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WHEN PARLIAMENTS DO NOT WAGE WAR: MILITARY OPERATIONS ABROAD AND CONSTITUTIONAL FRAMEWORKS

Fabio Longo

Executive branches of governments have always enjoyed a primacy in managing foreign policy and waging war. However, in several contemporary constitutional systems this trend has been offset through (more or less effective) parliamentary powers. When looking at recent developments concerning the Syrian crisis, could it be that parliamentary prerogatives in matters of foreign and defense policy are gaining new momentum?

In fact, in this area, the relations between political-parliamentary forces tend to weigh in more prominently than existing norms or constitutional conventions, regardless of the fact that dissenting parliamentary positions are made official through parliamentary deliberations. In the last few months governments have continued to ask parliaments to “take it or leave it”, but where parliaments would have once taken it, they have now decided to leave it.

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The invitation to struggle

Edward Samuel Corwin coined an effective expression (that would later enjoy great fame) to describe the American Constitution as an invitation – addressed to the President as well as Congress – “to struggle for the privilege of directing American foreign policy”¹. A few years later, with reference to the same constitutional text, Arthur M. Schlesinger Jr. defined the distribution of powers of the legislative and executive branches of government in international policy as “cryptic, ambiguous and incomplete”². Today, in spite of a radically different domestic and international scenario, the situation does not appear, overall, to have changed significantly: the same scheme of the invitation to struggle remains in place³.

In the wake of the recent crisis in Syria, it could be argued that in the United States it was Congress that prevailed over the President in the very last round of the match, forcing him to step on the brakes and delay plans for a military intervention. Are parliament’s prerogatives in foreign and defense policy matters being rediscovered? In light of the current fragmentation of power in foreign policy, is it reasonable to add national parliaments to the list of numerous actors (public and private, government- and non-government-related) that set the course of foreign policy making? Is this a general trend that is gaining ground in many countries?

The balance of power

It is clear that Corwin’s considerations also apply to constitutional systems other than the American one. On the one hand, it is a fact that the executive branch has always prevailed in foreign policy and war-related matters (consider John Locke’s *federative power*). History has unequivocally shown a tendency among governments and presidents – at times in open contrast with constitutional provisions – to exclude parliaments from the decisional process by virtue of their presumed inadequacy in dealing with diplomatic war-related matters and their inability to reach decisions in a timely fashion.

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¹ E.S. CORWIN, *The President: Office and Powers*, 4th rev. ed., New York, New York University Press, 1957, 171.

² A. M. SCHLESINGER JR, *The Imperial Presidency*, (1973), Boston, Mariner Books, 2004, 2.

³ An interesting debate on the issue took place between Bruce Ackerman and John Yoo in the pages of the *Los Angeles Times* in April 2007: <http://www.latimes.com/la-op-dustup2apr02,0,2350819.story#axzz2lsykWruK>.

parliamentary powers. In addition to their function as watchdogs of presidents and the executive branch of government, parliaments are generally also entrusted with the power to formally declare war; to approve major international treaties; and – through their control over government expenditure – to reject or to influence the allocation of the resources required to finance international missions⁴.

It should also be noted that in this constant tension between the executive and the legislative branches, over the last twenty years the former has certainly benefitted, at least in Continental Europe, from a lexical shift that has diluted the term “war” into a less threatening array of alternatives, including “international mission” and “humanitarian action”⁵. Such terminological stratagems still lie at the heart of the matter and have pushed aside the relevant constitutional norms on declarations of war and other war-related decisions. This is the framework on which we are called to reflect: an invitation to struggle, a *de facto* extension of the power of the executive branch, the existence of potential parliamentary counter-powers, and dangerous semantic drifts.

Military operations abroad and constitutional frameworks: a new paradigm?

The earlier questions that postulate a strengthening of national parliaments have gained momentum in the wake of the decisions by the British and American executive branches to seek the approval of their respective legislative assemblies on the issue of military intervention in Syria.

In the UK in late August Prime Minister David Cameron could only acknowledge the decision of the House of Commons that rejected the possibility of a military intervention, while across the Atlantic President Obama was forced to slow down the pace of the American journey to Damascus as the opposition of Congress became more blatant. In spite of their apparent similarity, the two cases are hardly comparable.

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⁴ On this point, a recent reflection has come from Y. HASEBE, *War Powers*, in M. ROSENFELD – A. SAJO (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford, OUP, 2012, 462-480. A comprehensive analysis in comparative terms on the war regulations in comparative constitutional law can be found in A. VEDASCHI, *À la guerre comme à la guerre*, Torino, Giappichelli, 2007.

⁵ G. de VERGOTTINI in *Guerra e Costituzione* (Bologna, il Mulino, 2004, 10) wrote that in normal practice war is disguised as something else.

In the United States the unruliness of Congress can be regarded as a constant in the American political scenario that becomes more marked at times of *divided government*: President Obama was particularly cautious because he is aware that a military intervention would not only lack appeal with the general public, but it would also go up against the staunch resistance of Congress across the political spectrum. Nevertheless, it would be misleading to interpret this hesitation as part of a more general tendency to “parliamentarize” US foreign policy as a whole. The impatience of the executive branch with parliamentary dynamics and Congressional vetoes appeared in earnest also with regard to the recent regulatory amendment – welcomed with great enthusiasm by President Obama himself – that curtailed the Senate’s control over White House appointments of federal officials.

The British case is certainly more striking: what happened in Westminster reveals – for the first time in such clear terms – a growing dependence of 10 Downing Street on the whims of the majority that supports the Prime Minister. The reason behind Cameron’s sudden debacle and the – corresponding – renewed vitality of Parliament can be found in the nature of the coalition between the Tories and the Liberal Democrats that has no precedent in a country with such a solid two-party tradition. The element that breaks away from recent political practice resides not in the involvement of the legislative assembly – in the past other Prime Ministers had sought the support of the House of Commons in spite of the fact that they regarded themselves as being relatively above parliamentary guidelines and exclusively competent on matters of war powers – but rather in the outcome of the vote itself.

There is another element that should be considered when analyzing the “Cameron case” vis-à-vis the events that have occurred in Washington: in the distribution of war powers, British constitutional conventions are more generous towards the executive branch than their American counterparts towards the US President on matters of military interventions abroad.

There is no doubt that the British Prime Minister has – deliberately or accidentally – paved the way for a new course that will be hard to reverse – even for his successors - whereby military operations abroad will require the preventive approval of Parliament. Moreover, from now on – and even more so in case of a more fragmented political scenario – the outcome of the Parliament’s vote could hold some surprises for the British Prime Minister.

There is little doubt that in matters of defense policy the relation between political-parliamentary powers tends to weigh in more heavily than constitutional norms and conventions, regardless of the fact that

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dissenting parliamentary positions can be made official through specific parliamentary decisions. Clearly, the weight of the party variable that played such a crucial role in the two cases above can be crucial also in constitutional systems other than the British and the American ones.

Deferred vetoes and “parliamentary armies”.

In some national systems attempts were made to “bring to safety” the distribution of powers on matters of defense to the advantage of parliaments: in two countries in particular – among those closer to Italy – where constitutional amendments and jurisdictional activism have contributed to regulating in greater detail and with greater determination the deployment of military troops abroad.

The first example is the recent constitutional reform in France⁶. Art. 35 of the 1958 Constitution used to state, quite simply, that *A declaration of war shall be authorized by Parliament*, while after the reform the same article explicitly envisages the Parliament’s authorization to extend *military intervention by the armed forces* abroad for periods of more than four months. This addition is certainly not a procedural revolution, particularly because the actual decision to intervene falls outside of the Parliament’s scope. It is, however, an implicit recognition of the need to adapt the constitution to the new forms of waging war and, at the same time, to reject the terminological calisthenics that were mentioned earlier in this paper. It is true that Parliament cannot, in fact, decide on the use of military power, but it is involved in (and it takes responsibility for) its conclusion: since 2008 the Parliament has been entrusted with a sort of deferred veto power. Thus the so-called *domaine réservé* of the President of the Republic has been somewhat reduced on matters of international policy. However, it should be noted that until today the French Parliament has not exercised its deferred veto power, which brings us back to the considerations presented in the previous paragraph on the primacy of the political to the detriment of the normative side.

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⁶ See *Loi constitutionnelle n° 2008-724 du 23 juillet 2008 de modernisation des institutions de la Ve République*.

In Germany, as we know, the scenario is characterized by a highly structured approach that also concerns the distribution of power in foreign matters: the *Grundgesetz* envisages advanced forms of control in foreign and defense policy issues, regulating in detail the state of emergency, strengthening the position of parliament as regards the armed forces. Additional substantial and procedural guarantees have come from relevant decisions of the Federal Constitutional Court that, among other things, sanctioned the fundamental principle whereby all interventions by the armed forces are recognized as legitimate by basic law only following approval by the German parliament. This explains the expression *parliamentary army*, which is not that rare when referring to the German military. However, even in Berlin matters of foreign policy can generate friction between the powers that make up the majority party or the coalition in power— as has been the case in the past – but the legal framework within which the players are moving is extremely clear-cut. The mission in Kosovo in 1999 and subsequent military interventions have generated (more or less temporary) fractures both within political parties inside and outside the parliamentary chamber. However, unlike other contemporary democracies, in Germany this process developed into a more comprehensive reflection that took on a constitutional and political relevance – elections in the past two decades have hinged also on foreign and military policy issues. It could be argued that the caution shown by Chancellor Angela Merkel on the Syrian crisis was dictated, in fact, by a question of timing between the worsening of the crisis and Germany’s last electoral round. The German presence on the international scene in the near future will thus depend largely on the shape of the new government coalition.

The Italian case and the inadequacy of the procedural process.

Lastly, the “transit” of military policy issues before the members of the Italian parliament calls for some considerations. In Italy the parliament is the weakest link in a decisional chain that finds only an uncertain footing in constitutional provisions. While the executive branch is relatively active on the international scene, the Italian system has not yet adopted adequate procedural rules to enter into and exit from international crisis situations based on the “new” ways of waging war. The Italian system lacks an organic and effective legislative framework on international missions and as a result there is little consistency when individual cases are presented to parliament.

The recently approved Code of Military Law (*Codice dell’ordinamento militare*, Legislative Decree n. 66, 15 March 2010), that should have laid down some clear procedural limitations, simply provides for the Ministry of Defense to implement decisions on matters of defense and security that

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are adopted by the government, submitted to the Supreme Defense Council and approved by parliament (art. 10). There is no reference to *how* and *when* parliament should be called to express its approval.

Nevertheless, over the past twenty years the pacifist principle sanctioned by article 11 of the Italian Constitution has been repeatedly stretched and put to the test.

The parliament's role in making decisions of a military nature – with the exception of occasional and non-regulated approvals of resolutions and opinions addressed to the government – is therefore reduced to the conversion into law of measures adopted for financing or re-financing military missions abroad. Additionally, in the past few years the lack of an organic approach to regulating the matter has led to significant differences in the timeframe of reference of each case – that varied from three months to a year depending on the availability of funds.

However, the historical trend is clear and points towards a constant and transversal convergence of the major forces in parliament with the position of the executive branch. In spite of sporadic exceptions (that in some cases brought the government in office to the brink of a crisis), international missions have always been refinanced.

It should be noted, however, that this convergence is probably the consequence of the procedural impossibility of separating the *political opportunity* of each international mission from the *financial* one of supporting the deployment of troops or assisting those already in the field. A distinction between the two would allow the more skeptical and less warmongering parliamentary forces to express their political dissent on the option chosen by the government, without being “accused” of being insensitive towards the practical and equipment needs of the armed forces.

In the current Italian scenario the executive branch rests on a very precarious balance of power: while the numbers in parliament of those less inclined to support international military operations are not such as to generate concern for the government, the hybrid nature of an executive – that rests entirely on a less and less cohesive group of parties – points towards greater caution in decisions on new military operations to be carried out abroad. It is against such a background that the more and more active role of the President of the Republic should also be considered. The picture painted by the media has portrayed an Italian President who, since the intervention in Libya, has stepped in and acted as if to compensate for such shortcomings, going so far as to secure the decisions of the executive on the matter

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of modernizing the armed forces⁷.

Conclusion

It could be useful at this point to refer to an idea that is quite popular among analysts and advisors, whereby the parliamentarization of *war powers* is a clear indicator of the weakness of the State that is being considered.

It is often argued that parliamentary dynamics are incompatible with the decision-making process required on foreign and defense policy issues. This concept should be carefully considered: it is undoubtedly true that the storms that rage inside parliamentary forces can translate into executive hesitations, as has been the case in recent times. It should also be noted, however, that within most parliaments – and certainly those considered in this paper – standing committees are generally envisaged on specific subject matters, which provide ideal interlocutors for the government on such issues. Parliamentary committees, by virtue of their intermediate role as restricted but representative bodies, are less crowded than parliamentary assemblies as a whole - and as such they are more inclined to discussion and compromise. Consequently they are crucial crossroads on the path towards a realistic parliamentarization that is moderate and effective regarding actions concerning foreign policy and military decisions. The theory of the inadequacy of parliaments could easily be overcome through the effectiveness of such restricted committees⁸. In the various constitutional systems, this role could acquire even greater prominence without overriding any perfunctory precaution (in 1973 Arthur Schlesinger Jr. noted that it is often unclear whether such committees control the executive on behalf of Congress or vice versa).

While the recent unexpected turns of events concerning the Syrian crisis can be ascribed, with some caution, to a somewhat general or long-term trend, the reasons behind the “rediscovery of parliaments” without any significant changes to the constitution (except for France) can be found in two partially entwined elements.

The first regards the current international scenario. For different reasons, when the situation in Syria seemed to call for inevitable action the executive branches of the countries analyzed in this paper were faced with parliaments that were mightily skeptical about the use of force. Rather than the parliamentarization of foreign policy it would be more

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⁷ See on this point the press release issued by the Italian Supreme Defense Council on 3 July 2013: <http://www.quirinale.it/elementi/Continua.aspx?tipo=Comunica&key=15294>.

⁸ See F. LONGO, *Parlamento e politica estera. Il ruolo delle commissioni*, Bologna, il Mulino, 2011.

appropriate to talk about the *introversion* of parliaments. Once again, this points towards an influence of the party variable on the processes under analysis (and the fact that the political-parliamentary scenario is more or less “simplified” by electoral formulas). It is only by looking at cohabitation solutions in a more general sense – regarded as conditions that could potentially weaken the government’s unitary line – that the effectiveness of parliamentary control over executive power can be properly assessed. In recent months governments have not refrained from submitting to their parliaments the dry “take it or leave it” option. More simply, when parliaments would have once “taken it” they have now decided to “leave it”.

Secondly, the impact of the economic crisis on the overall scenario has played a significant part. It has certainly reflected on the “introversion” of parliaments and on the isolationist tendency among several political forces, the scarce willingness to invest heavily in the military machine in the presence of vast economic imbalances on the internal front. In this sense the economic crisis and consequent domestic difficulties have further increased the lack of appeal of military interventions.

Experience has also shown that the relative swiftness of decision-making concerning the deployment of military troops is offset by a rather complicated implementation of an exit strategy. It could be argued that until now the real weakness of constitutional and legislative frameworks has not concerned the entrance into armed conflicts but rather the difficulty of parliaments in disengaging from such conflicts.