

A Global Comparative Study of the Constitutional Statutes of Deciding and Declaring War

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Abstract. The powers to decide and declare are basic constitutional instrument to control over war. Such provisions can be found in a large number of constitutions in force. By analyzing of 185 codified constitutions and 6 uncoded constitutions, the paper found that 128 constitutions have the clauses about decision or declaration of war. The paper tried to build three basic models to describe the relationship between the power of deciding war and the power of declaring war: Collective Decision and Declaration Model, Collective Decision and Single Person Declaration Model, Single Person Decision and Declaration Model. Meanwhile, 150 (78.53% of 191) constitutions vest a single person the command in chief of armed forces. Some of them just have very limited restrictions on powers of the command. However, only 108 (56.54% of 191) constitutions vest the legislative body the power of deciding war. Nearly half of all nations' war power haven't been controlled by their constitutions.

Keywords: Comparative study, Constitution, Deciding war, Declaring war, Command in chief.

1. Introduction

Mankind's common aspiration for world peace forms the basis of constitutional control of war. Today, all nations should pay more attention to the fundamental constitutional problem of determining when national military power should be committed to situations of actual or potential conflict than ever before. What is lacking is a cross-national analysis of war-and-peace decision-making as a challenge to constitutional theory and constitutionalism. A comparative understanding of constitutions can show that for all their many differences, nations do share certain basic models that distinguish them from others and notably affect their decision-making processes in peace and war. Thus, the paper tries to build simple models from the analysis of those statutes of deciding and declaring war through a global comparative study, and explore the constitutional role in the exercise of war powers, and seeks to understand whether the existing statutes of deciding and declaring war are competent to control over wars or not, as well as what is transferable and what is not. Through a better understanding of what is common to and what is different among nations, we may not only be able to make wiser choices in judging international situation, but also be able to reach some generalizations about the future world constitution.

Nowadays, constitutionalists have formed a consensus that the war power must be exercised consistently with some limits and protections. Looking back at history, the power of deciding war and declaring war were vested in a handful of individuals in powerful positions, such as Emperor, Khalifa, King, Sudan, etc. Given that only a civilian Legislative collective could assure the civil supremacy and political accountability, American framers like James Madison[1] had tried to establish a better system of deciding for war, by shifting the locus of responsibility from one person to a broadly representative group--the Congress. Today, those constitutional provisions about making war vest in the organs of state the power to decide and declare war. In other words, those clauses were designed to be the final switch of nations' motivation of forces.

The paper analyzed the constitutional statutes of deciding and declaring War in all 185 codified constitutions and 6 unmodified constitutions including Canada, Germany, Israel, New Zealand, and Saudi Arabia. Those partially recognized regimes and dependent territories such as Samoa, Aruba and Virgin Islands are not in the scope of the analysis. All constitutional texts are downloaded from the Wikipedia Page "List of national constitutions". The statutes of deciding and declaring war surely do vary--some techniques are embodied in written constitutions and other formal instruments; some entail greater and others lesser degrees of legislative supervision; some are before-the-fact and others after-the-fact; some do and some do not include control through constitutional courts or other judicial

bodies. The paper tried to find the common models of who decides war, who declares war, and who leads the war.

By keywords analysis of the 191 codified and unmodified constitutions in force, the paper has found 128 (67.02% of 191) constitutions that have the clauses about decision or declaration of war. By analyzing them, we could find three common models:

Collective Decision and Declaration Model: A collective such as parliament, congress, nation assembly, etc., makes decision and declaration of war.

Collective Decision and Single Person Declaration Model: The Constitution divides war powers between the legislative and executive branches. A public persona like the Head of State could declare war with the endorsement of a collective.

Single Person Decision and Declaration Model: A single person like the Head of State could decide and declare war.

Several constitutions have statutes about who decide war but leave blank about who declare it. The paper will analyze them under the second model.

The paper also found that 160 constitutions which have the clauses about designation of commander in chief. In 150 (93.75% of 160) nations, the command in chief of armed forces is vested in the Head of State including executive and non-executive persona.

2. Collective Decision and Declaration Model

According to this model, legislative collective such as parliament, congress, assembly, government, etc., have the power to declare war to ensure that the decision to initiate hostilities would not be made by a single person and his/her arbitrary order, but instead collectively by a deliberative and politically accountable judgment of the legislature. Moreover, the model laid the ground for political accountability for war by requiring the Congress to make war powers decisions and declarations transparently and deliberately by the complex and lengthy legislative process of approval. However, deciding and declaring on war constitutionally and prudently requires chiefly that Legislative body consistently perform its constitutional duty to decide whether to initiate war. If it cannot fulfill its duty, the war power may be vested to a political persona or an executive body by according to the so-called “exceptions clause”.

30 (23.44% of 128) nations are Collective Decision and Declaration Model (listed in alphabetical order): Albania, Bahrain, Belarus, Cuba, Czech, Estonia, Ethiopia, Guatemala, Honduras, Hungary, Iraq, Israel, Italy, Liberia, Madagascar, Mexico, Moldova, Mongolia, Montenegro, Morocco, Panama, Philippine, Poland, Romania, Serbia, Turkey, the U.S., Uruguay, Armenia, Sweden. In most of them, the legislative body makes war decision and declaration. However, in Armenia and Sweden, the Government declares war upon the legislative body’s decision. In Israel, the state may only begin a war pursuant to a Government decision. In Netherlands, Parliament declares war by Royal Decree that shall be signed by the King and by one or more Ministers or State Secretaries, which can be seen as a “collective declaration”.

Several nations have special procedural pre-requirements before making war. In Albania and Estonia, the proposal of the President of the Republic is the pre-requirement before their legislative bodies make the declaration of war. In Mexico, the Congress shall declare war based on the information submitted by the President of the Republic. In Ethiopia, the House of Peoples' Representatives shall declare war on the basis of a draft law by the Council of Ministers. In Morocco, a communication made by the King to the Parliament is the pre-requirement before the declaration of war. In Armenia, the pre-procedural before the decision on declaring war is the proposal of the Government.

3. Collective Decision and Single Person Declaration Model

According to this model, the Legislative branch authorization is required before the Head of State initiates the use of force abroad. In one hand, legislative body such as parliament, congress, assembly,

etc., have the power to declare war. However, the Legislative body cannot dictate to the Head of State the day-to-day tactics. Thus, he or she must use in commanding the armed forces. Nevertheless, legislative branch can enact statutory limits on the use of force that the Head of State is bound to follow. In the other hand, the single person such as President, Sudan, King, Monarch, etc., has the power of declaration to ensure that the armed forces' mobilization would not be hesitated by committee and defend his/her nation from sudden attacks without delay.

67 (52.34% of 128) nations are Collective Decision and Single Person Declaration model (listed in alphabetical order): Afghanistan, Argentina, Austria, Azerbaijan, Bangladesh, Benin, Brazil, Bulgaria, Burkina Faso, Cambodia, Cape Verde, Chad, Chile, China, Colombia, the Democratic Republic of the Congo, Côte d'Ivoire, Croatia, Cyprus, Denmark, Djibouti, Egypt, El Salvador, Eritrea, Finland, France, Gabon, Gambia, Guinea, Guinea-Bissau, Haiti, Honduras, Indonesia, Italy, Kenya, the Republic of Korea (South), Kyrgyzstan, Latvia, Luxembourg, Maldives, Mexico, Myanmar, Netherlands, Niger, Nigeria, Papua New Guinea, Portugal, Rwanda, Sao Tome and Principe, Sierra Leone, Slovakia, South Sudan, Spain, Sudan, Suriname, Syria, Tanzania, Thailand, Timor-Leste, Togo, Tonga, Tunisia, Uganda, Ukraine, United Arab Emirates, Uzbekistan, Viet Nam . What special in Cyprus is that the Vice-President, separately or conjointly with the President, could declare war. Although the United Kingdom does not have one specific constitutional document named as such, the prime minister alone has the authority to send troops to war using Royal Prerogative Powers that decided by the parliament and declared by the Queen.

The paper also finds that 11 nations' constitution have statutes about who decides war but leave blank about who declare it. They are Georgia, Ireland, Kazakhstan, Lao People's Democratic Republic, Lebanon, Macedonia, Mali, Mauritania, Senegal, Slovenia, and Venezuela. However, in those nations, the declaration of war is in the form of decrees or ordinances which signed and pronounced by the Head of State. Thus, they can be seen as a special category of the collective decision and single person declaration model.

4. Single Person Decision and Declaration Model

According to this model, the executive Head of State has nearly infinite power to initiate war. The legislative and executive branch usually have very limited restrictions on him/her.

20 (15.6% of 128) nations are Single Person Decision and Declaration Model (listed in alphabetical order) : Algeria, Angola, Belgium, Burundi, Equatorial Guinea, Greece, Iran, Jordan, the Democratic People's Republic of Korea, Kuwait, Mozambique, Oman, Peru, Qatar, Saudi Arabia, Somalia, Sri Lanka, Uruguay, Zambia, Zimbabwe .

In those nations, the legislative body only provide advices to the Head of State like an advisory Committee. For example, in Mozambique, the Council of State shall compulsorily advise the President of the Republic on the war and peace affairs whenever the President requests such advice. In Somalia, the Upper House could participate in the process of declaring war but cannot decide it.

5. Designation of the Commander in Chief

By keywords analysis of the 191 constitutions in force, the paper has found 160 constitutions which have the clauses about designation of commander in chief. In 150 nations (93.75% of 160 constitutions), the command in chief of armed forces is vested in the Head of State including executive and non-executive persona, such as the President, the Prime Minister, the Queen, the Governor-General the Sultan, the Leadership, the Grand Duke, the Yang di-Pertuan Agong, the Prince, the Druk Gyalpo, etc. It is special that in Bosnia and Herzegovina that the three-member-Presidency is the Chief. Each member of the Presidency shall have civilian command authority over armed forces.

The data duplicated that a legislative body could direct or declare war, but not make it. Only a commander in chief could make the expeditious and coordinated tactical decisions necessary to "make war" successfully. Those Clauses of Commander in Chief therefore impliedly assigns to a

single person the power to conduct war. The commander, not collective or group, makes all day-to-day tactical decisions in the combat deployment of armed forces.

6. Conclusion

Through a global comparative analysis, 128 constitutions have the clauses about decision or declaration of war. 30 (23.44% of 128) nations are Collective Decision and Declaration Model. 67 (52.34% of 128) nations are Collective Decision and Single Person Declaration Model, and 11 nations' constitution have statutes about who decide war but leave blank about who declare it. 20 (15.63% of 128) nations are Single Person Decision and Declaration Model. In all, only 108 (56.54% of 191) constitutions vest the legislative body the power of deciding war. Nearly half of all nations' war power haven't been controlled by their constitutions. Meanwhile, 160 (83.77% of 191) constitutions which have the clauses about designation of commander in chief. In 150 (93.75% of 160) nations, the command in chief of armed forces is vested in the Head of State including executive and non-executive persona. Notably, some of them just have very limited restrictions on powers of the command in chief. The comparative study can contribute a new dimension to the relationship between constitutions and war, and generate new insight for the ongoing argument of the roles of the constitutions in war decision-making.

References

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- [2]. Information on https://en.wikipedia.org/wiki/List_of_national_constitutions.