

BOOK REVIEW

## Parliament's Secret War

by Veronika Fikfak and Hayley J Hooper. Oxford: Hart Publishing, 2018, 272 pp (£70.00 hardback). ISBN: 978-1-50-990287-3.

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Although the power to deploy UK armed forces to overseas conflict situations is constitutionally sourced in the royal prerogative – and, by convention, rests within the discretion of the Prime Minister – Parliament has, in recent years, occupied an increasingly central and substantive role in scrutinising its exercise. Some argue that a palpable shift in constitutional orthodoxy has thus been effected: a transfer of authority from the executive to Parliament to decide on matters of warfare.<sup>1</sup> This is due primarily to the apparent precedential force of the Commons vote, in 2003, in which MPs had been asked to ‘approve’ a substantive motion in support of the UK’s invasion of Iraq.<sup>2</sup> The subsequent development of this practice has given rise to a fully-fledged constitutional convention requiring ex ante parliamentary debate of military action, its codification in the Cabinet Manual in 2011 apparently signalling the permanence of this arrangement.<sup>3</sup> The so-called ‘War Powers Convention’ has been broadly embraced insofar as its operation in the contemporary constitution is indicative of the gradual ‘democratisation’ of domestic war powers: the cultivation of greater transparency, inclusivity, and, above all, accountability in the domestic decision-making process concerning the UK’s involvement in armed conflict.

In *Parliament's Secret War*, Veronika Fikfak and Hayley J Hooper set out to ‘unpack the precise nature of the evolving War Powers Convention and contextualise this against the values of accountability, participation, and transparency’.<sup>4</sup> The book is a timely, comprehensive, and necessary study of ‘how Britain constitutionally decides to go to war’, or, ‘how the House of Commons is and should be involved in the decision to send British troops into harm’s way’.<sup>5</sup>

The values of accountability, participation, and transparency underpin the methodology adopted by the authors, which is outlined in some detail in Chapter 1. Fikfak and Hooper use these values to evaluate the claims made by successive British governments about the War Powers Convention: that it ‘makes the process of deciding on war more open, accountable, and democratic due to the input of elected politicians’.<sup>6</sup> In this way, the groundwork is laid by Fikfak and Hooper’s methodological framework to test theory (that the War Powers Convention is a conceptually sound conduit for promoting the values of accountability, participation, and transparency vis-à-vis domestic war powers) against practice (whether the War Powers Convention actually delivers on this promise).

<sup>1</sup> See eg J Strong ‘Why parliament now decides on war: tracing the growth of the parliamentary prerogative through Syria, Libya and Iraq’ (2015) 17 BJPIR 604. See also G Phillipson ‘“Historic” commons’ Syria vote: the constitutional significance: part I’ (2013), available at <https://ukconstitutionallaw.org/2013/09/19/gavin-phillipson-historic-commons-syria-vote-the-constitutional-significance-part-i/>.

<sup>2</sup> *Hansard* HC Deb, vol 401, cols 902–11, 18 March 2003.

<sup>3</sup> Cabinet Office *The Cabinet Manual: A Guide to Laws, Conventions and Rules on the Operation of Government* (London: Cabinet Office, 2011) paras 5.36–5.38.

<sup>4</sup> V Fikfak and HJ Hooper *Parliament's Secret War* (Oxford: Hart Publishing, 2018) p 3.

<sup>5</sup> *Ibid.*, p v. The authors explain at p 23 that, for the purposes of the book, the term ‘war’ is to be interpreted as synonymous with terms such as ‘military action’, ‘armed response’, and ‘use of force’.

<sup>6</sup> *Ibid.*, p 3.

It is this dimension of the book's methodology – the thematic reconciliation of theory and practice – which makes a significant contribution to the realisation of Fikfak and Hooper's broader aims. The book prompts a number of important questions about political regulation in the UK constitutional sphere: 'What political controls?'; 'How do they work?'; 'How can they be improved?' And so, it is fitting that Fikfak and Hooper embrace a mode of inquiry which they call 'evidence-based public law':

[W]e feel this is an approach that allows us to achieve the goals set by doctrinal-style research in a political setting. We use it to determine the current political practice and also to build up an evidence base from which we can later construct more theoretical normative arguments ... We believe strongly that such a case-by-case evidence based approach is beneficial for public lawyers, as it allows us to fully understand the operation of the constitution in context.<sup>7</sup>

The broader significance of this approach is the way in which it generates more general constitutional insights. This resonates with Fikfak and Hooper's evident commitment to the style of public law scholarship inspired by John Griffith's seminal 1978 Chorley Lecture, which, in essence, encourages a method of constitutional analysis premised on observation of 'what happens' in practice.<sup>8</sup> That 'the political constitution' is taken seriously in *Parliament's Secret War* is clear from the outset. Fikfak and Hooper note, 'In short, if the political constitution is "no more and no less than what happens", then, we seek to build an accurate picture of what is happening in the context of war powers'.<sup>9</sup> And where the book is perhaps most compelling is where the War Powers Convention serves as a microcosm of the broader scheme of political regulation of power in the UK – the lifeblood of the political constitution, as Griffith conceived it<sup>10</sup> – and, as is made clear in Chapters 2 and 3, its shortcomings.

The six substantive chapters of *Parliament's Secret War* might be roughly divided into two sections. The first, comprising Chapters 2–4, explores the interaction between (often competing) domestic and international legal frameworks which govern the use of force (Chapter 2); the adequacy of the War Powers Convention as the means by which domestic accountability relations in the context of war powers are organised (Chapter 3); and the impact of information asymmetry between government and Parliament on debates concerning armed conflict (Chapter 4).

What is ultimately revealed is a stark disconnect between the conceptual desirability of involving elected parliamentarians in the domestic decision-making process concerning matters of warfare – that is, that the process is imbued with (enhanced) democratic legitimacy – and the practical reality of enduring executive dominance in the area of national security. Far from promoting accountability, participation, and transparency, the reality is that the democratic veneer of the House of Commons serves as a convenient ruse on which the UK Government routinely capitalises to mitigate the strictures of the international legal framework. In essence, 'Parliament is not used as a true forum for political discussion, but more covertly as a surrogate [UN] Security Council'.<sup>11</sup> And the practical operation of the War Powers Convention is shown to be equally flawed: porous with exceptions (which includes 'emergencies', 'drone' warfare, the deployment of Special Forces); narrow in its application; its ability to organise accountability relations effectively overstated. Yet, even in circumstances where Parliament is afforded the opportunity to debate proposed military action, the perennial '[m]isuse of secrecy by government' is said to have 'a corrosive effect on Parliament's ability to exercise its constitutional functions'.<sup>12</sup>

The core problem with the War Powers Convention exposed in *Parliament's Secret War* is made explicit in Chapter 3: '[it] is an inappropriate and ineffective tool to deliver on what it promised'.<sup>13</sup>

<sup>7</sup>Ibid, pp 22–23.

<sup>8</sup>JAG Griffith 'The political constitution' (1979) 42 MLR 1 at 19.

<sup>9</sup>*Parliament's Secret War*, above n 4, p 22.

<sup>10</sup>See eg Griffith, above n 8, at 16.

<sup>11</sup>*Parliament's Secret War*, above n 4, p 65.

<sup>12</sup>Ibid, p 106.

<sup>13</sup>Ibid, p 103.

In Chapters 5 and 6, the second ‘section’ of the book, Fikfak and Hooper postulate solutions ostensibly capable of addressing this problem. For instance, they consider whether a ‘War Powers Act’ or a parliamentary resolution could reinforce – with the prospect of judicial enforcement in the case of the former – Parliament’s role in the domestic decision-making process. Neither, it is argued, is capable of achieving what Fikfak and Hooper ultimately deem to be necessary: the fostering of a ‘culture of challenge’ and a ‘culture of justification’, particularly in the context of domestic war powers;<sup>14</sup> innovation capable of empowering MPs ‘to construe their role in debates more broadly’.<sup>15</sup>

This, it is claimed, is what debates about form ultimately misapprehend: ‘Reinvigorating Parliament’s role will not come from the form the rules of procedure take. Instead, the role of politics and politicians must be reimagined’.<sup>16</sup> This, the ‘re-arming’ of Parliament, as it is termed in Chapter 5, involves distinguishing its role from that of the UN Security Council in conflict-decision-making by ‘[re-examining] questions discussed by the Security Council from the perspective of ... the electorate’;<sup>17</sup> rejecting the (continuing) ‘legalisation of parliamentary discourse’;<sup>18</sup> impressing upon politicians the need to vote freely on matters of war, unencumbered by party lines, and, most importantly, to justify their views to the electorate, to whom they are ultimately accountable.<sup>19</sup> Only then, it is suggested, will political discourse move beyond misleading binary distinctions in debates about war – whether, for instance, ‘legal or illegal’ – ‘towards a spectrum of alternatives and available choices’.<sup>20</sup>

There are no doubt practical issues, concerning, as discussed in Chapter 5, definition and justiciability,<sup>21</sup> which could undermine the effectiveness with which either new legislation or a parliamentary resolution could ‘change the character of the activities currently undertaken by governments or Parliament pursuant to the convention’.<sup>22</sup> Yet, having regard to the fact that what has been identified as the core problem with current activities is, in essence, an issue of (prevailing) political attitudes, of political culture, and of institutional self-awareness, Fikfak and Hooper are perhaps too quick to reject formal change as a means of securing a culture shift. The implication of this rejection is that the problem is disclaimed as a constitutional problem and characterised as a purely political one. How, then, one might ask, do we procure culture change through the constitution, if not through change to rules, institutions and processes?

On the one hand, Fikfak and Hooper’s use of ‘the political constitution’ as a tool for constitutional analysis might involve perpetuating a circular logic. If, as Griffith suggests, the remedies to constitutional problems are or ought to be ‘political’,<sup>23</sup> then the remedy to a failing political mechanism of accountability is, simply, to institute a ‘better’ political mechanism of accountability, however that may be conceived. On the other hand, that there has been a genuine attempt to think of practical solutions, such as that which is explored in Chapter 6, demonstrates a willingness on the authors’ part to avoid this circular logic. For instance, where secret intelligence-based claims threaten to undermine the transparency of the Government’s case for war, the suggestion that ‘the whole House of Commons should scrutinise and debate reports of the Joint Intelligence Committee (JIC) in *closed session*’<sup>24</sup> evidences a commendable attempt to build on the problems identified with the political constitution, in the context of war powers, rather than end there.

<sup>14</sup>Ibid, p 137.

<sup>15</sup>Ibid, p 137.

<sup>16</sup>Ibid, p 146.

<sup>17</sup>Ibid, p 151.

<sup>18</sup>Ibid, p 138.

<sup>19</sup>Ibid, p 175.

<sup>20</sup>Ibid, p 148.

<sup>21</sup>Ibid, pp 141–146.

<sup>22</sup>Ibid, p 141.

<sup>23</sup>Griffith, above n 8, at 16.

<sup>24</sup>*Parliament’s Secret War*, above n 4, p 187 (emphasis added).

Overall, the book makes (at least) two key contributions to the field. The first is substantive. It is the first comprehensive inquiry into an issue of utmost contemporary constitutional import. *Parliament's Secret War* supplies compelling evidence with which to challenge increasingly trite claims about the effectiveness of the War Powers Convention and its continuing viability as the current mechanism through which domestic accountability relations in this context are organised.

The second is methodological. Notwithstanding the recent dilution of interest amongst public lawyers – particularly in the UK – of conceiving of the UK constitution in terms of (competing) models of ‘legal’ and ‘political’ constitutions,<sup>25</sup> *Parliament's Secret War* serves as an example of how ‘the political constitution’ can be utilised as an effective framing device. For instance, the book succeeds in demonstrating that broader insights as to ‘how the UK constitution works’ can be gleaned from analysis of ‘what happens’ *in practice*. Fikfak and Hooper reveal this in the specific context of domestic war powers. But these findings clearly have implications of broader conceptual significance. The putative values which the War Powers Convention is thought to embrace, which, in theory, guide the relationship between government and Parliament in this area, patently fail to supply a conceptually robust explanation of ‘how the UK constitutionally decides to go to war’ in practice. Consequently, there is scope to question the normative force of the values of accountability, participation, and transparency in the UK constitution, generally.

The book's core message – that we must strive to keep in good health the political constitution, that we must continue to expose and scrutinise those ‘hidden power structures’<sup>26</sup> – will resonate not only with those concerned specifically with the issue of domestic accountability arrangements vis-à-vis UK war powers, and the place of the nascent War Powers Convention within these arrangements. The book will be of interest to those keen to understand how the UK's constitutional machinery continues to evolve against the backdrop of pressing issues of contemporary constitutional import, more broadly.

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<sup>25</sup>See eg A Tomkins ‘What's left of the political constitution?’ (2013) 14 German Law Journal 2275.

<sup>26</sup>*Parliament's Secret War*, above n 4, p v.