

Fundamental Rights in EEA Law –
The Perspective of a National Supreme Court Justice

EFTA Court spring seminar, Luxembourg 12th of June 2015

1. Judge President, Justices, prominent guests, colleagues and friends! I salute the EFTA Court for this distinguished conference. I thank the previous speakers for generously sharing their insights, making the day here in Luxembourg truly worthwhile. I am indeed happy for taking part in this discussion, dedicated to such a well-chosen subject.
2. In contrast to the eminent former speakers, I am not an expert. I address you in my capacity as a Supreme Court Justice in the EFTA pillar of the EEA. What I am about to say is based on my experience from the *Norwegian Supreme Court*; there are nuances, probably even more than that, if one intended to compare in more detail the highest courts of Liechtenstein, Iceland and Norway.
3. I speak for myself, not on behalf of the Norwegian Supreme Court. – I am not its president, and I have not discussed this intervention with my 19 fellow Justices. Probably, some of them would agree with me, some would not. The fact that I, as a judge and a representative of the Norwegian judiciary, do not speak on behalf of the Norwegian *government* needs no further explanation.

4. Today's seminar demonstrates how contemporary European law is truly dynamic and multidimensional. It is generated and refined by multiple and complex momentums on a *national*, an *international* and a *supranational* level. It has been forecasted that when the legal history of the early 21st century is to be written at some remote juncture, that will be *a chronicle of courts taking a lead position* in clarifying and developing the law and the systems of law. – Only the enlightening and calming distance of time will enable us to confirm whether this is actually the case.
5. There is, however, no doubt that what has already become the *history of fundamental rights* is indeed also a *history of courts*. Moreover, the *future* of fundamental rights surely depends on courts taking them seriously, transforming them from normative ideas to realities with an impact on real-world lives. In order to do so, the courts need to make wise, sustainable and principled choices of legal policy, within the limits of the law and in accordance with the powers vested in the judiciary.
6. The European courts in Strasbourg and in Luxembourg have in this respect acquired a position that can hardly be overestimated; dedicated to making fundamental rights a living corpus of law.
7. But the past, and certainly the future of fundamental rights, is also the saga of *national courts*, recognising, clarifying, developing and protecting these rights on domestic soil, cultivating them in the light of that particular nation's history, values, hopes and beliefs. It is at the national level that the fundamental rights must be respected and secured; the international machinery of enforcement being *subsidiary*. At the end of the day it is the domestic courts that actually decide the outcome of the concrete cases. – Access to justice is predominantly a question of access to effective protection of rights and freedoms in the domestic courts.
8. The principle of *homogeneity*, formulated in Article 6 EEA, being at the heart of the EEA Agreement and thoroughly developed and continuously promoted by the EFTA Court, is one powerful tool, also when it comes

to the protection of fundamental rights and the constitutionalisation of EEA law.

9. However, even that principle might have limitations as to supporting the dynamic development of EEA law, motivated by constitutional changes within the EU aiming at "an ever closer union", that are not mirrored in the static EEA Agreement: The avenue of homogeneity may, when taken alone and given its fullest effect, encroach upon state sovereignty and on legal certainty for those private parties that have acted in good faith relying on their rights and freedoms according to pre-existent EEA law. Those advocating a renegotiation of the EEA Agreement have also at this point a strong case, as seen from a systemic perspective. My guess is, however, that neither the EFTA States nor the EU wants to open up what might be a Pandora's Box.

10. Anyhow, a judge does not have the privilege of declaring "mission impossible". Moreover, courts and tribunals should not – in the words of Sir Robert Jennings – "regard themselves as different, as separate little empires". Faced with the dynamic forces of legal fragmentation and of overlapping jurisdictions, maintaining *coherency* within the law is of the very essence of judicial duty. This includes securing that co-existent and partly integrated systems of law is *functioning as a whole*, facilitating democracy and respect for fundamental rights and the rule of law.

11. Any court, and certainly any European apex court and the European courts in Luxembourg and Strasbourg, should target coherence as an objective for that particular court's efforts, on a case-by-case basis, as to clarifying and developing contemporary law into *an integrated and converging body of legal norms*. In the absence of clear rules and hierarchies of norms and tribunals, guidance must primarily be drawn from the general principles of European law. It goes without saying that these efforts will not have any prospects of success if performed solitarily or as a play of power, not in the true spirit of cooperation.

12. The very idea of fundamental rights within the EU, is indeed a genuine child of coherence, in particular as the duty to respect and ensure those rights are placed upon the *EU itself* – its institutions, bodies, offices and agencies. Moreover, the tension between fundamental rights according to a Member States' own constitution and treaty obligations on the one hand, and the desired legal effects of EU law on the other hand, is reduced, since the fundamental rights within the EU applies even to the *Member States* when implementing EU law.

13. Admittedly, the domestic courts of a Member State cannot declare secondary EU law invalid as being in conflict with fundamental rights. But the ECJ can do so in a preliminary ruling initiated by a domestic court in accordance with the procedure prescribed by Article 267 TFEU. Hence, a Member State giving precedence to fundamental rights in accordance with such a ruling from the ECJ, is acting *in accordance* with EU law, not in *breach* of it.

14. Experience tells us that without the fundamental rights being part of EU law, the principles of *direct effect* and *primacy* of EU law, would be in peril: The Member States would be placed in a dilemma of competing and conflicting obligations, requiring them to choose between compromising the established protection of fundamental rights or challenging defining principles of EU law. Thus, the very existence of fundamental rights within EU law cuts through this Gordian knot – well illustrated by the German Constitutional Court's rulings in *Solange I* and *Solange II*, respectively. I must add, however, that equilibrium will only endure as long as the field of application of fundamental EU rights is not expanded *beyond* what can reasonably be regarded as the *implementation of EU law*. Outside this scope, fundamental rights according to EU law cannot supersede the protection of such rights provided for by the domestic courts, according to a Member State's own constitution and human rights treaties to which that Member State is a party.

15. It is indeed crucial for the progress of European law that fundamental rights' existence and main components have been developed by the ECJ. And it was, moreover, a significant step to have them expressed through the *EU Charter of fundamental rights* from 2000, included in EU's constitutional foundation through the Lisbon treaty in 2007, in force from 2009.
16. The fact that fundamental rights *are* adhered to even by the EU as such, and by the Member States when implementing EU law, has paved the way for – once again in the name of *coherence* – the ECtHR's pragmatic approach to the Member State's obligations under Article 1 of the ECHR when implementing EU law.
17. In the hallmark judgment in *Bosphorus Airways* from 2005, the ECtHR confirmed its previous case law that the Strasbourg Court has no competence to review EU acts as such. These may, however, in principle be reviewed *indirectly*, through examining specific implementation measures at the national level, carried out by a Member State. But the ECtHR simultaneously shaped the doctrine expressing its trust in the fact that the EU guarantees a level of protection of fundamental rights that is equivalent – i.e. not necessarily identical, but *comparable* – to that of the ECHR. The Strasbourg Court could therefore *presume* that any measure adopted by a Member State in fulfillment of its legal obligations under EU law, under the supervision of the ECJ, is compatible also with the ECHR's requirements, unless a “manifest deficiency” is apparent in the concrete case at hand.
18. The *Bosphorus doctrine* is well suited to the need to organize the coexistence of two jurisdictions, that of the ECtHR and that of the ECJ, both ensuring respect for fundamental rights, but without any hierarchical link or coordination between one another. The doctrine was probably also designed to smoothen the EU's accession to the ECHR.

19. The ECJ did – by its recent Opinion on the EU’s accession to the ECHR (Opinion 2/13) – miss an exceptional occasion to actually establish a *structured partnership* between the two European courts, and thereby also a unique opportunity of achieving *systemic coherence* as to the protection of fundamental rights in Europe. If coupled with the ECJ’s case law being developed independently from the ECtHR’s case law, resulting in a *lower* level of protection of fundamental rights within the EU than that required by the ECHR, coherence is once again under pressure. Furthermore, the *rationale* behind the *Bosphorus doctrine* will gradually be failing.
20. According to established case law from the EFTA Court, fundamental rights form part of the general principles of EEA law, the provisions of the ECHR and the case law of the ECtHR being particularly important expressions of *the shared European point of reference*.
21. The *EU Charter of fundamental rights* is not as such applicable within the EFTA pillar of the EEA. Making the *Charter* part of the EEA Agreement *de facto*, by defining fundamental rights within the EEA in accordance with the *Charter* by analogy, would represent a not so straightforward *substantial judge made amendment* to the EEA Agreement: Such an approach may, in effect, include new obligations for the EFTA States, and might in some cases reduce the rights of private parties and economic operators.
22. However, on the other hand, it would – to speak plainly – seem a bit awkward acting as if the *Charter* did not exist, completely ignoring its provisions and the ECJ’s case law related to it: Fundamental rights permeate the law, and cannot function properly within a series of parallel and completely self-contained bodies of law.
23. So far, the EFTA Court has handled this skillfully, on what has been characterized as a “low key case-by-case approach”, aiming at maintaining homogeneity between EU and EEA law, without drawing heavily – at least not expressly – on the *Charter* as such. Yet, one may ask if the day will come when the EFTA Court openly declares that “*voilà*, a universe of

fundamental rights parallel to that under the *EU Charter of fundamental rights* has actually been established – or shall we say discovered – within EEA law”. As far as the *Charter* runs parallel to the ECHR, this is, I believe, already the established legal situation.

24. The former speakers have elaborated on the EFTA Court’s approach to fundamental rights, as rights integrated in the general principles of EEA law and as a matter of homogeneity of EU and EEA law. Today’s conference demonstrates that there certainly are some challenges along the way, and several choices that need to be made.
25. *Prima facie*, one could easily assume that the current – somewhat unsettled and still developing – legal situation represents a major problem as to the interpretation and application of EEA law in domestic courts in the EFTA pillar.
26. Surely, it is a demanding methodological task for a Supreme Court Justice to untangle the intricate and dynamic web of legal material that continuously are being spun within European law, layer by layer. There is no institution of *advocate general* in the Norwegian Supreme Court; the Court is more or less dependant on the lawyers representing the parties before the Court providing the material and arguments that the Court needs to decide the case. No doubt, the Norwegian Supreme Court must in the future strengthen the *staff of legal clerks*, in order to deal with these issues on an even more complete and explained basis.
27. It goes without saying that the legal situation is knotty also when seen from a systemic and principled perspective.
28. However, EEA law is born and raised on *pragmatism*, aiming at workable compromises that can produce acceptable results in practice. And the introduction of fundamental rights within EEA law has, so far, not caused any particular difficulties for the Norwegian Supreme Court in this respect. More challenging developments are probably to come. However, we will have to find a way, in the spirit of *joint responsibility*.

29. I will elucidate on this by addressing the following question: If the Norwegian Supreme Court is asked by one of the parties to a case before the Court, to interpret a piece of EEA law in a specific way due to particular fundamental rights, which approach should be the preferred one?
30. The safe point of departure is that the Supreme Court also when it comes to fundamental rights within EEA law, must be guided by the governing principles under the EEA Agreement on *homogeneity*, *reciprocity* and *loyal cooperation* – all three primarily representing “engagements de résultats”. This implies, *inter alia*, that the Supreme Court cannot confine itself to apply EEA law, as it appears from its transformed shape in Norwegian legislation. In some way or another, the Norwegian Supreme Court must be prepared to confront EEA law with fundamental rights.
31. It is my suggestion that the Supreme Court should not deal with the question of protection of fundamental rights, as a particular issue under EEA law. Rather, it appears to me that these matters are best pursued along routes that are already more familiar, in the spirit of subsidiarity. Allow me to expound:
32. Norway, similar to Iceland, but different from Lichtenstein, has a *dualistic approach* to international law. Hence, in order to be applicable within domestic Norwegian law, EEA law needs to be transformed into Norwegian legislation. EEA law that has not been transformed is not as such applicable by Norwegian courts. Moreover – and this is the crucial point here – even transformed EEA law is *inapplicable* before Norwegian courts if in conflict with domestic law of a *higher rank (lex superior)*.
33. The Norwegian approach is not *per se* in conflict with the basics of the EEA Agreement, since EEA law, as opposed to EU law, does not call for the *direct effect* or for the *supremacy* of EEA law within the domestic legal system of the EFTA States (Article 7 EEA and Protocol 35 to the Agreement).

34. The Norwegian Constitution dates back to 1814. It has always included certain fundamental rights, such as fair trial guarantees in criminal cases, prohibition on torture, ban on retroactive legislation, the right of free speech and the protection of private property. And it has been established for more than 160 years that these constitutional rights are to be protected by the courts, the Norwegian Supreme Court being even a *constitutional court*. In fact, the Norwegian Supreme Court is the second oldest constitutional court in the world, the US Supreme Court being the oldest.
35. According to well established practice – and now, since 1st of June this year also Article 89 of the Norwegian Constitution – the Supreme Court shall, in the particular cases before the Court, set aside – or interpret narrowly – *any governmental act, including legislation* that is not in accordance with the Norwegian Constitution. This includes any legislation or other regulation produced in order to implement EEA law.
36. As part of the Constitution’s bicentennial anniversary in May 2014 the Norwegian Constitution went through a considerable modernisation and expansion as to the protection of fundamental rights. Numerous of the classic civil and political rights as prescribed by the major human rights conventions were taken into the Constitution itself, in addition to certain economic, social and cultural rights and the core rights of the child as prescribed in the UN Convention on the rights of the child.
37. The Norwegian Supreme Court has, in its case law after the reform, stressed that the new constitutional rights and freedoms are to be understood “in the light of” their international background. Moreover, as to the interpretation, any applicable case law from the relevant international courts and tribunals must be taken into account. Case law from the ECtHR will have a key position. Although not formally bound by the international case law when interpreting the Norwegian Constitution, the Supreme Court should not deviate from it without good cause.

38. The preparatory work to the constitutional amendments in 2014 shows, however, that the international human rights treaties were not the only source of inspiration. One also looked to the *EU Charter of fundamental rights*, both as to determining which rights and freedoms to include in the Constitution and as to the detailed structure and design. It is to be assumed that case law on fundamental rights from the ECJ may be taken into consideration when interpreting the parallel provisions in the Norwegian Constitution, let's say on the right to respect for private life or the general rule that the best interests of the child shall be a primary consideration. It goes without saying that any case law from the EFTA Court on corresponding fundamental rights within EEA law has similar relevance.
39. Article 92 of the Norwegian Constitution, as amended in May 2014, states that all governmental bodies shall respect and secure the rights and freedoms, not only prescribed in the Constitution itself, but also those stemming from international human rights treaties to which Norway is a party. Moreover, human rights treaties that are incorporated into Norwegian law through the human rights act, takes precedence over any other legislation, including EEA law. The incorporated human rights treaties are the ECHR, the two UN Covenants on respectively civil and political rights and on economic, social and cultural rights, the UN Convention on discrimination against women and the UN Convention on the rights of the child. According to well-established case law from the Norwegian Supreme Court, the Court will – when interpreting human rights treaties – make use of the same methodological approach as the corresponding treaty body.
40. So, the Norwegian Supreme Court is not only prepared to test whether EEA law is in accordance with fundamental rights, as prescribed by the Norwegian Constitution itself and by the incorporated human rights treaties. The Supreme Court is *constitutionally obliged* to do so. This duty has not been transferred to the EEA institutions; it remains unfettered within the Norwegian Supreme Court. Although the Court's review may be

expected to take into account the EEA origin of the disputed act, there seems to be no opening for the Norwegian Supreme Court to adopt an approach similar to that of the German Constitutional Court in *Solange II*.

41. The Norwegian Supreme Court's duty to set aside – or to interpret narrowly – EEA law due to constitutional or treaty based fundamental rights are not dependent on support in an advisory opinion from the EFTA Court. The EFTA Court's jurisdiction in cases of referral is limited to *the interpretation of EEA law*. This does not include the interpretation of the Norwegian Constitution or of the human rights treaties to which Norway is a party.

42. As to the referral procedure established under Protocol No 16 to the ECHR, the ECJ's Opinion on the EU's accession to the ECHR (Opinion 2/13) is not too encouraging when it comes to the Member States of the EU. However, for the EEA States in the EFTA pillar, this new referral procedure may, if entered into, provide a useful supplementary tool as to enhancing coherence between EEA law, constitutional rights and freedoms and human right treaties. At this point I should add that as to the *intensity* of any subsequent review by the ECtHR when dealing with *individual petitions* to the Strasbourg Court connected to an EFTA State's implementation of EEA law, I count myself among those not expecting the Strasbourg Court to expand the *Bosphorus doctrine* to the EFTA pillar of the EEA Agreement.

43. There is the risk that the Norwegian Supreme Court, by setting aside, or interpret narrowly, EEA law due to constitutional or treaty based fundamental rights engages *liability* for the Norwegian State under the EEA Agreement. However, since the EFTA Court recognises that fundamental rights are limiting EEA law, that risk is, from a practical angle, substantially reduced, *as long as* the applicable constitutional and treaty based rights are in substance equivalent to those applicable in EEA law.

44. So, while the introduction of fundamental rights within the EU was necessary in order to inspire domestic courts to refrain from performing a thorough judicial review of secondary EU law (*Solange II*), and to create a basis for the *Bosphorus doctrine* under the ECHR, the introduction of fundamental rights within EEA, with this Agreement's *sui generis* design compared to that of the EU, actually paves the way for a domestic court in the EFTA pillar to perform its constitutional duty of judicial review of EEA law, without acting in breach of the EEA Agreement.
45. Moreover, acknowledging that the domestic courts in the EFTA pillar perform judicial review based on rights and freedoms that are in substance comparable to those under EU and EEA law facilitates *coherence* and *homogeneity* as an *end result*, without encroaching upon the EFTA States' sovereignty.
46. Admittedly, there might remain *a certain gap* between the rights and freedoms that are covered by this constitutional and treaty based approach that I am suggesting as the preferred avenue for the Norwegian Supreme Court, and the range of thinkable candidates for fundamental rights within EEA law, bearing in mind the wide scope of rights and principles in the *EU Charter of fundamental rights*. How should the domestic courts of the EFTA pillar of the EEA Agreement deal with this possible gap?
47. Again, to my mind, the starting point should be the governing principles of *homogeneity*, *reciprocity* and *loyal cooperation*. Accordingly, one must examine whether the *EU law* on fundamental rights – if it had been applicable – *prima facie* substantiates the claim for a certain interpretation, or for setting EEA law aside. If well-established case law from the ECJ clearly *excludes* the possibility of a conflict, this should suffice. Conversely, in the absence of such well-established case law from the ECJ, or if the question is whether EEA law at that particular point *deviates* from EU law, there might be a pressing need for clarification. This represents *the very core* of issues that the Norwegian Supreme Court ought to decide upon *only after advice* from the EFTA Court according to the procedure in Article 34 SCA.

48. Judge President, Justices, prominent guests, colleagues and friends!

Europe is changing quickly in terms of perceptions, social mix, cultural values and communications. The economy and the currents of politics are volatile. We face new challenges as to national security and immigration. It is vital that the constitutive legal structures provide us with the stability and principled guidance we need to manoeuvre steadily through troubled waters.

49. I started by stating that the history of fundamental rights is *a chronicle of courts taking a lead position* in clarifying and developing the law. Moreover, I maintained that the future of fundamental rights depends on courts taking fundamental rights seriously, based on sustainable and principled choices of legal policy, within the limits of the law and in accordance with the powers vested in the judiciary. I will conclude my intervention by advocating that the future of fundamental rights within European law – in order to become a prosperous one – must also be the venture of *a constructive discourse within the partnership of national, international and supranational courts*. It is my sincere hope and honest ambition, that the Norwegian Supreme Court will have both voice and ears in this dialogue.

Thank you so much for your attention!