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Security Sector Reform in Constitutional Transitions

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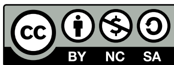

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Key recommendations

Security sector reform, democratization and constitutional reform are intrinsically linked. The constitution-building process can therefore provide a critical forum for negotiations over changes in the relationship between civilian and security sector institutions. This Policy Paper aims to support advisors and decision-makers in navigating these complex transitions. Key recommendations drawn from the paper are listed below.

1. **Analyse the context**: The parameters of the potential interactions between constitutional reform and security sector reform will to a great extent be determined by context. Key considerations will include the state of the security sector at the moment of transition, the leverage of security sector agencies in negotiations, the critical interests of security sector leaders, including economic interests, criminal accountability and normative values, and how security sector agencies are represented in political negotiations.
2. **Civilian oversight**: Separate civilian ministries staffed by professional bureaucrats and led by a cabinet minister should be established for each security sector agency, to ensure political responsibility, direction and accountability for the actions of the security sector, while at the same time to serve as an institutional buffer that protects the security services from partisan abuse. In addition, consideration should be given to constitutionalizing the oversight powers of parliament—for example, through mandatory reporting—and to the establishment of independent oversight bodies, such as a National Police Service Commission. The composition of such bodies should be inclusive of civil society representatives and broadly representative of the population.
3. **Separation of functions**: The constitutional and legal framework must clearly distinguish the different roles and institutional architecture associated with different security agencies. For example, the military should be responsible for national defence and the police should be responsible for law and order.
4. **National Security Councils**: National Security Councils can be critical bodies for coordinating security, sharing intelligence and enabling whole-of-government responses to threats, but their composition should include a civilian majority to maintain democratic accountability. Careful thought should be given to balancing the need for confidentiality with the establishment of adequate procedures for oversight.

5. **States of emergency**: Most constitutions provide for states of emergencies, during which security sector agencies may be given expanded roles beyond their usual mandates, and with less oversight. These provisions should be drafted clearly and with sufficient detail to avoid ambiguity and should include maintaining an oversight role for the legislature throughout the emergency.
6. **Legal instrument/sequencing**: Where possible, establishing principles and parameters in the constitution can be a powerful first step in strengthening the chances of extensive security sector reform, while the details can, and often should, be left to legislation.
7. **Amnesties/transitional justice**: It is important to adopt a broad view of transitional justice which is not limited to criminal accountability. There are numerous ways in which constitutional transitions can address victim-centred justice through promoting the right to truth, the right to justice, the right to reparations and guarantees of non-recurrence.
8. **Economic issues**: Militaries in non-democratic regimes may often have significant economic interests (e.g. commercial activity, salaries, patronage networks), which they seek to protect during the transition. Constitutional reform may jeopardize these interests. Careful thought should be given to the impact of constitutional reform on these economic interests from the very outset.

Executive summary

This Policy Paper focuses on the relationship between **security sector reform (SSR**) and **constitutional reform** processes. While SSR and constitution-building are typically seen as separate issues, in practice they are deeply interconnected, and the success of a transition to constitutional democracy depends on the successful handling of security sector issues. Constitutional reform and SSR processes intersect in democratic transitions from **military rule, civil war and authoritarian regimes**.

No two transitions to democratic rule are alike, and differing contexts shape the form, scope and modalities of constitutional change. Nonetheless, there are six common issues that arise in most processes: (a) civilian control and oversight; (b) separation of functions and national security councils; (c) legal instrument; (d) sequencing; (e) amnesties and transitional justice; and (f) economic interests.

Civilian control and oversight: Security sector agencies should be under civilian control, while at the same time be protected from partisan abuse by civilian authorities. In addition, they must be strong enough to respond to internal and external security threats, while remaining accountable to institutions and officials armed with only the force of the law. A common pillar of civilian oversight is to establish civilian ministries at the apex of each security sector agency's command structure. The interposition of a minister and a professional bureaucracy with expertise also helps to curb abuses of power, by serving as a buffer between the head of government and the security sector. Legislative committees are an important and effective means of exerting civilian oversight, by debating security-related legislation, exercising oversight in the form of oral hearings and receiving reports, playing a role in decisions to deploy armed forces, and controlling the budget and expenditure of security sector agencies. Other oversight mechanisms include mandating reporting to parliament, complaints processes and establishing independent oversight bodies.

Separation of functions and national security councils: There should be a clear separation between the role of the military (to protect against external threats), the role of the police (to maintain internal law and order) and the intelligence agencies (to gather information of national interest and assess internal and external security threats). This separation should be delineated through a legal framework that articulates, and limits, the mandates and missions of different security sector agencies, and serves two objectives: extracting the security services from politics and making it harder for civilian authorities to abuse the security services for partisan ends. The roles of the police and the armed forces may become blurred during a state of emergency, and this can be abused by governments with authoritarian intentions. The constitutional and statutory framework governing states of emergency should be carefully designed. There is also a series of security threats, such as international terrorism and drug trafficking, that require a whole-of-government response,

and this can exert pressure on the distinctions between the different security sector agencies. To safeguard against potential abuse, the composition of national security councils should include a civilian majority, and careful thought should be given to balancing the need for confidentiality with the establishment of adequate procedures for oversight.

Legal instrument: A critical issue in constitutional transitions is what to include in the constitutional text and what to leave to be dealt with subsequently by law and regulations. Including detailed provisions in a constitution makes them harder to change compared with an ordinary statute, and, depending on how they are drafted, such detailed provisions can entrench SSR or thwart it. As transitions can be times of low trust, there may be greater scope for reform if it is done gradually. An intermediate option is to use organic laws to create and regulate security sector agencies. Regardless of the level of detail required in the constitution, there will always be some form of implementing legislation required. Finally, even when constitutions provide only a loose agenda for SSR or no detail at all, consideration should be given to limiting the power of the executive over security sector agencies during a state of emergency.

Sequencing: SSR can occur before, after or at the same time as constitutional reform. Variations in sequencing reflect the leverage of security sector agencies. Where their leverage is low, SSR will frequently precede constitutional reform; where it is high, SSR will usually follow constitutional reform; where security sector agencies have an intermediate degree of leverage, SSR and constitutional reform will often occur in parallel. In all cases, transitions evolve over an extended period and the relationships between civilian institutions and security sector agencies will continue to change. Two important principles are: (a) SSR, democratization and constitutional reform are intrinsically linked, and the constitution-building process can provide a critical forum for negotiations over changes in the relationship between civilian and security sector institutions; and (b) where possible, establishing principles and parameters in the constitution can be a powerful first step in strengthening the chances of extensive SSR, while the details can be left to legislation.

Amnesties and transitional justice: Criminal accountability for past human rights abuses is often a prominent and polarizing issue in constitutional transitions. In many cases, amnesties are discussed during ceasefire or peace agreement negotiations. Constitutions can entrench an amnesty (in which case they are also often made difficult to amend), frame the composition of the legislature and its decision-rules to make a legislated amnesty hard to repeal, or expressly protect an amnesty from potential legal challenge. Where amnesties are not protected through constitutional entrenchment, they may be easier to overturn at a later date when political dynamics change. Beyond amnesties, constitutional negotiations can help or hinder transitional justice, including the right to truth, the right to reparations, the right to justice and guarantees of non-recurrence. Civilian oversight and constraints on the executive can be important mechanisms of non-recurrence.

Economic interests: Security sector personnel and agencies in non-democratic regimes often have a range of economic interests and can sometimes be very significant participants in the economy. A fundamental issue to confront in a democratic transition is whether to allow security services to continue to enjoy economic benefits in order to convince them to let the transition occur, or to risk the transition by cutting off the supply of perquisites and economic benefits to security officials. Likewise, it is important to understand how constitutional reform affects the political economy of the transition. A critical challenge in transitions is how to replace income from the war economy (in post-conflict cases) or force reductions (in post-conflict cases, but also transitions from military and authoritarian rule). Constitutional reform can provide incentives, or disincentives, for armed groups to support the political process.

1. Introduction

> Princes must lay good foundations, and those foundations include good laws and good armies.
> (Niccolò Machiavelli, *The Prince*)

Although the society envisaged by Machiavelli was not democratic, his conclusion that the law and the military were of paramount importance as the twin foundations of the state remains valid for constitutional democracies in the 21st century. This Policy Paper focuses on the foundational moment of state-reform or state-building, and in particular on how the relationship between the security sector and democratically elected and accountable civilian leadership is reshaped through constitutional change during major political transitions. Negotiated political transitions typically involve a series of transformations in the relationships between different actors and institutions, and new or amended constitutions provide the legal basis for any revised arrangements. The role of security sector elites in these negotiations and the effect of the political transition on security sector agencies are often critical to the overall success of the transition.

Each constitutional transition presents a different context, and constitutional reform processes must adapt to the unique characteristics of each situation. However, some common scenarios that give rise to questions about the relationship between security sector agencies and the constitutional framework include:

- contexts where a **military regime** has been in power and must now exit politics, and security sector agencies must be subject to democratic, civilian oversight;
- contexts where several armed groups exist (e.g. a **civil war**), and the state must establish a legitimate monopoly on the use of force; and
- contexts where the security forces (e.g. the police) have been used as tools to protect an **authoritarian regime** (including a ruling party) and to oppress opposition and dissent.

There is a vast array of processes and reforms needed to tackle these challenges, and many do not touch directly on constitutional change. They may include: (re)training security sector personnel; vetting; demobilizing, disarming and reintegrating former armed actors (DDR); and engaging in the internal re-organization of security sector agencies ranging from the military to border control forces. At the same time, in many cases the constitution-building process is a critical forum in which key choices are made regarding the governance of security

sector agencies in order to ensure a successful and stable democratic transition. These choices include:

- What role can and should the security sector agencies play in **constitutional negotiations**?
- How will **democratic, civilian control and oversight** of the security sector be ensured? What roles should there be for parliament and for civil society?
- How will the **functions and roles of different security agencies** be separated, in particular to ensure that the military is not given responsibility for maintaining internal law and order?
- How should the military be removed from **governance and policymaking**?
- What should the **pace and sequencing** of security sector reform (SSR) and constitutional reform be? What should be dealt with immediately in the constitution, and what can be left to subsequent regulation by statute, regulatory orders and policy?
- How will past **human rights abuses** be dealt with?
- How will potential changes to the constitution affect the **economic interests** and patronage networks of the security sector agencies?

This Policy Paper takes up these questions, with sections on democratic constitutional change, contextual factors, civilian control and oversight, separation of functions, legal instrument, sequencing, amnesties and transitional justice, and economic interests. While the outcomes and contexts of each case vary, one common lesson is that where the security sector, and particularly the military, has retained strong leverage and a strong negotiating position, the path towards full SSR is likely to proceed incrementally, rather than in one fell swoop. Some issues may need to be postponed, to make a constitutional bargain possible, and some core interests of the military may require very lengthy deferral.

2. Democratic constitutional change and the security sector

Constitutional change occurs in a variety of different contexts and is not limited to democratizing transitions. A recent study found that constitutional transitions result in greater levels of democracy in only about 50 per cent of cases (Eisenstadt, LeVan and Maboudi 2015). Indeed, constitution-making can matter to authoritarian leaders, as even military regimes draft constitutions, often suspending existing constitutions and promulgating new constitutional texts to consolidate their rule (e.g. the 1968 Constitution of Greece, the 1974 Constitution of the Union of Burma (now Myanmar)). In such cases, constitutions may fulfil a number of functions, including coordinating state actors and institutions, expressing fundamental values and principles, and legitimizing the regime through creating a perception, however thin, of constrained government.

However, this Policy Paper focuses on cases where constitutional change is part of a new political settlement which has as one of its broadly agreed objectives the (re)establishment of a democracy. While every constitution and every constitution-making process is different, democratic constitution-making experiences share certain objectives and characteristics that are relevant when considering a concurrent process of SSR. These include:

1. **Inclusive processes of arguing and bargaining**: Constitutional change, in particular since the 1990s, has become an increasingly complex and expansive process. There is an emerging norm that constitutions should no longer be made behind closed doors over a few weeks by a small group of elites, with public involvement limited to—at most—ratification through referendum. Instead, a modern democratic constitution-building process is often a protracted affair, usually lasting more than a year, and involves a series of consultations and negotiations with the general public, civil society organizations, political parties, elected officials and many other stakeholders. Different groups seek inclusion and a voice in constitutional negotiations to protect and promote their own interests in a constitutional bargain. Exclusion from the process increases the likelihood that groups will seek to 'spoil' or cause the collapse of that process, and decrease the likelihood that reforms mandated in the constitutional text will be 'owned' and implemented in practice. The nascent constitutional order needs the support of the security sector to have any chance of taking root, and without the acquiescence of the military in particular it is prone to early collapse. As discussed below, how and when leaders of the security sector agencies and non-state armed

actors are involved in the constitution-building process is a critical determinant in the trajectory and success of the overall transition.

2. **Constraining power through the organization and separation of roles and responsibilities:** Central to any notion of constitutionalism is the prevention of arbitrary rule through constraints on the exercise of public power. A primary mechanism through which constitutions seek to achieve this goal is the separation of powers, which consists of the allocation of the responsibilities of state across different institutions, and the establishment of mechanisms for oversight and deliberation among these institutions. The concept of the separation of powers also applies to security sector agencies. One common and critical objective of democratic constitutional change is to assign distinct responsibilities to different security agencies—for example, the military should be responsible for national defence, while internal law and order should be left to the police, and intelligence gathering separated from the investigation and prosecution of criminal activity.
3. **Democratic accountability:** Sovereign power in democratic societies lies with the people, and democratic constitutions aim to ensure that all exercise of public power by organs of the state is ultimately accountable to the people, either directly or through their elected representatives. With regard to security sector agencies, this fundamental democratic principle mandates carefully considered mechanisms of oversight and clear command and control hierarchies to ensure that no element of policymaking—including all aspects of security policy—remains outside the oversight of elected officials. Increasingly, civil society is also seen as playing an important oversight role, especially through providing independent civilian expertise on security matters.
4. **Inclusive ownership of the state:** Democratic constitutions, in particular in countries with a history of ethnic division, seek to ensure that all societal groups are represented in state institutions. This goal shapes a number of commonly debated constitutional design choices, such as the choice of electoral system, forms of territorial autonomy and bicameral legislatures. It is often the case in post-conflict transitions that certain groups have been excluded from security sector agencies, and constitutional arrangements may be necessary to mandate the integration of these groups into the military, police and other arms of the state security apparatus.
5. **Big bang or incremental reform:** A critical question that arises during constitutional transitions is how much can be decided definitively at the moment of constitutional change, and how much should be deferred to a later date (see, e.g., Lerner 2011; Dixon and Ginsburg 2011). In some cases, the constitutional framework for the security sector was democratized in one fell swoop (e.g. South Africa, Kenya). In others, the context demanded a more gradual, pacted transition, which allowed security sector agencies to maintain influence in politics, and protected enclaves from civilian oversight, for a period of time (e.g. Spain, Indonesia). The pace of reform, and the scope of what the constitution should cover, can be critical to the overall process of transition.
6. **State effectiveness:** Constitutions and constitutionalism are often thought of as primarily a means of constraining state power. But they must also enable efficient decision-making and effectiveness of state action. In the famous ‘If men were angels’ passage from the *Federalist* No. 51, it is noteworthy that James Madison stated: ‘In framing a government . . . the great difficulty lies in this: you must *first* enable the government to control the governed; and in the *next* place oblige it to control itself’ (our emphasis; Hamilton and Madison 1788). A parallel consideration is of

paramount importance in the security sector. The power to defend the nascent constitutional order and to maintain internal law and order are critical in the process of state-building, and efforts to reform the security sector through greater controls should be conscious of maintaining an adequate level of military and police effectiveness.

In sum, the overall objectives of democratic constitutional reform and the more specific issues involved in reframing the relationship between security services and civilian political authority are tightly interwoven and share common principles and challenges.

3. Contextual factors

No two constitutional transitions are the same, and each process reflects the context in which it occurs: different starting points may require different forms, scope and modalities of constitutional change. The fact that 'context matters' is an obvious and oft-repeated axiom, but here we seek to map out some of the most important contextual factors that might constrain, enable or otherwise affect how the constitution-building process deals with SSR.

First, what does the **security situation** look like at the moment of transition? Does the state maintain a monopoly on the use of force, or are there also multiple non-state armed groups? The latter context will raise additional issues regarding DDR, as well as the challenges of integrating such armed groups into a security sector representative of society as a whole. Is the state security apparatus overly bloated, and top-heavy in terms of numbers of senior officers? If so, it may be necessary to somehow alleviate the burden on state resources by 'right-sizing' the security sector, while simultaneously finding a way to give security personnel some assurances regarding their future economic security.

Second, a major consideration at the time of transition is the relative **leverage** of the security sector agencies in constitutional negotiations. In many cases—for example, Chile and Indonesia—the security sector maintained a degree of power and legitimacy with a large segment of society, which necessitated a pacted transition, with the consequence that SSR was incomplete at the time of constitutional reform. In other cases, the bargaining power of the security sector was relatively low, with the consequence that comprehensive SSR preceded and was ratified by constitutional reform of the relationship between security sector and civilian politics. The loss of support for the Argentine military following the Malvinas War, and the resulting diminishing of their leverage in constitutional negotiations, is a case in point.

Third, linked to the issue of leverage is the question of **interests**. The most important interest of all, of course, is whether the security sector, and most importantly the military, has the desire to leave political power behind. In some cases, such as Indonesia, military personnel had discussed leaving politics for many years before the transition. In others, such as Egypt, the military leadership was willing to oversee a formal transition, with a new constitution and new president (supplied by the army), but was not ready for any genuine advances in the area of civilian oversight and accountability. In all cases, an exit from politics can be encouraged or discouraged depending on how constitutional negotiations provide for the interests of the military. Consideration should be given to what elements might be part of a constitutional bargain, and what might be non-negotiable. For example, in Spain and Chile, the military sought to retain a high degree of institutional autonomy from civilian authorities by safeguarding their prerogatives over issues such as budget, procurement and promotions.

In cases where there is evidence of systematic and serious **human rights violations**, some form of protection from prosecution will likely be among the primary concerns of security sector personnel, as well as being high on the agenda of reformists, as was the case in South Africa. A form of amnesty is often difficult to avoid in order to protect the stability of the transition, and is often part and parcel of a larger compact between civilian reformers and the former regime. Where serious human rights abuses have occurred, international pressure and support for reformers is also likely to be greater, further diminishing the leverage of security sector principals in constitutional negotiations.

Sometimes, in particular in contexts of longstanding military or military-dominated regimes such as Egypt and Myanmar, the military has extensive **economic interests**—for example, through military-owned enterprises and land ownership. There may also be complex patronage and loyalty networks involving public payroll positions and private sector interests in the security sector (see, e.g., Sayigh 2012 on Egypt; Salisbury 2015 on Yemen). Coming to grips with the context requires a political economy analysis of how certain constitutional reforms may disrupt these networks, and the consequences thereof.

In addition, in some cases, the military may have a particular, normative vision of society and **societal values**, ranging from issues such as territorial integrity to language, family and religion. In these contexts, negotiations over constitutional provisions that articulate values may be just as fiercely contested as provisions explicitly concerning the power and autonomy of the military, and these will need to be folded somehow into the overall constitutional bargain.

Finally, there is also the question of **representation**. In some contexts, the military leadership may negotiate directly with civilian political parties. In other cases, in post-conflict peace process settings, there may be a number of different armed actors seeking representation at the constitution negotiating table. In civilian-authoritarian contexts, the security sector agencies may retain close enough links with particular political parties or leaders that they can exert their influence on negotiations through them. Finally, one should avoid thinking of the security sector as a holistic entity. Different security sector agencies may have different interests, and often militaries are divided between ‘hardliners’ and ‘moderates’.

In sum, the context of the transition is likely to determine the key constitutional issues, the possible scope of constitutional reform, the pace of change, the shape of negotiations and the parties to negotiations. The most important contextual considerations usually relate to the shape and profile of the security sector, both state and non-state, the interests of security sector agencies and the leverage their leadership has in negotiations. Understanding how any transition is likely to unfold, and what a constitutional transition might look like, especially as it relates to SSR, requires first of all an analysis of these critical contextual factors.

In the following sections, we examine the comparative practice regarding the relationship of constitution-building to SSR. While many of the issues are interconnected, they can roughly be grouped into six topics: civilian control and oversight; separation of functions and national security councils; legal instrument; sequencing; amnesties and transitional justice; and economic interests.

4. Civilian control and oversight

Democratic oversight of the security sector means that civilian governments should have 'authority over decisions concerning the missions, organization, and employment' of a state's security apparatus (Trinkunas 2005: 5). The balance here is delicate—the armed forces, police and intelligence services must be loyal to the constitution and its institutions and be under civilian control, while at the same time be protected from partisan abuse by civilian authorities. In addition, they must be strong enough to respond to internal and external security threats, while remaining accountable to institutions and officials armed with only the force of the law.

A common pillar of civilian oversight is to establish civilian ministries at the apex of each security sector agency's command structure, thus ensuring that there is a civilian who bears political responsibility for the actions of each agency and to whom each agency reports. The interposition of a minister and a professional bureaucracy with expertise also helps to curb abuses of power, by serving as a buffer between the head of government and the security sector. Indonesia and Iraq provide examples of post-authoritarian constitutions in which the military reports directly to the head of the executive, thus bypassing discussion in, or consultation with, cabinet. These constitutions can be compared with the Constitution of South Africa, which mandates that there must be separate members of the cabinet responsible for both the defence forces and the police (sections 202(1) and 206(1), respectively), and distinct civilian secretariats for both agencies (sections 204 and 208, respectively).

Legislative committees are an important and effective means of exerting civilian oversight. While there are often capacity issues in terms of the expertise necessary to ask the right questions and understand the answers given, which is compounded in contexts of high electoral turnover, strong involvement of the legislature in security issues can often be a reliable predictor of democratic civil–military relations. The function of legislative committees includes debating security-related legislation, exercising oversight in the form of oral hearings and receiving reports, playing a role in decisions to deploy armed forces, and exerting control over the budget and expenditure of security sector agencies. While the effectiveness of legislative oversight will depend on many factors outside the realm of the constitutional text, it is important that the constitution establish strong and broad oversight powers (see, e.g., sections 55 and 56 of the Constitution of South Africa), and not explicitly include mechanisms to block such control. For example, article 203 of the 2014 Constitution of Egypt provides that the National Defence Council, a body comprising a majority of military members, is responsible for discussing the armed forces' budget, which is then included as a single figure in the state budget, thereby precluding scrutiny in the House of Representatives.

In addition, there may be other mechanisms of oversight that can be considered in constitutional design, which can include mandated reporting to parliament (see, e.g., section 207(5) of the Constitution of South Africa, requiring provincial police commissioners report to their respective legislatures annually), the establishment of complaints mechanisms (see, e.g., section 206(6) of the Constitution of South Africa, regarding complaints against police at the provincial level), and also the establishment of independent oversight bodies.

An example of the constitutionally entrenched independent oversight body is the 2010 Constitution of Kenya, which provides in section 246 for a National Police Service Commission, composed of the Police Inspector General and his/her two deputies, two retired police officers, a person qualified to be a high court judge and three persons with a record of distinction in public service. In South Africa, section 210(b) of the Constitution calls for the establishment of an independent inspector to conduct civilian monitoring of the activities of all intelligence services. The enabling legislation (Committee of Members of Parliament on and Inspectors-General of Intelligence Act 1994, as amended by Intelligence Services Control Amendment Act 1999) also creates a parliamentary committee with specific oversight and control powers regarding all intelligence activities.

When establishing such oversight bodies and mechanisms, it may also be important to consider political and ethnic composition. For example, section 246(4) of the Constitution of Kenya provides that the National Police Service Commission shall 'reflect the regional and ethnic diversity of the people of Kenya' (Kenya 2010). The South African Joint Standing Committee on Intelligence must represent political parties on a proportionate basis, pursuant to a formula provided in legislation.

5. Separation of functions and national security councils

A critical principle underlying democratic constitutional design is the separation of powers, premised on the claim that the fragmentation and dispersal of state responsibilities among different institutions provides a safeguard against tyranny. A similar principle arises in relation to security sector agencies. In democracies, there should be a clear separation between the role of the military (to protect against external threats), the role of the police (to maintain internal law and order) and the role of the intelligence agencies (to gather information of national interest and assess internal and external security threats). This separation should be delineated through a constitutional and statutory framework that articulates, and limits, the mandates and missions of different security sector agencies, as well as establishing a distinct institutional architecture for each. Such laws serve two objectives: extracting the security services from politics and making it harder for civilian authorities to abuse the security services for partisan ends.

For example, in Argentina the National Defence Law (1988) and the Internal Security Law (1992) provided the legal basis for orienting the scope of military affairs to external, rather than internal, threats. Similarly, in both Spain and Chile, the legal framework for the separation of functions was enacted a number of years after the initial transition to democracy. In South Africa, many within the military had grown weary of being used to respond to internal political threats and were already committed to withdrawing from internal security even before the democratic transition of 1994. Alongside the revelations that covert, militarized branches of the police had been operating beyond the country's borders which drew heavy criticism from all sides, the situation in South Africa was ripe for constitutionalizing the distinct roles of policy and military without delay. In the Constitution of South Africa, sections 200(2) and 205(3) therefore clearly define and distinguish the roles of the defence forces and the police respectively.[1]

In federal states, the separation of powers among security sector agencies becomes a jurisdictional issue. The question is which level of government has authority over different security sector agencies (Leuprecht, Kölling and Hataley 2019). The armed forces and intelligence services generally fall under the control of the central government in federal states. However, responsibility for policing is generally sub-national, with the prominent exception of South Africa. In a post-conflict transition after a regional insurgency, an important issue is the fate of rebel militias. In Myanmar, a number of ethnic armed organizations (EAOs) agreed in 2009 to become the Border Guard Forces, under the control of the Myanmar military. Another option is for rebel militias to become sub-national police forces, as has been proposed in Myanmar for the remaining EAOs.

One scenario in which the role of police and armed forces may become blurred is during a state of emergency. Democratic constitutions often provide for the concentration of decision-making power in the executive, and an expanded mandate for the armed forces to manage natural disasters, quell internal violent disturbances or respond to other exceptional circumstances. Since such situations can be and are often abused by governments with authoritarian intentions, the constitutional and statutory framework regulating such states of exception must be carefully designed. This includes at a minimum at constitutional level: specifying limited grounds for which emergencies can be declared; providing a substantive role for parliament in approving, extending and exercising oversight of a state of emergency; and setting forth a set of rights which may not be derogated from.[2] In addition, legislation and regulations should provide clear terms of engagement for armed forces and police when exercising their powers in such circumstances.

It is not only in states of emergency where distinctions between the roles of security agencies may become unclear. There are also a series of security threats—most notably international terrorism and drug trafficking—which exert pressure on these distinctions and make coordination among the various leaderships of security sector agencies, and with political leadership, of paramount importance. Many democracies, especially in recent years, have adopted 'whole-of-government' approaches to meeting these kinds of challenges. For example, the 2010 Constitution of Kenya establishes a National Security Council (NSC) composed of the President, Deputy President, Cabinet Secretaries (Ministers) for Defence, Foreign Affairs and Internal Security, the Attorney General, and the heads of the defence forces, the National Intelligence Service and the police. While these bodies may challenge strict approaches to ministerial reporting lines, they allow for greater coordination and sharing of intelligence and recognize the reality that citizens expect the government as a whole to have responsibility for security.

The Kenyan example is instructive in two other ways. First, the NSC consists of a majority of civilian actors, but with appropriate input from security professionals. This is important to preserve ultimate decision-making in the hands of persons with democratic mandates from, and accountability to, the public. Second, another aspect of such bodies is that the patent need for secrecy in their deliberations can create challenges in terms of oversight of decisions relating to national security. To address this problem, section 240(7) of the Constitution of Kenya directs the NSC to report annually to Parliament, and the subsequent enabling legislation (the National Security Council Act 2012) states that Parliament can call for the NSC to report to it on any issue and directs the NSC to make regulations concerning confidentiality but provides that said regulations must be approved by Parliament and delineates the ways in which NSC confidentiality limits the right of access to information.

The constitutional and legal framework must clearly distinguish the roles and institutional architecture associated with different security agencies. At the same time, national security councils can be critical bodies for coordinating security, sharing intelligence and enabling whole-of-government responses to threats, but their composition should include a civilian majority and careful thought should be given to balancing the need for confidentiality with the establishment of adequate procedures for oversight.

Endnotes

1. Section 200(2) provides: 'The primary object of the defence force is to defend and protect the Republic, its territorial integrity and its people in accordance with the Constitution', while section 205(3) states: 'The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law' (South Africa 1996).
2. For more on designing emergency powers in democracies, see Bulmer (2018).

6. Legal instrument

A critical issue in constitutional transitions is what should be included in the constitutional text and how much should be dealt with subsequently by law and regulations. Should the constitution cover the issues discussed above in detail, only in broad terms or not at all? There is unlikely to be extensive choice on whether issues are dealt with in the constitution or deferred to a later date—to a large extent, this will be determined by the contextual factors discussed in section 3 and also by the constitutional culture of the country in question. However, it is important for stakeholders and advisors to be aware of the potential trade-offs and consequences involved.

On the one hand, including detailed provisions in a constitution makes them harder to change compared with an ordinary statute. One should note that this can cut both ways: in Kenya and South Africa a great deal of detail, comparatively speaking, was included in the constitutional text to entrench security sector reforms, but in Egypt and Indonesia, constitutional provisions were included which impeded democratic reform of the security sector. On the other hand, the transition can be a time of low trust—in particular, from an outgoing military regime. The scope for reform may be greater if done gradually, and to seek wholesale change within the constitutional transition may lead to a collapse of negotiations, or military rebellion.

In some legal contexts, an intermediate option that is available is to use organic laws to constitute and regulate security sector institutions. Spain and Chile are both examples of countries where the constitutional text covered little of the eventual scope of SSR, which was accomplished instead gradually through the negotiation of organic laws over time.

Regardless of the level of detail contained in the constitution, there will always be some form of implementing legislation required, which will be enacted by future legislatures. Therefore, while constitutions can constrain and guide the law-making process, there will always be some level of discretion for anti-reformists to seek to draw back the reforms through legislation. For example, in Kenya legislation that was enacted subsequent to the 2010 constitution reduced the independence of the Inspector General, partly because there was not enough buy-in from the police itself on the scope of reform envisioned in the constitution.

Finally, even where constitutions provide only a loose agenda or no detail for SSR, consideration should be given to limiting the power of the executive over the security sector agencies, in particular during a state of emergency (Bulmer 2018).

7. Sequencing

Questions of timing also influence the choice of constitution, organic laws, statutes and/or executive decrees for implementing SSR. There are three broad scenarios for the sequencing of SSR and constitutional transition:

1. **SSR prior to constitutional reform:** The military loses its grip on political power and the transition from military rule to democracy—including some elements of SSR—takes place prior to constitutional change, which then serves only to formalize and entrench reforms which have already been agreed to. Examples include Argentina, Indonesia and Iraq.
2. **SSR after constitutional reform:** The constitutional reform precedes any meaningful SSR, which takes place in a more gradual, phased manner over subsequent years. Examples include Chile, Ghana and Spain.
3. **SSR simultaneous with constitutional reform:** Significant reform takes place in the security sector concurrently with, and through, reform of the constitution. Examples include Kenya and South Africa.

To a great extent, these variations in sequencing reflect the leverage of security sector agencies. In Argentina, the fall of the military junta was swift, following defeat in the Malvinas War. The changeover from military rule to democracy in 1983 was effected in part by executive decrees that were only later codified in legislation, and still later reflected in constitutional reforms in 1994. In Iraq, the military was dismantled after the 2003 invasion.

In Chile, the military had greater leverage and reformists were uncertain of their own capacity to hold onto power. In this context, the military was able to embed protections in constitutional amendments and statutes for its institutional prerogatives in relation to budgets, pensions, political representation and immunity from prosecution during the transition negotiations. This ultimately presented a set of legal obstacles to SSR, which took place in incremental steps over the course of many years. Chile only saw the reform of its National Security Council with the 2010 enactment of a new defence law, and the shifting of civilian control over the police from the Ministry of Defence to the Ministry of the Interior in 2011.

South Africa and Kenya are examples of countries where SSR and the constitutional transition happened more or less in parallel, with both countries deciding to have relatively elaborate provisions for security sector agencies in their constitutions. In these cases, the security sector agencies had an intermediate degree of leverage, which led to SSR being part of the constitutional agenda where it could be negotiated along with other issues. While

members of the security establishment influenced internal security sector structural reforms, they were not involved with the political arrangements for the new constitutional democracy.

It must also be recognized that—even in cases where SSR took place prior to, or concurrently with, constitutional reform—transitions evolved over an extended period. In all cases, the relationships between civilian institutions and security sector agencies continued to change, and remained the subject of negotiations for many years after the end of the previous regime. There are no templates for which pathway to follow in terms of sequencing and, as stated above, much will depend on the relative leverage of different actors. However, two important principles can be taken from the South African example, which has been influential in a number of democratic transitions since then:

1. SSR, democratization and constitutional reform are intrinsically linked. The constitution-building process can therefore provide a critical forum for negotiations over changes in the relationship between civilian and security sector institutions.
2. Where possible, establishing principles and parameters in the constitution can be a powerful first step in strengthening the chances of extensive SSR, while the details can, and often should, be left to legislation.

8. Amnesties and transitional justice

Criminal accountability for past human rights abuses is often a prominent and polarizing issue in constitutional transitions, in both post-conflict and post-authoritarian contexts. As a constitutional transition towards democracy may place the power of the state, including the power of prosecution, in the hands of a party's political opponents, amnesties are frequently on the agenda of constitutional negotiations, despite the international law prohibition on blanket amnesties.

In many cases, amnesties are discussed before the constitutional transition, during ceasefire or peace agreement negotiations. Constitutions are then used to entrench an amnesty (e.g. Ghana), frame the composition of the legislature and its decision-rules to make a legislated amnesty hard to repeal (e.g. Chile) or protect an amnesty from potential legal challenge (e.g. South Africa). Where amnesties are entrenched in constitutions, they are often accompanied by extremely high amendment thresholds to provide further guarantees to perpetrators that they will not be held accountable (e.g. Fiji, Ghana, the Gambia and Myanmar).

Where amnesties are not protected through constitutional entrenchment, they may be easier to overturn at a later date when political and societal support for doing so increases, and the leverage of the military decreases. The experience of Argentina illustrates how the ebb and flow of military influence can affect the implementation of amnesties and overturn them. In 1983, just before leaving power, the military government passed an amnesty law. This was overturned by the civilian government leading to the trial and conviction of several former military leaders, prompting a negative reaction from within the military and four attempted rebellions. Under fear of a coup d'état and in the interests of democratic stability, the government passed immunity laws in 1986 and 1987, which brought all criminal trials to an end and issued a series of pardons for those convicted and those under investigation. However, in the ensuing years the influence of the military faded and that of human rights organizations increased, eventually resulting in the Supreme Court overturning the immunity laws and declaring the pardons unconstitutional in that they were not compliant with Argentina's commitments under international law.

Beyond the issue of amnesties, the links between transitional justice and constitutional transitions are manifold and require broadening the oft-held view that transitional justice is only about criminal accountability (Cats-Baril 2019). Constitutional negotiations can help, or hinder, along several axes of transitional justice, including the right to truth, the right to reparations, the right to justice and guarantees of non-recurrence.

Of relevance to SSR are the historical narratives established in constitutional texts, which may reflect a particular version of the military's and other armed groups' roles in the conflict, and institutional reforms providing constraints on executive power and civilian oversight of the security sector (discussed further in section 4), which can be seen as strengthening guarantees on non-recurrence.

9. Economic interests

Often just as critical as the issue of criminal accountability is the fact that security sector personnel and agencies in non-democratic regimes often have a range of economic interests and can often be very significant participants in the economy. The scale of economic interests varies, but in nearly all contexts where the military has a role in politics, it also has a role in the economy. Indeed, in regimes under de facto military control, such as Egypt, the economic role of the military may extend to entire sectors of the national economy and include vast land holdings.

A fundamental issue to confront in a democratic transition is whether to allow security services to continue to enjoy economic benefits in order to convince them to let the transition take place, or to risk the transition by cutting off the supply of perquisites and economic benefits to security officials. This can be complicated in contexts where military budgets are so low that proceeds from business enterprises are necessary to fill the gap for operational expenses left by inadequate public funds. For example, Indonesian President Yudhoyono had little choice but to give up on the ambition to eliminate or drastically scale down the armed forces' involvement in the country's economy, as it would likely have alienated not just the top military figures, but also most uniformed personnel because the financial conditions of military service would undoubtedly have deteriorated.

Similarly, in Chile civilian leaders were able to negotiate the political withdrawal of the military junta by allowing the security service to maintain control over their budgets, benefits and command structure. In particular, the Organic Constitutional Law on the Armed Forces (1990)—enacted after the election of President Aylwin but before he took office—indexed the armed forces' budget to inflation, eliminating congressional debate over the size of the military budget and guaranteeing the military a degree of autonomy.

It is also critical to understand how constitutional reform—through the rearrangement of the composition and responsibilities of public institutions—affects the political economy of the transition. In many post-conflict transitions, a critical challenge is how to replace income from the war economy in the peace economy, and often the primary source of income post-transition will be the public payroll and rent-seeking opportunities afforded by offices of the state. Therefore, constitutional reform and the resulting dispensation of public offices can provide incentives, or disincentives, for soldiers to lay down arms and become civilians.

As an example, following the 2011–12 revolutions in Egypt, one issue on the political agenda was whether governors and local government officials and provincial governors should be elected, instead of the previous practice of being appointed by the national executive. Under previous regimes, local government had provided an important site of civilian–military collaboration. Military retirees were given comfortable jobs at the local or provincial level, from which they could command steady salaries and rents, and in turn acted

as a ‘parallel executive and security arm that ultimately reports to the president through the provincial governors he appoints’ (Sayigh 2012: 6). Discussions on reforming the constitutional framework for local and provincial governments—without understanding these aspects of political economy—failed to anticipate the extent to which, and the reasons why, the military blocked such reforms.

South Sudan offers another example. Following the 2018 Revitalised Agreement on the Resolution of the Conflict in the Republic of South Sudan (R-ARCSS), the Constitution was amended and the political institutions expanded to the extent that South Sudan now boasts ‘the largest parliament in the region, the highest ratio of cabinet to population in Africa, and the highest MP-to-population ratio in the world’ (de Waal and Boswell 2019: 6). The deal also expands the civil service, and in response the government has also separately added positions in order to reward its own loyalists. This expansion of the state is presented as ‘institution-building’ or ‘decentralization’ but its underlying raison d’être is to provide financial incentives for armed groups to accept the peace agreement.

In sum, it is important to understand how potential revisions to the constitutional framework will affect the military’s self-interest, including, the risk of potential criminal prosecution, economic interests and the political economy of informal state–military relations.

10. Conclusion

Security sector reform and constitution-building are typically seen as separate issues. But in practice they are deeply interconnected. Moreover, the success of a transition to constitutional democracy depends on handling security sector issues successfully. In this Policy Paper, we have mapped out the relationship between SSR and constitutional reform, highlighted the importance of context for understanding how to approach the relevant issues, and discussed comparative practice for six key questions: civilian control and oversight; separation of functions and national security councils; legal instrument; sequencing; amnesties and transitional justice; and economic interests. While there is no recipe book for how to grapple with these matters, there is much to be learned from how other countries have wrestled with them.

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About the organizations

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Security sector reform, democratization and constitutional reform are intrinsically linked. The constitution-building process can therefore provide a critical forum for negotiations over changes in the relationship between civilian and security sector institutions.

This Policy Paper aims to support advisors and decision-makers in navigating these complex transitions. The Paper focuses on the relationship between security sector reform (SSR) and constitutional reform processes. While SSR and constitution-building are typically seen as separate issues, in practice they are deeply interconnected, and the success of a transition to constitutional democracy depends on the successful handling of security sector issues. Constitutional reform and SSR processes intersect in democratic transitions from military rule, civil war and authoritarian regimes.

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