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RESEARCH ARTICLE

Separation of powers in a globalized democratic society: Theorizing the human rights treaty organs' interactions with various state organs

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Abstract

As part of their continuous effort to enhance the effectiveness and democratic legitimacy of human rights treaties, human rights treaty organs have increasingly fostered a direct relationship with various state organs, thereby penetrating the 'states' that traditionally have been treated as monolithic legal entities. Treaty organs review the decision-making process of each type of state organ – courts, parliaments and administrative organs – and make remedial orders that are substantially addressed to specific state organs. Such phenomena go hand in hand with the relativization of the distinction between the legal spheres in which human rights treaty organs and state organs operate. This is the first study to address such phenomena as a totality. It constructs the 'separation of powers in a globalized democratic society' theory, thereby proposing how each type of state organ and the treaty organs should interact under human rights treaties. Its findings contribute, first, to the harmonious achievement of the effectiveness and democratic legitimacy of human rights treaties; second, to the reform of the classical paradigm of international law, in which monolithic states are the only relevant legal entities; and third, to the long-standing debates on the relationship between international and national laws from a new angle.

Keywords: disaggregation of a state; duties of individual state organs; effectiveness and democratic legitimacy of human rights treaty systems; globalized democratic society; 'two-tiered bounded deliberative democracy' theory

I. Introduction

Under the concept of 'subjects of international law', international law scholarship has long confined itself to studying the rights and obligations of 'states' as monolithic entities,[1] which are unitarily represented by the executive in the international

[1]For criticisms against the dominance of the concept of 'subjects of international law' in international law scholarship, see Rosalyn Higgins, *Problems and Process* (Oxford: Clarendon Press, 1994), 49.

plane.[2] As a corollary of the separation between international and domestic laws, international law scholarship has long been based on the assumption that international law and institutions do not directly – without the mediation of domestic law – address the state organs. It is only the domestic laws of each state that can address state organs as such.[3] However, today it is widely acknowledged in international human rights law that regional human rights courts and UN human rights treaty bodies (both referred to hereinafter as 'human rights treaty organs' or 'treaty organs') are, and should be, fostering a direct relationship with various state organs beyond the executive.

Studies that address the relationship between treaty organs and individual state organs are rich and increasing in number. Some have highlighted the phenomena of 'piercing the veil of the state' and 'disaggregating the state',[4] and presented the concept of 'state organs' obligations',[5] where each state organ cooperates with treaty organs for the higher effectiveness of human rights treaties. Many have urged, often using empirical and statistical methods, for looking 'behind the state'[6] to focus on concrete actors that make up the domestic mechanism for implementation of treaty organs' decisions.[7] Some studies have indicated that treaty organs, most notably the European Court of Human Rights (ECtHR), have treated different state organs in different manners,[8] often in the context of the 'proceduralization' of review.[9] Nevertheless, these studies have largely left unanswered the questions concerning the concrete duties of each type of state organ under human rights treaties,[10] the principles governing the

[2]For the general principle that the executive represents the 'state' in the international plane, see International Court of Justice, Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Georgia v. Russian Federation*), Preliminary Objections, Judgment of 1 April 2011, ICJ Reports 2011, 70, para 37.

[3]See generally, Heinrich Triepel, *Völkerrecht und Landesrecht* (Leipzig: CL Hirschfeld, 1899). See, however, Georges Scelle, *Précis de droit des gens: Principes et systématique* (Vol. 1) (Paris: Recueil Sirey, 1932), 42–3, for the theory of *dédoublement fonctionnel*.

[4]Laurence R Helfer and Anne-Marie Slaughter, 'Toward a Theory of Effective Supranational Adjudication' (1997) 107 *Yale Law Journal* 237, 277, 288, 333–35.

[5]Ward Ferdinandusse, 'Out of the Black-Box? The International Obligation of State Organs' (2003) 29 *Brooklyn Journal of International Law* 45.

[6]Rachel Murray and Christian de Vos, 'Behind the State: Domestic Mechanisms and Procedures for the Implementation of Human Rights Judgments and Decisions' (2020) 12 *Journal of Human Rights Practice* 22.

[7]Alexandra Huneeus, 'Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights' (2011) 44 *Cornell International Law Journal* 493, at 511, 513–17; Courtney Hillebrecht, *Domestic Politics and International Human Rights Tribunal* (Cambridge: Cambridge University Press, 2014), 135.

[8]Oddný Mjöll Arnardóttir, 'Res Interpretata, Erga Omnes Effect and the Role of the Margin of Appreciation in Giving Domestic Effect to the Judgments of the European Court of Human Rights' (2017) 28 *European Journal of International Law* 819, 834–35.

[9]Janneke Gerards, 'Procedural Review by the ECtHR' in Janneke Gerards and Eva Brems (eds), *Procedural Review in European Fundamental Rights Cases* (Cambridge: Cambridge University Press, 2017) 127 at 140–58; Eva Brems, 'The "Logics" of Procedural-Type Review by the European Court of Human Rights' in Gerards and Brems, *Procedural Review in European Fundamental Rights Cases* 17, 37; Oddný Mjöll Arnardóttir, 'The "Procedural Turn" under the European Convention on Human Rights and Presumptions of Convention Compliance' (2017) 15 *International Journal of Constitutional Law (I-CON)* 9 at 23–33; Geir Ulfstein, 'The European Court of Human Rights and National Courts' in Oddný Mjöll Arnardóttir and Antoine Buyse (eds), *Shifting Centres of Gravity in Human Rights Protection* (London: Routledge, 2016) 47, 50–56.

[10]See, however, Amrei Müller, 'Domestic Authorities' Obligations to Co-develop the Rights of the European Convention on Human Rights' (2016) 20 *International Journal of Human Rights* 1058. Müller

relationship between treaty organs and state organs and the theoretical basis of such duties and principles.

A large number of studies have addressed the relationship between treaty organs and specific state organs. With regard to national courts, there are abundant works – especially under the concepts of 'domestic application', '(vertical) judicial dialogue' and 'shared judicial responsibility'.[11] Some have described the role of the domestic judiciary as one of 'agents' or 'trustees' of human rights treaties,[12] while others have presented original theories such as Çalı's 'responsible domestic courts doctrine'.[13] In relation to national parliaments, the relatively recent publication of the two edited volumes, *Parliaments and Human Rights*[14] and *The International Human Rights Judiciary and National Parliaments*,[15] in addition to the 2016 monograph by Donald and Leach,[16] is emblematic of this trend. There, parliaments are described as treaty organs' 'compliance partners'[17] and 'human rights actors',[18] and theories such as 'parliamentary civil disobedience'[19] are introduced. While a large part of these works concerns the European Convention on Human Rights (ECHR), relevant practices at the universal level or in other regions have also drawn attention.[20] As a whole, these studies attest to the increasing importance of the relationship between human rights treaty organs and various types of state organs. However, they have treated the relationship in a fragmented manner by focusing on just one type of state organ, one treaty organ or one aspect of the treaty organs' activities. Consequently, existing studies have not fully explored the possibility that the relationship is governed by a set of common principles as a totality, nor have they exploited the

has observed how domestic courts and parliaments should effectively interact to secure the Convention rights in an up-to-date manner.

[11]See, for example, ECtHR, 'Dialogue Between Judges 2014: Implementation of the Judgments of the European Court of Human Rights: A Shared Judicial Responsibility? (2014), <https://www.echr.coe.int/documents/d/echr/dialogue_2014_eng.>; Raffaela Kunz, 'Judging International Judgments Anew? The Human Rights Courts Before Domestic Courts' (2019) 30 *European Journal of International Law* 1129.

[12]See, for example, Eirik Bjorge, *Domestic Application of the ECHR: Courts as Faithful Trustees* (Oxford: Oxford University Press, 2015).

[13]Başak Çalı, 'From Flexible to Variable Standards of Judicial Review', in Arnardóttir and Buyse (n 9) 144, 155.

[14]Murray Hunt, Hayley Hooper and Paul Yowell (eds), *Parliaments and Human Rights* (Oxford: Hart, 2015).

[15]Matthew Saul, Andreas Follesdal and Geir Ulfstein (eds), *The International Human Rights Judiciary and National Parliaments* (Cambridge: Cambridge University Press, 2017).

[16]Alice Donald and Philip Leach, *Parliaments and the European Court of Human Rights* (Oxford: Oxford University Press, 2016).

[17]Alice Donald, 'Parliaments as Compliance Partners in the European Convention on Human Rights System', in Saul et al. (n 15) 75.

[18]Kirsten Roberts Lyer, 'Parliaments as Human Rights Actors' (2019) 37 *Nordic Journal of Human Rights* 195.

[19]Andreas Føllesdal, 'Law Making by Law Breaking? A Theory of Parliamentary Civil Disobedience against International Human Rights Courts' in Saul et al. (n 15) 329.

[20]See Eduardo Ferrer Mac-Grego, 'What Do We Mean When We Talk About Judicial Dialogue?' (2017) 30 *Harvard Human Rights Journal* 89; Antonio Moreira Maués et al., 'Judicial Dialogue Between National Courts and the Inter-American Court of Human Rights' (2021) 21 *Human Rights Law Review* 108; Melissa Loja, 'Recent Engagement with International Human Rights Norms by the Courts of Singapore, Malaysia, and the Philippines' (2021) 19 *I-CON* 98; Jasper Krommendijk, 'National Parliaments: Obstacles or Aid to the Impact of International Human Rights Bodies?' in Marlene Wind (ed), *International Courts and Domestic Politics* (Cambridge: Cambridge University Press, 2018) 227; Lyer (n 18).

opportunity raised by the fact that the experiences of one treaty organ can provide beneficial implications for others.

Against this background, this article aims to bridge the gaps in the previous studies, thereby establishing a comprehensive framework to prescribe the duties of each type of state organ and treaty organ under human rights treaties and regulate their relationship in a principled manner. As a preliminary observation, it examines the theoretical background of the emerging relationship between treaty organs and each type of state organ (Part II). It then proposes the 'separation of powers in a globalized democratic society' as an original theoretical framework, which prescribes the concrete duties of each type of state organs and the treaty organs as well as the principles regulating their relationship (Part III). Finally, it analyses the emerging patterns in treaty organs' practices, especially those on reviewing the necessity and proportionality of a measure and on ordering remedial/reparation measures under such a framework (Part IV).

This article makes three original contributions. First, it contributes to the harmonious achievement of the effectiveness and democratic legitimacy of human rights treaties (Part II). Second, it supplements the classical paradigm of international law, where monolithic states are the only relevant legal entities, by offering a new theoretical framework of the 'separation of powers in a globalized democratic society' to accommodate a more complex reality. Third, it builds on the long-standing theoretical debates addressing the interactions between international and national laws: Such previous studies have focused largely on the relationship between legal orders as such[21] and have only grasped the relationship between international law, *as interpreted and applied by international judicial bodies*, and national laws, *as interpreted and applied by national courts.*[22] However, in reality, state organs other than courts also participate in the implementation of human rights treaties, sometimes in a contradictory manner from that of courts.[23] Moreover, treaty organs and state organs increasingly cross the border between international and national laws to concurrently interpret and apply human rights treaties and national laws (Part II). Thus, by focusing on the relationship between organs rather than legal orders, and by including state organs other than courts into its analysis, this article supplements previous research from a different angle.

This study is not the first to highlight the need for the separation of powers between treaty organs and state organs. For example, relying on the separation of powers, Fahner argues that human rights courts should accord 'constitutional deference' to national decisions,[24] and Möllers states that the ECtHR should act 'with care and political sensitivity'.[25] Nevertheless, these authors have not expatiated upon the concrete manners

[21]See, for example, Mattias Kumm, 'The Cosmopolitan Turn in Constitutionalism' in Jeffrey L. Dunoff and Joel P. Trachtman (eds), *Ruling the World?* (New York: Cambridge University Press, 2009) 258; Antonio Cassese, 'Towards a "Moderate Monism"' in Antonio Cassese (ed), *Realizing Utopia* (Oxford: Oxford University Press, 2012) 187; Yota Negishi, 'The Pro Homine Principle's Role in Regulating the Relationship Between Conventionality Control and Constitutionality Control' (2017) 28 *European Journal of International Law* 457.

[22]Mathias Forteau, 'Repenser la logique de traitement des rapports entre ordres juridiques Changer de regard' in Baptise Bonnet (ed), *Traité des rapports entre ordres juridiques* (Paris: LGDJ, 2016) 633, 635.

[23]*A. and Others v. UK* (n 132) is one example where the decisions of the national court contradicted with those of the parliament and the executive branch.

[24]Johannes Hendrik Fahner, *Judicial Deference in International Adjudication* (Oxford: Hart, 2020) 207.

[25]Christoph Möllers, *The Three Branches: A Comparative Model of Separation of Powers* (Oxford: Oxford University Press, 2013) 213.

in which their proposals should operate. Although Ulfstein has suggested several broad elements to that effect, such as democracy, human rights, the rule of law, the margin of appreciation and subsidiarity,[26] further elaboration is necessary. Moreover, certain authors have examined the transnational separation of powers in global governance in a more general context,[27] which provides useful insights for our case, as explained in Part III.

Some clarifications are necessary concerning this article's scope. First, its examination is confined to the practice of human rights treaty organs, leaving the analysis of the state organs' practice to future research. Second, it focuses primarily on the allocation of powers between treaty organs and each state organ, while that between state organs under human rights treaties[28] needs to be integrated into our model in future studies. Last, under the generic terms 'human rights treaty organs' or 'treaty organs', this article focuses on the ECtHR, the Inter-American Court of Human Rights (IACtHR), and UN human rights treaty bodies, especially the Human Rights Committee (HRC), which has the richest experience. This article does not cover the African Court on Human and Peoples' Rights due to the scarcity of relevant practice and consolidated jurisprudence. Among the functions of the treaty organs, it focuses primarily on the individual complaint procedure, where claims to the decision-making authority collide between treaty organs and state organs most directly, although it touches briefly upon other functions where relevant. As for state organs, this article covers courts, parliaments and administrative organs. Although national human rights institutions (NHRIs) are excluded from its scope, as they are not one of the 'powers' in the context of the separation of powers, their roles in the 'separation of powers in a globalized democratic society' should be explored in future research.[29] Additionally, on rare occasions, treaty organs have dealt with measures that are directly based on national referenda rather than decided by a specific state organ.[30] Although it is beyond the scope of this article, future research should discuss how direct democracy should be situated within the 'separation of powers in a globalized democratic society'.

II. Why do treaty organs construct direct relationships with various state organs?

Effectiveness of human rights treaty systems

Unlike the traditional fields of international law that regulate the relationship between states horizontally, human rights treaties govern the vertical relationship between a

[26]Geir Ulfstein, 'A Transnational Separation of Powers?' in Saul et al. (n 15) 21, 22–23.

[27]Ingo Venzke and Joana Mendes, 'The Idea of Relative Authority in European and International Law' (2018) 16 *I-CON* 75, 96; David Haljan, *Separating Powers: International Law before National Courts* (Hague: TMC Asser Press, 2013) 281–85.

[28]See generally, Aikaterini S. Tsampi, *Le principe de séparation des pouvoirs dans la jurisprudence de la cour européenne des droits de l'homme* (Paris: Pedone, 2019).

[29]For the interactions between treaty organs and NHRIs, see generally, Katrien Meuwissen and Jan Wouters (eds), *National Human Rights Institutions in Europe* (Cambridge: Intersentia, 2013); Hinako Takata, 'NHRIs as Autonomous Human Rights Treaty Actors' (2021) 24 *Max Planck Yearbook of United Nations Law* 170.

[30]See, for example, IACtHR, *Gelman v Uruguay*, Ser C No 22, Judgment of 24 February 2011 (Merits and Reparations). Especially in Switzerland, a party to the ECHR, many decisions affecting human rights are made through national referenda.

state and the individuals under its jurisdiction, an area that previously had been regulated solely by national public laws. Moreover, compared with other fields that focus on specific sectors, human rights treaties concern the wide-ranging aspects of the states' exercise of public authority. For this reason, compliance with human rights treaties requires the cooperation not only of the executive branch, which has traditionally represented the state in the international plane, but also of other state organs, including courts and parliaments.

Thus, treaty organs have strived to pierce the veil of the state to forge a direct partnership with relevant state organs. One of the most prominent practices is the IACtHR's development of the 'conventionality control' (*control de convencionalidad*),[31] governing the relationship between the IACtHR and national courts.[32] It posits that the American Convention on Human Rights (ACHR) directly obliges not only states as a totality, but also the judiciary, to exercise a 'conventionality control' between domestic law and the ACHR, taking into account the IACtHR's jurisprudence.[33] The IACtHR has used this doctrine to highlight the obligations of national courts under the ACHR not to enforce laws – especially amnesty laws – contrary to the ACHR and IACtHR judgments, thereby 'transfer[ring] authority to domestic judges, bypassing domestic legislatures'.[34] The IACtHR has also used its powerful advisory jurisdiction to address state organs – judges in particular[35] – as a form of 'preventive control of conventionality'.[36] The highest courts of some states have accepted the obligations to exercise control of conventionality, although sometimes with a certain nuance,[37] thereby contributing to the effective implementation of the ACHR and IACtHR judgments.[38] The IACtHR is also well known for its prescriptive approach to ordering reparation measures.[39] It has often ordered the respondent states to amend national legislation,[40] investigate the

[31]See generally, Pablo González-Domínguez, *The Doctrine of Conventionality Control* (Cambridge: Intersentia, 2018).

[32]Note that the scope of this doctrine was later extended to all State organs. See IACtHR, *Cabrera García and Montiel Flores v Mexico*, Ser C No 220, Judgment of 26 November 2010 (Merits, Reparations, and Costs), para 225. Nevertheless, the IACtHR has invoked this doctrine mostly with regard to national courts.

[33]IACtHR, *Almonacid-Arellano et al. v. Chile*, Ser C, No 154, Judgment of 26 September 2006 (Preliminary Objections, Merits, Reparations and Costs), para 124.

[34]Jorge Contesse, 'The International Authority of the Inter-American Court of Human Rights' (2018) 22 *International Journal of Human Rights* 1168, 1170.

[35]Jorge Contesse, 'The Rule of Advice in International Human Rights Law' (2021) 115 *American Journal of International Law* 367, 381–400.

[36]IACtHR, *Entitlement of Legal Entities to Hold Rights Under the Inter-American Human Rights System*, OC-22/16, Ser A No 22, Advisory Opinion of 26 February 2016, para 26.

[37]See generally, Christina Binder, 'The Prohibition of Amnesties by the Inter-American Court of Human Rights' (2011) 12 *German Law Journal* 1203, 1218–26; Laurence Burgorgue-Larsen, 'Conventionality Control: Inter-American Court of Human Rights (IACtHR)' in Anne Peters (ed), *Max Planck Encyclopedias of International Law* (Oxford: Oxford University Press, 2018), paras 34–42.

[38]Maria-Louiza Deftou, 'Fostering the Rule of Law in the Americas' (2020) 38 *Nordic Journal of Human Rights* 78, 90–92.

[39]See generally, Douglass Cassel, 'The Expanding Scope and Impact of Reparations Awarded by the Inter-American Court of Human Rights' in Marc Bossuyt et al. (eds), *Out of the Ashes: Reparations for Gross Violations of Human Rights* (Oxford: Intersentia, 2006) 91; Başak Çalı, 'Explaining Variation in the Intrusiveness of Regional Human Rights Remedies in Domestic Orders' (2018) 16 *I-CON* 214, 217–20.

[40]See, for example, IACtHR, *Olmedo-Bustos et al. ('The Last Temptation of Christ') v Chile*, Ser C No 73, Judgment of 5 February 2001 (Merits, Reparations and Costs), operative para 4.

facts, and prosecute and punish those responsible.[41] Although these orders are formally addressed to the state, they are substantially directed at parliaments and domestic courts.[42]

The ECtHR, for its part, has long maintained that the concrete content of the remedial measure and allocation of roles among state organs to that effect are left to the state.[43] However, this stance took a significant turn in the 2000s. Under the initiative of the Committee of Ministers of the Council of Europe (CMCoE) to enhance the effective implementation of ECtHR judgments in 2000,[44] the majority of the member states have amended their legislation to permit the reopening of proceedings based on ECtHR judgments.[45] Against this background, the ECtHR began to recommend and order the reopening of domestic proceedings as a remedial measure,[46] thereby substantially reaching out to national courts. Indeed, the ECtHR was explicit in *Fabris v France* in 2013 that domestic courts have the 'obligation … to ensure … the full effect of the Convention standards, as interpreted by the Court'.[47] In the same vein, under the political initiatives of the CMCoE,[48] the ECtHR introduced a pilot judgment procedure in 2004, intending to tackle the so-called 'clone cases' deriving from structural problems.[49] In pilot judgments, the ECtHR has indicated specific remedial measures, including those that substantially require the parliament's actions, such as legislative amendments.[50] Moreover, the advisory opinion procedure introduced by Protocol No. 16, which entered into force in 2018, has been used as a device for the ECtHR to convey its messages directly to national courts.[51]

The HRC has also recommended, since its early days of jurisprudence in the individual communication procedure, the amendment of the legislation in question[52] and the reopening of proceedings[53] as remedial measures. Furthermore, in its general comments and concluding observations, the HRC has systematically recommended states parties to

[41]See, for example, IACtHR, *Bámaca-Velásquez v Guatemala*, Ser C No 70, Judgment of 25 November 2000 (Merits), operative para 8.

[42]Yota Negishi, 'The Subsidiarity Principle's Role in Allocating Competences Between Human Rights Courts and States Parties' in Armin von Bogdandy et al. (eds), *Ius constitutionale commune na America latina*, vol III (Curitiba: Juruá Editora, 2016) 125, 144–45.

[43]ECtHR, *Marckx v Belgium*, Application no 6833/74, Judgment of 13 June 1979, para 58.

[44]CMCoE, Recommendation No R (2000) 2, 19 January 2000, para II.

[45]Committee of Experts on the Reform of the Court (DH-GDR), Overview of the Exchange of Views Held at the 8th Meeting of DH-GDR, DH-GDR (2015)008 Rev, 12 February 2016, 4–12.

[46]See generally, Philip Leach, 'No Longer Offering Fine Mantras to a Parched Child?' in Andreas Føllesdal et al. (eds), *Constituting Europe* (Cambridge: Cambridge University Press, 2013) 142, 152–57.

[47]ECtHR, *Fabris v France*, Application no 16574/08, Judgment [GC] of 7 February 2013, para 75.

[48]CMCoE, Resolution Res(2004)3, 12 May 2004, para I; CMCoE, Recommendation Rec(2004)6, 12 May 2004, para II.

[49]For the pilot judgment procedure, see generally, Dominik Haider, *The Pilot-Judgement Procedure of the European Court of Human Rights* (Leiden: Brill, 2013).

[50]ECtHR, *Greens and M.T. v United Kingdom*, Application nos. 60041/08 and 60054/08, Judgment of 23 November 2010, Operative para 6.

[51]Małgorzata Wąsek-Wiaderek, 'Advisory Opinions of the European Court of Human Rights' in Paulo Pinto de Albuquerque and Krzysztof Wojtyczek (eds), *Judicial Power in a Globalized World* (Dordrecht: Springer, 2019) 637, at 644.

[52]See, for example, HRC, *Shirin Aumeeruddy-Cziffra and 19 other Mauritian Women v Mauritius*, No 35/1978, View of 9 April 1981, UN Doc CCPR/C/OP/1 at 67, para 11.

[53]See, for example, HRC, *Violeta Setelich v Uruguay*, No 63/1979, View of 28 October 1981, UN Doc CCPR/C/OP/1, 101, para 21.

incorporate the International Covenant on Civil and Political Rights (ICCPR)[54] and urged domestic courts to apply and take it into account.[55] In recent years, the HRC has recommended states to strengthen their legislative scrutiny processes[56] and the Committee on the Elimination of Discrimination Against Women (CEDAW) has systematically recommended in its concluding observations that national parliaments be involved in the implementation of concluding observations.[57]

Democratic legitimacy of human rights treaty systems[58]

Corresponding to the effort of the treaty organs described in the previous section, today human rights treaties and treaty organs are significantly 'embedded' in domestic legal orders.[59] National courts refer to the jurisprudence of treaty organs when they interpret human rights treaties as part of domestic law, often as part of the 'constitutional bloc'.[60] Moreover, an increasing number of states have established internal mechanisms for the implementation of the treaty organs' decisions, such as the procedure for reopening judicial proceedings[61] and the implementation legislation that provides competences and responsibilities for relevant actors and requires their coordination towards the implementation.[62] As a result, treaty organs often play roles similar to the 'constitutional court',[63] substantially overturning the constitutions, statutory laws and judgments of supreme or constitutional courts, thereby greatly interfering in the competences of state organs under national constitutions.[64]

This observation applies, albeit to a much lesser extent, to UN human rights treaty bodies with no formal power to issue binding judgments, as they have increasingly

[54]HRC, General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc CCPR/C/21/Rev.1/Add.13 (26 March 2004), para 13.

[55]See, for example, HRC, Concluding Observations on Paraguay, UN Doc CCPR/C/PRY/CO/4 (20 August 2019), paras 4–5.

[56]See, for example, HRC, Concluding Observations on Australia, UN Doc CCPR/C/AUS/CO/6 (1 December 2017), paras 11 and 12.

[57]CEDAW, Concluding Observations on Ecuador, UN Doc CEDAW/C/ECU/CO/7 (7 November 2008), para. 10. For more practice of UN human rights treaty bodies addressing national parliaments, see Lyer (n 18) 201–3.

[58]This section is partly based on Hinako Takata, 'Reconstructing the Roles of Human Rights Treaty Organs under the "Two-Tiered Bounded Deliberative Democracy" Theory' (2022) 22 *Human Rights Law Review* 1. Please refer to the paper for a closer examination of the issue of democratic legitimacy of human rights treaty systems.

[59]Laurence R. Helfer, 'Redesigning the European Court of Human Rights' (2008) 19 *EJIL* 125.

[60]For the ECtHR, see Helen Keller and Alec Stone Sweet (eds), *A Europe of Rights* (Oxford: Oxford University Press, 2008). For the IACtHR, see Manuel Eduardo Góngora Mera, *Inter-American Judicial Constitutionalism* (San José: Inter-American Institute of Human Rights, 2011). For UN human rights treaty bodies, see Machiko Kanetake 'Giving Due Consideration: A Normative Pathway Between UN Human Rights Treaty-Monitoring Bodies and Domestic Courts' in Nico Krisch (ed) *Entangled Legalities Beyond the State* (Cambridge: Cambridge University Press, 2021) 133.

[61]For European practices, see DH-GDR (n 45). For practices concerning UN human rights treaty bodies, see Kate Fox Principi, 'Internal Mechanisms to Implement U.N. Human Rights Decisions, Notably of the U.N. Human Rights Committee' (2017) 37 *Human Rights Law Journal* 237, 241–44.

[62]See, for example, Open Society Justice Initiative, *From Rights to Remedies* (New York: Open Society Foundations, 2013) 59–61.

[63]Alec Stone Sweet, 'Sur la constitutionnalisation de la Convention européenne des droits de l'homme' (2009) 80 *Revue trimestrielle des droits de l'homme* 923.

[64]Ulfstein (n 9) 47.

acquired authoritative status similar to that of regional human rights courts in many national legal orders.[65] Symbolically, in 2018 the Supreme Court of Spain even affirmed that a decision by the CEDAW in its individual communication procedure was binding on Spain.[66] Therefore, UN human rights treaty bodies' non-binding character does not necessarily make a qualitative difference from regional human rights courts in terms of their actual effect on national legal orders.[67]

The growing influence of treaty organs in national legal orders has given rise to democratic (or constitutional) legitimacy problems, according to which treaty organs are allegedly 'not only less democratically legitimate than domestic legislative and judicial mechanisms for the promotion and protection of rights but [they] also risk undermining these domestic [mechanisms]'.[68] Such criticism has highlighted that today treaty organs should be mindful of their roles in national legal orders, giving due respect to the respective state organs' mandates under their national constitutions. Thus, the ECtHR has acknowledged that due to their 'direct democratic legitimation' in 'matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the *domestic policy-maker* should be given special weight'.[69] The HRC has highlighted that 'it is generally for the [national] *courts* … to evaluate facts and evidence of a particular case'.[70]

Towards a principled regulation of the relationship between treaty organs and state organs

In the classical picture, where the boundary between international and domestic laws was intact, human rights treaties only concerned the allocation of authority between treaty organs and the state, and the allocation of authority among state organs was solely a matter for the respective domestic laws. However, as presented in the previous sections, today the distinction between the sphere where treaty organs operate and that where state organs operate has become relativized: on the one hand, treaty organs substantially participate in the interpretation and application of domestic constitutions and laws through affecting the actions of relevant state organs, while on the other hand, state organs claim to and actually do play roles in the interpretation and application of human rights treaties, as the latter are inextricably enmeshed with domestic constitutions and laws. In such situations, treaty organs and state organs inevitably interact closely and

[65]Takata (n 58) 3–4.

[66]Supreme Court of Spain, *Gonzalez Carreno v Ministry of Justice*, ROJ, STS 2747/2018, 17 July 2018 (Spain) 12.

[67]In this respect, this article shares with previous studies on 'international public authority' (Armin von Bogdandy et al. (eds), *The Exercise of Public Authority by International Institutions* (New York: Springer, 2009)), 'global administrative law' (Benedict Kingsbury et al., 'The Emergence of Global Administrative Law' (2005) 68 *Law and Contemporary Problems* 15) and 'informal international lawmaking' (Joost Pauwelyn, Ramses Wessel and Jan Wouters (eds), *Informal International Lawmaking* (Oxford: Oxford University Press, 2012)) that formal legal bindingness is not the decisive factor for democratic legitimacy problems.

[68]Richard Bellamy, 'The Democratic Legitimacy of International Human Rights Conventions: Political Constitutionalism and the European Convention on Human Rights' (2014) 25 *European Journal of International Law* 1019, 1020.

[69]ECtHR, *Maurice v France*, Application no 11810/03, Judgment of 6 October 2005, para 117 (emphasis added).

[70]See, for example, HRC, *HAMIDA v Canada*, No 1544/2007, View of 18 March 2010, UN Doc CCPR/C/98/D/1544/2007, para 8.4 (emphasis added).

concurrently. However, as seen in the previous sections, while the treaty organs have adopted an intrusive and top-down approach by directly requiring individual state organs to take specific actions for compliance, they have also shown a deferential and bottom-up approach by respecting the legitimate exercise of authority by state organs under their national constitutions. Thus, such interaction of treaty organs with state organs should be regulated and coordinated in a principled manner so the effectiveness and democratic legitimacy of human rights treaties – which potentially conflict, given that the former requires an increased impact on domestic legal orders while the latter demands respect for national decisions[71] – are achieved in a harmonious manner.

III. The separation of powers in a globalized democratic society

Framework of a 'globalized democratic society'

Rooted in Article 29 of the 1948 Universal Declaration of Human Rights (UDHR), all main human rights treaties embrace the term 'democratic society'.[72] As international and national societies were long considered distinct, the drafters of the UDHR and human rights treaties must have considered that the unit of a democratic society is the national societies. However, today, we live in 'globalized democratic societies'. Although there is no single universal community where human beings constitute a single *demos*, and international law and national laws do not constitute a single monist legal order, respective national democratic societies are greatly affected by human rights treaty standards and have become spaces where treaty organs and state organs closely intersect, regardless of their formal origins (see Part II). Therefore, instead of maintaining distinct constitutional principles for human rights treaties and national laws respectively, it is necessary to develop single and common constitutional principles that apply to such globalized democratic societies, which can be a driving force for integrating the international and national legal orders. Such principles should be based on widely shared values and understandings in national constitutional laws, but with adequate modifications, so they are acceptable from both the eyes of human rights treaties and those of national laws.

The separation of powers – a widely recognized but incomplete concept

Having its most prominent origin in Montesquieu's *De l'esprit des lois* (1748), the separation of powers has become one of the most fundamental and universally accepted principles in the world's constitutional democracies.[73] In the classical literature, the concept of the separation of powers was considered equivalent to the strict division of powers in terms of institution, function and personnel ('the pure doctrine of the separation of powers'),[74] based on the 'one branch-one function' and 'separation as

[71]Geir Ulfstein, 'The Human Rights Treaty Bodies and Legitimacy Challenges', in Nienke Grossman et al. (eds) *Legitimacy and International Courts* (Cambridge: Cambridge University Press, 2018) 284, 286; Paolo G Carozza and Pablo González, 'The Final Word? Constitutional Dialogue and the Inter-American Court of Human Rights: A Reply to Jorge Contesse' (2017) 15 *I-CON* 436, 441–42.

[72]In addition, in their preambles, the ECHR refers to 'effective political democracy' and the ACHR refers to 'democratic institutions'.

[73]Maurice John Crawley Vile, *Constitutionalism and the Separation of Powers* (New York: Liberty Fund, 1967) 97.

[74]Ibid 13.

confinement' views.[75] The effective protection of individuals' liberty by averting the risks of tyranny was its primary concern.[76] However, the pure doctrine has gained little support, as it cannot accommodate interaction and interdependence between the branches.[77] Thus, today the separation of powers is reconstructed to harmonize the division of powers element with the active checks and balances element;[78] the separation of powers is not only about separation, but also about coordination and supervision among powers. Accordingly, the other rationale of the separation of powers, in addition to the protection of liberty, is increasingly highlighted: allocating power and assigning tasks to those bodies best suited to execute them in terms of their composition, capacity, decision-making process and function, and coordinating with and supervising one another for the proper fulfilment of their tasks[79] – the value often referred to as 'efficiency'.[80]

Reconstructed as such, the separation of powers provides useful guidance for regulating the relationship between treaty organs and state organs in a globalized democratic society in a principled manner. The core philosophy of the separation of powers – that authority should be divided in a way that is connected to the specific legitimacy assets that each actor can bring into the governance process – is applicable even outside the context of the tripartite powers under national constitutions.[81]

Nonetheless, even after these clarifications, the separation of powers still remains a 'desiccated concept'.[82] In fact, the separation of powers does not impose a unified institutional arrangement; rather, it is applied in various ways in light of the particularities of the constitutional systems and conceptions of democracy in the state in question.[83] The separation of powers has played determinate roles only with 'hidden normative judgements'.[84] Thus, we need a thicker political theory to be able to derive concrete guidance on the relationship between treaty organs and state organs from the concept of separation of powers.

Embodying the separation of powers under the 'two-tiered bounded deliberative democracy' theory

Human rights treaties only provide a catalogue of rights and are largely silent on political models. Nevertheless, the term 'democratic society' in the treaties can be a key to

[75]Aileen Kavanagh, 'The Constitutional Separation of Powers' in David Dyzenhaus and Malcolm Thorburn (eds), *Philosophical Foundations of Constitutional Law* (Oxford: Oxford University Press, 2016) 221, 225.

[76]See, for example, Supreme Court of the United States, *Myers v United States*, 272 US 52, 25 October 1926, 293 (Brandeis J., dissenting).

[77]Eoin Carolan, *The New Separation of Powers* (Oxford: Oxford University Press, 2009) 18–21.

[78]Kavanagh (n 75) 233–34.

[79]Ibid 233.

[80]See, for example, Nicholas W Barber, 'Prelude to the Separation of Powers' (2001) 60 *The Cambridge Law Journal* 59. In German literature, similar arguments have been developed under the concept of 'die strukturelle-funktionelle Gewaltenteilung'. See, for example, Konrad Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* (20 Aufl., Heidelberg: C.F. Müller, 1999), 210–11.

[81]Venzke and Mendes (n 27) 91–96.

[82]Barber (n 80) 65–67.

[83]Möllers (n 25) 43.

[84]Carolan (n 77) 334.

incorporating a thicker political theory therein,[85] as after the Cold War, a growing consensus on a denser conception of 'democracy' has gradually emerged at the universal level and beyond Europe.[86] Today, this 'democracy' requires not only free and fair elections, but also inclusive representation, participation and deliberation. Moreover, democracy and human rights are considered 'interdependent and mutually reinforcing'. Thus, the concept of 'democratic society' should be interpreted in an evolutive manner. In this respect, I would like to rely on my own theory of the 'two-tiered bounded deliberative democracy', which builds on and modifies the theory of deliberative democracy to harmonize democracy and human rights at the global level. In essence, the two-tiered bounded deliberative democracy theory posits that

> deliberations should primarily take place within each *national* society, as only national societies are equipped with dense public spheres, sufficiently shared values, and approximately equal stakes, which are preconditions for rich and meaningful deliberations. However, deliberations in national societies inevitably suffer from some deficits … To address this gap … 'bounds' on national deliberations should be established through long-term and matured deliberations at the international level. Thanks to the different population compositions and the diversity of political and social backgrounds among states, deliberations at the international level enable a wider range of positions and interests to be heard and considered, including those that are overlooked and ignored in national deliberations.[87]

This theory can assist the full functioning of the principle of separation of powers in a globalized democratic society so the principle can produce concrete normative prescriptions.

Duties of treaty organs and each type of state organ in a globalized democratic society

Given the core philosophy of the separation of powers that the roles of organs should be allocated in accordance with their particular legitimacy assets by virtue of their composition, capacity, decision-making process and function, and considering the requirements of the 'two-tiered bounded deliberative democracy', this article posits that treaty organs and state organs should be allocated the following duties in 'globalized democratic societies'.

Parliaments

Parliaments are generally known for their representativeness and their submission to direct public accountability, although with a certain deliberative distance from the electorate.[88] Furthermore, from the perspective of deliberative democracy, parliaments are the only organs that possess unlimited access to normative, pragmatic and empirical

[85]Cf Matthew Saul, 'How Does, Could and Should the International Human Rights Judiciary Interact with National Parliaments?' in Saul et al. (n 15) 135, 145.

[86]Takata (n 58) 8–9.

[87]Ibid, 10–11.

[88]Dimitrios Kyrit, 'Constitutional Review in Representative Democracy' (2012) 32 *Oxford Journal of Legal Studies* 297, 305.

reasons.[89] Parliaments should therefore be allocated the primary responsibility to deliberate on matters of general public policy where there are 'reasonable disagreements'[90] and their decisions on such matters should be accorded especially wide deference by treaty organs as long as they have duly exercised their duties.[91] In making decisions, parliaments should ensure the effective representation and inclusive participation of all sectors of society, not only by ensuring free and genuine elections and protecting the political rights of all individuals,[92] but also by conducting thorough, transparent, inclusive and open deliberations.[93] Such deliberations should be 'bounded', which requires due consideration of the human rights of the affected, especially those of minorities and marginalized groups of people.

Courts

The prominent features of courts are their independence and remoteness from direct democratic control, their triadic – judges and parties to dispute – structure and their expertise in law. Thus, they are best placed to adjudicate one-off disputes between the parties in a foreseeable, coherent and fair manner[94] and to play a guardian's role against the tyranny of the majority resulting from the flaws in parliamentary deliberations.[95] As Habermas observes, courts are fora of deliberations in their own ways.[96] Courts must not only ensure independence and fairness in their composition and procedures, but also conduct a comprehensive and thorough review of evidence and reasons submitted by the parties and furnish reasons for their judgments, showing 'an effort to deal with all points of view in a thorough manner'.[97] The review of courts must be under human rights treaty-compatible standards.

Administrative organs

The legitimacy of administrative organs comes primarily from their expertise, supported by rich resources and accumulated experiences through the bureaucratic system. Although administrative organs are not permitted to deal with normative reasons in either a constructive or reconstructive manner,[98] they still engage in deliberations by exercising their statutory discretions through dialogue with the affected.[99] Thus, administrative organs possess a special authority to determine technical and complex issues in applying and embodying parliamentary legislation to individual cases. When making

[89]Jürgen Habermas (translated by Rehg), *Between Facts and Norms* (Cambridge, MA: MIT Press, 1996) 192.

[90]Jeremy Waldron, 'The Core of the Case Against Judicial Review' 115 *Yale Law Journal* (2006) 1346, 1366–69.

[91]Ulfstein (n 9) 55.

[92]Habermas (n 89) 181.

[93]Ibid 171.

[94]See Barber (n 80) 74–84.

[95]John Hart Ely, *Democracy and Distrust* (Cambridge, MA: Harvard University Press, 1980) Chapter 6.

[96]Habermas (n 89) 230.

[97]Conrado Hubner Mendes, *Constitutional Courts and Deliberative Democracy* (Oxford: Oxford University Press, 2013) 110.

[98]Habermas (n 89) 192.

[99]Geneviève Cartier, 'Deliberative Ideals and Constitutionalism in the Administrative State' in Ron Levy et al. (eds) *The Cambridge Handbook of Deliberative Constitutionalism* (Cambridge: Cambridge University, 2018) 57, 60–64.

such decisions, they must conduct sufficient investigation and must follow a decision-making process that is transparent and open to the public – including those affected – and provide reasons for their decisions.

Human rights treaty organs

As judicial/quasi-judicial organs, treaty organs share structural and functional similarities with national courts. Nevertheless, treaty organs have higher expertise in international human rights law, are far more remote from national influence and control, and enjoy a higher degree of diversity in their composition in terms of national, cultural and legal backgrounds.[100] Thus, treaty organs are uniquely placed to find and supplement the deficits in national deliberations from an impartial and outsider's perspective[101] and to identify the international human rights standards that develop through deliberations at the international level.[102] In fulfilling these tasks properly, treaty organs must retain independence and fairness in their composition and procedure, and engage in a comprehensive review of all relevant views and aspects, in the same way that national courts are required to do. Moreover, as there is no centralized parliament at the international level, treaty organs are expected to serve as a forum for international deliberations[103] by ensuring diversity in their composition, encouraging the participation of third-party states and entities in their proceedings and collecting comparative law evidence on their own initiative.

Principles regulating the relationship between treaty organs and state organs

Subsidiarity

The subsidiarity principle is known for its duality.[104] While it prioritizes the smaller/lower unit that is closer to the affected individuals in fulfilling certain aims ('negative subsidiarity'), this priority should be reversed in favour of the intervention by the larger/higher unit when the smaller/lower unit cannot properly fulfil the aim, or when the larger/higher one can do so better ('positive subsidiarity').[105]

The principle of subsidiarity underlies the 'two-tiered bounded deliberative democracy'. By prioritizing the decision-making in the smaller/lower unit, where those who are affected by the decision are more closely represented in the decision-making process, subsidiarity generally promotes the proper functioning of deliberative democracy.[106] This applies even more so in our case, where deliberations at the international level remain discursive and underdeveloped due to the absence of centralized international political organs. The duality of subsidiarity enables the appropriate regulation of the relationship between the two tiers of deliberations. Although national deliberations should be given

[100]Cf Article 31(2) of the ICCPR.

[101]Björnstjern Baade, 'The ECtHR's Role as a Guardian of Discourse' (2018) 31 *Leiden Journal of International Law* 335, 358.

[102]Leach and Donald (n 16) 131. See also Shai Dothan, *International Judicial Review* (Cambridge: Cambridge University Press, 2020), Chapter 3.

[103]Takata (n 58) 17–18.

[104]Chantal Delsol, *L'État Subsidiaire* (Paris: Presses universitaires de France, 1992) 13–14.

[105]See generally, Paolo G Carozza, 'Subsidiarity as a Structural Principle of International Human Rights Law' (2003) 97 *American Journal of International Law* 38.

[106]Dinah Shelton, 'Subsidiarity and Human Rights Law' (2006) 27 *Human Rights Law Journal* 4, 6–7.

priority, such priority is reversed in favour of international intervention when the national deliberative process fails to properly represent the rights and interests of those affected, most likely non-nationals and discrete and insular minorities. In the same vein, this duality is a key to harmonizing the effectiveness and democratic legitimacy of human rights treaties. On one hand, treaty organs' intrusive attitude towards malfunctioning national decision-making processes, where the state organs fail to fulfil the above-stated duties of deliberation, contributes to the effectiveness. On the other hand, their deferential attitude towards well-functioning national decision-making processes, where state organs properly fulfil their duties of deliberation, promotes the democratic legitimacy within the meaning of the two-tiered bounded deliberative democracy. They are two sides of the same coin, as positive subsidiarity and negative subsidiarity respectively.

Principled and continuous dialogue

The concept of 'dialogue' has played an important role in national constitutional law contexts, especially in Commonwealth countries,[107] to promote checks and balances.[108] It has been suggested that the interpretation of constitutional rights should be produced through a shared elaboration between the judiciary and other constitutional organs.[109] These lessons from constitutional studies are transposable to our context,[110] although with two refinements in accordance with the requirements of the two-tiered bounded deliberative democracy, to avoid the 'misleading' and 'distorting' effects caused by the over-simplified metaphor of 'dialogue'.[111] First, the dialogue between treaty and state organs must be based on the values and principles widely shared in the epistemic community of respective human rights treaties, which consists of various actors, including the treaty organs, national courts, administrative branches, NHRIs, civil society organizations and academics. This requirement is endorsed by the concept of a 'culture of justification', where every exercise of power should be justified by reference to reasons which are publicly available and compatible with society's fundamental commitments.[112] Second, the dialogue must be continuous. Habermas describes the decisions of competent organs as 'the rationally motivated yet fallible result of a process of argumentation that has been interrupted in view of institutional pressures to decide, but is in principle resumable'.[113] Even when a treaty organ decides that a measure is compatible (or incompatible) with a treaty, this should not be taken as final and conclusive. State organs can and must continue to engage in dialogue, considering the evolving situations.[114] Treaty organs, for their part, should be open to changing their previous positions when state organs provide

[107]Peter W Hogg and Allison A Bushell, 'The Charter Dialogue Between Courts and Legislatures' (1997) 35 *Osgoode Hall Law Journal* 75. See also Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism* (Cambridge: Cambridge University Press, 2013) 30–31.

[108]Alison L Young, *Democratic Dialogue and the Constitution* (Oxford: Oxford University Press, 2017) 156–58.

[109]Christine Bateup, 'The Dialogic Promise' (2006) 71 *Brooklyn Law Review* 1109.

[110]Cf Matilda Gillis, 'Can We Talk? The Application of the Public Law Democratic Dialogue Model to the Interactions Between Domestic Legislatures and the European Courts' (2022) 23 *German Law Journal* 56.

[111]Aileen Kavanagh, 'The Lure and the Limits of Dialogue' (2016) 66 *The University of Toronto Law Journal* 83.

[112]Murray Hunt, 'Introduction', in Hunt et al. (n 14) 15–16.

[113]Habermas (n 89) 179.

[114]Cf Føllesdal (n 19) 344–48.

persuasive reasons for having to do so, although they must also take due account of the principle of legal security.

IV. Treaty organs' practice: How do they treat different state organs?

In the context of reviewing the necessity and proportionality of a measure

Treaty organs' review of the balancing and weighing exercises conducted by state organs, most typically under the requirements of necessity and proportionality, is the primary occasion where the decision-making authority is contested between treaty organs and state organs. Previously, in such reviews, treaty organs paid little attention to a state's internal factors, such as which specific state organ adopted a decision and how that particular organ arrived at the decision.[115] However, in recent years, treaty organs – though at differing levels – have begun to adopt a new approach, often called a 'procedural' approach,[116] focusing on the quality of the decision-making process of the particular state organ that has substantially adopted the decision concerned. On the one hand, such a review has a top-down and intrusive dimension, since treaty organs directly require state organs to adopt specific standards in their decision-making processes and non-compliance with such standards results in the treaty organs' rigorous review. On the other hand, it assumes a bottom-up and deferential dimension because, when a particular state organ has adopted the decision through the proper deliberative process, the treaty organ accords a higher degree of deference to the substance of the national decision.

European Court of Human Rights

In terms of review of national courts, *Von Hannover v Germany (no. 2)* in 2012, concerning the protection of Princess Caroline von Hannover's right to privacy from the press, symbolically showed that the ECtHR paid special attention to the decision-making process of the national courts. While the ECtHR conducted a rigorous review in *Von Hannover v Germany (no. 1)* (2004) to find a violation of Article 8 of the ECHR,[117] in *Von Hannover v Germany (no. 2)*, it adopted a different approach:

> where the balancing exercise has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts.[118]

As German domestic courts carefully balanced the rights at stake and 'explicitly took account of the Court's relevant case-law', including the ECtHR judgment on *Von*

[115]For example, when applying the margin of appreciation doctrine, the ECtHR has consistently invoked the nature of the purpose of the restriction, the existence and extent of consensus among the state parties and the nature of the rights/activities involved – all of which are factors external to the state.

[116]See generally, Gerards and Brems (n 9). The idea that the phenomena described as a procedural approach by previous studies can also be interpreted as imposing distinctive duties on individual state organs originated in Hinako Takata, 'Jinken joyaku ni okeru kobetsu no kokka kikan no ichizuke III [The Autonomous Status of Individual State Organs in Human Rights Treaties III]' (2021) 189 (2) *Kyoto Law Review* 53, 71 (footnote 147). Some relevant cases are also introduced in the paper.

[117]ECtHR, *Von Hannover v Germany*, Application no 59320/00, Judgment of 24 June 2004, paras 61–75.

[118]ECtHR, *Von Hannover v Germany (no. 2)*, Application nos 40660/08 and 60641/08, Judgment of 7 February 2012, para 107.

Hannover v Germany (no. 1), in *Von Hannover v Germany (no. 2)*, the ECtHR granted larger deference to the national court's decision and found no violation.[119] In *Matúz v Hungary* in 2014, the ECtHR added to this formula that 'the fairness of proceedings and the procedural guarantees afforded … are factors to be taken into account when assessing the proportionality'.[120]

With regard to review of national parliaments, as a rich body of literature points out, the ECtHR has placed increasing weight on the parliamentary decision-making process.[121] The high quality of this process even led to the substantial reversal of the precedent in *Animal Defenders International v UK* (2013) on the general prohibition of political advertising, to find no violation. There, the court established the criterion in general terms that, 'The quality of the parliamentary and judicial review of the necessity of the measure is of particular importance … to the operation of the relevant margin of appreciation.'[122] In other cases, the court has even inserted a section titled 'the quality of parliamentary review' in its judgments.[123]

In some cases, the ECtHR has instructed the national parliament to continue deliberations while not finding a violation in the case at hand.[124] In *Zdanoka v Latvia* (2006), while finding no violation in the case, the ECtHR indicated that 'the Latvian parliament must keep the statutory restriction under constant review' and warned that otherwise the court might find a violation in the future.[125] In the same vein, in 2011's *S. H. and Others v Austria*, the ECtHR urged that the parliament should continuously keep the rules under review, taking into account the dynamic developments in science, law and society.[126]

In terms of review of national administrative organs, the ECtHR has developed certain criteria for the administrative decision-making process that differ from those imposed on national courts and parliaments. In *Chapman v UK* (2001), concerning the refusal to give planning permission to gypsies to station residential caravans, the ECtHR highlighted the expertise of the administrative organs that, 'Because planning inspectors visit the site, hear the arguments on all sides and allow the examination of witnesses, they are better placed than the Court to weigh the arguments.'[127] Thus, the ECtHR emphasized that it 'must examine whether the decision-making process … was fair and such as to afford due respect to the interests safeguarded to the individual'.[128] Eventually, the ECtHR deferred to the planning inspectors' decision and found no violation of Article 8 because the inspector's reports showed 'that there were strong, environmental reasons for the refusal of planning permission and that the applicant's

[119]Ibid, paras 124–26.

[120]ECtHR, *Matúz v Hungary*, Application no 73571/10, Judgment of 21 October 2014, para 35.

[121]See, for example, Matthew Saul, 'The European Court of Human Rights' Margin of Appreciation and the Processes of National Parliaments' (2015) 15 *Human Rights Law Review* 745; Robert Spano, 'The Future of the European Court of Human Rights' (2018) 18 *Human Rights Law Review* 473, 488–92.

[122]ECtHR, *Animal Defenders International v United Kingdom*, Application no 48876/08, Judgment of 22 April 2013, para 108.

[123]ECtHR, *L.B. v Hungary*, Application no 36345/16, Judgment of 9 March 2023, para 124.

[124]Cf Müller (n 10) 1061.

[125]ECtHR, *Zdanoka v Latvia*, Application no 58278/00, Judgment of 16 March 2006, para 135.

[126]ECtHR, *S.H. and Others v Austria*, Application no 57813/00, Judgment [GC] of 3 November 2011, paras 117–18.

[127]ECtHR, *Chapman v United Kingdom*, Application no. 27238/95, Judgment of 18 January 2001, para 92.

[128]Ibid.

personal circumstances had been taken into account in the decision-making process'.[129] In *Taşkın and Others v Turkey* (2004), the ECtHR elaborated further criteria for the administrative organs' decision-making process: appropriate investigations and studies; public access to the conclusions of such studies and to information; and availability of judicial review.[130]

It is not unusual for more than two state organs within one state to take different views regarding the interpretation and application of human rights treaties.[131] Unlike the existing frameworks, which either consider states as monolithic entities or focus on the relationship between legal orders, the framework of the 'separation of powers in globalized democratic society' makes such situations visible, and properly regulates them by establishing the relationship between treaty organs and individual state organs.

In 2009's *A. and Others v UK*, concerning the detention of suspected international terrorists under the Anti-terrorism, Crime and Security Act ('2001 Act'), while the House of Lords (now the Supreme Court) held that the detention scheme under the 2001 Act was incompatible with the ECHR, the government took no remedial action and argued that 'the House of Lords had erred' in the interpretation and application of the ECHR, emphasizing that the 2001 Act was the outcome of parliamentary debate.[132] Faced with this difficult situation where the national court and parliament took opposite views, the ECtHR gave a large margin of appreciation to the national court, favouring it over the parliament.[133] This approach was presumably motivated by the fact that, while the national court properly conducted a careful and thorough review based on the ECHR standards,[134] the parliament failed to secure conditions for proper deliberations and passed the Bill hastily.[135]

Inter-American Court of Human Rights

In terms of review of national courts, as introduced above,[136] the IACtHR has established a doctrine of 'conventionality control' to directly address national courts. Previous studies have characterized this doctrine as 'an extraordinary and unprecedented degree of intrusion into domestic legal systems'[137] and 'the direct opposite of the "margin of appreciation"'.[138] Indeed, most of the time the IACtHR used the doctrine to effectively export its jurisprudence to domestic legal orders and treated national courts as obedient messengers that should mechanically implement the IACtHR's jurisprudence in their

[129]Ibid, para 110.

[130]ECtHR, *Taşkın and Others v Turkey*, Application no. 46117/99, Judgment of 10 November 2004, para 119.

[131]Cf Rosalyn Higgins, 'The Concept of "The State"' in Laurence Boisson de Chazournes and Vera Gowlland-Debbas (eds) *The International Legal System in Quest of Equity and Universality* (The Hague: Martinus Nijhoff, 2001) 547.

[132]ECtHR, *A. and others v United Kingdom*, Application no 3455/05, Judgment of 19 February 2009, para 150.

[133]Ibid para 174.

[134]Ibid paras 17–21.

[135]Ibid para 12.

[136]Part II, 'Effectiveness of human rights treaty systems'.

[137]Paolo G Carozza, 'The Problematic Applicability of Subsidiarity to International Law and Institutions' (2016) 61 *American Journal of Jurisprudence* 51, 65.

[138]Lucas E Barreiros, 'Emerging Voices: Freedom or Restraint?' *Opinio Juris* (11 August 2014), available at <http://opiniojuris.org/2014/08/11/emerging-voices-freedom-restraint-comparison-european-inter-american-human-rights-courts>.

domestic legal orders.[139] In *Almonacid-Arellano et al. v Chile* (2006), in which the IACtHR applied the doctrine for the first time, the IACtHR went so far as to state that the amnesty law in question 'does not have any legal effect'.[140] There are presumably two factors behind such an interventionist approach.[141] First, when the IACtHR initiated its activities in the late 1980s, most of the ACHR member states were not mature democracies, thus the IACtHR had insufficient trust in the national courts. Second, most cases before the IACtHR concerned gross and systematic violations of human rights, which do not reasonably tolerate divergent understandings and applications by national courts.

However, in recent years, thanks to successful democratization in the ACHR member states, the independence and quality of the decision-making process of national courts have greatly improved. There are more 'less obvious cases',[142] deriving from the good faith restriction of rights for the general welfare and freedom of others. Thus, the IACtHR has modified its interventionist approach and admitted the possibility of deferring to a national court's decision, albeit in an ad hoc and sporadic manner. In *Mémoli v Argentina* in 2013, concerning the criminal sanctions for the applicants' statements in newspaper articles and radio broadcasts, the IACtHR stated that,

> in strict observance of its subsidiary competence, the Court … must verify whether the State authorities made a reasonable and sufficient weighing up between the two rights in conflict, without necessarily making an autonomous and independent weighing, unless the specific circumstances of the case require this.[143]

In this case, the IACtHR positively valued the fact that the domestic courts 'examined thoroughly the characteristics of the statements [in question]'[144] based on standards that are compatible with the IACtHR's jurisprudence.[145] Thus, the IACtHR deferred to the domestic courts, holding that 'domestic judicial authorities were in a better position to assess which right suffered most harm',[146] and found no violation of Article 13.

With regard to review of national parliaments, as the IACtHR has mostly dealt with the conduct of military personnel and the police and laws adopted under undemocratic regimes, it has had few opportunities to develop the procedural approach on national parliaments. The most relevant – yet highly controversial – case was *Gelman v Uruguay* (2011). Here, an amnesty law was passed by the democratic parliament in 1986 and reaffirmed twice in the national referenda in 1989 and 2009. However, the IACtHR asserted that such a fact 'does not automatically or by itself grant legitimacy [to the amnesty law] under international law' and that the 'democratic legitimacy of specific facts

[139] Ariel E Dulitzky, 'An Inter-American Constitutional Court?' (2015) 50 *Texas International Law Journal* 45, 83.

[140] *Almonacid-Arellano et al. v Chile* (n 33) para 119.

[141] Paolo G Carozza, 'The Anglo-Latin Divide and the Future of the InterAmerican System of Human Rights' (2015) 5 *Notre Dame Journal of International & Comparative Law* 153, 168.

[142] Jorge Contesse, 'Inter-American Constitutionalism' in César Rodríguez Garavito (ed), *Law and Society in Latin America* (New York: Routledge, 2015) 220, 227.

[143] IACtHR, *Mémoli v Argentina*, Ser C No 265, Judgment of 22 August 2013 (Preliminary Objections, Merits, Reparations and Costs), para 140.

[144] Ibid para 141.

[145] Ibid para 142.

[146] Ibid para 143.

in a society is limited by the norms of [human rights treaties] such as the American Convention'.[147] Thus, the IACtHR did not defer to the national deliberation and found violations of Articles 8 and 25 of the ACHR.

On the surface, this judgment could be interpreted as the IACtHR's blatant rejection of considering the parliamentary decision-making process.[148] However, a careful reading of the case reveals that the IACtHR did not go so far as to consider parliamentary decision-making to be completely irrelevant. Although the IACtHR clarified that the rule of the majority is not absolute and should be limited by human rights norms, it did not deny the possibility that a parliamentary decision-making process that carefully considers the human rights implications of a Bill – which the Uruguayan parliament failed to do in this case – deserves deference.[149]

In terms of review of national administrative organs, the IACtHR has also reviewed the quality of the administrative decision-making process – although rarely. In *Granier v Venezuela* (2015), concerning the telecommunication authorities' refusal to renew the broadcasting licence, after highlighting the need for a clear and precise procedure and objective criteria,[150] the IACtHR determined that the administrative authorities' failure to follow such procedures demonstrated that their refusal was based on illegitimate rather than technical grounds.[151]

Human Rights Committee

In terms of review of national courts, since the 2000s, the HRC has ascribed a special role to the national courts. It has consistently asserted that

> it is generally for the [national] courts … to evaluate facts and evidence of a particular case, unless it is found that the evaluation was clearly arbitrary or amounted to a denial of justice.[152]

This formulation was first introduced in the context of fact-finding and the interpretation and application of domestic law, especially in the context of Article 14 (right to a fair trial) of the ICCPR.[153] However, the scope of this formulation has quickly expanded to concern the interpretation and application of the Covenant in general. For example, in *Althammer et al. v Austria* in 2003, concerning a violation of Article 26 of the ICCPR (prohibition of discrimination), the national court conducted a comprehensive and thorough review of the measure in question, under the standards of objectiveness and proportionality.[154] The

[147] *Gelman v Uruguay*, (n 30) paras 238–39.

[148] Leiv Marsteintredet, 'The Inter-American Court of Human Rights and the Mobilisation of Parliaments' in Saul et al. (n 15) 248, 257.

[149] Cf Nino Tsereteli, 'Emerging Doctrine of Deference of the Inter-American Court of Human Rights?' (2016) 20 *International Journal of Human Rights* 1097, 1106.

[150] IACtHR, *Granier et al. (Radio Caracas Television) v Venezuela*, Ser C No 293, Judgment of 22 June 2015 (Preliminary Objections, Merits, Reparations and Costs), para 171.

[151] Ibid para 252.

[152] See, for example, *HAMIDA v Canada* (n 70) para 8.4.

[153] See, for example, HRC, *Sergei Anatolievich Cheban et al v Russia*, No. 790/1997, View of 24 July 2001, UN Doc CCPR/C/72/D/790/1997, para 6.5.

[154] HRC, *Althammer et al. v Austria*, No. 998/2001, View of 8 August 2003, UN Doc CCPR/C/78/D/998/2001, para 2.3.

Committee found, without substantive review, that 'the measure, as was stressed by the Austrian courts … was based on objective and reasonable grounds'.[155]

The same approach has led the HRC to apply a rigorous review when the domestic court has failed to satisfy the required standards. In *Evelio Ramón Giménez v Paraguay* in 2018, the Committee critically observed that 'neither the appellate court nor the Supreme Court … expressed any view on the restriction of the author's right of peaceful assembly or on the grounds for its imposition'.[156] Therefore, the Committee held that 'the domestic authorities failed to demonstrate' the necessity and proportionality of the measure.[157]

With regard to review of national parliaments, in *Oulajin & Kaiss v The Netherlands* in 1992, concerning the alleged discrimination between foster children and own children in family allowance, the HRC took a deferential approach to find that the distinctions are compatible with Article 26.[158] Although the Committee did not give reasons for the deferential approach, the individual opinions of four members are telling:

> It is for the legislature of each country, which best knows the socio-economic needs of the society concerned, to try to achieve social justice in the concrete context. Unless the distinctions made are manifestly discriminatory or arbitrary, it is not for the Committee to … substitute its judgment for that of the legislatures of States parties.[159]

A similar opinion was expressed by Iwasawa, then a Committee member and currently a judge of the International Court of Justice, in *Haraldsson v Iceland* (2007). He observed that, 'The Committee should be mindful of the limits of its own expertise in reviewing economic policies which have been formed carefully through democratic processes.'[160]

However, despite such calls from individual members, the HRC is generally reluctant to focus on the quality of parliamentary deliberations. In the 2017 case of *Siobhán Whelan v Ireland*, concerning abortion law, the HRC refused to uphold Ireland's argument on the democratic and inclusive decision-making process.[161] This attitude of the HRC must derive from the wider diversity among ICCPR member states, in terms of their political systems and the composition, procedure and competence of parliaments.

Nonetheless, in the context of Article 27 of the ICCPR (rights of minorities), the HRC tends to place considerable weight on the parliamentary decision-making process, particularly regarding the representation and participation of the minority peoples.[162] It is yet to be seen whether this approach remains relevant solely to Article 27 cases or

[155]Ibid para 10.2.

[156]HRC, *Evelio Ramón Giménez v Paraguay*, No. 2372/2014, View of 25 July 2018, UN Doc CCPR/C/123/D/2372/2014, para 8.4.

[157]Ibid, para 8.5.

[158]HRC, *Oulajin & Kaiss v The Netherlands*, Nos 406/1990 and 426/1990, View of 23 October 1992, UN Doc CCPR/C/46/D/406/1990 and 426/1990, para 7.4.

[159]Ibid., Individual Opinion of Mr Herndl et al.

[160]HRC, *Haraldsson v Iceland*, No 1306/2004, View of 24 October 2007, UN Doc CCPR/C/91/D/1306/2004, Dissenting Opinion of Mr Iwasawa. See also Dissenting Opinion of Ms Palm, Mr Shearer and Ms Motoc.

[161]HRC, *Siobhán Whelan v Ireland*, No. 2425/2014, View of 17 March 2017, UN Doc CCPR/C/119/D/2425/2014, para 7.4.

[162]See, for example, HRC, *Apirana Mahuika et al. v New Zealand*, No. 547/1993, View of 27 October 2000, UN Doc CCPR/C/70/D/547/1993, para 9.6. See also, Steven Wheatley, 'Deliberative Democracy and Minorities' (2003)14 *European Journal of International Law* 507, 523–24.

extends to a wider scope. Moreover, in recent years, the states parties concerned have increasingly tended to emphasize the democratic quality of the laws at issue.[163] Although the HRC has only taken note of such arguments so far, this tendency may catalyse a change or clarification of attitude by the HRC in the future.

In terms of review of national administrative organs, the HRC has also scrutinized the administrative decision-making process.[164] In the 2015 case of *Mansour Leghaei and Others v Australia*, concerning the Minister of Immigration's refusal to grant the author a permanent visa despite his long-settled family life in Australia, the HRC made the criticism that, 'The author was never formally provided with the reasons for the refusal.'[165] Thus, without closely examining the substantive aspect of the measure, the HRC held that the measure was arbitrary within the meaning of Article 17 of the ICCPR. In other cases, too, the lack of transparency in the administrative decision-making procedure and the failure to provide adequate reasons have led the Committee to deny deference to such decisions.[166] In contrast, when the administrative organs have thoroughly examined the relevant factors through transparent procedures, the HRC has deferred to their decisions.[167]

In the context of ordering remedial/reparation measures

After finding a violation of one or more rights enshrined in respective treaties, treaty organs issue orders (recommendations in the case of UN human rights treaty bodies) concerning remedy and reparation. In recent years, individual state organs have become substantial targets of remedial orders. On the one hand, such orders indicate the top-down relationship between treaty organs and state organs, where the former directly impose their demands on the specific state organ. On the other hand, the treaty organs have increasingly recognized the bottom-up aspect of the relationship by deferring to trustworthy state organs as the primary decision-making forum.

European Court of Human Rights

As shown above,[168] the ECtHR has issued remedial orders substantially addressed to parliaments in the context of the pilot judgment procedure. In determining whether to apply the pilot judgment procedure, the ECtHR has considered, in addition to the formal requirement of the existence of a structural or systemic problem,[169] whether the parliament can reasonably be expected to act promptly and in good faith. When the ECtHR finds the parliament trustworthy, it refrains from applying the pilot judgment procedure, even when the above criteria are formally met. If it finds otherwise, it applies the

[163]HRC, *Bikramjit Singh v France*, No. 1852/2008, 1 November 2012, UN Doc CCPR/C/106/D/1852/2008, para 5.2. HRC, *Luiz Inácio Lula da Silva v. Brazil*, No. 2841/2016 (Initial proceedings) 17 March 2022, UN Doc CCPR/C/134/D/2841/2016, para 4.28.

[164]Viljam Engström, 'Deference and the Human Rights Committee' (2016) 34 *NJHR* 73, 79.

[165]HRC, *Mansour Leghaei and Others v Australia*, No 1937/2010, View of 26 March 2015, UN Doc CCPR/C/113/D/1937/2010, para 10.4.

[166]HRC, *Q v Denmark*, No 2001/2010, View of 19 May 2015, UN Doc CCPR/C/113/D/2001/2010, para 7.5.

[167]See, for example, HRC, *M.G.C. v Australia*, No 1875/2009, View of 7 May 2015, UN Doc CCPR/C/113/D/1875/2009, para 11.9.

[168]See Part II, 'Effectiveness of human rights treaty systems'.

[169]Rule 61 (1) Rules of Court of the ECtHR. This rule was inserted on 21 February 2011.

procedure and specifically indicates to the national parliament the timing and content of the legislative amendment.[170]

In the 2006 case of *Sürmeli v Germany*, concerning the absence of a national system to provide adequate redress for the excessive length of civil proceedings, the formal criteria for the application of the pilot judgment procedure seem to have been fulfilled. Nevertheless, the ECtHR refrained from applying it because it positively valued the fact that a Bill to remedy the violation had been introduced to the parliament.[171] However, thereafter, the enactment process in the German parliament made little progress. Thus, the ECtHR initiated the pilot judgment procedure in 2010's *Rumpf v Germany* to indicate specific measures, criticizing the parliament's 'complete reluctance to resolve the problems at hand in a timely fashion'.[172]

Moreover, even when indicating specific measures in pilot-judgments, the ECtHR has been keen on promoting parliamentary deliberations.[173] In *Manushaqe Puto and Others v Albania* (2012), it indicated that the 'decision-making process for the type of compensation to be awarded requires the utmost transparency and efficiency'[174] and that 'wide public discussions' on the matter are necessary.[175]

As for the ECtHR's relationship with national courts, the jurisprudence of the ECtHR concerning the ordering of the reopening of national proceedings is not yet fully consolidated.[176] Nevertheless, there is a sign that the ECtHR is willing to defer to a trustworthy national court on the need for the reopening. In the 2011 case of *Moreira Ferreira v Portugal*, after finding a violation of the ECHR's Article 6(1) (right to a fair trial), the ECtHR indicated that a retrial would constitute an appropriate remedy in principle.[177] However, when the applicant later relied on this ECtHR judgment to request a retrial, the Supreme Court dismissed the request, so the applicant lodged a new complaint with the ECtHR claiming that the dismissal violated Article 6(1). Given that the Supreme Court analysed the content of the 2011 ECtHR judgment in good faith, the ECtHR relied on the principle of subsidiarity and held that the Supreme Court's refusal was not arbitrary.[178] These interactions between the ECtHR and Portugal's national courts have been positively valued as 'open[ing] up an entirely new path of a *sensu stricto* judicial dialogue'.[179]

[170]Cf Nino Tsereteli, 'The Role of the European Court of Human Rights in Facilitating Legislative Change in Cases of Long-Term Delays in Implementation' in Saul et al. (n 15) 223, at 239.

[171]ECtHR, *Sürmeli v Germany*, Application no 75529/01, Judgment of 8 June 2006, paras 138–39.

[172]ECtHR, *Rumpf v Germany*, Application no 46344/06, Judgment of 2 September 2010, para 72.

[173]Markus Fyrnys, 'Expanding Competences by Judicial Lawmaking: The Pilot Judgment Procedure of the European Court of Human Rights' in Armin von Bogdandy and Ingo Venzke (eds), *International Judicial Lawmaking* (New York: Springer, 2012) 329, 357.

[174]ECtHR, *Manushaqe Puto v Albania*, Application nos 604/07, 43628/07, 46684/07 and 34770/09, Judgment of 31 July 2012, para 114.

[175]Ibid para 118.

[176]Alice Donald and Anne-Katrin Speck, 'The European Court of Human Rights' Remedial Practice and its Impact on the Execution of Judgments' (2019)19 *Human Rights Law Review* 83, at 114–15.

[177]ECtHR, *Moreira Ferreira v Portugal*, Application no 19808/08, Judgment of 5 July 2011, para 41.

[178]ECtHR, *Moreira Ferreira v Portugal (no. 2)*, Application no 19867/12, Judgment of 11 July 2017, para 98.

[179]Wąsek-Wiaderek (n 51) 642.

Inter-American Court of Human Rights

Contrary to the ECHR's practice described in the previous subsection, since around 2000 the IACtHR has ordered concrete measures addressing specific organs in a categorical manner without having examined whether the particular state organ is expected to act in a responsible manner in individual cases. Moreover, the orders often included more than what was strictly necessary for restitution.[180] Undoubtedly, one of the principal factors that has enabled the IACtHR's interventionist approach is the wording of ACHR Article 63(1), which authorizes it to take wider measures along with financial compensation.[181] However, an equally important factor may be that state organs in many ACHR member states largely lacked the willingness and ability to take reparation measures on their own.[182]

However, given the progress of democratization in the member states, the IACtHR has recently refined its approach to reparation by recognizing the roles of national courts and parliaments as the primary decision-makers, to the extent that some authors consider that the traditionally different approaches of the ECtHR and the IACtHR on reparation are now converging.[183] In 2010's *Manuel Cepeda Vargas v Colombia*, the IACtHR held, based on its 'subsidiary and complementary competence', that as the domestic court has awarded compensation to the victims based on the 'criteria of objectivity, reasonableness and effectiveness', the IACtHR must not order additional reparation,[184] even though the detailed criteria used by the domestic courts were different from the IACtHR's precedent.[185]

In 2018, the IACtHR examined whether the presidential pardon on humanitarian grounds of former Peruvian president Alberto Fujimori, who had been convicted and imprisoned for his role in crimes against humanity, was compatible with the obligation to investigate, prosecute and punish as established in the *Barrios Altos* and *La Cantuta* judgments. Despite the submissions of the petitioners and the Inter-American Commission on Human Rights that the IACtHR should revoke the pardon, the IACtHR referred to the doctrine of conventionality control and decided that it was the Peruvian courts that should address the matter, considering the ACHR and IACtHR's order.[186] The IACtHR then clarified the multiple factors that national courts should consider, including the person's health condition, compensation paid to the victims, the person's recognition of the seriousness of the crimes, his rehabilitation and the potential impact of his release on society and the victims.[187] As Contesse describes, this order shows 'a novel form of

[180]Leiry Cornejo Chavez, 'New Remedial Responses in the Practice of Regional Human Rights Courts' (2017) 15 *I-CON* 372, 389.

[181]IACtHR, *Baena-Ricardo et al. v Panama*, Ser C No 104, Judgment of 28 November 2003 (Competence), para 64.

[182]Cornejo Chavez (n 180) 390–91.

[183]Christina Binder, 'Die Zukunft des regionalen Menschenrechtsschutzes: Europa und Amerika – oder: Subsidiaritit Revisited' (2022) 77 *Zeitschrift fur Offentliches Recht* 5, 22.

[184]IACtHR, *Manuel Cepeda Vargas v Colombia*, Ser C No 213, Judgment of 26 May 2010 (Preliminary Objections, Merits, Reparations and Costs), para 246. For the discussions on this formula, see Clara Sandoval, 'Two Steps Forward, One Step Back: Reflections on the Jurisprudential Turn of the Inter-American Court of Human Rights on Domestic Reparation Programmes' (2018) 22 *International Journal of Human Rights* 1192, 1201–2.

[185]*Manuel Cepeda Vargas v Colombia* (n 184), Partially Dissenting Opinion of Judge Pérez Pérez, para 8.

[186]IACtHR, *Barrios Altos and La Cantuta v Peru*, Resolution of 30 May 2018 (Monitoring Compliance with Judgment), paras 64–66.

[187]Ibid para 57.

engagement' of the IACtHR with national courts by giving them 'constrained deference' under the principle of subsidiarity.[188] Perez-Leon-Acevedo analysed that this order resulted from 'the IACtHR' implicit recognition of and trust in the Peruvian democratic regime and overall respect for the rule of law'.[189] Unfortunately, the IACtHR's invitation for a principled dialogue was not well received by the Peruvian Constitutional Court, which reinstated the pardon in March 2022 and ordered the release of Fujimori while failing to examine many of the factors indicated by the IACtHR.[190] Thus, criticizing the Constitutional Court's failure to engage in the conventionality control because it disregarded those factors,[191] the IACtHR ordered the state not to execute the Constitutional Court's judgment in April 2022.

There are signs of a new approach with regard to national parliaments, too. In 2019, the IACtHR received a request for provisional measures to suspend the Legislative Assembly of El Salvador's processing of the Bill on the National Reconciliation Law, which would allegedly negatively affect the execution of the reparation order in the 2012 *Massacres of El Mozote and Nearby Places* judgment. However, the IACtHR refrained from ordering a provisional measure, ascribing great weight to the fact that the Legislative Assembly intends to ensure the participation of different social sectors in the deliberations and seek a wide consensus among them.[192] This shows the IACtHR's willingness to respect and promote the deliberations of a national parliament.

Human Rights Committee

The HRC has also shown a sign of respecting the primary decision-making competence of national courts. In 2010's *Hamida v Canada*, concerning the rejection of the author's asylum application, the HRC first endorsed the principle that 'it is generally for the courts … to evaluate facts and evidence of a particular case'.[193] However, the HRC pointed out that the administrative bodies and domestic courts gave 'inadequate consideration' to his rights under the ICCPR.[194] Therefore, the HRC conducted its own assessment of the evidence and concluded that the expulsion of the author would violate Article 7 of the ICCPR if it were enforced.[195] Nonetheless, the HRC did not recommend the revocation of the expulsion order and instead deferred the decision to the domestic courts by recommending 'a reconsideration of his expulsion order, taking into account the state party's obligations under the Covenant'.[196] Given this 'view', the administrative bodies and domestic courts conducted a review and fully considered the relevant factors, taking

[188]Jorge Contesse, 'International Decisions: Case of *Barrios Altos* and *La Cantuta v Peru*', (2019)113 *American Journal of International Law* 568, 573–74.

[189]Juan Pablo Perez-Leon-Acevedo, 'The Control of the Inter-American Court of Human Rights Over Amnesty Laws and Other Exemption Measures: Legitimacy Assessment' (2020) 33 *Leiden Journal of International Law* 667, 685.

[190]Constitutional Court of Peru, *Alberto Fujimori Fujimori*, 02010-2020-PHC/TC, 17 March 2022.

[191]IACtHR, *Barrios Altos and La Cantuta v Peru*, Resolution of 7 April 2022 (Provisional Measures and Monitoring Compliance with Judgment), para 40.

[192]IACtHR, *Massacres of El Mozote and Surrounding Areas v El Salvador*, Resolution of 3 September 2019 (Provisional Measures and Monitoring Compliance with Judgment), paras 23 and 41.

[193]*Hamida v Canada* (n 70) para 8.4.

[194]Ibid para. 8.5.

[195]Ibid para 8.7.

[196]Ibid para 10.

the ICCPR standards into account.[197] Although the expulsion order was eventually maintained, in the follow-up procedure, the HRC positively valued this measure, with an A-rank.[198]

Analysing the findings

Emerging general patterns

The analysis in the previous sections is far from comprehensive, and inconsistent practice does exist. Nevertheless, it has revealed the following emerging patterns across different treaty organs and state organs, which largely endorse the 'separation of powers in a globalized democratic society' model.

First, in both reviewing the necessity and proportionality of the measure and ordering remedial or reparation measures, treaty organs have increasingly recognized the primary roles of various state organs, which are different depending on their respective composition, competence, decision-making process and functions, and have placed themselves in a subsidiary position. In principle, it is for the national courts to hear the arguments of relevant authorities and individuals, evaluate the relevant facts and determine whether the measure is compatible with treaty standards; it is for national parliaments to balance between different values and interests when deciding matters of general policy; and it is for the administrative organs with expertise to deal with the technically complex evaluations in individual cases.

Second, treaty organs have required national courts, parliaments and administrative organs to adhere to different procedural standards. National courts must conduct a comprehensive and thorough review under human rights treaty-compatible standards, with the guarantee of procedural fairness. Parliaments must hold rich deliberations that ensure inclusive representation, participation and consideration of various positions and interests, including the human rights of the affected. Administrative organs must conduct sufficient investigations and must follow a decision-making process that is transparent and open to the public, including those affected, and provide reasons for their decisions.

Third, treaty organs increasingly endorse the duality of subsidiarity in their relationship with state organs. They take a deferential and bottom-up approach to state organs when the latter fulfil, or are reasonably expected to fulfil, the above procedural requirements (negative subsidiarity). In contrast, treaty organs take an intrusive and top-down approach when a state organ has not fulfilled or cannot be expected to fulfil them, by replacing state organ decisions and evaluations with their own and ordering detailed measures for specific state organs (positive subsidiarity). This practice indicates the emergence of a new conception of deference.[199] While the classical conception has been concerned with the allocation of authority between treaty organs and states solely in the international plane, where deference is given unconditionally and equally to all states because treaty organs must respect the sovereignty inherent in any state, the new conception concerns the separation of powers in a globalized democratic society where

[197]HRC, Follow-up Progress Report on Individual Communications Adopted by the Committee at its 116th Session, UN Doc CCPR/C/116/3 (2016) 7–8.

[198]Ibid 8.

[199]Cf Marisa Iglesias Vila, 'Subsidiarity, Margin of Appreciation and International Adjudication within a Cooperative Conception of Human Rights' (2017)15 *I-CON* 393, 407.

deference is given to each state organ under the condition that it fulfils certain standards. Although the first conception of deference was dominant in the twentieth century,[200] reflecting the clear boundary between international and domestic laws and actors, in recent years the second version has gradually become prevalent, corresponding to the blurring of the boundaries.

Finally, treaty organs have shown a certain willingness – although not always – to accept the 'principled and continuous dialogue' by refraining from making a determinate decision on the matter and entrusting the deliberations to national parliaments and courts (see *S.H. and Others v Austria*; *Zdanoka v Latvia; Manushaqe Puto and Others v Albania; Barrios Altos and La Cantuta [Monitoring Compliance]; Massacres of El Mozote and Surrounding Areas v El Salvador [Provisional Measures and Monitoring Compliance]*), and by relaxing the substantive standards established in previous cases when faced with the state organs' arguments based on serious deliberations (see *Animal Defenders International v. UK; Manuel Cepeda Vargas v Colombia*).

Difference among the three treaty organs

Despite the common elements described above, the extent to, and manner in, which the treaty organs have endorsed the 'separation of powers in a globalized democratic society' model vary. On the one hand, the ECtHR elaborated on the roles of respective state organs in a detailed manner and established general formulas. On the other hand, the IACtHR and HRC acknowledged the roles of state organs only in an ad hoc and restrained manner. This difference presumably derives from the fact that the relativization of the boundary between international and domestic legal orders, which constitutes the rationale for developing the separation of powers between treaty organs and state organs,[201] is much more advanced in the ECHR framework; it is clearly the least advanced in UN human rights treaties, due to the lack of binding powers in treaty bodies' decisions. Nonetheless, the ECtHR's reaction to the integration between international and domestic legal orders and actors can provide useful lessons for other treaty organs, not only where such integration advances under those treaty regimes in the future, but also where the treaty organs wish to promote such integration.

Another point of difference is that although the ECtHR has acknowledged the roles of respective state organs in an equal manner, allocating different functions to each, the IACtHR and HRC place greater weight on the roles of national courts than on those of others. In fact, the IACtHR invented the doctrine of conventionality control primarily to address national courts. The HRC established the formula: 'it is generally for the courts … to evaluate facts and evidence in a particular case', but has been reluctant to show a deferential attitude to parliaments. This difference may be attributed to the fact that, while the ECHR largely consists of well-functioning representative democracies, the ACHR and ICCPR contain a wider variety of states parties, including those without consolidated democracy.[202] Thus, the IACtHR and HRC placed larger trust and expectations on

[200]See, for example, Ronald St J Macdonald, 'The Margin of Appreciation' in Ronald St J Macdonald, F Matscher and H Petzold (eds), *The European System for the Protection of Human Rights* (Dordrecht: Martinus Nijhoff, 1993) 84, 123.

[201]See Part II, 'Toward a principled regulation of the relationship between treaty organs and state organs'.

[202]Andrew Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (Oxford: Oxford University Press, 2012), 73–4.

national courts; these, due to their independent nature from the majority's will and their professional knowledge of the law and human rights, appeared to become their partners more easily than other organs.[203] Again, the ECtHR's approach in relation to parliaments can provide valuable lessons for other treaty organs when the parliaments in their member states generally begin to function responsibly.[204] At the same time, the careful approach of the IACtHR and HRC to respecting parliamentary deliberations may also become instructive to the ECtHR if the recent global rise of populism, including in several European countries,[205] results in the general decline of the quality of parliamentary decision-making processes in Europe.[206]

Implications for the treaty organs' practice and procedure

Although the 'separation of powers in a democratic society' model can offer various implications for improving treaty organs' practice and procedure, this article elaborates on the one that has often been overlooked. Currently, the state is represented by the executive branch, most often by the Ministry of Foreign Affairs, in making pleadings before treaty organs and receiving judgments and recommendations from treaty organs.[207] In fact, the IACtHR has rejected a Costa Rican Legislative Assembly's request for an advisory opinion because the Legislative Assembly is 'not one of the governmental entities empowered to speak for Costa Rica on the international plane'.[208] However, given that treaty organs are increasingly looking into the decision-making procedures of each state organ and directing their orders and recommendations to specific state organs when necessary, the inclusion of the relevant state organs in their proceedings is essential. It will not only raise awareness among the relevant state organs about their duties,[209] but also give them opportunities to directly share their views with treaty organs. In fact, many authors on the 'proceduralization' of review have questioned the treaty organs' capability to correctly examine the decision-making processes of state organs,[210] and some have pointed out discrepancies and errors in treaty organs' determinations.[211] The direct

[203]For this reason, previous studies on the IACtHR and HRC have largely focused on deference to national courts. See, for example, Soledad Bertelsen, 'A Margin for the Margin of Appreciation: Deference in the Inter-American Court of Human Rights' (2021) 19 *I-CON* 887, at 897–900.

[204]Cf Dominic McGoldrick, 'A Defence of the Margin of Appreciation and an Argument for Its Application by the Human Rights Committee' (2016) 65 *International & Comparative Law Quarterly (ICLQ)* 21, at 43.

[205]Jure Vidmar (ed), *European Populism and Human Rights* (Leiden: Brill, 2020).

[206]In general, see the articles contained in the 'Special Collection: Representative Democracy in Danger? The Impact of Populist Parties in Government on the Powers and Practices of National Parliaments' (2021) 74(1) *Parliamentary Affairs*.

[207]Murray and De Vos (n 6) 25.

[208]IACtHR, *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, OC-4/84, Ser A No 4, Advisory Opinion of 19 January 1984, para 11.

[209]Huneeus (n 7) 522–23.

[210]Aruna Sathanapally, 'The Modest Promise of "Procedural Review" in Fundamental Rights Cases' in Gerards and Brems (n 9), 40, 62–63; Angelika Nussberger, 'Procedural Review by the ECHR' in in Gerards and Brems (n 9), 161, 168–69.

[211]Matthew Saul, 'Structuring of Parliamentary Processes by the European Court of Human Rights' (2016) 20 *International Journal of Human Rights* 1077; Eva Brems, 'Positive Subsidiarity and its Implications for the Margin of Appreciation Doctrine' (2019) 37 *Netherlands Quarterly of Human Rights* 210, 222–23; Thomas Kleinlein, 'The Procedural Approach of the European Court of Human Rights' (2019) 58 *International & Comparative Law Quarterly* 91, 97–99.

involvement of each state organ in treaty organs' proceedings may mitigate such problems.

The advisory opinion procedure by the ECHR[212] has created one such channel, as Rule 92 (2.1)(e) of the Rules of Court of the ECtHR provides that the requesting court may provide a statement of the requesting court's own views on the question.[213] In the same vein, the *amicus curiae* or third-party intervention procedures, which are actively used by the ECtHR[214] and IACtHR,[215] and newly introduced by the HRC,[216] may also be used by the relevant state organs. In the state reporting procedures, UN human rights treaty bodies have encouraged the participation of parliaments and parliamentarians,[217] received independent submissions from parliamentary committees[218] and welcomed the participation of parliamentarians in the review of state reports.[219] Such a practice can provide useful lessons for individual communication procedures.

V. Conclusion and task for future research

As part of their continuous effort to enhance the effectiveness and democratic legitimacy of human rights treaties, human rights treaty organs have fostered a direct relationship with each type of state organ, giving rise to the need for the principled regulation of their relationships (Part II). This article has elaborated on each state organ's and treaty organs' duties and the principles governing their relationships within the 'separation of powers in a globalized democratic society' model. There, the intrusive attitude of treaty organs towards individual state organs for effectiveness of human rights treaties and their deferential attitude for democratic legitimacy can be coordinated harmoniously, as the two sides of the same coin – that is, through the principle of subsidiarity (Part III). This article then showed that there is a certain tendency among treaty organs, although at differing levels due to their unique backgrounds, to endorse the model (Part IV).

One of the most important aspects of 'the separation of powers in a globalized democratic society' that this article could not fully explore is that, as much as treaty organs scrutinize the decision-making process of each state organ, state organs should also scrutinize whether treaty organs have properly fulfilled their duties, elaborated

[212]See Part II, 'Effectiveness of human rights treaty systems'.

[213]This rule was inserted on 19 September 2016. In general, this opportunity has not been used effectively. See, however, ECtHR, *Applicability of Statutes of Limitation to Prosecution, Conviction and Punishment in respect of an Offence Constituting, in Substance, an Act of Torture*, Request no P16-2021-001, Advisory Opinion of 26 April 2022, paras 29–32.

[214]See generally, Nicole Bürli, *Third-Party Interventions Before the European Court of Human Rights* (Cambridge: Intersentia, 2017).

[215]Francisco Rivera Juaristi, 'The Amicus Curiae in the Inter-American Court of Human Rights (1982–2013)' in Yves Haeck et al. (eds), *The Inter-American Court of Human Rights* (Cambridge: Intersentia, 2015) 103.

[216]Rule 96 Rules of Procedure of the HRC, UN Doc CCPR/C/3/Rev.11 (9 January 2019).

[217]See especially, CEDAW, Statement on the Relationship of the Committee on the Elimination of Discrimination against Women with Parliamentarians (18 July 2008), para 16. See also Saul (n 85) 161–62.

[218]Seanad Public Consultation Committee, Report on Ireland's Compliance with the International Covenant on Civil and Political Rights (16 June 2014).

[219]See, for example, CEDAW, 841st mtg, UN Doc CEDAW/C/SR.841 (9 July 2008), paras 32–34, 66; CEDAW, Concluding Observations on Finland, UN Doc CEDAW/C/FIN/CO/6 (15 July 2008), para 3.

above,[220] in the form of principled and continuous dialogue. As the precise avenues from which state organs can exercise such scrutiny remain unclear, future research should closely examine the state organs' engagement with treaty organs.

Finally, this article has suggested that the emergence of the 'separation of powers in a globalized democratic society' supplements the classical paradigm of international law, where monolithic states are the only relevant legal entities, and contributes to long-standing debates on the relationship between international and national laws from a new angle. However, this article could not go so far as to ascertain the legal order(s) to which the concept of the separation of powers in a globalized democratic society belongs, as well as state organs' and treaty organs' duties and their governing principles. Although they imply the emergence of a larger legal universe, covering both international and domestic laws and actors under the same overarching values and principles, it is a task for future research to draw a complete picture of such a legal universe.

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[220]See Part III, 'Embodying the separation of powers under the 'two-tiered bounded deliberative democracy' theory: Duties of treaty organs and each type of state organ in a globalized democratic society'.

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