When It Comes to the Courts, There's Nothing Really Foreign About "Foreign Policy"

By:

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The COVID-19 pandemic has changed the nature of life all around the world. Given its global impact, you might have assumed that it would have led to greater efforts at international collaboration. By and large however, efforts to address this global public health crisis have primarily been through nationally allocated resources and processes. Still, initiatives such as COVAX as coordinated by the Global Alliance for Vaccines and Immunisation (GAVI) and the World Health Organisation (WHO) will likely demonstrate just how crucial international collaborative efforts are if we are to successfully deal with this global crisis.

The pandemic also highlights the nature of the almost certain future calamities that we will face -- crises like climate change -- which observe no national boundaries and underline the need for greater not fewer efforts at global coordination in order to tackle these issues. For nation States, even though

these crises have domestic impacts, the efforts to deal with them will fall within the scope of their “foreign relations” – either bilaterally (nation-to-nation) or multilaterally (participated in by more than two countries).

Given that our best hope of successfully meeting such existential crises lies in the judicious and expert deployment of the government’s authority to conduct foreign policy, it should hardly seem controversial that their exercise should be the subject of judicial scrutiny and check in exactly the same way the exercise of domestic powers by governments are in democracies in ordinary times. Yet, the exercise of foreign relations powers is said by some scholars to be exempt from judicial review and scrutiny. For an excellent recent account observing the dominant view in the US that the executive has almost unfettered powers in relation to foreign affairs decision-making and why this shouldn’t be the case, see Martin S. Flaherty, Restoring the Global Judiciary: Why the Supreme Court Should Rule in U.S. Foreign Affairs.

In South Africa's constitutional era, courts have shown no disinclination to pronounce on what might be understood as foreign relations powers. From the outset, South Africa’s courts have insisted that all public power is subject to constitutional control. Accordingly, all government conduct can be tested for compliance with the Bill of Rights, for whether it is sourced in legal authority and for whether it accords with the principle of rationality. This last standard – rationality, that is that the government has provided a plausible rationale for its actions – is the most complicated and is one which the courts have applied variably. The case law makes clear that the courts view different types of public power as being appropriately scrutinised with differing levels of intensity. In other words, if all public power is subject to constitutional control, some forms are to be more tightly controlled than others. Determining the appropriate level of scrutiny for the particular type of governmental power under review is a subject of much judicial and scholarly analysis and debate.

The courts make this determination with reference to the separation of powers principle. This enables them to appropriately respect and recognise the constitutionally demarcated roles and powers afforded to the executive and legislative branches. The courts' approach also allows recognition that these branches are often better placed to perform certain roles and exercise particular functions in that they have expertise and capacities that the judicial

branch does not — for instance, the ability to act swiftly or to appreciate the contextual consequences of particular budgetary allocations. Theunis Roux has suggested that judges will also take into account 'pragmatic considerations' such as the need to shore up and protect the institutional security and independence of the judiciary in determining the appropriate level of scrutiny.

South Africa's constitutional scheme envisages that conduct understood to be "administrative action" is subject to a higher level of scrutiny than other types of public power. On at least one previous instance, the courts have found that foreign policy power should be understood, at least, to be among the types of public power attracting a less rigorous level of scrutiny than that attaching to "administrative action".

South Africa's Constitutional Court has avoided simple doctrinal categorisation and has not applied a generic template for judicial scrutiny to foreign policy powers– preferring, instead, to be guided by the specific context and circumstances of each case. Nevertheless, it bears noting that the Constitutional Court believes that the executive's engagement of policy considerations involving foreign affairs is owed deference.

It is important to note that while the Constitution allocates different roles to the executive and legislature in matters that implicate considerations of foreign policy – so, for instance, section 231 of the Constitution provides that the signing and negotiation of all international agreements is the responsibility of the national executive but that ratification requires approval of the National Assembly and National Council of Provinces – other institutions of government may exercise powers that also have repercussions for foreign policy.

In *National Commissioner of the South African Police Service v Southern Africa Human Rights Litigation Centre*, the Constitutional Court was asked to review the failure on the part of the National Prosecuting Authority to investigate, with a view to prosecuting, perpetrators of grave international crimes. Given the nature of the crimes involved, its decision would have foreign policy considerations for the South African State. Similarly, in *Government of Zimbabwe v Fick and Others*, a case which involved the rather technical and politically uncontroversial issue of the enforcement of costs orders, the Court was required to consider the legitimacy of the SADC Tribunal and its orders. In

these types of cases, the factors that determine the intensity of judicial review are the type of power being exercised and by whom, and not their foreign relations implications.

Clearly where judicial review is mandated for compliance with the Bill of Right, the judiciary's scope to afford deference to the executive runs out — even if the exercise of the power said to violate rights is clearly a foreign policy power. This is the clear message of *Law Society of South Africa v President of the Republic of South Africa*. And if what is said to be the hallmark of judicial review of foreign relations power — deference to the executive — is ultimately inapposite, does it make sense in any real way to understand judicial review of foreign relations powers any differently from judicial review of any other government power?

In South Africa's constitutional scheme, all public power, including foreign policy powers, is subject to judicial review for legality, rationality and compliance with the Bill of Rights. However, the scope of the judicial review – and in particular the standard of rationality – is informed by a certain deference to the executive, in order to respect the democratic principle and its institutional competence. The level of deference will depend on the facts and circumstances of each case. This means that the level of scrutiny to be afforded the other branches of government's respective foreign relations powers and responsibilities cannot be predicted with any degree of confidence. Rather, the particular circumstances and context of the case will be the primary concern of the courts.

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