THE CONCEPT OF PROPORTIONALITY IN THE LAW OF THE
EUROPEAN COMMUNITIES WITH COMPARATIVE MATERIAL
FROM CERTAIN MEMBER STATES.

A DISSERTATION SUBMITTED TO
THE FACULTY OF THE DEPARTMENT OF LAWS
IN CANDIDACY FOR THE DEGREE OF
DOCTOR OF PHILOSOPHY.

DEPARTMENT OF LAWS.

BY

NICOLAOS EMILIIOU
SCHOLAR OF THE ONASSIS PUBLIC BENEFIT FOUNDATION.

LONDON, ENGLAND

DECEMBER 1990
To my parents in love and gratitude for what they have done for me.
Abstract of Thesis.

To compare the principle of proportionality on a legal basis in different legal systems presents almost insurmountable difficulties. A review of the relevant bibliography reveals that the concept of proportionality is vague and heavily discussed in most European legal systems. Obviously it is difficult to describe in abstract terms the precise meaning and scope of the principle in question. In this essay it is attempted to portray some general principles which form the substance of the basic idea of proportionality. A narrow approach to the content of the principle of proportionality may result into a very limited scope of examination. Some legal aspects which, in the opinion of others, come under the heading of proportionality could be neglected or even discarded. Thus the definition of proportionality adopted is quite broad essentially referring to the principle according to which public authorities shall take no action the overall costs of which are excessive in relation to its general benefits. Comparative study shows that the concept of proportionality seems to be most elaborate in Germany. This can be easily explained by the fact that it was the Prussian Administrative Tribunal that first recognized and applied the principle of proportionality. Originally designed as a legal limit on the police powers and later on the administration in general, it has been developed after the Second World War to a basic legal principle binding the executive, the judicial and even the legislative power. Different rules derived therefrom lead back to certain patterns of interest conflicts which must be solved in the legal systems included in this study. In this essay it is argued that proportionality involves the State-citizen relationship and could be considered as a response to the historical experience that public authorities, national and supranational, function with the tendency to impair the freedom of the individual.
Dissertation Outline.

**TOPIC:** "The Concept of Proportionality in the Law of European Communities with Comparative Material from Certain Member States."

I). Introduction.
   The Transformation of Public Law in the Twentieth Century.

II). The Principle of Proportionality in the Laws of Member States.
   The Principle of Proportionality in French Public Law
   The Principle of Proportionality in German Law.

III). Proportionality as a Principle of Community Law.
   General Principles of Law in Community Legal Order.
   Judicial Review of Proportionality of Community Acts by the Court of Justice.

IV). The Application of the Principle of Proportionality in the Case Law of the Court Relative to the Common Agricultural Policy.

V). The Principle of Proportionality as a Safeguard of the Basic Community Freedoms.
   Free Movement of Goods.
   The Principle of Proportionality and the Invocation of the Treaty Escape Clauses.

VI). Conclusions.
   The Impact of the Application of the Principle of Proportionality on Community Law.
   In Safeguarding Fundamental Rights.
   In Safeguarding the Principles of Free Economy.
TOPIC: "The Concept of Proportionality in the Law of European Communities with Comparative Material from Certain Member States.

CONTENTS.

Introduction.
The Transformation of Public Law in the Twentieth Century.

I). The Development of the Modern Social State and the Transformation of Public Law.

II). Legislative Activism and the New Role of Legal Rules.


ENDNOTES.

Chapter I: The Principle of Proportionality in French Public Law.

I). Introduction.

II). The Principle of Legality.

i). The Contents of the Principle of Legality.

ii). Discretion.

a). The Duty of Care of the Administration to the Citizen in the Exercise of its Discretionary Powers.

iii). The Sliding Scale of Judicial Review.

iv). L' Erreur Manifeste d' Appreciation des Faits.

III). The Principle of Proportionality in French Legal Order.

Chapter II: The Principle of Proportionality in German Public Law.

I). Introduction.

II). Observations on Terminology.

   a). Suitability.
   b). Necessity.
   c). Proportionality stricto sensu.

IV). The Principle of Proportionality and the Notion of Reasonableness in German Public Law System.

V). The Rule of Law as a Foundation of the Principle of Proportionality in German Legal System.
   b). The Principle of Legality.
      1). Constitutionality.
      2). Legality stricto sensu.
      3). Inflation of Legal Rules.

VI). Basic Rights: Elements and Limits. Proportionality as
a Principle of Constitutional Interpretation.


VII). The Use of the Principle of Proportionality in Controlling Administrative Discretion.

VIII). Conclusions.

ENDNOTES.

Chapter III: The General Principles of Community Law in the Community Legal Order. Proportionality as a General Principle of Community Law.

I). The General Principles of Law in the Community Legal Order.

i) Definition.

ii) The Raisons d' Etre of General Principles of Law in the Community Legal Order.

iii) Applications of General Principles of Law in Community Law.

iv). Sources of General Principles of Law in the Community Legal Order.

II). Proportionality as a General Principle of Community Law.

III). The General Principle of Proportionality in Relation to Other General Principles of Community Law.

a) Proportionality and Legal Certainty.
b) Proportionality and Non-Retroactivity.
c) The Relationship between the Principles of Equal Treatment and Proportionality.
i) The Application of the Principle of Proportionality within the Scope of the Prohibition of Sex Discrimination

IV). The Scope of the Application of the Principle of Proportionality in Community and National Legal Orders.

V). Conclusions.

ENDNOTES.

Chapter IV: Judicial Review of the Proportionality of Community Acts by the Court of Justice.

I). Nature of Judicial Control in the European Communities.

II). Control of Discretionary Powers of Community Administration.

a) Introduction.


c) Court's Practice in Evaluating Economic Facts and Circumstances.


IV). Establishment and Proof of (Dis)proportionality of a
Measure Before the Court of Justice.

V). Conclusions.

ENDNOTES.

Chapter V: The Application of the Principle of Proportionality in the Case-Law of the Court Relative to the Common Agricultural Policy.

I). Introduction.

II). Monetary Compensatory Amounts.

III). Basic Rights.

IV). The System of Deposits and Licences.

   i). Introduction

   ii). The Legality of the System.

   iii). The Amount of the Deposit.

   iv). The Character of the Obligation to be Implemented.


ENDNOTES.

Chapter VI: The Development of the Principle of Proportionality in Relation to the Free Movement of Goods.

I). The Importance of the Free Movement of Goods.

II). Elimination of Restrictions on Imports and Exports and All Measures Having Equivalent Effect.

IV). The Rule of Reason.

V). The Development of the Principle of Proportionality in Relation to Article 36 EEC.

VI). Conclusions.

ENDNOTES.

Chapter VII: The Application of Escape Clauses in the Light of the Principle of Proportionality.

I). Introduction

II). Judicial Control of (Dis)proportionality of Protective Measures.
   Case Study. The Application of the Principle of Proportionality in Relation to Articles 115 and 226 of the EEC Treaty.
   a). Article 115 EEC.
   b). Article 226 EEC.

III). Conclusions.

ENDNOTES.

CONCLUSIONS.

BIBLOGRAPHY.
INTRODUCTION: THE TRANSFORMATION OF PUBLIC LAW IN THE
TWENTIETH CENTURY.

I). The Development of the Modern Social State and the
Transformation of Public Law.

During the last hundred years the concept of the sphere
development has been dramatically transformed. Instead of
confining itself to defence, public order, criminal
law and few other general matters, the modern state also
provides elaborate social services and undertakes the
regulation of much of the daily business of the society. In
contrast, the constitutional state, as a heritage of the
nineteenth century liberalism, sets out from a concept of a
minimal state. Accordingly, the state's responsibilities are
basically limited to leave space for individual freedom. The
liberal state is a 'negative state.' But recent developments
in all the modern industrialized nations call for the 'positive
state.' State action is required for regulating social,
economic and cultural life, distributing the wealth and
creating opportunities for enjoying civil rights. The social
state is the state of affirmative, not only protective action.
No doubt, there has emerged an inescapable tension between the
liberal ideal of separation and control of powers, so as to
contain government, and the social conviction that real freedom
requires governmental action rather than inactivity. It is the
responsibility of all governmental agencies, in applying the
the principle of social state based on the rule of law
(Sozialer Rechtsstaat), to strike the balance between both ideals.

These developments resulted in much greater powers for the public authorities, the executive in particular, and a very great freedom of discretion in their exercise. This, in turn, required stricter conditions to be imposed both as to the form of the executive acts as well as the means by which they were exercised. The requisite control is exercised by various means and in widely differing circumstances. Parliaments exercise political control; various interest groups contribute to it by means of consultations between them and the authorities; the courts play an increasingly important part. Judicial review of administrative action is a powerful and effective tool of preventing "the powerful engines of authority ... from running amok." (1) Thus "the essence of administrative law lies in judge-made doctrines which apply across the board and which therefore set legal standards of conduct for public authorities generally." (2) In this essay it is argued that the principle of proportionality, as a doctrine of public law, involves the State citizen relationship and could be considered as a response to the historical experience that public authorities function with the tendency to impair the freedom of the individual. Proportionality embodies a basic principle of fairness and simply requires that public authorities shall take no action the overall costs of which are excessive in relation to its overall benefits. Originally a part for protecting
basic rights and freedoms proportionality has been transplanted into economic law thus taking different meanings in different contexts. Though seemingly different in various legal systems, proportionality has a very similar content and application in each one of them. In this introduction the historical and legal developments which led to the elaboration of the principle of proportionality will be portrayed.

A first approach to a definition of administrative law is to say that it is the law relating to the control of governmental power. (3) In view of the developments outlined above it is obvious that a system of administrative law may aim at two different and often conflicting objectives. It may be attached to rendering the administrative action as efficient as possible, so as to allow the furtherance of public interest under the best possible conditions. On the other hand, it may aim at ensuring the widest possible protection of the citizens against the administration. These two ends are obviously conflicting: In the first case, the law should accord the administration quite extensive prerogatives, while in the second it should put the maximum possible constraints on administrative action.

The classic administrative law of the nineteenth and early twentieth century resolved the conflict in favour of the protection of private interests. The whole history of the 'recours pour exces de pouvoir' underlines the progressive harnessing of administrative prerogatives. Naturally the
recognition of wide administrative prerogatives, derogating from the ordinary law, (4) seems to contradict this point of view; it should, however, be interpreted in the spirit of liberalism prevailing at that time. Administrative intervention was, ex hypothesi, restricted in the area of the so called 'services de souveraineté' (for example, police). The powers of the public administration were thus limited in clearly defined areas. Certainly this narrow definition of the administrative prerogatives by the courts did not appear harmful to the general interest, since in the framework of liberalism, the welfare of the citizens was dependent essentially, on the free interaction of private activities and not on state intervention. According to the classic conception of administrative law, it was, therefore, possible to afford the greatest possible protection to the citizen without impairing public interest. These ideas could be summarized in John Stuart Mill's aphorism: "The only purpose for which power can rightfully be exercised over any member of civilized community against his will, is to prevent harm to others ..." (5).

After the First World War and the ensuing deep economic crisis, the state had to intervene actively in the management of economic and social activity. Along with the increasing public intervention in more and more fields of human activity, classic administrative law started to appear to public authorities as a brake to an effective and efficient
administrative action. Numerous civil servants considered administrative law not as an organized system of rules securing the better management of public affairs, but as a list of useless and anachronistic prohibitions. So, they did not hesitate to violate the law. The regulation of administrative action according to legal principles formed mainly during the nineteenth century was considered as incompatible with modern ideas about the role of the state as a sine qua non participant in every aspect of social and economic life. Traditional administrative law was adapted to the classic nineteenth century conception of liberal administration as an apparatus of stabilization of social relations. In this sense, administration was of a conservative nature, since its function was mainly to manage an existing organism rather than to transform it. This attitude was consonant with the dominant ideas of the late nineteenth and early twentieth century. These ideas could be summarized in the point that social and economic development was coming to an end, because it had reached its peak and the society, therefore, had reached a level of development which it was sufficient to maintain. Any further social change was considered as unhealthy and anomalous symptom.

Nevertheless, social transformation continued, and the administration had the new vital function to anticipate the shape of things to come and to ensure the smoothness of social change and progress. The new concept of the 'administration-
entrepreneur" led it to intervene in social affairs and in delicate economic balances and to interfere with private interests. The traditional 'list of prohibitions' of administrative law did not seem to be suitable to meet the new situation which rendered the administration an essential partner in most social and economic affairs. As Debbasch has put it:

"Autant il etait legitime d' entourer d' un reseau de barbeles les actions traditionnelles de l' administration, plus la machine a vapeur grincait moins elle agissait plus cela etait favorable a l' interet des citoyens, autant il apparait aujourd'hui necessaire de permettre a l' administration d' agir avec la rapidite de l' engin spatial, la force du bulldozer, la libert de l' oiseau." (6)

Traditional administrative law stressed the value of private interests and the dominant ideology maintained that the general interest amounted to the outcome of the free interaction of the various private interests. By contrast, today, the general interest is regarded as the autonomous expression of the will of the public authorities (puissance publique) which should always prevail over the various conflicting private interests. (6a) On the basis of this modern concept of public interest administrative action acquired a new dimension. Thus, for instance, the interest of an owner of a small villa could no longer be legitimately opposed to an expropriation decision, when this step could provide accommodation to a great number of people. The extension of administrative intervention in public affairs appeared as the only way to ensure the adequate satisfaction of the public
interest. It should also be underlined that in recent years, especially after the Second World War, there is the tendency for people to demand that their daily needs be met more from the state and take state action for granted. Thus, frequently services are rendered where there is no longer need for social welfare; this can be seen in Germany, for example, from the great number of social housing projects where the tenants now enjoy much higher incomes than those laid down in the relevant provisions for the distribution of flats in such projects.

As far as the Federal Republic of Germany is concerned the expansion of state activity in virtually all the spheres of life is largely founded on a constitutional command as well. One of the express and unalterable (7) basic principles of the Grundgesetz proclaims that: "... the Federal Republic of Germany is a ... social ... state" (Article 20(1) GG). It has been contended that the basic rights to human dignity, free development of personality and equality before the law represent as much the idea of social state as of the Rule of Law. (8) The Grundgesetz does not contain the State only to ensure the liberty of individuals but also imposes an obligation on it to engage in wide ranging activities to secure the citizen's opportunity to realize his/her freedoms. This approach is not only due to the dynamic welfare state clauses of Articles 20(1) and 28 GG but also essentially to the understanding of the fundamental rights which are interpreted as defensive individual rights (status negativus) as well as
norms comprising objective values which the state has to respect and to bring forward, especially through legislation. (9) It should be stressed that it is for this very reason that the Grundgesetz cannot be adequately described solely as an order drawing limits to state activities, in some respects it rather represents an order which, besides its subsisting and vital limiting function, constitutes the binding basis for the entire policy of the state. (10)

The concept of the social state is not defined either in the Grundgesetz or in any other law. Nor is it easily definable. On a perusal of the immense literature on the subject it could concisely be stated that in contrast to a liberal or individualistic state whose primary concern is the protection of certain basic rights and freedoms of its citizens through non-interference, the social state aims at restructuring the existing social order with a view to removing the social and economic inequalities and risks in life, leading to the realization of social justice and removal of distress and calamity. The social state insists on social equality and realization of freedom under the Rule of Law. That also distinguishes it from a totalitarian state. The important characteristics of a social state are: creation of tolerable living conditions, social security, social freedom and the provision of compensation for injuries sustained through state action. (11) Since the relevant constitutional provisions are brief and vague the primary obligation of transforming the
notion of social state into reality falls on the shoulders of the legislature. The Bundesverfassungsgericht has held that the choice to have a social state was an important constitutional decision (12) and that the legislator is under the obligation "... to take up constitutional social welfare activities and is under a special duty to balance conflicting interests and to create tolerable living conditions." (13) The social state clause also binds the administration and the judiciary. The administration must always take this clause into account in the implementation of laws and the exercise of its discretion. The judiciary must always interpret the laws in its light and direct the administration to advise the citizen on his/her legal position and material facts. (14) Thus the Bundesverfassungsgericht has taken the view that the administration should not only assure freedom and equality, but also see that, in view of the new techniques and progress and the social conditions which the individual cannot face alone, every vital need, necessary for human dignity is satisfied. (15)

There is no doubt that, as a matter of fact, state interventionism and individual economic freedom are often at odds. The liberal state, founded on the notion of classical democracy, individualistic and liberal in character, intervenes in the realm of the economy in exceptional circumstances only, since the economic freedoms are often considered as the keystone of political freedoms. It should, however, be
underlined that liberalism does not mean anarchism and that freedom of competition, which is the foundation of economic liberalism, is not always in complete harmony with the 'laissez faire integral' doctrine. Nevertheless, the liberal state trusts the greatest possible part in the field of the economy to private initiative, the individual choice and the free interaction of the markets. In other words, the starting point of liberal economic theory is that economic freedom ensures the maximum production in relation to given resources, that is, economic efficiency. This is the justification of the liberal principle of non interference by the state with individual freedom in the domain of the economy. (16)

As a result of the developments outlined above, public authorities play a preponderant role in economic life. Their action takes usually one of these two forms: public authorities take charge of an economic activity directly or they issue regulations which limit the freedom of action of individual agents. From this point of view one could expect that the principle of economic freedom would disappear or at least lose its original value. However, not only does this principle retain its eminence and its wide sense of economic freedom and freedom of trade, occupation or profession but it is always considered as a general principle of law having constitutional status in both Germany and France.

In the Federal Republic, the Grundgesetz contains in the part dealing with basic rights various provisions which are of
importance for the individual's economic activity. Thus the freedom for personal development guaranteed in Article 2 GG extends according to the prevailing learned opinion also to certain areas of economic activity, inter alia, to the freedom of contract. Article 9 GG protects the formation of economic associations. Article 14 GG contains a guarantee of property. The same provision, however, allows under certain circumstances nationalization (Uberfurungen in Gemeineigentum). Of cardinal importance is Article 12(1) GG:

"All Germans shall have the right freely to choose their trade, occupation or profession, their place of work and their place of training. The practice of trades, occupations or professions may be regulated by or pursuant to a law."

This constitutional provision has led to copious case law from the Bundesverfassungsgericht. The landmark decision is the one of 11 June 1958 in which the Court laid down the conditions and delineated the extent to which freedom of trade, occupation or profession can lawfully be regulated by statute. (17) Since then the same court has continued to move along the lines of this decision, while in a series of later decisions it has further elaborated where the boundary is to be drawn between lawful and unlawful interference with the freedom to choose one's trade or occupation. (18) The guiding principle of the Bundesverfassungsgericht is that interference with the freedom to choose trade, occupation or profession is lawful for the purpose of safeguarding important public interests at stake against the individual's freedom of personal development.
Although the Preamble to the Constitution of 1946 does not list the right to free economic activity among the 'principes sociaux', the judgements of the French Conseil d'Etat proceed on the footing that the 'liberte de commerce et de l'industrie' and the 'liberte de l'activite professionelle' are fundamental constitutional principles. (19) The Conseil relies on the constitutional guarantee contained in the Constitution of 1848 and on the other hand on a decree of 1791 on freedom of economic activity:

"Il sera a toute personne de faire tel negoce ou d' exercer telle profession, art ou metier qu' elle trouvera bon; mais elle sera tenue de se conformer aux reglements de police qui pourront etre faits." (20)

Pursuant to Article 37 of the Constitution of 1958, the executive is directly authorized to issue directives for the purpose of regulating the economy. In its decision in the de Laboulaye case the Conseil d'Etat has, however, set certain limits to this law-making power of the executive, in that it has included the 'liberte de commerce et de l'industrie' amongst the fundamental guarantees which can be regulated by the Parliament under Article 34 of the Constitution. (21) Accordingly, any fundamental intervention in the sphere of free economic activity will amount to regulating a basic principle with the meaning of Article 34; examples of such intervention are the introduction of marketing organizations for certain products, price restrictions and quota arrangements. This has been established explicitly in the Conseil's judgement in the Societe Mobil Oil francaise case which concerned the
quantitative restrictions on petroleum imports. (22) The executive will, therefore, retain the power to make provision, within the framework of the law, for the detailed implementation of the measures aiming at regulating the economy. It is still an open question how far the 'liberte de commerce' sets limits to the power of the legislature to enact provisions for regulating the economy. In view of the necessity, widely recognized in France, of extensive state intervention in the economy, the hypothesis is scarcely conceivable in which the Conseil constitutionnel could declare unconstitutional a statute for regulating the economy.

As far as the 'liberte de l' activite professionelle' is concerned the Conseil d' Etat has stated in several judgements that the administration may not prohibit the exercise of a trade or occupation or make it subject to conditions or administrative licences having no statutory basis. (23) In regulating the exercise of a trade or occupation, the administration should, however, have full regard to 'ordre public.' (24) It has been widely assumed from these judgements that the change in economic and social thought allows extensive restrictions to be imposed on the exercise of a trade or occupation. There can be therefore not only traditional restrictions, in the sense of supervision for the avoidance of dangers but also restrictions on grounds of social justice. The overall impression from French learned writing is that the 'liberte de commerce et de l' industrie' is a freedom which is
controlled and guided to a considerable extent. (25) This situation has been epitomized by Roche as follows:

"Pur produit du liberalisme, la liberte du commerce et de l'industrie sans etre abandonee comme principe general de notre droit n'a cesse de deperir en meme temps que l'Etat etendrait son controle sur l'economie." (26)

So there is an internal conflict between the theoretical aspect of the principle of economic freedom and reality. This contradiction, schematically, could lead to a deadlock since state interventionism excludes economic freedom and vice versa. Nevertheless, a compromise is necessary since there can be no question for the public authorities to abdicate from their activities and their prerogatives in the economy under the circumstances. It is also not possible, legally speaking, to renounce the principle of economic freedom. In view of these findings, it would be interesting to examine, at a later stage, whether the principle of proportionality could be one of the means for compromising these conflicting interests. The necessity of judicial control of economic decisions is even more pressing because of the importance of the interests at stake and the illusory character of the political control of the executive. It should, however, be noted that an effective judicial control of the legality of economic decisions comes up against two initial obstacles: The ability of the judge to carry out such a control and the wide discretionary powers enjoyed by the executive in this field. The judge in this area, because of the complexity and the highly technical
character of the decisions in question, is not always prepared or qualified to use all the tools of control at his/her disposal in order to review economic decisions before him/her. He/she is content to verify merely whether the challenged measure is justified by an economic interest provided for by the legal basis of the measure in question. The economic interests at stake are considerable. State interventionism is, in essence, inegalitarian since it is intended to favour activities which are in accordance with the general economic interest as this is conceived by the government of the day. There has been a profound change in the concept of equality on which the relations between public authorities and the citizens were based in the traditional liberal system of civil rights. Very important economic, financial and property interests depend on the - often discretionary- judgement of the administration. Business managers are well aware of the value of a grant or a refusal of an import or export authorization, or of the admission to the facilities of a preferential fiscal regime, of the access to free and cheap credit etc. The value of real estate depends more on the constraints of town planning attached to it rather than on its intrinsic properties; the definition by the administration of an occupation co-efficient of land will make the fortune or misfortune of the owner of a development site. Wide powers of state intervention in the economic life often tempts the administration into arbitrariness. Political control is not a sufficient means to
control this tendency nowadays. The new functions of the state contributed to the precipitation of the liberal constitutional systems and upset the old equilibria. Today the executive exercises everywhere the essential power. Its quasi-monopoly of information on the economy and its tendency to keep this information secret do not facilitate at all the control of the executive action by the parliaments or the public opinion. Shonfield is right when he points out that the essential political problem of capitalistic countries is to submit an active power to a real democratic control. (27)

II). Legislative Activism and the New Role of Legal Rules.

To meet their new tasks administrative authorities pressed for new rules of law for the regulation of their action. The type of state which is loosely defined as the welfare state resulted primarily from legislative activities. The first steps were taken in the area of social policy, by means of legislation on labour law, health and social security; state legislation, however, gradually advanced into the economic sphere, by means of legislation on antitrust law, unfair competition, transport and agriculture. It finally brought the society to its current situation by extending the public sector, by exercising an overall control of the economy, by assuming responsibility for employment, by framing schemes of social assistance and by subsidizing non-profit making activities like the arts, community work and renovation of decaying urban centres. The character of this 'change
directed' legislation was different than that of older statutes. Traditional legislative techniques —formulating rules of conduct— for instance on safety and hygiene in factories, on prohibition of child labour etc, were not adequate for framing social security schemes or rules on investment and competition. Statutes might still fix rules of conduct, but they did other things as well —they established institutions, they gave them power to decide individual cases and sometimes they delegated rule-making powers to the government or to other bodies.

As the scope and the intensity of public interference was growing, the emphasis in legislative activity was shifting increasingly from rules of conduct to institutional arrangements. Step by step, a new type of legislation emerged: Statutes that defined certain goals or principles, leaving their implementation to subordinate legislation, to decisions by ministers or by regional or local authorities or to the care of newly established institutions such as agencies, tribunals or boards. It would be hard to find any classical rule of conduct at all in modern statutes on subjects such as, say, price control, regional industrialization or urban renovation. In many fields the activities of the citizens are not governed by the terms of the statutes, but by the executive and its agents and by administrative bodies policing legislative or administrative schemes. This evolution could be summarized in the paradox that parliaments set themselves so many and diverse
targets that they finally had to leave a good deal of their work to others; their ambitions finally resulted in abdications. In a way the French Constitution of 1958 (Article 34) may have drawn the consequences from these developments by formally limiting the parliament to certain well-defined areas. It is easy to see that this evolution accounted for institutional changes, such as the growth of executive power and the escalation of new institutions, the rise of bureaucracy and bureaucratic decision-making, the delegation and subdelegation of legislation—sometimes to the second or third degree—and the changing role of representative bodies, henceforth controlling and policy discussing rather than rule-making institutions.

New rules of law accorded to the administration a considerable margin of discretion and significant powers to intervene in public affairs, and at the same time restricted the importance of the protection of private interests. These laws laid down the general aims which the administration should pursue and left to the administration an almost unfettered choice of the means for the attainment of these goals. They also brought about the phenomenon of the so-called administrative inequality (l' inegalite administrative), using the technique of derogations from the general rules, which led to the 'legalisation de la discrimination.' By their instability and their gaps these new rules of law did not allow the exercise of an effective judicial control of administrative
action which requires a comparison between the administrative
decision and a precise and stable norm of reference. To cite
the words of Debbasch:

"Les normes administratives sont passees de l'ere du
quartz a celle de l'amide. Le controle jurisdictionnel
est rendu encore plus complexe par la diversification
des formes juridiques de l' intervention administrative."
(28)

The tradition of the legalite of the 'etat politique-
liberal' and its doctrines of freedom of trade and industry,
equality of treatment, the right to property and protection of
vested rights had to be redefined and reconciled with the
realities of the modern 'etat industriel et commercial' and its
doctrines of active state interventionism and of mixed economy
(which aimed at the increase of productivity and of output and
even competitiveness within the framework of the European
Economic Community). As stated above, the interference of the
administration with civil rights and private interests in
general is no longer, by all means, limited to the maintenance
of the public order. It has been extended to the establishment
of certain economic order as well, whose technical, flexible
and mobile rules are at the basis of the so called 'crise de
legalite.' (29) As a matter of fact, the imprecision and
vagueness of economic legislation, (30) very often bestow on
the administration wide discretionary powers which leave the
judge unarmed, whereas traditional judicial techniques of
control have become unsuitable, even antinomic, under the
circumstances. It could plausibly be argued that property
rights or freedom of enterprise are in jeopardy today. Individual rights are without second thoughts sacrificed, by some people, when an administrative intervention may present even the slightest economic or social interest for the community. For those people, the expropriation of a private plot of industrial land for the construction of a municipal swimming pool, for instance, would be perfectly acceptable.

A result of the developments outlined above is the emergence of one important effect which is not always considered in this perspective: The decline in acceptance of government's authority may be related to it. Representative systems of government prided themselves on embodying, by their very nature, the consent of the governed: People were living under the law established by their own elected representatives. Nowadays, it seems that the thread between a vote cast for a Member of Parliament and the many decisions by public authorities affecting the voter has become very long and thin. It requires some imagination to see that these decisions are ultimately supported by an enabling statute in the far background. And the voter, apparently, is less inclined to consider these decisions as 'legitimate' than he/she used to be. Any misgivings in this regard may be somewhat vague, but they can be perceived throughout the major industrialized western democracies. These vague feelings, in their turn, have triggered new developments; the most notable, from the legal point of view, is the degree to which the judiciary have become
involved in these matters. Citizens who are dissatisfied with decisions of public authorities—for lack of legitimacy or for other reasons—tend to challenge the legality of these decisions before the courts. And the courts often respond to these new demands by pointing out their traditional role of being guardians of legality. Legal battles sometimes take place on issues which twenty five of thirty years ago were considered exclusively in terms of political settlement. In Germany and France the complaint is already common that citizens tend to overstress the help they can derive from judicial remedies ('die Ueberforderung des Richters'). This situation is not due to sheer accident; many people seem to feel that the political process is too much intermingled with bureaucracy for providing a counterbalance against bureaucratic decision-making, and they, therefore, turn to courts.

Under these circumstances it will be more and more difficult for the courts to stay aloof from 'political' issues. (30a) Important administrative decisions, even if previously had been discussed in parliament, may be quashed; France and Germany, for instance, both had major judicial rulings on the limits of the government's power to restrict the access of students to the universities. (31) In this process questions of the judicial control of executive discretion seem to have gained an unprecedented importance. So, ultimately, the courts may find new tasks in ascertaining the link between the legislative process with its democratic legitimation, and the
abundance of administrative decisions citizens have to cope with—a link citizens themselves more often than not are unable to discover.


It has been argued, with a wealth of detail, that the evolution of European legal thought is shifting its preference from general and abstract to individual and concrete problems, in a sort of irreversible process. The shift is apparent in moral as well as in legal philosophy. Thus the future belongs to judicial law-making in a way. This statement can be illustrated by pointing to developments mainly in the Federal Republic of Germany, and the activities of the Bundesverfassungsgericht in particular. (32) To put the abovementioned proposition in its true prospective, two parameters have to be taken into account. That of changed institutional arrangements in post-war constitutions in Western Europe; and secondly, that of changing functions of law-making in modern industrialized societies in general.

From an institutional point of view, pre-war European democracies were predominantly founded on ideas of parliamentary supremacy. After the Second World War, the scene was beginning to change. The reconstruction of Germany brought a fully-fledged system of judicial review. The Bundesverfassungsgericht started its work with much devotion and seriousness of purpose; already during the first year of its existence, it had traced the limits to be observed by the
federal legislature in view of the constitutional principle of equal protection before the law. (33) Ten years later, it delivered major decisions on equality, basic rights, the requirements of the Rule of Law, and it established the principle of proportionality as a constitutional principle among other things. These developments in Germany, however, were not an isolated phenomenon. The birth of the Fifth Republic in France introduced the control of constitutionality of bills by the Conseil constitutionnel. Initially, the latter technique could have been considered - and indeed was often considered - as exclusively intended to arbitrate conflicts between the Parliament and the executive concerning the exact course of the boundaries between the 'domaine legislatif' and the 'domaine reglementaire.' The first decisions of the Conseil constitutionnel were in effect concerned with the distribution of legislative power - which constituted after all one of the main innovations brought about by the Constitution of 1958. From 1971 onwards, however, the Conseil began to exercise its control in a different way, by disqualifying bills for violation of basic rights. (34) It thereby engaged in a much wider task of constitutional adjudication than had originally been foreseen. Thus, France seems on its way towards a more traditional form of judicial review of (draft) legislation.

The second parameter to our problem consists of the changing perceptions of what the role of legislation in
moulding the law should be. In the nineteenth century legislative bodies confined themselves to enacting rules which they considered as emanating from pre-existing norms -whether based on customary law or moral principles or any other source. This attitude was founded on the belief that the part to be played by legislation ought to have such a limited scope. Since the 1930s the idea of social change triumphed: Poverty, unemployment, inequality and misery were not just there as unavoidable and unchangeable conditions, but resulted from human conduct and could therefore be abolished by rational and planned human action. According to this school of thought, legislation was one of the principal vehicles for achieving social change. And this is what happened in fact: Far from codifying existing rules, new legislation aimed at modifying existing rules of conduct and established patterns of behaviour. Law was viewed as an instrument for achieving certain social aims.

In view of the development towards the modern social state based on the Rule of Law some more important points should be highlighted. To the extent that the function of the State has changed, the development in the direction of welfare state which assigns new responsibilities to the legal rules has come about. Consequently legal rules are no longer seen in the first place as enabling the administration to infringe on the freedom and property of the citizen, but rather as obliging it to shape a social state and distribute its benefits. It is
quite obvious that the new tasks which have faced the administration require new means of intervention by the state. Thus the control of the administration remains a control of power only in part. It becomes more and more necessary also, to control the administration to the extent that it distributes services or funds to the society, in other words a control of the administration distributiva is needed (for example, the grant of a state subsidy to a private enterprise). This control does not aim at ensuring the observance of rules set to regulate administrative action; it must prevent the individual from enjoying unjustified privileges. It is the common welfare which is at stake here. To stimulate the argument, the question may be asked whether the existing means of control suffice as far as judicial control is concerned, since they rest on the concept of interference of the State with individual rights or interests. According to Forsthoff:

"L' administration interventionniste travaille dans des circonstances qui echappent completement aux techniques de protection des libertes et de controle juridique telles que les a developpees l' etat de droit liberal. Ces techniques partent de l' hypothese qui l' individu a une existence autonome et qu'il est independant de l' administration. Cela n' est pas plus vrai pour l' administration moderne. L' individu n' est plus independant de l' administration, mais dependant." (35)

The reaction was not slow in coming nevertheless. Political disenchantment led - in some countries earlier than others - to the questioning of the premise that law could cure the evils of the society and sometimes to a widespread disbelief in its ability to do so. Legal theory explored the
disadvantages of the use of law as an instrument of change and often returned to value-oriented conceptions of law. (36) Natural law theories made their comeback on the stage of legal doctrine. In Germany, the Bundesverfassungsgericht embraced them explicitly; in 1953 it held that, in principle, even constitutional rules can be attacked for not conforming to principles of natural law. (37) Finally, the post-war rediscovery of the importance of basic rights, the international protection of these rights—particularly by means of the 1950 European Convention on Human Rights—and the public's awareness of their significance, have put their limitations on legislative activity. Perhaps, the period of boundless legislative energy has gone and conceptions of natural law, human rights and legal values might well have certain bearing on the functions to be carried out by the judiciary. It should also be noted that the normative function of the judge is sometimes favoured by the attitude of the legislature. On important questions, which are politically sensitive and might have adverse repercussions on public opinion, parliaments knowingly or not tend to hand over their powers to the executive or the courts. (38) The most striking current example in France is that the right of the civil servants to strike which despite the express invitation of the Constituent Assembly in the Preamble to the Constitution of 1946 has never been completely and coherently dealt with by the legislature. The courts, therefore, took the matter in their
hands and filled this gap by establishing the principles that
govern this area of law.

Under legal systems providing for judicial review of
legislation, protection of fundamental rights is ultimately in
the hands of the courts. The Grundgesetz instituted a special
remedy to that effect: Whenever someone alleges that one of his
basic rights or similar individual rights (grundrechtsähnliche
Rechte) has been violated by any public authority, he/she has
the right to petition the Bundesverfassungsgericht for redress
by means of a Verfassungsbeschwerde. (39) As this petition lies
only when ordinary remedies have been exhausted, it sometimes
resembles a kind of super-appeal. Such a general action is
unknown in French law; the Conseil constitutionnel decides only
on bills which have not yet reached the statute book.
Nevertheless, the administrative courts, and particularly the
Conseil d'Etat, consider that the basic rights established in
the 1789 Declaration on the Rights of Man and of the Citizen—
to which the Preambles to Constitutions of 1946 and 1958
explicitly refer—form part of the general principles of law to
be upheld by the courts. Thus administrative decisions and
regulations (including regulations issued by the government or
the President of the Republic) may be quashed for violating
human rights. German practice, however, shows a much greater
wealth of case law in this respect. This is due in differences
in types of action, availability of remedies and policy of
courts in these two countries.
The feature which gives German constitutional adjudication its own distinctive flavour is the way constitutional provisions on basic rights are seen as interrelated: They are not taken individually, but as a part of a body of values which the Bundesverfassungsgericht considers as incorporated in the Grundgesetz. In this construction the Court is helped by some of the vague notions embodied in different constitutional provisions, like equality, democracy, federalism, Rechtsstaat and Sozialstaat. Each of these notions has given rise to interesting and sometimes imaginative interpretations. Thus in 1956 the Bundesverfassungsgericht struck down a federal statute which froze the existing legal situation. The Court held that this statute was so confusing that citizens would not be able to determine exactly what rights they had, so that the statute failed to meet the standards imposed by the principle of legal certainty and therefore infringed upon one of the requirements of the Rechtsstaat (Rule of Law). (40) Each of these interpretations contributes to shaping the body of values, the so-called 'objective Wertordnung' deemed to be contained in the Grundgesetz. This view of the constitution implies that the Bundesverfassungsgericht, more than its American sister-institution, is given to what American lawyers call 'balancing'; an individual basic right can only be regarded in its relation to the entire body of values. It can never be absolute or have 'preferred position', because its scope depends on that of other constitutional rights and values.
When, therefore, the Grundgesetz at its very beginning proclaims that: "The dignity of man is inviolable", it does more than merely stating a ringing moral principle; for the Court's conception of dignity will guide its interpretation of individual basic rights. From this point of view, the Court tends to perceive its role as a trustee of certain legal, moral and political model, rather as a guardian of human rights; natural law overtones reinforce this tendency.

The French Conseil d'Etat discovered and developed the 'principes generaux du droit' (subsequently also applied by the Conseil constitutionnel) in much the same way as the English courts, at a much earlier stage, construed the principles of 'natural justice.' (41a) There was no clear legal basis or constitutional mandate, it had just something to do with what courts consider doing justice is all about. (41b) The French expression has a wider scope than the English one, because it does not only cover procedural guarantees such as the right to a hearing, the rule against bias and other 'droits de la defense', but also matters of substance, like non-retroactivity and protection of libertes publiques. In French administrative law, and gradually perhaps in French constitutional law, general principles of law form an important body of judge-made law aimed at protecting the citizen against a powerful state machinery. In this regard, they are more or less akin to the notion of Rechtsstaat (Rule of Law) under German law. French legal writers admit that it would be difficult to make an
exhaustive list of the general principles of law. (41) Nevertheless, an examination of case-law shows that these principles consist exclusively of traditional legal values such as have been discussed over centuries. German constitutional law with its interconnecting legal expressions, including such modern notions as Sozialstaat, may have more potential for venturing into unforeseen areas of modern government. Much depends on judicial attitudes. From this point of view, it is important to stress that the Conseil d'Etat sometimes shows a great independence of mind, even in politically hazardous cases, and that this court seems also willing to intensify its control with regard to subjects which are typical of contemporary government such as economic law.

Social rights or generalized sociopolitical and cultural state objectives, the attainment of welfare state in casu, cannot be translated into reality without regard to the resources available. To what extent and with which methods these state aims can be accomplished, is a matter for the political discretion of the legislature which, as the author of tax and budgetary laws, is obliged at the same time to secure the financing of measures taken towards a welfare state. In so doing the legislature is bound to observe norms laying down competences and the political limits contained in the basic rights. Generally, it is up to the legislature, in fulfilling the desire for the realization of a social state, to determine the method and intensity of social equalization and the
prerequisites and amounts for claims against the measure of the real value of the entire social economy in particular. Social welfare law by no means should impair the rights of the individual. It should merely endeavour to guarantee to every citizen, regardless of race or religion a minimum standard of living. The concept of a social state under the Rule of Law (Sozialer Rechtsstaat) requires judicial protection to the greatest possible extent against violation of the sphere of the individual and of public institutions by the encroachment of the administration. (42)

State interventionism and the relevant legislation must observe the limits imposed by the constitutionally guaranteed freedoms and the doctrine of the separation of powers: Economic rights in all Western democracies have proven themselves to be preconditions for the creation of the material economic basis of a redistributive welfare state. These depend on performances on the part of the citizens in the intellectual, technical and economic fields which are largely carried out on their responsibility. The principle of proportionality is a most appropriate tool to control interventionist activity in the area of welfare state. Since as it has been argued above, economic rights constitute an indispensable prerequisite for the realization of the social state in all liberal democracies, proportionality in this case can be taken to mean that public authorities, when restricting or qualifying economic liberties, may not do so to an extent which is manifestly disproportionate.
to what is required, in the light of the results to be attained. From the economic point of view, this rule implies two concepts fundamental to the mixed economy systems which are democratic in their inspiration: The principle that the intervention of the authorities must be subsidiary in nature and that there must be a connection between State intervention protection and the protection of individual freedom of action. In this way, building the social state cannot be allowed to hamper the material prerequisites for so doing. It may thus be argued that the realization of the constitution and the state aims in a wider sense consists of free development between citizens and state regulation which maintains freedom within the framework of the common cause and furthermore bring about social equalization.
ENDNOTES.

INTRODUCTION.

1). Wade, p. 5.
2). ibid, p. 6.
3). ibid, p. 4.
4). In general droit commun (ordinary law) does not refer as in England to the 'common law' in the sense of case law as decided by the courts, but to what in France is the ordinary law applicable to all persons, e.g., civil code and penal code, as distinct from special law applicable to certain matters or persons. E.g., administrative law and commercial law which are described as droits d' exception.
6). Debbasch, Melanges.Waline, at p. 348
6a). Dworkin holds out that courts should decide hard cases (that is, a case that cannot be straightforwardly resolved on the basis of determinate black-letter rules) on grounds of principle, not policy. Principles differ from policies in the following way. A principle defines and protects an individual right, whereas a policy stipulates a collective goal. [Dworkin, Taking Rights - Seriously, London 1978, p 22] Goals are those preferred states of affairs which the community seeks to pursue: e.g., a clean environment, a favourable balance of trade, an efficient transport system. Rights are individual claims that operate as 'trumps' over collective goals. When we say that someone has, for instance, a right of free speech, we mean (according to Dworkin) that that person's freedom of speech ought not to be interfered with even if that interference would serve collective goals, or the overall welfare of the community. Rights serve to protect the individual in that they work out certain individual interests which must not be interfered with merely to achieve some incremental increase in the general welfare. This is not to say that rights are absolute: rights (like the principles that define them) have a dimension of weight, and this weight is a matter of how far they will operate as trumps over policy considerations. Thus, although the right to free speech should not be abrogated merely in order to increase industrial productivity (for example), it might be the case that free speech could justifiably be suppressed for genuinely urgent reasons of national
security. But, if a right truly is a right, it must have some weight to 'trump' policy considerations: a right is not simply a desirable object to be taken account of and traded off against other desirable objectives.

Many critics doubt whether Dworkin has succeeded in establishing a distinction between principles and policies. They argue, for example, that we can only determine what rights people have by reference to some understanding of what will best serve the general welfare, or collective goals. [See Simmonds, Central Issues in Jurisprudence, London 1986, p 106] However, the following point should be noted. Dworkin makes the controversial claim that legal positivism and utilitarianism are connected not just historically, but conceptually: they are really two sides of the same theory. Dworkin's insistence on the distinction between principles and policies is really a part of his rejection of classical utilitarianism: hence his insistence that rights operate as 'trumps' over collective goals and over the general welfare. Thus it would be a mistake to imagine that the principle/policy distinction can be discussed in isolation about these further issues about utilitarianism. [Simmonds, p 129 et seq] Dworkin offers in support of his claim that judges are, and ought to be, restricted to arguments of principle, the arguments from consistency (that is, the general expectation that judicial decisions should be consistent and rational), democracy and retroactivity (Dworkin argues that when a court decides a case on grounds of principle it is enforcing a pre-existing right). [Dworkin, Taking Rights Seriously, London 1978 p 84 et seq, Dworkin, A Matter of Principle, Oxford 1986, part I, Bell, Policy Arguments in Judicial Decisions, Oxford 1983, Simmonds, pp 106-108]

7). Article 79(3) GG.


9). BVerfGE 7 S 198(205), E 56 S 54(77) etc.

10). Stern, p. 78.

11). Katz, pp. 74, 94 et seq.


13). BVerfGE 7 S 1.

15). BVerfGE 22 S 180(204).
16). Dreufus, p. 5.
17). BVerfGE 7 S 377.
18). E.g., BVerfGE 39 S 210 (225 et seq).
21). Supra no. 17.
24). Supra no 17
25). Ibid.
28). Supra no 4 at p. 343.
29). Ibid.
30). See e.g, the provision of l'ordonnance of 30 June 1945 on the police des prix.

30a). There is a lively discussion as to how the role of the judiciary can be justified in a democratic society, how can non-elected judges justifiably make and shape the law and whether law-making should be left to the democratically elected legislature. Dworkin believes that questions of this kind are bound to seem highly intractable so long as it is believed that judges in hard cases establish new rules on grounds of policy. But the questions can receive an acceptable answer once it is realised that judges do not characteristically base their decisions on policy, but on principle. Questions of policy concern the collective goals that the community wishes to pursue: new roads or new hospitals? high productivity or clean air? Such questions can plausibly be thought to depend
on what peoples preferences are. The democratic process is itself a mechanism for the expression of preferences, and legislatures are exposed to the expression of preferences more generally. It is therefore appropriate that questions of policy should be decided democratically, and should not be decided by judges. With questions of principle it is otherwise. Principles define rights and operate as trumps over collective goals. Rights are therefore (in a sense) rights against the majority. It is therefore appropriate for questions of principle to be decided not by democratically elected legislators, but by judges. [Dworkin, A Matter of Principle, Oxford 1986, part I, Bell, Policy Arguments in Judicial Decisions, Oxford 1983, pp 1-7, 204-225, 247-270]


32). See Marcic p 45 et seq.

33). BVerfGE 1 S 10.

34). The starting point was the decision of the Conseil constitutionnel of 16.7.71 on the loi d' associations Rec. 29.

35). Forsthoff, p. 133.


37). BVerfGE 3 S 15.

38). In the view of a French legal writer:


39). See Article 95(1) GG.


41). de Laubadere, para. 379.

41a). According to Dworkin the law does not entirely consists
of rules: it also includes principles. Principles differ from rules in a number of ways:

a) Rules apply in an 'all or nothing' fashion. If a rule applies, and it is a valid rule, the case must be decided in accordance with it. A principle, on the other hand, gives a reason for deciding the case one way, but not a conclusive reason. A principle may be a binding legal principle, and may apply to a case, and yet the case need not necessarily be decided in accordance with the principle. This is because principles conflict and must be weighed against each other.

b) Valid rules cannot conflict. If two rules appear to be in conflict, they both can be treated as valid. Legal systems have doctrinal techniques for resolving apparent conflicts of valid rules, e.g. the maxim lex posterior derogat priori. Legal principles, on the other hand, can conflict and still be valid legal principles.

c) Because they can conflict, legal principles have a dimension of weight which rules do not have. Rules are either valid or not valid: there is no question of one rule 'outweighing' another. But principles must be balanced against each other.

Discussing a US case [Riggs v Palmer 115 N.Y. 506, 22 N.E. 188 (1899) where a murderer claimed that he was entitled to inherit under the will of his victim. D maintains that almost any case would serve his purpose as well] Dworkin shows in effect how the courts can change the law while applying the law. At first this seems paradoxical: it could be argued that if the courts change the law must do so by diverging from the strict application of the law. However, the example of Riggs v Palmer shows that a court may create a new exception to the established rules but do so on the basis of legal principles ('no man shall profit from his own wrong'). [See Dworkin, Taking.Rights.Seriously, London 1978, p 23 et seq, see also Dworkin, The Philosophy.of.Law, Oxford 1977, chapt 2]

Dworkin maintains that the judge who first formulates a legal principle formulates it as an existing part of the law and not as a legislative innovation of his own. In general, principles are identified by showing that they are embedded in the established rules and decisions, in the sense that the principle provides a suitable justification for black letter rules. He describes a hypothetical judge called Hercules who possesses superhuman powers. Thus, Hercules is able to carry out judicial function in a far more thorough-going and articulate manner than could any actual judge. Nevertheless, the procedures and methods of argument used by Hercules represent the form of
decision-making that is presupposed by the methods of ordinary judges. Hercules does fully and explicitly what normal judges do in a more piecemeal and less self-conscious manner.

When Hercules decides a hard case (supra 6a) he must begin by constructing a theory of law applicable to his jurisdiction. This theory of law will consist of an elaborate moral and political justification of the legal rules and institutions of the jurisdiction. For example, Hercules's jurisdiction may contain settled rules about legislative supremacy, and about the binding force of precedent. Hercules will need to work out a body of principles that will justify these rules. He must ask "What moral principles would serve to justify the doctrine of legislative supremacy? What moral rules underlie the doctrine of precedent?"

Hercules must also consider the moral and political theory that seems to be at the basis of the substantive law of contract, tort, property, criminal law, welfare law and so on. If Hercules carries out this task properly, this will result in a complex and integrated body of principles.

The criterion that, according to Dworkin, distinguishes legal from non-legal principles is this: a principle is a legal principle if it forms a part of the soundest theory of law that could be offered as a justification for the established legal rules and institutions. [Dworkin, Taking Rights Seriously, London 1978, p 105 et seq] The view that principles are not part of the law, but are extra-legal considerations applied in the exercise of judicial discretion, is incompatible (according to Dworkin) both with the idea of binding rules and with the idea that courts enforce the parties' rights. If it is held that principles are not part of the law, it must also be assumed that judges may depart from earlier decisions when, in the exercise of their discretion, they think it best to do so. If, however, judges can alter established rules in this way whenever they think it best (on moral or social policy grounds), they cannot be said to be bound by the rules at all. Thus, Dworkin argues, if principles are not part of the law rules are not binding. [Supra pp 22 et seq, 71 et seq] As far as the second count is concerned, we regard courts, not as deciding for the benefit of the plaintiff at the defendant's expense (or vice versa), but as enforcing the plaintiff's or the defendant's rights. But if principles are not part of the law, it follows that courts in hard cases (which would certainly include the majority of cases reaching an appellate level) are exercising discretion; and if the court has a discretion about how it will decide the case, the parties cannot have a right to any particular decision.
[ibid]

42). BVerfGE 8 S 326.
(I). Introduction.

In the words of the great French jurist M. Waline, administrative law "is essentially the study of the discretionary powers of the administration and their limitation in view of the need to protect the rights of third persons (citizens or civil servants)." (1) As a matter of fact, the control of discretionary powers held by administrators is one of the basic political problems of modern government. France has seen a great development in this area, particularly after the Second World War. "L' Etat providence" has required a change in the role of the administrator. The job of the civil service is not simply to keep the institutions of government ticking over, but also to participate in the restructuring and development of the society through the state. (2) As legal writers pointed out, traditional ideas of administrators being kept within the limits of the law imply that such limits can be established clearly in advance and are relatively stable. (3) By contrast, the demands of the "etat providence" require great flexibility in transforming the status quo and make it difficult to stake out in advance the limits of powers. In this case, the programme of action replaces the rule of law as the directing force in government.

French law has set out with a distinction between
questions of legality and questions of merits (legalite and opportunite). Judicial control operates on the former only checking that the power has been exercised within the limits set by law but refusing to enter into the appropriateness of the exercise of this power under the circumstances. (4) Such a traditional division has the advantage that questions of legality seem objective, and questions of merits a matter of personal political judgement about which reasonable people could disagree; (5) this distinction does, however, provide too rigid a framework for an effective judicial control over discretionary powers. In view of the strong State intervention, it was deemed necessary for the judiciary to control the justifications given by the administration for its decisions, and to quash decisions which do not have sufficient merit. Whether this amounts to judicial control over the opportunite of an administrative decision is a matter of labelling. Perhaps the best way to describe what has happened is to say that the boundaries between the two categories have been redrawn so that the new grounds of control over discretionary powers better ensure that judicially defined standards of "good administration" are adhered to. (6) The task of the administrative judge is to attempt to balance the public interest and the interests of persons affected by the decisions of the administration. According to Letourner:

"La tache fondamental du juge administratif est, en effet, de concilier les droits de la puissance publique, qui doit necessairement jouir de certains prerogatives pour mener a bien la tache d' interet general qui lui incombe, et
les droits des citoyens qui pour privés qu'ils soient, n'en sont pas moins légitimes. Le juge doit trouver un juste équilibre entre ces prérogatives indispensables à la marche de l'État, et ces droits des particuliers. Or les deux éléments de la balance équitable qu'il lui appartient de réaliser, ne restent pas constants; la "transaction", qu'il parvient enfin à accomplir à un moment donné, devient rapidement, soit insuffisante, soit dépassée, et il faut sans perdre haleine, reédifier un nouvel équilibre." (7)

Nevertheless, this task is one also performed by the administrator and admits of no straightforward solutions. It is, therefore, obvious that judicial views of "good administration" and those of administrators will not necessarily coincide.

Naturally, not all forms of state intervention into the sphere of the individual or any degree of discriminatory treatment can be justified on grounds of public interest. There should be a reasonable proportion between the need for discriminatory measures, in order to attain certain social or economic goals, and the discriminatory treatment of an individual. Therefore, a measure should be declared void if this relationship has been misjudged or ignored. A number of commissaires du gouvernent have argued that a discriminatory administrative measure ought to be justified not only in its principle but in its extent (ampleur) as well. (8) Economic and land development policy, for instance, are by their nature, inegalitarian and their implementation results in discriminatory and selective measures which derogate from the principle of equality and create categories of favoured
persons: "les beati possidentes du droit administratif."  (9)
The instruments of the abovementioned policies are authorizations, licences, agreements, derogations d' urbanisme, etc. These measures are intended to compromise conflicting public and private interests. These intervention techniques are not always contrary to the principle of equality. This is the case, where persons deemed to be in a "comparable situation" with those who benefited from a derogatory administrative measure, may also benefit from the same measure. The notion of "comparable situation" lacks, however, a precise definition and the relevant case-law is not enlightening. It is difficult, therefore, to establish whether a "comparable situation" exists. Moreover, the vagueness of this notion presents a further risk of discrimination and arbitrariness. In practice administrative measures in areas such as urbanisme derogatoire, for example, have a more or less informal character. Usually these measures are not published officially or do not receive adequate publicity. (9a) In addition, the decisions in question do not, in principle, contain a statement of reasons unless otherwise is expressly provided. Thus, the informal character of such decisions may constitute another source of arbitrariness and inequality which evades judicial control.

Given the decline of the traditional tools of judicial control by means of the established principes generaux du droit, the judge had to react, in order to safeguard the
principe de legalite, and to adopt judicial control of the administrative action to the new legal, social and economic reality and ideas. Nevertheless, the instinctive fear of the judge that he might trespass in the area of the opportunite of the administration on the one hand and the complex and mostly technical character of the intervention measures on the other limited his initiatives which remained prudent. The courts began by restoring the status of the principles interdependent with the general principle of equality of treatment such as impartiality, audi alteram partem and the right to judicial review. Since the early 1960s the courts imposed on the administration the control of the erreur manifeste d'appréciation, the obligation to make known to the its motives, (10) the respect of the contradictory character of the administrative procedure, etc. (11) These judicial initiatives, though positive, were insufficient to allow the judge to review effectively the abuse of administrative discretion in areas such as land development policy. A number of legal writers suggested that the judge should elaborate the new principles of public economic law. In the last few years, however, in a somewhat different but, nonetheless, innovative way the Conseil d'Etat has introduced the control of the proportionality of the administrative measures in relation to their objectives. Under this new doctrine the courts are entitled to review any measure whose inconvenience and disutility is excessive compared to its advantages and apparent
utility (le principe bilan-cout-avantage). The effect and the meaning of this new concept in French public law will be the subject of the analysis below.

(II). The Principle of Legality of the Administrative Action.

(i). The Contents of the Principle of Legality.

Le principe de legalite governs the whole spectrum of the administrative action and precedes judicial control. It is the judge, of course, who through his jurisprudence has defined and elaborated the principle in question. It is the administrator, however, who examines first, at the moment when he takes a decision, whether it is legal or not. It is only once a decision has been taken, and provided there is a judicial remedy available, that the judge will examine, in turn, the legality of this decision. Administrative action and its control cannot, nevertheless, be disassociated logically and chronologically. It at the stage of the administrative decision-making process that the problem of legality should, at first, be considered. Furthermore, le principe de legalite applies and is equally binding even in areas where judicial control is non-existent. Indeed, traditionally, there is a category of administrative decisions which escape from the control of the courts. These are essentially the so called "les actes de gouvernament". This doctrine today extends only to the relations of the government with the parliament, foreign states and international organizations. This fact does not prevent, however, these acts from being subjected to le
principe de legalite, even though, in this case, it is not for the courts to check whether the principle has been observed. Thus the scope of the principle in question extends beyond the limits of judicial control.

Legalite can be analysed into three headings. The first is internal legality (la legalite interne) which corresponds to the limitations of the administrative powers. The second is external legality (la legalite externe) which is concerned with the regulation of the administrative powers, and the third one is legality of derogation (la legalite d' exception) which applies in periods of emergencies (war, etc). The question of internal legality is dominated by the fundamental distinction between total limitation of the administrative powers, which is expressed by the legal concept of competence liee, and their partial limitation which is conveyed by the concept of discretionary power. According to Braibant: "la competence d'une autorite est liee lorsque cette autorite est tenue d'agir dans un sens determine sans disposer de possibilites d'apprciation ou de choix." (12) The notion of discretionary power will be examined below in detail. In practice, however, competence liee is not a total restriction, and discretionary power is not an absolute power. As it has been pointedly observed: "la pouvoir discretionnaire est un pouvoir dont il faut user avec discretion..." (13) It is a political not a judicial formula. Legally speaking, in the case of discretionary power, there are a number of limitations which
ensure that the freedom of the administration is not absolute, but subject to the constrains arising from le principe de legalite. Two of these constrains are the judicial control of the erreur manifeste d' appreciation des faits and the obligation of the administration to respect, and this the most important, les principes generaux du droit.

(ia). Les principes generaux du droit.

Les principes generaux du droit have been described by President Bouffandeau as:

"... unwritten rules of law, which have legislative validity and which consequently are binding upon the administration in its exercise of pouvoir reglementaire or administrative discretion in so far as they have not been overruled by some express legislative provision ... they cannot, however, be described as forming a system of customary administrative law as they have, for the most part, only recently been recognized by the administrative courts. These principles are really a creation of the courts originating in equity and have been brought into being so as to assume the protection of the individual rights of citizens." (14)

General principles been introduced to the principle of legality through a broadening of the notion of la loi, a violation of which is ground for review. They have a double action: legal and political. They have been an outstanding feature of the jurisprudence of the Conseil d' Etat since 1944 and they constitute a measure of the intensive influence of the highest administrative court over French public life. The establishment of the general principles as an eminent feature of French public law reveals more than anything else the extent of the authoritative power of the Conseil on the administration
and subjects "l' ensemble de la vie publique francaise a une
ethique dont il definit les elements en dehors de tout texte
ecrit." (15) It is in the development of this doctrine that
le droit administratif has shown its most elastic qualities and
its ability to deal with any situation where, in broad terms,
administrative morality has not been observed.

The political function of the general principles should
not, by all means, be overlooked, considering the fact that
they form the expression of certain political conceptions, that
is, "une representation de l' ordre social dans une societe
determinee." (16) The administrative judge, in deriving these
principles from a given legal and political order, does not
behave in a fundamentally different manner from the
legislature. In exactly the same way as the latter "il se
penchera sur la vie sociale, il tachera de courrir ses besoins,
il se demandera ce qui exige l' equite." (17) In this case
the judge fulfils a quasi-legislative and, therefore, a
political function. Furthermore, a careful consideration of
the contents of these principles, will reveal that they
constitute the translation of a moral code that expresses
"une certaine conception de l' homme dans ses relations avec le
pouvoir" and to which the judge intends to "soummettre l'
ensemble de la vie publique francaise." (18) Thus general
principles of law may appear, at one and the same time, both as
an objective element of the administrative legal order and as
an instrument with a view to the realization of certain
political order.

In the French political system and according to the doctrine of separation of powers the judge can never be a "juge qui gouverne." (19) His role is contained in resolving individual disputes only. On certain occasions, however, it is extremely difficult to adjudicate upon a dispute on the basis of the existing texts because of their gaps or obscurities. (20) In such a case the judge has no choice but to appeal to general principles of law. These must reflect a certain state of civilization, since they will be acceptable at the political level only if they are accepted by the public opinion and correspond to a certain popular consensus in a certain moment of historical evolution. (21) In other words the judge does not create or invents general principles; he simply exposes and formulates them. Sometimes, he extrapolates a principle from a statute that applies a general principle in a particular matter, that is:

"... le juge se livre a une generalisation a l'ensemble du droit de solutions deja consacrees par la loi dans des domain particuliers ... par une demarche inductive, la juge infere donc d'une texte precis l'existence d'une principe plus general susceptible d'autres applications." (22)

Primarily, these principles are deduced as a matter of statutory interpretation praeter legem, based on the assumption that the legislature is anxious to preserve the essential liberties of the individual. Before 1958, the Conseil d'Etat claimed that, in establishing a general principle, it was only interpreting the intention of the parliament:
"Il estime ... que ces principes correspondent à cette volonté et que s'ils n'ont pas été écrits, c'est que leur existence est si certaine, si évidence qu'elle n'a pas besoin d'être constatée par un texte." (23)

This position is basically right and maintained its validity even after the enactment of the Constitution of 1958. This theory is further substantiated by the fact that the operation of a general principle can be excluded by an express statutory provision which constitutes the expression of the legislature's will. The Conseil d'État, in setting the limits of the operation of general principles has ruled that: "aucun principe général même en l'absence de texte n'oblige le gouvernement." (24)

Given, nevertheless, the decisive part of the judge in the shaping of the general principles, it can be argued that they constitute "l'expression d'une pouvoir quasi-legislatif du juge." (25) By virtue of their object and general character they give the impression of genuine rules of law susceptible of multiple and varied applications. Their importance is not only comparable to that of lois but, quite often, is even greater qualitatively as much as quantitatively. They are not less stable than the rules laid down by the legislature given the extreme flexibility of the latter nowadays. In the words of Loschak:

"Alors que la loi reflète souvent un rapport de forces politiques au sein d'une assemblée, le principe découle en effet de considérations d'ordre social ou moral qui revêtent un certain caractère de permanence." (26)
In many cases general principles are introduced by the judge step by step, before they are formally established into the legal system as such. Thus these principles have a relative and evolutionary character. A good example of this is furnished by the evolution of the principle of proportionality in the French legal system. This principle has been developed from the simple requirement that means justify the ends to a requirement of reasonable relation between a decision, its objective and the circumstances under which the decision was taken. Thus understood, proportionality has not been confined to cases involving police measures or a decision to penalize an individual but has also been applied step by step to decisions concerning social and economic ends.

Waline has suggested that the Conseil d'Etat has deduced general principles of law from the "general spirit" of legislation and from public opinion; when the Conseil applies one of these principles it does so in the firm conviction that this principle is a part of the legal system. (27) A special application of this approach to a specific problem is the Ville nouvelle Est decision. (28) There the Conseil ruled that the expropriation of a large plot of land, by means of a ministerial decree, was illegal since it violated a general principle of law, namely, that:

"les mesures administratives portant atteinte a des droits et libertés ne doivent pas être excessives eu égard a la finalité de l' action administrative et la situation de fait concernée." (29)

The following can perhaps be cited as sources of general
principles of law:

a) The first is constitutional documents as the 1789 Declaration of the Rights of Man and the Preamble to the Constitution of the Fourth Republic (1946). Examples include: Liberty, respect of the rights of the citizens, equality in all of its aspects (in taxation, public burdens, access to public services etc.). As Mme Batailler has stated, there is a "tradition constitutionelle republique." (30)

b) Some of the principles seem to have been drawn from private law and civil procedure. Thence come, for instance, procedural rules applicable in the administrative courts even in the absence of specific legislative provisions such as the rule against double jeopardy or the powers of appellate courts over courts of first instance. From the same source come such fundamental rules as are applied even to the purely administrative decision process such as the right to be heard and the non-retroactivity of administrative acts.

c) The residual source is natural law - considerations of justice and equity. Thence the notion that the administration is expected to be fair and just in its dealings with the citizen. Thus the right to review all administrative action by means of the recours pour exces de pouvoir rests on no formal text but constitutes a general principle of law derived from this source. Also under this head comes the countervailing notion, favourable to the administration, of the necessity for the continuity of the public service.
Before 1958, it was generally accepted that general principles of law enjoyed the same status as the lois, that is, binding on the administration but susceptible to be discarded or even contradicted by loi itself (for example, a loi giving a retroactive effect to a regulation contrary to the principle of non-retroactivity of administrative acts). This theory of "valeur legislative" of general principles has been adopted by the Conseil d'Etat which in the Syndicat de proprietaires de forets de chenes-lieges d'Algerie held that:

"... la disposition legislative ... autorise le gouvernament a deroger tant a des dispositions de lois expresses qu' a des principes generaux du droit ayant valeur legislative..." (31)

A number of authoritative legal writers and members of the Conseil d'Etat, in particular, have argued in favour of this theory as well. Thus Bouffandeau, a former president of the section contentieux, who played a great role in the elaboration of many principles stated that they are "regles du droit non-ecrites ayant valeur legislative", (32) while President Odent, after observing that certain general principles are of constitutional status, argued that "aucun d' entre eux n' a une valeur superieure a celle de la loi qui peut toujours y deroger." (33) After the enactment of the Constitution of 1958 the question of the legal force of general principles gave rise to a series of discussions again due to the introduction by Article 37 of the new Constitution of the so-called "autonomous regulations." It was put forward that since this new kind of regulations was not subject to the rule of subordination of
regulations to lois, they also escaped from the obligation to respect general principles of law since the latter were at the same level with the lois.

This argument gave rise to another theory according to which general principles of law (or some of them at least) enjoy constitutional status thus overriding Article 37 regulations. Commissaire du gouvernament Fournier in its conclusions in Syndicat general des ingenieurs-conseils made a distinction between two categories of general principles with which administrative judge will enforce compliance. (34) In the first category belong certain rules of mere interpretation. These are intended to fill gaps that may exist in lois and regulations or to serve as guidelines in cases of obscure legal texts. These principles are to be applied in the absence of clear indication to the contrary in the statute or regulation. They include a number of procedural rules (such as les droits de la defense) governing the functioning of both administrative authorities and jurisdictions. The other category, which is the most important, consists of the principes generaux properly so called. These are the fundamental principles which are contained in the Declaration of the Rights of Man of 1789 and the Preamble to the Constitution of 1946 or which may be deduced from them. (35) The executive, even when acting under Article 37, cannot transgress these principles. For, although the division of powers between the parliament and government is now expressly regulated by the Constitution, the administrative
judge is still entitled, in fact obliged, to examine the validity of governmental action with reference to those principles which constitute the very basis of the republican regime, such as the basic freedoms of the citizen (liberte), equality before the law (egalite), the doctrine of separation of powers, the principle of non-retroactivity and the right to judicial review. Such fundamental rights, which are mostly entrenched in the text of the German Grundgesetz, in France are protected to a large extent by resorting to the unwritten principes generaux.

It is submitted, however, that it is not necessary to accord general principles constitutional status in order to ensure the subordination of regulations issued under Article 37 to them. The Pouvoir reglementaire of the executive, even where it is exercised by virtue of Article 37, is not raised to the level of la loi in the hierarchy of the sources of law. (36) Thus the theory of the "valeur legislative" of the general principles is sufficient to secure their precedence over every category of decrets reglementaires. Professor Chapus suggested that general principles have "valeur infra legislative et supra decretale" (serviteur des lois et censeur des decrets). (37) In other words, the legal force of general principles is inferior to this of la loi but superior to that of subordinate legislation. This implies that while the legislature is not obliged to respect general principles of law, the executive must do so in its decrees. This theory is
connected with an analysis of the hierarchy of authority: the judge who formulates a general principle is subject to la loi while the executive is subject to the authority of the judge. The principles or rather cases where they have not been observed by the administration are sometimes dealt with by French legal writers as specialized examples of violation de la loi, sometimes as matters of incompetence and sometimes as specific applications of detournement de pouvoir. (38)

(ii). Discretion.

The notion of "l'Etat de droit" (such as the Rule of Law and the Rechtsstaat), required the administration to derive its powers from the law and be limited by it. Even in the absence of specific legal restrictions, general principles of law would be added to control the exercise of power. Thus, traditional French descriptions of discretionary power have been essentially negative—in terms of the margin of freedom left by the absence of specific or general legal regulation. (39) By contrast, administrators would argue for a positive definition, that is, in terms of the margin of freedom necessary to carry on a particular administrative enterprise. The tension between these two approaches has posed problems about the proper place of judicial and other forms of control of discretionary powers. The balance between the values of l'Etat de droit and the needs of l'etat providence is a major issue of discussion by legal scholars today. The essence of discretionary power lies in the power of evaluation of facts.
(appréciation des faits). The modern theory of discretionary powers, in France, dates only from the 1930s and is founded on an analysis of the administrative decision. It is this analysis that—even where it is not clearly expressed or explained in these terms—provides the key to the cases, and which is not very different from the type of analysis which serves as the basis for operational research.

Defined as a choice among the means available to attain certain objectives, the decision submitted to the control of the administrative judge, will be an action taken by the administration which, in a given fact situation, aimed at adopting the means best suited to achieve certain goals in furtherance of public interest. Under these circumstances the judge will consider the objectives of the administration and this will inevitably lead to judicial scrutiny of the legal justifications behind the decision in question. The fact situation, separately considered, may raise the question whether the administrative decision is based on materially correct or incorrect facts. Finally, there is the question of the evaluation of the facts in order to establish whether they justify the decision from the legal point of view, that is, "l'ajustement des motifs de fait aux motifs de droit." The distinction between discretionary power and non-discretionary power lies today precisely in the control exercised by the judge over this balancing operation. Power is discretionary if the assessment of facts is not subject to judicial review.
and ceases to be so whenever it is subject to such a review. Furthermore, what at first seems a single act may be broken down into two or more successive decisions—as for instance, in disciplinary matters where the existence of a fault is a legal precondition for the infliction of a sanction and is reviewable, while the choice of the penalty was left, until quite recently at least, to the discretion of the administration. Whether one deals with a single decision or a series of decisions, the question of administrative discretion and its judicial review still forms a coherent whole, although it may, of course, be approached from the different standpoints of the administration or the judge. Unreviewable questions of fact can be classified as decisions on opportunite, while reviewable questions can be labelled as questions of legalite. The correct classification, however, does not automatically result from the inherent qualities of the decision. Legalite, faits and opportunite are not conditions that can precede the judge's decision to review or not the decision on the facts. In any event, the scope of discretionary assessment or decisions regarding the opportunite of a given course of action has been steadily diminishing due to judicial determination to extend the scope of review and thus expand the domain of legalite.

The existence of discretion is typically justified in terms of the difficulty of particular decisions or the need to leave the administration free, up to a certain extent, to
fulfil its duties. These are hardly convincing arguments. Indeed, the best proof of this lies in the scant attention paid by the judge to such a reasoning, whenever he finds it necessary to tighten its grip. The real difficulty in reviewing the opportune of administrative decisions is neither technical nor political but legal; review makes sense only if the judge is in a position to enunciate or explain the rule on which its decision is based. If it is true that no general justification of discretionary power exists, it is equally true that there is no test which could possibly establish whether any particular statutory formula must be read as granting discretionary power or not. Certainly, it is true that the judge will be more inclined towards review of the facts if the criteria which entitle or invite the administrative agency to intervene are explicitly set out in the relevant legislation. But, equally, the judge may refuse to take advantage of a lead given by the legislator or, on the other hand, may decide to review in the face of a total silentio legis. The Conseil d'Etat in its capacity as the final judge decides if, under the circumstances, the arguments of the State or the public carry more weight and whether the moment is opportune to review the merits (opportunité) of any decision taken by the administration in the exercise of its discretionary powers. In any event, the case-law in its attempt to establish a "reasonable scope of discretionary power" has seen a steady decline in the field of discretionary
(a). The Duty of Care of the Administration to the Citizen in the Exercise of Its Discretionary Powers.

It has long been accepted that discretionary power is not the equivalent of arbitrary power. (41) According to the well-known statement of Braibant:

"... meme lorsq' elles ont le pouvoir de faire ce qu' elles veulent, les autorites administratives ne doivent pas etre autorises a faire n'importe quoi." (42)

It is a common ground, on the one hand, that the administration should enjoy a degree of discretion necessary for the accomplishment of its tasks, while, on the other, (implicitly at least) that a reasonable limitation of the administrative discretion is a sine qua non requirement for the effective protection of the citizens' rights. It is for the administrative judge, therefore, taking into account the considerations above "mettre des bornes a l' action de l' administration, sans pour autant en arriver a bloquer cette action." (43) In this context the category of "les actes discretionnaires" has been removed from French legal order since 1902 and every administrative decision can be subject to a minimum judicial control that fetters as much the administration's freedom of action. (44)

Even though the grant of discretionary power leaves to the administration the choice of the means suitable for the attainment of certain goals, it has generally been accepted that the administration should not be left free to take any
decision or to act as it thinks fit, no matter what! (45) This statement, however, raises the question of the exact legal position of the administrative authority enjoying some form of discretionary power. In this case, the administration is not under total constraint: the law leaves it the choice of the contents of the decision to be taken; nor does it enjoy unfettered freedom. It is suggested, therefore, that to every discretionary power granted to the administration corresponds a particular type of a duty of care which can be defined as "un soin attentif et applique." (46) As a matter of fact, the contents of the administrative decision, in many cases, may not be fixed by the law but is expected that the administration will take its decision exercising a minimum degree of care, according to the specific circumstances, requirements and sense of its action. In the words of Waline worth quoting in full:

"L' autorite administrative, lorsq' elle dispose d' un pouvoir discretionnaire, c' est-a-dire du choix entre deux ou plusieurs decisions dont l' une comme l' autre seraient également conformes a la legalite, a au moins une obligation (autre naturellement celle de se laisser guider dans son choix que par le seule consideration de l' interet public) : l' obligation de se placer dans les meilleurs conditions pour faire une saine appreciation de l' opportunite de sa decision." (47)
As in private law where the guardian (tuteur) is under the obligation to act "en bon père de famille", in public law it should be accepted that the administrative authorities are obliged to act "en bon administrateur." In both cases (that is, in private law and in public law, in case of discretionary power) the content of the action is not predetermined by the existing legislation but it cannot, however, be denied that there exists a duty of care limiting the freedom of action of either the private party or the administration respectively. The only difference in this case is that the duty imposed on the administrator was not, until quite recently, subject to judicial control. The use of these concepts could, from this point of view, appear as a demand on the part of the courts on the administrator to show, in the evaluations that underlie the choice of his decisions, a degree of care for the interests of the citizens affected by these decisions. This attitude according to Henry:

"Sans aboutir à une substitution d'appréciation, la sanction qu'elle entraînerait révélerait seulement la distance qui peut exister entre le discrétionnaire et l'arbitraire. Selon le sens même de l'expression s'en remettre à la discrétion de quelqu'un, qui implique une confiance la mesure de l'action de l'interlocuteur l'erreur manifeste permettait de sanctionner alors l'abus de la confiance." (48)

The concept of le principe de légalité, which regards the law as the foundation and the limit of the administrative action, prevents us from considering discretionary power as a sovereign power. The freedom of action vested to the
administration by the law could only be a conditional freedom accompanied by an implicit obligation for its proper use (bon usage). Thus the control of the discretionary action of the administration by means of the doctrines of erreur manifeste and bilan remains indisputably a control of legalité. In this way the opportunite of an administrative decision becomes an element of its legalité. Under these circumstances the requisite standard of care will not be difficult for the administrator to satisfy, being more akin to recklessness rather than negligence. The administrative authority accorded some form of discretionary power therefore enjoys:

"... ni liberté ni contrainte, un contrôle effectué par le juge instaurerait en effet un régime de liberté surveillée qui correspond essentiellement à la nature du pouvoir discrétionnaire d'une administration dont toute l' action est soumise au principe de legalité." (49)

(iii). The Sliding Scale of Judicial Review.

(a) General Remarks.

It has long been established that French administrative courts do not adopt the same attitude to all powers of the administration and that in some areas a greater or lesser degree of control is operated. The general tenor of the law is clear, but the exact details are, to some extent, a matter of debate among writers. Two important points could, however, be underlined: First, there is a sliding scale of review of the grounds offered as justifications for administrative decisions; second, in recent years, the intensity of review in the area of minimum control has been increased by the adoption by the
Conseil d'Etat of concepts such as erreur manifeste, la théorie des directives and proportionality. In broad terms, the long established areas for the control of the motifs offered were two: error of law and material error of fact. The former empowered the Conseil to quash decisions where the decision-maker had made an error of law about the scope of the power exercised. The notion of error of law was extended to the categorization of facts. (50) Given this development, it was easy for the Conseil to decide that it should be verified whether the material facts on which the decision is based do in fact exist. (51) In checking that there is no error of law and that the facts on which the decision is based are materially exact, administrative courts are in a position to ensure that the conditions for the exercise of power by the administration are actually met. This established area of control called is called "normal control" and constitutes the basis of comparison with the other areas.

(b). Categorization of Areas of Judicial Review.

The intensity of review pertaining to different areas has been distinguished by legal scholars. In every area the law must be interpreted properly and the facts must be materially exact. Nevertheless, it is in the area of the 'qualification juridique' (application of legal categories to the fact) that the difference of intensity is felt. The courts will most certainly check whether public authorities have exercised their powers under circumstances which in law justify this step.
They also consider whether the reasons given (motifs) for the administrative decision are accurate. It will not always be the case, however, that the courts will check carefully whether the legal category could properly be applied to the facts of the case. The intensity of scrutiny, in this regard, depends on the nature of the discretionary powers vested in the administration and the nature of the subject-matter in question. Professors Auby and Drago are the leading experts in this area and it might be useful to explain the differences which they see in the way in which discretion is approached:

(1). Minimum Control.

This involves the greatest reluctance to do more than check that there has been no error of law, that the facts are materially exact and, of course that there has been no abuse of power (detournement de pouvoir). (53) In its traditional form, after the Second World War, this did not involve any concern with the question of whether a legal category had properly been applied to the facts. Auby and Drago indicate four areas in which this approach was adopted: (54).

A). General Public Order Measures. Although the category of the so-called "actes de gouvernement" was quickly restricted and, therefore, the Conseil d' Etat did at least have some power of review, it was reluctant to become involved in challenging administrative action concerning public order. This covered areas such as immigration, issue of passports, permission for foreign periodicals to circulate in the country.
etc.

B). Technical Standards. Quite often legal conditions for the exercise of a power involve the determination of some technical issues on which administrative judges have little or no expertise. Accordingly, they refuse to check whether these conditions have properly been applied. Technical criteria such as, for instance, the toxic nature of a product are left to the administrators.

C). Internal Discipline of the Civil Service. The Conseil has much work as a kind of industrial tribunal for the civil service. To avoid a large number of complaints and to prevent a conflict with often political judgements about the appropriate kinds of people in the service, a very limited kind of review has been operated.

D). Where Legal Conditions for the Exercise of Power are not Determined by the Law. In the traditional conception of competence liee and in many early cases involving discretionary powers the circumstances for the exercise of the power were laid down in a reasonably precise manner by the law. In many other empowering statutes the conditions for the exercise of power are left far more vague, requiring the minister to "consider it necessary" or the existence of "public utility" for the power to be exercisable. Many other laws give just a few indications of the set of circumstances under which the power is exercisable, and leave it up to the administration to complete the list. Given the obvious preference of the
legislator that the administration should determine the conditions of its action, the administrative judges have been very reluctant to restrict the liberty thus granted. In this context, it might be appropriate to mention that there two areas in particular, in which the administrative judges have been, until quite recently, unwilling to intervene. The first one is that of powers over the economy, where the wide discretion enjoyed by the executive and the political sensitivity of the issue rendered a vigorous judicial control seem inappropriate. The second one concerns expropriation of property, which was used, especially after the Second World War, not merely for the reconstruction and building of new towns, but also for the restructuring of the agricultural landholding in an effort to improve the efficiency of French farmers. It should be noted that, as we will see below, here the judicial review of the motifs of the relevant administrative decisions has lately been intensified, by the use of the proportionality test, by the courts as a criterion for the declaration of utilité publique. Nonetheless, technical questions of the equivalence of the productive capacity of one agricultural unit with another, are best left to the competent administrative offices, provided the prescribed procedures are followed.

(2). Normal Control.

In other circumstances, especially where the legal conditions for the exercise of power are fairly specific, the
judges have long been willing to examine carefully whether the facts justifying the decision are sufficient to fit within the legal category. This obviously leaves a margin for judgement, for all it has to appear from the dossier of the case is that there are facts of the kind which would justify the decision in law. As it appears from the case-law, however, the Conseil is prepared to say, it just does not think that the case has been made out. (55) To the extent that the criterion adopted is general and involves evaluative judgement, the idea that the law has laid down the standard in advance is more a matter of degree rather than a clear-cut difference from the powers subjected to minimum control.

(3)...Maximum-Control.

In certain cases, the Conseil will check not merely whether the requisite legal conditions for the exercise of the power are met, but also whether the measures adopted are appropriate. This occurs in cases of exceptional public order measures where the freedom of the individual is at stake. The leading case in this area is Benjamin (56) where a notorious right-wing speaker was banned from addressing a public meeting organized by a literary society on a literary theme on the ground that certain left-wing groups had threatened public disorder if he spoke. The Conseil held that the grounds for banning the meeting were insufficient in that it had not been shown that exceptionally serious threats of public disorder were posed and that the only way of dealing with the situation
was to ban the meeting. The latter motif relied on by the Conseil introduces clearly the control of (dis)proportionality of the administrative action in this area, but this fact was not clearly mentioned in the decision above. From this judgement, it may be inferred that the judge does leave some margin for discretion, but is exceedingly scrupulous about the way in which the facts fit a broad discretionary standard.

Such a variety in the intensity of review presents a significant interest from both the theoretical and practical point of view. The categorization proposed by Auby and Drago, however, is perhaps too rigid. There remain areas which are not subjected to judicial control over reasons. Despite the arguments of the commissaires du gouvernement, the Conseil has refused to intervene in matters concerning the administration of schools and prison discipline. (57) These different areas form more of a sliding scale of review than a series of clearly marked steps. The appropriate level of intensity of review seems to be a function of the nature of the subject-matter and the degree to which the legislator has determined in advance the conditions under which the power becomes exercisable. The judge seems to be balancing the need for administrative flexibility, the political sensitivity of the case in question, and the competence of the court against the interference with the liberties of the citizen. Where fundamental liberties are at stake, then even the most general and discretionary power seems to come in for scrutiny.
In other areas, similar words receive more respectful treatment. The degree of determination in advance is also not clear-cut. General words will be used, and so it is a matter of determining which kinds of general issues are best left to be sorted out by administrators, and those which ought to be more closely construed by the judges. Even in the areas subject to maximum control, one cannot expect that the conditions for the exercise of power will be tightly defined by the legislator. What one seeks is, therefore, a sliding scale of the intensity of the review depending on a number of variables considering both the public interest and the interests of the individuals affected by the decision, as well as the respective competences of the administrator and the judge. In more recent years, administrative judges are more eager to review the way in which legal standards are applied in areas traditionally subject to minimum control. This had led to some blurring of the distinction between the various levels of review, but there has not emerged a uniform standard for all areas. The revamped minimum control seems to permit the judge to intervene only where there has been a gross error in applying the legal standard, rather than the greater control operated under the "normal" category. The control has become more intense, but the arguments which weighted in favour of limited judicial intervention remain valid to some extent and continue to affect the approach of the judges.
(iv). L'erreur manifeste d'appréciation des faits.

According to Vincent, erreur manifeste:

"... est un erreur commise par un administrateur dans l'appréciation des faits à laquelle il se livre discrétionnairement pour fonder sa décision et qui s'avère si grossière qu'elle ne laisse place à aucun doute." (58).

The administration has the right to err in its evaluation (appréciation) of the facts of a particular case, but it may not commit a manifest error, that is, a flagrant and a self-evident one. Accordingly, when the administrative courts are convinced that the administration, though making no mistake in its finding of facts, has, nevertheless, committed an erreur manifeste d'appréciation des faits, they are prepared to quash the decision. In English terminology, it is as if the administrative courts were to say that no reasonable administrator could have reached that view of those facts. Erreur manifeste is an error committed in the course of an evaluation (une appréciation), that is, in an intellectual process, and it is analogous, in the domain of logic, to the notion of détournement de pouvoir (misuse of power) in the domain of administrative morality. It is a security valve in the cases of patent injustice. The problem, however, is that it is not always easy to know what is absurd and what is not.

In the words of Braibant:

"L'erreur manifeste apparaît lorsque l'administration a abuse, volontairement ou non, de la latitude dont elle dispose, qu'elle est allée au-delà des limites du raisonnable dans le jugement qu'elle a porté sur des éléments d'opportunité." (59)
In view of what has been said above the following conclusions may be drawn:

(a). The introduction of the concept of erreur manifeste by the Conseil d'Etat in 1961 was intended to extend the domain and the effectiveness of minimum control. (60) The usefulness of this notion lies in the fact that it extends judicial review beyond error of law and to the realm of fact. It is very important, therefore, since it allows an extension of judicial review into areas—such as the use of police powers to regulate immigration or censorship—where the courts had exercised only minimum control. The doctrine of erreur manifeste has now been applied to all the areas of minimum control, thus strengthening it overall. It has been held applicable to general public order measures, such as the ban of foreign journals (a power which has been unqualified by statute) and also to internal management and even discipline of the civil service. (61) This doctrine has also been applied to technical questions, such as the evaluation of the quality of land in rural reorganization; in Guye, the applicant sought the annulment of a ministerial decision concerning the requisition of his property as part of a plan for the reallocation of agricultural land. The Conseil stated that the competent authorities, in evaluating whether the two plots of land were equivalent in terms of agricultural productivity:

"... se livrent a une appreciation des faits qui n'est pas de nature a etre discutee devant le juge de l'exces de pouvoir, il appartient, en revanche, a celui-ci de controller si cette appreciation n'est pas entachee d'erreur manifeste." (62)
A similar approach can be found in the area of economic interventionism; there the discretion left with the administration is commonly very wide. The landmark decision in this area is Maison Genestal. (63) At the time in question - the early 1960s- French law imposed an ad valorem tax on real property transactions for value. There was, however, an exemption for property acquired in the course of certain specified operations, including the regrouping of commercial undertakings. For such an exemption to be obtained it was necessary to have the prior assent of the relevant Minister and the Secretary of State for Finance, who were themselves bound to consult a body known as the Conseil de direction de fonds de developpement economique et social. Maison Genestal were a firm of customs forwarding agents who operated in a number of ports including Le Havre. They were interested in buying an old rice mill in which they proposed to regroup their existing activities. Their application was, however, turned down. The Minister of Construction, who had received an unfavourable report by the Conseil de Direction, felt unable to support the application and his view was supported by the Finance Minister who, in communicating his decision to the Maison Genestal, said only that the proposed operation "did not appear to him, in the general interest, to have sufficient economic advantage to justify his agreement the consequences of which would be a substantial reduction in tax." Against the latter's decision the Maison appealed to the Tribunal administratif at Rouen. In
due course the matter came before the Conseil d'Etat which, in remitting the matter back to the local court, observed that the reasons given by the Minister "were formulated in terms too general to allow the court to judge whether the decision attacked was vitiated by a mistake of fact, an error of law, an erreur manifeste or a detournement de pouvoir" and were accordingly insufficient. That is to say, the court was entitled to look at the assessment by the Minister of a concept as indefinitely expressed as "general economic interest", not to substitute its view of this concept but to see whether there was anything inherently wrong in the reasoning adopted by the Minister. Nonetheless, the decision will be examined not only for an error in law but, and most importantly, for an erreur manifeste d'appréciation des faits as well. In a discussion of this judgement, Coulson concludes that it has opened a new path in the subject-matter of the control of economic interventionism by means of the unusual expedient of judicial control. (64)

(b). Erreur manifeste should, as its name indicates, be obvious, that is, grave, gross, loud and self-evident, to the extent that it could be detected even by a non-lawyer. According to Henry:

"... c'est a ce seul prix qu'elle peut justifier en permettant au juge de ne pas commettre d'injustice majeure s'il s'enferme dans le contrôle minimum."

(65)
Erreur manifeste represents a historic compromise between the worst effects of no control while maintaining the advantages of
minimum control over administrative discretion. (66) As a result of the control of erreur manifeste the administration may no longer claim that its "appreciations" are beyond judicial control. In return the judge abstains from sanctioning administrative errors which do not appear as self-evident from the dossier of the case. The requirement that the error should be patent and flagrant is designed to safeguard the principle of discretionary power but to exclude its most shocking aspects. The control of erreur manifeste imposes on the authority entitled to exercise a discretionary power the obligation to avoid an unreasonable evaluation of the facts, that is, a manifestly erroneous evaluation. The judge examines, therefore, the quality of the evaluation of the facts made by the administration. These limitations, however, do not result in the total extinction of the discretionary powers of the public authorities to evaluate a factual situation, as it happens, for instance, in the case of the qualification juridique des faits (where the administration is no longer master of the evaluation of the conditions of its action which are totally subject to judicial control). Under the doctrine of erreur manifeste the judge is confined to censure an evaluation in the case it offends the reason and common sense, "le flagrant delit administratif." (67). The discretionary power of the administration remains intact as long as it is used in a reasonable manner. In this case, the judge -in his concern to leave free the administration in the choice of 1'
opportunité of the exercise of its power—shall respect the administrative assessments of fact even in the case where he does not agree with them.

(c). Erreur manifeste is a judicial standard, that is, according to Rials:

"... un type de disposition indéterminée, plutôt utilisé par le juge, dont le caractère normatif est l'objet de contestations et qui met en jeu certains valeurs fondamentales de normalité, de moralité ou de rationalité." (68)

As it becomes obvious from the discussion above, erreur manifeste is an error bearing on the assessment of the motifs (erreur manifeste d'appréciation) but it results in the annulment of an administrative decision only if it is gross and flagrant (erreur manifeste). It could be said that an erreur d'appréciation is the maladjustment, the unsuitability of an administrative measure to its motifs. The problem of the administrative appreciation (evaluation, assessment) can be broken down into two questions: the abstract definition of a norm of reference, a standard (such as, for example, notoire medicale or l'equivalence d'emploi etc.) and the standardization of the facts of the case in question, in relation to this norm. If the control of the erreur manifeste consists of the will to detect and sanction the "erreurs", the nature of the control may vary according to the norm of reference (standard) used. An "erreur" assumes a norm of reference in the same way as a mistake assumes a truth, and the nature of its control largely depends on the standard used.
If the law itself does not lay down appropriate standards, then, at the very least, the administration's practice should be consistent in the standards it considers appropriate, unless special circumstances intervene. One way to attain this goal is the use of directives and circulars which since 1983 are opposable against the administration. (69) By allowing the administration to set its standards of action, the administrative judge is merely hoisting the administration with its own petard, and is not substantially interfering with its proper determination of policy. However, it will not always be possible to find or rely on the administration's own definition of appropriate standards. The kinds of factors to be considered or the body charged with the decision may not make central directives possible or satisfactory. Accordingly, if effective control is to be exercised, then the standards will have to be set by the administrative judge. Unlike the traditional case of normal control, the standard here is not clearly defined by the legislator. The application of the legal categories to the facts is a matter of judgement and the answer arrived at cannot be usually be said to be clearly right or wrong. Under such circumstances, the judge confines himself to detecting manifest errors in the evaluation of facts and/or applying the appropriate legal category to them. As commissaire Badouin argued, manifest error is a flagrant administrative wrongdoing which is more or less self-evident and requires little strict inquiry into the facts of the case.
According to Braibant it is "un erreur evidente, invoquee par les parties et reconnue par le juge et qui ne fait aucune doute pour un espirit eclair." This approach, however, does not avoid the need to determine a standard of proper evaluation and then see whether the decision is manifestly beyond that standard. Such a standard does not have to be very precise or finely tuned to different kinds of problems. Rather, it is a broad standard and only serious violations will count. All the same, by setting standards, the administrative judge restricts the freedom of manoeuvre of the decision-maker according to criteria which are not always clearly extracted from the law.

III). The Principle of Proportionality in French Public Law.

(i). The French Theory of Proportionality.

Braibant, the originator of the idea of proportionality in French legal order, contends that this concept endorses a rule of common sense: That one, to use a common expression of the French language, ought not "to crush a fly with a sledgehammer." This concept is more complex than a simple requirement that means justify ends; it requires a reasonable relation between a decision, its objectives and the circumstances under which this decision was taken. Thus understood, proportionality is not confined to cases involving a decision to penalize an individual, but it has also been applied to decisions pursuing social and economic ends. There is a tendency in French legal literature to identify the principle of proportionality with
the so-called doctrine of bilan-cout-avantage. (72) The principle of proportionality implies that the administration shall take no action the overall costs of which are excessive in relation to its general benefits. (73) On the other hand, the doctrine of bilan-cout-avantage constitutes a legal evaluation of administrative decisions by drawing up a balance sheet in relation to the facts, showing the respective advantages and disadvantages of an administrative measure to the public and assessing whether the former associate with the latter. It is obvious, therefore, that proportionality does not exactly coincide with the doctrine of bilan. The latter should, more appropriately, be viewed rather as a test whether or not the means are proportionate to the desired ends.

A number of legal scholars propose a legal analysis of the judicial control of proportionality which avoids considering it as an interference of judicial authority in the exercise of discretionary powers of the administration. (74) It has thus been argued that a disproportionate administrative measure violates a new general principle of law, that is, the principle of proportionality. Any infringement of the new principle will, therefore, be classified under the head of "violation de la loi." This means that, granted that the administrative authority is competent and has acted in due form, the judge will move on to examine the actual content of the administrative act in order to decide whether it conforms with the legal conditions set upon administrative action and
with the general principles of law in particular (the principle of proportionality in casu). Thus, under this theory, a breach of the principle of proportionality will come under the heading of error of law instead of error of fact, which is the present classification by the majority of the legal writers. Proportionality, however, is yet to be recognized as a general principle of law in French legal order, though in the last few years the word "proportion" has been used on several occasions by the Conseil d'Etat in its decisions, the commissaires du gouvernament in their conclusions and legal authors in their works. According to Braibant:

"Even where the concept [of proportionality] is not expressly stated, it is beneath the surface. The French administrative judge, in short, applies the principle of proportionality without knowing or more accurately without saying so." (75)

Costa commenting on this statement added that:

"... de meme que le juge affirme des principes generaux du droit qu' il degage souvent de regles non ecrites, de meme, en matiere de proportionnalite, il fait intervenir dans son activite juridictionnelle une regle non ecrite ou pour laquelle il use de periphrases; mais le principe existe bien." (76)

According to the French theory, proportionality is basically a statement on the status of persons or things that are in certain relation to each other. This relation may be one of logic, size, dimension, height etc. Proportional treatment may, for instance, refer to the procedure for determining the distribution of seats in relation to the number of votes for groups which participated in an election. (77) Disproportionality in this simple sense means an error of
calculation. The administration commits an error in its calculations if it fails to consider some facts during its evaluation of the situation in question. It may also happen that facts are given an incorrect weight: certain facts may be over or under estimated. The administration may, for instance, regard a mistake in the construction of a building as very dangerous for the safety of the public while in reality the mistake is trivial. In these cases proportionality serves as an instrument of ensuring that the administration gathers and evaluates correctly the facts on which an administrative decision is based. In most cases, the criteria for the application of the principle are based on commonly accepted standards of natural science, logic etc. There are cases, however, where the proportionality of administrative action is determined according to certain standards established by the law (e.g. the necessity of the exercise of the police powers vested to mayors in order to preserve public order). Establishing a relationship between various facts is, however, just one aspect of administrative decision-making. Administrative action is usually a complex process of gathering and evaluating facts and applying legal rules to a given situation. Different factors have to be weighted, priorities to be established, legal conclusions to be drawn. Here the principle of proportionality again comes into the picture. In a wide sense, this principle is connected with sound administration, reasonableness and fair procedure. This rather
vague notion of proportionality facilitates an all embracing meaning without any clear boundaries.

As it was said above, the administration may commit errors in gathering and establishing the facts necessary for the exercise of its discretionary powers. These cases could potentially be brought under the heading of proportionality since an error in calculation may result in a disproportionate weighing of facts and situations. Administrative courts will be prepared to quash an administrative decision, based on such a wrong factual background. More complicated, however, is the case of administrative errors in the evaluation of facts and the application of legal categories to certain factual situations (qualification juridique). The assessment of specific facts in the comparative weighing of the whole set of facts may be mistaken; the licensing authorities may, for instance, decide that a planned industrial complex with potentially dangerous characteristics is too close to a residential area or the planning authority may misjudge the relative advantages and disadvantages of a proposed location for a new airport. (78) The judicial review of the evaluation of facts by the administration is a highly controversial matter in the French legal system as it will be illustrated elsewhere in this work. In principle, it seems to be generally accepted that the judge is entitled to review both errors of law and fact up to a certain extent.

Proportionality entails, on the one hand, substantial
guarantees for the citizen against an arbitrary use of discretionary powers of the administration but, on the other hand, its abuse may distort its scope and purpose and turn the administrative judge into judge-administrator (juge administrateur). The new doctrine constitutes a serious guarantee for private rights and interests, especially as far as the right to property is concerned. This can be easily illustrated by contrasting two decisions of the Conseil d'Etat: This of 23 May 1964, Malby - Bedouet, (79) and that of 26 October 1974, Grassin. (80) The facts of both cases are almost identical: An administrative declaration of utilite publique for the expropriation of private property for the construction of an airport in a village of about 1000 inhabitants. In 1964, the abstract notion of utilite publique led the Conseil to find for the legality of the project. In 1974, the application of proportionality and the concrete notion of utilite publique led the same court to annul the project. Both cases will be discussed in detail below.

The application of the principle of proportionality does not constitute a guarantee for the private property only; it also safeguards all the potential interests of those citizens whose conditions of life may be affected by an expropriation. As such interests could be mentioned the exercise of a profession or trade, the exercise of commercial and industrial activity, protection of the environment etc. The application of this principle implies, therefore, a global evaluation of
the advantages and the inconveniences of the envisaged operation. Finally, this global evaluation of the situation and the resulting obligation for the administrative agency to establish all of its motives remedies, in favour of the individual, the lack of co-ordination in land development policy and the expropriations' practice. Indeed, before the incorporation of proportionality into French public law, private property could be expropriated "sans utilite publique reelle." It was enough for the administration simply to submit that the contemplated expropriation would serve a purpose which could be classified as being of utilite publique. Thus it is quite clear that the introduction of the concept of proportionality has restored the traditional role of the judge as a guardian of legalite and patron of civil liberties.

Under the doctrine of proportionality judicial powers of review have considerably been extended. The judge does not merely subjects "motifs du fait" to normal control, but also checks whether an administrative measure is justified in relation to its motives and its aim, that is, he reviews the overall "situation, decision, finalite." (81) This kind of control, however, entails, by its nature, the serious and almost inevitable risk, that the judge can be led to substitute his own evaluations for those of the executive. This would result into calling into question discretionary powers granted to the administration by law and inherent in its action. One may seriously doubt the ability of the judge to deal with
projects which have already been a subject of a public inquiry
and whose technical data have been studied in detail by
specialized administrative agencies. It could, moreover, be
observed that deciding on actual evidence after a long period
of time is going to add to the arbitrariness of the
administration the a posteriori arbitrariness of the judge. In
addition, the idea to weigh the pros and cons of a project may,
in fact, appear quite artificial in certain cases at least. In
St. Marie de l' Assomption case, (82) for instance, the Conseil
compared the utility yielded by a slip road with that of a
psychiatric hospital; or in the cases concerning derogations d'
urbanisme how could one possibly compare the general interest
protected by the provisions of the Reglement d' urbanisme with
the pseudo-general interest served by the derogation from those
provisions; it is difficult to understand and explain where
does this comparison lead and what does it mean. It can,
therefore, be argued that under the guise of comparison and
weighing the advantages and disadvantages of a project, the
judge quite simply reviews a measure which is excessive in
itself, that is, a measure which appears to him as
conspicuously excessive. It is not possible, however, to
decide whether a measure is excessive or not, unless certain
comparisons are made.

If the natural tendency of the judge, in applying
proportionality, is to review every administrative measure
which to his mind is excessive, one should be alarmed by what
Rougevin-Baville, in his conclusions in Ville de Limoge case, called "d' arbitraire a posteriori du juge." (83) It should also be added that this risk did not escape the attention of Braibant who, in his conclusions in Ville nouvelle Est, observed that:

"Naturellement, vous exercez ce controle conformement a vos habitudes et, pour rependre l' expression que le code de deontologie medicale applique a la fixation des honoraires, "avec tact et mesure." (84)

It could therefore be concluded, to cite Lemasurier, that:

"Ainsi le principe 'bilan-cout-avantages' s' il dote le juge d' un arme efficace pour proteger la legalite economique contre les abus de l' administration, s' avere d' un maniement delicat; il exige de ceux qui l' appliquent circonspection et doigte, faute de quoi, il risque de transformer le juge en administrateur." (85)

(ia)...Comparison Between the Doctrines of Erreur manifeste and Bilan-cout-avantage.

The distinction between erreur manifeste and bilan is not always clear and precise. In Braibant's opinion the doctrine of bilan "... n' est qu' un cas particulier du controle de l' erreur manifeste d' appreciation", (86) while Auby and Drago have argued that "la notion d' erreur manifeste vient rejoindre la 'theorie du bilan' ou le 'principe de proportionnalite'. Il s' agit en fait de concepts identiques qui vont dans le sens d' une extension des pouvoirs du juge et la reduction du pouvoir discretionnaire." (87) In Costa's view:

"L' erreur manifeste d' appreciation, censuree par le juge, constitue bien une application implicite aux motifs de la decision administrative du principe de proportionnalite. C'est en realite une disproportion entre les motifs de fat de la decision et le contenu..."
de celle-ci; mais, simplement, pour que le juge puisse utilement la relever, la disproportion doit etre manifeste, c'est-a-dire encore une fois evidente et grave tout ensemble." (87a)

Thus it is frequently maintained by legal scholars that the respective areas of application of the concepts in question coincide and that erreur manifeste could be applied where the application of bilan would result in debatable solutions. (88) Even some members of the Conseil d'Etat seem hesitant as to which of the two concepts should be employed in the case before them. So commissaire Rougevin-Baville, in his conclusions in Ville de Limoge, (89) suggested the application oferreur manifeste instead of bilan, which was finally used by the court. Even Braibant, the proponent of bilan, put forward the use oferreur manifeste for the solution of the problem posed in the celebrated Ville nouvelle Est case. It is the Assemblee generale du contentieux that produced in its judgement the doctrine of bilan as such. (90)

As a matter of fact, this confusion is quite understandable since both doctrines share certain common characteristics:

i). Both notions introduced in the "regime du contentieux du pouvoir discretionnaire" a novel kind of judicial control, non-existent to that point, which constitutes an important innovation.

ii). The kind of judicial control exercised on the use of discretionary powers, within the context of these two doctrines, strongly resembles the control pertaining to the
exercise of a competence liee. In controlling the exercise of both a competence liee or a discretionary power, under these two doctrines, the judge makes virtually the same sort of evaluations. There is a difference of degree however. When the judge reviews the use of a discretionary power he will sanction an erreur d' appréciation des faits if and only if the error is manifest or the disproportionality of a measure only if the latter is unduly excessive. In the case of competence liee, however, a lesser degree of error or disproportionality will do.

Despite their common characteristics erreur manifeste and bilan present certain differences between them. The opinion often advanced contends that their essential difference lies in the nature of the control exercised on the "appreciation discrétionnaire" made by the administration. (91) It has been submitted that the control of erreur manifeste is more objective because only a palpable error is sanctioned, while the judge neither penetrates into the judgement of the administration nor makes a judgement anew. (92) On the contrary, the application of bilan leads the judge to substitute his own judgement—which is inevitably subjective—for that of the actual decision-maker, to the extent that he resumes all the elements in the dossier in order to weigh the pros and cons of an administrative decision. It is exactly for this reason that it is often advocated by some authors the application of erreur manifeste where the use of bilan would be
problematic or unsatisfactory and vice versa. (93) This view implies that these principles can be applied interchangeably with the difference that the control of erreur manifeste can be exercised in a more objective manner. It is respectfully submitted that this approach is doubly erroneous because: first, both doctrines are of the same nature; and secondly, they have clearly distinct fields of application.

The nature of the control exercised by the judge is qualitatively the same in both cases; it concerns a discretionary assessment made by the administration and tends to review only the unreasonableness of such an assessment. In both cases, therefore, the judge penetrates into the exercise of discretionary power since he has to reconstruct the decision of the administrative authority by assessing a posteriori the elements of the dossier. The judge examines, however, only whether the administration has gone beyond a certain degree of error or unreasonableness and whether, in its assessment of the existing situation, it has committed such a grave error that is contrary to common sense. In this case the exercise of a discretionary power by the administration will be incompatible with the public interest, in view of its duty of care in the exercise of such a power. As Bockel has pointed out:

"Et l'on peut aussi bien qualifier ce controle d'objectif (il faut qu'un seuil evident soit franchir) que de subjectif (le seuil est parfois place trop bas, le juge ne laissant pas assez de liberte a l'administration). Il est caracteristique que l'application de chacune de ces jurisprudences [erreur manifeste, bilan] appele des critiques du
While identical in their nature, these two notions must, on the other hand, be meticulously distinguished as regards their respective field of application. The notion of erreur manifeste is intended to control an assessment which has led an authority in the decision to exercise one of its powers believing that the relevant legal and/or factual conditions for its exercise have been fulfilled. When the competent public authority, for instance, has the intention of deporting a foreigner, it must assess his/her behaviour in order to make sure that this behaviour is contrary to public order. The public authority, in this case, enjoys a discretion in making the abovementioned assessment but under the condition that it will avoid committing an erreur manifeste. However, the matter whether deportation is the appropriate measure under the circumstances is subject to the control of proportionality. Thus erreur manifeste has a very specific field of application: the control of the exercise of unconditional powers, for which no judicial control of the "qualification juridique" of facts is exercised (e.g. deportation of foreign subjects). The control of erreur manifeste pertains, therefore, to the first stage of decision-making process in which discretionary power comes to light and the public authority contemplates whether, under the circumstances, use of this power seems to be justified. Accordingly, the concept of erreur manifeste is
expressed by the establishment of a control bearing on the assessment of facts at the beginning of the administrative decision-making process, but not at the stage of the choice of the contents of the particular administrative decision.

This view is supported by the relevant case-law. In Societe Maspero (95) the Minister of the Interior was vested with powers under statute and regulation to ban periodicals provided they "originated from overseas." He used his powers to ban a Cuban review entitled "Tricontinental." It was argued that the statutory definition did not cover the case, but the Conseil d'Etat upheld the ban on the ground that the French edition was a word for word translation of the Cuban original and was not in any sense a new French publication. The Conseil concluded that the ministerial decision was "not founded on materially incorrect facts or vitiated by an erreur manifeste." It is obvious that the concept of erreur manifeste was employed in this case by the court in order to judge whether the administration had rightly assessed the existence of the preconditions for the exercise of its discretionary power to ban this foreign periodical. The foreign origin of a periodical is clearly, in these cases, a precondition for its ban. It is clear that the control exercised by the Conseil in Societe Maspero did not bear on the contents of the ministerial decision in question itself (that is, the decision per se to ban this periodical under the particular circumstances).

Societe Maspero is not the only case that illustrates the
precise role of erreur manifeste in judicial control. Another example will do. Certain practitioners are entitled, because of their higher professional status, to greater financial rewards. A refusal to recognize a practitioner's high status is subject to judicial review on the ground, inter alia, of an erreur manifeste. In Rougemont (96) the Conseil d'Etat quashed a decision of a local medical committee refusing to place a well-known and highly qualified surgeon on a special list, which would entitle him to higher fees as being vitiated by an erreur manifeste. Here again erreur manifeste had been used by the court to review the administrative assessment of the high professional status of the applicant which was a precondition for his registration in the special list of highly qualified surgeons. The court did not deal with the contents of the case itself.

On the other hand, the question that arises in the cases where bilan is used, is whether the administrative authority has judiciously selected the contents of a decision taken by virtue of a discretionary power; in other words, if the administration has chosen the appropriate means to carry out its wishes. Generally, in this case, the exercise of a power by an administrative agency is subject to the fulfilment of a legal condition (e.g., the existence of a utilite publique in the case of expropriation). The contents of a decision may, however, form the subject of a number of further terms and conditions (e.g., the impact of the means used to carry out a
project of utilite publique). It is these further terms and conditions and their impact that constitute the basis of judicial control in the case of bilan; that is whether they are appropriate and adequate to meet the public interest and attain the aim sought. As Braibant has said:

"... le juge verifie alors s'il existe un rapport de juste proportion entre la situation, base de la decision, la finalite recherchee, et la decision elle-meme." (97)

The example of the control of the utilite publique of a project is quite revealing in this respect. Court decisions have, for the last few years, been formulated in a rigorous language; first of all it is established whether the administration has used its powers intra vires, then a control of the "qualification juridique" of facts is made which ends up concluding that, under the circumstances, the operation in question is of utilite publique or not. In Pourlier, (98) for instance, a project of regional development was declared of utilite publique because it would have relieved the traffic problems in the village in question. Then the contents, that is, the advantages and the disadvantages of the project are considered by the judge. In other words, the further evaluation made by the administrative authorities -bearing on the specific conditions and the terms of the project in question- forms the subject of a second examination made by the court, resulting in the conclusion that the disadvantages of the plan under consideration are or are not excessive in relation to its advantages. In the area of expropriation, for
example, it can clearly be seen that two controls of different nature are exercised: The first bears on the question whether expropriation can be used for the execution of the project in question (not an abstract project but the one under consideration). This is the control of the so-called "condition legale" which is carried in concreto in the last few years. The second kind of control is concerned with the specific terms and conditions of the project in order to verify that they are not disproportionate to the desired end. This is the control of the contents of the administrative decision for which the doctrine of bilan is used.

The doctrines of erreur manifeste and bilan have a different function. The former bears on the motifs while the latter on the contents of an administrative decision. For this reason the control exercised by the judge in each case will be of different intensity. The application of bilan implies a more detailed examination of the dossier of the case and the evaluations of the administration. Between these two kinds of control there is a difference of degree but not of quality, since in both cases only unreasonable discretionary assessment will form the object of judicial criticism.

(ii) The Main Fields of Application of the Principle of Proportionality in French Legal Order.

The ambit of the principle of proportionality, in the French legal order, has been extended to embrace some important areas where the judge exercised minimum control only. This is
due to the fact that the evolution of State powers and the lacunae in legal regulation in the respective areas of administrative action led to arbitrary or even scandalous decisions on the part of the administration. This situation brought into light the need for more effective judicial control. The courts reacted by introducing some novel judicial doctrines which enabled a more rigorous control of administrative discretion. One of these doctrines is proportionality. The introduction of the new doctrine caused considerable reaction from legal scholars. (99) In order to placate criticism, the Conseil extended the scope of the new doctrine gradually and only in a few, quite important though, areas of minimum control. Indeed it is a common tactic for the Conseil d'Etat to introduce a new doctrine gradually (e.g., erreur manifeste). The Conseil will first establish the doctrine as a general principle but suggest that it is subject to various qualifications. It may even find some reason why it should not be applied to the particular facts of that case (e.g., Ville nouvelle Est case). The principle, however, is now established. If there are not too many protests, it will be reaffirmed in later cases; the qualifications will gradually be whittled away and the full extent of the new doctrine revealed.

As it was said earlier, in France, the general principle of proportionality has not yet been applied in administrative law as such. There are, however, fields where proportionality
plays an important role. Traditionally, in the area of fundamental rights, the principle of proportionality has been used to safeguard libertes pubilques and control municipal police powers. There has to be a reasonable proportion between the means employed by the administration and its desired ends. French administrative courts examine, therefore, not only whether certain decision is necessary but in accordance with the public interest as well. What seems to be the nucleus of the principle of proportionality, in French public law, is that libertes pubilques should not be restricted more than is absolutely necessary for the protection of public interest. Another application of the principle, in a relevant field, is found in emergency situations. French law allows derogations from the ordinary laws in cases of exceptional circumstances (e.g., war, mutiny etc), but only if these derogations are indispensable to deal with the situation. The Conseil d'Etat, therefore, in the famous "Affaire Canal" quashed a death penalty imposed by a military court, since the derogation from common standards of judicial procedure was not indispensable to achieve the independence of Algeria. (100) Recent case-law has extended the scope of proportionality in the area of disciplinary sanctions inflicted on civil servants. The courts examine, in these cases, whether the penalty imposed on a civil servant for a faute de service commensurates with the nature of this faute. (101) Proportionality has also been applied to cases involving questions of urban planning and land
development. Here, the judge examines whether the encroachments on private property, financial implications and social inconvenience resulting from an administrative measure or project are excessive or not with regard to the public interest (that is, the utilité publique of the project in question).

At this point it would be helpful to give a definition of the key terms of public interest and private interest in the context of the application of the principle of proportionality by the courts. What is meant by the term public interest, in this context, is an action or omission in which the public, the community at large, has some pecuniary or other economic interest, or some interest by which their legal rights or liabilities are affected. It does not mean anything so narrow as mere curiosity, or as the interests of the particular localities which may be affected by the matters in question. It is an interest shared by citizens generally in affairs of local or national government. The term private interest describes a legal concern of an individual, or the position of being affected by something (e.g., an administrative measure), or a title or a right (in property) or an individual pecuniary stake (e.g., in a commercial undertaking etc). The administrative judge has come out with an extensive evaluation of the different public and private interests at stake. Instead of applying an abstract and monolithic notion of public interest, he has pursued a global cost-benefit analysis
The principle of proportionality has been used to ensure that the administration seeks a reasonable conciliation between the different interests affected by its decisions.

(iia). The Application of the Principle of Proportionality as a Safeguard for Fundamental Rights and Freedoms.

The origin of the idea of proportionality, and one of its most important fields of application, lies in the field of fundamental rights and freedoms. The application of proportionality in this area has the following consequences. First, there must be a relationship which is considered as reasonable, adequate or not excessive between the aim pursued by state action and the means used to achieve this aim. Second, the relationship between alternative courses of action and the resulting burdens for individuals must be such, that the least restrictive measure is taken if it is equally effective. The courts should, however, recognize that the administration has certain tasks to carry out and, while it will not be permitted to do by force (or other illegitimate means) what it has no legal power to do, it must be endowed with a general power so as to function with regularity and certainty. This is the basis of the judicial authority to interpret the police powers of the administration. The apparent purpose of police measures is the protection of law and order. To fulfil this task, police measures may have to restrict individual rights and freedoms. Police law permits
these restrictions. They must, however, not extend beyond than is absolutely necessary to attain the objective of police measures.

Two conclusions can be drawn from this rule: First, The police authorities are under the obligation to choose out of various means at their disposal the one that is the least restrictive of the libertes publiques. Second, the police authorities may not take measures that cause disproportionate harm and restriction of fundamental rights and freedoms. Thus in Benjamin case, (102) the Conseil d' Etat held that a mayor, by forbidding the holding of a lecture, had gone further in interfering with the right of assembly, than required by the need to maintain law and order; the court concluded the risk of disturbances was not so acute so that it could not be averted by less drastic measures. To cite the Conseil's own words:

"Il resulte de l' instruction que l' eventualite de troubles ... ne presentait pas un degre de gravite tel qu' il n' ait pu, sans interdire la conference, maintenir l' ordre en edictant les mesures de police qu' il lui appartenait de prendre."

The nucleus of the principle of proportionality may be described as a legal expression of the basic idea that every rule has to be applied equally against all citizens. Equality in the application of law, however, presupposes proportionate treatment, that is, every individual case must be treated according to its special circumstances. Thus in Ville de Dieppe, the Conseil upheld the legality of traffic regulation of the local mayor prohibiting the circulation of private cars,
not all vehicles, on Saturday afternoons because:

"... dans les circonstances de l' espece; les
sujetions resultant pour les riverains de cet
arrete n' excendent ni par leur nature, ni par
leur importance celles que le maire pourrait
legalement leur imposer dans l' interet general." (103)

In addition to the idea of equal treatment, a second idea that underlies the principle of proportionality seems to be the adequacy of administrative action. Enactment, application and enforcement of law do not find purpose in themselves. They are justified by the common commitment to certain basic principles of promotion of human dignity, fundamental rights, welfare and a common understanding of values. The application of law is not an isolated process. The effects of administrative action on individuals have to be weighed. That is why law enforcement may prove to be disproportionate when the means employed by the administration are out of proportion to the objective of a police measure for instance. It may be that the fundamental rights of the citizens are excessively restricted or that, in terms of an abstract common benefit, more harm is done than that which the administration seeks to prevent by its action.


As it was said earlier, the Conseil d' Etat acts as a kind of industrial tribunal for the civil service. (104) In the area of disciplinary action against civil servants the courts have been exercising minimum control only.
Traditionally judicial control in such matters was confined to examining: First, whether the sanction imposed was founded or not on materially inexact facts; (105) and second, whether the facts invoked by the administration were of such a nature as to justify a sanction (qualification juridique des faits). (106) The traditional approach of the judge can be summarized in the idea that "il n' appartient pas au Conseil d' Etat statuant au contentieux d' apprecier si l' importance de la sanction prise par l' autorite administrative est en rapport avec les faits qui l' ont provoquee." (107) This approach has been of long standing, but was reinforced by the purges of office-holders at the liberation (108) and again in the early 1950s when the victims were communist sympathisers. (109)

This conception of a very limited judicial control in this field was mainly adopted for three reasons:

a). The conditions of employment in the civil service are provided by le statut general de la fonction publique. This statute prescribes the scale of sanctions applicable to civil servants found guilty of fautes professionnelles but fails to define which behaviour qualifies as a faute. Therefore, since no legal text clarifies which acts or omissions on behalf of a civil servant amount to a faute professionnelle, it is difficult for the judge to check whether a relationship of reasonable proportion exists between fautes (defined nowhere) and sanctions (which are enumerated beforehand) imposed to penalize them. Thus, the administrative judge, as a "juge de
legalite", felt some difficulty, under these circumstances, in controlling the disproportionality of a sanction to a faute. This is due to the fact that the law provided him only one of the two terms of the comparison necessary for such a kind of control.

b). The second justification for the traditional approach is based on the idea that disciplinary action could be taken not simply because of a faute professionnelle, but on the basis of such a faute combined with the general behaviour of a civil servant. (110) The evaluation of the general behaviour of a civil servant, under punishment, presupposes a thorough knowledge of his/her precedents. This task, according to this view, fitted better to the responsible administrative authority (which was competent to examine fully the background of a civil servant) rather the judge.

c). Finally, it was maintained that a disciplinary sanction inflicted on a civil servant could be the expression of a specific policy on behalf of the competent administrative authority. This could lead, in certain cases, to the imposition of a light sanction in an effort of appeasement or, on the contrary, to the choice of a more severe sanction in an effort to implement discipline in the civil service. Article 31 of the Ordonnance of 4 February 1959 states, inter alia, that a sanction may have an exemplary character (that is, to act as a deterrent for others) provided that "la sanction et ses motifs seront rendus publics."
The refusal of the Conseil d' Etat, however, to exercise any control on the proportionality of a sanction to a faute was not in harmony with the general evolution of the judicial control of the discretionary powers of the administration. Already, since 1967, commissaire du gouvernament Kahn, in his conclusions in the Chevreau case, urged the Conseil "d' ouvrir une breche dans le principe que le juge de la legalite s' est donne lorsqu' il interdit, une fois pour toutes de controler la proportionnalite de la peine a la faute." (111) The court did not, however, depart from its traditional stance. In 1978 commissaire Genevois, in his conclusions in Lebon, argued that:

"En droit, le fait que l' appreciation de l' importance de la sanction par rapport aux faits qui l' ont provoquee constitue l' exercise d' un pouvoir discretionnaire ne vous interdite nullement d' exercer dans ce cas comme toutes les autres hypotheses ou il y a exercise d' un pouvoir discretionnaire par l' administration, le controle de l' erreur manifeste d' appreciation. Sans vous substituer a l' administration vous seriez simplement conduit a censurer une decision en cas de disproportion evidente entre une sanction grave et une faute legere." (112)

A number of legal writers also felt that the lack of effective judicial review in this area could easily lead to abuses. (113) It was hardly satisfactory to leave the administration free to impose severe sanctions for light fautes. In the Chevreau case, (114) for instance, a nurse was dismissed from her job in a home for incurables, because she failed to show (in a moment of tension) gentleness (doucer) to a recalcitrant patient! Such severe penalties for relatively trivial faults seemed to be unfair and unreasonable. According to Braibant:
Le fait pour un agent publique d' arriver un fois en retard à son bureau peut entraîner la revocation alors qu' une malhonnêtete grave peut se traduire par un simple avertissement sans que le juge puisse limiter l' arbitraire et retablir l' équité. " (115)

The Conseil d' État, apparently convinced by these arguments, changed its attitude. The first sign of change appeared in SAFER d' Auvergne c Bernette. (116) It should, however, be noted that this case concerned a sanction imposed on a person which was not a civil servant stricto sensu. Here, the Conseil ruled that the alleged fautes of Mr. Bernette (a staff representative) were not sufficiently grave as to warrant dismissal from his post. In Lebon, (117) a teacher had been charged with indecent behaviour towards very young girl pupils and dismissed by the education authority. The Conseil rejected the appeal of Mr. Lebon, after stating explicitly that the authority had not committed an erreur manifeste and that the penalty was not disproportionate to the offence. The introduction of the principle of proportionality, in the area of disciplinary action in the civil service, was reaffirmed few days later by the same court in Vinolay. (118) Here, the director of a local agricultural committee was dismissed for his delay in replying an inquiry from the Ministry of Finance. It was accepted that this delay amounted to a faute professionnelle but the decision to dismiss Mr. Vinolay was quashed. The Conseil reasoned that:

"... si le manquements aux regles d' une bonne administration qui lui sont ainsi imputes etaient de nature a justifier une sanction disciplinaire ils ne pouvaient legalement fonder, sans erreur manifeste d' appreciation, une mesure de revocation..."
qui constitue la plus severe des sanctions figurant a l'echelle des peines du statut applicable au requerant."

The wording of the abovementioned decision calls for certain comments:

a). The ground for the decision in Vinolay was, in essence, that the sanction inflicted on the applicant had been so disproportionate as to amount to an erreur manifeste d'appréciation des faits. This means that, since the notion of erreur manifeste has been used by the court, both in Lebon and Vinolay, only a manifest, flagrant disproportionality between the faute committed by a civil servant and the penalty imposed on him/her by the competent administrative authority will result in a judicial intervention. It can, therefore, be concluded that when there is just a lack of reasonable proportion between the faute committed and a disciplinary penalty the judge will not intervene. As Auby has pointed out:

"... celui a laisse subsister un certain degre de pouvoir discretionnaire dans la decision d' infliger une sanction en fonction de la faute commise; mais il peut désormais intervenir pour censurer les injustices flagrantes c'est-a-dire le cas ou la sanction est manifestement disproportionnee a la faute." (119)

b). As it was said in Vinolay, the Conseil considered that in view of the faute committed by the applicant (delay in replying an inquiry), the penalty imposed on him (dismissal) was so disproportionate as to amount to an erreur manifeste. The question arises whether this decision introduces the notion of erreur manifeste into the judicial control of the contents
of an administrative decision. As it has been submitted above the control of erreur manifeste pertains to the motifs an administrative decision, that is, it can only be used to control an error in the evaluation of facts which constitute the conditions for the exercise of a discretionary power. On the other hand, the contents of the decision can only be controlled by the judge by applying the principle of proportionality. It is submitted that erreur manifest has been used again, in these cases, by the Conseil to review the motifs of the decisions inflicting on civil servants; it does not affect the control of the content of those decisions as it has been argued by certain legal writers. (120)

The decision to impose a disciplinary action can be analysed into two successive stages, each stage constituting a decision per se. The first is the decision to penalize a faute, that is, whether it is opportune to exercise the power to inflict a penalty in view of the faute committed. The second is the decision on the choice of the appropriate sanction. This stage concerns the balancing between the faute and the penalty to be imposed under the circumstances, that is, the choice and its "adaptation aux fins, et aux motifs." (121) The point to make here is that, if there had not been an erreur manifeste on the part of the administration in evaluating the factual conditions (i.e. the alleged faute in casu) necessary to lead to the imposition of a sanction, there would not have been a disproportionality between the faute and the penalty.
It is the *erreur manifeste* d'appréciation of the gravity of the alleged faute, which constitutes the necessary precondition for the infliction of a sanction, that lead to an imbalance between the faute and the penalty and possibly to gross disproportionality between them. It is clear, therefore, that in these cases *erreur manifeste* operates at the level of the evaluation for the exercise of a discretionary power of the administration (i.e. of the grounds for the imposition of a particular sanction in casu), and not at the level of the choice of the contents of the decision (i.e. the choice of a particular disciplinary measure in casu).

This case-law illustrates the fact that the notion of *erreur manifeste* can be combined with the principle of proportionality in the control of an administrative decision; it cannot, however, substitute for the latter in the control of the contents of that decision. As Bockel concludes:

"... c'est confus si l'on entend par la 'erreur manifeste dans l'appréciation du contenu de la décision' par rapport aux besoins, car la notion d'erreur manifeste n'a jusqu'à présent, jamais été utilisée dans ce sens; il convient d'éviter d'utiliser la même formule pour signifier deux réalisations différentes sans prendre le soin de le préciser. Il conviendrait plutôt de parler de manque de proportion manifeste; mais c'est alors la théorie du bilan autrement dénommée. Ces deux jurisprudences ont donc un champ d'application nettement spécifique, et qu'il importer de préciser afin d'éviter les confusions..." (122)
(iic). The Introduction of the Principle of Proportionality into the Case-law Relevant to Town-Planning and Land-Development.

Undoubtedly, it is not a mere coincidence that the judge de l' excess de pouvoir coined for the first time the doctrine of "bilan-cout-avantages" in a case regarding the expropriation of private property in 1971. (123) Until then the proprietors were practically defenceless against the expropriating authority, unless they managed to establish detournement de pouvoir, on the part of the administration, which has always been extremely difficult to prove. The Conseil d' Etat for a long time responded to the owner deprived of his property and contesting the utilite publique invoked to justify the expropriation in a rather laconic way: That is, the envisaged operation is -or it is not- one of those that could be declared of utilite publique. The court had been failing to address the question whether the operation in question should be carried out in the expropriated plot or elsewhere. (124) The judge was afraid that further control would transgress the field reserved for the administration. Thus he was refusing to control the expediency of the means chosen to carry out the envisaged operation, that its real and concrete social and economic utility. He was content just to verify whether an expropriation presented a character of utilite publique in an abstract and general manner without trespassing on the domain of the administration.
Nevertheless, the landmark decision Ministre de l'Équipment et du Logement c Fédération des personnes concernées par le projet actuellement nommé "Ville nouvelle Est" broke a new ground. (125) The special gravity of this case is underlined by the fact that it was decided by the assemblée plénière (i.e. convening of the full court) of the Conseil d'État. It is in this instance that the idea of proportionality was first given full expression in the French legal order. This is a striking illustration of the readiness of the superior administrative court to extend the control of opportunité in the area of land use planning. The facts of the case were as follows. New faculties of law and letters for the University of Lille were to be built on the outskirts of that city. As experience had shown the undesirability of segregating students from the rest of the population, it was proposed to build a whole new town adjoining the faculties in order to form a single residential and academic complex. To acquire the extensive site required required the usual procedures were set in train. This involved the demolition of some 88 houses which had only recently been constructed. The consequent public inquiry provoked a storm of protest led by a 'Defense Association' of threatened property owners and residents. The 'Association' challenged the subsequent declaration of the Minister that the acquisition was in the public interest (utilité publique). This challenge was upheld by the Tribunal administratif of Lille on the account of
certain procedural irregularities and the declaration of utilite publique was quashed. The Minister appealed to the Conseil d'Etat.

The interest of the judgement delivered by the Conseil lies in its reasoning. Commissaire du gouvernement Braibant argued that given the social importance of expropriation, it was no longer sufficient for the court to state that it does not look into the merits of administrative decisions. Claims of utilite publique could not be taken at face value, but the court had to ensure that a proper case had been made out. The commissaire went on to suggest that the judge should examine whether or not the social and/or financial cost of the project under consideration was "unusually high and without justification in relation to the utility presented by the envisaged operation." He added that the court should also verify in concreto if there existed a utilite publique instead of judging in abstracto "si telle operation est au nombre de celles qui peuvent justifier une declaration d' utilite publique." Judicial control of this kind would secure that the administration would not take "des decisions arbitraires, deraisonnables ou mal etudiees." (126)

This approach was adopted by the Conseil which ruled:

"... qu' une operation ne peut etre legalement declarée d' utilite publique que si les atteintes a la propriete prive, le cout financier et eventuellement les inconvenients d' ordre social qu' elle comporte ne sont pas excessifs eu egard a l' interet qu' elle presente."

Having examined the socio-economic impact of the project in
question the court concluded that under the circumstances, and
given importance of this plan, the fact that its execution
would involve the demolition of about hundred houses was not
such as to deprive it of its character of utilite publique.

Although the outcome was a victory for the Minister, this
judgement marks, as most legal writers have pointed out, a
remarkable extension of judicial control in cases of compulsory
purchase; a realm where hitherto administrative discretion was
almost sovereign, procedural defects apart. Ever since,
administrative courts have been weighing for themselves the
advantages and the disadvantages of a challenged declaration of
expropriation. Only if the balance is in favour of the former
the courts will adjudicate the declaration d' utilite publique
to be well founded.

Practically, in this case there was the dilemma whether,
in order to avoid segregation of the students, the sacrifice of
88 houses was necessary. This question has a political flavour
since it implies certain university policy. The Conseil has,
therefore, placed itself in a position where if it fails to be
very circumspect and discreet, it could be led to take policy
decisions (in the wide sense of this term). Naturally, it is
not desirable for a court of law to be so much involved in
policy decisions, especially in delicate matters.

Nevertheless, this can be somewhat justified because, according
to Waline:

"...ce sont les fautes et les carences de l'
administration qui determinent (et justifient)
les audaces du juge ... si l' administration veut
This balancing of costs and advantages does, however, seem, in the opinion of a number of commentators, to move into the area of merits of the administrative decisions. Braibant, in his conclusions in Ville nouvelle Est, refuted this arguments stating that:

"There is no question that you are exercising in place of the administration the discretionary choices which belong to it; questions such as whether the new Paris airport should be built to the north or to the south of the capital or whether the Eastern Motorway should pass close to Metz or to Nancy remain matters of judgement on the merits. It is only above a certain threshold, in cases where a social or financial cost is abnormally high and has not been justified that you should intervene. That means that your control permits the sanctioning of arbitrary, unreasonable or badly thought out decisions, and it forces authorities to give first to all citizens, and thereafter the courts, should the need arise, serious and plausible justifications for their projects." (128)

The reason for the extension of the judicial control in this area is quite obvious. According to Henri:

"...il devait avoir tout a la fois une fonction curative et une fonction preventive puisq' il s' agissait de sanctionner les decisions deraisonnaibles et mal etudiees et de forcer ainsi l' administration a choisir et a justifier ses projets avec plus de soin." (129)

It is worth noting in this respect that Braibant, in his conclusions, implied judicial control in this area should observe certain limits. Thus he invited the court to act "avec tact et mesure", not to substitute its evaluation for that of the administration and finally to sanction arbitrary decisions
only. (130) This implies that the administration should be granted a margin of freedom in the choice of its decisions. What Braibant proposed, therefore, is not a total and systematic judicial control of all discretionary decisions of the administration, but simply suggested that manifestly unjustified decisions should not be left beyond reach of the courts. Since Ville nouvelle Est the doctrine of bilan whereby the court makes a legal evaluation of the situation by drawing up a balance-sheet showing the advantages and the disadvantages of a project to the public, and assessing whether the former outweighs or not the latter, has been established in the relevant case-law. It may be that there is no direct substitution, in such cases, of the court's view for that of the administration; but it is significant that Braibant draws a parallel with the Benjamin decision which has always been thought at the other extreme of judicial review. Such a parallelism points to the way that the various levels of judicial control in France are coming together.

In its decision in Societe civile Sainte-Marie de l'Assomption (131) the Conseil d'Etat had to deal with a plan to route a motorway in such a direction as to lead to the partial destruction and future restriction of a psychiatric hospital site. The construction of a slip-road off the motorway was held unlawful because regard had not been had to the interests of the inmates of the hospital who would be disturbed by the use of the road on that site. Commissaire Morisot suggested
that:

"... la legalite de l' exercise d' un pouvoir de contrainte suppose que les atteintes portees aux droits et interets publics ou prives, restent proportionnees au profit que, dans l' interet general, on peut attendre de la contrainte exercee."

The court followed its commissaire and ruled that:

"Une operation ne peut legalement etre declaree d' utilite publique, que si les atteintes a la propriete privee, le cout financier, et eventuellement les inconvenients d' ordre social, ou l' atteinte a d' autres interets publics qu' elle comporte ne sont pas excessifs eu egard a l' interet qu' elle presente."

It is worth noting that this decision gave a new dimension to the doctrine of bilan by extending its scope to the balancing between antagonistic public interests: those of a public hospital service as opposed to the traffic circulation on a public motorway in casu. This step has been sharply criticized by some legal writers. It has been argued that, the decision in question, by extending the control of the judge to "atteintes a d' autres interets publics", distorts completely the nature of bilan as initially conceived to protect the citizen against the abuses of the administration. Lemasurier alleges:

"Ainsi detournee de son but, la regle 'bilan-cout-avantages' transforme le juge en administrateur; dans l' espece, le juge se trouve conduit a comparer deux interets publics antagonistes ... mais ces deux interets publics, ..., ainsi respectables l' un que l' autre, sont si fondamentalement differents qu' on [le juge] ne saurait logiquement les comparer, ni etablir, a fortiori quelque hierarchie entre eux." (132)

In Grassin (133) the Conseil quashed the declaration of
utilité publique of a project to construct a category D airport, despite the finding of a public enquiry that local industrial and commercial needs did not warrant anything more than a category C airport. The court took the view that given the local commune's assessment of potential users, which focused on the advantages to the local aero-club, and the proximity of another airport of this type at Poitiers, the cost of 700000 F was "hors de proportion avec les ressources financières de la commune" of around 1000 people. It is interesting to note that the notion of proportionality that remained until then implicit, has been explicitly used in this decision. Ten years before this decision, however, the Conseil adopted in a very similar case, a completely different approach. The facts in both cases were almost identical. The point in question in Malby et Bedouet (134) was, again, the utilité publique of a plan to construct an airport in a commune (Aigle) of around 1000 people. It would be interesting to mention the grounds for the decision in Malby so as to illustrate, fully, the impact of the application of Bilan in the area of expropriation. In this case, the court after considering that the construction of an airport by the commune of Aigle constituted in itself an operation, which could legally be declared of utilité publique, it concluded that it was not for the judge to assess the opportunite of the project in question. It declared, therefore, that the arguments put forward by the applicants - that is, that the operation pursued
by the commune of Aigle was not sufficiently justified by the needs of the local population, as regards air transportation and the exercise of aeronautical sports, and that it exceeded the financial means of the commune—could not successfully be invoked before the court against the challenged administrative decision. The application of the doctrine of bilan in Grassin, however, has been characterized as open to criticism on comparable grounds as the Soc. civile St.-Marie de l'Assomption decision. (135) It has been suggested that:

"... le Conseil d'Etat, qui devait se limiter à comparer les intérêts publics et privés de l'opération elle-même a cru devoir, dans un 'considerant' superflu, comparer, à tort, deux intérêts publics: le coût de l'opération et le montant des ressources d'une commune, jouant ainsi le rôle d'autorité de tutelle, sur la gestion des finances communales." (136)

In Drexel-Dahlgren (137) the Conseil d'Etat quashed a proposed compulsory acquisition by the Prefect of Paris of a town house in the expensive Rue des Saintes-Peres; the court applying the doctrine of bilan concluded that the cost of acquisition and refurbishing (in the region of about 20 million francs) outweighed the advantages of securing the premises as an annex to the overcrowded Ecole Nationale des Ponts et Chausées next door, especially as this grand école was likely to be moving out of Paris in the course of the ensuing 12 months. The Conseil had to strike a balance between two antagonistic public interests; the cost of the operation to the national exchequer on the one hand and the educational needs of a public school on the other. The considerations of financial
interest prevailed in this case. In Comite central d' Enterprise de la BNP (138) it was held by the same court that the expropriation of a plot for municipal offices and a public park did not outweigh the loss of an area for children's camps. In this case the Conseil had to balance two competing social interests. The court, after referring to the Ville nouvelle Est formula, noted that the camps in question attracted a considerable number of children during summer vacations, presenting thus a social interest which was not contested by the administration. Under the circumstances and despite the genuine need for new municipal offices, the Conseil ruled that:

"... ni l' interet qui s' attache a ce transfert, ni ce lui qui comporterait l' ouverture au public d' un parc, ..., ne sont de nature, en l' espece a compenser les inconvénients d' ordre social qui resulteraient de l' execution du projet."

The Application of the Doctrine of "Bilan-cout-avantages" in the Field of Derogations in Town-Planning Conditions.

The Ville de Limoges (139) decision extended the scope of bilan to the area of "urbanisme derogatoire" (derogations in town-planning conditions) which is sometimes described as "urbanisme de complaisance", and where the abuses of the administration are as scandalous as in the area of expropriation. Waline deplored "toutes les constructions hideuses, deshonorates ... qui defigurent nos villes, et contre lesquelles s' insurgent une partie de l' opinion ont pour origine, une derogation a une disportion d' urbanisme." (140)

In view of the inadequacy of the relevant legal provisions -
especially of the Decret de 28 mai 1970 which permits the grant of derogations by means of a "permis de construire tacite"—one could not but welcome the enhancement of judicial control in this area introduced by the aforementioned decision. Until 1973, les documents d'urbanisme did not define any specific reasons (motifs) for which derogations could be authorized. Until then, the administrative courts were content just to ensure that these derogations were justified either on the grounds of a reason drawn from "la legislation de l'urbanisme" or "un motif d'urbanisme." (141) It is clear that under these conditions the control exercised on the discretionary decisions of the administration authorizing a derogation was schematic and very limited.

The judgement of the Conseil d'Etat in Ville de Limoges submitted, henceforth, les derogations d'urbanisme to the normal control of the judge de l'exces de pouvoir on the basis of the doctrine of bilan. The Conseil ruled that:

"Qu'une derogation aux regles prescrites par un reglement d'urbanisme, ne peut legalement etre autorisee, que si les atteintes qu'elle porte a l'interet general que les prescriptions du reglement ont pour objet de proteger, ne sont pas excessives, eu egard a l'interet general que presente la derogation."

Despite its ambiguity, this formula is a clear indication of the willingness of the highest administrative court to limit the abuses of the administration in this area by employing the doctrine of bilan. This decision is all the more revealing since commissaire Rougevin-Baville, in his conclusions, preferred, instead of invoking bilan, to refer to the rather
more customary concepts of erreur de droit and erreur manifeste as grounds for annulment of illegal administrative decisions granting derogations. The commissaire considered the application of the doctrine of bilan as a subtle matter and expressed the fear that its application, in this area, would lead to an a posteriori judicial arbitrariness. The Conseil, however, was anxious to highlight its intention to exercise fully its control on urbanisme derogatoire. Using the above formula, the court substituted, in a satisfactory and adequate manner, for the insufficiency of legal provisions in the area in question. Finally, two circulars of the Ministre de l'amenagement du territoire et de l'equipement of March 19, 1973 and April 24, 1974 respectively (142) reproduced the Ville de Limoges formula and referred to it as "une norme de legalite" underlining thus its importance.

The Development of Judicial Review in the Field of Environmental Protection.

French administrative courts in the last fifteen years, to match the mood of contemporary society, have begun to develop general principles for the protection of the environment. The doctrine of bilan has proved a powerful instrument in the hands of the courts in their efforts in this direction. Thus in Syndicat CFDT des marins-pecheurs de la Rade de Brest a group of sea fishermen in the Brest roadsteads opposed to the creation on the shore of an industrial complex which was planned to include an oil refinery. The Conseil d'
Etat adopting the Ville nouvelle est approach ruled that:

"Un operation ne peut etre legalement declaree d' utilite publique que si, notamment, les inconvenients d' ordre ecologique qu' elle comporte eventuellement ne sont pas excessifs eu egard a l' interet qu' elle presente." (143)

In the instant case, only a small amount of agricultural land was to be acquired, precautions would be taken against the pollution of the sea, and the project did not affect a site classified of special historic or ecological value; accordingly the declaration of utilite publique was upheld.

In Ministre du developpement industriel et scientifique c Arnaud, (144) however, the competent authority was required to examine whether the benefit to the public interest, by ordering the closure of a polluting plant, was balanced by the damage to the economic and social order that would follow from the closure. In Dept. de la Savoie the applicants submitted that the project to construct a nuclear power station could not be held of utilite publique:

"... en raison de l' insuffisance des etudes prealables, du cout excessif de l' operation, des risques que comportent pour l' environnement, tant en cas d' accident que du fait meme de leur fonctionnement, les reacteurs de ce type, enfin de ce que la construction projetee defigurant une region a vocation rurale."

Nevertheless, this claim was rejected, but not before the Conseil had gone through the following lengthy consideration of the facts in the dossier:

"Whereas, on the one hand, the disproportion between energy needs and available resources in our national territory make it necessary to develop the production of electricity by different methods from those traditionally
used; and that, on the other hand, severe requirements are imposed on the builders and operators of nuclear installations concerning the precautions which are taken to maintain the safety of the installations; and that the construction of a nuclear plant in the planned location will not have any severe effect on the environment; that in the circumstances, there appear to be nothing in the dossier to indicate that the project would involve disadvantages, whether financial, economic, from the point of view of safety or from that of the environment, which would deny its character of utilite publique." (145)

In the environmental field the pioneering approach of the highest administrative court has prompted statutory intervention. The loi of 10 juillet 1976 now requires an étude d'impact to be prepared before any governmental project of environmental importance (as specified in the statute) is undertaken. This corresponds to the 'environmental impact statement' of the Federal National Environmental Protection Act of 1969 in the United States. Subsequently we find the vice-president of the judicial section of the Conseil, claiming in a recent interview that as a result of its decision in the nuclear installations case the Conseil, in examining bills, now insists that provisions adequately protecting the environment are included in legislation. (146) It should finally be noted that under EEC Directive 85/337 which became mandatory in all Member States in June 1988 all major land-use projects will require an Environmental Impact Statement containing an analysis of the likely effects of the project on the environment, and the steps the developer proposes to carry out to mitigate those effects. (147)
Innovations of the Ville nouvelle Est Doctrine in Relation to the Traditional Approach to the Control of Utilite Publique.

These can be summarized in the following two points:

i). The control of the judge is no longer limited to the standard finding that "telle operation est entre dans la categorie de celles qui peuvent etre declarees d' utilite publique"; under the new doctrine he examines thoroughly the dossier of each case.

ii). The second and most important innovation is the manner of the examination of the dossier by the judge. According to Waline:

"... [le juge] se reconnaît le droit, en effet, d' apprécier tous les avantages et tout les inconvenients, de toutes sortes, de l' operation envisagee, d' etablir entre eux une balance, de faire quelque sorte la somme algebrique des uns et des autres, et de n' accorder le feu vert que si le solde de l' operation lui apparait, tous comptes faits, positif." (148)

It is important to note that, under the new approach, the judge examines the utilite publique of the envisaged project in concreto. That is, the judge asks himself whether the particular project before him is of utilite publique.

Nevertheless, the real question, here, is how far the administrative judge can go in examining technical matters. Due to the expansion of state interventionism in social and economic matters, the notion of utilite publique has continuously been expanding. At the same time judicial control in this area tended to become less and less effective. To
restore the scope of its control and ensure a better protection of the numerous conflicting interests, the Conseil d'Etat turned, inter alia, to the idea of proportionality as expressed by the doctrine of bilan. This can be explained as follows; Setting standards against which the application of a legal category can be said to be manifestly wrong is possible where, a conception, based on the assumed objective of the legislation, can be developed and articulated to some degree by the administrative judge. The problem with some standards is that they are not capable of such a precise delimitation. A typical example is the concept of utilite publique which is so broad (and deliberately so) that no single conception or a group of conceptions of what amounts to utilite publique will be capable of development in a way which provides adequate scope for flexibility in its application by the administrator. As a result, the Conseil has developed the requirement that there must be a reasonable proportion between the measures taken and the facts of the case.

The Ville nouvelle Est doctrine has been the culmination of an evolutionary process which began in 1968. That year the Conseil replied to an applicant, who pleaded the dangers of the discharge of alumina waste in a nearby shore, that the envisaged operation was not "de nature a porter atteinte a la sante publique ou la faune et a la flore sous-marines, ou a mettre en cause le developpement economique et touristique des regions cotiers." (149) To those applicants who challenged the
utilite publique of a ground reserve, planned to be installed on their plot, the same court replied that, taking into account, "... des aménagements d'ores et déjà engagés et des perspectives d'extension du quartier nouveau ainsi créé, l'acquisition des terrains destinés à contribuer à ces extensions" the project in question was of utilité publique.

(150) The importance of these cases lies in the fact that the Conseil changed its attitude in evaluating the utilité publique of a project. Instead of examining utilité publique in an abstract and general manner, the court went on to analyse the factual circumstances before it, and assessed the possible repercussions of the proposed projects on the particular circumstances of the applicants and the community at large. It was only after establishing that the advantages of the proposed projects overrode their disadvantages that the Conseil declared them of utilité publique. The court did not, however, invoked the principle of proportionality expressis verbis nor it coined a general formula as it did in Ville nouvelle Est. Nevertheless, the above decisions can be seen as a prelude to the introduction of the doctrine of bilan.

Comparison Between Ville nouvelle Est.- Benjamin
Jurisprudence.

The judicial control of the discretionary powers of the administration exercised in both areas in question, is essentially of the same nature: The courts examine whether there is a reasonable proportion between the measures taken and
the facts of the case. The case-law in each of these areas has its own characteristics, which give each one its individuality:

i). In Ville nouvelle Est, three precise and concrete factors were taken into account by the Conseil d'Etat in order to assess the utilite publique of the proposed project: encroachment on private property, financial cost and the resulting social inconvenience. It is worth noting that the court went beyond its commissaire who invoked only the last two factors as criteria for review. The step taken here, therefore, consisted of the comparison of the project's "cout avec son rendement, ou comme diraient les economistes, sa desutilite avec son utilite." (151) This is a classic case of what, in the economists' jargon, is called cost-benefit analysis (bilan-cout-avantages). On the other hand, in Benjamin the court took into consideration only one factor to evaluate the legality of municipal police measures, that is, the need to strike a balance between a liberte publique and a threat to the public order. The Ville nouvelle Est approach implies, therefore, a more extensive and profound analysis on the part of the judge than in Benjamin. Judicial review under the former approach is more extensive because the factors taken into consideration are more numerous and heterogeneous. The judge here has to evaluate three variables instead of one. This fact multiplies the chances that under Ville nouvelle Est, the a posteriori judicial evaluations will finally prevail over the administrative ones. In addition, the control under Ville
nouvelle Est is more profound because a cost-benefit analysis tends to be much more objective. It allows to take into account not only the encroachments of libertes publiques but, for example, the social cost of a measure as well.

ii). In municipal police matters (Benjamin) the judge always has to strike a balance between a private (the liberte publique at stake) and a public (the maintenance of l' ordre publique) interest. In expropriation cases, however, things are rather more complicated. As commissaire Braibant pointed out, in his conclusions in Ville nouvelle Est, here "les interets publics et les interets prives sont souvent intement lies des deux cotes." The St. Marie de l' Assomption case soundly confirmed this view. In this case, the interest of the owner of the property under expropriation was, in reality, a public interest: This of mental patients of a private psychiatric clinic "faisant fonction de public." In this case, therefore, two public interests (traffic circulation and public health) were at variance.

iii). The control of utilite publique goes under the heading of minimum control, whereas municipal police measures are subject to maximum control. This means that the standard (threshold) of disproportionality set by the judge in the former case is higher, stricter and more rigorous. As a result, unlike the Benjamin case-law, the judge in applying the Ville nouvelle Est formula, will not normally intervene where there has merely been a lack of reasonable proportion. He will
intervene only where there is a manifest disproportion (les bilans trop negatifs), that is, an excessive imbalance between the advantages and the drawbacks of the proposed measure. An analysis of the subsequent case-law, however, reveals that it is the unreasonable administrative evaluations which lead to manifestly ill balanced decisions, open to courts' attacks. On the other hand, where there is no excessive disequilibrium between the benefits and the costs of a plan, the administration is entitled to choose between the options available, all of them being equally acceptable.

(iii).--The Doctrine of Bilan as a Test of Balancing Interests.

There seems to be a tendency to use the doctrine of bilan to enable the judge to control the balance between advantages and disadvantages of a special course of action, especially in the field of land use and construction. It is still along the lines of traditional case-law for the courts to overrule an expropriation which is disproportionate, in the sense that its either not necessary to achieve the desired end or excessive in relation to the aim to be furthered by the expropriation. Recently, however, the courts have gone one step further to apply the principle of proportionality, by reviewing whether public interests warrant certain planning decision. It could, therefore, be argued that the judicial control of a reasonable balance between conflicting public and private interests, as for instance in the case of the construction of a nuclear plant
or an airport, results in a comprehensive cost-benefit analysis of an administrative decision. A similar development takes place in German case-law on planning, where the principle of proportionality has been interpreted as a requirement for "just balancing between private and public interests." The same results can be achieved by applying the tests of reasonableness and adequacy in other countries.

In French legal system it would be fair to suggest that, though serious consideration is given to the merits of the decision, the Conseil will not intervene unless the decision seriously lacks rational justification. The precise degree of intervention involved remains uncertain. It is clear that the courts will intervene where there has been manifest disproportion between the measure taken and the facts on which it is based. Given that the notion of proportionality, is relatively subjective and the criteria for deciding whether it has been respected are, therefore somewhat ambiguous, the requirement that the disproportionality of a measure should be manifest, in order to justify judicial intervention, permits the courts to mitigate the subjective character of the principle. It is, nevertheless, still for the judge to evaluate every aspect of the case before him in order to be able to verify, whether the principle of proportionality has been respected by the administration. Whether the courts will intervene where there has merely been a lack of reasonable proportion is unclear, though the kind of decision in St. Marie
de l' Assomption (152) would lead anyone to believe that this is the case. It is clear, however, that the Conseil does not require a strict proportion and will not intervene simply when it would have decided differently. (153)

What is offered, therefore, is a limited extension of judicial power, no longer closely connected to questions of law, or even to the determination of conceptions of policy to be applied by the administration. Rather, we have something more akin to the ground of irrationality in English law, though with a much more searching considerations of facts on which the decision is based. English courts are not yet in the business of quashing decisions to build motorways or airports, or entertaining applications about the construction of nuclear power stations. It has been suggested above that the notion of proportionality involves both a reasonable proportion between the administrative goals and the means used to achieve it, and a requirement that the measures taken by the administration should be the least restrictive of individual freedom and compatible with the desired end. While Braibant's attempt to draw a parallel with the Benjamin decision may suggest that both these aspects are part of French minimum control, this is to be doubted. The cases discussed here concentrate on the balance between costs and advantages and are restricted to ensuring a reasonable proportion between them. It appears that the stronger requirement that the measure be the least restrictive of the individual's liberty is, as far as French
law is concerned, limited to the areas subject to maximum judicial control (e.g., control of public order measures).

IV)....Conclusions.

Lord Reid in a well-known obiter dictum stated that "we do not have a developed system of administrative law - perhaps because until fairly recently we did not need it." (154) This statement, according to Braibant, could slightly be altered, as regards the evolution of the principle of proportionality in French law, to "Nous n' avons pas une theorie developpee du principe de proportionnalite - peut-etre parce que jusqu'a une date relativement recente nous n' en avions pas besoin." (155) It is true that, in France, the function of the principle of proportionality could, partially at least, be fulfilled by notions such as erreur manifeste, detournement de pouvoir or qualification juridique des faits. As it has been illustrated throughout the above analysis, however, in view of the great expansion of state interventionism in virtually every aspect of public life, the principle of proportionality can play an all important role and prove an invaluable instrument of enhancing judicial review and limiting administrative arbitrariness.

Generally, as executive powers tend to become more discretionary in form, the role of administrative courts comes to be more a matter of narrowing the range of l' opportunite which can be accepted as justifying executive decisions. Whereas, it is true that the extension of judicial review can
bring about substantial guarantees for the liberty of the citizen, one has to question whether the subjective views of judges as to what constitutes anerreur manifeste or disproportionate measure is any better than leaving the final say to the administration. The so-called standards to which the judges appeal may generate too much uncertainty for both the citizen and administrator. Furthermore, the acceptability of the developments exposed here depends on whether one considers judicial control to be an appropriate means of containing the power of the executive, despite the political inconvenience this may cause to the adoption of policies necessary for the proper government of the country. Judicial review does not leave the politicians and their advisers an ultimate political power to override criticism which they consider unjustified. The question for a democracy is who is to have the final say. Recent decisions of the courts and their reception by legal scholars would suggest that some consider that the rule of judges is best. (156)
Endnotes.


3). For a general discussion see Debbasch, *D.1967, Chr* 95.


5). Bell, *1986, P.L.99*


8). See e.g. conclusions in Credit Foncier General, CE 12 December 1970.


9a). See e.g. The derogations d'urbanisme permitted by a permis de construire tacite according to the provisions of the Decret of 28 mai 1970.


18). Supra no. 15.

19). Supra no. 15.

20). See Article 4 of the Code civil:

"Le juge qui refusera de juger sous pretexte du silence, de l'obscurite ou de l'insuffisance de la loi, pourra etre poursuivi comme coupable de deni de justice."

21). Supra no. 12 at p. 221.


23). Supra no. 7.


26). Supra no. 22 at p. 83.


29). Supra no 4 at p. 268.


32). Supra no 12 at p. 222.

33). Supra no 32.


35). Both the 1789 Declaration and the 1946 Preamble are reaffirmed to the Preamble of the Constitution of 1958.

36). Supra no 4 at p. 270.


38). Supra no 27 at nos. 703 - 721.


43). Supra no 6 at p. 26. This problem has been analysed by Henry (ibid) as follows:

"Aujourd'hui donc se pose plus que jamais la question de savoir ce que doit être le pouvoir discretionnaire. S'il est conçu comme l' absence de contrôle et donc de sanction, son renforcement actuel peut être générateur d'un arbitraire dont le risque est renforcé par l' omniprésence de l' administration dans la vie de la société. S'il est au contraire conçu comme un simple pouvoir d' initiative de la part des autorités administratives qui pourront toujours voir leurs décisions annulées pour inopportunité par un juge qui se comporterait en supérieur hiérarchique à part entière, c'est la paralysie de l' administration qui est à craindre, paralysie qui peut être aussi dangereuse pour les libertés que son arbitraire."
44). Grazzieti, CE 21 January 1902, S 1903, 111.
45). Supra no. 42.
47). RDP 1973 1752, cf Supra no. 27 at no. 815.
48). Supra no. 43.
49). Supra no. 6 at p. 17.
50). See e.g. Gomel, CE 4 April 1914.
51). See e.g. Camino, CE 14 January 1916.
54). Supra no. 52.
55). Supra no. 50.
56). CE 19 May 1933.
57). See Attard, CE 5 November 1982 and Gaillot, CE Ass. 27 January 1984 respectively.
59). Supra no. 42.
63). Supra no. 10.
64). JCP 1968 I 2203.
65). Supra no. 6 at p. 17.

67). Supra no. 62.

68). Supra no. 66.


70). Supra no. 62.

71). Supra no. 42.


73). See section on German law.

74). Supra no. 4.


78). See e.g. Grassin, CE 26 October 1973.


80). Supra no. 78.

81). Supra no. 75.


86). Supra no. 75.

87). Auby and Drago, *Traite.de.contentieux.administratif*, 3rd
87a). Costa, 1988 AJDA 434
89). Supra no. 83.
92). Supra no. 91.
93). Supra no. 6.
94). Supra no. 92.
97). Supra no. 75 at p. 298.
99). See e.g. Supra no 84, p.551 et seq.
100). CE 19 October 1962.
101). See e.g. Lebon, CE 5 June 1978.
102). Supra no. 56.
104). See p. 34.
105). Supra no. 56.
108). See e.g., Arunin, CE 26 October 1946.
109). See e.g., Barel, 28 May 1954, GA no 91.


112). Supra no. 105.

113). Supra no. 80 at 304 et seq.


115). Supra no. 80 at p. 305.

116). Supra no. 40.

117). Supra no. 105.


120). See e.g. supra no. 123 and no. 6 at 17 et seq.

121). Supra no. 91 at pp. 367 - 368.

122). Supra no. 95 at p. 368.

123). Supra no. 28.

124). See e.g. Groupement de defense de riverains de la route de l'interieur, CE 30 June 1961, Leb. 452.

125). Supra no. 127.

126). Supra no. 88a.


128). Supra no. 130.

129). Supra no. 6 at p. 24.

130). In this connexion Lemasurier (supra no. 89) has stated:

"Ainsi le principe bilan-cout-avantage, s'il dote le juge d'une efficacité pour protéger la légalité économique contre les abus de l'administration, s'avère d'un maniement délicat; il exige de ceux qu'il appliquent circonspection et doigté, faite de quoi il risque de transformer le juge en administrateur."
131). Supra no. 87.
132). Supra no. 89 at p. 561.
133). Supra no. 83.
134). Supra no. 84.
135). Supra no. 87.
136). Supra no. 89.
139). Supra no. 88.
140). Waline, Note on Communy de Marly-de-Roi, RDP.1972 1540.
141). See e.g. Buisine, CE 4 February 1972, Dauder, CE 10 January 1968.
147). OJ L 175, 5. 7. 85, p. 40.
151). Supra no. 80.
152). Supra no. 87.
153). See e.g. Mazubert, CE 22 November 1980.
155). Supra no. 80 at p. 306.

156). See e.g. Supra no. 80, 131 etc.
CHAPTER II: THE PRINCIPLE OF PROPORTIONALITY IN GERMAN PUBLIC LAW.

I). Introduction.

The Grundgesetz sets boundaries and guidelines for political action. Within this framework politicians and administrators act to specify the common weal, from the more general (parliamentary) legislation down to the concrete order to the individual (Law enforcement by the executive). The constitution addresses its commands not only to all public authorities but to the individual as well. As far as the government is concerned, the constitution commands (in the positive) who has to act, to what end and in what manner. From the individual's point of view the constitution commands (in the negative) where and to what extent individuals and social groups are free to act as they wish. In the latter sense the constitution represents a guarantee that the state may not at all, or only to a limited extent, interfere with the citizens' freedom. In principle, basic rights may be limited in order to protect the rights of others and the common weal. Restrictions must accord with the principle of proportionality under which, state power may only encroach upon individual freedom to the extent that it is indispensable for the protection of the public interest. The origins of the principle are not that old. Its earliest tracks can be found in the judicial pronouncements of the late nineteenth century, in which the Prussian Supreme Administrative Court invoked it to control the
discretionary power of the police authorities in the realm of law and order matters. (1) To use the expression of the eminent jurist of the nineteenth century Walter Jellinek: the police ought not to "shoot a swallow with a canon."

The German courts did not base the principle created by them on any implied legislative prohibition against unreasonable exercise of powers, but on a more fundamental and scientific basis of means and ends or cause and effects relationship. (2) Accordingly in the first stage of its development the principle insisted that out of various means available to attain an end, the public authorities should use the most suitable one. But the most suitable means could not necessarily be the one through which the end could be achieved with the least injury to the citizen. Therefore, the courts added a second limb to the first which required that out of several equally effective means to achieve an end, one which causes the minimum injury to the individual must be employed. A third limb has been developed only recently, after the second world war, and requires that the intrusion into the rights of an individual must not be out of proportion to the desired end. (3) Thus the principle of proportionality in its present form consists of three limbs or subprinciples and in short requires that a means or measure must be suitable and necessary for achieving the aspired objective and that means and ends should stand in a reasonable proportion. The three limbs of the principle of proportionality are interconnected and overlap,
but they are still exclusive in the sense that each one of them must be satisfied for the validity of measures taken by the public authorities. The requirement of proportionality is not confined only to administrative measures whether regulatory or benefactory. It has acquired constitutional status and it applies to legislative measures just as it applies to administrative ones. Before explaining the application and function of the three limbs of the principles, some preliminary observations as far as terminology is concerned should be made.


The principle of proportionality is an unwritten constitutional principle that plays an extremely important role in the jurisprudence of the Bundesverfassungsgericht (BVerfGE). At the beginning it was invoked by the Court only reluctantly, not very often and without any visible systematic sequence. Since the Apothekenurteil case (4) in 1958, however, the principle has has been employed much more frequently and covers the whole area of public law, as a standard of constitutionality of legislative acts. The main, but not sole, function of the principle lies in the field of basic rights, where it contributes to the realization and the effective safeguard of the citizens' freedom. It could reasonably be assumed, in view of the significance of the principle for the constitutional jurisprudence, that its structure, systematic position and scope of application should have been clarified. Such a conclusion, however, is far from
truth. The reason for that lies in the fact that there is no
general agreement at basic points as regards the notion and the
scope of proportionality. Beyond the common understanding that
the principle is an integral part of the constitutional law
there is a lot of controversy.

As far as terminology is concerned there is lack of
agreement as well. The BVerfGE classifies the subprinciples of
suitability, necessity and proportionality stricto sensu under
the principle of proportionality in wide sense. In contrast to
this, Lerche (5) puts the principles of necessity and
proportionality stricto sensu under the term of prohibition of
excess (ubermassverbot) from which it excludes the principle of
suitability. The BVerfGE, on the other hand, employs the term
'excess' or 'excessive' just to indicate the principle of
proportionality stricto sensu. (6) The terminology used in
legal literature is also not consistent. Krauss, for instance,
(7) accepts the terminology used by the BVerfGE while Gentz (8)
distinguishes the principle of suitability from the principle
of proportionality (in a wide sense) which comprises of the
principle of necessity and the principle of proportionality
stricto sensu.

Differences in the use of terminology can be considered
as harmless, provided that there are clear definitions and no
confusions as far as the concepts in question are concerned.
The case law of the BVerfGE, however, is not fully clear. The
principle of proportionality (wide sense) refers to a
relationship between a legitimate objective and a state measure, which is necessary for the realization of this objective, and requires that the measure should be suitable for the envisaged purpose. This is according to Larenz (9) an expression of the more profound principle of 'moderation' (Massvollen) or 'fair standards' (Masstabgerechten), so far as it describes a quantitative relationship between means and ends. Whether a measure is suitable for the attainment of certain end, however, can only be judged according to qualitative criteria. The fact that the principles of proportionality stricto sensu and necessity on the one hand, and the principle of suitability on the other, form the general term proportionality, suggests a similarity in the logical structure of these notions which is practically non existent. (10) It would be better, therefore, to exclude the principle of suitability of means from the principle of proportionality (wide sense). The fact that the BVerfGE also employs the term 'Verhältnismassigkeit' both in a wide and strict sense is also quite confusing. Different and more accurate terminology should be used, such as, for instance, the term 'Verhältnismassigkeit' for proportionality in wide sense and 'proportionalität' for proportionality stricto sensu. For the purposes of this paper the terminology used by the BVerfGE has been adopted.

III). Individual Components of the Principle of Proportionality

(a). The Principle of Suitability.
The BVerfGE considers a means as suitable to attain the end pursued "when the desired result can be furthered with its help." (11) More specifically in the area of civil liberties, a statute which restricts a basic right accords with the principle of suitability "if at all able to protect the endangered object of legal protection effectively." (12) These definitions imply a double restriction, above all, on the constitutional review of legislative measures. On the one hand, at first glance, a measure should not be regarded as suitable when it does not seem able to attain fully the desired end. However, the partial realization of the objective in question is considered to be rather enough. This is especially true in the case of legislative measures whose terms do not go far enough as to effect the perspective of success. (13) On the other hand, it is not necessary that the chosen means should actually promote the end at the time of the decision making. The mere fact that a legislative measure has not yet reached the aim pursued by it does not lead to its unconstitutionality. Thus the special tax on commercial long-distance traffic (Werkfernverkehre) was not declared to be unconstitutional, on the ground that the span of time from its enactment had been too short "to establish that the realization of the purpose intended by the legislator is excluded." (14) It has been established in the case law of the BVerfGE, however, that a measure which is considered from the start unsuitable to attain the desired end is unconstitutional. Thus the ban of
'Mitfahrerzentralen', in view of the objective of road traffic safety and the increased protection of individual passengers, and in another case, the requirement to prove experience in retail trade of every commodity, in view of the objective of consumer protection, were declared by the BVerfGE as 'objectively unsuitable' (objektiv untauglich) and 'plainly unsuitable' (schlechthin ungeeignet) respectively. (15)

The BVerfGe makes an ex ante evaluation and considers whether a legislative measure, after the assessment of the relevant circumstances at the time of its preparation, could appear as suitable to the legislator. This process requires fact determinations and predictions which the legislator, accordingly, makes when he sets about to standardize the fundamental rights limits. He can also shift such decisions to the courts and the administration by virtue of open-ended-clauses in statutes. On the one hand, if the legislator had a completely free hand in making fact determinations and predictions which constitute the basis for statute restricting a fundamental right, he could then be able to circumvent the supremacy clause Art 1(3) GG. On the other hand, one should not go as far as to ban the legislator completely from issuing statutes restricting fundamental rights merely because such predictions are too uncertain. The BVerfGE, in carrying out its task of reviewing the constitutionality of statutes, has also along the way, reviewed the legislator's fact determinations and predictions. (16) In the course of this
review, the accuracy of the legislator's practical knowledge, considerations and appraisals is presumed, until they are actually proven to be wrong. (17) It has been widely accepted (18) that the legislator has the right to err (Recht zum Irrtum) about the course of the future development (operation) of a legislative measure; a measure taken as a result of a false prediction on the part of the legislator cannot merely due to this fact be declared unconstitutional. (19) The legislator is, therefore, granted a prerogative to make its appraisals, which, furthermore, is graded according to the peculiarities of the regulated sphere, the possibilities of reaching a relatively certain decision and the significance of the objects of legal protection (Rechtsgüter) at stake. (20)

This classification results in the review of various levels of intensity: mere review of evidence, mainly in the field of economic rights, in those instances where the fundamental rights guaranteeing the freedom of economic activity are only marginally affected; (21) the review of for defensibility (tenability), in the area of basic economic rights, in instances where more certain predictions are possible; (22) an intense substantive review, in those instances where the life or freedom of a person (23) or other fundamental rights are concerned, in the latter case, only if far-reaching restrictions are also involved such as, for instance, the choice of profession. (24) The legislator should, however, after an examination of the actual development and
function of a measure, either amend it or repeal it, if there is a sufficient proof that it is not 'suitable'. (25) Thus the BVerfGE in its decision in the Muhlengesetz case stated that the legislator has the task 'exclusively' (lediglich), if his prediction sufficiently proves wrong, to amend or repeal the measure concerned. (26)

In the view of certain legal writers (27) the above cases suggest that, from the BVerfGE's viewpoint, a measure if after an ex ante evaluation has not been considered as unsuitable, then it cannot be considered as such, if after an ex post evaluation becomes certain that neither it has achieved nor it can ever achieve the desired end. Such a conclusion, however, cannot be sustained from the constitutional point of view; the principle of precedence of the constitution over a statute operates not only at the stage of the latter's preparation, but has a temporal effect as well. These are the limits of the concept of suitability from both the objective and the temporal point of view which narrow its legally material scope and sometimes constitute the expression of its functional limits. These limits are taken into account by the courts during their examination of the suitability of a legislative measure for the attainment of the desired end. The very notion of suitability touches the question whether the legislator can choose between several options to attain its objective or whether a solution is suitable only in the case where it is the only possible one. The BVerfGE has opted for the first opinion.
The principle of suitability has a wide scope of application in the area of German administrative law as well. In enforcing the law, the administrative authorities can employ only such means which are suitable for the accomplishment of the objective of the provisions concerned. The suitability of a measure has to be decided according to objective standards and not according to the subjective judgement of the administrative authority. An administrative measure which does not serve or is contrary to the objectives of the legal provisions in question is clearly unsuitable and therefore impermissible. Equally unsuitable is a measure which is legally or factually impossible to be carried out for the attainment of the legitimate objectives sought. Thus, for example, an administrative directive which prescribes the installation of a plant at a place where according to the natural qualities of the land is not possible or feasible to do so is an illegal directive. Similarly, a person cannot be asked to act in a way which is incompatible with the provisions of private law. Thus one of the owners of an installation cannot be asked to remove the installation. (29) Neither can a tenant be asked to make alterations in the building under his tenancy. (30) Equally impermissible is a command or prohibition whose observance would violate the provisions of any public law. Thus, for example, the police cannot order the owner of a dogs' house to keep the kennels inside the closed rooms in order to prevent disturbance and noise in the neighbourhood,
because the observance of such an order would be incompatible with the law on the protection of animals. (31) It is clear, however, from the case law of the courts that the unsuitability of a measure can be established only very rarely and only in particularly clear cases.

(b). The Principle of Necessity.

Suitable measures, however, can be unduly oppressive. Such measures may be detected when submitted to the test of necessity. This principle, which may also be called the principle of mildest means, requires that out of several suitable means available for achieving the object of law, only those should be pursued which in case of regulatory measures cause minimum harm to the citizen and in case of beneficial measures cause minimum loss to the community. Wolff, for instance, argues that out of public funds only that much be granted to an individual as is necessary. (32) According to the BVerfGE a (legislative) measure is necessary to attain the desired end when "another, equally effective but sensibly less restrictive of a basic right measure, could not have been chosen." (33) Thus, for example, to control disturbance caused by the use of an inn, the inn-keeper need not be fined, taxed or penalized if the disturbance can effectively be controlled by advancing the closing hours. (34) But restriction on the plying of motor vehicles in some streets of a town during limited hours in the night for a few months with a view to provide undisturbed nights to the tourists is not unreasonable.
For the application of the principle, it is necessary that there exist several suitable means to achieve the desired end. In the absence of the possibility of choice, the question of a milder means does not arise. Thus in interpreting Section 4(1) of the Road Traffic Code of 1952 which authorizes the police to withdraw the driving licence of a person who has proved him/herself not fit to hold it, the Bundesverwaltungsgericht held that the partial withdrawal of the licence could not be upheld since the purpose of the statute, that is the protection of the public against the risk of being overrun by some unsuitable driver of power driven vehicles could only be achieved by total withdrawal. So to the question of what can be considered as mildest means, the courts have responded by putting in concrete terms the notion of necessity, in a completely different way from its common language usage. It is of no importance whether a legislative measure is actually necessary. This is due to the axiomatic 'creative freedom' (Gestaltungsfreiheit) proper to the legislator, according to the German legal theory, in the area of standing basic rights, under the 'reservation of the law' (Gesetzesvorbehalt) proviso (e.g, Articles 5, 13 GG). This implies that the legislator can pursue any constitutionally legitimate objective.

The judicial standard against which a measure is tested, is whether it could be substituted by another means which is
'milder' but 'equally effective' in achieving the ends pursued. 'Milder' is the measure which brings about the least possible adverse repercussions in the legal status of the party concerned. A measure can be considered as 'equally effective' when it is suitable to achieve actually and with, at least, equal intensity the desired end. The principle of necessity, therefore, is relative to the extent that the degree of state intervention with the citizens' liberties is defined by the objectives of the law.

Whether one measure is as effective as another cannot be determined in abstracto. The BVerfGE and the other courts as well, deal with this question only in concreto. This affects the classification process undertaken by the law. The high place in which the Grundgesetz puts the human personality justifies a tendency to dispense with the rough classifications scarcely adapted to individual circumstances and to hand over the decision on the particular case by way of abstract legal terms and discretionary provisions, to the judge and the administrator accordingly. Admittedly, the consideration of individual circumstances should not strive so far as to undercut the reliability and the foreseeability of the law.

(37) This implies that the BVerfGE, in the course of its constitutional review, may not undermine the general and classifying character of statutes, which should be preserved, by virtue of the principle of necessity and thus disintegrate the legal system.
Because of the peculiarities of each individual case it is not easy to say when two measures are equally effective. However, from the case law of the BVerfGE, some clues can be extracted as to when two measures are not equally effective. This is the case when a measure with equal intensity of effects restricting basic rights, has even further detrimental effects than another measure. (38) In this way the requirement of licence and the imposition of quotas on commercial transportation, as an alternative to special tax, was quashed because the necessary examination as to whether and to what extent was functionally necessary, stumbled on insurmountable practical definition difficulties. (39) From the same point of view, the permission of multiple operation of pharmacies up to a certain level of turnover was not considered as equally effective measure for the attainment of the purpose pursued by the general prohibition of multiple operation, that is the safeguarding of the drug supply through the 'chemist in his pharmacy' philosophy.

The legislator, however, is not restricted in employing only between one of more equally effective measures available. The BVerfGE has granted the legislative a certain degree of freedom for the evaluation of future (possibly dangerous) situations. The legislator is also entitled to a margin of freedom of action as regards the choice of the appropriate means. (40) It cannot, however, be always estimated which of those measures that seem suitable after an ex ante evaluation
will finally be successful. It is therefore acceptable to pursue one objective by means of a bundle of equally effective measures. (41) This line of case law suggests that the BVerfGE combines, in a similar way, the suitability of one measure with its necessity only in cases where: either after an ex ante evaluation it is certain that an equally effective but less drastic measure can be enacted, or after an ex post evaluation it is established that the chosen measure is far too restrictive in comparison with others. As regards the first case, the BVerfGE in its decision on the prohibition of sale of animal drugs by travel businesses, did not consider this prohibition as necessary, because the end pursued by it, that is, the avoidance of any danger to human health, could be achieved equally well through the restriction of soliciting orders of goods available exclusively at pharmaceutical undertakings. (42) As an example of the second case one could cite the decision of the same court on the expansion of the monopoly of Employment Agencies to the contracts of employees for temporary jobs. Here the court concluded from the facts of the case that this expansion of the monopoly was too restrictive and not necessary.

The principle of necessity has gained a prominent position as an effective means of control of the action of public authorities in the extremely sensitive area of basic rights. One example will suffice. In Berlin in 1968, at the time of the Vietnam demonstrations, the chief of the local
police prohibited a demonstration. Nevertheless, small groups were busy putting small posters on street lamps and other places, inviting the population to join the demonstration. The meeting place was given on the stickers. The police arrested a young man in the act of fastening such a sticker on the wall of a house in a residential area of the city. He was kept in custody overnight and throughout the following day, until the demonstration, which had been authorized in the meantime by the local administrative court, had come to a close. On his complaint the court gave a declaratory judgement to the effect that the arrest was not necessary to maintain public order, since it would have sufficed to confiscate the propaganda material. (43) The decision seems satisfactory at first glance, but it may equally be asked whether the confiscation of propaganda material could have prevented the printing of new material.

(c)...The Principle of Proportionality Stricto Sensu.

The principle of proportionality stricto sensu is intended to ensure that the burden on the individual through the suitable and necessary restriction of a basic right stands in a reasonable relationship to the advantages gained by the public. The principle requires a proper balancing between the injury to an individual and the gain to the community caused by a state measure and prohibits these measures whose disadvantages to the individual outweigh the advantage to the community. According to the BVerfGE (44) "the chosen means and the desired ends

-------------------------
Page 156
should be in a reasonable relationship to each other." This
statement suggests that on the basis of this principle an
ultimate, absolute, established barrier should be built for
public, especially in the field of basic rights which should be
interpreted in connection with the degree of legal perplexity
(Rechtsbetroffenheit) and to the extent of the resulting
disadvantage for the interested party. (45)

A closer analysis indicates that the principle of
proportionality stricto sensu, like the principle of necessity,
provides only a relative standard of judicial evaluation. In
contrast with the principle of necessity, the balance between
means and ends in this case, need not proceed from a
predetermined and fixed objective. The objective pursued in
the case of proportionality can be variable but it is, however,
subject to judicial review. If the legislator were free in the
formulation of the legislative objective, then he could
influence the admissibility of means which ought, simply, not
to be out of proportion to the stated end. Thus it would not
be interrogated, whether the public interest in the postulated
objective were so preeminent so as to justify a severe
prejudice of individual rights. The function of the principle
of proportionality in the area of basic rights therefore,
depends, finally, to the extent that the Grundgesetze, leaves to
the legislation a margin of intervention in the definition of
the purpose of his measures. (46) Means and ends, as the
BVerfGE has stated, must not be 'out of proportion' (nicht
Thus arises the need for a comparison between means and ends, which must be balanced against each other on the basis of their importance.

The scope and depth of the principle of proportionality vary according to the legal encroachment and the sphere of protection of the basic right involved. In the area of regulation of the economy, for instance, the legislature has been granted a wide scope for intervention. (48) In this area, according to the case law of the BVerfGE, the principle of proportionality is infringed only where either the legislator proceeds on the basis of manifestly wrong assumptions or where the intervention measures serve, on reasonable grounds, no purpose of public weal. In other cases, as for example in the area of the freedom of choice of trade, occupation and profession, (49) the BVerfGE held that 'reasonable' (vernuftige), 'objectively justified' (sachlich gerechfertigte) or 'important' (wichtige) grounds of public weal do not provide sufficient basis for restricting the basic right concerned. The Court requires as grounds for restrictions of the abovementioned basic right, the protection of an 'outstandingly important' (uberragend wichtigen) community interests. In the case that the freedom of trade, occupation and profession is to be restricted through the requirement of an objectively granted licence, the same court attaches the condition of 'defence from a probable or imminent serious danger' (Abwehr nachweisbarer oder hochstwahrscheinlich schwer Gefahren). (50) The existence
of the above requirements is subject to judicial review. The criterion used by the courts in this case is the constitutional system of values ('Wertordnung des Grundgesetzes').

Another aspect of the principle of proportionality is that the administrative authorities cannot exercise their discretion as they think fit. They are under an obligation to strike a judicious balance between the community and individual interests and they must avoid to act in a way which will put severe burdens on the existence of an individual. (51) Thus the administration's refusal to issue a character certificate which was necessary for the enrollment of the applicant in an institution of tertiary education was quashed by the Bundesverwaltungsgericht, although the authorities were entitled to do so in case that criminal proceedings were pending against an individual. In this case, criminal proceedings were pending against the applicant but the court held that the adverse consequences of refusal which deprived the plaintiff from pursuing a vocation of his choice guaranteed by Article 12(1) GG exceeded by far any consequential benefit to the society. (52)

Several recent cases on the expulsion of foreigners from the Federal Republic on the ground of conviction by a criminal court furnish further examples of the application of the principle of proportionality. The courts have insisted that in exercising their discretion to expel a foreigner on the ground of a criminal conviction the immigration authorities must
always observe the restrictions resulting from the application of the principle of proportionality. In a relevant case the Bundesverwaltungsgericht held: "The principle of proportionality which substantially restricts the discretion in the matter of expulsion, must be observed. After considering the facts and circumstances of each case, the harm associated with the expulsion must not be disproportionate to the desired end, which includes that between the concrete facts of the case, particularly in terms of kind and severity, and the consequences, that is, between the ends and means must exist no disproportionality." In this case, however, the Court ruled that taking into account the past behaviour of the applicant and his subsequent conviction for causing injury to a co-worker resulting in the death of the latter, the decision to expel him and the consequent impact of it on the behaviour of other foreigners in the observance of law and order, there was no violation of the principle of proportionality. (53)

In two other cases, applying the principle to judge the legality of the rejection of an extension of the permission to live in Germany on the ground of the applicants' convictions for minor traffic violations during their long stay in that country, the same court annulled the decision of the immigration authorities. (54) The Court held that in the matter of refusal of renewal of a permit to stay, on the ground of a criminal conviction, the authorities should observe the principle of proportionality. Accordingly, the authorities
should consider the relationship of the disadvantages associated with the refusal and the consequences pursued. They should also pay attention to the circumstances of each case in terms of length of stay, the degree of economic and social integration of the person concerned, his/her financial standing, his/her contacts in his/her native land and his/her overall behaviour. (55) The law also requires that, in the process of balancing the individual and social interest, the administration should establish a relationship of proportionality between the loss on the one hand and the gain on the other. Account should also be taken of the incidental effects of the administrative action, particularly on third parties. (56) Thus in an area where English courts have generally adopted a policy of non-interference with the administrative decisions, German courts have insisted on strict observance of fairness and proportionality.

The application of the principle of proportionality is, however, subject to certain limits which restrict its scope of application and its effectiveness in protecting the interests of the individual. First, the courts, in deciding on the (dis)proportionality of a measure, normally give weight to the administrative decision and would interfere only when a clear case of disproportionality is made out. Thus the Bundesverwaltungsgericht refused to interfere with a decision of municipal authorities merely because in imposing a fee on the plaintiff for putting up hoardings, they had failed to
establish an exact equivalence between the burden on the plaintiff and the benefit to the community. (57) Similarly, if the law is quite clear about a measure the courts will refuse to interfere with it even if the apparent injury to an individual outweighs the apparent gain to the community. Thus an administrative order for the demolition of an illegal construction, for instance, does not contravene the principle of proportionality. The courts have to recognize that the balancing of interests has to be done not only in the context of one case but in the context of law and order situation in general. (59)

One further restriction as regards the application of the principle of proportionality is the following: When, in accordance with this principle, a public measure may not be out of proportion with the desired end, this does not mean that the balance between these two variables should be deduced from the positive certainty that they are in reasonable relationship to each other. The BVerfGE checks only negatively, whether a measure is unsuitable, unnecessarily harmful to the affected private interest and manifestly disproportionate. This causes considerable restriction to the material importance of the principle of proportionality. This becomes clear from a comparison with the so called principle of practical concordance (praktischer konkordanz). The latter requires that two objects of legal protection (Rechtsgute) must be balanced in such a way, so as to help both to achieve optimal
effectiveness. The finding that means and ends are not out of proportion to each other does not, however, necessarily mean that their relationship is optimum as well. The attitude adopted by the Court could therefore be criticized on the ground that it does not ensure the best possible protection of individual rights.

On the other hand, it is possible to explain and justify the above restriction on the ground of the functional legal limits the BVerfGE tries to respect vis-à-vis the democratic legislator. These limits arise out of the conditions which govern legislative activity in the area of the regulation of basic rights. The legislator classifies the competing constitutionally protected individual and community interests. This task must be fulfilled not only within the framework of the regulation and legal reservations (Gesetzesvorbehalt) set out by the constitution but also within the framework of the unreservedly guaranteed rights as well. The legislator is, therefore, under the duty to solve the competition between conflicting private and public interests. The constitution gives certain guidelines as to how this duty is to be carried out and beyond this point it accords him a discretion to determine the conditions of the classification of the competing interests. The explanation for this concession to the legislator can be found in the principle of the unity of the constitution (Prinzip der Einheit der Verfassung). This is a principle of constitutional interpretation and requires that a
constitutional norm should be interpreted in such a way that it
will not conflict with another constitutional rule. Since the
constitution does not provide explicitly whether one
constitutional rule can take precedence over another, the
legislature is entrusted with the duty to work out a compromise
in such a way so as to secure the relative effectiveness of
both rules.

Non-observance of the principle of proportionality
stricto sensu results not only in the invalidity of an
administrative decision but, as some legal authors maintain,
can also constitute a ground for claiming damages from the
state, if the authority concerned knew or could have known that
its action violated this principle. (60)

IV). The Principle of Proportionality and the Notion of
Reasonableness in the German Public Law System.

A number of legal writers and court decisions have quite
often stressed the close relationship between the principle of
proportionality and the notion of reasonableness
(Zumutbarkeit). Bettermann (61) has described the principle of
proportionality as a restriction of unreasonable burdens while
Ersehen (62) has argued that a public measure is acceptable to
the extent that the burdens it entails for the citizen are kept
within reasonable limits; finally, Steinberg has contended that
the idea of reasonableness is founded on the principle of
proportionality. There is no dearth of cases which illustrate
the relationship between the notions in question as well. The
Bundesgerichtshof ruled that the principle of proportionality had been violated because a tax authority imposed an 'unreasonable burden' on the applicant by pursuing the forced sale of a plot of land (on which the authority had a mortgage) valued at 60000 DM in order to collect outstanding debts of about 500 DM. (63) The Bundesverwaltungsgericht stopped the transfer of an army officer, on the grounds of certain political views he expressed while on duty, as being incompatible with the principle of proportionality. The court added that the official necessity of the contested measure could only be accepted when the prejudice to the public interest could not be remedied in a reasonable way other than the transfer of the applicant. Likewise, the same court, pronouncing itself upon the legality of paragraph 3 Abs 152 WPfLG (Military Code), which imposes on the servicemen the duty to wear uniform outfits, recognized that the limit of reasonableness derived from the principle of proportionality must be observed.

The BVerfGE, in particular, often connects the idea of reasonableness with the principle of proportionality. In its decision on the Law on the Compensation of Witnesses and Expert Witnesses the Court stated that the principle of proportionality required that the means used (by a public authority) must be suitable and necessary to achieve the desired end and that the 'limit of reasonableness' justified by the balance between the difficulty of the operation and its
importance (for the public interest) should be observed. The Court came into conclusion, however, considering the facts of the case, that the 'limit of reasonableness' had been observed; from this, it inferred that the legislative measure in question did not infringed the principle of proportionality. (65) The relationship between proportionality and reasonableness is further illuminated by two further decisions of the BVerfGE. The first case (66) concerned the constitutionality of the prohibition of the planting of new vines. The Court said that the principle of proportionality is complied with when the restrictions imposed by public authorities (on individual rights) are reasonable and added that proportionality required 'reasonableness of means' in relation with the desired end. In the second case (67) concerning the Law on the Legal Relationship between Tax Consultants and Authorized Tax Agents, the same court held that the restrictions imposed on the professional activities of the applicant were unreasonable and therefore in breach of the principle of proportionality.

Considering all the above, it becomes clear that there is a certain relationship between proportionality and reasonableness. The abovementioned legal literature and case law suggest that the idea of reasonableness is either identical or at least interchangeable with proportionality. This is not surprising since both concepts can be considered as aspects of the more general (Uberpositiven: superlative) idea of equity (Billigkeit: Justice). (68) The idea of equity is to be
understood within the framework of the requirement of justice for the individual. The latter constitutes an integral part of the Rule of Law; (69) both reasonableness and proportionality are therefore covered by the Rule of Law which is a generic term. It could thus be argued that both notions share a common foundation. There are, however, qualitative differences between reasonableness and proportionality that make necessary the distinction between them. This differentiation is not only in the interest of conceptual clarity but is also necessary where the principle of proportionality, in contrast with reasonableness, is not applicable.

The starting point for proportionality is the existence of two variables, that is, a means and an objective pursued through the former. These variables stand in a certain relationship to each other which is evaluated in accordance with the standards of suitability, necessity and proportionality stricto sensu. Proportionality can therefore be applied only where the facts of the case make possible the contrast between means and ends. For sets of facts characterized by other circumstances the principle of proportionality has been proven irrelevant. Lucke (70) cites as an example the various (neutral) actions in the field of fiscal law, where in any case concerning the enforcement of judicial decisions, the state acts through its organs in a neutral mediating role between the creditor and debtor. On the other hand, the notion of reasonableness does not assume any
relationship between any two variables. It rather represents an evaluation standard. This standard is used to assess whether the particular circumstances of the person concerned allow the fulfilment of certain duty by him/her or not. Thus, while the principle of proportionality provides an objective standard of a means-ends relationship, the idea of reasonableness constitutes a subjective, unilateral standard for the assessment of the totality of circumstances of the case to which it is to be applied.

It is obvious that, because of the differences illustrated above, the idea of reasonableness cannot be said to derive from the principle of proportionality. It is possible, perhaps, to put forward the idea that reasonableness is an independent general principle of law in the German legal order. Some authors (72) have argued that the principle of reasonableness can be derived by an analogy with Article 242 BGB (Civil Code) in the area of public law as well. Civil law literature considers Article 242 BGB as the main legal foundation of reasonableness in private law where it is used as a criterion of the limits of the obligations of parties to each other. Since Article 242 BGB is considered as a 'supercontrol norm' for the whole field of private law and indeed large parts of German law outside it, (74) it really makes sense to consider this provision as the legal basis for the application of reasonableness in the domain of public law as well.
V). The Rule of Law (Rechtsstaatprinzip) as a Foundation of the Principle of Proportionality in German Legal System.

The philosophical concept upon which the Grundgesetz is based is that of a free democracy governed by the Rule of Law (Rechtsstaatprinzip). Its core is the liberty of the individual which is derived from the liberty of human being and his/her right to self-determination, that is, his/her right to decide on the pursuit of happiness for him/herself. Liberty is vested in human beings by nature; consequently the constitution is laid down to guarantee liberty not to grant it. Applying the constitution in the sense of shaping political life according to the patterns laid down therein may be expressed in structural terms—that is, who is to apply the constitution, why and how?—and substantive terms—that is, the principles shaping the analysis of specific objectives, definition of goals and choice of means. If the constitution is the supreme measure for the political and social order of state, then the question arises as to what is the essence of this measure: structure or substance? That is, whether the institutional components (organization, management, procedure) or the substantive elements (value system, goals, ends) prevail.

Recent developments in the BVerfGE's case law (76) as well as in legislation (77) and legal literature (78) tend to apply the constitution in substantive terms, as basic value principles for state action. The idea is that the general rise of the positive—namely the social state made alternative
thinking about the function, interpretation and application of
the constitution inevitable. One can no longer be content with
securing justice by defining the inherent boundaries of state
institutions. Rather one should develop on alternative
conception of the "just" in matters of state powers, a
conception of substantive measures, values found into the
constitution and converted into politics. The essential
elements of the Grundgesetz are summarized in the formula "free
democratic basic order" which the BVerfGE has defined as "an
order determined by the Rule of Law, based on self
determination of the people according to the will of the
respective majority, and on liberty and equality excluding any
rule of force and arbitrary rule" (79)

A German jurist looks both at the substantive as well as
formal aspects of the Rule of Law. The basic elements of the
substantive Rule of Law are expressed in articles 1, 19(2), 20
and 79(3) of the Grundgesetz. These provisions provide among
other things for the inviolability of human dignity and its
respect and protection by all state authorities; subjection of
the legislature, executive and judiciary to basic rights;
establishment of a democratic and social federal state;
exercise of the state authority by the people by means of
elections through specific legislative, executive and judicial
organs; subjection of legislation to constitutional order; and
the unamentability of these provisions and principles even by
process of constitutional amendment. The entire chapter on the
basic rights strengthens the concept of substantive Rule of Law.

The material Rule of Law requires the realization of a just legal order. Above all it demands that state power is subject to substantive, definite and unamendable principles of the constitution and material basic values, and the emphasis of the state activity is not primarily on the drawing up of a scheme of formal guarantee of freedom. Rather it is on the attainment, preservation and grant of substantive justice within the sphere of the state and spheres susceptible to state influence (80). The Grundgesetz does not consider the state as value in itself. The state obtains its value by securing the liberty of the people. This is underlined by the fact that the first section of the Grundgesetz is devoted to basic rights. The function of the state to secure the liberty of the people and of each individual requires a strong state capable of defending law and justice. The underlying paradox of the Rule of Law democracy as constitutional government is this: Freedom requires the observance of certain rules -rules threaten liberty. Ironically the state's very attempt to maximize freedom can result in the opposite effect of minimizing the freedom of the citizen. The answer of the liberal Rule of Law to this problem is leaving as much as possible liberty to the individual by guaranteed basic rights, democratic participation and separation of state functions. The principle of proportionality, which constitutes a substantive element of the
Rule of Law, has an important role to play in this context. Nobody should inhibit fundamental human rights, one should infringe on individual rights only if and as far it is inevitable due to a compelling public interest. Limits on freedom demand justification in terms of objects meriting legal protection, either of an individual or of the community.

Neither the principle of proportionality nor any of its components are expressly mentioned in the Grundgesetz. Notwithstanding, proportionality has unanimously been considered as an unwritten constitutional principle, (81) binding on the legislature, executive and judiciary, partly in its own right and partly as derived from other expressly mentioned constitutional principles. The BVerfGE has held that:

"Constitutional law does not consist merely of the single sentences of written constitution, but equally of certain general principles and leading ideas that were not formulated by the drafters of the constitution as explicit legal rules because these ideas formed the preconstitutional global picture in which they originated". (82)

The same court in a later case stated that the principle of proportionality was a consequence of the constitutional state or the principle of the Rule of Law and resulted essentially from the very nature of the basic rights, which as as expression of the demand of the individual for freedom vis-a-vis state power could be restricted only to the extent which is indispensable for the protection of the public interest. (83)

As far as the basic rights of the individual are
concerned, the constitution is applied primarily in a negative sense. It restricts every action of the state—if permitted at all—to cases of compelling common necessities and leaves space—as much as possible—to the individual's liberty. According to their history and present contents, basic rights are primarily human and civil rights, which aim at protecting concrete, especially endangered spheres of human freedom. (96) The individual is both the model and the measure of objective legal order. (97) The focus of the constitutional supervision is the individual; the criterion is exclusively the law. In this way, individual interests appear to take absolute priority, prevailing over legitimate majority interests and becoming a medium for the realization of these interests. (98)

Although the liberty of man is the starting point of the Grundgesetz philosophy and the purpose of the state, the citizen has to acknowledge that unlimited freedom for the individual would endanger and sometimes destroy the freedom of his/her fellow citizens. To secure the liberty of all people, the constitution provides legal possibilities to limit individual rights in favour of others (99) and in favour of the community (100) if this is necessary to enable it to perform its protective function. The idea of the individual underlying the Grundgesetz is not that of an isolated sovereign individual; instead the constitution has decided the conflict between the individual and the society in the sense of an individual based on society and tied to society, without,
however, affecting the individual's intrinsic value. According to the BVerfGE: "The individual to whom the provisions of the Grundgesetz apply, is not merely an autonomous individual; but is rather a person who of his/her own volition integrates him/herself into the political community." (101) This means that the individual has to submit to these restrictions on his freedom of action, which the legislator sets up, within the limits of what can generally be required in given circumstances, to maintain and advance social life, provided that the autonomy of individual is guaranteed. (102)

The formal Rule of Law demands that all state activities be based on laws justified under the constitution, and that in case of unlawful exercise of power by the state, the citizen has a legal remedy in an independent court. In German legal jargon a state which combines the ordinary and administrative jurisdiction is a judicial state (justizstaat) while a state that keeps these jurisdictions separate with equal independence to their judges is a state based on the Rule of Law. The Rule of Law in that sense is fully embodied in the constitution and the German legal system. The principle of legality with its two limbs - primacy of law and requirement of law - is now well established. Certainty in laws is required, and laws delegating legislative powers to the executive in uncertain or vague terms making the prospective subordinate legislation unpredictable and uncalculable have been annulled by the courts for violation of the Rule of Law. As regards the propriety of
motifs, the law required that at the time of making the bye-laws, all the relevant considerations should be taken into account and second, the bye-law should not be manifestly disproportionate in its operation and application.

The right to approach the courts in case of infringement of any right by any public authority is one of the basic rights enumerated in the Grundgesetz. The independence of the courts to be so approached has been fully ensured in the constitution. The principle of separation of powers which is considered to be an integral part of the Rule of Law has been fully recognized. The Rule of Law both in its material and formal sense is thus well established in the German legal system and controls as well as directs all aspects of state activity.

(a)...Equality.and.Proportionality.

Others derive the principle of proportionality from the principle of equality or the prohibition of arbitrariness (Willkurverbot). (84) Article 3(1) GG commands that: "All persons shall be equal before the law." The Grundgesetz in the course of adopting this traditional formula has given it a wide meaning. Thus equality before the law means that equality is founded upon the constitution and supersedes laws which themselves must be directed towards it. (85) The equality clause, as part of the constitution, thereby binding on the legislature, must be interpreted in a manner consistent with the fundamentally guaranteed freedoms. Legal equality is conceived and defined in accordance with its relationship to
Legal equality is conceived and defined in its relation to freedom. According to this definition, despite the variety of social conditions in which people live, freedom and equality are realised in people, who do not have to be made first factually equal in order to be freed. Legal equality involves rather the removal of artificial differentiations which result from a biased legislation. Legal equalization of human beings is then prerequisite for their freedom. (86)

Opposing the notion of legal equality is the idea that the state must first achieve factual equality among people. Factual equality is not attainable through legal equalization, but rather through expropriation and redistribution by the state. The legislator who aims at factual equality must diminish legal freedom in order to attain this goal because the freely acting man is a constant threat to the factual equality of his fellow citizens. As an inherent paradox, factual equality may be realized only if freedom is repressed, that is only in a dictatorship, which by its nature entails the extreme inequality between the rulers and the ruled. Factual equality of men, therefore, is a utopia which cannot reasonably be the aim of the constitution. The Grundgesetz has occupied itself with the social conditions of life. Its goal is not factual equality which conflicts with legal equality and the basic rights, but rather a balancing of these through suitable social policy. The social state clause (Article 20(1) GG), which comes into play here, is necessary because classical legal
equality does not compel the legislator to offset the inequality of actual living conditions.

While guaranteeing legal equality, Article 3(1) GG at the same time does not specify what the legislator must treat equally and what he may or even must treat unequally. In this respect, recourse must be made to the principle of generally stated laws which guarantees a high degree of legal equality according to the proper traditional interpretation. (87) Moreover, the Grundgesetz confers upon the generally stated law a high rank in the protection of basic rights, in that, according to Article 19(1) GG, laws which restrict fundamental rights must apply generally and not merely to an individual case. (88) This formula implies the protection of freedom through the standard of equality. The general equality clause, again, neither specifies how to form categories nor under which circumstances differentiating legal regulations are acceptable. The mere generally stated form of regulation alone does not absolutely guarantee equality. The BVerfGE has tried to define equality clause by means of various explanatory formulas, (89) according to which the legislator may not treat 'arbitrarily neither substantially equals as unequal nor substantially unequals as equal.' (90) Such formulas demonstrate their flexibility to the effect that equality clause does not compel the legislator under all circumstances to treat equals and unequals respectively as such. According to Article 3(1) GG then, equals are to be treated equally and unequals according
to their nature only when the equality or the inequality is so important in the context of the particular case, that its consideration with the requirements of justice in mind seems mandated in the course of statutory regulation. Equality clause permeates the entire constitutional order, from which arises the balancing of values necessary for the application of the clause. The contents of the equality clause necessary for the constitutional review are taken up to a great extent by the prohibitions against, orders for and permissions for differentiation directly brought out in the Grundgesetz, which also contains standards for classifications and regulations related to them. (91)

The basic rights are guaranteed to all men, or at least to all Germans. The words "everyone" and "no one" in themselves alone embody prohibitions against differentiation. With regard to their guarantees, the fundamental rights seem at first glance egalitarian and contrary to differentiation; nevertheless basic rights limits reveal an abundance of differentiations. Precisely because basic rights are guaranteed to all men, these rights must be restricted through the principle of proportionality, which requires mutual consideration in the course of exercising one's freedom. The freedom of profession (Article 12(1)GG) calls forth, for instance, orders for differentiation in the course of establishing and defining occupational activities for which admission requirements are established. The right to pursue a
profession of one's choice has been narrowed down through the
definition of the legal notion of profession (Berufsbild), the
contents of which must comply with the principle of
proportionality. (92) The BVerfGE, for instance, dealing with
the restrictions for establishing new pharmacies, ruled that:
"These restrictions have been proved to be adequate means for
the prevention of possible prejudices and risks. On this
account, they are not unreasonable, because they are the same
(equal) for every candidate for this profession and known to
them in advance, so that the individual before choosing his/her
profession can judge, whether it is possible for him/her to
fulfil the required preconditions. The principle of
proportionality is applied here, in the sense that, the
prescribed subjective requirements should not stand out of
proportion with the desired end of lawful fulfilment of
professional activity." (93)

Other fundamental rights are often subject to legislative
reservations of power. The BVerfGE interprets the latter in
such a manner that fundamental rights restrictions are
acceptable only if they are suitable, necessary and
proportional for the safeguarding of another's object of legal
protection (Rechtsgut). This set of criteria is the basis for
numerous and often complex classifications and differentiating
fundamental rights restrictions related to them. For example,
the prohibitions or restraints on advertisement conform to the
standard of Article 3(1) GG in relation to the freedom of
profession, in order to prevent health hazards posed by the recommended product. Differentiations can arise out of not only of the various degrees of endangering the object of legal protection but also the necessity of restricting fundamental rights. An example of a differentiation, prohibited for not being justified by the abovementioned criterium of necessity, is provided for by the decision in the case concerning surgical experiments (vivisections) with animals in state and non-state research institutes. (94) The BVerfGE ruled that the restriction of these experiments to state research institutes was not necessary while the same court offered an example for a necessary differentiation: the ban on advertising of the tax consultancy professions was restricted to the area of legal counselling, and did not concern mere mechanical occupations such as bookkeeping and payroll accounting. Thus the principle of proportionality provides the link between equality and freedom, since the proportionality of the state intrusion into the sphere of basic rights safeguards freedom and at the same time preordains classification of interests and values with regard to equality.

(b)...The Principle of Legality.

Literally the principle that public organs have to comply with the law does not convey more than that the organs have to obey the law where it can be authenticated. But the principle is usually given a deeper more substantial meaning, presupposing legal support as a prerequisite to any
encroachment on human freedom. Furthermore, even if the authorization has been made in very wide terms, no authorization is limitless. The limits may be narrow or wide according to the nature and purpose of the authorization and accordingly, may be easy or difficult to be drawn, but there can be no situation where public authorities may claim that their authorization knows no limits. According to Article 20(3) GG, the legislature shall be subject to the constitutional order while the executive and the judiciary shall be bound by law and justice. Therefore, in every case the exercise of power by state organs may be raised before the courts to test its legality. Legality, of course, covers constitutionality. In view of the scope of German constitutional provisions and their application by the courts, the principle of constitutionality deserves separate treatment.

(1) The Principle of Constitutionality.

The Grundgesetz is the supreme law of the land and not merely a political document for the guidance of the state organs. It binds all state institutions and any violation of it may be subject of litigation before the courts which can make an authoritative pronouncement. Furthermore, unlike France, the binding effect of the constitution is not only formal but also substantive, insofar as all state actions, including legislation, must conform to such principles as are embodied in the basic rights or some other constitutional provisions. This is expressly laid down in Article 1(3) GG,
known as the 'supremacy clause.' Starck (103) argues that the principle of proportionality is normally extracted from the Rule of Law, nevertheless: "At least with regard to the fundamental rights doctrine, one can resort first to the normatively much denser supremacy clause of Article 1(3) GG rather than to the general concept of the Rule of Law in order to derive a workable principle of proportionality."

Normally, in a state governed by the Rule of Law there would be rare situations where the constitution operates directly, insofar as the Rule of Law requires a legislative basis for an administrative action. And so long as the legislation is consistent with the constitution any action of the administration which violates the constitution must also violate the legislation on which it is based because no constitutional legislation can authorize an unconstitutional action. The Grundgesetz, as noted above, makes the basic rights directly operative irrespective of the constitutionality of the legislation on which it is based. Basic rights provisions are directly applicable not only to the exercise of discretion, but also to the issue and application of subordinate legislation and to the application of laws enacted before the coming into force of the constitution as well. Proportionality is one of the most important limits put up by the requirement of constitutionality, and operates not only against legislation and its application but also against the administrative or judicial practice which the administration or
the courts themselves have established for the exercise of their discretionary powers.

In one case, for instance, a man was on trial for a minor fraud before a municipal court. Before the witnesses were called, his counsel moved that the defendant should be medically examined to determine his responsibility. A medical expert upon examination of the defendant, said that without electro-encephalography and pneumo-encephalography (pumping of air into the cerebral ventricle) it was impossible to determine his responsibility because an earlier sustained brain injury might be a decisive factor. The court thereupon, using its discretion, ordered the defendant to be examined in a hospital and gave permission to subject him, even against his will, to the abovementioned tests. On appeal the order was upheld. But on the subsequently filed constitutional complaint of the defendant, the BVerfGE annulled the order insofar as it permitted pneumo-encephalography. This, the Court held, would be a considerable encroachment on the defendant's right to the inviolability of his personality guaranteed by Article 2(2) GG, in as much as such operation might result in great pain and eventually in a dangerous infection. Such an invasion into the protected personal sphere should, according to the principle of proportionality, commensurate to the criminal act which the defendant was suspected to have committed. (104)

(2)...Legality.Stricto.Sensu.

The principle of legality, which is a creation of the
courts, has two aspects. One is the primacy of law over all expressions of state authority (negative legality) and the other one is the requirement of law for the exercise of any executive and administrative powers (positive legality).

a). Primacy of law, in general, means that all administrative actions are invalid to the extent they conflict with any existing legislation. More specifically, it means that an administrative act is invalid to the extent it conflicts with a rule of law—parliamentary or executive—of higher order and that any other administrative action is invalid to the extent it conflicts with a legislative norm, even if the latter is laid down by the administration. The foundations of this aspect of legality rest upon the unity of the state power and the legal system and is immediate basis can be seen in Article 20(3) GG which binds the executive by law and justice. By employing justice with law, Article 20(3) GG broadens the scope of legality to cover not only formal legislation but also the general principles of legality operating in the legal system as well. Thus in its specific details negative legality consists, among other things, of the following prohibitions and commands: First, observance of the constitutional commands and prohibitions including the basic principles on which the Grundgesetz is based, such as the free representative democracy. (103) Secondly, observance of valid laws, including the observance of such legal principles such as equality, proportionality, impartiality, non arbitrariness,
compliance with the public morals and with the budgetary provisions. (104) Thus observance of the principle of proportionality is, according to the principle of negative legality, a precondition for the validity of any measure taken by the public authorities. Since proportionality has, according to the case law of the BVerfGE, the status of a constitutional principle, (107) it applies to legislative as well as administrative measures. In some subsequent decisions the same court held that proportionality was an overriding rule for the guidance of all state activities; (108) it should be observed by the courts in settling conflicting interests under private law; (109) its application could not be restricted to any particular branch or sphere of law; (110) and that it should always be observed in the interpretation and application of the law. (111)

b). The second aspect of the principle of legality is the so called requirement of law or positive legality. Legality in this sense requires the authority of law as a precondition for the exercise of any executive and administrative power. Law means a formal statute enacted by a competent legislative body or subordinate legislation authorized by a statute. The immediate basis for this aspect of legality is Articles 19(1) and 20(3) GG. The former requires a law of general application for the restriction of fundamental rights while the latter makes the executive bound by the law. (112) A broader, more convincing justification
lies, however, in the principle of parliamentary democracy according to which the executive must act not on its own authority, but upon authorization of the people's representatives. A clear assertion of this principle finds expression in the pronouncements of the BVerfGE, which has ruled that it is a fundamental requirement of the classification of the functions in a democratic state based on the Rule of Law, that the government and administrative authorities should be allowed to interfere with the rights and freedoms of the people only on the authorization by the people's representatives and not on their own authority. (113) An additional justification is given by the requirement derived from the Rule of Law that the legal relationship between the state and the citizen must be regulated through general law, which not only should define the executive and administrative activities but it should also render them foreseeable and calculable. (114) In this respect German law is clearly distinguishable from French law which recognizes inherent powers with the executive to act without legislative authorization.

As regards interference with the rights of a person by the administration (regulatory administration), the requirement of law has been established since the last century and is no more a disputed issue. But in the sphere of administration of benefits for the members of the society (benefactory administration), which the state has undertaken primarily in
this century, the issue is still a subject matter of controversy. So also is the case in the sphere of special relationships of subordination, such as school administration, penal institutions, or the status of civil servants to which not much attention was paid last century. The predominant opinion of the German jurists as well as the balance of recent court decisions is in favour of having a law even in these areas. (115) The arguments in support are: First, with the establishment of democracy and rejection of monarchy the executive has lost its leadership role and the parliament has become the most prominent instrument through which the executive acts. Second, and perhaps more important, with the introduction of the social state the concept of freedom has changed. In the liberal state (of the 19th century) freedom meant autonomy of the individual in certain spheres in which the state could encroach upon only through law. Today freedom has a different connotation. The effort of the state today is to remove through legal regulation the handicap on the freedom of an individual created by his/her social dependence and to restore his/her freedom. Freedom today does not mean only absence of state interference but also participation in the state benefits. (116) Accordingly, the requirement of law must cover the entire benefactory administration just as it covers regulatory administration. (117) Much of the controversy, however, has lost its practical importance because almost all areas of benefactory administration are covered by a thick
stratum of legislation.

3). The Role of the Principle of Proportionality in Dealing with the Inflation of Legal Rules.


The requirements of the principle of positive legality (requirement of law) and the tendency of the modern state to adopt rules in almost every aspect of social, cultural and economic life has led, particularly during the last decade, to an inflation of legal rules. The inflation of laws, as it is commonly referred to in Germany, covers various phenomena such as:

- The constant expansion of public legislation into areas which were formerly reserved to private or social self-regulation.
- The superfluity of regulations et caetera.

The inflation of rules is a qualitative as well as a quantitative phenomenon. As regards the quantitative aspect of the inflation of laws, there probably exist too many rules. Between 1969 and 1978, 889 federal laws and 3350 federal regulations were enacted. To these there should be added since 1975, 3426 regulations of the European Communities and, for each Land between 200 and 400 laws, more than 1000 regulations and thousands of administrative rules. (118) It must be stressed, however, that figures cannot be taken as conclusive. They are first of all an indication of an overproduction that has to be verified. It should be clear by now that the modern state cannot manage with the relatively small number of rules
that existed in the 19th century. As compared to other branches of law, it seems that the phenomenon of inflation becomes more apparent in administrative and tax law. It is above all in these fields where the expansion of the state lies (e.g., the development of environmental protection), where the complexity of problems to be regulated becomes apparent (e.g., building law) or the need is felt for a balanced distribution of goods and rights.

A description of qualitative coefficients of inflation presupposes an agreement on the criteria of the evaluation of the quality of laws. The most important aspect of inflation concerns the increasing restriction of individual liberty. More and more aspects of social life are covered by law, thus suppressing private initiative and self-regulation. It should, however, be underlined that legislation not always restricts liberty but makes it really feasible through a balanced distribution of goods and rights.

Turning to the causes of legal inflation, it has to be stated that no global or one-dimensional explanation should be adopted. The phenomenon is complex and has manifold interdependent causes. In the scope of this paper emphasis will be given to the objective and legal reasons for this phenomenon. First of all the constitution which primarily serves the purpose of developing the Rule of Law is alleged to be one of the causes of the inflation of laws. Also the continuous refinement of the concept of the Rule of Law by
means of interpretation, the elaboration of new dimensions of civil liberties (e.g., protection of personal data) and advanced constitutional requirements for any interference with the basic rights, as adopted by the BVerfGE, (essential items of a subject matter should be regulated by statute) and the membership in the European Communities which calls for continuous adaptation of national law to Community law, and execution of Community law in addition to domestic law, are some of the reasons contributing to the increase of production of rules. In any case, it would be premature to be content with the global statement that the Rule of Law and stringent requirements for protecting the basic rights (as laid down by the BVerfGE) belong to the incurable causes of legal inflation. Surely the Grundgesetz does not contain a general prohibition of inflationary law-making. Nevertheless, restrictions may be achieved by reconsidering the prevalent interpretation of certain constitutional rules and principles or by giving a new meaning to them. Key-words of such an approach could be: the evolution of individual liberty as a shield against too many or unduly oppressive rules and the balance of powers in the face of inflationary law-making.

The reasons for legal inflation which can be called objective may be listed as follows:
- the expansion of the state as a consequence of the social state principle
- the necessity for high flexibility in the face of rapid economic and social change
- the general intricacy of today's social relations
- and the need to master technological evolution (e.g. atomic energy law, environmental law etc).

From this list it should be clear that objective factors do not necessarily contribute in a negative sense to the inflation of rules. Thus the refinement of the concept of the Rule of Law or the elaboration of the basic rights very often reflect dangers and problems that have come up and modify traditional constitutional positions. The consequences of legal inflation can be summed up under three heads: a) the overproduction of rules affects the execution of and compliance with the rules. b) it may produce an increase of bureaucracy. c) it interferes with the balance of powers between the state institutions.

(B). The Role of the Principle of Proportionality.

In one of its decisions the BVerfGE (119) discussed the constitutionality of 'superfluous' laws with reference to the 'principle of abuse'. A law not based on 'reasonable causes' is incompatible with the abovementioned principle. The crucial question on this point is the definition of 'reasonable causes'. The Court adopted a very broad definition. A statutory provision must not be annulled if it contributes only to the equalization and satisfaction of relevant interests. The broadness of this interpretation is rather questionable, because the principle of abuse should be open to more
substantial restrictions, which, however, must respect the
discretionary power of the legislator.

As regards the principle of proportionality the problem is
somewhat analogous. (120) The argument that the Rule of Law
may be used to protect against measures which are not required
needs further clarification. One crucial question concerns the
meaning of 'being required' in the context of inflation of
laws. The task of the interpretation of this term should fall
upon the BVerfGE. Furthermore, the principle of
proportionality, has until now, been applied only in cases of
public interference in the sphere of the individual. Bearing
in mind that the overproduction of rules is not a phenomenon
limited to acts of interference, the principle of
proportionality should be construed in a broader sense which
shall also include acts of non-interference. Even so, the
principle would exercise a steering function only on individual
provisions of statutes or a particular statute. It could not
limit the totality of regulatory acts. Taken, as a whole, the
constitutional principles of abuse and proportionality need
further elaboration and at the present state it is doubtful
whether they can provide an overall remedy against the
inflation of rules.

Many attempts to restrain inflationary law-making take
into account that any legal inflation tends to lead to
progressive restrictions of individual liberties. The
constitutional relevance of this argument becomes apparent as
soon as it is linked with the principles to be applied in the interpretation of the Grundgesetz. In this case a sort of re-orientation should be considered which re-emphasises the constitution as a system of freedom, that is, a system which does not call for regulation at any price. It should then be possible that the legislator would become more sensitive to individual liberty that relies to a great extent upon self-regulation and private initiative.

Improving the quality of laws by means of the principle of proportionality proves to be an even more difficult task. At first, the question arises concerning the standards against which the quality of law should be measured. From the constitutional point of view, these standards must be founded in the constitution and comply with the method of law-making. The principle of proportionality complies with these conditions. When proportionality is employed, the question may arise whether the legislator has sufficiently considered all available facts and circumstances to justify definite interfering regulation. The results of such a control, however, can only be of a limited effectiveness because the legislator enjoys a wide scope of discretion to be respected by the courts.

The reduction of legal inflation may pursue at least two goals. Either it aims at deregulation for the purpose of self-regulation or of promotion of private initiative, or it refers to a more balanced position of the administration in the face
of legislative power. Administration should not be strangled by rules; it should enjoy sufficient flexibility to encounter concrete situations. It seems, however, that both goals can usually be combined. Two possible solutions of the problem under consideration could be the requirement that any law-making initiative should pass a severe test showing its necessity or inevitability, and that the effectiveness of statutes should be reviewed by the Parliament itself from time to time. The effectiveness of the above measures is, nevertheless, questionable. The science of legislation is not yet in a position to supply the law-making bodies with conclusive standards. With regard to the issue of controlling the effectiveness of statutes a consensus must be reached on the standards with which a successful law should comply. Moreover it is doubtful whether law-making bodies are really prepared to judge convincingly the effectiveness of provisions enacted by themselves and to draw the appropriate consequences therefrom. It is not by accident that the BVerfGE, by applying the principle of proportionality (suitability in particular), tried to set an obligation for the legislator to improve statutes that interfere with individual rights and/or freedoms after a lapse of time from their enactment. In its decision of August 8th, 1978 (121) the Court held that if the legislator comes to a decision the basis of which is put into question, because of new developments not predictable at the time of the measure's enactment, then the legislator is bound by the
VI). Basic Rights: Elements and Limits... Proportionality as a Principle of Constitutional Interpretation.

The principal interpretation guideline in the case law of the BVerfGE as regards the protection and the limits of basic rights is dictated by the Rule of Law. Its purpose is to reconcile the freedom of the individual with the freedom of others and with the interests of the community, that is, public interest. The Grundgesetz provides that fundamental rights guaranteed by it bind directly not only the executive and the judicial but also the legislative branch (Article 1(3) GG); it also guarantees the substance of basic rights (Article 19(2) GG) (122) and reinforces their effectiveness by insuring against constitutional amendments the guarantee of human dignity contained in Article 1(1) GG which permeates all the basic rights (Article 79(3)GG). (123) An important implication of Article 1(3)GG, known as the 'supremacy clause', which provides for the direct binding effect of the basic rights on the legislature, the executive and the judiciary as directly enforceable law, is that the constitution renders the basic rights themselves the standard for judicial review, in order to guarantee them effectively.

Even with all these safeguards, the basic rights might well have remained mere programmatic principles and not have attained the dominant position they hold today in the legal
order of the Federal Republic, had it not been for the institution of constitutional jurisdiction with the power to review laws. To fulfil this task, this constitutional jurisdiction, the BVerfGE, has developed a sufficiently clear concept of the limits of basic rights, according to which all restrictions on a freedom safeguarded through a basic right must be suitable, necessary and proportional in the act of protecting objects and values generally deemed worthy of such a protection, (124) and which must be as equally valued as the restricted basic right. The safeguard of the supremacy clause included in Article 1(3) GG and the requirement of proportionality, as dictated by the Rule of Law, impels the basic rights doctrine to secure foreseeable and logically sound decisions in the course of constitutional review. Such an objective entails the translation of a particular expression of freedom into a set of elements of a corresponding basic right, that is, a sphere of protection. It must then be determined whether the disputed law or measure represents a constitutionally legitimate restriction of a basic right or, on the contrary, violates the basic right, thus being unconstitutional.

The doctrinal separation of basic rights' elements and limits avoids the inclusion of necessary public interest and welfare considerations directly in the basic rights' elements themselves and thereby also avoids the danger of arbitrarily restricting freedom by way of an ad hoc definition of basic
rights, ultimately by these means, assuring optimal freedom. Constitutional interpretation does not entail developing a general basic rights philosophy, but it rather works out within the frames of legal doctrine, the basic problems of validity and binding nature with regard to the BVerfGE's power of review. The elements of a basic right, that is, its sphere of protection, must be defined through individual case analysis. Keeping in mind the various basic rights limits, one must assign fact elements to the different expressions of basic rights. Basic rights which guarantee free action also protect the corresponding omissions of actions as well. Not only positive freedoms such as, for instance, freedom of faith and creed, freedom of marriage and freedom of association, but also their negative counterparts are guaranteed, the freedom respectively not to profess a belief, not to express one's opinion, not to get married and not to join an association.

(125)

The difficulties in effectuating the binding effect of basic rights on the legislature stem from its very contradictory position: The legislator, bound to the fundamental rights, is at the same time empowered to set limits to a number of basic rights which provide explicitly for a legislative reservation of power (Gesetzesvorbehalt). The legislature may set limits on the basic rights only within the scope provided for by the Grundgesetz. The problem of the binding nature of the basic rights on the legislator, and
likewise the need to delimitate the latter's scope of power in relation with the BVerfGE, become evident in the substantive requirements for encroachment in the sphere of basic rights. When the constitutionality of a statute is put into question, the legislator will most likely appeal to its own authority to restrict the basic right according to its legislative reservation of power. The BVerfGE must examine, then, whether this disputed statute contains such a restriction or an infringement of the respective basic right, thus violating the 'supremacy clause' of Article 1(3) GG.

This problem requires a logical approach on a general, fundamental level. It would be a good starting point to examine the legislative reservations of power themselves. Though they present themselves in a wide range of diverse forms, they may still be classified into four distinct categories: (126)

A). The first category comprises legislative restrictions of power setting substantive limits on the basic rights involved. These can still be further categorized into those which are directly effective by virtue of the constitution and others which further need to be enacted through a statute. The following limits are found within this group: the right to full development of one's personality is restricted by the rights of others, the constitutional order and the moral code (Art 2(1)GG Sittengesetz); the numerous individual rights comprising the freedom of expression are limited by the right of personal
honour and through the statutory provisions for the protection of youth (Art 5(2)GG). The freedom of teaching, is restricted by the loyalty to the constitution (Article 5(3)GG). Further restrictions are set in Articles 7(4), 7(5), 9(2), 10(2) al 2, 11(2), 13(3)GG.

B). The second category consists of 'formal' legislative reservations of power, that is, not touching on substantive limits, but rather left to the legislator to be defined. Such limits involve the following rights: the right to life and to inviolability of one's person, and the rights of habeas corpus (Article 2(2)GG), the freedom of assembly pertaining to open-air meetings (Article 82(2)GG), the right to privacy of the post and telecommunications (Article 10(2)al 1 GG), the right to inviolability of the home (Article 13(2)GG), the right to property and the right of inheritance (Article 14(1) al 2 GG); furthermore numerous basic rights with respect to the members of the Armed Forces according to Article 17a(1) GG.

C). The third category consists of 'formal' legislative reservations of power, which refer to those laws which protect objects and values without explicitly limiting the freedom of expression as such (hereinafter generally stated laws in the sense of Article 5(2) GG). Found within this group are, for example, various rights comprising the freedom of expression through generally stated laws of Article 5(2) GG and the freedom of association restricted by criminal statutes according to Article 9(2) GG.
D). A fourth category of basic rights does not contain any explicit limits. Included among these are freedom of faith and creed (Article 4(1, 2) GG), freedom to pursue arts, humanities and sciences (Kunst und Wissenschaft), freedom of assembly pertaining to closed chamber meetings (Article 8(1) GG), right to choose one's trade, occupation, profession and place of training (Article 12(1) GG).

The substantive limits of basic rights, clearly classified under the first category, protect by virtue of explicit constitutional regulations, Rechtsgute (objects of legal protection) (public welfare, individual well-being) which have precedence over the exercise of freedom. The Grundgesetz itself designates in the fundamental elements, the object of legal protection (Rechtsgut) which should take precedence over the exercise of the corresponding freedom, after an assessment of the one side against the other. Naturally, the difficulties of construction, which may arise in the course of interpreting these limits, may not be overlooked. At this point the principle of proportionality as a standard of constitutional interpretation, when two constitutionality protected Rechtsgute are in conflict, comes into play. It is absolutely necessary to maintain a reasonable balance between two conflicting objects of legal protection (Rechtsgute) so as to prevent one of them from prevailing totally at the other's expense. Therefore, the limits of each object of legal protection should be drawn in such a way, so as to attain its optimal function
and protection. This drawing of limits between the various conflicting Rechtsgute must in each case be 'proportional', that is, it should not go further than is necessary to put conflicting Rechtsgute in harmony with each other.

As far the second category of restrictions is concerned ('formal' legislative reservations of power), one could not draw the conclusion that the legislative has the final say on substantive matters regarding the fundamental rights restrictions in this category. The limitation of fundamental rights merely through formal legislative reservations of power finds justification chiefly in that the objects of legal protection which may take precedence over the exercise of the corresponding freedom elude an exhaustive enumeration. The BVerfGE at an early stage has stated that the legislator, acting under the power to pass laws restraining personal liberty or freedom of speech, was limited by the principle of proportionality, which the Court derived from the Rule of law (Article 20 GG) and from the very essence of the basic rights, which should be encroached upon by the public authorities only to the extent required by the public interest (127). One example will suffice. The German code of Criminal Procedure provides that a person under suspicion of having committed a crime may be detained on remand upon a warrant issued by a judge if he is expected to take flight, there is danger that he will contact witnesses or otherwise destroy important proof or he is suspected to have committed murder or manslaughter. A 76
year old admiral was taken into custody because he was suspected of having committed murder during the war. The investigation of the case, with the knowledge of the defendant, had already lasted five years before the warrant was issued. The suspect had always put himself at the disposal of the prosecutor's office and had been living for years in the same abode. The BVerfGE, on constitutional complaint, revised the judgement of the court which had upheld the warrant upon appeal because it violated the suspect's right to personal freedom as guaranteed in article 2 paragraph 2 GG. Although section 112, paragraph 4 of the Code of criminal procedure empowered the court to issue warrants, the facts of the case were such that the purpose of bringing the suspect to trial could be secured by other means; therefore, the public interest did not require such a harsh measure as taking him into custody would not be commensurate to the actual situation. (128)

What was stated above about the second category of limitations of basic rights is further substantiated in the third category of limitations. Here the generally stated law in the sense of Article 5(2) GG, including the general criminal statutes, is simply applied. The freedoms of expression, religion and association can violate so many different objects of legal protection that an application of the general criminal statutes dispenses with an enumeration of these objects of legal protection. Even along this line of reasoning the formal legislative reservations of power do not allow the legislature
to select at its discretion the objects of legal protection restricting freedom, for a legislative freedom of judgement in that effect would render the contents of the supremacy clause hollow. The latter demands, as a matter of principle, that the relationship between basic rights and their limits be clearly defined at the outset by the constitution.

This could be illustrated in the famous Der Spiegel case back in 1960's. (129) In October 1962, the news magazine Der Spiegel published an unsigned article 'Bedingt abwehrbereit' (Limited readiness for defence'). It drew conclusions from the results of the NATO war games 'Fallex 1962', and stated that the German Bundeswehr (Federal Armed Forces) was prepared for effective defence only on a limited scale. The article criticized the equipment of the Bundeswehr with nuclear weapons and disclosed particulars on the operation Fallex and on the military planning within NATO in general. It also published the pictures of new weapons. Subsequently, proceedings were instituted by the chief federal prosecutor with the purpose of bringing the publisher and some editors of the magazine to trial for Treason Section 99, para 2 and section 100 para 1, of the German criminal code had, at the time, provided that a person who intentionally disclosed in public an official secret and thereby endangered the Welfare of the State should punished for treason.

The prosecution stated that the military details disclosed in the article were classified material and, therefore, were to
be considered official secrets. The prosecution procured judicial warrants for the search of the 'Spiegel' premises, and for the seizure of all material connected with the article, and for the arrest of the publisher and the editor. The Bundesgerichtshof (Federal Court of Criminal Appeals) threw out the indictment against the publisher and the editor for lack of evidence, but upheld the search warrants. Against the latter the Spiegel Publishing Company filed a constitutional complaint in which it stated that the warrants had violated the right of the freedom of the press. The BVerfGE dismissed the complaint as unfounded by a 4 to 4 decision. It agreed that a search and seizure with the sole purpose of detecting leads to the persons who had given the editor information for his article would have illegal under the Grundgesetz, but it further held that there was no sufficient evidence to support this contention. Moreover, the court pointed out that the constitutional guarantee of the freedom of the press did not include an absolute prohibition of search and seizure of editorial offices. The press could claim no special privilege in criminal proceedings; they had to submit inquiries just the same as the ordinary citizen who was suspected of committing a crime. But the court stressed, that the prosecutor and judge weigh up, carefully, the measures intended and avoid unnecessary restraint and hardship on editorial and publishing work. There was, however, no evidence that the authorities in question had overstepped these limits. This decision
dramatised the inadequacy of the provisions of the German Criminal Code on treason, which failed to distinguish between the felon who committed treason by disclosing military secrets to foreign intelligence for financial gain and the responsible editor who did it in order to inform the general public of weak points in the country's defence. This gap, as an aftermath of this case, was closed in 1968 when the provisions of treason of the Criminal code were amended accordingly. (130)

The problem of restricting fundamental rights which are not supplied with any explicit limits -Those regarding the arts, humanities, sciences, (Article 5(3) cl 1 GG), conscience (Article 4(3) GG), choice of profession (Article 12 GG), peaceful assembly in closed chambers (Article 8(1) GG) - cannot be solved through a restrictive interpretation of the fundamental rights elements. The latter would lead to arbitrarily conceived friends which would introduce vagueness into the fundamental rights doctrine and, moreover, would pass over the formal arguments justifying the fundamental rights limits. Every freedom which affects the sphere of fellow men (as distinguished from pure thoughts which are known as 'duty free'), presents problems of fundamental rights limits. Two ways of imposing limits on basic rights, explicitly lacking such, have been suggested. The first one entails the application of limits from other fundamental rights, mutatis mutandis, especially those of Articles 2(1) GG (that is, the constitutional order, the moral code and the rights of others)
and 5(2) GG (general laws, protection of youth, personal honour). The second way makes use of the so called verfassungsrelevante or verfassungsunmittelbaren limits, that is, those inherent in the Grundgesetz which arise out of the constitutionally protected objects (Rechtsgute), for instance, out of other fundamental rights or constitutionally established fundamental duties. Accordingly a scientist, in his scientific experiments with human beings, will be obliged to observe the limits set forth in Article 5(2) GG regarding generally stated, laws, here specifically, general criminal statutes or the fundamental rights of human dignity (Article 1(1) GG) and of life and inviolability of one's person (Article 2(2) GG).

It appears then that all fundamental rights, of any of the four abovementioned groups, are subject to certain limits. The limit is the requirement of proportionality. The basic requirement of enforcing these limits is an object of legal protection (Rechtsgut). The latter may be defined in the light of special substantive limits of fundamental rights or else from objects of legal protection otherwise protected by the constitution or at least not contradicting it. For instance, with regard to free exercise of one's profession, there is a consistent line of BVerfGE decisions requiring for the restriction of this freedom an object of general public interest which does not conflict with the constitutional system of values. (132)
The determination on a constitutional basis of objects of legal protection safeguarded through basic rights limits does not, however, resolve the conflict between the binding force of the latter and legislative discretion through the instrument of legal reservations of power. If the goal merely to protect such objects were to suffice for basic rights restrictions of any kind, then the binding effect of basic rights on the legislature would be circumvented, and thereby, basic rights would be reduced to mere programmatic principles void of practical effect. This result can be avoided by setting certain limitations on the very means designated to protect the objects constitutionally deemed worthy of such protection (Rechtsgüte). (133) Article 11 GG, which prescribes the objects of legal protection justifying a curtailed freedom of movement, requires that the restrictions on the freedom of movement be necessary for the sake of protecting the objects involved (free democratic order, public health, protection of youth, crime prevention). Even if other basic rights do not explicitly mention the necessity of restrictive laws, this principle, with the view of avoiding unnecessary basic rights limitations and giving effect to the supremacy clause, hold true for limits on these basic rights as well. In its decisions the BVerfGE not only requires necessity but also suitability and proportionality of the restriction of the basic rights in question. The principle of proportionality (in its wide sense) as an instrument of legal interpretation is not a mere precept
of method but a value centred guideline of substance as well. It furthers the objective of the BVerfGE, that is, to achieve an optimum balance between an effective state action and realization of social interest on the other. In this way the aim of seeing social welfare being administered effectively along with the maintenance and observance of the Rule of Law is in the path of realization.


The question whether the constitution should deal with exceptional circumstances such as war or emergency is a very serious one. There is some merit in the argument in favour of leaving the necessary decisions in such cases to the responsible state organs. On the other hand, it could be argued that a constitution establishing a free democracy governed by the Rule of Law should not limit its jurisdiction to normal cases but should also provide for other circumstances to ensure that law and not facts alone will govern the situation for as long as possible. The Grundgesetz has adopted the second alternative. In a rather complicated manner it tries to deal with internal and external states of emergency, starting from the principle that by no means should emergencies be allowed to expand the power of the executive. These rules represent the demanding legislative attempt to combine the basic constitutional guarantees of basic rights, democratic
institutions and their functions with the necessity of a changed legal order adequate for emergency situations. This ambitious attempt has led to an amendment of the Grundgesetz which followed the German tradition of constitutional amendments. Some articles of the constitution were changed while other articles as well as a new section were inserted. (134)

The relevant provisions entitle the executive authorities to interfere profoundly with individual rights. Article 12a(6) GG, for instance, permits restriction by or pursuant to a law of the right of German nationals to give up their occupation or profession if, during the state of defence, the labour requirements for defence requirements cannot be met on a voluntary basis. (135) A federal law, subject to the consent of the Bundesrat, may in case of expropriation provisionally regulate compensation. The period of imprisonment without judicial review may be prolonged by law up to four days. The Federal Law Securing the Supply of Food and Other Agricultural Products permits the regulation by governmental decrees of agricultural production and the distribution of food, the prices of such products etc. The decrees already issued regulate the rationing of food down to the last detail as well as the enforced delivery of agricultural products. Such severe restrictions of basic rights require, above all, the observance of the principle of proportionality.

The abovementioned constitutional changes, though creating
rather complicated provisions, were concentrated on the main object to maintain and protect, on the one hand, the basic liberal order of the Grundgesetz where possible, even in case of emergency. It aimed, on the other hand, at an institutional concentration of powers, especially on the federal executive level, and at an abridged as well as simplified procedure for decision-making so that emergency situations can be dealt with effectively. For this reason German provisions on emergency situations, consisting of constitutional clauses and of the respective statutes and decrees is, notwithstanding, some deficiencies and contradictions, basically permeated by the principle of proportionality. This means that the legislative purpose of the relevant provisions, is to enable all state organs to undertake the measures which are suitable, necessary and adequate to master every specific emergency situation. Thus the emergency provisions provide for a kind of controlled escalation depending upon the type of, the scope and the gravity of the internal or external crises; the state organs may react on a broad scale of different levels, beginning with purely executive measures, then undertaking a restricted change of the legal order by parliamentary decisions up to the determination of the 'State of Tension', and finally determining the 'State of Defence'. In internal emergency situations the Grundgesetz permits similar controlled reactions at different levels.

The 'State of Defence' lies in the ultimate stage of
emergency situations and according to Article 115a(1) GG it presupposes "That the federal territory is being attacked by armed force or that such an attack is directly imminent." The constitutional provisions on the state of defence are based on three leading principles: Firstly, on the necessity of a suitable and adequate legal order in the event that the Federal Republic is involved or is about to be involved in an international armed conflict; secondly, on the basic aim of applying such a legal order for defence purposes only as the ultima ratio in cases where it is not to be avoided; thirdly, on the intention of legitimizing the application of this emergency order by a parliamentary decision. The main legal consequences of the declaration of the 'State of Defence' are that the federal powers are strengthened, a shortened procedure of legislation takes place, both houses form a 'Joint Committee', the executive acquires wide powers to issue delegated legislation and certain basic rights may be abridged. Women, for instance, may be obliged to compulsory service in civilian medical units and stationary military hospitals. (137)

It must, however, be stressed that the federal competences, especially those laid down in Article 115c GG, (138) permit enactment of laws and decrees which are deemed necessary to meet the requirements of a defence situation. The necessity clause, as incorporated in this provision, is oriented towards the all inclusive principle of proportionality which admits suitable, necessary and adequate legislation within a
constitutional framework, considerably extended, in the case of the 'State of Defence.' The situation as regards internal emergencies (139) is mutatis mutandis similar to this of external emergencies as described above and the principle of proportionality is fully applicable as well.

VII). The Role of the Principle of Proportionality in Controlling Administrative Discretion.

More than thirty five years ago, Professor Hans Huber observed that the use of discretionary powers - 'the Trojan Horse of the classical administrative law- had not yet been fully reconciled with the ideal of the Rule of Law. This remains true today as it was then.

A). The Doctrinal Problem.

The reason discretion rests uneasily within the German system of public law is because it renders necessary a compromise between two fundamental and conflicting goals of the legal order. On the one hand, protecting citizens from arbitrary application of the executive power requires that they receive equal treatment under fixed and ascertainable rules of law. On the other hand, the fullest realization of justice in individual cases and the practical needs of the executive often require that the decision maker enjoys a measure of freedom to recognize and weigh special circumstances and factors that the legislature could not have anticipated or subsumed under a comprehensive formula. Some instances of the need for administrative discretion involve only expediency, such as the
problems of the design and the location of facilities in city planning. More often administrative discretion relates to problems of individualized justice: Balancing interests, minimizing governmental interference with individuals, and ensuring uniformity of treatment. In this case the principle of proportionality is a binding guideline as to the use of discretionary power by the administration and a standard against which the administrative decisions are judged.

The threshold question in the development of the legal doctrine of discretion is whether the use of discretion is unconstitutional per se. The BVerfGE has declared legislative grants of discretion to be consonant with the Rule of Law and not in violation of the constitutional relationship between the legislative and the executive. However, the Court held unconstitutional laws that delegate discretionary power without furnishing guidelines for its exercise. (141) In another case, it was held by the same court that the availability of review by independent courts helped to make discretionary powers within the executive branch tolerable. (142) These rulings closed the doors to the appealingly simple 'radical approach' to the problem of controlling discretion and set upon the difficult task of developing legal principles to guide its exercise.

German legal doctrine in this area lies on the assumption that the purposes served by administrative discretion do not require an absolute freedom of decision, but can be fulfilled
by a closely restricted power to choose among several equally legal alternatives. The degree of discretionary freedom granted to an administrative authority varies considerably, but always within limits, and involves the facts that may be considered, the manner in which the administrative decision may be reached and the alternative solutions available. The relevant statute may describe which values are to be considered and in which sequence. Even if the statute grants free discretion (freies Ermessen), the administrator is bound, however, to decide issues consistently with the purpose of the statute (143) and in accordance with general legal principles, whether they derive from the constitution or from the basic principle of the Rule of Law.

Present German legal theorists regard the standards for the exercise of discretion as containing a curious anomaly. Although the relevant principles limiting the use of discretion—for instance, the principle of proportionality—should be equally binding no matter what source they derive from, in fact, the scope of judicial review may depend on whether the pertinent principle is recited in the relevant statute or is derived from the constitution. If the principle has been enacted in a specific statutory provision, compliance with the standard is fully reviewable by the courts; if the standard is derived from the constitution or the concept of the Rule of Law, however, the administrative authority enjoys a broader sphere of discretion. (144) Naturally, in the latter case, the
administration may not pursue its goals ad libitum but it must apply objective criteria, balancing in a just, proportional and reasonable manner the various interests affected. Thus even in cases governed by constitutional principles the exercise of discretion is not free, but bound by the duty of the administrators to act under the guidance of principles of law and justice (pflichtmassiges Ermessen).


Through a series of judicial decisions and legal writings since early this century the legal premise has evolved that in a constitutional state based on the Rule of Law, discretion of the administrative authorities does not mean a discretion free of all legal constraints. It is desirable and judicious that discretionary power be exercised for the purpose for which it has been granted and the legal limits which apply to its exercise must not be crossed. (145) According to a decision of the BVerfGE taken in early 1959: 'The Rule of Law requires that the administration can interfere with the rights of an individual only with the authority of law and that the authorization is clearly limited in its contents, subject, purpose and extent so that the interference is measurable to a certain extent, foreseeable and calculable by the citizen.' (146) These propositions have now been enacted in the Law of Administrative Procedure 1976 (147) and the Law of Administrative Courts (148). Moreover it is doubtful whether the grant of unlimited discretion to the administration would
be compatible with the Grundgesetz. In German law an excess of discretion is distinguishable from an abuse of discretion. While the excess of discretion is equivalent to an ultra vires exercise of power, an abuse of discretion is an illegality within the granted powers. In the former case the administrative authority is said to have exceeded the outer limits laid down by the law while in the latter it commits an illegality by intentional or mistaken non-observance of the internal legal limits set for the exercise of discretion. Abuse of discretion may be either objective or subjective. An objective abuse results from the non-observance or violation of the constitutional or other legal principles. A subjective abuse is the result of an exercise of discretion for a wrong purpose or when its exercise is justified by the considerations on which it is based. The violation of the principle of proportionality has been classified as an objective abuse of discretion and results in the nullity of the administrative act.

The degree of discretion that may be delegated to the administration varies widely, depending on such factors as the nature of the discretionary choice and whether basic rights are at stake. Other relevant factors are the requirements of the constitution and the principle of the Rule of Law. Under section 114 of the Law on the Administrative Courts, (149) the courts must fully review decisions of administrators for errors of law, for mistakes in necessary facts, but may not review the
wisdom (Zweckmassigkeit: expediency) of administrative
decisions. A case involving the regulation of civil service
employees illustrates the manner in which administrative courts
apply this scope of review to discretionary action by the
public authorities and the role of the principle of
proportionality in the context of these proceedings.

This case involved the vice principal of an elementary
school, who had been transferred to another school over her
objection. (150) The transfer was due to long-standing tensions
between the vice principal and her superior, the principal of
her previous school. She filed an action to prevent her
transfer and the local Verwaltungsgericht dismissed her suit.
Her first appeal was unsuccessful, but on appeal to the
Bundesverwaltungsgericht the case was remanded for a new trial.
Under the relevant statute a civil servant may be transferred
to another post upon his request or for official needs. The
transfer in this case was purportedly for official needs.
While the BVerwGE demanded a judicial review of the finding on
an 'official need' (dienstliches Bedürfnis), it stepped back
from interfering with the placement of individual members of
the civil service. The court ruled that whether the plaintiff
or her superior had to be transferred was a decision resting
within the power of those responsible for the planning and
administering the school system. Nevertheless the case was
remanded back to the lower court, which had erroneously deemed
itself bound to accept the decision of the school authority
without examining whether the principle of proportionality had been observed—for instance, whether there had been an effort to reconcile the plaintiff with her colleagues or supervisors so that a transfer could be avoided. Thus despite the desire and need for full judicial review, the courts are careful not to interfere with the daily work of the administration if at all possible. In the above case this attitude meant that, although the court did not refrain from reviewing the contested decision, it accepted a significant and perhaps decisive factor as resting within the special expertise of the authority involved.

Once the content of an individual right has been determined, the community must furnish at least the minimum level of protection against the risk of injustice required by that content, even though the general welfare might suffer in consequence. The need for the principle of proportionality in controlling discretionary powers can be illustrated by pointing out the nature of modern authority where discretion has such a pervasive role that an individual interest may be left largely unprotected. There may be good reasons for discretionary powers and for accepting that they are to be exercised on policy grounds; but there are also equally good reasons for ensuring that proper consideration be given to the affected individual interests. The argument then is that since important interests may be affected seriously by discretionary decisions, this itself a strong reason for a requirement of a
proportional relationship between means and ends. In the field of city planning and land development, for instance, the principle of proportionality requires "a fair balancing between public and private interest" and covers not only the contents but the admissibility of certain plan as well. Thus before the introduction of a planning process it should be examined whether the public interest stands in a reasonable proportion to the intended interference with private interests. (151)

Decision makers have a duty to act reasonably and a duty based on the notion of concern and respect for the citizen, to consider the interests that are affected by their decisions; from this, threshold conditions as to what constitutes 'taking into account' may be derived. One such condition would be the maintenance of some sense of proportion between the relative importance of individual as contrasted to community interest. Just as rights may be allotted a relative weighting in the political values of the society, so the relative importance of interests may be calculated. The German attitude towards the use of discretion reflects concern about the proper division of legislative and executive functions, the protection of individual rights and the maintenance of a state based on the Rule of Law. On the other hand, because of the complex problems of the German welfare state, it is recognized that administrators should be given a degree of discretion in weighing special circumstances in individual cases. In sum,
administrative discretion is clearly established within the German legal system, but its position is highly sensitive to the balance between the state and the individual and to the allocation of roles among the legislative, executive and judicial branches, maintaining that balance.

VIII). Conclusions.

German legal theory and case law have conceived the principle of proportionality as a general principle prohibiting excess and comprising three different aspects: Suitability, necessity and proportionality stricto sensu. According to the case law of the BVerfGE, an interference of the public authorities with basic rights of the citizen - in order to be compatible with the constitution - must be suitable and necessary for the achievement of the desired end and, furthermore, its disadvantages must be reasonably proportionate to the advantages of this action to the community. 'Suitability' means that the course of action chosen promotes noticeably the objective pursued. This does not imply total judicial control over state action. An error about the future development or partial success does not result in the annulment of the act. Only if it is evident at the very beginning that the means chosen by the public authorities cannot attain the objective sought or when it becomes obvious that this objective cannot be achieved that the constitutional principle of proportionality is breached. The BVerfGE has always stressed the necessity of leaving the legislator a wide scope of
discretion as to the suitability of a statute. (152) In recent
decisions, however, the Court has reviewed the prognosis
underlying a statute as evidently wrong and invalidated the
statute. (153) The concept of 'necessity' requires there is no
alternative course of action which restricts basic rights less
while achieving the same results intended by the original
course of action. Finally, the chosen course of action and the
objective of the action must be in reasonable proportion to
each other. The burden resulting from this action must not be
excessive in relation to the public interest involved.

The Grundgesetz does not mention neither the principle of
proportionality nor its different aspects. Proportionality is
considered, however, as a principle having constitutional
status, as an unwritten constitutional axiom. The BVerfGE has
deduced the principle of proportionality from the Rule of Law,
that is, from the character of basic rights, as an expression
of the general right of the citizen towards the State that
his/her freedom should be limited by the public authorities
only to the extent indispensable for the protection of the
public interest." (154) The principle of proportionality was
originally a principle of expressing an objective
constitutional right, not a subjective individual right.
Nevertheless its deduction from the 'character of basic
rights', and therefore its close relationship with individual
rights, the protection of which against excessive interventions
has completely been assumed by the law, renders, in this case,
the distinction between an objective principle and an individual right void of any practical consequence. The relationship between the principle of proportionality and the protection of basic rights has made the latter one of the most important principles of German public law which plays a preponderant role in the case law of the BVerfGE.
Endnotes.

1). See decisions of 14 June 1882, 9 PrOVG 353 and of 10 April 1886, 13 PrOVG 424.


4). E 7 S 378.

5). AaO (Amn 6, S 21).

6). E 14 S 19 (22), 15 S 226 (234) etc.

7). aaO (Amn 6).

8). NJW 1968, S 1600.

9). Supra no 8 op cit.

10). Wittig, DoV S 817.


12). E 16 S 147 (181).

13). E 16 S 147 (183).

14). ibid.

15). Supra no 12.

16). See e.g., E 7 S 377 (412), E 25 S 1 (13) etc.


19). E 30 S 250 (263).

20). E 50 S 290 (333).

21). E 37 S 1 (20), 40 S 196 (223).

22). E 25 S 1 (12), 30 S 250 (263), 39 S 210 (225), etc.

23). E 39 S 46, 45 S 187 (238) etc.
24). Supra no 3.
26). E 25 S 1 (13).
28). 52 Pr OVG 419.
30). 31 BVerwGE 15.
31). 27 OVG Lunenburg, E S 321 (325).
39). E 16 S 147 (173).
41). E 21 S 150 (157).
42). E 17 S 269 (279).
43). OVG (DVBI) 1971 S 279.
44). E 35 S 401.
45). Grabitz, p. 575.
49). See Article 12 GG.
50). See E 7 S 408, 11 S 183, 21 S 251 etc.
52). 22 VR 64 (67).
53). 60 BVerwGE 75, 77.
54). 59 BVerwGE 105 and 112.
55). 65 BVerwGE S 73(75).
57). 26 BVerwGE S 305(309).
59). Supra no 56 at p. 156.
60). Supra no 59.
61). See Lucke, DOV p. 769.
62). Ibid.
64). NJW S 874 Beschl. v 14-11-73.
65). E 33 S 240.
66). E 21 S 150.
69). E 7 S 89 (92).
70). Supra no 61, p. 770.
72). Supra no 61, p. 771.
73). Article 242 BGB reads as follows: "The debtor is bound
to effect performance according to the requirements of
good faith (Treu und Glauben), giving consideration to
the common usage."

74).
75). E 12 S 45 (54).
76). See e.g., E 39 S 36 (abortion).
77). Comp. para. 1 Bundesbaugesetz (Federal Law on
Building) of August 18, 1976 as amended.
78). See e.g., Larenz, Methodenlehre der Rechtswissenschaft,
79). E 5 S 85 (139).
80). Generally see Katz, Grundkurs im Öffentlichen Recht I,
81). Expressly in E 23 S 127 (133).
82). E 2 S 380.
83). E 19 S 342 (348-349).
84). Grabitz, p. 584.
85). Leibholz, Die Gleichheit vor dem Gesetz, 2nd Ed.,
1959, p. 34 et seq.
86). Supra no 85, p. 21.
88). Article 19(1) GG reads as follows: "In so far as a
basic right may, under this Basic Law, be restricted
by or pursuant to a law, such law must apply generally
and not solely to an individual case. Furthermore
such law must name the basic right, indicating the
Article concerned."

89). Most of them can be found in Leibholz (Supra no 85) p. 216.
90). See E 9 S 124(129), 15 S 167(201), 23 S 12(24) etc.
91). Supra no 87, p. 59.
92). E 54 S 301 (314), E 50 S 302 (315) etc.
93). E 7 S 377 (407).
94). E 48 S 376 (379).
96). E 50 S 290 (337).
97). E 5 S 85 (204).
99). E.g, Article 2 GG.
100). E.g, Article 14 (3) GG.
101). E 12 S 45 (51).
102). E 4 S 7 (15).
105). E 2 S 1 (12).
107). E 19 S 342 (348-9).
108). E 38, S 348 (368).
112). See the relevant case law of the BVerfGE, e.g, E 40 S
237 (248), E 49 S 89 (126).
113). E 8 S 274 (325), E 9 S 137 (147).
114). E 49 S 89 (133 et seq).
115). E 33 S 1, E 40 S 276 etc.
118). Supra 103, p. 117.
120). Supra 103, pp. 124-128.
121). E 49 S 89.
122). Article 19(2) GG reads as follows: "In no case may the essential content of a basic right be encroached upon."
123). Article 79(3) GG states that "Amendments of this Basic Law affecting ... the basic principles laid down in Articles 1 and 20 shall be inadmissible."
125). Supra 103, p. 25.
127). E 23 S 127 (133).
129). E 20 S 162.
131). Supra no 87, p. 28.
133). Grabitz, p. 586 et seq.
135). Compulsory civilian service for defence purposes may be introduced by parliamentary approval even prior the state of tension.
136). Supra no 103, p. 144.
138). Legislative Competences of the Federation During the State of Defence.
139). Natural disasters, especially grave accidents, disturbances of public security and order.
141). E 8 S 71.
142). E 9 S 338 (353).
143). VwVfG para. 40.
144). See 29 BVerwGE S 304 (307).
146). E 9 S 137 (147).
147). VwVfG para. 113: "If an administrative authority is authorized to act in its discretion, it has to exercise its discretion in accordance with the purpose of the authorization and the legal limits of the discretion have to be observed."
148). VwGO para. 114: "So far as the administrative authorities are authorized to act at their discretion the courts should also examine whether the administrative act or its refusal or omission is illegal because the statutory limits of the discretion have been exceeded or because the discretion has not
been exercised for the purpose of the authorization."

149). Supra no 148.

150). 26 BVerwGE 65 was confirmed in the Decision 31 BVerwGE 345 (358).


152). E 19 S 119.


CHAPTER III: THE GENERAL PRINCIPLES OF COMMUNITY LAW IN THE
COMMUNITY LEGAL ORDER. PROPORTIONALITY AS A
GENERAL PRINCIPLE OF COMMUNITY LAW.

I). The General Principles of Law in the Community Legal Order.

i). Definition of General Principles of Law.

When reference is made to an unwritten rule which does not constitute custom, it is generally or very often classified as a general principle of law. As it is often said (1) a general principle is a concept required by civilization whose law, custom or case law have applied it in one or more occasions. In this sense the principle is obviously 'general'. In this regard the difference between a written rule of law and a general principle must be considered in terms of its generality which is one of the factors in a rule of law; it is not, however, sufficient to state that a principle has a wider scope than a rule. A rule of law is adopted with a view to a specific legal situation whilst a principle of law is general in that there is inherent in a series of infinite applications in law. It may also be stated that a number of distinct series of solutions expressed in rules of law come under the general principles of law. (2)

General principles form the moral and institutional framework upon which the Community is based. Such rules bind the authorities empowered to issue secondary legislation (the Council and the Commission in casu), the Court and all national
agencies charged with the application of Community law. As Geny wrote:

"These general principles represent an ideal of reason and of justice which accords with the permanent basis of human nature and are presumed to form the basis of law. It is held that they must always have been born in mind by the legislature." (3)

Indeed the law-making bodies, consciously or otherwise, frequently construct written rules in the light of the existence of these principles and supposing that they will be applied in particular when the written rules of law are interpreted. General principles may also arise as a result of uniform arrangements which the laws have thus applied to certain problems or to problems having a similar nature. They may further give effect to common sense and logic.

The EEC Treaty contains numerous references to the principle of freedom. This apply not only to the movement of goods, but also to the circulation of persons, to establishment and exercise of professional activities, to provision of services, to competition etc. Fundamental to these diverse forms of freedom is a philosophy that is inspired by a regard for private initiative and free development of human personality as far as economic, social and professional activities are concerned. These rules provide in turn a basis for the development, beyond the positive prescriptions of the Treaties, a general principle of protection which the 'European homo economicus et socialis' (4) might invoke where ever his/her fundamental rights are threatened by some action of the
Communities. What has just been said is not a pure fiction, since in the case law of the Court there are a number of decisions dealing with the so called 'fundamental provisions' of the Treaties such as, for instance, Article 30, 48, 52, 59, 60, 85, 86 of the EEC Treaty. The Court has used this expression to ensure an overriding effect for some Treaty provisions which are essential to the institution and operation of the Common market. These principles have thus far been derived from such postulates of an economic and social character as inherent in the integration of the market, the Community preference or the principle of the free movement of workers. The Court pursuing the same logic of the above case law has included respect for fundamental rights among these basic principles of Community law.

(ii). The Raisons d'Etre of General Principles of Law in the Community Legal Order.

According to Article 164 of the EEC Treaty: "The Court shall ensure that in the interpretation and application of this Treaty the law is observed" (4a) while Article 173 EEC lists as one of the grounds of review of the legality of the acts of the Council and the Commission the infringement of "this Treaty or any rule of law relating to its application." Nevertheless, nowhere in the Treaty is the term 'law' defined. Obviously 'the law' includes the rules of conduct to be found in the Treaty itself and in the regulations, directives or decisions of the Council or the Commission. At the one end of the scale
these rules may be stated with some precision. For example, when from time to time the Court is called upon to interpret the Common Customs Tariff, which applies at the external frontiers of the Community, it has available the detailed wording of the Common Customs Tariff itself. At the other end of the scale the relevant rule of Community law may be expressed in terms of stark generality, such as to be found in Article 30 EEC which prohibits quantitative restrictions on imports and all measures having equivalent effect to a quantitative restriction, without any definition of what is a measure having equivalent effect to a quantitative restriction. Thus the texts of the Treaties or even the more detailed texts of secondary legislation are often inadequate to resolve the problems which they create. Much is unexpressed and yet solutions have to be found.

It is thus obvious that in no legal system it is possible for legislation or other written sources of law to provide an answer to every question which comes before the courts. The judges are thus obliged to create rules of law to decide the issues before them. Up to a certain degree it may be argued that all judicial processes reduce to a process of comparison. First, the appropriate rule of law must be found; it might be known or wrested only with difficulty from the sources available; in turn the facts of the matter in hand are laid alongside the law to be applied and the excess or shortfall be determined. Without adequate guidelines therefore a court has
no starting point, no standard against which to measure the problem before it. These guidelines may come from the clear text of a legislative measure or be extracted by some interpretative process; they may also be found in the time-honoured wisdom of a common law system or embodied in a jurisprudence constante; they may, as far as the European Court, is concerned be found in certain fundamental principles which emerge from an unwritten Community law. On account of its lack of maturity and, as yet great detail, the Community legal order has need of even greater recourse to general principles for its completion than is the case with most national legal orders. The use of the words 'the law' in Article 164 EEC and the reference to 'any rule of law' relating to the application of the Treaty in Article 173 EEC indicate clearly that from the outset it was envisaged that the Treaties would be operated in accordance with certain principles recognized by all the Member States. (5) The principles, as Advocate General de Lamothe has stated in the Internationale Handelsgesellschaft case, (6) which came before the Court in 1970:

"Contribute to forming that philosophical, political and legal substratum common to the Member States which through the case law an unwritten Community law emerges."

Or as the Court stated in the Merlini case:

"The fact that ... a rule [invoked by a party] is not mentioned in written law is not sufficient proof that it does not exist." (7)
The main reason for the extensive use of general principles by the Court is the fact that Community law resembles national law in structure and contents. Most rules of Community law create rights for individuals, and the institutions of the Communities resemble the judicial, executive and legislative institutions of a modern state; in these respects Community law bears a closer resemblance to municipal law than to ordinary international law, even though the European Communities were created by international treaties. The differences of kind between international and national law mean that analogies derived from national law are sometimes irrelevant and inappropriate to international law. But the similarity in the structure and content between Community law and municipal law are irrelevant or inappropriate to Community law. (8)

The fact that the Court usually confines itself to examining the laws of the Member States enables it to make detailed surveys of comparative law in a manner which other international tribunals, claiming to apply world-wide principles, cannot hope to emulate. The opinions of the Advocates General frequently contain such surveys, but there have been only two cases in which the survey appeared in the Court's decision. (9) In other cases the Court simply declares that something is a general principle of law without citing any authority. Nevertheless, it seems probable that the judges do take national laws into account before declaring the existence
of a general principle of law; in this connection a former judge stated:

"It can be assumed that in a court composed of judges from all the Member States, important strands of all the national legal systems are woven into its judgements, even if the judges may prefer—particularly having regard to the generality of the general principles—to limit themselves in this connection to oral discussion during the deliberation and forego more detailed comparisons of the laws of the Member States in the ... judgement. These may explain the terse findings which are frequently found in the ... judgement." (10)

Beyond legal and doctrinal reasons for the introduction and frequent use of general principles in the Community legal order, there are other practical, mainly political reasons. The Community Treaties contain no catalogue of basic rights and the corresponding constraints on Community authority. It should also be borne in mind that possible accession of the European Communities in the European Convention on Human Rights is a highly controversial issue from both the political and legal point of view. Nevertheless, as the Communities expanded their field of activities this lacuna gave rise to serious objections, first of all in Germany. It is hardly surprising that it was in Germany that these objections were first raised as there legal protection of basic rights is the most developed in the Community, and in view of the important role that these rights play into the socio economic sphere. Thus it was German appellants who challenged various decisions of the Community institutions before the Court, alleging that they were incompatible with national constitutionally guaranteed rights.
In these cases the Court was content to observe that it was not competent to review decisions in the light of national constitutional provisions. (11) Partly under the influence of discussions in German legal circles (12) about the relationship between Community law and national constitutional law, the view of many participants that German judges were entitled to review Community rules in the light of their own constitutional rights and considering that German courts found this idea quite convincing, the Court, at the end of 1960s, revised its passive stance on the matter of basic rights in the Communities.

The heart of the matter was that the individual required protection against Community authority and this protection had to be found within Community law, since recourse to purely national guarantees and procedural machinery could jeopardize the existence and further development of Community law. The approach adopted by the Court was that the absence of written provisions relating to basic rights did not, however, mean that the Community and its organs were not bound by fundamental rights. (13) The position is rather that Community law -like the law of other international organizations and the written law of the individual states- required to be supplemented by unwritten legal principles, which include predominantly, basic rights. (14) These legal principles supplement written Community law and are of equal status with primary Community law. In its judgements the Court has with increasing precision acknowledged that Community law bears the imprint of basic
rights which belong to the legal principles common to the Member States and which are embedded in their understanding of law. (15) The progressive development and deployment of general principles within the field of basic rights is a part of the legitimate duties of the judicial arm, and of the jurisdiction of the Court as defined in the Treaties, to maintain Community law (Article 164 EEC). In the nature of things it is only gradually and by surmounting of uncertainties that judicial recognition and implementation of unwritten principles can lead to a secured canonical corpus of protected basic rights.

iii). Applications of General Principles of Law in Community Legal Order.

General principles of Community law are applied in the following ways:

i) as guidance in the interpretation of the Treaty provisions or secondary legislation.

ii) as guidance for the exercise of powers granted by the founding Treaties or secondary legislation, including the power to adopt legislation (General principles of law as means of protecting basic rights).

iii) as criteria for determining the legality of acts of the Community institutions and the Member States, including legislative measures, and

iv) for the purpose of filling gaps in Community law where to accept the existence of a lacuna would lead to a denial of justice.
i) General principles of law are used to interpret the Treaties and acts adopted by the institutions of the Community to implement the Treaties. In general, where a provision of Community law is open to more than one interpretation, preference will be given to an interpretation which is compatible with the general principles of Community law rather than to an interpretation which is not. (16) The importance of the general principles of law (proportionality in casu) for the interpretation of the Treaties is underscored, for example, in the Coenen case. (17) Here the Court had to interpret Articles 59, 60 and 65 of the EEC Treaty in connexion with a provision of Dutch law requiring that persons acting as insurance brokers should have their permanent residence in the Netherlands. The Court ruled that:

"... the provisions of the EEC Treaty, in particular Articles 59, 60 and 65, must be interpreted as meaning that national legislation may not, by means of a requirement of residence in the territory, make it impossible for persons residing in another Member State to provide services when less restrictive measures enable the professional rules to which provision of the service is subject in that territory, to be complied with."

According to the ex Judge Kutscher (18) an act adopted by a Community institution:

"...is to be interpreted -if at all possible- so that it is compatible with the superior law of the Treaties and the general principles of law which, too, are attributed status superior to that of subordinate law. Other interpretations which would lead to incompatibility with the superior law, and thus ... to the invalidity of the measure adopted by the institution, are to be disregarded."
Thus the Court in A. M and S v Commission held that Regulation 17/62:

"... must be interpreted as protecting, ...
the confidentiality of written communications
between lawyer and client ..., and thus
incorporating such elements of that protection
as are common to the laws of the Member States." (19)

Although the Court will often strive to interpret the Treaties and secondary legislation in conformity with general principles of law, the Court will not interpret the Treaties in conformity with these principles where it is clear from the wording of the Treaty that the drafters of the Treaty intended to reject a principle contained in the laws of Member States. (20)

ii) General principles of law provide a guidance for the exercise of powers granted by the founding Treaties or secondary legislation including the power to adopt legislation. It could be mentioned, for instance, that guarantees for the protection of individuals which are laid down in the EEC Treaty take precedence over regulations. Thus the Court in Noordwijk's Cement Accoord (21) held that:

"In any event it [that is, Regulation 17/62] cannot prevail against the guarantees for the protection of individuals laid down by the Treaty and which take precedence over all regulations."

The obligation to comply with the general principles of Community law follows from the fact that a failure to do so may lead to the annulment of the measure concerned.

One of the most remarkable jurisprudential developments in European Community law is the protection of basic human
rights under the cover of general principles of law. In the
1960s, the argument that Community law should comply with basic
human rights provisions of national constitutions (especially
of the Grundgesetz) was put forward by German litigants both in
German courts and the European Court. At first the Court was
unsympathetic. However, it was soon apparent that the German
courts found the doctrine very persuasive, and it became
imperative for the Court to take action to head off a possible
'rebellion.' The solution adopted was to proclaim a Community
concept of human rights, in the form of general principles of
law, and to lay down the doctrine that the European Court of
Justice would itself annul any provision of Community law
contrary to basic rights.

In its somewhat reserved ruling reviewing the validity of
a Commission decision in Stauder, (23) the Court for the first
time took cognizance of basic rights as a part of the Community
legal order. But the real turning point of this development is
undoubtedly Internationale Handelsgeellschaft. In the Court's
view:

"... respect for fundamental rights forms
an integral part of the general principles
of law protected by the Court of Justice.
The protection of such rights, whilst inspired
by the constitutional traditions common to the
Member States, must be ensured within the
framework of the structure and objectives
of the Community." (24)

This view was strongly confirmed and further developed in the
decision in Nold (25) rendered in an annulment procedure:
"In safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the Constitutions of those states."

Within this common constitutional framework, the Court reviews Community acts in the light of fundamental principles. (21) More than that, it considers their infringement as a ground for annulment as explicitly stated in Nold. This development has been further reaffirmed in Hauer. (27) By 1986 the Bundesverfassungsgericht was sufficiently reassured by the developments just outlined that fundamental rights were now sufficiently protected in Community law despite the absence still of any enacted catalogue. (27a)

The origin of this development may be found in the political and legal dynamics underlying the independence of Community law and its supremacy. An absolute supremacy of Community law could not have been developed at the expense of constitutionally guaranteed basic rights. The close relation of national law, of constitutional law in particular, with Community law and the effect on the operation of its legal order, might have prompted the Court to look for a different and more satisfactory solution. On the one hand, supremacy of Community law could not have been maintained at the disregard of the basic principles of human rights; on the other, their continued protection, in case of conflict with provisions of Community law, by national courts would have, in turn,
compromised the latter's absolute supremacy and uniform validity. Facing this dilemma, the Court, it seems, solved it in its own way by considering these rights as part of the general principles of law to be safeguarded in accordance with Article 164 EEC. The development of the case law does confirm this assumption.

Having already established the supremacy of Community law, the Court, dealing for the first time with a conflict between basic rights and Community law, in Stauder, declared these rights immediately and without hesitation as part of the Community legal order. The close connexion between the protection of basic rights and supremacy of Community law appears rather evident even though neither Stauder nor Internationale Handelsgesellschaft made the slightest reference thereto. In Hauer the Court stressed this connexion. It observed that an infringement of basic rights by acts of Community institutions may be determined within the framework of Community law only. (28) If the validity of Community acts were reviewed in terms of national legislation and the constitutional law of the Member States, reasoned the Court, the substantive uniformity and efficiency of Community law would be impaired. And this would, according to the Court, lead to the destruction of the Common Market and endanger so the coherence of the Community. Finally, it should be pointed out that within the system of Community law the legal protection of individual rights and liberties by means of
principles of administrative law is not at all out of date. These principles which have formed an integral part of Community law from its very beginning are still alive, and they do ensure -in their varieties and even nowadays increasing substance- together with genuine human rights adequate and effective legal protection for the citizens within the Community.

iii) General principles of law constitute objective standards for judging the legality of administrative action. Recognizing certain general principles as a ground for annulment, the Court has considerably strengthened its control over the legal exercise of Community powers. The recognition of general principles of law as a part of Community legal order has ultimately opened the way for a most notable and important development of the judicial protection of private parties by means of an annulment action. The introduction of basic rights under the cover of general principles of law, as a ground for annulment, has reinforced the judicial control over the legal exercise of Community powers.

General principles of law constitute criteria for determining the legality of acts of the Community institutions and those acts of the Member States concerning the implementation of Community law or otherwise giving effect to the Community Treaties. In Schmitz (29) the contract of a staff member was not renewed for a reason which the Court considered 'clearly exaggerated.' The Court therefore annulled
the decision not to renew the contract. In Zuckerfabrik Franken (30) the legality of national rules which provided the liability of recipients of denaturing premium certificates, for any use otherwise than for the intended purpose by third parties was at stake. The Court after stating that national provisions did not conflict with the relevant provisions of Community secondary legislation, went on to examine whether such rules were compatible "with the superior rules of Community law, in particular with the principles of legal certainty and proportionality."

iv) In no legal system is it possible for legislation or other written sources of law to provide an answer to every question which comes before the courts. General principles of law constitute a fund of knowledge tried and tested by the national and international practice of States as well as by equivalent international organizations which must be utilized if the European Court of Justice is to escape 'the reproach of a denial of justice' (31) and the stultifying effects of non liquet on the development of Community law. In Algera the Court had to deal with the problem of revocation of individual administrative measures. After observing that the Treaty did not contain any rules on that matter the Court went on to state that: "Unless the Court is to deny justice it is therefore obliged to solve the problem by reference to the rules acknowledged by the legislation, the learned writing and the case law of the Member States." (33)
This does not mean that any particular principles of another legal order—even those embodied in the constitutions of the Member States—are binding as such on the Community organs. Rather, the principles here in question simply offer authoritative evidence of an existing consensus which the Court may draw for persuasive support of its decisions. Seen from this perspective, they reflect a true ius gentium or common law which 'Est l' expression de la conscience commune des nations' or, more concretely, of a 'socially realisable morality.' (34) Through their incorporation into Community law, they function as stabilizers of legal development, appealing to the continuity of existing practice and integrating judicial innovation with recognized legal practice. The use of general principles in order to fill a lacuna in Community law is expressly envisaged in Article 215 EEC (35) which provides that, in the case of tort liability, the Community is to make good any damages caused by it in accordance with the general principles common to the laws of the Member States. Other lacunae in the Community treaties do not give guidance as to how they are to be filled; the ECSC Treaty, Article 31, the EEC Treaty, Article 164, and the Euratom Treaty, Article 136, require the Court to ensure that 'the law' is observed without explaining to what this refers. Similarly all three Treaties list as one of the grounds for annulling an act the breach of any rule of law relating to the application of the Treaty (36) without defining such rules or explaining how are they found.
In such cases, the Court applies the general principles of law in order to give effect to the Treaties. (37)

In any cases, apparent gaps are filled by giving a provision of Community law a broad interpretation. These are false lacunae because the gap would only exist if the provision in question were interpreted narrowly. Real lacunae may also be filled by giving a provision of Community law an extended meaning which gives full effect to a general principle which it is intended to implement, (38) or by applying another provision by analogy in order to ensure that the general principles of law are observed. An example will do. Regulation 263/75 on accession compensatory amounts made no provision for an escape clause in case of 'force majeure.' The Court accepted that by analogy with Article 6(1) of the Regulation 192/75 (on compensatory amounts), Article 5(2) of the Commission Regulation 269/73 were to be interpreted as meaning that goods exported from one of the original Member States of the Community to a new Member State had perished in transit, as a result of 'force majeure,' the exporter was entitled to the same compensatory amounts as would have been due to him if the goods had reached their destination and if import formalities had been completed there. However, recourse to general principles in order to fill lacunae applies only to matters of substantive law; the Court cannot fill a real gap in the provisions defining its jurisdiction. Thus in CFDT v Council (39) where proceedings were instituted with regard to subject
matter other than that defined in Article 38 ECSC the Court dismissed the application of the CFDT as inadmissible maintaining that:

"Whilst the principles [right to judicial remedy] upon which the applicant relies call for a wide interpretation of the provisions concerning the institution of proceedings before the Court with a view of ensuring individuals' legal protection they do not permit the Court on its own authority to amend the actual terms of its jurisdiction."

iv) Sources of General Principles of Law in the Community

Legal Order.

General principles of law are derived from various sources but the most important are the Community Treaties and the legal systems of the Member States. In the former case the Court declares that a specific provision in one of the Treaties is an application of some more general principle which is not itself laid down in the Treaty. This is then applied in its own right as a general principle of law. An example of this is Article 36 ECSC which provides that in an appeal against a fine or penalty, the applicant may claim that the measure which he contravened is invalid. In Meroni (40) the applicant wished to invoke this plea in a case involving not a fine but a levy. Article 36 ECSC could not apply but the Court held that this provision was a particular application of the general principle that all legislative measures may be challenged indirectly. This general principle was applied to the case at hand so as to allow the applicant to challenge the measure. It will be noticed that this reasoning involves two stages: The first is
inductive, in which the Court derives a general principle from specific provisions in the Treaty; the second stage is deductive – here the Court arrives at a solution to the particular issue before it by applying the general principle. It should be stressed that when the Court acts in this way the legal basis of its decision is not the Treaty but the general principle.

General principles of law as unwritten principles of Community law are derived mainly, if not exclusively, from principles and conceptions which are common to the legal systems of the Member States and the origins of which may very often traced back to Roman law. (41) In the case of the Communities' non-contractual liability, this is expressly so provided by the Treaties. Article 215(2) EEC (42) provides that the liability of the Community is based on the 'general principles of law common to the laws of the Member States.' For the most part, therefore, general principles of law represent principles of the civil law system. This means that in Community law the concept of general principles of law is, in general, narrower than in public international law where it refers to such legal principles as have been generally accepted by all 'civilized nations', (43) by all the major legal systems in the world. Such a wide acceptance is obviously not required for the purposes of Community law. Nevertheless, with the enlargement of the Communities, the concept of legal principles is liable to become broader so as to take account of the laws
of the new Member States and with them of the principles of the common law system. While it is clear that these laws cannot be relevant to the solution of a problem that arose before accession, (44) the principles of common law have, from the early days of the United Kingdom's accession to the Communities, started to make their impact upon the Community legal system thus contributing to its development through the concept of general principles of law. A striking example in this respect is the recognition by the Court of the principle audi alteram partem in 1974, just one year after Britain's accession to the Communities, following Advocate General Warner's strong plea in the Transocean Marine Paint case. (45)

When the Court looks to national law for inspiration, it is not necessary that the principles should be accepted by the legal systems of all the Member States. In the words of Advocate General Langrange:

"In this way the case law of the Court, in so far as it invokes national laws (as it does to a large extent) to define the rules of law relating to the application of the Treaty, is not content to draw more or less arithmetical 'common denominators' between the different national solutions which, having regard to the objects of the Treaty, appear to be best or, if one may use the expression, the more progressive. That is the spirit, moreover, which has guided the Court hitherto." (46)

It must be stressed, however, that whatever the factual origin of the principle, it is applied by the Court as a principle of Community not national law. These points need further elaboration. Where a rule has been laid down by the Treaty or by an act of a Community institution, it is permissible to
interpret that rule by comparison with legal systems where such rule exists, and with those systems only. In Assider, for instance, the Court held that a provision enabling it to interpret its previous judgements must be construed in comparison with the laws of Member States where the same rule existed -which meant French and Belgian law as the rule did not exist in other Member States. (47) The fact that the laws of some Member States are silent on the point at issue does not prevent the Court from applying a principle which is clearly established by the laws of the other Member States. (48)

However, when general principles of law are used as a source of law in their own right, and not merely to define the scope of a rule laid down by the Treaty or by acts of Community institutions the position is less clear. The Advocates General have occasionally suggested that the Court is free to select a principle of national law which it regards as most progressive (49) or most carefully considered. (50) Such approaches are not without their dangers. A Member State might feel aggrieved if the Court said that a principle which was rejected by that State's law was not progressive or not carefully considered. This could also lead to a sort of 'rebellion' from the courts of the resentful Member State which may either defy or discard the relevant ruling of the Court. Moreover, progressive is a subjective term; what is progressive and retrogressive depend on the direction in which one wants to move and there is often no agreement about this. If a principle is really progressive,
why is it not accepted everywhere? The fact that it is not accepted everywhere proves that one's conception of progressive is subjective and not shared by everyone. Sometimes the Advocates General have tried to meet this objection by arguing that the law in some states is beginning to move towards the solution adopted in other countries, and that the Court should therefore follow the latter solution. (51) Nevertheless it is not certain at all that the law in the first group of countries will continue to evolve in that direction, or whether the trend will be reversed. It is respectfully submitted that it is no part of the Court's function to anticipate developments which may never be completed.

The main argument in favour of the above views of the Advocates General is that, differences between national laws would often make it impossible for the Court to apply general principles of law if the latter were interpreted to mean principles existing in the laws of all the Member States. This argument should not be pushed too far; although the laws of the Member States differ from one another in points of detail, the underlying principles are quite often the same. There are also cases where different principles may in particular factual situations produce the same result. Nevertheless there can be a situation, of course, where different principles lead to different solutions, and these situations are likely to become more numerous as the number of Member States increases. The Court may, in certain circumstances, choose from among
conflicting principles of national laws those principles which it regards as best or more progressive; very often a principle has to be formulated in very broad and abstract terms in order to transcend differences of detail between national legal systems. The Court inevitably enjoys a wide margin of discretion in deciding how such vague principles should be applied to the facts of particular cases.

The Court may opt to give greater weight to the laws of some Member States than to the laws of others. As a matter of fact the decisions of the Court and the conclusions of the Advocates General refer, at the early stages of Community law at least, most frequently to French and German law. This is due undoubtedly in large part to the fact that the Advocates General being thus far French and German jurists, have simply drawn on the municipal law they know best. It is also true, however, that these two legal systems in general tend to embody the most pronounced differences in conception and approach among the Member States. The emphasis therefore has not been misplaced. In the selection of general principles of law for the Community, what is necessary or reasonable is not their universal recognition but their uniform application in the main systems of national law.

German law has exercised a stronger influence since about 1970. Many of the most important principles applied by the Court - principles such as Verhaltnismassigkeit (proportionality), Rechtssicherheit (legal certainty) and
Vertrauensschutz (protection of legitimate expectations)—have been borrowed by the Court from German law. This does not necessarily mean that such principles are contrary to the laws of other Member States. When an English judge, for instance, states that bye-laws made by local authorities would probably be held void for unreasonableness if they involved "such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men", (53) reaches the same result a German jurist would reach by applying the principle of proportionality. The Court's use of German legal concepts and terminology, however, suggests that it pays more attention to German law than to the laws of other Member States. The main reason for the strong German influence is that a large proportion of cases referred to the Court under Article 177 EEC come from German courts or tribunals. Until early 1989, no fewer than 603 cases out of 1858 (that is 34 %) referred to the Court under Article 177 EEC came from courts in the Federal Republic. In replying to the question raised by German courts, the Court will naturally try to frame its reply in terms which German judges can understand, and that means using German concepts and terminology. Furthermore the doctrinal completeness and the highly logical structure of German law has widely been acknowledged. It is also plausible to argue that German public law provides a complete substantial and procedural framework for the protection of the citizen from arbitrary use of state authority
which can be used as a model for other legal systems.

It should be pointed out that the application of general principles of law is a creative and not merely a mechanical process. The Court's tendency to declare dogmatically that such and such a principle exists and requires a particular solution to the case in hand, without citing the national laws on which the principle is supposed to be based, often conceals the degree to which the Court develops and extends the general principle of law which it purports to apply. In short there is a tendency for general principles borrowed initially of Member States, to evolve into principles of judge-made law. After a principle has been applied by the Court on a number of occasions there is a tendency for litigants, Advocate Generals and the Court itself to define the scope of this principle by citing the previous judgements of the Court rather than the national laws on which the principle was originally based. This may not play a decisive role on the outcome of the case but it contributes to averting the danger of divergent or even in some cases conflicting case law developing in the Member States. It also gives the principle a Community-wide character thus enhancing its legal status. In the Internationale Handelsgesellschaft, for instance, the Court referring to the principle of proportionality stated that: "The fundamental right invoked here ... is already guaranteed by the general principles of Community law that has been affirmed by at least two of the Court's judgements ..." (54)
It is also significant that the Court sometimes describes the general principles of law which it applies as principles of Community law. Each subsequent judgement of the Court slightly alters the content of the principle, so that the Court can end up applying a principle in a manner which is contrary to the laws of all the Member States. At this point the fiction that the Court applies general principles of law is transparently false. What the Court is originally doing is creating law. Judicial legislation may seem undemocratic, but the rules it produces are often practical and satisfactory. There is no reason to believe that the law created by the Court of Justice will be less satisfactory than the English common law or the case law of the French Conseil d'Etat.

It is clear that there is no common principle where the national laws vary to such an extent that it is impossible to extract from them a truly common of a legal concept. Nor where a principle existing in one Member State is not at least generally known in the others. Thus Advocate General Gant commenting, in Chemiefarma, on the principle that persons concerned should be made aware of their right to make an application and the time limits fixed for so doing, stated that:

"Although the rule relied upon exists in Germany, it is not known generally in other Member States and it thus impossible to consider it as a 'general principle' which applies to Community law in the absence of written provisions." (55)

In such cases, a principle of national law can only be adopted
in Community law as a new and independent concept of the latter and not as a general principle of law so altered from the original as to take account of the specific purposes and requirements of Community law and the new context in which it is intended to operate. In some cases even the fact that a principle is universally recognized in the Member States may not lead to its incorporation into Community law, namely, where this could be achieved only by what would amount to genuine legislative activity on the part of the Court going beyond the limits of interpretation and application. Clearly the Court is reluctant to create new law under the disguise of applying general legal principles. In Chemiefarma (56) the Court, in spite of the contrary opinion of its Advocate General, refused to set the length and terms of a limitation period in the field of competition law saying that this belonged to the competence of Community legislator. Likewise a general principle common to the laws of the Member States must remain outside the Community legal system if the question is already governed by a rule or a principle belonging to this system which is independent of or different from the national principles. (57)

Considering the unique character of the Community legal order as conceived by the Court, (58) general principles of international law may be expected to have little relevance and pursuasive value in judicial decision. These principles not only minimize the role of the individual, but also offer meagre direction for interpreting the institutional balance of
Community powers as well as the economic subject-matter of the Treaties traditionally reserved to the states. (59) Not surprisingly, therefore, the Court has employed them rarely and then primarily as a means for strengthening the independence of Community legal order. Thus the reception of the doctrine of 'implied powers' into Community law emphasizes the autonomous development of this legal order. There the Court relies on 'a rule of interpretation generally recognized in international as in municipal law.' (60)

From the foregoing it follows that there is a close connection between the national laws of the Member States and general principles of law as sources of Community law. In certain cases it is not even possible to state whether a concept or rule has found its way into Community law as a solution borrowed from the laws of the Member States and the general principles of law; consequently it may be regarded as either. (61) A clear dividing line between the two may nevertheless be drawn according to the following considerations. On the one hand, the national, even constitutional, law of a particular Member State can never be invoked for the purpose of challenging the legality and validity of Community measures and only exceptionally for the purpose of interpreting or supplementing Community law. Consequently, the national legal systems, taken individually, cannot be considered proper sources of Community law. On the other hand, in so far as national rules and concepts represent
values common to the legal orders of all the Member States they may be raised to the rank of 'general principles of law.' As such they may become a genuine source of Community law capable of creating rights and obligations for its subjects in the light of which the validity of secondary legislation may be tested. Moreover, the concept of general principles is broader in so far as these principles are not necessarily restricted to municipal laws of the Member States, but are, although less frequently, also derived from the field of public international law (62) and from Community law itself.

Recourse to the general principles of national law looms large in the Court's reasoning. Nor only does it correspond closely to the subject matter of Community regulation, but it also will be most persuasive -because of more familiar and trusted- for the bulk of legal opinion in the Member States. For the most part, judicial reasoning is most effective when the sources invoked are elaborated and their peculiar relevance pointed out. Only rarely has the Court elaborated its references to general principles of national law. (63) Most generally, the Court has preferred to rely -either expressly or impliedly- on the comparative studies of the Advocates General or on unstated studies of its own. Conclusions of Advocates General are rich in source material. Their comparative enquiries into Member States' laws -on such diverse questions as the concept of detournement de pouvoir, contracts of employment etc- reflect the influx of general principles of
national law into Community legal order. The persuasive value and even the intelligibility of the Court's decisions, therefore, often depend on reading them in conjunction with the conclusions of the Advocates General. Above all, the appeal to national laws is not automatic. It must be weighed carefully and selected in terms of its suitability to Community purposes. The criteria for comparing legal concepts in varying legal systems "cannot be derived from their doctrinal role, but only from their common function in the several legal orders which they belong." (64) The objective of comparative studies, warns ex Advocate General Langrange, "is not to create a synthesis or to lead to a 'compromis juridique', but rather to seek to determine the proper law of the Treaty." (65)

In Community law nowadays the task of establishing common principles of administrative law is rather difficult and quite complex in any event. Those principles have to be formulated on the basis of -at present- twelve different legal orders which are not at all easy to compare. It has to be emphasized that administrative law is strongly influenced by national features and traditions. Administrative law belongs to these legal branches where national characteristics of the people and the state are especially prevalent. (66) Traditional forms and elements prove to be especially persistent within administrative law; for instance the legal status of civil servants, the degree of centralization and the way of handling administrative matters seem to be, to a high degree, the
Nevertheless despite all national traits and traditions of administrative law in the Member States, it seems that the different national legal orders to a great extent find similar solutions to similar problems in practice. (67) The similarity of problems and solutions may turn out to be a solid basis for a further harmonization of administrative law within the framework of the European Communities. In this context, EEC law with its general principles may even prove to be pacemaker for the development towards a common law in Europe. According to Rivero:

"Le droit communautaire peut accelerer ... le developpement d' un droit administratif european commun, attache a degager les principes essentiels d' un equilibre entre les imperatifs de l' action du pouvoir et les libertes des citoyens." (68)

II) Proportionality as a General Principle of Community Law.


The principle of proportionality made an early debut in Community law, in the Fedecar case in 1955, (69) and it has either been invoked by the litigants or applied on the Court's own motion until 1990, according to Lexis data, in approximately 400 cases. In the very first case that the Court referred to the principle of proportionality, it held that:

"In application of a generally accepted rule of law, actions of the High Authority in response to a wrongful act of an enterprise must be proportionate to the gravity of that act."
It is obvious from this quotation that the Court has considered proportionality as a general principle of Community law from the very early days of its operation. It is worth noting that in these early judgements, where the principle of proportionality was alluded, neither the Advocates General nor the Court mused over the origin of proportionality in Community law as it was the case with other general principles. A possible explanation for this, is that proportionality might have been considered by both the Court and Advocates General as such fundamental and obvious a principle that its presence in the Community legal order was deemed as self-evident with no need for further explanation and clarification.

The question of the origin of proportionality in Community law was first tackled by the Verwaltungsgericht of Frankfurt am Main in the Export of Oat Flakes case (70) where the legality of the system of export deposits was challenged by the applicant. Discussing this point the German court stated that the principle of proportionality:

"... is derived from the general rule of law applicable in public international law of the prohibition against the abuse of rights. Therefore it also applies in the supranational law of the Member States of the European Economic Community and must thus be observed in its legislation. A breach of this supranational law principle makes a law of the Community invalid."

The fullest discussion of the question of the legal source of proportionality in the Community legal order was made by Advocate General de Lamothe in his conclusions in Internationale Handelsgesellschaft. (71) The applicants in this
case challenged the system of export licences and deposits as being contrary to fundamental human rights. One principle invoked was that of proportionality. It was argued in the German court where the proceedings commenced that the relevant Community measure was invalid for violating the Grundgesetz; the question of validity was referred to the Court. The Advocate General scrutinized the three possible sources which could justify the existence of proportionality in Community law. The first possible source of proportionality was the combined effect of Articles 2 (Rights of Liberty) and 12 (Right to Choose Trade, Occupation or Profession) of the Grundgesetz. As a result Community acts may not infringe constitutional principles. The second source suggested was the unwritten law of the Community, that is, the general principles of Community law. Finally the Advocate General said, the source of the principle in question could be found in an express and clear provision of the Treaty. He rightly pointed out that even though the final solution to the case were to be the same, whatever source accepted, it was still necessary for the Court to pronounce itself on that matter for otherwise there would be the danger of divergent or even contradictory case law developing in the Member States.

De Lamothe correctly rejected the first source suggested, on the count that Community measures can be judged only in the light of Community law, whether written or unwritten, but in no case in the light of the national law, even if that was
constitutional law. Justifying his view, he referred to the Court's ruling in Costa v ENEL (72) where it was held that a Community measure:

"...by virtue of [its] specific original nature, cannot be judicially contradicted by an internal law, whatever it might be, without losing [its] Community character and without undermining the legal basis of the Community."

Advocate's General position is, moreover, vindicated by the ruling in Geitling (73) where the Court stated that the validity of a Community decision could not be judged in the light of the German Grundgesetz and Articles 2 and 12 GG in particular, that is the very Articles suggested as a possible source of proportionality in Community law. (74) Nevertheless, it was also submitted that the fundamental principles of national legal systems have an important function in Community law: They contribute to permitting the latter to find in itself the resources necessary, where needed, to ensure respect for fundamental rights which form the common heritage of the Member States. Proportionality was, however, guaranteed both by the general principles of Community law for which the Court ensured compliance and by an express Treaty provision.

To illustrate his point on general principles of law the Advocate General cited as examples the Court's decisions in Fedechar (75) and Compagnie des Hauts Fourneaux (76) where it was held that in application of a general principle of law, the penalties imposed on a defaulting undertaking should commensurate with the gravity of the punishable act. To
substantiate the view that proportionality can be traced to a provision of the EEC Treaty, reference was made to Article 40 of Title II on agriculture, from which it follows that the common organization of the market in agricultural products set up to attain the objectives described in Article 39 EEC: "May include all measures required to attain the objectives set out in Article 39", that is, they may employ only those measures necessary for the attainment of the objectives pursued by Article 39 EEC.

The Court endorsed the position of its Advocate General as far as the first source (Article 2 and 12 GG) was concerned, saying that recourse to the rules or concepts of national law in order to judge the validity of measures adopted by Community institutions would jeopardize the uniformity and efficacy of Community law. It repeated the formula put forward in Costa v ENEL (77) and concluded that the validity of a Community measure or its effect within a Member State could not be affected by allegations that it ran counter to the principles of a national or constitutional structure. It stated, however, that it intended to examine "whether or any analogous guarantee in Community law has been disregarded."

The position of the Court, on the question of the legal source of proportionality is not very clear though. In its decision in the case in hand it hinted that both the general principles of Community law and Article 40(3) EEC could be accepted as sources of proportionality. The Court treated
proportionality as constituting a fundamental right, that is, the individual should not have his/her freedom of action limited beyond the degree necessary for the general interest. (78) This view is substantiated by the Court's statement that it was going to examine the allegation of the plaintiff in the main action "that the burden of the deposit for trade, to the extent of violating a fundamental right." In the very same judgement it was said that "respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice." Therefore since proportionality constitutes a fundamental right, it results from the above statement that its legal source can be located in the general principles of law protected by the Court. But the Court did not reject Article 40(3) EEC as a possible source of proportionality either. In another part of the same judgement, referring to the compatibility of the system of deposits with the Treaty provisions, it stated that:

"... the system of licences ... does not violate any right of a fundamental nature ... The machinery of deposits constitutes an appropriate method, for the purposes of Article 40(3) of the Treaty for carrying out the common organization of the agricultural markets ..."

From the three possible legal sources of proportionality in Community law described above, the one which is founded on written law will be accepted because: "It is a good judicial technique to apply unwritten law only in cases of obscurity, insufficiency or gaps in the written law and also that since Article 40 of the Treaty refers not to more or less defined
aims of general interest but more precisely to the objectives listed in Article 39 it thereby ensures a more precise guarantee of the rights of individuals than the general principles of Community law." (79) Therefore, not only there is no any problem in tracing the principle of proportionality within the Community legal order but "you could even ponder over which of those bases you should use."

III). The Principle of Proportionality in Relation to Other General Principles of Community Law.

a). Proportionality and Legal Certainty (Securite juridique).

The principle of legal certainty, underpinning any legal system, is one of the most important general principles of Community law pervading all its aspects, substantive and procedural alike. In its broadest meaning it gives effect to the fundamental requirement for a reliable and stable Community legal order. It means that the application of the law to a specific situation must be predictable and it demands that ambiguous legal situations should be avoided: All those subject to the law should at all times be in a position to recognize what their rights and obligations are. It implies moreover that existing legal situations and relationships on the continuance of which without change to their detriment Community subjects acting in good faith are legitimately entitled to rely on, should possibly be maintained and should not be upset without compelling reasons. (80) In the field of
procedure legal certainty requires that Community institutions should not, even in the absence of statute limitations, delay indefinitely the exercise of their powers to impose sanctions (81) and that Community measures should not be challengeable beyond strict, and possibly not unreasonably long time limits. Admissibility of actions for annulment and allegations as to absolute nullity must be judged with due regard to this principle. (82) The general idea of legal certainty is naturally recognized by the legal systems of the Member States; in Community law, however, it plays much more concrete role in the form of various sub-concepts which are regarded as applications of it. The most important of these are non-retroactivity, vested rights and legitimate expectations.

Nevertheless, the principle of legal certainty, however important it may be, cannot be applied absolutely but must be harmonized with the principles of legality and proportionality [justice] (82a) which, in turn, must be applied with due regard paid to legal certainty. This requires a balancing of the private interests which parties who have in good faith benefited from a Community measure proved later to be illegal have in maintaining a situation upon whose continuance they have relied, with the public interest which the Community has in safeguarding the legality of its actions. (83) On the other hand, the principles of proportionality and legal certainty must be so reconciled as to entail the minimum of sacrifice by Community subjects as a whole in the carrying out of measures
taken to attain the Community objectives. (84) In Klockner (85) the applicant argued that the scrap moving between his respective subsidiaries is own resources of one and the same undertaking and therefore it should be exempted from the levy imposed on ferrous scrap. The Court observed that:

"... the High Authority, in working out and applying the financial arrangements which it has established to safeguard the stability of the market, has indeed a duty to take account of the actual economic circumstances in which these arrangements have to be applied, so that the aims pursued may be attained under the most favourable conditions and with the smallest possible sacrifices by the undertakings affected. The principle of justice however must always be harmonized with the principle of legal certainty which likewise is based on the requirements of law and justice. These two principles must be so reconciled as to entail the minimum of sacrifice by Community members as a whole."

b) Proportionality and Non-Retroactivity.

A close link is deemed to exist between the principle of proportionality and non-retroactivity. The latter applied to Community secondary legislation precludes a measure from taking effect before its publication. There are two rules which, according to the relevant case-law, can be derived from the principle of non-retroactivity: (86) First, there is a rule of interpretation, that in the absence of a clear provision legislation is presumed not to be retroactive; (87) secondly, there is a substantive rule that prohibits retroactivity in general, but allows exceptions where the purpose of the measure could not otherwise be achieved, provided the legitimate expectations concerned are respected. (88) The Court summarized its case-law on non-retroactivity in Salumi (89) in which it
held that:

"Although procedural rules are generally held to apply to all proceedings pending at the time when they enter into force, this is not the case with substantive rules. On the contrary, the latter are usually interpreted as applying to situations existing before their entry into force only in so far as it clearly follows from their terms, objectives or general scheme that such an effect must be given to them."

The position of the Court confirms that new procedural rules apply in previously initiated cases. Similarly new substantive rules will apply to future consequences of fact which have arisen previously to the new rules. This is consonant with generally accepted principles of economic law according to which a regulation amending an earlier one will apply, unless otherwise provided, to the future consequences of situations which arose in the past under the former regulation even though this may involve disadvantageous consequences for individuals. The Court adopted this position in Mrs P where it stated that:

"According to a generally accepted principle a law amending a legislative provision applies, save as otherwise provided to the future effects of situations which arose under the previous law." (90)

A special aspect of the link between these two principles is that the invocation of the principle of proportionality may, under certain circumstances, invalidate an authorization by the Commission of protective measures taken by Member States and which are retroactive for the most part. However, decisions of the Commission authorizing temporary protective measures taken by a Member State prior to the date of the decisions and of
their publication in the Official Journal are not necessarily rendered invalid by the fact that they are given retroactive effect. In quite a few cases the protective measures authorized retroactively cannot fully achieve their legitimate objective otherwise, unless they come into operation as soon as the economic conditions which made their adoption necessary arose. (91) In Racke, (92) the applicant in the main action challenged the validity of a regulation which imposed retroactively the payment of monetary compensatory amounts on wine originating from a third country and which was removed from a private customs warehouse before the regulation in question was in fact published.

The Court held:

"Although in general the principle of legal certainty precludes a Community measure from taking effect from a point in time before its publication, it may exceptionally be otherwise whenever the purpose to be achieved so demands and the legitimate expectations are duly respected."

For the monetary compensatory amounts to be fully effective, the Court contended, it may be necessary to take effect as from the occurrence of the events which gave rise to their introduction. Therefore newly fixed monetary compensatory amounts may be applicable to "facts and events which occurred shortly before the publication of the regulation fixing them in the Official Journal." It is not quite clear what the term 'legitimate objective' (that is, the purpose of the Community measure in question) means in abstracto. It seems to mean an objective of the Treaty as a superior rule of law which has to
be carried into effect by subordinate legislation. (93) Such legislation may, therefore, have to be enacted with retroactive effect. The position remains to be clarified by the Court since the judicial authority on this matter is scanty and ambiguous. (94) It seems that the need for the retrospective effect has to be substantiated by the legislator and, where questioned approved by the Court within its power of review of the legality of Community acts. (95)

The Court has been called upon, in several cases, to delineate the limits imposed by the application of the principle of proportionality on the authorization of retroactive (protective) measures by the Commission. Most of this case law sparked off by disputes arising out of the application of Article 115 EEC. Under the first paragraph of this provision: "In order to ensure that the execution of measures of commercial policy taken ... by any Member State is not obstructed by deflection of trade, or where differences between such measures lead to economic difficulties in one or more of the Member States," the Commission may, inter alia, "authorize Member States to take the necessary protective measures, the conditions and details of which it shall determine," it being nevertheless understood under the third paragraph of the same provision that: "In the selection of such measures, priority shall be given to those which cause the least disturbance to the functioning of the common market." It is clear from the wording of the third paragraph of Article 115
EEC that a 'proportionality test' is established for the measures taken under its provisions.

In Bock (96) the Court annulled in part a decision of the Commission authorizing Germany to prohibit imports of mushroom consignments originating in China but which were already in free circulation in the Netherlands. The authorization granted was covering applications for import licences pending before the time of its issue. Advocate General de Lamothe stated that the challenged provision should be annulled in so far as the extension of rules laid down for the future to pre-existing situations was not absolutely necessary to attain the desired end. The insignificance of the transactions involved, he argued, did not justify "even a slight encroachment on the principle of non-retroactivity." The Court took up the position of its Advocate General ruling that when the Commission authorizes a Member State to take protective measures under Article 115 EEC, it is exceeding the limits of what is 'necessary' under Article 115(1) EEC if it extends the authorization to applications of import licences which were pending at the time and which related to a quantity insignificant (0,26% in casu) compared with the total annual imports of that product into the Member State.

In a later case (97) the applicant had, on January 2nd, 1975, applied to the German Federal Office for Food and Forestry for an import authorization concerning a small quantity of Chinese beans in pod which had already been in free
circulation in the Netherlands. On January 14th, 1975 the competent German authority requested the Commission for an authorization, under Article 115 EEC, not to apply Community treatment to the abovementioned product with retroactive effect as from January 1st, 1975. The authorization was granted on January 20th, as requested, and the applicant's request was rejected. Kaufhoh AG lodged an action complaining that the Commission exceeded its powers under 115 EEC and thus violated the principle of proportionality of administrative measures. Relying on the Court's ruling in Bock the applicant argued that due to the insignificance of the quantities of goods for which import licence was requested, it was not necessary to extent the authorization in question to licence applications pending when the matter was referred to the Commission.

Advocate General Warner maintained that before exercising its powers under Article 115 EEC, the Commission must be satisfied that it fully understands the policy of the Member State concerned and the reasons for it, for, without that knowledge, it could not be able to assess whether the measures proposed are 'necessary' for the protection of that policy nor whether, as required by the third paragraph of Article 115 EEC, they are those that will cause the least disturbance to the functioning of the common market. The Advocate General continued adding that having been satisfied as to those things the Commission must exercise its discretion carefully, bearing in mind that, as the Court pointed out in Bock, any exercise of
the powers conferred on it by Article 115 EEC involves a
derogation from fundamental principles of the common market,
such as the free movement of goods (Articles 9 and 30 EEC) and
the implementation of the common commercial policy (Article 113
EEC) "so that those powers should be exercised sparingly." The
Court ruled that the Commission, in granting the authorization
in question, failed to review the reasons put forward by the
State concerned in order to justify these protective measures;
by failing to do that the Commission was in breach of its duty
under Article 115 EEC to examine whether the measures have been
'taken in accordance with this Treaty' and whether the
protective measures sought were necessary within the meaning of
the same provision. Furthermore, the Court added, the
Commission had also exceeded the limits of its discretion since
it extended the authorization to applications already received,
"without taking account of the size or insignificance of the
quantity in question in these applications." The Court
annulled the authorization to the extent to which it applied
retroactively.

An obvious conclusion from the judicial decisions
discussed above is that the general principle of economic law,
that a measure can be retrospective on the ground that the
legitimate objective cannot be attained otherwise, finds its
limits in the principle of proportionality. This principle
cannot therefore be applied where the extension of the
application of rules validly laid down for future cases to pre
existing situations is not absolutely necessary in order to attain the desired end. Advocate General de Lamothe, in his submissions in Bock, described these restrictions as follows:

"In any event, on each occasion that you have considered to be legitimate what may have appeared to be an encroachment on the general principle of confidence in legal positions, you have always stressed that such encroachments are justified by the necessity to infringe a general principle of law to a greater or lesser extent in order to achieve the end pursued. You have in fact, by a very original and very interesting construction, to some extent interpreted the principle of non-retroactivity in relation to the principle of proportionality." (98)

It is quite clear, though not expressly mentioned in the decisions, that the crucial consideration that led the Court to annul the retroactive effect of the authorizations in both Bock and Kaufhoh was the failure of the Commission to apply the 'proportionality test' required by Article 115(3) EEC. As a result, when authorizing a Member State to adopt protective measures within the sphere of commercial policy in casu, the Commission must review the reasons put forward by the State concerned in order to justify those measures and examine whether they are necessary and in accordance with the Treaty. Thus retroactive authorization by the Commission, of protective measures taken by a Member State, is invalid when the Commission exceeds the limits of what is 'necessary' by extending the authorization to transactions that are too insignificant to justify even a slight encroachment upon the principle of non-retroactivity.
c). The Relationship between the General Principles of Equal Treatment and Proportionality.

A). The Principle of Equal Treatment.

The economic and legal position of the individual within the Communities is basically determined by the principle of equal treatment or non-discrimination. This principle in effect forms one of the essential theoretical foundations of the Communities and in a broader sense, of the whole idea of European Integration. (99) Equality of treatment is as important, if not more, as the individualization of justice through discretion. The principle of equality is not a negation of discretion but requires that the administrator must exercise its discretion with equality. (100) Indeed, in the Community legal order great care is taken to guarantee equality or to avoid discrimination. In broad lines, discrimination consists of unequal treatment in situations which are identical or comparable. (101) Within this context, the essence of discrimination lies in an unjustified failure to distinguish between dissimilar situations; a different treatment of comparable situations must be rationally justified by objective criteria. (102)

In the EEC Treaty, equality is to be attained through prohibition of discrimination on the ground of nationality (Article 7); as between consumers and producers of agricultural produce (Article 40(3)) and as between employees on account of their sex (Article 119). The Court has, however, gone beyond
these scanty provisions by holding that the rule of equality of treatment "is one of the fundamental principles of Community law." (103) In Ruckdeschel (104) the Court stated that the prohibition of discrimination:

"...is merely a specific enunciation of the general principle of equality which is one of the fundamental principles of Community law. This principle requires that similar situations will not be treated differently unless differentiation is objectively justified."

On the basis of this concepts, discrimination, is essentially tantamount to arbitrary distinction. The Court made it plain, in the case of discriminatory reception of Italian refrigerators in France, (105) that "the different treatment of non-comparable situations does not necessarily indicate a violation of Community law." (106)

Thus Community institutions are not under the obligation to treat everybody alike, but there must not be arbitrary distinctions between different groups within the Community. This position was adopted by the Court in its ruling in Union des Minotiers (107) where it held that "difference in treatment cannot be regarded as constituting discrimination which is prohibited unless it appears arbitrary." More specifically, measures of the Community organs affecting the competitive position of certain undertakings amount to discriminatory treatment when they distort competition and give rise to an appreciable disequilibrium in the competitive relationship of the undertakings concerned. (108) With reference to Article 40(3)(2) EEC, Advocate General Capotorti, in his conclusions in
Ruckdeschel, provided a concise formula highlighting the case law of the Court:

"...(a) discrimination consists of dissimilar treatment of comparable situations;
... (b) Community measures which provoke disturbances in the competitive capacity of undertakings must be considered discriminatory;
... (c) differentiation based on objective criteria is permissible, but any unjustified difference of treatment constitutes discrimination. (109)

In this context, within the meaning of Article 40(3)(2) EEC there is no question of proportionality. The test of discrimination does not concern the (isolated) relation between the impact of an act on the material sphere of the affected persons or undertakings and the aim underlying the measure, but it rather deals with the effect on the competitive relationship of undertakings. Difference in treatment may be acceptable if it can be sufficiently justified. It is permitted, for instance, to grant reimbursement in respect of storage costs to sugar in transit between two approved warehouses situated within a Member State but refused in respect of sugar which is in transit between between two approved warehouses situated in different Member States, on the sole ground that the latter kind of aid is very difficult to supervise. According to the Court (110) this differentiation was objectively justified considering the fact that "the supervisory measures which would be necessary if reimbursement had to be made in case of international transport would involve disproportionate administrative costs," since the warehouse of dispatch and the warehouse of arrival were subject to jurisdiction of different
national administrative authorities, and in view of the absence of any system of intra-Community co-operation which would ensure the effectiveness of the necessary supervision.

A possible divergence between national laws does not create in itself discrimination prohibited by Community law, (111) as long as there have been no harmonization rules and provided that all other rules of Community law are complied with. (112) Nevertheless, within the national legal systems no discrimination is permitted with respect to nationals of other Member States. When, for instance, national provisions grant particular rights to an unmarried partner, such privileges may not be denied when the unmarried partner is a national of another Member State. (113) In support of a claim of discrimination one may not rely on an illegal act in favour of others. (114) There may be a discrimination in the case of equal treatment of unequal circumstances. (115) The fact that there are objective differences in the situation of the individuals concerned may therefore be a valid reason for differentiating the conditions applicable to each of them. (116) Differences which are due to natural phenomena cannot be described as 'discrimination' within the meaning of the Treaty. The latter regards only difference in treatment arising from human activity, and especially taken by public authorities as discrimination. Moreover, the Court pointed out that:

"...even if the Community has in some respects intervened to compensate for natural inequalities, it has no duty to take steps to eradicate differences in situations such as those." (117)
The principle of equality in comparable situations forms the basis of the common market. Indeed free movement of goods is assured by enforcing the prohibition of discriminatory measures whether they are equivalent to customs duties or quantitative restrictions or whether they are fiscal measures designed to protect a national produce at the expense of a similar imported one from another Member State. (118) Equality of treatment was also vindicated in cases within the context of the common agricultural policy. Beyond being a special enunciation of the general principle of equality, the prohibition of discrimination laid down for the agricultural sector in Article 40(3)(2) EEC operates both as a fundamental protection against distorting interventions into competition and as a guarantee of freedom of economic action. (119) Unlike the 'mere' disregard of the general principle of equality a violation of Article 40(3)(2) EEC by discrimination between competitors or competing products (that is, products that can be substituted for each other) always entails an infringement of the material sphere of the adversely affected undertakings and may therefore give rise to damages.

The rulings in the 'Skimmed-Milk powder' (120) cases mark the entrance of a new concept. The Court held, annulling some provisions of Regulation 563/76 on the compulsory purchase of skimmed-milk powder, that:

"...the obligation to purchase at ... a disproportionate price constituted a discriminating distribution of the burden of costs between the various agricultural sectors."
As a prima facie observation, it should be mentioned that the Court did not fully discuss the competitive relationship between the various 'agricultural sectors' (that is, the overlapping grounds of milk producers and adversely affected purchases of feed stuff) in terms of competition. The reasoning of the European Court which deduces discrimination from an infringement is, with all due respect, rather questionable on several grounds.

The view taken by the Court in the above decisions is not supported by a comparative survey the legal systems of the Member States, referred in to Article 215(2) EEC as sources of the general principles of Community law. The principle of equality can safely be regarded as one of 'the general principles common to the laws of the Member States.' (121) In the most national legal orders within the Community, the principle of equality is understood as protection against differential treatment of comparable situations which is not justified rationally by objective criteria. (122) In this context, it is merely a question of terminology whether the principle of equality prohibits the unequal treatment of essentially equal situations or rather calls for justification of the different treatment of comparable situations. (123)

The principle of equality is laid down in Article 3(1) of the Grundgesetz (124) and is conceived by the jurisprudence and the prevailing doctrine as a protection against arbitrary differentiation. (125) Unlike the general principle of
equality, the special provisions of Article 3(2) and 3(3) GG (126) are understood according to the prevailing theory as allowing distinctions related to the specifically mentioned criteria in so far as they are necessary. (127) Maunz and Durig (128) have adopted an even stricter approach and argue that differentiation is only possible in so far as equal treatment would amount to discrimination. According to the most eminent German legal scholars the abovementioned prohibitions of discrimination on certain grounds do not really embody the principle of proportionality despite the related aspects of adequate or even necessary differentiation. (129) The application of the principle of proportionality rests on the infringement of the sphere of already granted rights or protected interests. By contrast, the special rules against discrimination apply also to exclusion from benefits, even when the favourable treatment as such is not legally prescribed.

Similarly, the equality rule does not exclude non-arbitrary, objectively justified distinctions in French law. (130) In none of the Member States' legal systems does the general principle of equality embody a reference to proportionality in the sense that disproportionality amounts to unlawful discrimination, although the two concepts may occasionally overlap. In the Netherlands, for instance, when the Courts apply a 'marginal review' (131) they do not only examine whether an individual decision is in conformity with the criteria established by the administration. They do also
check that the criteria underlying an administrative decision are not disproportionate or arbitrary and do not involve an unreasonable differentiation. In this respect the principle of proportionality may overlap in some cases with the principle of equality. Nevertheless, in principle, these principles are considered as separate remedies. (132)

The difficulty of combining proportionality and equality in a coherent and a clearcut concept is illustrated by the case law of the Court. In Werhahn the plaintiffs were owners of mills in Germany which processed durum wheat into cereal meal. They complained about a Community subsidy given to French and Italian producers of durum wheat at a lower price than the threshold price for imported durum wheat which the applicants had to pay. They invoked the principle of proportionality to demonstrate the existence of an illegal discrimination, maintaining that the application of the system of production aids for Community durum wheat gave a disproportionate advantage to French mills which was due to their favourable geographic location close to the production centres. This fact did not in itself constitute prohibited discrimination, the applicant argued, but rather was the consequence of a more advantageous location of the French undertakings which was not contrary to the rules of the Treaty. Nevertheless, it did appear that the difference between the prices on the German and French markets for durum wheat was more than what would have resulted from this advantage, expressed in terms of transport
costs between the Paris area and the German marketing centres. The cause of the applicants' complain was the failure of the Council to re-establish the equality of treatment by taking appropriate measures. In the view of the German undertakings the breach of the principle of proportionality resulted from the Council's decision to fix the threshold price for the imported durum wheat at an excessively high level "thus exceeding the limits of its function of protecting the Community market, contrary to Article 40(3) of the EEC Treaty which provides that the common organization may include any measures 'required' to attain the objectives of Article 39 but 'shall be limited' to the pursuit of these objectives.

Advocate General Roemer did not rely on the arguments put forward by the applicants which were based on the text of the Treaty. On the basis of a series of purely economic considerations he arrived at the conclusion that there was a violation of the principle of equality. In his opinion there was no legal justification for the notion of 'necessity' of the measures taken in regard to the objectives of the common agricultural policy. The multiplicity of the objectives listed in Article 39 EEC and the consequent necessity of evaluation leaves the Community institutions a wide margin of discretion. Indeed for the purposes of Article 39 EEC:

"...it must suffice that a measure comes within its ambit if it can be regarded as appropriate for the realization of the objectives set out there. Nowhere in this provision or elsewhere in this Treaty it is provided, however, that Article 39 can be used for the purpose of justifying a measure of agricultural policy only
if that measure is indispensable, urgently necessary, in connection with the attainment of the objectives of that Article."

The respective situation of the French and German millers in regard with the 'laws of the market', on the contrary, clearly indicated, according to the Advocate General, the obvious disadvantage of German undertakings and led "one to take it for granted that the detriment has assumed serious proportions." Thus the existence of a serious, gross discrimination could not be denied, that is a clear violation of the principle of equal treatment.

The Court did not follow this line of reasoning. It adopted the necessity approach instead. Comparing the systems of protection for cereals the Court stated that:

"It does not appear that the Council, in deciding on the level of the threshold price, went beyond what could be regarded as necessary of attaining the aims of the system of aid for durum wheat."

Thus the necessity (a concept narrower than proportionality) of the challenged measure had to be understood as the principle of equality itself within the relevant context (dans la logique du system). The objective of the system of production aid for durum wheat was to encourage the Community produce. The Court considered whether the Council should have acted to provide equality of competitive conditions -in other words whether the discriminatory subsidy could survive. It did not consider whether there were any objective criteria but simply whether it was practicable for the Council to end the discrimination. The Court examined the possible courses of action -a lower
threshold price for imported durum wheat, a lower threshold price for the countries affected (Germany and the Benelux) and a higher intervention price for Community produced durum wheat. It nevertheless rejected them as jeopardizing the position of common wheat, the free movement of goods and the objective of increasing Community production of durum wheat respectively. Discrimination was in fact weighted up against other Community interests and lost. As a corollary to the above it should be added that this case shows the difficulty of the Court to accept a plead of breach of the principle of proportionality. Even though the applicants alluded to it expressly neither the Court nor the Advocate General made an express reference to it. The Court confined itself solely to the scrutiny of the 'necessity' of the challenged measure, placing this notion within the framework of the interventionist provisions (dispositions interventionnistes) of the Treaty which restrict its scope considerably.

The confusion between the two principles was all but obvious in the 'Skimmed-milk powder' cases. (154) There the parties talked of discrimination in relation to whether it was lawful to impose on a certain section of undertakings (producers and importers of animal feed as well as animal breeders) the economic consequences of an unfavourable economic situation in another sector (milk production). Olmuhle, one of the parties, conceded that differential treatment was lawful if it was necessary in the general interest of the Community. It
should, nevertheless, be noted that such an argument waters down the notion of discrimination which concerns the different treatment of similar situations without objective criteria. Objective criteria cannot include the objectives listed in Article 39 EEC nor general Community policy considerations but must be related to the particular situation in question. In other words, the test for discrimination is very specific while that for proportionality is more general. By adding the general criteria of proportionality to the specific criteria of discrimination one confuses the two principles and weakens both. Advocate General Capotorti avoided this pitfall by considering both principles separately and concluded that the persons or undertakings adversely affected by the compulsory purchase provisions had not suffered from distortion of competition or discriminatory infringement of their market positions. In this context he offered a lucid view of the difference between the two concepts and gathered that the contested Regulation was invalid only because it breached the principle of proportionality.

The Court, however, it is respectfully submitted, failed to keep the two principles separate when it held that:

"... the obligation to purchase at such a disproportionate price constituted a discriminatory distribution of the burden of costs between the various agricultural sectors. Nor, moreover, was such an obligation necessary in order to attain the objective in view, namely the disposal of stocks of skimmed milk powder. It could not therefore be justified for the purposes of attaining the objectives of the common agricultural policy." (135)
The Court probably meant that the effect of making animal feed producers use skimmed milk powder was to increase the price of animal feed and this harmed all livestock breeders; the benefits of the policy were, on the other hand, felt only by dairy farmers. Thus the policy worked in a discriminatory fashion between different groups of farmers. (136) In this way dissimilar situations (milk producers - non milk producers) had been treated alike, without sufficient reason, and so there was discrimination.

The words 'distribution of the burdens of costs' suggest, nevertheless, the notion of proportionality which is confirmed by the next sentence which mentions the 'objective in view.' This interpretation was lent credit by the Court itself when it had to consider the same issue in relation to the award of damages in Skimmed-milk powder cases no 2. (137) It stated that it reached:

"... this conclusion [on invalidity] on the ground that the Regulation provided for the obligation to purchase at such a disproportionate price that it was equivalent to a discriminatory distribution of the burden of costs between the various agricultural sectors without being justified as a measure in order to attain the objective in view, namely the disposal of skimmed-milk powder."

Not surprisingly, this rather rash assumption of discrimination called for a restrictive counter-concept when the question of liability for damages caused by the annulled regulation arose. Counterbalancing this rather broad concept of discrimination the Court concluded that the Community organ concerned must
have "manifestly and gravely disregarded the limits of the exercise of its powers."

The Court displayed an even more amazing reasoning by combining proportionality and non-discrimination in the Isoglucose cases. (139) Isoglucose, a recently developed product, is a sweetener which competes with sugar in a certain sector of the market (soft drinks, jams and similar products). It was first put on the market in 1976 and the Community authorities immediately took steps to meet the threat posed to sugar, a product which was in surplus and building up a 'mountain.' The result was a Regulation imposing on isoglucose a levy of such large proportions that, according to the producers, it would have made all production uneconomical. Two of the main factories were in Britain and proceedings were brought in the English courts to challenge the validity of the Regulation. Isoglucose manufacturers had been obliged to suspend production while the levy dispute was pending: If the levy had been upheld, their plants would have had to switch to other products or close entirely. They had therefore incurred heavy expenses from lost production and financial overheads. The affected companies claimed damages before the European Court. (140)

In the annulment action the Court ruled that the Council Regulation 711/77 imposed a levy on the products of isoglucose, the amount of which was 'manifestly unequal' compared with the treatment of sugar producers and therefore a
violation of Article 40(3)(2) EEC had occurred. In the Court's own words: "... inconveniences of the type alleged cannot justify the imposition of a charge which is manifestly unequal." (141) Here again Advocate General Reischl, discussing the two concepts separately, could not find a discrimination between the concerned groups of producers, that is, the manufacturers of isoglucose and those of starch, were non-fungible and generally did not compete with each other. (142) Later on the Court denied liability of the Community for damages on the grounds that the Council, albeit imposing a 'manifestly unequal' charge, had not so 'manifestly and gravely' disregarded the limits of its powers as to involve the Community in non-contractual liability, above all as 'an appropriate levy was fully justified.' (143) It is respectfully submitted, that in these cases it might have been equally plausible to assume (merely) that the charges imposed were disproportionate and to deny the liability of the Community on the grounds that no specific right or freedom with a material scope of its own (such as the freedom of property or of competition) was infringed in a way calling for compensation.

This rather unfortunate dilution of proportionality and non-discrimination was present in the 1978 Milac case, (144) where the Court, with reference to non discrimination said that:

"... the various factors in the common organization of the markets, protective measures, aids, subsidies, and the like may be distinguished according to the areas and other conditions of production or consumption only in terms of criteria of an objective nature which
ensure a proportionate distribution of advantages and disadvantages for those concerned without distinguishing between the territory of Member States."

This quotation does not, however, provide an explanation. There are certain cases of 'derogation' from the principle of non-discrimination in relation to temporary aids necessary for the full development of the common agricultural policy. It seems that the Court considers discrimination and proportionality as one in these cases. This analysis may help to explain the ruling in the Werhahn case (145) (durum wheat subsidies), where the Court did consider whether there were any objective criteria for the differential prices but simply whether it was practicable for the Council to end the discrimination - in other words whether the objective could not be achieved in another way less damaging to the plaintiffs. The Court then considered whether the threshold price and intervention price were in breach of the principle of proportionality, and held these were not.

With respect to the scrutiny of proportionality and non-discrimination, the more recent jurisprudence of the Court does not always follow a straight line. Sometimes the alleged infringement of the principle of proportionality is discussed within the concept of non-discrimination. In Sermide (146) the plaintiff argued the failure to synchronize the reference periods for sugar adversely affected Italian undertakings, which were situated in areas producing insufficient quantities of sugar to meet demand and so exported relatively little and
thus benefited undertakings in Northern Europe, where there was a surplus and exporting was traditional. The Court illustrated the prohibition of discrimination enshrined in Article 40(3)(2) EEC and repeated word for word the Milac formula. (147)

In the 1984 Denkavit case the Court discussed the alleged breach of the two concepts under different headings. In order to receive the aid in respect of compound feedingstuffs for animals delivered in bulk from the Netherlands to Belgium, the plaintiff in the main action, was required to submit the prescribed monthly application and the corresponding processing and summary reports, subject to the condition that the aid might have to be repaid. Denkavit argued that the provisions of Article 6(2) and 7 of Regulation 1725/79 imposed in case of exports a heavier burden of proof as to the use to which products delivered in bulk had been put than in the case of inland deliveries. In consequence the aid in respect of exports was paid on average one month later than in respect to the domestic market of the Member States. The applicants argued that this constituted, inter alia, discrimination against producers contrary to Articles 40(3) and 43(3)(b) EEC and also breached the principle of proportionality. The Court examined the alleged breach of these two principles separately and concluded that there was no discrimination within the meaning of Article 40(3) EEC when the difference in method by which the aid was paid corresponded to an objective difference between the export situation on the one hand, and that of trade
within a Member State on the other. As far as proportionality was concerned the Court held that the principle was not breached by Community rules which prescribed prior administrative supervision to ensure compliance with the conditions for the payment of aid where the sums involved were particularly large and there was a particular danger of fraud. (148)

In the third Racke case, (149) which involved a customs duty imposed on imported Tokay wine, the Court first examined the alleged violation of Article 40(3)(2) EEC by certain provisions of Regulation 1167/76; after denying an infringement of the principle of non-discrimination, the Court dealt with the question whether the challenged measure was 'required' by the pursuit of the objectives laid down in Article 39 EEC and were therefore compatible with Article 40(3)(1) EEC. Although the motives of the Courts in considering proportionality and discrimination together are understandable, it does not help legal certainty since one does not know when the two remedies are considered as one (Werhahn, Milac and Isoglucose cases) or separately (Denkavit). Werhahn was a case of temporary subsidies to boost Community production, Milac of alteration in monetary compensatory amounts and Isoglucose of imposition of a production levy to reduce surpluses. Logically, proportionality should only be relevant to the issue of discrimination where the measure is to help Community production as in Werhahn, where a degree of discrimination was
essential if the objective of the measure were to have any
effect. In other situations, individual undertakings should
have the full protection of the fundamental rule of non-
discrimination as well as the additional, but separate, remedy
of proportionality.

A Community measure can, therefore, be declared invalid
on the quite separate grounds of infringing the principles of
proportionality and non-discrimination. In the words of
Advocate General Capotorti:

"The difference between that principle [of proportionality]
and non-discrimination may be described in these terms:
non-discrimination is concerned with the relationship
between various groups of persons and takes the form of
equality of treatment by bodies vested with public
authority, whereas the principle of proportionality means
that the burdens imposed on the persons concerned must
not exceed the steps required in order to meet the
public interest involved. If therefore a measure imposes
on certain categories of persons a burden which is in
excess of what is necessary—which must be appraised in
the light of the actual economic and social conditions
and having regard to the means available—it violates
the principle of proportionality." (150)

The principle of proportionality applies to the protection of
freedoms, substantive rights or legally protected interests
against an excessive encroachment by the acts of a public
authority. In Internationale Handelsgesellschaft, (151)
Advocate General de Lamothe linked the principle of
proportionality with both the individual's 'freedom of action'
and to the 'fundamental right' that an individual should not
have his freedom limited beyond that degree necessitated by the
general interest. In this context, the Advocate General
referred to the general principles of law and to Article
40(3)(1) EEC which provides that the measures covered by Article 39(1) EEC must be required to attain the objectives laid down in that provision. According to the case law of the Court, the principle of proportionality means that the charges imposed by a measure must not exceed "what is appropriate and necessary to attain the objective sought." (152)

The requirement of proportionality draws its substantive scope from the affected individual guarantee, such as the freedom of competition or property. Broadly speaking, unlike the general principle of equality, proportionality is an aspect of freedom not of participation and as such it does not give rise to a claim of benefits which are granted to others. In this respect the prohibition of discrimination has a wider scope than the requirement of proportionality. On the other hand, it is obvious that discrimination is not necessarily inherent in the disproportional effect of a measure. Thus:

"Une analyse purement quantitative de la disproportion ne suffit donc pas à établir la pertinence du grief de discrimination. Ce qui demeurent determinant, c'est l'adéquation qualitative du moyen utilisé, fut-il "disproportionné" du point de vue des lois de marché habituelles, a la fin interventionniste poursuivie."

It is difficult to see how a measure imposing, for instance, an excessive charge can have a discriminatory character when it affects equally all persons in comparable situations.

The principle of proportionality has a particular field of application in cases of 'positive discrimination', where a special group affected by normative or factual disadvantages
(such as adverse conditions of competition or limited access to education, for example) is favourably singled out to mitigate or remedy existing inequalities. The correction of these inequalities will generally amount to objective and reasonable justification, excluding arbitrary and thus discriminatory differentiation. In these cases, the unequal treatment of comparable situations must be, in principle, not only justified by reasonable, objective criteria, but also adequate and required in the light of the objective pursued and the disadvantages imposed on the groups benefited from the status quo. In Italy v Commission (Potato starch case) (154) the Italian government complained that the introduction of production refunds for potato growers was in breach, inter alia, of the principles of proportionality and non-discrimination. It claimed that the objective sought could have been attained by means of other than the payment of a premium to the products of potato starch which had in fact imposed on the maize industry an additional burden since the two industries were in competition to each other. One of the ways to attain the end pursued was the granting of production refunds. The rate of these refunds was fixed in such a way that the balance between competing products such as maize starch and potato starch was not disturbed. The balance which had existed traditionally between these two products primarily due to the fact that, although the raw material of maize starch was more expensive than the potato starch, and although
the respective production costs were comparable, the value of maize starch by-products was greater than the potato starch by-products with the result that the cost price of the two products did not differ appreciably. The cause of action was the introduction by the disputed regulations of a premium payable only in respect of potato starch whilst the system of comparable refunds was retained for the benefit of both products.

The Court stated that the premium had been introduced for the purpose of obviating the special difficulties which the Council had found to exist in the potato starch sector following the trend, unfavourable to that sector, of certain economic factors, especially of the value of the by-products of both the principal products. This differentiation, therefore, could not be regarded as discriminatory. On the count of the alleged breach of the principle of proportionality the Court stated:

"It must be born in mind that the aim of the premium payable to products of potato starch was not to ensure that the growers received a better income but to maintain the profitability of the potato starch industry and in this way to protect the traditional opportunities for marketing potato products in so far as these products do not find any another outlets. The introduction of the premium at issue cannot in the prevailing economic conditions be regarded as disproportionate to the objective sought to be attained and the complaint cannot be upheld."

It should be pointed out that in this context the application of the 'proportionality test' follows from the infringement of the material sphere of the groups adversely affected by the
State intervention in the existing framework of (favourable) economic or other substantive conditions.

Although the concepts of equality and proportionality should be kept apart, they share certain related aspects. Both principles impose on the legislator the obligation to base every differentiation or restriction on reasonable criteria. Both also imply a test of elementary reasonableness and plausibility: The concept of proportionality under the head of suitability and necessity; the principle of equality with respect to arbitrariness. (155) A charge which is, on its face or because of its amount, manifestly unreasonable and therefore inappropriate to fulfil the objective pursued, is disproportionate as well as arbitrary. Under certain conditions, a measure infringing the material sphere of an individual or an undertaking may violate both principles. Thus an excessive charge distorting the competitive between different groups will generally amount to unlawful discrimination. As this aspect of discrimination often calls for subtle economic comparisons it may occasionally be easier to have recourse to the principle of proportionality in declaring a measure unlawful.

According to Apollis:

"Cette superposition des principes généraux est d'ailleurs favorable aux plaidiers, puisque l'examen du grief de discrimination suppose l'appréhension des situations individuelles dans leur singularité et leur comparabilité par rapport à d'autres, ce que le moyen de violation de la proportionnalité, n'entraine pas. Mais ... la proportionnalité envisage dans ce contexte ne dépassera pas la portée du concept, plus étroit, de "nécessité", tel qu'il
Though it has been put forward that any measure lacking 'reasonable proportion' in relation to its objective can be considered as discriminatory, (157) in view of the arguments discussed above the two notions should be kept distinct. It should always be borne in mind that discrimination assumes the arbitrary nature of a difference in treatment introduced by a rule of law, where when reference is made to proportionality it is the relation between the objective pursued by the rule and the burdens or restrictions which it imposed that come into play.

1). The Application of the Principle of Proportionality within the Scope of the Prohibition of Sex Discrimination.

A). The Prohibition of Sex Discrimination, Scope and Rationale.

The principle of equal treatment prohibits discrimination on grounds of sex. Article 119 EEC requires that men and women should receive equal pay for equal work. Since, moreover, the principle is mandatory in nature, the prohibition applies not only to acts of public authorities, but also extends to all agreements which are intended to regulate paid labour
collectively, as well as contracts between individuals. This principle may be invoked in national courts in order to enforce individual rights to which it gives rise, in particular as regards those types of discrimination which arise from legislative or collective labour agreements, as well as in cases in which men and women receive unequal pay for equal work which is carried out in the same establishment or service whether private or public. (158) It may be noted that all the provisions of the Treaty requiring Member States to abolish all forms of discrimination within a specified period (usually within a transitional period) have become directly applicable and hence enforceable in the national courts upon the expiry of that period. (159)

Article 119 EEC, the basis of Community's programme on equal treatment of sexes, was motivated by the desire to eliminate unfair competition and rationalize the market. This provision was added on the Treaty on purely economic grounds, as a compromise to France to protect her from unfair competition from other Member States where such legislation was not existence. The Commissioner for Social Affairs in the European Communities explained in 1980:

"The Fathers of the Treaty [of Rome] were certainly not devotees before their time of women's emancipation. This Article [119 EEC] was adopted purely and simply out of fear that if women workers were underpaid, national industries would suffer a negative effect as regards their competitive position." (160)

In other words, unfair competition might be engaged in by industries in some states employing women at a lower rate that
men and women are paid in that industry within national or EEC boundaries. The EEC commitment to free competition is expressed through strict anti-trust laws and the prohibition of unfair competition. Creating the conditions whereby women and men compete for employment is a part of this process. Competition on equal terms involves the elimination of unjustified prejudices in favour of one sex. This can be said to be a rationalization of the market.

In addition to the economic rationale there is also a social motive. In the Second Defrenne case (161) the Court stated that:

"...respect for fundamental personal human rights is one of the general principles of Community law, the observance of which it has a duty to ensure. There can be no doubt that the elimination of discrimination based on sex forms part of those fundamental rights."

It then went on to describe the principle in question as one of the 'foundations of the Community' designed to achieve a 'double objective', economic and social. As a social goal it seeks to achieve 'social progress' and 'the improvement of the living and working conditions of ... peoples', as required by the Treaty (Preamble and Article 117 EEC). No doubt because of this double objective, Community law on sex discrimination, unlike the fundamental provisions relating to goods and workers, is not limited in its application to migrant workers. Its application may be and invariably is 'wholly internal.' It is, however, confined strictly within the economic context; it is not designed to settle questions concerned with the
organization of the family or to alter the division of responsibility between parents. (162) Nor is the prohibition of sex discrimination absolute. A difference in treatment as between men and women is permissible as long as it is 'objectively justified.' (163) In the area of sex equality, the principle of proportionality is important in determining whether discrimination between male and female employees can be objectively justified. The Court's case law (163a) leaves no doubt that Article 119 EEC does not prevent pay differentials that can be objectively justified without reference to sex. Any employer wishing to rely on this exemption to equal pay principle has the burden of proof that the principle of proportionality has been observed: if the objective of the differential could be achieved in non-discriminatory manner it will be disproportionate and the prohibition contained in Article 119 EEC will apply. The principle of proportionality should also be respected by any employer who wishes to invoke the derogation from the principle of equal treatment contained in Article 2(2) of Directive 76/207. (163b).

B). Derogation from the Equal Treatment Principle.

Objective Justification.

In Bilka-Kaufhaus, (164) the Court was faced with a claim by a part-time worker, challenging her employer's occupational pension scheme which discriminated overtly against part-time workers. Here both full and part-time work forces comprised both by men and women, but of the men employed (28% of the
total workforce), only 10% worked part-time, as against 27.7% of the female workforce. Overall male part-time workers comprised only 2.8% of the total workforce. The disadvantages suffered by part-timers thus fell disproportionately on the women. The Court was asked whether such a scheme might be held in breach of Article 119 EEC. The Court ruled that if it was found that a considerably smaller percentage than of men worked part-time, and if the difference in treatment could not be explained by any other factor than sex, the exclusion of part-time workers from the occupational scheme would be contrary to Article 119 EEC. (165) The difference in treatment would, however, be permissible if it were explained by objectively justified factors which were unrelated to discrimination based on sex. It would be for the employer to prove, and for national courts to decide, on the facts, whether the difference in treatment may in fact be objectively justified.

Guidelines as to what might constitute objective justification were laid down by the Court in its decision in the Bilka Kaufhaus case. There it was held that in order to prove that a measure is objectively justified, the employer must show that the measures giving rise to the difference in treatment:

a) correspond to a 'genuine need of the enterprise',

b) are suitable for obtaining the objective pursued by the enterprise, and

c) are necessary for that purpose.
It is thus obvious that derogatory measures are subject to the 'proportionality test.' (166) The factors capable of justifying a difference in treatment will be primarily but not exclusively economic. (167) It is clear from the Bilka decision that the fact that the particular group adversely affected by a particular measure comprises both sexes does not prevent it being discriminatory on grounds the of sex, as long as it affects one sex to a disproportionate extent. If this were not so, as Nicholls LJ pointed out in the English Court of Appeal, in Pickstone v Freemans Plc, (168) as long as there is a man there doing the same work 'which in some cases might be wholly fortuitous or even, possibly, a situation contrived by an unscrupulous employer', the woman cannot make the comparison, even if the difference in pay is attributable solely to grounds of sex. According to the Court of Appeal in Pickstone, this could have occurred under the 'unambiguous words' of the English Equal Pay Act 1970, Sl(2). However, unless is disproportionately affected, a claim of discrimination based on sex, under Article 119 EEC, is unlikely to succeed.


Directive 76/207, which is based not on Article 119 EEC but on the Institutions' general powers under Article 235 EEC, lays down the principle of equal treatment for men and women in Article 1(1):

as regards access to employment, including promotion, and to vocational training as regards working conditions
and ... social security.
The principle of equal treatment is defined in Article 2 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.

Derogation from the equal treatment principle is provided under Article 2(2) for activities which, 'by reason of their nature or the context in which they are carried out, the sex of worker constitutes a determining factor'; and by Article 2(3), which allows for exemption for 'provisions concerning the protection of women, particularly as regards pregnancy and maternity.'

D). Derogations from the Equal Treatment Principle under Articles 2(2) and 2(3) of Directive 76/207 in the Light of the Principle of Proportionality.

Article 2(2) was raised as defence in Johnston by the UK government. (169) This action was brought by a female member of the Royal Ulster Constabulary (RUC) against a decision by the Chief Constable of the RUC refusing to renew her contract of employment. The RUC had decided as a matter of policy not to employ women as full-time members of the RUC reserve, since they were not trained in the use of firearms nor permitted to use them. In proceedings before the Court under Article 177 EEC concerning the interpretation of Directive 76/207 and in particular the scope for derogation from the equal treatment principle available under Community law the RUC argued, by
analogy with Article 48(3) EEC that in view of the political situation in Northern Ireland derogation was justified on public safety or public security grounds; it was also justified under Article 2(2) of Directive 76/207. To allow women to carry and use firearms, the RUC claimed, increased the risk of their becoming targets for assassination.

The Court held that there was not a general public safety exception to the equal treatment principle available under the EEC Treaty. A claim for exemption could only be examined in the light of provisions of Directive 76/207. With regard to Article 2(2), the Court held that:

(a). The derogation provided under Article 2(2) could be applied only to specific duties, not to activities in general. Nonetheless, it was permissible to take into account the context in which the activity takes place.

(b). Where derogation is justified in the light of (a) the situation must be reviewed periodically to ensure that justification still exists.

(c). Derogation must be subject to the observance of the principle of proportionality. It was stated that:

"... in determining the scope of any derogation from an individual right such as the equal treatment of men and women ..., the principle of proportionality, one of the general principles of law underlying the Community legal order, must be observed. That principle requires that derogations remain within the limits of what is appropriate and necessary for achieving the aim in view and requires the principle of equal treatment to be reconciled as far as possible with the requirements of public safety which constitute the decisive factor as regards the context of the activity in question."
It was for the national courts to establish, in the light of
the principle of proportionality, whether 'the sex of the
worker constitutes a determining factor', that is to say, it
will be for the court to determine whether another measure
could have been taken to achieve the same purpose but without
excluding women from access to employment.

The Court, however, was keen to stress that women should
not be excluded from a particular employment 'on the ground
that public opinion demands that women be given greater
protection than men against risks which affect women and men in
the same way and which are distinct from women's specific needs
and protection.' This ruling is very significant for
restrictions based on reproductive hazards or other biological
and physiological restrictions. The reasoning in this
judgement suggests that the decision of the English Employment
Appeal Tribunal in Page v Freight Hire (Tank Haulage) Ltd (170)
that the employer need only show that his actions were
'reasonable', has been refined by the principle of
proportionality. It would seem that employers now have the
burden of actually showing that jobs cannot be reasonably
organized to minimize or avoid reproductive hazards. In
rejecting unsubstantiated notions of stereotyping women for
certain work it may be moving closer to American equal
opportunity concept. In the United States instead of accepting
discriminating and unsubstantiated 'play safe' policies of
employers of excluding women automatically from certain jobs;
the burden of proof fall upon the employer to show the necessity for women to be excluded by objectively justified scientific evidence, or by showing a considerable body of opinion that the risk is confined to women workers, and that there is no acceptable alternative which would achieve the required protection in a less discriminatory way. (171) However, even this analysis is limited. It fails to take on board the effects of reproductive hazards upon male workers, thus confining women to a special sphere and reinforcing gender hierarchies. Moreover, it subjects the employment policy to a 'business necessity' approach. Thus many women may be excluded from the higher paid and traditionally male jobs by cost factors, and economic justifications may be given priority at the expense of equality. (172)

The Court interpreted Article 2(3) of Directive 76/207 in Hofman. (173) There the plaintiff in the main proceedings argued that the subsidized optional maternity leave of six months (beginning after the absolute non-employment protection period of eight weeks following the birth of the child), granted to employed women under German law, served objectives which could also be fulfilled by enabling the father to take care of the child and household during this period (depending on the common decision of the parents). He argued further that restriction of the leave to female employees amounted to prohibited discrimination. The defendant relied on Article 2(3) of Directive 76/207 according to which provisions relating
to the protection of women, especially with respect to pregnancy and maternity, shall remain unaffected. The Commission put forward a prima facie impressive argument in support of the plaintiff. It contended that the proviso in Article 2(3) called for restrictive interpretation inasmuch as it derogated from the principle of equal treatment. Since that principle constituted a 'fundamental right', its application could not be limited except by provisions which were 'objectively necessary' for the protection of the mother. German law did not fulfil that requirement since leave could not be granted to either parent without adversely affecting the objective pursued. Advocate General Darmon rejected Commission's reasoning saying that neither the purport nor the general scheme nor even the aim of the directive seemed to justify so restrictive an interpretation of the exemption. It was sufficient that the national measure which conferred an advantage on women in connection with employment should sought to protect them for an objective reason. It was the relationship between its aim (namely protection) and the objective reason determining that aim (pregnancy and maternity for example) which justified the measure, not the absence of alternatives. He also pointed out that Commission's approach was open to question for it was based on the erroneous assumption that the benefits under maternity leave regime amounted to an acquired right, whereas the directive did not place Member States under an obligation to establish new
rights. It namely called for parity where discrimination existed.

The Court observed that it was legitimate to protect the special relationship between a woman and her child over the period that follows pregnancy and child birth, by preventing that relationship from being disturbed by the multiple burdens which resulted from the simultaneous pursuit of employment. That being so, such leave could legitimately be reserved to the mother to the exclusion of any other person, in view of the fact that only the mother who could find herself subject to undesirable pressure to return to work prematurely. The Court passed over the argument of the Commission by stressing Member States' adequate discretion in implementing the Directive and held that the German provisions did not collide with the prohibition of discrimination. Perhaps the judgement would have been no less convincing if the Court had ruled that by virtue of the exemption clause relating to material protection the scrutiny of 'necessary differentiation' was replaced again by the milder test of non-arbitrary, objective justification inherent in the general principle of non-discrimination. This reasoning supports the view that the test of 'necessary differentiation' is not inherent in the general concept of non-discrimination; therefore relations between the principles of equal treatment and proportionality should not be assumed without caution.

The principle of proportionality is applied not only as a test of validity for Community but also for national measures, interfering with the exercise of individual rights and freedoms vested by the Treaties. Proportionality was invoked in the sphere of the free movement of persons in order to challenge the legality of certain action by the Italian authorities. (174) The contested national measures, in this case, were not adopted in the exercise of an exceptional power of derogation under the Treaty, as Article 48(3) EEC for instance, but were the expression of a general power, which is normal and permanent attribute of the Member States, to keep track of the movement of persons on their national territory. One of the defendants, Ms Watson, a British citizen, was claiming rights of residence in Italy. The right of free movement of workers is regarded as a fundamental Community right, subject only to limitations which are 'justified' on the grounds of public policy, public security or public health (Article 48(3) EEC). The Italian authorities sought to invoke this derogation to expel Ms Watson from the country. The reason given for the expulsion was that she failed to comply with certain administrative procedures, required under Italian law, to record and monitor her movements in Italy.

The legality of the national provisions came into questions in the main proceedings, and the pretore of Milan
referred to the Court under Article 177 EEC. Advocate General Trabbuchi noted that:

"... certain principles laid down by the Court ... may be borne in mind in the exercise of a power normally retained by the states, ... not necessarily in order that these principles may vigorously be enforced, which would be justified in the case of measures derogating from the fundamental principles of the common market, but at least so that may serve as authoritative guidelines in defining the limit beyond which, during the exercise of that function, the state would no longer be justified in interfering with the exercise of the individual rights or freedoms guaranteed by the Treaty. In this context, special importance attaches to the principle that the obligation imposed should be proportionate to the legal objective sought by public authorities. Indeed, this principle is not confined to cases of derogation from such rights but is of general application and constitutes one of the principles which must govern action by public authorities Community or national, within the Community legal order. This follows clearly from precedents established by the Court ..."

The obligation of the national authorities to observe the principle of proportionality as a benchmark in their (legislative) action in regard to measures concerning Community freedoms, may also be provided for by a piece of secondary legislation enacted by the Community institutions. Article 3 of the Commission directive 70/50, (175) for instance, provides for the abolition of national measures governing the marketing of products, even where they are applicable equally to domestic and imported products, where their restrictive effect on the free movement of goods exceeds the effects intrinsic to trade rules. In the same provision, it is stated that this is the case in particular where:
"The restrictive effects on the free movement of goods are out of proportion to their purpose; when the same objective can be attained by other means which are less of hindrance of the trade."

Advocate General Trabbuchi, in his conclusions in Dassonville, (176) argued that the Commission in drafting this provision, applied a general criterion governing the implementation of authorized restrictions on the full operation of fundamental freedoms constituting the basis of the common market. It is quite clear that the criterion implied by the Advocate General in this case is nothing else but the 'proportionality test.' The importance of proportionality as a guideline for the action of national authorities is underscored, for example, in Coenen. (177) There the Court was called upon to assess the legality of the requirement of Dutch law that persons acting as insurance brokers should have their permanent residence in the Netherlands. The Court ruled that national legislation might not, by means of a requirement of residence in the territory, make it impossible for persons residing in another Member State to provide services when less restrictive measures could enable professional rules to which the provision of the service was subject in that territory, to be complied with.

Generally, at the national level, within the area of discretion retained by the Member States, the principle of proportionality should be utilized so that:

a) The national authorities must always select, for a permitted public interest purpose, administrative measures and
procedures which are the least restrictive of the free movement of goods, services and capital. (177a)

b) The national authorities may not impose in respect of violations of such measures by their citizens or those of other Member States, penalties and sanctions so disproportionate to the gravity of the infringement as to become obstacles to the free movement of goods and persons. (177b)

V). Conclusions.

General principles of law are found, not only in Community law, but also in many national legal systems. The principle of proportionality is especially prominent in German law, where it has constitutional status. Although not expressly mentioned in the Grundgesetz, it has been held by the German courts to be the principle of underlying two basic Articles of the Basic law, Articles 2 and 12. Indeed German law has made perhaps the greatest contribution to the development of the general principles applied by the European Court, including the principle of proportionality and the principle of protection of legitimate expectations. For the English lawyer the closest analogies are perhaps to be found in the rules of natural justice in administrative law, in the common law notion of reasonableness and in the maxims of equity. These also are now making their mark on Community law. The French lawyer is familiar with the notion of principes generaux du droit which, especially in the field of administrative law, have much the same function as in Community
law. In French administrative law they have a restrictive effect in relation to reglements (governmental decrees) which they do not have on lois enacted by the French Parliament.

Similarly, in Community law, although they may be invoked to interpret the Treaty provisions, general principles cannot prevail over the express terms of the Treaty. In Sgarlata, (182) various Italian citrus fruit producers sought the annulment of a number of EEC regulations dealing with agricultural matters. In support of their argument that Article 173(2) EEC should be interpreted to give them standing to challenge these regulations, the applicant invoked 'fundamental principles' applicable in all the Member States to the legal protection of individual rights. Advocate General Roemer considered that this argument would require the Court not to interpret but to amend the Treaty on this point; the Court agreed that the arguments put forward by the applicants could not be allowed to override the clearly restrictive wording of Article 173 EEC. In the same way, when a question can be resolved, or an individual right is guaranteed, by both an express provision and a general legal principle, recourse should be had to the former as it is preferable to apply unwritten law only in cases of obscurity, insufficiency or gaps in the written law. (183) Finally it should be pointed out that general principles of Community law are binding on all authorities entrusted with the implementation of the provisions of that law. In Eridania, (184) the Court stated that:
"The authorities which have power to alter basic sugar quotas must, in order to observe general principles of Community law which are binding on all authorities entrusted with the implementation of Community provisions, reconcile the interests of beet and cane producers with other lawful interests which may be affected."

While general principles of law, or their analogue, can be found in many legal systems, they play a special part in Community law. Firstly, they illustrate both the character of Community law as developed by the Court and the interaction of that law with the laws of the Member States. Second, the use made by the Court of the general principles of law exemplifies as well as does any other of its techniques, the law making function of the Court. Finally by means of these techniques the Court had been able to elaborate a doctrine of far-reaching importance, no less than the protection of basic rights in Community law.
Endnotes.


2). Supra no. 1.


4a). It should be noted that the word 'interpretation' lacks precision. In particular when the word is used by a francophone it seems that what is being discussed is a much broader concept than the task of construing a document - be it an Article of the EEC Treaty, a Community regulation, a national statute or a written contract - the orthodox English use of the word 'interpretation.' To a non common law lawyer, interpretation is his whole life: it is the process of extracting justice from the texts. [See Lord MacKenzie Stuart, The European Communities and the Rule of Law, London 1977, p 35 et seq] As Steiner, writing in a different context, has put it:

"The French word interprete concentrates on all the relevant values. An actor is interprete of Racine; a pianist gives une interpretation of a Beethoven sonata. Through engagement of his own identity, a critic becomes un interprete - a lifetime performer - of Montaigne or Mallarme."

[See Steiner, After-Babel, London 1975, p 27] It is only in the broader sense that interpretation is apt to cover the whole question of decision forming by the judge - in effect the judicial process or as Judge Cardozo put it: "What is it that I do when I decide a case?" [Cardozo, The Nature of the Judicial Process, 1921, (Yale Reprint, 1971), p 10] This question was later answered by Cardozo by saying:

"My analysis of the judicial process comes then to this, and little more: logic and history and custom and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law. Which of these forces shall dominate in any case must depend largely upon the comparative importance or value of the social interests that will thereby promoted or impaired."

[ibid p 112]
Given, that the European Court is seised of a problem susceptible of judicial treatment, it quite often treats the question before it as one of interpretation in the wide sense described above. [MacKenzie Stuart, p 71]

The Court frequently uses the teleological method of interpretation (ie, it seeks out the object of the text in dispute and tries to give practical effect to it). The form of Community law facilitates the purposive approach. As far as the Treaties are concerned their intention and objectives are plainly stated. In the case of secondary legislation, the requirement that it must be reasoned enables the Court by a consideration of the preamble easily to deduce its object. The use by the Court of the teleological approach has attracted both praise and criticism. The approach of the Court has been described as 'activist' or 'dynamic'. It should be emphasised though that it is the text—including of course its expressed objectives— which dictates the approach of the Court. It has been argued that the Court often follows its own policy. Apart from the inherent improbability that such a collegiate body as the Court—consisting of a group of individuals each having a mind of his own and having such diverse backgrounds and traditions—would have a uniform policy it must be underlined that it is the Treaties and the subordinate legislation which have a policy, and which dictate the ends to be achieved. The Court only takes account of what has been decided: "It is not for the Court to remedy the situation, by modifying, by way of interpretation, the content of the provision applicable to one or other case, since such modification pertains exclusively to the competence of the Community legislature."

[Case 97/71, Interfood, [1972] ECR 251]

Thus teleology, in the sense used here, is not a licence for judicial legislation, but the methodological premise for understanding Treaty interpretation. It does not legitimate every act or decision expedient to a given purpose, but simply acknowledges that the continuing search for the purposes, values and principles underlying the Treaties is intrinsic to law and legal development. The topoi themselves are the mode for pressing the judicial search. They do not determine but simply discipline judicial choice, embracing the continuing tension between the written norm and its ideal content. Taken substantively, they frame the given problem in terms of the relevant Treaty provisions and the purposes or values which they serve. Thus, through such topoi as 'reasonable', 'necessary', 'proportionate', 'normal' and 'partial', a given provision or concept is put and context and considered from the various standpoints of the Treaty as a whole.
Beginning with the problem in question, they initiate a line of reasoning which is shaped and informed over the years with each new case. By this process, a judicial choice is continually tested and criticized in terms of accumulating judicial experience and the changing requirements of Community integration. [See Mann, *The Function of Judicial Decision in European Economic Integration*, The Hague 1972, p 227 et seq]

5). See Also Article 215(2) EEC according to which the non-contractual liability of the Community will be decided "in accordance with the general principles common to the laws of the Member States."


16). See, for example, Joined Cases 146, 192 and 193/81, BayWa, [1982] ECR 1503 at 1535 per curiam.


18). Supra no 10 at p. 38.

20). See e.g., Case 1/64, Glucoseries Reunies, [1964] ECR 413 at 420 per Advocate General.


22). See case 1/58 supra no 11, Joined cases 36-38, 40/59, Geitling, [1960] ECR 423 at 438, where the Court held:

"Under Article 31 of the ECSC Treaty the Court is only required to ensure that in the interpretation and application of the Treaty ... the law is observed ... but not to pronounce itself, as a rule, on the provisions of national law. Consequently the charge that the decision of the High Authority infringed the principles of the German constitutional law may not be examined in the procedure before the Court."

23). Case 29/69, Supra no 14 at p. 425 where the Court said that fundamental rights were "enshrined in the general principles of Community law and protected by the Court

24). Case 11/70, supra no 6 at p. 1134 per curiam.

25). Case 4/73, supra no 15 at 507 per curiam.

26). This was confirmed by preliminary ruling 149/77, Defrenne, [1978] ECR 1365 at 1378.


32). Ibid at p. 55 per curiam.

33). Compare with Article 4 of the French Civil Code.

34). Supra no 8.

35). See also the identical provision of Article 188
Euratom.

36). See Articles 33 ECSC, 173 EEC and 146 Euratom.


38). See e.g., case 6/72, Continental Can, [1973] ECR 215 where Article 85 and 86 were very broadly interpreted so as to regulate merger control for which nothing is provided in the Treaty.


41). See case 25/68, Klomp, [1969] ECR 43 at 50 per curiam:

"In accordance with a principle common to the legal systems of the Member States, the origins of which may be traced back to Roman law, when legislation is amended, unless the legislature expresses a contrary intention continuity of the legal system must be ensured."

42). Supra no 35.

43). Article 38(1)(C) of the Statute of International Court of Justice.

44). Case 81/72, Commission v Council (Staff Salaries Case), [1973] ECR 575 at 593 per AG.


46). Case 14/61, Hoogovens, [1962] ECR 253 at 284-4 per AG.


49). Supra no 46 per AG.

50). See joined cases 63-69/72, Wehrhahn, [1973] ECR 1229 per AG Roemer at 1259-60:
"What is important in ascertaining the law ..., is not the unanimity of the legal systems of all Member States, nor a kind of vote ending in a majority finding; it is rather a matter of looking at what eminent legal writers have called evaluative comparative law. In this connexion ... what may be highly relevant is to ascertain which legal system emerges as the most carefully considered." Clearly considered is less subjective than 'most progressive', but there is a danger that one will regard principles with which he/she agrees as more carefully considered than others.

51). Supra no 50 at p. 1260.

52). See Brown & Jacobs at p 222:

"It is characteristic of the Court's jurisprudential approach to lay down a principle in broad, even absolute terms, but leave its application to be refined by subsequent developments in the case law."


54). Supra no 6 at p. 1147.

55). Case 41/69, [1970] ECR 661 at 713 per AG. See also case 72/74, Union Syndicale, [1975] ECR 401 at 416 per AG Reischl, joined cases 63-69/72, supra no 50 at 1274 per AG Roemer.


60). See case 8/55 ibid.

61). See amongst other things, the principles audiatur et
altera pars, non bis in idem, force majeure,
proportionality, protection of fundamental rights,
administrative liability under Article 215(2) EEC and
188(2) Euratom.

62). See e.g., cases 17 and 20/61, [1962] ECR 344 per curiam,
351-3 per AG.

63). It has done this, for instance, in the Algera decision,
supra no 31, where it considered the revocation of
administrative measures and to a lesser extent, in the
Nold (case 18/57, [1957] ECR 121) and Kloeckner (supra
no 62, p. 325) decisions where it resolved certain
civil law questions in the light of German law.

64). Mann, p. 354.

65). Langrange, 64 Rev.dr.pub.sci.pol 841 at 857 (1958); see
also his conclusions in case 3/54, Assider, [1955] ECR
63.


p 389 passim.

68). Supra no 67.

69). Case 8/55, supra no 59.


75). Case 8/55, supra no 59.
77). Case 6/64, supra no 72.
78). Case 11/70, [1972] CMLR 255 at 271 per AG.
79). Submissions of AG de Lamothe in case 11/70, supra no 78 at p. 272.
80). Case 43/75, Defrenne, [1976] ECR 455 at 481, where the Court held that although Article 119 EEC was directly applicable as from 1 January 1962, consideration of legal certainty demanded that its direct effect could only be invoked for the future.
81). See e.g, Case 48/69, ICI, [1972] ECR 619.
82). Cases 6 & 11/69, Commission v France (Rediscount Rate Case), [1969] ECR 523 at 539 per curiam and 550 per AG.
82a) It should be noted that the European Court in its early decisions used to refer to the principle of proportionality as the principle of 'justice'.
87). See e.g, case 86/76, Societe pour l' Exportation des Sucres, [1977] ECR 709.
88). See e.g, case 108/81, Amylum v Council, [1982] ECR 3107
91). See e.g, cases 98/78, Racke, [1979] ECR 69, 99/78,

92). Case 98/78, supra no 91.

93). Lasoc and Bridge, p. 165.


95). For the need of justification of the authorization of retroactive (protective) measures taken in the field of common commercial policy see case 29/75, Kaufhoh, [1976] ECR 431 at 443, consid. 6.


97). Case 29/75, supra no 95.

98). Case 62/70, supra no 96.

99). In the Community Report on the Protection of Fundamental Rights in the European Communities [Bull. of the EC, Suppl. 5/76], it is stated that the principle of non-discrimination, like that of proportionality, is one of 'a number of important general principles of law' and reference is made to the Merkur case [Case 43/72, [1973] ECR 1055].

100). See Toth, Vol I.

101). See e.g, Joined cases 198-202/81, Micheli, [1982] ECR 4157, Consid. 5.


106). Thus in order to decide whether a particular measure is discriminatory, one must find out if there is a comparable situation. This is a question of fact.

107). Case 11/74, supra no 102, p. 886. Also case 43/72, supra no 99.


   "... discrimination in the legal sense consists of treating in an identical manner situations which are different or treating in a different manner situations which are identical ..."
118). See e.g, case 168/76, Commission v France (Re Tax on Alcoholic Drinks), [1980] ECR 347.
119). See AG Capotorti, supra no 104, p. 1777.
124). See Article 3(1) GG: "All persons shall be equal
before the law."


126). Prohibition of discrimination on the grounds of sex (Art. 3 para 2GG), parentage, race, language, homeland and origin, faith and religious or political opinions (Art. 3 para 3GG).

127). Supra no 125, paras 82 and 97.


129). Supra no 123, p. 694.

130). See Tiffeau, 'France', supra no 121, p. 2. This also holds true for Belgium, Greece, Italy and the Netherlands. See the respective national reports in FIDE supra no 121.

131). In this case the courts will review the relevant facts and circumstances when the executive operates outside reasonable margins. See Schermers, para. 310.


134). Supra no 120.

135). Supra no 120 at p. 1223.


138). Supra no 120 at p. 1224.


141). Supra no 140, Recital 82.


143). Supra no 140 at p 3561.


145). Supra no 133.


147). Supra no 144.


150). Supra no at 1232-3.


155). See Capotorti, supra no 121, p.5


157). Jacque, supra no 121, p. 10.


159). See e.g, case 2/74, Rayners, [1974] ECR 631 at 651-2,
confirming the direct applicability of Article 52 EEC as from the end of the transitional period.


161). Case 43/75, supra no 158.


164). Case 170/84, supra no 163a.

165). Supra no 164, cons 29.

166). These principles were reiterated by the Court in the Rummel case, 237/85, [1987]3 CMLR 127.

167). See per AG Darmon in case 96/80, supra no 163.


173). Supra no 162.


183). Case 11/70, supra no 151, p. 1147 per AG.

CHAPTER IV: JUDICIAL REVIEW OF THE PROPORTIONALITY OF COMMUNITY ACTS BY THE COURT OF JUSTICE.


The European Communities are based upon a legal order - the Community Rule of Law. While the objectives of the Communities and the means of achieving them are a matter of political choice and agreement, Community law is there to ensure that the consequent obligations are fulfilled, and that rights are safeguarded according to accepted and acceptable principles. These rights and obligations concern not only Member States and Community Institutions, but commercial undertakings and individual citizens as well. It is this feature that distinguishes the Community from all other international associations. Those who administer are subject to limitations imposed by law and those who are administered have rights in law which must be protected. In the words of Advocate General Langrange, Community legal order requires that:

"In each case the public interest and legitimate private interests should be balanced against each other; that moreover, is one of the fundamental concepts of administrative law, and is without doubt the chief justification for the very justification for the very existence of administrative courts." (1)

Judicial control must, however, recognize that for the administrator to do his/her job properly he/she must enjoy a reasonable measure of discretion as to the means he/she adopts.
Moreover, the administrator, by the nature of the task, is frequently faced with having to take action rapidly in the face of unexpected economic forces; with having to assess the future impact of those forces; with a variety of courses open to him and a choice to be made among them. The problem is whether the judge acting with hindsight can replace the administrator reacting to the pressure of events. More often than not the issue is confused by an allegation that the problem is not one of law but economics and is thus not a fit matter for judicial treatment. As it has been succinctly put: "In general judges are not qualified to decide questions of economic policy, and such questions are not justiciable." (2)

This may be to misconceive the nature of judicial control available in even those Member States which provide it in its least extensive form. The control is not over the merits of the decision as such but over its legality. Legality in this context implies conformity with certain objective standards within which administrative action was permissible and the existence, in fact, of the necessary circumstances which alone allowed the administrator to take the action in dispute. Judicial control may even require an examination of the various alternatives open to the administrator in order to see whether the one he/she chose was in reasonable relation of proportionality to the end to be achieved. Once, however, the administrative decision in question has passed the test of legality the Court's duties are over. It will not then
substitute its own evaluation for that of the administration.
The statement, therefore, that questions of economic policy are
not justiciable requires qualification. 'Policy' itself is a
word with many shades of meaning. In so far as it means a
choice of objectives policy is not justiciable. That the
policy is economic policy makes it neither more or less
justiciable. An individual problem which involves
consideration of economics may indeed give rise to very solid
and three-dimensional alternatives.

The problem of when to exercise judicial restraint is
connected with the whole question of whether or not the problem
before the Court is 'justiciable.' Thus before a court can
proceed to its next step, that is to say whether or not to seek
to exercise its control and in what manner, it is essential
that the issue be declared 'justiciable.' The usual context in
which the question of justiciability arises is to be found in
the exercise by authority of discretionary powers granted to
it. Sometimes the matter can be resolved by an examination of
those powers and of the subsidiary problem whether the powers
have been properly and completely exercised within the terms of
the enabling provision. Very often it is here that confusion
arises between the role of the Court and the administrator.
Here, above all, the Court runs the danger of being indulged in
politics.

The European Treaties are intensely political texts in
the sense that they set out explicitly a series of political
goals and prescribe, in greater or, more frequently less detail the methods by which these goals are to be achieved. On the road to their achievement the Community Institutions must necessarily dispose of a fair margin of discretion in the choice and execution of those methods. The European Treaties as a whole cover a large part of the economic life of the Member States. Accordingly the broader question of what is a 'justiciable' issue frequently concentrates itself on the Community stage into a more specific one of how far it is proper for the Court to concern itself with policy and matters of administrative nature. The Treaties seek to regulate matters which are by their very nature dynamic and have a high degree of economic content. The Court cannot evade the problems which arise. According to Asso:

"... la cour des communautes etant essentiellement un juge d' interet economique, devrait interpreter les normes communautaires en fonction de l' economie. En d' autres termes, elle devrait aller au-dela de la reconstruction teleologique du sens de la norme et voir cas par cas ... quel est l' interet economique en jeu dans le differend qu' elle doit juger." (3)

II). Control of Discretionary Powers of Community Administration.

a). Introduction.

While the choice of policy itself may not be justiciable there is no reason why the legal and factual basis for policy decisions need escape judicial consideration. To be effective, economic policy must be translated into economic law. Economic law can be defined as the totality of legal rules promulgated
in furtherance of economic policy. It is in the field of economic law that the greatest risk of arbitrariness occurs. State aid or intervention is frequently selective in its nature. There is perhaps nothing inherently wrong in the principle of selection taken alone, or at least administrative necessity may impose it, but it remains nonetheless essential that the exercise of such discretion should be subject to the Rule of Law. (4) In the words of Advocate General Gand:

"The much greater the powers of the EEC and the very freedom of discretion in their exercise require stricter conditions to be imposed both as to the form of Community acts as well as to the means by which they can be exercised." (5)

Under these conditions, even the exercise of discretionary powers must be subject to a judicial review by the Court in order to ensure an effective control. "There appears ... no doubt" observed Advocate General Roemer "that the facts upon which a discretionary decision is based are subject to judicial review." (6) As the Court pointed out in Hoogovens:

"... to recognize the High Authority's discretionary powers is not to deny the jurisdiction of the Court of Justice to see whether the Decision of the High Authority rests on a correct application of the Treaty ... and whether it is objectively justified in law." (7)

The crucial and difficult question concerns the extent to which the Court may exercise such a review.

Because of the limitations inherent in the separation of powers as embodied in the institutional structure of the Community, the Court is understandably reserved in evaluating economic facts and circumstances underlying an act. Presumably
anxious to demonstrate that this principle is duly respected and the exercise of discretionary powers by Community Institutions are reviewed under exceptional circumstances only, the Court seeks to distinguish between a review of a material accuracy of facts on the one hand and the consequences drawn therefrom on the other, which implies an evaluation of economic facts and circumstances. (8) The administration must assess the basic data accurately; it may require to draw from the basic data secondary conclusions of fact; it must then consider what courses are open to it and which of those courses are permissible within the legal framework in which it operates; it must balance the pros and cons of these courses and make its choice.

The Court's role is essentially different. It can evaluate the secondary conclusions at least to the extent of seeing whether they are supportable by primary facts; it can assess the legal competence of a proposed course of action but it cannot make the final choice between the competing solutions. Should it find the solution chosen to be illegal, it may not fill a gap with a solution of its own choice. In the first place, therefore, the Court of Justice will examine the evidence before the administrator to see whether it has fallen into a material error of fact. The Court may further examine the inferences which it has drawn from the primary facts and will then consider the compatibility of its chosen course with the law. As the the Court has said in Consten and
Grundig:

"The exercise of the Commission's powers necessarily implies complex evaluations of economic matters. A judicial review of these evaluations must take account of their nature by confining itself to an examination of relevance of the facts and of legal consequences drawn therefrom." (9)

Advocate General Langrange stated in Hoogovens that it was for the Court to investigate whether the different reasons stated in the contested decision were correct in substance on the one hand and, such as to justify the decision in law on the other. He went on to say that the Court should review the administration's concept of the legal interests which it should take into consideration and which constitute the limits for the exercise of its discretion. However, much such an effort to limit the control of discretionary powers may be understandable. It must nevertheless be realistically admitted that even a review of accuracy of facts stated may sometimes imply an element of evaluation. It is, therefore, rather difficult, if not impossible, to draw a sharp and reliable dividing line between a mere review of the accuracy of facts and their evaluation particularly so if the facts were complex.

b) Limits of Evaluating Economic Facts and Circumstances.

Generally stated, the Court may, under whichever Treaty provision it exercises its jurisdiction, evaluates economic facts and circumstances provided a misuse of powers is committed, including a great disregard of Community objectives or a provision of Community law 'manifestly' misinterpreted.
In the Second Balkan-Import-Export case the Court stated:

"As the evaluation of a complex economic situation is involved; the Commission ... enjoys in this respect a wide measure of discretion. In reviewing the legality of the exercise of such discretion, the Court must confine itself to examining whether it contains a manifest error or constitutes a misuse of power or whether the authority did not clearly exceed the bounds of its discretion." (11)

Such a manifest failure to observe provisions of Community law, must imply an assessment of an economic situation underlying the decision which, measured on the Treaty provisions, is manifestly erroneous.

According to the first pronouncement of the Court on this point, this failure is related to an erroneous evaluation. And it may be noted that in the EEC case-law this manifest failure appears at first as a patent or flagrant error or omission, finally as a manifest error or a clear infringement of the limits of discretion of the Community institutions. Westzucker (12) concerned a Commission decision suspending payment of a grant. In reviewing the validity of this decision the Court said that the Commission enjoyed a 'significant freedom of evaluation' in fixing the level of the grant. It then continued:

"When examining the lawfulness of the exercise of such freedom, the courts cannot substitute their own evaluation of the matter for that of the competent authority but must restrict themselves to examining whether the evaluation of the competent authority contains a patent error or constitutes a misuse of power."

In Racke (12a) the Court examined whether the competent authority had clearly exceeded the limits of its power of
evaluation. In the Second Schluter case (13) the Court held that it was not satisfied that in adopting a particular system of monetary compensatory amounts the Council imposed burdens on traders 'which were manifestly out of proportion to the object in view.'

'Manifest error' is, however, a phrase with a wide meaning including error of law and error of fact. Moreover, the Court may test the choice which has been made by the Community administration against certain of the unwritten principles of Community law. Proportionality is one of the most prominent examples and it involves consideration of whether the means chosen by the Commission or the Council might cause disproportionate interference in the market compared with some other solution—a question which involves a necessary consideration of the other possible solutions. Once again it must be pointed out that the Court will not substitute its own judgement of what is correct. This does not mean that it is altogether out of the question for the Court to appraise economic considerations to the extent to which their assessment is necessary in determining the legality or otherwise of the measure. This will be the case in particular when inquiry is made into the observance of the principle of proportionality. But it is clearly no part of the Court's duties to assess the wisdom or otherwise of an aspect of economic policy adopted by the Council or by the Commission or go into the propriety of economic provisions on which certain decisions of those bodies.
were based. As Asso has put it:

"There are many cases where a decision cannot legally be taken unless such a measure is necessary. Thus the judge who is called upon to examine its legality may be obliged to examine its merits. This, however, is only considered by the judge as an element constituting the legality of the decision. It is accordingly necessary to make a distinction between the merits of a decision as an element of its legality and the whole merits of a decision where the judge substitutes his assessment of the facts for that put forward by the administrator." (14)

In the case that the legality of a measure contains its opportunite as one of the constituent elements of its validity, it is quite obvious that the judge will assess the compatibility of this measure with the principle of legality taking into account the suitability (l' a propos) of the measure in question. In Biovilac, the applicant argued, inter alia, that the contested Commission Regulation was void because the measures introduced by it were partially ineffective to attain the desired end. After examining in detail the functioning of the challenged system the Court observed that:

"The fact that the technical methods of denaturing chosen to achieve that aim subsequently proved to be partially ineffective does not alter the legality of the contested Regulation vis-a-vis Article 39 of the Treaty since the legality of a measure can adversely be affected only if the measure is manifestly unsuitable for achieving the aim pursued by the competent Community Institution." (14a)

Thus the Court of Justice controls the opportunite of an economic measure only when the opportunite of the challenged measure is an element of its legality; on the contrary the Court will not control the 'inopportunito' of such a decision
when its legality hinges on its compatibility with a body of norms. (15) The judge will, therefore, be led in the first case to control the merits of an economic decision in order to assess, eventually, its suitability with the economic objective pursued. According to Guibal:

"Dans une perspective de proportionnalité, legalité et opportunité ne se distinguent pas nettement, en tout cas ne se opposent pas. La mise en œuvre de la proportionnalité suppose d'abord l'adaptation des moyens aux fins, ce qui est un aspect essentiellement matériel de la décision et donc un aspect d'opportunité; mais elle suppose aussi un contenu de règle juridique, ce qui est l'aspect formel de la décision. Ceux deux aspects ne s'opposent pas, ils sont même difficiles à distinguer." (16)

In the second case, on the other hand, the judge will refrain from controlling the inopportunité of a decision which is compatible with Community law in abstracto. Actually if he/she went beyond the verification of the compatibility of the decision with the general norms, the judge would substitute his/her own evaluation of its 'opportunité économique' for that of the executive. Nevertheless, even in this case the Court will be entitled to check whether the evaluation of the executive is taunted by a manifest error.

As long as discretionary powers are envisaged by a competent Community institution within its legitimate limits and respecting the essential procedural requirements, there is no valid ground for a Court's power to review their exercise. Once, however, a Community institution exceeds this limit, the Court must inevitably review such acts from all possible aspects, including an evaluation of economic facts and
circumstances which might have prompted such an exercise. It may be difficult to maintain that the fundamental concept of the Rule of Law should be restrained because discretionary powers were exercised.

In practice even the nature of the act may have some bearing on the extent of such a review. A distinction between an exercise of legislative powers, as formally expressed in regulations or general acts, and of mere administrative powers, stated in individual decisions, may predetermine the nature and extent of the Court's review. (17) The required findings of a Community institution may differ depending on whether they support a legislative or an administrative act. A normative act which deals with a general situation in an abstract manner is based on findings of a general nature. Thus, for instance, the requirement of Regulation 17/62 (18) that certain types of agreements must be notified to the Commission deals with a general situation only. Advocate General Mayras in examining the extent of review of facts on which a Commission Regulation fixing an amount of subsidies on cereal imports was based, pointed out that the contested regulation entailed a 'choice of economic policies' implying a freedom of judgement, that is, a margin of discretion of the Commission. The Advocate General stressed that "judicial review of the Court is, in such matters, comparatively limited inasmuch as, inevitably, it is essential that the Community authorities should have greater freedom of action." (19)

According to Article 33 ECSC, the Court may not normally 'examine the evaluation of the situation resulting from economic facts or circumstances, in the light of which the High Authority took its decisions or made its recommendations save where the High Authority is alleged to have misused its powers or manifestly failed to observe the provisions of this Treaty or any rule of law relating to its application.' As a result of this provision, the Court will not examine economic facts and circumstances wherever the evaluation of the Commission seems to be reasonably tenable. The Court will review economic facts and circumstances only when such evaluation is manifestly wrong. (20) In Dutch law this is called 'marginal review function', as the courts only interfere when the executive operates outside reasonable margins. (21) The Court confirmed this interpretation of Article 33(1) ECSC in Netherlands v High Authority (22) where it held:

"The term 'manifest' presupposes that a certain degree is reached in the failure to observe legal provisions so that the failure to observe the Treaty appears to derive from an obvious error in the evaluation, having regard to the provisions of the Treaty, of the situation in respect of which the decision was taken. In the present instance the 'manifest' failure to observe the Treaty can only result from the finding by the Court of the existence of an economic situation which prima facie reveals no necessity for the contested measure in the pursuit of the objectives set out in Article 3 of the Treaty, in particular paragraph (c)."

There is no provision similar to Article 33 ECSC in the EEC Treaty. In practice, however, the Court acts in much the same
way as under the ECSC Treaty. Once again, the Court only intervenes when the evaluation of the economic situation is manifestly wrong. (23) In both Deuka cases (24) the Court considered that the Commission had considerable freedom in adjusting the denaturing premium for wheat when the balance of the market in cereals was likely to be disturbed.

The review of facts begins with a review of material accuracy of basic findings underlying an act contested, followed by an inference drawn therefrom, which implies an evaluation of economic circumstances. A review of material accuracy of facts drawn therefrom may not always be clearly separated. Consequently much of what is said about the Court's review of facts may equally be applied to the Court's evaluation of economic circumstances. Plaintiffs frequently challenged the accuracy of facts underlying the act impugned. In practice, the Court examined and reviewed the the accuracy of such findings in connexion with an infringement of Community law as a material requirement of a statement of reasons. It does so, only if the facts disputed concern the legality of the act and, furthermore if these facts are both relevant and substantial. There must be a close connexion between the disputed facts and the legality of the contested act. The Court examines the facts only within the limits of its power to review the legality of the act. Beyond this context it is up to the executive to find and determine the facts. (25) The Court reviews disputed facts only if they are relevant for an
argument as was explicitly stated in the Hoogovens case. (26) A disputed fact may be relevant for a particular argument but not substantial enough to be decisive. The Geitling case (27) offers a good example for the situation in which the Court refused to examine disputed facts because they were considered unsubstantial.

There are several examples of 'marginal review' under the EEC Treaty. The Community institutions enjoy wide discretionary powers when they adopt a particular system of monetary compensatory amounts (28) or when they authorize safeguard measures, (29) or when they decide on the admission free of custom duties of a scientific instrument (30) or whether or not to impose anti-dumping duties. (31) Similarly, when the Commission authorizes a Member State under Article 115 EEC to withhold Community treatment from imported products third states, where that state has restricted such imports, it enjoys considerable discretion. (32)

III). The 'Misuse of Powers' in Relation to the Principle of Proportionality.

Under the ECSC Treaty, misuse of powers plays a special role which in some ways puts it above the other grounds of invalidity. First, it will be remembered that where a non-privileged applicant challenges a general decision or recommendation, he may do so only on one ground: Misuse of powers affecting him/her; secondly, where the Commission is obliged to evaluate the economic situation in order to decide
how to exercise its powers, the Court may not review the
Commission's assessment except where it is alleged that the
Commission has misused its powers or has manifestly failed to
observe the provisions of the Treaty or any rule of law
relating to its application. (33) Under the EEC Treaty the
situation is much the same. The Court, in evaluating an
economic situation, must restrict itself "to examining whether
the evaluation of the competent authority contains a patent
error or constitutes a misuse of powers." (34) 'Misuse of
powers' can be defined as the exercise of a power for a purpose
other than that for which it was granted. Under Articles 35(1)
ECSC, 173(1) EEC and 146(1) Euratom, 'Misuse of powers' is one
of the grounds of invalidity of Community acts. Its character
is subjective. In order to establish it, one has to discover
what was the subjective purpose -motive or intention- of the
authority exercising the power. For this reason 'misuse of
powers' is difficult to prove: In the absence of a document,
emanating from the authority, which indicates its purpose in
adopting the measure, the applicant may have to rely on
inference from the contents of the measure and general
circumstances prevailing when it was enacted.

The notion of 'misuse of powers' has been largely if not
exclusively developed under the ECSC Treaty. Its examination
is primarily related to objectives actually pursued by the act
contested. Accordingly, the consideration of the objectives
pursued predominates in the Court's definition of 'misuse of
Thus in one of its decisions the Court suggested that the High Authority would misuse its powers if it pursued an objective incompatible with the objective for the pursuit of which powers were granted. Its later well established case law considers that a 'misuse of powers' has been committed if an objective pursued is other than that the High Authority may legally pursue.

It is apparent that there is a close affinity between the principle of proportionality and 'misuse of powers.' Proportionality requires that burdens imposed on the citizen should be proportionate to the objective pursued, that is, the means chosen must be reasonably likely to attain the desired end and the detriment inflicted on those concerned must not be disproportionate to the general benefit. The difference between the notion of proportionality and that of 'misuse of powers' is that the former is purely objective: The terms of the measure are balanced against the objective of the provision under which it was adopted; whereas in the case of 'misuse of powers', the subjective intention of the author of the act is the relevant factor. If the authority is genuinely pursuing the proper objective, but uses inappropriate means, the measure will be annulled for lack of proportionality; if the objective is improper, 'misuse of powers' will be the correct ground of review. However, though the two notions are quite distinct in theory, can easily merge in practice, since the fact that the measure is inappropriate for the attainment of its ostensible
objective will suggest that this was not the objective which its author was trying to achieve.

IV). Establishment and Proof of (Dis)proportionality of a Measure Before the Court of Justice.

Before dealing with the review of (dis)proportionality of an act by the Court, a brief analysis of the constituent elements of the notion of proportionality would give us a better insight to our subject. The elements of proportionality can be analysed as follows: Proportionality may depend, at the same time, on the measure taken, its objective and the factual situation to which this measure will be applied. In this case, proportionality embraces the ensemble situation-measure-objective. It is also possible for proportionality to lie in a relationship of adequacy between means and ends in a given context. This idea resembles the previous one as far as the nature of the constituent elements of proportionality is concerned. Nevertheless, the relationship between these elements is of different nature in this case. Finally, proportionality can be a function of the existing factual situation, the expected advantages and the resulting disadvantages of the measure under examination. In this case, according to the circumstances the element of 'factual situation' can be replaced by another element: 'Consequences of abstention' (failure to act). In this case, proportionality hinges on the relationship between the anticipated advantages of a measure, the qualitative aspect of its disadvantages (or
their existence) and their quantitative aspect (or their intensity)—that is, the degree of gravity of the situation—the desired end and the discomfort caused to the citizens.

In the light of what was said above an effective judicial control of the (dis)proportionality of an act is subject to the following assumptions. First of all, the judge should have all the necessary technical knowledge which would enable him/her to assess the contents of the challenged administrative decision as well as the contents of alternative legally tenable solutions. He/she should also be in a position to understand and assess the objectives pursued and the means for their attainment. This knowledge is a sine qua non requirement for a real comparison between the advantages and disadvantages by the judge of a measure before him/her. Second, the applicant should produce to the court all the relevant evidence which support a specific allegation of excessiveness of the disadvantages of the contested measure in relation to its advantages. Even though the Court is less demanding, nowadays, in admitting prima facie evidence or the existence of a presumption and even sometimes contents itself with existence a serious and precise allegation, the present state of case law shows that the initial contribution of the applicant, in matters of proof, is fundamental, and that the Court will not pronounce itself, especially on an allegation of disproportionality, if the interested party fails to meet this task. The judge should have clear and accurate information
before him/her as far as the motifs of the contested act are concerned. An effective control of proportionality presupposes that the administration will make known its exact motifs and the facts in the light of which it reached its decision. This is due to the fact that the disproportionality of a measure cannot be properly evaluated unless the judge has before him/her the real elements for the requisite comparisons.

In examining the (dis)proportionality of a measure, according to the case law of the Court, it is important to establish "whether the means [a provision] employs correspond to the importance of the aim and ... whether they are necessary for its achievement" (37) or simply "whether the means [a provision] employs are appropriate to achieve the objective pursued and whether or not they go beyond what is necessary to achieve it." (38) Necessary means is the one which is least harmful of more than one means available to achieve a particular objective while appropriate means is the one which is suitable to the accomplishment of a given law, and which is not in itself incapable of implementation or unsuitable for that purpose. Thus in order to establish the disproportionality of a measure the following three questions should be posed:

i) What are the objectives of the measures in question?

ii) What measure has actually been adopted? and

iii) Is there any milder measure which could attain these objectives?
If the last question can be answered in the affirmative and be proven then the disproportionality of the measure in question has been established. It is obvious that the proof of the (dis)proportionality of a measure is all a question of degree not of substance, therefore the problem of review of facts and their evaluation is acute here. This may involve judicial appreciation of economic considerations which might appear to be foreign to a court of law. But as Advocate General Capotorti put it in Thy Marcinelle: (39)

"... an infringement of the principle of proportionality may [not] be held to have occurred, without careful reflection on the scope of that principle and on the importance which the facts given assume in its light."

Judicial review of the (dis)proportionality of a given measure reveals, in fact, how frail and blurred the dividing line between a review of facts and their evaluation may be. In the early case of San Michele v High Authority, (40) several steel enterprises challenged a decision of the High Authority which obliged them to forward to the High Authority at Luxembourg the invoices concerning consumption of electric power. Arguing that the inspectors of the High Authorities may inspect such documents at their premises only, they maintained that such an obligation infringed Articles 47 and 86 para 4 of the ECSC Treaty. Dealing with this count, the Court examined the obligation of forwarding the invoices to the High Authority in terms of its proportionality to the objective pursued:

"As there is no express rule on this matter in Community law, it is for the Court to determine whether the measures of investigation taken by the High Authority were excessive. In this case, and having regard to
the circumstances, the demand for the dispatch of the
invoices at Luxembourg was not excessive and dis-
proportionate to the aim in view ..."

This ruling calls for certain comments. The plaintiff
charged in this connexion merely an infringement of Community
law; neither a misuse of power nor a manifest misinterpretation
of rules of Community law were invoked which are required as a
precondition for evaluating economic facts and circumstances.
Nevertheless, the Court did evaluate the measure taken—a mere
review of facts would have hardly permitted such a conclusion.
The Court shared the evaluation of the High Authority on this
point. The question is raised whether the Court would have
upheld the legality of the challenged measure without reviewing
its proportionality. Under these circumstances it may be
argued that this ruling is minimizing the relevance of the
required grounds of illegality for an evaluation of economic
facts and circumstances. As a result it can be supported that
an infringement of the principle of proportionality warrants,
already, by itself such an evaluation, irrespective of whether
or not a misuse of powers or manifest misinterpretation of
Community law is charged.

The Court's ruling in Bock (41) seems to uphold the above
conclusion. The Court quashed a Commission decision which
authorized the German Federal Government to exempt imports of
mushrooms from China from Community treatment, a safeguard
measure extended even to imports for which licences were
already requested. The Court compared the quantity of
mushrooms for which licences were requested (120 tonnes) with the quantity imported to Germany in one of the preceding years (46,122 tonnes) and found this quantity "... insignificant in terms of effectiveness of the measure of commercial policy proposed by the Member State concerned ..." In its view the Commission "... has exceeded the limits of what is 'necessary' within the meaning of Article 115 of the EEC Treaty." In view of this decision, it could feasibly be maintained that this comparison implies an evaluation of economic circumstances rather than a mere review of facts, though again the Court is very discreet indeed on this point. It is debatable, nevertheless, whether the necessity of such a measure may be examined without an evaluation, however rudimentary and self-evident it may appear.

In preliminary rulings reviewing the validity of Community acts in terms of the principle of proportionality, the Court is not only very pragmatic but also reserved as to the extent of evaluating economic facts and circumstances in this procedure. And yet the Court does in fact evaluate economic circumstances in this procedure as well - even though it does so very fleetingly, sometimes too briefly to permit a valid conclusion - as the following examples may demonstrate. In several rulings the Court found a Council regulation which required a bank deposit for the grant of an import or export licence and intended to ensure that those transactions were carried out within a time-limit to be proportionate to this
aim. Similarly a bank deposit, whose objective was to guarantee that butter sold for further processing by the national intervention agencies was not diverted for another purpose, was found to be proportionate. (42) The classic example, however, of this case law is the Internationale Handelsgesellschaft ruling. Considering the real burden of such a bank deposit and the costs involved in making it the Court observed:

"The costs involved in the deposit do not constitute an amount disproportionate to the total value of goods in question and of other trading costs. It appears therefore that the burdens resulting from the system of deposits are not excessive." (43)

The element of evaluation is even more obvious in those instances in which the Court, not sharing the Commission's evaluation of economic facts and circumstances, declared a regulation invalid as contrary to the principle of proportionality.

The so-called 'Skimmed-milk' powder cases (44) are particularly illustrative in this respect. In an attempt to reduce the surplus intervention stocks of skimmed-milk powder, Council Regulation 563/76 required skimmed-milk powder to be purchased by those trading in certain imported animal feedstuffs; if no such purchase took place the trader in question had his previously deposited security forfeited. The security was roughly equivalent to the increased cost of his feedstuff through incorporating skimmed-milk powder rather than the much cheaper vegetable protein products which were normally
used. Leaving aside the detailed conditions under which this compulsory purchase had to be made, it suffices, in the present instance, to recall that the Commission fixed the price of skimmed-milk powder, at which national intervention agencies had to sell it at a rate approximately three times higher than the price of vegetable protein products having a comparable nutritional value. This compulsory purchase of skimmed-milk affected primarily importers of cattle feed, undertakings preparing and processing animal food stuff and cattle breeders considering this measure in the light of the objectives of the common agricultural policy as stated in Article 39 EEC and of prohibition of 'any discrimination between producers and consumers within the Community' of agricultural products, contained in Article 40(3) EEC, the Court ruled on the principle of proportionality:

"The obligation to purchase at such a disproportionate price constituted a discriminatory distribution of the burden of costs between the various agricultural sectors. Nor, moreover, was such an obligation necessary in order to attain the objective in view, namely the disposal of stocks of skimmed-milk powder. It could not therefore be justified for the purposes of attaining the objectives of the common agricultural policy."

It seems that the Court attached primary importance to the prohibition of discrimination and to the principle of proportionality. The determination of the existence of discrimination and of an infringement of the principle of proportionality raises complex problems which is impossible to resolve without examining and evaluating economic facts and
circumstances. Should there still be any doubt as to whether or not the Court did in fact assessed the merits of the challenged measure in the 'Skimmed-milk powder', its observation that "nor ... was such an objective necessary in order to attain the objective in view ..." makes that quite obvious. It is hard to conceive that the necessity of a measure could be determined in any other way than the evaluation of its merits. The Court did so in a very reserved manner, so reserved that its reasoning fails to indicate the grounds on which the Court found the discrimination or the infringement of the principle of proportionality. It evaluated in this instance economic facts and circumstances although neither a misuse of powers nor a manifest misinterpretation of Community rules were charged.

The Court will review the disproportionality of a measure only if it is manifest. In Schroeder, (45) the Court held that some protective measures taken by the Commission against the imports of a product, will not offend against the principle of proportionality if at the moment of their adoption it did not appear that they were 'obviously inappropriate to contribute to the realization of the desired object.' This position was maintained by the Court in Stolting (46) where it ruled on the legality of co-responsibility levy in the milk sector that: "If a measure is patently unsuited to the objective which the competent institution seek to pursue, this may affect its legality." In the Second Schluter case the Court was not
satisfied that in adopting a particular system of monetary compensatory amounts the Council imposed burdens on traders which were "manifestly out of proportion to the object in view." The Court, therefore, will initiate the control of proportionality of a measure once it is made sure that this measure is legally tenable and necessary. In this case the challenged measure will be considered illegal only if it is manifestly disproportionate with the object in view; if it is not, then it will be regarded as lawful even when it is not reasonably proportional. Under these circumstances the judge will obviously compare the advantages and disadvantages of the measure in question but he/she will not require an agreement, not even an equilibrium between them. It is apparent that what is considered by the Court as a proportional measure is not necessarily the best one.

The fact whether a measure is disproportionate or not will not necessarily be determined by reference to the individual position of any particular group of operators. In Balkan-Import-Export, (47) the Court, in reviewing the proportionality of the contested measure, observed that:

"... it does not necessarily follow that that obligation must be measured in relation to that situation of any particular group of operators. Given the multiplicity and the complexity of economic circumstances, such an evaluation would not only be impossible to achieve, but it would also create perpetual uncertainty in the law."

According to Neri:
"Le principe de proportionnalite ne saurait etre invoque a l' encontre d' un acte comportant un pouvoir d' appreciation de la part de l' authorite publique pour demander le redressement d' interets et des situations individuelles ou propres d' une categorie limitee de personnes, telles que, par exemple, les producteurs du produit considere d' un Etat membre." (47a)

This is a fundamental criterion (d' appreciation) which clearly delimitates the scope of application of the principle of proportionality and has been expressed in absolutely clear terms in the order of the President of the Court in Simmenthal (47b) rejecting the request of temporary suspension of the application of the special arrangements for the importation of frozen meat intended for the processing industry instituted by the Council Regulation 425/77 and implemented by the Commission Decision 78/258. The adoption of this regulation was prompted by the collapse of prices which had occurred within the Community as a result of massive imports from third countries of beef and jelly preserves and suspended the benefit of levy suspension accorded to the importers of these products by virtue of the basic Regulation 805/68. The Commission in fulfilling its obligation to implement the new Council Regulation, adopted Regulation 2900/77 which provided, inter alia, that importation of these products with total suspension of the levy shall be conditioned upon the submission of a purchase contract for frozen meat held by an intervention agency, concluded in accordance with the relevant provisions.

In his decision the President of the Court (Kutscher), after a necessarily summary examination of the constitutive
elements of this regime, stated that:

"... the measure sought might have serious consequences on the market in beef and veal and adversely affect the interests of an incalculable number of agricultural producers and traders."

He thus concluded that: "The scope and possible consequences of such a measure would render it out of all proportion to the individual interest which the applicant wishes to safeguard."

It should be pointed out that in this case it was not the Community's measure itself, considered in its constitutive elements, which was the determining factor in the Court's eye, but the factual situation (la situation de fait) which would have been produced in the absence of the said measure. In other words, instead of asking itself, whether the Community measure in question could or not, in this case, be replaced by another more reasonable or proportionate measure, the Court will simply examine whether the effects resulting from the failure to adopt such a measure would have been even more disproportionate than those actually resulting from its adoption. (47c)

In Thy Marcinelle (48) the Court stated that in accordance with the Commission's duty to act in the common interest, a necessary consequence is that, certain undertakings by virtue of European solidarity, would have to accept greater sacrifices than others, and that the Commission could not be accused of having imposed disproportionate burden upon certain traders. In this case the applicants claimed that the futility
of their sacrifices - in view of the inability of the contested measure to attain the desired ends in the absence of additional measures - rendered the challenged general decision contrary to the principle of proportionality. Advocate General Capotorti rejected this argument on the basis of the following reasoning:

"On a formal level, it may be objected that the question whether that principle was observed must be answered having regard to the content of the measure under consideration, the weight of the burden which the measure imposes directly and not the relationship between the measure in question and other measures intended to strengthen its practical effectiveness ... I doubt whether that measure may be considered contrary to the principle of proportionality on the basis of the fact that other measures, necessary to set up an economically effective system were not adopted ... If the allegation of an infringement of the principle of proportionality is based on the inadequacy of that decision, it is not sufficient to declare that the system required to be supplemented by other measures; it would be necessary to prove that the system did not function as long as such measures were not adopted. Besides, a finding that the sacrifice was disproportionate would require proof that it casts an excessive burden on the persons affected ..."

The proof, that the action of the Community executive does not serve the public interest and that it constitutes, in view of the desired end, a disproportionate burden, is up to the applicant. The Court often examines whether a violation of the principle of proportionality has taken place but seldom admits that such a violation has taken place because of the difficulty to prove the disproportionality of a measure. As Savy has put it:

"... les regles appliquees par la Cour de Justice en ce qui concerne la charge de la preuve contribuent, ..., a limiter son controle et a renforcer le marge d' appreciation de l' executif."
The Court's ruling in Thy Marcinelle is quite illustrative in this respect. The Court held there that even if it might be admitted that the challenged measure was defective and insufficient in regard to the imports from third countries:

"... there is no evidence in the applicant's arguments to show that those rules imposed restrictions which were keeping out of the common interest and that they constituted a disproportionate measure in relation with the aim which they sought to achieve."

Experience has shown that it is possible to establish this proof in few cases only.

V). Conclusions.

Some tentative conclusions may be drawn from this general survey of the Court's case-law on the extent of the judicial review of proportionality in the Community legal order. The Court now appears inclined to evaluate economic circumstances even in instances of an infringement of Community law, other than patent error or misuse of powers, particularly of an infringement of the principle of proportionality. An infringement of such a fundamental principle may be interpreted as constituting a grave infringement of Community law which requires and justifies such an evaluation. Particularly striking is the practice of the Court of evaluating economic facts even in a preliminary proceeding for a review of the validity of Community acts. This unavoidable development dispels the erroneous assumption that the validity of an act can be reviewed in abstracto -a development which may have further practical consequences for shaping this procedure.
Even in a preliminary ruling reviewing the validity of an act, the Court finds it sometimes difficult to limit an evaluation of economic facts only to instances in which a misuse of powers or a manifest error in the interpretation of Community rules are alleged.

There is a consideration supporting a rather liberal and pragmatic approach as far as the principle of proportionality is concerned. If a reference by a national court requested a review of the validity of an act for an alleged violation of the principle of proportionality, the Court would have two alternatives to deal with such a reference. It could either simply uphold the validity of the challenged act without engaging into any evaluation, which would certainly be an unsatisfactory solution; or declare the reference inadmissible on the ground that it may not review it because a determination of such an infringement would involve an evaluation of economic facts and circumstances—and that technically in a non-contentious proceeding. Such an alternative would be excessively formalistic. Such an answer could hardly satisfy and help the national court which may be even encouraged to undertake under such circumstances, such an evaluation itself.

Being aware of the need to respect the legitimate limits of the discretionary powers of Community Institutions, whose undisturbed exercise is a sine qua non for an effective operation of the Community, the Court may certainly not be expected to push the extent of its judicial review any further
than is absolutely necessary for ensuring and respecting the Rule of Law. It is idle to point out in this connexion that an appropriate reasoning of a judgement supporting an evaluation of economic facts may be a proper guarantee for a judicial review, exercised properly and within reasonable limits.
Endnotes.


2). Charles Roberts v British Railways Board, [1965]1 WLR 396 at 400 per Ungoed-Thomas J.

3). Asso, p.25


7). Supra no 1.

8). See e.g, Case 6/54, The Netherlands v High Authority, [1954-56] ECR 103 at 114.

9). Joined cases 56 and 58/64, [1966] ECR 219 at 347.

10). Supra no 1, p. 284.


14). Asso, p. 27.

15). Asso defines as elements de l' opportunite celles-ci correspond a l' ensemble des circonstanes non-prevues par le droit et qui sont laissees a l' appreciation de celui qui fait l' acte. Ibid p. 22.


17). Asso, p. 27.

18). JO 1962, 204.


20). See e.g, case 98/78, Racke, [1979] ECR 81, cons. 5.
21). Schermers, p. 163.
22). Supra no 8 at p.115.
23). See e.g, case 13/63, Italy v Commission, [1963] ECR 178
25). See e.g, Germany v Commission, [1963] ECR 63.
26). Supra no 1.
30). Case 216/82, First University of Hambourg Case, [1983]
ECR 2789, cons 15.
31). See e.g, case 191/82, Fediol, [1983] ECR 2913.
33). See Article 33 ECSC.
34). See case 78/74, supra no 24.
36). See e.g, Joined cases 52 and 55/65, Germany v Commission
[1966] ECR 159 at 172.
38). Case 56/86, Societe pour l' Exportation des Sucres,
42). See e.g, case 66/82, supra no 37.


47c). These principles were later repeated in a new order of the President of the Court in the Second Simmenthal case 243/78R, [1978] ECR 2400.

48). Supra no 39.

I). Introduction.

The aim for agriculture, too, within the framework of the common market is an undistorted market economy. (1) Nevertheless, due to special factors pertaining to the agricultural sector, (2) a free price mechanism alone cannot produce satisfactory results on the agricultural market. The Court has since made it clear that Community price intervention may only deviate from the free market prices to the extent necessary to achieve the objectives of Article 39 EEC. Thus in Syndicat national des cereales, (3) for example, the Court declared:

"Whilst including measures of price support, ... the intervention machinery does not aim to derogate from the normal conditions of the market beyond what is strictly necessary to achieve its objective." (4)

Here too there is yet another example of the close connexion between different parts of the Treaty. This form of proportionality principle has already been encountered in the case-law on Article 36 EEC. (5) Thus Community intervention may not deviate from the market mechanism any further than is necessary for objectives regarded as justified on the basis of the Treaty and in any event certain fundamental principles of the common market such as the free movement of goods must be respected. (6) The same proportionality principle applies to
the requirement of guarantees and to the application of specific safeguard measures in the agricultural sector. (7) Thus the last recital of Regulation 974/71 (8) introducing the system of monetary compensatory amounts says that "... compensatory amounts should be limited to the amounts strictly necessary to compensate the incidence of the monetary measures on the prices of basic products covered by intervention arrangements" while Article 3 (2) of Regulation 2702/72, (9) laying down conditions for applying protective measures for fruit and vegetables, requires that "such measures may only be taken in so far and for so long, as they are strictly necessary." According to Druesne:

"... l' exigence de proportionnalite limite l' atteinte au droit commun, et la fonction du principe est d'etre un instrument du controle jurisprudentiel de la derogation, d' une part a l' egard des mecanismes de la politique agricole commune en tant qu' atteintes aux conditions normales du marche, d' autre part a l' egard des mesures de sauvegarde ou de protection en tant qu' atteintes au fonctionnement normal du Marche commun." (10)

The common regulation of the agricultural markets will have to contribute in particular towards the attainment of the objectives of Article 39 EEC, and may imply, under Article 40 (2) EEC, either common rules on competition, or compulsory co-ordination of the various national market organizations, or a European market organization. Thus far, in all cases the form of the common market organization has been chosen. Compulsory co-ordination of the various national market organizations has never seemed to be a realistic option. Sometimes common rules
on competition, particularly concerning quality standards, play a part. This is, for example, particularly true in the case of the common organizations of the markets in fruit, live plants and flowers. The only restriction applicable to the option between the various types conceivable is that by virtue of Article 40 (3) EEC they must be necessary to attain these objectives, be limited to the pursuit of these objectives and not to discriminate between producers or consumers within the Community. The Court has stressed that the Council must be recognized as having a discretionary power in this area which corresponds to the political responsibilities which Articles 40 and 43 EEC impose upon it. (11) The main legal basis for the common agricultural policy is to be found in Article 43 (2) EEC. Both on the strength of the text of this Article and in view of the way it has been put into effect it may be assumed that all other regulations or directives (particularly structural ones) which are required to achieve a common agricultural policy directed towards the objectives mentioned in Article 39 EEC may be based on this provision, as may the market-regulating measures of Article 40 EEC. (12)

It is not a mere coincidence that the principle of proportionality has been applied by the Court extensively in cases involving problems arising out of the implementation of the common agricultural policy. Agriculture is one of the most important areas of Community activity; and until the present day it has, more than any other sector, attracted the attention
of Community legislator. As a matter of fact, this sector, which presents a high degree of economic and legal integration, is heavily regulated by a large number of legislative acts, most of which involve the exercise of wide discretionary powers on the part of the Council and the Commission. (13) In the light of these considerations, the need to strike the right balance between the interests underlying Community legislation and the private interests affected is particularly pressing.

It would be useful, for the better comprehension of the Court's approach to this problem, to examine the relevant case-law according to the different kinds of acts or measures, Community or national, which gave rise to the application of the principle of proportionality. These measures or acts are those relating to:

i). the imposition of levies or the introduction of monetary mechanisms (Monetary compensatory amounts)

ii). the deposit system (lodging of securities etc)

iii). the protection of basic rights.

II). Monetary Compensatory Amounts.

The basic financial mechanism, as far as Common Agricultural Policy was concerned, was that agricultural prices were to be fixed in uniform units of account converted into national currencies at the official parity. The problems to which this gave rise in a world of floating exchange rates led to the introduction of the system of monetary compensatory
amounts and agricultural conversion rates. Nevertheless, the basic principle remains that Community agricultural prices are set at a single level in units of account. The Court considered the main legal issues arising from the introduction and the application of MCAs in its fundamental decisions of 1973 and 1975. (14) The main criticisms directed by the applicants in these cases, against the Council Regulation establishing the system of MCAs were that no legal basis for the introduction of MCAs could be found in the EEC Treaty and that the principle of proportionality had been violated in that, MCAs were calculated solely on the basis of the fluctuations between the Mark and the US Dollar, without taking into account the fluctuations between the Mark and the currency of the exporting country (Bulgaria and Switzerland in casu). The Court in its decisions set the limits of its control on acts of normative (legislative) character in general. It did not examine the legality of the basic Regulation introducing MCAs but confined itself in reviewing the motifs of the implementing Commission Regulation. (15) The Court probably felt that it could push its control further in the case of the implementing Regulation. It is in relation to the latter that the Court stated: "... as the evaluation of a complex economic situation is involved" the Commission enjoyed "in this respect, a wide measure of discretion" and therefore "in reviewing the legality of the exercise of such discretion, the Court must confine itself to examine whether it contains a manifest error
or constitutes a misuse of power or whether the authority did not clearly exceeds the bounds of its discretion. According to Neri:

"Ces affirmations font ressortir, un fois pour toutes les limites du controle juridictionnel de la Cour en la matiere, notamment a l'egard d'actes qui ont la nature d'actes legislatifs. Pour que le juge communautaire puisse reprocher a ces actes une violation du principe de proportionnalite, il faut que la disproportion entre le but legal recherche et le sacrifice inflige aux interets particuliers soit <<manifeste>>." (16)

To this end, the Court has developed certain criteria which would allow to detect or to recognize such a disproportion in every individual case. It has particularly insisted on compelling reasons relating to the practicability (practical needs) of the system of the MCAs and the necessity to ensure its efficiency (efficient functioning). Besides it has pointed out that in the case of a normative act, in an area in which Community Institutions enjoy wide discretionary powers, the obligation to respect the principle of proportionality is to be measured not in relation to the individual situation of a single operator or any particular group of operators, but in relation to the total number persons or the categories of the persons affected by the act in question. In other words:

"...les interets qu' il faut prendre en consideration, pour l'application du principe de proportionnalite, ne sont pas, vis-a-vis d' un acte legislatif de la Communaute ceux qui tiennent a la situation individuelle de la personne qui se plaint d' une lesion qu' elle estime avoir subie du fait de cet acte, mais les interets tenant a la <<situation globale>> des milieux concernes." (17)
It is on the same grounds that the Court (18) did not consider that the opportunity given to the Member States by Regulation 1608/74 to exempt from the payment of MCAs traders engaged in the performance of contracts concluded before the introduction of these amounts, could also be extended to operation undertaken on the basis of contracts concluded before each successive increase of these amounts resulting from the devaluation of a national currency which was allowed to float. The Court reasoned that Regulation 1608/74, being a provision for discretionary relief, was designed to mitigate in the appropriate circumstances of fact and law the hardship which may result for certain traders from the application of MCAs and helped to prevent the introduction of amounts for proving excessively burdensome for some of them. Under the circumstances it could not be held that such a regulation breached the principle of proportionality by not affording traders more ample opportunities to benefit from a clause providing for discretionary relief. The application of the principle of proportionality in this case to the effect that traders could avoid being charged increased MCAs for contracts concluded before this increase, would have prevented the proper functioning of the mechanism of the MCAs and would have jeopardized the common agricultural prices system established in the European Communities. The need to safeguard the efficiency of the latter prompted the Court to adopt a very prudent stance in applying the principle of proportionality and
avoid substituting its evaluations for those of the Community legislator as far as the conditions for suspending this mechanism were concerned.

The fundamental problem of monetary compensation relates to the legality of the system itself. It is undeniable that monetary compensatory amounts do constitute a partitioning of the market and, indeed, the Court recognized as much in its earliest decisions on the matter. (19) However, the Court also recognized that the diversion of trade caused solely by the monetary situation was more damaging to the common interest, considering the aims of the common agricultural policy, than the disadvantages of the measures in dispute (that is, the danger to the common market arising from the national monetary measures, in other words, the floating exchange rates, for which monetary compensatory amounts were intended to compensate, not from monetary compensation itself). The Court's decision in Ramel (20) made it clear that, even in the field of common agricultural policy the principle of the free movement of goods cannot be interfered with by the legislator.

In the light of this strict interpretation, a specific justification was needed for the duties levied by way of monetary compensatory amounts. As the Court pointed in Continental Irish Meat (21) the purpose of monetary compensatory amounts, as regards trade between Member States, is to correct the effects of variations in unstable exchange rates which, within a system of organization of the markets in
agricultural products, based on common prices are likely to cause disturbances in trade in such products. The need to safeguard intra-Community trade requires that monetary compensatory amounts should be applied not only in intra-Community trade but also in trade with third countries. (22) It is, therefore, quite obvious that the application of the principle of proportionality to the system of monetary compensatory amounts is all the more important. In ONIC the Court stated as follows:

"Monetary Compensatory Amounts fixed at a level which clearly over-compensates for the margin between the prices expressed in national currency and those expressed in units of account by the application of representative rates of exchange (green rates of national currencies) would be contrary to the nature of monetary compensatory amounts as a temporary expedient and the requirement that their introduction should be strictly necessary, which is a condition of their lawfulness." (23)

The Court thus defined in a single sentence the two-fold application of the requirement resulting from the principle of proportionality:

"A monetary compensatory amount may be introduced only if it is strictly necessary and the level at which it is fixed must meet the same criterion." (24)

According to the last recital in the preamble to Council Regulation 974/71, cited at paragraph 24 of the decision in ONIC, (25) a monetary compensatory amount is strictly necessary: "... only in cases where [the incidence of the monetary measures on the prices of basic products ...] would lead to difficulties." Such difficulties are present when there is a risk that the monetary measures will result in "a
disruption of the intervention system laid down by Community rules and abnormal movements of prices" (fourth recital of the Preamble to Regulation 974/71) or "disturbances in trade in agricultural products" (Article 1(3) of that regulation). As the Court ruled in Malt (26) the possibility of disturbances in intra-Community trade [in agricultural products in casu] is for the Commission to determine and in so doing it enjoys a wide discretion as a complex economic situation is involved. The Commission is not obliged to decide case by case or separately for each product and exporting country whether there is a risk of disturbance but may make a general assessment. The Court concluded that the Commission:

"Without being entitled to ignore the risk of deflections of trade, it must nevertheless ensure that the application of monetary compensatory amounts is limited to what is strictly necessary to neutralize the effects of currency fluctuations ... The Court's review is limited to examining whether the Commission's evaluation is vitiated by manifest error or by misuse of powers or whether the Court has exceeded the bounds of its discretion."

Thus the purpose of the system of monetary compensation is in fact to protect the unity and functioning of the agricultural markets against exchange rate fluctuations. The "partitioning off" of the market by monetary compensatory amounts is the lesser evil which compared with the danger of collapse of the Community intervention system due to monetary events and the resultant much greater threat to the unity of the market. This argument is clearly based on the principle of proportionality, according to which monetary compensatory
amounts are admissible only insofar as they are absolutely essential to compensate the incidence of monetary measures and to avert the disturbances to which these measures give rise. It corresponds by and large to the grounds set out in the original Regulation 974/71.

III). Basic Rights.

The Court has been invited to apply to principle of proportionality to cases where Community acts, in the field of common agricultural policy, have been alleged to violate basic rights such as the freedom of economic activity and the right to property. This holds true especially in the area of measures relating to Community policies on surplus production. These concern the exercise of discretion by Community Institutions, first, in the choice of policy instruments and, secondly, in the implementation of legal measures. These issues have been raised in challenges by private parties to the Community's attempts to control overproduction.

In Eridania (27) the Court was called upon to decide on the legality of the system of production quotas for sugar. Under the common organization for sugar each Member is allocated an 'A' quota and a 'B' quota to which a minimum price applies. No minimum price is set for sugar ('C' quota) above the basic quota. Quotas may be transferred between beet factories or between isoglucose factories but not between beet and isoglucose factories. The legality of this scheme was called into question on the ground, inter alia, that it
violated the freedom of economic activity guaranteed by both Community and national law. In Hauer, (28) the question arose whether the prohibition imposed by Article 2(1) of Regulation 1162/76 (29) on the planting of new vines for a period of three years constituted an unjustified restriction of the freedom of economic activity, and at the same time, a violation of the right to property.

Even though a violation of the principle of proportionality was not invoked directly in these two cases, the basic question on which the debate was centred, was whether the limitations imposed by the challenged measures were disproportionate in relation to the ends pursued by the relevant common organizations of the market, and whether the competent Community Institutions had at their disposal other less restrictive means, which would allow them to attain the desired ends. The Court ruled, in both cases, that there was no violation of the basic rights invoked by the applicants. It is quite remarkable that the Court examined whether a violation of the principle of proportionality had occurred in the course of the examination of a complaint against Community legislation based on subjective rights, and did not do so where the applicants invoked legitimate interests covered by national constitutional law.

In Eridania the Court had been able to overcome this problem quite easily by stating that the quota system specified the quantities of sugar in respect of which the undertakings
enjoyed the guarantees as to price and marketing provided for producers in the context of the relevant common organization of the market. They did not restrict the economic activity of the undertakings concerned but simply fixed the quantities of production which might be marketed in accordance with the special arrangements established by the common organization of the market in sugar to protect and assist the production of sugar in the Community. The Court added that the exercise by Italy of its power under the relevant provisions to alter the basic quotas was to be exercised only to the extent necessary for the implementation of the restructuring plans for sugar industry in this country. Moreover, this power was limited, first, by the objectives and principles of the common agricultural policy as stated in Article 39 EEC, secondly, by the objectives of the common agricultural policy, in particular the aim of protecting the interests of beet and cane producers, and thirdly, by the general principles of Community law, in particular the principle of proportionality.

In Hauer, (30) however, the problem of a possible conflict between the Council Regulation, on the one hand, and fundamental rights on the other, really existed, since the Regulation in question prohibited certain type of activity altogether (planting of new vines) thus affecting the right of the owners of agricultural land to make full use of their property (and capital). The Court approached this problem by recognizing the right to property as being protect by the
general principles of Community law, but pointed out that this right was not absolute. It, however, stated that:

"Even if it is not possible to dispute in principle the Community's ability to restrict the exercise of the right to property in the context of the common organizations of the market and for purposes of a structural policy, it is still necessary to examine whether the restrictions introduced by the provisions in dispute in fact correspond to the objectives of the general interest pursued by the Community or whether, with regard to the aim pursued, they constitute a disproportionate and intolerable interference with the rights of the owner, impinging upon the very substance of the right to property."

A parallel can be drawn with the Court's earlier decision in Nold. (31) There the Court stated, inter alia, that if the rights of ownership are protected by the constitutional laws of all the Member States and if similar guarantees are given in respect of their right freely to choose their trade or profession, the rights thereby granted, far from constituting unfettered prerogatives must be viewed in the light of the social function of the property and activities protected thereunder. For this reason rights of this nature are protected by law subject always to restrictions laid down in accordance with the public interest. Thus the Court reasoned that within the Community legal order it likewise seemed legitimate that these rights should, if necessary, be subject to certain limits justified by the overall objectives of the Community, on the condition that the substance of these rights was left untouched.

In Hauer, the Court placed special emphasis on the fact that, despite its wide scope, the ban was temporary in nature
and designed to deal immediately with overproduction, while at the same time forming part of a more general structural reform. It held that the ban did not entail any undue limitation upon the exercise of the right to property. Accordingly, the Court interpreted the measure as applying to applications for authorizations of new planting of vines submitted before the entry into force of the contested Regulation. In addition, the prohibition was in the Court's view unaffected by the question of the suitability or otherwise of the land for wine growing, as determined by provisions of national law. This judgement is of particular interest because the Court not only referred to particular provisions in the constitutions of three Member States (F.R. Germany, Italy and Ireland) in order to establish that the right to property was subject to restrictions, but also analysed in some detail the relevant provisions of the European Convention on Human Rights.

The application of the principle of proportionality to measure the validity of Community acts which violate basic rights guaranteed by national constitutional laws presents two problems. First, the Court does not feel competent to define the scope of the judicial protection of these rights in national legal orders. Furthermore, the application of the principle of proportionality should not lead to results, as far as the legality of the Community rule is concerned, which will vary according to the particularities of each national constitutional order. Thus the Court has, in order to avoid
such a risk, to 'harmonize' in some ways concepts of national constitutional laws. Before examining whether a Community rule affects in a disproportionate way a basic right of an individual guaranteed by national constitutional laws, the Court should start from a uniform and homogeneous notion of the scope and the contents of this right. This is a sine qua non condition which the Court cannot meet without raising delicate and complex legal and political questions.

On the other hand, the Court cannot overlook the fact that the disproportionate character of the effects that a Community measure may have on a basic right, can only be judged by contrasting directly the Community rule with the national constitutional rule. In other words, the Court is aware that the problem of the violation by a Community act of basic rights guaranteed by national constitutional laws conceals, in fact, a conflict of a very wide scope: that is, a conflict between Community law and the legal order of the Member States itself. The Court is also aware that such a conflict cannot be resolved on the basis of the 'proportionality' or the 'reasonableness' of the Community act, but should primarily be considered in the light of the balance of power between the scope of Community rule, taking into account its objectives and its particularities (character), and the extent of sovereignty that Member States still maintain in the sector in question vis-a-vis the Community order. This is why the invocation by the applicants of the principle of proportionality to challenge the
validity of a Community measure, on the ground that this measure violates their constitutionally guaranteed basic rights, does not prove to be, in practice, helpful and effective. This holds true especially in the agricultural sector where Community Institutions enjoy broad powers at the expense of national sovereignty.

IV). The System of Deposits and Licences.

i). Introduction.

In the framework of the common organizations of the market, in the agricultural sector, traders must at various occasions lodge deposits as a guarantee of discharge of their obligations under Community law. Deposit, therefore, can be defined as a legal measure according to which a trader as a condition for carrying out certain transactions in agricultural products, is obliged to lodge a sum of money (or to provide for an equal security) in order to guarantee the proper fulfilment of the provisions to which those transactions are subjected. However, this amount is declared wholly or partially forfeit if these provisions are not complied with. (32) The use of deposits to ensure that the obligation is performed is widely used in many common organizations of the market, and the method has been adopted for a variety of transactions. (33) The instances where the lodging of a deposit is required can be classified in two broad categories:

(a) Where deposits have to be lodged to obtain an import or export licence for agricultural products;
(b) Where deposits are employed to guarantee the fulfilment of conditions attached to transactions which involve an expenditure on the part of the Community such as the grant of aid for private storage schemes, (34) the selling from intervention stocks at reduced prices and the grant of special disposal aids, (35) and levy suspended imports in order to satisfy certain specific needs on the market, subject to processing and time conditions, and advance payment of export refunds. (36)

The deposit is released after the prescribed proof has been furnished that the conditions concerned have been fulfilled. If not, the deposit is declared forfeit. Sometimes partial forfeiture is imposed if the conditions have been partially implemented as is the case with private storage aid schemes. Generally, forfeiture of the deposit can be avoided if proof of force majeure is established by the trader, as being the cause for the non-fulfilment of his obligations. The primary purpose of the deposits system therefore is to ensure the proper execution of an operation within the framework of common organizations of the market. As the Court already recognized in Schwarzwaldmilch (37) the threat of financial loss is the key element for the effectiveness of this technique. Everytime this technique is applied, the trader is confronted with the potential punitive effect of the measure. As far as the administration is concerned, however, forfeiture serves different purposes. In the case of subsidies granted in
the form of aids or selling at reduced prices forfeiture is a method for the administration to safeguard at the same time amounts which otherwise would have been unduly paid. Where import or export licences are concerned forfeiture results in a pure financial advantage to be compared with a fine. It should, however, be stressed that for the administration compliance with the provisions remains the primary objective.

It is in the area of deposits that much of the case law on the principle of proportionality has arisen, the validity of the licence and deposit system being upheld in Internationale Handelsgesellschaft, (38) where the principle of proportionality was raised as a matter of German law, and the Court took account of it as a general principle of Community law. As it will be shown below the application of the principle of proportionality offers sufficient ground for an adequate protection of traders' rights. Proportionality has been invoked to challenge the legality of the deposit and licence system per se and the details of its application such as the amount of the deposit required and the character of the obligation to be implemented. The problem of double sanction has also been tackled by the Court within the framework of the principle of proportionality.

(ii). The Legality of the System.

The validity of the deposit and the licence system was dealt with by the Court in its landmark decision in the Internationale Handelsgesellschaft case. (39) In order to
export cornflour, the applicant in the main action had, under Community law to obtain a licence. The relevant Regulation provided for a performance deposit, payable on application and forfeit if the exports were not effected within the licence period. The only saving was for force majeure. The firm paid such a deposit, obtained a licence but managed only partial exports during the time allowed. They sued the German intervention agency for the return of all the deposit, whereupon the Frankfurt Verwaltungsgericht made a reference to the European Court. The Court had, inter alia, to examine whether the deposit system could be justified in terms of the principle of proportionality. Firstly, it observed that the deposit system was intended to guarantee that the imports and exports for which the certificates were issued, were translated into reality so as to ensure that both the Community Institutions and the Member States had an exact knowledge of the proposed transactions.

According to the applicants the burden of the deposit was excessive for trade, to the extent of violating basic rights because:

a) the Commission's services were not technically able to exploit the information supplied by the criticized system, the latter being therefore devoid of practical usefulness.

b) The undertaking to import or export within certain period of time arising out of the issue of certificates together with the deposit which was attached to them, was
thought to constitute an excessive intervention with the freedom of disposition in trade, whereas the objectives of the relevant Regulation could be realized by means of intervention which had less heavy consequences.

The response of the Court to these arguments was based on three basic premises:

a) the deposit system could not be equated with a penal sanction, since it was merely the guarantee of an undertaking voluntarily accepted by the trader who requested the issue of import or export certificate. The deposit simply played the role of a sanction, only as far as the obligations assumed by the beneficiaries of the system of Community aid were concerned.

b) The argument relied on by the applicant based on the fact that the Commission's services were not always able to use effectively the information supplied by means of the system of deposits, was not enough in itself to render disproportionate the financial burden resulting from the system in question.

c) Account should be taken not so much of the deposit itself, which was repayable but of the costs and charges involved in lodging it. In this case the deposit did not constitute an amount disproportionate to the total value of goods in question and other trading costs.

This decision calls for certain comments. First of all, it is not entirely correct to maintain that the deposit system, as far as the import/export certificates are concerned,
operates as a guarantee of an undertaking to import or export voluntarily accepted by the trader. This view seems to ignore the fact that the commercial operator does not always intend to commit himself to import or export, but simply contemplates to do so. Being exposed to the risk of losing the deposit if he abandons the envisaged operation, the trader is under, if not an obligation, a 'compulsion' (constraint) to import or export. Secondly, it is undeniable that, under the circumstances, the Commission was not able to make use of the information made available to it under the system of import-export licences, the respect of which it aimed to ensure by means of lodging a deposit. This seems to render the requirement for the lodge of a deposit devoid of any justification. Thus this requirement seems to be all the more disproportionate since the legitimate objective which would justify it could not in fact be attained. Finally, the fact that the deposit is repayable is not sufficient to exclude the disproportionate character of the financial burden that it entails. Such an evaluation should only be made in the case that the deposit is not released, because it is exactly in this case that the question arises whether the administration has, in relation to the needs of the system in force, imposed excessive burden on traders. In other words, it should not be overlooked that the lodge of a deposit, even in the case that it is finally released, is always translated to a financial charge for the trader and such a charge may, if it is set at a very high level, to affect the
ability of the trader to import or export.

The above decision shows that in reviewing the legality of the licence and deposit system, the Court has shown restraint as to the extent of its control, but at the same time willingness to examine whether the system in question was compatible with the principle of proportionality. Indeed, as Neri put it:

"La Cour s'est revelee certes consciente de ce que la regulation communautaire sur laquelle elle avait a se prononcer pouvait se situer au niveau d' un acte presque legislatif, mais en meme temps elle n' a pas entendu renoncer a controler plus a fond le validite de cette regulation par rapport au principe de proportionnalite. D' ou une certaine ambigue: d' une part, elle estime pouvoir se livrer a un examen detaille de tous les aspects de cette regulation; d' autre part, elle n' a pas cru pouvoir substituer son appreciation a celle discretionnaire de l' auteur de l' acte." (40)

(iii). The Amount of the Deposit.

With regard to the amount of the deposit the Court held, in Internationale Handelsgesellschaft, that account should be taken not so much of the deposit itself, which was repayable, but of the costs and charges involved in lodging it, finding that they did not, in casu, constitute an amount disproportionate to the total value of the goods in question and of the other trading costs. However, in its judgement given the same day in Einfuhr-Vorratsstelle, (41) the Court did consider the size of the deposit: the case involved advance fixing of an export refund, and the deposit required was several times greater than that required where the refund was not fixed in advance. Nevertheless the Court held it again to
"It cannot be denied that as a principle it is necessary to fix the amount of the deposit required in the case of 'advance fixing' of the refund at a higher level than in the case of a transaction giving rise to the application of the refund applicable on the day of exportation. As the system of advance fixing was created in the interests of trade, it was necessary to provide at the same time, in the scheme of the regulation, for adequate guarantees to eliminate the possibility that machinery of the common organization might be upset by speculation made possible by the introduction of this option.

To that end, the deposit was fixed in such a manner as to take into account price trends and consequently the variation in refunds during the period of validity of the export licence. The amount of the deposit must be sufficient to take away from the exporters any interest, as the prices on the external markets vary, in changing their export plans as they are apparent from the licences applied for and issued. It appears, therefore, that the requirement of higher deposit in cases of advance fixing of the refund is a method necessary to guarantee compliance on the part of the exporters with the obligation attached to the issue of the licence and thereby to ensure the accuracy of the forecasts of future market trends.

Taking into account the size of price fluctuations which can occur on the markets in question, this amount in no way appears excessive. Furthermore, determination of the amount of the deposit falls within the discretion of the authority having the power to adopt regulations in the matter."

In Societe pour l'exportation des sucres, (42) the applicant failed to fulfil, what the Court considered to be a principal obligation, that is, to supply a United Nations agency 755 tonnes of standard quality sugar intended for food aid. As a result the deposit lodged by the firm was declared forfeit in its entirety. The applicant claimed, inter alia, that the loss of his security was incompatible with the principle of proportionality. The Court stated that the means employed to achieve the objective pursued (i.e to deliver sugar
of standard quality) was a standard one in transactions under the common organization of agricultural markets: forfeiture of the security. The forfeiture which represented 37750 ECU, that is 7% of the contract, on a transaction involving 755 tonnes of sugar, was not unjustified since a principal obligation guaranteed by the security had not been fulfilled and the penalty did not go beyond what was necessary for the desired dissuasive effect.

From the decisions above, it can be inferred that it is a normal requirement for the proper functioning of the market organizations that traders may be charged with burdens. Nevertheless, the Court has laid the requirement that these costs must in proportion to the total value of the goods involved and of other trading costs. This does not imply that the financial position of the individual trader concerned is relevant but that the amount of the deposit has to be proportional to the obligation implemented. (43) It is clear therefore that the trader should not be impaired in his commercial activity by excessive costs, but that also forfeiture of high amounts, may have a disproportionate effect, which would amount to the imposition of a pecuniary penalty. Applied to the amount of the deposit, the principle of proportionality means that in the case of import or export licences the level has to be such that any temptation to modify commercial planning after the issuing of a licence is avoided. (44) When expenditure on the part of the Community is
involved, the deposit has to be such that any financial advantage through non-fulfilment is excluded. (45) Usually this implies that the deposit has to be equal to the amount of the subsidies or other financial benefits involved, perhaps with a small addition.

(iv). The Character of the Obligation to be Implemented.

Another consequence of the application of the principle of proportionality to the deposit system is that the administration does not enjoy an unfettered freedom to declare a deposit forfeit irrespective of the nature of the obligation to be implemented. The Court, in Maas, (46) distinguished between principal obligations whose observance is of fundamental importance to the proper functioning of a Community system and whose infringement may be punished by total forfeiture of the security lodged for its implementation, without there being any breach of the principle of proportionality; and secondary (incidental) obligations [usually a formality] whose infringement should not be punished with the same rigour as is applied to the failure to fulfil a principal obligation. A legislative version of the distinction the Court has made in its case law on proportionality between primary and secondary obligations is found in Article 20 of Regulation 2220/85, (47) which distinguishes between primary, secondary and subordinate requirements which a security is intended to guarantee, in so far as the relevant specific Regulation has defined the primary requirement. In this
context, secondary requirements are timelimits, and subordinate requirements are any other requirements. Under this scheme, if a primary requirement is not fulfilled the security is forfeited in full, if a secondary requirement is breached, but the primary requirement is fulfilled, 15 per cent of the sum secured is forfeited plus a further percentage for each day by which the time-limit is not met, and if just a subordinate requirement is breached, just 15 per cent of the sum secured is forfeited.

Accordingly if an obligation of a secondary nature is not complied with, the penalty of forfeiture cannot be the same as in the case of non compliance with the main obligation. This protective element was introduced in Buitoni. (48) Regulation 193/75 (49) lays down detailed rules for the application of the system of import and export licences and advance fixing certificates for agricultural products. Pursuant to this Regulation the issue of an import or export licence is conditional upon the giving of a security calculated to guarantee that the obligation to import or export will be fulfilled during the period of validity of the licence. The release of the security is subject to the production of proof of completion of the customs imports or exports formalities which proof shall be furnished in accordance to the relevant rules. Article 3 of Regulation 499/76 (50) added to those provisions a paragraph pursuant to which where proof has not been furnished within six months following the expiry of the
licensure, the security shall be forfeit save in the case of force majeure. According to the preamble to this Regulation the provision was introduced for 'administrative reasons.'

The Court ruled that Regulation 193/75 was invalid on this point; it drew on two arguments: firstly, the deposit system was intended to guarantee that the obligation to import or export, which has voluntarily been undertaken, were to be fulfilled during the period of validity of the licence issued for that purpose. Secondly, it is only as far as this guarantee is concerned, that the forfeiture of the security in case of failure to fulfil the obligation concerned constituted a penalty proportionate to the degree of that failure. Thus the Court concluded:

"That fixed penalty, which is applied to an infringement which is considerably less serious than that of failure to fulfil the obligation which the security itself is intended to guarantee, which is sanctioned by an essentially proportionate penalty, must therefore be held to be excessively severe in relation to the objectives of administrative efficiency in the context of the system of import and export licences. Although, in view of the inconvenience caused by the belated production of proofs, the Commission was entitled to introduce the period laid down in Article 3 of Regulation 499/76 for the furnishing of proof, it should have sanctioned the failure to comply with that period only with a penalty less onerous than that prescribing the loss of the whole of the security and more closely allied to the practical effects of such an omission."

In E.D. and F. Man, (51) the validity of the rules relating to the lodge of deposits for exporting sugar had to be considered. As a part of the complicated mechanism laid down by the relevant Regulation, the applicant was under the
obligation to apply for an export licence by noon on the August 2nd, 1983. Because of an unfortunate combination of circumstances, the telexes were not sent in time, but only at about a quarter to four that afternoon. The fact that the employee normally responsible was absent and his stand-in had a great deal of work on a very hot day did not constitute force majeure, which was the only factor which would prevent the security of £1,670,000, which the applicant had lodged with its tenders for the export of sugar, from being forfeited. The applicant, Man Sugar, sought judicial review of the decision declaring this amount forfeit, on the ground, inter alia, that it breached the principle of proportionality. A reference under Article 177 EEC was made to the Court. The Court stated:

"Where Community legislation makes a distinction between a primary obligation, compliance with which is necessary in order to attain the objective sought, and a secondary obligation, essentially of an administrative nature, it cannot without breaching the principle of proportionality penalize failure to comply with the secondary obligation as severely as failure to comply with the primary obligation."

It then examined the functioning of the system of sugar exports, and concluded that while the obligation to obtain an export licence performed a useful administrative function, the essential obligation was that of actually exporting the sugar. Failure to apply for the export licence in time was an infringement significantly less serious than the failure to export, so that automatic forfeiture of the entire security in these circumstances was too drastic a penalty in relation to
the administrative function of the export licence. The penalty should equally have been significantly less severe and more consonant with the practical effects of failure to comply with a time-limit. The Court therefore declared the provision describing forfeiture of the entire security invalid.

In Atalanta, (52) the court followed the same line with respect to the second group of deposits, that is, those employed to guarantee the fulfilment of conditions attached to transactions which involve an expenditure for the Community. To remedy the situation resulting from the substantial fall in the price of pigmeat in the Community, the Council issued a Regulation granting private storage aid in respect of this product. One of the conditions for the grant of this aid was that the beneficiary should forward to the competent intervention agency without delay the documents relating to the various storage operations. This condition was intended to ensure that the recipient of the aid would abstain from putting into the already saturated market, the pigmeat in respect of which the private storage aid was granted. In order to guarantee the fulfilment of the obligations assumed by the recipients of this grant, this Regulation further provided that only applicants who have given security for the fulfilment of their contractual obligations would be eligible for this scheme. In this connexion Article 5(2) of Commission Regulation 1889/76 (53) contained the following provision: "The security shall be wholly forfeit if the obligations imposed by
the contract are not fulfilled." The Court had in this case to pronounce itself upon two points involving the application of the principle of proportionality. Firstly, whether the storer had a right to payment of the amount of aid once it had been ascertained that the contractual obligations had been fulfilled and the proof of storage had been sent to the intervention agency, although this was not done without delay. Secondly, whether the security should be forfeit in its if the failure to fulfil the relevant principal or subsidiary obligations was only partial. On the first count, the Court ruled that the belated transmission to the competent intervention agency of the documents relating to the various storage operations did not prevent the acquisition of the right to aid, provided that the obligations set out in the relevant provisions had been fulfilled in their entirety (thus guaranteeing the effective retreat from the market of the quantities of pigmeat concerned). On the second point, the Court stated that the absolute nature of Article 5(2) of Regulation 1889/76 was contrary to the principle of proportionality in that it did not permit the penalty for which it provided to be made commensurate with the degree of failure to implement the contractual obligations or the seriousness of the breach of those obligations.

In Roquette, (54) a shortfall of 0.09% on the minimum amount of maize starch required to be processed under the provisions concerning production refunds for this product, led
to the forfeiture of 9.09% of the security. The applicant in the main action maintained, inter alia, that this violated the principle of proportionality. The Court distinguished between, first, that part of the deposit which corresponded to the tolerance of 4% (which the applicant exceeded by 0.09%) and secondly, that part which corresponded to the additional 5% on top of the amount of the refund granted (Pursuant to Article 3(2) of Regulation 1570/78, the security had to be equal to 105% of the amount of the production refund). As regards the part of the refund which corresponded to the tolerance, the Court held, that the provision that that part of the refund would be lost and an equivalent part of the security not released was in fact intended to give binding effect to the maximum tolerance and could not therefore be considered contrary to the principle of proportionality. As regards the loss of that part of the security corresponding to the additional 5%, the Court said, that the recovery of the benefit in its entirety was justified only if the entire refund paid must be repaid and the loss of the corresponding part of the security could be justified only to the extent to which the refund had to be reimbursed. Even though the possibility that an additional percentage might be lost, constituted a measure intended to encourage undertakings to carry out the processing operations indicated in their applications, such an objective could not justify the loss of the entire additional percentage where the undertaking had carried out the processing indicated
in its request and the difference between the quantity processed and that anticipated was only minimal. The Court therefore held that the loss of that part of the security corresponding to the additional 5% was not necessary for the achievement of the abovementioned objective and was therefore contrary to the principle of proportionality to the extent which that loss was not calculated in proportion to the refund to be repaid. It is clear that as far as the two main types of deposits are concerned, the requirement of proportional forfeiture in relation to the character of the obligation to be implemented, may be said to have general significance.

The Court has shown extreme severity in the majority of its judgements when a question of infringement of a principal obligation arose. Merkur (55) concerned a levy-free import of frozen meat from third countries, subject to the condition of processing within three months following the month of importation. In order to apply for this facility the importer had to lodge a deposit which was equal to the levy which normally would have applied. When the period was exceeded by 12 days, the importer saw his whole deposit declared forfeit. In the course of the proceedings two preliminary questions arose. Could forfeiture be linked to the non-fulfilment of a time limit, and if so, could also complete forfeiture take place, if there was only a slight delay? Both questions were answered in the affirmative by the Court by pointing to the objective of this import facility. Given the unstable nature
of the market in question, the suspension of the levy was
operated on a quarterly basis according to the changing import
needs. To prevent the building up of stocks of cheap imported
meat which in a period of surplus could jeopardize internal
supplies, processing within a certain time limit was added as a
condition to benefit from this import facility. According to
the Court, non compliance with the time limit in question had
the same effect as non compliance with the principal obligation
itself, as its purpose was to prevent the keeping of stocks
more than a quarter. In view of these considerations the Court
concluded that: "Failure to carry out the processing within the
period laid down, thus directly jeopardizes the objective
pursued by the system and the penalty attached to it, by no
means disproportionate." In Fromançais, (56) a case involving
the sale of butter from intervention stocks at reduced prices
for the manufacture of pastry and ice cream, the Court also
accepted forfeiture of the whole deposit when the time limit
for the processing was not complied with.

The judgement in Ru-mi (57) concerned with the validity
of a Regulation on the granting by tender of special for
skimmed-milk powder intended as feed for animals other than
young calves. The Regulation laid down several rules for
denaturing a product, only one of which had not been properly
complied with. Since the national court found that the
denaturing process departed only very slightly from the
generally recognized standard it queried whether the Regulation
in question infringed the principle of proportionality inasmuch as it enabled the same sanction to be applied both where no denaturing at all had taken place and where denaturing had been carried out but not wholly in the prescribed manner. The Court held that:

"...the Commission was legally justified in adopting provisions which entail withholding of the aid and loss of the security for failure to fulfil the principal obligation laid down in the tendering procedure and was not obliged to vary the severity of the measure in question according to the gravity of the tenderer's failure to comply with that obligation. Such a measure cannot be regarded as out of proportion to the objective pursued."

It should be noted that in this case the product had been used for its intended purpose and the good faith of the trader was not in issue. Similarly technical definitions may be strictly interpreted, so that to require grapes to be turned into must and must into wine in the immediate vicinity of the region concerned, in order for the wine to qualify as a quality wine produced in a specific region (VQPRD), was held to be necessary, in order to achieve the objectives of the legislation and therefore not to breach the principle of proportionality. (58)

The Court adopted similar stance in Nordbutter, (59) in the context of legislation granting a subsidy on skimmed milk used for feeding animals other than calves. This required a quarterly declaration of the number of calves on the holding, and under Commission Regulation 188/83, (60) the subsidy was reduced by 10% if the declaration was up to ten days late, and
was lost totally thereafter. The Court ruled that since this expressly allowed for minor infringements of the deadline it did not breach the principle of proportionality. On the other hand, Council Regulation 1300/84 (61) introduced a legislative application of the principle of proportionality in the area of premiums for the non-marketing of milk and the conversion of dairy herds, so that a reduced premium could be paid where there were minor infringement of the rules, rather than the premium being entirely lost. The Nordbutter decision may be contrasted with the Court's decision in Maas, (62) where a deposit paid under the food-aid legislation had been forfeited because the exporter loaded the goods into ships a few days late and because the ships used than the fifteen years specified in the legislation. The Court held that the obligation to load the goods within a fixed time limit was a primary obligation, but that in the context of sea transport a delay of few days did not necessarily breach that obligation, and, since the goods, in fact, arrived at their destination on time the, the loss of the deposit could not be justified. With regard to the use of ships of less than fifteen years old for insurance purposes, and that even if the ships used did not fall within the requirement as so interpreted, it was disproportionate to require the whole of the deposit to be forfeited.

Applying the principle of proportionality the Court has prevented the system of deposits and licences from being used
in a manner for which it was not meant. An important safeguard for the protection commercial operators under the system of deposits is the requirement that forfeiture must be proportional to the extent and the nature of the failure to comply with the obligations concerned. (63) This consideration implies that, where possible, the legislator has to provide for a forfeiture proportional to the extent of the non-fulfilment if this can be assessed in quantitative terms. This practice is already applied with respect to private storage aid and import and export licences. The requirement of proportionality between forfeiture and non-compliance does not give the commercial operator a right to claim partial forfeiture if the obligations in question have not fully been complied with. It remains the power of the competent authorities to declare a deposit wholly forfeit even in case of a slight deviation from the rules.

In particular in such cases forfeiture may constitute a heavy burden on the commercial operator. It is clear from the decisions analysed above (64) that if the objective to be achieved is one of the general aims of or requirements for the proper functioning of the mechanisms of the common agricultural policy, the principle of proportionality is not breached if the same consequences are laid down for non-completion of the operation which the beneficiary has undertaken as for its completion in a manner not complying with the prescribed conditions. In so far as the case law has already established
a distinction in this regard between breach of a principal obligation and breach of a secondary obligation, it is clear that the condition of processing the basic product to which the grant of the production refund is subject is a principal obligation and that forfeiture of the security if that obligation is not met is perfectly legitimate. In the case of non-fulfilment of a principal obligation may the mitigating influence of the principle of proportionality is excluded. This was explicitly stated by the Court in its ruling in Rumi:

"Although in certain cases the Court has declared void provisions which imposed the same penalty both for failure to fulfil the obligation which the security was intended to guarantee and for a far less serious breach such as failure to adduce proof of performance of the principal obligations within the period prescribed, the decisions concerned are not relevant in this case." (65)

A possible explanation for this approach is that the Court considers the actual attainment of the desired end (e.g., satisfaction of import needs, additional outlet on the market) to be realized if the conditions imposed (such as time-limits, processing requirements etc) have been properly implemented. Where the Commission can prove that strict conditions are necessary in order to prevent any risk of non-authorized use or abuse of the facility in question, (66) the conditions become constitutive elements guaranteeing the fulfilment of the principal obligation. Although, this interpretation is favourable for the administration, as it subjects the decision to release a security to a simple test if the various conditions have been implemented or not, it may be wondered
whether efficiency considerations are carried too far at the expense of effective protection for the trader. Indeed, in this approach the fact that in spite of minor or less serious infringements the objective is nevertheless attained becomes irrelevant. This is illustrated by referring to the facts of two of the cases examined above: Merkur and Ru-mi. The decisive element for the Court seems to be the potential risk that fulfilment could not have taken place at all. Thus where there was a risk that the objective of a measure would be thwarted or where it was important for the proper functioning of the system, a strict interpretation was held to be justified and the possibility of graduating the amount of security forfeited according to the seriousness of the non-performance of the obligation was rejected. The Court, perhaps recognizing that the above interpretation compromised the effective protection of the commercial operator, in its decision in Maas, (67) developed further the doctrine so that a security cannot be forfeit if there is a trivial infringement of a principal obligation; the same applies if the obligation which is not complied with is not of fundamental importance, in other words if there is no grave breach. (68)

The basic problem of the law of licences and deposits is to strike the proper balance between considerations of efficiency with respect to the attainment of the legitimate objectives of the common agricultural policy and the protection of the commercial operator from a far reaching liability for
non-compliance under the system in question. The application of the principle of proportionality to this problem has two obvious advantages. First, it fully recognizes the punitive effect of forfeiture and thus safeguards the efficiency of this technique. Secondly, it provides, up to a certain extent, for sufficient protection of the commercial operator and prevents the law of deposits from becoming a disguised kind of arbitrary penal law.


According to Neri:

"Si le principe de proportionnalité trouve et a trouvé ses meilleures possibilités d'application dans le domaine agricole du droit communautaire, c'est parce que dans un tel domaine la <<legislation>> communautaire est nécessairement portée à réglementer en profondeur l'activité de production et de commerce et est amenée, plus qu'ailleurs, à envahir la sphère d'action des particuliers. Le droit agricole communautaire constitue une <<zone ideale>> d'application du principe de proportionnalité." (69)

Indeed, the case law of the Court in the field of common agricultural policy has made an important contribution to the development of legal principles relating to an interventionist policy. Druesne (70) has grouped the most important issues into the following categories: Objectives, viz. the extent to which the legislator is bound and the definition of the interrelationship between the individual objectives; the division of powers between the Community and
the Member States, including the supervision of the bounds of the Commission's implementing powers; the principle of proportionality; the principle of legal certainty, viz. the principle of non-retroactivity and the principle of legitimate expectations on the part subject to Community law; the principle of the unity of the market; and, finally, the principle of Community preference.

The case-law of the Court in the agricultural sector illustrates two features of the common agricultural policy. First, much of the law relating to agriculture is concerned with granting legal rights to producers in return for their fulfilling specified conditions. Secondly, agricultural legislation must be interpreted having regard not only to the text and system but also to the sense, objectives and basic principles of the common organization of the market concerned, (71) while in its application, national courts may be confronted with arguments involving an appreciation of economic factors, such as the 'rational use' of an entrepreneur's capacity. (72) Thus the common agricultural policy affords an insight into the legal problems for the legislator, the executive bodies and the courts which arise in the working-out and subjection to judicial review of a far-reaching steering policy. The case law on steering policy, according to the judgement in Roquette Frères (73) leaves the Council and the Commission (but not, though, national authorities implementing the common agricultural policy) a wide margin of discretion,
both in ascertaining the relevant facts and in relation to the choice of instruments and objectives of steering policy. As the Court pointed out in its decision in Biovilac:

"... the legality of a measure can be adversely affected only if the measure is manifestly unsuitable for achieving the aim pursued by the competent Community Institution." (74)

As has been mentioned already, examination takes place against written legal provisions and general principles of law, proportionality being the most eminent in this field.

The tendency of the Court to recognize to the principle of proportionality a decisive part in reviewing the implementation of the law of the common agricultural policy is characterized by a 'graduation': it becomes stronger as the Community public interest ceases to be pre-eminent. The stronger the normative character of the act the less the Court is disposed to call into question the existence of a reasonable (proportionate) relationship between the act in question and its legitimate objective. In other words, the more the private interests affected by the Community act become more individual, that is, peculiar to a determined person or a closed category of commercial operators, the less the Court will be inclined to take these interests into account, in order to question the proportionality of the Community act before it.

The Court is more inclined to apply the principle of proportionality when the case before it raises no doubts about the validity of a Community act but calls for its interpretation. In this case, even in the presence of
Community acts which involve the exercise of wide discretionary powers, the Court usually exercises its control on the motifs and the ends of the act in question. The principle of proportionality is more readily applied when the measures or practices called into question are not Community but national ones. It should be mentioned at this point that, in general, national authorities have adopted a strict (literal) interpretation of Community rules. It is thus hardly surprising that legal disputes arise. This can also explain the frequency with which the Court has in certain matters (deposits, certificates of origin etc) declared disproportionate the challenged measure. The attitude followed by the national authorities entrusted with the administration of the mechanisms of the common agricultural policy, that is of strict adherence to the Community text, is largely due to the need, for the national agencies, to avoid the heavy financial consequences which may ensue from the supple application of these schemes. The danger is always present that the Commission, in case of irregularities, may disallow items of expenditure on the ground that they are ultra vires. (See Regulation 729/70, OJ 1970, L 94/13, Articles 2(1) and 3(1)) In the case of disallowance of an item of expenditure (e.g, import refunds, private storage aids, sale of intervention products at reduced prices etc) the financial consequences fall on the shoulders of the national agencies concerned.

Furthermore, the literal interpretation of Community
rules has the advantage of assuring their uniform application throughout the Community; whereas supple application of these provisions founded on the view of the principle of proportionality held by each national agency will, given the subjective character of the evaluations involved, inevitably jeopardize the uniform application of Community provisions in the various Member States. Nevertheless:

"Les matières dans lesquelles ce principe trouve application étant communautaires, il est tout à fait normal que le principe soit géré uniquement par l'instance communautaire et non pas par chaque Etat membre selon ses propres conceptions et traditions: c'est là le seul moyen d'assurer une application uniforme du droit communautaire." (75)
Endnotes.

1). This is obvious from the Court's judgement in case 13/86, UK v Council, [1988] ECR nyr. See also Kapteyn and Verloren Van Themaat, pp. 673-700.

2). For a summary of the problems in the agricultural sector in general see Wyatt and Dashwood, pp 291-300.

3). Case 34/70, [1970] ECR 1233 at 1239 per curiam.

4). See also e.g, cases 63-69/72, Werhan, [1973] ECR 1299, 55/74, Unkel, [1975] ECR 9, 6/77, Schouten, [1977] ECR 1291 etc.

5). The same goes for the case-law on Article 85(3) EEC as well.


7). See e.g, case 122/78, Buitoni, [1979] ECR 677 and 240/78, Atalanta, [1979] ECR 2137 etc.


9). J0 No L 291/3 SEdn 1972, 28-30 Dec, p. 3.

10). Druesne, (1979) RMC 84 at 85.

11). Case 179/84, Bozzetti, [1986]2 CMLR 246 at 266.


15). Case 5/73, supra no 13, op.cit


17). Ibid.


19). Supra no 14. See also case 10/73, Rewe, [1973] ECR 1175


23). Ibid.

24). supra no 22.

25). Ibid.


30). Supra no 28.


33). Common rules detailed for the application of the system of deposits for agricultural products were consolidated in Commission Regulation 2220/85, [OJ 1985, L 205/5].


39). Supra no 38.
43). Supra no 32, p. 244.
44). Supra no 41.
45). See per AG Mischo in case 56/86, supra no 42, at 1440-1
61). OJ 1300/84, L 125/3.
62). Supra no 46.
63). Case 240/78, supra no 52, consideration 45 per curiam.
64). Cases 147/81 (supra no 55), 272/81 (supra no 57), 66/82 (supra no 56), 116/82 (supra no 58), 9/85 (supra no 59) etc.

65). Case 272/81, supra no 57, consideration 14 per curiam.

66). Case 66/82, supra no 56, consideration 14 per curiam.

67). Case 9/85, supra no 59.

68). See case 47/86, supra no 54, per AG Lenz.

69). Neri, p. 678


75). Supra no 69.
CHAPTER VI: THE DEVELOPMENT OF THE PRINCIPLE OF PROPORTIONALITY
IN RELATION TO THE FREE MOVEMENT OF GOODS.

I). --THE IMPORTANCE OF THE FREE MOVEMENT OF GOODS.

Free movement of goods is the essential foundation stone of the Community because it forms the first important step towards achieving an optional division of labour within the Community. In fact, in such a situation, except for differences in transport rates and for possible distortion of competition, the producer with the lowest cost of production gets in all Member States the same potential outlets as local producers with a higher cost of production. This has led to a considerable increase in international competition in particular, in countries (France and Italy) or sectors (e.g., motor vehicles) with traditionally higher protective tariffs. Thus free movement of goods tends to stimulate enlargement of the scale and growth of production of the most efficient enterprises, concentration and specialization, and at the same time selection of most economic location for new production plants or trade centres. Thus the customs union has already made an inherent contribution to the development of the inter-state movement of persons, services and capital. At the same time it has rendered the economies of the Member States mutually interdependent, thereby laying a good basis for an economic and monetary union. The principle of the free movement of goods is, therefore, not merely at the heart of the Community system; it is also crucial to the development of a
new chapter in European regional integration. The aim of free
movement provisions in the Treaty is to create within the
Member States of the Community a single market, free of all
internal restrictions on trade, and presenting a common
commercial front to the outside world.

Although the free movement of goods provisions are
addressed to Member States all the main Treaty articles have
been found to be directly applicable and thus may be invoked by
individuals, whether in dispute with the State or another
individual. (1) Because of the fundamental importance of the
principle of the free movement of goods the Treaty in this area
has been strictly enforced, and exceptions, where provided,
have been given the narrowest scope. In interpreting the rules
the Court looks not to the name of a particular national
measure, nor the motive of introduction, but to its effect in
the light of the aims of the Treaty; that is, whether it
creates an obstacle to the free movement of goods. It should,
however, be stressed that due to the pressures of an economic
recession in certain sectors of the economy, the governments of
most Member States are often tempted to impede trade between
each other "by every conceivable device short of tariffs and
quotas." (2) Indeed, as it has been rightly observed, national
attempts to circumvent the principle of the free movement of
goods constitute one of the principal threats to the Community.
(3)

Various provisions in the Treaty permit exceptions to
this principle. (4) However, the ability of the Member States or private individuals to resist the exercise of the right of the free movement of goods is limited in order that the exceptions provided for by Community law are not abused. Thus the Court of Justice applies the criteria of necessity and proportionality to alleged justifications. As the Court explained in Commission v Belgium: (Re Pesticides)

"However [public health] measures are justified only if it is established that they are necessary in order to attain the objective of protection referred to in Article 36 and that such protection cannot be achieved by means which place less of a restriction on the free movement of goods within the Community." (5)

Although the Court has interpreted the exceptions to the principle of the free movement of goods which are envisaged in the Treaty strictly, it has recognized on equitable grounds, a rule of reason that the importation or sale of goods from other Member States may be resisted in pursuit of certain general interests. (6) In any event, it is important to note that where it is sought to oppose the free movement of goods, the burden of justification lies formally on the party seeking to deny the exercise of the right of free movement. (7)

The abolition of customs duties and charges of equivalent effect alone would not have been sufficient to guarantee the free movement of goods within the common market. In addition to pecuniary restrictions there are other barriers on trade of non-pecuniary nature, usually in the form of administrative rules and practices, protectionist or otherwise, equally
capable of hindering the free flow of goods from State to State. Articles 30-34 EEC are designed to eliminate these barriers. As it will be apparent, Articles 30-34 EEC cover a much wider range of measures than Articles 9 and 12-16 EEC, but unlike these latter articles provision is made for derogation under Article 36 EEC. These Articles are addressed to, and relate to measures taken by, Member States. However, "measures taken by Member States" have been interpreted in the widest sense to include the activities of any public body, legislative, executive or judicial, or even semi-public body, such as a quango, exercising powers derived from public law.

(8) Nor need the "measures" concerned be binding measures. This was expressly provided by the Commission in the preamble to its Directive 70/50, and confined by the Court in Commission v Ireland (Re 'Buy Irish' Campaign). (9) Although Articles 30-34 EEC are addressed to Member States, neither Community institutions nor individuals are free to act in breach of these provisions. However, Community institutions may derogate from them where they are expressly authorized to do so by other provisions of the Treaty, for example in implementing the common agricultural policy (Articles 39-46 EEC). (10)

The prohibition, as between Member States, of quantitative restrictions is twofold, embracing quantitative restrictions, and measures having equivalent effect to quantitative restrictions. The Court, in Riseria Luigi Geddo, said that any measures which amount to a total or partial restraints on
imports, exports or goods in transit constitute quantitative restrictions within the meaning of Article 30 EEC. (11) The concept of measures having equivalent effect to quantitative restrictions has no equivalent in other trade treaty. It has been interpreted very generously by both the Commission and the Court to include not merely overtly protective measures or measures applicable only to imports or exports ('distinctly applicable measures') but measures applicable to imports (or exports) and domestic goods alike ('indistinctly applicable measures'), often introduced (seemingly) for the most worthy purpose.

To offer Member States some guidance as to the meaning and scope of these measures the Commission issued Directive 70/50. Although passed under Article 33(7) EEC and therefore applicable only to measures to be abolished during the transitional period, it has been suggested that this Directive may still serve to provide non-binding guidelines to the interpretation of Article 30 EEC. (12) Article 2(3) of the Directive provides a non-exhaustive list of measures capable of having equivalent effect to a quantitative restriction. These are divided into:

(a) "measures, other than those applicable equally to domestic or imported products", that is, 'distinctly applicable measures', which "hinder imports which could otherwise take place, including measures which make importation more difficult or costly than the disposal of domestic production (Article
(b) measures "which are equally applicable to domestic and imported products", that is, 'indistinctly applicable' measures. These measures are only contrary to Article 30 EEC, "where the restrictive effect of such measures on the free movement of goods exceeds the effect intrinsic to trade rules" (Article 3). Thus, indistinctly applicable rules appear to be acceptable provided that they comply with the principle of proportionality.

The Court, in 1974, in the Dassonville case, (13) introduced its own definition of measures having equivalent effect to quantitative restrictions. This definition, now known as the 'Dassonville formula', has since been applied consistently, almost verbatim, by the Court. According to this formula:

"All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions."

Thus it is not necessary to show an actual effect on trade between Member States as long as the measures are capable of such effects. The measure in issue in Dassonville was a requirement, under Belgian law, that imported goods should carry a certificate of origin issued by the State in which the goods were manufactured. Dassonville imported a consignment of Scotch whisky from France. Since the sellers were unable to supply the required certificate, he attached a home-made
certificate of origin to the goods and appeared before a Belgian court on a forgery charge. In his defence, he claimed that the Belgian rule was contrary to EEC law. On a reference from the national court under Article 177 EEC, the Court, applying the aforementioned formula, found that the measure was capable of breaching Article 30 EEC. In applying the Dassonville formula in Tasca, (14) Van Tiggele, (15) and Commission v Italy (Re Fixing of Trading Margins), (16) the Court did not distinguish between distinctly and indistinctly applicable measures, and ignored the proportionality test laid down for the latter in Directive 70/50. The breadth of the formula thus bore harshly on Member States, particularly where the measure was indistinctly applicable and might be justified as in the public interest.

II). The Principle of Equivalence.

Whilst the basic principle in Dassonville (17) has a very wide scope, it sets out from a negative standpoint, a prohibition. In various cases, the Court has made an attempt to force the Member States to adopt an approach to the principle of the free movement of goods based on a more positive philosophy, that of the mutual acceptance of goods. (18) Indeed, the key to the Commission's policy (19) and the Court's case-law in the field of the free movement of goods (and more recently services) has been the principle of equivalence, whereby national measures are regarded as unlawful restrictions on the free movement of goods if they are merely
"equivalent" to those of another Member State or covered by mutual regulations, where the objectives and methods of achieving them are reasonably similar.

This approach has been particularly evident in cases in which the Member States have attempted to justify restrictions in the interests of the protection of public health under Article 36 EEC. In de Peijper, (20) which concerned the approval procedures for pharmaceuticals, the Court stressed that simple reciprocal co-operation between the authorities of the Member States could enable them to obtain the necessary details for checking many products. It suggested, accordingly, that a presumption of conformity with the description of the already approved medicinal preparation might be more appropriate than a presumption of non-conformity. With similar thoughts in mind the Court has applied this reasoning to duplicate health controls which may amount to disproportionate measures. In deciding Commission v France (Re Italian Table Wines) whether or not the frequency of French frontier tests of Italian wines complied with the principle of proportionality, one of the most important factors the Court took into account was, that similar checks on Italian wines were carried out by the Italian authorities. (21) Indeed, by virtue of the obligations arising out of the provisions of Article 5(1) EEC, the Member States are under a duty to co-operate with each other in order to assist the Community Institutions in removing barriers to trade between them.
Generally, the Court expressed the idea of equivalence in terms of a Member State being obliged to accept goods lawfully produced and/or marketed in another Member State. This idea was implied, though somewhat tentatively, in Cassis de Dijon. (22) Here, the Court remarked at the end of its judgement that the terms of Article 30 EEC covered "the fixing of a minimum alcohol content for alcoholic beverages intended for human consumption by the legislation of a Member State, where the importation of alcoholic beverages lawfully produced and marketed in another Member State is concerned." Although doubts have been expressed whether the principle of equivalence can be read into this statement, (23) it can be argued that there is at the very least a clear implication that goods lawfully produced and marketed in one Member State must have the right to move freely throughout the Community, subject, of course, to any restrictions which may be acceptable under Community law.

Although the Court did not spell out the principle of equivalence expressly in Cassis de Dijon, it did so in its subsequent ruling in Fietje. (24) There, the Court held, in effect, that the obligation to declare the nature of the goods on their label was, in principle, justified on consumer protection grounds. However, it added that: there was no longer need for such protection if the details given on the original label had as their content information on the nature of the product and that content included at least the same
information and was "... just as capable of being understood by the consumers in the importing State as the description prescribed by the rules of that State ...". In the field of technical standards, the principle of mutual acceptance of goods is an aspect of the principle of equivalence. This implies mutual recognition of the standards concerned, so that goods lawfully manufactured or marketed in one Member State can be presumed to comply with the standards of other States. In Gilli (25) it was held that, although the Member States in the absence of Community rules on the marketing of the products in question are entitled to regulate their production, distribution and consumption in their territory, this is "subject, however to the condition that these rules do not present an obstacle, directly or indirectly, actually or potentially, to intra-Community trade." Only in reliance on Article 36 EEC or in order to maintain a prohibition -equally applicable both to domestic and imported products- serving "a purpose which is in the general interest and such as to take precedence over the requirements of the free movement of goods" may restrictions be placed on goods lawfully produced and/or marketed in another Member State. (26)

The principle of equivalence, in judicial terms can be described as one aspect of the principle of proportionality. "The principle [of equivalence] put simply is this: if the aim of the importing Member State's rules has been complied with then that is sufficient, there is no longer any interest to be

Page 426
served in requiring the aim to be met for a second time in a different manner. Of course, if the aim has not been fully complied with at all then there is no reason to prevent the importing Member State from enforcing its rules." (27) It must be pointed out that unless the measures can be justified under one of the heads of the first sentence of Article 36 EEC, only equally applicable national rules serving, as the Court forcefully put it in Cassis de Dijon "a purpose which is in the general interest and such as to take precedence over the requirements of the free movement of goods" (28) may, in principle, oppose the right of goods to move freely throughout the Community. It is clear, therefore, that it is the free movement of goods which is the paramount principle and that any derogations from it must be strictly justified, that is, to be subject to the principle of proportionality. This is the only derogation or at least the all-encompassing more general one.

The Court made this point very clearly in Commission v France (Re Woodworking Machines). (29) In this case it was held that the French safety requirements were justified on public health grounds, although they were stricter than those prevailing in other Member States. The French legislation was based on the idea that the users of machines must be protected from their mistakes, and the machine must be so designed as to limit the user's intervention to the absolute minimum. In other Member States, the predominant approach to the problem was different. In Germany, in particular, the basic principle
was that the worker should receive thorough and continuing training so as to be capable of responding correctly if the machine does not work properly. The Court ruled that a Member State:

"... is not entitled to prevent the marketing of a product originating in another Member State which provides a level of protection of the health and life of humans equivalent to that which the national rules are intended to ensure or establish. It is therefore contrary to the principle of proportionality for national rules to require such imported products to comply strictly and exactly with the provisions or technical requirements laid down for products manufactured in the Member State in question when these imported products afford users the same level of protection."

The problem arises whether the principle of equivalence is in conflict with the "rule of reason." It is submitted that it is not. It merely gives rise to a presumption that goods which have been lawfully marketed in another State will comply with the "mandatory requirements" of the importing State. This can be rebutted by evidence that further measures are necessary to protect the interest concerned. This presumption will, however, be hard to rebut; the burden of proving that a measure is necessarily is a heavy one. The Court has applied the principle of proportionality rigorously, excluding all measures that go beyond what is strictly necessary to achieve the desired end. In Walter Rau, (30) a Dutch law requiring margarine to be packed in the shape of a truncated cone, allegedly introduced in the interests of the consumers, to enable them to distinguish margarine from butter, was held to be in breach of Article 30 EEC. The same objective could have
been achieved by other means, such as labelling, which could be
of less hindrance to trade. The correct interpretation of the
Court's judgement in Cassis de Dijon is, then, that goods
imported from another Member State may be subjected to national
laws only to the extent necessary in pursuit of certain
justified interests. (31) It is for this reason that the
principle of equivalence is not restricted to goods restricted
and marketed in another Member State.

To be sure, the principle of equivalence is not
unqualified and it should be emphasized that the Court has
demonstrated in many cases that the rule of reason may properly
assist national measures in certain circumstances. In
Commission v France (Re Woodworking Machines), (32) the Court
ruled, in effect, that the protection of public health was one
of the 'mandatory requirements' or interests recognized under
the rule of reason. Thus the Court examined whether the
application of French rules was disproportionate to these
interests. However, it found that the Commission had failed to
prove that imported woodworking machines did in fact protect
users equally well; the German approach to accident prevention
had not been shown to be as satisfactory as the French
approach. The Commission had put in statistics showing that
machines manufactured according to the specifications of other
Member States did not cause more accidents than machines made
to French standards. Nevertheless, in Court's view such
statistics could not establish by themselves that the French
approach did not provide greater protection to users since they left out of account other factors such as "the extensive training of users." It can be deduced from this that a Member State is not required to grant type approval for dangerous machines which can be used safely after extensive training, if machines meeting the specifications laid down by that state do not require such training. Yet the Court cannot be taken to have given its blessing to national rules which exploit users' habits so as to give an advantage to domestic manufacturers.

(33) Although, in the absence of action at the Community level, the basic competence of the Member States to enact legislation was left untouched, the Court has had no hesitation in indicating the limitations which Community law imposed on their freedom to act, particularly in relation to the application of national laws to products imported from other Member States. Thus national measures such as technical requirements, which apply to domestic and imported products alike, may not, in principle, be used to oppose the importation of goods from other Member States save to the extent to which opposition may be justified under the rule of reason and always subject to the principle of proportionality.

Mattera regards the principle of equivalence as a step away from the faceless world of Euro-bread, Euro-beer and Euro-toys. (34) Instead, local specialities from every Member State can in principle be bought and sold in their original form all over the Community. This gives the consumer a wide range of
products to choose from. On the other hand, the idea of equivalence has been criticized that it will result in a lowering of standards and eventually to a lowest-common-denominator. (35) Yet, if the standards with which the product complies do not "suitably and satisfactorily" fulfil the objective of the rules of the importing Member State which are justifiable under the rule of reason, then a Member State may well be entitled to refuse the product. (36) The positive approach to the free movement of goods is to be welcomed in principle for the greater legal certainty it should offer to Community citizens. In particular, by emphasizing that the right of free movement of goods is not dependent upon the harmonization of national laws, the Court has confirmed the free movement of goods as a fundamental principle upon which Community citizens and others are entitled to rely. (37) By emphasizing that the prima facie right is to the free movement of goods, the Court has enabled the private parties to know from what premise they begin. Thus the burden of proving that the rule of reason should be applied falls on the Member State which seeks to justify its measures. (38) III).--The Rule of Reason.

The rule of reason (or, as the European Court refers to it, "mandatory requirements") is a creation of case law. (39) In view of the very wide definition of measures equivalent to quantitative restrictions, which was given in Dassonville (40) and to a large extent repeated in subsequent cases, it is not
surprising that the Court sooner or later would have accepted the need to restrict the effect of that definition in some way. It did so not by revising its definition but by achieving the same result in a different way. Although the Court has stated repeatedly that the exceptions listed in Article 36 EEC are exhaustive, (41) it in effect established further grounds upon which Member States may derogate from Article 30 EEC in the Cassis de Dijon case. (42) The theoretical explanation for this apparent inconsistency is that the Cassis list does not so much provide grounds for derogation from Article 30 EEC as define the circumstances in which national measures fall within Article 30 EEC in the first place. (43)

The rule of reason was first applied in the Dassonville case (44) to the effect that, in the absence of action at the Community level, national measures applicable equally to domestic and imported products may not be prohibited by Article 30 EEC, so long as they are reasonable in the sense of being necessary in the particular circumstances to ensure that certain standards or values are guaranteed in the general interest. The Court made plain that the rule of reason is subject to the condition of the second sentence of Article 36 EEC, (45) and in any event it is now established that the rule of reason will only be available to justify measures which apply equally to domestic as well as imported products. (46) Subsequently in Cassis de Dijon (47) the Court expressed the rule of reason more clearly. The facts of this case were
fairly simple. The Germans prevented a French liqueur, Cassis de Dijon from being marketed in Germany because its wine content was too low. The plaintiff attacked this under Article 30 EEC, and the German government sought to justify their law on three grounds - for the protection of public health, the protection of the consumer against fraud, and the suppression of unfair competition. The Court, after referring to the Dassonville formula, added that:

"Obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer."

Once again, then, the Court made it clear that the rule of reason did not give the Member States anything like a carte blanche to restrict intra-Community trade. (48) It was only where it could be shown that measures served "a purpose which was in the general interest and such as to take precedence over the requirements of the free movement of goods" (49) that the application of national laws to refuse access to goods lawfully produced or manufactured (or placed in free circulation in a regular manner there) would be permitted. Prior to Cassis, it was assumed that any measure falling within the Dassonville formula would breach Article 30 EEC and could be justified on the grounds provided by Article 36 EEC. Since Cassis, at least where indistinctly applicable measures are concerned, courts
may apply the rule of reason to Article 30 EEC. If the measure is necessary to protect mandatory requirements, it will not breach Article 30 EEC at all. Distinctly applicable measures on the other hand, will normally breach Article 30 EEC, but may be justified under Article 36 EEC. The distinction is significant, since the mandatory requirements permitted under Cassis are wider than the grounds provided under Article 36 EEC and unlike 36 EEC, are non-exhaustive. (50)

The rule of reason does not deny that in principle the measures which it covers fall within the ambit of Article 30 EEC (51) but rather it is reflection of the lacunae which exist in the present state of integration of the Community. Thus the Court has sought to ensure that interests and values which are clearly compatible with the basic aims of the Treaty do not go unprotected in the period before their protection has been assured at the Community level. Thus it may be submitted that the real concept behind the rule of reason is the recognition that Community law does not yet offer at a legislative level guarantees in respect of certain interests or values. The Court recognizes that these interests or values are worthy of protection (as long as the national requirements apply to domestic and imported products alike and subject to the principle of proportionality and the terms of the second sentence of Article 36 EEC). Accordingly, in the lacunae pending the adoption of legislation at the Community level, the Court in the interests of reasonable and appropriate
application of the law, upholds national guarantees which the Community legislator does not as yet afford to Community citizens. (52) Thus the rule of reason is a recognition by the Court of the need, pending action at the Community level, (53) to allow Member States to act to ensure that certain interests or values are guaranteed in the general interest. (54) Measures which it is sought to justify under this rule of reason must be applicable to domestic and imported products alike (55) and must be reasonable. (56)

Measures justifiable under the rule of reason must be reasonable and proportionate. According to Advocate General Van Gerven: "'Reasonable' means ... necessary, proportionate and as unrestrictive as possible." (57) Proportionate are those measures that do not restrict trade between Member States any more than is absolutely necessary for the attainment of the legitimate purpose pursued and if there are other ways, less restrictive of trade between Member States of attaining that purpose then these measures will not be accepted. As the Court made clear in Rau:

"It is also necessary for such rules to be proportionate to the aim in view. If a Member State has a choice between various measures to attain the same objective it should choose the means which least restrict the free movement of goods." (58)

As the interests or values covered by the rule of reason do not constitute a closed class but are characterized by being matters the protection of which Community law should ensure in the general interest (59) pending legislative action to
safeguard their protection at the Community level, (60) this discussion will necessarily be confined to examples of the scope of the rule of reason and the application of the principle of proportionality. So far the Court has accepted only non-economic justifications as falling within the rule of reason, although it is remarkable how few of the Member States' arguments have been accepted on the facts; in the overwhelming majority of cases the Court has indicated that certain justifications are admissible but has then gone on to find that the national measures involved were unreasonable, disproportionate or even protectionist (albeit disguised).

In Dassonville the Court first recognized consumer protection and the prevention of unfair commercial practices as being interests which should be safeguarded by the Community law. This recognition has been repeated in various contexts in the subsequent case-law. In applying the rule of reason to the facts in Cassis de Dijon the Court found that the German law contested was in breach of Article 30 EEC. Although the measure fell within the categories suggested, being allegedly in the interests of public health (to prevent increased consumption resulting from lowering the alcoholic content of Cassis) and the fairness of commercial transactions (to avoid giving the weak imported cassis an unfair advantage over its stronger hence more expensive German rival), it was not necessary to achieve these ends. Other means such as labelling, which could less of a hindrance to trade could have
been used to achieve the same ends. Thus the word 'necessary' can be interpreted to mean no more than is necessary, that is, subject to the principle of proportionality. Clearly, in this case, the Court was concerned to show that the proportionality principle applied to the rule of reason just as it applies to the first sentence of Article 36 EEC.

The reference to a requirement of origin-marking being a possible method of ensuring that consumers were not misled as to the origin of the product is a clear recognition that an origin-marking may sometimes be justifiable under Community law. Where there is clearly no risk of consumers being misled—because, for example, the product is presented with a sufficiently clear label—then it will be impossible to run a defence based on the fairness of consumer transactions or consumer protection. In Commission v U.K (Re Origin-Marking of Retail Goods) (61) the Commission claimed that a British regulation requiring certain goods (e.g. clothing, textiles) sold retail to indicate their country of origin was in breach of Article 30 EEC. The British government argued that the measure was justified on the Cassis principles in the interest of the consumers, who regarded the origin of goods as an indication of their quality. The Court rejected this argument. It held that the regulation in question merely enabled customers to assert their prejudices, thereby slowing the economic interpenetration of the Community. Here the principle of proportionality was applied and it was noted that the
qualities of goods could as well be indicated on the goods themselves or their packaging, and the protection of consumers was sufficiently guaranteed by rules which enabled the use of false indications of origin to be prohibited. Whilst manufacturers remained free to indicate their own national origin it was not necessary to compel them to do so. The national regulation was therefore in breach of Article 30 EEC.

Requirements that particular products be packed or presented in certain shapes have also been considered in the light of consumer protection. This question was more specifically addressed in Rau. (62) In this case the Court examined a Belgian requirement that margarine for retail sale be packed in cube-shaped blocks or packs. The Court had little difficulty in concluding that such a requirement was capable of affecting trade between Member States and, moreover, that it had protective effects. Although it was clear that in principle Member States could indeed enact legislation designed to prevent butter and margarine from being confused in the mind of the consumer, the Court concluded that the Belgian requirement was disproportionate, for consumers could "in fact be protected just as effectively by other measures, for example by rules on labelling, which hinder the free movement of goods less."

Often allied to consumer protection in the Court's judgements is the prevention of unfair commercial practices (sometimes expressed as the promotion of fair trading or the
prevention of unfair competition). In Beele (63) the Court noted that national case-law which prohibited precise imitation liable to cause confusion between products could indeed protect consumers and promote fair trading. These interests were "general interests which ... may justify the existence of obstacles to movements within the Community resulting from disparities between national laws relating to the marketing of products." Thus the Court examined whether the application of the national case-law was disproportionate to these interests. Two principal factors led the Court to conclude that it was not disproportionate. First of all, there was no compelling reason for the virtual identicality of the products and needless confusion was being caused. Secondly, there was no agreement or dependence between the Swedish manufacturer of the original product and the German manufacturer of the alleged imitation. In the circumstances, then, the application of the national case-law could not be regarded as being disproportionate. In this case, though, as in so many others, the prevention of unfair commercial practices went hand-in-hand with consumer protection.

In its judgement in Cassis de Dijon (64) the Court also spoke of the protection of public health as being one of the "mandatory requirements" or interests recognized under the rule of reason. In Commission v Italy (Re Wine Vinegar) (65) the Court spoke of the rule reason in terms of mandatory requirements "such as the protection of public health, referred
to in Article 36." In doing so, it has scarcely added to the certainty of the classification of the concept of public health. Unfortunately, the explanation for the inclusion of the protection of public health in the interests coming under the rule of reason is less than wholly clear and it is submitted that the inclusion of this head in the rule of reason is superfluous. The protection of the health and life of humans, animals and plants is already a recognized ground of justification under Article 36 EEC. As the ambit of that Article extends to include measures applicable solely to imported products as well as equally applicable measures —in this respect, of course, differing from the rule of reason— the inclusion of the protection of public health in the rule of reason seems to defy rational explanation. (66) The Commission v Germany case (Re Beer Purity Laws) (67) concerned a blanket prohibition imposed by the German government on all additives in beer, including those approved for use in beer by other Member States on grounds of protection of public health, justified by the rule of reason. The Court held that the use of certain additives, permitted in another Member States, must be authorized for a product imported from that state where, having regard to the results of international scientific research, in particular the work of FAO (Food and Agriculture Organization) and WHO (World Health Organization), and to eating habits in the Member State of importation, that additive did not constitute a danger to public health and met a real
need. In this case, although the eating habits of the German population might have justified a selective exclusion of certain additives the exclusion of all additives was found to be disproportionate.

Environmental protection has also been specifically recognized by the Court as falling within the ambit of the rule of reason. (68) In order to protect the environment, conserve resources and reduce rubbish Danish legislation required that all beer and soft drinks sold in Denmark should be packaged in containers and which were reusable and had been approved by the National Environmental Protection Agency and that the distributors should set up and operate a system of deposit and return to encourage the recuperation of used containers and their insertion into the production cycle. In order to take account of the difficulty that might cause to the products of foreign drinks a producer was entitled to market drinks in unapproved containers up to 3000 hlt per year and foreign producers were entitled to a limited use of unapproved containers while testing the market. The Court held that national law might legitimately hinder imports if it was necessary to satisfy requirements of Community law and that protection of the environment was such a mandatory requirement. A system designed to secure the reuse of drink containers was a necessary measure for the protection of the environment. Consequently a compulsory deposit-and-return scheme for the use of such containers, being an essential element in such a
system, was not disproportionate to the aim of environmental protection and any incidental restriction on imports were not prohibited by Article 30 EEC. The Court added, however, that even though a national compulsory system for the return and re-use of used drink containers was a legitimate system for the defence of the environment, a requirement permitting only the use of containers which have been approved by a national environmental protection agency was disproportionate to that aim and in so far as it hindered the imports of drinks from other Member States it was contrary to Article 30 EEC. A concession allowing a limited use of non-approved containers did cure the illegality since it covered only limited quantities of beverages by comparison with the volume consumed in the country and because of the restrictive effect of the compulsory return on imports. This decision entirely accords with the concepts of the rule of reason being a recognition of the need to accept - albeit on a provisional basis pending guarantees at the Community level - that measures taken in the general interests may deserve precedence over the requirements of the free movement of goods. (69)

The effectiveness of fiscal supervision has also been recognized as being covered by the rule of reason, initially being mentioned in Cassis de Dijon although it was not relied upon in that judgement. However, in Carciatti (70) the Court had the opportunity to consider this matter more generally. Mr. Carciatti was prosecuted for using, whilst being a resident
in Italy, a German-registered car, contrary to Italian law. He claimed that Italian law was incompatible with Community law on the free movement of goods, although no specific mention was made of Article 30 EEC. The Court noted that Community Directives on Value Added Tax (71) made clear that the Member States retained:

"... broad powers to take action in respect of temporary importation, specifically for the purpose of preventing tax-frauds. It follows that if the measures adopted to that end are not excessive, they are compatible with the principle of the free movement of goods."

Moreover, the prohibition of the use by residents of vehicles imported temporarily was not disproportionate, since to the Court's mind it "... constituted an effective way of preventing tax frauds and ensuring that taxes are paid in the country of destination of the goods." Thus, although the Court did not discuss Article 30 EEC specifically, its approach in this case is an example of the interaction between the principle of the free movement of goods, the prevention of tax frauds and the principle of proportionality.

The need to ensure and enforce the observance of national rules governing the opening hours of retail premises as a means of improving working conditions falls within the rule of reason, as the Court ruled in Torfaen Borough Council v B&Q Plc. (72) B&Q Plc, a British retail chain, was prosecuted by Torfaen Borough Council for opening for prohibited sales on Sundays contrary to the Shops Act of 1950. B&Q maintained that nearly a quarter of its trade was done on Sundays, with 10% of
its sales involving goods from other Member States. In this way national law had a restrictive effect on the sales of goods imported from other Member States and was therefore incompatible with Article 30 EEC. On the other hand, the Borough Council argued that the protection of the working environment and the protection of health and welfare of workers were mandatory requirements which made the contested rule necessary. In the UK government's view the Shops Act was intended to meet the imperative need to protect the general character of Sunday as a non trading day. The Court ruled British rules on Sunday trading would be compatible with Article 30 EEC only if (a) the aim of the national rules was justified with regard to Community law and (b) their restrictive effects on Community imports did not exceed what was intrinsic to such rules. The Court said that these rules were justified with regard to EEC law. Such rules reflected certain political and economic choices in so far as their purpose was to ensure that working and non working hours were so arranged so as to accord with national or regional socio-cultural characteristics. Furthermore such rules were not designed to regulate the patterns of intra-Community trade. The question whether the effects of such rules exceeded what was necessary to achieve the aims of the national law was a matter for the national court.

So far then, the Court has recognized the protection of consumers, the prevention of unfair commercial practices, the
need to protect the environment, the effectiveness of fiscal supervision, and the improvement of working conditions as being so-called mandatory requirements. It has also mentioned the protection of public health as being a mandatory requirement, although, as has been submitted above, this is somewhat superfluous. (73) The class of interests or values which may be covered by the rule of reason is not closed; yet it is clear that the rule of reason is not meant to be the floodgate through which the Member States may demolish the central pillars of the Community. It must always be seen as a provisional action pending action at the Community level. As it has been shown above the rule of reason represents a recognition by the Court, on essentially equitable grounds, that certain interests or values are deserving of judicial protection at the Community level pending the intervention of the Community legislator. In fact, all the heads of the rule of reason are matters which are clearly in the general interest and are indeed recognized in one form or another in the laws of the Member States. The rule of reason does not, it is submitted, operate to cut down the substantive scope of Article 30 EEC but rather renders the operation of that Article inoperable provided that certain conditions are met. In examining whether these conditions are met the Court will pay particular attention to the principle of proportionality and will check whether the legitimate aim of protecting the interests or values coming under the rule of reason may be
achieved by measures which are less restrictive of trade between Member States. It is now settled law that the rule of reason will not be available to assist measures which discriminate against imported products, irrespective of whether such discrimination is real or merely apparent. (74)

IV). The Development of the Principle of Proportionality in Relation to Article 36 EEC.

The principal provision for derogation from Articles 30-34 EEC contained in the Treaty is Article 36 EEC. It provides that Articles 30 to 34 EEC do not preclude prohibitions or restrictions based on imports, exports or goods in transit justified on grounds of:

i) public morality, public policy or public security,

ii) the protection of health and life of humans, animals or plants.

iii) the protection of national treasures possessing artistic, historic or archaeological value; or

iv) the protection of industrial and commercial policy.

Since indistinctly applicable measures restricting imports will be subject to the rule of reason under Cassis, (75) it will normally only be necessary to apply Article 36 EEC to distinctly applicable measures in breach of Articles 30 and 34 of the Treaty. However, where indistinctly applicable measures are clearly discriminatory in their effects on imports the Court may still insist on justification under Article 36 EEC. (76) Distinctly applicable measures, on the other hand, can
never be justified under the rule of reason. (77)

Both Article 36 EEC and the rule of reason can in one sense be seen as provisional exceptions, pending action at the Community level for harmonization of divergent national laws. (78) However, where national laws do not fall within the scope of application of Article 36 EEC or the rule of reason they will automatically be caught by the prohibition contained in Article 30 EEC. Hence, the importance of the principle of equivalence which, when it applies, will exclude the applicability of the rule of reason or Article 36 EEC, since the national measure will not be necessary to guarantee the particular aspect of the general interest in question. The Court has repeatedly ruled that even in the interests of health protection specified in Article 36 EEC can in principle justify controls or inspections on goods imported from another Member State, the principle of proportionality means that the authorities concerned must take account of equivalent standards and similar controls or inspections in force or carried out in the exporting state. (79) In this context the mutual acceptance of goods, resulting from the principle of equivalence, can be seen as a reinforcement of the prima facie prohibition by Article 30 EEC of national measures prohibiting imports or having equivalent effect, which is subject to the exception of the rule of reason, and to Article 36 EEC. (80) The Court has made it clear that, in the absence of justification acceptable under the rule of reason or Article 36
EEC differences in national legislation cannot be used as a ground for refusing to permit the importation of goods (or the sale of goods imported) from another Member State. (81)

Although the grounds listed in Article 36 EEC appear extensive, they have been narrowly construed. (82) It follows that the list of exceptions is exhaustive. (83) The Court has continually insisted that Article 36 EEC only covers justifications of non-economic nature. (84) Thus the concept of public policy in Article 36 EEC, for instance, does not include the economic policy or system of the Member States and economic legislation adopted for its implementation or proper functioning. That is not to say, though, that justified measures are incapable of having economic effects in certain respects. (85) The Court has also held on many occasions that the purpose of Article 36 EEC is not to reserve certain matters to the exclusive jurisdiction of the Member States; it merely allows national legislation to derogate from the principle of the free movement of goods to the extent to which this is and remains justified in order to achieve the objectives set out in that Article. (86) It thus quite obvious that while Article 36 EEC leaves a margin of discretion in the national authorities as to the extent to which they wish to protect the interests listed therein, the discretion is limited by two important principles. First, that any discrimination between imports and domestic products must not be arbitrary. (87) Secondly, that national measures must not restrict trade any more than is
necessary to protect the interest in question.

The incorporation in the text of Article 36 EEC of the word 'justified' shows that the existence of considerations of public morality, public policy, etc, and still less a mere assertion by a Member State that they exist, are not in themselves sufficient to allow national measures to be taken contrary to Articles 30 to 34 EEC. (88) What is justified falls to be determined in the last resort by the European Court. (89) The Court has given its guidance in a variety of situations. (90) The Court gave the first indication of its approach in Commission v Italy (Re Art Treasures). Here the Commission attacked a progressive tax on the export of art treasures from Italy. Such a tax was one of the various options available to the Italian Government as a part of its drive to restrict the export of antiquities. The Italian Government argued, inter alia, that the tax fell within the exception provided for by Article 36 EEC covering the protection of national treasures possessing artistic, historic or archaeological value. It further advanced the argument that the tax in fact disturbed the functioning of the common market less than a prohibition or restriction of exports would have done. The Court rejected these contentions sternly and construed the exceptions of the first sentence of Article 36 EEC strictly:

"In order to avail themselves of Article 36 the Member States must observe the limitations imposed by that provision both as regards the objective to be attained and as regards the nature of the means
used to attain it." (91)

The Court further held that, even if measures fall within one of such restrictive interpretations, they will still not be regarded as justified if they offend against the principle of proportionality. This means that the restrictions on free movement of goods must be no more than are reasonably required in order to achieve the permitted objective. Accordingly, all exceptions to the principle of the free movement of goods must be justified and, moreover, the limitations imposed by the principle of proportionality and by the second sentence of Article 36 EEC should also be borne in mind.

This principle appeared in the Commission's Directive 70/50. (92) In that directive the Commission had spoken of equally applicable measures as being, in its view, prohibited if their purpose or if the same aim could be achieved by measures having a less restrictive effect. Although there was no explicit mention of proportionality in the Dassonville case (93) the Court very soon made it clear in its judgement in de Peijper (94) that national rules or practices which it is sought to justify "... are only compatible with the Treaty to the extent for the effective protection ..." of the relevant interest (health and life of humans in casu). The Court adopted a similar position in Eggers. (95) This concerned the compatibility with Article 30 EEC of a German statutory provision according to which spirits from wine could only bear certain designations of quality if they were stored for at
least six months on German territory. Having classified the measures in question as falling prima facie within the ambit of Article 30 EEC, the Court went on to consider "whether measures such as those which have given rise to the questions referred to the Court are not permissible by virtue of Article 36 of the Treaty, even though they are measures having an effect equivalent to quantitative restrictions." The Court said, inter alia, that:

"Article 36 EEC is exception to the fundamental principle of the free movement of goods and must, therefore, be interpreted in such a way that its scope is not extended any further than is necessary for the protection of those interests it is intended to secure."

Thus, if the interest could be "as effectively protected by measures which do not restrict intra-Community trade so much" (96) then the national rules or practices would no fall within the exception of the first sentence of Article 36 EEC.

Even beneficial rules or practices which were based on administrative convenience or the need to reduce public expenditure could not benefit from Article 36 EEC unless, in the absence of the said rules or practices, the administration's burden or expenditure would clearly exceed the limits of what could reasonably be required. (97) Accordingly, the Court ruled in de Peijper (98) that national rules or practices which made it possible for a manufacturer of the pharmaceutical product in question and his duly appointed representative, simply by refusing to produce documents relating to the medicinal preparation in general or to a
specific batch of that preparation, to enjoy monopoly of the importing and marketing of the product, must be regarded as unnecessarily restrictive and cannot therefore come within the exception specified in Article 36 EEC, unless it was clearly proven that any other rules or practices would had obviously been beyond the means which could be reasonably expected of an administration operating in a normal manner. (99)

Thus it is evident that the burden of proof that measures are reasonable lies on those who seek to justify them. This will usually be the national authorities, but may well, particularly in the field of industrial and commercial property rights, be an individual or an undertaking. (100) In proceedings under Article 177 EEC it will, of course, be for the national courts to decide whether that burden is fulfilled. (101) It will also be evident from the above discussion that the necessity of a measure for the purpose involved and the principle of proportionality in practice go hand in hand in the examination of attempts at justification under the first sentence of Article 36 EEC. This is particularly true in cases involving measures in the interest of the health and life of humans and animals. Although it is clear that the necessity for such measures is a distinct question from whether a measure is in fact proportionate to that purpose (102) the Court treats these as running in tandem. (103) A particularly vivid example of the use of the principle of proportionality is provided by the decision in the case Commission v UK (Re UHT Milk). (104)
This case was concerned inter alia with the requirement that imported ultra heated milk should undergo the heat treatment process in the United Kingdom. This was equivalent to a total ban on imports, since it rendered them uneconomical. Although there were disparities between the national regulations regarding such heat treatment, the Court found that in fact these disparities were limited. Furthermore, the Court considered other technical factors which ensured that UHT milk produced in the various Member States was equally safe as regards health. Accordingly, it sufficed to require imported UHT milk to meet such conditions as were absolutely necessary and this could be evidenced by certificates issued by the exporting Member State. The Court concluded that:

"... whilst the protection of the health of animals is one of the matters justifying the application of Article 36, it must none the less be ascertained whether the machinery employed in the present case by the U.K. constitutes a measure which is disproportionate in relation to the objective pursued, on the ground that the same result may be achieved by means of less restrictive measures, or whether, on the other hand, regard being had to the technical constraints already mentioned, such a measure is necessary and hence justified under Article 36."

The principle of proportionality has been developed most significantly in relation to industrial and commercial property, in which context the Court has chosen to express the concepts of necessity and action least onerous to intra-Community trade by limiting the permissible derogations under this heading to those necessary to give effect to the 'specific object' of the right relied upon. (105) The overall impression
from the relevant case-law (106) is that of an attempt to balance the competing interests resulting from the principle of the free movement of goods and the protection of nationally recognized rights (for instance, patentee's rights). It has thus been observed that this case law represents an attempt, at a time in which the Community has not yet regulated the matter, to strike the balance between the requirements of Community law and those of national legislation which represented solutions adopted at an earlier level of relations between the Member States. (107) This balance has found its outlet in the development of the notion of the specific object of the particular right concerned.

This concept is, naturally, consistent with the narrow interpretation of the first sentence of Article 36 EEC on which the Court rightly insists. Ullrich (108) has argued that the concept of the specific object of industrial and commercial property rights is an application of the principle of proportionality. Thus the defence of the specific object of the right is the interpretation least onerous to trade between Member States, consistent with the application of the first sentence of Article 36 EEC. The developments in this sphere is a very good example of the concrete application of proportionality. In Deutsche Grammophon (109) the applicant manufactured and sold records in Germany under the Polydor label. Metro, a supplier specializing in selling records at low prices, acquired Polydor records that had originally been
sold in France by Deutsche Grammophon's (DG) French subsidiary, Polydor SA. When Metro sought to resell those records in Germany at a price substantially lower than that of other DG retailers, DG sought an injunction against Metro to prevent the records being sold in breach of the statutory protection accorded to manufacture of sound recordings. Confirming and developing the line followed in earlier cases, the Court emphasised the distinction between the existence of rights and their exercise. In doing so, it applied a narrow interpretation of Article 36 EEC so that, although it permitted prohibitions or restrictions on the free movement of goods which were justified for the purpose of protecting industrial and commercial property, Article 36 only admitted derogations from the free movement of goods to the extent to which they were justified for the purpose of safeguarding rights which constitute the specific subject matter of such property. A use of a right related to copyright to prevent the marketing of the records by Metro—when, after all, they had been distributed elsewhere in the Community by subsidiaries of DG—solely on the ground that they had not been distributed by DG within Germany—would clearly have had the effect of allowing DG to partition off and protect the German market for records. Such a situation would have been "repugnant to the essential purpose of the Treaty, which is to unite national markets into a single market."
Article 36 EEC, Second Sentence.

Yet another restriction on national measures, even in cases which fall within the categories referred to in the first sentence of Article 36 EEC, is contained in its second sentence. If a measure is in principle justified on grounds of public policy, the protection of health and life of humans, animals or plants or the protection of industrial and commercial property for instance, it will cease to be so once it is established that it offends against the second sentence of Article 36 EEC by being a means of arbitrary discrimination or a disguised restriction on trade between Member States. Whilst the principle of proportionality constitutes the basis of the second sentence of Article 36 EEC, in relation to the first sentence of that Article, is that of a 'notwithstanding' requirement. As the Court put it in Rewe:

"However, the restrictions on imports referred to in the first sentence cannot be accepted under the second sentence of that Article if they constitute a means of arbitrary discrimination." (113)

Thus the second sentence is clearly designed to:

"... prevent restrictions on trade based on the grounds mentioned in the first sentence of Article 36 being diverted from their proper purpose and being used in such a way as either to create discrimination in respect of goods originating in other Member States or indirectly to protect certain national products." (114)

The second sentence of Article 36 EEC thus operates to exclude any justification which might in principle be made out under the terms of the first sentence. (115)
The Court has on various occasions spoken of the principle of proportionality as being the basis of the second sentence of Article 36 EEC. In Sandoz, the Court stated that:

"... the principle of proportionality which underlies the last sentence of Article 36 of the Treaty requires that the power of the Member States to prohibit imports of the products in question from other Member States should be restricted to what is necessary to attain the legitimate aim of protecting health." (116)

The reasoning behind this approach is that this sentence is designed to ensure that the justifications permitted in the first sentence of Article 36 EEC are not abused. This becomes clear from the Court's reasoning in Commission v France (Re Italian Table Wines) where it was stated that:

"By virtue of Article 36 of the Treaty, Article 30 of the Treaty, Article 30 does not preclude restrictions on imports justified in particular on grounds of the protection of health and life of humans. Nevertheless, since such restrictions [derogate] from the fundamental principle of the free movement of goods, they are in conformity with the Treaty only in so far as they are necessary for the attainment of those very objectives and do not constitute either a means of arbitrary discrimination or disguised restriction on trade between Member States." (117)

The requirements that measures taken by Member States under Article 36 EEC should not constitute a means of arbitrary discrimination, nor a disguised restriction on trade, and must comply with the principle of proportionality, overlap to a significant extent and should not be considered in isolation. Thus, infringement of the principle of proportionality may lead to a measure being categorized as a disguised restriction on trade. In Simmenthal (118) the Court pointed out that,
although systematic veterinary and public health inspections were no longer necessary or, consequently, justified under Article 36 EEC, as from the date of the entry into force of the relevant Community legislation; occasional inspections were permissible, provided that they were not increased to such an extent as to constitute a disguised restriction on trade between Member States. (119) In deciding, in Commission v France (Re Italian Table Wines), (120) whether or not the frequency of French frontier tests of Italian wines complied with the principle of proportionality, the Court took into account not only the fact that similar checks were carried out by the Italian authorities, but also the fact that the frequency of the French frontier inspections was distinctly higher than the occasional checks carried out on transportation of French wine within France. In Commission v UK (Re Imports of Poultry Meat), (121) the Court concluded that the evidence that the British measures designed for the protection of the health of animals were a disguised restriction on trade between Member States was overwhelming. Thus, the Court noted that one of the uses of which it disapproved in R v Henn and Darby (122) was in fact involved. However, the Court then appeared to apply to this finding the principle of proportionality and reasoned that the disputed measures would not constitute a disguised restriction on imports if it could be shown that for animal health reasons they were the only possible measures open to the British government. In other words, that the methods of
control which had been adopted in 1981 to ensure a high standard of animal health were not disproportionate.

In conclusion it is submitted that the proper function of the second sentence of Article 36 EEC, which is based on the principle of proportionality, is to act as an overriding requirement to ensure that apparently justified measures are not applied in such a way as to divide the Common Market artificially. Indeed, it has been suggested that it acts as something of an 'emergency break' in Community law. The Court has expressed this in terms of ensuring that measures or actions justified under the first sentence of Article 36 EEC are not diverted from their real purpose - that is, of course, to ensure equality in treatment on the principle of mutual acceptance of goods and to ensure the unity of the Common Market. The combined effect, though, of the two sentences of Article 36 EEC is clearly to achieve a balance between national and Community interests, although it will be clear that the Court has ensured, employing the principle of proportionality, that strict limitations are imposed on the possibilities for the Member States - and, for that matter, private individuals, to circumvent the requirements of the principle of the free movement of goods and create artificial barriers within the European Community.

V). Conclusions.

As it can be concluded from the discussion in this chapter the function of Article 36 EEC and the rule of reason
is to try to hold the balance between certain imperative national interests of non-economic nature on the one hand and the principle of the free movement of goods on the other. It is evident that Article 36 EEC is intended to effect the reconciliation between national and Community requirements. In achieving this reconciliation, the Court has interpreted the terms of the first sentence of Article 36 EEC strictly. To this effect, the Court has widely used the principle of proportionality and, sometimes, has also stressed the duty of the Member States to co-operate with each other in the wider, Community, interest, pending Community action to safeguard the relevant interests or values. There is little doubt that the development of the rule of reason in relation to Article 30 EEC has assisted the Court in maintaining this policy, but this has not been at the expense of a wide interpretation of Article 30 EEC.

The guiding principle in the Court's interpretation of Articles 30-36 EEC has been the need to maintain and promote the unity of the Common Market. To this end, the Court has been vigilant against protectionism by the Member States on the one hand and the artificial partitioning of the Community by the use of national industrial and commercial property rights by private parties on the other. It is clear, though, that both Article 36 EEC and the rule of reason offer merely an interim possibility for the Member States to justify refusing goods the benefit of the right of free movement. Once action
has been taken to guarantee at the Community level the interests of, for example, public health, in varying sectors, the presence of a Community scheme will, if it be a complete scheme, render recourse to Article 36 EEC or the rule of reason pointless. Where, naturally, the Community has only partially acted, the Member States retain the power subject to the requirements of Community law, to act unilaterally to the extent to which their actions are not covered by the Community rule, do not jeopardize the operation of these rules and conform with the principle of proportionality. Everything will, though, depend on the scale and scope of the Community action in the sector concerned.

The Court's insistence on a restrictive interpretation of Article 36 EEC and the rule of reason, mainly, by means of the principle of proportionality has not rendered the national interim measures illusory. (124) Rather, it indicates the Court's consistent determination to secure the Member States' respect and compliance with the obligations stemming from the Treaty of Rome, a Treaty concluded for an unlimited period, on a firm basis of equality and reciprocity. (125) The benefit of access to the markets of other Member States which is conferred by the Treaty, brings with it, of course, obligations. Thus, the European Court has also been concerned to ensure that private parties do not attempt, using the first sentence of Article 36 EEC, to recreate the protectionist barriers which
the Member States have undertaken to remove. That aim must simply be unexceptionable.
ENDNOTES.

2). Hager, Protectionism and Autonomy: How to Preserve Free Trade in Europe, 58 International Affairs 413 at 416.
3). Ibid.
4). E.g., Articles 36, 115 EEC etc.
7). See e.g., Case 251/78, Denkavit, [1977] ECR 3369 at 3392.
8). See e.g., Case 222/82, Apple and Pear Development Council, [1983] ECR 2913.
17). Supra no 13 at p. 854.
18). Gormley, Prohibiting Restrictions on Trade Within the EEC, Amsterdam 1985, p. 46.


23). Supra no 20 at p. 47.

24). Supra no 15.


26). Supra no 23.


28). Supra no 22 at p. 664.


32). Supra no 29.


35). Supra no 18 at p. 50.

37. Case 193/80, Commission v Italy (Re Wine Vinegar), [1981] ECR 2071 at 2078. See e.g, Supra no 27 at 2078 and Case 51/83, Commission v Italy, [1984] ECR 1633 para 17 (per curiam).

38. See e.g, supra no 25 at 2078 and case 51/83, Commission v Italy, [1984] ECR 1633 para 17 (per curiam).

39. Thus concepts such as consumer protection, prevention of unfair commercial practices and the effectiveness of fiscal supervision were not contained in the EEC Treaty.

40. Supra no 13.

41. Case 95/81, Commission v Italy (Re Security for Import Advances), [1982] ECR 2187.

42. Supra no. 22.

43. Gormley, p.54.

44. Supra no. 13.


47. Supra no 22.

48. Supra no 18 at p. 52.

49. Supra no 22 at p. 670.

50. Case 788/79, supra no 25 at p. 2082 per AG Copotorti.

51. Supra no 18 at p. 52.
52). This analysis is borne out by judgements such as those in Case 120/78 (Supra no 22), Case 193/80 (Supra no 37), and Case 94/82, De Kikvorsch, [1983] ECR 947.

53). Supra no 13 at p. 852.

54). Supra no 22 at p. 664.

55). See e.g, Case 266/81, Oosthoek, [1982] ECR 4575 at 4587.

56). Supra no 53.


58). Supra no 30.

59). Supra no 54.

60). Supra no 53.


64). Supra no 22.

65). Supra no 37.

66). Supra no 18 at p. 64.


69). Environmental protection has also been specifically recognized by the Commission as falling within the ambit of the rule of reason. See Commission's Communication on the Consequences of Cassis de Dijon Judgement (Supra no 38) and its Answer to Written Question 1285/77 (OJ 1979 C 214/5) on the prohibition of
non-reusable bottles.


74). Supra no 46.

75). ibid.


77). Supra no 46.


80). See e.g, Case 261/81, Supra no 30.

81). See e.g, Case 16/83, Prantl, [1984] ECR 1299 at 1327.

82). See e.g, Case 95/81, Commission v Italy (Supra no 43).

83). See e.g, Case 220/81, Robertson, [1982] ECR 2349.

84). See e.g, Case 238/82, Duphar, [1984] ECR 523 at 542.


87). In the absence of harmonized rules at the Community level, however, recourse to Article 36 EEC may entail the application of different standards in different Member States, as a result of different value judgements and different circumstances. See e.g., Case 34/79, Henn and Derby [1979] ECR 3795 as far as public morality is concerned and Case 94/83, Heijn, [1984] ECR 3263 in connexion with the protection of public health.


89). In the absence of any Community act on the subject, e.g. under Article 235 EEC. In case 35/76, Simmenthal, [1976] ECR 1871 at 1885, the Court equated 'justified' with 'necessary'.

90). The Court summed up its attitude towards Article 36 EEC in Case 95/81 (Supra no 43) in the following terms:

"It must be recalled that in accordance with the settled case law of the Court, Article 36 must be strictly interpreted and the exceptions which it lists may not be extended to cases other than those which have been exhaustively laid down and, furthermore, that Article 36 refers to matters of non-economic nature."


93). Case 8/74 (Supra no 15). The reference was in fact to the reasonableness of the measures.
94). Case 104/75 (Supra no 80).


96). Supra no 95.

97). Supra no 94 at p. 636.

98). Supra no 94.


100). On the general proposition see, e.g., Case 251/78, Supra no 7 at 3392-3.

101). Ibid.

102). Supra no 18 at p. 359, note 33.

103). See e.g., Case 42/82, Commission v France (Supra no 21)
at 1047-1048, Case 124/81, Commission v UK (Supra no 76)at 236-238. In Case 34/79 (Supra 87) at 3820-21 AG Werner rightly observed that in a number of cases the Court had used the word 'necessary' in explaining what could be justified under Article 36 EEC. The AG cited some examples of this. See his opinion loc.cit.

104). Supra no 76 at p. 236. Similar considerations are also evident in the judgement of the Court on the Franco -Italian wine war in Case 42/82 (Supra no 21).

105). Supra no 18 at pp 126, 184 et seq.

106). For a detailed discussion, See Gormley (Supra no 18), Section 6.6


112). ibid

113). Case 4/75, [1975] ECR 843 at 860. See also, for e.g, Case 102/77, Hoffman-La Roche [1978] ECR 1139 at 1164, Case 53/80, Eyssen, [1981] ECR 409 at 421. See also Gormley (Supra no 18) at 210-211.

114). Case 34/79 (Supra no 87) at 3815.

115). See e.g, Case 272/80, Supra no 79.


117). Case 42/82 (Supra no 21) at p. 1047. See also, Case 251/78 (Supra no 7) at p. 3390, Case 104/75, (Supra no 79) at p. 635, Case 97/83, (Supra no 5) at 2384-5 etc.

118). Case 35/76 (Supra no 89).

119). See also Case 272/80 (Supra no 79) at p. 3291 and Cases 2-4/82, Le Lion, [1983] ECR 2973 at 2987.

120). Case 42/82 (Supra no 21) at 1047-1048.

121). Case 40/82 (Supra no 88).
122). Case 34/79 (Supra no 87).
123). Supra no 18 at p. 217.
124). Supra no 18 at p. 221.
CHAPTER VII: THE APPLICATION OF ESCAPE CLAUSES IN THE LIGHT OF THE PRINCIPLE OF PROPORTIONALITY.

I). Introduction.

Escape clauses are provisions contained in the Treaties, providing for temporary exceptions, reliefs or immunities from rules of Community law, under certain temporary and exceptional circumstances and under certain limits. These provisions allow the Member States to take, within certain limits, temporary measures which are contrary to Community rules. Escape clauses are something distinct and must not be confused with permissible derogations from certain or all of the provisions of the EEC Treaty on public interest grounds (e.g., Article 56 EEC) etc. The operation of measures taken in application of an escape clause is subject to the authorization of the Council (e.g., Articles 25(1), 75(3), 93(2), 103 EEC) or the Commission (e.g., Articles 25(2) and (3), 37(3), 73(1), 80, 108(3), 115(1), 226 EEC) as the case may be. The competent Community institution, after examining the relevant factual circumstances, may permit or even recommend certain measures and set the conditions for their application at the same time (e.g., Article 226(3) EEC).

The Community institution, when granting the requisite authorization, must ensure that the measure to be taken is not formulated in a way detrimental to the other Member States (e.g., Article 25(1) EEC) or causes serious disturbances in the market (e.g., Article 25(3) EEC). The imposition and
application of protective measures taken under an escape clause is subject to the observance of the principle of proportionality. These measures must be in accordance with the aim pursued (e.g., Articles 70(2), 91(1), 102(1) EEC) and must also be necessary to deal with the situation. In Article 115(1) EEC, for instance, it is provided that "... the Community shall authorize the Member States to take necessary protective measures ..." in order to ensure that the execution of measures of commercial policy taken in accordance with the EEC Treaty by any Member State is not obstructed by a deflection of trade. As a general rule, authorized measures must not restrict Community freedoms and generally hinder the function of the Common Market to a greater extent and for periods greater than those strictly necessary to cope with the exceptional circumstances in question.

(II). Judicial Control of (Dis)proportionality of Protective Measures.

The decisions taken on the basis of an escape clause are subject to judicial control despite their eminently discretionary character. This can be explained by the fact that the discretionary power enjoyed by the Community authorities in this case are limited by the obligation imposed on them to choose "... leur moyens parmi aux prevus par la norme dont il est fait application, en outre, qu' ils soient strictement necessaires pour atteindre le but vise par la norme." (1) In the administrative theory of the Member States
it is accepted that the judge can verify whether the requisite conditions for the exercise of an exceptional power (pouvoir exceptionnel) do exist in fact. In France, for instance, it is for the Conseil d'Etat to decide on the 'exceptional' character or not of the circumstances invoked by the administration in order to justify its action. Thus:

"Le juge exerce un pouvoir véritablement créateur, car non seulement il est maître de déterminer la fin qu'il entend prendre en considération mais il peut considérer que l'appréciation technique de la nécessité est largement discrétionnaire." (2)

In Community law, an efficient control, on the part of the Court, of the conformity of the derogatory authorization with the Treaty and of the existence of the factual preconditions necessary for the application of an escape clause, should also include the verification of the existence of the relevant economic circumstances and the control of the compatibility of these circumstances with those prescribed in the Treaty in abstracto. This would, in turn, require value judgements consisting of extremely complex evaluation of facts, economic circumstances and quite often economic forecasts which usually will be very difficult or even inappropriate for the Court to make.

(IIa). Case Study. The Application of the Principle of Proportionality in Relation to Articles 115 and 226 of the EEC Treaty.

a). Article 115 EEC.

After Article 36 EEC and the 'rule of reason', Article
115 EEC is the most important exception to the principle of the free movement of goods. It provides for measures to control indirect imports into one Member State through another Member State of goods originating outside the Community (3) but are in free circulation within it. (4) The purpose of Article 115 EEC is to avoid deflections in trade which may circumvent measures of commercial policy taken by a Member State in accordance with the Treaty, and to encounter economic difficulties in one or more Member States resulting from differences between measures taken by Member States. To this end, Article 115 EEC empowers the Commission to recommend methods of co-operation between Member States. (5) If co-operation is not successful then the Commission is to authorize Member States to take necessary protective measures in accordance with conditions and details which is to determine. (6) In selecting protective measures priority is to be given to those which cause least disturbance to the functioning of the common market.

In order to understand the purpose and scope of this provision it is necessary to appreciate the Community scheme, established by Articles 9, 10 and 113 EEC, for dealing with goods which originate in third countries and then enter the Community. The first limb of this scheme is that under Article 113 EEC a common commercial policy is to be established. This is to be attained by means of a network of international agreements between the European Communities -as a legal person distinct from its constituent Member States- and third
countries, which establish the conditions upon which goods may be imported or exported between the Member States and those third countries. In a complete system, all countries of the world would be covered by this network of Community agreements. There would thus be uniform conditions applicable throughout the Community, upon which goods could pass between the Communities and those third States. The second limb of this scheme, established by Articles 9 and 10 EEC, is that once these goods from third countries have arrived in the first Member State, and all import formalities and any customs duties have been paid, they enter into 'free circulation', that is, they can move freely within the Community.

In such a perfect system there would be no room for any national rules in any Member State to govern the import of goods from third countries. However, the problem is that the common commercial policy is incomplete. There is still, therefore, room for a Member State to impose its own restrictions on the imports of any goods from a third state which are not covered by the common commercial policy, and these restrictions may not be matched by similar national restrictions in all other Member States. It follows that any such national restrictions could be undermined or defeated if goods were first imported from the third state into another Member State, and thus having got into 'free circulation' were to be sent into the first Member State. (7) This is the kind of deflection of trade with which Article 115 EEC seeks to deal.
It necessarily applies only where goods come from a third country to one Member State, and they are then deflected to another Member State which is lawfully trying to enforce its national restrictions in the absence of any relevant provisions of the common commercial policy. It must be said, however, that Article 115 EEC has an essentially interim character. (8)

Nevertheless, as long as commercial policy measures based on autonomous or bilateral agreements are still in force in various Member States with the authorization of the Council and the common commercial policy already set up does not rest on a completely uniform basis, Article 115 EEC will still permit restrictions on imports of products from third countries in free circulation in one of the Member States to be imposed with the authorization of the Commission. Given that the common commercial policy should have already been completely operational by the end of the transitional period in accordance with Articles 111 and 113 EEC, Article 115 EEC should have in theory be redundant. As the common commercial policy is incomplete in certain sensitive areas and as arrangements vary between Member States with regard to quantitative restrictions and the voluntary export restraints applicable to those areas, and in addition as with the accession of new Member States the uniform application of the common customs tariff may take further time to achieve, Article 115 EEC retains its importance.

Its principal use is in textile trade. This is due to
the fact that many Member States (e.g., The Netherlands, U.K., etc) have a large but ailing textile industry unable to hold its own against foreign imports, notably those from third world countries like Taiwan, Hong Kong and India. The Court ruled that the Commission may still apply Article 115 EEC in relation to international trade in textiles after the conclusion of the Multi-Fibre Arrangement and the adoption of Regulation 3589/82.

(9) Issues arising under Article 115 EEC are of considerable political importance, since they pit the interests of consumers, dealers, importers and third world exporters against those of employees and entrepreneurs in vulnerable industries; the principle of the free movement of goods against national protectionism. (10) Nevertheless, since the establishment of a common commercial policy is not yet complete, and in view of the grave economic situation, Article 115 EEC has continued to be applied frequently in recent years, particularly with regard to textiles. This is clearly shown by the following table:

(10a)

<table>
<thead>
<tr>
<th>Year</th>
<th>No of requests to the Commission by Member States (figures in brackets concern textiles)</th>
<th>No of requests granted by the Commission.</th>
</tr>
</thead>
<tbody>
<tr>
<td>1982</td>
<td>241(156)</td>
<td>174</td>
</tr>
<tr>
<td>1983</td>
<td>253(176)</td>
<td>188</td>
</tr>
<tr>
<td>1984</td>
<td>215(155)</td>
<td>165</td>
</tr>
<tr>
<td>1985</td>
<td>211(143)</td>
<td>176</td>
</tr>
</tbody>
</table>
The dramatic growth in these figures is almost due to the textiles sector. The Commission said (11) that the increase stemmed from the situation of the Community textile industry and the disparities which exist in the conditions under which textiles can be imported into the Community in the absence of fully uniform arrangements. The Court also pointed out that it will continue to apply Article 115 EEC to the textile sector until the introduction of completely uniform arrangements. In relation to agricultural products, the Commission is allowed to take appropriate measures in trade with third countries if the Community market experiences or is threatened with serious disturbances which may jeopardize the objectives described in Article 39 EEC. (12) Such measures may be taken only until the disturbance or threat has ceased. (13)

Measures which are authorized by the Commission under Article 115 EEC must be interpreted strictly as they constitute exceptions to the basic principles of Articles 9 and 30 EEC and an obstacle to the implementation of the common commercial policy mentioned in Article 113 EEC. (14) Although the requirement that the measures should not be disproportionate applies in principle, this is reinforced by the third paragraph of Article 115 EEC which calls for priority to be given to those measures "... which cause the least disturbance to the functioning of the common market and which take into account the need to expedite, as far as possible, the introduction of the common customs tariff." (15) This is merely an expression
of the general principle of proportionality which, in this context, is taken to mean that measures taken under exception clauses must be no more restrictive than is necessary. In the words of Reich:

"Le principe de proportionnalité apparaît inherent au système des clauses, il découle de la logique de leur régime juridique profondément derogatoire." (16)

It is thus suggested that Article 115(3) EEC must be taken to mean that measures authorized by the Commission under this provision must be absolutely necessary, that is, they should not exceed the degree of severity, extent and duration required to deal with the particular threat of deflection of trade or of economic difficulties in one or more Member States. If the situation can be dealt with by means of the same measure but at a lesser degree of severity, extent or duration or by another measure less restrictive of the intra-Community trade, an authorization for the more onerous measure will not be justifiable. That is, the restrictions authorized should cause the least possible disturbance to the normal pattern of intra-Community trade under the circumstances.

Having made this general analysis we can now turn to consider the Court's case law on Article 115 EEC in connexion with the principle of proportionality. The first of this batch of cases is Donckerwolcke. (17) There a reference arose out of criminal proceedings brought against a number of persons who had imported various consignments of cloth sacks from Belgium into France in 1969 (before the end of the transitional period)
and in 1970 (after the end of the transitional period). The importers declared in their customs documents the Belgo-Luxembourg economic union as the place of origin of their goods. Subsequent enquiries revealed, however, that the goods in fact originated in Lebanon and Syria and were in free circulation in Belgium; the importers were therefore charged before the French courts with making false customs declarations. The object of the questions raised was essentially to ascertain whether, during and after the transitional period, it was compatible with Article 30 EEC for a Member State to require declarations of origin to be made with respect to imports and subject imports to a system of import licences so as to monitor them with a view to applying Article 115 EEC.

The Court ruled that unless a derogation had been properly authorized by the Commission under Article 115 EEC, the requirement of an import licence would be incompatible with the Treaty provisions (18) and a refusal to issue an import licence would be incompatible with Article 30 EEC even when the refusal was in contemplation of a possible application of Article 115 EEC. The Court agreed, however, that Member States could require a declaration as to the origin of goods in free circulation accompanied by a Community movement certificate. The conclusion was based on the ground that:

"... knowledge of that origin was necessary both for the Member States concerned, so that it may determine the scope of commercial policy measures which it is authorized to adopt pursuant to the Treaty, and for the Commission, for the purpose of exercising the
However, applying the principle of proportionality, the Court felt that a Member State could not require from the importer more than an indication of the origin of the products in so far as he/she knew it or could reasonably be expected to know it. (19) Certainly any failure to supply the information could not give rise to disproportionate penalties for what it was purely an administrative contravention and the Court had no hesitation in stating that seizure of the goods or the imposition of an ad valorem pecuniary penalty would be equivalent to the free movement of goods. (20)

The proof that false declarations had been made on the importation of table grapes of Spanish origin into France from Italy gave rise to litigation in which the Court was able to confirm this approach. The Court in its judgement in Cayrol v Rivoira (21) reproduced its positions in verbatim as far as the principle of proportionality was concerned. The sequel to this case was Procureur de la Republique v Rivoira involving a reference from the French court seized of the criminal proceedings. (22) One of the French court's questions was whether criminal penalties could be imposed on persons making false declarations of the kind in question. The Court took the position that the reinforcement of a restriction on imports by criminal penalties in respect of products in free circulation would be just as incompatible with Community law as the restriction itself. In this respect, the Court ruled that it
would be in particular disproportionate for the importing Member State to apply without distinction criminal penalties designed to penalize declarations with respect of forbidden imports. Accordingly the Court concluded that:

"... although the fact that Spanish grapes imported into France from Italy have been declared as being of Italian origin may in appropriate cases give grounds for the application of the criminal penalties provided against false declarations, it would be disproportionate to apply without distinction the criminal penalties provided in respect of false declarations made in order to effect prohibited imports."

This adds nothing new to Donckerwolcke and Cayrol but it clarifies those judgements: It shows that once a Member State has been authorized to prohibit imports under Article 115 EEC, it may impose higher penalties for false declaration than it could previously, provided that the principle of proportionality is observed.

Two judgements of major importance on Article 115 EEC were delivered in the Tezi Textiel cases. (23) The cases related to textile products originating in Macao and in free circulation in Italy. These products were covered by Council Regulation 3589/82 (24) on common rules for certain textile products originating in third countries. This regulation, which was based on Article 113 EEC, gave effect on a provisional and autonomous basis to the Multi-Fibre Agreement. It laid down a quantitative limit for the whole Community for each year from 1983 to 1986 for each supplier country, including Macao; it then subdivided that quantitative limit
between the Member States, the Benelux countries being treated as a single unit. By two successive decisions the Commission authorized the Benelux countries to exercise intra-Community surveillance of certain textile products throughout 1983, pursuant to Articles 1 and 2 of Decision 80/47. Consequently, on April 29, 1983, Tezi applied to the Dutch authorities for licences to import such products from Italy. The applications were refused on the grounds that by Decision 80/47, the Commission had authorized the Benelux countries to exclude such goods from Community treatment, as had been requested by the Netherlands with the consent of Belgium and Luxembourg. Tezi then brought proceedings before the Dutch courts challenging this refusal to grant it licences. A reference for a preliminary ruling was made: That case was Tezi Textiel v Ministry for Economic Affairs (59/84). On 1 December 1983, Tezi submitted further applications for such licences. However, these applications were also refused since by decision of 14 December 1983 the Commission once again authorized the Benelux countries at their request to exclude such goods from Community treatment. That decision which was also based on Article 3 of Decision 80/47 (implementing Article 115 EEC), applied retroactively from 1 to 31 December 1983. This time Tezi brought a direct action for the annulment of the decision and for damages: Tezi Textiel v EC Commission (242/83).

In Tezi Textiel v Commission the plaintiff claimed, inter alia, that the contested decision infringed Article 115 EEC.
Firstly, Tezi claimed that the contested decision covered a somewhat wider category of textile products than was strictly necessary. Secondly, the applicant contested the view that economic difficulties existed such as to justify the authorization of protective measures. After referring to Donckerwolcke, the Court ruled that because of the derogations to the system of free circulation allowed under Article 115 EEC constitute not only an exception to Articles 9 and 30 EEC, which are fundamental to the operation of the common market, but also an obstacle to the implementation of the common commercial policy under Article 113 EEC, they must be interpreted and applied strictly. Where a system of common rules for the import from non-Member States of certain products constitutes in its sphere of application a step towards the establishment of a common commercial policy based, as Article 113(1) EEC provides on uniform principles, the Commission must show great prudence and moderation in exercising the derogation powers which it still retains under Article 115 EEC in respect of the products covered by that system. Consequently, in that respect, the Court pointed out, it may solely for serious reasons and for a limited period, after a full examination of the situation in the Member State seeking a derogation under Article 115 EEC and having regard to the general interests of the Community, authorize protective measures which cause the least disruption of intra-Community trade. (25) For reasons which need not be considered here the Court found that these
conditions had been satisfied.

Thus the continued existence of Article 115 EEC as a limitation on the principle of the free movement of goods is a fact of life. Article 115 EEC applies only in the context of the common commercial policy, that is, to goods originating from third countries which are in free circulation within the EEC and is necessary since deflections of trade or economic difficulties may well arise as a result of differences in regimes between Member States permitted under Community's common commercial policy. The Court, in its case law on Article 115 EEC, has continued to apply its restrictive interpretation of derogations from the main principles of the Treaty. Although largely as a result of the case law on Article 115 EEC, the Commission has established a whole procedure for measures of surveillance and protection by Decision 80/47, (26) it has been shown (27) that its willingness to grant authorizations for measures is not confined to the procedures and conditions mentioned in that Decision. In the words of Megret, Article 115 EEC:

"C'est un article précieux, et en même temps dangereux car le remède qui sera dû le plus souvent de l'article 115 risque de ne pas tendre à renforcer la cohésion du marché commun, mais bien plutôt à limiter l'application des règles fondamentales de ce marché et notamment le principe de libre circulation." (28)

The application of the principle of proportionality in connexion with the third paragraph of Article 115 EEC is a most appropriate and useful tool to contain these dangers and prevent Article 115 EEC from being diverted from its proper
purpose and used in such a way as to restrict the application of the principle of the free movement of goods and impede the development of a truly common commercial policy.

b) Article 226 EEC.

The important role which Article 226 EEC is called upon to play (and in fact has already played) within the framework of the Community legal order arises from its object and from the possibility it provides for the adoption of measures derogating from the rules of the Treaty. It is an escape clause in favour of the Member States allowing a temporary departure from the normal application of the rule prescribed for the gradual establishment of the Common Market in cases where certain essential national interests are threatened either in a given sector of the economy or in the economy of a certain area. This is particularly important since a straightforward application of Community law as far as new Member States are concerned can cause real economic shock to whole sectors of the economy, especially the less competitive ones, or to certain areas especially those less developed. The liberalization of intra-Community trade in 1961, for instance, led to an influx of cheap refrigerator imports to France from Italy. This fact threatened the respective sector of the French economy which invoked Article 226 EEC in order to counterbalance this sudden crisis in this particular sector. (27a)

Article 226 EEC applies during the transitional period.
Its scope has been elaborated by the Court in six decisions (28) and its application is subject to the observance of the principle of proportionality. The following guidelines can be deduced from the abovementioned case law as far as the application of the provision in question is concerned:

- Preference should be given to protective measures which cause the least possible disturbance to the functioning of the Common Market.

- The territorial scope of application of those measures must be limited in such a way as to avoid 'waterfall effect' on the whole market.

- The difficulties which justify the application of an escape clause may or may not result from the application of the Treaty.

- The adoption of protective measures is subject to an exact procedure and a Community control which the beneficiary Member State does not escape. The Court examines in each case the facts in detail and reviews the assessment of the Commission in that respect. As the Court ruled in Niederrheinische Bergwerks (29) regarding Article 37 ECSC which is quite analogous to Article 226 EEC:

"... the measures adopted by the High Authority must be necessary and appropriate and must therefore, on the one hand, constitute a proper remedy to the disturbed situation caused by its action or failure to act and, on the other hand, safeguard the essential interests of the Community."

By reason of the extent of the discretionary powers enjoyed by the executive in the area of escape clauses, every
decision authorizing derogation from the Treaty is subject to particularly strict requirements of reasoning. This can clearly be inferred from the case law of the Court. Its decision in Geitling (30) confirms that, indeed, when the granting of an authorization on the part of the High Authority depends on a finding which by its very nature comprises an assessment of the situation created by the economic facts or circumstances and accordingly is partially outside the jurisdiction of the Court, then the obligation to state specific reasons for the decision granting the authorization is rendered necessary and must be strictly observed by reason of the fact that review by the Court is limited.

As a matter of fact the Court cannot engage in detailed economic evaluations. It must confine itself to examining whether, taking into account the facts brought to its attention, the Commission has made a reasonable and objective evaluation of the situation. Moreover, it must not be forgotten that Member States other than the beneficiaries of protective measures have different interests as far as the grant of a derogatory authorization is concerned, because they are the ones which will sustain the disadvantages resulting from the protective measures. The Court, therefore, should verify, in view of the facts which warrant the application of an escape clause, whether the Commission was right in its evaluation of the situation in question as exceptional ('situation exceptionelle'). Thus in his conclusions in Rewe
Zentrale, (31) Advocate General de Lamothe stated:

"Since under Article 226 the Commission must take extremely difficult appraisals very quickly, the Court admits, ..., that although in this sphere the Commission cannot exercise a 'discretion', 'it possesses a power of appraisal subject to review by the Court' and I would personally add that this is a power of appraisal."

It thus follows that the decisions taken by the executive in this area are illegal not only if they are vitiated by material illegality or misuse of powers. This is also the case if those decisions are founded on materially inexact findings or if these findings though exact are evaluated in a manifestly erroneous way (erreur manifeste d'appréciation des faits), or when a measure which derogated less from the rules of the common market would apparently be sufficient to remedy the situation which gave rise to the application of Article 226 EEC. In the last two cases judicial control of the merits of the decision is implicit. As a matter of fact, in the former case the Court has an effective control over the limits of the merits by assessing or 'qualifying', as the French say, the facts of the situation in the light of the terms of Article 226 EEC as so interpreted (qualification juridique des faits), while in the latter it controls the suitability of the means to ends. Generally the control of the Court acquires an objective character, in the sense that it always aims at eliminating, to the greatest possible extent, the subjective elements which are inherent in every evaluation and attempts to concentrate on what can be considered as objectively reasonable and fair under
the circumstances. This is why Advocate General Roemer, in International Fruit Company, (32) stated as far as the protective clause provided for by Regulation 2513 is concerned: "It is thereby clear that a threatened disturbance is sufficient, the state of crisis therefore does not have to be in existence already, it is sufficient that it is to be reckoned with on any reasonable prognosis." The Court in its search of what is reasonable and fair should logically employ the principle of proportionality in order to verify the suitability of means to ends.

In the context of the control of proportionality, as far as protective measures are concerned, the judge should examine whether the challenged measure is suitable to deal with the situation and if so, whether it is sufficiently limited from the temporal and geographic point of view. Article 226 EEC provides that "... priority shall be given to measures as will least disturb the functioning of the common market." In his conclusions in Italy v Commission (33) Advocate General Langrange referring to the provisions above stated:

"When, in order to avoid certain serious disturbances in a Member State, it appears necessary temporarily to suspend in favour of that State the application of some particular rule of the Treaty, not only should the measures to be taken be strictly in conformity with the objective aimed at, ..., but they should also carefully avoid creating new impediments in Community relations where there is no need for them; in other words, the remedy should correspond exactly with the diagnosis."

This point is illustrated by the decision in Einfuhr-und Vorratsstelle fur Getreide und Fruttermittel (34) where the
Court examined the different measures which could cause the least disturbance to the functioning of the common market. This case concerned two questions posed by the Bundesverwaltungsgericht under Article 177 EEC on the validity of a decision taken by the Commission authorizing Germany to limit intervention purchases for certain categories of cereals. After analysing the various options available the Court concluded that since the first possibility involved measures limiting the freedom of intra-Community trade, such as the prohibition or quota restrictions of imports to Germany or the operation of compensating levies the Commission chose the second solution which scarcely affected the functioning of the common market in cereals. Based on these grounds the Court ruled that:

"In these circumstances, it was open to the Commission to consider that the measures authorized occasioned least disturbance to the functioning of the Common Market, so that the validity of its decision cannot be impugned on this ground."

The Court, therefore, verifies after a detailed consideration of the situation whether the challenged decision is appropriate in regard to the aim which would justify it in fine. The control of the legality of a Community act cannot depend on retrospective considerations of its efficacy. In its decision in Schroeder (35) the Court held:

"Since in the present case it is a question of complex economic measures, which necessarily require a wide discretion as to their expediency, and frequently present an element of uncertainty as to their effects, it suffices that at the moment of their adoption it does not appear that they are obviously inappropriate to contribute to the realization of the desired
In this way the Commission should ensure that its decision authorizing protective measures is in reasonable proportion with the desired end and does not aggravate the difficulties in intra-Community trade. The Court in this case examines whether the measures authorized by the Commission are suitable to adapt the sector of the economy in question to the conditions of the common market and rebalance the state of the economy.

The requirements of Article 109 EEC, authorizing protective measures in case of sudden crisis in balance of payments of a Member State, are similar to those of Article 226 EEC. These measures 'must cause the least possible disturbance in the functioning of the Common Market and must not be wider in scope than strictly necessary' to remedy the sudden difficulties that have arisen. In the case of Article 109 EEC, however, the examination of the merits of the measure taken by a Member State in order to deal with a sudden crisis in the balance of payments leads the Court in an extremely detailed analysis of the factual circumstances. In Commission v French Republic, (36) Advocate General Roemer, after an examination of the weekly and daily figures of the outflow of exchange from the French Central Bank, invited the Court to consider whether "keeping down the preferential rediscount rate (for short-term loans for liquidation abroad) was really intended as a protective measure within the framework of decisions on monetary policy." He finally added that "... there are serious
doubts on the appropriateness of this instrument in overcoming crises in the balance of payments ..." The same approach was adopted by Advocate General de Lamothe in Internationale Handelsgesellschaft in connexion with Article 40 EEC: "... the common organizations of the markets set up to attain the objectives set out in Article 39 may include only those measures required to attain the objectives set out in Article 39."

These statements raise the question whether the Court can revoke a decision of the Commission because it prefers some other measure. In Germany v Commission, (37) Advocate General Gand argued, citing Article 226(3) EEC, that the Commission does not enjoy discretionary power when it comes to establishing the priority among the measures which least disturb the functioning of the Common Market: "... the Commission cannot exercise a discretion in this respect, it possesses a power of appraisal subject to review by the Court." This seems to be paradoxical because judicial control is a posteriori while Commission's decision is a priori discretionary. Nevertheless, the nature of the power enjoyed by the Commission should not depend on the method of judicial control. Theoretically in this area the opposite is true. In Schroeder (38) Advocate General Roemer discussed the point whether "With regard to the question, which of the two measures is most in accord with the principle of proportionality one cannot generally say that the minimum price system is more
drastic in its effect than the restriction of imports." After this remark the Advocate General went on to make a comparative analysis of the advantages and the disadvantages of these two measures. The Court ruled that if one took into account the complex character of the economic forecast necessary for the issue of the disputed measure, it was not apparent that the Commission on ascertaining the prices to be taken into consideration had gone further than could be regarded as necessary for attaining the objects of stabilizing the market and assuring an appropriate standard of living for the agricultural producers.

In this way the Court, by means of the control of the proportionality of a measure, examines the merits of an economic decision; however, it always confines itself in the sphere of the control of the legality since, in this case, an evaluation of the merits of a measure constitutes a part of the assessment of its legality in toto. To the extent that the economic decisions of the administration imply, on the one hand, a 'subjective' evaluation of the factual circumstances, and on the other, an assessment of the decisive nature of the desired end, the combination of these two elements blurs the classic distinction between the control of the legality and that of the merits.

A comparison between Articles 226 EEC and 37 ECSC would be extremely interesting in this respect. The latter also constitutes a protection clause in favour of the Member States,
for cases in which the normal application of the ECSC Treaty adversely affects national economic interests. The similarities of these two provisions must not be pushed too far though, for there are sharp differences between them, the main one being the object of the escape clause. Article 37 ECSC is a provision of a permanent nature, intended to resolve conflicts which may arise between the regular functioning of the Common Market and that part of the general economy of a Member State which does not come under the Treaty. On the other hand, Article 226 EEC is a transitional provision (that is, it may be used only 'during the transitional period') allowing derogations only as far as it is necessary from the rules of the Treaty, so that the least possible damage is done to the establishment of the Common Market. The EEC Treaty supplies all the provisions intended to promote the gradual establishment of the common market. At the same time it provides the permanent rules, generally in the form of principles which should govern the common market. These rules provide the machinery, procedure, time limits, all including numerous derogations many of which are escape clauses, for the attainment of the objectives of the Treaty. In this connexion, Article 226 EEC appears simply as a supplementary escape clause intended to cope, in the two very specific cases for which it provides, with the possible insufficiency of the normal provisions of the Treaty, so that the common market can operate under optimal conditions.
The second difference between Articles 37 ECSC and 226 EEC is connected with the nature of the jurisdiction conferred on the Court. Article 37 ECSC bestows to the Court unlimited jurisdiction involving all the powers necessary for the exercise of the remedies provided for by the provision in question between the essential interests of the Community and the interests of the Member State which sustains fundamental and persistent disturbances in its general economy as a result of the common market in coal and steel. The grant of such wide and exceptional powers of judicial review can be explained by the fact that one of the elements with which the arbitration is concerned, namely the general economy of the Member States which is subject to disturbances, is outside the competences of the Community limited as it is to the market in coal and steel. In the EEC, it is quite different: It is the gradual realization of the general common market which is the task of the Community. This is the main reason why Article 226 EEC does not confer to the Court any exceptional powers. The decision taken by the Commission, whether positive or negative, is subject only to the ordinary application for annulment under Article 173 EEC and the responsibility for the decision belongs entirely to the Commission, which is free to act within the limits of its discretionary powers. Nevertheless, the Court's power of review as to legality thereby takes on a special importance, given the nature of the interests involved whether they are the interests of the State adversely affected, for
which Article 226 EEC is a true protection clause, or the
general interests of the common market which must be protected,
or even interests of another Member State brought into
conflict, by a positive protective measure, with those of the
State adversely affected. The judicial power of review should,
therefore, be exercised according to the normal rules of an
application for annulment.

It is beyond doubt, however, that the Court by way of
Article 37 ECSC verges and quite often penetrates into the area
of merits. Legal writers (39) have always tried to distinguish
between the wide powers of control and evaluation enjoyed by
the Court within the framework of Article 37 ECSC and its more
limited powers elsewhere. It should be noted that this
provision is the only escape clause in both ECSC and EEC
Treaties which confers expressly on to the Court the power to
assess whether the measures authorized by the Commission (High
Authority) to deal with fundamental and persistent disturbances
in a Member State's economy are well founded. The Court
examines whether the disturbances invoked do really exist. It
may also consider, taking into account the existing factual
situation, whether the measures taken by by the High Authority
can be deemed as necessary and appropriate. Should the
occasion arise, the Court may also decide the framework of the
measures which the High Authority must adopt in order to deal
with the situation in question. Considerations of merits
(opporunite) cannot be foreign to such evaluations.
The powers expressly attributed to the Court by Article 37 ECSC are therefore very wide. These exceptionally wide powers are not, however, unlimited. Their limits lie to their exceptional character and in the obligation imposed on the Commission (High Authority) to safeguard the interests of the Community. As the Court stated in Niederrheinische Bergwerks (40) the measures taken under Article 37 ECSC by the High Authority must be suitable and necessary and should therefore constitute a proper remedy to the disturbed situation while at the same time safeguarding the essential interests of the Community. Moreover a recourse to plenary jurisdiction by way of Article 37 ECSC "... necessitates examination of whether, in view of this situation, the measures adopted might be considered to be necessary and appropriate." (41) The word 'might' and the terms 'necessary' and 'appropriate' should be highlighted because they imply that the Court even when it exercises plenary jurisdiction does not have in mind anything more than an objective and external control of the discretionary power of the High Authority. Only the potential agreement between an act of the High Authority and the legitimate ends of this act is the Court's concern. It seems that the Court will not interfere with the contents of the act when this agreement is beyond doubt. Thus the judicial control retains its objective character even in cases involving subjective evaluations.
III). - Conclusions.

Following the time-honoured national traditions, the Community judge is a judge of the legality of the acts emanating from Community Institutions. To the extent, however, that legality is opposed to illegality and 'opportunité' to 'inopportunité', it must be admitted that the judge in controlling the legality of an act., he/she may be obliged in certain cases to control its merits as well, when the legality of the act in question depends on its expediency (opportunité). When the Court assesses the validity of the reasoning of an act it goes beyond the point of knowing whether the facts which justify these acts are materially exact; in this case it evaluates their intrinsic merits. That is, it is checked whether the decisions taken in application of objective norms (normes-objectifs) are based on a correct interpretation of the Treaty and whether they are founded on an accurate (exact) evaluation of the economic circumstances. Thus the Court does not only assess the intrinsic merits of the facts but it is led de facto to substitute it own interpretation or analysis of economic data for that of the executive. In this way in the area of the notion of the 'State of Emergency' or 'necessity' the Court judges whether the factual circumstances are of sufficient gravity to justify the measure taken. If they do, then the decision taken by the executive will be appropriate (opportune), if they do not, the decision will be invalid. On the contrary, in the examination of the (dis)proportionality of
an administrative decision, the judge crosses a threshold: He/she must directly (in the case of Article 37 ECSC) or indirectly (Article 226 EEC) decide which is the most appropriate measure. In this case he/she considers the expediency (opportunite) of the measure itself in connexion with the desired end. The Court therefore controls the merits of the decision by analysing its functional value (valeur fonctionnelle).

Nevertheless, 'juger l' administration n'est pas necessairement administrer.' It would have been so, had the Court not only substituted its own power of evaluation for that of the administration, but also decided itself on the measures to be taken (Article 37(4) ECSC). Yet the last case is exceptional, and moreover the annulment of an executive measure because it lacks legal basis or valid functional value (valeur fonctionnelle) is most certainly a judicial not an administrative function. As Glasier has put it and in words which are worth quoting in full:

"En effet, la legalite d'un act administratif depend de la conjonction reguliere des regles generales qui definissent les pouvoirs de l' administration et de la situation de fait particuliere a laquelle, en l' espece, ces pouvoirs s' appliquent. En l' occurence, dans le resume ou un acte administratif est legal s'il est opportun, ou necessaire ou encore pris avec 'a propos', le juge en verifiant donc de l' opportunit de l' acte ne quitte pas le controle de la legalite." (42)
Endnotes.

1). Asso, p. 33

2). Supra no 1, p. 35.

3). For the meaning of 'originating' see EC Council Regulation 802/68: Articles 4 & 5. However, certain products have their own rules: See e.g Commission Regulation 57/70 (Essential spare parts for cars).

4). See EEC Treaty Articles 9(2) and 10(1).

5). It has long been recognized, though, that such recommendations are in fact valueless and it seems to be the practice that the Commission authorizes measures without first issuing recommendations. Oliver pp 270-1

6). Article 115 (1) EEC.

7). The technical expression for such a pattern of indirect imports intended to by-pass quotas imposed by the country of final destination is deflection of trade.

8). See generally Gormley, Prohibiting Restrictions on Trade within the EEC, Amsterdam 1985, pp 240-4 and literature cited there.

8a). See Timetable part of COM (85)310 final, p. 6.

9). Case 242/82, Tezi, [1987]3 CMLR 64.

10). The Commission's authorization policies under Article 115 EEC have been subject of frequent written questions in the European Parliament.

10a). Oliver, p. 206.


15). Compare with Article 226(3) EEC.

16). Reich, (1978) BTDE 33 at 44.

17). Case 41/76, supra no 14.


19). Case 41/76, supra no 14 at p. 1938.

20). Ibid.


28). Oliver, p. 266.


31). Case 37/70, supra no 28 at p. 42.

32). Supra no 18.

33). Supra 27a.

34). Case 72/72, supra no 28.


38). Supra no 35.


40). Supra no 29.


CONCLUSIONS.

Proportionality, as a recognized general principle of law, originated in Germany and has more recently been adopted in France and in the law of the European Communities.

Generally, the thinking on fundamental rights in all Member States has been largely shaped by the historical development of fundamental rights and by an understanding of them as rights protecting the individual against undue encroachment by the State, and notably by the executive. The more the rights of the individual are likely to conflict with the interests of the community, without any unequivocal provision for the former to prevail, the greater the discretion to elaborate entrusted to the legislature whether on the basis of express reservation provided for by the catalogue of fundamental rights or under a general power of the legislature to draw the line in a manner exempt from judicial control between the personal sphere of the individual and the interests of the community. This is, for instance, true of the protection of property, where no legal system can dispense with some provision for expropriation, and the freedom of trade or occupation, which cannot have the same purpose for every occupation, and which is closely linked to the economy in the State in question. In this context proportionality has a special role to fulfil:

"Certes, c'est au nom de ce principe que la doctrine et la jurisprudence s'efforcent de préciser le critère du raisonnable dans l'action des pouvoirs publics, qu'elles cherchent aussi, pour protéger les droits les plus élémentaires..."
German administrative law requires administrative acts to comply with the principle of Verhaltnismassigkeit. The principle originated in the late nineteenth century when it was invoked by the Prussian Supreme Administrative Court to check the discretionary powers of police authorities. Since then the principle has acquired a constitutional status and applies to legislative as well as judicial acts. In the Federal Republic, the courts have the right and the duty to review the manner in which public authority has observed the Constitution, including the fundamental rights. It follows that in judicial practice, especially that of administrative courts, the basic rights and certain further constitutional maxims play an unusually important role. Individual basic rights, including the principle of equality and 'unwritten' constitutional principles such as the requirements of the rule of law, the principle of proportionality, etc, frequently govern the manner in which the courts conduct their review. Whenever the courts hold these rights and principles to have been breached they correct the executive act in question.

By virtue of their jurisdiction outlined above, the German courts, led by the BVerfGE, have evolved a body of case-law relating to all the important fundamental rights and fundamental constitutional principles, which imposes
constraints on all other parts of State authority and which must be respected by them. In this way judgements on, for instance, the freedom of trade or occupation, the right of property, the principle of equality or the requirement of the rule of law, have led to extremely subtle distinctions and differentiations, intended to protect the sphere of the individual, without at the same time disregarding unduly the necessary interests of the community as a whole. Verhältnismassigkeit is regarded as a consequence of the Rechtsstaat, under which state power may only encroach upon individual freedom to the extent that it is indispensable for the protection of the public interest. Two particular Articles of the Grundgesetz are commonly cited as authority for the principle of Verhältnismassigkeit, Article 2(1) (the right of liberty) and Article 12 (the right to choose freely trade, occupation or profession).

The principle of Verhältnismassigkeit contains three interconnected and overlapping conditions, each of which must be satisfied for the validity of an administrative action. These conditions are suitability, necessity and proportionality stricto sensu. First, the principle of suitability requires authorities to employ means which are appropriate to the accomplishment of a given law, and which are not in themselves incapable of implementation or unlawful. Second, the principle of necessity requires that the least harmful of more than one available means be adopted to achieve a particular objective.
Thus German law imposes the obligation on public bodies to pursue those regulatory measures which cause the minimum injury to an individual or the community. Third, as far as the principle of proportionality stricto sensu is concerned the courts engage in a balancing exercise between the injury to individual rights caused by an administrative measure and the corresponding gain to the community. The German courts require proof of manifest or clear disproportionality before they will substitute their own opinion for the opinion of the legislator or administrator on the merits of the weight to be accorded to either side of the equation. Thus two typical patterns in which the principle of Verhaltnismassigkeit is applied in German law can be distinguished. Firstly, there has to be a relationship considered as reasonable, adequate or non excessive between the end aimed by the State action and the means used to achieve the desired end. Secondly, the relationship between alternative courses of action and resulting burdens for individuals must be such that the least restrictive measure has to adopted if it fulfils the same purposes.

Learned writers in France appear to consider the setting-off of opposing interests according to the principle of proportionality as constituting something of a guideline in the case-law of the Conseil d'Etat. (2) The interest of the State in exercising its authority to intervene is weighted against the value of the freedom thereby affected and the extent of the damage inflicted. The severity of the intervention must bear
some reasonable relation to the interest of the State which is thereby to be secured. No intervention may therefore affect the substance of the freedom in question. This covers 'absolute, general' prohibitions (e.g. the prohibition upon persons suffering from tuberculosis from entering tourist areas) (3) Moreover, any interference with freedoms must be based on a careful weighing-up of the actual circumstances of the case. In this weighing-up an important consideration is the value of the freedom in question. The extension of the powers of control will thus depend on the value of the freedom opposing such an extension.

The Conseil d'Etat in this respect is guided by the intentions of the legislature. The possible limitations will vary depending on whether the legislature has employed a greater or lesser degree of care in order to guarantee the various basic rights. Particularly stressed is the value of the 'liberte fondamentale', which chiefly comprises the rights attaching to the individual's personal sphere, such as the freedom of the person, the inviolability of the home and the right of property. In addition the 'principes fondamentaux reconnus par les lois de la republique' usually carry particular weight. These include, inter alia, the freedom of the press, of assembly, of association and of religion. It is true that no systematic approach in relation to the content of, and the limitations upon, the 'liberte fondamentale' has been evolved. Whether the protection of freedom or the interests of
the State should prevail is decided by the Conseil d' Etat by weighing-up in each individual case the basic freedoms against the 'interets de l' ordre et de la securite'.

Within the ambit of the European Communities the initial question is different. At present, and for the foreseeable future, Community authority can only to a limited extent be compared to national authority. Of the classical basic rights, few seem greatly to be threatened by Community organs. The priority is to secure those basic rights which could be particularly vulnerable to attack by Community authority. Protection is primarily needed for those basic rights which secure the individual's freedom of economic development; in addition to the principle of equality, there is, for instance the protection of property, the freedom of trade or occupation and the freedom of movement; moreover requirements of the rule of law such as that of legal certainty, or the principles of proportionality and of protection of legitimate expectation, need to be safeguarded, although it is extremely difficult to frame these principles in the form of clear-cut basic rights.

Within the framework of European Community Law the principle of proportionality has taken to mean that the authorities, when restricting the freedom of traders or imposing requirements on them, may not do so to an extent which is manifestly disproportionate to what is required, in the light of the results to be attained. However, the tenor of the Court's case-law on the matter has been that an injury
unavoidably caused to private interests in the course of the regulation of economic activities in the public interest will not constitute an infringement of the Treaty, provided that the Institutions have acted with due care and have observed the principle of proportionality. The principle of proportionality in some situations appear to reflect a broader notion, still to be fully defined, that of freedom of commercial activity—a freedom which accords with the mercantilistic philosophy of the EEC Treaty and is found entrenched in the Grundgesetz. Under this freedom can be grouped, as well as the principle of proportionality: the freedom to pursue a trade or profession, the freedom from unfair competition, and a general freedom to act as one wishes unless the law prohibits the act in question.

(4) The freedom of commercial activity is of prime importance in a Community whose object is economic integration transcending national frontiers. In the wide variety of possible activities by way of trade or occupation, freedom of commercial activity occupies an important position. By this right we mean the freedom to pursue on one's own account the business of manufacturing, supplying services, or of buying and selling with the objects of participating in economic life and achieving profits.

It is beyond doubt that the extent of State intervention and regulation varies from State to State, but that no State refrains from intervening in many different ways in the economic process and in the freedom of economic and commercial
activity. The right to choose freely and exercise a trade or occupation, especially in the commercial field, can be considered a common feature of the legal systems of the Member States of the Community. The EEC Treaty also proceeds on the assumption that, inter alia, in its provision relating to freedom of movement and establishment, that the individual is free to choose and determine his occupation largely on his own responsibility. Any comprehensive regulation of commercial or professional life would moreover be incompatible with any legal system based on liberties, and would go for the heart of personal development.

It is inevitable that the national legislature as well as the Community authority will, to the extent of their competence in that behalf, intervene in the freedom of commercial activity for regulatory purposes. This is happening continuously, as a glance at the national official gazettes and the Official Journal of the European Communities will show. These interventions occur at different levels and with varying degrees of intensity. In many States, State monopolies and nationalizations remove important areas from the ambit of the individual's right to choose freely an economic activity. In all States, there are certain occupations and activities which are reserved to persons in the service of the State. Many activities may only be taken up by government authority or permission. In the exercise of most trades or occupations various aspects of public interest must be kept in mind.
The many forms of State intervention in the freedom of commercial activity are governed by different motives and aims. Sometimes the intervention is prompted -as in the case with nationalization- by general ideas of a just and democratic economic system. On other occasions the factors governing the extent and purport of the restrictions placed on the freedom of commercial activity are public safety and order, the protection of particular occupational groups, the protection of the immediate environment and of the environment generally. These are different concerns which can take various forms, but whose basic justification or reasonableness can hardly be disputed, and they cannot be set out in a catalogue of basic rights as limitations on the freedom of commercial activity in a manner which is comprehensive and at the same time sufficiently precise. Member States and Community organs alike should therefore be permitted to make rules to the extent of their competence at any given time, as to the limitation on the freedom of trade or occupation requisite for the life of the Community.

Given that economic life can take so many different shapes and that society makes a variety of demands, the freedom of commercial activity can hardly be constitutionally guaranteed without allowing to the legislator by means of explicit or implicit reservations a measure of discretion in the elaboration by statute of these rights -going as far the power to prohibit individual activities or set up State
monopolies and nationalize parts of the economy. The conditions for lawful intervention can hardly be particularized in the catalogue of basic rights, and certain generalized provisions would be unavoidable. It seems all the more important therefore that some judicial authority should have the power to review the acts of the legislature, and of the executive, and, if necessary, to correct them, if the basic right is not to be left entirely at the mercy of the legislature.

In evolving general principles of law the European Court has followed the example of national courts. The case law of the French Conseil d'Etat has, over the course of its long development, fashioned the most important principles to be observed by an administration which is subject to statutes and the law. In a similar way, although in a different context and in relation to a Community authority holding considerably less powers than a State, the European Court has developed appropriate legal principles; it can be assumed that the experience of individual judges derived from their own legal systems has played an important part in this. The proximity of these decided cases to the problem of basic rights is brought out by another comparison. The BVerfGE, relying loosely on a small number of references in the text of the Grundgesetz, has developed a whole series of constitutional requirements -such as the requirement of legal certainty, the principles of legitimate expectations and proportionality- and has brought
them within the protection of the Constitutional Court under the procedure for objections on grounds of constitutionality. The relevant judgements of the European Court do not refer expressly, or only do so very occasionally, to the requirement imposed by the rule of law, of upholding the rights of the individual or fundamental rights; but in fact these are limitations laid upon Community authority primarily in the interests of citizens of the Common Market.

From the economic point of view, as it has been mentioned in the introduction, the principle of proportionality as conceived in Community law embodies two concepts fundamental to the mixed-economy systems which are democratic in their inspiration: the principle that the intervention of the authorities must be subsidiary in nature and that there must be a connexion between an intervention threshold and the safeguard of individual liberties. Articles 5 and 57 of the ECSC Treaty reflect these ideas. Article 5 insofar as it provides that the Community is to carry out its task 'with a limited measure of intervention' and Article 57 insofar as it provides that in the sphere of production the Commission is to give preference to the indirect means of action at its disposal. It may therefore take direct intervention measures only if indirect measures prove insufficient. Under these circumstances the principle of proportionality may be considered parallel to the doctrine of the 'less restrictive alternative' applied by the American courts to assess the
compatibility of state legislation with the United States Constitution: the question there too is whether the State interest, however legitimate, could be achieved by a measure less damaging to free trade than the one adopted.

It has been submitted that if proportionality were not to be observed:

"The responded authority would convert a free market economy into a planned economy and thus one governed by compulsion." (5)

Thus proportionality is a principle according to which public authorities shall take no action the overall costs of which are excessive in relation to its overall benefits. It is also a standard for the exercise of discretion in public law. The word 'excessive' is sometimes used, though it usually refers, not to the administrative measure to be taken, but rather to the situation that measure is meant to address. There is an ambiguity latent in the term excessive, and therefore in the term proportional. On the one hand, costs may be thought of as excessive in relation to benefits whenever they exceed them; indeed some scholars who use the word seem to understand it in just this way. (6) On the other hand, the term excessive may be reserved for action whose benefits exceed its costs by a considerable margin or, to put it differently, "too far" outweigh them. (7) The distinction is an important one, but not because the action that an administrative agency takes should differ greatly depending on the definition of excessive or proportional that it favours; presumably it will
always prefer such action as seems in its understanding of the law and the facts, to be optimal. Distinguishing between the two meanings is important because it raises an issue that looms large in administrative law, the question of the reach of judicial review: when, if ever, should a judge set aside the executive's course of action because he would have chosen a different one.

If the courts see it as their function to ensure proportionality in its first, more literal sense, they may find themselves simply substituting their policy preferences for those of the executive, a practice which lies beyond what is generally regarded as their proper sphere of activity. The second view, on the other hand, might constitute an invitation to administrative agencies to take action the advantages of which are outweighed, though not too far outweighed, by its disadvantages. This interpretation also introduces the uncertainties of what "too far" generally means and how far is too far in a specific case. Thus, whichever way one chooses to read the word excessive, one would seem to incur significant risks associated with the problem of judicial review. The choice may also in a sense determine whose cost-benefit analysis, and therefore whose views on the wisdom and desirability of administrative action, shall govern. Logically, it is possible for courts to insist on rationality in administrative action without telling public officials what to do. The French courts seem to have found a way out of this
apparent dilemma. In certain areas of the law, they profess to decide for themselves through judicial review whether the disadvantages of a measure taken by an official outweigh its advantages, and they annul the measure if this is the case. (8) But they do not decide for the official which among the several measures whose disadvantages do not exceed its advantages he must take. (9)

The obvious truth is that the courts can still all too easily pass the invisible frontier between criticizing the (dis)proportionality of administrative action and criticizing its wisdom. Against this background, such a doctrine might run something like this: the courts should insist, as a matter of law, that administrative officials take no action without first determining that its costs do not outweigh its benefits, but the courts must accept this determination as long as it is a reasonable one. (10) The probable effect of a proportionality doctrine of this character would be to sustain those governmental decisions that rest on cost-benefit analysis with which the courts do not violently disagree. A measure which violates the principle of proportionality, not by being excessive, but by being defective, inadequate to achieve the desired goal will not be annulled by the judge even though it might be detrimental to the general in the same way as a disproportionate act by its excessive character. The judge is not prepared to impose the respect of the norms of action that the latter did not have the courage to impose on itself nor to
review the excessive timidity of administrative action no matter how prejudicial to the public interest the latter is.

The difference between the loose notion of proportionality found in EEC law and the stricter one professed in France and Germany can be exaggerated. As a practical matter, French (11) and German (12) judges are still reluctant to upset an administrative decision when they find the scales tipping only slightly in the other direction. To the extent -which is always difficult to establish- that judges overlook modest differences of opinion on the proportionality question, they are following something of a reasonableness approach, whatever else they may claim to be doing. On the other hand, there are many cases in which the European Court seems to have put aside its proclaimed difference to the judgement of the Institutions (that is, the Council and the Commission). In short it is difficult to escape the conclusion that in practice judges frequently find themselves somewhere between the two positions that have been described.

Oliver Wendell Holmes once observed that "no civilized government sacrifices the citizen more than it can help." (13) Even without laying down quite so broad a rule, legislatures, courts and agencies themselves can use the principle of proportionality to enjoin the government from compromising important interests any further than is strictly necessary to attain its legitimate purposes. Treating administrative action as excessive when it goes beyond such a minimum would give the
principle of proportionality precisely that effect, as certain French and German court decisions show. (14) The usefulness of the 'proportionality' test lies in the fact that it gives the courts maximum flexibility in reviewing administrative discretion within acceptable limits. Indeed these advantages have been summarized by Professor Jowell and A. Lester QC as follows:

"... proportionality is designed to guide the exercise of discretionary powers, and allows the courts to interfere with the substance of official decisions as well as the procedures by which they are reached. However it by no means releases the judges from their proper reserve in interfering with decisions on the ground of policy, or assessment of facts or merits. Indeed, because proportionality advances a relatively specific principle ... it focuses ... clearly on the precise conduct it seeks to prevent. By concentrating on the specific it is more effective in excluding general considerations based on policy rather than principle." (15)

Since courts have ways of finding latitude in even the most rigid of tests, it may be that a general principle of law such as proportionality is ultimately the most honest and most reliable that it might be devised.
Endnotes.

1). Delperee, F., Le principe de proportionnalite en droit public, 10th Congress of FIDE, Belgian Report, p. 503.


3). References in Burdeau, op.cit, p. 48.

4). All these principles were invoked together in cases 133-136/85, Rau, [1987] ECR 2287 and 249/85, ALBAKO, [1987] ECR 2354.


14). See e.g, Benjamin, [1933] Lebon 541.
BIBLIOGRAPHY.

INTRODUCTION.


B). Articles.


C). Speeches.


CHAPTER I.

A). BOOKS.


B). Articles.


15). Kornprobst B, L'erreur manifeste, D 1965 Chr. 121.


17). Labetoulle and Cabanes, Ministre de l'Equipement et du logement c Federation de defense des personnes concernées par le projet actuellement denomme Ville nouvelle Est, AJDA 1971, 404.


22). Moderne F, L' extension du controle juridictionnel a la correlation faute disciplinaire - mesure disciplinaire dans le droit de la fonction publique, Rev. Adm. 1978,634


26). Waline M, L' appreciation, par le juge administratif, de l' utilite d' un projet, RDP 1972, 454.

CHAPTER II.


II). Articles.


2). Feld, W., The German Administrative Courts, 36 Tulane L. R., 495.


8). Pakuscher, E., Administrative Law in Germany - Citizen v State, 16 AJCL m309 (1968-69).
12). Stein, T., Der Grunsatz der Verhaltnismassigkeit.

CHAPTER III.


II). Articles.
2). Apollis, G., Le principe de l'egalite de traitement en droit economique communautaire, 1980 RMC 72 and 140.
6). Lorenz, W, General Principles of Law: Their Elaboration in the Court of Justice of the European Communities, 13 AJCL 1964, p.1


CHAPTER IV.


B). Articles and Lectures.

1). Asso, B, Le controle de l' opportunite de la decision economique devant la Cour europeenne de justice, RTDE 1976, 21 and 177.


CHAPTER V.


B). Articles.


CHAPTER VI.


3). Gormley, Prohibiting Restrictions on Trade within the EEC, Amsterdam 1985.

B) Articles.
4). Hager, Protectionism and Autonomy: How to Preserve Free Trade in Europe, 58 International Affairs 413.

CHAPTER VII.


1). Bebr,G, Development of Judicial Control of the European Communities, Amsterdam 1981.


B). Articles.

1). Asso, B, Le controle de l' opportunite de la decision economique devant de la Cour europeenne de justice, RTDE 1976, pp 21 and 177.


3). Savy, R, Le controle juridictionnel de la legalite des decisions economiques de l' administration, AJDA 1972, p. 3.