Advantages and Disadvantages of Creating a Multi-Layered System for the Protection of Human Rights-Lessons from UK-European Experiences under the European Convention on Human Rights-

〔論　説〕

Advantages and Disadvantages of Creating a Multi-Layered System for the Protection of Human Rights:

Lessons from UK-European Experiences under the European Convention on Human Rights*

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I. Introduction: Two New Entries after World War II

This paper explores the possibility of a multi-layered system of human rights protection by comparing the UK and Japanese experiences under international and regional human rights protection systems. In particular, I discuss three questions. First, is traditional democracy (whether a parliamentary democracy or presidential system) appropriate to protect human rights in a globalised world? Second, is the traditional discussion (or perception) that 'who has a last word' helpful and constructive to grasp reality? It seems that, in the UK, the 'last word' question can

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be asked at two levels: (1) Parliament or the Supreme Court and (2) the Supreme Court/Parliament or the European Court of Human Rights (see, *A and others v. Secretary of State for the Home Department*[1] *and Hirst v. the United Kingdom (No. 2)*,[2] respectively). In this context, I also deal with what it means to say that the European Court of Human Rights is a subsidiary. Japan does not need to take this question seriously because the Japanese Supreme Court rarely turns down legislation and the Japanese government has not ratified any of the Optional Protocols of UN human rights treaties which allow individuals to bring cases to international organisations. The third and last question is can the UK and European systems (or at least the UK system under the strong and substantial influence of the European system) be drawn as a multi-layered system of human rights protection? If so, what are the advantages and disadvantages of this system? I do not deny the role of the domestic system (particularly the domestic legislature), and do not support the superiority of either the international or regional systems. Instead, I deconstruct the constitutional system of human rights and reconstruct it as a part of the multi-layered system of human rights protection, adding and reviewing new entries and emphasising the importance of the legislature over all other components of this system.

The paper focuses on two new entries in the constitutional system, designed to protect human rights after the events of World War II. The first is judicial review, which has been incorporated into the governmental systems of many countries, including Japan. The second is international human rights treaties, which have flourished all over the world.

Why have these two components been introduced? In general, the experiences of human rights violations before and during World War II raised two main questions. First, if the legislature as a representative body of the people enacts a statute which violates human rights, what measures would be possible to remove the human rights violation achiev-

1 [2004] UKHL 56.

2 Judgment of 25 October 2005.

ed by that legislation? Second, if the government of a particular country as a whole violates the human rights of a citizen or foreigner who resides in the country, what measures would be possible to remove the human rights violation accomplished by a government that claims sovereignty?

As far as the first question is concerned, the constitutional answer is the introduction of judicial review. For example, Article 81 of the Constitution of Japan stipulates that 'The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act'. This Article was the first time that Japan incorporated judicial review into its government system after World War II. It must be noted that the introduction of judicial review or even the whole design of the country's Constitution was initiated by the Allied Forces (i.e. the American Occupation Army). Moreover, many countries in addition to Japan adopted the concept of judicial review, much of which is accomplished by constitutional courts.[3] In contrast, the UK maintains the traditional constitutional principle of the sovereignty of parliament, which has prevented the entrenchment of the constitution and introduction of judicial review. Therefore, the significance of the 1998 Human Rights Act (HRA) should not be underestimated, even though the Act itself is no more than a statute which can be changed by parliamentary legislation. The new powers given by the HRA to British higher courts (particularly the Supreme Court[4]) under Sections 3 and 4 of the Act oblige the British judiciary to interpret domestic legislation as compatible or incompatible with a right established in the European Convention on Human Rights (ECHR). However, it is important that the declaration of incompatibility is not equal to the power of invalidation of the legislation,

3 It is interesting to point out that constitutional courts of Europe and the world have international forums to exchange view and experiences. See, 〈http://www.confcoconsteu.org/en/common/home.html〉 (accessed 18/04/2012) and 〈http://www.venice.coe.int/WCCJ/WCCJ_E.asp〉 (accessed 07/02/2012), respectively. The latter one claims 61 members of constitutional courts and supreme courts of the world.

4 It is also interesting to note that the House of Lords as the highest court was transformed into the Supreme Court.

which other constitutional and supreme courts have. Instead, it functions in a way that makes it appear as if the court has this power since, to date, the government has responded to declarations of incompatibility by changing the pertinent law. I return to this issue later.

As to the second question (as well as the first question), the international answer is that the international community will protect him or her. Specifically, the international system of human rights protection has been established by general, specific and regional human rights treaties. The UK and Japan ratified most of the major UN human rights treaties. Moreover, the UK was one of the earnest drafters of the ECHR. However, there is a legal difference in the status of treaties. The UK has to incorporate a treaty by parliamentary legislation to give a legal effect to a treaty in the domestic legal system. In Japan, a treaty automatically has a legal effect in the domestic legal system after it is ratified. I have to add that the difference does not make any significant difference in reality because the Japanese judiciary has been reluctant to cite or refer to international human rights treaties. The outstanding difference between the UK and Japan emerged after the introduction of the HRA.

In my paper, I first explain the UK experiences under the HRA, which brought the ECHR back to the UK. Second, I evaluate the country's experience and try to propose it as a possible model for a multi-layered system of human rights protection. Third, I explain the Japanese experience under the Constitution of Japan (1946). Finally, I point out the advantages and disadvantages of a multi-layered system of human rights protection by comparing the UK and Japan.

II. The UK Experience: Changes in the UK Human Rights Protection System after the Human Rights Act of 1998

In my view, the introduction of the HRA greatly contributes to making the UK human rights protection system a multi-layered one supported by the development of the European system of human rights protection.

1. The Preparation for the Implementation of the Human Rights Act of 1998

The two years of the preparation period (1998–2000) should be noted as a good example of how seriously the government of a matured, democratic country takes the implementation of the HRA (≒ECHR). The Human Rights Unit at the Home Office (later transferred to the Lord Chancellor' Department, which was merged in to the Department for Constitutional Affairs (now the Ministry of Justice)) was responsible for coordinating the implementation process in governmental departments, which had to check the compatibility of the legislation they use in their work. Numerous training opportunities were offered not only to public servants and judges as 'public authorities' for whom it is unlawful to act in a way incompatible with a Convention right (Section 6 of the HRA), but also to private sectors as 'hybrids' who are not public authorities in a strict sense but whose functions have a public nature. The Human Rights Flowchart in the guidance document created for public authorities is symbolic in showing that the compatibility of public authorities' activities comes first in the implementation process.[5] Given that the method for restraining the power of the government is the main purpose of a classic constitution, it is interesting that such a handbook was distributed inside the government of long democratic history at the end of the 20th century. This means that the UK government took the implementation very seriously. Contrastingly, the more reluctant (and even sometimes hostile) attitudes of the Labour government after 9/11 and the current Coalition government (Conservative and Liberal Democrats) toward the HRA has been recently observed. It is also questionable how far the HRA permeates local governments and 'hybrids'.

5 The present version can be seen at 〈http://www.justice.gov.uk/downloads/human-rights/human-rights-handbook-for-public-authorities.pdf〉, p. 51 (accessed 08/02/2013).

2. Compatible Interpretation (Section 3) and Declaration of Incompatibility (Section 4): A New Role for the Judiciary

UK judges also trained themselves during the aforesaid preparation period. This training was conducted by the Judicial Studies Board to maintain the independence of the Judiciary. What was the result of the two-year preparation? Since the HRA came into force on 2 October 2000, 27 declarations of incompatibility have been made, of which 19 have become final according to a report by the Ministry of Justice.[6] Eight of those declared incompatible have been overturned on appeal, 12 were remedied by subsequent primary legislation and two were remedied through remedial orders created under section 10 of the HRA. Four were related to provisions that had already been remedied by primary legislation at the time of the declaration and, as of 8 August 2011, one is under consideration to determine how to remedy its incompatibility. This shows that the UK courts use the HRA (i.e. rights in the ECHR) as a means for them to play the role of the defender of human rights. This frequency is probably more than what was initially expected.

It is also possible to say that the judiciary has the last word (de facto) because the government dutifully responds to declarations of incompatibility. Good examples of this are the declarations of incompatibility in *Bellinger v. Bellinger,*[7] which was followed by the 2004 Gender Recognition Act, and *A. and Others v. Secretary of State of the Home Department,*[8] which was followed by the 2005 Prevention of Terrorism Act.

It seems that compatible interpretation with the ECHR is a more controversial area. From the beginning, *R v. A (No. 2)*[9] caused controversy, followed by more judgments, such as *Mendoza v. Ghaidan.*[10] In *Regina v.*

6 Ministry of Justice *Responding to human rights judgments, Report to the Joint Committee on human rights on the Government response to human rights judgements* Session 2010–11, Cm 8162 (September 2011).

7 [2003] UKHL 21.

8 Supra note 1.

9 [2002] 1 AC 45.

10 [2004] UKHL 30.

Chief Constable of South Yorkshire Police ex parte LS and Regina v. Chief Constable of South Yorkshire Police ex parte Marper,[11] the House of Lords admitted the compatibility of Section 64 (1A) of the Police and Criminal Evidence Act of 1984 with Articles 8 and 14 of the ECHR. However, when the case went to Strasbourg, the European Court of Human Rights unanimously voted that the law violated Article 8 in *S and Marper v. the United Kingdom.*[12] In *R (on the application of Gillan v. Commissioner of Police for the Metropolis and another,*[13] the House of Lords stated that the Terrorism Act of 2000 was compatible with the ECHR. However, in *Gillan and Quinton v. the United Kingdom,* the European Court of Human Rights later unanimously found that the law violated Article 8 of the ECHR.[14]

Where to draw the line between interpretation and legislation is difficult. It seems that a wider interpretation as a purposive interpretation can be justifiable, particularly given that the case law of the European Court of Human Rights adopts an evolutive and purposive interpretation in light of the fact that it considers the ECHR a living instrument. I return to this issue later.

3. Joint Committee on Human Rights in Parliament

The substantial role of the Joint Committee on Human Rights (JCHR), a joint parliamentary committee between the House of Commons and the House of Lords cannot be ignored.[15] Its regular scrutiny of all Government Bills for human rights implications and compatibility has produced numerous reports to Parliament. Moreover, the JCHR can pick up urgent and important human rights issues. After 9/11, the regular examination and follow-up of anti-terrorism legislation by the JCHR has been one of few influential safeguards against human rights violations so

11 [2004] HL 39.

12 Judgment of 4 December 2008.

13 [2006] UKHL 12.

14 Judgment of 12 January 2010.

15 For example, Hiebert, J., "Governing Under the Human Rights Act: The Limitations of Wishful Thinking" [2012] P.L. 27, 38.

far as the declaration of incompatibility by the judiciary has been used less frequently. Furthermore, one of the JCHR's jobs is to examine the execution of judgments of the European Court of Human Rights and declarations of incompatibility, which is appreciated.[16]

It is also noteworthy that Section 19 of the HRA stipulates that a Minister of the Crown in charge of a Bill in either House of Parliament must before the Second Reading of the Bill make a statement of compatibility or a statement that, although he or she is unable to make a statement of compatibility, the government nevertheless wishes the House to proceed with the Bill.

The very recent research (led by Murray Hunt, the Legal Adviser of the JCHR) reveals that over the decade between 2000 and 2010 both the quality and quantity of substantive debates about human rights in Parliament significantly increased. Between 2000 and 2005 there were only 23 substantive references to reports of the JCHR in parliamentary debates, compared to more than 1,000 during the 2005–2010 Parliament.[17]

4. Equality and the Human Rights Commission as a National Human Rights Institution

The creation of a human rights commission under the name of the Equality and Human Rights Commission (EHRC) took some time before it was established in 2006, despite the fact that the necessity for establishing one had been mentioned in the HRA's 1998 White Paper. It is said that it was difficult to integrate the three commissions that existed then. Since then, however, some criticism regarding the management of the EHRC has arisen. Even the JCHR showed concern by stating 'Whether the EHRC is doing enough to devise and disseminate a culture of respect for

16 Parliamentary Assembly, Committee on Legal Affairs and Human Rights, Stockholm Colloquy: "Towards stronger implementation of the European Convention on Human Rights at national level", 9–10 June 2008, AS/Jur (2003) 32 (23 June 2008).

17 Hunt, M., Hayley, H. and Yowell, P, *Parliaments and Human Rights: Redressing the democratic deficit* (Arts & Humanities Research Council, 2012).

human rights in public authorities, the main aim our predecessors identified for the Commission in their 2003 report on the case for a UK human rights commission'.[18]

In brief, new acquisitions concerning a human rights-implementing mechanism, such as the JCHR and the EHRC, are not unfamiliar in many countries. Moreover, such measures have been encouraged by the UN's Paris principles.

III. A Multi-Layered System of Human Rights Protection

Given new and old actors in the human rights protection system, how and to what extent a multi-layered situation can be observed in the UK-European context is the next question.

1. A Dialogue (or Ping-Pong) between the UK's Judiciary and Parliament

The relationship between Parliament and the Judiciary in the UK has been a popular issue among British constitutional scholars. In my view, there existed a dialogue-like situation during the first half of the decade after the HRA went into effect. As I said before, *Bellinger v. Bellinger* and *A. and others v. Secretary of State of the Home Department* are good examples among the 27 cases in which declarations of incompatibility were made. The latter in particular is a benchmark for the judiciary as having the last word, which was confirmed by Strasbourg in *A v. the United Kingdom.*[19] The disappointing aspect of the House of Lords' judgment is the result of the democratic response under the Prevention of Terrorism Act

18 Joint Committee on Human Rights, *Equality and Human Rights Commission,* Thirteenth Report of Session 2009-10, HL 72/HC 183 [incorporating HC 1842-i and ii of Session 2008-09] (2 March 2010). Some commissioners of the first term of the Commission resigned and made allegations about the way in which the body was led by the chair (at that time). See, 〈http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/equality-and-human-rights-commission/〉 (accessed 08/02/2013).

19 Judgment of 19 February 2009.

of 2005, which abolished the discriminatory (only for foreigners) deprivation of liberty created by the 2001 Act but also installed a control-order regime applicable to everybody. The new regime can restrict freedom of personal life thoroughly.

After 7/7 (the London Bombings in 2005) the situation changed and the judiciary seemed to become more deferential to Parliament and the government. The House of Lords as the highest court in the UK stated that the control-order system was compatible with human rights provisions, although in a few individual cases it admitted that a few specific control orders were incompatible.[20] This shows the limits of dialogue. First, the judiciary does not have the authority to instruct Parliament about what should be done to remove any incompatibility.[21] Second, the judiciary cannot raise human rights issues, but rather has to wait for a case in which human rights issues can be discussed. After 9/11, and particularly 7/7, the Government did not hesitate to show their dissatisfaction and frustration about the aforementioned incompatibility judgments regarding anti-terrorism legislation.

When the UK judiciary has difficulty interpreting ECHR rights, the case law of the European Court of Human Rights may be helpful. Section 2 of the HRA states that a tribunal court determining a question which has arisen in connection with a Convention right must take into account any judgment, decision, declaration or advisory opinion of the European Court of Human Rights.

Lord Bingham in *R (Ullah) v. Special Adjudicator* addressed *Alconbury's* proposition:

> ...reflects the fact that the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court. From this it follows that a national

20 For example, *Secretary of State for the Home Department v JJ* [2007] UKHL 45.

21 In fact the judiciary can have a wider discretion when it interprets the legislation to be compatible with the ECHR.

> court subject to a duty such as that imposed by section 2 should not without strong reason dilute or weaken the effect of the Strasbourg case law... It is of course open to member states to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout the states party to it. The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: **no more, but certainly no less.**[22]

Recently, reflecting upon recent judgments and critically considering the *Ullah judgment,* Lord Irvine, the architect of the HRA, expressed his view about the interpretation of Section 2, stating that 'Section 2 of the HRA means that it is our Judges' duty to decide the cases for themselves and explain clearly to the litigants, Parliament and the wider public why they are doing so. This, no more and certainly no less, is their Constitutional duty'.[23]

This shift of emphasis (from Bingham to Irvine) reflects, to some degree, the recent relationship between the UK judiciary and the European Court of Human Rights.

2. A Dialogue between the UK Judiciary and European Court of Human Rights

Before the HRA, British judges had no legal obligation to take into account the case law of the ECHR. Now, however, it is these same judges' obligation to interpret whether all domestic legislation is compatible with the ECHR, taking into account Strasbourg case law. That raises the issue of what judges can do if they find it difficult to follow Strasbourg case law.

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22 [2004] UKHL 26. Emphasis is added by the author.

23 http://www.ucl.ac.uk/laws/judicial-institute/docs/Lord_Irvine_Convention_Rights_dec_2012.pdf (accessed 18/04/2012).

Recently, there have occurred interesting exchanges between the UK judiciary and European Court of Human Rights. The fourth section of the European Court of Human Rights found in *Al-Khawaja and Tahery v. the United Kingdom*[24] that Articles 5 (1) and 5 (3) were in violation, directly disagreeing with the British judges' view expressed in *R v. Sellick and Sellick.*[25] However, the Court of Appeal and House of Lords clearly refused to follow the above chamber judgment in a different case.[26] Lord Phillips stated:

> I do not accept that submission. The requirement to 'take into account' the Strasbourg jurisprudence will normally result in this Court applying principles that are clearly established by the Strasbourg Court. There will, however, be rare occasions where this court has concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances it is open to this court to decline to follow the Strasbourg decision, giving reasons for adopting this course. This is likely to give the Strasbourg Court the opportunity to reconsider the particular aspect of the decision that is in issue, so that there takes place what may prove to be a valuable **dialogue** between this court and the Strasbourg Court. This is such a case.[27]

Then, the UK government referred the case to the Grand Chamber, which changed the finding, admitting that 'the sole or decisive rule' adopted by the chamber judgment was too rigid.[28] The President of the European Court of Human Rights identified the occasion as a good example of the '**dialogue** through decisions and judgments' in a speech given at the opening of the judicial year of the European Court of Human Rights

24 Judgment of 20 January 2009.
25 [2005] EWCA Crim 651.
26 *R v Horncastle and others* [2009] UKSC 14
27 Id at, para 11. Emphasis is added by the author.
28 Judgment of 15 December 2011 (GC).

on 27 January 2012.[29]

3. A Dialogue between the UK and Europe (Council of Europe)

The UK played a very important role in drafting the ECHR, but did not incorporate the ECHR into UK law or take measures to implement the ECHR when the UK ratified it. To the government's surprise, individual applications of the European Commission of Human Rights surged and contributed to establishing the early case law of the ECHR. With a few difficult exceptions, however, the government rather dutifully executed the judgment of the European Court of Human Rights. It has to be added that, before the HRA, awareness of the ECHR among the domestic judiciary, Parliament, government and the general public was relatively low.

However, the present situation appears different: Strasbourg receives more publicity because of difficult cases in which the UK judiciary, legislature and the government find it difficult to agree with the views of the European Court of Human Rights. As explained previously, the judiciary clearly shows this disagreement in *R v. Horncastle and others.*[30] Some parliamentarians were shocked by the judgment of *Hirst v. the United Kingdom (No. 2)*[31] (prisoner's right to vote) and passed a motion to prevent amendment. The government was annoyed by extradition cases such as *Othman (Ab Quatada) v. the United Kingdom,*[32] in which the European Court of Human Rights disagreed with the UK government's decision to extradite a foreign terrorist suspect. Because of this fury, the European Court of Human Rights has become more often covered by the UK media, particularly the tabloid papers.

Recently, the Committee of Ministers of the Council of Europe held the Brighton Conference (18–20 April 2012) under the chairmanship of the

29 〈http://www.echr.coe.int/NR/rdonlyres/9F353912-1F71-4ABD-827F-4CEBA52EDBD0/0/2012_AUDIENCE_SOLENNELLE_Discours_Bratza_EN.pdf〉 (accessed 30/03/2012). Emphasis is added by the author.

30 Supra note 26.

31 Judgment of 6 October 2005 (GC).

32 Judgment of 17 January 2012.

UK (7 November 2011-14 May 2012). The Conference adopted the Brighton Declaration, which is the successor to the Declarations adopted at the Interlaken (2010) and Izmir Conferences (2011), both of which aimed to reform the European Court of Human Rights. It was reported that the UK government would lead attempts to agree to measures in which the number of cases reaching Strasbourg could be curtailed by focusing on the most important and serious human rights violations, thereby giving power back to domestic courts. One of main proposals was to include a provision which clearly stipulates the subsidiary role of the European Court of Human Rights and the margin of appreciation of contracting states.[33] Moreover, Prime Minister Cameron overtly criticised the European Court of Human Rights during his speech given at the end of January 2012 at the Parliamentary Assembly of the Council of Europe.[34]

This trend goes hand in hand with the attacks on the HRA. In March 2011 the Commission on a British Bill of Rights was established to investigate the creation of a UK Bill of Rights that incorporates and builds on the country's obligations under the ECHR, ensuring that these rights continue to be enshrined in UK law and protecting and extending citizen's liberties. At the same time, the Commission is supposed to provide interim advice to the government regarding the on-going Interlaken processes in regards to reforming the Strasbourg court and the UK's Chairmanship of the Council of Europe. In December 2012, the Commission submitted a rather modest report showing how difficult it is to create a new Bill of Rights in the 21st century by the commissioners failing to reach a unanimous conclusion regarding anything.[35]

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33 The proposal is toned down in the Brighton Declaration as those principles will be included in the preamble, but not as a provision. 〈http://hub.coe.int/20120419-brighton-declaration〉 (accessed 07/02/2013).

34 UK Prime Minister's speech at the Parliamentary Assembly, Wednesday 25 January, 〈http://www.number10.gov.uk/news/european-court-of-human-rights〉 (accessed 22/02/2012).

35 〈http://www.justice.gov.uk/about/cbr〉 (accessed 907/02/2013).

In sum, active interactions between domestic and international actors at several levels have been observed. It is naïve to describe these interactions as friendly dialogues in the short run. However, in the long run they have the possibility to develop a concept of shared responsibility for the protection of human rights at national and international levels.

IV. The Japanese Experience: No Change in the Human Rights Protection System Since 1946

When the UK and Japan are compared in terms of their development of human rights protection systems over the last 15 years, their stark contrast is quite shocking. It is obvious that the classic model of the constitutional arrangement upon which the Japanese Constitution is based has difficulty coping with modern issues concerning human rights in a globalised world. To cope with modern human rights issues, more and more countries adopt national human rights institutions and constitutional reforms. However, Japan has not amended its Constitution since it was taken into effect in 1946. I now explore the current situation of the Japanese constitutional system from the perspective of constitutional realisation and promotion of human rights.

1. The Judiciary

The overall attitude of the Japanese judiciary, particularly the Supreme Court is deference to the Diet (the legislature) and the government. Judicial review was initially expected to work as a guardian of human rights. In the 1960s and 1970s various controversial political and social issues were brought to the courts. The biggest controversy has been the constitutionality of the Self-Defence Force as Article 9 of the Constitution prohibits the possession of land, land, sea, and air forces. However, the Supreme Court has avoided the direct answer, relying on either procedural limit or theoretical excuse (so called political question).

There were only eight cases in which the Supreme Court found statutes as unconstitutional since 1947 when the Supreme Court was estab-

lished. The Court has been very reluctant to refer or take into account the international human rights treaties Japan ratified, presupposing that the content of the international human rights treaties is similar to the content of right clauses in the Constitution. Thus it is not necessary for the Court to consider the treaties. Recently a subtle change occurs in the judgment of the Supreme Court when it admitted the violation of the equality clause of the Constitution in a particular case. I shall return this issue later.

2. The Legislature (Diet)

The Lower House and the Upper House, or the Diet as a whole has no select or special committee on human rights. Therefore, whether human rights concerns are raised in the legislature depends on an individual or collective initiative from members of the Houses when they have a specific cause. A good example is the hardship of patients infected with the Hepatitis-C virus through tainted blood products due to the negligence of the government to supervise the pharmaceutical companies. After the long-lasting huge-scale legal battle against the government and companies coupled with few MPs' support, the situation has slowly improved, culminating in the enacting of the Basic Act on Hepatitis Measures in 2010. Furthermore, the plight of the former Hansen's disease patients is the other shocking example of the lack of systematic human rights protection by the Diet. The Leprosy Prevention Act (1907) and the 1953 Act (which replaced the 1907 Act) forced patients to enter a sanatorium, where their rights were hugely curtailed. The Act was kept in force even after it became scientifically clear that restraint of the patients was not neccessary as the virus was very weak and medication was established. The Kumamoto District Court admitted that the negligence of the executive and legislature was so grievous that former patients were entitled to receive compensation.[36] The 1953 Act was finally abolished in 1996. Moreover, the Diet passed the Act on Payment of Compensation to In-

36 Kumamoto District Court, judgment of 11 May 2001, 1748 *Hanrei Jiho* 30.

mates of Hansen's Disease Sanatorium (2001) and the Act on Promotion of Resolution of Issues Related to Hansen's Disease (2008). Those examples show the Diet's disadvantage in that it is not designed to tackle human rights issues systemically and thoroughly. On the other hand, they illustrate that once the Diet becomes aware of the existence of human rights violations and is determined to cope with them under the strong influence of public opinion, it can offer a more complete and thorough solution as legislation that the executive can implement.

3. The Failure of the Human Rights Protection Bill

The Ministry of Justice has a human rights bureau and related agencies.[37] It also appoints private citizens as human rights volunteers (about 14,000 people). They are helpful to give a daily advice to an individual with small-scale problems but not equipped with an authority or resources to deal with more difficult problems. However, there is no effective independent national human rights institution compatible with the UN Paris Principles.[38] In 2002, the government tried to pass the Human Rights Protection Bill to cope with human rights complaints. The Bill intended to establish a human rights commission as a national human rights institution. However, the Bill was severely criticised by the media and academics. The media argued that the bill would impede the free activities of journalists as watchdogs. Academics doubted the independence of the commission, since the Bill intended to establish a commission as an external agency of the Ministry of Justice. It was scrapped in 2003 after the dissolution of the Lower House. In December 2011, the government of the Democratic Party of Japan (DPJ) announced that it was going to prepare a bill to establish a national human rights institution.[39] The DPJ, however, lost the general election in December 2012.

37 http://www.moj.go.jp/ENGLISH/HB/hb-01.htmland; http://www.moj.go.jp/ENGLISH/HB/hb-04.html (accessed 31/01/2012).

38 Principles relating to the Status of National Institutions were adopted by the General Assembly Resolution 48/134 in 2003.

39 http://www.moj.go.jp/JINKEN/jinken03_00062.html (accessed 31/01/2012).

4. Status and Influence of Human Rights Treaties in the Domestic Constitutional System: Absence of Individual Communication to the UN Human Rights Bodies

In Asia a regional human rights treaty has not been established yet. Japan ratified major international human rights treaties, but it should be emphasised that Japan has not ratified any Optional Protocols, which enable individuals to communicate human rights violations to the UN bodies. As to the status of human rights treaties, they are superior to statutes but inferior to the Constitution.

(1) Domestic Implementation of Human Rights Treaties

The influences of human rights treaties can be observed at two levels; the first is domestic implementation. This may be classified into five spheres. First, the influences upon the legislature have been modest. The most influential moment is when the government ratifies a human rights treaty, since the government has to get approval from the Diet. A good example is the ratification of the Convention on the Elimination of All Forms of Discrimination against Women in 1985. To ratify the Convention, the Diet passed the Act on Securing Equal Opportunity and Treatment between Men and Women in Employment in 1985. Moreover, the Nationality Act was amended to make it possible that a child of a Japanese female national who married a foreign man becomes a Japanese national. On the other hand, when the government ratified the Convention on the Rights of the Child, no legislative action was taken, presupposing that the condition of children in Japan is compatible with the standards the Convention requires. In general, awareness of international human rights treaties is not high in the Diet except for a few MPs who maintain specific causes such as the abolition of the death penalty.

The second sphere is the government (the executive), which has the principal role of examining whether there is any discrepancy between the domestic legislation and practice, and the treaty, which the government will ratify. After ratification the government is responsible for imple-

menting the international standards. A good example is again the establishment of the Council for Gender Equality and the Gender Equality Bureau at the Cabinet Office of the government in 2001. The Gender Equality Bureau is mandated with the formulation and overall coordination of plans for matters related to promoting the formation of a gender-equal society, as well as promoting the Basic Plan for Gender Equality and formulating and implementing plans for matters not falling under the jurisdiction of any particular ministry.[40] However, it must be noted that the outcome is not yet satisfactory. Japan is ranked as 57th among 109 countries in terms of the gender empowerment measure.[41] Moreover, women have been poorly represented in the policy decision-making process. The government set the goal of a 20% participation rate in 1996, but it failed in every field such as the legislature, the judiciary and the executive, except for the members of the consultation commission, which is just a consultative body without any substantial decision-making authority and whose members the government can freely nominate. At present, the government has set another ambitious goal of 30% participation by 2020, although it is likely to fail unless the government adopts some radical measures including strong positive actions. As far as other international human rights treaties are concerned, there is no governmental body that specifically works on the implementation of each treaty.

The third sphere is the judiciary. In general, the judiciary has been very reluctant to use or even refer to international human rights treaties. Lawyers often refer to human rights treaties when they discover a clearer and more detailed clause in the treaty that would support her or his argument. However, until now, the courts have been reluctant to accept such citation of treaties. First, if the Constitution protects the same human rights that the international treaty protects, it is not necessary for courts to look at international ones. Second, domestic judges find it difficult to

40 http://www.gender.go.jp/english_contents/category/sorcial2_e.html (accessed 31/01/2012.)

41 The 2009 UN Development Report. 〈 http://hdr.undp.org/en/reports/global/hdr2009〉 (accessed 07/02/2013).

use international text due to lack of understanding of human rights treaties in general as well as the limited case law available in the UN body (In the European system, domestic judges can consult the rich case law of the European Court of Human Rights). Third, when the legislature is not enthusiastic to utilise the treaty, it is rather dangerous for judges to admit that a statute is incompatible with a treaty since they might be criticised that they are not legislators. Fourth and last, a violation of a treaty is not considered a successful reason to appeal to the Supreme Court. Therefore, the use of international human rights treaties in the courts has been deadlocked.

The Supreme Court, particularly, has consistently denied the existence of violations of human rights treaties without properly reasoned explanation. A good example is a case about the right of access to the court (Article 32 of the Constitution). The plaintiff, a prisoner who sued a prison warden because of maltreatment by the prison officers, claimed that his right of access to the court was denied because the head of the prison curtailed the meeting time with the plaintiff's lawyer, and all the meetings were supervised by prison officers. The local district court and the high court admitted the plaintiff's argument partially on the basis of the ICCPR and even the ECHR case law (particularly *Golder v. the United Kingdom*[42] and *Silver v. the United Kingdom*[43]) and awarded the plaintiff compensation. Conversely, the Supreme Court denied the violations of the ICCPR without reasons.[44]

However, as I mentioned before, there is a new indication that the Supreme Court would take into account the human rights treaties as well as foreign law.[45] In a case where the constitutionality of the Nationality Act was questioned (the Act denied to grant Japanese nationality to a

42 Judgement of 21 February 1975.

43 Judgement of 25 March 1983.

44 Supreme Court, first bench, 7 September 2000, 199 *Shumin* 283.

45 Ejima, A., "A Gap between the Apparent and Hidden Attitudes of the Supreme Court of Japan towards Foreign Precedents" in Groppi, T. and Ponthoreau, M.-C. (eds.), *The Use of Foreign Precedents by Constitutional Judges* (Hart, 2013).

child born between a Japanese father and a non-Japanese mother, who were not legally married), the Supreme Court referred to the ICCPR and CRC as well as legislative trends in other countries.

> 'In addition, it seems that other states are moving towards scrapping discriminatory treatment by law against children born out of wedlock, and in fact, **the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child, which Japan has ratified, also contain such provisions to the effect that children shall not be subject to discrimination of any kind because of birth.** Furthermore, after the provision of Article 3, para.1 of the Nationality Act was established, many states that had previously required legitimation for granting nationality to children born out of wedlock to fathers who are their citizens have revised their laws in order to grant nationality if, and without any other requirement, it is found that the father-child relationship with their citizens is established as a result of acknowledgement'.[46]

The fourth sphere is the activities of human rights NGOs, which have been very strong. There are general and specific NGOs that work for awareness campaigns and offer voluntary help to the individuals who have specific problems such as poverty, domestic violence and discrimination. Moreover, NGOs play an important role when they submit a counter-report to the UN monitoring bodies. The fifth and last sphere is those in the private sector such as companies, particularly those companies still in a nascent stage; how they would develop remains to be seen.

(2) International Implementation of Human Rights Treaties

The core of the international implementation of human rights treaties is the periodic State Party reports to the UN bodies, as Japan has not

46 Supreme Court, grand bench, 4 June 2008, 62 *Minshu* 1367. Emphasis is added by the author.

adopted individual communication measures. The Japanese government submits periodic reports under the obligation of six international human rights treaties: ICCPR; ICSECR; Convention on the Elimination of All Forms of Discrimination Against Women; International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Rights of the Child; and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Moreover, it is now subject to the Universal Periodic Review by the Human Rights Council of the UN.[47] Concluding observations given by the monitoring bodies of treaties are sometimes reported by the Japanese media, although the impact is limited.

Because of strong and effective participation of the human rights NGOs that submit counter-reports to UN bodies to challenge Japanese government report, a cordial custom gradually has been established in which the Japanese government offers an opportunity to receive opinions of the NGOs about a government report before the government submits it to a UN body. Taking into account the detailed content and regularity of the national reports with the appraisal by the UN human rights bodies, there is a possibility to utilise a process by establishing a database to monitor the government activities in the long run.

V. Conclusion: A Contrast between Fertility and Scarcity

The advantages and disadvantages of a multi-layered system of human rights protection can be observed from a comparison between the UK and Japan. As to the advantages, the first is that an issue is more likely to be discovered and coped with efficiently and sufficiently if the system is multi-layered. Second, even if a problem only affects a limited number of the people in a particular country, it can be universal in a regional or international community. A good example is the case of trans-

47 Report of the Working Group on the Universal Periodic Review: Japan. A/HRC/8/44, 30 May 2008.

sexual people (*Christine Goodwin v. the United Kingdom*[48]) and the case of Hansen's disease patients (2001 Kumamoto District Court judgment). The latter spent an unforgivable amount of time solving the issue because they were extremely isolated, even though a new trend for handling it existed at the worldwide level. Third, a multi-layered system gives more opportunities for a victim of human rights violations to challenge the system. Forth, a multi-layered system creates the possibility for maintaining established human rights standards (core rights such as the right not to be tortured by the state) in a difficult situation in which the state is prone to compromise. Fifth and last, a multi-layered system can keep an issue alive (again, the transsexual case is a good example). Sixth and finally, a multi-layered system can foresee a possible issue of human rights as it covers a wider territory.[49]

The disadvantages of a multi-layered system are the confusion or conflict that can arise among domestic and international actors due to their being influenced by traditional constitutional arrangements, political pressure and national emotion. This could be further aggravated by the familiar argument that who has a last word — the judiciary or legislature, national or international court, Contracting State or international organisation — wins. In my view, this problem might be solved if a model is created, where no actor has the last word but each has a moment to appear on the stage, has authority to decide an issue at a certain moment and place and then must hand over the issue to a different actor with a different authority and a function. Under the same universal rules as those that establish human rights, the content of these responses cannot be fixed in advance but must rather slowly develop through dialogues among different actors. In my view, the UK and the European Convention on Human Rights are possible candidates for creating this model, despite the current difficult relationship that exists between the UK and

48 Judgment of 11 July 2002.

49 *S. and Marper v. the United Kingdom,* supra note 12, is a good example. The European Court of Human Rights gave the alarm to a possible danger of DNA technology.

Strasbourg.

The executive summary of the report on the JCHR mentioned before reveals an important point.

> The choice between the Courts and Parliament as the guardians of human rights is increasingly rejected. In place of that old dichotomy there is now widespread agreement that all branches of the State — Parliament, the Executive and the Judiciary — have **a shared responsibility** for the protection and realisation of human rights. What explains the paradox that this emerging consensus about the shared responsibility for protecting legally recognised human rights is accompanied by new levels of dissensus about who has the final say.[50]

The above concept of the shared responsibility coincides with the speech of the President of the European Court of Human Rights when he delivered his speech at the Brighton Conference last year, in which he said:

> As to subsidiarity, the Court has clearly recognised that the Convention system requires **a shared responsibility** which involves establishing a mutually respectful relationship between Strasbourg and national courts and paying due deference to democratic processes.[51]

The more urgent question is not who has a final say, but how a multi-layered system in which every actor — national, regional or international — has an allocated role and shared responsibility for protecting human rights can be established.

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50 Supra note 17 at 6. Emphasis is added by the author.

51 Speech of Sir Nicholas Bratza at the Brighton Conference in 18–20 April 2012. 〈http://www.echr.coe.int/NR/rdonlyres/8D587AC3-7723-4DB2-B86F-01F32C7CBC24/0/2012_ BRIGHTON_Discours_Bratza_EN.pdf〉 (accessed 01/02/2013). Emphasis is added by the author.