prerogative. But the Privy Council has also produced a significant modification of dualist concepts of sovereignty. For the first time, the Board has clearly accepted that the content of domestic legal rights can be altered by the exercise of the prerogative involved in treaty ratification or, to put it another way, that "due process of law ... can convert the base metal of executive action into the gold of legislative power" (*per* Lord Hoffmann, in dissent). This question has also arisen before other leading courts. A majority of the Supreme Court of Canada has recently held that the values reflected in international human rights law may inform the contextual approach to statutory interpretation and judicial review (*Baker* v. *Canada (MCI)* (1999) 174 D.L.R. (4th) 193). This result was described by Iacobucci J. (in dissent) as giving "force and effect within the domestic legal system to international obligations undertaken by the executive alone that have yet to be subject to the democratic will of Parliament". If that result is considered objectionable in relation to statutory provisions, how much more so where it affects the content of the Constitution?

IVAN HARE

EC DIRECTIVES AND MISFEASANCE IN PUBLIC OFFICE

IN *Three Rivers District Council and others* v. *Bank of England* [2000] 2 W.L.R. 1220, the House of Lords answered two questions. What are the defining conditions of the tort of misfeasance in public office? What was the potential liability of the Bank of England under an EC directive relating to the exercise of its supervision over a credit institution? The questions had been raised as preliminary legal questions before further trial of the issues arising in the proceedings.

The proceedings related to the collapse of the Bank of Credit and Commerce International (BCCI) in 1991, the principal cause of that collapse being fraud by persons at a senior level in BCCI. The plaintiffs, depositors with UK branches of BCCI, claimed that, since the Bank of England could have known of the true situation in BCCI, the Bank and certain of its senior officials had committed the tort of misfeasance in public office, and had been in breach of EC law, by acting in bad faith in licensing BCCI in 1979 as a deposit-taking institution, by failing to revoke that licence, and, in general, by failing to exercise appropriate supervision over BCCI.

This was the first occasion on which the House of Lords has had to determine the requirements of the tort of misfeasance in

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public office, the last substantial consideration of the matter having been the decision of the Court of Appeal in *Bourgoin SA* v. *Ministry of Agriculture, Fisheries and Food* [1986] Q.B. 716. The House was accordingly constrained to establish the defining conditions of a tort, that is to say, of a legal structure designed essentially to regulate bilateral legal relations, but adapting the hallowed and arcane categories of tort law to the very different legal situation of the abuse, or abusive non-use, of powers conferred on public authorities in the public interest.

It was common ground between the parties to the proceedings that the Bank and its officers were holders of public office and that they had acted in exercise of public office. To constitute misfeasance in public office, the public officer must have acted in bad faith, in the sense that he acted in the knowledge that he was acting in excess of his powers or in reckless indifference to the illegality of his acts. Following the approach of Clarke J. at first instance, the House decided that, when there is no actual intention to injure a particular plaintiff, it need not be shown that the public officer must have foreseen that his action would cause damage to any particular person, if he should have known that his action would probably injure the plaintiff or a person of a class of which the plaintiff was a member. Damages can be recovered in respect of consequential economic loss, within the limits set by the conditions of the tort relating to the public officer's state of mind.

Consideration of the public officer's state of mind raises problems, especially in respect of ministers and departments of central government whose decisions are made collectively, involving many minds and with the assistance of many specialist legal advisers. The situation in the *Bourgoin* case was highly unusual in that the Ministry must have known that it did not, as a matter of EC law, have the power to use its powers in the way that it did, and there was surprisingly strong evidence of bad faith. However, even in that case, it may be that the Government were acting in what they considered to be the public interest, albeit on the basis of what others would regard as legal and political misjudgments.

If misfeasance in public office did not tenuously exist as an historical survival, it is doubtful whether anyone would invent it, at least in the form of a tort. Had the House of Lords, in the *Three Rivers* case, conceived of the matter as essentially a public law problem, it might have avoided the pseudo-subjective elements of the definition, requiring instead that there should have occurred a flagrant and aggravated abuse, or abusive non-use, of a public power causing actual and quantifiable loss to particular persons or classes of persons.

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The House sought to strike a balance between redressing the consequences of unlawful behaviour and, in Lord Steyn's words, allowing public officers, who must always act for the public good, to be assailed by unmeritorious actions. Perhaps, from a more characteristically public law perspective, one might say that the decision of the House reflected an unspoken concern that the courts should not, by way of the tort of misfeasance in public office, take on themselves the role of an ombudsman, a parliamentary committee, or an organ of public opinion in reviewing even egregious acts of maladministration, official incompetence, or bad judgement. It is to be hoped that a similar reticence will inspire the application by the courts of the Human Rights Act 1998.

The House adjourned the misfeasance aspect of the appeal for further argument in the light of its clarification of the law. The question of the unlawfulness of the Bank of England's behaviour under EC law raised a complex problem of the application of an EC directive, the First Council Directive on the co-ordination of laws relating to credit institutions (Directive 77/780 EEC of 1977; usually referred to as the First Banking Directive).

The central focus of the discussion in the House of Lords, as in the Court of Appeal, was the question whether the legislative intention of the Directive was to confer rights on individuals: rights to the benefit of the level of banking supervision provided for in the Directive, and hence a right to assert the liability of the Bank of England under Community law if it failed to provide that supervision, and a right to claim damages under Community law for loss arising from that failure, whether or not the requirements of the tort of misfeasance in public office were satisfied as a matter of English law. The House of Lords affirmed the decision of the Court of Appeal (Hirst and Robert Walker L.JJ., Auld L.J. dissenting), holding that the EC directive did not confer on individuals the rights claimed by the plaintiffs. The EC aspect of the case was fully discussed only in the opinions of Lord Hope of Craighead and Lord Millett.

The proceedings in the case seem to have been based on certain rather surprising assumptions about the direct effect of EC directives and about liability for breaches of Community law. The controversial jurisprudence of the European Court on the so-called direct effect of directives does *not* mean that a directive may have direct effect, within the national legal order, when that seems to be the legislative purpose of the directive, or that there is a direct effect of directives identical to that of provisions of the Community treaties or of an EC regulation. The Court itself has called it an *analogous* form of effect. Also, the Court's jurisprudence does *not*

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mean that violation of a particular provision in a directive, which is found to have an effect analogous to direct effect, necessarily gives rise to a right of action and remedy in a person affected by that violation. The legal effect of a directive in national law is much more complicated than that.

The central purpose of a directive such as the First Banking Directive is to create a level playing-field, to avoid what one might call predatory over-legislating or predatory under-legislating by the member States, both of which may be a form of disguised restriction on trade or of discrimination on the ground of nationality. The former means that the national law makes it exceptionally difficult for non-nationals to carry on a particular economic activity in another member State. The latter confers an improper advantage on nationals by imposing minimal legislative or regulatory requirements. It is for this reason that some directives allow the national legislator to go beyond the terms of the directive, while others allow the national legislator to refrain from incorporating all the possibilities allowed by the directive. The idea is to establish a settled core of uniform law, leaving other matters to be decided as a matter of national public policy. The Community public interest in co-ordinated banking law is served by the First Banking Directive. The national public interest in the protection of creditors is served by the national law implementing the Directive.

The net result is that it is the implementing national law, not the directive, which is applicable in the national legal order. It is for this reason that Article 249 of the EC Treaty (formerly Article 189 of the EEC Treaty) defines a directive as setting out "the result to be achieved" by the implementing national law. This is reflected in section 2(1) of the European Communities Act 1972, which provides that an "enforceable Community right" is a right which is to be given legal effect "without further enactment".

Directives, unlike regulations, thus essentially establish legal relations among the member States, their due implementation being overseen primarily by the Commission and, if necessary, by the Court of Justice. But, to the dismay of some commentators and some national courts, the Court has held that, in very exceptional circumstances, an individual may rely on the provisions of a directive in national legal proceedings.

To arrive at that result, complex conditions must be satisfied, the most fundamental of which is that there should have been a failure by a member State to implement the directive in national law, or to implement it properly, within the time-limit set by the directive itself for its implementation. It must then be shown that

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the relevant provision in the directive in question has certain characteristics of precision and completeness, and that it is, in general terms, suitable to be relied on by an individual litigant. Thirdly, it must be shown that the directive is being invoked against a defendant who is the defaulting State or an emanation of it, a test which becomes more and more difficult to apply as more and more constitutionally anomalous agencies are created which are neither fully under the control of the government nor fully independent of it. The Court has also allowed for the possibility that, in certain circumstances, even a properly implemented directive may be referred to, for example to assist in the interpretation of the national implementing law, perhaps even in so-called horizontal cases, where the parties to the proceedings are non-State persons.

The Court's whole doctrine of direct effect, whether of treaty provisions or of directives, is open to criticism. Twenty years ago, an exceptionally authoritative commentator (Pescatore, (1981) 8 E.L.R. 155–177) argued that the doctrine of direct effect was unnecessary and that courts should simply decide, in the case of every legislative form of Community law, whether a particular provision conferred a right on the person claiming that right, a task which is the routine task of all courts in relation to the many different forms of national legislation. It is possible to hope that the doctrine of direct effect may ultimately wither away.

There is a general principle of EC law that all necessary remedies must be available under national law to ensure that Community law is effectively enforced. But it follows from the nature of directives considered above that there is no rule of EC law requiring a general remedy under national law to enforce a member State's liability for breach of its obligations under a directive. The *Becker* decision of the Court of Justice (Case 8/81; 1982 E.C.R. 53), considered at length in both the Court of Appeal and the House of Lords and referred to as a "liability" case, was not a case on liability for breach of Community law. It was a paradigm case on the legal effect of directives, in which the Court ruled that a taxpayer could not be obliged to pay tax which was payable *under German law* but which would not have been payable if an EC directive had been properly implemented in German law.

The *Francovich* decision of the Court (Joined Cases C-6/90 & C-9/90; 1991 E.C.R. I–5357), also much discussed in the *Three Rivers* decisions, established a new form of liability, referred to as *State liability*. It requires a member State to compensate those who have suffered loss or damage from a violation by that State

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of its obligations under Community law, including loss or damage caused by a failure to transpose a directive properly in national law. Once again, the question of what is the "State" is a difficult one, especially in a constitutional system, such as that of the United Kingdom, where there is no constitutional conception of the State.

However, a *Francovich* action is not merely a general remedy in damages for breach of obligations owed by a member State to the plaintiff. There are cases, such as the *Factortame* case (C-48/93; 1996 E.C.R. I–1029), where an EC Treaty provision which has direct effect has been violated by the member State, so that the plaintiff can rely on the Community law provision in asserting the liability of the member State for what it has done in the realm of national law. But it is not necessary to show that the plaintiff had Community law rights correlative to the member State's Community law duty, other than the right to bring a *Francovich* action. *Francovich* is, as it were, a public law remedy in Community law, not merely a quasi-tort action.

In *Francovich* itself, where the defendant was the Italian Republic, the Court had ruled that the relevant provisions of the directive in question *did not* have direct effect, despite the failure to transpose the directive into Italian law, but it went on to rule that the claimants had been harmed by the absence *in Italian law* of the salary-guarantee scheme, for employees of an insolvent company, which would have existed if the directive had been duly transposed. In the *Dillenkofer* case (Cases 179–180/94; 1996 E.C.R. I–4845), also relied on in the opinions in the House of Lords, the Court ruled, not on whether the provisions of the directive had *direct effect*, but on whether *the result to be achieved* by the directive, that is, its proper transposition into German law, would have given to individual travellers the right, under German law, to a refund in the event of the insolvency of a package-tour company.

The House of Lords summarily dismissed the possibility of seeking a preliminary ruling from the European Court, on the ground that the matter was *acte clair*, despite the fact that the problem of the nature and effect of the directive had been a central issue in the case, and much intellectual effort had been devoted to that difficult matter. Provisions of the First Banking Directive have been the subject of preliminary rulings by the Court on two occasions.

However, as in its approach to the direct effect of directives, here also the House of Lords may be ahead of its time. Every legislative act and every decision of a court is an *acte obscur*, at least as soon as its meaning and effect are put in issue in legal

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proceedings. It is the everyday task of courts to find and analyse legal obscurities and to resolve them. The time must come when national courts simply treat Community law as an integral part of national law and do their best to interpret it, unless, in a particular case, the task seems to exceed the limits of their normal interpretative practices and competence. To refer questions of interpretation routinely to the European Court is to alienate the Community legal system from the national systems.

It is possible to hope that preliminary rulings may also wither away, or even be abolished so far as the older member States are concerned, leaving the possibility for the European Court to review exceptionally important or dubious national court decisions, using a sifting process similar to the *certiorari* system of the US Supreme Court, and leaving national courts under the obligation, in the excellent wording of section 3(1) of the European Communities Act 1972, to apply "the principles laid down by and any relevant decision of the European Court".

PHILIP ALLOTT

STAYS AND THE EUROPEAN CONVENTIONS—END-GAME?

MAY an English court, having jurisdiction under the Brussels or Lugano Convention, decline to entertain proceedings on the basis that a court in a non-Contracting State is the *forum conveniens*? Many would doubt it—can national law oust jurisdiction conferred by the Conventions? But the Court of Appeal famously decided otherwise in *Re Harrods (Buenos Aires) Ltd.* [1992] Ch. 72. The Conventions, it concluded, are designed to harmonise the jurisdictional rules of Contracting States only to the extent necessary to facilitate the enforcement of judgments between such States, their primary concern. That objective is unaffected if a case is eventually tried in a non-Contracting State, so stays in such cases are permitted. The House of Lords in *Harrods* referred the point to the European Court of Justice, but the case was settled, creating uncertainty about the correct solution, yet leaving all courts but the House of Lords bound by the Court of Appeal's decision.

Hints of unease have occasionally surfaced (see *Haji-Ioannou* v. *Frangos* [1999] 2 Lloyd's Rep. 337). But, despite its unpromising provenance, English courts have seldom questioned the *Harrods* principle, nor sought to cabin its scope. A recent example of such deference is *Ace Insurance SA* v. *Zurich Insurance Co.* [2000] 2 Lloyd's Rep. 423, where the defendant sought a stay of English

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