Intensity of review in international courts and tribunals

A comparative analysis of deference

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Summary

International adjudicators are more and more often requested to pass judgement on matters that are traditionally considered to fall within the domestic jurisdiction of States. Especially in the fields of human rights, investment law, and trade law, international tribunals are now commonly required to evaluate decisions of national authorities that have been made in the due course of democratic procedures and public deliberation. This raises the question of whether international adjudicators should review such decisions *de novo* or whether they should give deference to domestic authorities. In many national legal orders, courts do not exercise *de novo* review with regard to legislative and administrative decisions, as this would permit them to supplant the powers of other branches of government. Instead, courts exercise judicial restraint by exercising only deferential forms of review. Deference, in this context, is being understood as a form of legal reasoning which gives special weight to the determinations made by the institution under review, thus limiting the intensity of review exercised by the adjudicator. This study investigates whether deferential standards of review have been adopted by international courts and tribunals and asks whether they should do so.

The first part of this study provides a comparative analysis of judicial deference by international courts and tribunals. It investigates to what extent a range of international courts and tribunals have adopted structural doctrines of deference when evaluating State conduct against rules of international law. The analysis covers six permanent institutions (the International Court of Justice; the European, Inter-American and African human rights courts; the dispute settlement system of the World Trade Organization; and the International Tribunal for the Law of the Sea) as well as investment arbitration tribunals. Even though disputes before these institutions differ in many respects, all of them are at least occasionally asked to review domestic public policies against international rules. A comparative analysis shows how the different adjudicators have responded to demands for deference made by respondent States in similar ways in the different contexts. The arguments raised in favour of deference often concern issues that are relevant across different regimes, such as State sovereignty, regulatory autonomy and democratic accountability. The comparative analysis inquires whether international courts and tribunals respond to these issues in similar ways and whether a common approach to deference has emerged.

The comparative analysis undertaken here reveals a wide variety of approaches adopted by international courts and tribunals concerning their standard of review. Some adjudicators have developed intricate doctrines of judicial deference, referring to the superior capacities of domestic

institutions and to the direct democratic legitimacy of their decisions, as well as the open-ended character of many international legal rules. International adjudicators limit the intensity of their review especially in the context of fact-finding, technical assessments and the interpretation and application of domestic law, whereas deference towards public policy choices and treaty interpretations advanced by respondent States is less common. The comparative analysis further demonstrates that different adjudicators use similar phrases to express deference. The margin of appreciation as well as the standards of reasonableness and good faith have been adopted by different courts and tribunals to clarify how they exercise meaningful review while extending a certain measure of deference to respondent States. A rigorous assessment of these standards, however, demonstrates that they fail to provide insight into the specific tests adopted by the adjudicator and the extent to which the intensity of review is limited. This leads to the conclusion that while the concept of deference can validly express a certain willingness to accept the determinations made by domestic authorities, attempts to quantify or qualify the standard of review in more precise terms fail to produce satisfactory results.

Whereas some adjudicators explicitly adopt deferential approaches, others reject limitations on the intensity of their review. A common justification for strict scrutiny is the observation that States have voluntarily agreed to subject themselves to international review. Adjudicators who reject deference consider that their mandate requires them to provide an independent, neutral assessment of compliance with international law. When courts and tribunals adopt a strict standard of review, they rarely justify that choice in an extensive manner, which suggests that they consider *de novo* review as a legitimate exercise of their mandate. On this view, it is deference, not strict scrutiny, that needs justification.

The outcome of the comparative analysis demonstrates that the choice of deferential or rigorous standards of review does not fully depend on the procedural characteristics of the reviewing institution or on the substantive content of the applicable law. These parameters do not explain why, for instance, different investment tribunals or different regional human rights courts adopt divergent positions. Instead, the adoption or rejection of deference depends on normative views on the appropriate balance between international supervision, on the one hand, and respect for the prerogatives of domestic institutions, on the other.

The normative part of the thesis discusses whether international courts and tribunals *should* adopt a deferential standard of review when evaluating State conduct in the light of international law. I propose a distinction between epistemic deference, which is justified by the superior capacity of domestic authorities to make factual and technical assessments, and constitutional deference, which is based on the democratic legitimacy of domestic decision-making. I conclude

that epistemic deference is a prudent acknowledgement of the limited expertise of adjudicators with regard to non-legal assessments. Epistemic deference does not, however, necessarily translate into an overall decrease in the intensity of review to the benefit of respondent States. Since this form of deference is dependent on expertise, it can also be extended to the other party to the dispute or to independent experts.

The more controversial issue of constitutional deference evokes a wide variety of arguments relating to other debates in international law. In favour of deference, it has been argued that deference protects democratic decision-making, respects State sovereignty, and gives effect to the principle of subsidiarity and its preference for decision-making at the local level. These arguments are counterbalanced by claims that deference jeopardises the neutrality and effectiveness of international review, destabilises the equality of the disputing parties, and threatens the uniformity of the interpretation and application of international law. Many of these arguments are incommensurable but cannot on their own provide sufficient justification for the adoption or rejection of deference.

In response to the democratic argument, it can be argued that judicial review provides a check on majoritarian decision-making, which is widely accepted in domestic legal systems in order to protect minority interests. Moreover, in a well-functioning democracy, the State's decision to subject itself to the jurisdiction of an international court or tribunal is a form of self-binding that can have full democratic support. A similar argument can be made with regard to sovereignty: the assumption of international obligations is by definition a limitation of sovereignty but this choice is in itself an exercise of sovereignty. Consequently, the acceptance of the jurisdiction of an international adjudicator who enforces limits on domestic democracy and sovereignty can be a democratic, sovereign choice. In response to arguments concerning subsidiarity, one can argue that the mere establishment of international courts and tribunals suggests that international supervision fulfils functions that cannot be exercised by domestic courts; otherwise, States would not have created such institutions in the first place.

The arguments against deference are not conclusive either. References to the principle of equality of arms assume an equality between disputing parties that does not exist as a matter of fact and law when one of them is a State. Deference is an acknowledgement of the special responsibilities that distinguish States from private actors. Neither can the principle of equality provide a convincing argument when both disputing parties are States, because the applicant State would benefit from the same deference if, in another dispute, its own policies came under review. Arguments based on the universality and uniformity of international law disregard the importance of adapting international rules to local circumstances, which is explicitly required by many of these

rules. Finally, the argument that deference constitutes an abdication of the judicial task overstates the effect of deference. Certainly, the creation of international jurisdiction implies that international courts and tribunals ought to exercise their judgment but it does not mean that the task of interpreting and applying international law can never be shared with domestic authorities.

Several of the arguments mentioned so far are rather ambiguous. The same reasoning that justifies deference in the eyes of some provides a reason against deference for others. Whereas some consider it problematic that international courts subject domestic democracy to review, others advocate such review as an indispensable prerequisite for legitimate governance. Likewise, whereas some denounce the risk that deference poses to a uniform application of international law, others appreciate the diversity and pluralism that deference permits. In response to this complexity, I propose to focus on the principle of the separation of powers as the decisive rationale underlying judicial deference. This leads to a novel argument against constitutional deference in international courts and tribunals, except in the field of human rights.

In the domestic context, the principle of the separation of powers requires courts to fulfil a delicate role: on the one hand, they must review the conduct of other branches of government, restricting their exercise of public power; on the other, courts must refrain from accumulating too much power themselves, as this would also jeopardise the separation of powers. Constitutional deference is a response to this conundrum, allowing courts to control but not to replace other institutions. On the international level, the same rationale does not apply in the same way: since international courts and tribunals exercise only weak review, there is no need for constitutional deference.

Unlike the decisions of domestic courts, decisions of international courts and tribunals rarely have an immediate impact on the domestic legal order. On the contrary, most international adjudicators issue only declaratory judgments, leaving States the freedom to decide on whether to remove or to adapt an impugned measure when found unlawful by an international adjudicator. Moreover, several international regimes prioritise or permit the payment of compensation, enabling States to retain a contested policy and still remain compliant with international law. Consequently, international law allows States to mediate the effects of adverse rulings. In addition, apart from the lawful options that States have to respond to international judicial decisions, the reality of international affairs demonstrates that States can choose to ignore judgments, refuse compliance, or withdraw from treaty regimes. The point of this observation is not to justify non-compliance, but to demonstrate the limited powers of international courts and tribunals which removes the need for judicial deference.

Whereas domestic courts exercise their review in furtherance of a constitutional separation of powers that legitimises the exercise of public power, most international adjudicators have a more instrumental purpose. Apart from the regional human rights courts, international courts and tribunals do not have the purpose of legitimising the exercise of public power in a constitutional sense by providing checks on political institutions but of settling disputes within sectoral fields of international law that have more instrumental aims. Consequently, their review does not involve a general evaluation of the legitimacy of government conduct in the light of different public and private interests. This means there is less reason to be concerned about the constitutional questions of democratic accountability and the distribution of decision-making authority which justify deference in domestic judicial review.

My rejection of constitutional deference in international courts and tribunals is further reinforced by the conceptual confusion that it creates. Both adjudicators and scholars commonly consider that deference does not replace but only limits judicial scrutiny. In practice, however, it is difficult to quantify or qualify how limited deference works. The more nuanced and refined a standard of review becomes, the more closely it becomes intertwined with the interpretation of the applicable legal rule. This suggests that a better alternative to deference consists of a restrictive interpretation of the relevant international obligation, if adjudicators see reason to balance the demands of an international regime against competing domestic interests. Unlike deference, which leaves the content and scope of the relevant international obligation obscure because their interpretation and application is referred, at least to some extent, to domestic authorities, a restrictive interpretation provides a clear answer to the legal question before the adjudicator.

While I conclude against the adoption of constitutional deference by international courts and tribunals generally, I make an exception for the human rights courts, because the different arguments adopted in light of the separation of powers play out differently in the human rights context. The jurisprudence of human rights courts tends to have a larger impact on domestic legal orders than that of other international adjudicators. Human rights law covers potentially any aspect of public policy, while some regional human rights courts have become increasingly assertive in the remedies they order. Accordingly, concerns about overly intrusive judicial review have more pertinence in this context. Moreover, unlike other international courts and tribunals, the human rights courts share the constitutional purpose of domestic courts in securing the legitimate exercise of public power. States that accede to regional human rights regimes outsource part of this constitutional mandate to international adjudicators, conscious that domestic institutions may not always be able to execute their mandate as they should. Consequently, human rights courts are faced with the same challenge as domestic courts, namely to provide a form of review that limits

but does not replace the powers exercised by other institutions. Constitutional deference is a solution to this dilemma. Finally, whereas the uncertainty created by deference is problematic in other fields of international law, it is less so in human rights law. In accordance with the principle of subsidiarity, international human rights law is not primarily effectuated through a top-down imposition of decisions on domestic institutions, but through an internalisation of human rights at the local level. Constitutional deference encourages this by giving domestic decision-makers a say in the interpretation and application of human rights law.

Ultimately, the debate about the intensity of the review exercised by international courts and tribunals is a variation on broader debates about the proper balance between the aims pursued by international law and the prerogatives of sovereign States. In this study, I focus on the principle of the separation of powers to determine whether judicial deference is a helpful tool to strike this balance, and conclude that this is generally not the case. Once the intrusiveness of the remedies that can be ordered by the international adjudicator is identified as the relevant factor for deciding whether deference is due, it becomes clear that there is no need for constitutional deference in most regimes, because international law and politics leave States a wide range of options to mediate the consequences of international decisions. Moreover, in the interest of a clear understanding of international law, it is preferable that adjudicators provide a univocal interpretation of legal rules. Whereas in the human rights context a certain involvement of domestic authorities in the interpretation and application of the law is constructive, other international courts and tribunals should provide clarity on where the boundary between State sovereignty and treaty obligations lies.