

THE END OF SECUROCRACY: THE FUTURE OF SECURITY SECTOR GOVERNANCE IN MALAWI

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ABSTRACT

Why was [and still is] there a perception that the President is the Commander-in-Chief of the Malawi Police Service when section 78 of the Constitution is clear that he or she is the Commander-in-Chief of the Malawi Defence Force only? Why was the President steered into the 'academic freedom' impasse sparked by the Inspector General of Police when section 153(4) of the Constitution plainly stipulates that the political responsibility for the Malawi Police Service is vested in the responsible Minister? Why is the police sometimes regarded as a threat to the population when, in actual fact it is constituted to provide public safety and to protect the rights of all Malawian in terms of section 153(1) of the Constitution? While commending the Malawi Defence Force for its apparent professionalism in discharging its constitutional roles, this article condemns the politicisation of the police in Malawi. It also interrogates the role of the Parliamentary Committee on Defence and Security in providing oversight of the security sector. Malawi needs to curb or prevent 'securocracy' by reconstructing a security apparatus that is professional, transparent, accountable and independent from politics.

I INTRODUCTION

The traditional actors in the security sector have been the military, the police and prison or correctional services. In short, all those state institutions

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that bear arms have been the classical actors in the security sector. However, since the implosion of the Soviet Empire and the fall of the Berlin Wall, there has been a shift from state security to human security, where the focus has not only been on the security of the state but also on the security of citizens. This shift from state security to human security recognises the involvement of non-traditional actors in the security sector such as the judiciary and the civil society, among others. In the Malawian context, this view draws support from *National Consultative Council v Attorney General*, where the High Court said that the ‘preservation of law and order, the prevention and detection of crime and national security are matters of great concern to the courts of this country’.¹ The involvement of the courts in the security sector was succinctly explained by Justice Potani in *Kennedy Makwangwala & Hophmally Makande v The State, Inspector General of Police & Commissioner of Police (South)* thus:

One of the functions of the courts in a democratic society is to uphold the rule of law, which includes ensuring that constitutionally protected rights are upheld. Though the executive and the legislature are in the best position to determine policy with regard to national security, the courts have a crucial role to play in ensuring that security measures are done within the confines of the law and without unjustifiable limitation of human rights.²

The notion of human security is embodied in the Constitution of the Republic of Malawi (‘Constitution’), especially in the way it configures the roles of the traditional security sector actors.³ The Constitution aims to prevent and combat patrimonialism, which is a form of governance in which all power flows directly from the leader.⁴ In autocratic or oligarchic regimes, the leader typically enjoys absolute power and, usually, the police and the armed forces are loyal to the leader, not to the nation. To avoid this scenario, the Constitution has separated the security sector from direct control of the politicians. However, the governance of the security sector in practice has not been as was intended by the framers of the Constitution. This is evident in

1 *National Consultative Council v Attorney General* Civil Cause No 958/1994, [1994] MLR 243 (HC).

2 Misc Civil Cause No 63 of 2008 (unreported).

3 See, eg, secs 153, 160 and 163 of the Constitution.

4 JI Bakker ‘Patrimonialism’ *The encyclopedia of governance*, available at www.semioticsigns.com/hanspublications (accessed 2 July 2012); see also J Adams ‘The rule of the father: Patriarchy and patrimonialism in early modern Europe’, Working paper, Russell Sage Foundation, available at http://www.russellsage.org/sites/all/files/u4/Adams_Rule%20of%20the%20Father.pdf (accessed 2 July 2012).

the report of the Malawi Human Rights Commission following the 20 July 2011 incidents in which it was noted thus:

The conduct of law enforcement agencies, in particular the Malawi Police Service (the Police), characterised by incidences of brutality and the attendant impunity also created a situation that was conducive to the violence that emanated from the July 20th demonstrations. This situation was exacerbated by the presidential public directive on the shoot to kill policy that essentially gave the Police the mandate to shoot and kill [suspected] criminals on site. The directive was in stark contrast to the relevant laws, constitutional principles as well as international human rights standards. MHRC [sic] raised its observations on these developments and gave advice on the same to relevant authorities.⁵

More candidly, the Malawi Human Rights Report further notes:

The growing impunity on the part of the Police, coupled with the presidential directive contributed to a situation where, the Police were ill-prepared to contain unarmed demonstrators in a manner that is within the precincts of the relevant laws and in line with applicable human rights standards. These developments also rendered the Police incapable of lawfully handling the situation of people that may have been suspected of taking part in the looting and destruction of property during or after the demonstrations.⁶

The central theme in this article is how to prevent political influence on the security sector. The politicisation of the police as well as the military and the militarisation of politics breed 'securocracy', which erodes professionalism and promotes ineffectiveness in the security sector. In this sense, a 'securocrat' is a military or police officer who holds an influential position in the government; an advocate of the close involvement of military and police officers in government.⁷ Thus, the securocrat has the power to influence government policy.⁸ Direct political control of the security sector by politicians is also a catalyst for corruption and suppression of dissidents of the government in power.⁹ To avoid this scenario, this article argues for the crafting

5 Report of the Malawi Human Rights Commission following the 20 July 2011 incidents, Malawi Human Rights Commission, 2012, 3 ('The MHRC 20 July Report').

6 As above.

7 See 'Securocrat' *Oxford Dictionaries*, available at <http://oxforddictionaries.com/definition/securocrat> (accessed 1 June 2012).

8 As above. Although reference is usually made to members of the police and security that dominated the South African government in the 1980s.

9 Policy Studies Institute 'The role and responsibility of the police', The report of an independent inquiry established by the Police Foundation and the Policy Studies Institute, available at

legal and policy strategies that guarantee the independence of the security actors in Malawi and ensure that these actors are held accountable within the framework of the Constitution.

II POLITICISATION OF THE POLICE

In any democracy the ultimate responsibility for ensuring public safety and security lies with the people's representatives, specifically the Minister responsible for home affairs. In this case, the police are only implementers of policy.¹⁰ Law enforcement officials are required at all times to fulfil the duty imposed on them by law to serve the community and protect all persons against illegal acts. They are expected to discharge this duty with a high degree of responsibility required by their profession.¹¹

A Constitutional mandate of the Malawi Police Service

Like teaching and medicine, the role of the police is a lines of work that is intrinsically linked to serving general public.¹² This is reflected in the Constitution which provides for the functions of the Malawi Police Service ('MPS'). To be sure, section 153 of the Constitution of the Republic of Malawi stipulates:

(1) The [MPS] shall be an independent organ of the executive which shall be there to provide for the protection of public safety and the rights of persons in Malawi according to the prescriptions of the Constitution and any other law.

(2) The [MPS] shall enjoy only such powers as are necessary for the protection of rights under this Constitution and the maintenance of public safety and public order in accordance with the prescriptions of this Constitution and the law.

<http://www.psi.org.uk/publications/archivepdfs/Role%20pol/INDPOL-0.P.pdf> (accessed 15 June 2012) 12.

10 Human Rights Initiative 'The police-politician paradigm: The executive relationship', available at http://www.humanrightsinitiative.org/programs/aj/police/india/initiatives/police_executive_paradigm_stenning.pd (accessed 24 June 2012) 1.

11 United Nations *United Nations blue book*, available at <http://www.uncjin.org/Documents/Blue-Book/BlueBook/english/bbepolrol.html> (accessed 2 June 2012).

12 B Vila & C Morris (eds) *The role of police in American society: A documentary history* (Westport, CT: Greenwood Press, 1999); see also 'The role of the police in society', available at <http://faculty.ncwc.edu/mstevens/205/205lect01.htm> (accessed 2 June 2012).

(3) In the exercise of their functions, members of the [MPS] shall be subject to the direction of the courts and shall be bound by orders of such courts.

(4) Political responsibility of the [MPS] shall vest in a Minister of the Government who shall ensure that the discipline and conduct of the [MPS] accords with the prescriptions of this Constitution and any other law.

The constitutional roles of the MPS represent a shift from ‘policing the public’, as it was during the one-party era, to ‘serving the public’. This transformation is also evidenced by the change of name of the police in Malawi, from the ‘Malawi Police Force’ to the current ‘Malawi Police Service’. Sir Robert Peel observed that the public plays a substantial role in policing. Consequently, he stressed the importance of the relationship between the public and the police thus:

To maintain at all times a relationship with the public that gives reality to the historic tradition that the police are the public and that the public are the police; the police being only members of the public who are paid to give full-time attention to duties which are incumbent on every citizen, in the interests of community welfare and existence.¹³

The point is that the very nature of the work of the police requires it to have intimate connection with the people. While there has been an expansion of the roles of the police in recent years, the activities of the police are usually discussed in terms of three major categories: crime control – responding to and investigating crimes and patrolling the streets to prevent offences from occurring; maintenance of peace, law and order – preventing and controlling behaviour that disturbs the public peace, settling domestic disputes and intervening in conflicts that arise between citizens; and public service - the provision of various services to the community, including assisting in the search for missing persons and acting as an information/referral agency.¹⁴

It follows that the purpose of the police service is to uphold the law fairly and firmly; to prevent crime; to pursue and bring to justice those who break the law; to maintain peace, calm, law and order; to protect, help and reassure the community; and to be seen to do all this with integrity, honesty and sound judgment. Even though the police perform an increasingly wide range

13 R Peel ‘Principle seven in policing politics and public policy’, available at <http://mennozacharias.com/> (accessed 23 June 2012).

14 C Griffiths & SN Verdun-Jones *Canadian criminal justice* (Toronto: Harcourt Press, 1994) 70–71.

of functions, it is crime control which remains dominant in the perceptions of the general public. In the discharge of these functions, the Constitution provides for the position of the Inspector General as the head of the MPS, whose office is a public office accountable to the Minister responsible for the police, in the Malawian case, the Minister of Home Affairs.¹⁵ The Constitution clearly states that the Inspector General 'shall not be subject to the direction or control of any other person or authority' in the exercise of his or her duties and powers.¹⁶

Undoubtedly, the police may be justified to prioritise certain of its functions depending on the circumstances at hand. For example, faced with a conflict of priorities between the maintenance of public tranquility and the enforcement of the law, the police may be entitled to prioritise the former regardless of political expediency. Such a choice flows from the logic that you cannot enforce the law effectively when there is no public order. Another scenario is where the police is caught between maintaining public order and safety and satisfying the political interests of the government. In practice, it is for the Inspector General to establish an appropriate balance between crime prevention and detection, and the maintenance of law and order.¹⁷ This explains why the Inspector General and the MPS need to steer clear of any political influence.

B Political independence of the MPS

The Constitution requires members of the MPS to discharge their functions, powers and duties as impartial civil servants of the general public and the government of the day.¹⁸ For this reason, police officers are not permitted to participate directly in political activities although this does not restrict their right to vote. Any police officer who wants to participate in politics has the right to resign or retire.¹⁹ To ensure the political independence for the MPS, the Constitution also prohibits the government and any political party to influence any police officer 'to exercise functions, powers or duties for the purposes of promoting or undermining the interests or affairs of any political party or individual member of that party', and police officers are also

15 Section 154 of the Constitution.

16 Section 154(5) of the Constitution.

17 See Policy Studies Institute, above note 9.

18 Section 158 of the Constitution.

19 Section 158(1)–(2) of the Constitution.

prohibited to act in that way.²⁰ Furthermore, politicians are prohibited from causing members of the MPS to deploy any kind of support that promote or undermine any political party or members thereof or other interest groups. Likewise, police officers are also prohibited from deploying resources in such politically-orientated manner.²¹

The police have the duty to act independently when enforcing the law in individual cases. This includes important decisions about whom to investigate, search, question, detain, arrest and prosecute. The government is not precluded from engaging the police on issues that have or may have significant public policy or public interest implications, such matters of national security or international relations. However, in all such cases the government must not exert undue pressure on the police.²² In *Malawi Law Society & Others v The State & the President of Malawi, Minister of Home Affairs, The Inspector General of Police & the Army [Commander]*,²³ the then President issued a directive at a political rally to the police and the army not to allow and deal with any person who demonstrated against a proposed bill to amend section 83 of the Constitution in order to allow for the third term for the presidency. In that case, Justice Twea held that 'it is clear that the Minister of Home Affairs, the Inspector General and the Army Commander are all subject to the Constitution in the exercise of their power and duties'. Justice Twea decided that:

S.153 provides that the Malawi Police Force is an independent organ which is there to provide protection of public safety and the rights of persons in Malawi according to the prescriptions of the Constitution. It also vests the political responsibility of the Force in the Minister which responsibility must be exercised according to the Constitution. Be this as it may the Constitution under S.154 provides the Inspector General is the Head of the Malawi Police Force and is responsible to the Minister. This notwithstanding, he is required to be independent from control or direction of any other person or authority other than is prescribed under the Constitution. Further, S.158 of the Constitution, provides for the Political independence of the Malawi Police Force. This section restricts Police Officers to professionalism and constitutionalism failing which they would be subject to disciplinary action.²⁴

20 Section 158(3) of the Constitution.

21 Section 158 (4) of the Constitution.

22 Human Rights Initiative, above note 10, p.3

23 Misc Civil Cause No 78 of 2000 (unreported).

24 As above.

Thus, it is incumbent upon police officers to be and to remain professional and act as such, without favour or political inclination and undue influence. A textbook example of undue influence on the police is when President Bingu wa Mutharika ordered the MPS to shoot to kill suspects of crimes in order to deter potential perpetrators. Firstly, the President had no legal mandate to give such direction to the MPS.²⁵ Secondly, the order was manifestly illegal as the Police Act explicitly prohibits the policy of shoot to kill. Section 30(1)(c)(iv) of the Police Act states that the use of force by police officers 'shall as far as possible be to disable and not to kill'.²⁶

It has been argued that the police is too powerful to fall directly under political control.²⁷ Direct political control of the police by politicians is a precursor to corruption, oppression and lack of professionalism.²⁸ As noted earlier, this view is consistent the dictum of Justice Tambala in *National Consultative Council v Attorney General*, where he said:

There is need to strike a balance between the needs of society as a whole and those of individuals. If the needs of society in terms of peace, law and order, and national security, are stressed at the expense of the rights and freedoms of the individual, then the Bill of Rights contained in our Constitution will be meaningless and the people of this country will have struggled for freedom and democracy in vain. In a democratic society, the Police must sharpen their skills and competence. They must be able to perform their main function of preserving peace, law and order without violating the rights and freedoms of the individuals. That is the only way they can contribute to the development of a free State. Matters of national security should not be used as an excuse for frustrating the will of the people expressed in their Constitution.²⁹

Police officers are therefore obliged to act professionally and constitutionally, failing which they would be subject to disciplinary action or criminal prosecution.³⁰ For this reason, it has been suggested that there should be a buffer to ensure that politicians are not in a position to become directly involved in the operational aspects of policing. This explains the establishment of the Police Service Commission. However, according to section 155 of the Constitution, the functions of the Police Service

25 See sec 78 of the Constitution. See also sec 154 of the Constitution.

26 Police Act, Cap 13:01 of the Laws of Malawi.

27 Policy Studies Institute, above note 9, 12.

28 As above.

29 *National Consultative Council v Attorney General*, above note 1.

30 Per Justice Twea in *Malawi Law Society & Others v The State & the President of Malawi, Minister of Home Affairs, The Inspector General of Police & the Army [Commander]*, above note 23.

Commission in Malawi are merely to confirm the appointment of members of the MPS except the Inspector General; to remove such persons from office and to exercise disciplinary control of police officers. Given that the Inspector General is appointed by the President and is accountable to the Minister of Home Affairs, the whole MPS is ultimately responsible to the President and Minister.

The problem with this arrangement was evident when the former President Mutharika supported the Inspector General for an act that endangered the right to academic freedom at the University of Malawi in 2011. The former President commended the Inspector General for summoning and interrogating a professor following comments the latter had made in a classroom. The President weighed in the debate acting purportedly as the 'Commander-in-Chief of the MPS' and not as the Chancellor of the University of Malawi which he was at the same time.

It must be noted that section 78 of the Constitution is clear that the President is only the Commander-in-Chief of the Malawi Defence Force (MDF), which is the only constituted military force in Malawi in terms of section 159 of the Constitution. Secondly, the responsibility of intervening, if at all, laid in the Minister of Home Affairs who has the political responsibility of the MPS, and to an extent, the Police Service Commission by virtue of its disciplinary role. Furthermore, the Parliamentary Committee on Defence and Security had the mandate to intervene by virtue of its oversight function. Experts have noted:

It is well known that in any society, the police enjoy immense powers, which must be controlled to prevent their misuse. However, controlling the police itself becomes a source of tremendous power that can be misused to serve partisan interests. Balancing these conflicting ideas of how is the control exercised and the type of relationship that should exist between the police and the political executive that establishes and controls them is what will lead to an accountable and transparent police service.³¹

The distinction between appropriate political direction and inappropriate political interference in operational policing matters is an immensely significant one, both in terms of the way it is expressed in law and policy, as well as in practice.³² A careful balance should be struck between legitimate 'supervision' of the police by the political structures and illegitimate interference and partisan influence. Conversely, the police must always remain

31 Human Rights Initiative, above note 10, 13.

32 As above, 4.

accountable to elected politicians in Parliament and therefore, the general public for enforcing the law and performing other duties in accordance with the law and professional standards. The executive is entitled to devise policies and seek accountability for the implementation those policies.³³ However, such accountability needs to be enforced vicariously either via Parliament and/or the Police Service Commission. In this regard, the Police Service Commission may need to be strengthened and capacitated to oversee operational aspects of policing.

III DEFENCE IN A DEMOCRACY

Section 159 of Constitution establishes the MDF as the one and only military constituted in Malawi. The Constitution also spells out that the MDF shall operate at all times under the direction of appropriate civil authorities entrusted with such power by the Constitution.³⁴

A Constitutional mandate of the MDF

According to section 160 of the Constitution, the MDF is mandated to perform the following functions:

- to uphold the sovereignty and territorial integrity of the Republic and guard against threats to the safety of its citizens by force of arms;
- to uphold and protect the constitutional order in the Republic and assist the civil authorities in the proper exercise of their functions under this Constitution;
- to provide technical expertise and resources to assist the civilian authorities in the maintenance of essential services in times of emergency; and
- to perform such other duties outside the territory of Malawi as may be required of them by any treaty entered into by Malawi in accordance with the prescriptions of international law.

To ensure that the MDF performs these roles, the Constitution prohibits anyone or authority from ordering or deploying the MDF to act in contravention of its constitutional mandate and other provisions of the

33 As above.

34 Section 160 of the Constitution.

Constitution in general.³⁵ It should also be noted that the military also advises the government on the formulation of defence policy and helps to implement it. However, the military *does not* make policy as this power constitutionally lies with the civilian authorities.³⁶

One question that has hovered over the roles of the MDF relates to the involvement of the MDF in internal security operations. Indeed, where the police have for one reason or another not been able to fulfill its duties with regard to internal security, the MDF has dully been called upon to fill the operational void. For example, the MDF was deployed in a joint operation with the police under 'Operation Chotsa Mbava' which involved house-to-house searches for suspected criminals in crime-infested neighbourhoods of the country. Recently, the MDF was involved in evacuating street vendors from the streets in the City of Lilongwe to their designated trading areas. This support role of the MDF finds its legal basis in section 160 (b) of the Constitution which empowers it to 'uphold and protect the constitutional order in the Republic and assist the civil authorities in the proper exercise of their functions'.

The question then cannot be whether the MDF should be involved in internal security but rather when and how. As the MDF will be performing the roles of the police in this case, a very high standard of discipline, integrity, due diligence and respect for human rights is required of them.³⁷ For this to happen, the troupes must be properly trained and equipped for this purpose. More importantly, there must be a legitimate reason (right intention) for the deployment of the MDF in matters relating to internal security. A strict duty of care and respect for human rights is required by the MDF as they penetrate an area of work which entails an intimate connection between law enforcement agencies and the general public. With respect to the question of when the MDF can be deployed to support the police, guidance could be sought from the Constitution itself. The MDF cannot usurp the role of the MPS. Hence, its deployment may only be justified if the police are unable to discharge their functions. It could be added that the police must make the call and substantiate it. The circumstances that may justify the call by the police for assistance could be those that could justify a declaration of a state of emergency, such as in times of war, threat of war, natural disasters, and in

35 See sec 160(2) of the Constitution.

36 D Chuter *Defence transformations: A short guide* (Pretoria: Institute for Security Studies, 2000) 27.

37 Office of the High Commissioner for Human Rights, the United Nations Basic Principles of the Use of Force and Firearms, available at <http://www2.ohchr.org/english/law/firearms.htm> (accessed 1 July 2012).

times of internal conflict and civil unrest that constitutes a grave and imminent threat to the life of a nation.³⁸ It would help for this purpose to develop a clear and coherent policy, based on the principles of the Constitution, which clarifies the relationship between these two security institutions both in times of peace and in times of emergencies.

B Civilian control of the MDF

The doctrine of civil control of the military places ultimate responsibility for a country's strategic decision-making in the hands of the civilian political leadership, rather than in the hands of professional military officers.³⁹ As Georges Clemenceau observed, '[w]ar is too important to be left to the generals'.⁴⁰

As stated above, the MDF is required by the Constitution to operate only under the direction of civilian authorities entrusted with such power by the Constitution.⁴¹ To this end, the President has the ultimate responsibility of the MDF as the Commander-in-Chief.⁴² The political responsibility of the MDF is vested in the Minister responsible for defence. The Commander of the MDF, who is appointed by the President, is accountable to the relevant Minister.⁴³ This is a manifestation of the notion of 'civilian control' or 'democratic control' of the military in a democracy.

The Constitution states that the powers of the President as the Commander-in-Chief are exercised on the recommendation of the Defence Council. The Defence Council is composed of the Minister of Defence – who is the Chairperson, the Secretary for Defence and Chief Secretary to the Cabinet, and the High Command of the MDF, among others.⁴⁴ The Defence Council is also empowered to determine the operational use of the MDF.

To ensure a system of checks and balances, the powers of the Defence Council and, by implication, of the Commander-in-Chief, are exercised subject to the scrutiny of the Parliamentary Committee on Defence and Se-

38 See sec 45, discussed in DM Chirwa *Human rights under the Malawian Constitution* (Cape Town: Juta & Co Ltd, 2011) 50-51.

39 PD Feaver 'The civil-military problematic: Huntington, Janowitz and the question of civilian control' (1996) 23(2) *Armed Forces & Society* 149-178.

40 JH Jackson *Clemenceau and the Third Republic* (Conn: Hyperion Press, 1979) 228.

41 Section 160(1) of the Constitution.

42 Section 161(1) of the Constitution.

43 Section 161(2)-(3) of the Constitution.

44 Section 161(4) of the Constitution, read with sec 10 of the Defence Force Act, Cap 12:01 of the Laws of Malawi.

curity.⁴⁵ The Parliamentary Committee on Defence and Security is composed proportionally of all the political parties represented in the National Assembly.⁴⁶ Among other functions, the Parliamentary Committee on Defence and Security has the constitutional mandate of approving or disapproving declarations of states of emergency.⁴⁷

The notion of civil control of the military is intended to ensure that decisions and risks affecting national defence and the deployment of the MDF are taken by politicians who are accountable to the people, rather than by soldiers and other officials who are not.⁴⁸ It is clear therefore that subordinating the military to civilian control, in the manner that the Constitution does, strengthens democracy.⁴⁹

C The a-political nature of the MDF

The fact that the MDF is constitutionally required to be under civilian control does not mean that it should be politicised. The idea that the military should shy away from politics is fundamental to democracy. The basics of national security transcend party politics. Section 78 of the Defence Force Act,⁵⁰ makes it an offence for a service member to indulge in political activities:

- (1) Any person subject to military law [who] –
 - (a) promotes, or is a member of, or takes part in activities of, any political association;
 - (b) expresses political views in a public place or in the media; or
 - (c) addresses any meeting or joins any demonstration, the purpose of which is to express support for a political association or object, or for a candidate, in a parliamentary, presidential or local authority election or a by-election thereof or in a referendum,

45 Section 161(5) of the Constitution.

46 Section 162(1) of the Constitution.

47 See sec 45(45(2) of the Constitution.

48 L Alapishvili 'The civil-military relations and democratic control on armed forces in Caucasus – A comparative study', available at <http://www.nato.int/acad/fellow/97-99/alapishvili.pdf> (accessed June 15 2012) 9.

49 Human Rights Initiative, above note 10, 13.

50 Above note 44.

shall be guilty of an offence and shall, on conviction by court-martial or by the High Court, be liable to imprisonment for two years or any less punishment ...

(2) Voting in a parliamentary, presidential or local authority election or a by-election thereof or in a referendum shall not take place within the premises of the Defence Force and no person shall be permitted to campaign for such vote within such premises.

Clearly, this section requires military personnel to remain professional in the execution of the missions assigned to them and not to participate in politics. While retired officers have full rights to political activism, active-duty military personnel are prohibited from taking part in partisan politics. As Admiral Mullen has argued, the non-partisan nature of the military does not mean that troops cannot hold their own opinions; it means rather that they should understand the proper place and time to voice them.⁵¹ The military must carry out the *lawful* orders of the Commander-in-Chief no matter what party he or she is from. The military should serve the government of the day in a professional manner. In this way, the military will command respect and trust from the public.

IV GUARDING THE GUARDIANS – HOW TO ENHANCE SECURITY SECTOR GOVERNANCE IN MALAWI

A Management and oversight of the security sector

Management and oversight of the security sector are key to ensuring professionalism. Management of the security sector refers to the implementation, direction and operation of security policies, decisions and practices.⁵² It requires horizontal and vertical capacities and often structural reorganisation among and within security actors to improve efficiency and effectiveness.⁵³ These capacities include building and maintaining profes-

51 Admiral Mullen, Chairman of Joint Chiefs of Staff, US, 'Apolitical and professionalism in the military', available at <http://www.stripes.com/news/mullen-reminds-military-leaders-to-stay-professional-apolitical-1.131231>>9 (accessed 22 June 2012).

52 Stimson Centre 'Management of the security sector: A note on current practice' (2009), available at <http://www.stimson.org/books-reports/management-of-the-security-sector/> (accessed 22 June 2012).

53 As above.

sional defence and security forces, appropriate allocation of resources, reducing corruption, and engaging with civil society.⁵⁴

As such, management is linked to security sector governance and oversight mechanisms. Incorporating the principles of good governance – transparency, accountability, compliance with international law and respect for human rights – into management policies and procedures will help to generate the efficiency, effectiveness and legitimacy of the security sector. Furthermore, since all management bodies wield a great deal of authority over security forces, management bodies and their policies, decisions, and practices must themselves be subject to effective oversight.⁵⁵ To be sure, security sector governance involves effective oversight and accountability of the security and justice sectors. Security sector governance has two dimensions: institutional and normative dimensions. The institutional dimension relates to the (re)building of transparent mechanisms and processes for security policy, decisions and practices. The normative dimension concerns the transformation of the relationships among security and justice providers, governance and oversight bodies, and the general public to embody principles of ‘good governance’.⁵⁶

Formal and informal actors influence security sector governance.⁵⁷ Traditionally, reform efforts for security sector governance have mainly targeted support towards two actors: bodies authorised to use force and civil management and oversight bodies. This approach is now widely considered to be too narrow and state-centric, given the importance of the justice sector to security, the prevalence of non-state security and justice providers, and the need to include civil society in security debates, policies and measures.⁵⁸

B Making a comprehensive national security policy

A national security policy is a government-wide analysis and description of the strategic concerns a country faces, and defines how the government plans to deal with these concerns. In the same vein, a national security strategy is a government’s overarching plan for ensuring the country’s security which in turn provides the blueprint for the formulation and

54 As above.

55 As above.

56 Stimson Centre ‘Security sector governance and oversight: A note on current practice’, available at <http://www.stimson.org/books-reports/security-sector-governance-and-oversight/> (accessed 20 June 2012).

57 As above.

58 As above.

implementation of a country's national security policy. An initial national security strategy may play an important role in determining a comprehensive strategy for security sector reform. The national security strategy can be a tool for building the legitimacy of security actors in the eyes of the population.⁵⁹ In the absence of a clear or written national security policy, matters of national security may be dealt with on *ad hoc* basis and in arbitrary manner. While section 13 of the Constitution provides general and specific principles of national policy, this section is silent on the crucial issue of national security. This lacuna is certainly an area worth reviewing.

C Enhancing the effectiveness of the Police Service Commission

As argued earlier in this article, the executive must not interfere in operational matters of the MPS. The Constitution aims to protect the police's operational autonomy, and the law must reflect this aspiration. Requiring public participation in framing policy is also key to preventing the infiltration of political expediency in policing.⁶⁰ This is why the Police Service Commission needs to be effective. It can provide the much-needed buffer between the politicians and the police so that the MPS can be seen to be truly serving the general public in an independent manner. Like the courts, the MPS should not only serve the public but also be seen to serve the public. When police officers are seen to be complicit in political repression, this runs against the grain of the constitutional role of the police. The need to shield the police from political influence justifies the need for the Police Service Commission to be empowered to exercise oversight over the operations of the MPS.

D Human rights policy for the MPS

The need for a clear policy direction for the MPS was demonstrated when the incumbent Inspector General of Police recently discussed policy issues with unnamed police personnel in a debate mediated by the media. In this debate, the Inspector General of Police said that when he directed the police to respect the rights of suspects, some police personnel did not comply apparently because they think that such respect weakens them in the eyes of

59 Stimson Centre 'National security policies and strategies: A note on current practice', available at <http://www.stimson.org/books-reports/national-security-policies-and-strategies/> (accessed 23 June 2012).

60 Human Rights Initiative, above note 10, 4.

the public. One of the unnamed police officer said: 'As police officers, we are in awkward positions; we don't know how to deal with armed robbers without either risking our lives by being shot dead or losing our jobs by shooting the robbers.'⁶¹ To put the dilemma in perspective, another police officer asked: 'How are we expected to confront armed robbers, for example, if we are expected to go the human rights route in circumstances where even our hardware is obsolete? Just how can we be expected to salute criminal suspects?' The incumbent Inspector General responded that 'police officers do not have to fear to work professionally. Nobody has said police officers can't use firearms but when they want to use the firearms, let them refer to the Police Act to make sure that they are procedural'.⁶²

While it is correct that many police officers know how to shoot, it is also true that many do not know when to shoot. There are at least two ways of solving this problem. The first is 'to look at how we can use non-lethal methods of policing that are still effective'.⁶³ The other is proper training on the use of arms and provision of proper equipment to quell crime. Still needed is a comprehensive policy on the use of force by the police in line with the Police Act and the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Agencies ('UN Basic Principles').⁶⁴ As the Inspector General said, the policy of the MPS is aimed at ensuring that Malawi has a 'firm, fair and friendly' police service that handles people 'with dignity, a police service that makes arrest based on evidence and should also admit when there is no evidence when none is found'.⁶⁵ This is an outline of a noble policy that needs to be articulated consistently and comprehensively in the light of the constitutional vision of the MPS.

As regards the use of force and firearms, the UN Basic Principles urge governments to adopt and implement rules and regulations on the use of force and firearms against persons by law enforcement officials. In developing such rules and regulations, governments and law enforcement agencies are called upon to respect and review regularly the ethical standards associated with the use of force and firearms.⁶⁶ To this end, article 3 of the UN Basic Principles demands that the development and deployment of non-lethal incapacitating weapons should be carefully evaluated in order to minimise the

61 B Ligomeka & G Kamlomo 'IG's order fuels crime' *Daily Times*, 2 July 2012, 1-3.

62 As above.

63 As above.

64 Above note 37.

65 Ligomeka & Kamlomo, above note 61.

66 See MHRC 20 July Report, above note 5, 8.

risk of endangering uninvolved persons, and the use of such weapons should be carefully controlled.

Furthermore, article 4 of the UN Basic Principles requires law enforcement officials, in carrying out their duty, to, as far as possible, apply non-violent means before resorting to the use of force and firearms. They may use force and firearms only if other means are ineffective or do not achieve the intended result. According to article 5 of the same Principles, whenever the lawful use of force and firearms is unavoidable, law enforcement officials must exercise restraint in such use and act in proportion to the to the seriousness of the offence, minimise damage and injury to property or human beings, and respect and preserve human life. Lastly, article 7 of the UN Basic Principles requires governments to ensure that arbitrary or abusive use of force and firearms by law enforcement officials is punished as a criminal offence under their law.

E Defence and development

One of the aspects that is usually overlooked is that armed forces also carry out a social function, especially in developing countries where the military contributes to the modernisation of society as well as economic development.⁶⁷ This is particularly true in a developing country like Malawi where the most imminent threat to public security are human security challenges such as food scarcity, water shortages and effects of climate change, among others. Apart from the mainstream civil service, the MDF is the biggest employer in Malawi, providing employment to the country's youths. Given the shift from state security to human security, there are emerging and additional roles the military can perform in national development in order to ensure human security, such as building access roads and bridges, irrigation and climate change mitigation and adaptation. Therefore, policymakers should explore the development of defence policy guidelines that reflect the unique problems, challenges and opportunities in Malawi, and the unexploited role of the MDF to provide services for the people in national development in light of the Malawi Growth and Development Strategy II.⁶⁸

67 Alapishvili, above note 48, 6.

68 Malawi Government, the Malawi Growth and Development Strategy II, Ministry of Economic Planning and Development, Lilongwe, 2011 (on file with the author).

F The gap between the judiciary and correctional services

The Constitution establishes the Malawi Prison Service which consists of penal institutions that house, detain and rehabilitate convicted and sentenced persons.⁶⁹ While the Malawi Prison Service is charged with the task of reforming or rehabilitating offenders, it appears that prisons in Malawi tend to work more towards hardening criminals. As noted earlier, in *National Consultative Council v Attorney General*, Justice Tambala said that ‘courts and [the] police are ultimately entrusted with the duty to preserve law and order and to ensure that people live in an environment in which peace and security, preservation of law and order’.⁷⁰ This dictum underlines the fact that the judiciary has an important role to play in the security architecture of the country.⁷¹

However, there seems to be no link between the Malawi Prison Services and the judiciary in Malawi in the pardon and parole procedures, especially for purposes of assessing whether a prisoner has been rehabilitated or not. The absence of such a link undermines the aims of punishment, which are to protect the public, to reform offenders and to deter potential perpetrators. If crime is to be curbed, and the aims of punishment are to be realised, for a policy is needed to define a clear role of the judiciary in the dispensation of pardon and parole procedures. Prisons must serve as reform institutions, and not as schools for hardening criminals.

G Regulating the private security sector

There has been a proliferation of private security firms in Malawi since the attainment of democracy in 1993. While some private security firms work in close collaboration with the police, others do not. It is clearly important that the general public feels secure about the organisations that provide security, be they public or private. It is also crucial to be clear about what functions the private sector can and should be allowed to perform.⁷² The private security industry should be regulated in order to ensure public security and safety.

Currently, there is no specific law regulating the formation of private security companies in Malawi and possession or use of firearms by such

69 Section 163 of the Constitution.

70 *National Consultative Council v Attorney General*, above note 1.

71 See also sec 9 of the Constitution.

72 Alapishvili, above note 48, 21.

private security firms. Although there is specific legislation regulating the activities of the private security sector, generally, private security companies in Malawi are not permitted to arm their guards. Apart from the Companies Act,⁷³ which provides for the incorporation of companies, and the Firearms Act,⁷⁴ which provides for the possession of firearms, there is no requirement for a prospective security company to obtain a letter of authorisation from the Minister of Home Affairs to support the application for incorporation.

Apparently, there is draft legislation which seeks to provide for the establishment of a secretariat to regulate the functions performed by security guards.⁷⁵ This law seeks to empower the Minister of Home Affairs and Internal Security in Malawi to approve companies that may render security services. As noted above, private security service is a blossoming industry in Malawi which is currently under-regulated. The ineffective oversight and regulation of private security service providers is not only a source of insecurity to the country but may also be a threat to the very same people and property they are supposed to protect. There are several reasons why it is imperative to regulate private security service providers. First is the need to ensure the legitimate use of force since, according to Weber, the primary responsibility for public order, safety and security rests with the States.⁷⁶ The State is the entity which 'upholds the claim to the monopoly of the legitimate use of physical force in the enforcement of its order'.⁷⁷ However, the monopoly of public security agents to use force does not mean that private security providers should be totally excluded from using force. Private security agents can use force if such force has legitimacy derived from the state.⁷⁸ Flowing from its primary responsibility to ensure the security of its population, a state has a duty to establish a regulatory framework for private security companies to perform functions that have traditionally been solely in the domain of the public security agents. Therefore, where public force is outsourced to private security service, it is necessary for the government to

73 Cap 46:03 of the Laws of Malawi.

74 Cap 14:08 of the Laws of Malawi.

75 At the time of writing, the Bill was said to be under review by the Parliamentary Committee on Defence and Security. Despite efforts to trace the draft legislation, the author did not find such a Bill in any of the relevant offices or government departments.

76 Commission on Crime Prevention and Criminal Justice Twentieth Session, Vienna, 11-15 April 2011, Item 6 of the provisional agenda 'World crime trends and emerging issues and responses in the field of crime prevention and criminal justice', UN Doc E/CN.15/2011/1.

77 See D Warner *An ethic of responsibility in international relations* (Boulder: Lynne Rienner Publishers, 1991) 9-10.

78 As above.

establish a legal framework that governs such use of force.⁷⁹ Secondly, the regulation of private security providers is necessary to ensure that these providers do not pose a danger to crime prevention and public safety. For example, private security service providers may not have appropriate training on the use of force which may lead to the misapplication of force. Also, the possession of firearms by private security agents could increase the risk of arms diversion and misuse.⁸⁰

For these reasons, Malawi should consider establishing an adequate regime of oversight for private security services which should encompass not only oversight over who may be allowed to provide security services but also a mechanism for monitoring training standards, for licensing the possession of firearms, and for monitoring the use firearms.

V CONCLUSION

The basic truth is that for the security sector to be professional it is necessary for the government – to whose authority the security sector actors are subject – to show commitment to democratic norms and checks and balances.⁸¹ This would prevent securocracy in Malawi, the key is to constructing security governance ethos that nurture professionalism, efficiency and effectiveness.

The Constitution has laid down an impressive array of principles that seek to ensure that the security sector is an instrument for protecting the safety and democratic rights of the people.⁸² These principles cannot be given full effect unless the MDF and MPS are allowed in practice to discharge their constitutional roles in an independent and professional manner. Although the Police Service Commission is established as a buffer to between the MPS and politicians, the functions of Police Service Commission are limited to disciplinary oversight thereby creating room for direct political control of the MPS by the politicians. This loophole can be closed by conferring supervisory role of the MPS on the Police Service Commission.

The absence of a comprehensive national security policy in Malawi is one of the major challenges to the security sector in Malawi. This has had the consequence of dealing with matters of national security on *ad hoc* basis and

79 Commission on Crime Prevention and Criminal Justice Twentieth Session, above note 76.

80 International Code of Conduct for Private Security Service Providers, available at <http://www.smallarmssurvey.org/?id=447> (accessed 20 June 2013).

81 Cap 14:08 of the Laws of Malawi.

82 The Human Rights Initiative, above note 10, 13.

in arbitrary manner. This is further exacerbated by the fact that section 13 of the Constitution does not provide guidance for policy formulation and security sector governance in Malawi.

For its part, although the MDF is relatively professional and independent, the conceptual shift from state security to human security embodied in the Constitution means that the MDF could expand its role so that it contributes to achievement of human security. Also, there is a need to embrace new actors in the security sector such as the judiciary and the civil society. Particularly, the link between the judiciary and the Malawi Prison Service should be strengthened so that correctional facilities serve functions of rehabilitating criminals and protecting the public.

To reduce the involvement of the MDF in internal security operations, the capacity of the MPS to deal with internal security problems should be strengthened. Even so, the criteria and procedure for involving the MDF in internal security operations should be clarified. Also needed is legislation to regulate the activities of private security companies, including the possession and use of firearms and other weapons by these private security firms.