Constitutional LAW AND POLICY REVIEW

The constitutional authority to deploy Australian military forces in the Coalition war against Iraq

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Introduction

It has been said that '[p]robably the most striking achievement' of the framers of the Australian Constitution was 'the successful combination of the British system of parliamentary government containing an executive responsible to the legislature with American federalism'.[1] Unlike its American counterpart, it is a constitution that was founded upon *trust* rather than the *mistrust* of governmental power. The decision of the Commonwealth Government to commit our military forces in the Coalition war against Iraq without *prior* parliamentary approval presents an interesting and striking illustration of these observations.

The motion subsequently passed by the House of Representatives and moved by the Prime Minister, John Howard, asked the House of Representatives to 'endorse the Government's decision to commit Australian Defence Force elements' to the war in Iraq.[2] Significantly the Prime Minister sought endorsement of a decision already made. The absence of a *legal* need for the prior consent highlights one of the basic legal differences between the British and American systems of government. In that regard the Australian system follows the British model of parliamentary government.

The power to declare war is vested in Congress by reason of Art I s 8 clause 11 of the US Constitution. This has not been taken, however, as precluding presidential power as Commander in Chief to commit troops to battle without congressional authorisation in some circumstances — for example to respond to an invasion. The requirement for congressional approval is supplemented by the *War Powers Resolution* of 1973 which was passed by both Houses of Congress in the wake of differences that had occurred with successive Presidents in relation to the Vietnam War. Whether or not it was strictly necessary from a legal point of view, President George W Bush obtained in October 2002 authority from Congress 'to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to defend the national security of the United States against the continuing threat posed by Iraq'. The same congressional resolution enabled the US to go to war with or without the further approval of the United Nations Security Council.

Basic rule

It is true that, unlike the constitutions of many other countries, the Commonwealth Constitution fails to refer explicitly to the powers of the executive to declare war and peace and also to deploy the armed forces. However, those powers are now taken to form part of the 'executive power of the Commonwealth' which is vested in the Governor-General as the Queen's representative under s 61 (and possibly also s 68) of the Constitution. The modern view is that the provisions of s 61 now include all the so-called 'prerogatives' of the Crown under the English common law. This may not have been so in 1901 when the Commonwealth was established since those prerogatives, along with the

prerogative powers with respect to foreign relations (for example to enter into treaties and receive or send ambassadors), may have been more properly regarded as falling within the executive power of the British Imperial Government when Australia was part of the British Empire. However the application of s 61 was taken to encompass these powers once Australia lost its colonial status and attained independence.[3]

The existence of these prerogatives has long been recognised. After indicating that the king's prerogatives included the power to make treaties with the governments of other countries, and also to receive and send ambassadors, Sir William Blackstone wrote during the 18th century: 'Upon the same principle the king has also the sole prerogative of making war and peace.'

These prerogatives were seen as 'the principal prerogatives of the king respecting the nation's intercourse with foreign nations'.[4] The prerogatives in relation to war include the power to decide on the disposition and use that is made of the military forces even in the absence of a war.[5]

The prerogative nature of the powers in question means that the powers may be exercised without parliamentary approval, subject only to the existence of any legislative provisions which regulate and control their exercise. The writer is not aware of any statutory provisions which regulate the power to declare war or limit the power to deploy military forces overseas.

A formal declaration of war was not thought to be necessary in this case, with the Commonwealth Government being content to rely on its interpretation of pre-existing resolutions passed by the UN Security Council. As a matter of international law, modern practice no longer seems to require a declaration of war to precede the commencement of hostilities.[6] The announcement of Australia's participation in the war against Iraq was made by the Prime Minister at a press conference[7] and in the House of Representatives later on the same day.[8] A formal announcement involving the Governor-General was also thought to be unnecessary, despite the position occupied by the Governor-General as Commander in Chief, as provided in s 68 of the Constitution.[9] The relevant decision was made by Cabinet and then passed on to the Chief of the Australian Defence Forces through the legal chain of command provided in ss 8, 9 and 9A of the *Defence Act 1903* (Cth).

Accountability to Parliament

Even though parliamentary approval was not legally required, the Commonwealth Government, like its counterpart in the UK, had to be assured that its decision enjoyed the support of the lower House of Parliament. This was required as a matter of political reality and also for reasons related to the British system of responsible government which requires a government to enjoy the confidence of the lower House. If the Government did not enjoy that support in relation to the deployment of military forces in a military engagement it would have run the risk of a resolution of no-confidence. Such a defeat would have required the Government to resign as a matter of constitutional convention.

Australia has not followed the procedure used by Canada when it declared war against Germany in 1939 and also when it approved the sending of Canadian military forces in the first Gulf War pursuant to UN Security Council resolutions in 1990-1991. The decision to go to war and to deploy military forces overseas was taken by the executive with the *prior* approval of the Canadian Parliament. This is significant because that country also does not require such approval as a matter of *law*. Modern Canadian practice casts doubt, however, on the suggestion that this procedure has the status of a 'strong constitutional convention'.[10]

A measure of parliamentary accountability does, nevertheless, exist in other ways. First, it is clear that under the Westminster system of government Parliament may legislate to regulate and limit the exercise of prerogative powers. It is likely that the Commonwealth Parliament possesses such powers under, for example, the power to make laws with respect to defence under s 51(vi) of the Constitution.

Secondly, any expenditure of public funds needed to facilitate the deployment of the armed forces must be authorised by Parliament because of the provisions of s 83 of the Constitution. Such authority is usually expressed in generally worded items of parliamentary appropriation. It does not seem to have been suggested that there was a lack of authority to spend the money required for the present deployment of the military forces in Iraq. This is so even though the Appropriation Acts that may have contained that authority may have been framed without having the conflict in Iraq specifically in mind.

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Thirdly, each House of the Commonwealth Parliament has the power to hold inquiries under s 49 of the Constitution. Such inquiries could investigate and report into the deployment of the military forces and the conduct of their operations.

Finally, and depending on the scale of the hostilities involved, legislation may be required to govern civilian life and a variety of matters associated with

the preparation and conduct of military operations, such as authority to conscript civilians into military service. Legislative authority for conscription was sought and obtained in the Second, but not the First, World War in the last century.

Judicial review

It is no longer assumed that the exercise of all prerogative powers lies beyond the scope of judicial review. But the nature of the subject matter of some of those powers, such as the prerogatives in relation to war and the deployment of troops, makes it most unlikely that they are subject to legal limitations which restrict their exercise. In this case the institutional competence of the executive to assess what may be required to defend the country from external threats makes it almost certain that a court would not wish to second guess the judgment of the executive on these matters.

In this respect, there has been some debate on whether the deployment of military personnel in Iraq without additional approval of the UN Security Council breached the rules of public international law and the provisions of the UN Charter. The High Court has yet to formally rule on whether the executive powers of the Commonwealth must be exercised in conformity with the rules of public international law. However *legislative* powers are not so limited, and it is unlikely that the Court would entertain a legal challenge based on an alleged breach of those rules. In the view of the writer, the grant of executive powers to the Commonwealth is likely to encompass the immunities from legal action which flow from another branch of the English common law and are known as the doctrine of the 'Act of State'.[11]

These considerations seem to preclude the success of any legal challenge in the domestic courts of this country, whatever may be the position with challenges in international courts and forums.

Proposal for change

There remains the question whether, as some have suggested, the legal position should be changed to make prior parliamentary approval a legal condition for a declaration of war or the deployment of armed forces in any military engagement. The change could of course be achieved by a constitutional amendment. But this would require a referendum and experience shows that the chances of success are very low especially when, as can be expected, there is likely to be a difference of public opinion in relation

Commonwealth Constitution

s. 51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to:

...

(vi) the naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth ...

s. 61. The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

s. 68. The command in chief of the naval and military forces of the Commonwealth is vested in the Governor-General as the Queen's representative.

s. 83. No money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law.

United States Constitution

Art 1 s 8 cl 11. The Congress shall have the power:

To declare war ...

Art 2 s 2 cl 1. The President shall be Commander-in-Chief of the Army and Navy of the United States ...

to such a proposal.

It would be more realistic to achieve the change by the passage of ordinary legislation under s 51(vi) of the Constitution (possibly in conjunction with the power under s 51(xxxix) to enact legislation that is incidental to the execution of powers vested in the Government of the Commonwealth).[12] Similar proposals have been advanced, but are yet to be accepted, in relation to requiring parliamentary approval to authorise the executive to enter into treaties and other international agreements.[13]

It is true that serious doubts have been raised regarding the constitutional ability of Parliament to control the exercise of prerogatives which form part of the executive power of the Commonwealth under s 61. In the view of the writer, however, the better view is that, consistently with the traditional understanding of the British system of government, legislation can be enacted to strengthen parliamentary control over the executive branch of government in the exercise of its prerogative powers.[14] This is supported by the statement by the High Court in *Brown v West* that: 'Whatever the scope of the executive power of the Commonwealth might otherwise be, it is susceptible of control by statute.'[15]

In addition, the strength of the doubts that have been raised are reduced where, as here, the form of parliamentary control contemplated falls short of either destroying or usurping the exercise of those powers by the executive.

This does not, however, determine whether such legislation should be enacted. Proponents of the proposal would no doubt argue that the present power of the executive means that it can be exercised against the wishes of the people's representatives in *both* Houses of the Commonwealth Parliament, even where the military involvement appears to lack popular support. The fact that the public decides to support such involvement once the armed forces have been committed into action does not necessarily disprove the initial lack of support since some members of the public may, however reluctantly, feel obliged to support the action for fear of showing disloyalty to the armed forces. It is true that these matters have generated considerable tension in the US between the President and Congress where the interpretation of the *War Powers Resolution* has not been free from difficulty. Nevertheless it has been said that the 'post-Vietnam years underscore the need for the President to reach an accommodation with Congress in foreign policy and national defense'.[16] Furthermore, the system of seeking prior approval, at least for a declaration of war, is not confined to the US but is followed in a number of European countries.[17] In that regard it should be noted that the constitutions of some of those countries do not require parliamentary approval in cases of armed attack on, or invasion of, the country concerned.[18]

Opponents of the proposal might well stress that the difference between the present position and the system proposed to be introduced is not as great as might first appear. In the first place, as Canada shows, the requirement of prior approval can be followed as a matter of *practice* and, although less clearly, even *convention*, without the attendant inflexibility created by legislation. Furthermore even in the US, apart from the difficulties already mentioned, the requirement of prior approval can be undermined by the President. The President has the potential to use his authority as Commander in Chief to commit troops in advance of the necessary legislative approval in such a way as to effectively force the hand of Congress to grant the necessary approval.

More basic, however, is the argument that only the executive has the institutional ability and information required to make an informed judgment on whether war should be declared or military forces should be deployed. There may be cases where all that information cannot be made public — a problem that may not be wholly overcome by Parliament meeting in secret session. The need for parliamentary approval and the delay that may result may also compromise the ability to take speedy military action.

Ultimately, the answer to the question whether the change should be made will depend less on whether the change fits with some ideal or universal system of constitutional governance. As is the case with the proposal to seek parliamentary approval for the executive to enter into treaties and other international agreements, it is more likely to depend on the value and importance which each country chooses to attach to the use of a legislature as a check on executive action in such important matters. The system of prior approval need not necessarily make the decision making process in this area unacceptably cumbersome — as was illustrated by the relative ease with which the current US President obtained congressional authority in relation to the 2003 war with Iraq. A different outcome might, however, have resulted in Australia if the decision to deploy military forces was proposed by a Government that lacked a majority in the Senate at a time when the community was opposed to such military action. ●

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Endnotes

1. *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 275.

2. Commonwealth Parliamentary Debates, House of Representatives, 18 March 2003, 12505.

3. Constitutional Commission, *Final Report* (1988), vol 1, [2.129] and [5.176].

4. W Blackstone, *Commentaries on the Laws of England* (Oxford, 1783), vol 1, 253, 257 and 261.

5. *Chandler v Director of Public Prosecutions* [1964] AC 763, 791, 796,

807 and 814; *China Navigation Co v Attorney-General* [1932] 2 KB 197; Constitutional Commission, above n 3, [5.176].

6. For example J G Starke, *Introduction to International Law* (10th ed, Sydney, 1989), 533-534 and D J Harris, *Cases and Materials on International Law* (5th ed, London, 1998), 860.

7. Transcript of the Prime Minister, Hon J Howard MP, Press Conference, Parliament House, Canberra, 18 March 2003.

8. Above n 2.

9. A press release by the Governor-General on 18 March 2003 described the action as a 'decision [which] has been taken by the Government to commit members of the Australian Defence Force to support a United States-led coalition to disarm Iraq'. See <www.gg.gov.au/speeches/textonly/media/2003/mr030318.html>.

10. For a useful account of Canadian practice see M Rossignol, 'International Conflicts: Parliament, The *National Defence Act*, and the Decision to Participate' (Canadian Parliamentary Library Research Branch, August 1992): see <www.parl.gc.ca/information/library/PRBpubs/bp303-e.htm>. The suggestion was advanced in K C Wheare, *Legislatures* (2nd ed, London, 1968), 129.

11. G Lindell, 'Judicial Review of International Affairs' in B R Opeskin and D R Rothwell, *International Law and Australian Federalism* (Melbourne, 1997), 160, 188-189.

12. For a proposal along these lines which was moved by the Australian Democrats, see the Second Reading Debate on the Defence Amendment (Parliamentary Approval for Australian involvement in Overseas Conflicts) Bill 2003 (Cth): Commonwealth Parliamentary Debates, Senate, 27 March 2003, 10320-10323. The terms of this Bill may be found at <parlinfoweb.aph.gov.au/piweb/view_document.aspx?ID=863741&TABLE=HA>. I am grateful to Dy Spooner for drawing this proposal to my attention. However an examination of the Bill lies beyond the scope of this article.

13. Senate Legal and Constitutional References Committee Report, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties* (November 1995), ch 16.

14. As argued by L Zines, *The High Court and the Constitution* (4th ed, Sydney,1997), 262-263, 267 and 269-270. See also the discussion of the same issue as it affected the power to enact legislation to require prior parliamentary approval to authorise the executive to enter into treaties and other international agreements in the Senate Committee Report, above n 13, 275-278.

15. (1990) 169 CLR 195, 202.

16. L Fisher, *Constitutional Conflicts between Congress and the President* (4th ed, Lawrence, 1997), 292.

17. Wheare, above n 10, 128-129. France is a case in point because of Art 35 of the French Constitution. See also the Constitutions of Austria, Art 38; Denmark, s 19(2); Ireland, Art 28.3.1°; The Netherlands, Art 96(1); Spain, Art 63(3); and Sweden, Ch 10, Art 9(2).

18. Constitutions of Denmark, s 19(2) ('armed attack upon the Realm or Danish forces'); Ireland, Art 28.3.2° ('actual invasion'); Sweden, Ch 10, Art 9(1) ('armed attack upon the Realm'). The Swedish Constitution allows for other exceptions to authorise the deployment of armed forces in 'battle or sent to another country' pursuant to 'an international agreement or obligation which has been approved by the Parliament' (Ch 10, Art 9(1)(3)) and the use of force 'to prevent a violation of Swedish soil in time of peace or during a war between foreign states' (Ch 10, Art 9(3)). The Constitution of the Netherlands does not require the prior approval of Parliament if 'consultation with Parliament proves to be impossible as a consequence of the actual existence of a state of war'.