

Issues Relating to The Role of the Military in Myanmar's Constitutional Arrangements

Myanmar's Constitution of 2008 gives an extraordinary role to the military—one almost without precedent in contemporary constitutions. This paper provides a brief review of the constitutional provisions and some consideration of their implications possible role of the civilian authorities in relation to matters touching internal security. It also compares Myanmar's constitution with some other contemporary constitutions and then concludes with some reflections on what the Constitution might mean for future democratic developments and the progressive demilitarization of politics and society in Myanmar.

Overview of Provisions Relating to the Military in the 2008 Constitution

The 2008 Constitution gives the Defence Services both a leading role in the country's political life and seemingly complete autonomy, as a virtual state-within-the-state.

Article 6 provides for the Defence Services "to be able to participate in the National political leadership role of the State", while Articles 339 and 340 cite its lead in safeguarding the Union against all internal and external dangers and its authority to administer the participation of the entire people in security and defence of the Union. The Defence Services are defined as the "sole patriotic force, strong, competent, and modern" and it has the "right to administer security and defence" and is "mainly responsible for safeguarding the non-disintegration of the Union... and for safeguarding the Constitution" (Article 20).

While the President is empowered to exercise legislative powers and executive powers in the regions in a state of emergency, if there is "sufficient reason and danger", the Defence Services have the right to prevent danger and protection and, if the emergency could cause the disintegration of the Union, the Commander-in-Chief has the right to take over and exercise State Sovereign power (Chapter XI). Moreover, the President's powers on security matters seem to be subject to approval by the National Defence and Security Council, which has a major of military appointees (Article 201).

The Constitution establishes the Defence Services as a completely autonomous organization, responsible only to itself. It has "the right to administer and adjudicate all affairs of the armed forces"; the Commander-in-Chief is the Supreme Commander, with the right to administer security and defence (Article 20). The responsibility for defence, security, border administration, and "so forth" are reserved to the military, which shall name the relevant ministers and senior officials in all governments, national and sub-national (Article 17).

In addition, the military are guaranteed a central role in the general political life of the nation. The Commander-in-Chief names twenty-five percent of the members of all national and sub-national legislative bodies. This is especially

significant in that any constitutional amendment would require more than 75 percent approval in the national parliament, thus giving the military a veto; in some cases, a draft amendment would also have to be submitted to referendum, one approved by Parliament.

Civilian-military relations on matters of security under Myanmar's Constitution

With the Defence Service's control of defence, security and border administration and "so forth" at all levels of government and its autonomy regarding its own leadership and management, there seems to be little room for a role by the civilian authorities in these critical areas. The most likely way for the civilian authorities to acquire a role would be through suasion, perhaps based on their claims of public support but also of its potential to contribute to improving the security situation.

The country now has a civilian President, who works closely with the First State Counsellor, but the Constitution seems to severely restrict his independent authority on matters of security, where the National Security and Defence Council has the ultimate powers of decision. As members of the Council he and the First State Counsellor (in her capacity as Foreign Minister) can try to bring significant issues for discussion into that forum and influence the military by suasion. The second areas where the civilian members of the executive may act would be on matters within the competence of their ministries that may relate to security. This idea is developed further below, in the discussion of the possible role of the legislature.

There are areas where the legislature could potentially play an influential role and where the decision-making rule is a simple majority.

- Defence and Security Committee of the Pyithu Hluttaw: Article 115 empowers the PH to create such a committee, which must include the representatives who are Defence Services Personnel but can include "suitable" representative who are not military "in accord with the volume of work". The PH may take the position that it can compose such a committee by the normal procedure of a simple majority vote. Thus there is the possibility of creating a significant forum within the PH for the discussion of security matters and its composition could give the majority to the civilian representatives¹. While such a committee might be able to range broadly in its discussions, it would still face formidable constraints should it suggest legislation that touched directly on military or security matters. But in many cases in other countries comparable to Myanmar, comprehensive plans to address security challenges have involved social and economic programs, educational programs, amnesties, and matters addressing rights (which

¹ The language of Article 115 seems to suggest that all representatives of the military in the PH would be members of such a committee. This would be an unmanageable number and even more so if there were a greater number of civilian members than military members. Perhaps a reasonable sized committee could be negotiated.

could, potentially, extend to matters of citizenship). Some countries have had legislative committees that have played roles relating to transitional justice and reconciliation. Many of these potential issues fall within the legislative competence of the PH, though their overlap with security matters could, as discussed below, give rise to questions of how resolve conflicts between the civil and military authorities.

- Other committees of the Pyithu Hluttaw: Article 115 also recognizes the competence of the PH to establish committees on other matters, including “national race affairs, economic, finance, social, and foreign affairs”. Committees on any one of these issues could potentially examine them as they bear on relations between communities, the situation in certain regions and so on, thus touching indirectly on security matters.
- The Union Budget: A surprising feature of the Constitution is that it has no explicit provisions for the military budget to be determined separately from the civilian budget and there appears to be nothing in the Constitution that would restrict the mandate of the Finance Commission, whose membership is heavily civilian (Article 229), from any matter, including the finances of the military. Military expenditures in 2013-14 were estimated at 28.7 percent of government spending, which is over four times the average share for military spending in lower-middle income countries. Moreover, the military make extensive use of “off budget” financing (off budget revenues exceeded 40 percent of total Union revenues and 28 percent of Union expenditure in 2011-12) and these accounts are not particularly transparent nor are they accounted for in gross terms in the Union budget.² The Union government published its first public expenditure review in 2016. While civilian review of military revenues and expenditure is obviously a sensitive subject, it may provide a basis for deeper engagement on security matters between civilians and the military. It would appear that budgetary issues require a simple majority in the PH, which could give civilians some political leverage, though this would need to be managed carefully.

Of course, the military could challenge as unconstitutional or stonewall attempts by civilian authorities and representatives to engage on some issues related to security. Article 46 of the Constitution provides for the establishment of a Constitutional Tribunal “to interpret provisions of the Constitution”, the conformity of laws with the Constitution, and “decide on disputes relating to the Constitution” between and among the Pyidaungsu, regions, states and self-administered areas. However, this clause is silent on possible disputes between the government and the military (though in principle they would be covered) and the Constitution does not describe how the Tribunal will be composed. Given this silence, presumably the legislature is empowered to pass a statute by simple majority establishing the Tribunal. Depending on its composition and independence, such a Tribunal could become an important institution in arbitrating disputes over the respective roles of the civilian and military authorities.

² World Bank, *Myanmar Public Expenditure Review 2015*, September 2015, p.31

In conclusion, it is worth reiterating that the 2008 Constitution is remarkable in the extent of its provisions for military leadership and control relating to security matters as well as in the independence it grants the military. A serious shift in the balance between civilians and the military relating to security matters will require a new political understanding or a major shift in their relative political power balance. The Constitution itself provides little purchase for civilian engagement, but the avenues described above might offer some opportunities, however limited.

Comparisons with other contemporary constitutions

The world has seen progressive waves of democratization, so there are many fewer military governments than two or three decades ago. True military governments often ruled by decree, during which the constitution was suspended. In most current constitutions, the provisions relating to the military are relatively brief. They frequently assert the primacy of civilian control over the military, and they may have a brief statement of the role of the military (such as protecting sovereignty). Some constitutions have sections setting out the organization of the military and control of military appointments, national security councils, and the structure of military courts and the scope of military law (which is normally deemed to be limited to military matters, not civil or criminal law). Several constitutions explicitly assert the non-political nature of the military and prohibit political activity by serving personnel; Brazil even extends this to denying the vote to active military personnel. A few constitutions have sections dealing with pensions for military veterans and dependents. There can also be clauses dealing with the procedure for extending amnesties (not necessarily to the military), but it is rare for the substance of an amnesty for the military to be constitutionalized (though the Brazilian constitution of 1988 did so).

Even in countries, such as Algeria, Indonesia, Nigeria, Pakistan, and Venezuela, where the military have—or recently had—a major role in political life, the current constitutions do not give legal standing to the military's political role. The major exceptions include Thailand and Egypt, though neither goes nearly as far as Myanmar's in explicitly extending the rights of the military³. The new Thai constitution provides for the military National Council for Peace and Order to name a panel that chooses the membership of the Senate, where six seats are reserved for the heads of the three armed forces and police, the supreme commander and the permanent secretary of defence. A critical role of the Senate relates to naming the Prime Minister, which it can do with the support of only one quarter of the members of the popularly elected lower house. (The interim constitution of 2014 provided vast powers for the NCPO as well as for a broad amnesty for any military personnel

³ However, basic political freedoms are much more respected in Myanmar and its recent elections have been more in keeping with democratic norms. And as a practical matter, the shared governance arrangement in Myanmar gives a greater role to civilians than is currently the case in Egypt and Thailand. Thus constitutional provisions are only part of the story in any country, especially in military regimes with limited regard for the rule of law.

involved in the coup of its follow-up.) The Egyptian constitution of 2013 guarantees that for the next two presidential terms the Minister of Defence is military officer approved by the Supreme Council of the Armed Forces. It allows for trials of civilians in military tribunals and shields the military and intelligence community from civilian oversight. The National Defence Council, with important responsibilities for security, now has a military majority. In both Thailand and Egypt the military have effective autonomy. In 2015 Pakistan amended its constitution to provide for military courts to try civilian terrorism suspects—the law was to expire in two years but is being extended.

As a practical matter, the military in many countries retain considerable influence regardless of constitutional assertions of the primacy of civilian control. Many receive their government revenues “off budget” and have significant revenues of their own from businesses, so they are autonomous in how they spend. Their control of the intelligence apparatus (and sometimes, though less often, the police) can permit them to target individuals for various purposes. In some cases, the governing party—which may be the revolutionary founding party—is tightly linked with the military. Finally, in countries with a recent history of coups, the idea of a potential military takeover can provide effective constraints on the actions of governments.

Some Comparative Experiences in Transitions from Military Rule

A critical threshold in the transition from military to democratic civilian rule can be a relatively free general election that results in civilians forming the government and having a majority in the legislature. This can set up a competitive dynamic between civilian politicians and military leaders, especially if the military have tried to constrain the actions of civilian governments by constitutional or other means. One author has concluded that

“... military rulers are only likely to be successful in imposing constitutional constraints on a democratic regime if they find a party or parties willing to support them. Moreover, unless the military regime is itself strong enough to be able to impose conditions on democratic forces, its partisan allies should have a relatively significant following among voters. Because democratic parties would frequently attempt to signal the birth of a new democratic era by convening a constitutional assembly, the only way to preserve a constitution drafted under the military is if a party close to the outgoing regime (has...) sufficient political and institutional representation to veto the initiative.”⁴

Clearly, the military in Myanmar anticipated this potential problem, which is why they reserved to themselves the right to veto any constitutional change. But that rule flies in the face of democratic principles and its fundamental legitimacy may be

⁴ Gabriel L. Negretto, “Authoritative Constitution Making: The Role of the Military in Latin America”, in Tom Ginsburg and Alberto Simpson (eds.), *Constitutions in Authoritative Regimes*, (Cambridge University Press: New York, 2014), PP.92-3

challenged politically, so the stage is set for eventual tests of will and strength regarding Myanmar's constitution.

There are various models for transitions from military to civilian rule. At one extreme, it can be sudden—as in the collapse of the military regime in Argentina, which led to an immediate reversion to the constitution that had been suspended—or at the other extreme it can be a step-by-step process over many years. And there are many options between these. Moreover, it is useful to distinguish between democratization and demilitarization because the transition from military rule to democratic rule should not limit itself to the issue of how the armed forces are related to governments. Militarization is the overwhelming of the state apparatus by the armed forces, effectively their colonization of the majority of state and state-related structures; it can extend beyond the state level to occur at the micro level of normal life with a centralized system of social control⁵. By its nature, a deeply militarized society is likely to take longer to effect the transition to democracy.

An example of a drawn out progressive transition from military rule in the recent past that may contain lessons for Myanmar is Chile. While it now has a de-politicized military and fully functioning democracy, Chile's military regime—partly inspired by the consequence of the weak constitutional protections Franco had created to perpetuate his regime in Spain—had designed the Constitution of 1980 with strong institutional supports for the role of the military in political life that made for an exceptionally complex period of transition. During the initial, transitory period of eight years, the 1980 Constitution gave President Pinochet (by name) and the Junta overwhelming power before the main provisions were to become effective. The constitution provided for there to be a plebiscite in 1988 on whether Pinochet would continue as president, which—to the surprise of the military—he lost with 56 percent voting against his continuance. The Constitution provided that if he lost, the military would remain in power until 1990, but his defeat weakened their legitimacy and opened a delicate period of negotiations between the military and leaders of moderate right and left wing parties. While all accepted to operate within the Constitution, which was seen as vital for stability, the civilians succeeded in liberalizing some rules about political participation and restricting the power of the presidency, while the military won extra protection of the laws governing them. These changes, ratified by plebiscite, set the stage for elections, with centre-left reformers confirming their popularity and forming the new government.

The Constitution still reserved important powers to the military. Pinochet remained commander-in-chief and along with other military commanders he could not be changed for at least four years. Over the next sixteen years, the country had three presidents, all from the centre-left. Politics balanced cooperation and competition, with the military having a significant base of public support in centre-right parties. The key issues were constitutional reform, where the centre-left was repeatedly frustrated, the economy, where there was a growing consensus, and the past record of human rights abuses by the military, an extremely sensitive issue. The

⁵ Philip J. Williams and Knut Walter, *Militarization and Demilitarization in El Salvador's Transition to Democracy*, (University of Pittsburgh Press: Pittsburg, 1997), pp. 6-9.

dam finally broke on human rights with the arrest of Pinochet, by then a Senator-for-life, in England in 1998, in response to a Spanish extradition request, and this led to a major loss of reputation by the military. This facilitated key constitutional reforms that effectively ended any military role in politics in 2005. Throughout this long transition, Chile had the advantages of progressive economic improvement, a large measure of consensus on key policy issues and a preparedness by the centre-left majority and the centre-right parties close to the military to negotiate with one another. As well, there were no significant internal security challenges.⁶

The scope of this paper does not permit even a cursory review of several cases of transition from military rule to democracy. Instead, we are limited to drawing out a few, brief points of relevance to Myanmar that can affect the course of such transitions:

- *A transition is easier in an environment of low security risk or when any major internal insurgencies have ceased:* Clearly the military can claim a greater role in public life if there are risks to national security from external forces or internal insurgents. However, dealing with internal insurrections can be as much a political as a military matter, so both civilian leaders and the military will seek leading roles, which can lead to significant tensions if they differ on substance and their respective responsibilities are not clarified.
- *Transitions can involve a protracted evolution in the balance of power between the military and civilian forces:* This was clear in the Chilean case discussed above and for the civilian politicians it involves a continuing judgment as to how far they can press their claims at any one time, especially if there is a possibility of reversion to military rule.
- *Truth and reconciliation commissions, which address past abuses of human rights by the military and armed groups, can help consolidate support for due process and the rule of law:* Such commissions have often been part of the transitions from authoritarian to democratic rule, including transitions from military regimes in Argentina, Brazil, Chile, El Salvador, Guatemala, and Nigeria. While they are sensitive and require careful negotiation of their mandates, they can serve to demonstrate unacceptable practices under unaccountable military rule (as well as by rebel groups) and reinforce the importance of the rule of law. Well done, such commissions permit a cathartic collective accounting of past abuses and a political move forward.
- *External powers can have an important influence on transitions:* This is especially true in countries dependent on foreign aid. Foreign parties can bring significant economic, technical and human resources to bear that can facilitate a transition. They can also, on occasion, assist in mediating conflicts. An important aspect of this can be the desire of the military to modernize—getting up-to-date equipment and modern training—so foreign powers can provide this within a framework of the transition, including working to change the political culture of the military to respect democratic

⁶ Francisco E. Gonzalez, *Dual Transitions from Authoritarian Rule: Institutionalized Regimes in Chile and Mexico 1970-2000*. (Johns Hopkins University Press: Baltimore, 2008

norms⁷. Aid packages can also be important in helping resolve conflicts with dissent groups and in developing the administrative and juridical capacity needed for a democratic system.

- *Separating the military from the security apparatus and the police:* In many authoritarian regimes these three distinct functions are effectively fused and their decoupling can be an important step in demilitarizing the state and promoting civilian rule. Given its sensitivity, it is likely to come once civilian political supremacy is consolidated.
- *A transition may be achieved through constitutional continuity or rupture:* There can be strong reasons—symbolic, political and practical—to seek constitutional continuity in the transition from an authoritarian regime to democracy. But in many instances it is decided to “refound” a national regime with a clear break from a past, discredited regime, which may be for quite different symbolic and political reasons from those associated with continuity⁸. And there can be powerful practical incentives as well, including breaking from what may be constraining rules regarding constitutional amendment. The political legitimacy for such a rupture in a democratic transition normally comes from a freely elected constitutional assembly of some kind and it may be followed by a referendum of ratification. (A constitutional rupture does not imply the voiding of all existing laws: normally there is a provision for the continuity of existing legislation, except as otherwise provided.)

The potential relevance of these points to Myanmar is evident. Perhaps the greatest challenge the management of the still unresolved security challenges to the country, which involve a redefinition of its nature and its institutions at least as much as a military response.

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⁷ See Zoltan Barany, *Armed Forces and Democratization in Myanmar: Why the U.S. Military Should Engage the Tatmadaw*, Centre for Strategic and International Studies, 13 September, 2016, www.csis.org

⁸ Of course, military regimes also often choose a constitutional rupture when they draft authoritarian constitutions, as happened in Myanmar in 1974.