British court support international law law constitutional administrative essay

Law

The English court has supported the incorporation approach since the eighteenth century and the English Constitution remains the position of Monism[1]. The English law was in favour of incorporation doctrine by the evidence of practicing the Customary International Law (CIL). On the other hand, the status of Treaty law in UK does not automatically become part of the NL; it has to be transformed by the act of parliament into NL which is regarded as transformation theory.[2]The theories are differently treated under the principle of English constitution with significant reasons: One of the reasons is Parliamentary sovereignty; the Parliament remains the supreme position in the law making process in UK that the law cannot be changed without the intervention of the parliament. And another reason is, Separation of powers in UK with the contribution of the exercise of power to the function of executive, judicial and legislative in order to regulate as a state. Lord Mansfield had recognised that CIL is part of English law in 1764 which was followed with a quote from Lord Talbot who also agrees that the law of nations is a part of the extent of English law[3]. CIL could automatically hold as a part of NL without any necessity of intervention by any constitutional ratification proceedings and this theory was established in the case of Chung Chi Cheung v The King[4]as stated by Lord Atkin: " international law has no validity save in so far as its principles are accepted and adopted by our domestic law."[5]However, the limitations are existed in the use of incorporation theory, which was illustrated in the case of R v Jones (Margaret)[6]followed with a general principle that the CIL will not automatically become part of the English law when the case was involved with criminal offence. The court did not apply the incorporate theory followed

with two reasons. First, concerning with the legal limits in order to charged the defendants with criminal offence under Criminal law. Second, the proposition of nullum crime sine lege did not respond to the problem whether the defence of crime of aggression should be treated in a broad or narrow interpretation. For instance, if the Court had adopted a broad scope which included the conduct of crime could be a defence under IL, the defendant could easily avoid liability under criminal law. This exception had become a filter as maintaining a narrow approach of doctrine of nullum crime sine lege[7]. In this case, Lord Bingham recognised the crime of aggression was not a crime under English law and therefore the defendants cannot use the crime of aggression to avoid the conduct of criminal damage of what they made to get away from CIL. The reasons that the crime of aggression was not a crime under English law were; first, the Parliamentary Sovereignty, only Parliament have the power to create new offence; second, the process of law review by the courts to the foreign affairs would possibly taken into account that the crime of aggression would incorporate with the NL slowly and silently. Adopting the incorporate approach in this case might be correct because the crime of aggression is a very serious offence and the approach could make the offenders get sufficient legal punishment. However, CIL introduced a new offence into English law where the new offence has not been developed in the current law which is a disadvantage without any sufficient legal debate in the parliament before the enforcement into the national courts. This approach could also imply a big impact to the domestic law because it could amend or alter the exercise of criminal law without any intervention of the parliament. Nevertheless, their Lordships

indicated that the parliament were willing not to choose the incorporation approach into the English law, and reflected a democratic principle. Lord Bingham and Lord Hoffman has also recognised that Parliament is always be the sovereignty to determine the conduct of crime involved in the state. The process of incorporating CIL into English law has been regarded as a correct approach in the past because it is considered as part of English law that there is no new introduced offence which could easily apply it to and it would be part of civilised world[8]. However, Lauterpacht criticized Blackstone's wording that whether the IL had given an actual expression to the English law and whether these rules could present a rational principle accurately and irrefutable regardless to the background of the country. The incorporation approach allows the CIL automatically incorporate into the English Law, yet it also implies risks into the English constitution and pose a threat to the UK Parliamentary Sovereignty. First, the CIL could automatically incorporate into English law without any intervention of the Parliament to analysis the rule of CIL before handled by the national courts. Without any participation of legal debate and domestic legal order for new law application, this would lead to a very ambiguous political gestures. Second, the incorporation approach implies a very uncertain, ambiguous formation and incorporate into English law without transparent for determinacy of the negotiation of the law because the approach was not open in public for legal discussion, it makes the CIL automatically incorporation whenever it is necessary. Third, there are many forms of state practice that could get access to the CIL and the problems will raise immediately. For instances, the barriers of different languages, the difference of opinio juris and state practice which these are

the issues that were extremely difficult to avoid. As this approach incorporate, it will superseded the position of the Parliament and become a part of domestic law, it is different to present that this approach had accurately represented the exercise of the legal power of the English court. Roger O'Keefe gave concern on the individuals whether the incorporation have give a fair warning that CIL is part of English law[9]. Moreover, Philip Sales and Joanne Clement did not support the incorporation approach and suggested to put restriction to it, because there is a risk of inconsistent between the domestic law and international law that cannot be easily prevented regarded to the elimination of the political process by the parliament. Lord Bingham has also recognised the risk implied in the approach and he was being very cautiousAnother issue has raise is the issue of justiciability which brought into attention in the case of R (On application of Al Rawi v Secretary of State for Foreign and Common Wealth Affairs[10]that justiciability could limit the practical use of CIL. The defendant would not want to put more weight on to diplomatic protection when there is a involvement of Human Rights, the exercise of diplomatic protection comes within the exercise of Royal Prerogative and the Court will not review the exercise of Royal Prerogative power. But it requires permission to call for a judicial review to apply and then the court will consider the merits of the case. The court said even it is non-justiciability issue, the court will force to exercise their power with a independent judgement as it is " legal and ethical muscle of human rights". Treaties can incorporated into English law when they are transformed by the legislation into the national law illustrated in the case of Maclaine Watson v DTI[11]. Nevertheless, the treaties will have an

authority for enforcement when the parliament legislated in breach of treaty; this was illustrated in the case of R. v Secretary of State for the Home Department Ex p. Brind[12]and meant that UK could remain at a international level for any breach of treaties even when the national law is ambiguous for interpretation. Recently a concern has raised was that when a case was involved with breach of Human Rights whether it could be an exception to orthodox principle of Parliament Sovereignty of indirect effect and the issue of non-justiciability . It is notable that Lord Steyn had commented in the case of Re McKerr[13]raised question to concern about the dualist approach to the issue human rights treaties.[14]And he had emphasised that the ratification of Human Rights Treaties could not cause any harm to the power by the executive. Alan Brudner[15]criticised this transformation approach that it cannot represent the will of individual and he was more favour for incorporation approach that inherent with a wide practice and it could incorporated directly into domestic law without authorisation by the Parliament. Bharat Malkani[16]had supported Alan Bharat's arguments and noted that Lord Steyn's suggestions is problematic that it is inaccurate to describe the parliamentary sovereignty in 1688 as it can mainly focused on the limitation of the exercising power of the executive. He argued that the Parliamentary Sovereignty did not give concern on the will of the individuals in the society and that was limited to the democratic principle of individual's freedom. Although there are many criticisms with this approach, Philip Sales and Joanne Clement took an opposite analysed the approach. First, the transformation approach could be a good developer for statutory interpretation, as they indicated that " the

requirement of ambiguity" is necessary for the presumption of application in the legislation. Second, the transformation approach where applies to the treaties to constitute in the English court was more able to solve the uncertainties with the common law. This approach aid the structure of UK legislation because UK does not have a written constitution, and could improve the ambiguous legislation with the principle of parliamentary sovereignty. Treaties are providing a guidance to the common law which shows the development of it. Third, when a treaty is ratified by the executive, it could create legitimate expectation. The legitimate expectation deemed to be a advantage for decision-makers with the exercise of discretionary power, this is because the Parliament would always ensure the flexibility in the system for decision-making in order to adjust on every unseen circumstance of the case and widen the scope for evaluation of the law. However, this approach was being criticised that the common law should not rely on the treaties that while handling the a complex area and it is necessary to strike the balance that the UK legislature should take over the development of domestic law. In conclusion, the incorporation approach cannot accurately reflect the practice of the English court because this approach had substituted the position of the Acts of Parliament which gives analyse and discussion to the coming new law. Their Lordships had showed that parliament were willing not to choose the reception of CIL into the English Law. On the other hand, the transformation approach can reflect the practice of the English Court accurately because the Parliament will reflect the treaties into the exercise of the court in order to incorporate into the

national court. However, it is arguable that the transformation approach cannot reflect the will from individuals.