DISPATCH NO. 38 – NORWAY

THE 'BACK AND FORTH' IN THE PROTECTION OF (COLLECTIVE) LABOR RIGHTS UNDER THE ECHR CONTINUES: THE *HOLSHIP* CASE

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INTRODUCTION

For over a decade, the interpretation of Article 11 of the European Convention on Human Rights (ECHR)[1] by its supervisory body, namely, the European Court of Human Rights (ECtHR), has been a source of intense feelings for advocates of labor rights. In some of the Court's rulings, such as in the case of *Demir and Baykara v. Turkey* case,[2] these feelings have taken the form of joy and optimism, while in other cases, like in the *National Union of Rail, Maritime and Transport Workers v UK* judgment ('RMT' case)[3], they have unfolded as disappointment and indignation. Importantly, there are also some judgments that have generated a 'mixture of feelings', where there is an impression that the Court gives with the one hand and reaches with the other. As I argue in this dispatch, the recent decision of the ECtHR in the so-called *Holship* case [4] leans towards the latter situation, albeit a glimpse of hope can be said to remain at the end.

THE FACTS OF THE *HOLSHIP* CASE

The case involved the Supreme Court of Norway's judgment which, by overruling the decisions of two other lower domestic courts,[5] declared that a proposed boycott, organized by the Norwegian Transport Workers' Union

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1. European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, art. 11, Nov. 4,1950, 213 U.N.T.S. 221, on Freedom of Assembly and Association, (including the right to form and join a trade union).

2. Demir and Baykara v. Turkey, 2008-V Eur. Ct. H.R. 395.

3. National Union of Rail, Maritime and Transport Workers v United Kingdom, 2014-II Eur. Ct. H.R. 1.

4. Norwegian Confederation of Trade Unions (LO) and Norwegian Transport Workers' Union (NTF) v. Norway, App. No. 45487/17, HUDOC (June 10, 2021), http://hudoc.echr.coe.int/eng?i=001-210332 [hereinafter *Holship case*].

5. Drammen City Court and Borgarting High Court both found that the intended boycott was lawful.

(NTF), was unlawful. The boycott, as a form of industrial action, took place against a shipping firm, Holship Norge AS, that employed a number of workers to load and unload ships in the port of Drammen. In doing so, the company acted outside the framework of an existing collective agreement, which requires that this type of work should be undertaken by dockworkers who are organized in a local enterprise, established by the union and the employer's association. The agreement is based on ILO Convention No.137, which indeed, in its Article 3, enshrines that "*registered dockworkers should have priority of engagement for dock work*."[6] It, moreover, stipulates for minimum periods of employment and a minimum income, in an industry that for many years in the past had been dominated by casual workers with little job security, hired on a shift basis by different employers. The boycott, therefore, was intended to prevent Holship's employees from acting in breach of the terms of the collective agreement at issue.

In order to decide whether the industrial action was lawful, Norway's highest court of justice, requested an advisory opinion from the Court of Justice of the European Free Trade Association (EFTA) States—Norway is a member of the European Economic Area (EEA)—.[7] The EFTA court[8] ruled that under the proportionality test, the planned boycott had to be regarded as a restriction on the right to establishment. In justifying its conclusions, it referred to the case-law of the Court of Justice of the European Union (CJEU) and specifically to the reasoning followed in the cases of *Viking* and *Laval*.[9] By relying on this verdict, the Supreme Court pointed out that the industrial action by NTF union could indeed infringe Holship's right to freedom of establishment under the EEA; hence, any limitations on the boycott, which according to NTF constituted a violation of both the country's constitution and Article 11 ECHR, could be justified even if they were restricting constitutional entitlements, or human rights enshrined in the Convention. As a result, the union in question brought the case in front of the ECtHR.

The Strasbourg Court ruled that the refusal in relation to the obstruction of the boycott had to remain within the country's wide margin of appreciation,[10] as the justifications advanced by the Norwegian Supreme

6. Convention concerning the Social Repercussions of New Methods of Cargo Handling in Docks, C137 - Dock Work Convention, 1973 (No. 137).

7. The Agreement on the European Economic Area (EEA), Jan. 1, 1994, 1994 O.J. (No. L 1) 3, [hereinafter EEA], brings together the EU Member States and the three EEA EFTA States—Iceland, Liechtenstein, and Norway—in a single market, known as the "Internal Market", https://www.efta.int/eea/eea-agreement.

8. The EFTA Court is a supranational judicial body, which among other responsibilities gives advisory opinions on the appropriate interpretation of the of the EEA Agreement, https://eftacourt.int/.

9. In both cases, the CJEU acknowledged that the right to strike is a ''fundamental right which forms an integral part of the general principles of community law''. It was, however, held that such a right could and needed to be balanced against the commercial principles of EU law; Case C-438/05, International Transport Workers' Federation v Viking Line ABP, 2007 ECR I-10779 and Case C-341/05, Laval un Partneri Ltd v Svenska Byggnadsarbetareforbundet, 2007 ECR I-11767.

10. The margin of appreciation constitutes a legal doctrine, developed by the ECtHR. It refers to the space for maneuver that the Court is prepared to grant national authorities regarding the fulfillment of

Court were sufficient enough, given the particular circumstances of the case. Thus, no violation of Article 11 ECHR occurred. The ECtHR accepted, however, that boycotts as a tool in labor conflicts may be protected under the Convention. Notably, it went on to emphasize that: ''*from the perspective of Article 11 of the Convention, EEA freedom of establishment is not a counterbalancing fundamental right to freedom of association but rather one element, albeit an important one, to be taken into consideration in the assessment of proportionality under Article 11, paragraph 2.*''[11]

ART. 11 ECHR: THE ''BACK AND FORTH'' IN THE PROTECTION OF (COLLECTIVE) LABOR RIGHTS

It was the 2008 decision of the ECtHR, in *Demir and Baykara*, that led Keith Ewing and John Hendy QC to characterize the case in question as ''*epoch making ruling*''.[12] For the first time the Strasburg Court acknowledged that the right to collective bargaining constitutes an essential feature of Article 11 ECHR. To this extent, the Convention was interpreted as 'living instrument' that must be construed in the light of present-day conditions in order to avoid becoming a ''*dead letter*''.[13] In doing so, the ECtHR relied on common practices from the ECHR's contacting States and a systematic breakdown of the related international labor and human rights instruments, as well as the verdict of their supervisory bodies;[14] this is often called an 'integrated' approach.[15] Arguably, the Court paved the way for equal protection with respect to other forms of trade union activity, particularly the right to strike.[16]

That said, it was the subsequent ruling of the ECtHR in *Enerji Yapi-Yol Sen v. Turkey*[17] that led Dorssemont to describe the outcome of the case as a ''*judicial revolution*'', due to the 'U-turn' of the Court's approach with

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their obligations under the ECHR. Such a doctrine allows the Court to take under consideration cultural, historic, and philosophical differences between the different Contracting States.

11. *Holship case*, *supra* note 5, para 118.

12. Keith Ewing & John Hendy QC, *The Dramatic Implications of Demir and Baykara*, 39 IND. L. J. 2 (2010).

13. Sir Nicolas Bratza, *Living-instrument or dead letter - the future of the European Convention on Human Rights*, 2014 EUR. HUM. RTS. L. REV. 116.

14. For instance, reference was made to ILO Convention No. 87 on the Freedom of Association and Protection of the Right to Organise; ILO Convention No. 98 on the Right to Organise and Collective Bargaining; European Social Charter, art 6; reference was also made, *inter alia*, to the verdict of the ILO Committee on Freedom of Association and the ILO Committee of Experts on the Application of Conventions and Recommendations and to the European Committee on Social Rights (ECSR).

15. Virginia Mantouvalou, *Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation*, 13 HUM. RTS. L. REV. 529 (2013).

16. Ewing & Hendy QC, *supra* note 13, at 2.

17. Enerji Yapi-Yol Sen v. Turkey, App. No. 68959/01, HUDOC (April 21, 2009), http://hudoc.echr.coe.int/eng?i=001-92266.

respect to the right to strike.[18] In that case, it was pointed out that the right in question is an indispensable element of collective bargaining and for the very first time it was accepted that it should be also protected under Article 11 of the Convention. Once again, the 'integrated approach' was implemented. Furthermore, the Court departed from its previous line of jurisprudence and reluctance to accept that the right to strike should be protected under the Convention.[19] This development occurred despite the fact that the ECtHR left the question as to whether such a right constitutes an 'essential' or an 'important' facet of Article 11 open for interpretation. The Court's labor friendly path towards the right to industrial action in the form of a strike was also followed in some subsequent cases against Turkey, in which the latter was found in violation of Article 11 ECHR; once again, the Court relied on an extensive reference to related international standards.[20]

Still, few years later, in the so-called *RMT* case, the Court appeared to change its approach towards the level of protection of the right to strike. To a great extent, this can be attributed to the outcome, as well as the general approach of the ECtHR. In this judgment the Court seemed ''*to misplace the optimism*''[21] that *Demir and Baykara* and *Enerji* cases had generated. Even though it was reiterated that the right to strike is clearly protected under Article 11 ECHR, the decision reduced the scope of its protection. The Court by giving a wide margin of appreciation to the respondent State as to how trade union freedom may be secured, it claimed that the union in question was not restrained in its action as far as the ''*labyrinthine notice provisions conditioning the legality of strike action in the UK*'' were concerned.[22] Moreover, even though the ECtHR accepted the existence of an implicit right to secondary action preserved under the ambit the Article at issue,[23] it was ruled that the UK's blanket ban of secondary strikes did not violate Article 11. In doing so, it classified the right to secondary action as an 'accessory' rather than a core aspect of trade unions' activities. Arguably, such a differentiation resembles to a considerable extent the distinction that has been drawn with respect to the primary right to strike within the Convention. This

18. Filip Dorssemont, *How the European Court of Human Rights gave us Enerji to cope with Laval and Viking*, *in* BEFORE AND AFTER THE ECONOMIC CRISIS: WHAT IMPLICATIONS FOR THE 'EUROPEAN SOCIAL MODEL 220 (Marie-Ange Moraeu ed., 2014).

19. *See* National Union of Belgian Police v. Belgium, App. No. 4464/70, [1975] 19 Eur. H.R. Rep. 578 (1980); Schmidt and Dahlström v. Sweden, App. No. 5589/72, [1976] 1 Eur. H.R. Rep. 637 (1979-80).

20. *See* Saime Özcan v. Turkey, App. No. 22943/04, HUDOC (Sep. 15, 2009), http://hudoc.echr.coe.int/eng?i=001-93987; Kaya and Seyhan v. Turkey, App. No. 30946/04, HUDOC (Sep. 15, 2009), http://hudoc.echr.coe.int/eng?i=001-93993.

21. Charles Barrow, *RMT v. United Kingdom [2014]: The European Court of Human Rights Intimidated into Timidity or Merely Consistent in its Inconsistency?*, 3 EUR. HUM. RTS. L. REV. 277 (2015).

22. Alan Bogg & K.D. Ewing, *The Implications of the RMT case*, 43 IND. L. J. 221, 232(2014).

23. Reference was made to related international instruments and the decisions of international supervisory bodies, as well as common practices of the ECHR's States parties.

is to say that it is considered an important, rather than an essential feature of Article 11 of the ECHR.

The ''back and forth'' in relation to the Court's interpretation in terms of the overall protection of the right to industrial under the Convention, is also apparent in some subsequent cases. In a previous dispatch, Tonia Novitz[24] has thoroughly compared the stark contrast of the Strasburg Court's approach towards the right to strike in the cases of *Association of Academics v. Iceland*[25] and *Ognevenko v. Russia*.[26] The outcome of these two rulings seemed to, once again, create an uncertainty regarding the level of protection that the right to industrial action enjoys under the Convention. As noted, the so-called *Holship* case represents another example that can generate mixed signals for the future of Article 11 ECHR with respect to the protection of collective labor rights.

THE BROAD INTERPRETATION OF ARTICLE 11 ECHR IN THE *HOLSHIP* CASE

From the moment the Norwegian trade union lodged its application to the ECtHR, a number of legal scholars and trade unionists across Europe, were eagerly awaiting for the decision.[27] Indeed, the Court's approach and conclusions can be particularly significant in many respects. Starting with the encouraging messages traced in this judgment, it can be argued that the Fifth Section of the ECtHR proceeded with a broad interpretation of the Convention; an analysis that confirms that the Convention should be construed as a 'living instrument'.[28] Even though it was previously uncertain as to whether Article 11 also includes a 'right to boycott' as a form of industrial action which can be used as a tool in labor conflicts, the Court found that: "*the exercise of a blockade by an applicant trade union can also give rise to the applicability of Article 11 of the Convention* […] [as] *a boycott may be the only means available to a trade union to put pressure on an employer in defense of workers' rights*."[29] It went on to mention that the intended boycott "*aimed to ensure stable and safe working conditions for dockworkers."*[30] In doing so, and by reference to other supranational bodies, such as the CJEU, it was highlighted that the right to collective action

24. Tonia Novitz, *Dispatch No. 15—Iceland & Russia—To Protect the Right to Strike or Not? The Question Before the European Court of Human Rights in app no 2451/16 Association of Academics v Iceland and app no 44873/09 Ognevenko v Russia*, COMP. LAB. L. & POL'Y J. (March 29, 2019), https://cllpj.law.illinois.edu/dispatches (last visited July 12, 2021).

25. Association of Academics v. Iceland, App. No. 2451/16, HUDOC (May 12, 2018), http://hudoc.echr.coe.int/fre?i=001-183375.

26. Ognevenko v. Russia, App. No. 44873/09, HUDOC (Nov. 20, 2018), http://hudoc.echr.coe.int/eng?i=001-187732.

27. For instance, *see* Tonia Novitz & John Hendy QC, *The Holship case*, 47 IND. L. J. 315 (2018).

28. For instance, reference was made to the Digest of decisions and principles (fifth (revised) edition, 2006) of the ILO Committee of Freedom of Association in relation to its findings on boycotts as a form of industrial action.

29. *Holship case*, *supra* note 5, para 84.

30. *Id*., para 86.

constitutes a fundamental right under EU law[31] and "*for a collective action* [like a strike, or boycott] *to achieve its aim, it may have to interfere with internal market freedoms such as those at issue in the case before the Supreme Court*."[32]

THE RELEVANCE OF THE BOSPHORUS PRESUMPTION FOR THE *HOLSHIP* CASE

Moreover, the Court's approach towards one of the first points raised by the respondent Government, is worth-mentioning. As mentioned, Norway, although not a Member State of the EU, it is part of the EEA Agreement. The latter provides for, or the incorporation of EU legislation covering the four freedoms—the free movement of goods, services, persons and capital—throughout all EEA States. At this point it should be stated that since 2005 and the seminal '*Bosphorus'* case, it has been established by the ECtHR that will not rule on issues related to EU law and decisions touching upon the jurisdiction of the CJEU.[33] According to the so-called *Bosphorus* doctrine there should be a presumption that the EU, generally, offers a level of protection of fundamental rights that is equivalent to that offered under the ECHR. In this regard, cases regarding the implementation of EU law are to be considered inadmissible by the Strasbourg Court.

Along the lines of the *Bosphorus* case, the Norwegian Government claimed that: "*EEA law provided for the protection of human rights which was similar to the protection provided for by the Convention, and that there was a presumption of compliance with the Convention which was the same as or similar to that set out in Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*.''[34]

Still, in the *Holship* case, the applicant trade union, by also relying on the words of the ECtHR in an earlier decision,[35] contended that the EEA law in itself has no direct effect and no supremacy, in addition to the lack of a binding legal effect of advisory opinions from the EFTA Court. Consequently, the *Bosphorus* doctrine should not be triggered. The Fifth Section of the ECtHR appeared to accept this position as it pointed out that ''*for the purposes of this case the Bosphorus presumption does not apply to EEA law*.''[36] It mentioned though that "*it leaves it to another case, where questions in relation to the procedural mechanisms under EEA law may arise, to review* [again] *this issue*."[37] As already noted and will be further

31. *Id.*
32. *Id.,* para 117.
33. Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland, 2005-VI Eur. Ct. H.R. 107.
34. *Id.,* para 79.
35. Konkurrenten.no AS vs. Norway, App. No. 47341/15, HUDOC (Nov. 5, 2019), http://hudoc.echr.coe.int/fre?i=002-12665, para 42.
36. *Holship case*, *supra* note 5, para 108.
37. *Id.*

discussed below, no violation of the Convention was found in this case. As some scholars have already observed, however, the Court's interpretation towards the (non)application of the *Bosphorus* presumption on EEA law, may put Norway, or other countries in a position where in order to accomplish their obligations under the ECHR, they will find themselves in violation of the EEA Agreement and *vice versa*.[38] This is an arguably interesting development also considering all the parts of EU law that have been made part of the EEA Agreement. Even though it is difficult to speak with certainty that through this (rather short in extent) analysis, the *Bosphorus* presumption is formally called into question, we can, nonetheless, argue that the door remains open for such a development and future case-law is expected to make things clearer.

ECONOMIC FREEDOMS VS. FUNDAMENTAL HUMAN RIGHTS

The latter remark is also related to maybe the most remarkable part in relation to the *Holship* ruling, namely, the ECtHR's analysis on the balancing exercise between economic freedoms on the one hand and fundamental human rights on the other. As noted, at domestic level, the country's highest judicial tribunal asked for an advisory opinion from the EFTA Court. By relying on the latter's decision, the Supreme Court ruled that, under the proportionality test, the protection of the freedom of establishment, which constitutes a fundamental freedom in the EEA law,[39] "*can justify restrictions of constitutional or conventional human rights so can constitutional or conventional human rights justify restrictions of rights under the EEA Agreement*."[40]

In replying to this claim, the ECtHR asserted that the freedom of establishment constitutes an important factor in assessing whether interference with the freedom of association is proportionate. It was mentioned, however, that such a freedom does not share the same value as human rights which are protected under the Convention, including the right to industrial action. In light of this, it was mentioned that "*the degree to which a collective action risks having economic consequences cannot, therefore, in and of itself be a decisive consideration in the analysis of proportionality under Article 11, paragraph 2 of the Convention*."[41] Notably, it was further pointed out that "[…]*when implementing their obligations under EU or EEA law,* […] *Contracting Parties should ensure that restrictions imposed on*

38. Hans Petter Graver, *EU: The Demise of Viking and Laval*, DEFEND DEMOCRACY PRESS: EUROPE (June 16, 2021), https://www.defenddemocracy.press/eu-the-demise-of-viking-and-laval/ (last visited July 14, 2021).

39. Article 31, EEA Agreement, *supra* note 8.

40. Norges Høyesterett [Supreme Court of Norway], HR-2016-2554-P, Case No. 2014/2089, (Dec. 20, 2016), https://www.domstol.no/globalassets/upload/hret/decisions-in-english-translation/case-2014-2089.pdf. Unofficial translation from Norwegian (Holship NSC), para 85.

41. *Holship case*, *supra* note 5, para 118.

Article 11 rights do not affect the essential elements of trade union freedom, without which that freedom would become devoid of substance.''[42] Once again, it is necessary to wait and see whether this wording can indeed interfere with the *Bosphorus* doctrine. For the time being, nevertheless, an important observation can be made. That is that the Court via its interpretation creates, at least in a theoretical level, a hierarchy of rights where workers' rights enjoy a higher legal status than economic freedoms, a statement that can be also seen as a belated response to the 'infamous' decisions of the CJEU in *Viking* and *Laval* cases. Importantly, such a hierarchy can be also traced in the language of the other supervisory body within the Council of Europe, namely, the European Committee of Social Rights (ECSR).[43]

Having said that, someone would expect that in a balancing exercise between 'important factors *vs.* fundamental human rights', the latter would take precedence over the former. Still, that was not the case in the *Holship* ruling. The ECtHR, as in a number of earlier cases related to the right to industrial action, and despite its promising wording in the current decision, it accorded a very broad margin of appreciation to the respondent State. This is possibly another indication that the right to industrial action, including the right to strike, still remains an important, rather than an 'essential' feature of Article 11; thus, any imposed restrictions can be easier justified by Member States of the Convention. Even though the Court accepted that it was ''*undisputed that the impugned boycott also aimed to ensure stable and safe working conditions for dockworkers*''[44], it, nonetheless, did not consider that "*sufficiently "strong reasons" exist for it to substitute its views for that of the Supreme Court in this case*."[45] Furthermore, it was emphasized that "*the restriction of the application unions' Article 11 rights did not as such prevent them from engaging in further collective bargaining*."[46]

POSSIBLE IMPLICATIONS FOR NORWAY'S OBLIGATIONS UNDER THE ILO

It can be argued that the Court dedicated little space in reflecting on the reasons as to why the majority of Norwegian Supreme Court—10 judges —concluded that the proposed boycott was illegal under the proportionality test. The lack of an in-depth analysis occurred despite the existence of a strong minority—7 judges—that, by *inter alia* relying ''*on the Supreme Court's earlier upholding of the lawfulness both of the Framework*

42. *Id*.

43. For instance, *see* Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden, Complaint No. 85/2012, (Feb. 5, 2014), para 122; ECSR constitutes a regional human rights body which, *inter alia*, monitors the monitors implementation of the 1996 Revised European Social Charter.

44. *Holship case*, *supra* note 5, para 86.

45. *Id*., para 115.

46. *Id*.

Agreement and of boycott action in support of it'',[47] was of the opinion that boycott was an appropriate means of enforcing the existing collective agreement. The latter, as noted, is based on the provisions of the ILO Convention No.137, which aims at protecting dockworkers who find themselves in a precarious situation. In my opinion, this is exactly the greater 'omission' of the ECtHR in this case. To be specific, the Court failed to recognize that the Holship Norge AS's initiative to hire workers outside the framework of the existing Framework Agreement can adversely impact the latter's overall functioning and long-standing tradition. Concomitantly, the company's action can generate a precedent that may lead, if this is not already the case, to the factual annulment of the current collective agreement. In turn, the fulfilment of Norway's international obligations under the ILO can be also jeopardized. It is, therefore, surprising that the Court forgot its promising 'integrated' approach', as well as it did not engage into related considerations that might have led to a discussion on the possible violation of workers' right to collective bargaining, which constitutes an essential aspect of Article 11 ECHR; bearing in mind the *Demir* case the margin of appreciation given to the respondent State would be much narrower.

CONCLUDING REMARKS: A GLIMPSE OF HOPE FOR THE STATUS OF HUMAN RIGHTS IN THE CONTEMPORARY WORLD OF WORK

Undoubtedly, the *Holship* case will become the point of reference for many future discussions, either touching upon the indirect review of the ECtHR on all the parts of EU law that have been made part of the EEA Agreement, or the level of protection of the right to industrial action under the Convention. That said, let us conclude with maybe the most significant implication that this case can have for labor rights, included into the 'universal list' of human rights. Though its judgment, the Court made a step forward towards a fairer balance in favor of labor rights, recognized as human rights, when compared to the economic freedoms and interests of businesses. This is extremely important in the context of the contemporary world of work, considering that a great portion of workers within non-standard forms of employment are denied the enjoyment of their fundamental labor rights, such as the right to collective bargaining, due to the existence of economic factors. It is by now well-documented, for instance, how strict anti-trust laws have prevented many workers in a precarious position, like those in the platform economy, from freely associate and bargain collectively.[48] It remains to be seen, therefore, as to whether the ECtHR's approach in *Holship*

47. Novitz & Hendy QC, *supra* note 28, at 322, referring to the case of Port of Sola case, cf. Rt. 1997.

48. *See* for instance, Valerio De Stefano & Antonio Aloisi, *Fundamental labour rights, platform work and human rights protection of non-standard workers*, *in* RESEARCH HANDBOOK ON LABOUR, BUSINESS AND HUMAN RIGHTS LAW 359 (Janice Bellace & Beryl ter Haar, eds., 2019).

will pave the way for, not only a theoretical protection of collective labor rights, but also a practical one when the latter are in conflict with economic freedoms and interests.