Standard of review: reception of the concept in continental Europe

Pilkov Kostiantyn
PhD (Law), Senior Research Fellow,
Department of International Private Law and Legal Problems of Eurointegration,
Academician F.H. Burchak Scientific Research Institute of Private Law and Entrepreneurship of the National Academy of Legal Sciences of Ukraine. Kyiv, Ukraine;
Supreme Court Justice (Ukraine).
ORCID: 0000-0002-8931-0413

Traditionally, in civil law jurisdictions the court's power to intervene into decisions of other decisionmakers, e.g. lower courts or administrative agencies, is based on statutory provisions determining the type of decisions which might be subjected to review and kinds of violations of law that justify the court's intervention. This approach is rather negativistic and does not consider the idea that certain level of deference must be afforded to a decisionmaker whose decision is under review.

The article provides a general understanding of the idea of the standard of review as a prescribed by a statute or case law degree of deference to be given by the reviewing court to the actions or decisions under review. It contains an overview of each basic standard applied by reviewing courts in the United States of America due to the fact that the analyzed doctrine is highly developed there. The standards are de novo review, clearly erroneous review, reasonableness review, arbitrary-and-capricious review, abuse-of-discretion review, and no review.

The article reveals main factors that have impact on establishing an applicable standard, namely the type of proceedings, the type of a decisionmaker whose decision is under review, the decision type, types of questions under review (law, fact, mixed law/fact, and discretionary decisions).

The author argues that in one of its key aspects, namely in the aspect of a standard of judicial review of decisions of administrative agencies, the concept is known and applied in other legal systems, particularly in continental Europe. In another aspect, i. e. the standard of appellate review, the concept is not yet formally recognized in European domestic judicial systems, although the supranational judicial institutions in continental Europe sometimes refer to it.

The article argues that although the precision of deference attributed to standards of review is an illusion, the difference among the known standards might actually have psychological impact as it might help the judge in a reviewing court to reflect on the degree of deference that ought to be granted to a decision under review, which is closely related to the idea of stability of court decisions as a prerequisite of predictability of justice and, more generally, legal certainty.

Introduction. Although as noted by Prof. Martha S. Davis, "the idea of using standards to guide appellate review of decisions of tribunals below has existed from the beginning of American jurisprudence"[1], and according to American schol-

[1] Davis M.S. Standards of review: Judicial review of discretionary decisionmaking. The Journal of Appellate Practice and Process. 2000. Vol. 2, No. 1. p. 47.

ars, the standard of review (hereinafter – the 'SoR') is so significant in United States of America that the rules of most reviewing courts specifically require the appellant to identify the appropriate SoR for each issue addressed in the opening brief[2], and "every appellate decision typically begins with the standard of appellate review"[3], until recently this concept has not been widely used in continental Europe. This is in spite of the fact that the concept of the SoR as useful and very practical notion closely relates if not encompasses appropriate grounds for appeal and procedural powers of the appellate court.

The wide construct of the SoR as a general idea of when a court should intervene was known in the common law in England[4], and became part of the doctrine of procedural law in other common law jurisdictions (e.g. Australia[5], Canada[6] and other legal systems[7]). The concept even 'infiltrated' the procedures in international jurisdictional bodies, such as the WTO dispute settlement bodies[8]. This disparity of value attributed to the concept of the SoR throughout the major legal traditions compels us to conduct at least general analysis of this concept from the standpoint of a civil law researcher.

This article seeks to provide a general theory of the SoR, and an overview of each basic standard as they are applied primarily by the U.S. courts due to the already mentioned development of the doctrine in the United States, without claiming this overview to be comprehensive, as well as to explain how the concept integrates into European judicial practice.

The intent is not to analyze in details the case law addressing the SoR in any jurisdiction or advocate for any particular change in the law aimed at formal introduction of this concept into domestic legal orders of European countries, but to reveal whether the concept of the SoR has any benefits that might be gained from its application in judicial proceedings of continental Europe and whether there are any indicators that the idea of measuring deference for decisions under review is compatible with European legal tradition. The author's hypothesis underlying the forthcoming analysis is that the concept of the SoR makes the reviewing authority focus on deference to opinions under review, and thus adds to stability of decisions.

NOTION OF THE STANDARD OF REVIEW

A SoR prescribes the degree of deference given by the reviewing court to the actions or decisions under review and describes the authority of the reviewing court to determine the severity of error in the decision of the lower court or agency and whether that error reaches a reversible level[9]. Although some deferential standards are closely related to respective standards of proof, in general the concept of the SoR must be distinguished from the standard of

[2] Storm T.J. The standard of review does matter: Evidence of judicial self-restraint in the Illinois Appellate Court. *Southern Illinois University Law Journal*. 2009. 34. p. 73.

[3] Steinman A. Rethinking standards of appellate review. *Indiana Law Journal*. 2020. Vol. 96. p. 1.

[4] Mechanick A. The interpretive foundations of arbitrary or capricious review. *Kentucky Law Journal*, *Forthcoming*. p. 2. doi: 10.2139/ssrn.4125722.

[5] Prince T. Recurring issues in civil appeals – Part 1. *Australian Law Journal*. 2022. Vol. 96, No. 3. p. 203.

[6] Danay R. A house divided: The Supreme Court of Canada's recent jurisprudence on the standard of review. *University of Toronto Law Journal*. 2019. Vol. 69, No. 1. p. 3.

[7] De Beer A., Bradley M. Appellate deference versus the de novo analysis of evidence: The decision of the Appeals Chamber in Prosecutor v Jean-Pierre Bemba Gombo. *Yearbook of International Humanitarian Law*. 2019. Vol. 22. p. 153. doi: 10.1007/978-94-6265-399-3_7

[8] Wang Ch. Invocation of national security exceptions under GATT Article XXI: Jurisdiction to review and standard of review. *Chinese Journal of International Law*. 2019. Vol. 18, No. 3. p. 711. doi: 10.1093/chinesejil/jmz029

[9] Davis M. S. Basic guide to standards of judicial review. *Journal South Dakota Law Review*. 1988. Vol. 33. No. 3. p. 468.

proof, which is the degree of probability that must be reached in supporting the existence of a fact for a party bearing the burden of proof to prevail in dispute over that fact.

The SoR as a concept might have different meanings: (1) as a standard of appellate review it relates to courts of higher instances that are reviewing decisions of lower courts; (2) the term 'review' or sometimes more precise 'judicial review' is used when dealing with the deference given by a competent reviewing court to actions or decisions taken by an agency in an administrative setting[10].

Standards of appellate review are drawn from the limited role of the appellate court in a multi-tiered judicial system. Judges in courts of first instance generally decide upon relevant factual disputes and make credibility determinations regarding the witnesses' testimony because they see and hear the witnesses testify. Whereas, appellate judges primarily correct errors in questions of law made by lower courts, develop the law, and set forth precedent that will guide future cases. Because of these differences in the trial and appellate functions, appellate courts afford varying degrees of deference to trial judges' rulings depending on the type of ruling that is being reviewed[11]. These varying levels of deference are known as the SoRs.

OVERVIEW OF BASIC SORS

The applicable standard depends on several factors, most important among them are: the type of proceedings (civil, criminal, administrative); the type of a decisionmaker whose decision is subjected to review (judge, jury, agency); the decision type; types of questions under review (questions of law, fact, mixed law/fact, and discretionary decisions).

In the U.S. legal system, there are six basic SoRs which span a continuum of no deference to the lower court (*de novo*) to complete deference (no review). Complete deference to a lower court or an administrative agency occurs when there is no review. It is rare. However, some statutes do not allow review of certain agency actions or nonreviewable court decisions, usually of procedural nature.

In other countries there are other standards which still can be placed on that 'no deference – complete deference' continuum. For example, according to the Supreme Court of Canada's case-law reviewing courts have to determine whether a decision an administrative agency needs to be "correct", meaning that the court would have reached the same decision (no deference), or whether it suffices for the administrative decision merely to be "reasonable"[12].

The table below summarizes where the main SoRs fall on the deference continuum, and some of the areas where each SoR may apply. This table is a simplified version of presentation of the whole range of standards by J. Rugg, that provides a general roadmap of the SoRs' types[13]:

[10] Organisation for Economic Co-operation and Development. Executive summary of the roundtable on the standard of review by courts in competition cases. 2019. URL: https://one.oecd.org/document/DAF/COMP/WP3/M(2019)1/ANN2/FINAL/en/pdf (accessed on: 03.03.2023).

[11] The Writing Center at Georgetown University Law Center. Identifying and understanding standards of review. 2019. URL: https://www.law.georgetown.edu/wp-content/uploads/2019/09/Identifying-and-Understanding-Standards-of-Review.pdf (accessed on: 03.03.2023).

[12] Judgment of Supreme Court of Canada in the Case 31459 "Dunsmuir v. New Brunswick". (2008, March). Retrieved from https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2408/index.do (accessed on: 03.03.2023).

[13] The Writing Center at Georgetown University Law Center. Identifying and understanding standards of review. 2019. URL: https://www.law.georgetown.edu/wp-content/uploads/2019/09/Identifying-and-Understanding-Standards-of-Review.pdf (accessed on: 03.03.2023).

Table 1

Types of the SoR

Deference continuum	No deference	Minimal deference	Some deference	More deference	More deference	Complete deference
SoR	De novo	Clearly erroneous	Reasonableness / Substantial Evidence	Arbitrary and capricious	Abuse of discretion	No review
When it applies	Question of law	Question of fact	Jury decision Formal agency decision	Informal agency decision	Discretionary decision	Some agency actions; decision to not prosecute

De novo

In a *de novo* review the appellant is asking the court to look at issues of law anew and affords the lower court no level of deference. While applying this SoR, the reviewing court steps into the position of the lower court and re-decides the issue. Questions of law are reviewed *de novo*, because appellate courts are primarily concerned with correct interpretation and application of the law. Hence, they afford the lower court no level of deference regarding their assessment of purely legal questions.

American practitioners emphasize that there is a problem of defining an appropriate SoR with respect to so called mixed questions. Although, sometimes the task of uncovering true nature of a particular mixed question becomes challenging, in many cases those questions might be subjected to analysis aimed at splitting them into pure questions of law and fact, as was explained in details in one of earlier papers dedicated to fundamental and practical distinctions of factual and legal questions[14].

Clearly Erroneous

The 'clearly erroneous' SoR is applied to questions of fact. Under this standard, a court of appeal must have a definite and firm conviction that a mistake has been made by the lower court. Thus, some degree of deference is afforded to the lower court's findings. It is substantial, but not total, deference. The U.S. Supreme Court defined this SoR as: "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed"[15]. The burden is on the appellant to identify the alleged erroneous factual finding and to overcome the presumption of correctness applied to all lower court decisions. If there are two permissible outcomes, the lower court judge's choice is not clear error, even if the appellate court may have come to a different conclusion. J. Rugg notes that the 'clearly erroneous' SoR is only applied to fact finding by judges, masters, and sometimes magistrates. Fact finding by a jury or administrative agency is reviewed under the 'reasonableness' or 'substantial evidence' SoR[16].

Reasonableness / Substantial Evidence

There are two main types of decisions subject to a 'reasonableness' or 'substantial evidence' SoR: jury and agency decisions.

[14] Pilkov K. Questions of fact and law: Fundamental and applied differentiation of circumstances of the case, their legal qualification and application of law. *Law of Ukraine.* 2020. No. 8. p. 144–194.

[15] Decision of U.S. Supreme Court in the Case 333 U.S. 364 "United States v. United States Gypsum Co". (1948, March). URL: https://supreme.justia.com/cases/federal/us/333/364/ (accessed on: 03.03.2023).

[16] The Writing Center at Georgetown University Law Center. Identifying and understanding standards of review. 2019. URL: https://www.law.georgetown.edu/wp-content/uploads/2019/09/Identifying-and-Understanding-Standards-of-Review.pdf (accessed on: 03.03.2023).

i. Jury decisions

In Jackson v. Virginia (1979) the U.S. Supreme Court explained the 'reasonableness' standard in a criminal case: "A doctrine establishing so fundamental a substantive constitutional standard must also require that the factfinder will rationally apply that standard to the facts in evidence. A "reasonable doubt," at a minimum, is one based upon "reason". Yet a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt, and the same may be said of a trial judge sitting as a jury. In a federal trial, such an occurrence has traditionally been deemed to require reversal of the conviction"[17].

Hence, generally a jury verdict will stand unless there is no substantial evidence in its support. Probably, this is because jury fact findings and other decisions are given great deference by reviewing courts due to constraints on a court's authority to overturn factual findings made by a jury placed by the Seventh Amendment to the U. S. Constitution.

ii. Agency decisions

Agency's factual findings are reviewed under the 'substantial evidence' SoR. Substantial evidence means more than a mere scintilla but less than a preponderance of evidence; it means such relevant evidence as a reasonable mind might accept as adequate (sufficient) to support a conclusion. This SoR is highly deferential: a reviewing court must uphold the agency's findings unless the evidence presented would compel a reasonable fact-finder to reach a contrary opinion. If the evidence is susceptible to more than one rational interpretation, the court may not substitute its judgment for that of the agency. The application of a 'reasonableness' or 'substantial evidence' SoR to administrative proceedings varies in how much deference is afforded (e.g. if an agency is seen as performing court-like functions then the standard will operate similar to 'clearly erroneous' review; but if an agency is seen as operating not like a judiciary and rather as using its particular expertise, then 'reasonableness' review will look more like the review of jury decisions)[18].

However, whether an agency's procedures comply with due process requirements presents a question of law reviewed *de novo*. Also, the constitutionality of an agency's regulation being a question of law is reviewed *de novo*.

Arbitrary and Capricious

Under the Administrative Procedures Act, informal agency actions are reviewed under the arbitrary and capricious SoR. The arbitrary and capricious SoR is appropriate for resolutions of factual disputes implicating substantial agency expertise. Review under this SoR is narrow and the reviewing court may not substitute its judgment for that of the agency.

According to the U.S. Supreme Court, the court may reverse under the 'arbitrary and capricious' SoR only if the agency has relied on factors that Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. Rather, a court should only invalidate agency determinations that fail to examine the relevant data and

[17] *Decision of U.S. Supreme Court in the Case* 443 U.S. 307 "*Jackson v. Virginia".* (1979, June). URL: https://supreme.justia.com/cases/federal/us/443/307/ (accessed on: 03.03.2023).

[18] The Writing Center at Georgetown University Law Center. Identifying and understanding standards of review. 2019. URL: https://www.law.georgetown.edu/wp-content/uploads/2019/09/Identifying-and-Understanding-Standards-of-Review.pdf (accessed on: 03.03.2023).

articulate a satisfactory explanation for the action including a rational connection between the facts found and the choice made. When reviewing that determination, courts must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.

Initially this was a very deferential standard because agency fact finding or policy decisions did not require much of a record. However, as courts began requiring a more substantial record, the arbitrary and capricious review became less deferential. The major difference in 'arbitrary and capricious' and 'reasonableness'/'substantial evidence' SoRs is what the appeals court reviews: in substantial evidence review, the review encompasses the agency's assessment of the evidence in the record and its application of that evidence in reaching a decision; In arbitrary and capricious review, the focus is on the administrative agency's explanation or justification of its decision and whether that decision can be reasoned from the body of evidence[19].

J. Rugg notes that the "clear error judgment" test is a subset of arbitrary and capricious review that is not related to the 'clearly erroneous' SoR. Courts sometimes mix these two SoRs by referring to a "clear error of judgment" test when reviewing trial court discretionary or fact finding decisions[20].

Abuse of Discretion

The 'abuse of discretion' SoR recognizes that judges in the courts of first instance require some amount of discretion to perform their duties. A judge abuses her or his discretion (1) when the findings of fact upon which she or he predicates the ruling are not supported by the evidence of record; (2) if incorrect legal principles were used; or (3) if his or her application of the correct legal principles to the facts is clearly unreasonable. As a general matter, the 'abuse of discretion' SoR is a strict one, calling for more than a mere difference of opinion, as it recognizes that a judge has a range of choices and will not be reversed so long as the decision remains within that range[21].

It is worth mentioning that reviewing courts may use similar language when reviewing discretionary decisions of lower courts and administrative agencies, but in practice the review of administrative agency discretion is significantly more deferential, e. g. an agency's imposition of sanctions is reviewed under an "abuse of discretion" SoR, i.e. a penalty imposed should not be overturned unless it is unwarranted in law or unjustified in fact. This greater deference may be afforded because the reviewing court has little understanding of the agency subject matter or action, so it cannot easily assess the agency's use of discretion[22].

INTEGRATION OF THE SOR CONCEPT INTO EUROPEAN LEGAL SYSTEMS

European jurisprudence is more familiar with the concept of the standard of judicial review, meaning the degree to which a court has jurisdiction over reassessment of a decision of an administrative agency which is usually outside the judicial branch, rather than with rules prescribing the appellate courts to afford some degree of deference to decisions of lower courts.

[19] Ibid.

[20] Ibid.

[21] Weber J. The abuse of discretion standard of review in military justice appeals. *Military Law Review*. 2015. Vol. 223. p. 50.

[22] The Writing Center at Georgetown University Law Center. Identifying and understanding standards of review. 2019. URL: https://www.law.georgetown.edu/wp-content/uploads/2019/09/Identifying-and-Understanding-Standards-of-Review.pdf (accessed on: 03.03.2023).

In Case C-418/18 P before the Court of Justice of the European Union it was emphasized that the standard of judicial review was limited to the verification of manifest errors of assessment attached to situations where EU institutions enjoy wide discretion, in particular, when they adopt measures 'in areas which entail choices, in particular of a political nature'. Indeed, it is settled case-law of the CJEU that the intensity of its review varies with the discretion accorded to the institutions[23].

Sometimes in European jurisprudence, SoRs are referred to as degrees of importance or area of the law establishing particular rights or guarantees for a person, e. g. in 2019 the Federal Constitutional Court of Germany stated that German constitutional law (rather than the EU Charter) remained 'the primary standard for review' in cases where general personality rights are at stake[24]. The Federal Constitutional Court therefore "applied the fundamental rights enshrined in the Basic Law as its SoR, granting a constitutional complaint challenging a judgment of the Federal Court of Justice"[25].

With respect to application of the concept of the SoR to appellate proceedings, the case law of the European Court of Human Rights (hereinafter – the "ECtHR") is of greater importance for our analysis. In several opinions judges of the ECtHR pointed out how important was the adherence to the necessary SoR in domestic courts, e. g. that in many cases, where violation of Article 6 of the European Convention on Human Rights was found and the Court specified the reopening of the respective domestic procedure as an adequate remedy, the question was not the mere reopening of the proceedings. Clearly, the purpose of the domestic trial *de novo* in such circumstances was to correct the fatal faults, akin to 'absolutely essential procedural errors' in domestic law that led to the finding of violation in the first place[26]. In those cases where the ECtHR went deeper into analyzing the powers of the reviewing courts and their ability to redress the violation of the Convention due to the SoRs applied by that court, it specified the required standard[27].

Another set of the ECtHR jurisprudence that is able to demonstrate how important the implementation of the idea of the SoR into domestic judicial proceedings might be, encompasses the Court's opinions on the value of finality of judgments. In cases of *Ryabykh v. Russia* (no. 52854/99, judgment of 24 July 2003) §52, and *Svetlana Naumenko v. Ukraine* (no. 41984/98, judgment of 9 November 2004) § 91, the Court concluded: "Legal certainty presupposes respect for the principle of *res*

[23] §123 in Opinion of Advocate General Bobekin the Case C-418/18 P "Puppinck and Others v European Commission". (2019, July). URL: https://curia.europa.eu/juris/document/document.jsf?text=&docid=216560&doclang=EN#Footref1 (accessed on: 03.03.2023).

[24] European Union Agency for Fundamental Rights. *Fundamental Rights Report – 2020.* Luxembourg: Publications Office of the European Union, 2020. p. 27

[25] Decision of Federal Constitutional Court of Germany 1 BvR 16/13 "Right to be forgotten I". (2019, November). URL: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2019/11/rs20191106_1bvr001613en.html (accessed on: 03.03.2023).

[26] Judgment of the European Court of Human Rights in the Case of Dvorski v. Croatia (application No. 25703/11). (2015, October). URL: https://hudoc.echr.coe.int/eng?i=001-158266 (accessed on: 03.03.2023).

[27] §180 in Judgment of the European Court of Human Rights in the Case of Idalov v. Russia (application No. 5826/03). (2012, May). URL: https://hudoc.echr.coe.int/eng?i=001-110986 (accessed on: 03.03.2023); §112 in Judgment of the European Court of Human Rights in the Case of Sakhnovskiy v. Russia (application No. 21272/03). (2010, November). URL: https://hudoc.echr.coe.int/eng?i=001-101568 (accessed on: 03.03.2023).

judicata …, that is the principle of the finality of judgments. This principle underlines that no party is entitled to seek a review of a final and binding judgment merely for the purpose of obtaining a rehearing and a fresh determination of the case. Higher courts' power of review should be exercised to correct judicial errors and miscarriages of justice, but not to carry out a fresh examination. The review should not be treated as an appeal in disguise, and the mere possibility of there being two views on the subject is not a ground for re-examination. A departure from that principle is justified only when made necessary by circumstances of a substantial and compelling character"[28].

This opinion clearly indicates that the ECtHR is not preoccupied with the rules of *res judicata*, since those are dealing with the preclusive effect of a final judgment for subsequent proceedings, but with the fundamental idea of finality of a judgment itself. In general, this is closely related to the idea of stability of court decisions within the same judicial proceeding, which indeed mirrors the concept of the standard of appellate review.

The idea of implementing the concept of the SoR into European administration of justice may face well-argued criticism. Even in the U.S. legal system it is heavily criticized as the one that gives an illusion of mathematical precision in measuring deference given to a judgment under review. In Richard A. Posner's recent book where he criticizes the overly complex system of appeals, he also reveals this illusion to the public by showing how inadequate the strict and formalistic adherence to the 'clearly erroneous' standard might be: "Is it enough that the appellate court thinks there's a 51 percent probability that a trial judge's, or a jury's, ruling was incorrect? But it is unrealistic to think an appellate court could make such a precise estimate. Why not just say: if the appellate court thinks the district judge or the jury erred on a point material to the outcome of the case, it should reverse."[29]

The SoRs are being criticized for serving only as a loose framework for appellate analysis, or even operating as nuisances to be worked around when they do not support the desired outcome[30].

However, as noted by F. Blockx, the U.S. Federal system has a very broad access to the appellate level, but contrary to the French system and other continental legal systems inspired by it, the application of SoRs will lead to a smaller reversal rate[31].

From a standpoint argued in this article, this is exactly why European continental legal systems need a concept similar to that of the SoR in the U.S. system. This concept shifts the emphasis and the focus of a reviewing court from searching for errors in a decision of a lower court to self-restraint in order to defer the decision under review. Without being overly formalized as in the U. S. judicial system, the basic idea that different SoRs need to be applied while reviewing different decisions of lower courts might be

[28] Judgment of the European Court of Human Rights in the Case of Ryabykh v. Russia (application No. 52854/99). (2003, July). URL: https://hudoc.echr.coe.int/eng?i=001-61261 (accessed on: 03.03.2023); Judgment of the European Court of Human Rights in the Case of Svetlana Naumenko v. Ukraine (application No. 41984/98). (2004, November) URL: https://hudoc.echr.coe.int/eng?i=001-67357 (accessed on: 03.03.2023).

[29] Posner R.A. *The Federal Judiciary: Strengths and Weaknesses*. Cambridge, Massachusetts: Harvard University Press, 2017. p. 262.

[30] Weber J. The abuse of discretion standard of review in military justice appeals. *Military Law Review*. 2015. Vol. 223. p. 41.

[31] Blockx F.A. *Comparison of the American and French(–Inspired) appellate model* (Master thesis, Duke University School of Law, Durham, North Carolina, USA). 2018. p. 58. URL: https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1005&context=mjs (accessed on: 03.03.2023).

a significant psychological factor restraining judges of higher courts from disregarding decisions of their colleagues from lower courts, especially in questions where there is certain level of discretion.

CONCLUSIONS

The concept of the SoR, although sometimes hypercriticized, remains of paramount importance in the U. S. judicial procedure. For many issues, the applicable SoR is explicitly defined by statute or, which is more common, by case law.

In one of its key aspects, namely in aspect of a standard of judicial review of decisions of administrative agencies (e.g. competition agencies), the concept is known and applied in other legal systems, particularly in Continental Europe.

In another aspect, i. e. the standard of appellate review, the concept is not yet formally recognized in domestic judicial systems of Europe, although the supranational judicial institutions sometimes refer to this concept: the ECtHR refers to an adequate SoR for domestic judicial proceedings in those judgments where it finds a reopening of a domestic proceeding being an effective redress of the violation of the European Convention on Human Rights. Another regularly emphasized by the ECtHR angle from which the value of this concept if clearly visible is the paramount importance of the finality of judgments. It is not the number of instances available in a particular legal system that is in focus of the ECtHR, but the point at which the judgment in a domestic judicial proceeding becomes final and might be reopened onlyin order to correct a serious error, and thusa review of a final and binding judgment shall not be allowed merely for the purpose of obtaining a rehearing and a fresh determination of the case.

The concept of the SoR helps to practically achieve the result that the ECtHR is so eager to see. Although we might agree with R. A. Posner that the precision of each standard is an illusion, the difference among the known standards might actually have psychological impact as it might help the judge in a reviewing court to reflect on the degree of deference that ought to be granted to a decision under review, and the depth of intervention into that decision the judge should consider as permissible.