JUDICIAL REVIEW AND THE INTERNATIONALIZATION OF NATIONAL LAW. THE EXPERIENCE OF ENGLAND AND FRANCE

J. Anthony JOLOWICZ

In a world made up of nation states, the legal order of each state sees itself, almost inevitably, as self-contained and self-sufficient. A national judge must decide his cases in accordance with national law and may take account of foreign or international law only to the extent that his own national law allows. This is true whether national law does or does not recognize judicial review of Parliamentary legislation and a consequent power in the judges, or at least the judges of a Constitutional Court, to set aside or disregard national legislation on the ground that it is contrary to the national constitution. The constitution is, of course, itself a part of national law.

In his application of national law a national judge may occasionally take account of the provisions of international treaties to which his country is a party, but he may do so only to the extent that his own national law so requires or allows. It is no concern of his that the national law which he applies is contrary to an international treaty or convention by which his country is bound at the international level. From his point of view and so, also, from the point of view of all those subject to national law, national law is more than self-contained and self-sufficient it is nationalist and isolationist.

In the past this caused no particular difficulty. International law bore on the relations between states, not on the relations between citizens or between a citizen and a state, and treaties, whether bilateral or multi-lateral, were little more than contracts between states regulating certain aspects of their relations with each other. Their impact on the subjects of national law were negligible.

In the modern world, this is no longer true. Since the Second World War, in particular, there has been a proliferation of treaties and other international conventions which bear directly on the rights and obligations of individuals. It is necessary only to mention international instruments such as the Universal Declaration of Human Rights, the American Convention on Human Rights (Pact of

San Jose) and, of especial importance for England and France with which this paper is principally concerned, the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Treaties setting up the European Community or European Union as it is now known. In the light of developments such as these, can old-fashioned legal isolationism survive? Can national judges continue to be confined exclusively to national law and to strict adherence to national legislation even where that legislation is inconsistent with the international obligations of the state?

It is the purpose of this paper to consider some recent developments in England and France which suggest, al least for those two countries, that legal isolationism is beginning to decline and that national judges may now be willing to subject national legislation to a novel form of judicial review. This is not the judicial review of the constitutionality of legislation with which many states are familiar and it does not look for its criteria of judgment to the national Constitution. It looks instead to international conventions, and if the national judge finds that national legislation and a treaty by which his state is bound are in conflict when applied to the case before him, he may hold, as a purely judicial act, that it is the treaty which prevails. National legislation which, according to traditional ideas, is absolutely binding on the national judge, is put aside in favour of the conflicting provisions of a treaty. When this occurs, legal isolationism is abandoned.

To understand the developments in French and English law to which this paper refers, it is necessary to set out, by way of preliminary and as briefly as possible, first, the national law in both countries with regard to the incorporation of international treaties into national law and, secondly, the possibility that a court may annul or refuse to apply legislation duly enacted by the national legislature.

1. *Incorporation of International Law within National Law*

In England, the incorporation of treaties into national law requires specific parliamentary legislation by way of what is called an "enabling act". An enabling Act provides that the treaty in question shall have the force of law in England and so gives to the treaty itself the status of parliamentary legislation. A treaty which has not been the subject of an enabling act, on the other hand, has no status whatever as part of national law and should. therefore, be ignored by the national judge. It is irrelevant that the United Kingdom is bound by the treaty in the international legal order and it is irrelevant even that an affected individual may be entitled to direct recourse to an international jurisdiction in case of infringement of his rights under it, as is the case under the European Convention of Human Rights.

In England, the ratification of a treaty is a matter for the Executive branch of government alone. No parliamentary legislation is required, and that, perhaps,

provides the explanation of the need for legislation if a treaty is to be incorporated into national law. In France, on the other hand, treaties normally require parliamentary legislation for their ratification or approval,[1] but in that country, once a treaty has been ratified, it is automatically incorporated into national law by article 55 of the Constitution. This, at least, saves France fron the paradox of English law that a duly ratified international convention may not form part of national law. Nevertheless, in France as much as in England, it is national legislation which determines whether a treaty forms part of national law and so whether it can be taken into account by the national judge. National legislation retains its local supremacy.

2. *Judicial Control and the Supremacy of National Legislation*

As a matter of principle, no judge either in England or in France may exercise a power of judicial review over the legislation of Parliament.

For England, the position can be simply stated. There is no written Constitution and, whatever may have been the view in the past, it has now been long settled that the judges may not question the validity of parliamentary legislation. Parliament is the sovereign legislator and the judges may not even entertain an allegation that promoters of legislation obtained its enactment by fraud.[2]

In France, since 1958, there has been a *Conseil Constituionnel* whose powers include the review of parliamentary legislation, but only prior to its promulgation. Legislation which is found by the Conseil to be unconstitutional may not be promulgated and so never becomes law at all. The *Conseil* is not, however, a court in any ordinary sense and its judges are not members of the regular judiciary. It judges a text, not the rights and obligations of litigants, and it has no power once a law has been promulgated. The French judge, whether of the ordinary or the administrative jurisdiction has no more power than is English counterpart to disregard or even to bring under review legislation which has been enacted and brought into force. In both countries, parliamentary legislation, once enacted, is supreme.

It follow in both countries that the obligation of the judges to comply strictly with national parliamentary legislation is even more deeply entrenched than where the judges have the power of judicial review of the constitutionality of legislation. A national judge must apply the legislation enacted by his national legislature without regard to anything that is not itself part of national law and, in particular, without regard to the law of an international or supranational legal

1 Constitution of the Fifth Republic (1958), article 53.

2 *Lee v. Bude and Torrington Junction Railway Co.* (1871) L.R. 6 C.P. 576; *Briths Railways Board v. Pickin* [1974] A.C. 765.

order. It is that nationalist principle which is now beginning slowly to be undermined.

As already indicated, for both countries interest focuses on the European Convention on Human Rights and on the treaties of the European Union. Both have been incorporated into French law, but the Convention on Human Rights has not been incorporated into English law and, at least in theory, forms no part of national law. If the European Court of Human Rights in Strasbourg concludes that English law fails in some respect to meet the Convention's requirements that has no consequence for an English judge unless und until Parliament itself chooses to legislate so as to bring English law into accord with the Court's decision.

This, of course, is consistent with traditional nationalist ideas, and English judges continue to insist that the Convention is not a source of rights and obligations in national law.[3] Nevertheless, at a practical level, the Convention is frequently cited in English courts and exerts a significant influence on English law. By acting on the presumption that Parliament did not intend to legislate in a manner inconsistent with the United Kingdom's supranational obligations as a party to the Convention,[4] any ambiguity which may be found in the applicable national legislation will be resolved in accordance with the provisions of the Convention.

Adoption by the judges of this presumption has two important consequences. In the first place, it requires that the judges themselves study and become familiar with the terms of the Convention: if traditional principle requires that they should simply ignore any treaty or convention that has not been made part of English law, traditional principle is, in this respect now out of date. In the second place, the presumption has the result that national legislation will be interpreted in a manner which is inconsistent with the Convention only if it is absolutely clear and unambiguous. English judges lift their eyes from national law to look at the Convention. Theoretically it is no more than a guide to interpretation; in practice it is more.

I can now come to the critical question with which this paper is mainly concerned, namely the approach of the national judge when he finds that there is a conflict between his national legislation, on the one hand, and an international treaty of convention which has been incorporated into national law, on the other. Two cases are to be distinguished, depending on the sequence of events, but it is only the second which gives rise to significant problems and so to solutions which are themselves important to my theme:

a) In the first case, the national legislation in question was enacted before the treaty was ratified or incorporated into national law. Since ratification or incor-

3 *Reg. v. Home Secretary, Ex p. Brind* [1991] A.C. 696.

4 E.G., *Garland v. British Rail Engineering Ltd.* [1983] 2 A.C. 751. 771, *per* Lord Diplock.

poration of the treaty requires an act of the national legislature, the rule *lex posterior priori derogat* applies. By incorporating the treaty, the national legislature has modified its earlier legislation to the extent necessary to accommodate the treaty. By giving precedence to the treaty the judge does not infringe but, on the contrary, conforms to the traditional notion of the supremacy of the national legislature: ha gives effect to the "sovereignty" of Parliament.

b) In the second case, by contrast, the national legislation was enacted after the treaty was ratified or incorporated into national law. Here traditional legal analysis insists that the national judge is bound by national legislation, and application of the rule *lex posterior priori derogat* confirms the traditional solution. A treaty, though incorporated into national law, cannot prevail within the national legal order against subsequent national legislation with is inconsistent with it.

This conclusion, though certainly not abandoned in its entirety, is no longer accepted as absolute either in France or in England. In both countries the judges have begun to move away from the traditional nationalist ideas of national law and have begun to adopt a form of judicial review of national legislation in the light of the applicable treaty law. Given the basic differences between the two legal systems, the pattern of development has not been the same in both countries and each must be considered separately. But, as I hope to show, they come surprisingly close together in the final result.

A. *France*

Article 55 for the French Constitution does more than incorporate treaties into national law: it gives them an authority superior to that of parliamentary legislation. It was, therefore for some time expected that if a law which was inconsistent with an incorporated treaty was referred, before promulgation, to the *Conseil Constituionnel*, that body would refuse it promulgation. This expectation formed part of the reasoning of the *Conseil d'Etat* when, in 1968, it adopted the traditional solution and insisted that national judges have no power to disregard or even to review the validity of laws made by the national Parliament. The *Conseil d'État* therefore held that later national legislation prevailed over earlier treaty law.[5]

In a decision of 25 January 1975 the *Conseil Constitutionnel* itself confounded the expectation of the *Conseil d'Etat* and declined to entertain a challenge to a parliamentary law on the ground that the law was in conflict with a treaty.[6] A law dealing with abortion had been referred to the *Conseil*, before promulgation, on the ground that it was inconsistent with a provision of the European Convention on Human Rights. Shortly put, the reasoning of the *Conseil Constituionnel* is as

5 C.E. 1st March 1968, D. 1968. 285, *Synd. des fabricates de semoules*.

6 Cons. Const. 15 jan. 1975, D. 1975, 529; J.C.P. 1975, II 18030; Grands Arrets, 26.

simple as it was unexpected. The Counsel's competence is restricted to considering the *constitutionality* of unpromulgated laws. The Constitution gives an authority to treaties which is superior to that of laws but it does not give them constitutional status. The compatibility of legislation with a treaty is, therefore, not a question of the constitutionality of the legislation. It cannot be considered by the *Conseil Constitutionnel.*

This decision, taken in combination with the 1968 decision of the *Conseil d'État*, might seem to reassert the self-sufficiency and isolationism of French national law: even if proposed parliamentary legislation contradicts an existing treaty it will not be refused promulgation, and once promulgated it cannot be challenged by any judicial authority in the country. National law, as enacted by the French legislature, must be applied.

For all practical purposes, this seems to have been the view of the *Conseil d'État* which continued to adhere to the traditional solution as given in its decision of 1968 at least until 1985.[7] The cour de cassation, on the other hand, reacted quite differently and took the decision of the *Conseil Constitutionnel* as meaning that questions of the compatibility of a law with a treaty fell within the competence of the ordinary courts. In a decision "delivered as early as 24 May 1975, that cour declined to apply a French law imposing a tax on coffee products imported into France on the ground that it was inconsistent with a provision of the Treaty of Rome of 1957,[8] notwithstanding that the law had been enacted after the treaty had been ratified.[9] The decision was based on article 55 of the Constitution, and the Court insisted that its action amounted to no more than application of the Constitution. The Constitution creates a hierarchy of norms, giving to treaties an authority superior to that of parliamentary laws and it was the court's duty to give effect to that.

The existence of these conflicting decisions meant that for a period of time the administrative and the ordinary jurisdictions of France adopted different solutions to the same question, and a lively controversy developed. In particular, many commentators criticized the decision of the Court de cassation as contrary to the doctrine of the separation of powers on which French law has insisted since the Revolution: that doctrine, it was argued, denies to the judges all power of interference with what is done by the national legislature. Despite this argument, however, the *Conseil d'État* eventually changed its mind, and, in a decision of 20 October 1989,[10] finally accepted that it fell within its power to consider the compatibility of a parliamentary law sith a treaty ratified by France. Indeed, it has since gone further for it has held not only that treaties themselves take

7 C. d'E, 8 February 1985, *Association des centres E. Leclerc* Rec. p. 26.

8 Article 95 (2).

9 Société Jacques Vabres, Ch. Miste, 24 mai 1975, D.S. 1975, 497, concl. Touffait. J.C.P. 1975, II, 18180 bis.

10 *Nicolo*, cons. d'État Ass., 20 October 1989, J.C.P. 1989, II 21371.

precedence over national law, but so also does subsidiary supranational legislation made in accordance with a treaty, at least in so far as concerns the European Union.[11]

B. *England*

We have seen that the incorporation of treaties into the national law of England requires an "enabling" Act of Parliament, and such an Act was passed in 1972 when the United Kingdom entered the European Community. This Act, known as the European Communities Act 1972, was unusual in one particular respect. Obviously, it gave the force of law in England to the treaties of the European Community and to the law already made by Community Institutions, but it did more: it provided that, without further national legislation, the law created in the future by those Institutions should automatically become part of English law. It looked to the future as well as to the past.

One of the consequences of membership of the European Community is that the European Court of Justice in Luxembourg has the final voice on the interpretation of Community law —usually on a reference from a national court— but that apart, if the traditional view is adopted, Community law as part of English law has the same status in the hierarchy of norms as any other parliamentary legislation. This raises no difficulty if English legislation enacted before 1972 is found to be inconsistent with Community law. Once again the rule *lex posterior priori derogat* will apply, and this time the *"lex posterior"* is the European Communities Act of 1972 itself. What, however, of legislation enacted by Parliament after 1972?

The question leads to paradox. On the one hand the Act of 1972 gives the force of English law to Community legislation regardless or the date of its enactment. On the other hand, if Parliament is supreme, the one thing it cannot do is to bind its successors and so any post 1972 parliamentary legislation which is inconsistent with Community law must be given precedence as part of national law by English judges. In other words, if English judges give precedence to parliamentary legislation over earlier Community legislation, they confirm the traditional principle of English law and adhere to the nationalist position. If, on the other hand, they examine post 1972 parliamentary legislation in the light of Community law and, in the event of conflict, give precedence to the latter, they abandon the nationalist position and, as a necessary incident, adopt a form of judicial review of parliamentary legislation.

For many years following the United Kingdom's entry into the Community this fundamental problem was avoided. The judicial power of interpretation,

11 See, e.g., C.E. 28 February 1992, D.S. 1992, Chron. Annex, 213, *SA Rothmans International France*.

aided by the presumption already mentioned that Parliament does not intend to legislate in a manner inconsistent with the United Kingdom's international obligations, was sufficient to avoid a conflict. More recently, however, two cases have come before the highest English court —the House of Lords acting in its judicial capacity— in which the critical question could not be avoided.

In the first of these, in 1990,[12] the situation was complex. Under Community rules certain fishing quotas are allocated to each member state and, in order to be able to take advantage of the British quota, Spanish fishing interest formed companies under English law. In theory the ships owned by these companies were British, but their crews and the shareholders in the companies were predominantly Spanish. To prevent this encroachment on the rights of British fishermen, Parliament passed a law in 1988 refusing British registration to companies owning fishing vessels if less than 75% of the shares were owned by British residents. The validity of this law and its application to the Spanish owned companies was challenged in the English courts.

Two questions arose. First, it had to be decided whether the law of 1988 was indeed contrary to Community law, and that question was referred to the European Court of Justice in Luxembourg. It was, however, expected that it would take at least two years for an answer to be given by that Court, and the subsidiary question then had to be answered, namely whether the 1988 law could be enforced against the Spanish fishermen in the meantime. After further, urgent, reference to the Luxembourg Court it was held by the English judges that the law of 1988 could not be and must not be enforced. What actually happened was that the English court issued an injunction to the Government —an action never previously taken or even believed to be possible— ordering that the 1988 Act be not applied.

The importance of this case lies in two major points. In the first place, and for the first time in history, an English court suspended the operation of a parliamentary law on the ground that it was, as it then appeared and as was subsequently confirmed, contrary to European law. In the second place the reasoning of the House of Lords contains a striking idea about the European Communities Act 1972 itself. Every law passed since 1972, it was said, must be read as if the words of the law of 1972, the law which incorporates European law into English national law, had been repeated in it. On that basis, the law of 1972 is reborn each time that legislation is enacted. Its force cannot, therefore, be reduced by the rule *lex posterior priori derogat* and the primacy of community law over parliamentary law is ensured. The reasoning is, of course, artificial and amounts for all practical purposes to a legal fiction. But the willingness of the judges to resort to fiction is a sign in itself of their determination to escape fron the traditional rule, at least

12 R. v. *Transport Secretary, ex p Factortame* [1990] 2 A.C. 85; [1991] A.C. 603.

so far as the European Union is concerned, and in so doing to move away from legal isolationism.

The second and more recent case, decided only in March 1994,[13] concerned certain labour legislation of 1978 dealing with compensation for loss of employment. This law granted more favorable conditions to those who worked for more than 16 hours per week thant it did to "part-time" workers. Community law dating fron before 1978 prohibits any form of discrimination, including so-called "indirect discrimination", between workers on account of their sex in matters affecting their rights to pay and working conditions, and the fact is that the enormous majority of those who work more than 16 hours per week are men while the enormous majority of part-time workers are women. The law of 1978 thus amounted to indirect discrimination against women. The Equal Opportunities Commission, a statutory organization charged with preventing unlawful discrimination on account of sex, challenged the 1978 law and obtained from the Judicial Committee of the House of Lords, the highest court in the country, a judicial declaration that the law of 1978 conflicted with Community law. That declaration, however tactfully it may have been phrased, is a decision by an English court that a law of the United Kingdom Parliament may not be applied as part of English law.

CONCLUSION

It is time to try to bring the strands of this paper together. There are three points I wish to make.

1. *The nature of the review*

The form of judicial review of parliamentary legislation which is now emerging in both France and England is not a review of constitutionality and the courts in neither country claim the power to declare a parliamentary law to be invalid. It is a review of the compatibility of national legislation with the treaty obligations of the state. The decisions which I have mentioned do not annul the offending national legislation and therefore do not have effect *erga omnes*. Nevertheless, in both countries the consequences of the decisions are far reaching, especially, perhaps, in England which formally accepts the authority of case law. A judicial declaration to the effect that national legislation conflicts with treaty law, a declaration made, of course, against a background of particular circumstances, has the effect of making that legislation inapplicable as part of national law in

13 *Regina v. Secretary of State for Emplyment, ex parte Equal Opportunities Commission [1994] 2. W.L.R. 409.*

comparable circumstances, but the legislation itself lives on and may be applicable where the circumstances are significantly different.

2. *The scope of the review*

As long ago as 1964, the European Court of Justice in Luxembourg stressed that the Treaty of Rome was different from other international treaties because it created a whole legal order which was integrated into the legal orders of the member states. From this, according to the Court, it followed that Community law was preeminent in the legal orders of those states. By the time of the 1975 decision of the Court de cassation, this had been accepted by the national judges of some member states and the Advocate General in his submissions in that case urged that French judges should follow the same path. He therefore expressed the hope that the Court would not base its decision on article 55 of the Constitution. As he pointed out, if the decision giving precedence to the treaty were based on that article rather than on the special character of the community legal order, it would provide no example for other member states which could, if they lacked a constitutional provision similar to article 55, reach a different conclusion with regard to the place of community law in their own legal orders.

If the Court de cassation had followed this opinion its decision would have been limited to community law and would have decided nothing with regard to other treaties. As it was, however, the Court preferred to base its decision mainly on article 55 and, as a result, its reasoning is applicable to any treaty ratified by France. As for the *Conseil d'Etat,* since that supreme authority first accepted the primacy of treaties over parliamentary laws in 1989, its subsequent decisions have gone beyond the limits of community law. For France, therefore, the new form of judicial review is of general application.

In England, on the other hand, the prevailing vew seems to be that the decisions to which I have referred are restricted to community law, and there is force in that view. In the first place, it must be recalled that the supremacy of Parliament as we now understand it marks the subjection of the Executive branch of government —the Crown— to parliamentary control and was the great achievement of the so-called Glorious Revolution of 1689. Secondly, it must be borne in mind that England has no written constitution and that the decisions of the courts are recognized as formal sources of law in their own right: if the judges can control as well as interpret parliamentary legislation, the fear of undemocratic government by judges may become realistic. Thirdly, it may be that English judges are now willing to review parliamentary legislation which is contrary to community law because, in respect of community law but in respect of no other kind of law, they have to recognize that the last word on its interpretation and application rests nor with them but with the European Court of Justice.

Paradoxical as it may appear, therefore, it seems that the French decisions, based as they are on application of the national Constitution and involving the use neither of legal fiction nor of artificial reasoning, do more to break down the isolationism of national law that do the English. On the other hand, because the English decisions are the more difficult to reconcile with traditional principles of national law, it is those which can justifiably be seen as the more "revolutionary".

3. *The beginning of an end to legal isolationism?*

In these circumstances it is premature to say that legal isolationism in England is now dead, or even dying, and the same is probably true also for France. On the other hand, the decisions in both countries which have been mentioned in this paper mark a break with the past and they mark a decline in both countries of doctrinaire insistence on the supremacy of parliamentary legislation. That is an important and significant change of emphasis even if, for the present, it is no more.

Only time can tell how matters will develop, and it is not the intention of this paper ot guess what future developments will be. It can be suggested, however, that legal isolationism in the form of a rigid internal doctrine of parliamentary sovereignty without judicial control is incompatible with the growth of international collaboration through treaties such as those relating to Human Rights, whose tendency and purpose is to protect the rights of individuals, whatever their nationality. It can also be suggested that the decisions which have been mentioned in this paper show how national judges can prevent a national legislature from disregarding the international obligations of the state of which it is a part.

Such a development may not be pleasing to those of a nationalist disposition, especially, perhaps, to those in power for it will subject their exercise of power to judicial control. Nationalists must, however, be distinguished from patriots, and it is not necessary to be a nationalist to be a patriot. Individual nationalists may be proud and even honorable men, but nationalism, unlike patriotism, all too often brings death and destruction in this wake. The world of today, with its independent states each rightly proud of its own culture and traditions, needs patriotism. Nationalism it can do without.

Legal nationalism may not be nationalism in its most pernicious form, but it is the companion of legal isolationism, and legal isolationism es the enemy of international collaboration. If the recent developments in French and English law which I have tried to describe in this papel imply a reduction in legal nationalism and legal isolationism, I suggest that they are not only to be welcomed in the countries in which they apply, but also that they provide useful material for study elsewhere.