

HOW OTHER DEMOCRACIES DECIDE TO COMMIT TROOPS

In Canada and New Zealand, both inheritors of the British Westminster system of government, the royal prerogatives of executive powers in the declaration of war and deployment continue. Parliament has no role in approving the commitment of Canadian or New Zealand forces abroad. In South Africa the President retains the power to declare war and must inform Parliament but does not need its approval.

In the United Kingdom, the source of our executive privilege for foreign and defence powers, recent events have suggested a shift in this long held tradition. In 2011 the government acknowledged that a convention had developed in Parliament that before troops were committed to military operations the House of Commons should have an opportunity to debate the matter. It also proposed to observe that convention except when there was an emergency and such action would not be appropriate (Cabinet Manual 2011).

In August 2013, in response to the use of chemical weapons in Syria, allegedly by the Syrian government, against insurgents and civilians engaged in a civil war, both the UK and US governments contemplated making aerial attacks against Syria with a view to destroying those weapons. But before acting, the UK government submitted its proposal to Parliament. As it happened, its proposal was rejected by a majority of the House of Commons. The government chose to treat this as a withholding of authority to proceed with the action.

In September 2014 however, a military response to the activities of the so-called Islamic State (IS) in Iraq and Syria became an issue. For its part the British government took the view that it lacked authority to engage militarily against IS elements in Syria, because of the previous Parliamentary decision, but sought authorisation to engage militarily in Iraq. It put the proposal to Parliament where it was approved 524 votes to 43.

If these developments were to become accepted practice with regard to the authorisation of the use of armed force abroad, it could be maintained that a new 'constitutional convention' had emerged, displacing to some extent the prerogative power. A proviso would be that the war powers should be exercised in accordance with international law, which should in principle be demonstrated by an opinion to that effect by a high legal authority (e.g. the Attorney-General or Solicitor-General).

As the UK does not have a written constitution, its principles and norms are established by such practice, including legislation and convention. This outcome would be a strong and timely endorsement of democratic values in decision making.

In the United States, the constitution gives the power to declare war and the power to finance the armed forces to the Congress. The President is the Commander in Chief and can direct the use of forces. The codification of the powers in the War Powers Act 1973, requires the President to 'consult, report and terminate the deployment of armed forces with the approval of Congress'. Presidents have avoided the issue by conducting military operations without a declaration of war. Where Presidents have appeared to violate this Act, as in the bombing of Kosovo, the United States Courts have not consistently upheld Congressional powers.

In other democracies like Denmark, Finland, Germany, Ireland, Spain, Sweden and Switzerland troop deployment is set down in constitutional or legislative provisions, which require parliamentary approval. Some form of parliamentary approval or consultation is also routinely undertaken in Austria, the Czech Republic, Italy, Japan, Luxembourg, the Netherlands and Norway.

In Australia, the Constitution at s 51 vi allows the Parliament to legislate to ensure that any decision to declare war or commit troops would require parliamentary approval. Attempts have been made in 1985 and 2003 (Australian Democrats) and 2008 and 2014 (Australian Greens) to introduce such legislation. Each attempt has failed as it has lacked the support of both major parties.

An examination of the history of Australian deployment of troops overseas shows that the executive's decision to declare war and deploy forces overseas has always been taken before parliament has debated the issue.

Australia may soon be one of the very last democracies standing as bastions of the royal prerogative to make war by executive unilateral action. Already we are lagging behind the UK in this essential reform.

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