

1-1-2006

## The U.K. Courts, the Common Law Approach and the Application of E.C. Law

Gunnar Beck

Follow this and additional works at: <http://elibrary.law.psu.edu/psilr>

---

### Recommended Citation

Beck, Gunnar (2006) "The U.K. Courts, the Common Law Approach and the Application of E.C. Law," *Penn State International Law Review*: Vol. 24: No. 3, Article 5.

Available at: <http://elibrary.law.psu.edu/psilr/vol24/iss3/5>

This Article is brought to you for free and open access by Penn State Law eLibrary. It has been accepted for inclusion in Penn State International Law Review by an authorized administrator of Penn State Law eLibrary. For more information, please contact [ram6023@psu.edu](mailto:ram6023@psu.edu).

# The U.K. Courts, the Common Law Approach and the Application of E.C. Law

Gunnar Beck\*

## I. Introduction

Upon accession to the European Community (“EC”), the English courts acquired the power to apply EC law. This article focuses on the extent to which the distinct features of the common law and its systems of precedent, approaches to statutory interpretation and the need for political sensitivity in judicial decision-making have facilitated and/or hampered the application of EC law by the domestic courts. It concludes that, in broad terms, the domestic courts have not systematically used their powers to subvert the application of EC law, and the reception in the UK courts offers a good example of the politically sensitive type of judicial law-making which F.A. Hayek thought paradigmatic of the common law.<sup>1</sup> At the same time, while judicial discretion so far seems to have facilitated the application of EC law—generally by harmonious interpretation of potentially offending legislation and, *in extremis*, by the disapplication of either statutes or statutory instruments—the application of EC law has itself favored the judicialization of legislation in the UK. Finally, while for the most part judges have found it in their interest to give effect to EC law in the domestic legal order, the precise manner in which EC law must be applied is also determined by the domestic courts, which could lead to the undermining of the effectiveness of EC law in

---

\* Dr. Gunnar Beck is a lecturer in law at the School of Oriental and African Studies, University of London, and a parliamentary legal adviser to the European Scrutiny Committee of the House of Commons, London. He specializes in EU law, legal theory and constitutional and human rights law. His forthcoming and recent publications include: *Immanuel Kant's Theory of Rights*, *RATIO JURIS* (forthcoming 2006); *The Problem of Kompetenz-Kompetenz: A Conflict Between Right and Right, in Which There Can Be No Praetor*, 30(1) *EUR. L. REV.* 42 (2005); *The British Parliament and the Convention on the Future of Europe*, 30(5) *EUR. L. REV.* 743 (2005); *Dresden und das Weltgericht*, *FRANKFURTER ALLGEMEINE ZEITUNG*, Feb. 17, 2005.

1. For an outline of F.A. Hayek's theory of law, see CHRISTINA PETSOUHAS, *HAYEK'S LIBERALISM AND ITS ORIGINS: HIS IDEA OF SPONTANEOUS ORDER AND THE SCOTTISH ENLIGHTENMENT*, ch. 1 & 2 (2001).

the domestic legal order. Section III of this article will focus on the various ways in which the UK courts have used their discretion to that effect. Finally, the article concludes that in large measure, the avenues for the exercise of judicial law-making in the application of EC law are the same as in domestic law, the twin powers over the application of judicial precedent and of the interpretation of legislation.

## II. U.K. Courts and the Common Law

Lord Goff, one of Britain's most pre-eminent and learned Law Lords in recent times once commented: "The layman thinks of the law as inherently predictable, clear, precise, certain, even rock-like in quality. It is in fact nothing of the sort."<sup>2</sup> It may be more than a merely incidental difference in style between English and U.S. judges that Lord Goff did not go on to conclude, as O.W. Holmes famously did, that the Law is what the judge says it is (because the doctrine of precedent is largely a myth and even words and concepts in statutory law require interpretation).<sup>3</sup> But judicial discretion also rests on judicial self-restraint. For in any conflict between what the judge says and what the lawmaker legislates, what the law is will depend on what the official enforces. Law is about power and who has the final say; who has the final say also determines the legal reasoning.

Legal reasoning under the common law has at least two meanings. In one sense, it refers to what judges say, not what they do. Even if their decisions are value judgments, judges dress them up as reasons. Legal reasoning in this sense refers to the rhetoric and specialist jargon with which the courts present their judgments. In another sense, legal reasoning is no different from practical reasoning in everyday life. Impartiality is not a fact of human life—judges, the great American judge Benjamin Cardozo said, are supposed to transcend the emotional imperfections of ordinary human but in fact remain subject to human limitations.<sup>4</sup> They decide, just like everyone else, based on a variety of factors, including: professionalism, personal conviction, concern for the public interest, fear, individual self-interest and professional self-interest. No matter how these factors weigh upon each decision, judges generally seek to present the reasons for their decisions in the language of impartiality and universal validity. Judges and lawyers feel the need to give reasons for their actions, subject to one major constraint: they are constrained by the need to justify their decision in terms of the

---

2. Lord Goff, *Judge, Jurist and Legislature*, 3 Denning L.J. 79, 79 (1987).

3. See Oliver Wendell Holmes, *The Path of the Law After One Hundred Years*, 110 HARV. L. REV. 991, 994 (1997).

4. BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 168 (1921).

formalized language of the law. Legal reasoning is ordinary thinking in extraordinary language.

The vast majority of cases never reach this state; they do not raise questions of law but rather are concerned with the determination of facts and the evaluation of evidence from which they are deduced. For example, the judge may need to decide upon the credibility of witnesses, evaluate conflicting medical reports, and determine whether someone is telling the truth. This is simply what the law calls judicial fact-finding. However, the fault with judicial fact-finding is that its results do not usually find its way into the law reports. Worse, if a trial court mistakenly accepts as true the oral testimony of an honest but inaccurate witness or even a lying witness, seldom can an upper court detect this mistake; it usually adopts the facts as found by the trial court and does so because the trial court saw and heard the witnesses testify. So what I talked about in terms of uncertainty in the determination of the rules to be applied to facts is really only the tip of the iceberg, just as six-sevenths of an iceberg is located below water, six-sevenths of the uncertainty of the law is fact-uncertainty, which never reaches the law reports and hardly ever concerns the legal academic.

What does this tell us about the common law? First, judicial decisions often lack certainty. This is unavoidable for many reasons. Sometimes legal rules are lacking, and in difficult cases, judges lack the guidance of precedent. Contrary to Dworkin's view,<sup>5</sup> there is no clear hierarchy of principles that tells judges how to decide in these cases. Different judges will inevitably decide differently. This is amply demonstrated by thousands of appeal cases where the appellate court judges did not decide unanimously. Whether there is, as Dworkin maintains, a right legal answer independent of the actual answer reached by judges,<sup>6</sup> is neither here nor there since it is epistemologically inaccessible. Moreover, the doctrine of precedent is not what it is promised to be: whether a precedent exists is always a matter of interpretation. In most cases, judges can distinguish cases if they do not like their outcome. Furthermore, often even the "ratio of a case"<sup>7</sup> is unclear, and the ratio of a case may even evolve over time. What decides the ratio of a case is not the judge laying it down but how subsequent judges see it in light of subsequent cases.

Second, the idea that judges simply apply the law is a myth. The common law, and even the application of statutes, is judge-made law. It

---

5. See RONALD DWORKIN, *LAW'S EMPIRE* (1986).

6. See *id.*

7. "Ratio of the case" is the equivalent to the American legal term "holding."

is what Bentham called the product of Judge and Co.,<sup>8</sup> by which he meant it is the product not only of individual judges but above all of the state of professional legal opinion which influences their individual judgments. Law in this sense has an element of retrospectivity. Bentham gives the example of the way a man makes law for his dog; he waits until it does something he disapproves of and then beats it and thereby teaches it that what it did was wrong.<sup>9</sup>

Third, judges are not wholly unconstrained, and their decisions may entail costs not only to others but, in a more limited professional sense, to themselves. Judges do not like being overruled. To some extent, the lower court decisions anticipate what the Court of Appeal and House of Lords will think.

Finally, the law is ineliminably uncertain but not wholly unpredictable. Good lawyers have a better record of correctly predicting judicial outcomes. Therefore, there must exist better and worse reasoning in lawyers. However, what is meant by reasoning here is not legal reasoning as an autonomous and specifically legal way of reasoning. Rather, it is a good knowledge of the relevant law combined with an appreciation of the economic and political context in which judges make their decisions. Often, however, the political and social views of judges—both collectively and even individually—are held in check by their fear of being overruled. Fear of correction thus restrains judicial discretion just as much as such discretion rests on judicial self-restraint where cases are politically sensitive and all too obvious judicial law-making would lead judges into conflicts with the political authorities where the latter are unlikely to back down.

What is the relevance of the foregoing discussion for the application of Community law<sup>10</sup> in the common law jurisdiction of the United Kingdom? Judicial discretion appears to have favored rather than hampered the application of EC law. The reason for this, however, is contingent rather than inherent in the judicial discretion enjoyed by common law judges. They exercise their discretion essentially with the acquiescence of the political authorities; should the political climate change dramatically, it is by no means clear that judicial attitudes would remain as faithful to the purpose of EC legislation and judicial prescriptions of the European Court of Justice ("ECJ"). The discretion of the domestic courts has by and large resulted in the faithful application of

---

8. Jeremy Bentham, *Letters to Lord Greenville on the Proposed Reform in the Administration of Civil Justice in Scotland*, in 5 THE WORKS OF JEREMY BENTHAM 5-8 (John Bowring ed., 1962).

9. 5 THE WORKS OF JEREMY BENTHAM 235 (John Bowring ed., 1962).

10. Community law includes treaty obligations, directives, regulations and decisions. The term EC law may be used interchangeably.

Community law. And when it comes to fact-finding the one feature of the litigation process in the common law is the overwhelming amount of paper thrown up by its extensive rules of disclosure. Buried deep within countless files lies the ultimate answer to the question of how the domestic courts have applied Community law.

### III. Community Law Within a Common Law Framework

According to the Community law doctrine of the supremacy, all directly effective Community law automatically takes precedence over national law including national constitutional law.<sup>11</sup> Community law does not have direct effect when the obligations imposed are insufficiently precise or the measure is not intended to confer rights on individuals. Subject to qualifications, the principle of supremacy applies not only to the provisions of the Treaties on which the European Community is founded but also to secondary legislation<sup>12</sup> and the case law of the European Court of Justice. Under the principle of loyal cooperation set out in general terms in Article 10 EC Treaty,<sup>13</sup> national courts are under a duty to apply Community law, including the case law of the ECJ. However, like the European Commission which lacks the resources to administer and enforce its own policies and largely relies on national administrations for this purpose, the European Court of Justice relies on the resources and cooperation of national courts for the application and enforcement of EC law. Except in the very restricted circumstances laid down in Article 230(4) EC Treaty,<sup>14</sup> individuals cannot institute proceedings directly before the ECJ. Rather, they need to bring their action in the national courts, which may then refer questions of EC law to the ECJ under the preliminary rulings procedure of Article 234 of the EC Treaty.<sup>15</sup> The application of EC law necessitates the cooperation of national judiciaries. National courts are asked not only to decide whether a point of Community law has already been decided by the ECJ, but also whether the law is sufficiently clear so as to require no ruling from the ECJ. In the first case they are asked to refer, in the latter, they are asked either to interpret and apply existing precedents or to interpret the allegedly uncontentious legislation. Once a national court has decided not to refer an issue of EC law, private litigants generally have no means of forcing it to reconsider its ruling

---

11. Case C-11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, 1970 E.C.R. 1125.

12. Secondary legislation includes EC regulations, directives and decisions.

13. Treaty Establishing the European Community, Nov. 10, 1997, 1997 O.J. (C 340) 3 [hereinafter EC Treaty].

14. EC Treaty art. 230(4).

15. EC Treaty art. 234.

except by persuading an appeals court to make a reference.

By the time the United Kingdom joined the European Community in 1972, the doctrines of direct effect and of the supremacy of European Community were well established. Being that the United Kingdom is a dualistic country, where international obligations entered into by the government have to be given effect through an Act of Parliament before they can be enforced in the domestic courts, EC law was incorporated into national law by the European Communities Act 1972,<sup>16</sup> which also allowed the courts to give effect to the principles of supremacy and direct effect. Section 3(1) of the 1972 Act requires the UK courts to follow the case law of the ECJ on any question of EC law, namely, to follow precedents of the ECJ where they apply and to refer any other question to the ECJ for determination.<sup>17</sup> Section 2(4) states that any statute and other domestic legislation is to be interpreted in accordance with EC law as laid down in the Treaty, legislation adopted under it by the EC institutions and in the case law of the ECJ.<sup>18</sup> By requiring the English courts to take judicial notice of the decisions of the ECJ, the 1972 Act in effect allowed for the incorporation of judicially created principles, such as the doctrine of supremacy, into the domestic legal order.

The English courts thus see EC law through the filter of the 1972 Act. The dual uncertainty arising in the English legal system from the interpretation of legal texts and from the application of judicial precedents might have augured ill for the faithful application of EC legislation in conformity with the jurisprudence of the European Court of Justice, all the more given the relative lack of familiarity of British judges with the substance and reasoning of European Community law. However, the common law has not hampered the application of EC law through the domestic court system.<sup>19</sup> There are at least three reasons for this.

First, one obvious reason is the absence of a written constitution in the United Kingdom, which left the English courts free from the constraints of a written constitutional document as a national *Grundnorm*. It also gave the courts a large measure of flexibility to interpret domestic legislation to be in harmony with potentially conflicting EC law. In important respects, the common law tradition of judicial discretion seems to have favored rather than undermined the

---

16. European Communities Act 1972, c. 68 (U.K.).

17. *Id.* § 3(1).

18. *Id.* § 2(4).

19. This is the standard view shared by practically all the commentators. *See, e.g.*, Carl Otto Lenz & Gerhard Grill, *The Preliminary Ruling Procedure and the United Kingdom*, 19 *FORDHAM INT'L L. J.* 844, 847 (1996). The reasons, however, are not normally satisfactorily discussed.

application of European law. The exercise of discretion in the application of EC law ultimately rests on the need to avoid open conflict with the political authorities able to enforce their will. Had the political authorities been less acquiescent in the judicial approach giving effect to the supremacy of EC law, the political scope for the exercise of judicial discretion would have diminished rapidly. Ultimately, the absence of legal constraints on the exercise of judicial discretion in the common law only translates into effective judicial power within the confines set by the need to respect political power where the latter is likely to enforce its will.

Second, the degree to which the UK courts have facilitated the application of EC law—through harmonious interpretation of potentially conflicting legislation and, *in extremis*, through the disapplication of either statutes or statutory instruments—becomes less surprising if it is borne in mind that the application of EC law has itself favored the judicialization of legislation in the UK. Beginning with the landmark cases of *Shields v Coomes*<sup>20</sup> and *Macarthys v Smith*,<sup>21</sup> the UK courts have resolved any ambiguity or inconsistency with EC law in national statutes by giving primacy to EC law. The adoption of a purposive approach as part of the canon of statutory interpretation for the purposes of the application of EC law, subsequently emboldened the courts in their strongly teleological and at times highly strained construction of primary and secondary legislation to ensure compliance with the Human Rights Act.<sup>22</sup>

Third, the particular manner in which the EC Treaty provided for the application of EC law through the domestic courts, and in particular, the preliminary reference procedure, left the English courts with great flexibility over important aspects of the implementation of EC law. The remainder of this article will focus on the various ways in which the domestic courts have used their discretion to undermine or, at least, to influence this implementation. The subsequent discussion will focus on the judicial application of the doctrine of *acte clair* and the precedential effect of the case law of the European Court of Justice, together with the national prerogative over procedural and jurisdictional rules with regard to all national litigation involving points of EC law. Other potential sources of legal uncertainty will be mentioned less for reasons of completeness but as pointers for further and more detailed examination.

---

20. *Shields v. E. Coomes (Holdings) Ltd.*, (1978) 1 W.L.R. 1408.

21. *Macarthys Ltd. v. Smith* Note, (1979) 1 W.L.R. 1189.

22. Human Rights Act 1998, c. 42 (U.K.).



A. *Acte Clair*

Article 234 of the EC Treaty is designed to be used only if there is a question to be answered which falls into one of the categories mentioned in Article 234(1).<sup>23</sup> National courts need not refer a question of EC law in a number of circumstances, the most obvious being where they feel that the answer to the issue is so clear that no reference to the ECJ is warranted. This is known as the *acte clair* doctrine. The conditions in which it is legitimate for a national court to refuse to make a reference for this reason were set out by the ECJ in its 1982 CILFIT judgment.<sup>24</sup> In this case, the Court ruled that the *acte clair* doctrine applied in circumstances where no precedent of the ECJ existed on the point in question.<sup>25</sup> The Court also made plain that the *acte clair* doctrine has a very limited scope of application. It pointed out that a ruling from the European Court of Justice was only superfluous if the national judge—who had to consider all the different language versions of the relevant provision and both its context and objective—came to the conclusion that neither for him, nor for courts in other Member States, nor for the European Court itself, could there be a serious doubt as to the interpretation of the relevant provision.<sup>26</sup> In theory, the test laid down by the Court sets a tall order indeed. In practice, however, the almost insurmountable difficulties a national court would face in carrying out the required test have led national courts largely to ignore the very strict guidance offered by the ECJ.

One commentator predicted that the effect of CILFIT would be to encourage national courts to decide EC law points for themselves.<sup>27</sup> Reviewing the relevant post-CILFIT English case law through the 1980s, Prof. Arnall later concluded that his fears had been borne out, especially by the English courts.<sup>28</sup> The English cases in which the CILFIT decision

---

23. EC Treaty art. 234(1). The article reads:

The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

- (1) the interpretation of this Treaty;
- (2) the validity and interpretation of acts of the institutions of the Community and the ECB;
- (3) the interpretation of statutes of bodies established by an act of the Council, where those statutes so provide.

24. Case 283/81, Srl CILFIT & Lanificio di Gavardo SpA v. Ministry of Health, 1982 E.C.R. 3415.

25. *Id.*

26. *Id.*

27. Anthony Arnall, *Reflections on Judicial Attitudes at the European Court*, 34 INT'L & COMP. L.Q. 168, 172 (1985).

28. See Anthony Arnall, *The Use and Abuse of Article 177EEE*, 52 MOD. L. REV. 622 (1989).

was mentioned suggested that the judgment had been used by the domestic courts to justify refusing to make a reference where the national court had formed a view as to how the points of Community law in issue should be resolved.<sup>29</sup> Throughout the 1980s, courts in the United Kingdom made far fewer references than courts in other Member States of comparable size.<sup>30</sup> More recent studies show that the UK courts continue to remain markedly more opposed to refer questions as to the interpretation of Community law to the ECJ than those in other Members States. Between 1992 and 2002, UK courts referred 217 cases to the ECJ.<sup>31</sup> This compares with 481 references from the Italian courts, 586 from German courts and 188 from the Belgian courts, and 209 from Dutch courts.<sup>32</sup> The most recent figures for 2003 and 2004 confirm this trend: in both years taken together the UK courts referred forty-four cases to the ECJ compared to ninety-three from Italy, ninety-three from Germany, fifty-six from the Dutch courts, and forty-two from Belgium.<sup>33</sup> British courts referred roughly the same number of cases as two countries with each about one quarter of Britain's population, less than half than the courts in Italy, which has about the same population, and only slightly more than a third than the courts in Germany whose population is slightly larger. In absolute times, the UK courts referred fewer cases than Austria, a country with one-fifth of Britain's population, which was not even a Member State for three out of the eleven years. Proportionate to population size, the British courts referred fewer cases in virtually any year than any other EU Member State with the possible exception of Spain. In contrast to their Continental counterparts, at least in the original Member States, the English judges have generally had no formal training in EC law and are reliant, to a much greater extent, on the legal knowledge of counsel who likewise, with the exception of a few specialist barristers, are likely to have had little or no training in Community law. EC law only become a compulsory subject for UK law students in the mid-1990s. This may help to explain the greater reluctance of UK courts to make references. Such reluctance would be

---

29. *Id.* at 637.

30. *Id.*

31. Requests by national courts for preliminary rulings are recorded at the Court of Justice Registry and are published in full in the *Official Journal of the European Communities*. The cited figures are based on a table compiled from these records for 1992-2002 contained in Annex VI of the ECJ's report entitled "Application of Community Law by the National Courts: A Survey," available at [http://curia.eu.int/en/coopju/apercu\\_reflets/lang/index.htm](http://curia.eu.int/en/coopju/apercu_reflets/lang/index.htm) (last visited Mar. 28, 2006).

32. *Id.*

33. The statistics for 2003 and 2004 can be found in the annual reports of the ECJ for both years available at <http://curia.eu.int/en/instit/presentationfr/rapport/stat/st04cr.pdf> (last visited Mar. 28, 2006).

justifiable, however, only if UK judges were somehow more competent to decide points of Community than their Continental judicial colleagues. How plausible such a justification might be, is best left for the reader to surmise. Suffice it to say that the following cases both in this and the subsequent section suggest a rather pessimistic reading.

In *Francovich*<sup>34</sup> and *Brasserie du Pêcheur*,<sup>35</sup> the ECJ established the principle of Member State liability in damages for breaches of Community law, including breaches of directives that are not directly effective against private individuals. The ECJ laid down that, in addition to other conditions, a breach could be established only if the relevant Community rule of law was intended to confer rights on individuals.<sup>36</sup> One of the very first cases involving a claim for damages for breach of Community law coming before the UK courts was the *Three Rivers District Case*<sup>37</sup> in which depositors in BCCI, a bank that had been placed in liquidation, sued the Bank of England for damages for lack of supervision of BCCI in breach of the First Banking Directive 77/780.<sup>38</sup> The High Court held that the directive did not impose a supervisory duty capable of grounding a damages claim for breach of Community law.<sup>39</sup> Assessing the first condition of state liability—the conferral of rights upon individuals—the Court found that the First Banking Directive constituted a first step toward harmonization but did not confer rights on savers or other creditors nor a right of action in damages against the supervising authority, which precluded the plaintiffs from relying upon *Francovich* liability.<sup>40</sup> The ruling, to the effect that the directive did not confer rights on individuals vis-à-vis the supervisory body, was affirmed by the majority of the Court of Appeal as well as by the House of Lords.<sup>41</sup> The House of Lords regarded the matter of depositors' rights under *Francovich* liability as an *acte clair*, which obviated the need for a reference for a preliminary ruling.<sup>42</sup> In *Francovich*, the ECJ had held the Italian state liable for failure to take effective steps to guarantee payment of wages of employees in the event of their employer's insolvency subject to the conditions of Directive 80/987.<sup>43</sup> In the absence of any

---

34. Case C-6/90, *Francovich & Bonifaci v. Italy*, 1991 E.C.R. I-5357.

35. Case C-46/93, *Brasserie du Pêcheur SA v. Germany*, 1996 E.C.R. I-1029.

36. *Francovich*, 1991 E.C.R. I-5357, ¶ 3.

37. *Three Rivers Dist. Council v. Bank of England*, (2003) 2 A.C. 1 (H.L. 2000) (appeal taken from C.A.).

38. *See id.*

39. *Id.*

40. *Id.*

41. *See Three Rivers Dist. Council v. Bank of England*, (2000) 2 W.L.R. 15 (C.A. 1998).

42. *Three Rivers Dist. Council v. Bank of England*, (2003) 2 A.C. 1 (H.L. 2000) (appeal taken from C.A.).

43. *See Francovich*, 1991 E.C.R. I-5357.

ECJ ruling excluding depositors' rights from amongst the actionable rights in Community law, the House of Lords nonetheless took such an exclusionary intent to be self-evident.

According to *Francovich*, the only bases for excluding rights from amongst actionable damages claims are either that the content of those rights cannot be clearly identified from the text of the directive or that there is evidence that the directive was not intended to confer rights on individuals.<sup>44</sup> In *Three Rivers*, Lord Hope, in his leading judgment, made much of the fact that nowhere in the Directive was there to be found any definition of any expression referring to individuals in whose favor rights might be said to have been intended to be created by the Directive.<sup>45</sup> If the result to be achieved was to entail the granting of rights to individuals such as savers or depositors, Lord Hope opined, then one would have expected a definition of the intended rights-bearers such as those included in a number of EC consumer and environmental protection directives.<sup>46</sup> However, Lord Hope fails to address two key issues: (1) whether the employees' protection directive in *Francovich* had gone further in defining the intended rights-bearers, and (2) how this was not merely a first step towards harmonization, in which the First Banking Directive was held to be. In *Francovich*, the relevant Directive, which imposed clearly defined duties on emanations of the state, did not then go on to define the recipients beyond the generic term "employees."<sup>47</sup> Applying the criteria to *Three Rivers*, its directive also should have been construed as a harmonizing measure. In truth, both directives impose clearly defined duties, which may reasonably be construed to imply a right to enforce these duties provided the text does not expressly exclude such enforceability. In *Norbrook Laboratories v. MAFF*,<sup>48</sup> the ECJ made clear that the intention to confer individual rights could be inferred if the directive clearly and exhaustively laid down correlative duties.<sup>49</sup> Moreover, in *Francovich*, the ECJ even found the requisite intention in circumstances where some of provisions of the directive lacked sufficient precision to be directly effective.<sup>50</sup> Therefore, it appears that the rights laid down in the First Banking Directive are not obviously less clearly defined than those held to be actionable grounds in *Francovich* or some of the later cases where the ECJ imposed

---

44. See *id.* ¶¶ 66, 72.

45. *Three Rivers*, (2003) 2 A.C. 1, 219.

46. *Id.*

47. See generally Council Directive 80/987, 1980 O.J. (L 283) (EC) (relating to the protection of "employees" in the event of the insolvency of their employer).

48. Case C-127/95, *Norbrook Labs. v. Ministry of Agric., Fisheries & Food*, 1998 E.C.R. I-1531.

49. *Id.* ¶¶ 107-12.

50. See *Francovich*, 1991 E.C.R. I-5357, ¶¶ 56-68.

*Francovich* liability—the principal difference consisting solely in the different classes of rights-bearers. This was the view of the Court of Appeal’s Lord Justice Auld whose dissenting judgment expressed the view that the First Banking Directive did impose clearly defined obligations on both Member States and supervisory bodies, giving rise to Community law-based rights in damages for the benefit of depositors.<sup>51</sup>

Lord Justice Auld’s intellectually powerful dissenting judgment draws attention to the curious phenomenon of a category of UK cases where a unanimous or majority House of Lords rules a matter *acte clair* in circumstances despite a leading Law Lord or dissenting Court of Appeal delivered an alternative answer and favored a reference to the ECJ on the point in issue. Perhaps the most striking example of such judicial self-confidence in its own omniscience is Lord Slynn’s leading opinion in the case of *Optident Limited v. Secretary of State For Trade and Industry*.<sup>52</sup> Their Lordships held unanimously that a tooth bleaching product with other alleged medical qualities was a cosmetic product for the purposes of Council Directive 76/768/EEC.<sup>53</sup> By Lord Slynn’s own admission, their Lordships reached their conclusion by reversing the unanimous opposite view of the Court of Appeal which would have normally been the court of last instance.<sup>54</sup> Additionally, their Lordships opinion went against the view of the European Commission, as well as judicial decisions in both Germany and Sweden.<sup>55</sup> It can only be concluded that “clear” to their Lordships means “clear to them” and no one else.

A similarly solipsistic tendency is manifest in the very recent decision of the House of Lords (sitting on appeal from the Inner House of the Court of Session in Scotland) in *Percy v. Church of Scotland Board of National Mission*.<sup>56</sup> Percy was a female associate Minister of the Church of Scotland who was accused of having an affair with a married elder of the combined parish in which she exercised her ministry. In the course of the Church’s investigations into the charges brought against her, she resigned her position in the Church, thus bringing the investigation to an end. The Court was faced with three questions: (1) Was she employed under a contract of employment—all were agreed that she was not (including Percy herself); (2) Was she

---

51. *Three Rivers Dist. Council v. Bank of England*, (2000) 2 W.L.R. 15 (C.A. 1998) (Auld, L.J., dissenting).

52. *See Optident Ltd. v. Sec’y of State for Trade & Indus.*, [2001] UKHL 32 (U.K.).

53. *Id.* ¶¶ 27-43.

54. *Id.* ¶ 37.

55. *Id.*

56. *See Percy v. Church of Scotland*, [2005] UKHL 73.

protected by section 6 of the Sex Discrimination Act 1975<sup>57</sup> and/or by the Equal Treatment Directive<sup>58</sup> from unlawful discrimination consisting of exercising in her case a more severe discipline than the Church was accustomed to exercise in the case of a male Minister who is charged with having an affair with a married parishioner; and (3) If she was so protected, how was the Sex Discrimination Act of 1975 to be reconciled with Church of Scotland Act 1921<sup>59</sup> which recognises that Church's exclusive jurisdiction in matters of discipline?

With regard to the main issue of the second question, Lord Hoffman differed from Lord Hope. The other judges did not address cursorily this question. Lord Hoffman held that Percy held an office and so was not employed under a contract of service or a contract personally to execute any work or labor.<sup>60</sup> Consequently she fell outside the scope of the Equal Treatment Directive. Lord Hope held that she was a "worker" for the purposes of EC law, therefore, she fell within the scope of the Directive.<sup>61</sup> The point mattered because, whatever the proper priority as between the 1921 Act and the 1975 Act, the Directive clearly trumps the former. The Church sought a reference which Lord Hope regarded as inappropriate since "the matter at issue in this case is *acte claire*" (sic).<sup>62</sup> How a matter can be *acte clair* when a fellow judge in the highest appeal court in the land takes the opposite view is far from obvious. Perhaps it suggests that Lord Hope takes a decidedly dim view of Lord Hoffman's judicial qualities.

The vexed issue of who is and is not a worker under Community law also concerned Justice Moses in the case of the Queen on the application of *Finian Manson v. Ministry of Defence*.<sup>63</sup> What is remarkable in this case, however, is not so much the actual decision reached by Justice Moses but the reasoning whereby he reached his conclusions and more particularly his reasons for refusing to make a reference to the ECJ. In his judgment, his Lordship not only admitted his abiding doubts about his own conclusions on the issue of the justiciability of the relevant EC directive in the national courts (known as direct effect in Community law); he also conceded that if this meant that he should have referred the issue to the ECJ for this and possible other reasons, he would have refused to do so on the grounds that "the delay in

---

57. Sex Discrimination Act, 1975, c. 65, § 82(1).

58. Council Directive 76/207, 1976 O.J. (L 39) 40 (EC).

59. Church of Scotland Act, 1921, 11 & 12 Geo. 5, c. 29, § 3, sched. art. IV.

60. *Percy v. Church of Scotland*, [2005] UKHL 73, ¶ 66 (Hoffman, L.).

61. *Id.* ¶ 127 (Hope, L.).

62. *Id.* ¶ 135 (Hope, L.).

63. *The Queen on the Application of Finian Manson v. Ministry of Defence*, [2005] EWHC 427 (Admin) CO/4831/2002.

this case is already so great that it would be wrong to add to it so substantially by a reference.”<sup>64</sup> In the English legal system, which is more expensive and more prone to delays than any other with the probable exception of the U.S., the need to limit costs and delays is likely the most common reason for judges to refuse to exercise their discretion not to impose time bars, no less than for making references to the ECJ on issues of Community on which they have no competence to reach a judicial conclusion. The CILFIT criteria laid down by the ECJ leaves no doubt that ostensible concern to avoid delay and unnecessary costs under no circumstances justify a refusal to refer, and it is the responsibility of domestic courts to ensure that appropriate interim measures are adopted. On occasion, failure to refer may avoid purposeless hardship, as almost any departure from any rule occasionally does. Yet, it appears that more than twenty years after CILFIT many English judges remain as wise as to when they should and should not refer as they were on the day of British accession thirty years ago.

However, not even the above cases and considerations can account for the significant and consistent discrepancy in the number of referrals by the UK courts compared to those from national courts in other Member States. Often, the courts do not justify such decisions *expressis verbis* as “*acte clair*.” In other words, while some glaring examples of judicial misapplication of EC law can be excavated from the hundreds of yards of law reports that have been added to law libraries since the UK joined the Community, most instances of misapplication either will not have been reported at all or make no mention of Community. For in the English courts, judges still largely rely on counsel for either party to draw the relevant law to the attention of the judge, who is generally a non-specialist. If counsel does not, the odds are the judge will take no cognizance of the point. Additionally, if neither party asks for a reference, none will be made.<sup>65</sup> Far more cases will have been decided where a reference was not made when it should have been compared to situations where a reference was considered but found otiose or inappropriate. Finally, contrary to the artificial distinction drawn in the CILFIT judgment between issues that are *acte clair* and those covered by an ECJ precedent, there are many cases where either both elements are

---

64. *Id.* ¶ 75.

65. Chalmers emphasizes the more reactive position of judges in civil trials in the context of the British legal doctrine on the reference procedure. This perceives the question of reference, despite being a matter of judicial discretion, as essentially one for the parties. A court will not refer of its own motion, but only if asked by one of the parties, and will always refer if both parties agree on the need for a reference. Damian Chalmers, *The Much Ado about Judicial Politics in the United Kingdom: A Statistical Analysis of Reported Decisions of United Kingdom Courts Invoking EU Law 1973-1998* § VIII (Jean Monnet Working Papers, 1, 2000).

involved or where the failure to refer can be characterized either as a failure by the domestic court to apply the relevant ECJ case law or as a substitution of its own erroneous reasoning for that of the European Court. Both scenarios are illustrated by the cases in the next section, which could be presented either as misapplications of binding precedents or as failures to refer.

### *B. Precedent*

The second principal ground on which national courts may decline reference to the ECJ includes cases where precedent stems from a prior ECJ decision. In *CILFIT*, the ECJ clarified the effect of its precedent on national courts. According to *CILFIT*, national courts may rely upon ECJ precedent even if the prior decision did not emerge from the same type of proceedings, and even though the questions at issue were not strictly identical, provided that the substance of the legal point has already been adjudicated in a prior ECJ decision, thereby obviating the need for a reference.<sup>66</sup> In substance, the guidance provided by the ECJ regarding the application of its decisions to later cases raises the same fundamental problem characterizing the application of the doctrine of precedent in the English common law: when is the legal issue in any given case sufficiently similar to that in a prior decision of the ECJ for that decision to be legitimately applied as a precedent in the later case before a lower court. As the following cases suggest, due to the inherent uncertainty in the application of any precedent, the English courts have been able to exploit their discretion to subvert the application of ECJ precedents almost as effectively as their manipulation of inconvenient precedents in domestic law.

*Rutherford v. Secretary of State for Trade and Industry (No2)*,<sup>67</sup> and *Home Office v. Bailey & Ors*<sup>68</sup> provide a particularly striking example of the suspension of a binding ECJ precedent in English courts. In *Rutherford*, the claimants sought to nullify certain sections of the UK Employment Rights Act 1996<sup>69</sup> on the grounds that the upper age limit for unfair dismissal, which prevented anyone older than sixty-five from seeking compensation, was indirectly sex discriminatory on the grounds that it affected many more men than women as men formed most of the working population over sixty-five.<sup>70</sup> The Court of Appeal upheld the

---

66. Case 283/81, *Srl CILFIT & Lanificio di Gavardo SpA v. Ministry of Health*, 1982 E.C.R. 3415.

67. *Rutherford v. Sec'y of State for Trade and Indus. (No2)*, [2004] EWCA (Civ) 1186 (Eng.).

68. *Home Office v. Bailey*, [2005] EWCA (Civ) 327 (Eng.).

69. UK Employment Rights Act, 1996, c. 18.

70. *Rutherford*, [2004] EWCA (Civ) 1186.



decision of the Employment Appeal Tribunal which had overturned a judgment at first instance in favor of the claimants. The first instance tribunal had held the measure to be sex discriminatory with reference solely to the disadvantaged group of those employed and over sixty-five who were liable to dismissal without compensation together with that group of the workforce between fifty-five and sixty-five for whom retirement was a realistic prospect. Within the total composed of these two subgroups the tribunal found a significant majority of men.

The Court of Appeal upheld the reversal of this decision with reference to the prior ECJ decision in *R v. Secretary of State for Employment ex parte Seymour-Smith*. In this case, the ECJ held that the legal test for establishing whether a seemingly neutral provision may be indirectly sex discriminatory only where it has a substantial adverse disparate effect on one sex as opposed to the other.<sup>71</sup> It is insufficient to merely establish a substantial disparate effect within the disadvantaged group. The analysis requires a comparison of the measure's effect on the sexes within the advantaged and the disadvantaged groups, and the comparison must be followed by an assessment of the disparate impact on the proportion of men and women in both groups. Applying this test to the facts before it, the Court of Appeal found that the proper statistical pool was not the group of those above the statutory age limit together with the portion of the workforce approaching the limit but the entire eligible workforce from sixteen to over seventy. Only if a markedly greater impact on either sex could be established in the context of the entire workforce could a facially neutral provision be indirectly discriminatory based on sex. Given the small percentage of those employed over the age of sixty-five, the marked difference in terms of the numbers of adversely affected men as opposed to women, almost receded into statistical insignificance after adding the much more evenly balanced workforce under fifty-five. Accordingly, the Court of Appeal dismissed the claim for indirect sex discrimination.

The reasoning of the Court of Appeal is open to criticism on several grounds. First, the court failed to refer the issue of interpretation of the Burden of Proof Directive 98/52 on the ground that it was *acte clair* in all but name.<sup>72</sup> Second, female participation in the workforce declines in

---

71. Case C-167/97, *R. v. Sec'y of State for Employment ex parte Seymour-Smith*, 1999 E.C.R. I-623.

72. The Directive did not come into force until after the ECJ passed judgment in *Seymour-Smith*. If, as was argued before the Court of Appeal by counsel for the claimants, it lowered the burden of proof required to establish an instance of indirect sex discrimination, it would have raised the issue of whether *Seymour-Smith* survived as a precedent. According to Community law, national appellate courts have no power to affirm or overrule ECJ precedent, and the Court of Appeal should have referred on those grounds. The Court of Appeal, of course, took the view that the interpretation of the

rough proportion to the average age of the group under consideration: the older the workforce, the fewer the number of women employed, and correspondingly, the larger the proportion of families where the husband is the sole earner. In these circumstances it might have been more appropriate to interpret the principle in *Seymour-Smith* in a more purposive or flexible fashion so as to limit the size of the relevant advantaged group to take account for drastically changing employment patterns. Alternatively, the Court of Appeal should have referred precisely this issue to the ECJ. At the same time, however, it is arguable that the material facts in *Rutherford* were sufficiently similar to those of *Seymour-Smith* to justify its treatment as precedent. What is astonishing is not the application of this precedent in *Rutherford*, but the later decision of the court to apply the same precedent to the case of *Home Office v. Bailey & Ors.*<sup>73</sup>

In *Bailey*, a group of female employees filed a claim for indirect sexual discrimination against their employer, the Prison Service, alleging that a substantial number of female executives received less opportunity for promotion and less pay than males in equivalent levels of employment. Although there was no single criterion or threshold by reference to which the workforce could be described either as advantaged or as disadvantaged, the Court of Appeal nevertheless applied the *Seymour-Smith* test, and on the basis that the appropriate pool was the entire workforce in the Prison Service, held that the disparate pay effect on both sexes resulting from the discriminatory grade structure was sufficiently substantial to justify a finding of indirect sex discrimination.

The Court of Appeal's reliance on *Seymour-Smith* as binding precedent, however, is highly questionable due to the absence of a clear criterion distinguishing advantaged from the disadvantaged group. Without clear distinguishing criterion, the court's assessment of the grading structure's disparate impact rested on a considerably uncertainty statistical basis. The court compounded the uncertainty through its necessary determination of which employment grades were of sufficient equivalency. Arguably both features which distinguished the factual scenario in *Bailey* from that in *Seymour-Smith* were sufficiently material so as to cast doubt on the application of the latter case as a binding precedent. In these circumstances the Court of Appeal should have referred the question of the materiality of these facts to the ECJ and not substituted its own view for the Court of Justice's preliminary ruling.

---

Burden of Proof Directive was *acte clair*, which, on its proper construction, the Court held, was entirely consistent with *Seymour-Smith*—another far from self-evident conclusion where the Court of Appeal should have deferred to the ECJ. *See id.*

73. *Home Office v. Bailey*, [2005] EWCA (Civ) 327.

Given the obvious differences between both case scenarios, it is difficult to resist the suspicion that in its perception of a strongly politically correct climate, the Court of Appeal chose to apply an existing precedent to novel factual circumstances to achieve a politically desirable result when legal certainty could have been more effectively advanced by an authoritative ruling by the ECJ.

Another example of flagrant disregard for well-established ECJ precedent by the English courts is *Gough v. Chief Constable of Derbyshire*.<sup>74</sup> In this case both the Divisional Court and the Court of Appeal ruled that mandatory restrictions on free movement of persons involved in violence and disorder at football matches was compatible with Community law without finding that the restriction was necessary or appropriate to achieve a public policy objective. Indeed, the court thought the restriction was obviously quite unnecessary and inappropriate.<sup>75</sup> As the Court of Appeal put it, "The UK government enjoys a wide margin of discretion in the methods it adopts, by way of primary legislation, to achieve its legitimate objective on a difficult social policy issue, even when derogating from rights established by the EC Treaty."<sup>76</sup> The language of deference to the UK Parliament adopted by the Court of Appeal may have been appropriate in the context of the European Convention of Human Rights but has no place in relation to Community law. At the time of the decision, the principle of proportionality had been well-established as a pervasive principle of Community law. Thus, although Member States have the right to impose restrictions on free movement to achieve certain justifiable objectives under Article 39(3), the Court had made plain in numerous decisions that such restrictions would be unlawful if they were either not suitable or not necessary to achieve the desired end or went beyond what is necessary to the achievement of this end.<sup>77</sup> To be lawful, a measure must be for a justifiable end and meet all three criteria of the proportionality test: suitability, necessity, and the least restrictive means available to achieve the end. In *Gough*, neither the Divisional Court nor the Court of Appeal addressed the question of proportionality, which is fundamental to the

---

74. *Gough v. Chief Constable of Derbyshire*, [2002] Q.B. 1231.

75. It was precisely the purpose of the amendments to the Football Spectators Act 1989 introduced by the Football (Disorder) Act 2000 that restrictions on travel abroad were to be made mandatory on the basis of purely domestic conduct and without any finding of a risk of disorder if the individual were permitted to travel abroad. *See id.* at 1245 (Annex).

76. *Id.* at 1222.

77. *See, e.g.*, Case 36/75 *Rutili v. Ministre de l'Intérieur*, 1975 E.C.R. 1219; Case 33/74 *Van Binsbergen v. Beestur*, 1974 E.C.R. 1299. For further discussion including that of relevant case law *see* CRAIG & DE BURCA, *EU LAW—TEXT, CASES AND MATERIALS* (2003).

issue of its lawfulness. Both courts chose to ignore relevant ECJ precedents. The Court of Appeal judgment refers to the proportionality principle in all but name when considering whether the measure could be lawful even if not necessary and/or inappropriate. Its conclusion that the measure could stand even in these circumstances, directly contradicts the ample Court of Justice case law to the contrary on precisely this point. If the domestic courts had followed ECJ precedent, as they were obliged to under the European Communities Act 1972, they would have found either that the measure was unlawful on the grounds of it either being unnecessary or inappropriate. Alternatively, they should have referred the question whether the domestic legislation met the double “necessary and appropriate” test to the European Court of Justice for a preliminary ruling. In the event they did neither, and in obfuscating the legal issue in the case by borrowing the legal concepts of discretion and margin of appreciation from the ECHR, the Court of Appeal only thinly disguised the obvious motive for this curious reasoning, namely, to avoid a high profile clash between Community law rights and Parliamentary sovereignty. Put at its simplest, the Court of Appeal ignored binding ECJ precedent and gave effect to a domestic law, which according to relevant Community case law was clearly unlawful, and following the *Factortame*<sup>78</sup> ruling, should not have been applied by the domestic court.

As noted by one commentator, *Gough* is by no means the only questionable Court of Appeal decision recently made concerning the free movement provisions of the EC Treaty.<sup>79</sup> In *International Transport Roth v. Secretary of State for the Home Department*,<sup>80</sup> the Court of Appeal was confronted directly with the question of whether a piece of primary legislation in the immigration field could be challenged as incompatible with Community law, not because of its impact on individuals wishing to travel but because of its adverse impact on the provision of haulage services between the Member States. The legislation required carriers to perform extensive checks on their vehicles in order to avoid liability, while also providing for the detention of the vehicles as security for the discharge of the financial obligations notwithstanding the fact that such vehicles were used for the provision of lawful commercial haulage services between the Member States. The core reasoning of Lord Justice Simon Brown is revealing:

I simply cannot recognise in the present scheme, inconsistent with the

---

78. Case C-213/89 *R v. Sec’y of State for Transp. ex parte Factortame Ltd.*, 1990 E.C.R. I-2433.

79. Rhodri Thompson, *Community Law and the Limits of Deference*, 2005 EUR. HUM. RTS. L. REV. 242, 243 (2005).

80. *Int’l Transp. Roth GmbH v. Sec’y of State for the Home Dep’t*, [2003] Q.B. 728.

Convention though I regard it to be, a restriction under Community law such as to require justification under the public policy derogation. To characterise the scheme as unjust and unfair is not to say that it therefore “impair[s] the very substance of the rights guaranteed,” as the court put it in the Germany case [1994] ECR I-4973, 5065, para 78. Not every breach of the Convention affecting cross-border trade and services involves an impermissible restriction on Treaty rights.<sup>81</sup>

There are at least two significant errors in this reasoning. First, the ECJ has made clear repeatedly that it considers the ECHR to be an integral part of the legal patrimony of the Community, which forms the foundation of its legal order, and that it will take heed of the Convention and the caselaw of the European Court of Human Rights in interpreting Community law. For this reason it is difficult to follow Lord Justice Brown LJ’s reasoning that a measure—be it national or a Community rule—may be incompatible with the ECHR jurisprudence but permissible under Community law. In any event, it would be for the ECJ to decide this issue. It follows that Lord Justice Brown should have referred precisely this issue for a preliminary ruling. Secondly, Lord Justice Brown’s reasoning seems confused between: (1) when a right is engaged; and (2) whether an interference with that right can be justified. Lord Justice Brown suggests that the manifest interference with the haulage companies’ provision of services does not affect any rights under Community law—a position patently at odds with the existing case law of the ECJ. The error is clear in the first and last sentences of the above quotation, where the judgment slides from the concept of “a restriction . . . such as to require justification” to “an impermissible restriction on Treaty rights.” The correct position in Community law is that the degree of interference required by the domestic statute clearly engaged Community rights, but that the restrictions might be open to justification on the grounds of public policy, and if the objective were justifiable, provided that the measure were proportionate to the objective pursued. Neither Lord Justice Brown nor his two colleagues on the Court of Appeal panel provided any coherent analysis of the position in Community law in these terms.

*International Transport Roth* was part of the sequel to the original *Hoverspeed* litigation. In *Hoverspeed I*<sup>82</sup> the essence of the claimant’s case related to a Mr. Castro, a Portuguese national of Angolan birth who was living in London as a student. While in Calais, Mr. Castro had been

---

81. *Id.* at 757.

82. *R. v. Sec’y of State for the Home Dep’t ex parte Hoverspeed*, [1999] Eur. L.R. 596 (Q.B.) (hereinafter *Hoverspeed I*).

refused carriage by Hoverspeed and was arrested by the French special police. He spent a night in a French prison and was threatened with deportation to Angola. The claimants contended that this was a situation that was grossly incompatible with Community law, and in particular, incompatible with the procedural protections that were required under Council Directive 64/221,<sup>83</sup> where a Community national is refused entry into another Member State. Article 8 of that Directive reads:

The person concerned shall have the same legal remedies in respect of any decision concerning entry, or refusing the issue or renewal of a residence permit, or ordering expulsion from the territory, as are available to nationals of the State concerned in respect of acts of the administration.<sup>84</sup>

In a series of cases, the United Kingdom has argued, and the Court of Justice has accepted, that the relevant standards of procedural protection are the general rules of judicial review of administrative action.<sup>85</sup> However, the Divisional Court in *Hoverspeed I* again deferred to the UK legislature, finding that there was no incompatibility between domestic legislation requiring the security checks by private passenger carriers and Directive 64/221. The applicable directives, in particular Directive 73/148,<sup>86</sup> permitted checks on travel documents at the national boundaries between Member States, subject to the procedural protections afforded by Directive 64/221. The court reasoned that it must follow that the same checks, even if carried out by a private party outside the territory of the Member State and without any procedural protections, were also compatible with Community law.<sup>87</sup> Again, the underlying reasoning of the court was that this was an area where the national court was required to defer to the decisions of the sovereign legislature: "If ever there was scope for a significant margin of appreciation in operating what for present purposes we are assuming to be a restriction, surely it is here."<sup>88</sup> The court's conclusion again reveals a fundamental misunderstanding of the position under Community law. The aim of Directive 64/221 was "substantially to reduce the discretionary power of the States . . . by requiring that the individual position of such workers should be given a thorough examination which is subject to review by the courts."<sup>89</sup> There was thus no question of Member States enjoying

---

83. Council Directive 64/221, 1964 O.J. (L 56) 85 (EEC).

84. *Id.* at art. 8.

85. *See, e.g.,* Joined Cases C-65/95 & 111/95, *R. v. Sec'y of State for the Home Dep't ex parte Radiom & Shingara* [1997] E.C.R. I-3343.

86. Council Directive 73/148, 1973 O.J. (L 172) 14 (EEC).

87. *Hoverspeed I*, [1999] Eur. L.R. 596 (Q.B.).

88. *Id.*

89. Opinion of Advocate General Mayras (Feb. 19, 1975) in Case 67/74, *Bonsignore*

any legislative discretion over compliance with the procedural safeguards laid down in the Directive; at best national courts could be said to have the power to fine tune those standards within the confines of the parameters already laid down by the Directive and the ECJ. Instead, as in the cases of *Gough* and *International Transport Roth*, the domestic court muddied the waters by not even addressing the crucial issue of the position in Community law and by the misleading use of the language of the “margin of appreciation” which properly belongs to the European Convention of Human Rights but is prone to misrepresenting the position in the context of Community law.

### C. *The Procedural Prerogative*

In 1976, the European Court of Justice, in its influential preliminary rulings in *Rewe*<sup>90</sup> and *Comet*,<sup>91</sup> established three principles applicable that would apply to those cases where individuals invoke Community rights before national courts:

- (1) It is a matter for Member States to determine the courts, tribunals, procedures, and remedies available to secure enforcement of directly effective Community rights;
- (2) Those national procedures and remedies must not be less favourable than those available to similar national rights; and
- (3) The national procedures and remedies must not make the enforcement of Community law impossible in practice.

The importance of these decisions is rarely fully appreciated; in *Rewe* and *Comet* the ECJ laid down the principle that it is for the legal system of each Member State to determine the procedural conditions, including time limits and rules of evidence, governing legal proceedings for the protection and enforcement of directly effective Community law. There are qualifications to this general principle, notably, national procedures must be non-discriminatory or prevent the exercise of Community rights. In practice, however, these minimum conditions have not proved very onerous, and there are many cases where the English courts have been able to rely on domestic procedure in moderating the impact of Community law. Put in the language of Lord Denning’s famous words likening Community law to the incoming tide making its way up the

---

v. Oberstadtdirektor der Stadt Köln, 1975 E.C.R. 297, 316.

90. Case 33/76, *Rewe-Zentralfinanz eG v. Landwirtschaftskammer für das Saarland*, 1976 E.C.R. 1989.

91. Case 45/76, *Comet v. Produktschap voor Siergewassen*, 1976 E.C.R. 2043.

estuaries and into the remotest riverbeds in the British Isles,<sup>92</sup> it could be said that national procedural law has functioned as an elaborate system of water locks and dams that has enabled the many individual lock-master judges to close the floodgates and stem the tide. National time limits are perhaps the procedural device with the greatest measurable effect on the ability of individuals to enforce their rights as they directly correlate to the number of cases instituted in the courts.

The short time limits in some of the English tribunals have affected the enforcement of Community law in two ways. First, many rights individuals may have under Community law are classified in English law as public law rights and must proceed by judicial review. The time limit for commencing judicial review proceedings requires that the action be brought "promptly, and in any event not later than three months after the grounds to make the claim first arose."<sup>93</sup> This rule gives the courts almost complete discretion over which cases to allow to proceed and which to throw out. However, the courts also have discretion to allow proceedings to be instituted after three months have elapsed. As of yet, there have been no successful challenges brought in the English courts against the time limit for judicial review on the ground that the discretionary time limits governing the enforcement of many rights under Community law in Britain are in breach of the principle of legal certainty under Community law.

Second, disputes between employers and employees have been one of the most litigious areas of law involving Community law. In England, actions employees bring against employers in the employment tribunals, largely because the losing party typically does not bear the costs of the other side and because of the court's are perceived as more employee-friendly and less formal. Claims before employment tribunals, however, including all claims for unfair dismissal and sex discrimination, ordinarily have to be brought within three months of the point in time when the cause of action arose. Ample evidence suggests that, because of the very strict limitation period, many meritorious employment cases, including many involving rights under Community law, are never allowed to be brought.<sup>94</sup> Moreover, where Community law and national employment law partially overlap and where the claimant has first brought proceedings under national law which were either withdrawn or dismissed, then, the Court of Appeal has held in *Staffordshire CC v.*

---

92. *HP Bulmer Ltd. v. J. Bollinger SA*, [1974] Ch. 401, 418 (C.A.).

93. CPR pt. 54.5(1) (U.K.), available at [http://www.dca.gov.uk/civil/procrules\\_fin/menus/rules.htm](http://www.dca.gov.uk/civil/procrules_fin/menus/rules.htm) (last visited Mar. 28, 2006).

94. For a full discussion see FRANCIS JACOBS & MADS ADENAS, *EUROPEAN COMMUNITY LAW IN THE ENGLISH COURTS*, 199-208 (1998).



*Barber*<sup>95</sup> that the principle of issue estoppel would prevent the claimant from bringing a second set of proceedings on the same facts. Overall, the minimum standards laid down in the *Rewe* case have provided no safeguards for litigants; as long as national procedural rules do not openly discriminate against rights under Community law, or do not make it virtually impossible to enforce these rights, the national procedural prerogative allows national courts to follow a generally restrictive approach where it would be *ultra vires* for the ECJ to interfere.

However, national time limits are subject to one major exception. According to the principle of default, a Member State in default of implementing a directive cannot rely on its own delay in proceedings instituted against it to protect the rights intended to be conferred by the Directive.<sup>96</sup> In practice this principle means that a defaulting Member State cannot invoke a national time limit to defeat a claim against it. In *Emmott v. Minister of Social Welfare*,<sup>97</sup> the ECJ established that the time limit does not begin to run against the claim as long as the Member State is in default of its obligation fully to implement the Directive.<sup>98</sup> The principle in *Emmott*, however, only applies to the institution of proceedings, and not to the institution of an appeal against a decision. This is the implication of the decision of the Employment Appeal Tribunal in *Setiyah v. East Yorkshire Health Authority*,<sup>99</sup> which ruled that no principle of Community law was violated by the application of a national law rule setting a time limit for appealing.<sup>100</sup> *Setiyah* is another case where a domestic tribunal decided to interpret and effectively limit the scope of an ECJ precedent when it should have deferred and referred the question.<sup>101</sup> It brings into focus the impact of the principle of national procedural autonomy on the enforcement of Community law without even raising the official question of judicial compliance with its substantive requirements. Through procedural limitations, even the strongest cases may be lost.

---

95. *Staffordshire CC v. Barber*, [1996] I.C.R. 379 (C.A.) (Eng.).

96. *See Case C-208/90, Emmott v. Minister for Soc. Welfare*, 1991 E.C.R. I-4269, ¶ 20.

97. *Id.*

98. *Id.*

99. *Setiyah v. East Yorkshire Health Auth.*, [1995] I.C.R. 799 (E.A.T.) (Eng.).

100. *Id.*

101. It can be argued that *Emmott* has been effectively overruled by the ECJ in Case C-188/95, *Fantask A/S v. Industriministeriet*, 1997 E.C.R. I-6783. *Fantask*, however, was referred and decided several years after the domestic case of *Setiyah*. As the latter decision clearly conflicted with the then ECJ precedent, the domestic tribunal should have referred it.

*D. Judicial Decisions Between Ignorance and Oversight*

Contrary to the received view of the English courts as models of compliance, it has been shown that the English courts have skilfully used the uncertainty inherent in the application of ECJ precedent and of the *acte clair* doctrine. Matters are made worse by the fact that the Community legal order does not provide any judicial remedy against national courts for failure to make references to the ECJ or to apply binding ECJ precedent. As one notable commentator has shown, judicial discretion in the absence of effective Community sanction has allowed domestic political choices by Parliament to prevail over conflicting, doctrinally superior Community law.<sup>102</sup> On other occasions the English courts effectively imposed their own social and economic policy by favoring an arguably one-sided approach to sex discrimination or by invoking floodgates arguments for the sake of protecting the public purse, all either on the basis of alleged established precedent or under the guise of *actes clairs*. In many cases, however, it remains unclear whether the determining factor of the misapplication of Community law was deliberate manipulation, wilful disregard, or mere ignorance.

The fact that England has gotten by for centuries with little more than ten dozen High Court and Court of Appeal justices has long been one of the enduring mysteries in the eyes of a baffled outside legal world. Part of the explanation—less well known and perhaps less awe-inspiring—is the fact that traditionally English judges were not expected to know the law relevant to the case before them but rather relied on counsel for the exposition of the pertinent law. Somehow during the adversarial clash between starkly opposed pictures of the law as it was argued to apply to the facts, the truth was somehow assumed to break through and crystallize brightly in the sound judgment of the impartial judicial spectator. While, over recent decades, there has been a felicitous trend toward a more informed and interventionist judicial approach, even today most judges would not have received any formal legal training in Community law. In the early decades of British membership it was probably no exaggeration to say that most judges would have been practically ignorant of Community law. Most barristers, likewise, at least during the initial period of British membership of the EC, would have had little or no training in EC law and have been required to “mug up” the requisite unfamiliar law on a case-by-case basis; nonetheless, judges would have been almost entirely reliant upon them. In general terms, the quality of judicial decisions indicates that the situation began to improve after 1985, shortly before EC law became a compulsory

---

102. See Thompson, *supra* note 79.

subject for all UK law students in the mid-1990s. Even today, however, the non-specialist training and function of most High Court judges and of many barristers inevitably means that counsel will fail to cite all the relevant law, with the judge in no position to correct the oversight. This applies to Community law no less than any other specialist areas of the law, and the case of *Haracoglou* is a case in point.<sup>103</sup>

As the facts are stated in the decision, Ms. Haracoglou was the daughter of Greek nationals born in London. At the age of three her parents separated and her mother returned to Greece taking her daughter with her. Haracoglou was educated in Greece until the age of 18, and then returned to the UK to complete a three year law degree at University College London. Later, she was accepted for a course at the European University Institute (EUI) and applied to the Department for Education and Skills (DfES) for support. Regulation 4 of the *Education (Student Support) (European Institutions) Regulations 2000* (“the regulations”) provided that a person shall be eligible for support in connection with attendance at a designated course if a number of conditions are satisfied. Haracoglou’s course at the EUI was a designated course. Regulation 4(a) required eligibility under paragraph 8 of schedule 1 to the regulations. Paragraph 8(c) provided that a person was eligible for support if her residence in the UK “has not during any part of the period referred to in subparagraph (b) been wholly or mainly for the purpose of receiving full-time education.” The period referred to in subparagraph (b) was the period of three years preceding the first day of the first academic year of the course. It was conceded that Haracoglou was ordinarily resident during that three-year period. The principal issue was whether Haracoglou’s residence had “been wholly or mainly for the purpose of receiving full time education.” On these facts, the DfES took the view that Haracoglou had returned to the UK and had been a resident in the UK during the three relevant years “wholly or mainly for the purpose of receiving full-time education.” Haracoglou denied that her residence in the UK was wholly or mainly for the purposes of education, and sought judicial review of the decision on the application for funding for student support.<sup>104</sup>

Justice Hooper accepted her argument and ordered the DfES to fund her course at the EUI on the ground that Haracoglou, although living abroad until the age of eighteen and having entered this country two months before the commencement of her course at University College London and proposing to leave it a few months after completing her full-

---

103. *The Queen on the Application of Harcoglou v. Dep’t of Educ. & Skills*, [2001] EWHC (Admin) 678 (Eng.).

104. *See id.*

time degree to continue her studies elsewhere, had not been resident in Britain for those three years spent in full-time study either wholly or mainly for the purposes of education. Instead, he accepted her argument that while she may have spent the three relevant years studying, those studies were merely a necessary means to her end of becoming a practicing lawyer in the UK. Hence her residence in Britain had been devoted almost exclusively to the pursuit of a university degree had not in reality been for the purpose of studying law, but solely for practicing it—a distinction whose logic was not lost on Hooper. If either counsel had drawn Justice Hooper's attention to the fact that the domestic regulations gave effect to a directly effective EC directive and that the former had to be interpreted in the light of the latter, even Justice Hooper might have been estopped from ruling as he did.

The traditional reliance by the English judiciary on counsel for both parties to refer to all the relevant law constitutes a formidable and almost ineliminable institutional obstacle to the faithful application of any relatively unfamiliar or specialist area of law. Often this means that a judge who has very little expert knowledge of Community law is instructed on the matter by two or more counsel none of whom may be a Community law specialist. There now are a small number of three of four sets of barristers' chambers with EC law expertise at the English Bar, but because of the pervasive nature of Community law many cases involving both common law as well as EC legal points are still argued by traditional generalist or common law barristers. Therefore, all too often the blind are still being lead by the visually impaired.<sup>105</sup>

*Hoverspeed* I provides a telling example of the abiding self-confidence of the common law judge in his ability, all too often blissfully unencumbered by knowledge, to decide any Community law in question. In the case none of the three Court of Appeal judges provided any coherent analysis of the Community law position. However, Lord Justice Jonathan Parker came up with an absolute gem when he repeated the unfortunate erroneous formula from an earlier Court of Appeal

---

105. For a few good examples, see FRANCIS JACOBS & MADAS ADENAS, *supra* note 94. One recent high profile example mentioned is the case of *R. v. Ministry of Defence ex parte Smith*, (1996) 2 W.L.R. 305. One of the issues in the case was whether the discharge of the applicants on the ground that they were of homosexual orientation amounted to a breach of the Equal Treatment Directive 76/207. The Court of Appeal held that this was not a breach of the directive, but its judgment was called into question almost immediately by the publication of the Advocate-General's Opinion in the ECJ case of *P v S*. The Opinion had been published and received considerable attention by EU lawyers by the time the House of Lords Appeal Committee considered the petition to appeal against the Court of Appeal's decision in *ex parte Smith*. The Appeal Committee included Lord Slynn, a former judge of the ECJ. It refused leave to appeal. The Advocate-General's Opinion in *P v S* was not referred to by the parties nor in the decision of the highest court of the land. See JACOBS & ADENAS, *supra* note 94 at 143-44.

case,<sup>106</sup> that “frontier controls have ‘nothing to do with Article [49].’”<sup>107</sup> This is not only flatly inconsistent with the terms of the Community directives governing this area,<sup>108</sup> but it is also inconsistent with a whole series of cases where the European Court of Justice has considered this issue, such as *Wijsenbeek*.<sup>109</sup> The “veil of ignorance” from behind which the English courts still decide many points of Community law, led one leading practitioner to summarize the situation in these terms: “On the whole the English courts apply EC law with the utmost good faith though not always with much depth of knowledge.”<sup>110</sup> The above cases suggest that, while the former may be questioned, the latter is beyond dispute.

### E. *Cost and Delay*

Victory in the courtroom means not only losers but even the victors are undone, especially when winning comes at great cost and delay. Considerable expense and delay are associated with litigation in all legal systems, except perhaps for court martial trials where both are reduced at the expense of justice. Yet, it seems that, on average and across almost all areas of law, the cost of litigation in the English common law system exceeds that in any Continental jurisdiction. For example, the average cost of high value litigation in the English High Court is between two-and-a-half and three times the cost of an equivalent action in Germany.<sup>111</sup> The reasons are obvious: higher legal fees, the duplication of effort and expenditure arising from the division into barristers and solicitors, more extensive disclosure and due diligence requirements, the adversarial system with its emphasis on lengthy direct examinations and even lengthier cross-examinations, and as a result of extensive disclosure, the tendency of many lawyers to hide potentially damaging information by burying it deep within innumerable files of irrelevant documentation. None of these is an exclusive feature of the common law system but

---

106. *R. v. Sec’y of State for the Home Dep’t, ex parte Flynn*, (1995)139 Sol. J. 196 (C.A.) (Eng.).

107. *Hoverspeed I*, [1999] Eur. L.R. 596 (Q.B.), ¶ 202.

108. *See, e.g.*, Council Directive 73/148, 1973 O.J. (L 172) 14 (EEC); Council Directive 64/221, 1963-1964 O.J. SPEC ED. 117 (EEC).

109. *See Case C-378-97, Criminal Proceedings against Wijsenbeek*, 1999 E.C.R. I-6207, ¶ 45. (finding Member State’s requirement to show passport upon entry engaged the right of free movement).

110. Private e-mail to Dr. Gunnar Beck (Aug. 23, 2005) (on file with author).

111. PENNY DARBYSHIRE, *DARBYSHIRE ON THE ENGLISH LEGAL SYSTEM* 245 (2005). Penny Darbyshire in her most recent edition of her textbook on the English legal system cites estimates according to which a high value day case in the High Court would involve court fees alone of around £6,100 in England compared with only £2,300 in Germany. The discrepancy in lawyers’ fees involved in High Court litigation in English courts and those in other jurisdictions outside the United State and certain Commonwealth jurisdictions is broadly similar. *Id.*

taken together, they are more characteristic of litigation and court proceedings in England than elsewhere in Europe. To the extent to which the cost of litigation is higher in the English courts than elsewhere in the Community, the higher costs act as a deterrent which, *ceteris paribus*, makes it less likely that individuals will seek redress through the courts. Given that EC law is a specialist practice area where most of the advice is given by medium-sized to very large commercial law firms, this is likely to apply to the enforcement of individual rights under EC law just as much as to any other area of litigation. Similar to the U.S., higher litigation costs have not prevented the UK from becoming a more litigious society. While Community law is not necessarily less frequently litigated in the UK courts, the higher cost of doing so certainly raises the stakes.

Delay is a further deterrent for citizens seeking to enforce their rights through the courts. Between 1987 and 1992, the average delay in dispatching a reference to the ECJ for a preliminary ruling from the moment the order was drawn up was almost three months and often significantly longer in individual cases. There is no comparable set of data for the period from 1993 to the present but practitioners interviewed by the author suggest that, if anything, there might have been an increase. *In extremis*, the entirely avoidable administrative delay by the English courts can add up to fifty percent to the average two years it currently takes the ECJ to give a preliminary ruling.

#### IV. Conclusion

Section 2 of the 1972 Act requires the English courts to perform not only their traditional role as the domestic courts of the United Kingdom but also their novel role as the UK courts of the European Union. The belief is that the UK courts have been exemplary in discharging their new function and faithfully applied Community law throughout the three decades of British membership, often in the face of considerable political opposition and euro-sceptic public sentiment. The above discussion suggests a more nuanced and complicated picture. It is best described as a contrast between the high profile theoretical layer of official acceptance and the practical layer of day-to-day judicial decision-making where judges are largely free from the constraints of political and public scrutiny and loyal cooperation with the ECJ has been far from uniform.

From the first perspective, the standard view of the English courts as models of compliance seems largely uncontested. This is true particularly in relation to the high profile issues of the supremacy and direct effect of Community law, where the domestic courts have scrupulously implemented their mandate under the 1972 Act, and aligned

legislation with Community law wherever possible while giving primacy to EC law in cases of conflict. In one sense, the structure of the English legal and judicial system facilitated acceptance of the doctrines of supremacy and direct effect. The absence of a written constitution left the courts free from the constraints of a superior national legal code, which in other member states, acts as a side-constraint on parliamentary legislation, including decisions to delegate such powers to a supra-national organization thereby preventing national constitutional courts from, accepting the unconditional supremacy of Community law. In Britain, by contrast, absence of such a higher national law means that the House of Lords could simply not apply national legislation that is irreconcilable with Community law. In this sense, judicial discretion has favored the implementation of Community law in Britain.

Inevitably, discretion will always facilitate and not hinder its implementation. First, in spite of persistent euro-scepticism there is no doubt that the government wanted to fulfil Britain's obligations under the EC Treaty. Had the courts refused to discharge their vital role in enforcing compliance, this would have led them into conflict with the political authorities. It is even arguable that, in implementing unpopular EC legislation and ECJ case law, the courts provided governments with a convenient excuse, in some cases, for adopting a measure when its enactment through the domestic legislative machinery would have been politically undesirable. Second, judicial discretion has not merely facilitated the application of EC law but the application of EC law has itself favored the judicialization of legislation in the UK. Judges, thus, had good reason to welcome their novel function as Community law enforcers for it strengthened their hand vis-à-vis the domestic legislature, which has become obvious in the strongly purposive reading adopted by the Courts when interpreting statutes with a view to their compliance with the Human Rights Act 1998.

Third, like the exercise of all judicial power which rests on political acquiescence, the broadly loyal attitude shown by the domestic courts in discharging their less familiar role as the UK courts of the European Community, is conditional on the persistence of a political climate where British membership in the EC is not seriously questioned. If that climate were to change, then it remains to be seen whether a judiciary, which because of its legal training and outlook, cannot be assumed to be naturally integrationist, will resist the temptation of watering down Community legislation and case law by liberal use of its largely unchecked powers under the *acte clair* doctrine as well as its frequently highly restrictive and narrow reading of existing ECJ precedent. The present Community legal system fails to provide any real safeguards or remedies. The Community legal system remains dependent on the

cooperation of national judiciaries, and judges are likely to cooperate only in a broadly sympathetic political climate. If the political parameters change, so are judicial attitudes and opinions. In that sense, F.A. Hayek was right: the very considerable discretion enjoyed by common law judges both tends to record and translate into law changing social and political views, and it does so first and foremost because judges know that their power is conditional on not overstepping certain parameters of political acquiescence.<sup>112</sup>

In summary, the official view, as it may be called, of the English courts as a model for national courts of the European Union is not so much wrong as it is misleading. It represents a highly incomplete picture premised almost exclusively on the relative ease with which the highest English courts absorbed the doctrines of supremacy and direct effect—a fact almost wholly explicable in terms of the absence of a written constitution in the UK. In other Member States, by contrast, it has been precisely the non-negotiable domestic status of the national constitution which has infused judicial debates about the limits of the primacy of Community law. In Britain where such debates were more easily resolved, the implementation of Community law is itself conditional on the traditional model of parliamentary supremacy. If Parliament were to legislate in open defiance of Community law, the English courts would be placed in a position where they would have to choose between Parliamentary and Community legal supremacy. As in other Member States, however, such conflict has so far been carefully avoided.

The concepts of supremacy and direct effect may have been largely accepted but they remain largely theoretical concepts, to be applied in practice to recalcitrant facts, shifting evidential patterns to be evaluated in accordance with elaborate national procedures and with reference to problematic precedents and *les actes ni clairs ni évidents*. It from this, the second perspective which tries to cut through the thickets of everyday judicial decisions to the reality of the cooperation between national courts and ECJ, and not at the high profile level of official compliance that the English courts have been able to bring to bear their powers of discretion on the implementation of Community law on its long way through the national courts. In the common law tradition judicial power is exercised mainly through the interpretation of legal texts and the central concepts they contain and the distinction, widening and manipulation of precedents that may be doctrinally immutable but practically far from determinate in new factual scenarios. The above examples suggest that in the context of the implementation of Community law the exercise of judicial power has made itself felt via

---

112. See PETSOULAS, *supra* note 1.



three principal avenues. First, though the careful distinction, further abstraction or extension by analogy of ECJ precedents and relevant domestic cases the courts have skilfully adjusted the domestic implementation of Community law to their own preferred interpretations and political choices. Conversely, the doctrine of *acte clair* has provided the domestic courts with a second major avenue to bring about the same result: by deciding for themselves Community law points which, neither clear nor yet decided, they should have referred to the Court of Justice. Thirdly, Community law has conferred on national courts almost complete procedural control over the application of EC law in the national courts, which is practically the only route open to private litigants seeking to enforce their rights.

Like so much of the law in general, court procedure enjoys almost complete protection against public and press criticism because of its distinct mixture of great technicality and relentless tedium. Thus hidden from wider scrutiny, the impact of the national procedural prerogative has made itself felt across the whole spectrum of Community law litigation in the English courts. The above discussion does not suggest that the subversion of Community law by the English judiciary has been comprehensive, systematic and wholly intentional. Yet, it does call into question the received view of domestic compliance as near universal, in utmost good faith and with requisite competence. At no point so far has non-compliance seriously threatened the enforcement of Community law throughout the United Kingdom, but its persistence over a period of over thirty years—be it due to abiding ignorance or the result of deliberate domestic fine tuning or probably as result of both—might well in retrospect be judged an ominous pointer, if ever the English courts were asked to choose between their present potentially conflicting loyalties as the executors of (or true masters over) legislative will and the domestic agents of a supranational judicial structure. While there is much that this article has been designed to call into question, it does at least give a clear implied answer to the question of how the English courts would respond to such a situation now or for the foreseeable future.