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TENSIONS BETWEEN FUNDAMENTAL FREEDOMS AND FUNDAMENTAL RIGHTS

A Comparative Study of the European Union Court of Justice, the American Supreme Court, and the African Court on Human and Peoples' Rights

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Human rights are central to the legitimacy of legal systems, not only through their recognition but also through the manner in which courts resolve conflicts between rights. Judicial decisions require well-founded reasoning, drawing on interrelated legal sources to ensure coherence, legitimacy, and predictability while minimizing non-legal influences. In EU law, the Court of Justice employs grammatical, contextual, comparative, and teleological methods of interpretation, alongside principles such as proportionality, to deliver coherent judgments. However, it has faced criticism for prioritizing fundamental freedoms over fundamental rights, for the unpredictability of its balancing methods, and for insufficient sensitivity to non-economic values. This orientation is often linked to the economic teleology of EU integration, yet alternative approaches could address these criticisms without undermining the internal market framework.

In Africa, the African Court on Human and Peoples' Rights represents a significant advancement in continental human rights enforcement, although challenges relating to access and operational limitations persist. Comparisons with the U.S. Supreme Court highlight alternative approaches to resolving conflicts between economic and other rights, suggesting that legislative solutions could complement judicial reasoning in both EU and AU contexts. The article argues that refining case law remains a practical path to improving conflict-of-rights adjudication, while comparative analysis offers lessons to enhance legitimacy, coherence, and the protection of diverse rights across jurisdictions.

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INTRODUCTION

Human rights play a legitimizing role in any legal system. However, not only can the recognition of human rights contribute to the legitimacy of a social system, but also the way courts settle conflicts between different rights can increase or decrease that legitimacy. This brings the legal argumentation of adjudicating bodies to the fore. In any legal culture, the judicial reasoning expressed in decisions must be sufficiently convincing to ensure acceptance by the parties concerned and by society. An appropriate justification is indispensable for any judicial decision. Judicial argumentation is built upon legal reasoning. Interrelated legal sources must constitute a coherent legal argumentation in order to appropriately justify a decision. Sound legal justification helps reduce interpretative uncertainties and strengthens the legitimacy of the court by marginalizing non-legal (for instance political) considerations and arguments. It also promotes legal certainty, as it enables individuals to foresee the rules applicable to them and adapt their conduct appropriately.

In construing EU law, the Court of Justice relies on grammatical, contextual, comparative and teleological methods of interpretation. The use and interplay of these techniques aim to provide a single convincing answer to any issue related to EU law. Moreover, principles such as the proportionality test provide a formal framework through which the Court of Justice can adhere to legal reasoning rather than political or moral considerations.

Delivering a well-justified judgment may be particularly difficult when a court has to address a conflict between different rights. From this perspective, the Court's decisions have been the subject of strong criticism for several reasons. First, it has been asserted that the Court of Justice does not treat fundamental freedoms and fundamental rights as equal but gives automatic priority to fundamental freedoms. In the relationship between fundamental freedoms and fundamental rights, the latter are often treated simply as exceptions to the former, so that the protection of fundamental rights may justify restricting fundamental freedoms. Second, it has often been called into question whether its method of balancing, based on the proportionality test, is sufficiently predictable. Third, the Court of Justice has sometimes been criticized for not being sufficiently sensitive regarding certain non-economic values, such as social rights.

These features of the Court of Justice's judicial reasoning have often been explained by the economically oriented teleology of EU integration or the need to apply the methodology used by the Court in internal market law cases. As a matter of course, the internal market case law of the Court has been centered on fundamental freedoms that principally promote economic integration. However, this economic orientation does not imply that cases involving conflicts of rights could not be addressed in a way that is more responsive to the criticisms concerning the relationship between fundamental freedoms and fundamental rights.

In Africa, despite facing an uncertain future, the African Court on Human and Peoples' Rights unquestionably merits rigorous scholarly attention. It holds the distinction of being the first judicial body established at the continental level, a pioneering institution that will also lay the groundwork for the eventual African Court of Justice and Human Rights. Its creation followed the establishment of several sub-regional courts, situating it within a context that is at once intricate and unique. Indeed, while the Court's inception marks a substantial advancement in the continent's human rights architecture, promising enhanced enforcement of the African Charter and potentially fostering the consolidation of democracy and the rule of law—significant challenges persist. In particular, obstacles surrounding access for applicants continue to impede the Court's operational efficacy.

These unresolved issues underscore why the Arusha-based Court remains, in the words of Fatsah Ouguergouz, a "judicial body on probation, still navigating a transitional phase".[1]

The aim of this article is to show that many of these criticisms related to judicial reasoning are neither peculiar to EU or AU law nor inevitable. To demonstrate this, I refer to similar cases from the judicial practice of the U.S. Supreme Court, where conflicts have arisen between rights protecting economic activity and other rights. Moreover, the analysis demonstrates that U.S. federal law offers an alternative way to address such conflicts between rights of an economic nature and other rights—namely, legislation. I argue that although legislation could enhance legal certainty in conflict-of-rights cases in EU and AU law, refining the case law of both continental courts remains necessary and, for the moment, a more viable option.

The practice of the EU Court of Justice, the African Union on Human and Peoples' Rights, and the U.S. Supreme Court has already been compared from various perspectives, including the protection of fundamental rights in general and the framework of multilevel constitutionalism. However, less attention has so far been paid to comparing the judicial practice of the two courts with regard to conflicts of rights. More specifically, the focus is on the conflicts between fundamental freedoms or fundamental rights before the Courts of Luxembourg and Arusha, which will be compared with U.S. Supreme Court cases involving collisions between rights protecting the economic activity of business players and other (fundamental) rights. U.S. law does not use the term "fundamental freedoms" as EU and AU law do. This explains why the article focuses on rights protecting economic activity in the context of U.S. law, since these may be considered the functional equivalent to EU and AU fundamental freedoms.

Following the introduction, Section II briefly discusses the relationship between fundamental freedoms and fundamental rights in EU law. Section III examines the comparability of the judicial practice of the Court of Justice and the U.S. Supreme Court with regard to conflicts of rights, and Section IV discusses the criticisms raised concerning the case law of the Court of Justice. Section V demonstrates that similar situations and concerns are not unfamiliar in U.S. law. This is followed by an explanation that some of the concerns raised in the legal literature regarding the case law of the Court of Justice on conflicts between fundamental freedoms and fundamental rights could be addressed either through refinement of the Court's approach or through legislation (Section VI). The final part explores the scope of the powers of the African Court on Human and Peoples' Rights in exercising its disciplinary competencies, as well as the limits it faces (Section VII). The conclusion summarizes the lessons that may be drawn from the analysis.

1. Fatsah Ouguergouz. La Cour africaine des droits de l'homme et des peuples – Gros plan sur le premier organe judiciaire africain à vocation continentale », Annuaire français de droit international 2006. Page 215.

I. FUNDAMENTAL FREEDOMS AND FUNDAMENTAL RIGHTS IN EU LAW

Initially, the Treaty establishing the European Economic Community (EEC Treaty) made no reference to human rights, let alone to specific rights relevant to the free movement of persons. It was the Court of Justice of the European Union (CJEU) that gradually shaped the recognition of fundamental rights within the EU legal order.[2]

In Stauder, the Court recognized fundamental human rights as "enshrined in the general principles of Community law and protected by the Court."[3] Later, in *Internationale Handelsgesellschaft*, it affirmed that "respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice,"[4] noting that such protection draws inspiration from the constitutional traditions common to the Member States. In *Nold*, the Court further emphasized that international human rights treaties to which the Member States are signatories or parties provide guidance in interpreting Community law. Subsequent treaty amendments complemented this judicial development. The Single European Act referred to promoting "democracy on the basis of the fundamental rights recognized in the constitutions and laws of the Member States."[5] The Maastricht Treaty further required the EU to respect fundamental rights as guaranteed by the European Convention on Human Rights and as general principles of law derived from common constitutional traditions. The Treaty of Amsterdam explicitly stated that "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."[6] Finally, the Charter of Fundamental Rights of the European Union, adopted alongside the Treaty of Nice, became legally binding with the entry into force of the Treaty of Lisbon.

Fundamental rights play multiple roles in relation to fundamental freedoms. First, in CJEU jurisprudence, they have often served as a justification when a Member State seeks to derogate from one of the fundamental freedoms. Compliance with fundamental rights limits the circumstances in which such derogations may be permitted, thereby reinforcing the effectiveness of fundamental freedoms.[7] Second, in other cases, the enforcement of fundamental rights has itself led to restrictions on fundamental freedoms, creating a reverse dynamic.[8] In this context, fundamental rights may limit freedoms and provide leverage to Member States or private parties invoking those rights.

Conflicts between fundamental freedoms and fundamental rights may arise directly under the TFEU provisions on free movement or indirectly through secondary EU legislation implementing these

2. S.A. DE VRIES, The Protection of Fundamental Rights within Europe's Internal Market after Lisbon, cit., p. 59. See Art. 7 of the EEC Treaty on the prohibition of discrimination and Art. 119 of the EEC Treaty on equal pay for male and female workers for equal work. See also G. DE BÚRCA, The Evolution of Human Rights Law, in P. CRAIG, G. DE BÚRCA (eds), The Evolution of EU Law, Oxford: Oxford University Press, 2011, p. 475 et seq

3. Court of Justice, judgment of 12 November 1969, case 29/69, Stauder, para. 7.

4. Court of Justice, judgment of 17 December 1970, case 11/70, Internationale Handelsgesellschaft, para. 4

5. Court of Justice, judgment of 14 May 1974, case 4/73, Nold, para. 13.

6. Art. 6, para. 1, TEU

7. First case where this was established is Court of Justice, judgment of 18 June 1991, case C260/89, ERT AE, para. 43.

8. Judgment of 12 June 2003, case C-112/00, Schmidberger; judgment of 22 December 2010, case C-208/09, Sayn-Wittgenstein.

freedoms in specific contexts.[9] The CJEU's practice has been central to integrating fundamental rights into the EU legal system, which in turn has created the potential for conflicts between rights and freedoms. Resolving these conflicts is complex, as the two categories share certain features while also presenting important differences. Both enjoy constitutional status: fundamental freedoms derive from the TFEU, whereas fundamental rights are enshrined in the Charter. The Charter also recognizes certain economic freedoms and the right of Union citizens to move and reside freely, granting them a fundamental status. The CJEU treats both as core principles of EU law, although neither is absolute and both may be subject to restrictions.[10]

Despite their shared significance, fundamental freedoms and fundamental rights differ in scope. Fundamental freedoms are tied to the internal market and require a cross-border element, whereas fundamental rights have a broader application and may extend to purely domestic situations.[11] Within EU law, however, fundamental rights apply primarily when EU institutions, bodies, offices, agencies, or Member States are implementing Union law. Outside this scope, they do not influence the assessment of cases under EU law.

Some scholars argue that the two sets of rights serve distinct functions: fundamental freedoms primarily combat protectionism and promote economic integration, thereby indirectly enhancing individual freedom, while fundamental rights safeguard individual autonomy. This distinction, although valid, requires nuance. While fundamental freedoms have an economic rationale, the CJEU has long recognized their role in protecting individuals. In Van Gend en Loos, the Court established that EU law confers rights on individuals, including those deriving from fundamental freedoms.[12] EU legislation and the Court's jurisprudence seek to remove barriers to private economic activity imposed by Member States. In this way, fundamental freedoms empower individuals against state interference and, in some cases, against obstacles created by private actors. They enable market participants to pursue their self-interest while simultaneously advancing economic integration. As Lane observed, the pursuit of individual autonomy ultimately serves the interests of the Community. Derogations from fundamental freedoms must therefore be interpreted narrowly in order to preserve both private autonomy and the proper functioning of the internal market. As Petersmann notes, individual autonomy constitutes the "common core" of both markets and human rights.[13]

Importantly, the enforcement of fundamental freedoms also promotes broader objectives of market integration, benefiting both individuals and society. By enhancing autonomy, these freedoms overlap with fundamental rights. The extension of economic freedoms beyond economically active persons and the establishment of Union citizenship have further reduced their purely economic orientation. Likewise, the incorporation of certain aspects of fundamental freedoms into the Charter has narrowed the distinction between freedoms and rights.

Neither the Treaties nor the Charter provide explicit guidance on how to resolve conflicts between

9. V. TRSTENJAK, E. BEYSEN, The Growing Overlap of Fundamental Freedoms and Fundamental Rights in the Case Law of the CJEU, cit., p. 311.

10. R. LANE, The Internal Market and the Individual, in N.N. SHUIBHNE (ed.), Regulating the Internal Market, Cheltenham: Elgar, 2006, p. 258

11. Fundamental Rights and Fundamental Freedoms: The Challenge of Striking a Delicate Balance, in European Business Law Review, 2006, p. 233 et seq.; E. SPAVENTA, Federalisation Versus Centralisation: Tensions in Fundamental Rights Discourse in the EU, in M. DOUGAN, S. CURRIE (eds), 50 Years of the Eurpean Treaties, Oxford: Hart, 2009, p. 354 et seq.

12. Court of Justice, judgment of 5 February 1963, case 26/62, Van Gend & Loos

13. E.-U. PETERSMANN, Theories of Justice, Human Rights, and the Constitution of International Markets, in Loyola of Los Angeles Law Review, 2003, p. 435.

fundamental freedoms and human rights. Although the CJEU has not systematically analyzed the similarities and differences between these two categories in its rulings, it remains the primary authority for resolving such conflicts. In light of the comparative aim of this article, the next step is therefore to assess whether the case law of the CJEU and that of the U.S. Supreme Court and African Court on Human and Peoples' Rights is sufficiently comparable to allow for meaningful analysis.

II. COMPARABILITY OF THE CASE LAW OF THE EU COURT OF JUSTICE AND THE U.S. SUPREME COURT

A preliminary question is whether the case law of the CJEU and that of the U.S. Supreme Court is truly comparable when it comes to conflicts between rights. Several factors make such a comparison challenging. The two courts operate within distinct legal cultures: the U.S. Supreme Court functions within a common law tradition, while the CJEU largely reflects civil law methodologies. Their institutional contexts also differ: the CJEU is the apex court of a multi-level judicial system within a regional integration framework, whereas the U.S. Supreme Court serves as the highest judicial authority within a federal state. The composition of the U.S. Supreme Court is often perceived as more politically influenced due to its appointment process. The courts' judicial styles likewise diverge: the CJEU employs an impersonal, magisterial style, producing decisions that give little indication of internal disagreement, while the U.S. Supreme Court opinions typically include majority rulings alongside dissenting and concurring opinions, expressed in a more personal and less formal tone.

Despite these differences, a comparison remains feasible. Several factors support this view. First, both courts occupy a similar institutional position as the highest judicial authorities within multi-tiered legal systems.[14] Second, the development of human rights in the EU and the U.S. shows notable parallels. The U.S. Constitution initially lacked explicit protections for human rights, which were later enshrined in the Bill of Rights; this absence reflected the limited powers of the federal government and the reliance on protection at the state level. Similarly, fundamental rights in the EU emerged gradually during the process of European integration rather than being fully established from the outset.[15]

Third, the types of rights and conflicts under consideration are functionally comparable. While U.S. law does not employ categories such as "fundamental freedoms" or "economic freedoms," this does not imply that economic activity lacks protection. Business and property rights are safeguarded through provisions such as the Due Process Clause of the Fourteenth Amendment and the property protections of the Fifth Amendment. In the EU, both fundamental freedoms and fundamental rights possess constitutional significance, making potential conflicts between them analogous to disputes arising under U.S. constitutional amendments. The analysis will also consider U.S. cases in which economic rights clash with statutory rights, such as the right to engage in collective action.

14. E. MAK, The U.S. Supreme Court and the Court of Justice of the European Union, in E. FAHEY, D. CURTIN (eds), A Transatlantic Community of Law, Cambridge: Cambridge University Press, 2014, p. 13

15. M. CAPPELLETTI, D. GOLAY, The Judicial Branch in the Federal and Transnational Union: Its Impact on Integration, in M. CAPPELLETTI, M. SECCOMBE, J.H. WEILER (eds), Integration through Law. Vol. 1. Methods, Tools and Institutions. Book 2. Political Organs, Integration Techniques and Judicial Process, Berlin: de Gruyter, 1986, p. 339.

Terminological differences notwithstanding, both systems confront conflicts between comparable interests and rights. From a functional perspective, adjudication at the highest judicial level in both systems performs an equivalent role in resolving such conflicts, supporting the viability of comparative analysis.[16]

The requirement in EU law that fundamental freedoms typically involve a cross-border element does not undermine this comparison. Although no analogous requirement exists for fundamental rights under U.S. law, cross-border dimensions often arise naturally through interstate commerce or through the mobility of service providers and consumers.

Although conflicts involving economic rights appear less frequently in U.S. Supreme Court jurisprudence, the following sections will demonstrate that the adjudication of rights conflicts in both the CJEU and the U.S. Supreme Court reveals notable similarities. Examining these parallels can provide valuable insights into the interpretation and development of CJEU case law.

III. CRITICISMS RELATED TO THE COURT OF JUSTICE CASE LAW

The judicial practice of the CJEU has attracted considerable criticism in the legal literature. In particular, scholars have questioned the presumed hierarchical priority of fundamental freedoms over fundamental rights, the treatment of fundamental rights as mere exceptions, the methods used to balance fundamental freedoms against fundamental rights, and the attention—or lack thereof—given to social rights. This section focuses primarily on these issues, while also acknowledging other important questions, such as the implications of the Court's jurisprudence for the allocation of competences between the EU and its Member States.

1. Hierarchy

Initially, the rulings of the Court of Justice faced criticism because fundamental rights appeared to be subordinate to fundamental freedoms. These rights were often treated as components of public policy or as interests of general concern that could justify limitations on fundamental freedoms.

Neither the Treaties nor the Charter explicitly clarify the hierarchical relationship between fundamental freedoms and fundamental rights. Although most scholars argue for their equivalence, the case law of the Court of Justice suggests a different, at least formally, approach.[17] In the *Schmidberger* case, which will be examined in more detail later, the referring court specifically asked whether provisions on the free movement of goods take precedence over the fundamental rights at stake—namely freedom of expression and assembly. The Court, however, did not provide a definitive answer regarding the hierarchy between these two sets of rights. Nevertheless, its decisions allow one to discern an implicit approach to the issue.

16. M. POIARES MADURO, Striking the Elusive Balance between Economic Freedom and Social Rights, in P. ALSTON (ed.), The EU and Human Rights, Oxford: Oxford University Press, 1999, p. 452.

17. V. TRSTENJAK, E. BEYSEN, The Growing Overlap of Fundamental Freedoms and Fundamental Rights in the Case Law of the CJEU, cit., p. 311 et seq.; V. SKOURIS, Fundamental Rights and Fundamental Freedoms, cit., p. 237 et seq.; C. LADENBURGER, European Union Institutional Report, in J. LAFFRANQUE (ed.), The Protection of Fundamental Rights Post-Lisbon. The Interaction between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and National Constitutions, Reports of the XXV FIDE Congress Tallinn 2012, Tallin: Tartu University Press, 2012, p. 200.

In most cases where the Court has compared fundamental rights with fundamental freedoms, rights have been treated as exceptions that may justify restrictions on freedoms. Fundamental rights are typically framed as elements of public policy, explicitly recognized derogations under the TFEU, or overriding considerations of public interest. In practice, this approach creates a hierarchical structure in which fundamental freedoms are prioritized over fundamental rights.

In an initial group of cases, human rights considerations were connected to the protection of public policy. For instance, human dignity (*Omega*)[18] and the principle of equality (*Sayn-Wittgenstein*) were upheld as aspects of public policy.[19] In other cases, the Court recognized fundamental rights as overriding requirements in the public interest. In *Familiapress*, concerning Austria's ban on newspapers featuring prize competitions, maintaining press diversity and safeguarding freedom of expression was deemed an "overriding requirement justifying a restriction on the free movement of goods."[20] Similarly, in *UPC*, cultural policy—and thus freedom of expression—was classified as "an overriding requirement relating to the general interest."[21]

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From a formal standpoint, the Court does not explicitly resolve conflicts between fundamental freedoms and fundamental rights. Rather, it frames freedoms alongside public policy or overriding considerations in the general interest. This approach seems intended to mitigate conflicts between these two sets of rights.

There is a limited set of rights for which the Court has explicitly recognized priority. Certain rights, such as the right to life or the prohibition of torture and inhuman or degrading treatment, are considered non-derogable. In such cases, these rights may take precedence over fundamental freedoms. While the hierarchy here appears clear, potential conflicts can still arise. In *Grogan*, for example, the Court ruled that a national ban on distributing information about abortion services in other Member States fell outside EU law when the information was distributed by a student association unconnected to the clinics.[22] However, if the clinics themselves had distributed this information, or if a woman had traveled to access abortion services, the free movement of services would clearly have been engaged. Similar dilemmas may arise in relation to lawful euthanasia in another Member State.[23]

Importantly, the formal prioritization of fundamental freedoms over fundamental rights primarily reflects a procedural tool for aligning cases with the Court's internal market framework. It is therefore more rhetorical than substantive. In practice, the specific circumstances of a case may lead to fundamental freedoms yielding to fundamental rights. This issue will be analyzed in detail

18. Court of Justice, judgment of 14 October 2004, case C-36/02, Omega

19. Ibid.

20. Court of Justice, judgment of 26 June 1997, case C-368/95, *Familiapress*

21. Court of Justice, judgment of 13 December 2007, case C-250/06, UPC, para. 41.

22. N.N. SHUIBHNE, Margins of Appreciation: National Values, Fundamental Rights and EC Free Movement Law, in European Law Review, 2009, p. 246 et seq

23. Ibid., p. 251 et seq

in the following subsection.

2. Balancing by the Court of Justice

Although the preceding analysis might suggest that fundamental freedoms formally take precedence over fundamental rights, this represents only the CJEU's initial point of departure. The presumed primacy of freedoms must be considered alongside the substantive balancing carried out by the Court and national courts. Despite the formal hierarchy, the Court cannot avoid a case-specific assessment of conflicts between fundamental freedoms and fundamental rights. Depending on the circumstances, either a freedom or a right may ultimately prevail. This brings the focus to the substantive evaluation of such conflicts by the Court.

The proportionality test serves as the primary tool for legally justifying the Court's decisions and plays a central role in the legitimacy of its judicial reasoning. When fundamental freedoms and fundamental rights are in tension, the Court applies this test to determine which interest should prevail in the case at hand. Substantive balancing through proportionality can mitigate the apparent hierarchy between freedoms and rights established at the formal level.

Proportionality is widely employed in constitutional and human rights adjudication as a flexible method of reasoning, allowing courts to structure a legally justified response to complex questions. In the context of conflicts between fundamental freedoms and fundamental rights, the Court's interpretation and application of proportionality can favor either an integration-oriented outcome or one prioritizing human rights. The test provides a framework for ensuring that decisions are neither arbitrary nor unjustified. However, its outcomes are not entirely predictable. The CJEU evaluates proportionality in light of the specific facts of each case, and because factual circumstances vary, judges retain significant discretion. Moreover, the intensity of review and the margin of discretion afforded to the referring national court also fluctuate, meaning proportionality assessments rarely generate binding precedent.

Conversely, in *Viking* and *Laval*, the Court prioritized the freedom of establishment and the freedom to provide services over trade union rights, even where national law afforded strong protection to those rights. Notably, in *Viking*, the Finnish Constitution explicitly recognized the right to strike. These cases illustrate a divergence in approach: *Omega* and *Sayn-Wittgenstein* uphold Member States' discretion in defining public policy, while *Viking* and *Laval* limit national autonomy in shaping the protection of fundamental rights. They also suggest that trade unions have less leeway to justify restrictions than Member States, since private actors rarely succeed in invoking public-interest exceptions that are available to States under the TFEU.

Under Article 267 TFEU, the CJEU interprets EU law, but its application—including balancing and proportionality assessments—is left to the national courts. As Spaventa notes, treating fundamental rights as general interest exceptions can impose a "restrictive approach to fundamental rights" on Member States. This effect is moderated by the discretionary space granted to national courts through proportionality review. Yet the extent of this discretion is inconsistent. In some cases, such as *Familiapress*, national courts retain meaningful autonomy, whereas in *Viking* and *Laval*, the scope for independent decision-making is much narrower.

As outlined above, resolving conflicts between fundamental freedoms and fundamental rights presents complex challenges. The accommodation of social rights within the EU legal framework

adds a further layer of difficulty, which will be examined in the following subsection.

3. Fundamental freedoms and social rights

The European Union was initially established with the goal of economic integration. Over time, however, amendments to its treaties increasingly emphasized social objectives and the protection of social rights. While the European Social Charter (ESC) was adopted in 1961, it is important to note that the EU itself is not a signatory.

Nevertheless, the Single European Act made reference to the European Social Charter (ESC), and this was later mirrored in the Treaty of Amsterdam's amendments to the Treaty on European Union (TEU). In certain rulings, the Court of Justice has also drawn upon the ESC. Additionally, Chapter IV of the Charter of Fundamental Rights enshrines various social rights.

A clear tension exists between the pursuit of the internal market and other objectives. The Treaties, the Charter of Fundamental Rights, and the case law of the Court of Justice have not definitively clarified the relationship between fundamental freedoms and fundamental rights. While the Treaties contain provisions supporting market integration, social objectives, and fundamental rights, these texts also allow for differing interpretations when conflicts arise between fundamental freedoms and fundamental rights.[24] Consequently, institutions responsible for interpreting these provisions, such as the Court, have considerable discretion in balancing free market goals with the protection of social rights.[25]

This discussion focuses specifically on the relationship between fundamental freedoms and the right to take collective action, an issue the Court of Justice has addressed in its case law, with parallels observable in decisions of the U.S. Supreme Court. Two particularly debated cases are the *Viking* and *Laval* judgments, in which the Court had to interpret the right of trade unions to take collective action. These cases were largely consistent with earlier rulings, recognizing that the right to collective action to protect workers constitutes a legitimate interest that may justify restricting a fundamental freedom as an overriding public interest.[26] However, in both *Viking* and *Laval*, the Court's apparent preference for fundamental freedoms over the right to take collective action provoked significant controversy.[27]

In most conflicts involving competing rights, the Court's reasoning and outcomes have generally been well received in academic literature, even if the proportionality test applied by the Court has occasionally been criticized for inconsistency. In contrast, *Viking* and *Laval* drew intense criticism from trade unions, worker organizations, and some legal scholars, who argued that these decisions prioritized employers' rights to free movement over workers' rights and disregarded the varying levels of social protection across Member States. This reaction is largely attributable to the fact that *Viking* and *Laval* addressed broader issues of social dumping, highlighting tensions between the freedom of establishment and workers' social rights.

24. D. NICOL, Europe's Lochner Moment, in Public Law, 2011, p. 322.

25. Ibid.

26. ETUC Response to Court Judgements Viking and Laval, www.etuc.org

27. Viking [GC], cit., paras 75 and 77; Laval [GC], cit., paras 101 and 103

Viking and *Laval* are frequently distinguished from other cases. For instance, in *Omega* and *Sayn-Wittgenstein*, the Court of Justice prioritized the protection of fundamental rights over fundamental freedoms. In contrast, in *Viking* and *Laval*, the freedom of establishment and the freedom to provide services took precedence. Earlier cases could often be explained through the proportionality test, which weighed the competing interests.

Formally, the Court's reasoning in *Viking* and *Laval* does not deviate from previous judgments. However, it appears that in these cases the Court effectively made a policy decision under the guise of the proportionality test. From the perspective of legal argumentation, the Court might have clarified why fundamental freedoms were given priority over the right to collective action, and articulating the underlying policy considerations could have strengthened this explanation. The formalistic proportionality test, however, seems ill-suited to address such policy-driven motivations. As some commentators have noted, the proportionality framework can mask the policy orientation behind the Court's decisions.[28]

The proportionality test provides the appearance of legal reasoning for decisions that are, in essence, policy choices. It is worth noting that if the Court had explicitly framed its reasoning as policy-based—where the proportionality test alone does not suffice—it would have encroached upon legislative functions in areas of policy that are sometimes poorly defined. Such an approach could also affect the balance of power among EU institutions.

National courts were left with limited scope to prioritize the protection of fundamental rights according to domestic standards. This limitation is often justified by the idea that, in *Viking* and *Laval*, invoking the right to collective action could be perceived as a form of protectionism that infringes free movement provisions. A notable implication of the Court's case law concerns the permissible scope of restrictions: fundamental freedoms may not be limited by either Member States or private parties for economic reasons, as this principle serves to prevent protectionism. Fundamental rights, however, can be restricted for economic reasons, particularly to ensure the unhindered exercise of fundamental freedoms.[29]

As discussed, the Court of Justice's approach to resolving conflicts between fundamental freedoms and fundamental rights has been the subject of critique for multiple reasons. The following section will illustrate that similar concerns also arise in U.S. law, indicating that these challenges are not unique to EU law.

IV. THE CASE OF LAW OF THE U.S. SUPREME COURT

The CJEU formally prioritizes fundamental freedoms over fundamental rights, yet in practice resolves conflicts through proportionality-based balancing, allowing either interest to prevail depending on the context. By contrast, the U.S. Supreme Court recognizes no explicit hierarchy, instead distinguishing "fundamental" rights through varying standards of judicial scrutiny. Rights rarely function as absolute trumps, and most disputes concern whether governmental action unjustifiably

28. F. FONTANELLI, The Mythology of Proportionality in Judgments of the Court of Justice of the European Union on Internet and Fundamental Rights, in Oxford Journal of Legal Studies, 2016, p. 659.

29. L.F.M. BESSELINK, The Protection of Fundamental Rights post-Lisbon, cit., p. 24; C. LADENBURGER, European Union Institutional Report, cit., p. 200; C. SEMMELMANN, The European Union's Economic Constitution under the Lisbon Treaty: Soul-searching Shifts the Focus to Procedure, in European Law Review, 2010, p. 535.

restricts liberty rather than direct rights-versus-rights clashes.

In Sorrell v. IMS Health Inc., the Court protected commercial speech against statutory limits, focusing on legislative interference rather than balancing speech with privacy. U.S. doctrine employs tiered review—rational basis, intermediate scrutiny, and strict scrutiny—each assessing how closely a measure fits its objective. This contrasts with the EU's single proportionality test within a multilevel judicial structure. In PruneYard Shopping Center v. Robins, free expression in a private mall was upheld, illustrating states' ability to expand liberties beyond federal baselines. Civil rights decisions such as Heart of Atlanta Motel v. United States confirmed that property and economic freedoms may yield when Congress combats discrimination under the Commerce Clause. Social rights, however, lack constitutional status in the United States, leaving collective action largely statutory. Early labor cases including Gompers v. Bucks Stove & Range Co. and Truax v. Corrigan often privileged property rights over union activity, demonstrating limited balancing.

Overall, both systems confront tensions between economic liberties and other rights, yet differ in method: structured proportionality in the EU versus variable scrutiny and pragmatic adjudication in the United States.

1. Hierarchy

As we have seen, the CJEU formally gives priority to fundamental freedoms over fundamental rights, but this represents only a starting point. In practice, substantive balancing through the proportionality test allows either fundamental freedoms or fundamental rights to prevail in specific cases of conflict.

In contrast, the U.S. Constitution and its Amendments do not establish an explicit hierarchy among rights. However, the U.S. Supreme Court distinguishes fundamental rights from other rights. These are rights that the Court recognizes—explicitly or implicitly—as deserving heightened protection. Another distinction arises from the standard of judicial review applied when these rights are infringed, which affects the level of protection they enjoy. Similar to EU law, no rights in U.S. law operate as absolute "trumps" in the event of a conflict, including rights protecting economic activity. Consequently, even when economic rights conflict with other rights, no pre-established hierarchy governs the resolution.

Conflicts between rights protecting economic activity and other rights are relatively rare in U.S. Supreme Court practice. One reason is that such economic rights are often weighed against state legislation serving public interests, which may itself incorporate the protection of fundamental rights. In these instances, the Court's analysis focuses less on a direct clash of rights and more on whether government action interferes with the exercise of a particular right.

For example, in Sorrell v. IMS Health Inc., the Court examined whether a Vermont statute prohibiting the sale, disclosure, and use of prescriber-identifying information without a physician's consent violated the free speech rights of pharmaceutical manufacturers, who used the data for marketing purposes.[30] The Court concluded that this commercial speech was protected under the Free Speech Clause of the First Amendment. Although the majority briefly referenced privacy and human dignity concerns, it did not engage in a direct conflict between free speech and these

30. U.S. Supreme Court, judgment of 23 June 2011, Sorrell, Attorney General of Vermont, v. IMS Health Inc.

rights. The Court's scrutiny centered on the statutory restriction, rather than on resolving a rights-versus-rights collision.

This pattern is common in U.S. law: cases typically involve evaluating governmental measures that restrict rights, often justified by public-interest objectives such as public health, which may indirectly reflect the protection of individual rights. As a result, direct conflicts between rights protecting economic activity and other rights are uncommon. In the fewer instances where such conflicts arise, however, economic rights are considered independently rather than as part of a broader public-interest justification. In these situations, the U.S. Supreme Court must engage in substantive balancing, weighing the conflicting rights against one another directly—a contrast with the EU approach, where fundamental rights are often framed within public-interest exceptions to fundamental freedoms.

2. Balancing

In the United States, the Supreme Court's review of governmental measures varies in intensity and form, ranging from rational basis review to strict scrutiny, with several intermediate standards in between. This tiered approach also applies when the Court addresses conflicts between rights. The applicable level of scrutiny depends on the nature of the right involved and the context of the case. Each test evaluates the connection between the governmental measure and the interest it seeks to advance.

Under strict scrutiny, a measure must be narrowly tailored, employ the least restrictive means, and be justified by a compelling state interest. Intermediate scrutiny requires that the measure substantially advance an important governmental objective. Rational basis review, the most deferential standard, only requires that the measure be rationally related to a legitimate government interest. Disputes often arise over which standard applies, and legal scholars have critiqued the Court's inconsistent application of this tiered review.

Unlike the EU's multilevel judicial system, U.S. Supreme Court rulings are final and do not require implementation by lower courts. The outcome of a case rests entirely on the Supreme Court's decision. By contrast, the CJEU formally interprets EU law, leaving the referring national court responsible for its application, although CJEU decisions typically predetermine the correct outcome.

In PruneYard Shopping Center v. Robins, the Supreme Court addressed a conflict between the right to free expression and property rights. Students peacefully solicited signatures in a shopping center to protest a United Nations resolution condemning Zionism. The shopping center requested that they leave, citing internal regulations restricting expressive activity unrelated to commercial purposes. Although the students initially complied, they later sued under the California Constitution, which protects free speech and petitioning.

The U.S. Supreme Court upheld the state court's decision, confirming that states may extend individual liberties beyond federal constitutional guarantees. The Court found that allowing expressive activity on privately owned but publicly accessible property did not violate the property rights protected by the Fifth and Fourteenth Amendments. States may impose reasonable limits on property rights, provided these do not constitute a taking without just compensation or violate other federal provisions.

The Court noted that the students' activity did not materially disrupt business operations. While the mall's owners might incur additional maintenance or security costs, or experience minor reductions in customer traffic, the Court considered these impacts marginal. Alternative media channels were available for expression, but the mall provided a low-cost venue for the demonstration. The Court also acknowledged that property owners could regulate time, place, and manner, although expressive activity by individuals or groups could not be entirely prohibited.

By contrast, the CJEU cannot review national acts on human rights grounds outside the scope of EU law, as reinforced by Article 51 of the Charter of Fundamental Rights. In the U.S., however, the Supreme Court exercises jurisdiction over both federal and state measures, even when state powers are involved. In PruneYard, the Court effectively recognized the diversity of rights protection at the state level, allowing states to impose higher standards for free expression while maintaining federal property protections. This approach parallels the CJEU's recognition of Member States' discretion in cases such as *Omega* and *Sayn-Wittgenstein*, and aligns with *Familiapress* and Schmidberger, which permitted restrictions on fundamental freedoms to protect freedom of expression.

Civil rights cases in U.S. law also illustrate conflicts between property rights and equality protections. The Civil Rights Act of 1964, adopted under the Commerce Clause and partly to implement Section 5 of the Fourteenth Amendment, addressed private discrimination following the 1883 Civil Rights Cases, in which the Supreme Court had struck down the Civil Rights Act of 1875 as exceeding federal authority. In Heart of Atlanta Motel v. United States, the Court considered whether enforcing Title II—prohibiting discrimination in public accommodations—exceeded Congress's powers or violated the Fifth and Thirteenth Amendments. The motel owner argued that mandatory non-discrimination infringed property rights and liberty and imposed involuntary servitude. The Court held that the Commerce Clause provided a valid basis, as the motel served interstate travelers, and that Congress's chosen means were "reasonably adapted" to its legitimate objectives. The Court briefly dismissed the property and involuntary servitude claims, with concurring justices emphasizing that the prohibition of racial discrimination must be upheld irrespective of commercial activity. A similar ruling was issued in Katzenbach v. McClung, extending the same reasoning to a restaurant whose supplies moved in interstate commerce.

While the CJEU consistently employs the proportionality test, its application varies in intensity. In the U.S., the Supreme Court does not apply a uniform balancing test; instead, it relies on tiered scrutiny, which differs from case to case and often prompts debate. In PruneYard, rational basis review was applied, whereas in Heart of Atlanta, a two-prong test—assessing rational basis and the appropriateness of legislative means—was used. This latter step resembles the suitability inquiry under the CJEU's proportionality test, though it concerned the legislative power of Congress rather than a direct conflict between rights.

The diversity of reasoning in the U.S. Supreme Court becomes even more apparent in conflicts involving fundamental rights and collective action, which will be analyzed in the following section.

3. The right to take collective action and economic activity

In the EU, social rights have gained recognition progressively. However, the exact role of social rights in EU integration remains debated. As seen earlier, the *Viking* and *Laval* judgments stirred particularly fervent debates within the EU. The development of social rights in the U.S. has faced important limitations. The International Covenant on Economic, Social and Cultural Rights has been

signed but not ratified by the United States. U.S. law has historically resisted the constitutionalization of social rights.

The U.S. Constitution and its Amendments do not refer to social rights. Although Franklin D. Roosevelt proposed a "Second Bill of Rights" containing social rights in 1944, this proposal was not adopted. Social rights are instead protected through state or federal legislation and generally do not enjoy the status of "fundamental rights" under the U.S. Constitution. In the U.S., the absence of federal constitutional recognition of social rights has been widely criticized, and the need to safeguard such rights is a recurring claim among some legal scholars.

Nevertheless, the U.S. Supreme Court has also had to address conflicts between fundamental rights protecting economic activity and social rights. A recurring issue concerns the right of workers to take collective action and the rights of business owners.[31]

The U.S. Supreme Court has decided numerous cases concerning the rights of trade unions and the rights of the companies involved in labor disputes. Although the Court has referred to the "fundamental" nature of employees' right to self-organization and to select their representatives for collective bargaining or other mutual protection, this right is not mentioned in the U.S. Constitution or its Amendments. The right to collective action is therefore primarily a statutory right. In these cases, the U.S. Supreme Court also recognized that a business as a going concern is protected under property rights. Consequently, strikes and boycotts organized by trade unions were often considered to interfere with the right of property.

In Gompers v. Bucks Stove & Range Co., the officers of a trade union and some staff members of a trade union journal were prohibited by court injunction from continuing a boycott organized against the Bucks Stove company following a dispute over working time.[32] In related contempt proceedings, the defendants argued that the injunction and contempt charges violated the freedom of speech and of the press. Although the Supreme Court acknowledged the right of workers to associate, it emphasized that courts must protect individuals against the potentially vast power of trade unions. This position was justified on the grounds that the campaign conducted by the trade union exceeded "any possible right of speech which a single individual might have."[33]

The Court further noted that "the court's protective and restraining powers extend to every device whereby property is irreparably damaged or commerce is illegally restrained."[34] In this context, freedom of speech and the press was contrasted with the right to property and with the freedom of speech of the private individual affected by the trade union's actions.

In Truax v. Corrigan, a restaurant owner refused to accept the terms and conditions of employment demanded by the staff and by a trade union to which the restaurant's cooks and waiters belonged.[35] In response, the staff and the trade union initiated a strike and boycott against the restaurant, discouraging customers from entering the establishment. The boycott caused a significant loss in

31. J. MATHEWS, A. STONE SWEET, All Things in Proportion? American Rights Review and the Problem of Balancing, in Emory Law Journal, 2011, p. 797.

32. U.S. Supreme Court, judgment of 15 May 1911, Gompers v. Bucks Stove & Range Co.

33. Ibid., p. 439

34. Ibid., p. 438

35. U.S. Supreme Court, judgment of 19 December 1921, Truax v. Corrigan.

the restaurant's revenue. However, an Arizona statute prohibited courts from granting restraining orders or injunctions in cases involving peaceful strikes and boycotts.

The majority of the U.S. Supreme Court held that, despite the state statute, the boycott violated the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment. Once again, the business was treated as a form of property right, and the Court stated that "free access for employees, owner, and customers to his place of business is incident to such right."[36]

Another case in which the U.S. Supreme Court addressed the conflict between the rights of trade unions and those of business owners was Dorchy v. State of Kansas.[37] Dorchy, a trade union officer, was prosecuted and sentenced after calling workers of a mining company to strike over a payment allegedly owed to a former employee. The Kansas Court of Industrial Relations Act prohibited conspiring to induce others to strike in the mining industry, and this prohibition also applied to labor union officers.

Justice Brandeis, speaking for the Court, affirmed that "the right to carry on business – be it called liberty or property – has value."[38] He found that the strike aimed solely to compel the employer to make a payment and that Dorchy's claim relating to a former employee did not constitute a legitimate purpose. Ultimately, the Court held that "neither the common law, nor the Fourteenth Amendment, confers the absolute right to strike."[39] The decision did not involve balancing the competing rights concerned but rather focused on determining the impermissible nature of the strike.

A common feature of these cases is that the U.S. Supreme Court did not undertake a thorough balancing exercise but instead granted priority to property rights. Truax v. Corrigan resembles the *Viking* case, where the national standard for the protection of fundamental rights—namely the right to take collective action—was set aside in order to foster economic activity. It appears that deference to state standards is weaker with regard to the right to take collective action, both in the EU and in the U.S.

This contrasts with the state-level protection of other fundamental rights in the practice of both courts (in the EU, *Omega*, *Familiapress* and *Sayn-Wittgenstein*, as well as PruneYard in the U.S.). It should also be noted that the rulings in *Viking* and *Laval* apply only to cases involving cross-border collective action. Accordingly, Member States may define the boundaries of the right to collective action in purely internal situations according to their own preferences. By contrast, U.S. practice applies to situations without any cross-border element.

The above analysis demonstrates that the U.S. Supreme Court also faces the issue of conflicts between fundamental rights protecting economic activity and other rights. Some of the difficulties are similar. It suffices to refer to the variation in the tests used to measure conflicting rights against each other or to the problem of collisions between fundamental rights protecting economic interests and social rights. This shows that EU institutions—and in particular the Court of Justice—are not in a uniquely challenging position when addressing conflicts between different rights.

36. U.S. Supreme Court, Truax v. Corrigan, cit., p. 327

37. U.S. Supreme Court, judgment of 25 October 1926, Dorchy v. State of Kansas

38. Ibid., p. 311.

39. Ibid., p. 307

The next section will outline how some of the concerns related to the judicial practice of the Court of Justice might be addressed through a refinement of the Court's reasoning or through legislative intervention. In this regard, the above comparison with the case law of the U.S. Supreme Court will help illustrate how such refinements in the practice of the Court of Justice could be achieved.

V. AN ALTERNATIVE APPROACH IN EU LAW

EU law could adopt an alternative method for resolving conflicts between fundamental freedoms and fundamental rights by treating both as equally important rather than assuming a hierarchy. Unlike the formal priority often given to economic freedoms, the Court of Justice usually balances competing interests through proportionality, allowing fundamental rights to justify restrictions on market freedoms. Beyond judicial balancing, legislation could also provide clearer guidance, as illustrated by the U.S. model of National Labor Relations Act, which codifies how labor rights interact with business interests. Overall, a refined EU approach would formally recognize the equal status of rights and freedoms and rely on transparent proportionality or targeted legislation to resolve conflicts in a more predictable manner.

1. An Alternative Judicial Method for Solving Conflicts Between Fundamental Freedoms and Fundamental Rights

In U.S. law, fundamental rights related to economic activity are regarded on the same footing as other fundamental rights, without any predetermined ranking. A similar approach could potentially be applied within EU law. As discussed above, the apparent priority given to fundamental freedoms is largely formal, since conflicts are in practice balanced through a substantive evaluation using the proportionality test. In fact, in most of the cases examined—except for *Viking* and *Laval*—the Court of Justice allowed limitations on fundamental freedoms in order to safeguard other fundamental rights. Nevertheless, indications of a more nuanced balancing approach can be observed in the Court's decisions in Schmidberger and Dynamic Medien.[40]

a. Schmidberger and Dynamic Medien

In the Schmidberger case, the Court of Justice examined the relationship between freedom of expression and assembly and the free movement of goods, following the temporary closure of a commercially significant Alpine motorway by an environmental organization. The Austrian government argued that freedom of expression and assembly should take precedence, asserting that "fundamental rights are inviolable in a democratic society."[41]

The Court, however, refrained from making such an absolute statement. Instead, it treated the protection of expression and assembly as legitimate interests capable of justifying restrictions on the free movement of goods. Recognizing the wide discretion enjoyed by national authorities, the Court concluded that Austria's decision not to prohibit the demonstration did not violate the free movement provisions of the EC Treaty, read in conjunction with Article 5.[42]

40. Court of Justice, judgment of 14 February 2008, case C-244/06, Dynamic Medien.

41. C. BROWN, Case C-112/00, Eugen Schmidberger, Internationale Transporte und Planzüge v. Austria. Judgment of 12 June 2003, Full Court, in Common Market Law Review, 2003.

42. Ibid. Paragraphe 94.

Many commentators interpret Schmidberger as an instance in which the Court applied an equality-based approach, balancing fundamental rights and economic freedoms.[43] Others argue that the judgment suggests a primacy of fundamental rights over fundamental freedoms.[44] The Court itself referred to the "need to reconcile" fundamental rights with the free movement of goods, thereby signaling a balancing exercise between the interests of the demonstrators and those of the market.[45] Notably, the Court adopted a more flexible substantive assessment, considering not only the impact of the demonstration on trade but also the consequences that a potential ban would have had on participants' freedom of expression.[46]

A key innovation of Schmidberger was the Court's direct confrontation with a clash between a fundamental freedom and fundamental rights. The Court resolved the conflict between free movement and the rights to expression and assembly without categorizing these rights merely as matters of public policy or overriding public-interest requirements.[47] Interestingly, the Court could have invoked environmental or public health protections—recognized exceptions under Article 36 TFEU—to justify the restriction. It declined to do so, noting that the measure at issue merely authorized the demonstration, which rendered the protestors' aims irrelevant.

Scholars such as Tridimas observe that the Court did not treat expression and assembly as explicit exceptions under Article 30 of the EC Treaty, nor as overriding public-interest requirements. Semmelmann goes further, interpreting fundamental social rights as providing an "independent justification."[48] Indeed, the Court referred to the "legitimate interest" in protecting fundamental rights, reinforcing their autonomous role.[49]

Nevertheless, the practical impact of Schmidberger was limited.[50] Balancing was feasible without establishing a hierarchy because the conflict between the free movement of goods and the rights to expression and assembly was only partial: the restrictions were temporary and geographically confined. This differs from cases involving more complete conflicts between fundamental freedoms and fundamental rights. Formally, the Court maintained its usual approach: fundamental freedoms remain the starting point, and any restriction—even when justified by fundamental rights—must be duly justified.[51] Subsequent decisions have refined this approach by treating fundamental rights as general interests capable of justifying restrictions on freedoms. A similar line of reasoning appears in Dynamic Medien, where the Court recognized the child's right to protection as a legitimate

43. T. TRIDIMAS, The General Principles of EU Law, Oxford: Oxford University Press, 2006, p. 298 et seq. and p. 338.

44. M. AVBELJ, European Court of Justice and the Question of Value Choices Fundamental Human Rights as an Exception to the Freedom of Movement of Goods, in New York University School of Law Jean
Monnet Working Paper, no. 6, 2004, jeanmonnetprogram.org, p. 71.

45. C. BROWN, Case C-112/00, Eugen Schmidberger, Internationale Transporte und Planzüge v. Austria. Judgment of 12 June 2003, Full Court, in Common Market Law Review, 2003.Paragraphe 74.

46. Ibid.

47. Skouris put somewhat similarly regarding Schmidberger: "[…] there was no real conflict between fundamental rights and fundamental freedoms […]" V. SKOURIS, Fundamental Rights and Fundamental Freedoms, cit., p. 236.

48. T. TRIDIMAS, The General Principles of EU Law, cit., p. 338.

49. C. SEMMELMANN, The European Union's Economic Constitution under the Lisbon Treaty, cit., p. 535.

50. Skouris put somewhat similarly regarding Schmidberger: "[…] there was no real conflict between fundamental rights and fundamental freedoms […]" V. SKOURIS, Fundamental Rights and Fundamental Freedoms, cit., p. 236.

51. Schmidberger, cit., paras 74 and 78. See also E. SPAVENTA, Federalisation Versus Centralisation, cit., p. 356

interest capable of restricting fundamental freedoms in the context of age-labeled media.[52]

Both Schmidberger and Dynamic Medien signal a more nuanced approach by the Court. Fundamental rights are no longer automatically framed as public-policy exceptions but are recognized as independent legitimate interests. Yet, in practice, the Court still applies its traditional methodology, using these rights to justify restrictions on fundamental freedoms. In effect, fundamental rights continue to operate as exceptions to free movement provisions, albeit in atypical ways. Addressing these concerns fully would require a more systematic refinement of the Court's methodology.

b. Refinement of the judicial practice of the Court of Justice

The Schmidberger case, and its analysis in legal scholarship, offers valuable insights for refining the Court of Justice's case law. Such revisions should focus on the presumed hierarchical relationship between fundamental freedoms and fundamental rights, the treatment of fundamental rights as mere exceptions, and the application of the proportionality test as the principal method for balancing these interests.

Several scholars endorse the balancing approach advocated by Advocate General Trstenjak in Commission v. Germany, which highlights these points in need of clarification.[53] In that case, German local authorities awarded service contracts for occupational pensions without EU-level tenders. Germany argued that the contracts were assigned pursuant to a collective agreement, which allowed workers to influence the choice of service providers and thereby protected their interests. The European Commission contended that this practice violated EU public procurement rules.

Advocate General Trstenjak analyzed the compatibility of the collective agreement with EU procurement directives, the freedom of establishment, and the freedom to provide services. Collective bargaining, as a right closely connected to the right to collective action, is recognized as a fundamental right under EU law, and the right to negotiate and conclude collective agreements is also protected by the Charter of Fundamental Rights.[54]

AG Trstenjak's analysis began from the premise that fundamental freedoms and fundamental rights are of equal standing, without any hierarchical ordering.[55] From this perspective, she challenged the notion that fundamental rights should justify restrictions on fundamental freedoms through written or unwritten justifications. Instead, she proposed that both fundamental freedoms and fundamental rights constitute equally legitimate objectives, each capable of limiting the other when necessary.[56] Any conflict between them should therefore be resolved through the proportionality test, assessing both restrictions of freedoms by rights and restrictions of rights by freedoms.[57] De Vries has supported a similar "double proportionality" approach.[58]

52. Dynamic Medien, cit., para. 42

53. Opinion of AG Trstenjak delivered on 14 April 2010, case C-271/08, Commission v. Germany

54. Opinion of AG Trstenjak, Commission v. Germany, cit., para. 81

55. Ibid., para. 184.

56. Ibid., para. 188.

57. Ibid., paras 189-192.

58. S.A. DE VRIES, The Protection of Fundamental Rights within Europe's Internal Market after Lisbon.

Despite its appeal, the Court of Justice did not adopt AG Trstenjak's framework. It ruled that the fundamental right to collective bargaining did not exempt the collective agreement from EU public procurement rules or from the freedoms of establishment and service provision. While the Court acknowledged the need to reconcile collective bargaining rights with fundamental freedoms, as reflected in secondary legislation, it ultimately focused on compliance with the directives and ruled against Germany.[59]

Many commentators argue that the Court should recognize fundamental rights as a stand-alone exception to fundamental freedoms, in addition to the explicit exceptions listed in the TFEU and those developed in case law.[60] The apparent formal hierarchy favoring fundamental freedoms is largely rhetorical, since it is offset in practice by substantive proportionality assessment, and is therefore arguably unnecessary. Some scholars emphasize that examining fundamental rights in relation to economic freedoms is crucial because the Court can only exercise jurisdiction when economic freedoms are engaged. Once jurisdiction is established, however, fundamental rights and freedoms could be treated on an equal basis.[61]

Moreover, concepts such as public policy and general interest are commonly used in human rights adjudication to justify limitations on rights. In EU case law, however, fundamental rights themselves are often framed as matters of public policy or as overriding reasons in the general interest.[62] This approach risks portraying human rights primarily as instruments for promoting the public interest. While this may be appropriate in some situations, fundamental rights are not exclusively linked to collective interests; they also protect individual or group interests.

For instance, in Omega, the protection of human dignity arguably served public policy but did not necessarily correspond to the interests of service providers or participants. Similarly, in Schmidberger, the environmental demonstration impacted transport companies and thousands of leisure travelers, raising questions about the alignment with the broader public interest. The PruneYard decision in the U.S. illustrates that the exercise of property rights for collective expression may not serve either the property owner or the public directly, yet still falls within the ambit of rights protection.

Conflicts between economic freedoms and fundamental rights, as illustrated in *Viking* and *Laval*, demonstrate that fundamental rights may be limited in order to protect economic interests, often favoring employers over workers. This underscores that fundamental rights are not inherently tied to the public interest and could instead be treated as independent, self-standing justifications. Like economic freedoms, fundamental rights serve individual autonomy and self-realization. While public policy exceptions generally pursue collective objectives, fundamental rights primarily protect individuals or groups.[63]

AG Jacobs in Schmidberger distinguished restrictions imposed for broad public-interest objectives from those adopted to protect individual fundamental rights, suggesting an "individualized"

59. Commission v. Germany [GC], cit., para. 44

60. J. MORIJN, Balancing Fundamental Rights and Common Market Freedoms in Union Law: Schmidberger and Omega in the Light of the European Constitution, in European Law Journal, 2006, p. 39.

61. V. SKOURIS, Fundamental Rights and Fundamental Freedoms, cit., p. 237

62. J. MORIJN, Conflicts between Fundamental Rights or Conflicting Fundamental Rights Vocabularies?,cit., p. 613

63. U.S. Supreme Court, PruneYard Shopping Center v. Robins, cit., p. 85.

conception of human rights. Yet even in that context, fundamental rights were at times framed as legitimate public-interest objectives.[64]

Given that both fundamental freedoms and fundamental rights aim to protect individual autonomy—freedoms in the market context and rights in a broader sense—they could be treated on an equal footing. Consequently, balancing the two should take into account the respective restrictions each imposes on the other, as illustrated in Schmidberger and proposed by AG Trstenjak. Both rights and freedoms may justify limitations on one another. The economic orientation of EU integration, or the initial determination that a case falls within the scope of EU law, does not preclude examining the restrictions on fundamental rights that may arise from the exercise of economic freedoms.[65]

Implementing this refinement would have practical implications, even if the outcomes of cases might remain largely unchanged. The proportionality test would still be applied, but its focus would expand to evaluate restrictions on both freedoms and rights. This would also affect the burden of proof: currently, parties invoking fundamental rights must demonstrate that any restriction on freedoms is proportionate. A more balanced approach would require both sides to demonstrate proportionality—one with respect to the limitation on freedoms, the other with respect to the limitation on rights.

In summary, fundamental rights should be formally treated on an equal footing with fundamental freedoms and recognized as independent and legitimate objectives. Once the Court confirms that a case falls within the scope of EU law, freedoms and rights could be balanced through proportionality by assessing the restrictions imposed on both. This approach could also extend to conflicts involving social rights. Beyond judicial refinement, the U.S. experience suggests another possible avenue: legislative balancing of fundamental rights with economic or collective interests.

c. Legislation for solving conflicts of rights

The judicial approach remains the most common method for resolving conflicts between rights protecting economic activity and fundamental rights. Legal frameworks and techniques—such as tiered scrutiny or the proportionality test—serve both as tools for structured reasoning and as mechanisms for justifying decisions, making them more persuasive to the parties and to the public. In my view, the proportionality test employed by the Court of Justice is inherently open-ended and rarely determines the outcome of rights-conflict cases on its own. The decisive element lies in the substantive assessment and balancing conducted through proportionality within which the Court retains substantial discretion in shaping the final result.

However, legislative intervention offers an alternative means of managing such conflicts. While judicial decisions provide guidance, they often leave room for divergent interpretations in future cases. Legislation, by contrast, can provide greater predictability. The U.S. experience illustrates this approach. After PruneYard, differing interpretations among state courts highlighted the need for legislative clarification regarding the rights of individuals to express political views in shopping malls and the corresponding rights of mall owners, although no such legislation was ultimately

64. Opinion of AG Jacobs delivered on 11 July 2002, case C-112/00, Schmidberger, para. 89.

65. Ibid.

enacted.[66]

Similarly, the need to balance labor rights with business interests led to the adoption of the National Labor Relations Act of 1935 (NLRA), also known as the Wagner Act.[67] The NLRA formally recognizes workers' rights "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[68] It also established the National Labor Relations Board to resolve industrial disputes. In effect, the NLRA introduced legislative guidance in an area previously shaped through judicial assessments of workers' rights and market freedoms. Nevertheless, courts continue to play an important role in interpreting the NLRA and adjudicating cases that fall outside its scope.[69]

By analogy, EU legislation could theoretically regulate conflicts between fundamental freedoms and fundamental rights, following the American model. While some EU provisions aim to reconcile competing rights, none specifically address the clash between fundamental freedoms and fundamental rights. Legislation could refine the relationship between collective action and business rights, as suggested by Fabbrini, although its political feasibility remains uncertain. The Monti II Regulation, which proposed balancing the freedom of establishment, the freedom to provide services, and the right to collective action through proportionality, was ultimately blocked by Member States on subsidiarity concerns. Even if such legislation had been adopted, it would not have eliminated judicial balancing, as the Court of Justice and national courts would still retain their role in interpreting and applying the law.

Nonetheless, the Monti II proposal was notable for treating fundamental freedoms and social rights as equal. Article 2 provided that the exercise of economic freedoms must respect the fundamental right to collective action, including the right to strike, and vice versa. Implementation would have been left to national courts applying the proportionality test on a case-by-case basis. Although the right to strike was recognized only when serving overriding public interests, the proposal mirrored, in certain respects, the approach of the NLRA. It also reflected the "double proportionality" principle advocated by AG Trstenjak in Commission v. Germany, requiring proportionality to be assessed both for restrictions of freedoms by rights and for restrictions of rights by freedoms.[70]

Legislation can demonstrate a commitment to resolving conflicts and promote legal certainty by setting boundaries for the permissible exercise of rights and by sanctioning non-compliance. Yet it is not a panacea. Laws may provide guiding principles, but courts ultimately determine outcomes in concrete cases. Legislation such as the NLRA addresses only specific types of conflicts, particularly those between employers and employees, leaving broader rights conflicts to judicial resolution. The failure of the Monti II Regulation highlights the political challenges surrounding legislative solutions

66. W. BURNETT HARVEY, Private Restraint of Expressive Freedom: A Post-PruneYard Assessment, in Boston University Law Review, 1989, p. 929.

67. Supreme Court of Connecticut, judgment of 17 January 1984, Cologne v. Westfarms Associates; C.J. BERGER, PruneYard Revisited: Political Activity on Private Lands, in New York University Law Review, 1991, p. 670

68. U.S. Congress, National Labor Relations Act of 1935, 5 July 1935, paras 151–169

69. J. KING, American Exceptionalism over Social Rights, in L. LAZARUS, C. MCCRUDDEN, N. BOWLES (eds), Reasoning Rights, Oxford: Hart, 2014, p. 368.

70. Communication COM(2012) 130 final of 21 March 2013 from the Commission, Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services, p. 13.

in the EU and confirms that courts remain the primary arbiters. This underscores the importance of the proportionality test being applied consistently and transparently, thereby reinforcing both the legitimacy of judicial balancing and the authority of the Court of Justice itself.

VI. THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS: A COURT WITH BROAD POWERS THAT IS STILL FINDING ITS WAY

The establishment of the African Court on Human and Peoples' Rights has undoubtedly been a positive—if not the most significant—development for the African system of human rights protection. Until its creation, the system had been overseen primarily by a commission, which quickly revealed its limitations, due not only to a lack of resources but also to the absence of binding authority. The creation of an African court was therefore widely regarded as a necessary step forward.

A reading of Articles 3 and 4 of the Ouagadougou Protocol indicates that the functions of the African Court are twofold in nature: contentious and advisory. For the time being, however, the African Court has had limited opportunities to fully develop this dual role in practice.

1. Litigation jurisdiction: Significant Ratione Materiae and Ratione Temporis Competences

It should be noted from the outset that the Ouagadougou Protocol does not restrict the freedom of choice of States Parties regarding the means of monitoring the Charter's implementation. In fact, they remain free to bring a case before another court—such as the International Court of Justice (ICJ) or sub-regional courts that also develop case law interpreting the Charter—or before an arbitral body of their choice. By contrast, the European Convention on Human Rights is more restrictive in this regard, as it excludes any dispute resolution mechanism other than those provided within its own framework.[71]

Next, it should be emphasized that the African Court's contentious jurisdiction ratione materiae is very broad. Article 3 of the Ouagadougou Protocol states: "The Court shall have jurisdiction to hear all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol, and any other relevant human rights instrument ratified by the States concerned."[72] The liberal nature of this provision is confirmed by Article 7, which provides that the African Court "shall apply the provisions of the Charter as well as any other relevant human rights instrument ratified by the State concerned."[73]

Such a provision does not exist in either the Inter-American or European systems. In those two legal orders, the respective courts are limited to interpreting their regional conventions. Similarly, the

71. Abdou-Khadre Diop. La Cour africaine des droits de l'homme et des peuples ou le miroir stendhalien du système africain de protection des droits de l'homme. Les Cahiers de Droit. Volume 55. Number 24. June 2014. Page 536.

72. Protocol to the African Charter on Human And Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights. Article 3. chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://au.int/sites/default/files/treaties/36393-treaty-0019_-_protocol_to_the_african_charter_on_human_and_peoplesrights_on_the_establishment_of_an_african_court_on_human_and_peoples_rights_e.pdf

73. Ibid. Article 7.

Charter does not provide such an extension of competence for the African Commission on Human and Peoples' Rights, whose mandate is confined to interpreting the Charter.[74]

Moreover, the material jurisdiction of the African Court is all the broader because the Charter encompasses both individual and collective rights, as well as civil, political, economic, social, and cultural rights. The question of the scope of this material jurisdiction will inevitably arise before the African Court. Already, in Mtikila v. Tanzania,[75] the applicants invoked, as a relevant instrument, the treaty establishing the East African Community. The respondent objected that this treaty was not a relevant human rights instrument within the meaning of Articles 3(1) and 7 of the Ouagadougou Protocol. The African Court did not rule on this point; instead, it limited itself to examining whether there had been a violation of the Charter, considering that this was sufficient in the circumstances and that it was not necessary to rule on any other instruments invoked by the applicants.[76]

However, a literal interpretation of Article 3(1) might suggest that three cumulative conditions must be satisfied. First, the instrument must be an international treaty, which gives the act a certain binding force. In this regard, the question arises as to whether the Universal Declaration of Human Rights falls within the scope of Articles 3(1) and 7 of the Ouagadougou Protocol. Second, the treaty must relate to human rights. Here, it would be useful to distinguish between treaties whose primary purpose is exclusively the protection of human rights and those whose primary objective is different but which nevertheless contain provisions relating to such rights.

Treaties of the first category—those drafted to confer subjective rights on individuals—can without doubt be considered relevant instruments within the meaning of Articles 3(1) and 7 of the Ouagadougou Protocol. Similarly, treaties of this category that primarily impose obligations on States Parties, even without expressly granting individual subjective rights, could also be recognized as relevant instruments.

As for treaties of the second category—those whose primary purpose is different but which nevertheless contain provisions relating to human rights—the situation is more complex. The provisions in question generally do not confer subjective rights on individuals under the jurisdiction of the States Parties to these treaties. The African Court, exercising its competence to determine the scope of its own jurisdiction under Article 3(2) of the Ouagadougou Protocol, will therefore need to clarify which texts fall within its review through careful reasoning. This clarification will be particularly important for treaties establishing regional economic communities (ECOWAS, SADC, and the EAC), which are primarily aimed at economic integration but also contain references to the protection of human rights.

Finally, a third condition is that the treaty must have been ratified by the State party appearing before the African Court. In this regard, the Vienna Convention on the Law of Treaties defines ratification as the act by which a State expresses its consent to be bound by a treaty.[77] It would

74. African Charter of Human Rights and People. Article 45.2. chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.oas.org/en/sla/dil/docs/African_Charter_Human_Peoples_Rights.pdf

75. Tanganyika Law Society & The Legal and Human Rights Centre c. République-Unie de Tanzanie et Révérend Christopher R. Mtikila c. République-Unie de Tanzanie, CADHP. no 009/2011 et no 011/2011.

76. Abdou-Khadre Diop. La Cour africaine des droits de l'homme et des peuples ou le miroir stendhalien du système africain de protection des droits de l'homme. Les Cahiers de Droit. Volume 55. Number 24. June 2014. Page 536.

77. Vienna Convention on the Law of Treaties. Article 14. chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

indeed be illogical to hold a State liable on the basis of a text it has not ratified, in accordance with the fundamental principles of public international law.

With regard to the ratione personae jurisdiction, governed by Article 5 of the Ouagadougou Protocol, it should be noted that it is relatively liberal compared to the American and European systems.[78] The Protocol establishes the mandatory jurisdiction of the African Court for cases brought before it by the African Commission on Human and Peoples' Rights, by certain States Parties, and by African intergovernmental organizations. It also provides for optional jurisdiction in cases submitted by individuals or non-governmental organizations (NGOs).[79] Furthermore, unlike the European system, victim status is not required in order to bring a case before the African Court. With regard to ratione temporis jurisdiction, this issue has recently been the subject of considerable discussion before the African Court. The Court is competent to hear cases brought before it provided that, at the critical date when the acts in question were committed, the State concerned had ratified the Ouagadougou Protocol. According to the Court's reasoning in Norbert Zongo v. Burkina Faso, a distinction must be made between instantaneous acts and continuous acts.[80] If an act committed before the ratification of the Ouagadougou Protocol by the State concerned is considered instantaneous or completed, the African Court lacks jurisdiction ratione temporis. Conversely, if the act is continuous and persists beyond the ratification of the Protocol, the Court may exercise jurisdiction ratione temporis. Accordingly, the African Court's ratione temporis jurisdiction is assessed on the basis of both the critical date of the acts in question and their nature, namely whether they are completed or continuous.

2. Litigation jurisdiction: Significant ratione materiae and ratione temporis jurisdiction competences

Article 4 of the Ouagadougou Protocol empowers the African Court to issue advisory opinions on legal questions. A request for an advisory opinion may come not only from States Parties to the Ouagadougou Protocol but also from the African Union (AU) itself and its organs, other AU member States, as well as "any recognized African organization" by the AU.

The approach adopted by the Ouagadougou Protocol differs somewhat from that of the Charter regarding the Commission's power of interpretation. In fact, the Protocol broadens access to the advisory mechanism to all AU member States, whether or not they are parties to the Protocol. This approach also differs significantly from the European Convention on Human Rights, under which only the Committee of Ministers may request an advisory opinion. It is, however, similar to the system adopted in the Inter-American framework, where the court may be seized by all member States of the Organization of American States (OAS) as well as by certain of its organs. The only difference is that the Ouagadougou Protocol does not specify which organs are entitled to request an opinion.

The scope of the African Court's advisory jurisdiction, like its contentious jurisdiction, is very broad. It encompasses both the Charter and any other relevant human rights instrument, including not only

78. Abdou-Khadre Diop. La Cour africaine des droits de l'homme et des peuples ou le miroir stendhalien du système africain de protection des droits de l'homme. Les Cahiers de Droit. Volume 55. Number 24. June 2014. Page 537.

79. Ibid. Page 538.

80. Norbert Zongo, Abdoulaye Nikiema dit Ablasse, Ernest Zongo et Blaise Iboudo & le Mouvement Burkinabe des droits de l'homme et des peuples c. Burkina Faso, CADHP no 013/2011

related regional and universal treaties but also other non-binding instruments such as resolutions of the AU Commission or the United Nations General Assembly. The only material limitation is that the requested opinion must concern a "legal question," meaning that it must identify the relevant provisions of the instrument invoked.[81] Another formal limitation is that the opinion must not concern a matter currently pending before the African Commission on Human and Peoples' Rights.

An additional ambiguity concerns the material scope of a request for an opinion submitted by organizations recognized by the AU. In such cases, one may ask whether the request should be limited by the principle of specialization of international organizations. A similar limitation is specified in the United Nations system, where the UN charter allows certain organs to request an advisory opinion from the ICJ only on legal questions "arising within the scope of their activities."[82] Likewise, under the American Convention, the court may only hear requests for advisory opinions from specified international organizations if they concern legal questions "within [their] sphere of competence."[83] By contrast, the Ouagadougou Protocol contains no such limitations. Subsequent jurisprudence will undoubtedly clarify this issue.

In conclusion, the African Court's jurisdiction—both contentious and advisory—has a broad scope ratione materiae and ratione personae. However, its practical implementation raises several challenges, and only future jurisprudence will help clarify or resolve them. What should be emphasized for now is that the drafters of the Protocol intended to equip the African Court with the legal tools necessary to serve as the cornerstone of the African system for the protection of human rights. The judges themselves appear to have recognized this role, as they have taken early opportunities to position the Court as a guarantor of democracy, human rights, and the rule of law in Africa.

3. Limitations of the African Court on Human and Peoples' Rights

The establishment of the African Court is in itself is a significant advancement. However, several inherent factors tend to curb this momentum. First and foremost, there is the optional clause contained in Article 34(6) of the Ouagadougou Protocol and the lack of political will on the part of States, as evidenced by the relatively low ratification rate of the Protocol establishing the African Court. These elements undoubtedly constitute the system's Achilles' heel. Another important factor is the environment in which the African Court operates, particularly the potential competition from sub-regional courts, which may create inter-institutional bottlenecks and act as a veritable sword of Damocles over the system.

a. The low ratification rate of the Protocol

The African human rights protection system is, above all, an international legal order. For this reason, it relies largely on the consent of States. To date, South Africa, Algeria, Benin, Burkina Faso,

81. Ibid. Page 540.

82. Legality of the Use of Nuclear Weapons by a State in Armed Conflict, Advisory Opinion, ICJ Reports 1996, p. 66, para. 10: The ICJ concluded that the request for an advisory opinion submitted by the World Health Organization (WHO) did not concern a question arising within the scope of its activities.

83. Rules of the Inter-American Court of Human Rights, Official Doc. OAS/Ser.L./V/I.4 rev. 9 (2003), Art. 60.

Burundi, Cameroon, Côte d'Ivoire, Comoros, Congo, Gabon, Gambia, Ghana; Guinea-Bissau, Kenya, Libya, Lesotho, Mali, Madagascar, Malawi, Mozambique, Mauritania, Mauritius, Nigeria, Niger, Uganda, Democratic Republic of the Congo (DRC), Rwanda, Senegal, Tanzania, Chad, Togo, Tunisia and Zambia have ratified the Protocol of Ouagadougou establishing the African Court if Human Rights and People. It should be noted that, by comparison, fifty-three (53) of the fifty-four (54) AU member States have already ratified the African Charter on Human and Peoples' Rights.

What explains this gap between the enthusiasm for ratifying the Charter and the reluctance toward the Protocol establishing the judicial institution to protect the rights contained in that same Charter? One possible explanation lies in the preference, in many African contexts, for extra-judicial dispute resolution mechanisms rather than recourse to courts. As the Senegalese jurist Adama Dieng aptly noted, "going to court is to argue, not to discuss […] The notion of objective recourse is difficult to accept; when you challenge an act, the author of the act feels personally targeted."[84]

From this perspective, the Charter itself did not initially provide for the establishment of an African court responsible for the protection of human rights. Instead, it entrusted this mission to a commission, requiring it to "make every appropriate effort to reach an amicable solution."[85] This conciliatory approach, which underpins the Charter, undoubtedly contributed to its widespread ratification, as States did not perceive it as posing a significant challenge to their sovereignty.

However, the adoption of the Ouagadougou Protocol marked a shift in this philosophy, reflecting the creation of a genuinely institutionalized system of justice. From this perspective, the Charter itself did not provide for the establishment of an African court tasked with protecting human rights. Instead, it entrusted this mission to a commission, requiring it to "make every appropriate effort to reach an amicable solution." This approach, which forms the basis of the Charter, undoubtedly explains its widespread ratification, as States were not overly concerned about their sovereignty. However, the adoption of the Ouagadougou Protocol transformed this approach, signaling the establishment of a truly institutionalized system of justice.

The low ratification rate of the Ouagadougou Protocol can also be explained by limited institutional capacity in some States.[86] It is clear that certain States are aware of the institutional weaknesses of their judicial system, or of their human rights protection systems in general, which could ipso facto be condemned by the African Court if the State concerned were to recognize its jurisdiction by ratifying the Ouagadougou Protocol.[87] For many States, ratification would mean exposing themselves to the risk of condemnation by the African Court whenever they are challenged before it.[88] Consequently, some prefer to undertake the necessary reforms to align their systems with international standards before recognizing the Court's jurisdiction.[89]

The low ratification rate significantly affects the African Court's ratione personae jurisdiction and,

84. Adama Dieng, « Les droits de l'homme en Afrique : plaidoyer pour un développement des ONG africaines », Zaïre-Afrique, vol. 25, no 191, 1985, p. 7. M. Dieng est l'ancien greffier du TPIR.

85. Alain Didier Olinga, « Les emprunts normatifs de la Commission africaine des droits de l'homme et des peuples aux systèmes européen et interaméricain de garantie des droits de l'homme », (2005) 62 Rev. trim. dr. h. 499.

86. Abdou-Khadre Diop. La Cour africaine des droits de l'homme et des peuples ou le miroir stendhalien du système africain de protection des droits de l'homme. Les Cahiers de Droit. Volume 55. Number 24. June 2014. Page 546.

87. Ibid.

88. Ibid.

89. Ibid.

in turn, diminishes its capacity to function as an effective judicial body for the continent. This initial challenge is further compounded by the declaration provided for in Article 34(6) of the Ouagadougou Protocol.

b. Direct access of individuals to the African Court on Human and Peoples' Rights.

The question of individuals' direct access to the African Court on Human and Peoples' Rights remains a crucial issue in human rights litigation in Africa. Indeed, making individuals' direct access to this Court subject to the declared consent of the State appears somewhat anachronistic, clearly reflecting the difficulties surrounding direct individual petitions before the African human rights bench.[90]

In this regard, it should be noted that African States adopted an approach similar to that favored by Europeans at the time of the adoption of the European Convention on Human Rights on 4 November 1950. Indeed, the well-known right of individual petition before the European Commission of Human Rights, as provided for in Article 25 of that Convention, could only be exercised if the respondent State had previously accepted the Commission's jurisdiction to hear individual applications through an express unilateral declaration.

With the entry into force of Protocol No. 11 to the European Convention on Human Rights on 11 May 1994, which reformed the supervisory mechanism established by the Convention—most notably by abolishing the Commission and retaining only a single Court—the European Court of Human Rights now exercises compulsory jurisdiction with respect to individual applications.

Pursuant to Article 34 of Protocol No. 11, the European Court is directly empowered to examine individual petitions, and its jurisdiction in this area flows directly from the ratification of the Protocol. The Protocol thus removes the option previously left to States Parties regarding acceptance of jurisdiction over individual applications. Individuals' access to the European Court is now automatic and no longer requires any special declaration of acceptance. This development reflects the quantitative importance of the applications brought before this jurisdiction, to the point that reforms are now being sought to address the Court's docket congestion.

The case law of the African Court on Human and Peoples' Rights, however, clearly illustrates the obstacle created by the requirement set out in Article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights. The Court inaugurated its jurisprudence on this issue in Michelot Yogogombaye v. Republic of Senegal, decided on 15 December 2009. In that judgment, it dismissed the application for lack of jurisdiction due to the absence of a declaration by the respondent State under Article 34(6). The Court also clarified the meaning of Articles 5 and 34(6), thereby putting an end to a number of divergent interpretations.

From its very first judgment—and the African Court has remained consistent ever since—it has maintained that "a combined reading of these two provisions shows that direct access to the Court by an individual is subject to the respondent State's filing of a special declaration authorizing such referral."[91]

90. Ibid. Page 547.

91. Michelot Yogogombaye v. Republic of Senegal, African Court on Human and Peoples' Rights, Application No. 001/2008.

It should be noted that the declaration provided for in this article is a solemn act by which any State Party to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights expresses its consent to be bound by individual applications before the African Court on Human and Peoples' Rights. Consequently, individuals or NGOs whose State has not made such a declaration are unable to bring a case before this tribunal. To date, out of the thirty-three (33) States that have ratified the Protocol, only six have subscribed to the clause contained in Article 34(6): Gambia, Togo, Malawi, Tanzania, Ghana, and Rwanda. This minority clearly demonstrates that States Parties to the Protocol remain reluctant to allow their citizens direct access to the African Court. Yet, given that the case law of the African Commission sufficiently shows that its importance largely depends on individual petitions, the role of the African Court in the protection of human rights still depends primarily on the willingness of States to make the declaration under Article 34(6).

The success of the African Court as an instrument for the protection of human rights would require not only that the Ouagadougou Protocol be ratified by all member States, but also that they recognize the Court's jurisdiction by making the declaration provided for in Article 34(6). This "universal" ratification would give the African Court the legitimacy necessary to effectively carry out its mandate. This progress would demonstrate the commitment of States Parties to the protection of human rights and would restore hope to individuals for an improvement in this regard.

In the absence of widespread ratification of the Ouagadougou Protocol, the African Court's jurisdiction—and the legitimacy of the human rights protection system—remain limited, as citizens of certain member States are unable to benefit from the "insurance coverage" that the Court is intended to provide.

c. Risk of forum-shopping

The African Court on Human and Peoples' Rights is not the only institution within the human rights protection system in Africa. There is also the African Commission on Human and Peoples' Rights, which the Court is intended to "complement and strengthen."[92] Additionally, the courts of the Regional Economic Communities (RECs) also possess, in one way or another, a mandate to protect human rights in Africa. This institutional landscape may initially appear somewhat perplexing.

On the one hand, in the relationship between the African Court and the Banjul Commission, the risk of overlap appears to be relatively controlled. However, the legal texts have not deemed it necessary to clearly regulate the relations between these two autonomous institutions, which can create situations of legal uncertainty, particularly in the area of litigation. Drawing inspiration from the European system, which since 1 November 1998 has consisted of a single court, the drafters of the Ouagadougou Protocol might have been better advised to define the distribution of competences themselves by including explicit provisions to that effect in the Protocol—amending the Charter if necessary—rather than leaving this task to the internal rules of two autonomous organs.[93]

On the other hand, it is particularly in the relations between the African Court and the courts of

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93. Fatsah Ouguergouz, La Cour africaine des droits de l'homme et des peuples – Gros plan sur le premier organe judiciaire africain à vocation continentale. Annuaire français de droit international. Page 224.

the RECs that the risk of a bottleneck appears most evident. Indeed, the African Court and the Commission do not have exclusive authority over the interpretation and application of the Charter. The courts of the RECs also deal with such disputes. It is true that, broadly speaking, the aims of community organizations are the regulation of integration processes—most often economic, though these may also take on more political dimensions.[94] The ratione materiae jurisdiction of a community court originally covers economic matters, on the one hand, and is, in principle, limited to the interpretation and application of community law, on the other. However, the universalist expansion of human rights protection has led community courts to move beyond the purely "mercantile agenda."[95]

Among its manifestations, one may cite the example of the Southern African Development Community (SADC) and the Economic Community of West African States (ECOWAS). Article 4 of the Treaty of the SADC states: "SADC and its Member States shall act in accordance with the following principles: […] c) human rights, democracy and the rule of law." ECOWAS, for its part, is undoubtedly the African sub-regional organization that has demonstrated the greatest enthusiasm in this regard. Article 4 of the Revised ECOWAS Treaty provides: "The High Contracting Parties, in pursuing the objectives set out in Article 3 of this Treaty, affirm and solemnly declare their adherence to the following fundamental principles: […] respect, promotion and the protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights."

The impression that emerges is that the proliferation of African international courts with competence in the protection of human rights may become a source of disorder, while being counterproductive for the African system established for this purpose. This judicial parallelism inevitably creates competition, leaving the litigant perplexed. The difficulty is compounded by the absence of regulation and hierarchy in the relations between the continental and sub-regional levels. This results in two consequences: on the one hand, this situation is likely to generate a judicial cacophony in which each judge may seek to assert a position of predominance over the others; on the other hand, there is an inevitable temptation toward forum shopping. Litigants will tend to turn to the court most likely to best safeguard their interests.

94. Laurence Burgorgue-Larsen, Le fait régional dans la juridictionnalisation du droit international», dans Société française pour le droit international, Colloque de Lille. La juridictionnalisation du droit international, Paris, Éditions A. Pedone, 2003, Pages 203-206

95. Ibid. Page 247.

CONCLUSION

The above analysis shows that the challenges faced by the Court of Justice in cases involving conflicts between fundamental freedoms and fundamental rights are not unique. The practice of the U.S. Supreme Court also reveals similar features. Most of these concerns could be alleviated in two ways: first, the judicial reasoning of the Court of Justice could be further refined and, second, legislative intervention may increase predictability.

Regarding the judicial reasoning of the Court of Justice, as Gerards notes, the meaning and position of fundamental rights in the Court's case law are far from clear. The relationship between fundamental freedoms and fundamental rights, and in particular between fundamental freedoms and social rights, remains vague. The EU has traditionally pursued economic objectives, and fundamental rights have often been interpreted through the lens of economic integration. More recently, however, the inclusion of objectives other than economic ones in the Treaties (such as social policy objectives) may contribute to changing this approach. Although EU integration may still be driven by economic purposes, EU law must also accommodate non-economic values. This requires a rethinking of the treatment of fundamental freedoms and fundamental rights in the judicial reasoning of the Court of Justice.

Neither primary nor secondary EU law establishes a hierarchy between fundamental freedoms and fundamental rights. The case law of the Court of Justice, however, appears to grant an a priori hierarchical priority to fundamental freedoms. Nonetheless, this seems to function largely as a formal rhetorical device enabling the application of the traditional analytical framework used in internal market cases. One might attribute a symbolic value to this approach, reflecting the EU's traditional economic orientation. This does not alter the fact that, in practice, the balancing between the two through the proportionality test allows either to prevail in a given case. This is not different from the case law of the U.S. Supreme Court concerning the collision between fundamental rights protecting economic activity and other rights. The Court of Justice should therefore grant fundamental freedoms and fundamental rights formally equal rank. There is no need to treat fundamental rights as part of the public policy exception or as overriding reasons in the public interest. Fundamental rights should instead be recognized as having an independent status in EU internal market law.

In resolving conflicts through judicial reasoning, the Court of Justice and the U.S. Supreme Court have often faced similar situations, and the outcomes of their cases have also been comparable. This might seem surprising, since they apply different methods to settle conflicts between various rights: the proportionality test and tiered scrutiny, respectively. The Court of Justice applies the proportionality principle in several variations. In the practice of the U.S. Supreme Court, no uniform test is applied to assess a restriction of a right protected by the Amendments to the U.S. Constitution or by statutes. Instead, the U.S. Supreme Court has developed several tests. In cases concerning conflicts between fundamental rights protecting economic activity and other rights, we do not see the consistent application of any single test. This reflects a pragmatic approach that sometimes places less emphasis on the justificatory force of the decisions. Both EU and U.S. constitutional adjudication rely on general and highly flexible tests that can be used to justify almost any decision. This leads to the conclusion that the adjudication of both the Court of Justice and the U.S. Supreme Court are characterized by fluctuating choices between fundamental rights protecting economic activity (using EU terminology, "fundamental freedoms") and other rights.

The African judicial mechanism for the protection of human rights is nevertheless progressing despite the obstacles encountered. However, a protection system is fundamentally a system of values, and as such it naturally experiences periods of advancement and difficulty. These obstacles are therefore to be expected in the development of a regional human rights jurisdiction. The European experience can serve as a useful reference in this regard. The establishment of the African Court represents a significant step forward, but much remains to be done for it to exercise powers comparable to those of the European Court of Human Rights in Strasbourg or the Inter-American Court of Human Rights in San José. Reflecting on the future trajectory of African integration may help accelerate this process.

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Abdessalam Jaldi est spécialiste des relations internationales, plus particulièrement du droit international et des relations internationales. Il travaille actuellement au Policy Center for the New South en tant que membre principal d'une étude analytique examinant les mutations du Maghreb, les relations euro-africaines, les nouvelles tendances du droit international et l'influence de l'Inde et de l'Afrique. Titulaire d'un doctorat en droit obtenu en France en 2018, il a quatre ans d'expérience dans le domaine des organisations à but non lucratif, de la recherche sociale et de l'observation électorale.

ABOUT THE POLICY CENTER FOR THE NEW SOUTH

The Policy Center for the New South (PCNS) is a Moroccan think tank aiming to contribute to the improvement of economic and social public policies that challenge Morocco and the rest of Africa as integral parts of the global South.

The PCNS pleads for an open, accountable and enterprising "new South" that defines its own narratives and mental maps around the Mediterranean and South Atlantic basins, as part of a forward-looking relationship with the rest of the world. Through its analytical endeavours, the think tank aims to support the development of public policies in Africa and to give the floor to experts from the South. This stance is focused on dialogue and partnership, and aims to cultivate African expertise and excellence needed for the accurate analysis of African and global challenges and the suggestion of appropriate solutions. Read more

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