Introduction

So off went the Emperor in procession under his splendid canopy. Everyone in the streets and the windows said, 'Oh, how fine are the Emperor's new clothes! Don't they fit him to perfection? And see his long train!' Nobody would confess that he couldn't see anything, for that would prove him either unfit for his position, or a fool. No costume the Emperor had worn before was ever such a complete success.[1]

I. The issue of judicial review in foreign affairs – three examples

It appears fitting to start this book about deference to the executive in foreign affairs with a fairy tale. The 'traditional role' of the executive in foreign affairs has often been said to entail an almost mystical notion.[2] Foreign affairs powers developed out of the 'Crown prerogatives,' the exclusive and unreviewable power of the monarch.[3] The word deference itself suggests a gesture of submission in front of a wise king.[4] It is often used by courts to express their restraint in reviewing executive actions in foreign affairs.

This notion clashes with another idea:[5] 'It is emphatically the province and duty of the judicial department to say what the law is'.[6] The quote by Justice Marshall in *Marbury v Madison*[7] prominently established judicial

1 Hans Christian Andersen, 'The Emperors New Clothes', translation by Jean Hersolt, available at the Hans Christian Andersen Centre <https://andersen.sdu.dk/vaerk/hersholt/TheEmperorsNewClothes_e.html>.

2 Eberhard Menzel, 'Die auswärtige Gewalt der Bundesrepublik' (1954) 12 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 179, 186.

3 This is true for civil and common law countries alike, cf in detail Chapter 1.

4 Lord Sumption in *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598 (Court of Appeal) mn 22, 'At least part of the difficulty arises from the word, with its overtones of cringing abstention in the face of superior status'.

5 Bradley speaking of the 'Marbury perspective' Curtis A Bradley, 'Chevron Deference and Foreign Affairs' (2000) 86 Virginia Law Review 649, 650.

6 *Marbury v Madison* 5 US 137 (1803) (US Supreme Court) 177.

7 Ibid.

oversight in the modern state.[8] Its simplicity conceals a serious problem: if it is for the judiciary to say what the law is, who determines the boundary between law and politics? This question has always constituted a complicated issue for the courts. It is multiplied in the area of foreign affairs, where the traditional role of the executive has been echoed by kings and queens, presidents, prime ministers, and chancellors. Until today, the courts in democratic states struggle with questions concerning foreign affairs and the correct standard of judicial review in these cases.[9] Three more recent examples illustrate this point.

In 2017, shortly after assuming office, former US President Trump issued the so-called travel ban, barring the entry into the USA of nationals from seven countries with mainly Muslim populations.[10] The executive proclamation establishing the ban was justified with reference to protection from terrorists.[11] However, the underlying motives were questionable, as during his campaign Donald Trump had promised a 'total and complete shutdown of Muslims entering the United States'.[12] Thus, the ban stirred a national and worldwide debate. Only two days after their enactment, a Washington District Court entered a temporary restraining order blocking the entry restrictions.[13] Appealing the decision, the government claimed 'unreviewable authority to suspend the admission of any class of aliens'.[14] The Circuit Court rejected the claim of non-reviewability but held that 'deference to the political branches is particularly appropriate with respect to national security and foreign affairs'.[15] Nonetheless, it upheld the District Court's decision.[16] The government repealed the executive order and replaced it with another version that was challenged in the courts and partially blocked.[17] A third variant of the travel ban finally led to a Supreme Court

8 For the first time including legislative acts, cf David B Robertson, 'The Constitution from 1620 to the Early Republic' in Mark Tushnet, Mark A Garber and Sanford Levinson (eds), *The Oxford Handbook of the U.S. Constitution* (OUP 2016) 39 f.

9 Thomas Giegerich, 'Foreign Relations Law' in Anne Peters (ed), *Max Planck Encyclopedia of Public International Law* (online edn, OUP 2013) mn 35.

10 President of the United States, Executive Order 13769 of 27 January 2017, 82 FR 8977.

11 Ibid.

12 *Trump v Hawaii* 585 US 667 (2018) (US Supreme Court) 700.

13 *Washington v Trump* 2017 US Dist LEXIS 16012 (United States District Court for the Western District of Washington).

14 *Washington v Trump* [2017] 847 F 3d 1151 (Court of Appeals for the 9th Circuit) 1161.

15 Ibid 1163.

16 Ibid.

17 For an overview over the various proceedings see *Trump v Hawaii* (n 12) 673 ff.

decision on the merits.[18] The central issue was a possible violation of the Establishment Clause,[19] the constitutional provision enshrining non-discrimination on religious grounds in the United States.[20] Again, the Trump administration claimed non-reviewability of the ban.[21] The Supreme Court conceded that 'decisions in these matters may implicate "relations with foreign powers," or involve "classifications defined in the light of changing political and economic circumstances," such judgments "are frequently of a character more appropriate to either the Legislature or the Executive."'[22] For these reasons, in determining whether the executive had violated the Establishment Clause, it only applied a comparatively narrow[23] 'rational basis review'.[24] In a 5–4 decision, it finally upheld the travel ban.

On the other side of the Atlantic, judges are also often involved in highly contentious foreign affairs cases. In 2015 relatives of a victim of a US drone strike in Yemen brought a case in front of the Administrative Court Cologne to compel the German government to stop using the US Ramstein Air Base in Germany for drone strikes.[25] The plaintiffs had also filed a case in front of a US District Court. The US judge found the issue non-reviewable based on the 'political question doctrine,' stating that an 'area in which courts have been particularly hesitant to tread is that of foreign affairs and national security'.[26] The German court chose another approach. It found a considerable 'area of discretion for the foreign affairs power' in which 'international law assessments [...] cannot be reviewed without limit'.[27]

18 In previous proceedings the Supreme Court had not reached the merits cf *Trump v Hawaii* (n 12) 673 ff.

19 US Constitution, First Amendment.

20 *Trump v Hawaii* (n 12) 697 ff.

21 Ibid 682 ff.

22 Ibid 702.

23 Cf the dissent by Judges Ginsburg and Sotomayor *Trump v Hawaii* (n 12) 740 'The majority [...] incorrectly applies a watered down legal standard in an effort to short circuit plaintiffs' Establishment Clause claim'.

24 *Trump v Hawaii* (n 12) 704.

25 *Judgment from 27 May 2015 (Ramstein Drone Case)* 3 K 5625/14 (Administrative Court Cologne).

26 *Ahmed Salem Bin Ali Jaber v USA February* [2016] F Supp 3d 70 (United States District Court for the District of Columbia) 77 ff.

27 *Judgment from 27 May 2015 (Ramstein Drone Case)* (n 25) mn 76: 'Schließlich äußert sich der erhebliche Spielraum der auswärtigen Gewalt auch darin, dass es den innerstaatlichen Gerichten verwehrt ist, völkerrechtliche Beurteilungen der auswärtigen Gewalt unbeschränkt zu überprüfen' [my translation].

It hence only applied a 'plausibility'[28] review and upheld the executive assessment that no sufficient indications for a violation of humanitarian international law existed.[29] The plaintiffs appealed to the Higher Administrative Court.[30] In line with the previous ruling, the German government claimed a broad area of discretion for the fulfilment of its protective duty towards the claimants, especially as the case touched on the area of 'foreign policy'.[31] However, the court decided that no area of discretion existed to assess the compliance of the drone attacks with international law.[32] It held that whether a person or an object is a legitimate military target is 'not a political question, exempt from judicial review in the first place, but a question of international law'.[33] Contrary to the executive, it doubted the legality of the drone strikes under international law and found the steps taken by the government insufficient.[34] Hence, it ordered the executive to take 'suitable measures' to determine whether the drone strikes in Yemen were in accordance with international law and, if necessary, to work towards their compliance by the United States of America.[35] The government appealed[36] to the Federal Administrative Court.[37] In the first place, the court already

28 Ibid 'Vertretbarkeit' mn 78 [my translation].

29 *Judgment from 27 May 2015 (Ramstein Drone Case)* (n 25) mn 81.

30 For English articles on the case cf Leander Beinlich, 'Drones, Discretion, and the Duty to Protect the Right to Life: Germany and its Role in the US Drone Programme before the Higher Administrative Court of Münster' (2019) 62 German Yearbook of International Law 557 and Thomas Giegerich, 'Can German Courts Effectively Enforce International Legal Limits on US Drone Strikes in Yemen?' (2019) 22 ZEuS 601; case reviews in German: Patrick Heinemann, 'US-Drohneneinsätze vor deutschen Verwaltungsgerichten' (2019) 38 NVwZ 1580; Peter Dreist, 'Anmerkung Ramstein Fall' (2019) 61 NZWehrr 207; Helmut Philipp Aust, 'US-Drohneneinsätze und die grundrechtliche Schutzpflicht für das Recht auf Leben: „German exceptionalism"?' (2020) 75 Juristen Zeitung 303.

31 *Judgment from 19 March 2019 (Ramstein Drone Case)* 4 A 1361/15 (Higher Administrative Court Münster) mn 16.

32 Ibid mn 554.

33 Ibid mn 561 [my translation].

34 Ibid mn 565 ff.

35 Ibid operative part (*Tenor*).

36 German law knows two kinds of appeal, a first appeal (*Berufung*) allowing the court of second instance to review facts and law and a second appeal (*Revision*) allowing the court of third instance only a review of the law. The second appeal thus led to Revision-proceedings before the Federal Administrative Court.

37 *Judgment from 25 November 2020 (Ramstein Drone Case)* BVerwGE 170, 345 (Federal Administrative Court).

doubted whether German fundamental rights were applicable to the case.[38] Moreover, it reversed the decision of the Higher Administrative Court and found that 'the federal government possesses an area of discretion within the spectrum of justifiable legal positions concerning the compatibility of foreign states' actions with international law'.[39] Likewise, it found the steps the federal government took to ensure compatibility with international law sufficient.[40] The case is now pending in the Federal Constitutional Court.[41]

The problem of judicial review in foreign affairs not only causes problems in the Global North but also in the democracies of the South, as can be seen from a case in the South African Constitutional Court. It concerned certain decisions of the Southern African Development Community (SADC) summit in which the then South African President Jacob Zuma had participated. The SADC, inspired by the European Union,[42] created a common market, including a tribunal with direct access for individuals. After several judgements of the tribunal, which found that the Zimbabwean land distribution programme violated the rights of white farmers, the Mugabe administration of Zimbabwe started to lobby for its abolishment. An SACD summit in 2011 suspended the operation of the tribunal and in 2014 limited its jurisdiction to inter-state relations. The Law Society of South Africa challenged the South African government's involvement in the process, first in the High Court of the Gauteng Region. During the proceedings, the executive claimed the decision to be 'one of executive competence in relation to foreign affairs, in respect of which the

38 Ibid mn 40 ff.

39 Ibid mn 55, 'dass die Bundesregierung in Bezug auf die völkerrechtliche Beurteilung des Handelns anderer Staaten innerhalb der Bandbreite der vertretbaren Rechtsauffassungen über einen Einschätzungsspielraum verfügt' [my translation].

40 Ibid mn 75 ff.

41 Pending under file number 2 BvR 508/21, for reviews of the case cf Mehrdad Payandeh and Heiko Sauer, 'Staatliche Gewährleistungsverantwortung für den Schutz der Grundrechte und des Völkerrechts' (2021) 74 NJW 1570 (critical); Thomas Jacob, 'Drohneneinsatz der US-Streitkräfte im Jemen: Keine unbegrenzte Verantwortung Deutschlands für extraterritoriale Sachverhalte' (2021) jM 205 (positive); Patrick Heinemann, 'Tätigwerden der Bundesregierung zur Verhinderung von Drohneneinsätzen der USA im Jemen von der Air Base Ramstein' (2021) 40 NVwZ 800 (positive).

42 Karen Alter, James T Gathii and Laurence Helfer, 'Backlash against International Courts in West, East and Southern Africa: Causes and Consequences' (2016) 27 EJIL 294, 306.

Executive has a broad discretion'[43] and that '[i]nternational relations lay at the heartland of the Executive, and this fact would constrain any judicial review'.[44] The High Court nevertheless found a violation of international and constitutional law.[45] The case reached the Constitutional Court in 2018. In a not uncontroversial decision,[46] the court agreed with the High Court. Concerning South African constitutional law, it held that, once granted, the right to access to the tribunal is protected by the South African Bill of Rights[47] and cannot be taken away, even though the president has the competence of negotiating and signing treaties.[48] It hence ordered the president to withdraw his signature from the Protocol.[49]

These cases exemplify many common themes in the area of tension between executive competence in foreign affairs and judicial review. In all cases, the executive claimed a 'special role' concerning foreign affairs. Likewise, the courts appear to acknowledge this superior position.[50] Applying different legal techniques, they have tried to transform this general notion into legal doctrines. Nevertheless, in all cases, the courts are mindful of their role as the judicial branch. The 'traditional position' in foreign affairs does not appear to be as uncritically accepted as it may have been previously. Although the executive prevailed in the end, it took then President Trump three attempts and significant softening to finally pass the travel ban. A series of losses in front of courts (not exclusively related to foreign affairs) led the President to tweet: 'Courts in the past have given

43 *Law Society of South Africa and Others v President of the Republic of South Africa and Others (SADC Case)* 2018 2 All SA 806 (GP) (High Court – Gauteng Division) mn 54.

44 Ibid mn 56.

45 Ibid mn 61 ff.

46 The judgment was criticized on different grounds, the separate opinion challenged the clarity of legal reasoning, others also challenged the strong limits imposed on the executive, cf Dire Tladi, 'A Constitution Made for Mandela, A Constitutional Jurisprudence Developed for Zuma: The Erosion of Discretion of the Executive in Foreign Relations' in Helmut Philipp Aust and Thomas Kleinlein (eds), *Encounters between Foreign Relations Law and International Law* (CUP 2021) 215, 221 ff.

47 Especially Section 34 of the South African Constitution.

48 *Law Society of South Africa and others v President of the Republic of South Africa and others (Southern Africa Litigation Centre and another as amici curiae) (SADC Case)* 2019 (3) BCLR 329 (CC) (Constitutional Court) mn 72 ff.

49 Ibid mn 97.

50 In the SADC case, this acknowledgement is rather weak, in general, however, South African courts acknowledge the special position (cf especially Chapter 1, II., 1. for the more critical approach in recent cases cf Chapter 3, II., 2.).

"broad deference". BUT NOT [to] ME!'.[51] This trend does not appear to be exclusively related to Donald Trump[52] or the United States. As the cases from Germany and South Africa have shown, the courts in these countries also do not easily rescind their adjudicative function and have blocked or directed executive action even in the sensitive area of foreign affairs. On the other hand, variance is also apparent. As the *Ramstein* case has shown, courts in different countries, in the very same setting, may apply different approaches. Moreover, even within the same jurisdiction, the correct level of leeway awarded to the executive may be subject to debate.

These observations prove that striking a balance between judicial review and executive leeway in conducting foreign affairs is a general problem in democratic states.[53] This thesis aims to shed light on this problem. For this purpose, it will broadly define 'foreign affairs' as dealing with a state's foreign relations as opposed to, at first sight, purely internal matters.[54] It is guided by five questions that surfaced in the short review above: where does the notion of 'deference' in foreign affairs, which courts in different jurisdictions seem so natural to accept, stem from? How do courts in different jurisdictions implement this notion, and are there common patterns in its implementation? How do courts in different jurisdictions treat comparable foreign affairs cases? Has the level of 'deference' in different jurisdictions changed over time, and if so, what are the reasons for this change? Finally, what will the future of 'deference' look like?

51 President Trump on twitter cited in Eric A Posner and Lee Epstein, 'Trump has the worst record at the Supreme Court of any modern president' Washington Post from 20 July 2020, available at <https://www.washingtonpost.com/outlook/2020/07/20/trump-has-worst-record-supreme-court-any-modern-president/>.

52 See already Eric A Posner and Lee Epstein, 'The Decline of Supreme Court Deference to the President' (2018) 166 University of Pennsylvania Law Review 829.

53 Acknowledging this Thomas Kleinlein, 'Book Review – Oxford Handbook of Comparative Foreign Relations Law' (2020) 114 AJIL 539, 543.

54 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; on the question whether the inside outside dichotomy is still apt cf below Chapter 4, I., 2.

II. Design of the thesis

1. Selection of jurisdictions

As the selection of cases suggests, this thesis will look into the problem of judicial review in foreign affairs by examining three jurisdictions: the United States of America, the Federal Republic of Germany, and the Republic of South Africa.[55] Two main considerations guide this choice.

First, as submitted, judicial review in the area of foreign affairs appears to create an area of tension in all democratic states. Its central core is a separation of powers issue:[56] Every branch should fulfil its constitutionally assigned function to achieve a balance of power. The more a country leans towards authoritarianism,[57] the more the question becomes meaningless.[58] Absent an actual separation of powers, the tension between the judiciary and the executive branch rarely surfaces. In the end, the judiciary will always decide in favour of the governing elite.[59] The choice of candidates for meaningful analysis is thus limited to countries with a largely independent judiciary.

Second, as the problem is understood to be a universal one, this thesis will include countries from three different continents. They reflect three different legal systems and are often cited as their prime representatives.[60] The United States, as the oldest constitutional system in this study, represents common law, albeit in contrast to the UK, it is based on a supreme

55 As the law of the United States as well as of South Africa shares common roots with English common law, by proxy, English law will also play a vital part in this thesis.

56 On the different aspects commonly associated with the separation of powers see Jeremy Waldron, *Political Political Theory* (Harvard University Press 2016) 49; on different traditions see as well Christoph Möllers, *The Three Branches* (OUP 2013).

57 On authoritarian regimes and their 'constitutionalism' see Helena Alviar Garcia and Günter Frankenberg (eds), *Authoritarian Constitutionalism – Comparative Analysis and Critique* (Edward Elgar 2019).

58 In a similar direction Curtis A Bradley, 'What is foreign relations law?' in Curtis A Bradley (ed), *The Oxford Handbook of Comparative Foreign Relations Law* (OUP 2019) 3, 4; Felix Lange, *Treaties in Parliaments and Courts: The Two Other Voices* (Edward Elgar 2024) 8.

59 Elaborating on the problems of a separation of powers in China Nicholas Barber, *The Principles of Constitutionalism* (OUP 2018) 105 ff; cf as well Lange (n 58) 8.

60 On the value of legal families; Uwe Kischel, *Rechtsvergleichung* (CH Beck 2015) 217 ff; for a critical assessment: Jaakko Husa, 'Classification of Legal Families Today: Is it Time for a Memorial Hymn?' (2004) 56 Recueil de cours 11 and Mathias Siems, *Comparative law* (CUP 2018) 80 ff; cf as well below, this Chapter, II., 4.

constitution, not the sovereignty of parliament. On the other hand, Germany is a civil law country influenced by ancient Roman law. Finally, South Africa has a hybrid judicial system based on Roman-Dutch civil law and English common law.[61] Moreover, all three jurisdictions are typically cited for their quite different approaches toward judicial control of foreign affairs. The United States is generally perceived as giving a free hand to the executive, whereas German law often serves as the role model for judicial intervention.[62] South Africa finds itself in the middle of these rough pictures, with its roots in common law leaning towards the United States but with its new constitution strongly influenced by the German Basic Law,[63] now searching for a distinctively South African approach.[64] The focus on these three countries hence aims at including variance in examining how courts deal with the problem of judicial review in foreign affairs, while at the same time it may allow some generalization of the findings.

2. Structure

The structure of the thesis will follow the course of the questions set out above. As we have seen, all three jurisdictions appear to accept a special role for the executive in foreign affairs. The first chapter aims to shed light on the origins of the notion of deference typically associated with judicial review of foreign affairs. Its roots lie in modern political philosophy, which has diffused throughout the three countries, albeit to varying degrees and in diverse forms.

61 Native Law and the philosophy of ubuntu play a role as well, Yvonne Mokgoro, 'Ubuntu and the Law in South Africa' (1998) 1 Potchefstroom Electronic Law Journal 1.

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

63 Of course, also the new South African constitution is not only influenced by Germany but (among others) also the United States and Canada Dennis M Davis, 'Constitutional borrowing: The influence of legal culture and local history in the reconstitution of comparative influence: The South African experience' (2003) 1 I CON 181, 187; Christa Rautenbach and Lourens du Plessis, 'In the Name of Comparative Constitutional Jurisprudence: The Consideration of German Precedents by South African Constitutional Court Judges' (2013) 14 German Law Journal 1539.

64 Justice Ackermann in *De Lange v Smuts NO and Others* 1998 (7) BCLR 779 (CC) (Constitutional Court) 804 'I have no doubt that over time our courts will develop a distinctively South African model of separation of powers'.

The second chapter will examine how the courts in the three countries have transformed this general notion into legal terminology. Within the three countries, we see a multiplicity of concepts to accommodate the special role of the executive. I will argue that despite their variance, these concepts show structural similarities, which allows us to group them into different categories of deference. These categories can be brought into an order ranging from strong to weak deference.

In the third chapter, this categorization will be used to examine how courts in the three jurisdictions solve particular foreign affairs cases and how the level of deference has changed over time. This will be done with a double comparison. On a vertical level, the application of different categories of deference in comparable cases within a jurisdiction will be examined. We will see that the courts of a given jurisdiction change the application of different categories of deference and hence the level of deference over time. Five groups of cases will be formed to create a common point of reference for the analyses. These groups encompass 'classical' areas of tension between the executive and the judiciary. The first group is concerned with the sources of international law, namely how far the judiciary accepts the interpretation of international treaties by the executive branch. The focus will then shift to the subjects of international law: in the second group of cases, the question of how far the executive recognition of states and governments is binding on the courts will be analysed. The third group of cases deals with the problem of how far the judiciary may independently determine the immunity of states from jurisdiction. Closely related to these questions but already shifting the focus more towards the individual is the question of executive influence concerning the diplomatic status of foreign officials. Finally, the last group of cases completely turns to the individual and examines how far executive decisions concerning diplomatic protection may be reviewed. Although other topics would have been possible,[65] the selection should serve as a meaningful cross-section of classical areas of tension between the executive and the judiciary in foreign affairs. On a horizontal level, the development of the level of deference in every group of cases will be contrasted with that in the other jurisdictions. The analyses will also reveal country-specific problems in the application of deference and provide suggestions for their solution.

The fourth chapter aims to explain the dynamics of deference. As we will see, the three countries show a trend towards more judicial review in

65 (e.g. treatment of customary international law, treatment of extradition requests).

foreign affairs. However, this trend is not uniform and stronger in some countries than in others. General factors that push towards more judicial review in foreign affairs, especially since the end of the Second World War, will be identified. On the other hand, the three jurisdictions show a different receptiveness concerning this trend. The factors that facilitate or hinder their openness towards the convergence factors will also be examined.

In the last chapter, the likely future of deference will be analysed. I will argue that complementary to the traditional role of the executive in foreign affairs, a 'modern view' has developed through the forces examined in Chapter 4. Finally, a limited normative claim will be made concerning the best way to structure deference further into the 21st century.

3. The thesis within the broader project of comparative foreign relations law

This project is thoroughly rooted in the recently unfolding field of 'comparative foreign relations law'. Comparative projects are, of course, not a novelty[66] but have lately intensified in the area of 'foreign relations law'.[67] This area of law can be defined as 'the domestic law of each nation that governs how that nation interacts with the rest of the world'.[68] Although the main structures of this field are determined by constitutional law, it also encompasses other areas, mostly regular administrative and other statutory law.[69] These laws are not treated as a separate field in all jurisdictions,[70]

66 In fact, especially work in foreign relations law almost always included at least some comparative remarks (cf the literature below in this part); for the transatlantic tradition of comparative foreign relations law see Kleinlein (n 53) 539 fn 1.

67 Describing the hardly existent coverage in the two leading English language books on comparative constitutional law Bradley, 'What is Foreign Relations Law?' (n 58) 19 fn 79.

68 Giegerich, 'German Courts' (n 9) mn 1; Bradley, 'What is Foreign Relations Law?' (n 58) 3; 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; Helmut Philipp Aust and Thomas Kleinlein, 'Introduction: Bridges under Construction and Shifting Boundaries' in Helmut Philipp Aust and Thomas Kleinlein (eds), *Encounters between Foreign Relations Law and International Law* (CUP 2021) 6 ff.

69 Bradley, 'What is Foreign Relations Law?' (n 58) 4.

70 The US and German scholarship have defined a field of foreign relations law. In South Africa arguably such a differentiation is developing.

which does not hinder their comparative examination.[71] Two outstanding contributions have induced intensified comparative scholarship in the field. The first is Campbell McLachlan's *Foreign Relations Law* (2014),[72] in which he compares the law of four Commonwealth states: the United Kingdom, Australia, Canada, and New Zealand. The second is the first edition of the *Oxford Handbook on Comparative Foreign Relations Law* (2019),[73] edited by Curtis Bradley, which collects various contributions in the field from different jurisdictions.[74] Following this lead, other significant contributions have been published: *The Double-Facing Constitution* (2019),[75] edited by David Dyzenhaus, Thomas Poole, and Jacco Bomhoff, including especially contributions concerning theoretic foundations of foreign relations law and *Encounters between Foreign Relations Law and International Law* (2021)[76] edited by Helmut Aust and Thomas Kleinlein, which focuses on the intersection between foreign relations law and international law.

This thesis aims to contribute to the research in this dynamic field. As laid out above, it will focus on the relationship between the executive and the judiciary in foreign affairs. Foreign relations law, over time, developed some classical fields.[77] These include the mode of incorporation of international norms within domestic legal systems, the horizontal allocation of power between the three branches, and the vertical separation of powers, which is primarily the role of federal subunits and cities in international law. The objective of this thesis squarely falls within the second category. National treatises within this subfield often focus on the relationship between the executive and legislative branches. The problem of the executive-judicial relationship in foreign affairs is usually less intensely analysed. The endeavour of this book is hence to illuminate this relatively less examined field of foreign relations law and include it in a comparative analysis.

71 Bradley, 'What is Foreign Relations Law?' (n 58) 8; Kleinlein (n 53) 539.
72 Campbell McLachlan, *Foreign relations law* (CUP 2016).
73 Curtis A Bradley (ed), *The Oxford Handbook of Comparative Foreign Relations Law* (OUP 2019).
74 Acknowledging the character as 'groundwork' for comparative foreign relations law Kleinlein (n 53).
75 David Dyzenhaus, Thomas Poole and Jacco Bomhoff (eds), *The double-facing constitution* (CUP 2019).
76 Helmut Philipp Aust and Thomas Kleinlein (eds), *Encounters between Foreign Relations Law and International Law* (CUP 2021).
77 Describing similar main fields Bradley, 'What is Foreign Relations Law?' (n 58) 4.

As a basis, we can rely on various domestic works in foreign relations law and some comparative contributions that cover aspects of the topic. The phenomenon is most thoroughly researched within the United States. Classical monographs like Quincy Wright's *Control of American Foreign Relations* (1922),[78] Louis Henkin's *Foreign Affairs and the Constitution* (1972),[79] and, the modern classic, Curtis Bradley's *International Law in the US legal system* (2013)[80] inter alia cover the executive-judicial relationship.[81] More specific works on this question include Thomas Franck's *Judicial Questions – Judicial Answers* (1992)[82] and an influential article by Ganesh Sitaraman and Ingrid Wuerth concerning the 'normalization' of foreign relations law[83] to name just a few.[84] Common for US scholarship is a strong national focus, hardly taking into account foreign jurisdictions.[85] This thesis seeks to provide comparative material to fuel the ongoing debate within the United States.

In Germany, there are also some older works covering foreign relations law in general, including remarks concerning the judiciary.[86] Within con-

78 Quincy Wright, *Control of American Foreign Relations* (The Macmillan Company 1922).

79 Louis Henkin, *Foreign affairs and the constitution* (Minola 1972).

80 Curtis Bradley, *International Law in the U.S. Legal System* (1st edn, OUP 2013).

81 Now as well Sean D Murphy and Edward T Swaine, *The law of US foreign relations* (OUP 2023); an important source as well are of course the 'Restatements on Foreign Relations Law' of the American Law Institute; Paul B Stephan and Sarah A Cleveland (eds), *The Restatement and Beyond: The Past, Present, and Future of US Foreign Relations Law* (OUP 2020).

82 Thomas Franck, *Political questions, judicial answers: Does the rule of law apply to foreign affairs?* (Princeton University Press 1992).

83 Ganesh Sitaraman and Ingrid Wuerth, 'The Normalization of Foreign Relations Law' (2015) 128 Harvard Law Review 1897.

84 Other important articles include inter alia Louis Henkin, 'Is There a "Political Question" Doctrine?' (1976) 85 Yale Law Journal 597; G Edward White, 'The Transformation of the Constitutional Regime of Foreign Relations' (1999) 85 Virginia Law Review 1; Rachel E Barkow, 'More Supreme than Court?, The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy' (2002) 102 Columbia Law Review 237; Eric A Posner, and Cass R Sunstein, 'Chevronizing Foreign Relations Law' (2006) 116 Yale Law Journal 1170; important monographs comprise e.g. Alexander M Bickel, *The least dangerous branch: The supreme court at the bar of politics* (2nd edn, Yale University Press 1986) and Stephen Breyer, *The Court and the World: American Law and the New Global Realities* (Vintage 2016).

85 Cf however a chapter about the German approach in Franck (n 82) 107 ff.

86 Cf e.g. 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); Eduard Droop, 'Über die Zuständigkeit der in-

temporary German law, foreign affairs were first thoroughly discussed during a meeting of the prestigious annual 'Meeting of the Constitutional Law Teachers' in 1953, with essential contributions by Wilhelm Grewe and Eberhard Menzel.[87] Textbooks on foreign relations law evolved when the subject was first included in the standard curriculum of law schools in the 1970s as *Staatsrecht III*;[88] although they cover aspects of the executive-judicial relationship, the topic takes a rather limited role.[89] The same holds for several monographs aimed at placing the foreign affairs power within the architecture of the Basic Law, without a primary focus on the judiciary.[90] Relatively few authors have directly concentrated on the judicial

ländischen Gerichte für Rechtsstreitigkeiten zwischen Inländern und fremden Staaten, insbesondere für Anordnung von Arrest gegen fremde Staaten' (1882) 26 Beiträge zur Erläuterung des deutschen Rechts 289; Heinrich Triepel, *Völkerrecht und Landesrecht* (CL Hirschfeld 1899); Ernst Wolgast, 'Die auswärtige Gewalt des Deutschen Reiches unter besonderer Berücksichtigung des Auswärtigen Amtes. Ein Ueberblick' (1923) 44 AöR 1; Josef L Kunz, *Die Anerkennung von Staaten und Regierungen im Völkerrecht* (Kohlhammer 1928).

87 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).

88 For this development Frank Schorkopf, *Staatsrecht der internationalen Beziehungen* (CH Beck 2017) 636; the term refers to the classical numeration of public law subjects in law schools which teach constitutional law concerning the organisation of the state 'Staatsorganisationsrecht' as 'Staatrecht I' and constitutional law concerning fundamental rights 'Grundrechte' as 'Staatsrecht II', leaving for 'Staatrecht III' the interaction of constitutional law with the international system and with European Union Law.

89 Albert Bleckmann, *Grundgesetz und Völkerrecht* (Duncker & Humblot 1975) 246–63; Rudolf Geiger, *Grundgesetz und Völkerrecht: Die Bezüge des Staatsrechts zum Völkerrecht und Europarecht; ein Studienbuch* (CH Beck 1985) 170–80; Michael Schweitzer, *Staatsrecht, Völkerrecht, Europarecht* (Müller 1986) 214–18.

90 Contributions dealing less directly with the executive-judicial relationship: Hermann Mosler, 'Die auswärtige Gewalt im Verfassungssystem der BRD' in Hermann Mosler and others (eds), *Carl Bilfinger Festschrift* (Heymann 1954) 243; Jürgen Dreher, *Die Kompetenzverteilung zwischen Bund und Ländern im Rahmen der auswärtigen Gewalt nach dem Bonner Grundgesetz: zugleich ein Beitrag zum Wesen der Auswärtigen Gewalt und deren Einordnung in das gewaltenteilende, föderative Verfassungssystem* (Blasaditsch 1969); Siegfried Weiß, *Auswärtige Gewalt und Gewaltenteilung* (Duncker & Humblot 1971); Christian Tomuschat, 'Der Verfassungsstaat im Geflecht der internationalen Beziehungen' (1978) 36 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 7; Ulrich Fastenrath, *Kompetenzverteilung im Bereich der auswärtigen Gewalt* (CH Beck 1986).

branch, but important exceptions include[91] Hans Schneider's *Gerichtsfreie Hoheitsakte* (1951),[92] Wilfried Bolewski's *Zur Bindung deutscher Gerichte an Äußerungen und Maßnahmen ihrer Regierung auf völkerrechtlicher Ebene* (1971),[93] and Franz-Christoph Zeitler's *Verfassungsgericht und völkerrechtlicher Vertrag* (1974).[94] During the 1990s, the topic was also discussed at the 'Meeting of the Constitutional Law Teachers' in a well-received contribution by Kay Hailbronner[95] and an article by Thomas Giegerich.[96] Recent contributions on the executive-judicial relationship are virtually non-existent,[97] but some works with a broader focus have elaborated on the problem and provide valuable resources.[98] Although some authors include remarks on foreign jurisdictions, hardly any comparative works exist.[99]

91 Other monographs with a more direct focus: Gunnar F Schuppert, *Die verfassungsgerichtliche Kontrolle der auswärtigen Gewalt* (Nomos 1973); cf as well the article by Ernst Petersmann, 'Act of State Doctrine, Political Question Doctrine und gerichtliche Kontrolle der auswärtigen Gewalt' (1976) 25 JöR 587 and Jost Delbrück, 'Die Rolle der Verfassungsgerichtsbarkeit in der innenpolitischen Kontroverse um die Außenpolitik' in Albrecht Randelzhofer and Werner Süß (eds), *Konsens und Konflikt* (De Gruyter 1986) 54.

92 Hans Schneider, *Gerichtsfreie Hoheitsakte: Ein rechtsvergleichender Bericht über die Grenzen richterlicher Nachprüfbarkeit von Hoheitsakten* (Mohr 1951).

93 Wilfried M Bolewski, *Zur Bindung deutscher Gerichte an Äußerungen und Maßnahmen ihrer Regierung auf völkerrechtlicher Ebene: Ein Beitrag zur Verrechtlichung der Außenpolitik* (Marburg 1971).

94 Franz-Christoph Zeitler, *Verfassungsgericht und völkerrechtlicher Vertrag* (Duncker & Humblot 1974).

95 Kay Hailbronner, 'Kontrolle der Auswärtigen Gewalt' (1997) 56 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 8.

96 Thomas Giegerich, 'Verfassungsrechtliche Kontrolle der Auswärtigen Gewalt' (1997) 57 ZaöRV 409; other articles include: Dieter Blumenwitz, 'Kontrolle der Auswärtigen Gewalt' (1996) 42 Bayerische Verwaltungsblätter 577; Klaus Stern, 'Außenpolitischer Gestaltungsspielraum und verfassungsgerichtliche Kontrolle' (1994) 8 NWVBl 241; Juliane Kokott, 'Kontrolle der Auswärtigen Gewalt' (1996) 111 DVBl 937.

97 Stating the lack of contemporary research Gernot Biehler, *Auswärtige Gewalt: Auswirkungen auswärtiger Interessen im innerstaatlichen Recht* (Mohr Siebeck 2005) 96; the most recent monograph on the topic appears to be Sven Fischbach, *Die verfassungsrechtliche Kontrolle der auswärtigen Gewalt* (Nomos 2011).

98 Biehler (n 97) 24 ff; Christian Calliess, 'Auswärtige Gewalt' in Josef Isensee and Paul Kirchhof (eds), *Handbuch des Staatsrechts* (3rd edn, CF Müller 2006) 607 ff; Volker Röben, *Außenverfassungsrecht: Eine Untersuchung zur auswärtigen Gewalt des offenen Staates* (Mohr Siebeck 2007) 281 ff; Martin Nettesheim, 'Verfassungsbindung der Auswärtigen Gewalt' in Josef Isensee and Paul Kirchhof (eds), *Handbuch des Staatsrechts* (CF Müller 2012) 570 ff; Schorkopf (n 88) 343.

99 There appear to be exactly two exceptions Henning Schwarz, *Die verfassungsgerichtliche Kontrolle der Außen- und Sicherheitspolitik* (Duncker & Humblot 1995) (compar-

The lack of contemporary research on the executive-judicial relationship in foreign affairs may be attributed to the feeling that the problem of judicial deference in foreign affairs is solved in Germany,[100] which, as the *Ramstein* case has shown, is far from the truth.[101] In Germany, the question can be termed a 'dormant problem'.[102] This contribution aims to resurface the unsolved questions in German law and contribute to their solution by including them in this comparative project.

The problem of judicial review in foreign affairs was also discussed by some authors in pre-democratic South Africa.[103] Within contemporary South African law, research on the topic is relatively thin. Foreign relations law is covered prominently only by John Dugard's *International Law, A South African Perspective* (1994), which was recently updated.[104] The book covers 'general' foreign relations law but also includes valuable remarks concerning the executive-judicial relationship in foreign affairs.[105] Apart from this, some crucial articles have been published, triggered by major events. In the aftermath of the democratic transition, some scholars examined whether the English concept of 'act of state,' which limits judicial

ing Germany and the United States) and Thomas M Pfeiffer, *Verfassungsgerichtliche Rechtsprechung zu Fragen der Außenpolitik: Ein Rechtsvergleich Deutschland – Frankreich* (Lang 2007) (comparing Germany and France).

100 Already Bleckmann (n 89) 247 notes that the problem is not solved with the renouncement of non-reviewable areas but merely shifted to other legal mechanisms, cf below Chapter 2, II., 2.

101 In fact, the *Ramstein* case led to various articles (cf above n 30) and the judgment of the Federal Administrative Court may trigger more research in the field; for another case concerning arms exports cf *Judgment from 2 November 2020* 4 K 385/19 (Administrative Court Berlin).

102 'schlafendes Rechtsinstitut' when referring to 'gerichtsfreie Hoheitsakte' Biehler (n 97) 99.

103 Cf 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; Hercules Booysen, *Volkereg – 'n Inleiding* (Juta 1980) 229, 255; Gretchen Carpenter, *Introduction to South African Constitutional Law* (Butterworths 1987) 174.

104 John Dugard and others, *Dugard's International Law – A South African Perspective* (5th edn, Juta 2018); focused much more on 'pure' international law, also it includes ample African jurisprudence is Hennie Strydom's (ed), *International Law* (OUP 2016).

105 Especially Dugard and others (n 104) 104–23.

review in foreign affairs, survived the constitutional change.[106] The problem also surfaced again with the Constitutional Court's *Kaunda* decision concerning diplomatic protection.[107] The *SADC* decision mentioned above and other recent judgements will likely induce more scholarship in the area.[108] Concerning the executive-judicial relationship, the only more specialised source is a recent monograph by the former South African diplomat Riaan Eksteen.[109] However, the book was mainly written from a foreign policy angle and contains only a brief section on South African law.[110] As no general monograph on the topic exists in South Africa, this thesis seeks to create a reference point in South African law for further research. It also offers comparative material, which may prove particularly useful within the relatively young democracy to construct a contemporary South African approach concerning the problem of judicial review in foreign affairs.

4. Methodological remarks and conceptual constraints

As laid down above, we will take a comparative angle to address the question of judicial deference towards executive assessments in foreign affairs. There are various different approaches to comparative methodology.[111] Thus, a brief reflection on the chosen approach may lead to more transparency for the reader and the author as to what can be expected from the analyses and where shortcomings are to be found. This thesis predomi-

106 George N Barrie, 'Judicial review of the royal prerogative' (1994) 111 South African Law Journal 788; Hercules Booysen, 'Has the act of state doctrine survived?' (1995) 20 SAYIL 189; Karin Lehmann, 'The Act of State Doctrine in South African Law: Poised for reintroduction in a different guise?' (2000) 15 SA Public Law 337; George N Barrie, 'Is the absolute discretionary prerogative relating to the conduct of foreign relations alive and well and living in South Africa' (2001) Journal of South African Law 403.

107 Dire Tladi and Polina Dlagnekova, 'The act of state doctrine in South Africa: has Kaunda settled a vexing question?' (2007) 22 SA Public Law 444; Dire Tladi, 'The Right to Diplomatic Protection, The Von Abo Decision, and One Big Can of Worms: Eroding the Clarity of Kaunda' (2009) 20 Stellenbosch Law Review 14.

108 Tladi, 'A Constitution Made for Mandela' (n 46).

109 Riaan Eksteen, *The Role of the highest courts of the United States of America and South Africa and the European Court of Justice in Foreign Affairs* (Springer 2019).

110 The South African part only amounts to 30 in over 400 pages.

111 Vicki C Jackson, 'Comparative Constitutional Law: Methodologies' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2013) 55 ff.

nantly subscribes to a functionalist approach.[112] Its core question is posed in functional terms: how does the judiciary in democratic states deal with executive decisions in foreign affairs? This central question determines the material to be taken into account.[113] As mentioned above, it will also use the idea of different legal 'families' to ensure a certain variance of the material, a method commonly associated with functionalism.[114] On the other hand, it does not subscribe to a strict form or program, e.g. a presumption of similarity, commonly (and partially falsely)[115] associated with traditional functionalism.[116] Apart from the basic assumption of greater variance, the thesis does not rely on any typification of the different legal systems. Nevertheless, because of its functionalist elements, it will suffer from a certain imbalance: it will tend to emphasize similarities over differences.[117] I hope to mitigate this fact by trying to contextualise[118] the legal concepts and openly state singularities. Chapter 1 will show the development of the 'notion of deference' within the respective legal orders, stating the different domestic approaches and historical circumstances under which the concept has been adopted. Chapter 3 will analyse the treatment of executive decisions concerning the respective groups of cases within their original environment.[119] Finally, the fourth chapter will not only focus on convergence factors but also examine differences. With these contextual elements, I hope to evade some of the pitfalls that are inherent in the functionalist method.

Moreover, this thesis is subject to some conceptual constraints, resulting in conscious exclusions that shall be noted. It focuses on three jurisdictions, with South Africa representing the Global South. Although South African legal history in no way started only when the first European settlers set foot

112 Jackson (n 111) 62 ff; in the sense that its core is based on a functional question, cf Kischel (n 60) 180.
113 Kischel (n 60) 94.
114 Ibid 218.
115 E.g. the presumption of similarity has only been made by Kötz and Zweigert for 'unpolitical' private law matters see Konrad Zweigert and Hein Kötz, *Introduction to comparative law* (OUP 1998, 3rd revised edition) 40; Kischel (n 60) 181.
116 The 'traditional' functional approach has been laid down by Konrad Zweigert and Hein Kötz (n 115) 32 ff in notably only 16 pages.
117 Günter Frankenberg, 'Critical Comparisons: Re-thinking Comparative Law' (1985) 26 Harvard International Law Journal 411; Ruti Teitel, 'Comparative Constitutional Law in a Global Age' (2004) 117 Harvard Law Review 2570; Jackson (n 111) 66 ff.
118 Jackson (n 111) 66 ff; Kischel (n 60) 187 ff; emphasising the need to contextualise in comparative foreign relations law Kleinlein (n 53) 543.
119 Cf Jackson (n 111) 64.

on the Cape,[120] this thesis will not be able to engage in a more in-depth examination of constitutional structures of indigenous South Africans.[121] As the territory making up today's South Africa was first unified in 1910, the historic analysis will primarily start from this point. This starting point means that pre-democratic South African law will vastly be colonial, hence, English law.[122] Thus, despite including South Africa, the thesis will be liable to the charge of taking a Western view.

Concerning Germany, its division in the aftermath of the Second World War and its membership in the European Union warrant special consideration. The German Democratic Republic (GDR), commonly referred to as East Germany, existed for more than 40 years and, as part of the Eastern Bloc, developed its own legal system, which in foreign affairs stressed the ideological leadership of the Soviet Union.[123] However, the apparent systemic rivalry that ended with the peaceful revolution in the GDR and German reunification supports the assumption that its influence on contemporary German Foreign Relations is marginal.[124] The law of the GDR will hence not be included in this analysis. Concerning Germany's membership in the EU, the latter has developed into a highly integrated community and developed a character much different from 'ordinary' international law. German courts have reacted with specific standards and concepts that are exclusively applied within that context. As no equivalent project exists in the United States and South Africa[125], and as the focus of this thesis is 'ordinary' international law, these doctrines will not be included within the examination. German membership in the European

120 Stuart Woolman and Swanepoel Jonathan, 'Constitutional History' in Stuart Woolman and Michael Bishop (eds), *Constitutional law of South Africa* (2nd edn – January 2013 – Revision Service 5, Juta 2002) 2.

121 Likewise, it will also not include the legal system of the independent Boer Republics; cf e.g. concerning the reception of *Marbury v Madison* in the Boer republics Heinz Klug, 'Introducing the Devil: An Institutional Analysis of the Power of Constitutional Review' (1997) 13 South African Journal on Human Rights 185, 193.

122 Rautenbach and du Plessis (n 63) 1543.

123 Helmut Philipp Aust, 'The Democratic Challenge to Foreign Relations Law in Transatlantic Perspective' in David Dyzenhaus, Thomas Poole and Jacco Bomhoff (eds), *The double-facing constitution* (CUP 2019) 345, 362; cf as well Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland Bd. 4: Staats- und Verwaltungsrechtswissenschaft in West und Ost 1945–1990* (CH Beck 2012) 562 ff.

124 If at all existent; there appears to be no post-Cold War analysis of the foreign relations law of Eastern Germany.

125 The SADC (cf above n 42 and accompanying text) has not (yet) reached the level of integration of the European Union.

Union will, of course, not be ignored and referred to where it has a bearing on the analysis.