

# **Fundamental Rights and the EEA Agreement**

**Karin Fløistad**

ARENA Report No 1/2004

## **Fundamental Rights and the EEA Agreement**

**Karin Fløistad**

Copyright © ARENA  
and Karin Fløistad  
ISSN 0807-3139

ARENA  
Centre for European Studies  
University of Oslo

P.O.Box 1143, Blindern  
N-0317 Oslo  
Tel: + 47 22 85 76 77  
Fax: + 47 22 85 78 32  
E-mail: [arena@arena.uio.no](mailto:arena@arena.uio.no)  
<http://www.arena.uio.no>

Oslo, January 2004

# Table of Contents

|                                                                                                              |           |
|--------------------------------------------------------------------------------------------------------------|-----------|
| Table of Contents .....                                                                                      | iii       |
| Abstract .....                                                                                               | v         |
| <b>Chapter 1 Introduction .....</b>                                                                          | <b>6</b>  |
| 1.1 What if Mrs Mary Carpenter had to rely on the EEA Agreement? 7                                           |           |
| 1.1.1 <i>The facts and law of the case</i> .....                                                             | 7         |
| 1.1.2 <i>A case for Community or EEA law?</i> .....                                                          | 10        |
| 1.1.3 <i>General points regarding the judgment</i> .....                                                     | 12        |
| 1.2 Terminology .....                                                                                        | 15        |
| 1.2.1 <i>The EEA Agreement</i> .....                                                                         | 15        |
| 1.2.2 <i>Fundamental rights</i> .....                                                                        | 17        |
| 1.3 Structure .....                                                                                          | 18        |
| 1.3.1 <i>Three different stages in Community law</i> .....                                                   | 18        |
| 1.3.2 <i>The main problem</i> .....                                                                          | 19        |
| 1.4 Delimitation .....                                                                                       | 22        |
| 1.4.1 <i>Fundamental principles of Community law</i> .....                                                   | 22        |
| 1.4.2 <i>The difference between EEA law and national law in an EFTA State</i> ....                           | 23        |
| 1.4.3 <i>The lack of hierarchy of rules in the EEA Agreement</i> .....                                       | 23        |
| 1.4.4 <i>Different perspectives of the EEA Agreement and human rights</i> .....                              | 24        |
| <b>Chapter 2 The first stage of fundamental rights protection .....</b>                                      | <b>26</b> |
| 2.1 Avoiding conflict with the supremacy of EC law .....                                                     | 26        |
| 2.2 “Supremacy” in the EEA Agreement .....                                                                   | 29        |
| 2.3 The sources of the rights .....                                                                          | 32        |
| 2.3.1 <i>Constitutional principles of the Member States and international human rights instruments</i> ..... | 32        |
| 2.3.2 <i>The standard of protection</i> .....                                                                | 35        |
| 2.4 A restriction on Community legislation and action .....                                                  | 36        |
| 2.5 Summary .....                                                                                            | 39        |
| <b>Chapter 3 The second stage of fundamental rights protection .....</b>                                     | <b>41</b> |
| 3.1 Fundamental rights as a restriction on Member States’ action .....                                       | 41        |
| 3.1.1 <i>Introduction</i> .....                                                                              | 41        |
| 3.1.2 <i>Types of Member State action</i> .....                                                              | 42        |
| 3.1.3 <i>Limits and critiques of Community law</i> .....                                                     | 44        |
| 3.2 Fundamental rights as a restriction on EFTA States’ action .....                                         | 46        |
| 3.2.1 <i>Introduction</i> .....                                                                              | 46        |
| 3.2.2 <i>The text of the Agreement and the intentions of the Contracting parties</i> ...                     | 47        |

|                                                                         |                                                                                                      |           |
|-------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------|-----------|
| 3.2.3                                                                   | <i>Article 6 EEA and the concept of inherent principles</i> .....                                    | 50        |
| 3.2.4                                                                   | <i>The object of homogeneity</i> .....                                                               | 52        |
| 3.2.5                                                                   | <i>The protection of the rights of individuals</i> .....                                             | 54        |
| 3.2.6                                                                   | <i>Case law</i> .....                                                                                | 56        |
| 3.2.7                                                                   | <i>General considerations</i> .....                                                                  | 64        |
| 3.3                                                                     | Summary .....                                                                                        | 65        |
| <b>Chapter 4 The third stage of fundamental rights protection</b> ..... |                                                                                                      | <b>68</b> |
| 4.1                                                                     | The role of the political institutions in the Community .....                                        | 68        |
| 4.2                                                                     | The role of the political institutions in the EEA/EFTA.....                                          | 73        |
| 4.2.1                                                                   | <i>The “legislative” process in the EEA Agreement</i> .....                                          | 73        |
| 4.2.2                                                                   | <i>Secondary legislation based on articles with no parallel provision in the EEA Agreement</i> ..... | 75        |
| 4.2.3                                                                   | <i>Sex-equality</i> .....                                                                            | 79        |
| 4.2.4                                                                   | <i>Non-discrimination</i> .....                                                                      | 84        |
| <b>Chapter 5 Final observations</b> .....                               |                                                                                                      | <b>88</b> |
| <b>Bibliography</b> .....                                               |                                                                                                      | <b>91</b> |
|                                                                         | Books .....                                                                                          | 91        |
|                                                                         | Articles .....                                                                                       | 92        |
|                                                                         | Official publications .....                                                                          | 96        |
|                                                                         | Table of cases for the European Free Trade Association Court (EFTA-Court) .....                      | 96        |
| <b>ARENA Reports</b> .....                                              |                                                                                                      | <b>98</b> |

## Abstract

The purpose of this paper is to shed light on the significance of the fundamental rights development in the Community on the European Economic Area Agreement. The aim of the discussion is to illuminate a key weakness of the EEA Agreement, which reflects the state of Community law before the Treaty on the European Union. This is the difficulty of trying to separate and distinguish EC “internal market” law from all other EC law, given that its boundaries are blurred and its scope is always expanding. To facilitate the analysis, the development in the Community has been separated into three different stages; the establishment, the consolidation and the expansion of the principle of fundamental rights. Each of these stages raises specific questions in relation to the EEA Agreement. The issue is discussed both in relation to a substantive expansion of the EEA Agreement and to the role of the institutions in particular the EFTA Court and the EFTA Surveillance Authority. The starting point is an EEA Agreement, functionally limited to extending the common market into the three EFTA States through the four freedoms and competition rule, trying to achieve homogeneity with an EU which is moving further and further away from being functionally limited to facilitating a common market. There is a logical impossibility in trying to achieve homogeneity between two fundamentally different international systems. New areas of cooperation such as human rights are not separated from the common market but are related to and indeed affect the functioning of the common market as well as being independent policy areas. It is the argument in this paper the protection of fundamental rights represents one of the many changes in the Community, which can neither be ignored nor accepted in an EEA context, thus creating a challenge for the future functioning of the Agreement.

# Chapter I

## Introduction

The principle of protection of fundamental rights, which was first developed through the jurisprudence of the European Court of Justice<sup>1</sup> from the early 1960s, is presently an important part of the work towards a possible new constitution for Europe.<sup>2</sup> From being a principle of limited importance, largely consisting of a human rights scrutiny of Community action by the ECJ, the principle seems to be developing into an objective of the European Union with the Community actively promoting and developing the rights.

The present paper examines the development of human rights in the Community in light of the European Economic Agreement<sup>3</sup> and asks whether the principle of fundamental rights protection is part of the EEA Agreement. Already here attention should be drawn to the fact that the text of the EEA Agreement remains unchanged since the signing of the Agreement 2 May 1992. Hence, major changes in the EC Treaty resulting from the Intergovernmental conferences in Maastricht (1992),<sup>4</sup> in Amsterdam (1996)<sup>5</sup> and in Nice (2000)<sup>6</sup> as well as the suggested new Constitution of Europe (2003)<sup>7</sup> are not reflected in the text of the EEA Agreement. Apart from a minor exception connected to the EFTA Surveillance Authority<sup>8</sup> the conclusion is that the Agreement does not contain a principle of fundamental rights protection.

---

<sup>1</sup> Hereinafter referred to as the ECJ including also the Court of First Instance (CFI) unless otherwise specified.

<sup>2</sup> The European Convention, CONV 850/03, 18. July 2003, Draft Treaty establishing a Constitution for Europe, Part I, Articles 2 and 7 and Part II.

<sup>3</sup> Hereinafter referred to as EEA Agreement or simply the Agreement.

<sup>4</sup> Treaty on European Union (TEU).

<sup>5</sup> Treaty of Amsterdam (ToA).

<sup>6</sup> Treaty of Nice (TN).

<sup>7</sup> See footnote above.

<sup>8</sup> Hereinafter referred to as the ESA.

The opening section sets the scene with an analysis of a recent ECJ case concerning the right to family life. Subsequent sections examine the establishment, the consolidation and the expansion of the principle in the light of the EEA Agreement. The aim of the discussion is to illuminate a key weakness of the EEA Agreement which reflects the state of Community law before the Treaty on European Union. This is the difficulty of trying to separate and distinguish EC “internal market” law from all other EC law, given that its boundaries are blurred and its scope is always expanding.

## **I.1 What if Mrs Mary Carpenter had to rely on the EEA Agreement?**

### ***I.1.1 The facts and law of the case***

On the 11<sup>th</sup> of July 2002 the ECJ ruled in favour of Mrs Mary Carpenter, a national of the Philippines, who was refused the right of residence in the United Kingdom because she had infringed the UK’s immigration laws.<sup>9</sup> The ruling was based on an interpretation of Article 49 EC<sup>10</sup> on the freedom to provide services in the light of the fundamental right to respect for family life enshrined in Article 8 of the European Convention of Human Rights.<sup>11</sup>

Mary Carpenter was given leave in 1994 to enter the UK as a visitor for six months. She overstayed that leave and in May 1996 married Peter Carpenter, a national of the UK. Mr Carpenter had two children from his first marriage. Mrs Carpenter took care of the children. Mr Carpenter operated as the sole owner of an undertaking selling advertisements. The undertaking was established in the UK but a substantial part of the business was conducted with customers established in other Member States. In addition, Mr Carpenter attended meetings for business purposes in other Member States.

Mrs Carpenter admitted that she had no right of her own to reside in any Member State under Community law. She argued that her rights derived from those enjoyed by her husband Mr Carpenter to provide services and travel within the European Union. Mrs Carpenter argued that her deportation would require Mr Carpenter to go to live with her in the

---

<sup>9</sup> Case C-60/00 *Mary Carpenter v. United Kingdom*, ECR 2002 Page I-6279.

<sup>10</sup> European Community Treaty or the Rome Treaty 1957 as amended referred to as the EC Treaty or simply EC.

<sup>11</sup> Hereinafter referred to as the ECHR.

Philippines or separate the members of the family unit if he remained in the UK. In both cases Mr Carpenter's business would be affected.<sup>12</sup>

The UK Government argued that the national provisions at issue pursued the aim of ensuring the application of national procedures and rules on immigration in which it must be ensured that the rules are not evaded and thus marriages not contracted for the sole purpose of residence. Further, the UK Government argued that Mr Carpenter's right to extend his business activities to other Member States did not give him the right to indirect assistance by a national of a non-member country who had no right of residence in the UK. In conclusion the UK Government submitted that a person who was in a situation such as Mrs Carpenter's could not therefore derive a right of entry or residence from Community law. A possible remedy might be provided by the ECHR.<sup>13</sup>

The Commission stated in its intervention that it could not see how the situation of Mrs Carpenter could be subject to Community law. It was inclined rather to the view that such a situation be classified as an internal situation.<sup>14</sup>

In his opinion the Advocate General underlined that the subject-matter of the proceedings was the right of residence of Mrs Carpenter, that is, a national of a non-member country who was married to a citizen of the Union. Further, the Advocate General noted that many of Mrs Carpenter's submissions related to the rights of Mr Carpenter, raising the question whether the measures taken by the UK to terminate her residence obstructed Mr Carpenter in providing services to other Member States, in other words, whether the measures constituted a restriction on the free movement of services. The Advocate General noted that the issue was not whether the UK had restricted Mr Carpenter's rights deriving from Community law but rather whether Mrs Carpenter could rely on Article 49 EC for her right of

---

<sup>12</sup> A substantial part of the case, especially the opinion of the Advocate General from 13 September 2001 (EC reports 2002 Page I-06279), concerned the interpretation of Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services, and to provide the non-national spouse with the right to reside with his or her spouse in his or her spouse's Member State of origin. This Directive will not be commented upon here as the ECJ decided that it was not applicable to the case, C-60/00 para. 36. It should be mentioned, however, that the Advocate General decided the case in favour of Mrs Carpenter on the basis of an interpretation of this Directive.

<sup>13</sup> AG Opinion C-60/00 para. 18-25.

<sup>14</sup> AG Opinion C-60/00 para 29.

residence. As a national of the Philippines Mrs Carpenter could not herself rely on the fundamental freedoms, and hence not on Article 49 EC. In the opinion of the Advocate General since she could not rely on the freedom to provide services, she could not derive any right of residence therefrom.<sup>15</sup>

On the point of the applicability of Article 49 EC the ECJ simply noted that Mr Carpenter was exercising the right to freely provide services guaranteed by Article 49 EC.<sup>16</sup> The Court then pointed to the fact that Community legislature has recognised the importance of ensuring the protection of the family life of nationals of the Member States in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the Treaty, in particular Article 10 of Council Regulation (EEC) No 1612/68 of 15 October 1968<sup>17</sup> on freedom of movement for workers within the Community and Articles 1 and 4 of Council Directive 68/360/EEC of 15 October 1968<sup>18</sup> on the abolition of restrictions of movement and residence within the Community of workers of Member States or their families.<sup>19</sup>

Further, the ECJ stated that it was clear that:

”the separation of Mr and Mrs Carpenter would be detrimental to their family life and, therefore, to the conditions under which Mr Carpenter exercises a fundamental freedom”.<sup>20</sup>

It follows from this reasoning that the ECJ found Article 49 to be applicable. The Court also found that the freedom could not be fully effective with the obstacles raised in the UK to the entry and residence of his spouse.<sup>21</sup>

Concerning the Member State’s ability to invoke reasons of public interest to justify the national measure the Court noted its competence to assess whether the measure was compatible with fundamental rights.<sup>22</sup> The Court made extensive comments on the compatibility of the measure with fundamental rights. It noted that:

---

<sup>15</sup> AG Opinion C-60/00 para 33-38. The Advocate General did, however, decide the case in favour of Mrs Carpenter, see footnote above.

<sup>16</sup> Case C-60/00 para 37.

<sup>17</sup> OJ 1968 (II), p. 475.

<sup>18</sup> OJ 1968 (II), p. 485.

<sup>19</sup> Case C-60/00 para. 38.

<sup>20</sup> Case C-60/00 para. 39.

<sup>21</sup> Case C-60/00 para 39.

<sup>22</sup> Case C-60/00 para. 40.

”(t)he decision to deport Mrs Carpenter constitutes an interference with the exercise by Mr Carpenter of his right to respect for his family life within the meaning of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, (...), which is among the fundamental rights which according to the Court’s settled case-law, restated by the Preamble to the Single European Act and by Article 6 (2) EU, are protected in Community law”.<sup>23</sup>

The Court went on to find, in paragraph 42–45, that a decision to deport did not strike a fair balance between right of family life and the maintenance of public order and public safety.

### *1.1.2 A case for Community or EEA law?*

There is a lot to say about the seemingly unfair decision to deport Mrs Carpenter by the UK authorities. Her infringements of the immigration laws were arguably minor, consisting of overstaying a leave and failing to apply for an extension within the set time limit. There did not seem to be any doubt as to whether the marriage was genuine nor were there other, more serious, breaches of immigration law. The consequence, however, was the deportation from the United Kingdom of Mary Carpenter. For the purpose of this paper the point differs from the question of whether one agrees or disagrees with the UK government’s decision on the substance of the case. Different opinions on this matter will most certainly be influenced by one’s general view on immigration law which is both a complicated matter and a highly political issue. The point here is the involvement of Community law and the ECJ in a case largely about the fundamental right to respect for family life, hence the further extension of the applicability of Community law into human rights issues and its consequences for EEA law.

At first sight the facts of the case do not seem to point in the direction of Community law and ECJ competence but rather to the ECHR and the jurisdiction of the European Court of Human Rights.<sup>24</sup> Immigration laws regarding rights of residence and family reunification remain, in general, the domain of the Member State. The limited secondary legislation on entry and residence for the family of an EU national was not applicable to the situation of Mrs Mary Carpenter.<sup>25</sup> In order to reach its conclusion the ECJ had to extend the application of Article 49 far beyond its wording and beyond how both the Commission and the Advocate General understood the provision.

---

<sup>23</sup> Case C-60/00 para. 41.

<sup>24</sup> Hereinafter referred to as ECtHR.

<sup>25</sup> Council Directive 73/148/EEC, see footnote above.

The wide interpretation of the applicability of Article 49 EC can best be explained in light of the general developments in the Community concerning fundamental rights protection. How would a similar case have fared in an EEA context? Could Mrs Mary Carpenter have relied on the EEA for the same protection?

A parallel provision to Article 49 EC can be found in Article 36 of the EEA Agreement.<sup>26</sup> Further, Council Regulation (EEC) No 1612/68 on freedom of movement for workers within the Community and Council Directive 68/360/EEC on the abolition of restrictions of movement and residence within the Community of workers of Member States or their families, which the Court relied on in its interpretation of Article 49 EC, are both referred to in Annex V of the EEA Agreement meaning that they are part of the Agreement.<sup>27</sup>

In order to justify its encroaching into a fundamental rights review of the national measure the ECJ further relied on its settled case-law, restated by the Preamble to the Single European Act and by Article 6 (2).<sup>28</sup> One of the questions here concerns precisely the relevance of this case law and bearing in mind that the EEA Agreement does not contain the wording of the Preamble to the Single European Act or Article 6 (2) EU.<sup>29</sup>

The case is a good illustration of the many dilemmas inherent in an Agreement which is based on an historical version of the EC Treaty and of EU policy but still aims at homogeneity and equal application. The next chapter will explore some of the concerns raised by the judgment both in Community law and hypothetically in EEA law which will be dealt with in detail later.

---

<sup>26</sup> The wording of Article 36 paragraph 1 EEA is as follows: "Within the framework of the provisions of this Agreement, there shall be no restrictions on freedom to provide services within the territory of the Contracting Parties in respect of nationals of EC Member States and EFTA States who are established in an EC Member State or an EFTA State other than that of the person for whom the services are intended."

<sup>27</sup> In order to get the full picture it should also be mentioned that Council Directive 73/148/EEC which the Advocate General relied on is referred to in Annex VIII of the EEA Agreement and thus also part of the Agreement.

<sup>28</sup> Case C-60/00 para. 41.

<sup>29</sup> I will come back to the relevance of Treaty changes after the signing of the EEA Agreement in chapter 4.

### *1.1.3 General points regarding the judgment*

The Carpenter decision may have been a welcome judgment to those who desire an extended role for the Community and the ECJ on human rights issues. Others may be more sceptical and continue to question the Community's role. The general legitimacy and role of the Community in human rights issues remains contested and disputed.<sup>30</sup> Concerning the applicability of Article 49 EC in cases involving the rights to family life the ECJ has, however, decided the state of the law in the Community.

Legally there are, however, many challenges and unresolved questions following this development. In addition to the problem identified above, concerning the lack of continual updating of the EEA Agreement with the EC Treaty and EU policy, there are also a number of general concerns with the development of fundamental rights protection illustrated by the judgment. These are difficult in a Community context but perhaps even more so in an EEA context, as illustrated by the observations below.

The **first point** to be made is the novel fact that a Philippine national can rely on the EC law on free movement of services and the ECJ to protect her right to family reunification and residence in the UK with her English husband. It seems fair to say that such an application of Article 49 EC goes well beyond what the Member States had in mind when they signed the Treaty of Rome in 1957. It is important to note that this case is not about human rights protection from acts committed by any of the Community institutions. It should also be noted that this case is not about Community law being scrutinised by the ECJ to secure harmony with fundamental human rights. These are the more obvious areas of legitimate human rights review by the Court. This case is about extending Community law principles for a different purpose, i.e. in order to secure a fundamental right to respect for family life in national immigration law.

The consequence of the extension is that the ECJ can now scrutinise Member State national law and governmental opinion with Community law

---

<sup>30</sup> Some recent contributions to this discussion include Alston, P., and Weiler, J. H.H., "An 'Ever Closer Union' in need of a Human Rights Policy", in P. Alston, M. Bustelo, and J. Heenan (eds.), *The EU and Human Rights* (Oxford University press, 1999), Von Bogdandy, A., "The European Union as a Human Rights Organization? Human rights and the core of the European Union", (2000) 37 CMLRec. 1307, De Burca, G., "Convergence and Divergence in European Public law: The Case of Human Rights", in P. Beaumont, C. Lyons and N. Walker, *Convergence and Divergence in European Public Law* (Oxford – Portland Oregon, 2002).

on market freedoms in an area which is both politically sensitive and controversial. Although this case may have been relatively easy to decide considering the facts other immigration cases can involve highly complicated assessments including prioritising between different groups of immigrants, ensuring efficiency and equal treatment and balancing costs of the administrative system with a thorough credibility evaluation. One can legitimately ask whether there is any connection between these policy decisions which will ultimately influence individual cases and the right to provide services across borders.

The **second point** to be made is the legal uncertainty created by the decision. It should be kept in mind that human rights in Community law is to a large extent unregulated. Thus the Court has a great deal of discretion when deciding these cases. The implication of this case for future cases is uncertain. Also, the limits of the protection under Community law into national immigration law seem both unclear and unforeseeable.

In this context it should be added that the ECJ has not extended its competence or Community law into all decisions involving the fundamental right of respect for family life, or indeed immigration law. Mrs Carpenter was married to a UK national who had a business which extended beyond UK borders. Had she been married to any other UK national simply performing his economic activity within the UK she would not have had any protection under Community law. This illustrates, perhaps, a **third point** concerning the more general weakness of the fundamental rights protection in the Community in that it is not universal but selective and, to some extent, arbitrary perhaps weakening the credibility of having a protection at all.

The **fourth point** to be made is that in protecting Mrs Carpenter's right to family reunification the ECJ had to give its own interpretation separate from the ECtHR of the content of the fundamental right to respect for family life. Under the ECHR the right to respect for family life does not enjoy absolute protection. An interference with that right is permissible under Article 8 (2) of the ECHR if it *"is in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others"*. As regards such interference the Member States enjoy a margin of appreciation. Several criteria have to be taken into account in the assessment of the necessity and the proportionality of the interference. This involves a balancing act where factors like the seriousness of the breach, the aim of the provision of the law on foreigners,

the reasonableness of requiring Mr Carpenter to live in the Philippines, Mrs Carpenters family ties with the UK and the Philippines and that the marriage took place after the expiry of her limited permit, are relevant.<sup>31</sup>

An interesting **fifth point** to note, regarding a possible family reunification in the Philippines, is that this of course would not be sufficient for Mr Carpenter in exercising his freedom to provide services. Thus, a point of justification under the ECHR may be given little weight in the Community in so far as it undermines other fundamental principles of Community law. One interpretation of the judgment is that the fundamental right of respect for family life is extended under Community law, in keeping with other principles of Community law, including the notion of EU citizenship.

Until recently the opposite has often been true in the sense that economic freedoms and fundamental rights have regularly been seen as contradictory. This has led to the ECJ being criticised for giving too much weight to Community freedoms, as opposed to fundamental rights.<sup>32</sup> However, in a context where the two rights correspond the ECJ may be tempted and willing to give an enhanced protection. Regardless of whether there is an enhanced or a decreased protection within Community law the **sixth point** in this context is that the ECJ gives its own interpretation of the right and in so-doing may be influenced by other fundamental principles of Community law.

By giving its own interpretation of human rights, and hence extending its competence, there is an overlapping jurisdiction for the ECJ and the ECtHR. As we will see later, there are several problems with such an overlap. They may come to different results on similar issues as indeed they have,<sup>33</sup> creating an impossible situation for the States that are bound by two different international agreements and under the surveillance of two different courts. This is a problem which has been recognised in Community law, although it remains to be seen how the problem will be solved.

In the event of a similar case being raised in an EEA context and a similar judgment being passed, all the same concerns mentioned above apply. In addition there are several concerns which are specific to the EEA Agreement and which will be analysed further in this paper. A distinction can be made

---

<sup>31</sup> See among others the ECtHR case, *Beldjoudi v France*, Series A no. 234-A and the case ECtHR *Moustaquim v Belgium*, Series A no 193.

<sup>32</sup> See chapter 4 below.

<sup>33</sup> See point 4.2.2 below.

between institutional factors and substantive factors. Institutionally, the involvement of the EFTA Court in human rights issues raises many issues one of which is the involvement of yet another court in overlapping fields of competence. It also means giving the EFTA Court a large amount of discretion regarding the content of the right, substituting their opinion for those of the EFTA States' in a sensitive area outside the main scope of their function. Substantively, the expansion of the EEA Agreement within a set of human rights creates difficulties in terms of sovereignty, foreseeability and legal certainty. Such an extension of the EEA Agreement and of the competence of the EFTA Court will be no less surprising for the EFTA States in terms of what they signed in 1992 than it has been for the Member States of the Union in terms of their Treaty from 1957.

Before entering into the substance of the discussion some remarks will be made on terminology, structure and delimitation.

## 1.2 Terminology

### 1.2.1 The EEA Agreement

The EEA Agreement, which entered into force on 1 January 1994, extended the internal market of the Community to the European Free Trade Association<sup>34</sup> countries: Austria, Finland, Iceland, Norway and Sweden<sup>35</sup> without creating supranational institutions and thus necessitating the ceding of sovereignty from any of the parties.<sup>36</sup> The Agreement is based on reciprocal access based on the four freedoms to an internal common market. Central concepts for this purpose are “dynamism” and “homogeneity”. Dynamism aims at keeping the Community internal market legislation fully updated in the EFTA States. Homogeneity is the idea that EEA law shall, as far as possible, be interpreted and applied in the same way in the Community Member States and the States of the EFTA.

In order to provide for these conditions institutions with specific tasks were deemed necessary. Thus, an “EFTA pillar” was established in parallel to the

---

<sup>34</sup> Hereinafter referred to as EFTA.

<sup>35</sup> After Austria, Finland and Sweden joined the Community only Iceland and Norway remain the EFTA countries party to the EEA Agreement. Liechtenstein joined the EEA Agreement later.

<sup>36</sup> The only transfer of formal power is in competition law, where the ESA has been given much the same competences as the Commission enjoys. This is of modest practical importance, since most competition cases will have effect within the Community and therefore be dealt with by the Commission.

relevant institutions of the Community (in this context a “Community pillar”), in particular, the Council, the Commission and the ECJ. The parallel bodies thus established are the EFTA Standing Committee, the ESA and the EFTA Court. The two “pillars” of the European Economic Area are joined together by common institutions under the EEA Agreement, first and foremost by the EEA Council and the EEA Joint Committee.

The Agreement consists of a Main Part. This Main Part establishes the basic institutions and defines their composition, functions and powers.<sup>37</sup> In addition, the Main Part contains basic rules, most notably on the four freedoms and competition, reproducing the basic rules of EC law. The Main Part has been incorporated, as such, into the legal systems of the Contracting Parties.<sup>38</sup> Second, the Agreement consists of 22 Annexes, listing a vast number of EC directives and regulations.

For the EEA to be homogenous the two legal systems must develop in parallel and be applied and enforced in a uniform matter. To this end, the Agreement provides decision making procedures for the integration into the EEA of new secondary Community legislation and for a surveillance mechanism to ensure the fulfilment of obligations under the Agreement and also a uniform interpretation and application of its provisions.<sup>39</sup>

The EEA Joint Committee, consisting of representatives of the Contracting Parties, between the Community, on the one hand, and “the EFTA States speaking with one voice”, on the other, decides whether or not to extend the Agreement to the new directive or regulation, in which case it is added to the list of the appropriate annex.<sup>40</sup> It may be noted that an EFTA State may object to the introduction of new legislation since the EEA Agreement is based on unanimous decision-making.<sup>41</sup>

The EEA Joint Committee’s competence is limited to including secondary legislation in the Agreement. Changes in the Main Part of the Agreement to reflect the changes in the EC Treaty will require renegotiation by the Parties.<sup>42</sup>

---

<sup>37</sup> Part VII of the Agreement.

<sup>38</sup> Of course, insofar as the Contracting Parties are “monistic”, no specific act of implementation has been necessary. Norway and Iceland are dualistic whereas Liechtenstein is monistic.

<sup>39</sup> See chapter 3 and 4 of the paper.

<sup>40</sup> Article 93 EEA.

<sup>41</sup> See chapter 4 of the paper.

<sup>42</sup> See chapter 4 of the paper.

### 1.2.2 Fundamental rights

The ECJ has declared that the "*general principles of EC law*" include protection for fundamental rights which are part of the common constitutional traditions of the Member States and are contained in international human rights treaties on which they have collaborated or which they have signed. The term *fundamental rights* is often used interchangeably with human rights. This will also be done here. However, there is no precise definition of what constitutes a fundamental right in the Community.

Due to the lack of legislation on human rights, a fundamental right in the Community is arguably limited to what the ECJ has decided constitutes such a right or freedom in its case law. This ranges from the freedom of expression, the right to privacy, the right to property, the freedom to pursue one's trade or business and the right to equality. It would, however, also be right to say that although the ECJ has not ruled on all the rights yet, its justification and reasoning point in the direction of including all the rights of the ECHR as fundamental rights within Community law. The precise content of the rights remain, however, open and contested.

After the adoption of the Charter for Fundamental Rights for the EU<sup>43</sup> some writers argue that the Charter mirrors the content of fundamental rights in the Community. The argument is that the Conventions's mandate to the drafters of the Charter was to codify existing rights and not make any changes or alter Community law. Thus, although the Charter itself is not legally binding, the content of it reflects the existing fundamental rights. Tempting as it is to point to the Charter as a "bill of rights", hence making the citizens' rights clear and visible, it is probably too early to draw this conclusion. In the new draft Constitution for Europe it is suggested to make the Charter legally binding as part II of the Constitution.<sup>44</sup>

Some fundamental rights are clearly spelt out in the EC Treaty and also in the EEA Agreement. These are non-discrimination based on nationality and equal rights for men and women.<sup>45</sup> In the Community, recent developments include a reasonably broad competence in the field of non-discrimination and secondary legislation prohibiting discrimination based on race. This legislation will be dealt with specifically in chapter 4 of the paper.

---

<sup>43</sup> Charter of Fundamental Rights of the European Union (2000/C 364/01), see point 4.1 of this paper.

<sup>44</sup> The European Convention, CONV 850/03, 18. July 2003, Draft Treaty establishing a Constitution for Europe, Article 7 and Part II.

<sup>45</sup> Articles 12 and 141 EC respectively and Articles 4, 69 and 70 EEA.

Whether the four freedoms established by the EC Treaty should be termed fundamental rights or not is not entirely clear although the ECJ's terminology points in that direction. However, in the context of the Charter it was decided not to include these freedoms as such as fundamental rights. Instead, principles closely related to the four freedoms were termed fundamental such as the right to free movement but on a higher level of abstraction.<sup>46</sup> For the purpose of this paper the term fundamental rights will be reserved for the "classic" human rights, to a large extent the ones reflected in the ECHR with the reservation that these rights are often minimal rights whereas fundamental rights in the Community may be harmonised rights with a higher threshold.

## 1.3 Structure

### *1.3.1 Three different stages in Community law*

The topic of this paper is the principle of fundamental rights protection, as developed through the jurisprudence of the ECJ from the early 1960s and onwards, and the EEA Agreement. Furthermore, this paper will discuss some of the more recent political initiatives in the field of fundamental rights protection in the Community and the EEA Agreement.

To facilitate the analysis, the development in the Community will be separated into three different stages. Each of these stages raises specific questions in relation to the EEA Agreement. The **first stage** is the establishment of the protection of fundamental rights by the ECJ in the Community. This stage is characterised by fundamental rights constituting a limit on the Community when exercising its powers and is largely about protecting the supremacy of Community law. The **second stage** concerns the principle of fundamental rights protection as a limit on Member States' actions. This is a much more disputed and uncertain stage of the continuing development of EC law. It raises questions of sovereignty for the states, touches important political decisions and remains controversial. In the **third stage** the role of the political institutions is central. Gradually the jurisprudence of the ECJ has gained political support and there have been treaty changes, secondary legislation and soft law all dealing with the principle of fundamental rights protection. The activism demonstrated by the political institutions indicates a shift in the Community's role in the field of human rights. The Court's focus is on fundamental rights as a constraint on Community and Member State action, whereas the political institutions

---

<sup>46</sup> Charter of Fundamental Rights of the European Union (2000/C 364/01) Article 45 (1).

move towards the promotion and protection of humans rights as an objective of the EU and perhaps as a source of Community competence.

I wish to concentrate on the impact of this development on the functioning of the EEA Agreement, in particular whether the principle of fundamental rights protection forms part of the Agreement. This is a substantive issue concerned with the expansion of EEA law from essentially internal market law to including a set of human rights. When looking at the EEA Agreement attention will also be paid to the institutions created by the Agreement or set up to interpret and enforce the Agreement. It will be suggested that the judicial and the political institutions have different starting points concerning the EEA Agreement and the principle of fundamental rights protection. The Court is bound by the relevant legal sources whereas the political institutions can make decisions more freely based on political considerations. Chapters two and three will concentrate mainly on the judicial view of the issue whereas chapter four will take a political standpoint. It should be noted that the above institutions may influence each other on the issue.

### ***1.3.2 The main problem***

The initial reaction to the subject of fundamental rights and the EEA Agreement may be one of surprise. At first sight there is no relationship between the EEA Agreement and fundamental rights protection. The EEA Agreement is an international agreement creating rights and obligations for states and international organisations. It concerns the extension of the common market to the EFTA countries and not universal human rights protection for the individual. Thus, one could argue that the development of fundamental rights protection in the Community is irrelevant for the EEA Agreement. As we will see in chapter 2, the initial reasoning behind the development of the protection is of little relevance to the EEA Agreement. This may also explain why nearly 10 years have passed since the entry into force of the Agreement without the question ever having been raised in the EFTA Court.

Several factors, however, indicate that the comforting times where this development could be silently bypassed are over. Indeed, as will be explored in chapter 3 the scrutiny of Member State's action by the ECJ raises the question of whether the EFTA Court can do the same in relation to an EFTA State. The discussion of the Carpenter case in points 1.1.2 and 1.1.3 have demonstrated that the principle of fundamental rights protection influence the content and application of the right to the free movement of services. Thus fundamental rights are not a separate policy area of the

Community but an integrated part of the four freedoms and competition. Thus, the principles of dynamism and homogeneity are at stake.

The discussion in chapter 4 focuses on the political challenge facing the EFTA countries concerning the recent legislative development in this area, especially Article 13 EC. In the near future, major decisions will have to be taken on whether to include this legislation in the Agreement with its implications for general principle.

Having said that the development of fundamental rights protection in the Community can no longer be ignored in an EEA context the question arises of why this should pose a problem. The issue relates to a much larger question concerning the functioning of the EEA Agreement, namely the balance between seeking homogeneity and preserving sovereignty under the EEA Agreement.

Several commentators have already written about the inherent conflict in the EEA Agreement between the aims of homogeneity while simultaneously preserving sovereignty for the EFTA States.<sup>47</sup> It is often said that homogeneity can only be achieved through supranational elements in the Agreement which contradict the idea of sovereignty. Supranational elements often consist of principles to secure the effectiveness of EEA law in national law. Principles of direct effect, supremacy and state liability are all central issues in this discussion. The discussion of these and other general principles of Community law will, to the extent that they are relevant for the discussion of fundamental rights protection, be dealt with more extensively in point 3.2.5 of the paper.

In many ways there is a difference between these principles and the principle of fundamental rights protection, although they are all general principles of Community law and have been developed by the ECJ. The latter is not about securing the efficiency of existing EEA law but rather an extension of the substantive scope of the agreement. The more general point argued in this paper is not only the problem of sovereignty but also the seeming impossibility of preserving homogeneity between two already fundamentally

---

<sup>47</sup> Graver, H P., "Mission impossible: Supranationality and National Legal Autonomy in the EEA Agreement", in *European Foreign Affairs Review* 7: 73-90, 2002, Sejersted, F., "Between Sovereignty and Supranationalism in the EEA Context – On the Legal Dynamics of the EEA-Agreement", in Muller-Graff, P., and Selvig, E., (eds), "The European Economic Area – Norway's Basic Status in the Legal Construction of Europe" (Berlin Verlag A. Spitz, 1997), p. 43-74.

different international systems. Differences, which are continually increasing. This point can be made illustrated through comparing the aim suggested in Articles 2 and 3 on the Union's values of the draft Treaty establishing a Constitution for Europe<sup>48</sup> with Article 1 (1) on the aim of the EEA Agreement.

#### Article 2: The Union's values

"The Union is founded on the values of respect for human dignity, liberty, democracy, the rule of law and respect for human rights. These values are common to the Member States in a society of pluralism, tolerance, justice, solidarity and non-discrimination."

#### Article 3: The Union's objectives

"1. The Union's aim is to promote peace, its values and the well being of its peoples.  
..."

#### Article 1 (1) EEA has the following wording:

"The aim of the Agreement of association is to promote a continuous and balanced strengthening of trade and economic relations between the Contracting Parties with equal conditions of competition, and the respect of the same rules, with a view to creating a homogenous European Economic Area, hereinafter referred to as the EEA."

The EEA Agreement on the one side is functionally limited and cannot go beyond these limits without a renegotiation between the parties.<sup>49</sup> The European Union, on the other side, finds itself in a period of dramatic political and constitutional activism and dynamism. Developments are taking place not only with the introduction of a "bill of rights" but in areas like the operation of a single currency in most Member States, the EU's military

---

<sup>48</sup> The European Convention, CONV 850/03, 18. July 2003, Draft Treaty establishing a Constitution for Europe, Part I, Articles 2 and 3.

<sup>49</sup> A broader renegotiation to update the EEA Agreement with the changes in the Community has been raised by EFTA but the Commission has shown little interest, St. meld. Nr. 27 (2001-2002), Om EØS-samarbeidet 1994-2001, p. 89. There were negotiations this year on the Agreement in connection with the enlargement of the EU. The negotiations were, however, limited to financial issues primarily the question of how much the EFTA countries should contribute with the internal market extending into Eastern Europe. A possible broader renegotiation may take place only after the completion of the enlargement process.

capacity being enhanced, the dramatic phase of enlargement and the vigorously aired and debated questions of legitimacy, democracy and desirability of a European constitution. The starting point is thus that we have an EEA Agreement, functionally limited to extending the common market into the three EFTA States through the four freedoms and competition rules, trying to achieve homogeneity with an EU which is moving further and further away from being functionally limited to facilitating a common market.

Of course, some of the changes within the Community can be kept separate or be dealt with in other cooperation agreements between the EFTA States and the Community.<sup>50</sup> The EEA Agreement is only trying to achieve homogeneity with the part of the Community “acquis” which concerns the common market. The problem arises when the new areas of cooperation are not separate from the common market but are related to and indeed affect the functioning of the common market as well as being independent policy areas. The principle of fundamental rights protection is one such example as was demonstrated with the Carpenter case and developed further below. It is the argument in this paper that the protection for fundamental rights represents one of the many changes in the Community which can neither be ignored nor accepted in an EEA context, thus creating a challenge for the future functioning of the Agreement in its present form.

## 1.4 Delimitation

### *1.4.1 Fundamental principles of Community law*

The Court-made principle of fundamental rights protection should not be confused with other fundamental principles in Community law such as the Court-made principles of supremacy, direct effect, state liability and general administrative principles, although the latter, to a certain degree, overlap with fundamental rights, i.e. the right to have documents made public, the principle of proportionality and the right to a statement of reasons. These principles have all created their own set of challenges for the EEA Agreement. These principles will, however, only be dealt with to the extent that they can illuminate the discussion on fundamental rights.

---

<sup>50</sup> An example being Norway’s participation in the Schengen Agreement. This is a separate area of cooperation which is not connected to the EEA Agreement.

### ***1.4.2 The difference between EEA law and national law in an EFTA State***

Initially it should be pointed out that what constitutes EEA law does not necessarily constitute national law in the EFTA States. A legal instrument under the EEA Agreement has to be given proper effect in the national legal order. Thus a line has to be drawn between what constitutes EEA law and what has been implemented into national law. In the event that the principle of fundamental rights protection is part of EEA law, a separate discussion is in principle needed for each of the EFTA countries (except Lichtenstein) to determine whether the principle has been incorporated into national law. An illustrative example of this two step procedure can be found in the principle of state liability. The principle itself was found to be part of EEA law in the Sveinbjornsdottir case.<sup>51</sup> The next question was then whether the EEA principle of state liability had been implemented into Icelandic law. Concerning this the EFTA Court made a general remark in theory applicable to all fundamental principles. The EFTA Court did not consider this two step procedure a problem concerning general principles inherent in the Main Part of the Agreement since this part of the Agreement had been implemented into national law as such. This position has been criticised by scholars both substantively and on the lack of competence of the EFTA Court to interpret national law.<sup>52</sup> Whether this line of reasoning will be accepted by the national courts which, ultimately, will decide the question has yet to be seen.<sup>53</sup> This paper is, however, only concerned with EEA law and not the question of implementation.

### ***1.4.3 The lack of hierarchy of rules in the EEA Agreement***

When discussing a general principle another difference between Community law and EEA law should be mentioned. In EC law there is a hierarchy of provisions and secondary legislation must always be interpreted with the

---

<sup>51</sup> Sveinbjornsdottir case (Case E-9/97 Erla Maria Sveinbjornsdottir v Iceland, Report of the EFTA Court (1998) 95 paragraph 63 in an obiter. The Court stated, in paragraph 63: "It follows from Article 7 EEA and Protocol 35 to the EEA Agreement that the EEA Agreement does not entail a transfer of legislative powers. However, the principle of state liability must be seen as an integral part of the EEA Agreement as such. Therefore, it is natural to interpret national legislation implementing the main part of the Agreement as also comprising the principle of State liability".

<sup>52</sup> Eyjolfsson. M., "B. EFTA Court", CMLRev 37: 191-211, 2000.

<sup>53</sup> The question may never be raised in a national court. In a recent case decided in the lower court in Norway the Government chose not to question the EFTA Courts decision that the principle of state liability was part of the EEA Agreement and had been implemented in Norwegian national law. Instead it focused on the conditions of liability but lost on this point. The case was decided by Oslo Tingrett 13 March 2003.

treaties and the general principles in mind. Secondary legislation cannot conflict with treaty principles or general principles and therefore not with the principle of fundamental rights. As regards EEA law it must be admitted that neither the main part of the EEA Agreement nor the general principles inherent in the Agreement have priority over its other parts in a manner comparable to EC law. It is nevertheless probable that because of the homogeneity objective discussed in point 3.2.3 the same result will be achieved. A further discussion of the effects of a possible inherent principle of fundamental rights protection on the other parts of the Agreement lies outside the scope of the paper.

#### ***1.4.4 Different perspectives of the EEA Agreement and human rights***

Human Rights and the EEA Agreement can be looked at from a different perspective than the one chosen here. In this paper the focus is on the human rights development within the Community and its impact on the EEA Agreement.

But, the EEA Agreement could also be looked at independently of its relationship with human rights, especially the ECHR.<sup>54</sup> One possibility is to interpret the EEA Agreement to include the rights contained in the ECHR independently from their development in the Community. The legal consequence of this is that a possible conflict between the rules protecting the four freedoms, competition and basic human rights would be resolved within the context of the Agreement and its institutions.

Another approach is to treat the EEA Agreement and the ECHR as two distinct and separate systems where possible conflicts would have to be treated under general rules of international law. Possible conflicts would then have to be solved by national courts which would have to take into consideration the state's obligation towards both international treaties. As a starting point international agreements are equal in status and one does not take precedence over the other. This is a general principle of international law enshrined in the Vienna Convention on the law of Treaties Article 30 paragraph 3.<sup>55</sup> The

---

<sup>54</sup> Kalin, W., "The EEA Agreement and the European Convention for the Protection of Human Rights", (European Journal of International law 1992 p. 342), Falch, I., "Menneskerettigheter og EU/EØS – En eller flere konstitusjoner for Europa?", Lov og Rett 1997.

<sup>55</sup> The Vienna Convention on the law of Treaties 1969. This Convention has not been ratified by all the parties to the EEA Agreement but this has not generally been considered a problem for the application of the principles since they are general principles of international law.

rule of “*jus cogens*” would solve the conflict where fundamental principles of international law were at stake (*lex superior*) whereas other conflicts could be solved through general principles like *lex specialis* and *lex posterior*.

Without implying that there are no alternative ways of treating this subject or suggesting that there are not links between these approaches, this paper will only deal with the development in the Community and the subsequent consequences for the EEA Agreement. This means that the relationship between the EEA Agreement and the ECHR will not be considered separately from the Community system. As we will see, the Community has its own set of human rights but these rights are closely related to the human rights protected in the ECHR. The relationship between the two systems is complicated and unclear. The question of which Court, the ECJ or the ECtHR, has the final word in interpreting which rights is still an open and a widely debated one.<sup>56</sup>

---

<sup>56</sup> See chapter 4 below.

## Chapter 2

# The first stage of fundamental rights protection

In this second chapter I will first look at how and why the principle of fundamental rights protection was originally established in the Community, focusing on the issue of the supremacy of Community law. I will then look at the issue of supremacy under the EEA agreement. Finally, I will look at the sources of the rights and the limits on Community action and comment on this in light of the EEA Agreement.

### 2.1 Avoiding conflict with the supremacy of EC law

The original three Community treaties<sup>57</sup> contained no general provision concerning the protection of human rights in the conduct of Community affairs. They focus on economic aims and objectives with little reference to other values. In order to see the full picture it should, however, be pointed out that certain aspects of human rights have always been the concern of Community law such as: free movement, effective judicial protection and the observance of the rule of law. The sixth recital of the preamble of the original treaty expressed the commitment of the EEC to “*preserve and strengthen peace and liberty*”. More substantively Article 6 (presently Article 13 EC) contained a prohibition of discrimination on grounds of nationality and Article 119 (presently Article 141 EC) stated the principle of equal pay for equal work for men and women. The background for these provisions in the original treaty is, however, related to market issues. The initial development

---

<sup>57</sup> The European Coal and Steel Community (ECSC) 1951, the European Atomic Energy Community (Euratom) 1957, and the European Economic Treaty (EEC/EC) 1957.

of a more general principle of fundamental rights protection in the Community is characterised by the active role of the ECJ and its early case law on this matter.

The trigger is often said to be the challenge posed to the supremacy of Community law by Member State jurisdictions which felt that EC legislation was encroaching upon important rights protected under national law. And further, the doctrine of direct effect meant that Community action often had a direct legal impact on private economic and commercial interests who began to claim legal protection for fundamental property and commercial constitutional rights. The early case law in this field is about fundamental rights as grounds for annulment of Community laws. Thus, the protection is triggered by the need for a control of Community institutions and Community measures. Since the Community is not a member of the ECHR, it is not under scrutiny of the ECtHR. This increases the need for a human rights scrutiny by the ECJ.

The *Stauder* case is often referred to as the case where the ECJ responded more positively to a human rights claim.<sup>58</sup> The question was whether the implementation of a Community scheme constituted an infringement of the applicant's right to dignity. The ECJ did not accept the claim on the basis of a breach of fundamental rights but solved the case by interpreting the different language versions of the Commission decision making the disputed requirement unnecessary. The importance of the decision lies in that the ECJ did not reject the applicability of principles of this nature as they had in previous case law. Thus as early as the late 1960's traces of a general principle of fundamental rights protection can be found in Community law.

The next case after *Stauder* could not be solved by interpreting the Community measure in conformity with the principle which had been invoked. In the *Internationale Handelsgesellschaft* case the applicant challenged the validity of a measure regarding a requirement of a deposit for an export licence for maize as contrary to national law. The applicant wanted the German Constitutional Court to strike down the provision as contrary to German Constitutional law, including freedom of action and of disposition, economic liberty and proportionality.<sup>59</sup>

---

<sup>58</sup> Case 29/69, *Stauder v. City of Ulm* (1969) ECR 419. The case concerned a Community scheme to reduce the surplus of butter and requirements that the beneficiaries had to reveal their names and addresses.

<sup>59</sup> Case 11/70, *Internationale Handelsgesellschaft v. Einfuhr und Vorratstelle für Getreide und Futtermittel* (1970) ECR 1125 recital 3.

The ECJ emphasised that a recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law. The challenge for the Court, however, was to incorporate national principles into general principles of EC law. This allowed the ECJ to review the compatibility of Community measures not with national constitutional rights but with EC law.

In the judgment the Court said:

“The validity of such measures can only be judged in the light of Community law. In fact, the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community law being called into question. Therefore the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure.”<sup>60</sup>

This statement clearly demonstrates the difficult issue at stake – the principle of supremacy of Community law. As the Court says, to review Community law using principles, however high ranking internally, from national law threatens the whole foundation of Community law which is based on uniformity. Equally impossible is the situation for the German Constitutional Court with its inability to enforce constitutionally protected rights. The clever solution by the Court was as follows:

“However, an examination should be made as to whether or not any analogous guarantee inherent in Community law has been disregarded. In fact, respect for fundamental rights forms an integral part of the general principles of Community law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community.”<sup>61</sup>

---

<sup>60</sup> Case 11/70, recital 3.

<sup>61</sup> Case 11/70, recital 4.

Thus, the Court reconciled the conflicting interests by making fundamental rights an inherent part of Community law and making national constitutional rights a part of the content of fundamental rights in the Community assuring that the Court would review Community measures compliance with fundamental rights.

The discussion which followed between the German Constitutional Court and the ECJ regarding the constitutional relationship between Community law and German law is outside the scope of this paper. Indeed, most national courts do not accept the unconditionally monist view of the supremacy of EC law. While they accept the requirements of supremacy in practice, most regard this as flowing from their national constitutions rather than from the authority of the EC Treaties and the ECJ, and they retain a power of ultimate constitutional review over measures of EC law.<sup>62</sup>

From the perspective of the ECJ, the national courts in the Member States are, however, required to give immediate effect to the provisions of directly effective EC law of any rank in cases which arise before them. They are also required to ignore or to set aside any national law of any rank which could impede the application of EC law. This is, however, not the case under the EEA Agreement which creates a somewhat different legal situation.

## 2.2 “Supremacy” in the EEA Agreement

As demonstrated above, the initial trigger for the ECJ’s declaration that a more general principle of protection of fundamental rights formed part of the EC legal order was the challenge posed to the supremacy of Community law by Member State jurisdictions which felt that EC legislation was encroaching upon important rights protected under national law.<sup>63</sup> The question of supremacy and direct effect differs under EEA law and it will be suggested here that a different solution can be found under the EEA Agreement to ensure the respect for fundamental rights.

---

<sup>62</sup> Craig, P. and De Burca, G., “EU Law text, cases and materials”, Third Edition, (Oxford University Press 2003) page 275.

<sup>63</sup> This is a generally held view among scholars, see as an example Craig, P. and De Burca, G., “EU Law text, cases and materials” p. 318. A slightly different approach can be found in Menendez, A. J., “A Rights-Based Europe?”, in Arena 2002. He argues that the underlying considerations since the establishment of the European Communities were about rights. The preconditions of rights-protection are peace and prosperity and the cooperation was just a different strategy based on pragmatism to ensure a rights protection. Further, he argues that the ECJ sensed the transformations that the Community was about to experiment with in extent and breadth and that it was time for stressing that the protection of individual fundamental rights was at the very foundations of the European project.

The Agreement does not require any transfer of legislative competence. Protocol 35 to the Agreement states that the homogeneity objective does not require any Contracting Party to transfer legislative powers to any institution of the EEA; this must be achieved *"through national procedures"*. In accordance with this, the sole Article of Protocol 35, in cases of *"possible conflicts between implemented EEA rules and other statutory provisions"* directs the EFTA States<sup>64</sup> to introduce, *"if necessary"*, a statutory provision to the effect that EEA rules prevail in these cases. This is meant to create a substitute for the supremacy that follows from EC law.

Protocol 35<sup>65</sup> to the EEA Agreement reads:

“Protocol 35 on the implementation of the EEA rules

-Whereas this Agreement aims at achieving a homogenous European Economic Area, based on common rules, without requiring any Contracting Parties to transfer legislative powers to any institution of the European Economic Area; and

-Whereas this consequently will have to be achieved through national procedures;

Sole Article

For cases of possible conflicts between implemented EEA rules and other statutory provisions, the EFTA States undertake to introduce, if necessary, a statutory provision to the effect that EEA rules prevail in these cases.”

The **first point** to be noticed is that the Article speaks of “implemented rules”. Thus the provision seems to take as a starting point that the EEA rules have to be implemented before there can be any question of supremacy. Indeed, this also seems to be the view of the EFTA Court in relation to the broader question of whether there is any direct effect under the EEA Agreement. This point will be elaborated on extensively later with evidence from the EFTA Court’s judgments.<sup>66</sup> However, the general conclusion is that

---

<sup>64</sup> The limitation to the EFTA States is obviously due to the fact that the EU Member States are already subject to EC principles of supremacy.

<sup>65</sup> According to Article 119 EEA the “protocols shall form an integral part of” the EEA Agreement.

<sup>66</sup> See point 3.2.5 below.

EEA law has to be transformed into national law and given effect accordingly.<sup>67</sup>

**Secondly**, this Article only requires the EFTA States to introduce a “statutory provision” to secure the supremacy of EEA rules. National law in the EFTA States, therefore, regulates the question of supremacy. The statutory provision will have to be interpreted and harmonised with other statutory provisions in the EFTA States’ legal order by the national courts. Constitutional provisions and later statutory provisions will prevail even with this supremacy clause because of the principles of *lex superior* and *lex posterior*.

Protocol 35 EEA shows that the Contracting Parties wanted to leave open (or at least accepted) in principle the possibility that an EEA rule must stand back for a conflicting national provision. In contrast, under EC law the principle of direct effect and supremacy ensures that EC law effectively take priority over provisions of national law even when the latter are contained in subsequent statutes or in a national constitution.<sup>68</sup>

This line of reasoning is meant to illustrate a point of principle. Clearly in practice such conflicts will not occur often as a result of the principle of faithful interpretation and respect for international obligations. However, the point illustrates that the national courts in the EFTA States could reach a decision under national law which differs from EEA law, if necessary, in order to respect human rights.<sup>69</sup> The result being that the EFTA State in question would be in violation of its duties under the EEA Agreement. This is a breach by the state of an international obligation without, at the outset, internal effect as to the national legal situation.<sup>70</sup> In order to get the full picture it should be mentioned that a breach of EEA law is not entirely

---

<sup>67</sup> State liability or “economical “direct” effect” means that there is some legal effect of the provision even if it has not been implemented in national law. But this “economical direct effect” is based on the notion that the principle of state liability has been implemented into national legislation. This issue is discussed further in point 3.2.5 below.

<sup>68</sup> At least from the point of view of the ECJ.

<sup>69</sup> Indeed this has also happened in the so called Finnanger I-case, published in Rt 2000 page 1811. The majority of the judges in the Norwegian Supreme Court held that section 7 of the Norwegian automobile liability act was incompatible with Article 3 of the First Motor Vehicle Insurance Directive (72/166/EEC), Article 1 and 2 of the Second Motor Vehicle Insurance Directive (84/5/EEC) and Article 1 of the Third Motor Vehicle Insurance Directive (90/232/EEC). See also the advisory opinion of the EFTA Court in the case, E-1/99 of 17 November 99.

<sup>70</sup> This approach is the traditional dualistic approach where there is a distinction between the international level and the national level. Depending on internal procedures, monistic states may not separate as clearly between these levels.

without internal effect since there is a question of liability of the state. The important point, however, is that the substantial legal rights and obligations for the state or for individuals will not change.

The difference between EC law and EEA law with respect to supremacy and direct effect shows that there is also a difference in the need to include protection for fundamental rights into the respective legal orders. In EC law failure to do so could potentially result in an obligation for national courts in the Member States to apply EC law, even if the provisions are in contradiction with fundamental rights. As a result of the principles of direct effect and supremacy such provisions would prevail over national fundamental rights protection at any level. Such a legal situation would possess a challenge to the supremacy of EC law. Judicial recognition within EC law of fundamental rights resolved, at least temporarily, the possible threat of subordination of EC law to national law in this area. The national courts in the EFTA States are not bound to apply EEA law directly and as superior to national law. The harmonisation procedure will be made at a national level where protection of fundamental rights can be secured according to the national law of the EFTA States. Hence, the initial trigger to avoid conflict with the supremacy of Community law which led to the development of a general fundamental rights protection in the Community does not provide the same kind of incentive in an EEA context.

## 2.3 The sources of the rights

### 2.3.1 *Constitutional principles of the Member States and international human rights instruments*

In later case law the ECJ continued to emphasise the autonomy of Community law “*general principles*” while simultaneously stressing that the source of these general principles was not entirely independent of the legal cultures and traditions of the Member States. The Court made references to international treaties for the protection of human rights on which the Member States had collaborated or of which they were signatories. Special importance has been given to the ECHR.<sup>71</sup>

---

<sup>71</sup> Case 4/73, *Nold v. Commission* (1974) 491, Case 36/75, *Rutili v. Minister for the Interior* (1975) 1219. More recent examples of this strategy can be seen in *Johnston Case*, 222/84, (1986) ECR 1651, para. 18, *P v. S*, Case, C-13/94 (1996) ECR I-2143, para. 18 and *Coote*, C-185/97, (1998) ECR I-5199, paras. 21-23 in which particular Community legislative provisions on the rights to pursue a claim by judicial process and on sex discrimination were

The reference to the ECHR should not be understood as incorporating this body of law into Community law. On the contrary, the discussion about whether the Community should become a party to the Convention culminated in an opinion from the Court saying that the Community did not have the competence to do this.<sup>72</sup> The importance of the Convention lies in it representing basic principles and common values to which all of the Member States have committed themselves. It can be seen as a common denominator for all the Member States.

In practice, however, referring to basic principles and common values is a vague construction hiding many inherent conflicts and questions of interpretation. There is a core perhaps of basic principles and common values that has general agreement among Member States but there is no comprehensive, precise and agreed content. Indeed the jurisprudence from the ECtHR and previously the Human Rights Commission in Strasbourg show that it is often difficult to agree on the content of these principles when applied in specific cases. Although the “*sources of inspiration*” for the general principles of fundamental rights of EC law can be identified, the particular concrete rights derived from these sources are more difficult to conceptualize.

The point can further be illustrated by the *Internationale Handelsgesellschaft* case where the ECJ concluded that there had been no infringement of the rights claimed since the restriction on the freedom to trade etc. was not disproportionate to the general interest advanced by the deposit system. A different conclusion was reached by the German court demonstrating how difficult it is to assimilate the “*common constitutional principles*” of the Member States as part of the Community legal order.

This again can be illustrated by the potential conflict between the case law of the ECJ and of the ECtHR. So far the Courts have, to a large extent, avoided open conflicts and have tried to stay away from the other’s sphere of competence. Yet, at the same time, it is also necessary to recognise that a degree of divergence between Community and Convention law is virtually inevitable.<sup>73</sup>

---

declared by the ECJ to constitute specific expressions of the ECHR requirement of judicial control and of the fundamental principle on equality.

<sup>72</sup> Opinion 2/94 on accession by the Community to the ECHR (1996) ECR I-1759.

<sup>73</sup> More generally on this point: Harmsen, R., “National Responsibility for European Community Acts Under the European Convention of Human Rights: Recasting the Accession debate”, *European Public law*, Volume 7, issue 4, (Kluwer Law International, 2001).

Apart from the ECHR and national constitutional provisions, the Court has also occasionally drawn on other international instruments. In *Defrenne v. Sabena III*,<sup>74</sup> the Court, deeming the elimination of sex discrimination to be a fundamental Community right, supported its conclusion by noting that “the same concepts are recognized by the European Social Charter of 18 November 1961 and by Convention No. 111 of the International Labour Organisation of 25 June 1958 concerning discrimination in respect of employment and occupation”.<sup>75</sup> The fact that the Court draws on the ECHR in identifying fundamental rights within the Community has not, however, led it to refuse legal status to a right which is not expressly protected under these. In the *AM & S* case, concerning the production of documents in competition law proceedings, Advocate General Warner noted that the ECHR made no mention of a principle of lawyer/client confidentiality, yet the Court held that it was a part of Community law.<sup>76</sup>

From an EEA perspective a few points should be noted. All of the EFTA States that are party to the EEA Agreement are also party to the ECHR. Hence the EFTA States are also bound by the human rights principles contained therein. As long as the content of fundamental rights protection in the Community coincides with the ECHR, adopting these into the EEA Agreement will appear less controversial. Indeed, this is also what has led many writers to conclude that this part of Community law could be incorporated into the EEA Agreement without much controversy.<sup>77</sup>

But this argument could very well be used the other way around. There is little need for inclusion of fundamental rights protection in the EEA if the rights are secured through the membership of the EFTA countries in the ECHR. Harmonisation can then take place at a national level thus avoiding the involvement of the EFTA institutions.

Using the ECHR as a source of inspiration has, however, not led the ECJ to develop its fundamental rights protection along exactly the same line as the

---

<sup>74</sup> Case 149/77, *Defrenne v. Sabena* (1978) ECR 1365.

<sup>75</sup> (1978) ECR 1365 para. 26.

<sup>76</sup> Case 155/79, *Am & S Europe Ltd. V. Commission* (1982) ECR 1575.

<sup>77</sup> Sejersted, F., “Between Sovereignty and Supranationalism in the EEA Context – On the Legal Dynamics of the EEA-Agreement”, in Muller-Graff, P., and Selvig, E., (eds), “The European Economic Area – Norway’s Basic Status in the Legal Construction of Europe” (Berlin Verlag A. Spitz, 1997), p. 43-74, and Stefanson, S., “The EEA Agreement and its adoption into Icelandic law”, IUSEF no. 25, 1997, (Universitetsforlaget).

Convention. The ECJ seems to develop relatively autonomous EC law principles on a case by case basis. In emphasising the autonomy of Community law, the Court has developed both more extensive and sometimes arguably less extensive protection as well as rights not known by the ECHR. The Carpenter case, as demonstrated above, illustrates the possible different considerations relevant for the ECJ and for the ECtHR. The rights themselves are often vague and general, leaving much to the discretion of the court which means that the ECJ and the ECtHR have already, and will probably continue to interpret and apply the rights differently. Including fundamental rights protection in the EEA Agreement, based on the assumption that the protection in the Community is no more than what already follows from the ECHR seems to be a mistake.

Furthermore, there is no guarantee that the EFTA States will be party to other international instruments of human rights protection that the ECJ draws inspiration from. Finally, the ECJ often undertakes a comparative study of the laws of the Member States when determining the content of the Community protection. This study does not include the three EFTA countries that are party to the EEA Agreement. Thus any influence on the content of the right through national constitutional law is denied these countries. It is not suggested here that there should be any obligation on the ECJ to include these countries in their study, merely point out the factual consequence of the present situation.

### **2.3.2 *The standard of protection***

Once we have established that fundamental rights are protected in the Community and the sources of fundamental rights derived by the Court, the standard of protection for EU fundamental rights must be considered. Several articles have been written on this topic.<sup>78</sup> There is no clear answer in Community law to this question and the topic extends the limit of this paper.

In brief, however, some remarks are of relevance to this paper.

A distinction should be made between which rights are protected and how the rights are protected. For instance, it may be generally recognised that

---

<sup>78</sup> Coppel, J., and O'Neill, A., "The European Court of Justice: Taking Rights Seriously?" (1992) 12 Legal Studies 227, Lockhart, N., "'Taking Rights Seriously' Seriously: The European Court and its Fundamental Rights Jurisprudence" (1995) 32 CMLRev. 51, 579, Phelan, D. R., "Right to Life of the Unborn v Promotion of Trade in Services: The European Court of Justice and the normative Shaping of the European Union", The Modern Law review 55:5 September 1992 0026-7961.

freedom of expression is a protected right but there may not be general agreement between Member States on the level of protection taking into account the protection of privacy. This illustrates once again the amount of discretion given to the Court in this field.

As regards the standard of protection, it has been argued that far from applying the lowest common denominator standard the ECJ should apply a “universal maximum standard” which would involve the recognition of any right protected by any single Member State or in any relevant international agreement as a fundamental right in the EC law.<sup>79</sup> One obvious problem with such an approach is that a right recognised as fundamental in one Member State may be very specific to that State and may even be in contradiction with rights recognized as fundamental in other Member States. An example is the prohibition of abortion in Ireland.

In an EEA context it would have to be the EFTA Court that would determine the standard of protection within the EEA Agreement, provided that this principle was included in the Agreement. Although it is difficult to speculate, presumably the EFTA Court would take special account of the EFTA States’ constitutional principles on this matter. As a general remark, however, it is apparent that the objective of homogeneity would not so easily be reached if the two different courts, the ECJ and the EFTA Court used different sources of inspiration for establishing a standard of protection.

## 2.4 A restriction on Community legislation and action

In general, it should be noted that Community legislative action will not easily be set aside by human rights claims.<sup>80</sup> The overall objectives of the Community represent a limit to the extent of the human rights protection within the Community. Also, the ECJ may be reluctant to substitute its opinion of what constitutes protection of fundamental rights for that of the Council, the Parliament and the Commission.

---

<sup>79</sup> L. Besselink, “Entrapped by the maximum standard: on Fundamental Rights, Pluralism and Subsidiarity in the European Union” (1998) 35 CMLRev. 629. See for a different view J. Weiler, “Fundamental Rights and Fundamental Boundaries”, in his “The Constitution of Europe” (CUP, 1999), ch. 3.

<sup>80</sup> There are many examples of cases where grounds for annulment because of breach of fundamental rights have not been successful. A recent example is the Dutch government challenging the legality of the Biotechnology Directive, Case C-377/98, *Netherlands v. Council and Parliament* (2001) ECR I-7079.

A distinction can be made between three different types of cases; cases involving general legislation and cases involving administrative acts, which can be separated into two categories, staff cases and competition cases. Applicants challenging administrative acts for violation of fundamental rights, whether staff cases or competition proceedings, have been more successful than challenges of general legislative measures.<sup>81</sup>

Within the EEA Agreement there are no lawmaking bodies in the sense of the Community legislative process. All EEA legislation is taken from Community law and has been developed there. Accordingly, there is not the same need for the EFTA Court to have a parallel competence, as the ECJ has, to scrutinise EEA legislation for compliance with human rights. In particular, it may be noted that the validity of legislation approved by the EEA Joint Committee cannot be dealt with by the EFTA Court.<sup>82</sup> Therefore, the human rights review can be left to the Community system since all EEA legislation will simultaneously be Community legislation.

Further, the EFTA Court does not have competence in staff cases. Several of the important fundamental rights cases in the Community have been staff cases.<sup>83</sup> According to the Staff regulations of the EFTA Court, disputes involving an employee and the EFTA Court as an employer, are dealt with by the Administrative Tribunal of the International Labour Organisation.

This leaves us with situations when the EFTA institutions, in particular the ESA, for instance in competition cases, exercise their power over individuals. In these situations fundamental rights protection is needed in the same way as it is needed in the Community. According to Article 108 (2) (b) EEA:

---

<sup>81</sup> An example of a staff case; Case 100/88, *Oyowe and Traore v. Commission* (1989) ECR 4285 regarding the freedom of expression in relation to two journalists from the African, Caribbean, and Pacific States. An example of a competition case; Case 46/87 and 227/88, *Hoechst AG v. Commission* (1989) ECR 2859 regarding the protection of privacy on a business premise.

<sup>82</sup> No such competence has been given to the EFTA Court. In the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice, OJ No L 344, 31.12.1994, p. 1, (ESA/EFTA Court Agreement), the Court deals with direct actions in the following types of cases; against a State Articles 31 and 32, against a decision Article 36, against a failure to act by ESA Article 37. The Court's competence also includes questions of non-contractual liability of ESA for damage caused by it Article 39 of the same Agreement and unlimited jurisdiction with regard to penalties imposed by ESA Article 35.

<sup>83</sup> See, among others, Case C-274/99P, *Connolly v. Commission* (2001) ECR I-1611 about the freedom of expression for employees and Case C-404/92P, *X v. Commission* (1994) ECR I-4737, about respect to private life and AIDS testing of employees.

“(t)he EFTA Court shall, in accordance with a separate agreement between the EFTA States, with regard to the application of this Agreement be competent, in particular, for:

- a) ...
- b) appeals concerning decisions in the field of competition taken by the EFTA Surveillance Authority;
- c) ...”

Article 36 in the ESA/EFTA Court Agreement deals with the possibility of bringing an action against a decision of the ESA. The Article reproduces in essence the wording of Articles 230 and 231 EC, which deal with the control of the legality of acts of the EC Council and Commission. In the Scottish salmon case the EFTA Court did not accept the argument made by the ESA that there was no requirement to interpret the ESA/EFTA Court Agreement in conformity with the relevant rulings of the ECJ.<sup>84</sup> It has been clearly established in ECJ case law that whenever the Community institutions exercise their power they are bound to act in accordance with the general fundamental rights principles. Failure to do so can invalidate the act.

It follows from the first paragraph of the Article that the EFTA Court has jurisdiction against a decision of the ESA on grounds of:

“lack of competence, infringement of an essential procedural requirement, or infringement of this Agreement, of the EEA Agreement or of any rule of law relating to their application, or misuse of powers.”

As pointed out above, the same considerations concerning the protection of individuals apply in relation to the ESA’s decisions. A limit in the competence of the EFTA Court’s general scrutiny of the ESA’s decisions to not include human rights leaves a potential gap in the protection of individuals. An interpretation of Article 36 in the ESA/EFTA Court Agreement to include such competence for the EFTA Court in its control over the ESA does not have any major consequences expanding the EEA Agreement or violating sovereignty rights for the EFTA States. On the contrary, the EFTA States have good reason to want to give the Court such competence over the ESA’s decisions. The ESA is an independent institution

---

<sup>84</sup> Case E-2/94, Scottish Salmon Growers Association Limited vs. EFTA Surveillance Authority on the competence of the Authority in matters concerning state aid to fisheries, para 11.

but lack of compliance with human rights by the institution may have consequences for the EFTA States. The ECtHR held in 1999, in the Matthews case, that transfer of national competences to an international organisation does not preclude the state of the violation of the ECHR.<sup>85</sup>

Also, support for the view that the EFTA Court has a fundamental rights competence over decisions by the ESA can be found in the Oporto declaration of the Contracting parties of the 2<sup>nd</sup> of May 1993 (2) on the continuing effect of international agreements. There, it is assumed that rights which are enjoyed *inter alia* by individual persons, under current effective international agreements, remain effective with respect to the EEA Agreement, to the extent such agreements grant at least equal protection of rights as granted by the EEA Agreement. It may be expected that the declaration also applies to the duties of the ESA in human rights matters as it is held that the Member States are responsible for the actions of the institution.

As a consequence of the wide competence given to the EFTA Court in the wording of Article 36 in the ESA/EFTA Court Agreement and in light of the homogeneity objective, it seems safe to conclude that the EFTA Court has the competence to scrutinise the ESA's decisions for compliance with human rights.

## 2.5 Summary

In short, it is perhaps unsurprising that the question of fundamental rights protection has not yet been raised fully in an EEA context. The first stage of the development of this principle in the Community demonstrates that it is of little relevance to the EEA Agreement as long as it is limited to securing the supremacy of Community law and controlling Community legislative acts and institutions. The discussion on the sources of the rights and the level of the protection demonstrate that the EFTA countries have little, or no, influence over the content of the rights (lack of influence is, however, not unusual in an EEA context) and that the reference to Member States' constitutional principles create an extra obstacle to the achievement of homogeneity in this field. The second stage of the development within the Community, concerning fundamental rights as a restriction on Member

---

<sup>85</sup> App. No. 24833/94, *Matthews v. UK*, judgment of 18. Feb. 1999 esp. paras. 34-35 concerning voting rights in Gibraltar for elections to the European Parliament.

States' action is, however, much more controversial and complex, both within the Community and for the purpose of the EEA Agreement.

## Chapter 3

# The second stage of fundamental rights protection

In this third chapter I will first discuss the development, begun in the late 1980s and early 1990s, in the Community extending the principle of a protection for fundamental rights from applying to Community action and Community institutions to Member States' action. I will then look at whether there is a parallel scrutiny of EFTA States' action by the EFTA Court.

### 3.1 Fundamental rights as a restriction on Member States' action

#### 3.1.1 *Introduction*

In most cases involving fundamental rights the ECJ has been asked to assess measures of EC law; i.e. Community legislation or acts by Community institutions. A more controversial and, perhaps, unexpected development, is the application of fundamental rights requirements to certain acts of the Member States. This development came about gradually but the Wachauf case is often referred to as the starting point.<sup>86</sup> As one can easily imagine, while the first step of developing fundamental rights as a constraint on Community action was welcomed by most Member States, the second step –

---

<sup>86</sup> Case C-5/88 Wachauf v. Germany, (1989) ECR 2609 involved the right to the protection for property in relation to compensation for milk quotas. In this case the Court made it clear that Member States were bound, in implementing Community law by all of the same principles and rights which bound the Community in its actions. A similar formulation to the Wachauf case was used in a more recent agricultural policy case, Karlsson, where the ECJ ruled that the requirements flowing from the protection of fundamental rights in the Community legal order “are also binding on Member States when they implement Community rules”, Case C-292/97, Karlsson (2000) ECR I-2737, para 37.

in subjecting Member State action, even within the field of EC law, to an unwritten and uncertain cluster of legal rights is rather a different matter.

It might, of course, be argued that since these rights and principles really are derived from the constitutional traditions of the Member States and from international agreements signed by them all, there should be little objection to the requirement that Member States also comply with those shared legal values. However, as we have seen, not only does the interpretation of the meaning and scope of such rights vary from state to state, but not all general principles of Community law will be shared by all states. Further, even if it was possible to reach agreement on the exact substance of these rights and principles, the Member States would not necessarily want the ECJ to have a role in assessing their compliance with such principles. The Community “law” with which the Member States have bound themselves to comply and the Community “obligations” which they must fulfil were probably understood by the States to be those specific obligations expressly set out in the Treaties and in the legislation adopted by the Community institutions in which the States participate. The extension of a form of “human rights review” by the ECJ to Member State action came about gradually, and the exact scope of this development remains unclear.

### 3.1.2 *Types of Member State action*

Three different actions of the Member State can be identified. The **first** category is when Member States apply provisions of Community law which are based on protection for human rights.<sup>87</sup> The ECJ treats the provision of EC law as a specific manifestation of a recognized general principle of law, and therefore it is to be read in the light of the corresponding principle in the ECHR, which in turn is said to underlie the constitutional traditions of the Member States. Thus the ECJ developed a kind of indirect method of requiring a rule of national law to be reviewed for conformity with a principle embodied in the ECHR and it is presented as no more than an application of a principle which is part of the Member State’s own constitutional tradition.

The **second** category is when Member States act as agents of Community law. This could also be described as Member States enforcing EC policies and interpreting EC rules. The ECJ has, on several occasions, made rulings which seem to indicate that Member States, when interpreting and implementing

---

<sup>87</sup> An example can be found in Case 222/84, *Johnston v. Chief Constable of the Royal Ulster Constabulary* (1986) ECR 1651 regarding access to court and an effective judicial remedy.

Community law, are required to act and to legislate in a way that respects the rights set out in the ECHR, even when the Community measures do not themselves embody the particular right claimed.<sup>88</sup>

A **third** and more controversial category is when Member States derogate from Community law requirements. Originally the ECJ seemed reluctant to scrutinise Member State behaviour in this context. The *Cinetheque* judgment concerned an alleged restriction on the free movement of goods created by French law which prohibited the exploitation of films shown in cinemas in the form of videos until the expiration of a twelve-month period.<sup>89</sup> The ECJ ruled that any barriers to inter-state trade caused by this rule were justified since it was non-discriminatory in nature and was intended to prioritise cinematic exploitation. In response to the question concerning the freedom of expression the Court said that it had no power to examine the compatibility with the ECHR of national law which concerns an area which falls within the jurisdiction of the national legislator. The ECJ ruled that although French law constituted a *prima facie* restriction on the free movement of goods, the fact that it could be justified as a “mandatory requirement” of the public interest (the promotion of the cinematographic industry in France) brought it “within the jurisdiction of the national legislator”.<sup>90</sup>

In a later judgment the Court restated this point in a different way, ruling that it would not examine the compatibility of national law with fundamental rights or general principles of law where the national law lay outside the jurisdiction of the Community.<sup>91</sup> The ECJ’s indication that it would not examine the compatibility with the ECHR of national measures “lying outside the scope of Community law”,<sup>92</sup> suggested a willingness to examine the compatibility of national measures which lay within the scope of EC law. The question then is, of course, what constitutes the scope of Community law? This is neither a clear cut concept in itself nor is it a static concept. Rather, the scope of Community law will often be decided by the ECJ and will evolve over time.

---

<sup>88</sup> Some examples are Case 249/86, *Commission v. Germany* (1989) ECR 1263 regarding respect for family life and Case 63/83, *R. v. Kent Kirk* (1984) ECR 2689.

<sup>89</sup> Cases 60 & 61/84, *Cinetheque v. Federation Nationale des Cinemas Francais* (1985) ECR 2605.

<sup>90</sup> Cases 60 & 61/84 Para 26.

<sup>91</sup> Case 12/86, *Demirel v. Stadt Schwabish Gmund* (1987) ECR 3719 regarding family reunification.

<sup>92</sup> Case 12/86 Para 28.

In the ERT judgment some years after Cinetique the ECJ took a different approach than in Cinetique regarding the invocation by a Member State of a derogation in the Treaty from the principle of free movement.<sup>93</sup> The ECJ declared that it had a duty to ensure that the Member State had adequately respected the fundamental rights which were part of Community law. Thus, the idea that a non-discriminatory restriction on the free movement of goods, justified by a public interest requirement, would fall within national law and not EC law seemed to be history. The ERT judgement also meant that such derogations would be considered for compatibility with the EC general principles of fundamental rights.

The notion of a public interest derogation is closely linked to the relationship between states and their citizens. The judgment thus represented a further extension of the Court's jurisdiction and, by further encroachment of the general principles of law into the legal systems of the Member States, consequently on national sovereignty.

This line of reasoning by the Court continued in Familiapress.<sup>94</sup> The Familiapress case was about Austrian legislation prohibiting the sale of periodicals containing prize competitions. The effect was that foreign publications containing such competitions, while lawful in their country of origin, could be banned in Austria. The issue was whether the Austrian restriction was incompatible with the free movement of goods. The ECJ held that it was necessary to take account of fundamental rights, including the freedom of expression. Interestingly, in this case the concerns of freedom of the press could be said to go both ways. **On the one hand**, the right of publishers to sell their publications regardless of frontiers, and of readers to receive information from them, clearly form part of freedom of expression. **On the other hand**, the restriction including prize competitions was itself defended as being necessary to protect the diversity of the press and so also to protect freedom of expression.

### 3.1.3 Limits and critiques of Community law

Advocate General Jacobs is critical of the judgment in Familiapress and questions the reach of Community law implied by it.<sup>95</sup> He accepts that the

---

<sup>93</sup> Case C-260/89, *Elliniki Radiophonia Tileorassi AE v. Dimotiki Etairia plirofosisis and Sotirios Kouvelas* (1991) ECR I-2925 regarding freedom of speech.

<sup>94</sup> Case C-368/95, *Vereinigte Familiapress Zeitungsverlags- und Vertriebs GmbH v. Heinrich Bauer Verlag*, (1997) ECR I-3689 regarding freedom of expression.

<sup>95</sup> Jacobs, F., "Human rights in the European Union: the role of the Court of Justice" (2001) 26 ELRev. 331.

national court must assess the measure both from the perspective of the free movement of goods and from the perspective of the freedom of the press. But he asks whether the latter perspective really is a matter for Community law. Once it has been established that a restriction is justified from the perspective of Community law, the restriction might still be caught as infringing fundamental rights. That would be, he argues, a matter for national law or possibly the ECHR, not for Community law.

Advocate General Jacobs is of the opinion that the Member States should be bound by the principles of proportionality and non-discrimination on grounds of nationality when availing a derogation under Community law, but not by other general principles such as, the fundamental right to freedom of expression or religion. However, if the aim of the derogation in question is precisely to promote a particular fundamental right then the ECJ should assess the compatibility of the measure with that particular right.

Advocate General Jacobs is particularly concerned with the ECJ potentially conducting a general human rights review of all the Member States' acts covered by Community law, in particular the Court striking the balance between conflicting rights and laying the standard. He emphasises the vague notion of respecting fundamental rights as guaranteed by ECHR and as they result from constitutional traditions common to the Member States, as general principles of Community law. He asks; "*(p)recisely which rights? Which traditions? And what limitations? There is, it must be admitted, a lack of something-legal certainty, perhaps transparency or accessibility.*" Advocate General Jacob's view seems to be consistent with the ECJ's approach in *Cinetheque* but not in later case law although, in later case law the extent of application of Community law has been limited.

In *Konstantinidis* the question arose as to whether any EC national going to another Member State exercising their freedom of movement could rely on fundamental rights protection regardless of whether that protection was provided for nationals of the Member State.<sup>96</sup> Further, in *Kremzow* it was argued that the right to free movement was infringed by an alleged unlawful sentence of imprisonment.<sup>97</sup> Both of these claims were rejected by the Court. The exact boundaries of the sphere of action within which Member States can be held to account by the ECJ for their observance of human rights and general principles of law remains unclear.

---

<sup>96</sup> Case C-168/91, *Konstantinidis v. Stadt Altensteig Standesamt, and Landratsamt Calw, Ordnungsamt* (1993) ECR I-1191.

<sup>97</sup> Case C-299/95, *Kremzow v. Austria* (1997) ECR I-2629.

Recent case law on this matter includes the Carpenter case, referred to above. Clearly the UK government in the case assumed that the ECJ would not scrutinise their immigration laws thus they did not even try to justify the decision under the public security derogation. While the ECJ increasingly extends its competence and the depth of its human rights review over Member States, it is probably only a matter of time before the EFTA Court will be faced with a case involving fundamental rights. Indeed, a recent case concerning equality touches on the subject and will be commented on below.

## 3.2 Fundamental rights as a restriction on EFTA States' action

### 3.2.1 Introduction

It is possible, and perhaps not unlikely that in the future the EFTA Court could be faced with a case where it is asked to scrutinise an EFTA State action in light of the protection for fundamental rights. If, or when, the EFTA Court has to decide such a case it would first have to answer the question of whether the principle of fundamental rights protection forms part of the EEA Agreement. The EFTA Court may choose to do this in different ways. The Court may be faced by a particular case in which there is a problem concerning a specific right and the Court could choose to limit the question to whether that specific right is included in the Agreement. Another possibility is to make the specific case general and decide not only a specific fundamental right but about fundamental rights in general. The choice made will most likely be influenced by the content of the specific case and on how the parties choose to make their interventions.

As opposed to the political institutions dealt with in chapter 4, a decision by the EFTA Court is limited to, and has to be based upon, the relevant legal sources. The Court cannot decide the question purely on the basis of what it regards as the most suitable decision. It has to be kept in mind, however, that the language of the provisions in the EEA Agreement is ambiguous and open to interpretation due to the heavy political considerations involved. This opens up the floor for the Court and makes it possible for the Court to be influenced by its own opinion on the matter. In a hypothetical case, involving the question of whether the principle of fundamental rights protection is included in the EEA Agreement, there is a danger that the opinion of the Court could be influenced by its own interest in the matter. Arguably, in a court with a heavy case load, the interest of the court in such a

question could be to limit its competence, and hence, avoiding a rush of new cases. The EFTA Court is not heavily burdened with cases, however, and may have an incentive to include the principle of fundamental rights protection in the EEA Agreement hence giving itself both a broader competence and more importance in the EFTA States.

The protection of fundamental rights belongs in the EC legal order with other general principles of law that have been developed through the jurisprudence of the ECJ. Principles like the direct effect doctrine, state liability and supremacy of EC law have all created their own set of challenges for the EEA legal system. In attempting to analyse the principle of fundamental rights in an EEA context, due regard should be paid as to how the EFTA Court has dealt with these other general principles. Initially, it should be pointed out that there is no right or wrong answer to the question. Until we have a judgment by the Court the legal sources allow for different interpretations.

### ***3.2.2 The text of the Agreement and the intentions of the Contracting parties***

A starting point for this discussion is that the text of the EEA Agreement itself does not contain any general provision on the inclusion of a principle of fundamental rights protection or any traces of a catalogue of human rights within the scope of the Agreement. However, since the EEA agreement to a large extent copies the EC Treaty, the aspects of human rights which have always been of concern to the Community are also included in the EEA. Examples include provisions on free movement, effective judicial protection and the observance of the rule of law. The specific provisions on non-discrimination based on nationality and sex equality are dealt with in chapter 4.

It should also be mentioned that the preamble states that the EEA should bring a "*contribution*" to a Europe "*based on peace, democracy and human rights*". This seems, however, more like general introductory language in an agreement than any reference to legally binding obligations for the parties, an expectation expressed in the form of a declaration. However, arguably the wording has more significance since this was not an object stated in the EC Treaty at the time. The explanation for this inclusion is that the amendments of the EC Treaty by the TEU were, to some extent foreseen in the EEA

Agreement.<sup>98</sup> The old article f in the TEU only stated, however, that the Union would respect fundamental rights etc. but this was changed with the Amsterdam Treaty to a new Article 6 with stronger language. In comparison, Article 6 now declares that the Union “*is founded on*” the principles of liberty, democracy and respect for human rights and fundamental freedoms. The reference in the preamble of the EEA Agreement contains no such obligation.

The content of the Agreement is one of economic and market issues largely incorporating the Community rules on the four freedoms and competition. The question is whether an interpretation of the Agreement can lead to the inclusion of a principle of fundamental rights protection. Before going further into the interpretation of the Agreement some general remarks will be made on the method of interpretation.

Formally, the EEA Agreement is a treaty under international law. This means that ordinary principles of interpretation should prevail unless the Agreement itself states otherwise. Not surprisingly, the Agreement says nothing explicit about the method of interpretation. The ECJ, in opinion 1/91<sup>99</sup>, explicitly applied ordinary principles of treaty interpretation under international law when assessing basic aspects of the draft EEA Agreement.<sup>100</sup> Thus the starting point is what can be derived from express provisions of the Agreement, its objectives and structure.

The question is whether the homogeneity objective calls for a different style of interpretation. The dynamic style of interpretation of Community law by the ECJ is linked to special features of the EC legal system, most noteworthy, the idea of integration. Principles of direct effect and supremacy which do not exist in EEA law are crucial for the development of a unitary legal infrastructure in the Community. Even taking into account the objective of homogeneity the EEA Agreement was set up precisely with the objective not to integrate in the sense of the EC legal system. This calls for certain caution in the interpretation of the EEA Agreement.

---

<sup>98</sup> Another example of this is the reference in the preamble to a high level of protection of health, safety, social dimension and the environment.

<sup>99</sup> 1/91 Opinion on the Draft Agreement on a European Economic Area (1991) ECR I-6079, paragraph 14.

<sup>100</sup> In paragraph 20 of opinion 1/91 the ECJ states: “*The EEA is to be established on the basis of an international treaty which, essentially, merely creates rights and obligations as between Contracting Parties and provides for no transfer of sovereign rights to the intergovernmental institutions which it sets up.*”

The jurisprudence from the EFTA Court demonstrates that the absence of any traces of a principle in the text of the Agreement is not in itself decisive.<sup>101</sup> The EEA Agreement can not be placed in the same category as an ordinary international agreement which is ruled by international law and interpreted according to these principles. The Agreement is not solely an international agreement between sovereign parties. The EEA Agreement finds itself somewhere between an ordinary international agreement and the supranational system of the EU. This naturally creates tensions in the text and problems with the interpretation of the Agreement. Many questions are left open in the text and one of them is whether human rights form part of the Agreement?

However, although not decisive, it is a recognisable fact that there are no provisions in the text of the Agreement, including a general principle of fundamental rights protection within the scope of the Agreement.

One could argue that there was no incentive for the negotiators to include such a provision in the Agreement since no such provision at the time was included in the EC Treaty which the EEA Agreement to a large extent copies. However, the Contracting Parties must have been aware of the jurisprudence of the ECJ on fundamental rights and thus aware that this question could, and probably also would, be raised within the context of the EEA Agreement. If it was the intention of the parties that human rights should form part of the Agreement this could have been clearly stated. The decision, although we cannot find an explicit decision, not to do so indicates at least that the parties did not have a clear intention of including such rights.

Now, whether this observation can lead to the conclusion that the parties were opposed to including the principle in the Agreement is a different matter. One possible explanation is that the negotiators could not reach an Agreement on this point. It is possible that the Community was in favour of including fundamental rights protection in the Agreement securing the homogeneity objective whereas the EFTA countries may have been against it based on sovereignty considerations. Since it was politically favourable to reach an agreement on both sides, an unsolvable disagreement could be hidden in an ambiguous language. Thus, arguably the observation that there is no provision on the inclusion of human rights in the Agreement cannot be interpreted as reflecting a common view or intention of the parties.

---

<sup>101</sup> Case E-9/97.

### 3.2.3 Article 6 EEA and the concept of inherent principles

Having said that there are no direct provisions for a general fundamental rights protection in the EEA Agreement the question of a possible legal basis for including such a principle has to be explored. **First**, the principle of fundamental rights could be imported into the EEA Agreement through Article 6 EEA.<sup>102</sup> **Second**, the principle could be derived more directly from basic structural and teleological arguments found in the Agreement. This was done in the Sveinbjornsdottir case.<sup>103</sup>

The main rule is that the ECJ's case law should be applied when interpreting EEA law but three modifications are mentioned in the text of Article 6.<sup>104</sup> **First**, the EEA provisions must be "*identical in substance to corresponding*" Community rules. An important mechanism to promote an homogenous legal area is to repeat the wording of Community rules in the EEA context. This leads to identical wording being applied in many provisions. In other instances, after necessary adaptations, a corresponding wording is used. Such provisions, not being completely identical, will also be covered by the obligation in as far as they are identical in substance. In general provisions on the four freedoms – including general principles of the internal market, e.g. Article 4 EEA on non-discrimination – and rules on competition may be assumed as being "*identical in substance*".

**Second**, the provision only applies to the ECJ's case law prior to the signature of the Agreement, 2 May 1992. This time limit must be seen in a political context. With regard to new legislation (after the signing of the Agreement) the individual EFTA State has a veto.<sup>105</sup> It would have been

---

<sup>102</sup> The entire Article reads: "Without prejudice to future developments of case law, the provisions of this Agreement, in so far as they are identical in substance to corresponding rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community and to acts adopted in application of these two Treaties, shall, in their implementation and application, be interpreted in conformity with the relevant rulings of the Court of Justice of the European Communities given prior to the date of signature of this Agreement."

<sup>103</sup> Case E-9/97.

<sup>104</sup> Article 6 should be read in conjunction with the preamble Paragraph 15 which reads: "*WHEREAS, in full deference to the independence of the courts, the objective of the Contracting Parties is to arrive at, and maintain, a uniform interpretation and application of this Agreement and those provisions of Community legislation which are substantially reproduced in this Agreement and to arrive at an equal treatment of individuals and economic operators as regards the four freedoms and the conditions of competition;*".

<sup>105</sup> Co-ordination on the EFTA side takes place within the EFTA Standing Committee whose decisions must be unanimous, Article 6 (2) of the Agreement on the EFTA Standing

difficult for the EFTA States to accept to be bound by case law not yet developed at the time of the signing of the Agreement. There is, therefore, a parallel between legislation and case law. In practice, this is not an important limitation. Article 3 (2) in the ESA/EFTA Court Agreement states that the institutions “*shall pay due account*” to the ECJ ruling given after that date. It is in harmony with the spirit of the EEA Agreement to fully include the development of case law of the ECJ. This also seems to be the approach of the EFTA Court where no differences can be detected in the Court’s use of the ECJ judgments passed before or after this date. In the case of fundamental rights most of the decisions establishing the principle were in any event passed before 2 May 1992 although the principle has since been developed further.

**Thirdly**, only “*the relevant rulings*” of the ECJ should have effect on EEA law. The obligation to consider “relevant rulings” applies only with regard to case law on those provisions which are “identical in substance” to corresponding rules of the Community Treaties. Having established identity in substance between the provisions in the Community Treaties corresponding to the EEA law provisions in question the “relevant rulings” of the ECJ are, in principle, rulings which interpret those provisions. It may also be that only parts of the ruling are relevant.

For many provisions and judgments it is not difficult to assess the relevance of the rulings. However, there is a specific question of relevance with regard to the fundamental Community law principles including the principle of fundamental rights protection. This type of wording is a clear example of how the text of the Agreement covers what are really unsolved fundamental questions. It is difficult to assess what is meant by relevant in this context. Concerning these principles it all seems to depend on whether at the outset the principle is considered relevant to the EEA or not. Of course the criteria for this evaluation are not readily transparent.

A serious objection against including the principle of fundamental rights in the scope of Article 6 of the EEA lies in the fact that the provision is restricted to the question of how “provisions of this Agreement ...shall...be *interpreted*”. This speaks against invoking that provision as a basis for *establishing* a principle like that of fundamental rights. This could be the explanation for why the Court in Sveinbjornsdottir chose to use the phrase

---

Committee. The individual EFTA State’s right of veto is therefore manifested in the EFTA Standing Committee.

“*inherent in the Agreement*” instead of Article 6 of the EEA as the legal base for the principle of state liability.

Hence, there are two possible legal bases for the inclusion of the principle; Article 6 of the EEA or the concept that the principle is inherent in the Agreement, neither of which are particularly suitable for such a major and substantive expansion of the Agreement.

### 3.2.4 *The object of homogeneity*

The object of the EEA Agreement is “to promote a continuous and balanced strengthening of trade and economic relations between the Contracting Parties with equal conditions of competition, and respect of the same rules”.<sup>106</sup> A basic aim of the Agreement is to create “a homogeneous European Economic Area”.<sup>107</sup> As was illustrated by the Carpenter case in chapter 1, the principle of fundamental rights protection forms an integrated part of the “*acquis communautaire*”. Without the fundamental principles it is difficult to envisage an homogeneous interpretation of EEA law. As the former Advocate-General, van Gerven put it: Stripping Community law of its general principles amounts to taking its heart. An EEA legal system that would not encompass such general principles would therefore be a legal system that is not at all homogeneous with Community law.<sup>108</sup>

But the homogeneity objective, even if it lies at the very heart of the Agreement, has to be balanced with the principle of the autonomy of the Contracting parties. Indeed, there is potentially something troubling about extracting rights and obligations from objectives alone. As we will see later, including all the general principles can not be decisive for the functioning of the Agreement. The EFTA Court has refused to recognise both the principle of direct effect and the principle of supremacy under the EEA Agreement.

It may of course be argued that in light of the homogeneity objective there is a difference between the need to include principles determining the substantive law and principles to secure the enforcement like direct effect and supremacy. In short, the idea behind copying the rules and regulations of the Community is to have the same rules apply, not a former version of the rule. Thus, as in the case of Carpenter, the ECJ has determined the content of the freedom to provide services to, in certain cases, include the right of residence

---

<sup>106</sup> Article 1 (1) EEA

<sup>107</sup> Preamble recital 4 and Article 105 EEA

<sup>108</sup> Sevón, L., “The EEA Judicial system and the Supreme Courts of the EFTA States”, in the European Journal of International Law 1992 p. 329

of the wife of the service provider. It would make little sense to have a different understanding of this right under the EEA Agreement.

It can also be argued that in developing these principles within the EC legal order the ECJ has been influenced by a challenge to its supremacy and the long term aim of strengthening further integration.<sup>109</sup> The ECJ is generally perceived to have pursued a vigorous policy of legal integration over the years, and, in particular, in the earlier decades of the Community's history. It is seen as having undertaken the task of giving flesh and substance to an "outline" treaty, and as having developed a particular vision of the kind of Europe it sought to promote. The primary concern of the ECJ has probably been to enhance the effectiveness of Community law, promote its integration into the national legal systems and sustain the uniformity of Community law. The ambition of the EEA is not an "ever closer union", but the rather more pragmatic wish to gain access to the single market. The context in which the Agreement operates is clearly different from the Community context. This has led both the ECJ and the EFTA Court to recognise the limits of the homogeneity objective.

In opinion 1/91, the ECJ was asked by the Commission whether the draft EEA Agreement was compatible with the EC Treaty. The Court held that the divergences between the aims and context of the agreement and those of Community law stood in the way of the achievement of the objective of homogeneity in the interpretation and application of the law in the EEA. In light of that contradiction the Court held that the proposed court system was liable to undermine the autonomy of the Community legal order in pursuing its own particular objectives. However, this statement cannot wholly be relied upon as the drafters after the above opinion was given put new and strengthened efforts into expressing the goal of homogeneity in the Agreement. This included the preamble and the provisions of the Agreement and also because the Court had an interest in rejecting the Agreement as they were against the original proposal of a joint EC/EEA court. In a later opinion, when the EFTA Court had been created, the ECJ simply found that the revised draft Agreement was compatible with the EC Treaty.<sup>110</sup>

In an advisory opinion of the EFTA Court on the interpretation of First Council Directive 89/104 EEC<sup>111</sup> relating to trade marks, the Court rejected

---

<sup>109</sup> See discussion in chapter 2.

<sup>110</sup> 1/92 Opinion on the revised Draft Agreement on a European Economic Area (1992) ECR I-2821.

<sup>111</sup> OJ NO L 40, 11.2 1989.

the argumentation based on the EEA Agreement establishing a customs union.<sup>112</sup> The Court underlined the difference between the scope of the EC Treaty and the EEA Agreement and insisted that the difference leads to differences in interpretation.<sup>113</sup> The opinion has been criticised for being too formalistic and unnecessary due to the difference in purpose and scope between the EC Treaty and the EEA Agreement.<sup>114</sup> The main point is, however, to demonstrate that there is a limit to the homogeneity objective and that it is not unknown in an EEA context for rules to be interpreted differently. In addition to the general object of homogeneity emphasis has also been put on the protection of individuals when interpreting the Agreement. Thus a different interpretation of the freedom to provide services than the one found in the Carpenter case is possible.

### 3.2.5 *The protection of the rights of individuals*

One of the striking features of Community law is the role played by individuals. Provisions in the Treaties have the capacity to confer rights on individuals and, if justiciable, they can be invoked and relied upon by individuals before national courts. The rise of individuals as subjects of European law is a departure from classic international law where only states used to be considered subjects of international law. Even human rights treaties do not have immediate enforceability in national courts by individual applicants in dualistic states. The vital role of the individual can be seen as a major factor when the ECJ decided in favour of direct effect in the van Gend & Loos case.<sup>115</sup>

Further, the importance of the individual can be seen in the TEU where the concept of citizenship of the Union was created.<sup>116</sup> The introduction of the status of citizenship of the Union was symbolised by the move from European *Economic* Community to European Community and from Community to Union. Citizenship includes the right of movement and residence subject to certain restrictions and various political rights. In the Treaty of Amsterdam additional rights were conferred on EU citizens, such as the provisions on consumer protection and access to documents in Article

---

<sup>112</sup> Case E-2/97 *Mag Instrument Inc and California Company Norway* Ulsteen.

<sup>113</sup> E-2/97 para 25 and 26.

<sup>114</sup> Rognstad, O-A., "The Conflict between Internal Market and third Country Policy Considerations in the EEA. *Maglite Vs. Silhouette*", in Muller-Graff, P., and Selvig, E., (eds), "EEA-EU Relations" (Berlin Verlag A. Spitz, 1999).

<sup>115</sup> Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* (1963) ECR 1, paragraphs 10 and 12.

<sup>116</sup> Articles 17-22 EC.

255 EC.<sup>117</sup> Although the limits of EU citizenship have been criticised, there is evidence that the ECJ is making use of these provisions to expand the scope of Community law<sup>118</sup> and there is a proposal for secondary legislation for the free movement of citizens of the Union.<sup>119</sup>

The provisions on European citizenship can be read as operating a change in the nature of the Community. Their deep symbolic value relates to the mutual recognition of the status of members of a political community of equals (the Union). This has been expressed in the following way:

“The whole European legal order is no longer to be constructed as a contract among economic actors, but as a constitutional order where relationships are mediated by a set of rights and values.”<sup>120</sup>

The development in the Community towards a greater focus on human rights through the Charter and through Article 13 on non-discrimination can be viewed as aspects of citizenship.

The rights of individuals also play a role under the EEA Agreement.

Recital 8 of the preamble to the EEA Agreement reads:

“Convinced of the important role that individuals will play in the European Economic Area through the exercise of the rights conferred on them by this Agreement and through the judicial defence of these rights;”

First, recital 8 implies that the Agreement confers “*rights*” on individuals. Second, the individuals must be able to “*exercise*” those rights, that is to invoke them. Third, this defence must take place in a particularly effective manner, through “*judicial defence*”.

The focus of rights in recital 8 seems to be on those rights which are conferred on individuals in the Agreement itself, thus the rights connected to

<sup>117</sup> Access to documents is now enshrined in Article 42 of the Charter of Fundamental Rights.

<sup>118</sup> Case C-85/96, *Maria Martinez Sala v. Freistaat Bayern* (1998) ECR I-2691, Case C-184/99, *Rudy Grzelczyk v. Centre Public d'Aide Sociale d'Ottignies-Louvain-la-Neuve* (CPAS) (2001) ECR I-6193.

<sup>119</sup> Proposal for a European Parliament and Council Directive on the Right of Citizens of the Union and their Family Members to Move and Reside Freely within the Territory of the Member States, COM (2001) 257 final.

<sup>120</sup> Menendez, A. J., “A Rights-Based Europe?”, *Arena* 2002, p. 8.

the four freedoms and competition. Further, the focus seems to be on how the individuals can invoke these rights and accordingly, aspects of the efficiency of the Agreement. This recital when read in isolation, could lead to the conclusion that there is direct effect under the EEA Agreement. However, the EFTA Court has not adopted this interpretation. Also, there is no concept of citizenship of the European Economic Area, no Charter on Human Rights and no general provisions of non-discrimination (Article 13 EC) or access to documents (Article 255 EC). These issues will be more thoroughly developed later

Although there is a focus on individuals under the EEA Agreement, this is clearly more limited than in the Community. Increasingly, the development of fundamental rights in the Community has become part of the concept of citizenship and the concept of a Union, both unknown to the EEA. In so far as this is true, the argument of the object of protection of individuals provides little support for the inclusion of fundamental rights into the Agreement.

### 3.2.6 Case law

The next step of the analysis is to look at the practice of the institutions which are set up to interpret the EEA Agreement. Thus far, no decision has been taken by any of the institutions specifically dealing with the question of whether the general principle of fundamental rights protection is part of the EEA Agreement. The decisions mentioned below merely give arguments as to the solution with regard to how similar or related issues have been viewed by the institutions. The last case mentioned concerns the right to equal treatment but the principle is not discussed in general in the case.

In the Scottish salmon case the EFTA Court ruled on the right to have a statement of reasons for decisions taken by the ESA.<sup>121</sup> The Court interpreted the obligation laid down in Article 16 of the ESA/EFTA Agreement in conformity with Article 190 EC (presently Article 253 EC). The Court stated that the conclusion of the Court was in accordance with general principles of law and in line with the relevant principles developed by the ECJ.<sup>122</sup> It is not entirely clear what is meant by *general principles of law* but one possible conclusion is that the general administrative principles developed by the ECJ are to be part of the EEA Agreement.

---

<sup>121</sup> Case E-2/94

<sup>122</sup> Case E-2/94 para 26

In the Sveinbjornsdottir case<sup>123</sup> the EFTA Court held that the Contracting Parties to the EEA Agreement are obliged to provide compensation for loss and damage caused to an individual by the incorrect implementation of a directive incorporated into the EEA Agreement. After having stated that there was no explicit provision in EEA law establishing a basis for state liability on account of incorrect adaptation of national legislation,<sup>124</sup> the Court went on to consider whether such a state obligation could be derived "*from the stated purposes and the legal structure of the EEA Agreement*". First, the Court looked at the homogeneity objective. It referred to Article 1(1), as well as the preamble paragraphs 4 and 15.<sup>125</sup> The achievement of that objective rested, in particular, on two main foundations<sup>126</sup>the material provisions of the EEA Agreement,<sup>127</sup>and "*elaborate mechanisms with a view to ensuring homogeneous interpretation and application of the incorporated material provisions*".<sup>128</sup> The Court pointed to the objective of ensuring individuals and economic operators equal treatment and equal conditions of competition, as well as adequate means of enforcement.

The EFTA Court summed up its position in the following way:

"The Court concludes from the foregoing that the EEA Agreement is an international treaty sui generis which contains a distinct legal order of its own. The EEA Agreement does not establish a customs union but an enhanced free trade area, see the judgment in Case E-2/97 Maglite (1997) EFTA Court Report 127. The depth of integration of the EEA Agreement is less far-reaching than under the EC Treaty, but the scope and the objective of the EEA Agreement goes beyond what is usual for an agreement under public international law.

The Court finds that the homogeneity objective and the objective of establishing the right of individuals and economic operators to equal treatment and equal opportunities are so strongly expressed in the EEA Agreement that the EFTA States must be obliged to provide compensation for loss and damage caused to an individual by incorrect implementation of a directive."<sup>129</sup>

---

<sup>123</sup> Case E-9/97.

<sup>124</sup> E-9/97 para 107.

<sup>125</sup> E-9/97 para 49-51.

<sup>126</sup> E-9/97 para 52.

<sup>127</sup> E-9/97 para 53.

<sup>128</sup> E-9/97 para 54.

<sup>129</sup> E-9/97 para 59-60.

The Court found "*a further basis*" for state liability in Article 3 of the EEA regarding the obligation of the Contracting parties to take all appropriate measures to ensure fulfilment of the Agreement.<sup>130</sup>

The line of reasoning adopted by the Court in this case is relatively broad and one could ask whether, this judgement by the Court accepted that general principles developed by the ECJ were part of the EEA Agreement. Later judgments showed that such a general interpretation, however, could not be derived from the judgment.

In the Einarsson<sup>131</sup> case the Court was asked by the Icelandic National Court which rules should apply if the Icelandic law relevant in the case was deemed incompatible with the EEA Agreement. The question gave the EFTA Court the opportunity of stating that the principle of supremacy also applied in EEA law in cases of conflict between national rules and rules deriving from the EEA Agreement. The Court emphasised that it was not for the Court to rule on the interpretation of provisions of national legislation.<sup>132</sup> Further, the Court underlined that the relevant EEA provision must have been implemented in national law in order to have effect. Only then would the conflict rule in Protocol 35 apply which has as its premise that the implemented EEA rule shall prevail.<sup>133 134</sup>

Further, in the Karlsson case<sup>135</sup> the Court made important remarks on the question of whether the principle of direct effect was part of the EEA Agreement. The dispute concerned the question of whether the State monopoly on the import and wholesale distribution of alcoholic beverages in force in Iceland until 1 December 1995 was incompatible with the EEA Agreement, and, if so, whether a legal person prevented from importing alcoholic beverages was entitled to compensation from the State for financial loss incurred as a result of that monopoly.

The Government of Norway contested the earlier established principle in Sveinbjornsdottir concerning state liability arguing that under Community law this was regarded as a necessary corollary of the direct effect of

---

<sup>130</sup> E-9/97 para 61. Article 3 EEA is the parallel provision to Article 10 EC.

<sup>131</sup> Case E-1/01, *Horsur Einarsson v. The Icelandic State*.

<sup>132</sup> E-1/01 para 48.

<sup>133</sup> E-1/01 para 55.

<sup>134</sup> About Protocol 35 see chapter 1.

<sup>135</sup> *Karl K. Karlson v Iceland*, E-4/01, Judgement of the court 30. May 2002.

Community provisions. The Government further argued that no such principle of direct effect could be established under the EEA Agreement.

The Court contested the need for the principle of State liability based directly on the EEA Agreement as such, to be contingent upon recognition of a corollary principle of direct effect of EEA rules.<sup>136</sup> Indeed the Court continued to distinguish EEA law from EC law by saying:

“The finding that the principle of State liability is an integral part of the EEA Agreement differs, as it must, from the development in the case law of the Court of Justice of the European Communities of the principle of State liability under EC law. Therefore, the application of the principles may not necessarily be in all respects coextensive.”<sup>137</sup>

The Court also states explicitly the absence of recognition of direct effect for EEA rules establishing this on the basis of Article 7 of the EEA and Protocol 35 to the EEA Agreement. The Court does not elaborate on the reasons behind its views. It only says:

“It follows from Article 7 EEA and protocol 35 to the EEA Agreement that EEA law does not entail a transfer of legislative powers. Therefore, EEA law does not require that individuals and economic operators can rely directly on non-implemented EEA rules before national courts.”<sup>138</sup>

It is difficult to see why the same line of reasoning as the Court applied for including State liability as a general principle under the Agreement does not apply to the general principle of direct effect. Possibly the Court felt bound by the direct evidence in the Agreement that it was the wish of the Parties not to transfer legislative powers to any institution of the EEA.

Both the homogeneity objective and the principle of protection for individuals were arguments in favour of including direct effect in the Agreement as they are for including fundamental rights into the Agreement. Perhaps the Court needs evidence of a wish not to include a principle in order to give a ruling that leaves a discrepancy between EEA law and EC law. In the case of fundamental rights, there is no explicit evidence of the parties rejecting the application of the principle in the EEA.<sup>139</sup>

---

<sup>136</sup> E-4/01 para 27.

<sup>137</sup> E-4/01 para 30.

<sup>138</sup> E-4/01 para 29.

<sup>139</sup> See discussion in point 3.2.2 above.

A clear conclusion however, is that general principles developed by the ECJ under EC law do not automatically form part of the EEA Agreement. Until the Court has been faced with the question it seems difficult to predict which path the Court will take regarding each different principles and a consistent approach is hard to detect.

In terms of looking at the difference between the principle of fundamental rights protection and, for instance, the principle of state liability, it can be argued that the latter is mostly about efficiency of already established principles and thus less far reaching in its content than introducing a whole new principle of fundamental rights protection. The same could be said about the principle of direct effect which the Court decided against, possibly because it was viewed as being too far reaching for an international agreement such as the EEA Agreement. Direct effect could also increase the scope of the Agreement.

On 24 January 2003 the EFTA Court delivered a judgment involving the right to equality which for the purpose of this paper is worthy of a more thorough investigation.<sup>140</sup> In the case the Court makes important remarks concerning points relevant for chapter 4 in the paper. Hence the case will also be commented upon here:

The case concerned an application for a declaration which stated that, by applying its legislation so as to reserve a certain number of academic positions exclusively for women, Norway had failed to fulfil its obligations under the EEA Agreement.

The question in the case was the compatibility of earmarking 40 so-called “post-doctoral” research grants for women with the equal rights directive.<sup>141</sup> The Norwegian government made several arguments, one being the necessity of such earmarking for academic positions where women are grossly underrepresented. From the point of view of the Norwegian Government, the aim was to create equality for the sexes. The measure although appearing to be discriminatory against men was only intended to reduce actual instances of inequality already existing for women in relation to academic positions.

---

<sup>140</sup> Case E-1/02.

<sup>141</sup> Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, referred to in point 18 of Annex XVIII to the EEA Agreement.

The starting point for the Court was the right to equal treatment as a fundamental right of the individual as recognised in the equal treatment directive.<sup>142 143</sup> The Court viewed the earmarking as a derogation from the right to equal treatment and then went on to discuss whether the derogation showed sufficient flexibility to be permissible and, thereby, concluded the case in the negative for the Norwegian Government. The Court cited several judgments from the ECJ and relied on the reasoning in those judgments to draw the line.

The **first** interesting point is that the Court takes the position that a measure which is intended to create equality in practice is viewed as a measure derogating from the principle of equality without really addressing the question and discussing the concerns at stake.

The **second** point of note is the argument made by the Norwegian Government contending that the ECJ had not yet had an opportunity to rule on whether the earmarking of specific posts for women may not be considered discriminatory or, may fall within the scope of Article 2 (4) of the equal treatment directive.<sup>144</sup> The ECJ had shown in its latest case law more flexibility in accepting schemes reserving a limited number of positions for one sex and on measures in appearance discriminatory, but in reality aimed at reducing existing inequality.<sup>145</sup> The EFTA Court mentioned this case law without finding it decisive for the outcome of the case.

The **third** observation concerns the Norwegian Government's reference to a number of other international instruments regarding gender equality such as Article 4 (1) of CEDAW,<sup>146</sup> Article 14 of the European Convention on Human Rights, Protocol 12 of the same convention, Articles 2 and 5 of the ILO Convention 111 Concerning Discrimination in respect of Employment and Occupation, as well as Recommendation No R (85) 2 from the Council of Europe. The reference to the CEDAW is especially interesting since the aim of this Convention's ban on discrimination is to achieve not only equal opportunities *de jure*, but *de facto* equality (equality of outcome). As a consequence, the Convention bans direct and indirect discrimination against

---

<sup>142</sup> E-1/02 para 45.

<sup>143</sup> Directive 76/207/EEC.

<sup>144</sup> Directive 76/207/EEC.

<sup>145</sup> Cases C-79/99 Schnorbus (2000) ECR I-10997 and C-476/99 Lommers (2002) ECR I-2891.

<sup>146</sup> The United Nations Convention on the Elimination of all Forms of Discrimination Against Women dated 18. September 1979, ratified by 169 countries including all the EEA Member States.

women, but goes on to state in Article 4 (1) that specific temporary measures of positive action aimed at accelerating *de facto* equality between women and men shall not be considered discrimination. The Government argued that, in this sense, positive action measures in favour of women are defined and interpreted as an intrinsic dimension of the very ban on discrimination. Further, it was inconceivable to the Government of Norway that measures permitted and promoted by a widely ratified UN convention, based on a common international understanding of the importance of gender equality, should be prohibited in the Directive in a situation where this would be the only appropriate measure.

It will be remembered from the case law of the ECJ that international conventions, to which all the Member States are party, shape the content of Community fundamental rights. The interpretation of the directive and Member States' implementation will be assessed with due regard to fundamental rights. The EFTA Court simply notes that:

“the provisions of international conventions dealing with affirmative action measures in various circumstances are clearly permissive rather than mandatory. Therefore they cannot be relied on for derogations from obligations under EEA law.”<sup>147</sup>

The EFTA Court did not assess these instruments as relevant for determining the content of EEA law. The Court looked at these instruments solely as *other* international instruments and therefore, separate from EEA law. One could argue that if the principle of fundamental rights was part of the EEA Agreement, then this approach would not be sufficient and not in line with the approach of the ECJ.

The Court made a point of the fact that CEDAW was in force for Community Member States at the time when the ECJ rendered the relevant judgments concerning the Directive. But this argument is less persuasive if the ECJ was not called upon to assess CEDAW in light of this particular question which was the argument made by the Norwegian government.

Without implying that an assessment including these international instruments in the reasoning would necessarily lead to a different conclusion on the substantive question in the case, the lack of relevance demonstrated by the Court's reasoning is important. Indeed, in this case the argument of a human

---

<sup>147</sup> E-1/02 para 58.

rights protection was used both ways. It will be remembered that this also happened in the *Familiapress* case.<sup>148</sup>

One possible explanation for the approach chosen by the Court could be the way the Norwegian Government made its argument. To some extent it seems that the Government used these instruments as other international instruments separate from EEA law in their reasoning. The line of argument and the facts of the case were, however, an invitation to a broader discussion on the concept of discrimination.

No doubt it would have been a risky and unexplored path for the Court had it discussed the limits of positive action measures under all this new legislative development including the international instruments. It could have been a groundbreaking decision and also included the risk that the ECJ would reach a different conclusion in a later case. This risk is part of the structure of the EEA Agreement and cannot in itself justify a refusal by the Court to rule on the issue. But it can be a psychological factor influencing the Court when they adopt a certain line of reasoning and decision of the case.

However, if the EFTA Court does not explore the unknown territory of law when faced with such questions, then the EFTA States will always have to wait for a similar case to arise in the Community. This is not the intention of the Agreement and it would certainly be a deficiency in the working of the Agreement for the EFTA States.

It is interesting that the Court points to the homogeneity objective in its reasoning in paragraph 45 of the judgment. It may be the case that its reasoning is outdated in terms of the present legal situation in the Community. Without a judgment from the ECJ we cannot know this for sure but several factors in Community law points in that direction.

A rather confusing picture appears when trying to summarise the five cases concerning the applicability of general principles of Community law in the EEA. An attempt to draw any general conclusion would be that less invasive principles such as administrative principles and state liability are found to be part of the Agreement whereas extensive principles such as direct effect and supremacy are not. The principle of fundamental rights protection would represent a major extension of the scope of the Agreement and would be more comparable with the latter category of principles than the first.

---

<sup>148</sup> Case C-368/95, *Vereinigte Familiapress Zeitungsverlags- und Vertriebs GmbH v. Heinrich Bauer Verlag*, (1997) ECR I-3689 regarding freedom of expression.

### 3.2.7 General considerations

It seems that most writers who have touched upon this question so far have concluded without much discussion that the principle of fundamental rights protection is part of the EEA Agreement.<sup>149</sup> Several authors have, however, pointed out that they have not gone into the question in depth.

The reasoning behind the conclusion reached by these authors seems to be founded on the basis on that the content of the principle is largely uncontroversial and that securing the protection of basic human rights is an important part of the EFTA States' policy. It is difficult to disagree with these authors in the assumption that the EFTA States agree with the policy objective of the protection of fundamental rights. Nevertheless, there is both a substantive and a procedural side to this matter to be recognised.

Although the present content of the fundamental rights protection in the Community may be largely uncontroversial for the EFTA States notice should be taken of unforeseeable future developments. It cannot be ruled out that the EFTA countries will have to lower their human rights standards to harmonize with compromises made within the EU. There may also be controversies as to where the balance should be struck between fundamental rights which conflict with each other.

The procedural problems can be divided into at least two categories. On the one side, there is the procedural problem in having the substance of the rights and the balancing act in these sensitive and political areas decided outside the influence of the states.<sup>150</sup> The problem with this is the issue of sovereignty. Another side of the procedural problem or challenge is, that by including fundamental rights in the EEA Agreement, the institutions guarding the

---

<sup>149</sup> Sejersted, F., "Between Sovereignty and Supranationalism in the EEA Context – On the Legal Dynamics of the EEA-Agreement", in Muller-Graff, P., and Selvig, E., (eds), "The European Economic Area – Norway's Basic Status in the Legal Construction of Europe" (Berlin Verlag A. Spitz, 1997), p. 43–74, Stefanson, S., "The EEA Agreement and its adoption into Icelandic law", IUSEF no. 25, 1997, (Universitetsforlaget), Kalin, W., "The EEA Agreement and the European Convention for the Protection of Human Rights", (European Journal of International law 1992 p. 342), Falch, I., "Menneskerettigheter og EU/EØS – En eller flere konstitusjoner for Europa?", Lov og Rett 1997.

<sup>150</sup> It is not entirely clear whether the internal procedure within the Community will leave the EFTA States completely outside the procedure and thus without any influence on the development of secondary legislation in this field or whether the ordinary cooperation procedures enshrined in the EEA Agreement Articles 99–101 with participation in working groups etc. will be used. Even if these provisions were to be used they are insufficient to ensure any major influence for the EFTA countries.

Agreement such as the ESA and the EFTA Court will interpret and also make final decisions on human rights questions. The system of protection of human rights will be further complicated and there is a risk of overlap and possible contradictions with the decisions made by the ECtHR. There is also the complex issue of how a decision of the ESA or the EFTA Court could be challenged before the ECtHR. Most likely the action would have to be brought against the three EFTA States. These problems are in many ways parallel to the challenges within the Community to harmonize their system with the Strasbourg system. But within the EEA system there is also and perhaps even more so the dimension of competence and legitimacy of the ESA and the EFTA Court to make such decisions. This point is further discussed in chapter 4.

The principal argument in favour of including fundamental rights in the EEA Agreement is to secure legal homogeneity. This is one of the principle objectives of the Agreement. The principle of fundamental rights in the Community legal system is interlinked with other rights and forms an inherent part of an individual's legal right. To separate fundamental rights from other rights of a more economic character connected to the four freedoms or competitions would be difficult and, maybe at some stage, impossible.

But the same could be said of other essential parts of the Community's legal system such as direct effect and supremacy which do not exist or exist in a more limited manner within the EEA system. The EEA Agreement is in many ways an agreement where the impossible is being made possible. If there is political will, there are also legal ways of finding a solution within the Agreement.

### 3.3 Summary

The second stage of fundamental rights protection in the Community was developed fairly recently and is only apparent in a handful of ECJ judgments. The potential of cases in the field of human rights can, perhaps, best be illustrated by the current case load facing the ECtHR. Although there are stringent rules for the legal standing of private individuals in Community law, there is a potential for a tremendous increase of cases in this area.<sup>151</sup> As Community law continues to expand, the competence of the ECJ will grow accordingly. However, it remains to be seen how the Member States will

---

<sup>151</sup> Legal standing in the Community may change after a recent judgment in the CFI, Case T-177/01, *Jego-Quere et Cie Sa v. Commission*, judgment of 3. May 2002.

respond to the jurisprudence of the Court and, as will be shown in the next chapter, there is already evidence of the Member States limiting Community competence in the field of fundamental rights.<sup>152</sup>

In EEA law, the question of whether the EFTA Court can scrutinise the EFTA States and thus whether the EEA Agreement includes the principle of protection for fundamental rights remains a difficult one. The EFTA Court may have to answer the question in the near future considering the rapid development of this issue within the Community. As demonstrated in chapter two, the initial trigger for the development in the Community relating to securing the supremacy of Community law does not apply in the EEA. In addition, the lack of foundation in the wording of the Agreement, the unsuitability of the possible legal foundations, the recognition of the impossibility of total homogeneity, the discrepancies in the field of the protection of individuals and the jurisprudence on other general principles from the EFTA Court indicate that the principle of fundamental rights protection is not part of the Agreement.

The next question is whether the role of the political institutions may change this. A point to be made regarding the next chapter on the role of the political institutions, is that their actions may be an important factor in influencing the state of EEA law. Strictly legally speaking, there seems to be little foundation for the solution that this principle is included in the Agreement. However, as the political institutions, including the actions of the EFTA States, head in the direction of accepting to be bound by this principle, their actions may be decisive. It will have been noted that the Norwegian government, in the aforementioned case on equality,<sup>153</sup> argued that the Court should take into account the recent development in the Community regarding fundamental rights such as Article 141 of the EC and the newly adopted directive on equal rights which is also based on Article 13 of the EC. Further, the EEA Joint Committee is considering accepting the equal rights directive as part of the EEA Agreement and the Norwegian Government has proposed to accept the secondary legislation on race discrimination based on Article 13 of the EC as part of the EEA Agreement. All of this is the subject

---

<sup>152</sup> Charter of Fundamental rights Article 51.

<sup>153</sup> Case E-1/02

of the next chapter on the role of the political institutions in the third stage of the development of fundamental rights protection.

## Chapter 4

# The third stage of fundamental rights protection

In this fourth chapter I will first give an overview of the reaction to the ECJ's jurisprudence on fundamental rights by the political institutions in the Community. The main point, however, will be the subsequent discussion on the political challenge facing the institutions in the EEA/EFTA. Under this heading I will examine the relevance of treaty changes and secondary legislation based on articles with no parallel provision in the EEA Agreement, with emphasis on the field of sex-equality and non-discrimination.

### 4.1 The role of the political institutions in the Community

The principle of fundamental rights protection in the Community has been, as demonstrated above, developed by the ECJ. It is the jurisprudence of the Court which established fundamental rights as a constraint on Community- and Member State action, as values they must respect in the course of their activities. Although the Court has had the leading role in developing the fundamental rights protection, it has gradually gained support from the other Community institutions for its development. Indeed, as recently the political institutions have shown great activism in this field, there is evidence of the Court pulling back and leaving further development to the political institutions.<sup>154</sup> Involving political institutions has moved the focus from the passive approach of human rights as a constraint on Community and Member State action, to the active approach of human rights being promoted and protected as an objective of the EU. This development can also be conceptualised with the distinction between negative and positive policy

---

<sup>154</sup> Case C-249/96, *Grant v. South West Trains Ltd* (1998) ECR I-621 and C-122 & 125/99P *D. v. Council* 2001 ECR I-4319 regarding legal concept of marriage of same sex- partners.

making or by the notion of human rights operating as a *limit* on the European legal system as opposed to *determining* that system. Whereas the judicial monitoring and “negative” legal protection perhaps could be incorporated into the EEA Agreement through a progressive EFTA Court, the “positive” policymaking certainly has to be considered by the political institutions in the EEA/EFTA.

The objective here is not to give a comprehensive description of the role of the political institutions in this field which would, in any event, exceed the limit of this paper.<sup>155</sup> A brief overview is, however, necessary to provide a background for the discussion of the role of the EEA/EFTA political institutions.

As early as 1977 the Council, Commission and Parliament issued a joint declaration effectively approving the ECJ’s development of general principles as part of EC law, and affirming their commitment to respect fundamental rights in their activities. After this, various non-binding political initiatives were taken, including a Community Charter of Fundamental Social Rights in 1989. Although these responses remained a “soft” form of response they did, in legal terms, add weight to the ECJ’s developments.

“Hard” legal approval came with the amendments introduced by the Treaty on European Union and the Treaty of Amsterdam. But while the TEU initially referred to fundamental rights in a number of its provisions, the only provision of the EC Treaty to be amended in this way at that time was Article 177 which provides that Community policy in the area of development co-operation:

“shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms.”

Article 6(2) of the TEU, which was not at that stage justiciable, provided that the Union would respect the fundamental rights guaranteed by the ECHR and by the national constitutional traditions. Respect for human rights and fundamental freedoms was also mentioned in the two other “pillars” of the TEU. The major change introduced by the Amsterdam Treaty, was to amend Article 6 and to add a new Article 7. Whereas the old Article F stated that the

---

<sup>155</sup> For a general discussion on this point see Craig, P. and De Burca, G., “EU Law text, cases and materials”, Third Edition, (Oxford University Press 2003) chapter 8 p. 349.

Union would respect fundamental rights etc., Article 6 now declares that the Union is founded on:

“the principles of liberty, democracy, and respect for human rights and fundamental freedoms.”

This provision is also rendered justiciable. Following the Amsterdam Treaty, respect for such principles is a condition for accession to the Union,<sup>156</sup> and establishes the possibility for the Union to impose sanctions on one of its Member States in the event of a serious and persistent breach of those principles.<sup>157</sup>

The latest developments include the competence exercised by the Community to enact antidiscrimination policies in fields such as race,<sup>158</sup> sexual orientation,<sup>159</sup> age and religion<sup>160</sup> according to Article 13 in the EC treaty giving broad competence to legislate in the field of anti-discrimination.

A Charter of Fundamental Rights for the EU was drafted and officially “proclaimed” in 2000, and the proposal to give it full legal effect by incorporating it into the Treaties has been placed on the agenda to be considered at the Intergovernmental Conference in 2004.

In spite of all the developments referred to above, it should be noted that there are limits to the EC’s “human rights” power. In opinion 2/94 on Accession by the Community to the ECHR<sup>161</sup> the Court ruled that the Community lacked competence under the Treaty to accede to the ECHR. One of the main differences which accession would bring is that the Community institutions would be made subject to the review jurisdiction of the ECtHR.

---

<sup>156</sup> Article 49 of the TEU.

<sup>157</sup> Article 7 of the TEU.

<sup>158</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

<sup>159</sup> Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

<sup>160</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

<sup>161</sup> Opinion 2/94 on accession by the Community to the ECHR (1996) ECR I-1759.

The Court sees a limit to the Community measures for the protection of human rights when they amount to an amendment of the Treaty. After ascertaining that there are no treaty provisions which confer on the Community institutions any general power to enact rules on human rights,<sup>162</sup> the Court says that Article 235, being an integral part of an institutional system based on the principles of conferred powers, cannot serve as a basis for widening the scope of Community powers beyond the general framework created by the provisions of the treaty.<sup>163</sup>

Undoubtedly the main “hard” source of EC competence in the field of human rights protection within the EU, apart from the last-resort provision in Article 7 of the TEU has been that introduced by the Amsterdam treaty into Article 13 of the EC Treaty, supplementing the existing range of EU gender equality policies. The introduction of legislative competence in anti-discrimination law has had an impact on the ECJ case law. In cases regarding sexual discrimination, the ECJ emphasised its own unfitness as a judicial institution, to bring about positive change which was more properly enacted by legislation.<sup>164</sup> This clearly represents a retreat from the strong principle of equality as a fundamental right and a deferential judicial stance in a situation where the exercise of positive legislative competence has been made possible.

The Charter of Fundamental Rights for the EU has already been mentioned as one of the political initiatives supporting fundamental rights protection in the Community. Pending the decision of the legal status of the Charter to be taken by the Intergovernmental Conference in 2004, the Charter has been described as being something of a legal limbo.<sup>165</sup> This does not mean that the Charter presently is without any legal influence or effect. A range of institutional actors have already made use of its provisions. The Charter was for the first time mentioned in an EU judicial decision when the CFI, in *Max.Mobil Telekomunikation Service* referred to Articles 41 and 47 of the Charter as an affirmation of the general principles of law common to the Member States.<sup>166</sup> More significantly in *Jego-Quere*, in which it relied on Article 47 to move away from the restrictive case law on individual locus

---

<sup>162</sup> Opinion 2/94 para 27.

<sup>163</sup> Opinion 2/94 para 30.

<sup>164</sup> Case C-249/96, *Grant v. South West Trains Ltd* (1998) ECR I-621 and C-122 & 125/99P *D. v. Council* 2001 ECR I-4319 regarding legal conception of marriage, same sex- partners.

<sup>165</sup> Craig, P. and De Burca, G., “EU Law text, cases and materials”, Third Edition, (Oxford University Press 2003), chapter 8, page 362.

<sup>166</sup> Case T-54/99, *max.mobil Telekomunikation Service GmbH v. Commission*, ruling of 31. Jan 2002 para 48, 57.

standi to challenge EC regulations.<sup>167</sup> Numerous references to the provisions of the Charter have also been made by various Advocate Generals,<sup>168</sup> although the ECJ has not yet mentioned it in a judgment. One of the revolutionary features of the Charter has been described as its embodiment of the indivisible, interrelated and interdependent nature of human rights.<sup>169</sup> The mentioning of civil, cultural, economic, political and social human rights on the basis of parity not only reflects a progressive understanding of human rights theory, but also gives the Charter a “specific European flavour”.<sup>170</sup>

If the principle of fundamental rights protection existed under the EEA Agreement it is difficult to envisage how the EFTA Court should approach the Charter. The Charter is clearly not part of the EEA Agreement unless a political decision on the incorporation of the Charter is taken. Arriving at a homogenous legal interpretation in the field of human rights without the Charter as a source is difficult, even if the Charter remains only a proclaimed document, given the significant influence of the Charter already in Community law.<sup>171</sup> A possible future decision to incorporate the Charter into the Treaty, as suggested by the European Convention<sup>172</sup> renders it almost impossible to reach a homogenous interpretation. The political development particularly demonstrated by the Charter suggests, at least a cautious approach, to the question of the possible inclusion of a principle of fundamental rights protection under the EEA Agreement.

Note should also be made of the lack of participation from the EFTA States in the drafting of the Charter or in the Convention working group discussion on a possible new constitution for the EU.

Finally, the EU’s external policy should be mentioned more generally. Not only are there human rights clauses in the developments programmes, but indeed for membership of the Union democracy and respect for human rights

---

<sup>167</sup> Case T-177/01, *Jego-Quere et Cie Sa v. Commission*, judgment of 3 May 2002.

<sup>168</sup> For references see Craig, P. and De Burca, G., “EU Law text, cases and materials”, Third Edition, (Oxford University Press 2003), page 362, footnote 154.

<sup>169</sup> Morijn, J., “Judicial References to the EU Fundamental Rights Charter, First experiences and possible prospects” page 14.

<sup>170</sup> Von Bogandy 2000, page 1314, footnote 37.

<sup>171</sup> See the reference to the Article in the footnote above.

<sup>172</sup> The European Convention, CONV 850/03, 18. July 2003, Draft Treaty establishing a Constitution for Europe, Part I, Article 7 and Part II.

has always been a necessary qualifications.<sup>173</sup> This can most recently be seen in the enlargement process where all the candidate countries have been reported for human rights violations. The EU was criticised for having double standards by imposing more heavy human rights conditions on accession countries than to its own Member States, for instance in the field of minority protection. Thus, the external and the internal developments have to be seen in parallel in the Community. Of course, for the EEA, there is no need for fundamental rights protection on the grounds of an external dimension.

The role and relevance of the European Union in the field of human rights remains contested and confused. A lively debate is currently taking place between those who think "an "ever closer union" (is) in need of a Human Rights Policy"<sup>174</sup> and those who question the legitimacy of the Union to foster human rights norms and to develop an autonomous human rights policy of its own.<sup>175</sup> Depending on the outcome of this discussion, the challenge facing the EEA/EFTA institutions will be different. However, already at the present stage the EEA/EFTA political institutions are faced with a human rights challenge which will be the topic of the next chapter.

## 4.2 The role of the political institutions in the EEA/EFTA

Initially, I will comment briefly on the legislative process under the EEA Agreement.<sup>176</sup> Subsequently I will look at the challenge posed by the new law in the field of human rights in an EEA context, especially in the field of sex-equality and non-discrimination.

### 4.2.1 The "legislative" process in the EEA Agreement

Whenever new legislation is proposed in the Community it has to be decided whether the proposal is relevant to the EEA. Usually it is the Commission

---

<sup>173</sup> More generally on this subject, Brandtner, B., and Rosas, A., "Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice" (1998) 9 EJIL 468.

<sup>174</sup> Alston, Phillip and Weiler, J. H.H, "An "Ever Closer Union" in need of a Human Rights Policy", *The EU and Human Rights* Oxford University press 1999.

<sup>175</sup> Von Bogdandy, Armin, "The European Union as a human rights organization? Human rights and the core of the European Union", *The EU and Human Rights*, Oxford University press 1999, De Burca, Grainne, "Convergence and divergence in European Public Law: The Case of Human Rights", *The EU and Human Rights*, Oxford University press 1999.

<sup>176</sup> For a comprehensive analysis of the legislative process in the EEA: Jervell, S., "Lovgivningen i EØS Beslutningsprosessen, gjennomføringen og konsekvensene", 2002, (Cappelen).

that will make the primary evaluation of this question, and whenever the Commission thinks the proposal is of EEA relevance this will be included in the text of the proposal. The procedures in Article 99-101 of the EEA securing the EFTA States' participation in the development of the proposal will be applicable.

For many of the new legislative proposals, for instance the proposals to change existing legislation within the field of the four freedoms or competition it is uncontroversial that the proposals are of EEA relevance. But as the Community continually extends its cooperation beyond these core issues, the question of EEA relevance becomes more difficult and unclear and the discrepancies between the two systems become more apparent.<sup>177</sup>

It should be pointed out that it is the EEA Committee i.e. the parties to the Agreement, and not the Commission who will make the final evaluation of whether the legislation is of EEA relevance. The importance of the classification by the Commission is one of practical significance to ensure that the EFTA States participate in the legislative process according to the procedures in the Agreement.

The legislative process in the EEA Agreement is set out to ensure the dynamic development alongside the development of Community law. These mechanisms do not, however, include revisions and amendments of the treaties establishing the Community and the European Union. The EEA Agreement reflects the state of Community law before the TEU. The EEA Agreement has not been altered since it was signed 2 May 1992 to reflect the developments of the European Union. The focus here is the problem this causes in the field of human rights, but this is a more general weakness of the EEA Agreement especially, for changes in areas which are clearly within the scope of the Agreement.<sup>178</sup>

---

<sup>177</sup> One important example where the issue of EEA relevance has not been easy is in the field of energy, oil and gas, see Council Directive 94/92 on production licenses for oil and gas. See further about this in Arnesen, F., "Regulerer EØS-avtalen den norske stats utnyttelse av petroleumsforkomster?", *Tidsskrift for rettsvitenskap* 1994 p. 425-468.

<sup>178</sup> Examples are; the new rules on movement of capital, the economic and monetary policy affecting the interpretation of the four freedoms, Union Citizenship which may affect the free movement of persons, the new Article 16 of the EC on services of general economic interests, the protocol on public broadcasting and for amendment in Articles 2,3 and 6 potentially giving more weight to the cross-sectional obligation to protect the environment, promote employment and to promote equality between men and women.

Given that the competence of the EEA Joint Committee is limited to include secondary legislation, no treaty changes have been made and clearly the Charter of Fundamental Rights cannot be adopted by the Joint Committee. Whether the EEA Committee can, or should, adopt secondary legislation based on these treaty changes, thus based on articles with no parallel provision in the EEA, is an open question which will be discussed below. The crucial questions are; Is it possible to have a principle of fundamental rights protection in the EEA without these sources of law? And, if not, is it possible to have a homogenous EEA without the principle of fundamental rights?

#### ***4.2.2 Secondary legislation based on articles with no parallel provision in the EEA Agreement***

The significant treaty provisions on fundamental rights which do not have a parallel provision in the EEA Agreement are Articles 13 and 141 (4) of the EC. The significant secondary legislation based on these articles are the three following directives; Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation and Directive 2002/73/EC of the European Parliament and of the Council of 23. September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

The questions here concern the legal significance of these treaty changes for the functioning of the EEA Agreement and the status of the secondary legislation developed accordingly.

It is possible to draw the conclusion that treaty changes not reflected in the EEA Agreement and legislation based on such articles are without EEA relevance. However, it seems necessary to analyse each situation further. The field of sex-equality is one example which one cannot readily deny is of EEA relevance, even if the basis for the legislation is an article that does not exist in the EEA Agreement.<sup>179</sup> A treaty change which seems to be applied in an EEA context, although not reflected in the Agreement, can be found in the field of state aid.<sup>180</sup>

---

<sup>179</sup> See below point 4.2.3.

<sup>180</sup> Attention is drawn to the interpretation of Article 61 (3) of the EEA. Article 87 (3) of the EC, amended by the Treaty of Amsterdam, provides in section (d) that aid to promote culture

The question is whether the new legislation “is in a field governed by this Agreement”.<sup>181</sup> This terminology coincides with that in Article 118 of the EEA regarding the extension of the cooperation beyond the fields covered in the Agreement.

A different phrase is used in Article 102 paragraph 3 where it says “(t)he Contracting Parties shall make all efforts to arrive at an agreement on matters relevant to this Agreement”. This provision seems to have more of a political, than a legal, content considering the relatively weak and vague language.

The expression “fields governed by the Agreement” is another example of the language in the Agreement which leaves room for interpretation. There is a flexibility in the legal tools which make it, to a large extent, open to interpretation. To a certain extent one could argue that if there is a political will to include a proposal in the Agreement, there is also a legal possibility to do so. Nevertheless, there is guidance within the Agreement as to what the fields governed by the Agreement are. And, since the Agreement goes far in practice to impose Community legislation on the EFTA States without the EFTA States having much influence on the content of this legislation, the extent of the Agreement must be limited and the limitations foreseeable.

The aim of the Agreement is one of promoting “a continuous and balanced strengthening of trade and economic relations”, Article 1 of the EEA. In Article 2 this is further described as the four freedoms and the ensurance that competition will not be distorted. For the purpose of the relevance to the four freedoms, articles on closer cooperation in the fields of research, development, environment, education and social policy are included.

The fields governed by the Agreement are therefore of an economic character and the Agreement lacks the overall goal in the Community of an ever closer union of peoples.<sup>182</sup> It should also be pointed out that the Agreement does not contain a number of vital EC core policy areas in fields like: agriculture and fisheries, transport, taxation and currency matters, and

---

and heritage conservation may be considered to be compatible with the common market. It is clear that the ESA interprets Article 61 (3) in the light of Article 87 (3) and is prepared to accept aid to promote cultural and heritage conservation under Article 61 (3).

<sup>181</sup> Article 99 paragraph 1 of the EEA.

<sup>182</sup> The expression “economic activity” has been discussed in relation to whether the EEA Agreement covers the exploitation of oil and gas on the Norwegian continental shelf in Arnesen, F., “Regulerer EØS-avtalen den norske stats utnyttelse av petroleumsforekomster?”, Tidsskrift for rettsvitenskap 1994 p. 425-468.

after all is a fundamentally improved free trade area and not a customs union and thus has no common trade policy.

The protection of fundamental rights, however, does not belong to a category explicitly excluded from the Agreement. In part, the fundamental rights protection in the Community is linked to the four freedoms but it also is developing as an independent policy area in the Community. Without attempting to give a general answer as to how the political institutions will interpret “*fields governed by this Agreement*”, an attempt will be made to present several arguments both in favour, and against, including fundamental rights protection in the EEA Agreement.

From a political point of view it is important not to be perceived as a country lagging behind in protection for human rights. Refusing to include secondary legislation in the EEA Agreement on such protection could be important symbolically even though the standards were equal, or even better, in the national legislation of the EFTA Countries. For instance the area of non-discrimination is generally of great concern to the EFTA countries. Refusing to accept the introduction of a Community policy on non-discrimination into the EEA Agreement could be viewed as if the EFTA States were less concerned with this important policy area. To the extent that the human rights policy in the Community is acceptable for the EFTA States, which seems to be the case presently, including such legislation is also less controversial. Further, including the legislation in the EEA Agreement could also lead to EFTA countries’ experts participation in the working groups and the further development of the legislation.

However, there is a “danger” in expanding the Agreement based on a present accord with the content of the policy, namely that it will be difficult to reject later developments on the grounds that the policy is no longer acceptable. In accepting secondary legislation in one field of human rights policy, as included in the scope of the EEA Agreement, one creates a powerful argument in favour of other fields of human rights protection also being relevant. Without knowing the content of such policies (since they have not yet been developed) it cannot be ruled out that they will not all conform to the views of the EFTA countries.

Including legislation on fundamental rights opens up new fields of competence for the EFTA institutions like the ESA and the EFTA Court. Depending on where one stands, this is arguably a positive development. It would also be fair to say that there are a number of concerns in such a

development. The institutions are not equipped with specialists in human rights although this could be compensated for by expanding the institutions. The institutions will, however, never reach the level of expertise and competence found in the Commission and the ECJ consisting of experts from a wide variety of countries. Also individuals complaining of human rights violations to the ESA would not be required to have exhausted domestic remedies such as is the case under the ECHR. Indeed, in opening up the system to complaints to the ESA and judgments by the EFTA Court there is a risk of undermining, and possibly conflicting, with the present ECHR's system.<sup>183</sup>

The very existence of the European Court of Human Rights in Strasbourg, which was established precisely to monitor compliance by member states of the Council of Europe with the commitments of the Convention on Human Rights, imposes the question of the appropriateness of a parallel jurisdiction being exercised by the ECJ or by the EFTA Court. The ECtHR was not only established with an express human rights jurisdiction, but has acquired expertise and a moral stature which neither the ECJ nor the EFTA Court share. However, as long as the ECJ neglects this argument in Community law it may not carry much weight in EEA law.

Thus far, there are two areas of development of secondary legislation in the field of human rights based on provisions that do not exist in the EEA Agreement. The following discussion will be divided into two, one part concerning secondary legislation on sex-equality and one part concerning secondary legislation on non-discrimination especially the race discrimination directive.

---

<sup>183</sup> Indeed, this can already be seen in the Community. The potential for differences in interpretation as between the two European courts and different conclusions on the same issue has been seen by contrasting decisions like that of the Court of Human Rights in *Open Door Counselling*, *Open Door Counselling Ltd. And Dublin Well Woman Centre v. Ireland*, Series A no. 246 with the Opinion of the Advocate General in *Grogan*, Case C-159/90, the approach of the ECJ in *ERT*, Case C-260/89 with that of ECtHR in *Lentia v. Austria*, *Informationsverein Lentia v. Austria*, Series A no 276, the decision of the ECJ in *Hoechst*, Cases 46/87 & 227/88, *Hoechst AG v. Commission* (1989) ECR 2859 with that of ECtHR in *Niemietz*, *Niemietz v. Germany*, Series A, No 251, the ECJ in *Orkem*, Case 374/87, *Orkem v. Commission* (1989) ECR 3283 with the ECtHR in *Funke*, *Funke v. France*, Series A, No 256A and the subsequent series of the ECJ and the CFI cases concerning various rights of the defence in the EC competition proceedings.

### 4.2.3 Sex-equality

The EEA Agreement part V Horizontal provisions relevant to the four freedoms cover the following areas; Social policy, consumer protection, environment, statistics and company law. These areas are not directly part of the four freedoms but accompany the rules establishing those freedoms in order to provide for their proper functioning. For example, harmonization of rules relating to specifications of products founded on environmental considerations would be indispensable in order to facilitate the free movement of goods. The aim of integrating EC legislation in this area into the EEA Agreement would be to make market conditions within the EEA as similar as possible to the internal market within the Community.

This chapter will include a provision on equal pay for men and women relating to Article 69 of the EEA. It reproduces the relevant parts of the wording of the former Article 119 of the EC, now Article 141 of the EC. The main content of Article 69 of the EEA is the obligation on the Contracting Parties to ensure and maintain the application of the principle that men and women should receive equal pay for equal work.

Annex XVIII of the EEA contains, under the more general heading: “*Equal treatment for men and women*”, the reference to Council Directive 75/117, on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women. The Directive defines the objective of the principle of equal pay to mean the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration, for the same work or for work to which equal value is attributed. Further obligations on the Member States include abolishing all discrimination in this respect and introducing judicial remedies.

From this reference Article 69 could thus be interpreted, in addition to the goal of ensuring that women and men receive equal pay for equal work, as having a second objective. As follows from the preamble of the EEA,<sup>184</sup> the aim of ensuring economic and social progress in general, as well as an improved standard of living and improved working conditions, is in concurrence with the homogeneity objective.

Article 70 of the EEA and Annex XVIII of the EEA are also worthy of note. Article 70 of the EEA obliges the Contracting Parties to promote the

---

<sup>184</sup> Recital 8 of the preamble of the EEA.

principle of equal treatment for men and women. This is to be achieved by implementing the provisions specified in Annex XVIII of the EEA.

The EC treaty does not contain any provision with wording corresponding to that of Article 70 of the EEA. The provision was introduced into the EEA Agreement in order to provide a legal basis for the integration into the EEA of the legal acts adopted by the Community in the field of equal treatment of men and women.<sup>185</sup> This was necessary since the EEA relevant Council Directives, which the Community has adopted in this field, are based on provisions of the EC Treaty which are not reproduced in the EEA Agreement.<sup>186</sup> This provision gives perhaps a more extended general competence in this field.

According to Article 141 (4) of the EC, the principle of equal treatment shall, with a view to ensuring full equality in practice between men and women in working life, not prevent the Member States from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

On the basis of this provision, the equal treatment directive<sup>187</sup> has been amended by Directive 2002/73/EC. In its amended version paragraph 4 of Article 2 is replaced by a new paragraph 8, which provides, "Member States may maintain or adopt measures within the meaning of Article 141 (4) of the Treaty with a view to ensuring full equality in practice between men and women".

Other substantial changes in the legal framework of the Community include the new Article 13 of the EC. Article 13 of the EC gives the Council the competence to take appropriate action to combat discrimination based on

---

<sup>185</sup> The four relevant directives included in the annex XVIII of the EEA are Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, Council Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security, Council Directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in matters of social security and Council Directive 86/613/EEC on the application of the principle of equal treatment between men and women engaged in activity, including agriculture in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood.

<sup>186</sup> Articles 94 and 308 of the EC.

<sup>187</sup> Directive 76/207/EEC.

sex. Under Article 2 of the EC the Community shall have as its task to promote equality between men and women and Article 3 (2) of the EC states that the Community shall, in carrying out the activities referred to in the first paragraph of that provision, aim to eliminate inequalities and to promote equality between men and women.

The first question in an EEA context would be to ask whether the new wording in Article 141 of the EC, which opens up for more positive discrimination, applies within an EEA context. This was one of the questions in Case E-1/02 referred to above.

A second question is whether secondary legislation about sex equality based on this new Article (especially in the changed wording) is EEA relevant or within the field of the EEA Agreement. This question also relates to Article of the 13 EC since, on the basis of this Article, there have also been initiatives in the field of sex equality.

In the Einarsson-case, the EFTA Court seemed to reject the application of treaty changes in the Community in the context of the EEA law. The case concerned the compatibility of a system of differentiated value-added tax applied under Icelandic law to books in the Icelandic language and books in foreign languages with Articles 4, 10 and 14 of the EEA.<sup>188</sup> The Court found that the measure had a protective effect incompatible with the second paragraph of Article 14 and that the measure could not be justified on grounds relating to the public interest of enhancing the position of the national language.

The Defendant submitted that the intentions reflected in the Joint Declaration on Cultural affairs corresponded to the objectives of Article 151(4) of the EC, and that, by analogy, this provision of the EC treaty, which was introduced by the Treaty of Amsterdam, may be relied upon by the Court in the present case. The Court rejected this argument. In the words of the Court:

“The Court considers that it would not be a proper exercise of the judicial function to seek to extend the scope of application of the EEA Agreement on that basis.”<sup>189</sup>

---

<sup>188</sup> Articles 12, 25 and 90 of the EC.

<sup>189</sup> E-1/01 para 45

In the aforementioned University case for the EFTA Court,<sup>190</sup> the Norwegian government made several interesting arguments in relation to the relevance of Article 141 (4) of the EC to the EEA Agreement. It will be remembered that the case concerned the Norwegian policy on gender equality between men and women in academia. It was argued that the rationale for tolerating unequal treatment in individual cases was in recognition of the fact that formal equality in treatment was not sufficient to achieve material equality in effect. It was asked that the Court viewed the Norwegian University act No. 22 of 12 May 1995 section 30 (3) which stated that the university “*may decide that a post shall be advertised as only open to members of the under-represented sex*” in this context.

It should also be kept in mind that positive action measures to promote gender equality are recommended in Article 14 of the European Convention on Human Rights, protocol 12 of the same convention and in CEDAW.

The overall purpose of the Community as laid down in Article 2 of the EC, now provides, *inter alia*, that it is an important task to promote “*equality between men and women*”. It was argued that the concept of gender equality may now, accordingly, be seen as a general and explicit principle based on the treaty itself. Furthermore, these provisions show that the aim is to achieve *de facto* equality, not just equal opportunities and equal treatment in legal terms. To operationalise the objective of gender equality, a positive action provision is now included in the EC Treaty itself, in paragraph 4 of the amended Article 141.

The ESA argued that Article 141(4) of the EC did not apply in the present case since the amendments made to the EC Treaty by the Treaty of Amsterdam had not been incorporated into the EEA Agreement. On the basis of Case E-1/01, Einarsson, the Authority submitted that relying on such a provision would extend the scope of application of the EEA Agreement beyond what the Court deemed acceptable.

In the University case the Norwegian Government agreed with the Court’s general approach in Einarsson, namely that it would not be a proper exercise of the judicial function to seek to extend the scope of application of the EEA Agreement.

---

<sup>190</sup> Case E-1/02

However, the Government was of the opinion that a distinction should be drawn between on the one hand, a situation where the Court is called upon to interpret the EEA Agreement expansively and, on the other hand, a situation where the Court is called upon to define more precisely provisions of the EEA Agreement. In the opinion of the Government, only the first-mentioned situation has the potential of resulting in an extension in scope of the EEA Agreement, and thus contradicts a proper exercise of the judicial function.<sup>191</sup>

In its ruling the Court simply noted that Article 141 (4) of the EC was not part of EEA law.<sup>192</sup> As regards the amending Directives based on Article 141 (4) which included references to Article 13, the Court made note of the fact that the Commission estimated that it would take 6-12 months before the Directives could be included in the EEA Agreement. The Court did not, however, reject the relevance of the amending Directive even though it rejected the relevance of the treaty change (which was the basis for the amending Directive).

The Court does recognise that the equal treatment directive has to be interpreted in light of the substantive changes made in Community law as referred to above. It says “[i]nvariably, the interpretation of the Directive will reflect both the evolving legal and societal context in which it operates.”<sup>193</sup> However, it is difficult to see where the Court applies this form of interpretation. It seems to rely entirely on the “old” jurisprudence of the ECJ. One remark in parentheses is that the Court does not in this case, as they have also demonstrated in other cases make any distinction between ECJ jurisprudence from before 2 May 1992 which Article 6 of the EEA directly refers to and jurisprudence after this date.

Thus far it is tempting to conclude that the basis for the legislation does not automatically determine whether the content is in a field covered by the EEA Agreement. In the field of sex discrimination, it seems that the field as such forms part of the Agreement. This conclusion is supported by Part V Horizontal provisions and Annex XVIII of the EEA which may be

---

<sup>191</sup> Another example of this distinction can be found in the interpretation of Article 61 (3) of the EEA. Article 87 (3) of the EC, amended by Amsterdam, provides in section d) that aid to promote culture and heritage conservation may be considered to be compatible with the common market. To interpret 61 (3) of the EEA in conformity with this would not be an extension of the scope of the EEA Agreement, but merely an explicit adjustment to a derogation that already forms a part of Community law.

<sup>192</sup> E-1/02 para. 55.

<sup>193</sup> E-1/02 Para. 56.

interpreted as including sex equality more generally within the scope of the Agreement. Article 102 of the EEA concerning amendments of an annex to the agreement also supports this interpretation. The provision can be seen as only giving a time limit to the EEA Joint Committee, but it can also be understood as presupposing that any changes to the annex will be within the field governed by the Agreement. Treaty changes not incorporated into the EEA Agreement in a field governed by the Agreement will not be without effect. Within the equal right directive we have the situation where the treaty change has been made part of the Directive through a reference. In an EEA context this means that the treaty change will apply through the Directive. In other situations, the treaty change is likely to have an influence through being a relevant factor for the interpretation of the secondary legislation.

The next field of interest is, however, not included in any other parts of the EEA Agreement either in the main part or the annexes. And the field of a general non-discrimination provision represents a major step for the EU in promoting human rights.

#### **4.2.4 Non-discrimination**

There has been an evolution of EU law and policy on racism and a number of factors have led the Member States to extend the Union's role in this field. The original treaties focus on nationality discrimination, that is, discrimination against other EC nationals, as opposed to racial discrimination. The Council of Ministers determined in 1968 that free movement was a right only available to nationals of the Member States. Moreover, regulation (EEC) 1612/68 also enshrined the principle of Community preference in EC law; that is, the objective of ensuring that EC nationals enjoy priority when filling employment vacancies in the Member States. These were crucial decisions. Being excluded from the free movement rights, there was no obvious market integration justification for the Community to become involved in matters relating to third country nationals, including racial discrimination.

The Commission failed to carve out a role for the Community in immigration policy in the 1970s. Sharp progress was, however, made in gender equality law at the same time. New initiatives were launched with the internal market programme in the mid 1980s.

The Commission took its first step in co-ordinating immigration policy through the adoption of Decision (EEC) 85/381, setting up a prior communication and consultation procedure on migration policies in relation to non-member countries. Certain Member States proceeded to seek its

annulment at the ECJ. Contrary to the argument of these Member States, the Court accepted that there did exist a sufficient connection between migration policies and the EC labour market to bring the former within the scope of the “social field” referred to in the EC Article 140, former Article 118.

Inside the EU there was great opposition to the Community engaging in issues regarding racism. The Council raised opposition every time the issue was raised on the basis of EC legal competence. As a compromise, the Social Charter adopted in 1989 only states in the preamble the importance of combating all forms of discrimination<sup>194</sup> alongside a statement reaffirming that the treatment of third country nationals was a matter for the Member States.

A major step forward was achieved with the adoption of Article 13. Article 13 of the EC is not in itself a prohibition on discrimination on grounds of race, disability, sexual orientation, etc., and, unlike the equal pay provision in Article 141 of the EC on sex-discrimination, it is not directly effective. Rather it enables the Community to adopt measures to combat discrimination on the grounds listed, within the scope of the policies and powers otherwise granted in the treaty. Two directives were adopted in 2000, the first was a directive to prohibit discrimination on grounds of race and ethnic origin,<sup>195</sup> and the second was the so-called *framework employment directive*, covering discrimination in the field of employment on the grounds listed in Article 13 (other than race, ethnic origin, or sex, which are already covered by other legislation); religion, belief, disability, age, and sexual orientation.<sup>196</sup> While the jurisdictional limitation in Article 13 specifies that the EC can act only within the limits of the Community’s powers, Article 3 of the anti-racism directive appears to give it a wider scope.

Article 3 of the anti-racism directive says that the directive shall apply “*within the limits of the powers conferred upon the Community*”. But in letters e to h it says that the directive shall apply to all persons in relation to social protection, including social security and healthcare, social advantages, education and housing. This directive is new in that it covers more than discrimination in relation to employment.

---

<sup>194</sup> The wording is as follows: “In order to ensure equal treatment, it is important to combat every form of discrimination including discrimination on grounds of sex, colour, race, opinions and belief.” Text appears in Social Europe 1/90, 46–50.

<sup>195</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

<sup>196</sup> Council Directive 2000/78.

An action plan to combat racism was adopted in 1998, and in 2000 a broader action programme to combat discrimination on all the grounds listed in Article 13 (other than sex, which was already covered by an action programme) was adopted.<sup>197</sup>

It remains to be seen how the EFTA States will respond to this development in the Community. The official view of the Norwegian Government concerning a general update of the EEA Agreement expresses a distinction between changes in provisions which already exist in the Agreement and the “new” provisions.<sup>198</sup> Changes in provisions like the free movement of capital, state aid, sex-equality and employment rights are mentioned as likely provisions to update. Article 13 of the EC is mentioned, in the same document, as an area under consideration for inclusion in the EEA Agreement. It is expressly stated that the inclusion of this provisions would be based on a political interest which could also mean an enhanced cooperation within the EEA in areas like environment and consumer protection.

Government sources indicate, however, that at the moment Norway supports the inclusion of the non-discrimination package into the EEA Agreement. However, it seems that the EFTA States do not have a common position on this as Iceland appears to be more reluctant.

It seems most likely from the discussion above that the EFTA Court will respond negatively if faced with the question of including Article 13 and the secondary legislation on that basis into the scope of the EEA Agreement. In the words of Hans Petter Graver after he concluded that an interpretation of the EEA Agreement could lead to a homogenous result in the fields of social policy, environment and equal rights for men and women:

“There are other changes in the treaties that are not easily reflected in the agreement by way of its own formulations of goals and objectives. There is, for instance, scant if any foundation in the agreement towards combating discrimination based on racial or ethnic origin, religion or belief, disability, age or sexual orientation. There can be no basis in the agreement to obligate the EFTA States to reflect these aims in the interpretation or application of its provisions.”<sup>199</sup>

---

<sup>197</sup> Council Decision 2000/750.

<sup>198</sup> St. meld. Nr. 27 (2001–2002), Om EØS-samarbeidet 1994–2001, p. 88.

<sup>199</sup> Graver, H P., “Welfare State and Constitutionalism under the EEA Agreement” in Scheinin, M., *Welfare State and Constitutionalism – Nordic Perspectives*, (Nord 2001:5), p. 100.

There are many questions for the political institutions. First, this development is just the beginning of many more initiatives and possibly the development of a comprehensive anti-discrimination policy, indeed human rights policy, under Community law.

It is difficult to isolate this development from the other parts of the internal market. First, there is an internal market dimension within the issue. Indeed, the EU legislation was motivated by cross-border dissemination of racist propaganda. Prior to 1989, Ireland did not have any legislation prohibiting incitement to racial hatred. The divergence in laws from other Member States was exploited by groups from the extreme right to produce the material in Ireland and export it from there. Such manipulation of the differences in national law created a classic justification for EU intervention.<sup>200</sup>

The same logic that regards nationality discrimination as an obstacle to the free movement of individuals can be applied to other grounds of discrimination, including racial or ethnic origin.

The right of free movement includes third country nationals who are members of the family of EU migrant workers.<sup>201</sup> However, the Commission has identified obstacles when these family members face racism at border crossings. In Community law all these aspects are interlinked and the “human rights law” can not be separated from the “internal market law”.

---

<sup>200</sup> The cross-border transmission of racist television broadcast is prohibited in the Television without frontiers Directive Article 22, Council Directive 89/552/EEC.

<sup>201</sup> Reg (EEC) 1612/68 on free movement for workers.

# Chapter 5

## Final observations

In the first stage of the fundamental rights development, focus was on the challenge to the supremacy of Community law. It was argued in the Community that, because of supremacy states could possibly be faced with conflicting rules and have no possibility of letting human rights prevail. Thus, one important justification for having a set of unwritten fundamental rights in the Community was to secure conformity of EC law with the national constitutional rights of the individual and the international obligations on the State to secure the rights of individuals. With the limited supremacy clause in the EEA, the same argument does not apply to the same extent. Human rights can be secured at national level by the national courts which will take into account the national Constitution, the international obligations to respect human rights and national legislation. Further, only the ESA will have a parallel function to the Community institutions relevant for this topic. My conclusion is that the EFTA Court can scrutinise ESA's decisions for conformity with human rights.

However, in the second stage, a much broader competence question is raised, namely the possible right to scrutinise EFTA States action for conformity with human rights. The discussion and the Carpenter case demonstrate the substantial extension of the Agreement such competence would entail.

At one level it is hard to argue against including human rights into the scope of the Agreement. One can hardly oppose human rights and at the outset including it enhances the protection of possible victims by giving them a new set of tools to use in a possible breach of human rights by the state.

Human rights law is however, no longer the clear cut protection of individuals against the state that it originally was. Decisions involving human rights considerations mean making largely political choices between

conflicting values. Suffice to mention examples such as freedom of speech is balanced against society's interest in public morality and by individuals' right to integrity of reputation, the right to property is balanced against society's interest in e.g. ensuring a clean environment, access to recreational land, the right to privacy may be balanced against a societal interest in, say, investigation of serious crime etc.

Demonstrating the value choice that is involved should make it clear that the question of the inclusion of human rights in the scope of the EEA Agreement is not one of being for or against human rights. The question is related more to who can, or should, make these choices. Has the EFTA Court really been given the mandate to make these choices? Is it democratic to have the Court itself deciding its own competence in this area? One can argue that in the way the EFTA Court is currently set up and functions, it is not the appropriate forum. Further, the standards and value choices made by the EU in the treaties, in the secondary legislation and in the soft law are all created without the participation of the EFTA countries, indeed, outside the cooperation mechanisms in the EEA Agreement. Accepting this as part of EEA law would amount to the EFTA States being legally bound by new treaties and treaty revisions concluded by foreign states. Such an understanding would make the EEA Agreement more supranational than the Community treaties and would seriously challenge the principle of sovereignty. Including the principle of fundamental rights in the EEA, but not giving it the same content as in the Community, would create an equally intolerable situation, freezing Community law at some arbitrary point of time in the history of the Community.

In the third stage, focus is on the political institutions and the implication of their actions. The EEA Committee is already facing the secondary legislation based on Articles 13 and 141 and will have to make some major decisions in the near future. It may be that Mrs Carpenter could not have relied on the EEA Agreement today but that she will be able to in the future with the help of the political institutions, although my view in the present situation is that this is not a desirable outcome.

Looking back at the nearly 10 years which have passed after the EEA Agreement entered into force, a different scenario than the one that has developed could have emerged. The EEA Agreement could, if the EFTA Court had taken an active and progressive line similar to the ECJ, have mirrored the developments of the Rome Treaty. One could have imagined the EEA developing into a supranational legal order through principles such

as absolute supremacy, direct effect, state liability and fundamental rights protection. However, the EFTA Court is not the ECJ, lacking a similar legitimacy and status. It has a small caseload and little interaction with the other institutions. Given the status and role of the EFTA Court, the EEA could not and should not have developed in parallel with the Community thus leaving out vital parts of the “*acquis communautaire*” such as the protection for fundamental rights.

However, given this scenario, we now have an Agreement already partially outdated and facing the challenge of the EC Treaty being replaced by the Constitution for Europe including the rights enshrined in the Charter of fundamental rights. To this end, the Agreement will no longer have a reference point for its aim of homogeneity. In conclusion, the EEA Agreement seems to be tied to a dying body, leaving an almost logical impossibility in its continuation.

Although the EEA Agreement in many ways has functioned well in creating a single market in the European Economic Area and ensuring the needs of the EFTA States, present events seem to have overtaken the Agreement. The time may have come where the EFTA States should rethink their relations with the EU. As is demonstrated in the field of human rights, the EFTA States do not necessarily have a common policy towards their relations with the EU. Norway seems inclined to develop its human rights protection along the same lines as the Community whereas Iceland seems to have chosen a different direction. The EEA Agreement is tying the EFTA States together and preventing the different states in pursuing their desired policy towards the Community. Even if it was possible for the EFTA countries to agree on their human rights policy, the question is whether it is desirable to stretch the EEA Agreement and use the institutions. The question is whether each of the EFTA countries should adopt their own approach for their future relations with the EU outside the EEA context? The dilemma is, of course, the uncertainty in leaving a familiar path and developing a new one. The principle of fundamental rights may, however, force this development through.

# Bibliography

## Books

Bell, M., "EU Anti-discrimination law" (2002)

Børde, Ketil, "The European Economic Area, Norway and the European Union: Achievements, Possibilities and Limitations" (BIBL)

Claes, D., and Tranøy, B., "Utenfor, annerledes og suveren? Norge under EØS-avtalen", 1999 (Fagbokforlaget)

Clapham, W., (Eds.), "Human Rights and the European Community", vol 3 (Nomos, 1991)

Craig, P. and De Burca, G., "EU Law text, cases and materials", Third Edition, (Oxford University Press 2003)

De Burca, G., "Convergence and divergence in European Public Law: The Case of Human Rights", "The EU and Human Rights" (Oxford University press, 1999)

Graver, H. P., and Arnesen, F., "Rettslige sider ved Norges EU-rettede avtaler", Makt- og demokratiutredningen 1998-2003, Rapportserien Nr. 19, oktober 2000

Jervell, S., "Lovgivningen i EØS Beslutningsprosessen, gjennomføringen og konsekvensene", 2002, (Cappelen)

Muller-Graff, P., and Selvig, E., (eds), "The European Economic Area – Norway's Basic Status in the Legal Construction of Europe" (Berlin Verlag A. Spitz, 1997)

Muller-Graff, P., and Selvig, E., (eds), "EEA-EU Relations" (Berlin Verlag A. Spitz, 1999)

Norberg, S., and Høkborg, K., and Johansson, M., and Eliasson, D., and Dedichen, L., "EEA-Law A Commentary on the EEA Agreement", (Kluwer, 1993)

Sejersted, F., and Arnesen, F., and Rognstad, O., and Foyn, Sten and Stemshaug H., "EØS-rett", (Universitetsforlaget AS, 1995)

## Articles

Alston, P., and Weiler, J. H.H., "An "Ever Closer Union" in need of a Human Rights Policy", in P. Alston, M. Bustelo, and J. Heenan (eds.), *The EU and Human Rights* (Oxford University press, 1999)

Arnesen, F., "Regulerer EØS-avtalen den norske stats utnyttelse av petroleumsforekomster?", *Tidsskrift for rettsvitenskap* 1994 p. 425-468

Brandtner, B., and Rosas, A., "Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice" (1998) 9 *EJIL* 468

Baudenbacher, B., "The legal Nature of EEA Law in the Course of Time A Drama in Six Acts, and More May follow", *Afmælisrit þor Vilhjalms* (Sjotugur 2000) p.39

Baudenbacher, B., "The EFTA Court and the European Court" in Muller-Graff, P., and Selvig, E., (eds), "EEA-EU Relations" (Berlin Verlag A. Spitz, 1999), p. 69-96

Bernitz, U., "Om EES-avtalet. Bakgrund, utforming ock tolkning", in Bernitz, U., *med fl EES-avtalet i svensk rett* (1993)

Bruha, T., "Is the EEA an Internal Market?" in Muller-Graff, P., and Selvig, E., (eds), "EEA-EU Relations" (Berlin Verlag A. Spitz, 1999), p. 97-130

Bull, H., "EØS-avtalen – litt om avtalens struktur og om prinsippene for gjennomføring i norsk rett" in *Lov og Rett* 1992 nr. 10, p. 583-601

Christiansen, P., "The EFTA Court", European law review Volume 22 no. 6 December 1997 p. 539-553

Claes, Dag H., "EØS – demokrati eller diplomati!", Arena Working Papers WP 01/10 (2001)

Coppel, J., and O'Neill, A., "The European Court of Justice: Taking Rights Seriously?" (1992) 12 Legal Studies 227

De Burca, G., "Convergence and Divergence in European Public law: The Case of Human Rights", in P. Beaumont, C. Lyons and N. Walker, Convergence and Divergence in European Public Law (Oxford – Portland Oregon, 2002)

De Witte, B., "The past and Future Role of the ECJ in the Protection of Human Rights", in P. Alston, M. Bustelo, and J. Heenan (eds.), The EU and Human Rights (Oxford University press, 1999)

Eyolfsson, M., "B. EFTA Court", CMLRev 37: 191-211, 2000

Falch, I., "Menneskerettigheter og EU/EØS – En eller flere konstitusjoner for Europa?", Lov og Rett 1997

Foreman, J., "The EEA Agreement Five years on: Dynamic Homogeneity in Practice and its Implementation by the Two EEA Courts" (1999) 36 CMLRev. 751

Graver, H P., "Mission impossible: Supranationality and National Legal Autonomy in the EEA Agreement", in European Foreign Affairs Review 7: 73-90, 2002

Graver, H P. and Sverdrup, U., "ESA: mer katolsk enn paven?", Nordisk administrativt tidsskrift – vol. 83, nr. 2 (2002) p. 154-170

Graver, H P., "Welfare State and Constitutionalism under the EEA Agreement" in Scheinin, M., Welfare State and Constitutionalism – Nordic Perspectives, (Nord 2001:5)

Graver, H P., "The EFTA Court and the Court of Justice of the EC: Legal Homogeneity at Stake?" in Muller-Graff, P., and Selvig, E., (eds), "EEA-EU Relations" (Berlin Verlag A. Spitz, 1999) p. 31-60

Harmsen, R., "National Responsibility for European Community Acts Under the European Convention of Human Rights: Recasting the Accession debate", *European Public law*, Volume 7, issue 4, (Kluwer Law International, 2001)

Haug, B., "The EFTA Court" in Muller-Graff, P., and Selvig, E., (eds), "The European Economic Area – Norway's Basic Status in the Legal Construction of Europe" (Berlin Verlag A. Spitz, 1997), p. 75-80

Jacobs, F., "Human rights in the European Union: the role of the Court of Justice" (2001) 26 *ELRev.* 331

Kalin, W., "The EEA Agreement and the European Convention for the Protection of Human Rights", (*European Journal of International law* 1992 p. 342)

Kronenberger, V., "Does the EFTA Court interpret the EEA Agreement as if it were the EC Treaty? Some questions raised by the *Restamark* judgment", *International and Comparative Law Quarterly*, Vol 45 p. 198-212

Lockhart, N., "'Taking Rights Seriously' Seriously: The European Court and its Fundamental Rights Jurisprudence" (1995) 32 *CMLRev.* 51, 579

Menendez, A., "A Rights-Based Europe? The Charter of Fundamental Rights of the European Union" (Arene report 2002)

Morijn, J., "Judicial References to the EU Fundamental Rights Charter, First experiences and possible prospects", [http://europa.eu.int/futurum/documents/other/oth000602\\_en.pdf](http://europa.eu.int/futurum/documents/other/oth000602_en.pdf)

Muller-Graff, P., "The Treaty of Amsterdam: Content and Implications for EEA-EU-Relations in Muller-Graff, P., and Selvig, E., (eds), "EEA-EU Relations" (Berlin Verlag A. Spitz, 1999), p. 11-30

Muller-Graff, P., "EEA-Agreement and EC Law: A Comparison in Scope and Content – Overview on the Basic Legal link between Norway and the European Union", in Muller-Graff, P., and Selvig, E., (eds), "The European Economic Area – Norway's Basic Status in the Legal Construction of Europe" (Berlin Verlag A. Spitz, 1997), p. 17-42

Norberg, S., "Perspectives on the Future Development of the EEA" Afmælisrit þor Vilhjálmsson (Sjotugur 2000) p. 367

Ojanen, T., "An outline of human rights in Community law", in Sejersted, F., Nordisk forvaltningsrett I mote med EF-retten, IUSEF nr. 21

Phelan, D. R., "Right to Life of the Unborn v Promotion of Trade in Services: The European Court of Justice and the normative Shaping of the European Union", The Modern Law review 55:5 September 1992 0026-7961

Rognstad, O. A., "EF-domstolens og EFTA-domstolens praksis som rettskilder ved tolkningen av EØS-avtalen" in Tidsskrift for rettsvitenskap 114 h3 (2001) p. 435-463

Rognstad, O. A., "The Conflict between Internal Market and third Country policy Considerations in the EEA. Maglite vs. Silhouette", in Muller-Graff, P., and Selvig, E., (eds), "EEA-EU Relations" (Berlin Verlag A. Spitz, 1999), p. 131-144

Sejersted, F., "Between Sovereignty and Supranationalism in the EEA Context – On the Legal Dynamics of the EEA-Agreement", in Muller-Graff, P., and Selvig, E., (eds), "The European Economic Area – Norway's Basic Status in the Legal Construction of Europe" (Berlin Verlag A. Spitz, 1997), p. 43-74

Sevon, L., "Primacy and Direct Effect in the EEA. Some Reflections" in Festskrift til Ole Due, Copenhagen 1994, p 340

Stefanson, S., "The EEA Agreement and its adoption into Icelandic law", IUSEF no. 25, 1997, (Universitetsforlaget)

Van Gerven, W., "The Genesis of EEA Law and the Principles of Primacy and Direct Effect", Fordham International Law Journal, 1992-93 p. 955

Von Bogdandy, A., "The European Union as a Human Rights Organization? Human rights and the core of the European Union", (2000) 37 CMLRec. 1307

## Official publications

NOU 2003:16 Ny konkurranselov

NOU 2000:12 Rettslig vern mot etnisk diskriminering

NOU 2003:2 Skjerpet vern mot diskriminering i arbeidslivet

Sveriges ratifikasjon av EØS avtalen, 1992/93:EU I s. 172

St. Prp. nr 100 (1991-92)

St. Meld. Nr. 40 (1993-1994), Om medlemskap i Den europeiske union

St. Meld. Nr. 12 (2001-2002), Om Norge og Europa ved inngangen til et nytt århundre

St. Meld. Nr. 27 (2001-2002), Om EØS-samarbeidet 1994-2001

From the European Convention – working group on "Incorporation of the Charter/Accession to the ECHR"

Explanatory memorandum for Council Framework decision on combating racism and xenophobia

## Table of cases for the European Free Trade Association Court (EFTA-Court)

Case E-2/94, Scottish Salmon Growers Association Limited vs. EFTA Surveillance Authority

Case E-2/97, Mag Instrument Inc. V California Trading Company Norway, Ulsteen

Case E-4/97, Norwegian Banker's Association v. ESA

Case E-8/97, TV 1000 Sverige AB v. Norway

Case E-9/97, Erla Maria Sveinbjornsdottir v Iceland

Case E-1/99, Storebrand Skadeforsikring AS v. Veronica Finnanger

Case E-1/01, Hórdur Einarsson v. Iceland

Case E-4/01, Karl K. Karlson v. Iceland

Case E-1/02, ESA v. Kingdom of Norway

## ARENA REPORTS

- 04/01: Karin Fløistad: "Fundamental Rights and the EEA Agreement"
- 03/07: Øivind Støle: "Europeanization in a Context of Enlargement. A Study of Hungarian Environmental Policy"
- 03/06: Geir Ove Kværk: "Legitimering gjennom rettigheter? En studie av arbeidet med EUs Charter om grunnleggende rettigheter og sivilsamfunnets bidrag til dette"
- 03/05: Martin Hauge Torbergsen: "Executive Dominance in a Multi-level Polity. Europeanisation and Parliamentary Involvement in the Spanish Autonomous Communities"
- 03/04: Caroline Rugeldal: "Identitetsbygging i EU – En analyse av EUs symbolstrategi"
- 03/03: Elisabeth Hyllseth: "Lovlig skatt eller ulovlig statsstøtte? En studie av norske myndigheters respons i konflikten med ESA om den norske ordningen med differensiert arbeidsgiveravgift"
- 03/02: Erik O. Eriksen, Christian Joerges and Jürgen Neyer (eds.): "European Governance, Deliberation and the Quest for Democratisation"
- 03/01: Maria Hasselgård: "Playing games with values of higher importance? Dealing with 'risk issues' in the Standing Committee on Foodstuffs"
- 02/11: Tommy Fredriksen: "Fra marked til plan. Europeisering av norsk lakseeksport"
- 02/10: Thomas A. Malla: "Nasjonalstat og region i den nye økonomien. En studie av hvordan betingelsene for politisk regulering av næringslivet i EU endres gjennom utbredelsen av markeder for elektronisk handel"
- 02/9: Anne Elizabeth Stie: "Preconditions for Democracy: National Identity Versus Constitutional Patriotism. A Theoretical Analysis of the German Federal Constitutional Court's Maastricht Judgement"
- 02/8: Marianne Riddervold: "Interesser, verdier eller rettigheter? En analyse av danske posisjoner i EUs utvidelsesprosess"

- 02/7: Helene Sjursen (ed.): "Enlargement and the Finality of the EU"
- 02/6: Various contributors: "Democracy and European Governance: Towards a New Political Order in Europe?" Proceedings from the ARENA European Conference 2002
- 02/5: Erik Oddvar Eriksen, John Erik Fossum and Agustín José Menéndez (eds.): "Constitution Making and Democratic Legitimacy"
- 02/4: Heidi Moen: "Fører alle veger til Brussel? En studie av Vegdirektoratets tilpasning til EU og EØS-avtalen"
- 02/3: Trygve Ugland: "Policy Re-Categorization and Integration – Europeanisation of Nordic Alcohol Control Policies"
- 02/2: Julie Wedege: "Sosial rettferdighet og normativ legitimitet – En analyse av potensielle sosialpolitiske utviklinger i EU"
- 02/1: Øyvind Mehus Sjursen: "To motpoler konvergerer – En analyse av britisk og tysk tilnærming til politi- og strafferettssamarbeidet i EU"
- 01/8: Erik Oddvar Eriksen, John Erik Fossum and Agustín José Menéndez (eds): "The Chartering of Europe – The Charter of Fundamental Rights in Context"
- 01/7: Jarle Trondal: "Administrative Integration Across Levels of Governance – Integration through Participation in EU-Committees"
- 01/6: Marthe Indset: "Subsidiaritetsprinsippet i EU etter IGC-96"
- 01/5: Liv Kjølseth: "Konflikt eller samarbeid? En analyse av medlemsstatenes adferd under Agenda 2000-forhandlingene og det institusjonelle forhandlingssystemet i EU"
- 01/4: Various Contributors: "Shaping the Union? Nordic Presidencies in the EU" Proceedings from the ARENA Annual conference 2000.
- 01/3: Svein S. Andersen (ed): "Institutional Approaches to the European Union – proceedings from an ARENA workshop"

- 01/2: Maria Martens: "Europeisering gjennom overvåkning – En studie av ESAs opprettelse og virkemåte"
- 01/1: Inger Johanne Sand: "Changes in the functions and the Relations of Law and Politics-Europeanization, Globalization and the Role of the New Technologies"
- 00/8: Ulf Sverdrup: "Ambiguity and Adaptation-Europeanization of Administrative Institutions as Loosely Coupled Processes"
- 00/7: Helene Sjursen (ed): "Redefining Security? Redefining the Role of The European Union in European Security Structures", Proceedings from an ARENA Workshop
- 00/6: Christian Henrik Bergh: "Implementering av EU-direktiv i Norge, Postdirektivet – Nasjonal tilpasning i forkant"
- 00/5: Morten Dybesland: "Til felles nytte? Interesser og verdier bak nordisk utenriks- og sikkerhetspolitisk samarbeid"
- 00/4: Andreas Holm Bakke: "National Welfare and European Capitalism? The Attempt to Create a Common Market for Supplementary Pension"
- 00/3: Ingeborg Kjærnli: "Ikke bare makt og nasjonale interesser? En analyse av EUs utvidelse østover i et integrasjonsteoretisk perspektiv"
- 00/2: Jon Helge Andersen: "Fra atlantisk sikkerhet til europeisk usikkerhet? En studie av utenriksdepartementets og forsvarsdepartementets responser på endrede sikkerhetspolitiske rammebetingelser"
- 00/1: Various contributors: "Nordic Contrasts. Norway, Finland and the EU." Proceedings from the ARENA Annual Conference 1999
- 99/5: Elin Kristine Karlsson: "Babel i Brussel og Oslo? Flerspråkligheten i EU og respons i norske institusjoner"
- 99/4: Frøydis Eldevik: "Liberalisering av gassmarkedet i Europa. EUs gassdirektiv av 1998"
- 99/3: Theodor Barth & Magnus Enzell (eds.): "Collective Identity and Citizenship in Europe. Fields of Access and Exclusion"

- 99/2: Simen Bræin: "Europeisering som rettsliggjøring. EØS-avtalen, EU og det norske alkoholmonopolet"
- 99/1: Various contributors: "Between Autonomy and Influence - Small states and the European Union", Proceedings from ARENA's Annual Conference 1998
- 98/2: Heidi Olsen: "'Europeisering' av Universitetet: Fullt og helt - eller stykkevis og delt?"
- 98/1: Kjetil Moen: "Fra monopol til konkurranse. EØS, norsk legemiddelpolitikk og Norsk Medisinaldepot"
- 97/5: Jon Erik Dølvik: "Redrawing Boundaries of Solidarity? ETUC, Social Dialogue and the Europeanisation of Trade Unions in the 1990s"
- 97/4: Stig Eliassen & Pål Meland: "Nasjonal identitet i statsløse nasjoner. En sammenliknende studie av Skottland og Wales"
- 97/3: Frode Veggeland: "Internasjonalisering og Nasjonale Reformforsøk. EU, GATT og endringsprosessene i Landbruksdepartementet og jordbrukssektoren"
- 97/2: Vebjørn Dysvik: "The Road to Maastricht. Dynamic and Formative Forces in the EMU Process"
- 97/1: Jon Erik Dølvik: "ETUC and Europeanisation of Trade Unionism in the 1990's"
- 96/2: Tom Christensen: "Adapting to Processes of Europeanisation - A Study of the Norwegian Ministry of Foreign Affairs"
- 96/1: Various contributors: "Enlargement to the East". Proceedings from 'European Thresholds' - ARENA Conference Series