

## Chapter 6

### How and When Can the International Human Rights Judiciary Promote the Human Rights Role of National Parliaments?

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#### 1. Introduction

Interpreting and applying human rights law (both domestic and international) are important features of the human rights role of national parliaments.<sup>1</sup> Too often parliaments are not fulfilling their rights-based role when law making and when holding the executive to account.<sup>2</sup> This includes failing to make full use of their democratic qualities.<sup>3</sup> It also includes failing to make full use of the connections with the international human rights system.<sup>4</sup>

Parliamentary bodies at the international level work to enhance the role of parliaments in the realisation of human rights. The Parliamentary Assembly of the Council of Europe (PACE) and the Inter-Parliamentary Union (IPU) are particularly active. They organise capacity-building workshops on human rights and pass resolutions specifying the importance and nature of the human rights role of parliaments.<sup>5</sup> The dual mandates of the members of these bodies – parliamentarians at the national and international levels – entail that they are

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<sup>1</sup> See M. Hunt, 'Introduction', in M. Hunt, H. J. Hooper, and P. Yowell (eds.), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart, 2015), p. 1, 2; also D. Feldman, 'Can and Should Parliament Protect Human Rights?', *European Public Law*, 10 (2004), 635, 645–651.

<sup>2</sup> Hunt, *ibid.*; J. Hiebert, 'Legislative Rights Review', in M. Hunt, H. J. Hooper, and P. Yowell (eds.), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart, 2015), p. 39, 41.

<sup>3</sup> J.L. Hiebert and J. B. Kelly, *Parliamentary Bills of Rights: The Experiences of New Zealand and the United Kingdom* (Cambridge University Press, 2015), p. 411.

<sup>4</sup> I. Schwarz, 'The Work of the Inter-Parliamentary Union', in M. Hunt, H. J. Hooper, and P. Yowell (eds.), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart, 2015), p. 329, 331.

<sup>5</sup> See, e.g., PACE Resolution 1823 (2011); also A. Drzemczewski and J. Lewis, 'The Work of the Parliamentary Assembly of the Council of Europe', in M. Hunt, H. J. Hooper, and P. Yowell (eds.), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart, 2015), p. 309; Schwarz, 'Inter-Parliamentary Union', 329; see also K. Roberts Lyer and P. Webb, 'Effective Parliamentary Oversight of Human Rights' (in this volume).

well positioned to help develop standards and ensure they are implemented.<sup>6</sup> Nonetheless, the parliamentary bodies have limited resources,<sup>7</sup> and facilitate rather than determine states' implementation of human rights norms.<sup>8</sup> How can other bodies at the national and international levels support their work?

International human rights bodies of a judicial and quasi-judicial nature (herein the international human rights judiciary, IHRJ) can have an important role.<sup>9</sup> As a set of institutions that assess the human rights compliance record of all branches of the state but that connect most directly with executives, the IHRJ institutions could develop greater interest in and serve as a promoter of the human rights role of national parliaments.

This idea is supported by recent developments at certain IHRJ institutions. For instance, the Committee of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) now includes a prominent paragraph in all of its concluding observations on state reports calling for a role for parliaments in implementation of its recommendations.<sup>10</sup> In several recent high profile European Court of Human Rights (ECtHR) cases, such as *Animal Defenders International v. UK*,<sup>11</sup> the ECtHR has placed great weight on the quality of the parliamentary process underlying the legislative measure in question. The reference to parliamentary process in these cases can be read in different ways. It is an attempt to give a more persuasive account for the degree

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<sup>6</sup> Drzemczewski and Lewis, *ibid.*, p. 326.

<sup>7</sup> See Schwarz, 'Inter-Parliamentary Union', 334.

<sup>8</sup> P. Leach, 'The Parliamentary Assembly of the Council of Europe', in S. Schmahl & M Breuer (eds.), *The Council of Europe: Its Law and Policies* (Oxford University Press, forthcoming) (draft on file).

<sup>9</sup> 'The international human rights judiciary [IHRJ] includes regional bodies such as the European Court of Human Rights (ECtHR), which interprets and adjudicates the European Convention on Human Rights (ECHR) ... [i]t also includes the core treaty bodies set up to monitor states' compliance with such human rights treaties as they have subjected themselves to, including the United Nations Human Rights Committee (HRC) for the International Covenant on Civil and Political Rights', A. Follesdal, 'The Legitimacy Deficits of the Human Rights Judiciary: Elements and Implications of a Normative Theory', *Theoretical Inquiries in Law*, 14 (2013), 339, 340; see also B. Çali, 'The Legitimacy of International Interpretive Authorities for Human Rights Treaties', in A. Follesdal, J. K. Schaffer, and G. Ulfstein (eds.), *The Legitimacy of International Human Rights Regimes: Legal, Political and Philosophical Perspectives* (2014 CUP) p. 141, 148; distinguishing interpretive authorities from political forms of international human rights practice.

<sup>10</sup> See, e.g., UK, CEDAW/C/GBR/CO/7, 30 July 2013, para. 9.

<sup>11</sup> *Animal Defenders International v. United Kingdom*, Application no. 48876/08, 22 April 2013.

of deference afforded to states parties in particular cases.<sup>12</sup> It can also be read as serving a promotional role: states are encouraged to pursue certain activities in particular ways in order to generate deference.<sup>13</sup>

The idea of the IHRJ serving as a promoter of the human rights role of parliaments is especially attractive when the high caseload of an IHRJ institution challenges the premise that it operates as a complement to and not a replacement for domestic protection of human rights. The development of a promotional role for the IHRJ is consistent with the call for a greater focus on how to maximise the overall usefulness of the IHRJ for the realisation of rights, whilst working within its existing infrastructure and resources.<sup>14</sup> The promotional perspective places an emphasis on how existing points of connection between the IHRJ institutions and national parliaments might be optimized to enhance the human rights efforts of parliaments. To date, the feasibility of the IHRJ operating as a promoter of the human rights practices of domestic parliaments remains under-examined.<sup>15</sup>

This chapter addresses the theory and practice that help to determine how and when the international human rights judiciary (IHRJ) can promote the human rights role of national parliaments. In the first part it asks: what is the human rights role of parliaments? To what extent can that role be subject to external influence? Why should the IHRJ be interested in encouraging its improvement? What could the IHRJ promote to help advance the human rights role of parliaments? In the second part, it draws on the initial analysis in exploration of some of the modalities that are available to the IHRJ for implementation of a

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<sup>12</sup> M. Saul, 'The European Court of Human Rights' Margin of Appreciation and the Processes of National Parliaments', *Human Rights Law Review*, 15 (2015), 745–74, 750; R. Spano, 'Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity', *Human Rights Law Review*, 14 (2014), 487–502, 498.

<sup>13</sup> L. Lazarus and N. Simonsen, 'Judicial Review and Parliamentary Debate: Enriching the Doctrine of Due Deference', in M. Hunt, H. J. Hooper, and P. Yowell (eds.), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart, 2015), p. 385, 393, 401; A. Kavanagh, 'Proportionality and Parliamentary Debates: Exploring Some Forbidden Territory', *Oxford Journal of Legal Studies*, 34 (2014), 443, 466; J. Gerards, 'Pluralism, Deference and the Margin of Appreciation Doctrine', *European Law Journal*, 17 (2011), 80, 118.

<sup>14</sup> E. M. Hafner-Burton, *Making Human Rights A Reality*, (Princeton University Press, 2013), p. 186.

<sup>15</sup> See more generally L. R. Helfer, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime', *European Journal of International Law*, 19 (2008), 125, 159; J. L. Cavallaro and S.E. Brewer 'Reevaluating Regional Human Rights Litigation In The Twenty-First Century: The Case Of The Inter-American Court', *American Journal of International Law*, 102 (2008), 768, 777.

promotional agenda. The focus is on three modalities considered to be relatively well suited for impact and further development: interpretation of rights (especially political participation and communication rights), modes of reasoning (on deference and the proportionality test), and concluding observations by UN human rights treaty bodies on state reports.<sup>16</sup>

The analysis draws on the institutional frameworks, relevant case law and reports from the IHRJ, along with a surrounding body of literature from multiple disciplines. A key focus of the analysis is on the challenges that might be encountered by IHRJ institutions attempting to promote the human rights role of national parliaments and how they might be navigated. Particular attention is given to the practice from the ECtHR and two of the UN human rights treaty bodies, the CEDAW Committee and the Committee on the Rights of the Child (CRC Committee). These bodies are at the forefront of developments in this area. However, the analysis is intended to have relevance for the IHRJ institutions in general.

The main argument of this chapter is that advancing the human rights role of national parliaments is desirable but also creates challenges for the IHRJ. The challenges limit, but do not extinguish, what can hope to be achieved. To maximise the impact of efforts in this area, we should focus on the scope for coordination of the practice of the IHRJ across institutions and modalities.<sup>17</sup>

## 2. Explaining the human rights role of parliaments

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<sup>16</sup> Literature primarily concerned with domestic judicial review highlights how ordinary judicial functioning can impact on domestic political processes, see Hiebert and Kelly, *Parliamentary Bills of Rights*, p. 7 (judicial interpretation develops the normative framework to be applied); K. Roach, 'The Varied Roles of Courts and Legislatures in Rights Protection', in M. Hunt, H. J. Hooper, and P. Yowell (eds.), *Parliament and Human Rights: Redressing the Democratic Deficit* (Hart, 2015), p. 405, 416 (judicial modes of reasoning prompt greater openness) 416; and A. Sathanapally, *Beyond Disagreement: Open Remedies in Human Rights Adjudication* (OUP, 2012) p. 69 (judges contribute information to be debated).

<sup>17</sup> This links to the call for human rights implementation bodies to seek to operate in an integrated rather than fragmented manner. E. Brems, 'Should Pluriform Human Rights Bodies Become One? Exploring the Benefits of Human Rights Integration', *European Journal of Human Rights*, (2014), 447–470, 467: 'what is expected is that each human rights implementation body shapes its specific function in a manner that shows awareness of its being part of a project that transcends that particular body.'

The representatives at the second world conference of speakers of parliaments in September 2005 declared by consensus: 'Parliament embodies democracy. Parliament is the central institution through which the will of the people is expressed, laws are passed and government is held to account.'<sup>18</sup> The practice of these functions includes a range of activities. Consider that the process by which a bill is made into law by parliament can involve, along with plenary votes, the 'referral of that bill to specific committees, the discussion of the bill within such committees, [and] the debates of a bill in the plenary'.<sup>19</sup> This section identifies the human rights role of parliaments and considers factors influencing its performance.

## 2.1 The human rights role of parliaments

Parliaments are bound, as state organs, by the obligations laid down in human rights law. Human rights law has overlapping domestic and international dimensions. International norms set minimum standards applicable to all obligated states. Domestic norms must comply with the international norms, but they can set more demanding standards.<sup>20</sup>

Human rights law provides parameters, not a blue print, for decision-making. The law needs to be interpreted and applied to a context, which can often require the balancing of different interests. By interpreting and applying human rights law, parliaments help the law to develop. This is an important way for the human rights framework to benefit from the democratic qualities of parliaments,

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<sup>18</sup> Second world conference of speakers of parliaments, United Nations Headquarters, New York, 7 to 9 September 2005; see also on the functions of parliaments, D. Beetham, *Parliament and Democracy In The Twenty-First Century* (IPU, 2006), p. 1–2; A. Horne and A. Le Sueur (eds.), *Parliament: Legislation and Accountability* (Hart, 2016).

<sup>19</sup> R. Pelizzo and R. Stapenhurst, 'Democracy and Oversight' in R. Pelizzo, R. Stapenhurst and D. Olson (eds.), *Parliamentary Oversight for Government Accountability*, (2006), p. 8, also noting that the 'tools to oversee the actions of the executives...[include] hearings in committees, hearings in the plenary assembly, the creation of inquiry committees, parliamentary questions, question time, the interpellations and the ombudsman'; see also P. Webb and K. Roberts, 'Effective Parliamentary Oversight of Human Rights: A Framework for Designing and Determining Effectiveness' (Outcome Document) (Kings College London, June 2014).

<sup>20</sup> S. Besson, 'The Legitimate Authority Of International Human Rights: On The Reciprocal Legitimation Of Domestic And International Human Rights', in A. Follesdal, J. Karlsson Schaffer, and G. Ulstein, *The Legitimacy of International Human Rights Regimes: Legal, Political and Philosophical Perspectives* (Cambridge University Press, 2013), p. 32, 43–44.

such as participation, representation, and deliberation,<sup>21</sup> which feature to varying degrees in explanations for the authority of parliaments.<sup>22</sup>

However, there are indications that, even in high-quality democracies (defined, for example, by the Freedom House and Polity IV scales), parliaments are not performing well on human rights. They are not sufficiently engaging with human rights,<sup>23</sup> in a way that makes full use of their democratic qualities,<sup>24</sup> or the connections with the international human rights system.<sup>25</sup> This has implications for the democratic legitimacy of human rights law, but most significantly impacts on the lives of those individuals affected by the outcomes of decision-making.

The scope for parliaments' engagement with human rights to be influenced by the IHRJ is connected to the factors that explain parliaments' performance. Recent studies provide some possible explanations.<sup>26</sup>

## 2.2 Factors influencing the human rights role of parliaments

The significance of institutional design and the nature of the issue have been studied by Steiner et al as determinants of the quality of parliamentary discourse.<sup>27</sup> Their model of discourse quality includes considerations such as participation, and level of justification of arguments.<sup>28</sup> These scholars argue that the more polarised the issue, the less the quality of the discourse, as participants

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<sup>21</sup> See J. Waldron, 'Refining the Question about Judges' Moral Capacity', *International Journal of Constitutional Law*, 7 (2009), 69, 79 – 81; R. Bellamy, *Political Constitutionalism* (CUP, 2007) p. 210; J. Steiner, *The Foundations of Deliberative Democracy: Empirical Research and Normative Implications* (CUP 2012) p. 36.

<sup>22</sup> See S. Hershowitz, 'Legitimacy, Democracy, and Razian Authority', *Legal Theory*, 9 (2003), 201, 213.

<sup>23</sup> Hunt, 'Introduction', 2; Hiebert, 'Legislative Rights Review', 41.

<sup>24</sup> Hiebert and Kelly, *Parliamentary Bills of Rights*, p. 411.

<sup>25</sup> Schwarz, 'Inter-Parliamentary Union', 331.

<sup>26</sup> Measuring the human rights performance of parliaments creates methodological challenges, see C. Evans and S. Evans, 'Evaluating the Human Rights Performance of Legislatures', (2006) *Human Rights Law Review*, 6 (2006), 545, 551-52 (stressing the importance of assessing both outputs and process).

<sup>27</sup> J. Steiner, A. Bächtiger, M. Spörndli, and M. R. Steenbergen, *Deliberative Politics in Action: Analysing Parliamentary Discourse* (Cambridge University Press, 2004), p. 12–13, their analysis takes account of the relevance of the individual preferences of parliamentarians (which are considered to be sensitive to prevailing social norms), the culture of the political institution and the context of the debate.

<sup>28</sup> See Steiner et al., *ibid.*, p. 78, factors considered for influence on discourse: consensus/competition; weak/strong veto players; parliamentary/presidential; first/second chambers; public/non-public; polarised/non-polarised debates; see also Sathanapally, *Beyond Disagreement*, p. 65-6, 186 specifying criteria for examining deliberative quality of legislative debates on rights.

are not likely to operate in a co-operative matter.<sup>29</sup> Also, there is likely to be more deliberation on issues in legislatures in presidential rather than parliamentary systems, because of the greater scope for representatives to dissent from the executive in the presidential system.<sup>30</sup>

This latter finding is supported by a recent study by Hiebert and Kelly. They study the way in which institutional innovations in the UK and New Zealand – two Westminster-based parliamentary systems where there is no bill of rights tradition<sup>31</sup> – have impacted on the role played by parliament in the protection of rights. Their focus is on the effects of the introduction of weak judicial review (constrained remedial powers) and a ministerial obligation to report to parliament on the consistency of a bill with rights. They find little evidence of increased pressure on government or in the number of reasoned deliberations as a result of the aforementioned innovations.<sup>32</sup> This is attributed to two key considerations: the continued power imbalance between the executive and the parliament, and the dynamics of the parliamentary context which does not promote an interest ‘in seeking the best way to ensure that legislation is compliant with protected rights’.<sup>33</sup> Causes for the underperformance of parliaments on rights issues might vary in states with different types of constitutional arrangements.<sup>34</sup>

Yet the dominance of the executive is also part of the explanation provided by Schwarz (former Director of the IPU Human Rights Programme) for the general absence of parliamentarian engagement with the practices and outputs of the

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<sup>29</sup> Steiner et al, *ibid.*, p. 90.

<sup>30</sup> Steiner et al, *ibid.*, p. 86.

<sup>31</sup> See further S. Gardbaum, *The New Commonwealth Model of Constitutionalism. Theory and Practice* (Cambridge University Press, 2013).

<sup>32</sup> See further J. King, ‘Parliament’s Role Following Declarations of Incompatibility under the Human Rights Act’, in M. Hunt, H. J. Hooper, and P. Yowell (eds.), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart, 2015), p. 165, 174 – 182; A. L. Young, ‘Is Dialogue Working under the Human Rights Act 1998’, *Public Law*, (2011), 773, 782-785, although see also 786; Sathanapally, *Beyond Disagreement*, p. 185.

<sup>33</sup> Hiebert and Kelly, *Parliamentary Bills of Rights*, p. 411.

<sup>34</sup> See Evans and Evans, ‘Evaluating the Human Rights Performance of Legislatures’, 553; also Y. Lupu, ‘Legislative Veto Players and the Effects of International Human Rights Agreements’, *American Journal of Political Science*, (2015) 1, 14 (pre-print on file).

international human rights system. Schwarz points to two main types of consideration:

on the one hand, such absence is more often than not due to sometimes grave structural and economic problems and to a lack of financial resources, expertise and information; and, on the other hand, it is the lack of political will, the role of political parties, in particular, strict party discipline preventing MPs from criticizing their party colleagues in government, thus creating obedient parliamentary majorities, and more generally the lack of independence of parliaments from governments which hinder parliaments in effectively serving as guardians of human rights.<sup>35</sup>

Taken together, the noted studies indicate that the underperformance of parliaments in the rights field can be explained by various political and institutional considerations. As many of the causal factors are heavily entrenched or circumstantial, the scope for external influence is limited. However, some explanatory themes emerge that could be more susceptible to external influence.

One central theme is that awareness, knowledge and interest in human right issues amongst parliamentarians appears too low. Another related theme is that executives are not doing enough to empower parliaments on human rights issues.<sup>36</sup> Both of these themes include elements that the IHRJ might be able to affect. For instance, parliamentarians could be encouraged to contribute to the state reporting procedures of UN human rights treaty bodies. Executives could be encouraged to make available to parliament sufficient information, time for debate and consultations on human rights issues, and opportunities to vote freely (or at all) on matters pertaining to human rights.<sup>37</sup> Targeting such

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<sup>35</sup> Schwarz, 'Inter-Parliamentary Union', p. 331.

<sup>36</sup> Schwarz, *ibid.*; M. Hunt, 'Enhancing Parliaments' Role in the Protection and Realisation of Human Rights', in M. Hunt, H. J. Hooper, and P. Yowell (eds.), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart, 2015), p. 469, 470.

<sup>37</sup> Schwarz, *ibid.*; Hunt, *ibid.*



elements would be one way to promote conditions that are conducive to improvement in the performance of parliaments on human rights.

### **3. Incentives and challenges for the IHRJ as promoter of the human rights role of parliaments**

Why might the IHRJ be interested in promoting the human rights role of parliaments, and what challenges might serve as deterrence? What can this tell us about the reasonableness of the IHRJ attempting to develop such a role?

#### **3.1 Incentives**

The case for the IHRJ working to promote and strengthen domestic parliamentary practices in the field of human rights can appear straightforward.

There is intrinsic value in parliaments operating in ways that capitalise on their democratic qualities. It matters how political authority is exercised, not just whether it comes to the right decision. Improvements in the participation, representation and deliberation practices of parliaments can be argued for on the basis of the values of political equality,<sup>38</sup> human autonomy,<sup>39</sup> human dignity<sup>40</sup> and procedural justice.<sup>41</sup>

There are also instrumental arguments in favour of the IHRJ encouraging better performance of parliaments on human rights issues. These can be about the quality of the decisions that are made on human rights issues as well as other, broader consequences. The more debates on human rights issues are representative, in the sense of the number of members participating representing different interests, the more scope there is for outcomes to be

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<sup>38</sup> Bellamy, *Political Constitutionalism*, 219

<sup>39</sup> Hershowitz, 'Legitimacy', 213–214.

<sup>40</sup> *Ibid.*

<sup>41</sup> R. Dahl, *Democracy And Its Critics* (Yale University Press, 1989), p. 164–165; also E. Brems and L. Lavrysen, 'Procedural Justice in Human Rights Adjudication: The European Court of Human Rights', *Human Rights Quarterly*, 35 (2013), 176–200, 180.

reached that take account of the different interests of society.<sup>42</sup> The more debates are participatory, in the sense of drawing on the views of particularly interested groups through consultations, the greater the understanding of the issues at stake can be; in addition the sense of awareness and ownership of the outcomes can also be enhanced.<sup>43</sup> The better the deliberative quality, in terms of the information available and the tone of the debate, the more scope there is for new insights and understandings to be generated.<sup>44</sup>

In addition, national parliaments are key parts of the domestic compliance communities that ensure that the judgments and views of the IHRJ are implemented. They do this by passing legislation that complies with the jurisprudence of the IHRJ, but also by raising issues and calling on the executive to act.<sup>45</sup> When parliaments become more interested in human rights issues, this can lead to stronger and more frequent pressure for the implementation of the outputs of the IHRJ.<sup>46</sup>

### 3.2 Challenges

There are, though, also a number of reasons why the IHRJ might be hesitant about developing its role as promoter of parliamentary engagement in the rights sphere.

Questions on the authority of the IHRJ might arise. No specific provisions on the promotion of parliaments' human rights role are included in any of the foundational human rights treaties. Still, the powers afforded to the IHRJ through

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<sup>42</sup> Lazarus and Simonsen, 'Judicial Review and Parliamentary Debate', 395.

<sup>43</sup> See F. Butler, 'Building a Human Rights Culture', in C. Harvey (ed.), *Human Rights In the Community: Rights as Agents for Change* (Hart, 2005), p. 63, 67; see, though, A. Nolan, *Children's Socio-Economic Rights, Democracy and Courts* (Hart, 2011), p. 79, distinguishing consultation from 'true participation' which requires involvement in the actual decision-making.

<sup>44</sup> See Steiner, *Foundations Of Deliberative Democracy*, p. 12, for criteria for measuring the quality of deliberation; and more generally the website of BIDS (Bern Interdisciplinary Deliberation Studies) [http://www.bids.unibe.ch/content/index\\_eng.html](http://www.bids.unibe.ch/content/index_eng.html).

<sup>45</sup> C. Hillebrecht, *Domestic Politics and International Human Rights Tribunals: The Problem of Compliance*, (Cambridge University Press, 2014), p. 23; A. Donald, 'Parliaments as Compliance Partners in the European Convention on Human Rights System' (this volume).

<sup>46</sup> See D. Anagnostou and A. Mungiu-Pippidi, 'Domestic Implementation of Human Rights Judgments in Europe: Legal Infrastructure and Government Effectiveness Matter', *European Journal of International Law*, 25 (2014), 205, 221.

the founding human rights treaties can be explicit, implicit and inherent.<sup>47</sup> Many human rights treaties make democracy an issue that should be figured into the practice of the international institution. One of the clearest examples is the ECtHR, where the preamble of the ECHR indicates that the system created is based on:

‘belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend’.<sup>48</sup>

Similarly, the preamble to the American Convention on Human Rights (ACHR) specifies the importance of democratic institutions to the functioning of the system.<sup>49</sup> At the global level, it is possible to find indicative references, such as the use of the term ‘democratic society’ in some of the limitation clauses included in the ICCPR.<sup>50</sup> These references to democracy support IHRJ institutions developing their practices in a way that promotes the human rights role of parliaments. Indeed, this already happens.<sup>51</sup> For instance, pluralism and public debate are prominent considerations in aspects of the work of the ECtHR.<sup>52</sup> How far might the IHRJ reasonably go in promoting the human rights role of parliaments? It is possible to foresee both normative and practical parameters.

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<sup>47</sup> See C. Brown, ‘Inherent Powers in International Adjudication’, in C. P. R. Romano, K. J. Alter, and Y. Shany (eds.), *The Oxford Handbook of International Adjudication* (Oxford University Press, 2014), p. 828.

<sup>48</sup> See also *Hirst v United Kingdom (No 2) Application No 74025/01*, 6 October 2005, para. 58.

<sup>49</sup> See also A. Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (Oxford University Press, 2012), p. 73–74.

<sup>50</sup> Democracy is not explicit in the Banjul charter, but the 2000 Constitutive Act of the African Union, Article 3(g) provides that one of the AU’s objectives is to ‘promote democratic principles and institutions, popular participation and good governance’.

<sup>51</sup> See A. Mowbray, ‘Contemporary Aspects of the Promotion of Democracy by the European Court of Human Rights’, *European Public Law*, 20 (2014), 469; see also T. Altwicker, ‘Convention Rights as Minimum Constitutional Guarantees?’, in A. von Bogdandy and Sonnevend (eds.), *Constitutional Crisis in the European Constitutional Area* (Hart, 2015), p. 331, 349–350, making the case for the ECtHR to have a role in identifying and operationalising minimum standards of institutional design on the constitutional level.

<sup>52</sup> See P. Popelier, ‘The Court as Regulatory Watchdog: the Procedural Approach in the Case Law of the European Court of Human Rights’, in P. Popelier et al. (eds.), *The Role of Constitutional Courts in Multilevel Governance* (Intersentia, 2012), p. 249, 256; also A. Zysset, ‘Searching for the Legitimacy of the European Court of Human Rights: The Neglected Role of “Democratic Society”’, *Global Constitutionalism*, 5 (2016), 16.

On the normative side, parliament is the institution that is most closely associated with the will of the people within a state. This gives parliaments a strong claim to be able to determine their own modes of operation.<sup>53</sup> This does not exclude the reasonableness of interest being taken by the IHRJ in the way in which human rights are dealt with by parliaments. It does provide a reason for the IHRJ to favour modesty in the development of any promotional strategy. In practice, the importance of a cautious attitude might be heightened when there is already a strained relationship between the international judicial institution and a particular set of national authorities.<sup>54</sup> This perspective can be developed in terms of subsidiarity.

The principle of subsidiarity is emerging to guide how the IHRJ institutions relate to the three branches of domestic government. The common core of different conceptions of subsidiarity is described by Follesdal as a:

‘rebuttable presumption for the local. Local authorities should enjoy as much authority as possible, so long as it is consistent with achieving the particular, normatively permitted or required objectives of the relevant IC [international court].’

In international human rights law, subsidiarity based reasoning is most often used to calibrate the exercise of responsibilities afforded to the higher level through reference to attributes that the local level is expected to possess.<sup>55</sup> This corresponds with the negative side of subsidiarity.<sup>56</sup> There is also a positive side to subsidiarity. This directs the higher level to use its powers to advance the capacity of the local level to realise the goals for which the higher level was

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<sup>53</sup> See Bellamy, *Political Constitutionalism*, p. 220 -221; the strength of this claim is linked to an assumption that parliaments are operating in good faith, J. Waldron, *Law and Disagreement* (Oxford University Press, 1999), p. 15.

<sup>54</sup> See, e.g., E. D. Bates, ‘The UK and Strasbourg: A Strained Relationship — The Long View’, in K. S. Ziegler, E. Wicks and L. Hodson (eds.), *The UK and European Human Rights: A Strained Relationship?* (Hart, 2015), p. 39; it is important to recognise that some of the criticisms of the ECtHR emanating from the UK have been focused precisely on the sidelining of parliaments in the development of the machinery for the protection of human rights; see J. Straw, *Aspects of Law Reform: An Insider’s Perspective*, (Hamlyn Lectures), (Cambridge University Press, 2013), p. 26, 42; also E. Bates, ‘Democratic override (or rejection) and the authority of the Strasbourg Court: the UK Parliament and prisoner voting’, (this volume) p. xxx.

<sup>55</sup> See J. Gerards, ‘Pluralism, Deference and the Margin of Appreciation Doctrine’, 87.

<sup>56</sup> A. Follesdal, ‘Subsidiarity’, *Journal of Political Philosophy* 6 (1998) 190, 195.

established.<sup>57</sup> Positive subsidiarity is associated with a justification for a strong, prescriptive interventionist stance from the higher level.<sup>58</sup> Positive subsidiarity can also be subtler and involve the higher level optimizing its practices to advance the capacities of the lower level.<sup>59</sup> The term supportive subsidiarity is a useful way to distinguish this subtler perspective from other forms of positive subsidiarity.<sup>60</sup> Supportive subsidiarity is most viable in relation to promotion of the human rights role of parliaments. This is underlined by the practical challenges that are likely to emerge.

Practical concerns stem from the level of variation in the nature of the legislative and accountability roles of parliaments. There can be variation from state to state and within states from issue to issue.<sup>61</sup> Given that just one IHRJ institution can have jurisdiction over more than one hundred states, it is possible that attempts to promote the human rights role of parliaments might encourage practices that do not suit the domestic context. This indicates the importance of the IHRJ institutions avoiding a 'one size fits all' approach in promotional efforts. Instead, they should work to accommodate the contextual demands of a particular state.

In sum, there are strong incentives for the IHRJ to do all they can to promote the human rights role of democratic parliaments, particularly to facilitate parliaments engaging more often, more deeply and more democratically on human rights issues. The incentives, though, are checked by some strong challenges. The absence of an explicit mandate suggests that there should be modesty in the active steps that are taken. The variations in political and

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<sup>57</sup> P. Carozza, 'Subsidiarity as a Structural Principle of International Human Rights Law', *American Journal of International Law*, 97 (2003), 38, 44 and 76.

<sup>58</sup> Follesdal, 'Subsidiarity', 195; see also Helfer, 'Redesigning the European Court of Human Rights', 149.

<sup>59</sup> Helfer's principle of embeddedness can be read to include the range of degrees of positive subsidiarity, but this principle is articulated as the counterpoint rather than another side to subsidiarity, Helfer, *ibid.*, 130, 149 and 159; see similarly without the language of subsidiarity and a focus on subtler methods Cavallaro and Brewer 'Reevaluating Regional Human Rights Litigation', 777.

<sup>60</sup> Thanks to Andreas Follesdal for suggesting this terminology.

<sup>61</sup> A. Donald and P. Leach, 'The Role of Parliaments Following Judgments of the European Court of Human Rights' in M. Hunt, H. J. Hooper and P. Yowell (eds.), *Parliaments and Human Rights: Redressing the Democratic Deficit* (2015), p. 59, 84; more generally, D. Arter, 'Conclusion. Questioning the 'Mezey Question': An Interrogatory Framework for the Comparative Study of Legislatures', *The Journal of Legislative Studies*, 12 (2006), 462.

institutional contexts of states parties to the foundational human rights treaties calls for an approach that is particularised to the needs of each country. What might a promotional agenda that responds to these considerations look like?

#### **4. What could the IHRJ promote to help advance the human rights role of parliaments?**

To gain further insight on how the IHRJ might develop a role as a promoter of the human rights role of national parliaments, this section examines international policy material concerned with the operation of parliaments. This material is interesting as it originates from bodies, which although political in nature, share certain similarities with the IHRJ. In particular, they are international and must relate to a broad range of diverse states.

Firstly, attention is given to the work of international parliamentary bodies that already explicitly target the human rights role of national parliaments. Secondly, consideration is given to the relevance of the outputs of international economic bodies that seek to influence the effectiveness of legislation.

##### **4.1 International parliamentary bodies**

Initiatives to improve the functioning of parliaments can be necessary regardless of the political, social and cultural context of a state.<sup>62</sup> This is reflected in the work of the IPU, a collection of representatives from parliaments from around the world, often working alongside UN organs to improve parliamentary functioning across the globe. One area that has provided a thematic focus for the IPU is the protection and promotion of human rights.<sup>63</sup> The work of the IPU raises awareness of rights and encourages parliamentarians to scrutinise the work of the executive on this basis. The IPU's approach, channelled through its own human rights committee, has centred 'promoting the formation of specialised human rights committees, on capacity building of their members and

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<sup>62</sup> See Steiner et al., *Deliberative Politics in Action*.

<sup>63</sup> See also UN Office of the High Commissioner for Human Rights, Mainstreaming Human Rights, [www.undg.org/hrm](http://www.undg.org/hrm); C. McCrudden, 'Mainstreaming Human Rights', in C. Harvey (ed.), *Human Rights in the Community* (Hart, 2005), p. 9.

parliamentarians in general, and the role of parliaments in international regional human rights mechanisms'.<sup>64</sup>

A similar approach is found in the parliamentary body of the Council of Europe (CoE). The President of the Parliamentary Assembly of the Council of Europe (PACE) has stressed that:

It is indeed important that national parliaments systematically check that draft legislation is compatible with the Convention, that they closely monitor the action taken to execute judgments against their States and that they ensure that changes to national legislation are in line with the measures recommended by the Court.<sup>65</sup>

This statement has a foundation in PACE Resolution 1823 (2011), which provides a set of 'basic principles for parliamentary supervision of international human rights standards'. The principles highlight the importance of the establishment of 'appropriate parliamentary structures to ensure rigorous and regular monitoring of compliance with and supervision of international human rights obligations, such as dedicated human rights committees or appropriate analogous structures'. The remit of such structures is specified as including 'the systematic verification of the compatibility of draft legislation with international human rights obligations'.<sup>66</sup>

The general message from the international parliamentary bodies is that it is essential for domestic parliamentarians to self-empower (to develop and utilise awareness of rights), but that it is also important for the executive to take steps to improve the human rights role of parliaments in the production of

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<sup>64</sup> Schwarz, 'Inter-Parliamentary Union', p. 331–332; see also H. Yamamoto, *Tools for Parliamentary Oversight: A Comparative Study*, (Inter-Parliamentary Union, 2007).

<sup>65</sup> Opening Statement by Jean-Claude Mignon, President of the Parliamentary Assembly of the Council of Europe, at the Brighton Conference, 19 April 2012.

<sup>66</sup> See Drzemczewski and Lowis, 'Parliamentary Assembly of the Council of Europe', 318; see also Donald and Leach, *The Role of Parliaments Following Judgments*, p. 72: 'At the CoE level, the development of parliamentary models of human rights scrutiny is embryonic and context-dependent; there is no ideal model.'

legislation.<sup>67</sup> Most notably, the high-level resolutions of the international parliamentary bodies share an emphasis on the importance of a standing human rights committee (or analogous structures) for enhancing the rights performance of parliaments in general.<sup>68</sup> The IHRJ might reasonably find inspiration in these recommendations, using them as a basis to communicate similar messages or for seeking out ways to promote conditions that can facilitate their realisation.

## 4.2. International economic bodies

The Organisation for Economic Co-operation and Development (OECD) and the European Union (EU) are two international bodies that have produced standards to promote the quality of law making across the whole of government (not just in relation to parliaments).<sup>69</sup> The standards produced have been summarised as placing an emphasis on: coordination of action, broad consultation, legislation on the basis of evidence, motivation of decisions, transparency, proportionality and subsidiarity, monitoring, consistency, accessibility and intelligibility.<sup>70</sup> The work of the two bodies does not set out a 'one size fits all' approach to regulation. Rather, member states are encouraged 'to define priorities on the basis of available human and institutional capacities'.<sup>71</sup> The role of the international body is to highlight the pool of different, generally useful approaches that are available, and to encourage the domestic body to reflect upon their relevance in a

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<sup>67</sup> See PACE Resolution 1823 (2011), Appendix 1 - Basic principles for parliamentary supervision of international human rights standards; for further best practice suggestions directed at the executive intended to help achieve enhanced implementation of judgments of the ECtHR, Drzemczewski and Lowis, 'Parliamentary Assembly of the Council of Europe', 322; Report of the UK Parliament's Joint Committee on Human Rights 2010, 'Enhancing Parliament's Role in Relation to Human Rights Judgments', p 52-56, available at: [www.publications.parliament.uk/pa/jt200910/jtselect/jtright/85/85.pdf](http://www.publications.parliament.uk/pa/jt200910/jtselect/jtright/85/85.pdf).

<sup>68</sup> See also 'Draft Principles and Guidelines on the Protection and Realisation of the Rule of Law and Human Rights', in M. Hunt, H. Hooper and P. Yowell, (eds.), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Oxford: Hart Publishing, 2015), p. 485-95, (Appendix) section I A; K. Roberts Lyer and P. Webb, 'Effective Parliamentary Oversight of Human Rights' (in this volume).

<sup>69</sup> See, e.g., The OECD Council, Recommendation on Regulatory Policy and Governance, March 2012, available at <http://www.oecd.org/governance/regulatory-policy/49990817.pdf>; EU 2010 Smart Regulation communication COM (2010) 543 final, <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0543:FIN:EN:PDF> addressing both organs of the EU and member states, p. 8.

<sup>70</sup> F. Kartner and A. Meuwese, 'Responsiveness towards fundamental rights impacts in the preparation of EU legislation', paper presented at Seminar on Procedural Review and ECHR, Ghent University, May 21-22, 2015 (on file with author); see H. Xanthaki, 'European Union Legislative Quality after the Lisbon Treaty: the Challenges of Smart Regulation', *Statute Law Review*, 35 (2013), 75-76.

<sup>71</sup> EU 2010 Smart Regulation communication COM (2010), p. 9.



particular instance. The development of a pool of resources is something that the IHRJ could also consider working towards. It offers a means to steer parliaments towards certain types of activities, without neglecting the importance of context for what will be suitable and possible.

In contrast to the international parliamentary bodies, the guiding concern of these economic bodies has been the production of high-quality legislation that is effective at achieving its aims.<sup>72</sup> As such, the standards should not be assumed to serve as a blueprint for desirable parliamentary activity in the human rights field. Indeed, it is possible that the emphasis in the underlying motivation of these standards, on achieving legislation that is effective in the pursuit of its aims, could lead to a downplaying of both human rights considerations and parliamentary debate as unnecessary luxuries.<sup>73</sup> Such a risk heightens the need for and importance of the work of bodies with a particular focus on the human rights role of parliaments.

Still, some of the practices that the international economic bodies have highlighted, such as specifications on broad consultations, legislation on the basis of evidence and proportionality assessments, also have relevance when considering the role of parliaments in relation to human rights. The endorsement by international economic bodies is one basis for the IHRJ to consider their promotion, at least in relation to states that are subject to these international economic regimes.

In sum, existing policy material from international parliamentary bodies is support for the IHRJ seeking to encourage advancement in the human rights role of parliaments. It supports the IHRJ sending signals that communicate the importance of parliaments self-empowering and executives empowering parliaments. It provides a basis for the IHRJ to take steps to promote conditions that enable empowerment to occur. In particular, it provides encouragement for

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<sup>72</sup> Kartner and Meuwese, *ibid.*, p. 2; also E. Darian-Smith & C. Scott, 'Regulation and Human Rights in Socio-Legal Scholarship', *Law & Policy*, 31 (2009), 27, 271–272.

<sup>73</sup> Kartner and Meuwese, *ibid.*, p. 17; a similar concern arises in the security context, see A. Orford, *Responsibility to Protect* (Cambridge University Press, 2011), p. 137, p. 190–2.

the IHRJ promoting the creation of a standing human rights mechanism within parliaments. Policy materials from international economic bodies indicate that promotion of particular types of parliamentary activity need not be in the form of a blueprint. It can take the form of a pool of resources that can be built up over time through practice and be drawn upon more or less by a state depending on the context.<sup>74</sup> It is whether and to what extent the IHRJ has modalities available to develop and implement a promotional agenda along these lines that attention is now turned.

### **5. By what means can the IHRJ promote the human rights role of parliaments?**

The IHRJ does not have a specific mode of operation intended to promote the quality of parliamentary process. Still, to the extent that its modes of operation touch upon matters related to the operation of parliaments, it is possible that it will be able to influence the approach taken to rights-based issues. This section considers three modalities by which the IHRJ might communicate specific messages related to and about the human rights role of parliament. The modalities addressed are considered to be relatively well suited for impact and further development: interpretation of rights; modes of reasoning in application of the law; and concluding observations by UN human rights treaty bodies on state reports.

By addressing the potential benefits alongside the limits of the three modalities, light is shone on the importance of further investigation into the scope for the IHRJ institutions developing a coordinated effort: coordinated across the three modalities and across the IHRJ institutions.

Before proceeding, it is important to reiterate that parliamentarians often lack awareness of the outputs of the IHRJ.<sup>75</sup> This reduces the hope for the IHRJ to be

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<sup>74</sup> For a theory of legislative quality along these lines, see Xanthaki, 'European Union Legislative Quality after the Lisbon Treaty', 74.

<sup>75</sup> See Schwarz, 'Inter-Parliamentary Union'; R. Murray and D. Long, *Implementation of the Findings of the African Commission on Human and People's Rights* (Cambridge University Press, 2015), p. 103–104; J. Krommendijk, *The Domestic Impact and Effectiveness of the Process of State Reporting under UN Human Rights Treaties in the Netherlands, New Zealand and Finland* (Intersentia, 2014), p. 169, 289, although see

able to directly affect the way in which parliamentarians undertake their activities. The IHRJ might seek to enlist intermediaries, such as NGOs, to draw the attention of parliamentarians to their work.<sup>76</sup> Still, the importance of the contact that the IHRJ has with executives should not be underestimated. The executive is the domestic branch of government that the IHRJ interacts with directly in contentious cases, reporting processes and other requests for input, such as during the production by UN treaty bodies of general comments. It is also the executive and its lack of incentive to empower parliaments that is central in explanations for the underperformance of parliaments in the rights field.<sup>77</sup> Accordingly, an initial focus from the IHRJ on the executive as a route to enhancement of parliamentary process could be a judicious use of resources.

## 5.1 The interpretation of rights

Although the interpretive practice of the IHRJ is guided by the Vienna Convention on the Law of Treaties,<sup>78</sup> it does have a 'particular dynamism' as it 'deals directly with the relationship of the individual and the state and is thus one of the areas of law where a change in social realities and conditions can exercise a direct influence on the applicable law'.<sup>79</sup> To the extent that consensus amongst contracting states guides the interpretative practice of the IHRJ,<sup>80</sup> this might make it possible for there to be a more concentrated interpretive approach in regional bodies than global bodies on matters that connect with the nature of parliamentary process. Still, in either respect, the scope for harnessing the interpretation of rights to contribute towards promotion of parliamentary performance in rights-related issues depends on the scope and content of the

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also p. 331; and P. Yowell, 'The Impact of the Joint Committee on Human Rights on Legislative Deliberation', in M. Hunt, H. J. Hooper, and P. Yowell (eds.), *Parliament and Human Rights: Redressing the Democratic Deficit* (Hart, 2015), p. 141, 156-7.

<sup>76</sup> See Krommendijk, *ibid.*, p. 289; also K. W. Abbott, P. Genschel, D. Snidal, and B. Zangl (eds.) *International Organizations as Orchestrators* (Cambridge University Press, 2015), p. 4.

<sup>77</sup> Hiebert and Kelly, *Parliamentary Bills of Rights*, p. 411; see also Roach, 'The Varied Roles of Courts and Legislatures in Rights Protection', 416.

<sup>78</sup> For an overview in the common ground and variations in the interpretative practices of the different bodies, see M. Fitzmaurice, 'Interpretation of Human Rights Treaties', in D. Shelton (ed.) *The Oxford Handbook of International Human Rights Law* (OUP, 2013) 739, 753 – 769.

<sup>79</sup> B. Schlutter, 'Human Rights Treaty Interpretation by the UN Treaty Bodies', H. Keller and G. Ulfstein (eds.), *UN Human Rights Bodies* (Cambridge University Press, 2012), p. 261, 317.

<sup>80</sup> See Schlutter, *ibid.*, 318; also G. Neuman, 'Import, Export, and Regional Consent in the Inter-American Court of Human Rights', *European Journal of International Law*, 19 (2008), 101, 107.

underlying right. The most central rights are those concerned with political participation and those with the closely related political communication rights (expression, association and assembly). From the case law, it is possible to identify two focal points to help explain how the interpretative practice of the IHRJ connects to circumstances relevant for parliaments' human rights role: structural arrangements, and working conditions of parliamentarians.

### *5.1.1. Structural arrangements*

Specifications relevant for the structural arrangements of parliaments can be found in the interpretative practice of the IHRJ. The requirement of multi-party elections is much more firmly established as a requirement of the right to political participation within the European system than in the ICCPR.<sup>81</sup> Yet the UN Human Rights Committee (HRC) has still encouraged a reading of the right to political participation that includes a requirement of multiparty elections.<sup>82</sup> As political party competition can contribute to the quality of parliamentary conduct on rights based issues – by facilitating representative debate that increases the scope for solutions to general problems to be found –<sup>83</sup> the interpretative practice on this topic can help to strengthen the performance of parliaments on human rights.

However, even at the regional level, the potential for structural prescriptions for parliaments to be interpreted into human rights law remains slim. The ECtHR, for instance, has not gone so far as to specify a form that an electoral system should take; recognising that what might be deemed appropriate in one place is not necessarily suitable for another.<sup>84</sup> This is consistent with the view that as

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<sup>81</sup> J. Vidmar, 'Multiparty Democracy: International and European Human Rights Law Perspectives', *Leiden Journal of International Law*, 23 (2010), 209, 233; see also S. Wheatley, 'Democracy in International Law: A European Perspective', *International & Comparative Law Quarterly*, 51 (2002), 225–248.

<sup>82</sup> On the approach to application of the right to political participation in the Inter-American system, see 'The Right to Political Participation in International Law', in G. H. Fox and B. R. Roth (eds.), *Democratic Governance in International Law* (Cambridge University Press, 2000), p. 49–90, 64–6.

<sup>83</sup> See Popelier, 'The Court as Regulatory Watchdog', p. 256; J. Gerards, 'Procedural review by the ECtHR – a typology', paper presented at Seminar on Procedural Review and ECHR, Ghent University, May 21–22, 2015 (on file with author), p. 4; Bellamy, *Political Constitutionalism*, p. 254.

<sup>84</sup> See *Gitonas v. Greece*, (Appl. no. 18747/91; 19376/92; 19379/92), 1 July 1997, ECtHR, para. 39; also Vidmar, 'Multiparty Democracy'.

there remain considerable differences in the political arrangements within states, the IHRJ has to a large extent refrained from making structural specifications.<sup>85</sup> It seems unlikely therefore that any IHRJ institution would presently be in a position to locate a requirement of a standing human rights committee inside parliament (or analogous arrangement) within its founding treaty. This will likely require greater evidence of consensus in the practice of member states than presently exists.<sup>86</sup>

### 5.1.2. Working conditions

The interpretative practice of the IHRJ can also address the working conditions of parliamentarians. Consider the case of *Karácsony and Others v. Hungary*. This is an Article 10 ECHR case concerned with an act of protest against a legislative measure by two opposition members of the Hungarian parliament.<sup>87</sup> The ECtHR responded to the government's claim that political expression deserved weaker protection because of the immunity of prosecution enjoyed by politicians, by stressing the extra importance of speech of elected representatives given that parliament was an essential forum for debate.<sup>88</sup> The ECtHR also underlined the particular importance that minority members are able to express their opinions in the parliamentary setting.<sup>89</sup> This interpretative approach contributed to the finding that the sanction of the applicants' acts and the process by which it was imposed violated Article 10 ECHR. The reasoning of the ECtHR sent a signal that parliamentarians should not be deterred from voicing views that do not support the government.<sup>90</sup> This sort of interpretive approach based on a particular image of the position of a parliament within a democracy can contribute towards a more permissive parliamentary environment. This may advance in turn the

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<sup>85</sup> See S. Wheatley, 'Minorities, Political Participation, and Democratic Governance under the European Convention on Human Rights', in M. Weller (ed.), *Political Participation of Minorities* (Oxford University Press, 2010), p. 177, 185.

<sup>86</sup> See Drzemczewski and Lowis, 'Parliamentary Assembly of the Council of Europe', 312.

<sup>87</sup> *Karácsony and Others v. Hungary*, Application no. 42461/13, Second Section, 16 September 2014.

<sup>88</sup> *Ibid.*, para. 69.

<sup>89</sup> *Ibid.*, para. 72.

<sup>90</sup> See also *Karácsony and Others v. Hungary*, Applications nos. 42461/13 and 44357/13, Grand Chamber, 17 May 2016, para. 142, para. 151, para. 161. The Grand Chamber also stressed the particular importance of freedom of expression in the parliamentary context, but afforded the state a broader margin of appreciation in light of the importance of parliamentary autonomy. This led to a focus not on whether the restriction on expression was necessary but instead on whether it was 'accompanied by effective and adequate safeguards against abuse.' The result was a narrower violation of Article 10 (ECHR).

quality of parliamentary engagement with rights, through helping to ensure that debates benefit from a broad range of perspectives.<sup>91</sup>

The potential for the IHRJ to develop its influence on the quality of parliamentary process through interpretation is perhaps greater in matters related to working conditions than structural arrangements. One reason for this is that political communication rights (freedoms of expression, association and assembly) are often subject to closer scrutiny than rights that might pertain more to structural arrangements, such as the right to free elections. In addition, the development and strengthening of political communication rights is not dependent on cases that are directly related to parliaments. A general strengthening of freedom of expression for media outlets, for instance, increases the access of parliamentarians to information.<sup>92</sup>

One opportunity for interpretation of political communication rights to lead to specifications on the nature a legislative process is found in the limitation clauses that help to define the scope of the rights. For example, Article 10 of the ECHR permits limitation of the right to freedom of expression on the condition that the limits ‘are prescribed by law and are necessary in a democratic society’. The requirement of lawfulness might have been understood to include reference to the quality of the law making process. However, with some limited exceptions,<sup>93</sup> it has instead been interpreted as a reference to the quality of the law; requiring that the law imposing limits on rights is accessible and foreseeable,<sup>94</sup> in order to prevent arbitrariness and ensure legal certainty.<sup>95</sup>

In addition, the requirement of ‘necessary in a democratic society’ might have been interpreted to require evidence of popular support for the measure limiting

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<sup>91</sup> Consider also *A v UK*, Application no. 35373/97, 2003; A. Horne and H. Tyrrell, ‘Sovereignty, Privilege and the European Convention on Human Right’, in A. Horne and A. Le Sueur (eds.), *Parliament: Legislation and Accountability* (Hart, 2016), p. 265, 285-88.

<sup>92</sup> Gerards, ‘Procedural Review’, 4.

<sup>93</sup> G. Lautenbach, *The Concept of the Rule of Law and the European Court of Human Rights* (Oxford University Press, 2013), p. 202–203.

<sup>94</sup> Lautenbach, *ibid.*, p. 73.

<sup>95</sup> Lautenbach, *ibid.*, p. 72; see also Müller, ‘Obligations to ‘secure’ the rights of the Convention in an ‘effective political democracy’: How should parliaments and domestic courts interact?’, (this volume) p. xxx.

a right. Instead, it has been interpreted as providing the structure for the ECtHR's substantive assessment of a measure. This is as follows. The ECtHR must assess whether 'the interference complained of corresponded to a pressing social need, whether it was proportionate to the legitimate aim being pursued, and whether the reasons given by the national authorities to justify it are relevant and sufficient'.<sup>96</sup> This formulation does not require the ECtHR to consider the quality of the underlying legislative process. Indeed, in the majority of cases, the ECtHR simply assumes that domestic processes are operating at a high level of quality.<sup>97</sup> However, this formulation does afford the ECtHR discretion with regard to which elements it will consider relevant in determining a case.<sup>98</sup> On occasion, the ECtHR has included attention to the quality of the parliamentary process underlying legislation. We now turn to this issue.

## 5.2 Modes of reasoning

In cases on the justifiability of the limitations of rights, the international human rights judiciary is required to determine how much deference should be afforded to the defendant state and how the substantive assessment (often in the form of a proportionality test) should be structured and populated with content.<sup>99</sup> The choices have major implications for the outcome of the case. In both respects, though, relatively little guidance is found in the founding treaties. Accordingly, the approaches of the IHRJ institutions can vary in nature and in the level of explication from institution to institution, from right to right, and from case to case. The possibility for the quality of parliamentary process to be made a factor in the reasoning for both deference and the proportionality test is demonstrated clearly by recent practice of the ECtHR.

### 5.2.1. Overview of practice

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<sup>96</sup> *Sunday Times v. UK* (Application no. 6538/74) (1979) para. 62; A. Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge University Press, 2009), p. 234.

<sup>97</sup> See Gerards, 'Pluralism, Deference and the Margin of Appreciation Doctrine', 87.

<sup>98</sup> See also M. Saul, 'Structuring Evaluations of Parliamentary Processes by the European Court of Human Rights', *The International Journal of Human Rights* (2016, forthcoming).

<sup>99</sup> See B. Cali, 'Balancing Human Rights? Methodological Problems with Weights, Scales and Proportions', *Human Rights Quarterly* (2007) 251–70, 254; M. Klatt, 'Positive Rights: Who Decides? Judicial Review in Balance', *International Journal of Constitutional Law*, 13 (2015), 354–382, 362–63.

Consider the case of *Animal Defenders International v. United Kingdom*.<sup>100</sup> In this case, the Grand Chamber of the Court found that the prohibition on political advertising on television or radio (2003 Communications Act) – under which the applicant, a social advocacy group for the protection of animals, had been prevented from broadcasting a television advertisement – did not amount to a disproportionate interference with the applicant’s right to freedom expression. To reach its verdict, the ECtHR formulated a particular approach for assessment of general measures (meaning a measure the impact of which is not tailored to the facts of a particular case). This included that rather than having an emphasis on the necessity of the measure in terms of whether the aim could have been achieved in a less restrictive manner (as the applicant had argued for), the emphasis in its assessment should be primarily on assessment of the ‘legislative choices underlying [the measure]’.<sup>101</sup> In this respect, it further specified that ‘[t]he quality of the parliamentary and judicial review of the necessity of the measure is of particular importance...including to the operation of the relevant margin of appreciation’.<sup>102</sup> The ECtHR did not provide specific criteria to determine the quality of the parliamentary process. Instead, one is left to determine what sort of parliamentary process the ECtHR had in mind through considering the way it assessed the process, and justified the view that there was an ‘exceptional examination by parliamentary bodies of the cultural, political and legal aspects of the prohibition’ on political advertising in the UK.<sup>103</sup> In this instance, key elements that can be read as supporting the positive inferences drawn from the process for the outcome of the case include the number of bodies involved (both within and outside of parliament), the breadth of issues covered, the level of detail involved, the consultation with experts and the attention given to the most relevant case law of the ECtHR.

The explanation for why the ECtHR made parliamentary process relevant in this case – and in a line of earlier ECtHR cases in which parliamentary process can be construed as having a bearing on the outcome (both positive and negative) –

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<sup>100</sup> *Animal Defenders International v. United Kingdom*, Application no. 48876/08, 22 April 2013.

<sup>101</sup> *Ibid.*, para. 108.

<sup>102</sup> *Ibid.*, para. 108.

<sup>103</sup> *Ibid.*, para. 114.



includes a number of considerations, such as an onus from certain states that the ECtHR should take more seriously the subsidiary nature of its role in rights protection.<sup>104</sup> Regardless of the motivation, through making the quality of the parliamentary process a central factor in its reasoning, the Court provides an incentive for the executives and parliamentarians in future practice to seek to replicate the type of activities that underpinned the positive inferences.<sup>105</sup>

### *5.2.2. Scope for development*

The ECtHR might seek to develop this practice further. There is scope for clearer articulation as to the types of cases within which the quality of parliamentary process will be seen as a relevant factor, as well as with regard to the criteria that are relevant for the assessment.<sup>106</sup> Other IHRJ institutions might also develop this sort of practice. The latent nature of the margin of appreciation doctrine in other institutions can reduce the scope for direct signals. Still, cases have been identified from other IHRJ institutions that have been argued to reflect a similar logic.<sup>107</sup>

Reasons to query the extent to which valuing the quality of parliamentary process should be developed further as a practice of the IHRJ include the following.<sup>108</sup> The link it makes between the outcome of a case and the way in which legislation has been produced generates a relatively strong normative pull. If it is used in a more detailed and frequent manner, parliaments might be more inclined to see it as an imposition on their autonomy.<sup>109</sup> Moreover, there is

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<sup>104</sup> See Saul, 'Margin of Appreciation', 750; Spano, 'Universality or Diversity of Human Rights', 498.

<sup>105</sup> Lazarus and Simonsen, 'Judicial Review and Parliamentary Debate', 393, 401; Kavanagh, 'Proportionality and Parliamentary Debates', 466; Gerards, 'Pluralism, Deference and the Margin of Appreciation', 118.

<sup>106</sup> See E. Brems, 'The European Court of Human Rights and the Quality of Parliamentary Process', paper delivered at the MultiRights Workshop: The International Human Rights Judiciary and National Parliaments, Oslo, March 2015 (on file).

<sup>107</sup> See, e.g., case law from the IACtHR and UN HRC identified by Legg, 'Margin of Appreciation', p. 79–80.

<sup>108</sup> See also A. Donald and P. Leach, *Parliaments and the European Court of Human Rights* (Oxford University Press, 2016) p. 140 – 44.

<sup>109</sup> This point is reflected in some of the words of warning made by judges in dissenting or separate opinions, for instance, Judge Wildhaber et al. adopt the view that it is 'not for the Court to prescribe the way in which national legislatures carry out their legislative functions'. *Hirst v. UK (no. 2)*, Joint Dissenting Opinion of Judges Wildhaber, Costa, Lorenzen, Kovler And Jebens, para. 7; while Judges Tulkens and Zagrebelsky suggest that: 'This is an area in which two sources of legitimacy meet, the Court on the one hand and the national parliament on the other. This is a difficult and slippery terrain for the Court in view of the nature of its role, especially when it itself accepts that a wide margin of appreciation must be allowed to the Contracting States.'

a risk that in increasing attention to the quality of the parliamentary process, there can be a slide away from assessment of the substantive outcome encompassed in the legislation. This is significant because although good process can improve the prospects that an outcome will be rights compliant, by, for instance, helping to ensure that a decision is taken with a fuller awareness of the different interests at stake,<sup>110</sup> it does not entail the consistency of outcomes with rights.<sup>111</sup>

The IHRJ should thus be cautious with the manner and extent to which it incorporates consideration of the quality of parliamentary process in its modes of reasoning. A reasonable approach might adhere to the following considerations, which already seem to guide the ECtHR: give attention to parliamentary process only when there is reason to consider it particularly relevant for the case, whilst also giving most attention to the aspects of the process that have been brought into focus from the parties.<sup>112</sup>

Proceeding in the manner just sketched links to the idea that reflective legitimacy is especially important in the international adjudication context.<sup>113</sup> It can, though, reduce the strength of the signals, as it can lead to a more patchwork and abstract image of parliamentary process developing, than if specific criteria were to be prescribed. Still, over time it will be possible for an image – a pool of resources, to repeat the language used in the section above – to emerge.

In relation to the ECtHR case law, it has been argued that the following image of good quality parliamentary process is emerging: in terms of parliamentary formation, the Court is open to value committee work, and plenary sessions of both lower and upper houses. For activities within these formations, the Court is

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<sup>110</sup> See Lazarus and Simonsen, 'Judicial Review and Parliamentary Debate', p. 395.

<sup>111</sup> See also Donald and Leach, 'The Role of Parliaments Following Judgments', p. 84; E. Brems, 'Human Rights: Minimum and Maximum Perspectives', *Human Rights Law Review*, 9 (2009), 349, 391; consider also the drawn-out parliamentary process in the UK following *Hirst (No 2)*, for commentary see, e.g., C. Murray, 'A Perfect Storm: Parliament and Prisoner Disenfranchisement', *Parliamentary Affairs* 66 2013, 511-539.

<sup>112</sup> See, e.g., *Lindheim and Others v. Norway* Applications Nos 13221/08 and 2139/10, Merits and Just Satisfaction, 12 June 2012, para. 85, para. 118.

<sup>113</sup> M. R. Madsen, 'Sociological Approaches to International Courts', in C. Romano, K. J. Alter, Y. Shany (eds.), *The Oxford Handbook of International Adjudication* (Oxford University Press, 2014), p. 388.

open to value reports, consultations, debates and votes. The reasons why these activities are supported can vary, but for each activity the variation to date has been limited: inclusiveness or experts in terms of consultations; breadth of issues covered or reasoning in reports; for debates, extensiveness or detailed nature; for votes, demonstration of support but also contestation.<sup>114</sup>

To strengthen the image of parliamentary process the IHRJ projects, it is important that the IHRJ is consistent in its practice. This could involve praising similar rather than contrasting types of activity, or at least reasoning why diverging approaches are taken across its case law. It could also involve linking praise given to parliamentary activities during reasoning its level of deference to signals sent from other modalities. For example, praising debates on the basis of the inclusion of views from different political parties links well to the promotion of political competition through interpretation of the right to political participation. It also seems prudent to take notice of the messages that other bodies are communicating to the states in question, and to cooperate to the extent possible, so as to help strengthen the impact of outputs.<sup>115</sup>

### 5.3 Reporting processes

An additional modality by which the quality of parliamentary process might be promoted by the IHRJ is periodic state reporting. The reporting procedures of the UN treaty bodies attached to the UN human rights treaties are examples.<sup>116</sup> States submit a report at regular intervals to the relevant UN treaty body on the measures that they have adopted which give effect to the rights in the relevant treaty and on the progress made in the enjoyment of those rights (e.g., article 40 ICCPR).<sup>117</sup> The procedure includes a dialogue, mostly in Geneva (on occasion, in New York), between the treaty body and state representative based on the

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<sup>114</sup> Saul, 'Margin of Appreciation'.

<sup>115</sup> See Brems, 'Pluriform Human Rights Bodies'.

<sup>116</sup> All ten UN human rights treaty bodies, with the exception of the Subcommittee on Prevention of Torture, receive periodic reports from states parties addressing how they are applying the treaty provisions, see OHCHR, *The United Nations Human Rights Treaty System*, Fact Sheet No. 30/Rev.1 (United Nations, 2012) p. 21.

<sup>117</sup> See generally W. Kalin, 'Examination of State Reports', in H. Keller and G. Ulfstein (eds.), *UN Human Rights Treaty Bodies Law and Legitimacy* (Cambridge University Press, 2012), p. 16.

state's report. The process culminates with the treaty body's report of concluding observations, which are consensus comments on positive and negative aspects of a state party's implementation of the foundational treaty and include recommendations for future practice.<sup>118</sup>

To gain insight on the current condition of practice in this area, it is useful to study the recent practice of two UN treaty bodies, the Committee on the Rights of the Child (CRC Committee) and the CEDAW Committee. These two bodies might be expected to be at the forefront in terms of enhancing the role of parliaments, due to the centrality of an interest in promoting the political participation of certain groups.<sup>119</sup>

### *5.3.1. Involving parliaments in reporting*

The concluding observations (COs) of reporting processes offer two routes for UN treaty bodies of the IHRJ to promote the quality of parliamentary process.<sup>120</sup> One is to make recommendations for the executive to involve the parliament in the different stages of the reporting process (including preparation, during, and follow-up). The need for such calls is linked to the fact that parliamentarians have often been side-lined in the establishment and standard operation of the IHRJ.<sup>121</sup> Greater direct involvement in reporting can generate higher information levels amongst parliamentarians, which can provide a basis for parliamentary activities that are more aware and knowledgeable of the international human rights framework.<sup>122</sup>

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<sup>118</sup> See OCHR, Civil and Political Rights: The Human Rights Committee, Fact Sheet No. 15 (Rev.1) (2005).

<sup>119</sup> See UN Committee on the Elimination of Discrimination Against Women, *Statement on the relationship of the Committee on the Elimination of Discrimination against Women with parliamentarians* (2010), [www.ohchr.org/Documents/HRBodies/CEDAW/Statements/Parliamentarians.pdf](http://www.ohchr.org/Documents/HRBodies/CEDAW/Statements/Parliamentarians.pdf); also M. A. Freeman, B. Rudolf, C. Chinkin, *The UN Convention on the Elimination of All Forms of Discrimination Against: A Commentary* (Oxford University Press, 2012), p. 544; CRC Committee, General Comment No 12 on the Right of the Child to be Heard, UN Doc CRC/G/GC/12 (2009); also Nolan, *Children's Socio-Economic Rights*, p. 79–81; they are also two bodies with particular links to the IPU, see Schwarz, 'Inter-Parliamentary Union', 336.

<sup>120</sup> Other stages in the reporting process can also be relevant, see, e.g., List of issues to be considered during the examination of the fifth periodic report of Norway (CCPR/C/NOR/2004/5), CCPR/C/NOR/Q/5, 31 January 2006, para. 1, 'Please provide further information on the outcome of the working group established to prepare a proposal on how to increase parliamentary decision-making power of the Sameting in areas affecting the Sami population in Norway'.

<sup>121</sup> See Lautenbach, 'The Concept of the Rule of Law', p. 3.

<sup>122</sup> Krommendijk, 'The Domestic Impact and Effectiveness of the Process of State Reporting', p. 331.

Concern about the limited focus on the parliaments in the interactions between the IHRJ and states has been raised in the various policy reports and recommendations on reform and strengthening of human rights regimes generally.<sup>123</sup> Calls for more direct engagement with parliaments have emanated from individual members of UN treaty bodies.<sup>124</sup> Still, it is the CEDAW Committee that has been identified as most pro-active in seeking to generate parliamentary involvement.<sup>125</sup> Reviewing a selection of recent COs from the CEDAW Committee (fifteen) indicates that a key action has been to introduce a standard paragraph early on in the COs. This commonly addresses parliamentary involvement in the stage that follows reporting, implementation. At times, it is used to call for the government to encourage parliamentary involvement.<sup>126</sup> Other times, parliaments are invited to become involved.<sup>127</sup> It also occurs that the importance of involving parliament in the preparation of reports is stressed.<sup>128</sup>

The CRC Committee also calls for the involvement of parliaments in implementation and in the preparation of reports. Yet a review of fifteen reports (the most recent ones for the same states examined in the CEDAW context) indicates a more ad hoc approach, which often goes little beyond requesting that the report be disseminated to relevant branches of the state, including parliament.<sup>129</sup>

More research is required to determine the difference that recommendations for parliamentary involvement make in practice. It is, though, not unreasonable to

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<sup>123</sup> See, e.g., Brighton Declaration (on reform of the ECtHR), 19–20 April 2012, p. 2; the Report Of The Special Working Group To Reflect On The Workings Of The Inter-American Commission On Human Rights With A View To Strengthening The Inter-American Human Rights System For Consideration By The Permanent Council, 11 December 2011, p. 10; Office of the United Nations High Commissioner for Human Rights, Strengthening the United Nations Human Rights Treaty Body System: A report by the United Nations High Commissioner for Human Rights, Navanethem Pillay, 26 June 2012, A/66/860, p. 86.

<sup>124</sup> See, e.g., UN Doc. CCPR/C/SR.2412 (2006) para. 52, Ruth Wedgwood calling on the HRC to find ways to 'speak to states and to parliaments directly' and to seek 'to increase the influence and didactic effectiveness of its jurisprudence'.

<sup>125</sup> Schwarz, 'Inter-Parliamentary Union', 335.

<sup>126</sup> See, e.g., UK, CEDAW/C/GBR/CO/7, 30 July 2013, para. 9.

<sup>127</sup> E.g., Denmark, CEDAW/C/DNK/CO/8, 11 March 2015.

<sup>128</sup> E.g., Hungary, CEDAW/C/HUN/CO/7-8, 1 March 2013; Switzerland, CEDAW/C/CHE/CO/3, 7 August 2009 para. 10 and para. 50.

<sup>129</sup> E.g., UK, CRC/C/OPSC/GBR/CO/1, 8 July 2014, para. 44; the latest on Switzerland, CRC/C/CHE/CO/2-4, 26 February 2015, para. 77 refers simply to the importance of the concluding observations being made widely available.

think that to the extent they are repeated across bodies in a consistent manner, the scope for impact is likely to be strengthened.

### *5.3.2. Calling for empowerment*

COs can also be used to make direct recommendations to the executive to take measures to empower the role of parliaments in the development of legislation. In this respect, a review of the COs reveals two routes.

One route is through recommendations that can serve to enhance the working conditions of parliaments. For instance, the CEDAW Committee has called for the UK ‘to continue to take specific targeted measures to improve the representation of women, in particular black and ethnic minority women and women with disabilities, in Parliament and the judiciary’.<sup>130</sup>

Recommendations of this nature can help to ensure that when parliamentary activities are undertaken they are of a nature – perhaps more representative than otherwise – that has the potential to help advance the realisation of rights.

Another route to impact on parliamentary process for a treaty body is through direct recommendations with regard to the types and nature of activities that are desirable in relation to legislation. This can be in a general form. For instance, the CRC Committee has called upon Hungary to ‘[t]horoughly examine the existing laws and regulations that impede the collection of disaggregated data.’<sup>131</sup> It can also be more specific. For instance, the CRC Committee has called for Croatia to ‘[p]romote and facilitate regular public debates and the active involvement of children and civil society organizations, before adopting draft laws’.<sup>132</sup> It has also, for example, recommended that Switzerland, ‘develop and implement, in consultation with children and civil society, a national policy and strategy for the overall realization of the principles and provisions of the Convention, thus providing a framework for cantonal plans and strategies’.<sup>133</sup>

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<sup>130</sup> UK, CEDAW/C/GBR/CO/7, 30 July 2013, para. 43(a); see also, Switzerland, CEDAW/C/CHE/CO/3, 7 August 2009, paras. 33–34.

<sup>131</sup> CRC/C/HUN/CO/3-5, 14 October 2014, para. 8(b); See also UK, CRC/C/OPSC/GBR/CO/1, 8 July 2014, para. 29(b).

<sup>132</sup> CRC/C/HRV/CO/3-4, 13 October 2014, para. 7.

<sup>133</sup> CRC/C/CHE/CO/2-4, 26 February 2015, para. 11.

In relation to the large number of recommendations that the treaty bodies make for legislative action, the noted calls targeting process appear quite exceptional. This could lead to doubts about the level of importance a treaty body places in matters of parliamentary process. As such, there is reason for treaty bodies to be more consistent in their reference to matters of parliamentary process. A general paragraph on the importance of parliamentary engagement with human rights – drawing inspiration from the paragraph used by the CEDAW Committee for generating involvement of parliaments in the reporting process – could help to address this issue. Another way to strengthen the individual calls for particular process elements could be for coordination amongst the treaty bodies that are dealing with similar issues on the same state.

## **6. Conclusion**

This chapter has focused on the potential for the IHRJ to develop a role as a promoter of the human rights role of parliaments. It has addressed the nature of the human rights role of parliament, considered how subject to influence by the IHRJ it might be and examined why the IHRJ may be interested in encouraging its improvement. In the light of this initial analysis, the chapter has asked: what could the IHRJ promote to help advance the human rights role of parliaments? What modalities are available to the IHRJ for implementation of a promotional agenda?

The discussion has brought into view the contours of an image of the human rights role of parliament. This depicts the parliament as respecting, interpreting and applying human rights through activities that make the most of the democratic - participatory, representative and deliberative qualities - that define their authority. The discussion has also identified certain causes for the underperformance by parliaments of their human rights role, some of which the IHRJ might be able to exercise some influence over. On the one hand, there are knowledge, awareness and interest issues on behalf of the parliaments. On the

other hand, the executive can appear to lack motivation to empower the parliament.

The IHRJ institutions have been argued to have several normative and instrumental reasons to address the causes for underperformance of parliaments on human rights, including benefits for their own legitimacy and effectiveness. It has, though, been contended that the IHRJ should be cautious with what it seeks to promote for two main reasons: it does not have a precise mandate to promote the human rights role of parliaments; nor is there a readily available image of the details of what could usefully be promoted across contexts.

Through exploring policy materials of international political bodies and the practice of the IHRJ, it has been argued that the IHRJ is fairly well placed to seek to encourage enhancements in the human rights practice of parliaments. Yet it has also been shown that there are a number of challenges that should be kept in mind, to help to ensure that any move in this direction is to the enhancement of the protection and realisation of human rights. In particular, it has been contended that a key objective of the IHRJ should be to work towards the development of a coordinated approach, in order to maximise the scope for impact of the limited efforts that are viable for each institution.<sup>134</sup> This should involve coordination within institutions across the three opportunities for promotional efforts that have been studied here, as well as other modalities, such as the specification of remedies and rules of procedure on advisory opinions, which are brought into focus in other chapters of this volume. It should also include coordination across institutions. These steps can help the IHRJ to develop and project a general notion of the types and qualities of activities that are desirable with regard enhancing the role of parliaments for the realisation of rights.

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<sup>134</sup> Consider links to Brems, 'Pluriform Human Rights Bodies'; also Hafner-Burton, *Making Human Rights A Reality*, p. 187 calling for greater coordination in the field of human rights as a general matter.



To support these ends, further research might give more attention to the issues raised in this chapter as they pertain to the specific contexts covered by the various IHRJ institutions. In particular, there are questions about how far it will be possible and desirable for a common agenda on the human rights role of parliaments to be developed, given the differences in the implementation challenges encountered across the global and the three main regional systems for human rights protection.<sup>135</sup> Further attention should also be given to the question of whether existing outputs of the IHRJ have had an impact on parliamentary practice. The emerging body of work on the role of national parliaments in the implementation of human rights obligations indicates that, in certain states, parliamentarians do, on occasion, make direct reference to the case law of the ECtHR,<sup>136</sup> and the work of the UN Treaty Bodies.<sup>137</sup> Yet, the question of how parliaments and executives respond to signals about the nature of the role of parliaments in the human rights context remains to be studied.

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<sup>135</sup> See, e.g., R. Murray and E. Mottershaw, 'Mechanisms for the Implementation of Decisions of the African Commission on Human and Peoples' Rights', *Human Rights Quarterly*, 36 (2014), 349; consider also that particular challenges can arise in federal states in which there are multiple parliamentary bodies at different levels of governance, see on Switzerland, CRC/C/CHE/CO/2-4, 26 February 2015, para. 12; CEDAW/C/CHE/CO/3, 7 August 2009, para. 19.

<sup>136</sup> M. Hunt, H. J. Hooper and P. Yowell, 'Parliaments and Human Rights: Redressing the Democratic Deficit', (2012) 5 AHRC Public Policy Series, p. 26; Open Society Justice Initiative, *From Judgment to Justice: Implementing International and Regional Human Rights Decisions* (2013) p. 55–56.

<sup>137</sup> Krommendijk, 'The Domestic Impact and Effectiveness of the Process of State Reporting', p. 168–170 (CEDAW COs in the Netherlands); p. 217–220 (CRC COs in the Netherlands).