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ECJ Review of Member State Measures for Compliance with Fundamental Rights

John J. Barceló III*

Introduction

This essay explores the avenues through which a European-level system of fundamental rights might be effectively enforced against EU Member State measures. The parallel concept in the U.S. occurred when, starting in 1938, the U.S. Supreme Court began ruling that different distinct guarantees in the Federal Bill of Rights of the U.S. Constitution controlled State government measures. In the EU, the European Court of Justice (ECJ) could conceivably follow a similar line of development within the EU system, or, on the other hand, the European Court for Human Rights (ECtHR) could play that role. This essay explores these options and suggests that either one or the other is likely to emerge at some point in the future in a role equivalent to the U.S. Supreme Court as the guardian of fundamental rights for all EU citizens, articulated and enforced (even against Member State measures) at the European level.

Fundamental Rights as General Principles of EU Law

The development of fundamental rights law within the EU legal system¹ has followed a captivating trajectory. The imperatives that motivated the European Court of Justice (ECJ) to discover an unwritten system of fundamental rights law embedded in the general principles of EU law are well known. Once the ECJ had ruled that parts of the EC Treaty, to some extent Directives, and of course Regulations had direct effect and were supreme within the Member State judicial orders, it became necessary for the ECJ to find the power to review the EU's secondary law measures for conformity with fundamental rights law. Otherwise the Member States would be asked to subordinate their national legal rules to superior EU law, untested and uncontrolled by fundamental rights principles. Either the ECJ would have to perform such a review or the Member State constitutional courts would do so and would thus destroy EU law uniformity and harmony.

As is well known the ECJ took the first option and gave itself the role of a judicial review court controlling EU secondary law for conformity with fundamental rights law. The ECJ discovered the content of that law in general principles of EU law deriving from the constitutional traditions of the Member States and the European Convention for the Protection of

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¹ Throughout this essay I will use EU law and EC law interchangeably and without distinction to refer to the law that derives from the European Community Treaty and the Treaty on European Union.

Human Rights and Fundamental Freedoms (ECHR). This development took a logical step forward when the ECJ decided that Member State measures enacted to implement EU Directives, or otherwise compelled by EU law, also could be reviewed by the ECJ for conformity with fundamental rights.² The step was logical because in complying with their legal obligation to implement EU Directives or other measures, the Member State legislatures or officials were in essence functioning merely as agents of the EU legal order, forced to act by the command of EU law.

The *ERT* Case and Its Potential

In the momentous *ERT* decision in 1991,³ however, the ECJ took a step that was not truly compelled by the imperatives of a supreme and harmonious legal order guaranteeing an integrated internal market. Instead it was a step in the direction of a more broadly conceived political integration movement that held out the potential of a common fundamental rights order at the EU level binding on all Member States and enforced by directly effective rulings of the ECJ.

The theory of the *ERT* judgment was—on its own facts—a striking decision, but its potential was (and remains) even more striking. The theory involves two distinct analytical stages. The first, “triggering,” stage arises whenever a Member State measure in principle infringes one of the four market freedoms (goods, services, persons, capital). If a complainant challenges such a Member State measure, then the Member State has the burden of showing that its measure is nevertheless justified under the ECJ’s proportionality analysis. That analysis aims at ensuring that the Member State measure in question serves a legitimate public regulatory purpose and that it does not overly burden intra-Community commerce.⁴ The second analytical stage, which then follows, is truly innovative. The *ERT* decision holds that the Member State must also show that its commerce burdening measure is consistent with EU fundamental rights law. Why? Because that law is part of the general principles of EU law and more or less gets carried along on the “coat-tails” of the proportionality analysis—a bold line of reasoning. The ECJ could easily have limited its analysis to applying the free-market-preserving concepts of proportionality and left any issues of fundamental rights review to Member State courts (or ultimately, the Strasbourg Court). But instead it forged ahead into fundamental rights territory.

A moment’s reflection also reveals the breathtaking potential of the *ERT* decision.⁵ The case arose in the context of an “economic” dispute concerning a Greek measure granting a radio and TV broadcast monopoly to a single firm. Thus, it might at first seem to have little importance outside of a limited range of economic regulatory measures. Anyone familiar with the way the U.S. Supreme Court greatly expanded the reach of federal legislative power by finding even the slightest and most indirect effect on interstate commerce to suffice (under the

² See Case C-5/88, *Wachauf v. Germany*, [1989] ECR 2609.

³ Case C-260/89, *Elliniki Radiophonia Tileorassi AE (ERT) v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas*, [1991] ECR I-2925.

⁴ See generally, PAUL CRAIG & GRAINNE DE BURCA, *EU LAW—TEXT, CASES, AND MATERIALS* 666-722 (4th ed. 2008) (Chapter 19: Free Movement of Goods: Quantitative Restrictions).

⁵ This very point was made by Judge Manicini of the ECJ shortly after the ECJ handed down the *ERT* decision. See G. F. Mancini & D. Keeling, *From CILFIT to ERT: the Constitutional Challenge Facing the European Court*, 11 *YRBK EUROPEAN L.* 1, 12 (1992).

federal power to regulate interstate commerce)⁶ would nevertheless immediately see the potential. For example, any infringement of the fundamental rights of a citizen from a different Member State could be seen as discouraging travel (a worker or service freedom) to the infringing Member State or as burdening the exercise of other economic freedoms that would require presence in the infringing Member State. Indeed, although the logic is even more indirect, the same could be said of a Member State measure that infringed the fundamental rights of anyone present in the infringing Member State, including its own citizens, since that too could discourage other Member State citizens from exercising their “acquis communautaire” rights within that Member State.

Parallel U.S. Law—Supreme Court Incorporation of the Federal Bill of Rights into the 14th Amendment Due Process Clause to Control State Measures

There is a parallel development in U.S. constitutional history that may be instructive. In the early part of the 20th century the U.S. Supreme Court enforced the Federal Bill of Rights (the first ten amendments of the U.S. Constitution enacted along with the Constitution itself in 1789) against federal government measures but not against State measures.⁷ Each State had its own constitution and a system of State courts that enforced that State’s system of fundamental rights. A federal-level system for protecting fundamental rights, however, was acutely lacking.

The Supreme Court gradually altered that system of limited federal-level fundamental rights protection through a series of decisions starting in 1938 and still continuing to this day.⁸ On a case by case basis the Court has found that one after another of the Federal Bill of Rights protections must be applied against the States through incorporation into the Due Process Clause of the 14th Amendment⁹ enacted at the end of the U.S. Civil War. The Due Process Clause provides that “[no] State shall deny any person life, liberty, or property, without Due Process of Law”¹⁰ Although “Due Process” evokes notions of procedural fairness, the Court found in it a substantive meaning. The Court has ruled that the term includes those fundamental rights that are of “the very essence of a scheme of ordered liberty”¹¹ and that are “fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.”¹² This interpretation allowed the Court subsequently to rule that certain of the Federal Bill of Rights applied against State measures because these rights constituted “fundamental principles of liberty and justice.”

⁶ See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 259 (Aspen Publishers 3d ed. 2006) (“In *Hodel v. Indiana*, in 1981, the Court stated: ‘A court may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce’”).

⁷ See *id.* at 499.

⁸ See *id.* at 504-05.

⁹ See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 772 (Foundation Press 2d ed. 1988) (noting *United States v. Carolene Products Co.*, 204 U.S. 144 (1938) as the beginning of the Supreme Court’s explicit incorporation of federal guarantees through the Due Process Clause).

¹⁰ U.S. CONST. amend. XIV, § 1.

¹¹ *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

¹² *Hebert v. Louisiana*, 272 U.S. 312, 316 (1926).

Although the line of interpretation needed to achieve a similar result in the EU requires perhaps more creativity, it has nevertheless beckoned to more than one Advocate General—as we will see below. The equivalent parallel in the U.S. Constitutional structure would have called for the U.S. Supreme Court to apply the Federal Bill of Rights against State measures that in principle burdened interstate commerce and thus that had to pass muster under what in the U.S. is called the “dormant commerce clause” analysis—a balancing test closely paralleling the EU proportionality concept.¹³ Along with the dormant commerce clause analysis, the Supreme Court could have slipped in Federal Bill of Rights scrutiny as well. But of course the 14th Amendment Due Process Clause was a more direct route to that end—at least as long as one is not daunted by giving a substantive meaning to language (“Due Process”) that carries a procedural connotation.

ECJ Refusal to Extend *ERT*

The ECJ of course has no 14th Amendment at its disposal. On the other hand the *ERT* case lays the necessary foundation for the ECJ to transform itself into a constitutional court enforcing EU fundamental rights protections against Member State measures—at least if the ECJ were willing to embark on a series of bold decisions extending the reach of the *ERT* holding. So far it has been unwilling to do so.

Three years after *ERT*, Advocate General Jacobs advanced an extraordinarily broad view of the ECJ’s role in reviewing Member State measures for conformity with fundamental rights. In *Konstantinidis*,¹⁴ a Greek national who worked in Germany, claimed that official mistranslation of his name had violated his worker freedom (because he had moved from Greece to Germany to work) and his fundamental right of personal identity. Advocate General Jacobs would have ruled in his favor, among other reasons, on the ground that every EU worker who moves to another Member State for employment is entitled to the full protection of EU fundamental rights—conceived of as a “common code of fundamental values” applying within the EU.¹⁵ Note that this theory would still have left uncovered by the EU fundamental rights umbrella EU citizens working in their home country—a gap that a later decision could have filled.¹⁶ In fact, however, the ECJ was unwilling to embrace AG Jacobs’ theory and decided the case without mentioning it.

Later in *Kremzow*¹⁷ the ECJ was more explicit in rejecting an expanded view of the *ERT* theory. In *Kremzow* a former Austrian judge, serving a criminal sentence, sought ECJ scrutiny of Austrian criminal procedure for breach of EU fundamental rights. He argued that because he was unlawfully imprisoned in Austria he could not exercise his freedom to travel to another Member State. The ECJ ruled that the defendant’s hypothetical right to exercise an EU

¹³ See CHEMERINSKY, *supra* note 6, at 428–29 (explaining that dormant commerce clause analysis involves balancing State interests in the subject matter being regulated against national interests, including the burden the State law imposes on interstate commerce).

¹⁴ Case C-168/91, *Konstantinidis v. Stadt Altersteig, et al*, [1993] ECR I-1191.

¹⁵ In a later publication, AG Jacobs, no longer speaking as an Advocate General, seems to take a much more limited view of the force and effect of the *ERT* theory. See F. Jacobs, *Human Rights in the European Union: The Role of the Court of Justice*, 26 EUROPEAN L. REV. 331 (2001).

¹⁶ See *infra* fn. 18.

¹⁷ Case C-299/95, *Kremzov v. Austria*, [1997] ECR I-2629.

economic freedom was too speculative to justify fundamental rights review of Member State criminal procedure.¹⁸

Nevertheless, the ECJ continues to cite the *ERT* case and to apply its theory in cases that arguably go beyond the facts of *ERT* itself, though perhaps not as far as *Kremzov*.¹⁹ For example in *Carpenter*,²⁰ the ECJ held that the UK could not deport the non-EU national wife of a UK husband, who resided in the UK but exercised his EU freedom to provide services by traveling to other Member States to sell advertisements in UK journals. The first stage “triggering” link, bringing the case within the “scope of Community law,” was the UK measure’s infringement of the husband’s freedom to provide services throughout the EU by denying him his wife’s company on such trips. The ECJ did not limit itself to proportionality analysis, however, but instead explicitly ruled—at what I have called a “second stage” analysis—that the UK measure was inconsistent with the fundamental right of respect for family life within the meaning of Article 8 of the ECHR.

Recently in *Europa 7*²¹ Advocate General Poiares Maduro revisited the *ERT* issue and proposed another theory for enlarging its reach, though not with the full exuberance of AG Jacobs’ theory in *Konstantinidis*. The case involved a complaint against Italian administrative authorities brought by an Italian broadcast company that had won national broadcasting rights in a public tender procedure. Despite the public tender results, the Italian authorities failed to allocate broadcasting frequencies to the successful Italian company because the number of frequencies was limited and the Italian authorities allowed previous holders of the frequencies (who had not succeeded in the public tender proceeding) to continue to use them. One claim was that the action of the Italian authorities violated the EU fundamental right of freedom of expression (in part because the broadcasters who continued to use the disputed frequencies held a large number of broadcasting outlets in Italy). AG Maduro noted AG Jacobs’ expansive jurisdictional theory in *Konstantinidis* and, without urging that it be adopted by the Court, suggested a refinement of it by drawing on Articles 6 and 7 of the Treaty of European Union (TEU). Since the adoption of the Amsterdam Treaty, Article 6 of the TEU has provided as follows:

¹⁸ The ECJ recently cited *Kremzov* with approval in *Vajnai*, a case in which the ECJ held that it had no jurisdiction to decide whether Hungary’s law penalizing the wearing of a five-pointed red star, designated by the law as a totalitarian symbol, violated EU fundamental rights when applied to a Hungarian national. *See* Case C-328/04, Attila Vajnai, [2005] ECR I 8577 (ruling that the Hungarian provisions fell outside the scope of Community law). The Hungarian court making the reference to the ECJ noted that the same symbol that Hungarian law penalized was allowed and in fact used by workers’ parties in other Member States. Presumably had a worker from one of those other Member States been penalized for wearing the star symbol in Hungary, the case would have fallen within the *ERT* pattern. Would it have taken such a large interpretive leap for the ECJ to have ruled (or for it to rule in the future) that Hungary’s punishing a Hungarian national for wearing a symbol used by workers in other Member States would discourage those workers from moving to Hungary? The ECJ has also employed another line of reasoning in cases based on facts centered within a single Member State. In such cases it has reasoned that whether an EU law right would arise in a cross-border context could still be relevant in a non-cross-border context, because a Member State’s own law might insist that its own nationals be treated no less favorably than nationals of other Member States. *See* Joined Cases C-94/04 and C-202/04, Cipolla and Others, [2006] ECR I- 11421. *See also* Advocate General Maduro’s opinion in Case C-380/05, *Europa 7*, [2008] ECR I-349 at paras. 29-30.

¹⁹ *See* CRAIG & DE BURCA, *supra* note 4, at 396-401.

²⁰ Case C-60/00, *Carpenter v. Home Secretary*, [2002] ECR I-6279.

²¹ Case C-380/05, *Centro Europa 7 Srl v. Ministero della Comunicazioni e Autorita per le Garanzie nelle Comunicazioni*, [2008] ECR I-349.

“(1) The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.

“(2) The Union shall respect fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms . . . and as they result from the constitutional traditions common to the Member States, as general principles of Community law.”

Article 7 of the TEU allows the Council and the Parliament to suspend certain rights within the EU system of any Member State found responsible for a “serious and persistent” breach of the Article 6(1) principles. In effect AG Maduro found a foothold in this TEU Article 7 language in arguing that the ECJ should subject Member State measures to fundamental rights review only when they involve a serious and persistent breach of fundamental rights:

“Only serious and persistent violations which highlight a problem of systemic nature in the protection of fundamental rights in the Member State at issue, would, in my view, qualify as violations of the rules on free movement, by virtue of the direct threat they would pose to the transnational dimension of European citizenship and to the integrity of the EU legal order.”²²

Instead of relying on this *ERT* refinement,²³ however, AG Maduro urged that the *Centro 7* case be resolved on the basis that the actions of the Italian broadcasting authorities violated the freedom of services provisions of Article 49 of the EC Treaty. The ECJ agreed without mentioning the *ERT* theory.²⁴

Were AG Maduro’s theory ever adopted, however, it is not likely that the progression of “refinements” in the theory would stop at the point he articulated. One could easily imagine a series of later rulings that would eventually conform to AG Jacobs’ position in *Konstantinidis*.

The ECHR Alternative

Rather than look to the Luxembourg Court for fundamental rights review of Member State measures, most commentators would probably see the European Court of Human Rights in Strasbourg [ECtHR] as the appropriate institution for this purpose.²⁵ Nothing like the innovative *ERT* theory is needed to establish the ECtHR’s jurisdiction. The ECHR and its various protocols expressly provide for it. Moreover the Strasbourg Court has gained in prestige and status in recent years, stemming in part from a number of developments, including (i) the institutional reform that dropped the role of the former Human Rights Commission, which had

²² Case C-380/05, *Europa 7*, [2008] ECR I-349, AG Maduro Opinion at para. 22.

²³ Note that the TEU in Article 46(d) expressly limits the powers of the ECJ concerning the relevance of Article 6(2) to cases concerning “actions of the institutions, insofar as the Court has jurisdiction under the Treaties.

²⁴ Case C-380/05, *Europa 7*, [2008] ECR I-349.

²⁵ *See generally*, CLAIRE OVEY & ROBIN WHITE, *JACOBS & WHITE—THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (4th ed. 2006).

served as a filter before cases could reach the Court; (ii) the gradual ratification by member countries of the right of individual petition (between 1970 and the 1990's);²⁶ (iii) the enactment of national statutes that enhance the ECHR's role in national courts (and hence the Strasbourg Court's interpretations of the ECHR), such as the U.K.'s Human Rights Act and Ireland's ECHR Act; and (iv) the generally good record of government compliance with Strasbourg Court rulings.²⁷ Moreover the Lisbon Treaty—though unadopted as of this writing—requires the EU to become a party to the ECHR, thus seeming to anoint the Strasbourg Court as the final arbiter of fundamental rights in Europe.

At the same time, however, the ECHR regime suffers serious inadequacies as the primary guarantor of uniform fundamental rights protection at the European level. For one thing recourse to the Strasbourg Court is only possible after a claimant has exhausted all potential remedies at the national level. National recourse is always a lengthy process, to which the further lengthy process at the Strasbourg level must be added. As of January 1, 2009 there was a backlog of approximately 97,300 applications pending on the Strasbourg Court's docket.²⁸ Many years will thus have to elapse before a complainant's claim can even be heard by the Strasbourg Court. To deal with the backlog problem, Protocol 14 Bis allows a single judge on the Strasbourg Court to decide that a case is inadmissible²⁹—but this, of course, increases the risk that a claimant's case will in fact never be heard. Most important of all, a Strasbourg Court's ruling—in contrast to an ECJ ruling—has no direct effect within the legal system of a Member State.³⁰ Thus, even when a claimant succeeds before the Strasbourg Court, the final remedy (and its timing) depends ultimately upon political considerations and processes within the respondent Member State.³¹

The Imperative of an Efficacious European-Level Enforcement of Fundamental Rights

Thus, from an EU-wide viewpoint the current state of affairs concerning fundamental rights enforcement against Member State measures entails the following dilemma: the ECtHR has jurisdictional authority but to some extent lacks juridical efficacy, whereas, the ECJ is empowered with juridical efficacy but lacks jurisdictional authority. If one reads U.S. constitutional history as suggesting that a federalizing process impels the affected citizenry toward a federal level guarantee of fundamental rights against government infringements at the

²⁶ Michael Goldhaber, *A PEOPLE'S HISTORY OF THE EUROPEAN COURT OF HUMAN RIGHTS* 5 (2007).

²⁷ *See id.* at 6.

²⁸ REGISTRY OF THE COURT, *EUOPREAN COURT OF HUMAN RIGHTS: SOME FACTS AND FIGURES 1959-2009* (2009), available at <http://www.echr.coe.int/NR/rdonlyres/65172EB7-DE1C-4BB8-93B1-B28676C2C844/0/FactsAndFiguresEN.pdf> (last consulted, June, 2009).

²⁹ Protocol 14Bis applies to those States that express their consent. Council of Europe Treaty Office, <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=204&CM=2&DF=5/30/2009&CL=ENG>. (last consulted, June, 2009).

³⁰ PIETER VAN DIJK et al. eds, *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 275 (4th ed. 2006) (“Repeatedly the Court has declared that it lacked jurisdiction to direct the states to take certain measures, such as to abolish the violation found by the court and to repair the costs, etc. The Court notes regularly that it is left to the State concerned to choose the means within its domestic legal system to give effect to its obligations under Article 53.”)

³¹ *See* Paul Craig, [Chap.] 2. *Fundamental Rights*, in PHILIP MOSER & KATRINE SAWYER, *MAKING COMMUNITY LAW* 54, at 76 (2008) (making the point that in the U.K. one wanting to challenge primary U.K. legislation for violation of fundamental rights would prefer to rely on EU law, because of its greater efficacy within the U.K. legal system, than on ECHR law, which ultimately depends for enforcement on political action by Parliament.)

sub-federal level—that is, a uniform articulation and guarantee of fundamental civil rights throughout the polity—then one might predict that, in a mutually reinforcing pattern, pressure for political unification in Europe may go hand-in-hand with further evolution of the fundamental rights regime in Europe. That evolution might come in the form of treaty amendments providing for a more efficacious Strasbourg regime, or in the form of case by case development by the ECJ of the inherent potential of *ERT*, or in some as yet unanticipated form.