

Role of the High Courts of the United States of America, South Africa and the European Union in Foreign Affairs

{What follows below are direct and verbatim excerpts from the Examiners' Reports}

A. Supervisors at the University of Johannesburg

Prof. D.J. Geldenhuys (Dept. of Politics and International Relations) and Prof. H. A. Strydom (South African Research Chair in International Law)

In this study Mr Eksteen addresses a vastly neglected question in the scholarly domain of foreign policy analysis (FPA): what role does the judiciary play in the foreign policy process of states? Courts are not formally authorized to formulate foreign policy, a task that states typically assign to the executive and to a lesser extent the legislature - or what Eksteen calls the political branches of government. This long-standing and familiar distribution of functions has led to the presumption in FPA literature that the judiciary does not merit serious consideration as a factor in the foreign policy process. The author records the current state of FPA in his literature review in chapter 1 and in chapter 2 that is dedicated to an overview of foreign policy analysis as a research tool.

To determine the role of courts in foreign affairs, Eksteen selected three case studies: the United States of America, South Africa and the European Union. The first two are of course constitutional democracies institutionalizing the separation of powers between different branches of government and observing the rule of law. In America the focus of the study is on the Supreme Court of the United States (SCOTUS) and in South Africa its two Appellate Courts (the Constitutional Court and the Supreme Court of Appeal) are investigated. The European Union's European Court of Justice (ECJ) is 'the most powerful supranational court in world history', with defined jurisdiction over member states of the regional organization.

In all three cases the courts mentioned are legally entitled to deal with matters related to foreign affairs.

To examine the role of the four courts in practice, the candidate studied a vast number of judicial decisions, presentations and briefs addressed to the courts, scholarly writings and various other relevant sources. Because of the study's heavy reliance on legal texts, a co-supervisor from the Law Faculty has been involved from the outset. The thesis in fact has a bi-disciplinary character as it draws on both International Relations and International Law. Since SCOTUS has a long history of dealing with foreign policy issues and hence generated a large volume of related documentation, Eksteen devotes four chapters to the American court. He traced the evolution of SCOTUS through four eras in terms of its handling of matters concerned with US foreign policy. As the court continuously re-

examined its role in this regard, SCOTUS 'developed into a powerful and bold constitutional adjudicator' that did not shrink from judging (and often overturning) the foreign policy actions of the political branches in terms of constitutional provisions. Eksteen illustrates very clearly that SCOTUS has become an important influencer of foreign policy by reviewing the decisions and actions of the foreign policy makers.

Because the two South African courts have by contrast dealt with relatively few foreign affairs cases, their role is examined in a single chapter. Still, the courts have already decided a number of benchmark cases in which human rights issues featured prominently. Their rulings in these hearings, Eksteen concluded, 'have already left an indelible reminder that the judiciary will not be kept from adjudicating cases that may have implications for the country's foreign affairs'.

Eksteen's two chapters on the ECJ draw on a wealth of cases related to the foreign affairs of the European Union. Known for its 'judicial activism', the court's jurisdiction has extended to areas such as human rights, monetary policy, immigration and citizenship. The pronouncements show that the ECJ 'is committed to guide the EU in its foreign relations'. It is especially with regard to human rights, which it placed 'at the apex of the EU's edifice', that the ECJ has taken a 'forceful and uncompromising stand'. The candidate's overall conclusion, based on his three country studies, is that the court involved do not shy away from using their judicial power when dealing with cases relating to foreign affairs. As a result, Eksteen argues that 'the executive has to bend to the judiciary'.

Through his in-depth and wide-ranging inquiry (the text exceeds 340 pages) the author has demonstrated conclusively that the judiciaries involved have assumed a definite role in the foreign policy processes of the US, South Africa and the EU respectively. This is where the study's original contribution to knowledge lies. It is, as far as Eksteen and his supervisors could determine, the first such comprehensive and systematic inquiry into the foreign policy role of the four courts. With his findings, Eksteen has thrown down the gauntlet to foreign policy analysts: they need to give due recognition to the role of the judiciary in the formulation and conduct of the foreign relations of the US, South Africa and the EU and also take Eksteen's work a step further by examining the same question in other democratic states.

B. External Assessors

1. Prof. J. C. Alden, Professor in International Relations, London School of Economics and Political Science, UK

This doctoral dissertation is a thoughtful and well-documented treatment of the topic. It makes a strong and well-substantiated case for the findings as both part of a trend across

all the case studies and one which has been systematically ignored in the existing FPA literature. This is the most important dimension of this doctoral dissertation and one which clearly demonstrates its contribution to the scholarly literature.

This doctoral dissertation examines three judiciaries systems – the Supreme Court of the United States (Scotus), the two appellate courts in South Africa, and the European Court of Justice – to assess the changing role of the judiciary in foreign affairs. It concludes that their role, while distinctly different in respect to the particulars of their relationships to their national (or in the case of the European Union, international) constitutional system, nonetheless shares common features in that they all exercise to varying degrees influence over foreign affairs. Furthermore, the dissertation seeks to provide the basis for moving beyond the ‘one dimensional state-centric’ approach adopted by Foreign Policy Analysis (FPA) in its understanding of the judiciary in foreign affairs.

The candidate has produced a careful considered argument that draws on a wealth of literature to address its key research question. Its originality lies in conducting a comparative study of the role of the judiciary in foreign affairs which enables it to make a contribution both to our understanding of the specificities of the part played by the judiciary in each political system but, more broadly, make general points about the nature of that influence. As the candidate rightly points out, the scholarly literature in International Relations and FPA does not fully recognise the judiciaries growing influence, nor does it theorise the process or even the impact in any structured way.

In terms of style, the carefully constructed argument aimed at unpacking the central thesis results in a deliberative approach throughout the dissertation. This is especially welcome as the use of comparative case studies as the basis of its methodology demands symmetry of content in order to provide the requisite interpretation and generalisations that ensue. I would say that the impulse to provide detail at times can cloud the larger themes under consideration, but to the candidate’s credit, he pulls together the core ideas in the beginning and concluding chapters.

In short, this doctoral dissertation provides a well-structured and original treatment of the theme of the role of the judiciary in foreign affairs, bolstered by its use of comparative case studies and careful analysis. This is an innovative approach to FPA, one that sets the stage for necessary corrective to the body of theory on foreign policy making as well as providing new comparative data on how this has occurred in three important cases. It deserves to be considered for distinction.

2. Prof. Marijke Breuning, Professor of Political Science, University of North Texas, USA.

a. Overall Assessment:

This dissertation presents a valuable scholarly contribution. The author argues that the impact of the judiciary on foreign policy is understudied – which it is. Foreign policy analysis typically does not address the impact of the judiciary on foreign policy and the field of judicial politics does not address the foreign policy impacts of court decisions in a systematic way.

The author demonstrates that the judiciary has clearly had an impact on foreign policy, as well as on the actors responsible to foreign policy decision making, through a series of detailed case studies of precedent-setting legal decisions. The study is comparative in that it addresses legal precedent in the United States (i.e. Supreme Court decisions), South Africa (i.e. decisions by the Constitutional Court and the Supreme Court of Appeal), and the European Union (i.e. decisions by the European Court of Justice). Although the study appears somewhat lopsided by devoting four chapters to the United States cases, only one to South Africa, and just two to the European Union, this unevenness is the necessary result of the evidence: the US Supreme Court has been in existence far longer than the relevant courts in South Africa or the ECJ. In other words, the unevenness is substantively justified, and the comparative element adds a useful and important component to the dissertation. The meticulous and detailed discussions of the cases, as well as the background and context to the cases, make this dissertation a highly valuable and innovative study. The author demonstrates that the judiciary influences foreign policy making and should not be overlooked. In doing so, the author has opened up a new area of inquiry for foreign policy analysts.

b. Content and Research Methodology

The author has clearly delimited the field of study. He has done so by pointing to a gap in the foreign policy analysis literature. The author clearly outlines his research question and persuasively explains the appropriateness of the chosen methodology. The author discusses the case study method, which is used in the thesis, as well as an appropriate justification for the case selection. The author's findings and conclusions follow logically from the close analysis of the cases. The general layout of the dissertation and the sequence of chapters is structured in a logical manner. The author is working in a field with rather little previous work, but uses existing work (predominantly from the field of law) effectively and engages with the conclusions of relevant scholarly work in a sensible manner. The conclusions are clearly evidence-based. Work from other scholars is clearly

marked through paraphrased references and/or quotes, and consistently attributed to the appropriate source.

c. Formal Aspects

The language and presentation are of a professional standard. The citing and referencing follows a consistent style and is done according to that style. Sources vary in vintage, as is common in this type of work, but include recent sources among the many sources consulted. The overall presentation is good.

d. Other Academic Aspects

As explained in the chapter by chapter comments below, my comments do not in any way negate that the dissertation is a solid scholarly contribution. I approve the thesis in its current form. The author might consider the comments that follow in the chapter by chapter comments for the purposes of publishing the thesis. My points are generally matters of interpretation. The dissertation presents a solid contribution to the field.

e. Final Evaluation

The author has presented a detailed and meticulously sourced study of the role of the judiciary in foreign policy making in comparative perspective, using two country cases (US and SA) and the EU. Given the dearth of work in this area, especially from an FPA perspective, this is an important achievement.

Overall, this is a well-written dissertation on a novel subject for FPA. The author is commended for the detail-oriented work on the large number of court cases, as well as for providing appropriate historical context to help with the interpretation of the significance of various court decisions.

I approve the thesis.

3. Prof. Johan D. van der Vyver. I.T. Cohen Professor of International Law and Human Rights, Emory University School of Law, USA.

I read the entire dissertation with great interest and found it to be absolutely up to doctoral standard and in fact quite excellent. I without hesitation or reservation recommend that he be awarded the degree, and if it is permissible I would in fact recommend that the degree be awarded with distinction.

The subject-matter of the dissertation is focused on the influence of judgment of the highest courts in the United States, South Africa and the European Union on foreign affairs obligations of the executive authorities in the countries and the system under consideration.

I could not find any relevant judgments in the United States, South Africa and the European Union that were not included in the in-depth analysis of the author. Also of special significance is the inclusion of in-depth analyses of pro amicus briefs submitted by academics, politicians and other persons with a special interest in the subject of adjudication in the United States and in South Africa, with sensitivity to the fact that submission of such briefs is common practice in the United States, and less so in South Africa. In the European system external opinions are confined to State Parties and are therefore less significant in that system. The author submitted an in-depth analysis of the influence of such briefs in judgments of the courts, which is quite a unique focus in higher degree studies with which I am familiar.

I tried almost desperately to find grounds of critique relating to the substance of the dissertation. As far as the focus of his thesis is concerned, the substance of materials covered can indeed not be faulted.

Special mention should be made of the fact that the authorities cited by the author are quite elaborate and include a sound representation of scholarly books and articles with a bearing on the topic of the thesis. I was also impressed by the author's critical analysis of those authorities, with words of praise and of critique where appropriate and which cannot be faulted. Also quite significant is the inclusion of recent developments almost up to this very date of events that have a bearing on the subject of the dissertation, such as current disputes and rulings relating to Brexit—to mention only one example.

The manuscript is well formulated.

I again want to emphasize that this is an extremely good dissertation and absolute up to the expected standard of a doctoral thesis.