THE ROLE OF CONSTITUTIONAL LAW IN CIVILIAN CONTROL OF THE MILITARY

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Abstract

This dissertation discusses the role of the constitution in establishing civilian control of the military through the lens of comparative constitutional studies, filling the gap in the literature. The first part discusses how constitutions can be seen and used in various ways to control the military based on the original dataset, which includes all available past and current constitutions. The latter part of the dissertation provides a theoretical framework for these eclectic constitutional provisions through an analysis of the principle of separation of powers and the unique characteristics of the military.

The main argument is that constitutions can both constrain and empower the military through similar forces unique to constitutional law. Constitutional texts function more than just the reflection of a country's civilian-military relations. Due to its power to make credible commitments and create legitimacy, the constitution can mobilize all civilian actors against the military to ensure civilian control. However, when the constitution involves the military without a specific design, there is a great danger that the military can instead preserve and extend its political roles through the abusive use of constitutionalism.

Case studies of countries from Turkey, Thailand, and Myanmar illustrate the limited usage of the constitution as a tool for civilian control and the risks that powerful militaries may use the constitution to further authoritarian gains. Thus, the dissertation suggests that a better understanding of how the constitution might affect the military is not only academically relevant but also instructive for constitutional drafters and practitioners who face the problem of civilian control.

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I: Introduction and Description of the Military in the Constitution

Chapter I: The Military under the Constitution: The Role of Constitutional Law in Civilian Control of the Military

Introduction

Cincinnatus, the legendary Roman military leader, was twice appointed as the dictator of the Roman republic to deal with emergencies. His heroic deed as the dictator impressed people throughout history because he wielded such absolute powers but promptly returned to his retirement as a farmer after ending the crisis that led to his dictatorship.[1] Cincinnatus is such a rare example that it took almost two thousand years to find another Cincinnatus in George Washington when he retired from his presidency to his farm, throwing away an opportunity to establish his monarchical dynasty.[2]

It is, therefore, a great mystery that, without an abundance of Cincinnatus-like leaders, the world is not uniformly governed by warlords but by civilian leaders. Indeed, civilian control of the armed forces has been the norm of today's states. Even in civilian authoritarian regimes, the armed forces are expected to be loyal to their authoritarian

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[1] *See* GARRY WILLS, CINCINNATUS: GEORGE WASHINGTON AND THE ENLIGHTENMENT 20 (1984).

[2] *See* John Shelton Lawrence & Robert Jewett, The Myth of the American Superhero 130 (2002) (Comparing George Washington to Cincinnatus).

rulers. In this light, excluding soldiers from political offices appears to be another '*unqualified human good*' as universal as the rule of law.[3]

However, unlike the rule of law, the study of civilian-military relations falls outside the traditional scope of constitutional law. The rule of force does not fit easily with the rule of law. The association between constitutionalism and the military facially does not provide much beyond the conclusion that the military must be kept away for the good of constitutionalism and democracy, for it stands opposite to the values held dear in a constitutional democracy. The armed forces often betray public trust in their profession and seize power in one fell swoop.[4] As the pattern of coup d'états goes, the first business after a coup d'état is to suspend or abrogate the constitution and rule directly with neither legal constraints nor democratic mandate.[5]

That said, while the ever-dwindling military regimes themselves tend to favor weak constitutions with few rights, they at least care enough about the constitution to use it as a coordinating tool within their regimes purely for increased efficiency in governance.[6] Outside of military dictatorship, the armed forces also matter for

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[3] *Cf.* E. P. THOMPSON, WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT 266 (1975) ("the rule of law itself, the imposing of effective inhibitions upon power and the defence of the citizen from power's all-intrusive claims, seems to me to be an unqualified human good").

[4] Ozan O. Varol, *Military Influence on the Constitutional Order: Turkey*, *in* CONSTITUTIONALISM IN CONTEXT 474, 474 (David S. Law ed., 2022) (stating that the popular image of the military is that of "a universal threat to constitutional democracy").

[5] JOHN HATCHARD, MUNA NDULO & PETER SLINN, COMPARATIVE CONSTITUTIONALISM AND GOOD GOVERNANCE IN THE COMMONWEALTH: AN EASTERN AND SOUTHERN AFRICAN PERSPECTIVE 247 (2004) ("The fate of a constitution following a coup is depressingly familiar. Military usurpers abrogate, suspend or significantly amend the document and then rule by decree").

[6] David S. Law and Mila Versteeg, *Constitutional Variation among Strains of Authoritarianism*, *in* CONSTITUTIONS IN AUTHORITARIAN REGIMES 165, 184-86 (Tom Ginsburg & Alberto Simpser eds., 2013)

constitutions in countries with security concerns where the military has a salient role in everyday politics.[7] Even where the military poses the unlikeliest threat of overthrowing the government, such as in the United States, there is a recent wave in literature that criticizes the role of the military in endorsing conservative political agendas, especially issues concerning the president's ever-expanding power as the commander-in-chief under the Constitution.[8] Thus, casting aside any constitutional significance of the military would miss both the phenomenon already manifested and the opportunity to improve civilian-military relations in any regime. With an eruption of coup d'états since the pandemic in 2020,[9] there is a possibility that coup d'états may never become obsolete. Constitutions are again under the threat of forceful abrogation and manipulation by the military.

(discussing how military regimes prefer weak constitutions which better reflect how their states routinely operate).

[7] *See, e.g.*, Guy Davidov & Amnon Reichman, *Prolonged Armed Conflict and Diminished Deference to the Military: Lessons from Israel*, 35 LAW & SOC. INQUIRY 919–956 (2010) (examining the deference given to the military by the Israel Supreme Court); SHEILA A. SMITH, JAPAN REARMED: THE POLITICS OF MILITARY POWER (2019) (discussing the effects of the Article 9 over the evolution of Japan's defense policies); Jeremiah I. Williamson, *Seeking Civilian Control: Rule of Law, Democracy, and Civil-Military Relations in Zimbabwe*, 17 INDIANA J GLOB. LEGAL STUD. 389, 397-401 (2010) (discussing the use of the constitution to prevent military intervention in Zimbabwe).

[8] *See, e.g.*, Walter Dellinger, *After the Cold War: Presidential Power and the Use of Military Force*, 50 U. MIAMI L. REV. 107 (1995); DIANE H. MAZUR, A MORE PERFECT MILITARY: HOW THE CONSTITUTION CAN MAKE OUR MILITARY STRONGER (2010).

[9] *See* Declan Walsh, *Coast to Coast, a Corridor of Coups Brings Turmoil in Africa*, N.Y. TIMES (Jul. 29, 2023), https://www.nytimes.com/2023/07/29/world/africa/africa-coups-niger.html. (providing background on the recent wave of coups in six African countries from 2020); *"An Epidemic" of Coups, U.N. Chief Laments, Urging Security Council to Act*, REUTERS (Oct. 26, 2021), https://www.reuters.com/world/an-epidemic-coups-un-chief-laments-urging-security-council-act-2021-10-26/ (discussing the surge of coups and coup attempts since the pandemic).

With these preceding issues in mind, this dissertation fills in the gap in the literature by discussing the military's role as found in the constitutions worldwide. It describes various ways that the constitution can deal with the issue of the armed forces, ranging from complete silence to detailed stipulation. It then provides a conjecture on the underlying logic of the relationship between the constitution and the military. Finally, it combines the descriptive and theoretical accounts to examine empirically through quantitative methods and case studies to assess the failures and successes of constitutional attempts toward civilian control of the military.

I. Purposes and Scope of the Dissertation

A. Background

Civilian control of the military is an essential democratic norm.[10] There are, however, two common problems facing most jurisdictions that aim to achieve civilian control of the military and the supremacy of civilian authority in politics. The first and more obvious one is the risk of coup d'états: the total breakdown of a constitutional system and the usurpation of power by the military. The second and more subtle problem is regarding the improper political roles of the military. While the military in many jurisdictions does not seize power from the government outright, it can still erode

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[10] DAVID KUEHN & AUREL CROISSANT, ROUTES TO REFORM: CIVIL-MILITARY RELATIONS AND DEMOCRACY IN THE THIRD WAVE 52-55 (2023) (discussing the importance of civilian control with regards to the survival and quality of democracy).

democratic governance by exerting political influence outside its proper role as the defender of national security.

Unique to the military is the paradox of an institution that must be powerful enough to threaten its creator. First, the military is the only one who guarantees the monopoly of the force of the state. It holds a monopoly on violence to preserve the state's autonomy and enforce laws.[11] Thus, the soldiers could disregard all laws and start ruling by decree through their monopoly of violence. This fact raises the question of "Who watches the watchmen?" If the people gave up their right to the use of force and granted it to the military, who would provide a check against the abuse of such immense power? Moreover, the military also has its primary task of managing external security threats. While an all-powerful military threatens any non-military regime, a weak army will also fail to protect any regime from the perils of war. How can a state control the military without reducing its strength?

To solve these problems, scholars and practitioners rely on the principle of civilian control of the military. Initially, the principle mainly focused on the military's role in determining the national security policy, emphasizing the difference between the civilian government's political authority to decide on entering a war and the technical expertise of the military to fight wars.[12] As Carl von Clausewitz astutely observes since the early 19th century, "war is not a mere act of policy but a true political instrument, a

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[11] Max Weber, *Profession and Vocation of Politics*, *in* POLITICS WRITINGS 310-11 (Peter Lassman & Ronald Speirs eds., 1918).

[12] Peter D. Feaver, *Civil-Military Relations*, 2 ANN. REV. SCI. 211, 228-29 (1999)

continuation of political activity by other means."[13] Accordingly, the military should have no control over defense policy. If a state enters a conflict and brings itself to ruin, the civilians must make a call, not those in uniform. The armed forces are a tool to be commanded by civilians to advance the people's collective will.

However, the focus shifted during the 20th century as the usurpation of power by military strongmen occurred regularly in many new nations, especially in Latin America and Africa. Still, civilian control is not synonymous with coup-proofing. Coups are only symptoms and are not the cause of all troubles in civil-military relations. They are events that can only represent the tip of the iceberg—the manifestation of failures in civilian control.[14] While coups have the most noticeable effects on any given polity, the military can still dominate political decision-making and dictate government policy without threatening a coup.[15] Later, as the modern armed forces developed along with the changes in international relations, preventing coups and warmongering were no longer the core of civilian control. The influence of the military in the political realm takes center stage. Coup-proofing is now relevant only to coup-prone countries in some parts of Africa and Southeast Asia.[16] For most of the world, civilian control is meant to solve the

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[13] CARL VON CLAUSEWITZ, ON WAR 28 (Beatrice Heuser ed., Michael Howard & Peter Paret trans., Oxford University Press, 2007) (1832).

[14] CLAUDE E. WELCH, CIVILIAN CONTROL OF THE MILITARY 1-2 (1976).

[15] *See* Michael R. Kenwick, *Self-Reinforcing Civilian Control: A Measurement-Based Analysis of Civil-Military Relations*, 64 INT STUD Q 71, 72 (2020) (arguing that civilian control is about the relative strength of the military compared to civilians rather than about coup-proofing).

[16] *See, e.g.,* Aníbal Pérez-Liñán & John Polga-Hecimovich, *Explaining Military Coups and Impeachments in Latin America*, 24 DEMOCRATIZATION 839, 839-42 (2017) (discussing the rising trend of using impeachments as an alternative to military coups in Latin -America); Aurel Croissant, *Coups and Post-Coup Politics in South-East Asia and the Pacific: Conceptual and Comparative Perspectives*, 67 AUSTL. J.

problem of politicized and partisan militaries. Scholars and practitioners alike moved away from the coup and no-coup dichotomy and turned towards the overall influence of the military on civilian politics.[17]

Because controlling the military's influence requires monitoring mechanisms and institutions, this shift in focus moves logically toward legal and constitutional tools. Notwithstanding the paradox of law ruling over the force and the more popular solution of cultivating professionalism within the military, some scholars in civil-military relations regard legal rules, especially constitutions, as one of the powerful tools to achieve stable civilian control, even as a complementary or supporting tool.[18]

Even though a mere parchment barrier like the constitution is insufficient to constrain power,[19] constitutionalism has performed decently against power abuses, at least as 'speedbumps' that can slow down the collapse of constitutional rules.[20] Without

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INT'L AFFS. 264, 266-68 (2013) (showing that Africa has the highest number of coups from 1990 and that coups in Asia only come from 15 out of 40 Asian states).

[17] Feaver, *supra* note 12, at 218.

[18] *See, e.g.*, Marybeth P. Ulrich, *Civil-Military Relations Norms and Democracy: What Every Citizen Should Know*, *in* RECONSIDERING AMERICAN CIVIL-MILITARY RELATIONS (Lionel Beehner et al. eds., 2021) ("American civil-military relations are rooted in constitutional foundations that distribute and check political power, such as civilian control over the military."); Paul Chambers, *Constitutional Change and Security Forces in Southeast Asia: Lessons from Thailand and Myanmar*, 36 CONTEMP. SOUTHEAST ASIA 101, 104-05 (2014) (discussing how the constitution is a tool of institutional reform for both the military and civilian officials).

[19] THE FEDERALIST No. 73 at 360 (Alexander Hamilton) (Lawrence Goldman ed., 2008) ("The propensity of the legislative department to intrude upon the rights, and to absorb the powers, of the other departments, has been already suggested and repeated; the insufficiency of a mere parchment delineation of the boundaries of each, has also been remarked upon; and the necessity of furnishing each with constitutional arms for its own defense, has been inferred and proved.").

[20] *See, e.g.*, ADAM CHILTON & MILA VERSTEEG, HOW CONSTITUTIONAL RIGHTS MATTER 56-58 (2020); Bojan Bugaric, *Can Law Protect Democracy? Legal Institutions as "Speed Bumps"* 11 HAGUE J. RULE L. 447, 447–450 (2019).

civilian control over the military, constitutionalism has no effect; any state that claims to endorse constitutionalism loses all of its credibility if it fails to protect its citizens from both external threats of wars and internal threats of letting the military infringe on its people's rights.[21] Even when constitutionalism deviates from its strictly liberal underpinnings to embrace other strains of authoritarian or non-liberal constitutionalism,[22] the absolute minimum of constitutionalism still requires that those in power comply with formal or procedural constitutional requirements.[23] Hence, a coup d'état abrogates liberal and authoritarian constitutions equally, substituting a rule-based regime with absolutism in raw power. No matter which definition of constitutionalism one subscribes to, civilian control of the military is fundamental.

At the most abstract level, constitutional text and its symbolic power provide legitimacy essential to maintaining civilian control.[24] With the idea of constituent power (*pouvoir constituant*), which legitimizes the constitution by its direct link to the will of the people,[25] most constitutions start the text with a declaration of popular sovereignty

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[21] Globally, organized violence from 1989 to 2019 is accountable for 2,542,310 fatalities. *See* Therése Pettersson & Magnus Öberg, *Organized violence, 1989-2019* 57 J. PEACE RSCH. 597, 598 (2020).

[22] *See, e.g.*, Li-Ann Thio, *Constitutionalism in illiberal polities in* OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW, 133, 133-34 (Michel Rosenfeld & András Sajó eds., 2012) (arguing for the separation between liberalism and constitutionalism); Mark Tushnet, *Authoritarian Constitutionalism*, 100 CORNELL L. REV. 391, 394-97 (2015) (discussing varieties of constitutionalism).

[23] Tushnet, *supra* note 22, at 415-18 (providing an account of absolutist constitutionalism and rule-of-law constitutionalism).

[24] WELCH, *supra* note 14, at 6-9.

[25] Emmanuel Joseph Sieyès, *What Is the Third Estate?*, *in* POLITICAL WRITINGS 92, 136 (Michael Sonenscher ed., 2003) ("In each of its parts a constitution is not the work of a constituted power but a constituent power. … Thus all the parts of a government are answerable to and, in the last analysis, dependent upon the nation.").

over all state powers and bestow the title of commander-in-chief of the armed forces to the head of state.[26] Indeed, some constitutions go as far as establishing civilian control as a principle by stating that the military can only exist under the constitution.[27] These fundamental but often overlooked features of modern constitutions provide convincing evidence that civilian control is among the objectives of constitutional law.

Likewise, the rule of law—which can only function when the constitution is indeed the supreme law of the land—also puts any military action under the legal constraints of military law.[28] The European idea of the legal state (*Rechtstaat*) also dictates that all exercises of state powers—including military powers—must be limited.[29] Putting aside the violent nature of military activities, they are no more special than any physical act governed under the law. Within the common law tradition, for example, a writ of *habeas corpus* works effectively against all forms of illegal confinement—for military or non-military purposes—by the government.[30] A physical act of the state is not inherently beyond the reach of law.

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[26] WELCH, *supra* note 14, at 6.

[27] *See, e.g.,* Constitution of Ireland, art. 15 § 6 cl. 2 (1937) ("No military or armed force, other than a military or armed force raised and maintained by the Oireachtas, shall be raised or maintained for any purpose whatsoever."); Verfassung des Fürstentums Liechtenstein (Constitution of the Principality of Liechtenstein), art. 44 cl. 2 ("…no armed units may be organised or maintained, except so far as may be necessary for the provision of the police service and the preservation of internal order…").

[28] *See* Walter T. Cox III, *The Army, the Courts, and the Constitution: The Evolution of Military Justice*, 118 MIL. L. REV. 1, 28-30 (1987) (arguing that the system of military justice must be in accordance with the rule of law and the Bill of Rights).

[29] P.J. Vatikotis, *The Military in Politics: A Review* 139, 140. *See also* MARTIN LAUGHLIN, FOUNDATIONS OF PUBLIC LAW 337-39 (2010) (discussing the difficulty of putting the use of military forces under constitutional rule within the liberal concept of rule of law).

[30] *See, e.g.*, PAUL D. HALLIDAY, HABEAS CORPUS FROM ENGLAND TO EMPIRE (2010); Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (applying the writ of habeas corpus to a person detained as an enemy combatant).

Despite the lack of theoretical discussions, these connections between the constitution and the military were evident from ancient constitutions.[31] Thinkers of antiquity had already preached the importance of an obeying army in any state.[32] In his reflection of the rise and fall of ancient and contemporary states, Machiavelli emphasized that the key to a stable and glorious state is the maintenance of a loyal and capable standing army governed by good law.[33] This observation is supported by how some ancient constitutions gave the monarch absolute control over the military through his sovereignty over the state,[34] confirming the association between the concept of sovereignty and the power to take control of the armed forces. Machiavelli also argued throughout his career that the constitution and the military are deeply connected. He took inspiration from the Romans and saw military service as a civic expression, emphasizing the democratic and legitimizing nature of universal military involvement of the citizens. Similarly, James Harrington argued further, in the context of England, that military men are essential for the existence of law. If the people carry the sword by serving in the army, they become a counterpower to prevent tyranny that may try to seize their property

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[31] Stephen Holmes, *Constitutions and Constitutionlism, in* THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW, *supra* note 22, at 189, 194-98.

[32] *See generally* DE RE MILITARI: THE CLASSIC TREATISE ON WARFARE AT THE PINNACLE OF THE ROMAN EMPIRE'S POWER (2012).

[33] *See* NICCOLÒ MACHIAVELLI, THE PRINCE 42-46 (Peter Bondanella trans., Oxford University Press 2005) (arguing against the use of mercenaries in place of the prince's own troops).

[34] *See, e.g.*, SARAH B. POMEROY ET AL., A BRIEF HISTORY OF ANCIENT GREECE: POLITICS, SOCIETY, AND CULTURE 103 (2004) (describing the militaristic role of the Spartan king).

rights.[35] The bottom line from these threads is that laws and constitutions cannot operate without the power to control the military.

However, modern discussions of constitutional law do not expand much on such a connection. Primarily, there are discussions of civilian control as a crucial component of security sector reform in democratic and constitutional transitions. Still, the focus is mostly on post-conflict settings or the security sector (specifically the police and paramilitary forces).[36] Even in security sector reform, the focus is often on preventing human rights abuses by military personnel or military effectiveness rather than the control and command over the armed forces.[37] While there are works that comprehensively analyze the connection between the constitution and civil-military relations, they are mainly specific to certain jurisdictions, making no claims on a global scale.[38] Moreover, although the military is a constant in most constitutions, there is limited quantitative research on constitutional provisions that deal with the military, especially on a global scale.[39]

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[35] *Id.* at 116-17.

[36] *See, e.g., Introduction, in* SECURITY SECTOR REFORM IN CONSTITUTIONAL TRANSITIONS 1, 2-3 (Zoltan Barany et al. eds., 2019) ("This volume is intended to bring together a handful of cases of SSR during constitutional transition..."); Raymond A. Atuguba, *The Constitutional and Legal Framework for Oversight of the Security Sector in Ghana: Outstanding Matters for the Ghana Police Service*, 24 U. GHANA L.J. 205 (2008-2010) (focusing only on the Ghana Police Force).

[37] Felix Heiduk, *Introduction, in* SECURITY SECTOR REFORM IN SOUTHEAST ASIA: FROM POLICY TO PRACTICE 1, 8 (Felix Heiduk ed., 2014) (stating that security sector reform often focuses on security and stability not democratic accountability and strengthening of civilian oversight).

[38] *See, e.g.,* Varol, *supra* note 4, at 494-95; ROBERT BARROS, CONSTITUTIONALISM AND DICTATORSHIP: PINOCHET, THE JUNTA, AND THE 1980 CONSTITUTION (2002).

[39] *But see* Tom Ginsburg, Daniel Lansberg-Rodriguez & Mila Versteeg, *When to Overthrow your Government: The Right to Resist in the World's Constitutions*, 60 UCLA L. REV. 1184 (2013) (providing an

There is thus a gap in the literature at the nexus between constitutional law and civil-military relations. Accordingly, analyzing the military and the constitution contributes to a once familiar subject of early constitutional theories. This dissertation offers a starting point for further development on this fruitful subject in comparative constitutional studies with a new empirical dataset and a broader set of jurisdictions under study.

B. Findings and Claims

The original dataset for this dissertation shows that the military is a common subject in most constitutions worldwide.[40] Among the seemingly eclectic and specific rules and principles that resist precise categorization, two general approaches for civilian control nevertheless emerge in most countries. The most common approach is to keep constitutional measures for or against the military at a minimum, keeping the usual tripartite framework of separation of powers intact. In these constitutions, the head of the executive is usually the commander-in-chief of the armed forces, and the legislature often assumes a supervisory role in the defense budget or maintenance of the military. Through these arrangements, the military operates under the separation of powers and checks and balances, subjecting to the executive's command and the legislative's supervision. This

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original dataset on right-to-resist provisions in all national constitutions which include the right to resist coup attempts).

[40] Currently, only about five percent of all the constitutions have no reference to the military. *See infra* Chapter II .

framework is called the ‘separation-of-powers approach’ because it relies on the checks and balances between the executive and the legislative.

The other approach is more direct in purpose and means. Constitutions in this group single out the military as a separate institution functioning as the fourth branch of the government. Within this framework, the military is supposed to be independent and apolitical, similar to the professional standards of the judiciary. Constitutions often declare, as grand principles, that the armed forces are obedient to the command of their civilian leaders and do not deliberate in politics. There are also specific mechanisms and rules for civilian control, such as the establishment of national security commissions and restrictions on the political rights of senior military officers. Most countries that adopt this approach in their constitutions have recent histories of military coups and military dictatorship, especially in Latin America and Africa, suggesting an emerging trend of subjecting the military to a higher standard of supervision as a response to ongoing civil-military tensions. Due to the special treatment of the military under the constitution, the framework is called the ‘military-exception approach.’

Considering how these two main approaches of constitutional treatment of the military operate both in text and in practice, the lack of a theoretical framework for the military has resulted in more confusion in designing and applying the constitution. While it is plausible that controlling the military is possible through clear rules that limit the political roles and guide the procedures for smooth cooperation between the civilian and the military, a formula that could manage the ever-growing breadth and complexity of modern national security is yet to come by. The most popular practice so far is to designate a civilian commander-in-chief to create a clear chain of command for all

military matters that could prevent the armed forces from subverting the government's political power. Even then, the office of the commander-in-chief is vague enough that it is subjected to abuses.[41] Moreover, the overall structure and theories governing the treatment of the military in most jurisdictions do not have civilian control as the objective. The English Bill of Rights, which originated the practice of parliamentary control over the military, was meant to be a check on the power of the crown, not the armed forces.[42] As many constitutions adopted this system of checks and balances over the armed forces, the modern military often faces a dilemma between siding with the legislature or the executive, forcing them to have political involvement in defense policy.[43] Thus, while the separation of powers framework distributes control over the military, it does little to support military control.

As for the military-exception approach, these constitutions directly deal with issues like coups and the political role of the military through less familiar principles and rules. The overall impression from the three case studies is that the constitution alone rarely succeeds in bringing about civilian control. A few of the past constitutions of

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[41] *See, e.g.,* Memorandum from Jay S. Bybee, Assistant Att'y Gen., Office of Legal Counsel, to Alberto R. Gonzalez, Counsel to the President 2-3 (Aug. 1, 2002) (building on the President's Commander-in-Chief authority to support a definition of torture that is more flexible), http://www.justice.gov/olc/docs/memo-gonzales-aug2002.pdf; Hakkı Göker Önen, *Ten Critical Years of Turkish Civil–Military Relations (2007–2017)*, 22 J. PUB. AFFS. (14723891) 1, 8 (2022) ("With greatly increased powers under the new presidential system, President Erdogan now held two positions—commander-in-chief of the military and leader of the AK Party—thus directly subordinating the military to the AK Party instead of to parliament.").

[42] *See* Gary W. Cox, *Was the Glorious Revolution a Constitutional Watershed?*, 72 J. ECON. HIST. 567, 569 (2012) (arguing that the Bill or Rights and the Mutiny Act of 1689 serve to prevent the Crown from crushing the Parliament militarily).

[43] *See* Samuel Huntington, *Civilian Control and the Constitution* 50 AME. POL. SCI. REV. 676, 689-93 (1956).

Thailand tried using both the right to resist and limiting the political rights of military officers. However, the Thai Army could still stage a coup anytime there is a political crisis.[44] The reasoning behind the ineffectiveness of these constitutional measures is possibly due to the tendency for the government to underutilize the constitution in controlling the military. The military's standard for professionalism or political neutrality is not as universally agreed upon as that of the judiciary. And the courts are often reluctant to intervene in matters of national security.

On the contrary, the armed forces often have advantages over the civilian government in mobilizing their constitutional status. Due to their professional and hierarchical nature, the military can coordinate better over what the constitution means and mobilize for collective action, such as staging a coup against the much less united civilian government. For this reason, the military in Myanmar abused the constitutional clause regarding national emergency. In 2021, for instance, it claimed to be the guardian of the constitution when it staged a coup against the civilian government.[45] Even more troublesome, the Turkish case shows that the cost of successful civilian control against such a political and powerful military might require the authoritarian expansion of the president in combination with other abuses of the constitution.

In conclusion, constitutional tools are so far inadequate for civilian control of the military. The constitution can sometimes even sabotage the attempt to control the

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[44] *See* ANDREW HARDING & PETER LEYLAND, THE CONSTITUTIONAL SYSTEM OF THAILAND: A CONTEXTUAL ANALYSIS 26-29 (2011) (discussing the nature of coups in Thailand).

[45] *See* Andrew J Harding and Nyi Nyi Kyaw, *The Long Struggle for Constitutional Change in Myanmar*, 50 FED. L. REV. 192, 195-97 (arguing that the 2021 coup is an "unconstitutional coup").

military. Since the constitution can legitimize and coordinate any leading force, the military and authoritarian leaders are often more well-equipped to use the constitution in their favor. Selective and minimal constitutional measures available from a better understanding of the two main approaches to civilian control should work better without creating too much opportunity for constitutional abuses by any party.

C. Research Question and Scope of the Dissertation

This dissertation investigates constitutions' roles in achieving civilian control over the military from theoretical and comparative perspectives. Specifically, it asks whether and how the constitution promotes civilian control of the military by any means. Moreover, due to the theoretical nature of the dissertation, there is also another question of fit between constitutionalism and civil-military relations: "Why should the constitution deal with the problem of civilian control?"

The scope of this dissertation is limited only to civilian control of the military through constitutional law. While there are still other areas of civil-military relations that are relevant to constitutionalism and the rule of law, such as those that involve the efficiency of the military, most of these do not affect political processes the same way that a coup or a highly politicized military can. Moreover, while military effectiveness will always be the primary aim of civil-miliary relations—as effectiveness dictates the failure or success of national defense, the question of effectiveness goes beyond politics,

involving technical aspects of military operations.[46] Second, while there is already a wealth of information on civilian control in the literature, the concept is still inconclusive regarding its requirements and prescriptions.[47] With the already discussed lack of constitutional theory on both the military and the principle of civilian control, this dissertation simultaneously engages in the challenges of comparative constitutional and civil-military relations.

Even though the interactions between the military and the law are not limited to constitutional law, the focus here is limited to the constitution, not all other areas of law. Indeed, many impactful civil-military relations arrangements take the form of legislation. For example, the Posse Comitatus Act of the US famously prohibits the use of US federal troops in each domestic state,[48] a rule that also appears in many constitutional sources.[49] Moreover, ordinary legislation usually governs basic and routine conduct within the

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[46] Modern scholars of CMR often calls for more attention to efficiency and effectiveness of the military as part of the discussion rather than focusing on just civilian control. *See e.g.*, Suzanne C. Nielsen, *Civil-Military Relations Theory and Military Effectiveness*, 2 POL'Y & MGMT. REV. 1 (2002); Florina Cristiana Matei & Carolyn Halladay, The Control-Effectiveness Framework of Civil–Military Relations, *in OXFORD RESEARCH ENCYCLOPEDIA OF POLITICS* (Feb. 23, 2021), https://doi.org/10.1093/acrefore/9780190228637.013.1874.

[47] *See infra* Chapter III.

[48] 18 U.S.C. § 1385.

[49] *See, e.g.*, Constitution of Norway 1814 art. 101 ("The Government is not entitled to employ military force against citizens of the State, except in accordance with law…"); Constitution of Portugal 1976 art. 275 ("…the Armed Forces may be charged with cooperating in civil protection missions, tasks concerning the satisfaction of basic needs and the improvement of people's quality of life...").

armed forces, such as details regarding military conscription[50] or insubordination.[51] Thus, focusing on constitutional texts is incomplete and potentially misleading when considering how to keep the military under civilian control. Constitutions, in effect, are just a fraction of the interactions between the law and armed forces.

However, because constitutions are the supreme law of the land, they govern the rules of the game for the state. It is the duty of the constitution to face the vital problem of civil-military relations. Specifically, constitutional text can establish a clear line between civilian and military authority.[52] Constitutions, after all, have characteristics that transcend ordinary laws. Because constitutions are supposed to be supreme, symbolic, aspirational, and enduring, arrangements made through the constitution are more impactful and long-lasting, even after the document itself was abrogated.[53] Accordingly, attempts at security sector reform typically start with constitutional reforms, kickstarting all other changes with an overarching constitutional framework.[54]

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[50] *See, e.g.,* Military Service Law of the People's Republic of China (2011 Amendment), http://eng.mod.gov.cn/publications/2017-03/03/content_4774222.htm; South Korea's Military Service Act of 1949; Leah Kaufman, We Want YOU: Constitutionality of Conscription in the United States and Israel, 37 WHITTIER L. REV. 193, 203-04 (2015) (discussing the history of the Military Service Law in Israel)

[51] *See, e.g.*, MANUAL FOR COURTS-MARTIAL, United States (2000), art. 90-92 (addressing insubordination to both officers and disobedience of standing order); David Pion-Berlin, Diego Esparza & Kevin Grisham, *Staying Quartered Civilian Uprisings and Military Disobedience in the Twenty-First Century*, 47 COMP. POL. STUD. 230, 244-45 (2014) (discussing legal mandates for repression by the military through constitutions or legislation).

[52] Mark Yaniszewski, *Civil-Military Relations in East-Central Europe and the Former Soviet Union: Some Theoretical Issues, in* THE EVOLUTION OF CIVIL-MILITARY RELATIONS IN EAST-CENTRAL EUROPE AND THE FORMER SOVIET UNION 19-37, 24 (Natalie Mychajlyszyn & Harald von Riekhoff eds., 2004).

[53] *See generally* BEAU BRESLIN, FROM WORDS TO WORLDS 3, 9 (2009); Son Ngoc Bui, *Constitutional Mobilization*, 17 WASH. U. GLOBAL STUD. L. REV. 113 (2018).

[54] Zoltan Barany et al., *Introduction, in* SECURITY SECTOR REFORM IN CONSTITUTIONAL TRANSITIONS 1, 12 (Zoltan Barany et al. eds., 2019) ("the process of SSR, especially of the military, was not completed until

Moreover, with the recent upticks in coup d'états and controversial involvement of the military in politics—coupled with the already questionable track record of rights protection,[55] the constitution faces an existential threat to its relevance and effectiveness. Putting the constitution to the test here brings to the fore the question of the effectiveness of the constitution in general. Thus, while legislation does matter to the military, this chapter will only refer to ordinary laws when they are relevant to the discussion of constitutional law.

II. A Constitutional Theory of Civilian Control of the Military

This dissertation explores the relationship between the constitution and the military. It is thus necessary to first develop a theoretical account of how the constitution can constrain or empower the armed forces. An excellent place to start is to consider available theories on how the constitution can affect the real world beyond the constitutional text. The issue of enforcement is complicated for constitutional law because, unlike private laws such as contracts or torts, constitutional law is self-imposed by the sovereign, and the sovereign has no higher institution capable of enforcing the constitution.[56] In many settings, mere formal acts of drafting and adopting a written

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after— in some cases, many years after—the adoption of a new constitutional framework and the establishment of civilian government.").

[55] CHILTON & VERSTEEG *supra* note 20, at 64-74 (providing a literature review on the effectiveness of constitutional rights with no obvious correlation between constitutional rights and good constitutional practices).

[56] Dieter Grimm, *Constitutional Adjudication and Democracy*, *in* 2 JUDICIAL REVIEW IN INTERNATIONAL PERSPECTIVE, LIBER AMICORUM IN HONOUR OF GORDON SLYNN, 103 (Mads Adenas ed., 2000),

constitutional document may amount to nothing in practice. While many jurisdictions have constitutional courts interpreting the constitution, they have no power to enforce compliance apart from rendering convincing court decisions. The judiciary has a disappointing track record against the military, usually allowing coup-makers to abrogate the constitutional system.[57] Fundamentally, if the constitution cannot do anything to prevent its ruin, then maybe the constitution does not matter in practice.

Indeed, the military is not the only uncontrollable and powerful subject the constitution has to deal with. For instance, the revolutionary force of the people's constituent power, which is supposed to be unlimited, is still limited by theories of what *pouvoir constituant* means and by the concept of eternity clauses, which creates another level of constitutional law protected from constitutional amendments.[58] Even revolutions—which are supposedly illegal and violent—are still subject to theories on the procedures and substances that qualify an event as a revolution.[59] Framing a proper theory to an unlimited force can sometimes create newfound limitations.

That said, constitutions are considered "parchment barriers."[60] Constitutions have no physical powers to fight against the power of the sword. Suppose the constitution

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[57] *See* KRIANGSAK KITTICHAISAREE, JUDICIAL RESPONSIBILITY AND COUPS D'ÉTAT: JUDGING AGAINST UNCONSTITUTIONAL USURPATION OF POWER 7-9 (2023) (discussing judges' roles in "paving the way for a coup" and conferring "legitimacy upon the coup").

[58] *See, e.g.,* Yaniv Roznai, *Unconstitutional Constitutional Amendments - The Migration and Success of a Constitutional Idea*, 61 AM. J. COMP. L. 657 (2013) (discussing the migration of unconstitutional constitutional amendments); SUDHIR KRISHNASWAMY, DEMOCRACY AND CONSTITUTIONALISM IN INDIA: A STUDY OF THE BASIC STRUCTURE DOCTRINE (2009).

[59] GARY JEFFREY JACOBSOHN & YANIV ROZNAI, CONSTITUTIONAL REVOLUTIONS 25-27 (2020).

[60] James Madison, *Letter from James Madison to Thomas Jefferson*, (Oct. 17, 1788), *in* 11 THE PAPERS OF JAMES MADISON 295, 297 (Robert A. Rutland & Charles F. Hobson eds., 1977).

already struggles against an encroaching legislature bent on escaping all the checks provided by the other branches of the government. What are the chances that the constitution can constrain the military? This is the fundamental question facing any attempt to affect the armed forces in any way with the constitution.

In search of an answer, discussions of the connection between law and force in the literature of legal theories could provide valuable clues. Suppose one follows John Austin's legal positivism, which portrays the law as simply the command of the sovereign backed by threats of sanctions.[61] In that case, the military holds the ultimate key to the legal system because it has the proverbial sword ready to use force against those who oppose the law.[62]

Moreover, H.L.A. Hart argues that law has a purpose: to guide the endeavor of human survival.[63] At its core, the law is a powerful tool of social control and coordination. In advancing the concept of law, Hart rejects the idea that laws are commands and argues that law must have the authority to separate it from a gunman's command.[64] And since the ultimate criteria of legal validity include both the "obedience by ordinary citizens" and "the acceptance by official behavior,"[65] the military—the literal

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[61] *See generally* John Austin, *Lecture I.*, *in* AUSTIN: THE PROVINCE OF JURISPRUDENCE DETERMINED, 18, 20–37 (Wilfrid E. Rumble ed., 1995).

[62] (arguing that the subjects under a violent conquest "would kick with all their might against intrusive government, if the military sword which it brandishes were not so long and fearful.").

[63] *See* H. L. A. HART, THE CONCEPT OF LAW 190-93 (3rd ed., 2012).

[64] *See Id.* at 82-85, 100-17 (discussing the flaws in Austinian concept of laws as commands and arguing that law must be justifiable by virtue of the internal point of view of those who obey and apply the law).

[65] *Id.* at 117.

gunman—can transform a legal system into a system of commands by forcing both the people and legal officials to recognize the law as it sees fit. Without proper control over the military, any legal system can be manipulated by piecemeal and arbitrary commands of the military. Thus, the judiciary worldwide consistently validates military coups and all subsequent legal acts from the junta through the doctrine of necessity or the doctrine of efficacy of the usurpation.[66]

Even when one believes in the deep connection between law and morality, the monopoly of force still penetrates legal thinking. Though recourse to violence is inherently limited, and the law should set forth such limitation,[67] forceful tyranny has been the source and object of laws throughout history.[68] In any society, whether democratic or authoritarian, law holds the fabric of society together by ensuring security and controlling violence.[69] Thus, the military—as the institution of force—is inevitably a part of the legal system. Whatever the military's role in society, it inevitably takes part in the existing legal system—whether as creator, enforcer, or destroyer of the law.

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[66] *See* KITTICHAISAREE, *supra* note 57, at 15-43 (discussing the various legal doctrines that domestic courts resort to for the validation of coups).

[67] A. W. Cragg, *Violence, Law, and the Limits of Morality*, 8 LAW & PHIL. 301, 316-18 (1989) (arguing that law serves a moral objective for the society by providing non-violent ways of dispute resolution as an alternative to violent means).

[68] *See* DAVID M. BEATTY, FAITH, FORCE, AND REASON: AN ARMCHAIR HISTORY OF THE RULE OF LAW 7-13 (2022) (providing a snapshot of the history of the rule of law and its successes and failures over tyranny and arbitrariness).

[69] HART, *supra* note 63, at 194 ("Of these [prohibitions] the most important for social life are those that restrict the use of violence in killing or inflicting bodily harm.").

The belief that the military and the law are incompatible should therefore be dismissed. The following shall discuss different strands of significant constitutional theories that touch upon the interconnections of the military and the constitution.

A. Legitimation of Power

Popular sovereignty is the foundation of all modern constitutions. Accordingly, constitutionalism, along with its embedded democratic values, has undermined the legitimacy of any authoritarian government since its revolutionary rise at the end of the 18th century.[70] Constitutionalism firmly establishes the superiority of civilians over the military by requiring that only the people can be the legitimate source of the constitution. In this way, the American Constitution is supreme because the document came from the original will of the people themselves.[71] The Hobbesian concept of law of absolute monarchy—which is based upon the virtues of law and order[72]—must give way to democratic values based on the general will of the people.[73]

As direct military rule stands against democratic legitimacy and accountability, the military can only claim to represent the people on a temporary and exceptional basis.

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[70] *See* GEORGE ATHAN BILLIAS, AMERICAN CONSTITUTIONALISM HEARD ROUND THE WORLD, 1776-1989: A GLOBAL PERSPECTIVE 53 (2009) (discussing the spread of American revolutionary constitutionalism from 1776 to 1800 in Europe).

[71] *See* Robert Schütze, *Constitutionalism(s), in* THE CAMBRIDGE COMPANION TO COMPARATIVE CONSTITUTIONAL LAW 40, 45-47, 48-50 (Roger Masterman & Robert Schütze eds., 2019) (discussing the republican features the American Constitution).

[72] THOMAS HOBBES, LEVIATHAN 183-200 (Richard Tuck ed., Cambridge U. Press 1996).

[73] RONALD A. CASS, THE RULE OF LAW IN AMERICA 20-22 (2001).

Even though there are many sophisticated strategies to reconcile civilian authoritarian governance with constitutionalism, virtually no doctrine or theory can support the legitimacy of military rulers in compliance with constitutionalism. Thus, while civilian dictators could try to adopt constitutional principles in an abusive way to consolidate their powers,[74] military dictators cannot conveniently do the same. The military is categorically not civilian and not the equivalent to the people; it would take strained and creative interpretations and theorizations of the constitution to argue that the armed forces can represent the sovereign people.[75]

Moreover, even constitutions in authoritarian regimes (where constitutional checks on power are lacking) possess a normative and symbolic status. These authoritarian constitutions can, therefore, cause a reputational cost to whoever violates the constitution.[76] The military that stages a coup or disobeys its civilian head must consider the constitution's normative force. For these reasons, most modern coup makers no longer take direct control of the country but often appoint a caretaker government that is at least nominally civilian.[77] Thus, as direct military rule lacks any legitimacy for

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[74] ROSALIND DIXON & DAVID LANDAU, ABUSIVE CONSTITUTIONAL BORROWING: LEGAL GLOBALIZATION AND THE SUBVERSION OF LIBERAL DEMOCRACY 117-140 (2021) (discussing the abuse of constituent power in both enabling and limiting constitutional change in illiberal ways).

[75] *But see* José Nun, *The Middle-Class Military Coup, in*, THE POLITICS OF CONFORMITY IN LATIN AMERICA 66, 66-118 (Claudio Veliz ed., 1967) (arguing that the military are representative of the middle class in Latin America).

[76] Tom Ginsburg & Alberto Simpser, *Introduction: Constitutions in Authoritarian Regimes*, *in* CONSTITUTIONS IN AUTHORITARIAN REGIMES 1, 10-11 (Tom Ginsburg & Alberto Simpser eds., 2013).

[77] *See* Kimana Zulueta-Fülscher and Thibaut Noël, *The 2021 Coup Pandemic: Post-Coup Transitions and International Responses, in* ANNUAL REVIEW OF CONSTITUTION-BUILDING: 2021 74, 77-88 (Adem K. Abebe et al. eds., 2022) (providing details of the recent interim or transitional governments announced by the military after the coups in Chad, Mali, Guinea, and Sudan).

governance,[78] the mere presence of a written constitution will always undermine the authority of the military in power as an usurper of power, stealing the democratic rights and freedom of the people.

Empirical studies, however, question this connection between legitimacy and constitutionalism. It is argued that path dependency often dictates the risk of a coup d'état more than any other factor; the more venerable and long-lasting the constitution, the more unlikely the military could seize power and abrogate the document.[79] For instance, a longstanding one like the US Constitution could hardly ever face a serious threat of coup.[80] A stable and durable constitution is generally protected from coup d'états; thus, a great constitution only prevents coups until it does not. Such a tautology is marginally helpful in suggesting that a stable constitutional system is sufficient to prevent outright military coups but not other subtler kinds of military interventions. Surely, constitutionalism legitimizes civilian control of the military in general, but at this level of abstraction, the consequences of having constitutions are not obviously beneficial to civilian control.

On the other hand, since the military is in a unique position to ostensibly fix the failings of democracy by its heroic devotion to the security of the state as opposed to the

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[78] SAMUEL E. FINER, THE MAN ON HORSEBACK: THE ROLE OF THE MILITARY IN POLITICS 14-22 (1962)

[79] *See* John B. Londregan & Keith T. Poole, Poverty, *the Coup Trap, and the Seizure of Executive Power*, 42 WORLD POL. 151, 160 (1990) ("…poverty and a past history of coups significantly increase the risk that a coup will occur.").

[80] *See* Ekim Arbatli, *Armies in Politics: The Domestic Determinants of Military Coup Behavior*, in THE OXFORD ENCYCLOPEDIA OF THE MILITARY IN POLITICS (William R. Thompson & Hicham Bou Nassif eds., 2022), https://doi.org/10.1093/acrefore/9780190228637.013.1936.

diverse but divisive interests of politicians, the soldiers can ironically stage a coup d'état while claiming that they legitimately act by the people's will.[81] This claim to protect the nation's best interest is even more complicated, given how recent literature observes the positive effects of coups on constitutional democracy, especially when constitutional constraints fail to prevent democratic backsliding.[82] In opposition to civilian authoritarian government, the military can "topple a dictator, assume absolute power during a temporary period, provide a steady hand during a turbulent transition, establish democratic procedures, and hand over power to elected leaders."[83] Accordingly, the military, as the guardian of the state, can claim legitimacy by arguing that it is both democratic and apolitical. Because the military is necessary to maintain national security, it is often the only institution capable of going against a dominating political party[84] or leading a revolution.[85]

In effect, the military's role as the guardian against tyranny and disintegration serves as the linchpin in the revival of legitimacy for the armed forces. Through crises and emergencies, even a military dictatorship can be constitutional for the sake of democracy.[86] Under constant instability, the military can claim to follow the constitution

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[81] DAVID BEETHAM, THE LEGITIMATION OF POWER 149-50 (1991).

[82] *See* OZAN VAROL, DEMOCRATIC COUP D'ÉTATS 196-98 (2017) (arguing that military leaders can better fight against dictators).

[83] *Id.* at 193.

[84] *Id.* at 103-13 (arguing that having an overpowered political power can adversely affect the military similar to how the judiciary could benefit from political pluralism).

[85] *Id.* at 20-25.

[86] *See* CLINTON L. ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES 314 (1948) ("One problem is to make that power effective and responsible, to make any

and set up a permanent state of exception.[87] This way, the military does not have to stay in power as the government and exposes its weakness in the democratic mandate. Instead, the military can indefinitely remain in power in the background, getting ready to activate its claim of authority at any moment of crisis when the people are ready to accept a necessary but temporary lapse of the constitutional regime.[88] As discussed elsewhere in this dissertation, the ability to intervene to save the country from a total collapse will be the most substantial point for legitimacy that the military keeps invoking across all jurisdictions.

B. Coordination and Collective Action

While the legitimacy of the state is greatly supported by the concentration of armed forces by the central government,[89] the monopoly of violence by the government has profound implications beyond legitimacy. The military revolution from the middle of the 16th century changed the tactics, strategy, army size, and impact of war on society, giving rise to centrally financed and supplied armies and consolidating modern fiscal and

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future dictatorship a constitutional one. No sacrifice is too great for our democracy, least of all the temporary sacrifice of democracy itself").

[87] GIORGIO AGAMBEN, STATE OF EXCEPTION 1-3 (Kevin Attell trans., 2005) (arguing that state of exception has becomes a reliable tool for modern totalitarianism in maintaining power).

[88] BRIAN LOVEMAN, THE CONSTITUTION OF TYRANNY: REGIMES OF EXCEPTION IN SPANISH AMERICA 397-98 (1993) (discussing how the armed forces can intervene in Spanish American politics by overthrowing or supporting the government during a crisis which often results in constitutional changes).

[89] Daniel H. Deudney, *The Philadelphian system: sovereignty, arms control, and balance of power in the American states-union, circa 1787–1861*, 49 INT'L ORG. 191, 192 (1995) (stating how the early European state is conceptualized as "a hierarchically organized protection providing entity monopolizing violence in a particular territory and possessing sovereignty and autonomy.").

administrative practices.[90] Then, the French Revolution ushered in the idea that military service was an essential citizenship requirement, coordinating the nation at war against the absolute monarchies.[91] In the context of national defense, constitutions are instrumental in mobilizing the resources and the people against the problem of collective action, solving free-riders of public goods through a coordinated constitutional government. Thus, forming "a more perfect union", as written in the preamble to the American Constitution, was to better national defense through the coordination of resources and manpower.[92]

In short, a more concrete effect that the constitution has on the military is the power of coordination. The regulation of national security has always been central, even in ancient constitutions. The Roman Empire notably provides a clear chain of command and optimization of the state apparatus for military conquest.[93] In modern times, the coordinating power of constitutions is well observed. For instance, constitutions facilitated the recruitment of the armed forces in late 19th-century Europe by tying voting rights with the duty to serve in the military.[94] More evidently, the most basic provisions

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[90] *See* Geoffrey Parker, *The "Military Revolution," 1560-1660—a Myth?*, 48 J. MOD. HIS. 195 (1976).

[91] *See* BRUNO AGUILERA-BARCHET, A HISTORY OF WESTERN PUBLIC LAW: BETWEEN NATION AND STATE 398-99 (2015).

[92] Max M. Edling, A More Perfect Union: The Framing and Ratification of the Constitution, *in* THE OXFORD HANDBOOK OF THE AMERICAN REVOLUTION 388, 388-90 (Edward G. Gray & Jane Kamensky eds., 2015) (discussing the importance of national defense both internal and external in the framing of the American Constitution).

[93] Holmes, *supra* note 31, at 189, 194-98.

[94] Christopher Thornhill, *The Weimar Constitution as a Military Constitution*, *in* A SOCIOLOGICAL THEORY OF LAW: EMPIRICAL APPROACHES TO LUHMANN 3-5 (manuscript, 2021), https://www.research.manchester.ac.uk/portal/files/195964147/The_Weimar_Constitution_as_Military_Constitution_revised.pdf (arguing that international military pressures during the nineteenth century led to the

regarding the structure of the military and its ultimate commander still exist in almost every constitution,[95] providing a clear picture of the chain of command necessary for ongoing military affairs. These provisions govern the military in a neutral way, functioning as a coordinating tool to rule the country effectively.[96]

Therefore, the coordinating power should be efficient without considering its effects on democracy. For example, when the role of the commander-in-chief is written in detail with a clear separation between each function of the security sector from the military to the police,[97] the military's power is limited within its prescribed autonomy, posing low threats to the civilian government. Thus, in much the same way the constitution can help strengthen the military chain of command, the constitution should also be able to enhance the principle of civilian control.

Indeed, even before the rise of liberal constitutionalism, Jean Bodin suggested that constitutional restraints could help deal with the principle-agent problem.[98] Constitutional constraints on the powerful monarch could ensure that representatives in the legislature (protected under parliamentary immunity) could provide vital information to help the king monitor his agents through complaints of grievances against the royal

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proliferation of national military conscription and also the increase in enfranchisement of citizens in Europe).

[95] *See, e.g., German Basic Law: Article 65a "(1) Command of the Armed Forces shall be vested in the Federal Minister of Defence."*

[96] Russell Hardin, *Why a Constitutuion, in* SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS 51 (Denis J. Galligan & Mila Versteeg eds., 2013).

[97] Zoltan Barany et al., *Conclusion: Security Sector Reform and Constitutional Transitions: Challenging the Consensus, in* SECURITY SECTOR REFORM IN CONSTITUTIONAL TRANSITIONS 263-64 (2019).

[98] Holmes, *supra* note 31, at 193.

officials without fear of punishment.[99] The idea that credible limits on the powerful—comparable to drill and discipline for soldiers, can serve to empower applies even more so to the military. Strikingly, Samul Huntington, in his influential framework of civilian control, argues that the military could gain its autonomy by subjecting itself to a standard of professionalism.[100] Analyzing this theory of civil-military relations from a different angle, the civilian government refrains from taking direct control of the military to benefit from far better national security of professional (and politically neutral) armed forces. Thus, there is a basis for both the civilian and military sides to subject themselves to constitutional restraints, refuting the argument that the powerful—legally or factually—may never be put under the power of law.

Similar to how legislation can give social meaning and normalize any action,[101] the constitution and its expressive powers can lower the cost of compliance with the law for the military. For example, senior generals who typically follow orders from above the chain of command may use a constitutional provision prohibiting coup d'état as a rationale to refrain from participating in the coup.[102] The constitution helps create a

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[99] *Id.* at 193-94.

[100] SAMUEL HUNTINGTON, THE SOLDIER AND THE STATE 463-64 (1957).

[101] RICHARD H. MCADAMS, THE EXPRESSIVE POWERS OF LAW: THEORIES AND LIMITS 165-68 (2015) (providing an example of how law anti-discrimination law might shape people's preference by providing a new social meaning to non-discrimination acts that did not result in social sanctions during Jim Crow era).

[102] *See, e.g.,* Gary Fields, *US Military Academies Focus on Oaths and Loyalty to Constitution as Political Divisions Intensify*, AP NEWS (Jan. 14, 2024), https://apnews.com/article/democracy-military-academies-oath-constitution-trump-insurrection-d3f017a8722eb4f4a681963400f2a2d5 (showing how military education at West Point attempts to emphasize more on the oath and the duty of soldiers towards the Constitution in light of the January 6 assault); *German Security Forces Loyal to Constitution - Interior Ministry*, REUTERS (Dec. 9, 2022), https://www.reuters.com/world/europe/german-lawmakers-want-security-review-after-failed-coup-plot-2022-12-09/ (claiming that the German security forces will not take part in a rumored coup because they "stand firmly behind the constitution").

credible commitment for the people that sends the signal to prevent military intervention.[103] Through the combined values of both legitimizing and expressive powers generated by relevant constitutional clauses, staging a coup becomes more costly than standing by.[104] In this way, the costs of being branded as insubordinate when refusing to join a coup attempt will be alleviated.

However, the coordinating power of the constitutional text is diminished once such a legal principle is full of ambiguous and contradictory definitions like that of the military's professionalism, failing to get the attention of the public, who already have various constitutional principles to choose as focal points.[105] On the other hand, constitutions can readily create a focal point for authoritarian regimes to coordinate to become more stable and salient.[106] For example, constitutions can harmonize and coordinate various decision-making actors within the military that might have conflicting interests no different from those within civilian government.[107]

Instead of supporting civilian control, the coordination function of the constitution is a powerful and neutral tool that can evade civilian control and further the military's

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[103] *See* Ginsburg et al., *supra* note 39, at 1208-12 (arguing that the right to resist can serve as a precommitment device that can coordinate a popular uprising against undemocratic backsliding).

[104] NAUNIHAL SINGH, SEIZING POWER: THE STRATEGIC LOGIC OF MILITARY COUPS 80-81 (2014) (discussing how coups from the top officers cannot rely on the chain of command because "obligations to the constitution" contradict military officers from obeying orders from an usurper).

[105] MCADAMS *supra note* 101, at 179-80.

[106] Ginsburg & Simpser, *supra* note 76, at 10-12.

[107] ROBERT BARROS, CONSTITUTIONALISM AND DICTATORSHIP: PINOCHET, THE JUNTA, AND THE 1980 CONSTITUTION 36-49 (2002) (discussing the use of legal and institutional structures by the Chilean military after the coup in 1973).

dominance. In combination with the legitimizing effect of the constitution, the military—generally more coordinated than the civilians—can claim coordination as a source of legitimacy and legitimacy as a coordinating force that maintains peace and order, creating a perpetual feedback loop. Coup makers thus claim that they intervene because they can coordinate better and declare themselves the ultimate coordinator. After all, no one else has the same legitimacy in ending the crisis.[108] Accordingly, sometimes even the judiciary accepts such a claim as legitimate under the doctrine of necessity; for instance, the Supreme Court of Pakistan declared after the coup in 1958 that:

"*If the revolution is victorious in the sense that the persons assuming power under the change can successfully require the inhabitants of the country to conform to the new regime, then the revolution itself becomes a law creating fact because thereafter its own legality is judged not in reference to the annulled constitution but by reference to its own success...*"[109]

Thus, legitimacy and coordination, the most prominent functions of the constitution, certainly play a role in civilian control. The question this dissertation tries to answer is: to what extent do these functions work toward improving civilian control?

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[108] *See, e.g.,* Jon Fraenkel, *Fiji's December 2006 Coup: Who, What, Where and Why?*, *in* THE 2006 MILITARY TAKEOVER IN FIJI 43, 49-51 (Jon Fraenkel et al. eds., 2009) (providing an account of President Bainimarama of Fiji in attempting to claim legitimacy after the coup in 2006 by employing state apparatus to end corruption and implement populist measures); *Beyond the Coup in Myanmar: "In Accordance with the Law"–How the Military Perverts Rule of Law to Oppress Civilians*, INTERNATIONAL HUMAN RIGHTS CLINIC (Apr. 29, 2021)., https://humanrightsclinic.law.harvard.edu/beyond-the-coup-in-myanmar-in-accordance-with-the-law-how-the-military-perverts-rule-of-law-to-oppress-civilians/ (arguing that the military in Myanmar claims to maintain order and rule of law after the coup in 2021 through violent repressions which were "in accordance with the law").

[109] *Dosso v. Federation of Pakistan* [1958] P.L.D. S.C. 533, 538 Munir CJ.

Suppose certain forms and substances of constitutions can work to enhance civilian control. In that case, the scholarship should strive towards optimization for further implementation for other jurisdictions with comparable challenges of civil-military relations. But if it turns out that constitutions can easily tip the scale towards a worse outcome in civilian control, constitutional lawyers should hold the same level of modesty that they have in other areas of constitutional law. This main question, however, is empirical, and this dissertation can only explore and tentatively provide a conjecture through the following mixed-methods research design.

III. Research Methods and Limitations

A. Research Methods in Comparative Constitutional Studies

Comparative constitutional law is criticized for its selective group of overrepresented countries, e.g., Germany, South Africa, and the United States.[110] Research in civil-military relations also runs into a similar problem as the focus has been on a handful of countries in the two extremes: either coup-ridden countries or stable democracies with few controversies on the political roles of the military.[111] However, with the help of a new wave of well-crafted research methods in the last decade, the reliance on a few selected case studies without justifying the selective use of foreign jurisdictions in comparative constitutional work has become a thing of the past, mainly

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[110] RAN HIRSCHL, COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW 246 (2014).

[111] Feaver, *supra* note 12, at 212-13.

due to the critiques of studies that select case studies based on availability or through an act of cherry-picking.[112] Similarly, scholars in civil-military relations realize how every country struggles with the problem of the military in its own way; a few well-known examples that provide a convenient explanation for healthy civilian-military relations with the benefit of hindsight, as in the case of the United States, do not represent proof of a perfect relationship between the military and the state.[113]

Here is where methodologies on case selection and research design come into play. Since there is indeed a need for "inference-oriented, controlled comparison" in comparative constitutional law,[114] both the descriptive and theoretical parts of the dissertation work toward setting up the stage for causal inference with empirical research. While this dissertation could fall within the category of taxonomical work due to its attempt to classify the characteristics of constitutional regimes based on their treatment of the military,[115] it also seeks to explain why each constitution tackles the problem of civilian control differently, hoping to build a conceptual framework for further investigation.

The purpose here is not to find the best possible design for all jurisdictions by establishing a normatively desirable model; it is inevitable that "every approach to

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[112] *See* HIRSCHL, *supra* note 110, at 205-223.

[113] Richard D. Hooker, *Soldiers of the State: Reconsidering American Civil-Military Relations*, 41 PARAMETERS 1, (2011) (arguing that civil-military relations in the US are in good shape and faithful to the Constitution, notwithstanding the necessary gap which professionally separates the military from the rest of the society).

[114] *See* HIRSCHL, *supra* note 110, at 245.

[115] *See id*. at 128 (explaining a taxonomy as "a classification of laws and governments according to their distinguishing characteristics").

comparative constitutional law carries with it some normative or ideological baggage."[116] The dissertation thus uses a mixture of quantitative and qualitative methods with a conscious decision to balance the general assumption in both the liberal underpinnings of constitutionalism and in civilian-military relations that civilian control of the military has to be democratic. Functionally, authoritarian or democratic civilian governments, as well as military dictators, can use the constitution as a tool for civilian control as long as the armed forces are under control. The door is left open for the possibility that authoritarian constitutions may perform better in terms of civilian control.

In short, the quantitative global survey of constitutional texts shall work to illustrate the possibilities of different constitutional designs, identifying but not evaluating the mechanisms and the underlying ideological purposes of these provisions. The qualitative case studies, along with the quantitative statistical models, then analyze these constitutional design choices more practically by exploring the mechanisms through which constitutional rules and principles can support civilian control of the military and the overall effectiveness of such endeavors. The details of the methods are as follows.

1. The quantitative survey of constitutional text

Comparative constitutional law is diverse, with many viable approaches toward a particular problem. One well-known approach is the functional approach, which looks at how foreign jurisdictions solve a common problem to explore available options for the

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[116] MARK TUSHNET, ADVANCED INTRODUCTION TO COMPARATIVE CONSTITUTIONAL LAW 9 (2nd ed. 2018).

home jurisdiction of the inquirer.[117] But constitutional law can only be universal to a degree. There are no sets of prescribed provisions that could work in any jurisdiction. For instance, in places where civil-military relations are not salient or problematic, there is no need for additional constitutional reform.

However, one could see a pattern in the aggregate. Similar to studies of how constitutions worldwide deal with the separation of powers and constitutional amendments,[118] the presence or absence of the armed forces in the constitutional text can inform the approaches most constitutional designers follow to pursue civilian control. While popularity is no guarantee of merit or success, it directs attention to the issue and provides a convincing case for adopting and borrowing constitutional norms. So long as the data is available and valid, the descriptive function of empirical research can provide new insights into existing issues.

The quantitative method helps fulfill the limitations in the comparative constitutional law literature, which often relies on small-n case studies. At a minimum, "scholars might use quantitative data to map the constitutional universe and identify similarities and differences across different legal systems, by simply summarizing and counting quantitative data."[119] These insights can inform future constitutional drafters of

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[117] *See* Francesca Bignami, *Methodologies of Comparative Constitutional Law: Functional Approach*, *in* THE MAX PLANCK ENCYCLOPEDIA OF COMPARATIVE CONSTITUTIONAL LAW para. 11-12 (Rainer Grote et al. eds., 2021).

[118] There are already great scholarly works on both subjects. *See, e.g.,* YANIV ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS (2017); CHRISTOPH MOELLERS, THE THREE BRANCHES: A COMPARATIVE MODEL OF SEPARATION OF POWERS (2013).

[119] Anne Meuwese & Mila Versteeg, *Qualitative Methods for Comparative Constitutional Law, in* PRACTICE AND THEORY IN COMPARATIVE LAW 230, 232 (Maurice Adams & Jacco Bomhoff eds., 2012).

the breadth and depth of constitutional tools that could work across borders to solve similar problems, opening up more possibilities than what would normally be available from a few jurisdictions.

Within the literature, similar attempts have accomplished great results in the past few decades, with subject matter ranging from constitutional endurance to constitutional rights.[120] However, while there is an abundance of empirical studies of the military and the constitution,[121] there is still no empirical study on the issue of the military. Even the CCP project, which meticulously captured many characteristics of national constitutions, only observes whether the armed forces are present in the constitution and who the commander-in-chief is.[122] Accordingly, the dissertation aims to fill the gap in this emerging sub-field by creating an original dataset on constitutional treatment of the military.

Apart from summarizing data, another objective here is taxonomical. The chapter classifies the details of the constitutional text and its effects on the military based on

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[120] *See, e.g.*, David Law & Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism* 99 CAL. L. REV. 1163 (2011) (showing differentiation and polarization among bills of rights worldwide); ZACHERY ELKINS ET AL., THE ENDURANCE OF NATIONAL CONSTITUTIONS (2009); Tom Ginsburg et al., *Commitment and Diffusion: How and Why National Constitutions Incorporate International Law*, U. ILL. L. REV. (2008), 201–38; Tom Ginsburg and Zachery Elkins, *Ancillary Powers of Constitutional Courts*, TEX. L. REV. 87 (2009); CHILTON & VERSTEEG, *supra* note 20.

[121] *See, e.g.*, Jonathan M. Powell & Clayton L. Thyne, *Global Instances of Coups from 1950 to 2010: A New Dataset*, 48 J. PEACE RES. 249 (2011), available at http://www.uky.edu/~clthyn2/powell-thyne-JPR-2011.pdf; Dan Reiter & Curtis Meek, *Determinants of Military Strategy, 1903-1994: A Quantitative Empirical Test*, 43 INT'L STUD. Q. 363 (1999).

[122] ZACHERY ELKINS, TOM GINSBURG, & JAMES MELTON, CHARACTERISTICS OF NATIONAL CONSTITUTIONS (2014), available at https://comparativeconstitutionsproject.org/download-data/.

normative and theoretical considerations.[123] The aim is to provide different standard models for the constitutional treatment of the military. Constitutional drafters from each nation can compare their constitutional system with different models provided here and find the most compatible choice for the design of their constitution.

Finally, this dissertation uses the dataset to explore the correlations between constitutional provisions and civilian control. While incomplete data and the basic regression models used may pose a challenge to reaching a robust causal inference, this quantitative exercise could provide additional evidence for theory testing, which can benefit from the objectivity of empirical research. Hopefully, it can also serve as an invitation for more sophisticated studies that can apply the dataset from this dissertation in the future.

It is worth acknowledging here, however, that the quantitative exercise in this dissertation faces the problem of context-insensitivity. Focusing on the military is especially problematic as the limited scope highlights just one microscopic part among the numerous fundamental principles that form the constitutional system, with no room for the in-depth consideration of individual contexts.[124] Mark Tushnet, for instance, criticizes quantitative exercises that consider "a subset of all words in a constitution have

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[123] *See* HIRSCHL, *supra* note 110, at 128 (providing *'The Spirit of Laws'* by Montesquieu as an archetype of a constitutional scholarship which uses a taxonomy to create "a classification of laws and governments according to their distinguishing characteristics.").

[124] *Cf.* Thomas Wischmeyer, *Unconstitutional Constitutional Amendments,* 15 INT'L J. CONST. L. 1242, 1246 (2017) (reviewing YANIV ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS (2017)) (arguing that atheroy that focuses on unamendability or constituent power may lead to context-insensitivity).

motivating force" as "a super-formalist jurisprudence."[125] In other words, one cannot understand the provisions regarding the military without first interpreting the text in each jurisdiction.[126] One answer to this challenge is to acknowledge that, like constitutional rights, civilian control of the military is trending toward transnational harmonization.[127] Most countries agree that the military should have no prominent political role. The quantitative findings in this chapter will show how many constitutions across different legal cultures share certain norms and institutions regarding the military, even without a conventional theory on the issue. Moreover, the dissertation employed a mixed methods research design to fill the gap left by the broad stroke of quantitative study.[128] The qualitative method here complements the quantitative part and tests the theories offered in the later chapters.

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[125] Mark Tushnet, *"Sometimes the Magic Works, Sometimes It Doesn't": A Comment on Chilton and Versteeg*, 2021 U. CHI. L. REV. ONLINE 1, 2-3 (2021).

[126] *See* Madhav Khosla, *Is a Science of Comparative Constitutionalism Possible*? 135 HARV. L. REV. 2110, 2130-40 (2022) (arguing that interpretation of constitutional rights is essential in truly understanding the true differences between even among similar constitutional texts).

[127] *See, e.g.*, RAN HIRSCHL, COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW 233 (2014) (observing that "constitutional jurisprudence in Germany, Spain, Israel, Canada, and South Africa looks increasingly similar"); David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652, 659 (2005) ("Commonalities emerge across jurisdictions because constitutional law develops within a web of reciprocal influences, in response to shared theoretical and practical challenges.").

[128] James D. Fearon & David D. Laitin, *Integrating Qualitative and Quantitative Methods*, *in* THE OXFORD HANDBOOK OF POLITICAL METHODOLOGY 756, 758 (Janet M. Box- Steffensmeier et al. eds., 2008) ("Done well, multimethod research combines the strength of large-N designs for identifying empirical regularities and patterns, and the strength of case studies for revealing the causal mechanisms that give rise to political outcomes of interest.").

2. Case selection for theory-testing

Regarding the qualitative part, since many works in comparative constitutional law have trouble justifying case selection due to a small set of well-known countries,[129] the dissertation aims to select case studies objectively and logically. These case studies comprise Turkey, Thailand, and Myanmar. The selection process started by examining the extent to which countries have military-related provisions in their constitutions as available through the dataset illustrated in Chapter II. Those countries with a significant number of provisions on the military (having provisions on civilian control through both separation of powers and direct limitations of the military's political roles) are then sorted into three groups: (1) those with no recent coups and no significant roles for the military in politics (2) those with coups or blatant military intervention in politics in the past ten years (3) those with the military still holding a direct and significant role in politics.

This classification tests whether constitutions matter in extreme or hostile civil-military relations in (2) and (3). These worst-case scenarios where constitutions are relatively similar will provide a strong test to assess whether constitutional provisions matter at all in civil-military relations. Moreover, countries where the military has a role in politics can show whether the constitution can also strengthen the position of the armed forces in relation to the civilian government.

This process of elimination makes Turkey, Thailand, and Myanmar a fitting combination for a comparative attempt. They all have different combinations of

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[129] *See* HIRSCHL, *supra* note 110, at 246.

constitutional provisions on civilian control from their past to current constitutions, enabling a thorough analysis of almost all available constitutional design choices as independent variables. Moreover, since the three countries have fluctuated between the (2) and (3) groups (from occasional interventions in politics to coups that result in direct control of the government by the military), these shifts in the levels of civilian control provide variance in dependent variables against which effects of the constitution can be assessed. Accordingly, these countries align with the "most difficult case" principle.[130] Under this principle, if constitutional tools can enhance the control over the military in even the most unlikely places where the armed forces—considering their histories of coup d'états—are extremely powerful, then the constitution is more likely to be effective in ordinary cases far from the extreme.

Furthermore, the military leadership in these jurisdictions had all shaped their constitutional system, acting as a crucial institution guarding and guiding the state. The constitution—its texts and interpretations—is the main instrument of such a strategy and, fittingly, the main object of the comparative study here. Applying the "most similar cases" principle for case selection, the research design comes close to the ideal cases that are "identical but for the factors of causal interest."[131]

Specifically, while the Thai military has succeeded so far in asserting its political influence with no need for another coup even when under significant pressure from the

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[130] *Id.* at 260-62.

[131] *Id.* at 205-17 (discussing a small set of 'usual suspect' normally studied as representative of global constitutional law).

opposition, the Burmese military, against its intricate schemes, had to step up and stage another coup d'état in 2021. Meanwhile, the Turkish government survived a coup attempt in 2016, cementing the dominance of the civilian government more than ever. Based on these different outcomes, there seem to be some factors that make one regime more 'successful' than the others in their similar endeavor of controlling the politics behind the scenes. And the constitution could be one of those crucial factors. The divergence is especially striking in Turkey, where a significant series of constitutional amendments occurred before the failed coup in 2016. Thus, these case studies are ripe for theory-testing concerning the effectiveness of constitutional provisions that aim to control the military.

Conclusion

This dissertation explores the approaches that constitutions worldwide have taken concerning civilian control of the military. This first part of the dissertation is quantitative and descriptive. After pondering the form and substance of constitutional provisions, the latter part theorizes constitutional concepts of civilian control and their applications to form normative conjectures. The dissertation concludes with quantitative and qualitative research methods to assess the precision of the proposed conjectures.

Chapter II: Constitutional Provisions on the Military in Comparative Perspective

"*Cedant arma togae, concedat laurea laudi—Let arms yield to the toga, let the laurel yield to praise*"— Cicero, De Officiis I:77

Introduction

The constitution reigns supreme as the highest normative authority within any legal system. Other norms are derivative of the one fundamental source of law above all.[132] In this abstract world, might does not make right. All the political determinations that create the constitution are extra-legal, falling beyond the reach of constitutional law.[133] However, practitioners of constitutional law long realized that extra-legal forces can always make or break the constitution.[134] With the violent nature of humanity lingering in the background, constitutional texts are designed to cope with forces of violence in various settings, from anti-terrorism provisions[135] to constitutional protection from mob violence.[136] Among these, the most common and deadly one belongs to the

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[132] *See* LARS VINX, THE GUARDIAN OF THE CONSTITUTION: HANS KELSEN AND CARL SCHMITT ON THE LIMITS OF CONSTITUTIONAL LAW 27-31 (2015) (discussing the concept of constitution as the supreme law of the land).

[133] J. WALTER JONES, HISTORICAL INTRODUCTION TO THEORY OF LAW 224 (Oxford, 2 ed. 1956) ("Only by restricting his field and resolutely refusing to wander along any road which may bring him in contact with the extra-legal world, can he hope to avoid the pitfalls which, in Kelsen's View, await those who think they can use legal technique to solve problems of politIcs or sociology.").

[134] Tom Ginsburg, *Constitutional Endurance, in* ROUTLEDGE HANDBOOK OF COMPARATIVE CONSTITUTIONAL CHANGE 61, 64-65 (Xenophon Contiades & Alkmene Fotiadou eds., 2020) (arguing that constitutional replacement and regime change may not necessarily occur at the same time but may also go hand in hand depending on the country at issue).

[135] *See, e.g.*, Kent Roach, *Comparative Counter-Terrorism Law Comes of Age*, *in* Comparative Counter-Terrorism Law 1–46 (Kent Roach ed., 2015).

[136] *See, e.g.*, Susan Kuo, *Bringing in the State: Toward a Constitutional Duty to Protect from Mob Violence*, 79 INDIANA L. J. 177 (2004).

military—a professional and well-organized institution capable of staging a coup and putting an end to the life of constitution factually and legally.

Indeed, constitutionalism has a long history of civilian governments controlling and putting limits on the military via constitutional texts. The development of many early great written constitutions that inspired all subsequent modern constitutions worldwide coincided with the rise of the modern standing armies.[137] Notably, the following quote from Alexander Hamilton illustrates how the American Constitution attempts to establish democratic control over the military through the executive and legislative branches by splitting the prerogative power of the British monarch:

"*[the power of the commander-in-chief] would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy; while that of the British king extends to the declaring of war and to the raising and regulating of fleets and armies, all which, by the Constitution under consideration, would appertain to the legislature.*"[138]

As the American experiment with a written constitution had become a success, many subsequent constitutions adopted the same framework by having the head of the executive as the commander-in-chief while also providing other supervisory powers to the legislative branch.[139] Contrary to what has become a given in civil-military

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[137] *See* Huntington, *supra* note 43, at 676-79 (discussing the emergence of military professionalism and objective civilian control that came about 25 years after the drafting of the American Constitution).

[138] THE FEDERALIST, No. 69, at 386 (Alexander Hamilton) (Clinton Rossiter ed., 1961, 1999 reprint).

[139] *See, e.g.,* Constitution of Colombia (1991) art. 189 (3); Constitution of Honduras (1982) art. 245 (16).

relations,[140] the American constitutional framers were already afraid of what the armed forces could do to their vision of the Constitution. The constitutional framework that still exists regarding the military did not come by accident; it was a deliberate constitutional design choice to control the military. This framework is another contribution of the American constitution, which still resonates today, similar to the separation of powers or the very idea of a written constitution. Despite the lack of discussion on the effects of these constitutional arrangements, the military has always been a common subject under constitutional law.

Thus, whatever the conclusive causal relationship between the military and the constitution, there is at least a correlation between the two, which needs a general theory to expound. At least, there is a need for guidelines on how to effectively use the law to command those soldiers, who comprise a large portion of many states' human resources.[141] This chapter is thus the first step in filling this gap by exploring the myriad ways constitutions deal with the military to lay the groundwork for further conceptualization. The overall objective of this chapter is descriptive; it applies quantitative research methods to take advantage of the availability of the existing databases in the field of comparative constitutional law.

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[140] *See See* Huntington, *supra* note 43, at 681 ("The Framers' concept of civilian control was to control the uses to which military forces might be put rather than to control the military per se. They were more afraid of military power in the hands of political officials than of political power in the hands of military officers.").

[141] In the last decade, the proportion of armed forces personnel in active duty to the total labor force is at 0.8 percent. The World Bank, International Institute for Strategic Studies, The Military Balance , Armed forces personnel (% of total labor force) (last visited Mar. 7, 2024), https://data.worldbank.org/indicator/MS.MIL.TOTL.TF.ZS?name_desc=true.

This chapter shall proceed in three parts: the first part discusses the original dataset and some of its characteristics. The next one describes all the variations of constitutional provisions related to the military to detect any trends or patterns in the attempt to control the armed forces through the power of the constitution. The last part then attempts to categorize constitutions into groups according to the overall structure and content of the treatment of the military. Considering these broad categories, the last part also analyzes the two core approaches to civil-military constitutional provisions that have become prevalent in many constitutions today to set the stage for the following theoretical chapters.

I. Dataset on the Military in Constitutions

Regarding the quantitative methodology employed here, the rise of empirical research in comparative constitutional law benefits this chapter greatly with the resources and research methods that are more readily available than ever. All the constitutions coded in the dataset came from the Comparative Constitutions Project, which meticulously collects almost all historical and current constitutions, including texts translated into English.[142] The author also follows suggestions from sources in the emerging field of empirical legal research.[143]

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[142] COMPARATIVE CONSTITUTIONS PROJECT (last visited Apr. 12), https://clinecenter.illinois.edu/project/CollaborativeResearch/comparative-constitutions-project

[143] *See, e.g.*, LEE EPSTEIN & ANDREW D. MARTIN, AN INTRODUCTION TO EMPIRICAL LEGAL RESEARCH (2014); David Law, *Constitutions in* THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH 376 (Peter Cane & Herbert M. Kritzer eds., 2010).

To capture how national constitutions treat the military, the author created a global dataset on constitutional provisions that involve the military. The process begins with a brief survey of current constitutions, skimming major constitutions in alphabetical order for any reference to the military. The survey provides an initial understanding of the general scope and structure of provisions related to the military. Repeated patterns, such as clauses regarding commander-in-chief and limitations on the political rights of active-duty soldiers, are noted and analyzed. Then, based on this initial survey, the author drafted a codebook to make the exercise as precise and transparent as possible so that future researchers can replicate the study results.[144] The author manually coded 191 constitutional systems in the database to 2020. All of these are available in English or French,[145] including all available historical constitutions as far back as 1789.[146]

In total, there are 19 variables in the dataset.[147] The first two variables are generic, measuring in a broad brush the existence and prevalence of the military in the

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[144] Some variations such as those on appointment of military officers were added after 20% of all constitutions were coded.

[145] There were 191 constitutions in the dataset up until the year 2020. All states which no longer exist today are excluded from the dataset. For example, Kingdom of Prussia which was incorporated in the Weimar Republic and Republic of Vietnam (South Vietnam) which was incorporated into Socialist Republic of Vietnam are not included of the dataset.

[146] Specifically, the American Constitution, which became effective in 1789, is often considered as the first influential written constitution as understood today. *See* ZACHARY ELKINS ET AL., THE ENDURANCE OF NATIONAL CONSTITUTIONS 48–50 (2009) ("The year 1789, of course, marks the effective year of the United States' Constitution, the widely reputed "first" document of its kind."); Stephen Gardbaum, *The Myth and the Reality of American Constitutional Exceptionalism*, 107 MICH. L. REV. 391, 411 (describing the United States as "the inventor of modern constitutional supremacy—a constitution containing a bill of rights that is entrenched, the supreme law of the land, and enforced by the power of judicial review…").

[147] *See infra* Appendix I.

constitution.[148] Next, there are three other variables that deal with emergency powers and terrorism that are not directly related to the military.[149] Since it is believed that the military thrives in crises, these peripheral provisions are meant to explore any connection between exceptional circumstances and how the military may be presented in the constitution. The other eleven variables then capture different military issues: professionalism and political neutrality, military service, and separation of powers. Finally, the last three variations investigate provisions related to coup d'états and any attempt to constitutionalize the military institutions—the kind of provisions assumed to be rare or nonexistent.[150]

At the outset, just by systematically collecting data on the control of the military in the constitutions should contribute to the area of comparative constitutional design. Challenging the view that some provisions are rare or exceptional could persuade future constitutional drafters to adopt less established provisions in the literature.[151] Likewise,

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[148] One captures whether the military is mentioned in the constitution and the other captures whether the military has a dedicated heading covering a set of articles in the constitution.

[149] Two variables regard the existence of emergency powers and the involvement of the military. One variable captures the existence of terrorism as an issue.

[150] Hatchard, Ndulo & Slinn, *supra* note 5, at 275 ("Whilst few constitutions contain express provisions to this effect, they apply, by *implication,* in every state that is committed to good governance and the rule of law.").

[151] Mark Tushnet, *Some Reflections on Method in Comparative Constitutional Law, in* THE MIGRATION OF CONSTITUTIONAL IDEAS 67, 72-75 (Sujit Choudhry ed., 2006) (providing an account of the functionalist approach to comparative constitutional law which use the constitutional law of foreign jurisdictions as to find the best solution for one's home jurisdiction).

provisions commonly adopted by established democracies may create a normative impression that one approach to civilian control is superior to others.[152]

However, even within such a basic objective, the data collection here is not exhaustive. Certain features, such as military justice, are not coded here yet due to the issue's complexity, which requires further theoretical considerations before creating new variables. The issue of military justice systems—essentially how to balance the civilian control of the military's administration of justice through the judiciary[153]—has specific theories and controversies that warrant a separate treatment.[154] While provisions stating the establishment and jurisdiction of the military court are prevalent in many democracies and essential to the principle of civilian control,[155] military courts nonetheless adjudicate many different issues specific to military justice.[156] The breadth and complexity of military justice make the quantitative exercise risky, especially since the details on the military courts and offenses are often found in ordinary legislation rather than the

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[152] *Id.* at 69-72 (stating how universalists see comparative constitutional law as a way to discover universal principles of constitutional law).

[153] *See* Edward F. Sherman, *Military Justice Without Military Control*, 82 YALE L.J. 1398, 1400-03 (arguing that theoretical justifications for no longer support a separate system of military justice without civilian control).

[154] There are several book-length discussions on the issue domestically and internationally. *See, e.g.,* EUGENE R. FIDELL ET AL., MILITARY JUSTICE: CASES AND MATERIALS (4th ed. 2023); LISA HAJJAR, COURTING CONFLICT: THE ISRAELI MILITARY COURT SYSTEM IN THE WEST BANK AND GAZA (2005).

[155] *See generally* BRETT J. KYLE, ANDREW G. REITER, MILITARY COURTS, CIVIL-MILITARY RELATIONS, AND THE LEGAL BATTLE FOR DEMOCRACY: THE POLITICS OF MILITARY JUSTICE (2021).

[156] Indeed, these provisions often operate to strictly separate military personnel from ordinary citizens so that the ordinary procedures are protected under due process rights while the military can have their own modified procedures in accordance with the nature of their missions. *See, e.g.,* Ghana's Constitution of 1992 art. 19 cl. 19 ("Parliament may, by or under an Act of Parliament, establish military courts or tribunals for the trial of offences against military law committed by persons subject to military law."); Constitution of Egypt art. 204 para. 2 (2019) ("No civilian shall face trial before the military court, except for…").

constitution.[157] Complexity also explains the exclusion of the militia as part of the study. The militia is essentially the military in its capacity but lacks the permanent nature and standard of professionalism distinctive of the regular armed forces.[158] The issue thus warrants another research project outside of this dissertation.

Moreover, some constitutional provisions may not directly mention the military but involve it in application. For instance, Article 6 of the Argentinian Constitution gives the federal government the power to "intervene in the territory of a Province in order to guarantee the republican form of government or to repel foreign invasions."[159] This power allowed the president to remove any provincial leader he did not like by using the armed forces as part of the federal executive authority, even though the constitution did not mention the military directly.[160] It is safe to assume that many more references to the military are overlooked in this quantitative exercise. The dataset is thus mostly limited to provisions that directly refer to the military with the purpose of civilian control.

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[157] *See, e.g.*, Uniform Code of Military Justice, 10 USCS prec § 101; Armed Forces Act 2006, c. 52 (Eng.). *See also* EMMANUEL DECAUX, INTERNATIONAL STANDARD PRINCIPLES GOVERNING THE ADMINISTRATION OF JUSTICE THROUGH MILITARY TRIBUNALS 12 (2010) (noting that the status and independence of military tribunals must be established and guaranteed either by the constitution or the law).

[158] Niccolò Ridi, Militias, *in* THE MAX PLANCK ENCYCLOPEDIA OF COMPARATIVE CONSTITUTIONAL LAW para. 1-5 (Rainer Grote et al. eds., 2021).

[159] Constitución Argentina (Constitution of Argentina), art. 6 (1853).

[160] David Pion-Berlin, *Argentina: The Journey from Military Intervention to Subordination Argentina*, *in* Oxford Research Encyclopedia of Politics (Mar. 31, 2020), ("Article 6 of the Argentine constitution actually allowed (and still allows) for such interventions ostensibly to guarantee that a republican form of government would be maintained.").

A. The Prevalence of the Military within the Constitutions

The first impression of the dataset is how almost all constitutions have a direct reference to the military.[161] In contrast to the lack of theoretical discussions in comparative constitutional law, the armed forces are a common component of virtually any constitution. As seen in Table I, 94% of the current constitutions at least make a passing reference to recognize the existence of the military. The lack of military presence in a handful of constitutions (3%) only occurs in small countries with low security risks, such as Andorra and Iceland.[162]

As shown in Figure I, the chronological trend confirms the consistent connection between the military and the constitution since 1798, when the American Constitution was promulgated. Only after the Second World War did some countries start to deviate from the trend and completely drop the military from the constitution: a phenomenon likely caused by a new international order founded as an aftermath of the war, which relatively limits the use of force by sovereign states than ever before.[163] That said, the five current constitutions (out of 191 in the dataset) that refrain from mentioning the military are still extremely small. Notwithstanding the varying degree of depth and breadth on the issue in each constitution, the military has always been a subject of

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[161] The terms vary but they all mention the military as an institution or to one of its members, e.g., "army", "defense forces", or "soldiers".

[162] Libya is the only outlier in this regard due to its relatively larger population and area combining with its security issues.

[163] *See generally* THE UNITED NATIONS SECURITY COUNCIL AND WAR: THE EVOLUTION OF THOUGHT AND PRACTICE SINCE 1945 (Vaughan Lowe et al. eds., 2010) (discussing the role of the security council in solving the problems of both civil and international wars).

modern constitutions. The universality of the idea and organization of the armed forces is comparable to other essential modern institutions that are far more covered by constitutional law literature, such as central banks and other independent agencies.[164]

It is worth noting that other security forces, such as the police or intelligence services, do not feature as prominently in the constitution as the military. Even when they appear in the constitution, their form and content do not present observable patterns comparable to the military.[165] Also, paramilitary groups or insurgent forces who exist under some constitutions after internal conflicts and possess the ability to use violence but do not have both the legitimacy and the traditional structure are not counted as the military under this study as they are intrinsically different from the armed forces.[166]

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[164] *See, e.g.,* Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1257-64 (discussing, through comparative perspective, how government agencies and quasi-autonomous nongovernmental organizations function as the fourth branch of the government); John B. Goodman, *Constitutional Aspects of the Independence of the European Central Bank*, 23 Int'l & Compar. L.Q. 329 (1991); Anne-Caroline Hüser, *Bankers, Bureaucrats and Central Bank Politics. The Myth of Neutrality*, 12 INT'L J. CONST. LAW 835 (2014).

[165] *But see* Zoltan Barany et al., *Conclusion: Security Sector Reform and Constitutional Transitions: Challenging the Consensus, in* SECURITY SECTOR REFORM IN CONSTITUTIONAL TRANSITIONS 1, 247-48 (Zoltan Barany et al. eds., 2019) (treating the armed forces, the police, and intelligence service as falling within the same security sector and having the same problems of civil-military relations due to their coercive powers).

[166] *See, e.g.,* Tobias Böhmelt & Govinda Clayton, *Auxiliary Force Structure: Paramilitary Forces and Progovernment Militias*, 51 COMPAR. POL. STUD. 197, 201-06 (2018) (discussing auxiliary security forces such as paramilitaries and progovernment militias); MORRIS JANOWITZ, THE MILITARY IN THE POLITICAL DEVELOPMENT OF NEW NATIONS: AN ESSAY IN COMPARATIVE ANALYSIS 38-40 (1964) (providing examples of how paramilitary organizations can function separately from the military, especially as counterweights to the army).

Current Constitutions with Reference to the Military	No. (%) of Constitutions
Constitutions with Reference to the Military	182 (95.29%)
Constitutions with no Reference to the Military	5 (2.62%)
Constitutions with Prohibition of the Military	4 (2.09%)

Table I

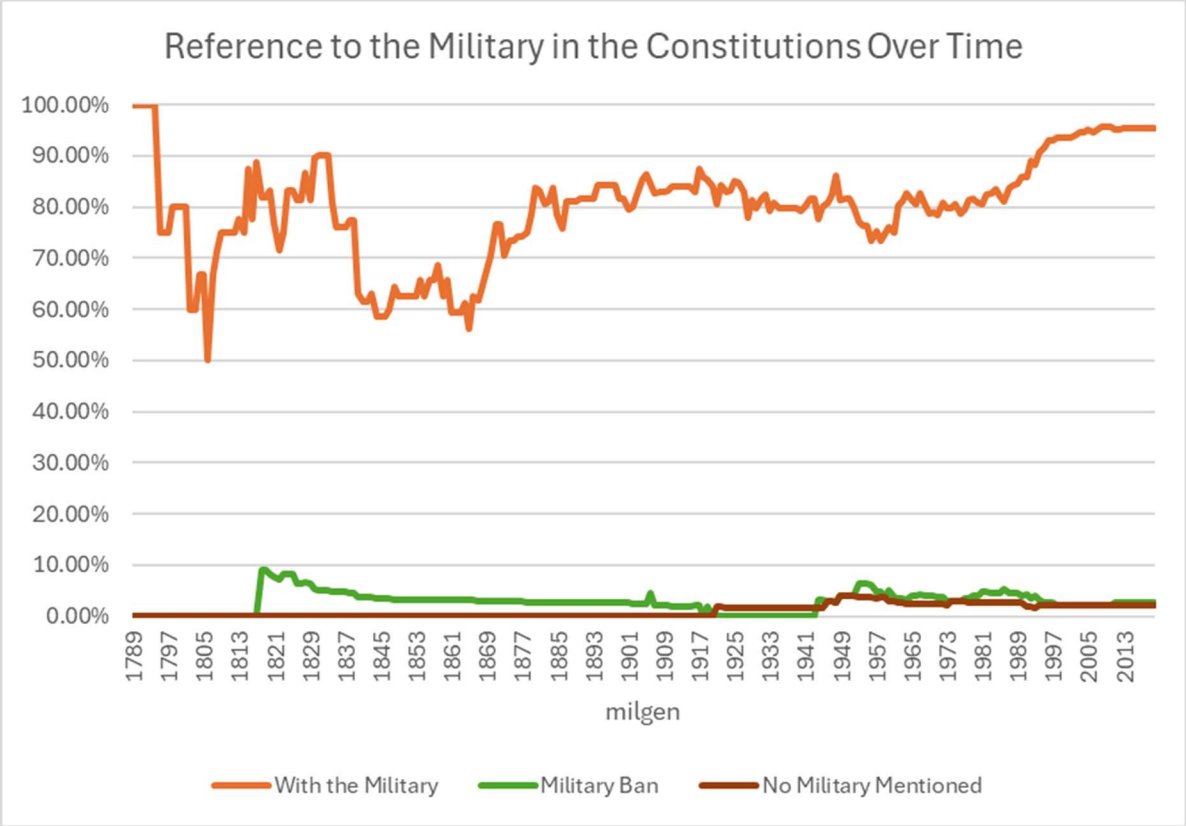

Figure: 1

A. The Breadth and Depth of the Military-Related Provisions

However, the common occurrence of the military is the only obvious observation at this point. The breadth and depth of provisions related to the military in each constitution differ in varying degrees. Constitutional treatment of the military varies from just acknowledging its existence to providing a whole set of powers and duties for the defense forces in detail. Again, the data collection is inevitably incomplete as it is impossible to capture all the various ways a constitution could deal with the military. Therefore, the emphasis is on those most relevant to civilian control. In doing so, some constitutional arrangements that are also both interesting and illuminating to the civilian control effort must make way for those that are more impactful and prevalent.

For example, while many old constitutions prevent armed forces from entering the legislative assembly (as inspired by the event in 1642 where King Charles I stormed the English House of Commons with armed soldiers in a power struggle between the Crown and the Parliament),[167] such provisions only appear now as an artifact of the parliamentary tradition in constitutions that retain these provisions despite its obsolete function.[168] The dataset can only capture the most common and relevant variables per the

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[167] *See* AUSTIN WOOLRYCH, BRITAIN IN REVOLUTION, 1625-1660 212-13 (2002) (detailing the attempt of Charles I to arrest the Five Members of the House of Commons with about 80 armed men to threaten the House).

[168] Interestingly, even relatively recent constitutions still have these provisions as a guarantee for the safety of members of the legislature. *See, e.g.,* دستور مملكة البحرين (Constitution of the Kingdom of Bahrain), art. 78 para. 3 (2002) ("No other armed force may enter the Assembly or be stationed close to its gates unless so requested by the Speaker."); دستور الجمهورية العربية السورية (Constitution of the Syrian Arab Republic), art. 73 para. 2 (2012) ("The People's Assembly shall have special guards under the authority of the Speaker of the Assembly; and no armed force may enter the Assembly without the permission of its Speaker.").

general objective of civilian control. Anything beneath the surface level of constitutional texts has to be dealt with through case studies.[169]

Regarding the depth of military-related constitutional provisions, it is difficult to quantify the level of detail each constitution provides on its military through coding. This difficulty primarily comes from the variety of forms and content these provisions could take shape. Therefore, the variable 'Milheading' is created as a proxy to gauge how each constitution deals with the military. Of course, the heading is of limited use as it is still a proxy. However, constitutions with a separate chapter heading for the military or national defense naturally provide more provisions to justify the dedicated space in the constitution, and the heading could represent a substantial constitutional engagement with the military.[170] According to the dataset, 44% of the current constitutions that have mentioned the military also create a separate heading and section for provisions on the military. This finding further supports that the prevalence of the military in the constitution is more than just mentioning the armed forces in passing.

What is more, the trend in Figure II suggests that once the heading for the military is in the constitution, future amendments or new constitutions rarely abandon this format even when the military is no longer relevant in a particular country as seen in Figure II.[171]

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[169] *See infra* Chapter VII.

[170] *See, e.g.,* Constitución de 2009 del Estado Plurinacional de Bolivia (Political Constitution of the State), art. 243-50 (2009) (stating the components, functions, political neutrality, conscription, council of defense, and designation of the commander-in-chief of the military); Hiến pháp của nước Cộng hòa xã hội chủ nghĩa Việt Nam (Constitution of the Socialist Republic of Vietnam), art. 64-68 (1992) (stipulating the duty to defend the nation, military training, political neutrality and functions of the military).

[171] Switzerland and Luxembourg, both of which have been relatively uneventful in terms of national security, are prime examples of constitutions that retain provisions on the military.

Although the trajectory from the beginning had been going up and down in the middle, the trend for adopting a military heading in the constitution has been consistently upward since the 1960s.[172] It is plausible that once the military is present in the constitution, it tends to stick. Constitutional amendments are generally difficult and are often costly.[173] If there is no real urgency for change, most constitutions will retain some obsolete provisions regarding the military. Thus, these superficial observations alone provide strong evidence that the military is more common and significant in the constitution than what the absence of discussions in the literature might suggest.

Current Constitutions with a Military Heading	**No. (%) of Constitutions**
Constitutions with no Military Heading	103 (53.93%)
Constitutions with a Military Heading	79 (41.36%)
Constitutions without any Reference to the Military or with a Military Ban	9 (4.71%)

[172] Interestingly, the uptick during the 1960s matches with the period of the Cold War but the proportion of constitutions with the military chapter remains even after the collapse of the Berlin Wall in 1989.

[173] *See* Richard Albert, *Formal Amendment Rules: Functions and Design, in* ROUTLEDGE HANDBOOK OF COMPARATIVE CONSTITUTIONAL CHANGE 117, 118-35 (Xenophon Contiades & Alkmene Fotiadou eds., 2021) (discussing the purposes of constitutional amendment and various designs of formal amendment rules).

Tabl

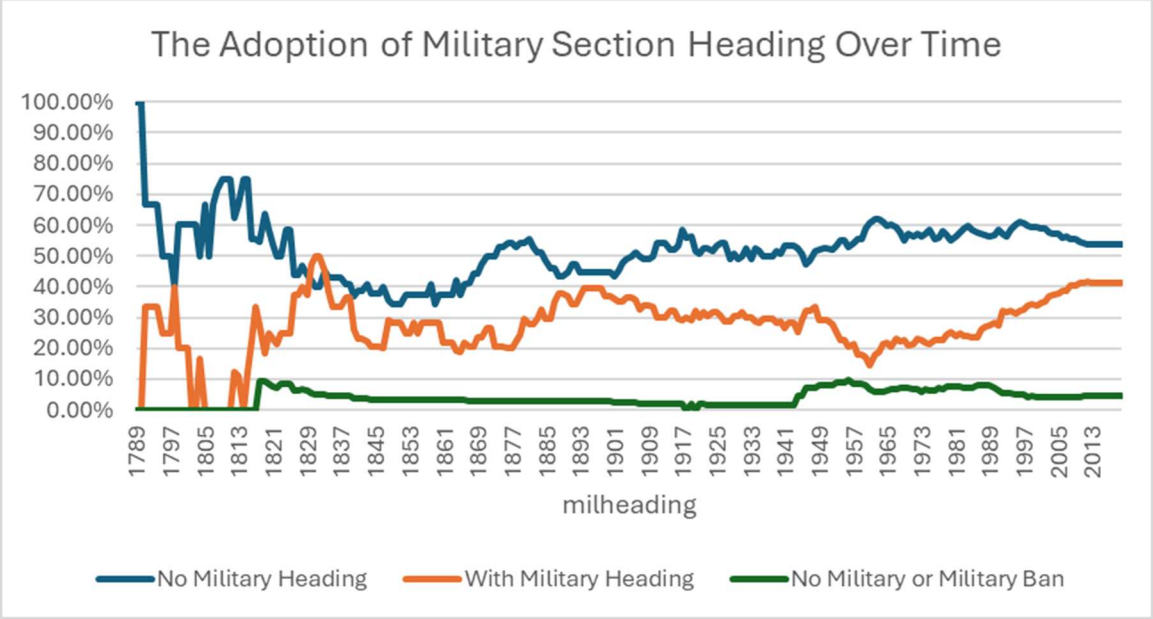

Figure II

II. The Structure and Content of Military Provisions

After discussing the prevalence of the military in the constitution, the following part summarizes the myriad forms and substances of these provisions based on their relevance to the principle of civilian control. At first blush, the nature of these military-related provisions seems too varied and specific for a proper and systematic categorization; lumping together all constitutional texts that have the military as the subject or object is arguably too mechanical for an academic exercise. However, this is a crucial step in understanding a constitutional institution similar to what a study of

presidential powers would entail.[174] There are logical patterns that run across time and space once these provisions' specific functions and purposes are considered.

Accordingly, constitutional provisions are classified loosely into four sub-groups. The first group is for those military provisions that are most discernable because they operate within the scheme of separation of powers. They are written as among the enumerated powers of one of the three branches of the government. The next group is for those provisions with deliberate aim for civilian control. They all subscribe to a common ideal of professionalism for an apolitical and obedient military following the dominant theory of civil-military relations. The third one addresses any direct attempts to prevent coup d'états. These constitutional provisions present an endeavor that is more common than expected based on the idea that coups are extra-legal and, thus, constitutionally undefendable. Though these texts also support civilian control, their distinctive features warrant a separate category for further conceptualization. The last group deals with constitutional provisions on martial law and emergency powers. While emergency regimes are not directly related to the military, foreign aggression and internal security are the most common causes for an emergency declaration, and the military is relied upon

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[174] *See, e.g.,* Jenny S. Martinez, *Inherent Executive Power: A Comparative Perspective*, 115 YALE L.J. 2480, 2487-506 (2006) (comparing clauses on war powers, emergency powers, and treaty powers in five countries); Tom Ginsburg, *Chaining the Dog of War: Comparative Data*, 15 CHI. J. INT'L L. 138, 146-57 (2014) (comparing clauses on the power to declare war in a large-n study).

in those crises.[175] Thus, any relation between the military and emergency regimes is also observed here.

A. The Separation of Powers

The conventional wisdom is that there are no grand and universal principles like the rule of law or human dignity that all constitutions can conveniently borrow and adopt from others regarding the military. While civilian control is necessary for any civil government, it does not provide any constitutional prescription that can readily strengthen a grip on the military. Provisions declaring that the armed forces "protect constitutional order"[176] or that "the activity of the armed forces shall be established by law"[177] might be located first among fundamental principles in some constitutions. Still, they do not provide instructions for compliance. The ambiguity of the military clauses reflects the disconnection between the armed forces and the constitution.

Upon closer inspection, however, the use of separation of powers with regard to the armed forces has been the earliest and most common way for constitutions to establish civilian control. While discussions of separation of powers (and its complementary principles such as checks and balances) often revolve around the three main branches and their correlative functions of legislation, execution, and

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[175] *See* Christian Bjørnskov & Stefan Voigt, *The Architecture of Emergency Constitutions*, 16 INT'L J. CONST. L. 101, 108 (2018) (providing data that shows war and internal security as the two most common reasons for calling a state of emergency).

[176] Kushtetuta E Republikës Se Shqipëisë (Constitution of the Republic of Albania), art. 12 (1998).

[177] Конституция на Република България (Constitution of the Republic of Bulgaria), art. 9 (1991).

adjudication,[178] this fundamental principle also covers all government institutions, including the bureaucracy.[179] The separation of powers guarantees that any government action will be under the law provided by the legislature, supervised by the executive, and finally reviewed by the judiciary. Similarly, control over the armed forces is divided among the three branches. Thus, the armed forces are not envisioned as a separate and equal fourth branch akin to the monarchy or other independent agencies that can take up their own constitutional status.[180] Under the separation of powers framework, the power and control over the military is split among the three main branches, employing the tools of checks and balances to enhance civilian control.

It is worth noting here, however, that the separation of powers form is asymmetric in its application to civilian control. While the legislature has a secondary role in supervising the executive's command of the military, the judiciary has a minimal role in civilian control because the secretive and peculiar nature of national security usually

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[178] *See, e.g.,* THE FEDERALIST No. 47 at 239 (James Madison) (Lawrence Goldman ed., 2008) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self- appointed, or elective, may justly be pronounced the very definition of tyranny."); CHRISTOPH MÖLLERS, THE THREE BRANCHES: A COMPARATIVE MODEL OF SEPARATION OF POWERS 16-50 (2013) (finding that all main constitutional orders share the same three powers).

[179] *But see* Peter Strauss*, The Place of Agencies in Government: Separation of Powers and the Fourth Branch,* 84 COLUM. L. REV. 573, 579 (1984) (arguing that "[t]he theory of separation-of-powers breaks down when attempting to locate administrative and regulatory agencies within one of the three branches").

[180] ANDRÁS SAJÓ & RENÁTA UITZ, THE CONSTITUTION OF FREEDOM: AN INTRODUCTION TO LEGAL CONSTITUTIONALISM 131-32 (2017) (discussing Benjamin Constance's moderating power as found in the king in a constitutional monarchy); Mark Tushnet, *Fourth-Branch Institutions: South Africa*, *in* CONSTITUTIONALISM IN CONTEXT, *supra* note 4, at 426 (discussing the fourth branch in South Africa which has independent institutions protecting constitutional democracy).

compels the court to defer to the executive.[181] The famous case of *Ex Parte Merryman*—where President Lincoln defied the order of the Chief Justice and suspended the writ of habeas corpus without congressional authorization—illustrates how the President could justify the detention by military authorities by arguing that the guardian of the constitution.[182] Furthermore, the conduct and discipline of military officials have traditionally been under the jurisdiction of specialized military courts with uniformed judges.[183] Accordingly, there is no dedicated part in the dataset for any specific role of the judiciary under the framework of separation of powers.

Thus, the following part will discuss only those provisions that have become a formal standard for contemporary constitutions that adopt one of the many variations of the separation of powers framework for the executive and the legislature. These clauses related to the separation of control over the military constantly appear among the enumerated powers of the executive and the legislative. For example, many constitutions that include the power to declare war as one of the main functions of the legislature also require the executive to participate in the process as a scheme of checks and balances.[184]

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[181] *See* Brad Epperly1 & Jacqueline Sievert, *Conflict and Courts: Civil War and Judicial Independence across Democracies*, 72 POL. RSCH. Q. 700, 701 (2019) (arguing that judicial deference to the executive is enhanced during times of security crises at the expense of liberty).

[182] *See* Edward A. Hartnett, *The Constitutional Puzzle of Habeas Corpus*, 46 B.C. L. REV. 251, 279-82 (2005).

[183] P Sean Morris, *Military Courts*, *in* MAX PLANCK ENCYCLOPEDIA OF COMPARATIVE CONSTITUTIONAL LAW (Mar. 2021).

[184] *See* Ginsburg, *supra* note 174, at 146-52 (providing data on any executive involvement in declaration of war among national constitutions).

Accordingly, they exist today in most constitutions across political systems and legal traditions. Their details will be discussed in the following sections.

1. Executive Powers Concerning the Military

a. Commander-in-Chief

According to Table III, 76 % of all the current constitutions have the head of state as the supreme commander or commander-in-chief of the military *ex officio*. Typically, the president takes this top military position in a republic while the monarch does so in a kingdom. Essentially, this position is the zenith of both civil and military authority personified. The head of state without absolute authority over both civilian and military powers would not be able to represent a sovereign state.[185] Thus, the commander-in-chief is not organically part of the armed forces since the title is inextricable from the total sum of the state, rising above any part of the state.

While constitutional texts may vary between jurisdictions, they all direct to the head of the state or the head of the executive, either the 'chief' or 'supreme' control of the military.[186] However, the most common form is to include the status of 'commander-

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[185] *See, e.g.*, IMMANUEL KANT, PERPETUAL PEACE AND OTHER ESSAYS 113 (Ted Humphrey, trans., Hackett Publ'n Co. 1983) (1795) (Discussing the original power of a prince to declare war that could be just for his own personal reasons).

[186] Supreme commanders usually exist in constitutional monarchies to establish that they are higher in hierarchy than commanders-in-chief. In such jurisdictions, the monarch is on top of the chain of command but lacks the power to assert command in practice as contrast to the president in a republic. *See, e.g.,* រដ្ឋធម្មនុញ្ញនៃព្រះរាជាណាចក្រកម្ពុជា (Constitution of The Kingdom of Cambodia), art. 23 (1993) ("The King is the Supreme Commander of the Royal Khmer Armed Forces. The Commander-in-Chief of the Royal Khmer Armed Forces shall be appointed to command the Armed Forces.").

in-chief' among the listed powers of the president.[187] These clauses rarely elaborate on what the commander-in-chief can or cannot do, only stating sometimes that one may 'command' or 'direct' the military during the war or in peacetime with certain exceptions. The brevity and ambiguity of the power here might suggest that the clause is somewhat irrelevant in practice. The control over the military must be in the hands of the executive because it does not belong to the other two more strictly defined powers. Hamilton thus argued in *The Federalist* that "little need be said to explain or enforce [the provision]…" because the use of military strength already "forms a usual and essential part in the definition of the executive authority."[188]

That said, the title here is not only symbolic or honorific, recognizing that no commanding generals are higher in the hierarchy than the civilian leader. This convention also imbues the military with an aura of legitimacy from the figurehead, justifying its monopoly of violence. The president elected by the people and the monarch coronated under hereditary succession are equally the head of the state, holding the sword that establishes the legitimate authority over the people superior to any brute force. In tandem with how the military is trained to follow the chain of command strictly, the commander-in-chief can act as a focal point for all the military members.[189] When in doubt, the commander-in-chief can be the ultimate decision-maker on all things military.

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[187] *See, e.g.,* U.S. CONST. art. 2, § 2; Constitución de la Republica de Cuba (Constitution of the Republic of Cuba), art. 128 (i) (1976); CONSTITUTION OF IRELAND 1937 art. 13(4).

[188] THE FEDERALIST No. 74 at 364 (Alexander Hamilton) (Lawrence Goldman ed., 2008).

[189] *See* SINGH, *supra* note 104, at 218 (discussing the 1991 Soviet coup attempt and emphasizing that "Without clear expectations to provide a focal point for coordination, many members of the military began to sit on the fence, unwilling to commit themselves to either side.").

From its origin in English constitutional history, the exact title was less relevant than the fact that commanders-in-chief had principal command of a military unit.[190] In this context, the commanders-in-chief were appointed and controlled by the monarch who ultimately had the army's supreme command.[191] The British commanders-in-chief were simply another commander in the chain of command—albeit ranking among the highest on the field.[192] Thus, commanders-in-chief only have exclusive military authority, possessing no executive power over the civilians, and are constantly subjected to the monarch's prerogative.[193]

However, once the American Constitution imported the title of the commander-in-chief, the practical command over the army was fused with the executive's constitutional authority. Because governors of English colonies, including those in North America, had absolute control over civilian and military matters,[194] the president could fill in the vacuum left by the governors after the independence. Thus, despite how the Federalists argued that the commander-in-chief clause is nothing more than just the

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[190] Saikrishna Bangalore Prakash, *Deciphering the Commander-in-Chief Clause*, 133 YALE L.J. 1, 19-28 (2023) (discussing the early uses of the term "commander in chief" in England and the Commonwealth).

[191] *Id.* at 26 (noting also that "this command is not preclusive, for the monarch's control was subject to legislative direction").

[192] In England, the commander-in-chief did not even need to have command over an entire army. *Id.* at 27 ("from the late seventeenth century onwards, there were officers and committees within the army that were independent of the Commander in Chief.").

[193] *See* G. R. Rubin, *Parliament, Prerogative and Military Law: Who had Legal Authority over the Army in the Later Nineteenth Century*, 18 J. LEGAL HIST. 45, 49-50 (1997).

[194] *See* Prakash, *supra* note 190, at 24-26 (discussing the use of the term "commander-in-chief" among the British colonies).

command of the military,[195] the long history of the American Constitution has led to the conclusion that "[t]he power of the President is at its zenith under the Constitution when the President is directing military operations of the armed forces, because the power of Commander in Chief is assigned solely to the President".[196] The American president then held powers similar to those of the monarchs of France and Germany, who retained supreme authority over the armed forces and all executive matters.[197]

This fusion between the prerogative of the crown, which the parliament has delineated since the 17th century,[198] and the practical title of the commander-in-chief is problematic as a constitutional matter. With its brief and ambiguous text, the commander-in-chief clause is "an ideal instrument to amass more power."[199] Even the American Supreme Court cannot find a definite scope of the commander-in-chief's power through

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[195] THE FEDERALIST, *supra* note 138.

[196] The President's Const. Auth. To Conduct Mil. Operations Against Terrorism and Nations Supporting Them, 25 Op. O.L.C. 188, 190 (2001) (claiming "inherent constitutional power" from the commander-in-chief clause during the War on Terror in 2001).

[197] *See* Carl J. Friedrich, *The Development of the Executive Power in Germany*, 27 AM. POL. SCI. REV. 185, 185-86 (1933) (discussing the concentration of executive power within the monarch among constitutional monarchies in Europe in the early 19th century). For an example of the monarch's control of the military, see, Verfassung des Deutschen Reichesart [The Constitution of the German Empire] art. 63 (1871), translation at https://ghdi.ghi-dc.org/pdf/eng/518_Constitution%20Germ%20Empire_161.pdf ("The entire land force of the Reich will form a single army which in war and peace is under the

command of the Emperor.").

[198] JEAN LOUIS DE LOLME, THE CONSTITUTION OF ENGLAND 65 (David Lieberman ed., Liberty Fund ed. 2007) (1784) (observing during the 18th century that "[t]he king of England . . . has the prerogative of commanding armies, and equipping fleets—but without the concurrence of his parliament he cannot maintain them.").

[199] Prakash, *supra* note 190, at 6.

its sophisticated jurisprudence and plenty of constitutional theories produced by the academia.[200]

Arguably, the apparent incongruence between the civilian leader of the executive and the practical control and command of the military could explain the initial reluctance of early constitutions to adopt the clause. From the middle of the 19th century, when the written constitutions gained ground and started to exist everywhere,[201] the number of constitutions with the commander-in-chief was stuck at about 60% until the trend shifted upwards around 1990, as shown in Figure III. The third wave of democracy—and implicitly the triumph of constitutionalism—brought about a new faith in democratic institutions that any ambiguity about the power of the democratically elected head of the executive becomes implausible. From then on, almost 80% of the constitutions clearly state the holder of the supreme command of the military.

Lastly, the Commander-in-chief or supreme commander of the armed forces is not always the head of the state or executive branch. There are instances, especially in older constitutions, where the president or the prime minister can appoint someone else to take charge of the military.[202] This format is now recommended by scholars in civil-military

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[200] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 641 (1952) (Jackson, J., concurring) ("[J]ust what authority goes with the name [of Commander in Chief] has plagued presidential advisers who would not waive or narrow it by nonassertion yet cannot say where it begins or ends.").

[201] ZACHARY ELKINS ET AL., THE ENDURANCE OF NATIONAL CONSTITUTIONS 41 (2009) ("In the space of fifty years or so in the early nineteenth century, constitutions had become a thoroughly necessary chapter in the script of independent states.").

[202] *See, e.g.*, Конституция на Република България (Constitution of the Republic of Bulgaria), art. 35(16) (1947) (granting the presidium of the National Assembly the power to "appoints and discharges the commander-in-chief of the armed forces on the recommendation of the government").

relations, arguing that a ministry of defense can act as a buffer between politics and the armed forces.[203] However, for now, the traditional way is well established, and a change is unlikely to occur on a large scale. Currently, only three constitutions have the minister of defense acting as the commander-in-chief, according to Table III.

Commander-in-Chief in Current Constitutions	**No. (%) of constitutions**
the commander-in-chief is not mentioned	38 (19.90%)
the head of the state is the commander in chief	145 (75.92%)
the head of the executive is the commander in chief	2 (1.05%)
the minister of defense is the commander in chief	3 (1.57%)
others	3 (1.57%)

Table III

[203] *See, e.g.,* Thomas C. Bruneau, *Ministries of Defense and Democratic Civil-Military Relations* 13-15 (2001) CENTER FOR CIVIL-MILITARY RELATIONS, https://calhoun.nps.edu/bitstream/handle/10945/43302/bruneau_min_def_2001.pdf.

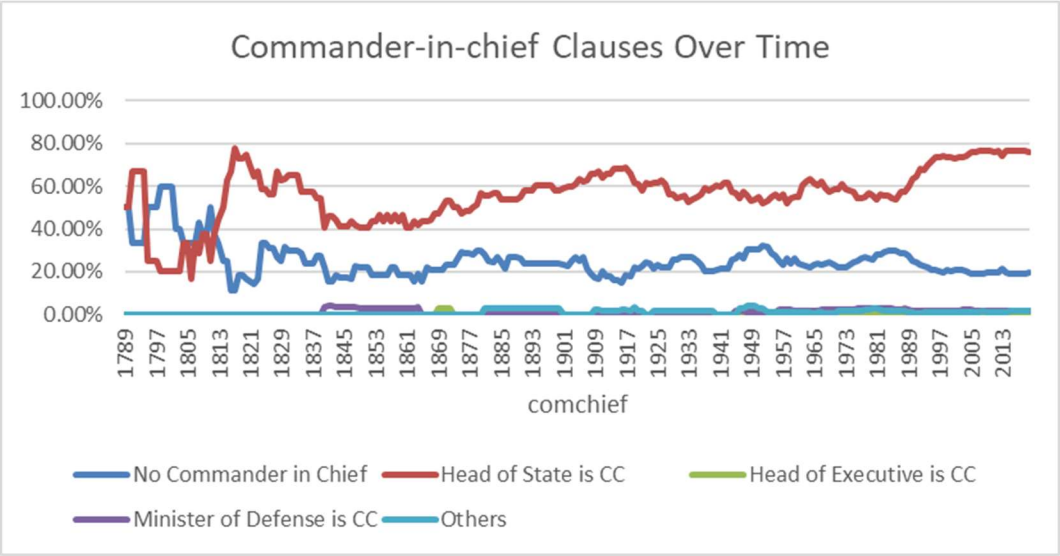

Figure III

b. Military Appointments

One type of constitutional text that often accompanies the title of commander-in-chief is the power to appoint high-ranking military officers. Naturally, entrusting officers to high-ranking military posts guarantees smooth control over the armed forces. Screening for compatible military generals is the most direct external mechanism to ensure civilian control.[204] Over half of the current constitutions (56%) exclusively allow the executive to select from among the candidates. Here, the focus on high-ranking officers aligns with the assumption that the professionalized military is a unitary actor, assuming that lower-ranking officers are more willing to follow orders from higher-ups

[204] PETER D. FEAVER, GUARDING THE GUARDIANS: CIVILIAN CONTROL OF NUCLEAR WEAPONS IN THE UNITED STATES 7-8 (1992) (arguing that control over military promotions is a key element of subjective control).

than comparable officers in other civilian organizations.[205] Nevertheless, many constitutions also protect the autonomy of the military by forbidding arbitrary discharge of senior military officers,[206] meaning that they are not reined in by their civilian leaders as long as they still perform their duties professionally.

The function of checks and balances is more pronounced here than what is seen in the powers of the commander-in-chief. The powers over military personnel belong to the executive branch, and the legislative branch can only deal with the budget and objectives of the military. This view is supported by the much-debated idea of a unitary executive, which suggests that the executive must have complete control over the administrative agencies and officers according to the formalist perspective of the separation of powers.[207] While certain constitutions require legislative approval as a safety measure against the abuse of the complete capture of the armed forces by the executive, only 8% of all current constitutions adopt such a mechanism.[208] The spread of this model is also consistent over time, as shown in Figure IV, as the legislature's role in appointing military officers has steadily declined during the last century. This is puzzling since appointments of other significant officers, such as the head of a central bank or a

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[205] Barbara Geddes, *How Autocrats Defend Themselves against Armed Rivals*, UCLA (2009) at 3-4, http://www.sscnet.ucla.edu/polisci/cpworkshop/papers/geddes2.pdf.

[206] *See, e.g.,* Colombia's 1830 Constitution art. 108 ("Officers of the Army and Navy must be Colombians and may not be deprived of their rank except by sentence passed in a proper trial.").

[207] *See* Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1165-68 (1992) (discussing how the president should have the power to remove any officers who exercise executive power under the theory of a unitary executive).

[208] Including both cases where the executive and the legislature must act together and where the legislature can exclusively appoint senior military officers according to Table IV.

constitutional court's justices, often require the legislative to confirm such nominations.[209] One possibility is that military effectiveness requires unified command and shorthand decision-making processes.[210] Then, it is rational that commanders-in-chief should select those who will most suitably work for them as part of the executive branch. Another explanation is that many countries nonetheless require legislative approval through ordinary legislation rather than fixing the appointment process in the constitution.

Finally, it is worth noting that constitutions vary regarding how to formulate provisions on the appointment of military officers. Some elaborate on the specific officers that the president or the monarch, as the commander-in-chief, can appoint.[211] However, many constitutions also lump together the power to appoint civilian and military officers, which falls under the scope of powers of the executive, by stating that the head of the executive appoints both "the civil and military offices."[212] There are also instances where civilian and military officers are not distinguished, resulting in

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[209] *See* Alex Cukierman et al., *Measuring the Independence of Central Banks and Its Effect on Policy Outcomes*, 6 WORLD BANK ECON. REV. 353, 384-94 (1992) (finding that chief executive officers of central banks are solely or jointly appointed by legislative branches in 16 countries among the 71 central banks surveyed); Katalin Kelemen, *Appointment of Constitutional Judges in a Comparative Perspective—with a Proposal for a New Model for Hungary*, 54 ACTA JURIDICA HUNGARICA 5, 11-17 (2013) (providing three models of constitutional justices appointment in Europe which almost all involve the legislature).

[210] HEW STRACHAN, THE DIRECTION OF WAR: CONTEMPORARY STRATEGY IN HISTORICAL PERSPECTIVE 24 (2019) ("In the ideal model of civil-military relations, the democratic head of state sets out his or her policy, and the armed forces coordinate the means to enable its achievement.").

[211] *See, e.g.,* The Constitution of the United Republic of Tanzania of 1977, art. 148(2); دستور المملكة المغربية لعام 2011 (Constitution of the Kingdom of Morocco of 2011), art. 53.

[212] *See, e.g.,* Constitution de la Quatrième Republique (Constitution of the Fourth Republic), art. 65(12) (2010) (Madag.); ZHONGHUA MINGUO XIANFA (Constitution of the Republic of China) art. 41 (1947) (Taiwan) ("The President shall, in accordance with the law, appoint and dismiss civil and military officers.").

constitutional provisions that authorize the executive to appoint military officers without mentioning so in the text. Because of this, many more among the 32% of the current constitutions that were coded as silent on the issue may provide the power to appoint military officers to the executive without referring directly to the uniformed officers. The US Constitution, which states that the President has the power to appoint "all other Officers of the United States," is a good case in point as this practically provides the President the power to appoint military officers.[213] In effect, the appointments clause could likely be as common as the commander-in-chief clause.

Appointment of Military Officers in Current Constitutions	**No. (%) of constitutions**
the legislature can exclusively appoint senior military officers	2 (1.05%)
the executive can exclusively appoint senior military officers	108 (56.54%)
the executive and the legislature must act together	14 (7.33%)
others	4 (2.09%)
the constitution is silent on the issue	63 (32.98%)

Table IV

[213] U.S. CONST. art. 2, § 2. *See also* Prakash, *supra* note 186, at 60 (arguing that the American President "has a tight hold over the military because no one may assume office without his approval, and no one will likely remain in their post without it."). For another example, see, Constitution of the Republic of Ghana, art. 70(1)(e) (1993) (stating that the President can appoint "the holders of such other offices as may be prescribed by this Constitution or by any other law not inconsistent with this Constitution.").

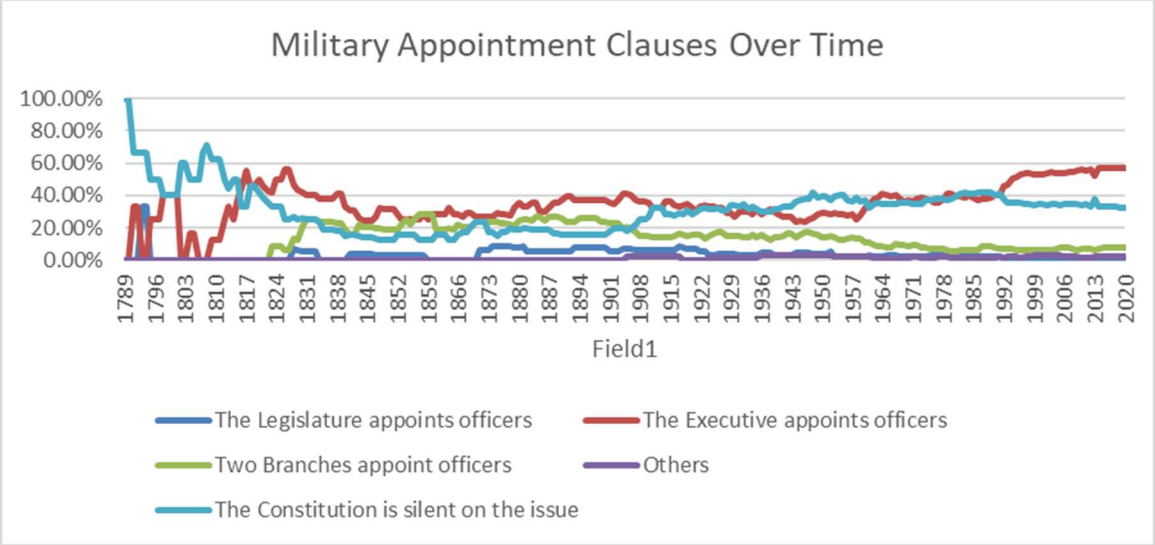

Figure IV

2. Legislative Powers Concerning the Military

The discussion so far shows that civilian control is interpreted by many constitutions as control of the military by the executive branch. However, the legislative branch also interacts with the executive to provide another check on the military.

a. The Power to Declare War

The most prominent power of the legislature over military issues is the power to declare war. From Table V, more than half of all current constitutions provide that the legislature makes the ultimate call to declare war. Indeed, it is the only common provision among countries worldwide regarding civilian control over the military that grants the power to the legislature. Because the armed forces' influence and power are always at their peak when the state is at war, having the people's representatives authorize the start of war protects against opportunistic wars that can seize powers from

the civilian government. Even the Roman dictatorship was considered problematic to the republic's stability at the time because a dictator could use war and emergencies to conceal his intention to sabotage political enemies.[214] Compared to the principle of natural justice, which states that no one should be a judge in his own case, the soldiers themselves are not the ones who decide when to engage the nation in an armed conflict. As aptly observed by Carl von Clausewitz, since the beginning of the modern military, the military in a democracy should not be able to choose its missions.[215]

Again, the US Constitution started this typical model by stating that Congress has the power to declare war,[216] effectively keeping the executive from deciding to engage in a war. James Madison argued that this "power to declare war, including the power of judging of the causes of war, is fully and exclusively vested in the legislature."[217] The reasoning for this design is based on the fear of an overgrown executive who thrives on foreign threats and oppresses people with no checks.[218] Similarly, John Stuart Mill observes that the representative branch is meant to control rather than to govern because

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[214] *See* MARINNE HARTFIELD, ROMAN DICTATORSHIP 401-04 (1982).

[215] CARL VON CLAUSEWITZ, ON WAR 27-29 (Beatrice Heuser ed., Michael Howard & Peter Paret trans., Oxford University Press, 2007) (1832) (arguing that political objectives should bring about military objectives).

[216] U.S. CONST. art. 1, § 8.

[217] 4 JAMES MADISON, THE WRITINGS OF JAMES MADISON 174 (Gaillard Hunt ed., 1906).

[218] MAX FARRAN, RECORDS OF THE FEDERAL CONVENTION OF 1787 465 (1911) ("Among the Romans it was a standing maxim to excite a war, whenever a revolt was apprehended. Throughout all Europe, the armies kept up under the pretext of defending, have enslaved the people.").

the legislature can deliberate and reconcile conflicting opinions,[219] making the legislative branch a much preferable choice as a platform to decide on the issue of war.

However, the most common model for the power to declare war requires the executive and the legislature to cooperate (35% of the current constitutions), a more practical choice since the executive has to plan and operate in campaigns, not the legislature. In practice, these provisions have the same result as when the constitution only mentions the legislature because the legislature's approval generally implies the executive's proposal. The legislature is rarely a practical branch that initiates a war without the executive's energy. That said, even when the Constitution is clear about the power to declare war, the executive can still find a way to encroach upon such power and initiate aggression without the legislature's approval.[220]

It is worth noticing that while declarations of war have become irrelevant under international law,[221] new constitutions still include provisions on the power to declare war out of convention when borrowing from earlier or foreign constitutions.[222] These borrowings are in line with the trend towards constitutional silence on the declaration of war that has stagnated since the 1990s as seen in Figure V. Most constitutions still

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[219] JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 112 (1861, Prometheus Books, 1991).

[220] *See, e.g.*, Saikrishna Prakash, *Only Congress Has the Authority to Declare War. Can It Take that Power Back from the Presidency?*, THE WASH. POST (Oct. 2, 2020), https://www.washingtonpost.com/politics/2020/10/02/only-congress-has-authority-declare-war-can-it-take-that-power-back-presidency (providing examples of American military activities abroad with no Congress' approval such as those in Libya and Yemen).

[221] Tom Ginsburg, *Chaining the Dog of War: Comparative Data*, 15 CHI. J. INT'L L. 138, 143 (2014).

[222] *Id.* at 148-49 (observing "a tendency for constitutions that are written within the same region and same time period to have a good deal of similarity.").

provide some details on the authority to declare war through constitutional borrowing that comes out of convenience.[223] As shall be discussed in Chapter IV, borrowing constitutional provisions often creates unintended results, as in other areas of constitutional law.

Declaration-of-War Clauses in Current Constitutions	**No. (%) of constitutions**
the constitution is silent on the issue	69 (36.13%)
the executive and the legislature must act together in declaring war	67 (35.08%)
the legislature can declare war unilaterally	36 (18.85%)
the executive can declare war unilaterally	17 (8.90%)
others	2 (1.05%)

Table V

[223] *Id.* at 160 ("[T]here is great continuity over time within a country, even if it adopts multiple constitutions.").

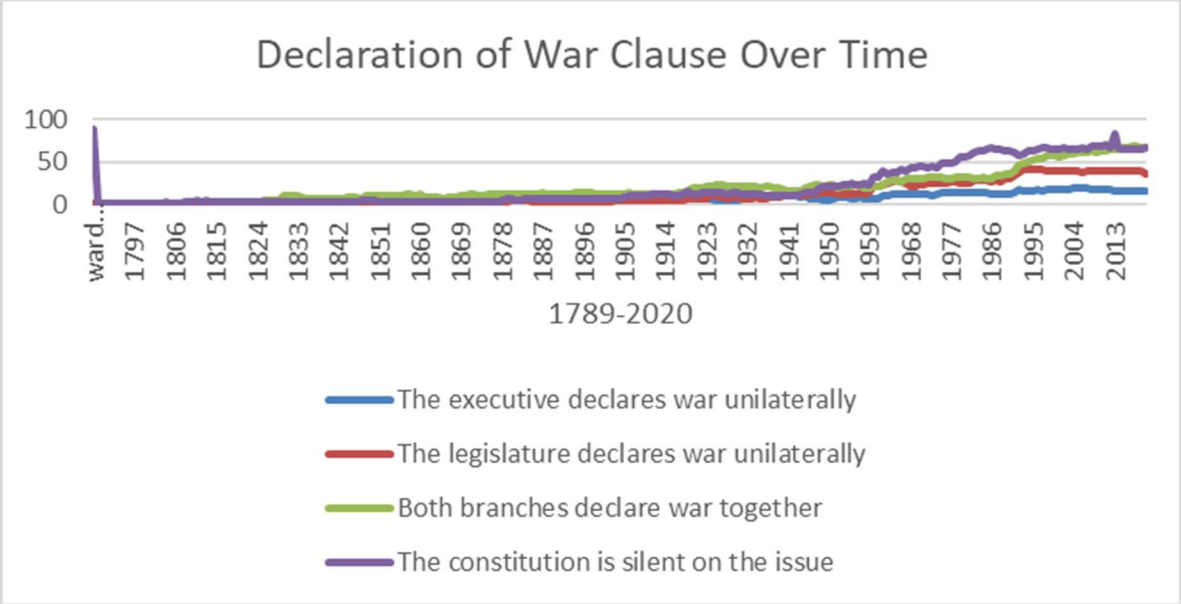

Figure V

b. Legislative approval of the maintenance of the armed forces

Constitutions not only entrust the legislature with the powers to declare wars; many also share the control over the military directly, granting the legislature the power to raise armies or to make rules for the armed forces.[224] In this way, checks and balances between the two branches are supposed to enhance control over the military, albeit only in a limited way that both branches will pay more attention to the armed forces under their control. However, like the ambiguity over the powers of the commander-in-chief, there are constant debates in practice with regard to the legislative control over the

[224] *See, e.g.*, U.S. CONST. art. 1, § 8, cls. 11-14;

military regarding the deeply rooted checks and balances nature of the allocation of powers.[225]

Legislative Authorization of the Military in Current Constitutions	**No. (%) of constitutions**
not applicable because the constitution is silent on the issue	150 (78.53%)
the legislature has the power to raise and maintain the armed forces unilaterally	22 (11.52%)
the executive has the power to raise and maintain the armed forces unilaterally	11 (5.76%)
the executive and the legislature must act together	8 (4.19%)

Table VI

[225] *See, e.g.,* Kristen E. Eichensehr, *Youngstown Canon: Vetoed Bills and the Separation of Powers*, 70 DUKE L.J. 1245, 1286-94 (2021) (discussing controversies over the US Congress' attempts to supervise the executive's war powers); Yusuo Hasebe, *War Powers, in* THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW, *supra* note 22, at 463 (discussing the complicated war-power arrangements in the US, UK, France, Germany, and Japan).

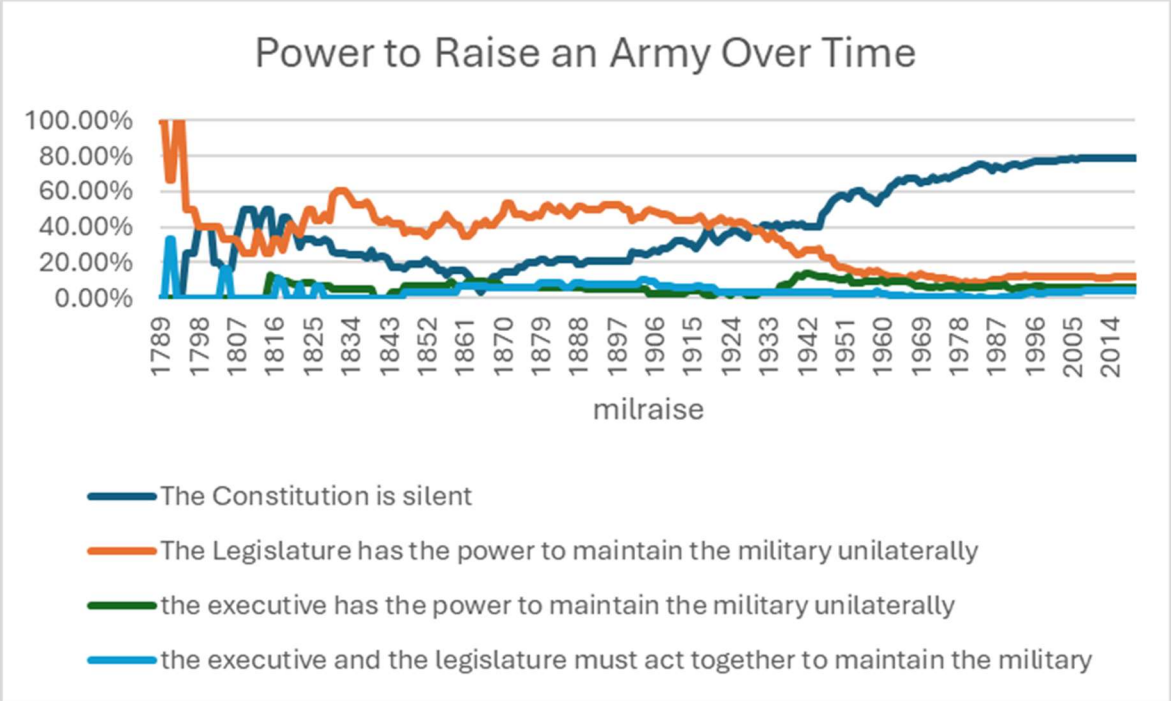

Figure VI

Though less common than executive control, legislative control of the standing army works also as a tool that enhances civilian control.[226] Since the English Bill of Rights in 1688, the English constitution prohibits the maintenance of a standing army during peacetime without the Parliament's consent.[227] The triumph of the glorious revolution back then was not only about the primacy of Parliament over the Crown in

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[226] Larry Diamond & Marc F. Plattner, *Introduction, in* DEVELOPING DEMOCRACY TOWARD CONSOLIDATION xxviii (Larry Diamond & Marc F. Plattner eds., 1999); Davd Kuehn & Aurel Croissant, Routes to Reform: Civil-Military Relations and Democracy in the Third Wave 208 (2023) (listing legislative oversight as among effective instruments for civilian control).

[227] *See* The British Bill of Rights (1688) art. 6 ("the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of Parliament, is against law").

general but also the understanding that both the control and maintenance of a standing army could lead to abuse of power.[228]

The American Constitution was the first to introduce the power to raise and support armies in a written constitution.[229] These provisions state directly that legislative approval is a prerequisite for the existence and maintenance of the military. The terminology of 'raise,' 'create,' and 'maintain' indeed conveys the most robust control over the military because the military then becomes a creature of law under the whim of the legislature. Worth noting here is the emphasis on the army. The navy was initially conceived as "the floating bulwark of the island… …from which, however strong and powerful, no danger can ever be apprehended to liberty."[230] there is no time limit on naval appropriations.

However, the principle was only meant to protect the legislature against the executive's exclusive control of the military; the effectiveness of such a provision in keeping the military under control is questionable. Moreover, the prevalence of standing armies in the 20th century has made the power to maintain the military less relevant. It is difficult now to imagine a legislature willing to disband or even suspend the armed forces. Accordingly, while early constitutional theorists such as Montesquieu were

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[228] TIM HARRIS, REVOLUTION: THE GREAT CRISIS OF THE BRITISH MONARCHY, 1685–1720 342 (2006) ("attempts by both Charles II and James II (particularly the latter) to establish a standing army in peacetime without parliamentary consent had led to violations of the law and of the people's ancient rights and liberties.").

[229] U.S. CONST. art. I, § 8, cl. 12 ("[The Congress shall have Power . . .] [t]o raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years…").

[230] 1 WILLIAM BLACKSTONE, COMMENTARIES *405.

occupied with legislative control over the military, most current constitutions no longer grant the legislature any apparent supervisory power over the military. Table VI shows that over 78% of the current constitutions do not provide any role for the parliamentary control of the standing army. Along with the decline in the adoption rate of the clause since the early 20th century, as illustrated in Figure VI, constitutional drafters do not consider legislative control of the military as vital as those of early constitutions.

B. Civilian Control of the Military

1. General Principles

Thus far, the separation of control over the military between the executive and the legislature has dominated the attempt to install civilian control through the constitutional structure. While these powers create stakeholders who will be responsible for the performance and obedience of the military, there is still a missing link between the civilian institutions and actual control of the armed forces' behavior. There is no guarantee that soldiers will obey these civilian leaders since they still possess the power of the sword to disobey orders or to take over the state through a coup. Unlike other types of delegation of power found within the civilian government, military power is physical and thus cannot be revoked instantly, as with other legal authorities.[231] Facing this unique

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[231] *See* Stefanie A. Lindquist & David M Searle, *Comparative Administrative Law: The View from Political Science*, *in* THE OXFORD HANDBOOK OF COMPARATIVE ADMINISTRATIVE LAW 195, 198-203 (Peter Cane et al. eds., 2021) (discussing how the problems of delegated power is viewed under principal-agency theory and how delegation in this sense is predicated upon enabling legislation that impose the scope and procedures for the delegated agency).

challenge, are there other legal principles or mechanisms that can support civilian control more directly?

To begin with, A. V. Dicey—in his influential work near the end of the 19th century—observes that "the existence of a standing army is historically, and according to constitutional theories, an anomaly."[232] A permanent army obeying any commands is at odds with the rule of law and unarmed civilian institutions.[233] Even in an attempt to integrate the armed forces within a constitutional framework, the only legal principle examined is the double status of a citizen-soldier. Soldiers are essentially citizens who still have to abide by all ordinary laws in addition to military law, implying that any soldier taking part in staging a coup against the civilian government shall be tried afterward in the courts of law.[234] Thus, the only obvious and practical constitutional principle enforcing civilian control is that 'any man, in short, subject to military law has duties and rights as a citizen as well as duties and rights as a soldier.'[235] Enforcement of civilian control ensures the rule of law and the supremacy of the constitution without adding anything specific to the armed forces.

Through this concept of citizen-soldier, compulsory military service becomes potentially a straightforward attempt to enhance civilian control. For this reason, many constitutions provide details regarding education and training for the military that

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[232] ALBERT VENN DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 189 (8th ed. Macmillan 1915).

[233] *Id.* at 189-90.

[234] *Id.* at 192-98.

[235] *Id.* at 192.

emphasize respect for human rights, the rule of law, professionalism, and political neutrality.[236] Moreover, clauses regarding the recruitment of soldiers can strengthen civil-military relations. The theory is that when the armed forces are representative of the society it serves, they will more likely prevent the military from subverting the democratic system, as its values should be aligned with those of the civilians.[237] A soldier is a soldier only because he is, in the first place, a citizen.[238] Thus, as seen in some constitutions, conscription for all citizens can be a sign that a country is immune to coups or military intervention, serving as an automatic public oversight of the military.

As the variable only captures provisions that specify military service as a duty for its citizens and not any general duty to defend the country (which is more commonly written), only 41% of all constitutions allow conscription (79 out of 190 constitutions). The number of countries requiring citizens to serve in the military is even lower in practice; only 60 countries still implement mandatory military service as of 2019.[239] Overall, more and more constitutions set aside compulsory military service. It was noted

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[236] *See, e.g.,* Constitución Política de Colombia (Political Constitution of Colombia), art. 222 (1991) ("The law will determine the system of professional, cultural, and social development of the members of the public force. During their training, the members will he taught the fundamentals of democracy and human rights. "); Constitución de la Republica del Ecuador 2008 (Constitution of the Republic of Ecuador 2008), art.158 ("The employees and officers of the Armed Forces and the National Police Force shall be trained in the basic principles of democracy and human rights…").

[237] *See* DIANE H. MAZUR, A MORE PERFECT MILITARY: HOW THE CONSTITUTION CAN MAKE OUR MILITARY STRONGER (2010) (arguing that a gap between the civilian and military institutions was caused by the end of the draft in the United States).

[238] WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (Oxford, 3rd ed., 4 vols., 1768), I, 407, 413-414.

[239] Drew Desilver, *Few Countries Currently Have a Draft, and Most Don't Draft Women* PEW RESEARCH CENTER (Apr. 23, 2019), https://www.pewresearch.org/fact-tank/2019/04/23/fewer-than-a-third-of-countries-currently-have-a-military-draft-most-exclude-women/.

at the beginning of the 20th century that most nations had compulsory military service.[240] This is supported by Figure XI, which shows that constitutions started to authorize conscription more towards the end of the 19th century but dropped in popularity after World War II. Indeed, the necessity and popularity of compulsory service declined in the latter half of the 20th century.[241] Both technological and socio-political factors, such as the advent of nuclear weapons, economic pressure, and progressive moral opposition against the military in general, all contribute to the decline of mass armies that require conscription.[242] Moreover, while the US specifically relied on the non-professional militia to work as a check on the federal military and the federal government,[243] the militia has become a feature rarely seen in constitutions today. It is seldom powerful enough to counter the main standing army even in the case of the US.

The power to conscript is also connected to the power to raise and support armies, which is part of the separation of powers scheme discussed earlier. The ability to raise an army implies that the legislative branch has the legitimacy and authority to force military enlistments.[244] With the shrinking demand for mass armies, it is plausible that the

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[240] Leon Friedman, *Conscription and the Constitution: The Original Understanding*, 67 MICH. L. REV. 1493, 1498 (1969) ("[T]he Court noted that in 1918 most of the nations of the world had compulsory military service").

[241] Danko Tarabar & Joshua C. Hall, *Explaining the Worldwide Decline in the Length of Mandatory Military Service, 1970–2010*, 168 PUBLIC CHOICE 55, 61-62 (2016) (showing a significant reduction in the duration and use of conscription from 1970 to 2010).

[242] Morris Janowitz, *The Decline of the Mass Army*, MILITARY REV. 10, 13-16 (Feb. 1972), https://www.armyupress.army.mil/Portals/7/military-review/Archives/English/50th-Anniversary/50th-Janowitz/the-mass-army.pdf.

[243] *See* U.S. CONST. amends. II. ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.").

[244] For example, the American Supreme Court already confirms that Congress has the power to conscript manpower for military service by virtue of its constitutional powers. *See*, Lichter v. United States, 334 U.S.

necessity to include such a power in the legislature has also become obsolete as the number of constitutions with a provision granting the power to raise an army swiftly dropped from 1940 onwards. These observations, in conjunction with other provisions discussed so far, suggest that civilian control, as seen in the constitution, has been mainly under the responsibility of the executive rather than the legislative or the judiciary. Overall, there is a tendency—at least within the constitutional realm—for the military to be disconnected from the legislature, which is supposed to be the direct source of democratic legitimacy. There is uncertainty, however, whether the people or the armed forces are more dominant in shaping the military's attitude.

Provisions on Military Conscriptions in Current Constitutions	**No. (%) of Constitutions**
no compulsory military service mentioned in the constitution	111 (58.12%)
compulsory military service is in the constitution	79 (41.36%)
prohibition of compulsory military service in the constitution	1 (0.52%)

Table VII

742, 756 (1948) ("The power of Congress to classify and conscript manpower for military service is 'beyond question.'"); Rostker v. Goldberg, 453 U.S. 57, 59 (1981).

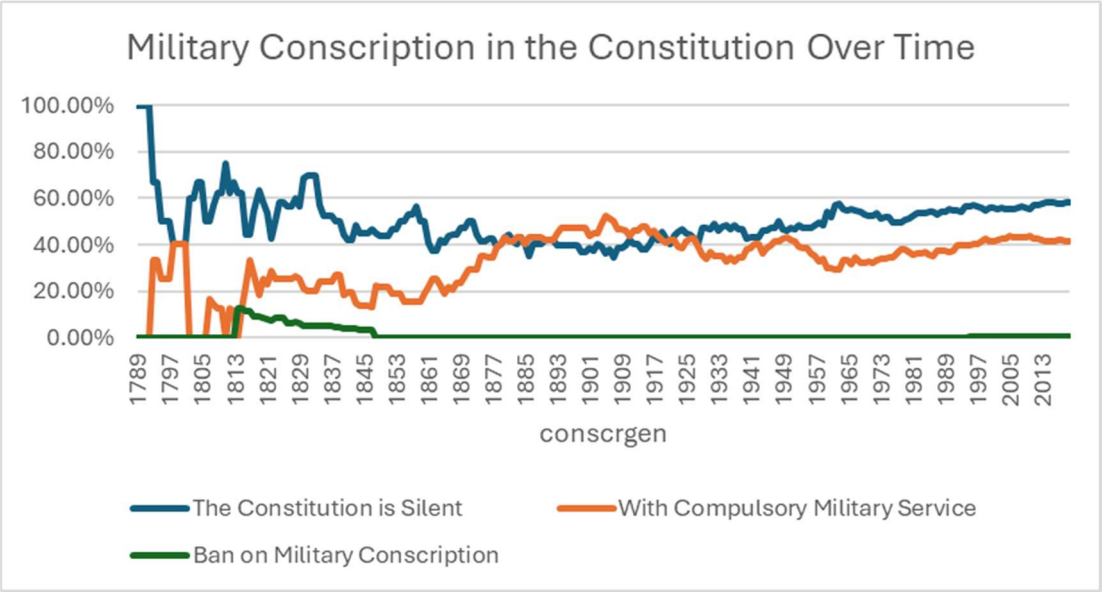

Figure VII

With no additional resources within the literature of law, theories in civil-military relations provide some solutions. Samul Huntington provides the most influential method outside the legal scholarship to guarantee strong civilian control and a highly professionalized military. For Huntington, a "highly professional officer corps stands ready to carry out the wishes of any civilian group which secures legitimate authority within the state."[245] To achieve military professionalism, civil-military relations studies prescribe the quality known as 'political neutrality' for the armed forces.[246] Ideally, the armed forces will become professional by enhancing the military's autonomy, and a professional army will naturally become nonpartisan.[247] Comparable to judicial

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[245] HUNTINGTON, *supra* note 100, at 84.

[246] Harald von Riekhoff, *Introduction, in* THE EVOLUTION OF CIVIL-MILITARY RELATIONS IN EAST-CENTRAL EUROPE AND THE FORMER SOVIET UNION 1, 1 (Natalie Mychajlyszyn & Harald von Riekhoff eds., 2004).

[247] SAMUEL P. HUNTINGTON, THE SOLDIER AND THE STATE 59-85 (1957).

independence, the soldiers should have the final say in national security and defense strategies, but anything beyond these is outside the scope of military competence. As long as they can work professionally to protect their territorial integrity, there is no legitimate reason for a coup or military intervention in politics. Due to the popularity of this model of objective civilian control in academia, it is worth observing the adoption of its principle in national constitutions without having to discuss its normative aspects.

Interestingly, many early constitutions already expressed more abstract and pervasive forms of civilian control, emphasizing obedience and political neutrality. The military's political neutrality has been emphasized in written constitutions since the end of the 18th century. For instance, several early constitutions stipulated that "the military shall not deliberate".[248] Moreover, European constitutions and those written under their influence have long had clauses that ensure the civilian leaders' dominance over the armed forces. The most common one used by many South American countries is to state that the armed forces are "essentially obedient" to the government or any civilian officers.[249]

These provisions might sound foreign and distant to the standard constitutional law, but they are quite common even among the current constitutions. According to the

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[248] *See, e.g.,* French Constitution of 1791 Title IV art. 12 ("The public force is essentially obedient; no armed body can deliberate"); Constitución Política de la República de Chile (Political Constitution of the Republic of Chile), art. 157 (1822) ("The public force is essentially obedient. No armed body shall deliberate.").

[249] *See, e.g.,* Colombia's 1830 Constitution art. 105 ("The armed forces shall never assemble as such for purposes of deliberation. They are essentially obedient to the constituted authorities and to their chiefs in accordance with the laws and ordinances.").

dataset, 31% of the current constitutions have some form of general clauses professing the subordination of the military under the civilian government.

Moreover, many specific provisions apply the principle in the background without manifesting it in a grand declaration of principles, such as those that prohibit the arbitrary dismissal of military officers to ensure the autonomy of the military[250] or those that establish a training system based on the rule of law and human rights.[251] Among those 31% of current constitutions that adopt such principles, more than half provide further actions and legislation for proper implementation. It is also worth looking at the trends over time in Figure VII, which shows that more and more constitutions have included political neutrality of the military, notably increasing during the third wave of democracy as countries transitioned away from authoritarian regimes.

Based on these observations, political neutrality—a principle deeply connected to military professionalism—can serve as a proxy to illustrate the prevalence of civilian control in the world's constitutions. With more than one-third of current constitutions prescribing civilian control, the obscurity of the principle in comparative constitutional law literature has to be highlighted here. Unfortunately, like many other great ideas in constitutional law, these grand provisions of political neutrality are no more than empty

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[250] *See, e.g.,* Constitución de la Republica del Ecuador 2008 (Constitution of the Republic of Ecuador 2008), art. 160 para. 3 ("The members of the Armed Forces and the National Police Force can only be deprived of their ranks, pensions, decorations and commendations for causes set forth in these laws and cannot make use of privileges stemming from their ranks over the rights of persons.").

[251] Dastuurka Jamhuuriyadda Federaalka ee Soomaaliya 2012 (Provisional Constitution of the Federal Republic of Somalia 2012) art. 127 ("Members of the forces shall be trained on the implementation of this Constitution, the laws of the land and the international treaties to which the Federal Republic of Somalia is a party.").

words without action. The details that sometimes follow the formulation of these principles are primarily limited to procedures for training or removal of military officers. Understandably, no comprehensive measures can be written in the constitution. However, more concrete measures are required to realize the principle of civilian control and military professionalism. The following are some tangible examples that can contribute to implementing principles collected by the dataset.

Neutrality Clauses in Current Constitutions	**No. (%) of Constitutions**
With no Neutrality Clause	132 (69.11%)
With Neutrality Clause	59 (30.89%)

Table VII

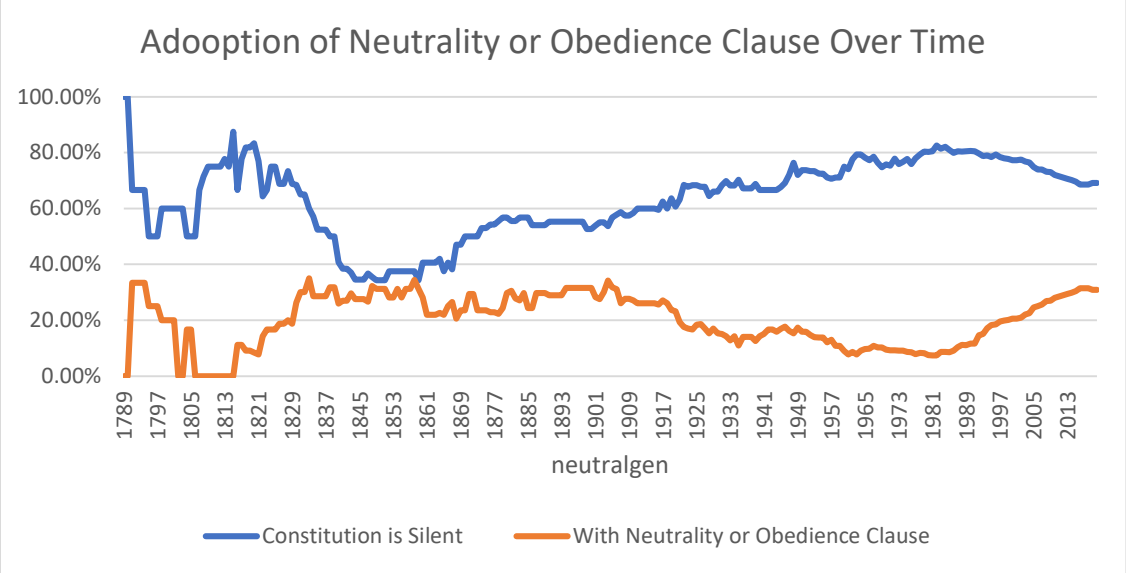

Figure VII

2. Voting and Political Rights

The most obvious and direct measures against political militaries concern military personnel's voting rights and political rights. Since participation in electoral politics is the "most necessary condition" for democracy,[252] military involvement in elections threatens civilian control and interrupts democratic processes. After all, if the military has its own political party and dominates elections, the lines between the military and the civilian will become blurry; there will no longer be a difference between the civilian in control and the military which is supposed to be obedient. Considering all these difficulties in separating the military from electoral processes, stripping the military of their political rights should be an effective means to control the military's influence in a democratic regime. However, doing so can alienate the military, creating a rift between the soldiers and the citizens in voicing their political ideology.

Beginning with voting rights, throughout history, military officers have rarely lost their right to vote entirely. Indeed, the initial concept of citizenship entails the duty to defend the state as an essential quality of any good citizen. For instance, while discussing the potential danger of ambitious military leaders in modern regular armies, Thomas Jefferson argued that every citizen should be a soldier, as was "the case with the Greeks & Romans and must be that of every free state."[253] In Western Europe during the 18th and 19th centuries, the increase of suffrage was a legitimation tool for governments that had

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[252] Richard H. Pildes, *Elections in* OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW, *supra* note 22, at 529.

[253] *The Papers of Thomas Jefferson*, Retirement Series, vol. 6, *11 March to 27 November 1813*, (ed. J. Jefferson Looney. Princeton University Press) 209–210 (2009).

increasingly centralized and interfered with the lives of citizens.[254] The rise of national armies in this context also necessitated conscription, which in turn required the enfranchisement of the general population.[255] In some cases, this is to the extent that serving the military is a prerequisite for political rights, as it was natural at the time to think that those defending the state should also participate in political deliberations.[256] However, as times of massive mobilization of troops began, many eligible electors in uniform who moved in deployment from one region to the next became logistical and political problems.

However, while the indoctrination in the military branches—especially in countries with conscription—could shape the political outlook of soldiers in one direction, banning military personnel from voting booths is against the established rule of equal and universal suffrage; soldiers are protected against unreasonable restrictions of their political rights.[257] The danger of soldiers voting thus becomes an issue in voting and election laws that could be dealt with in detail—not with a broad brush of the constitution. For example, state laws in the US can provide absentee ballots for uniformed officers on active duty to vote in their state as opposed to their current station.[258]

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[254] *See* John R. Freeman & Duncan Snidal, *Diffusion, Development and Democratization: Enfranchisement in Western Europe* 15 CANADIAN J. POL. SCI. 299, 302-04 (1982).

[255] *Id.* at 303.

[256] *Id.* ("Swedish elites made popular the slogan 'one man, one vote, one gun'").

[257] International Covenant on Civil and Political Rights art. 25, adopted Dec. 19, 1996, 999 U.N.T.S. 171.

[258] *See, e.g.*, VA. CODE ANN. § 24.2-451-470 (2012) (Uniform Military and Overseas Voters Act).

Accordingly, only six countries still limit the military's voting rights, as seen in Table VIII, four of which are in Latin America.[259] These constitutions also restrict the right to vote only when the military is on active duty.[260] Thus, the impact is limited only to mostly professional soldiers, with many more individuals in reserved forces and veterans being free to vote.[261] Moreover, as shown in Figure VIII, when looking back in history, banning the military from voting had never been popular. At its height, coinciding with massive military conscriptions during World War II in 1942, only eleven countries banned the military's voting rights. Overall, the right to vote for the military is respected in most countries and conforms with the modern understanding of civilian control, which accepts that the armed forces will always have particular ideological views and political roles.[262]

Clauses on Voting Rights of the Military in Current Constitutions	**No. (%) of Constitutions**
No Vote Ban on Military Members	185 (96.86%)
Contained Vote Ban on Military Members	6 (3.14%)

Table VIII

[259] These countries are Guatemala, Colombia, Dominican Republic, Honduras, Yemen, and Turkey.

[260] *See, e.g.*, Constitution of Colombia (1991) art. 219 ("The members of the public force may not exercise their right to vote while they are on active service…")

[261] RICHARD WEITZ DR., THE RESERVE POLICIES OF NATIONS: A COMPARATIVE ANALYSIS 1-2 (2007) (stating that traditionally reserve forces are meant to facilitate the mobilization of a large number of troops in national emergencies or major conflicts).

[262] *See e.g.*, SAMUEL E. FINER, THE MAN ON HORSEBACK 23-71 (2002) (discussing the disposition that led the military to intervene in politics).

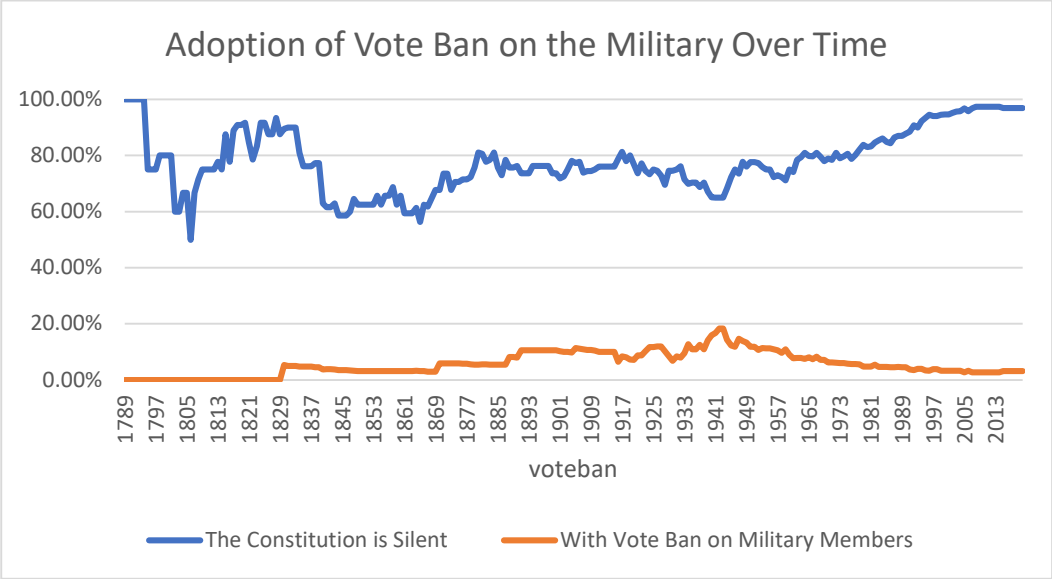

Figure VIII

Political rights, however, are not limited to voting rights; a right to be elected and freedom of association are also essential for citizens to participate fully in political processes. These political rights are especially relevant here as they can be limited to help with civilian control without infringing the core of political rights. Compared to voting rights, the rights to be a candidate and a political party member are not as absolute as universal suffrage. For instance, international rights treaties often provide these rights with exceptions or reservations for members of the armed forces.[263] Accordingly, constitutions that prohibit military members from participating in political parties or taking elected offices outside of the military institution are much more common than those that limit voting rights. As shown in Table IX, over 39% of current constitutions

[263] *See, e.g.*, International Covenant on Civil and Political Rights art. 22 para. 2 ("This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right").

limit the political rights of the military. It is worth noting that the increasing adoption rate of these provisions during the third wave of democracy coincided with the adoption of political neutrality in the constitution discussed earlier. This observation suggests that the limitation of political rights is thought of as the most logical next step to implement civilian control.

However, as seen in the ineligibility and incompatibility clauses in the American Constitution, which forbid all persons holding any office (civil or military) from being senators and representatives,[264] the restrictions aim much more to separate the legislature from the executive, treating military officers as part of the executive.[265] Thus, the one exception that lets members of the legislative branch become military officers is only for the benefit of national defense. In comparison, a different approach in many recent constitutions only picks out members of the armed forces as ineligible or incompatible for a political office.[266] According to this, the military is not considered simply as part of the executive but as a unique organ requiring unique measures.

One could also attribute the prevalence of these provisions to the fact that many of these constitutions come as part of those boilerplate independence constitutions drafted

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[264] U.S. CONST. art. I, § 6. ("No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.").

[265] HUNTINGTON, *supra* note 100, at 165-66.

[266] *See, e.g.*, Constitution of Luxembourg (1868) art. 54 (1)(7) ("The mandate of Deputy is incompatible:… 7. with those of [a] military career in active service.").

under British influence in London.[267] Potential abuses of military forces that could oppress the local population were a concern for the longevity of new constitutional regimes.[268] However, while these former colonies adopted some limitations to the military's political rights, few countries that retained them turned out to be smaller countries with no problematic civil-military relations or risks of coups, simply keeping the original outline of the independence constitution intact.[269] Interestingly, former colonies with tumultuous histories after independence often created new constitutions without any traces of limitations to the political rights of military members.[270]

With regard to the content of these provisions, there are differences in the degree of limitation to political rights. Brazil, for example, only requires military members to take leave from military duties when running for a political office and to retire once they are successfully elected.[271] Some constitutions do not allow membership to any political party.[272] However, some only prohibit activities associated with political parties while

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[267] CHARLES O.H. PARKINSON, BILLS OF RIGHTS AND DECOLONIZATION: THE EMERGENCE OF DOMESTIC HUMAN RIGHTS INSTRUMENTS IN BRITAIN'S OVERSEAS TERRITORIES 1–19 (2007) (providing an account of the involvement of the British in drafting the independence constitutions of its former colonies).

[268] *Id.* at 209 (illustrating how the British believed that the bill of rights can prevent military dictatorship).

[269] For example, see, the constitutions of Belize, Maldives, Bahamas, Barbados, Cyprus, and Guyana. And see the constitution of Sri Lanka as a counterexample.

[270] PARKINSON, *supra* note 267, at 261 (noting that "[o]f the 14 states that gained independence as autonomous nations, 12 contained a bill of rights in their independence constitutions. With only one exception, these bills of rights have either been amended or the state's whole constitution rewritten. The cause of most constitutional changes has been political instability, with military coups and periods of one-party rule being commonplace.").

[271] Constituição da República Federativa do Brasil (Constitution of the Federative Republic of Brazil), art. 14 para. 8 II.

[272] *See, e.g.,* Constitution of Haiti, art. 265 ("The Armed Forces of Haiti are apolitical. Their members may not be part of a group or of a political party and they must observe the strictest neutrality.").

military officers are on active duty.[273] Moreover, there are exceptions to these limitations, and retired military generals are often allowed to participate in politics.[274] Regardless of how these limitations are formulated, separating the civilian and military worlds is more precise and enforceable than just declaring to subordinate the military to the civilians. To illustrate, by stipulating that "The office of a Minister shall be incompatible with that of… a member of the armed or security forces"[275], the precise rule at least prevents ambitious military officers from running for a political office without the risk of losing their military career.

Clauses on Limitations of Political Rights of the Military in Current Constitutions	**No. (%) of Constitutions**
no political ban on military members	115 (60.21%)
political ban on military members	75 (39.27%)
others	1 (0.52%)

Table IX

[273] *See, e.g.,* Constitution of Albania, art. 167 para. 1 ("Military servicemen on active duty cannot be elected or appointed to other state duties or take part in political activity or in a party.").

[274] Most political and voting restrictions on the military only applies to those active members of the armed forces.

[275] Cyprus Constitution (1960) art. 59 para. 2.

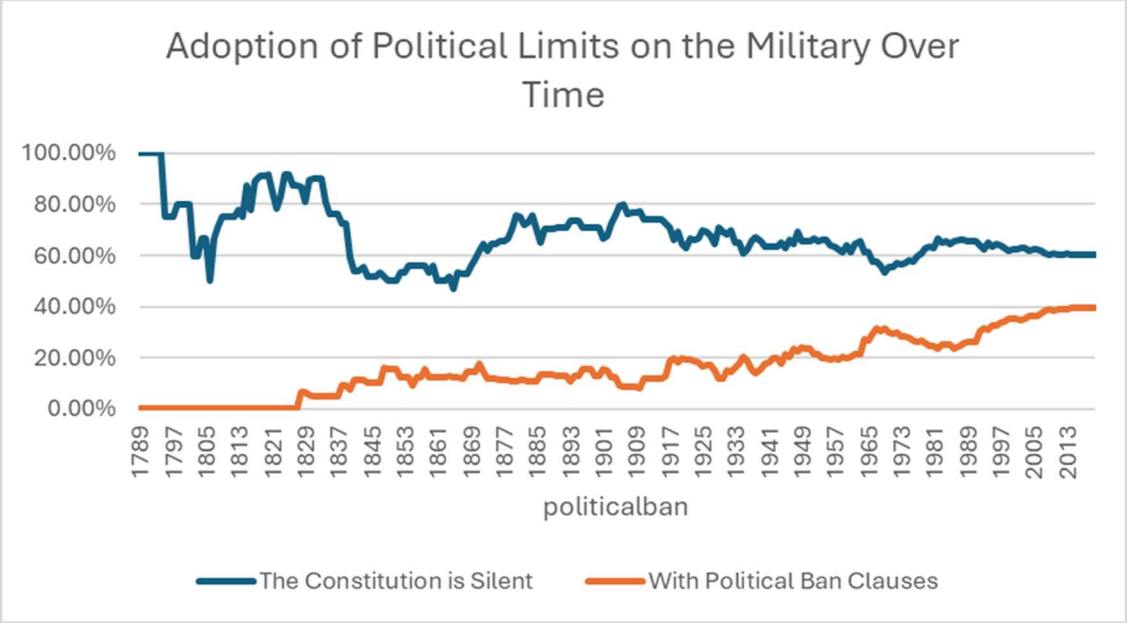

Figure IX

3. Oversight Institutions

According to the civil-military relations literature, another common way to ensure civilian control of the military is to establish special oversight institutions. These institutions often consist of civilian and military officers, including political considerations from civilians and military security expertise.[276] Most countries also have the civilian commander-in-chief as the head of the council, with most of the members being civilian members. The powers of these councils can range from purely advisory to supervisory. For example, councils in presidential systems tend to work more as an

[276] Florina Cristiana Matei, *A New Conceptualization of Civil-Military Relations in* THE ROUTLEDGE HANDBOOK OF CIVIL–MILITARY RELATIONS 26, 32 (Thomas C. Bruneau & Florina Cristiana Matei eds., 2013) (arguing that national security councils and other similar structures are essential for the implementation of military reform).

extension of the executive power because the president often dominates the security policy, while councils in parliamentary systems are mostly limited to advisory and coordinating roles due to the stronger parliamentary control over national security.[277]

Alongside security councils, which are considered part of the executive branch, oversight institutions for military affairs also include parliament's oversight committees, which, in some jurisdictions, work alongside independent oversight institutions to ensure civilian control of the military.[278] These councils and committees—despite their varying characteristics—work to support civilian control of the military. They emphasize the roles of civilian officers from both the executive and legislative branches over those of the military, serving both the functions of democratic control and military effectiveness.[279] These institutions thus support synergy among civilian actors who have to work against military members within the institutions instead of the emphasis on checks and balances as seen in earlier separation of powers schemes.

Some countries opt for more independent oversight institutions besides the traditional security councils. In constitutional democracy, there is a rise in new oversight institutions designed to be politically neutral and institutionally independent.[280] They are considered an extension of the traditional tripartite branches of government, operating

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[277] *See* Iurie Pintea, *National Security Council and Democratic Governance in* THE NATIONAL SECURITY COUNCIL IN THE DECISION-MAKING PROCESS. COMPARATIVE ANALYSIS:REPUBLIC OF MOLDOVA, ROMANIA AND UKRAINE 7, 7-8 (Gheorghe Erizanu ed., 2006).

[278] https://www.dcaf.ch/sites/default/files/publications/documents/ipu_hb_english_corrected.pdf

[279] Thomas C. Bruneau et al., *National Security Councils: Their Potential Functions in Democratic Civil-Military Relations*, 25 DEFENSE & SECURITY ANALYSIS 255 (2009).

[280] *See generally* MARK TUSHNET, THE NEW FOURTH BRANCH: INSTITUTIONS FOR PROTECTING CONSTITUTIONAL DEMOCRACY (2021).

outside partisan politics with an emphasis on specific technical expertise. While these institutions are often associated with electoral or regulatory functions, national security councils that provide oversight, recommendations, and sometimes decisive actions regarding the armed forces also belong to the same category of institutions. Yet, these independent institutions are still uncommon as it is more difficult to justify supervision and control over the military by other officials apart from members of the government or the legislature, who have a more democratic mandate than in the case of security councils.

However, most constitutions only establish all these types of oversight institutions without many details on procedures, powers, or even memberships of the institutions. Indeed, some only acknowledge the existence of these institutions without much detail, leaving further legislation or organic laws to flesh out the content afterward. Even when the constitution is clear on the details, there will always be some discretion left for the legislation to fill in; it is thus possible for the military or those who oppose the oversight to sabotage the implementing legislation.[281]

Based on this observation, these oversight institutions are not necessarily constitutional. Many oversight bodies do not have any constitutional status as they are established by legislative acts or decrees.[282] The dataset finds that independent

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[281] Sumit Bisarya and Sujit Choudhry, Security Sector Reform in Constitutional Transitions 21 (Int'l IDEA Pol'y, Paper No. 23, 2020) (providing an example of the legislation on the Inspector General in Kenya which failed to have the independence as promised in the constitution), https://www.idea.int/sites/default/files/publications/security-sector-reform-in-constitutional-transitions.pdf.

[282] Ayşegül Kars Kaynar, *Making of Military Tutelage in Turkey: The National Security Council in the 1961 and 1982 Constitutions*, 19 TURKISH STUD. 451, 471 (2018).

institutions specific to the military are uncommon within the constitution. As shown in Table X, only 63% of the current constitutions have a provision for oversight institutions over the military. Moreover, some of the most established democracies grant no constitutional status to their councils.[283] It is questionable if constitutional supervisory bodies are genuinely needed to maintain strong civilian control.

That said, an analysis of the dataset over time suggests a trend towards more constitutional supervisory bodies for the military. Figure X shows that from 1962 to 2013, there was a rapid rise from just 10 to 70 constitutions that established oversight institutions over national security. Apart from the question of necessity, there are also possible causes for concerns for these constitutional institutions. For example, Turkey suffered from an anti-democratic stance of their National Security Council whose members abused the vague wording of their powers within the constitution to intervene in politics.[284]

Clauses on Specific Oversight Institutions in Current Constitutions	**No. (%) of Constitutions**
No Specific Oversight Institutions	121 (63.35%)
With Specific Oversight Institutions	70 (36.65%)

Table X

[283] These countries are, for instance, France, US, UK, and Australia.

[284] *See* Kaynar, *supra* note 282, at 472-73.

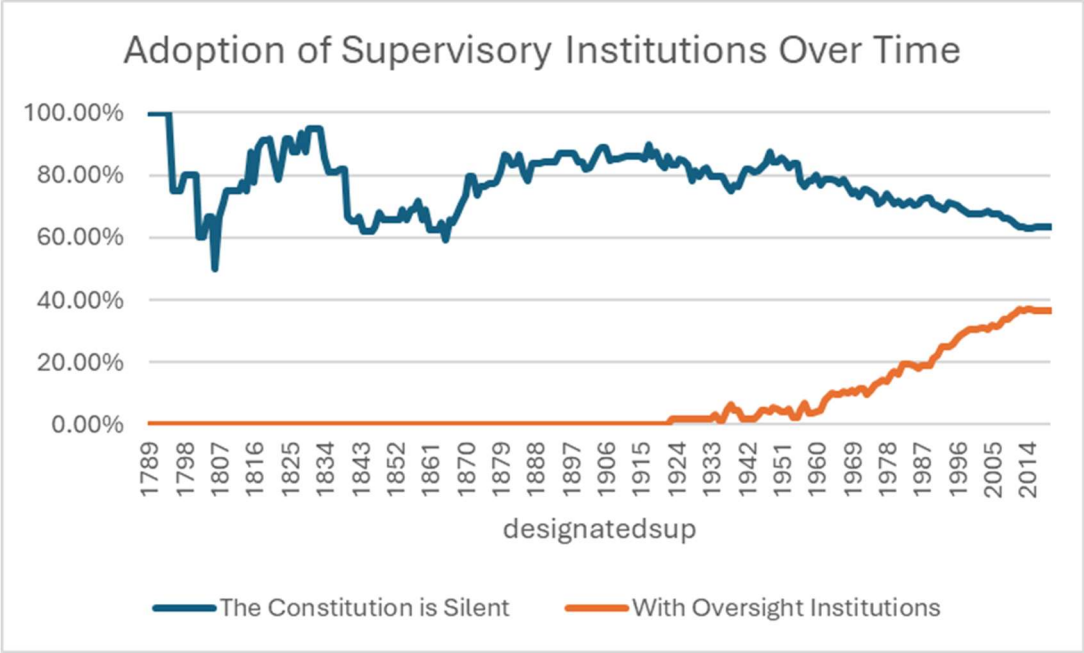

Figure X

C. Coup Prevention

As the forms of separation of control over the military powers are common across countries, they also have to tackle similar shortcomings related to the separation of powers in general. For instance, the fact that the separation of powers preceded the advent of longstanding political parties jeopardizes the balance meant for the separation of the legislative and executive branches.[285] Again, the power of the sword hands in the balance, threatening to claim powers that belong to other branches or even seek to

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[285] *See* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2312-14 (2006).

become sovereign through coup d'états. Ultimately, a legal regime of civilian control must face the issue of coup prevention directly.

Notwithstanding the inconclusive causation between the quality of a constitutional system and the risk of coups, constitutional drafters have designed various constitutional measures to prevent military takeovers. While constitutional wisdom suggests that constitutions are no more than pieces of paper against the use of force, 39 current constitutions have a clause that directly deals with the overthrow of the constitutional regime by military coup d'état. The emphasis here is on the word 'direct' because the variable does not capture any peripheral provisions that can potentially contribute to lowering the risk of coup attempts, such as a flexible constitutional amendment process or guarantees of judicial independence. Provisions presented in this variable explicitly counter military coups through pre-coup and post-coup measures.

Pre-coup measures are meant to prevent the coup from success either through the threat of treason offenses for those who attempt to overthrow the government or through the duty to resist the coup attempt. A typical provision prescribes the right and duty to protect the constitution, stating, "All citizens have the duty to combat any person or group of persons who would try to change by force the democratic order established by this Constitution."[286] In a more elaborated design, constitutions may grant emergency powers to the embattled government in retaliation for the attempted overthrow. For example, Greece's Constitution states that "[i]n case of war or mobilization owing to

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[286] *See, e.g.*, CONSTITUTION DE LA IV REPUBLIQUE, Oct. 14, 1992, art. 45 (Togo), *translated in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 9 (Gisbert H. Flanz ed., 2004).

external dangers or an imminent threat against national security, as well as in case of an armed coup aiming to overthrow the democratic regime, the Parliament, issuing a resolution upon a proposal of the Cabinet, puts into effect throughout the State, or in parts thereof the statute on the state of siege, establishes extraordinary courts and suspends the force of the provisions of articles…"[287]

Some aim to defend against coups retroactively. These provisions are often called "Snow White provisions". These provisions declare that the constitution will remain valid even after the usurper has terminated the document and ruled by decrees, waiting for the day the Constitution will wake up and prevail again. This unique provision should provide many functions, such as showing the resilient nature of the constitution and its supremacy over even the military and encouraging the people to oppose the coup.[288] As far back as 1896 in the Dominican Republic, the Constitution provides that "Usurped authority is inefficient and the acts thereof shall be void. Every decision reached under the pressure of the armed forces or of a reunion of individuals in riotous attitude is null in law and lacks efficiency."[289] However, this design choice is rarer than the preemptive one, with only a handful of constitutions containing the clause.[290]

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[287] Το Σύνταγμα της Ελλάδας (CONSTITUTION OF GREECE), art. 48 (1975) (Greece).

[288] Hatchard, Ndulo & Slinn, *supra* note 5, at 247-48.

[289] Constitution of Dominican Republic, art. 102 (1896).

[290] *See, e.g.,* La Constitution du Burkina Faso (Constitution of Burkina Faso), art. 167 para. 1-2 (1991) ("The source of all legitimacy follows from this Constitution. All power which does not derive its source from this Constitution, notably that resulting from a coup d'état is illegal.").

Overall, coup prevention provisions in constitutions are still unusual—a phenomenon suggesting that drafters doubt such measures' effectiveness. The result is also true across time, as illustrated in Figure XII. The assumption that the constitution is not a popular tool to prevent coup d'états is thus correct. However, the effectiveness of these provisions is still inconclusive. The later chapters will deal with this question through case studies of countries with constitutional measures against coups.

Clauses on Coup-Proofing Measures in Current Constitution	**No. (%) of Constitutions**
No Coup Measures	149 (78.01)
With Coup Measures	42 (21.99)

Table XII

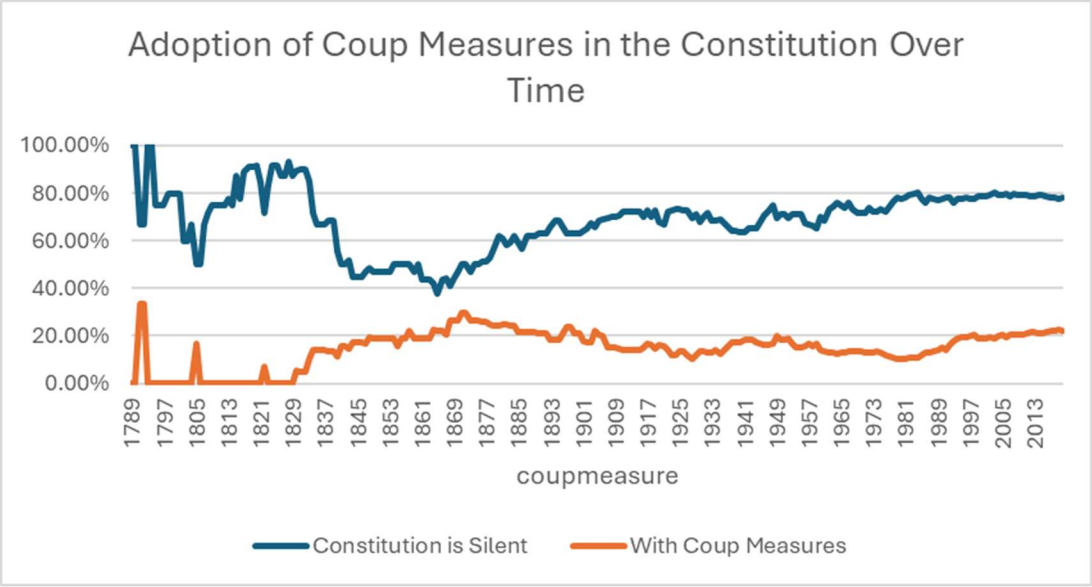

Figure XII

D. Emergency Powers and Martial Law

Naturally, the armed forces are deeply connected with emergency powers. In a devastating natural disaster or a nationwide terrorist attack, only the soldiers have the workforce and coordination to react immediately to the crisis. Once the survival of the state is at stake, questions of politics and principles become secondary. It is thus expected that constitutional provisions on emergency powers should visibly involve the military in declaring or operating in the emergency regime.

However, the dataset suggests a rather subtle relationship between the military and emergency regimes. While more than 83% of current constitutions have provisions for the state of emergency,[291] almost all constitutions do not mention the military in exercising emergency powers. Among the six countries that give power to the military during an emergency, Most of these are countries with weak civilian control, such as Myanmar, Thailand, and Fiji.[292] Emergencies are almost exclusively reserved for the head of the executive to declare and for the legislative branch to approve or extend the period of emergency. Thus, authorizing the military to initiate or play any decisive role in a state of emergency is a sign that the military may hold too much influence over the state. After all, it is in the context of an emergency that armed forces can abuse their power and usurp the civilian government amidst the confusion.[293]

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[291] 159 out of 191 constitutions in the dataset.

[292] The other three are Cape Verde, Peru, and Nicaragua; none of which is lauded for healthy civil-military relations.

[293] *See infra* Chapter VII (discussing the use of martial law in the 2014 Coup in Thailand).

Recently, more constitutional changes have attempted to weaken the boundary between emergency and ordinary situations, eroding the line between the military and civilians. Countries have increasingly seen the advantage of using the military in law enforcement.[294] The resistance to using the military internally is especially more relaxed in counterterrorism and natural disaster relief missions.[295] For example, Seychelles amended its Constitution in 2022, allowing defense forces to enforce laws related to "public security, environmental protection and maritime security."[296] Also, in the same year, a constitutional amendment in Mexico authorizes the military to perform domestic law enforcement duties through 2028 to tackle drug and cartel-related violence.[297] However, the use of the military in law enforcement is not captured by any variables in the dataset. These new developments thus present a creative way to affect the control over the armed forces that is still beyond the scope of this dissertation.

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[294] Sharon Pia Hickey, *In the World of Constitution Building in 2022*, CONSTITUTIONNET (Dec. 22, 2022), https://constitutionnet.org/news/world-constitution-building-2022 ("While the impetus for and character of the amendments vary, critiques centre on the dangers of an increased and indefinite militarization to the separation of powers and to society at large.").

[295] Dale Stephens, *Military Involvement in Law Enforcement*, 92 INT'L REV. RED CROSS 453, 455-56 (2010).

[296] Constitution of the Republic of Seychelles, art 163 (1991).

[297] Mark Stevenson, *Congress Approves Keeping Military in Police Work,* AP NEWS (Oct. 13, 2022), https://apnews.com/article/mexico-police-caribbean-legislature-reform-874696226c175ed500cdcabdbfd9d394.

III: Categories of Constitutions Based on Civil-Military Relations Clauses

While civil-military relations can vary according to each jurisdiction's historical and institutional context, constitutional provisions that dictate the relations between the military and politics can be broadly categorized for comparative constitutional law. These texts show a wide degree of military independence and dominance governed by the Constitution. After a general overview of the dataset and relevant provisions on the military in detail, this Part attempts to create a taxonomy of countries based on the resemblance of the treatment of the military in the constitution. While this endeavor is descriptive and incomplete, the categories presented here can provide valuable insight into general trends of civil-military relations within the constitutional realm.

The criteria for the classification here are as follows. First, the extreme groups of countries that have a ban on armed forces or are under direct military rule are sorted out from all other countries. These countries are easily identified by the literal reading of the constitutional text and by the fact that they are such outliers, earning them a reputation in every new addition to these extreme categories.[298] Only a handful of countries could afford to abandon their militaries entirely.[299]

Likewise, constitutions that grant powers to the junta or provide political roles to the military are well documented due to the international pressure against such norm-

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[298] As of 2024, for instance, the latest country which has a direct military rule is Gabon which had a successful coup in August 2023.

[299] *See* CHRISTOPHE BARBEY, NON-MILITARISATION: COUNTRIES WITHOUT ARMIES 13-14 (2015), https://peace.ax/wp-content/uploads/2021/02/Arbetspapper-Barbey.pdf (identifying Costa Rica, Kiribati, and Panama as the only three with constitutions that absolutely prohibit the armed forces but not counting Japan due to the enormous size of its so-called Self-Defense Forces).

breaking practices. The dataset serves as a reference for these cases to ascertain these distinctive features in the constitutional text. For example, the drafters of the Thai Constitution of 2017 concealed any military influence in government by referring to the previous temporary constitution instead of spelling out the terms candidly.[300] Without data from prior constitutions and various scholarly articles condemning the act, Thailand would instead belong to the average group of countries based exclusively on reading the current text.

Another convenient category is one for those constitutions that are entirely silent on the issue. The dataset's variables captured constitutions that do not mention the military by any name. While the absence of the military could mean that the military operates without constitutional constraints, it is more likely that the military is simply not relevant or important enough for the supreme law of the land. Among these are constitutions in countries where there is *de facto* demilitarization without an express prohibition against the armed forces.[301] At a minimum, constitutions establish the armed forces along with their objectives or provide rights and duties for military personnel. Here, the dataset captures these countries and verifies the military's insignificance by examining proxy variables that touch upon national security issues, such as those on emergency powers or terrorism. However, the number of these jurisdictions is insignificant compared to the following two categories.

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[300] *See infra* Chapter VII.

[301] BARBEY *supra* note 299, at 30 (observing that "there are 26 countries out of 196 or one out of eight that have no army.").

The most challenging part is the distinctions between countries with average provisions on civilian control and those with heightened measures to contain the political roles of the military. As seen from the discussions above, various possible constitutional tools can support civilian control of the military. Determining what kinds of provisions are unique or rigorous requires a good theory as guidance.

Fortunately, the dataset also captures the prevalence of the normal theory of civil-military relations, which emphasizes the professionalization of the military as the key to strong civilian control (limits to political rights and proclamation of neutrality of the military).[302] The dataset shows that those countries with provisions that aim to enhance the apolitical nature of the military fall neatly into three main geographical areas: Central and Southern America, Central and Eastern Europe, and Africa. Looking deeply into the population of this group, the hypothesis that, generally, constitutions have more to say about the military only when there is already a problem in civil-military relations still holds. Most countries, such as Brazil, Ukraine, and Zimbabwe, face different degrees of civil-military relations problems. Thus, provisions related to professionalization of the military become the dividing line between those countries that adopt only the standard norms of civilian control and those that embrace heightened norms to deal with their specific civil-military problems.

After eliminating all other categories, the contour of the last category emerges. What remains from the heightened norms of civilian control is simply the structural provisions regarding the control of the military by the three main branches of the

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[302] *See infra* Chapter III on Samuel Huntington's theory as written in 'The Soldier and the State'.

government, such as clauses regarding commander-in-chief and legislative approval on the maintenance of the military. The following are all the categories in detail.

A. Anti-Military Constitutions

On the anti-militaristic or pacifist side of the spectrum, some constitutional drafters rid the military of its existence, believing that such a design should be the most effective way to end all problems about the military. Here, constitutions affirm the lack of the military as a grand principle similar to other unique proclamations found elsewhere, such as those prohibiting changes to the form of the state or fundamental human rights. These constitutions are sometimes called "Peace Constitutions" to emphasize their abilities in limiting war and promoting peace.[303]

Japan is the epitome of this anti-military constitutional structure. It is among the only four nations currently using this extreme measure; for example, Article 12 Constitution of Costa Rica also states that '*The Army as a permanent institution is proscribed…. Military forces may only be organized by a continental agreement or for the national defense; one and the other will always be subordinate to the civil power: they may not deliberate, or make manifestations or declarations in an individual or collective form.*'

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[303] *See* Benjamin A. Peters, *Constitutions as Peace Systems and the Function of the Costa Rican and Japanese Peace Constitutions*, *in* PEACE ETHOLOGY: BEHAVIORAL PROCESSES AND SYSTEMS OF PEACE 191, 193-95 (Peter Verbeek & Benjamin A. Peters eds., 2018) (arguing that popular sovereignty is inherently anti-war).

Despite the apparent benefit of saving all the military spending for other public goods and overcoming the fear of the military, outright prohibition of the military is rare. Only Costa Rica, Japan, Liechtenstein, and Panama follow such a strong measure.[304] The fear of the military does not convince constitutional drafters to cast the armed forces out of the constitutional realm. And national security issues in most nations prevent them from rejecting the military entirely. Constitutional drafters need strong justifications to push for a total ban on armed forces. To illustrate, the constitutions of Germany (until 1955) and Japan, which did not allow for a standing army, were the product of experiences during World War II.[305]

Indeed, even when constitutions prohibit a standing army, they typically allow for temporary and exceptional forces needed for national defense.[306] Thus, using the constitution to erase the existence of the military can only work in very limited jurisdictions. Even Japan—which has never once amended its constitution and has so far embraced pacificism as part of its constitutional identity—struggles to maintain the prohibition on the military in practice as national security becomes the most contentious constitutional issue.[307]

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[304] These include Costa Rica, Japan, Liechtenstein, and Panama.

[305] The Basic Law was amended to allow a standing army in 1955. *See* Russell A. Miller, *Germany's Basic Law and the Use of Force* 17 INDIANA J. GLOBAL L. STUD. 197, 199-200 (2010).

[306] *See, e.g.,* Constitution of Costa Rica, art. 12 para. 3 ("Military forces may only be organized by a continental agreement or for the national defense; one and the other will always be subordinate to the civil power: they may not deliberate, or make manifestations or declarations in an individual or collective form.").

[307] *See, e.g.,* David Law, *The Myth of the Imposed Constitution*, *in* SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS 239, 247-48 (Denis J. Galligan & Mila Versteeg eds., 2013); Rosalind Dixon & Guy Baldwin, *Globalizing Constitutional Moments? A Reflection on the Japanese Article 9 Debate*, 67 AM. J.

B. Minimal Military Constitutions

For those countries with a parliamentary system where the separation of powers is different due to the closer relationship between the legislature and the executive, the British constitution has been a primary model. The English unwritten constitution retains the monarch's prerogative powers, including the control and organization of the armed forces beyond the purview of the court.[308] Due to this unwritten nature, constitutions influenced by the English system often leave military matters out of the constitution and instead use statutory laws on a piecemeal basis. As seen in many countries formerly colonized by the British Empire, the reference to the military in these constitutions is minimal. Because most of these constitutions were written by British lawyers during a series of conferences held in London,[309] they provided only the necessary provisions, such as designating the commander-in-chief.[310] The colonial influence is profound and long-lasting even after independence; most former colonies choose to retain the minimal presence of the military in the constitution.

COMPAR. L. 145, 158-72 (2019) (analyzing article 9 of the Japanese Constitution under the framework of Bruce Ackerman's constitutional moments).

[308] IAN LOVELAND, CONSTITUTIONAL LAW, ADMINISTRATIVE LAW, AND HUMAN RIGHTS: A CRITICAL INTRODUCTION 102 (5th ed., 2009).

[309] *See* CHARLES PARKINSON, BILLS OF RIGHTS AND DECOLONIZATION: THE EMERGENCE OF DOMESTIC HUMAN RIGHTS INSTRUMENTS IN BRITAIN'S OVERSEAS TERRITORIES 3-19 (2007) (discussing the process of constitution-making which occurred alongside the decolonization of former British colonies).

[310] *See, e.g.*, Constitution of Jamaica 1962; Constitution of Antigua and Barbuda 1981; Constitution of Singapore 1963.

Countries that belong in this category also include six countries that do not make any reference to the military.[311] Here, the assumption that the absence of the military in the constitution means the irrelevance or impotence of the armed forces is primarily correct. Among these six countries, only Libya has a significant army (which was only consolidated after the Second Libyan Civil War from 2014 to 2020).[312]

Overall, these minimal constitutions prove that civilian control provisions are not universal. It is not as widespread as principles of the rule of law or human rights may be. However, this is mainly because civil-military relations are highly context-specific; with no concerns over the issue of national security and, thus, smaller militaries, some nations are spared from the task of designing a way to control the political roles of their armed forces.

C. Standard Civilian Control Constitutions

Most modern constitutions, however, do not stop short at a bare minimum. Even countries with no troubled civil-military relations sometimes elaborate on military matters. Whatever the design choice, the minimum core seems to be the same in most constitutions, similar to how most states must establish their form of state and form of government in the constitution.

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[311] There countries are Abkhazia, Andorra, Iceland, Libya, Micronesia, and Nauru.

[312] George Joffé, *Where Does Libya Go Now?*, 25 J. N. AFR. STUD. 1, 3-5 (2020).

For most countries in the world, constitutions usually follow the same pattern. These typical provisions include what the American Constitution had pioneered, such as the use of separation of powers (by giving the command to the executive but giving the control to the legislature) to harness the military power. Notably, constitutional drafters also imitate what other popular models of constitutional systems adopt, such as appointing senior military officers by the executive, as found in many Western European countries. That said, there are debates about these provisions' effectiveness and normative values. For example, some suggest adopting more specific mechanisms (such as a civilian-led ministry of defense, defense oversight committees, and national security councils) instead of relying only on the role of the president as commander-in-chief.[313] Most nations, however, at least agree on the most basic forms of civilian supremacy. Thus, It is not surprising that most current constitutions fall into this category.

The defining feature of these standard constitutions is the focus on structural provisions as opposed to abstract or rights-based provisions. The powers over the military are divided among different branches, and the procedures for the use of armed forces are enumerated as part of the division of labor and checks and balances. The military is treated as another state apparatus requiring specific constitutional treatment, such as limitations on civilian law enforcement tasks. Quite different from the judiciary, the military in these constitutions does not acquire any additional legitimacy or institutional

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[313] *See, e.g.*, Narcís Serra, The Military Transition: Democratic Reform of the Armed Forces 72 (2010); Gregory Weeks, *Democratic Institutions and Civil–Military Relations: The Case of Chile*, 18 J. THIRD WORLD STUD. 65, 69-77 (2001); Florina Cristiana Matei, *A New Conceptualization of Civil-Military Relations in* THE ROUTLEDGE HANDBOOK OF CIVIL–MILITARY RELATIONS 26, 32 (Thomas C. Bruneau & Florina Cristiana Matei eds., 2013).

guarantees based on the idea that it has professional autonomy. The military thus fuses with the executive and operates according to the overarching principle of the separation of powers. As discussed in Chapter IV, the reliance on the separation of powers comes with its own costs and benefits that are still mostly unexplored, despite how most of the current constitutions are in this category.

D. Heightened Civilian Control Constitutions

As for countries that have an enhanced level of civilian control measures in their constitutions, they are distinctive by the use of principles and mechanisms like political neutrality of the military, limits on political rights of military offices or national security councils that balance the involvement of civil and military personnel in making defense policies.[314] Following the recommendation of civilian control as proposed by the main theory of civil-military relations, the objectives of these provisions are to limit the military's political roles and political influence.[315] Some provisions, such as political neutrality clauses, are more popular than others, but strong mechanisms that try to prevent coup d'états equally belong to this type of constitutions.

It is worth noting that most countries in this category that adopt a provision proclaiming that the military is either obedient to the civilian authorities or maintain

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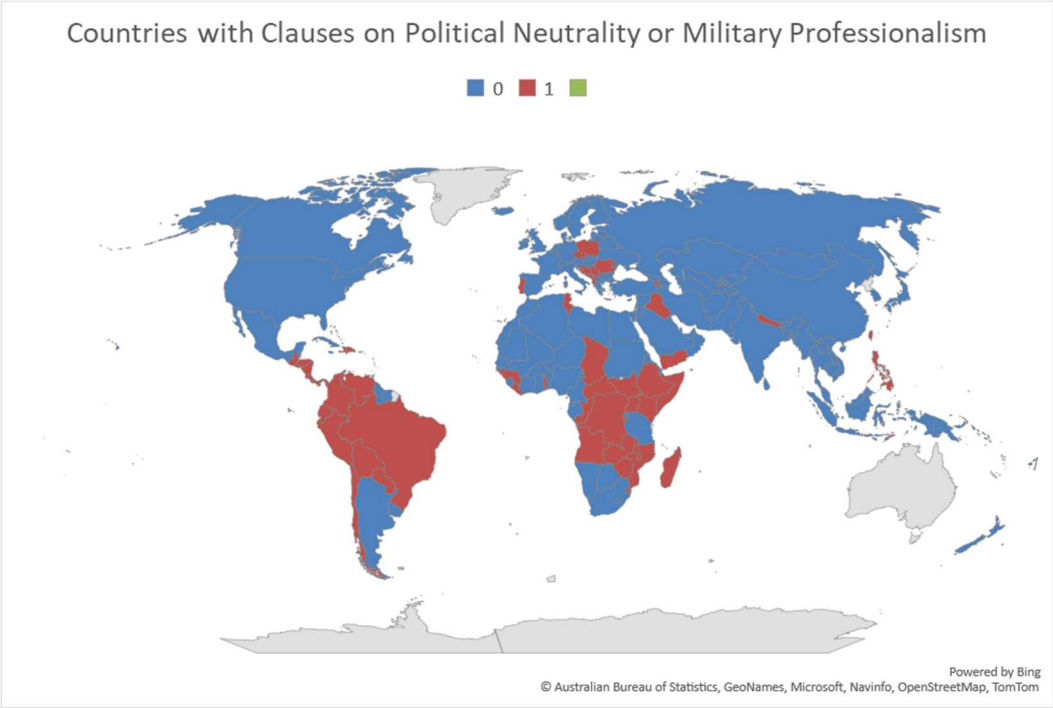
[314] *See, e.g.*, Constitution of Turkey 1982 art. 118 ("The National Security Council shall submit to the President of the Republic the advisory decisions taken with regard to the formulation, determination, and implementation of the national security policy of the State and its views on ensuring the necessary coordination…").

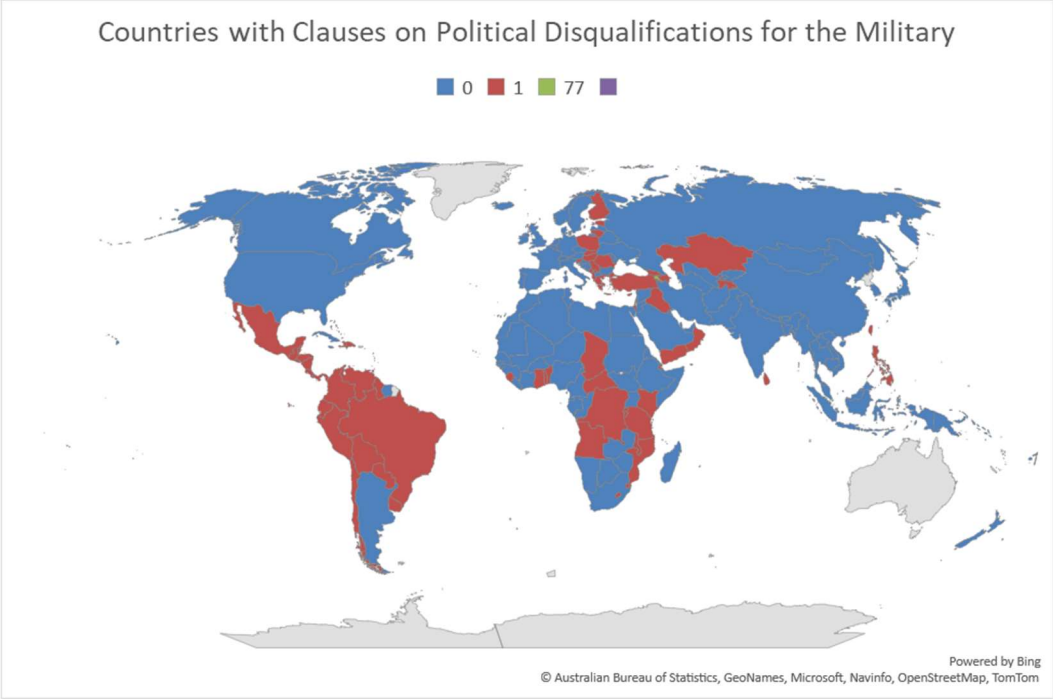
[315] *See supra* Chapter III.

political neutrality tend to have more troublesome civil-military relations than those that do not have such clauses. This correlation tracks the tumultuous history of countries with military coups, especially those in Latin America, Africa, and Eastern Europe (Map I and Map II). While certain constitutional provisions may create civil-military relations problems, it is more likely that civil-military relations problems inspire constitutional solutions.

Notwithstanding the effectiveness of these special provisions, they at least highlight the importance of the military in these jurisdictions. On the one hand, constitutional constraints could help limit the power of the armed forces. On the other hand, the military can be even more salient and gain additional legitimacy as a constitutional body. The following chapters will discuss these provisions' normative and practical values in greater detail.



Map 1: Countries with Provisions on Neutrality are in Orange, and Countries with no such Provisions are in Blue



Map 2: Countries with Provisions on Political Disqualifications are in Orange, and Countries with no such Provisions are in Blue

E. Praetorian Constitutions

The previous three groups of constitutions are relatively common worldwide; no matter what the civil-military relations in a particular state are, they form an essential part of the boilerplate clauses borrowed and accepted in modern constitutions. Possibly, constitutional drafters may include these provisions in the work without giving much thought to its impact. The following countries, however, present a deviation that warrants closer inspection to explain the reasons behind these deliberate attempts to go against the dominant model already discussed.

Recently, there have been more constitutions that pressed ahead by recognizing the military as one of the constitutional institutions; these constitutions are called 'praetorian constitutions' due to the significant role that the military has in the system.[316] The most recent ones are Myanmar's 2008 Constitution and Thailand's 2017 Constitution.[317] For instance, these constitutions give fixed seats to military personnel in the House of Representatives[318] and those that allow the army to nominate all senate

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[316] REBECCA L. SCHIFF, THE MILITARY AND DOMESTIC POLITICS: A CONCORDANCE THEORY OF CIVIL-MILITARY RELATIONS, 21 (2009) (explaining that the term refers to a praetorian society "where exclusive social and political groups are in collusion with the military).

[317] Paul Chambers, *Constitutional Change and Security Forces in Southeast Asia: Lessons from Thailand, the Philippines and Myanmar*, *in* POLITICS AND CONSTITUTIONS IN SOUTHEAST ASIA 93 (Marco Bünte & Björn Dressel eds., 2016).

[318] No more than 110 Pyithu Hluttaw representatives who are the Defence Services personnel are nominated by the Commander-in-Chief of the Defence Services in accord with the law according to Article 109 of the 2008 Constitution of Myanmar.

members who shall later take part in choosing the prime minister.[319] The idea is that if the military decides the fate of the democratic regime during a crisis,[320] one might as well incorporate this principle as part of the constitution. Strikingly, a handful of countries known to have praetorian militaries, such as Fiji, also have constitutions which grant the military power to declare, approve, or implement emergency regimes,[321] suggesting a close relationship between the military guardianship and emergency powers.

Thus, at the end of the spectrum, constitutions can provide political functions to the armed forces, crafting a leading role for soldiers as part of military guardianship. Constitutions by the military naturally emphasize how important the military is in both securing the state and strengthening democratic governance; thus, there should be mechanisms, such as the national security council, that could serve as a military delegate to interfere with and improve the politics.[322] These constitutions may also fix a quota of senators appointed by the military as an insurance policy, ensuring that no harm is made to the exiting junta in the democratic transition.[323] Myanmar has been a prime example of this type of constitution, going as far as to give fixed seats to military personnel in the

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[319] *See* Eugénie Mérieau, *How Thailand Became the World's Last Military Dictatorship*, The Atlantic (Mar. 20, 2019), (explaining the military's role under Thailand's 2017 constitution).

[320] *See generally* VAROL, *supra* note 82.

[321] As of 2020, there are six countries with such provisions: Cape Verde, Fiji, Myanmar, Nicaragua, Peru, and Thailand.

[322] Tom Ginsburg, *Transformational Authoritarian Constitutions: The Case of Chile, in* FROM PARCHMENT TO PRACTICE: IMPLEMENTING NEW CONSTITUTIONS 239, 245 (Tom Ginsburg & Aziz Z. Huq eds., 2020).

[323] *See* ROBERT BARROS, CONSTITUTIONALISM AND DICTATORSHIP: PINOCHET, THE JUNTA, AND THE 1980 CONSTITUTION 229-44 (2002).

House of Representatives.[324] In such a military guardianship, the military can also intervene in policymaking through some elaborate scheme, such as in Thailand, where Section 65 of the 2017 Constitution provides for a national strategy that is heavily supervised by the military.[325] These provisions often work with other existing constitutional strategies to protect the military's dominance, such as making it extremely difficult to amend the Constitution or using proportional representation in its electoral system to prevent a unified civilian government from posing a challenge to guardianship. Overall, the military is elevated in status and becomes a separate fourth branch of the government.

These constitutions are still rare. Only five countries—Cape Verde, Estonia, Myanmar, Sudan, and Thailand—provide formal political roles to the military. But it is an extreme model that may inspire future military juntas to implement, especially more likely in the age of abusive constitutional borrowing.[326] Chapter VII will thus also discuss the benefits and risks of this arrangement in greater detail when discussing the cases of Thailand and Myanmar.

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[324] No more than 110 Pyithu Hluttaw representatives who are the Defence Services personnel are nominated by the Commander-in-Chief of the Defence Services in accord with the law according to Article 109 of the 2008 Constitution of Myanmar.

[325] DUNCAN McCargo et al., *Ordering Peace: Thailand's 2016 Constitutional Referendum*, 39 CONTEMP. SOUTH EAST ASIA 65, 69 (2017) (stating that the strategy could put "the country under de facto military tutelage for another two decades.").

[326] DIXON & LANDAU, *supra* note 74.

F. Direct Military Rule

When the military takes control of the country, it is expected to hand over the state power for a democratic transition. The practice of direct military rule is now disapproved universally and can only work as a temporary measure with a promise of timely election. As in the cases of South Korea and Chile, military juntas had to give up power and move towards democratization once economic and political pressures from the people started to gain ground.[327] These temporary constitutions are written for the military juntas and thus tend to provide them with absolute power during a short transitional period or create a civilian caretaker government with weak constraints appointed by the junta. Even when military juntas intend to stay for a long haul, like the 1974 Constitution of Myanmar, constitutions in this category still retain these transitional characteristics, albeit with some provisions that may overlap with those of praetorian constitutions.

Conclusion

After exploring relevant constitutional provisions concerning the military, one can understand possible relationships between the military and the constitution. While the discussions here are not exhaustive, the quantitative data helps provide convincing

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[327] For accounts of transitions from military rule, see, Zoltan Barany, *Exits from Military Rule: Lessons for Burma*, 26 J. DEMOCRACY 86, 87-89 (2015) (discussing South Korea); Gonzalo García Pino, *The Slow Change in Chile: Long-term Security Sector Reform Alongside Constitutional Transition, in* SECURITY SECTOR REFORM IN CONSTITUTIONAL TRANSITIONS 39, 43-45 (Zoltan Barany et al. eds., 2019) (discussing Chile).

evidence for more attention in comparative constitutional law on the treatment of armed forces. However, how effective these different categories of rules and principles are in implementing civilian control remains a mystery as countries which adopted these provisions widely range in civil-military relations from unproblematic to crisis-ridden.

There seems, nevertheless, to be a correlation between the importance of the military and the many rules that the constitution tries to restrain them. The next three chapters develop a theory based on the insights from this chapter to provide a coherent understanding of what the constitution can and cannot do regarding the military. Afterward, a quantitative analysis and case studies in Chapters VI and VII shall also look deeper into the results of these constitutional rules as applied to the real and complicated world, diving deeper into countries with heightened civil control and praetorian constitutions.

II: A Theory of Civilian Control as a Constitutional Principle

Chapter III: Civilian Control and Constitutionalism

Introduction

Constitutionalism is the modern universal principle upheld as the highest standard for governance. While it has become universally acclaimed at the risk of being meaningless,[328] the usual meaning of constitutionalism often denotes limitations on public powers supported by constitutional norms.[329] Constitutionalism also requires that the people are the only source of legitimacy and that the rights of the people are protected under the law.[330] Following these objectives, a written constitution establishes and regulates these principles and institutions with supremacy above all other laws. Within this framework, the military sits awkwardly as an unrecognized institution that virtually exists in any jurisdiction, like the judiciary and the legislature.

By the constitution's supremacy, both civilian and military institutions ought to operate equally according to the rules of the game provided by the constitution. However, since the military can seize control of the civilian government, it can initiate constitutional change unconstitutionally against the will of the people. Coup d'états—

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[328] JEREMY WALDRON, POLITICAL POLITICAL THEORY 23-24 (2016) ("The potential for "constitutionalism" to degenerate into an empty slogan is exacerbated by the fact that the word is sometimes used in a way that conveys no theoretical content at all.").

[329] *See, e.g.*, Yasuo Hasebe & Cesare Pinelli, *Constitutions*, *in* ROUTLEDGE HANDBOOK OF CONSTITUTIONAL LAW 9, 12-14; WALDRON, *supra* note 328, at 29-31.

[330] *See, e.g.*, Li-Ann Thio, Constitutionalism in Illiberal Polities, *in* THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW, *supra* note 22, at 133, 134-35.

once thought eradicated in the 21st century—come back in fashion with 'an epidemic of coups'.[331] From 2020 to 2022, seven successful coup d'états occurred in five countries.[332] Apart from condemnations and urges to return to democratic governance from the international community, these countries also suffer irreversible consequences in their constitutional norms. The military junta in Guinea abrogated the constitution, and the coup leader in Burkina Faso suspended the constitution.[333] The military in Myanmar went as far as claiming that their coup d'état was per the constitution.[334] In these instances, the military follows the same pattern of "might makes right" established since antiquity.[335]

Short of having a coup d'état, the military can also exert political influence beyond their primary objective of national defense. Even in the United States, where the armed forces are regarded as highly professional and democratic, it is argued that "the American military has grown in influence to the point of being able to impose its own perspective on many policies and decisions."[336] Moreover, as the largest public

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[331] *"An Epidemic of Coups" in Africa? Issues for Congress,* CONGRESSIONAL RESEARCH SERVICE (Feb. 11, 2022), https://crsreports.congress.gov/product/pdf/IN/IN11854.

[332] Mali in 2020; Chad, Mali, Guinea, and Sudan in 2021; two Burkina Faso coups in 2022.

[333] *Soldiers Say Guinea Constitution, Gov't Dissolved in Apparent Coup*, REUTERS (Sep. 5, 2021), https://www.reuters.com/world/africa/soldiers-say-guinea-constitution-govt-dissolved-apparent-coup-2021-09-05/; *Burkina Faso Military Says It Has Seized Power*, BBC NEWS (Jan. 24, 2022), https://www.bbc.com/news/world-africa-60118993.

[334] *See* Thibaut Noel, *Unconstitutionality of the 2021 Military Coup in Myanmar*, INT'L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE 3 (March 2022).

[335] While coup d'états are different from military interventions of the past, they share core characteristics such as the claim of legitimacy based on public interest by the usurpers and the distinction between the armed and the unarmed population. *See* David C. Rapoport, *The Political Dimensions of Military Usurpation*, 83 POL. SCI. Q. 551, 552-560 (1968) (arguing that the military intervention also requires legitimation by public opinion).

[336] Richard H. Kohn, *The Erosion of Civilian Control of the Military in the United States Today*, 55 NAVAL WAR COLL. REV. 8, 8 (Summer 2002).

organization in many jurisdictions with massive human force willing to obey their uniformed supervisors, the military can greatly manipulate the electoral process.[337] For instance, by favoring one political group over others, the army in Pakistan deployed 371,000 soldiers to polling stations across the country to ensure "free and fair" elections and intervened in vote management and vote counting.[338] Moreover, the risk that the military will try to drain the government's resources with ever-increasing military spending is also persistent, even among the most advanced democracies.[339] Indeed, any attempt to legally constrain the military often meets strong resistance from the armed forces and civilian politicians with hawkish positions.[340] The overall attitude that laws can adversely affect military operations' effectiveness is commonly shared among the

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[337] *See, e.g.,* Diane H. Mazur, *The Bullying of America: A Cautionary Tale about Military Voting and Civil-Military Relations*, 4 ELECTION L.J. 105 (2005) (discussing the rhetoric of disenfranchised military members involving in the controversial 2000 presidential election); Louis A. Perez, Jr., *The Military and Electoral Politics: The Cuban Election of 1920* 37 MILITARY AFFS. 5, 5-7 (1973) (providing an example from Cuba in 1920 of how the military could intervene in elections through threats, frauds, and political influence).

[338] Aqil Shah, *Pakistan: Voting Under Military Tutelage*, 30 J. DEMOCRACY 128, 137 (2019).

[339] Justin Lewis & Joanne Hunt, *Press coverage of the UK military budget: 1987 to 2009*, 4 MEDIA, WAR & CONFLICT 162, 180-82 (2011) (providing an account of how the military can use strategies of public relations to appeal for more spending through the media).

[340] *See* PETER D. FEAVER, ARMED SERVANTS: AGENCY, OVERSIGHT, AND CIVIL-MILITARY RELATIONS 58-68 (2003) (discussing the differences between military and civilian preferences that could explain the military's resistance to civilian control); SHEILA A. SMITH, JAPAN REARMED: THE POLITICS OF MILITARY POWER 144-50 (2019) (providing an example of tensions between the military and politicians of different views on the tightening of civilian control in Japan); *But see* Edward Gonzalez, *Adjudicating Competing Theories: Does Civilian Control Over the Military Decrease Conflict?*, 50 ARMED FORCES & SOC'Y 149 (2022) (arguing that increased civilian control increases the likelihood of interstate conflict because civilian politicians might have more reasons to engage in aggressive conflicts than soldiers).

armed forces.[341] The UK's Chief of Defence Staff at the time of the 2003 Iraq invasion made this familiar argument in the House of Lords:

"*The Armed Forces are under legal siege. … They are being pushed by people not schooled in operations but only in political correctness. They are being pushed to a time when they will fail in an operation because the commanding officer's authority and his command chain has been compromised with tortuous rules not relevant to fighting and where his instinct to be daring and innovative is being buried under the threat of liabilities and hounded out by those who have no concept of what is required to fight and win.*"[342]

As troublesome as they are, these problems of civil-military relations are fundamental to constitutional democracy. Since political power belongs to the people who are civilians, soldiers are—by design—a part of society without any role in politics.[343] They do not have the legitimacy nor expertise to function as an intermediary in a democracy the way that political parties may operate.[344] Indeed, the analogy with political parties is illuminating as the military is also an institution situated between

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[341] *See, e.g.*, DAVID LUBAN, *Military Necessity and the Cultures of Military Law*, 26 LEIDEN J. INT'L L. 315 (2013) (discussing the contrast between military necessity and human dignity in the area of international humanitarian law); Hersch Lauterpacht, *The Law of Nations and the Punishment of War Crimes*, 21 BRIT. Y.B. INT'L L. 58, 71-74 (1944) (discussing the conflict between the duty to obey of the soldiers and the general obligation under the law).

[342] Official Report, House of Lords, 14 July 2005; Vol. 673, c. 1236.

[343] MORRIS JANOWITZ, THE PROFESSIONAL SOLDIER: A SOCIAL AND POLITICAL PORTRAIT 233-56 (1960) (comparing the military to other professional groups in the society which are also 'pressure groups' in politics with orientation towards conservatism).

[344] Samuel Issacharoff & Daniel R. Ortiz, *Governing through Intermediaries*, 85 VA. L. REV. 1627, 1635-52 (1999) (discussing the functions of political intermediaries such as political parties in monitoring representatives' behavior).

society and government.[345] Both the military and political parties also exist in most modern states without a need for the constitution to directly create them in the first place.[346] However, while political parties can justify their existence by their function in facilitating democratic processes, the armed forces do not have any obvious role in democratic decision-making. Accordingly, the constitution should only assign the military a subordinate role under the political authority of the civilian government. This principle is known as civilian control—a principle deeply connected to the liberal constitutional theory.[347]

However, constitutions do not simply declare that the military must be obedient and follow the law. As the previous chapter has shown, principles and tools in constitutional law, such as separation of powers and federalism, have been adopted by constitutions worldwide with some variations in the treatment of the armed forces.[348] Strikingly, the constitutional law literature has not offered any standard framework for the maintenance of civilian control. Despite the prevalence of the military and its threat to

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[345] Cindy Skach, *Political Parties and the Constitution*, *in* OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW, *supra* note 22, at 874, 875-76.

[346] *See, e.g.,* Steven G. Calabresi, *Political Parties as Mediating Institutions*, 61 U. Chi. L. Rev. 1479, 1482-83 (1994) (discussing the historical background which caused the US Constitution to be silent on the issue of political parties); Harold M. Bowman, *Martial Law and the English Constitution*, 15 MICH. L. REV. 93, 104-06 (1916-1917) (discussing the prerogative of the English Crown as including the power over the armed forces through unwritten constitutional law).

[347] *See, e.g.*, JACK N. RAKOVE, THE BEGINNINGS OF NATIONAL POLITICS: AN INTERPRETIVE HISTORY OF THE CONTINENTAL CONGRESS 196 (2019) ("The subordination of the military to civilian control was a central axiom of the Whig ideology that had led the colonists into rebellion."); Glenn Sulmasy & John Yoo, *Challenges to Civilian Control of the Military: A Rational Choice Approach to the War on Terror*, 54 UCLA L. REV. 1815, 1816 (2007). ("…civilian control is perhaps the singular constitutional principle with which our civilian and military leaders continuously grapple.").

[348] *See supra* Chapter II.

constitutionalism in general, constitutional drafters go about their task without a theoretical account of what the constitution can do regarding civilian control.

Consequently, this chapter aims to study and make the connection between civilian-military relations and constitutionalism. The first part deals with the concept of civilian control and its implications. The second part brings constitutional law into the picture and discusses the relationship between the constitution and the military. In doing so, it categorizes two main approaches to constitutionalizing civilian control, developing a theoretical framework, and setting up a stage for the next two chapters.

I. Theories on Civilian-Military Relations

A. Overview of the Field

In his classic work titled The Soldier and the State, Samuel Huntington pioneered a theoretical framework that still dominates current discussions to solve the paradox of ensuring civilian control over the military's monopoly of violence.[349] Huntington offered a theory that analyzes different equilibriums between a society's military and non-military elements.[350] At the outset, he emphasizes that the unique professional qualifications of the military, e.g., pessimistic attitudes towards human nature, the emphasis on the state over individuals, and the instrumentalist view of the military in loyally following the command of the civilian, require that the armed forces are treated as

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[349] HUNTINGTON, *supra* note 100.

[350] *Id.* at viii.

an autonomous profession.[351] He then states that there are two ways to achieve an equilibrium that reconciles these inherent differences. The first and simpler model is 'subjective civilian control', which focuses on the convergence between the military and the civil government. Under this model, the military is civilianized, to the detriment of the autonomy and professional capacities of the military.[352] Once wholly controlled by the civilian side, "the military leadership of the armies reflected the same interests, values, and outlook as the political leadership of society."[353] Moreover, since the civilian power is not held by a monolithic entity, the control in this model needs to maximize only the power of a particular civilian group in competition for power with other social classes, bourgeois groups, or government branches such as the Congress and the President.[354]

Thus, for Huntington, subjective civilian control is suboptimal since the military needs autonomy to maintain national security properly; it should not blindly follow the civilian leaders who tend to increase the risk of conflicts.[355] He then presents his normative argument by suggesting that the right balance in civil-military relations lies in the second model, 'objective civilian control.' Under this second model, equilibrium is achieved by enhancing the military's autonomy so that professionalism and political

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[351] *Id.* at 59-79.

[352] HUNTINGTON, *supra* note 100, at at 83 (arguing that subjective control "…achieves its ends by civilianizing the military, making them the mirror of the state.").

[353] *See* Huntington, *supra* note 43, at 677.

[354] HUNTINGTON, *supra* note 100, at 80-83 (providing examples such as how in the UK the parliamentary fought to gain military control from the Crown).

[355] *Id.* at 83-85.

neutrality can follow.[356] When the military has both autonomy and professionalism, it can reach its national security goals at the highest level of competency without being mired by domestic politics.[357] For the military to be truly apolitical, the ideal form of civilian control should be an objective civilian control that minimizes the military's political power, thereby "professionalizing the military by rendering them politically sterile and neutral."[358]

The upshot here is that the normatively better objective civilian control requires the establishment of the military profession, without which maximizing both national security and civilian control would be impossible.[359] This normative claim made by Huntington had elevated through time and by now become the 'normal theory of civil-military relations".[360] The theory, which was conceived as normative at first, has now been treated as empirical due to its respected status.[361] As such, many contemporary discussions on CMR of various countries start by applying the objective control framework on a particular state.[362]

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[356] *Id.* at 74, 83-84.

[357] *Id.* at 463-64 (stating how the inherent conservative outlook of a professional military would preserve national security better than a political officer corps which are full of factions).

[358] *Id.* at 84-85.

[359] *Id*.

[360] ELIOT COHEN, SUPREME COMMAND: SOLDIERS, STATESMEN, AND LEADERSHIP IN WARTIME 226 (2002) (stating that the theory is "the accepted standard by which the current reality is to be judged.").

[361] Thomas C. Bruneau & Florina Cristiana Matei, *Introduction in* THE ROUTLEDGE HANDBOOK OF CIVIL-MILITARY RELATIONS 1, 13, 14 (Thomas C. Bruneau & Florina Cristiana Matei eds., 2013).

[362] *See e.g.,* Andrew A. Szarejko, *The Soldier and the Turkish State: Toward a General Theory of Civil-Military Relations*, 19 PERCEPTIONS J. INT'L AFFS. 139, 139-41 (2014); Maung Aung Myoe, *The Soldier*

Indeed, the framework is powerful for its clarity and simplicity. It provides both a convenient explanation and a definitive set of goals for healthy civilian-military relations. The appeal of the theory, even half a century later, was succinctly captured by Peter D. Feaver—a leading authority of American CMR:

"*Why bother with a model [Huntington's] that is over forty years old? The answer is that Huntington's theory, outlined in The Soldier and the State, remains the dominant theoretical paradigm in civil-military relations, especially the study of American civil-military relations… …Huntington's model is widely recognized as the most elegant, ambitious, and important statement on civil-military relations theory to date. Moreover, Huntington's prescriptions for how best to structure civil-military relations continue to find a very receptive ear within one very important audience, the American officer corps itself, and this contributes to his prominence in the field.*"[363]

As a counterargument to Huntington's normative theory, Samuel E. Finer wrote a book in 1962 called '*The Man on Horseback*,' pointing out that professionalism is not sufficiently instructive and "often thrusts the military into collision with the civil authorities."[364] Having provided counter-examples of the Japanese and German armed forces before the end of World War II, he argued that professional militaries can still significantly intervene in domestic politics.[365] Finer further questioned whether it is

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and the State: The Tatmadaw and Political Liberalization in Myanmar since 2011, 22 SOUTH EAST ASIA RSCH. 233 (2014).

[363] PETER D. FEAVER, ARMED SERVANTS: AGENCY, OVERSIGHT, AND CIVIL-MILITARY RELATIONS 7 (2003).

[364] SAMUEL E. FINER, THE MAN ON HORSEBACK: THE ROLE OF THE MILITARY IN POLITICS 25 (1962).

[365] *Id.* at 25-30.

'natural' for the armed forces to obey the civil power.[366] In his analysis, the armed forces possess three main political advantages over civilians: "a marked superiority in organization, a highly emotionalized symbolic status, and a monopoly of arms."[367] Civilian control over the military has become desirable only because the military does not have both the ability to administer a modern state and the legitimacy to rule.[368] As a result, military intervention persists in certain countries where the recently westernized civilian governments fail to become a capable source of legitimacy and to develop material conditions such as literacy and education to maintain stable civilian organizations.[369]

Despite certain pushbacks, subsequent variations on civilian-military relations often follow closely on what *The Soldier and the State* describes and prescribes due to the prominence of Huntington's model. For example, there is '*Convergence Theory*,' which suggests that the military and civilian authorities should learn from each other instead of just emphasizing the differences between the two sides.[370] In this convergence of civil-military relations, which deviates from the classical model of objective control, the armed forces should be able to understand and accept better civilian political control while

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[366] *Id.* at 5.

[367] *Id.* at 6.

[368] *Id.* at 14-22.

[369] *Id.* at 223-31.

[370] *See generally* MORRIS JANOWITZ, THE PROFESSIONAL SOLDIER: A SOCIAL AND POLITICAL PORTRAIT (1960).

retaining and embracing the inherent difference between the civilian and the military already established.[371]

Even when there is an attempt to create a new theory, a new model still builds on Huntington's model. '*Concordance Theory*,' as offered by Rebecca L. Schiff, for instance, breaks away from the focus of only highly democratized Western countries and provides another alternative to the much-prescribed objective control. The theory suggests that "emerging nations may achieve concordance among the military, political elites, and citizenry regarding the role and function of the armed forces within indigenous government while not conforming to western government standards."[372] Nevertheless, the theory still accommodates and validates Huntington's separation model by stating that such a model is one of the possible options based on the context and characteristics of a nation.[373]

As this brief literature review above might suggest, the field of civil-military relations is open to many criticisms: "instead of developing a conceptual base of comparative and empirical studies that could be built on by encompassing other disciplines, the field of civil-military relations remains amorphously delineated and heavily anecdotal."[374] While the literature on civil-military relations provides various

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[371] *Id.* at 440 ("To deny or destroy the difference between the military and the civilian cannot produce genuine similarity, but runs the risk of creating new forms of tensions and unanticipated militarism).

[372] REBECCA L. SCHIFF, A CONCORDANCE THEORY OF CIVIL-MILITARY RELATIONS 3 (2009).

[373] Rebecca L. Schiff, *Concordance Theory, Targeted Partnership, and Counterinsurgency Strategy*, 38 ARMED FORCES & SOC'Y 318, 319 (2012).

[374] Bruneau & Matei, *supra* note 361, at 14.

responses to the problem of civilian control, it lacks a cohesive theoretical framework essential for developing any distinctive academic field.[375] Moreover, civil-military relations is fraught with the lack of reliable data for both quantitative and qualitative purposes.[376]

Due to these challenges, practitioners dealing with CMR are left with Huntington's normative model, which is the most straightforward and practical. But Huntington's model is not without its flaws. On a fundamental level, since Huntington's theory predominantly relies on the American context, his model does not try to represent a universal relationship between the military and the state.[377] The literature from Latin America, for example, challenges the idea that the professionalization of the military could solve the problem of military intervention in domestic politics.[378] Quite the opposite, it is argued that professionalization can lead to a higher degree of intervention due to the increased proficiency in carrying out a coup once the armed forces are more organized and coordinated as a professional entity.[379] Though a contextual analysis,

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[375] *Id.* at 14.

[376] *Id.* at 2 (stating that the confidential nature of national security prevents a thorough data collection of the military).

[377] Richard D. Hooker, Soldiers of the State: Reconsidering American Civil-Military Relations (discussing how civil-military relations in the US are in good shape and faithful to the Constitution, notwithstanding the necessary gap which professionally separates the military from the rest of the society).

[378] DAVID PION-BERLIN & RAFAEL MARTÍNEZ, SOLDIERS, POLITICIANS, AND CIVILIANS: REFORMING CIVIL-MILITARY RELATIONS IN DEMOCRATIC LATIN AMERICA 77-79 (2017) (arguing that military must has its autonomy in those areas that lie at the core of its professional interest).

[379] *See, e.g.,* Tobias Böhmelt et al., *Pitfalls of Professionalism? Military Academies and Coup Risk*, 63 J. CONFLICT RESOLUTION 1111 (2019) (suggesting that military academies increase the likelihood of coups in authoritarian states); Arthur Whitaker, *National and Social Change in Latin America*, *in* POLITICS OF CHANGES IN LATIN AMERICA 85, 99 (J. Maier & R. W. Weatherhead eds., 1964) ('in those countries in

whatever the military is made of, it is often the structure of the state that dictates the political behavior or at least the tendency of the armed corps.[380] Although Huntington's framework is still influential today, it is no panacea to all problems of civil-military relations.

Interestingly, scholars from other fields also tackle the question of civilian control independently. Free from the Platonic solution of raising a class of soldiers with no appetite for professional ideals, economists offer alternative models of civilian control. Instead of focusing on laws and regulations, economists are more concerned with reducing the incentives for staging a coup, looking into an interdependence between coup risk and military spending.[381] For example, some scholars propose a political economy model based on how much the political elites are willing to share their resources with the military.[382] The model is, however, limited in its scope; increasing military spending to avoid coups may only work in specific settings, such as in African countries where militaries extort from the government a higher budget.[383] In this way, one may also argue

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which they have been most highly professionalized, they seem to have become even more closely linked with the rest of society than formerly).

[380] Daniel Zirker, *Jose Nun's "Middle-Class Military Coup" in Contemporary Perspective: Implications of Latin America's Neoliberal Democratic Coalitions*, 25 LATIN AMERICAN PERSPECTIVES 67, 70-77 (1998).

[381] Paul Collier & Abje Hoeffler, *Military Spending and the Risks of Coups d'etats*, OXFORD UNIVERSITY 20 (Centre for the Study of Afr. Econs., Working Paper (2007).

[382] *See, e.g.,* Timothy Besley & James A. Robinson, *Quis Custodietipsos Custodes? Civilian Control Over the Military*, 8 J. ECON. ASSOC. 655, 661-62 (2010) (arguing that civilian politicians either maintain a big army through sufficient rents or create a tin pot military that cannot stage a coup).

[383] Collier & Hoeffler, *supra* note 381 (finding that in Africa where coup risk is high the civilian government often increase military spending to buy off the military).

that path dependency (e.g., the abundance of natural resources or potential security threats in a polity) dictates the emergence of military dictatorship.[384]

Despite all the different theories developed on the proper relationship between civilian and military powers, both within and without the field of civilian-military relations, the focus of almost all the scholars is on "the control or direction of the military by the highest civilian authorities in nation-states."[385] There are at least two points agreed by virtually every author engaging in civil-military relations: (1) a powerful standing army poses a threat to democracy, and (2) the military needs to be under civilian control.[386]

There are two primary responses to these common concerns. One is to decrease the 'ability' of the military to intervene. The other is to instill the 'disposition' of the military to obey. The civil-military relations literature emphasizes the latter, as tinkering with the military's abilities would inevitably affect its essential ability to protect the state. Huntington's model, for instance, falls into the latter category as it tries to shape the disposition of the military through professionalization. As for the former, scholars in CMR mainly discuss constitutional constraints as one of a few tools that could limit the ability of the military to intervene in politics, emphasizing its limited effects and the fact that the practical ability to overthrow the government is left intact even with the

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[384] *See* Daron Acemoglu et al., *A Theory of Military Dictatorships*, 2 AM. ECON. J. 1, 36-38 (2010).

[385] Peter D. Feaver, *Civil-Military Relations*, 2 ANN. REV. SCI. 211, 211 (1999).

[386] Florina Cristiana Matei et al., *A New Conceptualization of Civil-Military Relations*, *in* THE ROUTLEDGE HANDBOOK OF CIVIL-MILITARY RELATIONS 1, 27-28 (Florina Cristiana Matei et al. eds., 2022).

constitutional constraints.[387] Moreover, even the 'disposition' side of civilian control, which attempts to cultivate the military's obedient disposition, has also appeared in the constitution.[388] Whatever the theory or model selected for civilian control, the constitution is still involved in the end product.

Following the overwhelming concerns over the control of the military, recommendations to optimize civilian control based on practical wisdom abound. As most policymakers and constitutional drafters inevitably always have these prescriptions at their disposal when dealing with the military, it is worthwhile to summarize these recommendations first to understand the policy choices presented before any consideration of constitutional law.

B. Civilian Control of the Military (subordination of the armed forces to democratically elected governments)

The question of control over the army would determine the right to the throne in an absolute monarchy, but when the government is representative of the people, losing control of the army is not a personal failure of the ruler but a regime change.[389] The basic assumption shared among experts—even outside of CMR—is that civilian control is one

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[387] Feaver, *supra* note 385, at 225 ("These measures, however, only restrain the military insofar as the military abides by the measures.").

[388] *See supra* Chapter II.

[389] REBECCA L. SCHIFF, THE MILITARY AND DOMESTIC POLITICS: A CONCORDANCE THEORY OF CIVIL-MILITARY RELATIONS 21 (2009) (discussing different forms of military intervention in domestic politics which could potentially trigger national transformations).

of the pillars of democratic governance.[390] Civilian control is a logical precondition for a democratic regime where might is not right. The democratic ideals underpinning any modern constitution presuppose that civilians are morally and politically competent to make decisions for the state, even when they are not necessarily the most technically competent.[391] Especially in the 21st century, the unelected military has no authority to govern states.[392]

Civilian supremacy over the armed forces requires subordination, which could come in varying degrees—the design of which is the cause of all theories generated in civil-military relations. However, while many theorists define the principle differently, the core feature of civilian control can be formulated in a negative statement: the armed forces shall have no political power over the civilian government.[393]

Based on this skeletal definition, one can start from a bare minimum by identifying that military control is the opposite of civilian control. And that the transition from the latter to the former takes the form of a coup d'état. Indeed, military coups almost always lead to regime change, especially in civilian democracies and military

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[390] *See e.g.,* MANAGING DEFENCE IN A DEMOCRACY (Laura R. Cleary & Teri McConville eds., 2006).

[391] *See* ROBERT A. DAHL, CONTROLLING NUCLEAR WEAPONS: DEMOCRACY VERSUS GUARDIANSHIP 72-75 (1985).

[392] *See* SAMUEL FINER, THE MAN ON HORSEBACK: THE ROLE OF THE MILITARY IN POLITICS 14-22 (1962) (arguing that the military's pollical weaknesses are its technical inability in governing and the lack of legitimacy)

[393] *See, e.g.,* LARRY DIAMOND, DEVELOPING DEMOCRACY TOWARD CONSOLIDATION 11 (1999) ("the military is subordinate to the authority of elected civilian officials."); The Editorial Board, *Opinion | Civilian Control of the Military Is Vital*, N.Y. TIMES (Dec. 10, 2020), https://www.nytimes.com/2020/12/10/opinion/biden-lloyd-austin-defense-secretary.html ("Among the most worrisome is the erosion of the principle that the military should be led by a civilian and those in uniform kept separate from partisan politics.").

dictatorships.[394] However, a coup is still an event that can only represent the tip of the iceberg—a failed civilian control manifested.[395] It is the usual destination of most dysfunctional civil-military relations, but robust civilian control requires more than just the lack of military coups. If the military elites could get whatever they want, they have no reason to stage a coup and face the repercussions of this much-condemned deed; the military, in such a case, is much more powerful than the one that must seize power by force.[396]

As discussed earlier, limiting the capability of the military to have a coup will also weaken its performance of core functions. Thus, altering the disposition of the military is considered a superior approach that does not sacrifice efficiency in national defense. Taming the military is where the classic works of civil-military relations mainly operate. A long line of research following Huntington's theory relies on the tautological definition of the professional military, which only states that uniformed officers obey civilian authority because they are professional.[397] Principles or rules governing a professional military are not listed anywhere in an exhaustive and authoritative fashion. As a result, scholars in the field struggle to develop a coherent set of recommendations to achieve objective control through the professionalization of the military.

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[394] JOSE ANTONIO CHEIBUB, PRESIDENTIALISM, PARLIAMENTARISM, AND DEMOCRACY 144 (2006) (showing that the military is "the main agent of democratic breakdown" notwithstanding whether it is a presidential or parliamentary democracy).

[395] CLAUDE E. WELCH, *Civilian Control of the Military: Myth and Reality*, *in* CIVILIAN CONTROL OF THE MILITARY: THEORY AND CASES FROM DEVELOPING COUNTRIES 1, 1-2 (Claude E. Welch ed., 1976).

[396] Feaver, *supra* note 385, at 218 (arguing that coups could be interpreted as signaling the military's weakness as it cannot compete with civilians in normal political process).

[397] WELCH, *supra* note 395, at 2.

Nevertheless, there are two main strategies to realize the ethics of obedience. The first one relies on the ascriptive characteristics of the military, selectively recruiting those who are more willing to obey.[398] The action plan can be in many shapes. For example, in its early years, the US built up the militia from ordinary citizens to reflect the republican values at the time.[399] However, the downside of this approach is the risk that political infighting in the civilian realm will also be reflected in the military that adopts such a policy, thereby politicizing the armed forces in a way that is similar to how inferior subjective civilian control is criticized.[400] As a workaround, some emphasize training military officers through the indoctrination of civilian control.[401]

The other approach focuses on providing incentives for the military to obey. This approach could be implemented in its simplest form—bribery, as seen since the Roman empire,[402] operating similarly to the military spending model used in many African states.[403] However, the more subtle and noble incentive is to follow the model of objective civilian control, which offers military autonomy as an incentive for

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[398] Feaver, *supra* note 385, at 226-27 (discussing the strategies of either recruiting officers from a specific group of population or from the whole population).

[399] *Id.*

[400] HUNTINGTON, *supra* note 349, at 80-83 (providing examples such as how in the UK the parliamentary fought to gain military control from the Crown).

[401] *See, e.g.,* Morris Janowitz, The Professional Soldier: A Social and Political Portrait 428-29 (1960) (suggesting that indoctrination of military officers through political education could enhance civilian control).

[402] Feaver, *supra* note 385, at 228 (arguing that the Romans bribed the military in the capital to stay away from politics).

[403] *See* Collier & Hoeffler, *supra* note 383.

subordination to civilian authorities.[404] This idea is based on division of labor; the military specializes in managing violence and war operations.[405] Accordingly, these military issues are supposed to be technical, not political. As long as the military has control over their domain, they will be satisfied and obey the civilian authorities.[406] It is important to emphasize, however, that the objective civilian control is normative; it is not meant to describe how civilians and military institutions interact.[407] In practice, there is no guarantee that the military will not intervene in politics once they have autonomy.

Still, ensuring military professionalism has been the most adopted approach in many countries. In substantiating the concept of professionalism of the military that simply requires the professional military to be obedient,[408] political neutrality is added as a component of civilian control. Under the ideal objective of civilian control, the separation of the military should be a distinctive institution apart from the rest of the civilian government; the people elect their representatives, and the representatives then appoint the soldiers.[409] In subordinating a group to another group, classifications are needed. Whether it is a relationship of masters and servants or of principals and agents,

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[404] *See generally* HUNTINGTON, *supra* note 100, at 59-85 (discussing the meaning of professionalism).

[405] *Id.* at 17-18.

[406] *Id.* at 84-85.

[407] Bruneau, *supra* note 361, at 14-19.

[408] PETER D. FEAVER, ARMED SERVANTS: AGENCY, OVERSIGHT, AND CIVIL-MILITARY RELATIONS 18 (2003) ("A professional military obeyed civilian authority. A military that did not obey was not professional.").

[409] Peter D. Feaver, *The Civil-Military Problematique: Huntington, Janowitz, and the Question of Civilian Control*, 23 ARMED FORCES & SOC'Y 149, 153 (1996) ("[I]ndividuals delegate to a collective, the collective delegates to a regime, and the regime delegates to the fighters.").

civilian supremacy requires a clear distinction between civilian and military personnel. The literature often suggests that the normative difference between the civilian and the military is the political neutrality of the latter. Hence, even when the principle of civilian control is in place, structurally subjecting the military to the civilian government is not a guarantee for strong civilian control. Professional armed forces also need to be apolitical, preventing them from ever entering the fray.

However, having a completely neutral military is, at best, impractical and, at worst, impossible. Any functioning institution inevitably has its political stance. As an essential state institution, the military always gets involved in politics. Realistically, civilian control should be considered a matter of degree, with military involvement ranging from military influence to total military control.[410] Within this spectrum, several monitoring mechanisms, such as audits, oversight institutions, and the media, are available to prevent excessive politicization of the military.[411] Specifically, legal mechanisms can contribute to strong civilian institutions through various legislations and regulations.[412]

Lastly, civilian governance must be stable and legitimate to prevent any military intervention in politics. The weaker the civilian government, the more chances the

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[410] WELCH, *supra* note 395, at 3-5.

[411] *See* Matei et al., *supra note 386*, 26, 30-31.

[412] *Id.* at 30 ("Institutional control mechanisms involve providing direction and guidance for the security forces, exercised through institutions that range from organic laws and other regulations that empower the civilian leadership…").

military will try to use its influence and power to rule.[413] Historically, new states that emerged from colonialism in Asia and Africa have shown that instability attracts military intervention, while those without any experience of military rule stand out as an exception.[414] Conditions for strong civilian legitimacy, however, often lie beyond the control of any state, and the emphasis is thus more on the reform on the military side than on the civilian side.[415]

II. Constitutionalism and Civilian Control.

The literature on civil-military relations focuses much more on the limitations of law rather than its potential benefits in establishing civilian control. Huntington, for instance, argued that American civil-military relations thrive despite the Constitution, which goes against the ideal civilian control by allowing the military to go back and forth between influencing the President and the Congress.[416] As a result, the field emphasizes shaping the disposition of the military more than imposing regulations and installing mechanisms for supervision.

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[413] AMOS PERLMUTTER, THE MILITARY AND POLITICS IN MODERN TIMES: ON PROFESSIONALS, PRAETORIANS, AND REVOLUTIONARY SOLDIERS 281 (1977) (arguing that a "stable, sustaining, and institutionalized political regime can hardly succumb to military pressure and rule.").

[414] Feaver, *supra* note 385, at 238-40 (providing an overview of military intervention in Latin America, Asia, and Africa).

[415] WELCH, *supra* note 395, at, 27.

[416] *See* Huntington, *supra* note 43, at 689-93.

However, the constitution and the military are both related and interdependent. A constitution will lack any force without stable and healthy civilian control; an uncontrolled military can disobey or even abrogate any constitution when the supreme law is not beneficial to the armed corps. And even though certain preordained factors such as geography or colonial history might dictate the prospect of a state's civil-military relations, stable constitutional democracy is still the best defense against military interventions.[417] Especially in developing countries, weak civilian institutions can even result in the constitutionalization of military involvement in politics, allowing the armed forces to lead in developing and modernizing the state.[418] In this way, the monopoly of force by the state is indeed a guarantee for civilian control. Without firm control of the armed forces, democratic consolidation is not possible, as the military is generally more organized and legitimized than any nascent civilian political group.[419] It is thus argued that modern state systems from the 17th century onwards were contingent upon the establishment of permanent and professionalized forces which obey the public authorities as servants of the state.[420]

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[417] Feaver, *supra* note 385, at 229-30.

[418] Felix Heiduk, *Introduction: Security Sector Reform in Southeast Asia in* SECURITY SECTOR REFORM IN SOUTHEAST ASIA: FROM POLICY TO PRACTICE 1, 3-4 (Felix Heiduk ed., 2014) (arguing that this dominant role in political, economic, and social sectors are especially problematic when "the doctrinal inclinations were reflected in the constitutions and in the organizational structures of the military.").

[419] ALFRED C. STEPAN, RETHINKING MILITARY POLITICS : BRAZIL AND THE SOUTHERN CONE x-xii (1988) (arguing that the problem of civilian control of the military is more difficult in "newly democratizing ones").

[420] Samuel E. Finer, *State- and Nation-Building in Europe: The Role of the Military in* THE FORMATION OF NATIONAL STATES IN WESTERN EUROPE 84, 84-163 (Charles Tilly ed., 1975).

While constitutional theorists from the first few centuries of modern constitutionalism accordingly paid attention to the issue of the military,[421] the more recent literature has been relatively silent on the issue. The following sections thus try to capture all the prior literature in comparative constitutional law on civilian control.

A. Coup d'états and Coup Prevention

Coup d'états are not discussed generally in constitutional law despite being the greatest threat to the constitution and the main concern in CMR. The main reason is that coups—the factual usurpation of state powers—are pre-constitutional. The law has no force when facing such effective acts of power; thus, it forfeits any attempt to shape what a coup is. Within the literature of law, coups are pre-legal and fall beyond the ambit of law in general. What the law does is only recognize a coup when there is one. Hans Kelsen, for example, traces the chain of validity for all constitutions and laws back to the first historical constitution that must be established by a usurper or a council with a possible use of coercion.[422] The previous constitution was nullified after the coup as it lost the efficacy upon which the validity of norms was conditioned.[423] Similarly, in explaining the foundation of his rule of recognition, H.L.A Hart argues that a coup d'état

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[421] *See supra* Chapter I.

[422] HANS KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY: A TRANSLATION OF THE FIRST EDITION OF THE REINE RECHTSLEHRE OR PURE THEORY OF LAW 57 (Bonnie Litschewski Paulson & Stanley L. Paulson trans., 1992) (arguing that the basis of the validity of the constitution is based upon "the first constitution, historically speaking, established by a single usurper or a council, however, assembled.").

[423] HANS KELSEN, GENERAL THEORY OF LAW AND STATE 117-19 (2006 ed.).

or a revolution in a modern state could upend habitual obedience to the current sovereign and create legitimacy for the usurpers themselves as the new sovereign.[424] So long as the officials of the new system comply with the latest fundamental rules and the people accept such an operation by acquiescence, the legal system will continue.[425] Moreover, along the same line of 'might is right,' the doctrine of necessity in the English common law had been applied to validate and legitimate usurpers by virtue of preserving the state.[426] In effect, coups are a matter of fact, not of law; coups both end the constitution and start a new one.

Coups, as a matter of fact, nevertheless give rise to a constitutional right commonly known in most constitutions as 'the right to resist.'[427] Since both the American and French constitutional regimes were created through unconstitutional means and revolutionary force, the act of the people coming together to overthrow a tyranny is not essentially in conflict with constitutionalism.[428] The American founders, in particular, envisioned a "well regulated militia" in the Constitution to prepare for resistance against

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[424] H. L. A. HART, THE CONCEPT OF LAW 58-61 (3rd ed., 2012).

[425] *Id.* at 59.

[426] Tayyab Mahmud, *Jurisprudence of Successful Treason: Coup d'Etat & Common Law*, 27 CORNELL INT'L L. J. 49, 116-18 (1994).

[427] *See* Ginsburg et al., *supra* note 39.

[428] *See*, e.g., JOHN LOCKE, TWO TREATISES OF GOVERNMENT 412 (Peter Laslett ed., 1988) (1690) ("…whenever the Legislators endeavour to take away, and destroy the Property of the People, or to reduce them to Slavery under Arbitrary Power, they put themselves in a state of War with the People, who are thereupon absolved from any farther Obedience."); Emmanuel Joseph Sieyès, *What Is the Third Estate?*, *in* POLITICAL WRITINGS 92, 135-138 (Michael Sonenscher ed., 2003) (1789) (arguing that 'the nation' is unlimited and unconstrained by a constitutional form, especially when such a form is made by a tyrant).

unjust tyranny.[429] Since then, the idea has inspired subsequent constitutions to adopt other variants of the right to resist.[430] These include also the right to stand up against coup attempts.[431] Still, the purpose of the right to resist is not exclusively for coup-proofing; in most cases, it is the citizens as the subject of the right who choose when to revolt, not the military.[432] Since coup leaders usually claim to resist an unjust civilian government—a pattern well recognized in coup d'états worldwide,[433] the military can even claim the right to resist as support for the legitimacy of the coup. Establishing a right to resist is thus still not a direct answer to the problem of coup d'états.

Another option is to examine basic constitutional principles already embedded in all modern constitutions. Separation of powers can potentially shape the deposition of the military, gradually leading towards a subordinate military. Even before modern written constitutions, Montesquieu saw that control over the military was unique in the framework of separation of powers: the armed forces are naturally more compatible with the executive power, which consists of more "in action than deliberation" than the other branches.[434] Thus, while the legislative branch may have the power to establish or disband an army, it will constantly be at risk because it can never control the soldiers who

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[429] Ginsburg et al., *supra* note 39, at 1203-05.

[430] *Id.* at 1217-28 (2013).

[431] *See, e.g.*, The Constitution of the Republic of Azerbaijan, art. 54(II), available at https://president.az/en/pages/view/azerbaijan/constitution#:~:text=The%20Constitution%20was%20prepared%20by,force%20on%2027%20November%201995 ("Any citizen of the Republic of Azerbaijan has the right to independently oppose insurrection against the state or coups d'état.").

[432] *See* Ginsburg, Lansberg-Rodriguez & Versteeg, *supra* note 427, at 1227-28.

[433] *See* Hatchard, Ndulo & Slinn, *supra* note 5, at 241-44.

[434] MONTESQUIEU, THE SPIRIT OF THE LAWS 156-66 (Anne M. Cohler et al. eds., 1989) (1748).

despise the legislature's lack of military values such as courage and strength.[435] Accordingly, the military should be under the control of a single commander-in-chief who still operates under the legislature's supervision but with sufficient prestige and independence to prevent coups.[436] However, putting the president in command of the military is, unfortunately, no guarantee for a coup-proof regime. The formula is nonetheless adopted in most countries today as a constitutional standard for civilian control.[437]

Thus far, despite some discussions on the problem of military coup d'états, there is no normative agreement on the best way to avoid coup d'états. The only obvious point is that stable constitutions rarely succumb to coups. But the insight here is more like a tautology than a claim. After all, coup makers usually suspend or abrogate the constitution to legitimize its seizure of powers;[438] enduring constitutions are long-lasting because they never face a coup d'état. Aristotle likewise claimed that "the part of a state which wishes a constitution to continue must be stronger than the part which does not."[439]

Constitutionalism accordingly has coup d'états as one apparent weakness which threatens its existence. As shall be discussed, this weakness also extends to any form of military intervention, not just outright military takeover of the government. The

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[435] *Id.*

[436] Holmes, *supra* note 31, at 189, 205 (arguing that civilian control is weakened if the legislature does not give control over the military to the executive).

[437] *See supra* Chapter II on commander-in-chief clauses.

[438] Hatchard, Ndulo & Slinn, *supra* note 5, at 247.

[439] ARISTOTLE, THE POLITICS OF ARISTOTLE (Ernest Barker trans., 1968) 1296b, 185.

complicated issue of coup d'états serves as a reminder of how unequipped the defense of constitutionalism is against the power of the armed forces. But the singular focus on coup d'états can be misleading. Martial law and emergency powers are also integral to the relations between the military and its civilian government. Both civil law and common law traditions possess a justification for the suspension of rights and liberties in times of crisis, either through a claim of necessity, self-defense, or public safety.[440] For instance, martial law deliberately renders "the military independent of and superior to the civil power."[441] As illustrated in the previous chapter, the military is not referred to in most of the emergency provisions of the constitution. But whenever a crisis threatens the state's survival, the armed forces increase in power as the guardian of the state.[442] When the regime of exception is in force, constitutional rule becomes secondary to the security of the state, which is indeed the central providence of the armed forces.[443] Therefore, the nature of these emergency regimes is similar to coup d'états, with the difference being that they are more temporary. Thus, while the literature is limited in finding a solution for coups, it leaves open potential tools that can empower the military to stage a coup.

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[440] G.E. Devenish, *The Demise of Salus Republicae Suprema Lex in South Africa: Emergency Rule in Terms of the 1996 Constitution*, 31 COMP. & INT'L L.J. S. AFR. 142, 144 (1998).

[441] DECLARATION OF INDEPENDENCE para. 14 (1776)

[442] *See, e.g.*, United States v. Diekelman, 92 U.S. 520, 526 (1876) (defining the martial law according to the US Supreme Court that "Martial law is the law of military necessity in the actual presence of war. It is administered by the general of the army, and is in fact his will. Of necessity it is arbitrary; but it must be obeyed.")

[443] Henry Winthrop Ballantine, *Unconstitutional Claims of Military Authority*, 24 YALE L.J. 189, 189 (1915) ("The idea seems to be growing that it is the prerogative and function of the military to substitute itself for all civil authority, and that, while it is in control, the constitutions, courts and laws may be suspended and set aside.").

B. Distrust of the Armed Forces and Separation of Powers

While coup d'états might not be an essential subject in constitutional law, its implications, especially the distinctions—and possibly the incompatibilities—between the civilian and the military, have inspired many early constitutional provisions. Since all the early written constitutions of the US and France came from revolutions, with the military having a large part in the process, constitutional drafters saw firsthand the formidable force that could make or break the constitution. What started as factual distinctions between the army and the democratic government based on the fear of a military overthrowing a newly created government became a theoretical separation of military powers beyond the risk of coups.

Although the US is credited for first constitutionalizing civilian control with a conscious design conceived by its drafters,[444] the idea of establishing civilian control through law did not originate in America. Samuel Adams, one of the founding fathers, had already written an essay that objected to the British's maintenance of a standing army before the American Constitution was written,[445] suggesting that the principle is not a product of the written constitution. Indeed, the idea that a standing army is fatal to a liberal and constitutional government harkens back to the 17th century. The Cromwellian Protectorate from 1653 to 1659, which was set up and destroyed by military coups, had

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[444] Walter T. Cox II., *The Army, the Courts, and the Constitution: The Evolution of Military Justice*, 118 MIL. L. REV. 1, 4-5 (1987).

[445] Carl J. Richard, *Cicero and the American Founders*, *in* BRILL'S COMPANION TO THE RECEPTION OF CICERO VOLUME 2 124, 129 (William H.F. Altman ed., 2015).

already shown how armed forces could be considered a "semi-autonomous political force."[446] Then, after the Glorious Revolution in England, the deeds of King James II—who raised an army in peacetime and billeted soldiers in private houses despite the prohibition in the Petition of Right[447] and other Acts of Parliament— became a subject of discussion.[448] The idea that the free and constitutional government and standing army are incompatible started a transformation from a political idea to a legal principle.[449] As seen in the House of Commons debate on the establishment of the standing army, the main arguments against the military are legal in nature, pointing out the discrepancies between the practice of the army and the English common law.[450]

The English, therefore, originally put the distrust of the military into a legal framework, retaining today some aspects of civilian control in its customary constitution, such as the annual approval by the Parliament for the presence of a standing army.[451]

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[446] Blair Worden, GOD'S INSTRUMENTS: POLITICAL CONDUCT IN THE ENGLAND OF OLIVER CROMWELL 1 (2012).

[447] Petition of Right (1628) art. VI ("And whereas of late great companies of soldiers and mariners have been dispersed into divers counties of the realm, and the inhabitants against their wills have been compelled to receive them into their houses, and there to suffer them to sojourn, against the laws and customs of this realm, and to the great grievance and vexation of the people").

[448] Tim Harris, *The People, the Law, and the Constitution in Scotland and England: A Comparative Approach to the Glorious Revolution*, 38 J. BRIT. STUD. 28, 45-46 (1999).

[449] John Trenchard & et al., AN ARGUMENT, SHEWING THAT A STANDING ARMY IS INCONSISTENT WITH A FREE GOVERNMENT AND ABSOLUTELY DESTRUCTIVE TO THE CONSTITUTION OF THE ENGLISH MONARCHY 4-5 (1697) ("…the Constitution must either break the Army, or the Army will destroy the Constitution…" and "…no Nation ever preserved its Liberty, that maintained an Army otherwise constituted within the Seat of their Government").

[450] *Debates in 1673: November (3rd-4th)*, *in* GREY'S DEBATES OF THE HOUSE OF COMMONS: VOLUME 2 215-223 (T. Becket and P. A. De Hondt eds., 1769) (discussing issues such as the collection of money from persons to be exempted from quartering soldiers and the arbitrary nature of martial law).

[451] NIGEL D. WHITE, DEMOCRACY GOES TO WAR: BRITISH MILITARY DEPLOYMENTS UNDER INTERNATIONAL LAW 13 (2009).

Because the complete control over the military used to belong to the king as part of the royal prerogative, the parliament, who held suspicion of a standing force, designed a system that asserts parliamentary control over the maintenance of the military. Meanwhile, the monarch retains the rest of the prerogative.[452]

Nevertheless, the Americans did put the principle first into a written constitution. By adopting and adapting the English tradition,[453] the revolutionary framers decided to strengthen the division of military powers further.[454] The distrust of a standing army among the American Framers was indeed stronger due to the additional abuses perpetrated by the English during the revolution.[455] For example, one of the grievances in the Declaration of Independence against King George III was that the King "has kept among us, in times of peace, Standing Armies without the Consent of our legislatures."[456]

The American Constitution, influenced by the fear of putting all military powers in one place, creates three different tiers of division of military powers: (1) division of control over the militia between the federal and state governments, (2) division of control over the national military forces between the Congress and the President, and (3) division

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[452] *See* JOSH CHAFETZ, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS 52 (2017) (stating how the legal form of the parliamentary control over the military is through the use of Mutiny Act which shall expire every year unless there is a parliamentary approval).

[453] *Compare supra* note 525. *with* DECLARATION OF INDEPENDENCE para. 13(1776) ("He has kept among us, in times of peace, Standing Armies without the Consent of our legislatures.").

[454] Huntington, *supra* note 43, at 681-82.

[455] RICHARD H. KOHN, EAGLE & SWORD: THE BEGINNINGS OF THE MILITARY ESTABLISHMENT AND THE CREATION OF THE MILITARY ESTABLISHMENT IN AMERICA, 1783-1802 2-6 (1975).

[456] THE DECLARATION OF INDEPENDENCE para. 13 (1776).

of control within the executive over the military between the President and departmental secretaries.[457]

In tandem with other more familiar constitutional principles, these divisions of control of the military function were made ubiquitous by the US Constitution. For instance, it is argued that civilian control has become an essential feature of the Constitution because the constitution grants command of the military to the President (who holds a civilian office).[458] Moreover, compromises during the establishment of federalism created the militia to guarantee the status of each state but also have the military to preserve national security.[459] Even the Supreme Court reaffirmed the militia's role as a safeguard against tyranny to protect the right of private citizens to bear arms.[460] In short, the principle of civilian control has been hidden under the label of other major constitutional principles like the separation of powers.

At about the same time in continental Europe, Revolutionary France had not yet experienced a coup or an abuse of military powers, as seen in England or the US when they drafted their first written Constitution in 1791. They, nonetheless, reiterated the distrust of the military based on comparative experiences and theoretical discussions. Thus, while Montesquieu discussed the English system to derive his famous account of the separation of powers, he also touched upon the issue of control over the navies and

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[457] *Supra* note 454.

[458] *See* Stephen I. Vladeck, *Military Officers and the Civil Office Ban*, 93 IND. L.J. 241, 250 (2018).

[459] The control over the militia is shared between the federal government and the states with the national government having control only in time of war. *See* KOHN *supra* note 455, at 680-85.

[460] District of Columbia v. Heller, 554 US 570, 600 (2008).

armies.[461] He pointed out the danger of the military powers. He provided an ascriptive solution similar to what the modern civil-military relations scholars advocate, suggesting that recruiting the people to the armed forces should make the military institution more representative of the people.[462] The distrust of the standing army as part of the executive was evident from the first constitution of France. Right after the French Revolution, the armed forces—like in England, required annual consent, and the King, as the head of the executive, had the command over them.[463] Despite France's tumultuous constitutional history, this framework continues to exist in the Constitution of the Fifth Republic; the president is, ex officio, the commander-in-chief and the Parliament still holds the power to declare war.[464]

It is thus clear that the three countries with influential constitutional systems had dealt with the question of civilian control even before the professionalization of the modern armed forces, as is often understood in the literature of civil-military relations. All these jurisdictions had created their own solutions to the need for civilian control through similar structural mechanisms in their constitutions. Since most of these provisions are embedded in greater and more general constitutional principles like

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[461] MONTESQUIEU, *supra* note 434.

[462] *Id.* ("To prevent the executive power from being able to oppress, it is requisite that the armies with which it is entrusted should consist of the people, and have the same spirit as the people…").

[463] Constitution of 1791, Title III Chapter III Section I art. I para. 8 ("The Constitution delegates to the legislative body exclusively the following powers and functions:… Legislation annually, upon the proposal of the King, concerning the number of men and vessels of which the land and naval forces are to be composed…") & Title IV § 7 ("All branches of the public force employed for the security of the State against enemies from abroad shall act under the orders of the King").

[464] Constitution of 1958, art. 15, art. 35.

separation of powers and supremacy of the constitution, they have gradually become canonical in the world's constitutions, for many jurisdictions soon adopted the forms and contents of these early revolutionary constitutions. However, unlike other areas of constitutional law, civilian control as a constitutional principle never receives the same attention as other issues like judicial review or constitutional amendments.

Part of the reason for this lack of interest could be that the civil-military relations of these three countries had become sufficiently stable and healthy that they no longer looked to the constitution for support.[465] However, the same success is not guaranteed for all other countries under the influence of these three great constitutional systems. Despite many elements of civilian control in today's constitutions, coup d'états are still a real threat, and concerns over the political role of the military are common.

While these constitutional mechanisms remain unamended in most stable constitutional systems, their significance is long forgotten, lying dormant for action with questions of their effectiveness unanswered. This inactivity questions the merits of these provisions and the wisdom in adopting them without robust theoretical and empirical discussions. Accordingly, the next chapter shall take up this challenging question and attempt to find a systematic explanation for the separation-of-powers approach in civilian control.

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[465] The last coup attempt in France was in the Algiers putsch of 1961 which only took place in French Algeria. *See* Adam Roberts, *Civil Resistance to Military Coups*, 12 J. PEACE RSCH.19, 23-30 (1975). The US, the UK, and Germany never have a successful military coup as understood today.

C. Professionalization and Constitutionalization of the Military

The theoretical and historical accounts of civilian control presented so far have not touched upon the emerging categories of constitutions with enhanced civilian control measures or praetorian constitutions with heightened roles for the military in politics. While the sheer number of constitutions identified in these categories warrant a justification or a reference to longstanding constitutional traditions, there are, at the surface, resources akin to the rich tradition of military distrust and the separation of powers already discussed. The issue of professionalism and constitutional control over the military are rarely addressed as issues of constitutional law.

Of the influential constitutional models of the US, England, and France, only the French constitutions contain any constitutionalization of the military as a professional branch. While the constitutional traditions of England and the United States influenced the early French constitutions, as early as 1791, the early French constitutions already prohibited the armed forces from deliberating among themselves,[466] prohibiting the politicization of the armed forces. The French Constitution was the first trace of constitutionalization of the professionalization of the military. However, given the unstable history of the French constitutions and the numerous constitutions that finally led to the current Constitution of the Fifth Republic, their ever-evolving constitutional framework provides a shaky ground for developing a new constitutional doctrine on

[466] Constitution of 1791, Title IV art. XII; Constitution of 1793, art. 114; Constitution of 1795, 275.

civilian control.[467] The traces of any significance in its military have long been forgotten and disappeared from its constitutional text.

It is, however, the less prestigious constitutional traditions of Latin American countries that serve as a constitutional model for a more substantive form of civilian control. The quantitative findings in the last chapter show that the early constitutions of Latin American countries adopted and established an alternative tradition to civilian control. In the beginning, the independence constitutions of Latin America were heavily influenced by the longstanding Iberian tradition and the Bourbon reforms in 18th-century Spain that preferred centralization of powers and did not separate civilian and military authority; this provided a constitutional status and a prominent role in domestic politics to the military.[468]

Contrary to the distrust in Western European traditions, the military has become the protector of the constitution in many Latin American countries, supervising any unconstitutional actions that other civilian branches of the government may commit.[469] During the first few decades of the 19th century of Spanish American independence, there was so much chaos and violence from social, economic, and political conflicts left in the process that the military forces necessarily became a tool to settle political contests.[470]

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[467] *See* SOPHIE BOYRON, THE CONSTITUTION OF FRANCE: A CONTEXTUAL ANALYSIS 6-28 (2013) (giving an account and an analysis of the developments and differences between the constitutions from the very first written constitution of France).

[468] LOVEMAN, *supra* note 88, 398-99.

[469] M.C. MIROW, LATIN AMERICAN CONSTITUTIONS THE CONSTITUTION OF CÁDIZ AND ITS LEGACY IN SPANISH AMERICA 233 (2015).

[470] LOVEMAN, *supra* note 88, at 52-56 (providing an account of political conflicts during Spanish American independence).

Thus, the armed forces took up the role of custodianship in various ways that obscure the separation between the civilians and the military.[471]

These constitutions might try to constrain this profound constitutional status of the military by restricting the rights of military officers or creating supervisory organizations. However, it has been shown, paradoxically, before that many of these constitutions had adopted the prohibition of the military's role in politics and ended up legitimizing its permanent role in politics.[472] Comparable to the judiciary, claims of independence and professionalism create a sphere of authority that can conceal an aggrandizement of an institution. It is thus observed, even beyond Latin American countries, that certain powerful militaries should be considered a fourth branch of government. [473]

Strikingly, the underlying principle of these provisions resembles that of Carl Schmitt's state of exception: the idea that a sovereign needs the ability to ignore the law as necessary in the face of emergencies.[474] When Carl Schmitt distinguishes between the

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[471] FINER, *supra* note 78, at 35-39.

[472] *Id.* at 398.

[473] Kevin Y. L. Tan, *Law, Legitimacy and Separation of Powers*, 29 SING. ACAD. L.J. 941, 947 (2017) (providing an account in the context of Thailand); Ozan O. Varol, *The Turkish "Model" of Civil–Military Relations*, 11 INT'L J. CONST. L. 727, 750 (2013) (stating that the armed forces "acted as a de facto, if not de jure, fourth branch of the Turkish government."); Jared Gensar, *Democracy on a Leash*, U.S. NEWS (Nov. 12, 2015), https://www.usnews.com/opinion/blogs/world-report/2015/11/12/the-military-will-still-control-myanmar-after-aung-san-suu-kyis-victory ("the Myanmar military is a fourth branch of government").

[474] CARL SCHMITT, POLITICAL THEORY 158 (Jeffrey Seitzer trans. & ed., 2008) ("When every single constitutional provision becomes "inviolable," even in regard to the powers of the state of exception, the protection of the constitution in the positive and substantial sense is sacrificed to the protection of the constitutional provision in the formal and relative sense.").

military taking control during a state of siege and the dictator in a dictatorship, he points out that despite a concentration of powers in a state of siege, the separation of powers is retained.[475] However, Schmitt then proceeds to deconstruct the distinction by suggesting that the military governor in a state of siege can practically transform the legal system and cross the dividing lines between institutions.[476] Ultimately, the military commander is finally back to the original conditions of modern statehood: to react to emergencies with no limitations (i.e., without the burden of legality and constitutionalism).[477] In many countries where the military has a duty to "defend the constitution," the duty becomes a tool for the military in asserting its power over the executive.[478]

From the snapshots of constitutional theories regarding the military presented, intriguing questions emerge. On the one hand, constitutionalizing the military to regulate its powers and install specific measures for civilian control seems straightforward and intuitive. Why employ general tools like separation of powers when a more direct solution is available? On the other hand, involving the military with the constitution can invite the regime of exception that can perpetuate military intervention in politics. Then, is there a way to directly control the military without legitimizing it? Are there any criteria for constitutional design that can guide civilian control of the military?

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[475] William Scheuerman, *States of Emergency, in* OXFORD HANDBOOK CARL SCHMITT (eds.) 549-51

[476] *Id.* at 551.

[477] *Id.* at 552.

[478] *Introduction,* DEBATING CIVIL-MILITARY RELATIONS IN LATIN AMERICA 21, 23-24 (David R. Mares & Rafael Martinez eds., 2013).

In answering these questions, a new theory on the institutionalization of the military will be developed in Chapter V, drawing from both constitutional texts and comparative practice. It is at least conclusive here that these heightened civilian control or praetorian provisions are not simply an offshoot of modern civil-military relations. The wisdom from the study of civil-military relations alone does not offer an argument for or against the constitutionalization of the military.[479] In most cases, policymakers do not differentiate whether their measures are in constitutional form or not.[480]

As with the separation-of-powers approach, the lack of a coherent theory in comparative constitutional law is problematic, even more so here, due to the authoritarian undertone of this approach. It is, therefore, the task of Chapter V to offer an alternative account of the connection between civilian control and the constitution.

Conclusion

Despite the many discussions on the constitution and the military along with early written constitutions of the modern world, the topic is hardly explained and elaborated in today's comparative constitutional law literature. In particular, civilian control of the military, which is often among prescriptions for liberal democracy such as judicial review

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[479] *But see* LOVEMAN, *supra* note 88, at 403-05 (suggesting the eradication of constitutional foundation of the military's autonomy to achieve democracy consolidation).

[480] Thomas-Durell Young, *Military Professionalism in a Democracy*, *in* WHO GUARDS THE GUARDIANS AND HOW DEMOCRATIC CIVIL-MILITARY RELATIONS 17, 26 (Thomas C. Bruneau & Scott D. Tollefson eds., 2006) ("A democracy may circumscribe the military's power through various constitutional and legal instruments. There are no inherent or systematic advantages or disadvantages to the employment of such mechanisms.").

and free speech, finds no standard or boilerplate suggestions for constitutional design in great detail. There are discussions of the courts, the administration, or even political parties, but almost nothing resembling a constitutional theory for civilian control. Hence, the next two chapters attempt to bring the discussion on the military back to the field of comparative constitutional law.

Chapter IV: Separation of Military Control by Separation of Powers

"*The executive power ought to be well secured against legislative usurpations on it. The purse and the sword ought never to get into the same hands whether legislative or executive.*"[481]

George Mason

Introduction

During the founding of the American Constitution, James Madison strongly argued against the idea of retaining a standing army:

"*…A standing military force, with an overgrown Executive, will not long be safe companions to liberty. The means of defense against foreign danger, have been always the instruments of tyranny at home. Among the Romans it was a standing maxim to excite a war, whenever a revolt was apprehended. Throughout all Europe, the armies kept up under the pretext of defending, have enslaved the people."*[482]

Quite the opposite of Madison, Alexander Hamilton advocated for the establishment of a small and limited standing army, stating that such an army would prevent any faction or insurrection from achieving a swift conquest of the nascent nation, but at the same time, the small army would pose no threat to the people uniting as the militia.[483] Ultimately, the American Constitution includes a standing army in line with

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[481] 5 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, 165 (Jonathan Elliot ed., 1827).

[482] MAX FARRAN, RECORDS OF THE FEDERAL CONVENTION OF 1787 465 (1911).

[483] THE FEDERALIST NO. 8 at 39 (Alexander Hamilton) (Lawrence Goldman ed., 2008).

Hamilton's vision but with more mechanisms for control rather than just relying on the limited mission and the small size of the armed forces.[484] It is argued and criticized, however, that since the military institutions of the late 18th century were not yet distinct from other civil institutions, the civilian control then only meant that the interests and values of the military leadership were aligned with that of the civilian leadership.[485] Accordingly, the Framers' concept of civilian control focused more on what and how civilian politicians might use the armed forces rather than the military as an autonomous institution, providing no distinction between political and military responsibilities.[486] In other words, this early civilian control is a simple absolute control: the power of command over the armed forces. The control is subjective, i.e., the Congress and the President constantly engage in a tug-of-war to establish influence over the military.[487]

Against conventional wisdom, however, the quantitative and theoretical insights provided by the previous chapters have shown that constitutional theorists and drafters pay much more attention to the military than what the dominant theory on civil-military relations might suggest. Even the American Framers themselves thought about the possibility of a military coup by a military general like Napoleon before the actual first

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[484] Marybeth Ulrich, *Civil-Military Relations Norms and Democracy: What Every Citizen Should Know*, *in* RECONSIDERING AMERICAN CIVIL-MILITARY RELATIONS: THE MILITARY, SOCIETY, POLITICS, AND MODERN WAR 41, 44 (Lionel Beehner et al. eds., 2021) ("The chief design aspect was the overall distribution of national security powers between two coequal principals, the president and Congress, with the judiciary ensuring compliance with the constitutional order").

[485] Huntington, *supra* note 43, at 676, 677.

[486] HUNTINGTON, *supra* note 100, at 168.

[487] *See generally* PETER D. FEAVER, ARMED SERVANTS: AGENCY, OVERSIGHT, AND CIVIL-MILITARY RELATIONS: AGENCY, OVERSIGHT AND CIVIL-MILITARY RELATIONS (2003).

coup by Napoleon in 1799.[488] This chapter thus expands on the intricate connections between civilian control of the military and the principle of separation of powers to prove the existence of a constitutional framework that utilizes separation of powers as well as checks and balances to achieve civilian control of the military. In doing so, a theoretical account of both the features and limitations of the separation-of-powers approach to civilian control will be developed to evaluate its compatibility with the general principle of constitutionalism. Finally, it argues that separation of powers as a standard tool for civilian control provides a false sense of security that the military is under control while contributing nothing to the classic problem of principal-agent found in any civil-military relations. Indeed, the doctrine is legally ambiguous and is prone to different interpretations that could lead to both the expansion of executive power and the weakening of civilian control.

This chapter consists of three parts. The first part traces the origins and concepts of separation of powers and checks and balances to provide a background for later developments that link civilian control and separation of powers together. The second part develops a theory of civilian control through the separation of powers that may explain the general acceptance of such a framework in many jurisdictions worldwide. Then, it provides a detailed discussion of all the mechanisms involved in this theory. The last part discusses the limitations and implications of this separation-of-powers approach

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[488] *See* David Luban, *On the Commander in Chief Power*, 81 S. CAL. L. REV. 477, 527 (2008) (stating that the Framers was motivated by a "fear of military coups, the countervailing fear of civilian abuse of military power, and concern about adventurism").

both in theory and in practice and provides a cause for concern over the reliance on the separation-of-powers framework as the only means towards civilian control.

I. Separation of Powers: A Tool in Search of a Purpose?

As the previous chapters have shown how the American constitution and its English heritage have shaped the constitutional treatment of the military that inspired virtually all later constitutions, this part now provides a summary of the separation of powers in both its classical and reconstructed forms.

A. The Pure Theory of Separation of Powers and Checks and Balances

Separation of powers has been among the most universally acclaimed principles of constitutional law.[489] The French Declaration of the Rights of Man boldly states since 1789 that "[a] society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all."[490] Montesquieu made this early and pure doctrine of separation of powers famous, building on the distinction of three government functions in three separate and distinct organs.[491] The English constitutional

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[489] *See* M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 106 (2nd ed. 1998) (stating that the doctrine of separation of powers "had become a universal criterion of a constitutional government").

[490] DÉCLARATION DES DROITS DE L'HOMME ET DU CITOYEN DE 1789 (THE DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN), art. 16.

[491] *Id.* at 14.

system after the Glorious Revolution inspired the doctrine, which focused on separating the three powers that could serve to uphold liberty.[492] Thus, Montesquieu stated that "[a]ll would be lost if the same man or the same body of principal men, either of nobles, or of the people, exercised these three powers: that of making the laws, that of executing public resolutions, and that of judging the crimes or the disputes of individuals."[493] In other words, the pure theory of separation of powers only requires that powers are strictly separated among different institutions.

While this classic doctrine of separation of powers is often criticized as overly simplistic,[494] moderation in government has become the mainstay of constitutional design. This moderation dictates that the distribution of powers into three is not just for the sake of separation but also checks and balances.[495] Without resorting to any moral justification, Montesquieu argues that when powers are balanced by other powers distributed, citizens will have freedom under the law.[496] As James Madison astutely argued: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."[497] No matter what one

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[492] MONTESQUIEU, *supra* note 434.

[493] *Id.* at 157.

[494] *See* Laurence Claus, *Montesquieu's Mistakes and the True Meaning of Separation*, 25 OXFORD J. LEGAL STUD. 419, 420-27, 431-33 (2005) (arguing that Montesquieu did not consider that there can be more division of powers within one power and that the judicial and executive powers also make law).

[495] Celine Spector, *Montesquieu*, *in*, HANDBOOK OF THE HISTORY OF THE PHILOSOPHY OF LAW AND SOCIAL PHILOSOPHY: VOLUME 1: FROM PLATO TO ROUSSEAU 249, 253-54 (Gianfrancesco Zanetti et al. eds., 2023).

[496] MONTESQUIEU, *supra* note 434, at 156-57.

[497] THE FEDERALIST No. 47 at 239 (James Madison) (Lawrence Goldman ed., 2008).

believes Montesquieu had in mind regarding the doctrine of the separation of powers,[498] his tripartite formulation of state power has become the backbone of virtually all constitutional systems due to its simplicity.[499] Despite persistent claims about the existence of the "fourth branch" in the separation of powers, the three main powers are always intact in all new theories.[500]

Though the separation of powers has "rarely been held in this extreme form, and even more rarely been put into practice, it does represent a "bench-mark," or an "ideal-type."[501] For pure separation, three components of the doctrine must be present: a separation of institutions, a separation of functions, and a separation of personnel.[502] The legislature ought to be completely separated from the other two institutions and share no common functions and personnel; the same goes for the other two branches. One example of the early influence of the pure theory of separation of powers is in Maryland's Constitution, which declared in 1776 that "the legislative, executive, and judicial powers of government ought to be forever separate and distinct from each other."[503] Even among

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[498] VILE *supra* note 489, at 94 ("What does Montesquieu have to say about the separation of powers? A remarkable degree of disagreement exists about what Montesquieu actually did say.").

[499] *See* EOIN CAROLAN, THE NEW SEPARATION OF POWERS: A THEORY FOR THE MODERN STATE 21 (2009).

[500] *See, e.g.,* Peter Strauss*, The Place of Agencies in Government: Separation of Powers and the Fourth Branch,* 84 COLUM. L. REV. 573 (1984) (discussing administrative agencies as the fourth branch); SAJÓ & UITZ, *supra* note 180.

[501] VILE *supra* note 489, at 14.

[502] Aileen Kavanagh, *The Constitutional Separation of Powers, in* PHILOSOPHICAL FOUNDATIONS OF CONSTITUTIONAL LAW 221, 225 (David Dyzenhaus & Malcolm Thorburn eds., 2016).

[503] MD. CONST. OF 1776, DECLARATION OF RIGHTS CL. VI. The current Constitution of Maryland maintains the clause and added that "...no person exercising the functions of one of said Departments shall assume or discharge the duties of any other.".

modern constitutions, separation of powers has become synonymous with any structural arrangements of government. To tinker with any part of the government is to expand on the principle of separation of powers.

The significance of the separation of powers is thus not only in theoretical discussions. Rising in influence during the 18th century amidst the fear of tyranny,[504] the doctrine became a working slogan to assure the public of the new constitutional systems and thus had to be simplified to show its rigor against abuses of power.[505] Even though separation of powers is often criticized as "an institutional vision in search of an ideal,"[506] the doctrine is strongly associated with liberalism via its firm stance against the concentration of powers on the one hand. Separation of powers is, therefore, the promise of limited powers through constitutional design that resonates with the fear and apprehension of powers generally held by the people. Coincidentally, these concerns over the concentration of power are identical to the fear of a standing army, which will be discussed further.

B. The Modern Concepts of Separation of Powers

No matter how desirable the separation of powers is, the pure theory of separation of powers has many weaknesses in practice. Despite the importance of the insight that the

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[504] *See* ERIC POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC 176-205 (2010) (arguing against 'tyranophobia' which a false belief that the alternative to liberal legalism is tyranny by the executive).

[505] Kavanaugh *supra* note 502, at 237-38.

[506] CAROLAN *supra* note 499, at 44.

concentration of powers is a telltale sign of tyranny, Montesquieu's account of the separation of powers is notoriously thin. There is no consensus on what the doctrine requires.[507] Should powers be completely separated among different institutions and personnel according to the pure theory of separation of powers? Or should powers be separated but still interconnected to promote the system of checks and balances?

Despite ongoing debate, modern scholars and courts have a consensus at the foundational level of the doctrine. First, the objective of preventing "a single governmental institution from possessing and exercising too much power" is an overarching theme among all those who subscribe to the imperative of the separation of powers.[508] Second, to achieve this objective, different governmental functions are distributed among different governmental institutions with the added security of checks and balances so that no one power can be too powerful.[509] The operative words here are 'concentration' and 'checks & balances.' Concentration of power is identified as the root cause of ills, while checks and balances come in as the ultimate solution.

With consensus on the root cause and the solution, the disagreement on the separation of powers is now on the mechanisms that can better achieve the objective. The mere formal separation of powers as high walls and fortresses no longer satisfies modern constitutionalists who demand clarity and rationality in institutional design. The division of labor between different branches has to appeal to democratic legitimacy and technical

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[507] GEOFFREY MARSHALL, CONSTITUTIONAL THEORY 97 (1971) ("The phrase 'separation of powers' is, however, one of the most confusing in the vocabulary of political and constitutional thought").

[508] Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1148 (2000).

[509] *Id.* at 1148-49.

expertise to justify the imposed separation. And the separation itself must result in a balanced government with proper checks and balances. Conceptually, there are two components in any scheme of separation of powers: the division of labor between each branch of the government that serves different constitutional functions and a system of checks and balances. Together, these two mechanisms become the backbone of protection against authoritarianism.[510] The question thus becomes how to design a constitutional structure that best suits the context of a polity. Should one adopt a presidential or parliamentary system? How much supervision should the legislative power have over the executive?

Recently, the separation of powers has adapted well to the ubiquitous exigency of the administrative state and its auxiliary administrative laws in many jurisdictions. While there are claims that administrative agencies constitute the 'fourth branch' of the government and that, accordingly, agencies should fall outside the unitary control of the executive branch, administrative agencies still belong to one or all of the three branches.[511] In the US, for instance, government agencies, which often possess all three functions in one agency, distinguish the powers of agencies from the original three branches by labeling these new additions as quasi-legislative and quasi-judicial

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[510] *See, e.g.,* TOM GINSBURG & AZIZ Z. HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY 95-107 (2018) (identifying the erosion of checks and balances and the centralization of executive power as among the five mechanisms of democratic erosion). *But see* STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE: WHAT HISTORY REVEALS ABOUT OUR FUTURE 155 (2018) (arguing that separation of powers cannot operate without "innovations such as political parties and their accompanying norms").

[511] *See* Strauss *supra* note 500, at 597.

functions.[512] Similarly, for the administrative laws in France and Germany, these independent agencies trace their legitimacy from all three traditional branches to support the technocratic autonomy with stronger connections between administrative law and constitutional principles.[513] In other words, they simply apply the law as part of the executive. It is evident of the adaptability of the separation of powers that the relevance of the doctrine is updated despite the seemingly contradictory existence of the administrative state. There is a hint here that separation of powers is sufficiently pliable as a framework to fit with any function and power of government, including those of the military.

Thus, despite many attempts to abandon (primarily the pure doctrine of separation of powers), no constitutional systems truly leave Montesquieu and Madison behind. The tripartite framework still serves an essential role in constitutionalism, to which virtually all constitutions still conform. As a tool, the separation of powers benefits the efficiency and legitimacy of any constitution. Since civilian control of the military can be formulated under the terms of the separation of powers as the separation of control over the military that can also prevent concentration of power over the military, it is tempting to connect the purpose of separation of powers to the objective of civilian control. After

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[512] Martin Shapiro, *A comparison of US and European independent commissions*, *in* COMPARATIVE ADMINISTRATIVE LAW 234, 236-37 (Susan Rose-Ackerman et al., 2nd ed 2017).

[513] *See, e.g.,* Daniel Halberstam, *The Promise of Comparative Administrative Law: A Constitutional Perspective on Independent Agencies*, *in* COMPARATIVE ADMINISTRATIVE LAW 139, 151-52 (Susan Rose-Ackerman et al., 2nd ed 2017) (providing an example in France where administrative agencies are not considered autonomous from the executive because they simply 'apply' the law, not creating regulations on their own); Matthias Ruffert, National Executives and Bureaucracies, *in* THE OXFORD HANDBOOK OF COMPARATIVE ADMINISTRATIVE LAW 505, 513-14 (Peter Cane et al. eds., 2021) (discussing the chain of legitimacy in Germany from the people to administrative officers).

all, separating the government into different branches is facially conducive to achieving civilian control as even the complicated issue of independent agencies was already solved under the separation-of-powers framework. Strikingly, the expertise and independence of administrative agencies are comparable to the military's autonomy as a profession. Logically, if the three branches of government divide their control over the military, the armed forces should have no political power over the coordinated civilian government. The next part brings these two principles together and discusses the application of separation of powers in support of civilian control of the military.

II. The Separation of Military Control: Separation of Powers as a Tool for Civilian Control of the Military

As the initial connections between the separation of powers and the goal of civilian control are demonstrated, this part now offers a theoretical framework for this widespread practice by comparatively considering both the historical and textual features.

A. Theory of the Separation of Military Control

As the two components of the separation of powers—the division of labor and checks and balances—appear to support civilian control, the attractiveness of this separation-of-powers approach shall be discussed in full here. First, national defense is, by definition, a distinctive function of the government that should primarily belong to the executive. Alexander Hamilton argued accordingly that "[e]nergy in the Executive is a

leading character in the definition of good government. It is essential to the protection of the community against foreign attacks; it is not less essential to the steady administration of the laws."[514] Similarly, John Locke describes the executive power as having "the force of the commonwealth."[515] Montesquieu similarly states that the executive power "establishes security, and prevents invasions."[516] Constitutional theorists thus perceive that the military falls neatly within the executive branch, similar to other institutions that do not primarily legislate or adjudicate.

Assigning control over the military to the executive is not only theoretically convenient but also historically accurate. The executive power traditionally includes the control over the military.[517] Kingdoms and empires from ancient to medieval times have held the power of the sword tightly, even more than the power of the purse. For instance, the word 'emperor' came from 'imperator,' which originally meant 'commander.'[518] In Rome, *imperium* came to denote the supreme power of kings, consuls, and emperors, encompassing both the command of the army in war and the execution of law.[519] Meanwhile, Muslim leaders of the past were also on top of both the administration and

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[514] THE FEDERALIST No. 70 at 344 (Alexander Hamilton) (Lawrence Goldman ed., 2008).

[515] JOHN LOCKE, TWO TREATISES OF GOVERNMENT 194-96 (Thomas L. Cook ed., Hafner Publishing 1947) (1690) (arguing that the executive and federative powers, while distinct in functions, should nevertheless belong to the same institution because these powers equal the force of the commonwealth).

[516] MONTESQUIEU, *supra* note 434, at 157.

[517] SAIKRISHNA BANGALORE PRAKASH, IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE 143-44 (2015).

[518] JOHN ROBERTS, THE OXFORD DICTIONARY OF THE CLASSICAL WORLD 364-66 (2007).

[519] *Id.*

the army.[520] The most prominent is the prerogative power of the English monarch; even with the modern constitutional framework, their prerogative power over the armed forces still includes the power to command and deploy the military.[521]

Accordingly, the division of labor component of the separation of powers here is justifiable. It has been proven already that national defense, especially in a crisis, is best suited in the hands of a unified commander, not a cumbersome legislative assembly. No other branches of government can claim to be more efficient at handling national security. Experiences during World War II emphasized the need for a unified government coordinated by exemplary leadership of figures such as Winston Churchill and Franklin D. Roosevelt.[522] Most recently, the invasion of Ukraine has highlighted President Volodymyr Zelensky's role as the commander-in-chief of the armed forces, especially in mobilization through both civilian and military programs.[523]

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[520] Saleem Qureshi, *Military in the Polity of Islam: Religion as a Basis for Civil-Military Interaction*, 2 INT'L POL. SCI. REV. 271, 272 (1981) ("Muslim leaders have been military conquerors, combining both civil and military authority in their person.").

[521] *See, e.g.,* Harold M. Bowman, *Martial Law and the English Constitution*, 15 MICH. L. REV. 93, 104-06 (1916-1917) (discussing the prerogative of the English Crown as including the power over the armed forces through unwritten constitutional law which is used by the executive).

[522] *See* John Yoo, *Franklin Roosevelt and Presidential Power*, 21 CHAP. L. REV. 205 (2018) (discussing the centralization of power during World War II by President Franklin Roosevelt).

[523] *See e.g.,* Natalia Zinets & Matthias Williams, *Ukrainian President Drafts Reservists but Rules out General Mobilisation for Now*, REUTERS (Feb. 22, 2022), https://www.reuters.com/world/europe/ukrainian-president-calls-up-reservists-launches-programme-economic-patriotism-2022-02-22/ (discussing the role of the President in general); Margaret MacMillan, *Leadership at War: How Putin and Zelensky Are Defining the Conflict*, FOREIGN AFF. (Mar. 29, 2022), https://www.foreignaffairs.com/articles/ukraine/2022-03-29/leadership-war (making a comparison between Winston Churchill and Volodymyr Zelensky as wartime leaders).

Then, how does civilian control correspond to the checks and balances component of the separation of powers? Again, history provides sensible support for civilian control—this time through checks and balances by legislative mandate and judicial oversight. The most paradigmatic example is the constitutional history of England. While the ability to raise and command the English army has always been part of the prerogative power of the Crown,[524] the Bill of Rights prohibits the maintenance of a standing army during peacetime without authorization by the Parliament since the Glorious Revolution in 1688.[525] A standing army—due to its ability to coerce the Parliament by force akin to a coup—was considered a potential tool for the Crown to resist Parliamentary supremacy and bring back absolutism.[526] While the command of the military is in the hands of the executive, the maintenance of the army relies on appropriation by the legislature.[527] Since the rise of constitutional democracy, the armed forces are no longer under the exclusive authority of the Crown and would continue to be supervised by the Parliament until today. At the time, the dilution of the prerogative of the executive was such a unique development that Sieyès argued that English people

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[524] Alexander Luders et al., The Statutes of the realm (1225-1713) Volume 5 308-09, 358-64 (1819).

[525] *See* The British Bill of Rights (1688) art. 6 ("the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of Parliament, is against law").

[526] Gary W. Cox, *Was the Glorious Revolution a Constitutional Watershed?*, 72 J. ECON. HIST. 567, 569-71 (2012) (the other strategies being seat buying and vote buying as well as refusing to call Parliament).

[527] *See* CHAFETZ, *supra* note 452, at 45-53 (discussing the connection between parliamentary appropriation and the finance of armed forces in the history of English Constitution).

remained free only because England was the only nation at the time that did not allow a standing army.[528]

Moreover, since the power to declare war and maintain the armed forces belongs to the legislature, the executive's access to its military command is limited by design. For instance, the German Constitution was interpreted by the Constitutional Court to require parliamentary approvals for military activities abroad, including peacekeeping operations with NATO.[529] Even the US president—arguably the most powerful president on a global scale—had to seek Congressional approval to increase the legitimacy of its military activities during the Gulf War of 1991.[530] Under this framework, no single branch of the government has the exclusive use of the military. Tyranny through a standing army is therefore avoided following the Federalist's argument that "the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others."[531] The military becomes an object in this

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[528] Emmanuel Joseph Sieyès, *What Is the Third Estate?*, *in* POLITICAL WRITINGS 92, 132 (Michael Sonenscher ed., 2003) ("…what is needed is either a good constitution, which England does not have, or a set of circumstances in which the head of the executive power is not in a position to use force to back up his arbitrary will.").

[529] *See* Lori Fisler Damrosch et al., *Is There a General Trend in Constitutional Democracies Toward Parliamentary Control Over War-and-Peace Decisions?*, 90 PROCEEDINGS OF THE ANNUAL MEETING (AMERICAN SOCIETY OF INTERNATIONAL LAW) 36, 38-39 (1996).

[530] *Id.* at 49.

[531] THE FEDERALIST No. 51, at 319 (James Madison) (Clinton Rossiter ed., 1961) ("The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition.").

checks and balances scheme, teetering between the executive's command, the legislature's supervision, and the judiciary's adjudication.

Thus, with these two components intact in the separation of military control, the logic behind the separation of powers translates well into the separation of control over the military. A wide range of constitutional theories based on different rationales, from coordination theory to principle-agent relationship, already featured in the literature on the separation of powers, could apply to the separation of military control in finer-grained application. One could, for example, argue that military generals—like other public officials—will behave according to their self-interest, but their self-interest can also force them to coordinate their behavior according to the norms of their organization.[532] Alternatively, the principle-agent model suggests that the executive can fine-tune the reliability of its military by decentralizing the armed forces, such as by eliminating the position of the leader of the chiefs of the staff and creating competition between different services of the military.[533]

Applying the principle-agent framework, the whole civilian government is the principal, and the military serves as the agent. While both parties share an interest in national defense, their interests divert and contradict due to differences in technical

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[532] RUSSELL HARDIN, LIBERALISM, CONSTITUTIONALISM, AND DEMOCRACY 25-27 (1999) (arguing that officers with self-interest may control each other from peer-pressure which can solve the problem of collective action; thus norms within one organization can be self-enforcing).

[533] *See* John Yoo, *Administration of War*, 58 DUKE L.J. 2277, 2301-10 (2009) (arguing for more decentralization in civil-military relations).

competence, professional values, and other factors.[534] The military is the literal lone gunman in a village who has delegated power to protect the villagers from harm with the monopoly and authority to use force.[535] However, the military, like the lone gunman, can shirk by disobeying orders or even overthrowing the government. In response, a well-functioning system of separation of powers, civilians, through their representative institutions and their direct involvement, overcome information asymmetry and collective action problems. Instances of shrinking or disobeying by the military will be detected and punished by the concerted efforts of all civilian branches. As happened in many failed coup attempts, the grave mistake by coup leaders was to let the civilian leader slip away and coordinate support from both the civilian institutions and other branches of the military to regain control of the country.[536] For instance, the 1982 coup in Kenya was almost a success as a group of Air Force officers successfully gained many supporters among the people; however, the civilian government instead relied on the army to crush the coup attempt with its superior force.[537]

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[534] *See* FEAVER, *supra* note 340, at 99-102 (applying principal-agent framework to understand civilian control).

[535] David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 GEO. L.J. 723, 737-39 (2009) (discussing the problem of the lone gunman with a monopoly on the use of force).

[536] *See* Harvey G. Kebschull, Operation 'Just Missed': Lessons from Failed Coup Attempts, 20 ARMED FORCES & SOC. 565, 570-75 (1994).

[537] *Id.* at 572.

Moreover, this vision of articulated governance is also efficient because it assigns and divides tasks to the most suitable institutions.[538] Groupthink and tunnel vision,[539] which generally precede reprehensible decision-making, are less likely when multiple institutions represent different interests in the process. Also, evils and abuses will be articulated and discussed between branches, ensuring that the public can at least notice the government's mistakes.[540] Most importantly, a system of checks and balances presents a legitimate approach to improve civilian control, with all the civilian branches working jointly to control the military.

Thus, every piece of the puzzle falls into place to align the separation of powers with civilian control. Civilian control is conveniently established under one of the oldest areas of constitutional law. The power and supervision over the military are divided. The power to raise an army and declare war often belongs to the legislature due to their budgetary power and legitimacy to commit to national security concerns. The power to command the armed forces and appoint military officers typically belongs to the executive as the most practical branch suitable for action. Finally, the judiciary monitors the behavior of the military and punishes the military when it violates norms of civilian control. This division of labor on the control of the military forms a part of the

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[538] Kavanaugh *supra* note 502, at 230 (arguing that one of the two basic concerns in the separation of powers is "to allocate power and assign tasks to those bodies best suited to carry them out").

[539] IRVING JANIS, VICTIMS OF GROUPTHINK: A PSYCHOLOGICAL STUDY OF FOREIGN-POLICY DECISIONS AND FIASCOES 9 (1972) (defining groupthink as "a mode of thinking people engage in when they are deeply involved in a cohesive in-group, when the members striving for unanimity override their motivation to realistically appraise alternative courses of action").

[540] *See* JEREMY WALDRON, POLITICAL POLITICAL THEORY 62-65 (2016) (providing an account of articulated governance).

complicated system, which includes checks and balances between different branches of government in various domains, from economy to social relations. Due to the versatility of the principle, separation of military powers—as part of a scheme to establish civilian control—can work neatly within any constitutional system since most constitutions at least conform to the nominal tripartite structure of government. With both the historical and theoretical imperatives discussed thus far, the omnipresence of the separation of powers as a tool for civilian control shown in Chapter II is no surprise. Constitutional drafters and thinkers are persuaded from all directions to adopt separation of powers by default when coping with the problem of civilian control.

B. Mechanisms of the Separation of Military Control

As we now understand that the doctrine of separation of powers has been a foundation for the principle of civilian control, implementing the concept in the form of constitutional provisions should be analyzed and evaluated here with insights gained from the previous part.

The centerpiece of the separation of military control is the checks and balances between the two active branches of the government. Under this scheme, the executive, headed by the president or the prime minister (who usually works under the authority of the monarch in constitutional monarchies), takes control of the military as the commander-in-chief. The legislative branch then provides certain checks and balances against the aggrandization of the executive through its control over the military. To make

sense of this arrangement, this dissertation considers the roles of the legislature and the executive altogether.

With regard to the commander-in-chief, the concept is straightforward as most countries apply this principle by simply granting the president the title of commander-in-chief of the armed forces without any elaboration.[541] This lack of detail is inherent in the nature of the executive power. The executive function does not legislate laws or adjudicate cases; it exists as a sweeping power that is usually considered as anything that is not legislative or judicial.[542] As a result, the military—due to the diverse and practical roles of security matters—aptly falls into the classical definition of executive authority, which is the right to enforce the law.[543] Intuitively, the commander-in-chief is a focal point for other civilian branches and military members.

The history behind the commander-in-chief is also in line with this coordination theory. The commander-in-chief is the absolute commander of the armed forces with no room for deliberation or hesitation. While both the English monarch's prerogative and the US Constitution inspired the adoption of the separation-of-powers framework in modern constitutions, the control of the military in the hand of the executive power was recognized since the Roman Republic. During the Roman Republic, the two Consuls served jointly as the highest officers on both civilian and military sides, comparable to

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[541] *See supra* Chapter II.

[542] CHRISTOPH MÖLLERS, THE THREE BRANCHES: A COMPARATIVE MODEL OF SEPARATION OF POWERS 96 (2013).

[543] Julian Davis Mortenson, *Article II Vests Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1220-21 (2019).

the constitutional powers of the president of modern republics.[544] The Roman dictator likewise had an imperium, which included the supreme command of the Roman military.[545]

The supreme command was not merely a legal concept. Imperium, during the end of the Roman Republic, served as a tool for Augustus to concentrate power and coordinate the chain of command with other inferior commanders for further conquest.[546] Most European monarchs up until the American Revolution also had the power to raise and command their armies, unified in one person. When John Locke first distinguishes three different government functions, he interestingly defines the power to generally execute the law as 'executive' and the power to deal with the security outside of the state as 'federative.'[547] While the executive function is distinctive from the federative function, Locke argues that these two powers cannot be separated without chaos.[548] He claims this federative power "is much less capable of being directed by antecedent, standing, positive Laws, than the Executive."[549] Because the discretion to act for the public good is essential for any government, this executive power is associated with the prerogative power of the

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[544] *See* Fred K. Drogula, *Imperium, Potestas, and the Pomerium in the Roman Republic*, 56 HISTORIA: ZEITSCHRIFT FÜR ALTE GESCHICHTE 419 (discussing the meaning of *imperium* as both supreme civil and military power in the Roman republic).

[545] *Id.* at 420.

[546] *See* J.S. Richardson, *Imperium Romanum: Empire and the Language of Power*, 81 J. ROMAN STUD. 1, 8-9 (1991).

[547] LOCKE *supra* note 515, at 365-66.

[548] *Id.* at 366.

[549] *Id.*

monarch.[550] Therefore, the executive is the most powerful branch because of its proactive nature.

With regards to the title of commander-in-chief, which was created by Charles I of England in 1639 to be the delegate of the Crown's powers over the army,[551] the powers of commander-in-chief "included the powers to rule, govern, command, and employ the army, as well as the right to enforce discipline."[552] The commander presents unity at the top of the chain of command. In 1660, after the protectorate of Oliver Cromwell, Charles II took back these powers and claimed them as absolute and exclusive to the powers of the monarch.[553] While the monarchical origin may cause concerns over the concentration of power in the executive, efficiency in a unitary supreme commander is greatly valued in governmental decision-making and accountability.[554] As the executive function is more concerned "with action than with deliberation,"[555] efficiency could be considered a functional imperative that remains constant in any jurisdiction and convinces many countries to adopt the commander-in-chief clause to mobilize the armed

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[550] *Id.* at 374-75.

[551] Philippe Lagasse, *The Crown's Powers of Command-in-Chief: Interpreting Section 15 of Canada's Constitution Act*, 1867, 18 REV. CONST. STUD. 189, 202-03 (2013).

[552] *Id.*

[553] *An Act Declaring the Sole Right of the Militia to Be in the King*, 14 Car. 2, ch. 3 (1662) ("Forasmuch as within all his Majesty's realms and dominions the sole supreme government, command and disposition of the militia and of all forces by sea and land and of all forts and places of strength is and by the laws of England ever was the undoubted right of his Majesty and his royal predecessors, Kings and Queens of England, and that both or either of the Houses of Parliament cannot nor ought to pretend to the same....").

[554] David Jenkins, *Efficiency and Accountability in War Powers Reform*, 14 J. CONFLICT & SEC. L. 145, 154-56 (2009).

[555] MONTESQUIEU, *supra* note 434, at 165.

forces as necessary. Though modern commanders-in-chief do not engage in battle, the ability to coordinate all resources and manpower to fight a total war is evident. Many liberal-democratic countries during World War II concentrated power in the executive without much resistance from other branches. Even the courts were willing to defer to military objectives despite the risk of undermining the rule of law.[556]

Apart from the efficiency in national security, the commander-in-chief clause has been the most salient and obvious confirmation of civilian superiority over the military in the constitution.[557] A stable constitutional democracy never has to deal with military coups: if constitutions work perfectly in the first place, coups should not be a problem. But in an imperfect world with ambitious generals, the unquestionable supreme status of commander-in-chief can solve coordination and collective action problems. The framers of the American constitution realized that the army, by itself, could overthrow the government. The tumultuous period with the Continental Army at least informed the American leaders of the possibility of a coup d'état by the armed forces.[558] In this respect, stipulating that the civilian head of the state is also the commander-in-chief can support the superiority of the civilian leader over the military.

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[556] *See, e.g.,* Mark Tushnet, *Defending Korematsu: Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273 (2003) (stating that, even in the US, there is "little reason to hope that judges will in fact limit emergency powers in light of constitutional norms rather than interpret the constitution to accommodate exercises of emergency powers.").

[557] *See infra* Chapter II.

[558] David Luban, *The Defense of Torture*, 54 N.Y. REV. BOOKS (Mar. 15, 2007), https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1012&context=facpub.

Having the president or the king as the supreme commander of the armed forces, all civilians—including the competing legislature and judiciary—can collectively coordinate with the commander-in-chief to assert control over the military. The most celebrated case of this is when King Juan Carlos I of Spain, as commander-in-chief, opposed the attempted military coup in 1981 by denying the legitimacy of the attempt, leading to the failure of the coup-makers.[559] Similarly, President Charles de Gaulle of France appeared in his wartime uniform and successfully countered the putsch in Algeria staged by a group of retired French generals in Algeria.[560] As the success of a coup depends upon the mutual understanding that enough people will take part or support the act,[561] the legitimate and constitutional leader of the armed forces should have an advantage over a group of rouge military officers. The civilian commander-in-chief does not have just the military command but is also supported by the whole apparatus of the state. In a civil-military crisis, the commander-in-chief is the focal point for the mobilization of civilian control. The more difficult issue of the legitimacy of the executive in holding the monopoly of force is thus compensated for by this efficiency and straightforward guarantee of civilian superiority.

The danger of concentration of power in the executive is further alleviated by the involvement of the legislature over the control of the military. Beginning with the English doctrine, as discussed earlier, the legislature's approval is required to maintain an army in

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[559] *See* BALFOUR SEBASTIAN, THE POLITICS OF CONTEMPORARY SPAIN 37 (2005).

[560] SERGE BERSTEIN, THE REPUBLIC OF DE GAULLE 1958-1969 48-51 (Peter Morris trans., 1993).

[561] *See* SINGH, *supra* note 104, at 21-39 (discussing how coups can be conceptualized as coordination games).

peacetime. The American Constitution similarly stipulates that Congress has the power to raise and support military forces and that no appropriation of money for such a purpose can be longer than two years.[562] However, these provisions have not been adopted widely in current constitutions.[563] Moreover, because the standing army part in the Bill of Rights was only meant to prevent the King from creating his own private army,[564] the control over the maintenance of a modern army is not a real control at all, as almost any modern state with permanent armed forces have become a norm.[565] Now, the British Parliament, as a formality, renews the Armed Forces Bill every five years to enable the armed forces.[566] In practice, since the authority over the deployment of the British armed forces still comes from the prerogative without any need for parliamentary approval,[567] parliamentary control over the military is possible indirectly through a vote of confidence to remove the prime minister.[568] That said, parliamentary control here is only over the use of the military, not direct control over the armed corps.

Still, the legislature's power of the purse to control the military has become a standard for democratic regimes. As seen in the American Constitution, the legislative

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[562] U.S. CONST. art. I, § 8, cl. 1.

[563] According to the dataset, about 78% of the current constitutions are silent on the issue.

[564] NIGEL D. WHITE, DEMOCRACY GOES TO WAR 20-21 (2009).

[565] *Id.*

[566] MINISTRY OF DEFENCE, ARMED FORCES BILL 2021: SUMMARY 1-2 (2021), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/961043/Summary_of_the_Armed_Forces_Bill_2021_final.pdf

[567] ALEX CARROLL, CONSTITUTIONAL AND ADMINISTRATIVE LAW 281 (9th ed. 2017).

[568] NIGEL D. WHITE, DEMOCRACY GOES TO WAR 22 (2009) (arguing also that the control here is limited since the government often have a large majority in the House of Commons).

authority over the annual budget was already written as part of the 'raise and support' clause since the 18th century: "The Congress shall have power… to raise and support armies, but no appropriation to that use shall be for a longer term than two years."[569] According to Hamilton, it would take longer than two years to create an army large enough to threaten the liberty of the people.[570] Every single year, even without a constitutional clause directly stating so, countries all over the world debate and negotiate military budgets in the legislature. The government potentially has enough discretion in this process to the point of bribing the armed forces out of staging a coup.[571] Budgetary control is thus another option for controlling standing armies.

Reliance on budgetary is, however, elusive. As evident in the case of the US, in practice, it is understood that appropriations are to be interpreted strictly so as not to interfere with things that are "deemed necessary for the common defense."[572] Furthermore, the expenditures of the military are often referred to leaders of each military branch, referring to their professional expertise unique to the task of national security.[573] The clause can thus only have limited consequences on the control over the military. Moreover, while the budget system varies in each country, one common element in most systems is the constant pushing back and forth between the executive and the legislative

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[569] U.S. CONST. art. I, § 8.

[570] THE FEDERALIST No. 26, at 172 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[571] *See* Collier & Hoeffler, *supra* note 381.

[572] 25 Ops. Atty. Gen. 105, 108 (1904).

[573] *See, e.g.*, Charles Wallace Collins, *Constitutional Aspects of a National Budget System*, 25 YALE L.J. 376, 381 (1915-1916).

branches.[574] The civilian branches are not unified and are instead susceptible to military's manipulation. Again, the focus on the budget is not directed at the control of the armed forces but on the balance between the legislative and the executive branches.

The most concrete check by the legislature over affairs of the military, however, is the power to declare war. The framers of the American Constitution provided the legislature with the power to declare war to check on the president's power as the commander-in-chief.[575] Because the authority of the executive is at its maximum in war, the legislature must first declare war to activate the full power of the commander-in-chief to wage war.[576] While this power is also another indirect control over the military, the declaration of war requires serious deliberation and democratic legitimacy from the legislature, which could be wiser than rushing to war.[577] However, only about half of current constitutions still retain the clause regarding the declaration of war. Gradually, there has been a gradual decline of countries that still give the legislature a say in the declaration of war. The practice of declaring war has likely been obsolete since the second half of the 20th century. Waging war is prohibited under international law unless it is self-defense, which does not require a declaration of war to be lawful.[578] The United

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[574] *See, e.g.*, *id.* at 377-80 (comparing the systems of England and the United States with the conclusion that the American system gives most control to the Congress).

[575] RICHARD H. KOHN, EAGLE AND SWORD: THE FEDERALISTS AND THE CREATION OF THE MILITARY ESTABLISHMENT IN AMERICA, 1783-1802 84 (1975).

[576] Richard H. Kohn, *The Constitution and National Security: The Intent of the Framers, in* THE UNITED STATES MILITARY UNDER THE CONSTITUTION OF THE UNITED STATES, 1789-1989 61, 79 (Richard H. Kohn ed., 1991).

[577] *Id.*

[578] *See* Christopher Greenwood, *The Concept of War in Modern International Law*, 36, 287- INT'L & COMPAR. L.Q. 283 (1987) (discussing the incompatibility of war and the UN Charter).

States, for instance, has not officially declared war since World War II, rendering such declarations meaningless in international law.[579] Recent international conflicts no longer require a declaration or even legislative approval for involvement in hostilities.[580]

With the constitutional provisions discussed thus far, the legislative authority over the military has adapted well over the past few centuries to remain relevant despite all the changes in modern national security. In aggregate, the executive command and legislative checks appear to be balanced. While the executive takes the lead role in commanding the armed forces, it can only do so with the consent of the legislature. When caught between cooperation and fragmentation, these two branches have shown, time and again, that they could work together during crises. Logically, the two civilian branches align with common interests; they would only lose their overall sphere of influence if the military creeps in and intervenes in the government. The lessons from countries like Argentina and South Korea have shown that despite political infighting between factions within the civilian side, they usually band together to coordinate against any challenge from the military.[581] However, because war and national security are within the traditional ambit of the executive, the authority of the president or prime minister often far exceeds that of the legislature. To keep the system of checks and balances functional, the judiciary also has to take part in this scheme of separation of control over the military.

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[579] Garance Franke-Ruta, *All the Previous Declarations of War*, THE ATLANTIC (Aug. 31, 2013), https://www.theatlantic.com/politics/archive/2013/08/all-the-previous-declarations-of-war/279246/.

[580] *See, e.g.,* Jenkins *supra* note 554, at 150-53 (discussing war powers in the United States).

[581] *But see* AUREL CROISSANT ET AL., THE PALGRAVE MACMILLAN DEMOCRATIZATION AND CIVILIAN CONTROL IN ASIA 68 (2013) (arguing that the military could not play the civilian principals against each other because due to "a weak legislature and judiciary and fragile parties").

Moreover, ensuring civilian control is not only about subordinating the armed forces to democratically elected authorities. To complete the framework of separation of powers, the military also needs to be under the scrutiny of both the judiciary and the public.[582] The key here is democratic governance; the military cannot be left alone with just supervision from the executive and the legislature. There must be restrictions and standards of conduct for the military set forth by the legislature and reviewed by the courts to realistically expect compliance. While the pattern of courts deferring to the executive or the military has manifested throughout this dissertation, Apex courts still have a role in mediating the delicate balance between the executive and the legislative. The judiciary can help the civilian side overcome information asymmetry and collective action problems in civilian control by acting as both the monitoring and coordinating institution.[583] For example, coups in Argentina and Greece became obsolete once the courts started to accept cases against the coup makers.[584] A strong indicator that coups are no longer possible in a polity could be a strong stance against the military, as the court's decisions publicly show.

Despite the dubious reputation of the courts in deferring to the government on matters of national security, there is still evidence of court cases on civil-military issues

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[582] GENEVA CENTRE FOR THE DEMOCRATIC CONTROL OF ARMED FORCES, DEMOCRATIC CONTROL OF ARMED FORCES (2008), https://www.files.ethz.ch/isn/55845/17_bg_dem_control_armed_forces.pdf.

[583] *See* Law, *supra* note 535, at 745-78 (arguing that the courts can function as both monitors and coordinators).

[584] *See, e.g.,* Emilio Crenzel, *Revisiting the Origins of Argentina's Military Junta Trial: Political, Moral, and Legal Dilemmas of a Transitional Justice Strategy*, 42 CAN. J. LATIN AME. & CARIBBEAN STUD. 144 (2017); Chloe Howe Haralambous, *Making History (Disappear): Greece's Junta Trials and the Staging of Political Legitimation*, 35 MOD. GREEK STUD. 307 (2017).

around the world. The Colombian Constitutional Court, for example, has played a crucial role in solving the conflicts of competence between the civilian and military jurisdiction.[585] In the meantime, the Court also gave a verdict that forced the government to declare an internal armed conflict and follow international humanitarian law to shape the behavior of both the executive and the armed forces.[586] The US is also another case in point. In *Youngstown*, President Harry Truman issued an executive order to seize control of steel mills to prevent a work stoppage that could affect the war effort in Korea.[587] The Supreme Court, however, held that the executive order was unconstitutional and created—in Justice Jackson's opinion—legal principles that regulate the use of executive power ever since.[588] It is thus not too far-fetched to complement the legislative check against the ever-increasing authority of the executive power over the control of the military.

What is often left unwritten in the constitution is the role of the legislature in making laws governing the recruitment, training, and disciplines of the military. A critical area of supervision is in military law, which is often operated by a separate system of military courts. These military/judicial institutions are usually staffed by uniformed officials with legal training to maintain military discipline and obedience to

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[585] *See* JULIO RÍOS-FIGUEROA, CONSTITUTIONAL COURTS AS MEDIATORS: ARMED CONFLICT, CIVIL-MILITARY RELATIONS, AND THE RULE OF LAW IN LATIN AMERICA 73-80 (2016).

[586] *Id.* at 77-79.

[587] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 582–84 (1952).

[588] Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2314 (2006) (stating that the opinion is "the most celebrated judicial opinion of the separation-of-powers canon").

superiors with swift procedures and unique offenses found only among soldiers.[589] What the judiciary outside of military justice can do is to ensure that civilians are not subjected to a military trial without certain exceptional circumstances.[590] Since military jurisdiction often produces impunity for crimes committed by military officers during their missions, the judiciary can help supervise military justice by providing a restrictive scope of military jurisdiction and a channel for review by civilian high courts.

III. The Theoretical and Practical Implications of the Separation-of-powers Model

The discussions of civilian control under the separation of powers are not exhaustive. There are variations within this tradition that are dependent on the context of each jurisdiction. The overall themes and mechanisms that make sense for adopting such a framework across the board have already been discussed. In this sense, this last part is more descriptive than normative in nature. Hence, the purpose of this Part is to make a case against using the framework by presenting the incompatibilities and dangers involved.

While the separation of powers framework could function against some scrutiny under its own logic, the picture is far from perfect. At least two major problems are

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[589] BRETT KYLE & ANDREW REITER, MILITARY COURTS, CIVIL-MILITARY RELATIONS, AND THE LEGAL BATTLE FOR DEMOCRACY THE POLITICS OF MILITARY JUSTICE 23-28 (2021).

[590] *See* Robinson O. Everett, *Military Jurisdiction over Civilians*, 1960 DUKE L.J. 366, 366-72 (1960) (discussing exceptional cases in the US where civilians could be subjected to a military trial); J. Patrice McSherry, *Military Power, Impunity and State-Society Change in Latin America*, 25 CAN. J. POL. SCI. 463 (1992).

inherent in the reliance on the separation of powers. First, the military does not have its own place among the branches of the government and thus does not benefit from the checks and balances that are in place for the tripartite formulation. Second, related to the military's attachment to the executive, a strong president or prime minister could abuse the command over the military for authoritarian gains, subverting democratic governance in the process. The last part already touched on both issues. This part further analyzes them to argue that the separation-of-powers framework for civilian control can cause more harm than good despite its prevalence in the world's constitutions.

A. Incompatibilities between Civilian Control and Separation of Powers

The separation-of-powers framework, as analyzed in this chapter, can sometimes resemble a stereotype rather than a clearcut category with a definitive set of features. While the principle is universal in constitutional design, its normative depth does not match its widespread adoption. The attempt from the last part to make sense of the framework still faces multiple challenges, both theoretically and practically. In theory, its weaknesses are present in the doctrine itself. The unsatisfactory account of the many theories of separation of powers leaves the relevance of any legal doctrine in peril. Even the main normative objectives of preserving liberty and preventing tyranny are under scrutiny with regard to the suitability of the means towards the end.[591] More and more developments in constitutional law have been violating the doctrine of separation of

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[591] *See* VILE *supra* note 489, at 15-17.

powers in both pure and modern conceptions. Scholars keep arguing that the separation of powers is outdated and impractical for the current politics in many jurisdictions since political constraints such as public opinions and the media have a better chance of controlling the ever-expanding power of the executive.[592] While most constitutional systems may retain a system of checks and balances on paper, the accumulation of powers in the executive has become a new reality outside of the law.[593] Rules and principles of the nature of the separation of powers are gradually modified beyond the Madisonian framework, focusing more on broader issues such as electoral law and administrative law.

In most jurisdictions, it is now accepted that inter-branch checks are no longer the most reliable tool against concentrations of power. In the US, the virtue of divided government through political parties separated by ideological differences becomes an apparent replacement for the rigid conception of legislative-executive separation of powers.[594] Even when partisan checks do not work due to instances of unified government where the majority party has control of both the legislative and executive branches, civil society in democratic regimes also works as an independent check on the government. In the Westminster system, like England, the majority party and its allies may have complete control over the supreme power of the parliament in theory, but they

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[592] ERIC POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC 208-10 (2011), (considering separation of powers as "suffering through an enfeebled old age.").

[593] Tom Ginsburg, *Written Constitutions and the Administrative State: On the Constitutional Character of Administrative Law*, *in* COMPARATIVE ADMINISTRATIVE LAW (Susan Rose-Ackerman et al. eds., 2nd ed. 2017).

[594] Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006).

are nevertheless moderated by other rules and conventions of democracy that leave them vulnerable to public opinion.[595] It seems that separation of powers can only work under the requirements of strong democratic norms and adherence to the rule of law.

Considering the challenges that limit the efficacy of the separation of powers against its original three branches, it is thus even more challenging to apply the separation of powers as a tool for civilian control. What, then, can the principle help in such a daunting task of securing civilian control?

One way to answer this question is to consider the separation of powers as a tool against the concentration of powers in general. At a minimum, preventing the concentration of power in one hand is often considered the only saving grace of the doctrine. Most scholars would at least agree with Montesquieu that "any man who has power is led to abuse it; he continues until he finds limits."[596] If the separation of powers can offset the tendency for the concentration of power and powerholders, it is logical to apply its framework to tackle the problem of civilian control. Considering first the prime example of the framework, the American Constitution did not put into words the complete separation of powers.[597] Indeed, James Madison argued against the pure and

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[595] *See* Ludger Helms, *Five Ways of Institutionalizing Political Opposition: Lessons from the Advanced Democracies*, 39 GOV'T & OPPOSITION 22, 26-30 (2004) (providing an account of how the opposition can operate in the United Kingdom without formal democratic devices for the minority in the Parliament).

[596] MONTESQUIEU, *supra* note 434, at 155.

[597] Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 337 (2002) ("[T]here is nothing in the Constitution that specifically states, in precise terms, that no other actor may exercise legislative power or that Congress may not authorize other actors to exercise legislative power. Such clauses were known to the founding generation.").

complete separation of powers.[598] He admitted that there are grey areas between the three powers that resist neat categorizations.[599] The overlap over control of the military was intentional by the desire of the constitutional framers to deconcentrate power.

Still, the trajectory from the early written constitutions already shaped the use of separation of powers for civilian control in a self-defeating fashion. Instead of constitutionally dividing the military directly into multiple distinctive branches or granting the armed forces the status of a separate branch of government and creating incentives for inter-branch checks and balances,[600] constitutions typically divide control over the military among the three existing branches of government.

According to this typical approach shown in the previous part, the military is outside the tripartite formulation. In this respect, the armed forces are no different from other administrative agencies whose importance to constitutionalism has been overlooked. Since the military is thought of as one part of the executive, checks and balances do not function the same way as when the legislature may put a check on an executive action. Under the logic of separation of powers, for a power to be in check, such a power must first be identifiable through its primary function, e.g., the legislature

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[598] THE FEDERALIST No. 47 at 240 (James Madison) (Lawrence Goldman ed., 2008) ("[Montesquieu] did not mean that these departments ought to have no partial agency in, or no control over, the acts of each other.").

[599] THE FEDERALIST No. 37 at 177 (James Madison) (Lawrence Goldman ed., 2008) ("Experience has instructed us that no skill in the science of Government has yet been able to discriminate and define, with sufficient certainty, its three great provinces, the Legislative, Executive and Judiciary; or even the privileges and powers of the different Legislative branches.").

[600] *See, e.g.,* Aaron Belkin & Evan Schofer, *Coup Risk, Counterbalancing, and International Conflict,* 14 SEC. STUD. 140 (2005) (arguing that 'counterbalancing' can help protect vulnerable regimes to protect against coups "by dividing the military and pitting rival armed organizations against one another.").

makes laws, and the executive executes the laws. When the leader of the executive is on top of the chain of command (symbolically or functionally), it is, by definition, the holder of the military function of the government. Historically, the executive power has also been associated with matters of national security, even before the time of Montesquieu.[601] The military is thus not subject to division because it is always considered as one part of the executive.

At this point, it is essential to distinguish between the military and the executive, especially regarding emergencies and terrorism. The very contradictory nature of the military—which wields the power to use force but also needs to be under the government simultaneously—means that it is the only institution under the executive that can consistently stop obeying orders and seize power.[602] This is contrary to how the study of civil-military relations later embraces the idea that the military is a special and unique organization entirely separable from the civilian government. Most importantly, because the function of the military does not revolve around law, all three branches, which traditionally focus on different aspects of law, have trouble reigning in the military through law. The influence of the military is usually manifested in practice without a paper trail. This is the reason why constitutions in some countries may have minimal content regarding the military. The nebulous nature of national security and the principle of civilian control shield the military from any security based on legal reasoning. Soldiers

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[601] *See* LOCKE *supra* note 515, at 339 (arguing that early kings "are little more than Generals of their Armies and though they command absolutely in War, yet at home and in time of Peace they exercise very little Dominion, and have but a very moderate Sovereignty").

[602] VAROL, *supra* note 82, at 29.

are not enforcing the law in a strict sense. The main task is to be ready for armed conflict—the state function that the law struggles to process. Thus, the division of labor—the first essential component of the separation of powers—already failed to apply to the task of civilian control of the military.

As to the checks and balances—the second component of the separation of powers, the lack of proper division of labor also results in the incompatibility between civilian control and the separation of powers. Since the power of the military is not separated equally as part of the tripartite framework, it is not checked and balanced through the same mechanics that make the separation of powers appealing. The function and institution of the military are not separated and, therefore, not supervised fully by other branches. Without proper coordination among different branches in constitutional design, the military is not as salient as other powers under the tripartite formulation of the constitution. If the separation of powers has some success with the military, it is only over the encroachment and usurpation of power by the commander-in-chief found in the executive branch—a necessary precaution against the ever-expanding executive power. However, pairing the separation of powers with civilian control is a mismatch that only misdirects the effort towards other alternative means. The separation of control over the military among the three branches only causes fragmentation of the civilian side of the government, pitting each civilian branch against the others. Thus, even for Huntington, "The separation of powers is a perpetual invitation, if not an irresistible force, drawing

military leaders into political conflicts."[603] The dynamic between the three branches only keeps supervision and competition against each other, not against the military.

According to the principal-agent logic, the convention is that the people are the principal, and the executive is one of the agents. Then, the people keep the government in check with the help of the other branches, which are also agents of the people. The classical concept of separation of powers here does not address the military as an agent of its own. Instead, the literature on civil-military relations applies the principal-agent framework by perceiving the military as the lone agent against the people and the government, who are lumped together as the principal.[604] When separation of powers is an object of discussion, legal scholars focus mostly on the original image of the three branches working and competing to monitor and counter each other for the benefit of the people. The relationship between the military and the civilian government lies a deeper layer and is thus out of reach from the mechanisms of separation of powers.

The public disobedience by General MacArthur during the Korean War is a case in point. In 1951, the General was adamant about attacking China despite President Truman's diplomatic stance; thus, to reassert civilian control, President Truman abruptly dismissed the revered General of all his posts.[605] With his status as the hero of the war, the general was invited to address Congress with his views about the war. The Republicans within Congress saw an opportunity for political gains and quickly

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[603] *See* Huntington, *supra* note 43, at 689.

[604] *See, e.g.,* Feaver, *supra* note 396, at 54-58;

[605] STEVEN CASEY, SELLING THE KOREAN WAR: PROPAGANDA, POLITICS, AND PUBLIC OPINION IN THE UNITED STATES, 1950-1953 233-64 (2008).

demanded a congressional investigation and impeachments, seizing the moment to attack the executive branch.[606] As another separate institution, the military can play the executive and the legislative against each other, which is how the separation of powers is meant to function. It just happened to add more options for the military to resist control from the civilian government. While the crisis passed without much damage to civil-military relations,[607] it is a reminder to how an influential military leader can throw the equilibrium in separation of powers out of kilter—even in America.

Thus, even the checks and balances among civilian branches do not work properly to prevent the concentration of power. Firstly, the separation of powers, whether it is inherently a legal or political principle, has been interpreted, implemented, or complemented by judicial review. Because claims to the necessities of war and national security are popular, there is a trend towards judicial deference. Security matters not only defy legal certainty, but the complexities in civil-military relations also challenge legal doctrines. Thus, The judiciary is pushed to accept deference as the best strategy, gaining legitimacy and preventing costly confrontations with the commander-in-chief. The judiciary has shown great difficulties in interpreting the intricate balances between the commander-in-chief and the legislature. For instance, Justice Robert Jackson in *Youngstown* noted during World War II that the commander-in-chief clause has "given

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[606] MICHAEL D. PEARLMAN, TRUMAN & MACARTHUR: POLICY, POLITICS, AND THE HUNGER FOR HONOR AND RENOWN 200-216 (2008).

[607] *See* WILLIAM MANCHESTER, AMERICAN CAESAR: DOUGLAS MACARTHUR, 1880–1964 679–83 (1978) (providing an account of how Macarthur faded away shortly after the dismissal).

rise to some of the most persistent controversies in our constitutional history."[608] The office of commander-in-chief exists, but no one is certain about the scope of the power which belongs to it. The legislative, in turn, is powerless once the declaration of war has lost its importance. Maintaining standing armies becomes a mere formality, a relic from the past. The legislature could only find its support in public pressure as guided by the deliberation of the representatives. Even then, reliance on the people is unstable and unpredictable. This forces the executive to take up the lead role in asserting control over the military, which causes another problem of concentration of power in the executive.

In Latin America, a region with a long history of problematic civil-military relations, the separation-of-powers framework creates only weak control over their national militaries. Civilian defense ministries have served as "little more than a clearinghouse for personnel management, logistical support, and basic services (such as health care) for military personnel."[609] Although appointments of military leaders sometimes require formal approval by the executive or legislative branch, the military retains its control over military education and promotion.[610] The legislatures have only limited control through the power of the purse, mostly debating one military issue rather than directly controlling the armed forces.[611]

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[608] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 641 (1952).

[609] Juan Rial, *Armies and Civil Society in Latin America*, *in* DEVELOPING DEMOCRACY TOWARD CONSOLIDATION 11 (1999) 47, 58 (Larry Diamond & Marc F. Plattner eds., 1999).

[610] *Id.*

[611] *Id.* at 59.

Apparently, borrowing the American Constitution's original design has rendered much of the efficacy of civilian control in many constitutions in jeopardy. One readily available solution is to double down on the original design, assigning more roles for the legislature and moving towards federalism to create a more balanced government. Most promising among all is the use of federalism and the militia. As a different approach towards civilian control, the vertical separation of powers works better under the separation-of-powers framework because the military can be split in a federalist state between the regular armed forces and the militia. The American Constitution created state militias against the federal armed forces as the only realistic and systematic check on the military. The possibility of all militias from different states working together is a realistic check on the military as it involves engaging in a civil war. Strikingly, of all the countries that adopted federalism, only Pakistani had a successful coup d'état in the past 50 years.[612] Though there could be many reasons for the lack of coups in these countries, including the fact that they are mostly large and populous countries, federalism could at least be a valid design choice for states that have troublesome civilian control.

However, the American design, which was a compromise, was already hanged in its balance as it was anticipated that the strength of the militia would finally fall behind that of the federal standing army, and the right to bear arms would be ineffective against a modern army.[613] The design was based on specific historical facts that are mostly

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[612] Not including Myanmar which is not fully adopting federalism.

[613] *See generally* H. RICHARD UVILLER & WILLIAM G. MERKEL, THE MILITIA AND THE RIGHT TO ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT (2002) (discussing the history of the Second Amendment in connection with the militia).

obsolete in today's civil-military relations. While establishing and maintaining the militia as a counter to the professional military is conceptually sound under the logic of the separation of powers (because they are both military institutions sharing the monopoly of violence in the same state), the militia of today is no longer considered equally competent to the professional forces.[614] The republican ideal of citizen-soldiers and the numerous state militias still rely on the power of the commander-in-chief of the federal government to coordinate their mobilization and to act as the sole commander.[615]

Moreover, these constitutional changes to double down on the separation of powers approach are unfortunately costly or impractical in many countries. Federalism is admittedly infeasible for most countries that have already operated under unitary systems.[616] Indeed, federalism is still controversial in almost any country due to the risk of encouraging secession from Kenya to Myanmar.[617] Moreover, the authorization of the standing army—directly or indirectly through the power of the purse—has become obsolete with time. Even among countries with such provisions, the practice has become a mere formality without real significance. Thus, this option risks enforcing one global

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[614] Even the US militia, the most powerful in the world, is insignificant next to the professional armed forces.

[615] U.S. CONST. art. 2, § 2 (The President shall be Commander-in-Chief… of the Militia of the several States, when called into the actual Service of the United States…).

[616] *See, e.g.,* Michael G Breen, The Origins of Holding-Together Federalism: Nepal, Myanmar, and Sri Lanka, *Publius,* 48 J. Federalism 26 (2018) (discussing why federalism has been resisted in Asia).

[617] *See, e.g.,* PAU SIAN LIAN, FEDERALISM IN MYANMAR 32-34 (2023); James T. Gathii & Harrison Mbori Otieno, *Assessing Kenya's Cooperative Model of Devolution: A Situation-Specific Analysis*, 446 FED. L. REV. 595, 612-13 (2018).

norm of constitutionalism without sufficient care for the context of each jurisdiction.[618] However, sticking with the status quo is also not an option. As the sole commander of the armed forces, the executive can abuse the military for authoritarian gains that could also result in a breakdown of democracy comparable to a coup d'état by the military. In countries without strong democratic norms, the seemingly trivial power to control the military under the separation of powers could be an effective tool for a would-be tyrant, as will be discussed further.

B. The Hidden Abuses of Separation-of-powers Approach

Because the separation-of-powers framework does not fully support the objective of civilian control, most constitutional systems adapt accordingly to what they have. In many countries like the US, a strong commander-in-chief found in the president is the only reliable counterforce to a strong military. However, the vague meaning of the commander-in-chief clause can also be interpreted to expand the authority of the executive over security matters with a potential towards authoritarian governance. John Yoo, as deputy assistant attorney general in the George W. Bush administration, most prominently argued in the controversial "torture memo" that:

"*The Framers understood the Commander-in-Chief Clause to grant the President the fullest range of power recognized at the time of the ratification as belonging to the*

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[618] *See, e.g.*, Michael W. Dowdolw & Michael A. Wilkinson, *Introduction and Overview*, *in* CONSTITUTIONALISM BEYOND LIBERALISM 2-3 (2017) (arguing that there are limits to liberal constitutionalism).

military commander. In addition, the structure of the Constitution demonstrates that any power traditionally understood as pertaining to the executive—which includes the conduct of warfare and the defense of the nation—unless expressly assigned to Congress, is vested in the President."[619]

With the deficiencies of the separation of powers in mind, Yoo later argued that the military—as a physical force under the command of the commander-in-chief—can fit within the structure of the modern administrative state with the legislation and delegation authorized generally in the constitution.[620] The argument is that the increasing independence of the military from its civilian leaders is "no different than the account of a federal agency managing to prevail in pursuing its own preferences at the expense of the president or Congress."[621] However, since the president is still the principal and the military is his agent, the president should be able to increase civilian control by unifying the civilian government (thereby weakening the separation of powers) or dividing the agent.[622] This framework links the control over the military as another power possessed by the unitary executive, citing the importance of civilian control to assume more power to the president against the Constitution.[623]

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[619] Memorandum for William J. Haynes IT, General Counsel of the Department of Defense, Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States (Mar. 14, 2003) 4-5.

[620] Yoo *supra* note 533 at 2277.

[621] *Id.* at 2284.

[622] *Id.* at 2302-04.

[623] Glenn Sulmasy & John Yoo, *Challenges to Civilian Control of the Military: A Rational Choice Approach to the War on Terrorism*, 54 UCLA L. REV. 1815,1831-45 (2007) (arguing that military's opposition to George W. Bush's administration on the detention of terrorist suspects and military commissions is against civilian control).

The unitary executive theory is especially criticized outside the specific task of civilian control. It advocates for the concentration of power in the executive with less emphasis on the values of limited government. Once equipped with authority supplied by the war power and commander-in-chief provisions in the Constitution, the executive can extend its powers even within the border. Evidently, since the rise of terrorism following the attack on the World Trade Center in 2001, the American government has gained significant powers to prevent further terrorist attacks, such as tapping the domestic phones of its citizens.[624] This trend is observable worldwide, even among those strongly respecting liberal constitutionalism.[625]

While the reliance on constitutional intent and constitutional history could be a unique feature of American constitutional law, the executive's willingness to embrace the military to further the aggrandization of power and eventually the concentration of power under one unitary command of the president or the prime minister is not another proof of American exceptionalism. This theory of unitary executive has gained ground in the last few decades and has been influential even outside of the US.[626] In these jurisdictions, an effort to ensure civilian control can end up masking an authoritarian move to weaken the overall separation of powers. In Turkey, for instance, the government of Erdogan

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[624] *See generally* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, 115 Stat. 272 Title II.

[625] Martin Krygier, *Rule of Law*, *in* THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW, *supra* note 22, at 233, 262-64 (discussing the increasing invasive nature of intelligence agencies in the age of terrorism).

[626] *See* David M. Driesen, *The Unitary Executive Theory in Comparative Context*, 72 HASTINGS L.J. 1 (2020) (arguing that centralization of power in the head of the state can lead to authoritarianism through case studies of Hungary, Poland, and Turkey).

eradicated the system of military courts through popular support in the referendum in 2017.[627] This is a recommended move to further civilian control and reduce the sphere of influence of the military. However, the government could only do so because the Turkish military attempted a failed coup in 2016, which resulted in a purge of generals and military officers who opposed the President through dismissals, incarcerations, or retirements.[628] In this instance, President Erdogan also capitalized on the failed coup attempt by immediately using the declaration of emergency rule to consolidate his autocratic rule to bypass "parliamentary and judicial checks."[629] Thus, coup-proofing measures such as the closing of media outlets or the continuation of the state of emergency were an excuse for the President to later constitutionalize the concentration of presidential power in the referendum of 2017.[630]

Likewise, in parliamentary systems where the head of state takes the top spot of the chain of command, the title can still cause instability for both civilian control and constitutional democracy. Indeed, the commander-in-chief can significantly affect civilian control even in places where the title is ceremonious and symbolic in theory, such as among constitutional monarchies.[631] On the one hand, this is a constitutional declaration of civilian control. On the other, the absolute and flexible nature of the title is

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[627] Ayşegül Kars Kaynar, *Post-2016 Military Restructuring in Turkey from the Perspective of Coup-Proofing*, 23 TURKISH STUD. 383, 385 (2022).

[628] *Id.* at 386-87.

[629] *Id.* at 398.

[630] *Id.* at 398-99.

[631] *See, e.g.*, Herbert Barry, *The King Can Do No Wrong*, 11 VIR. L. REV. 349, 354 (1925) ("With the growth of constitutional government in England little of the actual powers of government remain in the King, and such theories are not of current interest").

prone to abuse. For instance, King Bhumibol of Thailand endorsed several coups by granting the junta the audience and giving his royal signature to legitimize the coups,[632] contrary to the apolitical role according to the Westminster model of constitutional monarchy.[633] There, scholars draw a comparison of the Thai King's power with the prerogative power of the English monarch to support the legitimacy of coup d'états as endorsed through the signature of the King.[634] The constitutional authority of the King, in turn, allowed an alliance with the Thai military and the judiciary that intervened in politics and obstructed further democratization in Thailand.[635] The same applies to countries with parliamentary systems with the monarch as the supreme commander. Without a longstanding tradition like the English monarch to limit the power, the monarch, even though sitting symbolically on top of the chain of command, can work with the military to repress the opposition.

Authoritarian leaders and other opportunists can thus repurpose the cryptic and shifting meaning of the commander-in-chief to serve their interests. It is, hence, tragic but true that "civilian control of the military… is expressed nowhere in the [Constitution]

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[632] *See* Apinop Atipiboonsin, *Volcanic Constitution: How is Plurality Turning Against Constitutionalism in Thailand?*, *in* PLURALIST CONSTITUTIONS IN SOUTHEAST ASIA 225, 239 (Jaclyn L. Neo & Ngoc Son Bui eds., 2019).

[633] *See* Donald Anthony, *Buckingham Palace and the Westminster Model, in* CONSTITUTIONAL HEADS AND POLITICAL CRISES: COMMONWEALTH EPISODES, 1945-85 1, 1-3 (1988). (discussing the doctrine of 'the King can do no wrong.').

[634] SOMCHAI PREECHASINLAPAKUN, DYNAMICS AND INSTITUTIONALIZATION OF COUPS IN THE THAI CONSTITUTIONS 21-23 (2013), available at https://www.ide.go.jp/library/English/Publish/Reports/Vrf/pdf/483.pdf.

[635] *See* Eugénie Mérieau, *Thailand's Deep State, Royal Power and the Constitutional Court (1997–2015)*, 46 J. CONTEMP. ASIA 445 (2016) (arguing that Thailand is currently governed by the deep state where the royalists task the Constitutional Court with the role of "a surrogate king" for their own hegemonic preservation).

except in the Commander-in-Chief Clause."[636] Many people only see the commander-in-chief clause as the only confirmation of civilian superiority in their constitution. However, the downside of this understanding is the overreliance on the already powerful executive, who may not only control the military but also unbalance the checks and balances as intended under the separation of powers.

Conclusion

In sum, despite the many benefits of separation of powers, the concept and mechanisms formed within the principle are not conducive to enhancing civilian control. Most tools that could control the military are obsolete or ineffective. The military is hidden within the executive, buried just a layer beneath the usual coverage of the separation of powers. Then, the most effective solution to the defects of the separation-of-powers approach to civilian control is to abandon the inefficiency of the checks and balances system and to focus solely on the ability of the commander-in-chief found in the executive to tame the military. Still, this solution does not guarantee successful civilian control. Recent coup d'états in the 21st century still occurred in polities with strong authoritarian leaders.[637] The dissatisfaction with the separation of powers as a solution

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[636] Yoo *supra* note 533 at 2281.

[637] *See, e.g.*, *Gabon Coup: Why Young Africans Are Celebrating Military Takeovers*, BBC NEWS (Aug. 31, 2023), https://www.bbc.com/news/world-africa-66657571 (President Ali Bongo of Gabon "first came to power in elections 14 years ago following the death of his father, Omar Bongo, who had monopolised the presidency for more than 40 years.").

thus propelled many countries to find an alternative solution in their constitutions, the analysis and evaluation of which shall be in the next chapter.

Chapter V: The Military as the Neutral and Obedient Guardian of the Constitution

"Necessitas non habet legem—necessity knows no law"

Introduction

During the Roman Empire, the Roman Praetorian Guard was an elite military unit garrisoned within the Roman capital to protect the emperor from rebellious forces. Though initially created as bodyguards with no political functions, they gradually expanded their roles to include administrative and, eventually, judicial tasks.[638] At its peak, the Praetorian Guard could nominate the next princeps/emperor against the consent of the Senate,[639] becoming the only source of stability amidst the chaos during the transition from the republic to the empire.[640] In modern times, the history of the praetorian guards inspires the concept of praetorianism, which describes a state where the military determines the success or failure of the political process.[641] Praetorianism is thus an ultimate form of military dominance in politics. The armed forces become the only source of stability when civilian authoritarians and democrats fight constantly for the authority to rule.

This chapter argues that emphasizing the military's neutrality and efficiency in safeguarding the polity can inadvertently set a state toward praetorianism, granting the military a legitimate platform to regulate and intervene in politics. Most importantly, such

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[638] Sandra Bingham, The praetorian guard in the political and social life of Julio-Claudian Rome 1-6 (Aug. 1997) (Ph.D. dissertation, University of British Columbia).

[639] KARL LOEWENSTEIN, THE GOVERNANCE OF ROME 245-46 (1973).

[640] *Id.* at 335-36.

[641] *See* Amos Perlmutter, *The Praetorian State and the Praetorian Army: Toward a Taxonomy of Civil-Military Relations in Developing Polities*, 1 COMPARATIVE POLITICS 382, 383-85.

a conception of the military has already made its way into many constitutions without much resistance due to the compatibility between the dominant model of civil-military relations and various constitutional theories on the state of exception and emergency. In short, putting the military under the spotlight could potentially encourage its praetorian tendency.

Although the last chapter has discussed generally how the separation-of-powers approach has influenced constitutions across different regions and legal traditions, the dataset from Chapter II suggests that there are still unexplored constitutional mechanisms that fall outside the separation-of-powers framework. Strikingly, these obscure constitutional provisions, albeit smaller in number, loosely operate under a more direct approach to civilian control. In this chapter, they are all categorized under the military-exception approach—a product of new ideas experimented by those constitutional systems with pressing civil-military relations, attempting to limit the political roles of the military through the constitution. As a sweeping category that incorporates all attempts towards greater civilian control, it involves all mechanisms capable of reducing the power of the military, from limitations of rights to institutional checks on the armed forces. In contrast to the separation-of-powers approach, the provisions in this chapter incorporate both substantive and structural mechanisms of constitutional law. Accordingly, at the outset, there seems to be no common feature among constitutions worldwide regarding how the military is institutionalized and controlled.

However, upon closer inspection, a recurring theme of the military as the guardian of the state begins to emerge from all these jurisdictions. Relying on the wisdom of civil-military relations literature that emphasizes the professional aspects of the military, constitutional drafters—in pursuit of civilian control—treat the military as a professional

group akin to the judiciary with its own sphere of expertise and autonomy. From coup-proofing measures to constitutionalization of the military, these provisions recognize the military as an essential and exceptional institution that produces obedient and apolitical soldiers through a sense of professionalism. Drawing on the logic of judicial independence and judicialization of politics in which courts are empowered to deal with questions of political controversies due to their technical expertise and independence from the other political branches,[642] the military, as a professionalized institution, can also claim to be independent in solving national security issues and political crises. Alongside the judiciary, the military becomes another arbiter of political conflicts, posing as the guardian of the constitution whenever constitutionalism is at risk. Through this framework, any visible mechanisms that seek to enhance civilian control may instead legitimize the guardianship or even transform the military into the proverbial praetorian guard under the right circumstances.

So far, this development in constitutional law has primarily been unobserved, resulting in a gap in the literature of comparative constitutional law and piecemeal constitutional borrowing among countries seeking to improve civilian control. Naturally, the lack of theory here invites theory-building. This chapter then takes on the task by arguing that the military can gain both legitimacy and salience based on its role as a focal point during crises and emergencies as prescribed by the constitution. The military, thus,

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[642] *See, e.g.,* LARS VINX, THE GUARDIAN OF THE CONSTITUTION: HANS KELSEN AND CARL SCHMITT ON THE LIMITS OF CONSTITUTIONAL LAW 47-48 (2015) (arguing that constitutional courts as dominated by legal experts are the most appropriate organ for judicial review of legislation); Martin Shapiro, Courts: A Comparative and Political Analysis 1 (1981) ("the triad for purposes of conflict resolution is the basic social logic of courts, a logic so compelling that courts have become a universal political phenomenon.").

not only evades civilian control but can also become even more potent in these jurisdictions that attempt to apply the military-exception approach due to both the questionable effectiveness of these measures and possible constitutional abuses inherent in them.

This chapter consists of three parts. part I introduces the "military-exception approach." It provides a theoretical framework for the military's constitutional role as distinct from the framework based on the separation of powers presented in the previous chapter. part II then discusses in detail all principles and mechanisms within this exceptional framework to access its normative use for strengthening civilian control. Finally, part III elaborates on how the military-exception approach could lead to praetorianism by appropriating exceptional power and involvement in constitution-making.

I. The Military-Exception Approach: A Constitutional Theory of Military Guardianship

As previously shown in Chapters II and III, modern constitutions started to adopt a new design that limits the military's power by presenting it as an institution outside of the classical three branches. Without getting bogged down by the rigid framework of separation of powers, constitutional drafters experiment with provisions and mechanisms other than division of labor or checks and balances. While the literature on civil-military relations sometimes prescribes measures of civilian control that are in line with the separation-of-powers approach, such as the executive branch the creation of a ministry of

defense, and the appointment of a civilian minister to take direct control of the armed forces,[643] most recommendations in civil-military relations go beyond the defense that relies on mechanisms of separation of powers and proactively seek to contain the role of the armed forces even further by limiting the political rights of the military and set up supervisory mechanism against undue military influence or coup d'état attempts. This is comparable to the concept of 'militant democracy', which employs illiberal means to prevent democratic backsliding from those who abuse freedom guaranteed in a democracy.[644] Through this alternative constitutional approach to civilian control, the military should be obedient and independent in accordance with the recommended path of objective civilian control.

Most countries that adopt this approach in their constitutions have recent histories of military coups and military dictatorship, especially in Latin America and Africa, suggesting an emerging trend of subjecting the military to a higher standard of supervision as a response to ongoing civil-military tensions. Due to the special treatment of the military under the constitution, the framework is called the 'military-exception approach.'

However, the subordination of the military in this sense is deeply associated with the use of martial law and other emergency regimes over ordinary constitutional law, which grants the military supreme authority in all matters regarding national security.

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[643] Rafael Martinez, *Objectives for Democratic Consolidation in the Armed Forces*, *in* DEBATING CIVIL-MILITARY RELATIONS IN LATIN AMERICA 43, 66 (David R. Mares & Rafael Martinez eds., 2013).

[644] *See* Karl Loewenstein, *Militant Democracy and Fundamental Rights I*, 31 AME. POL. SCI. REV. 417, 430-31 (1937).

Because constitutions in this group single out the military as a separate institution functioning as the fourth branch of the government, the military is then considered by both the people and itself to be independent and apolitical, similar to the judiciary. Generally, these constitutions often declare, as grand principles, that the armed forces obey their civilian leaders' command and do not deliberate in politics. There are also specific mechanisms and rules for civilian control, such as the establishment of national security councils and limitations on the political rights of senior military officers.

In short, there are two connecting theoretical foundations to any attempt to subject the military under constitutional control: emergency powers and the independent fourth branch. In any constitutional role, the military blends well into the background with other independent institutions due to its professionalism and technical expertise. Since independent institutions are associated with supervising and moderating functions, the military can claim to act as the guardian of the constitution, relying on the rationale of emergency regimes. These are the two faces of the military-exception approach that require normative discussions in relation to the mechanisms in part II.

Before discussing the new approach in detail, it is worth noting that the two main constitutional approaches to civilian control are not mutually exclusive. A constitution can perfectly adhere to the minimum features of a separation-of-powers design and still incorporate the military-exception approach in other parts of the text. As early as 1791, the French Constitution granted the legislature the power to declare war and raise the

army while the King, as the executive power, was still the head of the army.[645] While this appears to conform with the separation-of-powers approach,[646] the French Constitution also stated that "[t]he public force is essentially obedient; no armed body can deliberate."[647] The restriction here is supposed to control the military by preventing it from influencing laws and policies.[648] This was the earliest and most direct example of civilian control of the military found in a modern written constitution. As will be discussed, once the military-exception approach features prominently in a constitutional system with a powerful military, it becomes the dominant mode of civilian control that trivializes the separation-of-powers approach in relevance.

A. Emergency Regimes and Constitutional Dictatorship under the Military

The safety of the people is the supreme law.[649] This maxim was the rationale behind the office of the dictator in the Roman Republic, granting the power to hold absolute control of the army and take any measure necessary, even against the Roman

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[645] The first post-revolution Constitution of 1791 states clearly that the King cannot command the armed forces to overthrow the government. Chapter II § 1 art. 6 ("If the King places himself at the head of an army and directs the forces thereof against the nation, or if he does not, by a formal statement, oppose any such undertaking carried on in his name, he shall be deemed to have abdicated the throne.").

[646] French Constitution of 1791 Chapter III § 1 art.1 cl. 8, § Chapter III § 1 art. 2, a transition available at https://wp.stu.ca/worldhistory/wp-content/uploads/sites/4/2015/07/French-Constitution-of-1791.pdf; The power to nominate and remove the commander-in-chief is in the hand of the legislative branch and the command of the armed forces belongs to the executive council. *See id.* Chapter IV art. 1.

[647] *Id.* Title IV art. 12.

[648] LOVEMAN, *supra* note 88, at 61-62.

[649] Marcus Tullius Cicero, The Laws 152 (Niall Rudd trans., Oxford University Press 2d ed. 1998) ("They[praetors, judges, and consuls] shall hold the supreme military power and shall take orders from no one. To them the safety of the people shall be the highest law.").

citizens.[650] This rationale is based on the imperative of protecting the state, which aligns with the concept of "reason of the state". The idea is that an alternative mode to constitutional thinking turns the focus of "law and right" to another mode based on "interest and might."[651] Jefferson, for instance, argued that "[t]he laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation" than any written law.[652] In other words, the constitution is not a suicide pact. Ultimately, "constitutional barriers" are helpless against "the impulse of self-preservation."[653]

Together with the "state of exception" of Carl Schmitt, this type of argument, which states how a sovereign needs the ability to ignore the law as much as necessary in the face of emergencies to preserve the state, has a compelling normative force behind it.[654] In practice, the military also draws from this literature to legitimize any political intervention as necessary. From the 19th century to now, military juntas have often claimed to be the protector of the safety of the people or the rule of law.[655] When the state

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[650] THOMAS POOLE, REASON OF STATE: LAW, PREROGATIVE AND EMPIRE 1-2 (2015).

[651] *Id.* at 3.

[652] 5 THOMAS JEFFERSON, *To J.B.Colvin, September 20, 1810, in* WRITINGS 542 (Henry Augustine Washington ed. 1853).

[653] THE FEDERALIST NO. 41, at 292 (James Madison) (Benjamin Fletcher ed., 1961).

[654] CARL SCHMITT, POLITICAL THEORY 158 (Jeffrey Seitzer trans. & ed., 2008) ("When every single constitutional provision becomes "inviolable," even in regard to the powers of the state of exception, the protection of the constitution in the positive and substantial sense is sacrificed to the protection of the constitutional provision in the formal and relative sense.").

[655] The most recent coups in 2023 claimed to be in response to crises and national security. Gerauds Wilfried Obangome, *Gabon Officers Declare Military Coup, President Ali Bongo Detained,* REUTERS (Aug. 30, 2023), https://www.reuters.com/world/africa/gabonese-military-officers-announce-they-have-seized-power-2023-08-30/ (stating that the coup was due to "a severe institutional, political, economic, and social crisis"); Moussa Aksar & Boureima Balima, *Niger Soldiers Say President Bazoum's Government Has Been Removed*, REUTERS (July 28, 2023), https://www.reuters.com/world/africa/soldiers-nigers-

is at risk of implosion from pressures of political infighting and uncontrollable violence, the Leviathan—along with its terrifying might—rises to activate the sovereign power and end the existential threat to the state. Thus, although constitutional law has been about constraining and limiting power, it can enable and empower through different normative theories.[656]

Indeed, there has been no shortage of theorizing on constitutional dictatorship.[657] For most scholars, the noble ideal of the Roman dictatorship is foundational to a proper construct of any theory on constitutional dictatorship. Machiavelli pioneered this line of argument by stating that:

"*Republics must therefore have among their laws a procedure . . . [that] reserve[s] to a small number of citizens the authority to deliberate on matters of urgent need without consulting anyone else, if they are in complete agreement. When a republic lacks such a procedure, it must necessarily come to ruin.*"[658]

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presidential-guard-blockade-presidents-office-security-sources-2023-07-26/ (claiming that the coup is to "[p]ut an end to the regime that you know due to the deteriorating security situation and bad governance").

[656] Thomas Poole, *Constitutional Reason of State*, *in* PHILOSOPHICAL FOUNDATIONS OF CONSTITUTIONAL LAW 179, 198 (David Dyzenhaus & Malcolm Thorburn eds., 2016) ("Reason of state is a fairly immediate reminder that constitutions are as much about how power is sourced and operationalized as they are about how power is checked and constrained.").

[657] *See, e.g.,* Sanford Levinson & Jack M. Balkin, *Constitutional Dictatorship: Its Dangers and Its Design*, 94 MINN. L. REV. 1789 (2010); Jens Meierhenrich, *Constitutional Dictatorships, From Colonialism to COVID-19*, 17 ANN. REV. OF L. & SOC. SCI. 411 (2021); CLINTON ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES (1948).

[658] NICCOLÒ MACHIAVELLI, DISCOURSES ON LIVY 95 (Julia Conaway Bondanella & Peter Bondanella trans., Oxford Univ. Press 1997) (1531).

Likewise, Rossiter, in arguing for the application of constitutional dictatorship in the 20th century, opines that "*the original dictatorship, that of the Roman Republic, involved the legal bestowal of autocratic power on a trusted man who was to govern the state in some grave emergency, restore normal times and government, and hand back this power to the regular authorities just as soon as its purposes had been fulfilled.*"[659]

Despite the danger associated with the concept of dictatorship, the adjective "constitutional" dictates that such immense power is limited by law. Emergency powers still operate according to constitutional procedures with additional supervision through judicial review and other institutional mechanisms.[660] Indeed, the general theme among modern scholars is of cautious acceptance of emergency regimes and a strong belief in constitutional constraints.[661] Written in 1680 but reflecting the attitude of today's scholars, Algernon Sidney suggested with great faith in the law that a "virtuous man" can be trusted with the power of the dictator given that it is "limited in time, circumscribed by law, and kept perpetually under the supreme authority of the people."[662] Although there are endless criticisms of emergency powers, there is at least a consensus that

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[659] CLINTON ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES 4-5 (1948).

[660] Levinson & Balkin, *supra* note 657, at 1807-09.

[661] *See, e.g.,* BRUCE ACKERMAN, BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM (2006) 173-74 (arguing that the constitution and constitutional institutions matter in dealing with both threats to political existence of the state and freedom of the people); David Dyzenhaus, *States of Emergency*, *in* THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW, *supra* note 22, at 460-61 (arguing that all constitutional actors working together can establish constitutional control even against emergency powers).

[662] ALGERNON SIDNEY, DISCOURSES CONCERNING GOVERNMENT 152 (Thomas G. West ed., Liberty Fund 1990) (1680).

constitutional and legal frameworks must adapt during times of crisis.[663] As such, emergency regimes are under the law and the constitution by definition. However, the effectiveness of legal constraints on emergency powers is a separate issue under constant debate.

Interestingly, while the main legal tools of civilian dictatorship, like presidential emergency powers and state of siege, are well discussed in the literature, there is not much theorizing on military dictatorship. This absence in the literature is puzzling, given how the premise for constitutional dictatorship is the same for both civilian and military dictators. As seen from coup attempts worldwide, the narrative of crises and exceptional powers is also prevalent among military juntas who justify their break from civilian control to save constitutional democracy.[664] Despite all the pushback regarding the legitimacy of the military in meddling with politics, the military has an even stronger claim to dictate what the law is during an emergency due to its ability to use force on a large scale to enforce the law.[665] Moreover, the military does not necessarily need to stage a coup d'etat to tap into the power of the state of exception. There are many instances where civilian police have trouble enforcing the law to the point that the government is obligated to deploy the military to take control of the situation despite the

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[663] *See, e.g.,* Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?* 112 YALE L.J. 1011; ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC (2011); Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights during Wartime*, 5 THEORETICAL INQUIRIES L. 1 (2004); Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029 (2003).

[664] VAROL, *supra* note 82, at 19 (arguing that democratic coups which fight against dictators are not an extreme outlier)

[665] *See supra* Chapter I.

risk of human rights abuse.[666] In Latin America, for instance, the Colombian and Brazilian armed forces have a routinized presence in civilian law enforcement against drug cartels and gang violence.[667]

In spite of the salience of civilian dictatorship in the literature, the armed forces are the ultimate creator and destroyer of constitutions. Drawing legitimacy from popular sovereignty, the military can claim to represent the people who need a signal for collective action. Thomas Jefferson famously stated that in the face of absolute despotism, "it is their right, it is their duty, to throw off such Government."[668] Thus, in Latin America, Jose nun argued that military intervention may represent the middle class and its "inability to establish itself as a well-integrated hegemonic group."[669] According to this framework, coup d'etat becomes the only means to bypass the overwhelming power of populist politicians.

Strikingly, during the age of absolute monarchy, the thought of a military coup by a military commander is almost impossible. Never had the authority of the monarch been challenged by a mere military general. Only when popular sovereignty became a new source of political legitimacy did coups become a real threat to the government. Military generals such as Napoleon Bonaparte and Oliver Cromwell exploited instability and the

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[666] DAVID PION-BERLIN & RAFAEL MARTÍNEZ, SOLDIERS, POLITICIANS, AND CIVILIANS: REFORMING CIVIL-MILITARY RELATIONS IN DEMOCRATIC LATIN AMERICA 59 (2017).

[667] *See* Marcos Pablo Moloeznik, *The Military Dimension of the War on Drugs in Mexico and Colombia*, 40 CRIME, LAW & SOCIAL CHANGE 107 (2003) (discussing how the failure of civilian law enforcement in both countries led to an unusual reliance on the military against drug trafficking).

[668] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[669] JOSE NUN, THE MIDDLE-CLASS MILITARY COUP: THE POLITICS OF CONFORMITY IN LATIN AMERICA 66, 112 (1967).

decline in legitimacy of the monarchical regime to seize power. From then to now, the mechanisms for legitimizing coups are essentially the same. The military emerges as a neutral force to quell unrest and lawlessness, acting as the Hobbesian Leviathan and using violence to stop violence.[670] Recently, when Ozan Varol argues that "Some military coups promote, rather than hamper, democratic progress",[671] the only additional requirement for a rightful coup is for it to be democratic though a promise of free and fair elections.[672]

It takes a world at war to recognize the roles and capabilities of the military. Democratic countries in peace rarely have their military performing civilian tasks. However, once national defense becomes a priority, the military stands at the forefront in a national effort to preserve the state, defend the borders, and coordinate national security. Even the constitution can be suspended or treated in a different mode. In wars and crises, the military dominates the civilian government. This is especially true in the current age of wars on terrorism, where the states of normalcy and exception often overlap.[673]

Although the Roman republic—the bedrock of constitutional democracy—required certain limitations through procedures and time limits for the control over the

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[670] HOBBES, *supra* note 72.

[671] Varol, *supra* note 4, at 475.

[672] *Id.*

[673] GROSS, *supra* note 663, at 1086-89 (discussing how emergency mechanisms creeped into ordinary law after war on terrorism in Northern Ireland).

armed forces even during crises that threatened the republic,[674] legal constraints guarantee compliance by the armed forces. As the maxim goes, "*for among arms, the laws are silent*", throughout history, the survival of the state always trumps liberal ideals and the rule of law.[675]

Even the Roman dictatorship was eventually repurposed by Julius Caesar to end the republic and start the empire.[676] The same goes for the American government, which claimed after the Civil War that "[t]he officer executing martial law is at the same time supreme legislator, supreme judge, and supreme executive. As necessity makes his will the law, he only can define and declare it."[677] Fortunately, the Supreme Court resisted the trend toward constitutional dictatorship and sided with the plaintiff, but it acknowledged that public reason for national security could affect legal judgment.[678] However, relative to the Roman Republic and American Civil War eras, necessity in the modern state leaves even smaller room for limitations and procedures. The war on terror, as seen in the

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[674] MARK B. WILSON, DICTATOR THE EVOLUTION OF THE ROMAN DICTATORSHIP 3-6 (2021) (stating how a dictator needs to be formally appointed and can only stay for a term of six months).

[675] Tom Ginsburg & Mila Versteeg, *The Bound Executive: Emergency Powers During the Pandemic*, 19 INT'L J. CONST. L. 1498, 1509-13 (2021) (discussing four types of emergencies and why national securities usually require an unbound national executive).

[676] MARK B. WILSON, DICTATOR: THE EVOLUTION OF THE ROMAN DICTATORSHIP 325-26 (2021) (discussing the strategic values of the dictatorship in Caesar's consolidation of power).

[677] *Ex Parte* Milligan, 71 U.S. (4 Wall.) at 14.

[678] *Id.* at 109 ("Then, considerations of safety were mingled with the exercise of power; and feelings ... prevailed which are happily terminated. Now that the public safety is assured, this question, as well as all others, can be discussed and decided without passion or the admixture of any element not required to form a legal judgment").

US, has shown how detainees in Guántanamo could lose their legal status in the limbo of legal indeterminacy created by the Patriot Act.[679]

The outlook might seem disappointing for the sanctity of constitutional norms that other modes of thinking could come up with readily available legal doctrines to accommodate the suspension of constitutional norms. But, in the long run, all wars and crises come to an end; otherwise, there is no meaningful difference between what is normal and what is exceptional. Claims to power based on crises can thus only be temporary. The triumph of liberal constitutionalism in the 21st century is the certainty that right will consistently win over might. No autocrat today, military or not, can claim absolute power indefinitely. A new constitution is promised, and an election is scheduled at the start of any usurpation of power from a democratic government. Thus, new mechanisms and justifications for military intervention are needed. And these needs are fulfilled by the idea that the military serves as the guardian of the constitution.

B. The Guardian as the Fourth Branch

Far removed from formal-legal justifications, claims of necessity from the military usurpers seem to be unconnected or even antithetical to attempts to enhance civilian control through the constitution. However, the claim of constitutional dictatorship is surprisingly connected to those constitutional provisions with emphasis on

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[679] *See* AGAMBEN, *supra* note 87, at 3-4 (discussing how the USA Patriot Act stripped the Taliban captured in Afghanistan are stripped of their status as prisoners of war).

professionalism and neutrality of the military as these constitutional texts encourage the military to resist civilian control and further its political influence.

As discussed earlier, Carl Schmitt was the proponent of constitutional dictatorship, emphasizing the military's raw power in enforcing the law and protecting the state.[680] Interestingly, Schmitt envisions the president as having a "neutral, mediating, regulating, and conserving" power above all other branches to defend the constitution.[681] This mediating power is analogous to the idea of a neutral and professional military. Indeed, the claim for legitimacy can work better for the armed forces in the age of democratic backsliding and constant national security problems. When civilian branches are in constant gridlocks by the nature of politics, the military can claim to be the independent and impartial fourth branch that comes in to get things done when needed.

As alluded to earlier throughout this dissertation, judges and soldiers share similarities that affect their constitutional and institutional arrangements. Both are professions wholly based on technical expertise and strict professional ethics that discipline them from abusing their authority to promote self-interests. Thus, both groups of professionals are supposed to be apolitical and impartial, only acting according to their principles. These analogies, however, do not end at the personal and institutional level. These two professions also share a deep similarity at the philosophical and theoretical level.

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[680] *See supra* Chapter III.

[681] CLINTON ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES 56 (1948).

Both courts and armed forces are perceived as the third party in a conflict. The classical analysis of the court theorizes how parties from a conflict benefit from a peaceful resolution despite how a plaintiff or a defendant must emerge victorious at the end of every court proceeding.[682] Under the same logic, both politicians and people from a politically polarized conflict would prefer a bloodless coup rather than a civil war or a total anarchy. Whenever there is a crisis—either of a constitutional or political nature, the military can intervene, whether in the form of coup d'états or clear support to one side of the conflict. However, instead of adjudicating under a set of predetermined legal rules and court procedures, the military operates on a basis of necessity, claiming an exception to the normal constitutional situations.

While the military's role in solving crises is unique, it is the only possible normative argument for more military intervention. The military has no rightful place in civilian affairs, which belongs to the will of popular sovereignty. Without a claim of necessity, there is a giant logical leap from claiming that the military is professional and impartial to outright military intervention. The military can only shirk and maneuver around the flawed separation of powers framework as long as the civilian government is legitimate and effective. The possibility of a coup or military deep state is almost zero. Stable democracies like the US and France may have some tensions in civil-military relations, but not a military coup.

With a recent rise in illiberal and abusive constitutional regimes as well as democratic backsliding in the 21st century, however, the military has become a trump

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[682] *See generally* MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS (1981).

card against civilian authoritarianism. Since the military can still claim to be the guardian—either by history or by their functions in an emergency, there could be a revival for claims of democratic coups or democratic military interventions. The military's role in politics does not inherently attach to any ideology of politics. Indeed, totalitarianism—essentially a dictatorial and centralized government—is also politically neutral. A totalitarian regime can subscribe to all kinds of ideologies, from fascism to Marxism, without much difference in governance.[683]

II. Mechanisms of Military Guardianship

The modern form of the reason of state is not about arbitrariness without a formal legal platform; it is a claim for extra power with special jurisdiction and an exceptional set of rules beyond the ambit of judicial oversight.[684] In effect, constitutional law accepts the exception as a necessary evil even in its normal state. It creates a compromise between the rule of law and the reason of state by leaving an extra channel to activate exceptional powers open. As discussed earlier, the military can only intervene with authority and legitimacy when crises and emergencies necessitate intervention. Thus, to claim broadly that the military is the guardian of the constitution is not enough; there needs to be concrete and salient channels for it to establish its guardianship. This way, the military can argue that its intervention is effectively an exercise of its constitutional

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[683] *See* Stanislav Andreski, *ideological and military factors in the rise and retreat of totalitarianism, in* A RESTLESS MIND ESSAYS IN HONOR OF AMOS PERLMUTTER 244, 244-57 (Benjamin Frankel ed., 1997).

[684] *See* Poole, *supra* note 650, at 185-87.

duties—in other words, "judicial review with bayonets."[685] This Part shall argue that the armed forces emphasize the abstract idea of guardianship through constitutional provisions meant to establish civilian control and professionalism of the military. The following sections discuss such mechanisms and how they can empower the military as the guardian of both the nation and the constitution.

A. Principles and Rules of Professionalism, Neutrality, and Non-deliberation

As argued by Robert Dahl, power sharing in any polity cannot exist wherever the military is large and powerful unless it permits the civilian to rule and wholly believes in civilian supremacy.[686] A strong military tends to dominate politics over other civilian institutions. When the constitution does not clarify that the military should be a politically neutral institution, the military can claim to possess certain prerogatives to play political roles as an independent constitution even when a democratic government is in power.[687] This could be true even when the military has no clear legal prerogative on an issue but still resists obliging in practice by referring to national security.[688] Civilian control, in this sense, is thus only possible when the military accepts the rules governed by the civilian authority.

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[685] LOVEMAN, *supra* note 88, at 401.

[686] ROBERT A. DAHL, POLYARCHY: PARTICIPATION AND OPPOSITION 50 (1971).

[687] STEPAN, *supra* note 419, at 93-97 (providing a set of 11 prerogatives of the military as an institution in a democratic regime such as the constitutionally sanctioned independent role of the military and the relationship between the chief executive and the military).

[688] *Id.* at 93.

Intuitively, the logical solution to ambiguity is to set up impartiality and obedience of the military as a principle within the constitution. As discussed in Chapter II, provisions that declare impartiality and non-deliberation for the armed forces are thus a reasonable constitutional design. Interestingly, of all the constitutional provisions regarding the military in early written constitutions of the 19th century, the incompatibilities between the civilian and military powers, as influenced by the history of the three constitutional revolutions, have been the most prominent doctrine outside the separation-of-powers framework. Back then, there was no widespread belief in the principle of civilian control. Professionalism only came after the development of the concept of a professional military.[689] It is especially striking that the military's obedience and political neutrality existed among the early constitutions when the military was still considered an integral part of the executive branch. However, given how Latin American constitutions have borrowed from the French prohibition on "military deliberation" since the early 19th century without much fruition as the principle was only "interpreted to mean in normal circumstances,"[690] the relevance of such a grand principle of professionalism in practice is doubtful.

To make civilian supremacy more concrete, another design choice for implementing civilian control through the constitution is establishing rules regarding incompatibilities between the civilian and military offices. As a logical next step, limitations of political rights thus become natural following the declaration of political

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[689] HUNTINGTON, *supra* note 100, at 54 (arguing that civilian control through professionalism became established in Europe in 1875).

[690] LOVEMAN, *supra* note 88, at 402.

neutrality of the military. Either through limitations of voting rights or other political rights, these rules usually force senior military officers or members on active duty to limit their political involvement. However, it was also proven ineffective as ambitious military men can exempt or bypass these rules.[691]

It is also worth noting that rules and principles of independence and political neutrality are recurrent in constitutional law. The idea is, again, similar to what applies to judges who have to stay away from politics and limit their rights and freedom as citizens so that, in return, they are well protected through guarantees of long tenure and budgetary autonomy.[692] Judicial independence is universally accepted as a positive principle, protecting minority rights against the whim of a majority and promoting economic growth by enforcing property rights.[693] This idea of incompatibility that connects the military and the judiciary is unlikely a coincidence. Modern armed forces may be a new concept, but the idea that soldiers are professionals is as old as that of other professions. Thus, despite writing within the common-law tradition, A.V. Dicey argues that a soldier is no different from a clergyman in that they all have special obligations in their official character but still retain ordinary liabilities as citizens.[694]

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[691] *Id.* at 402-03 (arguing that those provisions in Latin American constitutions that limit military participation in politics failed to prevent presidents with military background).

[692] *See* Gretchen Helmke and Frances Rosenbluth, *Regimes and the Rule of Law: Judicial Independence in Comparative Perspective*, 12 ANN. REV. POL. SCI. 345, 348-51 (2009).

[693] *Id.* at 348-49.

[694] A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 191 (8th ed. 1915).

Within this analytical framework of judicial independence, independence and neutrality of the military become problematic. While the power of the judiciary is neither the sword nor the purse, the military is the sword. The judiciary could not keep challenging authoritarian governments or even single-party regimes since there are still many formal and informal strategies that the government could bypass the guarantees of judicial independence.[695] In contrast, the military always has all the resources and capacities to intervene regardless of what the law says about its status. Moreover, the Latin American constitutions have illustrated how precluding the military from participating in politics might paradoxically create a permanent political role for the military.[696]

In the case of Brazil, for instance, the three previous constitutions (of 1891, 1934, and 1946) all adopted the same language that provided an exception to civilian control, stating that the military should only obey the president "within the limits of the law."[697] These constitutions also granted that the armed forces the duty to "guarantee the constitutional powers, as well as law and order.[698] These constitutional clauses can legitimize discretionary obedience and encourage the military's involvement in politics.[699] The Brazilian military has been relying on these provisions so that it is still

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[695] *Id.* at 355-56.

[696] LOVEMAN, *supra* note 88, at 398.

[697] STEPAN, *supra* note 419, at 112.

[698] *See, e.g.*, Constitution of Brazil, art. 177 (1946) (It is the mission of the Armed Forces to defend the Country and guarantee the constitutional powers, as well as law and order.).

[699] STEPAN, *supra* note 419, at 111-12.

relevant as a political player without having to stage a coup. As recently as in 2020, President Bolsonaro referred to the constitutional role of the military to moderate conflicts among the three branches of government to threaten the judiciary with potential military intervention.[700]

Ultimately, there is a delicate balance between a professional military and a politicized military operating under the guise of a constitutional guardian. In contrast to the judiciary, constitutional provisions that require obedience and neutrality from the military have little to no effect when the armed forces are powerful and influential. Even when the military is weak, it can draw the power of legitimacy and coordination from the constitution by claiming its role as the fourth branch.

B. Security Councils and Other Oversight Institutions

The canonical trinity of legislative, executive, and judicial powers, created by Montesquieu, has been the foundation of many constitutions today. However, modern states started to develop new powers or functions that did not belong to the three classical branches, such as independent electoral commissions and central banks.[701] These institutions have become a common feature of almost any constitutional system,

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[700] João Victor Archegas & Leticia Kreuz, *The 'Constitutional Military Intervention': Brazil on the Verge of Democratic Breakdown*, VERFASSUNGSBLOG (Jun. 2020), https://verfassungsblog.de/the-constitutional-military-intervention-brazil-on-the-verge-of-democratic-breakdown/.

[701] Bruce Ackerman, *Good-bye, Montesquieu, in* COMPARATIVE ADMINISTRATIVE LAW 128, 129-30 (Susan Rose-Ackerman & et al. eds., 2nd edn. 2017).

especially if one counts electoral commissions and anti-corruption agencies among this new branch of government.[702]

According to Ackerman, a new additional power needs to be justified by a fundamental governmental value, a necessity for institutional independence, mechanisms for implementing such autonomy, and comparative support from other jurisdictions.[703] There are also new problems related to the creation of a new power.[704] First, the more powers being distributed, the more difficult it is to coordinate.[705] Second, insulating the new branch from political control of the legislature and the executive may reduce the democratic legitimacy of that power.[706]

The most extreme application of this concept is to look at the military as a distinctive and separate branch with no organic connection to the executive. Kevin Tan, inspired by the Taiwanese Constitution with its five branches of government (the two additions being examination and control branches), long suggests that, in certain states, there ought to be more than just three classical powers to accommodate 'real substantial powers' that are beyond the usual scheme of separation of powers.[707]

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[702] Tushnet, *supra* note 180, at 426-29.

[703] Ackerman, *supra* note 701, at 129-30.

[704] *Id.* at 130.

[705] *Id.*

[706] *Id.*

[707] *See* Kevin YL Tan, *Constitutionalism and the Search for Legal and Political Legitimacy in Asian States* 7 NAT'L TAIWAN U. L. REV. 503, 518.

One of the possible new fourth branches is undoubtedly the military. When the military can exist outside the constitution, it can "subvert the constitutional order and still remain legitimately in power."[708] In connection with the Madisonian notion of checks and balances, once such an enigmatic institution is under the constitutional spotlight, it can no longer escape constitutional constraints.[709] As the main objective of separation of powers is to prevent the usurpation of powers by an unintended constitutional organ,[710] avoiding the concentration of powers is an attractively sound policy[711] , and thus, creating a new military branch as an equal among the classical branches could serve to strengthen constitutional democracy at least by having one additional institution to add in the checks and balances scheme.[712] The feasibility of this model in practice is not yet considered anywhere, and the paradox of the force and the law does not support such a scheme.

The more widespread mechanism that promotes the military as the fourth branch instead comes from national security councils. While these oversight institutions, civilian-led defense oversight committees, and national security councils are often

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[708] Kevin Y. L. Tan, *Law, Legitimacy and Separation of Powers*, 29 SING. ACAD. L.J. 941, 947 (2017).

[709] *See* STEPHEN HOLMES, PASSIONS AND CONSTRAINT 241 (1995) ("Liberal constitutions . . . are designed . . . to force officeholders . . . to act against their own immediate interests in order to promote the general interest.").

[710] *See* Christoph Möllers, *Separation of Powers*, *in* THE CAMBRIDGE COMPANION TO COMPARATIVE CONSTITUTIONAL LAW 230, 239-42 (Roger Masterman & Robert Schütze eds., 2019).

[711] BRIAN TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 35 (2004) (arguing that separation of powers promote liberty by "preventing the accumulation of total power in any single institution").

[712] JEREMY WALDRON, *Separation of Powers and the Rule of Law in* POLITICAL POLITICAL THEORY 45, 62-65 (arguing that separation of powers force the government to go through processes under institutional articulation of different branches before affecting an individual).

recommended as institutional features that promote civilian control,[713] most of these mechanisms are not usually associated with the constitution.[714] These oversight institutions could play many roles on security matters, from advising the civilian government on security matters to coordinating all players within the security sectors.[715] But the most important one here is to promote civilian control by "providing the elected chief executive the tools, structure and personnel to keep track of what different actors, including the military, police and intelligence organizations are about, especially if they are working in secret."[716]

However, some of these oversight institutions for the military happen to exist in constitutions that are written under authoritarian rule to oversee a democratic change.[717] The archetypical example here is the 1980 constitution of Chile, which granted more power to the national security council, provided military-appointed senators, and established the constitutional tribunal to guarantee the effectiveness of the constitution.[718]

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[713] *See, e.g.*, NARCÍS SERRA, THE MILITARY TRANSITION: DEMOCRATIC REFORM OF THE ARMED FORCES 72 (2010); Gregory Weeks, *Democratic Institutions and Civil–Military Relations: The Case of Chile*, 18 J. THIRD WORLD STUD. 65, 69-77 (2001); Florina Cristiana Matei, *A New Conceptualization of Civil-Military Relations in* THE ROUTLEDGE HANDBOOK OF CIVIL–MILITARY RELATIONS 26, 32 (Thomas C. Bruneau & Florina Cristiana Matei eds., 2013).

[714] According to the dataset, only 70 (36.65%) of the 191 current constitutions have such provisions.

[715] Thomas C. Bruneau et al., *National Security Councils: Their Potential Functions in Democratic Civil-Military Relations*, 25 DEFENSE & SEC. ANALYSIS 255, 257-58 (2009).

[716] *Id.* at 258-59.

[717] *See, e.g.*, ROBERT BARROS, CONSTITUTIONALISM AND DICTATORSHIP: PINOCHET, THE JUNTA, AND THE 1980 CONSTITUTION 241-48. (2002).

[718] *Id.* at 248-49.

Also, the original 1980 Constitution gave the role of "protectors of the institutional order" to the military.[719]

Instead of controlling the military, military dictatorships can dominate security councils to "coordinate their non-democratic policies."[720] And since constitutions often create security councils without much detail on their functions and status, the military can seize this constitutional pretext to interpret and act as if the security council is an extension of the armed forces. For instance, in Turkey, where the security council was supposed to be an advisory council with their decisions having no binding effects on the government, the semi-military council was gradually dominated by the military to the point that the council became known as the "second cabinet" of the government, intervening in civilian policymaking even in matters that are not strictly related to national security.[721]

C. Coup d'états Prevention

Despite how the militaries worldwide have been staging more coups lately with relative ease, coups are still undesirable. Military intervention is a shock treatment to

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[719] Constitution of Chile 1980 art. 90 ("The Forces dependent on the Ministry in charge of National Defense are constituted only and exclusively by the Armed Forces and the Forces of Order and Public Security. The Armed Forces are composed of the Army, Navy and Air Force only. They exist for the defense of the fatherland, are essential for national security and **guarantee the institutional order of the Republic.**"); the bolded text was only repealed in the 2005 Amendment.

[720] Bruneau et al., *supra* note 715, at 266.

[721] *See* Ayşegül Kars Kaynar, *Political Activism of the National Security Council in Turkey After the Reforms*, 43 ARMED FORCES & SOC'Y 523, 526-28 (2017).

constitutional systems not to be used liberally; too many risks are involved, such as the possibility of a new military authoritarian state or overreliance on the military for political change.[722] There is no reason to have a constitution that allows coups to destroy itself whenever the military deems it necessary. Accordingly, designing a constitution immune to coup d'états has been a concern in constitutional design.

At the least, adding a provision that prevents coups creates one more deterrent to potential coups.[723] The Snow White clause could work in tandem with criminal offenses based on the act of overthrowing the government written also within the constitution, punishing the usurpers whenever they lose their grip on power.[724] Prosecution of the Greek juntas in 1975 has shown the extent to which courts can deny the legality of the coup.[725] When facing the rule of force, the odds are against the rule of law. There is no clear indication that, finally, all courts will constantly deny coup-makers' power. While the use of force should fall within the ambit of the law, it is essential to acknowledge that early legal positivism relies on threats to ensure compliance with a command.[726] As the

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[722] Varol, *supra* note 4, at 494-95.

[723] Hatchard, Ndulo & Slinn, *supra* note 5, at 247 ("the risk of failure is high and the gains from 'success' low").

[724] *Id.* at 268-70.

[725] *See* Nicos C. Alivizatos and P. Nikiforos Diamandouros, *Politics and the Judiciary in the Greek Transition to Democracy*, *in* TRANSITIONAL JUSTICE AND THE RULE OF LAW IN NEW DEMOCRACIES 27, 43-45 (A. James McAdams ed., 1997) (discussing the arguments made on the legal nature of the coup from claiming that democracy had not been abolished *de jure* to focusing on the popular resistance to the regime).

[726] H. L. A. HART, THE CONCEPT OF LAW 18-25 (3rd ed., 2012).

coercive element of law leads to the authority and legitimacy of law, the courts often respect the political reality whenever the military takes control of the state.

Indeed, even with legal mechanisms against military coups, the judiciary still needs to enforce the law. When faced with the immense pressure of the armed forces in control, the courts often stand back and be pragmatic, retaining their office to at least guard against future violations of constitutional rights.[727] Court decisions from many jurisdictions show the tendency of the judiciary to rely on Hans Kelsen's understanding that the constitution loses its validity, both factually and legally, whenever a coup is recognized under international law, and the new order is functioning effectively.[728] But the overwhelming legality of usurpation is surprisingly not always untouchable.[729] Some recent courts have adopted the principle of necessity, accepting the legality of the usurper while subjecting the usurper to legal limitations in the hope of a quick return to constitutional rule.[730] The effects of these legal mechanisms are thus still inconclusive.

It has consistently been recognized that the judiciary must face immense difficulties in deciding on the validity of the usurping government. At the outset, when such a case comes to the court, the coup is usually a *fait accompli*, leaving no hope that a

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[727] *See* KITTICHAISAREE, *supra* note 57, at 159-60.

[728] Hatchard, Ndulo & Slinn, *supra* note 5, at 248-49 (discussing similar cases in Uganda, Pakistan, and Lesotho).

[729] *Id.* at 249 ("…in recent years courts throughout the Commonwealth have taken the view that a military coup is illegal from the outset.").

[730] *Id.* at 250.

judgment against the new government would resurrect the old regime.[731] Thus, the force and authenticity by which judiciaries worldwide embrace the legitimacy of a coup have to be weighed against such a backdrop.

As shown earlier in Chapter II, constitutions that specifically nullify any amnesty to coup makers are rare. In many transitional (and thus fragile) democracies, preventing a safe exit for the military and those involved in the past authoritarian regime can inadvertently obstruct the military from having a peaceful exit.[732] With many militaries participating in constitution-making during the transitional period, it is impractical for the constitution to contain such a hostile provision against the armed forces.

Here, the framework of legitimacy and coordination might provide a solution. Similar to international law, constitutional law does not need a dedicated enforcement mechanism to be effective.[733] By having the constitution as a focal point that assures commitment from all parties involved, there is more support for stability and cooperation among civilian institutions. During the initial hours of a coup attempt, when it is not clear yet if the junta might succeed in gaining effective control over all state apparatus, claims to constitutional rights and authority could make or break the whole operation. By this

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[731] Farooq Hassan, *A Juridical Critique of Successful Treason: A Jurisprudential Analysis of the Constitutionality of a Coup d'Etat in the Common Law*, 20 STAN. J. INT'L L. 191, 200 (1984).

[732] *See* Zoltan Barany*, Exits From Military Rule: Lessons for Burma, 26* J. DEMOCRACY 86, 96-97 (2015).

[733] Tom Ginsburg & Richard H. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WM. & MARY L. REV. 1229, 1233-37 (2004) (discussing the compliance literature of international law and providing a summary of arguments for compliance without external enforcement mechanisms based on coordination theory).

logic, the constitutional duty to resist the snow-white clause can have any chance of preventing an overthrow of government by the military.

However, the right to resist does not only potentially prevent coups. By justifying challenges to a constitutional regime, the right to resist can also legitimize any military intervention in politics.[734] Instead of directly limiting its power, the right to resist can justify the latest coup as the only justifiable and legitimate revolution and condemn any further attempt to overthrow the government.[735] This reasoning also applies to other coup-proofing measures as these measures can validate past coups by preventing new opposition through another coup.

III. From Guardianship to Praetorianism

If the running theme of the separation-of-powers approach is 'separation,' the one for this chapter is 'exception.' Whether through the reason of the state or other forms of legitimation, constitutional scholars accept the necessity of state survival over the rigidity of constitutional rules.[736] Notwithstanding harsh criticisms from both domestic and international institutions, powerful militaries in many countries realize the waning influence of their position. The armed forces must find a way to legitimize and stabilize

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[734] *See* Ginsburg et al., *supra* note 39, at 1212-16.

[735] *Id.*

[736] *See, e.g.,* BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC 72 (2010) ("…the modern presidency has won sweeping legal authority from Congress to declare emergencies and to take unilateral action in response to a broad range of crises…").

their political role without presenting themselves as tyrants. To reiterate the weaknesses of military government, the armed men cannot oversee a complex economy and possess no political mandate to settle social issues. As evident from the small number of countries governed under military dictatorship today, the military must either transform itself into a legitimate constitutional institution that exerts its influence in the background or completely accept the principle of civilian control.

However, despite the advantage of civilian governance over military dictatorship, civilian control is still a concern worldwide.[737] Instead of an outright coup, the military now prefers to appear neutral and intervene in politics more subtly and indirectly. The bottom line is that mere instability and vulnerability within a polity do not necessitate a military overthrow. Such conditions only allow the military to act as the praetorian guard, enhancing its political power in relation to all other political groups. With or without a coup, the military can pose as the guardian of the constitution and indirectly intervene in politics. And from guardianship, it is only a step away from praetorianism. Thus, it is argued that "transitions to elected civilian governments guarantee neither democracy nor constitutional rule" without first dealing with the regime of exception.[738]

Strikingly, today's militaries have a better chance than before of claiming legitimacy in an intervention in politics. As recent scholarship of democratic backsliding has the executive as its target, charismatic leaders often employ populist tactics to subvert

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[737] Civilian Control Index

[738] LOVEMAN, *supra* note 88, at 404.

constitutional rules and accumulate more power.[739] With the executive constantly suspected of tyranny, a contrast to the professional stance of the military has never been as pronounced. All coups claim to overthrow dictators. Notwithstanding the convention in legitimizing coups after the fact, in many cases, the civilian governments are truly authoritarian and oppressive.[740] The list of successful coups in the last decade is full of countries with a bad track record of democratic governance.[741] The uniformed officers taking the place of the ousted dictators have become a familiar sight that is sometimes celebrated.

This dominance does not rely only on coups and threats to stage a coup. Praetorianism, in essence, is "a situation where armed forces exercise a quasi-monopoly over policy-making processes and a strong influence over political power within a society by virtue of its military might."[742] Therefore, praetorianism is not equal to direct military rule. After all, the military thinks of itself as the guardian, not the governor. Conforming to the historical origin of the concept, the military only claims to be a Cincinnatus and asserts its influence where the civilian government seems to go astray. However, direct military rule, as discussed earlier, is necessary as a temporary setback from a deadlock in politics: a sort of clean slate to make a foundation for a better democratic government to

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[739] *See generally* Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78 (2018); TOM GINSBURG & AZIZ HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY (2018).

[740] VAROL, *supra* note 82, at 19.

[741] All coups in the past 10 years took place in Africa except the 2021 Coup in Myanmar.

[742] Renaud Egreteau, *Embedding Praetorianism: Soldiers, State, and Constitutions in Postcolonial Myanmar*, *in* POLITICS AND CONSTITUTIONS IN SOUTHEAST ASIA, *supra* note 317, at 127.

come. There can be no praetorianism without a prelude of military caretaking. Consequently, this improvement from direct military rule is always comparatively more attractive for the people.

With the constitutional mechanisms discussed in the second part, the military can find a way to transition to civilian governance but still retain its relevance as the fourth branch of the government. Under this scheme, the military can stay behind the scenes through its independent and professional status under the constitution, waiting for a chance to activate its moderating power to save the constitution and the nation whenever there is a crisis that could justify its exceptional power.

At this point, it is worth reiterating that there are two separable components in the overall objective of civil control of the military: coup prevention and limitation of the military's role in politics. Each of these components requires a different set of constitutional provisions and mechanisms that may or may not overlap. While weaker democracies may face both problems of civilian control, a more established democracy only needs to worry about the role of the military in politics. Framing civilian control as one whole package thus dissuades those with more robust democratic regimes from abandoning any attempt to look at their constitution as a viable tool to limit the influence of the armed forces. At the same time, coup-prone countries may direct all resources to coup prevention while inadvertently accepting a more subtle form of praetorianism. The following sections discuss the implications of this framework in detail.

A. The Military as Constitutional Maker and Constitutional Entity

The most concrete and recognized convergence between constitutional law and civil-military relations happens to be a relatively recent phenomenon in comparative constitutional law: transformative constitutionalism.[743] The idea of a transformative constitution presupposes instrumental and practical effects that stem from the deliberative act of constitution-making as opposed to a mere restatement of the status quo.[744] A prime example of this concept is the South African Constitution of 1996, which is committed to transforming society from the apartheid past.[745] Transformative constitutionalism resists the pull towards status quo and ambitiously strives towards progressive ideals.

Recent constitutional and security reforms have merged to support democratic transitions from military rule, civil wars, and authoritarian regimes.[746] While constitutions may not be suitable for any security reform tasks, the constitution-building process can provide a forum for discussing design choices regarding civil-military relations.[747] Also, successful examples from countries that have transitioned through the

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[743] Karl E. Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. AFR. J. ON HUM. RTS. 146 (1998) (creating the term 'transformative constitutionalism').

[744] Willy Mutunga, *Transformative Constitutions and Constitutionalism: A New Theory and School of Jurisprudence from the Global South?*, 8 TRANSNAT'L HUM. RTS. REV. 30 (2021).

[745] *See, e.g.*, Mkontwana v Nelson Mandela Metropolitan Municipality 2005 (1) SA 530 (CC), 2005 (2) BCLR 150 (CC) para. 81 (O'Regan J) ("[O]ur Constitution is a document committed to social transformation. It insists that the deep injustices of our past characterised by racial dispossession and exclusion be addressed and reversed."); Soobramoney v Minister of Health (Kwazulu-natal) 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC) para. 8 ("The Constitution demands … that our society be transformed … to an open and democratic society based on human dignity, equality, and freedom").

[746] Sumit Bisarya and Sujit Choudhry, Security Sector Reform inConstitutional Transitions 10-11 (Int'l IDEA Pol'y, Paper No. 23, 2020), https://www.idea.int/sites/default/files/publications/security-sector-reform-in-constitutional-transitions.pdf.

[747] *Id.*

common issues could offer solutions or lessons for those who follow the same path. For instance, Kenya and Indonesia demonstrate the possibility of having both security sector reform and constitutional transition simultaneously; however, in countries with more significant influence of the military, such as Chile, democratic reform came first, and constitutional changes gradually followed.[748]

Under this framework, endurance and supremacy—qualities attached to constitutionalism—become central to security sector reform projects. With the power to make credible commitments, constitutions are considered a point of reference or an anchor against deviations from proper civilian control.[749] For example, it is suggested (in the context of Africa) that constitutionalism could bring accountability to the armed forces by constitutionally providing clear powers and limitations for security institutions.[750] Moreover, constitutions can guarantee power-sharing arrangements for all the armed groups in countries with internal conflicts to ensure long-lasting peace as part of peace processes.[751] In some countries, during the transition to democratic government, amnesty clauses for crimes committed by the military while maintaining the power of

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[748] *Id.* at 15-25.

[749] *See,* Annie Barbara Chikwanha, A Constitutional Based Transformative Approach to Reform the Security Sector in Africa's Post Liberation War Countries 30 AFR. SECURITY REV. 170, 173-74 (2021).

[750] *Id.* at 177.

[751] BERGHOF FOUNDATION AND THE UNITED NATIONS DEPARTMENT OF POLITICAL AND PEACEBUILDING AFFAIRS, CONSTITUTIONS AND PEACE PROCESSES: A PRIMER 45-47 (2020), (https://peacemaker.un.org/sites/peacemaker.un.org/files/2021_ConstitutionsPeaceProcessesPrimer_EN.pdf).

previous authoritarian governments are written in the constitution to ensure a democratic transition in the hope of a security sector reform afterward.[752]

In the context of civilian control, Felipe Agüero investigated factors that determine the role of the military in democratic transitions through the case of post-Franco Spain, investigating "how [reformers] empower themselves to lead the military to tolerate the establishment of a political regime it initially did not favor."[753] One crucial variable for the future of civilian control is the role of the military in the outgoing authoritarian government.[754] Militaries differ in influence in all authoritarian regimes; the more roles the military has under the authoritarian regime, the harder it is for the new democratic government to enforce civilian control.[755] Moreover, a gradual and well-planned exit usually provides the military with more leverage in negotiating for terms favorable to the military dominance compared to when the democratic transition follows an abrupt exit by an authoritarian.[756]

Despite the benefits of constitutions in transforming the military, emphasis on security institutions in transformative constitutionalism could also be abused. Constitutions—which are intrinsically already difficult to enforce due to their abstract and ambitious nature—face the daunting task of throwing legal papers against the sword.

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[752] ZOLTAN BARANY ET AL., SECURITY SECTOR REFORM & CONSTITUTIONAL TRANSITIONS 61-63, 174-75(2019) (discussing the examples in Chile and South Africa).

[753] FELIPE AGÜERO, SOLDIERS, CIVILIANS, AND DEMOCRACY: POST-FRANCO SPAIN IN COMPARATIVE PERSPECTIVE 6 (1995).

[754] *Id.* at 29, 44-45.

[755] *Id*.

[756] *Id.* at 234-35.

While transformative constitutionalism has been about protecting the rights and liberty of the people against encroachment by the government, the protection is mostly against abuses of executive and legislative powers, not the use of force by the military. Thus, as successful projects of transformative constitutionalism mostly rely on courts as the primary enforcers of the constitution,[757] the judiciary struggles to find an avenue to enforce the law within the security reform project.

It is also more problematic for constitutions to deal with the security sector in detail, given the evolving nature of national security objectives. Moreover, the lack of constitutional jurisprudence on civil-military issues suggests that the courts may not be counted as a major ally in the quest for constitutional reform of the security sector. It is thus likely that the transformative power of the constitution may have to rely solely on the people and its political representatives—elements that lie outside the legal realm. In many cases, however, the more involved the military is in the process of constitution-making, the more likely that more provisions that benefit the military will exist. For instance, in the case of Pakistan up until the constitution of 1973, more provisions on the military appeared each time the military intervened to rewrite the constitution according to the dataset.

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[757] *See* Eric C. Christiansen, *Transformative Constitutionalism in South Africa: Creative Uses of Constitutional Court Authority to Advance Substantive Justice*, 13 J. GENDER RACE & JUST. 575 (2010).

B. The Subversion of Constitutional Norms

France did not only create the modern coup d'état as led by General Napoleon Bonaparte. As discussed earlier, it was the first jurisdiction where the transition and legitimization of coups through the constitution started. Attempts to cement the new constitutional regime after the French Revolution proved to be futile as the fear of the military turned out to be a real danger soon afterward with the Coup of 18 Brumaire by then General Napoleon Bonaparte, which was the end of the republic and the beginning of a new empire. Ironically, Sieyes—who was among the most influential French jurists famous for his theory of constituent power—was the mastermind behind the coup and thus inadvertently created the model (of seizure of power, writing a new constitution, and ratifying such a document by a plebiscite) for later coups all around the world to follow.[758]

Accordingly, while there are sophisticated strategies to reconcile civilian authoritarian governance with constitutionalism, virtually no doctrine or theory can support the legitimacy of direct military rulers without getting into conflicts with constitutionalism. Civilian dictators could try to adopt constitutional principles in an abusive way to consolidate their powers.[759] However, the military is categorically not civilian and not the people; it would take more explaining and abusing the constitution to

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[758] Eugénie Mérieau, *French Authoritarian Constitutionalism and Its Legacy*, *in* AUTHORITARIAN CONSTITUTIONALISM 185, 195-99 (Helena Alviar García & Günter Frankenberg eds., 2019).

[759] Rosalind Dixon & David Landau, Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy 117-140 (2021) (discussing the abuse of constituent power in both enabling and limiting constitutional change in illiberal ways).

argue that the military represents the will of the sovereign people. For this reason, most modern coup makers no longer take control of the country but often appoint a caretaker government that is at least nominally civilian. Thus, as military authoritarians already lack any legitimacy for governance, the presence of a written constitution will always undermine the authority of the military junta.

However, the connection between legitimacy and constitutionalism is obscured by path dependency; the more long-lasting the constitution that continues to operate without a coup, the more unlikely that a military coup could seize power and abrogate the document.[760] It is, for instance, almost impossible for a longstanding one like the US Constitution to ever face a severe threat of a coup. A stable and durable constitution is generally protected from coup d'états. This is, of course, a tautology of the same caliber as claiming that professional military never intervenes because once they do intervene, they will be unprofessional. A great constitution prevents coups until it does not. Constitutionalism legitimizes civilian control of the military in general; however, at this level of abstraction, the consequences of having constitutions are not obviously beneficial to civilian control. Besides, since the military is in a unique position to ostensibly fix the failings of democracy by its devotion to the interest of the state as opposed to the diverse but divisive interests of politicians, the soldiers can stage a coup d'état while claiming that they legitimately act per the people's will.[761]

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[760] *See* Arbatli *supra* note 80.

[761] DAVID BEETHAM, THE LEGITIMATION OF POWER 149-50 (1991).

The most striking example of the legitimizing effects of the constitution is how the military can quickly have a temporary constitution that also supplies an election to satisfy the international community regarding democratic legitimacy. When nations within the Economic Community of West African States (ECOWAS) agreed that they have "zero tolerance for power obtained or maintained by unconstitutional means,"[762] many coup leaders are still unfazed as they can claim to have gained their power through "free, fair and transparent elections" provided by their temporary constitution.[763] Moreover, national security often legitimizes acts of an authoritarian nature with compelling authority based on reason of the state or public safety.[764] For example, early anti-sedition laws in both the UK and Italy illustrate how attempts to prevent military subversion could justify authoritarian abuse of the law, resulting in repressive measures against political opponents.[765]

Conclusion

While the separation-of-powers approach to civilian control has its limitations, the approach is straightforward in its structure and purpose. As this chapter shows, there is still much confusion as to what the constitution can do to advance civilian control by making the military an exceptional branch of the government. Through this confusion,

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[762] Protocol on Democracy and Good Governance (ECOWAS 2001-a), art. 1c.

[763] https://www.ipinst.org/wp-content/uploads/2022/04/Leonie-Mills-Effectiveness-of-ECOWAS.pdf

[764] *See* Günter Frankenberg, Authoritarian Constitutionalism: *Coming to Terms with Modernity's Nightmares*, *in* AUTHORITARIAN CONSTITUTIONALISM 1, 13-17 (Helena Alviar García & Günter Frankenberg eds., 2019).

[765] Stephen Skinner, *Inciting Military Disaffection in Interwar Britain and Fascist Italy: Security, Crime and Authoritarian Law* 42 OXFORD J. LEGAL STUD. 599-604 (2022).

the military can seize the opportunity to empower itself and act as the praetorian guard, intervening in politics during a crisis. Thus, constitutional designers should pay attention to the intersection between the theories of the state of exception and the military before creating constitutional norms that could instead backfire by empowering the military.

III: Conjecture and Application of the Constitutional Theory on Civilian Control

Chapter VI: Of the Constitution and Civilian Control: A Quantitative Exercise

"An' hustlin' drunken soldiers when they're goin' large a bit

Is five times better business than paradin' in full kit.."[766]

Rudyard Kipling

Introduction

It is usually acknowledged that when the civilian government is neither effective nor legitimate, the military is no longer under civilian control and thus can intervene in politics without much resistance. Through simple arithmetic, one can solve the equation of civil-military relations either through the strengthening of the civilian and democratic institutions or through the weakening of the military capacities to intervene. As seen in previous chapters, attempts were made to create a commander-in-chief to coordinate the civilian side against the armed forces. Alternatively, the military may be weakened by the constitution, which can be done by limiting political rights and other oversight mechanisms. Even after the theories from Chapters IV and V, most examples are necessarily anecdotal, and the causality between the law and the real world in each argument is hardly established. This is even more difficult for constitutional designers to choose among a catalogue of constitutional mechanisms without a guarantee of better

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[766] RUDYARD KIPLING, RUDYARD KIPLING 435 (Daniel Karlin ed., 1999).

civilian control. To provide more information for the real world, this chapter then offers an exercise in quantitative research to shed some light on the dilemma of constitutional choices regarding civilian control.

With the dataset created for this dissertation, it is possible to perform regression analysis to detect any correlations between constitutional clauses on the military and the level of civilian control. The keyword here is 'correlation' because civilian control is a complicated process encompassing various factors. All the variables that are potentially relevant to civilian control are virtually unidentifiable. Even with the best efforts to apply empirical research on constitutions, claims to causality are fraught with problems of inadequate data and causal complexity.[767] The adage, "correlation does not imply causation," applies here as in any attempt at quantitative research in any social institution as complex as a constitutional system. With limitations of causal inference in mind, the merit for such an attempt is warranted when taken modestly to complement small-n qualitative research. Insights from case studies provide an overarching theory, while regression analysis tests the relevance of mechanisms identified under the theory.[768]

This chapter accordingly explores the possibility of accessing the effectiveness of constitutional provisions as a tool for civilian control. After the theoretical and qualitative chapters, two points are available for empirical verification. The first is whether the separation-of-powers approach is misleading and ambiguous. Because these

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[767] *See* David Law, *Constitutions*, *in* THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH 376, 387-90 (Peter Cane & Herbert M. Kritzer eds., 2010) (discussing methodological challenges in conducting empirical research on constitutions).

[768] *See id.* at 389-90.

constitutional provisions only facially support civilian control, they are expected not to improve civilian control in any meaningful manner. The second point is whether the military-exception approach is prone to abuse. Because constitutional provisions that single out the military as an independent institution could potentially invite more military intervention in politics, those countries with such provisions should not expect much improvement in civilian control. Instead, these constitutions with more prominent roles for the military are supposed to backfire, resulting in weaker civilian control.

Through cross-country panel regressions, I measure overall correlations between the existence of specific types of constitutional provisions and the level of civilian control. The results mostly follow the two insights. Specifically, there is no correlation between provisions from the separation-of-powers approach and the improvement of civilian control. Meanwhile, provisions from the military-exception approaches tend to correlate with lower levels of civilian control in countries that adopt them. While it is impossible to confidently say that attempts to improve civilian control through the constitution mostly fail, the empirical research at least warns constitutional drafters and scholars not to be too optimistic about the prospect of success for their constitutional designs.

This chapter consists of three parts. The first provides details on the methodology applied. The next part deals with the results from regression analysis. The last part then discusses the implications of the results in connection with the overall arguments of the dissertation.

I. Methodology

The large-N statistical analysis here is inspired by the literature on the effectiveness of constitutional rights as the most similar model looking for the relationship between the existence of specific constitutional provisions and its causal effects in the real world.[769] The main challenge against using two-stage estimation strategies applies more evidently in pondering the impact of constitutional law on civilian control because any variables that can predict the adoption of specific civilian control measures in the constitution will also affect the level of civilian control.[770] For instance, the adoption of coup-proofing measures may result from a mismanagement of the economy under a deposed military junta, but such a disastrous performance also tarnishes the legitimacy and legacy of the military and decreases its overall power relative to the civilian side of politics.[771]

Because constitutions are often a product of various social, political, and economic factors, these factors are confounders that limit causal inference between the adoption of constitutional provisions and the level of civilian control.[772] One way to

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[769] *See generally* CHILTON & VERSTEEG, *supra* note 20, at 103-115 (providing a general discussion on the methodology of quantitative studies of constitutional rights).

[770] *Id.* at 104 ("… any variables that accurately predict the adoption of a constitutional right will also influence a range of other factors—like the government structures adopted by the constitution—which, in turn, will influence rights outcomes.").

[771] *See* SIMON BUTT & TIM LINDSEY, THE CONSTITUTION OF INDONESIA: A CONTEXTUAL ANALYSIS 5-7, 51-60 (2012) (providing an account of how the economic crisis in 1998 resulted in a series of constitutional reforms that strengthen the house of representatives and took away the reserved seats for the military in the parliament).

[772] *See* CHILTON & VERSTEEG *supra* note 20, at 107-08 (discussing the same problem with regards to the adoption of constitutional rights).

address this problem is to create a regression model with control variables that also affect the adoption of civilian control measures.[773] The inclusion of controls should complement the naïve regression analysis that only compares constitutional provisions' performances in different jurisdictions as if all countries are essentially the same in all characteristics.[774] The controls included are what the literature believes to affect civilian control in general: the occurrence of civil wars, internal and external armed conflicts, GDP, population, and democracy score. Moreover, the assumptions about the effects of constitutional provisions and civilian control are informed by the theories and case studies discussed, reducing the chance that any statistical significance was caused simply by randomness.[775]

In addition, the regression analysis here is set up as cross-country panel regressions with country-fixed effects, year-fixed effects, and robust standard errors clustered at the country level to allow for serial correlation over time. With panel data, variables that are not and cannot observed are also accounted for to alleviate omitted variable bias, fixing unobserved variables that change over time but vary across countries and vice versa.[776] Because each country has multiple characteristics that are inherently unique, using time series regression models with the more restrictive robust standard

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[773] *Id.*

[774] *See* Lee Epstein & Andrew D. Martin, *Quantitative Approaches to Empirical Legal Research*, THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH 901, 916 (Peter Cane & Herbert M. Kritzer eds., 2010).

[775] *Id.* ("[regression models] "require some strong assumptions about the relationship between the key causal variable and the outcome variable of interest") (citations omitted).

[776] BADI H. BALTAGI, ECONOMETRIC ANALYSIS OF PANEL DATA 4-5 (3 ed., 2005).

errors can control for these characteristics that are often undetected as both the effects of changes over time and entities are fixed in such models.[777]

To assess the effect of constitutional provisions on civilian control in my most simplistic model, each variable that captures a category of constitutional provisions regarding civilian control becomes an independent variable. These independent variables are then put into a regression model to see their effects on the overall level of civilian control—the dependent variable of interest.[778] The data on the level of civilian control comes from Michael R. Kenwick, who created a model that generates estimates of civilian control for all countries from 1945 to 2010. This dataset takes advantage of the earlier datasets that measured the degree of military involvement in politics to create a new measure for civilian control.[779] In doing so, Kenwick created the drift model to generate the level of civilian control for each country, arguing that civilian control is self-enforcing and that more years under civilian government should result in better civilian control in general.[780] Most importantly, none of the ten indicators used to identify forms of military involvement in politics for the new models do not look into constitutional

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[777] James G. MacKinnon et al., *Cluster-Robust Inference: A Guide to Empirical Practice*, 232 JOURNAL OF ECONOMETRICS 272, 273 (2023) ("Hypothesis tests [with cluster-robust standard errors] may reject far more often than they should.").

[778] *See Infra* Appendix Codebook for details of all variables.

[779] Kenwick, *supra* note 15, at 75-76.

[780] *Id.* at 73-75.

texts.[781] The regression analysis then relies on constitutional provisions to draw any correlations between the constitution and civilian control.

II. Results

For the most fundamental question of whether the existence of the military—notwithstanding its relevance, there appears to be no correlation with the level of civilian control. Mere reference to the military also does not correlate to the level of civilian control in any statistically significant manner. Also, having a dedicated heading to the military or national defense weakly and negatively correlates with civilian control. Interestingly, even the more specific and clear-cut prohibition on the armed forces does not correlate with any increase or decrease in the level of civilian control. Furthermore, the same is true for constitutions that have provisions regarding terrorism and emergency powers; there is no correlations between these provisions and civilian control in any statistically significant way.

A. Separation-of-powers Approach

All regression analyses on constitutional provisions categorized under the separation-of-powers approach fail to produce any statistically significant result. The following group of provisions are all subjected to the regression analysis: commander-in-

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[781] *Id.* Appendix p.1 (providing the list of all ten variables used to create the model), https://doi.org/10.7910/DVN/VCFMBI.

chief clauses, military appointment powers clauses, war powers clauses, and power to raise and maintain armed forces clauses. Therefore, the null hypothesis that these constitutional provisions do not have any effect on civilian control cannot be convincingly rejected.

However, it is worth reminding that these provisions are among the most common worldwide. As discussed in Chapter II, apart from the power to raise and maintain armed forces, more than half of the current constitutions have the rest of the three groups of constitutional clauses under the separation of powers framework.[782] The widespread use of these provisions obscures any significance that they may have on a large scale. It is possible, for instance, that some coup-prone countries include these provisions within an instance of "constitutional boilerplate," in which constitutional drafters copy language from other model texts.[783] Thus, these borrowings, without serious deliberation, may offset any gain that other countries with well-functioning civil-military relations may benefit from the same kind of provisions. These results do not confidently state that these provisions are ineffective in achieving civilian control. As a robustness check, even when the variable that captures a country's level of democracy ("Polity 2") is plugged into the same regression model without controls, it only has a marginal effect on the level of civilian control. The range of CCS_Dynamic, which is the score of civilian control used in the model, goes from -3.43 for Myanmar to 3.09 for Denmark. As shown in Table I,

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[782] *See sufra* Chapter II.

[783] Tom Ginsburg, *Constitutional Specificity, Unwritten Understandings and Constitutional Agreement*, *in* CONSTITUTIONAL TOPOGRAPHY: VALUES AND CONSTITUTIONS 69, 89 (András Sajó & Renáta Uitz eds., 2010).

the coefficient of Polity 2 (0.03) is minimal compared to the overall scale of CCS_Dynamic. Civilian control, as ill-defined as it is, may include too many measures that only multiple variables together—such as a country's GDP, population, and democratic score—can predict the level of civilian control.

Table I: The correlation between democracy score and civilian control under the naïve regression model

VARIABLES	**Correlation on Civilian Control**
polity2	0.0398***
	(0.00820)

Note: *** p < 0.01, ** p < 0.05, * p < 0.1. Robust standard errors are clustered by country in parentheses. All specifications included a constant and year-fixed effects, but they are omitted from the table.

B. Military-Exception Approach

Initially, constitutional provisions from the military-exception approach seem to follow the same pattern as provisions from the separation-of-powers approach. Almost all the main provisions in this category fail to have any statistically significant correlations. From the clauses that declare the military as an obedient and politically neutral institution to those that limit the political rights of military officers, none significantly impacts the level of a country's civilian control, even under regression models with no added controls. However, among the various constitutional tools that constitutions worldwide

designed to control the military,[784] a few variables show some correlations with civilian control. But while all of these have statistically significant effects, these effects are in the negative direction.

Specifically, the results of the panel regressions suggest that constitutionalizing a ban on voting rights of the military and establishing a national security committee have a negative and statistically significant relationship with the level of civilian control in countries that adopted these constitutional provisions. This remains true in most cases even after controls such as democratic scores and occurrences of civil war are included in the models. For constitutional provisions that limit military personnel's voting rights, Table 2 shows how the variable “Voteban” has a statistically significant negative relation with civilian control in all but the second model, which has democracy score as a control. In the third model, with all the controls, the coefficient is as large as 0.40, the equivalent of a 5 percent decrease in the civilian control score.[785] However, even though the second model fails to have a statistically significant result, the coefficient is still substantial and negative, with a p-value of 0.08, which is still low. Similarly, Table 3 provides a similar result for constitutional provisions establishing national security councils. However, national security councils provided by the constitution have relatively weaker correlations compared to the provisions on vote bans. In the third model with all the controls, the

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[784] There are eight variables under the label of military-exception approach compared to just four under the separation-of-powers approach.

[785] The scale of civilian control score is from -4 to 4.

result is only at the 10 percent significance level, and its coefficient only equals to a 1.2 percent decrease in civilian control score.

Table 2: Regression Results of Limitations of Voting Rights on Civilian Control

VARIABLES	**Model 1 (Voteban only)**	**Model 2 (with Democracy as a Control)**	**Model 3 (with All Controls)**
Limitations of Voting Rights for the Military	-0.386** (0.187)	-0.296 (-0.171)	-0.407*** (0.136)
Polity2		-0.030*** (-0.007)	-0.0288*** (0.00649)
Existence of a Civil War			-0.0449 (0.0531)
Existence of an international war			0.0345 (0.0692)
Existence of an international armed conflict			-0.114* (0.0609)
Existence of an internal armed conflict			0.152 (0.107)
Expenditure-side real GDP			1.26e-07*** (4.03e-08)
Real GDP per Capita			8.66e-06 (7.86e-06)

Population			0.00184*** (0.000516)
Observations	6,738	6,592	4,008
R-squared	0.750	0.754	0.896

Robust standard errors are in parentheses *** p<0.01, ** p<0.05, * p<0.1. Robust standard errors are clustered by country in parentheses. All specifications included a constant and year-fixed effects, but they are omitted from the table.

Table 3: Regression Results of Designated Supervisory Organization on Civilian Control

VARIABLES	**Model 1**	**Model 2 (With Democracy as a Control)**	**Model 3 (With All Controls)**
Designated Supervision	-0.270*** (0.102)	-0.289*** (0.0978)	-0.156*(0.0937)
polity2		0.0326*** (0.00695)	0.0305***(0.00636)
Existence of a Civil War			-0.0534 (0.0524)
Existence of an international war			0.0458 (0.0707)
Existence of an international armed conflict			-0.117*(0.0605)
Existence of an internal armed conflict			0.152 (0.110)
Expenditure-side real GDP			1.25e-07*** (3.97e-08)
Real GDP per Capita			7.89e-06 (7.86e-06)

Population			-0.00186*** (0.000522)
Observations	6,738	6,592	4,008
R-squared	0.752	0.758	0.896

Robust standard errors in parentheses *** p<0.01, ** p<0.05, * p<0.1 Robust standard errors are clustered by country in parentheses. All specifications included a constant and year-fixed effects, but they are omitted from the table.

The regression result is relatively weaker but still statistically significant regarding the variable "Millegis," which captures whether the constitution gives the military a position within the government by providing, for example, a military quota in the parliament. As seen in Table 4, the variable is statistically significant and negative at the 1 percent confidence interval in the simple specifications of Model 1 and Model 2. With the first model, the impact of the coefficient is as high as the equivalent of a decrease of 7.75 percent in civilian control score. However, the third model only provides weak results with correlations only at the 10 percent significance level.

The large confidence interval in the model with several controls is likely a result of the small sample for these specifications, as the dataset is incomplete for many country-years for these controls. There are inevitable intermittent missing observations that affect the regression models. Without further robustness checks, there is not yet strong evidence that these provisions correlate with worse outcomes in civilian control. In any case, however, it is unlikely that these provisions usually result in better civilian control.

Table 4: Regression of Provisions that Treat the Military as the Fourth Branch on Civilian Control

VARIABLES	**Model 1**	**Model 2 (With Democracy)**	**Model 3 (With controls and democracy)**
Constitutional Powers for the Military	-0.628*** (0.115)	-0.535*** (0.110)	-0.174* (0.102)
polity2		0.0278*** (0.00724)	0.0292*** (0.00661)
Existence of a Civil War			-0.0431(0.0519)
Existence of an international war			0.0362 (0.0691)
Existence of an international armed conflict			-0.113* (0.0610)
Existence of an internal armed conflict			0.150 (0.107)
Expenditure-side real GDP			1.25e-07*** (4.02e-08)
Real GDP per Capita			9.26e-06 (7.98e-06)
Population			-0.00184*** (0.000528)
Observations	6,738	6,592	4,008
R-squared	0.759	0.761	0.896

Robust standard errors in parentheses *** p<0.01, ** p<0.05, * p<0.1 Robust standard errors are clustered by country in parentheses. All specifications included a constant and year-fixed effects, but they are omitted from the table.

One other statistically significant result relates to the variable "Conscrgen," which captures whether the constitution directly requires compulsory military service from its citizens. While this type of provisions was not categorized within the two main

approaches to civilian control, having such a duty written into the constitution strongly correlates with worse civilian control score. The effect is roughly 5 percent on the eight-point scale of the civilian control score variable for the first and second models, with a confidence interval of 99 percent. With controls in model 3, the result is still statistically significant at the 5 percent significance level, with the size of the effect decreasing by half. Lastly, the fourth model only weakly correlates negatively to civilian control at the 10 percent significance level.

Table 5: Regression of Provisions that Prescribe Military Conscription on Civilian Control

VARIABLES	**Model 1**	**Model 2 (With Democracy)**	**Model 3 (With Controls and democracy)**
conscrgen	-0.468*** (0.135)	-0.420*** (0.135)	-0.174* (0.104)
Observations	6,738	6,592	4,008
R-squared	0.758	0.762	0.896

Robust standard errors in parentheses *** p<0.01, ** p<0.05, * p<0.1 Robust standard errors are clustered by country in parentheses. All specifications included a constant and year-fixed effects, but they are omitted from the table.

III. Discussion

Overall, the results from the regression models are consistent with the hypothesis that constitutional provisions alone cannot improve civilian control. In contrast, the military can use the constitution as an instrument to further its influence.

However, the lack of any positive effects from constitutions presented here does not lead to the conclusion that constitutions are useless against the military. There are possible reasons why the presence of constitutional texts might not correlate with better civilian control. First, as already discussed, the universality and ambiguity of the separation-of-powers approach to civilian control conceal how each jurisdiction interprets and applies these provisions effectively. For example, how one country has the president as the commander-in-chief does not mean the same thing in another country. These things are not truly equal because some presidents are more powerful, and some are mostly figureheads with ceremonial roles. As discussed earlier, the role of a strong commander-in-chief, in combination with a normative belief in a direct chain of command, can coordinate all civilian powers to prevent military intervention, as seen in the Algiers putsch against President De Gaulle of France and King Juan Carlos I's repudiation of the 1981 Spanish coup attempt.

Second, civilian control is a complex process involving more than external factors like the constitution and other government institutions; it also involves internal factors such as the ideology and training of the officer corps.[786] As happens in different fields of constitutional law, there are instances where law can only affect practice only to a certain extent.[787] In this sense, constitutional clauses for civilian control could work in

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[786] Jon Rahbek-Clemmensen, beyond 'The Soldier and the State': The Theoretical Framework of Elite Civil-Military Relations 120-44 (Aug. 2013) (Ph.D. dissertation, London School of Economics) (providing a thorough account of both the definition and tools of civilian control).

[787] *See, e.g.,* Tom Ginsburg et al., *Do Executive Term Limits Cause Constitutional Crises?*, *in* COMPARATIVE CONSTITUTIONAL DESIGN 350, 374 (Tom Ginsburg ed., 2012) (arguing that constitutional term limits work most of the time even though there are always leaders who overstay).

established democracies to maintain healthy civil-military relations. However, controlling politically powerful militaries may be impossible for most constitutions without other supporting elements.

That said, it is more likely that mechanisms for civilian control through the constitution are ineffective. Based on the theoretical discussions in previous chapters, constitutional makers might not even consider that these constitutional provisions are meant for civilian control. This is especially true for the separation-of-powers approach, which has been followed simply because other well-established constitutions have adopted it. Such patterns continue without much discussion and deliberation. Thus, despite how many constitutions require the legislature to approve the maintenance and funding for the armed forces periodically as prescribed, such a requirement becomes a mere formality with minimal effects in practice.[788] One cannot expect results from any law that is forgotten and ignored.

As for constitutional provisions of the military-exception approach, it seems a puzzling contradiction that having these strong and direct mechanisms may result in a worse result for civilian control. However, there are many plausible explanations for this result. At the outset, constitutions that include the direct approach to civilian control mostly have a cause for concern. Thus, these constitutions belong to countries fraught with troublesome civil-military relations.

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[788] *See supra* Chapter IV.

Moreover, because civilian control is not a simple concept, provisions that establish civilian control and prevent coups are doomed to fail without concrete plans for implementation. Under the constitution, formulation of civilian superiority is necessarily a constitutional principle that lacks the advantage of functioning as a focal point associated with constitutional rules.[789] While clear and simple rules (such as setting up the minimum age for presidential candidates or constitutional amendment rules) can immediately communicate normative information to the average citizen, there is always disagreement on the proper approach to civilian control. Indeed, acceptable civilian control operates within the spectrum that allows for the assertiveness of the civilians and the independence of the military to vary in accordance with a polity's context.[790] Constitutional enforcement becomes ineffective without general agreement on what is required by civilian control.

Moreover, the ambiguous nature of civilian control is further exacerbated by the lack of judicial interpretation. Since the judiciary tends to defer to the executive for issues of national security due to the lack of expertise and the political nature of military issues,[791] constitutional principles for civilian control do not benefit from the exposure and elucidation of constitutional adjudications. For instance, coup-proofing measures, such as the Snow White clause, are rarely enforced as the courts can only bring about a

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[789] *See* Barry R. Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 THE AMERICAN POLITICAL SCIENCE REVIEW 245, 245-62 (1997).

[790] *See* FEAVER, *supra* note 204, at 7-12 (providing the definition of civilian control as a spectrum).

[791] *See, e.g.,* GEOFFREY CORN ET AL., NATIONAL SECURITY LAW: PRINCIPLES AND POLICY 42-49 (2015) (discussing the doctrinal tools that the American federal courts invoke on issues of war powers under the Constitution).

constitutional crisis by ruling against the coup makers. As discussed in Chapter V, there is always a possibility of the state of exception that legitimizes a deviation from the norm of civilian control; courts do not want to recreate disorder and violence that have often justified coups in the first place; thus, judges are willing to defer to the will of the junta under the doctrine of state necessity.[792]

For those provisions that result in a negative level of civilian control, there are also mechanisms at hand that possibly account for such correlations. To begin with, due to the more organized nature of the military with its chain of command, the soldiers can better coordinate against the civilians stuck with their ever-conflicting ambitions.[793] If constitutional provisions that single out the military as an exceptional institution worsen civilian control, it is possibly through the military's appropriation of the constitution. For instance, security councils, which are usually outlined in the constitution with a list of objectives and another list of committees to support civilian control, can gradually be repurposed to work instead as "the institutional channel through which the armed forces could act as the ultimate safeguard of the institutional order"[794] as happened in Chile according to its 1980 Constitution. A strong case along the same line is the limitation of the right to vote among the military during the time of President Suharto. The military might gain legitimacy as a professional institution for its willingness to restrain from

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[792] *See supra* Chapter V.

[793] *See* SINGH, *supra* note 104, at 35-38 (arguing that coup makers from the top level of the military have far more success compared to those that come from the bottom due to the difference in their ability to coordinate).

[794] ROBERT BARROS, CONSTITUTIONALISM AND DICTATORSHIP: PINOCHET, THE JUNTA, AND THE 1980 CONSTITUTION 245 (2002).

exercising its political rights. Still, it did not need any voting rights because the constitution of Indonesia at the time already provided the military with many representatives in the legislature.[795]

Interestingly, military conscription can also work in the same manner as these provisions that worsen civilian control. Belonging to neither of the two main approaches of civilian control via the constitution, the duty to serve in the military has a noticeable negative correlation with the score of civilian control. Despite the argument that a vigorous program of compulsory military service will force the military to be representative of the people and democratic,[796] military conscription can more conveniently indoctrinate citizens and legitimize the military by granting the armed forces an indirect claim to a democratic mandate.[797] Indeed, since the duty is often both to serve the military and defend the nation and the constitution, putting a constitutional duty to serve becomes the greatest legitimizing tool for the military whenever it must intervene in politics.[798] Lastly, if the constitution contains the duty to serve the military,

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[795] SIMON BUTT & TIM LINDSEY, THE CONSTITUTION OF INDONESIA: A CONTEXTUAL ANALYSIS 59-60 (2012).

[796] *See supra* Chapter II.

[797] *See, e.g.,* Alexander de Juan et al., *The Partial Effectiveness of Indoctrination in Autocracies: Evidence from the German Democratic Republic*, 73 WORLD POLITICS 593, 622 (2021) (concluding that "military service enabled individuals to mimic the behavior required by the regime without being true ideological zealots"); Ioannis Choulis et al., Public Support for the Armed Forces: The Role of Conscription, 32 DEFENCE & PEACE ECON. 240, 246-47 (finding that countries with military conscription have more public support for the military).

[798] *See* Frederick Cowell, *Preventing Coups in Africa: Attempts at the Protection of Human Rights and Constitutions,* 15 INT'L J. HU. RTS. 749, 751 (2011) (providing examples of African militaries that claim to stage coups only to protect the constitution and bring peace).

any attempt to reform the recruitment system becomes an issue of constitutional amendment.

Conclusion

The key takeaway from the regression analysis exercises here is that the benefits of constitutional provisions to civilian control are inconclusive. On the other hand, the evidence of abuses or ineffectiveness of these provisions is more convincing. This is especially true for those provisions supporting the military's guardian role, such as those that govern military conscription, voting rights of military members, national security councils, and direct constitutionalization of the military.

Chapter VII: Turkey, Thailand, and Myanmar: The Most Difficult Cases of Civilian-Military Relations

"An army constitutes a small community, very closely united together, endowed with great powers of vitality, and able to supply its own wants for some time."[799]

Alexis de Tocqueville

Introduction

The three case studies for this dissertation are deceptively different. Myanmar and Thailand—despite their geographical proximity—belong to different categories of democratic development.[800] Turkey—despite its recent authoritarian turn—is still considered a constitutional democracy and had recently thwarted a coup attempt in 2016. Myanmar presents a seemingly new and growing trend of the military using the constitution to legitimize and solidify its place in a civilian regime. This endeavor culminated in the coup that led the country to direct military rule in 2021. On the other hand, Thailand has seen a successful transition towards civilian rule, with the opposition party replacing the military-backed political party as the government. So far, the Thai military poses a relatively low risk of staging another coup.

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[799] 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 343 (Henry Reeve trans., Longman 1862) (1835).

[800] *See* MARINA NORD ET AL., DEMOCRACY REPORT 2024: DEMOCRACY WINNING AND LOSING AT THE BALLOT 17 (2024), available at https://www.v-dem.net/publications/democracy-reports/ (listing Myanmar as a closed autocracy while listing Thailand and Turkey as electoral autocracies).

Despite the varying trajectories regarding constitutional democracy among these jurisdictions, Turkey, Thailand, and Myanmar share an uncanny similarity in their history of praetorianism: a situation where the military determines the success or failure of the political process.[801] All three countries have been through several coups and coup attempts; some took place recently during the last decade.[802] In these jurisdictions, the democratic governments were heavily influenced or directly controlled by the military at the time of this writing despite fierce demonstrations on the streets and international pressures. In a world where civilian control of the military is a norm, these outliers blatantly defy the belief that days of powerful military men are numbered and more subtle forms of democratic backsliding are in fashion. Thus, using the models proposed by scholars in civil-military relations, which require, at a minimum, that democratic representatives of the people have the ultimate authority over the military,[803] these countries seem to be extreme cases outside the established standards of how the military should and could behave.

This chapter thus capitalizes on this unfortunate similarity to test the hypothesis that constitutional texts alone are primarily ineffective in enhancing civilian control and that the military could instead capitalize on the constitution to undermine constitutional democracy. Interestingly, the three different outcomes of civilian control from the three case studies are an invitation for process tracing—identifying the causal chain and

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[801] *See* Amos Perlmutter, *The Praetorian State and the Praetorian Army: Toward a Taxonomy of Civil-Military Relations in Developing Polities*, 1 COMPARATIVE POLITICS 382, 383-85.

[802] 2014 In Thailand, 2016 in Turkey, and 2021 in Myanmar.

[803] James Burk, *Theories of Democratic Civil-Military Relations*, ARMED FORCES & SOC. 7, 8 (Fall 2002).

mechanisms that may or may not be connected to constitutional choices made in these jurisdictions. The fact that constitutional decisions in all three constitutional systems differ in certain aspects of civilian control despite similar powerful militaries at least warrants an investigation into the relevance of constitutional texts. Apart from trying to understand the unconventional use of the constitutions, this chapter also aims to provide evidence that such a strategy rarely works in establishing civilian control and only poses more risk towards authoritarianism of both military and civilian variations. With this final aim, these strategies and constitutional provisions will be identified and analyzed to prevent future abuses of such schemes.

This chapter consists of three parts. The first introduces the three militaries with both their historical and constitutional contexts. Part II investigates the constitutional texts in the previous and current constitutions to compare the similar and different mechanisms of civilian control and military empowerment to provide supporting evidence for the theories developed in Chapters IV and V. The last part then provides a normative analysis after considering the success and failure of these constitutions with an additional discussion on constitutional design.

I. The Historical and Constitutional Background of the Three Countries

As the issue of civilian control involves more than legal and constitutional considerations but also social, economic, and political factors, it is necessary first to establish some relevant similarities between the three cases here to provide evidence that all of them have comparable challenges in achieving civilian control. The case of Turkey

is especially challenging as it is outwardly different from the rest in terms of geography and overall cultural aspects. However, as will be addressed in this part, Turkey has a pattern of civil-military relations and constitutional history that resembles the other two countries to the point that its vicious circle of coups and new constitutions from 1960 to 1980 might be a mirror image of the situation in Thailand.

While this chapter focuses on constitutional texts, it is inevitable that many social and political factors of both exogenous and endogenous nature also determine both the shape of civil-military relations and the practice of constitutionalism in each country. This part provides background information on the three different militaries and their constitutional contexts to provide a fuller picture of the causes and effects of constitutional design choices in these countries.

A. The History and Contexts of the Armed Forces

Historically, Thailand, Myanmar, and Turkey converge in their struggle for modernization of their once flourishing empires while diverging wildly in their roles during colonialism. Thailand survived colonization through various compromises by European powers. The entirety of present-day Myanmar became part of British India in 1886. Turkey rose from the defeat of the Ottoman Empire in World War I to become an independent republic. Through these events, there are variances in similarities and differences among the three countries that could render them a mismatch for comparison. For this dissertation, however, these countries are compatible as case studies because they all have strong and influential militaries that persistently defy the dominance of civilian

politics, which is still far from democratic consolidation. In aggregate, the three countries have historical and geo-political features that guarantee the salience of the armed forces for the foreseeable future despite internal and external pushes towards greater civilian control. In these contexts, the odds are stacked against civilian control that additional constitutional measures can be meaningful or even decisive in shaping civil-military relations.

Intuitively, pairing Thailand and Myanmar together may seem more conducive in a comparative study. Even though the two countries long perceived each other as their archenemy in the annals of the old kingdoms,[804] the two neighboring countries share many similar religious[805] and historical characteristics.[806] With the long history of conquest in the region, the importance of their military might resonate today, with both the Thai and Burmese military touting their connection to the warrior kings of the past.[807] One crucial difference between the two countries is Myanmar's colonization, which could divert the country in its course. That said, the European influences on the Thai

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[804] *See* ARTHUR COTTERELL, A HISTORY OF SOUTHEAST ASIA (2014) 168-69 (recounting, for example, the sacking of Ayutthaya in 1761).

[805] *See* Sascha Helbardt et al., *Religionisation of Politics in Sri Lanka, Thailand and Myanmar*, 14 POL. RELIGION & IDEOLOGY 36, 49-51 (2013) (stating the use of Buddhism by the military government in both Myanmar and Thailand).

[806] *See* COTTERELL, *supra* note 804, at 131-76 (providing historical backgrounds for medieval Burma and Thailand).

[807] *See, e.g.*, Matthew Kosuta, *King Naresuan's Victory in Elephant Duel: A Tale of Two Monuments*, 34 SOJOURN: J. SOC. ISSUES SOUTHEAST ASIA 578, 586-87 (2019) (discussing the strategy of the military governments in to appeal to royalist nationalism by referring the role of the military as the protector of the throne). *See also* Indrė Balčaitė & Christian Gilberti, *Recurring Coups in Myanmar and Thailand: Military as Monarchy and the Military-Monarchy Nexus*, LSE SOUTHEAST ASIA BLOG (Feb. 9, 2021), https://blogs.lse.ac.uk/seac/2021/02/09/recurring-coups-in-myanmar-and-thailand-military-as-monarchy-and-the-military-monarchy-nexus/. (explaining how the white elephant symbol which had been associated with the Burmese kings is now adopted by the military).

ruling elites were almost, if not equal, to what Myanmar had gone through during British rule.[808] Still, the fact that both the military in Thailand initiated the democratic revolution in 1932 and the military in Myanmar led the movement towards independence from British rule in 1948 means that both of these armed forces were among the originators of their modern constitutions.

The inclusion of Turkey as the third case thus warrants more justifications against the charge of cherry-picking. Firstly, like Myanmar and Thailand, the Turkish military has been inextricably part of the nation's history, forming a constitutional identity that uniquely features the armed forces as a factor for constitutional success. Despite belonging geographically to West Asia and Southeast Europe with characteristics that are in stark contrast to the two Southeast Asian countries in terms of its religion and culture, Turkey also has the same story of the military leading a regime change that resulted in a new democratic constitution. Through their similarities in origins, these militaries are salient and powerful institutions that still shape and intervene in the overall constitutional politics of their countries. The following sections shall provide a summary of these militaries with a discussion of their convergence at the end of this part.

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[808] *See generally* Rachel V. Harrison & Peter A. Jackson, *Introduction: Siam's/Thailand's Constructions of Modernity under the Influence of the Colonial West*, 17 SOUTH EAST ASIA RESEARCH 325, 337-43 (Sage Publications, Ltd. 2009). (discussing how Siam was 'in several senses informally colonized'). *But see* TAMARA LOOS, SUBJECT SIAM: FAMILY, LAW, AND COLONIAL MODERNITY IN THAILAND 21 (2006) (arguing that Siam was 'at the crossroads of colonized countries and sovereign, imperial powers, sharing some of the traits of both but reducible to neither').

1. Myanmar

The Burmese Kingdom was once a great empire in the region, subjugating many of its neighboring Kingdoms at one point in history. This great achievement is owed to the monarchs and the warriors fighting alongside them in the many wars. With the loss of its monarch after the colonization in 1886, the military naturally inherited the legacy and legitimacy of kings to claim itself as the defender of the nation.[809] Throughout the history of modern Myanmar, the armed forces have been the only constant figure of authority amidst the conflicts and tensions stemming from the ethnic, religious, and ideological differences found within the country. The Three Main National Causes included in the current Constitution illustrate the military's guardianship of the nation[810] since the military is responsible for "the non-disintegration of the Union, the non-disintegration of national solidarity, and the perpetuation of sovereignty."[811]

The rise of the military came after World War II when the Burma Independence Army (BIA) led by Aung San—the founder of the modern Myanmar Armed Forces ("Tatmadaw")—negotiated almost single-handedly the Burmese independence in 1947.[812] However, the assassination of Aung San disrupted the transformation towards parliamentary democracy and left the country with protracted ethnic conflicts, which

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[809] Balčaitė & Gilberti, *supra* note 807.

[810] *See* MELISSA CROUCH, THE CONSTITUTION OF MYANMAR: A CONTEXTUAL ANALYSIS 36-40 (2019) (arguing that the Tatmadaw "co-opts the people into its cause" through these three principles that have been around since the 1990s)

[811] Constitution of the Republic of the Union of Myanmar, art. 20(e) (2008).

[812] *See* Chambers, *supra* note 317, at 108-09.

eventually became the pretext for the first coup.[813] Although the fledgling parliamentary democracy continued to operate from 1947 to 1962 with debates regarding constitutional principles and constitutional amendments,[814] the problems of the autonomy of the many ethnic groups promised by General Aung San before his assassination, along with the internal strife within the ruling party proved fatal to the experiment of parliamentary democracy.[815] Eventually, General Ne Win's rise to power went through a constitutional channel when he was appointed as the caretaker prime minister in 1958 by the civilian government to take care of an emergency.[816] When General Ne Win led the first coup in 1962 and started his military rule, the junta relied on Aung San's prestige to justify their government's legitimacy.[817] Indeed, through many internal struggles for the leadership of Tatmadaw, what holds constant is the uninterrupted line of legitimacy from the time of independence. Even after the rise of Aung San Suu Kyi—the stateman's daughter- the military government still tried to associate itself with General Aung San.[818]

When Ne Win was finally forced to step down after another coup took place in response to a surge of anti-government demonstrations in 1988, the new junta allowed a free election but reneged on their democratic promise right away after the National

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[813] CROUCH, *supra* note 813, at 18-22.

[814] *Id.* at 10.

[815] *Id.* at 18-22.

[816] Chambers, *supra* note 317, at 116.

[817] MARTIN SMITH, BURMA: INSURGENCY AND THE POLITICS OF ETHNICITY 198-99 (1991).

[818] *See* COTTERELL, *supra* note 804, at 304-05 (stating that the choice of Pyinmana as a new capital city was to commemorate the independence movement during World War II that started there by General Aung San).

League for Democracy (NLD) led by Aung San Suu Kyi won the elections over the party associated with the military.[819] The country then fell for a long time under military rule from 1990 to 2008, the period which is described as "one of the longest constitution-making exercises in the world."[820] Due to overwhelming international pressure, the Tatmadaw realized they could no longer "control the country indefinitely by tinkering with the constitution" and promulgated the 2008 Constitution.[821] The Constitution was finally completed and promulgated through a constitution-making process, which lacked public participation and deliberation as the process continued despite the devastating Cyclone Nargis.[822]

The 2008 Constitution, as the Tatmadaw designed it, contains many provisions empowering the military.[823] Nevertheless, it permits an elected legislature, and the president is to be indirectly elected with some improvements in civil liberties at the cost of the increased military's role in the Constitution.[824] Initially, the arrangements worked well enough that some scholars hoped at the time that the civilian government and the military were "learning to live with each other."[825] However, after a long struggle between the civilian and the military actors to establish dominance in which several

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[819] *Id.* at 117.

[820] CROUCH, *supra* note 813, at 27.

[821] COTTERELL, *supra* note 804, at 304.

[822] *Id.* at 26-28 (pointing out that the referendum to vote on the Constitution "was only postponed in some areas for a few days").

[823] *Id.* at 30-32.

[824] Chambers, *supra* note 317, at 111.

[825] Maung Aung Myoe, *Emerging Pattern of Civil-Military Relations*, SOUTHEAST ASIAN AFF. 259, 271 (2017).

proposals for constitutional amendments that could trim down the military's prerogatives were on the table,[826] the military had to reassert its control as the one and only guardian of the nation.[827] Ultimately, after the result of the general election in 2020 suggested the declining influence and popularity of the military party in the political scene, the commander-in-chief, General Min Aung Hlaing, claimed that the election was fraudulent and that the Constitution granted him the power to declare a state of emergency and take over the government.[828] As such, the coup does not abrogate the Constitution, and the junta still claim to be acting in line with the document until the tentative end of the state of emergency.[829]

While it is puzzling why the Tatmadaw wanted to suspend the Constitution that granted the military many privileges and policy prerogatives, the coup has shown that the military still holds a firm grip on power that praetorian constitutionalism can continue even when the 2008 Constitution is practically dead.[830] Partly, this was possible because, throughout the longest military regime in the modern world, the Tatmadaw has been in alliance with many other institutions beyond the armed forces from political parties and

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[826] Harding & Kyaw, *supra* note 45, at 199-204 (discussing the rigidity of the 2008 Constitution and all the subsequent attempts at constitutional amendment from 2013 to 2020).

[827] Aurel Croissant, *Transforming Civil-Military Relations: Myanmar in Comparative Perspective*, STIMSON (2021) at 16-18, https://www.stimson.org/wp-content/uploads/2021/04/Transforming-Civil.pdf (arguing that the 2021 Coup was a result of a failed brinkmanship in which the military was forced to make a critical choice between yielding to the civilian government or stage a coup).

[828] *Statement from Myanmar Military on State of Emergency*, REUTERS (Feb. 1, 2021), https://www.reuters.com/article/us-myanmar-politics-military-text-idUSKBN2A11A2.

[829] *Id.*

[830] *See* Harding & Kyaw, *supra* note 45, at 204-05 (discussing the clash between praetorian constitutionalism and democratic and political reforms through constitutional amendment process).

military-owned conglomerates.[831] The military dominance simply runs deeper than any military-led reform could achieve.[832] Currently, even with pressures from ethnic armed groups and the government-in-exile,[833] the Tatmadaw still stands as the sole protector of Myanmar's homogenous ideal of a Buddhist and Burmese nation.

2. Thailand

In contrast to Myanmar, with its long stretch of military governments in various forms, Thailand is known for its 'vicious circle' of alternation between civilian and military rule that has been ongoing since 1947 when a group of military leaders led the coup that would be a model for all later coups to follow.[834] The Royal Thai Armed Forces usually claim widespread corruption and election fraud by politicians and reset the constitution with a provisional charter, followed by the drafting of a new permanent constitution. So far, the military has taken part in 13 coups since 1932. And despite the international norm of security sector reform, all the constitutional and legal reforms that came after the most recent coup in 2014 did nothing to weaken the position of the military to bring it under civilian control.[835] How could the Thai military retain its

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[831] Croissant, *supra* note 827, at 14-15.

[832] *Id.* at 15.

[833] *Three Years after Coup, Myanmar Junta Chief under Unprecedented Pressure*, REUTERS (Jan. 31, 2024), https://www.reuters.com/world/asia-pacific/three-years-after-coup-myanmar-junta-chief-under-unprecedented-pressure-2024-01-31/.

[834] HARDING & LEYLAND, *supra* note 44, at 14-21 (providing an account of the pattern of coups and constitutional changes from 1947 until the promulgation of the 1997 Constitution).

[835] Paul Chambers, *Civil-Military Relations in Thailand since the 2014 Coup: The Tragedy of Security Sector "Deform"* PEACE RESEARCH INSTITUTE FRANKFURT 30-34 (2015),

influence for so long despite the many civilian governments that came after each coup and collapsed after another coup?

First, the Thai military has always played a decisive role in every major political event. Since the Siamese Revolution of 1932, initiated by the People's Party (*Khana Ratsadon*) consisting of young military and civilian students who pursued their studies abroad,[836] the military was crucial in any political conflict in Thailand. The military works closely with the winning players in Thai politics through each coup. The most concise way to put a narrative on Thai constitutional history is to consider the monarchy, the military, and the technocratic/bureaucratic complex working together to control and manipulate Thai politics.[837] According to these views, the military is not a truly dominant institution holding its distinct agenda; instead, the monarchy leads this alliance to intervene in the usual constitutional rule of the country.[838] However, the monarch only gained much of its political influence and started to work closely with the military after the coup in 1957 when Field Marsal Sarit Thanarat exploited the prestige of King Bhumibol to legitimize the military regime further.[839] The military was crucial in

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http://www.jstor.org/stable/resrep14467.1 (arguing the security sector reform for the Thai military only means strengthening the military, not promoting civilian control).

[836] *See generally* นครินทร์ เมฆไตรรัตน์, การปฏิวัติสยาม พ.ศ. 2475 [Nakarin Mektrairat, Siamese revolution of 1932] 206-11 (1992).

[837] *See, e.g.*, Duncan McCargo, *Network Monarchy and Legitimacy Crises in Thailand*, 18 PAC. REV. 499 (2005); Eugénie Mérieau, *Thailand's Deep State, Royal Power and the Constitutional Court (1997-2015)*, 46 J. CONTEMP. ASIA 445 (2016).

[838] McCargo, *supra* note 837, at 503-15 (discussing the dominant position of the King as the center of the network monarchy).

[839] MOSHE LISSAK, MILITARY ROLES IN MODERNIZATION : CIVIL-MILITARY RELATIONS IN THAILAND AND BURMA 77 (1976).

establishing the dominance of any political actor since it could overthrow the government and thus take a side in politics in every political crisis. Therefore, for most of King Bhumibol's reign, the decisive factor for the success or failure of a coup was the legitimation by the King. For instance, the coup attempt in 1981 failed once the leaders found no support from the King.[840]

Secondly, similar to how the Tatmadaw has positioned itself as the guardian of the nation to prevent the disintegration of the Union, the Thai military also includes internal threats such as maintaining public order and defending the monarch in its duties. Since the 1974 Constitution, all subsequent permanent constitutions state clearly that the military can be deployed "for the protection of the institution of the King, suppression of a rebellion or riot, maintenance of the security of the State and development of the country."[841] The extra roles for the military came as a result of the fear of the Communist Party of Thailand during the Cold War, justifying the social and economic development tasks for the Thai military as a strategy against communism.[842]

Lastly, even after a glorious constitutional making process to break the vicious loop of coups and constitutional changes with the 1997 Constitution, which came about

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[840] Kobkua Suwannathat, *The Monarchy and Constitutional Change Since 1972*, *in* REFORMING THAI POLITICS 57 (Duncan McCargo ed., 2002).

[841] Constitution of Thailand, art. 70 para. 1 (1974).

[842] พวงทอง ภวัครพันธุ์, *รัฐธรรมนูญกับการสร้างหลักประกันให้กับอำนาจของกองทัพ* [Puangthong Pawakapan, The Constitution and Guarantees of the Military's Powers], THE 101 WORLD (Sep. 24, 2023), https://www.the101.world/constitution-and-military-reform/.

after the massacres of protestors by the Thai army in 1992,[843] the Thai military still came back to stage a coup in both the 2006 and 2014 constitutional crises. Though these coups came as a surprise to observers since it was believed at the time that the military would no longer have the legitimacy to intervene,[844] the fact that the military ultimately ended the protracted political conflicts in the bloodless coups is illustrative of the effectiveness of the Thai military in restoring peace and order. As long as the military can end political violence with its power, the vicious circle will continue as it has proven to be the least costly way of bringing back political stability.

3. Turkey

The Turkish military (Türk Silahlı Kuvvetleri, "TSK") had been the progressive force that shaped the country since the founding of the republic. The TSK pioneered a model for the democratic coup d'état/revolution, where the military toppled an authoritarian government, leading the way to democratization.[845] Time and again, the soldiers fought for the ideals embedded within the constitution against the adversaries in politics fueled by radical beliefs and religious divides. If civilian control is a universal norm for modern states, Turkey has shown the possible benefits of constant military

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[843] *See* Tom Ginsburg, *Constitutional Afterlife: The Continuing Impact of Thailand's Postpolitical Constitution* 7 INT'L J. CONST. L. 83, 89-95 (2009).

[844] *See Atipiboonsin, supra* note 632, at 233-34.

[845] VAROL, *supra* note 82, at 10 (arguing that the 1960 coup was a democratic coup).

intervention as part of healthy checks and balances in a new democracy susceptible to decay and abuse by demagogues.

Before 1960, even though the TSK was influential and powerful, it was under civilian control during the single-party years under the Republic People's Party ("CHP") established by Atatürk.[846] Arguably, the 1960 Coup by the TSK was a response to the abuse of power by the democratically elected government that capitalized on the flaws of the 1924 Constitution.[847] Thus, the military made sure to be involved in constitution-making and made a strong alliance with the CHP, whose domination in the House of Representatives also guaranteed the military's autonomy.[848] The 1960 Coup also established the military as the lawful guardian of Kemalism; in other words, the TSK had "the right and duty to intervene again whenever it deemed the values of Atatürk and the spirit of his reforms to be in danger."[849]

This trajectory of military intervention then continued with the coup by memorandum in 1971, the 1980 Coup, and another coup by memorandum in 1997. This military autonomy grew even when the Justice Party ("AP") and its successors dominated Turkish electoral politics as the main opposition to Kemalism.[850] Even before the 1980

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[846] MEHTAP SOOYLER, THE TURKISH DEEP STATE: STATE CONSOLIDATION, CIVIL-MILITARY RELATIONS AND DEMOCRACY 106-08 (2015) (discussing the military autonomy in Turkey that developed around 1950 to 1960).

[847] ERGUN ÖZBUDUN, THE CONSTITUTIONAL SYSTEM OF TURKEY 6-9 (2011).

[848] *Id.* at 9-14.

[849] MOGENS PELT, MILITARY INTERVENTION AND A CRISIS OF DEMOCRACY IN TURKEY: THE MENDERES ERA AND ITS DEMISE 3 (2014).

[850] SOOYLER, *supra* note 846, at 123-26.

Coup, the military had already established three formal institutions to coordinate and intervene in internal security matters: the National Security Council, the post of president, and the gendarmerie.[851] With the 1982 Constitution, the TSK doubled down on its attempt to establish itself as the guardian with even less input from the civilian representatives in the constitution-making process.[852]

However, the military's autonomy has been gradually weakened through the Justice and Development Party ("AKP"), which has been the ruling party since 2003. The military eventually lost its dominant position through a combination of several factors—chiefly among these, the demilitarization process required as part of Turkey's EU candidacy from 2001 to 2004 and the purges of many military officers in civilian courts.[853] The long process of civilian control culminated in the failed coup attempt of 2016, in which even more military officers were purged.[854] Contrary to the continued autonomy and guardianship of the Tatmadaw and the Thai military, the power of the TKS suddenly stopped with seemingly no warning despite how the TKS tried to retain its hegemony. This chapter thus looks at the success story of Turkey in civilian control as a starting point for the discussion of constitutional attempts toward civilian control in these three countries.

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[851] *Id.* 125-26.

[852] Gülşen Seven & Lars Vinx, *The Hegemonic Preservation Thesis Revisited: The Example of Turkey*, 9 HAGUE J. RULE LAW 45, 60 (2017).

[853] *See* Nil S. Satana, *The New Civil-Military Relations in Turkey*, MIDDLE EAST INSTITUTE (Oct. 2022), https://www.mei.edu/sites/default/files/2022-10/The%20New%20Civil-Military%20Relations%20in%20Turkey.pdf

[854] *Id.*

B. The Convergence of the Armed Forces in Shaping Constitutional Identity

From the histories of the three militaries, three common features define the civil-military relations and constitutionalism within the three countries: a history of the military that is deeply connected to the identity of the nation, an active role of the military in economic development, and a strong network of allies that work in concert with the military.

First, the three militaries, like those during the independence of Spanish Americas, filled in the power vacuum left by an abrupt change from absolutism to constitutionalism. A path dependence argument applies to these countries where independence or democratic revolution originated from the elites with top-down constitution-making. These militaries then contested with their civilian governments by claiming allegiance to an alternative vision of the political order.[855] Kemalism in Turkey, the Three Main National Causes in Myanmar, and the protection of the Nation, the Religion, and the Monarch in Thailand are all deeply associated with the institution of the armed forces. As long as these militaries can present ideological alternatives to what the civilian politicians offer, the unified and stabilized platform of the military will often pose an ongoing threat to democratization and civilian control.

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[855] AGÜERO, *supra* note 753, at 108-13 (arguing that the lack of concrete policy alternatives to civilian reforms was the main reason for the success story of civilian control in Spain as opposed to what happened in Latin America).

Second, as political and economic instability in developing countries often requires a robust, organized effort to undergo reforms, the armed forces are usually deployed to provide civilian projects.[856] This is especially true in cases where the military takes the role of a nation-builder and provides also social development and public service that could increase the legitimacy and popularity of the military.[857] All three militaries in this study have intricate roles in the economy that go beyond the defense industry. As such, the military routinely coexists with the civilian government, familiarizing the people with the subversion of civilian supremacy in social and economic development.

Finally, all three militaries have more than their staff members and other resources. These armed forces have historically participated in movements toward independence or democratic revolution. Ideologically, the soldiers in all three cases manifest the spirit of the modern state while simultaneously carrying on the proud legacies of past kingdoms and empires. Regardless of their de jure status and powers, their symbolic and historical features endure through all changes and will continue to be significant to the future of their nations.

All these features of the armed forces do not only make them more powerful relative to other civilian institutions; any military with such prominence also shapes the constitutional identity of the polity in which it operates. As argued by Michel Rosenfeld, constitutional identity is the result of a balancing act between the identity of the people

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[856] Kristina Mani, *Military Entrepreneurs: Patterns in Latin America*, 53 LATIN AM. POL. & SOC'Y 25, 27-29 (2011) (discussing military entrepreneurship).

[857] *Id.* at 47-48.

under the constitution and the values that suppress and constrain such identity through the constitution.[858] When discussing constitutional identity in terms of "the context in which a constitution operates," the same constitutional concepts and principles can vary in practice due to their interaction with any particular constitutional identity.[859] Indeed, insensitivity to constitutional contexts is one of the weaknesses of the quantitative method employed in Chapter II. By emphasizing the extent to which "the military" can be much more than the sum of its parts, the next part should be able to explore the power and influence of the military in practice.

II. The Military under the Constitution

"Coups occur when there is nothing to prevent them"[860] is factually correct, but there is no sure way to keep coups from happening. If the military in a particular polity is strong and organized as the military should be, coups can occur. Considering all other factors, such as its legitimacy and popularity in the modern world, the only question is how long such a military regime can endure. Even though coups went out of fashion decades ago, the militaries in Thailand and Myanmar staged their latest coups without much hesitation. Against all odds, they took control of the country longer than the average military government and continue to dominate domestic politics today. Since

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[858] *See* Michel Rosenfeld, *Constitutional Identity*, *in* THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW, *supra* note 22, at 756, 762.

[859] *Id.* at 757.

[860] Andrew A. Szarejko, *The Soldier and the Turkish State: Towards a General Theory of Civil-Military Relations*, 19 PERCEPTIONS (2014) 139, 152 (adapting Kenneth Waltz's maxim on war).

these coups are almost always bloodless, staging a coup is tolerated, if not accepted, by the people as an alternative to protracted political polarization.

That said, coups are unsustainable and susceptible to failure. Eventually, soldiers are expected to be in the barracks where they belong. In compliance with healthy civil-military relations, most countries go through security sector reform and confine the military to their assigned tasks. However, the military's venture into politics in Thailand and Myanmar is still ongoing. The life and death of democracy rely, in large part, on the willingness of the armed forces not to intervene. The same was true for Turkey since the first coup in 1960 until the failed coup in 2016. After that, many scholars argue that the elusive civilian control of the Turkish military was finally established.[861] It is thus puzzling how the TKS lost such a strong trajectory of dominance despite having a track record comparable to that of the other two nations. This part investigates the constitutions of these case studies to analyze all the mechanisms that may affect civilian control of the military.

The 2017 Constitution of Thailand and the 2008 Constitution of Myanmar are anomalies compared to their predecessors. From their earliest constitutions, previous versions of permanent constitutions in both countries rarely mentioned the armed forces. For its first constitution after independence in 1947, the Burmese Constitution inherited

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[861] Satana, *supra* note 853 (arguing that civilian control ended up eroding constitutional democracy in Turkey).

the colonial influence that treats the military only as an afterthought.[862] Article 97 states that "the right to raise and maintain military, naval and air forces is vested exclusively in the Parliament."[863] Even with the 1981 Constitution, in which the military was heavily involved in the drafting process, no provisions granted any special treatment to the armed forces.[864] Likewise, all the previous 19 constitutions of Thailand only refer to the military in passing. The only exception is the short-lived 1949 Constitution, which was only in force until 1952. Apart from the standard provisions that designate the commander-in-chief in both countries, the other common provisions impose the duty to serve in the military on their citizens. Given how previous constitutions left the military out of focus, the sudden adoption of the military into both the current constitutions came as a surprise.

In comparison, constitutional clauses on the military in Turkey could be categorized as standard from the Constitution of 1924, which followed the Turkish War of Independence and the end of the Sultanate. In the original 1982 Constitution, the military is only mentioned when necessary and almost exclusively in traditional areas, such as provisions on the commander-in-chief, the appointment of military personnel, and the duty to serve in the armed forces. Despite how the military usually abuses its part

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[862] *See* Chapter II on Constitutional archetypes regarding the military. Interestingly, some clauses which are quite common in this tradition—such as those which strip active military members of their voting rights—do not appear in any Burmese constitutions.

[863] ပြည်ထောင်စုမြန်မာနိုင်ငံတော် ဖွဲ့စည်းအုပ်ချုပ်ပုံအခြေခံဥပဒေ (Constitution of Union of Burma), art. 97(1) (1947).

[864] On the contrary, there were provisions which limit the powers of the military. *See, e.g.*, art. 57(b) (establishing a National Defence and Security Committee with no members directly from the military).

in constitution-making,[865] the military junta designed the Constitution with only a few apparent provisions that may grant additional privileges or powers to the armed forces. On the surface, civilian control is thus supported by the supervision of the president as the commander-in-chief and the legislature as the military's 'spiritual existence'.[866]

A. Temporary constitutions and transitional processes

While the military does have the potential to support a movement against a dictatorship, coups that claim to democratize often end up furthering elements of authoritarianism. For instance, the Revolution of 1932, which ended absolute monarchy in Thailand, was led partly by the Thai military. Still, such an anti-authoritarianism act has not occurred in recent times for the three case studies. Instead, coups always lead to a transitional constitution with the military as one of the main parties in the drafting process. And these transitional constitutions often follow a somewhat familiar pattern. The sequence of a coup, a temporary charter, and a new constitution has already become an unwritten constitutional rule in Thailand.[867] The same convention is not followed in Myanmar as General Ne Win did not formally abrogate the constitution with the first

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[865] *See* ÖZBUDUN, *supra* note 847, at 15-17 (providing an account of the constitution making process leading to the 1982 Constitution including the fact that all members of the constituent assembly were appointed by National Security Council).

[866] CONSTITUTION OF TURKEY (1982), art. 117 para. 1 ("The Office of Commander-in-Chief is inseparable from the spiritual existence of the Turkish Grand National Assembly and is represented by the President of the Republic.").

[867] Apinop Atipiboonsin, *Volcanic Constitution: How is Plurality Turning Against Constitutionalism in Thailand?*, *in* PLURALIST CONSTITUTIONS IN SOUTHEAST ASIA 225, 232-33 (Jaclyn L. Neo & Ngoc Son Bui eds., 2019).

coup in 1962.[868] However, the promise of a new constitution through a constitutional assembly was present in the coup of 1988.[869] In effect, both the 2017 Constitution of Thailand and the 2008 Constitution of Myanmar were tolerated by the people simply as a step forward away from the military authoritarian regime.

Temporary and transitional processes, however, are not necessarily brief. The latest coup by General Chan-ocha in 2014 took three years to promulgate the Constitution. It was not until 15 years after the coup that the 2008 Constitution started to be in force in Myanmar, mirroring the long process from after the Coup in 1958 to the Constitution of 1968. These long transitional periods governed by the military are unique to these two countries; the temporary rules that govern the state with regular military involvement normalize the armed forces' permanent role in governance. In short, temporary rules are trial runs in which military leaders can experiment with new constitutional provisions, creating more building blocks for future constitutions. For instance, the Thai Temporary Constitution of 2014 experimented with having constitutional organs responsible for interpreting constitutional conventions to fill in constitutional gaps or solve political deadlocks without resorting to coups.[870] However, the later draft, which contained a similar provision, was discarded afterward before

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[868] Chambers, *supra* note 317, at 116.

[869] *Id.* at 117.

[870] 2014 Constitution art. 5 para. 2.

opting for the one that appeared in the current Constitution, which kept the original text intact.[871]

Moreover, with heavy military influence in the drafting process, the resulting constitutions often emphasize how important the military is in both securing the state and strengthening democratic governance, so there should be mechanisms such as the national security council that could serve as a delegate of the military to interfere with and make better the politics.[872] These praetorian constitutions, however, go even further by framing the inclusion of the military as a different regime distinguishable from a standard constitutional democracy: a compromise between democratic governance and national security. Both the 2008 and 2017 constitutions used a referendum to legitimize these documents as a voluntary choice by the people, although the circumstances surrounding the referendum campaign were repressive.[873]

B. Constitutionalization of Military Guardianship within the Constitution

In contrast to how most constitutions are often silent about the exact powers of the military, the 2008 Constitution gave the Commander-in-Chief the power to nominate the

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[871] *Compare* Art. 7 of the Council of State's draft in April 2015 for the Constitution of the Kingdom of Thailand *with* art. 5 para. 2 of the 2017 Constitution.

[872] Tom Ginsburg, *Transformational Authoritarian Constitutions: The Case of Chile, in* FROM PARCHMENT TO PRACTICE: IMPLEMENTING NEW CONSTITUTIONS 239, 245 (Tom Ginsburg & Aziz Z. Huq eds., 2020).

[873] *See* Chambers, *supra* note 317, at 118; Jonathan Head, *Thai Referendum: Why Thais Backed a Military-Backed Constitution*, BBC NEWS (Aug. 8, 2016), https://www.bbc.com/news/world-asia-37013950.

Ministries of Defense, Home Affairs and Border Affairs.[874] The Thai Constitution clearly states that the armed forces shall also be deployed to develop the country.[875] Moreover, both constitutions gave the military extensive emergency powers, including all the executive powers in the case of Myanmar[876] and the ability to declare martial law unilaterally and take control of the government in the case of Thailand.[877] Since the military already has certain powers and duties independent of the cabinet, civilian control is then precarious compared to other institutions within the executive branch. The prime ministers in both places do not have complete control over the armed forces.

However, the most popular constitutional way to give the armed forces a function is to provide fixed seats to military personnel in the house of representatives. The 2008 Constitution leads this trend unabashedly by simply stating that the Commander-in-Chief shall nominate 110 representatives from among defense services personnel.[878] Almost a decade later, the Thai Constitution of 2017 allows the military to temporarily appoint all members of the senate, who shall later take part in choosing the prime minister for the first five years of the Constitution.[879] While these military-appointed members of parliament are part of the legislature, they serve as a sub-chamber within the parliament

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[874] Constitution of Myanmar, art. 232 (b) (2008).

[875] รัฐธรรมนูญแห่งราชอาณาจักรไทย (Constitution of the Kingdom of Thailand), art. 52 para. 2 (2017).

[876] *See* art. 413 of the 2008 Constitution of Myanmar.

[877] รัฐธรรมนูญแห่งราชอาณาจักรไทย (Constitution of the Kingdom of Thailand), art. 176 para. 2 (2017).

[878] Art. 109 of the 2008 Constitution of Myanmar.

[879] *See* Eugénie Mérieau, *How Thailand Became the World's Last Military Dictatorship*, THE ATLANTIC (Mar. 20, 2019), (explaining the military's role under Thailand's 2017 constitution).

due to their unified nature and, thus, the ability to veto any legislative act, including a proposal for a constitutional amendment.

From the roles discussed above, if the military is supposed to be the fourth branch of the government, they do not have a proper place in theory to be. Instead, they occur among the existing branches of government, disrupting the appropriate government functions in the process. Separation of powers, meant to prevent concentration of powers, could not work with the military slipping into all available branches of government.

C. Insurance policy and entrenchment

Despite the many advantages of their institutions, the armed forces are limited in their ability to play a part in electoral politics. Creating a political party as a separable but deeply connected ally is essential to ensure long-lasting military dominance. As a result, the military in these countries has its own political parties (the People's Power in Thailand, the Union Solidarity and Development Party in Myanmar, and the CHP in Turkey) that act as their proxy in electoral politics. Constitutions can also include provisions that indirectly contribute to these political parties' success. For example, the Thai Constitution applies proportional representation in its electoral system to prevent a unified civilian government from posing a challenge to guardianship.[880] The Constitution

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[880] *See* Kritdikorn Wongswangpanich, *The Unexpected Defeat of an Electoral Champion: The Pheu Thai Party in Thailand's 2023 General Elections*, 45 CONTEMPORARY SOUTHEAST ASIA 397, 398-99 (2023) (providing an example of how the electoral system of the 2017 Constitution prevents the largest party to acquire a majority in the parliament).

of Myanmar disqualifies Aung San Suu Kyi from being the president through her association with a foreign citizen.[881]

However, a more straightforward insurance policy strategy is using amnesty clauses in the constitution to protect military leaders from prosecution after the transition. This kind of blanket amnesty is included in both the constitutions in our cases.[882] As a result, no military leaders have ever been prosecuted successfully for their deeds during military rule, especially with the independence of the judiciary in question regarding political matters.

Another powerful constitutional tool in connection to this is the ability to entrench the dominance of the military as dictated by constitutional arrangements. Strict constitutional amendment rules have been standard in modern constitutions.[883] Thus, these praetorian constitutions could make constitutional amendments exceedingly difficult without betraying their unusual arrangements. With the inclusion of the military sect in the parliament, the military always has the ultimate decision on whether an amendment is allowed. With amnesty clauses and other powers given to the military, the praetorian constitutions are thus protected from any constitutional changes.

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[881] 2008 Constitution, art. 59(f).

[882] 2008 Constitution, art. 445; 2016 Constitution art. 279.

[883] *See generally,* ROZNAI, *supra* note 118 (providing a detailed and systematic exploration of constitutional amendment provisions).

III. The Possibility of Constitutional Civilian Control and Praetorian Constitutionalism

As discussed in Chapter V, despite all the constitutional and legal mechanisms aiming to constrain the military as a professional and obedient institution, constitutions can instead be an important tool in the growth and sustainability of the military. Potentially, the military may transform itself into a constitutional institution with its own functions in checks and balances among other ordinary institutions like the senate or the judiciary. These constitutions—an evolutionary step for a more sophisticated military regime—escape the scrutiny of legal scholars due to their novelty.[884] Thus, this part attempts to theorize such a pattern recently presented in these countries.

A. Effectiveness of Constitutional Mechanisms

As powerful militaries regularly intervene in politics to function as the guardians of both the nation and the constitution, they can convincingly claim to belong in the constitution as the fourth branch of government. However, instead of backing down under constitutional constraints, the three case studies show how the constitution can also empower the military in different ways.

In the case of Thailand, where the provisions are mostly standard separation-of-powers provisions, the military can still find a way to exploit their invisible existence in

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[884] *But see* Egreteau, *supra* note 742, at 117 (defining "constitutional praetorianism" based on the 2008 Constitution of Myanmar); Chambers, *supra* note 317.

the constitution. The right to resist the unconstitutional usurpation of power was repurposed to invalidate constitutional amendments and legislative proposals from the opponents of the military. The Constitutional Court has never enforced the true meaning that would include the prevention of coups. As the supreme commander under the constitution, the King decided to create and command his own armies despite the title being supposed to be symbolic and ceremonial under the convention of constitutional monarchy.[885]

Other provisions in the realm of the military-exception framework, such as those on military conscription and martial law, also continue to perpetuate the dominance of the military. Attempts to move towards an all-volunteer force were branded as 'unconstitutional.' The power to declare martial law unitarily still exists despite calls for reform. Once these provisions are in the constitution, they are entrenched unless there is an overwhelming political consensus for amendment.

In fragile democracies where political uncertainty is business as usual, and the people rarely believe in genuine representation by their government, external and constant institutions such as the military are attractive alternatives for unity. Specifically, all three countries must face security threats from ethnic and religious minorities as well as conflicts with neighboring countries along the borders. As an improvement upon praetorianism, when a state recognizes the military as one of the constitutional institutions—either directly through constitutional text or indirectly through

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[885] *Thailand's King Takes Personal Control of Two Key Army Units*, REUTERS (Oct. 1, 2019), https://www.reuters.com/article/idUSKBN1WG4EU/.

constitutional practice; these constitutions are called 'praetorian constitutions' due to the major role that the military has in the constitutional system.[886]

All three militaries have invoked traditional sources of authority for legitimacy, such as the monarch or the military's role in the nation's history.[887] However, the Constitutions also help strengthen the legitimacy of the military, which is reinforced through rational-legal authority, despite the hope that once the armed forces are well-accounted for in the constitution, the constitutional force does not seem to gradually civilianize the military as intended. As the cases here have shown, the effects appear to be the opposite: constitutions only help legitimize the military in its same old militarized way, whether they succeed or fail to respect the constitutional text.

The armed forces have already long been a powerful player in the politics of both jurisdictions, even before any attempt to use the constitutions for civilian control. For instance, as provided by the old Act on Martial Law of 1914, which still applies today in Thailand, the military can unilaterally declare a state of emergency without consultation from the civilian government within specific areas.[888] Indeed, General Prayuth Chan-ocha (then the Chief of the Thai Army) declared martial law throughout the nation by himself—acting beyond the scope of powers given by the Act on Martial Law—as a last resort just two days before finally staging the 2014 coup d'état. Equipped with clear

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[886] *See* REBECCA L. SCHIFF, THE MILITARY AND DOMESTIC POLITICS: A CONCORDANCE THEORY OF CIVIL-MILITARY RELATIONS, 21 (2009) (explaining that the term refers to a praetorian society "where exclusive social and political groups are in collusion with the military).

[887] Balčaitė & Gilberti, *supra* note 807;

[888] Section 4 of the Martial Law BE 2457 (1914).

constitutional authority, the military can be bolder in using their powers, as seen during the 2021 coup in Myanmar when the military intentionally misinterpreted the Constitution to overthrow the civilian government legally. It seems that the constraining power of the constitution fails to apply to the military while the legitimizing power is exploited in full effect.

Constitutions under the military-exception approach might present a wise way to take control of the military and guarantee stable civil-military relations even with a strong and influential military. However, ensuring that the executive or the legislature has some checks and balances directly with the military is still not a sensible path toward healthy civil-military relations. There is no guarantee that soldiers will obey these civilian leaders if they still possess the power to swiftly take over the state. The powers between the military and other constitutional players are still out of balance.

While drafting the current constitutions of all three countries, the military had a direct role in constitution-making. It took advantage of its position as the junta by installing institutions that could guarantee its long-lasting influence. Because those under direct military control eagerly accepted any improvement from military dictatorship. When a draft constitution already offers standard separation of powers and rights protection, a few unfair and unjustifiable provisions empowering the military seem like a good bargain. With a working democracy imminent, there was a belief that these setbacks would be amended and corrected in time. However, once considered a temporary inconvenience, such a constitution became an insurmountable obstacle. With tiered constitutional amendments and a packed senate, constitutional entrenchment is ensured

against all the protests and formal constitutional proposals to undermine the military's constitutional legacy.

It is remarkable, however, that drafters of all three constitutions genuinely tried to phrase out the military coupes from politics through increased democratization and judicialization of politics. Thus, even though the Thai military has still been functioning as the enforcer for the deep state/network monarchy along with the constitutional court, it does not exist formally as a separate institution under the Constitution. Despite all the powers gained during the direct military rule, the 2014 Constitution only constitutionalizes all acts before the promulgation of the new Constitution.[889] Although its powers are still essentially unconstrained by law, the military maintains an informal institution, functioning without any direct claim of legal authority. The Constitutional Court has performed all necessary constitutional tasks for the military and its allies in a more constitutional and legitimate manner.[890]

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[889] รัฐธรรมนูญแห่งราชอาณาจักรไทย (Constitution of the Kingdom of Thailand), art. 265 (2017) (retaining the National Council for Peace and Order (the military junta responsible for the 2014 Coup d'état) by referring to the 2014 Interim Constitution).

[890] For detailed discussions of the role of the Constitutional Court of Thailand, see, Bjorn Dressel, *Judicialization of Politics or Politicization of the Judiciary? Considerations from Recent Events in Thailand*, 23 PAC. REV. 671 (2010); Eugénie Mérieau, *Thailand's Deep State, Royal Power and the Constitutional Court (1997–2015)*, 46 J. CONTEMP. ASIA, 445, 453-56 (2016); Khemthong Tonsakulrungruang, *The Constitutional Court of Thailand: From Activism to Arbitrariness*, *in* CONSTITUTIONAL COURTS IN ASIA: A COMPARATIVE PERSPECTIVE 184, 199-202 (Albert H. Y. Chen & Andrew Harding eds., 2018).

B. Implications on Constitutional Design

It is never clear if the constitution can contribute to better civilian control of the military. Given the initial quantitative analysis from the previous chapter, it is plausible that the constitutional presence of the military correlates to worse civilian control outcomes. Even though a stable constitutional system guarantees strong civil-military relations, the direction of the causation is unclear as no universal set of rules and principles is yet identified as the most conducive to civilian control. Moreover, as shown in the case of Turkey, a stable and constitutional civilian government, which is essential for civilian control, does not have to be liberal.

Everything that the constitution does with the military is prone to abuse. Commander-in-chief, for example, is often vague and ambiguous enough to invite conflicts rather than coordination among the civilian branches. Security councils can be easily repurposed as a focal point for the military to exert its political roles without any constitutional exposure. When constitutions successfully prevent a coup and reduce the power of the military, as in the case of Turkey, it is an authoritarian government that abuses the constitution for its gains, not purely for democratic civilian control. The government had successfully reduced the power of the military through a combination of constitutional amendments that eroded its sphere of influence and strong-arm tactics that purged dissidents through the rank and file of the army. This is in line with the argument in civil-military relations that coup-proofing measures work more effectively for

authoritarian leaders.[891] While the Turkish Constitution contains many provisions that limit the military's political influence, e.g., the armed forces cannot vote or belong to a political party, it is possible only because the power of the civilian president practically becomes stronger in relation to the military.

Structural arrangements according to the framework of separation of powers can contribute to civilian control under certain conditions, including stable democratic institutions and firm adherence to civilian control norms among the people and military members.[892] Countries that satisfy these conditions do not have trouble with costly constitutional experiments. Thus, only countries struggling with civilian control will risk adding constitutional provisions under the military-exception approach in Chapter V. This group of countries, already under threats of military intervention, are much more vulnerable to all constitutional abuses that could follow the introduction of new constitutional norms. The blatant abuse of the emergency clauses by the military in Myanmar serves as a warning for future constitutional drafters who might want to put the military under constitutional constraints. Such endeavors almost always result in military empowerment through additional legitimacy or coordination.

Constitutions work exceptionally for powerful militaries who intend to retain their power even after returning to the barracks. Turkey and Thailand have shown that

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[891] *See* Curtis Bell, *Coup d'État and Democracy,* 49 COMPAR. POL. STUD. 1167 (2016) (arguing that democratic constraints on the executive limit also the power to prevent a coup).

[892] This is comparable to the idea that judicial review is not needed for nations with strong democratic norms. *See* Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1359-62 (2006).

independent institutions and the judiciary could work as close allies to preserve the military's hegemony even after the end of direct military rule. These militaries can continue to intervene without risking a crisis of legitimacy because they rely on other nondemocratic institutions installed by the constitution to perform their tasks. The military, whether due to its status as the coup maker or its importance in society, often has a crucial role during the constitution-making processes, leading to its additional influence under constitutional law. As discussed throughout, the military is the ultimate creator and destroyer of constitutions. So long as there is a disconnection between the military and the constitution within the literature of comparative constitutional law, it will be clear enough for both the drafters of the constitution and the people to realize the potential abuses that the military can put within any constitution.

Conclusion

Civilian control is a balancing act, like many other issues in constitutional design. With a proper understanding of the context in each jurisdiction, constitutional drafters should curate only the least empowering of constitutional provisions to achieve the goal. One practical insight from this chapter is that less is more for civilian control. When various provisions for civilian control work in different directions, nothing works effectively due to the lack of one obvious focal point for mobilization. Because the military can also utilize all kinds of constitutional texts to its advantage, constitutional drafters should not be too ambitious with what a constitution can do. For example, a combination of a strong commander-in-chief with detail to guarantee the chain of

command and some coup-proofing mechanisms could provide a focal point for civilian control without adding too much power to the executive. Nonetheless, there is still a delicate balance between double threats of praetorianism and civilian authoritarianism. Still, the knowledge that constitutions can do as much harm as good for civilian control will force future drafters to be more cautious and critical when designing constitutions.

Chapter VIII: Conclusion

They're Caesar's praetorian guard, whispering as the parade roars down the avenue, 'Remember, Caesar, thou art mortal.'—Ray Bradbury

This dissertation deals with the problem of civilian control through the lens of comparative constitutional studies. What is civilian control of the military? What is the connection between civilian control and the constitution? Have countries worldwide tackled the problem of civilian control through the constitution? If so, what design choices are available so far?

The first part of this chapter summarizes the findings of this dissertation to answer the following questions. Part II concludes by providing all the avenues for further research that are beyond the scope of this dissertation.

I. A Summary of Theories and Findings

This dissertation explores whether and how constitutions have a role in establishing civilian control. The first layer of the question is empirical and descriptive. To this part of the question, the dissertation provides an empirical and comparative overview of constitutional texts involving the military.

Chapter II offers an empirical overview of constitutional texts regarding the military. Through an original dataset, relevant provisions and taxonomy of countries based on their treatment of the military in the constitution are illustrated in detail. While

this endeavor is inherently incomplete due to the lack of deep contextual understanding of all jurisdictions, it provides a glimpse at the patterns of how constitutions around the world regularly engage with the issue of the military. Overall, it is found that most countries either use separation of powers or the principle that the military is a professional and independent institution to enhance civilian control, reflecting the consensus that the military should have no active role in politics.

Chapter III then starts the theoretical discussion by drawing on the literature on civil-military relations to identify problems relevant to the ideals of democracy and constitutionalism. Through this exercise, the issue of civilian control stands out as the core principle crucial to healthy civil-military relations and stable constitutional democracy. Since the primary function of the constitution is to limit the power of the state through legal and constitutional constraints established by the people, a military force that is out of control will render the rule of law impractical and the constitution unenforceable. Without civilian control, the armed forces can either stage a coup to seize control directly or form an alliance with a particular political group to create an authoritarian regime.

However, the prescriptions from the literature on how to achieve civilian control of the military are far from conclusive. The most influential model by Samuel Huntington proposes an institutional approach that aims to professionalize the military and shield the soldiers from politics. Conceptually, this approach to civilian control is compatible with the principle of separation of powers—a foundational principle in constitutional law. Indeed, early constitutions of the United States and France had shown that civilian control was one of the objectives of constitutional drafters that ultimately dictated the

textual design. As a result, the supremacy of the civilian government as representative of the people is guaranteed by granting the head of the state the title of the supreme commander and by distributing control over the military between the executive and legislative branches. The chapter thus argues that the issue of civilian control is at the intersection between the fields of civil-military relations and constitutional law.

Based on the findings of the last chapter, two main approaches to civilian control in the constitution work in connection with the theoretical discussions. The first approach applies the framework of separation of powers to the problem of civilian control by separating control of the military between the executive and the legislature. As early written constitutions adopted the approach, it is confirmed by the dataset that most constitutions have since followed the same formula of checks and balances between the commander-in-chief and the legislature. The second approach, which is still less observed, uses right-based and institutional tools to directly limit the military's role. It is argued that the widespread adoption of the first approach obscures the rise of recent constitutions that gradually accept the second approach in their constitutional design. These constitutions generally provide oversight mechanisms and limit the political activities of active-duty military members. Still, each constitution varies in how it incorporates various provisions to work within different contextual features. Interestingly, countries that adopt this second and alternative approach to civilian control are mostly those facing troubled civil-military relations. This part wraps up the first layer of the research question.

The second layer of the question is theoretical: why do constitutions deal with the military? Should constitutions have any function in civilian control? In response, this part

focuses on the two main approaches to civilian control as discussed earlier as my subject of investigation. Despite several groups of countries classified by their constitutional treatment of the military in Chapter III, only these two main approaches are widely adopted worldwide. The following two chapters thus take advantage of this insight and discuss each approach through a theoretical and comparative lens.

Chapter IV discusses the widespread use of separation of powers to ensure civilian control. The origin of this approach to civilian control traces back to the Bill of Rights in England and then to the American Constitution. The motivation for such a design was the fear of the military as a tool of a tyrant. However, the fear was not directed at the military as a separate institution since instances of coups by military generals were rare at the time. Meanwhile, numerous examples of monarchs abused the standing army to suppress political opposition. From this historical point of view, all the mechanisms were designed to counter the tyrannical use of the military specifically. From the creation of a militia force to the requirement of legislative authorization for the armed forces, these are all rooted in the idea of checks and balances between one civilian branch of the government and other civilian branches, preventing one from holding a monopoly of force. In this way, the military is considered a special executive sub-unit with some unique characteristics comparable to agencies under the administrative state.

The focus on the civilian side of the equation here, however, obscures the fact that the military as a distinctive entity can also have its own motive; instead of strengthening the control over the military, separation of the control over the military may be inadequate or even detrimental to the objective of civilian control. First, while the legitimacy of the civilian government is supported by granting the executive the power to

command and the legislature the power of authorization and supervision, these provisions do not provide enough information for coordination. For instance, the commander-in-chief often has a vague set of powers regarding national security; there are always disputes over whether a particular decision, such as the determination of the status of prisoners of war, falls within the ambit of the civilian commander-in-chief or the military generals in charge. Once a controversy arises, the military, as a more harmonized institution, can appeal to the court or the legislature to weaken civilian control through the existing checks and balances. Moreover, delegation to the military without specific limitations to the conduct within the armed forces can often lead to deference from civilian branches and expand the military's sphere of influence beyond its proper competence. Such an expansive tendency is comparable to modern administrative agencies but with generally more extensive resources and greater legitimacy. In short, there is a need to reconsider this classical approach to civilian control.

Chapter V then turns the attention to the alternative approach to civilian control, which is the military-exception approach. The chapter observes how many constitutions adopt a similar approach to civilian control with the normative expectation that the military is supposed to be the professional guardian of the state in line with the conventional wisdom in the classical literature of civil-military relations. Based on this ideal image of the military, constitution drafters often rely on the resemblance between the judiciary and the military as professional institutions and bring the principles and mechanisms designed for the judiciary to the military. As a result, constitutions under this approach usually stipulate how the military must be apolitical and be subject to certain limitations on their political rights such as the right to join a political party.

Despite how these constitutions create different provisions to match each jurisdiction's context in enhancing civilian control, their approach singles out the military as the one institution with legitimacy and impartiality, like the judiciary. This is to the extent that the armed forces sometimes become the fourth or fifth branch of the government. While such a presence in the constitution may constrain the military more directly than the separation-of-powers approach and allow the military to function as the guardian of the constitution against democratic backsliding by the ambitious civilian leaders, the armed forces can abuse its new constitutionalized position and constitutional legitimacy to further their gain. The military can leverage its newfound position to influence national security policies or electoral processes if it is powerful enough. With the legitimacy of the guardian, the soldiers can also claim to be neutral and offer themselves as a focal point for the people to rally around them in protesting against the government.

Chapter VI takes a step towards theory testing by conducting a quantitative analysis based on the dataset collected. The initial results suggest that the benefits of constitutional provisions for civilian control are inconclusive. On the other hand, the evidence of abuses or ineffectiveness of these provisions is more convincing. This is especially true for those provisions supporting the military's guardian role, such as those that govern military conscription, voting rights of military members, national security councils, and direct constitutionalization of the military. Thus, there is some evidence to question the wisdom of relying on the constitution to establish civilian control.

The conjecture developed in Chapter IV and Chapter V is then analyzed using countries with powerful armed forces that have consistently staged coup d'états. Chapter

VII turns to case studies of Turkey, Thailand, and Myanmar—countries with powerful armed forces that have consistently staged coup d'états. The result is discouraging. First, when constitutions successfully prevent a coup and reduce the power of the military, as in the case of Turkey, it is an authoritarian government that abuses the constitution for its gains, not purely for the purpose of democratic civilian control. While the Turkish Constitution contains many provisions that limit the military's political influence, e.g., the armed forces cannot vote or belong to a political party, it is possible only because the power of the civilian president practically becomes stronger in relation to the military. It is unclear whether the changes in the constitution are the cause or the effect of the changes in politics.

Moreover, in places where the armed forces are still powerful, such as Thailand and Myanmar, it is not feasible for civilian politicians to insert any limitations to the power of the military in the constitution. In these two cases, the military can even use the constitution to legitimize and coordinate for the longevity of their dominance. These constitutions retain the separation of military control provisions, such as those on the head of the state being the commander-in-chief, to retain a semblance of normal civil-military relations. In the case of Thailand, the military could thus influence politics without exposing its dominance by overseeing the constitution-making process of the 2017 Constitution, modifying the electoral processes, and creating a special senate appointed by the junta for the first five years. In the case of Myanmar, the military uses the legitimacy of the constitution to establish itself as another branch of government, claiming itself as an equal among constitutional players and thus outright rejecting the principle of civilian control of the military. Ironically, this is only possible because the

military can claim itself as an apolitical professional force capable of guarding the country against the corrupted politics of the civilians.

In conclusion, it is never clear that the constitution can contribute to better civilian control of the military. Even when things work as designed, the direction of the causation is uncertain. Constitutions could manifest certain provisions regarding the military only when civilian control in the practical world had already changed. On the contrary, the constitution can be abused in everything involving the military. Commander-in-chief clauses, for example, are often vague enough to let the military challenge the authority of the executive. Also, security councils—despite the original intention by drafters—can serve as a focal point for the military to institutionalize its political roles.

Most constitutions follow the structure of the influential models of written constitutions, such as those of the US and France, that mostly rely on the separation of military control among the three branches to ensure that the military is obedient. However, the separation here only provides a check on the abuse of the military by either the executive or the legislature, not the armed forces themselves; the abuse is now obsolete. Thus, separation of control may not be effective in terms of civilian control by design. On the other hand, limiting political activities is an alternative design choice that could be enforceable and effective. By disqualifying active or retired military generals from political offices, for instance, the political neutrality and professionalism of the military become entrenched within the constitution. However, adding such provisions is difficult when the military is still influential. Instead, powerful militaries may seize the opportunity to design the constitution to their advantage over civilians.

The dissertation thus concludes with a caution that constitutions are no panacea. There are limitations to the constitution as a tool for civilian control and the risks that powerful militaries may use the constitution for authoritarian gains. Especially now that democracy is often considered as being in decline, suggestions that the military can help protect democracy and solve constitutional crises can do more harm than good.

II. Further Research on the Constitution and the Military

No constitutional arrangement is perfect. Constitutions are supposed to be updated formally or informally from time to time. But if a foundational principle is flawed, no amount of correction will save the constitutional system unless the underlying cause is taken care of. While this mode of thought tends to be simplistic and limited, it is still valuable in challenging established conventions in constitutional law.

In terms of constitutional design, the institutional features of the military are often dictated by factors outside of the constitution, leaving limited options to constitutional drafters. While there is a factor of efficiency that shapes how the judiciary should be independent to perform its adjudicative function properly,[893] military characteristics essential for national defense, such as professionalism and a strict chain of command, are usually extra-constitutional.[894] Civilian control is arguably achievable even when

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[893] Kavanaugh *supra* note 502, at 230-32.

[894] *See See* Huntington, *supra* note 43, at 677-78 (arguing that need for professionalization of the military developed outside the scope of the American Constitution).

constitutional provisions are at odds with proper control of the military.[895] Controlling a power that is resistant to legal factors is an arduous task with few success stories. For example, Japan and Costa Rica have shown how a different concept of the military is only possible in extreme circumstances with favorable geopolitical requirements.[896] And as seen in the case of Japan, there is a constant pull towards the traditional form of the armed forces.[897] Thus, one avenue for future research is to look at the feasibility of constitutional prohibition on the military. These constitutions along with those that do not refer to the military or those in countries that do not have the armed forces in practice, should provide excellent case studies for those who want to explore the relationship between the constitution and the existence of the military. For example, one can ask whether minimal reference to the military or an outright prohibition in the constitution should weaken the armed forces' position.

Secondly, there are still questions regarding the connection between constitutional change and civilian control. Because the literature on security sector reforms provides little guidance on constitutional reforms for civilian control, it is worth exploring all the available options for countries that want to escape praetorianism without committing the mistake of enabling the military. As this dissertation only provides a warning to

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[895] *Id.* at 676 (arguing that the US secures civilian control despite how "the American Constitution in the twentieth century obstructs the achievement of civilian control").

[896] *See supra* Chapter II.

[897] *See* Rosalind Dixon & Guy Baldwin, *Globalizing Constitutional Moments? A Reflection on the Japanese Article 9 Debate*, 67 Am. J. Compar. L.145 (2019) (discussing the constant pushes towards formal and informal changes to Japan's 'Peace Constitution').

constitutional drafters, a concrete solution or model is much needed for future constitutional reformers.

Lastly, topics that are excluded from the scope of this dissertation—e.g., military justice as well as the connection between the military and other internal security institutions like the police—still need to be explored through the perspective of comparative constitutional law. It should also be especially fruitful to connect the field of national security law to comparative constitutional law. While the focus of national security law might not be on civilian control of the military, its relationship with civil-military relations and comparative constitutional law is still worth exploring since the connection between constitutional law and legislation on national security is not yet discussed thoroughly in this dissertation.

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Appendix: Codebook Military in the Constitution

1. Identifying Constitutions

1.1 What constitutes a constitution?

In order to effectively capture the presence of the military in the constitution, the first step is to identify all the constitutions which will be subject under this study.

To begin with, unwritten or customary constitutions will not be included in the coding. This is due not only to the ambiguous nature of these constitutions but also the difficulty in ascertaining the link between the constitutional convention and the actual military institution. While written constitutions are often labelled as such in many countries and thus will be treated as constitutions in the coding, there are also documents in other names which substantively function as a constitution such as German Basic Law or UK's Human Rights Act; these documents will also constitute a constitution.

In hard cases where a document is not easily identified as a constitution, there will be a remark based on overall reading of the text as well as its history to justify the final decision.

2. Interpreting the Constitution

2.1 General rules

The coding will focus on the text of the constitution where the military is involved. Generally, clauses which refers to the military or the armed forces will fall into my coding. These institutions are distinctive from others by virtue of its legitimate monopoly on the use of violence against outside threats. Thus, internal security forces including the police will not be part of the study subject. Theoretically, this idea can be traced back to the seminal book by Samuel Huntington who distinguish the military as a separate profession with its own expertise, responsibility and a sense of unity among soldiers.[898] As a result, paramilitary groups or insurgent's forces who exist under the constitution and

[898] HUNTINGTON, *supra* note 100, at 8-10.

possess the ability to use violence but do not have both the legitimacy and the professionalship shall not be counted as the military under this study.

However, there can be parts which indirectly touch upon the military without naming the institution (e.g., the supervision of defense budget). These provisions will be coded accordingly as part of the project as long as they are relevant to the issue. Moreover, the coding here treats the text of a provision as a separate and independent object and do not interpret it by looking further into the text of other provisions as a whole. Unless a provision refers to others, textual context will not be part of the coding. Also, the nuanced and detailed issues of the purpose of the text and the actual practice in implementing the text are better dealt with through case studies, not through the coding of the text in order to minimize interpretation and thus discretion in the coding.

2.2 What are clauses regarding the military?

The focus of this project is on the military and its presence in the constitution. However, not every reference to the military will be relevant to the underlying issue of regulating the armed forced through the constitution. For instance, a provision stating the function of the military in defending the sovereignty of the state does not provide any additional meaning to the military institution and does not have anything beyond symbolic or expressive effects which are outside the scope of the coding; thus, such a provision will not be included in order to simplify the study.

For the same reason, the description of the composition of the military (e.g. army, navy, and air force) will not be part of the coding. Even though it is helpful in defining whether the subject under a constitutional provision is the military or not, there is no need to look into the horizontal structure within the military at this stage. Only when there are clauses governing the vertical structure such as setting out the power to supervise or to audit the military

3. Provisions

Below, I describe in detail the different provisions that are part of the coding scheme. For the purpose of further regression analysis, I pool groups of provisions. In order to do so, I distinguish the unconditional provisions from the conditional provisions. Conditional provisions are follow-up questions that are only relevant once a certain core provisions has been adopted. For example, whether or not there is a clause on declaring the state of emergency is an unconditional provision. However, the follow-up question if the military has the power to declare the state of emergency unilaterally (or whether they are given

partial or complete impunity from acts arising out of the state of emergency) is a conditional provision that is only relevant once there is a provision on the emergency powers.

3.1 General

a. Despite its potential in breaking up the very structure of the constitution, the military has never been a central issue in constitutional law. Generally, the armed forces are often considered as part of the executive and are rarely treated as a distinct constitutional branch under the scheme of the separation of powers. Nevertheless, there are certain constitutions which single out the military among all other constitutional players. These textual arrangements may indicate that the military in a given polity is more constitutionally significant than in others; thus, my coding will also take these into account.

1. **Milgen:** This variable captures whether the military or armed forces are mentioned in the constitution. The approach here is simply to capture any appearance of the term which directly refer to the military as an institution or to one of its members, e.g., "army", "defense forces", or "soldiers". The military service or the duty of the citizen to serve will also count as part of the coding. In addition, for peculiar cases where there are unique clauses on the military (i.e. its special status, structure, veterans etc.) that are not covered in the questions to follow, there will be a note in the comments section. Moreover, while some countries refer to the military in passing, a few countries refer to the military in order to outright prohibit the formation or the existence of the armed forces. For example, article 12 of Costa Rica's Constitution states that "*The Army as a permanent institution is proscribed. For the vigilance and conservation of the public order, there will be the necessary forces of police. Military forces may only be organized by a continental agreement or for the national defense; one and the other will always be subordinate to the civil power: they may not deliberate, or make manifestations or declarations in an individual or collective form.*" This variation will also take this into account. Finally, if there is not a single word that could refer to the military, the rest of variations outside of the general clauses that follow will not apply to such constitution. The same also applies to cases where the military is prohibited in the constitution.

0= Outright prohibition of the military

1= The military is not mentioned in the constitution

2= The military is mentioned in the constitution

77= other, as specified in the comment section

99. Unable to Determine

2. **Milheading:** Following from the last point, this variable captures whether the military or armed forces have a dedicated heading covering a set of articles in the constitution. The heading could also be about the functions of the military and not directly about the military itself such as "National Defense or security". For example, a group of articles can be written under one chapter heading such as Title VII Chapter I. ARMED FORCES of the Bolivian Constitution.

0= No

1= Yes

88= not applicable because the military is not mentioned

99. Unable to Determine

3. **Terror:** This variable captures whether the constitution address the issue of terrorism in its provisions. The mere mentioning of the word "terrorism" or "terrorist" is enough in this regard.

0= No
1= Yes
96= other, please specify in the comments section
97= unable to determine
99= not Applicable

3.2 Political Neutrality

4. **Neutralgen:** This variable captures whether the constitution has a general clause stipulating the principle of political neutrality of the military. Being a general clause, the wording does not have to provide any guidance as to how to implement the principle. Thus, simply indicating that the armed forces maintain neutrality in politics is enough to fit in as a general clause on neutrality. For example, article 14 of Armenia's Constitution states that "*the armed forces of the Republic of Armenia shall maintain neutrality in political matters and shall be under civilian control.*"

0= no general neutrality clause in the constitution

1= general neutrality clause in the constitution

99= unable to determine

5. **Neutralact:** This variable captures whether the clause which stipulates the general neutrality of the military entails further processes to be made by law or requires concreate actions for the military (excluding the ban on political candidacy which will be captured by the next variable instead). A clause may, for example, require that a law is passed to ensure political neutrality of the military. For example, article 127 of Somalia's Constitution stipulates after the clause on political neutrality that "*Members of the forces shall be trained on the implementation of this Constitution, the laws of the land and the international treaties to which the Federal Republic of Somalia is a party.*"

0= no further action required under general neutrality clause in the constitution

1= further action required under general neutrality clause in the constitution

77= other, as specified in the comment section

88= not applicable because there is no general neutrality clause

99= unable to determine

6. **Voteban**: This variable captures whether the constitution strips active military members of their voting rights. The ban could be an exception within a general clause on election right. Moreover, this does not have to be a strict prohibition of voting rights for military members. For example, §8 of Brazil's Constitution states that "*A member of the armed forces who can register to vote is eligible under the following conditions: I. if he has served for less than ten years, he shall be on leave from military activities; II.if he has served for more than ten years, he shall be discharged from military duties by his superiors and, if elected, shall be automatically retired upon taking office.*" This case which is a partial or conditional ban will be coded as having the ban.

0= no voting prohibition on active military members
1= voting prohibition on active military members
77= other, as specified in the comment section
99= unable to determine

7. **Politicalban:** This variable captures whether the constitution prohibits active military members from taking part in political parties or taking elected offices outside of the military institution. The ban could be part of the general clause

on election right. For example, article 56 III of Azerbaijan's Constitution states that "*Professional military persons, judges, government officials, persons sentenced to imprisonment according to a court decision brought into effect, religious officials and other people mentioned in the present Constitution and laws are limited in their right to be elected.*" Alternatively, the ban could be part of the disqualifications for elected members such as article 58 of the Belize's Constitution which says "*No person shall be qualified to be elected as a member of the House of Representatives who- […] g.is disqualified for membership of the House of Representatives under any law by virtue of- […] ii. his holding or acting in any office or appointment specified (either individually or by reference to a class of office or appointment) by such law;*"

The variable, however, does not capture those provisions that grossly prohibit elected officers to take any other office without mentioning the military offices directly. For example, article 1, section 6, clause 2 of the US Constitution states that "*No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.*" Here, the US is coded as having no political prohibition on active military members.

0= no political prohibition on active military members

1= political prohibition on active military members

77= other, as specified in the comment section

99= unable to determine

3.3 Military Service

8. **Conscrgen:** This variable captures whether the constitution requires compulsory military service from its citizen. The applies even in cases where the constitution just mention about the compulsory military service in passing such as in article 46 of the Syrian Arab Republic's Constitution which states that "*Compulsory military service shall be a sacred duty and is regulated by a law;*". There are also cases where the constitution prohibit the practice of compulsory military service for citizens. For example, Article 96 of Nicaragua's Constitution states "*There shall be no compulsory military service, and any form of forced recruitment to be part of the Army of*

Nicaragua and the National Police is prohibited." This will be coded separately as it offers a distinctive feature in the military.

0= no compulsory military service mentioned in the constitution

1= compulsory military service is in the constitution

2= prohibition of compulsory military service in the constitution

77= other, as specified in the comment section

99= unable to determine

9. **Conscropt:** This variable captures whether the constitution states exceptions or options for citizen in place of compulsory military service. For example, the constitution may allow conscientious objectors to work in other public capacities such as in article 4 of Greece's Constitution which states that "*the provision of paragraph 6 does not Preclude that the law provides for the mandatory performance of other services, within or outside the armed forces (alternative service), by those having a substantiated conscientious objection to performing armed service or, generally, military duties.*" However, this does not include clauses acknowledging possible exceptions as shall be created by legislations.

0= no exceptions to compulsory military service in the constitution

1= one or more exceptions to compulsory military service in the constitution

77= other, as specified in the comment section

88= not applicable because there is no compulsory military service in the constitution

99= unable to determine

3.4 Command

10. **Comchief:** This variable captures whom the constitution grants the position of commander in chief of the military. This could be the monarch, the prime minister or the president. The term could be the "chief of commander" or "supreme commander", whatever is the highest position of the whole military order in the country. This variable can be problematic as sometimes the commander-in-chief only have symbolic and ceremonial roles within the government, but the point is the association of the military with one of the

organs within the constitution which may have other effects apart from the practical command over the troops. For example, article 23 states that *"the King is the Supreme Commander of the Royal Khmer Armed Forces. The Commander-in-Chief of the Royal Khmer Armed Forces shall be appointed to command the Armed Forces.*" In this instance, the head of the state (the monarch) will be coded as the commander in chief.

0 = the commander in chief is not mentioned in the constitution

1= the head of the state (for single executive systems) is the commander in chief

2= the head of the executive (e.g., prime minister) is the commander in chief

3= the minister of defense is the commander in chief

77= other, as specified in the comment section

99= unable to determine

3.5 Supervision

11. **Wardeclare:** This variable captures whether the constitution grants the executive or the legislature the power to declare war unilaterally (including also when consultation with others is required by the constitution). For example, article 152 of Egypt's constitution states that "*The President of the Republic is the Supreme Commander of the Armed Forces. The President cannot declare war, or send the armed forces to combat outside state territory, except after consultation with the National Defense Council and the approval of the House of Representatives with a two-thirds majority of its members.*"

0= the executive can declare war unilaterally (including the case where the king acts as head of the state)

1= the legislature can declare war unilaterally

2= the executive and the legislature must act together in declaring war

77= other, as specified in the comment section

88= not applicable because the constitution is silent on the issue

99= unable to determine

12. **Designatedsup:** This variable captures whether the constitution designates a special committee or organization within or without of the executive and the legislature to specifically supervise the governance of the military. This could be a special independent committee or a security council consists of personnel from both political and military sides. For example, article 155 of Armenia's Constitution states that "*2.The general guidelines of defense policy shall be stipulated by the Security Council. Within such general guidelines, the Minister of Defense shall conduct the command of the armed forces.*" This variable shows that the constitution treats military matters as professional and autonomous.

0= no designated supervisory organization

1= designated supervisory organization

77= other, as specified in the comment section

99= unable to determine

13. **MilAppoint:** This variable captures whether and how the constitution grants the power to appoint senior military officers to the legislature or the executive.

0= the legislature can exclusively appoint senior military officers

1= the executive can exclusively appoint senior military officers

2= the executive and the legislature must act together in nominating and appointing senior military officers

77= other, as specified in the comment section

88= not applicable because the constitution is silent on the issue

99= unable to determine

14. **MilRaise**

0= the executive has the power to raise and maintain the armed forces unilaterally

1= the legislature has the power to raise and maintain the armed forces unilaterally

2= the executive and the legislature must act together in raising and maintaining the armed forces

77= other, as specified in the comment section

88= not applicable because the constitution is silent on the issue

99= unable to determine

3.6 Coup d'état:

15. **Coupmeasure**: This variable captures whether the constitution has a clause which preemptively deal with the overthrown of the constitutional regime such as by military coup d'état or not. There could be a clause giving rise to the right and duty to protect the constitution or a clause allowing emergency powers in retaliation to the attempted overthrow. For example, article 48 of Greece's Constitution which states that "*In case of war or mobilization owing to external dangers or an imminent threat against national security, as well as in case of an armed coup aiming to overthrow the democratic regime, the Parliament, issuing a resolution upon a proposal of the Cabinet, puts into effect throughout the State, or in parts thereof the statute on the state of siege, establishes extraordinary courts and suspends the force of the provisions of articles…*"

0= no direct measures against coup d'état or armed usurpation of power

1= direct measures against coup d'état or armed usurpation of power

77= other, as specified in the comment section

99= unable to determine

16. **Noamnesty**: This variable captures whether the constitution prospectively prevent the amnesty or pardon of coup-makers or not. For example, article 36 of the Argentina's Constitution states that "*This Constitution shall remain in force even if its observance is interrupted by acts of force against the institutional order and the democratic system. Such acts shall be irrevocably void. Their authors shall be subject to the sanction provided in Article 29, forever disqualified from holding public office and excluded from the benefits of pardon and commutation of sentences. Also suffering the same sanctions shall be those who, as a consequence of these acts, usurp the functions reserved to the authorities of this Constitution or those of the Provinces, and shall answer civilly and criminally for their acts. The aforementioned actions are not subject to the statute of limitations.*"

0= no prohibition of amnesty for coup-makers

1= prohibition of amnesty for coup-makers

2= there is a clause granting amnesty to coup-makers

77= other, as specified in the comment section

99= unable to determine

3.7 Constitutional Military

17. **Millegis:** This variable captures whether the constitution gives the military a position within the state (within the executive or the legislative) by virtue of the person or group of persons being part of the military. The prime example is article 109 of Myanmar's Constitution which states that there will be "*not more than 110 Pyithu Hluttaw representatives who are the Defence Services personnel nominated by the Commander-in-Chief of the Defence Services in accord with the law.*" As part of the upper house of the legislature. This also includes cases when the military involvement is temporary or transitional such as in article 269 of Thailand's constitution which states that "*during the initial period, the Senate shall consist of two hundred and fifty members appointed by the King upon the advice of the National Council for Peace and Order…*" which is the military group that staged the latest coup d'état in 2014. The ubiquitous practice of establishing military courts or martial courts shall not be included here.
    0= no direct military involvement in the government
    1= direct military involvement in the government

    77= other, as specified in the comment section

    99= unable to determine

3.8 Emergency Powers

18. **Emer:** This variable captures whether the constitution has provisions for a state of emergency. In this regard, "state of siege" and "martial law" will also be treated as the same as a state of emergency.
    0= no provisions on a state of emergency
    1= has provisions on a state of emergency
    99= unable to determine

19. **Emerdc&ap:** This variable captures whether the constitution has provisions involving the military in declaring or approving a state of emergency.

0= No
1= The military can declare a state of emergency
2= The military approves a state of emergency
88= not applicable because the constitution does not have clauses on a state of emergency
77= other, please specify in the comments section
99= Unable to Determine