

## **The contribution of international courts and tribunals to the methodology of international law**

### **OC - (ILA-14154) - THE CONTRIBUTION OF THE EUROPEAN COURT OF JUSTICE TO THE METHODOLOGY OF INTERNATIONAL LAW**

Riaan Eksteen PhD (Namibia)<sup>1</sup>

1 - Senior Research Fellow at the Department of Politics and International Relations in the Faculty of Humanities, University of Johannesburg.

#### **Riaan Eksteen PhD**

Born 1942.

Career in international relations and political analysis spanning more than 50 years of diplomacy at the highest level. Added experience in public relations and international consultancy.

Member of the South African Foreign Service for 27 years. Served during that period at the Foreign Ministry from 1964-67 (in the Namibian division with South Africa's involvement in a court case in the ICJ), 1973-1976 (Head of the UN and Namibian divisions) and 1981-1983 (Head of Planning).

Served from 1968-1973 at the South African Embassy in Washington, D.C. Ambassador and Head of Mission for 12 years at the UN New York (1976-1981); Namibia (1990-1991); UN Geneva (1992-1995); and Turkey, with accreditation to Azerbaijan, Kyrgyzstan, Turkmenistan and Uzbekistan (1995-1997). The ambassadorial assignment to Turkey was by Pres. Mandela.

Degrees: B.A. from University of Pretoria in 1963 majoring in Roman Dutch Law, Political Science and German; B.A. Honours from the University of South Africa in 1971; M.A. (Cum Laude) from the University of South Africa in 1974 with the thesis entitled: "The Role of the USA Senate in Foreign Affairs"; and D Litt. et Phil. from the University of Johannesburg in October 2018 on "The Role of the High Courts of the United States of America, South Africa and the European Union in Foreign Affairs" (awarded with no corrections).

Book to be released in Europe by Springer and MTC Asser in early August 2019 under the title of "The Role of the Highest Courts of the United States of America and South Africa, and the European Court of Justice in Foreign Affairs".  
<https://bit.ly/2Myozpv>

#### **Abstract**

#### Introduction

The European Court of Justice has been in existence since 1952. The Treaty of Lisbon (2009) renamed it and is now known as the Court of Justice of the European Union (CJEU). For the purpose of this submission the reference to the ECJ is maintained.

The ECJ is one of the most powerful supranational courts in world history with an extensive authority that has been clearly achieved and defined. In that process the Court has advanced a major aim of the Union, namely integration. By becoming its main proponent, the Court facilitated and advanced European unification by means of judicial interpretation and influential rulings.

#### Contribution to the Methodology of International Law

As methodology seeks to define the means of acquiring scientific knowledge the Court presents a rich and varied source of significant research material. The ECJ as a source of international law is

unique. Its rulings contain persuasive arguments to ensure the proper structuring of core theoretical frameworks for research. The main structure in that framework is based primarily on qualitative research focusing on the identification of the relevant rulings and thereafter systematic analysis of their contents.

Qualitative research is a process to assist in a new understanding of a study's main topic. In methodological writing the term qualitative data is generally taken to encompass the rough materials researchers collect from the field they study. The overall research strategy for a study is to collect and analyse material on the relevant. The main guide for conducting research is relevancy. The strategy to rely on is qualitative assessments of source material. One of the main elements of such a strategy is the case study research method. Qualitative case study provides insight and enabled interpretation leading to a rich end product — an in-depth study of a particular topic rather than a superficial reading of a few sources. Careful case selection is at the heart of this qualitative research.

### The ECJ and Case Study

With the ECJ case study is highly intensive and focuses on the Court as a unit. It is imperative for the understanding and interpreting of case studies that the context must be detailed. When the purpose of the research is well-defined, the choice of cases is self-evident. Thus, in addition to the single case study, multiple case studies (comparative case studies) involve collecting and analysing data from several cases. Employing this practice means that a better insight is gained into how influential the ECJ in fact is. It is now possible to untangle the complexities of this judicial system to make it understandable, while its rulings are placed in their historical and judicial contexts. An important advantage of qualitative case study is its ability to shed light on what was not initially thought necessary to be included, but that then presented itself as an important set of pointers. By conducting systematic and structured qualitative case studies, it is possible to identify and develop major themes and eventually produce valid conclusions.

### The Kadi Cases

These four cases have a special place in the annals of the ECJ. It merged security concerns and human rights protection. The Court moulded these rights and concerns into an overpowering concept: the threat of international terrorism must effectively be addressed without imposing disproportionate restrictions on the human rights of those suspected of supporting terrorism. The main Kadi ruling as per the ECJ in Kadi II stands out as a shining light on fundamental rights. It became the legal interface between the EU and the UN, and between security concerns and human rights protection. In the EU and its institutions, the cases had more than ripple effects. The ECJ was not only critical of the Commission and Council in several of its pronouncements, it ruled against them by rejecting their appeals. While the Court reined in their powers it widened the scope of its own and cemented them. It refused to defer to these EU executive bodies.

### Importance of Historical Material

Histories of court cases capture crucial developments in and important applications of rulings, especially when a particular issue or ruling is studied over a period of time. This life trajectory ensures that critical events are evaluated. Central themes can be identified and adequately considered in preparing the ultimate conclusion of the study. Fundamental

rulings enable a determination to be made about the Courts' involvement and role in the subject. Most important for a better understanding of the rulings has been research into the historical context of each epoch-making case. It is essential in rulings of the ECJ whereby this Court has established the principles of "supremacy" and "direct effect". In the cases of Van Gend & Loos and of E.N.E.L. the ECJ structured the two pillars of direct effect and supremacy of EU law. Today they are still guiding principles. They carry consequences for each Member State. The ECJ condensed and enunciated what has become known as the supremacy or primacy principle which requires that in the case of a conflict national law must yield to community law.

Apart from forming the basis for the EU these two principles became one of the main reasons for the UK making the ECJ a red line in its decision in June 2016 to leave the EU (Brexit). For the ECJ, the purpose of judicial review is not only to determine whether national laws are consistent with European law, but, most importantly, to declare illegal any EU or national law that violates any EU treaty.

These two landmark decisions are of profound importance for the EU legal system. They resonate until this day. With them the ECJ laid a firm foundation for a totally new legal order. By employing these two principles the Court entrenched four freedoms of the EU system: freedom of movement of persons, goods, services and capital.

#### Conclusion

The ECJ has a profound contribution to make to the methodology of international law.

**Palavras-chave : ECJ; Review; Cases, Court review cases**