

"A comparison of the developing role of parliaments in foreign military interventions in France, Germany and the United Kingdom: towards a *jus common*, or is there more than meets the eye?"

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Introduction

The starting point : Current events

- Step 1:** The terrorist attacks on 13 November 2015 in Paris
- Step 2:** UN SC passed res 2249: collective statement against ISIS
- Step 3:** The UK and Germany received parliamentary approval for military involvement in Syria

Common trend in the French, German and English legal systems: a move toward greater democratic legitimation for use of armed forces abroad

I / German law and the use of armed force: cooperation

- .Demilitarised after WW2
- .1956 Basic Law amendment
- .Article 65a : The **Federal Minister of Defence** is the **commander-in-chief** of the armed forces

I / German law

•Article 87a, para. 1: Armed Forces = **for defence**
purpose: *Bundeswehr*

•+ para. 2: Apart from defence, the **Armed Forces may be employed only to the extent expressly permitted by this Basic Law.**

•Article 24, para. 2: For the maintenance of peace, the **Federation may join a system of mutual collective security;**

- ***Parlamentsvorbehalt*** = important decisions require parliamentary approval
- The **German Federal Constitutional Court's** **application of this principle** to the use of armed force : should not be left to the executive alone, it should be a **'parliamentary army'** : deployment of armed forces = **requires approval by the *Bundestag*.**
- Complemented by **legislation** : the **2005 Parliamentary Participation Act**

Bottom line : the *Bundestag* has an effective right to co-decision for military interventions, protected by the FCC

II / French law and the use of armed force: a preserve of the executive

.Basis : 1958 Constitution

.Traditionally, an executive prerogative:

. Article 15: The **President** of the Republic shall be Commander-in-Chief of the Armed Forces.

.Article 20: The **Government...** shall have at its disposal the civil service and the armed forces.

.Article 21 : The **Prime Minister...** shall be responsible for national defence.

The limited role of Parliament

Originally: Article 35

- **'A declaration of war shall be authorised by Parliament.'**

The limited role of Parliament

A 2008 constitutional amendment added...

- .'The Government shall inform Parliament of its decision to have the armed forces intervene abroad, at the latest three days after the beginning of said intervention. It shall detail the objectives of the said intervention. This information may give rise to a debate, which shall not be followed by a vote.**
- .'Where the said intervention shall exceed four months, the Government shall submit the extension to Parliament for authorization. It may ask the National Assembly to make the final decision.'**

In practice

- .1991 Gulf war: only request for parliamentary approval of the military intervention (but not through art. 35 para. 1)
- .Parliament is informed of the use of armed force
- .*Opérations extérieures (OPEX)*: **continuation** of armed force beyond 4 months requires parliamentary approval : all requests have been approved.

III / English law and the use of armed force: from a royal prerogative to cooperation

- .The UK and its unwritten constitution
- .Power to declare war and deploy armed forces = with the Crown under the Royal prerogative (i.e. the Cabinet)
- .Until recently: parliamentary consent not a necessity : e.g. Falklands war, intervention in the Balkans, war in Afghanistan

2003: a shift?

- War in Iraq in 2003, debate followed by a vote to ‘authorise all necessary means’.
- Pressure for reform (e.g. draft Bills – white and green papers)
- Has authorisation of Parliament become a **constitutional convention?** Recommended by the House of Lords Select Committee on the Constitution in 2006

In practice

- **House of Commons voted on use of armed force prior to intervention:** Iraq (2003), Syria (2013 – motion defeated), ISIS in Iraq (2013), ISIS in Syria (2015)
- **2011 : Government acknowledged that a constitutional convention had developed** that House of Commons should have the **right to debate** any potential use of armed force (Cabinet Manual, para. 5.38)
- **EXCEPT in cases of emergency** (Libya 2011 retrospectively only, Mali 2013)

IV / A few comparative pointers

1/ 20th century history of France, the UK and Germany has been very different :

.France frequently intervening in its *pré carré* to support governments in place : *La Françafrique* : French speaking Africa , the UK hasn't until recently (Sierra Leone). BUT in **both countries it used to be an executive prerogative**

.Germany: first demilitarised/purely a defence force, then **cooperation executive-legislature**

2/ The extent of a legal scrutiny of a political decision is very different : full overview by the German FCC (it is a concept of constitutional law), a focus on the legality under PIL at best in both others.

3/ The nature of the military operations and the scale is very different: France and its military bases abroad, Germany and its involvement in collective forces only recently.

4/ Merely informing Parliaments or requiring authorisation, and at what stage?

- Consent needed in Germany, debate a convention in the UK (three line whip?), debate and subsequent approval in France.
- Are members of parliament sufficiently informed + enough time to process all of the information?

V/ Remaining issues

1/ A changing rhetoric in the description of military operations: from **wars** to **armed conflicts** to **military interventions**

+ At what point will an intervention need **democratic legitimation?** Purely humanitarian operations? Individual drone attacks?

2/ Globalisation and the media/news culture : the world is a village: General public is more aware (pressure) / wants to know (but is transparency such a good thing in political and diplomatic issues?) + Move among the general public from it being dependent on political considerations or ethical questions to it **becoming a question of law** : see war in Iraq **A bottom up approach?** Are politicians feeling the pressure from the general public (demonstrations in London against the war in Iraq)? An increased sense of democratic right to be consulted?

3/ The increased **threat by non-state actors**: rebel and terrorist groups : this has become a global issue, not a regional one anymore:**has legal implications under PIL** (re : non-state actors or self defence)

4/ Increasing trend in collective action

It's ok if it is a **joint military intervention**: collective security through UN (Cote d'Ivoire) / regional organisations (NATO, AU, EU, ECOWAS)
– France seeks UN approval and support for interventions in Francafrigue : **does this not**