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Lukasz Gruszczynski, Wouter Werner (eds.), *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation*, Oxford University Press, Oxford: 2014, pp. 464

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The reviewed book provides an in-depth analysis of the practice of major international courts and tribunals with respect to deference to national judgements. This practice appears when the courts and tribunals have to reconstruct and make an assessment of the scope and content of states' rights and duties, while leaving the states the freedom to appraise non-legal or legal elements in the process of ensuring their performance of international obligations. Two fundamental judicial doctrines are under consideration: the standard of review and the margin of appreciation. The former doctrine, taken from the US constitutional practice, expresses the right of the court or tribunal to reassess judgements made by national authorities and discloses the various possible levels of intrusiveness which they are permitted to undertake (ranging from *de novo* review through to substantial weight of the evidence, reasonableness and abuse of discretion, and up to a clearly erroneous standard). It has been distinguished from the burden of proof and standard of proof. The margin of appreciation doctrine, born in the European legal tradition, describes the different extent to which national legislative, executive, and judicial decision-makers are allowed to reflect diversity in their interpretation and application of, above all, human rights obligations. The two doctrines are perceived as "referring to the same thing, although in reverse fashion (i.e. a wide margin of appreciation equals a low standard of review, and vice versa)". Their judicial application and usefulness is determined by and depends on many different factors, investigated in detail in each of the chapters of the book.

The book is the result of the COST research project (International Law between Constitutionalisation and Fragmentation: the role of law in the post-national constellation) and two conferences organised in Seville and Lund within its framework. It encompasses 20 contributions arranged in five parts. The introduction, written by the editors of the book Lukasz Gruszczynski and Wouter Werner, offers preliminary remarks and some theoretical aims and considerations.

The first part of the book is entitled "General issues/comparative perspectives". It consists of four articles: 1) Judicial standards of review and administration of justice in trade and investment law and adjudication (Ernst-Ulrich Petersmann); 2) Deference and the use of the public policy exception in international courts (Ilona Cheyne); 3) Democracy and distrust in international law: The procedural democracy doctrine and the standard of review used by international courts and tribunals (Benedikt Pirker);

4) Good faith review (Andrei Mamolea). In the main these studies represent more a comparative than a general approach to the problem (with the exception of the text on the good faith). The authors compare in principle three international regimes: WTO law, EU law, and investment law.

The second part of the book concentrates on international investment law and WTO law. Here the reader can find four contributions on the following issues: 1) Beyond the standard of review: Deference criteria in WTO law and the case for a procedural approach (Michael Ioannidis); 2) The role of the standard of review and the importance of deference in investor-state arbitration (Caroline Henckels); 3) Treaty change, arbitral practice and the search for a balance: Standards of review and the margin of appreciation in international investment law (Erlend Leonhardsen); 4) Standard of review and scientific evidence in WTO law and international investment arbitration: Converging parallels? (Valentina Vadi and Lukasz Gruszczynski).

Part III is devoted to European Union law. It consists of three texts: 1) National procedural choices before the Court of Justice of the European Union (Pieter Van Cleynenbreugel); 2) Risk, precaution and scientific complexity before the Court of Justice of the European Union (Patrycja Dąbrowska-Kłosińska); 3) Standard of review for necessity and proportionality analysis in EU and WTO law: Why are differences in standards of review legitimate? (Alexia Herwig and Asja Serdarevic).

The fourth part of the publication concerns deference in the field of international human rights law, in particular in European and Inter-American law. It includes: 1) The European Court of Human Rights and standards of proof: An evidential approach toward the margin of appreciation (Mónika Ambrus); 2) Experts in hate speech cases: Towards a higher standard of proof in Strasbourg? (Uladzislau Belavusau); 3) The standard of equivalent protection as a standard of review (Veronika Bílková); and 4) Subsidiarity in the Americas: what room is there for deference in the Inter-American System? (Bernard Duhaime).

The last part (Part V) of the book refers to the practice of "other international courts". Among them are such important courts as: 1) the International Court of Justice (Standard of review and the margin of appreciation before the International Court of Justice by Chiara Ragni); The International Tribunal on the Law of the Sea (Standard of review and the International Tribunal on the Law of the Sea by Rosemary Rayfuse); 3) the International Criminal Court (Deference in the International Criminal Court practice concerning admissibility challenges lodged by States by Karolina Wierczyńska); and 4) Beyond hierarchy (Standards of review and complementarity in the International Criminal Court by Diane Bernard).

The variety of problems and the richness of the issues considered in the book are enormous. Their detailed examination is impossible in a short review. Nevertheless, some general observations can be made.

As can be observed, the book offers a wide panorama of the deferential practice of many international courts and tribunals. Their choice was not made randomly but consciously. The standard of review concept has been developed mostly in WTO law and investment arbitration, while the margin of appreciation appears throughout the

judgements of the European Court of Human Rights. It is noteworthy that the deferential doctrines, and especially the formally conceptualized standard of review, is almost unknown to the jurisprudence of the International Court of Justice (the first case is the Whaling case) and to classical inter-state arbitration (see however the Abeyi arbitral awards). In some courts, like the International Criminal Court, the practice is not sufficiently developed to allow for formulating precise conclusions. The doctrine appears not only in contentious cases, but also in advisory opinions (in, *inter alia*, the ITLOS, 2011 advisory opinion on the activities in the Area).

In each of the studies the authors show that the judicial approaches are very different and that the practice lacks coherence. In addition, the standard of review appears as a procedural tool, while the margin of appreciation has a substantive nature. As a consequence there are can be no conclusions at the end of the monograph. The introductory remarks as well as the conclusions at the end of each particular contribution are unable to fill this lacuna. However, the authors realize that the judicial practice is not yet mature in this respect and that the theoretical reflections on deference by international tribunals are still in the preliminary stage.

Nevertheless some ideas on the content, functions and practical role of the analysed judicial doctrines can be developed in more general terms. One might wonder, for instance, why some international courts and tribunals use both formulas, while others rely on one of them only. This is the question which arises when dealing with deference (i.e. the problem of the substantive and procedural concepts of deference and whether the name of the doctrine is formally mentioned in the reasoning of a court; the issue of good faith review; the relations to similar concepts or doctrines, i.e. the margin of appreciation and States' discretion). The interesting problem is to what extent the doctrines of deference are really at stake. What expressions of the courts' activity are judicial tools in the examination of states' obligations, i.e. instruments invented and used by judges, and what are expressions of the courts' activity depending on the part of international – primary – obligations are under judicial review, for instance in the cases of reasonableness or equitableness? What expressions used by courts and tribunals can be identified as a standard of review or margin of appreciation, and why they can be qualified as such?

The essential issue is to determine the premises of application of deference doctrines and the role of objective (e.g. the existence of freedom of State action, result-oriented rules, scientific facts and data) and subjective (e.g. intent, consciousness, will of a State) elements. Another question is what are the limits/criteria of the use of the analysed doctrines, if any, and should they be accepted as legitimate? One can maintain that a *de novo* standard of review is doubtful because it implies that the international court is in fact the court of the last instance, but equally assert that the full deference standard is hardly acceptable. In some articles partial answers can be found in the concepts of sovereignty, the democratic nature of national authorities, respect for human/fundamental rights, due process, non-discrimination, expertise, etc.

The theoretical reflections can help determine of the place of the deference doctrine in the cases of both traditional (governing inter-state relations) and non-traditional

(regulating transnational or even intra-national relations) international law. It could be interesting to see how the doctrines operate depending the nature and scope of international obligations (e.g. the duties of action or omission, of result and of means, and how the doctrines work when the international obligations do not leave any freedom for States, or when the State's duty is that of due diligence), or depending on the nature of national authorities (legislative, executive or judicial), the character and powers of different courts and tribunals (traditional courts and non-traditional, such as the ICC and arbitral tribunals), and on the interactions between them in the field of deference and so on. Though the jurisprudence of the international courts and tribunals is lacks coherence, the answers to these questions could lead to a soft theory of deference in international law.

The reviewed book is the outcome of the fruitful co-operation of many academics from diverse European and non-European research centres. Although it has some shortcomings, it contains a thorough and critical overview of the judicial practice of international courts and tribunals. The findings and suggestions formulated in the book can be valuable and useful for judges, and instructive for legal advisors, other practitioners, scholars and other persons interested in the practice of international dispute settlement with respect to the implementation of prescribed international obligations, and more generally conformity of states' activities with international law. However, they are presented not as ready-to-use precepts, but rather as points of reference for further reflection on the relatively recent and multifaceted phenomenon of judicial deference.

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