Chapter 2

Domestic Distribution of Conventionality Control Powers

The IACtHR has dynamically developed the doctrine of *control de convencionalidad* to deal with structural human rights violations resulting from domestic norms that are incompatible with international standards. In *Almonacid-Arellano v Chile*, the San José Court for the first time required the judiciary to exercise conventionality control of the self-amnesty law under the Pinochet regime.[633] In the later judgement of *Cabrera Garcia and Montiel Flores v. Mexico* concerning abuse of military jurisdiction, the Court further elaborated the doctrine, particularly as regards the distribution of powers between domestic courts:

> [W]hen a State has ratified an international treaty such as the American Convention, all its bodies, including its judges, are also bound by such Convention, which forces them to see that all the effects of the provisions embodied in the Convention are not adversely affected by the enforcement of laws which are contrary to its purpose and end. *The Judiciary [Los jueces y órganos vinculados a la administración de justicia], in all its levels*, must exercise ex officio a sort of 'conventionality control' between the domestic legal provisions and the American Convention, *evidently within the framework of their respective competence and the corresponding procedural rules*. To perform this task, the Judiciary has to take into account not only the treaty, but also the interpretation thereof made by the Inter-American Court, which is the ultimate interpreter of the American Convention.[634]

This paragraph embraces both *restrictive* and *permissive* aspects concerning the distribution of competences for conventionality control among domestic courts. Concerning the *restrictive* aspect, the first italicised emphasis clearly indicates that conventionality control must be performed by '"all judges", regardless of their formal membership in the Judiciary Branch,

633 *Almonacid-Arellano and Others*, Judgment (n 21) paras 123–125.
634 *Cabrera Garcia and Montiel Flores* (n 35) para 225 (emphasis added).

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and regardless of their rank, grade, level or area of expertise'.[635] Compared to the abstract formula 'the Judiciary' in *Almonacid-Arellano*, the *Cabrera Garcia and Montiel Flores* ruling concretised the scope of subjects responsible for conventionality control so as to include ordinary courts as well as the highest courts. In other words, the paragraph envisages *decentralised* or *diffused* conventionality control of domestic law by all judges.

Regarding the *permissive* aspect, the second italicised emphasis signifies that States Parties are granted certain discretion to realise conventionality control at the national level. According to the principle of subsidiarity, which is structurally embedded in international human rights law, the *primary* responsibilities are incumbent on States Parties, and treaty mechanisms are essentially *subsidiary* to national systems.[636] As the IACtHR confirmed in *Liakat Ali Alibux v. Surinam*, human rights conventions do 'not impose a specific model for the regulation of issues of constitutionality and control for conventionality'.[637] This position leaves national freedom of choice to exclusively entrust conventionality control to the *constitutional court* in line with its concentrated powers for constitutionality control. In this sense, the paragraph also opens the possibility of *centralised* conventionality control of domestic law by constitutional judges.

This chapter surveys these two directions of the distribution of powers among domestic courts in the implementation of human rights conventions. It starts with a general observation on the distribution of powers to ordinary courts (Section 1-A) and constitutional courts (Section 1-B) in the control of domestic law in light of national constitutions and community laws. The following section then examines the distribution of powers between domestic judges in a dual direction: decentralised conventionality control by ordinary courts (Section 2-A), and centralised conventionality control by constitutional courts (Section 2-B).

635 Concurring Opinion of Judge *ad hoc* MacGregor Poisot, *Cabrera Garcia and Montiel Flores* (n 35) para 19.

636 Paolo G Carozza, 'Subsidiarity as a Structural Principle of International Human Rights Law' (2003) 97 *American Journal of International Law* 38–79, 56–67.

637 *Liakat Ali Alibux* (n 307) para 124.

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1. Relationship between Constitutional and Ordinary Courts

A. Power Distribution for Ordinary Courts

(i) Consistent Interpretation of Legislation with National Constitutions

Internal and external pressures may prompt ordinary judges to engage in controlling statutes in light of fundamental rights even within the concentrated system of constitutional review.[638] In general, decentralised judicial review systems mandate ordinary judges to interpret ordinary law in conformity with a constitution as well as the annulment of specific norms of ordinary law. This does not mean that ordinary judges in the decentralised model are free from the task of constitution-conformity interpretation. Rather, the interpretative technique is ubiquitous in the jurisprudence of constitutional courts, known as *réserves d'interprétation* in French and as *verfasssungskonforme Auslegung* in German.[639] In Spain, for example, Article 5(3) of the *Ley orgánica del Poder Judicial* expressly provides that '[t]he question of unconstitutionality shall be raised when it is not possible to adapt the rule to the constitutional regulation through interpretation'.[640] Another example is an Italian case in which ordinary judges are able to raise constitutionality questions to the *Corte costituzionale* only if an *interpretazione conforme* of legislation with the Constitution is impossible.[641] With these methods, ordinary courts perform a certain type of constitutionality control by interpreting legislation in conformity with national constitutions before they initiate the preliminary reference to the constitutional court.

If an interpretation cannot resolve the conformity of legislation with national constitutions, the ordinary courts will be forced to set aside the law in substantive terms and to betray the centralised system of constitu-

638 In general, Ferreres Comella (n 442) Part III.

639 For a comparative analysis of European constitutional courts, de Visser (n 52) 291–305.

640 Procederá el planteamiento de la cuestión de inconstitucionalidad cuando por vía interpretativa no sea posible la acomodación de la norma al ordenamiento constitucional.

641 Tania Groppi, 'Constitutional Reasoning in the Italian Constitutional Court' (2014) *Rivista dell'Associazione Italiana dei Costituzionalisti* 1–45, 30.

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tional review in favour of a *de facto* diffused system.[642] Having conducted a broad comparative analysis of European constitutional courts, Marrtje de Visser neatly summarises the decentralisation trend of judicial review in Europe: On the one hand, constitutional courts gain some additional measure of control over their caseload by requiring that regular judges seek to interpret legislation in a way that makes it constitutionally valid before they are able to initiate the preliminary reference procedure. On the other hand, the constitutional role and responsibilities of the ordinary judiciary are enlarged as a result of this demand, especially when ordinary courts are overly eager to assess the scope for conciliatory interpretation. In the end, we may thus witness a shift in the division of labour between the constitutional and the ordinary judiciary in favour of the latter, and the introduction of *decentralising* tendencies in the centralised system for constitutional adjudication as it was originally established in many European countries.[643] By means of conformity interpretation of legislation with constitution, the centralised model of judicial review 'is thus based on an unstable distinction between the "power to interpret" (for the ordinary judge) and the "power to set aside" (for the constitutional court)', in contrast to decentralised systems where the distinction does not entail significant consequences.[644]

(ii) Disapplication of Legislation Inconsistent with Community Law

In addition to these internal factors, regional integrations have a significant influence on the distribution of judicial powers among national courts. In the European context, the principle of the primacy of EU law has been recognised as one of the constitutional principles of the EU legal order.[645] The basis of this primacy lies in the very nature of the EU legal order, as a separate and autonomous legal order created by transferring

642 Elisabetta Lamarque, 'Interpreting Statutes in Conformity with the Constitution: The Role of the Italian Constitutional Court and Ordinary Judges' (2010) 1 *Italian Journal of Public Law* 87–120, 115-116.

643 De Visser (n 52) 384 (emphasis added).

644 Ferreres Comella (n 442) 474.

645 Armin von Bogdandy, 'Founding Principles' in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (Hart Publishing 2010) 93–111.

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competences from the Member States to the EU.[646] The 1964 *Costa v. ENEL* decision established the primacy of EU law by holding that 'the law stemming from the Treaty, an independent source of law, could not […] be overridden by domestic legal provisions […] without the legal basis of the Community itself being called into question'.[647] In the 1970 *Internationale Handelsgesellschaft* ruling, the ECJ went a step further with respect to the absolute primacy over 'fundamental rights as formulated by the constitution of that state or the principles of a national constitutional structure'.[648]

The Luxembourg Court then formulated the famous *Simmenthal* doctrine by utilising the primacy of EU law to juxtapose the positions of constitutional and ordinary judges in enforcing Community law:[649]

> *[E]very national court* must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule. Accordingly any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent Community rules from having full force and effect are incompatible with those requirements which are the very essence of Community law.[650]

In *Simmenthal*, the ECJ also established the *immediacy* requirement, according to which ordinary judges are obliged 'to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent community rules from having full force and

646 Monica Claes, *The National Courts' Mandate in the European Constitution* (Hart Publishing 2006) 666.

647 Case 6/64 *Costa v ENEL* [1964] ECR 585, 594.

648 Case 11/70 *Internationale Handelsgesellschaft v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125, para 3.

649 The *Simmenthal* doctrine is also accepted in Community Law of Latin American region. See Karen J Alter, Laurence R Helfer and Osvaldo Saldías, 'Transplanting the European Court of Justice: The Experience of the Andean Tribunal of Justice' (2012) 60 American Journal of Comparative Law 629–664, 657–659.

650 Case 106/77 Amministrazione delle Finanze dello Stato v Simmenthal SpA [1978] ECR 629, paras 21–22 (emphasis added).

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effect'.[651] The European version of *Marbury v. Madison* is evaluated as an epoch-making step towards introducing the decentralised system of judicial review.[652]

In accordance with the *Simmenthal* judgement, all domestic judges are obliged to behave as not only as the guardians of national fundamental rights but also the *ordinary judges of Community law*.[653] In subsequent cases, the ECJ has continued such a decentralising approach that bypasses national constitutional courts in the enforcement of EU law.[654] The Court of Justice can interact with national courts in a variety of ways from full centralision to itself (*Cassis de Dijon*), to showing tendency and guidelines (*Dynamic Medien* and *Familiapress*), to granting full decentralisation (*Libert*).[655] The centralised constitutional systems are subject to judicial and executive organs to legislation unless the constitutional court declares that legislation invalid; therefore, the net effect of the *Simmenthal* doctrine is its empowerment of any and all national courts to review any kind of public acts, including acts of parliament.[656] Jan Komárek characterises this as the *displacement* doctrine, according to which 'national constitutional courts are removed from their place in constitutional law and politics and ordinary courts, acting in cooperation with the ECJ, replace them'.[657]

651 Ibid.

652 Peter W Schroth, 'Marbury and Simmenthal: Reflections on the Adoption of Decentralized Judicial Review by the Court of Justice of the European Community' (1979) 12 *Loyola of Los Angeles Law Review* 869–902.

653 Monica Claes, *The National Courts' Mandate in the European Constitution* (Hart Publishing 2006) 102.

654 Zdeněk Kühn, 'Wachauf and ERT: On the Road from the Centralized to the Decentralized System of Judicial Review' in Miguel Poiares Maduro and Loïc Azoulai (eds), *The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart 2010) 151–162.

655 Jan Zglinski, *Europe's Passive Virtues: Deference to National Authorities in EU Free Movement Law* (Oxford University Press 2020) 33-36.

656 Leonard F M Besselink, 'The Proliferation of Constitutional Law and Constitutional Adjudication or How American Judicial Review Came to Europe After All' (2013) 9 Utrecht Law Review 19–35, 25.

657 Komárek (n 612) 526–529.

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B. Power Distribution to Constitutional Courts

(i) Individual Complaint Procedures

Despite the purely conceptual distinction between centralised and decentralised models, the roles of constitutional courts have been reinforced in practice. Constitutional framers must decide how far to concentrate these judicial review powers in specially entrusted tribunals, and whether the system's court of last resort on constitutional matters is to be a specialist/non-ordinary or a generalist/ordinary tribunal.[658] To take the example of the German *Bundesverfassungsgericht*, which has been a leading model in the world, constitutional appeals can reach in three main ways: the concrete constitutional review triggered by the referral during a judicial proceeding, the abstract constitutional review (*Normenkontrolle*) directly petitioned by officials, and the individual complaint (*Verfassungsbeschwerde*) invoked by citizens.[659]

As the guardians of constitutional orders, the individual complaint mechanism operated by specialised organs with constitutional jurisdiction works not only for remedying subjective rights but also objective values. The German Federal Constitutional Court has indeed used the *Verfassungsbeschwerde* procedures in a characteristic combination: the *subjectification* of objective constitutional norms by complaining the violation of individual rights, on the one hand, and the *objectification* of substantive constitutional law, in which the constitutional complaint goes beyond specific remedies and extends to the protection of the constitutional order in general, on the other.[660] The Spanish *Amparo* under Article 53(2) of the Constitution, which has greatly influenced Latin American constitutional systems, also permits the *Tribunal Constitucional* to exercise the subjective

658 Frank I Michelman, 'The Interplay of Constitutional and Ordinary Jurisdiction' in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law: Research Handbooks in Comparative Law* (Edward Edgar 2011) 278–297, 279.

659 Justin Collings, 'Introduction' in Matthias Jestaedt, Oliver Lepsius, Christoph Schönberger, Christoph Möllers (eds), *The German Federal Constitutional Court: The Court Without Limits* (Oxford University Press 2020) xv–xvi.

660 Anuscheh Farahat, 'The German Federal Constitutional Court' in Armin von Bogdandy, Peter Huber and Christoph Grabenwarter (eds), *The Max Planck Handbooks in European Public Law: Volume III: Constitutional Adjudication: Institutions* (Oxford University Press 2020) 320–324.

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function to protect individuals' fundamental rights as well as 'la defensa objetiva de la Constitución'.[661]

The parallel techniques of subjectifying and objectifying constitutional jurisdiction entails the reallocation of powers between constitutional and ordinary judges. Lech Garlicki explains that '[b]oth procedures – incidental review and the constitutional complaint – modified the idea of the separation of judicial functions in this way: they invite the constitutional courts to participate in the adjudication of individual cases by ordinary jurisdictions, either by resolving preliminary questions of the constitutionality of statutes or by reviewing the constitutionality of final judicial decisions'.[662] Accordingly, although the primary responsibility to protect and respect individuals' fundamental rights rests with ordinary judges, constitutional courts act as subsidiary guardians of such rights by exercising their complaint jurisdiction. Because the jurisdiction dichotomy becomes less sustainable as a feature for classification when several countries adopt systems that mix aspects of a centralised and a decentralised system in Europe and Latin America, the context-specific classifications accurately capture the power distribution in the control of constitutionality, as well as of conventionality, in both regions.[663]

(ii) Rules Prioritising Constitutional Procedures over Community Law Procedures

As a reaction to the external decentralising factor, some States have introduced procedural rules that mitigate the *guerre des juges* in constitutional and ordinary jurisdictions. In Belgium, while the *Cour de Cassation* adopted the *cream cheese* doctrine (*smeerkaasdoctrine*) that the judge must refuse the application of all legal provisions that violate directly applicable international law, the *Cour constitutionnelle* has implicitly maintained the supremacy of the Constitution over treaties.[664] Against this background, there has been a 'parallel system of control with ordinary jurisdictions

661 Tribunal Constitucional español, Sentencia STC 1/1981, para 2.

662 Lech Garlicki, 'Constitutional Courts versus Supreme Courts' (2007) *5 International Journal of Constitutional Law* 44–68, 46–47.

663 Samantha Lalisan, 'Classifying Systems of Constitutional Review: A Context-Specific Analysis' (2020) *5 Indiana Journal of Constitutional Design* 1–24.

664 Matthias E. Storme, 'The Struggle Concerning Interpretative Authority in the Context of Human Rights: The Belgian Experience' in Rainer Arnold (ed), *The Universalism of Human Rights* (Springer 2013) 223–236, 228–231.

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(directly) reviewing the conformity with treaty provisions and the Constitutional Court reviewing the conformity with constitutional provisions'.[665] The Belgian priority rule, Article 26(4) of the special majority act on the Constitutional Court, on 12 July 2009, was thus invented, which 'clearly aims at pragmatically reconciling the centralized constitutional review installed by Article 142 of the Constitution, and the diffuse treaty review installed by the "cream cheese" judgment, because it applies in case of coincidence of constitutional and international human rights'.[666] The text of this new provision reads as follows: 'If before a jurisdiction it is alleged that a [legal provision] violates a fundamental right which is guaranteed in a totally or partially analogous way in a provision of Title II of the Constitution and in a provision of European or international law, the jurisdiction first asks for a preliminary ruling to the Constitutional Court concerning the conformity with the provision of Title II of the Constitution'.

A similar situation can be found in the French legal system, in which Article 55 of the Constitution explicitly recognises the supra-legal rank of treaties. Since the 1975 *IVG* judgement, the Constitutional Council has ruled that it has no jurisdiction to review the conformity of legal provisions in the light of treaties.[667] Subsequently, the *Cour de cassation* and *Conseil d'Etat* have performed the important task of judicial review *ex post* based on treaties, which has substantively complemented the constitutionality control *ex ante* assumed by the *Conseil constitutionnel*.[668] Because these ordinary courts can rely on the ECHR rather than constitutional protection, the 2008 constitutional reform mandated the *ex post* norm-control power to the Constitutional Council and introduced the *QPC*, to ensure priority of the constitutional issue over the treaties issue. Through the *QPC* procedures, 'some violations of ECHR rights are now no longer presented as such, but are rather framed as constitutional cases and hence can be dealt with via constitutional review'.[669]

In France, ironically, the introduction of the *QPC* mechanism itself triggered the *guerre des juges*. Indeed, the *Cour de cassation* responsible for

665 Erika de Wet, 'The Reception Process in the Netherlands and Belgium' in Keller and Stone Sweet (n 28) 229–310, 251.

666 Marc Bossuyt and Willem Verrijdt, 'The Full Effect of EU Law and of Constitutional Review in Belgium and France after the *Melki* Judgment' (2011) 7 *European Constitutional Law Review* 355–391, 368.

667 Conseil constitutionnel de la République Française, Décision n° 74–54 DC du 15 janvier 1975.

668 Bossuyt and Verrijdt (n 667) 366–375.

669 Céline Lageot, 'France' in Gerards and Fleuren (n 599) 145–184, 163–165.

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conventionality control harshly opposed the *QPC* procedures, and made a preliminary reference to the ECJ regarding the compatibility of the priority rule with Community law. In the 2010 *Melki and Abdeli* ruling, the Luxembourg Court, implicitly relying on the reasoning of the *Conseil constitutionnel*, achieved a compromise that under certain conditions Article 267 TFEU regarding a preliminary ruling does not preclude national legislation which establishes an interlocutory procedure for the review of the constitutionality of national laws.[670] In compromising in favour of constitutional courts, the CJEU also seemed to attenuate the *Simmenthal* immediacy requirement by admitting the temporal discretion in the obligation of national judges to ask for a preliminary ruling.[671] In this sense, this judgement can be considered part of the trend where 'the overall thrust of the Court's approach to questions about decentralised enforcement is merely to establish minimum standards of effective judicial protection, but otherwise leave much to the discretion of each Member State to design their own national remedies and procedural rules'.[672]

Such an optimistic view, however, should not be overestimated, because the CJEU did not change its own stance that the centralised review of legislation could be tolerated to the extent that it does not interfere with the essence of the principle of EU law primacy.[673] The core reasoning in *Melki and Abdeli*, largely based on the *Simmenthal* doctrine, was subsequently confirmed in *A v B and Others* that concerned the centralised judicial review system in Austria.[674] Through these judgements, the Luxembourg Court 'undermined some of the core premises of the reform, particularly the priority of the *Conseil constitutionnel*'s review of the review exercised by ordinary courts'.[675]

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670 Cases C-188/10 and C-189/10, *Aziz Melki and Sélim Abdeli*, CJEU, Judgment of 22 June 2010.

671 Ibid para 44.

672 Michael Dougan, 'The Vicissitudes of Life at the Coalface: Remedies and Procedures for Enforcing Union Law before the National Courts' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law*, 2nd ed (Oxford University Press 2015) 407–438, 419.

673 Davide Paris, 'Constitutional Courts as Guardians of EU Fundamental Rights? Centralized judicial Review of Legislation and the Charter of Fundamental Rights of the EU: European Court of Justice (Fifth Chamber), Judgment of 11 September 2014, Case C-112/13, *A v B and Others*' (2015) 11 *European Constitutional Law Review* 389–407, 404.

674 Case C-112/113, *A v B and Others*, CJEU, Judgment of 11 September 2014.

675 Komárek (n 612) 526–527.

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The role of constitutional courts within the multilevel framework of fundamental rights protection is embodied in the Austrian *Verfassungsgerichtshof*'s judgement issued on 14 March 2012. There was deep concern in this ruling: If the Constitutional Court were not competent to adjudicate on the rights contained in the CFREU, which largely overlap with the constitutionally guaranteed ECHR rights, it would counter the notion of a centralised constitutional jurisdiction provided for in the Austrian Federal Constitution.[676] By virtue of the principle of equivalence, it was thus clearly affirmed that the rights guaranteed by the CFREU 'constitute a standard of review in general judicial review proceedings' before the Constitutional Court.[677] As Davide Paris noted, this decision 'clearly amounts to an attempt by the Constitutional Court to keep its central position in fundamental rights protection, despite the current pressure toward decentralisation'.[678] In the attempt to recentralise its constitutional jurisdiction, the *Verfassungsgerichtshof* carefully reserved its authority to 'decide on a case-by-case basis which of the rights of the Charter of Fundamental Rights constitute a standard of review for proceedings before the Constitutional Court'.[679] With this cautious attitude, the Constitutional Court plays a role 'not as guarantors of certain rights and freedoms, but as important parts of communicative arrangements which generate decisions that remain open to further revision, and are subject to communicatively generated legitimacy'.[680] In the 2014 *A v B and Others* judgement, the ECJ employed a 'copy and paste' approach to the *Melki and Abdeli* reasoning with regard to the Austrian constitutional review system.[681]

The Austrian precedent was reminded when the Italian Constitutional Court in Judgement No. 269/17 recentralised its power in cases of *doppia pregiudizialità* (double prejudice), namely, disputes that may give rise to questions of constitutionality and, simultaneously, questions of compliance with EU law. In line with the Austrian *Verfassungsgerichtshof*, the Italian *Corte costituzionale* paralleled international and European parameters of fundamental rights for judicial review.[682] In this context, the CJEU

676 Verfassungsgerichtshof Österreich, U 466/11–18 und U 1836/11–13, Erkenntnis vom 14 März 2012, para 34.
677 Ibid para 35.
678 Paris (n 674) 399.
679 U 466/11–18 and U 1836/11–13 (n 677) para 36.
680 Komárek (n 612) 542.
681 Paris (n 674) 402.
682 Corte costituzionale italiana, Sentenza № 269 del 7 novembre 2017 Considerato in diritto para 5.2.

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jurisprudence in *Melki and Abdeli* and *A v. B and Others* was cited to affirm that EU law does not preclude the overriding character of the constitutional determination that falls under the competence of the national constitutional courts under certain conditions.[683] This mixture of cooperative intent and the Luxembourg judges and strategic behaviour to recentralise the Roman judges' powers implies 'a way of dealing with constitutional conflict that is able to activate a dialogue without falling into the trap of hierarchical relationships'.[684] As a matter of fact, in a case concerning the refusal to grant a childbirth or maternity allowance to third-country nationals holding a single work permit or a permit for family reasons, *la Corte Suprema di Cassazione* opted to trigger a constitutionality review by *la Corte costituzionale*, and then the latter issued a preliminary reference to the CJEU with Judgement No. 182/2020.[685]

2. *Domestic Centralisation and Decentralisation of Conventionality Control Powers*

A. Decentralising Conventionality Control Powers to Ordinary Courts

(i) Disapplying Legislation Incompatible with Regional Conventions

The previous section revealed the necessity to reconsider the conceptual boundary between constitutional and ordinary jurisdictions, which has been significantly disrupted by internal and external stimuli. In addition to regional community law, human rights conventions become another external factor for decentralising constitutional adjudication.[686] Typically, the *conventionality control* doctrine, in line with the ECJ's *Simmenthal*

683 Ibid.

684 Martinico and Repetto (n 633) 736.

685 Nicole Lazzerini, 'Dual Preliminarity Within the Scope of the EU Charter of Fundamental Rights in the Light of Order 182/2020 of the Italian Constitutional Court', European Papers 25 November 2020, 1–14. See also the list of decisions coherent with and diverging from the Italian Constitutional Court Judgment No 269/2017, available at https://www.cir.santannapisa.it/observatory-practices-inter-legality-italian-high-courts.

686 Mitchel de S-O-l'E Lasser, *Judicial Transformations: The Rights Revolution in the Courts of Europe* (Oxford University Press 2009) 240.

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doctrine,[687] converts all domestic judges into the primary and authentic guardians of human rights conventions.[688] The decentralised model of conventionality control would admittedly be beneficial for human rights protection by increasing the opportunities for upholding fundamental rights.

Some State Parties to the ECHR accept the decentralised system of conventionality control, as if the *Simmenthal* doctrine is reloaded in the Strasbourg law.[689] In the States Parties that have adopted the decentralised system of judicial review, such as Sweden, 'all courts and administrative agencies are obliged to refuse to apply a norm that conflicts with the ECHR'.[690] In the cases of Belgium and France where there exist the labour divisions of constitutionality control and conventionality control, the *contrôle de constitutionnalité* is entrusted to the *Cour constitutionnelle*/the *Conseil constitutionnel*, whereas the *contrôle de conventionnalité* is achieved by ordinary and administrative judges. In Spain, the *Tribunal Constitucional* has not expressly recognised its own competences to review the compatibility of legislation with international treaties. It is therefore possible, albeit only theoretically, that 'ordinary judges can refuse to apply a statute on the grounds that it infringes upon a convention right, without having to petition the constitutional court'.[691]

Disapplying domestic law was problematised in the *Almonacid-Arellano* case in which the IACtHR expressly stated the *control de convencionalidad* doctrine for the first time. In monitoring compliance with the judgement in 2010, the Court reviewed whether Chile had carried out the reparation measure to 'ensure that Decree Law No. 2.191 does not continue to hinder the investigation, prosecution and, as appropriate, punishment of those

687 Jânia M Lopes Saldanha and Lucas Pacheco Vieira, 'Controle jurisdictional de convencionalidade e reenvio prejudicial interamericano: Um diálogo de ferramentas processuais em favor da efetivação do direito internacional dos direitos humanos' (2013) 19 *Anuario de derecho constitucional latinoamericano* 435–466, 438–440.

688 Concurring Opinion of Judge *ad hoc* MacGregor Poisot, *Cabrera Garcia and Montiel Flores* (n 35) para 24.

689 Giuseppe Martinico, 'Is the European Convention Going to Be "Supreme"? A Comparative-Constitutional Overview of ECHR and EU Law before National Courts' (2012) 23 *European Journal of International Law* 401–424, 412–418; Alec Stone Sweet, 'A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe' (2011) 1 *Global Constitutionalism* 53–90, 63–72.

690 Ola Wiklund, 'The Reception Process in Sweden and Norway' in Keller and Stone Sweet (n 28) 165–228, 176–177.

691 Ferreres Comella (n 442) 142.

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responsible for similar violations perpetrated in Chile'. For this purpose, the Court started with stating as follows:

> The Court notes that the State took a first step towards fulfilling its duty to ensure that the Decree Law does not continue to represent an obstacle to guaranteeing the right to judicial guarantees and judicial protection in Chile. The Court notes that the effective implementation of this reparation measure is an essential part of complying with the Judgment, as it aims to ensure that violations, such as those in the present case, do not recur by adopting domestic legal measures (legislative, administrative or otherwise) to correct the root causes of violations. While there may be different domestic law measures through which the State could ensure such an outcome, the Court notes that the State considers the most appropriate way to do so is through a legislative amendment.[692]

As this view indicates, legislative reform was considered the most appropriate measure for fundamentally resolving the systemic violation of human rights which existed behind the present individual case. This means that the obligation of *legislative reform* as a part of the obligation of reparation is the principal legal basis by which to coordinate conflicts between the ACHR and domestic law. In this sense, it was welcomed that Chile reported on the initiation of the processing of the bill to interpret the grounds for the exclusion of criminal responsibility in 2008. The IACtHR, however, carefully monitored that, more than two years later, this bill was still pending before the Senate, and urged the state to take any steps that might be necessary to promptly and effectively comply with this reparation measure.[693]

This negative attitude of Chile represented just the tip of the iceberg. In addition to the cases where the States Parties lack intent to comply with the IACtHR's decisions, most of them do not organise competent systems to implement the judgements within their own domestic legal orders.[694] Because these elements are closely related to each other, the judgements ordering non-repetition measures, including legislative reforms, have a

692 *Almonacid-Arellano and Others*, Monitoring Compliance with Judgment (n 334) para 20.
693 Ibid paras 21–22.
694 Jo M Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (2nd ed, Cambridge University Press 2013) 330.

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very low compliance rate.[695] Against such a reality, even though it may contribute to the fundamental resolution of the systemic violation of human rights, the obligation of legislation might not be a realistic reparation measure to coordinate conflicts between the Convention and domestic law.

An important clue to overcoming this unreality is the *control de convencionalidad* doctrine emphasising judicial functions. In *Almonacid-Arellano*, the IACtHR determined the violation not only of Article 2 of the ACHR, directed at the 'legislature', but also of Article 1(1), aimed at facilitating the judiciary's role. The Court accordingly ordered that the state may not invoke any domestic law to exonerate itself from the Court's order to have a criminal court investigate and punish those responsible for the victim, especially the Decree Law in question.[696] These reparation measures addressed to the judiciary were close to (judicial) *restitutio in integrum*, in comparison with the legislature-oriented reparation measure as a part of guarantees of non-repetition.[697]

It is especially notable in the reasoning that both the reform and disapplication of the Decree Law are categorised into the legal bases for coordinating conflicts between the ACHR and domestic law. In other words, this logic recognises the possibility that the obligation of *disapplication* of legislation works as an alternative to the obligation of legislative *reform*. Oswaldo Ruiz-Chiriboga accurately separated these two kinds of measures for conventionality control: 'There are two reparations that must logically follow the establishment of a breach of Article 2 of the ACHR and the consequent violation of a right or freedom recognised by the Convention: 1) the State must modify, derogate, or otherwise annul or amend the municipal law that breached the Convention, and 2) in the meantime it should not apply that law to the case that was brought before the Court and all other similar cases'.[698] According to this view, the obligation of disapplica-

695 For statistics on the degrees of compliance of the IACtHR's judgments, see Fernando Basch, Leonardo Filippini, Ana Laya, Mariano Nino, Felicitas Rossi and Bárbara Schreiber, 'The Effectiveness of the Inter-American System of Human Rights Protection: A Quantitative Approach to Its Functioning and Compliance with Its Judgments' (2010) 7 *International Journal of Human Rights* 9–35.

696 *Almonacid-Arellano and Others*, Judgment (n 21) paras 151–154.

697 Ibid para 144.

698 Oswaldo Ruiz-Chiriboga, 'The Conventionality Control: Examples of (Un)Successful Experiences in Latin America' (2010) 3 *Inter-American and European Human Rights Journal* 200–219, 205. (the first two emphases are added; last emphasis is in the original text).

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tion performed by the judiciary contributes not only to the present case but also to 'all other similar cases' 'in the meantime' legislative change is in process. In the *Almonacid-Arellano* case, the IACtHR indeed confirmed that the 'Decree Law has not been applied by the Chilean courts in several cases since 1998'.[699] Moreover, in the 2010 monitoring compliance resolution, the Court positively assessed the performance of the reparation measures directed in large part at the judiciary.[700] As these developments indicate, the disapplication of the Decree Law by the judiciary has effects similar to guarantees of non-repetition until legislative reform can be achieved.

A complicated question then arises whether the obligation of setting aside unconventional legislation is imposed not only on the special institute equipped with the centralised competences of judicial review but also on ordinary judges lacking such powers. The *Simmenthal*-type of decentralisation realised in the *Radilla Pacheco v. Mexico* case concerning the abuse of military jurisdiction triggered the introduction of the diffused judicial norm-control system. While Article 13 of the Mexican Constitution provides that military jurisdiction subsists for crimes and offences against 'military discipline', Article 57 of the Code of Military Justice broadly defines the term's meaning and refers to the extension of military jurisdiction.[701] Therefore, the IACtHR concluded in the 2009 *Radilla Pacheco* judgement that Mexico failed to comply with Article 2 (Domestic Legal Effects) of the ACHR, in connection with Article 8 (Right to Fair Trial) and Article 25 (Right to Judicial Protection) thereof, upon extending the competence of military jurisdiction to crimes that did not have a strict connection with 'military discipline' or with judicial rights characteristic of the military realm.[702] The San José Court thus ordered the Respondent State to adopt the appropriate legislative reforms of Article 57 of the Code of Military Justice, on the basis of the conventionality control doctrine.[703]

In response, the *Suprema Corte de Justicia la Nación* handed down the 2011 *Radilla Pacheco* judgement, in which it clearly adopted diffused conventionality control by *todos los jueces* of Mexico.[704] To support this position, reference was made to Article 1, the constitutional *pro homine* provision that was newly introduced through the 2011 Human Rights

699 *Almonacid-Arellano and Others*, Judgment (n 21) para 121.
700 *Almonacid-Arellano and Others*, Order (n 334) paras 9–16.
701 *Radilla Pacheco v Mexico* Series C No 209, IACtHR, Judgment on Preliminary Objections, Merits, Reparations and Costs of 23 November 2009, para 283.
702 Ibid paras 288–289.
703 Ibid para 342.
704 *Radilla-Pacheco v Estados Unidos Mexicanos* (n 469) paras 23–36.

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Amendments.[705] The Supreme Court particularly put emphasis on Article 1(3), which requires *all national authorities* to realise human rights protection.[706] Consequently, even if ordinary judges are not allowed to invalidate legislation incompatible with constitutional and human rights treaties, they are obliged to *disapply* these norms.[707] This landmark decision is noteworthy because the Mexican judiciary dynamically changed its method of judicial review from the traditional (semi-) centralised version to the diffused version.[708]

Although the Strasbourg Court has not adopted the conventionality control doctrine in an explicit manner, it has alluded to the notion that all state organs are obliged by the ECHR. For example, the 1998 judgement in *The United Communist Party of Turkey and Others v. Turkey* elucidated that '[i]t makes no distinction as to the type of rule or measure concerned and does not exclude any part of the member States' "jurisdiction" from scrutiny under the Convention'.[709] Furthermore, the 1991 *Vermeire v. Belgium* ruling implied the decentralised model of conventionality control in mentioning that '[i]t cannot be seen what could have prevented the Brussels Court of Appeal and the Court of Cassation from complying with the findings of the *Marckx* judgement, as the Court of First Instance had done'.[710]

Another observable practice of decentralised conventionality control comes from the Supreme Court of Justice of Chile in relation to the *Norín Catrimán and Others* case concerning criminal convictions against indigenous leaders. In the 2014 judgement, the IACtHR held that there were multiple violations of ACHR provisions and ordered as legal restitution that '[t]he State must adopt all the administrative, judicial, or any other type of measures required to annul all aspects of the criminal judgments convicting'.[711] In the 2018 order on compliance with the judgement, the

705 Ibid.
706 Ibid.
707 Ibid.
708 Eduardo Ferrer Mac-Gregor and Rubén Sánchez Gil, 'Mexico: Struggling for an Open View in Constittuional Adjudcation' in Tania Groppi and Marie-Claire Ponthoreau (eds), *The Use of Foreign Precedents by Constituional Judges* (Hart Publishing 2013) 301–320, 304–305.
709 *The United Communist Party of Turkey and Others v Turkey*, ECtHR, App No 19392/92, Judgment on Merits and Just Satisfaction of 30 January 1998, para 29.
710 *Vermeire v Belgium*, ECtHR, App No 12849/87, Judgment on Merits of 9 November 1991, paras 25–27.
711 *Norín Catrimán and Others v Chile* (n 189) Declaration para 15.

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Inter-American Court admitted partial compliance through various measures but remained open to further supervision of national authorities.[712] In this context, *la Corte Suprema de Justicia de Chile* handed down an epoch-making decision in 2019. In line with the Inter-American order of reparation, the Supreme Court considered that the only possible remedy for provision in the case under review was to declare that the convictions had lost all effect.[713] For that purpose, the Chilean highest court supported the decentralised doctrine of conventionality control at the domestic level as follows:

> Thus, through conventionality control, *the national judges form a part of the inter-American system* in the protection of the standards of compliance and guarantee of such rights, depending on the consequences of this analysis of the functions that each judiciary operator has, being the obligation of all, the authorities and members of the State, systematically and integrally interpret the provisions that inform the legal system, in such a way that their determinations are as consistent and compatible with the international obligations acquired sovereignly by it.[714]

This decision would be praised in that by behaving in the same way as the San José judges, the Santiago judges 'not only enhanced its own authority, but also that of the Inter-American Court's'.[715]

(ii) Interpreting Legislation in Consistency with Regional Conventions

The European centralised judicial review systems are similarly experiencing the 'proliferation' tendency of constitutional adjudication through the practices of consistent interpretation.[716] Within the parallel norm-control

712 *Norín Catrimán and Others (Leaders, Members and Activist of the Indigenous Mapuche People) v Chile*, IACtHR, Monitoring Compliance with Judgment, Order of 28 November 2018.

713 Corte Suprema de Justicia de Chile, Sentencia AD 1386–2014 de 16 de mayo de 2019, para 9.

714 Ibid.

715 Jorge Contesse, 'The Supreme Court of Chile as an inter-American Tribunal' I·CONnect (Blog of the International Jounal of Constitutional Law, 31 May 2019, available at: http://www.iconnectblog.com/2019/05/the-supreme-court-of-chile-as-an-inter-american-tribunal.

716 Besselink (n 657) 25.

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mechanisms in Belgium and France, the special institutions Constitutional Court/Council as well as ordinary and administrative judges take the Strasbourg jurisprudence into account to avoid diverging from constitutional standards.[717] In Germany, the *Bundesverfassungsgericht* dictated in the 2004 *Görgülü* decision that *deutsche Gerichte* must give precedence to interpretation in accordance with the ECHR.[718] In the 2007 *Twin Sentences* Nos. 348 and 349, the Italian *Corte costituzionale* similarly clarified that it is a matter for *giudice comune* to interpret national law in accordance with the ECHR provisions as *norme interposte*.[719] As Oreste Pollicino observed, these statements recharacterised 'the ordinary judge as a decentralised ECHR judge who, for the first time in such a clear way, has been assigned a clear constitutional duty to interpret the domestic law in conformity with the international law of human rights'.[720]

The most sensational tension occurred among Italian constitutional and ordinary judges. In this context, we need to assess the 2007 *Twin Sentences* Nos. 348 and 349 that were the first opportunities for the *Corte costituzionale* to clearly delineate the boundary between constitutional and ordinary judges in conventionality control. Behind the judgements, some Italian common judges tried to bypass the centralised regime of constitutional review by disapplying domestic norms incompatible with ECHR criteria. To mitigate such practices derogating from the centralised system of constitutional adjudication, the Constitutional Court pointed out in the *Sentenze 'gemelle'* that the margin of uncertainty in identifying ECHR provisions 'has led several judgments of the ordinary courts directly to set aside legislative provisions which contrast with the ECHR', and consequently, induced the *Consulta* itself to redistribute labours with common judges as regards conventionality control of domestic law.[721]

This tendency continued even after the 2007 twin judgements. The *Tribunale di Bolzano* made a preliminary reference to the ECJ as regards the question of whether, '[w]hen there is a conflict between a provision of

717 De Wet (n 666) 250; David Szymezak, 'Question prioritaire de constitutionnalité et Convention européenne des droits de l'homme : L'européanisation « heurtée » du Conseil constitutionnel français' (2012) 7 *Jus Politicum* 1–23.

718 *Görgülü* (n 445) para 62.

719 Sentenze № 348 (para 4.7) e 349 (para 6.2) (n 447).

720 Oreste Pollicino, 'The Italian Constitutional Court at the Crossroads between Constitutional Parochialism and Co-operative Constitutionalism. Judgments Nos. 348 and 349 of 22 and 24 October 2007' (2008) 4 *European Constitutional Law Review* 363–382, 377.

721 Sentenza № 348 (n 447) para 4.3.

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domestic law and the ECHR, does the reference to the ECHR in Article of the 6 TEU oblige the national court to apply Articles 14 of the ECHR and Article 1 [of Protocol No 12] directly, disapplying the incompatible source of domestic law, without having first to raise the issue of constitutionality before the national constitutional court'? In the 2012 *Kamberaj* ruling, however, the CJEU simply dictated that 'Article 6(3) TEU does not govern the relationship between the ECHR and the legal systems of the Member States and nor does it lay down the consequences to be drawn by a national court in case of conflict between the rights guaranteed by that convention and a provision of national law'.[722]

The obligation of consistent interpretation is explicitly accepted in various national legal systems (see the previous chapter). One of the most open-minded provisions is Article 10(2) of the Spanish Constitution that restructures the constitutional provisions of fundamental rights according to the content of the ECHR.[723] Moreover, Section 3(1) of the 1998 Human Rights Act of the United Kingdom serves as the 'prime remedial measure' through which national judges realise the compatibility of legislative acts with the Convention.[724] In Latin America, the Bolivian *Tribunal Constitucional* confirms its own labours of conventionality control and constitutionality control in terms of Article 256(2) of the 2009 Constitution.[725] Likewise, Article 93 of the 1991 Constitution of Colombia provides the *Corte Constitucional* with the legal basis for dynamically including the ACHR standards within the block of constitutionality.[726] The Peruvian *Tribunal Constitucional* also acknowledges that human rights conventions constitute the block of constitutionality in accordance with Fourth of the

722 Case C 571/10, *Servet Kamberaj v Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano (IPES) and Others*, CJEU, Judgment of 24 April 2012, para 62. See, Giuseppe Bianco and Giuseppe Martinico, 'Dialogue or Disobedience? On the Domestic Effects of the ECHR in Light of the *Kamberaj* Decision' (2014) 20 *European Public Law* 435–450.

723 Patricia Cuenca Gómez, 'La incidncia del derecho interncional de los derechos humanos en el derecho interno: la interpretación del Artículo 10.2 de la Constitución española' (2012) 12 *Revista de Estudios Jurídicos* 1–24, 4.

724 *Ghaidan v Mendoza* [2004] 3 WLR 113, paras 38–49 *per* Lord Steyn. See also, Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge University Press 2009) Chap 2.

725 Sentencia 1907/2011-R (n 465) Fundamentos III.4. (De los crímenes de lesa humanidad y la CIDH; y, otras Cortes Control de convencionalidad).

726 Corte Constitucional de Colombia, Exp T-357702, Sentencia T-1319–01 de 7 de diciembrede 2001, Consideraciones y Fundamentos para 6 (Solución). See also, Sierra Porto (n 466) 440–446.

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Final and Transitory Provisions of the Constitution.[727] In the same vein, the Mexican SCJN integrated constitutional and international parameters for judicial review on the basis of the previously mentioned *pro homine* provision Article 1, particularly paragraph 2, of the Mexican Constitution.[728]

There exists a fundamental difference among the obligations of legislative reform, disapplication and consistent interpretation. On the one hand, the first two obligations of legislative reform and disapplication assume that the domestic law in question is determined as incompatible with international law. Therefore, these obligations are performed as the legal consequences of the breach, that is, the obligation of reparation.[729] On the other hand, the obligation of consistent interpretation relates to the domestic law whose compatibility with the Convention is not definite. The interpretative technique 'take[s] place in cases where the domestic court applies exclusively domestic law but finds that it must interpret it in such a way so as not to conflict with international obligations incumbent upon the State'.[730]

Notwithstanding the essential distinction, the obligation of reparation and consistent interpretation should not be observed independently from each other. Indeed, the performance of consistent interpretation does not depend on whether ordinary judges have the authority to set aside unconstitutional norms within the concentrated system of constitutional adjudication. Judge MacGregor carefully made notice on this point:

> [T]he intensity of the 'diffused conventionality control' will diminish in those systems where the 'diffused constitutionality control' is not allowed, and therefore, not all judges have the power to stop enforcing a law to a specific case. In these cases it is obvious that the judges who lack such jurisdiction, shall exercise the 'diffused conventionality control' with less intensity, *without this implying that they cannot do so* 'within their respective jurisdictions'. This implies that they cannot fail to apply the norm (even though they may not have that power),

727 Tribunal Constitucional de Perú, Exp 0047–2004-AI/TC, Sentencia de 24 de abril de 2006, Fundamentos para 22. See also, Natalia Torres Zúñiga, *El control de convencionalidad: Deber complementario del juez constitucional peruano y el juez interamericano (similitudes, deferencias y convergencias)* (Editorial Académica Española 2013) Chap II.

728 *Radilla-Pacheco v Estados Unidos Mexicanos* (n 469) para 31.

729 Nollkaemper (n 33) Chap 8.

730 Tzanakapoulos (n 420) 155-158.

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> and shall, in any case, make a 'conventional interpretation' of it, that is, make a 'consistent interpretation', not only of the national Constitution, but also of the American Convention and the jurisprudence of the Convention. This interpretation requires a creative action in order to achieve compatibility of the national standard in accordance with the conventional parameter and thus achieve the realization of the right or freedom in question, with the broadest and most encompassing reach in terms of the *pro homine* principle.[731]

The *Radilla Pacheco* case well illustrates the essential continuity between these two obligations in the process of conventionality control. Based on the merits decision declaring the violation of Article 2 of the ACHR, the IACtHR ordered Mexico to adopt, within a reasonable period of time, the appropriate legislative reforms in order to make Article 57 of the Code of Military Justice compatible with the international standards of the field and of the Convention.[732] Responding to the judgement, Mexico took steps to reform Article 57 of the Code of Military Justice in 2010. Nevertheless, in monitoring compliance with the judgement both in 2011 and 2013, the Court concluded that the reform initiative was 'insufficient because it does not fully comply with the standards specified in the Judgment'.[733] While the Court ordered Mexico to carry out the appropriate legislative reforms of this article, it is worth noting that the Court rejected the argument made by the representatives of the victim that the state had to make a reform to Article 13 of the Mexican Constitution that regulates military jurisdiction as follows, restating the concept of 'the control of conventionality'.[734]

> [I]t is necessary that the constitutional and legislative interpretations regarding the material and personal competence criteria of military jurisdiction in Mexico be adjusted to the principles established in the jurisprudence of this Tribunal, which have been reiterated in the present case As per this understanding, this Tribunal considers that it is not necessary to order the modification of the regulatory content

731 Concurring Opinion of Judge *ad hoc* MacGregor Poisot, *Cabrera Garcia and Montiel Flores* (n 35) para 37 (emphasis added).
732 *Radilla Pacheco*, Judgment (n 702) para. 342.
733 *Radilla Pacheco v Mexico*, IACtHR, Monitoring Compliance with Judgment, Order of 19 May 2011, paras 17–23; *Radilla Pacheco v Mexico*, IACtHR, Monitoring Compliance with Judgment, Order of 14 May 2013, paras 18–29.
734 *Radilla Pacheco*, Judgment (n 702) paras 337–339.

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included in Article 13 of the Political Constitution of the United Mexican States.[735]

This position manifests the requirement of consistent interpretation of domestic law with international law. It is remarkable in the judgement's logic that both the legislative reform of Article 57 of the Code of Military Justice and the consistent interpretation of Article 13 of the Mexican Constitution with the Convention are juxtaposed as the means to coordinate conflicts between the Convention and domestic law.

As a matter of fact, the Mexican Supreme Court faithfully followed the IACtHR judgement that required Article 13 of the Mexican Constitution to be interpreted consistently in line with the ACHR.[736] Relying on the new *pro homine* provision, Article 1(3) of the Constitution, the Supreme Court also noted that all judges in the country had to interpret human rights legislation in accordance with relevant international treaties that Mexico was a party to, ensuring at all times the highest standard of protection in the face of situations that violate the human rights of civilians.[737] The *Corte Suprema* furthermore stated that this interpretation should be observed in all future cases heard by this Court, and decided that all human rights abuse accusations against soldiers had to be sent to the ordinary justice system.[738] It follows that consistent interpretation of Article 13 of the Mexican Constitution in line with the ACHR serves as 'a stopgap measure' until the legislative reform of Article 57 of the Code of Military Justice will be achieved, and thus, has general effects similar to guarantees of non-repetition.[739] In fact, in monitoring compliance in 2013 with the *Radilla Pacheco* judgement, the IACtHR evaluated the ruling of the Supreme Court as a positive contribution and confirmed that from 6 August to 13 September 2012, the Supreme Court took over the hearing of cases related to the restriction of military jurisdiction, deciding in all of them to refer the case to the ordinary justice system.[740]

735 Ibid paras 340–341.
736 *Radilla-Pacheco v Estados Unidos Mexicanos* (n 469) paras 38–43.
737 Ibid para 44.
738 Ibid para 45.
739 Kristin Bricker, 'Military Justice and Impunity in Mexico's Drug War' (2011) 3 *CIGI Security Sector Reform Issue Paper* 2–13, 8.
740 *Radilla Pacheco*, Order 2013 (n 734) para 27.

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B. Centralising Conventionality Control Powers to Constitutional Courts

(i) Democracy: Balancing Individual Autonomy and Public Autonomy

Notwithstanding the merits of decentralised conventionality control by ordinary judges, the diffusion of judicial norm-controlling powers to unelected ordinary judges might have negative consequences in terms of democracy and legal certainty. The first risk of diffused conventionality control is that ordinary judges who are unaccountable to nationals may prejudice democratic values by disregarding parliamentary legislation. The *counter-majoritarian difficulty* conundrum is aggravated by ordinary judges who are generally selected through a bureaucratic process, rather than constitutional judges who are typically chosen through a more politicised procedure.[741] Inherently, constitutional review is a mechanism for protecting fundamental rights by reinforcing the rule of law, counteracting the conduct of political organs that possess democratic legitimacy. Therefore, as long as democracy simply means a majoritarian or aggregative form, and constitutionalism solely focuses on individual freedoms, they will come into collision with each other.

Jürgen Habermas conceptualises the *demokratischer Rechtsstaat* to reconcile the potential conflict between constitutionalism and democracy. In his *System of Rights* theory, Habermas elegantly reconciles popular sovereignty deriving from republicanism, and human rights emanating from liberalism.[742] It follows that *public autonomy* arising from popular sovereignty and *private autonomy* based on human rights share *Gleichursprünglichkeit* [co-originality].[743] Concretely speaking, '[c]itizens can make appropriate use of their *public autonomy*, as guaranteed by political rights, only if they are sufficiently independent in virtue of an equally protected *private autonomy* in their life conduct', and in the opposite direction, 'members of society actually enjoy their equal *private autonomy* to an equal extent [...] only if as citizens they make an appropriate use of their *political autonomy*'.[744]

741 Víctor Ferreres Comella, 'The Rise of Specialized Constitutional Courts' in Ginsburg and Dixon (n 659) 265–277, 270.

742 Jürgen Habermas, *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (Suhrkamp 1992) 151–165.

743 Ibid.

744 Jürgen Habermas, 'Constitutional Democracy: A Paradoxical Union of Contradictory Principles?' (2001) 29 *Political Theory* 766–781, 767.

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Given the intertwined relations between human rights and popular sovereignty, Habermas emphasises the 'discursive process of opinion- and will formation'.[745] In synchronism with his idea, *deliberative democracy* attracts mass support to overcome the limitations of the majoritarian view. Amy Gutmann and Dennis Thompson define the concept as '[a] form of government in which free and equal citizens (and their representatives), justify decisions in a process in which they give one another reasons that are mutually acceptable and generally accessible, to reach conclusions that are binding in the present on all citizens but open to challenge in the future'.[746] In relation to other forms of democracy, Günter Frankenberg explains that '[d]eliberative democracy [...] picks up, on the level of normative theory, liberal democracy's claim to legitimacy based on reasons [...] and connects its key focus, not on a predetermined will but on the process of its formation, with participatory democracy's claim to popular participation'.[747]

Within the framework of *demokratischer Rechtsstaat*, constitutional courts have an important role to 'keep watch over the system of rights that makes citizens' private and public autonomy equally possible'.[748] To put this in the context of deliberative democracy, constitutional courts first form a part of a communication process regarding constitutional issues.[749] Typically, the *communicative circle* on constitutional problems involves the original judges and parties to the trial; higher courts including the constitutional court within the same trial; the professional interpretative community; a public forum (the media and non-legal audiences); and the whole public sphere of society.[750] Second, constitutional courts guarantee deliberative discourse with political organs. As a notable model, Christopher Zurn advocates the *horizontal dispersal* of constitutional decisional powers: the establishment of self-review panels in the legislative and executive branches of national governments, and various mechanisms for

745 Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, translated by William Rehg (The MIT Press 1992) 104.
746 Amy Gutmann and Dennis Thompson, *Why Deliberative Democracy?* (Princeton University Press 2004) 3–7.
747 Günter Frankenberg, 'Democracy' in Rosenfeld and Sajó (n 409) 250–258, 255.
748 Habermas (n 746) 263.
749 Patricia Popelier and Aída Araceli Patiño Álvarez, 'Deliberative Practices of Constitutional Courts in Consolidated and Non-consolidated Democracies' in Popelier and others (n 605) 199–231, 201–202.
750 Mark Van Hoecke, 'Constitutional Courts and Deliberative Democracy' ibid, 183–198, 191–193.

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interbranch debate concerning constitutional elaboration.[751] In practice, the German *Bundesverfassungsgericht* employed the constitutional principle of democracy to permit the legislature to revoke legal acts of previous legislatures, and claimed that the principle of *Völkerrechtsfreundlichkeit* (openness to international law) does not include the constitutional obligation of unconditional compliance with international law.[752]

However, these contributions of constitutional courts should be reconsidered in the context of constitutional democracy *beyond the State*.[753] Rainer Nickel points out that 'in a new, globalized environment where the execution of diffuse powers by diffuse actors blurs the line between public authority and private power, the well-ordered theory of the *democratic Rechtsstaat* seems to lose its empirical foundation *and* its persuasiveness altogether'.[754] The blurring of the boundary between private and public autonomy is highly worrisome when international courts radically reinforce the protection of fundamental rights while their decision-making is beyond national control.[755]

With regard to the transnational roles of constitutional courts, the European constitutional democracy doctrine suggested by Komárek provides a fresh analytical perspective. He explains that '[t]he role of national constitutional courts related to the Europeanized *individual autonomy* thus consists in defending the rights of those who do not benefit from integration and whose voice can be structurally undermined by it'.[756] However, according to his theory, the role 'should not be understood as constitutional courts' simple defense of national constitutions or national democracy' but rather as 'putting limits on the currently too wide *individual autonomy*, which is not placed into a communicative arrangement with its political counterpart'.[757]

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751 Christopher F Zurn, *Deliberative Democracy and the Institutions of Judicial Review* (Cambridge University Press 2007) 301–312.

752 BVerfG, 2 BvL 1/12, Entscheidung vom 15. Dezember 2015, paras 53–54, 67.

753 Steven Wheatley, *The Democratic Legitimacy of International Law* (Bloomsbury Publishing 2010) Chap 8.

754 Rainer Nickel, 'Private and Public Autonomy: Jürgen Habermas' Concept of Co-Originality in Times of Globalisation and the Militant Security State' in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism* (Oxford University Press 2007) 147–167, 166 (emphasis in original text).

755 Geir Ulfstein, 'The International Judiciary' in Klabbers and Others (n 26) 126–152, 147.

756 Komárek (n 612) 537–543 (emphasis added).

757 Ibid.

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The transnational functions of constitutional courts should also be re-evaluated in the implementation of regional human rights conventions. Víctor Ferreres Comella, who at an early stage captured the decentralising phenomenon of constitutional adjudication in Europe, voices concern that the ECtHR endorses 'a very broad conception of the sphere of privacy of public figures'.[758] In parallel to Komárek's *European constitutional democracy* doctrine cited above, Ferres Comella emphasises the necessity of coordinating individual and public autonomy through constitutional courts as follows:

> In so far as the ECHR does not perform a minimal function but is instead at the vanguard of human-rights discourse in an increasing number of cases, the establishment of a system of checks and balances between the national institutions and the ECHR becomes important. The democratic nations that are parties to the European Convention on Human Rights should be able to voice their reasoned disagreement in controversial cases. The national parliaments are important settings where this disagreement can be expressed, and constitutional tribunals provide an ideal forum to continue the domestic conversation about the acceptability of the ECHR's rulings.[759]

This normative argument may be empirically grounded in the *Von Hannover v Germany* case concerning the conflict between Articles 8 (right to respect for private and family life) and 10 (freedom of expression) of the ECHR. Concerning these competing rights, the German *Bundesverfassungsgericht* ruled in favour of the media's freedom regarding public autonomy, while the Strasbourg Court issued *Von Hannover No. 1* in favour of the plaintiff concerning individual autonomy.[760] However, the ECtHR highly evaluated in *Van Hannover No. 2* that 'the German Constitutional Court, for its part, had [...] undertaken a detailed analysis of the [ECtHR's] case law' and concluded that national courts have not failed to comply with their positive obligations under Article 8 of the ECHR having regard their margin of appreciation.[761] This dialectic interaction indicates that national constitutional courts play a significant role in filling the gap between

758 Ferreres Comella (n 442) 150.
759 Ibid 151.
760 *Von Hannover v Germany (No. 1)*, ECtHR, App No 59320/00, Judgment on Merits of 24 June 2004.
761 *Von Hannover v Germany (No. 2)*, ECtHR (Grand Chamber), App No 40660/08, Judgment on Merits and Just Satisfaction of 7 February 2012.

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bloated individual autonomy and prejudiced public autonomy through supranational human rights adjudication.

The democratic role of constitutional courts becomes significant particularly in cases of transitional justice, as evinced by the election process in Bosnia and Herzegovina. The State Party's Constitution, adopted within the framework of the Dayton Agreement, provides in its Preamble that Bosniacs, Croats and Serbs are described as constituent peoples. In the *Sejdić and Finci* case, the applicants complained of their ineligibility to stand for election to the House of Peoples and the presidency on the grounds of their Roma and Jewish origin.[762] The ECtHR admitted the government's position that the exclusionary constitutional provisions that 'put in place a very fragile ceasefire' and were 'designed to end a brutal conflict marked by genocide and "ethnic cleansing"' aimed at 'the restoration of peace', which is broadly compatible with the general objectives of the Convention's Preamble.[763] However, the Strasbourg judges assessed that the maintenance of the system in any event did not satisfy the requirement of proportionality and held the violation of Article 14 taken in conjunction with Article 3 of Protocol No. 1, and that of Article 1 of Protocol No. 12.[764]

In the aftermath of *Sejdić and Finci*, the Constitutional Court of Bosnia and Herzegovina declared the relevant provisions unconstitutional of the Election Act 2001, ordered the Parliamentary Assembly to amend those provisions within a limited period, and, given the failure thereof, adopted a ruling on the non-enforcement of its decision.[765] Even after similar decisions by the ECtHR in *Zornić* and *Pilav*, the unconstitutional and unconventional situation was not remedied by the political sector.[766] Against the background of the government's failure to implement the decision of

762 Marko Milanovic, 'Sejdić &Finci v Bosnia and Herzegovina' (2010) 104 *American Journal of International Law* 636–641.

763 *Sejdić and Finci v Bosnia and Herzegovina*, ECtHR (Grand Chamber), App Nos 27996/06 and 34836/06, Judgment on Merits and Just Satisfaction of 22 December 2009, para 45. See also, Martin Wählisch, *Peacemaking, Power-sharing and International Law: Imperfect Peace* (Bloomsbury 2019) 69–71.

764 Ibid paras 47–50, 56.

765 Constitutional Court of Bosnia and Herzegovina, Decision of No. U 9/09 of 26 November 2010.

766 *Zornić v Bosnia and Herzegovina*, ECtHR, App No 3681/06, Judgment on Merits and Just Satisfaction of 15 July 2014; *Pilav v Bosnia and Herzegovina*, ECtHR, App No 41939/07, Judgment Merits and Just Satisfaction of 9 June 2016.

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the Constitutional Court and its ancillary orders, the ECtHR took a stricter position in applying Article 46 of the ECHR in the fourth *Baralija* case:

> Consequently, having regard to these considerations, as well as to the large number of potential applicants and the urgent need to put an end to the impugned situation, the Court considers that the respondent State must, within six months of the date on which the present judgment becomes final, amend the Election Act 2001 in order to enable the holding of local elections in Mostar. Should the State fail to do so, the Court notes that the Constitutional Court, under domestic law and practice, has the power to set up interim arrangements as necessary transitional measures.[767]

This message from Strasbourg judges to the Sarajevo judges suggests the former's expectation that the latter would not merely exert its power to behave as the 'negative legislator', merely striking down the norms which are inconsistent with the Constitution, but rather take the role of the active legislator in adopting the interim arrangements as temporary measures that will resolve the issue until a permanent solution is adopted by the legislators.[768]

The fine-tuning function of constitutional courts would be more problematic in the implementation of the ACHR given the IACtHR's judicial activism. The Court's radical expansion of Convention rights and freedoms has often been the target of criticism, and the gap between individual and public autonomy reaches a greater extent in the Latin American region.[769] Nevertheless, the inter-American human rights system also has an institutional gap in safeguarding public autonomy against overblown individual autonomy. For example, the judges of the San José Court are elected under less politicised procedures because politics has negatively influenced elections in Latin America.[770] This manner of choosing judges contrasts with the European human rights system in which judges are se-

767 *Baralija v Bosnia and Herzegovina*, ECtHR, App No 30100/18, Judgment on Merits and Just Satisfaction of 29 October 2019, para 62.

768 Dženeta Omerdić and Harun Halilović, 'The Case of Baralija v Bosnia and Herzegovina: A new Challenge for the State Authorities of Bosnia and Herzegovina?' (2020) 4 *Društvene i humanističke studije* 217–238, 228–233.

769 Diana P Hernández Castaño, *Legitimidad democrática de la Corte Interamericana de Derechos Humanos en el control de convencionalidad* (Universidad Externado de Colombia 2015) Chap 3.

770 Pasqualucci (n 695) 483–486.

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lected by the CoE Parliamentary Assembly, which is composed of political representatives appointed by national parliaments.[771]

Despite these circumstances, it should be carefully assessed whether constitutional courts in Latin American countries have the ability to reconcile the discrepancy between individual and public autonomy. Generally speaking, if the ordinary judges under a past dictatorship are not removed by a new democratic government, the constitutional judges are expected to show sensitivity to the liberal and transformative spirit of the new Constitution.[772] Nevertheless, Latin American courts are in a process of democratisation and their roles are still part of an open-ended discussion.[773] As an embryonic example in the unconsolidated democracies of Latin America, the Colombian *Corte Constitucional* issued an interesting ruling on 10 October 2013. Referring to the precedent case *López Mendoza v. Venezuela*, in which the IACtHR provided systematic interpretation regarding Article 23 ACHR (right to participate in government), the Constitutional Court cast a cautious eye at unconditional obedience to the San José jurisprudence by distinguishing the contexts of the Venezuelan and the Colombian cases. Consequently, the *Corte Constitucional* adopted its own interpretation of the ACHR provision with regard to the *Legislador*'s democratic role.[774]

As a democratic challenge from a national constitutional court to the regional court, the *El Mozote* case beautifully illustrates the relativist theories on international and national authorities in light of constitutional reasoning. This case concerned the alleged massacres that occurred during the period of the so-called counterinsurgency operations deployed against civilians on a massive scale by the Salvadoran army during the civil war in that country. Although the 1992 the Chapultepec Peace Accord that ended hostilities clearly mentions 'the need to clarify and put an end to any indication of impunity', the Legislative Assembly of the Republic of El Salvador enacted the 1993 Law of General Amnesty for the Consolidation of Peace to extend the benefit of unrestricted amnesty under the 1992 National Reconciliation Law. In the merits phase on 25 October 2012, the IACtHR resolutely maintained its jurisprudence on amnesty laws. Despite

771 Ferreres Comella (n 442) 148.
772 Ibid 270.
773 Popelier and Patino Alvarez (n 750) 206–208.
774 Corte Constitucional de Colombia, Exp T-3005221, Sentencia SU712/13 de 17 octubre de 2013, para 7.6 (La competencia atribuida constitucionalmente es compatible con la Convención Americana sobre Derechos Humanos).

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the apparently democratic process through which the Law of General Amnesty was adopted, it was regarded as evidently incompatible with the ACHR and lacking legal effect.[775] We should not overlook in this context the concurring opinion of Judge Diego García Sayán, which was adhered to by Judges Leonardo A. Franco, Margarette May Macaulay, Rhadys Abreu Blondet and Alberto Pérez Pérez. Their opinion complemented the majority position in terms of the special conditions of transitional justice as follows:

> In these [transitional situations between armed conflicts and peace], taking into consideration that none of those rights and obligations is of an absolute character, it is legitimate that they be weighed in such a way that the satisfaction of some does not affect the exercise of the others disproportionately. Thus, the degree of justice that can be achieved is not an isolated component from which legitimate frustrations and dissatisfactions can arise, but part of an ambitious process of transition towards mutual tolerance and peace.[776]

In line with this thoughtful opinion, the Constitutional Chamber of the Supreme Court of El Salvador in the judgement of 13 July 2016 tactfully orchestrated its constitutional reasoning in favour of both international and national mandates. As a starting point for dialogue, the constitutional guardian evaluated the inter-American authority in that the latter 'without disregarding the sovereign right that States retain to decree amnesties in situations of post-armed conflict, has ruled on the incompatibility of certain amnesty laws – specifically self-amnesties – with international law and with the international obligations of states'.[777] By offering a friendly reappraisal and at the same time, by recharacterising Inter-American jurisprudence as developed mainly in 'self' amnesty cases, the Constitutional Chamber skilfully arranged its own field to create jurisprudence on 'post-armed conflict' amnesty in terms of constitutional reasoning, which was corroborated with a constitutional comparative analysis of transitional cases including Argentina and Colombia.[778] To differentiate itself from

775 *The Massacres of El Mozote and Surrounding Areas v El Salvador*, IACtHR, Series C No 252, Judgment on Merits, Reparations and Costs of 25 October 2012, para 296.

776 Ibid, Concurring Opinion of Judge Diego García Sayán, para 38.

777 Sala de lo Constitucional de la Corte Suprema de Justicia de El Salvador, Inconstitucionalidad 44–2013/145–2013, Sentencia de 13 de julio de 2016, Considerando IV.6.A.

778 Ibid Considerando V.1.A.

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the Inter-American Court that links strict international obligations with 'all' violations of protected rights, the Salvadorean Court identified the actually relevant criteria to be applied only in 'serious' violations of human rights.[779] Within the reformulated framework, the proportionality was even more closely evaluated between 'the need to ensure certain legitimate public interests – such as peace, political stability and national reconciliation – and the state's inalienable obligation to investigate and sanction violations of fundamental rights'.[780]

Although the IACtHR and the Constitutional Chamber proceeded along different paths, they eventually joined together in the conclusion that the *Ley de Amnistía General para la Consolidación de la Paz* was subject to control of constitutionality and conventionality. As the subsequent stage of supervising judgement compliance, the San José judges positively evaluated the San Salvadorean judges' efforts to align the constitutional and conventional jurisprudence regarding the prohibition of amnesty.[781] This Salvadorean approach in *El Mozote* elaborated a thought-provoking constitutional reasoning that respectfully aims to relativise the IACtHR's absolutist doctrines. On this point, Carlos Arturo Villagrán Sandoval and Fabia Fernandes Carvalho Veçoso have made an insightful comment that the most interesting aspect of the Salvadorean decision was that it presented the Chamber as 'a catalyst in the bottom-up construction of democratic values in a dialectic manner'.[782] We may observe the dual aspect of such bottom-up democratisation: First, the Constitutional Chamber constructively criticised the IACtHR's comparative method for ascertaining the international *corpus juris.* As we confirmed above, the Inter-American comparative approach has been a target of criticism for 'undertak[ing] a fairly superficial reading of the law of the other countries involved, particularly in the absence of IACtHR cases dealing with the same set of laws in the other jurisdictions'.[783] The Constitutional Chamber, in order to overcome such a flaw stemming from the top-down approach of the Inter-American

779 Ibid Considerando V.2.A.
780 Ibid Considerando V.2.B.
781 The Massacres of El Mozote and Surrounding Areas v El Salvador, IACtHR, Order on Monitoring Compliance with Judgment of 31 August 2017, para 17.
782 Carlos Arturo Villagrán Sandoval and Fabia Fernandes Carvalho Veçoso, 'A Human Rights' Tale of Competing Narratives' (2016) 8 *Revista Direito e Práxis* 1603–1651.
783 Lucas Lixinski, 'The Consensus Method of Interpretation by the Inter-American Court of Human Rights' (2017) *Canadian Journal of Comparative and Contemporary Law* 65–95, 79.

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Court, intended to build a bottom-up democratic consensus among States Parties by comparing constitutional peers' practices in this region. Second, the Constitutional Chamber attenuated the IACtHR's ultimate authority in exercising control of conventionality, claiming its better placed position than that of the Inter-American Court's top-down standpoint for assessing constitutional proportionality to reflect democratic values in the sensitive context of transitional justice. As is implied in the Salvadorean case, such a double bottom-up construction of democratic consensus through reasonable constitutional reasoning contributes to reinforcing, rather than demolishing, the legitimate authority of international law.[784]

Another case that illustrates the synergy between regional and constitutional courts for democratic decision-making is found in the legal dispute over same-sex marriage in Costa Rica. Asked by the government of Costa Rica for its interpretation of the recognition of the rights of same-sex couples under the ACHR, the IACtHR issued its advisory opinion. Invoking the doctrine of conventionality control, the Court declared that Article 54 of the Civil Code of Costa Rica must be interpreted pursuant to the standards that those who wish to have their records and/or their identity documents comprehensively rectified in order to conform to their self-perceived gender identity, may effectively enjoy this human right recognised in Articles 3, 7, 11(2), 13 and 18 of the American Convention.[785] Along with the obligation of consistent interpretation, the advisory opinion manifested more generally that 'States must ensure access to all the legal institutions that exist in their domestic laws to guarantee the protection of all the rights of families composed of same-sex couples, without discrimination in relation to families constituted by heterosexual couples'.[786] Moreover, the Inter-American judges recognised that 'some States must overcome institutional difficulties to adapt their domestic law and extend the right of access to the institution of marriage to same-sex couples, especially when there are rigorous procedures for legislative reform, which may demand a process that is politically complex and requires time'.[787] As a responsive dialogue of judges in San José, the Constitutional Chamber of

784 The Salvadorian case is suggestive for the Colombian context. See, Juana I Acosta-López, 'The Inter-American Human Rights System and the Colombian Peace: Redefining the Fight Against Impunity' (2016) 110 *American Journal of International Law* 178–182, 181–182.

785 *Gender Identity, and Equality and Non-discrimination with Regard to Same-sex Couples* (n 159) para 171.

786 Ibid para 228.

787 Ibid para 226.

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the Supreme Court followed the Inter-American Advisory Opinion and set a deadline of 18 months for the entry into force of the unconstitutionality of the relevant provisions of the Family Code, which urged the Legislative Assembly to amend the laws.[788] As a fruitful result produced by the dialogue between national and Inter-American judges involving political actors, same-sex civil marriage came into effect in Costa Rica on 26 May 2020, which made it the first country in Central America to take this step.

(ii) Legal Certainty: Balancing Predictability and Acceptability

The second risk of diffused conventionality control is that *legal certainty* may be damaged when different ordinary judges reach a different conclusion regarding the application and interpretation of human rights conventions. Legal certainty has been a guiding principle of European legal systems, in contrast to the *legal indeterminacy* which governs American lawyers.[789] In parallel with the national sphere, the ECtHR has regarded the principle of legal certainty as 'inherent in the right of the Convention for the Protection of Human Rights'.[790] The IACtHR also invokes legal certainty in combination with procedural balance among the parties in cases of massacres involving a flood of victims and complicated facts.[791] Legal certainty has formal and substantive meanings. Elina Paunio, citing the hermeneutical footsteps of legal theorists such as Aulis Aarnio and Alexander Peczenik, elucidates that *formal legal certainty* implies that 'laws and, in particular, adjudication must be predictable: laws must satisfy requirements of clarity, stability, and intelligibility so that those concerned can with relative accuracy calculate the legal consequences of their actions

788 Sala Constitucional de la Corte Suprema de Justicia de Costa Rica, Exp 15–013971–0007-CO, Res Nº 2018012782 de 8 de agosto del 2018 See also, Ana María Ruiz González, 'Supreme Court of Justice of Costa Rica (Corte Suprema de Justicia de Costa Rica) Costa Rica [cr]' in Rainer Grote, Frauke Lachenmann, Rüdiger Wolfrum (eds), *Max Planck Encyclopedia of Comparative Constitutional Law* (Oxford University Press2019), updated in 2019, paras 20–22.

789 James R Maxeiner, 'Legal Certainty: A European Alternative to American Legal Indeterminacy?' (2006–2007) 15 *Tulane Journal of International and Comparative Law* 541–607, 545–553.

790 *Marckx v Belgium*, ECtHR, App No 6833/74, Judgment of 13 June 1979, para 58.

791 *The 'Las Dos Erres' Massacre v Guatemala*, IACtHR, Series C No 211, Judgment on Preliminary Objection, Merits, Reparations, and Costs of 24 November 2009, para 63.

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as well as the outcome of legal proceedings'.[792] Moreover, *substantive* legal certainty means 'the rational acceptability of legal decision-making'.[793] Habermas' theory on the *indeterminacy of law* suggests a procedural guarantee for reconciling both formal and substantive concepts of legal certainty. Although Habermas focuses on the investigation of the legitimacy of legal norms and not on legal certainty, his view highlights their inherent indeterminacy, and thereby covers both formal and substantive legal certainty.[794] In fact, he acknowledges that 'court rulings must satisfy simultaneously the conditions of *consistent decision-making* and *rational acceptability*'.[795] The theoretical framework of *procedure-dependent certainty of law* reckons from the start with a 'discursively regulated competition among different paradigms'.[796] Replacing the proceduralist approach to legal certainty in the implementation of human rights conventions, it implies a *judicial dialogue* between human rights courts and domestic courts for converging their interpretations.[797]

In addition to the democratic values examined above, legal certainty guaranteed through judicial dialogue is another key factor for distributing labour between constitutional and ordinary judges in conventionality control. In order to reconcile the decentralising tendency of constitutional review in Europe and the guarantee of legal certainty, Ferres Comella normatively suggests the following amendment to the centralised system of constitutional adjudication: [O]rdinary judges may engage in rather strained interpretations of statutes (and may even formally disregard them) only if the ECHR's precedents are sufficiently clear. When, in contrast, the legitimacy of the national law under the existing case law is more controversial, ordinary courts should ask the constitutional court to intervene and express their position.[798] In *Horncastle*, for example, Lord Phillips sent a message raising an objection to the interpretation made by the ECtHR Chamber 'so that there takes place what may prove to be a valuable dia-

792 Elina Paunio, 'Beyond Predictability: Reflections on Legal Certainty and the Discourse Theory of Law in the EU Legal Order' (2009) 10 *German Law Journal* 1469–1493, 1469.
793 Ibid.
794 Nupur Chowdhury, *European Regulation of Medical Device and Pharmaceutical: Regulatee Expectations of Legal Certainty* (Springer 2014) 58.
795 Habermas (n 746) 198 (emphasis in orginal text).
796 Ibid 223–224.
797 Paunio (n 793) 1476.
798 Ferreres Comella (n 442)145–146.

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logue between this court and the Strasbourg Court'.[799] In the *Al-Khawaja* ruling, the ECtHR Grand Chamber duly received the message from the Supreme Court of the United Kingdom and reformulated the Strasbourg principles.[800]

A revised model of concentrated constitutional adjudication in terms of legal certainty may be found in the Italian constitutional review system. In the 2015 *Judgement No 49*, the Italian *Corte costituzionale* had another occasion to elaborate the conventionality control framework in light of legal certainty. Regarding the ECtHR's responsibility for the *certezza* and *uniformità* of human rights protection, the Constitutional Court rejected the notion that the ECHR has turned national courts into passive recipients of an interpretative command issued elsewhere in the form of a court ruling, irrespective of the conditions that gave rise to it.[801] It is true that ordinary courts are regulated by the primary constitutional requirement of *stabile assetto* (equilibrium) *interpretativo*, according to which they cannot disregard the *consolidata interpretazione* of fundamental rights made by the Strasbourg Court as the ultimate instance.[802] However, the interpretative equilibrium must be coordinated with a synthesis between the interpretative autonomy of the ordinary courts and their duty to cooperate in ensuring that the meaning of fundamental rights ceases to be a matter of dispute.[803] Therefore, ordinary courts are required to follow only *diritto consolidato* of ECtHR jurisprudence, which corresponds to the 'well-established case law of the Court' under Article 28 ECHR.[804] In the absence of such a *diritto consolidato* under Strasbourg law, ordinary courts may avoid the need to refer a question of the constitutionality of the ECHR provisions by interpreting them in a manner in conformity with the Constitution.[805]

The Italian *Consulta*'s judgement may contribute to coordinating both *formal* and *substantive* legal certainty. On the one hand, it demarcates

799 *R v Horncastle and others* [2009] UKSC 14, para 11 (emphasis added). See also, Merris Amos, 'The Dialogue between United Kingdom Courts and the European Court of Human Rights' (2012) 61 Int'l & Comp. LQ 557.

800 *Al-Khawaja and Tahery v the United Kingdom*, ECtHR (Grand Chamber), App Nos 26766/05 and 22228/06, Judgment on Merits and Just Satisfaction of 15 December 2011.

801 Corte costituzionale italiana, Sentenza № 49 del 1 maggio 2015, para 7.

802 Ibid.

803 Ibid.

804 Ibid.

805 Ibid.

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the scope of consistent interpretation by ordinary judges in light of the *predictability* of ECHR rights. On the other hand, speaking in its own defence, the Italian *Corte costituzionale* explains that a judgement is based on argumentation within the perspective of *cooperazione* and *dialogo* between the courts rather than the vertical imposition of a particular interpretation which has not yet become established within Strasbourg case law.[806] To borrow the words of Giuseppe Martinico, this should be characterised not as a rebellious attitude embracing a feeling of mistrust towards Strasbourg jurisprudence but as *disobbedienza funzionale* for the ultimate purpose of achieving the effective protection of human rights.[807] Coordination between formal and substantive legal certainty by constitutional courts would be more important in relation to the *evolutive* or *dynamic* interpretation by human rights courts. Confronting such a *creatività* in the jurisprudence of human rights courts, national constitutional courts form a significant part of the communicative process for reconciling its predictability and acceptability simultaneously.[808]

Notwithstanding these advances, *Sentenza no 49/2015* is not without criticism in terms of legal certainty. In the later judgement in *GIEM SRL and Others v. Italy*, in which legal certainty and predictability inherent in the principle of legality under Article 7 ECHR were in question, the Strasbourg judges send a signal to the Roman judges: 'its judgments all have the same legal value. Their binding nature and interpretative authority cannot therefore depend on the formation by which they were rendered'.[809] More specifically, Judge Paulo Pinto de Albuquerque offered the criticism that the criteria the Italian Constitutional Court set forth in order to identify *consolidata interpretazione* reveals their propensity to create a situation of dangerous legal uncertainty, to the extent that it provided no further guidance to ordinary judges since the sentence.[810] The door opened by the Italian *Corte costituzionale* should not be closed by it for future deliberation as regards the *acceptability* of the Strasbourg law.

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806 Ibid.

807 Giuseppe Martinico, 'Corti costituzionali (o supreme) e "disobbedienza funzionale": Critica, dialogo e conflitti nel rapporto fra diritto interno e diritto delle Convenzioni (CEDU e Convenzione americana sui diritti umani)' *Diritto Penale Contemporaneo*, 28 Aprile 2015.

808 Sentenza №49/2015 (n 802) para 7.

809 *GIEM SRL and others v Italy*, ECtHR (Grand Chamber), App No 1828/06 and others, Judgment on Merits of 28 June 2018, para 252.

810 Ibid Partly Concurring, Patly Dissenting Opinion of Judge Paulo Pinto de Albuquerque, paras 43–56.

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In Latin America, the rationale of legal certainty for triggering the centralisation of conventionality control powers within constitutional courts is exemplified by the *Gelman* case concerning enforced disappearance in Uruguay within the scheme of *la Operación Cóndor*. In shifting from a military regime to a constitutional democratic system, the Uruguayan parliament in 1986 promulgated the Expiry Law to grant amnesty to those responsible for such crimes. La Ley de Caducidad was publicly supported through the exercise of direct democracy in 1989 and 2009. Against this background, the IACtHR rendered judgement on the merits on 24 February 2011. The *Gelman* ruling was slightly different from precedents regarding self-amnesty in that the Expiry Law in question allegedly gained democratic legitimacy. For the San José Court, the primary mission was to defend its individual-oriented case law from the risk of majoritarian rule:

> The fact that the Expiry Law of the State has been approved in a democratic regime and yet ratified or supported by the public, on two occasions, namely, through the exercise of direct democracy, does not automatically or by itself grant legitimacy under International Law. [...] The democratic legitimacy of specific facts in a society is limited by the norms of protection of human rights recognized in international treaties, [...] in such a form that the existence of one true democratic regime is determined by both its formal and substantial characteristics, and therefore, particularly in cases of serious violations of non-revocable norms of International Law, the protection of human rights constitutes an impassable [*infranqueable*] limit to the rule of majority.[811]

In this context, *la Corte Interamericana* highly evaluated the Supreme Court of Justice of Uruguay's *Sabalsagaray* judgement in 2009, in which the Expiry Law was disregarded as unconstitutional, as an *adecuado control de convencionalidad*.[812] In the aftermath of *Gelman*, however, *la Corte Suprema de Justicia* clearly showed a sense of rebellion against the Inter-American top-down decision. Indeed, its judgement of 22 February 2013 declared the unconstitutionality of Articles 2 and 3 of Law No 18831, which was enacted for implementing the IACtHR judgement on violating the constitutional principle of non-retroactivity. To justify their own constitutional logic, the Uruguayan highest judges emphasised that 'while it is beyond any discussion that the IACtHR is the final interpreter of the ACHR –

811 *Gelman*, Judgment (n 464) paras 238-239.
812 Ibid para 239.

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naturally within the sphere of its jurisdiction – it cannot be denied that the final interpreter of the Constitution of the Oriental Republic of Uruguay is the Supreme Court of Justice'.[813]

Shortly after receiving this harsh contestation from Montevideo, the San José Court in turn issued an order on compliance with the judgement in 2013. To counter the Supreme Court's argument distinguishing Inter-American and constitutional authorities, the IACtHR resolutely reiterated that according to international law which the State had accepted in a democratic and sovereign manner, it is unacceptable that once the Inter-American Court has issued a judgement with the authority of *res judicata*, the domestic law or its authorities should seek to leave it without effects.[814] Consequently, the San José judges signalled that the Montevideo judges' decision in 2013 constituted an obstacle to the full compliance of the Inter-American judgement by producing adverse effects against access to justice by victims of grave human rights violations.[815]

In receiving this signal from the IACtHR, the Supreme Court of Justice unanimously dismissed on 30 May 2019 the appeal filed by the defence in the case concerning the 'very seriously aggravated homicide' of victim Gerardo Alter, on the basis that 'the period of the *de facto* regime cannot be counted to calculate the statute of limitations for this criminal action, since the victim was prevented from seeking the relevant investigations during that time'.[816] The Inter-American Commission on Human Rights positively evaluated this decision as 'one step closer to investigation of events in that case', but, at the same time, expressed its concern about 'the persistence in criminal law proceedings of some statutory interpretations that insist on applying a statute of limitations to serious human rights violations committed during the Uruguayan dictatorship'.[817] In the most recent order on compliance with the judgement, which came in 2020, the IACtHR shared the Commission's evaluation and concern, and noted that 'sufficient juridical security does not exist' for complying with

813 Corte Suprema de Justicia de Uruguay, Gelman, Caso 20/2013, Proceso de Inconstitucionalidad. Sentencia de 22 de febrero de 2013, Considerando III.a.

814 *Gelman*, Order (n 375) para. 90.

815 Ibid.

816 IACHR, Press Release: IACHR Notes Uruguay Court Decision Limiting the Application of Statute of Limitations to Crime Committed during the Dictatorship, June 24, 2019, available at https://www.oas.org/en/iachr/media_center/PReleases/2019/158.asp.

817 Ibid.

https://doi.org/10.5771/9783748929833-155, am 16.08.2024, 22:01:27
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the judgement.[818] In the meantime, to overcome a fragmented situation where plural 'judicial interpretations persist', the Inter-American judges once again expected the Montevideo judges to play 'the important role that the Supreme Court of Justice of Uruguay – as the national tribunal of the highest hierarchy – has, within the scope of its competences, in the compliance with or implementation of the Inter-American Court Judgment'.[819] The *Gelman* case reveals that centralised conventionality control by constitutional courts is desirable to ensure legal certainty as well as democratic legitimacy at the national level.

818 *Gelman v Uruguay*, IACtHR, Monitoring Compliance with Judgment, Order of 19 November 2020, para 31.

819 Ibid paras 32–33.

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