EC COMPANY LAW—THE EUROPEAN COMPANY V. THE EUROPEAN ECONOMIC INTEREST GROUPING AND THE HARMONIZATION OF THE NATIONAL COMPANY LAWS

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I. INTRODUCTION

Upon the emergence of the European Economic Community (EC or EEC) in 1957, the Commission of the European Community and the respective business communities realized that the existing differences between the company laws of each signatory nation formed a barrier against the creation of a Common Market as prescribed in the Treaty of Rome. The creation of a Common Market mandates that companies be able to easily engage in transnational transactions

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1 The Treaty of Rome establishing the European Economic Community (EEC) was signed on March 25, 1957 and went into effect on January 1, 1958. The six signatory countries were the Federal Republic of Germany, France, Italy, Belgium, Luxembourg, and The Netherlands. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 3 [hereinafter EEC Treaty].

2 The basic principles creating the Common Market as expressed in article 2 of the Treaty of Rome have been reaffirmed in the Single European Act. See 30 O.J. EUR. COMM. (No. L 169) 1 (1987) [hereinafter Single European Act]. Article 2 of the EEC Treaty provides:

It shall be the aim of the Community, by establishing a Common Market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between its Member States.
and be able to easily establish new subsidiaries in other EC countries.  

The Commission has taken a twofold approach to achieve these objectives. First, it has tried to harmonize the Member States existing company laws by initiating directives which must be implemented by the national authorities within their legal systems. These directives will be discussed in part II. This harmonization of company law is aimed at realizing the complete freedom of establishment in the EEC. 

Second, to avoid the disadvantages of the harmonization process and to realize a more European outlook, the Commission has proposed two new company forms to be governed mainly by Community law instead of national law. These are the so-called “societas Europaea” or “SE” and the “European Economic Interest Grouping” or “EEIG.” The former constitutes the main part of this article, but a discussion of the SE, and especially a discussion of the necessity of the SE, would not be complete unless situated in the context of these other related subjects. Therefore, parts II and III contain a

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4 See infra Section II. A.

5 However, harmonization by the use of directives cannot create a completely uniform set of laws since each Member State is free to establish its own laws implementing the directive. The objective of complete freedom of establishment cannot thus be realized through this process.


brief discussion of the harmonization of the European company laws and the EEIG.

II. THE EUROPEAN HARMONIZATION EFFORTS

The Commission's efforts to harmonize existing company law is based on Article 54(3)(g) of the EEC Treaty and is an attempt to coordinate each Member State's company laws through directives. This harmonization is necessary to avoid distortions in the market which may result from the differences in each Member State's economic development and the varying corporate requirements of their national company laws. If no harmonization between the company laws of the different Member States existed, companies would seek to operate from the Member State that has the least restrictive company laws.

The United States experience has proven that competition to attract corporate resettlement through lenient corporate laws results in a general lowering of corporate standards. If the European Community does not prescribe minimum standards, by using directives or by introducing compulsory Community company law, then it risks a similar situation as the United States where a "pygmy among the 50 states" dictates the primary policy of American corporate law; satisfying big corporations and increasing their revenues. In order to remedy this "Delaware syndrome," harmonization of national company laws appears to be necessary.

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8 Article 54(3)(g) provides:
The Council and the Commission shall carry out the duties devolving upon them under the preceding provisions, in particular:
(g) by coordinating to the necessary extent the safeguards which, for the protection of the interest of members and others, are required by Member States of companies or firms within the meaning of the second paragraph of article 58 with a view to making such safeguards equivalent throughout the Community.

EEC Treaty, supra note 1.

9 Unless at least some harmonization is realized, the "Delaware effect", feared by the Commission and countries with strict and well developed company laws (such as Germany), will be realized. See Dine, The Community Company Law Harmonization Programme, 14 EUR. L. REV. 322, 328 (1989).


11 Id. at 701.

12 Id. at 700.
A. The Different Company Directives

The seven Directives which have already been adopted by the Council will now be discussed briefly. The First Council Directive of 1968 provides for a system requiring all companies to publicly disclose basic commercial data; i.e. paid capital, balance sheets, profit and loss accounts, and articles of incorporation. The Directive also provides for provisions which protect third parties by limiting the doctrines of constructive notice and ultra vires.

The Second Council Directive applies to public companies and lays down minimum requirements for their formation and maintenance and the increase and reduction in their capital. A public limited company must exceed 25,000 ECU in minimum subscribed capital.

The Third Council Directive of 1978 regulates internal mergers between public undertakings where the assets and liabilities of the acquired company are simultaneously transferred to the acquiring...
company. The Fourth Council Directive of 1978 provides the rules regarding the drawing up of the accounts of undertakings. The Sixth Council Directive of 1982 is the most recent directive that has been accepted by the Council and implemented by most of the Member States. This Directive provides for a public company's division into entities and the allocation of its assets and liabilities among the various beneficiary companies. It also contains specific provisions for the protection of creditors. The Seventh Council Directive of 1983 contains detailed rules regarding the drawing up of consolidated accounts and rules about publication of these accounts by companies with subsidiaries. The Eighth Council Directive of 1984 ensures the independence and the integrity of auditors in carrying out their statutory audits of company accounts.

B. Evaluation of the Directives

The harmonization of company laws has the advantage of minimizing problems caused by discrepancies between the company legislation of different nations without forcing the Member States to accept a supranational company law. In order to ensure that a directive has a harmonizing effect, the directive must be detailed and inflexible. Consequently, the Council has encountered difficulties in formulating and adopting directives.

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19 This directive protects the rights of creditors, shareholders and employees, and thus does not in principle have antitrust implications. This directive has not yet been implemented by Belgium, Italy, and Spain.
21 See Dine, supra note 9, at 324-25; Nieuwdorp, supra note 16, at 31.
23 Belgium, Italy and Spain have not yet implemented the Sixth Directive.
25 The Seventh Directive has been implemented only by France, Germany, Greece, Luxembourg, and The Netherlands. See Dine, supra note 9, at 325-26; Nieuwdorp, supra note 16, at 32.
27 The Eighth Directive has so far been implemented only by Belgium, Germany, Luxembourg, and Spain. See Dine, supra note 9, at 322.
28 Dine, supra note 9, at 328-29. The Commission has tried to include social,
It has been argued that the technique of harmonization and the mutual recognition of more or less identical companies is enough of a guarantee for European business.\textsuperscript{29} The Commission, however, has reasoned that this coordination would not bring about complete unity of national conditions under which enterprises are allowed to undertake their business.\textsuperscript{30} Because of the legal and tax obstacles involved, harmonization alone would not realize the possibility of formal cross-border mergers in the EC.\textsuperscript{31} Although there are several proposals for additional directives for the harmonization of European company law,\textsuperscript{32} this coordination, even if pursued to the maximum extent, will not bring complete unity of national conditions.

III. THE EUROPEAN ECONOMIC INTEREST GROUPING (EEIG)

The absence of any legal framework facilitating a collaboration between EC undertakings of different Member States was seen as an impediment to economic growth because some firms were either too tentative or unwilling to take the necessary step towards a higher level of business integration involving a takeover or merger.\textsuperscript{33} For political reasons the European Community was not yet ready in 1985 for the European Company;\textsuperscript{34} therefore, the Commission wanted to

\textsuperscript{29} Often reference has been made to the United States situation where companies are still incorporated in one state and there is no “Federal Company.” See Cary, supra note 10, at 700-05; Note, Federal Chartering of Corporations: A Proposal, 61 GEo. L. J. 89 (1972).

\textsuperscript{30} See infra section III for arguments in favor of creating a European company.


\textsuperscript{32} See, e.g., the Fifth, Tenth, Eleventh, Twelfth, and Thirteenth Council Directives, supra note 13.


\textsuperscript{34} The different forces opposing the European company will be discussed infra section IV.
provide the European undertakings with a legal framework which would allow certain cross border transactions without creating a European corporation.\textsuperscript{35}

The European Economic Interest Grouping is a legal entity governed mainly by European Community law, aimed at the collaboration of companies of separate EC Member States.\textsuperscript{36} The EEIG is based on the successful French corporate form called the "Groupement d'Intérêt Economique"\textsuperscript{37} and can be described as a cross between a small company and a partnership with non-profit motives. By using the EEIG, firms are able to engage in certain joint activities such as research and development, purchasing, sales, production, and other business activities.\textsuperscript{38}

The most important feature of the EEIG Regulation is that it creates a supra-national European institution, governed not by national laws, but by European Community law. The EEIG has full capacity, it can make contracts or accomplish other legal acts, and sue and be sued in its own name. Thus, it appears that the EEIG is a true European company;\textsuperscript{39} however, some very strict rules limit and differentiate the EEIG from the classic company traditionally found in most European countries and in the United States.

The EEIG constitutes an instrument for collaboration, aimed at facilitating and developing the economic activities of its members and improving or increasing the results of these activities.\textsuperscript{40} Consequently,

\textsuperscript{35} See infra section IV.
\textsuperscript{36} The EEIG could be used as of July 1, 1989.
\textsuperscript{37} See Murphy, supra note 33, at 67; J. Le Gall, French Company Law 28-36 (1976). The most striking example of the "Groupement d'Intérêt Economique" is Airbus Industries which consists of French, German, English, and Spanish companies. It cannot become a EEIG because it employs centrally more than 500 people.
\textsuperscript{38} Commission: the EEIG, supra note 33. The European Commission has indicated that about 85 EEIGs have been established. More than half are in commercial activities like marketing, purchasing, and import/export; 12 are in services ranging from audiovisual and transport to professional training and the financial sector; and 14 consist of groups of professionals like law firms. Only five are classified as "industrial." The Financial Times, July 30, 1990, § 1, at 2, col. 4. See Israel, The EEIG—A Major Step Forward for Community Law, 9 Company Law 14, 15 (1990); Murphy, supra note 33, at 67.
\textsuperscript{39} The EEIG Regulation, however, leaves essential aspects of the EEIG's legal status and operation to the legislation of the Member States. The result of the fact that the EEIG Regulation does not create an entity governed by European law alone gives rise to uncertainties, inefficiencies, and conflict of laws issues. Murphy, supra note 33, at 67.
\textsuperscript{40} Article 3 of the EEIG Regulation reads, "[t]he purpose of a grouping shall be to facilitate or develop the economic activities of its members and to improve or increase the results of those activities; its purpose is not to make profits for itself". EEIG Regulation, supra note 7, at Art. 3(1).
the EEIG neither replaces its members nor absorbs all their activities and is therefore inadequate to use as an instrument for a legal merger. Moreover, the EEIG may neither borrow on the financial markets nor act as a holding company.\(^4\)

Another important limitation is that the EEIG cannot have more than 500 employees;\(^2\) however, the labor force of the EEIG member companies are not included in this calculation. This restriction is the main reason why important firms such as Airbus Industry use the French "Groupement d’Intérêt Economique" and not the EEIG.\(^3\) In addition, the members of the grouping are jointly and severally liable for all debts and liabilities of whatever nature of the Group.\(^4\)

Regarding the taxation of an EEIG, the Regulation applies the principle of fiscal transparency, according to which the profits of the EEIG are taxed by the different Members States.\(^4\) The Regulation, however, does not determine the source of such profits; whether the EEIG is taxed in the country in which it is registered, the country in which it resides, or both, is determined by national laws.\(^6\) Also,

\(^{41}\) Carreau & Lee, supra note 31, at 505.
\(^{42}\) EEIG Regulation, supra note 7, at Art. 3(2)(c).
\(^{43}\) The French Groupement d’Intérêt Economique (GIE) does not have the employment restriction that exists in the EEIG.
\(^{44}\) Article 24 of the EEIG Regulation provides:
1. The members of a grouping shall have unlimited joint and several liability for its debts and other liabilities of whatever nature. National law shall determine the consequences of such liability.
2. Creditors may not proceed against a member for payment in respect of debts and other liabilities, in accordance with the conditions laid down in paragraph 1, before the liquidation of a grouping is concluded, unless they have first requested the grouping to pay and payment has not been made within an appropriate period.

EEIG Regulation, supra note 7, at Art. 24.

\(^{45}\) Profits are apportioned and taxed under the rules of the home country of each member. However, Tom Dickson notes, "Nobody is sufficiently confident that the authorities in each country will always accept this arrangement and there are worries that some Member States may demand more tax." Therefore, he indicates that this risk can be limited if "the EEIG act[s] as a broker or agent rather than a principal, so that the profits are made in the hands of the members." The Financial Times, July 30, 1990, § 1, at 2, col. 4; see also Goldsworth, Taxation of European Economic Interest Groupings, 8 TAX NOTES INT’L 856 (1990); Legal brief, Taxation of European Economic Interest Groupings (EEIGs), 18 INT’L BUS. LAW 296, 296-97 (1990); Murphy, supra note 33, at 79.

\(^{46}\) Silvestro, The EEIG Regulation—A Year After, 18 INT’L BUS. LAW 387 (1990). Allessandra Silvestro mentions in this article that some EEC Member States try to consider contributions to an EEIG as remuneration for services which, of course, are subject to VAT. Thus, it appears that the EEIG has not only failed to offer a common tax regime for direct taxes, but it also causes problems in the field of indirect taxes.
it is unclear how this situation fits into the existing bilateral and unilateral treaties for the avoidance of double taxation.47

The most valuable innovation of the EEIG is that it is the first truly European legal formula which is available to economic agents interested in developing certain activities on a Community scale.48 Apart from these limited restrictions, the EEIG Regulation allows the parties a wide measure of contractual freedom and thereby makes the EEIG a flexible business tool.49 The Regulation imposes only minimal obligations regarding the organization and management of the grouping, allows different arrangements for financing, and requires no minimum capital.50

IV. THE EUROPEAN COMPANY (SE)

A. History of the SE

1. Before the Creation of the EEC

The idea of forming a company with an international legal capacity and personality was first developed by the Italian lawyer Fedozzi in 1897.51 He proposed the creation of companies under an international statute which would facilitate the creation of large enterprises suitable for the rapid development of industry.

At the beginning of this century, the need for an international legal personality and a common uniform corporate law was discussed in several international congresses and meetings.52 These gatherings concluded that an "International Company" was a necessary tool in the fast moving international business environment.53

Goldsworth, supra note 45, at 856.
Commission, The EEIG Arrives, supra note 33, at 1-2.
Vinck, 2 Tax Notes Int'l (No. 6) 636 (1990).
See generally EEIG Regulation, supra note 7.
These included, for example, the Congresses held by the International Law Association in Paris (1889 and 1890), Antwerp (1903), and Brussels (1910).
It must also be mentioned that in 1952 the Council of Europe recommended that a European company be pursued. These proposals actually originated in 1949 but trade union opposition halted this early project in 1952. Hood, The European Company Proposal, 22 Int'l & Comp. L. L. Q. 434 (1973); Konstandinidis, supra note 51, at 288.
Despite these efforts, no true international company has yet been created. After World War II a new phenomena appeared which had not been previously observed. Increasing numbers of international business projects developed involving transactions between different countries. However, differences in the national laws and the conflict of law rules of the different states constituted obstacles to the resolution of problems that arose from these international projects. The obstacles were usually resolved in the conventional manner between the governments. Noteworthy illustrations of companies created between different states include the Bâle Airport Company, the Scandinavian Airlines System (SAS), and the Mont Blanc Tunnel Exploitation Company. Each one of these companies was founded by states, according to the rules of international public law.

2. **After the Creation of the EEC**

The history of the European Company within the framework of the EEC started in 1959 when the European Community was barely one year old. Pieter Sanders, a Dutch professor, launched the concept for an SE based on EEC law in his inaugural speech in Rotterdam. At about the same time, the French Notaries Public suggested in their 57th Annual Congress that it might be desirable to adopt some form of company law for the Common Market. During the next few years the idea of a European company was discussed and ex-
The idea of creating a European company gained momentum in 1965 when France proposed in a note to the Council that a detailed study on the possibilities of creating an SE should be undertaken. This proposal was favorably accepted by the Commission and a team of experts, under the chairmanship of Pieter Sanders, was invited to draw up a draft statute for a European company. After the draft was completed, the Commission submitted to the Council a Memorandum about the problems of creating a European company. The COREPER set up an ad hoc working group under the leadership of Pieter Sanders. Since the sole task of this group was to study the problem and not to draft a statute, the Commission of the EEC decided to make its own proposal for a European company. On May 13, 1975, the Commission proposed an amended version of its 1970 Proposal for a European Company to the Council. The Council appointed a new ad hoc committee which proceeded with a first reading of the proposal. However, the working party suspended discussions in 1982 because of a conflict with the Council over legislation concerning groups of companies.


61 For a detailed list of the various Congresses and events relating to the concept of the European company see Hood, supra note 53, at 434-35.

62 Foyer, La proposition française de création d'une société de type Européenne, RMC 268-73 (1965).

63 Commission des représentants permanents (Commission of the Permanent Representatives of the Council).


65 See Harmonization of Company Law, supra note 14, at 150.


67 Id. at 502, 509.

68 The ideas of the White Paper have since been formalized by the adoption of the Single European Act, supra note 2.

69 See 1988 Memorandum, supra note 31.

70 Proposal for a European Company Regulation, supra note 6. A few questions
B. The 1989 Proposal

The 1989 Proposal for a European company covers all aspects of modern company law. This is necessary because this proposal is designed to provide European companies with an additional option to those corporate forms currently available under the national laws of the Member States. Consequently, the same kinds of interests as those existing under national law need to be sufficiently protected.\(^7\)

The 1989 Proposal will create a single European corporate status and will thus be separate from existing national laws.\(^7\) Although the of principle remained to be resolved before the Commission could propose a European company regulation. On each question there were two or more options, each supported by at least one Member State. These questions of principle have proven to be the most intractable obstacle to achieving agreement on a European company regulation.

The first and politically most difficult question confronting the Commission was that of employee participation in the decision making process of the SE. In order to facilitate acceptance of the proposal by the Member States, the Commission decided to address the question of employee participation in the form of a separate directive rather than in the form of a regulation. Proposal for a Council Directive complementing the State for a European company with regard to the involvement of employees in the European company, 32 O.J. Eur. Comm. (No. C 263) 69 (1989) [hereinafter Proposed Employee Participation Directive]. It was hoped that this would facilitate acceptance of the proposal since under article 189 of the EEC Treaty a Member State retains some flexibility in adopting regulations implementing the directive's goals whereas a Council regulation is self-executing and must be implemented as passed. The proposed directive allows the Member States to choose between three different forms of employee participation. \(\text{Id. at Arts. 4, 5, and 6.}\)

The second remaining question of principle requiring resolution was whether the SE should be a company of "European law" or one of "European type," i.e. whether to harmonize national laws or to introduce a supranational system governed by community law. Although there has been some support for the "European type" company, most notably France, the Commission itself has always favored the company of "European law." See Konstandinidis, \textit{supra} note 51, at 293 and n.42.

The third remaining question of principle confronting the Commission was the issue of "accessibility." The question was whether to make the SE widely available to any entity whose business might conceivably expand to a European level or to limit the SE to entities with a strong possibility of operating on a European level. West Germany supported limited accessibility and proposed a high minimum capital requirement coupled with a showing that the entity will operate on a European level in order to qualify as a SE. The Commission has adopted both suggestions in its proposal albeit with requirements less stringent than those proposed by Germany.\(^7\) 1988 Memorandum, \textit{supra} note 31, at 12. The fact that the various aspects of modern company laws are covered in the proposal, however, has not precluded the Commission from proposing a legal entity that possesses relative flexibility and other useful attributes such as to make it a sufficiently attractive form for existing companies.

\(^7\) Proposal for a European Company Regulation, \textit{supra} note 6, at Art. 7(1).
SE may contain elements that are unknown or different from those of the various Member States, the impact of these differences between the European company Proposal and the various national company laws should not be overestimated for two reasons. First, Article 7(2) of the 1989 Proposal provides that matters covered by the proposed regulation but not mentioned therein shall be governed by the general principles upon which the proposal is based, and if this is not sufficient, national law will govern. Therefore, matters which are not governed by the 1989 Proposal will be governed by national law and general principles of Community law.

The second reason that one should not fear the SE is that incorporation under the proposed European company regulations is optional and firms will retain the alternative right of operating under national company law. Because of these harmonization efforts by the EEC, the SE will not be a completely different legal instrument but an entity with characteristics which are already well known in most Member States.

1. Description and Legal Foundation of the SE

a. Description of the SE

In the 1989 Proposal, the SE consists of a commercial company having a legal personality and a minimum capital of ECU 100,000.

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73 Carreau & Lee, supra note 31, at 508.
74 In addition to article 7, reference to national law can also be found in Articles 14, 54, and 55 of the 1989 Proposal.
75 Article 7 provides:
1. Matters covered by this Regulation, but not expressly mentioned herein, shall be governed:
   a) by the general principles upon which this Regulation is based;
   b) if those general principles do not provide a solution to the problem, by the law applying to public limited companies in the State in which the SE has its registered office . . . .
3. In matters which are not covered by this Regulation, Community law and the law of the Member States shall apply to the SE.
4. In each Member State and subject to the express provisions of this Regulation, an SE shall have the same rights, powers and obligations as a public limited company incorporated under national law.
76 Carreau & Lee, supra note 31, at 508.
77 The French "Société Anonyme" company form has from the beginning served as the model of a European company by the drafters of the SE. The Société Anonyme was chosen as the model for the SE because it was well known throughout Europe,
The registered office must be situated within the Community and must be located where the SE has its central administration. An SE has a branch in a Member State other than that in which it has its registered office, the branch may be registered in that Member State.

An SE can only be set up by legal persons. Article 2 provides that public companies formed under the law of a Member State and having their registered office and central administration within the Community may form an SE by merging or by forming a holding company, provided that at least two of them have their central administration in different Member States. An SE may also be created by forming a joint subsidiary. Such a joint subsidiary can be created by an existing SE, together with one or more other existing SEs, or with one or more companies or legal bodies. Finally, an SE may form subsidiaries in the form of SEs; however, these subsidiaries may not establish further subsidiaries in the form of SEs.

For United States companies, it is important to note that the restriction under Article 2 of the 1989 Proposal prohibits them from creating or participating directly in an SE. However, nothing prevents a United States company from using an EC-based subsidiary to obtain the same result.

and because it was considered to be best suited from the management, financial, and third party protection perspectives.

Proposal for a European Company Regulation, supra note 6, at Art. 1(3).

Id. at Art. 1(4).

Id. at Art. 4(1). There are two exceptions to the ECU 100,000 minimum capital requirement in article 4. SEs operating as credit institutions (Art. 4(2)) or as insurance carriers (Art. 4(3)) are excepted from the minimum capital requirement of the Community but made subject to the minimum capital requirements set by the Member State in which the entity has its registered office. Id. at Arts. 4(2) and 4(3).

Proposal for a European Company Regulation, supra note 6, at Art. 5. This clause differs from the Commission’s first proposal for an SE which would have required the SE to register with the European Commercial Register at the European Court of Justice. It would also have required the Member States to maintain a register supplementary to the European Register and to register all SEs having registered office in their territory. See First Commission Proposal (1975) in Harmonization of Company Law, supra note 14. This change between the 1975 and 1989 Proposals shows the influence of the parties supporting greater national and less Community control of the SE.

Proposal for a European Company Regulation, supra note 6, at Art. 8(2).

Id. at Art. 12(1).

Id. at Art. 2(1).

Id. at Art. 3(1).

Id. at Art. 3(2).

Id. at Art. 3(3).
b. The Legal Foundation

Although the Treaty of Rome, prior to 1986, did not authorize the Council to create an SE, a sufficient legal basis has been found for the first Proposal for a European company in Article 235 of the Treaty. This is a catch-all provision which expressly validates the doctrine of the implicit powers of the Community. The implicit powers are necessary to realize one of the objectives of the Treaty and are used when the goal to be accomplished is not dealt with by a specific article of the Treaty.

By 1989, however, a new legal basis became available under Community law. In 1987, the Single European Act introduced Article 100a which gives the Community a more adequate and easier legal basis to adopt a European company. The adoption of a European company is made easier since a Commission proposal under Article 100a can be adopted by a qualified majority, whereas unanimity is the rule under Article 235 of the EEC Treaty.

2. The Internal Organization of the SE

a. The Management System

The 1989 Proposal requires the SE to hold a general meeting of shareholders and to elect either a two-tier management system consisting of a management board and a supervisory board, or a single-

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89 See Carreau & Lee, supra note 31, at 505; Konstandinidis, supra note 51, at 301.
90 If there is an independent legal basis available in the Treaty of Rome, article 235 cannot be used.
91 Single European Act, supra note 2, at Art. 100a. Article 100a provides:
1. By way of derogation from article 100 and save where otherwise provided in this Treaty, the following provisions shall apply for the achievement of the objectives set out in article 8a. The Council shall, acting by a qualified majority on a proposal from the Commission in cooperation with the European Parliament and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.
2. Paragraph 1 shall not apply to fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons.
tier management system consisting of only an administrative board.92 In the two-tier system the SE must be managed and represented by a management board under the supervision of a supervisory board.93 The members of the management board are appointed by the supervisory board and may be removed by them at any time.94 At no time may a person be concurrently a member of both the management board and the supervisory board of the same SE.95 The supervisory board may not participate in the management of the company nor represent it in dealings with third parties. However, the supervisory board may represent the company in its relations with members of the management board.96 At least every three months, the management board must report to the supervisory board on the management and progress of the company's affairs, and on the company's prospects.97

Under the one-tier system, the SE must be managed and represented solely by an administrative board to be composed of at least three members.98 The management of the SE must be delegated by the administrative board to one or more of its members.99 The administrative board must meet at least once every three months to discuss the management and progress of the company's affairs.100

The management systems as described in the Proposal are well known in the EEC. The one-tier system is similar to the French Société Anonyme and has the advantage of strong collective responsibility among the members of the board.101 The dual board system on the other hand seems to be a useful system for larger undertakings.102 The most important innovation, however, is that the SE allows its founders to choose the management system that best suits its needs.

b. Employee Participation

The proposed Directive for workers' participation is the most sensitive element of the 1989 Proposal and must be seen within the

92 Proposal for a European Company Regulation, supra note 6, at Art. 61.
93 Id. at Art. 62(1).
94 Id. at Art. 62(2).
95 Id. at Art. 62(3).
96 Id. at Art. 63(1).
97 Id. at Art. 63(2).
98 Id. at Art. 66.
99 Id. at Art. 66(2).
100 Id. at Art. 67(1).
101 Konstandinidis, supra note 51, at 310.
102 Id. at 310-11.
larger social European context. On May 17, 1989, the Commission put forth a Community Charter of Fundamental Social Rights in which the Commission attempted to elaborate ways for a more social Europe. This Social Charter has been received with much criticism and has often been called "socialism by the back door." According to the Commission, "the social dimension of the internal market is not a new phenomenon... It was already present in the EEC Treaty, which provided that there should be an improvement in living and working conditions enabling them to be approximated while progress continued. It is among the objectives consolidated and developed by the Single European Act." The proposal for employee participation in the SE should be considered from this angle.

Because of the controversies surrounding the issue of employee participation, the Commission has chosen a flexible approach which permits the Member States to choose among three nonexclusive alternative formulas. In addition, the commission excluded the issue of workers' participation from the Proposal. Instead, the Commission created a separate directive based on Article 54 of the Treaty of Rome and not on Article 100a.

103 Proposed Employee Participation Directive, supra note 70.
106 The Commission is referring to articles 48-51 of the EEC Treaty dealing with the free movement of workers. For a general discussion see Movement of Workers, 1 COMM Mkt. Rep. (CCH) ¶ 1001.
107 Harris, supra note 104, at 768. Not everyone agreed that the social reforms proposed by the Commission had been agreed upon by the 12 EEC Member States. British Prime Minister Thatcher accused Jacques Delors, President of the Commission, of "trying to race ahead with moves towards European union that had not been agreed [upon] by the Member States." Osborn, supra note 105, at 40. Answering Thatcher's charges, Delors told the European Parliament that everything the Commission was doing, and planned to do, had been approved by Britain and the other EEC countries through the signing of the Single European Act in 1986. Id.
108 Proposed Employee Participation Directive, supra note 70.
109 Harris, supra note 104, at 764. It was impossible to base the proposal concerning employee participation on article 100a because article 100a(2) explicitly precludes it; it provides that article 100a(1) (permitting harmonization by qualified majority) "shall not apply to fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons."

A separate directive addressing the issue of employee participation enjoys a double
The proposed employee participation directive provides that an SE may not be formed unless one of the three employee participation models has been chosen by means of an agreement between management and administrative boards of the founder companies and their employee's representatives. If no agreement is reached, the management and administrative boards are permitted to choose the model most appropriate to the SE. However, each Member State will determine the manner in which the participation models must be applied for SEs having their registered office in its territory. A Member State may also restrict the choice of the different models available to the SE.

In the first model, at least one-third but not more than one-half of the members of the supervisory board or the administrative board are to be appointed by the employees or their representatives, or they shall be co-opted by the board. This is the so-called "German system" of co-management. In the second model, a separate independent body must represent the employees of the SE. This body shall have the right to be informed of important company matters by the managing board or the administrative board at least once every three months. Moreover, the employee's representatives can require a report concerning certain aspects of the company's business or any other pertinent information or documents. Further, the representatives have the right to be informed and consulted before any important decision referred to in Article 72 of the proposed directive is implemented. Belgium, France and Italy currently use this system.

advantage. First, the rejection of this proposal will probably not thereby jeopardize the possible acceptance of the SE. Second, by using a directive, the Member States will more readily accept the employee parties' action proposal because they will retain more control over its outcome since a directive is not self-executing and must be implemented through national law. EEC Treaty, supra note 1, at Art. 189.

10 Proposed Employee Participation Directive, supra note 70, at Art. 3(1).
11 Id. at Art. 3(4).
12 Id. at Art. 3(5).
13 Id. at Art. 4.
14 Carreau & Lee, supra note 31, at 509.
15 Proposed Employee Participation Directive, supra note 70, at Art. 5.
16 Id. at Art. 5(2)(a).
17 Id. at Art. 5(2)(b).
18 Id. at Art. 5(2)(c). The most important operations requiring prior authorization are the closure or transfer of establishment or of substantial parts thereof, substantial reduction, extension or alterations of activities, and substantial organizational change. Proposal for a European Company Regulation, supra note 6, at Art. 72.
The third possibility provided for by the proposed directive allows for the establishment of other models through an agreement between the SE’s management and administrative boards and the employees.\textsuperscript{119} There is, however, a minimum requirement that the employees must be informed of the progress of the SE’s business at least once every three months.\textsuperscript{120} Employees must also be informed and consulted before any decision referred to in Article 72 of the proposed employee participation directive.\textsuperscript{121} The German Industry Commissioner who developed this statute, Herr M. Bangemann, clearly hoped that this third option would be weak enough in order to assure the acceptance of the SE Proposal by countries which are less social minded, such as Great Britain.\textsuperscript{122}

From a United States perspective, compulsory employee participation in the management of a corporation constitutes an unacceptable interference in corporate management and ownership rights and is not actively sought by labor organizations.\textsuperscript{123} In Europe, however, employee participation is considered to be a normal and legitimate part of the business environment. Moreover, some countries have proven that employee participation in management is neither damaging to company profitability, nor to the countries’ economies generally.\textsuperscript{124} The best example to be found is Germany where companies are forced by law to have an employee participation program similar to the first model. Apparently, this has not prevented Germany from becoming the strongest economy within the EC.

In a multinational context such as the EC, the employee participation provisions can be a source of conflicts. For instance, a German employee of an English SE will likely have fewer rights to participate in the management of his corporation than his colleagues who work for German corporations. On the other hand, English employees, who usually do not participate in the management of a corporation, will have to send representatives to the supervisory board of the board of directors of an SE incorporated in Germany.

\textsuperscript{119} Proposed Employee Participation Directive, \textit{supra} note 70, at Art. 6(1).
\textsuperscript{120} \textit{Id.} at Art. 6(2)(a).
\textsuperscript{121} \textit{Id.} at Art. 6(2)(b).
\textsuperscript{122} See Johnson, \textit{Euro Firms Charter “Provokes” Britain}, \textit{supra} note 105, at 4.
\textsuperscript{124} Vagts, \textit{supra} note 123, at 66-67.
3. **Tax Implications of the SE**

As noted, the Commission has sought to add a social dimension to the SE. Jacques Delors, the French President of the European Commission, would especially like the SE to play a key role in ensuring that employees gain a share of the benefits of the single market. In order to compensate European business for the added cost burdens imposed by the social program, and in order to make the SE more attractive to the European business community, the Commission introduced a tax incentive program.

The 1989 Proposal provides that if the operations of an establishment in one Member State lead to losses, these may be used to offset the profits of the SE in the State where it is resident for tax purposes. The subsequent profits of the permanent establishment of the SE in another State will constitute taxable income for the SE up to the amount of the previous losses of the permanent establishment. However, the Member States are free not to apply these principles if they avoid double taxation by allowing the SE to set the tax already paid by its permanent establishments against the tax due from it with

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126 Proposal for a European Company Regulation, *supra* note 6, at Art. 133. Article 133 includes the tax incentive and reads:

1. Where an SE has one or more permanent establishments in a Member State or a non-member State, and the aggregation of the profits and losses for tax purposes of all such permanent establishments results in a net loss, that loss may be set against the profits of the SE in the State where it is resident for tax purposes.
2. Subsequent profits of the permanent establishments of the SE in another State shall constitute taxable income of the SE in the State in which it is resident for tax purposes, up to the amount of the losses imputed in accordance with paragraph 1.
3. Where a permanent establishment is situated in a Member State, the imputable losses under paragraph 1 and the taxable profits under paragraph 2 shall be determined by the laws of that Member State.
4. Member States shall be free not to apply the provisions of this article if they avoid double taxation by allowing the SE to set the tax already paid by its permanent establishments against the tax due from it in respect of the profits realized by those permanent establishments.

*Id.*

127 Proposal for a European Company Regulation, *supra* note 6, at Art. 133(1).

128 *Id.* at Art. 133(2).
respect to the profits realized by those permanent establishments.\textsuperscript{129}

This is a considerable tax advantage, and it will surely be an important incentive for European firms to adopt the SE form. However, this particular advantage may become less important in the future if, as the Commission has indicated, this tax incentive is extended to all companies operating in the EC and not only to the SEs.\textsuperscript{130}

Britain is unhappy with the tax implications of the 1989 Proposal. In the words of an English official, "[i]t would be legitimi[z]ing doubtful transfer pricing practices."\textsuperscript{131} It appears, however, that the United Kingdom's dissatisfaction is based on principle rather than technical objections.

The other countries were clearly in favor of this tax proposal. The French Minister for European Affairs, Edith Cresson, went a step further and made it clear that this Proposal was a priority for her country.\textsuperscript{132} Since France held the presidency of the European Council in 1989, the issue of the SE came to the top of the Council agenda.\textsuperscript{133}

C. The Necessity of the SE

An interesting question is whether the proposed SE is necessary, useful but unnecessary, or neither useful nor necessary for the European Community. The Commission seems to be convinced that the EC needs a European company.\textsuperscript{134} It calls the European company a priority for the EC and states in its Memorandum that "[a] European Market calls for a European Company."\textsuperscript{135}

However, not everyone shares this opinion. The opposition comes from four sides. First, as already mentioned, some Member States

\textsuperscript{129} Id. at Art. 133(4). It seems that there were serious changes made in the weeks before the actual proposal came out. Compare the actual proposed text with the article International Taxes, supra note 125.

\textsuperscript{130} International Taxes, supra note 125; See also International Taxes, EC Tax Commissioner Introduces Two Proposals to Remove Tax Barriers, Daily Rep. for Exec. (BNA) at G3 (Dec. 3, 1990). This intention of the Commission is also indicated in the preamble of the 1989 SE Proposal for a European Company Regulation, supra note 6, at preamble.

\textsuperscript{131} Tax Incentives for the European Company, supra note 125.

\textsuperscript{132} Id.

\textsuperscript{133} Id. As indicated supra section III, this tax incentive must be viewed in conjunction with the social aspects. It would seem that the main reason France supports the 1989 SE Proposal is because it supports the introduction of these social aspects into Community law.

\textsuperscript{134} See supra section III.

\textsuperscript{135} 1988 Memorandum, supra note 31, at 5.
oppose a European company. Second, opposition comes from scholars. The Belgian Professor Van Rijn has always been one of the most fervent writers opposing the European company. Third, there is the continuing opposition of the workers who consider that their rights are not sufficiently guaranteed under the proposed regulation. Finally, opposition comes from industry, which believes that the social aspects proposed by the Commission go too far. The industry argues that the added cost for employee participation would endanger the competitive situation of European business.

In its Memorandum, the Commission lists the five main obstacles to cooperation between companies from different Member States. The first obstacle mentioned by the Commission is the impossibility of carrying out cross border mergers if there is no European company. In the last decade the European business community has sufficiently demonstrated that this is a strong overstatement. In ac-

136 England has always been one of the most important opponents of the SE. Although other countries have also opposed this company form, their opposition has generally been limited to various aspects of the SE and not to the very concept itself. Although England has never formally opposed the concept of a European company, its opposition to virtually all the various elements of the SE is essentially equivalent to a repudiation of the concept of a European company. England has even opposed the term "European company." It apparently believes that SE refers to the French "Société Européenne." In fact, it stands for the Latin "Societas Europea," as indicated in the 1989 Proposal itself. The British considered this to be "a real continental trick." Johnson, Row Looms Over Euro "Companies", Daily Telegraph, Nov. 13, 1989, at 26.

137 He has made his opinion very clear in a short but convincing article in a Belgian law review. Van Rijn, Faut-il instituer la "société européenne"?, 1967 JOURNAL DES TRIBUNAUX 377.

138 As already indicated, there are three different options for employee participation. See Proposed Employee Participation Directive, supra note 70. Labor unions consider the third option as unsatisfactory and would prefer that it be either excluded or that it include more guarantees for minimum employee participation in company decision making.

139 Independents Turn Against "Eurofirms", Daily Telegraph, Oct. 24, 1988, at 35. The Union of Independent Companies has joined the growing British opposition to the EEC Proposal for a European company statute because of concern over its social engineering implications. Id. See also Johnston, Businessmen Opposed to Euro Mergers, Daily Telegraph, Oct. 27, 1988, at 11.

140 Johnston, supra note 139. This, however, is a discussion that has occurred in most European countries in relation to national laws concerning employee participation and is thus not unique to the SE.


142 Van Rijn attacks this argument by asserting that the SE will not make mergers easier because mergers do not avoid the tax and legal problems of firms involved in international business. Van Rijn, supra note 137, at 377.
tuality, though not technically, international mergers are taking place all the time. To accomplish these mergers, European lawyers use different legal techniques such as the creation of a common holding company, a parent-subsidiary relationship 143 or a joint venture. 144 However, it is true that technically a merger between two companies of two different EC countries is legally impossible. 145 It seems that the tax and psychological problems are much greater obstacles to successful cross-border mergers than the lack of a European company.

The second obstacle to international company cooperation is the problem of taxation. 146 Professor Van Rijn has indicated that the tax burden is the most important obstacle for a cross border merger, but he has also stated that the creation of a European company would not change this situation. 147 Two different tax problems must be distinguished. On the one hand, a capital gains tax must be paid on asset gains when a company stops operating as a legal entity. 148 On the other hand, a company encounters tax obstacles when it operates.

A new directive on the tax implications of mergers appears to supply a solution to the first problem. 149 It provides that “[a] merger . . . shall not give rise to any taxation of capital gains calculated by reference to the difference between the real values of the assets and liabilities transferred and their values for tax purposes.” 150 This provision clearly eliminates the taxation of asset gains when a company stops operating and merges in an SE.

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143 Konstandinidis, supra note 51, at 299.

144 Carreau & Lee, supra note 31, at 506.

145 Apart from the tax obstacles, a cross-border merger entails a change of nationality and, more importantly, a loss of the legal personality of the acquired company. 1988 Memorandum, supra note 31, at 12.

146 Id. at 6.

147 Van Rijn, supra note 137, at 377.

148 Article 17(1) of the Proposal for a European Company Regulation, supra note 6, appears to provide a solution to this problem. It provides that in an SE formed by merger, the merging companies shall be wound up without going into liquidation by transferring their assets and liabilities to the SE in exchange for the issue of stock in the SE. This means that there are, in principle, no tax burdens upon SEs formed by mergers. However, the new SE will be liable for the capital gains tax. The proposal also permits the formation of an SE in the form of a holding company, the formation of a joint subsidiary in the form of an SE, and the formation of a subsidiary by an SE. Respectively, id. at Arts. 31, 43, and 36.


150 Id. at Art. 4(1).
The second tax problem is more difficult. The preamble of the 1989 Proposal states that for tax purposes, the SE must be subject to the legislation of the Member State in which it resides. This provision will cause difficulties because of the varying tax systems in the different Member States; double taxation on dividends and on some of the economic transactions will also present problems. Thus, the Proposal will not eliminate all the tax problems. However, the Council of the European Community has recently adopted a Directive and a Convention on double taxation. These measures, which apply to all EC companies, and not only to SEs, will largely solve the problem of double taxation in the EC.

The third obstacle to cooperation between companies from the different Member States is the variance in company laws of the Member States. It is easier to do business with a company organized under a familiar structure than with one formed under a completely unfamiliar structure. Unfamiliar company law may produce unexpected results regarding such matters as protection of parties and ultra vires. This obstacle appears to be of minor importance because the directives, as described, have already realized a high degree of unification between the different company laws.

The fourth obstacle indicated in the Commission's Memorandum is the difficulty of managing a group of companies as a single economic unit. The Commission indicates that the:

[D]ifficulties under present company law in virtually all Member States of managing a group of enterprises as a single economic unit

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151 Proposal for a European Company Regulation, supra note 6, preamble at 42. The principle that the SE would be subject to the tax laws of the state in which it is domiciled, in the same way as any other company, means that all tax agreements made by the state of domicile with other states would apply equally to the SE. See M. Brealy & C. Quigley, supra note 33, at 205.

152 European Company Statute; Commission Issues Revised Proposal; Compromised Made on Tax Consultation, 1992—The External Impact of European Unification (BNA) No. 8, at 1 (July 14, 1989).


156 The harmonization of national company laws is discussed supra section II.

rather than in the interests of its individual component companies [and] [t]he lack of recognition in many Member States of the "groups" phenomenon continues to make such cooperation across frontiers too complex, too burdensome and thus too risky. 158

Again, the importance of this difficulty should not be exaggerated. It has never been so burdensome that companies which wanted to merge were not able to do so, or that companies which were merged were not able to run the group as a single unit. Moreover, most countries do not recognize the group interest in their company law and, according to domestic company law, the managers are not allowed to take this group interest into consideration when making a decision. 159 The successful operation of thousands of such companies in the European Community proves that this is not a real problem. However, the SE will undoubtedly make it easier to manage a group enterprises as a single unit. 160

The fifth obstacle to cooperation between companies from different Member States without the existence of a European company are the administrative difficulties and expenses inherent in setting up companies. 161 Naturally, entrepreneurs are not as familiar with foreign requirements as with those of their own national system. This makes it more expensive and psychologically more difficult to decide in favor of a cross-border merger. Here again, the SE form will lessen the administrative difficulties and reduce the cost of setting up a European operation, but these difficulties have not proven to be so burdensome that European businessmen have been unable to realize cross-border mergers.

V. CONCLUSION

The 1989 SE Proposal may in two ways be characterized as a political move. First, it is a move towards a more social Europe by forcing the Member States to adopt at least one of the employee participation schemes. Second, it is a move towards a closer and more intensive European integration because entities of different European countries will be able to cooperate more easily with each other.

158 Id. at 11.
159 "Group interest" refers to the interests of all daughter and parent companies rather than the interests of a single company.
There is no absolute necessity for an SE so long as there is available what the Treaty of Rome describes as the "right of establishment" or what is known in the United States as the "freedom of interstate commerce." And so long as there exists within the EEC a movement to harmonize the different company laws of the Member States, there will be no absolute necessity for an SE.

The main benefit of the 1989 SE Proposal is psychological. A company operating under this form constitutes a real European company. Having a European character and no longer being completely dependent on any particular Member State for its legal existence, it will thus be more likely to act in accordance with European interests and less likely to be governed by national sentiment and pride.

However, it remains an open question whether this will be enough of an incentive for existing large European corporations to opt for an SE. Smaller firms are more likely to be attracted to the SE form for the psychological benefits, the additional mobility and the smaller operation costs.

POLICE, STATE SECURITY FORCES AND CONSTITUTIONALISM OF HUMAN RIGHTS IN ZAMBIA

Charles Mwalimu*

I. POLICE AND STATE SECURITY FORCES IN ZAMBIA

A. Introduction

Zambia was a British colony of Northern Rhodesia from 1889 to 1963. It attained independence from Britain as a Republic within the Commonwealth of Nations on October 24, 1964 under an Independence Constitution attached to the Zambia Independence Act of 1964. The Constitution of 1964 was a multi-party constitution which lasted until 1973 when a one-party system of government was introduced pursuant to the One Party Constitution of 1973. The party presently in power is the United National Independence Party (UNIP). Currently, therefore, Zambia functions with a strong executive presidency governed by Kenneth Kaunda, its only president.

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To the author's knowledge, this is the first ever study on police, state security forces and human rights practices in Zambia other than the Country Reports on Human Rights Practices by the United States Department of State, referred to in this article.

1 See generally ZAMBIA: A COUNTRY STUDY (I. Kaplan 3d ed. 1987).
2 The two were incorporated into the Zambia Independence Order in Council, No. 1652 Stat. Inst. 4477 (1963).
since independence, with the advice of the Central Committee, Cabinet and Parliament.  

B. Historical Development and Current Structure

Pre-colonial policing in Zambia functioned through unwritten customary laws of the indigenous people. The advent of British colonial rule in Northern Rhodesia altered the political landscape of the country. The British South African Company (B.S.A. Company) of Cecil Rhodes was granted a Royal Charter in 1889. This instrument recognized the authority of the Company to acquire and exploit mineral rights in North-Western and North-Eastern Rhodesia in exchange for colonial armed protection against threats to local chiefs in the territories. To provide this military protection, a small constabulary was formed in 1891. It primarily functioned as a buffer against Arab slave traders and protected commercial interests of the B.S.A. Company. Two sections of the constabulary, the North-Eastern and Barotse Native Police, were established under the Barotseland North-Western Rhodesia Order in Council (1899). In North-Eastern Rhodesia, police were subject to the North-Eastern Rhodesia Order in

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5 *Id.* at 167. It is believed that article 4 of the Constitution of 1973 which entrenched the supremacy of UNIP as the sole political party has been repealed to accommodate the opposition parties, in particular, the Movement for Multi-Party Democracy (MMO). However, this amendment has not been received anywhere in the United States. Elections are scheduled to take place in October of 1991. These elections are being conducted under the same Constitution of 1973. The party in power is still UNIP and the infrastructure as well as institutions of government remain the same. Essentially, no change in the conduct of the affairs of government has been effected.

6 See generally J. Cramer, *The World's Police* 221 (1964). Traditional forms of police are found in well-established institutions of kingships and chieftainships such as the Lozi of western Zambia. Reportedly, they operated under a hierarchy of police powers from the village headman to the paramount chief. In this system, police arrangements appear to have been based on tribal customs and practices, effected largely by personalities of local potentates. These policing traditions were designed for both internal and external protection as well as to maintain law and order.

7 18 Hertslet's Comm. Treaties 134 (1907).


9 *Stat.* L.N.W. Rhod. 1899-1901, 1 (1905). Under this law, although a majority of the constabulary constituted an infantry unit, other members performed civil police duties.

10 *Stat.* L.N.W. Rhod. 1899-1909, 7 (1910); see also High Commissioner's Proclamations Nos. 15 & 19 (1901) on discipline and other provisions on the Barotse Native Police. *Id.* at 15.
It was also in 1911 that the two Rhodesias in the East and West were fused. Consequently, the Northern Rhodesia Proclamation No. 17 (1912) was issued to form a combined civil police, designated as the Northern Rhodesia Police.

British South African Company rule lasted from 1889 to 1924. To reflect the change in government and administration from the B.S.A. Company to direct British rule, the Northern Rhodesia Police Ordinance, No. 16 (1926), was issued to regulate matters regarding police in the territory. In 1937, the Northern Rhodesia Police Force was overhauled, evidenced in a new Northern Rhodesia Police Ordinance, No. 15 (1937).

A federation uniting Northern Rhodesia (Zambia) with Southern Rhodesia (Zimbabwe) and Nyasaland (Malawi) to form the Federation of Rhodesia and Nyasaland was established in 1953 to last until 1963. As on previous occasions of administration change, a police

\[11 \text{ STAT. L.N.E. RHOD. 101 (1917).} \]
\[12 \text{ No. 438 STAT. R. & O. 85 (1911).} \]
\[13 \text{ STAT. L.N.E. RHOD. 253 (1912). It was amended by Proclamation No. 16 (1915) and effected by Proclamation No. 14 (1914) and Amendment Order in Council (1916), which revoked section 20. The Law of 1912 superseded Proclamations Nos. 15 and 19 of 1901. Peculiarly, however, it was not mandatory under this law for police to consent to the merger and be amenable to the Law of 1912. Where officers opted to remain separate, they continued to be governed by the previously existing police instruments in Barotseland or North-Eastern Rhodesia. As a result, initial numbers of the Northern Rhodesia Police Force were very small. In 1912, for example, this force consisted of 19 British officers and 750 enlisted Africans. For details on the background of the Northern Rhodesia Police Force, see CRAMER, supra note 6, at 221-226.} \]
\[14 \text{ Northern Rhodesia Order in Council, No. 324 STAT. R. & O. 395 (1924); see also Northern Rhodesia Order in Council, No. 325, STAT. R. & O. 407 (1924).} \]
\[15 \text{ ORD. PROC. & O. IN COUNCIL N. RHOD. 35 (1927). Under this law, police functioned as a military force during times of war and other public emergencies. Supreme authority was vested in the Governor-General of Northern Rhodesia. However, command, superintendence and control of the force was vested in a Commandant under section 5 of the Police Ordinance (1926). The Commandant was an appointee of the Governor General as approved by the Secretary of the Colonies in England. This law was partial to Europeans, who readily qualified to command ranks under section 6 of the Ordinance of 1926. In 1933, the military portion of the Northern Rhodesia Police Force was detached from the regular police force and designated as the Northern Rhodesia Regiment. The Civil Police Force showed an increase in European police at 80 persons and a decrease in the African enrollment at 447 persons. For details, see CRAMER, supra note 6, at 221-226. The Law of 1926 was consolidated in the Northern Rhodesia Police Ordinance, 1 L.N. RHOD. Ch. 46, 393 (1930).} \]
\[16 \text{ SUPP. L.N. RHOD. 126 (1946).} \]
\[17 \text{ No. 1199 STAT. INST. 1804 (1953); see also Rhodesia and Nyasaland Order in Council, No. 1635 STAT. INST. 3090 (1963). The Federation dissolved under Order in Council, No. 2088 STAT. INST. 4477 (1963).} \]
ordinance followed: the Northern Rhodesia Police Ordinance, No. 5 (1953), was issued to cater to federal law enforcement needs in the Northern Rhodesian territory. At independence in 1964, the Northern Rhodesia Police Force became the Zambia Police Force (the Force) under the same law of 1953.

The Independence Constitution of 1964 in Part IX, articles 48 and 49, provided for the Zambia Police Force as an integral part of the public service. Colonial statutory regimes were modified in 1965 by the Police Act, No. 46 (1965). This law forms the basis of policing institutions in the country today.

The organization and administrative structures of the Zambia police force are largely predicated on the Zambia Police Act. This Act

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18 2 L.N. RHOD. Ch. 44, 1 (1965 ed.). In this pre-independence era, native authorities operated largely unarmed rural police forces to maintain law and order. Limited fiscal resources and the lack of a clearly articulated statutory authority hampered their enforcement functions. In a large number of cases, local police operated as messengers enforcing native authority edicts and summons. Cramer, supra note 6, at 221-226. The Northern Rhodesia Police Reserve, consisting of 1400 Europeans and 750 Africans, was formed in 1950 under ordinance No. 45, 2 L.N. RHOD. Ch. 39, 1 (1964 ed.).


20 2 L.N. RHOD. Ch. 44, 1 (1965 ed.). Under this enactment, police strength is estimated at approximately 6000, catering to a population of about four million people. Most expatriate officers remained on the force for a few years to ensure continuity and the orderly transfer of police functions to Zambian forces. See generally Z. Police Ann. Rep. for the Year 1964 1-39 (1964).

21 1 L.Z. arts. 48-9 (rev. ed. 1972). Articles 48 and 49 of the Constitution vested powers of appointment and disciplinary control of police in the President. As part of his executive functions, command of the armed forces (including the Zambia Police Force) was vested in the President alone. However, the Commissioner of Police was in charge of day-to-day operations of the force coincident with the Police Ordinance of 1953, still deemed applicable. See supra note 20, 2 L.N. RHOD. Ch. 44, 1-72. Furthermore, under articles 48 and 49 of the Independence Constitution of 1964, in conjunction with article 114 (9) and (10), powers of appointment and disciplinary control over police officers below the rank of superintendent were vested in the Commissioner of Police.


23 Under the One Party Constitution of 1973, articles 130 (1) and (c) established a Police and Prison Service Commission to supersede the Public Service Commission as the controlling authority of police. However, even under the One Party Constitution of 1973, power to appoint the Inspector-General of Police, who replaced the Commissioner as the most superior police officer, was vested in the President. The President also enjoys powers of disciplinary control and removal of the Inspector-General and his second in command, according to article 132 (1) and (c) of the Constitution of 1973.

also controls the structure, functions, and discipline of the force.\textsuperscript{25} Hierarchy of command of the Force runs through a Constable, Corporal, Sergeant, Sergeant Major, Sub-Inspector, Assistant Superintendent, Superintendent, Chief Superintendent, Assistant Commissioner, Senior Assistant Commissioner, Deputy Commissioner, Commissioner, Inspector General of Police, and the President.\textsuperscript{26} Three departments hold the structural organization together; namely, the Administration, Technical, and Operations departments.\textsuperscript{27}

The Zambia Security Intelligence Service (ZSIS) was established in 1973.\textsuperscript{28} The ZSIS deals with matters of intelligence and other activities pertaining to the security interests of the country pursuant to the State Security Act of 1969 as amended,\textsuperscript{29} together with the Preservation of Public Security Act of 1960 as amended,\textsuperscript{30} and the Regulations of 1964.\textsuperscript{31} It consists of a director and officers as determined by the President under section 3 of this law. Rule-making powers

\textsuperscript{25} According to section 5 of the Act, the term "security forces of Zambia" refers to the three components of the Zambian armed forces, namely, the Army, which may also include the National Service and Home Guards, the Air Force, and the Zambia Police Force. A small marine force operates on lakes bordering other countries such as Mweru with Zaire, Kariba bordering Zimbabwe, and Lake Tanganyika sharing borders with Tanzania. Cooperation for purposes of law enforcement with other sections of the armed forces is regulated through the Ministry of Home Affairs, which is responsible for the preservation of peace, prevention and detection of crime and apprehension of offenders.


\textsuperscript{27} See generally supra notes 28 and 29. Command of the force rests with the Inspector-General of Police assisted by the Commissioner of Police and three Deputy Commissioners. Each department in turn is under the command of a Senior Assistant Commissioner of Police. The force is jurisdictionally apportioned into 13 divisions, corresponding to the provinces of the country, which are Central, Copperbelt, Eastern, Luapula, Lusaka, North-Western, Southern and Western Provinces. The remaining units are organized according to function, such as the Mobile Police Unit, Training Schools, Para-Military, State House and TZazara Police for the security and patrol of the Chinese-built Zambia-Tanzania Railway. The Police Act was amended in 1985 by No. 23 Z. Gov't Gazette 101 (Acts Supp. 1985), to establish Vigilante Groups in the country. See also Vigilante Regulations, No. 122 Z. Gov't Gazette 323-334 (S.I. Supp. 1986). The Zambia Police Force is assisted by the Zambia National Defense Forces, the Anti-Corruption Commission, the Special Investigation Team for Economy and Trade (SITET), Flying Anti-Robbery and Anti-Drug Squads, the Office of the President, Zambia Police Force Reserve, Mine Police, and private and security guard operations. For details, see Z. Police Ann. Rep. for the Year 1979, 1-45 (1979); see also Z. Police Ann. Rep. for the Year 1976, 1-49 (1976); Z. Police Ann. Rep. for the Year 1974, 1-47 (1974).


\textsuperscript{29} 2 L.Z. Ch. 110, 1 (rev. ed. 1972).


\textsuperscript{31} 2 L.Z. Ch. 106, 8 [Subsidiary] (rev. ed. 1972).
are vested in the President. A Staff Board subject to the instructions of the Director-General appoints, promotes, and disciplines officers in the ZSIS below the rank of Director. The Board advises the Director-General on incidental matters affecting the general welfare of the ZSIS.

It should be emphasized that a close relationship is revealed between the actions of police and the performance of a government. From the public point of view, police performance mirrors the functions and actions of the government. No other agency of the government influences the development of sound constitutionalism more than the police.

In Zambia, due to the strict nature of the one-party system, an independent and impartial law enforcement system must exist. With this in mind, police independence comes only from its integrity and desire to ensure the preservation of individual rights.

The mandate for a police force to enforce law and order requires a reasonable exercise of control to ensure peaceful enjoyment of fundamental human rights. Colonial and post-colonial policing in Zambia was and is hierarchical in nature, reflecting the British influences. State security forces are also a part of this hierarchical system. Since Zambia has been under some form of national emer-

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33 Id.
37 Mwalimu, supra note 4, at 157.
gency continuously since just prior to 1964, the President, police, and state security forces enjoy extraordinary powers, including the right to detain persons. Use of these powers in certain instances results in abuse and infringement of individual rights.

Accountability of police and state security forces is constitutional in nature. Case law has developed within the Zambian constitutional framework that restricts the expansive modalities of police power and state security forces. Administrative accountability has also developed, as reflected in disciplinary sanctions imposed against rogue law enforcement agents.

The law of human rights in Zambia typifies similar regimes in other Commonwealth African countries that limit complete enjoyment of fundamental human rights in the interests of national security, public order, safety, general welfare of the state, and other policy considerations. This "misapplication" of human rights law can be traced to colonial formulation of human rights norms as part of a "second-tier" of states' rights, ordinarily reflected in the "public order" laws (such as criminal law). Contemporary formulation of human rights in Zambia and other sub-Saharan African states constitutes an usurpation of individual rights by the state because these two levels differ from one another in a basic sense—namely, fundamental human rights are regarded as the basis upon which all other constitutional norms rest, while second tier norms are the basis for government rights. To ensure that Zambia and other sub-Saharan nations recognize the full enjoyment of basic rights, the police and state security forces must function independently and focus on law enforcement rather than regime protection.

C. Theoretical Antecedents of Police

A police force represents the government department established primarily to maintain law and order. The caveat in the exercise of police authority is that reasonable control must always accompany its practical utility. However the police force itself, following the traditional concept of this government department, is granted discretion to determine the manner in which it safeguards both individual rights and government security.

Applying a test of reasonableness, the police exceed their mandated authority with actions considered arbitrary, capricious, or influenced

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39 See generally WEBSTER'S COLLEGIATE DICTIONARY 910 (1984); see also BLACK'S LAW DICTIONARY 1041 (5th ed. 1979).
by improper motivation. Where these actions adversely affect liberties and freedoms of individuals, they must be deemed a breach of fundamental human rights. Furthermore, if police action is not for the common good or the welfare of society at large, it must be declared a violation of fundamental human rights. Finally, police violations of laws restricting their powers are an abridgment of basic human rights.

This article employs a standard of "reasonable control" to examine police and state security forces in Zambia and follows a philosophy of unrestricted enjoyment of fundamental human rights as aspects of Zambian constitutionalism.40

II: ACCOUNTABILITY OF POLICE AND STATE SECURITY FORCES IN LAW AND PRACTICE

Police accountability exists in the constitutional context through administrative regulations and through the judicial process. The courts act as sentinels of individual liberties, ensuring that police powers (including those of state security forces) are utilized in accordance with the Constitution.41 Therefore, the legal accountability of any police force is constitutional in nature.42

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40 The test of "reasonable control" regarding police powers can conceptually be manipulated in a variety of ways to predicate other aspects of police powers. For example, secret police and other state security forces are founded on expansive modalities of state sovereignty in the philosophical tensions between fundamental human rights and rights of the state. The design of these forces, though not illegal by any means, is founded on a circumvention of the restrictive nature of the traditional authority of police as a unit of government. This article postulates that policy justifications emanating under notions of public security, public order and the general welfare of the state which are otherwise impermissible from the traditional outlook of police mandate, namely the exercise of "reasonable control" over persons, illustrate the extension in scope of powers enjoyed by state security and other secret police. Any unit of government established for the execution of secret police goals requires a tighter process of oversight in order to monitor possible erosion of basic individual rights. Contemporary national states invariably have blurred the requisite distinction between the regular political functions of the executive branch of a government and the authority of police as sentinels of law in public or civil service. The obliteration of this necessary demarcation invites undue political interference in the law enforcement function of police. As a result, the police force, as an organ of the law to safeguard society, acquires an identity as an instrument of the executive branch of government to warrant political interference. It must function as an independent entity of the state, primarily to follow the law and not the executive branch.

41 ZAMBIA CONST. art. 26.
42 Id.
Constitutional underpinnings of this accountability give rise to actions under tort law, administrative law, criminal law, and other legal branches. These actions arise only to the extent that police action has been subjected to its mandate to exercise reasonable control over persons and property for the common good and not to protect dominant classes. Since fundamental human rights constitute organic norms of the Constitution, all other norms, whether issued in the Constitution itself or purporting to follow it, must be conscionable under the spirit of fundamental human rights provisions. Thus, the test is a constitutional one which ascribes legality and liability to police and state security force actions.

In Zambia, the parameters of the police mandate are contoured under article 26 of the Constitution, balancing between individual rights and the domain of a sovereign state. Article 26, in addition to other articles limiting individual rights, stipulates that, notwithstanding guaranteed rights in other articles, a law or action under it is consistent with these provisions insofar as it is shown that this particular law permits preemption of these rights because the country is under a declaration of war or a state of emergency sustainable under article 30 of the Constitution. Any such law or action can only be held invalid if it is adjudged excessive, taking into account the test of reasonableness in view of prevailing circumstances.

Article 30 of the Constitution stipulates when the President may preempt the exercise of fundamental human rights. The President may declare that a state of emergency exists under the Emergency Powers Act of 1964. Alternatively, the President may declare that a situation exists which may develop into a state emergency under the Preservation of Public Security Act.

Under these measures, the President, police, and state security forces enjoy extraordinary powers. Since the exercise of executive

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43 Id.
44 Id. Article 15 relates to the protection of the right to personal liberty; article 18 protects from deprivation of property; article 19 protects from deprivation of privacy of home and other property; article 21 relates to the protection of freedom of conscience; article 22 addresses protection of freedom of expression; article 23 covers protection of freedom of assembly and associations; article 24 protects freedom of movement; and article 25 protects from discrimination on the grounds of race.
45 Id. art. 30.
46 Id.
47 See generally ZAMBIA: A COUNTRY STUDY (I. Kaplan 3d ed. 1987); see also Parker, Control of Executive Discretion Under Preventive Detention Law in Zambia, 13 COMP. & INT'L. L. J. SOUTHERN AFRICA 159 (July 1980).
power must conform to the Constitution's boundaries, notwithstanding the necessary draconian nature of such actions, a process must be established to review executive action and police powers.

An accord between these two sets of values, basic individual rights and government authority embodied in emergency executive and police powers, has been reached in article 27 of the 1973 Constitution. Under this article, where a person's liberties to freely move about are curtailed or limited in any way as a result of executive action, the following conditions must be complied with by the detaining authority.

First, as soon as reasonably feasible, but not in excess of fourteen days from the date the detention commenced, the victim must be provided with a written statement in a language he or she understands, articulating in detail the specific grounds of detention.

Second, not more than thirty days from the time the detention or restriction began, a notice must be published in the Government Gazette stipulating that the individual concerned is in detention. Detaining authorities also must provide the specific provisions of a law which permits such restriction or detention.

Third, only after a year in confinement or detention and upon a request from the detainee during the term of the detention, the victim's case must be reviewed by an autonomous tribunal constituted under law. Legal representation must also be provided either in the tribunal or in the court of adjudication according to article 27 of the Constitution.

Case law has emerged under these provisions to challenge the liberal exercise of presidential and police powers of detention. The cases are primarily founded on notions of constitutional accountability, but give rise to such torts as false imprisonment and malicious prosecution. In Banda v. Attorney General, for example, petitioner, a suspect in a murder trial, was detained by police under powers

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48 ZAMBIA CONST. art. 27.
49 Id. art. 27(a).
50 Id. art. 27(b).
51 Id. art. 27(c). See also Rubin, Tarantino & Larkin, Constitutions of the Countries of the World 52 (A.P. Blastein & G.H. Flanz eds. Supp. 1985).
52 ZAMBIA CONST. arts. 27(d)-(e). These provisions require that the detainee consult a legal representative of her choice. The attorney appears with the victim before the tribunal adjudicating her case. Facilities for legal representation under articles 27(d) and (e) of the Constitution are in respect to both the court and the review tribunal.
contained in Regulation 33(6) of the Preservation of Public Security Regulations of 1964 for nine days and then released without being provided grounds of detention as required by article 27 of the Constitution. The petitioner successfully maintained an action against the government for false imprisonment. In *Mulwanda v. The People*, petitioner, a Permanent Secretary in the Ministry of Home Affairs, was detained by police under the same Regulation 33(6) of the Regulations of 1964 for corrupt practices. The police officer who detained him believed that the case was a peculiar one which demanded similar unusual methods of investigation. The Court denounced the officer's detention of the petitioner.

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55 The Court criticized abuse of police powers under this Regulation stating:

A person may be arrested and detained under Regulation 33(6) if, and only if, the police officer in question has reason to believe that there are grounds which would justify the making of a Presidential order under Regulation 33(1). It is unlawful to use Regulation 33(6) for the purpose of investigating a criminal offense unrelated to public security. It is incorrect to say that in the case of a detention order under Regulation 33(6), the police act only on suspicion and do not have any grounds as envisaged by article 27 and which therefore applies only when grounds are established. As a matter of construction of the language used, there must be grounds for the police detention itself, and if that were not the proper construction, Regulation 33(6) would be *ultra-vires*.

1978 Z.L.R. at 238.

In *Mwaba v. Attorney General*, 1975 Z.L.R. 218 (1975), which disapproved *Chimba & Others v. Attorney-General*, 1972 Z.L.R. 165 (1972) on the same subject, the court held that a person detained under the Preservation of Public Security Regulations of 1964 does not surrender all her rights as a citizen of Zambia except those which are vitiated by virtue of the detention. But this detention under these Regulations is a mere preventive act, and no stipulations can be imposed except those which reasonably can be adjudged to facilitate the process of detention. In *Mwangala v. Attorney-General*, 1974 Z.L.R. 97 (1974), where the plaintiff was arrested by police, kept in a prison cell for twenty-four hours, released on a police bond, and never prosecuted, such police action was held to be an illegal act.


57 The High Court in Mulwanda's case disagreed with the police officer and his use of police powers, warning:

This is a thoroughly reprehensible attitude which must be unreservedly condemned. We share the deep anxiety which every right thinking member of society must feel at the prevalence of corruption in high places, but if the law enforcement agencies of the state knowingly resort to illegal methods to combat this type of social evil, they simply replace it with an even greater evil, namely an arm of the executive which regards itself as being above and beyond the law. Far from protecting society, these methods will inevitably lead to its destruction.

*Id.* at 136.
There are also cases decided within the parameters of criminal law and criminal procedure. For example, in *Mbandangoma v. Attorney General*, the plaintiff successfully made a case against the police for misuse of detention powers in a police bond. The courts strongly reprimanded the police, cautioning that they must show justifications to arrest the plaintiff and at the time of arrest, reasonable grounds must exist linking the plaintiff with the offense.

Other than judicial accountability, the police force is subject to administrative control under the Constitution and the Police Act.

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59 Id. at 49; see also In the Matter of the Criminal Procedure Code and In the Matter of R.S. Siuluta & 3 Others, 1979 Z.L.R. 14 (1979). In this case, the state admitted to the detention of the applicants while further inquiries were being made against them. The police intended to charge them with an offense in the distant future. Judge Hadden of the High Court found this conduct of the state improper and a gross violation of law. Id. at 16.
60 3 L.Z. Ch. 133, 1 (rev. ed. 1972). Recall that article 27 of the Constitution of Zambia provides caveats in the exercise of police powers which affect fundamental human rights enumerated in articles 13 to 26. These caveats pertain to rights to life, personal liberty, protection from slavery and forced labor, inhuman treatment, deprivation of property, privacy of home and other property, provisions to secure protection of law, protection of freedom of conscience, freedom of expression, freedom of movement, freedom of assembly and association, and freedom from discrimination on the basis of race, gender or other grounds. Under article 27, where a person's freedom of movement is restricted or detained, the detaining authority, which includes police and state security forces above the rank of superintendent, must comply with a number of conditions.

In any case, article 29 of the Constitution requires that if any person alleges that fundamental human rights provisions in articles 13 to 27 have been, are being, or are likely to be infringed in relation to him, then such a person must apply to the High Court for redress. Article 27 ensures compliance with the letter and spirit of constitutional mechanisms in respect to tenets of fundamental human rights. Article 29 is the culmination of the process and practice of the arena of basic rights under Part III of the Constitution. Should abuse by police or other authorities occur, notwithstanding the conditions stipulated in article 27, then the person is at liberty to seek court action.

In regard to administrative controls under the Constitution, these are mainly reflected in the work of the Police and Prison Service Commission established under articles 130-134 of the Constitution. Its membership is determined by the President and therefore, members may be removed by him for inability to discharge respective functions including misconduct in office. However, the Commission's powers are limited to enable the President to direct the Police and Prison Service Commission under article 131(9) and (10) of the Constitution. The President could further order the Commission to refer any matter under its consideration to him for a determination according to article 131 (10) of the Constitution. However, the courts have held that once a Commission has decided that the case merits no further inquiry or adjudication, then the matter ceases to be under consideration by the particular Commission. Once the matter is no longer being considered by the Commission, the President cannot exercise his constitutional powers to require the matter to be referred to him. Kangombe v. Attorney-General, 1973 Z.L.R. 114 (1973).
Administrative control under the above-cited Police Act by and large constitutes internal acts of discipline.\(^1\)

Methods of administrative accountability exist in the form of superior officers in the police force taking disciplinary measures against rogue police officers under a recognized mechanism of internal discipline in conjunction with an independent commission. For example, in 1980, 124 incidents of misconduct by police were reported, including theft by public servants, careless driving, and others.\(^2\) Such action enhances the poor image of police in the minds of the public and affects public respect for the law and government.\(^3\) Thus far, the work of the Police and Prison Service Commission is commendable.\(^4\)

It is true, however, that conditions under which the police operate in Zambia and other countries in sub-Saharan Africa are not commensurate with an effective policing system.\(^5\)


\(^5\) These poor conditions include low wages, inadequate or unsavory working conditions, inadequate transportation, and poor communications equipment. These are acknowledged by the Police and Prison Service Commission Annual Reports for the Years 1974-82. To improve their service to the public, the security and welfare of the police must correspondingly improve. Such improvements should reduce the tendencies to engage in corrupt practices. The issue of corruption, not only in the police force but also in the public service, generally is a major concern of the government and has culminated in the Corrupt Practices Act of 1980. Z. Gov't Gazette 63 (Acts Supp. 1980). Under this Act, an Anti-Corruption Commission controlled and supervised by the President was created. The Commission investigates complaints and alleged conduct of any public officer suspected of engaging in corrupt practices and initiates prosecutions in the courts. A report of such an officer is made to the President under section 10 (1) of the Act. The Corrupt Practices Act, supersedes the English Prevention of Corruption Act of 1916, extended to Zambia under the English Law (Extent of Application) Act, 1963, 1 L.Z. Ch. 4, 1 (rev. ed. 1972).
A. The Law of Human Rights in Zambia

The law of human rights in Zambia is recognized, preserved, and secured in Part III, articles 13 to 27 of the Constitution, with supplementary provisions in articles 28-31. For the purposes of this discussion, Part III of the Constitution of Zambia has been subdivided into four sections, as indicated below. Zambia was instrumental in the formulation of the Charter on Human and Peoples Rights adopted by the Heads of State of the Organization of African Unity (OAU) on June 27, 1981. Commitment to fundamental human rights in Zambia is also evident in serial prescription of these rights in the Constitution immediately subsequent to the formulations of principles of sovereignty and citizenship.

As in other countries of sub-Saharan Africa, these fundamental human rights are abridged. For example, article 13, which declares fundamental freedoms of life, liberty, security of the person in law, and protection of privacy of the home and other property, is sustainable only if these freedoms do not transgress on the rights and interests of the state as contained in article 4 of the Constitution prohibiting the formation of political parties outside the framework of the United National Independence Party. Also, rights of any individual must not prejudice the rights and freedoms of others or the public interest.

Although the government guarantees extensive fundamental human rights and observes basic freedoms, due process, and individual rights, the government nevertheless restricted political rights as a one party state. These restrictions are manifested in a variety of ways, such as, the large concentration of power in the hands of the President.

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66 ZAMBIA CONST. arts. 28-31.
67 21 I.L.M. 58 (1982). The scheme of basic human rights espoused in this piece calls for re-appraisal in the formulation of fundamental human rights initially, followed by principles of sovereignty and citizenship. This view consonantly applies to prescription of norms of basic rights in the Zambia Constitution. As societies increasingly move away from regional or state identity, the suggested scheme is appreciably more in tune with the commonality of human rights as a global tradition. This schema is reflected in the Constitution of the Federal Republic of Brazil, 1988.
68 ZAMBIA CONST. arts. 13-27.
Under the president's broad emergency and presidential powers, he is at liberty to suspend "observance of human rights in the interests of state security."\(^{70}\) Through the emergency legislation "the president has broad discretion to detain or restrict the movement of people, and law enforcement personnel have extra-ordinary powers to detain suspects and search homes."\(^{71}\)

As a result of the ongoing state of emergency in Zambia since 1964, the President has wide powers of detention, which are readily available to his police and state security forces.\(^{72}\) In 1988, roughly twenty people were still in detention, including eight people detained in late 1988 for an alleged plot to overthrow the government. Although detainees do have recourse to the courts, the legal process is generally not expeditious.\(^{73}\) Between 1979 and 1988, the reports recorded no denials of a free and public trial because the right to such a trial is constitutionally guaranteed (except in the case of presidential detainees).\(^{74}\)

Section Three of this part of the Zambian Constitution deals with the governmental attitude and record concerning national, international and non-governmental investigations of alleged human rights violations. The government does not encourage, discourage, or impede human rights inquiries by activists and organizations. Committed to the principles of human rights, President Kaunda was instrumental in seeking a mechanism in the Organization of African Unity for the protection and preservation of human rights in Africa. Although there are no local human rights groups in Zambia, the Law Association of Zambia and the University's law school cooperate in monitoring human rights protection in the country.\(^{75}\) In the period of 1979 to 1988,\(^{76}\) there is no public record of the Zambian government

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\(^{71}\) U.S. DEP'T. ST. COUNTRY REP. HUM. RTS. PRAC. 1988, 412 (1989). Because of this continuous state of emergency, it is recognized generally that the gap between rights accorded in the Constitution and those actually enjoyed by Zambians remains to be narrowed.


\(^{73}\) See infra note 96.


\(^{75}\) Id.

\(^{76}\) See infra note 96.
being subject to an international, national or regional investigation for the violation of human rights.

In 1982, however, Amnesty International reported concern regarding detentions without trial and mistreatment of prisoners in Zambia. Similar concerns were expressed by Amnesty International in 1983 and 1985. Because of these concerns, Amnesty International urged the government in 1986 to investigate allegations of the torture of imprisoned South-African security persons. President Kaunda replied that no torture or ill treatment had been inflicted on the South Africans and that their cases would be reviewed by the courts in accordance with the law.

In regard to cruel and inhuman or degrading treatment or punishment, Zambian practice between 1979 to 1988 is aptly summarized by the Country Reports of 1988 which state:

The Constitution outlaws torture, but there are credible reports that police and military personnel have resorted to excessive force when interrogating detainees or prisoners. In September, 1988, a High Court judge criticized ‘overzealous’ police officers and said that innocent people were treated brutally to obtain statements of confessions. Alleged abuses reported include beatings, the withholding of food, pain inflicted on various parts of the body and long periods of solitary confinement. The courts have ordered investigations to ascertain if confessions or statements were made after torture or mistreatment. All the Reports indicate that Zambian prisons are over populated, critically understaffed, unsanitary, and affected by the general lack of medical facilities throughout the whole country.

The right of privacy in the family, in the home, and in correspondence is guaranteed by the Constitution. Therefore, the police and state security forces must have search warrants to enter homes, except in cases involving a state of emergency or the deportation of an illegal alien. A magistrate or police officer above the rank of

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79 See infra note 96.
Sub-Inspector may issue a search warrant. To obtain a search warrant, constructive probable cause must be demonstrated, just as in the American system. This requirement is typically met in Zambia.\textsuperscript{82}

Section Two of this portion of the Constitution deals with human rights practices involving the respect for civil and political liberties.\textsuperscript{83} Freedom of speech and the freedom of the press are respected as long as they do not involve derogatory commentary about the Head of State, the philosophy of humanism, or the one-party State.\textsuperscript{84}

Exercising freedom of association and the right to peaceful assembly is similar to exercising the right to free speech and press. In principle, these rights were adversely affected by the nature of the political system. Therefore, all political activism outside the ambit of the one-party state was prohibited.\textsuperscript{85} As a result, permits to hold public association meetings, processions, rallies, assemblies, and other fraternal gatherings must be obtained from the police as a matter of course.\textsuperscript{86} These permits are easily secured unless the government believes that such assemblies will be disruptive and that they will destabilize the local authorities.\textsuperscript{87} The country possesses a multitude of associations and other professional bodies. These associations function as unofficial lobbying groups to exert pressure on the party and government regarding numerous economic, political and social issues.\textsuperscript{88}

In Zambia, the freedom of religion is constitutionally guaranteed and supported by President Kaunda. A wide variety of Christian denominations operate freely in the country. Even though the government specifically prohibits the Watchtower Sect (the Jehovah's Witnesses) from conducting open air meetings and door to door campaigns seeking converts, the Sect functions openly with other religions. Zambia has a large population of Muslims and Hindus with their own mosques and temples. Legal associations and religious groups operate independently of party control or influence. President

\textsuperscript{82} See infra note 96. Safeguards of fair and public trial as they exist at common law also apply to Zambia in non-detention cases. When these issues are tried, the trials are generally held in public. The Zambian judiciary is by and large known for its independence. However, the President appoints and transfers judges.

\textsuperscript{83} Id.

\textsuperscript{84} See e.g., U.S. DEP’T ST. COUNTRY REP. HUM. RTS. PROC. 1988, 414; note 178.

\textsuperscript{85} See infra note 96.

\textsuperscript{86} Id.

\textsuperscript{87} Id.

\textsuperscript{88} Id.
Kaunda encourages independent community action by religious groups.\textsuperscript{89}

Another area of civil and political liberties involves the right of unrestricted internal and external movement, which includes foreign travel, emigration, and repatriation.\textsuperscript{90} In Zambia, the President may restrict the movement of individuals within the country according to his emergency powers. For example, the government consistently prohibits foreign diplomats from traveling outside of a forty to fifty mile radius from Lusaka without the written permission of the Ministry of Home Affairs. Concerning internal travel, the government routinely uses police road blocks to conduct vehicle and passenger search and seizures. Although the government permits emigration, strict currency regulations, a result of adverse economic conditions, renders it difficult. Despite the government’s travel restrictions, Zambia has served as a haven for refugees in the region, thereby earning the country high praise by the United Nations High Commission for Refugees (UNHCR). During the war in Rhodesia, Zambia provided refuge to more than 60,000 Rhodesian refugees. In 1980, Zambia served as host to an estimated 17,500 refugees, including 11,000 Angolans and 4000 Namibians. Regarding foreign travel, the government reserves the right to refuse or withdraw a passport when an individual’s activities abroad seem to be inimical to the “interests of the state.”

The final and most important section of the Constitution involving civil and political liberties relates to the rights of citizens to change the government.\textsuperscript{91} Approximately 10% of Zambia’s adult population are currently members of the ruling United National Independence Party.\textsuperscript{92} As the leader of the party and head of state, the President possesses overwhelming powers that enable him to determine the members of the Central Committee and the Cabinet, which are the two premier organs of formal government. Political loyalty in both of these institutions is exacted by a mixture of merit and tribal balancing. All political and governmental offices at any level must be filled by members of UNIP. In practice, however, the political system was open to persons of divergent opinions as long as they operate within the one party structure.\textsuperscript{93}

\textsuperscript{89} Id.
\textsuperscript{90} Id.
\textsuperscript{92} See infra note 96.
\textsuperscript{93} See REPUBLIC OF ZAMBIA NATIONAL ASSEMBLY. THE REP. OF THE SPECIAL PAR-
In section four of this part of the Zambian Constitution, discrimination on the grounds of race, gender, religion, language or social status is dealt with. To appreciate the nature of these rights, it should be noted that Zambia consists of seven million people with more than seventy-two Bantu speaking ethnic groups. The pursuit of equality is generally made to meet social and economic needs. However, between February and April of 1988, 203 trading licenses were withdrawn from business persons, most of them Asians, in order to stem black marketeering. This revocation was considered a discriminatory act by most observers.

Thus, an interesting paradox exists within Zambia. Zambia is a vocal supporter and strong proponent of human rights at the regional and international levels. Consequently, Zambia is in the forefront of human rights and provides tangible support for self determination in Zimbabwe, Angola, Namibia, Mozambique and South Africa. In addition, Zambia serves as a country of first refuge for stateless and other displaced persons in the region. Simultaneously, the Zambian government continues to abridge fundamental human rights of its citizens. The solution to the problem lies in a fresh and renewal commitment to preserve the rights of Zambia’s constituents.

C. A New Approach to Human Rights Law in Zambia

As stated earlier, the primary function of any police force is to facilitate the peaceful and unbridled enjoyment of individual rights and freedoms in the state. In the execution of these functions, police
must balance the competing interests of individual rights with the
derivative rights and interests of the state. Balancing the two sets of
values is the subject of the restrictions on human rights in article 26
of the Constitution. Under this article, fundamental human rights
are subjected to powers of police and state security forces in the
event of war or national emergency under article 30 of the Constitu-
tion. Typically, article 30 is applied in regard to detention.

Therefore, the security and peaceful enjoyment of fundamental
rights are subordinated to the mandate of police and state security
forces under the Zambian regimes. Since the mandate of police power
is constitutional, both the police and state security forces must strictly
comply with the law in exercising their authority. Case law in which
Zambian courts have succinctly elucidated on this principle has been
alluded to above.

From the perspective of human rights law in Zambia, vis-a-vis the
specific mandate of police power and also the general attributes of
rights and powers of a sovereign state, the complete and unabridged
enjoyment of rights must be protected, even where purposes of na-
tional security, public order, defense, public safety, public morality,
or any such actions or laws are involved.

The issue of laws restrictive of fundamental human rights, yet not
unreasonable, is a conceptual misnomer in a democratic society. First,
from a regulatory point of view, this formulation shifts the burden
from the state to the victim, whose rights have been infringed, to

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97 ZAMBIA CONST. art. 26.
98 Id. art. 30.
99 Legislative history of the law on emergencies and preservation of public security
goes back to the period immediately before the independence of Zambia. On the
attainment of independence, the President assumed full executive powers similar to
those enjoyed by his predecessor. These powers included detention powers which
are delegable to appropriate police officers and state security forces. These powers
had been invoked by the colonial governor three months before independence to
deal with the Lumpa-Lenshina Mulenga uprisings in the eastern and northern portions
of the country. Pursuant to section 5(3) of the Preservation of Public Security Act,
Parliament is empowered to extend declarations of the colonial governor now vested
in the President. Under this authority, the Governor's declaration on the Lumpa-
Lenshina Mulenga uprisings continued into the present. It can be revoked by the
President or the National Assembly, or it lapses within seven days of a new President
assuming power other than the incumbent in power according to the Constitution
(Amendment) Act, No. 5 Z. Gov't GAZETTE 189 (Supp. 1969). Detention powers
contained in the Preservation of Public Security Act have been used to respond to
various situations ranging from conditions of liberation wars, political instability,
and purely criminal activities.
100 See supra footnotes 53-59 and accompanying text.
show cause why the state should not violate his rights. This burden supports the postulation that the state usurps rights that are properly vested in the individual.

Second, the only state action reasonably justifiable in a democratic society is a valid and legitimate one under fundamental human rights provisions. If such action or law contradicts these provisions, it must inherently offend notions of democracy.

Third, democracy symbolizes a government by the people, essentially a government whereby primordial authority is vested in the people to be exercised by them directly or indirectly through a system of representation reflected in a free electoral process. This concept differs markedly from democratic centrisim, a feature of any one-party state in which party members participate in policy discussions at all levels.\(^\text{101}\) The one-party system is more closely related to principles of oligarchy than to the traditional concept of democracy. As such, two contradictory principles cannot form the basis for diminishing rights and freedoms in specific cases.

Fourth, a postulation that the “participatory” disposition of the Zambian one-party state rendered it more in line with attributes of democracy and therefore justifies restrictions of basic rights if state action is necessary in a democratic society, is neutralized by the essence of the concept of democracy itself, namely the unrestricted freedom of people to self-govern. Their representatives in government constitute their agents. Since the people have declared their basic rights and freedom under articles 13 through 26 of the Constitution to be fundamental, the state lacks authority to vest in itself the right to serve purported interests of the state by limiting democracy.

The commitment to complete enjoyment of fundamental human rights as expressed under articles 13 through 26 of the Constitution, as long as they do not impinge on the rights of others, stems from the proposition that policy justifications limiting complete enjoyment of basic rights and freedoms constitute second-tier\(^\text{102}\) prescriptive norms already addressed by laws, rules, and regulations of public order. The legitimacy and authority of these limitations are from constitutional norms. However, these norms were not designed to supersede

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\(^{101}\) Members of the party and the nation as a whole are, by the nature of the system itself, required to follow decisions ultimately made by the Central Committee of the Party and the Office of the President.

\(^{102}\) “Second-tier” means the secondary level of formulating norms of laws governing societal conduct, distinguished from the primary or organic levels upon which norms of fundamental human rights are created.
or override the inherent enjoyment of basic rights contained in the Constitution.

There should be a commitment to full enjoyment of basic rights and freedoms formulated and recognized in the Constitution, except where they transgress the rights of others. Therefore, fundamental human rights are not about torture, inhuman treatment, or detention by state sanction, but instead represent an affirmation of the sanctity of life through law. Any articulation by the state to justify their preemption in specified cases under the guise of state sovereignty inherently undermines these fundamental principles.

If these basic rights and freedoms are considered derogable or revocable at the whim of the state, then it would follow that death, torture, and other forms of cruel and inhuman treatment or punishment would be conscionable in those state-justified circumstances. This view is erroneous and not constitutionally sound. The goal is just the opposite, namely to formulate and enshrine these natural rights recognized as safeguards against any abuse, erosion or abridgement. Abuse of human rights is the same whether it occurs overtly through a tangible display of force by individuals, or by instruments of the state to carry out prohibited actions in the name of national security, defense, public order or other policy considerations. If it is illegal for individuals to derogate fundamental human rights, it is also wrong for state instruments of power to do so. The Constitution represents an independent power base to govern the diversity of Zambia's citizens and promote the uniqueness of individuality.103 The Constitution is based on fundamental human rights, as reposed in the individual. Since constitutional foundation represents the collective will of the people, humanity at this level cannot be diminished in any way. Any such attempt conceptually leaves the entire constitutional mechanism in disarray because the power base upon which it was founded has been eroded. Constitutional preemption of basic individual rights treads on this delicate and most fundamental tenet of organized society. Therefore, legal circumstances do not exist where it is proper to reduce, restrict, or take away fundamental human rights. Moreover, preemption may not be inserted in the organic law to strip such rights. The Constitution cannot sanction the demise of life in deference to expansive modalities of state rights.104 There are

103 See generally Mwalimu, supra note 4, at 157.
104 As of 1988, 28 countries objected to the death penalty, 18 others allowed it for very exceptional criminal activities only, and 128 countries permitted it for
no state rights without fundamental human rights, including rights of those who have been delegated to govern or direct the state's course.

The process and practice of punishment in the case of wrongdoing is justified. In practice, these functions must necessarily be secondary under the wide umbrella of policy justifications. The bond of humanity is cemented by this consent to be bound by societal norms. Those who do not consent prima-facie are not bound and by implication must find a different level of consent or face expulsion from one society to another. Incidents of dissent in various societies and the courage of "dissidents" testify to this proposition. Until they have found an association or polity with whom they can forge a new compact, they may as well remain stateless. Therefore, no criminal act or civil wrong should be committed against anyone protected by this compact as generally manifested in the constitution, custom, or tradition holding a particular society together. Anyone in contravention of this compact is subject to the domain of state sovereignty as the only agent permitted by the collective will of the people to enforce and oversee the sanctity of individual rights expressed in the constitution. Under the second-tier permitting state or governmental action, sanctions against those engaging in recalcitrant behavior are properly within the ambit of rights and interests of a state. However, the state can only carry out and execute these functions to the extent that the Constitution of Zambia permits. Fundamental human rights, or the Bill of Rights as the case may be, are the only portion of the Constitution fundamentally prohibited from being infringed upon by anyone, including the state itself. The converse must be considered sound—that the state, being the preeminent agent of the collective will of the people, must ensure that recognition of these fundamental rights and freedoms are respected at all times by both the state and the individual. Such is the solemnity of fundamental human rights.

Government is established for the preservation of rights of citizens and other inhabitants in society. From the preservation of their rights, state rights and interests are founded and secured. A government established for purposes other than the security of citizens' rights lacks the mandate to rule. Therefore, violation of fundamental human rights by state instruments directly and immediately ruptures gov-

ernmental authority and legitimacy. Concurrently, any government which does not realize the essence of fundamental human rights as its base of authority is similarly culpable and negligent in the duty of a government to secure and safeguard the fundamentality of basic rights of the individual.

Basic or fundamental human rights of the individual are traced to natural and inalienable rights common to all, preserved and collected in the most fundamental form. The Constitution upon its creation finds them already in full bloom, original and fundamental. Pre-existence of a conglomerate of these rights prior to societal organization demands that the role of the Constitution be confined to recognition, preservation, respect and enforcement of these rights. This is necessary to recognize the imperfections in any structural edifice of humanity.

Therefore, the Constitution, representative of the collective will of the people, can do no more than ensure that the commonality of power in each and every individual is embodied in this instrument to ensure the complete exercise of rights. This equality must preserve the sanctity of the human person rather than an imposition of the will of the state over and above individual rights. State rights and interests must remain cognizant of their original source and be derivative of individual rights collected in an instrument representative of their collective will. Individual rights must be sanctified. Only in preservation, recognition and enforcement of human rights can the Constitution truly be the organic and fundamental law of the land.

It is also unsound for a basic law to secure and guarantee rights on one hand and essentially deny them on the other. These rights must be balanced in a court of law under a process requisite for a determination of breach.

The government cannot justify derogation of fundamental rights due to extraordinary circumstances contained in the Constitution. The government may take action through powers properly issued under the Constitution. Fundamental rights are not bargainable or negotiated in the Constitution, otherwise there would be no need for subordinate laws upon which policy finds expression. Rights are bargained and negotiated outside the Constitution, as legislators look into this instrument for guidance. Alternatively, they may be bargained while looking to the Constitution for direction. Therefore, any government and its operatives functioning under the rule of law must be subjected to this proposition. Those who violate the law tread on this delicate and important protective shield of the individual against state incursions into his or her private life and also against
transgressions of others in society. Breach of norms occurs at various levels in the interaction of society giving rise to functional constitutionalism. These include breaches by organized polities themselves. Whether breach occurs due to individual or state transgressions, the transgressors must be ascertained and sanctioned. As such, the government cannot, as a privilege of the state, constitutionally deprive another person of their natural rights. This premise stems from the fact that fundamental human rights contained in the Constitution of Zambia, as in other sub-Saharan African countries, are superimposed over and above all other constitutional norms and subordinate laws issued under them. Law is for order and peace and not for violence and destruction.

Consequently, no phrase better signifies the unity of individuals than “we the people.” The fact that the people themselves have united to create an organization, association or entity to be governed under the rule of law signifies the supremacy of the organic law of the land, namely the Constitution, custom or practice upon which society is founded. In essence, the source of fundamentality of human

rights in the constitution stems from the recognition of "we the people." This phrase is not synonymous exclusively with group rights but is also a fundamental predication of the human aspect of the individual as the basis of state creation.

Conceptually, even the proposition that these constitutions set against themselves is inherently flawed, because there is only one source to predicate enjoyment, namely the organic norms of fundamental human rights. Since fundamental organic norms cannot be used against themselves to prescribe and formulate liability, they must be tested against something else in the Constitution more superior than fundamental human rights. However, there is nothing more fundamental than basic human rights through which the state's rights and interests are founded; therefore, fundamental human rights must serve as the unrestricted source for all other norms.

The current state of emergency leads to excessive use of detention powers. The use of emergency powers must be constrained and narrowly restricted to legitimate applications of national security. However, judicial review of these powers ensures redress for wrongful application. This practice must be vigilantly pursued. It is vital that police and state security forces be made fully cognizant of the value of respect for the human rights tradition. Prisoners' fundamental human rights must be preserved at all times. Police and state security forces constitute societal agents, and in their dealings with the antisocial elements they must articulate and reflect the highest sense of honor and values of the law-abiding elements of society. Therefore, one of the primary reflections of the law enforcement function is to accentuate the positive attributes of compliance to norms of a civil society. As much as penal sanctions are necessary, they must be subordinate to the principles of rehabilitation and the need to prepare a perpetrator for reentry into society.

IV. Conclusion

In short, an examination of human rights practices indicates a general respect for human rights in Zambia, but also reveals a consistent disregard of the rights of prisoners and detainees during the course of arrest or interrogations, especially in cases pertaining to national security. Reports of the use of brutal force and other inhuman treatment of prisoners and detainees have been documented.\(^6\) Fur-

\(^6\) See supra note 96.
thermore, documented reports of unsanitary conditions, understaffing, and overpopulation in prisons constitute potential or actual grounds of abuse of inmate rights. These must be remedied through citizen awareness programs and the disciplining of offending officers through administration and criminal sanctions, including dismissal from public service and prison terms.

However, no government program concerning the proper interaction between law enforcement agents and the general public can succeed without the respective understanding and appreciation of individual human rights. Since law enforcement agents and the general public can only respect and protect that which they can understand, an educated and aware citizen is a valuable asset. If the level of understanding is minimal, respect will be correspondingly low. Thus, absent public awareness and understanding of the fundamentality of the rights enshrined in the Constitution, no amount of government representation will solve the problem of human rights abuse.

Coincident with public and police awareness of basic human rights is the issue of accessibility and contact between the public institutions and the people for whom they are designed to serve. This accessibility ensures familiarity between the ordinary citizen and government institutions, especially those units in continuous contact with the public. Law abiding members of the community must be free to interact with institutions of state power such as the police and state security forces. The pride of law enforcement must be reflected in the proper balance between the security of public institutions and public accessibility to the same. Only a citizen, unintimidated by the functions of the state, aware of his rights, and free to interact with all the instruments of state power, can informatively and effectively contribute to the development of the national state. Above all, there is no greater challenge to the success of a government than the need to ensure the general education of all segments of society regarding fundamental human rights of the individual.
Dr. Ranee K.L. Panjabi*

We live in a world of glaring contrasts and contradictions. Each of us views the polarities of human life—affluence on the one hand, destitution on the other. We all despair at the suffering of the poor who now make up the majority of our planet. We shrug helplessly, caught in the relentless orbit of our own lives, unable to find either the time or the fundamental inclination to come to grips with and seriously resolve the dilemma of economic inequity. We shake our heads, we feel sympathy, even compassion. We open our wallets and salve our consciences and go back to our busy lives. Nevertheless, the problems go on, worsening each day. The combined nations of the world spend well over $1.8 million a minute for military purposes,¹ a needless expense if the aim is killing, for malnutrition, in any event, kills 40,000 children per day.² Malnutrition is a "free" killer, the agent of some grim Malthusian ordering of life which picks on the most vulnerable as its victims. If all the technology currently available to the world were to be harnessed to improve the quality of life globally rather than regionally, there might be less contrasts and fewer contradictions. Yet this task, so simple to formulate on paper, is currently impossible to implement in practice. This is one instance where human problems have apparently gone beyond human solutions. It is not the lack of capacity but the lack of will to resolve this crisis which has bedeviled all efforts at a solution.

For once, history has not been a friend but a stern teacher. The past demonstrates a marked pattern of exploitation: colonial exploitation, gender exploitation, racial exploitation, and class exploitation. The habit appears to be an ingrained feature of human life. Why

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² D. FORSYTHE, HUMAN RIGHTS AND DEVELOPMENT at x (1989).
should anything be different now? Possibly because the main thrust of political and social revolution in the second half of the twentieth century has been that exploitation is no longer tolerable or acceptable. While the meek have by no means inherited the earth, they are loudly and vociferously clamoring for a share of it. If this demand is matched by the physical violence that bursts forth from a realization that one has been the victim of gross inequity, who knows what the future holds.

Thus far, the reactions to the clamor have been to stifle it (by imposing left or right wing dictatorships); to concede without loosening the stranglehold (by granting political but not economic freedom); to deflect the anger (by encouraging cosmetic social change); to grant benefits which the recipients pay for (by incorporating unemployment insurance and medical care); and to share the wealth (by minimal inclusion of acceptable elements of society into the circle of comfort, if not affluence). You may ask, who are the exploiters? To some extent, all of us are participants as exploiters and exploited. As consumers in the West, we exploit the developing world to satisfy our craving for the cheap products that allow us to enjoy a life of consumer spending. Women in the West are exploited by a pattern of gender discrimination. Men in the West suffer as well when an unstable economy deprives them of their livelihood. There are no clear demarcations between the exploiters and the exploited. Thus, solutions remain difficult to implement.

If the proliferation of war, revolution, malnutrition and environmental destruction provide a daunting challenge, one must also realize that never in the history of the earth has there been so much awareness of global problems. Millions of human beings are knowledgeable about the situation, millions are being informed every day about the problems that plague our planet. The potential for harnessing this global mental energy has never been greater. If the world is indeed a global village, there has never been a better time for people to come together to tackle and overcome these obstacles.

There are, of course, priorities. First, the resolution of at least some festering political crises would go a long way to enthusing and galvanizing global action in the human rights arena. At the time of writing, the government of the United States, having won a brilliant victory in the Gulf War, is devoting its energies to solve the prolonged problems of the Palestinian need for a homeland. Should the United States succeed in this important mission and also guarantee peace for Israel, this would be a very significant achievement.
The second priority is economic. We simply cannot afford to ignore the growing economic problems of our time or to apply band-aid measures of treatment which do nothing to alleviate the injustice. That the need for resolution is urgent is indisputable. The world’s population grows by “over one million every five days with nine-tenths of this increase in the poorer countries of the Third World.”

Each year sixty million new, young workers compete for jobs in the least developed countries. The world’s population, a mere 1.6 billion in 1900, will grow to seven billion by the year 2000. These statistics are all the more alarming when we consider that inhospitable climatic and land conditions presently force 90% of the world’s population to live on less than 10% of its land. “In the early 1980s, it was estimated some 450 million people in the Third World (about 14% of their total population) were living in extreme poverty and another 800 million (25%) in conditions of absolute poverty.”

Since the end of the second World War, nations around the world have experimented with rapid industrial development which was once considered a universal cure for the ills of the planet. The naivete of the 1950s and 1960s in believing that huge hydro-electric power projects and large industries would be a panacea has now become evident. Too often, development without a human face brought cultural shock, uprooting of people from their homes, benefits for the elite, exploitation for the majority. While GNP’s rose, the quality of human life frequently declined.

In recent years, the experiences of those decades have gone through agonizing reappraisals. The result has been a renewed emphasis on making an explicit connection between development and human rights. This process would improve economic conditions within a framework of human rights values and would be sensitive to cultural needs and susceptibilities. The possibilities of such an approach underlie most of the contributions to David Forsythe’s *Human Rights and Development*.

The volume consists of contributions to a conference on human rights and development. Participants from a number of countries gathered at the Hague in June 1987 for an exchange of ideas. David

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4 Id. at 56.
5 GOF, supra note 1, at 492.
6 Id.
7 Forsythe, supra note 2, at 48.
Forsythe, the editor, is President of the Human Rights Research Committee of the International Political Science Association. When a book has over twenty contributors, it can be hard to gain a sense of cohesive purpose from it. Fortunately, Forsythe provides this by categorizing the articles into “four orientations: a focus on the private sector, a focus on the public sector, country studies, and an integrated or general analysis.” Forsythe culls the kernel of all the articles by suggesting that the central theme proposed by the contributors is that “the key to better implementation of internationally recognized human rights in the Third World rests with political choice.”

This book is useful for students of international law, political science and human rights. Though law professors and political science educators might already be familiar with some of the political and historical examples, the views, ideas and perceptions are quite interesting. Forsythe has been careful to present the work of Western and non-Western authors, giving the book an international flavor which is useful for students. Undoubtedly, the book is most likely to benefit the undergraduate university student of human rights. I am presently teaching such a course and observed the reaction of my students when I read from “Testimony I” in Mariclair Acosta’s contribution to this book. The chapter on Women’s Human Rights Groups in Latin America partly concerns a forty-one year old woman from San Salvador whose husband (a student and photographer) “disappeared” after a term in prison. Eventually she found his mutilated body in a dump and learned to live with her nightmare by assisting other women facing similar problems. My students were obviously shocked by the testimony. The silence of a usually very vocal, large class spoke eloquently of their feelings.

The contributors to the “Private Sector” category of the book describe conditions in Latin America, the Philippines, Nigeria and India. The interest in human rights in these nations is clearly evident from these studies. Testimony from El Salvador:

> The people of El Salvador are at war because they are tired of being exploited .... The people are tired to death of being hungry .... Our real struggle is for human rights; and for us, human rights are the rights to work, to go to school, to join a union, to

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8 *Id.* at xiii.
9 *Id.*
10 *Id.* at 3-18.
11 *Id.* at 5-11.
say what we want . . . . These are the rights of the people. Human rights are part of life . . . . 12

As 2% of El Salvador's population is estimated to own 60% of its land, 13 it is inevitable that the cycle of poverty and repression can only be terminated by determined action in favor of human rights. Arguably, the very existence of such gross inequity is a type of rights violation.

That such problems have spilled over into other societies is also inevitable. El Salvador has produced thousands of refugees, men, women and children who have fled to neighboring countries and the United States. The active implementation of human rights is the single most important need for the people of that troubled nation. Such active implementation would require more than the formation of human rights groups.

Contributor Richard Claude mentions the attempt by President Corazon Aquino of the Philippines to require that human rights be taught throughout the Filipino educational system. 14 The idea was enshrined in the new Filipino Constitution of 1987 which stated: "The State shall enforce the teaching of human rights in all levels of education, as well as in non-formal training, to persons and institutions tasked to enforce and guarantee the observance and protection of human rights." 15

If development with a human face is to be the priority of the present and the future, education is still a classic method to awaken people; to inform them and to equip them to become intelligent watchdogs of their government's actions. While science and humanities train young people to lead a productive life, human rights education can help them to evaluate the quality of that life and to ensure that they are not forced to become hapless victims of social, political and economic exploitation. An awareness of the possibilities and limitations of each human right will create a more informed, more mature citizenry in every nation. Such education ought to emphasize that "rights" require a sense of responsibility in the greater interest of the entire community. Only by opening up human rights possibilities through education can we hope to demonstrate that exploitation need not necessarily be an inevitable feature of human life.

12 Id. at 14.
13 Id. at 18 n.15.
14 Id. at 30.
15 Id.
While it may be idealistic to assume that all the world will "convert" to human rights, the alternatives for our planet are so bleak that some action has to be taken urgently to change traditional attitudes. Human rights have to be enlarged from the world of lawyers and a few thousand activists and brought into the parlance of everyday life for millions of men and women. Given that they know about the problems that plague this world, would it not be worthwhile to present them with a frame of reference within which they can formulate some solutions? Given that there is a global lack of leadership to tackle these problems with courage, ultimate answers may have to come not from above but from below, in grass-roots campaigns which deal with issues on the level of each nation, province, district, village, or even each household.

The emphasis on education might serve to mitigate one serious offshoot of development—namely, the violations of human rights which can accompany extensive economic development. One of the great ironies in this field of human rights studies is that development which ought to inspire positive connotations can often be perceived as a major threat to human rights. A number of contributors deal with this topic.

As Jack Donnelly points out, "[c]onventional wisdom holds that short and medium-run sacrifices of human rights are required to achieve rapid development.'\(^{16}\) The assault of development projects on fragile cultures has sometimes caused suffering out of all proportion to the benefits of the "development." Development has occasionally been used as a catch-all to impose majority ways of life on indigenous minorities. Development has been invoked to justify brutal repression as traditional economic systems have been forced into alien, largely Western molds. If development is to be perceived as a positive force for improvement in the quality of human life, that has not yet happened in much of the Third World despite the plethora of industries, factories, dams and power projects which now mark the landscape of ancient nations.

That shrewd observer of world problems, Mahatma Gandhi once asserted that "[i]ndustrialism is . . . a curse for mankind. Exploitation of one nation by another cannot go on for all time. Industrialism depends entirely on your capacity to exploit, on foreign markets being open to you, and on the absence of competitors.'\(^{17}\) Though Gandhi's
preference for the simplicity of village life may be an impractical, and for many, an undesirable alternative, he did have a pragmatic idea which still has validity sixty-six years after he wrote in 1925: "industrialism is like a force of Nature, but it is given to man to control Nature and to conquer her forces. His dignity demands from him resolution in the face of overwhelming odds. Our daily life is such a conquest."

The conquest of the negative concomitants of development may not be easy, but there is emerging now a near-universal realization that development within human rights is not only a preferred alternative but a vital necessity. If the political leaders of some Third World nations have not accepted the idea, their peoples are certainly leaning in that direction. In the face of looming environmental devastation and increasing poverty, who can deny the cry for development with a human face. Hence, the earlier emphasis on "trade-offs" or on the necessity for human rights sacrifices to achieve development has to be adjusted in the face of historical experience. Contributor Jack Donnelly suggests that "human rights trade-offs, except at the very early stages of the move from a traditional to a modern economy, are not required by the imperatives of development. Rather they are contingent political choices, undertaken for largely political not technical, economic reasons." Donnelly also believes that "[i]n at least some circumstances, development simply does not require a growth-first strategy, with its attendant sacrifice of social and economic rights."

When development involves active, brutal repression as part of the process of rights deprivation, the connection between ends and means has to be made. Can repressive means justify developmental ends? Ethically and morally, the answer would have to be in the negative. Practically and pragmatically, the negative answer has been justified by historical experience. Donnelly argues that "in far too many instances repression is without significant economic rewards, except for a tiny predatory elite, and this is capable of no developmental justification."

If the aim of development is an improvement in the quality of human life, repression cannot be a concomitant of that ideal. To

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18 M. Gandhi, Young India, June 8, 1925.
19 Forsythe, supra note 2, at 306.
20 Id. at 308.
21 Id. at 314.
suggest, as Donnelly unfortunately does, that "[s]ome repression almost certainly is unavoidable," or that repression can be "functional for a particular development strategy," is to allow a loophole for tinpot dictators to violate the rights of their people. While Donnelly portrays the present with realism, there is no particular reason why the reality of today has necessarily to provide the standards for tomorrow. One could even suggest that the extent of human suffering occasioned by "development" in the Third World demands that we create a new reality for the 1990s. Ultimately, development with a human face must concern itself with human needs, human sensitivities and human priorities. The challenge for the next century will lie in implementing this new reality. While it may be somewhat dramatic to suggest that the survival of our planet depends on it, it is certainly not difficult to visualize the fate of our world should the present trends continue.

The methodology for effecting such dramatic change in the mindset of leaders and elites around the world presents us with a formidable challenge. While education is the key to generating new attitudes within developing nations, creating a climate conducive to change may require both internal and external efforts. Development aid, channelled to the dissemination of human rights literature, the training of legislators, and the creation of independent critical media are all possible routes to this end. Contributor Rhoda Howard proposes that "if citizens are empowered, especially through literacy, freedom of the press, and freedom of association, there is a chance that their internal organizations can undermine repressive government policies."

It must be emphasized, however, that external assistance must be given with grace, not with condescension and definitely not with a patronizing attitude which can be used by any Third World leader to refuse the aid in the name of nationalist sensitivities. As any diplomat knows, walking the fine line between ensuring honest utilization of one's foreign aid (a priority on the home front) and offending a Third World leader or government requires all the skill and delicacy of a tightrope walker. Hence, while it is important to demonstrate an enthusiasm for human rights implementation, criticism of human rights violation can pose problems for foreign governments.

22 Id. at 325.
23 Id.
24 Id. at 231.
Though United States President Jimmy Carter committed his nation to a foreign policy that emphasized human rights, the Carter record in implementing that policy was not very encouraging. The Reagan Administration went to the extent of attempting to thwart congressional actions (in adjusting foreign aid in favor of human rights) to support regimes in Argentina, Chile and Guatemala. One critic of the Carter and Reagan Administrations suggested that "the trouble with the Carter human rights policy . . . was the inconsistency between what it originally said and what it subsequently did. The trouble with the Reagan policy . . . was the consistency between what it originally said and subsequently did."

Contributor and editor, David Forsythe concludes that "[n]o human rights situation was immediately turned around by manipulation of economic aid." Forsythe offers an historical explanation for this:

One should not expect much positive impact from US bilateral economic assistance in support of the implementation of internationally recognized human rights. The US is preoccupied with its global competition with the Soviet Union; most US economic aid is politically designed for that competition. US economic aid . . . has declined drastically in relation to the US past and, more importantly, to others in the contemporary world. US bilateral aid, to the degree that it goes for something more than reward for political orientations, is more sympathetic to macro-economic growth according to traditional capitalistic strategies than to focusing on rights per se . . . . Specific attention in US economic aid programmes to rights as rights is marginal and largely cosmetic.

It is certainly true that one nation alone, even a donor nation, cannot have a resounding impact on the global human rights picture by manipulating its aid. Katarina Tomasevski has pointed out that some donor states which contribute significantly to development aid do not make an explicit connection between human rights and aid. Tomasevski cited the examples of Japan, Saudi Arabia and the U.S.S.R.

26 FORSYTHE, supra note 2, at 180.
27 Id. at 181.
29 FORSYTHE, supra note 2, at 181.
30 Id. at 191.
31 TOMASEVSKI, supra note 28, at 18.
A further obstacle arises when foreign aid is partly utilized as a method of assistance to citizens of the donor nation. Tomasevski stated that "[h]alf of the bilateral aid is tied, and thus spent in the donor countries themselves." When self-interest rather than idealism dominates development assistance policies, it is difficult for any government to attempt to impose a moral standard in favor of human rights on the recipient nation.

A solution might involve greater utilization of United Nations machinery both to express a commitment to human rights and for channelling development aid. If the major donor nations were collectively to commit themselves to implementing human rights by distributing their aid through the United Nations and within that frame of reference, some improvement could be effected.

The Commonwealth of Nations has committed itself to an explicit linkage between human rights and development. In October 1989, the Commonwealth announced its decision to establish a "10-nation group of senior experts to strengthen human rights in countries which have been accused of abuses." A Commonwealth source was quoted as suggesting that if developed nations "feel they have a right to criticize human rights in another Commonwealth country, they should be willing to do something about it."

One has to consider that some of the most generous donor nations, such as Saudi Arabia, arouse serious international concern about their own domestic policies with respect to human rights. In such instances we can only hope that Operation Desert Storm helped blow some progressive winds of change into the region.

If a desire for more human rights can be generated locally, so much the better. At the time of writing, the citizens of Kuwait are agitating for freedom and democratic systems and demanding that the Emir agree to extensive popular participation in the Government of Kuwait. Those Kuwaitis who stayed and endured the Iraqi onslaught are now among the most vociferous. The Kuwaiti experience in surviving Iraqi depredations has also led to an insistence by the women of Kuwait for their human rights.

Contributor Rhoda Howard stresses the importance of empowering groups in such societies "to claim their rights." Whether the rights

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32 Id.
34 Id.
35 Forsythe, supra note 2, at 223.
gained are political or economic, the positive benefits of such local agitation can be far more significant than by resort to foreign intervention. There is always a danger that the latter policy could be construed as an act of external interference. A somewhat extreme example of local self-empowerment is presently occurring in Iraq in the attempt by the population of that troubled nation to dismantle the totalitarian dictatorship of Saddam Hussein. With obvious reference to a less volatile situation, Howard suggests that "foreign aid could be geared toward enhancing" freedom of association, freedom of the press and educational opportunities.\[^{36}\] Howard's emphasis on internal activism to undermine repressive governments is tuned to the nationalist sensitivities and cultural susceptibilities of the new nations of Afro-Asia and the Middle East. As she states: "The best chance for protection of economic rights, and all other human rights, comes from changing internal actors, internal policies and internal social structures, especially relations of power and relations of production.\[^{37}\]

One of the difficulties scholars have faced is in agreeing on a definition of development. The United Nations Declaration on the Right to Development states that: "'development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.'\[^{38}\] While these works are inspiring, it is quite apparent that there can be serious contradictions in implementation. For instance, should the well-being of the majority culture be the correct frame of reference? How much should the majority sacrifice to accommodate minority interests? It is quite obvious that "no uniform and universally applicable model exists as regards the process of development.\[^{39}\]

The country studies in the book demonstrate this point quite clearly.

Because this book constitutes the proceedings of an international conference, the contributions detailing conditions in various countries are reflective of the research interests of the participants. While the international flavor is interesting, the collection does no justice to

\[^{36}\] Id. at 226.
\[^{37}\] Id. at 230.
\[^{38}\] Id. at 126.
\[^{39}\] Id.
significant areas of the world and to some relevant problems which are completely excluded. To have three articles on India also appears somewhat lopsided but this, of course, could not be helped. More analysis of the themes of this book and less recitation of chronological history might have enhanced the country contributions. This is why the book is recommended largely for the student audience for whom it will undoubtedly be an eye-opener and an exposé of conditions in some nations. As the volume presents donor and recipient perceptions of development, it is also useful for informing undergraduate and graduate students about the diversity of opinion on this subject. The book makes it clear that "[h]uman rights do not function in isolation but in concrete contexts and situations."40

By stressing the role of people who are actively working to achieve their rights, the contributors demonstrate the global interest in human rights. If this activism can affect the policies of ruling elites in some nations, there might well be an expansion of "the psychological universe of obligation."41 This significant ideal, emphasized by contributor Howard and clarified by editor Forsythe, stresses "that the state is not a toy for the enrichment and comfort of the elite, but rather is a tool to be used for the maximum good of the nation as a whole. At a minimum, the elite is obligated to the rest of the nation to rule for the nation; the people have a right to implementation of that idea. In larger perspective, under the notion of universal human rights all elites have presumably an obligation to give some assistance to realise the recognized rights."42

The dimensions of this problem of human rights and development should not obscure the fact that both human rights and development are twin pillars required in any society and indeed, indispensable for its survival. On a related issue, former Tanzanian President Julius Nyerere commented: "Freedom and development are as completely linked as chickens and eggs. Without chickens, you get no eggs; and without eggs you soon have no chickens."43 A common sense approach incorporating development and human rights would stress inherent cohesion rather than artificial division.

40 Id. at 123.
41 Id. at 222.
42 Id. at 356-57.
RECENT DEVELOPMENTS


I. FACTUAL BACKGROUND

The late Mr. Douglas Harvey Barber brought a suit against his employer, Guardian Royal Exchange Assurance Group (Guardian),¹ pursuant to Great Britain’s Sex Discrimination Act of 1975,² article

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¹ On May 26, 1989, with his case pending before the European Court of Justice, Mr. Barber died. His widow and executrix, Pamela Barber, continued the proceedings for and on behalf of Mr. Barber’s estate with permission from the British Court of Appeals. 2 Comm. Mkt. L. Rep. at 552-53 (1990).

² Sex Discrimination Act, 1975, ch. 65, reprinted in BUTTERWORTHS ANNOTATED LEGISLATION SERVICE (M. Beloff & H. Wilson eds. 1976). The relevant provisions are as follows:

§1.- (1) A person discriminates against a woman in any circumstances relevant for the purposes of any provision of this Act if—
(a) on the ground of her sex he treats her less favourably than he treats or would treat a man, or

§6.- (1) It is unlawful for a person, in relation to employment by him at an establishment in Great Britain, to discriminate against a woman—
(a) in the arrangements he makes for the purpose of determining who should be offered that employment, or
(b) in the terms on which he offers her that employment, or
(c) by refusing or deliberately omitting to offer her that employment.
(2) It is unlawful for a person, in the case of a woman employed by him at an establishment in Great Britain, to discriminate against her—
(a) in the way he affords her access to opportunities for promotion, or services, or by refusing or deliberately omitting to afford her access to them, or
(b) by dismissing her, or subjecting her to any other detriment.
(4) Sections (1)(b) & (2) do not apply to provisions in relation to death or retirement.

In 1986, the Sex Discrimination Act was amended to make discriminatory retirement ages illegal. However, it does not have a retrospective effect;

therefore, discrimination prior to the amendment may not be affected. In addition, the Employment Discrimination Act of 1989 fixed the retirement age at sixty-five for men and women for the purposes of redundancy benefit. J. Steiner, Textbook on EEC Law 238 (2d ed. 1990) [hereinafter Steiner].


Article 119 [Equal Pay for Men and Women]

Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work.

For the purpose of this article, “pay” means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer.


The Equal Pay Directive merely supplements article 119 by requiring Member States to implement such laws as would “enable all employees who consider themselves wronged by failure to apply the principle of equal pay” to bring their claims to the proper court for adjudication. Id. at art. 2. Also, the Equal Pay Directive demands that Member States abolish all laws or regulations which reinforce or mandate discriminatory practices, and Member States must take measures to eliminate employer/employee agreements which facilitate discrimination. Article 1 provides:

The principle of equal pay for men and women ... means, for the same work or for work to which equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration.

In particular, where a job classification system is used for determining pay, it must be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on the grounds of sex.

Id.

5 EEC Council Directive 76/207, issued Feb. 9, 1976; 19 O.J. EUR. COMM. (No. L 39) 40 (1976) [hereinafter Equal Treatment Directive]. The Equal Treatment Directive is not based on article 119 of the EEC but on the institutions’ general powers under article 235 laying down the principle of equal treatment for men and women “as regards access to employment, including promotion, and to vocational training and as regards working conditions and ... social security.” Id. at art. 1(1). Article 2(1) defines the principle of equal treatment as meaning that “there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.” Id. Article 5(1) defines “working conditions” as including “conditions governing dismissal.” Id. Furthermore, this provision may enable the application of the amended Sex Discrimination Act of 1986. It is possible that a person could bring a claim under Directive 76/207 against a state employer since that is who the Directive is directly affecting. Steiner, supra note 2, at 238-9.
Barber v. Royal Exchange Assurance Group, 1990 E. Comm. Ct. J. Rep. at ___, [1990] 2 Common Mkt. L. Rep. at 518. The Guardian Royal Exchange Assurance Group's non-contributory pension scheme was financed totally by the employer. It was a “contracted out” scheme, meaning it was approved under the Social Security Pensions Act of 1975. The employee member contractually waived the earnings-related part of the state pension scheme making the Guardian's scheme a substitute. Id. “Members of a scheme of that kind paid to the State scheme only reduced contributions corresponding to the basic flat-rate pension payable under the latter scheme to all workers regardless of their earnings.” Id.

"Compulsorily redundant” means an employee is terminated either because of an injury or illness or is fired.


"The severance terms confer on members of the pension fund who have attained the age of 55 (for men) and 50 (for women) . . . entitlement to an immediate pension to be calculated in accordance with the rules of the pension fund.” Barber, 1990 E. Comm. Ct. J. Rep. at ___, [1990] 2 Comm. Mkt. L. Rep. at 519. In the event of redundancy, employees who have reached these ages were to be regarded as “retired.” Thus, according to the Severance Terms, any member regarded as being “retired” during the ten years prior to normal pensionable age is entitled to immediate pension. However, any member who is not deemed “retired” merely receives a deferred pension as provided by the Severance Terms. In Barber's case, he was not considered “retired,” and thus he received the statutory redundancy payment plus an amount equal to four to five weeks salary. Had he been considered “retired,” he would have been entitled to his entire pension. Id.

Barber's pensionable age according to the scheme was sixty-two; the corresponding age for women was fifty-seven. Similarly, a five year difference exists for pensionable age under the state social security scheme. Specifically, the state scheme establishes a pensionable age of sixty-five for men and sixty for women. Once a member of the Guardian Pension Fund attains the normal pensionable age as provided in that scheme, he is entitled to receive an immediate pension.

Id. Also, members entitled to deferred pensions payable at the normal pensionable age were entitled to refunds if they were at least forty years old and had completed ten years service with the Guardian when the employment relationship was terminated. Id.
less than those to which a fifty-two year old woman would have been entitled were she declared redundant.  

Claiming that he was a victim of unlawful sex discrimination, Barber initiated proceedings before the British Industrial Relations Tribunal. The Tribunal dismissed his claim at the first and second instance. He appealed to the Employment Appeal Tribunal which also found his claim to be unfounded. Barber then appealed to the British Court of Appeal which stayed the proceedings and requested that the Court of Justice of the European Communities (the Court) render a preliminary ruling pursuant to article 177 with regard to the compatibility of Guardian’s pension scheme with EEC law.

13 Id.
15 To bring an individual claim under the Sex Discrimination Act one submits a claim to the Industrial Tribunal. This Tribunal’s decision will not bind other courts but one may appeal to the Employment Appeals Tribunal where a decision is binding. Recent Development, 10 GA. J. INT’L & COMP. L. 203, 206 (1980).
16 The Employment Appeals Tribunal decided that Barber’s claim was unfounded for three reasons:

   (1) Mr. Barber could not base his claim on the prohibition of discrimination laid down in the Sex Discrimination Act 1975 because, even though there was discrimination, that prohibition, according to section 6(4) of the Act, was inapplicable to “provision in relation to death or retirement;”

   (2) in [Burton v. British Railways] the Court of Justice decided that the question whether a person is entitled to a benefit under a pension scheme is one of access to pension benefits which falls to be resolved not by the principle of equal pay but by the principle of equal treatment;

   (3) finally, Directive 76/207 on equal treatment was not directly applicable in the United Kingdom, nor could it be relied upon for the purpose of interpreting section 6(4) of the Sex Discrimination Act, inasmuch as it was unclear what the consequences of the Burton judgment were with regard to a claim under an occupational pension scheme.


17 EEC Treaty, supra note 3, at article 173, which states: “The Court of Justice shall review the legality of acts of the Council and Commission other than recommendations or opinions.” The Court has liberally construed this provision to include any measure intended to have legal effects. BROWN & JACOBS, THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES 100 (3d ed. 1989) [hereinafter BROWN & JACOBS]. Member States and Institutions may bring an action under article 173(1) as well as natural and legal persons. Id. at 102-105. A suit may be filed on the grounds that an act infringes upon the EEC Treaty or on any rule of law relating to its application. Id. at 116. This cause of action has led the way for the Court to rule on “general principles common to the laws of the Member States.” Id. at 120.

18 This provision states:

The Court of Justice shall have jurisdiction to give preliminary rulings
Pursuant to the article 177\textsuperscript{19} procedure of the EEC Treaty, the British Court submitted five issues to the Court for consideration:\textsuperscript{20} (1) whether benefits in connection with redundancy are "pay" under article 119 and the Equal Pay Directive\textsuperscript{21} or whether they fall within the Equal Treatment Directive\textsuperscript{22}; (2) whether the fact that Barber was discharged under an employer provided pension scheme was material to the issue of discrimination; (3) whether the principle of equal pay was violated; (4) the direct effect of article 119\textsuperscript{23} and the Equal Pay Directive\textsuperscript{24}; and (5) the necessity of considering a woman's right to access to an immediate pension before answering whether article 119 and the Equal Pay Directive are infringed.\textsuperscript{25} 

\textit{Held}, a non-contributory

concerning:
(a) the interpretation of this treaty;
(b) the validity and interpretation of acts of the institutions of the Community;
(c) the interpretations of the statutes of bodies established by an act of the Council, where those statutes so provide.

Where such a question is raised before any court or tribunal of a member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a member State, against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

EEC Treaty, \textit{supra} note 3, at article 177.

An article 177 procedure is a means by which national courts, when an EEC law question arises, may apply to the European Court to obtain a preliminary ruling on matters of interpretation and validity. \textit{Steiner, supra} note 3, at 259.

\textsuperscript{19} EEC Treaty, \textit{supra} note 3, at article 177. The purpose of the European Court of Justice is "to ensure that through the interpretation and application of the EEC Treaty the law is observed." The Court consists of thirteen judges, one from each Member State, and a President of the Court, with six Advocates-General to assist. EEC law takes precedence over all conflicting domestic law. EEC Treaty, \textit{supra} note 3, at art. 164-67. \textit{See also} Costa v. ENEL, 1964 E. Comm. Ct. J. Rep. 585, [1964] Comm. Mkt. L. Rep. 425, in which the European Court reiterated that it is only empowered to give rulings on matters of Community law. The Court does not have jurisdiction to pass judgment on the compatibility of domestic law with EEC law. \textit{Id.} The Court stated that where it is asked to answer questions as to compatibility it will simply render an abstract interpretation of EEC law on the matter in question. \textit{Id.}


\textsuperscript{22} Equal Treatment Directive, \textit{supra} note 5.

\textsuperscript{23} EEC Treaty, \textit{supra} note 3, at art. 119.

\textsuperscript{24} Equal Pay Directive, \textit{supra} note 4.

\textsuperscript{25} In accordance with article 177 of the EEC Treaty, the European Court of
occupational pension scheme should not discriminate on the basis of gender in the event of compulsory redundancy, since the benefits paid are within the scope of article 119, and it is contrary to the principle of equal pay to withhold a man's pension on the basis that he has not met the requisite age when a woman in the same position and of the same age would be entitled to her pension. 26 Barber v.

Justice considered the following questions:

(1) When a group of employees are made compulsorily redundant by their employer in circumstances similar to those of this case and receive benefits in connexion with that redundancy, are all those benefits "pay" within the meaning of article 119 of the EEC Treaty and the Equal Pay Directive (75/117/EEC), or do they fall within the Equal Treatment Directive (76/207/EEC), or neither?

(2) Is it material to the answer to Question (1) that one of the benefits in question is a pension paid in connexion with a private occupational pension scheme operated by the employer ("a private pension")?

(3) Is the principle of equal pay referred to in article 119 and the equal pay directive infringed in the circumstances of the present case if (a) a man and a woman of the same age are made compulsorily redundant in the same circumstances, and in connexion with that redundancy, the woman receives an immediate private pension but the man receives only a deferred private pension; or (b) the total value of the benefits received by the woman is greater than the total value of the benefits received by the man?

(4) Are article 119 and the Equal Pay Directive of direct effect in the circumstances of this case?

(5) Is it material to the answer to Questions (3) that the woman's right to access to an immediate pension provided for by the severance terms could only be satisfied if she qualified for an immediate pension under the provisions of the private occupational scheme in that she was being treated as retired by the Guardian because she was made redundant within seven years of her normal pension date under the pension scheme?


26 The European Court of Justice answered the following questions referred to it by the Court of Appeals:

1. The benefits paid by an employer to a worker in connexion with the latter's compulsory redundancy fall within the scope of the second paragraph of article 119 of the Treaty, whether they are paid under contract of employment, by virtue of legislative provisions or on a voluntary basis.

2. A pension paid under a contracted-out private occupational scheme falls within the scope of article 119 of the Treaty.

3. It is contrary to article 119 of the Treaty for a man made compulsorily redundant to be entitled to claim only a deferred pension payable at the normal retirement age when a woman in the same position is entitled to an immediate retirement pension as a result of the application of an age condition that varies according to sex in the same way as is provided for by the national statutory pension scheme. The application of the principle of equal pay must be ensured in respect of each element of renumeration
II. LEGAL BACKGROUND

A. Introduction

European Economic Community (EEC) law in the area of gender equality, particularly with respect to the question of retirement and pension plans, is complex. The term “pay,” as defined under article 119, means “salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly” from his or her employer. The confusing element of this body of law is the European Court’s distinction between statutory and non-statutory retirement plans for the purposes of applying the article 119 definition of pay. In the past, article 119 included neither statutory retirement and pension benefits nor redundancy pay. Furthermore, the Court distinguishes legislation defining a social security scheme for workers generally from legislation relating to state employees.

Another division in European employment discrimination law was the definition of “treatment.” Treatment as defined in the Equal Treatment Directive includes not only working conditions but also matters of social security. The distinction drawn between pay and social security benefits, for the purposes of the Equal Treatment Directive, have been the source of much litigation. The litigation

and not only on the basis of a comprehensive assessment of the consideration paid to workers.

4. Article 119 of the Treaty may be relied upon before the national courts. It is for those courts to safeguard the rights which that provision confers on individuals, in particular where a contracted-out pension scheme does not pay to a man on redundancy an immediate pension such as would be granted in a similar case to a woman.

5. The direct effect of article 119 of the Treaty may not be relied upon in order to claim entitlement to a pension, with effect from a date prior to that of this judgment, except in the case of workers or those claiming under them who have before that date initiated legal proceedings or raised an equivalent claim under the applicable national law.


27 EEC Treaty, supra note 3, at art. 119.

28 STEINER, supra note 2, at 228.


31 Equal Treatment Directive, supra note 5, at arts. 5 and 1.
stems from the fact that Member States were allowed to exclude from the equal treatment principle the "determination of pensionable age for the purposes of granting old-age and retirement pensions." The Court routinely gave the "determination of pensionable age" language a very narrow scope, refusing to apply the exclusion where pensionable age was determined for any other purpose. Several different provisions function as the basis for EEC employment law.

B. Article 119 and Cases Dealing with its Application

Article 119 of the EEC Treaty establishes the general principle of equal pay for equal work for men and women. This equality principle applies only in the context of employment. Some commentators describe equality as one of the foundational principles of the EEC, designed to achieve both economic and social objectives. The economic goal is to ensure that Member States which implement the equality principle are not placed at a competitive disadvantage vis-à-vis those States which continue to discriminate. The social goal is to achieve "social progress" and to "improve . . . living and working conditions" for all EEC citizens.

Although the EEC Treaty contains only one article which specifically addresses the equality principle (article 119), the EEC imple-
mented equality directives\textsuperscript{41} to clarify any ambiguities.\textsuperscript{42} For example, in 1975 the Council of Ministers\textsuperscript{43} adopted the Equal Pay Directive to clarify the meaning of "pay" as defined under article 119.\textsuperscript{44} This Directive applies to both the public and private sectors. It defines concepts of "equal work" and "same work" as "work to which equal value is attributed;" therefore, equal pay must be given for identical work as well as comparable work.\textsuperscript{45} Also, the Equal Pay Directive requires Member States to implement legal measures to enable employees to bring discrimination claims for violations of the Directive.\textsuperscript{46} Articles 3 and 4 of the Equal Pay Directive prohibit discrimination in collective agreements or provisions contained in legal regulations.\textsuperscript{47} Furthermore, where employers implement job classification schemes to calculate pay, they must use uniform criteria to evaluate men and women.\textsuperscript{48} It is important to note that article 119 is the basis for this directive.

The European Court in Jenkins stated that "article 119 of the [EEC] Treaty applies directly to all forms of discrimination which may be identified solely with the aid of criteria of equal work and equal pay referred to by the article in question."\textsuperscript{49} Although this statement establishes the supremacy of article 119, it does not clarify the retirement and pension questions on which the European Court of Justice’s application of article 119 is inconsistent. For example, Defrenne III established that article 119 is effective against all parties.
but restricted it to enumeration not extending to dismissal or retirement conditions.\textsuperscript{50} The Court ruled that there is no general principle of Community law prohibiting sex discrimination in such circumstances.\textsuperscript{51} Furthermore, the Court held in \textit{Defrenne v. Belgian State (Defrenne I)} that although payment in the nature of social security benefits is not excluded from the concept of "pay," as defined under article 119, social security schemes and pension benefits are settled by Belgian law and, therefore, do not represent consideration paid.\textsuperscript{52} The Court's decision rested upon the fact that the social security scheme was statutory, as opposed to occupational.\textsuperscript{53} In \textit{Defrenne v. Sabena Airlines (Defrenne II)}, the plaintiff, an airline stewardess, was successful in invoking article 119 against her employer, Sabena Airlines, to claim the right to pay equal to that of her male counterparts.\textsuperscript{54} The Court noted that article 119 applies directly to "pay."\textsuperscript{55} However, the Court also held that pension benefits were not "pay" and, therefore, article 119 did not apply to pension benefits.\textsuperscript{56} Conversely, the Court held in \textit{Worringham v. Lloyds Bank Ltd.} that a plan to pay sums into male employees' occupational pension scheme and not females' was discriminatory.\textsuperscript{57} The plan differentiated between men and women under the age of twenty-five.\textsuperscript{58} Men contributed five percent of their salaries to the pension scheme, whereas women under twenty-five were exempt from contributing and could


Article 119, which does have direct effect, does not extend to incidents of the work relationship other than pay. The fact that certain conditions of employment, such as a special age limit, may have pecuniary consequences will not necessarily bring them within article 119, which is based on the close connection which exists between the nature of the services provided and the amount of remuneration. \textit{Id.}


\textsuperscript{56} \textit{Id.} at 320.


claim no equity in the pension fund upon leaving the bank before age twenty-five. Furthermore, the bank funded the men's five percent in the form of a five percent addition to their annual pay. The European Court held the contributions to be pay as defined by article 119.

The Court followed Worringham in Bilka-Kaufaus GmbH v. Weber von Hartz, where it held that a scheme restricting part-time employees' access to a non-contributory scheme which supplemented social security was discriminatory. Part-time workers at Bilka were primarily women. Furthermore, the scheme was contractual, not statutory in origin and, therefore, the benefits constituted consideration paid by the employer to the employee.

Liefting v. Amsterdam University Hospital challenged the statutory/contractual dichotomy. A statutory pension scheme for civil servants treated husbands and wives as one person for contribution purposes. This resulted in a policy of female civil servants whose husbands were also civil servants receiving substantially smaller contributions. The defendant, citing Defrenne [II], tried to argue that the scheme was a statutory social security scheme and, therefore, not within the scope of article 119. The Court disagreed, ruling that a statutory social security scheme was not per se outside the scope of article 119. The principle of equal opportunity was expanded to include more areas than just pay.

59 Id. at 2.
60 Id.
61 Id.
66 Id. at 377.
67 Id. In interpreting Liefting, one should remember that the legislatively adopted social security scheme is not the same as a legislatively imposed social security scheme on workers in general by the State. Thus, the former may be the subject of Directive 86/378, while the latter may be the subject of the Social Security Directive. See Newstead v. Department of Transport, 1987 E. Comm Ct. J. Rep. 4753, [1988] 1 Comm. Mkt. L. Rep. 219. In this case a confirmed bachelor filed a suit charging that a compulsory deduction for a pension scheme, actually for widows, from male civil servants and not female was discriminatory. The pension was to be repaid with interest in the event a civil servant left the service unmarried. The Court decided that this scheme was occupational in nature under Directive 86/378. Furthermore, the action failed because it fell within an exception under the Equal Treatment Directive. See supra note 4, at art. 2(1) and accompanying text.
C. The Equal Treatment Directive and Cases Dealing with its Application

In 1976, the Council drafted the Equal Treatment Directive, which was not based on article 119 but on article 235. Its essential purpose was to enhance opportunities for female employees. The tenets of the Equal Treatment Directive were equal access to employment opportunities, vocational training, promotions, and working conditions regardless of sex—thus furthering the abolition of direct or indirect discrimination based on sex. Three exceptions to the Equal Treatment Directive, however, did allow Member States to distinguish between men and women where: (1) gender was a determining factor in the ability of the person to perform the work; (2) the provision protected women; or (3) the provision promoted equal opportunity for men and women.

The primary obstacle facing the Equal Treatment Directive was the extent to which it could be “directly effective.” Unlike the Equal

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68 See supra note 4.
69 EEC Treaty, supra note 3, at art. 235, provides:
If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the Assembly, take the appropriate measures.

Id.

70 Equal Treatment Directive, supra note 4. In the United Kingdom, the Treatment Directive has been used to challenge the discriminatory retirement ages prescribed for men and women, since the Sex Discrimination Act excludes from its scope death and retirement provisions. STEINER, supra note 2, at 237.

72 Id. at art. 2(2)-(4). The Directive is unclear as to how the exceptions interact with the principle of equal treatment.

73 Direct effect refers to an enforceable Community right which is applicable to all Member States. EEC measures that are binding have vertical effect, meaning they affect Member States. If it binds parties as well, it is said to have horizontal effect. Many EEC sex discrimination matters lack horizontal effect, thus leaving an employee’s rights subject to the status of his or her employer. See Defrenne [III], 1976 Eur. Comm. Ct. Rep. at 458, [1976] 2 Comm. Mkt. L. Rep. at 122-123, where Defrenne argued that the principle of equal pay “represents the application of a general principle of equality which forms part of the philosophy common to the Member States.” Id. The European Court held that article 119 applied horizontally referring to its economic and social aims and not its general principle of equality. See infra Marshall v. Southampton and S.W. Hampshire Area Health Authority (Teaching), 1986 E. Comm. Ct. J. Rep. 725, [1986] 1 Comm. Mkt. L. Rep. 688. The Court strictly interpreted article 1(2) of the Equal Treatment Directive because of the “fundamental importance of the principle of equality of treatment.” Id. at
Pay Directive which was authorized by article 119, the Equal Treatment Directive was based on article 235, the general law-making provision of the EEC Treaty.\textsuperscript{74} The Court clarified the matter in \textit{Marshall v. Southampton and South West Hampshire Area Health Authority (Teaching)}, which held that the Equal Treatment Directive could be invoked directly against the Member State as an employer; however, it was not directly applicable against a private person.\textsuperscript{75} Marshall's dismissal from a \textit{State} health agency simply because she reached pensionable age, which was five years younger than a male's, was discriminatory and contrary to the Equal Treatment Directive.\textsuperscript{76} Marshall raised the "fundamental rights" argument under article 119\textsuperscript{77} established in \textit{Defrenne v. SABENA Airlines}, (\textit{Defrenne [III]}),\textsuperscript{78} yet the Court focused its decision on the direct violations of the Equal Treatment Directive and the Social Security Directive.\textsuperscript{79}

709. Ultimately, the Court held that article 5(1) was directly effective against the State as an employer or public authority but not against a private employer. \textit{Id.} at 711.

\textsuperscript{74} \textsc{Steiner}, supra note 2 at, 241. It was clear that the equal treatment could be directly effective against the State, yet unclear whether it could be invoked against the State as an employer. Even more equivocal was the question of whether it could be invoked against a private person.

\textsuperscript{75} 1986 E. Comm. Ct. J. Rep. at 725, [1986] 1 Comm. Mkt. L. Rep. at 688; where the Court stated:

\begin{quote}
[I]t must be emphasized that according to article 189 of the EEC Treaty that the binding nature of a directive, which constitutes the basis for the possibility of relying on the directive before a national court, exists only in relation to "each member State to which it is addressed." It follows that a directive may not of itself impose obligations on an individual and that a provision of a directive may not be relied upon as such against such a person.
\end{quote}


\textsuperscript{78} 1978 E. Comm. Ct. J. Rep. 1365, [1978] 3 Comm. Mkt. L. Rep. 312. This case established that the elimination of discrimination based on sex is a "fundamental right." It involved a flight attendant who challenged a provision of her employment contract which required female employees to terminate employment at the age of forty. \textit{Id.} Although the Court proclaimed equal treatment a "fundamental right," it rejected Defrenne's claim saying that it lacked basis in Community law because it did not fall within article 119. \textit{Id.} at 1378; [1978] 3 Comm. Mkt. L. Rep. at 329.

The purpose of the Social Security Directive was to implement the principle of equal treatment for men and women. The Social Security Directive (Council Directive 79/7), the equality directive addressing social security schemes, specifically applied to statutory schemes providing protection against the risks of old age and unemployment and implementing the principles of equal treatment in statutory schemes. Since the Social Security Directive applied to statutory social security schemes, its effects must be vertical. That is, they were only invocable against a State, as opposed to horizontal effectiveness which referred to private persons. Furthermore, the Social Security Directive overlapped the Equal Treatment Directive.

Rep. at 705-06. The Court answered two questions: (1) whether the dismissal of Marshall violated the Equal Treatment Directive; and (2) if so, whether Marshall could rely on it in a British court given the inconsistencies between the Equal Treatment Directive and the Sex Discrimination Act of 1975. The Court held that the Equal Treatment Directive had been violated and it could be relied upon notwithstanding the state authority. Id. at 751; [1986] Comm. Mkt. L. Rep. at 712-13.


(a) statutory schemes providing protection against sickness, invalidity, old age, accidents at work or occupational diseases and unemployment; and (b) social assistance, in so far as it is intended to supplement or replace these schemes Id. at article 3(1).

Article 1(1) states that the Directive's purpose is as follows: "to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training as regards working conditions." Article 2 applies the Directive to the working population including "self-employed persons, workers and self-employed persons whose activity is interrupted by illness, accident or involuntary unemployment and persons seeking employment—and to retired or invalided workers and self-employed persons." Article 3(3) relates to the implementation of the equal treatment principle in occupational schemes to be adopted in the future. Article 5 states as follows: "Application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex." Article 7 permits Member States to exclude the following matters from the scope of the equal treatment principle:

(a) the determination of pensionable age for purposes of old-age and retirement pensions and possible consequences thereof for other benefits;
(b) benefits or entitlements granted to persons who have brought up children;
(c) wives' derived old-age or invalidity benefits, and
(d) increases granted in respect of dependent wives related to long-term invalidity, old-age, accidents at work and occupational disease benefits.

Id.

Id. at art. 3.

See Equal Treatment Directive, supra note 5, at article 1(1) and accompanying text.
since it merely implemented the principle of equal treatment in the social security field.83

The Council designed Directive 86/378, which was complimentary to the Social Security Directive,84 to mandate the implementation of equal treatment for men and women in occupational, in contrast to statutory, pension schemes.85 Implementation was required by all Member States by July 31, 1989;86 yet even before the implementation of Directive 86/378 an employer's contribution to an occupational scheme may be deemed as "pay" thus falling under article 119.87 Council Directive 86/378 is nearly identical to the Social Security Directive; however, it contains no exclusions for survivor and family benefits.88 Furthermore, Directive 86/378 expressly prohibits different retirement ages for men and women.89 Both directives allow suspension of the principle of equal treatment regarding the determination of pensionable age when granting old-age or retirement pensions and other similar benefits.90

84 See supra note 80 and accompanying text.
[S]chemes not governed by Directive 79/7/EEC whose purpose is to provide workers, whether employees or self-employed, in an undertaking or group of undertakings, area of economic activity or occupational sector or group of such sectors with benefits provided by statutory social security schemes or to replace them, whether membership of such scheme is compulsory or optional.
Id. at article 2.
Article 4(a) refers to occupational schemes which provide protection against risks of old age, including early retirement, and unemployment. Article 5 prohibits in general terms any discrimination on the basis of sex. Article 6 lists a number of provisions, including those directly or indirectly based on sex . . . [including] "(e) setting different conditions for the granting of benefits or restricting such benefits to workers of one or other of the sexes; (f) fixing different retirement ages . . . ." Id.
86 Id. at article 12. Although implementation expired July 31, 1989, states are allowed until January 1, 1993 to take "all necessary steps to ensure that the provisions of the occupational [pension] schemes contrary to the principle of equal treatment are revised . . . ." Id. at art. 8.
89 Id. at article 6(f).
90 Id. at art. 9.
Burton v. British Railways tested the scope of the equality directives.91 British Rail operated a voluntary redundancy scheme in which women could apply for voluntary redundancy at age fifty-five and men at age sixty.92 Burton filed suit, claiming the scheme was discriminatory.93 Since the scheme fell within the exemption of the Sex Discrimination Act of 1975 which excluded provisions in relation to death or retirement,94 Burton turned to the Equal Treatment Directive.95 The Court ruled that the Directive did indeed apply to the conditions and terms of voluntary redundancy schemes.96 However, the ages in British Railway's scheme were referenced to the statutory retirement age and, therefore, the Court was bound to follow Directive 79/7, which permitted States to exclude from the equal treatment principle "the determination of pensionable age."97

Another case in which the European Court endeavored to flesh out the scope of the Equal Treatment Directive was Razzouk v. Commission.98 The Razzouk Court rested its decision on the fundamental right to equal treatment.99 The plaintiff's deceased wife was an EEC functionary and upon her death Razzouk was denied a survivor's pension because the staff regulations for the EEC provided different survivor's pension schemes based on the gender of the deceased.100 Citing Defrenne [III], the Court held that "the principle of equal treatment of both sexes . . . forms part of the fundamental rights the observance of which the Court has a duty to ensure."101 This case was unique because it applied the "fundamental right" principle established in Defrenne [III]102 to equal treatment as defined

91 1982 E. Comm. Ct. J. Rep. 578, [1982] 2 Comm. Mkt. L. Rep. 136. The criterion for distinguishing between equal treatment and equal pay may be expressed as follows: the first principle applies to the conditions of eligibility for a benefit, while the second applies to the benefit given to those who satisfy the qualifying condition. Id. at 148.
93 Id. at 558; [1982] 2 Comm. Mkt. L. Rep. at 139.
94 Sex Discrimination Act, supra note 3, at sec. 6(4).
95 Equal Treatment Directive, supra note 5.
97 See Social Security Directive, supra note 80, at article 7(a) and accompanying text.
100 Id. at 1529-30; [1984] 3 Comm. Mkt. L. Rep. at 491.
under the Equal Treatment Directive as opposed to equal pay under article 119.

D. Employment Discrimination Laws in Great Britain and Applicable Cases

Member States of the EEC are subject to the articles of the EEC Treaty and have a duty to implement article 119 and other equality directives within their domestic law accordingly. In 1975, the United Kingdom passed the Sex Discrimination Act amending the British Equal Pay Act which had been designed to effectuate the equality principle contained in article 119. In 1970, the Equal Pay Act introduced the right to equal pay for women in Great Britain by requiring men and women to be paid equally if they were employed in “like work” and if a woman’s work was “rated as equivalent” to that of a man. The British Equal Pay Act did not satisfy the EEC’s Equal Pay Directive and the European Commission instigated

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103 See Fitzpatrick, European Women Entitled to Equal Pay For Work of Equal Value, 34 FED. BAR NEWS & J. 384 (1987) [hereinafter Fitzpatrick]. The necessary domestic implementing legislation was required to be in effect by February 12, 1976.

104 Sex Discrimination Act, supra note 2.

105 British Equal Pay Act, 1970, ch. 41 [hereinafter Equal Pay Act]. The relevant provisions as originally enacted are as follows:

1.-(1) The provisions of this section shall have effect with a view to securing that employers give equal treatment as regards terms and conditions of employment to men and to women, that is to say that (subject to the provisions of this section and of section 6 below),

(a) for men and women employed on like work the terms and conditions of one sex are not in any respect less favourable than those of the other, and

(b) for men and women employed on work related as equivalent (within the meaning of subsection (5) below) . . . .

Id.

However, as originally enacted the Equal Pay Act excluded provisions relating to death or retirement:

(1) [N]or shall that requirement extend to requiring equal treatment as regards terms and conditions related to retirement, marriage or death or to any provision made in connection with retirement, marriage or death;

and the requirements of section 3(4) of this Act shall be subject to corresponding restrictions.

(2) Any reference in this section to retirement includes retirement, whether voluntary or not, on grounds of age, length of service or incapacity.

Id.

106 Id. The Equal Pay Act did not satisfy the law of the 1975 Equal Pay Directive because it was a “like work” act and the Equal Pay Directive refers to “work to which equal value is attributed.”

107 The Equal Pay Act was limited because in order to determine comparable worth it required, first, a job evaluation study. Second, only certain job evaluation
proceedings to require compliance with the Directive. This prompted Great Britain to pass the Sex Discrimination Act of 1975 which attempted to bring British law into compliance with the Equal Pay Directive.

To dissolve ongoing discrimination in pension plans, the Sex Discrimination Act required “equal access” to pension schemes for men and women. Yet it still permitted sex discrimination when it arose out of a “provision in relation to retirement.” The British Employment Appeals Tribunal construed this exception broadly. In Roberts v. Cleveland Area Health Authority, the Court ruled that a female hospital worker who was forced to retire at age sixty, while her male counterpart did not have to retire until sixty-five, could bring no discrimination action under the Sex Discrimination Act because section 6(4) of the Act exempts pension provisions establishing one’s retirement age from the general rule. The absence of provisions relating to retirement and pensions resulted in a challenge by the European Commission of the Sex Discrimination Act of 1975 on three grounds. First, the mechanisms employed by the United King-

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109 Fitzpatrick, supra note 103, at 385.

110 While “equal access” applies to pensions schemes, provisions in the Equal Pay Act relating to death and retirement were deleted from the “equal access” requirement:

(A) An equality clause and those provisions-
   (a) shall operate in relation to terms relating to membership of an occupa-
       tional scheme (within the meaning of the Social Security Pension Act of
       1975) so far as those terms relate to any matter in respect to which the
       scheme has to conform with the equal access requirements of Part IV of
       the Act;
   (b) by subject to this, shall not operate in relation to terms related to death
       or retirement, or to any provision made in connection with death or re-
       tirement.

Equal Pay Act, supra note 105.

111 Roberts v. Cleveland Area Health Authority, 1978 I.C.R. 370.

112 Id. at 375; C.f. Sex Discrimination Act, supra note 3, at sec. 6(4)(excluding provisions relating to death or retirement).
dom were inadequate to remove discriminatory provisions in collective agreements and rules governing independent employers. Second, the exemptions in the 1975 Act for private households and small undertakings violated the equality directives; and third, the exclusion of the midwife from the 1975 Act also violated EEC directives. The European Commission prevailed on the first and second counts before the Court of Justice.

Reacting to the decisions in Commission v. United Kingdom and Marshall, the United Kingdom amended the Sex Discrimination Act in 1986. First, section 6(4) was amended to render unlawful, in specified circumstances, discrimination with regard to retirement on the basis of sex. Second, the amended Sex Discrimination Act prohibits an employer from dismissing an employee on the basis of an age limit which discriminates between the sexes. These amendments are consistent with the holding in Marshall. However, the amended Sex Discrimination Act excludes a "provision in relation to retirement" including benefits, facilities and services unless it is related to a woman's dismissal or demotion which would violate the Equal Treatment Directive rather than the Sex Discrimination Act.

114 Id.
115 Sex Discrimination Act, supra note 2. The 1986 amendment to the Sex Discrimination Act includes provisions to end discrimination in retirement schemes. Furthermore, the Employment Act of 1989 fixed the retirement age at sixty-five for men and women. Neither of these two acts is retrospective. However, if a person is a state employee suffering from discrimination prior to the Acts' entry into force, he or she may have an action under the Equal Treatment Directive, since it was designed to directly effect claims against a state employer. See Marshall, 1986 E. Comm. Ct. J. Rep. 725, [1986] 1 Comm. Mkt. L. Rep. 688, in which the Court clarified two questions: (1) whether a different retirement age for men and women breached the Equal Treatment Directive and (2) if so, whether Mr. Marshall (the plaintiff) could rely on it. In this case the Sex Discrimination Act and the Equal Treatment Directive were at odds on the discriminatory retirement age question. After much deliberation, the Court decided that the Equal Treatment Directive had been breached stating "where a person involved in legal proceedings is able to rely on a Directive against a State he may do so regardless of the capacity in which the latter is acting, whether employer or public authority." Id. On the other hand, a Directive is only binding on "each member State to which it is addressed." EEC Treaty, supra note 3, at art. 189. This is avoided if the Member State concerned has correctly adopted and implemented the Directive into national law.
116 Sex Discrimination Act, supra note 2.
117 Id.
119 Sex Discrimination Act, supra note 2.
This is motivated by Britain's refusal to have the Sex Discrimination Act apply to an employee's entitlement to redundancy pay or occupational pensions. In other words, the amended Sex Discrimination Act still allows discrimination in retirement plans. The paradox here is that the Marshall Court was very concerned with separating employment questions from social security questions and guaranteeing the former complete protection under the Equal Treatment Directive. Regardless of the British government's intention to exclude redundancy pay, redundancy pay is an employment question, not a social security question.

The United Kingdom's reluctance to fully implement article 119 and the equality directives into its national law is evidenced by the discriminatory exclusion of retirement plans in the Sex Discrimination Act of 1986. This perhaps was remedied by the European Court's decision in Von Colson and Kamann v. Land Nordrhein Westfalen. In Von Colson, the Court, applying the Equal Treatment Directive, stated that interpretation of the directive does not have to conform to the interpretation of national legislation subsequent to the adoption of the directive concerned because Community law takes precedence over all provisions of national law. Von Colson established the principle of "indirect effects" which challenges Great Britain to interpret its national legislation pursuant to EEC law. "The answer should be that [Great Britain] will make every effort to maintain consistency." However, commentators argue that "British Courts do not even voluntarily uphold the principle and that many decisions violate its spirit." Obstacles to British application of the funda-
mental right of sexual equality include the principles of parliamentary sovereignty, stare decisis, the problem of sources, and jurisdictional restraints. 128

III. ANALYSIS

In Barber v. Royal Exchange Assurance Group, 129 the European Court of Justice took an important step toward achieving equal treatment for men and women under pension plans. The Court reasoned that private occupational pension redundancy benefits do qualify as "pay" under article 119.130 The difficulty which the Court had in recognizing this fundamental concept of equal treatment indicates a reluctance within the United Kingdom (and perhaps the European institutions) to fully implement the principles of equality.131 The evolution of the European Community case law, though meandering, finally has resulted in a reasonable rule of law consistent with the mandate of the Court.132

In Defrenne [III], the European Court of Justice elevated freedom from sex discrimination to the status of a "fundamental right." The Court defined a contractually mandated retirement age to be a "working condition" rather than "pay," thus negating the "fundamental right" principle established under article 119. The Court stated unequivocally that "fundamental personal human rights is one of the

128 Id. at 590. First, parliamentary sovereignty is an obstacle to the application of the fundamental right. While British courts interpret parliamentary acts in the light of "fundamental rights," the Acts of Parliament remain supreme. Furthermore, British courts have either construed legislation in line with EEC law or upheld inconsistent national legislation on the grounds that the relevant EEC directive lacked direct effect. Id. at 598. Secondly, the British court's adherence to stare decisis weakens the fundamental right to be free from sex discrimination, since the British courts follow precedent rather than uphold the fundamental right. Id. at 599-600. Third, "[t]he sources of the fundamental right for British courts must be an EEC directly effective traditional measure or an ECJ [European Court of Justice] judgment applying the right, since the right itself is not directly effective." Id. United Kingdom courts might apply the fundamental right of sexual equality more readily if the EEC Treaty expressly declared it as fundamental or held to be directly effective. Id. at 601. Fourth, "[s]o long as the fundamental right lacks direct effect, an Industrial Tribunal may not have jurisdiction to consider it." Id. at 602.


132 BROWN & JACOBS, supra note 17, at 119-20.
general principles of Community Law, the observance of which [the European Court] has a duty to ensure. There can be no doubt that the elimination of discrimination based on sex forms part of those fundamental rights." Inexplicably, however, the Court recanted its declaration for fundamental rights by demoting the so-called "fundamental right" to a "qualified right."

The Court's characterization of a mandatory retirement age as a working condition not subject to article 119 is inconsistent with principles of non-discrimination. By denying the plaintiff the right to equality in this respect, the Court declared that the fundamental right contained in article 119 excludes dismissal or retirement conditions. Implicit in the concept of a fundamental right is the notion that the right is so basic and essential that even in the most questionable circumstances it should be preserved. Furthermore, if the right is fundamental, a violation of such a right in any form would be subjected to the strictest scrutiny. In Defrenne III, the Court curiously declared freedom from sex discrimination a fundamental right when in fact it refused to enforce it as a fundamental right.

The fundamental rights argument has been relied upon in other EEC discrimination cases. For instance, the Razzouk Court also relied on the fundamental rights principle which holds equal treatment as a fundamental right which the Court has a duty to protect. While seeming to advance the fundamental rights principle, the Court actually may have taken this bold step because the equality directives do not apply to the EEC institutions. On the other hand, Razzouk could be seen as affirming the fundamental rights principle laid down in Defrenne III. Without actually following Defrenne III, the Razzouk Court held that equal treatment was a fundamental right, whereas Defrenne III denied protection.

135 R. Dworkin, Taking Rights Seriously 184 (1977). Dworkin distinguishes "fundamental rights" from other rights by saying that "fundamental rights" are rights "in the strong sense;" and no special grounds justify interfering with a "fundamental right." Id. at 190.
The *Razzouk* holding is desireable for several reasons. First, the Court dispensed with the formalities of interpreting article 119. Although technically article 119 would not have applied since *Razzouk* dealt with a survivor’s pension scheme and not “pay,” the Court creatively upheld the principles of article 119 by pointing out that *Razzouk* did not actually seek application of article 119. Instead *Razzouk*’s application to the Court used the words “in conformity with the principles laid down in article 119 of the EEC Treaty . . . .” Rejecting a more formalistic approach, the Court found in favor of *Razzouk*. Ordinarily, the Court would have rejected *Razzouk*’s claim outright on the basis that article 119 did not apply to a survivor’s pension scheme. Instead the Court adhered to the spirit, not the letter, of article 119 and construed “the principles laid down in article 119” to mean equality of treatment for both men and women and stated that the principle “forms part of the fundamental rights the observance of which the Court has a duty to ensure.”

Interestingly, both *Defrenne [III]* and *Razzouk* involved discriminatory contracts relating to employment, yet the Court treated each case differently. In *Defrenne [III]*, the termination of a woman’s employment contract at the age of forty was deemed to be a “working condition” relating to “treatment,” and thus was not “pay.” The survivor’s pension scheme in *Razzouk* was also said to constitute “treatment,” not “pay.” However, in contrast to its decision in *Defrenne III*, the Court held the scheme to fall within the principles laid down by article 119. The conflict in these two cases raised the question of whether “treatment” properly falls within the scope of article 119, or whether a plaintiff, complaining of merely discriminatory treatment, must rely on the Equal Treatment Directive which the Court has not proclaimed to be a per se “fundamental right.” If treatment falls within the scope of article 119 as implied by *Razzouk*, it may actually fall under the definition of “pay,” since treatment does have pecuniary consequences. However, if article 119 does not apply and treatment falls only within the scope of the Equal Treatment Directive and related directives, plaintiffs suffering discrimination will be granted relief only in limited circumstances.

The “fundamental right” argument was used effectively in *Marshall*, which was decided under the Equal Treatment Directive rather

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142 See supra note 5.
than article 119. Marshall contended that "the elimination of discrimination on grounds of sex forms the part of the corpus of fundamental human rights and therefore one of the general principles of Community Law." The Court interpreted the Equal Treatment Directive to facilitate the fundamental right to equal treatment. However, the Court retreated from its earlier tortured interpretation of article 119 in Razzouk, in part due to the fact that Marshall involved a Member State and not a Community institution. This interpretation foreclosed acceptance of the fundamental right principle of Razzouk. The Court found this to be significant because, although articles in the EEC Treaty apply to private parties as well as Member States, directives only address Member States. This lends credence to the vertical effects versus horizontal effects distinction. Marshall seems to set the stage for equal treatment, as defined under the Equal Treatment Directive rather than article 119, to gain fundamental right status; yet the Equal Treatment Directive only directly effects Member States. Given that the directive does not apply to individuals, the decision is somewhat hollow.

Besides an unwillingness on the part of Member States to implement article 119 and related equality directives, the Court has bound itself by its continued distinction between "pay" and "treatment." Logically, there is not principled basis for distinguishing between "pay" and "treatment." The pension benefits one expects to receive upon retirement are just as much a part of one's compensation as the

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144 The rationale for giving a directive any effects at all is that Member States must only rely, even in their own national courts, on laws consistent with the EEC Treaty, including any directives. The conclusion is the vertical (meaning affecting the Member States) - horizontal (meaning effecting private parties) distinction. Legislation, supra note 126, at 934.

145 In the United States, the terms "pay" and "treatment" are settled by Title VII of the Civil Rights Act of 1964. 42 U.S.C. 2000(e) [hereinafter Title VII]. For instance, Los Angeles Dept. of Water & Power v. Manhart, 487 U.S. 223 (1978), held that unequal pension plan contributions for male and female employees based on actuarial tables reflecting a woman's greater life span violated the sex discrimination provisions of Title VII. Furthermore, in Los Angeles Dept. of Water, the United States Supreme Court extended this nondiscrimination principle to unequal benefits payments. Arizona Governing Committee for Tax Deferred Annuity & Deferred Compensation Plans v. Norris, 463 U.S. 1073 (1983). Following the decisions in Manhart and Norris, nearly all employers have adjusted their pension plans to conform to the requirements the two decisions set forth. EEOC Policy Guidance On Retroactive Relief for Discriminatory Employee Retirement Plans, [Jan. - June] Pension Rep. (BNA) No. 16, at 103 (Jan. 16, 1989).
wages he or she receives at the end of the week. Pension and retirement plans which the Court has repeatedly excluded from article 119 protection should fall within the employment contract just as pay does. Consideration runs from the employer to the employee in the form of pay, benefits, pension and retirement benefits. In return, the employee performs his job according to the employer’s directions.

Since the Court refused to apply article 119 to social security schemes, pension schemes, redundancy pension schemes and other matters that do not qualify under the restrictive definition of “pay,” plaintiffs were able to recover in very few circumstances. To be protected, the plaintiff must first be an employee of the State under Marshall, since the Equal Treatment Directive does not apply to private employers, thus only state employees will be able to obtain relief under the Equal Treatment Directive. Second, the Court must decide that the discrimination in fact amounts to “pay.” The Court followed this reasoning in Worringham. Although the case involved an occupational pension scheme which ordinarily is excluded from article 119, the Court deemed the contributions to the scheme to be “pay.” If the Court had decided otherwise, the plaintiff would have been unable to gain relief because the Equal Treatment Directive does not apply to occupational schemes. Lastly, if the Court rules that directives have “horizontal” as well as “vertical” effect, plaintiffs who are not State employees would have another avenue of relief. By taking this step, the Court would recognize the economic and social goals underlying article 119 and give credence to the notion of equality of treatment as a “fundamental right.”

The pecuniary consequences of pension and retirement schemes, including redundancy plans, is apparent. For example, if an employer forces a female to retire five years earlier than her male counterpart, this amounts to five years less that she will be paid. By the same token, denying Barber his full redundancy pay simply because he

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149 Id. at 795.
had not met the requisite age for a male, when a similarly situated women would have received the pay, is discriminatory.\footnote{Barber, 1990 E. Comm. Ct. J. Rep. at 519.} This, in turn, means Barber was denied pay based on his gender which article 119 prohibits as discrimination.\footnote{EEC Treaty, supra note 3, at article 119.} If the European Court were to abandon its strict, inadequate definitions of "pay" and "treatment," it could freely uphold the "fundamental right" principle it declared it was mandated to ensure in Defrenne [III].\footnote{[1978] 3 Comm. Mkt. L. Rep. at 312.} Furthermore, this would enable the Court to attain the economic and social goals article 119 was intended to meet.\footnote{[1978] 3 Comm. Mkt. L. Rep. at 329.}

The European Court has broken some significant ground in Barber. First, it held that the fact that certain benefits are paid after termination of employment does not prevent them from being "pay" as defined under article 119.\footnote{Barber, 1990 E. Comm. Ct. J. Rep. at 1378, [1978] 3 Comm. Mkt. L. Rep. at 312.} Furthermore, the Court went on to state that article 119 applies even where redundancy compensation derives from legislation rather than from the contract of employment.\footnote{[1978] 3 Comm. Mkt. L. Rep. at 329.} Second, the Court made a blanket statement that occupational pension schemes, contributory or noncontributory, were part of the consideration paid by employers to employees, so long as the scheme was in no way financed by the state.\footnote{Id.} The Court also stated that a sex-differentiated age condition with respect to pensions paid under a contracted-out private occupational pension scheme was contrary to article 119.\footnote{Id.} The rule applied even where the difference was based on pensionable ages set by the national social security scheme.\footnote{Id.}

Lastly, the Court unequivocally granted direct effect of article 119 to private occupational pension and redundancy schemes by defining these schemes as components of renumeration.\footnote{Id.}

The economic goal is to ensure that Member States which implement the equality principle are not placed at a comparative disadvantage vis-a-vis those states which continue to discriminate. The social goal is to improve living and working conditions. Id.

The direct effect of article 119 may not be relied upon in order to claim entitlement to an occupational pension with effect from a date prior to May 17, 1990, except in the case of workers (or those claiming under the articles) who have prior to that date already initiated legal proceedings or raised an equivalent claim under the applicable national law. Id.
Barber is unprecedented in its broad interpretation of article 119 and its application to pension schemes.\textsuperscript{162} The Court rejected \textit{Defrenne [I]} outright saying, "[p]lay that is prescribed by law does not for that reason fall outside the scope of article 119."\textsuperscript{163} The Court pointed out that in \textit{Defrenne [III]} it clearly held that article 119 was particularly applicable to discrimination stemming from national legislation.\textsuperscript{164} Moreover, the pension scheme at issue in Barber was financed solely by the employer's contributions and the contributions were paid by the trustees of the fund.\textsuperscript{165} The Court construed these sums paid by the employer to the trustees of the fund as indirect consideration and, therefore, tantamount to "pay" as defined under article 119.\textsuperscript{166}

Although the Court was unwilling to give horizontal direct effect to the equality directives, specifically the Equal Treatment Directive, it did concede that a contracted-out private occupational scheme falls within the scope of article 119. If the Court had decided to give the Equal Treatment Directive horizontal effect, it would have been forced to overrule \textit{Marshall} and was unwilling to do so. However, the dilemma facing plaintiffs with an unequal treatment claim and the lack of horizontal effects will be obsolete if the Court decides to continue applying article 119 to historically unequal treatment issues as it did in Barber.\textsuperscript{167}

The Barber Court made some very positive changes in the law of sex discrimination as it pertains to retirement and pension plans. The

\textsuperscript{162} The decision in Barber has been compared to the United States Supreme Court's decision in Arizona Governing Committee v. Norris, 463 U.S. 1073 (1983). The impact on multinational firms is predicted to be even greater, since more plan design features are likely to vary by sex in the EEC than in the United States prior to the Norris decision. Pension plan options most likely affected include pensions for spouses and dependents, early and late retirement provisions, bridging pensions and waiting periods which indirectly discriminate against men or women. \textit{Multinational Firms with Pension Plans Seen Affected by EC Discrimination Ruling}, [July-Dec.] Daily Labor Report (BNA) No. 131, at A-13 (July 9, 1990).

\textsuperscript{163} \textit{Id.} at A-13.

\textsuperscript{164} \textit{Id.}

\textsuperscript{165} \textit{Id.}


Sums . . . which are included in the calculation of the gross salary payable to the employee and which directly determine the calculation of other advantages linked to the salary, such as redundancy payments . . . form part of the worker's pay within the meaning of article 119(2) of the Treaty even if they are immediately deducted by the employer and paid to a pension fund on behalf of the employee.

\textit{Id.}

\textsuperscript{167} \textit{Id.}
Court successfully expanded article 119 without upsetting a private employer's immunity from the Equal Treatment Directive by establishing horizontal direct effects. Actually, the avenue the Court took is more appropriate in light of the previously declared, yet still developing, fundamental right to sexual equality. Perhaps the most positive change is the implication that "pay" and "treatment" are really elements of a greater concept - the employment contract as a package of terms, benefits and pay.

IV. CONCLUSION

European Economic Community law concerning equal treatment has suffered through tortured interpretations and harsh results. By limiting its definition of "pay" to the actual salary an employee receives, the European Court had found itself trapped between upholding traditional European Economic Community definitions and the fundamental principle of freedom from sexual discrimination. Unfortunately, the Court spent many years relying on strict interpretations of the articles of the EEC Treaty. Plaintiffs were turned away without a remedy, since their claim did not qualify as "pay" under article 119. With the Barber decision, it seems the Court is broadening its definition of "pay" and, at least, curbing the futile distinction between "pay" and "treatment" in the area of pension and redundancy plans.

R. Mace Flournoy
EUROPEAN ECONOMIC COMMUNITY—ENVIRONMENTAL POLICY—ECONOMIC AND FISCAL INSTRUMENTS—REPORT OF THE WORKING GROUP OF EXPERTS FROM THE MEMBER STATES PROPOSES THE USE OF ECONOMIC AND FISCAL INSTRUMENTS TO ATTAIN COMMUNITY-WIDE ENVIRONMENTAL GOALS

I. FACTS

On November 28, 1989 the Environment Council\(^1\) of the European Community\(^2\) requested that an independent group of national experts\(^3\) prepare a detailed report on the use of economic and fiscal instruments in the environmental policy of the Community. The purpose of the report was to evaluate the potential effectiveness of these instruments in addressing the environmental problems before the EC. The impetus for this action was the failure of the current regulatory measures\(^4\) and the push toward a unified market. Due to the fact that the experts participated on an individual basis, the report is neither the official responsibility of the Commission nor of the Member States; however, it serves as a theoretical framework for a new approach to environmental regulation by the European Community.\(^5\)

The Report of the Working Group of Experts from the Member States on the Use of Economic and Fiscal Instruments in EC Environmental Policy\(^6\) (Experts’ Report or Report) is an important point

\(^1\) The Environment Council is composed of the environment ministers from the European Community’s twelve Member States.

\(^2\) The European Community (EC) consists of: Belgium, Denmark, Germany, Greece, Spain, France, Ireland, Italy, Luxembourg, the Netherlands, Portugal and the United Kingdom.

\(^3\) The group of national experts was drawn chiefly from senior environment department officials from each state. Pienaar, Brussels Takes Stronger Line on Pollution “Fines”; Radical EC Proposals For “Green Taxes” Will Provoke Stiff British Resistance, The Independent, Sept. 21, 1990, at 2.

\(^4\) Regulatory measures consist of the traditional practice of implementing maximum emission levels allowable under penalty of law.

\(^5\) The Commission is expected to formally adopt this report in the coming months. Dickson, Carbon Tax Plan Reappears on the EC Agenda, Fin. Times, Aug. 9, 1990, at 7.

in the Community's gradual movement from a regulatory policy of environmental protection to a policy based on the use of economic incentives. Though this concept is not new to the region, the shift in policy has been dramatically accelerated over the past year.

After the initial request for the Report was made by the Environment Council, the Environment Ministers convened for an informal meeting on April 21, 1990, to further address the use of economic and fiscal instruments. During the conclave, the Ministers reiterated their commitment to the imposition of a system of EC-wide instruments to complement, and in some instances replace, the regulatory measures that were currently in effect. The presidency conclusions to the meeting stated that the "Ministers acknowledged the value of supplementing existing regulatory instruments . . . by the use of economic and fiscal instruments." A very similar position was espoused during the Bergen Conference in May 1990, when an increased commitment to the use of environmentally driven tax measures was made.

In June of 1990 the European Council, during its meeting in Dublin, included in its Declaration a chapter on environmental concerns. The text of the chapter concluded with the following statement:

We therefore call on the Commission to accelerate its work in this field [of economic and fiscal instruments] and to present, before the end of 1990, proposals for a framework or guidelines within which such measures could be into effect by the Member States in a manner consistent with the Treaties.

This Declaration was followed by the release of a draft report by the Economic Instruments Task Force. The task force study was initiated by the Commission in response to its determination that fiscal initiatives were a necessary component of its environmental policy. The report called for the use of economic instruments and stated that the harmonization of taxes within the Internal Market

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7 Economic and fiscal instruments used in environmental policy are sometimes referred to as "ecotaxes" or "green taxes."
8 Experts' Report, supra note 6, at 2.
11 Experts' Report, supra note 6, at 2.
must be accomplished with environmental concerns in mind. These previous initiatives by various entities within the Community increased awareness in the potential effectiveness of economic instruments and resulted in a need for an exhaustive analysis of such a policy.

The Experts' Report proposes a comprehensive system of financial incentives and penalties to address the increasing problem of environmental degradation. The paper is supported by the Italian government, the present holder of the EC presidency, and the Environment Commissioner, Carlo Ripa di Meana. While the Report calls for the Commission to formulate proposals on this matter by the end of 1990, to this date no formal action has been taken. Regardless of the delay, this report provided sober reading for those who doubted that fiscal instruments would be implemented on a Community-wide scale.

The Experts' Report is comprised of three major sections: an introduction into the need for market mechanisms; an examination of the basic elements of economic instruments; and an evaluation of environmental problems which could be addressed through these instruments.

The present structure of environmental control by the Community consists predominately of regulatory measures. The market mechanisms that are in effect are products of individual legislation by Member States rather than a Community-wide program. The Report states

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13 The Report disagreed with the traditional view that economic growth and environmental concerns were mutually exclusive. Rather the task force position was that with a new commitment to sustained growth, the Community should be able to reconcile economic development and the environment. EC Official Says Fiscal Instruments to See Greater Use for Pollution Control, 13 Int'l Env't Rep. (BNA) No. 4, at 151 (April 11, 1990).

14 Mr. Carlo Ripa di Meana has been an enthusiastic proponent of a market mechanism approach in addressing environmental degradation. Dickson, supra note 5, at 7. Additionally, the Commissioner is pushing hard for a harmonized "green tax" system to be implemented by the Commission. Pienaar, supra note 3, at 2.

15 One possible explanation is that the Commission believes that this is not the proper time to increase energy costs, given the uncertainty of energy prices due to the Gulf War.


17 A number of the more advanced industrial states would prefer that environmental taxes be continued on a national basis rather than be harmonized. The reasoning is that individual application may work an advantageous distortion of competition for those countries who already have made some headway in addressing this problem. Percival, Environment: Green Taxes for Europe? An Inter Press Service, Inter Press Service, Sept. 25, 1990, at 1.
that both the regulatory approach of the Community and the nationalist use of economic instruments are inadequate measures to address the Community's environmental problems.

Regulatory controls offer no incentive to the polluter to minimize his waste beyond that which is required by law. The result is that the cost of the damage to the environment is externalized and must be borne by the public sector. Through the implementation of fiscal and economic instruments, the Report attempts to internalize these environmental costs so that the price of a product or service will ultimately reflect the actual total cost to the Community. The Report does not call for the complete abolition of the regulatory controls, but rather for the simultaneous use of both static regulatory limits and fiscal instruments.

With regard to the implementation of these instruments by the Community rather than individual states, the Report points out that allowing separate systems to evolve would run counter to the planned realization of an Internal Market in 1992 as set out in the EEC Treaty. The Treaty was subsequently amended in 1987 by the Single European Act.

In addition to being more effective, Community standards avoid the risk of creating fiscal barriers between various Member States; a risk which is an inherent part of any nationalist approach. Thus, it is clear to the Member States experts that any environmental taxes which are implemented must be done on the Community level to avoid potential trade distortions.

One final impetus prompting the Commission to address this issue was that the Community is the signatory to a number of international conventions on pollution, and will certainly sign on to more in the future. In that capacity, the Community is ultimately responsible for environmental compliance on an international level.

The Report points out the importance of distinguishing between the incentive impact of economic instruments and the raising of revenue. The goals of the two are dissimilar, and therefore each should be conducted in a distinct manner. Obviously the incentive tax attempts to discourage harmful activity, while the revenue tax aims to accumulate the necessary funds to address environmental problems which do occur. One is preventive and the other curative.

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On an economic level, incentive charges should be budget neutral and create no additional tax burden.

Once the motive for implementing the market mechanism is determined, the policy and the surrounding conditions will dictate which fiscal instrument is best suited to address that specific problem. The mechanisms which are available to effect an alteration of behavior in a manner that is more favorable to the environment are: 1) environmental charges and taxes, 2) tradeable emission permits, 3) deposit-refund systems, 4) enforcement incentives, 5) financial aid, 6) industry agreements, and 7) environmental liability.

In order to determine the potential of proposed instruments the Report lists five criteria for review: 1) the overall environmental effectiveness or reduction of harmful practices, 2) the economic efficiency or degree of adjustments made to the price structure, 3) the practicability of the measure and its administrative costs, 4) the fairness of the policy and the acceptability to the public as well as industry, and 5) the economic impact to the Community.

The Report proposes that the Community apply these economic and fiscal instruments to address both global and regional environmental problems. The strongest proposal is for a drastic incentive tax on carbon dioxide (CO2) emissions to deal with the growing problem of global warming. The paper urges that such a tax or charge be implemented in order to internalize the actual cost of the energy source and to reduce the overall consumption of fossil fuels. Possibilities suggested are either a tax system or a more moderate system of tradable emission permits.

As far as direct taxation, an emissions charge determined at the source of the pollution is the most equitable for industrial waste. The consumer, due to the number and mobility of the sources, could be assessed a product charge based upon the contribution of that

20 These may be applied as emissions charges, products charges/taxes or tax differentiation.
21 This creates a secondary market in pollution permits that acts as a component of a regulatory scheme.
22 Some examples are performance bonds and non-compliance fees which coerce the polluter to abide by the regulations that are prescribed.
23 Though Community subsidies are an option, this contradicts the “polluter pays” principle of Article 130r.
24 A switch to strict liability places the burden of proof on the polluter and results in higher premiums for the insured unless he can lower the environmental risks of his activities.
fuel source to the overall global warming problem. Clearly the desired effect of such a program is a drastic increase in the price of fossil fuels.

Ozone depletion is the other global issue dealt with by the Report. Chlorofluorocarbons (CFCs) are the cause of severe ozone depletion. Given that safer alternative chemicals cost three to five times as much as the CFCs used today, an incentive tax should be put into place to force a switch to the available, cleaner technology.

The regional problems addressed by the study run from water contamination to air traffic noise pollution. The proposed fiscal instruments are again an effort to internalize the cost of these products and to put the "polluter pays" principle into practical effect. In order for the "polluter pays" approach to be realized, the polluter must be responsible for all direct and collateral effects of his actions.

One of the more drastic proposals in the Report concerns a new approach to agricultural policies within the Community. Agricultural production is the source of many environmental contaminants to both the soil and the groundwater supply. These substances include pesticides, as well as nitrates and phosphates found in fertilizers. The larger problem is found in the present system of price support within the Community which, through governmental price support, encourages the farmer to maintain the status quo in agricultural methods. The result is that intensive farming practices which are most harmful to the environment are encouraged. In response to this problem, the Experts' Report proposes an abolition of certain types of national aid, in conjunction with an incentive tax on these agricultural contaminants. Due to the effectiveness of the pesticides and fertilizers in use, a high incentive tax must be applied in order to facilitate a switch to more environmentally correct methods. One way that the report suggests to lessen the financial blow on the farmer is to channel a portion of the revenue raised back to the farmers in the form of subsidies. Obviously these subsidies must be consistent with the competition guidelines of the Internal Market.

Another proposed solution concerns the Community's high level of automobile traffic and the subsequent air pollution that results.

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25 Such a system would consist of a graduate charge increasing in severity based upon the level of CO2 emissions of the fuel. In essence, coal would be charged a much higher rate than gasoline.

26 EEC Treaty, supra note 18, art. 130f(2); added by Single European Act, supra note 19, art. 25, at 12.
The Report's response to this issue is a combination of economic and fiscal measures. First, the report reiterates the need for an excise tax on carbon fuels, to be harmonized in accordance with the dictates of the Internal Market. Secondly, it suggests a vehicle or special consumer tax which could be returned as a subsidy to reduce the cost of automobiles which employ cleaner technology. Thirdly, it proposes an annual road tax on all vehicles based upon the automobile's weight and engine capacity or, in the alternative, upon the degree of carbon emission. Finally, the report calls for a fixed road use charge or toll to be applied consistently throughout the Community in order to prevent fiscal barriers or distortions.

In the area of waste disposal, the Experts' Report calls for a three part approach. Given in the order of importance, the areas are: 1) prevention, 2) reuse and recycling, and 3) more efficient treatment, incineration and land disposal of the waste that is created. To further these aims the Report proposes a deposit/refund system, as well as a charge or tax differentiation for harmful products. The degree of incentive tax should obviously vary according to the risk of the product.

This Report, given at the urging of the Commission, is a clear mandate for a comprehensive system of economic and fiscal instruments to address the growing environmental problems within the Community. In conclusion the Report states:

The development of economic and fiscal instruments of environmental policy is also required at EC level, essentially to cope with pollution on a transboundary or a global scale, to prevent trade distortion, and to prevent each Member State from postponing action to avoid competitive disadvantages, even in the short term. This exhaustive analysis of options available to the Commission should form the basis of the Community's environmental policy and create support for a shift from the static approach of regulatory limits to a more dynamic policy of market mechanisms. Report of the Work-

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27 Thus, cleaner products would carry a lower tax than dirtier ones. This has been an effective instrument in the introduction of unleaded gasoline within the Community. Its attributes are that it is budget neutral and has very little administrative costs. Commission Expected to Consider Issue of Using Taxes to Promote Pollution Control, 13 Int'l Env't Rep. Current Report (BNA) No. 10, at 383, (Sept. 26, 1990).

28 Experts' Report, supra note 6, at 19.

29 The implantation of this position has already begun, although not on a formal level. In a December 20, 1990 "working paper," the European Commission called for a package of taxes to address the issue of global warming. EC Favors Energy Tax, Will Sound Out Members First, The Reuter Library Report, Dec. 20, 1990.
Environmental concern is not a recent development within the Member States or the Community. However, at the inception of the EC none of the three treaties creating the Community contained explicit provisions granting authority to act in the area of environmental policy. Therefore, initial control over environmental issues remained in the hands of the Member States.

In the 1970s the Community began to move toward the harmonized control of certain environmental matters. In its progression toward a single market, the Community began the "General Program for the elimination of technical barriers within the Community." Included within this program were several directives which laid down Community-wide environmental regulatory standards, which in some instances replaced inconsistent national standards. Examples of this type of directive are: 1) measures against air pollution caused by motor vehicles, 2) requirements on the biodegradability of detergents, and 3) limits on the sulfur content of specific fuels. The Community realized that differing environmental standards would produce fiscal barriers within the Common Market and undertook to harmonize their regulatory approach.

In Paris during 1972, national leaders of the Member States of the Community published the "summit declaration" which expressed their desire that the Community develop an EC environmental policy. This declaration was followed up by a draft action program submitted by the Commission to the Council calling for just such an EC-wide environmental policy. This Community action program has been modified in 1977, 1983, and in 1987. While this program called for

30 In fact, the term "environment" is not found in any of the documents at that time. Haagsma, *The European Community's Environmental Policy: A Case Study in Federalism*, 12 FORDHAM INT'L L. J. 311, 315 (1989).
32 Haagsma, *supra* note 30, at 316.
an environmental policy, it did not provide the legal foundation for one. 38

The original EEC Treaty provided only an implied authoritative basis to implement a Community environmental policy in order to attain a single market. Article 10039 grants authority to the Council, acting unanimously on a proposal from the Commission, to preside over all matters that directly affect the "establishment or functioning of the common market."40 Thus, the Community could address all environmental matters which have the potential of erecting fiscal barriers within the planned Internal Market.

The Single European Act (SEA)41 in 1987 went one step further by granting the Community express oversight into environmental matters. First, the SEA amended the Treaty by inserting Title VII, referred to as the Environmental Title ("Title").42 Secondly, the amending document added a specific reference to environmental protection to the new article 100a on the harmonization of Member State legislation.43 Thus, the SEA gave the Community explicit authority to continue and expand upon its endeavors in the area of environmental protection.

While the legal basis for unified Community control was achieved, the enhanced role of the Community in the environment had its critics. Several states which already enforced high environmental standards objected to centralized control for fear that the Community standards would be lower and less effective. The new Treaty addressed this concern in article 100a(4) by allowing individual states to opt out of a harmonized standard for reasons of environmental protection.44

Article 130r45 of the Environment Title provides the substantive goals of the Community's environmental polices. Due to the broad

38 Haagsma, supra note 30, at 319.
39 EEC Treaty, supra note 18, art. 100.
40 Id.
41 Single European Act, supra note 19.
42 Single European Act, supra note 19, at 11.
43 EEC Treaty, supra note 18, art. 100a(3); added by Single European Act, supra note 19, at 18, at 8.
44 "If, after the adoption of a harmonization measure by the Council ... a Member State deems it necessary to apply national provisions ... relating to protection of the environment ... it shall notify the Commission of these provisions." See EEC Treaty, supra note 18, art 100a(4); added by Single European Act, supra note 18, at 18, at 8.
45 EEC Treaty, supra note 18, art 130r(1); added by Single European Act, supra note 19, art. 25, at 11.
sweep of power that this general aim places with the Community, the Member States insisted that unanimous Council vote be required in order to implement any measure based on this article.46 The Member States felt that this protection was necessary in order to ensure that the Community did not abuse its power.47

The Title sets out four principles that should be used to guide the EC’s environmental policy in article 130r(2). "Action by the Community relating to the environment shall be based on the principles that:

1. preventive action should be taken,
2. environmental damage should, as a priority, be rectified at the source,
3. the polluter should pay,
4. and the environmental protection requirements shall be a component of the Community’s other policies.48

It appears that given the broad nature of these principles, the institutions of the Community can claim a relatively large discretionary margin.49 The European Court of Justice (ECJ) should only declare a regulation or directive based on this article invalid when it is in manifest error, a misuse of power, or when the institution clearly exceeds its bounds of authority.50

Within this criteria, the authority for economic initiatives is laid. The foundation of all fiscal approaches to environmental protection undertaken by the Member States is the “polluter pays” principle encapsuled in article 130r(2).51 The principle states in clear terms that all who burden or harm the environment are required to bear the costs of avoiding, eliminating and compensating for these injuries.52 This principle provides the legal basis for a dynamic approach to the reduction of pollutants and the development of clean technology.

The “polluter pays” principle does not always exist in pure form. In some instances environmental regulation will result in severe ec-
onomic hardship for vital national undertakings. The compromise solution that has been taken by the states is to adjust the "polluter pays" principle to comply with the economic realities of a competitive market through the use of subsidies. Subsidies channel public revenues to the private concern so that it is able to meet its duty under the "polluter pays" principle of article 130r(2). This compromise between the goals of environmental protection and undistorted trade is one of the substantial problems in the individual application of fiscal instruments by the Member States.

Though subsidies are used, there are limitations under the EEC Treaty. Article 92(1)\textsuperscript{3} prohibits all state aids which distort or threaten to distort competition by favoring certain undertakings or certain goods as far as they affect trade between Member States. This severe restriction does not apply to the European Commission, thereby granting it a free hand to aid those concerns which are unduly disadvantaged by a stricter approach to environmental protection.\textsuperscript{4} In administering such a fund, the Commission is not restrained as the Member States are with respect to the creation of distortions within the market. The result does not conform to the true intent of the "polluter pays" principle, but provides a practical solution to the possible severe economic impact of tighter environmental controls.

Article 130r(3) formulates the criteria to be considered before the Community undertakes any environmental action. The Community shall take account of:

1. available scientific and technical data,
2. environmental conditions in the various regions of the Community,
3. the potential benefits and costs of action or lack of action,
4. the economic and social development of the Community as a whole and the balanced development of its regions.\textsuperscript{5}

However, in taking these factors into consideration, the Community shall only take action within the environmental field if the desired objectives can be better attained at the Community level rather than

\textsuperscript{3} EEC Treaty, supra note 18, art. 92(1).
\textsuperscript{4} See, European Social Fund, Id. at art. 125; the European Investment Bank, Id. at art. 130; the European Agricultural Guidance and Guaranty Fund, Id. at art. 40(4).
\textsuperscript{5} EEC Treaty, supra note 18, art. 130r(3); added by Single European Act, supra note 19, art. 25, at 11-12.
through individual state legislation. This allocation of authority is referred to as the principle of "subsidiarity." Its application allows the Member States to retain a degree of sovereign control over their environmental policies.

The last provision of the "Environmental Title," article 130t, allows individual states to adopt measures which are more stringent than those put into place by the Community; provided they are compatible with the remainder of the Treaty. In order for a Member State to implement stricter measures, the displaced Community standard must be intended only as an environmental measure and not as a means to accomplish additional Community goals, such as the removal of fiscal barriers.

Though articles 130r-t grants the Community greater authority for environmental control, each Member State retains its sovereign power over its environmental policies, thereby giving articles 130r-t a declaratory character. The powers of the Community do not preempt those of the states under the EEC Treaty, but rather run parallel to them.

One of those powers retained by the states is the use of economic and fiscal instruments. In the policies of the Member States, taxes are the most important instruments used to enforce the "polluter pays" principle. However, there are severe restrictions on these national instruments which are necessary to prevent unequal competitive positions between the Members of the Community.

Environmental taxes, like all other charges levied by the Member States, are subject to article 95 of the EEC Treaty which prohibits any discriminatory taxation of goods imported from another Member State. This provision deals exclusively with taxes which are imposed when goods cross borders; it is strictly concerned with the movement

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56 EEC Treaty, supra note 18, art. 130r(4); added by Single European Act, supra note 19, art. 25, at 12.
57 Haagsma, supra note 30, at 342.
58 EEC Treaty, supra note 18, art. 130t; added by Single European Act, supra note 19, art. 25, at 12.
59 Haagsma, supra note 30, at 347.
60 Id. at 348.
61 Id. at 425.
62 Id.
64 EEC Treaty, supra note 18, art. 95.
of products and is an extension of the sovereign power of the Member States.\textsuperscript{65}

Article 99 of the Treaty deals with the harmonization of indirect taxes, including environmental excise taxes.\textsuperscript{66} The harmonization is intended to prevent any distortion of competition.\textsuperscript{67} As long as the Council does not enact provisions calling for the harmonization of these indirect taxes,\textsuperscript{68} the Member States are free to introduce new indirect environmental taxes.

The harmonization of direct taxes, such as duties and contributions, is governed by articles 100\textsuperscript{69} and 100a,\textsuperscript{70} with the same concern for preventing distortions within the Internal Market. To this point, no legislation has been drafted to bring complete control of all direct taxation, including environmental charges, under the oversight of the Community authorities.\textsuperscript{71}

The individual states are also free to impose customs duties to implement their environmental policies with several restrictions. In order to comply with article 12 of the EEC Treaty,\textsuperscript{72} the charges must be levied against both outgoing domestic products and incoming foreign goods. Additionally, the charge must be based on the same features in the products or be assessed against the same stage of production. Within that framework, an environmentally oriented duty may be assessed in the form of an inspection fee, used to determine the environmental compatibility of the product, as long as the collected funds are not used solely for the benefit of domestic undertakings.\textsuperscript{73}

EEC Treaty article 100a, introduced by the SEA, relates to direct environmental charges or taxes and bestows upon the Community a legal duty to dismantle trade barriers which prevent realization of the Internal Market.\textsuperscript{74} Though this amended provision grants the Council expanded powers in the area of environmental charges, the

\begin{itemize}
\item \textsuperscript{65} Grabitz & Zacker, supra note 63, at 442.
\item \textsuperscript{66} EEC Treaty, supra note 18, art. 99.
\item \textsuperscript{67} Id.
\item \textsuperscript{68} One current example is the excise tax on leaded gasoline, imposed on a state-by-state basis as an incentive to encourage the use of cleaner unleaded petrol.
\item \textsuperscript{69} EEC Treaty, supra note 18, art. 100.
\item \textsuperscript{70} EEC Treaty, supra note 18, art 100a; added by Single European Act, supra note 19, art. 18, at 8.
\item \textsuperscript{71} Grabitz & Zacker, supra note 63, at 442.
\item \textsuperscript{72} EEC Treaty, supra note 18, art. 12.
\item \textsuperscript{73} Grabitz & Zacker, supra note 63, at 443.
\item \textsuperscript{74} Id. at 445.
\end{itemize}
Member States, under article 100a(4), retain the power to enforce more stringent national environmental charges even past the point of complete harmonization.\(^7\)

The overall effect of the SEA did not remove the Member States' ability to implement economic and fiscal instruments for the protection of the environment. However, the addition of the "Environmental Title" gave a mandate to the Council to develop a system for the practical application of the "polluter pays" principle.\(^6\) Additionally, article 100a requires that all measures designed to achieve a single market must incorporate the environmental dimension.

Until a comprehensive Community plan is introduced, the Member States may continue to assess environmental charges provided that they burden domestic and foreign products equally.\(^7\) At this point the Council has not attempted to harmonize indirect taxes under article 99 nor have they addressed the harmonization of direct taxes under article 100a. Therefore, individual states are competent to implement appropriate economic and fiscal instruments to address their environmental concerns.\(^7\)

Though the Council has not implemented any Community-wide economic instruments, there are nonetheless several successful examples which are currently being used on a national basis. Greece and the Netherlands have imposed tax differentiation systems which promote the use of motor vehicles that are safer for the environment. Greece grants a tax break of up to 40% for cars which are equipped with a three-way catalytic converter. These tax advantages result in a lower purchase price offered by the dealer. The Netherlands bases its tax advantage on the quality of the cars' exhaust, and the automobiles with better emission figures receive a discount on the special consumer tax which is added onto the Value Added Tax (VAT).\(^7\)

This measure is budget neutral due to the fact that the discounts are financed through an increase in the tax on all other cars. The result in the Netherlands has been an increase in the sale of these cars from 5% to 60% of the market.\(^8\)

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\(^7\) Id. at 446.
\(^6\) Id. at 447.
\(^7\) Id.
\(^7\) Id.

\(^8\) "Value Added Tax - a tax assessed on the addition to the original worth of raw materials or components as they are processed further in manufacturing."

BLACK'S LAW DICTIONARY 805 (5th ed. 1983).

\(^8\) Experts' Report, supra note 6, at Annex 2-1.
Germany has used a system of water effluent charges since 1981. The charge is assessed against industrial as well as individual consumers that discharge certain impurities into the water. The charge is based on the chemical oxygen demand, the organic halogen compounds, heavy metals and the toxicity to fish. An incentive is offered to employ the best possible technology to maintain the effluent level below that permitted; discounts up to 80% are possible. The result has been a substantial increase in the number of water treatment facilities, both collectively and privately owned.\textsuperscript{81}

Denmark employs a deposit-refund program for beverage containers used for beer, wine and soft drinks. The system results in a nearly 100% return rate of the containers. This system has been approved by the Court of Justice, with the reservation that it may be invalidated if the Community harmonizes this area of taxation.\textsuperscript{82}

In 1989 Italy introduced a charge on all non-biodegradable plastic bags which were domestically produced or imported. The charge trebled the price of the product and the consumption of the bags declined 40%.\textsuperscript{83}

Several EC Member States have introduced an excise tax differential between leaded and unleaded gasoline; the purpose being to increase the market share of the cleaner burning unleaded gasoline. The excise tax resulted in a drastic decline in the demand for regular petrol and forced oil companies to withdraw it from the market. This penetration of unleaded gasoline into the market made the introduction of three-way catalytic converters possible throughout the Community. However, the Report points out that lack of concerted Community action resulted in a loss of efficiency which could have been avoided.\textsuperscript{84}

While presently no program of economic and fiscal instruments is in place on a Community-wide basis, it appears that there is adequate authority within the amended Treaty for such a system to exist. Additionally, the actions of the Member States within this area have demonstrated the potential effectiveness of this approach in addressing the environmental issues within the Community.

III. Analysis

The support for the use of economic and fiscal instruments in the Community's environmental policies stems from the failure of reg-

\textsuperscript{81} Id. at Annex 2-1, 2-2.
\textsuperscript{82} Id. at Annex 2-2.
\textsuperscript{83} Id.
\textsuperscript{84} Id. at Annex 2-2, 2-3.
ulatory measures and the desire to avoid the inevitable trade distortions that accompany separate national legislation.

The regulatory controls have failed to effectively address the increasing environmental problems facing the region. The use of this static method provides no incentive to reduce pollutants below the permitted levels, and in doing so fails to properly internalize the cost of the damage to the environment. The historic preference for regulatory control has been rooted in two beliefs. First, the Member States and the Community believed that a regulatory limit offered a greater assurance that environmental quality standards would be met; the assumption being that sanctions are more effective than incentives. Coupled with this belief, industry was opposed due to the additional costs that it expected would be added to production.

The Member States experts discount both positions. Clearly the system that is in place today is ineffective in protecting the environment, and this failure will become even more evident with the economic growth which will undoubtedly accompany the establishment of the 1992 Internal Market. In addition, the experts do not adhere to the traditional notion that environmental protection and economic growth are mutually exclusive. Rather, there is a new emphasis on sustainable growth.

Given this mandate for action, the use of dynamic market mechanisms is the most promising option. Their success is not only theoretically attractive, but there is evidence from their use in the Member States that economic and fiscal instruments can be, if used properly, powerful tools in managing the environmental assets of the Community.

The imminence of the completion of the Internal Market provides the impetus to implement these instruments on a Community-wide, rather than a national, basis. The requirement that all fiscal barriers be dismantled prohibits the use of national product taxes which distort trade; environmental taxes fall into this category. Given the dramatic structural change that will come about within the Community as a result of an Internal Market, it is an opportune time to implement a more effective environmental policy.

Besides the harmonization problems inherent in the state-by-state use of economic instruments, there is also the issue of effectiveness. The experts clearly believe that effective action against these regional and global problems can only be achieved through Community-wide action. First, individual Member States are not capable of dealing with transboundary pollution problems. Secondly, only through centralized control can the Community comply with the international
conventions on global problems to which it is a signatory.\textsuperscript{85}

Finally, the Report concludes that although incentive taxes should be budget neutral, there is likely to be some use of these instruments as a means to raise revenue for environmental purposes. Given that scenario, it is likely that the funds would be returned to the Community in the form of subsidies, and only the Commission is immune from the severe restrictions that the EEC Treaty puts on subsidies as a form of state aid.

The significance of the acceptance of this dynamic approach to environmental policy is that the environment will become inextricably linked to all facets of industrial and agricultural economic planning.\textsuperscript{86} While the traditional command-and-control system of regulation will remain in place to a certain degree, economic instruments will offer a financial incentive to conserve and preserve the Community's resources.\textsuperscript{87} This new political approach to the environment is a product of increased public concern, as well as industry's realization that further steps are needed. In a recent Community survey, one-half of the European businesses polled considered environmental protection an important consideration.\textsuperscript{88} Even the oil industry expressed its qualified support for the use of reasonable economic instruments in the place of "rigid command-and-control legislation."\textsuperscript{89} While industry may not be an enthusiastic supporter of all aspects of fiscal and economic instruments, this cognizance of environmental issues is evidence that there is support for increased Community action on this front.

While there is an increased awareness that action needs to be taken, there is also a predictable amount of concern over the economic cost

\textsuperscript{85} One example is the acceptance of the Montreal Protocol by the EC. This international agreement requires community-wide reductions in the level of use and production of ozone depleting CFCs. See Montreal Protocol on Substances that Deplete the Ozone Layer, opened for signature Sept. 16, 1987, 52 Fed. Reg. 47,489, 26 I.L.M. 1541 (1987).


\textsuperscript{87} Id.

\textsuperscript{88} Id.

\textsuperscript{89} During the European Conference of Ministers of Transport (ECMT), Gilbert Portal, the Secretary General of the European Petroleum Industry Association (Europia), voiced the oil industry's support for fiscal initiatives. Oil Industry Drags Its Feet at Transport Ministers' Meeting, European Energy Rep., Dec. 14, 1990, at 1.
to the Community that a new policy of fiscal initiatives may entail. Some economic forecasters predict that if a radical shift in environmental policy occurs, resulting in severe fiscal measures which are harmonized on a Community level, the result could be a cost of 362 billion ECUs ($495 billion) by the year 2005. Additionally, concern exists that the least advanced Members of the Community will bear a disproportional burden of this cost. However, this fear may be tempered by the prediction that the stronger "green" policy would also create new opportunities within the Community that could make the environmental protection market worth more than 150 billion ECUs within the same time frame. An additional benefit is that this new commitment would accelerate the penetration of new, cleaner technologies, thus giving the Community a competitive edge within the global market.

On the microeconomic scale, an increase in the use of economic and fiscal instruments will clearly translate into higher consumer costs, especially in the energy sector. This increase is a necessary component of any incentive oriented "green tax."

While the Report by the Committee of Experts deals with the issue of trade distortions within the Community, it does not address the effect that the inherent costs of these fiscal instruments will have on the transactions of EC undertakings outside of the Market. Potentially these policies could, by forcing EC industries to reduce their reliance on certain resources, make these undertakings less competitive on the international scale. In such a system, costs of production will increase for companies operating within the Community, which will translate into higher prices for the consumer. However, the non-EC importer of the same product does not incur those additional costs and is therefore at a competitive advantage. This is especially true when the Community addresses global concerns such as the greenhouse gases. A unilateral reduction in CO2 gases serves to benefit the international community, but only the EC pays the cost for that environmental

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91 The countries that have expressed opposition to such a program include: Spain, Portugal, Greece and Ireland. Various Environmental Taxes May be Introduced by End of 1990, 13 Int'l Envtl. Rep. Current Report (BNA) No. 6, at 226 (June 13, 1990).
92 Measures to Control Pollution Could Cost Western Europe Billions, supra note 90, at 461.
93 Id.
gain. A possible ramification is that Community undertakings will move production to countries where production costs do not internalize environmental damage.\textsuperscript{94}

One solution which has been proposed is a variation on the Value Added Tax (VAT).\textsuperscript{95} The system would function by assessing a pollution based tax on every stage of the production and distribution of a product.\textsuperscript{96} The total Pollution Added Tax (PAT) is passed along to the consumer if the product is sold domestically.\textsuperscript{97} This tax would be applied to imported goods on the same basis.\textsuperscript{98} However, if the product is exported, the PAT is excused in order to allow the product or service to compete on a level playing field within the international market.

Although such a system aims to permit the unilateral adoption of more stringent environmental controls, its administration would be difficult and costly. A more efficient solution to this problem may be a program of Commission regulated subsidies used to channel revenue from environmental taxes back to the affected industries to be used for the development of new technology. Not only would it be more manageable on a practical level, but it would also provide the proper incentives to the Community undertakings. The subsidy approach also avoids the inevitable GATT conflicts\textsuperscript{99} that would arise if the Community assessed an environmental duty on all goods entering its market.\textsuperscript{100}

The release of this Experts' Report laid the groundwork for a comprehensive system of economic and fiscal instruments; however, the report itself is not a formal Commission document. Thus, there

\textsuperscript{94} Walter, Environmentally Induced Industrial Relocation to Developing Countries, in ENVIRONMENT AND TRADE: THE RELATION OF INTERNATIONAL TRADE AND ENVIRONMENTAL POLICY 67 (1982).

\textsuperscript{95} Comment, Proposal: A Pollution Added Tax to Slow the Ozone Depletion and Global Warming, 26 STAN. J. INT'L L. 549 (1990) (authored by Peeyush Jain).

\textsuperscript{96} Id. at 555.

\textsuperscript{97} Id.

\textsuperscript{98} Though this would provide an incentive for importers located abroad to reduce their emissions, such a reduction is unlikely since it would put them at a competitive disadvantage in every market besides the one employing the PAT.


\textsuperscript{100} A possible problem is that even though domestic products are taxed at the same rate as foreign imports, the revenue is used solely for domestic purposes and may be seen as a method to subsidize domestic industry through the use of a duty on imports. General Agreement on Tariffs and Trade, supra note 99, art. III.
must be action by the Commission and ultimately by the Council for such a program to become a reality. There is every indication, given the action of the Commission and the Council up to this time, that appropriate measures will be taken in the near future. Additionally, support exists in the Parliament for measures of this nature as well.

In December of 1990 the Committee on Legal Affairs and Citizens’ Rights issued an opinion for the Committee on the Environment, Public Health and Consumer Protection regarding “financial incentives for measures for environmental protection and on a new Community approach to reconciling economic and ecological considerations in a market economy.” The opinion called on the Committee on the Environment, Public Health and Consumer Protection to ask the Commission to submit to Parliament a strategy for applying financial initiatives in the area of environmental policy in accordance with articles 100a and 130r of the Treaty. Given the across the board recognition that these instruments are necessary components of the Community’s environmental policies, it appears that their introduction is inevitable.

Evidence of the implementation of this approach is already present. The area which will most likely be initially addressed is that of carbon dioxide emissions (CO2). Mr. Ripa di Meana, the EC Environment Commissioner, released a confidential proposal to the Commission to impose a substantial excise tax on gasoline in order to address global warming and combat excessive energy consumption. The document foresees a five year introductory period culminating with a tax of $10 per barrel of oil; additionally, the paper suggests that the fall of prices after the Gulf War may present a “unique window of opportunity.”

Shortly after release of the Commissioner’s paper, the Commission proposed a “green tax” on carbon dioxide emissions, focusing primarily on automobiles and power plants. The plan advocates a graduated tax based on the level of CO2 emission. An explanatory paper has been sent to the Council of twelve environment ministers; if they react favorably the Commission can be expected to furnish implementing directives within the coming months.

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103 Id.
105 Id.
One sign of the Commission's intent to harmonize environmentally directed fiscal initiatives is its recent rejection of a German proposal to provide tax benefits for cleaner burning diesel automobiles. Bonn planned to grant tax breaks of $358 on new diesels that complied with emission criteria which were stricter than the recently imposed Community standard. The Commission held that while the plan was not a state subsidy, it nonetheless was a trade distortion favoring cars meeting the non-EC standard. The Commission has taken a strong stance in enforcing its position that no Member State fiscal instrument may exist which attempts to regulate an area previously harmonized by the Community. This is a clear indication that the Commission intends to take the reigns of the region's environmental policy and that its actions will preempt any existing contradictory Member State legislation.

From these developments it appears that the Commission is initiating a move toward the centralized control of environmental policy through the use of economic and fiscal instruments as envisioned in the Experts' Report. The Report placed its greatest emphasis on the problem of global warming, and therefore the Commission has undertaken to address that issue first. While such a step is only one aspect of the plan of action called for by the Report, its importance must not be minimized. The successful implementation of a carbon tax on a Community-wide basis will create the framework for a comprehensive system of economic and fiscal instruments within EC environmental policy.

Given that there is no painless or perfect solution to the environmental problems facing the Community, the use of economic and fiscal instruments is a positive step toward achieving a sustainable balance between economic growth and environmental protection.

IV. CONCLUSION

Clearly there will be economic costs to a comprehensive program of economic and fiscal instruments as proposed by the Experts' Report; however, a much greater cost would result if the Community did not take steps to rectify the ineffective environmental controls presently in place. Additionally, any short term damage to Community undertakings can be mitigated through the use of Commission subsidies.

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The more important aspect of this policy is that it is an effective means to address environmental degradation within the Community through dynamic mechanisms which reduce injury in a way that no static control can. Through such a program, the undertakings of the Community are encouraged to develop clean technology that will grant them a clear competitive advantage in the international market in years to come. The control of these financial initiatives must come under the authority of the Commission in order to achieve harmonization required of the Internal Market.

The Community has initiated a new era of environmental policy that should provide a successful model for the coexistence of economic growth and environmental protection.

John B. Nicholson

I. FACTS


The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it.

Id. at art. 2. The EEC is composed of the following twelve Member States: France, Belgium, the United Kingdom, the Federal Republic of Germany, Italy, Luxembourg, the Netherlands, Greece, Portugal, Denmark, Ireland, and Spain.

Sofrimport, [1990] 3 Comm. Mkt. L. Rep. 946, at para. 3. Article XI of the General Agreement on Tariffs and Trade, opened for signature Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter GATT], prohibits quantitative restrictions on imports such as quotas, import licenses or other measures by any Contracting Party. McGovERN, INTERNATIONAL TRADE REGULATION 186 (2d ed. 1986) [hereinafter McGovERN]. The European Community maintains a Common Agricultural Policy (CAP) which systematically imposes quantitative restrictions such as quotas, tariffs and import licenses on imports to benefit domestic producers. Id. at 448, 456. The legality of the EC's CAP under the GATT is a source of controversy, and has been hotly contested by the United States and other members of the GATT. Id. at 455-6.
port’s application on April 18, while Sofrimport’s goods were still in transit, because of EEC Regulations No. 962/88 and No. 984/88 which stipulated that applications for import licenses pending on April 18, 1988 were to be rejected.

Consequently, on May 26, 1988, Sofrimport brought an action under Article 173 of the EEC Treaty seeking the annulment of Regulations No. 962/88, No. 984/88, and Regulation No. 1040/88 of April 20, 1988. Sofrimport also sought an order pursuant to

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5 Article 173 of the EEC Treaty gives individuals the right to challenge EEC legislative measures in the European Court of Justice when the regulation is of “direct and individual concern” to that individual. The requirement of direct concern involves the degree of discretion that the legislative measure leaves to the national authorities. If the contested legislative measure leaves no discretion, then the affected claimants are directly concerned. Sofrimport, [1990] 3 Comm. Mkt. L. Rep. 946, at para. 9. To be individually concerned, the applicant must be either the direct addressee of the contested measure or must be affected by the contested measure by reason of certain attributes which are peculiar to the applicant or because of circumstances which differentiate the claimant from all other persons. Spijker Kwasten BV v. European Community Commission, 1983 E. Comm. Ct. J. Rep. 2559, [1984] 2 Comm. Mkt. L. Rep. 284, at para. 8. The right of an individual to judicial review under Article 173 is very narrow because the “direct and individual concern” test is strictly construed and difficult to satisfy. Roberts, Judicial Review of Legislative Measures: The European Court of Justice Breathes Life into the Second Paragraph of Article 215 of the Treaty of Rome, 26 COLUM. J. TRANSNAT’L L. 246, 247 (1987) [hereinafter Roberts]. See also, Bebr, Direct And Indirect Judicial Control of Community Acts in Practice: The Relation Between Articles 173 and 177 of the EEC Treaty, 82 MICH. L. REV. 1229, 1248 (1984) (Article 173 results in occasional unsuccessful attempts by private parties to bring annulment actions challenging regulations) [hereinafter Bebr]; Stein & Vining, Citizen Access to Judicial Review of Administrative Action In a Transactional and Federal Context, 70 AM. J. TRANSNAT’L L. 219, 223 (1976) (analyzing strict reading of “direct and individual concern” requirement) [hereinafter Stein & Vining].

Article 215 (2) of the EEC Treaty\(^7\) that the EEC pay compensation for damages caused by the denial of its import license application.\(^8\) Included in Sofrimport’s complaint was an application pursuant to Article 186 of the EEC Treaty\(^9\) and Article 83 of the Rules of Procedure for the Court of Justice of the European Communities\(^10\) also called for suspension of import licenses for those countries which had exceeded their limits and specifically named Chile as being over its 142,131 ton quota. Accordingly, Reg. No. 1040/88 stated that import licenses for Chilean dessert apples would not be issued until the end of the 1988 importing year on August 31, 1988. Report for the Hearing, Case C-152/88, at para. 8. The EEC promulgated Regs. No. 962/88, No. 984/88 \(\text{(see supra note 4)}\), and No. 1040/88 pursuant to the system of surveillance of dessert apple imports from non-member countries established by Commission Regulation (EEC) No. 346/88 of 3 February 1988 \textit{Introducing Special Surveillance of Imports of Dessert Apples from Third Countries}, 31 O.J. EUR. Comm. (No. L 34) 21 (1988). That surveillance system required an import license for release of such fruit into free circulation in the EEC. The initial period of validity of the import license was 30 days, but Commission Regulation (EEC) No. 871/88 of 30 March 1988 \textit{Amending Reg. No. 346/88 Introducing Special Surveillance of Imports of Dessert Apples from Third Countries}, 31 O.J. EUR. Comm. (No. L 87) 73 (1988), changed the duration to 40 days. Sofrimport, \[1990\] 3 Comm. Mkt. L. Rep. 946, at para. 2.

\(^7\) Sofrimport brought the action for compensation pursuant to Article 215(2) of the EEC Treaty which provides that “in the case of non-contractual liability, the Community shall, in accordance with general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.” EEC Treaty, \textit{supra} note 2, art. 215 (2). \textit{Sofrimport, \[1990\] 3 Comm. Mkt. L. Rep. 946}, at para. 1.

\(^8\) Sofrimport sought an order requiring the Community to pay compensation for the harm caused by preventing it from marketing the Chilean dessert apples until June 10, 1988 (the date of the interim court order allowing the release of Sofrimport’s imports). \textit{See infra} text accompanying note 12. The damages claimed by Sofrimport amounted to \(f\ 2,821,959.10\), plus interest from the date of the court decision. Report for the Hearing, Case C-152/88, at para. 16. To assess damages, Sofrimport compared the price it would have received for the apples in the absence of the import restrictions to the price it did receive through mitigation. Sofrimport was able to sell 38,548 cartons in transit for \(f\ 67.10\) per carton, a particularly low price because the market was flooded with apples banned from the EEC. After the court order on June 10, 1988, Sofrimport sold the remaining apples for \(f\ 81.66\) per carton. Sofrimport asserted that the market price for identical apples from Chile in the EEC was \(f\ 103\) per carton, thus it suffered a loss in the amount of \(f\ 2,468,220\). Additionally, Sofrimport claimed storage costs of \(f\ 159,787.60\), transportation costs (to customs warehouses) of \(f\ 161,000\) and repackaging costs of \(f\ 32,951.50\). Sofrimport also sought interest at 9.5%. Report for the Hearing, Case C-152/88, at paras. 57-58.

\(^9\) Article 186 of the EEC Treaty, \textit{supra} note 2, reads: “[t]he Court of Justice may in any case before it prescribe any necessary interim measures.”

\(^10\) Article 83 of the Rules of Procedure reads: “[a]n application for the adoption of any other interim measures referred to in . . . Article 186 of the EEC Treaty . . . shall be admissible only if it is made by a party to a case before the Court and relates to that case.” \textit{Rules of Procedure of the Court of Justice of the European Communities}, 17 O.J. EUR. Comm. (No. L 350) 1 (1974).
for an order suspending Regulations No. 962/88, No. 984/88, and No. 1040/88 with respect to the dessert apples then in storage at Marseilles.\textsuperscript{11}

The President of the Court granted Sofrimport's request for the suspension of Regulations No. 962/88, No. 984/88 and No. 1040/88 on June 10, 1988, thus allowing the importation of the stored apples.\textsuperscript{12} Sofrimport's claim for damages continued to be litigated, and on June 26, 1990, the Court of Justice of the European Communities, \textit{held}, Sofrimport has standing to challenge the regulations under Article 173,\textsuperscript{13} and Regulations No. 962/88, No. 984/88, and No. 1040/88 are void with regard to products in transit to the Community;\textsuperscript{14} in addition, the EEC must compensate Sofrimport's damages resulting from the application of these regulations.\textsuperscript{15}

II. LEGAL BACKGROUND

A. Regulatory Background

The legal backdrop for the protective measures regarding imports of dessert apples is set forth in Article 29(2) of Council Regulation

\textsuperscript{12} \textit{Id.} at para. 22.
\textsuperscript{13} The Court held that Sofrimport is directly concerned by the challenged regulations because they require the national authorities to reject pending applications for import licenses and thus leaves the authorities no discretion. \textit{Id.} at para. 9. With regard to individual concern, the Court found that Sofrimport is in a restricted group of importers sufficiently well-defined by the fact that Article 3(3) of Règlement (CEE) Du Conseil du 19 Décembre 1972 Numéro 2707/72 Définissant les Conditions D'application des Mesures de Sauvegarde du Secteur des Fruits et Légumes, 15 J.O. Comm. EUR. (No. L 291) 3 (1972), requires the Commission to consider the special position of products in transit to the Community when adopting protective measures for fruit and vegetables. Thus, those importers who had goods in transit at the time the prohibition of import licenses went into effect were differentiated from other importers and, therefore, were individually concerned. The Court also reasoned that because Reg. No. 2707/72 gives specific protection to importers with goods \textit{en route}, these importers must therefore be able to enforce observance of that protection and bring legal proceedings for that purpose. \textit{Sofrimport}, [1990] 3 Comm. Mkt. L. Rep. 946, at paras. 10-13.
\textsuperscript{14} \textit{Id.} at para. 21.
\textsuperscript{15} \textit{Id.} at para. 29. The Court also ordered that interest at an 8\% annual rate be paid as of the date of the judgment and that the parties inform the Court within twelve months of the amount of compensation agreed upon by the parties. \textit{Id.} at para. 32.
No. 1035/72 of May 18, 1972,16 which established the common organization of the market in fruit and vegetables and provided for the adoption of protective measures if the Community market is threatened with serious disturbances. Article 3(3) of Council Regulation No. 2707/72 of December 19, 1972, lays down the conditions for applying protective measures to fruit and vegetable imports pursuant to Council Regulation No. 1035/72.17 Regulation No. 2707/72 requires that any protective measure adopted by the Commission shall take account of the special position of goods in transit to the Community.18

On February 3, 1988 the Commission imposed protective measures on the imports of dessert apples from third countries by adopting Regulation No. 346/88.19 The Commission, fearing serious injury to


[a]ppropriate measures may be applied in trade with third countries if:
by reason of imports or exports, the Community market in one or more of the products referred to in Article 1 experiences or is threatened with serious disturbances which may endanger the objectives set out in Article 39 of the Treaty. . . .

Report for the Hearing, Case C-152/88, at para. 9.

17 Reg. No. 2702/72, supra note 13, provides that:
1. The measures which may be taken . . . are:
when the situation covered by the first indent of paragraph 1 of that article exists, the suspension of imports or exports or the levying of export taxes; . . .
2. Such measures may only be taken in so far, and for as long, as they are strictly necessary.
3. The measures provided for in paragraph 1 shall take account of the special position of products in transit to the Community. They shall apply only to products exported from, or intended for, third countries. They may be limited to products exported from, originating in, or intended for, certain countries, or to certain qualities, size, grades or groups.

Report for the Hearing, Case C-152/88, at para. 1 (emphasis added).

18 See supra notes 13, 17.

19 Reg. No. 346/88, supra note 6, introduced a system of special surveillance of imports of third country dessert apples under which the release of dessert apples for free circulation within the EC was made subject to the presentation of an import license issued against the lodging of security of 1.5 ECU per 100 kilograms net. Report for the Hearing, Case C-152/88, at para. 2. Reg. No. 346/88 provided that import licenses were to be issued five working days after application unless protective measures are taken within that period. The initial 30 day period of validity for import licenses was increased to 40 days by Reg. No. 871/88, supra note 6. Report for the Hearing, Case C-152/88, at para. 3.
Community producers, perceived the need for additional protective measures against the importation of dessert apples. Thus, on April 12, 1988, the Commission adopted Regulation No. 962/88 which suspended the issue of import licenses for dessert apples originating in Chile.\textsuperscript{20} The Commission considered that the forty day period of validity for import licenses under Regulations No. 346/88 and No. 871/88 allowed importers sufficient opportunity to obtain import licenses before shipping their goods, so the Commission provided no special protection for goods in transit at the time Regulation No. 962/88 was issued.\textsuperscript{21}

B. Non-Contractual Liability

Article 215(2) of the EEC Treaty provides the standard for non-contractual liability of the European Community Institutions, and states that this liability only arises where the act in question arises out of the performance of an institutional task.\textsuperscript{22} In Aktien-Zuckerfabik Schöppenstedt v. Council of the European Communities,\textsuperscript{23} the Court interpreted Article 215(2) of the EEC Treaty for the first time,\textsuperscript{24} and articulated six elements to be considered in determining Community liability. The Court ruled that the Community is only liable for a legislative measure which is: "(1) illegal, because it (2) violates a superior rule of law (3) which is for the protection of the

\textsuperscript{20} See supra note 4. The Commission took this additional protective measure because it considered that applications for import licenses covering Chilean dessert apples exceeded the traditional quantity of imports of such products and that the continuation of such imports might lead to serious disturbance of the market, so as to jeopardize the objectives of Article 39 of the EEC Treaty and cause serious injury to Community producers. Report for the Hearing, Case C-152/88, at para. 4. Accordingly, the EEC promulgated Reg. No. 962/88 which suspended the issuance of import licenses.

\textsuperscript{21} The preamble to Reg. No. 962/88, supra note 4, states that: [S]ince the period of validity of import licenses has been fixed so as to cover amply the dispatch of dessert apples to the Community and to permit the operators to obtain import licenses before the ships depart, no account should be taken of goods being transported to the Community other than those for which import licenses have been issued.

Report for the Hearing, Case C-152/88, at para. 7 (emphasis added).

\textsuperscript{22} See supra note 7. Article 215(2) liability only relates to activities of the Community institutions performed in their institutional capacity. Stuart, The "Non-Contractual Liability" of the European Economic Community, 12 COMM. MKT. L. REV. 493, 497-8 (1975) [hereinafter Stuart, Non-Contractual Liability].


\textsuperscript{24} Roberts, supra note 5, at 251-52, n. 23.
individual, (4) in a manner which is sufficiently flagrant and (5) causes (6) damage. In the seminal Bayerische HNL Vermehrungs-betriebe GmbH & Co. KG and others v. Council and Commission of the European Communities (HNL) case, the Court reiterated the Schöppenstedt formula and adopted an extremely narrow scope for non-contractual liability of Community institutions. In particular, the HNL Court established a three part test for community liability under Article 215(2): (1) a breach of a superior rule of law, (2) which is sufficiently serious, and (3) the superior rule of law violated was one for the protection of individuals.

In order to restrict the scope for non-contractual liability of the Community, the Court in HNL indicated that not all legislative acts which are found illegal give rise to Article 215(2) liability, and

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25 Roberts, supra note 5, at 251-52. The Schöppenstedt Court held:
   In the present case the non-contractual liability of the Community presupposes at the very least the unlawful nature of the act alleged to be the cause of the damage. Where legislative action involving measures of economic policy is concerned, the Community does not incur non-contractual liability for damage suffered by individuals as a consequence of that action, by virtue of the promise contained in Article 215, second paragraph, of the Treaty, unless a sufficiently flagrant violation of a superior rule of law for the individual has occurred.


27 Article 215 (2) mandates that non-contractual liability of Community institutions be in accordance with the general principles common to the laws of the Member States. See supra note 7. The principles of the Member States governing liability of public authorities for damages caused to individuals indicate that only in exceptional cases with special circumstances can public authorities incur liability for legislative measures which are the result of a choice of economic policy. Therefore, the severe criteria for non-contractual liability developed in the HNL case are consistent with the laws of the Member States. Bronkhorst, Action for Compensation of Damages Under Articles 178 and 215, para. 2, of the EEC Treaty; Stabilization and Development, 1983 LEGAL ISSUES EUR. INTEGRAT’N No. 1, at 99, 111 [hereinafter Bronkhorst].


29 In HNL the Court held:
   Individuals may be required, in the sectors coming within the economic policy of the Community, to accept within reasonable limits certain harmful effects on their economic interests as a result of a legislative measure without being able to obtain compensation from public funds even if that measure has been declared null and void. In a legislative field such as the one in question, in which one of the chief features is the exercise of a wide discretion essential for the implementation of the Common Agricultural Policy, the Community does not therefore incur liability unless the institution
focused on the "sufficiently flagrant" element of the Schöppenstedt test. The HNL Court identified three factors which determine whether a violation is "sufficiently serious" to warrant damages. The first part of the HNL "sufficiently flagrant" test is the importance of the superior rule of law that has been violated. The second part of the test is whether the enactment constitutes a manifest and grave disregard for the limits of the institution’s powers. The final element of the inquiry is the nature of the injury. This element requires that the injury be of a special nature, only affecting a small number of people, and of sufficient severity to exceed a reasonable level of economic risk in the claimant’s sector. Thus, the standard for Community liability for legislative illegality under Article 215(2) espoused in HNL and subsequent opinions on the proper measure and proof of damages make it difficult for an individual to recover damages because of challenged legislative acts.

Despite the restrictive "sufficiently serious breach of a superior rule of law for the protection of the individual" standard that was applied in HNL, the Court has demonstrated some willingness to

concerned has manifestly and gravely disregarded the limits on the exercise of its powers.

1978 E. Comm. Ct. J. Rep. 1209, at para. 6 (emphasis added). Thus, even though a legislative measure might be annulled under Article 173, the Community will not incur Article 215(2) liability unless the Community institution has manifestly and gravely disregarded the limits on the exercise of its powers. Lysén, Three Questions on the Non-Contractual Liability of the EEC, 1985 LEGAL ISSUES EUR. INTEGRAT’N No. 2, at 86, 114 [hereinafter Lysén].

30 Roberts, supra note 5, at 254.

31 Id. The superior rule of law breached by the allegedly illegal legislation must be a fundamental rule or principle of Community law. See also Bronkhorst, supra note 27, at 104. Note 40, infra, lists some fundamental principles of Community law recognized by the Court.

32 Roberts, supra note 5, at 254. The essence of the manifest and grave disregard inquiry is whether the enactment is "arbitrary"; i.e., could not have been enacted under a reasonable, although mistaken, interpretation of the superior rule of law at issue. Id. Another interpretation of "arbitrary" is suggested by Lysén who defines arbitrary legislative acts as enactments in the absence of an overriding Community or public interest justifying the measures. Lysén, supra note 29, at 113.

33 Roberts, supra note 5, at 279.

find Community liability in situations where the legislative act adopted was not illegal. In particular, the Comptoir National Technique Agricole S.A. v. Comm’n of the Eur. Communities (CNTA) case manifested a change of emphasis from the culpability of the administration to the protection of the legitimate interests of the administered. In CNTA the Court held that the Community was liable not for the illegality of the legislative act in question, but rather for failing to provide transitional measures. Because the Court in CNTA did not find that the legislative measure was illegal on its face, but still held the Community liable under Article 215(2) for the adoption of the contested regulation, the Court recognized that Community liability can arise even without meeting the strict HNL test where the adoption of a legislative act creates liability if it is a result of a manifest and serious disregard for the limits of the institution’s discretionary power.

C. Legitimate Expectations

The doctrine of protection of legitimate expectations plays a significant role in the analysis of Article 215(2) non-contractual liability in the EEC. This is because the protection of legitimate expectations is a superior rule of law for the protection of the individual, the
breach of which can give rise to non-contractual liability. A "legitimate expectation" is defined as:

The particular form of economic prediction for which an economic agent [private business or individual] can claim legal validity in Community law, as being a belief that it was legitimate for him to entertain as to the way in which he would be treated by an administration in the application of Community regulations.

A successful claim of legitimate expectations consists of several elements. One of the central requirements is the absence of the foreseeability of change in the Community rules or laws. If the applicant had notice of the change in the law in which he is claiming a legitimate expectation or if a reasonably prudent trader would have foreseen the change, then he will not be able to maintain an action for the protection of his legitimate expectations. Pursuant to this require-

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40 Lysén, supra note 29, at 115. Superior rules of law include all rules of the unwritten law of the EEC deemed necessary and thus relevant for the lawful and proper operation of the Community. Examples of a breach of a superior rule of law for the protection of the individual include: infringements of human rights, violations of a legitimate interest [expectation] in Community law, infringement of a Council regulation by a Commission regulation (a situation which occurred in the Sofrimport case). Id. Other examples of superior rules of law include the prohibition of discrimination between producers and consumers within the Community and the general principle of legal certainty. Bronkhorst, supra note 27, at 104.

41 Sharpston, Legitimate Expectations and Economic Reality, 15 EUR. L. REV. No. 2 at 103, 105 (1990) [hereinafter Sharpston]. Thus, a legitimate expectation is a legally protectable general principle common to the laws of the Member States. See supra note 40.

42 Generally, a claimant seeking damages under Article 215(2) for a breach of legitimate expectations must prove that he had a legitimate expectation on which he acted in reliance and suffered loss as a result of the Community legislative measure. Even then the claimant will not prevail if the Community measure is justifiable by reason of an overriding matter of public interest. HARTLEY, supra note 28, at 144.


44 Sharpston, supra note 41, at 158. The policy behind not allowing a claim of legitimate expectations where a prudent trader should have foreseen imminent change is to not let a trader put himself in a better position by not taking due care than that in which he would have been had he exercised all due care. Id. at 150. Therefore, if an institution has given rise to justified hopes the trader may rely on the protection of legitimate expectations, but if a prudent and discriminating trader could have
ment that the change in Community law not be foreseeable, the burden of being informed is placed on the individual claiming legitimate expectations.\textsuperscript{45}

Another requirement for a claim of legitimate expectations is that the applicant must have acted or refrained from acting on the expectation. A mere hope for the continuance of the status quo will not suffice to create a legitimate expectation.\textsuperscript{46} Also, this theory will not be upheld where the previous situation was one of no real certainty so that the contested action produced no real change.\textsuperscript{47} Another element of a successful claim for a violation of legitimate expectations is that the applicant’s claim must be objectively plausible in that a reasonable economic agent should reasonably be able to form the belief that his interests would not be damaged by the contested legislation.\textsuperscript{48} Additionally, in situations where the applicant tries to take advantage of a weakness in the Community system to make a speculative profit, no legitimate expectations can be formed.\textsuperscript{49}

The many requirements for a successful claim of legitimate expectations reveal that it is extremely difficult for an applicant to prevail in a direct action in obtaining damages from the Commission or in having a regulation annulled because of a breach of legitimate expectations.\textsuperscript{50} This doctrine is essentially a form of equitable jurisprudence which strikes a balance between checking the unfairness of Community acts and refraining from interfering with the proper exercise of discretionary legislative power.\textsuperscript{51}

foreseen the adoption of Community measures likely to affect his interests, he cannot plead legitimate expectations. \textit{Id.} at 109. Also, changes in the underlying economic conditions or circumstances can give notice of imminent change. \textit{Id.} at 158.

\textsuperscript{45} \textit{Id.} at 159.

\textsuperscript{46} \textit{Id.} at 158. Evidentiary and damage assessment concerns are the reasons behind this requirement. \textit{Id.}


\textsuperscript{48} Sharpston, \textit{supra} note 41, at 158.


\textsuperscript{50} Stuart, \textit{Legitimate Expectations, supra} note 43, at 59. For an example of a case where a plaintiff prevailed on a claim of legitimate expectations see Meikokonservenfabrik v. Fed. Republic of Germany, 1983 E. Comm. Ct. J. Rep. 2539 (winning plaintiff challenged a regulation which had retroactive effect, discriminated between producers in similar circumstances, and breached plaintiff’s legitimate expectations).

\textsuperscript{51} Stuart, \textit{Legitimate Expectations, supra} note 43, at 73.
III. Analysis

In Sofrimport S.a.r.l. v. Commission of the European Communities, the Court of Justice of the European Communities held that the EEC is liable to Sofrimport for damages caused by the contested regulations because it found a sufficiently serious breach of a superior rule of law for the protection of the individual.\(^{52}\) To reach this conclusion, the Court noted three important factors: a breach of legitimate expectations, a breach of Regulation No. 2707/72, and the fact that the economic risks inherent in Sofrimport’s business did not include a breach of Regulation No. 2707/72.\(^{53}\) Each of these decisional factors is important, but the linchpin of this decision is the recognition of the doctrine of protection of legitimate expectations.\(^{54}\)

The first of the three reasons mentioned by the court for imposing liability on the EEC is the doctrine of protection of legitimate expectations.\(^{55}\) The Court observed that the purpose of Article 3(3) of Regulation No. 2707/72\(^^{56}\) is to protect importers of goods covered by that regulation, particularly those traders who have goods in transit at the time protective measures are adopted,\(^{57}\) from the unfavorable consequences of protective measures which might be adopted by European Community institutions. Therefore, the Court stated, Regulation No. 2707/72 “gives rise to a legitimate expectation the disregard of which constitutes a breach of that superior rule of law.”\(^{58}\)

The second basis for the finding of liability also involved Regulation No. 2707/72 because the Court ruled that the Commission committed a sufficiently serious breach of Article 3(3) of that regulation. The Commission committed a sufficiently serious breach of Regulation No. 2707/72 by completely failing to take account of the position of traders who, like Sofrimport, had goods in transit to the EEC when the license prohibition was adopted, without invoking any overriding public interest.\(^{59}\) The third reason provided by the court

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\(^{52}\) By finding a sufficiently serious breach of a superior rule of law for the protection of the individual, the Court held that the HNL test for Article 215(2) non-contractual liability is satisfied. See supra note 28 and accompanying text.


\(^{54}\) See supra text accompanying note 41.

\(^{55}\) Id.

\(^{56}\) See supra notes 13, 17.

\(^{57}\) Id.


\(^{59}\) Id. at para. 27. See supra notes 13, 17. (Reg. No. 2702/72 requires the Commission to take account of goods in transit to the Community).
for awarding damages focused on the limits of the risks inherent in Sofrimport's business. The Court reasoned that the damage alleged by Sofrimport was beyond the inherent risk of the import transaction because the purpose of Regulation No. 2707/72 was to limit those risks with regard to goods in transit.\(^6^0\)

Although the Court provided three reasons for its decision, close examination of those reasons reveals that the principle underlying the holding is the protection of legitimate expectations. For example, the Court emphasized the fact that the Commission failed to invoke any overriding public interest to explain its breach of Article 3(3) of Regulation No. 2707/72.\(^6^1\) One of the basic tenets of the doctrine of protection of legitimate expectations is that the EEC can absolve itself of liability for breaching a legitimate expectation if it does so because of an overriding public interest.\(^6^2\) Here, the Court's reliance on the absence of an overriding public interest suggests that the protection of legitimate expectations influenced the Court's finding of a breach of Regulation No. 2707/72.

The doctrine of legitimate expectations also permeates the third basis for the Court's holding, which in effect restates that doctrine. By finding that the risks inherent in Sofrimport's business did not include the risk of protective measures against goods in transit because Regulation No. 2707/72 limits those risks, the Court is essentially stating that Sofrimport had a legitimate expectation that no protective measures would be adopted. The Court's logic implies that because of the provisions of Regulation No. 2707/72, the risk of protective measures affecting goods in transit was not foreseeable to Sofrimport. Foreseeability of risk is one of the crucial inquiries into whether a legitimate expectation has formed.\(^6^3\) Therefore, all three of the reasons supporting the Court's holding involve elements of the doctrine of protection of legitimate expectations.

In addition to invoking elements of the doctrine of legitimate expectations, the three reasons given for the imposition of liability also satisfy the \(HNL^6^4\) test for a sufficiently serious breach of a

\(^{60}\) Id. at para. 28.

\(^{61}\) Id. at para. 27.

\(^{62}\) In one of the exceptional cases where legitimate expectations led to EEC liability, the dispositive factor noted by the court was a breach of a superior rule of law without any overriding matter of public interest. Sharpston, supra note 41 (emphasis added) (referring to \(CNTA, 1975 E. Comm. Ct. J. Rep. 533, [1977] 1 Comm. Mkt. L. Rep. 171\).

\(^{63}\) See supra notes 43-4 and accompanying text.

\(^{64}\) See supra note 26.
superior rule of law for the protection of the individual. First, the Court recognized Sofrimport’s legitimate expectation in not being denied an import license once its goods were in transit as a superior rule of law. This finding comports with the first part of the HNL test which requires that the rule of law breached be a fundamental rule or principle of Community law. Second, the Court ruled that the Commission erred by failing to take account of goods in transit without justification by an overriding matter of public interest as required by Regulation No. 2707/72. This failure to follow the strictures of a Council regulation without justification is exactly the kind of arbitrary legislative act that meets the manifest and grave disregard of legislative power requirement of the HNL test. Likewise, the third basis for the Court’s holding literally tracks the language of the final part of the HNL criteria for a sufficiently serious breach. Both here and in HNL the Court spoke of injury that exceeded the level of risk inherent in the claimant’s business sector. Thus, the Court’s holding seems to rest on both the doctrine of legitimate expectations and on the HNL criteria for non-contractual liability.

The Sofrimport Court demonstrated a heretofore unseen receptiveness to the doctrine of legitimate expectations, in addition to basing its decision on that doctrine and the HNL formula. Considering the restrictive interpretation of standing under Article 173 and the Commission’s argument that Sofrimport had notice of the adoption of protective measures, the Court had ample grounds for denying relief to Sofrimport. Article 173 of the EEC Treaty allows an individual to challenge the validity of legislative measures that directly and individually concern the claimant, but this right to judicial review is strictly construed and is thus extremely narrow. One principle that narrows the availability of Article 173 is the rule that no private person can challenge a general regulation which is defined as

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65 HNL establishes a three part formula for a breach of a superior rule of law for the protection of the individual to be sufficiently flagrant to warrant Article 215 (2) liability. See supra notes 31-33 and accompanying text.

66 See supra note 31 and accompanying text.

67 See supra note 32 and accompanying text.

68 See supra note 33 and accompanying text.

69 Few cases prevail on a legitimate expectations theory. Sharpston, supra note 41, at 160.

70 See supra note 5.

71 See supra note 2.

72 See supra note 5.
a regulation that applies to categories of persons treated theoretically. Although the Commission did not contest Sofrimport's right to judicial review under Article 173, the Court could have dismissed the action on its own motion had it decided that the "direct and individual concern" test was not met.

Indeed, the Advocate General strenuously argued that the Court should have denied Sofrimport's claim for relief by dismissing the action as inadmissable under Article 173. The thrust of the Advocate General's argument is that Sofrimport was not directly and individually concerned with Regulation No. 962/88 because it is a general regulation not addressed to a specific and identified group, but rather to a category of traders who were not and could not have been identified individually when the measure was adopted. Thus, according to the Advocate General, Sofrimport could not challenge its validity under Article 173 because it failed to satisfy the "direct and individual concern" test.

Despite the vigorous arguments of the Advocate General, the Court held that regulations No. 962/88 and No. 984/88 were of direct and individual concern to Sofrimport, so an action for annulment under Article 173 was maintainable. By allowing Sofrimport to challenge the contested regulations under Article 173, the Court vindicated one of the primary functions of an Article 173 annulment action which

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73 Stein & Vining, supra note 5, at 224. This principle that a private individual cannot challenge a general regulation underlies the narrow "direct and individual concern" standard of Article 173. Id.
75 Id. at para. 9.
76 Id. at para. 4. One reason for finding Reg. No. 962/88 to be a general regulation suggested by the Advocate General is that the Commission could not have known the identities of the traders who would be affected by the regulation. The identities of at least some of the traders would be unknown to the Commission because it affected traders who applied for import licenses after the regulation was adopted. Id. Another reason that the Advocate General considers that the contested regulation was general in nature is that the Commission made its decision to institute protective measures not on the basis of the number of applications lodged, but rather on the basis of a combination of relevant economic factors in the market. Therefore, applications lodged by individual traders would simply be a part of the total volume examined by the Commission. Id. at para. 5. The third reason the Advocate General advanced for finding the contested regulation to be general was that Reg. No. 962/88 gave no special consideration to traders with goods in transit, so those traders were viewed in the same light as all of the other traders. Id. at para. 6.
77 See supra note 74 and accompanying text.
78 See supra note 13 and accompanying text.
is to allow private parties to protect themselves against illegal actions. Additionally, the Court demonstrated an unusual receptiveness to a private party's action for damages against the Commission by allowing Sofrimport to maintain the action because the Court could have denied Sofrimport Article 173 standing consistently with the strict construction of that provision.

The second indication of the Court's rare amenability to a private individual's action for damages under Article 215 (2) lies in the Court's refusal to adopt the Commission's primary arguments. Specifically, the Commission argued in favor of denying relief on the basis that Sofrimport had notice of the possibility of adoption of protective measures, and, therefore, was not able to form any legally protectable legitimate expectations. The source of this notice, claims the Commission, is that the wording of Regulation No. 346/88 put importers on notice that within five working days of an application being lodged the Commission might take action to ensure that licenses were not issued. Thus no legitimate expectation could be formed by an importer. In support of this contention, the Commission relies on the precedent of the Roomboterfabrik "De Beste Boter" BV v. Produktschap voor Zuivel case where the Court held that a regulation, whose wording was substantially the same as Regulation No. 362/88 in that it provided a five day reflection period before granting export certificates, provided sufficient notice of the possibility that the application would be denied to defeat reliance. In this case the Court could have followed this close precedent and held that Sofrimport had notice of the possibility that protective measures would be adopted - notice that would defeat Sofrimport's claim of legitimate expectations. Instead, the Court upheld Sofrimport's legitimate expectations.

From a broader perspective, the Court's receptiveness to the doctrine of legitimate expectations represents a movement to conformity to the spirit of Article XIII, paragraph 3(b) of the General Agreement

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79 See, Bebr, supra note 5, at 1232.
80 See supra note 4.
81 Report for the Hearing, Case C-152/88, at para. 46.
82 1983 E. Comm. Ct. J. Rep. 3331 (Five day reflection period for export certificate applications held to be a contingent entitlement to certificate because applicant had notice that "special measures" might be adopted during five day waiting period).
83 Notice of the possibility of a change in the legal circumstances will defeat a claim of legitimate expectations. See supra note 44 and accompanying text.
on Tariffs and Trade (GATT)⁸⁴ regarding goods in transit. Under the GATT, goods which are *en route* when notice of a suspension of import licenses is given must be allowed entry.⁸⁵ On the other hand, Regulation No. 2707/72⁸⁶ merely requires the Commission to take account of goods in transit to the Community, and does not guarantee access to the Community for all products during all in transit situations.⁸⁷ By upholding Sofrimport's legitimate expectation that it would be granted an import license, the Court acted consistently with the spirit of GATT Article XIII, paragraph 3(b) while not vitiating the wording of Regulation No. 2707/72. Rather than an absolute requirement for entry of goods *en route*, the Court uses the doctrine of legitimate expectations to reach an equitable result of allowing entry for goods of traders who have no notice of import suspension before they act in reliance on the current import scheme.

The apparent synthesis in *Sofrimport* of the *HNL* test⁸⁸ with the *CNTA* approach to non-contractual liability⁸⁹ has broad ramifications for the future behavior of the Commission. Rather than relying on legislative discretion as a shield from individuals' claims for compensation under Article 215 (2), Commission regulations now must meet the more exacting standard of not breaching individuals' legitimate expectations. Thus, the Commission will have to provide more information and notice to the public to defend against the formation of legitimate expectations. In addition, the Court demonstrated a rare receptiveness to an individual's challenge of a Commission regulation. Therefore, the Court in this case opens the door for indi-

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⁸⁴ This subsection states in pertinent part:
Any supplies of the product in question which were *en route* at the time at which public notice was given shall not be excluded from entry; *Provided* that they may be counted so far as practicable, against the quantity permitted to be imported in the period in question, and also, where necessary, against the quantities permitted to be imported in the next following period or periods . . . .


⁸⁵ *McGovern*, *supra* note 3, at 192. This requirement takes the form of an absolute obligation to allow entry. *Id.*

⁸⁶ *See supra* note 13.

⁸⁷ *See supra* note 17. Although not directly applicable, the provisions of the GATT are binding on the Community insofar as the Community has assumed the powers previously exercised by Member States in the areas governed by the GATT. International Fruit Co. v. Produktschapvoor Groenten en Fruit, 1972 E. Comm. Ct. J. Rep. 1219, [1975] 2 Comm. Mkt. L. Rep. 1.

⁸⁸ *See supra* notes 28-33 and accompanying text.

⁸⁹ *See supra* notes 35-38 and accompanying text.
individuals who have legitimate reliance interests to recover from the legislative and regulatory entities in the EEC, thus providing a chilling effect on those regulatory bodies' willingness to test the bounds of their legislative discretion.

IV. Conclusion

The fundamental basis for the European Court of Justice's holding in Sofrimport is that the Commission of the European Economic Community breached Sofrimport's legitimate expectations that it would be able to import its Chilean dessert apples and those legitimate expectations constituted a superior rule of law for the protection of the individual. In this case, however, the Court seemed to reconcile the doctrine of legitimate expectations and the HNL test for non-contractual liability. Before Sofrimport, the exceedingly strict HNL criteria were considered a separate path to non-contractual liability of the Community from cases such as CNTA, which upheld legitimate expectations as a basis for Community liability. Furthermore, the Court had ample grounds before it to dismiss the complaint both for lack of Article 173 standing to challenge the contested regulations and for a lack of legitimate expectations on the part of Sofrimport. Both Article 173 standing and a finding of legitimate expectations are rare occurrences in the jurisprudence of the Court of Justice of the European Communities. However, in this case the unusual occurred and the Court imposed Article 215(2) on the Commission. Sofrimport might be the herald of a new, less stringent approach to Community liability. In addition, the Court has fulfilled the spirit of GATT Article XIII, paragraph 3(b) by requiring the Commission to compensate Sofrimport after the Commission failed to take account of goods en route when it banned imports of dessert apples. Thus, the Court may be signaling a more lenient attitude toward Community liability in the face of the impending formation of the Internal Market and closer international scrutiny of its import licensing policy.

Douglas C. Turner
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