

Parliaments and the European Court of Human Rights

12 May 2015, Senate, Warsaw

The conference, organised by Middlesex University and the Helsinki Foundation for Human Rights (Warsaw), was attended by some 80 people from several Council of Europe states, including parliamentarians; government officials; national judges and former judges of the European Court of Human Rights; representatives of the Parliamentary Assembly of the Council of Europe and the Committee of Ministers' Department for the Execution of Judgments; NGO representatives; and academics.

Thanks were offered to the Nuffield Foundation, which funded the conference and the research which inspired it. This research has been conducted by Dr Alice Donald and Professor Philip Leach of Middlesex University School of Law, co-authors of *Parliaments and the European Court of Human Rights* (Oxford University Press, forthcoming in 2016).

For their organisation of the conference, warm thanks were also given to Dominika Bychawska-Siniarska and Iuliia Cheromukhina of the Helsinki Foundation, and to the staff of the Senate.

The conference was formally opened and closed by Senator Michał Seweryński, Chair of the Human Rights, Rule of Law and Petitions Committee of the Senate.

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Panel 1: The role of parliaments in the implementation of Convention standards and European Court of Human Rights judgments

Professor Philip Leach, School of Law, Middlesex University

Professor Leach ventured that the idea of parliamentarians taking an active role in the implementation of human rights standards and judgments is 'an idea whose time has come'. There is now an international consensus behind the idea that the protection of human rights is a shared responsibility of all branches of the state: the executive, parliament and the judiciary. The Parliamentary Assembly has since 2000 placed great emphasis on the role of national parliaments in implementing European Convention on Human Rights (ECHR) standards and European Court of Human Rights (ECtHR) judgments and has gone so far as to say that the Convention system risks being put in jeopardy if parliamentary engagement is not increased. Council of Europe governments reaffirmed this view in the Brussels Declaration of March 2015, which is the first high-level declaration to specify in detail what governments must do to facilitate the role of parliaments.

The impetus towards improved implementation of the ECHR at the national level is underpinned by the principle of subsidiarity. This means that national authorities have the primary responsibility for securing for everyone within their jurisdiction the Convention rights and freedoms, and for providing an effective remedy when those rights are violated. This imperative is strengthened by the backlog of applications before the ECtHR, which stands at around 65,000; this is a dramatic reduction on the 160,000 applications pending in 2011, but remains a substantial problem in terms of delayed justice for many thousands of individuals. Ukraine, Russia, Turkey, Italy and Romania are responsible for the largest share of the backlog, with thousands of repetitive applications arising from structural or systemic violations of the Convention. In addition, around 11,000 non-implemented judgments are pending before the Committee of Ministers (CM), whose latest annual report notes that certain cases reveal significant 'pockets of resistance', linked variously to entrenched social prejudices, political considerations, or, more commonly, technical or economic obstacles to implementation.

As the spotlight has shifted onto national parliaments, it has become clear that relatively few within Europe have adequate (or any) structures or mechanisms to enable them to carry out effective legislative scrutiny or to monitor systematically compliance with Strasbourg judgments. However, there is now growing momentum in this direction, driven largely by the work of the Parliamentary Assembly.

Where parliamentary structures and processes do exist, they take a variety of forms. These range from the specialised model of having a human rights committee (e.g. the Joint Committee on Human Rights in the UK) or sub-committee (e.g. Poland and Romania) to a fully mainstreamed system (e.g. the Netherlands and Sweden), in which no specific committee or sub-committee exists but human rights are dealt with by different committees as they arise within their respective mandates. In some parliaments, a hybrid approach is

taken, with more than one parliamentary committee or sub-committee has human rights within its remit (e.g. Germany, Ukraine). The Parliamentary Assembly has declined to endorse any single model for institutionalising parliamentary human rights work, correctly recognising that different approaches suit different national contexts. Its Legal Affairs Committee has urged parliaments to create 'dedicated human rights committees or appropriate analogous structures, whose remits shall be clearly defined and enshrined in law'.

There are advantages and disadvantages to each model; for example, specialised committees are well-placed to develop both systematic oversight mechanisms and human rights expertise among its members and staff, but there is a risk that such specialisation might discourage the integration of human rights and related rule of law issues across the work of a parliament.

In addition to the need to make national implementation more effective, greater parliamentary engagement may also help to address the perception that changes to law or policy made in response to a judgment of the ECtHR lack democratic legitimacy. The question of legitimacy has loomed large in the United Kingdom: the Conservative government elected in May 2015 has pledged to curtail the authority of the ECtHR and senior Conservative leaders have called for the UK to consider withdrawing from the ECHR due to its purported democratic illegitimacy. Much of this debate is ill-informed, populist and opportunistic but as the protracted prisoner voting saga has shown, capable of inflicting damage on the Convention system.

Criticisms of the Court have not been confined to the UK; for example, politicians and commentators in the Nordic countries have also expressed concern about the effects of external judicial review' of domestic legislative acts. Criticism of the Court has also surfaced in Switzerland, France, Belgium and the Netherlands – but discussion about withdrawal from the Convention as a persistent feature of *mainstream* political debate is peculiar to the UK and to this extent is an aberration within the Council of Europe.

Professor Leach offered two broad observations arising from his and Dr Donald's research. First, implementation is an inherently political process; this means that greater parliamentary engagement can sometimes complicate or delay implementation because of problems of politicisation, opportunism, and lack of knowledge about human rights among parliamentarians. This, in turn, can provoke scepticism about the pragmatic benefits of involving parliaments. However, Professor Leach argued, it is neither feasible nor desirable to seek to shield human rights questions from political debate; rather, the imperative is to equip parliamentarians to hold governments to account for their action, or inaction, in responding to human rights judgments. Structures which embed parliamentary consideration of judgments (and promotion of Convention standards) may help to pre-empt opportunistic attacks on the Convention system by obliging parliamentarians to engage with reasoned, justificatory arguments about the meaning and scope of rights and the necessity and proportionality of restrictions upon them.

Secondly, human rights oversight is not only an obligation but also an opportunity for parliamentarians – an opportunity because of the increasing potential to ‘earn’ deference from the Strasbourg Court (see also Panel 4 below).

Christian de Vos, Advocacy Officer, Open Society Justice Initiative

Christian de Vos drew on research that he conducted for the Open Society Justice Initiative, published in the report *From Rights to Remedies: Structures and Strategies for Implementing International Human Rights Decisions* (2013).

To understand implementation, whether of norms more broadly or judgments more specifically, we need to understand two main factors: domestic *institutions* that can facilitate compliance, and domestic political actors’ *incentives* to comply with tribunals’ rulings. In a democratic system, ‘political will’ is not a unitary, or monolithic, will. Implementation involves disparate state actors which operate in different institutional settings and often have different or competing political interests. No single domestic institution can fulfil a country’s compliance obligations; rather, it requires a coalition of actors. Empirical evidence shows that the greater the number of actors involved in implementation, the less likely it is that rulings will be implemented, or the slower implementation will be.

Given the political nature of the implementation process, legislators are often seen by other actors as a cause of delay. Indeed, the domestic incentives for legislators to comply with court rulings may rest uneasily with other, competing demands of their constituents. However, there are both institutional and normative reasons for why increased parliamentary engagement is both desirable and necessary.

In a sense, then, the conversation oscillates between two poles: on the one hand, a desire for efficiency and a faith in the ability of institutional mechanisms to make implementation more effective, and, on the other hand, the need for legitimacy, which the democratic process is typically understood as conferring. Domestic political disagreements are, of course, not an excuse for the lack of implementation but there is a need for states to better structure the multiple points at which implementation occurs and to better coordinate communication between the various national authorities – including parliaments – that are engaged in implementation.

The *Rights to Remedies* report makes clear that few Council of Europe states have such adequate domestic structures or frameworks in place and the engagement of parliamentarians is particularly scant, a fact that is also true of the inter-American and African human rights systems. The report endorses a more systematic approach to parliamentary involvement and makes a series of recommendations, including the creation of some kind of dedicated human rights committee, or sub-committee, whose mandate encompasses the implementation and monitoring of international decisions. The report also recommends reporting procedures as a way to ensure communication between the executive and legislative branches. Further, it emphasises the importance of international parliamentary bodies like the Parliamentary Assembly of the Council of Europe and the dual role that parliamentarian can and should play at the national level and in Strasbourg.

Parliamentary actors can also contribute to implementation by providing a national legislative framework that brings together all state actors with jurisdiction over implementation. Examples of such legislation are scarce. In the Inter-American system, both Colombia and Peru have passed laws of considerable scope, providing procedures for the payment of pecuniary damages in adverse decisions by both the Inter-American Commission and the UN Human Rights Committee. Similar, although more limited, legislation exists in Ukraine and Italy. In Ukraine, the legislation seeks in part to improve the standing of the Government Agent by creating a statutory basis for the agent's authority during the execution stage of judgments.

The existence of formal implementation structures should not be confused with implementation itself. A state can have sophisticated structures in place but without a genuine commitment by relevant political actors to implementation, their promise will remain illusory. Moreover, many structures—be they committees or working groups—can be, either by design or neglect, poorly resourced, badly staffed, and politically feeble. Indeed, where parliamentary engagement does make the difference in terms of execution of a judgment, it is often due to the concerted efforts of a few individuals who make the issue a priority.

This brings us back to the point that implementation always operates in a political context; the existence of formal structures alone does not immunise implementation from political considerations, nor does it guarantee the execution of judgments. This is especially true in a country like the United Kingdom, which had developed some of the most sophisticated domestic implementation structures, even as strong ideological opposition to Strasbourg persists.

Dr Adam Bodnar, Vice-President, Helsinki Foundation for Human Rights (Warsaw)

The issue of parliamentary supervision of the execution of judgments gained prominence in Poland in 2011. This was due, first, to the success in the Senate in creating a system for the implementation of Constitutional Tribunal judgments that had remained unimplemented for many years, and secondly, to Resolution 1787 of the Parliamentary Assembly on the need to create domestic systems for the implementation of judgments in the context of the huge backlog of applications before the ECtHR. The Council of Europe office in Warsaw also played a significant role in creating pressure at the domestic level. At the same time, the National Council of the Judiciary became more active on this question, and an inter-ministerial team was created.

In 2012, the Committee on Justice and Human Rights in the Sejm and the Human Rights, Rule of Law and Petitions Committee in the Senate discussed the creation of more systematic mechanisms for parliamentary engagement. Also present were government officials, the National Council of the Judiciary, the Bar Association, the Ombudsman and NGOs. The Sejm Committee on Justice and Human Rights called on the Ministry of Justice to produce an annual report on judgments against Poland and their state of execution.

In 2013, in order to stabilise the system, the Justice and Human Rights Committee and the Foreign Affairs Committee of the Sejm decided to create a Sub-committee on the Execution of ECtHR Judgments. The relevant resolution was adopted in February 2014. In defining its remit, the Sub-committee decided to review the government's annual report; monitor the execution of judgments against Poland; and draft statements on specific judgments for adoption by the Justice and Human Rights Committee.

One of the most pressing issues facing the Sub-Committee was the *Dzwonkowski* group of cases concerning violations of Article 3 ECHR arising from instances of police brutality. The Sub-Committee met representatives of the police and the Ministry of Interior and was successful in increasing political pressure, which, added to media pressure, prompted the Ministry to adopt a strategy to eliminate the problem. Other structural problems arising in cases against Poland concern pre-trial detention, prison conditions, freedom of speech and freedom of assembly.

Since the Sub-Committee is within the Sejm, the question arises as to the role of the Senate, particularly its Human Rights, Rule of Law and Petitions Committee. Mr Bodnar suggested that this Committee was well-placed to deal with judgments that require a high degree of reflection and detailed scrutiny, including interventions by different stakeholders. Dr Bodnar gave the example of *Bączkowski and others v Poland*, concerning the banning of an LGBT parade in Warsaw in 2005 in violation of Articles 11 (right to freedom of assembly), 13 (right to an effective remedy) and 14 (right to non-discrimination). There had been a judgment of the Constitutional Tribunal and a relevant draft law had been prepared, but the judgment of the ECtHR remained unenforced because of the lack of proper reflection on the role of the courts in this group of cases. Dr Bodnar suggested that the Senate is also more likely than the *Sejm* to reflect upon recommendations given by UN treaty bodies such as the Committee against Torture and the Committee on the Elimination of Racial Discrimination. Further, the Senate should take the initiative in cases in which the government is unwilling to prepare draft legislation in response to a judgment because of political sensitivities.

Dr Bodnar argued that the recent strengthening of parliamentary supervision of the implementation of ECtHR judgments in Poland had been significantly influenced by the Parliamentary Assembly, by means of 'soft law' documents such as resolutions and recommendations. Committee of Ministers' political declarations, like the Brighton or Brussels Declarations of 2012 and 2015, had also been influential. However, more needs to be done to consolidate the system: the Sub-committee on the execution of judgments should develop its role, and the *Sejm* should take the issue of the ECHR more seriously. The international cooperation activities of the Polish Parliament are also of great importance.

Discussion after Panel 1

The importance of parliamentary scrutiny of legislation or draft legislation was emphasised. This can lead to complications, where human rights issues become unduly politicised within parliament; however, this is a problem that can be overcome by 'upstream' liaison between civil servants within relevant ministries and those within the relevant parliamentary bodies in order to ease the passage of legislative reform. Such liaison can also help overcome the problems that occur when Bills are published late in the process, meaning that there is no time for parliament to conduct effective scrutiny and parliaments effectively become a 'rubber stamp'.

It is important for parliamentarians to have sufficient technical understanding of the Convention and its domestic application. The importance of parliamentary human rights committees having adequate support, both in terms of their secretariats and high-quality independent legal advisers, was emphasised. It was argued that at present, the provision of legal advice within the Sejm is 'too haphazard'. It was also noted that MPs in Switzerland receive no legal advice.

A member of the Senate raised the issue of the practical problems that can hinder parliamentary oversight of the executive on human rights matters. These include a lack of time and space on the parliamentary agenda; and external interruptions such as elections. The execution of judgments can be hindered by the lack of resources to solve problems with serious resource implications, such as those concerning conditions in prisons. External pressure from NGOs can add impetus towards implementation. In addition, multiple opportunities exist in the Senate, such as the annual plenary debate on the state of human rights in Poland; the ability of the Human Rights, Rule of Law and Petitions Committee to take legislative initiatives or hold plenary discussions based on the thousands of petitions (addressed both to parliament and executive agencies) that pass before it each year; and the hearings that are held to consider serious problems, at which evidence is heard from members of the public and external organisations.

It was noted that the decentralisation of state power can pose problems for the execution of judgments. Within a federated state, or where a judgment requires action to be taken by local government, execution can be harder to coordinate and the 'quality' of implementation is harder to monitor. This has been the case, for example, with respect to monitoring the implementation of judgments against the Czech Republic concerning discrimination against Roma children in the education system.

It was noted that in bicameral parliaments, opportunities exist for Joint Committees to be created (like the Joint Committee on Human Rights in the UK) which combine in a productive way the political clout of MPs with the greater potential for reflection and detailed scrutiny in the upper chamber. The possibility of creating a similar joint committee in Poland was discussed; however, several respondents noted that there was insufficient energy to change the present structures

There is a risk in Poland that the present enthusiasm for strengthening the implementation of ECtHR judgments might dissipate. This risk underlines the importance of creating both structures and systematic working methods, in order to embed human rights within the parliamentary system.

Panel 2: The view from the national level

Dr Almut Wittling-Vogel, Representative of the Federal Government for matters relating to human rights, Federal Ministry of Justice and Consumer Protection, Germany

There are no special structures in Germany for the implementation of judgments of the Federal Constitutional Court (FCC), the ECtHR or the European Court of Justice. It is taken as read that all state institutions will fulfil their legal obligations. The ECHR is directly applicable law in Germany for all state organs: the executive, legislative and judicial branches.

The Federal Government seeks to promote implementation of ECtHR judgments in various ways: reporting on judgments; organising training measures, and translating ECtHR judgments. The Government reports annually to the German Bundestag on judgments against Germany and their state of execution. The reporting on measures taken to implement judgments is a direct result of a resolution in 2006 of the Parliamentary Assembly of the Council of Europe. Following a 2008 resolution of the German Bundesrat, a second report covers judgments and decisions against other states that could potentially be of significance to Germany. The annual reports are published on the website of the Ministry of Justice and Consumer Protection and disseminated widely. The aim is to give information to the German public in their own language. Any problems in the implementation of judgments would become immediately recognisable to parliament, including the parliamentary opposition. If the implementation of a judgment requires new legislation, the report may also serve as a reminder to parliamentarians of their responsibilities.

If legislative reform is required, the Federal Government will prepare a draft bill. If the Länder (federal states) are affected and legislation is necessary, the Länder governments will do the same. In one case, *M v Germany*, concerning preventive detention, 17 draft bills were prepared: one federal bill and 16 Länder bills and each was debated by the respective parliament. The need for separate bills in each state was the result of a judgment by the FCC, which was passed shortly after the ECtHR judgment and raised additional constitutional issues. This meant that a single Federal bill would not suffice. The 'enormous parliamentary activity' was as a result of implementing both judgments at the same time.

Judicial review of legislation is a well-accepted element in the German constitution. From 1951-2014, the FCC declared 697 pieces of legislation to be unconstitutional. Sometimes, even parliament itself will make use of this judicial scrutiny function. Parliamentarians are naturally sometimes unhappy with specific judgments coming from Strasbourg, Luxembourg

or Karlsruhe. But there is no opposition in principle to the idea of judicial control over the legislative branch.

An illustrative example is that concerning judgments on the length of domestic judicial proceedings. The German government had been aware of the issue since the 2000 judgment in *Kudla v Poland*. In 2006, the ECtHR issued the judgment in *Surmeli v Germany*, which obliged Germany to introduce a legal remedy. Initially, there was no parliamentary response and many repetitive applications followed, leading to the 2010 pilot judgment in *Rumpf v Germany*.

The Federal Government's first attempt to convince parliament with a proposed remedy failed. The Government organised a seminar with MPs, officials and external experts. Eventually a new law was passed and entered into force within a day of the deadline imposed by the ECtHR in *Rumpf*. The passage of the legislation was aided by the removal of previously obstructive MPs following federal elections.

Deadlines set by the ECtHR can create a balance between, on the one hand, the demand for immediate implementation and, on the other hand, the democratic demand for providing legislators with adequate time for deliberation. Appropriate deadlines acknowledge the need for a transitional period. This is a positive development and underlines the shared responsibility between the Strasbourg judiciary and national authorities.

Mirosław Wróblewski, Director, Department of Constitutional and International Law, Office of the Human Rights Defender

Judgments are symptomatic of failure: they highlight problems in the national system, which may have been present for many years. The Ombudsman's role is concerned with the *prevention* of violations, not only reparations, and serves as an early warning mechanism of problems of incompatibility with standards enshrined either in the Constitution or the ECHR. Where the executive or legislature is unresponsive to these 'red warnings', it is very costly to the whole system.

The Ombudsman's Office in Poland was established in 1998 and functions under the 1997 Constitution. It receives up to 70,000 complaints per year. Where parliament or executive agencies are unresponsive, the Ombudsman has powers to intervene, including by making a motion to the Constitutional Court or to support constitutional complaints initiated by citizens or other bodies.

The ECHR is used by the Ombudsman as a point of reference and basis for argumentation in many instances. There is an important role for the Senate in taking initiatives in response to Constitutional Court judgments.

Poland has made great strides towards implementation of ECHR standards and ECtHR judgments. It has become a source of good institutional practice, whereas previously it was only a source of problems. More needs to be done, however, to coordinate the various

stakeholders (e.g. executive, parliament, the Ombudsman and NGOs) who need to be involved in *ex ante*, as well as *ex post*, scrutiny of legislation for human rights compatibility.

Justyna Chrzanowska, Polish Government Agent before the ECtHR

Justyna Chrzanowska stated that during 2008-2015, the Polish Government had put in place a programme to 'institutionalise' the implementation of the Court's decisions. The emphasis had shifted from a concentration on individual measures to a focus on general measures, with the aim of eliminating the causes of repetitive applications.

In 2007, the programme was supplemented by an inter-departmental team for the implementation of the Court's decisions, which is formed of representatives of departments and other governmental organisations such as the Ombudsman, the Governmental Legislation Centre and the Supreme Audit Office, as well as judicial representatives, including representatives of the Constitutional Tribunal and Supreme Administrative Court. Parliamentarians from both chambers of the Polish Parliament also take part in the work of the team. The main goal of the team is to find solutions for the implementation of the ECtHR's judgments in cases against Poland, as well as monitoring cases against other states in order to prevent causes of potential future claims against Poland. The team is open to the contribution of NGOs and cooperates with the representatives of lawyers' associations.

In 2014, a new mechanism was created to provide for the systematic translation of the Court's decisions in cases concerning other states. Under a special agreement between the Ministry of Foreign Affairs, the Ministry of Justice, the Constitutional Tribunal and the Supreme Administrative Court, certain decisions concerning other states and which may have an impact on the Polish legal order are being translated into Polish. In 2014, 40 decisions of this kind were translated.

Mrs Chrzanowska noted that 2012 was a crucial moment for the implementation of the Court's decisions in Poland, as Polish Parliament became more involved. In a desideratum of the Parliament, the Government was asked to present an annual report concerning the state of execution of the Court's decisions. Under the order of the Prime Minister, a new mechanism was created, which resulted in the first government report concerning the implementation of Court judgments. The report was later discussed in the Parliament with the representatives of NGOs. As of May 2015, the third annual report was being prepared.

All this contributed in 2014 to the creation of a special sub-committee of the Sejm responsible for monitoring the implementation of ECtHR judgments. According to Mrs Chrzanowska, the meetings of the sub-committee are of great value, as representatives of government agencies responsible for the implementation of specific decisions are invited to them. One of the meetings was dedicated to the implementation of the decisions of *Dzwonkowski* group of cases, concerning both substantive and procedural violations of Article 3 arising from ill-treatment of applicants by police officers and the lack of an adequate investigation. The sub-committee contributed to the creation of a special strategy by the Ministry of Internal Affairs aimed at implementing the judgments.

Parliamentary involvement has further become institutionalised in respect of its legislative functions. Parliament has become more cooperative when amendments to the law are necessary to implement a decision. It is also advisable that the Parliament should provide for a permanent legislative mechanism to ensure that it is in compliance with Convention standards. In addition, Parliament exercises a supervisory function through the work of the subcommittee. Parliamentarians are encouraged to address their opinions and desiderata to the Prime Minister and other members of the Council of Ministers.

Mrs Chrzanowska concluded by underlining that cooperation between governmental bodies is required to make the implementation of Strasbourg judgments effective; in her view, appropriate mechanisms to provide for that have now been created in Poland.

Daniel Florea MP, Chair, Sub-committee on monitoring the execution of ECtHR judgments, Chamber of Deputies, Romania

In November 2009, following resolutions of the Parliamentary Assembly, a Sub-committee on monitoring the execution of ECtHR judgments was established under the Committee for Legal Affairs, Discipline and Immunities in the lower house (the Chamber of Deputies). It has seven members representing all parliamentary groups and is supported by two parliamentary civil servants (with a legal background and postgraduate qualifications in human rights), as well as the dedicated secretariat of the Committee for Legal Matters, Discipline and Immunities. The Sub-committee reports regularly to its parent committee and at least annually to the Standing Bureau of the Chamber of Deputies on the execution of Strasbourg judgments. Members of the Sub-committee have been greatly assisted by contact with the Parliamentary Assembly and the Committee of Ministers' Department for the Execution of Judgments.

In October 2010, the Court issued a pilot judgment in the case of *Maria Atanasiu and others*, imposing an 18-month deadline to rectify systemic flaws in Romania's system of restitution or compensation for nationalised properties. In December 2010, an inter-ministerial committee was formed to address the issue. The parliamentary Sub-committee held regular public hearings and consultations with this inter-ministerial committee. It also monitored the implementation of other judgments including those concerning: the lack of an effective remedy for excessively long judicial proceedings (the *Nicolau, Stoianova and Nedelcu* groups of cases); non-enforcement of domestic judicial decisions (the *Săcăleanu* group); poor conditions of detention (the *Bragadireanu* group); police brutality (the *Barbu Anghelescu* group); the consequences of racially-motivated violence against villagers of Roma origin (the *Moldovan* group); and the ineffectiveness of the criminal investigations into the violent crackdown on anti-governmental protests connected to the fall of the communist regime (the *Association "21 December 1989"* group).

The Sub-committee also regularly addresses questions to the Government Agent; ministers and other public authorities, such as the National Authority for Property Restitution. The Government Agent is required to provide regular updates to the Sub-committee and to share information about her communications with the Department for the Execution of Judgments.

Under Law no. 29/2011 (amending Law no. 24/2000), initiated by the former Chair of the Sub-committee, all bills must be reviewed for their law compatibility with Convention standards and ECtHR jurisprudence. Moreover, within three months of an adverse judgment of the Court that requires legislative reform, the Government must submit to Parliament a bill regarding any modification or repeal of the impugned legislation.

In 2014, members of the Sub-committee and other MPs initiated a proposal obliging the Government Agent to submit annually to Parliament a progress report on executing ECtHR judgments. This proposal has now become law.

Looking to the future, discussions have begun on the creation of a joint parliamentary standing committee of the two Chambers of the Romanian Parliament. The existing Sub-committee believes this step is necessary in view of (i) the large number of applications pending against Romania and (ii) the volume of unimplemented judgments pending before the CM (639 at the end of 2014, of which all but 83 were repetitive cases).

Katarzyna Gonera - Judge of the Supreme Court, Member of the National Council of the Judiciary, Poland

Katarzyna Gonera noted that, as well as obvious methods of judicial implementation of ECtHR decisions, such as the re-opening of domestic proceedings after the finding of a violation (which under Polish law is possible in criminal but not civil proceedings), there are other, more subtle methods by which courts can implement decisions.

Following the Interlaken conference in 2010, and influenced by the Government Agent, Justyna Chrzanowska, the National Council of Judiciary created a strategy for judicial implementation of the Court's decisions. The Council took the initiative willingly, since the majority of judgments against Poland concern the judiciary alone, for example in cases concerning excessive length of criminal, civil and administrative proceedings, temporary detentions, violations of the right to a legal defence, dismissal of appeal, or excessive formalism of proceedings (e.g. a strict interpretation by domestic courts of a procedural rule which deprives applicants of their right of access to a court).

Although the Council doesn't have supervisory competencies in relation to courts, under the Polish Constitution it stands guard over their independence. Moreover, the Council enjoys a high level of trust and respect from courts.

As of May 2015, the Council has organised three meetings with the participation of the Government Agent, the Ministry of Justice, courts, the Ombudsman, scholars, NGOs and others. The main goal of the meetings is to make recommendations and coordinate the actions of institutions in order to implement the ECtHR's decisions.

One of the recommendations was aimed at the co-ordination of the translation of judgments, both those against Poland and those against other states. Secondly, the National Council of Judiciary recommended the inclusion of human rights matters in the curricula of institutions which train judges, as well as organising trainings for existing judges. The initiative was

welcomed by the National School of Judiciary and Public Prosecution, which introduced human rights into its curriculum in 2012. The trainings in this field are presently organised both at the School as well as at the Courts of Appeal. Since 2012, the Council has managed to train more than 1,500 judges.

A third recommendation was aimed at informing courts and judges about the details of violations of the Convention arising from their actions, including both published judgments and decisions and those which are not published, such as friendly settlements and unilateral declarations. Thanks to the Ministry of Foreign Affairs and the Government Agent, a 'map of violations' has been created and information about violations found by the ECtHR is relayed by the Government Agent back to the courts. The president of a court can, where necessary, order judges to undergo human rights training.

Lastly the Council recommended that cases that require special attention should be flagged appropriately, so that they are easily identified by the president of a court or the Ministry of Justice.

Panel 3: Implementing European Court of Human Rights judgments: the role of Council of Europe bodies and their relationship to national parliaments

Andrew Drzemczewski, Head of the Legal Affairs and Human Rights Department, Parliamentary Assembly of the Council of Europe

Mr Drzemczewski emphasised the dual mandate of members of the Parliamentary Assembly, as members both of the Assembly and their national parliament. Some members have fulfilled this dual mandate to the full; for example, Mrs Herta Däubler-Gmelin, a previous chair of the Committee on Legal Affairs and Human Rights ('Legal Affairs Committee') of the Parliamentary Assembly, and at the same time Chair of the Committee for Human Rights and Humanitarian Aid in the German Bundestag, who performed a very influential role. Yet other members have not been so assiduous.

Under Article 46(2) of the Convention, the Committee of Ministers has the formal responsibility of executing the judgments of the ECtHR; this has historically been a 'jealously held monopoly'. Until recently, if any other institution sought to get involved, the CM rejected such involvement. This was a peculiar position to adopt; under the principle of subsidiarity, all branches of the state are responsible for implementation of ECHR standards and ECHR judgments, not only governments, and it follows that other Council of Europe bodies should also be involved in the process of supervision. Parliamentarians have an important role in 'naming and shaming' states when there is a problem. The Parliamentary Assembly can play this role more readily than the CM, in which discussions take place largely between diplomats and behind closed doors.

In 2000, there was an upsurge of cases pending before the CM, many involving severe structural or systemic dysfunctions. The CM was dilatory and was not always able to agree

on what approach to take. The entire Convention system was stagnating; cases remained unexecuted for many years. The Parliamentary Assembly began to intervene. The Legal Affairs Committee appointed a rapporteur on the execution of judgments in 2000. The current rapporteur, Klaas de Vries of the Netherlands, is a former Minister of the Interior in the Netherlands and this enhances his reputation in the eyes of other bodies in the Council of Europe and also at the national level. In 2006, the Committee began to undertake *in situ* visits to meet parliamentarians and other actors. This was initially seen as an encroachment upon the exclusive reserve of the CM and as a development which might complicate implementation. However, it is now widely agreed to be a positive development.

As of January 2015, the Legal Affairs Committee now has a new Sub-Committee on the implementation of ECtHR judgments. The Sub-Committee intends to hold hearings with leaders of parliamentary delegations whose states have problems in respect of execution. They have to explain in public (with, for example, NGOs and legal representatives present) the reasons for non-implementation or excessively slow implementation. These hearings, under the auspices of the new Sub-committee, have the potential to create a dynamic among parliamentarians of going back to their home base to press for implementation, with periodic opportunities within the Parliamentary Assembly to bring the delegations back for further public hearings if sufficient progress has not been made. It is also within the power of the Parliamentary Assembly to call for ministers to come before it to explain why judgments have not been implemented.

The Parliamentary Assembly has called for the development at national level of appropriate structures for implementation; however, structures *per se* are less important than good faith and political commitment. It is also crucial that parliamentary bodies have adequate secretariat support and access to independent, expert legal advice. The Parliamentary Assembly has undertaken a series of seminars which aim to strengthen the capacity of both parliamentarians and parliamentary staff.

Fredrik Sundberg, Deputy to the Head of Department for the Execution of Judgments of the European Court of Human Rights, Council of Europe

Mr Sundberg stressed that what is most important for the Committee of Ministers when it supervises the execution of the judgments of the ECtHR is that effective remedial action *is* taken, not *who* takes the action. The national capacity of reaction must, however, be capable of ensuring 'timely', or as more recently put, 'prompt' and full execution. The urgency of execution will depend on a variety of factors such as the existence (or likelihood) of repetitive applications or the seriousness of one-off breaches, such as a television channel being taken off air.

The CM thus expects that national procedures exist to rapidly assess what measures are required to execute the ECtHR's judgments and to efficiently follow up the adoption of the measures deemed necessary. These are, however, not always easy tasks. There are many instances in which it is not immediately apparent which state agency should execute a judgment and even when this is initially so, developments may frequently require, changes of strategy. The government may, for example, initially believe that legislation is necessary, but

may then be 'short-circuited' by the courts adapting their case-law in a way which makes legislation unnecessary. In other instances, the government may first count on the courts to respond, but the courts may not respond, and so legislation becomes urgent. In yet further situations, all measures planned are adopted but results are not achieved.

The CM's main interlocutor in supervising the progress of the national execution process is the government. Governments should provide action plans and, when action has been taken, action reports to the CM. Where the government considers legislation, and thus parliamentary involvement, necessary and prepares a bill to execute a judgment, the CM prefers to be able to review the bill for Convention compliance, to avoid a situation in which parliament is seized with legislation that may ultimately not be accepted by the CM (an example of such a situation emerged in the context of the execution of the *Modinos* judgment against Cyprus regarding the criminalisation of homosexuality).

In response to a question as to what the CM could do in case of refusal to execute and the use of the 'infringement procedure' foreseen in Article 46(4) of the ECHR, Mr Sundberg indicated that experience evidenced that domestic situations were rarely monolithic; it was unusual for *all* state actors to be opposed to the implementation of a judgment and the imperative was to provide support to those who could assist in ensuring execution – whether at the domestic or international level. Sometimes this also means ensuring information exchange and co-ordinated action with other international actors. The CM has never left a case wholly unexecuted, notwithstanding considerable delays in some cases.

One rare instance of major resistance had been the *Loizidou v Turkey*, concerning the rights of refugees wishing to return to their former homes and properties following the Turkish intervention in northern Cyprus. It was felt that the whole Turkish 'establishment' was opposed to implementation and the process seemed to have reached a dead end. The CM escalated its political pressure to obtain a solution, starting with an explicit rejection of the Turkish argument that execution could only take place in the context of a global settlement of the Cyprus problem, followed by a CM warning that Turkey was violating its obligations under the ECHR and as a member of the Council of Europe, followed by a call for a collective action by other member states. In parallel, intensive discussions took place to find creative solutions to the problems raised. Shortly thereafter, the European Union declared respect of the judgments of the ECtHR judgments to be a condition for continued partnership with a view to EU accession and a few months later, an interesting execution process started leading to the payment of the just satisfaction due and a law on the compensation and restitution of properties, eventually accepted by the ECtHR as creating an effective remedy in the *Demopoulos* inadmissibility decision.

The infringement procedure was closely linked to the idea of monetary sanctions raised from time to time by different Council of Europe bodies, including the Parliamentary Assembly. The member states had, however, eventually rejected this idea. The gist of the procedure was nevertheless maintained and led to the present infringement procedure under Article 46(4). So far this procedure has, however, not been used. There was also uncertainty as to when it should be used and the preparatory materials gave little guidance about this matter.

Mr Sundberg underlined that these situations of major resistance were exceptional. The gist of the CM's efforts to improve its contribution to execution had thus been directed at enhancing the efficiency and transparency of its supervision activities and improve the availability and use of Council of Europe targeted assistance programmes where needed. The new working methods adopted in 2011 – with the twin track procedure for the prioritisation of cases - inscribed themselves in these efforts.

Notwithstanding these developments, there remain problems with certain judgments which have not been fully implemented, whether because of political problems or the sheer size and complexity of the problems. Examples of cases raising such problems are the *Hirst v UK* (prisoner voting rights) and *Ivanov v Ukraine* (non-enforcement of domestic judicial decisions). The underlying reasons are frequently complex, with an important parliamentary dimension. In the *Ivanov case*, the main problems thus relate to a longstanding discrepancy between benefits promised by Parliament in legislation and the budgetary means available – a discrepancy leading to non-execution of judgments attempting to enforce the promises made in legislation.

CM responses to execution problems include action outside the supervision of the execution of individual cases. Over the last decade, the CM has also adopted several general recommendations for member states and a number of more political declarations to help the states overcome different execution problems. These texts notably aim at ensuring that draft legislation and existing legislation are in conformity with the ECHR, that there are adequate systems of redress, and that institutional arrangements are in place for the rapid execution of judgments. These texts also echo the Parliamentary Assembly's engagement in favour of the development of procedures before national parliaments in order to ensure 'prompt' execution. The last of these texts is the Brussels Declaration from March 2015. In order to improve European support to national decision makers, the CM has also created a number of expert bodies, such as the European Commission for the Efficiency of Justice and the Committee for the Prevention of Torture. It has also provided strong support for training of national decision makers in the form of the HELP programme.

The combination of European and national efforts appears to be starting to bear fruit. Statistics demonstrate positive developments both before the ECtHR and the CM. The persistence of a number of major structural and/or complex problems and the continued influx of new such problems clearly show, however, that efforts must continue. National parliaments must evidently be closely engaged in these efforts.

Dr Başak Çalı, Koç University, Turkey

Başak Çalı advanced the argument that the European Convention system as a whole – comprising the Court, the CM, the Parliamentary Assembly and other institutions – is legitimate in these sense that it is highly responsive to the concerns of states. However, it has been weaker in building up the domestic capacity of states to ensure compliance.

Dr Çalı offered three key insights about how judgments come to be implemented. First, compliance with judgments is a function of both political will and capacity: states must be

both willing and able to implement judgments. Secondly, the will and capacity of states is a complex picture: there are multiple actors within the state and each may have differing levels of will and capacity, which may change over time. Thirdly, the role of international institutions is facilitative and not determinative. They are external actors who have a range of tools at their disposal: they can nudge, remind, 'speak softly' to or 'name and shame' states, but they cannot make implementation happen.

With regards to political will, there are two types of problem. The first is that political will may be lacking because of either long- or short-term political calculations on the part of the elected branches of government. This may be termed the 'not now, not us' problem, which may complicate or delay implementation. The second problem relates to the question of democratic legitimacy, where states question the right of the European Convention system to determine certain matters of law or policy. This might be termed the 'we should decide' problem. The two problems – 'not us, not now' and 'we should decide' - need to be distinguished from each other as reasons for non-compliance or slow compliance.

The problem of lack of capacity also needs to be broken down into its constituent parts. There may be problems in relation to information capacity (e.g. lack of basic information about numbers of judgments or their state of execution); expertise capacity (e.g. lack of legal knowledge and understanding about cases and remedies); institutional capacity (e.g. lack of a focal institution, leading to ad hoc rather than systematic approaches to implementation); 'dialogical' incapacity (e.g. failure of the elected branches of government to exchange information with civil society) and 'interactional' capacity (e.g. absence of arrangements by which different state actors can 'nudge' one another, in order both to collaborate and apply pressure towards the goal of implementation).

The European human rights system has been highly responsive to the perceived issue of a lack of democratic legitimacy. Council of Europe institutions have repeatedly emphasised the primary duty on states to secure to everyone the rights and freedoms in the ECHR according to the principle of subsidiarity. This is not mere rhetoric. Most ECtHR judgments are declaratory. Even pilot judgments do not generally stipulate detailed remedies; rather, it is left to states to devise appropriate remedial measures. In this sense, the Convention system 'absorbs' potential legitimacy concerns. Certainly, compared to the more prescriptive approach of the inter-American human rights system, the European system 'speaks very softly' to states. This is also evident, for example, in the fact that meetings of the CM are held in private and on a peer-to-peer basis. The system is thus designed to cultivate the legitimacy of domestic actors. Moreover, it is predicated on the assumption that states are both willing and able compliers, and indeed relies on them to be so. This is positive feature of the system that should be cherished. Yet, inevitably some states lack both will and capacity, many having failed to build adequate institutions. This situation – the reliance on domestic will and capacity which is frequently not present - may be seen as a 'design fault' of the European system. The current system was designed in a different era and for different purposes than those which now pertain. The system suited the situation in the 1970s and 1980s in which there were far fewer judgments. The system is moving in the right direction, but needs to be further reinforced.

Discussion after Panel 3

A question was raised about the extent to which the CM does - or should - engage with interlocutors beyond the executive. For example, is it practical, and would it be beneficial, for the CM to engage with parliaments or national human rights institutions? Frederik Sundberg replied that the Department for the Execution of Judgments has some contact with national courts and parliaments. This is often extremely rewarding and may be regarded as an 'under exploited' area of its work. However, the Department generally holds national level discussions at the invitation of the government and does not like to short circuit this practice by talking to parliaments or other domestic actors on its own initiative. This is necessary in order to maintain a climate of trust with governments. Other Council of Europe institutions can initiate contact with parliamentarians (e.g. the Parliamentary Assembly or the Venice Commission) and there is scope for the CM to collaborate in such events more than it does at present.

The principle of *res interpretata* was raised, according to which judgments or decisions of the Court which establish a new standard or principle should have persuasive authority not only for the respondent state, but for all other states. Could the CM do more to identify and publicise judgments which might have implications for a number of states? It was noted that the Parliamentary Assembly has called on the CM to issue a resolution on this matter, but this has not happened thus far.

There was discussion about how Council of Europe institutions will respond if, as seems likely, the UK government continues to resist implementing the *Hirst* judgment on the voting rights of convicted prisoners. It should be recalled that when the UK delegation to the Parliamentary Assembly was called before a public hearing in January 2013, the head of the delegation, Robert Walter MP, stated that 'it was inconceivable for the UK authorities not to implement all Strasbourg Court judgments'. If the UK persists in not implementing *Hirst*, another Parliamentary Assembly hearing could well be held. It is also important to address the lack of understanding among UK MPs about the judgment; especially, that it does *not* mean that all prisoners must be enfranchised. Another complicating factor is that if the UK does not implement *Hirst*, Russia and Turkey may feel emboldened to refuse to implement judgments against them in respect of prisoner voting rights (respectively, *Anchugov and Gladkov v Russia* and *Söyler v Turkey*).

The dual mandate of Parliamentary Assembly delegates was debated. What is it reasonable to expect of delegates when they are working at the domestic level? Andrew Drzemczewski ventured that national parliaments should pay more attention to the composition of the delegation. For example, it was very rare for a member of the UK JCHR also to be a member of the UK delegation to the Assembly. By contrast, in Germany, there was a stronger overlap. A former rapporteur on the execution of judgments under the Legal Affairs Committee, Christos Pourgourides, has argued that where delegates do not seriously exercise parliamentary control over the executive in cases of non-implementation, the Assembly ought to consider suspending the voting rights of those delegations. Mr

Drzemczewski argued that MPs attend sessions in Strasbourg at public expense, and they have a 'moral duty' to reflect that experience at the domestic level.

In respect of the issue raised by Dr Çalı about states lack of capacity, Frederik Sundberg argued that there has been a significant amount of capacity-building at the domestic level within the past 10-15 years. The Convention has been incorporated into the legislative systems of all member states, and direct effect of ECtHR judgments in national decision-making is now widely accepted, meaning that the Convention is not viewed as an alien source of law. Most states now also have focal points for execution within the government, although not all have sufficient powers. More training and technical support is also needed.

Another matter raised in discussion was the extent of judicial reception of the ECHR in Poland. It was noted that, on the one hand, there is a 'self-congratulatory' discourse about the degree to which the ECHR has been embedded in the judicial system; on the other hand, some domestic judgments show judges to be unwilling or unable to apply the ECHR, in part because to do so is not seen as 'career enhancing'.

Panel 4: The relationship between parliaments and the European Court of Human Rights

Zdravka Kalaydjieva, Former Judge of the ECtHR (Bulgaria)

Judgments of the ECtHR are generally popular with applicants, if not always governments, and this should not be forgotten. The agenda for states should be not how to evade or politicise judgments of the ECtHR, but how to improve their execution and thereby meet their obligations under Article 1 of ECHR (to 'secure to everyone within their jurisdiction the rights and freedoms defined in the Convention'), taken together with Article 13 on the provision of domestic remedies. In fact, in many states, judgments of the Court are also popular with politicians. Judgments are invoked not only by opposition politicians to criticise the government, but also by members of ruling parties to justify their actions. It is politically delicate to take steps such as the abolition of the death penalty and international standards and judgments of the Court can provide cover for such decisions.

It is misleading to talk of judgments as merely declaratory. They are considered binding not only by Council of Europe bodies but also by national authorities. This is a major step forward. The problem that we face is not *whether* judgments should be implemented, but *how*.

The legitimacy of the ECtHR has been challenged but this is not a general phenomenon across Europe. Referring to Başak Çalı's presentation, Judge Kalaydjieva ventured that the problems besetting implementation are more problems of lack of capacity than lack of political will.

What is the Court doing to facilitate implementation? In recent years, it has taken a more proactive approach to tackling the backlog of applications. One response was in the handling of repetitive cases under the pilot judgment procedure. This is a 'remarkable instrument' in the dialogue between the national authorities, the Court and other Council of Europe institutions. Problems of length of domestic legal proceedings are widespread, including in Bulgaria, and while the Council of Europe cannot solve this dysfunction, judgments have at least led to the provision of adequate redress for victims. In *Neshkov and Others v Bulgaria* (January 2015), the Court identified serious and persistent problems within the prison system. It required Bulgaria to set up, within 18 months from the date on which the judgment becomes final, a combination of effective remedies in respect of poor conditions of detention that have both preventive and compensatory effects. The Court was also able to indicate good practice in other states. In the view of Judge Kalaydjieva, where domestic capacity is deficient, it is helpful for the Court to indicate in its reasoning the precise nature of the problem identified and possible solutions at the national level, rather than in every case leaving it to the discretion of the national authorities.

A key issue is what happens to a judgment at the national level. Where does the information go? Who has access to it? Who analyses it? Who is capable of synthesising it and 'spoon feeding' it to the decision-makers (including those at local level) who may need to be involved in designing the remedy? This also raises the question of how far national authorities communicate with each other. The principle of subsidiarity is very important where national authorities cooperate with the Strasbourg institutions; but it does not work well in the face of inactivity at the domestic level.

Egbert Myjer, Former Judge of the ECtHR (Netherlands)

Judge Myjer posed the question, 'how does the Court view the role of parliamentarians?'. He suggested that parliamentarians should take their own role in relation to the Convention seriously. In essence, this means ensuring that governments do what they have solemnly promised to do according to Articles 1 and 46 of the ECHR. This obligation has been reaffirmed in the high-level declarations at Interlaken, Izmir, Brighton and Brussels. Subsidiarity is a key notion, and under Protocol No. 15, states decided to enshrine it in the Preamble to the ECHR, along with the doctrine of the margin of appreciation. The import of this reform is doubtful, Judge Myjer argued, since the Court already takes the notion of subsidiarity seriously, as evidenced, for example, in the case of *SAS v France*.

What does the Court expect from national parliaments? The ECHR lays down a minimum standard and states should not try to walk 'too close to the edge'. Parliaments are better advised to stay on the safe side of the line, rather than risk being found in violation in Strasbourg. Governments may plead a lack of resources to implement ECHR standards or ECtHR judgments, but parliaments should not view this as an acceptable excuse.

Parliamentarians should also acquaint themselves with the way in which the Convention system works; for example, the fact that on average more than 95 per cent of applications are found to be inadmissible. Referring in particular to the UK, Judge Myjer noted that some governments have acted as if judgments of the ECtHR can be ignored. To act in this way is

to 'put a bomb under the whole system'. Not only should states implement judgments against them, but they should also seriously consider the implications of judgments against other states for their own legal order, in line with the principle of *res interpretata*.

Another role for parliamentarians is to ensure that governments abide by their duty under Article 50, which states that 'expenditure on the Court shall be borne by the Council of Europe'. Parliamentarians should also scrutinise the process by which three suitable candidates for the position of judge of the Court are nominated at the national level. The criteria set out under Article 21 of the ECHR have been further elaborated by the Council of Europe and it is imperative that national authorities nominate candidates based on these criteria and not according to domestic political factors.

To what extent can national parliaments 'earn' the deference of the Court through the quality of their deliberation? The first priority is to ensure that at the national level there is verification of draft laws, existing laws and administrative practice with the standards laid down in the Convention, as interpreted by the Court (in line with CM Recommendation Rec(2004)5). Parliamentarians should assure that the national legislative process is clear and thorough. The quality of parliamentary and judicial review of the necessity of a measure is of particular importance, including to the application of the margin of appreciation. Even long-established national laws may be found to be out of step with European standards, as evidenced by the case of *Tyrer v UK* (1978) on the use of judicial corporal punishment.

When there is abroad European consensus, the margin of appreciation will be smaller. However, there are exceptions in cases where there are serious moral and ethical issues at stake. In *A, B and C v Ireland*, concerning Ireland's unusually restrictive abortion laws, the Court held that the existence of a consensus could not be determinative. The Court looked carefully at the protracted public and parliamentary debate in Ireland and the fact that there had been referenda on the issue.

The judgment of *Animal Defenders International v UK* also illustrates the seriousness with which the Court takes the principle of subsidiarity. The Grand Chamber departed from the Court's previous case law in ruling 9-8 that the UK's ban on political advertising on television did not violate Article 10 (the right to freedom of expression). The decision could easily have gone the other way if it had not been for the quality and depth of the deliberation within parliament and the weight attributed to it by the majority in the Grand Chamber.

Murray Hunt, Legal Adviser, Joint Committee on Human Rights, UK

Murray Hunt addressed possible UK Government proposals to reform human rights law in the UK, as set out in the Conservative Party's manifesto for the May 2015 general election. The manifesto proposes, among other things, to 'scrap the Human Rights Act' (which incorporates the Convention into UK law) and replace it with a 'British Bill of Rights' in order to 'break the formal link' between UK courts and the ECtHR and make the Supreme Court 'the ultimate arbiter of human rights matters in the UK'. If this were to happen, it would make the UK the only Council of Europe state to have dis-incorporated the Convention. Moreover, if the Government seeks to legislate for an opt out of its obligations under Article 46(1) of the

ECtHR, by making ECtHR judgments merely advisory in the UK, Parliament will need to scrutinise carefully whether this would be compatible with the UK's continued membership of the Convention and is consistent with the commitment elsewhere in the governing party's manifesto that the UK will 'continue to support universal human rights' in its foreign policy.

A big task now lies before the UK Parliament to scrutinise the measures that the UK Government proposes to take. The role of legal advisers to Parliament is to ensure that it is made aware of and fully advised about the legal implications of any proposed legislation.

The UK has an excellent record in complying with ECtHR judgments. However, there are some judgments which have not been implemented after delays of many years, notably the *Hirst* judgment on prisoner voting. In its most recent report on human rights judgments, the cross-party JCHR stated that:

Judgments of the European Court of Human Rights are not merely advisory. States are under a binding legal obligation to implement them, an obligation voluntarily assumed by the UK when it agreed to Article 46(1) of the European Convention on Human Rights. Compliance with the judgments of the Court concerning prisoner voting is therefore a matter of compliance with the rule of law.

The JCHR adds that:

The UK enjoys a hard-earned international reputation as a State which values and exemplifies a commitment to the rule of law. That reputation underpins much of its power and influence over the behaviour of other States ... The UK Government's continuing failure to amend the law in response to the *Hirst* judgment undermines its credibility when invoking the rule of law to pressurise Russia—and other countries in a similar position—to comply with its international human rights obligations.

These passages demonstrate what a human rights committee as a voice in parliament can do, particularly if it has expert legal advice. It can make parliament aware of the implications of executive action for human rights and the rule of law.

Within the Council of Europe, there has lately been a great emphasis on national implementation of the Convention, as interpreted in the Court's case law, and the associated principles of subsidiarity and the margin of appreciation. National parliaments feature prominently in the Brussels Declaration. Indeed, parliaments are the best-placed institution at the domestic level to prevent human rights violations.

What, then, are the implications of the emphasis on subsidiarity for national parliaments, and also for the Court as it seeks to 'send signals' to parliaments? First, it is important that parliamentarians understand what subsidiarity and the margin of appreciation mean. In the UK, subsidiarity is often misunderstood as meaning that the Convention is secondary to national law. The margin of appreciation is mistakenly understood to refer to areas of decision-making that the Court does not enter into, akin to a zone of exclusive national competence and discretion. These misunderstandings have dominated debate in the UK. For

this reason, Protocol No. 15 creates an opportunity to educate parliamentarians about what these concepts mean in Convention law. The JCHR published a report on Protocol No. 15, which sought to draw attention to the prevalent misunderstandings and to make parliamentarians aware that subsidiarity reinforces the primary obligation on states to implement Convention rights for everyone in their jurisdiction. Similarly, parliamentarians need to understand that the margin of appreciation means that states can 'earn' the deference of the Court if they can demonstrate that their laws and policies have been properly reviewed for Convention-compatibility.

Animal Defenders International v UK and *SAS v France* are recent examples of the Court's new approach of spelling out to states what the margin of appreciation means; i.e. that it is in the interests of governments to do thorough and reasoned assessments of legislation for its impact on Convention rights, and to make this information available to parliaments. It is also in the government's interest to facilitate parliamentary debate about the Convention compatibility of legislation. Thus, if they are properly understood, the principle of subsidiarity and the doctrine of the margin of appreciation are 'engines' of national implementation.

There are other ways in which parliamentary human rights committees can become involved in respect of the Convention. One is to hold hearings in parliament with the national ECtHR judge. The aim of such hearings is not to hold the judge to account or to discuss individual cases. Rather, the aim is to inform parliamentarians about the Convention system, and bridge the gap that often exists between democratically-elected decision-makers and the Strasbourg institutions. Sir Nicolas Bratza, when he was the UK judge, did a superb job of answering questions before the JCHR. Committee members have also visited Strasbourg to meet judges *in situ* and this also helps to raise awareness and understanding of the relationship between national parliaments and the Strasbourg Court.

Discussion after Panel 4

There was discussion about the possible risks associated with the Court's new emphasis on reviewing the quality of democratic deliberation in order to inform its adjudication. For example, important discussions in parliament may take place without being documented. In other cases, there may be debate in wider society rather than on the floor of parliament. What appears to be perfunctory debate in parliament may therefore be informed by discussions elsewhere any may still produce a good outcome from the perspective of Convention compatibility. Moreover, the Court's emerging doctrine of due deference towards reasoned democratic deliberation needs to take account of the fact that there are areas where the state should not enjoy any deference, notably the 'pre-democratic' rights such as the absolute prohibition of torture. The Court also needs to send strong signals about the importance of rights which enable democracy, understood as more than simply majoritarian decision-making. What is required from the Court is a more nuanced doctrine of due deference than the one that has thus far been articulated. It was noted that most of the judgments in which the Court has expressly deferred to the outcome of parliamentary deliberation concern new legislation which engages qualified rights and which has been

debated by parliament with thorough and reasoned assessment of the competing interests at stake and the proportionality of any restrictions on rights.

Judge Kalaydjieva (who was among the dissenters in the *Animal Defenders International* case) argued that the most important factor for the Court is whether a law is compliant with the ECHR, as interpreted by the Court in its previous case law; the volume of parliamentary debate, or whether that is documented, is in her view a secondary factor.

Murray Hunt agreed that the developing due deference approach of the Court is not without problems. It should not be applied in inappropriate contexts, such as in relation to rights, like the right not to be subjected to torture, which are not capable of justified limitation. In addition, the question of how the Court assesses the quality of parliamentary deliberation is challenging. The Court needs to take into account not only debate on the floor of parliament but also, for example, committee reports, preparatory material, impact assessments, and consultation documents. An associated risk is that governments and parliaments adopt a 'tick box' approach to try to satisfy the Court, leading to an undue emphasis on purely procedural matters. However, the Court has already responded to this risk in *Shindler v UK*, concerning the restriction on voting rights of UK citizens who have been non-resident for 15 years or more. The Court noted that the UK Parliament had sought to weigh the competing interests and to assess the proportionality of the 15-year rule. However, 'This is not to say that because a legislature debates, possibly even repeatedly, an issue and reaches a particular conclusion thereon, that conclusion is necessarily Convention compliant. It simply means that that review is taken into consideration by the Court for the purpose of deciding whether a fair balance has been struck between competing interests' (para 117).

Closing remarks – Dr Alice Donald, Middlesex University

The conference has thrown a spotlight on the role of parliamentary actors within the Convention system, both at the domestic level and within the Parliamentary Assembly. The obligations under the Convention fall upon the state. However, states are not unitary actors; rather, they are a collection of actors each with separate motivations, capacities and interests. There is not only one 'political will' but many.

Parliaments can be a galvanising force, but also an obstructive one, since the process of implementing Convention standards and ECtHR judgments is an inherently political one. The conference has drawn attention to the different ways in which parliaments may lack capacity – in relation to information, expertise, and institutions, as well as their ability to interact with other branches of the state or Strasbourg bodies. However, awareness of these potential deficiencies helps to identify how to strengthen the capacity of parliaments in order that they can fulfil both the 'efficiency' and 'legitimacy' imperatives identified by several speakers.

Both within scholarship and practice, it is important to develop a greater understanding of the role that parliaments do – and should play – in the protection and realisation of rights. The Council of Europe has shown an increasing recognition of the centrality of the parliamentary

role. Governments recognised it in the Brussels Declaration. The Parliamentary Assembly continues to encroach on the still dominant, but no longer exclusive, supervisory role of the CM, as well as doing valuable capacity-building work both with MPs and parliamentary staff. For its part, the Court has shown itself to be increasingly attuned to the relevance of domestic democratic deliberation to its own determinations.

Appendix: Draft Principles and Guidelines on the Protection and Realisation of the Rule of Law and Human Rights

These Draft Principles and Guidelines have been drafted by Murray Hunt, Legal Adviser to the Joint Committee on Human Rights in the UK Parliament. The Draft Principles and Guidelines presently have no official status but it is anticipated that they will be debated widely with a view to their formal adoption by relevant international, regional and national bodies.

Parliaments have a special role in the protection and realisation of the rule of law, including human rights.

As the pre-eminent representative institution of the State, Parliaments enjoy a special democratic legitimacy. In their capacity as representatives of the people, parliamentarians are key actors in the protection and realisation of human rights and in building a society imbued with the values of democracy, human rights and the rule of law. Parliaments should seek to use their democratic legitimacy to build a culture of respect for and fulfilment of both human rights and the rule of law, founded as far as possible on a national consensus.

Reasonable people can disagree about the scope of a particular human right, the priority to be given to one right over another where rights conflict and the strength of justifications for interfering with human rights. Such disagreement about human rights is legitimate and Parliament, as the representative institution, is a legitimate forum for such disagreement. One of Parliament's most important functions is to represent people's views in the policy-making process. Disagreement about human rights should always take place within the framework of the State's commitments to human rights in both national law (constitutional or otherwise) and international law (including obligations assumed under international human rights treaties).

As an organ of the State, Parliaments share with the Executive and the Judiciary the obligation to respect, protect and fulfil the human rights which are recognised in national law and in international treaties by which the State has agreed to be bound. International and regional mechanisms for protecting human rights are subsidiary to the national machinery. Primary responsibility for securing in national law the rights and freedoms recognised in international treaties, and for ensuring the availability at national level of an effective remedy if those rights or freedoms are violated, rests with the State. Parliaments share that responsibility with the Executive and the Judiciary.

Because of the nature of their functions, and in particular their role in making law, Parliaments are the national authorities which are particularly well-placed to ensure that effective measures are taken to prevent violations, and to ensure that national law provides practical and effective means by which remedies may be sought for alleged violations of rights and freedoms. Their other important function, oversight of the Executive, also makes

them well-placed to monitor the Executive's performance of its own responsibilities to protect and realise human rights and to comply with the rule of law.

These Principles and Guidelines are intended to assist parliaments and parliamentarians everywhere to fulfil their important role in the protection and realisation of human rights in a democracy committed to the rule of law.

I. Parliamentary Structures

Parliaments should have adequate internal structures to enable them to fulfil their responsibility to protect and realise human rights and uphold the rule of law.

These internal parliamentary structures should ensure rigorous, regular and systematic monitoring of the government's performance of its responsibilities to secure the rights and freedoms recognised in national law and in the State's international obligations.

A. Specialised Human Rights Committee

Parliaments should identify or establish a specialised parliamentary Human Rights Committee.

The specialised parliamentary Human Rights Committee could be a committee dedicated solely to human rights. Parliaments could, however, identify or establish a relevant parliamentary committee which expressly includes human rights as part of its remit. In these Principles and Guidelines, either type of committee is referred to as 'the Human Rights Committee'.

B. Mainstreaming Human Rights across Parliament

In addition to establishing a specialised Human Rights Committee, Parliaments should take active steps to mainstream human rights across the entire range of Parliament's activities and functions.

Parliaments should ensure that expert advice on human rights, including but not confined to legal advice, is available to all parliamentary committees and to all parliamentary officials.

All parliamentary committees should identify which human rights are most relevant to their work. They should proactively seek expert advice, including legal advice, about the relevant human rights whenever their work engages a human right.

The parliamentary legal service should include lawyers with expertise in human rights law.

Parliaments should ensure that the necessary institutional safeguards are in place to guarantee the independence of Parliament's legal advisers, including written procedures for dealing with improper pressure from members of Parliament or other parliamentary staff.

The parliamentary legal service should proactively deploy its expertise in human rights law to ensure that Parliament and all parliamentary committees receive expert advice about

relevant human rights law across the full range of their functions and activities, and to assist them to identify when their work engages human rights.

Parliaments should put in place the necessary systems to ensure that the Speaker of the Parliament (or equivalent) is always informed in advance, and if necessary advised, when a parliamentary proceeding engages Parliament's responsibility to protect and/or realise human rights and the rule of law.

Parliaments should ensure that any relevant reports of the specialised parliamentary human rights committee are both drawn to the attention of and made available to members before any parliamentary proceeding which will include consideration of human rights and rule of law issues.

Parliaments should ensure that any relevant reports of the National Human Rights Institution are both drawn to the attention of and made available to members before any parliamentary proceeding which will include consideration of human rights issues.

C. Budgets

Parliaments have a special role in the determination of budgetary allocations and should seek to use all appropriate opportunities to ensure that due priority is given in the setting of national budgets to the fulfilment of the State's human rights obligations.

II. The Specialised Parliamentary Human Rights Committee

A. Establishment

The specialised parliamentary Human Rights Committee must be established by Parliament, not the Executive, and its permanent existence should be enshrined in Parliament's Standing Orders.

B. Remit

The remit of the specialised parliamentary Human Rights Committee should be broadly defined. It should concern human rights in the State in question and should reflect the fact that Parliament has the obligation both to protect and to realise human rights in that State.

It may not be part of the Human Rights Committee's remit to consider individual complaints, other than as examples of a more general human rights issue.

The remit of the specialised Human Rights Committee should be defined in such a way as to enable the committee to take into account all relevant sources of human rights standards in both national and international law.

C. Composition and Guarantees of Independence and Pluralism

The independence of the parliamentary Human Rights Committee from both the Government and non-state actors, including NGOs, is vital to its credibility.

The composition of the Human Rights Committee should be defined in such a way as to ensure that there can be no Government majority on the Committee.

The composition of the Human Rights Committee should be as inclusive as possible of all the parties represented in the parliament and should reflect the principles of pluralism and gender balance.

Bicameral parliaments should consider whether the Human Rights Committee should be a Joint Committee of both Houses where possible.

Members of the Human Rights Committee should be appointed by a transparent process which commands public trust and confidence in the independence of the Committee.

Parliaments should ensure that mechanisms exist for any possible conflicts of interest to be declared by members of the Human Rights Committee.

Members of the Human Rights Committee should have a proven expertise and interest in human rights.

Members of the Government should be ineligible to be members of the Human Rights Committee. A member of the Human Rights Committee who is appointed to the Government should immediately resign from the Committee.

The Chair of the Human Rights Committee should be elected by members of Parliament and should be a senior parliamentarian of proven independence.

D. Powers

The Human Rights Committee should have the power

- to initiate inquiries of its own choosing
- to compel witnesses to attend, including Government ministers
- to compel the production of papers
- to hold oral evidence hearings
- to conduct visits, including visits abroad
- to access places of detention without notice
- to report to Parliament
- to make recommendations to the Government.

Where possible, the Human Rights Committee could have various powers of initiative, including the power:

- to initiate parliamentary debates on its reports or on subjects of its choosing
- to propose amendments to legislation
- to introduce bills into Parliament concerning matters within its remit.

E. Staff

The Human Rights Committee should be supported by specialised staff with expertise in human rights law and policy.

In order to ensure the independence of the Human Rights Committee, including the appearance of independence, the staff of the Committee should not be on secondment either from Government or from NGOs.

III. Functions of the Human Rights Committee

The principal function of the specialised Human Rights Committee should be to inform parliamentary debate about human rights by:

- Advising Parliament about the human rights which are relevant to any issue being considered by Parliament
- Identifying the relevant factual questions which must be answered if Parliament is to be satisfied that it is acting compatibly with human rights
- Obtaining information from the Government about the justification for actions or inaction which affect human rights
- Advising Parliament about the human rights framework in which human rights issues should be considered by Parliament.

A. Core Functions

(1) Legislative Scrutiny

The Human Rights Committee could systematically scrutinise all Government Bills for their compatibility with human rights.

To facilitate such legislative scrutiny, the Human Rights Committee could ask the Executive to report systematically to Parliament on the compatibility of draft legislation with human rights.

The Human Rights Committee could seek to identify opportunities for Parliament to legislate to give effect or better effect to human rights obligations, including the implementation of treaty obligations, recommendations of the treaty bodies and judgments of Courts (national or international) concerning human rights.

(2) Scrutiny of Executive Response to Human Rights Judgments of Courts

The Human Rights Committee could systematically scrutinise the Executive's response to court judgments against the Government concerning human rights, including the judgments of international courts, with a view to reporting to Parliament on the promptness and adequacy of the Executive's response.

To facilitate such scrutiny, the Human Rights Committee could ask the Executive to report at least annually to Parliament on its responses to human rights judgments.

The Human Rights Committee could monitor relevant developments in human rights law, including judgments of international courts in cases against other States, with a view to identifying possible implications for national law, policy or practice.

(3) Scrutiny of Compliance with and Implementation of International Human Rights Obligations

The Human Rights Committee could monitor the State's compliance with and implementation of its international human rights obligations.

(a) Scrutiny of State's Compliance with Existing International Human Rights Treaties

The Human Rights Committee could scrutinise the State's reports to the UN treaty bodies, and any other compliance reports provided by the Executive to any other international mechanism concerning human rights.

The Human Rights Committee could consider sending any relevant report it has published directly to the monitoring bodies, and in appropriate cases sending a representative of the Committee to attend any relevant hearing before the monitoring bodies.

The Human Rights Committee could monitor the Executive's response to the Concluding Observations of the UN treaty bodies and seek opportunities to follow up the most significant of the recommendations contained in those Observations.

(b) Scrutiny of International Treaties Prior to Ratification

The Human Rights Committee could scrutinise proposed human rights treaties, and other international treaties with implications for human rights, and report to Parliament thereon, prior to their ratification.

Pre-ratification scrutiny of treaties could include scrutiny of the Government's justification for any proposed reservations or interpretative declarations to the treaty.

(c) Scrutiny of State of Accessions/Ratifications

The Human Rights Committee could ascertain and keep under review the Government's reasons for not acceding to or ratifying existing international human rights treaties.

(4) Inquiries into Topical Human Rights Issues

The Human Rights Committee could hold inquiries into topical issues concerning human rights, particularly in areas where there is concern about the country's compliance with its human rights commitments whether national or international.

The Human Rights Committee could develop a rigorous methodology for ensuring that it only conducts such inquiries where it is satisfied that it is uniquely placed, as a specialised parliamentary committee, to make a significant contribution to public understanding of the issue in question, over and above that made by other bodies, including national human rights institutions, or other parliamentary committees.

(5) Scrutiny of Government Policy Generally for Human Rights Compatibility

The Human Rights Committee may choose not to confine itself to scrutiny of legislation but could also scrutinise Government policy generally where it has significant human rights implications, in order to assist Parliament perform its function of oversight of the Executive.

(6) Monitoring the Adequacy of the National System for the Protection of Human Rights

The Human Rights Committee could keep the practical effectiveness of national mechanisms for the protection and realisation of human rights under review, including in particular:

- The adequacy of legal remedies
- Access to legal remedies
- The availability of effective alternatives to legal remedies.

B. Desirable but Non-core Functions

The Human Rights Committee could also develop the following desirable but non-core functions.

(1) Pre-legislative Scrutiny

The Human Rights Committee could also scrutinise Government policy proposals raising significant human rights issues which are likely to become legislative proposals.

(2) Post-legislative Scrutiny

The Human Rights Committee could also conduct post-legislative scrutiny of legislation with significant human rights implications on which it reported during the legislation's passage through Parliament.

(3) Scrutiny of Secondary Legislation

If resources permit, the Human Rights Committee could also scrutinise secondary legislation for human rights compatibility. Parliaments should ensure that mechanisms exist for identifying significant human rights issues raised by secondary legislation.

IV. Working Methods of the Human Rights Committee

The Human Rights Committee should publish a statement of its working practices. It should keep its working practices under regular review in the light of practical experience.

A. Priority Policy

The parliamentary Human Right Committee should, after public consultation and discussion with, amongst others, NHRIs, publish an explicit priority policy indicating the human rights issues it proposes to prioritise in its work programme, and the criteria according to which it will assess the significance of a human rights issue when deciding on its priorities.

B. Decision by Consensus

The Human Rights Committee should strive to reach consensus on the issues on which it reports, so far as it is possible to do so.

C. Transparency

The Human Rights Committee should maintain an up-to-date website, on which all relevant documents are publicly accessible.

All correspondence with the Human Rights Committee shall be published on the Committee's website as soon as possible after it has been sent or received.

In order to maintain public trust and confidence the Human Rights Committee should, so far as possible, avoid considering confidential material when it is carrying out its functions.

D. Civil Society

The Human Rights Committee should conduct its work in such a way as to provide opportunities for civil society to have a direct input into parliamentary consideration of human rights issues.

E. Reporting

The Human Rights Committee should report regularly to Parliament on its activities in the performance of its functions.

The Human Rights Committee should report annually to Parliament on its activities during the year and on the outcome of every review of its working practices.

The Human Rights Committee should expect the Executive to respond within a reasonable time to recommendations it makes in its reports.

F. Follow up

The Human Rights Committee should seek to follow up its reports and recommendations, including by seeking opportunities for parliamentary debate or Executive action.

V. Key Relationships

Parliaments and the parliamentary Human Rights Committee should develop and maintain consistent and effective working relationships with a range of key interlocutors. Such relationships should be established and maintained at the level of both members and officials.

A. Relationship with the Executive

Parliaments and the Human Rights Committee should help the Executive to understand how Parliament will fulfil its responsibilities to protect and realise human rights by developing, in close consultation with the Executive, detailed guidance for the Executive in respect of each of the functions identified above.

B. Relationship with Courts

Parliaments should seek to ensure that mechanisms are in place, which are consistent with the important principle of the separation of powers, for representative judicial views to be made available to Parliament to assist it in its scrutiny of laws or policies which affect the exercise of the judicial function or otherwise have significant implications for the rule of law.

Where a court wishes to consider what parliamentary consideration there has been of any human rights issue the court has to determine, Parliaments should facilitate such judicial consideration.

C. Relationship with NHRIs

Parliaments and the Human Rights Committee shall establish an effective co-operation with National Human Rights Institutions, and in doing so shall have particular regard to the Belgrade Principles on the Relationship between National Human Rights Institutions and Parliaments.

D. Relationship with Other Parts of National Human Rights Machinery

The Human Rights Committee shall develop working relationships with other parts of the national human rights machinery, including Ombudsmen, relevant commissioners, and independent reviewers, with a view to ensuring the coherence and co-ordination of that machinery, and its optimal use of resources for the protection and realisation of human rights.

E. Relationship with Civil Society

Parliament and the Human Rights Committee should be well connected with relevant civil society networks.

F. Relationship with International Human Rights Machinery

The Human Rights Committee should establish and maintain a close relationship with all parts of the relevant regional and international human rights machinery, including the UN treaty bodies and Special Procedures.

G. Relationship with Other Parliamentary Committees

The Human Rights Committee shall establish effective working relationships with other parliamentary committees with a view to ensuring that opportunities for Parliament to fulfil its obligations to protect and realise human rights are not missed.

H. Relationship with the Media

Parliaments and their Human Rights Committee should maintain close relations with the media, and be particularly vigilant about the importance of free and independent media to the protection of human rights in a democracy.

I. Relationship with Academic Institutions

Parliaments and the Human Rights Committee should maintain close relations with academic institutions, including human rights research institutes, so that relevant academic research about human rights informs scrutiny of policy and legislation, and research agendas in universities are informed about the human rights issues which are of pressing practical concern.

J. Relationship with the Legal Profession

Parliaments and the Human Rights Committee should maintain close relations with the legal profession and its representative bodies, and in particular with practitioners in relevant fields including human rights and constitutional law.

VI. Training and Research Services

A. Training

Parliaments could provide or arrange appropriate induction training in human rights and the rule of law for all new members of Parliament and staff, and at regular intervals thereafter. Parliaments should ensure that every member of Parliament is provided with a copy of the IPU's Handbook on Human Rights for Parliamentarians and other relevant materials about the role of Parliament in relation to human rights.

Parliaments should avail themselves of appropriate technical assistance available from international organisations to assist them to build their capacity to fulfil their role in the protection and realisation of human rights and the rule of law.

B. Research Support

Parliaments should ensure that their libraries and on-line resources provide access to the most relevant human rights materials required by parliamentarians to fulfil their role in the protection and realisation of human rights and the rule of law.

Parliaments should ensure that their research services include appropriate expertise in human rights and proactively provide regular updates to all members of parliament on significant human rights issues, in anticipation of the human rights issues likely to be most relevant to parliamentary business.

VII. Effectiveness

Parliaments should develop a methodology for assessing their effectiveness in the protection and realisation of human rights.