Zhu G., *Deference to the Administration in Judicial Review: Comparative Perspectives* (Ius Comparatum – Global Studies in Comparative Law vol. 39), Cham (Switzerland): Springer International Publishing 2019, ISBN 978 3 030 31538 2, xiii + 445 pp, hb € 185,29

In several countries, the very foundation of administrative law can be traced back to the theorization and establishment of a specific system of judicial remedies against public powers. For this reason, the judicial review of administrative action has consistently raised widespread academic interest in administrative law scholarship and, above all, has represented a valuable space for comparing different systems in the last century.[1]

In this sense, the present book, edited by Guobin Zhu, that collects the results of a research promoted by the International Academy of Comparative Law, fits into a larger and consolidated comparative tradition. However, it stands out for two main reasons.

Firstly, it differs from other comparative works in terms of the size and heterogeneity of the countries taken into consideration (17), which are governed, on the whole, by different legal cultures, different institutional systems and very different political and economic contexts. As is well known, the topic of risks and opportunities relating to a comparison between largely heterogeneous systems is still hotly debated,[2] even in the field of administrative law.[3] Besides, the variety of experiences considered in this research certainly constitutes added value, thus allowing administrative law scholars to familiarize themselves with constitutional and administrative experiences that are otherwise difficult to access.

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1 See R Bonnard, *Le contrôle juridictionnel de l'administration: étude de droit administratif compare* (Paris, Delagrave 1934); more lately, A-R Brewer-Carías, *Judicial Review in Comparative Law* (Cambridge: Cambridge University Press 1989); even in the European context, the first and most important comparative research has concerned the remedies against public authority: see JM Auby & M Fromont, *Les recours contre les actes administratifs dans les pays de la Communauté économique européenne* (Paris, Dalloz 1971). Similar, more general studies in comparative administrative law over the last century have traditionally paid great attention to judicial review: see J Rivero, *Cours de droit administratif compare* (Paris: Les Cours de droit 1954-1955); most recently, S Flogaitis, *Administrative law et droit administrative* (Paris, Pichon et Durand-Auzias 1986); M D'Alberti, *Diritto amministrativo comparato. Trasformazioni dei sistemi amministrativi in Francia, Gran Bretagna, Stati Uniti, Italia* (Bologna, Il Mulino 1992).

2 On the necessary affinity (at least cultural), see G Gorla, *Diritto comparato e diritto comune europeo* (Milano, Giuffrè 1981) 620; for a different perspective, A Gambaro & R Sacco, 'Sistemi giuridici comparati', in *Trattato di diritto comparato* (Torino, Utet 1996) 2; also on this issue, recently, see G della Cananea, *Il nucleo comune dei diritti amministrativi in Europa: Un'introduzione* (Napoli, Editoriale scientifica 2020) 226-232.

3 On the necessary uniformity of the administrative systems to be compared, see P Cane, *Controlling Administrative Power: An Historical Comparison* (Cambridge University Press: Cambridge 2016); M D'Alberti, *Diritto amministrativo comparato. Mutamenti dei sistemi nazionali e contesto globale* (Bologna, Il Mulino 2019). For a different opinion, P Craig, 'Comparative administrative law and political structure' (2017) 37 Oxford Journal of Legal Studies 946-965.

Secondly, this volume is characterized by the peculiarity of the object of comparison: at the heart of the research there is neither a consolidated legal institute (administrative proceeding, participatory guarantees, public liability, public contracts), nor a specific piece of administrative legislation or administrative task (public utilities regulation, town planning, environmental protection). The research deals, instead, with a purely theoretical concept – *deference* – which has essentially been developed within a specific legal context (the U.S.) and, even if nowadays it is well known at a doctrinal level around the world,[4] in most jurisdictions it is not yet accepted nor used (as the results of the research itself confirm). From this perspective, the efforts of country-reporters to apply the meaning of a concept consolidated in a specific legal context to other systems has been very valuable, and has been made possible through reference to a questionnaire that, in the wake of a consolidated method of comparative studies, has allowed the authors of the book to dwell on common problems (rather than on the same legal institute).

Further to these peculiarities, the framework of this comparative research is also remarkable both for its study of judicial control over administrative action and, more generally, for how it promotes a better understanding of the problem of the constitutional relevance of public administration in contemporary legal systems.

The research clearly highlights that the problem of judicial control of public administration – which is often analyzed from a technical perspective (legal standing, standards of control, judge prerogatives and powers, distribution of the burden of proof) – must be placed in a constitutional dimension, taking into consideration the specific level of concentration and distribution of powers in each system (as the Swedish report clearly confirms).[5] After all, it is only by taking into consideration the peculiar U.S. constitutional structure that the very meaning of deference can be understood: what is effectively defined as '*de jure* deference' by John C. Reitz (or 'medium de jure deference') is nothing more than a consequence of the broad regulatory power conferred to the agencies by Congress. Therefore, the recognition of this Chevron space is nothing more than the logical result of the democratic choice to entrust to an agency – and not to a judge – the role of defining (and interpreting) some 'rules of the game' within that jurisdiction.[6] For this reason, such a notion of deference is less developed in countries where public administrations are traditionally entitled

4 As the recent spread of books concerning deference all around the world clearly demonstrates: P Daly, *A Theory of Deference in Administrative Law: Basis, Application and Scope* (Cambridge: Cambridge University Press 2012); M Lewans, *Administrative Law and Judicial Deference* (Oxford and Portland: Hart Publishing 2016); E Jordao, *Le juge et l'administration: entre le controle et la deference* (Bruxelles: Bruylant 2016).

5 See Cane (n3).

6 As aptly suggested by PL Strauss, 'Deference' is too confusing - let's call them '*Chevron* space' and '*Skidmore* weight' (2012) 112 Columbia Law Review 1143-1173.

mainly to execute the law rather than to regulate (as in European countries) and where, consequently, the courts are the natural and sole 'guardian' of the correct interpretation of legislation.

However, beyond this particular perspective, a non-technical meaning of deference (or '*de facto* deference', following Reitz) also comes into consideration: it refers to a more general attitude of the courts to consider the 'weight'[7] of opinions and evaluations carried out by public administrations, with regard to the way in which they are adopted or to the specific constitutional values that they express.[8] This second meaning of deference – which overcomes the peculiar regulatory function of U.S. agencies – has been raised in every legal system, regardless of an explicit acceptance of a deference theory (the so called 'substantive underpinnings of deference', as aptly expressed by Paul Craig in his Preface). Indeed, as this research also clearly demonstrates, every country has always faced the problem of how to rationalize the relationship between courts and public administration and, for this reason, has progressively refined the techniques and tools to limit the courts' prerogatives vis-à-vis administrative agencies, also beyond the intensity of judicial review.[9] After all, several traditional categories in the administrative law domain (such as administrative acts or administrative discretion) have mainly served to regulate the space for, and limits to, court intervention.

The reasons why so few systems expressly adopt a deference theory can be traced to a plurality of circumstances, often connected to the historical roots and concrete objectives relevant to each experience of judicial review. In this regard, this book also clearly highlights the difficulty of asserting a theory of deference in systems where judicial protection has long been the first and most important way to protect citizens against the arbitrariness of public authorities (as in France or Italy), or where judicial review aims primarily at the protection of individual rights (as in Germany or Austria): it is precisely for this last reason that one of the main obstacles to the establishment of a complete theory of deference is currently represented by article 6 of the European Convention of Human Rights, which is seeking to strengthen the intensity of judicial review in several European countries (as shown by the results of many reports). However, this research demonstrates that a theory of deference is difficult to

7 To continue using the suggestion proposed by PL Strauss, 'Deference' is too confusing terminology (n6).

8 See F Kingham, 'Deference to the Administration in Judicial Review in Australia', in G Zhu (ed.), *Deference to the Administration in Judicial Review: Comparative Perspectives* (Cham, Springer International Publishing 2019) 51, who refers to S Gageler, 'Deference' (2015) 22 Australian Journal of Administrative Law 151-156. In this article, Gageler distinguishes a first meaning of deference (respectful regard for the judgment or opinion of another) from a second meaning of deference (respectful acknowledgement of the authority of another).

9 Even systems traditionally known for their judicial activism reveal some 'restraint' areas in judicial review: see the Israel report.

assert, even in systems where judicial control of administrative power is conceived as one of the most important pillars of the rule of law (as confirmed by the reports of countries belonging to the common law tradition, such as Australia or New Zealand, where courts remain the only arbiter of statutes and the common law). In these countries, the objective to ensure, through judicial review, a lawful and non-discriminatory exercise of public power as well as full compliance with the duty of procedural fairness, takes priority over other institutional needs and has traditionally prevented the formulation of a solid theory of deference (although the standard of review is not necessarily more intrusive than in other countries). After all, as also clearly emerges from New Zealand's report, the struggle to formulate a structural deference theory could also be related to a particular skepticism of the Courts, which often do not welcome excessive '*ex ante*' rationalization of their powers since it could sclerotize and limit their role in the legal system.

Beyond these general issues, it is interesting to wonder which are the main criteria that affect the substantial deference in each legal system, and which are the most relevant institutional factors that may influence it.

First of all, and contrary to what is often claimed to originate from the 'Diceyan misunderstanding', the presence of either an administrative court or an ordinary one is not especially relevant for our purposes.[10] A higher level of deference could also be granted by ordinary courts, while administrative courts may sometimes be more inclined to approach the 'heart' of the administrative decision: for example, in the Swedish system, administrative courts are entitled to carry out a full merit review; in some cases it is the civil law nature of the dispute (and not the ordinary nature of the judge) that justifies and makes possible a full merit review, unlike in public law disputes (see on this point the Czech report).[11] Much more relevant is the existence of a well-functioning system of non-judicial remedies entitled to provide a full merit review on the primary administrative decision (such as administrative tribunals): indeed, as the Australian and Danish reports demonstrate, it may contribute to making the reduced intensity of judicial review more acceptable.

As for the substantial reasons to defer, a clear tendency to grant a wider margin of discretion for decisions closely linked to political or sovereign interest emerges from the majority of national reports, even if the actual delimitation of this category presents some degree of uncertainty within the different sys-

10 See G della Cananea, 'Judicial Review of Administrative Action in Italy: Beyond Deference?' in Zhu (n8).

11 Even if it also depends on the fact that this system lacks a clear distinction between executive and judicial powers: see H Wenander, 'Full Judicial Review or Administrative Discretion? A Swedish Perspective on Deference to the Administration' in Zhu (n8) 413.

tems.[12] In most cases, this category includes matters such as defense, public order, immigration, and the appointment of political offices.[13] Sometimes, courts have been reluctant to review government policy, considering the political, social, and economic dimensions of the issues at stake (see the Australian report), while in other instances – even in legal systems characterized by a great extent and depth of judicial review – Courts have limited their intervention in the field of social welfare, granting a wider space to administrative bodies in the assessment and balancing of interests involved (see the Swedish report). Finally, there are cases in which deference recognized by national courts to local authorities in an urban-planning matter is an expression of a more general principle of non-interference of the central authority towards the local government (see the Czech report).

A limitation to the possible excessive extension of matters of political relevance is usually found in the impact of the disputes on individual rights: the risk of rights infringements contributes to a significant reduction of the deference space, surpassing the same traditional distinction between political, purely administrative or technical disputes (see Israel, Singapore, New Zealand reports).[14] This tendency emerges in many reports and, of course, clearly characterizes the legal systems belonging to the European Convention on Human Rights (Finland, Sweden, Netherlands, Italy). Only in isolated cases does a controversial deference to governmental authorities in adjudicating human rights cases because of the political and social importance of the issue at stake emerge (see the Hong Kong report).

Another common tendency that surfaces in all national reports is that of the weight given to the technical or scientific assessment provided by public administration (and, more generally, to administrative experts). However, in some countries such as Italy, the late-nineties intensification of the standard of review, interestingly, was claimed in a dispute concerning technical evaluation (service-related disease), since in these kinds of litigation judges have been allowed to seek expert technical advice (unlike in purely discretionary matters);

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12 On this point, see Kingham (n8) 81, who underlines that courts are 'reluctant to review political decisions, but the demarcation between the legal and the political is hard to draw', and that the same distinction between 'high and low policy is controversial and, generally, courts and tribunals are reluctant to either review or ignore government policy'.

13 See, for example, the U.S. report highlighting deference in military, security, or foreign affairs law; the Japanese report which refers to area of deference in matters related to public officials, areas of immigration, control and diplomacy, treatment of inmates and detainees, but also in the field of education and disciplinary action against students; the Hong Kong report underlines that courts have generally deferred to the government in decisions concerning immigration, recognizing wide government discretion in this field; in Chinese systems, matters concerning state action of national defense and foreign affairs cannot be brought to judicial review (according to Article 13 of Chinese Administrative Litigation Law).

14 See C Chan, 'A preliminary framework for measuring deference in rights reasoning' (2016) 14 International Journal of Constitutional Law 851-882.

similarly, in the EU legal order, technical discretion generally allows for stricter review if compared to pure discretion (see EU report).[15] However, in the majority of cases, it is precisely the presence of an assessment that requires a high level of technical expertise that allows for justifying less intrusive judicial control (see the Netherlands or the Japanese reports)[16]; sometimes, this can be expressly determined by the law, such as in the Czech legal order.[17] Nevertheless, the concrete extension of this 'technical space' varies considerably from system to system: for example, in several countries the same environmental disputes are considered to be characterized by technical assessments and justify a greater deference; other times, conversely, the environmental issues have been considered so relevant for the public interest as to justify stricter judicial review (see the Finland report).[18]

The issue of technical assessments also partly relates to the distinction between questions of fact and questions of law. While with respect to questions of law there is frequently an explicit refusal to recognize areas of deference (at least abstractly, as Paul Craig rightly pointed out), for questions of fact courts are sometimes less inclined to interfere with the administrative assessment (see Australian report): indeed, public agencies often have considerably more fact-finding skills, or may be more likely to provide a correct reconstruction of the facts (such as through the use of witnesses). However, this aspect depends on the concrete way in which the primary decision has been assumed and, above all, on the concrete guarantees that have been recognized during the administrative proceedings (for example, a strict distinction between investigative bodies and decision-making bodies). This is a relevant issue that confirms the necessity of strengthening the relationship between the standard of review and the concrete way in which administrative procedures are specifically organized and shaped within each system (rather than in relation to the importance of

15 On the uncertainties to distinguish between 'technical discretion' and discretion *stricto sensu* and on the need to clarify the intensity of review carried out for each form of discretion, see M Eliantonio, 'Deference to the Administration in Judicial Review: The European Union' in Zhu (n8) 168.

16 On this point see, JC Reitz, 'Judicial Deference to the Administration in the United States' in Zhu (n8) 442-443, who has hopes for a more cooperative relationship between agencies and courts in defining scientific policy (especially in the environmental field), and stresses a recent tendency of the Courts to reinforce their generalist approach for controlling scientific evaluation (as underlined by E Meazel, 'Super deference, the science obsession, and judicial review as translation of agency science' (2011) 109 Michigan Law Review 733-784).

17 As highlighted in the Czech Republic report, according to Section 70 (d) of the 2002 Code of Administrative Justice, judicial review is excluded for administrative decisions which depend solely on the state of health of persons or is of a purely technical nature (technical state of things), unless it represents 'by itself' an obstacle to the pursuit of a profession, employment or business, or any other economic activity.

18 As underlined by Zhu (n8) 12.

the matters or to the nature of the interests at stake):[19] such an element should be more extensively considered by the Courts in order to assess the proper scope and the intensity of their supervision, particularly in the absence of constitutional or legislative provisions expressly restricting judicial review.[20]

In conclusion, the book clearly underlines that the role and the design of 'substantial' judicial deference varies between diverse legal systems due to different juridical cultures, the particular scope of judicial review and the specific function assigned to the courts (also related to social trust in other forms of control).[21] At the same time, it reveals the growing difficulty of attaining, within each jurisdiction, a proper balance between the increasing demand for an effective judicial protection of individual rights (reinforced at supranational level) and the need to take due account of the constitutional and societal function covered by the administration in contemporary administrative systems (also in light of the increasing complexity of social phenomena to be governed and regulated). However, the need for a greater rationalization of judicial control – and therefore the reasons justifying the design of a deference theory – should not necessarily be seen as a weakening in the level of judicial protection and, consequently, a risk for individual rights. The theoretical systematization of a deference theory and, above all, its explicitation by the courts may contribute to greater stability and coherence of the techniques of control, to a higher level of predictability in court decisions, as well as a lower risk of contextualism and individualism in the standard of review;[22] thereby, the proper functioning of a deference theory may be considered a sign of maturity, and not of weakness, of the legal system.[23] However, such a theory may pose some risks and drawbacks outside legal systems in which the rule of law is firmly established and the strict separation and independence of powers is fully ensured (as clearly

19 See A Moliterni, 'Streamlining the Judicial Review of Administrative Decisions: a Comparative Institutional Approach' [2018] Rivista Trimestrale di Diritto Pubblico 539-578.

20 After all, as underlined by C Chan, 'A Principled Approach to Judicial Deference for Hong Kong' in Zhu (n8) 221, it can be risky to acknowledge deference simply because the Constitution has assigned certain tasks to the government or to the legislator – as the Supreme Court of Hong Kong seems to do – since in most Constitutions public tasks and functions are assigned mainly to such entities.

21 P Rosanvallon, *Counter-Democracy: Politics in an Age of Distrust* (Cambridge: Cambridge University Press 2008).

22 The risk of contextualism is clearly underlined by W John Hopkins, 'The "Dreadful Truth" and Transparent Fictions: Deference in New Zealand Administrative Law' in Zhu (n8) 350-358; see also Chan (n20) 217, who stresses the reduced predictability of those UK tendencies in public law scholarship which suggest adopting 'a more context-sensitive approach', also considering 'the importance of the interest at stake and how much expertise or legitimacy the court has in adjudicating the issue' (so called 'due deference').

23 As the same shift from a 'passive' to an 'active' model of deference, that is characterizing the Chinese system, indirectly demonstrates, also in order to facilitate communication with other Courts: see Q Gao, 'Deference to the Administration in Judicial Review in China' in Zhu (n8) 127-128.

emerges from the Polish report, but also the Chinese report). All of these aspects undoubtedly represent some of the main relevant lessons that emerge from this significant comparative research.

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