

## OUP Public Law Updates (Spring 2018)

### Constitutional Conventions: Syria and the War Prerogative

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#### Introduction

In this update I reflect on what the Government's recent use of the armed forces in Syria can tell us about the relationship between Parliament and government. In particular, I address the interaction between the constitutional convention that Parliament be consulted, and give its assent, in advance of military deployments, and the war-prerogative.

In looking at this example it is helpful to bear in mind Jennings' test for determining whether a constitutional convention exists.<sup>1</sup> The test requires that we ask three questions:

1. 'What are the precedents [for the purported convention]'
2. '... did the actors in the precedents believe that they were bound by a rule'
3. '... is there a reason for the rule?'

It should also be remembered that constitutional conventions are not legally enforceable. While the courts might recognise the existence of a convention, and may speculate about its scope, they will not require that it be complied with. The decision to comply or not is a political judgment to be made by the actors involved.

#### The War-Making Prerogative and Parliamentary Consultation

Although the Glorious Revolution at the end of the 17<sup>th</sup> century confirmed Parliament's supremacy, numerous prerogative powers previously held personally by the monarch were retained by Ministers of the Crown. One of the primary prerogative powers, indeed perhaps 'the most significant',<sup>2</sup> that continues to be exercised with relative freedom today is the war-making prerogative.<sup>3</sup>

No form of specific parliamentary control is required by law to be exercised prior to the deployment of the armed forces; compare the UK's intervention in Kosovo in the late 1990s

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<sup>1</sup> See Ivor Jennings, *The Law and the Constitution* (5<sup>th</sup> edition, 1959)

<sup>2</sup> House of Commons Public Administration Select Committee, *Taming The Prerogative: Strengthening Ministerial Accountability to Parliament* (Fourth Report of Session 2003-04, HC 422), para. 18; see also House of Lords Select Committee on the Constitution, *Waging war: Parliament's role and responsibility* (15<sup>th</sup> Report of Session 2005-06, HL 236), para. 6

<sup>3</sup> There is a separate debate to be had about whether it remains legally possible to 'declare war', see also House of Lords, above n.2, paras 9 and 10.

with Iraq in 2003, for example.<sup>4</sup> Having said this, Parliament is normally involved in political discussions relating to military deployment; for example the Korean War in 1950, and subsequent conflicts.<sup>5</sup> In addition to these specific discussions about military deployment, ministers are always constitutionally accountable to Parliament for their actions in general.<sup>6</sup> However, since the House of Commons was asked, in 2003, to approve a military deployment in Iraq, it has been argued that a constitutional convention has been established requiring House of Commons authorisation for the deployment of military force.<sup>7</sup> This, it should be emphasised, does not extend to parliamentary control over the operational decisions of the military.<sup>8</sup>

Four subsequent examples of government seeking parliamentary approval for the deployment of military force add weight to the claim that a constitutional convention has been established; the parliamentary votes in relation to action in Libya (2011), Syria (2013), Iraq (2014), and Syria (2015).<sup>9</sup> In each instance, the government sought parliamentary consent to take specific actions, and where consent was refused, largely abided by that refusal. In addition, the *Cabinet Manual* (2011) acknowledging the existence of the convention,<sup>10</sup> there are also explicit examples of the government stating that it believed itself to be bound by the decision of Parliament. For example, in relation to the Syria 2013 vote, the Prime Minister said:

‘I strongly believe in the need for a tough response to the use of chemical weapons, but I also believe in respecting the will of this House of Commons. It is very clear tonight that, while the House has not passed a motion, the British Parliament, reflecting the views of the British people, does not want to see British military action. I get that, and the Government will act accordingly.’<sup>11</sup>

## Military Action in Syria

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<sup>4</sup> See House of Commons, above n.2, para. 22;

<sup>5</sup> House of Lords, above n.2, para. 16; P. Rowe, *Legal Accountability and Britain’s Wars 2000-2005*, (Routledge, 2016), pp.67-68

<sup>6</sup> The courts have declined to review this type of executive action, see *Council of the Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (also known as the *GCHQ Case*) and *Chandler v Director of Public Prosecutions* [1964] AC 763

<sup>7</sup> House of Commons, above n.2, para. 20; also appropriate House of Lords, above n.2, paras. 85-93 alternatively it is argued that statutory provision would be appropriate, paras. 79-84

<sup>8</sup> House of Lords, *ibid.*, para. 13

<sup>9</sup> See Rowe, above n.5, pp.71-79

<sup>10</sup> Cabinet Office, *The Cabinet Manual* (1<sup>st</sup> edition, 2011), para. 5.38

<sup>11</sup> Rt Hon David Cameron MP, HC Deb 29 August 2013, vol.566 cols. 1555-1556, <https://goo.gl/Keuf66>

This brings us to the most recent example of military action which *may* come within the scope of the convention, the United Kingdom's military action in response to the apparent deployment of chemical weapons by the Syrian government, contrary to international law (Friday 13<sup>th</sup> April 2018). The Leader of the Opposition expressed concern that the air strikes were conducted without the Government having sought parliamentary approval – that is, no parliamentary debate was permitted because Parliament was in recess and not recalled – for its actions.<sup>12</sup>

### *In Breach of the Convention?*

If, for now, we proceed on the assumption that the action did fall within the scope of the convention, we can apply Jennings' test to decide whether the convention was breached.

1. 'What are the precedents'
  - There are a number of modern examples of the government seeking parliamentary approval, and abiding by Parliament's decision. These are discussed above and in greater detail in Rowe (note 9 above, pp.71-79).
2. '... did the actors in the precedents believe that they were bound by a rule'
  - The language of the Rt Hon David Cameron MP, and the language of the *Cabinet Manual* indicate that, barring extenuating circumstances, the government believes that it is bound by the rule in general.
3. '... is there a reason for the rule?'
  - The Rt Hon Jeremy Corbyn MP offered a reasonably succinct summary of one good constitutional reason for the rule as being:

'Parliamentary approval can be crucial to ensure the democratic legitimacy of any planned military operation or warlike act, just as it can establish public consent for a Government's wider strategy.'<sup>13</sup>

The constitutional reason for the rule is to give the executive's use of the war-making prerogative democratic legitimacy via the elected representatives of Parliament. By extension it also reasserts Parliament's constitutional authority to hold the executive account, which logically encapsulates both reflecting on action already taken, and pre-emptively controlling contemplated action.

### *Not in breach of the convention?*

It is also possible to argue that the military action in Syria did not constitute the type of military action covered by the convention. Consider, for example, that Parliament is not routinely asked to approve each and every deployment of the United Kingdom's armed forces around the world, even though it might be given the opportunity to discuss the

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<sup>12</sup> Rt Hon Jeremy Corbyn MP, HC Deb 16 April 2018, vol.639 cols.101-102, <https://goo.gl/E6VaWH>

<sup>13</sup> Rt Hon Jeremy Corbyn MP HC Deb 17 April 2018 vol.639 col. 193 <https://goo.gl/buUunT>

deployment after the fact. Furthermore, one can envisage many situations in which such an approach would be detrimental to the United Kingdom's aims; for example, where the element of surprise is important.<sup>14</sup>

If we disagree that the action fell within the scope of the convention, then we need to articulate how it fell into one of the exceptions to the convention expressed in the *Cabinet Manual* – i.e. that the convention will be observed 'except where there was an emergency and such action [consulting parliament] would not be appropriate.'<sup>15</sup> In 2016 the Defence Secretary provided a written statement to Parliament that suggested the type of exceptions contemplated would apply where parliamentary consultation would prevent the government from acting 'quickly and decisively', or which would compromise 'the security of their operations.'<sup>16</sup> If we return to the Jennings' test again we can re-address questions 2 and 3 from the perspective of someone who does not believe that the action fell within the scope of the convention.

2. '... did the actors in the precedents believe that they were bound by a rule'
  - Yes, but Government also thought that there were limits to the scope of the rule. The Government believed that the convention would not apply if it prevented them from acting appropriately in response to the particular situation in question.
3. '... is there a reason for the rule?'
  - Yes, there is a reason for the rule, but as with the 2, *ibid*, the reasons underpinning the rule had specific limits, and there were good reasons for those limits. As the Prime Minister said in her response to the Leader of the Opposition in April 2018 'the assumption that the convention means that no decision can be taken without parliamentary approval is incorrect – it is the wrong interpretation of the convention.'<sup>17</sup>

If you agree with this conclusion, it does not, *ipso facto*, mean that the convention itself is defunct. Both sides in the recent Syria example accept the existence of the convention. Instead, the decision not to consult Parliament indicates that the Government did not believe they were bound by the rule. The fact that this is open to dispute, but not capable of resolution by a legal mechanism, demonstrates the fundamentally political nature of constitutional conventions.

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<sup>14</sup> See exceptions to the convention outlined by the Defence Secretary, Hansard *Official Report*, 8 April 2016 vol. 608 col.10 (Written Statement) <https://goo.gl/pK9kVn>

<sup>15</sup> Cabinet Office, n.10 above, para. 5.38

<sup>16</sup> Defence Secretary, n.14 above.

<sup>17</sup> Rt Hon Theresa May MP, HC Deb 17 April 2018 vol 639 col. 201, <https://goo.gl/it9dnM>

Was there a breach? And, if there was, what can we do about it?

Would creating a statutory provision requiring the government to consult Parliament when it engages in military action resolve the problem? In my view it is hard to see how, at least given the prevailing position of the courts, a legislative solution would clarify the situation. The notion of a War Powers Act mooted by some in the parliamentary debates around the recent Syria intervention would appear unlikely to do more than codify the convention in much the same way that the Sewel Convention is codified in s.2(2) of the Scotland Act 2016. That is, it seems highly unlikely that it would convert a conventional political norm into a legally enforceable rule. As such, the codification of the statute in convention would not change what is emphatically a political decision for resolution by political institutions into a legal decision subject to adjudication by the courts. It would still be open to the government to argue that the military action in contemplation, or carried out, did not fall within the scope of the rule, and it is difficult to imagine the courts positioning themselves as the arbiter of what type of military action fell within, and outwith the scope of the rule.

How, then, do we resolve the question of whether there was or was not a breach of the convention, and thus whether the Government's action was constitutional? In many respects, the question is irrelevant. As I have said, conventions are a political control on the exercise of constitutional authority, and are not legally enforceable. Therefore, their breach will primarily have political consequences.<sup>18</sup> In view of their political nature, the argument of whether there was a breach will be won and lost in political debate. If it is possible to argue that the convention does not apply, then the government can claim to be acting constitutionally. The government then needs to focus on convincing Parliament and the electorate that this is the case.

The risk of losing that argument, and being seen to breach a convention is also likely to vary depending on the political position of the government and opposition parties. For a popular government with a large majority, the risk may be inconsequential, there may be no price to pay for behaving unconstitutionally. For a less popular government with a smaller, perhaps no majority, the risks are higher if the opposition parties can leverage public opinion in their favour. However, even where the government loses the political argument, and can be said in that sense to have acted unconstitutionally, if it can weather the political storm, there are unlikely to be further consequences. If the government cannot resist political outcry arising from the success of the claim that it acted unconstitutionally, then the government may, ultimately, fall. In this way we see that the consequences of successfully arguing that there was a breach of a constitutional convention are, like conventions themselves, political.

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<sup>18</sup> There are very limited occasions where breaches of conventions also produce legal consequences that we need not cover here.

Conventions are, moreover, paradoxical. Conventions rely upon constitutional actors being willing to put partisan considerations aside for the higher purpose of upholding the constitution. Similarly, conventions also anticipate that all constitutional actors have the same understanding of how conventional norms should be applied to achieve the goal of upholding the constitution. Yet, as is clear from the disagreement about whether the recent military intervention in Syria required parliamentary consultation, these assumptions are flawed. Constitutional actors disagree about the nature of the constitution and what is required to uphold it. Furthermore, the social context in which the constitution operates is always in flux.

To demonstrate the Gordian nature of the challenge posed by constitutional conventions, you may want to consider:

- Whether you are content with this situation.
- Whether there are alternative ways of upholding the constitution.
- What the practical consequences of implementing these alternatives would be.
- Whether you would be more content with that situation than the one we find ourselves in at present.