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**The Interpretative Influence of International
Human Rights Norms on Judicial Reasoning in
Thailand: Lessons from the United Kingdom
and the United States of America**

Chumpicha Vivitasevi

A Thesis submitted for the degree of
Doctor of Philosophy



Durham Law School

Durham University

September 2012

The Interpretative Influence of International Human Rights Norms on Judicial Reasoning in Thailand: Lessons from the United Kingdom and the United States of America

Chumpicha Vivitasevi

Abstract

This research studies and compares the interpretive influence of international human rights norms in Thailand, the UK and the USA. It has found that successive Thai Constitutions have greatly been influenced by international human rights norms, but Thai courts have not made use of such norms in interpretation. This is in contrast to the practices in the UK and the USA where courts have developed advanced theories of interpretation in order to permit influence of international human rights norms in domestic spheres. In order to better understand the underlying reasons for the use of international human rights norms or the absence of such, the research compares not only the interpretive influence of international human rights norms, but also political and constitutional backgrounds, roles of the judiciary – including judicial review and interpretive approaches – and the perceived relationships between international and domestic laws in the three countries. Based on the results of the comparison, it argues that the interpretive influence of international human rights norms is desirable in Thailand and that the Thai legal system is actually more open to such norms than those of the UK and the USA. The research culminates in using experiences of courts in the UK and the USA to formulate a framework for Thai courts to consistently and legitimately use international human rights norms in their judicial reasoning.

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Acknowledgements

My greatest appreciation goes to Mr Roger Masterman and Dr James Sweeney, my supervisors, for their patience, thoughtful comments, encouragement and invaluable assistance. Without them, it was not possible for me to complete this research. My greatest appreciation also goes to my examiners, Professor Peter Leyland and Professor Gavin Phillipson, for their careful reading of and valuable comments on the first and revised versions of this research.

I am deeply indebted to my parents and grandparents who supported my education and gave me the opportunity to pursue this PhD degree.

Last but not least, family, friends and colleagues provided help and encouragement during the studies. I thank all of them from my heart. Special thanks go to my father, Yi-Hung Weng, Tim and Pennee Wangmaeteekul for their assistance in supplying necessary materials and for dealing with the University' administrative procedure in Durham while I was not present.

July 2012

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THE UNITED STATES

Constitution of the United States

Alien Tort Claim Act 28 USC § 1350

List of Abbreviations

CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CDR	Council for Democratic Reform (formerly CDRM in Thailand)
CDRM	Council for Democratic Reform under Constitutional Monarchy (in Thailand)
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CIL	customary international law
CRA	Constitutional Reform Act 2005
CRC	Convention on the Rights of the Child
CRDP	Convention on the Rights of Persons with Disabilities
DIP	Department of Intellectual Property
DRDP	Declaration on the Rights of Disabled Person
EC	Election Commission (in Thailand)
EC	European Community
ECA	European Communities Act 1972
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EEC	European Economic Community
EU	European Union
HRA	Human Rights Act 1998
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESC	International Covenant on Economic Social and Cultural Rights
ICJ	International Court of Justice
ILO	International Labour Organisation

NPKC	National Peace Keeping Council (in Thailand)
NHRC	National Human Rights Commission (in Thailand)
RUD	reservations, understandings, and declarations
TRIPs	Agreement on Trade-Related Aspects of Intellectual Property Rights including Trade in Counterfeit Goods
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
USA	United States of America

Chapter One: Introduction

I. Background and Objectives of the Study

This research concerns the interpretive influence on domestic judicial reasoning of international human rights norms. These are referred to in the research in a very broad sense, including not only international human rights norms that are in the form of international law, such as international treaties and customary international law, but also those that are in the form of laws and practices of foreign countries.

Traditionally, the relevance of an international human rights norm in a national court depends on whether the norm has a legal effect on the domestic legal system. International human rights norms in the form of laws and practices of foreign nations generally do not have any legal status in a domestic legal system, and therefore have been considered irrelevant in domestic judicial reasoning. As regards international human rights norms that are international laws, their legal status in the domestic sphere is usually determined on the basis of the theory of the relationship between the international and domestic laws to which a state subscribes.

On the one hand, monist theory sees international and domestic laws as parts of the same system and thus submits that international law should apply to a domestic legal system automatically. In its extreme version, formulated by Kelsen, international law is a higher order of law, and domestic law that conflicts

with international law is invalid.¹ Dualist theory, on the other hand, maintains that international law and domestic law are two distinct systems of law. International law does not apply in a domestic legal system unless and until it has been processed according to the rules determined by the state. The question of which laws assume the higher status is also to be determined by the domestic legal system.² It is the dualist approach to international law that has played an important role in preventing the influence of international human rights laws in domestic courts.

Several arguments have been put forward that international human rights law has peculiar characteristics distinguishable from those of public international law in general and thus should be treated differently.³ This relates especially to the fact that while the former attempts to limit the powers of states regarding their own citizens, the latter operates under the principles of non-interference and the sovereignty of the states.⁴ It is also argued that international human rights, because of their normative values, should 'transcend national political systems' and have primacy over other kinds of international and foreign laws.⁵

¹ Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (7th edn, Routledge 1997) 63–64. See also Alexander Somek, 'Kelsen Lives' (2007) 18 EJIL 409.

² Malanczuk (n 1) 63–64. In practice, states usually adopt a mixture of monist and dualist approaches. *ibid* 64–68 citing the research conducted by L Wildhaber and S Breitenmoser, 'The Relationship between Customary International Law and Municipal Law in Western European Countries' (1998) 48 ZaÖRV 163, 204.

³ Michael K Addo (ed), *International Law of Human Rights* (Ashgate Dartmouth 2006) xxxvii; Lawrence Collins, 'Foreign Relations and the Judiciary' (2002) 51 ICLQ 485, 496; Shaheed Fatima, *Using International Law in Domestic Courts* (Hart 2005) 207–71; Murray Hunt, *Using Human Rights Law in English Courts* (Hart 1998) 26–28.

⁴ Addo (ed) (n 3) 1; Malanczuk (n 1) 1–2, 209–11.

⁵ Commonwealth Secretariat, 'Annex: The Challenge of Bangalore: Making Human Rights a Practical Reality' in *Developing Human Rights Jurisprudence, Volume 8: Eighth Judicial Colloquium on the Domestic Application of International Human Rights Norms: Bangalore, India, 27-30 December 1998* (2001) 267.

There is evidence that international human rights treaties have been treated differently from other kinds of treaties. The ICJ's advisory opinion in the case of *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* suggested that the unique characters and purposes of the Convention which concerned human rights may make the conditions and consequences of the reservations by states to this Convention differ from other kinds of international agreements where the integrity of the treaties and the consent of the parties play important roles.⁶ This approach was followed by the Vienna Convention on the Law of Treaties, the Inter-American Court of Human Rights, and the European Court of Human Rights.⁷ Nevertheless, it is still accepted that international human rights law forms part of the wider field of public international law.⁸ The practices of states in accepting international human rights norms into domestic legal regime have yet to reflect special treatment for, or the primacy of, such norms.⁹

In any case, during the last few decades, the national courts of many jurisdictions have been inclined to consider international human rights norms that are not directly enforceable in their domestic legal systems in interpreting national laws and deciding issues arising within national spheres.¹⁰ This trend has been explicitly acknowledged in the 'Bangalore Principles', the concluding statement of the Judicial Colloquium on the Domestic Application of International Human

⁶ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) 1951 <<http://www.icj-cij.org/docket/files/12/4283.pdf>> accessed 12 July 2011, 23–24.

⁷ See *Effect of Reservations on the Entry Into Force of the American Convention on Human Rights (Art 74–75)*, Advisory Opinion OC–2/82, Inter-American Court of Human Rights Series A No 2 (24 September 1982); *Hilaire v Trinidad and Tobago, Preliminary Objections*, Inter-American Court of Human Rights Series C No 80 (1 September 2001); *Belilos v Switzerland* [1988] ECHR 4 (29 April 1988).

⁸ Addo (ed) (n 3) xvii; Luzius Wildhaber, 'The European Convention on Human Rights and International Law' [2007] ICLQ 217, 220.

⁹ Dinah Shelton, 'Normative Hierarchy in International Law' (2006) 100 Am J Int Law 291, 294.

¹⁰ Melissa A Waters, 'Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties' (2007) 107 Colum L Rev 628.

Rights Norms and on Government under Law held in Bangalore in 1988. Para 4 of the ‘Bangalore Principles’ provides:

In most countries whose legal systems are based upon common law, international conventions are not directly enforceable in national courts unless their provisions have been incorporated by legislation into domestic law. However, there is a growing tendency for national courts to have regard to these international norms for the purpose of deciding cases where the domestic law – whether constitutional, statute or common law – is uncertain or incomplete.¹¹

It is submitted that instead of focusing on their legal status, national courts are now looking at international human rights norms as ‘persuasive authorities’.¹² It should be noted that the term ‘persuasive authority’ may be used with different meanings. While McCrudden uses it to mean ‘relevant’ consideration for the courts as opposed to ‘binding authority’,¹³ Jackson refers to it as non-binding but more than just relevant, because it carries ‘persuasive force’ in judicial reasoning.¹⁴ In any case, both meanings reflect the fact that domestic courts are not obligated to follow international human rights norms.

The purposes of looking at international human rights norms in domestic courts are also varied. Larsen has given useful typologies for the use of international

¹¹ Concluding Statement of the Judicial Colloquium, ‘Bangalore Principles’ (Judicial Colloquium on the Domestic Application of International Human Rights Norms and on Government under the Law, Bangalore (India), from 24–26 February 1988).

¹² Karen Knop, ‘Here and There: International Law in Domestic Courts’ (2000) 32 NYU J Int’l L & Pol 501, 512–25. Christopher McCrudden, ‘A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights’ (2000) 20 OJLS 499, 502; Vicki C Jackson, ‘Transnational Discourse, Relational Authority, and the U.S. Court: Gender Equality’ (2003) 37 Loy L A L Rev 271, 287–88.

¹³ McCrudden (n 12) 502.

¹⁴ Jackson (n 12) 287–88.

human rights norms in domestic courts: expository, empirical and substantive.¹⁵ Expository use occurs when a court uses international norms 'to contrast and thereby explain a domestic constitutional rule'.¹⁶ Empirical use occurs when the Court

looks abroad to see what the effect of the proposed rule might be in the context of a particular legal system and to ascertain whether the effect of the specific ruling urged upon the Courts will comply with the constitutional principle the Court has derived through domestic sources.¹⁷

Lastly, there is the substantive use of international norms, where courts seek 'guidance in defining the content' of the domestic law.¹⁸

Of these typologies, the first two are not controversial. In the expository use, international human rights norms do not directly provide the meaning and scope of the domestic laws under interpretation, nor do they give direction for the court's decision. They simply 'shed light on the distinctive function of one's own system'.¹⁹ Similarly, the use of international human rights norms for expository purposes does not directly inform the meaning and scope of the domestic law. In this case, however, the norms may help courts decide the case by showing that proposed solutions work elsewhere or by showing that fear of such solutions is not warranted.²⁰ By contrast, the use of international human rights norms for

¹⁵ Joan L Larsen, 'Importing Constitutional Norms from a "Wider Civilization": *Lawrence* and the Rehnquist Court's Use of Foreign and International Law in Domestic Constitutional Interpretation' (2004) 65 Ohio St LJ 1284, 1284.

¹⁶ *ibid* 1288.

¹⁷ *ibid* 1289.

¹⁸ *ibid* 1291.

¹⁹ Vicki C Jackson, 'Constitutional Comparisons: Convergence, Resistance, Engagement' (2005) 119 Harv L Rev 109, 117

²⁰ Larsen (n 15) 1289; B Markesinis and J Fedtke, 'The Judge as Comparatist' (2005) 80 Tul L Rev 11, 97, 105.

substantive purposes is controversial, since it means that the meaning and scope of rights under domestic law are guided by international human rights norms.²¹ Nevertheless, this use of international human rights norms seems to be most common.²²

Of many countries that use international human rights norms as persuasive authorities,²³ the United Kingdom (UK) and the United States of America (USA) are of interest to this research.²⁴ In the UK, the European Convention on Human Rights and Fundamental Freedoms (ECHR) has had an important role in the courts' judicial reasoning. There has long been a legal policy that 'both statutory and the common law should be interpreted in a way which does not place the United Kingdom in breach of (a) its international, unincorporated treaty, obligations nor (b) rules of international law'.²⁵ Then, the interpretive role of the ECHR in domestic judicial reasoning has been magnified by the Human Rights Act 1998 (HRA), which requires domestic courts to apply and enforce the Convention Rights by statutory interpretation where possible and to take into account jurisprudence of the European Court of Human Rights (ECtHR).²⁶

In the USA, there is also a canon of construction that 'statute is to be construed so as not to conflict with international law or with an international agreement of the United States'.²⁷ Although this canon is not directly applicable to constitutional interpretation, the US Supreme Court's jurisprudence, especially that on the Eighth Amendment of the Constitution, which prohibits 'excessive' or

²¹ Larsen (n 15) 1291.

²² The substantive use of international human rights norms in the UK and the USA will be discussed in Chapters Three, IV and Four IV. The reason for this kind of use to be most common will be discussed in Chapter Five.

²³ See McCrudden (n 12) 507 pointing out the practice in Israel, Singapore, South Africa and the USA.

²⁴ The reasons for choosing these two countries as subjects of studies are elaborated below.

²⁵ Fatima (n 3) 269.

²⁶ Human Rights Act 1998, ss 2–3.

²⁷ Restatement (Third) of the Foreign Relations Law of the United States, s 114 (1986).

‘cruel and unusual’ punishments, and the Fifth and Fourteenth Amendments, which provide for ‘due process’ requirement, shows that international human rights norms have had some influence on the Court’s reasoning.²⁸

From an international perspective, this is a very effective way of upholding international human rights standards within national spheres.²⁹ From a domestic perspective, however, it is perceived as an innovative way of using international and foreign norms and has been the subject of heated debates.³⁰ The critics have been most vocal in the USA, where there have been allegations that the use of international human rights norms by the Supreme Court is undemocratic and replaces American values with those of foreign countries. Judges, academics and people’s representatives are divided on the issues.³¹

Why have national courts started to refer to international human rights norms, and why are so many against this? Are the allegations that international human rights norms are undemocratic and pose a danger to national legal systems valid? It is profitable to understand this controversy.

Even more interestingly, the situation seems to be totally different in Thailand. The country has struggled to develop itself economically and politically. In order to gain recognition as a democratic and rights-respecting country, it has ratified several international human rights treaties and has adopted a Bill of Rights containing basic rights recognised by international society.³² Obviously, the use of international human rights norms in judicial reasoning has the potential to

²⁸ This will be discussed in Chapter Four, IV B i.

²⁹ Jochen A Frowein, ‘International Law in Municipal Courts (Remarks at the American Society of International Proceedings on Implementation, Compliance and Effectiveness, 9–12 April 1997)’ in Lisa Lan Chmura, ‘International Law in Domestic Legal Order: A Comparative Perspective’ (1997) 91 ASIL Proc 289, 294; Bernhard Schlüter, ‘The Domestic Status of the Human Rights Clauses of the United Nations Charter’ (1973) 61 Cal L Rev 110, 163.

³⁰ See McCrudden (n 12) 507.

³¹ This issue will be discussed in Chapter Four, IV B ii.

³² This issue will be discussed in Chapter Two, I B.

benefit Thailand, not only in fulfilling its international obligations but also in bringing rights protection in the country up to international standards. Nevertheless, unlike in the UK and USA, the interpretive influence of international human rights norms is scant and has yet to receive any attention from academics. It is intriguing to find out the reasons for the different approach and to evaluate whether Thai courts should also start to refer to international human rights norms.

Therefore, this research intends to examine in detail not only the practices of courts in Thailand, the UK and the USA relating to the interpretive influence of international human rights norms, but also the reasons for and the debates around such practices. The ultimate aims are to gain insights about these practices and their legitimacy, to assess whether Thai courts should also allow the practice, and, if so, to formulate a framework for their appropriate employment of international human rights norms.

It is noted here that, in fact, debates on the use of international human rights have revolved around issues of the universality of human rights vis-à-vis cultural relativism, the tenability of comparative law, and the legitimate sources of interpretation that may be used by the judiciary.³³ The first and second of these issues are broader questions which have been discussed widely in academic literature but are still contestable. This research will focus on the last question which is more pragmatic, and the answer to it may depend on the characteristics of a legal system as well as on general legal theories.

II. Methodology and Choice of Jurisdictions

The comparative method has been adopted in this research, since it has been accepted as a valuable tool for researchers aiming to gain a better understanding of their own legal system, and for anyone wishing to initiate improvements in a

³³ Christopher McCrudden, 'Judicial Comparativism and Human Rights' in Esin Örüçü and David Nelken (eds) *Comparative Law: A Handbook* (Hart 2007).

legal system, especially in a developing country.³⁴ The Thai legal system has been selected as a targeted jurisdiction since this researcher has full background knowledge of it, has seen the problems associated with the use of international human rights norms in judicial reasoning, and has access to necessary materials which are written mostly in the Thai language and may not be accessible to other researchers in the UK, where the research has taken place.

As regards the enlightening jurisdictions, the UK and USA have been selected for several reasons. The most important of these is that the use of international human rights norms in judicial reasoning has been practised, and has been subject to wide discussion, in these two jurisdictions. The materials from the UK and USA are among the richest and thus are able to contribute significantly to the content of this research.

Secondly, although the UK and USA share certain legal traditions, especially their common law traditions, the legal systems of each have developed separately from (though not totally independently of) each other.³⁵ The distinctions between the two regarding the issues of the entrenchment of rights, the judicial review, and the exposure of the countries to international law in general and international human rights in particular can help identify the factors that affect the judicial approaches towards international human rights norms. Further, the different solutions adopted by, and the debates that have occurred in, the two systems present a wider range of theoretical and practical considerations and of possible choices for future action regarding the development of the framework to be proposed for Thai courts in this research.

³⁴ Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (3rd edn, OUP 1998); W J Kamba, 'Comparative Law A Theoretical Framework' (1974) 23 Int'l & Comp L Q 485, 489–90.

³⁵ Zweigert and Kötz (n 34) 239–55; Louis Henkin, 'Introduction' in Louis Henkin and Albert J Rosenthal (eds) *Constitutionalism and Rights: The Influence of the United States Constitution Abroad* (Columbia University Press 1990).

Next, the UK and US courts seem to refer to different kinds of international human rights norms in their judicial reasoning. While the courts in the UK have concentrated on the ECHR, to which the UK is a party, courts in the USA have tended to refer to general propositions of the international community. This is very beneficial for the development of the framework for Thailand, which is to cover all kinds of international human rights norms.

Lastly, both the UK and USA have adopted a dualist approach towards international law, similarly to Thailand. Thus, their approaches regarding the interpretive influence of international human rights norms can serve as valuable models.

It is acknowledged that there are important differences between these three systems. While Thailand has declared itself to be a civil law country,³⁶ both the UK and the USA have adopted a common law legal system. While the Constitutions of the USA and Thailand are in written form, that of the UK is not. Furthermore, the social and political conditions in these three countries seem to be very different. However, it is submitted that these differences do not render the comparison impossible; neither do they make the lessons to be drawn impractical.

The comparative principle used here is that of functionality, a dominant technique in comparative legal scholarship. It is presumed that 'as long as in law things fulfill the same function, then they are normally comparable'.³⁷ What is indicated by this presumption is that the functionalist principle is a particularly flexible one and that the focus under this principle 'is not on what the formal

³⁶ As will be seen in Chapter Two, however, Thailand has been influenced also by common law tradition especially in relation to the interpretive approach.

³⁷ Antonios Emmanuel Platsas, 'The Functional and the Dysfunctional in the Comparative Method of Law: Some Critical Remarks' (2008) 12 EJCL 1, 2.

requirements of the comparable in foreign law are but rather on how foreign law operates in the area of law in question'.³⁸

In the area of public law, '[a]lthough there are still great differences in political systems and cultures, the main objectives of constitutional law have become more broadly similar than previously, due to the dominant international agendas of "good governance", "human rights", "international trade", and "sustainable development"'.³⁹ Therefore, constitutional law of dissimilar political systems and cultures can be studied comparatively. Such comparison is still comparing like with like. Of course, such comparability is also clear in the area of constitutional adjudication. In recent years, an increasingly transnational constitutional discourse has developed, the result of which is that 'constitutional courts around the world are confronting similar issues'.⁴⁰

By the same token, since the focus under the functionalist principle is on the operation of the law and not its formal requirements, it is submitted that the difference between written and unwritten constitutions does not render the comparison inappropriate. In arguing that 'the constitution is the highest level within national law',⁴¹ Kelsen stresses that he is referring to the constitution in a material sense – 'rules which regulate the creation of the general legal norms, in particular the creation of statutes'.⁴² This is different from the written constitution, or, in Kelsen's term, the 'formal constitution', which is 'a certain solemn document, a set of legal norms that may be changed only under the observation of special prescriptions, the purpose of which it is to render the

³⁸ *ibid* 2–3.

³⁹ Andrew Harding and Peter Leyland, 'Comparative Law in Constitutional Contexts' in Esin Örüücü and David Nelken (eds), *Comparative Law: A Handbook* (Hart 2007) 325.

⁴⁰ Vicki Jackson, 'Comparative Constitutional Federalism and Transnational Judicial Discourse' (2004) 2 *Int'l J Const L* 91, 91. For a comparative studies on the constitutional courts, see generally Andrew Harding and Peter Leyland (eds) *Constitutional Courts: A Comparative Study* (Wildy, Simmonds & Hill 2009).

⁴¹ Hans Kelsen, *General Theory of Law and State* (Harvard University Press 1945) 124.

⁴² *ibid*.

change of these norms more difficult'.⁴³ The material constitution is essential to and exists in all legal systems. In contrast, the formal constitution is created in order to put the material constitution in written form and is not indispensable.⁴⁴ Since the purpose of this research is to compare how the constitutions in the three systems operate and how they affect the use of international human rights norms in domestic courts, the difference in relation to the 'formal' constitution in the named systems is not an obstacle.

Regarding the legal traditions, it should be noted that the idea of 'legal families', which is well-known among comparative legal scholars, is the subject of criticism. This idea suggests that the different legal systems of the world can be grouped in terms of those possessing sufficient similarities with each other as to make comparison fruitful. The considerations for grouping include central elements of legal doctrine within the systems, as well as styles of developing and presenting doctrine, and of legal reasoning and interpretation.⁴⁵ According to this approach, three major legal traditions are identified in the modern Western world: common law, civil law and socialist law.⁴⁶ While this idea is a 'central theory of modern comparative legal studies',⁴⁷ its usefulness has been questioned. For example, Öricü attacks this traditional grouping on the grounds that it is too Euro-centric and too much shaped by thinking only about legal rules of private law. She forcefully argues that all legal systems, without any exception, are mixed. They 'are born of different parentage from marriages between systems

⁴³ *ibid.*

⁴⁴ *ibid* 124–25.

⁴⁵ Roger Cotterell, 'The Concept of Legal Culture' in David Nelken (ed) *Comparing Legal Cultures* (Dartmouth 1997) 13.

⁴⁶ Mary Ann Glendon, Michael W Gordon and Christopher Osakwe, *Comparative Legal Traditions in a Nutshell* (West 1982) 5.

⁴⁷ John Bridge, 'National Legal Tradition and Community Law: Legislative Drafting and Judicial Interpretation in England and the European Community' (1981) 19 *Journal of Common Market Studies* 351, 351.

and sub-systems of such'.⁴⁸ The legal system of Thailand is also of this nature. Since the modernisation that took place at the end of the 19th century, the Thai legal system has had 'a real mixture of sources such as English law, German law, French law, Swiss law, Japanese law and American law'.⁴⁹ In fact, Harding submits that '[l]egal families tell us nothing about legal systems except as to their general style and method, and the idea makes no sense whatsoever amid the nomic din of South East Asia'.⁵⁰

Moreover, in relation to judicial interpretations, which is what this research aims to compare, the differences between the common law and the civil law traditions have become less and less important. Arguably, common law judges no longer have wide discretion in making law, and their main task is now the interpretation of legislation.⁵¹ At the same time, the notion that 'civil law judges do not make law' has become folklore even in the countries where it originated. It has proved impossible for legislators to provide a perfect set of laws which can apply to every case arising. Civil law judges have to face situations where there is no applicable law, where the applicable law is too vague, and so on. Since they cannot refuse to decide the case for these reasons, they must fill the gaps in the legislation or decide in which ways to interpret vague provisions.⁵² In fact, the civil law legal system usually provides a general provision allowing judges to resort to local customs or general legal principles in cases where no provisions of law are applicable. Civil law judges normally hide behind this kind of provision

⁴⁸ Esin Özücü, 'A General View of "Legal Families" and of "Mixing Systems"' in Esin Özücü and David Nelken (eds), *Comparative Law: A Handbook* (Hart 2007) 184.

⁴⁹ *ibid* 173. This will be apparent in Chapter Two, II B i and III A of this research as well.

⁵⁰ Andrew Harding, 'Global Doctrine and Local Knowledge: Law in South East Asia' (2000) 51 *International and Comparative Law Quarterly* 35, 49.

⁵¹ John Henry Merryman and Rogelio Pe´rez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* (3rd edn, Stanford University Press 2007) 47; Lord Steyn, 'Dynamic Interpretation amidst an Orgy of Statutes' (2004) 3 *EHRLR* 245, 246–47. See also Guido Calabresi, *A Common Law for the Age of Statutes* (Harvard University Press 1982).

⁵² *ibid* 83.

when making law, but this does not make their function different from that of common law judges. The main distinction between civil law and common law judges, therefore, is not their approach towards interpretation or their power to make law, but rather how they present their interpretive process according to their traditions.⁵³ Accordingly, it is submitted that the different labels on the legal traditions of the UK and the USA on the one hand, and on those of Thailand on the other, will not make the task of comparison in this research inapt.

The last point on comparative method that needs to be addressed concerns the idea of legal transplants – ‘the moving of a rule or a system of law from one country to another’.⁵⁴ It is submitted that this is the one of the most powerful methods in establishing a set of laws in any society.⁵⁵ Its role is obvious in relation to the modernisation of the legal systems of the Third World. Feldman asserts that a fundamental assumption of jurists writing on law and development in the 1960s and 1970s was the idea that ‘law and legal rules are portable and autonomous, and can therefore be transplanted’.⁵⁶ For Alan Watson, a pioneer of this idea, a successful legal transplant will grow in its new body and become part of that body ‘just as the rule or institution would have continued to develop in its parent system’.⁵⁷ However, this part of the concept of legal transplants has been criticised as failing to take into account the fact that local society plays an important role in shaping law.⁵⁸ For the critics, the social and political contexts in which law operates have to be considered in order to ensure the transplants’

⁵³ *ibid* 47.

⁵⁴ The term is coined by Alan Watson. See *Legal Transplants: An Approach to Comparative Law* (1974) 21.

⁵⁵ David Nelken, ‘Legal Transplants and Beyond: of Disciplines and Metaphors’ in Andrew Harding and Esin Öricü (eds), *Comparative Law in the 21st Century* (Kluwer Law International 2002) 25.

⁵⁶ Eric Feldman, ‘Patients’ Rights, Citizen’s Movements, and Japanese Legal Culture’ in David Nelken (ed) *Comparing Legal Cultures* (Dartmouth 1997) 219.

⁵⁷ Watson (n 54) 27.

⁵⁸ Nelken (n 55) 20–24.

success.⁵⁹ The metaphor of legal transplants has also been seen as misleading as it tends to emphasise the *imposition* of law in a *one-way* direction. Alternative metaphors have been devised to describe the process of legal exchange, such as grafting, infiltration, infusion and cross-fertilisation, to mention only a few.⁶⁰

In relation to this research, it is submitted that the functionality approach is used in a contextually inclusive fashion. That is to say, it takes account of political science and other related disciplines to the extent that they explain the context in which the constitutions of the three countries operate. For instance, when looking at the constitutional adjudication of human rights cases in Thailand, what has to be kept in mind is Leyland's observation that this country 'does not share the same culture and history as European nations, and although it might be broadly designated as having a constitutional monarchy with a democratically elected government, it has a radically different political tradition'.⁶¹

III. Structure of the Research

The research follows a standard process for comparative studies and starts with a critical description of the legal systems to be compared.⁶² Chapters Two, Three and Four present an overview of the political and constitutional systems, the judiciary and the protection of rights, powers of judicial review, interpretive approaches, the legal status and interpretive influence of general international and foreign law and, finally, the legal status and interpretive influence of international human rights norms in Thailand, the UK and the USA respectively. The issues covered in these Chapters are crucial to the thesis since the influence of international human rights norms in judicial reasoning depends very much on

⁵⁹ *ibid* 23 referring to opinion of Otto Kahn Freund.

⁶⁰ Esin Öricü, '*Unde Venit, Quo Tendit Comparative Law?*' in Andrew Harding and Esin Öricü (eds), *Comparative Law in the 21st Century* (Kluwer Law International 2002) 7.

⁶¹ Peter Leyland, '*Droit Administratif Thai Style: A Comparative Analysis of the Administrative Courts in Thailand*' (2006) 8 *Asian Law* 121, 123.

⁶² Kamba (n 34) 511–12.

a set of conventions in the legal system which prescribes ‘the materials that judges may cite in their opinions and that lawyers may invoke in their legal arguments’.⁶³ The aim of these Chapters is not only to ascertain the extent to which international human rights norms influence judicial reasoning in each country, but also to understand the reasons underlying such influence.

It should be noted that as regards Chapter Two, which discusses the Thai legal system, most of the materials referred to are written in the Thai language, and so have needed to be translated by this researcher. Additionally, early Thai cases are mainly unpublished, or, if published, lack detail on fact and on reasons for judgment, and so secondary materials have to be used instead of the official report of the cases.

It should also be noted that although attempts have been made to ensure that the topics discussed in these three Chapters are parallel with each other, the nature of the materials prevents them from being exactly so. For example, while the discussions of the power of judicial review in Thailand and the USA concentrate on judicial review of legislation and mention only briefly review of executive actions, the discussion of the same subject in the UK focuses on the review of executive actions and the principle of legality. The influence of European Union law and the adoption of the Human Rights Act 1998 are also peculiar features of the UK. More importantly, discussion of the Thai legal system will involve more historical and developmental aspects than that of the UK and US systems, which will focus on current practices and controversies. This is simply because Thai courts have not engaged in using international human rights norms. The aim is to understand the development of the Thai legal culture, and evaluate its potential to accommodate international human rights norms using lessons drawn from the practices of the UK and USA.

⁶³ George P Fletcher and Steve Sheppard, *American Law in a Global Context: The Basics* (OUP 2005) 76.

Comparative analysis will take place in Chapter Five. Since the Thai legal system is much less developed than those of the UK and USA and the purpose of the research is to learn from the experiences of the latter two, instead of comparing three legal systems at the same time, those of the UK and USA will be compared first, and then these two will be compared with the Thai legal system. The experiences of the two judiciaries will be converted into the terminology of Thai legal culture. Although the research aims to address a specific issue, namely the interpretive influence of international human rights norms in judicial reasoning, ‘general institutional contexts’ in which such judicial approaches have developed will be taken into account.⁶⁴ The ‘legal concepts and techniques’ must also be compared.⁶⁵ The legal cultures (i.e. the historical, philosophical, political and economic principles of the societies in which these two legal systems operate) need to be compared as well.⁶⁶ This is because, as mentioned above, these factors play important roles in shaping a judicial approach.⁶⁷ What will emerge from the analysis at this stage are not only differences and similarities regarding how domestic courts in these two worlds (the UK and USA on one side and Thailand on the other) have used international human rights norms as interpretive tools, but also reasons for such differences and similarities.⁶⁸ Next, an evaluation of the potential interpretive influence of international human rights norms in Thailand, which is the targeted system, will

⁶⁴ Zweigert and Kötz (n 34) 5.

⁶⁵ Mary Ann Glendon, Michael W Gordon and Christopher Osakwe, *Comparative Legal Traditions: Text, Materials, and Cases on the Civil Law, Common Law, and Socialist Law Traditions, with Special Reference to French, West German, English, and Soviet law* (West 1985) 36–37.

⁶⁶ All leading literatures on comparative methods emphasise the importance of the legal cultures. See Peter De Cruz, *Comparative Law in a Changing World* (3rd edn, Routledge-Cavendish 2007) 223; Kamba (n 34) 513–17; Pierre Legrand, ‘How to Compare Now ‘ (1996) 16 LS 232, 236; Jan M Smits, ‘Comparative Law and Its Influence on National Legal Systems’ in Mathias Reimann and Reinhard Zimmermann (eds) *The Oxford Handbook of Comparative Law* (OUP 2008) 533.

⁶⁷ H C Gutteridge (ed), *Comparative Law: An Introduction to the Comparative Method of Legal Study & Research* (CUP 1946) 29.

⁶⁸ Kamba (n 34) 511–12.

be offered on the basis of such findings. It will be argued that Thai courts should be influenced by international human rights norms in interpreting Thai law.

Then, in Chapter Six, both judicial practices and legal literature in the UK and USA will be fully discussed in the context of the Thai legal system. This will culminate in a framework within which the following questions can be addressed: (1) what kinds of domestic laws are to be interpreted taking into account international human rights norms?; (2) which courts have the power and responsibility to do this?; (3) for what purposes may courts use international human rights norms?; (4) should the use of international human rights norms be dependent on the ambiguity or uncertainty of domestic law?; (5) what kinds of international human rights norms should be considered and what are the rules for selecting the most appropriate norms?; (6) what levels of authority or persuasiveness should international human rights norms of each kind have in Thai judicial reasoning?; (7) what are the constraints and conditions on the use of international human rights norms?; and (8) what are the justifications for using international human rights norms as proposed?

Finally, Chapter Seven summarises the important findings from the research, reviews what the research has contributed to academic literature and to courts' practice, and, lastly, offers recommendations for future research directions.

Chapter Two: Thailand

Since the Thai legal system is one that has been targeted by the research for the task of developing a framework for using international human rights norms in judicial reasoning, this Chapter serves two main purposes. The first is to ascertain whether Thai courts have already been influenced by international human rights norms and, if so, to what extent. The second is to appreciate the context in which the Thai legal system operates in order to understand the reasons for the practice (or lack of it). These tasks will also make it possible for the research to compare the Thai legal system with those of the UK and the USA, evaluate the potential of the Thai legal system in using international human rights norms, and propose an appropriate framework for Thai courts in the later Chapters.

In the following section, an overview of the political and constitutional system is presented first, in order to provide a general outline of how the country has been governed and how it has struggled for democracy. Special attention is given to constitutional reform since 1997. This is because the 1997 Constitution established the current institutional framework of courts and watchdog bodies, and established the basis of the power of the courts in the Thai constitutional system, with distinctive Constitutional Court, Supreme Court and Administrative Court jurisdictions. This Chapter also discusses the constitutional protection of rights in Thailand since the inception of constitutional monarchy in 1932. Again, special attention is given to rights protection after the 1997 constitutional reform. Following this, section II discusses the power of judicial review of the Constitutional Court, Administrative Courts and the Courts of Justice. It also discusses the development of the interpretive approach of the judiciary in Thailand in order to discern the legal culture that has dominated Thai judges' interpretation and application of law. Importantly, the research addresses the new interpretive rule implied by the current Constitution and the effect of this on the

courts' practice. In section III, the discussion moves on to address the reception of general international law and foreign law in Thailand and their interpretive influence in Thai courts. It then, in section IV, focuses on international human rights norms in the Thai legal system. First, the legal status of international human rights norms is discussed, and this is followed by an evaluation of whether (and if so to what extent) Thai courts have considered international human rights norms in their reasoning.

I. Overview of the Political and Constitutional System

A. The Political and Constitutional System and Its Development

According to the current Constitution, which was promulgated in 2007 and is the country's eighteenth, Thailand is a 'democratic country with the King as Head of State'.¹ Sovereign power belongs to the people, but the King exercises it through the National Assembly, the Council of Ministers and the Courts in accordance with the Constitution.² The National Assembly, the legislative branch, consists of the House of Representatives and the Senate.³ Members of the former are elected, whereas members of the latter are partly elected and partly appointed.⁴ The Council of Ministers, the executive branch, consists of the Prime Minister and other Ministers appointed by the King, but the Prime Minister must be a member of, and approved by, the House of Representatives.⁵ While there are overlaps between the legislative and the executive branches, the Courts are independent of both. Apart from the Courts of Justice, Thailand now has the Constitutional

¹ The Constitution of the Kingdom of Thailand (hereafter 'Constitution') 2007, s 2.

² Constitution 2007, s 3.

³ Constitution 2007, s 88.

⁴ Constitution 2007, ss 93, 111.

⁵ Constitution 2007, ss 171–72.

Court and Administrative Courts, which are considered to be independent organisations in the constitutional system.⁶

In order to appreciate the context in which the Thai Constitution operates, it is important to note the historical development of the Thai political and constitutional system. The change of regime from absolute monarchy to constitutional monarchy in 1932 came about as a result of a bloodless revolution by a group of people consisting of military personnel, bureaucrats and left-wing nationalists, who delivered an ultimatum to King Rama VII to give up his absolute power.⁷ However, political power did not devolve to the people: it was simply transferred from the monarch to military bureaucrats.⁸ The first general election was held in 1933.⁹ However, the first *direct* election did not happen until 1937, and the elected representatives chosen by this election constituted only half of the whole National Assembly.¹⁰ Moreover, during World War II (1939–1945) general elections were suspended and the country was governed in a highly authoritarian way.¹¹ Direct election for the entire People’s Assembly did not take place until 1946. Moreover, there was great political instability. Between

⁶ Constitution 2007, ch 10.

⁷ Likhit Dhiravegin, *Politics and Governance of Thailand* (7th edn, Thammasat University Press 2006) 383; Kittisak Prokati, *The Reformation of Thai Law under European Influence* (2nd edn, Winyuchon 2006) 43; Tom Ginsburg, ‘Constitutional Afterlife: The Continuing Impact of Thailand’s Postpolitical Constitution’ (2009) 7 I-CON 83, 85.

⁸ Dhiravegin (n 7) 383.

⁹ The election in 1933 was an *indirect* election where voters (Thai nationals aged over 20) elected sub-district representatives who then elected members of Parliament for the province. Royal Decree for the Election of Sub-District Representatives and Members of Parliament Type 1, 1933. See also Michael H Nelson, ‘Thailand’ in Dieter Nohlen, Florian Grotz and Christof Hartmann, *Elections in Asia and the Pacific: A Data Handbook: Volume II: South East Asia, East Asia, and the South Pacific* (OUP 2001) 266.

¹⁰ *ibid.*

¹¹ Robert B Albritton and Tahwilwadee Bureekul, ‘Developing Democracy under a New Constitution in Thailand’ (2004) Working Paper Series: No. 28 ASIAN Barometer: A Comparative Survey of Democracy, Governance and Development (Asian Barometer Project Office, National Taiwan University and Academia Sinica) 6.

1932 and 1957 there were ten rebellions, of which six were successful.¹² Subsequently, between 1957 and 1973, although elections happened from time to time, in practical terms Thailand was subject to a full military authoritarian regime.¹³

It is also important to mention the role of the monarch. The revolution marked the lowest point for the Thai monarchy, but since the middle of the 20th century the role of the institution has increased so that it is now more important than being simply what has been termed the ‘symbol of the nation’, thanks to the support of royalist military governments, especially that of General Thanarat who governed the country from 1957 to 1963,¹⁴ and to the personal popularity of King Rama IX, the current King. It appears, judging from the political incidents which will be discussed below, that the current King has had an influence on Thai politics and has successfully intervened in the political process, especially during periods of political turmoil. McDorman sees this unwritten power of the King as one of the important ‘constitutional imperatives’ which, from time to time, assert greater influence in Thailand than the written constitutions.¹⁵ Harding and Leyland also observe that there has been ‘a notion of the monarchy as a stabilising institution amid the vagaries of political turmoil and revolving-door governments’.¹⁶

A stronger demand for democracy from the people started to emerge during the 1970s, since the economic downturn had led the people to doubt the ability, honesty and legitimacy of the Government. Huge disturbances aiming to

¹² Dhiravegin (n 7) 71.

¹³ There were elections, but only in form. *ibid* 383–84.

¹⁴ Andrew Harding and Peter Leyland, *The Constitutional System of Thailand: A Contextual Analysis* (Hart 2011) 238.

¹⁵ Ted L McDorman, ‘The 1991 Constitution of Thailand’ (1993–1995) 3 *Pac Rim L & Pol’y J* 257, 267–68.

¹⁶ Harding and Leyland (n 14) 15.

Another important turn for Thai democracy occurred in 1992, when people from a wide range of backgrounds gathered to protest against the former leader of the coup, who had served as temporary Prime Minister and had been chosen by the leading political parties to be Prime Minister again after the General Election. The dispersal of the protest resulted in several deaths and injuries.²⁰ The controversy ended with the resignation of the Prime Minister following the meeting, which was broadcast on television, between the King (as a mediator), the Prime Minister and the leader of the opposition.²¹ The incident led to a constitutional amendment to the effect that the Prime Minister must be a

¹⁷ Dhiravegin (n 7) 139–45.

¹⁸ *ibid* 144–48.

¹⁹ *ibid* 149–50. However, the trigger was the return to the country after fleeing abroad of the former dictator who was the target of the 1973 protest. See Marian Mallet, ‘Causes and Consequences of the October’ 76 Coup’ in Andrew Turton, Jonathan Fast and Malcolm Caldwell (eds) *Thailand: Roots of Conflict* (Spokesman 1978) 80–103.

²⁰ Dhiravegin (n 7) 165–67; Ginsburg (n 7) 90.

²¹ McDorman (n 15) 260.

representative of the people.²² Further, the National Assembly appointed several committees to research the development of democracy and constitutional reform,²³ and then passed a resolution to amend the Constitution again in order to allow the establishment of the ‘Constitution Drafting Assembly’ in charge of drafting a new Constitution.

The non-partisan Constitution Drafting Assembly consisted of 76 persons elected by the people and 23 persons appointed by the National Assembly. Academics, lawyers and technocrats were all involved.²⁴ Most importantly, for the first time in Thailand the public were encouraged to participate in the process of the constitutional drafting via open consultations and education sessions.²⁵ The draft was completed and was promulgated, with the consent of the National Assembly, in 1997. In recognition that the people had been actively involved in the drafting process, this Constitution has been called ‘the People’s Constitution’.

Responding to the attitude of the public that the government was ‘corrupt, inefficient, non-transparent and indifferent to the plight of the marginal and the underprivileged sectors’,²⁶ the main ideas of the People’s Constitution were to let the people become more involved in the political process, ensure basic rights and liberties, limit the powers of government, prevent corruption, and improve government stability.²⁷ The most innovative component of this Constitution was

²² Constitution 1992 (4th Amendment).

²³ Charnchai Sawangsagdi, *The Constitutional Law: Concepts and Experience from Foreign Countries* (Winyuchon 2009) 337–38.

²⁴ Ginsburg (n 7) 90.

²⁵ *ibid* 91.

²⁶ Kittipong Kittayarak, ‘The Thai Constitution of 1997 and Its Implication on Criminal Justice Reform’ (February 2003) *Annual Report for 2001 and Resource Material Seires No 60, Asia and Far Eas Institute for the Prevention of Crime and Treatment of Offenders (UNAFEI) Tokyo, Japan* 107, 107.

²⁷ Dhiravegin (n 7) 521. It is noted that most Thai governments could not manage the country smoothly because most of the time the governments were coalition government.

the establishment of several independent organisations designed to regulate the political process.²⁸ Such organisations included an Election Commission, an Audit Commission, a Human Rights Commission, Ombudsmen, a Special Criminal Division of Persons Holding Political Office in the Supreme Court, a Supreme Administrative Court, a Constitutional Court, and a National Counter-Corruption Commission.²⁹

However, Thai politics continued to be tumultuous. Thaksin Shinawatra, a former policeman and business magnate, became the first Prime Minister under the 1997 Constitution following an overwhelming victory in the General Election of 2001. In spite of notorious issues regarding his political honesty,³⁰ his anti-human-rights approaches towards drug dealers and the Muslim rebellion in the southern part of Thailand,³¹ and his alleged ambition of overthrowing the monarchy,³² Shinawatra was the first Prime Minister who was able to maintain office until the end of the political term, and he was re-elected for a subsequent term of office starting in 2005. Not only the Cabinet and the House of the Representatives, but also the Senate and independent organisations were heavily influenced, if not controlled, by him and his party, Thai Rak Thai.³³ Opposition to his regime became more serious during his second term, when the National Assembly under his control passed several laws allowing him to sell his telecommunications company to a foreign company for 1.9 billion USD without

²⁸ Ginsburg (n 7) 91–92.

²⁹ Constitution 1997.

³⁰ In fact, after the election in 2001 but before he took the office, the National Counter-Corruption Commission found that he had failed to declare all of properties according to the law. However, the Constitutional Court ruled 8–7 that he was not guilty. Constitutional Court decision 20/2544 (2001).

³¹ Ginsburg (n 7) 97. See also Andrew Harding, 'Buddhism, Human Rights and Constitutional Reform in Thailand' (2007) 2 ASJCL 1, 9–10. The issue of human rights abuse is discussed further in section I B.

³² Ginsburg (n 7) 97.

³³ Kovit Wongsurawat, *Thai Politics and Administration: Multi-Dimensions* (Department of Political Science and Public Administration, Kasetsart University 2010) 124.

paying taxes. There were uprisings against his administration in Bangkok. The Government responded by dissolving Parliament and calling for new elections in April 2006. However, the election was boycotted by the other main political parties, which refused to participate in it and encouraged people to 'vote no'. The Thai Rak Thai party was the only major party to put up candidates, and was accused by the other main parties of hiring other, small political parties to put up candidates in order to meet the requirement of the Constitution that a representative of the people had to win votes over another candidate or, in the case of there being no other candidates, had to receive 20 per cent of the votes in the voting area.³⁴ The Courts, which had since 1997 gradually become more involved in deciding issues of high political and economic importance,³⁵ played an exceptionally important role in resolving this issue. In the midst of political uncertainty after the election, but before the result was confirmed, the King gave public speeches urging three courts (the Constitutional Court, the Administrative Courts and the Courts of Justice) to be involved in determining whether the election had been constitutional.³⁶ Responding to the King's speeches, the three Courts held a meeting, and the election was later annulled by the Constitutional Court and Administrative Courts. The main reasons given were that the election had allowed an unreasonably short time for campaigning, resulting in an unfair

³⁴ See Luek Supasiri, *History of Thai Politics in the Decade* (Postbook 2010) 170.

³⁵ This was especially the Administrative Courts which, at this point, had already handed down certain high-profile cases. For an example, see Central Administrative Court decision 584/2549 (2007) and Supreme Administrative Court decision 349/2549 (2007), holding that ITV (a Thai TV channel) had to comply with the original licence agreement and pay compensation to the government for breach of licence to the sum of approximately 9.4 billion Baht, and the Supreme Administrative Court decision 5/2549 (2007) revoking two royal decrees which the Government used as bases for privatising the Electricity Generating Authority of Thailand (EGAT). For a commentary on the EGAT case, see Peter Leyland, 'Droit Administratif Thai Style: A Comparative Analysis of the Administrative Courts in Thailand' 8 *Australian Journal of Asian Law* 121, 142.

³⁶ There were two speeches. The first was delivered to the Justices of the Supreme Administrative Court on 25 April 2006, and the second delivered to the Justices of the Courts of Justices on the same day. See <<http://www.kanchanapisek.or.th/speeches/2006/0425-01.th.html>> and <<http://www.kanchanapisek.or.th/speeches/2006/0425-02.th.html>>(accessed 16 April 2011) respectively.

election, and that the polling booths had been set up in a way that allowed the general public to see how voters were casting their votes.³⁷ The Criminal Court also held the Election Commissioners who had arranged the election guilty of abusing their power.³⁸ Some scholars endorse this role of the courts, and have proposed the further involvement of the judiciary in checking the political branches.³⁹ There is, however, another group of scholars who see this as illegitimate judicial interference in politics.⁴⁰

Another election was expected to be held in November 2006, but in September 2006 the military seized power, bringing Thailand back to the vicious cycle – *coup d'état*, new constitution, elections, and then a *coup d'état*. The leader of the coup claimed that the intervention had been necessary because the Government had caused unprecedented conflict among Thais, which could have led to violence; management was corrupt; independent organisations had suffered interference; and the monarchy had been insulted.⁴¹ The Thai public was (and still is) strongly divided on this issue.

The 2006 Interim Constitution provided for the process of drafting a new Constitution.⁴² This time, 100 persons of mixed backgrounds were appointed by the coup leaders to be members of the non-partisan Constitutional Drafting

³⁷ Constitutional Court decision 9/2549 (2006); Central Administrative Court decision 607–608/2549 (2006) discussed further in text to n 340; Supreme Administrative Court decision 88/2549 (2006).

³⁸ Decision of the Criminal Court on 25 July 2006.

³⁹ Theerayut Boonmee, 'Judicial Decision for Justice in the Country: The Increasing of Stability in Thai Politics: Moving Towards a Second Political Reform' (Thailand Crisis: Capitalism Era, Bangkok, 31 May 2006).

⁴⁰ Piyabutr Saengkanokkul, *Under the King's Signature, the Democracy and the Judiciary* (Openbooks 2010). See also the opinion of a group of law lecturers from Thammasat University in <<http://www.enlightened-jurists.com>> accessed 16 April 2011.

⁴¹ Declaration of the Council for Democratic Reform under Constitutional Monarchy (CDRM). The CDRM later changed its English name to the Council for Democratic Reform (CDR).

⁴² Constitution (Interim) 2006.

Assembly. Although the process of drafting did not involve the public as much as the previous Constitution had done, this draft Constitution was the first to be required to be endorsed by public referendum before coming into force. The draft was proposed for public referendum in April 2007 and was approved by a majority of 14,727,306 voters to 10,747,411.⁴³

The 2007 Constitution, which is the current Constitution, is the revised version of the People's Constitution of 1997. Most of the main provisions are the same, but the drafters of the new Constitution recognised the failure of the former Constitution in preventing the abuse of power by the executive and provided mechanisms to invigilate political branches of the government strictly.⁴⁴ Great power is given to the Courts.⁴⁵ Ginsburg calls this the 'postpolitical structure' of the Constitution, meaning that politics is judicialised and the courts themselves are politicised, since they have the final word on political arrangements.⁴⁶

Nevertheless, the new Constitution has not resolved the political crisis in Thailand, since people are sharply divided regarding ideas relating to democracy and the political foundation of the country.⁴⁷ From the time of promulgation of the Constitution up until now there have been a number of public demonstrations against the Government by different political groups, relating to the legitimacy

⁴³ The number of qualified voters was 45,092,955. The number of votes cast was 25,474,747. Published in the Government Gazette, vol 124, pt 45 A, dated 21 August 2007 p 8.

⁴⁴ The Constitution Drafting Assembly, 'Summary of Essential Elements' in *Draft Constitution of the Kingdom of Thailand for the referendum on 19 August 2007* (2007) 170.

⁴⁵ The role of the judiciary was one of the main targets of the criticisms against the current Constitution. Bowornsak Uwanno, *Economic Crisis and Political Crisis in Thailand: Past and Present* (King Prajadhipok's Institute 2009) 42.

⁴⁶ Ginsburg (n 7) 104. The restructure results in the Courts becoming involved in politics as never before. See, for example, Constitutional Court decisions 12-13/2551 (2008) holding that the Prime Minister's personal involvement with a TV cooking programme made him unqualified to stay in office; and 18-20/2551 (2008) ordering the dissolution of the People's Power party for abusing the 2007 election.

⁴⁷ Uwanno (n 45) 58.

and political stands of these governments.⁴⁸ Certain of these demonstrations even resulted in the closure of an international airport and the burning of several buildings in Bangkok. The current Constitution itself is also subject to proposals for amendment on some important points as a result of these political controversies.

B. Constitutional Guarantees of Rights

The concept of rights is not firmly established in Thailand. Prior to the revolution in 1932, Thailand had been ruled by an absolute monarch for an uninterrupted period of almost seven hundred years. During this time the King had absolute and unlimited power, which was believed to be undividable.⁴⁹ All people and lands in the country were considered to be the property of the King.⁵⁰ Although it was assumed that the King ruled for the good of his subjects, people were not considered as having rights or liberties.⁵¹

Soon after the People's Party (Khana Ratsadon) seized power from the King, it was declared, in the first permanent Constitution of Thailand⁵² for example, that

⁴⁸ *ibid* 49.

⁴⁹ Examination of the 'Three Seals Law', the codification of Thai traditional law undertaken by King Rama I in 1804, shows that there was no provision stating rights of the people. On the contrary: there were many provisions giving absolute powers to the King to make and enforce law and adjudicate cases according to such law. See Krisda Boonyasmith, *The Three Seals Law: Reflection of Thai Society No. 2* (Damnern Lekadul Foundation BE 2547) 46–66. Additionally, see David Streckfuss, *Truth on Trial in Thailand: Defamation, Treason and Lèse Majesté* (Routledge 2011) 59, submitting that the King 'would have the prerogative to decide who should live and who should die' in the old Siam.

⁵⁰ Kanok Wongtrangan, 'Executive Power and Constitutionalism in Thailand' in Carmelo V Sison and Roshan T Jose (eds) *Constitutional and Legal systems of ASEAN Countries* (Academy of ASEAN Law and Jurisprudence, University of the Philippines, Law Complex 1990) 290.

⁵¹ Pokin Polakul, 'The Constitution of Thailand and the Guarantee of Rights and Liberties to Life and Body' (1984) 14(1) *Thammasat Law Journal* 97, 97–98; Wongtrangan (n 50) 290.

⁵² This is the Constitution of the Kingdom of Siam BE 2475 (1932). Before this Constitution, there was the Temporary Charter for the Administration of Siam Act 1932 promulgated by the People Group immediately after the seizure of power from the King in 1932. Nevertheless, the

persons of any social status shall be deemed equal before the law; that a person shall enjoy full liberty to profess a religion or creed and observe religious precepts or commandments or exercise a form of worship in accordance with his or her belief; and that a person shall enjoy full liberties in his or her body, dwelling, property, speech, writing, communication, education, public meeting, associations, and occupation.

Nevertheless, political instability has affected constitutional rights, not only in terms of provisions in the Constitutions, but also in terms of the enforcement of such provisions.⁵³ It can generally be said that guarantees of rights did not exist, or existed with extremely wide exemptions, in the Constitutions enforced during authoritarian regimes. For example, the Charter for Administration of the Kingdom 1959 contained no rights provision and gave extremely broad power to the Prime Minister. One provision stated:

... in the case that the Prime Minister considers it appropriate in order to maintain national security, the Prime Minister by Cabinet resolution shall have power to order or to act whatsoever. Such order or act shall be deemed legal.⁵⁴

Act's main task was to establish (gradually) a democratic form of government, so its provisions were devoted to the issue of institutions such as the King, Parliament and the executive. Apart from the rights to vote for the representatives in Parliament, there was no rights protection provision.

⁵³ It is noted that apart from the political instability, issues that impacted on rights in Thailand since before the change of regime in 1932 included problems relating to human trafficking, public health and the international drug trade. This was despite the fact that certain actions were taken by the Government as part of the country's attempt to become a member of the League of Nations. Stefen Hell, *Siam and the League of Nations: Modernisation, Sovereignty and Multilateral Diplomacy, 1920–1940* (River 2010).

⁵⁴ The Charter for Administration of the Kingdom of Thailand (hereafter 'Charter') 1959, s 17.

The Charter was enforced in Thailand for as long as nine years and five months.⁵⁵ Similar provisions reappeared in the Charters/Constitutions promulgated in 1972,⁵⁶ 1976,⁵⁷ 1977⁵⁸ and 1991.⁵⁹

At this point, it is important to observe that there were no fierce objections or strong demands for rights from the people. This might have been the result of the attitudes generally accepted in Thai society. Thailand had for a long time been governed by absolute monarchs. Buddhism plays an important role in legitimising rulers, since it furnishes the notion that a ruler has obtained his status because of his exceptional merit.⁶⁰ Those who are governed are not encouraged to act against their rulers, but are encouraged to accept their given status and make merit – doing good works according to Buddhist principles – in order to gain better status in the next life.⁶¹ Hierarchicalism – the notion that older people deserve the utmost respect⁶² – contributes towards a high degree of trust in the Government as well.⁶³ Therefore, the main political tradition in Thailand is that the governed would try to establish a patron–client relationship with the rulers rather than oppose them.⁶⁴

⁵⁵ From 28 January 1959 to 19 June 1968.

⁵⁶ Charter 1972, s17.

⁵⁷ Constitution 1976, s 21.

⁵⁸ Charter 1977, s 27.

⁵⁹ Charter 1991, s 27.

⁶⁰ Harding, ‘Buddhism, Human Rights and Constitutional Reform in Thailand’ (n 31) 2–3. For more discussion of the roles of Buddhism in Thai politics, see C F Keyes, ‘The Power of Merit’ in *Visaka Puja* (Buddhist Association of Thailand 1973); P A Jackson, *Buddhism, Legitimation and Conflict: The Political Functions of Urban Thai Buddhism* (ISEAS 1989).

⁶¹ Dhiravegin (n 7) 160.

⁶² *ibid* 85–86.

⁶³ Albritton and Bureekul (n 11) 27.

⁶⁴ Dhiravegin (n 7) 45–46; Ake Tangsupvattana, ‘Driving the Juggernaut: From Economic Crisis to Global Governance in Pacific Asia’ in Simon S C Tay (ed) *Pacific Asia 2022: Sketching Futures of a Region* (Japan Center for International Exchange 2005) 158.

In any case, except for during the periods of time mentioned above, the Thai Constitutions have usually included provisions guaranteeing individual rights.⁶⁵ A noteworthy aspect of this is that the 1949 Constitution enacted rights specified in the United Nation Universal Declaration of Human Rights, which Thailand had voted in favour of in 1948.⁶⁶ The same set of rights reappeared in the 1978 Constitution, which was enforced for approximately thirteen years, longer than most Thai Constitutions,⁶⁷ and in the 1991 Constitution.⁶⁸ It should be noted, however, that the protection of rights according to the above Constitutions was subject to wide exemptions specified in the Constitutions themselves. The most common exemption was a clause stating that constitutional rights were recognised, but must be exercised in accordance with the law, which meant that the legislative branch may enact the law to limit such rights freely.⁶⁹ Certain rights were also qualified by vague concepts such as ‘public order’ or ‘good morals’.⁷⁰ Moreover, the Constitutions usually had a provision enabling blanket limitation of rights, such as ‘No person shall exercise the rights and liberties according to the Constitution against the Nation, religions, the King and the Constitution’.⁷¹ Although the above restrictions were supposedly justified because they had been imposed for appreciable reasons, the terms used in these

⁶⁵ These were the Constitutions of 1952, 1968, 1974, 1978 and 1991.

⁶⁶ Constitution 1949, ss 26–45. However, this did not appear on the face of the Constitution. Polakul (n 51) 100 fn 2 citing Yud Sang-Uthai, *The Explanation for The Constitution of Thailand* (Prachaniti 1950) 884.

⁶⁷ Constitution 1978, ss 22–45.

⁶⁸ Constitution 1991, ss 24–49.

⁶⁹ See also McDorman (n 15) 29 discussing the enforceability of rights under the 1991 Constitution.

⁷⁰ For example, see Constitution 1991, s 27, on the freedom to profess a religion.

⁷¹ Constitution 1991, s 48.

provisions were open to a wide range of interpretations and could have been used, so it was felt, to limit the rights of the people more than is necessary.⁷²

Greater protection of rights has been one of the core objectives that both the 1997 and the 2007 Constitutions attempted to achieve. This has partly stemmed from the recognition that the protection of rights is an essential ingredient of democracy, and partly from an acknowledgment of the human rights abuses that took place in the past.⁷³ It should be noted, however, that the extent of the protection, and enforcement mechanisms, were intensely debated in Parliament.⁷⁴

In terms of their substantive nature, current Thai constitutional rights include not only civil and political rights such as the right to equality, rights to life and body, freedom of expression for both individuals and the media, and freedom to profess a religion and observe a religious principle, but also social and economic rights, such as the right to own a property, freedom to engage in an occupation, and the right to safety and welfare at work. Moreover, third-generation rights which are complex composition rights,⁷⁵ such as communication rights, rights in connection with information and complaints, and community rights in protecting local customs and the environment, are included.⁷⁶ It is important to point out that Thai constitutional rights are more or less the same as those found in the UDHR and other major international human rights instruments. This is because the drafters intended to comply with international human rights norms. According to the official record made by the Committee for Recording Objectives of the Constitution, Recording Comments and Checking Minutes of the Constitutional

⁷² Viboon Engkagul, 'Recognition of Human Rights under Thai laws' in Harry M Scoble and Laurie S Wiseberg (eds) *Access to Justice: The Struggle for Human Rights in Southeast Asia* (Zen Books 1985) 99.

⁷³ The Constitution Drafting Assembly (n 44) 174.

⁷⁴ Harding and Leyland (n 14) 222.

⁷⁵ Christian Tomuschat, *Human Rights Between Idealism and Realism* (OUP 2003) 24–25.

⁷⁶ See Constitution 2007, ss 26–69.

Drafting Assembly, provisions in the international human rights documents, particularly the UDHR, were cited in relation to the consideration of most provisions concerning rights.⁷⁷

Thai constitutional rights can be divided into two categories: absolute rights and qualified rights. Absolute rights are those rights that cannot be derogated by legislation.⁷⁸ Rights in this category include the right of Thai nationals not to be deported and not to be prohibited from entering the Kingdom,⁷⁹ and the rights of a person to profess a religion, observe religious principles or religious precepts, and exercise a form of worship in accordance with his or her belief.⁸⁰

Opposite to absolute rights are qualified rights which are rights that can be limited by laws. Almost all Thai constitutional rights fall into this category. In the case of some qualified rights, the Constitution requires that legislative restrictions must be made only for the objectives determined by the Constitution itself. For example, while the Constitution requires that a restriction on freedom of expression shall not be imposed, it provides exemptions in cases where such restriction is imposed by laws ‘specifically enacted for the purpose of maintaining the security of the State, safeguarding the rights, liberties, dignity, reputation, family or privacy rights of other persons, maintaining public order or

⁷⁷ Specifically, ss 26, 32–39, 41, 52 were recorded as consistent with the UDHR; s 32 was recorded as consistent with the International Convention for the Protection of All Persons from Enforced Disappearance 2006; ss 38–40 were recorded as consistent with the ICCPR; s 52 was recorded as consistent with the Convention on the Rights of the Child 1989. *Spirit of the Constitution of the Kingdom of Thailand BE 2550* (The Secretariat of the House of Representatives 2007) 18–63.

⁷⁸ In any case, it is noted that rights may be removed by a constitutional amendment which, in Thailand, requires only a simple majority vote (3 times) in the National Assembly. Constitution 2007, s 291. It should also be noted that the exercise of these rights may be subject to the rights and liberties of others, core principles of the Constitution, and the good morals of the people. Constitution 2007, s 28.

⁷⁹ Constitution 2007, s 34 para 3.

⁸⁰ Constitution 2007, s 14. It is noted, however, that a person may not exercise these rights contrary to his or her civic duties, public order or good morals.

good morals or preventing the deterioration of the mind or health of the public.⁸¹ Other rights that can be restricted for specific purposes include: the right to equal protection;⁸² the rights of members of the armed forces or the police force, Government officials, other State officials and officials or employees of State agencies to enjoy the same rights and liberties under the Constitution as those enjoyed by other persons;⁸³ freedom in terms of dwelling;⁸⁴ freedom to travel and in choice of residence within the Kingdom;⁸⁵ rights to counter the public assertion of a statement or circulation of a picture, in any manner whatsoever, which violates or affects a person's family rights, dignity, reputation or right to privacy;⁸⁶ liberty in communication;⁸⁷ the right not to be subjected to forced labour;⁸⁸ rights and freedoms in relation to choice of occupation;⁸⁹ freedom of expression of individuals and the mass media;⁹⁰ rights against the nationalisation of land;⁹¹ the right to know and have access to public data or information in the possession of a Government agency;⁹² and the freedom to assemble peacefully, to form an association, or to form a political party.⁹³

There are also qualified rights that the Constitution allows to be restricted by law without specifying the objectives that can justify such restriction. The result of

⁸¹ Constitution 2007, s 45.

⁸² Constitution 2007, s 30.

⁸³ Constitution 2007, s 32.

⁸⁴ Constitution 2007, s 33.

⁸⁵ Constitution 2007, s 34 para 2.

⁸⁶ Constitution 2007, s 35 para 2.

⁸⁷ Constitution 2007, s 36.

⁸⁸ Constitution 2007, s 38.

⁸⁹ Constitution 2007, s 43.

⁹⁰ Constitution 2007, s 45.

⁹¹ Constitution 2007, s 42.

⁹² Constitution 2007, s 56.

⁹³ Constitution 2007, 63–65.

this is that the legislative branch may pass laws restricting rights for any purpose it deems appropriate. The rights in this category are: right and liberty in life and person;⁹⁴ rights in respect of the undue exploitation of personal data;⁹⁵ rights in the administration of justice;⁹⁶ rights in respect of property;⁹⁷ academic freedom;⁹⁸ and the rights of communities to preserve their local customs, natural resources and environment.⁹⁹

Lastly, there are rights that the Constitution provides in broad language without defining the scope and extent of protection. Thus, the executive and legislative branches may come up with measures in which these rights can be exercised. The rights in this category are: people's rights to health and education services;¹⁰⁰ rights to welfare at work;¹⁰¹ the rights of disadvantage groups such as children, senior citizens and disabled persons to receive support;¹⁰² and rights in connection with information and complaints.¹⁰³

Importantly, in respect of all kinds of qualified rights, the Constitution requires that the restriction on rights must not be greater than is necessary to achieve the purposes for which the restriction is being made; must not affect the essential

⁹⁴ Constitution 2007, s 32.

⁹⁵ Constitution 2007, s 35 para 3.

⁹⁶ Constitution 2007, s 39–40.

⁹⁷ Constitution 2007, s 41–42.

⁹⁸ Constitution 2007, s 50.

⁹⁹ Constitution 2007, 66–67.

¹⁰⁰ Constitution 2007, ss 49, 51.

¹⁰¹ Constitution 2007, 44.

¹⁰² Constitution 2007, ss 52–55.

¹⁰³ Constitution 2007, 56–62.

substance of rights and liberties; and must not be intended to apply to a particular group.¹⁰⁴

The 2007 Constitution seeks to address further the problem concerning the enforceability of rights, which was one of the main problems with rights protection according to the previous Constitutions, including the 1997 Constitution. The new Constitution states that it intends to provide immediate effect to most constitutional rights, which means that rights can be enforced directly in the courts of appropriate jurisdiction without the need to enact a statute to implement them.¹⁰⁵ Moreover, the National Human Rights Commission, which has been established since the Constitution of 1997 to investigate the actions of governmental agencies, has been entrusted with a more pervasive power.¹⁰⁶ The Commission now has the power not only to make recommendations to government agencies and to report the actions of these agencies to Parliament, but also to submit cases to the Constitutional Court or Administrative Court when it considers that laws or executive actions are detrimental to human rights and beg the question of constitutionality.¹⁰⁷ It may also bring cases to the Court of Justice on behalf of the injured person.¹⁰⁸ The Ombudsmen may also bring cases to the Constitutional Court or the Administrative Courts when they consider a statute, rule, order or action of a public body inconsistent with constitutional rights.¹⁰⁹ Most prominently, an

¹⁰⁴ Constitution 2007, s 29.

¹⁰⁵ Constitution 2007, s 28 para 3. The clause that rights ‘shall be exercised according to the law’, which the Constitutional Court interpreted to mean that rights do not have effect until the law has been passed to implement such rights, was cut from many provisions of rights, such as those concerning rights of community, consumer rights, and rights to receive health care from the state. See Constitution 2007, ss 51–54, 57–61, 66–67. See also the Constitution Drafting Assembly (n 44) 174.

¹⁰⁶ Constitution 2007, s 257(1).

¹⁰⁷ Constitution 2007, s 257(2)(3).

¹⁰⁸ Constitution 2007, s 257(4).

¹⁰⁹ Constitution 2007, s 245.

individual person whose rights according to the Constitution are violated by law may now bring a claim to the Constitutional Court for a decision as to whether such law is constitutional.¹¹⁰ The community, as a group, may take legal action against a government agency in cases where the community's rights are violated as well.¹¹¹ Remedies available in cases of violation of constitutional rights include: declaration that legislation is invalid as being inconsistent with the Constitution (exclusively from the Constitutional Court); revocation of administrative actions (either prospective or retrospective); ordering of administrative agencies to perform, or refrain from, actions; declaration of rights and duties; and compensation.¹¹²

It can be seen that Thai constitutional provisions have evolved towards a greater protection of rights. Nevertheless, it is important to note that actual protection of rights in Thailand is yet to be at the same level. There still exist laws that pose a great threat to human rights by conferring broad power and immunity on the executive and the military in dealing with national security or public safety.¹¹³ The Emergency Decree on Public Administration in Emergency Situation 2005¹¹⁴ allows the Prime Minister, after declaring a state of emergency, to order a curfew, impose censorship on the media, limit transportation routes and prohibit the assembly of persons.¹¹⁵ In some situations, such as those involving terrorism or the use of force or those affecting the security of the state, the Prime

¹¹⁰ Constitution 2007, s 212.

¹¹¹ Constitution 2007, s 67 para 3.

¹¹² Constitution 2007, ss 6 and 211; Act on the Establishment of the Administrative Court and Administrative Courts Procedure 1999, s 72.

¹¹³ See Andrew Harding, 'Emergency Powers with a Moustache: Special Powers, Military Rule and Evolving Constitutionalism in Thailand' in Victor V Ramraj and Arun K Thiruvengadam *Emergency powers in Asia: Exploring the Limits of Legality* (CUP 2009).

¹¹⁴ In respect of the current Constitution 2007, this power of the executive to pass this kind of law can be found in section 184.

¹¹⁵ s 9.

Minister may also order the military to terminate or control the situation.¹¹⁶ Furthermore, the executive and the military may also exercise special powers according to martial law¹¹⁷ and a newly promulgated Internal Security Act 2007.¹¹⁸ Special powers according to these laws have been invoked repeatedly in relation to the conflict in the southern parts of Thailand,¹¹⁹ and in dealing with anti-government groups.¹²⁰ Moreover, it has been reported that many people, including bystanders, were killed during the ‘War against Drugs’ campaign.¹²¹ The media have been under the control of the Government, the military, and people who have possessed a conflict of interest.¹²² Freedom of expression has

¹¹⁶ s 11.

¹¹⁷ Constitution 2007, s 188; Martial Law Act 1914.

¹¹⁸ See discussion in Harding ‘Emergency Powers’ (n 113) 306–11.

¹¹⁹ Excessive torture and extra-judicial killings were reported in relation to the southern conflicts. The most publicised incidents were *Kru Se*, where 107 people involved in Muslim insurgencies were killed by the Army, and *Tak Bai*, where Muslim protesters and bystanders were arrested and put in cramped trucks, resulting in 78 of them being suffocated to death. For further discussion, see Vitit Muntarbhorn, ‘Human Rights in the Era of “Thailand Inc.”’, in Randall Peerenboom, Carole J Petersen and Albert H Y Chen (eds), *Human Rights in Asia: A Comparative Legal Study of Twelve Asian Jurisdictions, France, and the United States* (Routledge 2006) 326; Harding and Leyland (n 14) 229–32.

¹²⁰ The recent, and most criticized, case was the declaration of a state of emergency by Prime Minister Abhisit Vejjajiva in April–May 2010 which empowered the Center for the Resolution of the Emergency Situation to set out the ‘live fire zone’ in Bangkok, resulting in the deaths of at least 89 people and in widespread censorship of TV and radio stations that had connections with the anti-government group. Human Rights Watch, ‘Thailand: Repeal Emergency Decree’, 24 November 2010 <<http://www.hrw.org/news/2010/11/24/thailand-repeal-emergency-decree>> accessed 28 January 2012; Human Rights Watch, ‘Thailand: Lift Emergency Decree’, 23 September 2010 <<http://www.hrw.org/news/2010/09/22/thailand-lift-emergency-decree>> accessed 28 January 2012.

¹²¹ Muntarbhorn, (n 119) 325–26.

¹²² *ibid* 329–30; Harding and Leyland (n 14) 232–37; Peter Leyland, ‘The Struggle for Freedom of Expression in Thailand: Media Moguls, the King, Citizen Politics and the Law’ (2010) 2 *Journal of Media Law* 115, 118–21. It is noted that the current Constitution attempts to correct this by, among other things, introducing an independent agency that is in charge of distributing broadcasting frequencies and supervising the media, and by prohibiting a person holding a political position from having ownership or control over the media. Nevertheless, the problems, especially those relating to the military’s control over the media, still remain.

also been limited by the application of several laws and regulations.¹²³ It should also be noted that, in these situations, the NHRC has not played an outstanding role in advising the Government, bringing cases to the appropriate courts or proposing remedies.¹²⁴ Its actual role has been limited to investigating and reporting the rights abuses in cases where the public had shown an interest.¹²⁵ It is therefore a great challenge for Thailand to make constitutional aspiration become a reality.

II. The Judiciary and the Protection of Rights

Actual rights protection depends not only on the constitutional provisions, but also on the performance of institutions that are entrusted with the duty to enforce constitutional rights. As was discussed in the section above, these institutions include, but are not limited to, the executive, the legislature, the judiciary, the Ombudsmen and the NHRC. This research, however, will focus on the role of the judiciary in protecting rights. The following subsections discuss first the power of judicial review exercised by different courts, and then the interpretive approaches adopted by those courts.

¹²³ Leyland points to the *lèse-majesté* law according to section 112 of the Criminal Code and Computer Crime Act 2007 which facilitates rigorous (and perhaps politically driven) enforcement. Leyland, 'The Struggle for Freedom of Expression' (n 122) 122–37. See also Harding and Leyland (n 14) 237–47.

¹²⁴ The powers and duties of the NHRC have been set out in section 257 of the 2007 Constitution and the National Human Rights Commission Act 1999.

¹²⁵ Andrew Harding, 'Thailand's Reforms: Human Rights and the National Commission' 1 JCL 88; Harding and Leyland (n 14) 229. During the incident in 2010 cited in n 120, some even complained that the NHRC's priority was to justify the Government's action based on the Emergency Decree, and not to find accountable authorities. The Nation Online Newspapers, 'Yukthi Mukdaviyiv: Letter to Amara Pongsapich' 31 May 2010 <http://www.matichon.co.th/news_detail.php?newsid=1275309862&grpId=01&catid=01> 28 January 2012.

A. Power of Judicial Review

Thai Courts have long enjoyed the power of judicial review of legislative and executive acts. Currently, the power to review legislative acts is exercised by the Constitutional Court, and the power to review executive acts is exercised mainly by the Administrative Courts. However, in order to gain important insights into the role of the judiciary in Thailand, this section discusses first the development of judicial review as exercised by Courts of Justice, before continuing with an examination of the power of judicial review of the Constitutional Court and Administrative Courts after the 1997 constitutional reform.

i. Before the 1997 Constitutional Reform

The judicial branch in Thailand was by no means strong in relation to the executive and legislative branches. Early Thai Constitutions did not directly confer the power of judicial review of legislation to the court. The first landmark case in which the Supreme Court of Thailand declared the law unconstitutional was the '*War Criminal Act*' case in 1946. This concerned the constitutionality of the War Criminal Act which was issued soon after the end of the World War II with the purpose of punishing people who had joined or helped the Japanese military during the War. The preliminary issue to be determined was whether the Court had the authority to decide the constitutionality of the Act. The Supreme Court unequivocally claimed that the constitutional provision conferring the power to interpret the Constitution to Parliament did not affect the power of courts to interpret the Constitution, which was a task associated with the adjudication of cases. It then went on to hold that the Act constituted a retroactive criminalisation of conduct and could not be applied because it interfered with a liberty protected by the Constitution.¹²⁶

¹²⁶ Supreme Court decision 1/2489 (1946).

This decision can be compared to that of the Supreme Court of the USA in *Marbury v Madison*,¹²⁷ where the Court first claimed the power of judicial review of legislative acts in the USA. Unlike the situation in the USA where the other two branches accepted such power, however, the Thai Government responded to the decision by amending the Constitution in order to establish the Judicial Committee for the Constitution.¹²⁸ It was reasoned that the legislative branch had already considered the constitutionality of statutes before enactment; therefore allowing the judiciary to void such law without consulting it beforehand was unreasonable.¹²⁹ The practices of other civil law countries, which tended to establish independent administrative and constitutional tribunals in order to prevent the judiciary from interfering with functions of the executive and legislative branches, might also influence this movement.¹³⁰

From then on, only the Judicial Committee (whose staff were nominated by the executive and confirmed by the National Assembly) might declare laws unconstitutional.¹³¹ The 1991 Constitution replaced the Judicial Committee with the Constitutional Tribunal, but the composition and operation of the Constitutional Tribunal continued to be under the control of the executive.¹³²

¹²⁷ *Marbury v Madison* 5 US 137 (1803). See discussion in Chapter Four, II n 33.

¹²⁸ Sathiya Lengthaisong, 'Judicial Review' (1973) 3(3) Thammasat Law Journal 122, 126–28.

¹²⁹ Ibid 128.

¹³⁰ For the issues regarding the concept of separation of powers in civil law tradition and the establishment of administrative and constitutional tribunals, see John Henry Merryman and Rogelio Pe'rez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* (3rd edn, Stanford University Press 2007) 86–90.

¹³¹ James R Klein, 'The Constitution of the Kingdom of Thailand, 1997: A Blueprint for Participatory Democracy' (1998) The Asia Foundation Working Paper Series # 8, 18. It is noted that the legislative branch had once attempted to reserve the power of constitutional interpretation by having a constitutional provision saying that 'absolute right to interpret this Constitution is vested in Parliament', meaning that Parliament may overrule the interpretation made by the Judicial Committee. However, the provision was later abolished. Constitution 1946, s 86.

¹³² Ibid 18.

However, the Courts of Justice did not lose all power relating to the review of legislation. Before forwarding the issue to the Judicial Committee or the Tribunal, courts that handled the cases would have to give an interim judgment on whether the provision was constitutional. If the courts found it constitutional, they would apply the law notwithstanding objections from the parties. Only when the courts found the law unconstitutional would they refer the issue to the Committee or the Tribunal.¹³³ Moreover, the Judicial Committee and the Constitutional Tribunal only existed during ordinary times.¹³⁴ When the country was ruled by coups or temporary governments such that the temporary Constitutions did not provide for the establishment of a special institution for constitutional matters, the Courts of Justice took back the power of judicial review of legislation.¹³⁵

The power of the judiciary to review executive acts was less controversial. Before the establishment of the Administrative Courts following the 1997 Constitution, although several administrative processes had to be enacted before claims against administrative acts could be heard in the Courts of Justice, it was accepted (it has been so since 1932) that it is the task of the judiciary to decide whether the executive has acted according to the law.¹³⁶

In any case, the role of both the Courts of Justice and the Judicial Committee or Constitutional Tribunals in checking the executive and legislative acts was limited. This was especially so during the authoritarian periods. After successfully seizing power, the agents of the coup usually cancelled the existing

¹³³ Supreme Court decisions 21/2492 (1949), 1212/2497 (1954) and 1260/2497 (1954). See also Prakob Hutasingh, 'Judicial Power' (1970) 1(1) Thammasat Law Journal 4, 6.

¹³⁴ An exception was the Charter 2006, which required that all powers of the Constitutional Court shall be exercised by a Constitutional Tribunal comprising the Chief Justice of the Supreme Court, the Chief Justice of the Supreme Administrative Court, five Justices of the Supreme Court and five Justices of the Supreme Administrative Court. Constitution (Interim) 2006, s 35.

¹³⁵ Supreme Court decisions 766/2505 (1962), 222/2506 (1963) and 913/2536 (1993).

¹³⁶ Pintip Sujaritkul, 'The Decisions Relating to Administrative Acts in the Courts of Thailand' (1990) 37 *Dulapaha* 4.

Constitution and promulgated a temporary one in order to justify their own power to govern the country. Thai Courts had never been able to resist this. The ideas of absolute sovereign power and positivism were used as tools to justify those who held powers.¹³⁷ The Supreme Court consistently held that the temporary Constitutions promulgated by the coups were valid and enforceable even though they had not been issued by the King with the consent of Parliament because the agents of the coup had, in fact, successfully seized power.¹³⁸

The subservient role of the judiciary (and, obviously, of the Judicial Committee for the Constitution and the Constitutional Tribunal) was most apparent in respect of the cases relating to the constitutional provisions which conferred broad powers on the Prime Minister to act whatsoever in order to maintain national security.¹³⁹ The Supreme Court held in several cases that power to decide whether there was a threat to national security rested exclusively with the Prime Minister himself. The courts did not have to consider whether there actually was a threat or whether other people thought so.¹⁴⁰ The Court even endorsed the view that such power on the part of the Prime Minister included the power to imprison a person, and that the order of the Prime Minister according to the provision was final and not subject to judicial review.¹⁴¹

¹³⁷ Prokati (n 7) 69–70.

¹³⁸ Supreme Court decisions 1153–1154/2495 (1952), 45/2496 (1953), 1512–1515/2487 (1944) and 1662/2505 (1962).

¹³⁹ See text to n 54.

¹⁴⁰ Supreme Court decision 494/2510 (1967) (en banc). This point of the decision was also supported by later decisions such as 1792/2512 (1969), 2291/2519 (1976), 2573/2519 (1976) found in Pokin Polakul, ‘The Constitution of Thailand and the Guarantee of Rights and Liberties to Life and Body (2)’ (1984) 14(2) *Thammasat Law Journal* 91, 107–08.

¹⁴¹ Supreme Court decision 1758/2513 (1970) found in *ibid* 108.

ii. After the 1997 Constitutional Reform

a. Review of Legislation

Since the 1997 Constitution, the review of legislative acts has become the exclusive power of the Constitutional Court,¹⁴² whose decisions ‘shall be deemed final and binding on the National Assembly, Council of Ministers, Courts and other State organs’.¹⁴³

The operation of the Constitutional Court was disrupted during the period following the *coup d'état* in September 2006.¹⁴⁴ However, the Court was resurrected by the promulgation of the current Constitution in 2007. Its composition is quite remote from politics. The Court consists of nine judges: three elected at the general meeting of the Supreme Court of Justice from qualified justices of the Supreme Court; two elected at the general meeting of the Supreme Administrative Court from qualified justices of the Supreme Administrative Court; two selected by the Selective Committee and approved by the Senate from the list of qualified persons in law; and two selected by the Selective Committee and approved by the Senate from the list of qualified persons in political science.¹⁴⁵ The Selective Committee just mentioned consists of the President of the Supreme Court of Justice, the President of the Supreme Administrative Court, the President of the House of Representatives, the Leader of the Opposition in the House of Representatives, and, lastly, the Presidents of the Constitutional Independent Organs elected among themselves to be one in

¹⁴² Constitution 2007, s 264.

¹⁴³ Constitution 2007, s 216 para 5.

¹⁴⁴ Constitution (Interim) 2006, s 35 provided for the Constitutional Tribunal. See text to n 134 for the Tribunal’s composition.

¹⁴⁵ Constitution 2007, ss 204, 206.

number.¹⁴⁶ Each judge of the Constitutional Court is to hold office for nine years, and is allowed only one term in office.¹⁴⁷

Issues of constitutionality may be referred to the Constitutional Court by the courts of justice or administrative courts, either when they are of the opinion that the laws are unconstitutional or when parties to the case raise the issue. As regards the latter, it is important to note that courts deciding the cases no longer have discretion as to whether to refer the constitutional issue. They must stay the trials and submit the issue to the Constitutional Court, as long as no decision of the Constitutional Court on the same provision has taken place previously.¹⁴⁸ Issues concerning the constitutionality of law may also be referred to the Court by the Ombudsmen, NHRC or affected persons (the latter two only when constitutional rights are involved).¹⁴⁹

Furthermore, the Constitutional Court is entrusted with the power of abstract review of legislative acts. The new Constitution is designed to invigilate the enactment of laws strictly. It requires that all organic bills – those bills which are required to be passed by the Constitution itself for the purpose of giving more detail to constitutional provisions – be referred to the Constitutional Court for a determination of constitutionality.¹⁵⁰ With other bills, the Prime Minister or a group made up of certain members of the House of Representatives and senators may refer constitutional issues to the Constitutional Court before sending such bills to the King for his signature.¹⁵¹ After the law has been passed, Ombudsmen

¹⁴⁶ Constitution 2007, s 206.

¹⁴⁷ Constitution 2007, s 208.

¹⁴⁸ Constitution 2007, s 211.

¹⁴⁹ Discussed previously in section I B text to nn 106–110.

¹⁵⁰ Constitution 2007, ss 138, 141 para 1.

¹⁵¹ Constitution 2007, s 154.

and the NHRC may raise the claim of constitutionality to the Constitutional Court even if there is no concrete case.¹⁵²

Given these great powers, it might be expected that the Constitutional Court would play an important role in protecting constitutional rights against interference by the legislative branch. During the previous 14 years since its establishment, however, most of the cases that have come to the Court's attention have been those related to political process: for example, the qualification of a member of the national assembly and the legitimacy of a political party.¹⁵³ Cases in which the Court was required to consider constitutional rights constitute only a minority of all cases decided by the Constitutional Court so far.¹⁵⁴ The reasons for this could be that the concept of rights has yet to be established in Thailand, as discussed in section I A above; and that, in the midst of political turmoil, political parties and other interest groups attempt to use judicial decisions as tools for their political advantage. Furthermore, the small number of constitutional rights cases in the Constitutional Court could be the result of the competition between different courts over jurisdiction. It should not be forgotten that all courts in Thailand may be involved in interpreting constitutional rights. The Courts of Justice have the power to interpret laws they are applying in light of constitutional rights. Cases shall not be referred to the Constitutional Court unless there is a question of the constitutionality of legislation. The Administrative Courts have the power to decide whether an administrative action

¹⁵² Constitution 2007, ss 245(1) and 257 (2).

¹⁵³ Some of these cases have been mentioned in section I A, n 46.

¹⁵⁴ Between May 1998 and June 2012, 421 cases were rendered by the Constitutional Court and the Constitutional Tribunal (the latter operated during the 2006 Interim Constitution), in 116 of which the Court/Tribunal considered the issue of constitutional rights on merit. There were only eight cases in which the Court/Tribunal held the laws/draft laws/actions in question unconstitutional as being inconsistent with constitutional rights. This statistic derives from a scan of all central decisions published on the website of the Constitutional Court of Thailand < http://www.constitutionalcourt.or.th/index.php?option=com_docman&Itemid=210&lang=thindex.php > accessed 30 June 2012.

is constitutional. This includes the issue of whether an action of a public body violates constitutional rights. Decisions of the Administrative Courts on this issue are not appealable to the Constitutional Court. The Constitutional Court would have an opportunity to decide the case only when the public body in question acted according to legislation, and there was an issue of the constitutionality of that legislation.¹⁵⁵

b. Review of Administrative Actions

As well as the change in the body that has the power of legislative review, the 1997 constitutional reform results in a change in the body that has the power to review administrative acts. The review of administrative acts, except those relating to criminal law, labour law and tax law, was transferred from the Courts of Justice to Administrative Courts in 2001.

Justices of the Supreme Administrative Courts are selected by the Judicial Commission of the Administrative Court from persons qualified in law or in government administration.¹⁵⁶ The Administrative Courts have the power to decide the constitutionality and legality of administrative acts, which include the questions as to whether a public body acts unlawfully, acts beyond its power, acts inconsistently with laws or procedures required for such actions, acts in bad faith or in a discriminatory manner or causes unnecessary process, or acts in a way that amounts to an undue exercise of discretion.¹⁵⁷ The Courts are able to give a wide range of remedies, including revocation of administrative actions,

¹⁵⁵ Andrew Harding, 'The Constitutional Court of Thailand, 1998–2006: A Turbulent Innovation' in Andrew Harding and Penelope (Pip) Nicholson (eds), *New Courts in Asia* (Routledge 2010) 125.

¹⁵⁶ Constitution 2007, s 224.

¹⁵⁷ It should be noted that the Courts also have the power to decide issues relating to the wrongful acts of administrative bodies and those relating administrative contracts. Constitution 2007, s 223; Act on the Establishment and Procedure of the Administrative Court 1999, s 9.

ordering an administrative body to act or cease acting, and granting compensation.¹⁵⁸

In addition to the affected persons, Ombudsmen may submit a case to an Administrative Court if they are of the opinion that any administrative rule or action begs the question of constitutionality or legality.¹⁵⁹ This can be done even in cases where controversial issues have not yet arisen. So far, the Courts have played an important role in ensuring that the government agencies act within the scope of the law.¹⁶⁰

B. Interpretive Approaches

Apart from the power of judicial review, the roles of the Courts in protecting rights are also dependent on the interpretive approaches adopted in the legal system. Traditionally, the Thai legal system had been influenced by traditional Thai and Indian cultures. The core idea was that the law should be consistent with *dharma* – Buddhist teaching, nature, law of nature, virtue, righteousness, rule, truth or principle.¹⁶¹ In the late 19th century, however, in order to avoid colonisation the country undertook modernisation of its legal system, and since

¹⁵⁸ *ibid* s 72. For commentaries see Leyland ‘*Droit Administratif*’ (n 35) and ‘The Genealogy of the Administrative Courts and the Consolidation of Administrative Justice in Thailand’ in Andrew Harding and Penelope (Pip) Nicholson (eds), *New Courts in Asia* (Routledge 2010).

¹⁵⁹ Constitution 2007, s 254 (2).

¹⁶⁰ As of July 2009, there have been 17,031 closed cases in the Central Administrative Court and 8,884 in the Supreme Administrative Court. The Administrative Court, ‘The Case Statistics of the Central Administrative Court’ 2009 <http://www.admincourt.go.th/amc_eng/02-KADEE/2552/a03case0.htm> accessed 18 January 2010; The Administrative Court, ‘The Case Statistics of the Supreme Administrative Court’ 2009 <http://www.admincourt.go.th/amc_eng/02-KADEE/2552/a02case.htm> accessed 18 January 2010.

¹⁶¹ The SE-ED’s Modern Thai – English Dictionary. *Dharma* may sometimes be referred to as ‘religious law’ as well. Harding ‘Buddhism’ (n 31) 1. For further traditional Thai legal culture see Prokati (n 7) 49–52; Somyot Chuathai, *The Basic Knowledge on the Philosophy of Law* (Winyuchon 1993) 100–01.

then it has been influenced by Western common law and civil law legal traditions.¹⁶²

i. The Influences from the Common Law and Civil Law Legal Traditions: The Strict Literal Approach

At the beginning of the process of modernisation, English common law was proposed as a model to be used for the Thai legal system. This was because Prince Rabi Badhanasakdi, a graduate of Oxford University and later known as the ‘father of the law’ of Thailand, had established the first law school in the country – the Law School of the Ministry of Justice – which was inspired by the Inns of Court in London. Generations of Thai judges who graduated from the Law School had been trained not only in English law, but also in common law methods.¹⁶³ Literal interpretation and the idea of legal positivism, which insisted that law and justice were separated, had a significant influence on Thai judges.¹⁶⁴

However, the later process of the reformation of the legal system law was significantly influenced by experts from European countries, especially Belgium and France. King Rama V was also of the opinion that the written style of law was closer to the traditional Thai legal system and could expedite the process of reform. Therefore, by the late 19th and early 20th centuries, the civil law model was adopted as an official model for the Thai legal system instead of the common law model.¹⁶⁵

¹⁶² Prokati (n 7) 35–39.

¹⁶³ *ibid* (n 7) 112–14; The Central Intellectual Property and International Trade Court (ed), *The Judicial System in Thailand: An Outlook for a New Century* (IDE-JETRO 2001) 7, 64– 66; Charnchai Sawangsagdi, *The Development of Public Law in Thailand and other Countries* (Winyuchon 1995) 126–31.

¹⁶⁴ Chuathai (n 161) 195–96; Arun Panupong, ‘Interpretation of Law’ (1996) 26(3) *Thammasat Law Journal* 546.

¹⁶⁵ Sawangsagdi *The Development of Public Law in Thailand and other Countries* (n 163) 126–30; Prokati (n 7) 111–15.

It is important to note that, although the origins of the civil law system can be traced back to the Romans' 12 Tables of law¹⁶⁶ and the interpretive role of judges has fluctuated from era to era,¹⁶⁷ the civil law tradition that influenced the Thai legal system was that operating in Europe, particularly France and Germany, during the 19th and early 20th centuries, since it was during this period that the legal system was modernised and many Thai elites were sent to Europe to study.¹⁶⁸ The interpretive role of judges in Europe at that time was very limited. After ecclesiastical rule had started to diminish in the 17th century,¹⁶⁹ the 'intellectual revolution' changed the way people thought about individuals, government and law. Importantly, the idea of the separation of governmental powers was advanced by Montesquieu in order to isolate the judiciary from the law-making and executive functions.¹⁷⁰ This was particularly the case in France, where the judiciary had a history of abusing their powers either by refusing to apply the new law or by interpreting the law against the legislature's intention.¹⁷¹ Judges were not allowed to use external factors to decide the case and the reliance on precedent was prohibited. In an extreme version, it was even held that judges should not interpret incomplete or unclear legislation and should instead refer it back to the legislators.¹⁷² This idea was also reinforced by the legal positivism which was widespread in Europe during the 19th century.¹⁷³

¹⁶⁶ Kittisak Prokati, *Legal Methods* (3rd edn, Winyuchon 2008) 22–24.

¹⁶⁷ For example, while civil law judges in Roman times had very limited discretion and had to apply the Emperor's will strictly, those in the medieval period (12th–13th centuries) creatively interpreted the law, structured a set of judge-made laws, and created something similar to the *stare decisis* principle. Merryman and Pe'rez-Perdomo (n 130) 8–9, 35–36; Prokati *Legal Methods* (n 166) 25.

¹⁶⁸ Sawangsagdi *The Development of Public Law in Thailand and other Countries* (n 163) 131.

¹⁶⁹ Prokati *Legal Methods* (n 166) 27.

¹⁷⁰ Merryman and Pe'rez-Perdomo (n 130) 16–17. This is different from the separation of powers in the USA, which will be discussed in Chapter Four, I and II.

¹⁷¹ *ibid* 17.

¹⁷² *ibid* 36.

¹⁷³ *ibid* 24.

Therefore, it was (and, to some extent, still is) widely believed in Thailand that civil law judges cannot make law and that their duty is simply to interpret the law.¹⁷⁴ In fact, the role of judges in interpreting and applying laws seemed to be even more limited in Thailand than in other civil law countries because of the residual influence of the literal interpretation approach stemming from the English common law, which was also influenced by the legal positivism. The Thai legal system combined a limited role for judges in making law and the idea that written law should be sacred from the civil law tradition with the English literal rule of interpretation. The result was that Thai judges did not have the power to ‘make’ law as English judges do. At the same time, codified laws, which according to the civil law tradition should be treated as principles rather than concrete rules, were interpreted literally and strictly.¹⁷⁵

The Supreme Court held that judges were persons who ‘applied’ but did not ‘create’ the law; therefore, they could explain or interpret the law, but could never ‘change’¹⁷⁶ or ‘broaden’ the law.¹⁷⁷ Moreover, values such as justice or equality, which at first were inseparable from traditional Thai law, were disregarded for the task of interpretation. The Court held that justice meant *righteousness according to the law*. Individuals’ opinions always varied and could not be taken to account.¹⁷⁸ There was also the notion that in interpreting written law, judges should consider the letter first, and only if the letter could not provide clear meaning might they turn to the intention of the law.¹⁷⁹

¹⁷⁴ Prokati *Legal Methods* (n 166) 37; Prakob Hutasingh, ‘Interpretation of Statutes’ (1970) 1(3) *Thammasat Law Journal* 67, 74.

¹⁷⁵ Chuathai (n 161) 195.

¹⁷⁶ Supreme Court decision 209/129 (1910).

¹⁷⁷ Supreme Court decision 1041/2466 (1932).

¹⁷⁸ Supreme Court decision 144/2459 (1916) (emphasis added). See also Supreme Court decision 211/2473 (1930).

¹⁷⁹ Chuathai (n 161) 195–96.

Therefore, it later became a tradition that Thai judges applied written laws literally and mechanically.¹⁸⁰ Criticisms were directed towards Thai lawyers on the following grounds:

They are narrow-minded and have a strong tendency to be strict on the letter of the law, to the extent that the realities, the changes in society and the ideology of law are altogether disregarded.¹⁸¹

Nevertheless, it should be noted that there were some exceptional cases in which the Supreme Court and the Judicial Committee for the Constitution interpreted written law less strictly in order to protect people's rights, especially those relating to the principle of *nullum crimen, nulla poena sine praevia lege poenali*¹⁸² and the rights to be tried in the courts.¹⁸³

¹⁸⁰ For example, see Supreme Court decision 837/2483 (1940) holding, according to the literal method of interpretation, that although the statute in question required a police officer to make a record of everything he found at the time of finding, it did not stipulate any consequence for the officer failing to do this. Consequently, the defendant's objection to the use of the record, in which discovered items had been added later, as evidence in the court had to be denied.

¹⁸¹ Chuathai (n 161), introduction page (author's translation). See also Alexander Shytov, 'Abuse of Judicial Powers in Thai Folktales' in *Thai Folktales and Law* (ACTSCO) para 12 saying: 'In Thailand for example, there is a danger of a prejudice that a judge must apply law strictly in a machine-like manner without taking seriously the merits of the case.'

¹⁸² See for example the *War Criminal Act* case where the Court held that the Act aiming to punish people who became involved with Japanese soldiers during World War II was unconstitutional because it provided for a retroactive criminal punishment. Supreme Court decision 1/2489 (1946) discussed previously in n 126. See also decisions of the Judicial Committee for the Constitution and the Supreme Courts, which invalidated a provision of law allowing officers to seize all properties involved in the illegal transferring of rice, whether the owners of such properties were involved in such illegal acts or not. Judicial Committee for the Constitution decision 3/2494 (1951); Supreme Court decisions 222/2494 (1951) and 225/2506 (1953).

¹⁸³ See Judicial Committee for the Constitution's decision on 18 February 1958 and Supreme Court decision 222/2506 (1963), which held that the provisions provided for the ouster of the courts' jurisdiction in the disputes between citizens relating to ownership of the land were unconstitutional. These two cases are comparable to the UK's House of Lords decision in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (HL), which will be discussed in Chapter Three, II B ii.

Furthermore, strict literal rule applied only when there were provisions of law to be interpreted. In cases where codified law could not be applied, Thai judges, especially at the beginning of the modernisation of the legal system, were engaged extensively in judicial law-making. For example, in area of tort, judges had to lay down legal principles in order to decide whether an act constitutes tort; whether an act can be called negligence; and what should be an appropriate amount of compensation in cases of contributory negligence.¹⁸⁴ This is what has been happening, despite the cliché that civil law judges cannot make law, and Supreme Court decisions can at most serve as examples of how to interpret law, or as persuasive authorities. In fact, the trend towards treating Supreme Court decisions as law is obvious from the practice of judges themselves. Lower courts usually, if not always, follow the Supreme Court decisions. Furthermore, in the Supreme Court itself there is a practice that a principle set by its previous decisions can be overruled only when all judges in the Supreme Court judges sit *en banc*.¹⁸⁵

ii. The Development of the Interpretive Approaches: The Departure from the Literal Rule

Since the modernisation of the law, jurisprudence has developed very slowly. New schools of legal thought that have been flourishing in the Western world since the decline of legal positivism, such as legal realism, legal pragmatism and the sociological school of law, are known only by a few Thai legal scholars. As a result, the formalist approach towards interpretation has been able to dominate the Thai legal landscape for a long time.

¹⁸⁴ For example, see the Supreme Court decisions 713/2469 (1926) and 933/2472 (1929).

¹⁸⁵ A normal quorum of the Supreme Court consists of three judges. Prakob Hutasingh, 'The Supreme court of Thailand' (1971) 2(3) Thammasat Law Journal 136 (n 133) 137–38. See also The Central Intellectual Property and International Trade Court (ed) (n 163) 45.

During the last three decades, however, there have been movements, originating in academia, to move away from the strict formalist interpretation. The education systems of certain law schools which used to focus only on the codes and decisions of the Supreme Court have been changed. Subjects that provide general understanding about systems of law and the roles of lawyers in society, such as philosophy of law, juristic methods, comparative law and the legal profession, have been added.¹⁸⁶ New generations of law students have a better understanding of the differences between common law and civil law systems, and learn that legal positivism is only one among several theories and not necessary appropriate in all circumstances.¹⁸⁷ Importantly, the question as to what are the correct ways to interpret laws is subject to re-evaluation.

The literal rule has faced strong challenges. There seems to be a consensus among legal scholars in Thailand that both the letter and the spirit (intention) of law should be considered simultaneously when interpreting the law in a civil law system like that of Thailand.¹⁸⁸ The meaning of ‘intention’ has proven controversial. Some scholars have argued that the intention to be used must be that of the drafters and not that of the law itself. They have maintained that the intention of the law itself does not exist and that judges simply cite their own opinions as the intention of the law. Therefore, allowing judges to use the intention of the law is equivalent to allowing them to interpret the law without any restraint.¹⁸⁹ Others, however, have argued, on the basis of the civil law tradition where the law itself rather than the drafters’ opinions is sacred, that the intention of the law should be accorded great importance, while the intention of

¹⁸⁶ Chuathai (n 161) the introduction page.

¹⁸⁷ Prokati *The Reformation of Thai Law under European Influence* (n 7) 74–76.

¹⁸⁸ Chinda Chairat, ‘Interpretation of Thai Law’ (1970) 1(2) *Thammasat Law Journal* 11 30; Chuathai (n 161) 195–96; Hutasingh, ‘Interpretation of Statutes’ (n 174) 70; Preedee Kasemsap, ‘The Application and Interpretation of Law’ (1985) 15 (1) *Thammasat Law Journal* 65, 73, 79–80; Prokati *Legal Methods* (n 166) 46.

¹⁸⁹ Hutasingh, ‘Interpretation of Statutes’ (n 174) 74–75.

the drafters might sometimes be disregarded.¹⁹⁰ Nevertheless, most now seem to accept that both kinds of intention are relevant for the task of interpretation. Any materials that can reflect either kind of intention, including but not limited to history of law, *travaux préparatoires*, logic of provisions, and context, are deemed acceptable for the task of interpretation.¹⁹¹

Moreover, several scholars are arguing for an interpretation of law that takes into account factors such as ‘justice’, ‘contemporary social context’ and ‘the consequence of the interpretation’. Kasemsap argues that Thai courts may consider a wide range of sources in interpreting and applying law, pointing to section 4 of the Civil and Commercial Code, which provides:

Where no provision is applicable, the case shall be decided in accordance with the local custom. If the said local custom is unapparent, the case shall be decided by analogy to the provision most nearly applicable, and, in default of such provision, by the *general legal principle*.¹⁹²

According to Kasemsap, this section reflects the fact that Thailand has actually adopted the ‘Mature Legal System’ as used in Switzerland. This system occupies a mid-way position between the ‘Classic Theory’ of interpretation developed by Montesquieu – which holds that law is complete in itself and that judges simply apply it mechanically – and the ‘Free Law Theory’, which argues that courts should be free to interpret the law and may disregard positive law if it is not just. It holds that interpretation must be based on the letter of law, but that at the same

¹⁹⁰ Chuathai (n 161) 109.

¹⁹¹ Kasemsap (n 188) 72–73; Chairat (n 188) 30–34; Hutasingh, ‘Interpretation of Statutes’ (n 174) 76–77; Panupong (n 179) 555.

¹⁹² Civil and Commercial Code, s 4 para 2 (emphasis added).

time judges may use several interpretive methods to ensure that the result is just. Therefore, moral factors can and should be used in interpretation.¹⁹³

Chuathai shares a similar idea. He submits that the concepts of law and of morality at first evolved from being the same to being totally distinct. Subsequently, the legal system developed to reach the present stage, in which law and morality are considered to be different concepts, but based on the same idea. At this stage, it is natural that the idea of justice may be used to interpret the law to make sure that the law is not too strict and not too uncertain.¹⁹⁴

Prokati, another scholar who supports the reference to social contexts and general legal principles in interpreting laws, suggests that courts need not follow the language of the law strictly. Rather, they should interpret the provisions of law in the light of their underlying reasons provided that the result of the interpretation does not contradict the language of such law.¹⁹⁵ He also asserts that civil law lawyers recognise that the law is the standard of behaviour for people in a society; therefore, the most effective way to use the law is to use it with an understanding of the social context.¹⁹⁶ Even Hutasingh, a former Supreme Court Chief Justice who values the certainty of law highly, expresses the view that in cases of doubt, the law must be interpreted according to the needs of the society and the development of national cultures as much as possible.¹⁹⁷

However, it should not be forgotten that the above movement can be perceived more as a reaction against over-strict judicial reasoning than as a direct approval

¹⁹³ Kasemsap (n 188) 79–82.

¹⁹⁴ Chuathai (n 161) 165–69.

¹⁹⁵ Kittisak Prokati, ‘General Principles on Application and Interpretation of Laws’ in *Application and Interpretation of Law* (Chitti Tingsabadh Fund, Faculty of Law, Thammasat University 2009) 70.

¹⁹⁶ Prokati *Legal Methods* (n 166) 42.

¹⁹⁷ Hutasingh, ‘Interpretation of Statutes’ (n 174) 77–78.

of the extensive judicial law-making. Some of the above-mentioned scholars note that judges should not be allowed to interpret law in a way that departs too far from the plain meaning of statutes.¹⁹⁸

Judicial practice seems to follow academic discussion as decisions taking into account justice and current social situations in interpreting and applying the law have become more apparent. For example, a provision in the Cheque Abuse Act 1954 provided for a punishment of those who issued personal cheques without having enough money in their bank accounts. The Supreme Court *read into* such provision the condition that only those who issued cheques *for the purpose of paying off debt* (and not for giving security to a loan) would be punishable according to the provision.¹⁹⁹ This was because the Court considered that it was unfair for the debtors to be forced to repay their debt, or otherwise face a penal punishment. This interpretation went far beyond the text of the statute, but the legislature later enacted a new Act endorsing the Court's decision.²⁰⁰

Another case worth mentioning is the Supreme Court's decision regarding an order issued by the National Peace Keeping Council (NPKC). The NPKC had successfully overthrown the Government in 1991 and set up a Commission in charge of investigating and deciding whether properties belonging to the members of the previous Government had been obtained legally. If the commission decided that the properties had been obtained illegally, they would be nationalised. According to the order, a person whose properties were thought to be illegally obtained might file a petition with a court of justice, which would forward it to the Supreme Court directly. The Supreme Court could either confirm or revoke the order of the Commission. The Commission later found that eight persons had obtained their properties illegally. Apart from the petitions

¹⁹⁸ Kasemsap (n 188) 77; Prokati *Legal Methods* (n 166) 51–52; Chairat (n 188) 33; Chitti Tingsabath, *Legal Profession* (Thammasat University Press 2007) 69,181.

¹⁹⁹ Supreme Court decisions 988/2513 (1970), 211/2523 (1980), 2570/2526 (1983).

²⁰⁰ Cheque Abuse Act 1991.

against the discretion of the Commission, the petitions on the *constitutionality* of the order under the Charter were filed with the Supreme Court. Instead of adopting a positivist view regarding the law of the military junta as in the previous cases,²⁰¹ the Court held that such an order was unconstitutional since it aimed to constitute a retroactive criminal law and had conferred on the Commission the power of adjudication which, according to the ‘customs of Thai democratic governance’, must be exclusively exercised by courts.²⁰²

It can be said that the Thai legal system has started to move away from strict literal interpretation and formalism. Courts have now considered a wide range of materials that may help in interpreting written law, including the contemporary concepts of justice and fundamental rights. Nevertheless, the cases discussed above are only parts of the whole system in which literal interpretation still has strong influence. A consistent theory of interpretation has yet to be established.

iii. The Effects of the 1997 Constitutional Reform on the Interpretive Approaches: Moving Towards a Rights Based Interpretation?

One of the main aspirations of the constitutional reform was to enhance the protection of rights. Apart from including an extensive list of rights that are protected constitutionally and improving the rights-enforcement mechanism,²⁰³ section 27 of the current Constitution provides a rule of interpretation:

Rights and liberties recognised by this Constitution explicitly, by implication or by decisions of the Constitutional Court shall be

²⁰¹ Discussed previously in section II A i of this chapter.

²⁰² Supreme Court orders 912/2536, 913/2536, 920/2536, 921/2536, 1131/2536, 1132/2536, 1133/2536, 1134/2536, 1135/2536, 1136/2536 (en banc) (1993). It was expressed in s 30 of the Charter for Administration of the Kingdom 1991 itself that ‘If the issue cannot be decided by provisions in this Charter, considerations shall be given to the customs of Thai democratic governance’. For commentaries, see Vicha Mahakun, ‘Judicial Review: Case Studies: Order of the National Peace Keeping Council no. 26’ (1993) 40 (5) Dullapah 4.

²⁰³ Discussed previously in section I B.

protected and directly binding on the National Assembly, the Council of Ministers, the Courts, Constitutional organisations and State agencies with respect to the enactment, application and interpretation of all laws.²⁰⁴

Two important points relating to the roles of the courts can be made from this provision. The first concerns the interpretation of the meaning and scope of the constitutional rights; the second concerns the interpretation of lower laws in the light of the constitutional rights.

Section 27 reflects the fact that the rights that are constitutionally protected in Thailand are not only those clearly and explicitly stated in the Constitution, but also those that can be implied from the text of the Constitution and those that are recognised by the interpretation of the Constitutional Court. The broad language of the constitutional provisions concerning rights protection, and exemptions from it,²⁰⁵ shows that the Constitutional Court is clearly entrusted with a significant judicial law-making function in defining the meaning and scope of constitutional rights. Its decisions have the same status as the Constitution itself and are ranked higher than Parliamentary Acts and other laws. In fact, it is observed that in some circumstances the interpretation of the Constitutional Court may result in the amendment of the Constitution itself.²⁰⁶

It is argued that section 27 can also be seen as an explicit mandate from the Constitution for a rights-based interpretation of all laws. All courts are to interpret and apply laws with respect to constitutional rights. Although the requirement looks simple, what the Courts may do in order to implement such a requirement is not. This requirement surely means that courts must not positively

²⁰⁴ Constitution 2007, s 27.

²⁰⁵ See discussion in section I B.

²⁰⁶ Bowonsak Uwanno, 'Analysing the impact of the Constitutional Court's Decisions' (The Special Lecture) 83–84.

violate constitutional rights by means of interpretation and adjudication. It can also mean that courts must consider the issue of constitutional rights when reviewing acts of the executive and the legislature to make sure that the latter two branches do not act in violation of the rights. Alternatively, it can be taken to mean that courts should attempt to limit the violation of constitutional rights by trying to *read down* the provisions of law which on the face of it may be inconsistent with such rights. As regards the last point, however, it is arguable that the better way might be to have such law declared unconstitutional, rather than to have its words and intention distorted.²⁰⁷ Despite these interesting points, neither the interpretation of the constitutional rights provisions themselves, nor the interpretation of lower laws in the light of constitutional rights has received much attention in Thailand.

In fact, very little literature is available regarding the interpretation of the Constitution in general. The matter seems to have gained attention only recently, after the last coup in 2006 and the promulgation of the 2007 Constitution, since when the Constitutional Court has adopted a controversial role in Thai politics. Pakirat suggests that, in general, interpretive methods for ordinary law can be applied with special considerations regarding the unity and integrity of the Constitution, the enforceability and the immediate effect of the constitutional provisions, and the separation of powers.²⁰⁸ A variety of sources of interpretation, including not only text but also the history of the adoption, the underlying reasons for the provisions, general principles and conventions, can be used.²⁰⁹ Singhanethi also supports the use of those unwritten principles that are the

²⁰⁷ This issue is discussed widely in the UK in relation to the ‘principle of legality’ and ss 3 and 4 of the Human Rights Act 1998. However, the same discussion does not appear in Thailand. The issue will be addressed further in Chapter Six, I A where this research proposes guidance for Thai Court based on the lessons learnt from the practice of the UK courts.

²⁰⁸ Vorachet Pakirat, ‘Application and Interpretation of Public Law’ in *Application and Interpretation of Law* (Chitti Tingsabadh Fund, Law Faculty, Thammasat University 2009) 345–46.

²⁰⁹ See *ibid* in general.

underlying principles of the Constitution, particularly the rule of law principle. He bases his argument on section 3 para 2 of the Constitution, which provides that all government agencies shall perform their duty ‘in accordance with the *rule of law*’.²¹⁰ Nevertheless, these proposed principles of constitutional interpretation are rather abstract, and do not answer the more practical question of to what extent the Constitutional Court or other courts that are also involved in interpreting the Constitution may use judicial creativity.

The lack of consistent interpretive principles in the Thai legal system is reflected clearly in the reasoning of the Courts. Although it is not a straightforward task (since judgments of Thai Courts are not usually presented in the style of common law judgments, with discursive analogy of general context), the following subsections attempt to identify the interpretive approaches, especially in relation to constitutional rights used by the Constitutional Court, the Administrative Courts and the Courts of Justice respectively.

a. Approaches of the Constitutional Court

Early jurisprudence of the Constitutional Court seemed to reflect the attachment to literal interpretation. This is likely to result from the fact that a majority of the justices had previously served as professional judges in the courts of justice and tended to make decisions based on points of law or rule *by law*.²¹¹

The Constitutional Court did not show a willingness to enforce constitutional rights actively. In the 1997 Constitution, it appeared that several constitutional rights provisions stated that the exercise of the rights shall be ‘in accordance with the provisions of law’ or ‘as provided by law’. The Court interpreted them to mean that the rights could *not* be enforced until a law had been passed to regulate

²¹⁰ Banjerd Singhaneti, ‘Constitutional Review of the Legislation that Affects Human Rights’ (2010) 39(1) Thammasat Law Journal 33, 55.

²¹¹ James R Klein, ‘The Battle for Rule of Law in Thailand: The Constitutional Court of Thailand’ in *KPI Congress 4: Five Years of Political Reform under the New Constitution* (2003) 3–4.

the exercise of these rights.²¹² This constituted what Continental lawyers call ‘programmatically rights’ – rights that were not immediately and directly enforceable until they were implemented by laws or executive actions or budgetary appropriations.²¹³

Even for other provisions that do not contain the above conditions, the Court did not interpret them in favour of rights. One of the most criticised decisions of the Court was the decision that will be referred to here as the *Case of the Disabled Judicial Applicants*.²¹⁴ In this case, two persons with physical disabilities caused by polio had applied for assistant judge positions and were disqualified by the Qualification-Examination Committee owing to their physical conditions. They appealed to the Judicial Commission, which later confirmed the Committee’s decision. The decisions of both were based on a provision in the Act regulating the application to be a judge in the Courts of Justice which provided that an applicant must not have ‘a body which is inappropriate for a judge’.²¹⁵

The Court started by repeating the equal protection clause in section 30 of the 1997 Constitution which provided, in essence, that unjust discrimination against a person on the grounds of physical condition or state of health shall not be permitted.²¹⁶ It then went on to qualify such provision by stating that regarding employment, it was acceptable that an organisation considered whether such a

²¹² See Constitutional Court decisions 62/2545 (2002) and 6/2546 (2003) concerning rights of communities in preserving their local traditions.

²¹³ Mary Ann Glendon, ‘Rights in Twentieth-Century Constitutions’ (1992) 59 U Chi L Rev 519, 528.

²¹⁴ 16/2545 (2002). For commentaries see Harding, ‘The Constitutional Court of Thailand’ (n 155) 130–31. Harding also comments, on the Court’s decision relating to freedom of religion 44/2542 (1999), that the Court tended to use Buddhist regulations rather than constitutional human rights principles in reaching its decision.

²¹⁵ Regulation of the Judicial Service Act 2000, s 26(10).

²¹⁶ Constitution 1997, s 30 para 3.

person had the knowledge, ability and suitability to work in the specific position. More importantly, it commented:

For a position of judge which is highly regarded, the considerations may include not only knowledge and ability, *but also proper physical and emotional health and appropriate characteristics and appearance* of the applicants. The work of judges is to be done both in court rooms and outside. They may be required to investigate places and give hearing to witnesses who are not able to come to courts. The rules for accepting applicants for this position are, therefore, somewhat stricter than those for other positions.²¹⁷

The Court went on to hold that the provision in question was issued according to necessity and suitability. It fell into an exception to the equal protection clause according to section 29 of the Constitution, which allowed restriction of constitutional rights that were ‘to the extent of necessity’ and did not affect ‘the essential substances of such rights’ by a provision of law which was ‘not intended to apply to any particular case or person’.²¹⁸

The decision provoked strong and widespread criticism in Thailand. Sinnganeti, among many, submits that the Court did not carefully consider all the elements set by section 29 of the Constitution, particularly the principle of ‘necessity’.²¹⁹ Moreover, the Court did not explain why the provision did not affect the substance of the rights.²²⁰ Sinnganeti concludes that the Court simply applied the Constitution *literally* without considering its role in protecting constitutional

²¹⁷ Constitutional Court decision 16/2545 (2002) 163 (author’s translation).

²¹⁸ *ibid* 163–64. The quotes were from Constitution 1997, s 29 paras 1, 2.

²¹⁹ Banjerd Sinnganeti, ‘Consideration Points Regarding Rights and Liberties According to the Constitution of the Kingdom of Thailand B.E. 2540’ (2002) 32 *Thammasat Law Journal* 520, 535.

²²⁰ *ibid* 535–36.

rights.²²¹ The same conclusion was also reached by Klein, who comments that the Court has been very conservative and that ‘it will serve as neither a force for social change [n]or legal reform’ in the area of rights protection.²²²

To be fair to the Court, it may be arguable that the rule in question was not unconstitutional in itself as physical fitness and mental fitness were arguably reasonable considerations. The injustice came rather from the standard of fitness used by the Judicial Commission, which was somehow not reviewable either by the Constitutional Court or the Administrative Courts.²²³ However, if the Constitutional Court wishes to protect the rights of a person, it may hold, as one dissenting judge did,²²⁴ that the provision allowed too wide a discretion for the Judicial Commission and thus was unconstitutional. In any case, that the central decision endorsed the argument made by the Judicial Commission relating to the ‘appropriate characteristics and appearance to work in a highly regarded position’ of an applicant does reflect conservative thinking on the issue of disability rights.²²⁵

A similar issue was raised before the Constitutional Court again that same year. In a case which will be called here the case of the *Disabled Public Prosecutor Applicant*, one of the claimants in the above case also applied to be a public prosecutor and was refused application according to a provision in the Regulation of the Public Prosecutors Act 2000, which also required the applicant to have an appropriate physical condition. The claimant first submitted his case to an Administrative Court, but the Court stayed the case and referred the

²²¹ *ibid* 544–45.

²²² Klein, ‘The Battle for Rule of Law in Thailand: The Constitutional Court of Thailand’ (n 211) 13.

²²³ Act on the Establishment of the Administrative Courts and Administrative Courts Procedure 1999, s 9(6) expressly exempted actions of the Judicial Commission from the jurisdiction of the Administrative Courts.

²²⁴ Constitutional Court decision 16/2545 (2002) 165.

²²⁵ *ibid* 163.

constitutionality issue to the Constitutional Court. The Constitutional Court confirmed its reasoning from the previous decision and upheld the provision.²²⁶

Another case worth noting is the *Nationality* case concerning sex equality. At issue was a provision in the Nationality Act which provided that an alien woman who married a Thai man might apply to be granted Thai nationality and that the Minister of Interior would have discretion regarding whether to grant this. It was argued that such a provision discriminated against alien men who married Thai women, who must meet additional requirements in order to be eligible to apply for Thai nationality. Among other requirements, these men must have continuing residency in Thailand for at least five years. The Court held that it was in the sovereign power of the country to set the criteria for granting nationality. It went on to hold that the provision in question was not unconstitutional since it represented the criteria set according to the social situation and national security. Such provision was not against international law. Moreover, the provision did not totally prohibit men who married Thai women from applying for nationality.²²⁷

This was another case that reflected the Court's formalist approach to rights. Instead of considering the issues of gender equality in the granting of nationality (which was the issue raised by the claimant) or the rights of non-citizens according to the Constitution, the Court focused on the issue of whether the provision violated international law relating to the exercise of state sovereignty in granting nationality. It even endorsed the view that the provision was enacted according to the social situation and national security, without taking into account the fact that the Act had been in force since 1955 and that national security was not likely to be involved in circumstances where alien women have

²²⁶ Constitutional Court decision 45/2545 (2002). However, see the Supreme Administrative Court decision 142/2547 (2004) discussed in n 243.

²²⁷ Constitutional Court decision 37/2546 (2003).

already been allowed to apply for nationality without meeting the residency requirement.

In any event, there were some decisions that can be taken as signs that the Court's approach may develop so as to be less formalist. The Court's decision in the *Name Act* case concerned a provision of the Name Act 1961 which required that married women must use their husbands' surname. In fact, the Constitution merely stated that 'men and women have equal rights', without further details.²²⁸ Nevertheless, the Court considered the right to use a surname to constitute a personal right to identify one's lineage, which for all persons should be equally protected, and held that the provision discriminatively forced only women to change their surnames and thus was unconstitutional.²²⁹

This case represented an example of the Constitutional Court laying down the new principle binding all government agencies and courts. More importantly, the decision showed that, in interpreting the provision, the Constitutional Court took into account not only the current social situation, where women and men were more equal than they had been before, but also its obligation to protect people's rights.²³⁰

At this point, discussion should be offered regarding an outstanding decision of the Court which, although not related to the issue of rights, may be taken as a sign that the Constitutional Court has prepared to depart from the literal approach. The *Joint Communiqué* case was another case that arose during the political

²²⁸ Constitution 1997, s 30 para 2.

²²⁹ Constitutional Court decision 21/2546 (2003) 6–7.

²³⁰ Other cases where the Court upheld rights (although its interpretive approach did not seem so obviously rights-based) include: the case where the Court held that a regulation of the Election Commission which states that those who failed to vote shall be deprived of state assistance was unconstitutional as limitation of rights could be enacted only by law 15/2541 (1998); and the case where the Court upheld a person's right to sell a community's traditional liquor, which was limited by the Liquor Act 1950 25/2547 (2004).

controversies in Thailand. The issue was whether the Joint Communiqué between Thailand and Cambodia stating that Thailand supported Cambodia in registering Kao Pravihan as a world heritage site was a treaty that required public consultation and approval by the National Assembly before being concluded. Section 190 para 2 of the Constitution provides a list of treaties that need to undergo this process:

A treaty which provides for a change in the Thai territories or the Thai external territories that Thailand has sovereign right or jurisdiction over under any treaty or under international law, or a treaty which requires the enactment of an Act for its implementation, or has wide-scale effects on the economic or social security of the country, or results in a significant obligation being placed on the trade, investment or budget of the country ...²³¹

The controversial part of this case derived from the long-term disputes between Thailand and Cambodia regarding their borders and the ownership of Kao Pravihan. In 1962, the ICJ ruled that Kao Pravihan was in Cambodian territory, and so Thailand removed its soldiers from there, but at the same time officially protested against the Court's ruling and reserved the right to claim it back when new evidence became available. The ICJ did not rule on the issue regarding the ownership of the land around the castle, which was still a matter of dispute between the two countries.

The claimants in this case, 77 senators and 151 members of the House of Representatives, argued that the instrument in question would result in giving up the rights of Thailand against Cambodia regarding both Kao Pravihan itself and the land around it. The Government responded that the instrument did not result in a change to Thailand's territories because Kao Pravihan was in Cambodia's

²³¹ Constitution 2007, s 190 para 2.

territory according to the ICJ's decision. A part of the land around it also belonged to Cambodia according to the Thai Cabinet resolution in 1962 ordering the removal of soldiers from the area. As to the other parts of the land around Kao Pravihan which was under dispute, it was specified in the instrument itself that the Joint Communiqué would not affect the territorial issues.

The Constitutional Court ruled 8 to 1 that the instrument fell under section 190 para 2. In its main opinion, the Court explained that although it seemed that the provision would regulate only the treaty that *'provides for a change'* in the Thai territories, such an interpretation would not be consistent with the *intent of the Constitution*, which aimed to invigilate treaty-making process in order to prevent damage to the country. Therefore, the correct interpretation should include the treaty that *'might result in a change'* of the territories.²³² Since the instrument did not make clear the delicate issue relating to the rights of each country regarding the areas around Kao Pravihan, it posed a risk to Thailand's territories. Thus, the conclusion of such an instrument could be reached only after public consultation and with the approval of the National Assembly.²³³ Further, the instrument related to an issue which has long been sensitive for the people of Thailand and Cambodia. Concluding this kind of instrument without careful deliberation would cause *wide-scale effects on the social security of the country*.²³⁴

It can be seen that a literal rule of interpretation was not applied in this case. The Court considered the constitutional intention behind the provision, the historical development of the problem between Thailand and Cambodia, the current political situation, and the consequences that might follow its decision. It went so far as to *read* the word 'might result in' *into* the constitutional provision.

²³² Constitutional Court decision 6-7/2551 (2008) 22-23.

²³³ *ibid* 23-24.

²³⁴ *ibid*.

While the progressive interpretation in this case may raise a concern over the legitimacy of judicial interpretation, since section 190 para 2 concerns the powers of the executive to make treaties vis-à-vis the power of the legislative branch and the courts to check on the executive acts, it is argued that the same interpretive approach may be better justified in the context of constitutional rights which the courts have a duty to uphold.²³⁵

b. Approaches of the Administrative Courts and the Courts of Justice

In the areas of rights, the Administrative Courts and the Courts of Justice have shown a faster and more obvious response to the 1997 constitutional reform than the Constitutional Court. In the case of the Courts of Justice, it is generally reported that human rights in the field of criminal justice have been much improved after the promulgation of the People's Constitution of 1997. In particular, it has been reported that the courts have favoured individuals' rights over the 'traditional strict appliance of [the] "law and order" approach'.²³⁶ For example, in 2003, Songkla Provincial Court interpreted a criminal law in the light of constitutional rights by holding that the association of people to protest against a government project did not constitute the 'group violence' described by the Criminal Code, but rather the exercise of the freedom to assemble peacefully and without arms according to the Constitution.²³⁷

The most outstanding case in which the Supreme Court interpreted the law broadly in order to accommodate rights was the *Arrest* decision rendered in 2007. The legislation in question was section 7 of the Act for Establishing and Setting

²³⁵ The Supreme Court in the USA tends to use a matter of rights as a further justification in exercising robust judicial review. This issue will be discussed in Chapter Four, II A.

²³⁶ Justice Prasobsook Boondech, 'Opening Speech, Proceedings of the Roundtable Meeting: Law, Development and Socio-Economic Changes in Asia II' (IDE Asian Law Series No 11, Manila, November 2000).

²³⁷ Songkla Provincial Court decision 2321/2547 (2003).

Criminal Procedure in the Magistrate Courts 1956, which provided that the police must send an ‘arrested’ suspect to the public prosecution office and the prosecutor must file a case to a court within 48 hours from the time the suspect was arrested. The prosecutor in this case did not submit the defendant’s case to the court in time, but argued that section 7 was not applicable as the defendant was not ‘arrested’ but had ‘submitted himself’ to the police. The Court stated that section 7 was enacted with the aim of avoiding a delay in the prosecution process and protecting the suspect from being confined for a long time. It then held that ‘arrested suspect’ in section 7 included those suspects who have submitted themselves.²³⁸

The case reflected the change in the Court’s approach. The textual meaning of ‘arrested’ itself would not go so far as to include ‘submitting himself to the police’. Nevertheless, the Court interpreted it as being within section 7, because it took into account the purpose of the legislation and individuals’ rights.

The Administrative Courts appear to respond to their constitutional task in protecting rights as well. Khon Kaen Administrative Court upheld the rights of a community protected by the People’s Constitution of 1997, holding that an action of a government agency in issuing a concession which affected the environment and living standards of people in a community, without giving an opportunity to the people in the area to know the details and offer their opinions, was illegal.²³⁹

The rights of the community to be consulted before the commencement of any project that substantially affects the environment in its vicinity was confirmed recently in the highly publicised *Maptapud* case. Before reaching its decision on merit, the Central Administrative Court ordered an injunction suspending the operation of 76 projects which were alleged to affect the environment. The Supreme Administrative Court revoked the injunction relating to 11 projects, but

²³⁸ Supreme Court decision 1997/2550 (2007).

²³⁹ Konkean Provincial Administrative Court decision 218/2545 (2002).

confirmed the rest. Both Courts reasoned that such suspension was necessary in order to ensure that rights of community according to the Constitution enjoy *direct effect*.²⁴⁰ Later, the Central Administrative Court held that the administrative decisions allowing all the projects were illegal, as the administrative bodies involved consulted neither the affected people nor experts from non-government organisations and universities as required by the Constitution.²⁴¹

Further, in the case relating to the rejection of the *Disabled Public Prosecutor Applicant* in which the Constitutional Court refused to hold the relevant statute unconstitutional,²⁴² the Supreme Administrative Court nevertheless revoked the decision of the Application Committee, reasoning that the physical conditions of the claimant were not likely to affect his ability to work as an assistant public prosecutor. Therefore, the decision of the Committee unreasonably discriminated against the disabled applicant.²⁴³

Other rights upheld by the Administrative Courts include rights to citizenship and to fair administrative procedure,²⁴⁴ rights to a secret vote,²⁴⁵ and consumer rights.²⁴⁶

²⁴⁰ Supreme Administrative Court order 592/2552 (2009).

²⁴¹ Nevertheless, the Court did not invalidate the projects, reasoning that it had to consider the legitimate expectations of people who relied on the existence of such projects, and that the required process could still be enacted. Central Administrative Court decision 1352/2553 (2010). Another case in which the Central Administrative Court upheld the right of people to live in a healthy environment was decision 1820/2545 (2002), ordering the Office of Atomic Energy for Peace to compensate victims of a Cobalt 60 radiation leak.

²⁴² See discussion in text to n 226.

²⁴³ Supreme Administrative Court decision 142/2547 (2004).

²⁴⁴ Supreme Administrative Court decision 117/2548 (2005), revoking administrative decisions to revoke the citizenship of 1,243 people from an area in the northern part of Thailand since the administrative agency did not give the affected persons an opportunity to explain or give evidence against the decisions.

It can be concluded that rights-based interpretation has started to influence the interpretative approaches of all courts, although consistent theory and practice have yet to be established.

III. International and Foreign Law in Thailand

Thailand currently adopts a mix of monist and dualist approaches in determining the legal effect that international and foreign law has in the legal system.²⁴⁷ Although it might be adequate simply to discuss the current approach and its impact on the legal status and effect of international human rights norms, this research nevertheless opts to provide a brief historical background to the issue in order to show that the country has had unique experience regarding the use of international and foreign law, and that such experience might affect attitudes towards international and foreign law in general, and international human rights norms in particular.

A. Historical Background

Thailand started to be involved extensively with international and foreign law during the time of King Rama IV (1851–68).²⁴⁸ The country was forced by England and other Western countries to make treaties to the effect that it had lost part of its sovereignty in enforcing Thai law against people under the control of

²⁴⁵ Central Administrative Court decision 607–608/2549 (2006), also known as the *Election Case*, which will be discussed further in text to n 340.

²⁴⁶ Supreme Administrative Court decision 5/2549 (2007), also known as the *EGAT* case, discussed in n 35.

²⁴⁷ Wissanu Krea-ngam, *Research Report: The Application of International Law in the Domestic Legal System of Thailand* (Chulalongkorn University 1978) 37.

²⁴⁸ Note, however, that international and foreign laws in Thailand can be traced back to around the 16th century. Nophanidhi Suriya, *International Law: Lecture Notes 1* (Winyuchon 2004) 134–36.

these countries in its own territories.²⁴⁹ The consequence of those treaties was difficult to accept for Thailand, especially when the people who claimed the privilege in question were not only nationals of those countries with which Thailand had made agreements, but also those people who applied to be under the control of such countries merely in order to avoid Thai jurisdiction. There were renegotiations, which resulted in the establishment of the ‘Foreign Court’ where Thai judges and foreign consuls sat together to adjudicate a case, although the consuls had the right to withdraw the case before the decision had been made. The Foreign Court became one of the courts of first instance in the Courts of Justice in 1972.²⁵⁰ The applicable laws were the treaties of friendship and Thai law. For the latter, it was under the condition that the Thai law was not inconsistent with the laws of the foreign countries involved.²⁵¹

Because of these, the use of international and foreign laws was not unusual in early Thai courts. They usually referred, applied and interpreted Friendship Treaties as if they were Thai law. Although some Thai academics argue that the ‘Promulgation of Treaty’ by the King in an absolute monarchy represents a form of transforming international agreement into domestic law, in practice the courts did not refer to such promulgation as an authority in deciding the case, but jumped to the treaties directly.²⁵² The reason for this could be that Thailand at that time did not have any theory or consistent practice regarding the relationship

²⁴⁹ *ibid* 136. Those countries are for example, the USA, France, Denmark, Portugal, Holland, Germany, Sweden, Norway, Belgium, Italy, Russia and Japan. See also Krea-ngam (n 247) 80.

²⁵⁰ Krea-ngam (n 247) 79. Further, another court, the ‘Foreign Cases Court’, was established in order to adjudicate matters relating to the treaties of friendship. The issues were also decided by Thai judges and foreign legal consultants sitting together.

²⁵¹ See, for example, Supreme Court decisions 530/2468 (1925), 532/2470 (1927), 568/2470 (1927) and 40/2471 (1928), 631/2475 (1932).

²⁵² Lukana Pobromyen, ‘Rights of Individuals under Treaties in Thai Court’ (Master of Law thesis, Thammasat University 2003) 35–36. At present, the practice is still that the executive issues the King’s promulgations of treaties and publishes them in the Royal Gazette for all international treaties, including those that do not require parliamentary approval. The testimony of the Government in the Constitutional Court’s decision 11/2542 (1999) 6.

between Thai law and international or foreign laws.²⁵³ Another possible reason is that, in the time of absolute monarchy, the notion of the separation of powers was not known. Therefore, as soon as the King made international agreements, Thai courts would honour and apply them.

Customary international law (CIL) was also relied on in early Thai judicial reasoning. For example, the Supreme Court in 1918 was faced with the question of whether Thai courts could enforce the civil judgment of a Vietnamese court. It held that the judgments of a foreign court were simply evidence of the debt between parties and could not be enforced directly.²⁵⁴ The Court did not expressly admit that it used international law, but it was explained by Lengthaisong that Thai law was not available to decide such an issue, and the Court in this case held according to the CIL which most countries adopted in their practices.²⁵⁵ Then, in 1951, the Supreme Court adopted the CIL relating to ‘hot pursuit’ and ‘high seas’. It held that the action of the Thai Government in pursuing and catching the defendant’s ship which had been used for illegal activities in Thai territory was not illegal even though the seizure had happened in the high seas, because the action was a ‘hot pursuit’.²⁵⁶

It was not only treaties and CIL that were influential, but also foreign law. Before the modernisation of the legal system, the most influential source was perhaps English law, especially in the areas of private law.²⁵⁷ This was due to the

²⁵³ See Pobromyen (n 252) 16.

²⁵⁴ Supreme Court decision 585/2461(1918) found in Sathiya Lengthaisong, ‘The Enforcement of Foreign Courts’ Judgements According to Thai Law’ (1973) 4 *Thammasat Law Journal* 76, 78–79.

²⁵⁵ *ibid* 80.

²⁵⁶ Supreme Court decision 1142/2494 (1951). There was comment at the end of the Supreme Court decision by Professor Yud Sang-Utai pointing out that the concept of ‘hot pursuit’ was an international law concept.

²⁵⁷ Prokati *The Reformation of Thai Law under European Influence* (n 7) 112–15; Sawangsagdi *The Development of Public Law in Thailand and other Countries* (n 163) 130–31.

penetration of English common law during the reign of King Rama V²⁵⁸ and the agreement between Thailand and England in which the latter demanded that English law should be taught and applied in cases where no Thai laws were applicable.²⁵⁹ For example, the Supreme Court in 1922 recognised the English concept of ‘nuisance’ in its tort jurisprudence and actually used the English term in its decision, without translation.²⁶⁰ Further, in 1938, the Court held that although Siam did not have specific legislation concerning trust, the term ‘trust’ was mentioned in a provision of the Land Certificate Act 1916. Therefore, English law on trust was part of Siamese law so long as the principle was not contrary to public order and the good morals of people in Siam.²⁶¹

Foreign law from other sources was also important. Foreign legal experts (e.g. George Padoux, Gustave Rolin-Jaquemyn, René Guyon and Tokichi Masao, among others) assisted in the process of drafting the Criminal Code and the Civil and Commercial Code of Thailand.²⁶² The Criminal Code was influenced by the criminal law of France, Germany, Hungary, Italy, Egypt and Japan,²⁶³ and the Civil and Commercial Code was influenced by the law of France, England, Switzerland, Japan, Germany, Italy, Belgium, Holland and some states of the USA.²⁶⁴ Later, some legal experts even served as judges.²⁶⁵ Naturally, foreign law from different sources had played important roles in Thai Courts in filling

²⁵⁸ Discussed in section II B i.

²⁵⁹ In fact, as well as English law, French law was also a part of early Thai legal education, as Thailand also made an agreement with France to the effect that French law should be in the curriculum of the law school and that a French lawyer would serve as a director of the school. Central Intellectual Property and International Trade Court (ed) (n 163) 61.

²⁶⁰ Supreme Court decision 168/2465 (1922).

²⁶¹ Supreme Court decision 163/2481 (1938).

²⁶² Sawang Boonchalermvipas, *The Thai Legal History* (Winyuchon 2009) 209–18, 233–34.

²⁶³ *ibid* 217.

²⁶⁴ *ibid* 232, 236.

²⁶⁵ Prokati *The Reformation of Thai Law under European Influence* (n 7) 114; Sawangsagdi *The Development of Public Law in Thailand and Other Countries* (n 163) 127–30.

gaps in, and in giving guidance in, interpretation of Thai law for some time after the modernisation of the legal system, when the country had still lacked developed legal principles.

B. Modern Approaches

i. Treaties

The treatment of treaties changed after the country adopted a system of constitutional monarchy in 1932. The first Permanent Constitution provided, in essence, that international affairs were to be the responsibility of the executive branch, but that certain kinds of international agreements must be approved by the legislative branch.²⁶⁶ This kind of provision has been included in all subsequent Constitutions establishing the parliamentary model of governance, including the current one. An example is Section 190 para 2 of the 2007 Constitution, which provides for 5 categories of treaties that requires approval of the legislative branch: (1) a treaty which provides for a change in the Thai territories; (2) a treaty which provides for a change in the Thai external territories that Thailand has sovereign right or jurisdiction over under any treaty or under international law; (3) a treaty which requires the enactment of an Act for its implementation; (4) a treaty which has wide-scale effects on the economic or social security of the country; and (5) a treaty which results in a significant obligation being placed on the trade, investment or budget of the country.²⁶⁷

It has been explained that treaties that require the enactment of Acts for their implementation are those that may change existing domestic law²⁶⁸ and those

²⁶⁶ Constitution 1932, s 54.

²⁶⁷ Constitution 2007, s 190 para 2. See the quotation in text to n 231.

²⁶⁸ Pobromyen (n 252) introduction (10); Prajit Rojanaphruk, 'Treaties and Thai Law' (1980) 30 Saranrom 85, 87; Nipa Suebkinorn, 'Application of International Customary Law in Thailand: A Case Study on The Vienna Convention on Consular Relations 1963' (Master of Law thesis, Chulalongkorn University 1996) 1.

that may change the existing rights and obligations of the people.²⁶⁹ The requirement reflects the respect for separation of powers. It ensures that the executive branch may not create a new law or change an existing law, which are the tasks of the legislative branch, simply by concluding a treaty.

The latter two broad categories of treaties in section 190 para 2 above are new additions to the current Constitution and represent direct responses to the controversial issues arising before the last *coup d'état* in 2006, when the Government attempted to make several international agreements which might require legislative implementation or have wide-ranging effects on economic or social security without consulting the legislative branches or the public.²⁷⁰ In fact, apart from adding very broad kinds of treaties that must be approved by the National Assembly, the Constitution of 2007 also adds the procedure requirement. In the case of those treaties specified in section 190 para 2, the Government not only has to ask for legislative approval in order to implement the treaties, but must also conduct public consultation and obtain approval from the National Assembly on the scope of negotiation *before* commencing the process of making agreements.²⁷¹

The power of the executive to conclude a treaty is now subject to rigid oversight. The most interesting consequence of this is that the judiciary has become more involved in the process of making treaties. The Constitution expressly confers the power to decide whether a specific treaty falls into one of the categories described by section 190 para 2 above on the Constitutional Court, provided that either the Prime Minister or a group containing certain numbers of the members

²⁶⁹ See *Suriya* (n 248) 168.

²⁷⁰ Several governments had been trying to avoid this process, but strong protests and public criticism occurred when Shinawatra's government attempted to conclude series of the Free Trade Agreements with many countries, especially developed ones such as the USA and Japan. Uwanoo *Economic Crisis and Political Crisis in Thailand* (n 45) 18–19. See also the Constitutional Court decision 6–7/2551 (2008) 2 discussing the background of section 190 of the current Constitution.

²⁷¹ Constitution 2007, s 190 para 3.

of the National Assembly initiates the case.²⁷² The Constitutional Court recently exercised this power in its decision concerning the controversial Joint Communiqué between Thailand and Cambodia discussed previously.²⁷³

The implication from section 190 of the Constitution is that Thailand has adopted a dualist approach towards international law, at least regarding international law in the form of treaties. Treaties that affect existing Thai domestic law do not have any legal status in the Thai legal system unless and until they have passed the required process and the legislative branch has enacted necessary law to give effect to them.²⁷⁴

In any case, it should be noted that the dualist approach towards treaties had not been obvious in Thai courts for some time after the adoption of the constitutional monarchy with a written-style constitution. At the beginning of the period of constitutional monarchy, Thai courts still applied treaties as if they were part of Thai law, although most of the time the treaties applied were those made during the period of absolute monarchy, which it was natural for modern Thai courts to continue to honour.²⁷⁵

One Supreme Court decision which created doubt over the country's attachment to dualism was the *UN* case, in 1955. After the War had ended, the Thai Government made an agreement with the UN allowing the English army to enter the country in order to disarm Japanese soldiers and manage their properties. The National Assembly enacted the Detaining and Managing People and Properties of the United Nations' Enemies Act 1945, establishing a Commission in charge

²⁷² Constitution 2007, s 190 para 6.

²⁷³ Constitutional Court decision 6–7/2551 (2008) discussed in text to n 232.

²⁷⁴ See a comment of the Council of State in the Constitutional Court decision 33/2543 (2000) 164 confirming this view. However, see the discussion on the effect of the customary international law in Thailand below.

²⁷⁵ See Supreme Court decisions 1315/2479 (1936); 326/2481 (1938).

of managing the people and properties of the Japanese army. The building in question fell under the jurisdiction of the Commission; however, the UN had seized and sold this building. It was argued that the buyer did not have rights to the building because the UN did not have rights to seize and sell the property. The Court referred extensively to the international agreement and held that the UN had the right to do so.²⁷⁶

Many scholars conclude that the Court departed from dualism, since it considered the international agreement as if it were Thai law.²⁷⁷ Nevertheless, it should be noted that the witness in the case, Seni Pramroj, the former Prime Minister, testified that the 1945 Act was enacted in order to facilitate the process of disarming and selling Japan's properties. Further, the Court might perceive the power of the UN to seize the properties of the loser of the War as customary international law, and concentrate on such grounds rather than on the legal effect of the treaty. This was evident from the fact that the Court took into account the testimony of the former Prime Minister that 'the winner of the War may do more or less than what the law provided'.²⁷⁸

The dualist approach towards international treaties has become more apparent since 1957. The courts have consistently applied international agreements only when implementing Acts exist, and have usually relied on such Acts rather than on international agreements themselves.²⁷⁹

An instance of the Supreme Court explicitly confirming the dualist approach can be found in the decision of 1980 which will be referred to here as the

²⁷⁶ Supreme Court decision 739/2498 (1955).

²⁷⁷ This case is discussed in several textbooks on international law as an example of when Thai courts have departed from dualism. See eg Suriya (n 248) 174; Jumpot Saisoontorn, *International Law Volume 1* (Winyuchon 2000) 157–58.

²⁷⁸ Supreme Court decision 739/2498 (1955). The effect of customary international law in the Thai legal system will be discussed below.

²⁷⁹ Pobromyen (n 252) 17, 63–64.

Immigration case. The defendant was a Vietnamese born in Thailand who had stayed in Thailand illegally. The executive practice in Thailand at that time was that so long as illegal immigrants from Vietnam did not carry out certain illegal activities, there would be no legal proceeding against them. This was because those illegal immigrants, including the defendant's parents, were refugees from Vietnam as a result of the Dien Bien Phu War. However, the defendant committed a prescribed illegal activity, so the police detained her and proceeded to expel her from the country according to the Immigrant Act 1950. The defendant argued that she was a refugee according to the international law in the Convention relating to the Status of Refugees 1951, and was born in Thailand; therefore, she was not an illegal immigrant and should not be deported according to the Act. The court held that *the Convention could not exempt the application of Thai law*; neither did the Government's policy.²⁸⁰ Thus, the Court confirmed that an international agreement to which Thailand was not a party and for which it did not have an implementing legislation did not have *any* legal effect in the Thai legal system.

In any case, it is observed that it is more likely that the courts, in adopting the dualist approach, simply followed the text of the Constitution rather than considering the sovereignty of the country and the exclusive powers of Parliament to enact the law. This is because they have never explained in detail why they have or have not used international agreement in their decisions. Judges in Thailand have been attached to strict literal interpretation and formalism. Moreover, Thai legal jurisprudence, in both international law and separation of powers, are not well developed.

²⁸⁰ Supreme Court decision 873/2523 (1980).

ii. Customary International Law

Although countries in the civil law system usually specify the effect of the CIL in the domestic legal systems in their Constitutions,²⁸¹ the Constitutions of Thailand have never mentioned this issue. This has led to divided opinions on the legal status of CIL in the Thai legal system. On the one hand, there is an argument that CIL is not part of Thai law.²⁸² The corollary is that Thai courts, as civil law courts which have no authority to make law, may not use CIL.²⁸³ The majority of academics, however, agree that Thai courts may apply CIL as part of Thai law on condition that such CIL is not inconsistent with existing Thai laws. This is because CIL is a principle that has been accepted by the international community and the country has an international obligation to comply with it.²⁸⁴

Alternatively, it has been argued that CIL has a role in the Thai legal system through section 4 of the Civil and Commercial Code, which provides that when the written laws, local customs and analogous provisions are not applicable to the case in hand, courts may decide such cases ‘by the general legal principle’.²⁸⁵ While some scholars assert that the general legal principle mentioned in this section means only ‘Thai’ general legal principle,²⁸⁶ most seem to believe that it has wider meaning. Not long after the modernisation of Thai law, it was explained that a general legal principle may derive from the teaching of law

²⁸¹ Saisoontorn (n 277) 138; Suebkinorn (n 256) 42.

²⁸² See the explanation made by Preedee Panomyong, the founder of the first Constitution, in 1929 found in Krea-ngam (n 247) 119–20.

²⁸³ Saisoontorn (n 277) 139.

²⁸⁴ Krea-ngam (n 247) 121; Pobromyen (n 252) 69; Suebkinorn (n 256) 48; Suriya (n 248) 139–150; Jaturon Thirawat, ‘The Processes of Treaties Making and Treaties Enforcement in the Practice of Thailand’ (1996) 26 *Thammasat Law Journal* 608, 609.

²⁸⁵ See Civil and Commercial Code, s 4 para 2, discussed previously in n 192.

²⁸⁶ Sompong Sujaritkul, ‘Initial Thought on International Law’ (1952) 20 *Botbandit* (first page not available) 76–77, quoted in Krea-ngam (n 247) 125.

lecturers and foreign textbooks.²⁸⁷ More recently, Punyapan submits that general principle of law according to this provision may come from foreign countries.²⁸⁸ Krea-ngam also argues that the expression refers to *any* general principle of law that has been accepted widely. This could be legal proverbs, widely accepted foreign laws, or CIL. In fact, Krea-ngam expresses the view that customary CIL is inherently more general than other kinds of law.²⁸⁹

Although no explanations have been given, Thai courts have allowed CIL to have influence on the Thai legal system since before the adoption of the first written Constitution. Recent Constitutional Court decisions concerning the definition of the term ‘treaties’ appearing in the Constitution seem to confirm this as well.

In the *IMF* case, the issue was whether the ‘Letters of Intent’ which Thailand submitted to the IMF in order to receive financial and academic assistance were ‘treaties’ according to section 224 of the 1997 Constitution. The Constitutional Court held that the Constitution did not provide the definition of the ‘treaties’, but it could be implied from the context of the provision that the term must refer to ‘international agreements under the control of international law’. The Court went on to consult provisions from the Vienna Convention on the Law of Treaty 1969 and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations 1986. Thailand was not a party to these Conventions, but the Court expressed that they provided codifications of *the long-accepted custom and practice of many*

²⁸⁷ Opinion of Praya Tepvitulpahulsarutabodi, found in Krea-ngam (n 247) 124.

²⁸⁸ Pajit Punyapan, ‘General Legal Principles’ (1954) 11 (4) *Dulapaha* 2, 6.

²⁸⁹ Krea-ngam (n 247) 126–27.

countries.²⁹⁰ One of the Justices also referred to the decision of the ICJ relating to the meaning of treaties.²⁹¹

The 1969 Convention was used again in the Constitutional Court's decisions in 2000²⁹² and 2008. In the latter decision, the Court provided that although Thailand is not a party to the Vienna Convention on the Law of Treaty 1969, such a Convention has an effect of CIL which is binding on a non-party.²⁹³

In any case, it should be noted that the issues relating to treaties are international in nature. There have not been circumstances where modern Thai courts explicitly held CIL to be part of Thai law when the issues were purely domestic, such as the issue of constitutional rights.

iii. Interpretive Influence of International and Foreign Law

The dualist approach resulting from the adoption of the constitutional monarchy with three branches of government and the formalist interpretation have gradually led Thai courts to totally ignore international and foreign laws that are not considered as parts of the legal system.

Beginning in 1995, however, there were some cases that courts referred to international agreements to which Thailand was not a party. In a decision which will be referred to as the *Extradition* case, the Court of Appeal was faced with the task of interpreting two related documents. One was the Extradition Treaty between Thailand and the USA, which appeared as an annexe in the Act on Extradition between Thailand and the United States 1990, an implementing legislation. The related provision in this Treaty provided that Thai officers may

²⁹⁰ Constitutional Court decision 11/2542 (1999) 8.

²⁹¹ *ibid* 93 (Justice Sratrun).

²⁹² Constitutional Court decision 33/2543 (2000).

²⁹³ Constitutional Court decision 6–7/2551 (2008).

send Thai suspects to the USA, ‘unless prohibited to do so’. Another was the Extradition Act 1929, which laid down the general principle concerning extradition in Thailand that Thai nationals shall not be extradited.

The issue to be determined was whether the 1929 Act prohibited the extradition of a Thai person according to the Treaty and the 1990 Act. In order to determine this issue, the Court referred to the Vienna Convention on the Law of Treaty 1969, which provided general principle that a treaty shall be interpreted in good faith. The Court stated that *although Thailand is not a party of this Convention, its provisions are related to the conclusion and interpretation of the treaty which can be taken into account.*²⁹⁴ It then held that the Thai Government, in good faith, intended to be committed to extradite Thai nationals to the USA. Thus, the general provision in the 1929 Act did not apply.²⁹⁵

This case can be seen as an instance of a Thai court using a treaty that did not have legal effect to interpret another treaty that had been implemented by Thai law. However, Saisoontorn comments that the court in this case actually interpreted ‘Thai law’, not a ‘treaty’, because such a treaty had already been transformed into Thai law by the Act. And since it was the interpretation of Thai law, it was not appropriate to rely on a provision in an international agreement to which Thailand was not even a party.²⁹⁶ Saisoontorn further argues that the Court’s approach was inconsistent with the principle specified in the Constitution that the Thai courts had to adjudicate ‘in accordance with the Constitution and the law’.²⁹⁷ In his opinion, such ‘law’ must be Thai law only.²⁹⁸

²⁹⁴ Court of Appeal decision 2965/2538 (1995).

²⁹⁵ *ibid.*

²⁹⁶ Jumpot Saisoontorn, ‘The Acceptance and Enforcement of Treaties According to the States’ Constitutions’ (2001) 31 *Thammasat Law Journal* 849, 893.

²⁹⁷ He refers to the Constitution 1997, s 233.

²⁹⁸ Saisoontorn, ‘The Acceptance and Enforcement of Treaties According to the States’ Constitutions’ (n 296) 893, 890. However, the Vienna Convention on the Law of Treaty was

Another case was the Supreme Court's decision which will be referred to here as the *Trade Mark* case. A government agency withdrew the rights of the plaintiff relating to the trademarks he had registered. It did so according to the Trade Mark Act 1991 prohibiting the registration of a trade mark 'identical with a well-known mark, or so similar thereto that the public might be confused as to the owner or origin of the goods'.²⁹⁹ The issue before the Court was what was considered to be a 'well-known mark' according to this Act. Since the Act itself did not provide a definition, the Court referred to the definition provided in the Agreement on Trade-Related Aspects of Intellectual Property Rights including Trade in Counterfeit Goods (TRIPs Agreement) to which Thailand was a party. Further, because the TRIPs Agreement referred to the Paris Convention 1967, the court also looked at the definition from the point of view of this Convention, although Thailand was not a party to it.³⁰⁰

The important point arising from this case was that the Trade Mark Act was enacted in 1991, before the TRIPs Agreement came into force in 1995, so the Act was definitely not the implementing law for such Agreement. The Paris Convention was even more distant from Thai law. From the traditional perspective, this could be considered as an instance of a court violating the dualist principle. However, it is submitted that this was the case that indicated the emergence of the practice of Thai courts of using international law as a tool in interpreting Thai law. Vichai Ariyanuntaka, a judge in the Intellectual Property Court, gave a personal interview with Lukana Pobromyen in which he stated that the court did so *in order to make sure that its decision is in line with those of*

relied on in the Constitutional Court decisions two years later, although the case was not criticised on this point because the Court seemed to refer to the Convention as a 'codified customary international law' rather than as a 'treaty'. These cases are discussed above in section III B ii.

²⁹⁹ Trade Mark Act 1991, s 8 (11).

³⁰⁰ Supreme Court decision 8834/2542 (1999).

*other countries since international commercial law should be certain and harmonised.*³⁰¹

Apart from treaties, foreign law has also started to be mentioned in Thai judicial reasoning. In a decision of the Constitutional Court in 2000 concerning the interpretation of a provision in the 1997 Constitution which required that certain kinds of treaties must be approved by the National Assembly, Justice Mongkon Sratrung explained that the constitutional provision in question was intended to provide a checks-and-balances process. In order to support this statement, he submitted that the Constitutions of several other countries such as Germany, France and Spain also had the same kind of provisions, and even the UK, which adopted the common law system, had a principle that treaties affecting domestic law must be approved by Parliament.³⁰²

However, there was also another case in which the same Justice expressed an opinion against the consideration of laws and practices of other countries. In the *IMF* case discussed previously,³⁰³ the Ministry of Foreign Affairs attempted to convince the Court that the letters of intent which Thailand sent to the IMF were not ‘international treaties’ according to the Constitution of 1997. It argued that governments of Mexico, South Korea, the Philippines and Indonesia had also submitted the same kind of letters to the IMF without asking approval from their Parliaments. The Justice addressed this argument, stating first that it was unclear whether the named countries had the same constitutional law as Thailand. Then, in a rather offensive statement, he declared that

Thailand is an independent country and has never been a colony of any powerful nation. Therefore, it should have its own policy

³⁰¹ Pobromyen (n 252) 43, fn 146. The interview was given on 14 November 2001 (author’s translation).

³⁰² Constitutional Court decision 33/2543 (2000) 141 (Justice Sratrung).

³⁰³ See text to n 290–291.

conventions regarding foreign affairs, and should not rely on other countries which do not have pride in their nations' history.³⁰⁴

This statement reflects very well strong nationalism and concern over the comparability of foreign legal systems with the Thai system.

It can be said that Thai courts have started to look at international and foreign norms as useful interpretational resources in matters relevant to international law. However, the practice has not been firmly established, and international and foreign laws have been used only by a small number of judges, without a consistent principle governing such use.

IV. International Human Rights Norms in Thailand

International human rights norms have had a significant influence on the Thai Bills of Rights. It was mentioned earlier that several Thai Constitutions enacted rights specified in the UDHR.³⁰⁵ Unfortunately, the motive for doing so was not the Government's commitment to the rights stipulated in the Declaration, but rather Thailand's need to be considered as an active member of the United Nations, which could ensure the country's independence.³⁰⁶ Therefore, apart from putting the list of rights from the UDHR into the Constitutions, successive Governments did not take any other measure to enforce those rights in practice. Legal scholarship on the field was also underdeveloped. It was reported that international human rights were not known in Thailand until 1985 when Thailand started to join more international human rights conventions.³⁰⁷

³⁰⁴ Supreme Court decision 11/2542 (1999) 104 (Justice Sratrung) (author's translation).

³⁰⁵ See section I B.

³⁰⁶ Engkagul (n 72) 97.

³⁰⁷ *ibid.*

However, Thailand has recently been much more enthusiastic about international human rights. The country has committed to several main international human rights instruments.³⁰⁸ Several rights contained in these treaties have been put into the current Thai Bill of Rights.³⁰⁹ As will be discussed further below, however, their legal status and effect in the Thai legal system may not be as significant as expected.

A. Legal Status of International Human Rights Norms in the Legal System and Their Effect upon It

i. Constitutional Implications

International human rights treaties were mentioned expressly in the Constitutions for the first time in the Interim Constitution promulgated in 2006 after the coup had successfully seized political power. In section 3 it provided:

Subject to the provisions of this Constitution, human dignity, rights, liberties and equality enjoyed by the Thai people under conventions pursuant to a democratic form of government with the King as Head of State and Thailand's *existing international obligations* shall be protected under this Constitution.³¹⁰

This provision was of particular interest since it seemed to imply that the rights in the international human rights treaties that Thailand had ratified had the same status as other rights expressly specified in the Constitution. Moreover, it appeared in the Constitution promulgated by a military junta which, as discussed previously, usually mentioned no rights and gave substantial power to the Prime

³⁰⁸ The list of treaties ratified is provided in Chapter Six, text to n 40.

³⁰⁹ Ministry of Foreign Affairs of the Kingdom of Thailand, 'Human Rights Promotion in Thailand' <<http://www.mfa.go.th/web/24.php>> accessed 11 February 2010.

³¹⁰ Constitution (Interim) 2006, s 3.

Minister.³¹¹ It reflected the increasing importance of rights in general and international human rights in particular in Thailand.

Nevertheless, the Interim Constitution of 2006 was replaced by the Constitution of 2007 in which international human rights continued to be mentioned explicitly, but within a different context which results in a different legal status of international human rights. Under the heading ‘The Directive Principle of Fundamental State Policies’, section 82 states:

The State shall promote friendly relations with other countries and adopt the principle of non-discrimination and *shall comply with human rights conventions in which Thailand is a party thereto* as well as international obligations concluded with other countries and international organisations.³¹² (emphasis added)

The actual impact of this section is still uncertain and has yet to be discussed in any academic literature or judicial decision in Thailand. It is arguable that this provision allows human rights conventions in which Thailand is a party to have ‘direct effect’ in the domestic sphere without the need for implementing legislations. This view is reinforced by the fact that section 82 is described as containing the rights and liberties *added* to rights/liberties under the previous Constitutions in the ‘Summary of Essential Elements’ distributed together with the draft Constitution to all Thais for referendum purposes by the Constitution Drafting Assembly. The Assembly even explains that the Draft Constitution required in the Directive Principle of Fundamental State Policies that rights and liberties according to Thailand’s international obligation *have the same effect as rights and liberties specified in the Constitution*.³¹³

³¹¹ Discussed previously in Section I.B.

³¹² Constitution 2007, s 82.

³¹³ The Constitution Drafting Assembly (n 44) 171.

However, it should be noted that the document distributed by the Constitution Drafting Assembly discussed above was intended for the general public, who might or might not have knowledge in law, and was made with the motive of persuading them to adopt the Draft. Therefore, certain statements can be oversimplified.

The Constitution provides a list of substantive rights in *Chapter III: Rights and Liberties of the Thai People*. However, section 82 is located within *Chapter V: Directive Principle of Fundamental State Policies*. Therefore, it is more likely that section 82 simply provides a *guideline* for the Government, and does not result in importing human rights conventions or other international agreements into the Thai domestic legal system. At most, the provision can be seen as requiring the Government to take necessary steps to enact the law in order to comply with international obligations, particularly those in the international human rights conventions, to which Thailand is a party. In fact, the Constitutional Court decided in 1999 regarding another directive principle requiring the State to promote the employment and the protection of children and women labour that such principle did not constitute a constitutional right.³¹⁴

Furthermore, this interpretation is more consistent with section 190 of the Constitution, which provides a dualist solution regarding the issue of how international treaties have effects in the Thai legal system.³¹⁵ It is also more consistent with the provisions concerning the duty of the National Human Rights Commission (NHRC). Section 257(1) of the Constitution 2007 requires the NHRC to ‘*examine and report* the commission or omission of acts which ... do not comply with obligations under international treaties to which Thailand is a party.’³¹⁶ However, the Constitution *does not* specify that the NHRC may submit

³¹⁴ Constitutional Court decision 37/2542 (1999).

³¹⁵ This issue is discussed previously in section III B i.

³¹⁶ Constitution 2007, s 257(1). In fact, these duties have existed since 1999 when the National Human Rights Commission Act 1999 was enacted in order to establish the NHRC according to

claims regarding the commission or omission of acts which are inconsistent with international treaties to the courts. This is in contrast to the claims regarding the law or administrative acts that violate human rights *and beg the question of constitutionality or legality*. In these cases, sections 257(2) and (3) confer power to the NHRC to file the cases for the Constitutional Court or the Administrative Courts as appropriate.³¹⁷ The fact that the Commission may not bring the claims relating to the violations of international human rights obligations to the courts implies that such obligations are not directly enforceable in the Thai legal system.

Therefore, it is concluded that, although inspired heavily by international human rights norms, the Constitution does not give special legal status to those international human rights norms. Apart from norms that have already become constitutional rights, the determination of whether an international human rights norm has any legal effect in Thailand has to depend on the perceived relationship between international law and domestic law in general.

ii. Relationship between International and Foreign Law and Domestic Law: Its Implications for the Legal Status and Effect of International Human rights Norms

The dualist approaches towards treaties applied to international human rights treaties as well as to other treaties. Thus, if an international human rights convention provides for a right which has never been recognised in the Thai legal system either explicitly or implicitly, such a right will not have any direct legal effect in Thailand. In other words, although Thailand has acceded to several international human rights treaties, such treaties will not have any further direct legal effect on the Thai legal system apart from what is already stated in the Constitution or statutes. International human rights norms that are customary

the Constitution 1997. Although the Constitution 1997 was terminated, the Act is still in force pending the amendment becoming more consistent with the Constitution 2007.

³¹⁷ See Constitution 2007, s 257 (2)(3).

international laws may form part of Thai law; however, this is true only to the extent that they are not in conflict with existing Thai law. Moreover, it is difficult, in practice, to argue that a human rights norm is CIL and that such CIL has the same effect as constitutional rights. Lastly, the dualism also prevents international human rights norms in the form of foreign law from being part of the legal system.

B. Interpretive Influence of International Human Rights Norms

It will be seen in the next two Chapters that courts in the UK and USA have established the principles for using international human rights norms in their judicial reasoning regardless of the legal status of such norms in the legal systems. Nevertheless, the same has yet to be developed in Thailand.

In assessing Thailand's performance relating to the International Covenant on Civil and Political Rights (ICCPR) in 2005, the Human Rights Committee observed that the Covenant's provisions 'are not in practice invoked in courts of law unless they have been specifically incorporated by legislation'.³¹⁸ A Thai delegate argued that 'in interpreting the provisions of domestic legislation, Thai courts took into account the intent and purport of the relevant articles of the Covenant'.³¹⁹ She said so in the context of the death penalty for young offenders, where such a penalty was automatically commuted to 50 years' imprisonment and the average sentence actually imposed on young offenders was between 12 and 17 years' imprisonment.³²⁰ However, it should be noted that exemption from

³¹⁸ Human Rights Committee (Eighty-Fourth Session) 'Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee: Thailand' (8 July 2005) UN Doc CCPR/CO/84/THA, para 8.

³¹⁹ Human Rights Committee (Eighty-Fourth Session) 'Summary Record of the 2294th Meeting, Consideration of Reports Submitted by States Parties under Article 40 of the Covenant and of Country Situations: Initial Report of Thailand (continued)' (25 July 2005) UN Doc CCPR/C/SR.2294, para 7.

³²⁰ *ibid* para 8.

the death penalty for a person younger than 18 was provided by the Thai Criminal Code,³²¹ and there were no cases in which the courts explicitly mentioned the Covenant when using their discretion to reduce the penalty.

In any case, recent court decisions have referred to international human rights norms explicitly, and these deserve detailed discussion here.³²² The first case was the Constitutional Court's *Case of the Disabled Judicial Applicants*. It was discussed previously that the Court upheld the provision of law barring an applicant with an inappropriate physical condition from taking the examination to be an assistant judge.³²³ Although the collective opinion in this decision did not mention international human rights, two of the Justices in the case addressed them in their personal opinions.

Justice Preecha Chalermvanich discussed the background of, and rights protected in, the UDHR and the ICCPR in detail, spending seven pages on his opinion.³²⁴ He also acknowledged that, while the UDHR did not have binding effect, the ICCPR did and the Constitution of 1997 had provisions implementing it.³²⁵ Nevertheless, the rest of his opinion regarding the relationship between international human rights and constitutional rights was confusing.

³²¹ Thai Criminal Code 1956 as amended by the Amendment of the Thai Criminal Code Act (no 16) 2003, s 18 para 2–3. It is noted that the amendment on the Thai Criminal Code was made so that Thai law on this issue is consistent with the ICCPR and CRC, but Thai courts did not mention these two Conventions in their judgments.

³²² It is noted that, apart from the cases discussed in detail below, there were the Constitutional Court decision 34/2554 (2011), where the NHRC referred to the ICESCR, ICCPR and ILO Declaration on Fundamental Principles and Rights at Work in its complaint but the Court did not consider it in its central decision, and the Constitutional Court decision 12/2555 (2012), where the Court referred to the UDHR and ICCPR as sources of Thai constitutional principle on the presumption of innocence, although these international documents did not play an important role in the decision.

³²³ See text to n 215–218.

³²⁴ Constitutional Court decision 16/2545 (2002) 210–17 (Justice Chalermvanich).

³²⁵ *ibid* 212.

Firstly, he considered section 26 of the ICCPR. He stated that this provision did not cover the rights of the disabled or people with a body ‘inappropriate’ for work. Thus, he stated generally that ‘no one can claim that the law in question *is inconsistent* with the UDHR and the ICCPR’.³²⁶

Then, in an inconsistent manner, the Justice changed the focus of his opinion, moving on to compare the UDHR and the ICCPR with the 1997 Constitution which provided for the equal protection. He found that while the former two did not allow exemption, the Constitution did.³²⁷ This was because section 30 para 4 of the Constitution stated:

Measures determined by the State in order to eliminate an obstacle to or to promote persons’ ability to exercise rights and liberties on the same basis as other persons shall not be deemed as unjust discrimination ...³²⁸

The Justice was of the opinion that the provision of law which required the physical and mental examination of applicants for the position of assistant judge was actually a measure that could ‘help’ people with disability, because if they passed the examinations they could be qualified to apply. Thus, it fell into section 30 para 4, which provided an exemption to the equal protection principle.³²⁹ He submitted that this exemption was inconsistent with the UDHR and the ICCPR and with his own opinion of what should be; nevertheless, the issue must be decided according to Thai law. Therefore, it was held that the law in question was not unconstitutional.³³⁰

³²⁶ *ibid* 213–15.

³²⁷ *ibid* 215–17.

³²⁸ Constitution 1997, s 30 para 4.

³²⁹ Constitutional Court decision 16/2545 (2002) 220.

³³⁰ *ibid* 217, 220.

Several comments can be made about this judgment. It can be seen that the Justice was at an ambivalent point. He was enthusiastic to address at length the international human rights standards and compare them to the related law of Thailand. However, perhaps for dualist reason, he was not willing to allow the interpretive influence from such international standards when he felt that Thai law was not consistent with them. This was so even though the country had international obligations.

It can also be seen that the Justice tended to interpret not only the international documents but also the Constitution using a strict literal approach, without considering the intention behind the provisions or the protection of rights. It should be observed that the grounds of discrimination listed in the ICCPR were not exclusive. In fact, it was obvious from the language of the provision itself, which requires protection against discrimination ‘on *any* ground *such as* race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth *or other status*’.³³¹ However, the Justice interpreted this provision to not include protection against discrimination on the ground of disability, simply because the provision does not explicitly mention it.

Similarly, section 30 para 4 of the Constitution was interpreted literally without reference to the intention of the provision or consideration of the consequence of the interpretation. The provision intended to allow an affirmative action, or in other words, allow the State to help people who were likely not to be able to exercise rights at the same level as others, which was not inconsistent with international principles. However, the Justice interpreted this as allowing unfair discrimination towards the disabled. Not only the constitutional intention, but also international human rights norms were neglected.

³³¹ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 26.

The other Justice who mentioned international human rights in the decision was Justice Amorn Raksasut. He voted for the minority opinion, holding that the law barring a person with an inappropriate body to apply for the position of assistant judge was unconstitutional.³³² The bases for his decision were constitutional provisions, but he also considered three international human rights instruments: the ICCPR, the International Covenant on Economic Social and Cultural Rights (ICESC), and the UN Declaration on the Rights of Disabled Person (DRDP). The first two instruments were treaties ratified by Thailand, and the last was a resolution of the General Assembly of the United Nations suggesting its members should comply. The Justice listed these international documents under the heading ‘Related Laws’. He then provided the text of the related provisions of such documents and emphasised the rights of the disabled to have equal protection and to work.³³³ He also stated:

Thailand has signed several international instruments with the approval of the National Assembly, and thus *is bound* by them. Therefore, it *should* comply with its obligations; all state’s organs especially the Courts of Justice *should* strictly act according to the obligation.³³⁴ (emphasis added)

This statement reflects a dualist approach towards international treaties. While the Justice accepted that international treaties bound the country, he did not hold that the state’s organs *had to* comply with such obligations. Also, in the final part of the opinion when the decision was made, the justice based his opinion on the constitutional provisions and did not use international instruments as authority. However, the statement also shows that the international instruments may at least serve as resources from which courts may draw inspiration or as additional arguments supporting their interpretation of the Constitution.

³³² Constitutional Court decision 16/2545 (2002) 260–68.

³³³ *ibid* 264–65.

³³⁴ *ibid* 267 (author’s translation).

Apart from international instruments, the same Justice also referred to foreign laws. Relying on section 7 of the 1997 Constitution, which directed that when there was no provision applicable the issue had to be decided in accordance with the constitutional conventions of the democratic regime of government with the King as Head of State,³³⁵ he referred to a provision from Germany's Constitution which explicitly recognised the right of the disabled to equal protection as an example.³³⁶ It is quite obvious here that the justice welcomed the consideration of foreign laws in interpreting the Constitution and also used them to support his argument.³³⁷

Last but not least, regarding the case of the *Disabled Judicial Applicants*, it is observed that the two justices mentioned here had very different opinions towards the interpretation of both international instruments and the Constitution. Nevertheless, neither of them discussed the other's opinion at all. They tended to have totally separated decisions. Neither were the differences mentioned in the main opinion. This is one of the weakest points in the style of judicial reasoning in Thailand which may result from Thai social culture which encourages people to avoid confrontation.³³⁸

Another case in which international human rights norms were involved was the Central Intellectual Properties and International Trades Court's decision in 2002. The case here was that an American company had applied for a patent on DDI, which was the medicine for those living with HIV. In its original application, which was published according to the patent law of Thailand, the company sought to have a patent covering medicines containing between 5 and 100 mg of DDI. However, the company later amended its application, deleting the condition

³³⁵ Constitution 1997, s 7.

³³⁶ Constitutional Court decision 16/2545 (2002) pp 266–67.

³³⁷ The issue of referring to foreign laws has not been debated in Thailand, but has been subjected to strong criticism in the USA, as will be seen in Chapter Four, IV B ii.

³³⁸ This issue will be discussed further in Chapter Six.

relating to the quantities of DDI. The Department of Intellectual Property (DIP) approved this amendment and issued the patent accordingly. The claimants in this case, HIV patients and non-governmental organisations established for the purpose of assisting those living with HIV, sued both the company and the DIP. They claimed that the amendment of the patent condition to cover dosages beyond those originally applied for was illegal because the dosages constituted 'substantial changes' to the rights according to the patent.

One of the issues that had to be decided was whether the claimants had the standing to sue, as the defendants argued that the claimants were not the producers of the medicine and thus were not affected by the exclusive rights to produce the medicine containing DDI conferred on the company by the patent in question. The Court disagreed. Referring to the Doha Declaration on the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) and Public Health, which expressed the view that 'the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health', the Court held that the HIV patients had standing because the right to health was more important than property rights and medicine-related patents were different from other kinds of patents, on the point that not only the producers of the medicine but also those who needed to be treated by such medicine were affected by the patent. The NGO claimants also had standing, because they had a duty to facilitate HIV patients' access to the medicine. The Court then went on to hold that the amendment of the condition of the patent was the substantial amendment, and therefore illegal.³³⁹

It can be seen that the Court in this case not only interpreted the patent law in the light of fundamental rights, but also made use of international human rights norms in order to support its conclusion.

³³⁹ Central Intellectual Property and International Trades Court decision 93/2545 (2002).

The last case in which international human rights norms had interpretive influence was the Central Administrative Court's decision in the *Election Case*, where the Central Administrative Court invalidated the General Election in 2006. The main issue of the case was the rearrangement of the voting booths by the Election Commission (EC). Traditionally, polling booths were arranged to the effect that the voters faced towards the public and EC staff, but 50 cm tall boards were set at the front and sides of each booth to prevent the public from seeing how voters were casting their votes. In 2006, the EC changed the arrangement to the opposite, letting voters turn back to face EC staff and the public. The Commission claimed that this new arrangement could prevent certain kinds of fraud, including the use of cameras to take pictures of the ballots in order to claim money from candidates. However, the Court agreed with the claimant, a political party, that such an arrangement allowed EC staffs and the public to see how voters cast their votes. The Court ruled that a proper election must reflect the true will of the people expressed without undue influences. It also expressed the view that one of the *widely accepted* conditions for a proper election was that the voters must be able to vote secretly. Such a condition was *prescribed in section 21 (3) of the UN's Declaration of Human Rights, which Thailand has accepted, and in section 104 of the Constitution of Thailand*. Therefore, the order of the EC was unconstitutional, and as a result the whole election was also unconstitutional.³⁴⁰

Looking carefully at the opinion, it can be seen that the Court did not need to mention the UDHR in order to reach its conclusion. The constitutional provision (which may be influenced by the UDHR itself) was very clear, in that the vote must be in secret. However, it did so either because it acknowledged the importance of the UDHR or because it attempted to add more weight to the holding – showing that the concept in the Constitution which it used was universally accepted. In any case, it should also be noted that the court was

³⁴⁰ Central Administrative Court decision 607–608/2549 (2006) 25.

careful to add that the Declaration had already been accepted by Thailand. This reflects the fact that it felt the need to justify the use of international standards in its judicial reasoning.

V. Conclusion

It can be seen that Thai courts have recently shown their willingness to refer to international human rights norms, especially those from treaties or international declarations that the country has accepted. Most of the time, international human rights norms serve either as guidance or as supports for the courts' reasoning – 'substantive use', in Larsen's typology.³⁴¹ Nevertheless, it is obvious that international human rights norms have yet to have a significant interpretive influence in Thai courts. The cases discussed in the last section are very much a minority of cases decided, and they reflected the uncertainty relating to the legitimacy and methodology of the use of international human rights norms.

These considerations all lead to the important questions to which this research aims to provide answers drawing on the lessons to be learnt from the UK and USA: whether Thai courts should allow the interpretive influence of international human rights norms in their judicial reasoning; whether the Thai legal system, as discussed above, is appropriate for the use of international human rights norms; and, if the answers to these questions are positive, what the best methodologies would be for the use of international human rights norms in Thai courts.

³⁴¹ See Chapter One, text to n 18.

Chapter Three: The United Kingdom

The main purposes of this Chapter are to discover whether courts in the UK have made use of international human rights norms in their judicial reasoning and if so to what extent, and also to understand the forms such usage takes, and the reasons underlying it. In order to achieve the above objectives, the Chapter follows, as much as possible, the structure presented in Chapter Two. An overview of the political and constitutional system is presented first, to give a general idea of the UK constitutionalism. Then, the research focuses on the role of the judiciary in relating to the protection of rights, which depends on the power of judicial review of executive act and interpretation of legislation. The Chapter moves next to address the legal status and interpretive influence of general international and foreign law in the UK, before focusing on the same issues in relation to international human rights norms. In the latter case, the research gives special attention to the ECHR, which is the main source of international human rights norms in the UK and which receives different treatments in the UK courts following the enforcement of the HRA 1998. Additionally, the research discusses the use of non-ECHR international human rights norms in the UK courts.

I. Overview of the Political and Constitutional System

The UK does not have a single written document called ‘the Constitution’. Rather, the Constitution which governs the country comes from a variety of sources, including statutes, the common law, European Union law, the European Convention on Human Rights, legal treatises, the law and customs of Parliament, and the Royal Prerogative.¹

¹ Peter Leyland, *The Constitution of the United Kingdom: A Contextual Analysis* (Hart 2007) 20–24; Adam Tomkins, *Public law* (OUP 2003) 7–10.

The UK adopts a system of parliamentary democracy with a constitutional monarch.² Parliament, the legislative branch in the UK, consists of the House of Commons, whose members are directly elected, and the House of Lords, whose members are primarily appointed.³ The Prime Minister, the head of the executive, is, according to the UK constitutional convention, the leader of the political party that gains a majority of seats in the House of Commons. The Prime Minister has power to appoint all other Ministers, but the Ministers must be members of one of the Houses of Parliament.⁴ The executive branch has to govern through and is responsible to Parliament, which has the power to approve or reject the Government's budgets and bills.⁵

While the executive and the legislative branches are clearly fused, the judiciary has long been recognised for its independence in adjudicating cases.⁶ Since the enforcement of the Act of Settlement in 1701, judges have enjoyed security of tenure as they are guaranteed to be in office given good behaviour and have their salaries fixed.⁷ Nevertheless, it was not until recently that the functions and personnel of the judiciary were clearly separated from those of the other two branches. Before the Constitutional Reform Act (CRA) 2005, the Head of the Judiciary was the Lord Chancellor, who was also a member of the Cabinet and speaker of the House of Lords. The highest court in the UK was the Appellate Committee of the House of Lords in Parliament. Law Lords who served as

² The monarch has prerogative powers to appoint the Prime Minister, dismiss the government and grant assent to legislation. However, such powers are limited by constitutional conventions to the extent that the monarch's roles are principally ceremonial. Other prerogatives belonging to the monarch such as the power to make treaties and to defend the realm are exercised by her Ministers or the executive rather than by her herself. Tomkins (n 1) 62–72.

³ *ibid* 99.

⁴ *ibid* 64.

⁵ *ibid* 90–92.

⁶ Roger Masterman, *The Separation of Powers in the Contemporary Constitution: Judicial Competence and Independence in the United Kingdom* (CUP 2010) 27.

⁷ Act of Settlement 1701; Supreme Court Act 1981, s 11(3); Appellate Jurisdiction Act 1876, s 6; Constitutional Reform Act 2005, s 33.

judges in the Committee might also take part in the process of legislation as members of the House.⁸ It was following the CRA 2005 that the Lord Chief Justice replaced the Lord Chancellor as Head of the judiciary and the Supreme Court of the UK was established separately from the executive and the legislative branches. The new Supreme Court started its work in October 2009. In addition to the former Law Lords who have become the Justices of the Supreme Court,⁹ it contains new Justices who are appointed by the monarch upon recommendation by the Prime Minister. Importantly, the Prime Minister is not allowed to recommend a person other than the one notified to him by the Lord Chancellor following the report from the Selection Commission.¹⁰

Traditionally, the most prominent characteristic of the UK Constitution was the unqualified nature of the Parliamentary sovereignty doctrine. This first gained recognition as a result of the 1688 Glorious Revolution and the Bill of Rights, which subordinated the powers of the Crown, including not only executive powers but also common law powers, to Parliament.¹¹ The doctrine was explained by Dicey as a legal fact having positive and negative aspects.¹² The positive aspect meant that ‘Parliament has the right to make or unmake any law whatsoever’,¹³ and the negative aspect meant that ‘no person or body is recognised by the law of England as having a right to override or set aside the

⁸ However, the practice before the Constitutional Reform Act was that Law Lords were attempting to avoid the legislative function. Lord Hope, ‘Voices from the Past – the Law Lords’ Contribution to the Legislative Process’ (2007) 123 LQR 547.

⁹ Constitutional Reform Act 2005, s 24.

¹⁰ *ibid*, s 26(2)(3).

¹¹ For discussions about sources of the parliamentary sovereignty doctrine see Helen Fenwick and Gavin Phillipson, *Text, Cases & Materials on Public Law & Human Rights* (2nd edn, Cavendish 2003) 132–33; Ian Loveland, *Constitutional Law, Administrative Law and Human Rights: A Critical Introduction* (OUP 2006) 24–31; Tomkins (n 1) 103–04.

¹² A V Dicey, *Introduction to the Study of the Law of the Constitution* (10th edn, Macmillan 1959) 68–70.

¹³ *ibid* 39–41. See also *Mortensen v Peters* (1906) 14 SLT 227 endorsing the view that Parliament’s power was not limited even by geographic factors.

legislation of Parliament'.¹⁴ On this basis, it followed that courts had no authority to doubt the validity of Acts of Parliament and could never hold such Acts unconstitutional.¹⁵

Since Parliamentary sovereignty could not be qualified, no rights were entrenched.¹⁶ Judicial protection of substantive rights against Parliament's encroachment was seen as anti-democratic, since it allowed an unelected group of judges to place limitations on what people (through Parliament) thought should have been the laws of society.¹⁷ It was also argued that reasonable people could have different opinions on rights,¹⁸ and that it was difficult to identify which rights were basic and which had priority over others.¹⁹ Therefore, rights were best settled by political process.²⁰ Consequently, liberties of people were regarded as 'residual'; individuals were free to act as they please, as long as their conduct was not prohibited by statute.²¹

However, this did not mean that Parliament's legislative power operated without any restraint. If Parliament enacted a law that pervasively contradicted the shared norms of the society, it had to deal with strong political pressure and democratic control.²² Moreover, as will be seen below, the UK courts adopted the principle

¹⁴ Dicey (n 12) 39–41. The absolutism of Parliamentary sovereignty was supported by the formal conception of the rule of law which does not concern the substance of the law. *ibid* 202–03.

¹⁵ *Madzimbamuto v Lardner* [1969] 1 AC 645 (PC) 723.

¹⁶ Lord Lester of Herne Hill, 'Human Rights and the British Constitution' in Jeffrey Jowell and Dawn Oliver (eds), *The Changing Constitution* (7th edn, OUP 2011) 71–73.

¹⁷ Mark Elliott, 'Parliamentary Sovereignty and the New Constitutional Order: Legislative Freedom, Political Reality and Convention' (2002) 22 *Legal Stud* 340, 343.

¹⁸ Jeremy Waldron, 'A Right-Based Critique of Constitutional Rights' (1993) 13 *OJLS* 18, 32.

¹⁹ James Allan, 'Bill of Rights and Judicial Power – A Liberal's Quandary' (1996) 16 *OJLS* 337, 345.

²⁰ J A G Griffith, 'The Political Constitution' (1979) 42 *MLR* 1, 17.

²¹ Fenwick and Phillipson (n 11) 840.

²² Elliott (n 17) 341–42; Anthony Lester, 'Fundamental Rights in the United Kingdom: the Law and the British Constitution' (1976) 125 *U Pa L Rev* 337, 339.

of legality which, although it could not trump the sovereignty of Parliament, might limit the effect of a statute in cases where Parliament did not explicitly express its intention to limit fundamental rights.²³

Notwithstanding the above discussion, recent decades have seen great changes in the UK constitutional system. The supremacy of the EU law,²⁴ the devolution statutes granting legislative and administrative powers to Northern Ireland, Wales and Scotland,²⁵ and the Human Rights Act 1998²⁶ have undermined the absolutism of Parliament sovereignty. At the same time, the separation of powers, which has not been an underlying principle of the UK Constitution²⁷ and which has been employed by courts as a tool for emphasising the sovereignty of Parliament and limiting the courts' powers in controversial cases rather than improving checks and balances across government as a whole,²⁸ plays important

²³ See section II B ii.

²⁴ This is especially after *Factortame (No. 2)*, where the House of Lords disapplied a statute in favour of the European Community – now European Union – law. *R v Secretary of State for Transport ex p Factortame (No 2)* [1991] 1 AC 603 (HL). This issue will be discussed further in Section III B.

²⁵ See Scotland Act 1998; Government of Wales Act 1998; Northern Ireland Act 1998. Although Westminster still reserves the concurrent rights to legislate in devolved issues, a constitutional convention has emerged that it would not do so without consent of the local governments. Mark Elliot, 'United Kingdom: Parliamentary Sovereignty under Pressure' (2004) 2 Int'l J Const L 545, 554. See also Stephen Tierney, *Constitutional Law and National Pluralism* (OUP 2004).

²⁶ The impact of the HRA on the UK constitutionalism is discussed further below.

²⁷ This is because the personnel and functions of the executive and legislative branches overlap with each other extensively and the judiciary has only recently been separated from the other two Tomkins (n 1) 37. Moreover, Parliament is controlled by the executive to the extent that the executive may make Parliament pass whatever laws it wishes. Lord Hailsham, *The Dilemma of Democracy* (Collins 1978) 125–32. See also G Ganz, 'Delegated Legislation: A Necessary Evil or a Constitutional Outrage?' in Peter Leyland and T Woods (eds), *Administrative Law Facing the Future: Old Constraints and New Horizons* (Blackstone 1997).

²⁸ This can be seen in *Duport Steels Ltd v Sirs* [1980] 1 All ER 529 (HL) 541; *R v Secretary of State for the Home Department, ex p Fire Brigades Union* [1995] 2 AC 513 (HL) 567 (Lord Mustill). For commentaries, see Masterman (n 6) 31; Adam Tomkins, 'Of Constitutional Spectres' [1999] PL 525, 531.

roles in the development of the Constitution.²⁹ This can be seen most obviously in *Jackson*.³⁰ Apart from considering the validity of the Act, which was unusual for the UK courts,³¹ several Justices explicitly expressed a willingness to revisit the Parliamentary sovereignty doctrine. The doctrine was still regarded as the bedrock of the British constitution,³² however, Lord Steyn stated:

We do *not* in the United Kingdom *have an uncontrolled constitution* ... The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom ... *It is a construct of the common law*. The judge created this principle. If that is so, it is not unthinkable that circumstance could arise where *the courts may have to qualify a principle established on a different hypothesis of constitutionalism*.³³
(emphasis added)

Consistently, Lord Hope remarked, *obiter*, that ‘Parliamentary sovereignty is no longer, if it ever was, absolute ... Step by step, gradually but surely, the English principle of the absolute legislative sovereignty of Parliament which Dicey derived from Coke and Blackstone is being qualified.’³⁴

In the issue of rights in particular, while Parliament is still able to pass whatever laws it likes, the HRA requires that it faces stronger political challenge as the Minister has to provide a statement on whether the Bill is compatible with

²⁹ *Masterman* (n 6) 19, 22.

³⁰ *R (Jackson) v A-G* [2005] UKHL 56, [2006] 1 AC 262.

³¹ However, one should make a distinction, as Lord Steyn did, between judicial review over the substance of Acts of Parliament, which is barred under the Parliamentary sovereignty doctrine, and judicial review over ‘what the constituent elements of Parliament must do to legislate’, which is not in the scope of Parliamentary sovereignty. *ibid* [73].

³² *ibid* [27] (Lord Bingham).

³³ *ibid* [102].

³⁴ *ibid* [104]. See also Baroness Hale’s observation that other qualifications on Parliamentary sovereignty ‘may emerge in due course’. *ibid* [159].

conventional rights.³⁵ Judges have also had a more important role in upholding substantive rights in the UK constitutional system since the Act has made Convention rights the standards which Parliament has to observe and courts have to use in interpreting statutes.³⁶ This will be discussed further below.

II. The Judiciary and the Protection of Rights

The judiciary in the UK plays its part in protecting rights mainly through the processes of judicial review of the executive acts and interpretation of law.

A. Power of Judicial Review

The judiciary in the UK may intervene in the executive's business by quashing executive orders, demanding the executive to act or stop acting, declaring what the law is or what the rights of parties are, and providing damages for human rights violations.³⁷ The traditional grounds of judicial review in the UK are illegality, procedural impropriety, and irrationality.³⁸ After the enforcement of the HRA 1998, the Convention rights that have been given effect by the Act have become new heads of judicial review.³⁹ The power of judicial review now covers not only the exercise of statutory powers but also the exercise of prerogative.⁴⁰ It also covers questions of acute political controversy such as the ban on the broadcast of speeches by terrorist supporters⁴¹ and the disposal of nuclear

³⁵ Human Rights Act 1998, s 19.

³⁶ See Jeffery Jowell, *The Rule of Law and Its Underlying Values* (6th edn, OUP 2007) 16.

³⁷ Fenwick and Phillipson (n 11) 705; Tomkins, *Public law* (n 1)170–72.

³⁸ *CCSU v Minister for Civil Service (the GCHQ case)* [1985] AC 374, 410 (Lord Diplock).

³⁹ HRA 1998, s 6.

⁴⁰ The court has confirmed that the justiciability depended on the 'nature' rather than the 'source' of powers. *CCSU* (n 38). See now *R v Secretary of State for Foreign and Commonwealth Affairs (No 2), ex p Bancoult* [2008] UKHL 61.

⁴¹ *R v Secretary of State for the Home Department, ex p Brind* [1991]1 AC 696 (HL).

waste.⁴² This is although courts have to decide these issues on legal and not political grounds.⁴³

The traditional model of justification for judicial review of executive acts is based on the concept of *ultra vires* – literally meaning ‘beyond granted power’. Originating from respect for Parliamentary sovereignty, the concept holds that the executive cannot act beyond what Parliament intends it to do, and the courts have the power to review the executive’s actions because this enforces Parliament’s intention.⁴⁴ However, the *ultra vires* doctrine has been attacked for being ‘indeterminate, unrealistic, beset by internal tensions and unable to explain the application of public law principles to those bodies which did not derive their power from statutes’.⁴⁵ An alternative model of justification is based on the common law power of the courts. Laws and Craig forcefully argue that fundamental principles for judicial review, such as the duty to hear the other side, the purposive implementation of statutes, legitimate expectations, and the irrationality test, are more readily described as being court-made principles than as being underpinned by Parliamentary intent.⁴⁶

For the purpose of this research, it is pointed out that the divided opinions over the models of justification of judicial review reflect the disagreement regarding the proper role of the judiciary which, in turn, may affect the sources to which courts may refer in interpreting legislation. The common law model of justification, which emphasises the wider power of the courts to uphold the rule of law, not only in the formal but also in the substantive sense, seems to allow

⁴² *R v Inspectorate of Pollution, ex p Greenpeace Ltd (No 1)* [1994] 1 WLR 570 (CA).

⁴³ See eg Lord Reid, ‘The Judge as Law Maker’ (1972–1973) 12 *Society of Public Teachers of Law* 22, 23 submitting that judges ‘must not take sides on political issues’.

⁴⁴ Christopher Forsyth and Mark Elliott, ‘The Legitimacy of Judicial Review’ [2003] *PL* 286, 119–20.

⁴⁵ Paul Craig, ‘Competing Models of Judicial Review’ [1999] *PL* 428, 429. See also Dawn Oliver, ‘Is the *Ultra Vires* Rule Basis of Judicial Review?’ [1987] *PL* 543.

⁴⁶ John Laws, ‘Law and Democracy’ [1995] *PL* 72, 77–79; Craig, ‘Competing Models of Judicial Review’ (n 45) 435.

wider extrinsic sources of interpretation, whereas the ultra vires model would limit the sources of interpretation to those that can reflect Parliament's intention.⁴⁷ Since Parliamentary sovereignty has become less absolute than before, it is argued that the movement is towards the common law model. In fact, those who advocate the ultra vires model seem to acknowledge this and so offer a modified concept. While acceding that in most circumstances the 'specific' intention of Parliament for limitation of executive actions cannot be found, they provide that 'Parliament has a general intent in granting discretionary powers, that they should be exercised in accordance with the rule of law; and that the judges in ensuring that powers are so exercised are acting in accordance with that general intent'.⁴⁸

The next and perhaps the most important issue that should be discussed under this heading is the standard of review. Traditionally, in reviewing the rationality of the executive acts, the courts adopted the *Wednesbury* standard which holds that irrationality occurs when an administrative action is 'so unreasonable that no reasonable authority could ever have come to it'.⁴⁹ The *Wednesbury* standard comes from the notion that judicial review does *not* confer on courts the power to review the 'merits' of the decisions of public authorities. Courts are not concerned whether the right decisions have been made; instead, they are concerned whether in making such decisions public authorities have actually acted unlawfully.⁵⁰ It has been argued that judges should defer to the Government when the issue involves a decision based on policy. It is reasoned, on the basis of separation of powers, that by enacting a statute Parliament

⁴⁷ Issues relating to the interpretative approaches are discussed further in section II B i.

⁴⁸ Forsyth and Elliott (n 44) 287. See also Mark Elliott, 'The Demise of Parliamentary Sovereignty? The Implications for Justifying Judicial Review' (1999) 115 LQR 119; Christopher Forsyth, 'Of Fig Leaves and Fairy Tales: the Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review' (1996) 55 CLJ 122.

⁴⁹ *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223 (CA) 230.

⁵⁰ A Horne and G Berman, 'Judicial Review: A Short Guide to Claims in the Administrative Court' (HC Library Research Papers 06/44, 2006) <<http://www.parliament.uk/commons/lib/research/rp2006/rp06-044.pdf>> accessed 19 April 2008

entrusts specific powers to a public authority and not to courts. Courts lack the expertise to make decisions that Parliament intends public authorities to make. Moreover, public authorities are elected according to the democratic process and so are accountable to the people, while judges are not.⁵¹ Nevertheless, the standard of irrationality has been widely criticised as giving too wide a freedom of discretion to the executive, especially in the areas that affect fundamental rights.⁵² Arguably, it was not right to give the final power to limit individual rights to the state or majority when such individual rights are rights against the state or majority itself.⁵³

Before the HRA 1998, the courts, being influenced by the then unincorporated ECHR, had shown a certain degree of willingness to subject executive actions to a more ‘anxious’ scrutiny depending on the importance of the rights in question in a series of cases.⁵⁴ Now that the HRA has been in force and it has become ‘unlawful for a public authority to act in a way which is incompatible with a Convention right’,⁵⁵ the proportionality standard, which requires a balance between the interest of the government and the protection of an individual’s rights, seems to be used in place of the *Wednesbury* standard in cases relating to a Convention right.⁵⁶ This issue will be discussed further in the section concerning the interpretive effect of the ECHR after the HRA below.⁵⁷

⁵¹ Lord Irvine of Lairg, ‘Judges and Decision Makers: The Theory and Practice of *Wednesbury* Review’ [1996] PL 59, 60–61; Richard Clayton, ‘Judicial Deference and “Democratic Dialogue”’: The Legitimacy of Judicial Intervention under the Human Rights Act 1998’ [2004] PL 33, 40–41.

⁵² Tomkins, *Public law* (n 1) 177.

⁵³ Martin Norris, ‘Ex Parte Smith: Irrationality and Human Rights’ [1996] PL 590, 598–99.

⁵⁴ *Bugdaycay v Secretary of State for the Home Department* [1987] AC 514 (HL); *R v Secretary of State for the Home Department ex p Brind* [1991] 1 AC 696 (HL); *R v Ministry of Defence, ex p Smith* [1996] QB 517 (CA). This will be discussed further in the text to nn 190–193.

⁵⁵ HRA 1998, s 6.

⁵⁶ *R v Secretary of State for the Home Department, ex p Daly* [2001] UKHL 26, [2001] 2 AC 532, 543, 547; Tomkins, *Public law* (n 1) 198. It is noted, however, that the proportionality standard is not so apparent in those cases where Convention issues are not raised.

⁵⁷ See text to n 226 onward.

It is important to note, however, that the courts still exercise only a secondary review.⁵⁸ The courts have recognised ‘an area of discretionary judgment belonging to decision-making bodies’,⁵⁹ which is different from a ‘normative question of proportionality’, the question for the courts to decide.⁶⁰ In *Kebele*, Lord Hope endorsed the point made by Lord Lester of Herne Hill and Mr Pannick that deference to the other two branches ought to be more likely in those cases in which a balance needs to be struck between individuals’ rights and the needs of the society, or in those cases which involve social, economic or political factors, than in cases in which rights are of high constitutional importance.⁶¹ A similar approach was also advanced by Law LJ in *International Transport Roth GmbH*. Four flexible principles were offered. Firstly, ‘greater deference is to be paid to an Act of Parliament than to a decision of the executive or subordinate measure’.⁶² Secondly, there would be ‘more scope for deference “where the Convention itself requires a balance to be struck, much less so where the right is stated in terms which are unqualified”’.⁶³ Thirdly, ‘greater deference will be due to the democratic powers where the subject-matter in hand is peculiarly within

⁵⁸ See *Daly* (n 56) 548 (Lord Steyn).

⁵⁹ Helen Fenwick and Gavin Phillipson, *Media Freedom under the Human Rights Act* (OUP 2006) 149.

⁶⁰ *ibid* 153. See also Gavin Phillipson, ‘Deference, Discretion and Democracy in the Human Rights Act Era’ (2007) 60 *Current Legal Problems* 40, 72. The example can be seen in the case of *A v Secretary of state for the Home Department* [2005] AC 68 where the question of the existence of ‘public emergency threatening the life of the nation’ had to be decided by the Government but the question of the proportionality of the Government’s measure had to be decided by the court.

⁶¹ *R v DPP, ex p Kebele* [2000] 2 AC 326 (HL) 381.

⁶² *International Transport Roth GmbH v Secretary of State for the Home Office* [2002] 3 WLR 344, [83]. However, the cogency of this principle has been criticised by Kavanagh and Hunt, and seems to be disavowed by Laws himself. See Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (CUP 2009) 196, 204–205; Murray Hunt, ‘Sovereignty’s Blight: Why Contemporary Public Law Needs the Concept of “Due Deference”’ in Nicholas Bamforth and Peter Leyland, *Public Law in a Multi-Layered Constitution* (Hart 2003) 357 fn 55; *Huang v SSHD* [2005] 3 WLR 488 (CA) [58] (Laws LJ).

⁶³ *ibid* [84] internal quotation was from Lord Hope in *Kebele*. The plausibility of this second principle is subject to criticism by Kavanagh based on the distinction between qualified and unqualified rights. Kavanagh, *Constitutional Review* (n 62) 204–05.

their constitutional responsibility, and less when it lies more particularly within the constitutional responsibility of the courts'.⁶⁴ And lastly, 'greater or lesser deference will be due according to whether the subject matter lies more readily within the actual or potential expertise of the democratic powers or the courts'.⁶⁵

However, deference based on an 'area' of discretionary judgment has been widely criticised.⁶⁶ Hunt and Kavanagh argue that since the subject-matter of cases often overlap, it is difficult to classify them into particular areas. Moreover, it is argued that the idea practically discourages judges from inquiring into the justifications underlying actions of the other two branches and results in abdication of judicial duty imposed by the HRA.⁶⁷ Instead of looking at the areas in which the subject-matters of the case fall, Hunt argues, courts should look at the 'specific issue' regarding which the primary decision maker has made a decision. The degree of deference to be shown depends on different factors including but not limited to those identified by Laws such as the nature of the rights in question and the relative expertise and degree of democratic accountability of the primary decision makers.⁶⁸

In *Huang*, the House of Lords seemed to abandon the doctrinal approach and adopt what has been called a non-doctrinal approach,⁶⁹ stating:

⁶⁴ *ibid* [85].

⁶⁵ *ibid* [86].

⁶⁶ It is noted that although Laws LJ's principles seem to suggest that the degree of deference shall be varied from cases to cases, Hunt and Kavanagh still categorise them as 'spatial' approaches. Hunt 'Sovereignty's Blight' (n 62) 360; Kavanagh, *Constitutional Review* (n 62) 204.

⁶⁷ Hunt 'Sovereignty's Blight' (n 62) 346–47. Kavanagh, *Constitutional Review* (n 62) 202–03.

⁶⁸ Hunt 'Sovereignty's Blight' (n 62) 353–54.

⁶⁹ Jeffery King describes the non-doctrinal approach as the one suggesting that 'there should be no doctrine articulated in advance, and that judges should decide upon the appropriate degree of restraint on a case-by-case basis'. Jeff A King, 'Institutional Approaches to Judicial Restraint' (2008) 28 OJLS 409, 411.

The giving of weight to factors such as these is not, in our opinion, aptly described as deference: it is performance of the ordinary judicial task of weighing up the competing considerations on each side and *according appropriate weight to the judgment of a person with responsibility for a given subject matter and access to special sources of knowledge and advice.*⁷⁰

Therefore, judges are to use discretion as to whether to restrain, and if so to what degree, on a case-by-case basis. In this respect, Phillipson argues that account should be taken of the fact that several layers of deference to majoritarian or democratic governance have already been built into the provisions of the ECHR, the judgments of the ECtHR (especially those relying on the doctrine of margin of appreciation), and the HRA itself. Therefore, the courts should decide the proportionality issues on the basis of law, except in respect of factual issues in which the decision-makers have expertise.⁷¹

The issues of proportionality and judicial deference have been discussed widely, especially in the context of the Human Rights Act.⁷² For the purpose of this research, it should be pointed out that these issues could affect the courts' ability and willingness to refer to international human rights norms. To be more specific, it is submitted that courts may be more able and willing to refer to international human rights norms in issues that are within their jurisdiction and expertise than in issues where substantial weight should be given to decisions of the elected branches. However, there are other factors that affect the use of international human rights norms in domestic courts. These will be discussed further below.

⁷⁰ *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [16].

⁷¹ Phillipson (n 60) 68–72. See also Francesco Klug, 'Judicial Deference under the Human Rights Act 1998' [2003] EHRLR 125 arguing that there should not be any issues that are always shielded from judicial review and that there is no need to develop complicated doctrines of judicial review. The issue of deference is closely related to the current controversy on the use of sections 3 and 4 of the HRA, which will be discussed in section IV B ii a of this Chapter.

⁷² For further discussion about judicial deference see, for example, King (n 69); Jeffery Jowell, 'Judicial Deference: Servility, Civility or Institutional Capacity' [2003] PL 592; Alison L Young, 'In Defence of Due Deference' (2009) 72 MLR 554.

B. Interpretive Approaches

i. General Interpretive Approaches

There are no systematic and coherent jurisprudences on rules of statutory interpretation in general.⁷³ It can be said, however, that Parliamentary sovereignty has had a significant influence on the interpretive approach of the UK courts. Traditionally, the literal rule of interpretation, which held that judges were supposed to ‘faithfully and strictly’ enforce the will of Parliament as reflected in the ‘plain meaning’ of statutes, was adopted.⁷⁴ The courts used to follow the literal approach strictly to the extent that, apart from the words, other sources of interpretation outside the statute book itself were disregarded. Even the legislative history of the statute or *Hansard* was not allowed to be used in interpreting law.⁷⁵

However, the impracticality of the literal rule itself has led English judges to turn to a purposive technique of interpretation. In cases where literal interpretation would bring about an absurdity, judges have been willing to consider the consequences of an interpretation and the purposes of statutes as factors that are relevant in interpretation.⁷⁶ The penetration of European Community – now European Union – law has also made purposive interpretation more prominent in the UK. The European Communities Act (ECA) 1972 instructs courts to interpret domestic law to be consistent with principles laid down by the European Court of

⁷³ Ian McLeod, *Legal Method* (Palgrave Macmillan 2002) 259–60. There were attempts by Parliament to regulate the courts’ interpretation, the most notable being the Interpretation Act 1978. However, it has been generally accepted that interpretation is the task of the Judiciary, with which other branches should not interfere. William Twining and David Miers, *How to Do Things with Rules* (CUP 2010) 239.

⁷⁴ John Bridge, ‘National Legal Tradition and Community Law: Legislative Drafting and Judicial Interpretation in England and the European Community’ (1981) 19 *JCMS* 351, 363; Lord Lester of Herne Hill (n 16) 72.

⁷⁵ Bridge (n 74) 364.

⁷⁶ *ibid* 364–65.

Justice,⁷⁷ whose interpretive approach is mainly teleological thanks to the text of the treaties, which generally lack precision and provide only general principles.⁷⁸ The House of Lords admitted that the English literal rule may not be suitable for dealing with Community law.⁷⁹ Later decisions from the House itself and the Court of Appeal further showed the trend towards purposive interpretation.⁸⁰ More recently, the HRA 1998 also instructs judges to adopt purposive interpretation by requiring them to interpret domestic law so as to give effect to the Convention rights.⁸¹ In fact, the interpretive obligation under the Act may be taken as allowing judges to strain the meaning of the words used in a statute.⁸²

The consequence of a more purposive approach is that sources outside the text may play a role in statutory interpretation. The House of Lords qualified the prohibition regarding the use of *Hansard*, holding that courts could refer to statements made in Parliament where legislation was ambiguous or obscure or would lead to an absurdity.⁸³ Reports of several commissions in relation to the enactment of legislation and international treaties which are incorporated into domestic law may also be referred to in order to ascertain the meaning and purpose of legislation.⁸⁴

Moreover, the UK courts have now accepted that a statute is to be interpreted taking into account the *current meaning* of the text.⁸⁵ For example, the House of Lords, in *R v Ireland*, took into account contemporary scientific knowledge and

⁷⁷ European Communities Act 1972, s 3(1).

⁷⁸ Bridge (n 74) 366–69.

⁷⁹ See Lord Diplock's opinion in *R v Henn (Maurice Donald)* [1981] AC 850 (HL) [14].

⁸⁰ See, for example, *HP Bulmer Ltd v J Bollinger SA (No 2)* [1974] Ch 401 (CA) 426.

⁸¹ HRA, s 3(1).

⁸² For example see *R v A (No 2)* [2001] UKHL 25, [2002] 1 AC 45 [44]–[46] (Lord Steyn). This issue will be discussed further in section IV ii a.

⁸³ *Pepper v Hart* [1992] UKHL 3.

⁸⁴ Twining and Miers (n 73) 260–61.

⁸⁵ Rupert Cross, *Statutory Interpretation* (3rd edn, 1995) 51–52.

interpreted the phrase ‘bodily harm’ to include ‘psychiatric harm’, despite the fact that the latter concept was not known at the time the statute containing the former phrase was enacted.⁸⁶ The dynamic interpretation applied especially in the areas of fundamental rights. In *Times Newspapers Ltd*, regarding the issue of freedom of expression, the Court interpreted ‘a public meeting’ to include ‘a press conference’, something which did not exist at the time the relevant statute was passed. In so doing, it recognised not only the invention of the press conference, but also the contemporary law of freedom of expression.⁸⁷ More obviously, Lord Hoffmann stated, in a case relating to the interpretation of a written Constitution of an overseas territory:

The fundamental rights provisions ... are expressed in general and abstract terms which invite the participation of the judiciary in giving them sufficient flesh to answer concrete questions ... The judges, in giving body and substance to fundamental rights, *will naturally be guided by what are thought to be the requirements of a just society in their own time* ... The text is a ‘*living instrument*’ when the terms in which it is expressed in their constitutional context invite and require periodic re-examination of its application to contemporary life.⁸⁸ (emphasis added)

Given the purposive and dynamic interpretive approaches, it can be envisaged that materials such as academic writings, international laws and foreign jurisprudences can be useful for the task of interpretation, although their relevance will vary considerably from case to case.

At this point, it should be acknowledged that the judiciary is to enjoy greater interpretative power. Some may argue that this is illegitimate since judges are unelected and lack of proper experience.⁸⁹ Some may also argued that judicial

⁸⁶ *R v Ireland* [1998] AC 147 (HL).

⁸⁷ *McCartan Turkington Breen v Times Newspapers Ltd* [2001] 2 AC 277 (HL).

⁸⁸ *Boyce v The Queen* [2004] UKPC 32, [2005] 1 AC 400 (PC) [28].

⁸⁹ J A G Griffith, ‘The Common Law and the Political Constitution’ (2001) 42 *LQR* 42, 64–65.

decisions are affected by individual judges' ideology, intuition and emotion.⁹⁰ However, others argue that judges are well trained to not let their personal viewpoints affect their decisions,⁹¹ and more importantly, it is to be remembered that such judicial powers are neither unlimited nor unconstrained.⁹² Parliament may make whatever law it deems appropriate, but judges are limited by the existing legal framework, the text of statutes⁹³ and identification of the issues by parties before they reach the courts.⁹⁴ Moreover, judges have a duty to provide reasons for their interpretation, and such reasons are subject to public criticism.⁹⁵ The constraints ensure that judicial interpretation is not arbitrary even in cases where judges are allowed a wide leeway for interpretation.

ii. The Principle of Legality

Since Dicey's time, the courts have helped to protect individuals' rights by defining the meaning and scope of legislation.⁹⁶ This task has been performed as part of the process of judicial review of executive acts aimed at ensuring that the executive branch does not act beyond its power. It is true that Parliament may enact whatever law it wishes, but it is also true that individuals are able to do everything not forbidden by law.⁹⁷ Although the literal rule of interpretation had

⁹⁰ Richard A Posner, *How Judges Think* (Harvard University Press 2008); J A G Griffith, 'The Common Law and the Political Constitution' (n 89) 64–65 arguing that judges must be judged by their policies.

⁹¹ *ibid*; Thomas Bingham, 'The European Convention on Human Rights: Time to Incorporate' (1993) 109 LQR 390, 398.

⁹² Twining and Miers (n 73) 145–47; Anthony Lester, 'English Judges as Law Makers' [1993] PL 269, 290.

⁹³ Aileen Kavanagh, 'The Elusive Divide between Interpretation and Legislation under the Human Rights Act 1998' (2004) 24 OJLS 259, 271.

⁹⁴ Twining and Miers (n 73) 145–47. See also Karl Llewellyn, *The Common Law Tradition* (1960).

⁹⁵ P S Atiyah, *Law and Modern Society* (2nd edn, OUP 1995) 28–29.

⁹⁶ Dicey (n 12) 197.

⁹⁷ Fenwick and Phillipson, *Text, Cases & Materials* (n 11) 840.

dominated the general statutory approach of courts in the UK, when it came to legislation that limited fundamental rights courts have adopted the ‘principle of legality’ – a court-made assumption that Parliament could not have intended to interfere with fundamental rights recognised by common law. Relying on such an assumption, if the violation of rights is not expressed clearly in specific language, courts will not interpret legislation to the effect that rights are limited.⁹⁸

A precursor to this tool of judicial reasoning can be found in *Anisminic Ltd Appellant v Foreign Compensation Commission*.⁹⁹ The issue concerned section 4(4) of the Foreign Compensation Act 1950, which said: ‘... the determination by the commission of any application made to them under this Act shall not be called in question in any court of law.’ This was a rather clear ouster of courts’ jurisdiction, but the House of Lords managed to construe the word ‘determination’ narrowly and allowed itself the jurisdiction to review the Commission’s action. Lord Reid reasoned:

If the draftsman or Parliament had intended to introduce a new kind of ouster clause so as to prevent any inquiry even as to whether the document relied on was a forgery, *I would have expected to find something much more specific* than the bald statement that a determination shall not be called in question in any court of law.¹⁰⁰ (emphasis added)

Wade and Forsyth comments that this interpretation adopted by the Court shows that it did not cling to literal interpretation when such would result in the courts being disarmed and subordinate authorities having uncontrollable power.¹⁰¹

The principle of legality applies also to the interpretation of legislation which confers certain powers on the executive. In *Witham*, the Lord Chancellor decided,

⁹⁸ Shaheed Fatima, *Using International Law in Domestic Courts* (Hart 2005) 296.

⁹⁹ [1969] 2 AC 147 (HL).

¹⁰⁰ *ibid* 170.

¹⁰¹ William Wade and Christopher Forsyth, *Administrative Law* (10th edn, OUP 2009) 614–15.

according to the power conferred on him by legislation, to prescribe the fees to be taken in the Supreme Court, and to cancel the provision excusing litigants who received income support from paying court fees and the provision allowing the Lord Chancellor to reduce or waive court fees in cases of financial hardship. The litigant in this case depended on those cancelled provisions in order to be able to exercise his right to access to a court; consequently, the Lord Chancellor's decision resulted in removal of such rights. Therefore, it was held that the decision was ultra vires because the legislation did not specifically confer such power on the Lord Chancellor.¹⁰²

Also, in *Wheeler v Leicester City Council*, the issue was whether the council properly exercised its powers under the Race Relations Act in banning a rugby club from using its recreation ground because it had failed to observe the council's policy against sporting links with apartheid countries. The House of Lords held that although the Act imposed on the council the duty to discourage unlawful racial discrimination, the club did not violate any law. The council, thus, abused its statutory power. Its decision was unreasonable, in breach of its duty to act fairly, which amounted to procedural impropriety.¹⁰³ The approach of Brown-Wilkinson LJ in his dissenting judgment in the Court of Appeal for the same case was of importance. He expressed the view that 'Parliament (being sovereign) can legislate so as to do so; *but it cannot be taken to have conferred such a right on others save by express words*'.¹⁰⁴

More recently, in *Simms*, the House of Lords employed the same principle in upholding freedom of expression. Lord Hoffmann explained that the blanket ban

¹⁰² *R v Lord Chancellor, ex p Witham* [1998] QB 575 (QB).

¹⁰³ [1985] AC 1054 (HL).

¹⁰⁴ *Wheeler v Leicester City Council* [1985] AC 1054 (HL) 1065 (emphasis added). See also *R v Secretary of State for the Home Department, ex p Leech (No 2)* [1994] QB 198 (CA) where the Court of Appeal interpreted a power of a prison governor according to a statute narrowly in order to uphold a prisoner's right to a solicitor.

on prisoner interviews with journalists exceeded the powers of the statute which conferred power on the Government, because

the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. *Fundamental rights cannot be overridden by general or ambiguous words.* This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.¹⁰⁵

Following the HRA, UK citizens have positive rights in the sense that they may bring cases to the courts if public authorities fail to respect their convention rights.¹⁰⁶ More importantly for the purpose of this research, in cases where the violations of convention rights rely on power conferred by legislation, the judiciary seems to have an increased interpretive power against Acts of Parliament. Section 3 of the Act specifically instructs that all legislation is to be read in the light of certain rights specified in the ECHR.¹⁰⁷ Convention rights have become more or less like standards for a principle of legality in place of common law fundamental rights. This issue will be discussed further in section IV B ii.

III. International and Foreign Law in the United Kingdom

It can already be seen from the previous two sections that international sources of law, especially EU law and the ECHR, have had a powerful influence on the UK's legal system. This section seeks to identify the approach of the UK in

¹⁰⁵ *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115 (HL) 131.

¹⁰⁶ HRA, s 6 (1).

¹⁰⁷ These are rights according to Articles 2–12, 14 of the Convention, Articles 1–3 of the First Protocol, and Article 1 of the Thirteenth Protocol. HRA 1998, s 1(1).

accepting international and foreign norms, including these two, into its legal system.

A. Legal Status of International and Foreign Law in the Legal System and their Effect upon it

In the UK, the dualist view that international and foreign law is a set of norms separate from domestic law, and thus cannot be automatically enforced in domestic courts, is accepted. This view is imposed on the UK by its own constitutional imperatives. Parliamentary sovereignty requires that only Parliament can make law and that its law is supreme. Therefore, international law made by an international community outside the knowledge of Parliament cannot have the same effect as law made in the UK. It also follows from the separation of powers doctrine that the judiciary must restrain itself from giving domestic effect to such international law, otherwise it intervenes with the function of Parliament.¹⁰⁸

The contradiction between international law and domestic law resulting from the dualist approach is said to be ‘the price which is paid for the benefits of self-governance via a democratic system’.¹⁰⁹ In *Mortensen v Peters*, the court said:

In this Court we have nothing to do with the question of whether the legislature has or has not done what foreign powers may consider a usurpation in a question with them. Neither are we a tribunal sitting to decide whether an act of the legislature is *ultra vires* as in contravention of generally acknowledged principles of international law. For us, an Act of Parliament duly passed by Lords and Commons and assented to by the King, is supreme, and we are bound to give effect to its terms.¹¹⁰

¹⁰⁸ Phillip Sales and Joanne Clement, ‘International Law in Domestic Courts: The Developing Framework’ (2008) 124 LQR 388, 390.

¹⁰⁹ *ibid* 390.

¹¹⁰ (1906) 8 F (J) 93 (HC) 100.

i. Treaties

The dualist approach is clear for international laws that are in the form of treaties. It is firmly established in the UK that treaties are not parts of, and have no direct effect within, the domestic regime unless and until they have been transformed into UK law by Acts of Parliament.¹¹¹

ii. Customary International Law

In respect of customary international law, courts in the UK have long adopted the incorporation doctrine, meaning that the rules of customary international law are parts of its law without any further process.¹¹² However, the dualist view has created limitations to this principle. Customary international law can apply only in cases where it does not contradict with a statute.¹¹³ Moreover, in ascertaining the substance and scope of customary international law, courts usually refer to their own previous decisions rather than recognise new ones accepted in the international community.¹¹⁴

There is a case that may support the arguments for a limited role of the CIL. In *R v Jones (Margaret)*, Lord Bingham observed:

I would for my part hesitate, at any rate without much fuller argument, to accept this proposition in quite the unqualified terms in which it has often been stated. There seems to be truth ... that

¹¹¹ *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418 (HL) 499–500. It is noted that, in practice, the Government will not ratify the treaties until 21 parliament days after the treaties have been laid before both Houses of the Parliament have passed. This is known as the Ponsonby Rule. Moreover, see now the Constitutional Reform and Governance Act 2010, Part II requiring that certain treaties have to be laid before Parliament before ratification.

¹¹² *Trendtex Trading Corp v Central Bank of Nigeria* [1977] QB 529 (CA), 554.

¹¹³ Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (7th edn, Routledge 1997) 69–70.

¹¹⁴ *ibid.*

international law is not a part, but is one of the sources, of English law.¹¹⁵

He then held that the customary international law cannot establish a criminal offence in national courts because English courts may apply customary international law only when permitted to do so by the Constitution.¹¹⁶ Although what the Constitution permits for other issues is not yet clear,¹¹⁷ it can be concluded that the direct effect of customary international law seems to be severely limited in the UK.

iii. Interpretive Influence of International and Foreign Law

The dualist concept and principle of no direct effect discussed above does not mean that unincorporated international law has no role at all in domestic courts. In fact, courts have adopted the ‘presumption of compatibility’ as a tool for developing common law and construing a statute in a way compatible with the country’s international obligations.¹¹⁸ In relation to the common law, the presumption of compatibility applies on the basis of a court-made legal policy that domestic law should conform to international law. In relation to statute, the principle is based on the presumption that Parliament could not have intended to violate international obligations.¹¹⁹

Apart from international treaties which enjoy the presumption of compatibility, it is well-established that jurisprudences of international courts, and laws and jurisprudences of other countries, are *relevant* in cases where courts have to

¹¹⁵ [2006] UKHL 16, [2007] 1 AC 136.

¹¹⁶ *ibid* [23] citing Roger O’Keefe, ‘Customary International Crimes in English Courts’ (2001) BYBIL 293, 335.

¹¹⁷ Sales and Clement (n 108) 419–20 offer a set of criteria based on the British constitutional law, but they have not yet been endorsed by case law.

¹¹⁸ The practice can be found as early as 1967. *Salomon v Customs and Excise Commissioners* [1967] 2 QB 116 (CA).

¹¹⁹ *Fatima* (n 98) 294–96, 341.

ascertain international law or interpret statutes that were enacted in order to implement international obligations.¹²⁰ Furthermore, UK courts generally seek guidance or inspiration from international and foreign laws in cases where domestic authority provides no clear answer or points towards an unjust solution.¹²¹ These kinds of materials not only can offer a variety of solutions for domestic courts to consider, but may also serve to ensure that a solution the courts wish to adopt is not likely to cause harm in their own system.¹²² In the case of problems that spread beyond national borders, international and foreign jurisprudences also ‘prompt anxious review of the decision in question’.¹²³

The interpretive influence of international and foreign law will be discussed further, in the context of international human rights, in section IV below.

B. The Impact of European Union Law on the UK’s Dualist Approach

Despite the dualist view held by the UK, it is now undeniable that European Union (EU) law, previously European Community (EC) law, has penetrated into the legal system and has even superseded contradictory domestic law.¹²⁴ The impact this causes on the recognition of international and foreign law in the UK courts is worth discussing here.

Upon accession to what was then the EC, Parliament enacted the European Communities Act 1972. Sections 2(1) and (4) of the ECA 1972 give legal effect to ‘enforceable community rights’ and instruct courts to construe legislations

¹²⁰ Tom Bingham, *Widening Horizons: The Influence of Comparative Law and International Law on Domestic Law* (CUP 2010) Chapter 2.

¹²¹ *ibid* 8.

¹²² *ibid* Chapter 1.

¹²³ *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22 [32] (Lord Bingham).

¹²⁴ Since the Lisbon Treaty came into effect, all previous element of EC and EU laws have been called EU law.

‘passed or to be passed’ in accordance with such rights.¹²⁵ Further, section 3(1) of the same Act provides that any question as to the meaning or effect of community law shall be treated as a question of law and be determined in accordance with principles laid down by the European Court of Justice.¹²⁶

Although UK courts did *not* accept the direct effect and supremacy of the EU law immediately, they interpreted statutes so as to be compatible with it.¹²⁷ The presumption of compatibility discussed above was used *without the condition that the statutes in question were ambiguous*.¹²⁸ The direct effect and supremacy of EU law were eventually accepted in *Factortame (No 2)*, held in 1991, where the House of Lords effectively suspended the application of the Merchant Shipping Act 1988 which was alleged to violate the ‘free movement of goods and people’ protected by EU law.¹²⁹ This case attracted widespread criticism, for it seemed to be inconsistent with the Parliamentary sovereignty doctrine, especially its negative aspect.¹³⁰ However, Lord Bridge submitted that Parliament, in enacting the ECA 1972, ‘voluntarily’ limited its own sovereignty.¹³¹

The UK courts have also been influenced by the principle of ‘indirect effect’ introduced by the ECJ. The principle holds that ‘national courts are required to interpret their national law in the light of the wording and the purpose of the [EU

¹²⁵ European Communities Act 1972, s 2 (1)(4).

¹²⁶ European Communities Act, s 3(1).

¹²⁷ *Macarthy Ltd v Smith* [1979] 3 All ER 325 (CA) 329 (Lord Denning).

¹²⁸ *Garland v British Rail Engineering* [1983] 2 AC 751 (HL) 771. For commentaries see Murray Hunt, *Using Human Rights Law in English Courts* (Hart 1998) 18.

¹²⁹ *R v Secretary of State for Transport, ex p Factortame Ltd (No 2)* [1991] 1 AC 603 (HL).

¹³⁰ But arguably, the doctrine may still be technically correct since the court did not invalidate the Act. It just disapplied the Act in relation to EC nationals. Fenwick and Phillipson *Text, Cases & Materials* (n 11) 182–84.

¹³¹ *Factortame Ltd (No 2)* (n 129). Many scholars sought to offer explanations for *Factortame*. See HWR Wade, ‘The Basis of Legal Sovereignty’ [1955] CLJ 172; HWR Wade, ‘Sovereignty – Revolution or Evolution?’ (1996) 112 LQR 568; TRS Allan, ‘Parliamentary Sovereignty: Law, Politics, and Revolution’ (1997) 113 LQR 443; Laws (n 46) 89.

law that does not have direct effect] in order to achieve the result referred to in Article 189(3) EEC',¹³² 'in so far as they are given discretion to do so under national law'.¹³³ At first, the House of Lords applied this principle of construction *with the condition* that the statutes in question had been passed in order to implement the relevant Directives.¹³⁴ However, the Court later admitted, in *Webb v EMO Air Cargo (UK)*, that it had a duty to 'accord with the interpretation of the Directive as laid down by the European Court of Justice' no matter whether 'the domestic legislation came after or, as in this case, preceded the Directive'.¹³⁵

Given that EU law has asserted a strong influence on the UK legal system and judicial reasoning and that Parliamentary sovereignty, which is the underlying concept of the dualist, has declined, the important question here is whether courts will allow other international treaties to have more effect in the UK legal system. The answer may depend on which of the justifications provided by scholars correctly explain the courts' practice in cases relating to EU law. If the view that courts' decisions derived their authorities only from the ECA 1972¹³⁶ is accepted, it is unlikely that international norms beyond EU law will enjoy the same status. However, if it is accepted that courts have been developing common law principles in order to recognise the normative force of EU law,¹³⁷ the other kinds

¹³² Case C-14/83 *Von Colson v Land Nordrhein-Westfalen* [1984] ECR 1891 para 26.

¹³³ Case 79/83 *Dorit Harz v Deutsche Tradax GmbH* [1984] ECR 1921 para 2.

¹³⁴ *Litster v Forth Dry Dock & Engineering Co Ltd* [1990] 1 AC 546 (HL) 576-77.

¹³⁵ [1993] 1 WLR 49 (HL) 59.

¹³⁶ See text to n 131 discussing Lord Bridge's reasoning in *Factortame (No 2)*. See also opinion of Laws LJ, who believes that the Court in this case was just exercising an ordinary statutory construction according to the ECA 1972, section 2(4), which provides a rule of construction that statutes shall be read in accordance with Community law. Laws (n 46) 89.

¹³⁷ Hunt argues that the ECA and sovereignty theory did not provide any justification. The Court changed its interpretive methods on the basis of the 'judicial acceptance of the growing normativity of Community law as the political and legal integration of Europe proceeds'. Hunt (n 128) 90, 96. Loveland also believes that the Court changed its approach not only because of the ECA but also because the social and economic conditions in the country had changed as a result of its membership of the European Union. Loveland (n 11) 478-79.

of unincorporated international norms may stand a chance of being upheld by the courts, on a case-by-case basis dependent on their normative force.

The fact that courts did not grant direct effect and supremacy to the then Community law immediately after the ECA 1972 entered into force, but rather developed case law gradually to accommodate it, may support the latter opinion. However, there is another way of looking at this phenomenon. It may be argued that even with guidance from Parliament, the courts were still attached to the dualist view and thus reluctant to grant direct effect and supremacy to such a regime of law. Hence, international norms that do not have support from statutes are likely to be strictly subject to the traditional dualist principles. Alternatively and perhaps more reasonably, it could also be argued that UK courts gave special treatment to EU law because of the combination of the ECA and its normative force. Therefore, the dualist concept still applies generally.

It is noted, however, that the tide of the EU law has opened the door for judges in the UK to experience a set of norms beyond the national borders. Such international sources have influenced not only the substance of domestic law but also the application of traditional constitutional principles and methods of interpretation. Thus, although the dualist concept still prevails, it is likely that courts will be inspired to look at the international and foreign norms as persuasive sources in judicial reasoning more often than before.

IV. International Human Rights Norms in the UK

A. Legal Status of International Human Rights Norms and Their Effect on the Legal System

The UK has ratified several human rights agreements covering a wide range of rights: the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of All Forms of Racial

Discrimination, the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data, and, most importantly, the European Convention on Human Rights and Fundamental Freedoms (ECHR).¹³⁸

So far, the ECHR has been given effect by the Human Rights Act 1998. The ICCPR and Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment have been given effect, in part, by the Criminal Justice Act 1988. The Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data has been given effect by the Data Protection Act 1998. International human rights norms in these instruments become parts of UK law in so far as they have been incorporated.

For unincorporated instruments, they simply do not have direct effect in the UK legal system. Lord Bridge ruled in *Brind* on the status of the (then) unincorporated ECHR:

It is accepted, of course, by the applicants that, like any other treaty obligations which have not been embodied in the law by statute, the Convention is not part of the domestic law, that the courts accordingly have no power to enforce Convention rights directly and that, if domestic legislation conflicts with the Convention, the courts must nevertheless enforce it.¹³⁹

More recently, in *Re McKerr*, although Lord Steyn did observe that, in the context of human rights treaties, the principle that international law is not part of domestic law should be re-examined, the House of Lords held that that the ECHR was not part of domestic law except in so far as it was incorporated into

¹³⁸ BBC World Service <http://www.bbc.co.uk/worldservice/people/features/ihavearightto/four_b/latest.shtml> accessed 8 July 2010.

¹³⁹ *R v Secretary of State for the Home Department ex p Brind* [1991]1 AC 696 (HL) 747.

the Human Rights Act 1998, and it was not appropriate for the court to impose positive human rights obligations, especially in an area regulated by legislation.¹⁴⁰ Consistently with the latter, Sales and Clement provide arguments against special treatment for international human rights treaties: the Crown has no authority to change domestic law by ratifying treaties; implementing international human rights imposes a burden on society and creates cost, which only Parliament can do; and enforcing unincorporated human rights treaties would be illegitimate judicial law making.¹⁴¹

B. Interpretive Influence of the International Human Rights Norms in the UK

Courts in the UK have made use of international human rights norms from several sources, including not only international human rights treaties but also human rights jurisprudences of other countries. However, this research devotes substantial attention to the interpretive influence of the ECHR and addresses the interpretive influence of other sources only briefly. This is because, among all sources of international human rights norms, the ECHR, which was established by the Council of Europe and provides for basic rights such as rights to life, fair hearing, privacy and freedom of expression, has been the most influential international human rights instrument in the UK to date. Moreover, the influence of the ECHR has *not* just emerged after the enforcement of the HRA 1998 which gives effect to most of the rights under the Convention. It has gradually asserted influence over the jurisprudence of the UK courts since the ratification of the Convention in 1951. The gap between the time of ratification of the ECHR and that of the enforcement of the HRA gives a unique opportunity for the research to compare the courts' approaches to the same set of international human rights norms in two different periods. This assists the research, not only in identifying a variety of approaches towards international human rights norms in the UK courts,

¹⁴⁰ *Re McKerr* [2004] UKHL 12, [2004] 1 WLR 807 [49]–[50].

¹⁴¹ Sales and Clement (n 108) 398–400.

but also in evaluating how and to what extent the legislative approval affects the courts' approaches towards international human rights norms.

i. The Courts' Use of Unincorporated ECHR

The ECHR had had a legitimate indirect role in judicial reasoning in the UK through the use of the principle of compatibility, discussed above in section III A

iii. In *R v Lyons*, Lord Bingham observed:

Even before the Human Rights Act 1998 the Convention exerted a persuasive and pervasive influence on judicial decision-making in this country, affecting the interpretation of ambiguous statutory provisions, guiding the exercise of discretions, bearing on the development of the common law.¹⁴²

Nevertheless, it is important to note that the interpretive role of the unincorporated ECHR had developed slowly. Hunt submitted that since the ratification until 1972, there were only 2 cases where UK courts *mentioned* the ECHR.¹⁴³ One was in 1964 relating to the immunity of the officers of the European Commission of Human Rights.¹⁴⁴ The other was in 1972, when the Convention was briefly mentioned in interpreting common law.¹⁴⁵ The first case in which UK courts *actually used* the ECHR as an interpretive tool was *R v Miah* in 1973.¹⁴⁶ However, Starmer and Klug found 316 cases between 1975 and 1996 that courts referred to the Convention, more than half of which were decided after 1991.¹⁴⁷ The sharp increase in the numbers of cases was likely to result

¹⁴² *R v Lyons (No 3)* [2002] UKHL 44, [2003] 1 AC 976 [13].

¹⁴³ Hunt (n 128) 131.

¹⁴⁴ *Zoernsch v Waldock* [1964] 1 WLR 675.

¹⁴⁵ *Broome v Cassell & Co Ltd* [1972] AC 1027, 1133 A.

¹⁴⁶ [1974] 1 WLR 675, 682.

¹⁴⁷ Keir Starmer and Francesca Klug, 'Incorporation through the back door?' [1997] PL 223, 223–24. They derive statistics from the research using LEXIS, searching the cases referring to the ECHR between January 1973 and July 1996.

from several judgments of the ECtHR which found the UK to be in breach of the Convention.¹⁴⁸ It was reported that by 1999 there were around fifty negative judgments against the UK involving almost all areas of rights.¹⁴⁹

In order to gain insights into the issue, the following subsections discuss the development of the courts' approach to the use of the ECHR in relation to statutory interpretation, common law development, judicial discretion and legitimate expectations, and then address the controversies around it.

a. Statutory Interpretation

One of the earliest cases in which UK courts referred explicitly to the ECHR was *Birdi v Secretary of State for Home Affairs*, where Lord Denning stated that courts 'could and should take the Convention into account in interpreting a statute. An Act of Parliament should be construed so as to conform to the Convention'.¹⁵⁰ No requirement that the statute in question had to be ambiguous was mentioned in this case. Moreover, Lord Denning claimed that '[i]f an Act of Parliament did not conform to the Convention, I might be inclined to hold it invalid'.¹⁵¹ This would make the ECHR different from other unincorporated international treaties and would, in effect, deny the Parliamentary sovereignty discussed in the previous sections.

¹⁴⁸ *ibid* 224–25, 232. The UK accepted individuals' rights to petition the Commission and the ECtHR in 1965. See also AW Bradley, 'The United Kingdom before the Strasbourg Court 1975–1990' in Wilson Finnie, Christopher Himsworth and Neil Walker (eds), *Edinburgh Essays in Public Law* (Edinburgh University 1991) discussing the ECtHR's decisions against the UK.

¹⁴⁹ Lord Lester, 'Chapter 1 History and Context' in Lord Lester and David Pannick (eds), *Human Rights Law and Practice* (Butterworth 1999) 8. The research uses the statistic as of 1999 because it reflected the UK performance under the Convention before the HRA came into force in 2000. More up-to-date statistics of violation can be found in the website of the ECtHR itself. <<http://www.echr.coe.int/ECHR/EN/Header/Reports+and+Statistics/Statistics/Statistical+information+by+year>> accessed 12 January 2012.

¹⁵⁰ (1975) 119 SJ 322 (CA).

¹⁵¹ *ibid*. The case is unreported. The quotation appears in Hunt (n 128) 134.

However, the effect of the ECHR according to this case was later limited by *Salamat Bibi*.¹⁵² Lord Denning recognised the ambiguity requirement:

The position as I understand it is that if there is any ambiguity in our statutes, or uncertainty in our law, then these courts can look to the Convention as an aid to clear up the ambiguity and uncertainty, seeking always to bring them into harmony with it.¹⁵³

The approach was confirmed in *Brind*, held in 1991. The case is of interest, as it stated the House of Lords' perception of the Convention not long before the Human Rights Act came into force. One of the issues in *Brind* was whether, in relation to the exercising of the power under the Broadcasting Act, the Secretary of State's discretion was presumed to be limited by the Convention. It was held:

When confronted with a simple choice between two possible interpretations of some specific statutory provision, the presumption whereby the courts prefer that which avoids conflict between our domestic legislation and our international treaty obligations is a mere canon of construction which involves no importation of international law into the domestic field. But where Parliament has conferred on the executive an administrative discretion without indicating the precise limits within which it must be exercised, to presume that it must be exercised within Convention limits would be to go *far beyond the resolution of an ambiguity*.¹⁵⁴ (emphasis added)

The court went on to give detailed reasons based on the constitutional arrangement:

It would be to impute to Parliament an intention not only that the executive should exercise the discretion in conformity with the

¹⁵² *R v Chief Immigration Officer, Heathrow Airport, ex p Bibi (Salamat)* [1976] 1 WLR 979 (CA).

¹⁵³ *ibid* 984–85.

¹⁵⁴ *R v Secretary of State for the Home Department ex p Brind* [1991] 1 AC 696 (HL) 748 (Lord Bridge).

Convention, but also that the domestic courts should enforce that conformity by the importation into domestic administrative law of the text of the Convention and the jurisprudence of the European Court of Human Rights in the interpretation and application of it ... When Parliament has been content for so long to leave those who complain that their Convention rights have been infringed to seek their remedy in Strasbourg, it would be surprising suddenly to find that the judiciary had, without Parliament's aid, the means to incorporate the Convention into such an important area of domestic law and I cannot escape the conclusion that this would be a judicial usurpation of the legislative function.¹⁵⁵

The requirement that executive actions be limited by terms of the Convention was seen as incorporating the Convention into domestic legal regime by the 'back door'.¹⁵⁶

It can be said that the unincorporated ECHR had interpretive effect on the UK statutes subject to the condition that the statutes had to be ambiguous. Notably, ambiguity in the sense that language in statutes may be flexible was not sufficient to allow courts to seek guidance from the Convention; a provision in a statute itself must be manifestly ambiguous.¹⁵⁷ The reason for limitations stemmed obviously from the concern over Parliamentary sovereignty and separation of powers.

b. Common Law Development

In just the same ways as they influenced statutory interpretation, the ECHR and jurisprudence of the ECtHR had a role in common law development. In *A-G v Guardian Newspapers Ltd (No 2)*, Lord Goff held, on the issue of common law

¹⁵⁵ *ibid.*

¹⁵⁶ *ibid* 718 (Lord Donaldson) 762 (Lord Ackner).

¹⁵⁷ PJ Duffy, 'English Law and The European Convention on Human Rights' (1980) 29 ICLQ 585, 590. Duffy also submits that what could be counted as ambiguous in this sense depended on the attitudes of judges towards the ECHR and the interpretation methods adopted – literal test, golden rule, mischief rule or something in-between.

on freedom of expression: ‘I conceive it to be my duty, when I am free to do so, to interpret the law in accordance with the obligations of the Crown under this treaty.’¹⁵⁸

However, the influence of the Convention on common law development tended to be limited to circumstances in which the common law was uncertain.¹⁵⁹ Where the law was certain, most of the cases from the House of Lords held that referring to the ECHR was not necessary and sometimes not appropriate. In *DPP v Jones*, Lord Slynn held:

Reference was also made to the European Convention for the Protection of Human Rights and Fundamental Freedoms ... *as indicating what our law should now be*. It is desirable to look at the Convention for guidance even at the present time, *but this is not a case in my opinion where there is any statutory ambiguity to be resolved or any doubt as to what the common law is*.¹⁶⁰
(emphasis added)

Nevertheless, there were exceptional cases. In *Choudhury*, although it seemed to be accepted that the common law of blasphemy was certain, the Divisional Court stated that it was ‘*necessary ... in the context of this case, to attempt to satisfy us that the United Kingdom is not in any event in breach of the Convention*’.¹⁶¹ This approach was endorsed by Balcombe LJ in *Derbyshire County Council v Times Newspapers*, where the issue was whether public authorities were entitled

¹⁵⁸ [1990] 1 AC 109 (HL) 283.

¹⁵⁹ See, for example, *Derbyshire CC v Times Newspapers Ltd* [1992] QB 770 (CA) 812 where Balcombe LJ stated that ‘[a]rticle 10 may be used when the common law (by which I include the doctrines of equity) is uncertain’; *R v Secretary of State for the Environment and the Secretary of State for Wales, ex p NALGO* [1993] Admin LR 785 where Neil LJ submitted that ‘[a]rticle 10 [of the ECHR] may also be used when the relevant rules of common law or equity are uncertain’.

¹⁶⁰ [1999] 2 AC 240 (HL) 265. See also *Witham* [1998] QB 575 (QB) 585 where the court noted that there was no need to refer to precedents of the ECtHR since the common law efficiently afforded protection of the right to access to the court.

¹⁶¹ *R v Chief Metropolitan Stipendiary Magistrate, ex p Choudhury* [1991] 1 QB 429 (QB) 449. See also Fenwick and Phillipson, *Media Freedom* (n 59) 486–88.

to sue for libel in order to protect their reputation according to the common law. Balcombe stated that '[e]ven if the common law is certain the courts will still, when appropriate, consider whether the United Kingdom is in breach of Article 10'.¹⁶²

In any case, the House of Lords seemed to develop a further approach towards the ECHR. Instead of considering the certainty or uncertainty of the common law, the Court simply claimed that principles laid down in the Convention and common law were identical. In *A-G v Guardian Newspapers Ltd (No 2)*, Lord Goff held:

The exercise of the right to freedom of expression under article 10 may be subject to restrictions (as are prescribed by law and are necessary in a democratic society) in relation to certain prescribed matters, which include 'the interests of national security' and 'preventing the disclosure of information received in confidence'. It is established in the jurisprudence of the European Court of Human Rights that the word 'necessary' in this context implies the existence of a pressing social need, and that interference with freedom of expression should be no more than is proportionate to the legitimate aim pursued. I have no reason to believe that English law, as applied in the courts, leads to any different conclusion.¹⁶³

Hunt argued that the consistency between common law and the ECHR and the ECtHR's jurisprudence in this area was actually in doubt.¹⁶⁴ Therefore, he believed that, by asserting common law and the ECHR to be identical, courts had

¹⁶² [1992] QB 770 (CA) 812. However, Butler-Sloss LJ stated that 'where the law is clear and unambiguous, either stated as the common law or enacted by Parliament, recourse to article 10 is unnecessary and inappropriate'. *ibid* 830.

¹⁶³ [1990] 1 AC 109 (HL) 283–84.

¹⁶⁴ Hunt (n 128) 12, 14.

found the way to develop common law using principles laid down in the Convention without answering the question about its status in domestic law.¹⁶⁵

The approach was used again in *Derbyshire*, where the House of Lords and the Court of Appeal agreed that common law and Article 10 of the ECHR were identical on the point that public authorities did not have rights to sue for defamation. However, there was a crucial difference in the approaches of the Court of Appeal and the House of Lords towards the ECHR. On the one hand, Balcombe LJ suggested:

So Article 10 does not establish any novel proposition under English law. Nevertheless, since it states the right to freedom of expression and the qualifications to that right in precise terms, it will be convenient to consider the question by reference to article 10 alone.¹⁶⁶

On the other, Lord Keith noted:

My Lords, I have reached my conclusion upon the common law of England without finding any need to rely upon the European Convention. My noble and learned friend, Lord Goff of Chieveley, in *Attorney-General v. Guardian Newspapers Ltd. (No. 2)* expressed the opinion that in the field of freedom of speech there was no difference in principle between English law on the subject and article 10 of the Convention. I agree, and can only add that I find it satisfactory to be able to conclude that the common law of England is consistent with the obligations assumed by the Crown under the Treaty in this particular field.¹⁶⁷ (internal citation omitted)

It can be seen that although both of the judges reached the same conclusion, they valued the ECHR differently. Balcombe LJ saw the Convention as an instrument

¹⁶⁵ *ibid* 185–86.

¹⁶⁶ *Derbyshire CC v Times Newspapers Ltd* [1992] QB 770 (CA) 812.

¹⁶⁷ *Derbyshire CC v Times Newspapers Ltd* [1993] AC 534 (HL) [1993] AC 534 (HL) 551.

describing rights in precise terms and was willing to refer to it instead of the common law. Lord Keith, on the other hand, saw the Convention as an international obligation. He was happy to see that common law was consistent with the Convention, but did not find it necessary to consider the Convention when deciding the case.

Of course, Hunt's observation that courts were simply developing common law from the Convention without admitting it in order to avoid criticism may be used to explain Lord Keith's approach. From such a viewpoint, the ECHR seemed to play an important role in developing common law. However, Starmer and Klug argued that 'the claim that the common law and the Convention "march arm in arm" is usually a prelude to ignoring the latter, or, at best, paying lip service to it'.¹⁶⁸ They referred to *Bennett*, where Lord Keith's dictum above was used to conclude that '[i]t follows, in my opinion, that a decision against the defendants in this case ... if in accordance with English law does not infringe Article 10 in any way'.¹⁶⁹

In any case, the role of the ECHR in common law development was limited. The unincorporated ECHR could not be used to establish a new right that common law did not provide.¹⁷⁰ Neither could it be used to develop common law to the extent of having the same effect as it would have had were it to have been incorporated.¹⁷¹ In *Derbyshire and Guardian Newspapers* above, it was clear that the right to freedom of speech had some roots in English common law. Where there were no existing rights in common law, courts refused to recognise a new one according to the Convention. In *Malone v Commissioner of Police of the Metropolis (No 2)*, on the issue as to whether the ECHR and the judgment by the

¹⁶⁸ Starmer and Klug (n 147) 227.

¹⁶⁹ *ibid* 228 quoting *Bennett v Guardian Newspapers Ltd (No 1)* [1997] EMLR 625 (QB) 640.

¹⁷⁰ *Fisher v Minister of Public Safety and Immigration (No2)* [2001] 1 AC 434, 445.

¹⁷¹ Sales and Clement (n 108) 403–04.

ECtHR could assist the court in determining the right to privacy in domestic law the court held the following:

It seems to me that where Parliament has abstained from legislating on a point that is plainly suitable for legislation, it is indeed difficult for the court to lay down new rules of common law or equity that will array out the Crown's treaty obligations, or to discover for the first time that such rules have always existed.¹⁷²

A limited exception to this principle can be found in the case of *Wilson*. The ECtHR had held that a prisoner had the right to see the report on himself which the Parole Board had considered. Existing common law protection did not cover the case, but the Court of Appeal extended the common law to include such a situation because Parliament had passed a statute to follow the said ECtHR's judgment, although at the time of the case such provision was yet to be enforced.¹⁷³

In fact, it is observed that after the HRA had been passed in 1998 but before it came into force in 2000, the House of Lords tended to acknowledge a more prominent role of the unincorporated ECHR in developing common law. Lord Cooke, in *Reynolds v Times Newspapers*, expressed the following view:

International human rights law, whenever relevant, should have an important part to play in developments of the common law. For United Kingdom courts, particular importance must attach to the European Convention for the Protection of Human Rights and Fundamental Freedoms, bearing in mind that by section 6(1) of the Human Rights Act 1998 it is unlawful for a public authority to act in a way which is incompatible with a Convention right ...

¹⁷² [1979] Ch 344 (CD) 379. The case was later appealed to the ECtHR, which held that there was violation of Article 8 of the ECHR. *Malone v United Kingdom* (1985) 7 EHRR 14.

¹⁷³ *R v Parole Board ex p Wilson* [1992] QB 740 (CA).

The Act is not yet in force, but naturally the appeal was argued on the footing that regard should be had to it.¹⁷⁴

The attitude of the elected branches toward the Convention, although short of enforceable legislation, certainly affected the courts' approach.

c. Judicial Discretion

The use of the ECHR in relation to statutory interpretation and common law development was settled, but with limitations as discussed above. However, courts tended to be more willing to refer to the Convention when the statute or common law involved the exercise of inherent judicial discretion¹⁷⁵ such as considering whether to grant interlocutory injunctions¹⁷⁶ and whether to allow publication of the case to the detriment of a child's confidential interest.¹⁷⁷ In *R v Central Independent Television*, the case concerning a restraining injunction against broadcasting pictures of a convicted paedophile without obscuring his face, which could lead to identification of his child, Lord Hoffmann held that

in order to enable us to meet our international obligations under the Convention ... it is necessary that any exceptions should satisfy the tests laid down in article 10(2) [of the ECHR]. They must be 'necessary in a democratic society' and fall within certain permissible categories ...¹⁷⁸ (internal citation omitted)

It can be seen that the test from the ECHR was directly applied to the case. Also, in the matter relating to the courts' power to review 'excessive' jury awards under the Courts and Legal Services Act, it was held in *Rantzen v Mirror Group*

¹⁷⁴ [2001] 2 AC 127 (HL) 223.

¹⁷⁵ Hunt (n 128) 191–92.

¹⁷⁶ *A-G v Guardian Newspapers Ltd (No 1)* [1987] 1 WLR 1248 (HL) 1296–97; *R v Advertising Standards Authority Ltd, ex p Vernons Organisation Ltd* [1992] 1 WLR 1289 (QB) 1293; *Middlebrook Mushrooms v Transport and General Workers Union* [1993] ICR 612 (CA).

¹⁷⁷ *Re W (A Minor)* [1992] 1 WLR 100 (CA) 103.

¹⁷⁸ [1994] Fam 192 (CA) 203.

Newspapers Ltd that the power had to be construed in a manner that was not inconsistent with Article 10 (freedom of expression) of the ECHR.¹⁷⁹

In fact, the House of Lords took into consideration not only the ECHR itself but also jurisprudence of the ECtHR. This can be seen most obviously in *R v Sultan Khan*. The Court took into consideration Articles 6 and 8 of the ECHR (the right to a fair trial and the right to privacy) in exercising its discretion as to whether to exclude evidence in criminal cases according to the Police and Criminal Evidence Act 1984. Furthermore, when holding that evidence obtained illegally was nevertheless admissible according to UK law, it took into account jurisprudence of the ECtHR which suggested that breach of a right of privacy did not necessarily render a criminal trial unfair.¹⁸⁰

The reason courts treated the ECHR and the ECtHR's jurisprudence more favourably in cases concerning inherent judicial discretion had never been made clear by case law, but academics offered some explanations. Mountfield and Beloff submitted that courts were free to consider all relevant sources when deciding the principles for their own discretion.¹⁸¹ Hunt suggested that, within their power, courts had a responsibility as government authorities to ensure that international obligations are respected in the domestic legal system.¹⁸² Most importantly, it is likely that constitutional constraints that applied when the courts' decision could interfere with functions of the other two branches did not apply here.

¹⁷⁹ [1994] QB 670 (CA).

¹⁸⁰ [1997] AC 558 (HL), 571–72 (Lord Slynn), 583 (Lord Nicholls).

¹⁸¹ Helen Mountfield and Michael J Beloff, 'Unconventional Behaviour? Judicial Uses of the European Convention in England and Wales' (1996) 5 EHRLR 467, 489.

¹⁸² Hunt (n 128) 195–96.

d. Judicial Review of Executive Acts

The influence of the ECHR in the interpretation of statutes and the developing of common law raised the question as to whether it could also influence the grounds and the standards of judicial review of executive acts.

As regards the grounds of review, the traditional view, which results from the dualist conception, held that there was no legitimate expectation arising against the executive to exercise its power according to the unincorporated treaties.¹⁸³ Although Lord Denning held, in *Bhajan Singh* in 1976, relating to the Immigration Act, that officers acting under this Act must consider principles in the Convention,¹⁸⁴ he amended his position in the same year in *Bibi*, stating: ‘I think that would be asking too much of the immigration officers. They cannot be expected to know or to apply the Convention.’¹⁸⁵

Nevertheless, in *Ahmed* the Court of Appeal accepted that ratification of the treaty could create a legitimate expectation that the agency would act in accordance with the international obligation, unless the executive agency had expressed a policy to the contrary.¹⁸⁶ The approach was followed in *Adimi*.¹⁸⁷ However, both cases were strongly criticised for attempting to incorporate the ECHR by the ‘back door’ inconsistently with Parliamentary sovereignty and the separation of powers.¹⁸⁸

¹⁸³ *R v Immigration Appeal Tribunal, ex p Chundawadra* [1988] Imm AR 161 (CA); *R v Secretary of State for the Home Department, ex p Behluli* [1998] Imm AR 407 (CA).

¹⁸⁴ *R v Secretary of State for the Home Department, ex p Bhajan Singh* [1976] QB 198 (CA).

¹⁸⁵ *R v Chief Immigration Officer, Heathrow Airport, ex p Bibi (Salamat)* 984–85. For a more recent parallel see Lord Hoffmann in *Belfast City Council v Miss Behavin’* [2007] UKHL 19.

¹⁸⁶ *R v Secretary of State for the Home Department, ex p Ahmed (Mohammed Hussain)* [1999] Imm AR 22 (CA).

¹⁸⁷ *R v Uxbridge Magistrates Court, ex p Adimi* [2001] QB 667 (QB).

¹⁸⁸ Shaheed Fatima, ‘Using International Law in Domestic Courts – Part II: Undomesticated Treaties’ [2003] JR 138, 142; Sales and Clement (n 108) 407–13.

As to the standard or the intensity of review, it is arguable that the ECHR was responsible for the change in the traditional *Wednesbury* standard.¹⁸⁹ The House of Lords tended to depart from such a standard when it came to issues of rights. Lord Bridge stated in *Bugdaycay*, a case concerning immigration and the individual's right to life, that the court had to 'be entitled to subject an administrative decision to the more rigorous examination, to ensure that it is in no way flawed, according to the gravity of the issue which the decision determines'.¹⁹⁰ Then in *Brind*, although the House of Lords upheld the Secretary of State's directive prohibiting broadcasters from broadcasting 'any matter' consisting of direct speech made by representatives of terrorist organisations where such speech supported or invited support for such organisations, in the process of consideration it stated:

... this surely does not mean that ... we are not perfectly entitled to start from the premise that any restriction of the right to freedom of expression requires to be justified and that nothing less than an important competing public interest will be sufficient to justify it.¹⁹¹

So, the judgment implied that courts were able to review not only whether government agencies had taken human rights issues into account, but also whether the public interest in question was important enough.¹⁹² *Bugdaycay* and *Brind* were considered by Sir Thomas Bingham MR to be the basis for the more intensive review on the ground of irrationality, offered by the counsel and accepted by the Court of Appeal in *Smith*, that

... in judging whether the decision-maker has exceeded this margin of appreciation the human rights context is important. The more substantial the interference with human rights, the more the

¹⁸⁹ Discussed previously in text to n 49.

¹⁹⁰ *Bugdaycay v Secretary of State for the Home Department* [1987] AC 514 (HL) 531.

¹⁹¹ *R v Secretary of State for the Home Department ex p Brind* [1991]1 AC 696 (HL) 748–49.

¹⁹² Norris (n 53) 596.

But even after using the test mentioned above, the court dismissed the claim of applicants who had been dismissed from the armed forces, on the basis of the government's policy that 'homosexuality was incompatible with service in the armed forces'.¹⁹⁴ Simon Brown LJ expressed his concern on the human rights issue, but found that the action 'cannot be properly held unlawful' and that 'the decision upon the future of this policy must still properly rest with others, notably the government and Parliament'.¹⁹⁵

The case was later referred to the ECtHR, which held that the doctrine of irrationality in British courts was so 'high that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicants' rights answered a pressing social need or was proportionate to the national security and public order aims pursued'.¹⁹⁶ Nevertheless, Poole pointed out that the decision in *Smith* was based on 'constitutional balance'.¹⁹⁷ The fact that the policy had been supported by both Houses of Parliament was a relevant issue. Although the court acknowledged that fundamental rights were interfered with in a significant way, the policy was upheld, simply because

¹⁹³ *R v Ministry of Defence, ex p Smith* [1996] QB 517 (CA) 554. However, Norris also argued that *Bugdacey* was ultimately decided on the ground that the official did not take into account the relevant consideration rather than on the ground of irrationality, and therefore, may not properly be considered as an authority for more a rigorous review on irrationality grounds. As to *Brind*, he pointed out that even though the idea of expanding the principle of judicial review to cover the substance of decisions of public authorities in the human rights case was supported by the majority, the standard for reviewing is still ambiguous since the Law Lords differed on this issue. Norris (n 53) 595–96.

¹⁹⁴ *Smith* (n 193) 517.

¹⁹⁵ *ibid* 541.

¹⁹⁶ Case 33985/96 *Smith v UK* (2000) 29 EHRR 493, 543.

¹⁹⁷ Thomas Poole, 'Legitimacy, Rights and Judicial Review' (2005) 25 OJLS 697.

judges were concerned as to whether they were in a position to declare it unlawful.¹⁹⁸

Another case supporting Poole's viewpoint was *B*. The case was raised by an applicant who had been denied treatment for leukaemia by the authority. In the Divisional Court, Laws J employed rights-based theory in holding that the authority had failed to take into account the family's perception of B's best interest, which was an indispensable consideration. The Court of Appeal disagreed. While recognising the very high value of human life, it went on to say that '[d]ifficult and agonising judgments have to be made as to how a limited budget is best allocated to the maximum advantage of the maximum number of patients. This is not a judgment which the court can make.'¹⁹⁹

It can be argued that the UK courts had been aware of the moral force of international obligations and fundamental rights stemming from the ECHR and had attempted to develop principles of construction and principles of judicial review in order to uphold such rights. But in doing so, they were careful not to interfere with functions of the other branches of government. Although the ECHR could influence the grounds and standards of review, such influence was limited by the dualist view and the principle of Parliamentary sovereignty.²⁰⁰

¹⁹⁸ *ibid* 705.

¹⁹⁹ *R v Cambridge DHA, ex p B* [1995] 1 WLR 898 (CA), 906.

²⁰⁰ See Hanneke Van Schooten and James A Sweeney, 'Domestic Judicial Deference and the ECHR in the UK and Netherlands' (2003) 11 *Tilburg Foreign Law Review* 440 discussing the reaction against the proportionality test which came to the UK together with the ECHR.

e. Arguments for a More Important Interpretive Role for the Unincorporated ECHR

From the discussion above, it can be said that the unincorporated ECHR significantly promoted awareness of human rights in the UK.²⁰¹ However, courts were careful not to let the ECHR change the balance of power between the judiciary and the other two branches. Moreover, Starmer and Klug submitted that only in sixteen out of 316 cases occurring between 1975 and 1996 might the judgments have been different if the courts had not taken the Convention into account.²⁰²

A number of commentators attempted to propose a theory for a more important role for the ECHR. Sir John Laws submitted that in developing the common law of fundamental rights, there was nothing wrong in courts looking openly at the unincorporated Convention. He proposed three judicial review principles. The first was the proportionality principle, meaning that public authorities had to consider and give priority to fundamental rights, unless they could provide ‘substantial, objective, public justification’ for derogating from such rights.²⁰³ Second, public authorities needed to give the reasons on which their decisions were based. And third, the *Padfield* rule, that statutory power must be exercised according to the purpose for which it was enacted, needed to apply concurrently with the rule of construction that Parliament did not intend to interfere with fundamental rights.²⁰⁴ Laws then suggested that the contents of the Convention and jurisprudence of the ECtHR could be used as a guideline in considering cases according to the said principles. He distinguished between two propositions:

²⁰¹ See Lord Browne-Wilkinson, ‘The Infiltration of a Bill of Rights’ [1992] PL 397, 410 discussing the impact of the ECHR.

²⁰² Starmer and Klug (n 147) 656.

²⁰³ John Laws, ‘Is the High Court the Guardian of Fundamental Constitutional Rights’ [1993] PL 59, 73–74.

²⁰⁴ *ibid* 75–76.

... (1) the E.C.H.R., as a legal instrument, is not part of the law of England; and (2) *the contents of the E.C.H.R., as a series of propositions*, largely represent legal norms or values which are either already inherent in our law, or, *so far as they are not, may be integrated into it by the judges.*²⁰⁵ (emphasis added)

He submitted that courts had long been developing common law according to the demands of a changing society, and that while they had been doing so their thinking had frequently been illuminated by foreign legal texts, decisions of foreign courts and academic work. Therefore, courts could take into account the ECHR and decisions of the ECtHR in the same way. This was supported by the fact that many provisions of the Convention were simply statements reflecting norms already accepted in democratic countries.²⁰⁶ Finally, he insisted that this would be conceptually nothing more than what courts had been doing in ‘evolving standards of administrative conduct within the four corners of conventional judicial review’.²⁰⁷

Jowell and Lester suggested that British courts could adopt the practice of the ECJ by referring to the ECHR as a general principle of law.²⁰⁸ They also suggested that courts should adopt a presumption ‘that nothing may be done by a public body which infringes the rights and freedoms guaranteed by the European Convention’.²⁰⁹

While the above approaches seemed to argue that using ECHR as ‘principles’ did not violate the dualist principle, some academics went further, to suggest that

²⁰⁵ *ibid* 61.

²⁰⁶ *ibid* 63.

²⁰⁷ *ibid* 71.

²⁰⁸ Anthony Lester and Jeffery Jowell, ‘Beyond *Wednesbury*: Substantive Principles of Administrative Law’ [1987] PL 368, 378–79. See also Rosalyn Higgins, ‘The Role of Domestic Courts in the Enforcement of International Human Rights: The United Kingdom’ in Benedetto Conforti and Francesco Francioni (eds), *Enforcing International Human Rights in Domestic Court* (Martinus Nijhoff 1997) 51.

²⁰⁹ Lester and Jowell, ‘Beyond *Wednesbury*’ (n 208) 379.

judges should depart from the strict dualist view. Hunt submitted that the Parliamentary sovereignty doctrine and dualism could no longer explain the existing status of international human rights law in domestic courts – better than other kinds of treaties but not fully incorporated.²¹⁰ Therefore, the courts, via common law powers, were supposed to do their best to interpret legislation in a way that was compatible with international human rights norms, including those stated in the ECHR, without concerns over ambiguity or uncertainty in law.²¹¹

Beyleveld had a more radical proposal, that the ECHR was already part of English law by ‘implied incorporation’ and that English judges could apply it as a direct source of law.²¹² His proposal was based on the argument that since ‘a human right is one possessed simply by virtue of being human’,²¹³ human rights treaties were not supposed to be subject to the dualist theory. The Crown, in ratifying human rights treaties, did not impose duties on people; rather, it imposed duties on itself.²¹⁴ And since the Crown usually informed Parliament in advance of signing treaties, if Parliament failed to object to such treaties it could be assumed that Parliament had given implied assent to them. Assent in the form of legislation, he argued, was not necessary.²¹⁵ Therefore, it was a responsibility of the court to review both legislative and executive actions in accordance with the ECHR. Beyleveld also maintained that his proposal was not inconsistent with the doctrine of Parliamentary sovereignty in its ultimate sense, because the country could still choose to withdraw from the ECHR at any time.²¹⁶ In any case, it is noted that this argument, especially the part maintaining that human rights treaties should not be subject to dualist theory because they are rights that

²¹⁰ Hunt (n 128) 301.

²¹¹ *ibid* Ch 8, 297–324.

²¹² Deryck Beyleveld, ‘The Concept of a Human Right and Incorporation of the European Convention on Human Rights’ [1995] PL 577, 578.

²¹³ *ibid* 581.

²¹⁴ *ibid* 584.

²¹⁵ *ibid* 590–91.

²¹⁶ *ibid* 592–93

an individual possesses simply because he or she is a human, is difficult to sustain. There is no guarantee that all rights according to the ECHR are those human rights that every human being should possess.

Other arguments supporting the practice of courts in using the unincorporated ECHR in the domestic sphere by other scholars included the claim that such principles had already become part of the domestic law of the UK by way of customary international law.²¹⁷ However, as discussed above, CIL, though theoretically accepted as part of UK law, plays only a limited role in practice as it can be used only to the extent that it does not contradict existing domestic law.²¹⁸ Moreover, these suggestions could entail a problem concerning identification of which norms in the Convention enjoy the status of customary international law.²¹⁹

It is observed that all the proposals for a more important role for the unincorporated ECHR tended to give more power to the judiciary against the elected branches without the help of legislation. Nevertheless, the UK government later chose to give effect to the ECHR via the HRA 1998 instead of letting the courts develop further interpretive approaches regarding the unincorporated ECHR.

ii. The Courts' Use of the ECHR and Jurisprudence of the ECtHR after the Human Rights Act 1998

The ECHR has been given more force in the courts by the Human Rights Act, passed in 1998, and enforced since October 2000. Some scholars maintain that

²¹⁷ See Andrew J Cunningham, 'The European Convention on Human Rights, Customary International Law and the Constitution' (1994) 43 ICLQ 537; Alan Brudner, 'The Domestic Enforcement of International Covenants on Human Rights: A Theoretical Framework' (1985) 35 Toronto LJ 219, 251–53.

²¹⁸ See section III A ii.

²¹⁹ See Higgins (n 208).

the Act serves as a British Bill of Rights in the sense that it gives certain rights a special status, binding governments, and provides redress for violations of such rights.²²⁰ However, the Act does not give courts the power to strike down legislation. The ultimate decision as to whether a provision in a statute is consistent with the ECHR and whether it should be revoked still belong to Parliament.²²¹ Therefore, Hiebert interestingly observes that the Act can be classified as a ‘Parliamentary Bill of Rights’ as distinct from the American Bill of Rights. The new model accommodates the concerns raised by rights sceptics and court sceptics,²²² and lets all three branches of government work together to protect fundamental rights.²²³

Focusing on the effect of international human rights norms on the UK legal system, the HRA neither gives the ECHR ‘direct effect’ comparable to European Union law nor gives the ECtHR’s judgments self-executing status.²²⁴ Rather, the Act gives effect to the ECHR by imposing that ‘it is unlawful for a public authority to act in a way which is incompatible with a Convention right’.²²⁵ Standard of judicial review has also changed. Instead of *Wednesbury*, the House of Lords applied a ‘proportionality’ test in considering whether the interference with a non-absolute right of a prisoner to keep his privileged legal correspondence confidential would be ‘justified as a necessary and proper

²²⁰ See J L Hiebert, ‘Parliamentary Bills of Rights: An Alternative Model?’ (2006) 69 MLR 7; Kavanagh, *Constitutional Review* (n 62) 416–20; Francesca Klug, ‘A Bill of Rights: Do We Need One or Do We Already Have One?’ [2007] PL 701, 705. Cf G Marshall, ‘Two Kinds of Compatibility: More about Section 3 of the Human Rights Act 1998’ [2007] PL 377.

²²¹ HRA 1998, s 4.

²²² See discussion in text to nn 17–20.

²²³ Hiebert (n 220).

²²⁴ Thus, the Act is said to be a statute which ‘indirectly’ incorporates the ECHR. Fatima, *Using International Law in Domestic Courts* (n 98) 231–32.

²²⁵ HRA 1998, s 6(1).

response to the acknowledged need to maintain security, order and discipline in prisons and to prevent crime'.²²⁶

More importantly for this research, which concerns the interpretive effect of international human rights norms, the HRA requires courts to interpret domestic legislation to be consistent with the Convention rights²²⁷ and to take into account jurisprudence of the ECtHR.²²⁸ The following subsections discuss how these requirements have affected the court's approach relative to the approach it took prior to the HRA, discussed above.

a. The Courts' Use of Convention Rights

Section 3(1) of the HRA provides:

*So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.*²²⁹

This requirement applies to all legislation, whenever enacted.²³⁰ The ambiguity requirement has been dispensed with since the Act has entered into force. Courts must now always consider whether a provision in question is compatible with rights specified in the Convention. The House of Lords in *Re S* admitted that such interpretational power is 'a powerful tool whose use is obligatory. It is not an optional canon of construction'.²³¹

²²⁶ *R v Secretary of State for the Home Department, ex p Daly* [2001] UKHL 26, [2001] 2 AC 532, 543, 547.

²²⁷ HRA 1998, s 3(1).

²²⁸ HRA 1998, s 2(1).

²²⁹ HRA 1998, s 3(1).

²³⁰ HRA, s 3(2).

²³¹ *Re S (Children) (Care Order: Implementation of Care Plan)* [2002] UKHL 10, [2002] 2 AC 291 (HL) [37].

Nevertheless, limitations on the extent to which the ECHR may influence the interpretation of domestic legislation can be found in the Act itself. Section 3 requires courts to interpret legislation in favour of the Convention only ‘so far as it is possible to do so’.²³² In the case of such interpretation not being possible, section 4 provides that the courts may issue a ‘declaration of incompatibility’ which does not affect the validity and enforceability of the provision in question, but which may prompt a fast-track amendment of legislation by the executive, which will consider whether it is necessary to amend legislation.²³³ Therefore, these sections attempt to balance giving effect to the ECHR (which equates with giving more interpretive power to the courts) and preserving the sovereignty of Parliament. The latter is preserved, as it is still Parliament that has the exclusive power to legislate and invalidate legislation.

While it seems to be accepted that section 3 ‘does not entitle the judges to legislate’,²³⁴ the precise division between legitimate interpretation (which includes judicial law-making) and illegitimate legislation remains contestable.²³⁵ Those who believe that the HRA is a Bill of Rights tend to argue for a more important role of courts in interpreting laws to be compatible with the ECHR through section 3. It can be seen that the Convention can have a more immediate effect in the UK in cases where the courts exercise their creativity intensely in order to interpret a statute in favour of a Convention right than in cases where a declaration of incompatibility is made. In the latter, the parties to the case are still bound by the incompatible statute, and the elected branches may fail to proceed in a manner that is necessary to implement the ECHR. However, some argue that the Act provides a ‘principle proposing dialogue’ and that the courts’ task is to

²³² HRA, s 3(1).

²³³ HRA, ss 4, 10.

²³⁴ *Poplar Housing & Regeneration Community Association Ltd v Donoghue* [2002] QB 48 (CA) 73.

²³⁵ See Kavanagh, ‘The Elusive Divide’ (n 93) 265–71.

propose the resolution on the rights issue to the elected branches through section 4.²³⁶

The approach taken by the courts has fluctuated. Soon after the enforcement of the HRA in 2000, it seemed as if the House of Lords was prepared to use section 3 in an extremely creative way in order to avoid making a declaration of compatibility.²³⁷ In *R v A (No 2)*, the case concerning a statute which seemed to be in conflict with the fair trial requirement under Article 6 of the ECHR because it excluded almost all evidence relating to the prior sexual behaviour of the complainant, Lord Steyn expressed the view that '[t]he techniques to be used will not only involve the *reading down* of express language in a statute but also the *implication of provisions*'.²³⁸ Moreover, he seemed to prefer section 3 over section 4, saying that '[a] *declaration of incompatibility is a measure of last resort*. It must be avoided unless it is plainly impossible to do so.'²³⁹ The only limitation on interpretive power recognised in this case seemed to be when the statute expressed the incompatibility 'in terms'.²⁴⁰ The Lords then laid down a new test of admissibility to be that trial judges may allow the evidence in question if they consider it to be so relevant that excluding it would affect the fairness of the trial under Article 6 of the ECHR.²⁴¹ However, this holding has proved to be controversial. In the same case, Lord Hope expressed the opinion that the statute did *not* allow the court to *read in* a more relaxing standard of

²³⁶ T R Hickman, 'Constitutional Dialogue, Constitutional Theories and the Human Rights Act 1998' [2005] PL 306, 308–10. Hickman himself argues for the 'strong form dialogue' representing the middle way. See also the sovereign-based approach proposed by Conor Gearty in 'Reconciling Parliamentary Democracy and Human Rights' (2002) 118 LQR 248, 269 and 'Revisiting section 3(1) of the Human Rights Act' (2003) 119 LQR 551, and, in contrast, the convention-friendly approach proposed by Gavin Phillipson in '(Mis)-Reading Section 3 of the Human Rights Act' (2003) 119 LQR 183, 184–85.

²³⁷ Fenwick and Phillipson *Text, Cases & Materials* (n 11) 883–84.

²³⁸ *R v A (No 2)* [2001] UKHL 25, [2002] 1 AC 45, 68.

²³⁹ *ibid.*

²⁴⁰ *ibid.*

²⁴¹ *ibid.* 46.

admission of evidence.²⁴² Moreover, the attitude that section 4 should be the last resort raises concerns over the issue of illegitimate judicial activism.

The Law Lords seemed to be more restrained in using section 3 in subsequent cases. In *Re S*, the case where the Court of Appeal *read in* a new procedure which allowed the court to supervise the implementation of a Parliament Act by the executive, the House of Lords held that ‘a meaning which departs substantially from a fundamental feature of an Act of Parliament is likely to have crossed the boundary between interpretation and amendment’.²⁴³ Also, in *Anderson*, where Parliament conferred on the Secretary of State the power to fix the minimum sentencing tariff which should be exercised exclusively by courts, the Lords found that it was impossible to read the provision in any other way. Lord Hutton said that to do so would *amount to the amendment of the statute transferring power from the Home Secretary to the judiciary*.²⁴⁴ Lord Bingham also stated that it would be ‘judicial vandalism’ since it would give the provision an effect very different from what Parliament intended.²⁴⁵ Lord Steyn agreed, and expressed the opinion that ‘section 3(1) is not available where the suggested interpretation is contrary to express statutory words or is by implication necessarily contradicted by the statute’.²⁴⁶ Moreover, in *Bellinger*, the case concerning a statute which provided that parties to a marriage had to be ‘respectively male and female’, the Court held that it could not interpret the term ‘female’ to include a male-to-female transsexual even though the term itself may be open to such interpretation. Lord Nicholls provided reasons for not interpreting so that ‘[t]he recognition of gender reassignment for the purposes of

²⁴² *ibid* 87.

²⁴³ *Re S (Children) (Care Order: Implementation of Care Plan)* [2002] UKHL 10 [40], [2002] 2 AC 291.

²⁴⁴ *R (Anderson) v Secretary of State for the Home Department* [2002] UKHL 46 [81].

²⁴⁵ *ibid* [30].

²⁴⁶ *ibid* [59] citing *Re S (Children) (Care Order: Implementation of Care Plan)* [41].

marriage is part of a wider problem which should be considered as a whole and not dealt with in a piecemeal fashion'.²⁴⁷

These cases led Nicol to argue that judicial creativity in such cases has correctly been restricted in order to give more space to section 4's declaration.²⁴⁸ However, Kavanagh disagrees, arguing that *S, Anderson* and *Bellinger* merely pointed out that section 3 may not be suitable in a context involving radical reform of the legal issue where Parliament is the more suitable institution to decide. These cases did not rule out the strained interpretation possible under section 3 as adopted by *R v A (No 2)* when the context is different.²⁴⁹

The latter view seemed to be confirmed in *Ghaidan*. In this case the House of Lords held that, in the light of the Convention rights, it was possible to read a provision in the Rent Act which provided for the succession rights of surviving spouses and those who lived together as husband and wife as though it covered homosexual couples living together. Importantly, some Law Lords openly admitted that the language of the legislation and the intention of Parliament in enacting such legislation are *not* always a limitation on the possibility of interpretation according to section 3(1).²⁵⁰ Courts might 'read in words which change the meaning of the enacted legislation'.²⁵¹ However, this reasoning has

²⁴⁷ *Bellinger v Bellinger* [2003] UKHL 21, [2003] 2 AC 467 [45].

²⁴⁸ Danny Nicol, 'Statutory Interpretation and Human Rights after *Anderson*' [2004] PL 274, 281–83. See also *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68 (discriminatory detention of foreign terrorist suspects according to Anti-Terrorism, Crime and Security Act 2001).

²⁴⁹ Aileen Kavanagh, 'Statutory Interpretation and Human Rights after *Anderson*: A More Contextual Approach' [2004] PL 537, 545.

²⁵⁰ *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557 [29]–[32] (Lord Nicholls); [40]–[41], [45] (Lord Steyn); [110], [123]–[124] (Lord Rodger) cf [72] (Lord Millett).

²⁵¹ *ibid* [32] (Lord Nicholls).

been subject to wide discussion and criticism based on the proper role of the judiciary.²⁵²

From the cases above, it can be concluded that UK courts have allowed Convention Rights to have substantially more interpretive effect in their judicial reasoning since the enforcement of the HRA. Still, it is apparent that the extent to which courts may give effect to the Convention rights by means of interpretation can prove controversial. The root of the controversy is obviously the question regarding the proper role of courts *vis-à-vis* Parliament in deciding the issue of rights²⁵³ – a question which is not unfamiliar in the UK constitutional system and not resolved by the enactment of the HRA 1998.

b. The Courts' Use of the Jurisprudence of the ECtHR

Apart from giving effect to the ECHR by interpretive instruction in section 3, the HRA 1998 also makes the opinions of certain Strasbourg bodies relevant to domestic cases concerning Convention rights. Most important among these sources is the 'judgment, decision, declaration or advisory opinion of the ECtHR', which section 2(1) requires courts to 'take into account' when 'determining a question which has arisen in connection with a Convention right'.

²⁵² For example, see James Allan 'Statutory Bill of Rights: You Read Words In, You Read Words Out, You Take Parliament Clear Intention and You Shake It All About – Doin' the Sankey Hanky Panky' in Tom Campbell, K D Ewing, Adam Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays* (OUP 2011); Kavanagh, *Constitutional Review* (n 62) Chapter 3; Jan Van Zyl Smit 'The New Purposive Interpretation of Statutes: HRA Section 3 after *Ghaidan v Godin-Mendoza*' 70 MLR 294. See also Lord Hoffman's opinion in *R (Wilkinson) v IRC* [2005] UKHL 30, which may refine *Ghaidan*.

²⁵³ See generally Bernadette Harkin, 'Section 3 (1) of the Human Rights Acts and the Rule of Law' (2008) 14 UCLA Jurisprudence Review 21, 26; Aileen Kavanagh, 'Unlocking the Human Rights Act: the "Radical" Approach to Section 3(1) Revisited'. (2005) 3 EHRLR 259, 271.

This section gives much stronger effect to ECtHR jurisprudence on judicial reasoning in the UK than it had previously.²⁵⁴ Although section 2(1) does not give direct effect to the ECtHR judgments, the point is, as Buxton LJ stated, that the jurisprudence will be taken into account ‘whether we determine the case in accordance with it, or on the other hand decline, on a reasoned basis, to apply that jurisprudence’.²⁵⁵ It is also observed that section 2(1) gives judges significant discretion not only as to whether a Strasbourg jurisprudence is relevant, but also as to how much weight they should accord to such jurisprudence. Courts may apply the ECtHR jurisprudences directly, consider them as part of their reasoning or totally disregard them.²⁵⁶ Not surprisingly, its application is subject to wide debate. Masterman submits that while adhering to the Strasbourg jurisprudence would benefit legal certainty and reduce accusations of judicial activism, the ability to depart from such international jurisprudence allows judges to develop an indigenous rights jurisprudence in the domestic regime.²⁵⁷

The controversy now is not about whether the jurisprudence of the ECtHR should influence judicial decisions in domestic courts, but about how influential it should be. Consistently with the purpose of section 2, the House of Lords did not consider the jurisprudence of the ECtHR to be binding. There have been cases in which the Court emphasised that the Strasbourg jurisprudence played a

²⁵⁴ Jurisprudence of the ECtHR did not receive much attention from the UK courts, apart from certain cases where judicial discretion was involved which the courts referred to the ECtHR’s decisions. See text to n 180.

²⁵⁵ *R (Anderson) v Secretary of State for the Home Department* [2002] UKHL 46, [2003] 1 AC 837 [88].

²⁵⁶ Roger Masterman, ‘Aspiration or Foundation? The Status of the Strasbourg Jurisprudence and the ‘Convention Rights’ in Domestic Law’ in Helen Fenwick, Gavin Phillipson and Roger Masterman (eds), *Judicial Reasoning under the UK Human Rights Act* (CUP 2007) 61–62.

²⁵⁷ *ibid* 60.

role in domestic cases as ‘principles’ rather than compelling authority.²⁵⁸ Nevertheless, UK courts have tended to follow Strasbourg jurisprudence very closely, adopting the so-called ‘mirror principle’.²⁵⁹ In *Alconbury*, Lord Slynn held that ‘[i]n the absence of some special circumstances it seems to me that the court should follow *any clear and constant jurisprudence* of the European Court of Human Rights’.²⁶⁰ Lord Bingham agreed and provided further reasons in *Ullah*:

... 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 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.²⁶¹

Moreover, he remarked that ‘the meaning of the Convention should be uniform throughout the states party to it’; therefore national courts have the duty under section 6 of the HRA to ‘keep pace with the Strasbourg jurisprudence as it evolves over time: *no more, but certainly no less*’.²⁶²

However, the courts’ approach has been criticised. Many scholars convincingly submit that the domestic judiciary should be able to play a more creative role and develop indigenous jurisprudence of human rights.²⁶³ It is argued that section 2

²⁵⁸ For example see *Secretary of State for the Home Department v JJ* [2007] UKHL 45, [2008] AC 385 [13]; *R v Secretary of State for the Environment, Transport and the Regions, ex p Alconbury Developments Ltd* [2001] UKHL 23, [2003] 2 AC 295 [76].

²⁵⁹ See J Lewis, ‘The European Ceiling on Human Rights’ [2007] PL 720.

²⁶⁰ *Alconbury* (n 258) [27] (emphasis added).

²⁶¹ *R (Ullah) v Special Adjudicator* [2004] UKHL 26, 2 AC 323 [20].

²⁶² *ibid.* See also *R (S) v Chief Constable of South Yorkshire* [2004] UKHL 39, [2004] 1 WLR 2196 [27] (Lord Steyn), [66] (Lord Rodger), [78] (Baroness Hale) expressing similar opinions. cf *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557 where the Court departs from the European Commission of Human Rights’ decision in *S v UK* (1986) 47 DR 274.

²⁶³ See eg Masterman, ‘Aspiration or Foundation?’ (n 256); Roger Masterman, ‘Section 2(1) of the Human Rights Act 1998: Binding Domestic Courts to Strasbourg’ [2004] PL 725; Lewis (n

was drafted with the words ‘take into account’ with the intention of leaving to domestic courts discretion as to the weight of the Strasbourg jurisprudence, because the legislature recognised special conditions in the UK and intended to allow the development of human rights law within the UK itself.²⁶⁴ Further, the same position is said to be difficult to reconcile with the aim of the ECHR, which envisages states as main players in realising the rights specified in the Convention.²⁶⁵

In fact, that domestic courts should be able to depart from the Strasbourg jurisprudence can be implied from Lord Hoffman statement in *Re McKerr*:

Although people sometimes speak of the Convention having been incorporated into domestic law, that is a misleading metaphor. What the Act has done is to create domestic rights expressed in the same terms as those contained in the Convention. But they are domestic rights, not international rights. Their source is the statute, not the Convention ... their meaning and application is a matter for domestic courts, not the court in Strasbourg.²⁶⁶

Nevertheless, the tendency to attach to the ECtHR closely was confirmed in *Secretary of State for the Home Department v AF*. Lord Hoffmann expressed the view that

the United Kingdom is bound by the Convention, *as a matter of international law*, to accept the decisions of the ECtHR on its

259); K D Ewing and J C Tram, ‘The Continuing Futility of the Human Rights Act’ [2008] PL 668; Andrew Clapham, ‘The European Convention on Human Rights in the British Courts: Problem Associated with the Incorporation of International Human Rights’ in P Alston (ed), *Promoting Human Rights Through Bills of Rights* (OUP 1999).

²⁶⁴ Masterman, ‘Aspiration or Foundation?’ (n 256) 71. However, Wright takes the opposite view, arguing that the HRA’s purpose is to give effect to the international rights and not to be considered as a domestic bill of rights. Jane Wright, ‘Interpreting Section 2 of the Human Rights Act 1998: Towards an Indigenous Jurisprudence of Human Rights’ [2009] PL 595, 598, 607–608.

²⁶⁵ Masterman (n 256) 85.

²⁶⁶ *Re McKerr* [2004] UKHL 12, [2004] 1 WLR 807 [65].

interpretation. To reject such a decision would almost certainly put this country in breach of the international obligation which it accepted when it acceded to the Convention. I can see no advantage in your Lordships doing so.²⁶⁷ (emphasis added)

Lord Carswell also stated in the same case, regarding the requirement of section 2(1), that '[w]hatever latitude this formulation may permit, the authority of a considered statement of the Grand Chamber is such that our courts have no option but to accept and apply it'.²⁶⁸ Nevertheless, the Supreme Court unanimously held in *R v Horncastle* that it may depart from Strasbourg jurisprudence in circumstances where it 'has concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of our domestic process'.²⁶⁹

It may be sufficient for the purpose of this research to observe that courts in the UK have now allowed a significantly more important role for the jurisprudence of the ECtHR in their reasoning than the role they allowed before the enforcement of the HRA.²⁷⁰ It is argued, however, that the 'mirror principle' is not necessarily the result of section 2(1) of the HRA, but rather of the courts' own initiative which develops from the (mistaken) belief that Convention rights according to the HRA are still international rights and that departing from jurisprudence of the ECtHR would amount to the UK breaching its international obligation.²⁷¹

²⁶⁷ [2009] UKHL 28, [2010] 2 AC 269 [70].

²⁶⁸ *ibid* [108].

²⁶⁹ [2009] UKSC 14 [11].

²⁷⁰ Sibrand Karel Martens, 'Incorporating the European Convention: the Role of the Judiciary' (1998) 1 EHRLR 5, 8.

²⁷¹ These points are important for the development of the Framework for Thai courts in Chapter Six.

c. The ECHR and Jurisprudence of the ECtHR as a Standard for the Principle of Legality

Leaving the debate over the scope of sections 3 and 2 aside, it can be seen that the HRA has provided an effect similar to the well-established ‘principle of legality’ discussed in section II.²⁷²

The HRA resembles the principle of legality inasmuch as it instructs courts to read legislation in a way that does not override certain rights, unless Parliament expresses its intention of limiting those rights in clear language.²⁷³ In the case of the principle of legality those rights can be found in common law, but in the case of the HRA 1998 the rights applicable are the Convention rights. Therefore, as Lord Hoffman put it in *Wilkinson*, the Convention rights ‘form a significant part of the background against which all statutes ... had to be interpreted’.²⁷⁴ The Convention rights as interpreted by the ECtHR have become standards which Parliament, though still supreme, is presumed to respect when legislating.

The difference between the two is that under the principle of legality, courts attempt to interpret legislation so as to not override common law rights, because they are careful not to presume that Parliament intends to violate or limit established rights when the language is not clear.²⁷⁵ Thus, in using such a principle, courts still refer to Parliament’s intention. The HRA, on the other hand, instructs courts to give effect to the Convention rights and take account of the Strasbourg jurisprudence to the extent that the intention of Parliament as

²⁷² This was acknowledged in *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115, 132 and *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, 46.

²⁷³ Phillip Sales, ‘A Comparison of the Principle of Legality and Section 3 of the Human Rights Act 1998’ (2009) 125 LQR 598, 609.

²⁷⁴ *R (Wilkinson) v IRC* [2005] UKHL 30, [2005] 1 WLR 1718 [17].

²⁷⁵ Sales (n 273) 600 quoting Francis Bennion, *Bennion on Statutory Interpretation* (5th edn, 2008) 823.

expressed in a statute may be overridden to some degree.²⁷⁶ The role of the courts has shifted from finding what Parliament intends to finding which possible meanings of the text are most compatible with the Convention rights.²⁷⁷ Of course, it is arguable that in the case of the HRA, the courts follow the intent of the Parliament in enacting the HRA instead of the intent in the statutes in question. By section 3(1), however, the intent of the HRA always prevails over the intent of statutes to be interpreted, no matter whether those statutes were enacted before or after the HRA.²⁷⁸ This is not consistent with the doctrine of implied repeal, which derives from the positive aspect of Parliamentary sovereignty discussed in the first section of this Chapter.

Further, the instruction provided by the HRA gives a stronger effect to the Convention rights than the principle of legality gives to common law rights. The courts' interpretive approaches aimed at interpreting UK law in a way which is compatible with the ECHR include not only the *reading down* of the statute, which they normally do in applying the principle of legality, but also the *reading in* of additional words to a statute.²⁷⁹

In fact, it is argued that the HRA 1998 has become a constitutional statute,²⁸⁰ which Laws LJ defined in *Thoburn* as 'one which (a) conditions the legal relationship between citizen and state in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights'.²⁸¹ The effect of the constitutional statutes is that they cannot be impliedly repealed by later Acts of Parliament.²⁸² Lord Rodger seemed

²⁷⁶ *ibid* 610.

²⁷⁷ Lester, Pannick and Javen Herberg (eds), *Human Rights Law and Practice* (3rd edn, 2009) 43.

²⁷⁸ Kavanagh, 'Unlocking the Human Rights Act' (n 253) 269–270.

²⁷⁹ Sales (n 273) 610. See also *R v A (No 2)* [2001] UKHL 25, [2002] 1 AC 45, 68.

²⁸⁰ Clayton (n 51) 33–34.

²⁸¹ *Thoburn v Sunderland City Council* [2002] EWHC 195 Admin, [2003] QB 151 [62].

²⁸² *ibid* [63].

to accept this in *Wilson* when he expressed the view that Convention rights ‘are clearly of a higher order than the rights which people enjoy at common law or under most other statutes’.²⁸³

iii. The Courts’ Use of Non-ECHR Norms

In addition to the norms from the ECHR, UK courts have also been influenced by other international human rights instruments and the jurisprudences of foreign countries.

This is most apparent in cases relating to refugees. The 1951 Geneva Convention Relating to the Status of Refugees and its 1967 Protocol, which the UK has ratified but has not enacted an implementing statute in relation to, have an important role in helping the UK courts determine who can be protected as refugees.²⁸⁴ Moreover, since there is no international tribunal in charge of interpreting the Convention, the UK courts have also sought *non-determinative guidance* from the interpretation of the Convention by the Office of the United Nations High Commissioner for Refugees, the European Union²⁸⁵ and other states.²⁸⁶ It can be said that the courts have attempted to ensure that their jurisprudence in this field is in line with international instruments and international consensus.

In relation to the HRA, the mirror principle discussed above²⁸⁷ provides a reason for UK courts not to utilise international human rights norms beyond the ECHR and Strasbourg jurisprudence, especially in the definition of rights. It is feared

²⁸³ *Wilson v First County Trust Ltd (No 2)* [2003] UKHL 40, [2004] 1 AC 816 [180].

²⁸⁴ Bingham, *Widening Horizons* (n 120) 37–38.

²⁸⁵ *R v Secretary of State for the Home Department, ex p Robinson* [1998] QB 929, 938–9.

²⁸⁶ For example, see *R v Immigration Appeal Tribunal, ex p Shah* [1999] 2 AC 629, 643 D; *Fornah v Secretary of State for the Home Department* [2006] UKHL 46 (see especially Lord Bingham’s approval of the use of foreign jurisprudence in para 10).

²⁸⁷ See text to n 259.

that the use of these materials may result in the UK jurisprudence being inconsistent with that of the ECtHR. Lord Bingham, one of the main proponents of the use of international and foreign sources himself, expressed concern about the use of commonwealth cases in the issue relating to the HRA since ‘the United Kingdom courts must take their lead from Strasbourg’.²⁸⁸ However, many scholars, particularly those who support indigenous rights jurisprudence in the UK, forcefully argue that since section 2(1) of the HRA does not require domestic courts to follow the jurisprudence of the ECtHR strictly, it not only allows but also encourages the consideration of non-ECHR norms.²⁸⁹ The relevance and usefulness of the jurisprudence of foreign countries, especially those in common law jurisdictions, have been emphasised.²⁹⁰ Moreover, Baroness Hale criticises the comment made by Lord Bingham, saying that the HRA does not prevent the use of jurisprudence from foreign courts that have comparable human rights instruments, ‘especially on subjects where Strasbourg has not recently spoken’.²⁹¹

²⁸⁸ *Sheldrake v DPP* [2005] 1 AC 264 [33] (HL). See also his hesitation to follow Canadian cases in *R (Gillan) v Commission of Police for the Metropolis* [2006] 2 AC 307 [23].

²⁸⁹ Francesca Klug, ‘The Human Rights Act 1998, *Pepper v. Hart* and All That’ [1999] PL 246, 251, 266–267; Masterman, ‘Section 2(1) (n 263) 726; Rabinder Singh, ‘Interpreting Bill of Rights’ 29 *Statute Law Review* 82, 98. See also Christopher McCrudden, ‘A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights’ (2000) 20 *OJLS* 499, 503–05 submitting that the use of foreign jurisprudence depends partly on whether the courts see the rights in the HRA as stating ‘universal’ rights, ‘European’ rights or ‘domestic’ rights.

²⁹⁰ David Feldman, ‘Standards of Review and Human Rights in English Law’ in David Feldman (ed), *English Public Law* (OUP 2004) 397; Keir Starmer, *European Human Rights Law: The Human Rights Act 1998 and the European Convention on Human Rights* (Legal Action Group 1999) 27; Lord Irvine of Lairg, ‘Activism and Restraint: Human Rights and the Interpretative Process’ (1999) 4 *European Human Rights Law Review* 350, 355. It is also submitted that the ECtHR considers a variety of international materials, many of which do not have binding force even in the international sphere. Thus, if courts in the UK take into account the judgment of the ECtHR, they may also be influenced by those materials. Fatima, *Using International Law in Domestic Courts* (n 98) 263–65; Feldman (n 290) 395–96.

²⁹¹ Baroness Hale of Richmond, *Law Lords at the Margin: Who Defines Convention Rights?* (JUSTICE Tom Sargant memorial annual lecture 2008, 15 October 2008) 4.

In fact, it is submitted by Singh that the nature of the HRA itself has required UK courts to grapple with the questions of international law where not only principles of public international law but also decisions of foreign courts have been useful.²⁹² References to non-ECHR materials can consistently be found in several cases arising under the HRA. In *Brown v Stott*,²⁹³ on the issue of the right not to incriminate oneself, references were made by Lord Bingham and Lord Hope to decisions of the Canadian courts. At the same time a relevant decision of the ECtHR was given little weight since its reasoning was ‘unsatisfactory and less than clear’²⁹⁴ and ‘unconvincing’.²⁹⁵ In *Lambert*,²⁹⁶ a judgment of the South African Constitutional Court was referred to in order to demonstrate the significance of the presumption of innocence, and reasoning from a decision of the Canadian Supreme Court was adopted in relation to the conclusion that a provision of law which required the defendant to establish that he did not knowingly possess illegal substances was inconsistent with the presumption of innocence.²⁹⁷ Then, jurisprudence from the two jurisdictions was used to *reinforce* ‘the view that a reverse legal burden is a disproportionate means of addressing the legislative goal of easing the task of the prosecution’.²⁹⁸

In *R v A (No 2)*, rape shield provisions in Scotland and in other countries such as the USA, Australia and Canada served as an ‘assistance’ in finding the answer as to whether the balance between the protection of the complainant and the

²⁹² Rabinder Singh, ‘The Impact of the Human Rights Act on Advocacy’ in Roger Masterman and Ian Leigh (eds), *The United Kingdom’s Statutory Bill of Rights: Constitutional and Comparative Perspective* (OUP 2013).

²⁹³ *Brown v Stott* [2003] 1 AC 681, 704, 724.

²⁹⁴ *ibid* 711 (Lord Steyn)

²⁹⁵ *ibid* 722 (Lord Hope).

²⁹⁶ *R v Lambert* [2001] UKHL 37. The House of Lords held that the defendant could not rely on article 6 of the HRA where the prosecution and conviction pre-dated the coming into force of the Act.

²⁹⁷ *ibid* [34]–[35] (Lord Slynn).

²⁹⁸ *ibid* [40] (emphasis added).

accused's right to a fair trial had been rightly struck.²⁹⁹ Moreover, the Court of Appeal in *Campbell v MGN Ltd* considered a decision of the Australian High Court, a decision which, as Phillipson submits, 'appears to have had far more influence on the development of confidence as a privacy remedy than any principles derived from Article 8'.³⁰⁰

The interpretive influence of international and foreign human rights norms is particularly apparent in cases relating to the Government's measures against terrorism which affect rights to liberty and fair trial according to the HRA.³⁰¹ For example, in *A*,³⁰² where the House of Lords held that the indefinite detention of foreign prisoners in Belmarsh without trial under section 23 of the Anti-terrorism, Crime and Security Act 2001 was incompatible with the ECHR Crime and Security Act 2001, Lord Bingham discussed the UDHR, ICCPR, Resolutions of the Security Council of the UN, Resolutions of the General Commission for Human Rights, Resolutions of the Parliamentary Assembly of the Council of Europe and, lastly, the International Convention on the Elimination of All Forms of Racial Discrimination.³⁰³ Lords Bingham, Hope, Rodger and Walker also referred to judgments from Canada and the USA in order to support their positions in issues relating to the role of courts in terrorist cases, proportionality and prohibition of discrimination against aliens.³⁰⁴ A number of references to foreign decisions were made by both majority and minority opinions in *A and*

²⁹⁹ [2002] 1 AC 45, 83–85 (Lord Hope).

³⁰⁰ Gavin Phillipson, 'Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act' (2003) 66 MLR 726, 731. It is noted that the ECtHR had not provided clear jurisprudence on the issue.

³⁰¹ The cases discussed here have been identified in Ian Cram 'Resort to Foreign Constitutional Norms in Domestic Human Rights Jurisprudence with Reference to Terrorism Cases' 68 CLJ 2009.

³⁰² *A v Secretary of State for the Home Department* [2005] 2 AC 68.

³⁰³ *ibid* [58]–[63.]

³⁰⁴ *ibid* [30], [39], [46], [70] (Lord Bingham), [134] (Lord Hope), [178] (Lord Rodger), [214] (Lord Walker).

Others (No. 2),³⁰⁵ which concerns the admissibility of evidence obtained by the torture of a third-party witness. More importantly, in holding that it was the responsibility of the detainees to establish that the third-party witness had been tortured, Lords Hope and Rodger cited only a decision of the Hamburg Regional Court of Appeals as support.³⁰⁶

Other cases in which the UK courts tended to follow foreign jurisprudences include *MB* and *AF* concerning the limited disclosure of information to the defendants,³⁰⁷ and *Abassi* in the Court of Appeal concerning the legitimate expectation of a citizen who had been detained without charge at Guantanamo Bay that the executive would initiate diplomatic assistance according to a ratified treaty and the Government's own statements.³⁰⁸

In conclusion, it is observed that non-ECHR norms of several kinds have had interpretive influence in UK judicial reasoning. Most of the time, they serve as additional supports for the courts' decisions. Nevertheless, from time to time they play an important role in shaping the courts' reasoning. In relation to the HRA, their role seems to be less important where relevant jurisprudence of the ECtHR exists and more important where there is no clear jurisprudence from the ECtHR or where such is deemed inappropriate for the UK. While norms from international human rights instruments enjoy presumption of compatibility just like that enjoyed by the unincorporated ECHR, foreign law and jurisprudence do not. The question of how persuasive those norms should be is answered by the courts on a case-by-case basis. Neither is there a consistent principle in choosing

³⁰⁵ *A v Secretary of State for the Home Department (No 2)* [2006] 2 AC 221.

³⁰⁶ Lord Bingham criticised the majority on this. However, his criticism focused on the persuasiveness of the decision itself, not on the fact that the majority followed 'foreign' jurisprudence. *ibid* [60].

³⁰⁷ *Secretary of State for the Home Department v MB; Secretary of State for the Home Department v AF* [2007] 3 WLR 681 [30] (Lord Bingham) [65] (Baroness Hale).

³⁰⁸ *R (on the application of Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2003] UKHRR 76 [86], [98], [102]–[106].

sources of norms,³⁰⁹ even though it is observed that cases from commonwealth countries tend to be cited more often than those from other jurisdictions.³¹⁰

V. Conclusion

International human rights norms from a wide variety of sources have had an indirect but important role in the interpretation of statutes and the development of common law, even though they have not been incorporated into the legal system. The unincorporated ECHR enjoyed the presumption of compatibility and served as guidance for UK courts in adjudicating domestic cases concerning rights. The influence was most obvious in situations where the courts had wide discretion, and less obvious where courts were limited by statutes, existing common law, or an obligation to defer to the decisions of public authorities. Other international conventions and jurisprudence of foreign countries also help to support and shape the reasoning of the courts, although to a more limited extent. It is argued that while the effect of these norms reflects relaxation of an absolute dualist concept, the conditions of ambiguity and uncertainty regarding the use, and the limitations on the influence, of these norms reflect restraint on the courts' part in order to show respect for dualism and for Parliamentary sovereignty.

The Convention rights, together with the interpretation by the ECtHR, have an even more important influence, in a substantive sense,³¹¹ on judicial decisions following the enactment of the Human Rights Act. It can be seen that with the authorisation of Parliament, judges are more comfortable about considering the

³⁰⁹ Bingham (n 120) chapter 3. This is surprising since the Judicial Committee of the Privy Council is well acquainted with the use of international and comparative human rights law in relation to the interpretation of the Bill of Rights of independent Commonwealth countries and the UK's overseas territories. Andrew Harding, 'Comparative Case Law in Human Rights Cases in the Commonwealth: The Emerging Common Law of Human Rights' in Esin Öricü (ed), *Judicial Comparativism in Human Rights Cases* (United Kingdom National Committee of Comparative Law 2003) 187.

³¹⁰ See McCrudden (n 289) 517–18 submitting that it is natural for judges to cite the sources from jurisdictions that are more or less similar to their own.

³¹¹ This is according to Larsen's typologies. Chapter One, text to n 18.

Convention and the ECtHR jurisprudence as one of the relevant factors and are actually required to do this. The consequence of this has been dramatic. Convention rights have become more or less constitutional rights for the UK, and jurisprudence of the ECtHR has been followed very closely. Nevertheless, there are still controversial debates over the extent to which these sources can be influential. Of course, the controversies, again, concern the perceived role of the judiciary *vis-à-vis* the executive and legislative branches.

Chapter Four: The United States of America

The main purposes of this Chapter are to investigate whether the US Supreme Court has made use of international human rights norms in its judicial reasoning, and if so to what extent, and also to understand the forms such usage takes and the arguments for and against it. In order to achieve these purposes, the Chapter follows the same structure as Chapters Two and Three. An overview of the political and constitutional system is presented first so as to give a general idea of US constitutionalism. Then, the research focuses on the role of the judiciary in US polity, especially in relation to the protection of constitutional rights, which depends on the judiciary's power of judicial review and interpretive approaches. The research then moves on to address the legal status and interpretive influence of general international and foreign law in the USA before focusing on the same issues in relation to international human rights norms. The research addresses Americans' perception of international human rights norms and their legal status first, then attempts to evaluate the practice of the US Supreme Court. Finally, the research engages with the debates for and against the use of international human rights norms in the US courts.

I. Overview of the Political and Constitutional System

The political system of the United States of America is based on its written Constitution – adopted in 1789 – which has proven to have durability and stability.¹ From its first promulgation, there have been only 27 amendments, the

¹ Edward Ashbee and Nigel Ashford, *US Politics Today* (Manchester University Press 1999) 42; Lawrence M Friedman, *American Law in the Twentieth Century* (Yale University Press 2002) 15.

first ten of which were adopted not long after the Constitution itself and are regarded as ‘a part of the original constitution’.²

The Constitution established the federal system of government whereby the national (federal) government enjoys enumerated powers in the Constitution, such as those related to foreign affairs, defence and inter-state commerce, while individual states retain all the rest.³ Federal law is the supreme law of the land, binding all states, and has supremacy over state law.⁴ The federal government consists of three branches, which, ranked according to greatest popular input first, are the legislative, the executive and the judicial branches.⁵ The legislative branch, Congress, consists of a House of Representatives and a Senate elected by the people and state legislators.⁶ The executive branch is led by the President, who is elected via an electoral college whose members are elected by voters from all the states. The judicial power is vested in the Courts. The Constitution does not elaborate the details of the judiciary’s structure as it does those of the other two branches. It only established the Supreme Court, and left other details to be worked out by Congress and the executive.⁷ The results are that the number of justices of the Supreme Courts is determined by a statute, lower courts are established by Congress, and judges of both the Supreme Courts and lower federal courts are nominated by the President and confirmed by the Senate.⁸

² Ashbee and Ashford (n 1) 42; Mark Tushnet, *The Constitution of the United States of America: A Contextual Analysis* (Hart 2009) 1.

³ Ashbee and Ashford (n 1) 38.

⁴ US Const art VI.

⁵ Akhil Reed Amar, *America’s Constitution: A Biography* (Random House 2005) 208.

⁶ US Const art I.

⁷ US Const art III.

⁸ Mark Tushnet, ‘The United States: Eclecticism in the Service of Pragmatism’ in Jeffery Goldsworthy (ed) *Interpreting Constitution : A Comparative Study* (OUP 2006) 14.

Congress may also remove federal judges using an impeachment process, control the budget of the judiciary, and in some circumstances limit its jurisdiction.⁹

Importantly, the separation of powers in the USA is not absolute. It includes a system of checks and balances to ensure that no one branch can abuse its powers.¹⁰ For example, the legislative branch may pass laws that regulate actions of executive officials. It may also impeach the President.¹¹ At the same time, the President may veto bills passed by Congress, although Congress may override the veto by a two-thirds majority in each house.¹² The executive and legislative exercise checks on the judiciary through the setting up of the latter's structure and personnel, as stated above. However, the judiciary may subject both executive and legislative actions to constitutional judicial review.¹³

With the aspiration to create 'a more perfect union',¹⁴ the most important concept behind the Constitution is the concept of government under law or limited government.¹⁵ The constitutional guarantee of individual rights against interference by both federal and state governments has been one of the most prominent characteristics of the US Constitution. The first ten Amendments to the Constitution adopted in the late 18th century,¹⁶ later known as the Bill of

⁹ *ibid* 15.

¹⁰ Ashbee and Ashford (n1) 38; A W Heringa and Philipp Kiiver, *Constitutional Compared: An Introduction to Comparative Constitutional Law* (2nd edn, Intersenta 2009) 146.

¹¹ US Const art II, s 4.

¹² US Const art I, s 7.

¹³ See *Youngstown Sheet & Tube Co v Sawyer*, 343 US 579 (1952) and *Marbury v Madison*, 5 US (1 Cranch) 137 (1803) discussed further in text to n 28 and n 33.

¹⁴ US Const pmb.

¹⁵ Stephen M Griffin, *American Constitutionalism: From Theory to Politics* (Princeton University Press 1996) 13; Lord Reed, 'Internationalism and Tradition – Some Thoughts on Incorporating Human Rights Law' (2000) 51 NILQ 365, 366–67.

¹⁶ The National Archives and Records Administration, 'Constitution of the United States: A History' <http://www.archives.gov/exhibits/charters/constitution_history.html> accessed 20 April

Rights, offer protections of certain rights of individuals,¹⁷ such as freedom of expression,¹⁸ the right to bear arms,¹⁹ the right to be free from unreasonable search and seizure²⁰ and the right to due process of criminal procedure.²¹ The abolition of slavery and guarantee of equal protection were added in the Thirteenth, Fourteenth and Fifteenth Amendments after the Civil War.²² Women's and minors' rights to vote were added by the Nineteenth and Twenty-fifth Amendments in the 20th century. Importantly, the Ninth Amendment emphasises that the enumeration of rights in other amendments does not mean that other rights retained by the people are denied. These provisions have long served as an important platform for people in the USA to reinforce their individual rights against the government.²³

II. The Judiciary and the Protection of Rights

The role of the judiciary in the protection of rights is exercised through its interpretation of constitutional provisions and the judicial review of executive and legislative acts. It is acknowledged that state and federal courts have concurrent jurisdiction in interpreting and exercising power of judicial review of the state's executive and legislative acts according to the federal Constitution, but

2010; The National Archives and Records Administration, 'Bill of Rights' <http://www.archives.gov/exhibits/charters/bill_of_rights.html> accessed 20 April 2010.

¹⁷ It should be noted that many of rights contained in the bill of rights derived from the general principle of common law. Graham Hughes, 'Common Law System' in Alan B Morrison (ed) *Fundamentals of American law* (OUP 1996) 12.

¹⁸ US Const Amend I.

¹⁹ US Const Amend II.

²⁰ US Const Amend IV.

²¹ US Const Amend V, VI.

²² Burt Neuborne, 'An Overview of the Bill of Rights' in Alan B Morrison (ed) *Fundamental of American Law* (OUP 1996) 83.

²³ Ashbee and Ashford (n 1) 21.

this research will focus on the federal courts, particularly the Supreme Court of the USA, which has the final word in interpreting the federal Constitution.²⁴

A. Power of Judicial Review

While it was considered the weakest branch of the three at the beginning of the Republic,²⁵ the judiciary has been accepted as having the power to review the actions of the executive and the legislative branches. The following was stated in *Baker v Carr*:

Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of *the Court as ultimate interpreter of the Constitution*.²⁶ (emphasis added)

²⁴ See *Cooper v Aaron*, 358 US 1, 18 (1958); *US v Morrison*, 529 US 598, 616 (2000); *Miller v Johnson*, 515 US 900, 922 (1995) holding that federal courts were supreme in exposition of the US Constitution.

²⁵ Alexander Hamilton stated in The Federalist No 78 that

the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

Alexander Hamilton, 'The Federalist # 78: The Judiciary Department' *The Federalist Papers* <<http://www.constitution.org/fed/federa78.htm>> accessed 4 June 2010 para 7.

²⁶ 369 US 186, 211 (1962). The issue of whether the reappointment statute fell into the 'political question' doctrine and hence non-justiciability.

It has been widely accepted that the *executive's* power is limited by the law, and it is the courts' duty to ensure that the executive branch does not act beyond its power.²⁷ The seminal case is that of *Youngstown Sheet & Tube Co v Sawyer*, when the Court held that, in the absence of enumerated authority from the Constitution or from statute, the President has no power to seize private plants, even during war time.²⁸

The more problematic issue is judicial review of the legislative acts. In fact, the Framers disagreed on the issue of whether the judiciary should have power to review and invalidate legislative acts. Madison was in favour of majoritarian democracy. However, Hamilton argued that the will of the people should not be totally replaced by the will of its representatives and that courts could serve as an intermediary between them in order to assure that the representatives did not exceed the limits of their authority.²⁹ Hamilton explained in the *Federalist Papers* that, in the system of limited government where the Constitution, a document reflecting the will of the people, was the supreme law, one of the courts' duties was 'to declare all acts contrary to the manifest tenor of the constitution void'.³⁰ He also emphasised that '[w]ithout this, all the reservations of particular rights or privileges would amount to nothing'.³¹

The Constitution simply confers on the judiciary the power to hear all cases 'arising under this constitution', without mentioning the power to invalidate or disapply legislation.³² However, the judicial power of review of legislative acts

²⁷ Jeremy Waldron, 'The Core of the Case against Judicial Review' (2006) 115 Yale LJ 1346, 1354.

²⁸ 343 US 579, 595 (1952)

²⁹ See in Gordon Wood, 'Comment' in Amy Gutmann (ed) *A Matter of Interpretation: Federal Courts and the Law : An Essay by Antonin Scalia* (Princeton University Press 1997) 54.

³⁰ Hamilton (n 25) para 9.

³¹ *ibid* para 9.

³² US Const art III.

has been accepted since the Supreme Court claimed such a power on the basis of the necessity to implement the concepts of limited government and supremacy of the Constitution in the landmark decision *Marbury v Madison* in 1803.³³

Although for some time after *Marbury* courts were still inclined to defer to their political counterparts when exercising the power of judicial review,³⁴ the rate of the judicial invalidation of federal statutes increased after 1860 when the powers of the national state started to expand.³⁵ Then, during the period from 1890 to 1937, the Supreme Court held unconstitutional several states' statutes aiming to initiate social and economic reform or establish labour unions and struck down several federal laws, especially those under the New Deal economic programme during 1935–37.³⁶ The ideology behind these decisions was actually the idea of limited government in the strict sense that government should not interfere with the people's rights to make and enforce contracts and to property for any purpose and the *laissez-faire* thinking that judges were not concerned whether the law was good or bad.³⁷

Decisions in this era created tensions between the judiciary and the political branches, and prompted President Roosevelt to initiate the 'Court-packing'

³³ 5 US (1 Cranch) 137, 176–77 (1803).

³⁴ Amar (n 5) 212–16. Since *Marbury* until 1860, there was only one Supreme Court decision that a federal statute was invalidated and this case was the infamous *Dred Scott v Sandford*, 60 US 393 (1856).

³⁵ Griffin (n 15) 97.

³⁶ This period is also known as *Lochner era* after *Lochner v New York*, 198 US 45 (1905). Though the Court in this era seems to be very aggressive, Griffin argues that the Court was simply strictly 'scrutinizing legislation that appeared to benefit a particular class of citizens', which was the standard recognised by the political philosophy accepted in the 18th century. *ibid* 99–101. It is reported that in such an era, 170 states' and federal statutes relating to labour issues were invalidated. Waldron (n 27) 1348. Waldron bases his calculation of the number of the cases on lists given in William E Forbath, *Law and the Shaping of the American Labor Movement* apps A, C, at 177–92, 199–203 (1991).

³⁷ As the court obstructed the political agenda using such ideologies, the era was labelled 'conservative activism'. *ibid* 16–18, 24.

project in order to have more judicial supporters for the New Deal.³⁸ Although the project was not successful, the Supreme Court responded by restructuring its role, relaxing its strictures for the review of economic and regulatory legislation, and focusing on the protection of rights.³⁹

In 1938, the Court declared in the famous footnote four of *US v Carolene Products Co*⁴⁰ that, while economic legislation was presumed to be constitutional, certain kinds of laws, namely those related to the Bill of Rights, those restricting political process, and those directed at minorities, were to be subjected to a more rigorous scrutiny. The Court stated:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth ... It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. ... Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or racial minorities.⁴¹
(internal citation omitted)

Starting from this point, courts in the USA have portrayed themselves as protectors of rights and exercise their powers of judicial review extensively.⁴²

³⁸ Griffin (n 15) 106.

³⁹ *ibid* 105.

⁴⁰ 304 US 144 (1938).

⁴¹ *ibid* 153.

⁴² Martin Shapiro, 'The United States' in Neal Tate and Torbjorn Vallinder (eds) *The Global Expansion of Judicial Power: Part II: Western Common Law Democracies* (New York University Press 1995) 46; Griffin (n 15)105.

Chief Justice Earl Warren, holding office from 1953 to 1969, delivered several landmark decisions affecting, *inter alia*, racial segregation in schools,⁴³ rights to attorney,⁴⁴ rights of suspects upon arrest,⁴⁵ and religion and the state.⁴⁶ After that, Chief Justice Warren Burger, holding office from 1969 to 1986, continued the liberal civil rights movement,⁴⁷ making landmark decisions regarding desegregation between races⁴⁸ and women's right to an abortion.⁴⁹

The exercise of judicial review, especially by the Supreme Court, has significantly affected the legal and political environment,⁵⁰ and has been extremely controversial.⁵¹ The Liberals welcomed the results, but the Conservatives believed that the Court 'converted constitutional law into ordinary politics'.⁵² Adding to the controversy is the fact that the Court's decisions are generally durable; they can be reversed only through the onerous process of constitutional amendment.⁵³ Therefore, although it is generally accepted that

⁴³ *Brown v Board of Education*, 347 US 483 (1954).

⁴⁴ *Gideon v Wainwright*, 372 U.S. 335 (1963).

⁴⁵ *Miranda v Arizona*, 384 US 436 (1966)

⁴⁶ *Engel v Vitale*, 370 US 421 (1962); *Abington Township School District v Schempp (consolidated with Murray v Curlett)*, 374 US 203 (1963).

⁴⁷ Ashbee and Ashford (n 1) 56.

⁴⁸ See, for example, *Swann v Charlotte-Mecklenburg Board of Education*, 402 US 1 (1971); *Regents of the University of California v Allan Bakke*, 438 U.S. 265 (1978).

⁴⁹ *Roe v Wade*, 410 US 113 (1973). It is said that the people's attitudes towards abortion were diverse, but the Supreme Court in this case impose the same standard for the whole nation. Edward Ashbee, *US politics today* (2nd edn, Manchester University Press 2004) 74 providing statistic.

⁵⁰ Lawrence G Sager, 'The Sources and Limits of Legal Authority' in Alan B Morrison (ed) *Fundamentals of American law* (OUP 1996) 54.

⁵¹ Ashbee and Ashford (n 1) 56.

⁵² Mark Tushnet, 'Constitutional Interpretation, Character and Experience' (1992) 72 B U L Rev 747, 759.

⁵³ Sager (n 50) 54; Tushnet, *The Constitution of the United States of America* (n 2) 1; Ashbee and Ashford (n 1) 60.

Congress cannot serve as a fair judge of its own power⁵⁴ and that the judiciary **is** the institution best equipped to declare and protect certain values with which Congress cannot interfere,⁵⁵ the power of judicial review has been seen by many as problematic. Arguments based on what democracy entails, like those of Madison, have consistently been raised.

Bickel famously observed that '[t]he root difficulty is that judicial review is a *counter-majoritarian* force'.⁵⁶ According to Bickel, when the Supreme Court, whose constituents are not elected and may hold their office given good behaviour, declares that a legislative act is unconstitutional, 'it thwarts the will of representatives of the actual people of here and now'.⁵⁷ More recently, Waldron submits that judicial review is inappropriate 'as a mode of *final* decision-making in a free and democratic society'.⁵⁸ Comparing the sources of powers and processes of decision-making of the legislative and the judicial branches, he argues firstly that the legislature comes from elections where people are treated equally in deciding who should be their representatives. Judges, on the other hand, are appointed by the President and confirmed by the Senate. The President and the Senate are elected, but because the people do not directly have a say in the appointment of judges, the judiciary's source of power is inferior to that of the legislature in terms of democratic values. Secondly, the quality of the decisions made by the majority of legislators can be defended on the basis of well-known arguments about fairness, which do not apply in the case of a

⁵⁴ Henry Wellington, *Interpreting the Constitution: The Supreme Court and the Process of Adjudication* (Yale University Press 1990) 24 referring to opinion of Hamilton in *Hamilton* (n 25) and Black in *C Black, The People and the Court: Judicial Review in a Democracy* (Macmillan 1977).

⁵⁵ Alexander Bickel, *The Least Dangerous Branch: the Supreme Court at the Bar of Politics* (Bobbs-Merrill 1962) 24.

⁵⁶ *ibid* 16.

⁵⁷ *ibid* 16–17.

⁵⁸ Waldron (n 27) 1348 (emphasis added).

majority vote of the judges. This is because judges are not ‘persons who have a moral claim to insist on being regarded as equals’ in the decision-process.⁵⁹

However, Bickel himself suggests that judicial review, counter-majoritarian as it may be, can be justified because it helps ensure the legitimacy of the government by enforcing principles in the Constitution – the principles which the legislative branches may neglect in favour of expediency.⁶⁰ The premise is that good society would endeavour to maintain both the ‘immediate needs of the greatest number’ and ‘enduring general values’.⁶¹ The Court is ‘an institution which stands altogether aside from the current clash of interests and which, insofar as is humanly possible, is concerned only with principle’.⁶² Moreover, the principles are evolving according to novel circumstances, and while the executive and legislative branches have to deal with abstract problems, the judiciary can consider concrete cases.⁶³ However, John Hart Ely criticises this approach, arguing that the judicial review is justified only when exercised to ensure that the democratic processes are open and fair.⁶⁴

There are also arguments that judicial review is not necessarily counter-majoritarian. Bruce Ackerman distinguishes between ‘ordinary politics’ and ‘higher lawmaking politics’. He points out that ordinary people are not involved much in ‘ordinary politics’, which is actually dominated by self-interested politicians and special interest groups, and that the Court’s exercise of power of

⁵⁹ *ibid* 1387–92. The quotation is in 1392.

⁶⁰ Bickel (n 55) 23–28. See also Kenneth Ward, ‘Alexander Bickel’s Theory of Judicial Review Reconsidered’ (1996) 28 *Ariz St L J* 893.

⁶¹ Bickel (n 55) 27.

⁶² *ibid* 25.

⁶³ *ibid* 25–26.

⁶⁴ John Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1980) 117.

judicial review in ordinary politics serves to enforce the result of the higher lawmaking politics.⁶⁵

Moreover, it is arguable that courts do limit the review to justiciable issues and abstain from issues where they lack capacity or expertise to judge. The ‘political question’ doctrine provides one area in which the Supreme Court has shown restraint. Also, after the self-restructuring in response to the Court-Packing scheme discussed above, the Supreme Court has applied a moderately weak standard of judicial review to social and economic legislation.⁶⁶

As to the area of rights, concerning which courts have exercised robust judicial review, it has been argued that the tyranny of the majority is not democracy, and that judicial review is necessary to protect the interests of ‘discrete and insular minorities’ against the majority.⁶⁷ The Court thus serves as an enforcement institution making sure that limits on the majority are respected.⁶⁸ The protection of fundamental rights is perceived as part of democracy itself.⁶⁹ The contractarian theory of constitutional adjudication supports this argument, saying that the underlying principles of the constitution are the principles of justice which the majority cannot contradict.⁷⁰ It is also submitted that judicial review provides a ‘good decision’ and that its processes ensure that rights are considered steadily and seriously.⁷¹

⁶⁵ Bruce Ackerman, *We the People: Foundation* (Harvard University Press 1991).

⁶⁶ David A J Richards, *The Moral Criticism of Law* (Dickenson 1977) 40–41.

⁶⁷ Heringa and Kiiver (n 10). See also Griffin (n 15) 105–06.

⁶⁸ Griffin (n 15) 109.

⁶⁹ *ibid* 111.

⁷⁰ Richards (n 66) 50–51.

⁷¹ Ronald Dworkin, *A Matter of Principle* (Harvard University Press 1985) 9–32. This is comparable to the argument made in the UK that the HRA 1998 provides for a dialogue between three branches of government. See Chapter Three, IV B ii a, text to n 236.

In any case, it is noted that those who are sceptical about the legitimacy of judicial review do not consider the matter of rights to be special. Waldron argues that judicial review on the subject of rights is not distinguishable from judicial review on other subjects, as they all are constitutional reviews.⁷² The core issue of judicial review, he argues, is the structural role of courts in upholding constitutional rules. This applies equally to the issues of federalism, separation of powers and rights.⁷³ Therefore, following the same line of argument against judicial review in general, he argues that disagreement about rights should be settled by the legislators rather than the courts.⁷⁴

B. Interpretive Approaches

Prior to the establishment of the nation, America as a colony of England had adopted English common law as its legal system. It has since become an important part of American legal culture. Until now, its contents and methods have continued to influence litigation, interpretation and decision-making techniques at both federal and state levels.⁷⁵ The most prominent characteristic of the American legal system is that judges play an important role in developing law.⁷⁶ They exercise great power in setting principles and then revising them as appropriate.⁷⁷ However, the role of the common law judges is subject to

⁷² Waldron (n 27) 1357.

⁷³ *ibid* 1357–58.

⁷⁴ *ibid* 1360.

⁷⁵ Hughes (n 17) 12–14.

⁷⁶ Antonin Scalia, 'Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Law' in Amy Gutmann (ed) *A Matter of Interpretation: Federal Courts and the Law: An Essay by Antonin Scalia* (Princeton University Press 1997) 4.

⁷⁷ Friedman (n 1) 4. See also *Roger v. Tennessee*, 532 US 541 (2001) discussing the nature of common law decision making and power of courts in details.

constraints. This is especially so with regard to constitutional interpretation, which, being part of the judicial review process, is politically sensitive.⁷⁸

Those who believe that judicial review is anti-democratic in nature attempt to limit and control judicial discretion in interpreting the Constitution. There have been arguments that courts should interpret constitutional provisions according to the ‘original intent’ – the intent of the Framers – and ‘original meaning’ – the ordinary meaning of the text at the time of drafting.⁷⁹ This is to prevent judges from utilising their own subjective values against the majority through the process of judicial review.⁸⁰ Bork, one of the leading contemporary proponents of originalism, who argues for original intent, submits that

if we are to have judicial review, and if the Constitution is to be law, so that the judge does not freely impose his or her own values, then the only way to do that is to root that law in the intentions of the founders. There is no other source of legitimacy. There is no other way that we can say at least in extreme cases that the judge has gone off the reservation.⁸¹

At the same time, Justice Scalia submits that the proper way to interpret the Constitution is therefore to ‘try to understand what it meant, what [it] was understood by the society to mean when it was adopted’.⁸² In any case, both

⁷⁸ Jeffery Goldsworthy (ed), *Interpreting Constitutions: A Comparative Study* (OUP 2006) 1.

⁷⁹ See Roger P Alford, ‘In Search of a Theory for Constitutional Comparativism’ (2005) 52 *UCLA L Rev* 639, 645–46; Ashbee and Ashford (n 1) 64.

⁸⁰ Ashbee and Ashford (n 1) 64.

⁸¹ Robert Bork’s remark made on May 8, 1987 at the Judicial Conference of the Court of Appeals for the Federal Circuit 119 *FRD* 45, 68 (1988).

⁸² Justices Antonin Scalia & Stephen Breyer, ‘U.S. Association of Constitutional Law Discussion: Constitutional Relevance of Foreign Court Decision’ (2005) <<http://www.freerepublic.com/focus/news/1352357/posts>> accessed 12 May 2009 para 51. It is noted that sometimes those who advocate ‘original meaning’ theory also reject the reference to the subjective intent of the Framers as it is difficult to identify and judges may use it to impose their own preference on constitutional interpretation. Scalia (n 76) 16–18.

original intent and original meaning theories see the courts strictly as interpreters which have no authority to change the meaning of the Constitution.⁸³

Apart from the text and structure of the Constitution, for the originalist, the history relating to the adoption of a provision, the speeches of the Framers, and other materials that may help illuminate the original intent and original meaning may be considered. By contrast, considerations that are not related to original intent or original meaning – such as the contemporary social situation and general principles of justice – are considered to be illegitimate and obstructive to the democratic will of the people as expressed in the Constitution.⁸⁴ The consequences of this theory being applied to international human rights norms will be discussed in detail below,⁸⁵ but it is noted here that, according to the originalists, international human rights norms that were not relevant in the drafting of the Constitution are not relevant to the task of its interpretation. Originalism insists that the meaning of the Constitution is not to be changed from the time of drafting. Justice Scalia contends that the very purpose of having a written constitution is to preserve certain values against interference by the government not only at times of drafting but also in the future. If the meaning of such values is not fixed, there is nothing to be preserved.⁸⁶

Theories about original intent and original meaning dominated American constitutional interpretation until the mid-20th century.⁸⁷ They still influence current interpretive approaches,⁸⁸ but are now subject to strong criticism. Many critics emphasise the difficulties associated with finding the original intent and

⁸³ Jo Eric Khushal Murkens 'Comparative Constitutional Law in the Courts: Reflections on the Originalists' Objections' 3–4; Alford (n 79) 645–46.

⁸⁴ Murkens (n 83) 3–4.

⁸⁵ See discussion in section IV B ii b.

⁸⁶ Scalia (n 76) 40; Justices Antonin Scalia & Stephen Breyer (n 82) para 60.

⁸⁷ Justices Antonin Scalia & Stephen Breyer (n 82) para 52.

⁸⁸ Alford (n 79) 646.

original meaning. It is argued that historical records are frequently inaccurate and incomplete.⁸⁹ Even presuming that the records are reliable, it should not be forgotten that current interpreters do not have the same outlook as those who lived two hundred years ago. The meaning and intent of the Framers could easily be misunderstood.⁹⁰ Furthermore, they are known to have been a group of people with diverse opinions and may have had different intentions regarding the Constitution. Whose intentions should count in interpreting the Constitution?⁹¹

More importantly, there are arguments that original intent and original meaning fail to provide determinative standards for interpreting vague constitutional texts.⁹² It is pointed out that constitutional texts, especially those in the Bill of Rights, are, in Ely's phrase, 'open-ended'. Ely argues that they are 'difficult to read responsibly as anything other than quite broad invitations to import into the constitutional decision process considerations that will not be found in the language of the amendment or the debates that led up to it'.⁹³ Terms such as 'due process', 'equal protection' and 'freedom of speech' are 'open to competing understandings at the deepest level'.⁹⁴ Hence, most of the time, courts cannot apply constitutional provisions mechanically. Judges have to give meaning to such terms, and they are often forced to choose between several plausible interpretations.⁹⁵ Although the originalist argues that courts should refrain from

⁸⁹ Wellington (n 54) 51–52.

⁹⁰ *ibid* 52.

⁹¹ Ashbee and Ashford (n 1) 64; Janet L Hiebert, *Limiting Rights: The Dilemma of Judicial Review* (McGill-Queen's University Press 1996) 93.

⁹² Hiebert (n 91) 93–94.

⁹³ Ely (n 64) 14.

⁹⁴ Sager (n 50) 55; Neuborne (n 22) 84.

⁹⁵ Neuborne (n 22) 84.

making law, it is difficult to avoid because judges must render judgment in each concrete case.⁹⁶

For this reason, Dworkin argues that courts should consider moral theory in constitutional interpretation. He points out that the Constitution endorsed certain moral rights and that judges have to make moral judgments in interpreting the Constitution and applying it to concrete issues.⁹⁷ However, the moral theory as a source of interpretation has been criticised as inviting judges to impose their own subjective view on the meaning of the Constitution. Ely, though not an originalist, is one of the hardest critics of this theory. According to him, '[o]ne might be tempted to suppose that there will be no systematic bias in the judges' rendition of "correct moral reasoning" aside from whatever derives from the philosophical axioms from which they begin'.⁹⁸ However, he does not believe that there is a settled moral theory to which judges may refer.⁹⁹

Disagreements over interpretive approaches appear most prominently with regard to the Supreme Court's recognition of 'substantive due process' under the Fourteenth Amendment, since it tends to show that the Court has recognised moral rights which are not enumerated in the Constitution as constitutional rights.¹⁰⁰ For example, in the controversial *Roe v Wade*, the Supreme Court held that 'the Fourteenth Amendment's concept of personal liberty and restriction upon state action ... is broad enough to encompass a woman's decision whether

⁹⁶ Wellington (n 54) 55.

⁹⁷ Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (OUP 1996) 2; Ronald Dworkin, *Justice in Robes* (Belknap 2006) 168.

⁹⁸ Ely (n 64) 57–58.

⁹⁹ *ibid.*

¹⁰⁰ The doctrine of substantive due process holds that the Due Process Clause prohibits States from infringing fundamental liberty interests, unless the infringement is narrowly tailored to serve a compelling state interest. *Washington v Glucksberg*, 521 US 702, 721 (1997).

or not to terminate her pregnancy'.¹⁰¹ More recently, in *Lawrence v Texas*, it was held that intimate consensual sexual conduct was part of the liberty protected by substantive due process.¹⁰² Also, the Court has recognised the rights of parents to direct the upbringing and education of children,¹⁰³ to marry a person of a different race,¹⁰⁴ and to be free from the law which in its application 'shock[s] the conscience'.¹⁰⁵ These all were based on the doctrine of substantive due process. Not surprisingly, concerns over judicial discretion have been raised in relation to the doctrine. Justice Scalia called it a 'judicial usurpation',¹⁰⁶ while Justice Holmes stated:

Of course the words 'due process of law' if taken in their literal meaning have no application to this case; and while it is too late to deny that they have been given a much more extended and artificial signification, still we ought to remember the great caution shown by the Constitution in limiting the power of the States, and should be slow to construe the clause in the Fourteenth Amendment as committing to the Court, with no guide but the Court's own discretion, the validity of whatever laws the States may pass.¹⁰⁷

In this matter, there is an argument that liberties protected under the doctrine of substantive due process should be limited to those 'deeply rooted in [the] Nation's history and tradition'.¹⁰⁸ On the other hand, however, it has also been

¹⁰¹ *Roe v Wade*, 410 US 113, 153 (1973). See also *Griswold v Connecticut*, 381 US 479 (1965) where the Court recognised rights to privacy relating to the use of contraceptive devices.

¹⁰² *Lawrence v Texas*, 539 US 558 (2003).

¹⁰³ *Pierce v Society of Sisters*, 268 US 510 (1925).

¹⁰⁴ *Loving v Virginia*, 388 US 1 (1967).

¹⁰⁵ *Rochin v California*, 342 US 165 (1952).

¹⁰⁶ *City of Chicago v Morales*, 527 US 41, 85 (1999) (dissenting).

¹⁰⁷ *Baldwin v Missouri*, 281 US 586, 595 (1930).

¹⁰⁸ *Lawrence v Texas*, 539 US 558, 588 (2003) (Scalia J, dissenting) quoting *Washington v Glucksberg*, 521 US 702, 721 (1997).

argued that '[h]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry'.¹⁰⁹

In relation to the last point, the argument has been raised against originalism that values from 200 years ago may not be able to deal with contemporary moral dilemmas.¹¹⁰ Many scholars and judges subscribe to the idea of the 'living constitution', arguing that the meaning and application of constitutional provisions should be adapted to suit current situations. It is the province of judges to figure out the needs of a changing society and interpret constitutional provisions in the light of such change. Contemporary philosophy and values in society should be taken into account.¹¹¹ As a result, international human rights norms may be considered relevant in the task of constitutional interpretation even if such norms were not considered (or even existed) at the time of drafting.

While the living Constitution is in direct conflict with the idea of original meaning such as that adopted by Justice Scalia, Dworkin argues, on the basis of the original intent theory, that it is unthinkable that the Framers intended to freeze the meaning of constitutional text so that it always meant the same as at the time of drafting.¹¹² By enacting abstract principles, the Framers must have expected that 'judges do their best collectively to construct, reinspect, and revise, generation by generation' such principles.¹¹³ Justice Holmes expressed the view in *Missouri v Holland* in 1920 that even the most gifted drafters could not have foreseen developments after the time of drafting, and argued that the case 'must

¹⁰⁹ *ibid* 570 (Kennedy J, majority) quoting *County of Sacramento v Lewis*, 523 US 833, 857 (1998) (Kennedy J, concurring).

¹¹⁰ Hiebert (n 91) 93.

¹¹¹ Ashbee and Ashford (n 1) 63.

¹¹² Ronald Dworkin, 'Comment' in Amy Gutmann (ed) *A Matter of Interpretation: Federal Courts and the Law: An Essay by Antonin Scalia* (Princeton University Press 1997) 121.

¹¹³ *ibid* 123.

be considered in the light of our whole experience and not merely in that of what was said a hundred years ago'.¹¹⁴

In a consistent line of cases, the Supreme Court has endorsed the concept of a living Constitution in interpreting the Eighth Amendment, holding that the phrase 'cruel and unusual punishment' should be interpreted in the light of 'the evolving standards of decency that mark the progress of a maturing society'.¹¹⁵

Richard Posner comments that '[w]e find it reassuring to think that the courts stand between us and legislative tyranny even if a particular form of tyranny was not foreseen and expressly forbidden by framers of the Constitution'.¹¹⁶

In fact, a measure of judicial evolution is implied in the common law concept.¹¹⁷ Courts have to decide not only whether to make, modify or reverse rules but also in which directions the law should be developed. Considerations adopted by courts in the USA include, but are not limited to, changes of circumstance, and increasing knowledge and experience.¹¹⁸

Nevertheless, it is also arguable that this interpretive approach allows too wide a discretion to the courts. Hogg submits that it is 'the course of judicial activism'.¹¹⁹ Huscroft submits that if he had to make the choice between the forward-looking interpretation and frozen rights, the former may be preferable. However, he argues that the more important question is *to what extent* judges are allowed to be involved in constitutional evolution. He also argues that 'living

¹¹⁴ 252 US 416, 433 (1920).

¹¹⁵ Decisions concerning the Eighth Amendment which will be discussed in section IV A i.

¹¹⁶ Richard Posner, *Sex and Reason* (Harvard University Press 1992) 328. See also Grant Huscroft, 'The Trouble with Living Tree Interpretation' (2006) 25 Queensland LJ 3, 4 making the same point.

¹¹⁷ *Roger v Tennessee*, 532 US 451, 461 (2001).

¹¹⁸ *ibid* 464.

¹¹⁹ Peter Hogg, 'Canada: Privy Council to Supreme Court' in Jeffery Goldsworthy (ed) *Interpreting Constitutions: A Comparative Study* (OUP 2006) 88.

tree' interpretation allows very wide discretion to judges and may cause uncertainty in the legal system.¹²⁰

In fact, the proponents of the idea of the living Constitution do not suggest unconstrained evolution. Dworkin submits that judges must observe 'integrity' in interpreting the Constitution. They have duties not only to ensure that the judgments are consistent with structure of the Constitution as a whole and in line with precedents, but also to 'defer to general, settled understanding about the character of the power the Constitution assigns them'.¹²¹ Kavanagh suggests that judges are naturally constrained by duty to give reasons; they need to explain the reason if the result of their interpretation is the changing of law.¹²² However, Huscroft, among others, seems to be dissatisfied with these constraints, suggesting that they are too vague and dependent on the judges themselves.¹²³

The debates over the methods of interpretation outlined above reflect clearly the tension between the majoritarian democracy and the courts' role in protecting rights against the majority's will coupled with necessities imposed by text and changing circumstances. There is no consensus on which method of interpretation is the correct one. It can be said that the practice of courts in the USA is a 'pluralist' or 'eclectic' approach. Usual considerations for constitutional interpretation include text, intent, constitutional structure, history, precedent, values and pragmatic consequences.¹²⁴ While some submit that

¹²⁰ His arguments are based mainly on decisions of the Supreme Court of Canada relating to the Canadian Charter of Rights and Freedoms. *ibid* 18–19.

¹²¹ Dworkin *Freedom's Law* (n 97) 10–11.

¹²² Aileen Kavanagh, 'The Idea of a Living Constitution' (2003) 16 *Canadian Journal of Law and Jurisprudence* 55, 78.

¹²³ Huscroft (n 116) 12–14.

¹²⁴ Vicki C Jackson, 'Constitutional Comparisons' (2005) 119 *Harv L Rev* 109, 122; Griffin (n 15) 148–49; Tushnet, 'The United States: Eclecticism in the Service of Pragmatism' (n 8) 27–48

legislative intent plays the most important role in constitutional interpretation,¹²⁵ a majority of scholars tend to believe that courts have used many interpretive tools in constitutional interpretation without giving priority to any specific method.¹²⁶ In any case, it is emphasised that because courts normally use many of these considerations at the same time, each consideration serves as a limitation on judicial discretion, as well as the sources of interpretation.¹²⁷ For example, value judgments have to be considered together with text, intent and other considerations. Thus, judges have to balance all relevant considerations and are not free to decide according to their own subjective values.

III. International and Foreign Law in the USA

A. Legal Status of International Human Rights Norms in the Legal System and Their Effect upon It

The USA generally adopts a dualist approach towards international law. The approach originates from a fear that national laws deriving from the democratic process might be undermined as a result of allowing international law to have an effect within the national regime. National laws have been highly valued because they derive from open and deliberative processes where different views are considered and discussed by elected representatives of the people. This process is said to be the core of democracy because it ensures that people can participate in decisions that affect their rights and responsibilities.¹²⁸

¹²⁵ George P Fletcher and Steve Sheppard, *American Law in a Global Context: The Basics* (OUP 2005) 83.

¹²⁶ Griffin (n 15) 147; Tushnet, 'The United States: Eclecticism in the Service of Pragmatism' (n 8) 48–49.

¹²⁷ Tushnet, 'The United States: Eclecticism in the Service of Pragmatism' (n 8) 51–54.

¹²⁸ Jonathan Turley, 'Dualistic Values in the Age of International Legisprudence' (1992–1993) 44 *Hastings LJ* 185, 186–87. See also John McGinnis and Ilya Somin, 'Should International Law Be Part of Our Law?' (2007) 59 *Stan L Rev* 1175, 1196.

By contrast, treaties are created without much involvement on the part of the representatives of the people apart from the President and the Senate.¹²⁹ ‘The people’ have even less part in creating CIL and foreign norms.¹³⁰ Institutions involved in making international norms are not accountable to the American electorate, neither is the process of international norm-making transparent to the people of the USA.¹³¹ What is more, international norms are made by the international community, consisting not only of democratic but also of authoritarian countries, ‘agreeing on a lowest common denominator’.¹³² The same objections apply with greater force to foreign laws. Therefore, some scholars have argued that strict dualism is appropriate since international and foreign norms have a ‘lower quality’ than domestic laws.¹³³

i. Treaties

According to the Constitution, treaties are to be concluded by the President with the advice and consent of the Senate¹³⁴ and they form a part of the supreme law of the land.¹³⁵ Before 1828, courts generally followed the plain meaning of the Constitution holding that all treaties made can become parts of the law in the

¹²⁹ Turley (n 128) 187.

¹³⁰ *ibid* 187–88.

¹³¹ McGinnis and Somin (n 128) 1193.

¹³² EA Posner, ‘Transnational Legal Process and the Supreme Court’s 2003–2004 Term: Some Skeptical Observations’ (2004–2005) 12 *Tulsa J Comp & Int’l L* 23, 34.

¹³³ *ibid.* cf Mattias Kumm, ‘Democratic Constitutionalism Encounters International Law: Terms of Engagement’ in Choudhry (ed) *The Migration of Constitutional Ideas* (CUP 2006) suggesting that simply the absence of accountability and transparency is insufficient to ground the argument that international law comes from deficit procedure. This issue will be discussed further in section IV B ii b i).

¹³⁴ US Const art II, s 2, cl 2.

¹³⁵ US Const art VI.

USA automatically.¹³⁶ However, in *Foster & Elam v Neilson*, Chief Justice Marshall introduced another way to read the Constitution. He stated:

... when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the court.¹³⁷

Since then, it has been accepted that there are two kinds of treaties. The first is the self-executing treaty which can be applied directly in domestic courts according to Article VI of the Constitution.¹³⁸ They have as high a status as federal statutes but rank lower than the Constitution.¹³⁹ In cases where conflicts between federal laws and treaties arise, the ‘last in time’ rule applies.¹⁴⁰ The second kind is the non-self-executing treaty, which does not have any effect in the domestic sphere unless and until it is incorporated into domestic law by Congress.¹⁴¹

To determine whether a treaty is self-executing or non-self-executing, courts consider the intention of the treaty, the related Senate and Congress resolutions, the substance of the treaty and whether implementing legislation is

¹³⁶ Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (7th edn, Routledge 1997) 66–67; George Slyz, ‘International Law in National Court’ (1995–1996) 28 NYU J Int'l L & Pol 65, 79.

¹³⁷ 27 US (2 Pet) 253, 314 (1829).

¹³⁸ R B Bilder, ‘Integrating International Human Rights law into Domestic Law – U.S. Experiences’ (1981) 4 Hous J Int'l L 1, 1–3. This division made by courts is unique, as noting in the Constitution signals the difference between self-executing and non-self-executing, and it is not arguable that the Framers ever consider the division. Slyz (n 136) 78. Paust even argues that this judicial invention ‘distorts’ constitutional text. Jordan Paust, ‘Self-Executing Treaties’ (1988) 82 Am J Int Law 760, 766–67.

¹³⁹ See Justice Black’s statement in *Reid v Covert* 354 US 1, 17 (1957).

¹⁴⁰ See *The Head Money Cases*, 112 US 580, 597–99 (1884); *Whitney v Robertson*, 124 US 190, 194 (1888); *The Chinese Exclusion Case*, 130 US 581, 600–03 (1889).

¹⁴¹ Bilder (n 138) 1–3.

constitutionally required.¹⁴² Treaties affecting issues on which Congress is likely to enact the law are mostly non-self-executing.¹⁴³ This is because the executive and Senate, which have the power to make treaties, do not have the same power as Congress in making law.

ii. Customary International Law

The Constitution does not mention the relationship between CIL and national law. However, more than one hundred years ago, the Supreme Court stated in *Paquete Habana*:

*International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.*¹⁴⁴

The Court in this case, in fact, held that the seizure of Spanish fishing vessels during the Spanish–American War was unlawful because ‘an ancient usage among civilised nations, beginning centuries ago, and gradually ripening into a rule of international law’ prohibited the capture of a fishing vessel as a prize of war.¹⁴⁵ Justice Blackmun commented extra-judicially on the result of the

¹⁴² The Restatement (third) of the Foreign Relations Law of the United States.

¹⁴³ Slyz (n 136) 79–80.

¹⁴⁴ 175 US 677, 700 (1900).

¹⁴⁵ *ibid* 686.

Paquete Habana that '[c]ustomary international law informs the construction of domestic law, and, at least in the absence of any superseding positive law, is controlling'.¹⁴⁶ However, it is noted that the adoption of CIL as part of the US law in the majority opinion above was objected to by a dissenter, Justice Fuller. He declared that he could not find 'adequate foundation for imputing to this country the adoption of any other than the English rule'.¹⁴⁷ He also commented on the works of writers on international law that they might be persuasive but not authoritative.¹⁴⁸

Following the *Paquete Habana*, CIL had been used by courts as 'general common law'.¹⁴⁹ Although it was later held in *Erie Railroad v Tompkins* that '[t]here is no federal general common law',¹⁵⁰ the Supreme Court has still allowed a limited set of federal common laws, and many scholars, including those writing the Restatement of the Law, have argued that CIL can be considered as post-*Erie* federal common law.¹⁵¹ The status of CIL as federal common law was also confirmed in the case of *Filartica v Pena-Irala* in 1980.¹⁵²

Nevertheless, it is submitted that since the 20th century the courts have become more concerned about the issues of separation of powers and judicial competence not only in dealing with international issues but also in making law.¹⁵³ Thus, although CIL is theoretically accepted as a source of law¹⁵⁴ and as having the

¹⁴⁶ Harry A Blackmun, 'The Supreme Court and the Law of Nations' (1994) 104 Yale LJ 39, 40.

¹⁴⁷ *ibid* 720.

¹⁴⁸ *ibid*.

¹⁴⁹ Harold Hongju Koh, 'Transnational Public Law Litigation' (1991) 100 Yale LJ 2347, 2353.

¹⁵⁰ 304 US 64, 78 (1938).

¹⁵¹ See Curtis Bradley, 'The Juvenile Death Penalty and International Law' (2002) 52 Duke L J 485, 551.

¹⁵² 630 F2d 876, 885 (2nd Cir 1980).

¹⁵³ Koh (n 149) 2356–58.

¹⁵⁴ Vaughan Lowe, *International Law* (OUP 2007) 126.

status of federal law,¹⁵⁵ its direct use in the courts is rare.¹⁵⁶ CIL has not really been incorporated in the legal systems by the courts.¹⁵⁷

Moreover, the role of CIL is limited only when ‘there is no treaty, and no controlling executive or legislative act or judicial decision’.¹⁵⁸ The Court of Appeal recently confirmed this limitation of CIL in *US v Fawaz Yunis*, holding:

Statutes inconsistent with principles of customary international law may well lead to international law violations. But within the domestic legal realm, that inconsistent statute simply modifies or supersedes customary international law to the extent of the inconsistency.¹⁵⁹

It can be concluded that CIL would not be used directly as enforceable laws and can rarely be asserted in the USA.

iii. Interpretive Role of International and Foreign Law

Despite the dualist influence, international and foreign law with no direct effect may have an interpretive influence on the domestic legal system, either by mandates from provisions of domestic law or by courts’ own initiations to resort to international and foreign norms.¹⁶⁰

Generally, the former way of using international and foreign norms is not much in dispute, because in such cases it is domestic law that instructs courts to look at

¹⁵⁵ Rebecca M Wallace and Olga Martin-Ortega, *International law* (6th edn, Sweet & Maxwell 2009) 51.

¹⁵⁶ *Bilder* (n 138) 4; *Slyz* (n 136) 89–90.

¹⁵⁷ Tamela Hughlett, ‘International Law: The Use of International Law as a Guide to Interpretation of the United States Constitution’ (1992) 45 *Okla L Rev* 169, 174.

¹⁵⁸ *Paquete Habana* (n 144) 700.

¹⁵⁹ 30 *ILM* 403 (1991).

¹⁶⁰ See Paust (n 138) 781 saying that non-self-executing treaties may be incorporated by judges.

non-domestic sources.¹⁶¹ For example, Article I of the Constitution confers on Congress the power to ‘define and punish ... offenses against the *laws of nations*’,¹⁶² and the Alien Tort Claim Act confers jurisdiction on federal courts to adjudicate ‘any civil law action by an alien for a tort only, committed in violation of the *law of nations or a treaty of the United States*’.¹⁶³ It is submitted by Calabresi and Zimdahl that, in order to discover the substance of the law of nations, the Supreme Court, especially at the beginning of the republic, considered ‘first, the laws and practices of other nations, especially those on the European continent; second, the views of foreign scholars, including writers on the civil law; and third, the decisions of English judges in cases arising after American independence in 1776’.¹⁶⁴

The landmark case was *Filartiga v Pena-Irala*¹⁶⁵ where the Court held the defendant guilty because torture against an individual by state officials was against the law of nations. The Court referred to the Declaration on the Protection of All Persons from Being Subjected to Torture, the UN Declaration of Human Rights, the American Convention on Human Rights, the International Covenant on Civil and Political Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms in order to discern the substance of the CIL.¹⁶⁶

¹⁶¹ See Steven G Calabresi and Stephane Dotson Zimdahl, ‘The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision’ (2005–2006) 47 Wm & Mary L Rev 743, 759–760.

¹⁶² US Const art I, s 8.

¹⁶³ 28 USC s 1350 (1982).

¹⁶⁴ Calabresi and Zimdahl (n 161) 759.

¹⁶⁵ 630 F 2d 876, 143 (2nd Cir, 1980).

¹⁶⁶ *ibid* 882–85. See also *Forti v Suarez-Mason*, 672 F Supp 1531, 1542 (ND Cal, 1987) and *Lareau v Manson*, 507 F Supp 1177, 1187–89 fn 9 (1980). It is noted, however, that there are attempts to limit the scope of the law of nations according to Article I of the Constitution and the Alien Tort Claim Act to those existing at the time of the adoption of the statute in order to limit

A more problematic use of international human rights norms occurs when there are no domestic laws explicitly authorising their use. For statutory interpretation, it is stated in the Restatement (Third) of Foreign Relations Law of the United States that '[w]here fairly possible, a United States statute is to be construed so as not to conflict with *international law* or with *an international agreement of the United States*'.¹⁶⁷ This statement reflects the canon of interpretation adopted by the Supreme Court of the USA since 1804 in *Murray v Schooner Charming Betsy*.¹⁶⁸ According to the canon, even though the international law in question is not enforceable in the domestic legal system, courts are obliged to look at them and attempt to interpret domestic statutes in a way that involves no violation of international law.¹⁶⁹

Courts in the USA have also referred to international and foreign norms in constitutional interpretation. Nevertheless, the *Charming Betsy* canon does not apply. This issue is at the heart of this research and will be discussed in the next section.

the effect of international norms in the domestic legal system. See Calabresi and Zimdahl (n 161) 758; Slyz (n 136) 89–94.

¹⁶⁷ Restatement (Third) of the Foreign Relations Law of the United States, s 114 (1986).

¹⁶⁸ 6 US 64 (1804).

¹⁶⁹ Curtis A Bradley, 'The *Charming Betsy* Canon and Separation of Powers: Rethinking the Interpretive Role of International Law' (1997–1998) 86 Geo LJ 479, 483. Apart from Bradley, two law professors have written classic articles considering this principle in depth and making significant contributions to the subject. See Ralph G Steinhardt, 'The Role of International Law As a Canon of Domestic Statutory Construction' (1990) 43 Vand L Rev 1103; Ralph G Steinhardt, 'Recovering the Charming Betsy Principle' (2000) 94 ASIL Proc 49; Turley (n 128).

IV. International Human Rights Norms in the USA

A. Legal Status of International Human Rights Norms in the Legal System and Their Effect upon It

International human rights norms rarely have legal status and direct effect in the USA. This is partly because international human rights treaties are normally categorised as non-self-executing,¹⁷⁰ and partly because the country has been notorious for not ratifying many international human rights treaties or ratifying them with reservations, understandings, and declarations (RUD) in order to limit their domestic effects.¹⁷¹

So far, the USA has ratified, with the declaration that they are non-self-executing treaties: the International Covenant on Civil and Political Rights (ICCPR) (with a reservation on the provision prohibiting the execution of juveniles);¹⁷² the International Convention on the Elimination of All Forms of Racial Discrimination (with a reservation on the point that the freedom of expression protected by the US Constitution will not be affected by the Convention's provisions);¹⁷³ and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (with several reservations and understandings).¹⁷⁴

The reason for this could be what Spiro calls 'the new sovereigntists'. On the basis of ideas of anti-internationalism and American exceptionalism, this notion holds that the USA as a sovereign nation 'can pick and choose the international

¹⁷⁰ See Bilder (n 138) 1–3.

¹⁷¹ Bradley, 'The *Charming Betsy* Canon' (n 169) 520–21.

¹⁷² 138 Cong Rec S4781–01 (April 2, 1992)

¹⁷³ 140 Cong Rec S7634–02 (June 24, 1994).

¹⁷⁴ 136 Cong Rec S17486–01 (October 27, 1990).

conventions and laws that serve its purpose and reject those that do not'.¹⁷⁵ For human rights treaties, it is argued that the USA should *not* adopt them because, firstly, the obligations specified in this kind of treaty are so amorphous that the nation would not really know what it is signing into.¹⁷⁶ For example, Goldsmith questions a provision in the ICCPR providing protection against discrimination on *any* ground: would it 'extend to discrimination on the basis of homosexuality? Age? Weight? Beauty? Intelligence?'¹⁷⁷ Secondly, it is argued that a human rights agreement is inconsistent with federalism. The US government, as a federal government, does not have any authority to bind each state, which still retains certain sovereign power over its citizens.¹⁷⁸ And lastly, it is argued that the formulation of international law lacks democratic accountability.¹⁷⁹

B. Interpretive Influence of International Human Rights Norms

i. The Practice

As mentioned in the previous section, notwithstanding the dualist approach, international and foreign law may have an indirect role in judicial reasoning through the *Charming Betsy* canon that 'statute is to be construed so as not to conflict with international law or with an international agreement of the United States'.¹⁸⁰ An example of cases where courts used the canon to interpret statute is

¹⁷⁵ Peter J Spiro, 'The New Sovereignist: American Exceptionalism and Its False Prophets' (2000) 79 *Foreign Affairs* 9, 9. However, Bradley and Goldsmith respond, convincingly, that there is nothing wrong about a nation deciding which international norms to accept. Curtis A Bradley and Jack Goldsmith, 'Letters to the Editor: My Prerogative' (2001) 80 *Foreign Affairs* 188, 188–89.

¹⁷⁶ See Spiro (n 175) 10.

¹⁷⁷ Jack Goldsmith, 'Should International Human Rights Law Trump US Domestic Law?' (2000) 1 *Chi J Int'l L* 327, 332.

¹⁷⁸ Spiro (n 175) 10–13. See further discussion in n 288.

¹⁷⁹ *ibid* 11–12. This issue is discussed in section III A.

¹⁸⁰ Restatement (Third) of the Foreign Relations Law of the United States, s 114 (1986).

Rodriguez-Fernandez v Wilkinson.¹⁸¹ In the process of determining that the Immigration and Nationality Act does not permit indefinite detention, the Court of Appeal stated that '[i]t seems proper then to consider international law principles for notions of fairness as to propriety of holding aliens in detention'.¹⁸² It cited the UDHR and the signed but not ratified American Convention on Human Rights. More recently, in *Cabrera-Alvarez v Gonzales*, the Court utilised the canon in assessing whether an immigration statute was consistent with children's rights according to international customary law, although it was noted that the canon did not require the Court to distort the statute.¹⁸³

There has been some academic discussion on the issue of whether the presumption discussed above should be used to construe constitutional provisions to be consistent with international human rights law either in the form of CIL or treaties, but it has not become the courts' practice so far.¹⁸⁴

Nevertheless, in contrast to common allegations that the use of international and foreign norms is an unprecedented approach for constitutional interpretation, the Supreme Court has relied on international human rights norms in deciding constitutional issues throughout its history.¹⁸⁵ The number of cases that the Court referred to such sources also accelerated greatly after 1940.¹⁸⁶ Examples of early

¹⁸¹ 654 F 2d 1382 (10 th Cir, 1981).

¹⁸² *ibid* 1388.

¹⁸³ 423 F 3d 1006, 1109–13 (2005). See also Melissa A Waters, 'Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties' (2007) 107 Colum L Rev 628 providing statistics for the cases where courts in the USA and other common law countries use international law according to the *Charming Betsy* canon.

¹⁸⁴ Yuval Shany, 'How Supreme is the Supreme Law of the Land? Comparative Analysis of the Influence of International Human Rights Treaties Upon the Interpretation of Constitutional Text by Domestic Court' (2006) 31 Brook J Int'l L 341, 364. cf *Cunard S.S. Co. v Mellon*, 262 US 100, 132–33 (1923) (Sutherland J, dissenting) (arguing that the Eight Amendment should be interpreted in the light of the *Charming Betsy* canon).

¹⁸⁵ Calabresi and Zimdahl (n 161) 755.

¹⁸⁶ *ibid* 838.

decisions referring to international human rights norms include the well-known *Dred Scott*,¹⁸⁷ *Reynolds*¹⁸⁸ and *Miranda*.¹⁸⁹

The use of international human rights norms has continued until today. International human rights norms of various kinds, including unincorporated treaties, treaties that the USA is not a party to, UN documents, decisions of international courts, opinions of the world community, international and foreign practices – all of which share the same status that they do not form part of and do not have direct effect in the United States legal system – have played some role in the Court's jurisprudence.

As will be seen below, the interpretive role of international human rights is most notable in areas where constitutional provisions are broad enough, such as the prohibition of 'excessive' or 'cruel and unusual' punishments in the Eighth

¹⁸⁷ In considering the question whether a particular group of people (in this case an African whose ancestors were brought to the USA and sold as slaves) were entitled to constitutional rights, six Justices from both concurring and dissenting sides in *Dred Scott* discussed at length opinions of foreign scholars, decisions from English courts, Roman law and law of continental countries in order to support their side of the argument. *Dred Scott v Sandford*, 60 US (19 How) 393 (1857).

¹⁸⁸ The Court referred to opinions of people in England and northern western nations of Europe against polygamy in order to hold that this issue was not within the First Amendment protection. *Reynolds v United States*, 98 US 145 (1878).

¹⁸⁹ Chief Justice Warren looked at the practices of foreign nations in holding that statements obtained from defendants during interrogation without full warning of constitutional rights were inadmissible as they were obtained in violation of the Fifth Amendment (privilege against self-incrimination). On the issue of whether such requirement constituted undue interference with a proper system of law enforcement, the Justice stated that '[t]he *experience in some other countries* also suggests that the danger to law enforcement in curbs on interrogation is overplayed' and that 'it is consistent with our legal system that we give at least as much protection to these rights as is given in the jurisdictions described'. *Miranda v Arizona*, 384 US 436, 486–89 (1966). See also *New York v Quarles*, where Justice O'Connor submitted that she would apply the learning from the same countries in deciding the development of the *Miranda* rule. 467 US 649, 673 (1984). However, Wollin criticises Justice O'Connor's approach as using foreign law as a compelling authority. David A Wollin, 'Policing the Police: Should *Miranda* Violations Bear Fruit?' (1992) 53 Ohio St LJ 805, 863.

Amendment,¹⁹⁰ the due process requirement of the Fifth and Fourteenth Amendments,¹⁹¹ and the equal protection clause of the Fourteenth Amendment.¹⁹²

a. The Eighth Amendment

In its Eighth Amendment jurisprudence, the Supreme Court has referred to international human rights norms in order to *ascertain the standard specified in the Constitution*, namely what constitutes a prohibited ‘cruel and unusual’ punishment.¹⁹³ This is the use of international human rights norms for a substantive purpose according to Larsen’s typology.¹⁹⁴ The Court implied that the legal system of the USA was in this respect comparable to those of other countries, and argued that, if many other countries found that a punishment was unacceptable, it was likely that such a punishment was unacceptable in the USA as well.

The starting point was the plurality opinion written by Chief Justice Warren in 1958, *Trop v Dulles*,¹⁹⁵ which is the first case in which the Supreme Court referred to international human rights norms in the course of striking down a statute.¹⁹⁶ The question for the Court was whether punishing a person by revoking his citizenship was ‘a cruel and unusual punishment’. The Court established that the basic concept underlying the provision was the ‘dignity of

¹⁹⁰ US Const Amend VIII.

¹⁹¹ US Const Amend V. The Fourteenth Amendment has similar language: ‘... nor shall any State deprive any person of life, liberty, or property, without due process of law.’ US Const Amend XIV.

¹⁹² US Const Amend XIV.

¹⁹³ It is provided that ‘[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted’. US Const Amend VIII.

¹⁹⁴ See Chapter One, text to n 18.

¹⁹⁵ 356 US 86 (1958).

¹⁹⁶ Calabresi and Zimdahl (n 161) 846–47.

man’, and that what punishment was ‘cruel and unusual’ needed to be interpreted according to the ‘evolving standards of decency that mark the progress of a maturing society’.¹⁹⁷ It found that denationalisation would amount to the revocation of a person’s right to have rights and inflict an ever-increasing fear and distress in violation of the Eighth Amendment. To support the statement on the effects of denationalisation, it referred to a report called ‘Study on Statelessness’ provided by the UN which showed that statelessness was a grievance for civilised people and that ‘statelessness is not to be imposed as punishment for crime’ by civilised nations.¹⁹⁸ The dissenting opinion by Justice Frankfurter also referred to a UN report on ‘Laws Concerning Nationality’ and the Philippine Commonwealth Act 1936 in order to show that many civilised nations used the loss of citizenship as a penalty in cases of desertion or even less serious illegal actions.¹⁹⁹

The trend continued during the period 1977–88. In *Coker v Georgia* the Court held that the death penalty for the crime of rape violated the Eighth Amendment. Citing a report on Capital Punishment provided by the Department of Economic and Social Affairs of the United Nations, Justice White noted that ‘[i]t is thus *not irrelevant* here that out of 60 major nations in the world surveyed in 1965, only three retained the death penalty for rape where death did not ensue’²⁰⁰ and that ‘in the light of the legislative decisions in almost all of the States and *in most of the countries around the world*, it would be difficult to support a claim that the death penalty for rape is an indispensable part of States’ criminal justice system’.²⁰¹

¹⁹⁷ 356 US 86, 100–01 (1958).

¹⁹⁸ *ibid* 102.

¹⁹⁹ *ibid* 125–26.

²⁰⁰ 433 US 584, 596 fn 10 (1977).

²⁰¹ *ibid*, 592 fn 4.

Enmund v Florida carried on the reference to international human rights norms in holding that the death punishment for a defendant who aided and abetted felony in the course of which murder was committed by others, but who did not himself kill, violated the Eighth Amendment. The waning status of the doctrine of felony in England, India, Canada, other Commonwealth countries and Europe was discussed. It was stated that ‘the climate of international opinion ... is an additional consideration which is not irrelevant’.²⁰²

Thirty years after *Trop*, the Supreme Court was asked to consider the ‘cruel and unusual punishment’ clause again in *Thompson v Oklahoma*.²⁰³ This time it involved the death penalty imposed on a 15-year-old. The Court reviewed relevant states’ legislation and concluded that executing a person under the age of sixteen was against the evolving standard of decency.²⁰⁴ It then added that such a conclusion was consistent with the views expressed by ‘*other nations that share our Anglo-American heritage, and by the leading members of the Western European community*’.²⁰⁵ The Court discussed the practice of several nations²⁰⁶ and cited international human rights treaties which contain provisions prohibiting juvenile death penalties in certain circumstances.²⁰⁷

However, the reference to international human rights norms was objected to in the dissenting opinion written by Justice Scalia, with whom Chief Justice Rehnquist and Justice White joined. Justice Scalia argued that ‘the views of other nations, however enlightened the Justices of this Court may think them to be,

²⁰² 458 US 782, 796 fn 22 (1982).

²⁰³ 487 US 815 (1988).

²⁰⁴ *ibid* 823–29.

²⁰⁵ *ibid* 830.

²⁰⁶ *ibid* 830–31.

²⁰⁷ Such treaties were the ICCPR (signed but not ratified), the American Convention on Human Rights (signed but not ratified) and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (ratified). *ibid* 831 fn 34.

cannot be imposed upon Americans through the Constitution'.²⁰⁸ This dissent was subsequently adopted in *Stanford v Kentucky*.²⁰⁹ Justice Scalia wrote, for this plurality court holding, that the capital punishment for a 16- to 17-year-old juvenile was not 'cruel and unusual punishment' under the Eighth Amendment.²¹⁰ He repeated his view in *Thompson* that while the practices of other democracies could be used to ascertain that a domestic practice was 'implicit in the concept of ordered liberty' they cannot be used to ensure that the same practice is also accepted in the USA.²¹¹

The beginning of the 21st century has seen more support for the use of international human rights norms in the Supreme Court. In 1999, Justice Breyer argued in his dissenting opinion in *Knight v Florida*²¹² that the Court should grant certiorari on the issue of whether the Eighth Amendment prohibited prolonged delay of execution. This was because, among other factors, there existed *decisions of courts outside the United States* holding the prolonged delay of execution inhuman.²¹³ Decisions of the Privy Council for Jamaica, the Supreme Court of India, the Supreme Court of Zimbabwe, the ECtHR, the Supreme Court of Canada and the United Nations Human Rights committee were cited.²¹⁴ Then in *Foster v Florida*,²¹⁵ while Justices Thomas and Stevens held that constitutional jurisprudence had not changed since the previous case and denied certiorari,²¹⁶ Justice Breyer argued in his dissenting opinion that a long delay was arguably cruel. He cited the same foreign courts' decisions as he cited

²⁰⁸ *ibid* 869 fn 4.

²⁰⁹ 492 US 361 (1989).

²¹⁰ *ibid* 364–65.

²¹¹ *ibid* 370 fn 1. However, Justices Brennan and Stevens dissented on this point. *ibid* 384, 405.

²¹² 120 S Ct 459 (1999).

²¹³ *ibid* 462–63.

²¹⁴ *ibid*.

²¹⁵ 123 S Ct 470 (2002).

²¹⁶ *ibid* 470.

in *Knight*, adding a recent decision from the Supreme Court of Canada, which made it relevant to consider prolonged delay in determining whether to extradite a person to the USA.²¹⁷

The trend of using international human rights norms continues in the most recent cases, *Atkins v Virginia*²¹⁸ and *Roper v Simmons*,²¹⁹ which were decided in 2002 and 2005 respectively. In *Atkins*, the Supreme Court held that the death penalty for a person with an intellectual disability violated the Eighth Amendment, as it was deemed to be cruel and unusual punishment. Justice Stevens, with whom Justices O'Connor, Kennedy, Souter, Ginsburg and Breyer joined, delivered the opinion of the majority Court. The majority found a *national consensus* against a death penalty for persons with intellectual disabilities, on the grounds that several states had adopted the law prohibiting such punishment,²²⁰ and that even in the states allowing the punishment such practice was uncommon.²²¹ It then went on to add that there was additional evidence showing that the 'legislative judgment reflects a much broader social and professional consensus'.²²² Such additional evidence included the opinions of professional organisations, religious communities, polling data, and *the world community*. As to the last, the Court found that 'the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved'.²²³ The Court then went on to say:

²¹⁷ *ibid* 472.

²¹⁸ 536 US 304 (2002).

²¹⁹ 543 US 551 (2005).

²²⁰ *Atkins v Virginia*, 536 US 304, 314–16 (2002). The Court noted that '[i]t is not so much the number of these States that is significant, but the consistency of the direction of change'. *ibid* 315.

²²¹ *ibid* 316.

²²² *ibid* 316 fn 21.

²²³ *ibid*.

Although these factors are *by no means dispositive*, their consistency with the legislative evidence *lends further support to our conclusion* that there is a consensus among those who have addressed the issue.²²⁴ (emphasis added)

Finally, in *Roper*, the most recent in this line of cases, the Supreme Court held that capital punishment for people under the age of eighteen was inconsistent with the Eighth Amendment.²²⁵ It did so after considering the consistency of direction towards national consensus, the justification for the punishment on the grounds of culpability of juveniles, and the potential for retribution and the deterrence of crime.²²⁶ To support this holding, the Court turned to international and foreign materials, including the United Nations Convention on the Rights of the Child (which every country in the world except the USA and Somalia ratified), the ICCPR (ratified with reservation on death penalty provision), the American Convention on Human Rights: Pact of San Jose Costa Rica (signed but not ratified), and the African Charter on the Rights and Welfare of the Child.²²⁷ Practices of other nations were also consulted. The Court found that since 1990, only seven countries other than the USA had executed juveniles. The abandonment of such punishment in the UK was of particular interest as the two countries had historic ties and the Eighth Amendment's language was borrowed from the English Bill of Rights of 1688.²²⁸ These had led the Court to say that 'the United States now stands alone in a world that has turned its face against the juvenile death penalty'.²²⁹

Nevertheless, in both *Atkins* and *Roper*, dissenting opinions strongly attack the legitimacy of the reference to international human rights norms. The majorities in

²²⁴ *ibid* 316 fn 21 citing *Thompson v Oklahoma*, 487 US 815, 830–831 (1988).

²²⁵ *Roper v Simmons*, 543 US 551 (2005).

²²⁶ *ibid* 566, 569–71.

²²⁷ *ibid* 576–77.

²²⁸ *ibid*.

²²⁹ *ibid* 577.

both cases were accused of using ‘irrelevant’ international and foreign opinion to fabricate a national consensus and to replace American values with other values.²³⁰ This point will be discussed further in the next section.

b. Due Process Clauses

The Court has used international human rights norms in ascertaining constitutional standards not only in the Eighth Amendment, but also in the interpretation of the Fifth and Fourteenth Amendments, which require that ‘no person shall be ... deprived of life, liberty, or property, without due process of law’.²³¹

The practice emerged at least as early as 1884 in the case of *Hurtado v California*, where Justice Matthew stated:

The constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of the English law and history; but *it was made for an undefined and expanding future, and for a people gathered, and to be gathered from many nations and of many tongues*; and while we take just pride in the principles and institutions of the common law, we are not to forget that in lands where other systems of jurisprudence prevail, the ideas and processes of civil justice are also not unknown. Due process of law, in spite of the absolutism of continental governments *is not alien to that code which survived the Roman empire as the foundation of modern civilization in Europe*, and which has given us that fundamental maxim of distributive justice, *suum cuique tribuere*. There is nothing in *Magna Charta*, rightly construed as a broad charter of public rights and law, which ought to exclude *the best ideas of all*

²³⁰ *Atkins v Virginia*, 536 US 304, 347–48 (2002); *Roper v Simmons* 543 US 551, 623–24, 628 (2005).

²³¹ US Const Amend V. The Fourteenth Amendment has similar language: ‘... nor shall any State deprive any person of life, liberty, or property, without due process of law.’ US Const Amend XIV.

*systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted.*²³² (emphasis added)

The Court later held that an indictment by a grand jury was not always essential according to the requirement of the due process of law. This decision came partly from the fact that in other countries where the concept of due process of law also existed there were no rights to indictment by a grand jury.²³³

Importantly for the purpose of this research, the above statement reflects at least four crucial points. First, it is evident that the early Supreme Court looked at the Constitution as a timeless document whose interpretation should take into account not only traditions and history but also changes of circumstance. Second, the Constitution has an international aspect. It intends to embrace many people from many nations and of many tongues. Third, the statement highlights the fact that the USA's legal system is by no means divorced from other legal systems: several legal concepts recognised by the USA are also recognised by other countries, particularly those in Europe. And lastly, it expressly asserts that according to the common law methods, inspiration can be drawn from every fountain of justice. Therefore, international and foreign human rights norms, to the extent that they are relevant to the issue in hand, can be used as an aid in interpreting the Bill of Rights.

A comparable issue was raised in *Palko v Connecticut* where the Supreme Court held that the law of Connecticut giving the State the right of appeal in criminal cases was *not* unconstitutional in depriving the accused of life without 'due process of law'. In this case, the Court discussed, *obiter*, immunity from

²³² 110 US 516, 530–31 (1884).

²³³ *ibid* 530–31, 538. However, it should be noted that the Court did consider in length the 'true meaning' of the phrase 'due process of law' according to English common law both before and after the incorporation of this phrase into the US Constitution. *ibid* 520–30.

compulsory self-incrimination as something that ‘might be lost, and justice still be done’.²³⁴ To support its statement it went on to say that ‘[i]ndeed, today as in the past there are students of our penal system who look upon the immunity as a mischief rather than a benefit, and who would limit its scope, or destroy it altogether’.²³⁵ And in a footnote, it cited foreign books and stated that ‘[c]ompulsory self-incrimination is part of the established procedure in the law of Continental Europe’.²³⁶

Justice Frankfurter is famous for consistently using the standard of decency and fairness adopted by English-speaking peoples in considering the issues of due process in criminal procedure. In *Malinski v New York*, the Justice expressed the opinion that courts have to ascertain whether the procedures in question ‘offend those canons of decency and fairness which express the *notions of justice of English-speaking peoples* even toward those charged with the most heinous offenses’.²³⁷

Such reference was repeated in *Adamson v California*,²³⁸ *Rochin v California*,²³⁹ and *Wolf v Colorado*.²⁴⁰ In the latest, Justice Frankfurter included in his opinion extensive citation of foreign cases. The issue was whether the due process clause of the Fourteenth Amendment forbade the admission of evidence obtained by an unreasonable search and seizure in a prosecution in a state court for a state crime.

²³⁴ 302 US 319 (1937) 325.

²³⁵ *ibid* 325–26.

²³⁶ *ibid* 326 fn 3.

²³⁷ 324 US 401 (1945) 416–17.

²³⁸ 332 US 46, 67–68 (1947). It was a controversial case where the issue was the constitutionality of a California statute allowing a prosecutor or a court to comment upon the failure of a defendant to explain or to deny evidence against him.

²³⁹ 342 US 165, 169 (1952) holding that the use of capsules containing morphine which were forced out of the defendant’s stomach to obtain the conviction of the defendant for illegal possession of morphine violated the due process Clause of the Fourteenth Amendment.

²⁴⁰ 338 US 25 (1949).

The Justice started by saying that the provision ‘exacts from the States for the lowliest and the most outcast all that is implicit in the concept of ordered liberty’.²⁴¹ He then explained that the security of one’s privacy against arbitrary intrusion by the police according to the Fourth Amendment was held to apply to states through the Fourteenth Amendment because it was basic to a free society.²⁴² He stated:

... the search without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the *conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples*.²⁴³ (emphasis added)

However, he later held that protection against intrusion did not demand the exclusion of evidence obtained by unreasonable search and seizure. One of the reasons was that the protection was not regarded by most of the *English-speaking world* as vital.²⁴⁴

It is quite clear that Justice Frankfurter took into account the opinions of peoples in most of the English-speaking world rather than just those of the Americans in determining rights according to the Due Process clause of the Fourteenth Amendment.

More recently, in *Zadvydas v Davis*,²⁴⁵ the issue was the interpretation of a provision in the Immigration and Nationality Act (INA), which authorised the Attorney General to detain a removable alien after a 90-day removal period in

²⁴¹ *ibid* 27.

²⁴² *ibid*.

²⁴³ *ibid* 28.

²⁴⁴ *ibid* 29. The practice of foreign nations, especially the UK and the British Commonwealth nations, was cited. *ibid* 30, 39 (Table J).

²⁴⁵ 533 US 678 (2001).

cases where such an alien was determined to be a risk to the community or unlikely to comply with the order of removal. In arguing that the detention incidental to removal was not a punishment, Justice Kennedy stated in his dissenting opinion that this argument ‘accords with international views on detention of refugees and asylum seekers’.²⁴⁶ International human rights norms served as part of the bigger argument that the detention according to the statute in question was not inconsistent with the due process requirement.

Apart from the issues of criminal procedure, international human rights norms play a role in judicial reasoning regarding rights to privacy. *Poe v Ullman* involved the Connecticut statutes prohibiting the use of contraceptives, which the plaintiffs alleged violated the Fourteenth Amendment in that they deprived life, liberty or property without due process. Although the case was dismissed on the grounds that plaintiffs could not show that the statutes would be enforced against them, in his dissenting opinion Justice Harlan stated:

This enactment involves what, by common understanding throughout the English-speaking world, must be granted to be a most fundamental aspect of ‘liberty,’ the privacy of the home in its most basic sense, and it is this which requires that the statute be subjected to ‘strict scrutiny.’²⁴⁷ (emphasis added)

Opinion of the wider society, namely the English-speaking world, was cited in order to support the use of the strict scrutiny test.

Later, in 1986, the Supreme Court in *Bowers v Hardwick* had to decide the issue of whether Georgia’s statute criminalising consensual sodomy in a private place violated the fundamental rights protected by the Constitution. The majority considered first the issue of whether the Constitution protected homosexuals’

²⁴⁶ Report of the United Nations Working Group on Arbitrary Detention and the United Nations High Commissioner for Refugees’ Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers were cited. *ibid* 721.

²⁴⁷ 367 US 497, 548 (1961).

rights to engage in sodomy.²⁴⁸ It found no precedent that supported such a right and also refused to recognise it as an unenumerated right under the due process clause.²⁴⁹ The majority laid down, as criteria for recognising the unenumerated rights, that they must be rights that were ‘implicit in the concept of ordered liberty’²⁵⁰ or ‘deeply rooted in this nation’s history and tradition’.²⁵¹ It claimed that since there had been practices prohibiting sodomy since ancient times and such practices were still reflected in the statutes of many states, the homosexual right did not meet such criteria.²⁵² Concurring with the above decision, Chief Justice Burger referred to ‘the history of Western Civilization’, ‘Judaean-Christian moral and ethical standards’, ‘Roman law’, ‘English statute’, and ‘the common law of England’ in order to show that sodomy had been prohibited for a long time and was therefore far from being protected as fundamental right.²⁵³

Bowers was recently reversed by *Lawrence v Texas* in 2003.²⁵⁴ In invalidating a Texas statute criminalising sexual conduct between same sex partners, the majority opinion written by Justice Kennedy and joined by Justices Stevens, Souter, Ginsburg and Breyer held that *Bowers* was wrongly decided. The majority found that the *Bowers*’ Court overlooked the claim of liberty, that there was actually no historical ground prohibiting sodomy, and that at the time *Bowers* was decided there was ‘an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex’.²⁵⁵ For the last point, Justice Kennedy also argued that the reference to the history of Western civilisation in *Bowers* failed to

²⁴⁸ 478 US 186, 90 (1986).

²⁴⁹ *ibid* 191–92.

²⁵⁰ *ibid* citing *Palko v Connecticut*, 302 US 319, 325–26 (1937).

²⁵¹ *ibid* 192 citing *Moore v East Cleveland*, 431 US 494, 503 (1977).

²⁵² *ibid* 192–94.

²⁵³ *ibid* 196–97.

²⁵⁴ 539 US 558 (2003).

²⁵⁵ *ibid* 571–572.

take into account the ECtHR decision in *Dudgeon v UK*²⁵⁶ holding that the law prohibiting consensual homosexual conduct put the UK in breach of Article 8 of the ECHR.²⁵⁷

The majority also found that subsequent cases were against *Bowers*. Again, it referred to decisions of the ECtHR and foreign countries:

To the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere. The European Court of Human Rights has followed not *Bowers* but its own decision in *Dudgeon v United Kingdom; Modinos v Cyprus; Norris v Ireland*. Other nations, too, have taken action consistent with an affirmation of the protected rights of homosexual adults to engage in intimate, consensual conduct.²⁵⁸ (internal citation omitted)

More importantly, after rejecting *Bowers* the majority continued the reference to international human rights norms. It said:

The right the petitioners seek in this case *has been accepted as an integral part of human freedom in many other countries*. There has been no showing that in this country the government interest in circumscribing personal choice is somehow more legitimate or urgent.²⁵⁹ (emphasis added)

Gerald Neuman has noted that the *Lawrence* court's use of the *Dudgeon* decision of the European Court of Human Rights 'was primarily normative' and intended to reinforce the Supreme Court's 'own reasons for affording constitutional

²⁵⁶ *Dudgeon v the UK*, App. 7525/76, 1981, Series A no 45.

²⁵⁷ *Lawrence* (n 254) 572–73.

²⁵⁸ *ibid* 576–77.

²⁵⁹ *ibid* 577.

protection'.²⁶⁰ The idea here is that if another impartial body had reached the same conclusion, this supports the conclusion the Court was reaching and adds to the Court's sense of security for its own decision. However, *Lawrence* raises contemporary debates over the legitimacy of using international human rights norms in interpreting the Bill of Rights. This will be discussed further in the next section.

Here, it is observed that not only in this case, but also in others relating to the due process clauses, courts have regularly used international human rights norms on the basis of the argument that the concept exists not only in the USA, but also in many other countries. Thus, if a particular right is not recognised in other countries, such a right is not likely to be indispensable in the USA. On the other hand, if a right is widely recognised in other countries, it is an indicator that the right is 'implicit in the concept of ordered liberty'.²⁶¹ This is, in Larsen's terms, a substantive use of international human rights norms.²⁶²

In any case, international human rights norms had also been used for empirical purposes. In *Roe v Wade*,²⁶³ Justice Blackmun delivered the opinion of the Court that insight from history was desirable. Among other sources, he referred at length to English statutes and the development of such law by English courts during the period 1803–1967.²⁶⁴ Such information supported the Court's judgment that the right of privacy, either by the Fourteenth Amendment or the Ninth Amendment, was broad enough to encompass the non-absolute right to an

²⁶⁰ Gerald Neuman, 'The Uses of International Law in Constitutional Interpretation' in 'Agora: The United States Constitution and International Law' (2004) 98 Am J Int Law 82, 90.

²⁶¹ This phrase has been used regularly since *Palko v Connecticut*, 302 US 319, 325 (1937).

²⁶² See Chapter One, text to n 18.

²⁶³ 410 US 113 (1973).

²⁶⁴ *ibid* 136–37.

abortion.²⁶⁵ Further, the Court referred to medical data from England, Wales, Japan, Czechoslovakia and Hungary in order to show that the concern about a woman's health during abortion was no longer warranted.²⁶⁶ International sources obviously served as factual supports for the Court's argument.

More recently, in *Washington v Gluckberg*,²⁶⁷ the Supreme Court held that the right to assistance in committing suicide was not a fundamental liberty protected by the due process clause of the Fourteenth Amendment. Remarkably, the majority opinion written by Chief Justice Rehnquist, and joined by Justices Scalia and Thomas, who usually objected to the use of international and foreign norms, discussed in detail international sources.

The Chief Justice announced that the Court would examine '*our Nation's* history, legal traditions, and practices'.²⁶⁸ However, immediately afterwards, he also stated that '[i]n almost every State – indeed, in *almost every western democracy* – it is a crime to assist a suicide'.²⁶⁹ Then in a footnote accompanying this statement, the Chief Justice cited a decision of the Supreme Court of Canada which discussed related laws of Austria, Spain, Italy, the UK, the Netherlands, Denmark, Switzerland and France, and concluded that it was the norm among Western democracies to have a blanket prohibition on assisted suicide.²⁷⁰

Moreover, on the issue of whether a state had a reasonable concern that assisted suicide might lead to voluntary and involuntary euthanasia, the majority referred

²⁶⁵ *ibid* 153. However, the Supreme Court held this case on the basis of the Fourteenth Amendment.

²⁶⁶ *ibid* 724–25 fn 44.

²⁶⁷ 521 US 702 (1997).

²⁶⁸ *ibid* 710.

²⁶⁹ *ibid* 710 (emphasis added).

²⁷⁰ *ibid* 711 fn 8. The Canadian decision was *Rodriguez v British Columbia (Attorney General)*, 107 DLR (4th) 342, 404 (Can 1993).

to the practice of the Netherlands, where physician-assisted suicide and voluntary euthanasia had been legalised. Upon finding that in the Netherlands euthanasia ‘has not been limited to competent, terminally ill adults who are enduring physical suffering, and that regulation of the practice may not have prevented abuses in cases involving vulnerable persons’,²⁷¹ it was held that ‘Washington’s ban on assisted suicide is at least reasonably related to their promotion’ and protection and thus did not violate the due process clause of the Fourteenth Amendment.²⁷²

It should also be noted that the experiences of the Netherlands were discussed further in the concurring opinion of Justice Souter, who said that the Netherlands was ‘the only place where experience with physician-assisted suicide and euthanasia has yielded *empirical evidence* about how such regulation might affect actual practice’.²⁷³

c. Equal Protection Clause

The Fourteenth Amendment provides that ‘no state shall ... deny to any person within its jurisdiction the equal protection of the law’.²⁷⁴ Recourse to international human rights norms in interpreting this clause is relatively new compared to the same recourse in the Eighth Amendment and due process as discussed above, but there are signs that it may be developed in the future.²⁷⁵

²⁷¹ *ibid* 734.

²⁷² *ibid* 735.

²⁷³ *ibid* 785.

²⁷⁴ US Const Amend XIV.

²⁷⁵ For academic discussion see G A Christenson, ‘Using Human Rights Law to Inform Due Process and Equal Protection Analysis’ (1983) 52 U Cin L Rev 3; Vicki C Jackson, ‘Transnational Discourse, Relational Authority, and the U.S. Court: Gender Equality’ (2003) 37 Loy L A L Rev 271.

In 2003, the Supreme Court held in *Grutter v Bollinger* that the policy of the University of Michigan Law School in seeking to enrol a ‘critical mass’ of students belonging to racial and ethnic groups which had been discriminated against in the past was narrowly tailored to serve its interest and did not violate the Equal Protection Clause.²⁷⁶ Filing a concurring opinion, Justice Ginsburg, with whom Justice Breyer joined, added an international flavour to the case. She stated that ‘[t]he Court’s observation that race-conscious programs “must have a logical end point” accords with the international understanding of the office of affirmative action’.²⁷⁷ To elaborate, Justice Ginsburg referred to the International Convention on the Elimination of All Forms of Racial Discrimination (ratified) and the Convention on the Elimination of All Forms of Discrimination against Women (signed but not ratified). Essentially, these two instruments supported affirmative treatment of certain groups in order to ensure that these groups would be able to enjoy equal protection, provided that the treatment was discontinued after the objectives had been reached. She then investigated the practice relating to race in the USA and submitted that since unequal opportunities were still apparent, the affirmative action was justified.²⁷⁸

*Gratz v Bollinger*²⁷⁹ is another case relating to admissions policy encouraging diversity among students decided on the same day as *Grutter*. The majority’s opinion written by Chief Justice Rehnquist held that the policy which automatically gave 20 per cent of the points needed for admission to applicants who in terms of race belonged to underrepresented minority groups was not individual-sensitive, as that in *Grutter* had been, and was not narrowly tailored to achieve its interest.²⁸⁰ Justice Ginsburg, with whom Justice Souter joined, dissented. Her opinion was based mainly on the domestic grounds that since

²⁷⁶ 539 US 306 (2003).

²⁷⁷ *ibid* 344 (internal citations omitted).

²⁷⁸ *ibid* 346.

²⁷⁹ 539 US 244 (2003).

²⁸⁰ *ibid* 249–76.

large disparities arising from racial discrimination from the past still continued, the use of race in order to reach equality might be appropriate. Nevertheless, she referred to international instruments in order to make clearer where to draw the line between such different uses.²⁸¹ She explained:

To avoid conflict with the equal protection clause, a classification that denies a benefit, causes harm, or imposes a burden must not be based on race. In that sense, the Constitution is color blind. But the Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination ... *Contemporary human rights documents draw just this line; they distinguish between policies of oppression and measures designed to accelerate de facto equality.*²⁸² (emphasis added)

The same international human rights conventions to which Justice Ginsburg referred in *Grutter* were again cited in this case. While in *Grutter* Justice Ginsburg referred to international norms relating to the use of affirmative action in order to support the majority opinion in the sense that its judgment was in line with international understanding, in *Grutz*, she used international norms to make clearer the proper line between strict equal protection and affirmative action. Both cases represent the use of international human rights norms for a substantive purpose according to Larsen's typology.²⁸³

ii. Controversies over the Interpretive Influence of International Human Rights Norms

From the cases discussed in the previous section, it is clear that international human rights norms do have an interpretive influence on the Supreme Court's judicial reasoning, especially for a substantive purpose, which is more

²⁸¹ *ibid* 301–2.

²⁸² *ibid* 302.

²⁸³ See Chapter One, text to n 18.

controversial than the empirical and expository purposes.²⁸⁴ Although the norms have never been a sole consideration determining the outcome of a case, they serve as relevant materials that help determine the existence, scope and application of domestic constitutional rights, which are expressed in broad language.

However, the use of international human rights norms in the Supreme Court seems to depend also on the interpretive philosophy held by each Justice. Some of them have argued that it is illegitimate and inappropriate for the judiciary to refer to international human rights norms that have no legal effect in the US legal system. Indeed, as soon as the use of international human rights norms emerged, criticism of it followed. In a very early case, *Dred Scott*, while six justices used international human rights norms in their opinions, Chief Justice Taney expressly stated that the Court should not have regard to opinions of other nations.²⁸⁵ The criticism has persisted and started to be more obvious in the dissenting opinion in *Thompson* and in the main opinion in *Stanford*, where Justice Scalia stated that reliance on international standards was not appropriate to the task of expounding the American Constitution.²⁸⁶ It became even stronger at the beginning of the 21st century when *Knight*, *Atkins*, *Lawrence* and *Roper* were decided with explicit reference to international human rights norms.²⁸⁷

In *Atkins*, Chief Justice Rehnquist wrote separately in order to argue that the use of foreign law and other sources of information was not supported by precedent and was inconsistent with federalism, which provided that the 'permanent prohibition' upon democratic government must be specified in legislation

²⁸⁴ See discussion in Chapter One, text to n 19-21.

²⁸⁵ Discussed in text to n 187.

²⁸⁶ Discussed in text to n 203 and n 209 respectively.

²⁸⁷ See *Knight v Florida* discussed in text to n 212; *Atkins v Virginia* discussed in text to n 218; *Lawrence v Texas* discussed in text to n 254; *Roper v Simmons* discussed in text to n 219.

approved by the people.²⁸⁸ According to the Chief Justice, American standards of decency should be ascertained on the basis of domestic legislation and jury determinations alone. This would be consistent with the role of judges in a democratic system.²⁸⁹ For him, referring to international opinions was unacceptable even as a ‘further support’ for the Court’s conclusion.²⁹⁰

Justice Scalia also filed a dissenting opinion in *Atkins*. He objected to the use of international human rights norms mainly for the reason that he could not find a national consensus which international and foreign norms could support,²⁹¹ and therefore was convinced that the international materials were adduced for the purpose of supporting the majority’s own subjective judgment rather than any national consensus.²⁹² The Justice went on to emphasise that international human rights norms were irrelevant in expounding the US Constitution.²⁹³ Then in *Roper*, he started by arguing that, to be consistent with the concept of democracy, the evolving standard must be found only in the practice of the American people and not in the Court’s own opinion.²⁹⁴ He pointed out that the fact that the USA had not ratified international instruments referred to by the majority demonstrated the people’s view in favour of the death penalty.²⁹⁵ Moreover, he

²⁸⁸ *Atkins v Virginia*, 536 US 304, 322. cf Mark Tushnet, ‘When Is Knowing Less Better Than Knowing More?’ (2006) 90 Minn L Rev 1275, 1292 arguing that the argument based on federalism is not directed to the issue of using non-US materials, but rather to the issues of the appropriateness of the Supreme Court decision to incorporate the Bill of Rights into the Fourteenth Amendment.

²⁸⁹ *Atkins* (n 288) 324.

²⁹⁰ *ibid* 328.

²⁹¹ He disagreed with the majority on almost every ground. He found no national consensus from legislations, rejected the majority attempt to find consensus from the ‘consistency of the direction of change’, and was not convinced that the practice was uncommon. *ibid* 342–46.

²⁹² *ibid* 348–49.

²⁹³ *ibid* 347–48.

²⁹⁴ *Roper v Simmons*, 543 US 551, 615–16 (2005).

²⁹⁵ *ibid* 622–23.

firmly submitted that foreign authorities were not relevant to the issue,²⁹⁶ not even as a confirming source. He stated:

To begin with, I do not believe that approval by ‘other nations and peoples’ should buttress our commitment to American principles any more than (what should logically follow) disapproval by ‘other nations and peoples’ should weaken that commitment.²⁹⁷

The criticism has arisen not only in regard to the Eighth Amendment, but also in regard to the due process clause of the Fourth and Fourteenth Amendments. In *Lawrence*, the majority’s reference to the ECtHR’s jurisprudence was criticised by Justice Scalia on the grounds that a constitutional entitlement was not established just because several states stopped criminalising some behavior, and ‘[m]uch less do they spring into existence, as the Court seems to believe, because foreign nations decriminalize conduct’.²⁹⁸

It is interesting to note that the disagreement among the Justices over the use of international and foreign norms can be seen as a ‘culture war’ between the conservative justices, who believe that the Court should limit sources of constitutional interpretation, and the more liberal justices, who prefer not to limit themselves only to certain sources.²⁹⁹ The late Chief Justice Rehnquist, Chief Justice Roberts, and Justices Scalia, Thomas and Alito, all nominated by Republican Presidents,³⁰⁰ seem to be in the former group. The first three consistently objected to the use of international and foreign norms in their judgments. Chief Justice Roberts and Justice Alito have not said anything on the

²⁹⁶ *ibid* 623–24.

²⁹⁷ *ibid* 628.

²⁹⁸ *Lawrence v Texas*, 539 US 558 (2003) 598.

²⁹⁹ Mark Tushnet, ‘Referring to Foreign Law in Constitutional Interpretation: An Episode in the Culture Wars’ (2005) 35 U Balt L Rev 299, 309–10.

³⁰⁰ See The US Senate, ‘The Supreme Court Nominations’ <<http://www.senate.gov/pagelayout/reference/nominations/Nominations.htm#official>> accessed 4 July 2010.

issue in their judicial opinions, but expressed the opinion against the use of non-US materials in their confirmation hearings before the Senate.³⁰¹ On the other side are Justices Stevens, O'Connor, Kennedy, Souter, Breyer and Ginsburg, who have used, and have expressed their approval for the use of, international human rights norms either in their judgments or in extra-judicial speeches.³⁰² The first four were nominated by Republican Presidents. The last two were nominated by a Democrat President.³⁰³

This debate has not been confined to the Justices. Since the controversial cases of *Atkins* and *Lawrence*, decided in 2002 and 2003 respectively, the debate has extended to involve legal scholars, politicians and the wider public, and has become a hot issue in the USA, although the focus has been on the use of international and foreign norms in general rather than international human rights norms.

In 2003, the House of Representatives issued the 'Constitutional Preservation Resolution', which stated that 'the Supreme Court should base its decisions on the Constitution and Laws of the United States, and *not* on the law of any foreign country or any international law or agreement not made under the authority of the United States'.³⁰⁴ Another two resolutions to the same were passed in 2004

³⁰¹ Justice Robert's statement is provided in text to n 337 and for Justice Alito's statement see text to n 312 below.

³⁰² Apart from cases discussed above, see: Justice Sandra Day O'Connor, 'Keynote Address before the American Society of International Law' (2002) 96 ASIL 348; Associated Press, 'O'Connor Extols Role of International Law' *ABC News* <<http://abcnews.go.com/Politics/print?id=202974>>; Stephen Breyer, 'Keynote Address' (2003) 97 ASIL Proc 265; Justices Antonin Scalia & Stephen Breyer (n 82); Ruth Bader Ginsburg, "'A Decent Respect to The Opinions of [Human]kind": the Value of a Comparative in Constitutional Adjudication' (2005) 64 CLJ 575; Ruth Bader Ginsburg, 'Sherman J Bellwood Lecture: Looking Beyond Our Borders: The Value of A Comparative Perspective in Constitutional Adjudication' (2003) 40 Idaho L Rev 1.

³⁰³ The US Senate (n 300).

³⁰⁴ 108th Cong, H Res 446 (2003) (emphasis added).

and 2007.³⁰⁵ The Senate passed the same resolution in 2005.³⁰⁶ These resolutions do not bind the courts, but they certainly generate political and societal pressure.

Moreover, in the recent process of confirming the new Supreme Court Justice, Sonia Sotomayor, in 2009, Republican senators made it very clear that the Justice's philosophy regarding the use of international and foreign law would affect the confirmation process. Justice Sotomayor's previous speech, which suggested that *ideas* from international and foreign laws can be useful in judicial reasoning, was questioned repeatedly. The senators also asked the Justice many times to confirm that '[f]oreign law cannot be used as a holding or a precedent or to bind or to influence the outcome of a legal decision interpreting the constitution'.³⁰⁷

In academic circles, one group of scholars supports the use of international and foreign materials on the basis of concepts such as transnational legal process, globalisation, transnational judicial dialogue, and respect for the opinion of mankind.³⁰⁸ On the other hand, another group of scholars raises serious concerns about the legitimacy and appropriateness of such practice.³⁰⁹

³⁰⁵ 108th Cong, H Res 568 (2004); 100th Cong, H Res 372 (2007).

³⁰⁶ 109th Cong, S Res 92 (2005) (Mr Cornyn).

³⁰⁷ LexisNexis Emerging Issues Law Center Staff, 'Sotomayor's Hearing: The Complete Transcript' *Los Angeles Times* <<http://latimesblogs.latimes.com/washington/2009/07/sonia-sotomayor-hearing-transcript.html>> accessed 2 February 2010 Day 3. See questions asked by Sens Cornyn, Coburn, Session and Graham.

³⁰⁸ See Cherie Booth and Max Du Plessis, 'Home alone? The US Supreme Court and International and Transnational Judicial Learning' (2005) 2 EHRLR 127; Harold Hongju Koh, 'The Ninth Annual John W Hager Lecture, The 2004 Term: The Supreme Court Meets International Law' (2005) 12 *Tulsa J Comp & Int'l L* 1; Harold Hongju Koh, 'International Law as Part of Our Law' in 'Agora: The United States Constitution and International Law' (2004) 98 *Am J Int Law* 43; Ginsburg, "'A Decent Respect to the Opinions of [Human]kind'" (n 302); B Marquesinis and J Fedtke, 'The Judge as Comparatist' (2005) 80 *Tul L Rev* 11; Shany (n 184);

The controversy over the use of international human rights norms is usually concerned with the allegation that the Supreme Court has imposed foreign law on the American people. However, it is the view of the present thesis that this objection oversimplifies the matter and is based on some questionable reasoning. In the following subsections, an attempt will be made to disentangle important arguments, and to identify the underlying reasons for the objections to the use of international human rights norms and evaluate their credibility.

a. American Exceptionalism and Unilateralism

One of the underlying reasons for the use of international and foreign laws in the Supreme Court being subject to wide criticism is the idea of American exceptionalism – the belief that the USA is essentially different from other countries.³¹⁰ This is reflected clearly in the dissenting opinion of Justice Scalia in *Atkins*:

Equally irrelevant are the practices of the ‘world community’, whose notions of justice are (thankfully) not always those of our people. We must never forget that it is a Constitution for the United States of America that we are expounding ...³¹¹

It is reflected also in this statement by Justice Alito:

Tushnet, ‘When Is Knowing Less Better Than Knowing More?’ (n 288) ; PJ Messitte, ‘Citing Foreign Law in U.S. Courts: Is Our Sovereignty Really at Stake?’ (2005) 35 U Balt L Rev 171; Neuman (n 260).

³⁰⁹ Alford (n 79); Roger P Alford, ‘Misusing International Sources to Interpret the Constitution’ in ‘Agora: The United States Constitution and International Law’ (2004) 98 Am J Int Law 57 ; Michael D Ramsey, ‘International Materials and Domestic Rights: Reflections on *Atkins* and *Lawrence*’ in ‘Agora: The United States Constitution and International Law’ (2004) 98 Am J Int Law 69; Posner, ‘Transnational Legal Process’ (n 132).

³¹⁰ Vicki C Jackson, ‘Ambivalent Resistance and Comparative Constitutionalism: Opening Up the Conversation on “Proportionality”, Rights and Federalism’ (1999) 1 U Pa J Const L 584, 592.

³¹¹ *Atkins v Virginia*, 536 US 304 (2002) 347–48.

I think the framers would be stunned by the idea that the Bill of Rights is to be interpreted by taking a poll of the countries of the world. *The purpose of the Bill of Rights was to give Americans rights that were recognized practically nowhere else in the world at the time.* The framers did not want Americans to have the rights of people in France or the rights of people in Russia or any of the other countries on the continent of Europe at the time. They wanted them to have the rights of Americans ...³¹² (emphasis added)

Rubinfeld submits that this exceptionalism has emerged since the founding of the nation and has been reinforced since the end of the World War II.³¹³ While European countries perceived their victory as the victory of democracy over absolute nationalism, the USA looked at it as a victory resulting from its own unique character.³¹⁴ This belief is said to pervade the general public and all branches of the American government, regardless of their liberal or conservative stands.³¹⁵

The Constitution, for Americans, is the document that creates the nation and gives its people an understanding of their roles as political beings.³¹⁶ Consequently, if the Constitution is to be interpreted or developed, it should be in the way that continues to give expression to perceived national characteristics.³¹⁷ The use of international and foreign sources is perceived as something that

³¹² Justice Alito in his confirmation hearing found in Roger P Alford, 'Alito: "Framers Would Be Stunned"' <<http://lawofnations.blogspot.com/2006/01/alito-framers-would-be-stunned.html>> accessed 3 July 2010.

³¹³ Jed Rubinfeld, 'Unilateralism and Constitutionalism' (2004) 79 NYU L Rev 1971, 1973–74.

³¹⁴ Jed Rubinfeld, 'The Two World Order' in Georg Nolte (ed) *European and US Constitutionalism* (CUP 2005) 280–82.

³¹⁵ Jackson, 'Ambivalent Resistance and Comparative Constitutionalism' (n 310) 592.

³¹⁶ Mark Tushnet, 'The Possibilities of Comparative Constitutional Law' (1999) 108 Yale LJ 1225, 1225–28.

³¹⁷ Rubinfeld, 'The Two World Order' (n 314) 285.

‘deprecates the nation’s uniqueness’³¹⁸ or dissolves ‘the affections that Americans have for their own Constitution’.³¹⁹ Therefore, while constitutionalism in the European countries can be called ‘international constitutionalism’, allowing international norms or universal values to limit domestic governments, constitutionalism in the USA is ‘national constitutionalism’, focusing only on domestic values.³²⁰

The fact that the USA is now the world’s leading superpower both politically and economically reinforces the attitude against international and foreign norms.³²¹ The USA has been involved in making international law and in developing the constitutions of other countries since the beginning of the Republic, and now the American-style Constitution has spread all over the world.³²² The decisions of the Supreme Court are also studied and respected in many other countries.³²³ The people and the courts get used of being leaders and thus develop a reticence to learn from their ‘constitutional offspring’.³²⁴ For human rights issues in particular, Henkin submits that while the USA is eager to be involved with, and even to interfere with, human rights development in other countries, it has been reluctant to accept standards from other countries ‘even if they were borrowed

³¹⁸ Tushnet, ‘Referring to Foreign Law’ (n 299) 310.

³¹⁹ McGinnis’s expression in ‘Testimony of Professor John McGinnis, Appropriate Role of Foreign Judgments in the Interpretation of American Law: Hearing on H.R. Res. 568’ (108th Cong 2004) . See also previous discussion in section III A i.

³²⁰ Rubinfeld, ‘The Two World Order’ (n 314) 283–85. See also the different between ‘national jurisprudence’ and ‘transnationalist jurisprudence’ as coined by Koh in Koh, ‘International Law as Part of Our Law’ (n 308) 52.

³²¹ Christopher McCrudden, ‘Judicial Comparativism and Human Rights’ in Esin Öricü and David Nelken (eds) *Comparative Law: A Handbook* (Hart 2007) 520.

³²² Messitte (n 308) 171–73 elaborating how the US Constitution influences the world. See Tushnet, ‘Referring to Foreign Law’ (n 299) 310.

³²³ Messitte (n 308) 172.

³²⁴ Booth and Plessis (n 308) 135; McCrudden (n 321) 520. The phrase ‘constitutional offspring’ was coined by Judge Calabresi in *United States v Then*, 56 F 3d 464, 469 (2d Cir 1995).

from [itself] and reflect [its] own value'.³²⁵ Some scholars call this phenomenon anti-internationalism.³²⁶ It has been the concept that dominates American polity, and is one of the reasons the USA refuses to join most international human rights treaties.³²⁷

Nevertheless, counter-arguments suggest that American values actually consist not only of what the nation contributes to the world, but also of a respect for diversity and an appreciation of what the world contributes to the nation.³²⁸ Some scholars refer to the statement in the Declaration of Independence that it is proper for the USA to pay 'decent respect to the opinion of mankind'.³²⁹ Some also add that external sources can help Americans to recognise and shape their own values.³³⁰ It is also arguable that the Bill of Rights, by enacting general principles, incorporates universal norms into the US Constitution.³³¹ Lastly, taking globalisation into account, it has been argued that the USA, as one of the

³²⁵ McCrudden (n 321) citing L Henkin, 'The US and International Human Rights' in *Justice for a Generation*, papers presented in London, England, 15–19 July 1985 at the plenary sessions of a meeting between the American Bar Association, the Senate of the Inns of Court and the Bar, and the Law Society of England and Wales, 377.

³²⁶ Spiro (n 175) 9.

³²⁷ *ibid* 9–12. This issue is discussed previously in section IV A. Additionally, there is also a fear that international and foreign norms might be used for the benefit of Anti-Americanism. Rubinfeld, 'The Two World Order' (n 314) 290; Tushnet, 'Referring to Foreign Law' (n 299) 311.

³²⁸ Tushnet, 'Referring to Foreign Law' (n 299) 310.

³²⁹ See for example, Justice Breyer's statement in *Knight v Florida*, 120 S Ct 459, 464 (1999); Ginsburg, "'A Decent Respect to The Opinions of [Human]kind": the Value of a Comparative in Constitutional Adjudication' (n 302). See also Mark Tushnet, "'A Decent Respect to the Opinions of Mankind": Referring to Foreign Law to Express American Nationhood' (2006) 69 *Alb L Rev* 809.

³³⁰ Jack Tsen-Ta Lee, 'Interpreting Bill of Rights: The Value of a Comparative Approach' (2007) 5 *I-CON* 122, 148–49.

³³¹ *ibid* 149.

members of the world community, cannot resist international influence for long.³³²

In fact, these counter-arguments were presented in certain Supreme Court judgments that referred to international human rights norms. For example, in *Roper*, Justice Kennedy stated:

It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.³³³

In the same case, Justice O'Connor also explained:

... this Nation's evolving understanding of human dignity certainly is neither wholly isolated from, nor inherently at odds with, the values prevailing in other countries. On the contrary, we should not be surprised to find congruence between domestic and international values, especially where the international community has reached clear agreement – expressed in international law or in the domestic laws of individual countries – that a particular form of punishment is inconsistent with fundamental human rights. At least, the existence of an international consensus of this nature can serve to confirm the reasonableness of a consonant and genuine American consensus.³³⁴

b. Concerns over Democracy

Following the suspicions of many Americans towards the international community, there are many opponents of the Court's reference to international

³³² Spiro (n 175) 13–15.

³³³ *Roper v Simmons*, 543 US 551, 578 (2005). The opinion was joined by Justices Stevens, Souter, Ginsburg and Breyer.

³³⁴ *ibid* 605.

and foreign norms who base their arguments on the democratic concept of governance and the separation of powers between three branches of government. The arguments can be divided into two headings. The first concerns the undemocratic nature of international human rights norms, and the second concerns the way the Court refers to such norms.

i) **Undemocratic Nature of International and Foreign Norms**

The objection against international and foreign norms, including international human rights norms, is founded on the premise that the USA has adopted a dualist approach which clearly distinguishes international law from domestic law and holds that, because international law lacks democratic value, it does not have legal effect in the domestic legal system unless and until it has been incorporated by the legislative branch.³³⁵ This objection is reflected in the resolution issued by the House of Representatives, which has expressed the view that international and foreign norms should not be used in US courts because *'laws of foreign countries, and international laws and agreements not made under the authority of the United States, have no legal standing under the United States legal system'*.³³⁶ The same applies to international and foreign jurisprudence. According to Chief Justice Robert in his confirmation hearing:

The first has to do with democratic theory. Judicial decisions in this country – judges of course are not accountable to the people, but we are appointed through a process that allows for participation of the electorate, the President who nominates judges is obviously accountable to the people. The senators who confirm judges are accountable to the people. In that way the role of the judge is consistent with the democratic theory. *If we're relying on a decision from a German judge about what our Constitution means, no President accountable to the people appointed that judge, and no Senate accountable to the people confirmed that*

³³⁵ Discussed previously in section III A.

³³⁶ 108th Cong, H Res 446 (2003).

*judge; and yet he's playing a role in shaping a law that binds the people in this country.*³³⁷ (emphasis added)

Posner and Alford express similar opinion.³³⁸ Anderson puts it another way by saying that the Supreme Court's use of international and foreign sources was undemocratic because the norms lack the 'consent' of the governed.³³⁹

However, dualism and democratic arguments can support the argument against international and foreign norms only up to the point of maintaining that the external norms should not be used as 'laws' or 'compelling authority', or with a presumption that domestic law should comply with them, as is required by the *Charming Betsy* Canon.³⁴⁰ Nothing in the dualist concept prohibits courts from using international and foreign norms *for the purpose of interpretation* in so far as such norms are useful and appropriate according to the Court's accepted interpretive approaches. In the end, it is in any case the domestic judges who will consider their relevance and persuasiveness and determine the extent to which they may influence cases.

It is also arguable that American courts have always referred to sources that do not originate from the democratic process. Kumm submits that modern national laws are not always created by the legislative branch, given that the executive and the judicial branches have started to play a more important role in creating laws. Therefore 'the absence of electorally accountable institutions on the international level is insufficient to ground claims that the international legal

³³⁷ 'Confirmation hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States' (2005) .

³³⁸ Richard Posner, 'No Thanks, We Already Have Our Own Laws' (July-August 2004) *Legal Aff*; Alford, 'In Search of a Theory for Constitutional Comparativism' (n 79) 709–10.

³³⁹ K Anderson, 'Foreign Law and the U.S. Constitution' (2005) 131 *Policy Rev* 33, 49.

³⁴⁰ See also argument made in Turley (n 128) 269–70. The *Charming Betsy* canon is discussed previously in text to n 168.

process is deficient procedurally'.³⁴¹ Moreover, it can be argued, as Tushnet does, that

the decision by the Justices to refer to non-U.S. law gives that law 'indirect' democratic provenance – or, at least, makes that reference indistinguishable from the indirect provenance of whatever sources the Justices refer to when they interpret the Constitution ...³⁴²

These arguments are convincing considering that common law, precedents, policies, factual data and academic writings are all accepted as legitimate sources of constitutional interpretation.³⁴³ Why is reference to these sources allowed while reference to international and foreign norms is not? In the case of international human rights norms that are customary international law in particular, it can also be argued that the norms are universal and have become part of the domestic law, and should be used for the task of interpretation as far as they are not in conflict with it.

It is important to re-emphasise here that the Supreme Court has not used international human rights norms as 'law' or 'compelling authority'. Neither has the Court used international and foreign norms with the presumption that domestic law should be interpreted to be compliant with them. The Court has simply used such norms in order to help interpret open or ambiguous provisions whose terms allow it to look at comparable circumstances or related opinions abroad. The norms have influenced the Court's decisions, but only on a case-by-case basis.

In fact, in recent cases, the Justices have been more cautious and have often put international points in a footnote with explicit statements that international norms

³⁴¹ Kumm (n 133) 268–72; the quotation is on 271.

³⁴² Tushnet, 'When Is Knowing Less Better Than Knowing More?' (n 288) 1286–87.

³⁴³ Sarah H Cleveland, 'Our International Constitution' (2006) 31 *Yale J Int'l L* 1, 103.

were not used as compelling authority. Justice Breyer stated in *Knight* that foreign authorities were not binding on the Court.³⁴⁴ In *Atkins*, Justice Stevens declared, regarding the use of international and foreign norms, that they were ‘by no means dispositive’,³⁴⁵ and in *Roper*, Justice Kennedy confirmed that the opinion of the world community did not control the outcome of the case.³⁴⁶

ii) Democratic Objections to the Uses of International and Foreign Norms

Apart from the nature of international and foreign norms themselves, democratic objections against the use of these norms are related to the controversial role of the judiciary in the USA.

As was discussed above, judicial review of legislation has been seen by many as a counter-majoritarian force in US politics. There are also arguments that courts should faithfully interpret the Constitution without inputting values that are not reflected in the text or that do not exist at the time of drafting.³⁴⁷ Although this so-called originalist approach to interpretation is only one of many available interpretive approaches, it has become one of the core bases for the rejection of the interpretive influences of international and foreign norms. This is reflected clearly in the resolutions passed by the House of Representatives stipulating that using foreign materials in interpreting US law is inappropriate *unless* such materials ‘inform an understanding of the *original meaning* of the law of the United States’.³⁴⁸ The resolutions also stated that the courts’ role is to ‘faithfully interpret the expression of the popular will through laws enacted by duly elected

³⁴⁴ *Knight v Florida*, 120 S Ct 459, 463–64 (1999).

³⁴⁵ *Atkins v Virginia*, 536 US 304, 316 fn 21 (2002).

³⁴⁶ *Roper v Simmons*, 543 US 551, 578 (2005).

³⁴⁷ Discussed in section II A and B.

³⁴⁸ 108th Cong, H Res 568 (2004); 110th Cong, H Res 372 (2007).

representatives of the American people and [the USA's] system of checks and balances'.³⁴⁹

Justice Scalia, the main opponent of the use of international and foreign law, also bases his objection on the originalist theory of interpretation. He argues that most constitutional issues involve moral questions to which there are no right or wrong answers, but judges are not to make this kind of determination.³⁵⁰ They should 'say what the Constitution provided, even if what it provided is not the best answer'.³⁵¹

Easterbrook further points out that judges have power of judicial review even though the Constitution does not expressly confer it, because they enforce the supreme law of the Constitution. Norms from international and foreign sources, on the other hand, are not 'law' and should not be enforced against the people, especially when it comes to the issue of balancing interests.³⁵²

In any case, it is noted that originalists do not argue that reference to international materials should be categorically prohibited. Only those that did not exist at the time of enactment or those that the drafters did not take into account are considered irrelevant to the task of interpretation. Justice Scalia explained that the legal and moral framework in the USA is different from that of other states, emphasising the fact that the Framers of the Constitution refused to follow frameworks from other countries, particularly those in Europe.³⁵³ Accordingly, 'foreign law is irrelevant with one exception: Old English law, because phrases

³⁴⁹ *ibid.*

³⁵⁰ Justices Antonin Scalia & Stephen Breyer (n 82) 153–55. See also Frank H. Easterbrook, 'Foreign Sources and the American Constitution' (2006) 30 *Harv JLPP* 223, 227–28.

³⁵¹ Justices Antonin Scalia & Stephen Breyer (n 82) 62, 153.

³⁵² Easterbrook (n 350) 227.

³⁵³ Justices Antonin Scalia & Stephen Breyer (n 82) para 27.

like “due process”, the “right of confrontation” and things of that sort were all taken from English law’.³⁵⁴

Arguing from the premise that international and foreign norms are irrelevant, opponents of the use of international norms go on to say that judges refer to such irrelevant norms in order to support their own value judgments using international norms as masks. This accusation is not exclusively made by the originalist. It has been argued that even for evidence of the ‘evolving constitution’, judges should not look at their own standard or foreign standards, but should look to contemporary ‘American’ standards.³⁵⁵ This accusation has been raised especially in decisions relating to socially controversial issues.³⁵⁶ The death penalty cases are good examples. In *Atkins*, although the majority explicitly said that international norms were used simply to support their conclusion about the contemporary standard of decency,³⁵⁷ the dissenters disagreed. The latter interpreted the trend of states’ legislation differently and believed that the majority used international and foreign norms in order to give more weight to the majority’s own subjective opinion about the standard of decency.³⁵⁸ The same opinion is also reflected in views expressed in the House of the Representatives. Immediately after *Roper* was decided, certain members of the House of Representatives raised concerns. One of them states:

This is a clear cut example of *policy-making* from the bench. The majority in this case make little attempt to hide *that personal*

³⁵⁴ *ibid* para 52; See also Alberto Gonzales, ‘Prepared Remarks of Attorney General Alberto R Gonzales at The University of Chicago Law School’ (9 November 2005); Murkens (n 83).

³⁵⁵ Justices Antonin Scalia & Stephen Breyer (n 82) 154–55. See also Justice Scalia’s opinion in *Roper v Simmons*, 543 US 551, 615–16 (2005).

³⁵⁶ For example, Calabresi and Zimdahl submit that cases like *Dred Scott*, *Reynold* and *Roe* suggest that the Justices were making public policy by relying partly on foreign norms. Calabresi and Zimdahl (n 161) 165.

³⁵⁷ *Atkins v Virginia*, 536 US 304, 316 fn 21.

³⁵⁸ *ibid* 347.

*judgments and international opinion form the basis of this badly reasoned decision. Clearly, the death penalty and its applicability to violent minors is an issue that should be decided by the people through their elected representatives.*³⁵⁹

Opponents of the use of international and foreign sources further support their argument by pointing out that such sources are so wide and varied that judges may pick the ones that support and disregard others that contradict or discredit their opinions. Chief Justice Roberts expressed this view in his confirmation hearing:

... relying on foreign precedent doesn't confine judges ... in foreign law you can find anything you want. If you don't find it in the decisions of France or Italy, it's in the decisions of Somalia or Japan or Indonesia or wherever ... And that actually expands the discretion of the judges. It allows the judge to incorporate his or her own personal preferences, cloak them with the authority of precedent ...³⁶⁰

This argument was also reflected in Justice Scalia's opinion in *Roper* when he said: 'To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decision-making, but sophistry.'³⁶¹ This might be so even without intention on the judges' side. Tripathi submits that because foreign materials are not binding, a judge 'is absolutely free to reject [them] unless [they appeal] to his reason. Appeal to one's reason, more often than not, amounts to a

³⁵⁹ Statement made by Steve Chabot of the House of Representatives in 'Supreme Court Ruling Reiterates Importance of the Reaffirmation of American Independence Resolution' found in <http://goodlatte.house.gov/press_2004_2006/roper.html> (accessed 16 March 2011).

³⁶⁰ Confirmation hearing of Chief Justice Roberts found in Gonzales (n 354). See also Posner, 'No Thanks' (n 338) expressing the same opinion against foreign decisions.

³⁶¹ *Roper v Simmons*, 543 US 551 (2005) 627.

confirmation and a strengthening of one's own opinion rather than a shaping of that opinion.'³⁶²

Moreover, when references were made to cases where the Supreme Court struck down legislation, the criticism extends to the point of saying that by using international and foreign norms, courts are *imposing such norms on the American people against their will*. For example, in *Lawrence*, Justice Scalia, whose dissenting opinion was joined by Chief Justice Rehnquist and Justice Thomas, argued that the majority recognised rights relating to homosexual conduct in private places because of the practices of other nations and not because of the practice of the USA.³⁶³

Similarly, in *Roper*, Justice Scalia believed that the Court's decision resulted in setting aside the American view.³⁶⁴ This view is supported by Young, who forcefully argues that the Court used foreign opinions in an authoritative way in order to make the domestic opinion supporting the abolition of death penalty for juveniles become the consensus and set aside equivalent and competing opposite domestic opinion, which supported the maintenance of the death penalty for juveniles.³⁶⁵

Some scholars call this an 'international countermajoritarian' deficiency and consider it to be even worse than the traditional countermajoritarian deficiency as it combines the anti-democratic tendencies of judicial review with another

³⁶² Pradyumna K Tripathi, 'Foreign Precedents and Constitutional Law' (1957) 57 Colum L Rev 319, 346.

³⁶³ *Lawrence v Texas*, 539 US 558, 598 (2003).

³⁶⁴ *Roper* (n 361).

³⁶⁵ Ernest A Young, 'Foreign Law and the Denominator Problem' (2005) 119 Harv L Rev 148 .

counter-majoritarian difficulty derived from imposing international and foreign values on American society.³⁶⁶

However, this line of objections against the interpretive influence of international and foreign norms has several weak points. Judicial enforcement of constitutional provisions concerning individual rights is necessarily non-majoritarian.³⁶⁷ But, it can be argued that the fundamental rights provisions, far from being undemocratic, have secured their place in the Constitution by democratic process, and that this constraint on raw majority helps ensure an effective democratic regime.³⁶⁸ This has been discussed previously in section II A. Moreover, in the immediately foregoing subsection it has also been suggested that international human rights norms, undemocratic as they may be, have not been used as law or compelling authority in defiance of the dualist concept. The fact is simply that courts referred to such norms in order to interpret the Constitution.

As to the methods of constitutional interpretation, originalism is one of many available ideologies, and is accepted by some but rejected by others. Moreover, it may be argued that some constitutional provisions have been intended, since the time of the adoption, to allow the use of contemporary international and foreign materials by courts.³⁶⁹ This can be seen in the Supreme Court's jurisprudence which held that the Eighth Amendment requires courts to use an 'evolving standard of decency'.³⁷⁰ More obviously, in *Hurtado*, the Court held that the

³⁶⁶ Alford, 'Misusing International Sources to Interpret the Constitution' (n 309) 59; Cleveland (n 343) 101; J Harvie Wilkinson, 'The Use of International Law in Judicial Decisions' (2003–2004) 27 Harv JLPP 423, 26.

³⁶⁷ Cleveland (n 343) 101.

³⁶⁸ *ibid* 101–2 referring to the theory proposed by Ely (n 64); Rubinfeld, 'The Two World Order' (n 317) 285.

³⁶⁹ Tushnet, 'When Is Knowing Less Better Than Knowing More?' (n 288) 1279.

³⁷⁰ *Trop v Dulles*, 356 US 86, 100–01 (1958).

Constitution 'was made for an undefined and expanding future, and for a people gathered, and to be gathered from many nations and of many tongues'.³⁷¹

It is also arguable that the originalist approach is especially inconsistent when applied to international and foreign norms. If the value of originalism rests on its efficiency in limiting the normative role of judges, the fact that it allows reference to international and foreign norms actually involved in the drafting process diminishes such value. Consistently with the idea of originalism, the Supreme Court has referred to the Anglo-American tradition, the history of Western civilisation, Roman law, the common law of England, and so on, because these were involved in the establishment of the US law.³⁷² However, it can be seen that these terms are broad and vague, allowing the Court to exercise normative judgment on the substance of the terms.

The accusation that judges used international norms as a disguise for their own subjective values is also subject to counter-arguments. It is argued that the presumption that there are precedents for all points of view available in international and foreign sources is unproved.³⁷³ Moreover, in citing sources beyond their own jurisdictions, the burden is on judges to explain why such sources are appropriate.³⁷⁴ Furthermore, it is submitted by McCrudden that judges now cite not only foreign sources that match their opinions, but also those that contradict their opinions, with reasons why such sources are inapplicable to the case in hand.³⁷⁵ Additionally, Tushnet notes that the idea that foreign sources are so varied that they include everything a judge may be looking for actually

³⁷¹ *Hurtado v California*, 110 US 516, 530–31 (1884). This case has been discussed in text to n 232.

³⁷² See for example *Trop v Dulles*, 356 US 86 (1958); *Knight v Florida*, 120 S.Ct. 459 (2002); *Bowers v Hardwick*, 478 US 186 (1986).

³⁷³ Lee (n 330) 147.

³⁷⁴ *ibid* 147.

³⁷⁵ Christopher McCrudden, 'A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights' (2000) 20 OJLS 499, 517.

comes from Judge Harold Leventhal, who describes the use of history in interpretation as ‘looking over a crowd and picking out your friends’.³⁷⁶ The criticism of reference to history has faded away.³⁷⁷ Last but not least, it should be recalled that courts use several sources of interpretation at the same time. The interpretive influence of international and foreign norms is subject to other sources of interpretation, such as text, intent, structure, precedent, and other relevant considerations.³⁷⁸ Judges are by no means free to impose their own value preferences.³⁷⁹

Therefore, it is submitted that the allegations that international human rights norms are irrelevant to the task of interpretation and have been used to conceal judges’ personal views or to subvert the American people’s opinion are not justified. On the contrary, such allegations can be seen to be the result of disagreement about domestic law and fact. This has been most obviously so in cases relating to the death penalty. The majority found a national consensus against such punishment for juveniles. It held such punishment unconstitutional and used foreign practices to confirm its view. The dissenters did not find such a national consensus, and thus believed that the majority used foreign law to fabricate the consensus. However, judges and people in society often have different opinions on issues of law and fact; it is incorrect to conclude that the differences always come from illegitimate personal judgments.

³⁷⁶ Patricia M Wald, ‘Some Observations on the Use of Legislative History in the 1981 Supreme Court Term’ (1983) 68 Iowa L Rev 195, 214.

³⁷⁷ Tushnet, ‘When Is Knowing Less Better Than Knowing More?’ (n 288) 1280–81.

³⁷⁸ Jackson, ‘Constitutional Comparisons’ (n 124) 122; Griffin (n 15) 148–49; Tushnet, ‘The United States: Eclecticism in the Service of Pragmatism’ (n 8) 27–48.

³⁷⁹ This issue is discussed in text to n 127.

c. Concerns over Interference in the Executive's Handling of Foreign Affairs

The use of international human rights norms has also raised concerns about the separation of powers, for it is argued that that the Court is not an appropriate institution to deal with foreign affairs, and that the Supreme Court's adoption of international norms might be in conflict with what the executive would like to do in its international human rights policies.³⁸⁰ Young submits that the practice 'circumvents the institutional mechanisms by which the political branches ordinarily control the interaction between the domestic and the foreign'.³⁸¹ The importance of speaking in 'one voice' has also been emphasised by opponents of the Court's practice.³⁸²

The point has been made with particular reference to the death penalty. Bradley submits that the courts should defer to the political branch as the USA has no international obligations regarding the death penalty, not even in the form of the CIL, as the country has consistently opted out of this custom.³⁸³ Justice Scalia criticised the majority in *Roper* for referring to international norms reflected in international agreements relating to the abolition and limitation of the death penalty despite the fact that the USA had not ratified such agreements or had done so with reservations.³⁸⁴ Anderson also argues that on this occasion the Court treated non-binding international norms as binding and thus interfered with the duty of the political branches.³⁸⁵

³⁸⁰ Posner, 'Transnational Legal Process' (n 132) 35–36.

³⁸¹ Young (n 365) 163.

³⁸² Gonzales (n 354).

³⁸³ Bradley, 'The Juvenile Death Penalty and International Law' (n 151).

³⁸⁴ *Roper v Simmons*, 543 US 551 (2005) 622–23.

³⁸⁵ Anderson (n 339) 35–36.

In fact, some of the Supreme Court justices express the view that referring to international and foreign materials may cause other nations to have a better attitude towards the USA. For example, Justice Breyer has asked:

Why don't we cite them occasionally? They will then go to some of their legislators and others and say, 'See, the Supreme Court of the United States cites us.' That might give them a leg up, even if we just say it's an interesting example. So, you see, it shows we read their opinions. That's important.³⁸⁶

Nevertheless, this foreign policy consideration has not been a main reason for the Supreme Court to cite international and foreign laws. In addition, it should be remembered that courts' interpretations do not result in the USA having international obligations, and therefore the courts do not interfere in foreign affairs through the use of international and foreign law.

More importantly, the argument that the Court interfered in foreign affairs is beside the point and is based on the premise that the Court used international and foreign norms as binding law. It is to be remembered that the Court has not used international human rights norms of any form as binding law; neither has it made any unbinding instrument to become binding on the country. The Court simply used international and foreign norms as aids in interpreting constitutional provisions whose language is broad. It is within the Court's power to interpret the Constitution and uphold the rights of the people according to the Constitution, even though such rights are not totally consistent with what the executive commits in international and foreign affairs.

d. Legal Coherence

A further objection against the interpretive influence of international and foreign norms in the US courts is based on the fact that each country has different

³⁸⁶ Justices Antonin Scalia & Stephen Breyer (n 82).

notions of justice, social structures, legal techniques and methods of balancing competing social interests. According to Anderson, to use international and foreign norms in US courts 'is to deracinate the judicial texts of other legal systems, to strip them out of the particular social settings that animate them'.³⁸⁷ It is also argued that because of such differences, norms or solutions provided by judges in one country are not relevant to another country's problems.³⁸⁸ Even if, on the surface, two jurisdictions share similar legal concepts, there is 'no guarantee, or even likelihood that the concept will mean the same thing to our courts that it does to its originators'.³⁸⁹ The functions and results of the same doctrine may be different in different contexts.³⁹⁰ Therefore, to use external norms is just to ignore the differences and may result in inaccurate analyses of the case at hand.³⁹¹

However, it is argued that the US Supreme Court has not adopted international and foreign norms that are totally alien to the US legal system. Moreover, it has not used such norms without considering the US context. Rather, the US Supreme Court has usually referred to systems that have a close jurisprudential relationship with the USA and are governed by democratic means.³⁹² References to 'English laws', 'countries of Anglo-American heritage', 'leading members of the western European community', 'opinion of former commonwealth nations', and 'civilised people' can be found in several cases discussed above.

³⁸⁷ Anderson (n 339) 46.

³⁸⁸ See Tushnet, 'Referring to Foreign Law' (n 299) 310–11 saying that this argument actually reflects a culture war.

³⁸⁹ Seth Kreimer, 'Invidious Comparisons: Some Cautionary Remarks on the Process of Constitutional Borrowing' (1999) 1 U Pa J Const L 640, 646–47.

³⁹⁰ *ibid.*

³⁹¹ Alford, 'In Search of a Theory for Constitutional Comparativism' (n 79) 697.

³⁹² Rex D Glensy, 'Which Countries Count?: *Lawrence v. Texas* and the Selection of Foreign Persuasive Authority' (2005) 45 Va J Int'l L 357, 407.

In fact, scholars have attempted to formulate a framework for selecting sources of foreign norms on the basis of some kinds of *commonality* of the systems in order to ensure legal coherence. Dixon requires that source countries should have a general constitutional level highly similar to that of the USA and ‘share relevant topic-specific constitutional commitments’.³⁹³ Moreover, the source country should have a rich history of democratic constitutionalism and have experienced substantial litigation issues.³⁹⁴ Glensy is less specific. He submits that courts in the USA should look at ‘western-style democracies’ because they have political regimes and societal characters close to those of the USA. He insists that the source countries should have ‘common normative value’ which could be inferred from shared history, otherwise the use of international and foreign sources risks imposing unrecognisable values on the US legal system.³⁹⁵ Samar argues for the least specific and least rigid version of commonality. He proposes that there should be

a common normative language capable of equating established meanings of settled American constitutional law with newly developing understandings of various conventions of international human rights by both the domestic courts of other nations and the International Court of Human Rights.³⁹⁶

By the words ‘common normative language’, Samar does not mean identical text, but rather common underlying values expressed in comparable words. He later finds that international human rights norms in the UDHR do have enough

³⁹³ R Dixon, ‘A Democratic Theory of Constitutional Comparison’ (2008) 56 Am J Comp L 947, 979.

³⁹⁴ *ibid* 979–82.

³⁹⁵ Glensy (n 392) 415, 423.

³⁹⁶ Vincent J Samar, ‘Justifying the Use of International Human Rights Principles in American Constitutional Law’ (2005–2006) 37 Colum Hum Rts L Rev 1, 1–3.

commonality with rights in the US Constitution, and therefore they may appropriately be used as interpretive tools.³⁹⁷

This research agrees that the commonality between the enlightening systems and the USA can help mitigate the concern over legal coherence. At the same time, however, it is argued that this concern should not place much weight against the use of international human rights norms in judicial reasoning, at least not as regards the way the US Supreme Court has used them.

It is important to point out that the argument against international human rights norms based on legal coherence is a classic argument against the idea of legal transplants;³⁹⁸ however, the Supreme Court's practice in referring to international and foreign norms is not based on such an idea. It has been discussed previously that the Supreme Court used such norms *not* as a 'law' or 'rule', *but* as an 'opinion' or 'idea' which could support domestic sources. There is no expectation that the rule from abroad will apply directly to domestic issues, nor that the result of applying such norms would be the same in different countries. Rather, the use of international and foreign norms is better called cross-fertilisation, which Bell defines as

a different, more indirect process. It implies that an external stimulus promotes an evolution within the receiving legal system. The evolution involves an internal adaptation by the receiving legal system in its own way. The new development is a distinctive but organic product of that system rather than a bolt-on.³⁹⁹

³⁹⁷ *ibid* 60–62.

³⁹⁸ See discussion on the concept of legal transplants in Chapter One, II.

³⁹⁹ John Bell, 'Mechanisms for Cross-Fertilisation of Administrative Law in Europe' in Jack Beatson and Takis Tridimas (eds) *New Directions in European Public Law* (Hart 1998) 147.

When international and foreign laws are used in this way, therefore, concern as to whether the receiver system can take new rules is mitigated.⁴⁰⁰ In the same vein, it is further argued that in the case of transcendent constitutional norms, the differences between countries in social and other conditions are not a fatal obstacle, for judges may look at such norms for inspiration or knowledge then make adjustments according to the peculiar condition of their own jurisdictions.⁴⁰¹ This is particularly so in the case of international human rights norms, which may be considered to reflect values not unique to the USA.⁴⁰²

e. Methodology Concerns: Haphazard and Selective Uses of International Human Rights Norms

The last set of objections is based on the practical concern that it is difficult for judges to use international norms efficiently and correctly.

It is argued that international human rights norms, especially those from foreign courts' decisions, are not easy to access and understand. Posner submits that foreign decisions 'emerge from a complex socio-historic-politico-institutional background of which our judges ... are almost entirely ignorant'.⁴⁰³ National judges are normally not experts in international and foreign norms.⁴⁰⁴ The subjects of international law and comparative law have not gained much attention in law schools in the USA. In fact, many of the law schools have not offered any courses on these topics in their curricula until recently.⁴⁰⁵ Moreover,

⁴⁰⁰ Lee (n 330) 143.

⁴⁰¹ *ibid* 144, 149.

⁴⁰² However, this point is controversial. See, for example, Alford, 'In Search of a Theory for Constitutional Comparativism' (n 79) 659–73; Anderson (n 339) 41; Tushnet, 'When Is Knowing Less Better Than Knowing More?' (n 288) 1299–1300.

⁴⁰³ Posner, 'No Thanks' (n 338); Richard Posner, 'Forward: A Political Court' (2005) 119 *Harv L Rev* 31.

⁴⁰⁴ Young (n 365) 165–66.

⁴⁰⁵ Jackson, 'Ambivalent Resistance and Comparative Constitutionalism' (n 310) 592–94.

only a small percentage of foreign decisions are available in English.⁴⁰⁶ Even if necessary materials are gathered and translated, it is almost impossible to understand and evaluate these materials thoroughly.⁴⁰⁷

Because of this, it is argued, when referring to such norms it is likely that judges just haphazardly choose the ones that are conveniently available to them without having any consistent standard to judge which materials are relevant and reliable.⁴⁰⁸ A comprehensive examination of all relevant international sources has not been made.⁴⁰⁹ Further, there is also a concern that the Court might focus on the norms from European countries and overlook those from other countries, in Asia, the Middle East, Africa and Latin America.⁴¹⁰ Gonzales, the Attorney General, considers that '[i]t may be impossible for even the most conscientious judge or lawyer to avoid being selective, or at least arbitrary, in the use of foreign law'.⁴¹¹ Therefore, it is argued, international and foreign material could never be used properly.⁴¹² This flaw can be seen, for example, in *Lawrence*, where the Court pointed out that while the Court in *Bowers* took into account the history of Western civilisation, it failed to look at other available authorities, such as the decision of the ECtHR on the same issue.⁴¹³

Moreover, the Court has usually consulted international and foreign norms provided by international legal experts in the case. It is likely that such experts chose norms that promoted particular results.⁴¹⁴ The majority in *Lawrence* itself

⁴⁰⁶ *ibid* 595.

⁴⁰⁷ Gonzales (n 354).

⁴⁰⁸ Alford, 'Misusing International Sources to Interpret the Constitution' (n 309) 65.

⁴⁰⁹ *ibid* 66.

⁴¹⁰ Anderson (n 339) 428.

⁴¹¹ Gonzales (n 354).

⁴¹² Ramsey (n 309) 77–79; Gonzales (n 354).

⁴¹³ *Lawrence v Texas*, 123 S Ct 2472 (2003).

⁴¹⁴ Alford, 'Misusing International Sources to Interpret the Constitution' (n 309) 64–65.

relied on an amicus brief filed by human rights organisations to say that the sodomy law had been invalidated in many other countries.⁴¹⁵ However, Alford submits that the human rights organisations in such cases did have the opposite information relating to homosexual discrimination in the world, but did not include it in the brief to the Court.⁴¹⁶

Admittedly, these are reasonable concerns about the use of international and foreign norms, including international human rights norms. Nevertheless, it is submitted that comparative and international laws are now of interest to more and more people. Research and symposia on such subjects are increasing.⁴¹⁷ Although these may not eliminate all problems, they should help to mitigate them.

More importantly, some scholars argue that the comprehensive examination of all related international norms is not always necessary.⁴¹⁸ It is reasonable for judges to choose only international norms from the jurisdictions that share similar values to the USA.⁴¹⁹ For example, in *Knight*, Justice Breyer stated that the foreign norms he cited ‘reflect a legal tradition that also underlies our own’.⁴²⁰ In several due process decisions, the courts looked abroad to find what is ‘implicit in the concept of ordered liberty’.⁴²¹ Waldron argues that in searching for *Ius Gentium* in the sense of principles which have been accepted widely,⁴²²

⁴¹⁵ *Lawrence v Texas*, 123 S Ct 2472 (2003) discussed in text to n 257.

⁴¹⁶ Alford, ‘Misusing International Sources to Interpret the Constitution’ (n 309) 65–66 citing several reports of human rights organisations involved in *Lawrence*.

⁴¹⁷ Jackson, ‘Ambivalent Resistance and Comparative Constitutionalism’ (n 310) 595–96.

⁴¹⁸ See Lee (n 330) 146–47.

⁴¹⁹ See *ibid* 147.

⁴²⁰ *Knight v Florida*, 120 S Ct 459, 997 (1999).

⁴²¹ See discussion in section IV A ii.

⁴²² Jeremy Waldron, ‘Foreign Law and the Modern *Ius Gentium*’ (2005) 119 Harv L Rev 129, 132.

judges may limit the search to ‘civilized’ or ‘freedom-loving’ nations.⁴²³ This is selective, but not arbitrary.⁴²⁴ It is rather a matter of selecting materials which might be deemed relevant. Besides, better techniques to distinguish appropriate materials are expected to be developed as the practice continues.⁴²⁵

Next, there is a concern that judges might be willing to use international materials only if they can enhance the protection of rights and only for selected rights.⁴²⁶ For example, the Court is not likely to curtail the extent of freedom of speech, because the USA is ‘alone among the major common-law jurisdictions in its complete tolerance of [hate] speech’.⁴²⁷ The same applies to issues such as rights to abortion or to bear arms, which the USA has recognised to a broader extent than other countries do. At the same time, in some areas of rights where the USA offers less protection than other countries, the Court may not look at international norms anyway. For example, the Court is not likely to enhance protection against regulatory taking to the level specified in NAFTA, as there is recognised government interest in protecting the environment. Nor is it likely to change the prohibition against the establishment of religions by referring to international recognition of the co-operation of church and state.⁴²⁸ Because of this, some scholars argue that the use of international norms has been selective and thus unpersuasive. According to Alford and Ramsey, if one advocates the use of comparative jurisprudence, one should accept its results whether liberal or

⁴²³ *ibid* 145.

⁴²⁴ Lee (n 330) 147.

⁴²⁵ Tushnet, ‘When Is Knowing Less Better Than Knowing More?’ (n 288) 1282.

⁴²⁶ Alford, ‘Misusing International Sources to Interpret the Constitution’ (n 309) 68–69; Ramsey (n 309) 69; Wilkinson (n 366) 429; Gonzales (n 354).

⁴²⁷ Alford, ‘Misusing International Sources to Interpret the Constitution’ (n 309) 68 quoting M J Matsuda, ‘Public Response to Racist Speech: Considering the Victim’s Story’ (1989) 87 *Mich L Rev* 2320, 2347–48.

⁴²⁸ *ibid* 68.

conservative, sweet or bitter.⁴²⁹ Consequently, if one expects only the more liberal result, one should reconsider the use of international norms.⁴³⁰

Nevertheless, this concern against international norms is not based on an accurate evaluation of the Court's approach. As for the view that the Court would look only for more liberal norms, it is not consistent with the actual practice of the Court. It can be seen from the previous section that the Supreme Court has sometimes used international human rights norms in supporting its decision that certain rights did not exist. This is especially so in the case of rights relating to criminal process.⁴³¹ Alternatively and more importantly, it has been argued by Samar that a preferable policy might be to look at international human norms only when they can help to improve rights protection. This is without incurring inconsistency in the courts' practice.⁴³² This issue will be discussed in Chapter Six.

As to the argument that the Court might look at international norms only in respect of selected rights and not others, although it is likely to be true, this is not necessarily because of an inconsistency in the Court's approach. In fact, it is reasonable that courts do not use international norms to suppress clear national jurisprudence.

V. Conclusion

This Chapter has laid down background of the US legal system that relates to the use of international human rights norms by courts. It has discussed the power of the US Supreme Court as the ultimate interpreter of the US Constitution, the tension between the Court and the other two branches, and the competing

⁴²⁹ *ibid* 69; Ramsey (n 309) 76–77.

⁴³⁰ Alford, 'Misusing International Sources to Interpret the Constitution' (n 309) 69.

⁴³¹ See section IV B i b.

⁴³² Samar (n 396) 1.

interpretive approaches towards constitutional interpretation which have resulted from the controversies regarding the role of the Supreme Court. It has then considered the exceptionalist approach the USA has adopted towards international and foreign laws in general and those relating to human rights in particular. Lastly, it has shown that the Supreme Court of the USA has continuously allowed the interpretive influence of international human rights norms, although the legitimacy and aptness of the practice have recently been subject to strong criticism. As regards the legitimacy concerns, it has been argued here that these can be seen as an overreaction deriving from peculiar aspects of American culture, namely exceptionalism, the attachment to popular democracy, and speculation about the role of courts. As to practical concerns, particularly regarding legal coherence and methodology for the use of international human rights norms, they are real obstacles to their efficient and accurate use, but they can be mitigated and do not render the practice inappropriate.

Chapter Five: Comparative Analysis

The previous three Chapters have explored the interpretive influence of international human rights norms, and have provided an understanding of legal principles underlying their influence, in Thailand, the UK and USA. This Chapter starts with an analysis of the differences and similarities between the three systems. On the basis of this analysis, it then discusses the following questions: why Thai courts have not used international human rights in their judicial reasoning; whether it is desirable for Thailand to allow interpretive influence of international human rights norms; and if so, whether the Thai legal system permits such influence.

I. Comparing the UK, the USA and Thailand

A. The Political and Constitutional Systems

i. Constitutionalism

The differences between governmental systems and approaches to constitutionalism in the UK and USA are straightforward. The UK has been governed by its unwritten constitution. Since the Glorious Revolution in 1688 up until now, the leading constitutional principle has been the doctrine of Parliamentary sovereignty. Separation of powers has inspired recent constitutional development, but is not at the core of the constitution.¹ As regards the USA, the written constitution is the foundational document for the nation's system of government. The crux of the constitutionalism in the USA is the

¹ See Chapter Three, I.

checks-and-balances system; no one branch has absolute power.² Despite the differences, it can be said that both countries are stable democracies, and in each the rule of law is well-respected. The unwritten constitution of the UK has operated relatively smoothly without drastic change except for certain constitutional reforms in the 20th century.³ The written constitution of the USA has stayed in place for more than 200 years and has rarely been amended.⁴

Thailand exhibits both similarities to, and differences from, the two countries discussed above. It has been governed by a written constitution since 1932. It has adopted the Parliamentary system of government like that of the UK, but did not accept the doctrine of Parliamentary sovereignty. Three branches of government in Thailand are able to check each other, although not to the same extent as in the USA, since the executive and the legislative branches in Thailand are fused.⁵

The most important factor distinguishing Thailand from the other two countries is that democracy in Thailand has been tenuous and still lacks stability. Thailand adopted a constitutional monarchy in 1932, a lot later than the Glorious Revolution in the UK in 1688 and the establishment of the Constitution of the USA in 1787. The Thai political system remains volatile and respect for the rule of law is in doubt. Some would maintain that the actual system of governance has changed from absolute monarchy to bureaucracy, and then plutocracy, with frequent interventions by the military.⁶ The vicious cycle of *coup d'état*, new constitution, election, and *coup d'état* has repeated itself many times, and still can happen in the future.⁷ As a result, the written Constitutions of Thailand have

² See Chapter Four, I.

³ See Chapter Three, I.

⁴ See Chapter Four, I.

⁵ See Chapter Two, I A.

⁶ Likhit Dhiravegin, *Politics and Governance of Thailand* (7th edn, Thammasat University Press 2006) 382–87. See also Chris Baker and Pasuk Phongpaichit, *A History of Thailand* (2nd edn, CUP) 274–75.

⁷ Baker and Phongpaichit (n 6) 273.

been far from durable. It has been said that Thai Constitutions have served as tools in legitimising the exercise of power by those who have possessed it,⁸ rather than as founding documents that may endure over time.

ii. Protection of Rights

The protection of rights is also different in the three countries. In the UK, Parliament may pass whatever laws, including laws that are in violation of civil liberties. However, it has been constrained by political pressure and the courts will not interpret a statute to limit fundamental common law rights unless it is obvious that Parliament intends this. Moreover, the HRA 1998 has made it politically more difficult for legislators to enact a statute against fundamental rights, especially those specified in the ECHR.⁹ In the USA, there has been a strong rights tradition ever since its foundation, resulting from its founders' aspiration to create a more perfect union, one distinct from that of the old England where people had no rights against the King. The Bill of Rights, which provides for the guarantee of fundamental rights, is supreme over *all* branches of government.¹⁰ It is observed that some see the HRA as the Bill of Rights of the UK comparable to that of the USA. However, there are others who argue that the HRA provides for 'dialogue' between the three branches of government rather than accommodating the idea of rights supremacy enforced by judges.¹¹

⁸ Duncan McCargo 'Introduction: Understanding Political Reform in Thailand' in Duncan McCargo, *Reforming Thai Politics* (NIAS 2002) 3; Duncan McCargo 'Alternative Meanings of Political Reform in Contemporary Thailand' 13 *The Copenhagen Journal of Asian Studies* 5, 5–9; Ted L McDorman, 'The 1991 Constitution of Thailand' (1993–1995) 3 *Pac Rim L & Pol'y J* 257, 262–64; Piyabutr Saengkanokkul, *Under the King's Signature, the Democracy and the Judiciary* (Openbooks 2010) 36–39. Cf Michael Kelly Connor, 'Framing the "People's Constitution"' in Duncan McCargo, *Reforming Thai Politics* (NIAS 2002) 38, optimistically arguing that at least the direction of Thai Constitutions, especially since the 1997 Constitution, has been towards liberalism and a more rigorous check on the political powers.

⁹ See Chapter Three, I.

¹⁰ See Chapter Four, I.

¹¹ See TR Hickman, 'Constitutional Dialogue, Constitutional Theories and the Human Rights Act 1998' [2005] PL 306, 306–7. This issue has been discussed in Chapter Three, IV B ii.

In this respect, Thai Constitutions have adopted a judicial-enforced Bill of Rights like that in the USA. However, the protection of rights in Thailand fluctuates according to the degree of political instability. The levels of rights protection as prescribed by the Constitutions were higher when the country was governed by parliamentary-model Constitutions, and lower when it was governed by authoritarian ones. Furthermore, while the USA has a strong rights tradition and the UK has long recognised civil liberties, the same idea of individual liberties has never taken root in Thailand. The revolution in 1932 which took away absolute power from the King did not give power to the people, but rather to groups of elites. Therefore, it did not raise awareness of rights among the public. People started to become more aware of their rights only after the constitutional reforms of 1997. Moreover, human rights abuses are still widespread.¹²

B. The Judiciary and the Protection of Rights

i. Power of Judicial Review

The political and constitutional environment dictates the roles of the judiciary in protecting rights. It is accepted, in both the UK and the USA, that the executive cannot act beyond the power conferred by the law and the Constitution. As to the check on legislative acts, Parliamentary sovereignty has prevented UK courts from second-guessing the validity and quality of legislation.¹³ Therefore, the UK adopted the system of ‘weak judicial review’.¹⁴ The USA, by contrast, adopts a system of ‘strong judicial review’, where courts may decline to apply a statute which is inconsistent with the Constitution.¹⁵ The latter reflects a distrust of absolute power, even when such power is exercised by representatives of the

¹² Chapter Two, I B.

¹³ Chapter Three, I.

¹⁴ Jeremy Waldron, ‘The Core of the Case against Judicial Review’ (2006) 115 Yale LJ 1346, 1355.

¹⁵ *ibid* 1354–55.

people. The democratic majority is constrained, especially on issues relating to individual rights.

The judiciary in the USA seems to have a more aggressive power in relation to defining and enforcing rights against the elected branches. Starting with the case of *Carolene Product Co*¹⁶ in 1938 and reaching a peak during the time of Chief Justices Warren and Burger in 1953–86, the Supreme Court has used its power of judicial review extensively, defining the meaning and scope of constitutional rights with which government may not interfere. The Supreme Court's decisions have involved controversial issues which have dramatically affected the legal, political and social situation in the USA. In many circumstances, its decisions have provoked strong public disagreement, but they are practically final.¹⁷ Nevertheless, courts in the UK have used the interpretation and application of laws as tools to define and enforce rights. Comprehensive jurisprudence which effectively protects the important fundamental rights of individuals from being interfered with by legislation has been developed.¹⁸ In fact, Lord Hoffmann has even asserted that courts in the UK 'apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document'.¹⁹ Such similarity has become more apparent after the enforcement of the HRA, which gives the list of rights in the ECHR special status in the UK.²⁰ Furthermore, it should be noted that while courts in the USA have enjoyed power to invalidate statutes, they have done so with the caution that their actions are 'counter-majoritarian',²¹ the concept which

¹⁶ *US v Carolene Products Co*, 304 US 144 (1938).

¹⁷ See Chapter Four, II A.

¹⁸ See Chapter Three, II B ii.

¹⁹ *Secretary of State for the Home Secretary, ex p Simms*, [1999] AC 115 (HL) 131.

²⁰ *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557; *Wilson v First County Trust Ltd (No 2)* [2003] UKHL 40, [2004] 1 AC 816. The issue has been discussed in Chapter Three, IV B ii c.

²¹ Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Bobbs-Merrill 1962) 16–17. Discussed in Chapter Four, II A.

also underlies the doctrine of Parliamentary sovereignty and prevents courts in the UK from engaging in a strong form of judicial review.

Like the UK and USA, Thailand has had an established system of judicial review of executive acts. This task was carried out by the Courts of Justice up until 2001, when the Administrative Courts were established to take charge of the review of executive acts in all areas except those relating to labour law and tax law. As regards review of legislative acts, the Supreme Court of Justice has claimed such power since the beginning of the constitutional monarchy regime early in the 20th century.²² The elected branch responded by amending the Constitution establishing the Constitutional Tribunal under the control of the executive to be the final tribunal on constitutional issues, but the Courts of Justice still retain significant jurisdiction over constitutional issues. Finally, after the constitutional reform of 1997, the independent Constitutional Court was established with explicit power to review acts of the legislative branch against the Constitution.²³ On the one hand, the system reflects the idea that ordinary courts should not be able to overrule the majority, comparable to the system in the UK. On the other, it reflects the strong distrust of the majority, as in the USA.

It can be seen that the Thai legal system provides a form of judicial review comparable to, or stronger than, that found in the USA. The current 2007 Constitution gives substantial power to all three courts in Thailand in not only regulating political process, but also protecting rights. However, these courts have yet to show a prominent role in handling constitutional rights cases. This is especially true of the Constitutional Court, which is expected to serve as a leading institution in defining and enforcing constitutional rights. The cases concerning constitutional rights represent only a small percentage of the Court's caseload.²⁴ More importantly, unlike courts in the UK and the USA, neither the

²² Supreme Court decision 1/2489 (1946) (the case of the *War Criminal Act*).

²³ See Chapter Two, II A ii a.

²⁴ *ibid.*

newly established Thai Constitutional Court nor other courts have established consistent jurisprudence regarding the proper scope of their roles in protecting rights.²⁵

ii. Interpretive Approaches

Because of Parliamentary sovereignty, UK courts used to adhere to the literal rule of interpretation under which extra-textual sources are deemed irrelevant. However, the trend has shifted towards purposive methods of interpretation, as a result of the impracticality of the literal rule itself and influences from international sources of law – European Union law and the European Convention of Human Rights. It has now been accepted that extra-textual materials may be used as aids for the task of interpretation, and that laws – especially those having constitutional status – may be interpreted as living instruments.²⁶ The constraints, however, are that judges should not exercise interpretive power so robustly that it could be considered as legislating, which is the task of Parliament, and that they should give proper weight to the decisions of the legislative and executive branches on those issues which require specialisation or pure judgment on their part. With regard to national security in particular, judicial deference towards the executive has been a strong trend.²⁷

The development of the interpretive approach has been different in the USA. Since the crux of US constitutionalism is the separation of powers, the judiciary has been seen as the protector of fundamental rights and the ‘ultimate interpreter of the Constitution’.²⁸ Nevertheless, attempts have long been made to limit the judicial power of interpretation. The originalist school of interpretation contends

²⁵ See Chapter Two, II B.

²⁶ See Chapter Three, II B.

²⁷ *Liversidge v Anderson* [1942] AC 206 (HL); *CCSU v Minister for the Civil Service* [1985] AC 37 (HL); *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696 (HL). See Chapter Three, II A & B.

²⁸ *Baker v Carr*, 369 US 186, 211 (1962).

that judicial constitutional interpretation should be based only on the text and original intent of a provision.²⁹ However, the originalist school has been subject to strong criticism. It has been pointed out by the non-originalists that the indeterminate language of the Constitution requires judicial evaluation according to contemporary circumstances. Interpretation is the process which standards and moral values from different sources may facilitate.³⁰ The Supreme Court of the USA appears to accept the non-originalist approach, especially in its jurisprudence relating to the Eighth Amendment and substantive due process. Nevertheless, both schools of thought have influenced constitutional interpretation in the USA, and the Supreme Court's practice has been eclectic, depending, at least in part, on the philosophies of individual judges.³¹

As regards the interpretive approach in Thailand, the strict literal rule of interpretation, resulting from the mix between the traditional civil law concept that judges do not make law and the English literal rule of interpretation, reinforced by the idea of state positivism, has dominated the legal system since the modernisation of law in the 19th century. However, over the last three decades, a movement for change has been instigated by academics as a reaction against the judiciary's extreme formalist attitude. Thai courts are now moving towards purposive interpretation where extra-textual factors such as historical background, the intention of the law and its drafters, the current social context, the consequences of the interpretation, and the idea of natural justice are all considered relevant. The constitutional reform that has taken place since 1997 further encourages the more important role of the judiciary in checking against the executive and legislative branches and in interpreting laws. The law-making function of courts in Thailand is perhaps most obvious in the newly established Constitutional Court. Its power to interpret vague constitutional provisions has

²⁹ See Chapter Four, II A. Richard Clayton, 'Judicial Deference and "Democratic Dialogue": The Legitimacy of Judicial Intervention under the Human Rights Act 1998' [2004] PL 33, 40. Clayton compares judicial review in the UK and the USA as well.

³⁰ *ibid* 40–41.

³¹ *ibid* 41.

rendered it impossible for it to not make law. In fact, decisions of the Constitutional Court may be considered as having the same force as the Constitution itself.³² Nevertheless, the legal system has suffered from conservative inertia. The civil law cliché that judges should not make law, and the formalist approach, still exert an important influence.³³

Importantly, Thailand has adopted a written style of Constitution like that in the USA.³⁴ However, unlike in the USA, where several competing theories of interpretation have specifically been offered in respect of the Constitution, in Thailand there exists only the (underdeveloped) statutory interpretive approach, and so courts apply this to the Constitution. Discussion of constitutional interpretation is difficult to find, even in academic circles.

C. International and Foreign Law in the Legal Systems

It can be said that all three systems adopt the dualist approach towards international and foreign law. While treaties in all three jurisdictions are deemed to have no legal effect unless and until they have been incorporated into the legal system by legislation, there are minor differences between the systems regarding the adoption of the customary international law (CIL). In the UK and USA, although the CIL is theoretically deemed to be a part of the legal system, the practice of the courts limits its effect substantially.³⁵ The Thai legal system seems to be more open towards the CIL, since it has been accepted as part of Thai law, and the Constitutional Court has actually confirmed this in recent cases. Nevertheless, the recent uses of the CIL have mostly involved the law regulating foreign affairs such as the law of treaties rather than that relating to international

³² See Constitution 2007, ss 211–12, 214.

³³ See Chapter Two, II B.

³⁴ For the discussion on the forms of the Constitution, see Chapter One, II text to nn 41–43.

³⁵ See Chapter Three, III A ii and Chapter Four, III A ii.

human rights. Further, it should be noted that the use of CIL is subject to the condition that it must not be in conflict with existing Thai law.³⁶

The underlying reasons for the adoption of this approach in the UK, the USA and Thailand are comparable. For the UK, the driving factor is its core constitutional principle, Parliamentary sovereignty.³⁷ Similarly, the US courts adopt the dualist approach because of the argument that international law which has not passed through a domestic law-making process is undemocratic and because of the constitutional implication of the separation of powers that the task of making law rests with Congress, not with courts or the President and the Senate.³⁸ For the USA, however, an additional reason for the dualist approach is American exceptionalism, a concept that applies strongly in the USA but not in the UK, at least following World War II and the UK's accession to the European Union.³⁹

In the case of Thailand, it is submitted that the Constitution provides for the dualist approach because of concerns over the separation of powers as well.⁴⁰ Nevertheless, ideas of sovereignty and exceptionalism underlying the dualist approach against international and foreign law, such as those in the UK and USA, are not as strong and deeply rooted in Thailand. This is because the country was bound by the treaties of friendship to apply international and foreign law when it first experienced international agreements, and several Western countries played an important role in the reformation of the Thai legal system. Moreover, the current situation is that the Thai legal system still needs further development where the experience of a more developed country may assist.⁴¹

³⁶ See Chapter Two, III B ii.

³⁷ See Chapter Three, III.

³⁸ See Chapter Four, III.

³⁹ See Chapter Four, III A, IV A, IV B ii.

⁴⁰ See Chapter Two, III B i.

⁴¹ See Chapter Two, III A & B.

In any case, although Thailand seems to have a more open attitude towards international and foreign law, when it comes to the *interpretive* influence of it the UK and USA seem to be more open than Thailand after 1957 when dualism was firmly established.⁴² While courts in the UK have developed a presumption of compatibility⁴³ and courts in the USA have developed the *Charming Betsy* canon for statutory interpretation⁴⁴ in order to allow international and foreign influence, Thai courts are still attached to the sharp division between national and international law. There have been only a handful of cases that Thai courts have referred to materials outside the country, and there have been no consistent principles for this practice.⁴⁵

D. International Human Rights Norms in the Legal Systems

i. Legal Status of International Human Rights Norms in the Legal Systems and Their Effect upon It

The dualist concept applies to international human rights treaties in the same way as to other kind of treaties. Therefore, the legal status and effect of international human rights norms in the UK, USA and Thailand depend largely on whether there is legislation implementing the treaties.

The UK has ratified several key international human rights treaties and has incorporated some of them into its legal system. The most important international human rights treaty in the UK has been the ECHR, which has been given effect in the UK legal system by the Human Rights Act 1998 and has become the main

⁴² Of course, before this time Thai courts tended to not distinguish between Thai law and international and foreign laws and allowed full interpretive influence of foreign laws, especially those that played a role in the country's legal modernisation. See Chapter Two, III A.

⁴³ See Chapter Three, III A iii.

⁴⁴ See Chapter Four, III A iii.

⁴⁵ See Chapter Two, III B iii.

sources of rights for the people in the jurisdiction.⁴⁶ By contrast, the USA has adopted an isolationist approach and rarely accedes to international human rights treaties. Therefore, international human rights norms play only a very small direct role, if any, in the legal system.⁴⁷

Thailand is different from the UK and the USA in this respect. Unlike the USA, it has ratified almost all the key UN international human rights treaties. It has also incorporated several norms from those treaties into its Bill of Rights. However, unlike in the UK, where the ECHR has been specified and given effect through the HRA, the Thai Constitution does not mention any specific treaty. Therefore, although it can be said that the substance of international human rights norms has a significant influence on the Thai Bill of Rights, that is where the inspiration ends. These international human rights norms are deemed to be Thai law rather than international law that has effect in Thailand. As for international human rights norms that have not inspired the Bill of Rights or have not been incorporated by legislation, they do not have any legal effect. Although the current Thai Constitution of 2007 mentions international human rights treaties explicitly and instructs, as a directive principle, that the state should comply with its international human rights obligations, it does not give any special legal status to such norms in the legal system.⁴⁸

ii. Interpretive Influence of International Human Rights Norms

a. The UK vs. the USA

Courts in both the UK and the USA have developed interpretive principles in order to allow the interpretive influence of international human rights norms.

⁴⁶ See Chapter Three, IV A.

⁴⁷ See Chapter Four, IV A.

⁴⁸ See Chapter Two, IV A.

However, there are similarities and differences between the practices of the two countries which should be addressed.

Sources of International Human Rights Norms

In the case of the UK, the main source of international human rights norms has been the ECHR, to which the UK is a party. Non-ECHR norms have played a less apparent role, and after the enforcement of the HRA have served mostly as additional sources to the Strasbourg jurisprudence.⁴⁹ In the USA, the US Supreme Court has referred to international human rights norms from varied sources such as treaties, UN reports, decisions of international and foreign courts, and opinions and practices of the world community. There has been no specific international human rights source that influences courts in the USA in the way that the ECHR influences courts in the UK.⁵⁰

In any case, it should be noted that the approaches towards choosing sources of foreign norms in the USA and the UK (in relation to the non-ECHR norms) are comparable. Both courts tend to refer to the legal systems that share their cultures or that have a close jurisprudential relationship. The US Supreme Court often refers to English law or law deriving from legal systems that share Anglo-American heritage. By the same token, law and jurisprudence deriving from the commonwealth countries, the USA and Canada are cited more frequently than others in UK courts. Nevertheless, both courts also refer to broader jurisdiction, such as ‘the world community’ or ‘civilised nations’, when issues are more transcendent.⁵¹

Purposes Behind the Use of International Human Rights Norms

⁴⁹ See Chapter Three, IV B iii.

⁵⁰ See Chapter Four, IV B.

⁵¹ See Chapter Three, IV B iii and Chapter IV B ii.

In terms of Larsen's typologies – expository, empirical and substantive uses⁵² – most of the references to the ECHR by the UK courts have concerned the substantive purpose. It is found that before the HRA, courts had used the unincorporated ECHR as a persuasive source in statutory interpretation, common law development, the exercise of judicial discretion, and judicial review of executive acts.⁵³ Following the HRA, courts in the UK have also been required to use norms from the ECHR in this way – to interpret statutes and to develop common law in ways that are consistent with international human rights.⁵⁴ Most of the uses of non-ECHR norms have also concerned substantive purposes.⁵⁵ Similarly, the US Supreme Court has referred to international human rights norms mostly in a substantive way in determining the existence and scope of constitutional rights especially in relation to the Eight Amendment,⁵⁶ the due process clauses⁵⁷ and the equal protection clause.⁵⁸

That international human rights norms have been used mostly for substantive purposes can be explained as being a result of the nature of domestic rights provisions. These provisions not only describe rights in abstract terms (and so require substantive input), but also contain what Neuman calls the 'moral aspect' of rights, which is less tied to a specific country than 'consensual' and 'institutional' aspects.⁵⁹ Therefore, courts may find international human rights norms helpful in the task of interpreting the moral aspect of the rights in question.

⁵² See Chapter One, text to n 15.

⁵³ See Chapter Three, IV B i.

⁵⁴ See Chapter Three, IV B ii.

⁵⁵ See Chapter Three, IV B iii.

⁵⁶ See Chapter Four, IV B i a.

⁵⁷ See Chapter Four, IV B i b.

⁵⁸ See Chapter Four, IV B i c.

⁵⁹ Gerald Neuman, 'The Uses of International Law in Constitutional Interpretation' *in* 'Agora: The United States Constitution and International Law' (2004) 98 Am J Int Law 82, 87. See also Gerald Neuman, 'Human Rights and Constitutional Rights: Harmony and Dissonance' (2003) 55 Stan L Rev 1863, 1866–72.

Techniques for Using, and Weight Given to, International Human Rights Norms

In the UK, before the HRA, the use of the ECHR was under the presumption that English law should have been interpreted in a way that was compatible with the country's international obligations.⁶⁰ However, the presumption was rebuttable and applied only when there was ambiguity or uncertainty in domestic law. Then, through the enforcement of the HRA 1998, the ECHR has enjoyed more force as Parliament orders statutory interpretation *in favour of* the Convention rights⁶¹ and the consideration of the jurisprudence of the ECtHR⁶² from the courts.

As regards the non-ECHR norms, those taking the form of international treaties which the UK has accepted have enjoyed the same presumption of compatibility as that enjoyed by the unincorporated ECHR, while those taking the form of foreign laws and jurisprudence have served only as relevant materials. The latter's persuasiveness depends on the courts' consideration on a case-by-case basis. As with the unincorporated ECHR, courts tend to refer to non-ECHR norms of both kinds only when domestic law is uncertain or leads to undesirable results.⁶³

In the USA, although there is an established principle that domestic law should be interpreted to be consistent with international law, the presumption does not apply to constitutional interpretation. The degree of reliance the Court has placed on international human rights norms has been that it considered them as constituting one of the relevant considerations, or, more frequently, as offering additional support to opinions which have already been made on other grounds.

⁶⁰ See Chapter Three, IV B i.

⁶¹ Human Rights Act 1998, s 3 (1).

⁶² HRA, s 2 (1).

⁶³ See Chapter Three, IV B iii.

The main justifications for the uses are relevance and the usefulness of the norms themselves.⁶⁴

It is interesting to observe that while the UK's rights jurisprudence has eventually been adopted from international law sources – not only the ECHR itself, but also the Strasbourg jurisprudence, which includes not only decisions but also the method of balancing between rights, namely the proportionality principle – the USA's has been home-grown, and international human rights are used simply – and at best – as aids to interpretation.

Perceptions of, and Criticisms of the Use of, International Human Rights Norms

The use of international human rights norms is perceived in both countries as being something that increases the power of the judiciary against the other two branches of government. Therefore, the main criticism of the use of international human rights law in both countries is based on the concept of popular democracy; in the UK it comes in the form of the doctrine of Parliamentary sovereignty, and in the USA it comes in the form of the argument that the Supreme Court's use of international law is undemocratic. Both are reinforced by the separation of powers doctrine in the sense that courts should not interfere with the function of the elected branches.

In any case, the criticism of the use of international human rights norms tends to be more robust in the USA than in the UK. Although both countries share the same concerns over democracy and judicial power, the elected branches in the UK later passed the HRA in order to facilitate the interpretive influence of the ECHR, while those in the USA continue to object strongly to the practice of the US Supreme Court in referring to international and foreign norms.

⁶⁴ See Chapter Four, IV B i.

Furthermore, it should be pointed out that in the USA, criticisms have been voiced regarding potential problems relating to the legal coherence between international or foreign law and American law, and the courts' methodologies in choosing, understanding and making use of international and foreign sources of law.⁶⁵ These issues have not been widely debated in the UK, except for that relating to the extent to which courts should follow the jurisprudence from Strasbourg, where some argue that courts should not always follow the ECtHR jurisprudence as it may not always be consistent with the UK legal system.⁶⁶

In any case, such differences can be explained by the peculiar factors of each jurisdiction. The USA has adopted an isolationist approach towards international law, especially international human rights, while the UK has for a long time been influenced by international law emanating from the European Union. Moreover, the interpretation of rights in the USA involves the interpretation of the Constitution. The originalist theory of interpretation may have an impact on the courts' practice. The UK, on the other hand, has accepted the concept of dynamic interpretation from the common law, which is more open to contemporary international human rights norms. Political integration in Europe and the use of comparative laws by international tribunals have made the use of comparative law common among members.⁶⁷ The ECHR is a local human rights treaty for the UK. Moreover, by ratifying the ECHR and enacting the HRA 1998, the executive and legislative branches of the country have shown approval, to some extent, of the norms from the Convention. This may mitigate the concern that courts impose international norms on the people.

⁶⁵ See Chapter Four, IV B ii d and e.

⁶⁶ See Chapter Three, IV B ii b.

⁶⁷ Christopher McCrudden, 'A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights' (2000) 20 OJLS 499, 521–22. See also discussion in Chapter Three, III B regarding the effect of EU law on the UK legal system.

b. The UK and the USA vs. Thailand

The interpretive influence of international human rights norms is totally different in UK and US courts, on the one hand, and Thai courts on the other. Although the Thai Constitutions, and some statutes, have been inspired by international human rights norms – especially those in the Universal Declaration of Human Rights and in international human rights treaties to which Thailand is a party⁶⁸ – courts usually treat those provisions like other ordinary provisions and rarely seek to look at the original international human rights obligations for further influence in interpreting them. As to international human rights norms that have not been transformed into the legal systems, they have rarely received any attention from the courts.⁶⁹

Although there have recently begun to be some references to international human norms in Thai judicial reasoning, such references have been somewhat opportunistic and have lacked adequate justification. Some dicta have even reflected a lack of comprehensive knowledge of the principles of interpretation and the substance of international human rights norms.⁷⁰ Academic literature in this area is also very scarce. No one has proposed an interpretive theory on the basis of which Thai courts may use international human rights norms in their judicial reasoning.⁷¹

⁶⁸ For the influence of international human rights norms on the drafting of the Thai Bill of Rights, see Chapter Two, I B particularly text to n 77.

⁶⁹ See Chapter Two, IV B.

⁷⁰ *ibid.*

⁷¹ The only article mentioning the use of international human rights norms in judicial reasoning is Banjerd Singhaneti, 'Constitutional Review of the Legislation that Affects Human Rights' (2010) 39(1) Thammasat Law Journal 33. The article is a part of the research on 'The Constitutionality of the Laws that Affect Human Rights' submitted to the Office of the Constitutional Court in January 2010. Singhanethi simply submits that the Constitutional Court may consider international human rights in reviewing the legislation, but, if such rights are not recognised by the Constitution, the Court may not use them as a standard for judging the validity of the law.

II. Lessons from the UK and USA

A. Why Thai Courts Have Not Used International Human Rights Norms in Their Judicial Reasoning

After comparing the UK, the USA and Thailand, it is now possible to discern certain important key points which affect the use of international human rights norms in judicial reasoning. It is submitted that the courts' interpretative approaches and the principles regulating the relationship between international and domestic law play an important role with regard to this issue. The more purposive, flexible and forward-looking the interpretive methods courts adopt, the greater the chance for international human rights norms to be one of the considerations. Approval from the legislature and the familiarity of judges and societies with international legal regimes also encourage courts to look at norms beyond their own jurisdictions. On the other hand, the attachment to democracy, especially popular democracy, results in a dualist tendency and in restrained roles for the judiciary in reviewing the acts of the other two branches and interpreting law. The degree to which the countries perceive themselves as exceptional vis-à-vis others in the world community also plays an important role in opposing international and foreign sources of interpretation.

Differences between systems of government (i.e. presidential and parliamentary systems), styles of constitution (i.e. written or unwritten), and the extent of powers of judicial review against legislative acts (i.e. strong and weak judicial review) are not of great significance in relation to the practice in question.

The reasons why the interpretive influence of international human rights norms has not been recognised in Thailand could stem from many factors which distinguish it from the UK and USA. Extremely unstable politics and constitutional systems may affect, to some extent, the independence of the judiciary, and may create uncertainty regarding its roles vis-à-vis the other two branches. The Thai judiciary, having experienced long-term authoritarian

governments and frequent military interventions, had been rather passive, and would act against the other two branches only in exceptional circumstances. It started to play a more aggressive role shortly before the military seizure of political power in 2006, but such a role did not arise in the context of rights.

Closely related to this is the old formalist tradition in applying and interpreting law, which still has influence in the minds of judges, lawyers and some academics, resulting in the text of the Constitution or a statute being interpreted strictly without extra-textual materials being taken into account. A provision of the Constitution which implies a dualist approach towards international law also encourages total ignorance of international and foreign sources.

Most importantly, Thai courts have yet to develop an interpretive theory comparable to the presumption of compatibility in the UK or the *Charming Betsy* canon in the USA. This is true even in cases where such international law plays an important role in inspiring the provisions of domestic laws. The interpretive values of international and foreign law in general have been neglected, and as a result interpretive influence of international human rights norms in particular has not been recognised.

B. Whether It Is Desirable for Thailand to Allow Interpretive Influence of International Human Rights Norms

Courts in the UK and USA have long benefited from the values of international human rights norms, despite the fact that their rights jurisprudences are highly developed. International human rights norms can provide useful insights,⁷² showing how others have considered and resolved the ambiguities associated

⁷² Neuman 'The Uses of International Law' (n 59) 87. See also the statement of Chief Justice Dickson of Canada in *Alberta Union of Provincial Employees v Attorney General of Alberta*, [1987] S C R 313, 348.

with analogous provisions.⁷³ Also, norms from international community are dynamic, which means that they may serve as ‘contemporary sources for a constitution’s practical and moral force’,⁷⁴ helping national jurisprudence to develop according to a changing world.⁷⁵ As Levinson argues, no country should ‘regard its own instantiated commitment to social justice or human rights as absolutely pristine’.⁷⁶

The neglect of the Thai courts regarding international human rights norms is greatly undesirable when the country is in need of development in all areas, including protection of rights. Constitutional provisions are normally open-ended, and international human rights norms can be of great assistance in giving meaning to such provisions.

The interpretive influence of international human rights norms may also be considered desirable for policy reasons. International human rights norms may help enhance rights protection in a jurisdiction. Newman submits that ‘[f]or new constitutions in fledgling democracies, anchoring constitutional rights in the jurisprudence of more established systems supplies a body of precedent and decreases the likelihood of repressive interpretation’.⁷⁷ This could be applied to Thailand, where democracy has suffered from frequent military interventions and the protection of rights has fluctuated from Constitution to Constitution. Furthermore, since the constitutional provisions on rights are directly inspired by

⁷³ Vincent J Samar, ‘Justifying the Use of International Human Rights Principles in American Constitutional Law’ (2005–2006) 37 Colum Hum Rts L Rev 1, 34. See also a decision from South Africa expressing a similar opinion, *S v Makwanane*, 1995 (3) SA 391, 413 (CC).

⁷⁴ A Barak, ‘A Judge on Judging: The Role of a Supreme Court in a Democracy’ (2002) 116 Harv L Rev 16, 69.

⁷⁵ Tamela Hughlett, ‘International Law: The Use of International Law as a Guide to Interpretation of the United States Constitution’ (1992) 45 Okla L Rev 169, 180.

⁷⁶ Sanford Levinson, ‘Looking Abroad When Interpreting the U.S. Constitution: Some Reflections’ (2004) 39 Tex Int’l LJ 353, 355.

⁷⁷ Neuman ‘The Uses of International Law’ (n 59) 85. See also Andrew Moravcsik, ‘The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe’ (2000) 54 International Organisation 217, 228.

international human rights norms, and since the country has been significantly affected in all its aspects (which include but are not limited to law, economics and culture) by globalisation, it is foreseeable that the Thai people will expect their constitutional rights to be protected according to international standards.

International human rights norms may help boost the credibility of the courts' judicial reasoning.⁷⁸ This is especially so in cases where the provisions of law invite moral or normative judgments. Instead of asserting their own normative view or natural law, courts may refer to international human rights norms and gain more credibility since international human rights can be seen as 'universal',⁷⁹ and 'objective' standards.⁸⁰

Last but not least, use of international human rights norms can help harmonise domestic law with international law. This is because, although Thai constitutional provisions have been made coherent with international human rights norms, the actual protection of rights in the country has not been up to the same standard.⁸¹ In cases where the international human rights norms are those that bind the country, the use of such norms can ensure that the country does not

⁷⁸ Vicki C Jackson, 'Transnational Discourse, Relational Authority, and the U.S. Court: Gender Equality' (2003) 37 *Loy L A L Rev* 271, 281.

⁷⁹ It is generally accepted that international human rights are universal. See for example, UN General Assembly 'Vienna Declaration and Programme of Action' in 'Note by the Secretariat' (12 July 1993) UN Doc A/CONF.157/23, para 1 stating, regarding 'all human rights and fundamental freedoms for all in accordance with the Charter of the United Nations, other instruments relating to human rights, and international law', that '[t]he universal nature of these rights and freedoms is beyond question'. Cf the preparatory document, the 'Bangkok Declaration' in 'Report of the Regional Meeting for Asia of the World Conference on Human Rights' (7 April 1993) UN Doc A/CONF.157/23 para 8, where the Asian states put forward a more relativistic position that 'while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds'.

⁸⁰ Lloyd G Barnett, 'International Human Rights Norms and Their Domestic Application: Judicial Methods and Mechanisms' (1999) 29 *Revista IIDA* 11, 20.

⁸¹ See Chapter Two, I B.

unnecessarily breach its obligations. Furthermore, it is argued that judicial uses of international human rights norms can help demonstrate to the world community the country's commitment to rights, avoid international friction,⁸² and reaffirm the status of the country as among the democracies of the world.⁸³

C. Whether the Thai Legal System Permits Interpretive Influence of International Human Rights Norms

Given the premise that the interpretive influence of international human rights norms is desirable in Thailand, the next question that has to be answered is whether the Thai legal system permits such influence. Although several factors, such as politics, the lack of a rights tradition, the formalist approach to interpretation and adherence to dualism, have prevented the interpretive influence of international human rights norms in Thailand to date, there have been some developments that point towards a system which better accommodates international human rights norms.

Although further development is needed, interpretive approaches in Thailand have started to depart from a strict literalist approach in favour of a more purposive approach. Extra-textual factors such as historical background, intention of the law and its drafters, current social context and natural justice are all considered relevant.⁸⁴

Next, Thailand has historically been more open to international and foreign laws, and is likely to be subject to more international pressure, than the UK and the USA. This means that exceptionalism is not as strongly rooted in Thailand as in

⁸² Daniel Bodansky, 'The Use of International Sources in Constitutional Opinion' (2004) 32 Ga J Int'l & Comp L 421, 427.

⁸³ Sujit Choudhry, 'Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation' (1999) 74 Ind LJ 819, 888–89; Margaret A Burnham, 'Cultivating a Seedling Charter: South Africa's Court Grows Its Constitution Symposium: Constitution-Making in South Africa' (1997) 3 Mich J Race & L 29, 44.

⁸⁴ See Chapter Two, II B ii.

its counterparts' territories, especially the USA's. As regards the issue of human rights in particular, certain international human rights norms, especially those stemming from UN Conventions, have inspired the drafting of rights provisions in many Thai Constitutions, including the current one.⁸⁵ Thai courts have very good reason to look at international human rights norms as aids to interpretation.

Constitutional reforms since 1997 have also changed the Thai legal landscape, especially regarding the roles of courts and protection of rights. The current Constitution even instructs *all courts* in Thailand to interpret the law in the light of constitutional rights. Since constitutional terms are usually vague and surely require elaboration, the Constitution implicitly allows judicial creativity on the part of the courts. Moreover, in the case of the Constitutional Court, the Constitution expressly gives it a power to define the meaning and scope of constitutional rights, which all branches are bounded to respect.⁸⁶ It can exercise power to the same extent as the US Supreme Court in defining constitutional rights, and there is no theory that limits the sources of interpretation in Thailand corresponding to the originalist theory in the USA.⁸⁷ Therefore, there is nothing relating to interpretive approaches that prevents Thai courts from referring to international human rights norms as interpretive aids.

Further, the current Constitution appears to support the influence of international human rights norms. Section 82 of the current Constitution directs that '[t]he state shall ... comply with human rights conventions in which Thailand is a party thereto'.⁸⁸ The judiciary, as one of the state's organs, is supposed to act in accordance with this constitutional directive. Moreover, since the executive and the legislative branches are supposed to act according to the principle, it is natural for courts to *presume* that they do not wish to violate international human

⁸⁵ See Chapter Two, IV A i.

⁸⁶ Constitution 2007, s 27.

⁸⁷ Chapter Two, II B iii.

⁸⁸ Constitution 2007, s 82. The importance of this section on the 'legal status' of the international human rights treaties in Thailand has been discussed in Chapter Two, IV A i.

rights conventions to which Thailand is a party and to interpret the law taking into account those conventions.

In fact, a comparable provision appears in the Constitution of India. It is stated in Article 51c that ‘the state shall endeavour to ... foster respect for international law and treaty obligations in the dealing of organized people with one another’.⁸⁹ Article 37 of the Constitution of India explicitly provides that the provision contained in this part shall not be enforceable by courts. Nevertheless, it is the duty of the state to apply the principle in making law. Thus, the Indian Constitutional Court used such provisions to state that domestic courts have a duty ‘to give due regard to International Conventions and Norms for construing domestic laws’.⁹⁰ Most obviously, in *Vishaka v State of Rajasthan*, the Court stated that ‘[a]ny international convention not inconsistent with the fundamental rights [of the Indian Constitution] and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee’.⁹¹

It is arguable that the implication for the Thai Constitution regarding international human rights is even stronger than it is for the Indian Constitution. Apart from the directive principle contained in section 82, the Thai Constitution also posits, in section 257 (1), that the National Human Rights Commission has the power to examine and report the commission or omission of acts which violate human rights or *which do not comply with obligations under international*

⁸⁹ The Constitution of India, art 51c found in Martha I Morgan, ‘The Roles of International Human Rights Norms in Comparative Constitutional Jurisprudence: CEDAW-Based Examples’ (IALS Conference on Constitutional Law) 3.

⁹⁰ *Apparel Export Promotion Council v AK Chopra*, [1999] *All India Reporter* (SC) 625, [2000] 1 Law Reports of the Commonwealth 563 [28]. See also *Githa Hariharan v Reserve Bank of India*, [1999] 1 Law Reports of India 151. Found in Morgan (n 89) 3.

⁹¹ 3 BHRC 261, 264 (1997). Found in Jackson (n 78) 293. See also *Hariharan v Reserve Bank of India*, 1 LRI 353 (1999) *8; *Shri DK Basu v State of West Bengal* (1996) SCC 416.

*treaties to which Thailand is a party.*⁹² Although the violation of international human rights treaties is not directly justiciable in courts, this provision reflects the strong will of the Constitution to have the country managed in a way that is consistent with the international human rights norms to which Thailand has acceded.

Also, Singhaneti asserts that there are some human rights principles that are not mentioned explicitly in the Constitution, but are underlying principles of the Constitution. These may be considered as ‘rule-of-law principles’ and could be used in the task of carrying out judicial review against the legislative and the executive branches according to section 3 para 2 of the Constitution, which provides that ‘[t]he performance of duties of the National Assembly, the Council of Ministers, the Courts, the Constitutional organisations and State agencies shall be in accordance with the rule of law’.⁹³ Accepting this argument, it could be argued that section 3 para 2 provides further justification for the use of international human rights norms that can be considered rule-of-law principles.

Last but not least, it is also arguable that democratically based criticisms directed against judicial reasoning influenced by international human rights norms are not as strong in Thailand as in the UK and USA. In the latter two countries, the arguments against norms outside their own legal systems are based partly on the reasoning that laws passed by the legislature and actions performed by the executive should be highly valued because they reflect people’s opinions. As is argued in Chapters Three and Four, this argument does not necessarily prevent the indirect use of international human rights norms in judicial reasoning.⁹⁴

⁹² Constitution 2007, s 257(1). Detailed discussion on the effect of this section can be found in Chapter Two, IV A i.

⁹³ Singhaneti (n 71) 55. It is noted that Singhaneti addresses human rights principles in general rather than international human rights. He does not articulate further the meaning of the ‘rule of law’ principles in the constitutional provision.

⁹⁴ See Chapters Three, IV and Four, IV.

In the setting of Thai politics, the argument faces another difficulty. This is because the validation of the argument depends largely on the efficiency of a political system in providing opportunities for people to be involved in politics and express their opinions through their representatives.⁹⁵ The political systems in the UK and USA may satisfy such criteria. But in Thailand, where elections are believed to be significantly abused, whether the laws and the executive actions reflect the people's opinions and are made for the people's benefit is in doubt. In fact, the recently expressed attitude of Thai people towards politics has been very negative. It is believed that in this plutocracy, where money has been used extensively to buy representatives of the people and votes, the nation's policies are controlled by the personal business interests of rulers rather than by other principles.⁹⁶ This negative feeling is also strong towards political parties, which are supposed to serve as the people's means of communicating with the Government and the Government's means of communicating with the people. Research published in 2004 by the *ASIAN Barometer* showed that Thais regard political parties as 'the source of corrupt and inefficient government'.⁹⁷

This is actually why Constitutions since the constitutional reform of 1997 have established the Constitutional Court, Administrative Courts and other independent organs: to invigilate closely the legislative and executive acts. Thus, Thai courts have a further justification for exercising the power of judicial review robustly in order to make sure that the political branches do not act beyond their powers. International human rights norms which are 'neutral standards', in the sense that they are beyond the manipulations of politicians, may be used to help protect the rights of individuals.

⁹⁵ See Waldron (n 14) discussing good, working democratic institutions and perception of rights among citizens as conditions for the arguments against judicial review.

⁹⁶ Dhiravegin (n 6) 385–86.

⁹⁷ Robert B Albritton and Tahwilwadee Bureekul, 'Developing Democracy under a New Constitution in Thailand' (2004) Working Paper Series: No. 28 *ASIAN Barometer: A Comparative Survey of Democracy, Governance and Development* (Asian Barometer Project Office, National Taiwan University and Academia Sinica) 18.

III. Conclusion

In short, it is desirable and appropriate for Thailand to allow the interpretive influence of international human rights norms in judicial reasoning. However, such norms have played almost no role in Thai courts to date because of the underdevelopment of legal jurisprudence in respect of the roles of the courts, interpretive approaches, and the relationship between international and national laws. Thus, the comprehensive framework for the development of rights jurisprudence using international human rights norms as a tool which will be proposed in the next Chapter will greatly benefit the legal system and the protection of rights in Thailand.

Chapter Six: Conceptualising the Use of International Human Rights Norms in Thai Courts

If the argument that international human rights norms should have interpretive influence in Thai courts is convincing, the next stage is to develop a framework that helps the courts to decide when and how to use such norms. Without an adequate framework, usage is likely to be opportunistic and inconsistent. On the basis of the experiences of the UK and USA and comparative analysis from the previous Chapters, this Chapter proposes a framework for the consistent and legitimate use of international human rights norms in Thai courts. It also discusses the potential challenges for the use of international human rights norms according to the framework proposed, and suggests adjustments for a more developed legal system which can accommodate international human rights norms.

I. Framework for the Consistent and Legitimate Use of International Human Rights Norms in Thailand

Several scholars in the UK and USA have attempted to offer justifications for using international human rights norms in domestic courts. Some also propose a methodology for their use. The suggestions are varied, not only in terms of the kinds of international norms to be used and the techniques for using them, but also in the degree to which such norms can have influence.¹ Nevertheless, these

¹ See Sarah H Cleveland, 'Our International Constitution' (2006) 31 Yale J Int'l L 1; Murray Hunt, *Using Human Rights Law in English Courts* (Hart 1998); Michael Kirby, 'International

suggestions have been made in consideration of the UK or US contexts, and cannot be applied directly to the Thai legal system. Moreover, no-one has offered a full framework for the use of international human rights norms which this research attempts to provide.

The proposed framework below seeks to discuss and answer the questions: (1) what kinds of domestic laws are to be interpreted taking into account international human rights norms?; (2) which courts have the power and responsibility to do this?; (3) for what purposes may courts use international human rights norms?; (4) should the use of international human rights norms be dependent on the ambiguity or uncertainty of domestic law?; (5) what kinds of international human rights norms should be considered and what are the rules for selecting the most appropriate norms?; (6) what levels of authority or persuasiveness should international human rights norms of each kind have in Thai judicial reasoning?; (7) what are the constraints and conditions on the use of international human rights norms?; and lastly, (8) what are the justifications for using international human rights norms as proposed?

This framework focuses on the use of international human rights norms, but some preliminary suggestions on general principles of interpretation are also offered, when necessary. This is because the Thai legal system has yet to develop

Law – The Impact on National Constitution’ (2006) 21 Am U Int’l L Rev 327; Karen Knop, ‘Here and There: International Law in Domestic Courts’ (2000) 32 NYU J Int’l L & Pol 501; Harold Hongju Koh, ‘International Law as Part of Our Law *in* ‘Agora: The United States Constitution and International Law’ (2004) 98 Am J Int Law 43; John Laws, ‘Is the High Court the Guardian of Fundamental Constitutional Rights’ [1993] PL 59; Christopher McCrudden, ‘A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights’ (2000) 20 OJLS 499; Christopher McCrudden, ‘Judicial Comparativism and Human Rights’ in Esin Örüciü and David Nelken (eds) *Comparative Law: A Handbook* (Hart 2007); Gerald Neuman, ‘The Uses of International Law in Constitutional Interpretation’ *in* ‘Agora: The United States Constitution and International Law’ (2004) 98 Am J Int Law 82; Jeremy Waldron, ‘Foreign Law and the Modern *Ius Gentium*’ (2005) 119 Harv L Rev 129; Melissa A Waters, ‘Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties’ (2007) 107 Colum L Rev 628.

a consistent theory of interpretation, which is important as a foundation before international human rights norms are used.

A. What Kinds of Domestic Laws Are to Be Interpreted Taking into Account International Human Rights Norms?

The protection of rights in the Thai legal system is based mainly on Thailand's written Constitution. The current Constitution, promulgated in 2007, contains a lengthy list of the rights and liberties of the Thai people.² As is usual for constitutional provisions, these rights and liberties are described in abstract terms and come with exceptions that are equally undetermined. Therefore, constitutional texts will be the main objects of the interpretation taking into account international human rights norms.

It is noted that the result of constitutional rights being interpreted taking into account international human rights norms is that statutory interpretation should also take into account international human rights norms as well. In order to appreciate this argument, it is important to recall the proposal made in Chapter Two that the Constitution, by section 27, requires a rights-based interpretation of the law in which at least two requirements are involved. Firstly, courts must not positively violate constitutional rights by means of interpretation and adjudication. Secondly, they must consider the issue of constitutional rights when reviewing acts of the executive and the legislature to make sure that the latter two branches do not violate the rights.³ From the experience of the UK, it is further suggested here that in interpreting legislation according to the requirements above, Thai courts should also adopt a 'principle of legality' such as that used by UK courts.⁴ According to section 27, constitutional rights are binding on both the legislative branch and the judiciary; therefore, courts should *assume* that the

² For the detail on rights protected, see Chapter Two, I B.

³ See Chapter Two, II B iii.

⁴ See Chapter Three, II B ii.

legislature does not wish to enact the law in a way that contradicts constitutional rights and should, *as far as possible, read and give effect to legislation in a way which is compatible with the constitutional rights*. This will reduce unintended limitations of constitutional rights by the legislative branch and render justice to parties in a particular case. Statutes that may affect rights and must be judged against the Constitution should be interpreted in this way. Those relating to criminal procedure are the most obvious examples. It is noted, however, that unlike with the principle of legality in the UK, where clear and intended violation of rights by Parliament will be accepted by courts, in Thailand, the law has to be declared invalid by the Constitutional Court.

If the arguments for the rights-based interpretation of statutory law above are accepted, it is further suggested that courts should take into account international human rights norms in such interpretation. This is for the sake of consistency in the courts' interpretive approach. Since the constitutional rights are interpreted taking into account international human rights norms, statutory interpretation that takes into account constitutional rights should take into account international human rights norms as well. However, international human rights norms that can influence statutory interpretation must not be inconsistent with the Constitution.

B. Which Courts Have the Power and Responsibility To Do This?

It is suggested that the Constitutional Court should play a leading role in constructing rights jurisprudence in Thailand given that it has the powers to define the meaning and scope of constitutional rights, and to render the decision as to whether a parliamentary Act is inconsistent with recognised constitutional rights and thus unenforceable. In fact, section 27 of the Constitution discussed above even implies that rights and liberties recognised by decisions of the Constitutional Court through constitutional interpretation are equal to rights expressly recognised by the Constitution.⁵ Although cases concerning the

⁵ See Chapter Two, II B iii.

interpretation of rights have not arisen in the Constitutional Court frequently over the past 15 years,⁶ it is envisaged that this could change as Thai citizens become more aware of their rights and constitutional mechanisms for enforcing rights improve.⁷

It is also the duty of the Courts of Justice and the Administrative Courts to interpret domestic law taking into account international human rights norms. This is because they are responsible for interpreting all laws and judging the actions of public authorities in the light of constitutional rights.⁸ Moreover, in the application of law to any case, if the Courts of Justice or the Administrative Courts are of the opinion that the law to be applied is unconstitutional they may refer such an issue to the Constitutional Court. They can do so even in cases where parties to the cases do not raise the issue.⁹

C. For What Purposes May Courts Use International Human Rights Norms?

This framework suggests that Thai courts should be able to use international human rights norms for all purposes – expository, empirical and substantive.¹⁰ However, it is pointed out that the substantive use will be most beneficial, and Thai courts should concentrate on this use.¹¹ This is because many constitutional rights are needing to be defined, and Thai courts have yet to develop their rights jurisprudence. The supra-national nature of the moral aspect of the

⁶ Chapter Two, II A ii a.

⁷ See Chapter Two, I B on discussion of the new constitutional scheme for rights protection.

⁸ See Chapter Two, II A ii b and B iii b on the role of the Administrative Courts and the Courts of Justice on judicial review and interpretation of laws concerning rights.

⁹ Constitution 2007, ss 6, 27, 211.

¹⁰ The typologies are provided by Larsen. This has been discussed earlier in Chapter One, text to n 15.

¹¹ Most of the time, courts in the UK and USA use international human rights norms for the substantive purpose. See Chapter Three, IV B and Four IV B.

Constitution,¹² and the fact that Thai constitutional texts are inspired by international human rights documents such as the UDHR and other international human rights treaties which are also adopted by other countries, especially those having modern constitutions,¹³ hint that human rights norms from international and foreign sources may help ‘illuminate’ or ‘inform’ the meaning and scope of the Thai constitutional provisions.¹⁴ In other words, international human rights norms may provide ‘normative insight’ for interpretation at the domestic level.¹⁵

However, unlike with the expository and empirical uses, there should be a greater caution with regard to the substantive use of international human rights norms. In cases where international norms are to be found in decisions of international or foreign courts, Larsen submits that substantive use of them could be made either by looking at the reasons provided by such courts (reason-borrowing) or by looking at rules adopted by the courts (moral fact-finding).¹⁶ Regarding the latter, Larsen argues that this is unjustified because the content of domestic law, especially the Constitution, should not be defined in a certain way simply because other nations adopt such rules.¹⁷

Although Larsen’s argument is convincing to the extent that courts’ investigations into the details of other legal systems provide further justification for their reliance on international and foreign sources, the caution against ‘moral

¹² See discussion in Chapter Five, I D ii a.

¹³ The Honourable Claire L’Heureux-Dube, ‘The Importance of Dialogue: Globalisation and the International Impact of the Renhquist Court’ (1998) 34 *Tulsa L J* 15, 24; McCrudden, ‘A Common Law of Human Rights?’ (n 1) 501.

¹⁴ Vicki C Jackson, ‘Constitutional Comparisons’: Convergence, Resistance, Engagement’ (2005) 119 *Harv L Rev* 109, 118; G A Christenson, ‘Using Human Rights Law to Inform Due Process and Equal Protection Analysis’ (1983) 52 *U Cin L Rev* 3, 3.

¹⁵ Neuman, ‘The Uses of International Law’ (n 1) 87.

¹⁶ Joan L Larsen, ‘Importing Constitutional Norms from a “Wider Civilization”’: *Lawrence* and the Rehnquist Court’s Use of Foreign and International Law in Domestic Constitutional Interpretation’ (2004) 65 *Ohio St LJ* 1284, 1291.

¹⁷ *ibid* 1326.

fact-finding’ should not be exaggerated. Many international human rights norms are perceived as being ‘universal’ and applicable to any state, whatever its legal system. These are especially the rights specified in the UDHR.¹⁸ More importantly, as is discussed above, the Constitution needs a moral input. International human rights norms which are widely accepted by the international community are good sources for the interpretation of the Constitution because, to use the logic adopted by the US Supreme Court, they indicate what rights are ‘implicit in the concept of ordered liberty’.¹⁹ Besides, widely accepted norms are preferable to the personal opinion of judges. The concern should be mitigated by the fact that according to this framework, in no circumstance do courts use international and foreign norms as exclusive means for determining the outcomes of the decisions. Such norms will have to be considered alongside other related factors.²⁰

D. Should the Use of International Human Rights Norms Be Dependent on the Ambiguity or Uncertainty of Domestic Law?

Section 4 of the Civil and Commercial Code – which provides general rules for the application and interpretation of law in Thailand²¹ – provides that courts may refer to ‘general legal principles’ in cases where no provisions of law, no local customs and no analogous provisions are applicable.²² Section 7 of the Constitution also provides that ‘[w]henever no provision under this Constitution is applicable to any case, it shall be decided in accordance with the constitutional

¹⁸ See text to nn 34–39 for the discussion of the UDHR.

¹⁹ This phrase has been used regularly since *Palko v Connecticut*, 302 US 319, 325 (1937). The issue has been discussed in Chapter Four, IV B i b.

²⁰ Further justifications are discussed in section H.

²¹ It has been accepted in Thailand that the principle provided by section 4, though located in the Civil and Commercial Code, can be applied to the interpretation and application of Thai laws in general, including criminal and public laws, but with some adjustments. Kittisak Prokati, ‘General Principles on Application and Interpretation of Laws’ in *Application and Interpretation of Law* (Chitti Tingsabadh Fund, Faculty of Law, Thammasat University 2009) 41.

²² See discussion in Chapter Two, II B ii and III B.

conventions of the democratic regime of government with the King as Head of State'. Therefore, it is arguable that international human rights norms that can be considered as 'general legal principles', or as 'constitutional conventions' of regimes comparable to that of Thailand, are expressly allowed in Thai courts as a source of law when no other sources are available.

However, even in cases where there are provisions of law that can be applied either directly or analogously, or where local customs are available, international human rights norms can still influence the application and interpretation of provisions and customs. The US Supreme Court has referred to international materials in cases where the constitutional terms were open to be interpreted.²³ The courts in the UK before the HRA 1998 also looked at the ECHR when there was ambiguity in statutory provisions or uncertainty in common law.²⁴ Given that provisions providing protections of rights in Thailand are constitutional provisions which are presented in an open-ended language and are inherently ambiguous and uncertain, and that Thai courts have yet to develop their own rights jurisprudence based on these provisions, Thai courts can also benefit from international human rights norms in the same way that UK and US courts do.

Nevertheless, this framework argues that the ambiguity or uncertainty of laws and customs should *not be a precondition* of Thai courts looking at international human rights norms. It cannot be said that all related constitutional and statutory provisions that have the potential to benefit from international human rights are ambiguous or uncertain. This is especially so considering the fact that there are provisions that by themselves do not look ambiguous or uncertain, but may become ambiguous and uncertain when considered with international human rights norms.

²³ Chapter Four, IV B.

²⁴ Chapter Three, IV B i.

The experience of the UK courts before the HRA 1998 is relevant here. Although UK courts held that reference to the ECHR was not appropriate in cases where the statute was not ambiguous and common law was certain, there were several arguments for the more extensive use of norms from the ECHR. In particular, there were arguments based on the common law power of the courts that judges were able to interpret domestic laws to be consistent with the ECHR even though such laws were not ambiguous or uncertain,²⁵ and that they were able to ‘integrate’ into the legal system norms and values according to the ECHR in order to meet the changing demands of society.²⁶ These arguments can be applied to Thailand, where courts also assume power to interpret the law according to changing circumstances, taking into account all relevant materials.

In fact, the provisions concerning rights in the Thai Constitution are actually inspired by international human rights norms, especially those in the UDHR and the other UN-based Conventions that Thailand has ratified.²⁷ It has been accepted in the Thai legal system that historical development relating to the adoption of positive laws may serve as aids in interpretation so that laws are interpreted according to their purposes and their drafters’ intention.²⁸ There are no reasons to reject international human rights norms that serve as an inspiration to the provisions in issue simply because there is no ambiguity or uncertainty in the domestic law.

Furthermore, it should not be forgotten that UK courts, before the HRA, used the ECHR in order to comply with their international obligations rather than to enhance the protection of rights in the country. Thai courts, on the other hand, have to consider not only their international obligations but also the Constitution’s aspiration to enhance the protection of rights in the country so that

²⁵ Hunt (n 1) 297–324 discussed in Chapter Three, IV B i e.

²⁶ Laws (n 1) 75–76 discussed in Chapter Three, IV B i, e.

²⁷ See Chapter Two, I B and IV A.

²⁸ See Chapter Two, II B ii–iii.

it is up to international standards.²⁹ International human rights norms can be a guideline in cases where there is a need for law to be modernised, or when the issues spread far beyond national borders and harmonised responses are desirable.³⁰

Therefore, it is argued that Thai courts should *always* consider international human rights norms in interpreting and applying constitutional and statutory laws relating to rights. Of course, in cases where the provisions are ambiguous or laws are uncertain, or no provisions of laws or customs are applicable to the case, there will be stronger reason for courts to look at international human rights norms.

E. What Kinds of International Human Rights Norms Should Be Considered and What Are the Rules for Selecting the Most Appropriate Norms?

It is recognised that international human rights norms come in different forms: CIL, treaties, laws and practices of foreign nations. They have different authorities and levels of connection to the country, but all of them can be useful in the task of interpretation because they may be able to offer expository, empirical or substantive information. It is submitted by Knop that, since ‘relevance is not based on bindingness’, the ‘status of international and foreign law becomes similar’.³¹ Hoffmann also expresses the view that, in terms of their use as an interpretive tool, the difference between different kinds of international and human rights norms is simply a matter of degree.³² Therefore, this

²⁹ Discussed previously in Chapter Five, II B.

³⁰ B Marquesinis and J Fedtke, ‘The Judge as Comparatist’ (2005) 80 Tul L Rev 11, 76–96.

³¹ Knop (n 1) 520.

³² Paul Hoffman, ‘The Application of International Human Rights Law in State Courts: A View from California’ (1984) 18 Int’L L 61, 61. Cf Tamela Hughlett, ‘International Law: The Use of International Law as a Guide to Interpretation of the United States Constitution’ (1992) 45 Okla L Rev 169, 185 arguing that courts should refer only to ‘international law’ since sources that are too wide cannot restrain judges.

framework suggests that *all* kinds of international human rights norms can be considered by Thai courts in interpreting and applying Thai law, but they should be given different priorities depending on their levels of connection with the country.

The framework proposed that international human rights norms can be divided into three categories: (1) international human rights norms with which Thailand has an international obligation to comply; (2) interpretation of international human rights norms in the first categories by relevant treaty bodies; and (3) international human rights norms with which Thailand has no obligation to comply.

i. International Human Rights Norms with which Thailand has an International Obligation to Comply

International human rights obligations may come in the form of CIL or ratified treaties. CIL binds every country that has not persistently objected to it. Traditionally, the principle for recognising a practice of nations as having CIL status was laid down by the International Court of Justice as the following:

Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.³³

Generally, it is not a straightforward process to identify CIL. Nevertheless, in the areas of international human rights, it is widely accepted that customary international human rights norms can be found in the UDHR, an unbinding resolution of the United Nations General Assembly of which Thailand voted in favour.³⁴ Therefore, there has been an argument, with which this framework

³³ North Sea Continental Shelf (FRG v Den, FRG v Neth), 1969 ICJ 3, 44 (Feb 20).

³⁴ Lillich, 'Invoking International Human Rights Law in Domestic Courts' (1985–1986) 54 U Chi L Rev 367, 393–394; John P Humphrey, 'The International Bill of Rights: Scope and

agrees, that the UDHR should be one of the main documents national courts consult when interpreting domestic laws.³⁵

It should be noted, however, that not all rights that are listed in the UDHR can be considered as CIL. While it is generally accepted that the provisions relating to genocide, slavery, torture, cruel punishment, arbitrary detention and racial discrimination constitute CIL, those relating to economic, social and cultural rights are not likely to be accepted as having the same status.³⁶ It is also noted that UDHR is not necessarily an exclusive source of customary international human rights norms. Other rights-related CIL could also come within the definition. An example is humanitarian law, which is inspired by the concept of human rights.³⁷ Therefore, courts are still required to evaluate each norm on a case-by-case basis taking into account practices of the international community and judgments of international tribunals.³⁸

In any case, most widely accepted customary international human rights norms, including those specified in the UDHR, have been replicated in the form of international treaties.³⁹ Thailand is, to date, a party to: the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); the

Implementation' (1976) 17 Wm & Mary L Rev 527, 529; Office of the United Nations High Commissioner for Human Rights (OHCHR), 'The United Nations Human Rights Treaty System: An Introduction to the Core Human Rights Treaties and the Treaty Bodies' Fact Sheet No 30, 9.

³⁵ Hurst Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law' (1995–1996) 25 GA J Int'l & Comp L 287, 353–54.

³⁶ *ibid* 340–51.

³⁷ For the relationship between human rights and humanitarian law see Dietrich Schindler, 'Human Rights and Humanitarian Law' (1981–1982) 31 Am U L Rev 935. The main source of humanitarian law is the Geneva Convention Relative to the Protection of Civilian Persons in the Time of War 1949.

³⁸ It is noted that this research does not give priority to unwritten international customary international human rights norms. Theoretically, they are international obligations and can be considered as part of Thai law. Practically, however, it is difficult to identify which norms have the status of CIL and what the meaning and scope of such norms are. This may lead to the accusation that judges simply present their own subjective opinion as CIL.

³⁹ OHCHR (n 34) 12–21.

Convention on the Rights of the Child (CRC); the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); and the Convention on the Rights of Persons with Disabilities (CRDP).⁴⁰

It is submitted that these international human rights conventions should be primary sources of international human rights norms that Thai courts should use in interpreting Thai law. This is not only because they put CIL in written terms, but also because the executive branch has specifically expressed its willingness to commit to such norms, and the Constitution aspires to follow international human rights obligations. By choosing international human rights norms from these sources, courts are able to not only avoid allegations of being selective in choosing the sources, but also to reduce criticisms that international human rights norms are used as a cover for judges' own subjective opinions.⁴¹

ii. Interpretation of International Human Rights Obligations by Relevant Treaty Bodies

The invigilation of members' compliance with their obligations contain in UN human rights treaties is carried out on the basis of the mandatory periodic reports that the members have to submit to relevant treaty bodies. After considering the report and discussing the compliance issues with the states, treaty bodies usually issue 'Concluding Observations' acknowledging positive aspects of the states'

⁴⁰ Information taken from Office of the National Human Rights Commission of Thailand, 'International Human Rights Instruments' <http://www.nhrc.or.th/menu_content.php?doc_id=179> accessed 15 February 2010.

⁴¹ See Hughlett (n 32) 181–82 also arguing, in the context of the USA, that international law reduces the courts' subjectivity in constitutional interpretation and may even improve efficiency, as international law puts natural law and values that are shared among all countries into writing, making it easier for courts to ascertain the country's own constitutional standards.

performances and giving concrete and practical recommendations that will help states to give full effect to treaty provisions.⁴² It is generally accepted that the concluding observations of the treaty bodies do not have binding effect, but it is also generally accepted that they have notable authority, especially when they interpret treaty obligations or declare certain acts of the states inconsistent with treaty obligations.⁴³

Sometimes, treaty bodies also publish ‘General Comments’ on the specific issues in order to give a comprehensive interpretation of substantive provisions or further clarify certain obligations according to the Convention.⁴⁴ For example, the CESCR gives a ‘General Comment’ on ‘The Rights to Adequate Housing (Art 11.1): Forced Evictions’.⁴⁵ Just as with the concluding observations, it is uncertain what legal status these have.⁴⁶

Also, in some treaties, namely the ICCPR, CAT, CEDAW and ICERD, there are also optional protocols that allow individuals to file complaints in cases where their rights have been violated by a state party. The committees in these cases act in a quasi-judicial manner.⁴⁷ The views of the treaty bodies are not legally

⁴² OHCHR (n 34) 31–32.

⁴³ Michael O’Flaherty, ‘The Concluding Observations of United Nations Human Rights Treaty Bodies’ (2006) 6 Hum Rts L Rev 27, 32–37.

⁴⁴ OHCHR (n 34) 37.

⁴⁵ UNCESCR ‘General Comment 7’ in ‘Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies’ (12 May 2004) UN Doc HRI/GEN/1/Rev.7.

⁴⁶ See Philip Alston, ‘The Historical Origins of the Concept of “General Comments” in Human Rights Law’ in L Boisson de Charzournes and V Gowland Debbas (eds) *The International Legal System in Quest of Equity and Universality: Liber amicorum Georges Abi-Saab* (Martinus Nijhoff 2001).

⁴⁷ OHCHR (n 34) 33–34.

binding, but they serve to provide strong pressure on the states.⁴⁸ It is noted, however, that Thailand has not accepted any of the optional protocols.

Although these official recommendations, comments and views of the treaty bodies about the instruments do not bind the country legally, they can be used in Thai judicial reasoning as they can help explain the terms of the international human rights obligations with which Thailand has to comply.⁴⁹ In fact, these kinds of international human rights norms can be very useful as both customary international human rights norms and international human rights treaties will only give Thai courts broad guidelines to follow, rather than examples of how such norms should be applied to concrete cases. For example, in the UDHR, broad statements such as '[e]veryone has the right to life, liberty and security of person'⁵⁰ and '[n]o one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation' are used.⁵¹ Several treaties that have been created under the auspices of the UN in order to put norms in the UDHR in legally binding terms also describe rights in rather general terms. On the one hand, this gives Thailand a wide margin of appreciation regarding how to interpret and implement its obligations in its own territory. On the other, when it comes to judicial reasoning that treats international norms as persuasive authorities, such norms do not give precise directions to the courts.

⁴⁸ See J S Davidson, 'Intention and Effect: The Legal Status of the Final Views of the Human Rights Committee' (2001) NZL Rev 125 discussing the legal status of the final 'view' of the HRC under the optional protocol to the ICCPR suggesting that the HRC attempts to assert that its view has some legal status in relation to states that accede to the protocol. Although such an assertion is not likely to succeed, Davidson submits that it may be politically unwise for states to argue that the views are actually not legally binding.

⁴⁹ Michael Wells, 'International Norms in Constitutional Law' (2004) 32 Ga J of Int'l & Comp L 429, 432.

⁵⁰ UDHR, art 3.

⁵¹ UDHR, art 12.

This framework suggests that interpretation of international human rights obligations by relevant treaty bodies should be considered in Thai courts along with the international human rights norms from ratified treaties discussed in the previous section.

iii. International Human Rights Norms with which Thailand Does Not Have an International Obligation to Comply

International human rights norms in this category include but are not limited to unratified treaties, decisions of international courts according to international instruments which Thailand does not ratify (e.g. decisions of the ECtHR according to the ECHR), laws and practices of foreign nations, decisions of foreign courts, and academic and social writings.

Obviously, these sources of international human rights norms have less connection with the country than those in the first and second categories in term of international obligation. At the same time, however, it is unwise to disregard them totally simply because they are not binding on the country.⁵² Waters convincingly argues that well-reasoned arguments relating to a norm from many sources 'can serve as an important reality check for courts in developing sound jurisprudential approaches to respond to the era of human rights internationalism'.⁵³ Further, since many modern constitutions following World War II are inspired by the UDHR, it is very likely that courts around the world are interpreting the same principle of human rights.⁵⁴ At a time when the CIL and international treaties do not provide determinative guidelines applicable to concrete cases, these foreign jurisprudences can be very helpful.

⁵² Sanford Levinson, 'Looking Abroad When Interpreting the U.S. Constitution: Some Reflections' (2004) 39 *Tex Int'l LJ* 353, 355.

⁵³ Waters (n 1) 652.

⁵⁴ McCrudden, 'A Common Law of Human Rights?' (n 1) 501.

Courts in the UK have made use of foreign laws and jurisprudence especially where the ECHR and ECtHR's jurisprudence cannot give clear or desirable answers.⁵⁵ The US Supreme Court has also realised this benefit, and has used the views of international communities to assist its judicial reasoning. It has been reasoned that development of domestic rights protection is 'neither wholly isolated from, nor inherently at odds with, the values prevailing in other countries',⁵⁶ and that laws and jurisprudence abroad may serve as 'common denominators of basic fairness governing relationships between the governors and the governed'.⁵⁷

In any case, one of the strongest objections in the USA against this kind of use of international human rights norms is that the selection of sources of international human rights norms to be used as an interpretive tool has been totally unprincipled. Courts simply picked the ones that they preferred or that were conveniently available to them without considering the appropriateness of such norms. Some even go further to say that courts used only norms that helped support their opinions and ignored those that contradicted such. It has been discussed in Chapter Four that the latter argument is unproven,⁵⁸ but the concerns about the haphazard selection of international human rights norms are valid, although they cannot render the use of international human rights norms illegitimate or inappropriate *per se*.⁵⁹ Therefore, if Thai courts are contemplating the use of international human rights norms, there should be some principles

⁵⁵ Chapter Three, IV B iii.

⁵⁶ *Roper v Simmons*, 543 US 551, 605 (2005) (Justice O'Connor).

⁵⁷ Ruth Bader Ginsburg, "'A Decent Respect to The Opinions of [Human]kind": The Value of a Comparative in Constitutional Adjudication' (2005) 64 CLJ 575, 582 quoting Justice Wald's phase.

⁵⁸ See Chapter Four, IV B ii b ii. There is no comparable objection against the practice of the courts in the UK. This is despite the fact that UK courts have no consistent theory in choosing the jurisdiction either. This has been discussed in Chapter Three, IV B iii.

⁵⁹ See Chapter Four, IV B ii e.

guiding the process of selection in order to ensure that there is no judicial arbitrariness.⁶⁰

This framework generally agrees with practices in the UK and the USA, and with the theories submitted by scholars discussing the US context that the greater the commonality in political and societal respects between the sources and the enlightened country, the more assurance there will be that courts will not impose on their own system something that does not belong to it. However, it is argued that, in many circumstances, this kind of general commonality may not be necessary.

In relation to the comparative method adopted for this research, it was argued in Chapter One that comparison can be approached on the basis of the functions of the objects being compared.⁶¹ Such a functionality principle might also be adopted by Thai courts in relation to the selection of jurisprudence. Notwithstanding the commonality of the system, as long as the *situations* or *issues* abroad were *comparable* to those at hand, international human rights norms from such jurisdictions might be useful. In fact, the US Supreme Court has already used this principle. For example, in *Miranda*, Chief Justice Warren discussed foreign experience from England, Scotland, India and Ceylon because ‘[c]onditions of law enforcement in our country are sufficiently similar to permit reference’ to those countries.⁶² In *Knight*, where decisions of courts in India, Zimbabwe and Canada were cited, Justice Breyer stated that ‘this Court has long considered as relevant and informative the way in which foreign courts *have*

⁶⁰ The principle offered here is comparable to the one offered by Waters which argues that domestic courts should give weight to the treaties according to their ‘domestic values’ and to that offered by Cleveland which focuses on the ‘Constitution’s receptiveness’ to the international norms in question. Waters, ‘Creeping Monism’ (n 1); Cleveland (n 1).

⁶¹ See Chapter One, II.

⁶² *Miranda v Arizona*, 384 US 436, 489 (1966).

*applied standards roughly comparable to our own constitutional standard in roughly comparable circumstances’.*⁶³

Furthermore, it should be noted that, when focusing on the purpose of the use, commonality of systems plays a less important role when international human rights norms are used for expository and empirical purposes than it does when they are used for substantive purposes. As regards the expository use, selection of sources depends on which countries possess relevant and useful information or legal points that may help home courts to understand their own system. The legal systems do not have to be common. In fact, they can even be opposite, as long as the norms from those legal systems can be used to contrast and explain the targeted system. As regards the empirical use, this also depends on which countries have relevant information or practice which courts in the targeted system may observe in order to estimate whether a proposed solution would be likely to work, or whether fear of a particular solution is warranted. For example, in *Washington*, the US Supreme Court referred to the law and practice of the Netherlands not because the systems were common, but because the Netherlands was the only place that legalised assisted suicide.⁶⁴

The commonality of the systems is also less important in cases where the problems transcend political and societal borders. In *Fairchild*, a case concerning the liability of employers to employees who had been exposed to asbestos dust during periods of employment, Lord Bingham expressed the following opinion:

If, however, a decision is given in this country which offends one’s basic sense of justice, and if consideration of international sources suggests that a different and more acceptable decision would be given in most other jurisdictions, *whatever their legal tradition*, this must prompt anxious review of the decision in question. *In a shrinking world (in which the employees of asbestos*

⁶³ *Knight v Florida*, 120 S Ct 459, 463 (1999).

⁶⁴ *Washington v Gluckberg*, 521 US 702 (1997) discussed previously in Chapter Four, IV B i b, n 266.

*companies may work for those companies in any one or more of several countries) there must be some virtue in uniformity of outcome whatever the diversity of approach in reaching that outcome.*⁶⁵

Similarly, the US Supreme Court sometimes referred generally to ‘the world community’ or to ‘international opinion’ in cases where political and societal differences were not perceived to be relevant.⁶⁶

In relation to this point, it should also be remembered that many international human rights norms contain values that are universal. Therefore, the commonality of the sources and the home legal systems may not play an important role in determining suitable sources of international human rights norms. Instead, the threshold turns out to be how universal that particular norm is.⁶⁷

Finally, in the case of Thailand, where the use of international human rights norms is supposed to help improve the protection of rights and develop a better democracy,⁶⁸ the requirements of political and societal commonality may become obstacles. In most circumstances, it may be more desirable to look to the established or stable democracies⁶⁹ than to be influenced by countries with the same level of democracy.

In short, the selection paradigm has to be flexible and sensitive to particular cases, yet far from unprincipled.⁷⁰ Courts should consider and balance many factors.

⁶⁵ Fairchild v Glenhaven Funeral Service, [2002] UKHL 22, [32].

⁶⁶ See Chapter Four, IV B ii d.

⁶⁷ Cleveland (n 1) 113–14.

⁶⁸ Discussed in Chapter Five, II B.

⁶⁹ Waldron (n 1) 145.

⁷⁰ Rex D Glensy, ‘Which Countries Count?: *Lawrence v. Texas* and the Selection of Foreign Persuasive Authority’ (2005) 45 Va J Int’l L 357, 404. It is noted that the selection of historical sources is also of the same kind, but those who argue that the use of international and foreign

The commonality between the political, societal and legal systems, the compatibility and relevance of the issues/situations, the universality of norms and the purposes for which such international norms are to be used are all involved. The accessibility of the norms, and the accuracy of the statistics and contents of norms reflected in documents, may also be considered. The most important point is that courts must explain the reasons why international human rights norms from specific sources are being selected using one or more of the principles provided above. The explanation does not have to be lengthy, but it should adequately justify the selection or, if appropriate, non-selection of the sources.⁷¹ This requirement will mitigate the core concern of the selection process, which is the courts' arbitrariness in selecting sources of international human rights norms.⁷² Of course, even with this requirement judges do have opportunities wilfully to distort all kinds of sources of interpretation, not only international human rights but also others such as the intent of drafters, the purpose of the law, history, and general principles. However, it should not be assumed that judges discharge their duty dishonestly.⁷³

F. What Levels of Authority or Persuasiveness Should International Human Rights Norms of Each Kind Have in Thai Judicial Reasoning?

Not only should different kinds of norms have different priorities, they should also have different authorities and levels of persuasiveness in Thai judicial reasoning.

sources are selective seem to accept the use of history. Rebecca R Zubaty, 'Foreign Law and the U.S. Constitution: Delimiting the Range of Persuasive Authority' (2007) 54 UCLA L Rev 1413, 1434.

⁷¹ Glensy (n 70) 440.

⁷² See Aileen Kavanagh, 'The Idea of a Living Constitution' (2003) 16 Canadian Journal of Law and Jurisprudence 55 suggesting that, in a context where the interpretation results in changing the law, judges are naturally constrained by the duty to give reasons.

⁷³ Kirby (n 1) 356.

i. International Human Rights Norms with which Thailand Has an International Obligation to Comply: A Presumption of Compatibility

It is argued that courts should consider international human rights norms that come in the form of customary international law, or that are contained in international treaties with *a rebuttable presumption that domestic laws should comply with such norms*.

The presumption of compatibility used in the UK and the *Charming Betsy* canon used in the USA contribute to this argument.⁷⁴ Just as is the case for those two countries, it is in the interests of Thailand to enforce compliance with its international obligations, including those relating to human rights.⁷⁵ It is emphasised, however, that, unlike in the USA, the presumption that Thai laws should not be interpreted to violate international obligations if any other possible interpretations remain applies to *constitutional* as well as to statutory interpretation. This proposal is based on the premise that the Thai Constitution explicitly confers the power to enforce rights against violation by the executive and legislative branches on the Court, and that the amendment of constitutional provisions in Thailand is not as difficult as in the USA. More importantly, Thailand does not have any theory of constitutional interpretation that prohibits the use of international human rights norms. By contrast, the constitutional provisions themselves are inspired by international human rights norms, and the Thai Constitution provides the direction that the country should comply with its international human rights obligations.⁷⁶

It is also proposed that, in applying the presumption of compatibility, Thai courts may use interpretive techniques used by UK courts after the HRA, such as the reading down of, or the reading of some words into, written provisions.

⁷⁴ See Chapter Three, III A iii and Four, III A iii.

⁷⁵ See discussion in Chapter Five, II B.

⁷⁶ Constitution 2007, s 82.

Language of the Constitution or statutes may also be strained.⁷⁷ However, these techniques all operate on the condition that it is possible to interpret using them considering all relevant factors, including but not limited to the text, structure, the intention of the drafters, underlying values, domestic context, and the institutional role of the courts vis-à-vis the other two branches.⁷⁸ Thai courts need not and must not distort the language and purposes of domestic laws in order to comply with such norms. In the case of constitutional interpretation, Thai courts must keep in mind that Thailand has its own list of constitutional rights. International human rights obligations can give scope and meaning and can influence the evolution of constitutional rights, but cannot add new rights not consistent with,⁷⁹ or remove those that are protected according to, the Constitution. If a constitutional provision cannot be consistent with an international human rights obligation, courts must uphold the Constitution. Also, in the case of statutory interpretation, international human rights norms may influence the interpretation only through, and as far as they are consistent with, the Thai Constitution.

ii. Interpretation of International Human Rights Obligations by Treaty Bodies: A Presumption of Compatibility with Cautions

It can be seen from the above discussion that, most of the time, the comments on or interpretations of the treaties by treaty bodies are not legally binding for Thailand. However, since they are explanations of the international human rights obligation by institutions that are neutral and specially charged with the duty to

⁷⁷ In fact, the Constitutional Court of Thailand has already started to use these techniques of interpretation, although they are not yet used in the area of rights and are not yet well-developed. See the *Joint Communiqué* case in Chapter Two, II B iii a..

⁷⁸ See discussion on the limit of section 3 of the HRA in Chapter Three, IV B i.

⁷⁹ It is important to note that this framework does not intend to prevent the recognition of new rights that *can be implied* from the constitutional text even though the ‘plain meaning’ of the text may not cover such new rights. To use the experience of the USA as an example, this framework will not argue against actions of the courts in interpreting the due process clause to include ‘substantive due processes’. See discussion in Chapter Four, II B and IV B i b.

promote and enforce international human rights conventions, this framework proposes that Thai courts consider them *with a presumption of compatibility* just as they consider CIL and treaties, *though with greater caution*. Specifically, in cases where treaty bodies deliver comments or decisions relating to the performance of other members of the treaties, Thai courts should be careful in analysing whether such comments or decisions are applicable to situations in Thailand. Of course, those recommendations, comments and views that are directed to Thailand in particular are more persuasive than those that address other countries or that apply generally.

A contrast should be drawn with the practice of the UK courts. Despite strong criticism in the UK, courts tend to follow the jurisprudence of the ECtHR closely. This could be because they perceive the rights specified in the HRA as being international rights which should be interpreted consistently among all parties to the Convention rather than as being the UK's own constitutional rights,⁸⁰ or because the approach benefits legal certainty and shields UK judges from the accusation of judicial activism.⁸¹ But the circumstances are different in Thailand. While judgments of the ECtHR legally bind the UK internationally, in Thailand, observations, comments and views of UN treaty bodies serve only as recommendations. More importantly, there is no constitutional provision in Thailand that expressly gives effect to any international human rights convention comparable with sections 3 and 6 of the HRA which give effect to rights specified in the ECHR. Neither does Thailand have a provision comparable with section 2(1) of the HRA which explicitly instructs UK courts to take into account judgments of the ECtHR. Therefore, while Thai courts should observe concluding observations, general comments, and final views of treaty bodies, and give presumption that Thai laws should comply with them because they explain

⁸⁰ Discussed previously in Chapter III, IV B ii b.

⁸¹ Roger Masterman, 'Aspiration or Foundation? The Status of the Strasbourg Jurisprudence and the "Convention Rights" in Domestic Law' in Helen Fenwick, Gavin Phillipson and Roger Masterman (eds) *Judicial Reasoning under the UK Human Rights Act* (CUP 2007) 60.

international obligations according to the treaties, they need not and should not adopt the so-called ‘mirror principle’ as the UK courts do.⁸²

iii. International Human Rights Norms with which Thailand Does Not Have an International Obligation to Comply: An Engagement Model

In the case of international human rights norms with which Thailand does not have international obligations to comply, Thai courts should not be obligated to take them into account in interpreting Thai law, and it is unreasonable to presume that the legislative and executive branches wish to follow them.

Among others scholars who propose principles for using international and foreign norms,⁸³ Vicki Jackson argues for the ‘engagement model’, where international and foreign norms are not to be excluded *per se*, but at the same time neither shall they be treated as binding, nor as something that it is presumed will be followed. Jackson submits that such norms should be seen as ‘interlocutors, offering a way of testing understanding of one’s own traditions and possibilities by examining them in the reflection of others’.⁸⁴ This model is suitable for Thai courts in dealing with non-binding international human rights norms, since it means that Thai courts will not have to always bend towards them more than the rule of acceptance of international law allows, but at the same time they are able to consider ‘relevant information’ for the purpose of interpreting domestic laws. Thai courts may follow or not follow these international human rights norms as they deem appropriate, on a case-by-case basis. In any case, it is

⁸² See J Lewis, ‘The European Ceiling on Human Rights’ [2007] PL 720.

⁸³ See the list in n 1.

⁸⁴ Jackson (n 14) 114. See also Sujit Choudhry, ‘Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation’ (1999) 74 Ind LJ 819, 835–38 discussing ‘dialogue interpretation’, which is close to what Jackson argues here.

noted that the more universal the norms are, the more persuasive power they could have.⁸⁵

In fact, this model is consistent with the practice of courts in the UK⁸⁶ and the USA.⁸⁷ Although recent decisions of the US Supreme Court have tended to emphasise that non-binding international human rights norms were used solely as confirmation of or additional supports to decisions made on other grounds,⁸⁸ it is important to note here that the Court has not limited the use of international human rights norms to these uses. From the beginning of the Republic until recently, the Supreme Court has used the norms not only as confirmation, but also as one of the reasons determining the existence and scope of rights.⁸⁹ Thus, it is suggested that Thai courts may well utilise non-binding international human rights norms to the full without being limited to the use of such norms only as confirmation of the decisions made on domestic grounds. In fact, Cleveland convincingly suggests that considering the norms as one element in the test, or even using them to provide the rule of decision, does not raise concerns about popular democracy, because it is within the power of domestic judges to decide issues by consulting any relevant materials.⁹⁰

In any case, it is noted that courts should be very cautious in dealing with these materials. Although the paramount principles are the same, different countries may apply them in different ways depending on their own legal systems, laws and cultures. This deviation always happens, even with regard to the principles

⁸⁵ Cleveland (n 1) 113–14.

⁸⁶ Chapter Three, IV B iii.

⁸⁷ Chapter Four, IV B.

⁸⁸ See *Knight v Florida*, 120 S Ct 459 (1999) 463–64; *Atkins v Virginia*, 536 U.S. 304 (2002) 316 fn 21; *Roper v Simmons*, 543 U.S. 551 (2005) 575. Discussed previously in Chapter Four, IV A.

⁸⁹ Discussed in Chapter Four, IV A.

⁹⁰ Cleveland (n 1) 104.

that gain universal acceptance.⁹¹ While international human rights instruments are based on a presumption of universality, most accept some local modulation – most clearly embodied in the recognition by the ECtHR that Contracting Parties to the ECHR possess a ‘margin of appreciation’.⁹² However, this does not contradict the universal value of the rights and does not make the reference to international human rights norms in domestic courts inappropriate.

G. What Are the Constraints and Conditions on the Use of International Human Rights Norms?

It is emphasised that, in order to be legitimate and appropriate, this research proposes that the use of international human rights norms in Thai judicial reasoning has to be subject to certain constraints and conditions.

Firstly, the interpretive influence of international human rights law must be subject to the rules of interpretation in general. Due respect has to be given to the text, structure, the intention of the drafters, underlying values, precedent, and domestic context. International human rights norms can have influence only when the Thai legal system as a whole, and the language of a specific provision, allows.⁹³ The proposal regarding the authority and levels of persuasiveness of international human rights norms in section F has already implied this. Even norms that Thailand has an obligation to comply with may influence Thai

⁹¹ Lord Hoffmann, 'Universality of Human Rights' (2009) 125 LQR 416, 419–20. In other words, universality is not the same as uniformity. James A Sweeney, 'Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era' (2005) 54 ICLQ 459, 469.

⁹² See Sweeney (n 91).

⁹³ See Steven Greer, "Balancing" and the European Court of Human Rights: A Contribution to the Habermas-Alexy Debate' (2004) 63 CLJ 412, 424; Vicki C Jackson, 'Transnational Discourse, Relational Authority, and the U.S. Court: Gender Equality' (2003) 37 Loy L A L Rev 271, 305.

judicial reasoning only to the extent that it is possible according to the Thai Constitution.⁹⁴

The consequence of the use of norms from CIL with this constraint is that Thai courts are to have their own rights jurisprudence rather than jurisprudence that always attaches to international human rights norms. This is consistent with what the Constitution intends, since it may be implied that the Thai Constitution uses wording from several international human rights instruments without mentioning the sources because it assumes that the constitutional rights of the country should take into account the country's own culture and should not always be tied to certain international sources.

Secondly, the institutional constraints regarding issues that should be left for the other two branches to decide should also be considered.⁹⁵ Dworkin's theory is useful here. He submits that judges must observe 'integrity' in interpreting the Constitution. They have duties not only to ensure that the moral judgment they are about to use is consistent with the structure of the Constitution as a whole and in line with precedents, but also to 'defer to general, settled understanding about the character of the power the Constitution assigns them'.⁹⁶

This issue is of importance especially when courts need to strike a balance between constitutional rights and legitimate limitation on rights imposed by the legislature or the executive, which is very likely to happen, since most Thai constitutional rights are not absolute.⁹⁷ There is yet to be any academic discussion of this issue in Thailand and it is not the purpose of this research to

⁹⁴ Section F i, text to n 78.

⁹⁵ See Jackson, 'Constitutional Comparisons' (n 14) 116; Vincent J Samar, 'Justifying the Use of International Human Rights Principles in American Constitutional Law' (2005–2006) 37 Colum Hum Rts L Rev 1, 87–90.

⁹⁶ Ronald Dworkin, *Freedom's Law: the Moral Reading of the American Constitution* (OUP 1996) 10–11.

⁹⁷ See Chapter Two, I B.

offer a full analysis on this point; nevertheless, it might be suggested that an approach like that of the UK courts should be considered by Thai courts.⁹⁸ Courts should exercise proportionality judgment.⁹⁹ As a part of this, greater deference should be accorded to executive or legislative decisions on issues, such as national security and social and economic issues, which fall within the constitutional responsibility of, or require the expertise and judgment of, the elected branches.¹⁰⁰ If the principles above are accepted, it is further argued that in using international human rights norms, courts could have more freedom when the issues to be determined involve the question of law or judicial discretion and should be more restrained when the issues involve judgments of the executive and legislature.¹⁰¹

Moving on to another point, it is proposed as a matter of policy that courts should limit the use of international human rights norms to cases where such norms can

⁹⁸ It is noted that although the Thai Constitution intends to vest great power in courts in enforcing constitutional rights, the power of the Thai courts is still subject to provisions of the Constitution which, on many occasions, provide for exemption to constitutional rights. Therefore, proportionality judgment and a principle of deference, similar to those in the UK, could be useful.

⁹⁹ In fact, this is required in relation to the review of legislation according to s 29 of the Constitution discussed in Chapter Two, text to n 104. Nevertheless, it is argued that proportionality judgment is to be exercised in the review of administrative actions as well. It is also observed that Thai courts have started to be interested in the proportionality analysis. For example, see the Constitutional Court decision no 59/2545 (2003) on the scope of the right of the owner to use land below ground level; the Central Administrative Court decision no 1605/2551 (2008) holding that the Government's measure in dispersing a protest during October 2008 was beyond necessity. See also Constitutional Court decisions 30/2548 (2003) and 11/2549 (2004). However, there has yet to be a developed principle for this, and Thai courts tend to mention the principle but defer to decisions of the legislative and executive branches without much investigation. For example, see Constitutional Court decision no 48/2542 (1999) deferring, without any inquiry, to a public authority on the issue of whether a measure which limited a right to occupation was necessary in order to maintain the national economy.

¹⁰⁰ See discussion in Chapter Three, II A, pp 112–114. See also brief discussion of the political question doctrine in Chapter Four, II A, text to n 66. It is noted that this framework does not intend to argue that courts should show restraint in deciding cases relating to national security or economic and social problems in a blanket fashion.

¹⁰¹ See Chapter Three, II A and the influence of the unincorporated ECHR, which tended to be more on the areas where judges had discretion than on those in which the other two branches were involved in IV B i.

help strengthen and not weaken existing domestic rights. This proposal is inspired by that of Samar.¹⁰² In the USA, there is an argument that if the use of non-US materials in judicial reasoning is to be accepted as consistent and non-arbitrary, the courts should accept such influence for all rights and accept the results of such influence no matter whether they are ‘sweet’ or ‘bitter’.¹⁰³ Nevertheless, such methods would raise concerns that international human rights may weaken some rights that are better protected in the national jurisprudence. Samar tries to solve this dilemma, proposing the normative constraint that international human rights norms should not be used to the extent that existing domestic rights are devalued. He bases his argument on the assumption that both international human rights (particularly the UDHR) and the Constitution of the USA have a common end, which is the ‘self-fulfillment’. The Constitution should be interpreted towards such an end, and international human rights, because they have the same end, should be used to support rather than obstruct such an interpretation.¹⁰⁴

Although it cannot be said that Thailand at the present time has some rights that are protected better than international standards, this argument may be adopted for future use, and for preventing a derogation of rights protection from the influence of the laws and practices of nations that have less protection of rights than applies in Thailand. In fact, it is argued above that Thai courts have to consider and balance all relevant domestic factors, including the existing rights protection in the country. There is no reason to follow international human rights norms to the extent that rights protection in the country is weakened. As regards those norms that are in international human rights conventions to which Thailand is a party, this should not always be considered as violating the obligation. After

¹⁰² Samar (n 95).

¹⁰³ Michael D Ramsey, ‘International Materials and Domestic Rights: Reflections on *Atkins* and *Lawrence*’ in ‘Agora: The United States Constitution and International Law’ (2004) 98 Am J Int Law 69, 76–77; Roger P Alford, ‘Misusing International Sources to Interpret the Constitution’ in ‘Agora: The United States Constitution and International Law’ (2004) 98 Am J Int Law 57, 69.

¹⁰⁴ Samar (n 95) 49–50.

all, international human rights conventions can be viewed as serving as platforms or minimum standards of protection rather than as a strict set of standards which the country must follow.

Last but not least, the framework requires that with every step of using international human rights norms according to this framework, courts have to give reasons for the use. Questions such as why a certain provision is open to international human rights norms, for what purpose such norms are used, why a chosen international human rights norm is relevant, why courts give a particular weight to the norms, and so on, have to be answered in judicial reasoning and are subject to criticism. This duty to give reasons will not only serve as a final constraint in ensuring that the courts use international human rights norms legitimately and appropriately, but will also help improve the quality of judicial reasoning based on international human rights norms.¹⁰⁵

H. What Are the Justifications for Using International Human Rights Norms as Proposed?

One of the results of the use of international human rights norms according to the framework is that such norms will not only inform the courts' interpretation of law but also influence the way the executive and legislative branches perform their duties. Because the executive and legislative branches have a constitutional duty to observe constitutional rights, they will also have a duty to observe international human rights norms that courts use in interpreting constitutional rights. This is highly beneficial for the improvement of rights protection in Thailand. However, the courts will, consequently, have great power vis-à-vis the elected branches, and this is one of the main causes of the controversies over the use of international human rights norms in the UK and the USA. Therefore, it is

¹⁰⁵ Although this suggestion may look obvious for those in the UK and USA, it is not for Thailand, where judicial reasoning has been characterised by a lack of reason. This will be discussed further in section II of this Chapter.

necessary to re-emphasise here that Thai courts are justified in using international human rights norms according to the framework proposed.¹⁰⁶

Three important points need to be made here. First, the Constitution implicitly supports the influence of international human rights norms, especially those that Thailand has accepted, in the Thai legal system and expects all branches of Government to follow such norms.¹⁰⁷ The Constitution also supports the strong role of the courts in upholding constitutional rights.¹⁰⁸

A second and related point is that the use of international human rights norms according to this framework does not go beyond the courts' proper role in interpretation. Thai courts are allowed to make law when there is no law applicable and to give normative value to the constitutional and statutory provisions when the provisions are open for such.¹⁰⁹ Moreover, they are allowed to refer to all relevant materials in the task of interpretation.¹¹⁰ Therefore, if international human rights norms are relevant and able to illuminate the issues, judges should be able to use them as well as other materials. This is especially so regarding the interpretation of the Constitution, where international human rights norms have played a very important role in inspiring its content. It can be said that there are 'genealogical links' between Thai constitutional rights and

¹⁰⁶ Certain justifications have already been provided in Chapter II C and in the suggestions in sections A-G of this Chapter. Therefore, this section merely re-emphasises the most important justifications underlying the use of international human rights norms according to this framework.

¹⁰⁷ Constitution 2007, ss 82, 257(1). This has been discussed in full in Chapter Five, II C.

¹⁰⁸ Constitution 2007, s 27 discussed in Chapter Two, II B iii and section A of this Chapter. See also the power of the courts in reviewing legislation and administrative actions in Chapter Two, II A ii a & b.

¹⁰⁹ Constitution 2007, ss 3, 7 and 27; Civil and Commercial Code, s 4. These have been discussed previously in section D of this Chapter. See also discussion in Chapter Two, II B ii and iii; Chapter Five II C.

¹¹⁰ Chapter Two, II B ii; Chapter Five, II C.

international human rights law,¹¹¹ and it is normal for courts to look at these in attempting to make a consistent interpretation.¹¹²

Lastly, the framework proposed does not suggest that Thai courts impose international human rights norms on the legal system against the dualist principle¹¹³ or against legal coherence¹¹⁴ in Thailand. Rather, it simply suggests courts should consider international human rights norms as interpretive aids. Expository and empirical uses are obviously far from the use of international human rights norms as compelling authorities. Substantive use may allow the influence of international human rights values over Thai law, but it has done so because of the persuasiveness of such norms and not because of the authority of them as law.¹¹⁵ The presumption that domestic laws should be interpreted so as to be consistent with international human rights norms with which the country has international obligations to comply is rebuttable. As for the international human rights norms to which the country has not committed, the engagement model does not impose any presumption in favour of international human rights norms on the courts' interpretative approach. In relation to legal coherence, it should also be recalled that the main source of international human rights norms to be applied by Thai courts is the international human rights treaties to which

¹¹¹ See The Honourable Claire L'Heureux-Dube (n 13) 24 discussing the link between the Canadian Charter and international human rights treaties.

¹¹² Markesinis and Fedtke (n 30) 106–108. See also the statement of a Justice of the South African Constitutional Court that 'where a provision in our Constitution is manifestly modeled on a particular provision in another country's constitution, it would be folly not to ascertain how the jurists of that country have interpreted their precedential provisions' *Bernstein v Bester*, 1996 (4) BCLR 449 (CC) at 133 (S Afr) quoted in *ibid* 106–107.

¹¹³ In fact, some scholars tend to suggest that a departure from dualism is justified. See, for example, Waters, 'Creeping Monism' (n 1) 695 suggesting that international human rights may justify some degree of erosion of strict dualism. Also, Hunt (n 1) submits in the UK context that Parliamentary sovereignty, which is the underlying principle for dualism, has declined and thus courts may exercise common law power in using international human rights law.

¹¹⁴ See Chapter Four, IV B ii d.

¹¹⁵ See a comment of Law LJ in Chapter Three, IV B i e, text to n 115 distinguishing between the contents of the ECHR as 'propositions' and the 'law'.

Thailand is a party, the concepts of which it has put into its Constitution. For this reason, inconsistency in the legal system is not likely to occur.¹¹⁶

II. Challenges for Thai Courts

The task of creating a rights jurisprudence is quite challenging for Thai courts, which have not had either consistent interpretive jurisprudence or rights jurisprudence before. International human rights norms can be of great assistance, but some legal cultures have to change in order to accommodate the development of a rights jurisprudence in general and the use of international human rights norms in particular.

The greatest challenge, perhaps, is the way in which Thai courts deliver opinions. Harding and Leyland criticise the judicial reasoning of the Thai Constitutional Court on the following grounds:

Judgments tend to be formulistic ... they do not engage with the arguments presented or those referred to by other judges or in other cases dealing with similar issues, especially those with which the judge presumably disagrees; they fail in general terms to justify the decisions taken; holdings are binding but not the reasoning.¹¹⁷

In fact, this has been the style of reasoning adopted in Thai courts even before the establishment of the Constitutional Court. The Thai Constitution actually recognises this problem, and expressly requires for Constitutional Court decisions that they include at least ‘the background of the allegation concerned, a

¹¹⁶ It is noted that since Thailand has had no rights tradition, inconsistency may arise between the existing legal culture and the international human rights norms as adopted by the Constitution. Nevertheless, the transplant is by the Constitution and not by the courts using international human rights norms. The issues of legal transplants have been discussed in Chapters One, II and Four, IV ii d. The potential conflict between Thai tradition and constitutional rights is discussed in Chapter Seven as a potential subject for future research.

¹¹⁷ Andrew Harding and Peter Leyland, ‘The Constitutional Courts of Thailand and Indonesia: Two Case Studies From South East Asia’ (2008) 3 JCL 118, 130.

summary of facts obtained from hearings, reasons for the decision on questions of fact and questions of law and the provisions of the Constitution and the law invoked and resorted to'.¹¹⁸ It also encourages reason-based arguments among judges by requiring each of them to submit individual opinions.¹¹⁹ The Court's judgments do follow the formula provided, since each of the judgments tends to have headings similar to those listed in the Constitution, but, consistently with Harding and Leyland's submission, judges have failed to relate the headings to each other and provide adequate reasons.

This facet of the judicial practice must be improved. Judge Coffin suggests that the 'dangerous trend of broad, bright-line pronouncements should be replaced by cautious, incremental decision-making, reached by detailed, careful, open balancing'.¹²⁰ Not only the Constitutional Court, but also all other courts should be encouraged to provide adequate reasons for their decisions. This is a requirement not only for the use of international human rights norms according to the framework proposed, whose legitimacy depends partly on the courts' explanation of the reasons for the use of international human rights norms in particular, but also for the improvement of judicial reasoning in general. The practice of judges in the UK and the USA can be used as a model.¹²¹

Another challenge for Thai courts in using international human rights norms is that Thai judges at the present time may not have comprehensive knowledge of the international human rights norms from CIL, from international human rights

¹¹⁸ The Constitution 2007, s 216.

¹¹⁹ Harding and Leyland (n 117) 130.

¹²⁰ Frank M Coffin, 'Judicial Balancing: The Protean Scales of Justice' (1988) 63 NYU L Rev 16, 16.

¹²¹ To stress the importance of the improvement of judicial reasoning, it is observed that the judiciary in the USA started to play a more important role in the constitutional system, partly because, during the 1810s, the method of delivering reasons was changed at Marshall's instigation from oral to timely published written statements, and from the totally separate opinions of each Justice to the courts' opinions. These practices improved the judicial branch's ability to communicate with people. Akhil Reed Amar, *America's Constitution: A Biography* (Random House 2005) 214–17.

conventions or from the jurisprudences of other countries. This is reflected by the scarcity of references to international human rights norms in the courts' jurisprudence and by the inaccuracy of some of these rare references.¹²² This lack of comprehensive knowledge may have different causes, which include but are not limited to the availability of the information, differences in terms of backgrounds and languages which may prevent understanding of international and human rights materials, or simply the ignorance of the judges.¹²³

However, this difficulty can be lessened by more research, not only on the judges' side but also on the parties'. The UDHR and human rights treaties to which Thailand is a party are not difficult to access and understand, since there is only a limited amount of them and they have been translated into the Thai language. Some other kinds of international human rights texts, such as those arising from the jurisprudence of foreign countries, have not been translated into Thai and so offer more linguistic difficulties. Those that are in a language other than English will present more difficulties still. However, the adversarial system, where parties find the materials that best support their cases, may be able to provide help in this regard.¹²⁴ Using expert witnesses is also a good option.¹²⁵

Sometimes, the secondary documents which assemble the practices of several countries on a certain issue together may facilitate the courts' consideration of international human rights norms. The United Nations and other non-governmental organisations such as Human Rights Watch seem to provide many reports of this kind, and the Supreme Court of the USA has made use of them in

¹²² These cases have been discussed in Chapter Two, IV B. It is noted that the scarcity of the references to international human rights norms may also result from the fact that only a small amount of cases related to the interpretation of rights have arisen in the courts, especially the Constitutional Court. See Chapter Two, II A ii a.

¹²³ See Ginsburg (n 57) 580; Markesinis and Fedtke (n 30) 113.

¹²⁴ Markesinis and Fedtke (n 30) 119.

¹²⁵ *ibid* 113, 131.

identifying world opinion or international consensus.¹²⁶ While some scholars reasonably suggest that the more detail is available on the source countries' legal system the more accurate and useful the insights that courts can obtain,¹²⁷ it is argued here that the detail may not always be indispensable. Given proper caution as discussed in the framework proposed above, the use of the secondary document is beneficial for Thai courts.

In the long run, more courses relating to international human rights law in law schools, and more promotion of international human rights awareness among the public by governmental and non-governmental organisations, can be useful.

In any case, the challenges should not discourage the interpretive influence of international human rights norms. The use of comparative law, which includes international human rights norms, seems to be inevitable in today's world.¹²⁸ Justice O'Connor of the Supreme Court of the USA expresses the view that '[i]nternational law is no longer a specialty ... it is vital if judges are to faithfully discharge their duties'.¹²⁹ Similarly, Lord Bingham of the UK states:

Times have changed. To an extent almost unimaginable even thirty years ago, national courts in this and other countries are called upon to consider and resolve issues turning on the correct understanding and application of international law, not on an occasional basis, now and then, but routinely, and often in cases of great importance. This calls for special, and in many cases new,

¹²⁶ For examples see *Trop v Dulles*, 356 U.S. 86 (1958) 102; *Stanford v Kentucky*, 492 U.S. 361 (1989). However, see Alford (n 103) 65–66 and Ramsey (n 103) rejecting the use of proxies such as UN reports to derive foreign practice arguing that they are often inaccurate. Discussed in Chapter Four, IV B ii e.

¹²⁷ Markesinis and Fedtke (n 30) 116–18, 128–31; Larsen (n 16) 1326.

¹²⁸ Jackson, 'Constitutional Comparisons' (n 14) 119.

¹²⁹ Associated Press, 'O'Connor Extols Role of International Law' *ABC News* <<http://abcnews.go.com/Politics/print?id=202974>> accessed 18 January 2010.

skills on the part of advocates who present cases and judges who decide them.¹³⁰

Thailand, as a developing country seeking recognition from the international community, will be forced to accept the influence of international human rights norms, and at the same time will benefit from them. Thai courts should attempt to broaden their perspective, and develop more coherent interpretive techniques and reason-providing styles to be able to cope with this international tide.

¹³⁰ The statement is found in the Foreword of Shaheed Fatima, *Using International Law in Domestic Courts* (Hart 2005).

Chapter Seven: Conclusion

The research has studied the interpretive influence of international human rights norms in Thailand, the UK and USA. It has found that the Constitution of Thailand has been influenced greatly by international human rights norms. But Thai courts have yet to develop a consistent method of interpretation in order to allow the interpretive influence of such norms, which is in contrast to what their counterparts in the UK and USA have done.

The UK had been influenced by the ECHR since before the enactment of the HRA 1998. The Convention rights, as well as the jurisprudence of the ECtHR, have become even more important for the courts' reasoning following the implementation of the Act. Non-ECHR norms have played a supplemental role in the UK courts. The Supreme Court of the USA, on the other hand, has made use of international human rights norms from less specific sources including, but not limited to, treaties and practices of foreign nations. Nevertheless, there are controversial issues relating to the use of international human rights norms in both the UK and the USA. The research has discussed the practices of the two countries in detail and has related such practices to their political and constitutional systems, the roles of the judiciary in protecting rights, including the power of judicial review and interpretive approaches, and the perceived relationship between international and domestic law. It has also disentangled the arguments against the use of international human rights norms in each country, submitting that these arguments exaggerate valid concerns over democracy, separation of powers and nationalism.

Next, the research compared the three jurisdictions. It found that, despite certain differences, the UK and USA are similar in many respects. This is particularly so with regard to the relatively stable political and constitutional system, the

common law approach, and the attachment to a dualist view of international and domestic laws. Most importantly, the main issues that have been raised against the courts' practices in both countries are based on the dualist concept of the relationship between international and domestic law and what is perceived to be a proper role for the judiciary in these countries' polities, both of which bases emerge from the concepts of democracy and the sovereignty of the legislative branch in making law.

The Thai legal system should have been more receptive to the interpretive influence of international human rights norms than those of the UK and USA. This is not only because the country is less attached to dualism, but also because the new Constitution has been inspired by international human rights norms and has required, as a directive principle, that Thailand shall comply with its international human rights obligations. However, the practice of using international human rights norms has not been developed in Thai courts. This is not because it is inappropriate for the legal system, but mainly because of its unstable political and constitutional setting, the absence of a rights tradition, and the lack of developed concepts in judicial review and judicial interpretation.

Therefore, on the basis of the lessons learnt from the UK and USA, and with adjustments to suit the Thai legal system, the research proposes a framework by means of which Thai courts may legitimately and appropriately make use of international human rights norms in interpreting Thai laws and developing Thai rights jurisprudence. The main principles included in the framework are as follows:

- Both the Constitution and statutes should be interpreted taking into account international human rights norms.
- All courts in Thailand have a responsibility to take into account international human rights norms in interpreting and applying laws,

but the Constitutional Court will be the leader in defining the meaning and scope of constitutional rights.

- International human rights norms may be used for expository, empirical and substantive purposes, although it is observed that the last of these purposes will be the most useful for Thai courts.
- Courts should always consider international human rights norms whenever they are relevant and helpful. In circumstances where Thai laws are ambiguous or uncertain or when no laws are applicable, there is further justification for courts to seek guidance from international human rights norms.
- Courts may consider all kinds of international human rights norms. International human rights treaties to which Thailand is a party should be the main sources of the norms that Thai courts use. However, the interpretation of those treaties by relevant treaty bodies should also be considered, and the other non-binding sources of international human rights norms, such as the jurisprudence of a foreign country, should not be disregarded. In the case of the last category of norms, the commonality between the legal systems, the universality of the norms and the purpose of using them should be considered in order to identify the most appropriate norms to be used.
- Different weights shall be attached to different kinds of norms. A rebuttable presumption of compatibility should be given to norms with which Thailand has an international obligation to comply, and also to the interpretation of such norms by relevant treaty bodies. As for other kinds of international human rights norms, they shall be deemed a 'relevant' consideration, but courts shall not presume that Thai laws should be interpreted to be consistent with them.

- The use of international human rights norms according to the framework shall be within the courts' power of interpretation. Balances have to be struck between international human rights norms and other interpretive considerations, including but not limited to text, structure, the intention of the drafters, underlying value and other domestic contexts. Moreover, in reviewing the constitutionality of executive or legislative acts, courts ought to give proper weight to the judgments of the executive and legislative branches.
- The courts should try to use international human rights norms in a way that enhances rights protection rather than weakens it.
- The courts shall provide reasons for their use of international human rights norms, including but not limited to an explanation of why certain norms are relevant, and why a particular weight is given to such norms.

This framework encourages Thai courts to develop their own indigenous rights jurisprudence with guidance from international human rights norms, without suggesting that Thai constitutional rights should be strictly tied to international human rights norms of any form. The proposal is consistent with what are considered to be the proper roles of the courts in Thailand, and with the Constitution.

The research has submitted that it is inevitable that Thai courts have to be prepared for a larger volume of cases concerning rights and for the influence of international human rights norms. At the same time, it has also identified certain factors that could present challenges for Thai courts in using international human rights norms according to the framework. It has suggested that Thai courts need to develop their interpretive approaches away from a strict literal interpretation

and improve their judicial reasoning so that it involves more development and articulation of reasoning. It is also suggested that legal education relating to comparative studies should be improved, so that not only the courts but also the other parties involved have accurate information and understandings regarding international human rights norms. In short, the research has sought not only to achieve a better understanding of the interpretive influence of international human rights norms in the UK and USA, but also to provide a valuable framework with which Thai courts may fully utilise the norms in their judicial reasoning in order to improve the quality of their rights jurisprudence so as to bring it up to international standards and people's increasing expectation.

Of course, there are many important issues relating to the use of international human rights norms in judicial reasoning which the research has not covered and which should be discussed further in future work. Firstly, this research has focused more on the issue of democratic objections against such norms than on the problems of legal coherence and issues of methodology, regarding which the research has offered a quite broad paradigm. This is because the former is the most immediate issue in terms of whether it is legitimate for the courts to allow interpretive influence of international human rights norms. If it is accepted, as the research proposes, that interpretive influence of international human rights norms is legitimate, research on the methodological issues can be developed further.

Next, this research has offered a general framework for the use by Thai courts of international human rights norms. Further research could be done by applying this framework to specific rights such as freedom of speech or due process. This kind of research will not only test the validity and applicability of the framework, but will also give courts more specific guidance as regards how to use international human rights norms in a specific area.

It is further suggested that, for Thailand in particular, attention should be given to the potential clash between constitutional rights which are inspired by, and thus should be interpreted to be consistent with, international human rights and local

perceptions of rights and morals. The issue of freedom of expression vis-à-vis the Lèse majesté law is perhaps the most outstanding example of this.¹ It would be rewarding to study how Thai courts should balance the two sources of norms.

Last but not least, in addition to research that focuses on the domestic level, research on the impact at an international level of domestic judicial reasoning that refers to international human rights norms—an area which has started to attract the attention of several scholars—could also build on this research.

¹See Andrew Harding and Peter Leyland, *The Constitutional System of Thailand: A Contextual Analysis* (Hart 2011) 242–47 suggesting potential conflicts.

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