereira 2005; Hilbink 2007; Helmke 2005). The military may play an indirect role and support a government or political party that exerts influence over the courts. More broadly, the military may manipulate the law, legal system, and legal process—such as military control over constitution-making, restructuring the courts in subordination to a military-dominated executive, or controlling the interpretation of the constitution.

5. Here I am referring only to the general, civilian court system. I am leaving aside military courts and military tribunals.

The end of military rule may create an opening for the demilitarization of the courts, that is, the process of reestablishing the courts as separate and independent from the military both individually and institutionally. At a broad level, the demilitarization of the courts can only occur if there is a wider process of the demilitarization of the state, economy, and society. One demilitarization strategy is to retrain or remove and replace judges who served under a previous regime and have ties to the military. Retraining judges is a standard component of law and development efforts, though the results are widely recognized as failing to bring about the intended reform (Trubek and Galanter 1974; Hammergren 2007; Armytage 2015) and it does not directly address the issue of loyalty to the military. The process of demilitarization may include removing judges who are existing or former military officers, or who served under a military regime, and replacing them with civilian judges. Removing all judges is rare because of the absence of a ready pool of new judges, although there are historical examples such as the reform of the judiciary in East Germany (Muller 1991; Markovits 1995).

Another demilitarization strategy is to establish new courts or reform the structure of the courts to enhance their institutional independence from the military and other institutions influenced by the military, and to reform processes of judicial appointment, conditions of tenure, and removal. Constitutional limits may be placed on the power of the military; the military may be subordinated to the executive and separated from the police. Such structural reform may occur through constitutional change and law reform. In Indonesia, constitutional reform efforts in 1999–2002 affirmed judicial independence, ensured formal independence of the courts from the executive, and subordinated the military to the executive and separated it from the police (Assegaf 2019). This was followed by major legislative reform to the courts' powers and jurisdiction, and the expansion of specialized courts (Crouch 2019b). Structural reform to demilitarize the courts inevitably includes reform of both the courts and the military to end judicial loyalty to the military.

Building on the idea of militarization as judicial loyalty to the military and processes of socialization, selection, and restructuring by which it occurs, I turn to offer an expanded approach to judicial behavior that incorporates the decision to enter or exit the judiciary.

AN EXPANDED APPROACH TO JUDICIAL BEHAVIOR: FROM DECISION MAKING TO ENTRY-EXIT

Judicial behavior not only includes how judges decide in individual cases, but can also include other decisions such as whether to enter the bench and when to exit. In countries under military rule or with a history of military rule, working as a judge brings the risk of being perceived as compliant with or loyal to the military. I first explain the idea of judicial loyalty to the military and then explore its individual and institutional dimensions.

In military authoritarian regimes, judicial loyalty is the expectation or perception that judges are subordinate and responsive to the military. Judicial loyalty is a form of judicial bias. The appearance of judicial loyalty to the military can therefore be determined by whether a person is willing to work as a judge under a military regime. Judicial

loyalty cuts against the grain of both individual and institutional judicial independence. Given that judges in authoritarian regimes may be military officers or former military officers, we need to appreciate the specific nature of loyalty within or to the military as an organization. Militaries are highly corporatized, driven by ideology and based on strict notions of discipline, hierarchy, and obedience to superiors (Nordlinger 1977; Geddes, Frantz, and Wright 2014). In terms of institutional culture, a military regime may expect the courts to display discipline, deference, and responsiveness to the regime. If a former military officer enters the judiciary, there is a perception that their loyalty remains with the military.

On this view of judicial loyalty, a key dilemma for judges is whether and, if so, when to enter or exit the bench. The dilemma lies in the fact that if judges committed to civilian rule do not join the bench, they are potentially leaving the judiciary to military partisans with little prospect for reform. Yet joining the judiciary means the danger of being co-opted and adding legitimacy to the military regime, or the risk of losing one's job if politics shifts from civilian to military rule. The entry dilemma is whether and when a person decides to enter the judiciary during authoritarian rule. By entering the judiciary during military rule, a judge displays a willingness to serve, or at least ambivalence toward serving, a military regime. This is particularly so in regimes where judges are civil servants, effectively part of the military-led administration.⁶ Entry-level loyalty only focuses on loyalty at the time of entrance to the judiciary, although I acknowledge that the loyalty of judges can change over time.

Another sign of whether a judge is loyal to the military is the exit dilemma, that is, when a judge departs the bench voluntarily if the country shifts from civilian to military rule, or when a judge stays but risks being forced out. Exit, or turnover on the bench, may occur for a variety of reasons. Exit may be natural (by retirement), forced (by extra-legal or legal removal), or voluntary (that is, nonforced exit prior to retirement). Voluntary exit may be an example of active disloyalty to the military, while forced exit includes the military removing judges who are perceived to be disloyal. Of course, judges appointed under an authoritarian regime may still have agency and shift loyalty. Yet the threat of forced exit is used to influence the decision-making behavior of judges.

In terms of timing, the exit dilemma may arise due to democratic decline or to the intensification of authoritarian interference with the courts. That is, political change is not necessarily from liberal to illiberal rule, but between varieties of illiberalism. A judge who enters the judiciary during a period of civilian rule may later choose to exit once the courts lose their independence. In the 1980s, judges in South Africa faced the dilemma of whether to exit the court as the apartheid regime intensified its interference with the courts.⁷ In other cases, exit may be forced, as occurred in the Philippines under President Duterte when Chief Justice Maria Lourdes Sereno, a critic of the policies of the Duterte regime, was ousted from the Supreme Court. Judicial exit is vulnerable to regime change.

The profile of judges, particularly who they were appointed by and their past work experience, is one indication of judicial loyalty to the military. I develop my approach

6. Of course, there is a range of explicit responses one may have to working for a military regime, from resignation to indifference.

7. I thank Theunis Roux for this insight.

based on situations where the dominant split among judges is an ideological one between support for military or civilian rule, rather than among competing policy preferences as such. The individual dimension of judicial loyalty includes four ideal types of judges: military insiders; military affiliates; civilian affiliates; and civilian outsiders.

Military insiders are judges appointed by the military who are active or retired military officers. The military appoints them because the presence of active, nonactive, or retired officers in civilian institutions increases the military's influence over that institution. Military insiders are perceived to be highly loyal because they are former military officers and have demonstrated loyal service to the military over many years. When military personnel cross over into the civilian courts, the line between courts martial and civilian courts is blurred.

Military affiliate judges are appointed by a former military officer who was elected to a civilian post and previously worked as a career judge or civil servant under the military regime. This is perhaps the most controversial type, as I suggest that these judges are perceived to be affiliated with the military even though they never worked as military officers. The loyalty of military affiliates to the military may be described as moderate, in comparison to military insiders. They are affiliates because they willingly served part of their career working for a bureaucracy under the military regime.

Civilian affiliate judges are appointed by a civilian executive and previously worked as a career judge or civil servant under a military regime and/or military-backed government (but not as a military officer). If regime change leads to military rule, civilian affiliates face the exit dilemma. Civilian affiliates could become allies of the military and switch loyalty. This is less likely to occur in the apex court, given its influence and control over the lower courts and the need for the military to maintain control. If a civilian affiliate judge stays on the bench and exercises voice by deciding cases contrary to the interests of the military, the judge runs the risk of being impeached or being extralegally removed from office.

All of the above judicial types have a connection to the military in terms of either direct military service or indirect service in the administration under the former military regime. The fourth type, a civilian outsider, has no connection to the military. Civilian outsiders are appointed by a civilian executive and never held a position as a military officer or as a civil servant under military rule. Civilian outsiders presumptively have the strongest loyalty to civilian authorities and are the most likely to exit the court or be forcibly removed by the military if the country shifts to military rule. The military may perceive civilian outsiders as disloyal given their lack of service to the military or to the administration under military rule. Civilian outsiders are least likely to shift their loyalty to the military. At the least, it is not possible to tell from collective court decisions whether an individual judge disagreed with the decision of the majority of the bench.

The idea of individual judicial loyalty is based on the appearance of loyalty at the time of entrance or exit. Decision making in court cases is another component of individual loyalty in regimes where judges can issue individual judgments or dissenting views. However, my focus is on regimes where judges cannot express individual views in cases heard by more than one judge, so court decisions are less relevant to individual loyalty.

The institutional dimension of loyalty is interrelated with individual judicial loyalty. Institutional loyalty to the military is influenced by who leads the court and

the majority composition of the bench. There are four types: a compliant court, a co-opted court, a divided court, and an independent court. These ideal types presume that the chief justice exerts strong control over the court. A compliant court is a court that submits to the military regime because it is led by a chief justice from the military and a majority of the bench are military affiliates or military insiders. A co-opted court is a bench led by the chief justice from the military, but with a mix of civilian and military appointees. The difference between a compliant and a co-opted court is that in the latter the chief justice plays a stronger role to ensure that the court maintains its loyalty to the military so, for example, the internal allocation of judges to a case takes on heightened significance. A divided court is where the chief justice is a civilian outsider or affiliate but a majority of the bench are military insiders or affiliates (this is likely to be rare or undesirable under military rule). An independent court is free from the influence of the military regime and led by a chief justice who is a civilian outsider or affiliate and a majority of the bench are civilian outsiders or affiliates.

The strength of institutional loyalty to the military in any particular court case will depend on a range of other factors, including the allocation of the court docket. Further, judicial profiles matter more in courts with open recruitment systems, where noncareer judges may sit alongside career judges, compared to closed recruitment systems where only judges in the lower courts are eligible for appointments to higher courts (see Cappelletti 1989; Merryman and Perez-Perdomo 2007). An independent court, for example, may be impossible where courts use a system of closed recruitment. This is not the case in Myanmar; there has been a system of open recruitment since 2011 and so in theory an independent court is possible.

In this article I explore this idea of individual and institutional loyalty to the military in Myanmar, beginning with the fundamental challenges to studying judges in military regimes.

ON METHODS: STUDYING JUDGES IN MILITARY REGIMES

The study of judges in military regimes presents specific methodological and ethical challenges. Scholars have affirmed the need for fieldwork, archival research, and ethnographic observations in authoritarian regimes, while acknowledging the importance of addressing the ethical and methodological challenges (Massoud 2016). Methodologically, I take a relational approach to studying judges.⁸ A relational approach understands judges and courts as embedded in society, part of the broader legal, political, economic, and social networks. I undertook ethnographic fieldwork to understand the courts' embeddedness in Myanmar's military authoritarian regime. In my research, I sought to balance the sensitivities of studying the courts with the necessity of interrogating information the courts did, or did not, make public. I also adapted my approach to the reality that the primary ideological fault line of judges is military or civilian (rather than alignment with the policy preferences of one political party or another).

8. On relational sociology see Emirbayer (1997). For another example of a relational approach, see Wang and Liu (2019) on China's legal system, and Dressel, Sanchez-Urribarri, and Stroh (2017) for a comparative perspective.

Studying judges in authoritarian regimes requires being alert to the sensitivities and validity of information gathered, and grounding court records, including judicial profiles, in an ethnography of the local context (Merry 2002; see, for example, Geertz 1983; Merry 2000). Between 2011 and 2020, I made numerous trips to the Supreme Court, and visited five high courts and many township courts. I have collaborated with many judges who are part of this study on various education initiatives. Even during this period of relative political reform, there were limitations on my access to the courts and on information available. While I was invited to survey judges about judicial independence, it was clear that methodological techniques for ensuring impartiality and anonymity of the participants would be insufficient to guarantee independent responses.⁹ As a result, I draw on archival sources, online resources, and ethnographic participant observation. Information can be confirmed by publicly available sources so that no individual is at risk given that the country is now under military rule.

In such a context, publicly available information about courts should be treated with skepticism and interrogated. Post-2011, the courts have gradually established an online presence yet the courts primarily disclose information that is administrative and bureaucratic, rather than substantive. For example, the courts do not make their decisions available online (except select reported cases of the Supreme Court). An example of publicly available information is their annual reports.¹⁰ In 2018, the first high court annual reports were published. The reports include photos of official ceremonies, photos of trainings, and judges' headshots; information on new court buildings and equipment; budgets and tenders; and descriptions of the powers of the court, the size of its staff, and its caseload. In short, I read the annual reports as playing a part in obfuscating the courts' role in judicial decision making. Looked at another way, the information available online is an accurate picture of the courts' role as an administrative institution.¹¹

My study includes 141 judicial profiles, including retirements and new appointments, based on ethnographic fieldwork and publicly available profiles combined with a range of other sources including court websites,¹² social media, judicial journals, and state-run newspapers. There are three main reasons I focus on the Supreme Court and high courts.¹³ First, these are the apex courts of the general (civilian) court system. Second, since 2011, constitutional reforms introduced a formal system of open recruitment for these courts. This is potentially a reform that could liberalise or demilitarise the courts, as individuals who are not judges or career civil servants, such as lawyers, can be appointed as judges. Third, the fourteen high courts of the states/regions were established in 2011 during the start of the reform era and oversee the district courts, township courts, and self-administered zone courts. While much scholarship has focused on the

9. I would like to thank Jeffrey Staton for our discussion on these issues.

10. Here I am drawing from a review of separate reports published by each of the fourteen state and region high courts each year over a period of three years from 2018 to 2020 (published in Burmese).

11. For a critical historical analysis of the court administration, see Cheesman (2019).

12. The Union Supreme Court website launched in 2014, and state and region high court websites were established in 2020.

13. I exclude the Constitutional Tribunal, the courts martial, and military tribunals that try civilians. Courts martial have the authority to try military personnel. In contrast, military tribunals are ad hoc courts set up by the military to try civilians during a period of martial law or military administration. Profiles of judges who staff these courts are not publicly available. On the Constitutional Tribunal, see Crouch (2018).

relative political reform through the new national legislature, consideration has not yet been given to the role the high courts play as the subnational apex courts of each state or region.

I expand the literature on judicial behavior to the decision to enter or exit the court, and leave for later inquiry the possibility of linking judges' profiles to court decisions. The literature on judicial behavior presumes that court cases are comprehensively and independently reported and publicly available. However, in Myanmar, a systematic collection of court decisions is not readily available. Reported cases of the Supreme Court are often released several years late and are a fraction of the actual cases, often less than twenty cases per year.¹⁴ The high courts do not report any cases at all. Most court decisions of the high courts are still recorded in hard copy on typewriters.¹⁵ While there are ways to obtain unreported decisions, such as by purchasing case summary digests by court officials or obtaining copies of original court documents through lawyers, there remains the challenge of obtaining a representative sample. The absence of reported cases, I suggest, is one reason that the courts in Myanmar lack an audience (aside from the parties to a case). Even the official bar association is co-opted by the government.

It is often not possible to determine the voting behavior of individual judges of the Supreme Court and the high courts, because they work under certain constraints. Judges are not permitted to write individual judgments and there is no recognized practice of dissenting judgments (this ended in the 1960s) (Cheesman 2012a; Myint Zan 2014). Despite this, I acknowledge that judges can rule against the government of the day or act in ways that obstruct the government's wishes, such as bribery (Cheesman 2012b; 2015, 161–92). Judges deal with many cases that are nonpolitical, or not related to the military, such as family law disputes, and these cases may be an area for judges' subtle independent behavior. My focus however is on the politics of entry-exit, and I leave court decisions for future consideration. I turn next to the historical process by which the courts were militarized and, counterintuitively, how the expansion of the courts post-2011 facilitated militarization.

CASE STUDY: THE MILITARIZATION OF THE COURTS IN MYANMAR

Historical Background: The Long *Durée* of Judicial Subordination to the Military

Judicial-military relations in Myanmar have changed over time in favor of the military. In the decades since the 1960s, the military has instrumentalized the courts through a process of militarization, subordinating them and rendering them loyal to the military.

14. For an example of the use of natural language processing to review the docket of the Myanmar Supreme Court over five years from 2007 to 2011, see Nardi and Lwin Moe (2014). They note the difficulty of drawing any conclusions from their analysis.

15. At one court I visited in 2013, the judge mentioned to me that she had personally purchased the one desktop computer in the court.

The courts were once independent of the military. In postcolonial Burma in the late 1940s and 1950s, the courts prided themselves on their independence, all judges were civilians, and the chief justices boasted foreign degrees from the Global North.¹⁶ The immediate postcolonial period, 1948–1962, was one of rule by a democratic parliament and independent courts. This is with the exception of 1958–1959, when the military commander took over as president and military officers worked alongside the government administration. After a brief return to elected rule, in 1962, General Ne Win staged a coup and the country entered an era of military rule.

Since the 1960s, Myanmar's military has monopolized law and politics. The courts were restructured and subordinated under a military-led socialist regime (Myint Zan 2008; Cheesman 2012a). A key strategy was the transfer of military personnel into civilian posts. The military intervened in the administration and an increasing number of military officers served in executive positions (Nakanishi 2013). Starting in the 1970s, the military institutionalized the secondment of military officers into the government administration and into positions of leadership (Nakanishi 2013, 167), including the courts. From 1972 to 1988, the People's Councils, hybrid administrative-judicial organizations, had the highest number of transfers of military officers into their ranks, with 794 officers transferred or a total of 45 percent of all transfers across the administration (Nakanishi 2013, 161). This is the era when military insiders began to enter the judiciary.

The year 1962 marked the beginning of almost five decades of military control over judicial appointments. It also signaled a shift from open recruitment to primarily closed recruitment, shutting off the judiciary as a career path for lawyers. The military detained the chief justice and replaced him with its own loyalist, U Bo Gyi, the first chief justice who did not hold overseas qualifications. This was the start of the military's control over judicial appointments. In 1965, the military appointed Maung,¹⁷ a judge who had previously served as Assistant Attorney General under General Ne Win (1958–1960). From the 1970s to 1988, the regime continued to appoint persons to the position of chief justice who were expected to be loyal both to the military and to the Burma Socialist Programme Party (BSPP), the socialist front used by the military.¹⁸ The chief justices were either former military officers (military insider judges) or career civil servants who were members of the BSPP (military affiliate judges).¹⁹ The courts were officially responsible to the unicameral legislature, the Pyithu Hluttaw, and were considered subordinate to it (Myint Zan 2000, 42, 51). The independence of the courts was further compromised as the term of office for judges was the same as for the Pyithu Hluttaw. The people's courts followed policies of the Council of State, which comprised

16. Sir Ba U (1948–1952), U Thein Maung (1952–1957), and U Myint Thein (1957–1962) all received an MA and LLB from Cambridge University in England. In addition, U Thein Maung had a BA from Calcutta.

17. Maung Maung attended Rangoon University, but earned an LLD (Utrecht) and a JSD (Yale).

18. Chief Justices U Hla Thin (1972–1974); U Aung Pe (1974–1981), a former colonel (military); U Moun Moun Kyaw Win (1981–1982), a former brigadier and barrister; and U Tin Aung Hein (1982–1988) all received their degrees from Rangoon University and were members of the Burma Socialist Party.

19. "Obituary: Junta Insider Dies at 92." *The Irrawaddy*, March 26, 2018. <https://www.irrawaddy.com/news/burma/obituary-junta-insider-dies-92.html>.

a majority of military officers. In political trials, judges were known to have received orders from the administration.²⁰

The post-1988 era of military rule was the most blatant period of military control of the courts. Judicial appointments were made by military decree. The military manipulated the courts without any legal pretense of restraint on appointments, term, or removals. The military appointed U Aung Toe, a retired official of the socialist-era courts, as chief justice, along with five other judges. A decade later, in late 1998, five judges were permitted to retire (a euphemism in Myanmar suggesting they were removed) and, in their place, the military appointed four new judges.²¹ In 2000, the regime introduced a law that required the Supreme Court to sit in metropolitan areas of Yangon and Mandalay, expanding the bench to seven and four judges, respectively. In 2006, the military moved the civil service to the new capital, Naypyidaw, including the chief justice and deputy chief justice, although seven judges remained in Yangon and six in Mandalay.²² These changes took place in anticipation of the 2008 Constitution, prior to the constitutional referendum, a sign that the draft constitution was a *fait accompli*. From 1988 to 2011, U Aung Toe held the position of chief justice. The military used his lengthy tenure as a means to exert control over the courts. In many respects, the militarization of the courts became the default mode or equilibrium in Myanmar. Under a military-appointed chief justice, the courts were expected or perceived to be compliant courts. In the decades prior to 2011, the judiciary was loyal to the military, and so the military had full confidence in the courts and the law as a key mechanism of authoritarian rule (Cheesman 2009).

Starting in 2011, political and legal reforms shifted the country away from direct military rule to constitutional rule. The military reintroduced competitive elections and established a legislature in a bid to develop legitimacy for its new system. At the subnational state and region level, high courts were established to oversee the district courts and township courts. The reforms did not include an intentional effort to decentralize, liberalize, or demilitarize the courts. In fact, like other areas of the administration, the militarization of the courts continued through transfers of former military officers into the judiciary. At times, military transfers into the judiciary provoked public opposition.²³ In 2015, lawyers and advocates for judicial independence posted photos on Facebook of themselves wearing a yellow ribbon as a sign of protest.²⁴ Then in 2016, what had previously seemed politically impossible happened—the military handed over power to an elected civilian government, the National League for Democracy (NLD). This ended in 2021, when the military staged another coup.

20. In an interview many years later, former chief justice Tin Aung Htein admitted that he had received orders from the administration in relation to the trial of Tin Oo (Kyaw Yin Hlaing 2003).

21. Order No 6/1998 of the SPDC. Cheesman (2009, 265).

22. This information is drawn from the Judicial Journals published by the Supreme Court from 1998 to 2008.

23. Pyae Thet Phyo and Swan Ye Htut. "Yellow Ribbons Seek an End to Militarised Judiciary." *The Myanmar Times*, September 10, 2015. <http://www.mmTimes.com/index.php/national-news/nay-pyi-taw/16400-yellow-ribbons-seek-an-end-to-militarised-judiciary.html>.

24. This campaign mimicked other social media campaigns protesting against former military officers being transferred into civil service entities such as the Ministry of Health, sometimes without the necessary experience.

Overall, since 2011, there have been three distinct periods in civil-military relations. In the first period, 2011–2016, the Union Solidarity and Development Party (USDP) government was a regime run by a military-backed political party of former military officers who took office after the questionable 2010 election. The USDP government was a military-backed government because the USDP is a political party supported by the military and the constitutional system does not give the civilian executive control over the military.

In the second period, 2016–2021, the NLD government was a partially elected civilian government that existed within the military-state. The military retains significant powers under the Constitution, effectively acting as a veto power against any elected government (discussed further below). The civilian government existed within a legal complex captured by the military. The compromises to civilian rule include that 25 percent of seats were reserved for the military, former military officers were elected to office, and large parts of the government administration had either worked for extended periods under military rule or previously held a position within the military. This was a quasi-civilian government and while the political party that won office was civilian, the legal and political system did not permit civilian control over the military.

In the third period, since the coup of February 2021, the commander in chief is the ultimate authority; he has prevented the incoming government from holding office and has remade all power structures. The commander in chief initially ruled through a central State Administration Council that consists of military officers together with some civilians; in late 2021 the Council was replaced by a so-called caretaker government. Under this regime, the military claims to be in control politically and civilians only serve at its whim, often by threats and coercion. In addition to its political role, over many years the military has crafted an expansive role for itself, including in the economy, such as through its control over two major military-owned conglomerates that span multiple sectors from the extractive industries to construction and tourism. The coup of 2021 is a return to the political equilibrium of overt military rule.

Individual and Institutional Dimensions of Judicial Loyalty

The period starting in 2011 demands that we reconsider our understanding of the composition and design of the courts within the context of a new constitutional framework. I first explain some of the common characteristics of judges in this period and the institutional context, before turning to discuss how the individual and institutional dimensions of judicial loyalty sustain the militarization of the Supreme Court and then the high courts.

The individual profiles of judges in Myanmar are strikingly uniform. High court judges are mostly male ethnic Burman Buddhists educated domestically at the University of Yangon in the 1980s (although about 30–40 percent are women). The only difference between the chief justice and judges of the high courts is that the former is more senior in years of experience. Supreme Court judges have a similar profile, though up until 2021 there were no women. Judges share many characteristics in terms of education, ethnicity, religion, gender, and seniority (described in detail later), yet I show that the key point of difference is whether they are from the military or worked for the military-led bureaucracy.

Institutional loyalty is shaped by the political and legal environment in which the court exists. In the 1990s and 2000s, the military engaged in preemptive constitution-making, that is, it controlled the constitution-making process in order to contain a potential transition toward constitutional democracy (Crouch 2020). The purpose of preemptive constitution-making in authoritarian regimes is to use a new constitution to arrest and limit the possibility of transition, and ultimately to contribute to authoritarian-regime resilience. The military used the 2008 Constitution to enshrine its role in politics and as the most powerful institution in the country. In fact, the military is named in the Constitution as having a leading role in politics and acts as a *de facto* interpreter of the Constitution.

While some scholars have described the state post-2011 in Myanmar as praetorian (Egreteau 2016) and others as a double-edged *détente* (Slater 2014), such characterizations fail to fully capture the entanglement of the military in civilian politics and the military's use of law to achieve control over civilian institutions. The military uses the Constitution to facilitate the coexistence of military and civilian actors and institutions under the military's ultimate control, a situation I have described as a military-state (Crouch 2019a). The military-state has three key parts—the political leadership of the military; a national ideology that places the military at the heart of the state; and military infiltration and oversight of a centralized administration. Rather than capture one institution or branch of government, the military has infiltrated all branches of government while simultaneously maintaining its own institutional autonomy. The judiciary has two main roles in the military-state. First, the judiciary is like a branch of the administration. It is subordinate to the legislature and reports to it. The courts have a similar function to other government departments and at times are involved in lawmaking.²⁵ Second, judges do not interpret the law. While the legal profession may pay lip service to the common law, judges generally do not consider it their role or within their powers to interpret the law.

The career track from judicial officer to senior judge is a form of bureaucratic socialization. The closed recruitment system of the lower courts is a feeder into the apex courts. Most Supreme Court and high court judges start out as career judges of the lower courts, where they are classified as civil servants. The process and structure of judicial appointments to the lower courts in Myanmar is closer to that in civil law systems than that in common law systems (Merryman and Perez-Predomo 2007). Promotion is based on years of service and seniority. In the lower courts, judges are rotated to a different court roughly every three years. Rotation may sometimes be used in conjunction with promotion or demotion (e.g., rotating a judge who is misbehaving to a remote area, or rotating a judge to a sought-after metropolitan placement as a reward for promotion). Away from home, a judge's social network may shrink as they become dependent on their colleagues with whom they share similar experiences.

This extended career track means that judges become reliant on their job for basic social services such as housing, income,²⁶ and transportation. A judge's decision to exit prior to retirement may be influenced by the fact they would lose their income, housing,

25. I acknowledge the limits of the state judicial system and the existence of nonstate systems: see, for example, Kyed (2020).

26. As Cheesman points out, given the low salary of judges, corruption is also rife (Cheesman 2012b).

transportation, future pension entitlement, and social network. However, the choice to leave is a real one, as demonstrated by the contemporary Civil Disobedience Movement (known as “CDM”), a prodemocracy movement that emerged after the 2021 coup and encourages civil servants to leave their jobs as a sign of protest against military rule. A civilian affiliate or outsider is most likely to choose to leave the court after military takeover because they are unwilling to serve in the military. The decision of civilian affiliates to stay on the bench may indicate that they have shifted loyalty to the military, while also being influenced by other factors mentioned above.

Drawing on these individual and institutional dimensions of judicial loyalty, I now consider the Supreme Court and high courts in more detail.

The Union Supreme Court

The Supreme Court complex is not open to the public and lies 40 kilometers outside of the capital Naypyidaw in central Myanmar. The Court is geographically isolated from the legislature as the most powerful quasi-civilian state institution (2011–2021), as well as from the rest of the country, that is, the people. There are no other buildings in sight and no public transport. The buildings are in a compound with a high iron fence locked at the front and manned by security. Physically, the Court is as far removed from the people and society as possible. Yet the Court is very close to the military. I show that most judges are military insiders or military affiliates, creating a strong perception of entry-level loyalty to the military. On the institutional dimension, the Supreme Court was a compliant court from 2011–2016 and post-2021; from 2016–2021, it was a co-opted court with civilian affiliates although it was still led by a former military officer.

Despite changes to the judicial appointment criteria, which allows for open recruitment, I found that the military continues to operate as if the courts are a closed recruitment system. By closed recruitment system I mean that judges are recruited from either the judiciary, the military, or government administration. The post-2011 appointment process does not offer any insulation from politics for Supreme Court judges; there is no judicial commission, eschewing global trends. The chief justice is appointed by the president and the legislature cannot object to the nomination unless the appointee does not meet the selection criteria. The president, together with the chief justice, appoints the other judges to the bench. The appointment process is now explicitly one of open recruitment, that is, the criteria allows the president to nominate noncareer judges, such as an advocate (lawyer), a judge, a law officer (prosecutor or government legal officer) or judicial officer, or an “eminent jurist.” The power of the Supreme Court includes original jurisdiction and exclusive writs jurisdiction, appellate and revision authority, and supervision of the lower courts.²⁷ The Supreme Court does not hear cases for constitutional review (except for the writs), unlike the Indian Supreme Court.

27. This is with the exception of periods during an alleged constitutional emergency, such as the one in effect since February 2021, when constitutional writs are no longer available.

Under the USDP (2011–2016), the Supreme Court was a compliant court that consisted of military insiders and military affiliates. The ties between the chief justice and the military are one indication of institutional loyalty to the military. The chief justice is a military insider and exerts control over the general court system. The chief justice is involved with the president in the appointment of high court judges, and so he potentially has an influence over the lower courts. Further, the chief justice has an influence over the development of the law. While cases may be heard by a single judge, or sometimes by a bench of three judges, the decision of a single judge can be appealed to a full bench where decisions are unanimous. The chief justice also oversees the administration and resources of the judiciary. Appointing a military insider as chief justice means that the military retains close ties with the judiciary.

In addition to the strategy of appointing military officers, the USDP government deliberately appointed judges at a relatively young age. This ensures a longer tenure, as judges must retire at the age of seventy. For example, in 2011, the military sought to extend its influence over the Court by the appointment of U Htun Htun Oo to the position of chief justice at fifty-five years old, ensuring a fifteen-year tenure. The military passed over existing judges on the bench who were older than him.

U Htun Htun's profile is indicative of military insiders. He is a former military officer from the office of the Judge Advocate General. He was educated domestically at Rangoon University, which contrasts with the international qualifications of the first three chief justices postindependence. In the 1980s, Htun Htun Oo was a captain in the Southwest military command. Starting in 1990, he served in the department of the Judge Advocate General. The Judge Advocate is the official representative of the Judge Advocate General in the courts martial. The department of the Judge Advocate General has seen a gradual increase in status and prestige over time from the rank of a colonel to a Major General (Maung Aung Myoe 2009, 72–73).²⁸ The Judge Advocate is responsible for preventing crime, prosecuting crime, research, and training for military officers (Defence White Paper 2015). This indicates the close relationship between the department of the Judge Advocate and the military, and the wide scope of its role beyond legal trials in the courts martial.

In 2005, Htun Htun Oo was appointed to the Supreme Court in Yangon. By 2007, he was transferred to Naypyidaw as the deputy chief justice, working closely with military insider Chief Justice Aung Toe, who played a key role in the process of constitution-making. This was the year of the Saffron Revolution, when many monks and activists were detained and tried by courts for protesting against the military regime. By February 2011, on the eve of the political transition, U Htun Htun Oo was nominated by the president as chief justice. He can serve until 2026 when he turns seventy. The profile of the chief justice is a classic example of a military insider.

From 2011 to 2016, the remainder of the seven-member bench included two other military insiders and four military affiliates. All seven judges fit the characteristics I describe earlier of the Burman Buddhist male judge. Up until 2021, there had never been any female judges, which is indicative of a glass ceiling in the courts. The absence of women is not surprising, in part because if judges are drawn from the military, they are

28. In 1988, the Judge Advocate General was established as a separate department; since 2010 it has been known as Office of the Judge-Advocate General.

likely to be men. Under the USDP, the Supreme Court was a compliant court because the chief justice was a military insider and all judges were either military insiders or military affiliates.

The process of socialization begins through local legal education. All seven judges were educated domestically and share a similar educational background. During the socialist regime (1962–1988) they either received a BA degree, which was common for those completing their schooling prior to the 1980s, or an LLB degree post-1980 from the University of Yangon or the University of Mandalay.²⁹ The quality of legal education in Myanmar has suffered under decades of military rule (Myint Zan 2008).

From 2016 to 2021, under the NLD, the Court gradually shifted to a co-opted court with a mix of insider, outsider, and civilian and military affiliate judges, with the position of chief justice still held by a military insider. The reduction in the degree of judicial loyalty to the military occurred largely naturally, by retirements, and therefore slowly. The NLD did not opt to remove sitting judges or, initially, to pack the Court by expanding the size of the bench. In 2017, the NLD had the opportunity to make two new appointments due to the death of one judge and the retirement of another.³⁰ The president took the opportunity to appoint four judges, effectively expanding the bench from seven to nine judges. Two of these judges were civilian outsiders as career lawyers, while two were civilian affiliates. In 2018, another retirement enabled the NLD to appoint another civilian outsider. From that time, the NLD-appointed judges formed a majority on the Supreme Court (5–4). As a co-opted court, it was internally divided. Yet the chief justice retained control over the Court as he has power to allocate judges to cases; cases heard by more than one judge were also made unanimously. The NLD could have legislated to allow judges to write separate judgments and dissenting judgments, but it did not.

In other respects, the profile of judges under the NLD largely remained the same: male Burman Buddhist. In yet another paradox, the NLD did not seek to further political liberalism by appointing a more diverse bench; in fact, none of the five judicial appointments were women, nor were any of them ethnic or religious minorities. The NLD's term shows that the power of appointment lies with the president, not the chief justice, as the latter did not oppose the appointments proposed by the NLD.

After the coup of 2021, the commander in chief took over and installed a new mixed civil-military administration. The consequences of the coup have been catastrophic: the military has killed over 1,874 civilians and arrested, charged, or sentenced 10,841 people.³¹ The military has used extrajudicial means against opponents including both targeted and arbitrary violence by the police, the military, and paramilitary groups. Civilians have been arbitrarily arrested, some have disappeared, others have been tortured. In addition to these extralegal measures, a prominent part of the military's arsenal against civilians is the use of law and courts. However, unlike in Pereira's (2005) study of courts under the military in Latin America, where some regimes used violence more and courts less, while other regimes used courts more

29. Then known as the Yangon Arts and Science University and Mandalay Arts and Science University, respectively.

30. President's Office Appointment of Supreme Court Judges, Notification 2018.

31. Assistance Association for Political Prisoners, data as of May 30, 2022. <http://aappb.org>.

and violence less, there is no relationship between the degree of violence and the use of law. The military has used both legal and illegal means to suppress anticoup efforts; my focus here is on the social processes by which the military subordinates the courts.

Six days after the February 1 coup, the military formally removed judges who were civilian affiliates and outsiders, replacing them with military insiders or affiliates.³² In contrast to the NLD, the judicial turnover was extralegal and by force, rather than by natural retirement or voluntary exit. The military then appointed another five judges, turning the bench into a compliant court. The judges who were removed were not due to retire and there were no formal impeachment proceedings. The removal of these judges shows that the military, which distrusted the loyalty of NLD-appointed judges, rendered the concept of tenure under the Constitution meaningless.³³ This purge is not due to a risk that the Supreme Court would review the legality of the military's alleged declaration of a constitutional state of emergency or of martial law, as courts have done during coups in Bangladesh and Pakistan. Rather, it is to ensure military control over the political trials of anticoup activists and former politicians, including Aung San Suu Kyi. Starting in June 2021, criminal appeal cases have been heard by a Supreme Court bench of five that includes the chief justice, three military affiliates, and one military insider; these four judges were appointed by the military since the coup (GNLM June 15, 2021).

In the Supreme Court, there is a long history of judicial subordination to the military. Despite the post-2011 era bringing some political reforms, it did not lead to liberal reform of the courts. In fact, under the USDP government, the informal practice of closed recruitment continued. The NLD government practiced open recruitment, but the Court was still led by a chief justice who was a military insider. Under military rule since 2021, the military did not wait for judges to decide against it, it extralegally replaced most civilian judges. This indicates that exit for judges of the Supreme Court is likely to be forced and not natural or voluntary.

STATE AND REGION HIGH COURTS

The Supreme Court does not exist in isolation but is closely connected to subnational courts. In 2011, Myanmar's unitary judicial system was revised to include fourteen state and region high courts at the subnational level. The jurisdiction of the high courts extends to original civil and criminal matters, and appeal and revision cases. Unlike their judicial counterparts across South Asia that share a common law heritage, high court judges in Myanmar do not have the power of judicial review and do not hear constitutional writs cases. The high courts' primary role is in overseeing criminal cases and cases on appeal from the lower courts.

The establishment of these high courts raises a puzzle: did the military create the new subnational apex courts to be a force for reform, demilitarization, and decentralization, or are they an extension of the system of court subordination to the military?

32. State Administration Council Order 24/2021, regarding termination from duty of justices of the Supreme Court, February 4, 2021.

33. Contra Cheesman (2009), who has suggested that the military made the judiciary into "a reliable instrument" for authoritarian control.

I find that the military created these courts to enhance centralised control over subnational courts. The militarization of the courts has continued because of the persistence of the informal practice of closed recruitment.

In short, there is a gap between who can potentially become a judge and who does become a high court judge. Formally, the president appoints the chief justice of a high court, in collaboration with the Supreme Court chief justice and the subnational executive leader.³⁴ This rule creates a potential opportunity for the chief justice, as a military insider, to prevent civilian outsiders from entering the high courts. Counterintuitively, under the NLD, the chief justice did not prevent the president from appointing civilian outsiders or affiliates. This suggests that the chief justices' role in this process is symbolic and not substantive. In other words, there was scope for the NLD government to demilitarize the high courts.

Yet the actual practices of appointment to the high courts follow a closed recruitment process and a practice of deference to seniority defined by years of service. Even though judges can be appointed at forty-five years old, new appointees tend to be closer to the maximum age limit of sixty-five.³⁵ The leadership of the high courts is predictable because, as my data shows, it draws on the next most senior judge from among the total pool of high court judges. In theory, a judicial candidate must have experience as either a judicial officer or prosecutor,³⁶ or have practiced as an advocate, or be an eminent jurist in the opinion of the president. In practice, the preference is to appoint career judges to the high court, that is, the default is closed recruitment.

While the military takes a largely uniform approach to recruitment in the high courts, appointments to the two metropolitan courts, Yangon and Mandalay, are clearly of most importance. The high courts can be differentiated by their relative importance to the military depending on their location. I suggest that there are three types of high courts: metropolitan courts, lowland courts, and borderland courts. Metropolitan courts are in the two largest, cosmopolitan cities of Yangon and Mandalay.³⁷ These cities are the center of trade and commerce, as well as historic sites of student activism. Politically, in these cities there is strong support for the NLD. These two high courts have the largest benches (six and seven judges, respectively) and account for a large percentage of all high court cases: in 2019, they received 42 percent of all cases filed in the high courts. In their supervisory capacity, they supervise many lower courts and judicial officers. The military maintains an interest in controlling the metropolitan courts, given their strategic location, the large number of cases they hear, and the potential for politically sensitive cases. By extension, the military has a vested interest in ensuring the loyalty of judges who sit on these high courts. Among the ranks of lower judges, appointments to these courts are competitive.

Lowland courts are located in lower Burma, where the population is majority Burman Buddhist and which includes the regions of Sagaing, Bago, Tanintharyi,

34. The chief minister is the leader of the state/region and is appointed by the president (Constitution, section 308).

35. They must be forty-five to sixty-five years old and meet the requirements of Pyithu Hluttaw candidates.

36. They must have served as a judicial officer or prosecutor (known as "law officer") for at least five years at the state/region level or ten years at the district level.

37. Mandalay is the high court for Naypyidaw, the capital city.

Ayeyarwady, and Magway. Politically, these areas are traditionally strong supporters of the NLD. Lowland courts have a smaller bench than the metropolitan courts (three to five judges) and a smaller case load. In 2019, these courts received 35 percent of all cases filed. These high courts generally supervise a smaller number of lower courts. There are some similarities between lowland and borderland courts, although at least four of the lowland courts have a significantly larger role in supervising lower courts than the five borderland courts do.

Borderland courts are courts in the border regions of the country with a comparatively small population of ethnic minority groups.³⁸ Borderland courts include courts in Shan, Mon, Kachin, Chin, Kayah (Karen), and Karenni states. In these areas, ethnicity-based political parties and their related armed groups are the main source of resistance to the military. These courts generally do not decide important cases in terms of trade, because the vibrant black market operates outside of state control in areas bordering China, Thailand, India, Bangladesh, and Laos. Like lowland courts, these courts tend to have the minimum three judges. Borderland courts have a small caseload because the territory in some areas is in the hands of armed groups beyond the control of the state. In 2019, these high courts received 23 percent of all cases filed with these courts. These courts supervise the smallest number of lower courts. The exception is Shan State High Court, which supervises sixty-four lower courts (the large number of lower courts is due to the state's expansive land mass). Despite their location, borderland courts are more likely to be staffed by Burman Buddhist judges than by judges from the relevant minority group; this is a key point of difference from lowland courts (where Burman judges staff courts in Burman-majority areas).

Across these courts, the judges have undergone a similar process of socialization through education and career trajectory. Judges receive training via domestic legal education and then after that through judicial experience and training. All judges who served from 2011 to 2022 received their education during military-led socialist rule. The overwhelming majority of high court judges undertook their LLB degree in the Burmese language in the late 1970s and early 1980s at the University of Rangoon, with a handful graduating from the University of Mandalay. Later, most judges worked in the civilian judiciary (military affiliates and civilian affiliates) and served across the country due to the practice of rotations in the lower courts. Overall, judges lack the comparative and cosmopolitan education that civilian outsider judges of the early years of independence had.

The career path of civil servants under a military regime is a key part of the process of militarization. The trajectory of military affiliate and civilian affiliate judges is almost identical. They started their career in the early 1980s at the lowest level (Grade 4 Judicial Officer), after graduating from law school and passing the judicial examination. Once accepted into the judicial service, a judge must sit for further exams to eventually be promoted up to Grade 2. Their career begins in one of the 330 township courts as a deputy township judge, then additional township judge and township judge. Their career progression takes them to one of seventy-seven district courts as a deputy district judge, additional district judge, and then district judge. In addition, judges may also serve as judicial officers in the district courts, high courts, or in the Supreme Court.

38. These are Chin, Kachin, Kayah, Kayin, Mon, Rakhine, and Shan.

The judges' career trajectory, combined with the three types of courts—metropolitan, lowland, and borderland—provides the individual and institutional context to judicial loyalty to the military. Under the USDP (2011–2016), most judges were military affiliates and so all high courts were compliant courts. The majority of judges were over sixty years old at the time of appointment, which means that retirements occurred regularly (when they reached sixty-five). Under military-backed rule, women judges were always a minority on the bench. For example, in 2011, thirty-six high court judges were men and sixteen were women. Ten out of fourteen high courts had at least one woman judge. The reason for the low number of women is that appointment is based on years of service, favoring male career judges.

All chief justices were either military insiders or affiliates and had over thirty years' experience in the military or government administration. There were no female chief justices. Two high court judges and two chief justices were military insiders who had served in the legal apparatus of the military, the department of the Judge Advocate General. However, most high court judges were military affiliates who had been career judges for three decades. Three judges previously worked for the Attorney General's office. Seven judges had previously worked in the Supreme Court, indicating that holding the post of a judicial officer in the Supreme Court is a pathway to a high court appointment. Under the USDP, there were no judicial impeachments, although officials usually resign if they suspect they may be impeached.³⁹

Under the NLD government (2016–2021), the composition of the high courts shifted gradually. By the end of the NLD term, there were two compliant courts, nine co-opted courts, one divided court, and two independent courts. The NLD was cautious in its approach to judicial appointments and did not remove judges. Instead, change on the bench occurred in three ways. The most common way was natural or incremental turnover, with new appointments after a retirement in two lowland courts and five borderland courts. In two courts this led to the complete turnover of the bench to independent courts, and one was a divided court. However, other benches had no change, due to the absence of retirements. There was also change through the expansion of the bench in two courts.

The beginnings of a process of demilitarization of the bench were gradual and partial, and appointments were largely due to retirements, except two. The NLD's commitment to civilianization was also partial; it appointed only three civilian outsiders. Two left the bench, and so in 2021, only one civilian outsider remained. The NLD did not actively seek to use the courts to promote political liberalism by appointing independent lawyers as judges. One reason is that the absence of demilitarization from the top is a deterrent, that is, lawyers committed to civilian rule are less likely to want to become a judge while the Supreme Court remains headed by a military insider and the high courts report to it.

In replacing chief justices, the NLD followed the practice set by the military-backed government of promoting the next most senior judge as chief justice. There was an increase in women judges on the high courts, and the metropolitan courts

39. For example, in October 2013, the Rakhine state legislature initiated impeachment proceedings against a judge who allegedly took a bribe (Win Ko Ko Latt 2013). The judge resigned before the investigative body released its report.

had a majority of women on the bench (5–2 in Yangon and 4–3 in Mandalay). In late 2019, the first female chief justice was appointed,⁴⁰ breaking the glass ceiling of women in judicial leadership. This feminization of the courts was largely accidental rather than intentional.

While the high courts became mixed in composition, most still remained co-opted courts. Judicial appointments by the military post-2021 have been due to retirement vacancies and select expansion of the bench. A small number of judges have been replaced, either because they were forced to exit or because they left the court due to their participation in the anticoup movement. From 2021 to May 2022, the military appointed a total of twenty-three judges: eight chief justices and fifteen judges of the high courts. Of these, five judicial appointments were to the metropolitan courts, including the appointment of a new chief justice in Yangon and Mandalay. All judicial appointments are either military insiders or military affiliates who worked in the civil service for their entire career. The military did not remove civilian judges entirely, which suggests that these judges may have switched loyalty. The military is still following a rigid practice of promotion according to age regardless of who appointed the judge, even appointing civilian affiliates as chief justice. There are also now two women-only benches.

In contrast to the Supreme Court, the military did not act quickly to forcibly remove civilian affiliates or civilian outsiders from the high courts. This is because the military has maintained a military insider as the chief justice of the Supreme Court, in addition to other strategies such as creating military tribunals to bypass the civilian courts. Turnover on the apex courts is interconnected because the appointment of high court judges to the Supreme Court creates vacancies in the high courts. There has been a shift back to high courts as compliant courts. The military anticipated the prosecution of anticoup opponents and appointed new chief justices to the two most important courts, the metropolitan courts in Yangon and Mandalay, to ensure that it commands their loyalty. Overall, in 2016–2021, civilian judges faced a dilemma about whether to enter the high court and attempt change from within an institution loyal to the military. Exit from the court for civilian affiliates is generally by retirement, although this is because tenure is usually shorter than in the Supreme Court, and the military regime consistently replaces judges with military insiders or affiliates. Ultimately, rather than decentralize, liberalize, or civilianize the courts, the military created the high courts to extend its system of centralized military control.

CONCLUSION

In military authoritarian regimes, the relationship between the judiciary and the military matters. I have explored judicial profiles and the conditions under which the entry-exit dilemma is an indicator of loyalty. My goal was not to study how “uncourtlike” courts in military regimes are because, in agreement with Martin Shapiro (1981), this would miss the point that sociolegal studies need to be “freely accepting of the vast variety of actual social institutions and behaviors loosely

40. Order 48/2019 on the Appointment of Chief Justice in Rakhine State High Court.

related to that concept” of a court. Instead, by taking a relational and ethnographic approach that explores judges’ connections to the military, I have expanded our understanding of the ways courts are captured by the military, or the processes of the militarization of the courts.

In Myanmar, the political default is military authoritarianism and judicial loyalty to the military. Despite a new constitutional framework since 2011, turnovers on the bench have resulted in little change to the profile of judges, with the exception of judges’ relationship to the military. The courts have been, and continue to be, militarized through processes of selection, socialization, and restructuring of the courts that render judges loyal to the military. The judicial types I identify show that the military or military-backed regimes informally follow closed selection practices based on seniority, and only appoint military affiliates or military insiders. The civilian regime appointed some judges based on open recruitment but also continued to follow the seniority rule for closed recruitment, and so appointed a mix of civilian affiliates and outsiders. I found that while the entry dilemma is a choice for judges, in the Supreme Court exit is primarily about the risk of being forced to leave after regime change. Being appointed by a civilian regime is sufficient to risk being perceived by the military as disloyal. The risk of being forced to exit may in fact act as a deterrent for civilians considering entrance to the judiciary in the first place. Upon retirement, civilian affiliates in the high courts are likely to be gradually replaced with military affiliates. One change that has not yet occurred but that would count as a civilian revolution in the courts and as a key indicator of demilitarization in Myanmar is the replacement of the Supreme Court chief justice with a civilian outsider. What this study shows is that, in light of the history of military rule in Myanmar, the dilemma of would-be civilian judges is whether to risk being co-opted by the military if they enter the judiciary, or to risk being forced to exit after a return to military rule. This goes to wider questions of the role of courts during a military coup and the prospects for demilitarization after a period of military rule. While some observers have raised the question of whether Myanmar’s courts could play a role in returning the country to civilian rule, my study shows how the Supreme Court and high courts have been militarized and why they have not resisted the military coup.

The case of Myanmar is a vivid reminder to scholars of judicial behavior that in military authoritarian regimes, judges face an entry-exit dilemma. The initial challenge to demilitarization of the courts may be encouraging civilian outsiders to become judges, despite the risks. Overall, in the absence of individually attributed judicial decision making in court cases, entry to and exit from the judiciary are an important indicator of judicial loyalty to the military.

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