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Savior of the Unions?
The EU's Approach to Collective Action after the Holship-Judgment

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The paper sets out to examine whether or not the Holship-judgment from the ECtHR in June of 2021 is likely to change the EU's, and the CJEU's, controversial case-law on the relationship between the fundamental right of assembly and the freedom of establishment of the EU[1]. The paper finds that Holship will probably not change the CJEU-approach to rights and freedoms, as the ECtHR has only given indirect direction on the interpretation of the relationship whilst granting a wide margin of appreciation on the subject. The CJEU is unlikely to act upon this, as it may jeopardize the European integration and effectiveness of EU-law that the Four Freedoms provide. The paper finds this by examining both the Viking-judgment and the Holship-judgment with a focus on the relationship between rights and freedoms and then reimagining a Viking-like case solved in accordance with the Holship-judgment. The paper briefly discusses the effect of Holship on EU-law. Finally this paper considers the concerns raised by a pluralistic approach to European Human Rights Law.

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[1] Of course, there are scholars pushing back against this controversy, such as Angelica Ericsson (Angelica Ericsson, "The Many (Mis)readings of the *Laval* Case," *Europarättslig tidskrift* 2016, no. 1 (2016):113–126), who both neatly summarizes the (many) critical voices on the CJEU's case-law on fundamental rights, namely the Viking and Laval cases, and pushes back against these.

1. Introduction

It has been an established fact of EU-law since the Viking-Laval[2] line of judgments that an exercise of the freedom of assembly through collective action is subject to the Four Freedoms – namely the freedom of establishment. The European Court of Justice (hereinafter referred to as: "the CJEU") has been critiqued for its stance – both on Viking-Laval specifically and fundamental rights generally.[3] However, the EU is not alone among the supranational organisations in Europe, and another such organisation is the European Convention on Human Rights and Fundamental Freedoms (hereinafter referred to as: "the ECHR"). The Court of the ECHR, namely the European Court of Human Rights (hereinafter referred to as: "the ECtHR"), handed down a ruling in June of 2021, which has been hailed as the godsend to the unions[4] and the saviour of those who consider the CJEU's line of case-law to not take rights seriously.[5] The Holship-judgment[6] is the result of a complaint against Norway which is not a member state of the EU but has aligned with the Union through the EEA Agreement, which materially

[2] Consisting of Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, EU:C:2007:809 (hereinafter: "Laval") and Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, EU:C:2007:772 (hereinafter referred to as: "the Viking-judgment" or "the Viking-case").

[3] As examples see Eleanor Spaventa, "A Very Fearful Court: The Protection of Fundamental Rights in the European Union after Opinion 2/13," *Maastricht Journal of European and Comparative Law* 22, no. 1 (2015):35–56 (hereinafter "Spaventa 2015"); Phil Syrpis and Tonia Novitz, "Economic and Social Rights in Conflict: Political and Judicial Approaches to their Reconciliation," *European Law Review* 33, no. 3 (2008):411–426, at 419; or, more overtly, Mitchel Lasser, "Fundamentally Flawed: The CJEU's Jurisprudence on Fundamental Rights and Fundamental Freedoms," *Theoretical Inquiries in Law* 15, no. 1 (2014):229–260.

[4] As demonstrated by the MEP Johan Danielsson's question to the Commission, E-003921/2021, in which he states that the contested issue of the hierarchy between the freedom of association and the freedom of establishment has been finally settled by the Holship-judgment.

[5] Hans Petter Graver, "The Demise of Viking and Laval: The Holship Ruling of the ECtHR and the Protection of Fundamental Rights in Europe," *Verfassungsblog*, June 16, 2021, https://verfassungsblog.de/holship/.

[6] Case of *Norwegian Confederation of Trade Unions (LO) and Norwegian Transport Workers' Union (NTF) v. Norway*, no. 45487/17, June 10, 2021 (hereinafter referred to as: "the Holship-judgment" or "the Holship-case").

corresponds to the equivalent EU rules, but with structural differences – namely the absence of direct effect and supremacy.[7]

It is important to understand why the judgment of one court may curb the excesses of another, as the EU and ECHR are – as every teacher of EU law painstakingly instructs their students – two separate institutions, despite similar names[8] and overlapping membership. This paper will argue that the ECtHR's judgment is relevant for the CJEU's caselaw due to (1) article 52(3) of the Charter of Fundamental Rights of the European Union (hereinafter referred to as: "the Charter"), (2) the Bosphorus-presumption, (3) the fact that the Holship-judgment rules on the Viking-judgments case-law. These reasons will be expanded upon below.

This paper therefore seeks to examine the contents of the Holship-judgment in light of the Viking-Laval doctrine, presently represented mainly by the Viking-judgment for the sake of brevity, as Viking was the first of the two. It established that collective action, though an expression of fundamental rights, is likely to be a limitation of one of the Four Freedoms, and must as such be subjected to both a test of proportionality and legitimate aim.

This paper will briefly introduce the Bosphorus-presumption and article 52(3) of the Charter followed by the important points of the Viking-judgment. Having established the prerequisite concepts, this paper will move to an analysis of the Holship-judgment and finally compare the two through a contra-factual analysis of how the Viking-judgment would be solved in light of the Holship-case. The paper will then attempt to answer the question:

Is the Holship-judgment likely to change the Viking-Laval doctrine?

1.1. Article 52(3) of the Charter

There is an overlap between the membership of the EU and the ECHR – even to the extent that ECHR membership is a de facto requirement for EU membership[9]

[7] Hilde Ellingsen, "Reconciling Fundamental Social Rights and Economic Freedoms: The ECtHR's Ruling in *LO and NTF v. Norway* (The *Holship* case)," *Common Market Law Review* 59(2):583–604 (hereinafter "Ellingsen 2022") at 8.

[8] Most famously the European Council and the Council of Europe, one an EU institution, the other an ECHR related institution.

[9] See, e.g., Point 5 of Committee on Legal Affairs and Human Rights, The accession of the European Union/ European Community to the European Convention on Human

– which makes the member states subject to both the ECtHR and the CJEU. Any disagreements between the two are difficult for the member state to reconcile. As we will see, the Courts avoid handing down contradicting judgments, but they will engage in intra-Court dialogue.

The EU, through the CJEU, has long sought legitimacy on the area of Fundamental Rights and has initially achieved this by referring to the ECHR and the case-law of the ECtHR to gain legitimacy.[10] This changed somewhat when the EU, within a short period of time, both failed to accede to the ECHR[11] and elevated the Charter to the level of Primary Law. It is apparent from the Charter's art. 52(3) that "[*i*]*n so far as this Charter contains rights which correspond to rights guaranteed by* [the ECHR]*, the meaning and scope of those rights shall be the same as those laid down by the said Convention.*" This is the case for the right of association, enshrined in art. 12 in the Charter and corresponds to art. 11 of the ECHR, cf. Explanations to the Charter of Fundamental Rights of the European Union art. 12(1).

The Charter, being a piece of Primary Law in the EU, is to be interpreted the same way as corresponding rights in the ECHR, and the right of association in the ECHR corresponds to the same right in the Charter. As the ECtHR is the authoritative interpreter of the ECHR,[12] the meaning and scope the ECtHR gives to art. 11 of the ECHR are therefore binding interpretations of Primary EU law. This is, however, subject to the CJEU ruling in accordance with this principle, as it is the final arbiter of EU-law.[13]

1.2. The Bosphorus-Presumption

For the same reasons as stated above, the ECHR similarly has a vested interest in avoiding contradictions in the Human Rights framework – the remedy of the

Rights, Rapporteur: Mrs Marie-Louise Bemelmans-Videc, Doc. 11533, March 18, 2008, at https://www.europarl.europa.eu/document/activities/cont/201003/20100324ATT71249/20100324ATT71249EN.pdf (last visited 26th of July 2023).

[10] Fisnik Korenica, *The EU Accession to the ECHR: Between Luxembourg's Search for Autonomy and Strasbourg's Credibility on Human Rights Protection* (Brussels: Springer International Publishing, 2015), 42–43.

[11] Opinion 2/13, *The Draft Agreement providing for the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms*, EU:C:2014:2454.

[12] ECHR art. 19.

[13] TFEU art. 256.

Court in Strasbourg is the Bosphorus-presumption, which is, in short, a legal presumption in the ECHR case-law that a state is presumed to be in compliance with the ECHR when it implements legal obligations flowing from an international organisation, so long as the organisation's protection of fundamental rights is equivalent.[14] The ECtHR has concluded that the EU's protection is equivalent.[15] The same presumption was not found applicable in the Norwegian case.[16]

2. The Viking Judgment

2.1. The Case in Short

The *Viking*-judgment concerned the re-flagging of a Finnish-owned ship from Finnish flag to Estonian flag. This was done to cut costs by employing (cheaper) Estonian seamen and sailors.[17] The International Transport Workers' Federation (hereinafter referred to as: "the ITF"), is an international union of unions. On behalf of the Finnish union, they instructed all their member unions to avoid contracting with Viking ship Rosella.[18] The ITF argued, with reference to the European Social Charter and the Community Charter of the Fundamental Social Rights of Workers that EU-law included a right to strike, and that the collective action did not amount to a restriction under EU-law. The CJEU found that the circular could amount to a restriction of the Freedom of Establishment that might be justified by an overriding reason of public interest, subject to proportionality.[19]

2.2. The Court's Reasoning

The CJEU establishes that the case essentially concerns the right to collective action, which is fundamental in nature but subject to restrictions,[20] counterbalanced with the fundamental freedom of establishment, being of a fundamental nature.[21] The fundamental right to association and collective action notwithstanding, the fundamental freedom conveys a protection of the economic

[14] Case of *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland,* no. 45036/98, June 30, 2005 (hereinafter: "the Bosphorus-case"), para. 155.

[15] Bosphorus-case, paras. 159–165.

[16] Holship-judgment, para. 108.

[17] Viking-judgment, para. 9.

[18] Ibid., paras. 11–12.

[19] Ibid., para. 90.

[20] Ibid., paras. 43–44.

[21] Ibid., paras. 58–59.

activity (namely establishment) against the collective action onto the economic actor.[22]

The collective action therefore has to be justified, necessary and proportionate.[23] The CJEU thus acknowledges that fundamental rights may justify infringements on the fundamental freedoms, which essentially establishes the internal hierarchy of the rights and freedoms, such that fundamental freedoms are protected by the court, but can be limited by fundamental rights, so long as it is both necessary and proportionate to the aim. The right of association is thus reduced to (merely) an overriding public interest.[24]

3. The Holship Case

3.1. The ECtHR's Judgment

Moving on to the essence of the paper. The Holship-judgment concerned a Norwegian subsidiary, namely Holship Norge A/S (hereinafter referred to as: "Holship"), of a Danish company, which was operating in Drammen Port, where on- and off-loading of cargo was managed by an Administrative Office setup under a collective framework agreement.[25] The agreement was intended to make the employment of dockworkers more permanent by making the Administrative Office employ the workers and then require that ships using the port acquired their workers from the Administrative Office.[26] Holship was not party to the framework agreement and, from 2013, employed four workers to carry out their on- and offloading.[27] One of the unions who negotiated the collective Framework Agreement, NTF, demanded that Holship enter into the Framework Agreement. Holship refused and in response hereto NTF sent a letter of notice warning the use of collective action.[28] Following failed mediation, the NTF asked the local court in Drammen to rule on the legality of a threatened blockade. The City Court found no illegal purpose with the blockade,[29] and Holship therefore appealed to the court of second instance, being the High Court.[30] The High Court, once more, found

[22] Ibid., para. 66.

[23] Ibid., para. 75.

[24] Ibid., para. 45.

[25] Holship-judgment, para. 5.

[26] Ibid., paras. 6–7.

[27] Ibid., para. 8.

[28] Ibid., para. 10.

[29] Ibid., para. 13.

[30] Ibid., para. 17.

no illegal purpose[31] and thus, further appeal was made to the Supreme Court, who in turn requested an advisory opinion from the Court of Justice of the European Free Trade Association (EFTA) States (hereinafter referred to as: "the EFTA Court").[32] The EFTA Court was asked to determine whether or not the boycott contravened the Freedom of Establishment. The EFTA Court, by reference to the Viking-judgment, advised that the blockade would not be lawful, and the Supreme Court ruled to that effect.[33] This decision was finally appealed to the ECtHR, which found that article 11 of the ECHR had not been violated.[34]

3.2. The Court's Reasoning

The ECtHR argues that the right to strike is not the right to succeed,[35] thus the rights secured under art. 11 only requires that unions be afforded the possibility to collective action. The convention being a living instrument, the limitations allowed must be interpreted restrictively in light of the increasing standards of fundamental rights in the present-day.[36] The ECtHR notes that the theoretical limits of the right to collective action are implemented differently in the Contracting States, and these are therefore afforded a wide margin of appreciation[37] and reiterates the limits of its competence.[38] The ECtHR thereby establishes the existence of the right and then states reservations as to the thoroughness of the judgment. The ECtHR continues and quotes the reporting judge from the Supreme Court, who claims that there are no differences in the interpretation of the relationship between the freedom of establishment and the right of association (and the thereof derived right to collective action).[39] This is indicative of an attempt by the ECtHR to distance themselves from a conflict between the ECHR and EU-law, as they attempt to give the Contracting Parties as wide a margin as possible, a fact it reiterates several times in the judgment, and signalling that no discrepancies exist between Luxembourg and Strasbourg. The ECtHR underlines this reserved stance by concluding that it does not have "strong grounds" to replace the proportionality test of the Supreme Court and cannot,

[31] Holship-judgment, para. 18.

[32] Ibid., paras. 25–26.

[33] Ibid., para. 48.

[34] Ibid., para. 120.

[35] Ibid., para. 93.

[36] Ibid., para. 96.

[37] Ibid., para. 97.

[38] Ibid., para. 98.

[39] Ibid., para. 111.

therefore, establish a violation.[40] Having refrained from an actual in-depth examination of the case, the ECtHR then, as an obiter dictum, argues that the freedom of establishment is not and cannot be a counterweighing right to the right of association.[41] This means that in the exercise of the right to collective action economic interests, and thereby the fundamental freedoms, will be prejudiced.[42] The apparent disparity between the ECtHR's actual ruling and its obiter dicta remarks is striking and the result of the disunited European Human Rights Law, which as stated, is subject to more than one court. It can be argued, and has been pointed out by the ECtHR, that the ECtHR attempts to avoid a collision between states' obligations under the ECHR and EU-law.[43] These considerations more than imply that the obiter dicta comments of the ECtHR express the intentions of the ECtHR when they don't need to take intra-Court relations into account. The Holship-doctrine regarding the relationship between the Four Freedoms and fundamental rights can therefore be understood as follows: The Four Freedoms are not on the same level as the rights within the ECHR. The freedoms can serve as justifications for a restriction of a fundamental right, but no more. The hierarchy is therefore clearly fundamental rights first, thus being lex superior, and the economic freedoms second.

4. The Effect of Holship

4.1. Viking Reimagined

For the purposes of comparing the two judgments and determine the specific deviations, this paper will redo the Viking-judgment on the merits relating to the relationship between rights and freedoms. Thus, creating an imagined new case decided in accordance with the Holship-judgment as described above.

4.1.1. The First Question

The line of argumentation in paras. 32–43 would remain the same, as the recognition of the right to strike is coherent with the Holship-doctrine. Deviation comes already in the line of argumentation in paras. 46–55. The CJEU establishes the fundamental nature of the Four Freedoms, and that fundamental rights may serve as a justification for an infringement upon the Four Freedoms. The CJEU draws a distinction between the areas of competition law and the Four Freedoms,

[40] Ibid., para. 115.

[41] Ibid., para. 118.

[42] Ibid., para. 117.

[43] Ibid., para. 117.

where one is subject to material limitations when dealing with fundamental rights, but the other cannot be because of their special nature. Specifically, para. 52 is in direct opposition to the Holship-doctrine, where it is stated that: "*Contrary to the claims of FSU and ITF, it cannot be considered that it is inherent in the very exercise of trade union rights and the right to take collective action that those fundamental freedoms will be prejudiced to a certain degree*"[44]. When compared with para. 117 of the Holship-judgment, which states that: "(...) [the ECtHR] *also notes that for a collective action to achieve its aim, it may have to interfere with internal market freedoms* (...)"[45] this conclusion is contrary to the case-law of the ECtHR. However, this change does not necessitate a changed answer to the first question, and considering the weight put by the CJEU on the Four Freedoms, exempting their application would be unlikely, cf. para. 46. The Treaties' provisions on the freedom of establishment will therefore still be found applicable.

4.1.2. The Third to Tenth Questions

The framing of the question(s) is inherently at odds with the Holship-judgment, because, as shown above, the examination of the case as a violation of the freedom of establishment which can be justified with reference to fundamental rights implies the opposite hierarchy between rights and freedoms than the Holship-doctrine establishes. However, as the judgment is still made by the CJEU, and the legal basis for judicial review is the freedom of establishment, the structure of the judgment redone would, overall, remain the same. The line of argumentation in paras. 68–72 concerning the existence of a restriction of the freedom of establishment, bases its argumentation on references to the economic consequences of the exercise of collective action, which, as stated above, does not conform to the Holship-doctrine, as economic considerations "*cannot be a decisive consideration in the analysis of proportionality*".[46] As the section does not concern the proportionality test, but rather the establishment of a restriction, the use of economic considerations cannot be rejected outright, but it would require a lower standard for the proportionality test, as the economic considerations of the freedom of establishment cannot themselves supersede the exercise of a fundamental right. Hence, the exercise of such a right should ceteris paribus be able to justify any restriction against one of the Four Freedoms.

The line of argumentation in paras. 75–85 is premised on the aforementioned prioritization of freedom first, rights second, as the fundamental right is being

[44] Viking-judgment, para. 52

[45] Holship-judgment, para. 117

[46] Ibid., para. 117.

examined primarily in light of the purpose of its exercise, namely the protection of workers. The fundamental aspect of the right is referenced once, but otherwise it is the purpose of the action, rather than the protected nature of the action, that is subject to examination. As such, the CJEU examines the right on its aim rather than its nature. This is contrary to the Holship-doctrine, which emphasizes the fundamental nature of the right of association. Furthermore, the requirement that the exercise of a fundamental right does not go beyond what is necessary to achieve the aim of said exercise in relation to preventing economic consequences is in direct violation of the Holship-judgment, as economic concerns must bend to fundamental rights. Para. 80 leaves it to the national court to examine if the collective action pursues the protection of the workers and then, in para. 84, prerequisites the fulfilment of this requirement for the continuation of the proportionality test. The proportionality test is, therefore, premised on the assumption that the exercise of fundamental rights must serve a legitimate purpose (rather than the exclusion of protection for a right exercised for an illegitimate purpose, cf. ECHR art. 17). This, combined with the fact that the freedom of establishment is an expression of economic concerns, means that the proportionality test of the Viking-judgment would have to be redone. It would instead have to flip the test around and examine if a limitation of the fundamental right could be justified by the protection of the freedom of establishment. The conclusion of this test would be that economic considerations alone cannot justify such a restriction and the final conclusion of the CJEU would be that no infringement of the freedom of establishment could be established.

This conclusion is assuming the judgment by the CJEU would be based on the actual merits of the obiter dicta in the Holship-judgment. As shown, the ECtHR in the Holship-judgment found no violation of article 11 ECHR. The hesitance and margin of appreciation afforded in said judgment could have allowed the CJEU to conduct a proportionality test similar to the one actually conducted in the Viking-judgment and thereafter have that proportionality test accepted by the ECtHR similar to its accepting of the proportionality test in the Holship-judgment. This is further emphasized by the special place that economic freedoms hold in the EU legal order and the ECtHR's general tendency to give a wide margin of appreciation in areas which are contentious (such as intra-marked relations).[47]

4.2. More Bark than Bite?

The above indicates the essence of the question, namely the conflict between, on one hand, the clarity of the obiter dicta in the judgment and, on the other hand,

[47] Holship-judgment, para. 114.

the fact that the ECtHR did not find an infringement. Despite rejecting the *Bosphorus*-presumption, which the ECtHR would be unlikely to do if faced with a complaint against a Member State, the ECtHR still granted a wide margin of appreciation to Norway.

On one hand, it could be argued that the ECtHR has demonstrated a willingness to be very clear in its remarks on the relationship between rights and freedoms, and, if the CJEU followed the spirit of the ECtHR's ruling, the CJEU would be obliged to acknowledge the lex superior nature of rights compared to freedoms. Contrarily, it could be argued that whilst the CJEU's track record on fundamental rights is controversial, the same can also be said about its take on European integration, in the pursuit of which, the CJEU is accused of using any means necessary – including fundamental rights.[48] The CJEU has through this track record demonstrated that it considers all barriers to entry for businesses between member states inhibiting to the Common Market and thus European integration – the Viking-Naval-cases being among the most high-profile. As the CJEU tends to prioritise integration over fundamental rights,[49] it is unlikely that the ECtHR would follow any imperative issued by the CJEU should it have decided to find an infringement of the ECHR. Even though the Charter has the same scope as the ECHR, cf. Charter art. 52(2), the CJEU evidently considers economic freedoms as counterbalancing rights, a thing ECtHR disputes.[50] The Courts might, therefore, agree on the scope of the right of assembly, but disagree on the counterbalancing weight on the scale, the nature of economic rights. The scales of Lady Justicia balance differently in the two cities. Pushing this division too far may hurt the purported (and in a majority of cases true) unity of European Human Rights Law. The ECtHR fails to properly commit to its stance,[51] and should it decide to do so, there is no guarantee that the CJEU would follow along, as it would not jeopardize European integration. This latter argument is

[48] Spaventa 2015, p. 40

[49] In Susanne K. Schmidt, *The European Court of Justice & The Policy Process* (Oxford: Oxford University Press, 2018), 54, the Author demonstrates the use of EU-law on areas where the situation is "purely domestic", which indicates the CJEU's willingness in asserting the applicability of EU-law in areas where the cross-border element is difficult to identify – thus furthering EU-integration.

[50] Charalampos Stylogiannis, "The 'Back and Forth' in the Protection of (Collective) Labour Rights under the ECHR Continues: The *Holship* Case," *Comparative Labor Law & Policy Journal* Dispatch No. 38 – Norway (2021) (hereinafter "Stylogiannis 2021) at 8.

[51] Which it has also been critiqued for historically, see hereto Stylogiannis, 2021, pp. 3–5

strengthened by the mere fact that no infringement of the ECHR was found, so no matter how many teeth the ECtHR shows in its non-binding remarks, it stops short of actually acting upon the intention, thus avoiding (open) division on the practical application of fundamental rights.[52] The Norwegian Supreme Court was therefore right to follow EU-law (EFTA-law) as no infringement of the ECHR was found hereby.

Some scholars have argued that a pluralistic human rights order in Europe is not, necessarily, a bad thing, so long as the courts show respect to each other's authority,[53] and that the intra-Court dialogue, as displayed in the Bosphorus-case, can ensure that EU member states are not caught between a rock and a hard place.[54] The discrepancy between the obiter dicta and the merits of the ruling in Holship might very well be an example of intra-Court dialogue, by which the ECtHR attempts to influence the CJEU whilst simultaneously respecting its authority. One might consider that Viking isn't even "good law" anymore, as the constitutional evolution of the EU has resulted in, among other things, the Charter going from declaratory to being Primary Law.[55] The validity of this argument can be questioned considering (i) that the CJEU has yet to demonstrate a willingness to conform to this constitutional change, (ii) that the Viking-judgment was made long after fundamental rights became part of the general principles of EU[56] and that the EFTA Court, whose advisory decision the Norwegian case was based upon, used Viking as one of its primary arguments[57] - and the Supreme Court agreed with the use[58]. However, even if one grants the argument and believes the CJEU has evolved beyond Viking, the question is still why ECtHR didn't strike down a decision which used an outdated case.

If the answer is pluralism, and this pluralism is to be ensured by granting the member states a wide margin of appreciation,[59] then this solution is not a perfect one. Whilst such a solution would indeed ensure that EU member states can abide by their obligations to both organisations, the purposes of the Courts, namely to

[52] For a more optimistic view believing that Holship is a first step on the way, see Stylogiannis, 2021, pp. 9–10

[53] Ellingsen, 2022, p. 20.

[54] Ibid., p. 20.

[55] Ellingsen, 2022, p. 14.

[56] Case 29/69, *Stauder v City of Ulm*, EU:C:1969:57.

[57] HR-2016-2554-P, para. 54.

[58] Ibid., para. 171.

[59] Ellingsen, 2022, p. 21.

ensure compliance within their respective systems, is challenged to the deficit of the protected interest: the populations in the member states, whose legal certainty can vary depending on which court arbitrate their case or who might fall between two chairs and down the drain of the margin of appreciation.

5. Conclusion

In conclusion, the CJEU in the Viking-judgment argues that conflicts between fundamental rights and freedoms should be solved as the right infringing on the freedom, subject to proportionality and necessity. The ECtHR in the Holship-judgment argues that no infringement is made against article 11 ECHR due to a wide margin of appreciation, but that conflicts between rights and freedoms should be solved as the freedom infringing on the right. The Holship-doctrine holds that (1) economic freedoms are not fundamental rights; (2) economic concerns alone cannot justify a restriction of a fundamental right; (3) fundamental rights are lex superior to economic freedoms. This paper further finds that the Viking-judgment, subject to the Holship-doctrine, would change the argumentation and the answer in the third question, which would change to find that no violation of the freedom of establishment occurred, subject to the CJEU using its margin of appreciation to avoid following the spirit of the Holship-doctrine.

This paper finds that the CJEU is likely not to follow the spirit of the Holship-judgment, as the CJEU has previously been adversely disposed to prioritize rights over freedoms. The ECtHR stops short of finding a violation, and even if it had, the CJEU is unlikely to change its case-law. This paper finds that the CJEU and the ECtHR disagree on the fundamental nature of economic freedoms and, therefore, this paper finds that the Holship-judgment is unlikely to change the Viking-Laval doctrine.

This paper further finds that arguments to the effect that pluralism solves the conflict in the Courts' approaches to fundamental rights carry their own challenges regarding the reluctancy of the Courts to interfere in contested legal areas.