Bingham Centre Myanmar Project: Constitutional Transitions and the Role of the Military

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1. It is now common to isolate two separate phases of large-scale constitutional and political reforms whose ultimate goal is the establishment of a stable system of democracy. The first phase – the transition – is said to be complete when:

   a. agreement about political procedures produces an elected government;
   b. a government assumes power as a direct result of a free and popular elections;
   c. the government so elected has actual – and not merely legal – authority to generate new policies; and
   d. the executive, legislative and judicial power established by the new democracy as a matter of law does not have to share power with other bodies.

The second phase – the consolidation – relies on politicians and citizens applying the new rules to other issues and thereby adjust the democratic structure.

2. In this paper, I focus on the role constitutions and constitutional reform can play in transitions to democracy which involve the military. I aim to explore the experiences of selected other countries who have undergone transitions to democracy and to offer some insights for Myanmar’s current phase of reform. There is no doubt that Myanmar is in the transition phase of its reforms. When that transition began is debatable – it can be placed anywhere between the grant of local governance through the Government of Burma Act 1935 and the announcement in March 2013 of the formation of a parliamentary committee to review the constitution – but ultimately a point of scholarly and historical rather than practical interest. I do not seek to make recommendations here or to interfere in what is and must remain a domestic process. Rather, I hope to assist Myanmar’s leaders and its citizens to make informed choices. I feel able to do so because I note from the public statements of the government, the ruling Union Development and Solidarity Party, the Tatmadaw, the major political parties and many of the ethnic nationalities groups that a stable democratic system is a shared goal, though the precise shape of that system is still under discussion.

THE NATURE OF TRANSITIONS AND THE ROLE OF CONSTITUTIONS

3. Past experience and careful study of transitions has indicated some recurrent themes. Small groups of leaders play a disproportionately large role in the decision-making process leading to the completion of the transition. A widespread fear that civil war or other forms of internal strife are likely makes gradual changes appear more attractive than radical and rapid ones. Political consensus – an act of explicit agreement in which
political leaders accept the existence of diversity in unity and consent to forming the basic structures and procedures of a democracy – is essential to make serious progress.

4. While there is now a rich body of scholarship on democratic transitions there has been relatively little study of transitions involving the military. There is even less that focuses on the role of constitutions and constitutional reform in such cases. This is despite many countries completing democratic transitions where militaries have previously held sovereign power or played a significant political role. Such countries are not limited to particular regions or cultures and (to take a random sample from the past 50 years or so) include Algeria, Turkey, Pakistan, Portugal, Egypt, Spain, Chile, Indonesia, South Korea, Nigeria, Ghana and Venezuela.

5. Some initial remarks are therefore warranted to provide context to the role of constitutional reform in these transitions. Some of the points that follow apply to all constitutional transitions but they are particularly apt for transitions in which the military plays an outsize role. First, there is a tendency to misunderstand the nature and potential impact of constitutional change on its own. Constitutions often come to be seen as the solution (or at least part of the solution) for every issue or conflict that arises in relation to the transition. This overplays their resolutive power and underplays the importance of other forms of law (statutes passed by parliaments, decisions issued by judges). From a legal perspective, successful transitions to a new constitutional order are achieved through a combination of constitutional alterations, new laws and a judiciary whose decisions command public confidence.

6. Secondly, constitutional reform is often mistakenly viewed as a purely technical and legal process. The mistake lies in considering that alterations to the text of a constitution by themselves can achieve lasting progress. Politics and political agreements are as important, and sometimes more important, than perfecting the text of a constitution. Meaningful constitutional renewal relies on three propositions:

   a. All political stakeholders consider the new constitution to be the highest law according to which power will be wielded. The text of the constitution cannot be a sham: its terms and its practice must be to the same effect.

   b. Building a culture of constitutionalism – the recognition across all major facets of society that the constitution ought to be followed and interpreted in accordance with its spirit and that political actors should be held to account where they do not – is a process that must operate in tandem with drafting constitutional amendments.

   c. The constitution is a facultative instrument that sets basic parameters and minimum standards but leaves room for change and informal arrangements. Offering too great a degree of specification – and here Zimbabwe’s current constitution, adopted in 2013, is a good example – ensures that the first two propositions will be broken. This will do serious long-term damage, as it will undermine any trust or confidence that political actors and the public at large may place in a constitution or constitution making. Agreeing a set of minimum standards for the most important aspects of political governance with an understanding that other changes may be agreed without being reflected immediately in the written constitution can be a helpful tool towards compromise.

7. Finally, there are two significant risks for the long-term stability of constitutional transitions where a significant portion of governmental power is held by military. The first is that, at the conclusion of the transition, the military retains reserve domains of policymaking or protective powers to intervene in the affairs of state for the safeguarding of some higher
purpose. An example of the former is found in Chile, where the military directly controls the national copper industry and retains 10 per cent of its revenue. The Portuguese Constitution adopted in 1976 offers an example of the latter: it established a non-elected Revolutionary Council, controlled by the military and separate from the executive and the legislature, with the power to veto legislation and oversee the armed forces. The second is that civilian politicians prioritise negative consolidation (the removal of existing powers or privileges possessed by the military) at the expense of positive consolidation (the incorporation of the military into the goals and institutions of the new democratic system). Both are equally important. A failure to plan and undertake meaningful positive consolidation through successful constitutional design will reduce the likelihood of stable constitutional government.

THE RELEVANT PARTS OF MYANMAR’S CONSTITUTION

8. Myanmar’s current constitution reflects the fact it represents a transition from a system of government led by the military. The Tatmadaw is guaranteed a role in national political leadership of the country by section 6(f) and section 20 makes it the principal safeguarding force for the constitution. These features and others are common to constitutions developed during the course of transitions involving the military. In describing these provisions, I pass no comment on their merits and legitimacy. I intend simply to state how the current constitution distributes power with respect to Tatmadaw personnel.

A. Nominations and positions of significance

9. The constitution guarantees, in section 17(a) and (b) of the Basic Principles, that military personnel will play a significant role in the operation of both the executive and legislative branches of government at the Union and sub-Union levels. This is reflected across several provisions. The nomination of one quarter of all positions in all legislatures – at both Union and state or regional level – is vested in the Commander in Chief (sections 74, 109, 141, 276(i)). In addition to the legislative influence this grants, the bloc provides an effective veto-power to military personnel on any proposed changes to the constitution (section 436). The Commander in Chief is also given the power to nominate the ministers of defence, home affairs and border affairs (section 232(b)(ii) and (iii)). The nomination is entirely discretionary and cannot be refused: sections 232(d), (j)(ii), 234(b), 235(c)(ii). The ministry of home affairs is particularly important: the Head of the General Administration Department for a region or state, who ultimately reports to the minister of home affairs, is deemed to be secretary of the region or state government (section 260). As a result, the minister for home affairs, and through him the military, has a significant role in state and regional government administration in addition to the powers granted to appoint state and region ministers (sections 262(a)(ii), (n)(ii), 276(d)(ii)). The military have representation on the Nay Pyi Taw Council (section 285(b)(iii) and (f)) and the military personnel who serve in the Union legislature are, in effect, granted the nomination of one of the vice-presidents by section 60(b)(iii).

10. Chapter V of the constitution creates the executive of the Union and establishes as part of the executive the National Defence and Security Council (section 201). The full powers or scope of responsibilities of this council are not specified in the constitution. However, the Council has the authority to abolish the three branches of government and transfer sovereign power for up to two years to the Commander in Chief in the case of a state of emergency. It also proposes and advises the President on the appointment of the
Commander in Chief. The Council comprises 11 members, six of whom are serving military personnel or nominated by the military.

11. In all the cases described here, nominated personnel (except the vice-president) remain serving members of the Tatmadaw and, at least in theory, are subject to the line of command.

B. Domains of autonomous influence and control

12. The text of the constitution grants significant autonomy to the military in the conduct of its own affairs. This is confirmed in section 20(b), which vests the right to independently administer and adjudicate all affairs of the armed forces. The further effect of sections 337, 338 and 339 is to make all potential threats to stability affairs of the armed forces, whether they originate inside or outside Myanmar, and to give power to the Tatmadaw to address them.

13. A consequence of the right vested by section 20 of the constitution is that military justice operates separately to all other parts of the judiciary. Military personnel are subject to military laws, even if they may assume other positions within government (section 291). Decisions on matters of military law are ultimately for the Commander in Chief and his decision is final and binding: section 343. The legislature retains power to pass laws with respect to defence and the operation of the Tatmadaw (see section 96 and Schedule One, item 1(a)) but there would appear to be no way for such legislative regulation to be enforced. In effect, this means that there is very limited scope for the civilian branches of government to engage in a meaningful way with the Tatmadaw.

AREAS OF MODERNIZATION IN CONSTITUTIONAL TRANSITIONS INVOLVING THE MILITARY

14. To achieve a traditional democratic system of governance, the goal of the transition must be to shift the constitutional conception of the military from an institution in and of itself – effectively a fourth and separate branch of government – to a body that exists as an integrated part of the state. It will not be above politics or any branch of government but rather it will form an integral element of the body politic. Experience with military transitions in other countries indicates that two key areas must be addressed to create a stable and effective relationship between civilian democratic institutions and the military. To explore these areas, I will draw on the developments in two countries that have successfully attempted a transition from military government.

15. Indonesia’s transition was triggered by the forced resignation of President Suharto in 1998 following protests and riots. The military withdrew the support it had previously and consistently provided to the president and forced the installation of a new president. The constitutional transition proceeded without any particular planning or design. The 1945 constitution was amended in four stages by an assembly chosen in direct popular elections. Between November 1999 and May 2000, two parliamentary committees conducted public and private hearings and study tours and prepared reports that were debated in stages between 2000 and 2002. The reform exercise used the existing constitution as a starting point but amended it to such a degree that only about 11 per cent of the original remains.
16. In Spain, the death of General Francisco Franco in 1975 brought to power a king, Juan Carlos, who oversaw the process of total power transfer from the military to a civilian government between 1975 and 1982. General elections were held in 1977 to form a constituent assembly tasked with drafting a new constitution. The product was approved at a general referendum in 1978 and the first democratic elections under it were held in 1982. This new constitution, the first since the 1930s, remains in force with only two amendments.

THE MILITARY AND POLITICS

17. In Spain, this relied on a leader within the military who was committed to the gradual transfer of all political power persuading the military to relinquish all power and form an integral part of the body politic. The Spanish constitution had never guaranteed seats for the military in the parliament but in the first constituent assembly following the 1977 elections there was direct representation of the military and several parties sympathetic to its concerns. The military also had autonomy over the conduct of its own affairs, though there was no defence minister as such. The drafting of the 1978 constitution, which was led by civilians not aligned with the military, involved a gradual separation of the military and politics. It sought to do this, first, by distinguishing between the armed forces and forces of public order (such as the police or border guards) in the preliminary section of the new constitution. Amending existing phrases and drawing on historical language, the new text excluded forces of public order from the mission of being guarantors of the constitution. Secondly, the drafters ensured that provisions about the internal organisation of the military, and in particular its governing organs, were not established by or in the constitution. This was important for future developments: by leaving out such organs it enabled them to evolve, and eventually disband, without the need for constitutional amendment.

18. Indonesia had, since its constitution of 1945, allowed for representation in the main legislative body from the military and police. This representation was not constitutionally entrenched. Rather, the constitution delegated a power to appoint representations from phase “regional territories and groups as provided for by statutory regulations”. During the of constitutional reform that lasted from 1999-2002, several attempts were made to constitutionalise the practice that had developed of the military and the police holding seats in parliament. These did not succeed. The principal reason for the rejection of military representation was the lack of popular support. The body preparing amendments to the constitution was broadly representative of the people and conducted many public consultations across Indonesia. These features of the reform process offered a chance for public concern about any political role for the military or the police in the future constitutional system. As a result, the military and the police withdrew from politics without being forced to.

19. At present, Myanmar’s constitution guarantees a role for the military in politics. It does so through formal nominations and declarations. It legally separates public order forces (the police and border guards) from its military. However, the forces that are intended to oversee public order are informally connected with the Tatmadaw, reflected in the fact that the minister in charge of these forces is a serving member of the military. The lessons learned from other military transitions suggest that finding a way to disengage forces protecting public order – providing civilian oversight, establishing distinct identities – improve public confidence in government and provide greater stability during transition.
This may be an important first step towards creating a closer and more meaningful engagement between civilian and military leaders.

**MILITARY JUSTICE**

20. It is not uncommon in developed democracies for the military to operate separate tribunals and a separate system of justice to adjudicate military law. A key feature, however, of military justice in democratic systems is the limited scope of the jurisdiction of military courts and the possibility of review on significant cases.

21. A key success of Spain’s military transition was reform of military justice. At the start of and in the early phase of the transition, military courts exercised wide jurisdiction over soldiers and civilians alike and were used as political tools to stymie attempts to reform. There are documented instances of soldiers’ insubordination going unpunished when it was directed towards civilian government or initiatives to reform. The constitution adopted in 1978 stipulated (in art 117) that there would be a unitary system of justice, covering both civilian and military justice, and that this would be implemented through an organic law defining jurisdiction. Such a law was never fully implemented because of the confrontation that such legislation would have represented to the military. Instead, what proved much more powerful was a provision in the constitution that allowed for appeals from the highest court martial to the Spanish Supreme Court. This removed the autonomy of military courts and integrated them into the unified legal system of the state. It allowed a dialogue between military judges and civilian judges that was productive and stabilizing.

22. Indonesia has so far not succeeded in reforming its military justice system from the Suharto era. Though parliament and the executive in theory have the constitutional power to regulate and oversee military tribunals, in practice it has been politically unfeasible to do so. As a result, military tribunals operate with very little transparency or accountability.

**CONCLUSIONS**

23. Myanmar’s constitution preserves significant influence and control for the Tatmadaw in politics and government. To say that is not to criticize the Tatmadaw or the constitution but merely to note the characteristics of the current constitution. If – as public statements of actors on all sides of Myanmar’s transition suggest – a system of democratic governance is desired, gradual changes directed towards a more engaged relation between civilian structures and the military will need to emerge. Existing practice suggests that two areas that will require attention are the system of military justice and the separation of the military from politics and its reintegration as an integral part of the body politic.