Reinforcement of the Execution of Judgment of the European Convention on Human Rights: Developments and Challenges

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1. Introduction

It is well-known that universal and regional treaty-based human rights protection systems have been developed since after the World War II. They provide judicial or quasi-judicial institutions for securing the human rights given in each treaty[1].

1） There are a plenty of books on the developments on the international and regional human rights treaties. E.g., Walter Kalin and Jorg Kunzli, *The Law of International*

Judicial proceedings are expected to be practical. Making judgments is not a goal, but a starting point for a process to secure protections of human rights. It is very important how the State parties accept and implement the international judgments on their domestic spheres[2]. It means that domestic implementations of international or regional judgments much influence on the effectiveness of human rights treaty systems. Remedies for individual victims or amendments of the relevant domestic legislations are index of the effectiveness. In other words, the credibility of the system depends to a great extent on the execution of the delivered judgment or decisions.

Along such understanding, in recent years, human rights treaty institutions have introduced and strengthened monitoring procedures of domestic implementations on their judgments[3]. Among those phenomena, I would like to take up the case of the European Convention on Human Rights (hereinafter, the Convention) in this paper, because its reinforcement of measures for the execution of judgments is noteworthy with taking note of both developments and challenges. Of course, Japan is not a party of the European Convention on Human Rights. Japan, however, ratified several international human rights treaties[4] and accepted obligations to implement international obligations or

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Human Rights Protection, OUP, 2009, Sarah Joseph and Jenny Schultz, and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (3rd ed.), OUP, 2013, Philip Alston and Ryan Goodman, *International Human Rights: The Successor to International Human Rights in Context*, OUP, 2012, Olivier de Schutter, *International Human Rights Law*, CUP, 2010, Alstair Mowbray, *Cases and Materials on the European Convention on Human Rights*, OUP, 2007.

2） As to the system of the European Convention on Human Rights, the Brighton Declaration adopted by the Committee of Ministers of the Council of Europe on April 2012 put importance on implementation of the Convention at national level and interaction between the European Court and national authorities.
The declaration is available at the website of the European Court of Human Rights. URL:http://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf #search='brighton+declaration+ECHR' (as of 14 July 2014).

3） Under the UN human rights treaties, the follow-up procedure was introduced in 1990's. For details, *see,* " How to Follow Up on United Nations Human Rights Recommendations", available at http://www.ohchr.org/Documents/AboutUs/CivilSociety/HowtoFollowUNHRRecommendations.pd (as of 15 July 2014).

4） As of the end of June 2014, Japan ratified the following human rights treaties; International Convention on the Elimination of All Forms of Racial Discrimination, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, Convention against Torture and Other Cruel,

decisions on those treaties in domestic contexts, sometimes with facing to tensions between international and domestic legal order. It seems that the Japanese Government have been hesitating to accept individual communications before the United Nations (UN) human rights treaty bodies because it might be a 'threat' against the domestic traditional legal order supported by bureaucracy for a long time. We could learn much from experiences under the European Convention system in order to persuade such resistance.

2. Framework for the Execution of Judgments of the European Convention on Human Rights

(1) Obligation of the Execution of Judgments

In Article 44(1) of the Convention ruled that the judgment by the Grand Chamber of the European Court of Human Rights (hereinafter, the Court) shall be final. This final judgment has a binding force. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties in accordance with Article 46(1) of the Convention. The State parties have international obligations to implement the legally-binding judgment. But it does not necessarily mean that the judgments have domestic legal effects automatically. Moreover, executing the international judgment is still much harder. If a High Contracting Party would hesitate to make a judgment of the Court operative to detriment of the parties, the human rights protection system based on the Convention would be illusory.

The provision on the execution of judgments was given in the Convention when it was adopted in 1950. The then article 54 precluded that a task of monitoring judgments was given to the Committee of Ministers of the Council of Europe[5]. This capacity of the Committee of Ministers (hereinafter, the Committee) was rather conducted as matter of form. Year by year, the number

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Inhuman or Degrading Treatment or Punishment, Convention on the Elimination of All Forms of Discrimination against Women, Convention on the Rights of the Child, International Convention for the Protection of All Persons from Enforced Disappearance, Convention on the Rights of Persons with Disabilities.

5) The Committee of Ministers of the Council of Europe is a decision-making body composed of the Foreign Ministers of all member states.

of applications from alleged victims of human rights violations has been increasing due to the expansion of the member states of the Council of Europe. The total number of applications before the judicial formation of the European Court of Human Rights is over 100,000 as of the end of the year 2013[6]. Applications have been compiled rapidly, though the Court is working very hard so as to deliver approximately 1,500-1,600 judgments in each year.

As a matter of course, the growth of the number of application means the growth of the number of judgments to be executed. If judgments were not effective in terms of execution, it would harm the credibility of the European Court[7]. Here, the European human rights system has been required to take new and more effective measures for supervision of the executions.

(2)The Committee of Ministers of the Council of Europe

・Original Roles

Article 46(2) of the Convention provides that the final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution. This present supervisory function of the Committee of Ministers is not superficial any more. The revision of the Convention by Protocol No.11 in 1998 made the Committee to concentrate on supervising the execution of judgments of the Court. The Committee of Ministers adopted in 2001 its rules of procedure for supervision of the execution of judgments. Main three procedures were provided in the rules. The first one; A High Contracting Party shall communicate measures of implementation of a judgment to the Committee of Ministers. The second one; the Committee of Ministers decides whether the taken measures, both individual remedial measure and general measures, are enough or not. The third one; the Committee takes periodic reviews on implementation of general measures taken by a High Contracting Party until the Committee admits the implementation is enough.

6） Statistics 2013 by the European Court of Human Rights, available at http://www.echr.coe.int/Pages/home.aspx?p=reports&c= (as of 15 July 2014).

7） L. Wildhaber, The Role of the European Court of Human Rights: an Evaluation, *Mediterranean Journal of Human Rights*, vol.8(2004), pp.9-32.

Thereafter, in 2006, two procedural measures were further produced for supervision. The new Protocol No.14, adopted in 2004, aims to make the changes such as the introduction of a new admissibility criterion, the treatment of repetitive cases or clearly inadmissible cases, for a more satisfactory operation of the European Court. The Protocol has given the Committee of Ministers chance to ask assistance of the Court in Strasbourg, in the event of problems in interpreting the scope of a judgment or if a state fails to execute it.

The new rules of procedure, in 2006, put priority on the Committee's supervising works. Rule 4 decides as follows.

" 1. The Committee of Ministers shall give priority to supervision of the execution of judgments in which the Court has identified what it considers a systemic problem in accordance with Resolution Res(2004)3 of the Committee of Ministers on judgments revealing an underlying systemic problem."

This has a close link with strengthening the pilot judgment procedure.

· Pilot Judgments[8)]

Large number of the over 150,000 cases[9)] pending before the European Court of Human Rights are so-called repetitive cases, which derive from a common dysfunction at the national level of the High Contracting Parties[10)]. The pilot judgment procedure has been developed as a technique of identifying the structural problems underlying repetitive cases and imposing an obligation on the States to address those problems.

The Court can select one or more cases for priority treatment, and the Court should identify the systemic problems and necessary remedial measures as well as deciding whether a violation of the Convention in the specific case. The

8） Concerning the details of pilot judgments, *see* Takeuchi's article in this volume.
9） Statistics as of the end of 2013 by the European Court of Human Rights
10） The factsheet on the Pilot Judgments by the European Court of Human Rights as of October 2013, available at http://www.echr.coe.int/Documents/FS_Pilot_judgments_ENG.pdf#search='150%2C000+cases+pending+before+the+European+Court+of+Human+Rights' (as of 15 July 2014).

leading judgment will apply to the other similar cases that had been adjourned during consideration of the leading cases.

It is expected that this procedure contribute two points. The one is to offer a possibility of speedier redress to the individual victim. The other is to help the European Court to manage its workload more efficiently by reducing the number of similar cases.

On a deliberation of a pilot judgment, the Committee of Ministers begins to supervise on the execution of the judgment in line with the above Rule 4. According to the Annual Report of the Committee of Ministers in 2012[11], quite interesting trends were shown. The number of pending cases has continued to increase in 2012. The total number of cases pending at the end of 2012 was around 11,000, it has increased with 4% as compared to 2011. Namely, on one hand, the consistent trend of expansion of the pending cases has been cleared though the pace is slowing down. On the other hand, the number of new cases for supervision has been marked a new important decrease for the second time in these ten years. It is decreasing 10% as compared to 2011[12]. This may means that certain amount cases are categorized as the repetitive cases. The statistics give us an evidence of good interactive work between the Court and the Committee.

(3) The European Court of Human Rights

· Referral to the Court for Interpretation of a Judgment

For cooperation between the Court and the Committee, 'referral to the Court for interpretation of a judgment' and 'infringement proceedings' have been introduced as new measures. As such an innovation, on the referral to the Court for interpretation of a judgment, the rule in 2006 prescribes the following.

Rule 10 (Referral to the Court for interpretation of a judgment)

"1. When, in accordance with Article 46, paragraph 3, of the Convention, the

11) Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights (6th Annual Report of the Committee of Ministers), the Council of Europe, 2012.

12) *Ibid*., pp.39-44.

Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, it may refer the matter to the Court for a ruling on the question of interpretation. A referral decision shall require a majority vote of two thirds of the representatives entitled to set on the Committee.

2. A referral decision may be taken at any time during the Committee of Ministers' supervision of the execution of the judgments. ……."

This new measure as a referral, as my personal view, seems to be ineffective in terms of practical uses. This Rule10 would have followed Article 60 of the Statute of the International Court of Justice[13]. Any party of a case can request for interpretation before the ICJ, however, only the Committee of Ministers is entitled to make a referral of interpretation to the European Court of Human Rights. The parties concerned have no rights to do[14]. And this procedure is confined to fairly isolated cases where the Court has not had an opportunity to clarify its case-law through a subsequent judgment or has not indicated the general measures for remedies. Accordingly, feasibility of this measure is anticipated to be limited to the extent. And, even the Committee of Ministers, it is requested to use the possibility sparingly to make such a referral in order to avoid over-burdening the Court[15].

13） Article 60 of ICJ Statute: The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.

14） Protocol No.16 to the Convention (adopted in 2013) gives highest courts and tribunals of a High Contracting Party a right to request the Court to give advisory opinion on questions of principle relating to the interpretation of application of the rights and freedoms defined in the Convention or the protocols thereto. But this entitlement does not cover requests of interpretation of judgments of the European Court, which are already delivered.

15） Explanatory Report for Protocol No.14, to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention (Madrid, 12 May 2009), para.96, available at http://conventions.coe.int/Treaty/EN/Reports/Html/194.htm.

· **Infringement Proceedings**

The second remedy is infringement proceedings. The Court Rule provides as follows.

Rule 11 (Infringement proceedings)

"1. When, in accordance with Article 46, paragraph 4, of the Convention, the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two thirds of the representatives entitled to sit on the Committee, refer to the Court the question whether that Party has failed to fulfil its obligation.

2. Infringement proceedings should be brought only in exceptional circumstances."

The purpose of this remedy is clearly support the Committee of Ministers in the event of persistent opposition from a state. This proceeding would result in a (new, another) judgment by the Court, but such a judgment is intended not to reopen the question of violation, already decided in the Court's first judgment. The new judgment is needed only to rule whether the state party has taken the measures requested by the judgment that found the violation. Now there is a room that the final stage of supervision is succeeded to the Court. The supervisory process taken by initiatives of the Committee of Ministers has been reinforced with judicial procedures. Explanatory Report for Protocol No.14[16] notes in its paragraph 99 as follows;

"This infringement procedure does not aim to reopen the question of violation, already decided in the Court's first judgment. Nor does it provide for payment of a financial penalty by a High Contracting Party found in violation of Article 46, paragraph 1. It is felt that the political pressure exerted by proceedings for non-compliance in the Grand Chamber and by the latter's judgment should suffice to secure execution of the Court's initial judgment by the state concerned."

16) Explanatory Report, *ibid*.

Of course, some questions come arise in this course. How will the Court hold a decision on appropriateness of measures taken by state parties, being apart original judgments? Can the Court deliver a judgment which is opposite to the opinion of the Committee of Ministers? Regardless of these questions, it is probable the Court will take and endorse the Committee's previous opinion.

Fortunately or unfortunately, there is no record on cases filed by the above two procedures so far[17]. It is likely that both of the Committee and the Court are reluctant to use those procedures because of the vague outcomes of their legal status and implied risks on a future relationship of the two organs.

3. Case Review

As mentioned above, supervision of the execution of judgments have been conducted under cooperation of judicial and political organs. However, as a matter of fact, the High Contracting Parties have sometimes faced with difficulties to executions because of their domestic legislations and/or policies. Here, I take up a short review of a case against the United Kingdom (UK) on restriction of prisoners' voting rights. The case will show us the reality of confrontation between domestic and international/regional norms and values.

In the UK, a comprehensive statutory prohibition on convicted prisoners voting was introduced under relevant domestic legislations since 1960's. Today, in section 3(1) of the Representation of the People Act 1983, it is ruled that, "a convicted person during the time that he/she is detained in a penal institution in pursuance of his/her sentence….is legally incapable of voting at any parliamentary or local election."

The applicant, Mr. Hirst, who was guilty of manslaughter and sentenced to life imprisonment, applied to the UK domestic courts with claiming that the

17） Frank Emmert, the Implementation of the European Convention on Human Rights and Fundamental Freedoms in New Member States of the Council of Europe - Conclusions Drawn and Lessons Learned, *The European Convention on Human Rights and Fundamental Freedoms in Central and Eastern Europe*, Eleven International Publishing, 2012 . Available at SSRN: http://ssrn.com/abstract=1971230.

relevant law was incompatible with Article 3, Protocol 1 to the Convention[18]. As the UK courts refused his claim and right to appeal, Mr. Hirst then brought an application before the European Court of Human Rights. Finally, the Grand Chamber of the Court held, by 12 votes to 5, that there has been a violation of Article 3, Protocol 1[19]. The Court ruled that the right to vote was not a privilege and the 'blanket ban' on convicted prisoners voting was not appropriate because it is outside any acceptable margin of appreciation.

In this judgment, besides individual remedy (compensation), the Court concluded that "it will be for the United Kingdom Government in due course to implement such measures as it considers appropriate to fulfill its obligations to secure the right to vote in compliance with this judgment"[20]. It means the UK Government is obliged to make any general measures for avoiding future repetitive cases. However, the UK has received over 2,500 similar applications[21] thereafter. The European Court of Human Rights adopted its pilot judgment procedure on this situation.

The Committee of Ministers has allowed, several times, the UK Government to extend the deadline for submission about its execution of the relevant judgments. Lastly, on 22 November 2012 the Government published a draft bill on prisoners' voting eligibility[22]. The draft bill includes three proposals: (1) ban from voting those sentenced to four years' imprisonment or more; (2) ban from voting those sentenced to more than six months; or (3) ban from voting all prisoners (i.e. maintain the status quo). The Committee is overseeing the progress of this draft bill. At its last meeting on the matter held on 5 December 2013, the Committee, although it has adopted interim resolutions repeatedly, has again decided to resume consideration of these questions in 2014.

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18) "The High Contrasting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."

19) *Hirst v. UK (No.2)(application no. 74025/01)*, Grand Chamber, 6 October 2005.

20) *Ibid*., para.93.

21) E.g., *Green and M.T. v. UK (Application nos*.60041/08 & 60054/08), 23 November 2010.

22) Joint Committee on the Draft Voting Eligibility (Prisoners) Bill (House of Lords and House of Commons, UK), Report: Draft Voting Eligibility(Prisoners) Bill, HL Paper 103, HC 924 (18December 2013).

It is likely the thing is going well, but during such a process, the UK public opinion to the Strasbourg judgment has been hardly divided in terms of 'constitutional legitimacy'. Since the Grand chamber judgment on the *Hirst* case (No.2), it would have passed nearly 10 years to reach the final stage of execution of the judgments concerned. The Strasbourg is awaiting the decision of the UK parliament on the law reform. Regrettably, this case is not the sole example. Other member states (Russia, Italy and Turkey etc.) have similar hardship.

4. Conclusion

Reinforcement of supervision of the execution of judgments can be achieved on good cooperation and coordination between the Committee of Ministers and the European Court of Human Rights. In fact, the both organs' interaction, in implementation of Article 46, is evolving, particularly through the pilot judgment procedure, though another devise are not practical with contrary to expectations.

This is the very good leading model for conventional framework for protection of human rights. The universal human rights treaties have been operated by both quasi-judicial and political organs in theory. But in reality, for example, the General Assembly (GA) of the UN has hardly made concrete consideration to the outcomes by treaty bodies. Besides, the GA is currently going for another way for monitoring human rights situation of each member states, with introduction of the new process called as 'Universal Periodic Review (UPR).'

Of course, even in Europe with commonality, it remains challenges that how they consider taking a good balance between individual remedial measures and general measures for each case in floods of applications. General measures obliged by the Court would be effective for the majority of the similar cases, that is, it could have a preventive function against further repetitive violation of human rights in the future. However, it should not forget that the right of

application has a significance as a right for seeking an individual remedy[23]. All the cases are not targets of systemic improvements.

Last but not least, I have to touch upon the importance of cooperation between the Strasbourg Court and domestic (national) courts. There is no doubt that a supervisory framework for the execution of judgment is vital, but it is a neither only nor enough element for standard-settings of human rights. The supervisory measure is just one piece of a system, and other essential pieces are indispensable. Application and interpretation of the Convention is not an exclusive work for the Strasbourg Court or the Committee of Ministers. The European common standards for human rights have been developed through domestic implementations in the High Contracting Parties. Accordingly, dialogue between the Strasbourg Court and national courts is a pivot for consolidation of common human rights standards and its dissemination[24].

The practice and experience of the European Convention give Japan hints about a vision for effective human rights protection based on multilateral legal instruments. Needless to say, the judiciary is not only the state power which is responsible for the issue. The domestic implementation of international law is not conducted only before the courts. Every branch (the administration and the legislature, too) has its own duty and obligation to application of international law respectively. Thinking what we can do is much better and realistic approach rather than thinking what we cannot do.

23） The importance of the rights of individual application and individual remedies thereto are often discussed. E.g., Hans-Jurgen Papier, Execution and Effects of the Judgments of the European Court of Human Rights from the Perspective of German National Courts, *HRLJ*, vol.27(2006), pp.2-4. Philip Leach, Access to the European Court of Human Rights-From a Legal Entitlement to a Lottery?, *HRLJ*, vol.27(2006), pp.19-20.

24） In recent years, the importance of dialogues between the Strasbourg and national courts of the High Contracting Parties has been much focused.
The Council of Europe has adopted in 2013, Protocol No.16 of the ECHR, enabling national highest courts to request the Strasbourg court to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto.
The Strasbourg court organized a seminar on dialogues. *See*,
Dialogue between Judges: "Implementation of the Judgments of the European Court of Human Rights: a Shared Judicial Responsibility?" (Proceedings of the Seminar, 31 January 2014), the European Court of Human Rights.