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do Countries Legislate? Occasional Paper #7**

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**THE CENTER FOR
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NAVAL POSTGRADUATE SCHOOL
MONTEREY, CALIFORNIA**

Occasional Paper # 7

**DEMOCRATIZING CIVIL-MILITARY
RELATIONS: WHAT DO COUNTRIES
LEGISLATE?**

**Jeanne Kinney Giraldo
June 2001**

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DEMOCRATIZING CIVIL-MILITARY RELATIONS: WHAT DO COUNTRIES LEGISLATE?

Jeanne Kinney Giraldo

After a transition away from authoritarianism, one of the central challenges facing new democratic elites is redefining civil-military relations. Among other things, this means writing or revising constitutions and laws that regulate the roles, rights, and obligations of the military so that they conform to the basic democratic principles of accountability to democratically elected leaders and respect for civil liberties.¹ Under the preceding non-democratic regimes, militaries were often accustomed to acting in ways that violated these principles, by operating autonomously within the defense arena, playing an important role in non-defense areas, and participating in regime violations of human rights.² Although writing new laws designed to modify this behavior will not automatically lead to a change, it is a necessary first step.

This paper identifies some of the most important areas of legislation that need reform during a transition to democracy in order to establish the authority of civilian

¹ This paper addresses all legal measures that govern civil-military relations, ranging from articles of the constitution to presidential and ministerial decrees. The permanency of such measures varies from country to country, but in general *constitutional provisions* have the most staying power since they usually require an unusual majority for amendment. *Organic laws or constitutive laws* describe how organs of the state will be constituted and have a semi-constitutional character, frequently requiring a larger majority for reform than ordinary legislation but a lower quorum than constitutional reform. All constitutions, even those as detailed as the Brazilian Constitution of 1988, require *enabling legislation* that provides the detail necessary for general constitutional principles to assume the force of law. *Ministerial or presidential decrees* are usually easily reversed by the next government.

² This draws on the definition of civilian supremacy offered by Felipe Agüero, *Soldiers, Civilians, and Democracy: Post-Franco Spain in Comparative Perspective* (Baltimore, Maryland: The Johns Hopkins University Press, 1995), p. 19. Since Agüero's definition of civilian supremacy can apply to non-democratic as well as democratic regimes, it does not include an explicit reference to respect for civil

leaders in defense areas, reduce the role of the military outside the defense area, and guarantee civil liberties.³ The first section examines constitutional provisions that establish the principle of civilian supremacy over the military. In addition to asserting this *principle* in the constitution, legislation should contain provisions for the subordination of the military to the three branches of government – the executive, the legislature, and the judiciary. The second section discusses military subordination to the executive branch of government via a chain of command that names the head of state or government as the head of the military and a Ministry of Defense (MOD) that converts this legal authority into practical authority. The third section highlights laws that delineate military subordination to the judicial branch and the rule of law in carrying out its mission.⁴ The second half of the paper addresses legislation designed to reduce and regulate the involvement of the military in non-defense areas. The fourth section discusses rules governing the political activities of military personnel and the institution as a whole. The fifth section summarizes the debate over the use of the military in internal roles, such as civic action and internal security. It discusses the legislation necessary to guarantee civilian authority over such missions and the protection of civil liberties. Finally, the reduction of the military’s role in internal security requires the demilitarization of police forces and intelligence agencies; legislation geared toward this

liberties. However, one of the features that sets *democratic* civilian supremacy apart from its non-democratic counterpart is respect for civil liberties, hence its inclusion in this paper.

³ The paper is based on an examination of the experiences of democratizing countries representing a broad, geographical cross-section: Brazil, Germany, Guatemala, Indonesia, Mozambique, the Philippines, Russia, South Africa, South Korea, and Spain. Each country has been through a transition to democracy, which entailed a debate over the appropriate roles and missions of the armed forces and numerous attempts to assert democratic civilian control over the military. The countries chosen provide variation with respect to levels of economic development, regime type (presidential or parliamentary), levels of external and internal threat facing the government and, most importantly, the degree to which they have crafted constitutional and legal frameworks that reflect the principles of democratic civilian control of the military.

end is highlighted in the sixth section. Although many governments may not be able to carry out all these reforms immediately following the transition to democracy, their eventual inclusion on the agenda is necessary for democratic consolidation.

1. The Principle of Civilian Supremacy

In a democracy, elected officials are the only ones who can claim to represent the national interest or the will of the people. In order to govern, these officials delegate responsibilities to different organs of the state, such as the military or the ministry of health, which are then held accountable to the elected officials for their actions. The constitution should reflect this and not accord the military a privileged position, distinct from that of other state institutions. The military should not be granted any special status that puts it on a par with, or above, the duly constituted branches of government – the executive, legislature and judiciary. Democratic constitutions in the past often granted the military such status and this was frequently used as a justification for military involvement in politics.⁵

Recognition of the principle of civilian supremacy is sometimes made explicitly in constitutions, as is the case in the Philippines.⁶ In other cases, civilian supremacy is acknowledged implicitly, simply by not granting the military any special status and by

⁴ The authority of the legislature over the military is discussed in Jeanne K. Giraldo, “Legislative Control of the Military: The Comparative Experience,” Center for Civil-Military Relations, Occasional Paper # 8, Naval Postgraduate School, Monterey, California, June 2001.

⁵ See Brian Loveman, “‘Protected Democracy’ in Latin America,” in John P. Lovell and David E. Albright, eds., *To Sheathe the Sword: Civil-Military Relations in the Quest for Democracy* (Westport, Connecticut: Greenwood Press, 1997).

⁶ “Civilian authority is, at all times, supreme over the military. The Armed Forces of the Philippines is the protector of the people and the State. Its goal is to secure the sovereignty of the State and the integrity of the national territory” [Constitution of the Philippines, Article II, Section 30].

discussing the armed forces only in the section of the Constitution on organs of the government.⁷ The explicit recognition of civilian authority provides the surest legal safeguard, since standard constitutional references to the military as protector of the “people,” the “state,” or the “nation” can be (and often are) interpreted by the military as a mandate to interpret the will of the people or the nation on their own.

In some countries, the constitution assigns the military a more ambiguous role of “defending the Constitution” (for instance, in Brazil and Chile) or preventing the president from seeking re-election or staying in power (as is the case in El Salvador and Guatemala).⁸ The role of “defending the Constitution” can be interpreted in many benign ways – as the duty to defend the Constitution from external threats or as an injunction against actions contrary to the democratic system. However, it is also frequently understood by the military as a duty to interpret the Constitution and act autonomously to veto what it judges to be unconstitutional policies or objectionable constitutional reforms. In effect, the military becomes a fourth branch of government, checking and balancing the power of the other branches rather than being accountable to them.

2. Military Subordination to the Executive Branch

Almost universally, democratic constitutions implement the principle of civilian supremacy by naming the head of state or government – whether this be the president, prime minister, or constitutional monarch (as in the case of Spain) – as the commander-

⁷ In the Spanish case, the mention of the military in the preamble to the 1978 Constitution set the armed forces apart from other state agencies and was interpreted as a sign of its special status. Military hardliners would later use this to justify their challenge of civilian efforts to assert control over the military. See Agüero, p. 152.

in-chief of the armed forces. While this is a necessary condition for asserting civilian control over the military, it is insufficient. The head of state generally does not have the time or the expertise to direct personally the formulation and implementation of defense policy. As a result, he or she will delegate responsibility to a minister of defense who, advised by a ministry staffed with both civilian and military experts, will oversee defense and military policy.⁹

Civilian supremacy over the military is enhanced by stripping service commanders of the cabinet rank they often enjoyed under authoritarian regimes and putting them under the control of a civilian minister of defense. This was done in Spain soon after the transition to democracy and in 1999 in Brazil, 14 years after its transition.¹⁰ In Russia, service commanders were removed from the cabinet but the minister of defense remains a military officer. In Indonesia, in contrast, the head of the armed forces is a peer of the minister of defense in the cabinet and thus participates in political decision-making.

A number of additional reforms are usually necessary to strengthen the role of civilians in general, and the civilian defense minister in particular, in the making of policy. First, collective bodies with strong military representation should be relegated to advisory roles with reduced command or policy authority (as occurred with the Joint

⁸ Loveman, p. 139. This paragraph draws on his discussion.

⁹ The authority of the defense minister thus derives from that of the president or prime minister as commander-in-chief; the two are not mutually exclusive. Under these circumstances, it makes little sense to argue that the military should report only to the president (as commander-in-chief) and not the minister of defense. (An argument the Indonesian military, for example, has made in their effort to resist civilian control.) For more on the need for civilian Ministries of Defense, see Thomas C. Bruneau, "Ministries of Defense and Democratic Civil-Military Relations," Center for Civil-Military Relations, Occasional Paper # 13, Naval Postgraduate School, Monterey, California, 2001.

Chiefs and the National Defense Board in the 1984 reform of Spain's Organic Law on National Defense).¹¹ Second, within the ministry, the responsibilities accorded to civilians should be specifically defined or else it is likely that many tasks will fall by default to the military. The division of labor between military and civilian personnel within the ministry on policy, administrative, and professional functions varies within democratic regimes, but it is generally agreed that the more civilians are in the top policy-making posts, the more effective civilian control is likely to be.

Finally, civilian control is likely to be more effective if civilian power is concentrated and there is a single unambiguous chain of command, so that the military cannot pit civilians within the executive branch against one another. However, advanced democracies differ in the extent to which they are organized in such a fashion. Germany forestalls any attempts to bypass the minister of defense with direct appeals to the prime minister (Federal Chancellor) by naming the Minister as commander-in-chief during peacetime. (During times of emergency, the Federal Chancellor assumes command.) In Britain, in contrast, service chiefs have the right of direct access to the prime minister. In France and many new East European democracies, the hybrid nature of the executive – consisting of both a prime minister and a president who share authority over the armed forces – creates a confused chain of command. In Spain, in contrast, a 1984 reorganization of the chain of command clarified confusions about the responsibilities of the king (as commander-in-chief), the prime minister, and minister of defense in the making of defense policy. It specified that the government and not the king play the

¹⁰ In Spain, the Ministry of Defense was created in July 1977 and service chiefs demoted, but a civilian minister of defense was not named until April 1979.

leading role in defense policy and explicitly delegated many of the prerogatives of the prime minister to the minister.¹²

3. Military Subordination to the Judicial Branch

The rule of law is a fundamental aspect of any democracy, and the military must not be exempt from obedience to the civil code and judgment in civilian courts. In a democracy, civilian courts should have broad jurisdiction over all criminal acts committed by military personnel, including common crimes, violations of civil liberties committed in the course of carrying out internal security tasks, and political crimes like military rebellions against the democratically-constituted authorities. The military cannot be above the law, and this is best guaranteed by trial in civilian courts, which are often more likely than military courts to find military transgressors guilty. Civilian courts have jurisdiction over military personnel in Germany, Spain, and even Guatemala (after a 1996 law limited military jurisdiction to violations of military regulations). In Brazil, in contrast, military courts have jurisdiction over federal military personnel and the state military police, which is responsible for domestic law enforcement at the state level.¹³ Repeated efforts to place the state military police under civilian courts have failed. After 19 members of the Landless Movement were massacred by state police forces at Eldorado dos Carajás in 1996, however, President Fernando Henrique Cardoso managed to shepherd through Congress minor changes to the jurisdiction of military courts. Premeditated crimes committed by members of the state military police (but not the

¹¹ Agüero, p. 189.

¹² *Ibid.*, pp. 188-197.

¹³ The state military police is an army reserve that came to perform street-patrolling functions under the authoritarian regime, supplanting the role of the state civilian police.

federal military) involving loss of civilian life would be tried in civilian courts (although they would still be investigated by the military).¹⁴

For civilian courts to have jurisdiction over military violations of human rights, legislation must be passed that restricts a soldier's ability to argue that he was simply following orders as a defense for illegal actions. For example, a 1985 reform of the Military Penal Code in Spain put limits on the "due obedience" defense, while the South African Constitution eliminated such a defense completely by obligating soldiers to disobey orders that contravene the Constitution or international humanitarian law. In Guatemala, in contrast, the Constitution exempts soldiers from following unlawful orders but it does not obligate disobedience, thus leaving room for a defense of "due obedience."

Conversely, military courts should have very little jurisdiction in a democracy over civilians. In particular, they should not try civilians for violations of national security or anti-terrorist laws during peacetime.¹⁵ In keeping with this, the 1985 Guatemalan Constitution and the 1978 Spanish Constitution prohibit military jurisdiction over civilians and the 1988 Brazilian Constitution eliminated military jurisdiction over political crimes. However, these cases illustrate the important point that constitutional provisions have no impact until they are given life by enabling legislation. In Spain, for example, it was not until 1980 – after two leading journalists were court-martialed and a film critical of the *Guardia Civil* was seized by the military – that parliament enacted the

¹⁴ Jorge Zaverucha, "The 1988 Brazilian Constitution and its Authoritarian Legacy: Formalizing Democracy While Gutting its Essence," *Journal of Third World Studies*, 15:1 (Spring 1998), p. 114.

additional legislation necessary to make the constitutional provision a reality. Similarly, the Brazilian Constitution transferred jurisdiction over political crimes from military to civilian courts, but because civilian courts have no jurisprudence for such crimes, cases end up being remanded to military courts.¹⁶

In cases of extreme unrest, it is sometimes considered legitimate for the executive, usually in cooperation with the legislature, to delegate authority to military courts by declaring a state of siege or martial law. This often permits military courts to prosecute civilians charged with otherwise legal activities like strikes and demonstrations. However, the frequency with which states of siege are invoked in some developing countries calls into serious question the existence of due process if military courts are granted extensive jurisdiction under such circumstances. Civilian legislators should consider their country's particular circumstances, in particular the executive's propensity to rely on states of emergency to govern, when deciding on military jurisdiction during such times.

In sum, the primary task of military courts should be limited to enforcing a Military Code of Justice (MCJ), which is designed to ensure the discipline necessary for the military's effective performance of its mission. To this end, the MCJ should only criminalize offenses against military discipline, such as abandoning one's post.¹⁷ In a

¹⁵ The range of crimes covered by national security and anti-terrorist laws was frequently widened under authoritarian rule. As a result, these laws usually need to be (but often are not) revised to make them compatible with democracy. For a discussion, see Loveman.

¹⁶ Jorge Zaverucha, "Fragile Democracy and the Militarization of Public Safety in Brazil," *Latin American Perspectives*, 27:3 (May 2000), p. 21.

¹⁷ No other crime should be considered a military crime, lest military jurisdiction expand unduly. In Brazil, for example, any crime committed with a weapon belonging to a member of the armed forces is considered

democracy, this need for military discipline must be balanced against a concern not to infringe excessively on the basic civil rights of soldiers. For this reason, the MCJ in many countries includes safeguards that provide military personnel with due process. In addition, many countries limit military jurisdiction by permitting soldiers the right to appeal military court decisions in civilian courts. In the United States, due process guarantees were introduced after the Second World War, when returning veterans (of whom 1 out of every 8 had been subject to court martial) demanded greater protections against summary justice meted out by superior officers.¹⁸ Similarly, the 1985 Military Penal Code in Spain introduced safeguards comparable to those of the civil criminal system and permitted decisions made in military courts to be appealed to the civil Supreme Court. In Germany, the Military Code of Justice restricts the disciplinary power of officers and guarantees the right to appeal. (In addition, an Independent Office of the Parliamentary Commissioner is charged with monitoring the military's treatment of its soldiers and has broad powers to investigate wrongdoings.)

4. Political Activities of the Military

In an effort to forestall military involvement in politics, many democratic constitutions and laws expressly forbid the military as an institution from playing a political role. For example, the Mozambican National Defense Law describes the character of the armed forces as “non-partisan,” the Philippine Constitution notes that the military “shall be insulated from partisan politics,” and one of the most strongly contested

a military crime. This means almost all crimes committed by military personnel are judged in military courts.

¹⁸ Nearly 2 of the 16 million who served were subject to court martial. See John S. Cooke, “Military justice and the uniform code of military justice,” *The Army Lawyer* (Charlottesville, VA: March 2000).

provisions of the 1987 South Korean Constitution asserts that the “political neutrality [of the armed forces] shall be observed.”¹⁹ These provisions are important in preventing the kind of military involvement in partisan politics that often characterized non-democratic regimes or undermined previous experiments with democracy. However, the terms lend themselves to being too narrowly construed as foreclosing military participation in *partisan* activities and debates, but permitting more general comments on government policy or participation in policy making. The 1985 Constitution in Guatemala casts a wider net in prohibiting military consideration of political matters by designating the institution as “professional, apolitical, obedient and *non-deliberative*.”²⁰

Interestingly, while the military as an institution is prohibited from playing a political role in most democracies, the military officers are often not explicitly prohibited from holding cabinet positions.²¹ Despite the lack of *legal* prohibitions, civilian elites in newly democratizing countries often view the exclusion of the military from the cabinet as one of the first tasks necessary for asserting civilian control. The number of military personnel in the cabinet generally declines over time as the military is phased out as a

¹⁹ The South Korean military argued for the phrase, “political neutrality *shall* be observed,” whereas democratic reformers preferred the stronger “political neutrality *must* be observed.” [Michael G. Burton and Jai P. Ryu, “South Korea’s Elite Settlement and Democratic Consolidation,” *Journal of Political and Military Sociology* 25:1 (Summer 1997), p. 11.] This example illustrates the maxim that, at least in matters of constitutional reform and legislation, “the devil is in the details.”

²⁰ In the Chilean case, a “non-deliberative” clause has been effective in placing some limits on participation in the public debate of a military that otherwise has an expansive view of its role and prerogatives.

²¹ The 1987 Constitution in South Korea, written during the transition to democracy, is an exception. It retained a clause from the 1980 authoritarian constitution prohibiting active duty military from holding a cabinet post. The Guatemalan Constitution of 1985 is exceptional for a different reason: it requires the minister of defense to be an officer. A recent effort to circumvent this provision through presidential decree has been declared unconstitutional.

political actor and as civilians establish the principle of civilian supremacy in the defense area.²²

While countries often find it unnecessary to have laws governing cabinet appointments (which are at the discretion of the executive), most countries have detailed provisions regulating the right of individual soldiers to hold public office, organize politically, and vote. In deciding on these regulations, democracies are faced with the challenge of balancing the individual soldier's right as a citizen to participate in politics and the overriding need to prevent such involvement by the military as an institution. Typically, the more public and sustained the political activity is (e.g., holding office), the more likely the involvement of military personnel is to be prohibited or highly regulated. The more private (and limited) political act of voting is least regulated, although this was not always the case.

Many democracies prohibit active-duty personnel from running for and holding legislative office. In Israel and Spain, for example, individuals who are on active duty or who expect to return to the military in the future are not allowed to serve in the legislature. Some countries limit participation in politics according to categories of military personnel and areas of politics. In the United States, for example, reservists but not active duty personnel are allowed to serve in the legislature. In Brazil, military personnel with more than ten years in the service must retire in order to hold office, but those with less than ten years are allowed to take leave in order to hold office. In

²² In some cases, military participation is not limited to the national-level cabinet. In Indonesia, for example, the ongoing political role of the military is evidenced in the continuing presence of military at the

Germany, soldiers may serve in local legislative offices while still on active duty, but must take unpaid leave for the duration of their elected term of office at the national level. In other cases, there are few restrictions. Russian military personnel have campaigned successfully for local and national-level elected offices since 1989.

Almost universally in democracies, parties and movements are banned from carrying out activities in military barracks, where there is a captive audience and such behavior could be interpreted as official endorsement of partisan, political views. There is more variation within democracies on whether soldiers are allowed to participate in political groupings or parties. In many advanced democracies (e.g., Germany, the United States), soldiers are allowed to belong to political parties (and express their political views publicly) as long as it is clear that they are not acting as representatives of the armed forces.²³ In countries where the distinction between the involvement of the “individual as private citizen” in partisan politics and the “individual as officer” has been harder to maintain, outright prohibitions on partisan politics can be found. For example, members of the Spanish armed forces are not allowed to express their political views publicly or to collaborate in any way with political parties. Soldiers in the Philippines are not permitted to engage in partisan political activity.

Finally, most advanced democracies permit soldiers to vote since this has come to be seen as one of the most fundamental political rights, and its secret nature reduces the risk that casting a vote will implicate the military as an institution in politics. In the

cabinet level in provincial, regency-level, and local governments.

past, particularly in developing countries where politicization of the military was an issue, soldiers were denied the vote out of the fear that military commanders could become important political actors by controlling the votes of their personnel or that soldier-citizens would be subject to the same politicization and divisions as voters in the broader society. With the spread of universal suffrage, however, restrictions on the military vote have become less tenable. Of the newer democracies addressed in this study, only Guatemala and Indonesia deny voting rights to military personnel.²⁴ In most countries, concerns about politicization are addressed through restrictions on partisan activities in the barracks rather than through limits on the right to vote.²⁵

5. Military Roles and Missions

In a democracy, elected officials must decide whether the military's role should be limited to defending the country from external threats or expanded to promoting internal security and carrying out civic action programs (e.g., providing health and education services, building infrastructure). In addition to defining the military role, democratic authorities must structure a clear legal framework regulating military involvement in, and civilian supervision of, the specific missions that arise from these roles.

²³ There is one important exception: US military personnel are prohibited from showing disrespect in public for the president.

²⁴ In Brazil, conscripts are not allowed to register to vote during their period of compulsory service.

²⁵ These restrictions have not always been effective. In Russia, presidential decrees banning parties and movements from the armed forces are routinely ignored. As a result, it is believed by Russian politicians and analysts alike that military commanders can influence the votes of their subordinates. See Marybeth Peterson Ulrich, *Democratizing Communist Militaries: The Cases of the Czech and Russian Armed Forces* (Ann Arbor: The University of Michigan Press, 1999), p. 143.

Under authoritarian rule, militaries frequently play extensive internal security and civic action roles and many enjoy a great deal of autonomy from civilian authority in carrying out their missions. Most authoritarian regimes during the Cold War era did not distinguish clearly between external and internal threats to security. Instead, they often conflated the two, defining groups of citizens as enemies against whom war should be waged, and justifying the use of the military in policing, counterintelligence, and civic action.²⁶ In many southern European, Latin American, and South Asian countries, police were often under the control of the ministry of defense, police officers were seconded from the armed forces, and police units were commanded by active-duty military officers. In other cases where the police apparatus of the state was strong, the military role in internal control was reduced but nonetheless significant.²⁷ Everywhere, military intelligence agents were involved in collecting information on their fellow citizens. Military-run civic action programs provided health and education services and infrastructure in poor, rural areas that were considered fertile terrain for insurgent movements. Frequently the administrative presence of the military in these areas doubled as an intelligence service, monitoring the civilian population. In most countries, this expanded role for the armed forces led to widespread human rights violations and extensive involvement of the military in politics.

²⁶ Much has been written about the national security doctrine of authoritarian regimes in Latin America, but the notion is not limited to the Western Hemisphere. The civil war in Mozambique, in which insurgents had the backing of neighboring regimes, gave rise to a similar conception. Similarly, the threat from North Korea encouraged such interpretations in the South. In Leninist states, counterintelligence and foreign intelligence were combined in single organizations in part because the states “made little distinction between external and domestic political threats, claiming that the latter were always foreign inspired.” [*Russia: A Country Study*, Chapter 10, subsection on “Internal Security Before 1991,” Library of Congress. Available at <http://lcweb2.loc.gov/frd/cs/cshome.html>.]

In response to this experience, a number of new democracies have chosen to identify the military's primary role as external defense. The Spanish Constitution, for example, eliminated the historical reference to the military's role in maintaining "national security" and the 1996 peace accords in Guatemala called for eliminating reference in the 1985 Constitution to the military's role in maintaining "internal peace and security." (However, a May 1999 referendum on constitutional reforms, including this one, failed.) In Brazil, while the 1988 Constitution maintains a role for the military in keeping "law and order upon the request of any of the three branches of government," supplemental legislation passed in 1991 limited the military to a support role. Civilians would be permitted to call on the military only after police forces have tried and failed to keep order.²⁸ In short, many new democracies have arrived at the same conclusion: that the military should not be the constitutionally-mandated first line of defense in internal security or civic action. A civilianized police force and civilian ministries of the state (e.g., health, education, public works) should bear the primary responsibility for maintaining order and providing services to the population.²⁹

Despite the potentially negative implications of an internal role for the military, the reality of weak civilian institutions unable to deal with escalating rates of crime and increasing poverty make it unlikely that civilians will restrain from using the military in

²⁷ For example, there was a clear separation between the police and the military in the South African apartheid regime, but the military was involved in internal policing roles, nonetheless.

²⁸ In practice, this clause has been violated repeatedly. See Zaverucha, 2000, pp. 16-17.

²⁹ Louis Goodman has outlined valuable criteria to guide civilians in deciding whether the military should be used in an internal mission. The military should only be used if national well-being depends on the task being carried out and no civilian institution is capable of carrying it out. In addition, civilians should consider how the mission affects the military's involvement in domestic politics and its core combat mission. See Goodman, "Post-Cold War Military Missions," in Larry Diamond and Marc Plattner, eds., *Civil-Military Relations and Democracy* (Baltimore, Maryland: Johns Hopkins University Press, 1996).

internal missions. In many countries, understaffed, technically incompetent, corrupt, undisciplined, and poorly trained police forces are incapable of providing riot and strike control, standing up to insurgents, fighting narcotraffickers, or dealing with high crime rates that are often fueled by the availability of weapons and the persistence of a culture of violence in post-conflict scenarios (e.g., Guatemala, Mozambique, South Africa). In some countries, the military is the only national institution with a presence in all parts of the national territory and the capacity to deliver state services. Politically, there is frequently a great deal of support for the military to play a role in civic action in countries with high levels of poverty and to use the military in a policing role. Under some circumstances, the military might also favor such roles in order to garner resources and recuperate public faith in the institution.

Given the likelihood of some military involvement in internal missions, new democracies cannot be satisfied with simply identifying external defense as the military's primary mission. This would leave the door open for the use of the military on a completely ad hoc and unregulated basis, circumventing civilian control. Instead, legislation must be passed that (1) guarantees civilian control over the military's internal missions; (2) reduces the degree of military encroachment on the roles of other civilian institutions; and (3) minimizes the risks of human rights violations. Civilians, and not the military, should decide when and how the armed forces will be used, specifying what can and cannot be done, the time frame to begin and cease action, and the allocation of responsibility among civilians and officers in command and control of the mission. The military should be limited to a support role. They should only be called in after the police

have failed and they should not be granted police powers of search and seizure or detention and arrest. Military support operations should be subject to review by the legislature and courts.³⁰

The 1996 peace accords that ended the internal conflict in Guatemala provide a good example of the principles that should govern military participation in internal missions:

When the ordinary means for the maintenance of public order and domestic peace are exhausted, the President of the Republic may exceptionally use the armed forces for this purpose. The deployment of the armed forces shall always be temporary, shall be conducted under civilian authority and shall not involve any limitation on the exercise of the constitutional rights of citizens.... The operations of the armed forces shall be limited to the times and modalities which are strictly necessary, and shall end as soon as the purpose has been achieved. The President of the Republic shall keep Congress informed about the operations of the armed forces, and Congress may at any time decide that such operations should cease. At all events, within 15 days of the end of such operation,

³⁰ For a discussion of the difficulties that emerge when the military is employed in domestic law enforcement, see María José Moyano Rasmussen, "The Military Role in Internal Defense and Security: Some Problems," The Center for Civil-Military Relations, Occasional Paper #6, Monterey, California, October 1999.

the President of the Republic shall submit to Congress a detailed report on the operation of the armed forces.³¹

Similarly, Article 87a of the German Constitution stipulates that the military only be used at the initiation of civilian authorities and only when the police are incapable of defending democracy from armed insurgents. The military must cooperate with the competent authorities and Parliament can put an end to the use of the military.

In Brazil, in contrast, there is little legislative or judiciary oversight of either the President's initial decision to call out the armed forces or of the subsequent operations.³² As importantly, the rules governing military operations are unclear, leading to disputes over command authority and a lack of executive control over the operations. In a 1995 sweep of the crime-ridden *favelas* outside of Rio de Janeiro, the state governor was not involved in decisions about the operation, other than the initial decision to use the armed forces. Command authority was disputed between the military and the secretary of public safety for the state (a reserve general), but the ambiguous legislation in this area made it impossible for even the Minister of Justice to resolve the conflict.³³

³¹ *Agreement on the Strengthening of Civilian Power and on the Role of the Armed Forces in a Democratic Society*, signed September 19, 1996. Available at the United States Institute for Peace's Digital Documents page: http://www.usip.org/library/pa/guatemala/guat_960919.html.

³² The 1988 Constitution originally called for the armed forces to play a role in maintaining law and order, at the request of any of the three branches of government. This led to the unusual situation of a judge calling out the military to repress a November 1988 steel strike in Volta Redonda, resulting in the death of three workers. In response, Congress passed Supplementary Law 69 on July 23, 1991, which gave only the executive the right to call out the Armed Forces. The presidents of the Senate, the Chamber of Deputies, and the Supreme Court may also ask for military intervention, but the request must pass through the president, who has the right to veto it. See Zaverucha, 1998, pp. 111-112.

³³ Zaverucha, 2000, p. 16.

6. Demilitarizing Public Security and Intelligence

In order to ensure that the military's role in internal missions remains temporary, the government must work to strengthen the civilian ministries and agencies that have the primary responsibility for providing services and maintaining order. In the case of institutions charged with internal security, this means strengthening and civilianizing the police force and creating civilian intelligence agencies that are accountable to the executive and legislative branches. In countries where the police is under the control of the military, legislation must be written to shift this control to local officials or a non-military ministry, such as the Ministry of Interior, and to ensure that active duty military do not command police units. In all newly democratic countries, even those where the police is already under civilian control, police training and staffing must be adapted to the requirements of operating in a democratic environment. Personnel must be trained to respect civil liberties and force levels must be increased to match the higher crime rates that often accompany democratization (as curfews are lifted, borders are opened, and former combatants in post-conflict democracies turn to illegal activities).³⁴

Training in the use of non-lethal force, legal procedures, and the principles of community-based policing distinguish the police in new democracies from the military, whose training in the maximum use of force to eliminate the enemy is incompatible with internal policing. Police training should correct basic deficiencies in crime prevention skills and standard detective work that emerged as a result of reliance on informants and

³⁴ For an overview of the issues involved in the civilianization of the police, see Murray Scot Tanner, "Will the State Bring *You* Back In? Policing and Democratization," *Comparative Politics*, 33:1 (October 2000). For a discussion of reform in a specific case, see William Stanley and Charles T. Call, "Building a New

coerced confessions during the authoritarian period. In the first stage of democratization, military-style ranks are frequently replaced with a British-style police hierarchy or civil service-type personnel grades (e.g., Germany, Indonesia) as a symbolic demonstration of the civilianization of the police.

One of the most problematic aspects of police reform is increasing force strength to meet threat levels. In Indonesia, for example, the police was moved out of the MOD with the transition to democracy, but it is estimated that it will take at least 10-15 years for the police to increase their personnel levels enough to be able to maintain order on their own. The need for more police, combined with the pressure to downsize the military in many new democracies, frequently leads to former military personnel flooding the ranks of the police force. This endangers the process of demilitarization of public security. To counter this, legislation should limit the number of ex-military permitted and enforce strict training requirements for all new personnel.

In addition to demilitarizing the police, civilian leaders must get the military out of the domestic intelligence business and assert civilian control over the military's legitimate intelligence functions. The first step of democratic reformers is usually to establish a clear division of labor – limiting the military to collecting military intelligence, and perhaps foreign intelligence. Civilians should be responsible for strategic intelligence and counterintelligence and should be guided by rules of evidence and domestic laws. In Mozambique, for example, the National Defense Law of 1997

Civilian Police Force in El Salvador,” in Krishna Kumar, ed., *Rebuilding Societies After Civil War: Critical Roles for International Assistance* (Boulder, Colorado: Lynne Rienner Publishers, 1997).

limits the intelligence services of the armed forces to collecting information of a military character. Similarly, in South Korea, the military's Defense Security Command, a key domestic intelligence agency in the 1980s, was stripped of power unrelated to military affairs after Kim Young's victory in the 1993 presidential elections. The Guatemalan government is proceeding slowly on its commitment in the 1996 peace accords to create a Civilian Intelligence Agency within the Ministry of Interior to handle internal intelligence. The 1999 law that created the new Brazilian Intelligence Agency (ABIN) does not clearly define a division of labor between civilian and military intelligence agencies, failing to even mention the intelligence and counterintelligence activities of the state military police or the armed forces.³⁵

To ensure that the new division of labor is respected, mechanisms for civilian oversight of military intelligence agencies must be put into place. Civilians should ensure that old counterintelligence records are not kept by the military and that the military does not create or maintain parallel counterintelligence structures. Civilian oversight of military intelligence can take a number of different forms. Perhaps most common is the creation of an overarching civilian agency to oversee the assortment of military and civilian agencies that conduct intelligence. The civilian intelligence agency, in turn, should be accountable to the executive and the legislature. If the central intelligence agency is to exercise effective civilian oversight of military intelligence, civilians must staff it and military intelligence agencies must be required to report to it. In Brazil, despite multiple efforts to create centralized intelligence agencies, military

³⁵ Marco Cepik, "The New Brazilian Intelligence System: An Institutional Assessment," paper presented at the Naval Postgraduate School, Monterey, California, June 2000.

intelligence agencies continue to be involved in domestic intelligence (in particular, collecting information on the Landless Movement) and are subject to little civilian oversight.³⁶

Civilians sometimes choose to assert control over military intelligence agencies by having them report directly to the president or to the minister of defense, rather than a central intelligence agency. In cases where there is a history of the president using intelligence agencies for political purposes, a reformer might choose to have military agencies report to the ministry of defense (as South Korean President Kim Young did with the military's Defense Security Command). In contrast, in countries where civilians feel their tenuous control over the ministry of defense endangers their supervision of military intelligence, the latter might be required to report directly to the president. This was the case in Spain in 1984 when legislation designated the military's Higher Defense Intelligence Center (CESID) as the intelligence agency of the prime minister and required it to report to the executive and to parliament (even though it still depended organically on the MOD).³⁷

Conclusion

The writing of constitutions and laws is not sufficient to guarantee military respect for civil liberties and accountability to democratically elected leaders. However, it is a necessary first step. The legal framework must both be clear and its provisions

³⁶ *Ibid.* See also Wendy Hunter, *Eroding Military Influence in Brazil: Politicians Against Soldiers* (Chapel Hill: The University of North Carolina Press, 1997), pp. 63-64 and 66-68.

³⁷ Jorge Zaverucha, "The Degree of Military Political Autonomy during the Spanish, Argentine and Brazilian Transitions," *Journal of Latin American Studies*, 25 (1993), pp. 286-287.

widely understood by civilians and military alike for it to have any impact on behavior. Although some military and civilian actors may reject the framework, it increases the cost of defying democratic authority and provides leverage to civilians trying to assert their control.