Chapter 5: Remedial Deference and Domestic Legislatures

The previous chapter showed that there is a common understanding among human rights courts with respect to the type of issues that trigger the use of legislative remedies, despite different priorities in this regard. In this context, such intrusive measures are usually reserved for a rather limited set of human rights issues. This intrusiveness does however not only depend on the question of *when* these measures are employed, but also on *how* this is done. This chapter will therefore focus on the different ways of employing and spelling out legislative remedies, examining in particular the question of how much deference they afford to domestic legislatures.

The concept of deference is generally used in relation to the standard of review employed by international courts when dealing with domestic decisions.[1053] There is however another (often overlooked) dimension of deference, related to the discretion afforded to domestic authorities when implementing an international judgment. I will refer to this as 'remedial deference'. Remedial deference can range from complete deference, when international courts issue judgments that are essentially declaratory and states are free to take any action in consequence, to 'zero deference' with respect to some remedies. For example, when a court specifies the sum that the state must pay as compensation, there are no alternatives other than paying that specific amount. This reflects the fact that different remedial categories offer diverging discretion in the context of their implementation. In this respect, each human rights court has developed its own approach towards remedial deference. However, the issue to be examined here is not so much the deference of the different types of remedies issued by

1053 For example, Fahner describes the concept of deference as "the respect that a judge gives to the findings of another institution" (see Johannes Hendrik Fahner, *Judicial Deference in International Adjudication. A Comparative Analysis*, Oxford: Hart, 2020, p. 5). Similarly, Shirlow refers in this respect to the tools used by judges to take into account the authority of other decision-makers (Esmé Shirlow, *Judging at the Interface: Deference to State Decision-Making Authority in International Adjudication*, Cambridge: CUP, 2021, p. 16). Remedial deference is arguably more closely related to the latter definition, as it does not affect a previous finding by a domestic institution but rather a future decision (the implementation of a remedial measure).

human rights courts, but rather the varying degrees of deference within the remedial category of legislative measures.

In this respect, there are many remedial categories in which the amount of deference depends on how the remedial measure is spelled out. For example, it is not the same for a court to order the state to provide human rights training to public officials than to specify the addressees of that training (such as police officers, medical personnel, etc.) or the content of it (women's rights, right to health, etc.). This is the same with respect to legislative measures, which can have different degrees of specificity. Some of them are rather vague, in the sense of prescribing only a legislative reform related to a particular topic, while others are very specific in terms of indicating the concrete provision that needs to be amended and the expected result of that reform.

This chapter will thus examine and normatively assess the specificity of legislative remedies before human rights courts. In order to carry out this normative assessment, it will first inquire about the deference that should be afforded to legislators when implementing a judgment. A concept that can be particularly useful and that will be developed in this respect is that of the 'margin of deliberation', implying that legislative remedies should not curtail the deliberative elements of domestic lawmaking procedures. In addition, the mechanisms developed by human rights courts that relate to deference *vis-à-vis* legislatures will be examined, focusing particularly on the ECtHR's margin of appreciation and the IACtHR's conventionality control. Then, the chapter will analyse the specificity of the three courts' legislative remedies, taking into account the varying nature of these measures and the approach developed by each human rights court in this regard.

I. Deference and Human Rights Remedies

The issue of deference has been extensively studied in human rights scholarship, although most of these studies focus on the deference displayed by courts at the moment of finding a human rights violation, and not so much when defining the consequences of it. It has been even argued that deference is not a very important factor in international adjudication generally, due to "[t]he limited impact of international judicial decisions, which leave States the final say on matters of domestic policy by allowing

them to choose the appropriate means to comply with a judgment".[1054] This is nevertheless different when international courts include remedial measures in their judgments, as it binds states to act in a specific way. Thus, remedial deference is a very important aspect when assessing the legitimacy of such measures.[1055]

In general, human rights courts defer to domestic actors mainly for two reasons, related to their superior expertise and their higher democratic legitimacy. Fahner mentions in this context two dimensions of deference, labelled as 'epistemic deference' when it relates to the expertise concerning technical, scientific or factual issues, and 'constitutional deference' regarding the democratic legitimacy of domestic decision-makers.[1056] The latter, he argues, is especially relevant for regional human rights courts.[1057]

However, deference has to remain within boundaries to ensure the effectiveness of human rights protection systems on the ground. It has been argued in this respect that deference needs to be restrained because "it has the potential to create uncertainty and to allow an overly broad margin of appreciation within which States might be tempted to evade their international obligations".[1058] If a human rights court would be completely deferential to states, its function could be questioned. It is therefore a matter of maintaining a proper balance between the amount of discretion that state actors should possess and the effective supervision of these actors' compliance with its human rights obligations.

In this respect, the degree of deference should probably be decided on a case-by-case basis, taking into account a number of circumstances.[1059] Among them, one aspect to consider is the 'democratic pedigree' of the decision that is reviewed, which can derive from the procedure employed to adopt the decision or the democratic credentials of the decision-maker.[1060] In this context, a higher democratic pedigree of the primary decision would imply a more deferential review by the court in question. Domestic

1054 Johannes Hendrik Fahner, "The Limited Utility of Deference in International Dispute Settlement", *LPICT* 21, 2022, at p. 479.

1055 See with respect to the legitimacy of legislative remedies Chapter 1 of this book.

1056 Fahner, *Judicial Deference in International Adjudication,* 2020, pp. 149-157.

1057 Fahner, *Judicial Deference in International Adjudication,* 2020, pp. 200-202.

1058 Laurence Boisson de Chazournes and Jason Rudall, "Judicial Deference: Why Does It Matter?", *LPICT* 21, 2022, pp. 419–424, at p. 423.

1059 See generally Murray and Sandoval, *JHRP* 2020.

1060 See René Urueña, "The Democracy We Want: Standards of Review and Democratic Embeddedness at the Inter-American Court of Human Rights", in Hélène Ruiz Fabri *et al.* (eds.), *International Judicial Legitimacy*, Baden-Baden: Nomos, 2020, pp. 227-248, at p. 230.

laws adopted in the context of participatory and transparent procedures in well-functioning democracies are arguably those exhibiting the highest democratic credentials.

If the perspective switches from deference at the moment of carrying out the review to deference when designing remedies, what needs to be taken into account is especially to whom the remedy is addressed, or which is the domestic body in charge of implementing it. The democratic pedigree of domestic bodies should thereby also affect their discretion in the execution of remedial measures. Remedies addressing the legislature are particularly important in this respect. The next pages will explore whether and why legislatures deserve increased remedial deference in human rights adjudication – thereby developing the concept of a 'margin of deliberation' – as well as how the authoritarian tendencies witnessed recently in several states affect this issue.

1. An Increased Remedial Deference for Legislators

Legislative bodies play a very particular role in democratic systems and therefore possess a democratic legitimacy that is arguably higher than that of executive bodies or judicial ones. This aspect is likely the main reason for affording an increased remedial deference to legislators. Certain administrative agencies may have more expertise than legislative bodies on specific issues, but legislators can also benefit from this expertise by obtaining input from such agencies in a well-structured legislative process. In addition, another justification for affording increased deference concerns the nature of the issues legislatures deal with, which relate mostly to broad policy choices, while decisions adopted by administrative bodies are usually of a more technical nature.[1061] In the area of constitutional law, the issue of deference towards the legislature when higher courts exercise judicial review has been one of the main debates of the last decades, generating a lot of discussions at a philosophical level. These will be briefly explored next, as well as the additional complexity of translating these debates to the international level.

1061 Benedikt Pirker, "Democracy and Distrust in International Law: The Procedural Democracy Doctrine and the Standard of Review Used by International Courts and Tribunals", in Lukasz Gruszczynski and Wouter Werner (eds.) *Deference in International Courts and Tribunals*, Oxford: OUP, 2014, pp. 58–73.

a) Judicial review of legislation and parliamentary sovereignty

When examining the issue of deference towards the legislature, it is necessary to have a look at the constitutional law debate that has been going on for many decades around the judicial review of legislation (especially in its strong form) and its potential undermining of representative democracy. This debate has taken place mainly in the realm of political philosophy, and especially in the context of the UK and the US. Its origins are usually traced back to the landmark judgment of the US Supreme Court in *Marbury vs. Madison* (1803), where this Court decided that it had the competence to review acts of government and legislation against the US Constitution.

This type of judicial review then extended to many other states, especially throughout the 20th century. Some of the early critics warned against a *gouvernement des juges*, seeing the review of legislation as a reactionary move against democratic developments.[1062] On the other hand, among the early supporters of the judicial review of legislation, one can find Hans Kelsen, who argues that it is a necessary instrument for the protection of minorities.[1063] The fierce debate then continued throughout the twentieth century and has even some remnants today.[1064] It turned mainly around what Alexander Bickel has coined "the counter-majoritarian difficulty", referring to the difficulty of putting in place a system of judicial review of legislation while law-making is subject to majority decision-making.[1065]

In this philosophical battle, one of the most notorious defendants of judicial review was Ronald Dworkin, who conceived rights as 'trumps' that necessarily prevail over conflicting legislation.[1066] He argued that equality

1062 The origin of this critique can be found in Edouard Lambert, *Le Gouvernement des juges et la lutte contre la législation sociale aux États-Unis*, Paris: Giard et Cie, 1921. See also Tushnet, in Tushnet and Cane (eds.), 2005, p. 166.

1063 See Hans Kelsen, "La garantie jurisdictionnelle de la Constitution (la Justice constitutionnelle)", *Revue du Droit Public et de la Science Politique en France et à l'étranger* 45, 1928, pp. 197-257. Kelsen took part in the design of the European form of constitutional review, centralised around a specialist constitutional court. The first constitutional court of this type was established in Austria in 1920, on the basis of Kelsen's project.

1064 See for example Waldron, *Global Constitutionalism* 2021.

1065 See Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, New Haven: Yale University Press, 2nd ed., 1986.

1066 Ronald Dworkin, "Rights as Trumps", in Jeremy Waldron (ed.), *Theories of Rights*, Oxford: OUP, 1984, at p. 153. See also Ronald Dworkin, *Taking Rights Seriously*, Cambridge, MA: Harvard UP, 1977, at pp. 194 and 269 ("A right against the Government must be a right to do something even when the majority thinks it

rights should not be made dependent on whether democratic procedures take them seriously enough, as it is not possible to know whether external preferences have influenced such procedures.[1067] Similarly, Rawls stated that "in a just society (…) the rights secured by justice are not subject to political bargaining or to the calculus of social interests".[1068] Others have taken more nuanced positions, such as that of John Hart Ely, who argued in favour of reserving the judicial review of legislation for instances in which representative decision-making procedures were malfunctioning at a procedural level.[1069]

On the other side of the battlefield, one can find Jeremy Waldron, who published his famous "Core Case Against Judicial Review" in 2006. There, he argued that judges lack the elements of democratic representativeness and accountability that legislators possess, while they are equally likely to err about rights.[1070] For Waldron, it is primarily an issue of participation and representativeness, whereby the decisions taken by the legislature have always a greater participatory element and are therefore more legitimate than those of judges.[1071] This argument, however, rests on four assumptions concerning a (today perhaps utopian) well-functioning democracy committed to human rights.[1072] Fallon then replied to it by arguing that the legitimacy of judicial review lies in the fact that it contributes to the mini-

---

would be wrong to do it, and even when the majority would be worse off for having it done").

1067 Dworkin, 1977. See also Richard Bellamy, "Ronald Dworkin, *Taking Rights Seriously",* in Jacob T. Levy (ed.), *The Oxford Handbook of Classics in Contemporary Political Theory,* Oxford: OUP, 2017.

1068 John Rawls, *A Theory of Justice- Revised Edition*, Oxford: OUP, 1999, pp. 3-4.

1069 John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review,* Cambridge, MA: Harvard UP, 1980.

1070 Waldron, "The Core Case Against Judicial Review", *Yale Law Journal* 115(6), 2006, pp. 1346-1406, at pp. 1372 et seq.

1071 Jeremy Waldron, "A Right-Based Critique of Constitutional Rights", *Oxford Journal of Legal Studies* 13(1), 1993, pp. 18-51, at p. 50 ("Instead of talking impersonally about 'the counter-majoritarian difficulty', we should distinguish between a court's deciding things by a majority, and lots and lots of ordinary men and women deciding things by a majority. If we do this, we will see that the question 'Who gets to participate?' always has priority over the question 'How do they decide, when they disagree?'").

1072 Waldron, *YLJ* 2006, p. 1359-1369. On the four concrete assumptions, see below section I.2.

mization of human rights violations, as the over-enforcement is preferable to the under-enforcement of rights.[1073]

Nowadays it can be observed that an overwhelming majority contends that some sort of judicial review of legislation is necessary at a constitutional level, and the debate is turning mostly around the specific forms and features that such a review should possess.[1074] Even fierce opponents such as Waldron accept that judicial review might be necessary "against legislative pathologies relating to sex, race, or religion in particular countries". [1075] In addition, judicial review of legislation is nowadays consistently established in most constitutional systems around the world, becoming especially popular in the wave of new constitutions adopted during the 1980s and 1990s.

One of the main issues that remain contested is whether constitutional courts should issue binding remedies or only some sort of recommendations, also known as 'dialogic remedies', typically found in the weak-form review.[1076] For example, Dixon defends this form of judicial review, highlighting its usefulness for so-called 'blind spots of application', where the legislature fails to take into account all possible scenarios in which a law can infringe human rights, or 'priority-driven inertia', where the legislator avoids dealing with an issue due to political motives.[1077] Others have however advocated in favour of stronger forms of review, pointing at the risks of such weak-form review and the attached remedial discretion, especially in cases concerning criminal laws, where the absence of a clear order can "produce significant individual and systemic harms".[1078]

1073 Fallon, "The Core of an Uneasy Case for Judicial Review", *Harvard Law Review*, 121 (7), 2008, pp. 1693-1736.

1074 See Tushnet, in Tushnet and Cane (eds.), 2005, p. 164 ("A residue of skepticism about the ability of judicial review as a mechanism for protecting liberal democratic rights remains (…), but the contemporary debates are over the form that judicial review should take"). See however Roberto Gargarella, *Law as a Conversation Among Equals*, Cambridge: CUP, 2022, pp. 183-201, maintaining some objections against the constitutional review of legislation.

1075 Waldron, *YLJ* 2006, p. 1352.

1076 See Kent Roach, "Dialogic remedies", *I•CON* 17(3), 2019, pp. 860–883, suggesting a two-track approach where binding remedies should be issued with respect to the individual victims and dialogic remedies for the larger systemic issues.

1077 See Dixon, *I•CON* 2019, p. 926, mentioning among these motives that the issue in question "threatens to divide a political party or legislative coalition, or undermine its support with some key group, while increasing support with others".

1078 Robert Leckey, *I•CON* 2016, p. 607.

b) The additional complexity of the international judicial review of legislation

Most of these arguments concerning the constitutional review of legislation are also applicable to the review of laws by regional human rights courts, as such a review is also mainly criticised due to its interference with domestic democratic procedures.[1079] However, some additional arguments related to the particularities of international courts have been brought up in this regard. In this respect, it has been argued that constitutional accountability mechanisms are not applicable to these courts, as it is more difficult to control them by domestic legislatures,[1080] and that international courts lack the closeness to the facts and the knowledge of national law that constitutional courts have.[1081]

Moreover, if the legislature does not agree with the constitutional review there is an option to amend the benchmark of that review (i.e. the constitution). It is usually not an easy reform procedure, as it requires high majority thresholds, but to reform the benchmark of an international review (e.g. a human rights treaty) is arguably much more difficult, as it would require all state parties to accept the amendment. For such reasons, some authors have concluded that human rights courts lack the democratic legitimacy to review domestic legislation, especially if this review is not merely declaratory but includes binding orders for a state to legislate.[1082] This is also an issue that is closely related to the critiques based on the 'judicial activism' of courts.[1083] It has been argued that the activism of an international court

1079 See Gargarella, *Law as a Conversation Among Equals,* 2022, p. 198, stating that the matter is situated at a "higher level", but "at the root the objection remains relevant".

1080 Follesdal, *Global Constitutionalism* 2021, pp. 119, 126.

1081 Bellamy, *EJIL* 2014, p. 1039; Ulfstein, *Global Constitutionalism* 2021, p. 161.

1082 See Richard Bellamy, "The Democratic Legitimacy of International Human Rights Conventions: Political Constitutionalism and the European Convention on Human Rights", *EJIL* 25(4), 2015, pp. 1019–1042, arguing that human rights courts are only legitimised to exercise weak-form judicial review of legislation. See with respect to the IACtHR, Dulitzky, *Texas Law Review* 2015, p. 67, stating that the remedial approach of the IACtHR, *inter alia* due to its power to "order national governments to amend legislation (…) is typical of a deep-integration regime such as the EU, or of a constitutional court, but not of an international human rights system".

1083 See generally Stefanie A. Lindquist and Frank B. Cross, *Measuring Judicial Activism*, Oxford: OUP, 2009.

depends precisely on the amount of deference afforded to domestic political bodies.[1084]

But courts can also have a democracy-protective role, for example when incumbent office-holders act against political rivals and attempt to hold on to power through the adoption of legislation (especially of an electoral nature) that favours them in some way.[1085] This is especially the case when parliamentary procedures and majorities are such that the party in government can reform legislation on its own. In this respect, political scientists have found that legislative processes in parliamentary systems are not only led but sometimes also carried out almost exclusively by governments.[1086] Thus, an important aspect to take into account concerns the democratic features of the law-making body in question and the legislative procedures before it, affecting issues such as transparency, participation or deliberation.[1087] This will be explored next.

2. Deference and Democratic Conditions

Much of the discussion around judicial deference *vis-a-vis* the legislature is based on the assumption of a well-functioning democracy.[1088] This can be clearly seen in Waldron's four assumptions upon which his core case

1084 Fuad Zarbiyev, "Judicial Activism in International Law—A Conceptual Framework for Analysis", *JIDS* 3(2), 2012, pp. 247-278, at p. 250 ("More precisely, judges are considered to be activist when they lack deference to political branches and pass judgment on matters which are deemed normally to be reserved to those political branches").

1085 See Cram, *ISQ* 2018, p. 479.

1086 See Sathrapally, *Beyond Disagreement*, 2012, p. 52, highlighting that "[t]he overwhelming majority of legislation is drafted and introduced by government departments", and that "[t]he government typically has control over the parliamentary timetable, as well as strong structures to ensure votes are in place where needed".

1087 For example, with respect to the ECtHR it has been argued that choices made by domestic legislatures should be afforded significant weight, but only as long as these choices are made through "genuine democratic processes and respect for the principles embodied in the ECHR as interpreted by the ECtHR" (Ulfstein, *Global Constitutionalism* 2021, p. 173).

1088 As highlighted by Kleinlein, "[d]eference is based on the assumption that domestic institutions and procedures are working as they should, in a transparent manner, allowing for participation of affected rights-holders and, generally, under conditions that are capable of generating reasonable outcomes" (Thomas Kleinlein, "The Procedural Approach of the European Court of Human Rights: Between Subsidiarity and Dynamic Evolution", *ICLQ* 68, 2019, pp. 91–110, at p. 101).

against judicial review rests. These include "(1) democratic institutions in reasonably good working order (…); (2) a set of judicial institutions, again in reasonably good order (…); (3) a commitment on the part of most members of the society and most of its officials to the idea of individual and minority rights; and (4) persisting, substantial, and good faith disagreement about rights".[1089] In this respect, it can be argued that nowadays there are many states in which these four conditions are not met, due to a recent turn towards authoritarianism.[1090] Waldron's core case was thus arguably stronger in 2006 than in 2024.

This 'authoritarian exception' has also featured in the debate around international judicial review, with some opponents of the constitutional review of legislation arguing in favour of an international review in cases concerning non-democratic states or authoritarian governments, explicitly mentioning in this respect the early case law of the IACtHR.[1091] Although at first glance this argument only seems applicable to such past situations in certain regions, it has arguably gained renewed relevance in recent times. During the last decade or so, there has been a steady tendency towards authoritarianism in states under the supervision of human rights courts, that have increasingly acquired non-democratic features.

This democratic decline has been noticeable in the three regions under review. In the European context, this eventually contributed to Russia's expulsion from the CoE, and in the cases of Turkey or Azerbaijan, this decline presents serious challenges to the ECtHR.[1092] In the Inter-American region, one can find cases such as those of Venezuela and its treaty exit, or the democratic decline in Nicaragua and El Salvador. Similar situations of authoritarianism have also been present in the African system for some

1089 Waldron, *YLJ* 2006, p. 1360. According to Waldron, "[i]n cases in which the assumptions fail, the argument against judicial review presented in this Essay does not go through" (at p. 1402).

1090 In 2019, Dixon highlighted with respect to Waldron's assumptions that "[t]he current wave of illiberal populist politics, however, has arguably threatened the stability of almost all these commitments" (Dixon, *I•CON* 2019, p. 928).

1091 Gargarella, *Law as a Conversation Among Equals*, 2022, p. 199.

1092 This is due reflected *inter alia* in Turkey's refusal to comply with the Court's orders, as it can be most clearly observed in the context of the *Kavala* case, where the ECtHR included a remedial provision ordering the release of this political prisoner. Due to the State's refusal to comply, the CoM had to activate for the second time the infringement proceedings under Art. 46(4) ECHR. The other time it made use of it, this led to a relatively fast execution of the judgment by Azerbaijan, but in this case Turkey continues to refuse releasing Mr. Kavala at the time of writing.

time, with governments such as those of Mali or Benin curtailing the democratic rights of the opposition. There is in sum what many have called a crisis of democracy at the global level.[1093] In such contexts, deferring to the domestic actors is probably not an effective strategy for human rights courts.

Actually, one of the main features of modern authoritarian regimes concerns the takeover of the domestic judiciary at the highest level, usually through the amendment of laws that regulate the composition and organisation of the high courts of the state. This allows such regimes to 'capture' these courts in order for them to decide in a way that favours the rulers' interests or otherwise legitimises the rulers' actions.[1094] If these courts exercise a constitutional review of legislation, it is much easier for such regimes to pass laws that violate human rights but are nevertheless validated by the domestic judiciary. The intervention of human rights courts with respect to such states and their domestic laws thus becomes necessary. It is, however, difficult to draw a clear line determining when the decline into authoritarianism and 'court capture' call for the intrusion of human rights courts into the legislative matters of the state.[1095] In any case, this justifies the general authority of human rights courts to intervene at the legislative level, not only with declarations of incompatibility but also with stronger remedies.

Besides this increased authoritarianism, there are further situations in which a very deferential approach by human rights courts is not convenient. Benvenisti mentions in this respect four situations reflecting "inherent flaws in the domestic democratic processes" where specific groups can be disenfranchised and lack effective judicial protection at a domestic level.[1096] These concern the cases affecting "the outsider within" (i.e. non-nationals in the country or seeking to enter it), "the outsiders without" (referring to the transnational effects of governmental decisions), foreign public governance actors, and foreign private actors. Further 'democratic failures' involve the rights of other insular minorities and disenfranchised

1093 See for example Anne Applebaum, *Twilight of Democracy: The Seductive Lure of Authoritarianism*, New York: Doubleday, 2020.

1094 See generally, with a number of examples of 'captured courts', Tom Ginsburg and Tamir Moustafa, *Rule by Law: The Politics of Courts in Authoritarian Regimes*, Cambridge: CUP, 2008.

1095 For example, the dismantling of an effective constitutional review has also occurred in states such as Poland or Hungary, where the democratic backsliding has not reached the level of Russia or Turkey.

1096 Eyal Benvenisti, "The Margin of Appreciation, Subsidiarity and Global Challenges to Democracy", *JIDS* 9, 2018, pp. 240–253, at p. 241.

groups, such as prisoners or indigenous peoples. He argued, therefore, that deference is beneficial to those who are able to participate in governance and politics, but it fails to take other people's preferences into account.[1097] Literature on both domestic and international judicial review has affirmed that in such cases the intervention of courts is justified and that the legislator's room of manoeuvre should be restrained.[1098]

In sum, a number of specific situations require human rights courts to intervene in domestic legislative arrangements. Weak-form review in the form of declarations of incompatibility is arguably insufficient. This can be seen in the example of the ECtHR, which has been issuing these declarations for a long time. Thereby, some states have consistently avoided reforming the laws that were at the source of the problem, while paying the prescribed compensation. This led to massive numbers of repetitive violations concerning the same laws, and eventually to the ECtHR starting to include legislative remedies in its judgments.[1099] However, it is argued that courts still need to take the domestic context and the democratic features of the state into account in order to decide the degree of deference to be afforded to national legislatures in this regard. This can be done through a variable 'margin of deliberation' in the context of legislative remedies.

3. A 'Margin of Deliberation'

As mentioned before, the main aspect to consider by human rights courts when applying legislative remedies is the particular role played by legislative bodies in contemporary democracies, where they act as deliberative institutions. In this context, public deliberation is one of the cornerstones of democracy and has been extensively researched in political theory.[1100] It includes many different aspects, but in a nutshell, it implies that democratic decisions should comprise a public exchange of arguments "that involves weighing and reflecting on preferences, values, and interests regarding

1097 Benvenisti, *JIDS* 2018, p. 250.

1098 At a constitutional level, see generally John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review*, 1980. Referring to the ECtHR, Dothan, *When Should International Courts Intervene?*, Cambridge: CUP, 2020, p. 134.

1099 See on the evolution of the ECtHR's remedial approach in this context Chapter 3 of this book.

1100 As one of the seminal texts on deliberation and democracy, see generally Jürgen Habermas, *Between Facts and Norms*, Cambridge, MA: MIT Press, 1996.

matters of common concern".[1101] Despite some innovative mechanisms that increase the ability of citizens to engage in public deliberation by themselves, it is generally difficult for a large number of individuals to exchange arguments on an equal basis.[1102]

This is why such deliberation takes place through representatives who are elected by the citizens and form the legislative bodies. Although the ideal aim of deliberation is "to arrive at a rationally motivated consensus", as this is usually not the case, often "deliberation concludes with voting, subject to some form of majority rule".[1103] In this regard, democratic deliberation is one of the main functions of legislatures, and remedial provisions should not impede it.[1104] In accordance with the democratic principle of Habermas, "only those statutes can claim legitimacy that can meet with the assent of all citizens in a discursive process of legislation that in turn has been legally constituted".[1105] If a legislative remedy is too specific as to the expected outcome of the reform, this substantially curtails the ability of parliaments to carry out a meaningful debate and deliberation, which in turn affects the legitimacy of the outcome. In this respect, Habermas pointed elsewhere to the absence of coercion as one of the central elements of deliberation.[1106] Although legislative remedies necessarily imply some level of coercion, they should aim to promote deliberation as far as possible.

The remedial measures should therefore ideally afford the domestic legislature a 'margin of deliberation'. This is a concept closely related to the well-known margin of appreciation, a doctrine developed especially by the ECtHR which will be examined below. However, the latter is mainly related

---

1101 Andre Bächtiger *et al.*, "Deliberative Democracy: An Introduction", in Andre Bächtiger *et al.* (eds.), *The Oxford Handbook of Deliberative Democracy*, Oxford: OUP, 2018, pp. 1-32, at p. 2. *Inter alia*, deliberation includes mutual respect, inclusion, and equality of communicative freedom (at p. 5).

1102 See generally Robert E. Goodin, *Innovating Democracy: Democratic Theory and Practice After the Deliberative Turn*, Oxford: OUP, 2008.

1103 Joshua Cohen, "Deliberation and Democratic Legitimacy", in A. Hamlin and P. Pettit (eds.), *The Good Polity: Normative Analysis of the State*, Oxford: Blackwell, 1989, pp. 17–34, at p. 23.

1104 Certainly, deliberation does not take place exclusively before legislative bodies but in the democratic system as a whole. However, it is argued that "[f]rom almost any systemic perspective, institutions with a high level of decision-making power such as legislatures play key roles in deliberative systems" (Bächtiger *et al.,* in Bächtiger *et al.* (eds.), 2018, p. 16).

1105 Habermas, *Between Facts and Norms*, 1996, p. 110.

1106 Jürgen Habermas, *Structural Transformation of the Public Sphere*, Cambridge, MA: MIT Press, 1989, p. 202.

.

to the ability of domestic actors to better appreciate their national circumstances in the context of finding an infringement. The margin of deliberation is instead more closely linked to the democratic law-making procedure taking place before domestic legislatures, implying that these bodies need to be able to deliberate before implementing legislative reforms. The concept of a margin of deliberation has not been employed by legal scholarship when making reference to international judgments, instead favouring the margin of appreciation concept that already encompasses some of these democratic elements. However, the margin of appreciation refers to the state as a whole and to the general review performed by human rights courts, while the margin of deliberation as developed here refers exclusively to the legislature and the wording of legislative measures. It is thus necessary to differentiate between these two concepts, and it is argued that the concept of a margin of deliberation can be more useful than the margin of appreciation in this context.

II. The Human Rights Courts' Deference Mechanisms vis-a-vis *the Legislatures*

Human rights courts have developed particular doctrines that affect their deference *vis-à-vis* domestic actors, especially legislatures. The most well-known in this respect is the ECtHR's margin of appreciation doctrine. On the other hand, the IACtHR has been more reluctant to specify its approach towards this issue, but it can be considered to have developed a particular deference-related mechanism through its conventionality control doctrine. The ACtHPR, due to the small number of judgments issued until now, has not yet established a similar doctrine or approach towards deference.

In general, these deference mechanisms are mainly applied in the relation between human rights courts and domestic courts. However, in recent times human rights courts have also included domestic legislatures under the scope of these mechanisms, developing particular approaches towards them. For example, the ECtHR's review of laws has taken a procedural turn, where the legislative procedure followed by parliaments is examined more closely and can be more relevant than the substantial review of the norm. The IACtHR's conventionality control has also been extended to the legislative process, although the review of legislation by this Court still focuses more on the substance than the procedure.

1. The ECtHR's Margin of Appreciation Doctrine *vis-à-vis* the Legislature

The ECtHR developed its famous margin of appreciation doctrine over many years, starting with the case of *Handyside vs. UK* (1976). The basis of that doctrine can be found in the principle of subsidiarity, which usually governs the relationship between the different levels of government in federal constitutional systems and is considered to be a structural principle in international human rights law as a whole.[1107] Applying the negative dimension of subsidiarity, human rights courts need to refrain from intervening in case domestic judges are able to effectively protect the rights of individuals. Similarly, legislatures also have a primary responsibility to protect human rights, in accordance with the obligations to legislate under international treaties.[1108] In accordance with the concept of positive subsidiarity, in case legislatures or domestic courts fail to comply with these primary obligations, human rights courts would be required to step in and remedy the situation.[1109]

The margin of appreciation doctrine is a manifestation of the subsidiarity principle, and it is one of the aspects surrounding the ECtHR which has received more attention by scholarship in the last decades.[1110] States have also widely supported this deference mechanism, to the point of including it in the Preamble to the Convention through the adoption of Protocol No. 15 to the ECHR.[1111] In a nutshell, this doctrine implies that the Court will grant a wider discretion to national authorities when certain conditions are met, thereby applying an increased deference towards national policy

1107 See generally Carozza, *AJIL* 2003. The requirement of exhausting available domestic remedies, included in the three regional systems, is another manifestation of the subsidiarity principle.

1108 See on the human rights obligations to legislate Chapter 1 of this book.

1109 Eva Brems, "Positive subsidiarity and its implications for the margin of appreciation doctrine", *NQHR* 37(3), 2019, pp. 210-227.

1110 For an early analysis see Howard Charles Yourow and Eric Stein, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*, Leiden: Brill, 1995. See also Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, Cambridge: Intersentia, 2002; Andrew Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality*, Oxford: OUP, 2012.

1111 The addition to the ECHR Preamble reads "that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation".

choices at the expense of its own interpretation of the concerned rights.[1112] These conditions are related on the one hand to the nature of the issue at stake and the presence of a consensus among European states, and on the other hand to the democratic quality of the domestic institutions and whether they followed the appropriate procedure when adopting the act in question.

The latter has been labelled as the procedural margin of appreciation, entailing that domestic bodies will be granted a wider margin in cases where the ECtHR can assess that the acts in question have been adopted in accordance with established procedures and taking into account the Convention and the Court's case law. In this respect, a 'procedural turn' has been observed in recent years, where these considerations over the domestic procedure have gained a prominent role in international judicial review.[1113] The ECtHR has been applying this procedural review more frequently, not only with respect to the judiciary[1114] but also with regard to domestic laws and parliamentary proceedings.[1115] This procedural review has also notably affected the margin of appreciation afforded to domestic legislatures,[1116] an issue that has been considered "controversial".[1117] In this respect, Saul identified a number of cases in which the margin of appreciation is widened or limited by the Court because of parliamentary procedures, finding that "the Court is starting to develop a framework of considerations (…) that it will take into account in its assessments of parliamentary process".[1118]

1112 Sadurski, *HRLR* 2009, p. 401.

1113 See Oddný Mjöll Arnardóttir, "The 'procedural turn' under the European Convention on Human Rights and presumptions of Convention compliance", *I•CON* 15(1), 2017, pp. 09–35.

1114 For a nowadays classical example, see ECtHR, *von Hannover vs. Germany (No 2)* (2012), at paras. 124–126.

1115 One of the first cases in which this was explicitly done is ECtHR, *Animal Defenders International vs. UK* (2013).

1116 See Kleinlein, *ICLQ* 2019, p. 94 ("In a set of cases, the Court establishes a clear or at least implicit connection between the quality of parliamentary process and the breadth of the margin of appreciation").

1117 Helmut Philipp Aust, "Introduction: The European Court of Human Rights – the past in the present", in Helmut Philipp Aust and Esra Demir-Gürsel, *The European Court of Human Rights - Current Challenges in Historical Perspective*, Cheltenham: Edward Elgar, 2021, p. 3 ("First, the Court itself has recalibrated part of its case law in recent years with a growing focus on procedural review, giving member states the benefit of the doubt when their courts and – controversially so – also parliaments pay due attention to the Strasbourg case law").

1118 Matthew Saul, "The European Court of Human Rights' Margin of Appreciation and the Processes of National Parliaments", *HRLR* 15(4), 2015, 745–774, at p. 772.

However, according to Kleinlein "the content of the procedural values has remained rather vague so far".[1119] In any case, if the ECtHR is satisfied with the parliamentary proceedings, it is more likely to accept the resulting domestic law.

In this context, the ECtHR has arguably employed a thicker subsidiarity and afforded a wider margin of appreciation when dealing with domestic legislators instead of judges.[1120] For example, in the case of *SAS vs. France* (2014), it considered three aspects of national parliaments deserving a structural margin of appreciation. These are first and foremost the issue of democratic legitimacy, secondly the fact that a domestic parliament is better placed than an international court to "evaluate local needs and conditions", and thirdly that in some matters "opinions within a democratic society may reasonably differ widely".[1121] Therefore, in this case, the ECtHR expressly determined that it "has a duty to exercise a degree of restraint in its review of Convention compliance, since such review will lead it to assess a balance that has been struck by means of a democratic process within the society in question".[1122]

The ECtHR has in sum generally displayed a wide deference towards domestic actors – and especially towards legislatures – through its margin of appreciation doctrine, sometimes limiting its review to the procedural dimension of their decisions. Some authors have, therefore, warned against a potential weakening of the ECtHR's substantial review of decisions in specific situations of concern, such as those related to migration.[1123] However, the deferential approach of the ECtHR seems to be expanding, especially

---

See also Matthew Saul, "Shaping Legislative Processes from Strasbourg", *EJIL* 32(1), 2021, pp. 281–308.

1119 Kleinlein, *ICLQ* 2019, p. 99.

1120 Saul, *HRLR* 2015, especially at p. 772 ("It has been shown that there is a growing body of case law that supports the thesis of deeper subsidiarity in relation to parliaments"). See also Arnardóttir, *I•CON* 2017, pp. 32-33.

1121 ECtHR, *S.A.S vs. France* (2014), para. 129.

1122 ECtHR, *S.A.S vs. France* (2014), para. 154. This case has thus been considered "one striking example of the Court's restraint in carrying out a substantial review based on the quality of the domestic decision-making by the legislator" (Demir-Gürsel, in Aust and Demir-Gürsel (eds.), p. 250).

1123 See Prisca Feihle, "Asylum and immigration under the European Convention on Human Rights - an exclusive universality?", in Helmut Philipp Aust and Esra Demir-Gürsel (eds.), *The European Court of Human Rights - Current Challenges in Historical Perspective*, Cheltenham: Edward Elgar, 2021, pp. 133-157.

with respect to the so-called "good faith interpreters" of the Convention.[1124] This is in part a result of the 'Interlaken reform process' that took place during the last decade, which will be explored in the next chapter. This deference is also clearly observed with regard to the legislative measures, both in their exceptional character and in the way they are framed when included in the ECtHR's judgments, as will be shown below.

2. The IACtHR's Conventionality Control Doctrine vis-à-vis the Legislature

The doctrine of conventionality control developed by the IACtHR is (in principle) not directly linked to deference, but it still has some effects on that issue. In a nutshell, this doctrine implies – similar to constitutionality control – that domestic authorities have an obligation to review the compatibility of internal laws and decisions with the American Convention, as interpreted by the IACtHR.[1125] If the IACtHR considers that domestic actors have carried out the conventionality control adequately, it will also more likely defer to their decisions. From that point of view, this doctrine is not radically different from the procedural review exercised by the ECtHR, as the latter also considers whether the ECHR and its jurisprudence were taken into account by the domestic decision-maker.

This doctrine was first laid down by the IACtHR in the case of *Almonacid Arellano vs. Chile* (2006).[1126] There, the Court referred exclusively to the domestic judiciary, stating that this was the body in charge of carrying out the conventionality control of "domestic legal provisions which are applied to specific cases", adding that this review must also encompass the IACtHR's interpretation of the Convention.[1127] Due to this statement, the

1124 Başak Çalı, "Coping with Crisis: Whither the Variable Geometry in the Jurisprudence of the European Court of Human Rights", *Wisconsin International Law Journal* 35(2), 2018, pp. 237-276.

1125 See generally Yota Negishi, *Conventionality Control of Domestic Law*, Baden-Baden: Nomos, 2022.

1126 Before that, the conventionality control had already appeared in separate opinions of judge Garcia Ramirez, who thereby highlighted the 'constitutional' character of this doctrine. See for example the Separate Opinion of judge Garcia Ramirez in IACtHR, *Tibi v. Ecuador* (2004), especially in para. 3, where he compares the conventionality control assumed by the IACtHR to the constitutionality control performed by the domestic judiciary.

1127 IACtHR, *Almonacid Arellano vs. Chile* (2006), para 124.

doctrine of conventionality control has been mostly linked to the domestic judiciary, which was thought to be the actor responsible for reviewing the conventionality of domestic acts.[1128] This was also a point of critique in the early assessments of this doctrine.[1129] However, the Court clarified at a later stage that the doctrine applies to all state authorities, including the legislature.[1130]

In any case, the conventionality control doctrine has since its inception played an important part in the jurisprudence of the IACtHR, and has gained increased attention in the literature.[1131] Some authors have criticised it by arguing that it contradicts the principle of subsidiarity, as it places the ACHR on top of the domestic legal order.[1132] However, in accordance with the obligations to legislate that states commit to when ratifying a human rights treaty,[1133] they are expected to perform a review of its domestic legal order before the ratification as well as every time they adopt new laws or modify existing ones, in order to assess whether they conform with the treaty in question.[1134] One difference, however, is that the IACtHR does not just include the Convention and other treaties among the standards against which to perform such a conventionality control – it also includes its own jurisprudence. It thereby affords an *erga omnes* effect to its decisions, as well as a binding character not only to the operative paragraphs but also to

1128 IACtHR judge Ferrer MacGregor for example argued that through the conventionality control every domestic judge would turn into an inter-American judge. See IACtHR, *Cabrera García and Montiel Flores vs. Mexico* (2010), Separate Opinion of Judge Ferrer MacGregor.

1129 See Dulitzki, *Texas Law Review* 2015, p. 93 ("In fact, the conventionality control, by strengthening the judiciary vis-à-vis other branches, produces two effects: local courts become more relevant inter-American players, and the other branches lose part of the control in the relations between the country and the American Convention and Inter-American Court".).

1130 IACtHR, *Gelman vs. Uruguay*, Monitoring Compliance with Judgment, Order of the Court (2013), para. 69.

1131 See for example Pablo González-Domínguez, *The Doctrine of Conventionality Control*, Cambridge: Intersentia, 2018; Jorge Contesse, "The final word? Constitutional dialogue and the Inter-American Court of Human Rights", *I•CON* 15(2), 2017, pp. 414-435.

1132 Dulitzky, *Texas Law Review* 2015.

1133 See Chapter 1 of this book.

1134 In the inter-American system, this general obligation to legislate is provided under Article 2 ACHR.

its reasoning, contrary to what is usually the case in international human rights law.[1135]

In some cases, increased deference on behalf of the IACtHR can be observed when state authorities perform the conventionality control adequately.[1136] It is in this sense also a reflection of the subsidiarity principle, as the domestic level is given the primary responsibility of redressing the potential infringements. In this context, the doctrine has also been refined and nowadays it is clear that international regulations and jurisprudence are not given automatic primacy, as domestic laws need to be interpreted in accordance with the *pro homine* principle, giving greater weight to the interpretation that is more beneficial to the individual.[1137]

This Court seems thus to be overcoming its traditional hesitation towards deferring to national actors in the review of domestic laws. A usual justification for this approach was the lack of confidence in domestic institutions due to its "limited capacity (…) to effectively protect human rights in the region",[1138] as well as its low democratic credentials. Nevertheless, this situation has arguably changed, and nowadays most states under the supervision of the IACtHR constitute consolidated democracies with fairly effective and independent judicial systems governed by the rule of law. However, despite cautious moves in that direction, the IACtHR's approach is still far from that of the ECtHR in terms of deference to domestic legislatures. This can also be observed in the legislative measures, which are far more common and arguably also more specific in the Inter-American than in the European human rights jurisprudence, as will be explained next.

1135 Article 68(1) ACHR clearly states in this respect that "States Parties to the Convention undertake to comply with the judgment of the Court in any case *to which they are parties*" (emphasis added).

1136 See for example IACtHR, *Tenorio Roca vs. Peru* (2016), para. 231, stating that "due to a timely and correct conventionality control, in the specific case the inadequacy of the criminal definition of enforced disappearances (…) did not result in a specific element hindering the effective development of investigations" (non-official translation).

1137 See Yota Negishi, "The *pro homine* Principle's Role in Regulating the Relationship between Conventionality Control and Constitutionality Control", *EJIL* 28(2), 2017, pp. 457–481.

1138 Bernard Duhaime, "Subsidiarity in the Americas: What Room Is There for Deference in the Inter-American System?", in Lukasz Gruszczynski and Wouter Werner (eds.), *Deference in International Courts and Tribunals*, Oxford: OUP, 2014, pp. 289-315, at p. 314.

III. The Specificity of Legislative Remedies

In order to explore the deference employed by human rights courts when applying legislative remedies, it is necessary to look at the specificity of these remedial measures and examine whether they allow for public deliberation.[1139] In this respect, Donald and Speck have defined remedial specificity as "the degree of detail contained in the indication of particular non-monetary individual or general measures (…) the more specific the judgment, the less discretion remains to the state as to what remedial measure is required".[1140] While this definition refers to the indication of remedial measures in general, a slightly different understanding of remedial specificity will be employed in this context, as the required measures are already clear and consist of the reform of legislation. Thus, what will be examined is the degree of detail provided by human rights courts when ordering such reforms.

The object of this analysis are therefore the operative provisions concerning legislative reforms. The argumentative part is also relevant, as it usually includes further details on the expected outcome of these reforms. However, such recommendations included in the reasoning are in principle not formally binding for the state.[1141] This view on remedial specificity is certainly more narrow than the one employed by other authors, who also include specificity issues settled after the judgment, either by the international body in charge of supervising compliance or directly at the national level.[1142] In this respect, it is arguably a different issue when remedial specificity is included in the judgment itself than when it is decided by a supervisory body such as the CoM after a negotiation with the state or directly by the state on a voluntary basis.[1143] Therefore, these aspects will not be taken into account.

1139 See Dothan, *JIDS* 2018, p. 153 ("Deliberation is crucial for democracy to flourish. Discovering whether international courts, such as the ECHR, promote public deliberation following their judgments is a worthy challenge").

1140 Donald and Speck, *HRLR* 2019, p. 84.

1141 This is different when the remedial provisions included in the operative part specify that the reform should be implemented in accordance with specific paragraphs of the reasoning, thereby providing binding force to such paragraphs. This is for example usually the case with the remedial measures of the IACtHR, as will be seen below.

1142 Murray and Sandoval, *JHRP* 2020, p. 120.

1143 See on this point the discussion on the remedial measures of the ECtHR included in Chapter 3 of this book.

Additionally, the specificity dimension examined here mainly affects the details of the substantive outcome of the legislative reform prescribed by the respective court. Other specificity-related issues, such as the temporal deadlines concerning the adoption of the legislative reform or the obligations to report on the steps taken towards implementation will not be considered.[1144] In the former case, this is because human rights courts, despite often specifying deadlines for the implementation of remedial measures, are mostly not attaching great weight to them, as a state will be considered to have complied with the judgment even if that compliance is delayed.[1145] With respect to the specificity of obligations to report on the implementation, they are a very common feature of human rights judgments and are arguably not very intrusive, as they concern the well-accepted function of supervising compliance with such judgments. In sum, the remedial specificity dimension examined here focuses only on the degree of detail contained in legislative measures regarding their outcome.

It has been argued that the more specific a remedial order is, the more difficult it is for the state to avoid implementing it, as "the failure to comply becomes more visible with more concrete remedies".[1146] In addition, specific remedies can entail a higher sense of prescriptiveness or urgency. Staton and Romero argue in this context that "[i]t is at least plausible that vague remedies fail to persuade states that it is necessary to change their behavior".[1147] However, specificity can also bear higher costs for the supervisory bodies in case of defiance, as it will be more difficult to reach an acceptable solution in the implementation phase. When remedies are vague, a negotiation can take place between the state and the body in charge of supervising compliance, whereby some sort of middle-ground agreement can be reached. This is not the case when the remedial measure is very specific, as implementation needs to fit the measure and the space for negotiating is therefore narrower. Remedial measures thus provide the parameters within which a post-judgment negotiation will take place, and remedial vagueness can be more convenient in many cases for reaching a solution that is acceptable to both the state and the supervisory body.

1144 See on these different elements of remedial specificity Murray and Sandoval, *JHRP* 2020, p. 104. They include also a specificity dimension that concerns the indication of which domestic actors that should be involved in the implementation. This is generally implicit here, as the measures examined affect the domestic legislature.

1145 An exception in this regard are the measures of compensation, to which the payment of interests in case of delayed implementation can be attached.

1146 Staton and Romero, *ISQ* 2019, p. 480.

1147 Staton and Romero, *ISQ* 2019, p. 489.

In addition, vague remedies can be beneficial for the two main problems previously discussed concerning legislative measures. Vagueness addresses on the one hand the issue of the information deficit of human rights courts, as domestic actors can decide about the best outcome of a legislative reform based on the information they have on their domestic circumstances.[1148] On the other hand, remedial vagueness is also better suited for the democratic legitimacy issue, as it allows for debate and deliberation to take place before domestic legislative bodies, thus reaching an outcome that is more legitimate from a democratic perspective.[1149] Remedial specificity is therefore curtailing to some extent the margin of deliberation that legislatures should possess when carrying out a reform of domestic laws. If a remedial measure specifies in detail what the outcome of a legislative reform should be, there is not much room to deliberate. A margin of deliberation can even allow for a reform that goes beyond what was originally envisaged by the court. As argued elsewhere, "[i]f the supranational body sets the ceiling, this may restrict (…) broader reform".[1150] It might thus be more convenient for the respective court to set the minimum standards of the reform and to let the domestic legislator decide democratically where to go from there.

In any case, it is very relevant to examine the degree of specificity employed by human rights courts in their remedial practice. In this respect, an important element is the difference between legislative remedies of a positive and a negative nature. Remedies specifying the expected outcome of a legislative reform are mostly those of a positive nature, as in the negative ones the outcome is already implicit, consisting of a repeal of a norm. However, in the latter case, it is still important to consider whether the law or provision to be repealed is specified in the remedial measure. After analysing the varying nature of legislative remedies, this section will look into the approaches to remedial specificity employed by the three courts in their legislative measures.

1148 Staton and Romero, *ISQ* 2019, p. 489 ("Simply put, courts, certainly international courts, often do not have the kind of information necessary to match policy means to policy ends, and for that reason, they will want to depend on the information domestic actors can bring to bear. Vagueness addresses this problem").

1149 Murray and Sandoval, *JHRP* 2020, argued similarly that "[i]n selecting ambiguity, the supranational body can thereby maintain its own legitimacy by giving space to a state to decide how best it should implement" (at p. 111).

1150 Murray and Sandoval, *JHRP* 2020, p. 113.

1. The Varying Nature of Legislative Measures

As already mentioned in Chapter 1, the legislative measures ordered by human rights courts can require different actions from the domestic legislator. There are generally three possible scenarios in this regard. First, remedial measures can require the modification of existing norms in order to make them compatible with the corresponding treaty. Second, they can order the enactment of new laws for better domestic protection of human rights. Third, they can order the repeal of laws or provisions that are incompatible with the treaty. However, in the first scenario, where the courts order the amendment of existing laws, this usually consists of either the incorporation of certain elements or provisions into domestic laws or the suppression of specific elements included in these laws. Therefore, the division employed here will be between legislative remedies of a positive, negative, and neutral nature. In this respect, positive legislative remedies order the adoption of new laws or the addition of elements to existing laws, and negative legislative remedies include measures that order the repeal of entire domestic laws or specific elements of these laws, while the concept of neutral legislative remedies include those that are either vague enough to avoid specifying which action is required, or that entail both positive and negative elements.

In the categorisation of legislative remedies included in the previous chapter, it can be observed that some categories clearly comprise remedies of a negative nature, such as those concerning amnesty laws or the death penalty, while others are mostly positive, such as those on the protection of vulnerable groups or the codification of criminal offences. In the following, the specificity aspects of these three different dimensions of legislative measures will be explored, focusing thereby on the specification of a provision for the case of negative measures, the specification of an outcome for the positive ones, and the arguably higher deference included in neutral measures.

a) Negative legislative remedies and the specification of a provision

Legislative remedies of a negative nature imply the repeal of a law or an element of the relevant legislation. In terms of specificity, these can be divided among those that identify the concrete law or provision that needs to be repealed (whereby the expected outcome is precisely the repeal) and

those that order broadly to repeal laws to achieve a particular objective. The latter are arguably more deferential towards the legislature, as they entail discretion to decide the elements to be removed from domestic laws in order to reach the expected outcome.

This dimension of remedial specificity does not affect the ECtHR, as this court avoids ordering legislative reforms of a negative nature. In the case of the other two courts, one can find both negative measures that identify a concrete provision and measures limited to defining an objective. Concerning the former, specifications of both laws and provisions that must be amended are relatively common in the ACtHPR's case law. This can, for example, be evidenced in the judgment of *Ajavon vs. Benin* (2020), where the African Court expressly ordered the repeal of two specific provisions and two entire laws.[1151] Moreover, there are a number of cases in which the ACtHPR identifies the law in which certain elements have to be repealed and adds the expected outcome of such suppression. For example, in four judgments it ordered Tanzania to "remove the mandatory imposition of the death penalty from its penal Code".[1152] Despite not specifying the provisions of the Tanzanian Penal Code in which this element needs to be eliminated, this indication is also narrowing the margin of deliberation.[1153]

Indicating the law or provision that needs to be repealed is also relatively common in the IACtHR's measures.[1154] For example, in the case of amnesty laws, instead of ordering more broadly to guarantee that no domestic law constitutes an obstacle to the investigation of human rights violations, the IACtHR always expressly refers to concrete laws. Nevertheless, it has

1151 ACtHPR, *Ajavon vs. Benin* (2020), operative paras. (1-4), ordering the repeal of "Article 27 paragraph 2 of Law No. 2018 - 23 (...); Articles 1 and 2 of Organic Law No. 2018-02 (…); Law No. 2019 – 39 (…); [and] Constitutional law No. 2019 – 40".

1152 ACtHPR, *Ally Rajabu vs. Tanzania* (2019); *Amini Juma vs. Tanzania* (2021); *Gozbert Henerico vs. Tanzania* (2022); *Marthine Christian Msuguri vs. Tanzania* (2022).

1153 Similarly, in ACtHPR, *Lohe Issa Konate vs. Burkina Faso* (2014) it ordered this State to "amend its legislation on defamation (…) by repealing custodial sentences for acts of defamation".

1154 See for example IACtHR, *Caesar vs. Trinidad and Tobago* (2005), operative para. 3 ("The State shall adopt, within a reasonable time, such legislative or other measures as may be necessary to abrogate the Corporal Punishment Act"); *Expelled Dominicans and Haitians vs. Dominican Republic* (2014), operative para. 18, ordering to "prevent (…) the provisions of articles 6, 8 and 11 of Law No. 169-14 from continuing to have legal effects"; *Urrutia Laubreaux vs. Chile* (2020), operative para. 8 ("The State shall eliminate paragraph 4 of article 323 of the Organic Code of the Courts").

exceptionally also prescribed the repeal of all legislative provisions related to a concrete issue. For example, in the case of *Expelled Dominicans and Haitians vs. Dominican Republic* (2014), it ordered "to annul any law or regulation of any nature, whether administrative, regulatory, legal or constitutional, (…) that establishes or results in the irregular situation of the parents (…) being used as a reason to deny Dominican nationality to those born in the territory of the Dominican Republic".[1155] The latter arguably leaves more margin, as the State has the capacity to examine and decide by itself which norms are creating the problem alluded to.

In sum, remedial measures ordering the repeal of legislation generally leave a narrow margin of deliberation to the domestic legislature. When they specify the provision or even the entire law that needs to be eliminated, there is not much room to decide otherwise domestically. Instead, when these measures limit themselves to identifying the outcome or objective of this repeal the margin is wider, but such measures are exceptions to the rule. In the latter cases, deliberation can take place before legislative bodies on how to best achieve the required objective.

b) Positive legislative remedies and the specification of an outcome

As legislative remedies of a positive nature do generally not concern existing laws, a specification of the norm is rather exceptional and takes place only in the case of a requirement to add concrete elements to a provision. This is for example taking place when human rights courts order the introduction of exceptions into criminal provisions. In these cases, the concrete provision is usually identified, and the requested exceptions are spelled out, sometimes rather vaguely and sometimes with more detail. A relatively vague measure in this respect is that of the ECtHR ordering the introduction of exceptions to the prisoner voting ban in the UK, as it only specifies that the provisions must be amended "in a manner which is Convention-compliant".[1156] Even if this can be considered to have a high degree of specificity for European standards (because it identifies the provisions to be amended), its vagueness becomes clear when comparing it with some measures of the IACtHR that order the introduction of exceptions

1155 IACtHR, *Expelled Dominicans and Haitians vs. Dominican Republic* (2014), operative para. 19.

1156 ECtHR, *Greens and MT vs. UK* (2010), operative para. 6 (a) and (b).

concerning the application of the death penalty.[1157] In other cases, human rights courts prescribe the addition of specific elements in the laws that regulate judicial proceedings.[1158]

Besides these orders to introduce exceptions, most positive measures are rather broad in this respect, and prescribe the introduction of elements into domestic legislation in general.[1159] Thus, in the case of remedial measures ordering legislative enactments, specificity depends to a great extent on the level of detail with which the expected outcome of this incorporation is spelled out. In this respect, some measures are considerably vague, ordering states to adopt measures in order to adequate their domestic legal order to a specific article of the Convention, thus leaving a wide margin of deliberation.[1160]

Most positive measures however specify the objective of these enactments, thus reducing the legislator's room for manoeuvre. Thereby, the level of detail in the specification of the outcome becomes especially relevant. For example, the measures of the ECtHR requesting to set up domestic remedies generally specify only the situation that these remedies shall tackle (such as inhuman conditions of detention or excessive length of judicial

1157 See for example IACtHR, *Raxcacó Reyes vs. Guatemala* (2005), operative para. 5 ("The State shall modify, within a reasonable time, Article 201 of the Penal Code in force, in order to define various specific crime categories that distinguish the different forms of kidnapping or abduction, based on their characteristics, the gravity of the facts, and the circumstances of the crime, with the corresponding provision of different punishments, proportionate to each category, and also the empowerment of the courts to individualise punishments in keeping with the specifics of the crime and the perpetrator, within the maximum and minimum limits that each crime category should include"). See also *Fermín Ramirez vs. Guatemala* (2005), operative para. 8.

1158 For example, in *Oumar Mariko vs. Mali* (2022), operative paras. xv and xvi, the ACtHPR included an obligation to "to amend the laws governing the Constitutional Court to include provisions that ensure respect for the principle of adversarial proceedings" and "to include provisions on the procedure for recusal of judges".

1159 This can be observed in the European approach concerning the introduction of domestic remedies, where the Court avoids specifying in what concrete law such remedies should be included.

1160 See for example IACtHR, *'Street Children' vs. Guatemala*, operative para. 5 ("the State of Guatemala must adopt in its domestic legislation, the legislative, administrative and any other measures that are necessary in order to adapt Guatemalan legislation to Article 19 of the Convention"); ECtHR, *Xenides-Arestis vs. Turkey* (2005), operative para. 5 ("the respondent State must introduce a remedy which secures the effective protection of the rights laid down in Article 8 of the Convention and Article 1 of Protocol No. 1 in relation to the present applicant as well as in respect of all similar applications pending before the Court").

proceedings) and the preventive and/or compensatory character they shall possess. This limits to some extent the margin of deliberation, but not completely. On the other hand, measures of the IACtHR that for example order the adoption of legislative measures "to ensure, without exception, the imprescriptibility of incipient actions for crimes against humanity and international crimes" limit to a great extent the options of the legislature, as there are not many ways of implementing it besides introducing an imprescriptibility clause in the relevant criminal provisions.

Thus, in the case of legislative incorporations, remedial specificity depends to a great extent on the expected result. In this respect, the ECtHR has usually avoided being very specific, while the IACtHR's remedies have gone along the whole range of specificity degrees, up to the level of indicating very clearly how the new provision should look like, thereby tying up the hands of the domestic legislator to a considerable extent. Finally, legislative incorporations are ordered by the ACtHPR rather scarcely, and in those exceptional cases it has stayed on an intermediate level of specificity, prescribing an outcome but in broad terms.[1161]

c) Neutral legislative remedies and the attached discretion

Finally, there is another type of legislative remedies that neither orders the introduction nor the suppression of laws or legislative elements: neutral legislative remedies. This form of remedy comes about either because the remedial measures are extremely vague or because they order an amendment in which both positive and negative elements come into play.[1162] Vagueness is a common feature of the early practice of the three courts concerning legislative remedies. For example, in its first legislative measures, the IACtHR limited itself to order the amendment of "those laws that this

1161 For example, in *Eric Houngue vs. Benin* (2022), the ACtHPR ordered to amend a specific provision of the State's Criminal Code in order to introduce an exception that broadly protects "freedom of opinion and expression in relation to criticism of judicial decisions".

1162 For example, in *Saramaka vs. Suriname* (2007), the IACtHR's legislative measure stated that "the State shall remove or amend the legal provisions that impede protection of the right to property of the members of the Saramaka people and adopt, in its domestic legislation, (…) measures as may be required to recognize, protect, guarantee and give legal effect to the right of the members of the Saramaka people to hold collective title of the territory they have traditionally used and occupied" (IACtHR, *Saramaka vs. Suriname* (2007), operative para. 7).

judgment has declared to be in violation of the [ACHR]".[1163] Similarly, the first legislative measure of the ACtHPR stated that "[t]he Respondent is directed to take constitutional, legislative and all other necessary measures within a reasonable time to remedy the violations found by the Court".[1164] The ECtHR was arguably a bit more specific than that in its early legislative measures, but it did not go into the detail of more recent judgments.[1165] This is probably due to the fact that the courts were cautiously establishing their authority to deliver this type of remedial measures, and thus intended to avoid a negative reaction on behalf of states by allowing for enough discretion in the implementation of such measures.

Vague legislative remedies can also be found in more recent judgments, but they are rather exceptional.[1166] Instead, what is more common are remedies that include an objective in broad terms and avoid specifying what kind of legislative action is needed. For example, in the case of *Casa Nina vs. Peru* (2020), one of the IACtHR's remedial measures mandated the State to "adapt its domestic laws in order to ensure job stability to provisional prosecutors". The State is thereby free to take the legislative arrangements it considers best suited to achieve this objective, whether it consists of the addition or suppression of legislative elements.

In other cases, the courts have included measures that specify the law but leave the outcome requirement very vague. For example, in *APDH vs. Côte d'Ivoire* (2016), the ACtHPR ordered to "amend Law No. 2014-335 of 18 June 2014 on the Independent Electoral Commission to make it compliant with the aforementioned instruments to which it is a party".[1167] This remedy, despite identifying the specific law to be amended, does not make clear if that reform should be of a positive or negative nature, nor

1163 IACtHR, *Castillo Petruzzi vs. Peru* (1999), operative para. 14. Similarly in *Bamaca Velasquez vs. Guatemala* (2002), operative para. 4.

1164 ACtHPR *Tanganyika Law Society and Legal and Human Rights Centre* vs. *Tanzania* (2013), operative para. 3.

1165 See for example ECtHR, *Lukenda vs. Solvenia* (2005), operative para. 5 ("the respondent State must, through appropriate legal measures and administrative practices, secure the right to a trial within a reasonable time"). In more recent judgments, the ECtHR has specified that this right needs to be protected with a domestic remedy that has a compensatory nature. See for example ECtHR, *Vlad vs. Romania* (2013), operative para. 6.

1166 See for example IACtHR, *Deras García vs. Honduras* (2022), operative para. 13.

1167 ACtHPR, *APDH vs. Côte d'Ivoire* (2016), operative para. 7.

what the precise outcome should be.[1168] Actually, in this case, Côte d'Ivoire requested an interpretation of the judgment, asking for clarification on how to implement the legislative reform. The ACtHPR rejected this request, arguing that, based on the principle of subsidiarity, it would not be its function to direct the state on how to comply with its orders.[1169]

In sum, with such vague measures, the domestic legislator has a wider margin of deliberation, as the political forces can debate on the form of implementation, democratically deciding what elements to add and/or what to eliminate from its legal order. These remedies are thus arguably better suited to tackle some of the main concerns with respect to the democratic legitimacy issues and the lack of knowledge of local circumstances. On the contrary, specifying that a concrete provision needs to be repealed or that a very detailed legislative incorporation has to be implemented restricts the capacity of parliaments to perform its constitutional function of democratic law-making, which includes meaningful deliberation on the substance of legislative reforms. This is of course especially relevant for well-functioning democracies, as this type of law-making is usually not taking place in authoritarian systems, as mentioned before.

2. The Human Rights Courts' Approaches to Remedial Specificity

Each of the three regional courts has developed its own approach to remedial specificity in the context of their legislative measures. Thereby, differences can be observed concerning the positive or negative nature of the measures as well as the degree of deference that is afforded to the domestic legislator. In this context, the ECtHR employs a very particular approach to legislative measures, which primarily consists of ordering the introduction of an effective domestic remedy for certain human rights violations. Legislative measures of a positive nature are also predominant before the IACtHR, and a typical feature of its specificity approach is the referral to the reasoning of the judgments to provide more detail to its

1168 See also ACtHPR, *APDF and IHRDA vs. Mali* (2018), where it ordered the State rather broadly to "amend the impugned law, harmonise its laws with the international instruments, and take appropriate measures to bring an end to the violations established" (at operative para. x); and *Jebra Kambole vs. Tanzania* (2020), ordering to "take all necessary constitutional and legislative measures (…) to ensure that article 41(7) of its Constitution is amended and aligned with the provisions of the Charter (at operative para. viii).

1169 See ACtHPR, *APDH vs. Côte d'Ivoire,* Interpretation of Judgment (2017).

remedies. The case of the ACtHPR is quite different, as negative reforms are prescribed more commonly than positive ones, while there are important variations in the level of specificity of its measures.

a) The European approach: prescribing the introduction of a domestic remedy

In its first judgments with legislative measures, the usual approach of the ECtHR was to spell them out rather broadly, usually mentioning only that legal measures or domestic remedies needed to be set up in order to protect a concrete right.[1170] The measures then turned gradually more specific, indicating the expected outcome in more precise terms. For example, in *Hutten Czapska vs. Poland* (2006) the ECtHR specified that legal measures must be adopted in order to "secure in its domestic legal order a mechanism maintaining a fair balance between the interests of landlords and the general interest of the community".[1171]

Starting in *Burdov (No. 2) vs. Russia* (2009), the ECtHR has predominantly used the approach of mandating the introduction of domestic remedies for a specific issue.[1172] The most common of these issues are excessive delays in domestic judicial proceedings, non-enforcement of domestic judgments, or inhuman conditions of detention, as explained in Chapter 4. Occasionally, it is specified that the remedy must have suspensive and

1170 See for example ECtHR, *Lukenda vs. Slovenia* (2005), operative para. 5.
1171 ECtHR, *Hutten-Czapska vs. Poland* (2006), operative para. 4.
1172 See ECtHR, *Burdov vs. Russia (No. 2)* (2009), operative para. 6 ("the respondent State must set up (…) an effective domestic remedy or combination of such remedies which secures adequate and sufficient redress for non-enforcement or delayed enforcement of domestic judgments").

compensatory effects,[1173] while in other cases only the compensatory aspect is mentioned,[1174] and in others, there is no specification at all.[1175]

A different approach seems to be taken in legislative remedies related to property rights, which have considerably more neutral and vague wording, referring only to the protection of the relevant rights. For example, the measure included in *Maria Atanasiu vs. Romania* (2010) mentions only that "the respondent State must take measures to ensure effective protection of the rights guaranteed by Article 6 § 1 of the Convention and Article 1 of Protocol No. 1".[1176] This type of neutral remedies constitute about a quarter of the ECtHR's legislative measures, while the rest are all of a positive nature. Notably, the ECtHR has never included a legislative remedy of a negative nature.

As mentioned in the introduction, the ECtHR indicates rather scarcely the legislative nature of its general measures in the operative part of its judgments. It is then in the argumentative part of the judgments where the need to introduce such domestic remedies through legislation is specified, sometimes with very concrete expectations as to their regulation.[1177] However, there are also some exceptions in which the need for legislative reforms is explicitly included in the remedial provision. For example, in the Chamber judgment of the case *Ališić vs. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and Macedonia* (2012), the ECtHR ordered Serbia and Slovenia to "undertake all necessary measures (…) in order to allow [the applicants] and all others in their position to be paid back their 'old' for-

1173 This is typically the case in remedies related to conditions of detention. See ECtHR, *Sukachov vs. Ukraine* (2020), operative para. 7; *Tomov vs. Russia* (2019), operative para. 9; *Varga vs. Hungary* (2015), operative para. 9; *Neshkov vs. Bulgaria* (2015), operative para. 7 (a).

1174 This is the usual approach in cases related to the non-enforcement of domestic judgments (see for example ECtHR, *Gerasimov vs. Russia* (2014), operative para. 12) as well as in those concerning excessive delays in domestic judicial proceedings (ECtHR, *Ümmühan Kaplan vs. Turkey* (2012), operative para. 5).

1175 As for example in ECtHR, *Gaszó vs. Hungary* (2015), operative para. 5, where it only specified that the domestic remedies must be "capable of addressing, in an adequate manner, the issue of excessively long court proceedings".

1176 ECtHR, *Maria Atanasiu vs. Romania* (2010), operative para. 6. See also, with an almost identic wording, *Manushaqe Puto vs. Albania* (2012), operative para. 6.

1177 See for example ECtHR, *Sukachov vs. Ukraine* (2020), para. 153 ("The Court's findings under this provision require specific changes in Ukrainian legislation that will enable any person in the applicant's position to complain of a breach of Article 3 resulting from poor detention conditions and obtain adequate relief for any such breach at domestic level"). See also ECtHR, *Gerasimov vs. Russia* (2014), para. 221.

eign-currency savings".[1178] This is in accordance with the usual approach of avoiding to determine the legislative nature of these measures. However, the case was thereafter referred to the Grand Chamber, and it expressly added the need for legislative measures to the aforementioned remedy, by stating that both states "must make all necessary arrangements, *including legislative amendments*, in order to allow [the applicants] and all others in their position to recover their 'old' foreign-currency savings".[1179]

The 'European approach' of ordering the introduction of a domestic remedy has also been employed by the IACtHR, although rather scarcely.[1180] One of these cases is *Castañeda Gutman vs. Mexico* (2008), where the IACtHR ordered the introduction of a domestic remedy allowing individuals to challenge the constitutionality of the norms regulating the right to be elected.[1181] This is a rather surprising measure, as the possibility for individuals to challenge domestic laws before a constitutional court is generally an issue that states are free to decide, and there are many different approaches depending on the constitutional system.[1182]

The ACtHPR also adopted the 'European approach' in one case, ordering Tanzania to "amend its legislation to provide individuals with judicial remedies in the event of dispute over their citizenship".[1183] It can be seen that although this measure is similar to those of the ECtHR, ordering the introduction of a domestic remedy for a specific issue, the ACtHPR made the legislative nature very explicit, indicating that the way of setting up a domestic remedy is an amendment of legislation.[1184] In sum, the legislative remedies of the ECtHR have remained considerably broad, limiting them-

1178 ECtHR, *Ališić vs. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and Macedonia* (2012), operative para. 11.

1179 ECtHR, *Ališić vs. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and Macedonia* (2014), operative paras. 10 and 11 (emphasis added).

1180 See for example IACtHR, *Rosendo Cantú vs. Mexico* (2010), operative para. 13 ("The State must introduce the pertinent reforms to provide an effective remedy for contesting jurisdiction to those persons affected by the intervention of the military justice system"). See also IACtHR, *Yean and Bosco vs. Dominican Republic* (2005), operative para. 8; *Fernandez Ortega vs. Mexico* (2010), operative para. 14.

1181 IACtHR, *Castañeda Gutman vs. Mexico* (2008), operative para. 6.

1182 It is likely that the measure was ordered because Mexico was in the process of reforming its Constitution to include this possibility, and the IACtHR wanted to give an impulse to that reform by adding international pressure in this direction.

1183 ACtHPR, *Anudo Ochieng Anudo vs. Tanzania* (2018), operative para. viii).

1184 The IACtHR has also specified the requirement of reforming the laws in order to introduce such a remedy. See for example IACtHR, *Yatama vs. Nicaragua* (2005), operative para. 9 ("The State shall adopt, within a reasonable time, the necessary legislative measures to establish a simple, prompt and effective recourse to contest

selves to indicating a general objective while avoiding to go into more detail.

b) The Inter-American approach: referrals to the reasoning

The IACtHR has been recognised as the court employing the highest level of remedial specificity in general.[1185] In the particular case of legislative remedies, due to the important number of them included in the IACtHR's judgments, it is possible to find a wide range of specificity degrees.[1186] Like the ECtHR, the IACtHR most often orders legislative incorporations, which constitute over half of its legislative remedies. Neutral measures represent almost a third of them, and orders to repeal legislation only amount to 18%. In terms of specificity, it is possible to find some measures that are extremely detailed as to the outcome of the legislative reform, as well as others that are very vague, and many in between these two poles.

However, an issue that is very common in the IACtHR's legislative measures is the referral to the argumentative part in order to specify certain aspects. It does so by indicating in the operative part of the judgments that the legislative reform needs to be implemented "pursuant to" one or various paragraphs of the reasoning. Although this does not always add remedial specificity,[1187] this is generally the case, especially when several

---

the decisions of the Supreme Electoral Council that affect human rights, such as the right to participate in government, respecting the corresponding treaty-based and legal guarantees, and derogate the norms that prevent the filing of this recourse").

1185 Murray and Sandoval, *JHRP* 2020, p. 106 ("The Inter-American Court has been recognized not only as the supranational body with the most holistic approach to reparations (…), but also as the body that has engaged the most with specificity as a particular feature of its approach to reparations").

1186 It needs to be remembered in this regard that the IACtHR has delivered twice as much legislative remedies than the other two regional courts together.

1187 For example, in IACtHR, *Former Employees of the Judiciary vs. Guatemala* (2021), the Court's remedy stated that "[t]he State shall adapt its regulations regarding the remedy, procedure and judicial competence for challenging the declaration of illegality of a strike, pursuant to paragraph 144 of this judgment" (operative para. 7). However, this paragraph of the reasoning does not contain more details concerning the content of the reform, as the formulation is identical to the one of the operative part in that respect (para. 144: "The Court notes that the violation of the right to judicial protection, with respect to the appeals filed against the declaration of illegality of the strike, was due to a lack of clarity in the regulations governing this matter. Thus, it finds it necessary to order the State, within two

paragraphs are being referred to. In some instances, it even constitutes a chain of referrals. For example, in *Nadege Dorzema vs. Dominican Republic* (2012), the IACtHR ordered the State to "adapt its domestic laws on the use of force by law enforcement officials, in the terms of paragraphs 274 and 275 of this Judgment".[1188] In turn, paragraph 275 – among other requisites for the reform – stated that "[t]his legislation must include the specifications indicated in Chapter VII-1 of this Judgment". The IACtHR is thus often extending the binding nature of its remedial provisions to whole sections of its argumentation.

It has to be noted in this respect that the IACtHR also uses this approach in other remedial measures, not only in those ordering legislative reforms. In many judgments, each remedy refers to the corresponding paragraphs of the reasoning to specify how it needs to be implemented. The IACtHR thus appears to interpret that its reasoning is binding in general. In this context, the part of the reasoning that constitutes an interpretation of the Convention is afforded binding force in accordance with the aforementioned conventionality control doctrine, while the parts in which it examines the content of domestic legislation and the ways to amend it (and to implement other remedies) are made binding through these referrals of the operative provisions.

The other two courts have traditionally not included a referral to the reasoning in its remedial measures. Nevertheless, the ECtHR seems to have started using this approach in recent cases. For example, in *Tunikova vs. Russia* (2021) – related to the criminalisation of domestic violence – the ECtHR's remedy consisted of an obligation to make "amendments to the domestic legal and regulatory framework in order to bring it into line with the Court's indications in paragraphs 151-58 of the present judgment". These paragraphs then specified *inter alia* what the legal definition of domestic violence must include, the persons it should cover, issues concerning the burden of proof and the trigger of investigations in cases of domestic violence, the need for criminalisation and the type of penalties that should be attached to it.[1189] Thus, it can be seen that although in principle the remedial measure is rather broad, the referral to argumentative paragraphs in it makes it much more precise, as it attaches a binding character to what

years, to clearly specify or regulate, through legislative or other measures, the remedy, procedure and judicial competence for challenging the declaration of illegality of a strike").

1188 IACtHR, *Nadege Dorzema vs. Dominican Republic* (2012), operative para. 9.

1189 See ECtHR, *Tunikova vs. Russia* (2021), paras. 152-157.

in principle would constitute mere recommendations.[1190] This approach is however still highly exceptional for the ECtHR, while it is almost the rule for the IACtHR.

In sum, although the legislative measures of the IACtHR are not very specific *per se*, its consistent referrals to the reasoning provide a lot more detail and narrow down the margin of deliberation to a considerable extent. As most of its legislative measures concern incorporations or modifications, it is arguably constraining the domestic legislatures to a point that its decision-making capacities can be compromised, as the amount of legislative detail imposed by the Court entails that they can only follow the path already laid down in a judgment. It has been argued in this respect that "specificity appears to be an intrinsic element of its [the IACtHR's] legal culture".[1191]

c) The African approach: prioritising legislative incompatibilities

A particularity of ACtHPR is that it is the only human rights court that has included negative measures more frequently than positive ones in its judgments. They constitute almost half of its legislative measures, while both positive and neutral measures represent about a quarter each. Besides this focus on incompatibilities, the Court has not developed a consistent approach towards remedial specificity. Indeed, Murray and Sandoval have found that the ACtHPR varies from rather vague to much more specific remedies, thus considering it "difficult to discern a particular trend or strategy in their approach".[1192]

In the context of its focus on the incompatibility of legislation, it sometimes went considerably far in terms of extending the repeal orders to an indeterminate number of laws. For example, in multiple judgments, the ACtHPR has ordered the repeal of a specific Beninese constitutional law that implied a reform of Benin's Constitution. In the case of *Houngue*

1190 For a more lenient approach in this respect, avoiding to make reference to concrete paragraphs, see for example ECtHR, *Dimitrov and Hamanov vs. Bulgaria* (2011), operative para. 6, indicating that the State "must set up (…) an effective remedy which complies with the requirements set out in this judgment". In most legislative remedies this is even broader, stating that the remedy needs to be "in line with the Convention principles as established in the Court's case-law" (see e.g. ECtHR, *Rumpf vs Germany* (2010), operative para. 5).

1191 Murray and Sandoval, *JHRP* 2020, p. 113.

1192 Murray and Sandoval, *JHRP* 2020, p. 106.

Eric Noudehouenou vs. Benin (2020), the African Court added another measure, consisting of an obligation to repeal "all subsequent laws related to the election".[1193] In another judgment, it went even further and ordered to repeal every law adopted after this constitutional reform, although it referred to a particular one among them.[1194] These measures, despite not identifying every law to be repealed, are very specific. By referring to all laws adopted after a certain point or related to a particular issue, no margin of deliberation is left to the state.

However, such far-reaching legislative measures are rather exceptional. In general, legislative remedies before the ACtHPR do not reach the level of specificity of some of those before the IACtHR. This is despite the fact that it has taken inspiration from the latter's case law for some issues related to remedial specificity. For example, in a judgment concerning indigenous peoples' territorial rights, it specified a procedural aspect of the implementation, by stating in the remedial measure that the identification of territory must be carried out "in consultation with the Ogiek and/or their representatives".[1195] This procedural requirement was previously included by the IACtHR in some of its judgments concerning indigenous territory.[1196]

In sum, with respect to the ACtHPR, it is difficult to find a pattern of remedial specificity, as it has employed different approaches in this regard. However, a distinct feature is its focus on legislative incompatibilities and the orders to repeal legislation. This is another element that hints at the fact that this Court has adopted a more constitutional self-understanding, as the orders to repeal legislation are more common before constitutional courts than human rights courts.[1197]

1193 ACtHPR, *Houngue Eric Noudehouenou vs. Benin* (2020), operative para. xi.

1194 ACtHPR, *XYZ vs. Benin (II)* (2020), operative para. xiv ("Orders the Respondent State to take all measures to repeal Law No. 2019-40 of 1 November 2019 amending Law No. 90-032 of 11 December 1990 on the Constitution of the Republic of Benin and all subsequent laws, in particular Law 2019-43 of 15 November 2019 on the Electoral Code").

1195 ACtHPR, *ACmHPR vs. Kenya* (2022), operative para. vi).

1196 See for example IACtHR, *Sarayaku vs. Ecuador* (2012), operative para. 4.

1197 This adds to the possibility of reviewing laws *in abstracto*, that is usually a feature of constitutional courts, as discussed in Chapter 1.

Interim Conclusion: A Margin of Deliberation for Legislative Remedies

To conclude, this chapter has shown that remedial deference is a paramount element to be considered with respect to legislative remedies. In this regard, the legislature displays several features which justify it having more discretion than other bodies in the implementation of remedial measures. This has triggered a notorious debate among political philosophers with respect to the constitutional review of legislation. Especially the strong-form judicial review, which generally implies the capacity of courts to strike down legislation, has been criticised for being at odds with the democratic principle. The concepts of majority rule and deliberation are fundamental principles of democratic governance, guaranteeing that the will of the people is reflected in decision-making processes. There are nevertheless situations in which the will of the majority can lead to the discrimination of individuals or groups which are not part of that majority. In sum, the issue revolves around deciding an adequate trade-off between legitimacy and effectiveness of judgments. Thereby, one could argue that weak-form review is often not enough for an effective protection of rights.[1198]

In the case of legislative remedies before human rights courts, this problem is to some extent downplayed, as these measures lack the power to invalidate legislation, requiring instead a domestic legislative procedure in this respect. However, the specificity of such measures becomes very important in this context. In relation to this, the concept of a margin of deliberation has been developed throughout this chapter. As deliberation is considered a cornerstone of modern democracy, legislative measures should ideally spell out some general conditions or a framework into which the substance of the reform would be demarcated but leaving the legislatures a margin to deliberate in this respect. Thereby, the democratic conditions of the concerned state should also be taken into account, as the recent backsliding of democracy in many states subject to the supervision of the three regional human rights courts can result in parliamentary deliberation being a mere façade, with law-making procedures increasingly controlled by the executive and its outcome decided in non-democratic ways. In such cases affecting regimes with authoritarian tendencies, the margin of deliberation is arguably less useful.

1198 See Dixon, *I•CON* 2019, p. 930 ("Not all models of judicial weakness, therefore, will necessarily be as attractive when it comes to the effectiveness of judicial review in protecting or promoting certain democratic values").

The chapter has also examined certain deference-related mechanisms developed by the ECtHR and the IACtHR with respect to legislatures. These mechanisms are more closely related to the review of laws than to legislative remedies, but they are still relevant in this context. The ECtHR's margin of appreciation is especially important in this regard, as it has increasingly focused on the procedural aspects of domestic laws. This Court is thus taking the legislative procedures of domestic parliaments more and more into account when deciding about the compatibility of domestic laws with the Convention. It has in this respect developed different standards of review when dealing with 'good-faith' and 'bad-faith' interpreters of the ECHR.[1199] On the other hand, the IACtHR has traditionally favoured its own substantial review of laws, irrespective of domestic procedural considerations.[1200] However, with the doctrine of conventionality control, this is starting to become more nuanced, as the IACtHR has shown more deference when it found that national bodies such as legislatures performed this control adequately at the moment of adopting a law or another decision. This is nevertheless not yet consolidated in its case law, and this Court should probably apply a more deferential standard when reviewing the actions of states with fully democratic credentials, instead of maintaining the same approach it used when authoritarian regimes predominated in the region.

The same can be argued for the degree of deference displayed by this court in its legislative remedies. This deference has been evaluated taking into account the specificity of the measures with regard to the indication of the concrete law to be repealed or amended (especially in the case of negative measures) as well as the specificity concerning the expected outcome of the legislative reform (in the case of positive measures). In this respect, the IACtHR has been highly specific in many cases, by introducing referrals to its reasoning in the remedies and making these argumentative considerations binding for states in the implementation of legislative reforms. On the other hand, the ECtHR has been much more deferential in its legislative measures, mostly limiting itself to ordering the introduction of domestic remedies for a specific issue. Finally, the ACtHPR has arguably not yet developed a consistent approach to remedial specificity, as one can find legislative measures that are extremely vague and others that are very specific. However, an outstanding feature is that this court orders very often the repeal of legislative provisions, while the other two focus mostly on the enactment of domestic laws. It can thus be inferred that the ACtHPR

1199 Çalı, *Wisconsin International Law Journal,* 2018.
1200 Çalı, in Lang and Wiener (eds.), 2017, p. 300.

has adopted a more constitutional approach in this respect, as the repeal of legislation is more common before constitutional courts than before the other regional human rights courts.

In sum, remedial deference can be considered an essential aspect that human rights courts need to take into account when issuing legislative remedies. It is highly recommended that these remedies leave the states' legislature a margin of deliberation if the domestic legislative procedures are fully democratic. The specificity of remedial measures is a particularly important element in this respect. This can also affect the issues of compliance and backlash, as these are measures that are arguably more prompt to cause resistance by states. Such consequences of legislative remedies will be examined in the last chapter of the book.