## Lucas Sánchez de Miquel

# Legislative Remedies before Human Rights Courts

A comparative analysis





Beiträge zum ausländischen öffentlichen Recht und Völkerrecht

Edited by

the Max Planck Society for the Advancement of Science represented by Prof. Dr. Armin von Bogdandy and Prof. Dr. Anne Peters

Volume 345

Lucas Sánchez de Miquel

## Legislative Remedies before Human Rights Courts

A comparative analysis



Open Access funding provided by Max Planck Society.

**The Deutsche Nationalbibliothek** lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available on the Internet at http://dnb.d-nb.de

a.t.: Berlin, FU, Diss., 2023

Source title: Legislative Remedies in Human Rights Adjudication

1st Edition 2025

© Die Autor:innen

Published by Nomos Verlagsgesellschaft mbH & Co. KG Waldseestraße 3–5 | 76530 Baden-Baden www.nomos.de

Production of the printed version: Nomos Verlagsgesellschaft mbH & Co. KG Waldseestraße 3–5 | 76530 Baden-Baden

ISBN (Print): 978-3-7560-2322-6 ISBN (ePDF): 978-3-7489-4971-8

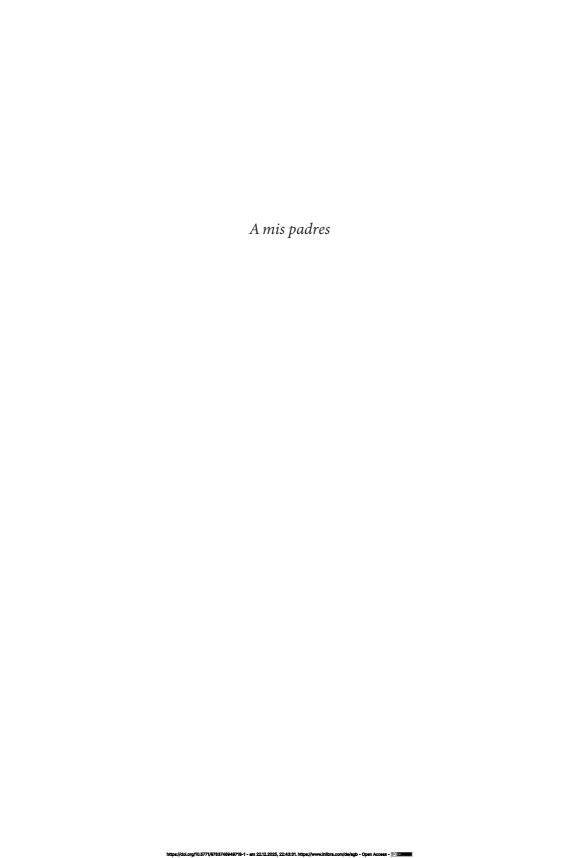
DOI: https://doi.org/10.5771/9783748949718



Online Version Nomos eLibrary



This work is licensed under a Creative Commons Attribution 4.0 International License.





### Acknowledgements

The present book is based on my doctoral thesis, defended at the Faculty of Law of the Freie Universität Berlin in November 2023. I am deeply indebted to my supervisor, Prof. Dr. Anne Peters, for her invaluable support, trust and encouragement. I would also like to thank my second supervisor, Prof. Dr. Helmut Aust, for his feedback and advice.

Special thanks also to my former colleagues at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg for the constructive conversations and feedback on the thesis, particularly in the context of the 'Tuesday meetings' of Prof. Peters' team and the 'Coloquio Iberoamericano' organised by Dr. Mariela Morales. In this context, thanks also to the other doctoral candidates of the Institute for the more informal part of our time there, it was a pleasure sharing this journey with you.

This book also benefitted from research stays at the Inter-American Court of Human Rights and at the Department for the Execution of Judgments of the European Court of Human Rights, for which I also want to express my gratitude to these two institutions. At the institutional level, I also want to thank the Max Planck Society for funding my position as a Research Fellow at the Max Planck Institute and for enabling this Open Access publication. Finally, thanks to Mario Petoshati for his excellent work proof-reading and editing this book.

Para acabar, quiero dar gracias por encima de todo a mis padres, mi hermano y el resto de mi familia por su apoyo constante a lo largo de tantos años, a mis amigos por estar siempre allí a pesar de la distancia, y a Julia por acompañarme y aguantarme durante todo este trayecto.

Lucas Sánchez de Miquel

Berlin, December 2024



## Inhaltsverzeichnis

List of Abbreviations	17
Introduction	21
I. Conceptual Clarifications	25
1. "Legislative"	25
2. " Remedies"	26
3. "before Human Rights Courts"	28
II. Methodological Clarifications	30
1. Identifying Legislative Measures: the Special Case of	
Legislative Remedies before the ECtHR	31
2. Comparing the Three Regional Human Rights Courts	35
III. Structure and Overview	36
Chapter 1: The Concept of Legislative Remedies	39
I. Obligations to Legislate under Human Rights Treaties	40
1. General Obligations to Legislate	41
2. Specific Obligations to Legislate	45
a) Obligations to legislate in order to protect specific rights	45
<ul><li>b) Obligations to legislate in order to protect specific groups</li><li>c) Obligations to legislate in order to prevent and punish</li></ul>	46
specific acts	47
d) Obligations to modify or repeal domestic laws	49
3. Implicit Obligations to Legislate	50
4. From Obligations to Legislate to Legislative Remedies: Is	
There a Victims' Right to Legislative Reforms?	52
II. The Review of Legislation by Human Rights Courts	54
1. The Competence to Request a Review of Legislation before	
Human Rights Courts	56
a) The 'victim requirement' before human rights courts	57
b) Exceptions to the victim requirement	58
i. Potential and possible victims before the ECtHR	60
ii. Self-executing laws before the IACtHR	62

iii. The absence of a victim requirement before the	<i>C</i> 4
ACtHPR  2. The Advisory Povious of Logislation	64 69
<ul><li>2. The Advisory Review of Legislation</li><li>3. From the Review of Legislation to Legislative Remedies</li></ul>	75
	73
III. Legislative Remedies and the Constitutionalisation of Human	
Rights Law	77
Regional Human Rights Courts as International	
'Constitutional' Courts?	80
a) Diverging constitutional elements of regional human	
rights courts	82
b) Individual vs. constitutional justice before human rights	0.5
courts	85
2. Legislative Remedies as a Sign of Increased	0.0
Constitutionalisation  The Differences between Legislative Remedies in	88
3. The Differences between Legislative Remedies in Constitutional and International Settings	90
a) The effects on the domestic legal order	90
b) The predominantly positive nature of legislative	90
remedies before human rights courts	92
c) The moment of the legislative process for issuing	72
remedies	93
4. Legislative Remedies and the Sovereignty of States	94
a) The increased intrusiveness of legislative remedies	95
b) The legitimacy of legislative remedies	96
c) Legislative remedies and the efficiency of human rights	
courts	99
Interim Conclusion: Domestic Laws in Three Stages of Human	
Rights Adjudication	100
0 ,	
Chapter 2: Legislative Remedies and General International	
Adjudication	103
I. The Remedial Practice of the International Court of Justice	105
1. The Legal Basis for the ICJ's Remedial Competence	107
2. The Precedent at the PCIJ: Factory at Chorzów	108
II. A Categorisation of Remedies in General International Law	109
1. Cessation	112
a) Cessation in the ICJ's case law	113

b) Legislative reforms as cessation	115
2. Restitution	117
a) Restitution in the ICJ's case law	117
b) Legislative reforms as restitution	120
3. Compensation	121
a) Compensation in the ICJ's case law	122
b) Legislative reforms as compensation	124
4. Satisfaction	125
a) Satisfaction in the ICJ's case law	126
b) Legislative reforms as satisfaction	127
5. Guarantees of Non-Repetition	128
a) Guarantees of non-repetition in the ICJ's case law	128
b) Legislative reforms as guarantees of non-repetition	131
Interim Conclusion: The Particular Functions of Remedies in General International Adjudication as a Barrier for Legislative	
Measures	132
Chapter 3: The Special Nature of Remedies in International Human	
Rights Adjudication	137
I. A Remedial Lex Specialis in International Human Rights Law?	137
1. The ARSIWA <i>vis-à-vis</i> the UN Basic Principles	139
2. The Special Function of Remedies in International Human	
Rights Adjudication	143
3. The Regulation of the Human Rights Courts' Remedial	
Competence	146
a) The ECHR's limited remedial provision	147
b) The ACHR's expansive remedial provision	150
c) The ACHPR's concise yet wide remedial provision	152
4. The Specialty of Remedies According to Human Rights	
Courts	153
Interim Conclusion: The Progressive Specialisation of Remedies	
before Human Rights Courts	155
<u> </u>	
II. The Remedial Practice of Human Rights Courts	155
1. The Evolution of the Human Rights Courts' Remedial	151
Practice	156
a) The evolution of the ECtHR's remedial practice	157
b) The evolution of the IACtHR's remedial practice	162

### Inhaltsverzeichnis

c)	The evolution of the ACtHPR's remedial practice	165
2. Th	e Current Remedial Landscape before Human Rights	
Co	purts	166
a)	The remedial landscape before the European Court of	
,	Human Rights	167
b)	The remedial landscape before the Inter-American	
ŕ	Court of Human Rights	169
c)	The remedial landscape before the African Court of	
,	Human and Peoples' Rights	170
3. A	Classification of Remedies before Human Rights Courts	171
	Restitution	172
	Compensation	175
	Satisfaction	176
	Rehabilitation	178
•	Guarantees of Non-Repetition	178
III. Legis	lative Remedies in the Case Law of Human Rights Courts	180
_	ne Special Case of Legislative Remedies before the ECtHR	183
	ıman Rights Courts: Positive or Negative Legislators?	190
	gislative Remedies as Guarantees of Non-Repetition?	192
	nclusion: The Self-Understanding of International Courts	105
ii Ligiit oi t	heir Remedial Practice	195
Chapter 4: A	A Categorisation of Legislative Remedies	199
I. Com	mon Categories of Legislative Remedies	200
1. Th	ne Protection of Vulnerable Groups	201
	Indigenous communities	205
	Children	206
	Prisoners	208
,	Women	211
,	Persons with disabilities	213
	ne Right to a Fair Trial	214
	The right to an independent and impartial tribunal	
,	established by law	215
	i) The independence of judges and prosecutors	216
	ii) Restrictions to the military jurisdiction	218
b)	The right to be judged within a reasonable time	220
	The right to appeal before a higher court	222

	d) The enforcement of domestic judgments	224
	e) Other due process rights	226
3.	Property Rights	227
	a) Property rights in the context of transitions to	
	democracy	229
	b) Property rights in the context of state succession	231
	c) Property rights in post-conflict situations	233
	d) Property rights of indigenous communities	234
4.	Electoral Rights	235
	a) The incompatibility of electoral laws before the ACtHPR	236
	b) Prisoners' voting rights before the ECtHR	238
	c) Political participation and the rights of elected officials	
	before the IACtHR	239
5.	Nationality Rights	240
	a) Statelessness in the context of state succession	241
	b) Deprivation of citizenship in the context of migration	242
6.	Freedom of Expression	243
	a) The offences of libel, slander and defamation	244
	b) The regulation of public access to information	245
	c) Other freedom of expression-related issues	246
	Amnesty Laws	247
	Mandatory Death Penalty	251
	Constitutional Issues	253
	Codification of Criminal Offences	256
11.	Others	257
II. Di	fferent Intensities in the Use of Legislative Remedies	258
Interim (	Conclusion: A Common Understanding with Different	
Priorities		262
1 HOHE	,	202
Chapter	5: Remedial Deference and Domestic Legislatures	265
I. De	eference and Human Rights Remedies	266
1.	An Increased Remedial Deference for Legislators	268
	a) Judicial review of legislation and parliamentary	
	sovereignty	269
	b) The additional complexity of the international judicial	
	review of legislation	272
2.	Deference and Democratic Conditions	273
3.	A 'Margin of Deliberation'	276

II. The Human Rights Courts' Deterence Mechanisms <i>vis-a-vis</i> the Legislatures	278
1. The ECtHR's Margin of Appreciation Doctrine <i>vis-à-vis</i> the Legislature	279
2. The IACtHR's Conventionality Control Doctrine vis-à-vis the Legislature	างา
	282
III. The Specificity of Legislative Remedies	285
1. The Varying Nature of Legislative Measures	288
<ul> <li>a) Negative legislative remedies and the specification of a provision</li> </ul>	288
b) Positive legislative remedies and the specification of an	200
outcome	290
<ul><li>c) Neutral legislative remedies and the attached discretion</li><li>2. The Human Rights Courts' Approaches to Remedial</li></ul>	292
Specificity	294
<ul> <li>a) The European approach: prescribing the introduction of a domestic remedy</li> </ul>	295
<ul><li>b) The Inter-American approach: referrals to the reasoning</li><li>c) The African approach: prioritising legislative</li></ul>	298
incompatibilities	300
Interim Conclusion: A Margin of Deliberation for Legislative	
Remedies	302
Chapter 6: The Consequences of Legislative Remedies	305
I. Legislative Remedies and Backlash Against Human Rights	
Courts	306
1. Legislative Remedies and Individual Instances of Backlash	310
a) Resisting the ECtHR	310
b) Limiting access to the ACtHPR	313
c) Exiting the ACHR	318 322
<ol> <li>Legislative Remedies and Collective Instances of Backlash</li> <li>The 'Interlaken Process' in Europe</li> </ol>	323
b) The 'Five Presidents Declaration' in the Americas	326
II. Legislative Remedies and Compliance	328
Empirical Studies on Compliance with Legislative	
Damadias	320

2. The Reasons for the Low Rates of Compliance with	
Legislative Remedies	334
3. Impact beyond Compliance	336
III. The Reaction of Human Rights Courts	345
1. Changes in the Use of Legislative Remedies	346
2. Lowering of Compliance Requirements	348
Interim Conclusion: System-Dependent Consequences of Legislative Remedies	350
Concluding Remarks	355
I. Main Findings	355
II. Nomative Assessment	359
Bibliography	367
List of Sources	397



#### List of Abbreviations

ACHR American Convention on Human Rights

ACHPR African Charter on Human and Peoples' Rights

ACmHPR African Commission on Human and Peoples' Rights

ACtHPR African Court of Human and Peoples' Rights

ACDEG African Charter on Democracy, Elections and Governance

AHRLJ African Human Rights Law Journal

AJICL African Journal of International and Comparative Law

AJIL American Journal of International Law
AJJ American Journal of Jurisprudence

App. Application
Art. Article
Arts. Articles

ARSIWA Draft Articles on the Responsibility of States for Internationally Wrongful

Acts

AU African Union

AUILR American University International Law Review

CAT UN Convention Against Torture

CDDH Steering Committee for Human Rights

CED UN Committee on Enforced Disappearances

CEDAW UN Convention on the Elimination of Discrimination against Women

CERD UN Committee on the Elimination of Racial Discrimination
CESCR UN Committee on Economic, Social and Cultural Rights

CJEU Court of Justice of the European Union
CJTL Columbia Journal of Transnational Law

CLR Columbia Law Review
CoE Council of Europe

CoM Committee of Ministers of the Council of Europe

CRC UN Convention on the Rights of the Child

CUP Cambridge University Press

#### List of Abbreviations

DR Dominican Republic

DRC Democratic Republic of Congo

E.g. Exempli gratia

ECHR European Convention on Human Rights

ECHRLR European Convention on Human Rights Law Review

ECmHR European Commission of Human Rights

ECtHR European Court of Human Rights

Ed. editor Eds. editors

EHRLR European Human Rights Law Review

Et al. et altri Et seq. et sequens

EU European Union

GLJ German Law Journal HLR Harvard Law Review

HRCee UN Human Rights Committee
HRLR Human Rights Law Review

IACmHR Inter-American Commission of Human Rights

IACtHR Inter-American Court of Human Rights

I.e. Id est

ICCPR International Covenant on Civil and Political Rights

ICESCR International Covenant on Economic, Social and Cultural Rights

ICERD International Convention on the Elimination of All Forms of Racial

Discrimination

ICJ International Court of Justice

ICLQ International and Comparative Law Quarterly

ICMW International Convention on the Protection of the Rights of All Migrant

Workers and Members of Their Families

I•CON International Journal of Constitutional Law

ICPED International Convention for the Protection of All Persons from En-

forced Disappearance

ICTY International Criminal Tribunal for the Former Yugoslavia

ILC International Law Commission

IJHR International Journal of Human Rights

IJLC International Journal of Law in Context

ISQ International Studies Quarterly

IVF In Vitro Fertilisation

JHRP Journal of Human Rights Practice

JICJ Journal of International Criminal Justice
JIDS Journal of International Dispute Settlement

JIRD Journal of International Relations and Development

JSAP Journal of Small Animal Practice
JTD Journal of Trauma and Dissociation
LCP Law and Contemporary Problems

LGBTI Lesbian, Gay, Bisexual, Transexual and Intersexual

LJIL Leiden Journal of International Law

LPICT The Law and Practice of International Courts and Tribunals

MoU Memorandum of Understanding

MPEIPro Max Planck Encyclopedia of International Procedural Law
MPEPIL Max Planck Encyclopedia of Public International Law

NGO Non-Governmental Organisation
NHRI National Human Rights Institution
NJHR Nordic Journal of Human Rights

NILR Netherlands International Law Review

No. Number

Nos. Numbers

NQHR Netherlands Quarterly of Human Rights

OAS Organisation of American States
OAU Organisation of African Unity
OJLS Oxford Journal of Legal Studies

OUP Oxford University Press

p. pagepp. pages

PACE Parliamentary Assembly of the Council of Europe

PALU Pan African Lawyers Union

Para. paragraph Paras. paragraphs

#### List of Abbreviations

PCIJ Permanent Court of International Justice SFRY Socialist Federal Republic of Yugoslavia

TFF Turkish Football Federation

UDHR Universal Declaration of Human Rights

UK United Kingdom
UN United Nations

UNGA United Nations General Assembly

US United States

USD United States Dollar

VCCR Vienna Convention on Consular Relations
VCLT Vienna Convention on the Law of Treaties

Vol. volume Vs. versus

WILJ Wisconsin International Law Journal
YJIL Yale Journal of International Law

YLJ Yale Law Journal

ZaöRV Zeitschrift für ausländisches öffentliches Recht und Völkerrecht