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Further support for the execution by Ukraine of judgments in respect of Article 6 of the European Convention on Human Rights

Expert Analysis

Parliamentarian oversight on the execution of the ECtHR judgments: Brief overview of the practices of CoE member states resolving the systemic problem of non-execution

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LIST OF ABBREVIATIONS

CoE	Council of Europe
CM	Committee of Ministers of the CoE
the Convention	European Convention on Human Rights
ECtHR	European Court of Human Rights
the Verkhovna Rada	Verkhovna Rada of Ukraine (Parliament)
the Assembly	Parliamentary Assembly of the CoE

EXECUTIVE SUMMARY

1. In the context of the execution of the *Burmych* group of judgments delivered by the ECtHR,[1] the Ministry of Justice of Ukraine requested an analysis of the systems of effective parliamentary oversight of the execution of the said judgments in other European countries.
2. This assistance was provided through the CoE project "Further support for the execution by Ukraine of judgments in respect of Article 6 of the European Convention on Human Rights" (the Project), which is funded by the Human Rights Trust Fund and implemented by the Justice and Legal Co-operation Department of the CoE. The Project invited Mr Lilian Apostol, an international expert of the CoE, to prepare the requested expert analysis. Mr Apostol had been involved previously in developing the draft national strategy for the implementation of general measures for the execution of the pilot judgments in the cases of *Yuriy Nikolayevich Ivanov v. Ukraine* and *Burmych and Others v. Ukraine*.
3. The Project provided the Ukrainian authorities with a number of expert opinions and analyses covering a range of topics related to the issue of non-execution of national judgments. The experts' documents, amongst others, addressed the question of lifting social benefits, as the current social legislation appears to be at the root of the said problem. In this context, the matter became one of the Verkhovna Rada's responsibilities in their contribution to the execution of the *Burmych* group of judgments.[2]
4. The present analysis is focused on the role of parliaments in the execution of the ECtHR judgments overall, and in particular in changing legislation that aims to resolve the systemic problem of non-execution identified in the *Burmych* group of cases.
5. As regards the methodology, this analysis was prepared on the basis of the CoE standards, the practice of the ECtHR, and the relevant documents of the Project.

Parliamentary oversight in general

6. National parliaments play an equally important role in the execution of the ECtHR judgments as the executive and the judicial branches of the state power.

7. There are two key elements of parliamentary oversight in the process of executing the ECtHR judgments: 1) **the legislative function** held by parliaments to change, lift, or repeal the legislation at the root of the violations and/or provide a legal basis for the introduction or improvement of effective remedial measures by passing new legislation, and 2) the **co-operative function** with the executive branch, which is primarily responsible for the implementation of the ECtHR judgments in complex, structural and systemic situations where a range of general measures is required. The Assembly adds another specific function to the parliamentary oversight, namely **the preventive function,** held by parliaments to introduce remedial measures when the violation of the Convention and the ECtHR judgment require it to do so.

[1] Committee of Ministers, *Group ZHOVNER v. Ukraine* (2004); *Group YURIY NIKOLAYEVICH IVANOV v. Ukraine* (2009); *Group BURMYCH AND OTHERS v. Ukraine* (2017) See for details http://hudoc.exec.coe.int/eng?i=004-47973

[2] It was framed as how to better employ the Ukrainian legislature into the process of execution via its parliamentarian oversight and convince the MPs to accept lifting the social benefits. See "Analysis on improving socially-oriented legislation as part of the execution of the European Court of Human Rights judgments. Selected practice of the CoE member states".

8. When an ECtHR judgment reveals systemic problems, then the role of the national parliaments is broader. In addition to changes to legislation, the parliaments might be asked to intervene and introduce remedial measures by passing new legislation to that end. In addition, the parliaments should be able to eliminate the root causes of systemic violations, if they are legislative in character.

9. How the parliaments perform their oversight and organise their work is mainly discretionary.

10. The analysed practices of the CoE member states demonstrated that the execution of the ECtHR judgments in areas that revealed systemic problems was more effective when the parliaments intervened and co-operated with their respective governments.

The *Burmych* group of judgments

11. The Ukrainian Government already identified the root causes of the problem of non-execution of national judgments and proposed general measures aimed at tackling this issue. However, none of these measures could be carried out without the involvement of the legislature.

12. There is a need to formulate and adopt a comprehensive legislative package, which will, inter alia, include laws on a new and efficient enforcement system; a new social security system, including the budgetary resources to implement this; and provide for the lifting of moratoria.

Recommendations

13. The role of the Verkhovna Rada in the process of the execution of the *Burmych* group of cases should be crucial due to its legislative role in reforming the enforcement system by changing legislation, which in this case may include erasing the root causes of violations by repealing problematic social legislation; lifting moratoria; and enacting remedial legislation.

14. It is recommended that the Verkhovna Rada should fulfil its duty to provide oversight by co-operating with the government. The implementation of the *Burmych* judgments could and should be done only together with the government institutions retaining the necessary expertise to reform the enforcement system.

15. It is recommended that a special multi-agency working group be created (to include the Government, the Parliament, the judiciary, as well as other experts representing last-resort institutions), to act on an *ad-hoc* basis and respond to the challenges of the *Burmych* group of judgments.

GENERAL CONSIDERATIONS

The present chapter reflects two primary aspects that are relevant to the topic. The first is about parliamentary oversight in general and the second deals with the specific context of the *Burmych* group of judgments' execution process requiring the involvement of the Verkhovna Rada. These aspects must be explored to draw an overall conclusion on how the Ukrainian model of parliamentary oversight might help to bring about the successful execution of the *Burmych* group of cases.

About the parliamentarian oversight in general

The topic of parliamentary oversight of the execution of the ECtHR judgments is well explored both in theory and in practice. A number of thorough and detailed studies were conducted and as many valuable recommendations were given in this sense. Some of these studies included a thorough analysis of existing practices in Ukraine,[3] as well as in other countries that introduced parliamentary oversight for the purposes of implementing ECtHR judgments and human rights obligations arising from international treaties[4].

In general, questions concerning parliamentary control have, in fact, been elevated to a universal level. It is argued that there is an emerging consensus amongst the international community, not only the members of the CoE, that effective parliamentary oversight over human rights obligations is strongly recommended.[5] As regards the protection of human rights on a global level, the UN High Commissioner of Human Rights has suggested that this is a matter of soft law by guiding principles.[6] At the regional level, namely at the CoE level, the need and the means of

[3] Philip Leach and Alice Donald, *Parliaments and the European Court of Human Rights* (Oxford University Press, 2016), pt. II Ch. 5, https://doi.org/10.1093/acprof:oso/9780198734246.001.0001.

[4] International Bar Association Human Rights Institute (IBAHRI), 'Human Rights and Parliaments: Handbook for Members and Staff', March 2011, https://doi.org/10.1163/2210-7975_HRD-9923-0009; Almut Wittling-Vogel, 'The Role of the Legislative Branch in the Implementation of the Judgments of the European Court of Human Rights', in *Judgments of the European Court of Human Rights - Effects and Implementation* (Nomos Verlagsgesellschaft mbH & Co. KG, 2014), 59–74, https://doi.org/10.5771/9783845259345_59; Matthew Saul, Andreas Follesdal, and Geir Ulfstein, eds., *The International Human Rights Judiciary and National Parliaments: Europe and Beyond*, 1st ed. (Cambridge University Press, 2017), https://doi.org/10.1017/9781316874820; European Implementation Network, *Implementation of Judgments of the European Court of Human Rights. A Handbook for NGOs, Injured Parties and Their Legal Advisers*, 2018, https://static1.squarespace.com/static/55815c4fe4b077ee5306577f/t/5b9a2d1dc2241b0df20e3e54/1536830763149/Handbook-EIN-Web-FINAL-compress.pdf.

[5] '...Although parliaments were not recognised as distinct stakeholders by international and regional human rights bodies until relatively recently, there has been a growing international recognition of the important role that parliaments play in implementing the human rights obligations voluntarily assumed by States and imbuing these obligations with democratic legitimacy. International and regional human rights organisations have increasingly recognised this role, and have taken steps to foster greater parliamentary engagement with human rights mechanisms....' Brian Chang, 'Global Developments in the Role of Parliaments in the Protection and Promotion of Human Rights and the Rule of Law: An Emerging Consensus', *Arts and Humanities Research Council*, 2018, 48.

[6] OHCHR, 'Draft Principles on Parliaments and Human Rights (Report of the OHCHR to the HRC, Pages 14-16)', 2018, https://www.ohchr.org/Documents/HRBodies/UPR/Parliaments/DraftPrinciplesParliament_EN.pdf.

parliamentary oversight has already been thoroughly codified by the Assembly.[7] The Parliamentary Assembly of the CoE handbook has been translated into Ukrainian[8].

The present research, however, does not concern parliamentary oversight as a mechanism for the implementation of human rights in general. It mainly regards the existing principles from the perspective of the execution of the ECtHR judgments, in particular. It does not cover all the practices of the States and recommendations given in this matter. Nor it is about the creation of permanent and general mechanisms in the Verkhovna Rada to supervise and control the execution process or to implement human rights. Indeed, these mechanisms exist in Ukraine and they are working. The research is focused on the specific task of how the Verkhovna Rada might respond to the challenge of the *Burmych* execution. Thus, in what follows, only the most relevant and brief aspects of the universal principles concerning the role of parliaments in human rights protection shall be illustrated.

Parliamentarian oversight as part of a universal human rights implementation

The purpose of this sub-chapter is to summarise the key elements of the parliamentary oversight doctrine, as is relevant to the purposes of the present research. It looks at parliamentary oversight mainly from two perspectives, functional and operational. The first perspective is about the which particular functions parliamentary oversight should retain in order to be effective in the execution of ECtHR judgments. The second perspective looks into the principles of the internal organisation of the parliaments to perform these tasks.

As previously mentioned, there are many studies and recommendations concerning the parliamentary oversight of human rights issues. Yet, all of them begin from the very basic idea that parliaments should retain the primary role in domestic human rights protection mechanisms.

> *"There is at present an unprecedented level of attention given to the importance of increasing parliamentary engagement with both the international and regional machinery for protecting human rights, and other national human rights and rule of law actors"*[9]

This quote reflects the basic idea of the role of parliaments in the universal implementation of human rights. Further to this, the researchers came up with other relevant recommendations on parliamentary engagement in human rights issues, amongst which it is underlined that:

> *b. At the regional level, parliaments and parliamentary human rights committees should work together with the relevant regional bodies to monitor the enforcement of judgements of the regional human rights court.*
>
> *c. At the national level, parliaments and parliamentary human rights committees should build effective working relationships with all the key stakeholders, and work together with other parts of the national human rights machinery to ensure*

[7] PACE, *National Parliaments as Guarantors of Human Rights in Europe. Handbook for Parliamentarians* (Council of Europe Pub., 2018), http://www.assembly.coe.int/LifeRay/JUR/Pdf/Handbook/HumanRightsHandbook-EN.pdf.
[8] PACE, *Національні парламенти – гаранти прав людини в Європі. Посібник для парламентарів* (Council of Europe Pub., 2018), http://www.assembly.coe.int/LifeRay/JUR/Pdf/Handbook/HumanRightsHandbook-EN.pdf.
[9] Chang, 'Global Developments in the Role of Parliaments in the Protection and Promotion of Human Rights and the Rule of Law'.

the coherence and co-ordination of that machinery, and its optimal use of resources for the protection and realisation of human rights.[10]

The OHCHR Draft Principles on the role of parliaments in human rights protection underline the legislative functions as the first key elements after the adherence to the international human rights instruments:

2. A parliamentary human rights committee shall, inter alia, have the following responsibilities:

…

(b) To introduce and review bills and existing legislation to ensure compatibility with international human rights obligations and propose amendments when necessary;

(c) To lead the parliamentary oversight of the work of the Government in fulfilling its human rights obligations, as well as political commitments made in international and regional human rights mechanisms;[11]

The process of execution of the ECtHR judgments definitely falls into the meaning of the "international human rights obligations" and "the Government's human rights obligations" as provided by the above quote. Thus, in addition to other functions of the parliaments in human rights implementation, the legislative functions and cooperation with the executive branch are being seen as crucial for the overall protection machinery of human rights[12]. The same view is shared by the institutions of the CoE. The PACE has underlined the legislative functions as a primary element for the implementation of the judgments of the ECtHR along with the need to oversight the government's work in that regard[13]. Thus, these two key elements of the parliamentarian oversight represent the starting point for the present analysis.

This does not mean that the whole range of other functions of the parliaments in human rights should be disregarded as irrelevant. The national parliaments retain other important functions such as to ratify human rights instruments, to regulate and control budgetary support for the implementation of human rights, to draft necessary human rights expertise and policies, action

[10] Brian Chang and Graeme Ramshaw, 'Strengthening Parliamentary Capacity for the Protection and Realisation of Human Rights. Synthesis Report', 26 August 2017, ii, https://www.wfd.org/2017/08/26/strengthening-parliamentary-capacity-protection-realisation-human-rights/.

[11] OHCHR, 'Draft Principles on Parliaments and Human Rights (Report of the OHCHR to the HRC, Pages 14-16)'.

[12] "Parliaments have an important role to play in ensuring respect for human rights law, particularly on the basis of two of their principal functions. Their law-making functions make them well-placed to ensure that effective measures are taken to prevent human rights violations and to ensure that national law provides practical and effective means by which remedies may be sought for alleged violations of human rights. Their other important function, oversight of the executive (the government), also means that they have a role in monitoring the government's human rights performance. " Chang and Ramshaw, 'Strengthening Parliamentary Capacity for the Protection and Realisation of Human Rights', chap. Introduction.

[13] 'The Parliamentary Assembly has identified, in Resolution 1823 (2011), a range of functions that parliamentarians need to fulfil as guarantors of human rights. These include functions that may prevent violations of human rights, such as systematically verifying the compatibility of draft legislation with Convention standards and functions that ensure rigorous oversight of executive and administrative bodies when it comes to the implementation of human rights norms and of judgments of the European Court of Human Rights.' PACE, *National Parliaments as Guarantors of Human Rights in Europe*, 28.

plans and, not least, to cooperate with other international, regional and national institutions, including judiciary on matters of practical enactment of human rights standards. They may conduct human rights inquiries in matters of general interest or high-profile individual cases, etc.[14] These above-mentioned functions remain valid and necessary for the implementation of human rights overall. Still, for the purposes of the present research, the legislative and the cooperative functions should be featured as the primary elements of the parliamentarian oversight.

While the OHCHR Draft Principles see the parliaments as general draft legislators in the matters of human rights, the PACE adds another specific function to the parliamentarian oversight. This additional function remains in line with the primary legislative powers. It is a preventive function of the parliaments to introduce remedies when the violation of the Convention and the ECtHR judgment requires to do so[15]. In other words, the parliaments should not be held responsible only for the changes in legislation that is running contrary to the particular human right standard. They are also compelled to introduce legislative remedies so as to ensure that the judiciary and the administrative branches fulfil their functions to repair and prevent further violations[16].

As it could be observed, the above-described aspects of the parliamentarian oversight concern the substantive functions that the parliaments should retain in the human rights area. Here and overall, a universal consensus could be easily observed; many of the parliaments over the world agree with such functions. Still, the question remains open about how the parliaments should do so. There is no clear vision and overall agreement what are the recommended operational mechanisms within the domestic parliaments to perform such human rights functions.

The studies on the universal role of the parliaments are inclined to suggest the creation of specialised parliamentary structures.[17] The OHCHR Draft Principles take this approach as unconditional and without even mentioning the option of a dedicated structure within the domestic parliaments. The only condition is that a special committee must have a broad mandate[18]. However, in the opinion of regional international parliamentarian structures the question on the internal organisation of the parliamentarian oversight should fall into the broad discretion of the domestic parliaments. The PACE is more or less explicit in this sense. It recognises that how the

[14] see para. 2 p.p. d]-k) OHCHR, 'Draft Principles on Parliaments and Human Rights (Report of the OHCHR to the HRC, Pages 14-16)'.

[15] "...Where the origin of a human rights violation identified by the Court is a defective law, parliamentarians have an indispensable role in legislating to remedy the violation. This is especially important where the problem with the law in question may give rise to multiple applications to the Court... PACE, *National Parliaments as Guarantors of Human Rights in Europe*, 31.

[16] As lawmakers, parliamentarians can ensure that measures are taken to prevent violations, and that practical and effective remedies are available at the domestic level for alleged violations of human rights. Parliaments may also need to legislate in order to give effect to adverse judgments of the Court, or the decisions of other international human rights bodies, especially where they reveal structural or systemic problems, and allocate an adequate budget for doing so. PACE, 18.

[17] 'As a starting point, the existence of a specialised parliamentary human rights committee is important because it sends a strong political message that human rights are to be taken seriously by parliament, as well as ensuring that human rights concerns feature prominently and regularly in parliamentary discussions. All six of the parliaments studied had a dedicated human rights committee or a committee with an express human rights mandate (the parliamentary human rights committee).' Chang and Ramshaw, 'Strengthening Parliamentary Capacity for the Protection and Realisation of Human Rights', 37.

[18] '1. A parliamentary human rights committee shall be given as broad a mandate as possible, covering all human rights as defined in national and international law. The mandate of the parliamentary human rights committee shall also provide clear terms of reference setting out its purpose and goals.' OHCHR, 'Draft Principles on Parliaments and Human Rights (Report of the OHCHR to the HRC, Pages 14-16)'.

domestic parliaments should organise their work remains the issue open for them to decide[19]. Its opinion is based on the evaluation of practices among the members of the CoE and the 3 models of the parliamentarian oversight drawn therefrom[20]. The domestic parliaments of the CoE member states embrace a specialised, cross-cutting and hybrid model of institutionalised parliamentarian oversight[21]. Thus, the PACE upholds any of the models and does not give preference to a centralised model of a dedicated committee as it transpires from the OHCHR Draft Principles[22].

In general, the PACE prefers to any of these models another innovative solution[23]. This "innovative model" puts emphasis on a cooperative approach, when the parliamentarians work together with the representatives of other branches of power. Strictly speaking, this model is outside of the parliamentarian oversight in its classic understanding. The parliament in this model is represented equally along with other branches. Still, it appears to be the most effective operational mechanism to share obligations of execution of the ECtHR judgments between the authorities and to foster collective responsibility. This is relevant in the cases revealing systemic dysfunctions and structural problems with human rights[24].

Any such judgment binds the State as a whole and what domestic authority(s) will be better equipped to secure execution depends on a variety of factors. It could be the nature of the violation or the specificity of the domestic context or the complexity of the factual and legal issues in the impugned case, etc. The Government here appears as a "driving force" to identify the domestic authorities responsible for the execution. In the situation of systemic human rights violations, the leading factor is the rule that a systemic violation requires systemic responses. Systemic problems, understandably, cannot be solved by the government alone. Thus, inter-institutional Committees are better positioned to find systemic solutions, as they only are able to secure the

[19] 'PACE has refrained from prescribing a single institutional model of parliamentary human rights work, and has instead adopted a flexible approach in order to ensure that the structures set up are appropriate for the particular national context.' PACE, *National Parliaments as Guarantors of Human Rights in Europe*, 48.

[20] 'Parliaments have adopted a variety of institutional models for the conduct of human rights oversight: some are wholly decentralized (the cross-cutting model), while others have allocated the role to a single committee (the specialized model) or to more than one committee (the hybrid model). Some domestic systems of implementation have a basis in national legislation, although the mere presence of such legislation is no guarantee of effectiveness in the absence of political commitment.' Leach and Donald, *Parliaments and the European Court of Human Rights*, pt. 1 Chapter 3.3.

[21] PACE, *National Parliaments as Guarantors of Human Rights in Europe*, 48.

[22] 'The Assembly's "Basic principles for parliamentary supervision of international human rights standards" (appended to Resolution 1823 [2011]) make explicit mention of "dedicated human rights committees or appropriate analogous structures",[citation] while also calling on parliaments "to set up and/or to reinforce structures that would permit the mainstreaming and rigorous supervision of their international human rights obligations". Indeed, the setting up of dedicated committees in and of itself is likely to be insufficient to ensure the effectiveness of parliamentary human rights mechanisms.' PACE, 48.

[23] " "A promising innovation is the creation of a dedicated group bringing together multiple institutions and individuals – including parliamentarians – who are tasked with ensuring the effective and full implementation of Court judgments. Working groups may be created to co-ordinate the implementation of particular judgments that require action from multiple agencies. PACE, 45.

[24] 'At a practical level, multilateral discussion has the potential to foster effective co-ordination and collective "ownership" of the implementation process. This may in turn help to identify and overcome points of obstruction, such as agencies that are either unwilling or unable to take the required action, and facilitate the design of feasible and sustainable legal and policy reform. This is particularly important for complex judgments that require a combination of legislative, administrative and/or judicial action and judgments that have remained unimplemented for a long period and require an injection of momentum.' PACE, 45.

required inter-institutional cooperation, including between the parliaments and other branches of power.

The present research will not dwell further on how a parliament should perform its functions and what model it should embrace in view of securing the execution of the ECtHR judgments. It mainly falls into the discretion of the state, in the present case the Verkhovna Rada.

The Verkhovna Rada has already long experience in defining its own internal mechanisms to exercise parliamentarian oversight. Regardless of the challenges and fluctuations that it has met while setting up and improving its own working methods, the operational mechanism of the parliamentarian oversight exists in Ukraine. It has been questioned for its efficiency but there is still hope that the parliamentarian model the Verkhovna Rada had chosen will prove to be effective eventually. It is not for the present study to analyse and evaluate its effectiveness. In this sense, the present research could only rely on the conclusions of a thorough evaluation of the Ukrainian parliamentarian oversight:

> *After a decade of tumultuous political upheaval in Ukraine, and in view of the dysfunctionality of many domestic institutions and the protracted and flawed processes of constitutional and legislative reform, there is an obvious need for stronger, more independent scrutiny mechanisms. The political system has been dominated by the presidential administration, thereby severely limiting the role played by parliament, and eroding public trust in parliamentarians.*
>
> *The preponderance of structural or systemic violations of the Convention in Ukraine has meant that it has been, and continues to be, the subject of repeated scrutiny by PACE. There is, nevertheless, a high level of respect for the Convention and ECtHR in Ukraine, including amongst parliamentarians (…). The introduction of a law in 2006 specifically addressing the implementation of ECtHR judgments was symptomatic of such respect, but the lack of any real political will to get to grips with structural and other serious human rights violations, coupled with the insufficient clout enjoyed by the government agent dealing with human rights, has meant that the law has had little impact in practice.*[25]

The truth is that in the case of Ukraine, it is not the question of the model that the Verkhovna Rada has elected to enforce its parliamentarian oversight; it is another question of "political willingness" and, sometimes, the overall political and social context in which the Ukrainian parliamentarians operate:

> *"[It has been] highlighted the potential importance of the role which parliament could play in realizing human rights standards, but at the same time it has shown the limited influence which has actually been exerted by the Verkhovna Rada or its committees in recent years. Following the 2014 parliamentary elections, there may, however, be opportunities for, and some signs of, positive democratic change. Leading parliamentarians, ... are cautiously optimistic about improving and developing domestic systems and capabilities to integrate and comply with international human rights standards, including by expanding the remit of the Human Rights Committee to take on the responsibility for monitoring the implementation of judgments of the European Court. Above all, this study of Ukraine underlines the fact that the issue of political will remains*

[25] Leach and Donald, *Parliaments and the European Court of Human Rights*, para. 5.6.

> *paramount, over and above the creation of suitable structures or legal powers of scrutiny"*[26].

It is obvious that the later aspect of "political willingness" is outside of the present research. It must be focused on legal questions and on the specific topic of the Verkhovna Rada's role in the execution of the *Burmych* group of cases.

Parliamentarian oversight as part of the execution process of the ECtHR judgments

Execution of the ECtHR judgments is not an easy and straightforward process when it comes to the implementation of general measures. It is even more difficult and burdensome to implement a judgment revealing structural or systemic problems in the state concerned. Accordingly, the role of the parliaments in this process does not appear to be clear at first glance. Still, it was well defined by the PACE and could be inferred from the following statement:

> *It is the responsibility of all the state organs—the executive, the courts and the legislature—to prevent or remedy human rights violations at the national level. Governments and parliaments are principally responsible for prevention, whereas remedying violations is mainly the responsibility of the judiciary, unless the only remedy available is a change to the law. The legislature must examine whether draft legislation is compatible with the Convention and its protocols, as interpreted by the Court.*[27]

Thus, the parliaments play an equally important role in the execution of the ECtHR judgments as the executive and the judicial branches. Sometimes, their role is so crucial that the execution would become virtually impossible without proper engagement of the legislature into the process. What role the parliaments should play in the execution process will depend on the character of a violation and the specificity of the required execution measures. Still, the intervention of the parliaments is mostly legislative in nature and it concerns either the need to change legislation, to lift incompatible provisions, or to introduce new legislation for remedial purposes.

Of course, not all judgments of the ECtHR require an intervention from the domestic parliaments, and not all general measures, as defined by the CM, might raise obligations of the legislatures to repeal or change legislations. Many judgments require changes in practices that do not question the quality of legislation. Mostly the structural or systemic problems, as framed by the ECtHR or the CM, call for such legislative measures in a much larger context of administrative, institutional, and structural reforms. In other isolated situations, the parliaments retain the primary role of execution when a judgment reveals a complex problem stemming from incompatible legislation. This might be the case only when the legislation lies at the very core of the violation or it generates repetitive cases, without being, however, a systemic problem in its essence.

In this sense, it is required to clarify the nature of violations that would call the domestic parliaments to intervene. As mentioned above, the violations requiring parliamentarian intervention could be either systemic, structural, or complex in character. Both the ECtHR and the CM retain their own criteria for the classification of these problems, still, both are adamant that none of these violations could be addressed exclusively by the executive or judicial branches of the respondent state. The violations of such character require legislative intervention, which is an

[26] Leach and Donald, sec. 5.6.
[27] PACE, Committee on Legal Affairs and Human Rights, Guaranteeing the authority and effectiveness of the European Convention on Human Rights, Doc. 12811, 3 January 2012 (Rapporteur: Marie-Louise Bemelmans-Videc) para. 56.

exclusive task of the domestic parliaments. The only question remains on how to determine the degree of parliamentarian intervention and what cases require changing of domestic laws; what laws should be changed and to what extent. Almost all the ECtHR judgments could be regarded as revealing systemic, complex, or structural problems laying in the incompatible or non-qualitative legislation. This is due to the specificity of the Convention and the role of the ECtHR as an international court delivering individual justice with general implications and effects on the domestic system overall. However, the is no clear-cut understanding of such types of cases and further explanations are required to understand what are these cases and when parliaments are required to intervene.

The ECtHR, judging about a systemic problem, usually refers to a large number of repetitive violations and potentially new upcoming applications. In its understanding, all systemic problems almost always require the introduction of domestic remedies. According to the ECtHR, a particular systemic problem rests, either or both, in the domestic legislation and incompatible practices. This means that systemic patterns could be found in the situation when compatible legislation faces problematic implementation. Indeed, almost all pilot judgments identify structural problems in connection with, either or both, the deficiencies in legislation and failures to implement it. For example, the *Hirst* judgment underlined that the structural problem consists of a failure to repeal legislation five years after the ECtHR had classified it as incompatible[28]. Still, the problem of the blanket disenfranchisement of the prisoners giving rise to thousands of repetitive applications was found long before the classification of the problem as systemic[29]. Another relevant example is the *Atanasiu* judgment, where the ECtHR saw systemic ineffectiveness of compensation and restitution leading to a recurring and widespread problem in the country[30]. It was the problem of practices rather than of the legislation, that the ECtHR did not dare to question. In any case, all pilot judgments could not have been executed and can be never executed without the intervention from the parliaments.

The CM relies on ECtHR reasoning when it observes systemic problems. Still, it sees them more broadly. It can find systemic patterns of violations in other non-pilot cases disclosing complex and structural problems. The CM's view is that human rights violations should be qualified as systemic when the domestic system of protection entails significant, long-term, and structural changes at many levels of governance. In this sense, changes of legislation and/or practices along with the introduction of remedies to stop the flow of incoming cases might be insufficient to tackle a systemic problem. A time is needed to see whether the new system or the old reformed system would not generate similar violations in the future.

Nevertheless, the CM still prefers to define structural or systemic problems relying on the need for remedies and the principle of subsidiarity. In its annual reports, the CM explains its understanding of these problems from different perspectives, including with emphasis on the remedial element of the systemic problem but also with the reference to its origins. For example, in its Annual Report of 2017, it defined general measures as those 'needed to address more or less important structural problems revealed by the Court's judgments to prevent similar violations to those found or put an end to continuing violations'. According to the CM, they 'imply a change of legislation, of judicial practice or practical measures such as the refurbishing of a prison or staff reinforcement, etc'. Yet again, the CM refers to its Recommendation (2004)6 saying that

[28] Hirst v. the United Kingdom (no. 2) [GC], No. 74025/01 (6 October 2005)
[29] Greens and M.T. v. the United Kingdom, No. 60041/08 and 60054/08 (23 November 2010)
[30] Maria Atanasiu and Others v. Romania, No. 30767/05 and 33800/06 (12 October 2010)

introduction of 'domestic remedies is an integral part of general measures' in situations of structural and/or systemic problems[31].

The PACE, instead, is explicit in its terminology and defines systemic problems. In one of its Reports[32], the PACE takes the definition from the ECtHR case-law, emphasizing that 'a structural or systemic problems may be considered a "dysfunction" in the national legal system which may lead, in particular, to numerous applications before the Court in Strasbourg'. As noted above, the identification of systemic problem depends on the particular context and circumstances of the case. Accordingly, the PACE rightly underlines that 'the Court defines such a problem in the context of the specific circumstances of a case before it'. However, the most appropriate understanding of the terminology, the PACE derives from the relevant works of the CDHH and the CM (emphasis added):

> *"…As stressed by the [CDDH], a structural or systemic problem "may originate in legislation or an absence of legislation or an administrative or judicial practice that may be contrary to the Convention (length of pre-trial detention, length of proceedings, detention conditions, non-execution of final judgments, property rights, etc.)"[33]. However, according to the [CM]' practice, the fact that a group of judgments pending execution before it is small does not prevent the underlying structural problem to be considered as important[34].*

The overall conclusion that the parliaments are required to intervene whenever the violation found by the ECtHR entails questioning the effectiveness of the legislation. It is obvious that the parliaments should repeal the broken legislation that stands at the origins of the violations of the Convention. Nevertheless, the parliaments should step in when the legislation is inefficient in practice by setting up remedies.

About the Burmych group of judgments and the root causes

This group "relates to the major structural problem of non-enforcement or delayed enforcement of domestic judicial decisions, mostly delivered against entities owned or controlled by the State, and to the lack of an effective remedy in this respect"[35]. The execution of this group has been and remains a burdensome process for Ukraine. The question of "endemic non-enforcement of the domestic judgments" represents one of the biggest concerns for the CM, the ECtHR, and the

[31] Committee of Ministers, '2017 Supervision of the execution of judgments and decisions of the European Court of Human Rights. 11th Annual Report of the Committee of Ministers', March 2018, 54, https://rm.coe.int/annual-report-2017/16807af92b.

[32] 'Report of the PACE Committee on Legal Affairs and Human Rights (Rapporteur: S. Kivalov), Ensuring the Viability of the Strasbourg Court: Structural Deficiencies in States Parties, 7 January 2013 (Doc. 13087).', 7 January 2013, para. 6, https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=19245&lang=en.

[33] 'CDDH Report on the Advisability and Modalities of a "Representative Application Procedure" [CDDH(2013)R77 Addendum IV]', 21 March 2013, Appendix III, para. 6

[34] Committee of Ministers, '2011 Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights. Annual Report.', April 2012, 40 Footnote 25, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680592ac7.

[35] BURMYCH AND OTHERS v. Ukraine | Application N°: 46852/13 | Date(s) of Judgment: 12/10/2017 | Judgment(s) became final: 12/10/2017 | Latest Decision: CM/Del/Dec(2020)1383/H46-27

PACE[36]. Seeing this problem from the perspective of parliamentarian oversight the following clarifications are due.

The *Burmych* group of judgments marked the roots of the non-enforcement problem in Ukraine. Firstly, the authorities did not set up an efficient enforcement system. Secondly, they keep legislative restrictions (moratoriums) affecting domestic execution, and, thirdly they are unwilling to introduce effective remedies. These three aspects have been already acknowledged by the executive authorities as primary strategic ways underpinning the *Burmych* execution process. Almost the same view on the situation has been taken by the CM. It qualified it as a 'major structural problem of non-enforcement or delayed enforcement of domestic judicial decisions, mostly delivered against the state and state enterprises, and to the lack of effective remedies in this respect'[37]. Accordingly, it distinguished two pressing issues: (i) an overall deficiency of enforcement system and the (ii) lack of effective remedies.

The Ukrainian Government has already identified the roots-causes of the problem in its own way. The analysis was based on the character of the non-enforcement claims. In other words, the domestic enforcement system fails because some of the debts continue to grow. The unenforced claims are provided excessively by the domestic law without financial cover. This problem mostly concerns the social benefits and some social security rights, most of which are opportunistic and populistic. They are hardly sustainable in practice but once the domestic law affords such rights their execution becomes unconditional. In addition, the debts incurred by the state-owned enterprises and confirmed by the judicial decisions cannot be really enforced because of the virtual immunity of these entities. Their financial and patrimonial resources are inaccessible to the debtors by virtue of legislation imposing moratoria on any enforcement claims. The legislation provides no other alternative means to execute such decisions. The last type of enforcement titles, non-pecuniary in character, is difficult to execute because of the overall domestic enforcement system inefficiency. It lacks necessary tools to prevent dishonest private debtors and responsible state authorities to circumvent the enforcement process and to delay or to nullify execution.

Thus, all non-enforced domestic judicial decisions have been classified into three types, relating to (i) in-kind obligations, (ii) social benefits, and (iii) state-owned enterprises' debts. This distinction allowed us to identify easily the measures aimed at resolving each execution claim and thus talking about the problems of non-enforcement as a whole. In the cases of in-kind obligations, the general measures should be oriented to improve the system of enforcement and providing tools to secure the effectiveness of the enforcement measures. The social benefits claims would require revision of the social security system and lifting benefits that could not be covered by the budgetary funds. The decisions on the state-owned enterprises' debts must be firstly resolved by repealing moratoria.

As it could be observed none of these measures, as envisaged by the executive authorities, could be carried out without the involvement of the legislature. It is certainly required to change the whole package of laws pertaining to the enforcement system and to guarantee the efficiency of the enforcement proceedings. The social benefits cannot be left in the legislation and to be uncovered financially. They will continue to generate legitimate expectations and judicial claims leading to a growing number of non-enforceable decisions. The whole social security system must

[36] PACE Resolution 1787 (2011), Implementation of judgments of the European Court of Human Rights, 26 January 2011. See also Recommendation 1955(2011), Implementation of judgments of the European Court of Human Rights, 26 January 2011.

[37] See the case description in a number of the CM Resolutions / Decisions : CM/ResDH(2008)1, CM/ResDH(2009)159, CM/ResDH(2010)222, CM/ResDH(2011)184, CM/ResDH(2012)234, CM/ResDH(2017)184, CM/Del/Dec(2017)1302/H46-38 and CM/Del/Dec(2018)1318/H46-29

be revisited, including the budgetary resources to that matter. The moratoria should be lifted eventually as they no longer secure because they run counter the free market relations and virtually accumulate the state debts. All these are legislative measures for the Verkhovna Rada to decide.

RELEVANT EXAMPLES OF THE PARLIAMENTARIAN RESPONSE TO THE EXECUTION OF THE ECTHR JUDGMENTS

The chapter compiles relevant practices of other countries, with which legislatures responded to the execution process and changed legislation for the purposes of execution of the ECtHR judgments. The compilation, however, does not cover the changes in social legislation only. Such concrete examples are difficult to find. Indeed, the parliaments of the CoE countries amended social legislation following the ECtHR judgments but not only because they exercised a parliamentarian oversight over the execution.

Firstly, as mentioned above, the concept of parliamentarian oversight emerged relatively recently. Still, most of the cases concerning social security rights were successively resolved in the period before this concept acquired large consensus and acceptance from the States-members of the CoE. Secondly, though the parliamentarian oversight is a tool for effective execution of the ECtHR judgments, it has never been its scope as such. In other words, the execution of a particular judgment of ECtHR, if it calls for changes in legislation, does not require to institute a parliamentarian oversight for that purpose. Institution of the parliamentarian oversight mechanism is the question that falls into the discretion of the States. They are free to choose their own means of how to change legislation, either with or without such a mechanism. The practices, however, show that those countries that introduced effective mechanisms of the parliamentarian oversight were more efficient in the implementation of the ECtHR judgments and, thus promptly resolved their systemic problems.

Practices of the parliamentarian interventions in the cases when the legislation is at the core of systemic violation, without there being a pilot procedure

Despite the overall vision that the ECtHR should not concern itself with the legislation but to exercise its judicial function, the evolution of its case-law shows otherwise[38]. The ECtHR's judgments become more and more focused on the origins of the violations, which in many instances lie in the legislation. It might question the quality of legislation, from the perspective of

[38] 'Since the early 2000s, the ECtHR started engaging in matters of implementation in response to failures of states to solve problems in their legal systems independently. The ECtHR became more explicit about legislative sources of violations. It may suggest legislative action as one of several options or even a preferable option. In some cases, it may order legislative change in imperative terms. As regards the exact content of legislative change, the ECtHR's engagement may range from very limited guidance to detailed instructions. It may set the deadline for the implementation itself or let the state specify the time frame. Consequently, one may discern a spectrum of prescriptiveness in formulating legislative demands from the case law of the past decade.' Nino Tsereteli, 'The Role of the European Court of Human Rights in Facilitating Legislative Change in Cases of Long-Term Delays in Implementation', in *The International Human Rights Judiciary and National Parliaments: Europe and Beyond*, ed. Andreas Follesdal, Geir Ulfstein, and Matthew Saul, Studies on Human Rights Conventions (Cambridge: Cambridge University Press, 2017), 223–47, https://doi.org/10.1017/9781316874820.010.

its accessibility[39], clearness or foreseeability[40] or to overrule the legislation as a whole because of its substantive incompatibility with the Convention[41].

The most representative of these cases are those questioning some constitutional and primary principles of the domestic legal systems. Not all parliaments have fallen agree with the implicit changes of the legislation following the ECtHR judgments.

The case of *Tănase*[42] serves as the first success story of the prompt parliamentarian intervention in legislation that was highly delicate for the parliament itself. The violation, in that case, was at the core of the election system of Moldova banning access to the parliamentarian sits for certain representatives of political parties. It was a highly sensitive question in the then political context when the ruling party introduced a legislative ban on nationals with dual or multiple nationalities to stand as a candidate in the upcoming parliamentary elections. Since most of the opposition retained dual citizenship, they suddenly became unelectable to a candidate in the parliamentarian elections. The ECtHR found a violation in that case in 2008 by the judgment that was not yet final. Pending the examination of the compatibility of the law before the Grand Chamber, the Moldovan Parliament changed the questionable law in 2009, without waiting for the final resolution of the case. Moreover, the Parliament extended the scope of its intervention into the law and lifted the bans for all categories of public servants to hold dual citizenship while in public service[43].

Another example, the case of *Olexandr Volkov* is well known by the Ukrainian parliament. Still, it is an illustrative example of the case when the primary, constitutional, legislation stands at the basis of the violation. The applicant has been dismissed as a result of dysfunction to handle judicial discipline cases. The case disclosed serious systemic problems regarding the functioning of the Ukrainian judiciary, which did not ensure the sufficient separation of the judiciary from the other branches of State power. However, the case has never been assigned a pilot classification, though it was always regarded as raising structural and complex problems.

Other high-profile cases, disclosing such types of complex constitutional legal problems, also fall into the category of systemic cases, without being subjected to the pilot procedure. For example, the case of *Sejdić and Finci*. It found the electoral system in Bosnia and Herzegovina as discriminatory and the problem was enshrined in the Constitution drafted on "Dayton Agreements" putting end to inter-ethnic war[44]. The case of *Paskas* concerning the permanent ineligibility of an impeached president is also an illustrative example of a complex case. They all appeared to mark systemic problems but remained unclassified as either pilot or even quasi-pilot-judgments. Nevertheless, the problems identified in these judgments are so embedded in the domestic legislation that they could potentially lead to a number of repetitive applications before the ECtHR. The only solution to execute these cases is to repeal the incompatible legislation.

Again, illustrative in this sense is the following example. The developments of the *Sejdić and Finci* case in which the failure to lift the constitutional discriminatory ban to stand elections, has led to further repetitive cases. The cases of *Zornić*, *Šlaku,* and *Pilav* reiterated concerns about systemic issues. The ECtHR went on to indicate that 'the failure of the respondent State to introduce constitutional and legislative proposals to put an end to the current incompatibility of the

[39] ECtHR, Roman Zakharov v. Russia [GC], No. 47143/06 (4 December 2015).
[40] ECtHR, Oleksandr Volkov v. Ukraine, No. 21722/11 (9 January 2013).
[41] ECtHR, Sejdić and Finci v. Bosnia and Herzegovina [GC], No. 27996/06 and 34836/06 (22 December 2009).
[42] ECtHR, Tănase v. Moldova [GC], No. 7/08 (27 April 2010).
[43] Committee of Ministers, TĂNASE v. the Republic of Moldova | Application N°: 7/08 | Date(s) of Judgment: 27/04/2010 | Judgment(s) became final: 27/04/2010 | Final Resolution: CM/ResDH(2012)40 (27 April 2010).
[44] *Sejdić and Finci*.

Constitution and the electoral law with [the Convention] is not only an aggravating factor as regards the State's responsibility under the Convention for an existing or past state of affairs but also represents a threat to the future effectiveness of the Convention machinery"[45].

Another positive example appears to be the evolution of the *Olexandr Volkov* case. The change of incompatible legal system confined the systemic problem and thus halted the flow of repetitive violations, like in the case of *Kulykov and others*. In that case, the judgment clearly states that no general measures are needed as they were implemented following the *Olexandr Volkov* judgment. There is no indication that the applicants would have their rights impaired by new judicial reform, since "…it cannot be concluded that this substantially new background renders the relevant domestic procedures *prima facie* futile and useless"[46].

Some cases such as *Roman Zakharov* or *Iordachi and others* identified shortcomings in the legal framework governing secret surveillance of telephone communications and reiterated the status of applicants as potential victims. This type of violation concerns the incompatibility of legislation, which also discloses the systemic features of the problems. The ECtHR's holds in these cases that 'the mere existence of laws and practices which permitted and established a system for effecting secret surveillance of communications entailed a threat of surveillance for all those to whom the legislation might be applied'[47]. The "affecting all" or "threatening-all" scenario appears to be systemic since the number of victims of violations remains unaccounted.

The cases questioning the quality of legislation and legal certainty, notably in criminal matters, usually disclose the same problems of unaccounted risk of violations. In this sense, such cases raise serious concerns about the systemic character of violations, though the ECtHR would never go to a state that directly. For example, in the *Kokkinakis* case, the ECtHR noted that Article 7 embodies more generally, the principle that only the law can define a crime and prescribe a penalty[48]. The law should fulfil certain criteria of quality (accessibility, clearness, and foreseeability) under the Convention, otherwise, it would affect a large number of individuals whose behaviour it should regulate[49]. Doubts concerning the quality of legislation could be observed in the case of *Boicenco*, where the ECtHR directly highlighted certain legislative incompatibilities. It questioned the quality of criminal procedure legislation banning a release on bail because of the gravity of criminal accusations. The ECtHR noted that 'the right to release pending trial cannot, in principle, be excluded in advance by the legislature'[50]. From this rationale, it could be inferred that any person in detention could be potentially a victim of the violation because of such a legislative ban, thus the numbers of violations are unpredictable.

Practices of the parliament interventions in the cases concerning systemic problems relating to the systemic non-execution or delayed proceedings

The scope of the present sub-chapter is to illustrate both successful and unsuccessful stories when the parliaments' interventions were exerted following pilot and quasi-pilot judgments. For obvious reasons, the judgments against Ukraine were excluded from the analysis. Moreover, not

[45] ECtHR, Zornić v. Bosnia and Herzegovina, No. 3681/06 (15 July 2014); Šlaku v. Bosnia and Herzegovina, No. 56666/12 (26 May 2016).
[46] ECtHR, Kulykov and Others v. Ukraine, No. 5114/09 and 17 others (19 January 2017).
[47] *Roman Zakharov* paragraph 168.
[48] ECtHR, Kokkinakis v. Greece, No. 14307/88 (25 May 1993); Vasiliauskas v. Lithuania [GC], No. 35343/05 (20 October 2015).
[49] '...It is a logical consequence of the principle that laws must be of general application that ...' Del Río Prada v. Spain [GC], No. 42750/09 (21 October 2013).
[50] ECtHR, Boicenco v. Moldova, No. 41088/05 (11 July 2006).

all systemic problems were taken into the assessment. The research selected only the problems relating to the systemic non-enforcement of the domestic decisions and delayed proceedings to that effect, as this is the subject of the *Byrmych* execution and, thus, the scope of the present study. At last, the study focused only on the aspects pertaining to the parliamentarian role in dealing with the execution of the ECtHR pilot or quasi-pilot judgments.

In **Albania**, the *Manushaqe Puto & Driza* (2002) and the *Gjyli & Puto et al.* (2007) pilot judgments revealed a wide range of systemic and structural problems laying in the inefficiency of the restitution and compensation mechanisms of the confiscated proprieties during the Communist regime. The legislation that granted the rights of restitution or compensation was declaratory and without proper administrative mechanisms for implementation. The judiciary satisfied the claims of the rights holders but its decisions grew in number without enforcement. In addition, the systemic dysfunction spread to the judiciary itself that had been affected by the lack of legal certainty, impartiality, and excessive length of the proceedings. As a result, the non-enforcement problem became a part of a bigger picture and has been addressed along with other systemic changes in the state institutions. The parliament played its role by passing new law reviewing the whole compensation and restitution mechanism as of 2015. It established new propriety evaluation criteria, including the mechanism to solve previous debts, set up a special financial fund to cover claims for compensation, etc.[51]. In other words, the parliament erased the roots of the problem by setting aside the old law causing the problem but still kept the initial commitment to grant compensation or restitution.

In **Armenia**, the non-enforcement problem did not elevate to the level of systemic. Still, it had been regarded as recurring and complex in the *Avakemyan* (2009) group of cases and another 4 judgments. These cases reflect a variety of non-enforced claims related to propriety, reinstatements, and timely payments of compensations awarded by domestic courts. The Armenian executive chooses to institute acceleratory and compensatory remedies along with the general revision of its enforcement system. These measures require parliamentarian approval to change laws and to agree with the introduction of remedies. To date, it was reported that these measures were included in the strategic policy documents and in drafted laws[52].

The problem in **Azerbaijan**, relevant for the purposes of the present paper, was recorded in respect of the state policies concerning the IDPs, Azeri ethnics who fled the Nagorno-Karabakh region and received free housing and social privileges in the mainland. This policy caused a great number of litigations of the IDPs with the flat owners and amounted to a structural problem, requiring authorities to provide alternative accommodation for the IDPs. The ECtHR delivered a number of judgments underlying the problem and the CM compiled them into the *Mirzayev, Humbatov,* and *Tarverdiyev* group of cases, concerning non-enforcement of housing rights, restoration of propriety rights, and job reinstatements. The root social legislation is kept in place and the Azeri authorities preferred to settle individually each case. However, it was reported that a new legislative framework has been put in place, that *inter alia* resolved the problems of housing and counter-claims of evicted owners. Along, with numerous executive and presidential normative decrees, the Parliament adopted 23 laws[53].

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[51] See the 1324th meeting (September 2018) (DH) - H46-1 Manushaqe Puto and Others group (Application No. 604/07) and Driza group (Application No. 33771/02) v. Albania

[52] AVAKEMYAN v. Armenia | Application N°: 39563/09 | Date(s) of Judgment: 30/03/2017 | Judgment(s) became final: 30/03/2017 | Latest Decision: none

[53] Committee of Ministers, MIRZAYEV v. Azerbaijan | Application N°: 50187/06 | Date(s) of Judgment: 03/12/2009 | Judgment(s) became final: 03/03/2010 | Latest Decision: CM/Del/Dec(2019)1348/H46-2 (3 March 2010) including the cases Andreyeva, Bakhshiyev and others, Gasimova and others, Gulmammadova, Gurbanova, Hajiyeva and others, Hasanov, Isgandarov and others, Ismayilova, Jafarov,

The issues relating to systemic problems in **Bosnia and Herzegovina** are so complex and widespread that their description could exceed the limits of the present paper. In brief, the country faced a number of systemic problems such as non-enforcement of the judicial orders to demolish illegally erected buildings (*Kozul*), impossibility to obtain enforcement of titles in litigations between private parties (*Martinović*), non-reinstatements in jobs position despite judicial decisions (*Josić*). It also encountered systemic problems affecting a whole class of pensioners living in the Federation who were internally displaced in the Republika Srpska during the armed conflict. Initially, the Federation did not adopt any coherent legislation on validation and portability of the pensions and social security rights. Consequently, the grieved persons had to apply to the human rights courts and are left with unenforced judicial decisions for lengthy periods of time, as the administrative authorities refused execution in a lack of domestic legislation[54]. Later, the Federation was compelled by the ECtHR to introduce legislation for the validation and to institute such a social security scheme that would remedy the defects in the pension system, thereby making the IDPs returning to Bosnia and Herzegovina eligible for the Federation pension.[55] All issues were solved by the Parliament in passing validation laws and equating the social security rights around the entities.[56] In addition, the Parliament issued the 2012 Domestic Debt Act stipulating settlement of the Republika Srpska's internal debts, thus solving a number of non-enforced claims resulted from payments of war damages (the *Momic* group of cases[57] and the *Panorama Ltd* case).

Bulgaria encountered structural problems reflected in the case of *Gavrilov* on non-recovery of the state debts due to liquidation of state enterprises and the *Stoyanov and Tabakov* group of

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Soltanov, Yusifova, Zahid Mammadov and others, Zulfali Huseynov, Israfilova and Agalarov, Valiyev and others, Arif Islamzade and 21 Others.

[54] ECtHR, Karanović v. Bosnia and Herzegovina, No. 39462/03 (20 November 2007) Pension legislation have not yet been harmonised between the two entities and pensions are generally lower in Republika Srpska than in the Federation of Bosnia and Herzegovina. As the applicant's request to be allowed to draw pension from the Federal Fund was unsuccessful, he complained to the Human Rights Chamber for Bosnia and Herzegovina. In a decision [it] held that the applicant had been discriminated against in his enjoyment of his right to social security, as guaranteed by Article 9 of the International Covenant on Economic, Social and Cultural Rights. It ordered the Federation of Bosnia and Herzegovina to take appropriate legislative and administrative steps with a view to ending such discrimination and to pay the applicant the difference between the amount of pension he had in fact received and the amount he should have received from the Federal Fund. However, even though he obtained some remuneration from the Federal Fund, the applicant's pension continued to be paid by Republika Srpska.

[55] ECtHR, Šekerović and Pašalić v. Bosnia and Herzegovina, No. 5920/04, 67396/09 (8 March 2011) The State had failed to comply with domestic court orders requiring their pension entitlements to be transferred from Republika Srpska, where the applicants had been internally displaced during the war in Bosnia and Herzegovina, to the Federation of Bosnia and Herzegovina, the entity to which they had returned after the war and where pension levels were generally higher. The respondent State had to secure the amendment of the relevant legislation in order to render the applicants and others in that situation eligible to apply for Federation pensions. That order did not, however, apply to those who had not returned to the Federation after the war, although those who were granted Federation pensions after their return from the Republika Srpska were to keep their pension entitlements even if, like the second applicant, they later moved abroad.

[56] Committee of Ministers, KARANOVIC v. Bosnia and Herzegovina | Application N°: 39462/03 | Date(s) of Judgment: 20/11/2007 | Judgment(s) became final: 20/02/2008 | Final Resolution: CM/ResDH(2012)148 (4 December 2012); Committee of Ministers, SEKEROVIC v. Bosnia and Herzegovina | Application N°: 5920/04 | Date(s) of Judgment: 08/03/2011 | Judgment(s) became final: 15/09/2011 | Final Resolution: CM/ResDH(2012)148 (4 December 2012); Committee of Ministers, 'Resolution CM/ResDH(2012)148 2 Cases against Bosnia and Herzegovina Execution of the Judgments of the European Court of Human Rights', 4 December 2012, http://hudoc.exec.coe.int/eng?i=001-116482.

[57] MOMIC v. Bosnia and Herzegovina | Application N°: 1441/07 | Date(s) of Judgment: 15/01/2013 | Judgment(s) became final: 15/01/2013 | Final Resolution: CM/ResDH(2017)29

cases where the ECtHR criticised the administrative authorities for failing to comply with final domestic judgments compelling them to grant privatisation titles of the municipal property. In the first type of cases, the parliament agreed to pass a law establishing a national guarantee fund for the salaries in view of compensation in case of bankruptcy. It also amended a number of laws improving the domestic enforcement system[58]. In addition, the Parliament erased the roots of the non-enforcement problem in the case of *Popnikolov,* where the local administration refused to recognize the rights to purchase State-owned properties under a preferential procedure regulated by the law, despite the final judicial decision in that regard. The parliament repealed that law in full and improved enforcement legislation by extension of the sanctions to the state authorities for non-enforcement[59].

Croatia's non-enforcement cases were not numerous and related mostly to the difficulties in execution of in-kind obligations recognised by the domestic courts, such as eviction of squatters (*Cvijetic*) or returning of a vehicle (*Lukavica and Siničić*)*,* as well as enforcement of other various propriety claims (the *Kvartuc* group of cases). In 2012, the Parliament adopted the new Enforcement Act, placing a particular emphasis on out-of-court enforcement and transfer of enforcement proceedings from commercial to municipal courts. The act was subsequently amended with a number of occasions improving domestic enforcement proceedings in view of new coming cases from the ECtHR[60].

In **Georgia**, its systemic non-enforcement is due to the inefficient administration of public funds or lack thereof[61]. The Parliament voted to establish special budget lines (2007) to cover the debts and then instituted a special government fund (2008) to reimburse previous debts and enforcing judicial decisions. It also supported the executive reforms of the bailiff and financial administration systems by agreeing with certain amendments of primary civil and enforcement legislation (2010).

Greece continues to raise concerns with respect to its land and propriety policies. The cases in the *Beka-Koulocheri* group revealed a structural problem in the lifting of land expropriation orders and charges on land. The cases of *Zazanis and others* and *Moudaki-Soilentaki* exposed a problem that the state authorities might allow themselves to disobey with impunity the execution of the administrative courts' decisions granting proprieties or re-instating an ex-ministerial employee. The new case of *Georgakopoulos et al.* concerns the non-enforcement of compensations for the expropriation of lands and lack of remedies. The role of the Greek Parliament in resolving these cases remains unclear[62].

The same could be said in respect of Italy's non-enforcement cases. The case of *Therapic center s.r.l. and others* related to refusal to execute judicial orders by the local health service based on a law that was only later declared unconstitutional, thus preventing such execution. The case of *D.A. and others*, seemingly reveals a structural problem in paying compensations for damages after infections in the course of blood transfusions carried out in public hospitals. In both cases,

[58] BELEV v. Bulgaria | Application N°: 16354/02 | Date(s) of Judgment: 02/04/2009 | Judgment(s) became final: 02/07/2009 | Final Resolution: CM/ResDH(2016)153
[59] POPNIKOLOV v. Bulgaria | Application N°: 30388/02 | Date(s) of Judgment: 25/03/2010 | Judgment(s) became final: 25/06/2010 | Final Resolution: CM/ResDH(2015)223
[60] KVARTUC v. Croatia | Application N°: 4899/02 | Date(s) of Judgment: 18/11/2004 | Judgment(s) became final: 18/02/2005 | Final Resolution: CM/ResDH(2020)104
[61] "IZA" LTD AND MAKRAKHIDZE v. Georgia | Application N°: 28537/02 | Date(s) of Judgment: 27/09/2005 | Judgment(s) became final: 27/12/2005 | Final Resolution: CM/ResDH(2011)108
[62] BEKA-KOULOCHERI v. Greece | Application N°: 38878/03 | Date(s) of Judgment: 06/07/2006 | Judgment(s) became final: 06/10/2006 | Latest Decision: CM/Del/Dec(2020)1369/H46-11

the legal provisions causing non-enforcement remain in force, thus the parliamentarian oversight has not been yet really fulfilled[63].

Lithuania faced relatively minor problems with non-enforcement, mostly described in the group of cases *Nekvedavicius* pertaining to non-restoration of the rights to nationalised lands during the Soviet period. The Parliament stepped in by a number of legislative amendments expanding possibilities of in-kind restoration and providing alternatives to restoration *in natura*. The amendments also accelerated the restoration proceedings overall and instituted additional procedural and substantive guarantees against abuses or misinterpretation of the domestic law. Various unclear and non-qualitative legislative provisions were either repealed in full or changed to clarify the administrative requirements for the restoration claims[64].

Montenegro resolved its systemic problems, which were roughly similar to those identified in Ukraine. The cases of *Mijanovic*[65], *Velimirovic*[66], and *Vukelic*[67] were leading in establishing that state authorities failed to enforce debts against state-owned companies, judicial decisions granting social housing, and claims in the area of execution between private parties. The Parliament played a crucial role by passing legislation reforming the whole enforcement system. A new Enforcement Act was adopted in 2011 abandoning the old model of enforcement in favour of a mixed model of private and public bailiffs. New legislation proved to be effective in practice.

North Macedonia embraced the same policy of changing the whole enforcement system. Its *Nesevski*[68] *and Jankulovski*[69] cases concern delayed enforcement of judicial decisions, but they were examined within the larger context of the structural problem of the unreasonable length of judicial proceedings[70]. The North Macedonian Parliament has been involved in an overall multifaced reform of the judicial sector. During these reforms, new legislation established a system of private bailiffs as of 2012.

In the **Republic of Moldova**, the non-enforcement problem was acknowledged as systemic by the authorities. It first unsuccessfully tried to solve non-execution claims in social housing by friendly settlement and realised that the problem could be structural in character (*Clionov*). Next, the claims of delayed enforcement and non-enforcement elevated into a complex problem, when a number of other claims in the areas of various social payments, indexation of the bank savings, private enforcements, etc. remained problematic (the *Luntre* group[71]). The ECtHR eventually

[63] THERAPIC CENTER S.R.L. AND OTHERS v. Italy | Application N°: 39186/11 | Date(s) of Judgment: 04/10/2018 | Judgment(s) became final: 04/10/2018 | Latest Decision: see Status of Execution
D.A. AND OTHERS v. Italy | Application N°: 68060/12 | Date(s) of Judgment: 14/01/2016 | Judgment(s) became final: 04/07/2016 | Latest Decision: see Status of Execution
[64] NEKVEDAVICIUS v. Lithuania | Application N°: 1471/05 | Date(s) of Judgment: 10/12/2013 | Judgment(s) became final: 10/03/2014 | Latest Decision: see Status of Execution
[65] MIJANOVIC v. Montenegro | Application N°: 19580/06 | Date(s) of Judgment: 17/09/2013 | Judgment(s) became final: 17/12/2013 | Final Resolution: CM/ResDH(2016)201
[66] VELIMIROVIC v. Montenegro | Application N°: 20979/07 | Date(s) of Judgment: 02/10/2012 | Judgment(s) became final: 02/01/2013 | Final Resolution: CM/ResDH(2016)292
[67] VUKELIC v. Montenegro | Application N°: 58258/09 | Date(s) of Judgment: 04/06/2013 | Judgment(s) became final: 04/09/2013 | Final Resolution: CM/ResDH(2017)36
[68] NESEVSKI v. the former Yugoslav Republic of Macedonia | Application N°: 14438/03 | Date(s) of Judgment: 24/04/2008 | Judgment(s) became final: 24/07/2008 | Final Resolution: CM/ResDH(2016)35
[69] JANKULOVSKI v. the former Yugoslav Republic of Macedonia | Application N°: 6906/03 | Date(s) of Judgment: 03/07/2008 | Judgment(s) became final: 03/10/2008 | Final Resolution: CM/ResDH(2016)35
[70] ATANASOVSKI v. the former Yugoslav Republic of Macedonia | Application N°: 36815/03 | Date(s) of Judgment: 14/01/2010 | Judgment(s) became final: 14/04/2010 | Final Resolution: CM/ResDH(2015)152
[71] LUNTRE v. the Republic of Moldova | Application N°: 2916/02 | Date(s) of Judgment: 15/06/2004 | Judgment(s) became final: 15/09/2004 | Final Resolution: CM/ResDH(2018)226

delivered a pilot judgment in the Olaru and others cases that mainly concerned non-enforcement of the social housing and housing for public servants, but it mentioned the general inefficiency of the enforcement system and lack of remedies as primary roots of the problem. The Moldovan Parliament fully endorsed the then government policies to lift all social benefits and housing rights to stop the flaw of non-enforceable judicial decisions. It abolished in full the legislation providing problematic benefits and later adopted new Locative code with a rigorous regime of propriety rights and limitations to of privatisation of housing rights. A new system of private bailiffs was introduced by the new Execution code and special compensatory remedies were instituted by a special law.

Romania is committed to resolving a number of its structural and systemic problems in relation to the problem of non-enforcements. The *Sabin Popescu* pilot judgment refers to the refusal to allocate lands by administrative decisions, overruled by administrative courts, and remained unenforced. Other pilot judgment in the case of *Maria Atanasiu* illustrated a widespread and repetitive problem of non-execution of judgments granting restitution right of the nationalised proprieties. The *Sacaleanu* case disclosed a structural problem of non-enforcement on part of the state-owned commercial entities. The Romanian Parliament facing these challenges instituted its own general mechanism of the parliamentarian oversight by a special Human Rights committee and sub-committee to supervise the Government's measures. It changed the restitution laws and acted as a supervisory body for checking the activity of the newly established restitution commissions. Moreover, it has been involved in the drafting of the State Strategy to resolve all these cases and agreed in principle with the Government proposals to set up a special budget for guaranteeing payments by State legal entities and for compensations of restitution claims. Overall, the Romanian Parliament is pro-active in exercising its special functions to oversee the process of execution of the ECtHR judgments. It is one of the illustrative examples when parliamentarian oversight has been developed to resolve systemic problems.

Serbia confronts a recurring problem of non-enforcement that needed legislative interventions and call for parliamentarian intervention. The cases of *Rafailovic* and *R. Kacapor* concerned the failure to enforce debts of the state-owned companies or municipal authorities, ineffective implementation of the final administrative courts' decisions concerning pensions and demolition orders in respect of unauthorised constructions. The Government mainly focused on the improvement of remedies and enhanced, with the help of the Parliament, the constitutional complaint, and ordinary judicial remedies. Some of the root causes were addressed by new legislation; for example, since 2012 new legislation strictly regulated commercial transactions in municipalities, and since 2018 amendments to civil procedure brought clear rules on enforcement of demolition orders.

Last but not least, **Turkey**'s Parliament addressed the non-enforcement claims in the case of *Kilic*[72] revealing various violations on account of the failure by administrative bodies to enforce judicial decisions awarding compensation and other pecuniary awards. The Parliament introduced special remedy law for compensations of lengthy proceedings, including in the cases of delayed enforcement. In 2014, it changed briefly the law on municipalities, thus lifting moratoria on confiscation of municipality property to cover its debts.

[72] KILIC v. Turkey | Application N°: 38473/02 | Date(s) of Judgment: 25/07/2006 | Judgment(s) became final: 25/10/2006 | Latest Decision: see Status of Execution

CONCLUSIONS AND RECOMMENDATIONS

The parliaments play a crucial role in the execution of the ECtHR judgments. This is a reflection of their universal role in the protection of human rights as legislators regulating the very fabric of society and social relations. It is not their role to secure the execution of the ECtHR judgments, as this still remains the task of the executive branch. Nor it is the role of the parliaments to provide remedies for alleged breaches of human rights in individual cases. The latter task is for the judiciary. However, the parliaments cannot be regarded as outside of the whole process of the execution of the ECtHR judgments. Their oversight should be regarded from both functional and operational perspectives.

They retain two functions in the process of executing ECtHR judgments:

- Legislative functions to change, lift, or repeal legislation at the root of the violations and/or provide a legal basis for the introduction or improvement of effective remedies by passing new legislation.
- Co-operative functions with the executive branch primarily responsible for the implementation of ECtHR judgments in complex, structural, and systemic situations where a range of general measures is required.

Whenever the ECtHR judgment requires legislative changes, irrespective of whether it is a systemic or structural problem, the parliaments should step in to bring the legislation into line with the Convention. This is usually the case for structural and complex violations. When the ECtHR judgment reveals systemic problems, then the role of the parliaments is broader. In addition to changes in legislation, if it is required by the pilot judgment, the parliaments might be asked to intervene and introduce remedial measures by passing new legislation to this effect. In addition to these obligations, the parliaments should be able to erase the root causes of systemic violations, if they are legislative in character. The latter functions of the parliaments should come into effect in a whole range of other measures initiated by the executive and/or judiciary.

In brief, the parliaments predominantly have two scopes when exercising the oversight of human rights. Their primary role is proactive, that is to improve legislation and provide a normative basis for the remedies. The second role is of due diligence, namely to restrain themselves from populistic or regressive changes in legislation that would be incompatible with the human rights requirements.

How the parliaments perform their oversight and organise their work is mainly discretionary. It could either be a dedicated specialised parliamentary committee with extensive expertise in human rights or multi-agency and multidisciplinary committees with cross-cutting or hybrid functions. These working methods remain at the full discretion of the domestic parliaments. The *modus operandi* thereof is however less relevant in assessing the effectiveness of parliamentary oversight in the execution of the ECtHR pilot judgments and dealing with systemic problems. The scope of such oversight is to react appropriately to the challenges of implementing a such a judgment.

The practices of all CoE member states showed that the execution of the ECtHR judgments with respect to systemic problems was more effective when the parliaments intervened and co-operated with their respective governments. When the systemic problems concerned sensitive issued for parliamentarians, the changes in constitutional and electoral legislation were always difficult (see *Sejdić and Finci*, *Paskas*). The execution of such judgments usually depends on the appropriate political and historical context (see *Tănase* and *Olexandr Volkov*). When the question of incompatible legislation is outside of the express interests of the parliament, such as in criminal

systems (*Kokkinakis, Boicenco*) or in enforcement systems, the parliaments become more open to changing laws.

In the latter situations, most of the of the systemic problems pertaining to non-enforcement could never have been enforced without legislative changes. The parliaments contributed to the implementation of large-scale systemic reforms (*Manushaqe Pluto & Driza* (Albania), *Momić* (BiH)) or to erasing the root cause of the problem generating repetitive violations by the withdrawal of social legislation (*Olaru et al.* (Moldova). In a number of other cases, the parliaments agreed to review the compensation and restitution systems and to introduce remedial measures (*Maria Athanasiu* (Romania), *Olaru et al.* (Moldova), *Nekvedavicius* (Lithuania)). Some countries would never have reformed their enforcement systems without the involvement of their parliaments (*Mijanovic* (Montenegro), *Nesevski and Jankulovski* (North Macedonia), Croatia). A lack of parliamentary co-operation with government in the implementation of the ECtHR judgments makes their execution virtually impossible (*Georgakopoulos et al.* (Greece)*, D.A. and others* (Italy), *Avakemyan* (Armenia)). Even a partial intervention of the parliaments moves the execution process forward (*Rafailovic* and *R. Kacapor* (Serbia), *Kilic* (Turkey), Georgia).

Given the scale of the problem in the *Burmych* group of cases, the role of the *Verkhovna Rada* is crucial to the execution of the judgments. It should play its legislative role in

- reforming the enforcement system by changing legislation
- erasing the root causes of violations by repealing problematic social legislation
- lifting moratoria
- creating remedial legislation

In this sense, apart from these legislative functions, the *Verkhovna Rada* is called to fulfil its oversight functions through co-operation with the Government. Implementation of the *Burmych* judgment could and should be done only in concert with the government institutions that retain the necessary expertise in reforming the enforcement system. The current model of a dedicated committee within the *Verkhovna Rada* could be kept operational. Still, it has been proved to be less efficient than expected.

Accordingly, the most acceptable solution appears to be the institution of a special multi-agency and multidisciplinary working group. It should include the Government, the Parliament, the Judiciary, and other experts representing the last-resort institutions. It may have a limited scope and remit to resolve systemic problems of non-enforcement, but its conclusions should be granted more than recommendatory force. In other words, it should be institutionalised inter-agency co-operation acting on an *ad-hoc* basis and responding to the challenges of the pilot judgments in the *Ivanov* and *Burmych* cases. However, it should have a decisive influence on the parliamentary process in the adoption of the legislation necessary for that purpose.