

The Principle and Reality of Legislative Oversight in Defence Matters in Liberal Democracies: An Empirical Case

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Abstract: *Legislatures worldwide are an important arm of government in any political system that has an active oversight over defence. As elected representatives of the people legislators are at the heart of the democratic system. They represent the electorate from whom the armed forces of any state are drawn and whose taxes pay for their upkeep. The functions that legislatures play with regards to defence are many and vary greatly among most democratic states. Legislatures exercise their traditional legislative function by carrying out defence legislations on a number subjects. The legislature is an indispensable organ of state in modern democracies and its role in the area of defence is indisputable. The legislature has jurisdiction over policy, oversight, budget issues, procurement of defence equipment, promotions in the armed forces and the deployment of the military in a state of emergency. These areas are necessary for the legislature to exercise its essential role in shaping national security policy and democratic control over the military. In many countries, however, the constitutional and legal framework marginalizes the role of the legislature relative to the executive in formulating and implementing policy. Some legislatures manage to overcome these obstacles and turn their limited legal powers into real authority. In large part, this can be attributed to their willingness and ability to generate expertise in related issues.*

Keywords: Principle, Legislative, Oversight, Defence, Liberal Democracies

1. Introduction

In most liberal democratic political systems the Legislature is one of the main three arms of government. The other two arms are the Executive and the judicial branches.

In political systems in which the principle of separation of powers is enshrined in constitutions, legislatures are normally granted the power to raise and support the armed forces of a country. Article 210 (2) of the 1992 Constitution of the Republic of Ghana for example stipulates that only parliament can raise an armed force (Constitution of Ghana, Article 210). No defence policy can endure without the support of the public it is supposed to protect. As elected representatives of the people, legislators are at the heart of the democratic system. They represent the electorate from whom the armed forces are drawn and whose taxes pay for their upkeep. Legislatures perform dual functions in the sense that they must both influence and reflect public opinion. It is their task, for instance, to explain and justify military expenditure and why military personnel are deployed overseas. Thus, Winston Churchill labelled the Legislature as: “the workshop of democracy and it goes without saying that the legislature does play a central role in any democracy” (Hans, 2003). The roles that legislatures play with regard to defence are many and vary greatly among most democratic states.

This paper aims at critically examining the principle and reality of legislative oversight in defence matters. In particular, the paper focuses on the following:

- Role of the legislature in defence legislation.
- Oversight of defence.
- Roles in budget, approvals, appointments, promotions and declaration of states of emergencies.
- Challenges of the legislature in performing its oversight role over defence.

2. Defence Legislation

The traditional function of the legislature worldwide is the legislative function. Constitutional and political arrangements in a particular country are influential factors that determine how legislations are shaped by the legislature of any democratic state. According to Herbert (2001), another influential factor depends on whether the government of a particular state is practising a presidential or parliamentary

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system of government. The perception is that legislators have less influence in the parliamentary type of government because the government decides strictly what defence policies are to be debated upon. Also the government controls the agenda of the legislature with the majority supposed to vote on strictly party lines. In reality, the legislature wields some influence since all issues introduced in the legislature are openly discussed and issues are voted in legislature. Britain is a typical example of the parliamentary system and almost all defence policies originate from the ruling government (Bruce, 1998). The US practises the presidential system with Congress wielding wide powers on the agenda of the legislature and the content of legislations. In most emerging democracies the executive proposes almost all bills introduced into the legislature, whether the system of government is a presidential or a parliamentary type. There are, however, very few cases of private members bill on defence in some countries.

Specifically, legislatures are responsible for debating and passing defence legislations after the executive have submitted proposals for consideration. Once bills are presented and given the required number of readings they are passed to the specialised committee on Defence, which takes evidence, considers memoranda from various groups and civil society groups, before the committee reports back to the full legislature with its recommendations. One advantage for using the select committee system is that, the committee may not only propose amendments to the bill before the full legislature, but may also recommend that certain matters should be reviewed before the passage of the bill based on research conducted on the specific subject matter or submissions made by some defence related groups and civil society in particular. In Ghana, the legislature has on a number of occasions gone through this process before a bill is finally passed. Some notable areas of defence legislations include: military laws to regulate the Armed Forces, procurement of major defence equipment, approval to participate in foreign/international operations, enactment of a defence policy to protect the national interest based on

the National Security Framework Policy and defence strategic reviews (Herbert, 2001). In the United Kingdom, the first Armed Forces Bill was passed in 1961 to regulate disciplinary procedures of service personnel. In 1966, parliament amended the Armed Forces Act to make major changes to the operation of the court martial system (Tom, 1998). Legislatures in most transitional and emerging democracies have used their legislative powers to pass important legislations on defence issues. According to Geraldo (2001), 'the Argentine parliament for instance redefined the military's role after transition to democracy.' The South African legislature passed a new Defence Policy as part of that country's National Security Framework after the transition to democracy in 1994 (Chuter, 2006). Indeed, the Defence Committee of the South Africa legislature has played and still playing a leading role in Defence Sector Reforms in the country. Legislatures are key actors in shaping and passing legislations to for the modernization of the armed forces in the Philippines, Malaysia and Uganda. (Renato: 1999). In some democracies it is not surprising for major policy decisions on defence to be taken by the executive without the knowledge of the legislature.

3. Role of Defence Committees

As part of its legislative and oversight role, it is important at this stage to consider the functions of the Defence Committee of the Legislature. Defence Committees are created in most legislatures to support the work of the legislature with jurisdiction almost matching the Defence Ministry. According to Dodd (1998) in the United Kingdom, the House of Commons select committee for Defence is made up of eleven members with a permanent parliamentary staff of not less than five. Defence Committees in most countries do not have a formal role in legislation. Its formal functions are defined as monitoring the expenditure, policy and administration of the Ministry of Defence and associated public bodies and making recommendations although it can comment on any defence-related issue. The committee effectively undertakes most of the oversight functions of the legislature. In a country like Germany, the Defence

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Committee is the only legislative committee mandated by the constitution. (Germany Constitution, Article 45a). This may be because of Germany's history in the world wars as its country suffered major defeats during the war years. Whilst in Ghana the Defence Committee is created under the Standing Orders of Parliament (Constitution of Ghana, Article 103). Defence Committees examine issues more critically and the smaller size of the committee usually facilitates compromises between different political divides. They have a tremendous influence over the legislative process, relative to the floor. According to Jeanne Giraldo (2001); "they can control which bills are considered by the legislature like the US Congress, or can pass legislation on their own, without the need for a floor vote like in Brazil." In addition to scrutinising bills for legislation, defence committees serve to balance the right of the public to be informed and the need for the secrecy that governs some activities and policies in national security issues. Defence Committees therefore devoted more of their time on legislation with some devoted to oversight and the defence budget.

4. Approval of Defence Budgets

The strength of most legislatures in the world today especially in established democracies is in the sphere of defence expenditure. The historical background of defence budgets can be traced to the Middle Ages in the United Kingdom. According to Dodd (1998), this is because from the Middle Ages, the Crown's foreign military ventures were dependent on its ability to raise funds from parliament. Parliament was reluctant until the end of the seventeenth century to agree to the funding of a standing army from taxation. Funds continue to be voted from taxes collected for defence budgets throughout the world. The legislature as the taxpayer's representative therefore has the responsibility of stewardship on how moneys are allocated and used.

Legislatures in most modern democracies vote for the defence budget in its entirety. Even though departmental

expenditure may be scrutinised by the Defence Committee or the Accounts Committee (depending on the tradition of each country), the committees have no direct power over the expenditure vote. At the end of each financial year the Ministry or Department of Defence would produce accounts, showing that it has spent its money in accordance with the legislature's wishes. In the United Kingdom this is audited by the National Audit Office and certified by the both its head, the Controller and Auditor General, and the Permanent Secretary of the Ministry of Defence (Dodd, 1998). Based on its control over defence budgets, most legislatures have powers to dictate the size of armed forces and the equipment to be procured for the military in each particular year (Chuter, 2006). The maximum number of active and reservist personnel allowed for each service of the armed forces for instance is included in the Defence estimates for the year. The legislature's control of expenditure is however weakened by the practise of approving the estimate as a whole in some countries, rather than voting on individual blocks of expenditure.

The size of the defence budget could be influenced by the threats that a nation faces at any particular time. In the cold war era defence budgets of NATO states and particularly the US was influenced by the threat posed by the Soviet Union and its WARSAW allies. Thus legislators were bound to assess such a threat in defence budget debates before approvals were made. Since the 2003 the war against terrorism as part of the National Security Framework of the US has influenced Congress in the approval of defence budgets. Public opinion in a particular country has also had an influence on whether the legislature should increase or decrease defence budgets. Whilst some legislators are bent on curtailing defence spending in some states, others have been influenced by public opinion to increase defence spending. According to Cox and Kirby (1986, 121): "In the US because of its super power status there has been evidence in favour of increasing defence spending especially during the cold war era by pro-defence public groups which stimulate public and congressional support for increased spending." In post-cold war era most legislatures are shifting emphasis from traditional security to human and environmental security issues. Thus in most developing

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states defence budgets have been cut by the legislature and instead shifted such funding to health care, education, eradication of poverty and other areas of human security. These cuts are implemented without compromising the defence of such states against external or internal threats.

4.1 Procurement of Equipment

Closely related to budgetary allocation is the role that the legislature performs as regards procurement of equipment for defence. Weapon procurement worldwide has ceased to be the preserve of the Armed Forces and the Defence Ministry of any democratic state. The procurement process in most established democracies is effectively divided between the legislature and Defence Ministries (Cox and Kirby, 1986: 179). The funding and development of a particular weapon programme is therefore subjected to scrutiny and the influence of the legislature. Legislatures demand to be involved and informed about all stages of the procurement process from the definition of an operational requirement, through to the stages of research and development and engineering to the eventual full scale production and entry into service of a piece of military equipment. In the US military witnesses and political heads of service departments sometimes challenge the assessment and budgetary allocation proposals made by the Department of Defence for particular weapon systems and they are given a hearing at the Congress where a final decision is to be taken on procurement (Ibid). On the contrary, there is a show of solidarity for the United Kingdom Ministry of Defence when defence issues are dealt with at Parliament (Cox and Kirby, 1986: 179). This may be because of the concept of collective responsibility rooted on the parliamentary system of governance. The important lesson here is that, the legislature and the public are much better informed about how procurement process works and why certain decisions are taken. The legislature is therefore better placed to approve estimates for new equipment. In some states however, because of the resistance by the

executive to provide information on vital procurements the legislature is denied its constitutional duty of oversight in procurement of defence equipment. This is evident in most emerging democracies which have transited especially from military regimes. In Ghana, the government purchased an executive aircraft for the Ghana Air Force without the approval of parliament in late 1999. Parliament and civil society groups protested vehemently against the process and the aircraft was resold eventually.

5. Appointments and Promotions in the Military

Apart from legislation, oversight and budgetary roles, the legislature in some democratic states may have the duty of vetting and approving of appointments and promotions of officers the armed forces to high command positions. These appointments are normally the prerogative of the Commander-in-Chief of the Armed Forces. In the Presidential system of government, the Executive President may be vested with the power by the constitution to appoint personnel to command positions. In these circumstances and depending on the constitution or practises of the country, the legislature exercises its function on checks and balances by scrutinising/vetting of individuals appointed to such public offices. The public is allowed to raise observations on the reliability of selected individuals by a written petition or any acceptable means to the ad hoc committee vetting the nominees. In the US, Congress approves the President's nominee for the office of the Chairman of the Joint Chiefs of Staff. Indeed, when President Bush nominated General Pace to replace General Myers as the Chairman of the Joint Chiefs in 2005, the nominee waited for well over three months for congressional hearing and approval before he assumed office. Geraldo (2001) states that: "In Indonesia, the Peoples Assembly has the right to approve or disapprove the President's nomination for the commander of the Armed Forces." In contrast, in Ghana the President appoints the Chief of the Defence Staff and the Services Chiefs in consultation with the Council of State. (Constitution of Ghana, Article 212). According to Zaverucha (1993), "the screening and selection of officers permits legislatures to send a strong message

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about the kind of behaviour that is expected of the military – a message that the executive may be unwilling or unable to send.” Perhaps it is upon this assertion by Zaverucha that some legislatures have occasionally refused to confirm the executive’s nominees to the military high command. In view of the history of human rights violations associated with the Argentine military, the Senate occasionally refused to confirm the President’s nominees to the military high command citing human rights violations against individuals nominated (Ibid).

6. Declaration of State of Emergency

An emerging role of the legislature in modern democracies is the right of declaration of a State of Emergency and the deployment of the military for internal operations at the request of the executive. In view of the history of the misuse of the military to suppress internal opposition in most developing states in the recent past, most liberal democratic constitutions demand for legislative approval before a State of Emergency is declared by the executive to quell domestic insurrections, violence or disturbances. In some states, the executive alone has the right to declare a state of emergency, whilst in other states the legislature would have to sanction the deployment of the military in case of internal conflicts. Yet in another circumstance, the President can declare a state of emergency and deploy the military immediately, however the legislature would have to sanction such a move within a specified period. In the US and Germany, the legislature alone has authority to declare a state of emergency (International Parliamentary Union, 1986: 1273). The Filipino constitution requires legislative and judiciary approval for a declaration of a martial law (Geraldo, 2001). In contrast, the constitution of Ghana empowers the President acting in accordance with advice of the Council of state to declare a state of emergency in any part of the country by proclamation published in a

gazette. (Constitution of Ghana, Article 31). Parliament must however approve of the declaration within 72 hours otherwise the state of emergency would be revoked after seven days of coming into force.

7. Challenges of Legislatures

Despite the positive roles that legislatures have played over the years, there are several challenges they encounter on their responsibilities over defence in most countries. Most of these challenges equally affect developed democracies and transiting or new democracies.

Firstly, the legislature is placed at a disadvantaged position over its oversight role because it lacks the access to expertise and information on defence issues. The executive arm of government without doubt controls information in the defence sector in either the established democratic or new democratic states. The legislature requires information urgently to assist in debates and for right decisions to be taken to fulfil its constitutional oversight over defence. There is the tendency for the executive to shroud information under secrecy and prevent the legislature from accessing (Bruce, 1998). It influences the withholding of information from the legislature using the protection of national security as an excuse. The effect that this has over the supervisory role of the legislature challenges the very foundation and principles of democratic control over the military. Constitutionally, the executive may fulfil its control over military, but without an equally effective legislative oversight, there would not be a satisfactory democratic control. These challenges affect legislative oversight, even in countries with long democratic history. According to Geraldo (2001), "In the US the combined expertise of the President's political advisers, the administrative staff of the Department of Defence, and professional soldiers in the military gives the executive an edge over the legislature in their control of the expertise necessary to manage the country's defence." The situation in the United Kingdom is relatively positive, since in recent times the legislature gets some information required. This may be because of the United Kingdom's parliamentary system of government, where there is fusion between the executive branch and the legislature. In addition, the freedom of information bill passed in the recent

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past in some countries including United Kingdom has helped the legislature's course of accessing information. Developing countries, which have just come out of autocratic regimes with the history of secrecy, have a worse situation. It is therefore crucial that the flow of information from the defence sector should be passed on to the legislature without any impediment to ensure an effective civil and democratic control over the military. The enactment of freedom of information legislation would help to make governments release the necessary information to the legislature. In addition, the empowerment of civil society groups to aggressively search for information will help the legislature to acquire the necessary information for its work.

Secondly, the effectiveness of the legislature's control over defence will depend very much on the expertise and effectiveness of the select committee on defence. Most members of Defence Committees are naive with defence and particularly military matters. Therefore, former military personnel or experts on defence matters who find themselves elected to the legislature are self-elected to join the committee. Majority of the members may not therefore have the requisite experience or knowledge on defence issues. The members may therefore have to develop their own expertise or rely on the professional committee staff, defence researchers or outside experts on defence to assist in exercising their oversight responsibilities. In most new liberal democratic states, assistance is sought from developed states to help train and to build the capacity of Defence Committees and other key actors including civil society groups to play a meaningful oversight function. This assistance is provided as part of Security or Defence Sector Reforms, and the United Kingdom government is one of the leading states offering assistance to most African countries and other new democracies elsewhere in the world.

The third challenge that legislatures face is the lack of qualified parliamentary staff made up researchers, expertise and administrative staff. This setback has had a serious effect on the supervisory role of most legislatures in developing countries. This is because parliamentary role over

defence cannot be efficiently pursued. Most developing countries lack the requisite qualified personnel to be employed. In many developing states, poor remuneration and salaries for the public service has discouraged qualified staff from applying for jobs in the legislature, and instead such personnel prefer to work with other sectors where wages are higher. Some Defence Committees in Africa have neither researchers nor any expert on defence matters. Indeed, most Defence Committees in developing states are not privileged like developed countries to have large numbers of former military personnel serving on the committee as members. Apart from the issue of staff, there is generally the lack of resources to support committee work. Even though the situation in most African legislatures has improved with the aid of external donors, it is important that the governments in emerging democracies increase budgetary allocation of the legislature to improve upon its resources to efficiently and effectively run business in the legislature.

8. Conclusion and Recommendations

The legislature has been established as an indispensable organ of state in the constitutions of most modern democratic states. The legislature's role in the area of defence is indisputable. The legislature has jurisdiction over policy, oversight, budget issues, procurement of defence equipment, promotions in the armed forces and the deployment of the military in a state of emergency. These areas are necessary for the legislature to exercise its essential role in shaping national security policy and democratic control over the military. In many countries, however, the constitutional and legal framework marginalizes the role of the legislature relative to the executive in formulating and implementing policy. Some legislatures manage to overcome these obstacles and turn their limited legal powers into real authority. In large part, this can be attributed to their willingness and ability to generate expertise in related issues. While defence committees will benefit from any measures taken to strengthen the legislature as a whole, specific efforts targeted

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at defence are required to overcome the special challenges posed by in this area.

The following recommendations are therefore made to strengthen the overall role of the legislature over defence:

- An organized and informed civil society should be established in democratic countries to put related and military issues on the political agenda of states. This will encourage the legislature to be responsible in the legislative execution of its responsibilities and to press for more powers from the executive.
- Legislatures should be empowered by constitutions to prevent the executive from using secrecy in the name of national defence to keep information away from the legislature. The enactment of Freedom of Information legislation in modern democracies is the way forward.
- It is important to develop good relations between members of the legislature, defence officials and civil society involved in the defence sector to ensure partnership to benefit all. Such partnership should be built on mutual learning, respect for one another and the building of trust.
- Governments of new democratic states should increase the budgetary allocation of legislatures to enable them procure the necessary resources to run parliamentary business efficiently.

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