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The War Powers in French Constitutional Law

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theory of "Chapter Six-and-a-Half" operations, that is, actions that go beyond purely diplomatic measures, but stop short of enforcement by military means. By analogy, the same theory applies to regional arrangements under the UN Charter, where it takes the form of "Article Fifty-Two-and-a-Half" actions.

As for peace-enforcement measures, the Law is somewhat ambiguous. It speaks about "international enforcement measures involving the application of armed force, undertaken under the decision of the UN Security Council," but it remains unclear whether that provision applies to regional arrangements as well. That ambiguity could be clarified by subsequent practice of the Commonwealth of Independent States, which has a body of treaties on regional peace operations, including enforcement measures. However, that very scenario scares some partners of Russia in that post-Soviet arrangement.

The Law and the practice of its application, though limited, provide a partial answer to the question raised by the upper chamber of the Russian Parliament in its petition to the Constitutional Court, which I briefly discussed above. Under the Law, the President files a proposal for a dispatch of troops with the upper chamber. The proposal provides details of the area of operations, mission, numerical strength, composition of a contingent, subordination, duration of deployment, procedures for rotation and withdrawal, as well as of salaries, allowances, benefits and compensation for servicemen and their families. The proposal is then voted upon by the Council of Federation, and subsequently the President issues a decree ordering troops into action. Recently the procedure proved to be workable when a decision was taken to send a Russian airborne brigade to join the NATO contingent in Bosnia. It remains to be seen what would happen, however, should the Council of Federation reject the President's proposal.

However, the Law on the Provision of Personnel avoids instances to which the "Uniting for Peace" Resolution of the UN General Assembly could be applied. It is unclear whether drafters of the Law were influenced by traditionally negative Soviet attitude toward that Resolution, or were simply unaware of its existence.

Finally, in my opinion, the Russian Law on the Provision of Personnel contains language that may come into conflict with certain important stipulations of the UN Charter, although these Charter provisions are dormant at this moment. Should provisions of the Charter's Article 43 be activated, and agreements between the Security Council and member states be concluded contributing contingents to a UN force, those contingents should then be readily available to the Security Council on short notice. Those requirements notwithstanding, however, the Law on the Provision of Personnel sets the general rule that the Russian Federation shall decide whether to take part in a peace operation on a case-by-case basis. Despite a reference in the law to obligations under the UN Charter and other international treaties, these obligations are only to be "taken into consideration," while the final decision is being worked out.

This, then, has been a brief overview of the evolving Russian experience with regard to the dispatch of troops to peace operations.

THE WAR POWERS IN FRENCH CONSTITUTIONAL LAW

*By Elisabeth Zoller**

In France, the war powers are addressed by constitutional provisions very similar to those found in the Constitution of the United States. Like the President of the United States, the President of the French Republic is Commander in Chief. Article 15 of the

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Constitution of 1958 provides: "The President of the Republic shall be Commander of the Armed Forces." Like Congress, the French Parliament has the power to declare war. Article 35 reads as follows: "Parliament shall authorize the declaration of war."

The distribution of war powers between the Executive branch and the legislative branch was adopted well before the Constitution of 1958. It was hammered out in 1790 during the course of the parliamentary debate that followed the so-called Nootka Sound attack.¹ In the Nootka Sound bay, off the coast of what is now British Columbia, British boats had been captured by Spanish warships and London was seeking redress from Madrid, which in turn refused it. Seeking support from the so-called "Family Compact" (*Pacte de famille*) entered into by the Bourbons of France, Spain, the two Sicilys and Parma in 1761, Spain requested French assistance against Great Britain. On May 14, 1790, Louis XVI—at that time still King of France—proposed an appropriation bill to the National Assembly in order to fit out fourteen French warships in the case of a conflict with Great Britain. The National Assembly passed the bill, but took advantage of the case to raise the constitutional issue of the right to wage war. To whom did that right belong: to the King or to the National Assembly? The decree adopted by the National Assembly on May 22, 1790 gave a balanced answer to the question. It decided that the right to declare war belonged to the National Assembly, whereas the right to conduct the hostilities—namely, the power to command the armed forces—fell within the power of the Executive. Thus, in France as in the United States, war powers are not centralized in one hand, but shared between the legislative branch and the Executive branch. Such a distribution of powers may be considered as a genuine implementation of the republican form of government, which requires policy judgements to be made by several persons, not just one.

The republican distribution of war powers between the Executive branch and the legislative branch has been enshrined in all democratic French constitutions. Leaving aside the Vichy regime, it has not left French constitutional law since 1875, when the Third Republic came into being. But its practical implementation has never worked very smoothly. This was true before the Constitution of 1958; it is even more true after it.

The War Powers Before the Constitution of 1958

In theory, practical implementation of the republican distribution of war powers between the Executive branch and the legislative branch is supposed to unfold in a three-step procedure: the Executive requests Parliament to authorize armed operations; Parliament gives its authorization to the Executive; and the Executive launches the armed operation. In French constitutional practice, things never worked this way.

Regarding the constitutional practice of the Third Republic (1875–1940), the first wars to be addressed were the various colonial wars fought by France in North Africa, Sub-Saharan Africa and in Southeast Asia. In respect of all these wars, the Executive never sought declarations of war from Parliament because it was commonly accepted that wars were waged against states, not against peoples. Under international law in force at that time, statehood was denied to peoples subject to colonial conquest. Parliamentary consent was however obtained through the usual mechanisms of the parliamentary regime, namely the political accountability of the Executive before Parliament. This form of parliamentary consent worked at least once in connection with a colonial war. On March 30, 1885, the Jules Ferry cabinet was overthrown by the National Assembly in response to the military disaster encountered by the French forces in the Gulf of Tonkin. The constitutional practice ran very differently following the outburst of the two World Wars in 1914 and 1939. In 1914, the question of parliamentary authorization did not arise inasmuch as France, being

¹ The parliamentary debate is reproduced in *ORATEURS DE LA RÉVOLUTION FRANÇAISE, T.I: LES CONSTITUANTS* (1989).

attacked—Germany declared war on France on August 3 and Parliament convened on August 4—had no need to formally declare war on Germany.² The President of the Republic sent a message to Parliament, which approved it by casting a vote of confidence in favor of the government. In 1939, the situation was the opposite in that France had to declare war on Germany in order to meet her treaty obligations toward Poland. Nonetheless Parliament did not formally authorize the government to declare war on Germany. As it was abundantly clear that the chambers did not have the political will to declare war, the government—in order to comply with the constitutional requirements requesting parliamentary consent to war—had to circumvent the issue of a formal authorization to declare war. Instead, it proposed an appropriation bill requesting special funds in order “to meet the needs of the international situation.” After tumultuous debates, the bill was unanimously adopted. This vote was interpreted by the government as implicitly authorizing it to declare war on Germany.

During the Fourth Republic (1946–1958), France undertook several armed interventions abroad, particularly in its colonial empire. These interventions were never subject to “declarations of war” in the formal sense of the term, nor were they formally authorized before being undertaken. During the Suez crisis (1956), for example, the National Assembly merely approved the government’s policy by a vote of confidence that was taken on the very same day the ultimatum addressed to Egypt expired.

If any lesson can be learned from this experience, it is that the law in the Constitution is one thing, and the law in action another. However, in terms of constitutional lawfulness, the situation is perhaps less serious than it looks at first glance because the Third and the Fourth Republics were parliamentary regimes. In a parliamentary regime, the Premier and the ministers are answerable to Parliament for the Cabinet’s policy. From this basic tenet, two consequences follow. On the one hand, Parliament can always force the government to resign by adopting a vote of defiance. As long as Parliament does not act, silence means consent. On the other hand and by implication, the government is always supposed to conduct policy with the support of a parliamentary majority. If, however, a loss of confidence among parliamentarians occurs, the Cabinet or, depending on the circumstances, the Minister who is responsible for the policy under attack, is expected to resign.³ Therefore, in respect of the constitutional practice followed under the Third and the Fourth Republics, it could be said that, as long as the government remained in power (that is, it was not overthrown by a vote of defiance), armed operations that were not previously authorized by Parliament were in fact necessarily approved by implication. This constitutional analysis should however be mitigated by the political realities, in particular by the fact that parliaments in most parliamentary regimes have been progressively infiltrated by disciplined parties that distort traditional parliamentary techniques of control and accountability.

War Powers After the Constitution of 1958

Under the Fifth Republic, the war powers were not a constitutional issue until the late 1970s. Neither President De Gaulle nor Pompidou sent French troops abroad in armed intervention. It was President Giscard d’Estaing who launched the first peace operation in 1978 when he ordered the Legion to quell the rebellion in Kolwezi, Zaire. No preliminary authorization was sought from Parliament, which discussed the matter three weeks after the mission. A similar pattern was followed in the case of the French intervention in Chad in 1983—but the parliamentary debate took place even later: nine weeks after the mission.

Regarding the peace operations undertaken under the auspices of the United Nations,

²The point is made by M. HAURIU, *PRÉCIS DE DROIT CONSTITUTIONNEL* 422 n.45 (1962).

³For an account of the resignation of Lord Carrington in 1982 after the unexpected Argentine invasion of the Falkland Islands, see C. TURPIN, *BRITISH GOVERNMENT AND THE CONSTITUTION* 432–33 (2d ed. 1990).

they are always decided—and can only be decided—by the President of the Republic in his capacity as Commander of the armed forces (Article 15 of the Constitution). However, neither in the case of Lebanon (1978) or Cambodia (1991), nor in the case of the territory of Yugoslavia (1992), has preliminary parliamentary authorization ever been sought from Parliament. According to the Ministry of Foreign Affairs, UN peace operations must be considered as undertaken in the pursuance of the UN Charter. For all practical purposes, this means that parliamentary authorization must be considered as having been given by anticipation when Parliament approved the ratification of the UN Charter. This reasoning enables the government to claim that the agreements that place French forces under UN command do not come within the categories of treaties that must be approved by Parliament and, in a more general manner, that “French participation in UN peace keeping missions finds its justification in the Charter itself.”⁴

With the exception of Article 16 on emergency powers (which is irrelevant in the case of peace operations and thus beyond the scope of this study),⁵ the Constitution of October 4, 1958 did not change the republican distribution of war powers between the Executive branch and the legislative branch.⁶ The President of the Republic is the commander in chief (Article 15) and Parliament must authorize the declaration of war (Article 35). However, the manner in which Article 35 is today commonly construed by French legal scholars and policy makers has greatly impoverished the republican principle of shared responsibilities in respect of peace operations.

The starting point of the legal analysis is the interpretation given to Article 35. It is widely held that Article 35 has become inapplicable because today states no longer may declare war. French scholars contend that today a declaration of war is an unlawful act under international law. These scholars believe that the only lawful war under contemporary international law is a war of self-defense, which in their view does not require declaration. Whatever the merits of the argument, which need not at this point be discussed from an international legal standpoint, there is no doubt that the alleged impermissibility of a declaration of war explains the statement made by President Mitterrand during the Gulf War when he said that France was declaring war on no one, but was acting within the legal framework of the United Nations. However he also said that Parliament would be referred to in due course.⁷ Indeed, on convocation by Decree of the President of the Republic, Parliament convened for a special session on January 16, 1991, the day after the ultimatum to Iraq had expired. The parliamentary session did not last more than an afternoon. It was officially closed on January 17, 1991 by a Decree of the President of the Republic.

Once it had decided that Article 35 was to be held inapplicable in the case of the Gulf War, the government had no other option than to find a substitute in the traditional techniques of the parliamentary regime if it wanted—as it claimed it did—Parliament to be in a position “to exercise its power in its entirety.”⁸ Thus, it put into question its political responsibility before the National Assembly by calling a vote of confidence on its policy

⁴ See the survey of French practice of international law by Charpentier in 24 AFDI 1133–36 (1978) and 28 AFDI 1065 (1982).

⁵ Article 16 provides in part that “when the institutions of the Republic, the independence of the nation, the integrity of its territory or the fulfillment of its international commitments are threatened in a grave and immediate manner,” the President of the Republic—subject to certain procedural conditions—shall take the measures commanded by the circumstances. Fr. Const., Art.16.

⁶ See, ELISABETH ZOLLER, *DROIT DES RELATIONS EXTÉRIEURES* 85 (1992).

⁷ D. Maus, *La pratique institutionnelle française: 1er Octobre 1990—31 Décembre 1990*, 5 REVUE FRANÇAISE DE DROIT CONSTITUTIONNEL 91 (1991).

⁸ See, JOURNAL OFFICIEL DÉBATS, ASSEMBLÉE NATIONALE, Dec. 12, 1990, at 6748.

in the Gulf War. In the National Assembly as well as in the Senate, the government won overwhelming majorities. The problem is that these votes did not have the slightest effect on the decision to order French forces to participate in the "Desert Storm" operation against Iraq, since that decision was not within the power of the government but within the power of the President. Moreover, even before the votes were taken in Parliament, the presidential spokesman declared that the votes would not affect the presidential decision. From a constitutional standpoint, that statement was perfectly correct since the French President is not politically responsible before the National Assembly. Had the votes however been negative, the government would have had to resign. Had those events occurred, the constitutional and political situation would have been quite surrealistic, with a President without a government having to enforce his decisions.

The French constitutional practice followed during the Gulf War is a very instructive experience. The most important practical result is that the French President has discretionary power to decide peace operations involving armed forces—operations that are tantamount to what in the United States would be considered "war." It should be noted that there has been hardly any objection against such a generous interpretation of presidential war powers. Some commentators went so far as to say that there was no need for Parliament to cast a vote on the issue because Article 15, which makes the President Commander in Chief, was itself a sufficient legal basis for the President to order French troops to join the American-led coalition. Secondly, it is now clear that Article 35 of the Constitution is widely considered to be obsolete.⁹ This is the crux of the matter because Article 35 is indeed the only constitutional check against the Commander in Chief. *Mutatis mutandis*, the situation is as serious as it would be in this country if presidential war powers were to be exercised free of the limitations imposed by the U.S. Constitution (Article I, Sec. 8) or by the War Powers Act. In France, it turns out that the situation would not be such a disgrace if the alternate solutions provided by the parliamentary regime—namely, the political accountability of the Cabinet before the chambers—could be considered as adequate substitutes. Unfortunately, this is not the case because the ultimate responsibility for defense and foreign policy rests with the President, not the government. Therefore, the traditional techniques of the parliamentary regime are in this particular case meaningless.

In conclusion, French constitutional practice has reached a point where the distribution of war powers is seriously unbalanced to the detriment of Parliament. Constitutionally speaking, the President of the French Republic reigns supreme over peace operations and Parliament barely has a say in the matter. The situation could even get worse with the Maastricht Treaty and the Common Foreign and Security Policy (CFSP) that is supposed to take place as the European Union is taking shape. CFSP provides for possible peace operations under the name of "joint actions." Under the Treaty, these joint actions can be undertaken without preliminary authorization by national parliaments. They are not even subject to preliminary consent by the European Parliament. Last, but not least, the situation prevailing in France contrasts sharply with the situation in Germany, particularly since the judgement handed down by the Federal Constitutional Court regarding the participation of German troops in collective security operations.¹⁰ In its judgment of July 12, 1994, the Federal Constitutional Court decided that the German Constitution permits the deployment of German troops for both collective peacekeeping and collective peace-enforcement missions. However the Court held that every deployment of German troops

⁹ See the commentary made by Dabiezies on Article 35 in *LA CONSTITUTION DE LA RÉPUBLIQUE FRANÇAISE, ANALYSES ET COMMENTAIRES* 775–77 (F. Luchaire & G. Conac, eds., 2d ed. 1987).

¹⁰ See, G. Nolte, *Bundeswehreinätze in kollektiven Sicherheitssystem, Zum Urteil des Bundesverfassungsgerichts vom 12. Juli 1994*, 54 *ZAöRV* 652–755 (1994); see also, *id.* at 684–85 (English summary).