

**ECJ REVIEW OF MEMBER STATE MEASURES
FOR COMPLIANCE WITH FUNDAMENTAL RIGHTS**

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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

* © 2009 John J. Barceló III. All rights reserved. I am pleased to dedicate this essay to Professor Philippe Manin, an extraordinary legal scholar, educational leader, and man of wide-ranging accomplishments and interests (in addition to law: music, history, skiing, and even rock climbing). He is also a warm personal friend. Philippe and I first met in 1993, when he was Director of the International and European Law Department of the University of Paris 1 law faculty. He was unfailingly gracious, efficient, and far-sighted as we worked together to establish a number of cooperative undertakings linking the University of Paris 1 law faculty and Cornell Law School – which I represented as Cornell's Reich Director of the Berger International Legal Studies Program. The first venture was the highly successful Cornell-Paris 1 Summer Institute of International and Comparative Law – now in its sixteenth successive year. The Summer Institute offers a series of courses (and occasional conferences) each summer at the Sorbonne and Centre Panthéon devoted to various aspects of European, international, and comparative law. Students come from all parts of the world to participate. That was followed soon after by the double degree program offering to a limited number of French and American law students each year a four-year dual legal education in American and French law (now the J.D./Master program). Also included were various exchanges of students and faculty, the latter exchange having brought Philippe to Cornell as a Visiting Professor of European Community Law in 1997 and me to Paris 1 as a *professeur invité* in 1996 and 1998. These initial cooperative undertakings have been the core of a rich and productive relationship linking the students and faculty of Cornell Law School to legal education at Paris 1 and to the broader world of higher education and juridical affairs in France. We at Cornell are grateful to Philippe for the essential role he played as the then “Dean” of the Paris 1 law faculty (for International and European Law) during the founding years of these cooperative ties that have proven so rich and productive. I am also grateful to him for the warm personal friendship that has grown between us in the course of these professional undertakings.

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 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 rights². 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 1991³, 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

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.

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 Siotirios Kouvelas*, [1991] ECR I-2925.