Erga Omnes

Blog of the Weeramantry Centre for Peace, Justice and International Law

#3/2020 | 6 September

www.weeracentre.org

INTERVIEW

Riaan Eksteen (Ph.D. University of Johannesburg)

author of

***The Role of the Highest Courts of the United States of America and South Africa, and the European Court of Justice in Foreign Affairs* (Springer, 2019, pp. 448)**

-

Greetings and a very warm welcome Dr. Riaan Eksteen. Before we move ahead with the discussion on your book, can you briefly tell us about yourself and your career?

I obtained my master's degree (*Cum Laude*) in Political Science in 1974 from the University of South Africa with the thesis entitled: "The Role of the USA Senate in Foreign Affairs". My Ph.D. Was awarded by the University of Johannesburg in October 2018 and the book was published in July 2019. Currently, I am a Senior Research Fellow at the Department of Politics and International Relations in the Faculty of Humanities, University of Johannesburg. Academically, the last twelve months have been quite engaging as I have been busy with presenting and writing extensively on issues of law, courts, and foreign relations.

Over the long span of my career, I have held several profiles. For instance, I was a member of the South African Foreign Service and served in the Foreign Ministry's Namibia Division 1964-1967; S.A. Embassy in Washington D.C. 1968-1973; head of the UN and Namibian division in the Foreign Ministry 1973-1976; Ambassador and Head of Mission at UN, New York, 1976-1981; Head of Planning in the Foreign Ministry 1981-1983; Ambassador in Windhoek 1990-1991; Ambassador at the UN, Geneva, 1992-1995; Ambassador in Ankara 1995-1997 (also accredited to Azerbaijan, Kyrgyzstan, Turkmenistan and Uzbekistan). Also, from 1983-1988 I was the Director-General of the South African Broadcasting Corporation.

What inspired you to take up this unique area of research? Also, if you want to introduce our readers with five key features of your book, what would they be?

When I did my master's degree I was intrigued by the question: does the judiciary have any role in foreign affairs, not as the formulator of the foreign policy, but as an active influencer? How the judiciary holds the executive accountable to the constitution and prevents executive overreach in respect of foreign affairs?

If you ask me five key features of the book, they would be:

1. An intensive and incisive examination of the judiciary's role in foreign affairs.
2. Coverage of essential material and analysis on foreign affairs by the relevant Courts through their decisions, presentations and briefs to the Courts, scholarly contributions and relevant publications.
3. The lack of recognition of the judiciary's role in foreign affairs is conspicuous, and the book accordingly addresses the deficiency.
4. It gives due recognition to the judiciary and its increasing relevance and influence in foreign affairs.
5. Three chapters in the book deal with the European Court of Justice (ECJ). One of them is devoted to Brexit and the inordinate fixation of the United Kingdom (UK) with the Court.

Did your long illustrious career in diplomacy help you in framing arguments in your research?

Throughout my diplomatic career, it was always important to observe the three pillars of constitutional government and to understand the interrelationship between them. Consequently, I became aware of how each one of them has an impact on the other in some way or the other. Sometimes it is a delicate balance but nevertheless, the interaction and the influence cannot be ignored. These factors were integral in my research for the book.

Your book undertakes the heavy task of assessing the judicial responses to foreign policy in the USA, the European Union and South Africa. Where do you think is the fundamental difference in those responses?

Each of the three judiciaries studied differs from the others. They are not the same and different criteria apply to the assessment of each judicial system. The two Appellate Courts of South Africa and the ECJ do not have a history or track record in matters

involving foreign affairs to the same extent as the Supreme Court of the USA (SCOTUS). The main focus has consequently been on SCOTUS, with a more incisive examination of its role in foreign affairs.

SCOTUS is not charged explicitly by the Constitution with any responsibility in foreign affairs. It does, however, embody the crucial principles of the separation of powers and checks and balances. Together with the doctrine of judicial review that the Court exposited in 1803, SCOTUS is assured of being a formidable force in the US society — and one no less in that country's foreign affairs from a very early stage.

The highest judicial authority in South Africa has not shied away from involving itself in issues that may have an impact on foreign affairs. While not enough cases have as yet been decided to serve as a study equal in scope to that handled by SCOTUS, these two South African Courts have already decided benchmark cases. With a determined approach to human rights issues, their rulings have left an indelible reminder that the judiciary will not be kept from adjudicating cases that may have implications for the country's foreign affairs. With its stern reprimands in these cases, the two Courts have lived up to their role of upholding the rule of law in exemplary fashion. Their rulings carried another equally important message: the judiciary has an unmistakable role to play in foreign affairs. In doing so these two Courts will not only hold the executive accountable to the principles enshrined in the Constitution, but also keep the executive within constitutional limits. This they have done in several cases without fear or favor. Foremost are the cases involving the former President of Sudan during his visit to SA while a warrant for his arrest issued by the International Criminal Court was ignored by SA.

From its inception, the ECJ has been an unusual international forum for the EU. Over the years it has expanded its jurisdictional authority well beyond its original, narrow boundaries. Its influence has become more apparent and contested. Contrariwise, the ECJ has been hailed as the most powerful supranational court in world history. It has already had a significant impact on the EU's foreign affairs by placing human rights unequivocally at the heart of the EU legal order. The series of cases involving Kadi underscores this point. It secured an appropriate balance between fighting terrorism and protecting those rights. The Court's central argument was that the protection of fundamental rights forms part of the very foundation of the EU's legal order whereby the Court is committed to guiding the EU in its foreign affairs. In doing so the Court has ensured that all EU actions are commensurate with and in harmony with obligations encompassed in all EU treaties. Over six decades the ECJ has grown into a formidable

force, so much so that it has not endeared itself to the UK. In the Brexit negotiations between the UK and the EU, the ECJ has become a major bone of contention and stands central in the efforts to finalize the UK's exit from the Union by the end of March 2019. In the current negotiations between the UK and the EU to give substance to the former's decision to leave the EU (Brexit), the ECJ has featured prominently. Historically important rulings placed the Court in the centre of the UK's Brexit decision. That resulted in the ECJ becoming a major issue with consequential foreign affairs implications for both the UK and the EU. In the final analysis, everything Brexit is foreign affairs-oriented, and at the centre of all of this stands the ECJ.

While the political branches of government most directly determine outcomes in foreign affairs, the contributions of the judiciary are no less significant. Many questions impacting on foreign affairs require constitutional interpretations relating to the authority vested in the executive and legislative branches. Only the judiciary possesses the authority to interpret constitutional and treaty stipulations. In doing so judicial decisions define the parameters and boundaries within which the political branches can and should operate — in domestic affairs and most definitely also in the foreign affairs of the USA, South Africa and the EU.

Why is it important to give the judiciary a say in matters of foreign policy, which is typically seen as the domain of the executive? How would it affect the dynamics of justice?

Foreign Policy Analysis (FPA) provides the analytical framework for this inquiry. It focuses and concentrates on the domain of foreign affairs analysis. The lack of recognition of the judiciary's role in foreign affairs is still noticeable in FPA literature. I concluded that FPA has to move away from its state-centred orientation that focuses on the two political branches of government and give due recognition to the judiciary and its increasing relevance and influence in foreign affairs. As mentioned before, it is important to maintain the checks and balances in a constitutional system.

In the post-truth era, it is alleged that heads of States are behaving in a way that compromises the independence of the judiciary. Do you think it is true and that the judiciary as a critical pillar of democracy is getting challenged?

I will focus my answer on SCOTUS as it has been the most active of all the three courts that I have chosen. In the past 25 years, SCOTUS has dealt more and more with issues pertaining to foreign affairs. The result has been that the executive paid the price when SCOTUS started cutting the President down to constitutional size. Therefore, while

SCOTUS may not formulate foreign policy, nor engage in relations with foreign entities, many judicial actions, directly and indirectly, affect foreign affairs. The point is thus not whether the judiciary has a role to play in foreign affairs, but rather how great its influence is. The stage has now been reached where the President can no longer merely assume that his actions — defined as constitutional overreach — will not be critically scrutinized and he himself will not be rebuked. The Court has thus determined that the point has been reached that a President has to be called constitutionally to order when he has gone too far. The conclusion reached is that SCOTUS is a *de facto* element in US foreign affairs. SCOTUS does decide cases that affect the relationship of the USA with the rest of the world; and as the Justices decide these cases, they are doing as much as anyone to influence US foreign affairs. The Court's pronouncements in an age of globalisation, international terror, economic turmoil and, now lately, also with the ever-growing international debate on immigration, and their consequential impact on the country's foreign affairs are not to be underestimated.

Do you think the decision of the US Supreme Court in Trump *v.* Hawaii (2018) could have been different?

With the decision on President Trump's travel ban, the Court admitted what the President had underlined all along: the crux of his immigration actions has been national security. The decision gives credence to a statement that in the case of the USA SCOTUS has now concretized its role in foreign affairs. Consequently, the stage is set for greater involvement of SCOTUS in foreign affairs than before.

What are the most striking instances of judiciary-executive interaction in the US that your book engages with?

In the USA: The consideration of cases that focus on human rights, viz. those relating to the detainees at Guantánamo Bay prison and the application of the Alien Tort Statute. The cluster of Detainee Cases involving Rasul; Hamdi; Hamdan; and Boumediene was brought on by the "war on terror". They became hallmark decisions in defining the contours of the President's powers, not least in foreign affairs. They were setbacks for the President's conception of authority and his responsibilities as Commander-in-Chief. Each case is also relevant for its human rights implications.

Human rights cases have the potential to intersect with complex and sensitive issues of foreign affairs and, in turn, give rise to the separation of powers concerns. The cases of Sosa; Kiobel; and Jesner became synonymous with human rights and the Alien Tort Statute (ATS) of 1789. Two hundred years later, this once-obscure provision of the

Judiciary Act has become a unique vehicle for human rights litigants from various parts of the world to pursue their claims in US courts. The jurisdictional basis for most civil claims by foreign human rights plaintiffs in the USA is the ATS. The focus has turned on how the ATS could be used by these foreign plaintiffs to advance a global human rights regime. Only these three cases progressed all the way to rulings by SCOTUS. Each one left its distinct impact on the judicial consideration of human rights. These three cases acknowledged the importance of not causing diplomatic strife. From these cases emerged crucial concepts. Henceforth, plaintiffs in ATS cases will have to demonstrate their "nexus" to the USA. Another concept they will have to face and overcome is the presumption against extraterritoriality as ruled by SCOTUS.

Although, judge-made law is an exciting jurisprudential proposition, how do you think SCOTUS can claim its space in foreign policy matters when ultimately, the legislature remains the final maker of law?

SCOTUS forms an integral part of the US constitutional system of government and has a rich 200-year plus history of testing issues of foreign affairs for constitutional validity and harmony. Its rulings impose constitutional restraints on the other two branches of government. This enables it to be a potent force in society and in its foreign affairs. Not many judicial institutions in the world are credited with initiating and effecting political change on the scale of SCOTUS. This Court has exerted its authority with a great deal of influence. Because the Court's responsibility is first and foremost to interpret the Constitution, SCOTUS has profoundly affected the US society over more than two centuries. In that process, it has had principled impacts on the political and judicial systems of the USA. Its influence on all spheres of human endeavour in the USA has been universally acknowledged and its record is awash with emphatic rulings touching the lives of ordinary citizens. Suffice it to mention two important points in this respect:

1. In his autobiography (*Decision Points*), President George W. Bush singled out the Hamdan-ruling for special reflection:

   > I disagreed strongly with the Court's decision, which I considered an example of judicial activism. But I accepted the role of the Supreme Court in our constitutional democracy. I did not intend to repeat the example of President Andrew Jackson, who said, "John Marshall has made his decision, now let him enforce it!" Whether presidents like them or not the Court's decisions are the law of the land.

2. One particular instance of judicial scrutiny changed the USA forever. In 1954, with the rise of the civil rights movement, the case of Brown *v*. Board of Education served as a guiding light for all future generations. With that ruling, SCOTUS — not the President, not the Congress — ended legal segregation in the USA. This

case did more than any other to solidify the Court's role in the protection of civil rights. Furthermore, it enhanced the Court's standing among the public in the USA from its humble beginnings to its preeminent institutional standing today.

Many thanks for your responses Dr. Eksteen. We wish you all the best with the book and future endeavours.

Pleasure is all mine. Thanks for having me and asking interesting questions.

----------end of the post----------

Amazon link for the book is here.