

Study on European Judicial Protection System of Human Rights

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Keywords: Human Rights, Judicial Protection, Echr, Ecthr

Abstract: the European Judicial Protection System of Human Rights is a Regional Human Rights Protection System, Which is Based on the Convention for the Protection of Human Rights and Fundamental Freedoms, Better Known as the European Convention on Human Rights (Echr) and It Centered on the European Court of Human Rights. through the Long-Term Practice by the European Convention on Human Rights and European Court of Human Rights, the Concepts of Human Rights and Fundamental Freedoms to Be Protected Are More Clear to People. Therefore, This Research on Human Rights Protection in the Judiciary Will Be Focused on the European Human Rights Protection to Get a Clear Picture of the Status Quo of It, and Hopefully, by So Doing, the Problems in China's Protection of Human Rights Will Be Found and Some Suggestions on the Improvement of the Relevant Laws Will Be Given.

1. Introduction

After the Extremely Brutal World War II, People in the Whole World Have Been Yearning for Freedom, Safety and the Protection of Human Rights, and the Whole International Community Acknowledges That Human Rights Protection Should Not Be Limited At the National Level, But At the Global Level as Well. Yet Compared with the Slow Progress of International Protection of Human Rights, Regional Protection of Human Rights Has Achieved Prominent Progress, So Research on Regional Protection of Human Rights May Be an Important and Good Starting Point of the Research on International Protection of Human Rights. as the First Political Organization in Europe the European Council Set the Protection of Human Rights as Its Goal Shortly after Its Foundation and Started the Designing Work of a System of Human Rights. in November 1950, the European Council Adopted the European Convention on Human Rights, Which Protects the Civil and Political Rights of All the People within the Europe. after This, in Order to Further Improve the Mechanism of Human Rights Protection in Europe, the European Council Passed the European Social Charter in October 1961 Which Further Protect People's Economic, Social and Cultural Rights.

This Paper is Intend to Study the Judicial Protection System of Human Rights, the Judicial Protection of Human Rights is Mainly Embodied in the Rights of the Participants in Judicial Activities, and the Most Common Way is the State Set Up Various Kinds of Litigation System in Order to Provide Protection of Human Rights.[1] It is Well Known That the European Convention on Human Rights is the Basic Legal Document of the European Judicial Protection System of Human Rights, and the Effective Human Rights Protection Mechanism Established by the European Convention on Human Rights is the Most Typical and Influential within the Europe. Therefore, It is Appropriate to Start with the European Convention on Human Rights When Discussing the European Judicial Protection System of Human Rights.

2. European Judicial Protection Mechanism of Human Rights Based on European Convention on Human Rights

The European Convention on Human Rights is a Part of the Political Plan of Unification, or At Least the First Step Toward This Ideal. Therefore, the European Convention on Human Rights Has Been Viewed as “the Jewel in the Crown” of the European Council to This Day.

As International Conventions, Both of the European Convention on Human Rights and the European Social Charter Stipulate a Binding Human Rights Standard for the High Contracting Parties, Which is to Say That They Are Made for Two Categories of Rights, One is for Civil and Political Rights, and the Other for Economic, Social and Cultural Rights. Civil and Political Rights and Economic, Social and Cultural Rights Are Interdependent, Which Are Indispensable Fundamentals in Establishing a Democratic System in Europe.[2] the European Convention on Human Rights and the European Social Charter Are Legal Basis of the European Legal Protection Mechanism of Human Rights.

According to the European Convention on Human Rights, Case Law is Formed on the Basis of the Judgments Delivered by the European Court of Human Rights.[3] the Case Law of the European Court of Human Rights Makes the Specific Provisions of the European Convention on Human Rights Much More Vitality and Alive. Besides, the Cases of the European Court of Human Rights Are Also References for the European Court of Justice[4] When Handling Cases of Human Rights.[5]

Under the European Convention on Human Rights, a Mechanism of Human Rights is Formed, Which Includes the European Commission of Human Rights, the European Court of Human Rights and the Committee of Ministers of Council of Europe, and the Enforcement Measures Featured by Individual Application Procedures and Inter-States Prosecution Procedures. This Mechanism is Primarily to Protect Civil and Political Rights. after Protocol 11 of the European Convention on Human Rights Was Put into Effect on November 1, 1998, the Judicial System of Human Rights Protection Established under the European Convention on Human Rights Becomes More Mature and Effective. the European Commission of Human Rights and the European Court of Human Rights, Based in Strasbourg, France, Are Bodies Established to Ensure the Observance of the Engagements Undertaken by the High Contracting Parties in the Convention. According with the Article 34 of the European Convention on Human Rights, the Court May Receive Applications from Any Person, Non-Governmental Organization or Group of Individuals Claiming to Be the Victim of a Violation by One of the High Contracting Parties, and These High Contracting Parties Shall Not in Any Way Prevent the Parties from Effective Exercise of This Rights. However, in Order to Achieve Article 34 of the European Convention on Human Rights Needs to Achieve One Condition Which is the Court Only Deal with the Matter after All Domestic Remedies Have Been Exhausted. and According to the Generally Recognized Rules of International Law, within a Period of Six Months from the Date on Which the Final Decision Was Taken. Meanwhile, under the Article 38, the Court May Examine the Case Together with the Representatives of the Parties and, If Need Be, Undertake an Investigation, for the Effective Conduct of Which the High Contracting Parties Concerned Shall Furnish All Necessary Facilities. Article 46 of the European Convention on Human Rights, the High Contracting Parties Undertake to Abide by the Final of the Court in Any Case to Which They Are Parties, and the Final Judgment of the Court Shall Be Transmitted to the Committee of Ministers, Which Shall Supervise Its Execution.

3. The Relevant Practice of the European Court of Human Rights

The Rights and Freedoms Set Forth in the European Convention on Human Rights Are Presented in a General and Principled Manner. in Order to Better Apply These Rights and Freedoms into Specific Cases, the European Court of Human Rights Has the Fully Exercise to Interpret the Convention. the European Court of Human Rights Reiterates That the European Convention on Human Rights is “ a Living Instrument That Must Be Interpreted According to Present-Day Conditions “. [6] Therefore, the Court Interprets the Articles with Each Different Cases and Then Makes Them Case-Law, and in This Way, the Convention is Supplemented, Developed and Improved. in Particularly, the European Court of Human Rights Extended and Enriched the Judicial Protection of Human Rights under Article 6 of the European Convention on Human Rights Though the Case Law.

3.1 Right of Access to Court

Although the Right of Access to Court Has Long Been Acknowledged as a Very Important Right and Been Protected in the Judicial Systems of the Majority of Countries, However, This Right is Not Explicitly Expressed to Be Guaranteed in Most International Conventions of Human Rights. According to the European Court of Human Rights, the Right of Access to Court Was Viewed as the First Element of Fair Hearing Guarantees Stipulated in Article 6 Paragraph 1 of the European Convention on Human Rights.[7]

For This Circumstance, There Used to Be Two Quite Different Opinions. One is That Guaranteeing individual's Right of Access to Court is Embodied in Fair Hearing Guarantees, and the nations' Undertaking the Obligation of Fair Trial Means That They Must Guarantee That Individuals Get Effective and Timely Judicial Relief. the Other Opinion is That Only When the Proceedings Are under Way Does the Nation Undertake the Obligation of Fair Hearing Guarantees; When They Are Not, No Obligations.[8] This Issue Was Solved in the Case of Golder V. United Kingdom. Taking an Affirmative Attitude to the First Opinion in Its Ruling, the Court Takes That to Guarantee That Individuals Get Effective and Timely Judicial Relief is the Premise of Guaranteeing a Fair Hearing. If This Can Not Be Guaranteed, Then the Procedure Guarantee in Article 6 That Everyone is Entitled to a Fair and Public Hearing within a Reasonable Time Will Become Meaningless.[9] the Court Has Made It Clear That to Guarantee the individuals' Right of Access to Court is the Obligation That Shall Be Undertaken by the High Contracting Parties of the Convention. Based on That, a Series of Case-Law Has Further Explained the Basic Framework of the Right of Access to Court, for Instance: the Right to Legal Aid and the Right to Access into a Trial.

3.1.1 Legal Aid

In Modern Society, the Increasing Litigation Fees Have Become a Big Obstacle for a Party to Get Actual Judicial Relief. in Many International Treaties, It is Only Those Defendants Who can't Afford Their attorney's Fees in the Criminal Proceedings Can Be Provided with Legal Aid. But in Case Airey, the European Court of Human Rights Raises High Standard for This Issue: in Other Kinds of Proceedings, the Parties Shall Also Be Provided Legal Aid. to Guarantee the Right of Access to Court Ensures That Both in Criminal Proceedings as Well as in Civil Proceedings, Legal Aid is Needed.[10]

3.1.2 Access into a Trial

The Right to a Fair Trial, Referred by Some Scholars as “ the Right to Request to Be Tried “[11] the Right to a Fair Trial is Itself a Inalienable Right of a Person. Certainly, the Trial Should Be Undergone Swiftly and Timely and Ended within a Reasonable Time. in Criminal Procedures Particularly, Criminal Suspects Are Usually Not At Liberty Before and during Trials. If a Trial Prolongs, It Will Be a Torment for a Criminal Suspect Mentally and Physically, Which is Against the Requirements of Human Rights Protection.

3.2 Right to a Fair Trial

The Right of Fair Trial is the Core of Judicial Justice, and the Justice of Trial is the Key Link to Decide Whether the Criminal Procedure is Fair or Not.[12] Many International Conventions on Human Rights Explicitly Proclaim That Guaranteeing the Right to a Fair Trial is a Basic Obligation to Be Assumed by the Contracting Members.[13] the Right to a Fair Trial Was Initially Proclaimed in Article 10 of the Universal Declaration of Human Rights as a Principle, Which Provides That Everyone is Entitled in Full Equality to a Fair and Public Hearing by an Independent and Impartial Tribunal. Article 14 Paragraph 1 of the International Convention on Civil and Political Rights of the United Nations Explicitly Stipulated That “in the Determination of Any Criminal Charge Against Him, or of His Rights and Obligations in a Suit At Law, Everyone Shall Be Entitled to a Fair and Public Hearing by a Competent, Independent and Impartial Tribunal Established by Law.” Article 6 of the European Convention on Human Rights Has Three Sections, Which Provides the Principle of

Ensuring the Justice of the Member States, as Well as Some of the Most Basic Procedural Safeguards to Ensure Judicial Justice. Article 6(1) Provides the General Standard of the Right to a Fair Trial, Everyone is Entitled to a Fair and Public Hearing within a Reasonable Time by an Independent and Impartial Tribunal Established by Law. Article 6(2) Emphasizes the Principle of Presumption of Innocence. Article 6(3) is the Specific Criteria for the Right to a Fair Trial, Which Provides the Minimum Protection for Any Person under Criminal Charge, and It Includes Five Subsections: (a) to Be Informed Promptly, in a Language Which he Understands and in Detail, of the Nature and Cause of the Accusation Against Him; (B) to Have Adequate Time and Facilities for the Preparation of His Defense; (C) to Defend Himself in Person or through Legal Assistance of His Own Choosing or, If he Has Not Sufficient Means to Pay for Legal Assistance, to Be Given It Free When the Interests of Justice So Require; (d) to Examine or Have Examined Witnesses Against Him and to Obtain the Attendance and Examination of Witnesses on His Behalf under the Same Conditions as Witnesses Against Him; (e) to Have the Free Assistance of an Interpreter If he Cannot Understand or Speak the Language Used in Court.

However, Such Stipulations Are Expressed Too Simply for the Standards of European Court of Human Rights. Many Important Fundamental Principles of a Fair Trial Are Set during the Practice of the Court Considering the Specific Conditions of Each Individual Case by the Form of Case-Law, among Which, the Most Important One is the Principle of Equality of Arms. the Purpose of This Principle is to Make It as Much as Possible a Reasonable Balance of Defense Ability between the Parties.[14] the Basic Concept of the Principle of “Equality of Arms” is Parties in Civil or Criminal Matters Should Be Equal. to Put It Further, Each Party of a Litigation Should Have Equal Opportunities to Appear At a Court and to State Their Own Opinions in Court.[15] More Specifically, the Principle of “Equality of Arms” Can Be Summarized as Three Points: First, the Way to Obtain Litigation Information Should Be Symmetrical for Both Parties, Which Means That Each Party Has the Right to Know the Evidence and Documents That May Affect the Judgment, and to Debate on the Evidence and Documents;[16] Second, the Witnesses of Both Parties Shall Be Treated Equally by the Court;[17] Third, the Protection of the Independence of Lawyers, Lawyers Are the Fair Trial Watchdogs, Therefore, Lawyers Should Separated from Accusing Parties and Public Power of Judge.

4. The Judicial Reform of the European Judicial Protection System of Human Rights

The European Convention on Human Rights Has Gone through 64 Years Since Its Entry into Force. during This Period, the European Convention on Human Rights Continued to Improve and Develop the Convention through Experience and Practice. as of October 2013, the Council of Ministers of the European Council Has Adopted 16 Protocols.[18] for Instance: Protocol 1 Provides That under the Existing Powers of the European Convention on Human Rights Protection, the Further Explanation on the Protection of the Property Rights, the Right to Education, the Right to Free Elections;[19] Protocol 4 Prohibits the Imprisonment of People for Inability to Fulfil a Contract, and a Right to Freely Movement, Furthermore, Prohibits the Collective Expulsion of Foreigners;[20] Protocol 6 Requires Parties to Restrict the Application of the Death Penalty;[21] Protocol 7 Explains the Right to Appeal , the Right to Compensation for Wrongful Convictions, Most Importantly, Protocol 7 Prohibits the Re-Trial of Any One Who Has Already Been Finally Acquitted or Convicted of a Particular Offence(Double Jeopardy);[22] Protocol 12 Prohibits the General Discrimination;[23] Protocol 13 Provides for the Total Abolition of the Death Penalty.[24] This Paper is Most Concerned about Protocol 11 and Protocol 14. First of All, Protocols 2, 3, 5, 8, 9 and 10 Have Now Been Superseded by Protocol 11 Which Entered into Force on 1 November 1998. It Established a Fundamental Change in the Machinery of the Convention. It Abolished the Commission, Allowing Individuals to Apply Directly to the Court, Which Was Given Compulsory Jurisdiction and Altered the Latter's Structure. Previously States Could Ratify the Convention without Accepting the Jurisdiction of the Court of Human Rights. the Protocol Also Abolished the Judicial Functions of the Committee of Ministers. Furthermore, Protocol 14 Follows on from Protocol 11 in Proposing to Further Improve the Efficiency of the Court.

4.1 Protocol No.11 Building a Permanent European Court of Human Rights Case Handling Procedures of the Court

Before the Protocol No. 11 Was Written, the Institutions for Cases of Human Rights Included the European Commission of Human Rights, the Committee of Ministers of the Council of Europe and the European Court of Human Rights. the European Commission of Human Rights, Would First Receive Individual Applications and Determine Whether to Transfer Them to the European Court of Human Rights. If the Commission Considers It Admissible, Then It Will Be Transferred to the Court of Human Rights. Before the Amendment, the Committee of Ministers, as an Internal Administrative Institution of the Council of Europe, Also Makes Decisions on Admissibility of Individual Applications. the Examination and Determination of Cases by the Non-Judicial Institutions Caused a Lot of Problems, Such as over-Lapping of Work among Different Institutions, Landslide of Cases, Repetition of Handling the Same Case. Most Seriously, the Justice of Cases and Fairness of Procedures Can Not Be Guaranteed. Therefore, the Protocol No. 11 to the Convention Lifted the Power of the European Commission of Human Rights and the Committee of Ministers to Handle Cases and Only Left the Committee of Ministers the Responsibility to Supervise the Execution of the Judgment.[25] the Protocol No. 11 Combines the Supervisory and Hearing Functions of the European Commission and the European Court of Human Rights and Establishes a Permanent Court of Human Rights to Enforce the Judicial Guarantee to the Protection of Human Rights.[26]

After the Amendment of the Protocol, the Court Will Receive Two Kinds of Cases: Applications from Any Person, Non-Governmental Organization or Group of Individuals Claiming to Be the Victim of a Violation by One of the High Contracting Parties of the Rights Set Forth in the Convention or the Protocols to the Convention; and Inter-State Cases.[27] Before Amendment, the European Court of Human Rights Can Only Handle Cases Referred to It by the European Commission of Human Rights. That is to Say, Individual Applications Must First Be Selected by the Commission and Then If They Are Admissible, They Will Be Transferred to the European Court of Human Rights. So the European Court of Human Rights Could Only Play a Role on Judicial Hearing, and Had No Opportunity to Undergo Overall Judicial Review for Applications, Which Were the Disadvantage of the Then European System of Human Rights Protection.

The Amended Convention Makes Specific Stipulations on the Individual Applications. under the Convention, Any Person, Non-Governmental Organization or Group of Individuals Claiming to Be the Victim of a Violation by One of the High Contracting Parties of the Rights Set Forth in the Convention or the Protocols to the Convention, May Bring Its Individual Applications to the Secretary General of the Council of Europe.[28] What's More, the Convention Clearly Provides That the High Contracting Parties Undertake Not to Hinder in Any Way the Effective Exercise of This Right, Which Shows That the Court's Jurisdiction of Individual Applications of the Contracting States is Mandatory.[29] the Provision Raises the Position of Individual Applications in the Court and Makes the Domestic Matters of Human Rights Able to Be Transferred to Higher-Level Judicial Bodies.[30]

4.2 Protocol No.14 Optimizing the Judicial Procedures

The Protocol No. 11 helps increase the efficiency of the system of human rights protection by raising the accessibility of the Court of Human Rights and simplifying the procedures, to cope with the flood of applications caused by an increase of the number of contracting States. Protocol 14 seeks to filter out cases that have less chance of succeeding along with those that are broadly similar to cases brought previously against the same member state. Furthermore, a case will not be considered admissible where an applicant has not suffered a "significant disadvantage". This latter ground can only be used when an examination of the application on the merits is not considered necessary and where the subject-matter of the application had already been considered by a national court.

5. Analyze Chinese Judicial Protection System of Human Rights Though the European Judicial Protection System of Human Rights

The judicial protection of human rights in Europe is a balance of the theories and concrete practice of the European Convention on human rights and the European Court of human rights. It continuously reforms the contents the past convention has stipulated and what human rights need in modern society. Although the convention has been over 60 years since it was signed, the judicial interpretation of the European Court of Human Rights and a series of protocols endow it with the ability to adapt to the society and the moral norm which continually change. Hence, the convention adjusts itself with its flexible feature to constantly suit the development of the human rights in modern society. The convention, which is interpreted by the European Court of Human Rights in a dynamic way, flexibly applies to all kinds of cases in the court. The protocol signed in the later period partly modifies the convention, which improves the case handling efficiency of the court and allows the judges to have more time to focus on case details and evidence review.

In 1998, the Chinese permanent representative to the United Nation on behalf of the Chinese government signed the International Covenant on Civil and Political Rights. Article 14 of the International Covenant on Civil and Political Rights has similar provisions on the protection of the right to a fair trial compare with the Article 6 of the European Convention on Human Rights. In the future, China will ratify the International Covenant on Civil and Political Rights and will fulfill the obligations of the contracting parties under the ICCPR. Although there are great differences between Europe and China in the ways of realizing human rights and the mechanisms to protect human rights, the protection of human rights, especially the judicial protection of human rights, is still the consensus of our times.[31]

China has always attached great importance to the issue of human rights, in order to improve the judicial protection system of human rights, in 2004, the basic principle of “respecting and protecting human rights” was written into the constitution for the first time.

Decision of the CPC Central Committee on Major Issues Pertaining to Comprehensively Promoting the Rule of Law in 2014 point out “strengthen judicial protection of human rights”. The 2012 new version of the Chinese Criminal Procedure Law has already appeared the concept of rights to a fair trial in, and affirmed the principle of equality before the court, provided the principle of judicial organs independently exercise their powers, furthermore, it provided that a sentence shall be announced publicly. At the same time, Article 12 of the Chinese Criminal Procedure Law absorbed the presumption of innocence, but there is no clear provisions of the principle of presumption of innocence; Article 33 specified After the first time a criminal suspect has been investigated or taken coercive measures, may employ counsel to provide legal assistance; Article 34 added that for those defenders who have not been entrusted a legal counsel because of the economic difficulties, after application meets the conditions, give legal assistance; Article 50 cleared that no one should force to commit self-incrimination has established the exclusionary rule; Article 54 established the exclusionary rule of illegal evidence and etc...

The newly revised Chinese Criminal Procedure Law in 2012 is a big leap in China's criminal legislation. However, in the judicial protection of human rights, if compared with international standard set up by the International Covenant on Civil and Political Rights and the European Convention on Human Rights, China still exists some deficiencies, such as: the scope of legal aid is relatively narrow; the judiciary independent exercise of powers is not enough; lawyer defense condition need to be further improved; to determine the principle of prohibition of “Double Jeopardy”; the abolition of the “criminal suspects of investigators shall truthfully answer the inquiry,” etc.. All require us to further improve criminal legislation in the future.

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