Chapter 1 – Origins of Deference

As the introduction has shown, when used in a legal context, the term 'foreign affairs,' is often surrounded by an almost mystical[1] notion that something about it is 'special'. This opaque idea consists of three main traits, which together will be referred to as the 'traditional position:'[2]

(1) foreign affairs are substantially different from domestic matters,
(2) the executive is best suited to deal with decisions in this area, and
(3) judicial control of executive action in foreign affairs should be minimal.

The last trait shall be referred to as the 'notion of deference' in contrast to the different doctrines making up this notion, which will be dealt with in the next chapter. This chapter will show how the traditional position developed in specific political ideas, especially those of Thomas Hobbes, John Locke, and Charles Montesquieu, and how it migrated into the law of the United States, Germany, and South Africa.

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1 In the same vein Eberhard Menzel, 'Die auswärtige Gewalt der Bundesrepublik' (1954) 12 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 179, 186.

2 Speaking of the 'traditional approach' Campbell McLachlan, *Foreign relations law* (CUP 2016) 14; cf as well Campbell McLachlan, 'Five conceptions of the function of foreign relations law' in Curtis A Bradley (ed), *The Oxford Handbook of Comparative Foreign Relations Law* (OUP 2019) 21, 24 ff where he develops a broader understanding of an 'exclusionist' mindset, my claim here is more limited and only refers to the executive-judicial relationship; describing the traditional conception of foreign affairs Helmut Philipp Aust, 'Foreign Affairs' in Rainer Grote, Frauke Lachenmann and Rüdiger Wolfrum (eds), *Max Planck Encyclopedia of Comparative Constitutional Law* (online edition, OUP 2017) mn 1; speaking of 'traditionelle Sichtweise' Christian Calliess, *Staatsrecht III* (3rd edn, CH Beck 2020) 68; in contemporary US scholarship the 'traditional position' is largely congruent with the idea of foreign affairs 'exceptionalism', cf Curtis A Bradley, 'What is foreign relations law?' in Curtis A Bradley (ed), *The Oxford Handbook of Comparative Foreign Relations Law* (OUP 2019) 3, 13 (who also coined the term); Ganesh Sitaraman and Ingrid Wuerth, 'The Normalization of Foreign Relations Law' (2015) 128 Harvard Law Review 1897, 1906 ff; also using the 'traditional view' terminology in a related but different context Anne Peters, 'Humanity as the A and Ω of Sovereignty' (2009) 20 EJIL 513, 520.

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I. The traditional position in political philosophy

1. Thomas Hobbes

The beginning of modern political and legal theory, not only in the area of foreign affairs, is widely attributed to Thomas Hobbes[3] and especially his book *Leviathan, or the matter, form, and power of a common-wealth ecclesiastical and civil.*[4] According to Hobbes, men 'without a common power to keep them all in awe'[5] live in the state of nature, which essentially means 'war [...] of every man against every man'.[6] The solution to escape these circumstances lies in a 'covenant of every man with every man'[7] and 'the multitude so united is called a commonwealth [...] the great Leviathan, or rather [...] that mortal god, to which we owe under the immortal god, our peace and defence'.[8] The organised state symbolised through one almost godlike person ends the state of nature. What, however, about the outside world?

The relationship between organised communities towards each other remains in the state of nature:[9]

> *As for the law of nations, it is the same with the law of nature. For that which is the law of nature between man and man, before the constitution of commonwealth, is the law of nations between sovereign and sovereign, thereafter.*[10]

The capacity of (wo)men to create an organised society, the 'mortal god,' is not applied to the relation amongst states. 'Man is a God to man, and Man is a wolf to Man. The former is true of the relations of citizens with

3 David Armitage, *Foundations of modern international thought* (CUP 2013) 59.
4 Thomas Hobbes, *Leviathan: or the matter, form, and power of a common-wealth ecclesiastical and civil* (digitized version, printed for Andrew Crooke, at the Green Dragon in St. Pauls Church yard, London 1651).
5 Ibid 62.
6 Ibid.
7 Ibid 87.
8 Ibid.
9 Arguably, in early works Hobbes did not adhere to this position Armitage (n 3) 62; for this part cf especially Thomas Poole, *Reason of state: Law, prerogative and empire* (CUP 2015) 56.
10 Thomas Hobbes, *De Corpore Politico or the Elements of Law, Moral & Politick* (digitized version, Printed for J Ridley, and are to be sold at the Castle in Fleetstreet by Ram-Alley, London 1652) 183; cf as well Poole (n 9) 57.

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each other, the latter of relations between commonwealths'.[11] As Armitage aptly observed, 'the commonwealth once constituted as an artificial person took on the characteristics and the capacities of the fearful, self-defensive individuals who fabricated it'.[12] The state of nature is thus projected to the international sphere.

Against this hostile environment, the organised community builds a fortress establishing 'peace at home and mutual aims against their enemies abroad'.[13] The created Leviathan administers both duties, managing internal affairs like giving of laws and external affairs, that is 'the Right of making War, and Peace with other Nations, and Common-wealths'.[14] In this, he has absolute discretion 'to do whatsoever he shall think necessary to be done, both before-hand, for the preserving of Peace and Security, by prevention of discord at home and hostility from abroad; and, when Peace and Security are lost, for the recovery of the same'.[15] Although cooperation is not entirely excluded in Hobbes's theory,[16] international relations are highly volatile. Because of the lack of superior power,[17] the different sovereigns are in a constant state of mistrust:

> *yet in all times kings and persons of sovereign authority, because of their independency, are in continual jealousies and in the state and posture of gladiators, having their weapons pointing, and their eyes fixed on one another, that is, their forts, garrisons, and guns, upon the frontiers of their kingdoms, and continual spies upon their neighbours: which is a posture of war.*[18]

With this, Hobbes prominently introduced the first notion of the traditional position into political thought, the dichotomy between the inside and the outside.[19] The society inside is pacified through the creation of a sovereign, whereas the world outside remains in constant struggle.

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11 Richard Tuck and Michael Silverthorne (eds), *Hobbes – On the citizen* (CUP 2005) 3 f; cf as well Poole (n 9) 58.
12 Armitage (n 3) 64.
13 Hobbes, *Leviathan* (n 4) 88.
14 Ibid 92.
15 Ibid 90 f.
16 Poole (n 9) 59.
17 Armitage (n 3) 67.
18 Hobbes, *Leviathan* (n 4) 63; this view was already articulated by Hobbes in 'De Cive', for further references see Armitage (n 3) 66.
19 Arguably, Hobbes himself did not draw such a clear distinction, but has also undoubtedly been understood in that way by most scholars, Armitage (n 3) 71.

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2. John Locke

John Locke built on the ideas of Hobbes and also saw humans as being in an original state of nature.[20] Locke's version of that state is, in its ideal position, more peaceful than that of Hobbes, as long as everyone adheres to the natural law.[21] However, also according to Locke, there is a permanent danger that the 'state of nature' has to give way to the 'state of war' because someone acted against natural law and now the victim can exercise their right to retaliation.[22] To avoid this uncertainty, also for Locke, the solution lies in creating a political society and government.[23]

Like Hobbes, Locke acknowledges that '[t]he whole community is in the state of nature, in respect of all other states or persons out of this community'.[24] In contrast to Hobbes, the powers of the sovereign are not unlimited, and his crucial contribution is to define who has to manage the affairs of the 'outside world'. He differentiates between the 'executive power' having the task of executing municipal laws within a given society and the management of the security and interest of the public outside the state given to the 'federative power'.[25] By way of the 'federative power,' the state is represented externally and may enter into treaties.[26] Although 'the well or ill management'[27] of the federative power is 'of great moment to the common-wealth'[28] one of its main characteristics is that, as opposed to the executive power, it can hardly be guided by law. '[I]t is much less capable to be directed by antecedent, standing, positive laws, than the executive; and must necessarily be left to the prudence and wisdom of those, whose hands it is in, to be managed for the public good'.[29] This distinction between the executive power acting within the society and subject to laws and the

20 John Locke, *Two treatises of government* (digitized version, Printed for Awnsham Churchill, at the Black Swan in Ave-Mary-Lane, by Amen-Corner, London 1690) Book II § 4 ff.
21 Ibid § 6 ff.
22 Ibid § 16 ff.
23 Ibid § 87 ff, § 95 ff.
24 Ibid § 145; unlike Hobbes, he did however not equate the law of nature and law of nations, instead, both apply to states Armitage (n 3) 79 f.
25 Locke (n 20) § 147.
26 Armitage (n 3) 81; the treaties do not change the character of the outside world as being in a state of nature McLachlan, *Foreign Relations Law* (n 2) 38.
27 Locke (n 20) § 147.
28 Ibid.
29 Ibid [my adjustment].

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federative power being outside the scope of the law had a crucial influence in developing the traditional position.

It may appear as if Locke created a new power, besides the executive, charged with foreign affairs. However, he acknowledges that even as the 'executive and the federative power of every community be really distinct in themselves, yet they are hardly to be separated'.[30] What is more, 'it is almost impracticable to place the force of the common-wealth in distinct [...] hands; or that the executive and federative power should be placed in persons, that might act separately, whereby the force of the public would be under different commands'.[31] This would 'be apt to some time or other to cause disorder and ruin'.[32] The separation between the 'executive' and the 'federative' is thus rather one of function than that of creating two different powers.[33] Locke thus effectively split the executive competence in a domestic area subject to the law and a foreign area without any checks, introducing the idea of the 'Janus-faced'[34] exercise of executive power into political theory. Moreover, in his warning to separate both traits of the executive power lay the first seeds of the claim that the state 'has to speak with one voice' in foreign affairs.[35]

Another relevant aspect of Locke's thinking in this regard includes his analysis of the 'prerogative' power. He was one of the first scholars to explicitly[36] define the concept, which gained broader academic interest in the early 17th century.[37] Locke described it as the 'power to act according to discretion, for the public good, without the prescription of the law, and

30 Ibid § 148.

31 Ibid [my omission].

32 Ibid.

33 Saikrishna B Prakash and Michael D Ramsey, 'The Executive Power over Foreign Affairs' (2001) 111 Yale Law Journal 231, 267; McLachlan, *Foreign Relations Law* (n 2) 32; Jeremy Waldron, *Political Political Theory* (Harvard University Press 2016) 56; in the same vein Thomas Poole, 'The Idea of the Federative' in David Dyzenhaus, Thomas Poole and Jacco Bomhoff (eds), *The double-facing constitution* (CUP 2019) 54, 71.

34 Term taken from David Dyzenhaus, 'The Janus-Faced Constitution' in David Dyzenhaus, Thomas Poole and Jacco Bomhoff (eds), *The double-facing constitution* (CUP 2019) 17; cf as well this Chapter, II., 3., c) for the adoption in Germany.

35 McLachlan, *Foreign Relations Law* (n 2) 39.

36 Especially in contrast to Hobbes, see Poole, *Reason of State* (n 9) 51.

37 Poole, *Reason of State* (n 9) 19 f; Leander Beinlich, 'Royal Prerogative' in Rainer Grote, Frauke Lachenmann and Rüdiger Wolfrum (eds), *Max Planck Encyclopedia of Comparative Constitutional Law* (online edition, OUP 2017) mn 4.

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sometimes even against it'.[38] In contrast to the 'federative power,' which at least in principle was designed by Locke as an independent power, the 'prerogative' is only a trait of the executive, and always with 'him that has the executive power in his hands, to be ordered by him as the public good and advantage shall require'.[39] Like the federative power, the prerogative qua definition cannot be subject to the law. If it is abused, 'the people have no other remedy in this, as in all other cases where they have no judge on earth, but appeal to heaven'.[40] With this construction of the prerogative, which is somehow part of the new order but at the same time unfettered by its laws, Locke 'carries vestiges of the pre-modern order over into the modern constitution'.[41] In his *Two Treatises*, Locke did not draw a connection between the federative power and the prerogative.[42] Nevertheless, they share common characteristics: both are, in essence, traits of the executive and outside of judicial control.[43] Therefore, it is not surprising that soon after Locke, as we will see later, the conduct of foreign affairs came to be seen as one of the main aspects of the prerogative power.[44]

Building on Hobbes' ideas, Locke significantly shaped the traditional position. Whereas Hobbes established the difference between the inside and outside of a community and thus gave birth to the first notion, Locke contributed significantly to the second and third point. He established that the executive is best fitted to fulfil this task and while subject to the law acting domestically it is unshackled acting outside.

3. Charles Montesquieu

The political philosophy of Charles Montesquieu finally completed and solidified the traditional position carved out by Hobbes and Locke. Montesquieu famously developed the idea of separating the state's power into

38 Locke (n 20) § 160.
39 Ibid § 159.
40 Ibid § 168.
41 Poole, *Reason of State* (n 9) 52.
42 This 'missing link' was already recognized by Ernst Wolgast, 'Die auswärtige Gewalt des Deutschen Reiches unter besonderer Berücksichtigung des Auswärtigen Amtes. Ein Ueberblick' (1923) 44 AöR 1, 96.
43 Armitage (n 3) 84 even states that Locke in essence referred to the prerogatives.
44 Beinlich (n 37) mn 2 and 13; cf below this Chapter, II., 1., b).

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three different branches.[45] In addition to Locke's separation between the executive and the legislative,[46] he conceptualized judicative power:

> *[T]here is no liberty, if the power of judging be not separated from the legislative and executive powers. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary controul; for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor.*[47]

Like Locke, Montesquieu perceived the executive power as being charged with two related but different tasks. He distinguished between 'the executive in respect to things dependent on the law of nations; and the executive in regard to things that depend on the civil law'.[48] By virtue of the latter, the sovereign 'makes peace or war, sends or receives embassies, establishes the public security and provides against invasions'.[49] In contrast to Locke, the power to conduct foreign affairs is not established as an independent 'federative' power but as part of the executive.[50] Montesquieu's model of separation of powers became widely accepted and thus ended the peculiar disintegration of executive power introduced by Locke.[51] However, the idea remained of two different tasks fulfilled by the executive, depending on whether it acted inside or outside the community. As we will see, this notion made its way into the legal thought of all three jurisdictions.

II. Adoption of the traditional position in the three jurisdictions

We will start our examination of how the philosophical foundations migrated into the foreign relations law of the three jurisdictions with South Africa. This appears worthwhile because South African law has strongly relied on the English system, the oldest parliamentary democracy. Hence,

45 Also he did not use the phrase 'separation of powers'.
46 For Locke the judicative power vested in part with the legislative and in part with the executive Alex Tuckness, 'Locke's Political Philosophy' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Summer 2018 edn, Stanford University 2018) under 6. Separation of Powers and Dissolution of Government.
47 Charles Montesquieu, *The Spirit of Laws* (Printed by Thomas Ruddiman, Edinburgh 1793) 177 [my adjustment].
48 Ibid 176; cf as well Prakash and Ramsey (n 33) 268.
49 Montesquieu (n 47) 177; cf as well Prakash and Ramsey (n 33) 268.
50 Prakash and Ramsey (n 33) 268.
51 Menzel (n 1) 184 f.

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incidentally, English law will be examined as well and again become relevant to understanding the development in the US, which will be analysed in due course. Germany, less strongly connected to the Anglo-American tradition, will be examined last.

I. South Africa

As mentioned, the territory which constitutes South Africa in its present form was for the first time unified by the South Africa Act in 1909 as a British dominion. The British Empire managed all foreign relations as an imperial reserve until the 1920s,[52] and even when the colony gained more and more independence, the influence of English law remained dominant. These historical circumstances will guide the description of South African foreign relations law, which started off as purely English law and, with independence, gradually developed into genuinely South African law.[53]

a) Jenkins, Blackstone and foreign affairs as crown prerogatives

The first recognition of the 'deferential role' of the judiciary towards the executive in foreign affairs in England was probably made by Leoline Jenkins, who served as a Judge at the Court of Admiralty and later as Secretary of State in the second half of the 17th century.[54] He suggested that the King's Privy Council should interpret treaties and that this decision should bind the Prize Court and the Court of Admiralty.[55] However, Jenkin's opinion was rejected by other judges[56] and did not develop into a systematic approach. Nevertheless, his idea foreshadowed later developments.[57]

52 McLachlan, *Foreign Relations Law* (n 2) 32.
53 Ibid 33.
54 William S Holdsworth, 'The History of Acts of State in English Law' (1941) 41 Columbia Law Review 1313, 1315.
55 Ibid; Arnold McNair, *Law of Treaties* (OUP 1961) 356.
56 William S Holdsworth, *A history of English law* (Methuen & Co 1937) 653 fn 5.
57 Holdsworth, 'The History of Acts of State' (n 54) 1322 draws a line from Jenkins to Eldon (on Eldon below, this Chapter, II., 1., b)); also Jenkins formulated first deferential ideas, I concur with McLachlan that the notion of deference is, in essence, a development of the Victorian Age, cf below, this Chapter, II., 1., b) and (n 75).

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In the 18th century, William Blackstone developed a more systematic account. He directly referred to and built on the ideas of Locke in his *Commentaries on the Laws of England*[58] when describing the nature of the King's prerogative.[59] Blackstone defined these as 'that special pre-eminence, which the king hath, over and above all other persons, and out of the ordinary course of the common law, in right of his regal dignity'.[60] In contrast to Locke, he connected the royal prerogative with conducting foreign affairs, describing it as one of its primary traits:[61] first and foremost, 'with regards to foreign affairs, the king is the delegate or representative of his people'.[62] The conduct of foreign matters is explicitly placed in the executive power of the king because in him 'as in a center, all the rays of his people are united, and form by that union a consistency, splendor, and power, that make him feared and respected by foreign potentates'.[63] The picture of Hobbes' great Leviathan, built out of the many subjects, that has to deter and wrestle with foreign powers, shines through Blackstone's description. He even asked laconically, 'who would scruple to enter into any engagements, that must afterwards be revised and ratified by a popular assembly'[64]? In contrast to Hobbes, Blackstone's version of the relation between different states seems more regulated,[65] guided by natural law and by 'mutual contracts, treaties, leagues, and agreements'[66] together forming the 'law of nations'.[67]

The making of these 'treaties, leagues, and alliances with foreign states and princes'[68] is part of the foreign affairs power and in the exclusive domain of the king. He also has 'the sole power of sending embassadors to foreign states; and receiving embassadors at home'[69] and the 'sole prerog-

58 William Blackstone, *Commentaries on the Law of England: Book the First* (digitized version, Clarendon Press 1769).
59 Ibid 244.
60 Ibid 232.
61 Ibid 245 ff.
62 Ibid 245.
63 Ibid.
64 Ibid.
65 McLachlan, *Foreign Relations Law* (n 2) 43.
66 Ibid 43.
67 Ibid.
68 Blackstone (n 58) 249.
69 Ibid 245.

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ative of making war and peace'[70] or granting 'letters of marque'.[71] Although Blackstone connects the concept of prerogative with the area of foreign affairs, he is not granting foreign relations complete exclusion from judicial control. The law of nations is 'adopted in its full extent by the common law and is held to be part of the law of the land'[72] and thus, at least in principle, in the realm of the judiciary. However, as most regulations will only apply to states, domestic courts can only deal with these matters where they are 'properly the object of its jurisdiction'.[73] Although the occasions will be limited, courts thus have a role to play in foreign affairs.[74]

b) The birth of deference in the Victorian Age

Blackstone thus took up the ideas of Hobbes and Locke and, as we have seen, adhered to the first and second notion of the traditional position. However, the birth of the third notion of judicial deference is not attributed to him but is a development of the 19th century and Victorian scholars and judges.[75]

The first series of cases expanding the scope of non-justiciable areas arose between the Nabob of the Carnatic, a local Indian ruler, and the East India Company.[76] Both had entered into a treaty inter alia concerning the cessation of territory, and on its terms, the Nabob later tried to sue the East India Company. The English courts denied the claim, stating that the East India Company had entered into the treaty as a foreign sovereign and that no municipal jurisdiction would exist in such cases. This approach was

70 Ibid 249.
71 Ibid 251.
72 William Blackstone, *Commentaries on the Law of England: Book the Fourth* (digitized version, Clarendon Press 1769) 67.
73 Ibid, cf as well McLachlan, *Foreign Relations Law* (n 2) 46.
74 Blackstone, *Book the Fourth* (n 72) 66 ff; McLachlan, *Foreign Relations Law* (n 2) 44 ff.
75 For this part cf especially McLachlan, *Foreign Relations Law* (n 2) 49 ff.
76 *Nabob of the Carnatic v East India Company* (1791) 30 ER 391 (Court of Chancery); *Nabob of the Carnatic v East India Company* (1793) 30 ER 521 (Court of Chancery); *The Secretary of State for India v Kamachee Boye Sahaba* (1859) 15 ER 9 (Privy Council); the activities of the East India Company provoked many cases in which courts started to apply 'deference mechanisms' cf *Salaman v Secretary of State in Council of India* [1906] 1 KB 613 (Court of Appeal); Holdsworth, 'The History of Acts of State' (n 54) 1316; the Nabob was also often referred to as the 'Nabob of Arcot' McLachlan, *Foreign Relations Law* (n 2) 49, 282.

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taken further in several decisions by Lord Eldon,[77] Lord Chancellor from 1801 to 1826. He introduced the notion that the courts are somehow bound to the view of the executive before granting legal personality to states or governments in front of domestic courts,[78] asking 'what right have I, as the King's Judge, to interfere upon the subject of a contract with a country which he does not recognise'.[79] In developing this doctrine, he appeared to be strongly influenced by the UK's role on the international plane. In the aftermath of the American Revolution, many new states were created by breaking away from imperial powers, especially England, Spain, and France.[80] The question of recognition of these entities and their governments was thus highly political, and English judges appeared to be afraid that taking notice of their existence in court would amount to international recognition and thus create a conflict with the executive's position.[81] The doctrine was solidified in *Taylor v Barclay*,[82] a case posing the question of whether the UK recognised the government of the Federal Republic of Central America, which had broken away from Spain. Vice-chancellor Shadwell consulted with the foreign office and felt bound by its guidance: 'it appears to me that sound policy requires that the Courts of the King should act in unison with the Government of the King'.[83] Other decisions followed the case and accepted that the executive enjoys special privileges in foreign affairs.[84]

Remarkable about this development is not that the courts recognized a special role of the executive in foreign affairs. This notion, as we have seen, had long been accepted. What is notable is that this special role warrants the introduction of self-imposed restrictions to judicial control where these areas are touched upon.[85] More recently, names for these rules like

77 Also, the jurisprudence of other courts at that time developed in this direction, see Holdsworth, 'The History of Acts of State' (n 54) 1324.

78 Louis L Jaffe, *Judicial Aspects of Foreign Relations: In Particular of the Recognition of Foreign Powers* (Harvard University Press 1933) 124 ff; McLachlan, *Foreign Relations Law* (n 2) 35.

79 *Jones v Garcia del Rio* (1823) 37 ER 1113 (Court of Chancery) 1114; Jaffe (n 78) 124; Holdsworth, 'The History of Acts of State' (n 54) 1322; cf McLachlan, *Foreign Relations Law* (n 2) 49.

80 Jaffe (n 78) 124, 139.

81 Ibid 129.

82 *Taylor v Barclay* (1828) 57 ER 769 (Court of Chancery).

83 Ibid 221, cf as well Jaffe (n 78) 128.

84 McLachlan, *Foreign Relations Law* (n 2) 52 f.

85 Ibid 53.

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'exclusionary doctrines'[86] and 'avoidance doctrines'[87] have evolved. Their development marks the birth of 'deference,' the idea that the courts have to restrain themselves in their judicial function if foreign affairs are involved. Although these rules may have started as sporadic judicial restraint in a few cases, they would soon crystallize into solid law.

Albert Venn Dicey acknowledged these developments when he laid down the foundations of modern English constitutionalism in his *Lectures introductory to the study of the law of the constitution*.[88] For him, as for Blackstone, foreign affairs are part of the royal prerogatives, as the 'residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown'.[89] He especially stressed how the power to engage in this area had been transferred more and more from the monarch to his or her ministers:[90] 'the far more important matter is to notice the way in which the survival of the prerogative affects the position of the Cabinet. It leaves in the hands of the Premier and his colleagues, large powers which can be exercised and constantly are exercised free from Parliamentary control. This is especially the case in all foreign affairs'.[91] He also listed several cases where issues regarding foreign affairs were excluded from the judiciary.[92]

The pinnacle[93] of the development of 'deference doctrines' can be seen in Harrison Moore's *Act of State in English Law,* written at the end of the 'long 19th century'.[94] Before this book, the term act of state was hardly a staple in English Law. It had only been used in a few judgments, most prominently in cases in front of the Privy Council on appeal from the Supreme Court of the Colony of the Good Hope sparked by the annexation of Pondoland,

86 Ibid 14.
87 Eyal Benvenisti, 'Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts' (1993) 4 EJIL 159, 169.
88 Especially Albert V Dicey, *Lectures introductory to the study of the law of the constitution* (Macmillan 1885); McLachlan, *Foreign Relations Law* (n 2) 54 ff.
89 Ibid 348 f.
90 In this he made clear a position which was also already underlying Blackstone's ideas Arthur Bestor, 'Separation of Powers in the Domain of Foreign Affairs: The Intent of the Constitution Historically Examined' (1974) 5 Seton Hall Law Review 527, 531.
91 Dicey (n 88) 390 f.
92 Albert V Dicey, *A digest of the law of England with reference to the conflict of laws* (Stevens and Sons 1896) 209 ff; McLachlan, *Foreign Relations Law* (n 2) 55.
93 McLachlan, *Foreign Relations Law* (n 2) 56.
94 The term was coined by the British historian Eric Hobsbawm.

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a region in the Eastern Cape, by the British Cape Colony.[95] However, no coherent doctrine existed tying together the acts of state and several of the 'deference doctrines,' which had developed gradually, especially towards the end of the 19th century. Out of the history of the 'crown prerogatives,'[96] Moore developed the 'modern' version of an act of state so defined as 'the matter between States, which, whether it be regulated by international law or not, and whether the acts in question are or are not in accord with international law, is not a subject of municipal jurisdiction'.[97] This definition does not greatly deviate from Blackstone's account, who likewise admitted that only in very narrow circumstances does international law have a place in front of domestic courts. Moore's act of state concept, however, transcends the question of sole relations between states:

> *[T]here is a troublesome borderland of law and politics. On the one hand, out of the relations of independent States there may spring rights and duties in municipal law; on the other,* ***international relations may sometimes overwhelm clear matters of individual right or liability****. In either case there will be grave questions as to when these consequences do happen. Finally, there are some matters of State, or suggested matters of State, which cannot be brought within the general principle above stated. Often in the following pages it will be necessary to follow up for a time subjects which are not matter of State at all, but are sufficiently close thereto to demand attention.*[98]

Thus, possible consequences of an act of state are not confined to the very narrow question of pure inter-state relations but can stretch into areas generally in the clear jurisdiction of the courts. This marks a substantial deviation from Blackstone's account: what started as a question of how far inter-state relations may be adjudicated by municipal courts thus turned

95 *Cook v Sprigg* [1899] AC 572 (Privy Council); *Sprigg v Sigcau* [1897] AC 238 (Privy Council); cf as well, not related to Pondoland and not directly referring to acts of state *DF Marais v General Officer Commanding the Lines of Communication* [1902] AC 109 (Privy Council); using the expression act of state: *Buron v Denman, Esq* (1848) 154 ER 450 (Court of Exchequer); using the expression act of state: *The Secretary of State for India v Kamachee Boye Sahaba* (n 76); using the expression act of state: *West Rand Central Gold Mining Co Ltd v The King* [1905] 2 KB 391 (King's Bench Division); William Moore, *Act of state in English law* (E P Dutton and Company 1906) 3.

96 Moore (n 95) 5 ff.

97 Ibid 1 f.

98 Ibid 2 [my emphasis and adjustments].

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into a question of how far inter-state relations exclude municipal issues normally within the jurisdiction of the courts. Moore's attempted systematization of these cases would soon migrate into English international law books and thoroughly root the notion of deference in English foreign relations law.

c) South African adoption of English foreign relations law

aa) Older South African constitutions

South African law started its independent jurisprudence at the beginning of the 20th century.[99] The South Africa Act of 1909[100] set up the first South African constitution, unifying the two British colonies of the Cape of Good Hope and Natal and the territory of the two formerly independent Boer Republics, the South African Republic (Transvaal) and the Orange Free State (Orange River Colony) in the aftermath of their defeat in the Second Anglo-Boer War. It established a Governor-General as the King's representative and legislative independence for most internal matters. The power of parliament to legislate was limited by safeguard provisions allowing the King to annul laws[101] and subject to the British Colonial Laws Validity Act from 1885,[102] voiding all laws contrary to acts of the UK parliament.[103]

External relations for the time being remained in the hands of the Empire, and only gradually did South Africa gain sovereignty over its foreign policy. The Imperial Conference of 1911 established that dominions should at least be consulted before international obligations affecting their status were entered into.[104] Nevertheless, when the UK went to war with Germany in 1914, all dominions were regarded as having shared this status automatically.[105] On the other hand, the First World War also brought greater inde-

99 Of course the British colonies before this point also had their own jurisprudence, which however was closely tied to the English system. The Boer Republics had their independent legal systems.
100 South Africa Act (1909).
101 Especially ibid Section 64 and Section 65.
102 Colonial Laws Validity Act (1865).
103 Cf as well Iain Currie and Johan de Waal, *The new constitutional and administrative law: Volume 1 – Constitutional Law* (Juta 2001) 44.
104 Henry J May, *The South African Constitution* (3rd edn, Juta 1955) 203.
105 Ibid.

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pendence, with South Africa prominently represented by its future Prime Minister Jan Smuts in the Imperial War Cabinet.[106] He would later sign the treaty of Versailles on behalf of South Africa (and famously would be the only person to sign peace treaties after both World Wars).[107] Likewise, South Africa became a founding member of the League of Nations.[108] Complete internal and external independence was nevertheless only gained with the Statute of Westminster 1931,[109] repealing the Colonial Laws Validity Act and granting power to the dominion parliaments to make laws having extra-territorial operation.[110] Adopting these changes, the South African Parliament passed the Status of the Union Act 1934,[111] stating that the power to conduct 'any aspect of its domestic or external affairs'[112] is now vested in the King, represented by his Governor-General, acting on the advice of his ministers. Like in the English system, this meant that effectively the executive government was now in charge, acting in the name of the King.[113]

With these powers of the King, in the English tradition, now the concept of royal prerogatives,[114] including the conduct of foreign affairs like declarations of war,[115] the making of treaties,[116] or the appointment of ambassadors,[117] also became part of the executive power, albeit without being explicitly referred to in the Status of the Union Act.[118] This changed in 1961 with the Republic of South Africa Constitution Act,[119] South Africa's second constitution, under which it left the Commonwealth and, as the name implies, became a republic. Theoretically, this could have meant the end of the concept of prerogatives in South Africa, which was, however, not the case. Instead, to a vast extent, the constitutional structure followed

106 Ibid.
107 Ibid; the treaties of the Paris Peace Conference (1919–1920) and the Paris Peace Treaties (1947).
108 Ibid.
109 Statute of Westminster 1931 Section 2.
110 Ibid Section 3.
111 Status of the Union Act 1934.
112 Ibid Section 4 (1).
113 May (n 104) 203, 205 f.
114 Ibid 202.
115 Ibid 205 f.
116 Ibid 210 ff.
117 Ibid 214.
118 Gretchen Carpenter, *Introduction to South African Constitutional Law* (Butterworths 1987) 174.
119 Republic of South-Africa Constitution Act 32 of 1961.

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the former Westminster framework, replacing the former 'governor-general' with the state president. Section 7 (2) of the Act then explicitly pointed out that the powers of appointing ambassadors,[120] making treaties,[121] or declaring war[122] are vested in the president. Moreover, it stated that the state president now has 'such powers and functions as were immediately prior to the commencement of this Act possessed by the Queen by way of prerogative'.[123] The prerogatives thus survived the constitutional change largely unaltered.[124] This also holds for South Africa's third and last apartheid constitution, brought into force by the Republic of South Africa Constitution Act of 1983.[125] The act infamously established a tricameral parliament with one chamber for 'whites,' one for 'coloureds,' and one for 'indians'.[126] 'Black' people were supposed to be represented in their own (semi)independent 'homeland' states ('Bantustans'), which were an artificial creation to strip them of South African citizenship.[127] Concerning the prerogative, again, the powers were transferred to the new system. Section 6 of the new constitution was a mere 'carbon copy'[128] of the former Section 7, providing for the same powers in foreign affairs and again stating that the state president has 'such powers and functions as were immediately before the commencement of this Act possessed by the state president by way of prerogative'.[129] In terms of the prerogative, the older South African constitutions thus showed a remarkable continuity, and the thesis will thus in the following only distinguish between them where they deviate.

Together with the prerogatives, the notion of deference migrated into the South African system. Under all three constitutions, the courts made references to the acts of state, e.g. in *Sachs v Dönges*[130] (1909 Constitution), *S v Devoy*[131] (1961 Constitution), and *Boesak v Minister of Home Affairs*

120 Ibid Section 7 (3) (d).
121 Ibid Section 7 (3) (g).
122 Ibid Section 7 (3) (i).
123 Ibid Section 7 (4).
124 Cf as well Carpenter (n 118) 174; Dion A Basson and Henning P Viljoen, *South African Constitutional Law* (Juta 1988) 42.
125 Republic of South Africa Constitution Act 110 of 1983.
126 Currie and Waal (n 103) 56.
127 Ibid 54.
128 Carpenter (n 118) 174.
129 Republic of South Africa Constitution Act (n 125) Section 6 (4); cf as well Carpenter (n 118) 174; Basson and Viljoen (n 124) 42.
130 *Sachs v Dönges NO* 1950 (2) SA 265 (A) (Appellate Division).
131 *S v Devoy* 1971 (3) SA 899 (A) (Appellate Division).

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and Another[132] (1983 Constitution) and their possible effect of rendering a dispute in the area of foreign affairs non-justiciable.[133] The judgements often directly referred to English case law and scholars.[134] Moreover, South African authors like Sanders,[135] Booysen,[136] and others[137] endorsed the doctrine as part of the South African legal system. South Africa thus inherited crown prerogatives and the notion of deference from English law.

bb) The new South African Constitution

The democratic change and end of apartheid in South Africa came in two steps. First, an interim constitution was issued in 1993, which paved the way for the current South African Constitution in 1996. What did these changes mean for the fate of the prerogatives?

The interim constitution vested the executive power in the president 'subject to and in accordance with the constitution'.[138] Following the tradition of former constitutions, the interim constitution listed the president's powers in Section 82 (1), among them again the power to appoint ambassadors and negotiate and sign treaties.[139] In contrast to the older constitutions, a direct reference to prerogatives is missing. The same holds for the current South African Constitution from 1996. Like the interim constitution, it lists executive functions, like the appointment of ambassadors.[140] The capacity to negotiate and sign treaties is now closely tied to parliament[141] but still in the power of the executive.[142] The president is also given 'the powers entrusted by the Constitution and legislation, including those necessary

132 *Boesak v Minister of Home Affairs and Another* 1987 (3) SA 665 (C) (Cape Provincial Division).
133 For further cases cf Carpenter (n 118) 172 f; and Basson and Viljoen (n 124) 42 ff.
134 Cf ibid.
135 AJGM Sanders, 'Our State Cannot Speak with Two Voices' (1971) 88 South African Law Journal 413; AJGM Sanders, 'The Justiciability of Foreign Policy Matters under English and South African Law' (1974) 7 Comparative and International Law Journal of Southern Africa 215.
136 Hercules Booysen, *Volkereg – 'n Inleiding* (Juta 1980) 229, 255; Carpenter (n 118) 172 fn 11.
137 Cf as well Carpenter (n 118) 172 ff; Basson and Viljoen (n 124) 41 ff.
138 Interim Constitution of South Africa 1993 Section 75.
139 Although Section 231 demanded much stronger involvement of parliament.
140 Constitution of the Republic of South Africa 1996 Section 84 (2).
141 Cf in detail below Chapter 4, I., 3., b), bb).
142 Constitution of the Republic of South Africa 1996 Section 231.

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to perform the functions of Head of State and head of the national executive'.[143] Moreover, the new Constitution provides that all law in force when the Constitution took effect continues in force unless it is repealed by an act of parliament or is inconsistent with the new constitution.[144] Whether these latter two provisions once more provide for the survival of crown prerogatives until today remains an open question. It appears that a textual analysis alone cannot settle the question convincingly.[145] In their case law, the courts seem to be undecided as to whether the old prerogatives and, with them, deference have survived.[146] The same is true for scholars:[147] the fate of the crown prerogatives and the problem of judicial review in foreign affairs are still debated, and this thesis will shed light upon these questions in the course of its examination.

2. United States of America

As we have seen, South Africa explicitly relied on English precedent in foreign affairs cases even after it became a republic. In contrast, the extent to which English law or the ideas of Hobbes and Locke guide the law of the United States is much more controversial. It is part of a general academic debate if foreign affairs powers were intended to and should be placed within the president, the Congress, or shared between these institutions.[148] It is beyond the ambit of this thesis to try to settle this issue. Instead, this part, as with South Africa, will trace where and when the ideas of the leading role of the executive and the notion of deference spread within United States law.

143 Ibid Section 84 (1).
144 Ibid schedule 6 Section 2 (1).
145 Cf in more detail below Chapter 3, II., 1.
146 Cf in more detail below Chapter 3, II., 1.
147 Cf authors cited in Chapter 3 (n 880) and (n 881).
148 For an overview of different positions cf Prakash and Ramsey (n 33) 237 who themselves would come up on the executive side of the argument.

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a) A new idea of separation of powers in foreign affairs: Continental Congress and Constitutional Convention

With the beginning of the revolutionary period, the former British colonies organised their governance independently from the crown by establishing the Continental Congress with delegates from the different colonies.[149] In its second meeting, the Congress (1775–1781) passed the Articles of Confederation,[150] which would serve as America's first national constitution, followed by the US Constitution in 1787. In contrast to the United Kingdom, which started with an absolute monarchy, which then conceded more and more powers to parliament, the situation in the United States was the other way around.[151] Its first government was an almighty assembly possessing executive and legislative powers.[152] Amongst these was also the complete tableau of foreign affairs like the sending or receiving of ambassadors, entering into treaties, declaring war, or issuing letters of marque and reprisal.[153] Every crucial foreign policy decision was thus subject to legislative deliberation.[154] The states had only been given residual competences, for example, in cases of an immediate attack.[155]

The challenge faced by the delegates of the Philadelphia Convention, charged with developing a new constitution, was thus deciding how far the powers now owned by the legislative should be transferred to newly created other branches of government.[156] A proposal stated within the Virginia plan[157] to attribute to the executive 'besides a general authority to execute the National laws, […] the Executive rights vested in Congress by the Confederation'[158] caused strong objections by the delegates, which shows a

149 The first Congress from 1774 did not include delegates from Georgia.

150 Articles of Confederation and Perpetual Union, created 15 November 1777, ratified 1 March 1981.

151 Louis Fisher, *The Law of the Executive Branch: Presidential Power* (OUP 2014) 264 f.

152 Ibid 264.

153 Cf especially Articles of Confederation and Perpetual Union (n 150) Articles 6, 9; certain powers like the right of self-defence were however left to the individual states; Fisher (n 151) 364 f.

154 Bestor (n 90) 568.

155 Ibid 567.

156 Ibid 570.

157 The discussions in Philadelphia produced four large plans, the Virginia Plan, the New Jersey Plan, Hamilton's Plan and Pickney's Plan, cf Max Farrand, *The Records of the Federal Convention of 1787 Vol. 3* (Yale University Press 1911).

158 Max Farrand, *The Records of the Federal Convention of 1787 Vol. 1* (Yale University Press 1911) 21.

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clear departure from the British model of executive prerogatives.[159] Charles Pinckney (South Carolina) was afraid that 'the Executive powers of (the existing) Congress might extend to peace & war &c which would render the Executive a Monarchy, of the worst kind, towit an elective one'.[160] In the same vein, James Wilson (Pennsylvania) 'did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers. Some of these prerogatives were of a Legislative nature. Among others that of war & peace &c'.[161] Not even the Hamilton plan, which was called the 'British Plan' for its close orientation towards the Westminster system, gave all foreign affairs powers formerly part of the prerogative to the executive but split them between the executive and the Senate.[162] This was the way finally chosen by the Committee of Detail in constructing the first draft of the constitution. It considered whether a specific power formerly vested in Congress was functionally of legislative nature and, if not, allotted it to the newly created executive or judicative branch.[163]

This process resulted in the final constitution giving certain express foreign affairs powers to Congress and others to the executive. Under Article 1 (8) of the US Constitution, the Congress has the power

> *[…] To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;*
> *[…] To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;*
> *To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;[…]*

For the president, Article 2 (3) of the US Constitution provides

> *[…] The President shall be commander in chief of the Army and Navy of the United States*
> *[…] He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur; and*

159 Bestor (n 90) 575.
160 Farrand, *Records Vol. 1* (n 158) 64 f; cf as well Bestor (n 90) 575.
161 Farrand, *Records Vol. 3* (n 157) 65 f; cf as well Bestor (n 90) 575.
162 Farrand, *Records Vol. 3* (n 157) 622 § 8; Bestor (n 90) 589; Curtis Bradley and Martin Flaherty, 'Executive Power Essentialism and Foreign Affairs' (2004) 102 Michigan Law Review 545, 596.
163 Bestor (n 90) 593.

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> *he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls […]*[164]

Although using almost the exact same terminology as Blackstone,[165] the text of the new constitution marks an apparent deviation from the 'British approach'. Blackstone lists almost all powers now in the hands of the legislative branch (Congress or Senate) as executive royal prerogatives. Moreover, during the ratification debates, it became clear that the executive of the new constitution was not equal in powers to the British Monarch. In Federalist No. 69,[166] Hamilton compared the foreign affairs powers of the British king and the new presidency and marked out the differences, especially concerning declarations of war and the making of treaties.[167] Nevertheless, it has been argued in more recent times that the president enjoys further foreign affairs powers by virtue of Article 2 (1) of the US Constitution, which states that '[t]he executive power shall be vested in a President of the United States of America'.[168] Proponents of this 'vesting clause thesis'[169] argue that the framers understood 'executive power' to encompass the 'foreign affairs prerogatives'. Hence, all foreign affairs powers not explicitly given to Congress should be vested in the president. Given the apparent deviation of the new constitutional framework from the British concept of royal prerogatives in foreign affairs, it is unlikely that the founders harboured such a view. Their idea of 'executive power' is not to be equated with the British concept.[170] The 'vesting clause thesis'

164 [My omissions].

165 Blackstone's writings were of course well known and thus served as a starting point for the framers Phillip R Trimble, *International law: United States foreign relations law* (The Foundation Press 2002) 19.

166 Alexander Hamilton, 'Number LXIX' in Erastus H Scott (ed), *The Federalist and other constitutional papers* (digitized version, Albert, Scott & Co 1894) 377 ff.

167 Ibid 379 ff; Fisher (n 151) 265.

168 Haywod J Powell, 'The President's Authority Over Foreign Affairs: An Executive Branch Perspective' (1999) 67 George Washington Law Review 527; cf especially Prakash and Ramsey (n 33); Trimble (n 165) 10 ff; John C Yoo, 'War and the Constitutional Text' (2002) 69 University of Chicago Law Review 1639, 1676 ff.

169 Aptly called 'royal residuum thesis' by Julian D Mortenson, 'Article II Vests Executive Power, Not the Royal Prerogative' (2019) 119 Columbia Law Review 1169, 1181.

170 Bestor (n 90) 601.

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has been thoroughly rebutted[171] but proved influential in US constitutional thought.[172]

b) Early constitutional practice and first traits of the traditional position

The birthplace of the traditional position in the US thus cannot be found in the drafting era. Nevertheless, the idea of executive dominance in foreign affairs and judicial deference also developed in the United States. The first seeds are visible in Alexander Hamilton's 'Pacificus' letters, written four years after the enactment of the constitution.[173] In these pamphlets, he defends the legality of Washington's proclamation to stay neutral during the post-French Revolution wars in Europe. He argues for the executive as 'the *organ* of intercourse between the Nation and foreign Nations'[174] and bases his reasoning inter alia on the vesting clause,[175] purporting that except for the powers explicitly conferred to Congress 'the EXECUTIVE POWER of the Union is completely lodged in the president'.[176] Moreover, he gives control over the interpretation of treaties to the president. Although he acknowledges the judiciary's power to interpret treaties, he states that, in controversies, the executive is the 'interpreter of the National Treaties in those cases in which the Judiciary is not competent, that is in the cases between Government and Government'.[177] Like Blackstone, he holds that when the conflict is purely between states, the judiciary has no say in the matter. Hamilton's view in the 'Pacificus' clearly deviates from his previous position during the Philadelphia Convention and the ratification debates,[178] an inconsistency also noted by his contemporaries. Thomas Jefferson strongly urged James Madison to write a reply: 'Nobody answers him, & his doctrine will therefore be taken for confessed. For god's sake,

171 Especially considering that the clause was introduced by Wilson who clearly opposed the British concept, see Prakash and Ramsey (n 33) 284; for a thorough rebuttal of the 'vesting clause thesis' see Bradley and Flaherty (n 162) f; Mortenson (n 169).
172 Mortenson (n 169) 1182 ff.
173 Bestor (n 90) fn 190.
174 Alexander Hamilton and James Madison, *The Pacificus-Helvidius Debates of 1793–1794* (Liberty Fund 2007) 11 [italics in the original].
175 Ibid 12 ff.
176 Ibid 13 [capital letters in the original].
177 Ibid 11.
178 Bradley and Flaherty (n 162) 682.

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my dear Sir, take up your pen, select the most striking heresies, and cut him to pieces in the face of the public'.[179] Madison, following this call, wrote five letters arguing against Hamilton under the alias of 'Helvidius,'[180] thereby frequently quoting Hamilton's earlier statements in the Federalist papers.[181] In his view, Hamilton borrowed improperly from the British example;[182] refuting Hamilton's new ideas, he asks, 'Whence then can the writer have borrowed it? There is but one answer to this question. The power of making treaties and the power of declaring war, are *royal prerogatives* in the *British government*, and are accordingly treated as Executive prerogatives by *British commentators*'.[183] Indeed, it appears fair to say that Hamilton, who has always been a supporter of a strong executive and the British system, subsequently reinterpreted the foreign affairs articles of the constitution in the light of the British model and thus helped to introduce a British understanding of foreign affairs powers to the US constitutional system.[184] With his 'Pacificus' letters, he makes one of the first legal arguments for executive dominance in foreign affairs under the new US Constitution and hints at a deferential role for the courts.[185] Proponents of a strong executive role and the 'vesting clause thesis' often cite his remarks.[186]

Another essential piece of the puzzle, which, as we will see later, completes the picture of deference, lies in John Marshall's speech[187] in front of Congress concerning the fate of Jonathan Robbins. Robbins, a British subject, was charged with murder following a mutiny on a British ship and extradited by President John Adams according to the Jay Treaty (a British-American friendship treaty in the aftermath of the American Revolution) causing opposition in the House of Representatives.[188] Defending Adams's behaviour in Congress, Marshall stated: 'The President is the sole organ of

179 Letter to Madison, Hamilton and Madison (n 174) 54.
180 Ibid 55 ff.
181 Bestor (n 90) fn 259.
182 Hamilton and Madison (n 174) 63; Bradley and Flaherty (n 162) 684.
183 Hamilton and Madison (n 174) 63 [italics in the original].
184 Henry P Monaghan, 'Protective Power of the Presidency' (1993) 93 Columbia Law Review 1, 49.
185 For Hamilton's role as father of American realism cf Robert Knowles, 'American Hegemony and the Foreign Affairs Constitution' (2009) 41 Arizona State Law Journal 87, 117.
186 Mortenson (n 169) 1172.
187 (Congressman at that time).
188 Ruth Wedgwood, 'The Revolutionary Martyrdom of Jonathan Robbins' (1990) 100 Yale Law Journal 229, 235 ff.

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the nation in its external relations, and its sole representative with foreign nations. Of consequence, the demand for a foreign nation can only be made on him'.[189] In contrast to Hamilton, Marshall did not claim inherent foreign affairs powers for the president but held that he acted upon a treaty being part of the supreme law of the land.[190] His characterization of the president as 'sole organ,' as we shall see, would soon be taken out of context and used to establish the idea of executive dominance in foreign affairs.[191]

c) Early traces of the traditional position in the Supreme Court

The idea of a special role for the executive and judicial deference slowly made its way into the Supreme Court's jurisprudence. In *Ware v Hilton*,[192] concerning the question of whether a treaty between the US and Great Britain had been violated and was voidable, the concurring opinion mentioned that '[t]hese are considerations of policy, considerations of extreme magnitude, and certainly entirely incompetent to the examination and definition of a Court of Justice'.[193] The explicit acknowledgment of areas outside the ambit of judicial cognisance ironically came about in the same case that established judicial review of legislative acts for the first time. In *Marbury v Madison*,[194] John Marshall, then chief justice, declared an act assigning original jurisdiction to the Supreme Court, contrary to Article 3 (2) US Constitution, to be void. In an almost mythological dialectic, the court not only introduced judicial review but also, as its twin, gave birth to the 'political question doctrine,' the idea that certain acts of the executive (or legislative) branches are out of judicial reach. In the words of Justice Marshall:

> *[W]hether the legality of an act of the head of a department be examinable in a court of justice or not, must always depend on the nature of that act. […] By the constitution of the United States, the President is invested with*

189 United States Congress, *Abridgment of the Debate of Congress from 1789 to 1856 – vol II* (digitized version, D Appleton and Company 1856) 466.
190 Fisher (n 151) 267.
191 Ibid 266.
192 *Ware v Hylton* 3 US 199 (1796) (US Supreme Court).
193 Ibid 260; cf as well Jide Nzelibe, 'The Uniqueness of Foreign Affairs' (2004) 89 Iowa Law Review 947.
194 *Marbury v Madison* 5 US 137 (1803) (US Supreme Court).

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> *certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience.*[195]

This particular type of 'political acts' bears an apparent resemblance to the royal prerogatives only within the king's discretion. As Marshall explained, they can mostly be found in the area of foreign affairs:

> *The application of this remark will be perceived by adverting to the act of congress for establishing the department of foreign affairs. This office, as his duties were prescribed by that act, is to conform precisely to the will of the President. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts.*[196]

The Marshall court, in subsequent foreign affairs cases, went on to develop the doctrine. In *Foster v Neilson*,[197] the question arose whether the United States had acquired a piece of land from Spain. In interpreting the treaty, Justice Marshall stated

> *After these acts of sovereign power over the territory in dispute, asserting the American construction of the treaty by which the government claims it, to* ***maintain the opposite construction in its own courts would certainly be an anomaly*** *in the history and practice of nations. If those departments which are entrusted with the foreign intercourse of the nation, which assert and maintain its interests against foreign powers, have unequivocally asserted its rights of dominion over a country of which it is in possession, and which it claims under a treaty; if the legislature has acted on the construction thus asserted, it is not in its own courts that this construction is to be denied. A question like this respecting the boundaries of nations, is, as has been truly said, more a political than a legal question; and in its discussion, the courts of every country must respect the pronounced will of the legislature.*[198]

Importantly, Marshall places great emphasis on the position of both the executive and the legislative. In another case, the Cherokee Nation invoked

195 Ibid 165 ff [my adjustments and omissions].
196 Ibid 166.
197 *Foster v Neilson* 27 US 253 (1829) (US Supreme Court).
198 Ibid 309 [my emphasis].

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a treaty with the US to prevent the application of US law in its territory.[199] Justice Johnson explicitly relied on the English Nabob cases[200] to dismiss the claim, which exemplifies the 'use of British case law to plant the political-question doctrine on American soil'.[201] In the early years of its existence, the notion of deference thus became part of the Supreme Court's jurisprudence,[202] albeit without developing into a consistent approach.[203] Moreover, the doctrine was applied rather narrowly. As already alluded to in *Marbury v Madison*,[204] when private rights were touched on, courts decided even in highly political cases.[205] This approach was in line with the prevalent position in US jurisprudence by the end of the 19th century holding that questions of law and policy could be distinguished rather clearly.[206]

d) The late victory of deference: from Quincy Wright to Sutherland

This late 19th century position fell under pressure with the beginning of the 20th century,[207] as depicted by Quincy Wright, who wrote one of the first comprehensive monographs on American foreign relations law.[208] In his *Control of American Foreign Relations*,[209] Wright remarks that 'no definite

199 *The Cherokee Nation v Georgia* 30 US 1 (1831) (US Supreme Court).
200 Ibid 29; cf above, this Chapter, II., 1., b).
201 Thomas M Franck, *Political questions, judicial answers: Does the rule of law apply to foreign affairs?* (Princeton University Press 1992) 12.
202 Cf as well *Luther v Borden* 48 US 1 (1849) (US Supreme Court) albeit a rather 'domestic' case, it entails remarks concerning the recognition of governments and acknowledges the limitations of judicial review.
203 Nzelibe (n 193) 947; Ariel N Lavinbuk, 'Rethinking Early Judicial Involvement in Foreign Affairs: An Empirical Study of the Supreme Court's Docket' (2005) 114 Yale Law Journal 857, 889 ff.
204 *Marbury v Madison* (n 194) 170: 'The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court'.
205 G Edward White, 'The Transformation of the Constitutional Regime of Foreign Relations' (1999) 85 Virginia Law Review 1, 36.
206 Ibid 26 ff, 36.
207 Ibid 8 ff.
208 Curtis A Bradley, 'What is foreign relations law?' in Curtis A Bradley (ed), *The Oxford Handbook of Comparative Foreign Relations Law* (OUP 2019) 3, 11.
209 Quincy Wright, *Control of American Foreign Relations* (The Macmillan Company 1922).

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line has ever been drawn between principles of international law and treaty provisions which are of a political character and those which are of a legal character'.[210] Perhaps unsurprisingly, around the same time in international law, a debate over justiciability ensued, triggered by the arbitration clause of the League of Nations Covenant and the question of which disputes are 'suitable for submission to arbitration'.[211] In US foreign relations law, Quincy Wright named several cases (e.g., cessation of territory, recognition of states and governments) in which 'the courts ordinarily follow the decisions of the political organs'.[212] According to him, 'political questions' remain confined to these traditional areas.[213] Wright also acknowledges a leading role for the president: 'In foreign affairs […] the controlling force is the reverse of that in domestic legislation. The initiation and development of details is with the president, checked only by the veto of the Senate or Congress upon completed proposals'.[214] It is worth noting that the president's power is not unchecked by the legislative branch. Quincy Wright's account of foreign relations thus marks the transition period between the 'orthodox' 19th century approach and the developments to come in the 20th century.[215]

The first cracks in the armour of the old 'orthodox' approach, which also stressed states' competences,[216] became visible in *Missouri v Holland*.[217] The Supreme Court decided that the government acting on a treaty could override state laws and thus strengthened federal competences.[218] The pinnacle of executive dominance in foreign affairs came about 16 years later

210 Ibid 172; cf as well White (n 205) 37.

211 The most prominent adversaries in this international law debate were certainly Hersch Lauterpacht arguing for the aptness of judicial settlement in general, Hersch Lauterpacht, *The Function of Law in the International Community* (first edition published 1933, OUP 2011) 147 ff and Hans Morgenthau emphasizing that some issues were too political for judicial dispute settlement, Hans Morgenthau, *Die Internationale Rechtspflege, ihr Wesen und ihre Grenzen* (Noske 1929) 72 ff; cf Martti Koskenniemi, 'The Function of Law in the International Community: 75 Years After' (2008) 79 British Yearbook of International Law 353, 355; Oliver Jütersonke, 'Hans J. Morgenthau on the Limits of Justiciability in International Law' (2006) 8 Journal of the History of International Law 181; Martti Koskenniemi, *The Gentle Civilizer of Nations* (CUP 2009) 361 ff, 366, 440 ff.

212 Wright (n 209) 173.

213 Ibid 38, 44.

214 Ibid 149 f [my omission]; cf as well White (n 205) 43.

215 Ibid 42 ff.

216 Ibid 21 ff.

217 *Missouri v Holland* 252 US 416 (1920) (US Supreme Court).

218 White (n 205) 62 ff.

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in *Curtiss Wright*.[219] By joint resolution, Congress had delegated broad discretionary power to the president to regulate the arms trade with countries taking part in the Chaco War between Bolivia and Paraguay. Wright Export Corp. sold arms to Bolivia and was subsequently convicted for violating a presidential proclamation based on the resolution. It challenged the resolution as an unconstitutional delegation of legislative power to the president. The case finally reached the Supreme Court. Justice Sutherland delivered the majority opinion and introduced his concept of executive dominance in foreign affairs, which he had developed in an essay in 1909[220] and at a series of lectures given at Columbia University.[221] He upheld the delegation, which in his opinion, would probably be unconstitutional if only related to domestic affairs,[222] thereby clearly relying on the separation of the internal and the external sphere. As the executive proclamation affected the latter, it could be based not only on a legislative act but also on the special powers of the president in foreign affairs.[223] To establish these extraordinary powers, Sutherland refuted the idea that the government could only resort to powers enumerated in the constitution as 'categorically true only in respect of our internal affairs'.[224] Concerning foreign affairs, '[a]s a result of the separation from Great Britain […] the powers of external sovereignty passed from the Crown […] to the colonies in their collective and corporate capacity as the United States of America'.[225] This theory marks an apparent deviation from the 19th century position, which, although accepting a robust executive role and the absence of judicial review in some instances, saw all powers as flowing from the constitution.[226] Sutherland's approach opened the backdoor already introduced by Locke[227] to go behind the constitution and introduce a mystical notion of natural sovereign power into the constitutional framework: 'Rulers come and go; governments end and forms of government change; but sovereignty survives'.[228] Although Sutherland

219 *United States v Curtiss-Wright Export Corp* 299 US 304 (1936) (US Supreme Court).
220 George Sutherland, 'The Internal and External Powers of the National Government' (1910) 191 North American Review 373.
221 George Sutherland, *Constitutional Powers and World Affairs* (Columbia University Press 1919), cf as well White (n 205) 46 ff.
222 *United States v Curtiss-Wright Export Corp* (n 219) 315.
223 Ibid 320.
224 Ibid 316.
225 Ibid [my adjustments and omissions].
226 White (n 205) 8 ff.
227 See above Chapter 1, I., 2.
228 *United States v Curtiss-Wright Export Corp* (n 219) 316.

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does not explicitly mention royal prerogatives, he is guided by these powers formerly vested in the crown. He cites Marshall's speech in the Robbins case,[229] referring to the president as 'sole organ,' conveniently dropping the following phrase, which implies a limitation of this statement to communicate with foreign governments.[230] According to Sutherland's account, such limitations not only do not apply, but Marshall's quote is bolstered, and the president is awarded 'the very delicate, plenary and exclusive power [...] as the sole organ of the federal government in the field of international relations'.[231] This view appears even more radical than the 'vesting clause' thesis by attributing all foreign affairs powers to the president 'anything to the contrary in this constitution not withstanding'.[232] Such an approach, of course, has serious repercussions for judicial control. As with the English concept of crown prerogatives, Sutherland's concept of extra-constitutional powers implies a very limited role for courts in controlling foreign affairs.[233]

What drove Sutherland to develop such a theory of executive dominance is not entirely clear. He and his contemporaries, without doubt, had been influenced by the changing international landscape after the First World War, which now saw the US as a global power and authoritarian regimes in Russia, Germany, and Italy on the rise.[234] It was also suggested that the court felt the need to make some kind of concession after being heavily criticised for blocking parts of the New Deal legislation.[235] In his personal experience as a Republican representative and senator, Sutherland had witnessed the problems of explaining an increasing number of executive agreements without the Senate's approval, as well as the challenge to Congress' practice in acquiring and governing new territories like Puerto Rico, for which only a thin constitutional basis existed.[236] His concept of extra-constitutional powers provided an easy fix, and his theory influenced a series of decisions, all considerably strengthening the role of the executive: *United*

229 This Chapter, II., 2., b).
230 *United States v Curtiss-Wright Export Corp* (n 219) 319.
231 Ibid 320.
232 White (n 205) 109.
233 Ibid 47, 110.
234 Ibid 102, 148; Sitaraman and Wuerth (n 2) 1913.
235 Louis Henkin, *Foreign affairs and the United States Constitution* (2nd edn, Clarendon Press 1997) 60 f.
236 White (n 205) 28 ff, 51.

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States v Belmont[237] and *United States v Pink*[238] (authorising executive agreements and limiting state's rights)[239] as well as *Ex parte Peru*[240] and *Mexico v Hoffman*[241] (giving the executive influence over immunity questions).[242] This line of decisions, sometimes even referred to as the 'Sutherland Revolution,'[243] firmly established the traditional position in US law. Admittedly, *Curtiss Wright* has been challenged, and judgements like *Youngstown*[244] (denying the president the right to seize steel factories during the Korean War) show that the courts have not entirely acknowledged executive supremacy in foreign affairs. However, although Sutherland's extra-constitutional ideas were soon replaced by functionalist arguments,[245] since Curtiss Wright, the traditional position has been thoroughly rooted in US jurisprudence and proved dominant for most of the 20th century.[246] How it fared in more recent times will be examined in the course of this thesis.

3. Germany

a) Prussian legal thought and constitutional practice

The theories of Hobbes and Locke and other classical scholars[247] were received widely across Europe and also resonated in German legal thought. Hence, it is not surprising that German ideas concerning foreign affairs developed in a similar direction as English jurisprudence.[248]

237 *United States v Belmont* 301 US 324 (1937) (US Supreme Court).
238 *United States v Pink* 315 US 203 (1942) (US Supreme Court).
239 More on executive agreements below Chapter 3, I., 1., a).
240 *Ex parte Republic of Peru* 318 US 578 (1943) (US Supreme Court).
241 *Republic of Mexico v Hoffman* 324 US 30 (1945) (US Supreme Court).
242 White (n 205) 111 ff.
243 Sitaraman and Wuerth (n 2) 1911 ff.
244 *Youngstown Sheet & Tube Co v Sawyer* 343 US 579 (1952) (US Supreme Court).
245 Sitaraman and Wuerth (n 2) 1917.
246 Ibid 1919.
247 Also of course including others like Bodin, Machiavelli or Rousseau.
248 For an early German monograph cf David G Struben, *Gründlicher Unterricht Von Regierungs- Und Justitz-Sachen: Worinn untersuchet wird: Welche Geschäffte ihrer Natur und Eigenschafft nach vor die Regierungs- oder Justitz-Collegia gehören?* (digitized version, Rudolf Schröder 1733); cf remarks by Bolewski, Wilfried M, *Zur Bindung deutscher Gerichte an Äußerungen und Maßnahmen ihrer Regierung auf völkerrechtlicher Ebene: Ein Beitrag zur Verrechtlichung der Außenpolitik* (Marburg

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This connection becomes apparent in the ideas of Georg Wilhelm Friedrich Hegel,[249] who was familiar with and often critical of Locke's ideas.[250] However, concerning foreign affairs, his legal philosophy shows a similar approach.[251] He distinguished sharply between the 'the constitution or right within the state'[252] ('*inneres Staatsrecht*') with reference to the individual state as a 'self-referring organism'[253] and the 'right between states'[254] also often translated as 'external public law'[255] ('*äußeres Staatsrecht*') concerning other states. Hence, Hegel followed a terminology that Georg Friedrich von Martens had introduced in his seminal *Précis du droit des gens moderne de l'Europe*.[256] It is contested if, through the choice of language, Hegel intended to deny the normativity and independence of international law or simply aimed to avoid the term 'ius gentium'.[257] Be that as it may, in his sphere of 'external public law' quite like with the theories of Hobbes

1971) fn 45; cf as well for the ideas of Georg Friedrich von Martens, Martti Koskenniemi, *To the Uttermost Parts of the Earth* (CUP 2021) 936.

249 Wilhelm Grewe, 'Die Auswärtige Gewalt der Bundesrepublik' (1954) 12 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 132; for this part cf as well Gernot Biehler, *Auswärtige Gewalt: Auswirkungen auswärtiger Interessen im innerstaatlichen Recht* (Mohr Siebeck 2005) 40 ff.

250 Cf e.g. Shamsur Rahman, 'Locke's Empiricism and the Opening Arguments in Hegel's Phenomenology of Spirit' (1993) 20 Indian Philosophical Quarterly 2; Jeanne Schuler, 'Empiricism without the dogmas: Hegel's critique of Locke's simple ideas' (2014) 31 History of Philosophy Quarterly 347.

251 Biehler (n 249) 41; the same is true for Georg Friedrich von Martens, Koskenniemi, *To the Uttermost Parts* (n 248) 930 ff, 946.

252 Georg W F Hegel, *Outlines of the Philosophy of Right* (first published 1820, OUP 2008) § 259.

253 Ibid.

254 Ibid.

255 Koskenniemi, *To the Uttermost Parts* (n 248) 930 ff.

256 Georg Friedrich von Martens, *Précis du droit des gens moderne de l'Europe, fondé sur les traités et l'usage. Pour servir d'introduction à un cours politique et diplomatique* (digitized version, 2nd edn, Goettingen 1801) § 4 'droit public exterieur'; Koskenniemi, *To the Uttermost Parts* (n 248) 938 f.

257 Hegel has often been cited as 'Völkerrechtsleugner', citing Hegel in this direction Anne Peters and Bardo Fassbender 'Prospects and Limits of a Global History of International Law: A Brief Rejoinder' (2014) 25 EJIL 337, 340 fn 5; in the same vein Bruno Simma and Alfred Verdross, *Universelles Völkerrecht* (3rd edn, Duncker & Humblot 1984) 15 § 20, however more differentiating towards the end of § 20; doubtful Sebastian M Spitra, 'Normativität aus Vernunft: Hegels Völkerrechtsdenken und seine Rezeption' (2017) 56 Der Staat 593, 594; doubtful as well Sergio Dellavalle, 'Hegels Äußeres Staatsrecht: Souveränität und Kriegsrecht' in Rüdiger Voigt (eds), *Der Staat – eine Hieroglyphe der Vernunft* (Nomos 2009) 177, 178; without doubt, Hegel has been used to deny international law's normativity by

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and Locke, states remain in a state of nature without a higher power above them and there is a permanent danger of wars.[258] As a proponent of a constitutional monarchy,[259] within the state, Hegel distinguished between legislative power, governmental power and the 'principal (or monarchical) power'[260] (*fürstliche Gewalt*). He attributes the subject of foreign affairs to the latter:

> *The state's orientation towards the outside stems from the fact that it is an individual subject. Its relation to other states therefore falls to the power of the crown. Hence it directly devolves on the monarch, and on him alone, to command the armed forces, to conduct foreign affairs through ambassadors etc., to make war and peace, and to conclude treaties of all kinds.*[261]

Again, the reference to the state who acts as an individual subject towards other states showcases the Hobbesian influence. Moreover, Hegel also mentions that the 'idea of right as abstract freedom'[262] is placed within the inner sphere, thus establishing that the outer sphere is not subject to the regular laws of the state.[263] In his philosophy, he thus reflects all three notions of the traditional position.

From Hegel's account on, German scholarship of the early 19th century widely accepted the idea of foreign affairs as a field of monarchical power.[264] At that time, the territory of today's Germany was ruled by a plethora of different principalities, with Prussia and Austria competing for hegemony. In Prussia, different legislative instruments were used to safeguard the dominant role of the executive in foreign affairs. As early as in 1793, the 'Procedural Code for the Prussian States' stipulated that the arrest of a foreign consul is only possible with the permission of the

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authors like Philipp Zorn and Adolf Lasson, see Schorkopf (n 88) 596 with further references.

258 Hegel (n 252) § 333; Koskenniemi, *To the Uttermost Parts* (n 248) 947.

259 At least in his later years, in his early years he supported the French revolution but was later appalled by the violent course of events.

260 Georg W F Hegel, *Grundlinien der Philosophie des Rechts* (first published 1820, Duncker & Humblot 1933) § 273 [my translation].

261 Hegel, *Philosophy of Right* (n 252) § 329.

262 Ibid § 336.

263 Dellavalle (n 257) 177, 190; Hegel, *Philosophy of Right* (n 252) § 278; Biehler (n 249) 41; Koskenniemi, *To the Uttermost Parts* (n 248) 947.

264 Frank Schorkopf, *Staatsrecht der internationalen Beziehungen* (CH Beck 2017) 583.

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foreign department.[265] The 'Royal-Prussian decree concerning cases of contentious treaty interpretation'[266] passed in 1823 strengthened the role of the executive even more.[267] It provided that concerning the interpretation of a treaty, the application of two concurrent treaties, or the validity of a treaty, the courts should request the binding opinion of the Prussian Minister of Foreign Affairs.[268] The decree even applied to treaties to which Prussia was not a party. As rationale, the decree stated that concerning treaties and their underlying motives, standard rules of interpretation are not applicable. Certain interpretations could be seen as a violation of the treaty by other states, and the government would have better access to negotiation papers. The executive, in general, would be better positioned to gain the necessary knowledge to put a contentious formulation into context. Courts accepted and applied the decree.[269] For example, the Duke of Rovigo tried to receive compensation payments from the Prussian state related to territorial exchanges in the wake of Napoleonic wars, but the courts turned down his claim referring to a binding interpretation of the Treaty of Paris[270] by the Ministry of Foreign Affairs.[271] Contemporary scholars in part welcomed the decree,[272] but it was heavily criticised at large.[273] The main point of critique was that the executive now performed core judicial functions like interpretation and application of the law.[274] This resistance

265 Allgemeine Gerichtsordnung für die Preußischen Staaten 1795, § 65; Bolewski (n 248) 47 fn 1.

266 Königlich preußische Verordnung wegen streitig gewordener Auslegung von Staatsverträgen vom 25. Januar 1823, Gesetzessammlung für die königlich preußischen Staaten 1823, 19.

267 For an analysis of the decree cf especially Bolewski (n 248) 45 ff; cf as well Biehler (n 249) 51 ff.

268 Königlich preußische Verordnung (n 266) 50.

269 Bolewski (n 248) 53.

270 Treaty of Paris 1814.

271 Johann L Klüber, *Die Selbstständigkeit des Richteramtes und die Unabhängigkeit seines Urtheils im Rechtsprechen: im Verhältniß zu einer preussischen Verordnung vom 25. Jänner 1823* (Andreä 1832) 93, 122.

272 Friedrich Weidemann, *Hat seine Majestät, der König von Preußen, das Recht, die Entscheidung der Gerichtsbehörden bei Auslegung von Staatsverträgen von den Äußerungen des Ministeriums der auswärtigen Angelegenheiten abhängig zu machen? Eine polemisch affirmativ beantwortete Frage gegen die negative Behauptung des Publicisten Johann Ludwig Klüber* (Merseburg 1832); Romeo Maurenbrecher, *Grundsätze des heutigen deutschen Staatsrechts* (Frankfurt am Main 1837) 342, cf Bolewski (n 248) 48 fn 2.

273 Klüber (n 271); for further references see Bolewski (n 248) 48 fn 3.

274 Bolewski (n 248) 50.

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was fuelled by the Prussian tradition that civil courts could decide on prejudicial questions even if they were part of constitutional law.[275] Due to the heavy criticism, the decree was replaced by a new order in 1843.[276] It now merely demanded that in contentious cases relating to the validity, application, or interpretation of a treaty, the necessary information for the application of the law should be requested from the Ministry of Foreign Affairs.[277]

Another Prussian institution establishing the influence of the executive over foreign affairs was the 'Prussian Court of Competence Conflicts'[278] founded in 1847,[279] which on the application of the executive, decided whether a court was competent to hear a case or whether it remained in the sole discretion of the administrative agencies. It soon developed jurisprudence which excluded certain executive acts in foreign affairs from civil proceedings.[280] This approach applied to territorial claims based on treaties,[281] and the court, in several cases, denied a claim by Count von Pappenheim,[282] based on the Congress of Vienna settlement, for not being justiciable. It referred[283] to a 'Cabinet Order'[284] issued in 1831, which held that 'private objection against an act of the sovereign is not possible'[285] and that 'as the sovereign in exercising his sovereign rights is not subject to any jurisdiction, he also is not to be held judicially accountable for the

275 Bolewski (n 248) 52.
276 Gesetz-Sammlung für die königlich preußischen Staaten 1843, 369.
277 Bolewski (n 248) 53.
278 'Preußischer Gerichtshof zur Entscheidung der Kompetenzkonflikte'.
279 Established by the 'statute concerning the procedure in cases of competence conflicts between the courts and administrative agencies from 8 April 1847' ('Gesetz über das Verfahren bei Kompetenzkonflikten zwischen den Gerichten und Verwaltungsbehörden vom 8. April 1847') [my translation].
280 Bolewski (n 248) 55.
281 L Hartmann, *Das Verfahren bei Kompetenz-Konflikten zwischen den Gerichten und Verwaltungsbehörden in Preußen* (Verlag der königlich geheimen Ober-Hofbuchdruckerei 1860) 138; Bolewski (n 248) 55; Biehler (n 249) 53 ff.
282 Bolewski (n 248) 55 ff.
283 *Decision from 13 November 1858* (1859) 21 Justizministerialblatt 155 (Court of Competence Conflicts); *Decision from 13 May 1865* (1865) 179 Justizministerialblatt 27 (Court of Competence Conflicts).
284 'Cabinet Order referring to the precise observation of sovereign and fiscal legal relationships' ('Kabinetts-Order betreffend die genauere Beobachtung der Grenzen zwischen landes-hoheitlichen und fiskalischen Rechtsverhältnissen') 1831 [my translation].
285 'daß ein privatrechtlicher Widerspruch wider den Akt des Hoheitsrechts selbst nicht stattfinde' [my translation].

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consequences of exercising his sovereign rights'.[286] A commentary on the Court's jurisprudence[287] refers to an older Bavarian judgment[288] which even applied Hegelian terminology in denying these claims; such acts are said to be part of the 'external public law'[289] and thus not to be decided in courts.[290] In general, these cases show a certain resemblance to the Nabob cases and later British cases[291] in excluding the possibility of enforcing a treaty claim in municipal courts.

As with the decree concerning treaty interpretation, the court's jurisprudence was subject to severe criticism, especially as the exclusion of treaties from judicial review allowed the executive to infringe on private rights by using its foreign affairs power.[292]

b) The German Empire

So far, the focus has been on Prussian state practice. Prussia and the German principalities since 1815 had been loosely joined together in the German Confederation (*Deutscher Bund*), which did not enjoy international legal subjectivity.[293] An attempt to create a sovereign German nation-state in the wake of the German Revolutions of 1848/49 failed. Only when Prussia finally decided the tug of war over hegemony with Austria in its favour in 1866 and founded the North German Confederation was an entity with international legal personality created.[294] The Confederation was succeeded shortly afterward by the German Empire when Prussia won the war with

286 'So wenig der Souverän in Ausübung seiner Hoheitsrechte selbst von der Einwirkung irgend einer Gerichtsbarkeit abhängt, so wenig hat derselbe die Folgen dieses Gebrauchs seiner Rechte in einem gerichtlichen Verfahren zu verantworten […]' [my translation].

287 Otto Stölzel, *Rechtsweg und Kompetenzkonflikt in Preußen* (Franz Vahlen 1901) 90 fn 7; the court continued its work under the Bismarck Constitution, cf below, this Chapter, II., 3., b).

288 *Decision from 18 February 1851* (OAG, Court of Appeals Munich).

289 Ibid, 'äußeres Staatsrecht'.

290 Cf as well Biehler (n 249) 54.

291 *Rustomjee v R* (1876) 2 QBD 69 (Court of Appeal); Holdsworth (n 54) 1316.

292 Bolewski (n 248) 59 with further references; in this direction already Klüber (n 271) 154 f.

293 Schorkopf (n 264) 588.

294 Ibid 590.

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France in 1871.[295] The German Empire was the first constitutional order to cover the whole territory of today's Germany.[296]

Its constitution now codified the idea of foreign affairs as sole executive domain:[297]

> *Art. 11: The Presidency of the Confederation belongs to the King of Prussia, who bears the name of German Emperor. The Emperor has to represent the Empire internationally, to declare war, and to conclude peace in the name of the Empire, to enter into alliances and other Treaties with Foreign Powers, to accredit and to receive Ambassadors.*
> *The consent of the Council of the Confederation is necessary for the declaration of war in the name of the Empire […]*
> *In so far as Treaties with Foreign States have reference to affairs which according to Article IV, belong to the jurisdiction of the Imperial Legislation, the consent of the Council of the Confederation is requisite for their conclusion, and the sanction of the Imperial Diet [Reichstag] for their coming into force.*[298]

It is apparent that the functions given to the emperor mirror those given by Blackstone to the King by virtue of the crown prerogative. The enumeration in the constitution is not conclusive; the term 'represent the Empire internationally' had been taken as a general delegation of foreign affairs power.[299] Parliament had only a minor role to play and was only involved when treaties needed legislative implementation. The non-approval of the Reichstag only had domestic effect.[300] The formerly independent German states represented in the 'Council of the Confederation' had a stronger

295 Ibid.
296 Of course, the territory of the German Empire exceeded the territory of today's Germany.
297 Schorkopf (n 264) 592.
298 Article 11 Constitution of the German Empire 1871, translation available at <https://en.wikisource.org/wiki/Constitution_of_the_German_Empire> [my omission and insertion].
299 Albert Haenel, *Deutsches Staatsrecht. 1, Die Grundlagen des deutschen Staates und die Reichsgewalt* (Duncker & Humblot 1892) 532, not to the extent however, that competences given e.g. to the states can be trumped cf 537 ff.
300 Schorkopf (n 264) 603.

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influence through their mandatory involvement in treaty-making and in case of a declaration of war.[301]

The Prussian approach of securing executive influence in foreign affairs by special legislation also continued in the new order.[302] The new 'civil-servant liability law'[303] stated that the chancellor could certify that a questionable act of a civil servant in foreign affairs was in accordance with political and international considerations, which led to the exclusion of liability.[304] This legislation explicitly aimed to exclude foreign affairs as 'political questions' from judicial scrutiny.[305] Also the Prussian Court of Competence Conflicts continued its work and safeguarded the influence of the executive.[306] The court's procedural statute now entitled the minister of foreign affairs to intervene in any civil proceedings which may touch foreign sovereign immunity.[307] Following such intervention, the Court of Competence Conflicts had to rule and, in most cases, decided in favour of the executive.[308]

Although the main focus of legal academia in the late 19th century was internal constitutional law, German scholarship continued to theorize about foreign relations.[309] To describe the 'foreign affairs power' encompassing the acts of the state in the international sphere as well as the domestic acts necessary to facilitate and transform external acts, Albert Haenel[310] coined the term '*Auswärtige Gewalt*'.[311] It does not refer to a separate branch of gov-

301 Which appears to reflect their position as formerly independent states, cf Ernst R Huber, *Deutsche Verfassungsgeschichte seit 1789 – Bismarck und das Reich* (Kohlhammer 1963) 942.

302 In how far it was influenced by the Prussian decree is not entirely clear, but appears to be likely Hans P Ipsen, *Politik und Justiz* (Hanseatische Verlagsanstalt 1937) 65 fn 146; for such a connection Bolewski (n 248) 68.

303 Gesetz über die Haftung des Reiches für seine Beamten vom 22.05.1910, § 5 Nr. 2.

304 Bolewski (n 248) 65 ff.

305 The statute even survived the transition after 1949, cf Karl Doehring, *Pflicht des Staates zur Gewährung diplomatischen Schutzes* (Carl Heymanns 1959) 111; Bolewski (n 248) 67 ff; it was however later found incompatible with the Basic Law for lack of federal competences *Judgment from 19 October 1982* BVerfGE 61, 149 (German Federal Constitutional Court).

306 Bolewski (n 248) 56; Biehler (n 249) 54 f.

307 Using § 5 of the 'Verordnung zur Erhebung des Kompetenzkonflikts' from 1879; Bolewski (n 248) 56 fn 2.

308 Biehler (n 249) 54 fn 174 with further references.

309 Biehler (n 249) 40.

310 Haenel (n 299) 531.

311 Ibid 532 f.

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ernment but serves as a functional description of legal acts associated with the conduct of foreign affairs and thus bears a close similarity to Locke's 'federative power,'[312] and some German authors equated the expressions.[313] It found broad resonance and has been used by German scholars to address legal issues concerning foreign affairs through to the present.[314] Paul Laband,[315] one of the most influential constitutional theorists of the Bismarck period,[316] stated that 'in no part of state administration the freedom of legal restraints is more apparent than in administrating foreign affairs'.[317] In the same vein Georg Jellinek,[318] in distinguishing between 'free' and 'legally constrained' 'actions'[319] of the state, saw foreign policy as one of the main areas falling within the first category. He refers to Locke and praises the concept of 'prerogatives' as correctly reflecting this special nature.[320] According to Jellinek, only the influence of French theory[321] covered up the distinction of both actions of the state by treating them as part of the executive branch.[322] On the other hand, this made it necessary for the French system to distinguish between justiciable *actes administratifs* and non-justiciable *actes de gouvernments*.[323] Jellinek is probably the first German[324] scholar to draw a comparison to the French system in this regard, which, as we shall see, proved very influential. Moreover, the strict differentiation between the external and internal spheres succeeded in the

312 Biehler (n 249) 29.
313 Wolgast (n 42) 6; Klaus Stern, 'Außenpolitischer Gestaltungsspielraum und verfassungsgerichtliche Kontrolle' (1994) 8 NWVBl 241, 245.
314 Cf Christian Calliess, '§ 72 – Auswärtige Gewalt' in Hanno Kube and others (eds), *Leitgedanken des Rechts* (CF Müller 2013) 775.
315 For Laband's account of foreign affairs cf Biehler (n 249) 42.
316 Michael Stolleis, *Öffentliches Recht in Deutschland* (CH Beck 2014) 70 ff.
317 'Bei keinem Zweige der gesamten Staatsverwaltung tritt die Freiheit derselben von gesetzlichen Vorschriften deutlicher vor Augen als bei der Verwaltung der auswärtigen Angelegenheiten' [my translation] Paul Laband, *Deutsches Reichsstaatsrecht* (5th edn, Mohr 1909) 208.
318 Biehler (n 249) 43.
319 'Tätigkeiten'.
320 Georg Jellinek, *Allgemeine Staatslehre* (3rd edn, Springer 1921) 617.
321 Ibid, explicitly referring to Rousseau, but probably also having in mind Montesquieu who did not maintain the distinction introduced by Locke between the executive and federative power, see above Chapter 1, I., 2.; Rousseau indeed explicitly relied on the 'act gouvernement'; Biehler (n 249) 37.
322 Jellinek (n 320) 617 f.
323 Jellinek (n 320) 617 f.
324 Jellinek was educated in Austria and Germany and taught in both countries and Switzerland.

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scholarship of the German Empire. Heinrich Triepel[325] famously established his dualist conception of the relationship between international and domestic law as two 'two circles which at best touch each other but which never intersect'.[326] The constitution of the German Empire thus, to a wide extent, embraced the traditional position.[327]

However, to a certain degree, the judiciary's role was also strengthened through the creation of the Empire. The new state reformed its court system in 1879, and the Prussian Court of Competence Conflicts became a special Prussian state court subordinate to the newly founded Supreme Court of the Reich. The Supreme Court of the Reich, in some cases, overturned the Court of Competence Conflicts[328] and, in general, developed a tendency to decide prejudicial questions even when they included subjects of foreign affairs.[329] The influence of the strict Prussian approach concerning the judicial exclusion of foreign affairs was thus weakened.

c) Weimar Republic

Germany's defeat in the First World War in 1918 led to the next change in the constitutional system when Germany abolished the monarchy and became a republic in 1919. Concerning foreign affairs, Article 45 of the Weimar Constitution now stipulated:

> *The President of the Reich represents the Reich in international relations. In the name of the Reich he makes alliances and other treaties with foreign powers. He accredits and receives diplomatic representatives.*
> *Declaration of war and conclusion of peace shall be made by national law. Alliances and treaties with foreign states which relate to subjects of national legislation require the consent of the Reichstag.*[330]

325 Schorkopf (n 264) 594.
326 Heinrich Triepel, *Völkerrecht und Landesrecht* (CL Hirschfeld 1899) 111 [my translation]; Jochen von Bernstorff, 'Innen und Außen in der Staats- und Völkerrechtswissenschaft des deutschen Kaiserreiches' (2015) 23 Der Staat (Beiheft) 137.
327 Werner Heun, 'Art. 59' in Horst Dreier and Hartmut Bauer (eds), *Grundgesetz: Kommentar* (3rd edn, Mohr Siebeck 2015) mn 3.
328 *Decision from 10 June 1899* RGZ 44, 377 (Supreme Court of the Reich); *Decision from 22 May 1901* RGZ 48, 195 (Supreme Court of the Reich).
329 Bolewski (n 248) 59; Biehler (n 249) 55.
330 Article 45, translation available at <https://en.wikisource.org/wiki/Weimar_constitution>.

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Although this newly created position of President of the Reich (*Reichspräsident*) has often been called a 'surrogate emperor' and inherited many powers of the former monarch, foreign affairs were not entrusted to him alone. The *Reichspräsident* could only act with the government's approval and not in his own right. Thus, he had to share power with the chancellor of the Reich.[331] On the other hand, he had extended powers if no functioning government existed due to a lack of majority in parliament. The legislature was now more strongly involved in foreign affairs. War could only be declared by an act of parliament (*Reichstag*), and treaties also required its consent. Treaties without consent were regarded as invalid under constitutional law and, in contrast to the old constitution, also under international law.[332] Moreover, the strict dualist conception was modified by Article 4 of the new constitution stipulating that '[t]he universally recognised rules of international law are accepted as integral and obligatory parts of the law of the German Reich'.[333]

Concerning the judiciary, contemporary scholars still recognized the special position of foreign affairs. Rudolf Smend,[334] one of the leading scholars of the Weimar Constitution, analysed doctrines of non-justiciability of governmental acts in different countries (especially France)[335] and saw them reflected in Germany, especially in the mentioned 'civil servant liability law'.[336] He did not develop his ideas into a systematic approach but, as we will see, strongly influenced the discussion in Germany after 1945.[337] Ernst Wolgast, a former diplomat of the Empire, was one of the first German scholars to deliver in-depth analysis of the 'foreign affairs power'.[338] He clearly emphasized the dual nature of the state, looking inward and outward, by citing the Swedish conservative political scientist Rudolf Kjellen:

331 Wolgast (n 42) 268; Martin Nettesheim, 'Art. 59' in Günter Dürig, Roman Herzog and Rupert Scholz (eds), *Grundgesetz: Kommentar* (July 2021 edn, CH Beck 2021) mn 12; cf Article 50 of the Weimar Constitution and Schorkopf (n 264) 602.
332 Wolgast (n 42) 33; Schorkopf (n 264) 603.
333 Schorkopf (n 264) 603.
334 Cf as well Biehler (n 249) 47.
335 Rudolf Smend, *Die politische Gewalt im Verfassungsstaat und das Problem der Staatsform* (Mohr 1923) 5 ff.
336 Ibid 12 f.
337 Biehler (n 249) 47.
338 Cf as well ibid 49 ff.

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> *Since the word 'state' became naturalised in widely separated linguistic areas, it stands as a Janus with two faces, one looking inward, one looking outward, in our imagination.*[339]

Wolgast was probably the first scholar to directly link the conduct of foreign affairs to the Janus metaphor, which is still frequently used.[340] Strongly relying on Hobbes and Locke, he sees the state as 'one person' acting in the area of foreign affairs.[341] Whereas natural rights internally circumcise the powers of the 'Leviathan,' externally, they have no real reflection and political considerations are dominant.[342] Wolgast assumes that his characterization of the 'foreign affairs power' is a general feature of modern constitutional orders, and he explicitly draws a comparison to the United States.[343] Although later scholars often neglected his work,[344] his ideas offer an exceptional insight into German thought on foreign affairs.

d) Nazi Germany

When the Nazis took power in 1933, the competence to conduct foreign affairs became centred in the person of Adolf Hitler as the 'supreme leader' (*Führer*).[345] Article 4 of the Enabling Act formally brought about the change by removing the necessity of legislative approval for treaties, and the 'Law concerning the Head of State of the German Reich' unified the position of the chancellor and the president.[346] The position of the new 'supreme leader' was summarised by a leading constitutional scholar of the Nazi period as follows:[347]

339 'Seitdem es (das Wort Staat) … in weitgetrennten Sprachgebieten naturalisiert worden ist, steht es wie ein Janus mit zwei Gesichtern, eines nach innen, das andere nach außen gewendet, vor unserer Vorstellung' [my translation] Rudolf Kjellen, *Der Staat als Lebensform* (Hirzel 1917) 20.
340 Dyzenhaus (n 34).
341 Wolgast (n 42) 78 ff.
342 Ibid 88 also he sees the principle of 'pacta sunt servanda' as an attempt to limit the powers of states.
343 Kjellen (n 225) 74.
344 Biehler (n 249) 50.
345 For the legal discourse at that time in general cf Michael Stolleis, *The Law under the Swastika* (University of Chicago Press 1998).
346 Schorkopf (n 264) 611.
347 Ibid 610.

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> *It is part of the character of the 'Führer-Reich', that the 'Führer' is the autonomous and unlimited bearer of the foreign affairs power. He determines the entire foreign policy of the Reich, he concludes treaties and alliances in the name of the Reich and he is the Lord over War and Peace.*[348]

Although the judges remained formally independent, their room for manoeuvre, including foreign affairs questions, hinged on the will of the *Führer*.[349] As mentioned in the introduction, the question of judicial review of the foreign affairs power becomes more and more futile the more a legal system leans towards authoritarianism.[350] Nevertheless, the ideas of the Nazi period and especially their explicit rejection[351] shape contemporary German law.

Not surprisingly, Nazi period scholars adhered to an extreme version of the traditional position. Carl Schmitt, as a leading figure, strongly relied on Thomas Hobbes in developing his theories,[352] and many authors declared foreign affairs acts as generally unreviewable.[353] Scheuner explicitly referred to non-justiciability doctrines inter alia in the United States to justify this approach.[354] Ipsen went more into detail and developed his concept of *justizfreie Hoheitsakte* ('non-justiciable acts of state') in 1937.[355] He drew on

348 Ernst R Huber, *Das Verfassungsrecht des Großdeutschen Reiches* (2nd edn, Hanseatische Verlagsanstalt Hamburg 1939) 262 'Zum Wesen des Führerreichs gehört, dass der Führer der selbstständige und unbeschränkte Träger der auswärtigen Gewalt ist. Er bestimmt die gesamte Außenpolitik des Reiches, er schließt Verträge und Bündnisse im Namen des Reiches ab, er ist Herr über Krieg und Frieden' [my translation].

349 Bolewski (n 248) 93.

350 Schorkopf (n 264) 610.

351 See *Order from 4 November 2009 (Wunsiedel)* BVerfGE 124, 300 (German Federal Constitutional Court).

352 Timothy Stanton, 'Hobbes and Schmitt' (2011) 37 History of European Ideas 160; Armitage (n 3) 71; stressing the relevance of the Hobbesian conception of the international sphere for Schmitt's enemy-friend distinction also Ernst-Wolfgang Böckenförde, *Constitutional and Political Theory* (OUP 2017) 71 ff.

353 Concerning all acts with a 'political' element Friedrich Schack, 'Die richterliche Kontrolle von Staatsakten im neuen Staat' (1934) 55 Reichsverwaltungsblatt 592, 592; explicitly Ulrich Scheuner, 'Die Gerichte und die Prüfung politischer Staatshandlungen' (1936) 57 Reichsverwaltungsblatt 437, 442; explicitly Siegfried Grundmann, 'Die richterliche Nachprüfung von politischen Führungsakten nach geltendem deutschem Verfassungsrecht' (1940) 100 Zeitschrift für die gesamte Staatswissenschaft 511, 535.

354 Scheuner (n 353) 442.

355 Ipsen (n 302); Biehler (n 249) 88.

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the ideas of Jellinek[356] and Smend[357] and argued for the existence of these acts, parallel to the French institute of *acte gouvernement*, in the German legal order. In analogy to the 'civil servant liability law,' he proposed that a competent body (*Qualifikationsträger*) should decide whether or not an act of state is amenable to judicial review.[358] The Nazi courts, in some cases involving foreign affairs, showed an astonishing stubbornness concerning the non-reviewability of executive acts.[359] However, they operated under the permanent threat of political interference[360] and acted in anticipatory obedience, especially in high-profile cases.[361]

e) Contemporary German Law

Germany's last constitutional change occurred after the Second World War. The Allied Forces occupied Germany, which only enjoyed limited sovereignty,[362] with the 'Occupation Statute' explicitly excluding international relations from German self-government.[363] The Federal Republic only gradually regained control of its foreign affairs, especially with the ratification of the Bonn-Paris Conventions in 1955.[364] Acting on the Allies' initiative, a new constitutional framework for West Germany was created and, due to its (intended) provisional character, called the 'Basic Law'. Although this framework was meant as a temporary arrangement, it was designed as a fully-fledged constitution, ignoring the de facto limited sovereignty. Thus,

356 Ipsen (n 302) 65.
357 Ibid 81.
358 Ibid 275 ff.
359 Scheuner (n 353) 441; Grundmann (n 353) 515 fn 3; Hans Schneider, *Gerichtsfreie Hoheitsakte: Ein rechtsvergleichender Bericht über die Grenzen richterlicher Nachprüfbarkeit von Hoheitsakten* (Mohr 1951) 15 ff; Paul van Husen, 'Gibt es in der Verwaltungsgerichtsbarkeit justizfreie Regierungsakte?' (1953) 68 DVBl 70.
360 According to the mainstream scholarly position the executive could at will declare an act to be unreviewable Scheuner (n 353) 442.
361 Cf recognition in the Franco Case below Chapter 3, I., 2., b); especially the Imperial Fiscal Court developed a jurisprudence quite openly allowing the Minister of Finances to decide contentious questions, cf with cases Heinz Meilicke and Klaus Hohlfeld, 'Der Bundesfinanzhof und die Bundesregierung – Neue Steuergesetzgeber im Außensteuerrecht?' (1972) 27 Der Betriebs-Berater 505 fn 12.
362 Cf as well Schorkopf (n 264) 627 ff.
363 Occupation Statute from 10 May 1949, Nr 2 c.
364 Schorkopf (n 264) 632 nevertheless, certain special powers of the allied forces lasted much longer.

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it distributed the full 'foreign affairs power' amongst the state branches.[365] The central provision is Article 59 of the Basic Law:

> *(1) The Federal President shall represent the Federation in international law. He shall conclude treaties with foreign states on behalf of the Federation. He shall accredit and receive envoys.*
> *(2) Treaties that regulate the political relations of the Federation or relate to subjects of federal legislation shall require the consent or participation, in the form of a federal law, of the bodies responsible in such a case for the enactment of federal law. […]*[366]

The federal president inherited the representing role in foreign affairs from the president of the Reich. In contrast to the latter, the former is more limited in his actions. All of the president's acts, except for very limited residue competences, require the government's consent.[367] The actual foreign affairs power thus lies with the chancellor.[368] The position of parliament was strengthened. Treaties that need to be implemented and treaties regulating political relations require its approval. The Constitutional Court soon defined this expression very narrowly: only 'highly political' questions, e.g., membership in military alliances, require parliamentary consent.[369] The strengthened role of the legislative branch also led to an academic debate at the prestigious 'Meeting of the Constitutional Law Teachers' in 1953.[370] Wilhelm Grewe still saw foreign affairs in the 'tradition of European state theory and constitutional development'[371] as strongly tied to the executive.[372] On the other hand, Eberhard Menzel saw a more substantial involvement of the legislature, which, together with the executive, should

365 Ibid 627.
366 [My omissions], translation available at <https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0277>.
367 Article 58 of the Basic Law.
368 Nettesheim (n 331) mn 52.
369 Cf *Judgment from 29 July 1952 (Deutsch-Französisches Wirtschaftsabkommen)* BVerfGE 1, 372 (German Federal Constitutional Court) 381; cf in more detail below Chapter 4, I., 3., b), aa).
370 Ernst Forsthoff and others (eds), *Begriff und Wesen des sozialen Rechtsstaates. Die auswärtige Gewalt der Bundesrepublik* (De Gruyter 1954) (= Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 12).
371 Grewe (n 249) 174.
372 Ibid.

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administer foreign affairs as a 'combined power'.[373] This debate still informs the German discussion about foreign affairs.[374]

Concerning the judiciary, the new Article 19 (4) of the Basic Law stipulates that 'should any person's rights be violated by public authority, he may have recourse to the courts' appears to bar the possibility of non-justiciable areas (or other strong forms of deference). However, such a provision in itself does not completely exclude the possibility of non-reviewability. It may be interpreted in a way that in such cases, there simply is no 'right' and hence no need for access to a court. Indeed, Ipsen's considerations were taken up again after the war by Hans Schneider,[375] who argued that in the light of Article 19 (4) of the Basic Law, they have become not less but more pertinent.[376] Drawing on Ipsen's work, he compared the situation in Germany to France, the United Kingdom, the United States, and Switzerland and called for the adoption of non-justiciable acts of state.[377] He already saw traces of such a doctrine in certain provisions of the Basic Law, which grant the government considerable discretion, e.g., in cases of a 'legislative emergency'.[378] Schneider tries to classify such acts of state, inter alia in foreign affairs, mentioning immunity decisions, recognition of foreign states and governments and diplomatic protection.[379] The opinion that non-justiciable acts of state exist under the new Basic Law was shared as well by other scholars[380] and almost all speakers referring to the topic at the 'Meeting of the Constitutional Law Teachers' in 1949 recognized that

373 Menzel (n 1) 197.
374 Nettesheim (n 331) mn 28.
375 Cf as well Biehler (n 249) 88.
376 Schneider (n 359) 36 ff, 80.
377 'Gerichtsfreie Hoheitsakte'.
378 Similar argument Herbert Krüger, 'Der Regierungsakt vor den Gerichten' (1950) 3 DÖV 536, 537; Schneider (n 359) 33.
379 Schneider (n 359) 47.
380 Krüger (n 378); Hellmuth Loening, 'Regierungsakt und Verwaltungsgerichtsbarkeit' (1951) 66 DVBl 233; van Husen (n 359); Klaus Obermayer, 'Der gerichtsfreie Hoheitsakt und die verwaltungsgerichtliche Generalklausel' (1955) 1 Bayerische Verwaltungsblätter 129; Ernst Forsthoff, *Lehrbuch des Verwaltungsrechts* (8th edn, CH Beck 1961) 468 who also refers to the civil servant liability law; for another monograph of that time cf Helmut Rumpf, *Regierungsakte im Rechtsstaat* (Ludwig Röhrscheid Verlag 1955).

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Article 19 (4) of the Basic Law did not exclude such a doctrine.[381] Courts as well gradually started to apply the concept.[382]

However, the period of acceptance of the non-justiciable acts of state doctrine under the German Basic Law was very short. The Federal Constitutional Court (as we will see in the next chapter), in its *Saarstatut* decision, soon rejected the idea, which by no means meant that the problem of appropriate deference was solved in Germany. For now, it suffices to conclude that the traditional position was part of older German constitutions and also the current German Basic Law. The common belief that 'in German constitutional law there is no tradition of judicial deference to the executive in foreign policy matters'[383] is plainly wrong.

III. Conclusion on the Origins of Deference

This chapter has first shown how the traditional position concerning foreign affairs developed in early modern political philosophy. The works of Thomas Hobbes introduced the idea of an essential difference between the inner and the outer sphere and thus make a particular contribution to the first notion of the traditional position. John Locke developed the idea that the executive in the form of the 'federative power' manages foreign affairs largely unconstrained by law and hence established the second and third notions of the traditional view. Finally, Montesquieu, who more clearly than Locke saw the management of foreign affairs as an executive function, agreed that the nature of that task differed from the domestic setting and thereby solidified the idea of a 'Janus-faced' executive.

In the following, we examined how the idea of the traditional position migrated into the law of our three reference jurisdictions. South Africa,

381 Walter Jellinek and others, *Veröffentlichung der Vereinigung der deutschen Staatsrechtslehrer – Heft 8* (Walter de Gruyter & Co 1950) 149 ff; speaking of the 'concurring opinion' of the legislative branch, the judicial branch and of scholars Krüger (n 378) 539; Schneider (n 359) 37; Matthias Kottmann, *Introvertierte Rechtsgemeinschaft: Zur richterlichen Kontrolle des auswärtigen Handelns der Europäischen Union* (Springer 2014) 63.

382 *Decision from 23 September 1958* DVBl 1959, 294 (Higher Administrative Court Münster); Constitutional Court of the Federal State of Hesse cited in Krüger (n 378) 538; Administrative Court Düsseldorf cited in Obermayer (n 380) 131; Biehler (n 249) 90 ff.

383 Hans-Peter Folz, 'Germany' in Dinah Shelton (ed), *International law and domestic legal systems: Incorporation, transformation, and persuasion* (OUP 2011) 240, 244.

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until the 1930s, was under the strong influence of the UK. In English law, Blackstone's writings, drawing from Locke's philosophy, established foreign affairs as a key part of the monarch's prerogative power. During the 19th century, several decisions by Lord Chancellor Eldon introduced the idea that judicial review of certain foreign affairs issues should be restricted. The several 'exclusionary doctrines' developed in the case law of the Victorian Age were refined and tied to the royal prerogative by Harrison Moore, establishing the idea of 'act of state'. When South Africa grew more and more independent in the early 20th century, it inherited the ideas of the royal prerogatives and acts of state from English law. All three pre-democratic South African constitutions recognized the concept of prerogatives, including the idea of deference in foreign affairs. The current South African Constitution does not explicitly regulate the issue, and whether the idea of act of state survived the constitutional transition will be elaborated on in the course of the thesis.

In the United States, the framers consciously diverted from the British tradition and divided classical foreign affairs powers between the executive and legislative branches. However, after the constitution's enactment, influential politicians like Alexander Hamilton argued for an executive-friendly interpretation of the foreign affairs provisions of the constitution. Likewise, the US Supreme Court starting with *Marbury v Madison* acknowledged the existence of 'political questions' not apt for judicial review, especially in the area of foreign affairs. Still, during the 19th century, the 'orthodox' approach held that these cases were rather rare and narrowly defined. This changed in the 1930s with the decision in *Curtiss Wright*. Justice Sutherland solidified the idea of the exclusive and plenary power of the executive in foreign affairs and the corresponding low level of judicial review. Thus, the traditional position won a delayed victory in the United States. Although scholars and courts challenged Justice Sutherland's rulings, the idea of executive leadership in foreign affairs and judicial deference proved influential for most of the 20th century. More recent developments will be analysed during the course of the thesis.

In Germany, Hegel's ideas concerning foreign affairs showed a similarity to the positions of Hobbes and Locke. Hegel saw foreign affairs as part of the monarchical power and the 'external public law' not subject to the regular laws of the state. These ideas resonated within the German states of the 19th century. In Prussia, several legislative acts granted a special influence to the executive in foreign affairs decisions, and a special 'Competence Court' allowed the executive to block judicial action in contentious cases.

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Under the constitution of the German Empire, foreign affairs powers were explicitly awarded to the executive in the form of the Emperor, with only a minor role for the legislative branch and the federal states. Scholars of the Bismarck period like Laband and Jellinek recognized the special character of foreign affairs as largely free from legal constraints. During the Weimar Republic, more influence in the area was given to the legislative branch, especially concerning the conclusion of treaties. Nevertheless, concerning the judicial branch, academics like Smend saw certain foreign affairs decisions as non-justiciable. In the Nazi period, foreign relations were centred in Adolf Hitler as the supreme leader, and most academics argued that foreign affairs decisions were non-reviewable as *justizfreie Hoheitsakte*. Under current German law, the chancellor effectively governs foreign relations, but the legislative branch is influential concerning the conclusion of treaties. In the early years of contemporary Germany, many scholars still believed in the existence of non-justiciable areas. However, the Constitutional Court, starting with the *Saarstatut* case, has gradually chipped away at the idea of areas beyond judicial control. Nevertheless, contrary to common belief, the traditional position was part of the previous and even the current German legal system.

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