

# Fragile Democracies, Strong Human Rights Courts? Comparing European and Inter-American Cases

Special Section Introduction

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Do regional Human Rights Courts strengthen democracy? If so, when and why does this occur: what are the scope conditions and intervening mechanisms that make such courts have positive effects? The articles in this special section address these questions as regards the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR). Their similarities and differences allow several lessons to be drawn about the relationship between such courts and democracy. In the instruments creating these courts – the European and the American Convention on Human Rights respectively – the signatory states expressly commit to apply their provisions within a democratic framework.<sup>1</sup> Yet their origins were different: the ECtHR was created at the end of

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1 The Preamble of the European Convention on Human Rights (ECHR) states: ‘fundamental freedoms ... are best maintained on the one hand by an effective political democracy...’ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended). Articles 6, 8, 9, 10, 11 and Protocol 4 (art.2) and Protocol 13 (Preamble) include the formula ‘democratic society’. The ACHR also place democracy as one of its values in the Preamble and articles 15, 16, 22, 29 and 32.

World War II reflecting a resurgence of trust in regional institutions, while the IACtHR was born in the midst of authoritarian regimes, some of which engaged in systematic violations of human rights. States in both regions enjoy democratic institutions within a system of check and balances, separation of powers, widespread freedom of expression, and the exercise of fundamental rights.

Studies made on the correlation between human rights treaty ratification and human rights violations show that while positive effects can be seen in transitional democratic states, ratification has less impact on well-established democracies and authoritarian regimes.<sup>2</sup> Alas, some studies suggest that instances of human rights violations increase after non-democratic states ratify human rights treaties.<sup>3</sup>

Looking at these ranges of effects, including the negative repercussions that ratification may seem to produce, it is important to explore whether and when human rights courts' decisions can affect democracy negatively, eg in states that are found in violation to the conventions.

The IACtHR and the ECtHR have taken different approaches ordering remedy measures in their decisions. The former often interprets the American Convention on Human Rights dynamically and issues new types of innovative remedies.<sup>4</sup> The latter often applies the *principle of subsidiarity* allowing states to decide which particular remedies to implement in order to address violations to the ECHR. In this sense the ECtHR exercises a “weaker” review.<sup>5</sup> Even in recent *pilot judgments*, the ECtHR is very cautious, indicating only the necessity of implementing certain measures, but it refrains from dictating specifically which measures are appropriate to implement.<sup>6</sup>

Historically, as reflected in the high level of compliance with its decisions, the ECtHR has enjoyed a great deal of respect for its authority. This acceptance by states is one reason why the Court has been overloaded by numerous petitions. In

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2 Beth Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (CUP 2009) 16.

3 Courtenay Conrad, ‘Divergent Incentives for Dictators: Domestic Institutions and (International Promises Not to) Torture’ (2012) *Journal of Conflict Resolution* (Online publication 14 October 2012), available at <<http://jcr.sagepub.com/content/early/2012/10/12/0022002712459707?patientinform-links=yes&clgid=spjcr;0022002712459707v1>> last accessed on 16 October 2013.

4 See Jo Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (CUP 2013). See Chapter 8 for an updated classification of remedy measures ordered by the IACtHR. See also Cecilia Bailliet’s article in this special section.

5 Andreas Follesdal, ‘The Legitimacy of International Human Rights Review: The Case of the European Court of Human Rights’ (2009) 40 *J Social Philosophy* 595.

6 See Kjetil Larsen’s article in this section.

this sense the Court suffers from its own success.<sup>7</sup> Recently, however, compliance rates have begun to decrease.<sup>8</sup> One reason is the accession to the ECHR by various Central and Eastern European states, and successor states of the former USSR. They have created challenges in compliance and spurred the Court into broadening its catalogue of remedies, mostly through the adoption of *pilot judgments*.<sup>9</sup> This development has also created concerns about the counter-democratic effects of the new developments of the Court. The case of UK is an example of this. Previously, this state had a good compliance record, yet it is now challenging the Court's authority in regard to controversial interpretations of specific articles of the ECHR.<sup>10</sup>

The IACtHR has a significantly lower activity than its European peer, having only issued 21 final decisions in 2012, compared with the 1678 ECtHR judgments delivered in 2012. This discrepancy might be thought to render the IACtHR less influential. This comparison, however, should take into consideration that the limited number of decisions might reflect the difficulties encountered by the IACtHR in terms of access mechanisms, budget limitations, lack of personnel, etc.<sup>11</sup> The IACtHR suffers from a high rate of non-compliance. One reason may be that the Court, besides the traditional pecuniary remedies, has also issued a large number of innovative remedies.<sup>12</sup> These types of remedies are rarely complied with.<sup>13</sup> Also worrying is that disagreements with the Court have resulted in

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7 Laurence Helfer, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime' (2008) 19 EJIL 125.

8 Until 2007 the ECtHR presented records of almost perfect compliance according to the Reports on Supervision of the Execution of ECtHR Judgments (hereafter CoE Report on Execution of ECtHR Judgments). In 2008 the number of leading cases pending before the Committee of Ministers (CoM) between two and five years was 35%, in 2009 the number was 49%, and in 2010 it was 51%. See CoE Report on Execution of ECtHR Judgments (2008) 10, and (2010) 57.

9 For an updated study on the pilot-judgment procedure see Dominik Haider, *The Pilot-Judgment Procedure of the European Court of Human Rights* (Martinus Nijhoff Publishers 2013).

10 The case of *Hirst v UK* illustrates the conflict of national implementation. After the issuance of the ECtHR's decision, the UK delayed implementation of the reforms and is currently considering passing legislation that bans the vote for prisoners serving more than one year. See ECtHR, *Hirst v The United Kingdom* (No 02) (Appl No 74025/01) Judgment (Grand Chamber) Reports 2005-IX. See also ECtHR, *Case of Othman (Abu Qatada) v The United Kingdom* (Appl No 8139/09) Judgment (Merits and Just Satisfaction) 17 January 2012, not reported.

11 Contrary to what occurs in the ECtHR, the IACtHR is not directly accessible to victims, as they can only recur to it through the Inter-American Commission on Human Rights (IACoMHR).

12 In *Aloeboetoe et al. v Surinam*, Reparations, Series C No 15 IACtHR (10 September 1993) [9] 20 the Court ordered the nomination of a street after a victim of a human rights violation. Other innovative measures in the IACtHR include public apologies to the victims and their relatives, to publish the court's decisions in the main newspapers of the country, to construct monuments, etc.

the withdrawal of certain states from its jurisdiction. Recently, Venezuela withdrew from the IACtHR's jurisdiction after blaming the Court for the lack of credibility in Latin America's human rights debate.<sup>14</sup> Venezuela rejected an IACtHR decision which ordered the state to redress the unlawful treatment given to 'terrorists responsible for the attacks against the Embassies of Spain and Algeria, and the Colombian consulate in Caracas'.<sup>15</sup> Venezuela also rejected a declaration made by the Inter-American Commission on Human Rights, in which the state was made responsible for the massacre of 84 Yanomami indigenous people.<sup>16</sup>

If one of the goals of regional human rights judiciaries is to strengthen democracy in their jurisdictions, are these courts accomplishing their objectives when states reject their decisions? Likewise, in cases of successful compliance, is such compliance a really effective tool for the promotion of democracy in those states? These are the questions entertained by the authors of this section.

In her article Cecilia Bailliet reviews the current challenges concerning compliance with IACtHR decisions and the Court's link to democratic consolidation, focusing especially on the difficulties for achieving full compliance in cases involving the military. Firstly, she analyses the resolutions monitoring compliance issued by the IACtHR in 2012. To achieve this, Bailliet introduces a classification of remedy measures especially designed for the context of this Court, as the types of remedies included are not used by the ECtHR or any other human rights judicial or quasi-judicial organ. Secondly, Bailliet identifies the cases under supervision which concern issues related to the military. She examines the remedies ordered by the IACtHR and identifies factors contributing to non-compliance. In conclusion, she recognises that decision compliance is still very problematic in the Inter-American system and that in some cases the most significant contribution is the symbolic value attributed to new remedies. The role played by the

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13 See order to carry out investigations to identify the intellectual and material authors of a massacre in *Mapiripán Massacre v Colombia*, Judgment, Series C No 134, IACtHR (15 September 2005) 180 [7]. On 23 November 2012, the IACtHR declared that the Colombian state had not complied with this order (Supervision of Compliance Procedure). See also order to erect a monument in memory of the victims in *Barrios Altos v Peru*, Reparations, Series C No 87, IACtHR (30 November 2001) 16 [5.f]. On 7 September 2012, the IACtHR declared that this order had not been complied with on 7 September 2012 (Supervision of Compliance Procedure).

14 See statement of Ambassador Chaderton Matos before the AOS Permanent Council on 1 March 2013 <[www.mre.gov.ve/index.php?option=com\\_content&view=article&id=26785:embajador-chaderton-matos-denuncia-degradacion-politica-de-los-organos-de-ddhh-en-el-sistema-interamericano&catid=2:actualidad&Itemid=325](http://www.mre.gov.ve/index.php?option=com_content&view=article&id=26785:embajador-chaderton-matos-denuncia-degradacion-politica-de-los-organos-de-ddhh-en-el-sistema-interamericano&catid=2:actualidad&Itemid=325)> last accessed on 16 October 2013.

15 *Díaz Peña v Venezuela*, Judgment, Series C No 244 IACtHR (26 June 2012)

16 Press released from the IAComHR (No 114/12) 5 September 2012.

Organization of American States is also highlighted, as it is an important actor in the ongoing reform process of the Inter-American human rights system.

Kjetil Larsen introduces an analysis of non-compliance with ECtHR decisions and the mechanisms available in the European Convention on Human Rights, focusing especially on the newly created infringement procedure.<sup>17</sup> He examines the current status of compliance with the ECtHR's orders to reform legislation, and considers the UK's delay in compliance with the *Hirst* decision as an example of the Court's present challenges. This case concerns the denial of the right to vote to prisoners, which clearly affects political participation, a recognized feature of democracy. Larsen explains how this case has served to expose the weaknesses of the European human rights judicial system which lacks clear compliance mechanisms. Coming in the middle of a reform process for the ECtHR, Larsen asks what the judgment's actual effects are, especially when not complied with. After all, the only real consequence of non-compliance is for the state to be found in violation of the obligation to comply with the ECtHR decisions. Larsen goes further in the analysis and looks at the traditional types of remedy measures set by the ECtHR, making connections between them and possible strategies of the Court in order to ensure compliance. Finally, he analyses the possible use of the infringement procedure as a mechanism which would enhance the ECtHR's role in promoting legislative reforms.

Leiry Cornejo Chavez analyses an IACtHR case: *Claude-Reyes v Chile*.<sup>18</sup> In this case, Chile was found in violation of the American Convention on Human Rights, and –quite exceptionally– complied with the Court's orders to reform legislation. The *Claude-Reyes* case has been presented as an indication of the IACtHR's effectiveness. Cornejo Chavez presents evidence that Chile's ensuing legislative reform was *not* significantly influenced by the Court's authority, but by the combination of internal pressure existing in the country and the willingness of the government to promote the right to access public information. Hence, Cornejo Chavez argues that the IACtHR might have strategically chosen to issue orders to reform legislation after observing that the chances of compliance were high. She concludes that the Court's effectiveness in strengthening democracy cannot be measured only by looking at the direct link between order and compliance, but also at the factors surrounding the changes occurring in the country ie the political and social context.

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17 European Convention on Human Rights, article 46 (4)(5).

18 Judgment, Series C No 151 IACtHR (19 September 2006).

Focusing on freedom of the press, Ramute Remezaite explores the *Fatullayev v Azerbaijan* case, in which the ECtHR identified a systemic problem regarding the criminalization of defamation.<sup>19</sup> The relationship between freedom of the press and democracy is generally recognized in the European system. The ECtHR followed this rationale when ordering the release of a journalist imprisoned under charges of defamation and calling for a legislative reform. Hence, the Court chose more intrusive remedy measures compared to the traditional *just satisfaction*. Azerbaijan complied with the release order but defamation is still criminalized. On the one hand, Remezaite highlights the positive role of political bodies, such as the Council of Europe (CoE) and the Parliamentary Assembly of the Council of Europe (PACE), which encouraged legislative reforms resulting in the end of journalists prosecuted under these charges. On the other hand, Remezaite argues that, although Azerbaijan has shown willingness to comply with the Court's decision, in reality the state persecutes journalist using other methods. Democracy is thus not better ensured than before the issuance of the Court's decision.

Discussions in the four articles of this special section lead us to conclude that non-compliance is still a challenge in both the European and the Inter-American systems. The fact that these courts have different approaches with regard to the detail in which remedy measures are ordered does not appear to affect the rate of compliance. In the case of the IACtHR, compliance seems to be affected, *inter alia*, by the actors involved in each case, where cases involving the military are very difficult to redress. The study of the *Fatullayev v Azerbaijan* case shows us that even when the ECtHR seeks to correct the misuse of domestic legislation and states comply with the ECtHR's orders, states are able to find other means to maintain a situation which is not attuned with the objectives of the European Convention on Human Rights. Diverse mechanisms might be used to secure compliance with Court's decisions. Some of them might be institutionalized (eg infringement procedure at the ECtHR or monitoring execution of judgments in the IACtHR), while others might be more informal, relying on the good-faith of states and the desire of keeping a good reputation in the international landscape. More comprehensive and systematic studies are needed to assess to what extent these mechanisms are affecting real compliance in both systems.

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19 ECtHR, *Fatullayev v Azerbaijan* (Appl No 40984/07) Judgment (First Section) 22 April 2010, not reported.