



Democracy Lost: The EEA Agreement and Norway's Democratic Deficit

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Abstract

The purpose of the EEA Agreement is to integrate the remaining EFTA countries (except Switzerland) into the EU's internal market. Norway was required to incorporate the material legal rules that were in force at the time when the EEA Agreement was ratified, and remains committed to incorporating all future EU law that is of relevance to the Agreement. The purpose is to maximize the freedom of movement of persons, capital, goods and services in all of the European Economic Area, as well as to strengthen and spread the cooperation to neighboring policy areas. To a large extent, this has made Norway a *de facto* EU member. The EU is based on a *status contract* intended to change the status of the states, something which spills over to the EEA Agreement. The latter is not an ordinary trade agreement between equal parties, but rather a *crofter contract*. But out of consideration for the *Realpolitische* consequences, Norway must relate to the EU as best it can. Successive Norwegian governments have systematically aspired to be part of as much as possible of the EU's activities. The democratic deficit for Norway will however increase as the cooperation within the EU expands and the institutions are reformed.

Introduction

National self-rule was one of the strongest arguments against Norwegian membership in the European Union (EU).¹ Securing the right of self-determination, popular rule and democracy was by far the most important 'No' argument in 1994 (Ringdal 1995, 51). The credo was that Norwegians were not to be ruled by laws enacted by others than themselves. Thus the already ratified EEA Agreement² (European Economic Area), which had come into force less than a year before the last EU referendum, and which was supposed to be only a temporary arrangement, became Norway's permanent attachment to the EU. To many of those who were skeptical towards EU membership, the EEA Agreement was perceived as a lesser evil; a deal which would secure Norway's access to the EU's internal market, while simultaneously minimizing cession of sovereignty.

Some claim that the No campaigners won in 1994, but have lost ever since. Every government since 1994 has brought Norway closer to the EU. Today, Norway is not only member of an increasingly comprehensive internal market and related policy areas, but also of Schengen (border control), and now also defense cooperation. Norway provides troops to be at the disposal of EU-led battlegroups. Consequently, Norway participates more than Denmark, which has opt-outs regarding e.g. defense cooperation, and the UK, which also has a number of opt-outs. That Norway must have a close and well-functioning association with the EU is seen as an established fact by all governments, regardless of how many anti-accession parties there are in the coalition. But where does this leave democracy? Self-government entails that the citizens have the authority to decide which issues are and which are not to be subjected to collective decision-making (Dahl 1982: 6).

The EEA Agreement ensures that EU rules become Norwegian law, without being subjected to the effective influence of the Norwegian citizens. Norway is committed to comply with rules that emanate from the EU and which Norwegian decision makers have not taken part in enacting. Paradoxically, this has not led to the EEA Agreement losing its popularity. In an opinion poll carried out in April 2008, 57.7 per cent responded that they would have voted 'yes' had there been a referendum on the Agreement today, while only

¹ Thanks to Erik Ryen and Bjørn Tore Erdal for assistance and to Kjartan Mikalsen, Fredrik Sejersted, Helene Sjørusen, Frode Veggeland and Ian Cooper for comments.

² The European Economic Area, currently consisting of 30 countries: the EU 27, Iceland, Liechtenstein and Norway.

23.1 per cent said they would have voted 'no'.³ In this sense the EEA Agreement can be characterized as a success. What is it then that makes it so problematic from a democratic point of view? I locate the problem in that we are dealing with a somewhat special kind of agreement. It reflects the EU's supranationalism; the EU is based on a status contract intended to change the states, something which spills over to the EEA Agreement. Furthermore I argue that the severity of the problems will only increase as the cooperation within the EU expands and the institutions are reformed. The overall claim is that the structural asymmetry built into the EEA agreement makes it a crofter agreement that positions the EEA countries in a second-rate situation. I maintain that under conditions of globalization, of juridification and executive dominance, the democratic deficit in Norway is bigger compared to that of the states which have chosen to become EU-members.

Dynamism and integration

Iceland, Liechtenstein and Norway, which now make up the EEA group, have chosen to remain outside the EU, but are still benefiting from participation in the internal market through the EEA Agreement. This should secure two goals: increased problem-solving capacity through market access and minimal concession of sovereignty (by keeping fisheries, agriculture and foreign policy outside the realm of cooperation).⁴ With sovereignty we understand actors' exclusive control with actions regarding themselves and with the conditions pertaining to these actions. A sovereign group controls its own agenda. Strictly speaking, it is correct that the EEA Agreement is an international agreement, which respects the sovereignty of the contracting parties, as the EFTA⁵ countries have not delegated decision-making competency to supranational bodies. The Norwegian parliament, the 'Storting' has enacted the Agreement on the basis of a qualified majority vote, and it can be terminated by the contracting parties. Yet, EFTA's Surveillance Authority - ESA - does have

³ T. Valestrand, 'Vi sier ja til EØS', *Bergens Tidende* 21.4.2008. For a discussion, se E. Ryen, 'Den populære EØS-avtalen', *Bergens Tidende*, 6.5.2008.

⁴ The EEA Agreement does not integrate Norway into the EU's customs union and common commercial policy either. Norway therefore negotiates and speaks on its own behalf in the World Trade Organization (WTO), and is free to determine tariff rates, enact trade sanctions and enter into trade agreements with third countries

⁵ The European Free Trade Association (EFTA) is a European trading bloc established in 1960 which is based in Brussels. Currently the organization has four members: Iceland, Liechtenstein, Norway and Switzerland. EFTA has free trade agreements with a number of countries, the most comprehensive one being the EEA Agreement (in force from 1.1.1994), which grants the member states (except Switzerland) access to the EU's internal market.

direct competency in questions regarding competition (including public procurement and government subsidization). In these areas, ESA has authority equivalent to that of the European Commission. Norway has, then, conceded sovereignty, something that is reflected in that the Agreement needed a $\frac{3}{4}$ majority in the Storting in order to be ratified.

The EEA Agreement is based on that portion of EU law that regulates the internal market. The core of the Agreement consists of rules pertaining to the four freedoms, and competition law, government subsidies, and public procurement. In addition to this, there are certain legal areas which do not concern the four freedoms directly, but which help these to work better, as well as some so-called fringe areas. The latter refer to 'areas of EU law that are on the fringes of the ambit of the EEA Agreement, but where one has nonetheless wanted more or less comprehensive cooperation' (Sejersted 2004a, 93, author's translation). We are dealing with a dynamic framework agreement that must not be re-negotiated every time the EU adopts a new relevant legal act. Instead, the Agreement is updated periodically so that the legislation within the entire EEA remains uniform. In order to secure the main purpose of the Agreement, upholding the uniformity of the internal market, the dynamic aspect is of great importance. A principle of homogeneity has been put into effect, meaning that the same rules apply to the EFTA partners and the EU countries (van Stiphout 2007). This leads to the inclusion of most of the *acquis communautaire* in the EEA Agreement. By the end of 2006, 5300 legal acts had been incorporated into Norwegian law, including 99.3 per cent of all directives then in force.⁶ Norway is, then, a member which has chosen to remain outside the formal decision-making channels, but which nevertheless has incorporated the EU's directives and regulations into its national law.

This is the most comprehensive agreement Norway has ever signed, and it is a special agreement. It is not only special because it applies to very unequal parties - three small EFTA countries against 27 EU member states, but also because its purpose is to integrate the EFTA countries into the EU's internal market. It is not only so that Norway is committed to incorporate a given set of legal rules and directives; the country is also expected to incorporate all future

⁶ Europaportalen, *Gjennomføring av direktiver i norsk rett*, available electronically at: <http://www.regjeringen.no/nb/sub/Europaportalen/norsk-europapolitikk/europafakta/05---Gjennomforing-av-direktiver.html?id=487389&epslanguage=NO>, accessed on 27.08.2008.

legislation relevant to the Agreement.⁷ It is an expansive agreement which increases in scope as the EU enlarges and integration deepens.

An expansive status contract

In contrast to what is the case with an ordinary international treaty, where presumably equal parties enter into, renew or terminate an agreement, the EU is based on a status contract, whose purpose it is to change the status of one of the parties. Its object is to change, confirm or 'nullify the status of at least one of the parties' (Offe and Preuss 2007, 192). The purpose of the status contract is to change the members' status from nation states to member states. Similarly, the EEA Agreement aims at making Norway, Iceland and Liechtenstein similar to the EU countries by requiring them to incorporate large parts of the Union's *acquis communautaire* into their respective national legal systems. In an ordinary contractual relationship, the parties, on a voluntary basis, enter into a legally binding agreement which can be changed or renewed only on the basis of unanimity. Nothing is changed unless everyone agrees. Such an agreement is a sort of 'gentlemen's agreement' which presupposes equality and mutual independence, and which does not touch upon the parties' sovereignty and identity. The parties remain the same after the contract has come into force. Thus, an international treaty does not establish own criteria for legitimacy (Frankenberg 2000, 260-1). An international organization is prototypically based on indirect legitimization. The EU, on the other hand, has an independent source of legitimacy; it is not merely legitimized indirectly through the member states – by bodies that are themselves legitimate, but also based on direct legitimization from the citizens of Europe (Beetham and Lord 1998, 11; Eriksen and Fossum 2008).

The term status contract is self-contradictory, as it departs from the very essence of a contract as an agreement that does not infringe on the status of the states as sovereign parties.⁸ The term is however suited to throwing light on the dynamics inherent in the European integration process. The EU, which has both intergovernmental and supranational structures, can best be characterized as a *bund* (Schönberger 2004). It is something more than an

⁷ 'Because EC law and therefore also EEA law are dynamic areas of law, more and more areas will require the adaptation of national law' (Veggeland 2002, 350, author's translation).

⁸ A status contract is an oxymoron, designating 'the legal confirmation of a pre-legal relationship' – an existential relationship 'in which a person with a particular identity enters into a new legal relationship [...] for the purpose of changing this identity in a new way' (Offe and Preuss 2007, 192-3).

international organization or an association of states, but less than a federation. It takes a peculiar intermediate position in relation to international law. It is a hybrid that can hardly be placed within ordinary state-theoretical terms. The states have a strong position within a quasi-federal structure which places EU law above national law. The principle of direct effect gives EU law the same force as internal, national law, and the principle of supremacy of EU law means that national law must yield to Community law, in those areas where the EU has competency, when the two sources of law come into conflict. Moreover, in contrast to a regular international organization, the EU has an independent source of legitimacy because of its representative bodies and the European Court of Justice (ECJ), with its exclusive right to interpret the Treaties. The Court acts as an authoritative interpreter of the Treaties and not as an agent of the member states. The EU enacts laws that reach throughout Europe through institutions that are committed to the Union itself.

From the very start, the European Commission was given an important role as initiator, executor and 'guardian' of the Treaties that the collaboration was based on, while the ECJ, which was to secure that legal acts were applied to the same degree in all member states, already in the early 1960s established that Community law was to take precedence over national law. During the last twenty years, as the scope of the collaboration has increased immensely, also the decision-making structure has become more and more supranational. Qualified majority has replaced unanimity as the dominant decision-making principle in the Council. The European Parliament (EP), which since 1979 has been directly elected, has developed from a consultancy body into a powerful decision-maker - a co-decider (with the Council) - which the other institutions in Brussels can no longer ignore. In other words, both the scope and the degree of supranationalism in the European cooperative scheme is significant, and increasingly so.

The EU is an organization in its own right and with a democratic vocation. It has its own legal basis, supranational institutions, and direct links to the citizens. It is based on the rather self-contradictory, but expansive status contract. The EEA Agreement, whose purpose is to integrate Iceland, Liechtenstein and Norway into the EU's internal market, is of course marked by this construction. But because these countries' authorities and citizens lack representation in the EU's decision-making bodies, the EEA Agreement does not only bear the imprint of a status contract, but also of a crofter contract. In much the same way as a crofter, Norway has entered into a relationship that makes its subject to the will of an authority that it cannot control and an authority that is under no obligation to take Norway's opinions into account. Not only do the EEA countries lack a seat at the table where decisions are

made, it is also the EU that has the right of initiative and that interprets what is of relevance to the Agreement. Thus, we are dealing with an unbalanced agreement between very unequal parties.

Supremacy of Community law

The superiority of the EU is established early in the Norwegian EEA Act of 1992.⁹

Legal provisions that serve to fulfill Norway's commitments according to the Agreement, shall in the case of conflict take precedence over other provisions regulating the same matter. The same goes for cases in which a regulation that serves to fulfill Norway's according to the Agreement, conflicts with another regulation or runs into conflict with a later law.

EEA Act § 2 (author's translation)

In a legal sense, paragraph 2 does not establish superiority of EEA rules in relation to other laws. The Storting can 'at any time pass a law that goes against implemented EEA rules, and Norwegian courts would be obliged to adhere to this law, even in if this entailed a treaty breach that Norway could be convicted for by the EFTA Court' (Arnesen 2004, 245, author's translation). The legislative competency of the Storting is, in contrast to paragraph 2, established in the Norwegian constitution, and the provision should therefore be seen as expressing a principle of interpretation rather than a formal curbing of the national parliament's sovereignty and superiority (ibid). Whether national or EU law should take precedence is thus a (political) question of how to weigh the two sources of law. However, the EFTA Court has established that the EEA Agreement is 'an international treaty sui generis which contains a distinct legal order of its own' that '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' (Graver 2005). Because of the dramatic consequences – Norway could be sued for treaty breach – it will in any case be difficult for the Storting to enact laws that go against EEA rules. For most practical purposes EEA law, as it is implemented in Norwegian law, is given precedence over other Norwegian legislation. Freedom and autonomy is more formal than real (Arnesen 2004: 245).

As already noted, it is the EU that has the real power to interpret what falls under the EEA Agreement. Furthermore, the competency to interpret whether

⁹ The act specifying how the EEA Agreement is to be implemented in Norway law.

a Norwegian law breaches EEA rules rests with the EFTA Court and not with the Storting or Norwegian courts. 'If ESA comes to the conclusion that an EFTA state has not fulfilled a commitment following from the EEA Agreement, the state can, according to Article 31, be brought before the EFTA Court on allegations of treaty breach.' (Sejersted 2004b, 156, author's translation).

Formally speaking, Norway has the opportunity to affect or resist the EU's decisions. New EU rules do not automatically become part of the EEA-agreement, but must be adopted in the EEA Committee, where the EEA countries and the EU are represented. However, the Committee has very little leverage regarding the contents of the legislation. The negotiations in the EEA Committee, in which the legal act is formally adopted, provide an opportunity to arrive at interim and accommodative arrangements, but not changes of or additions to the substantial contents of the EU legal act (Andersen 2000, 125). When it comes to preventing new EU rules from being made part of the EEA Agreement, the possibilities for influence are greater. Decisions in the Committee are made unanimously, and if agreement is not reached with regard to the implementation of a legal act, the EEA countries can reserve themselves collectively against the inclusion of the act in the Agreement. This means that Norway can prevent legislation from being incorporated into the EEA Agreement, but it has no means of stopping the EU from adopting its own legislation. Therefore, the EEA countries do not have a right to veto, but rather a reservation right. However, this right is in practice very difficult to make use of. If it were to be used, the entire EEA-arrangement, and thus also the interests of Iceland and Liechtenstein, would come under threat. Reservation would create imbalance in the internal market, which could again lead to counter-reactions from the EU in the shape of protective measures, i.e. measures to handle the practical problems that would follow from such an imbalance.¹⁰ The reservation right has therefore remained latent in the 15 years that the EEA Agreement has been in force, and it is doubtful whether any government will be willing to risk the uncertain consequences of using it.¹¹

Democracy under pressure

Democracy is founded on the two foundational principles of autonomy and accountability: Autonomy refers to the basic democratic principle that those

¹⁰ For a discussion of what counter-reactions the EU could be expected to employ, see: Arnesen, Graver and Sverdrup 2001, 19-32.

¹¹ U. Sverdrup, 'Hva vet vi om veto?', *Bergens Tidende*, 6.12.2006.

who are subjected to laws should also be the ones to enact them. This criterion implies that the political exercise of power has the character of being a process where the citizens themselves are the legislators, either directly or through their representatives. The principle of accountability indicates that there must be in place a communicative process through which reasoned answers to questions that arise in the public sphere are demanded from the political leaders, and that these leaders, in cases where they cannot provide such answers and come to be seen as incompetent, can be removed from office (Bovens 2007). Moreover, for these two principles to be realized, ensuring that the citizens can govern themselves autonomously via law and politics, congruence between *de jure* jurisdiction and the actual reach of political bodies is required. For citizens to be able to control their agenda, possessing the organized capacity to act on common problems and realize collective goals, overlap between political and social space is required (Zürn 1998).

In a democratic Rechtsstaat, participation in public debate and in elections to representative institutions warrants the presumption that the democratic principles are met. The decision-makers that get a public mandate through elections, and after a public exchange of views, can be held accountable through public scrutiny, and can be ousted at the following elections. With regard to the EU it is more complicated, as it is the Council, where only national governments are represented, which has the most power. Still, the EU differs from other international organizations, which are based on mere delegation of sovereignty that can be controlled and withdrawn by the contracting parties. The institutions have *de facto* autonomy over decision-making, and considerable opinion- and will formation takes place in the decision-making fora at the European level. This occurs in committees and policy networks, in the Commission as well as in the Council, where experts and interest groups are represented. Most significantly, the directly elected EP breaks with the delegation model altogether, and by extension with the understanding of the EU as a traditional international organization. Rather, the EU is a supranational organization with direct links to a European citizenry. This does not mean that the requirements of autonomy and accountability are fully realized but, in a globalized world, membership in such an organization increases congruence, and by implication the members' organized capacity to act.

Norwegian citizens are not represented in the bodies that enact EU legislation, the EP and the Council. While representatives of the EU's member states and citizens have decision-making authority, the Norwegians and the Norwegian government, to the extent that it aspires to affect the decision making process, must make do with the informal leverage they can acquire through traditional

diplomacy and lobbying.¹² In addition, Norwegian experts partake in many of the Commission's expert groups (Trondal 2006). In fact, Norwegian seconded national experts take part in more than 200 committees in the EU-system. However, they are barred from the most important ones, especially the key committees in the Council. Lobbyism and committee membership gives Norwegian citizens some influence, but this can of course not compensate the democratic deficit in Norway's relationship with the EU. Norway has become a decision-taker and not a decision-maker. The problem is compounded in that the EEA Agreement makes it difficult even to fulfill the criteria of autonomy and accountability nationally. This concerns three issues in particular:

- a) The legislative role of the Storting is weakened to the advantage of the government and the public administration.
- b) The central administration is strengthened in relation to the local administration.
- c) The power of the courts increases to the detriment of both the Storting and the administration. (Sejersted 2004a, 99-100).

Although the ratification of the EEA Agreement did not imply a constitutional amendment, it is fair to say that the actual content of the constitution has changed considerably. With the EEA Agreement in force, the scope for Norwegian authorities to exercise discretion is reduced in many areas. This is true especially in areas such as government subsidization and the exposure to competition of public contracts. Here, Norwegian legislative authority is suspended completely, leading some to characterize the Agreement as a constitutional catastrophe (Nordby and Veggeland 1999). The EEA Agreement limits the space of opportunity for national politics, as we have seen in connection with the reservation right. National democracy is also weakened because Norwegians are disconnected from the European communication streams and the learning process that takes place through public reasoning in connection with elections and campaigns. Because Norway does not take part in the initial phase, when issues emerge on the EU's political agenda, there is little public debate over directives or regulations before they are made into EU law. The Norwegians are presented with a *fait accompli*. When for example one can only take a position on as important a piece of legislation as the

¹² Norwegian Minister of Foreign Affairs, Jonas Gahr Støre, described Norway as 'a kind of lobby-nation' in the discussion programme *Redaksjon EN* on the Norwegian public broadcasting network NRK, 23.4.2008.

Services Directive after it has been adopted by the EU, the debate is suddenly turned towards the question of what would happen if Norway were to say no, rather than on the merits of the Directive itself. Thus, the conditions for free and independent opinion formation are worsened. The EEA Agreement and other agreements that Norway has with the EU have a negative effect on the principles of autonomy and accountability, but have positive economic and social advantages: Through market access and open borders, Norway's problem-solving capacity is increased.

De-nationalization and juridification

While the nation states' de jure sovereignty is firmly anchored in the UN Charter, their de facto sovereignty is today under great pressure. The world economy is open and is becoming increasingly integrated. Cash flows are globalized and the ability to maintain autonomous national control of the economy is reduced, at the same time as the world is faced with new challenges that hardly can be handled within the confines of the nation-state. The international situation is marked by an intense interdependence between the states and many problems which require coordinated efforts across national borders. Examples are unstable financial markets, exodus of taxpayers, pollution, ecological crises, unregulated migration, refugees, and human rights violations. Because of de-nationalization and the emergence of new forms of governance beyond the nation state, no national community is fully able to control its scope of action, and no state decides exclusively what conditions should apply for its own citizens. De-nationalization undermines the two symmetries that are necessary for effective participation, namely overlap between the citizens and the responsible decision-makers, i.e. input congruence; and between the decisions and the territory they apply for, i.e. output congruence. Without participation in decision-making processes by those affected by them, no real self-determination, and without accordance between the political system and the territory that is to be controlled, no effective participation (Held 1995, 16). In a globalized world, the individual nation-state cannot with own resources alone realize the freedom and welfare of the citizens. The EU can be seen as an attempt to counter this; through the establishment of supranational governmental structures, the output congruence is increased.

The term globalization evokes associations to liberalization, de-regulation and free movement of capital, or what we call economic globalization, but it is also manifested in international and supranational decision-making bodies and legal structures. A formidable building up of international law has taken place

in the wake off the establishment of the UN (especially the Universal Declaration of Human Rights and the International Criminal Court (ICC)), which in reality has curbed the sovereignty of the nation states. The European Court of Human Rights in Strasbourg protects the rights of European citizens; they can now sue their own state. The ICC sets limits to the governments' room for action; war criminals can now be convicted in The Hague. National interests are often overrun. The WTO, through its dispute settlement body, can make decisions that are binding on all its member states, even those that may not agree to the particular decision. The tradition of quoting international legal sources in the pronouncement of judgments in national courts allows norms that have not been explicitly accepted by the citizens to become part of *de lege lata*. Furthermore, it can be asserted that the EU's regulatory policies regarding working standards, environmental standards-, and human rights standards, overrun national legislative processes,¹³ but secure the rights and status of the individual.

The problem with this buildup of international law is that it implies a juridification. From a democratic perspective, juridification is problematic because it implies a subsumption of the citizens to a legal system that they cannot easily influence.¹⁴ This system is marked by the absence of representative institutions, i.e. mechanisms for democratic control. The problem is also partly true of the EU, as it is a defective democracy with many representative weaknesses and a disproportionately strong court. The consequence is that rights protection increases, but at the expense of national democracy. It is not the citizens themselves or their representatives that enact the laws, but legal practitioners, civil servants and bureaucrats. Although globalization as well as Europeanization leads to juridification, the citizens of countries that are members of the EU still have some leverage to influence the supranational decisions, especially through their representatives in the EP and through their governments' representatives in the Council. Norwegian citizens are not represented in the few elected bodies that have been established in order to adopt, and to check the application of, new supranational rules. But what does democracy mean today?

¹³ In the WTO, it is the European Commission that negotiates on behalf of the EU member states in the areas that are covered by the Treaties. It is also the Commission that deals with disputes on behalf of the member states.

¹⁴ See Bohman 2005, 39 and see Blichner and Molander 2008 for a refined conceptualization of juridification.

On democratic legitimacy

Democracy, understood as the self-rule of a sovereign people, becomes problematic under conditions of complex interdependence and international juridification. The idea of national sovereignty safeguarding constitutional rule, which in turn enables and justifies democracy and thus the protection of the citizens' rights and interests, becomes confining. From a normative point of view, democracy requires that the citizens, when their rights have been infringed, can bring their grievances before a superior authority. Any 'people' can get it wrong, and needs correctives; majority decisions can violate the rights of individuals and minorities, and national, constitutional law does not always protect them. Supranational bodies are needed in order to prevent the nation states from violating the rights of their citizens, states violating each other, and the policies of one state creating negative externalities that others have to pay for. Still, supranational rights protection is problematic as long as post-national democracy is lacking.

Moreover, democracy can no longer mean only the collective self-determination of a community based on one conception of who 'we' are or of the common good, as this has become abstract, has dissolved, and has retreated into institutional procedures: 'Our common good, then – the good and interests we share with others – rarely consists of specific objectives, activities, and relations; ordinarily it consists of the practices, arrangements, institutions, and processes (...)' (Dahl 1989, 307). Hence popular sovereignty no longer means the substantive will of a people: it does not constitute a single subject which is capable of acting, but acts only in the plural; 'the People' consists of many peoples. The will of the people then rather stems from the way the procedures for opinion-formation and decision-making – legislative procedures of constitutional democracies – register and integrate all the interests and values of the citizenry. Popular sovereignty has become proceduralized in modern states as laws are correct when they have been decided through correct procedures. This is reflected in the basic principle of discourse theory, according to which only those action norms are valid that all affected persons can agree upon as participants in rational discourses (Habermas 1996, 107). Only public deliberation can get political results right because it entails justification towards the ones affected.

What is more, nationally confined democracy is not worth much if it is not able to get things done. Small nation-states have a low capacity to affect the conditions under which they act, and their sovereignty therefore becomes more symbolic than real. Thus, democratic legitimacy is not only dependent on mere compliance with the principle of autonomy, but also on congruence

and the possibility for effective control over own agenda. Democratic procedures have an epistemic justification: they are there to ensure good and just decisions. Democratic legitimacy is therefore not grounded merely in the possibility for participation or in the realisation of certain given preferences, but moreover in the access to a process that is of such a quality that presumptively reasonable, generally acceptable decisions are made (Habermas 2001, 110). Without results there is no legitimacy, and without congruence there is no effective democracy. It is in this light one has to see Norwegian governments' active effort to tie Norway increasingly closer to the EU.

More integration and more supranationalism

Norway's dealings with the EU do not end with the EEA. In the preamble of the EEA Act, it is established that the Agreement is to encompass 'closer cooperation in other areas, such as research, development, environment, education and social policy'.¹⁵ The body of rules is constantly evolving as new areas are added. The EEA gives Norwegians and Norwegian private businesses the same rights and duties as the EU citizens when it comes to trade, investments, services, banking and insurance, and Norwegians are entitled to work, study, and live in the other countries of the Area. The system of agreements also encompasses cooperation within the areas of research, education, environment, gender equality, consumer protection, workplace environment, tourism, disaster preparedness, etc.

The EU has sustained a rapid expansion of political regulation in Europe, and has over a period of fifty years transformed the political landscape in a profound manner. Integration has deepened as a wide range of new policy fields have been subjected to integrated action and collective decision-making. This has taken place not only with regard to trade, monetary and business regulation, fishing and agriculture, but also with regard to foodstuff production, gene- and bio-technology, labour rights, environmental protection, culture, tourism, immigration, police and home affairs and now also with regard to a common foreign and security policy. The EU has succeeded in entrenching peace and it has established a Single Market, a Monetary Union – the Euro – a common European citizenship and a Charter of Fundamental Rights. Even though the powers of the Union in many policy areas – such as social and tax policy – are severely restricted, a significant amount of laws and amendments in the nation states stem from the binding EU decisions, directives and regulations.

¹⁵ The EEA Law, Article 1.2. (author's own translation).

No Norwegian ministry and hardly any legal field remain untouched by EU law. Every government after 1994 has brought Norway closer to the Union, and several parallel agreements outside the EEA have been added, such as the Schengen Agreement (border control and police cooperation), which is also a framework agreement with legislation being added successively, and agreements about Norwegian participation within the EU's Security and Defence Policy (ESDP), and in the reforms of higher education and research, which have increasingly become an EU matter (Olsen and Maasen eds, 2007). The fact that the Ministry of Education and Research gives universities and university colleges that take part in the EU's framework programme 2.13 times more in basic funding illustrates the strong emphasis on cooperation on all levels. The EU connection solves important problems for Norway; out of consideration for Realpolitik, it has become a necessity to cooperate with the Union (Sverdrup and Trenz, 2008), and for many practical purposes Norway has therefore become a de facto EU member, though without the right to participation in decision-making bodies.

The deepening of the EU's own integration process culminated (temporarily) with the Constitutional Treaty (2005), which suffered defeat in popular referenda in France and the Netherlands. It has now been replaced by the Lisbon Treaty, which was signed in November 2007, and is scheduled to take effect from January 2009.¹⁶ This treaty to a large extent consolidates already existing EU legislation, and reaffirms that the Union has become an organization in its own right and something far more than a common market. Both the codification of rights and the decision-making systems bear testimony to this. The Charter of Fundamental Rights, which constituted the second part of the initial Constitutional Treaty, has now been replaced by a cross-reference with the same legal value.¹⁷ The reference to free and undistorted competition as an objective of the Union has been removed, although the free trade regime can still be regarded as constitutionally entrenched. New elements include references to challenges such as climate change and energy solidarity, and there is a higher degree of flexibility with regard to participation in new policy fields, such as border control, asylum and immigration, and legal cooperation in justice- and police matters.

The most important provisions of the Constitutional Treaty regarding institutional changes are kept. The use of qualified majority voting is extended

¹⁶ At the time of writing, the future of the Lisbon Treaty is uncertain after Irish voters turned it down in a referendum on 12.06.2008.

¹⁷ The Charter is not binding on Poland and the UK.

to 40 new areas, and in the Council a double majority rule (55 per cent of the member states and 65 per cent of the population) becomes the standard decision-making mechanism in most areas. Furthermore, a permanent presidency (2,5 years) of the European Council is introduced, as is a 'foreign minister' with a double portfolio, attached to both the Council and the Commission. The number of commissioners is reduced from today's 27 to 18 by 2014, the EU's own legal personality is affirmed, and national parliaments are strengthened through the introduction of an early warning mechanism that gives them the right to oppose legislation that is not in conformity with the principle of subsidiarity.¹⁸ Finally, the powers of the EP are increased through the provision that the co-decision procedure is to be renamed the 'ordinary legislative procedure', and become the main rule, approximating the EU to a bicameral system; and a popular right of initiative is introduced, allowing citizens to petition the Commission directly.¹⁹

The Lisbon Treaty is intended to simplify and streamline the decision-making process, and is presented as a contract between the member states – a mini treaty – not as a constitution. However, because it is built on the existing body of law, it is very complex, and it transfers more power to the institutions of the Union. It comes on top of an already comprehensive set of treaties and entails another turn of the spiral of supranationalism. A Charter with legal force, the proliferation of majority voting to new policy areas, and new voting procedures, affect national governments and parliaments and the power relations between them. These changes have consequences for the interests and values of the citizens, and are consequently constitutional in nature. They touch upon the fundamental rules for political intercourse in Europe, and democracy's first commandment is that the basic principles of a political order are laid down with the partaking of all affected parties.

¹⁸ The Lisbon Treaty introduces an early warning mechanism that will give all the EU's national parliaments eight weeks to assess whether or not a legislative proposal is in conformity with the principle of subsidiarity as it is codified in Article 5 of the consolidated Treaty on European Union (TEU). Whenever one third of the parliaments conclude that the proposal would represent a breach of subsidiarity, the Commission will have to consider it anew. In addition, if the Commission decides to sustain the proposal and at least half of the national parliaments believe that it would represent a breach, the Commission must forward the arguments of the parliaments to the Council and the EP, as an attachment to the proposal. At this point a negative vote in either chamber would block the proposed measure.

¹⁹ It is stated in Article 11 of the consolidated TEU that: 'Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties.'

New dilemmas

The Lisbon Treaty contains a number of changes with consequences for the EEA cooperation. To begin with, it will mean an end to the three-pillar-structure of the original TEU. The second pillar, the Common Foreign and Security Policy, will maintain its intergovernmental structure, but the other two pillars, the EC and Justice and Home Affairs, will be merged. For the EEA member, Norway, the increasingly integrated and binding cooperation in the EU creates difficulties. Issues interlock, and dynamics in one area beget consequences for others. For decision-makers, it becomes necessary to see several policy fields in context, something that is all the more difficult for Norwegians because of the country's peculiar position as half insider and half outsider. The Minister of Foreign Affairs, Jonas Gahr Støre, pointed to one of the central challenges facing Norway's European policy in his speech to the Storting 22.04.08: 'Cooperation in the EU develops in ever new areas - and beyond the internal market. To an increasing extent, cooperation is cross-sectoral, and coordination takes place across the pillars.'²⁰ If the Lisbon Treaty is ratified, it will become even more difficult to distinguish between what is relevant to the internal market, thus committing Norway under the EEA Agreement, and what is not.

The aim of developing regulations can be to achieve something that formally goes beyond the scope of the EEA Agreement, but which at the same times has implications for economic actors operating in the internal market. Assessing whether or not these regulations are then EEA-relevant is not easy.²¹

In addition, the Lisbon Treaty will, if ratified, lead to considerable transfer of power from the Commission and the Council to the directly elected EP. Because the opportunities of the EFTA countries to affect the legislation that is adopted are largely confined to traditional diplomatic channels, the weakening of the state actors in the decision-making structure will make it even harder for these countries to make an impact. While most of the countries of Europe have now, through the EU, made foreign politics into domestic politics and established common procedures for conflict- and problem resolution, Norway is left to old-fashioned diplomacy and 'corridor politics'. That the Lisbon Treaty makes more areas subject to majoritarian procedures means that the EU's supranationalism is increased and that the opportunity

²⁰ Støre, J. G., *Halvårlig redegjørelse om viktige EU- og EØS-saker*, Stortinget 22.4.2008, author's translation.

²¹ Ibid.

for influence through bilateral diplomacy is further decreased. Supranationalism implies that the EU not only solves the problems of the member states, but also wields influence over the states and their citizens. The effects are evidently felt in Norway today. It is indeed a paradox that the development of the EU towards a democratic polity in its own right has the inverse effect of reducing the opportunities of Norwegians to take part in the making of decisions that have a strong and direct impact on their daily lives. For them, the republican condition of not being subject to the arbitrary will of an alien power under the rule of law has not been met (cp. Pettit 1997, 31).

Conclusion

Out of consideration for Realpolitik, Norway must try to affect the policies of the EU as best it can. That is why successive Norwegian governments have systematically aspired to be part of as much as possible of what is undertaken within the EU. The result is that the Norwegian people are to a large extent steered from Brussels, even though 52.2 per cent voted against joining the Union in 1994. Norwegian citizens are affected by the EU's rules as employers and employees, as students and teachers, as customers and clients, and as users of public services. Norway's political agenda is increasingly influenced by the EU. As citizens, Norwegians are affected negatively by this imbalance. They have acquired more economic and social rights, but their political rights have been weakened as the opportunity to partake in creating and shaping the actual rules has diminished. For those who voted against EU membership out of consideration for national democracy, the outcome could hardly be worse: supranational governance without a modicum of participation. One can rightfully ask for the popular mandate of the prevailing policy. With what right can the Norwegian government and parliament pursue such a persistent and comprehensive integration into the EU?

References

- Andersen, L. (2000) *Demokrati i klemme? EØS-avtalen i et demokratiteoretisk perspektiv*, MPhil dissertation at the Department of Political Science, University of Oslo.
- Arnesen, F. (2004) 'EØS-reglernes betydning i norsk rett', in Sejersted, F., Arnesen, F., Rognstad, O.-A., Foyn, S. and Kolstad, O., *EØS-rett*, 2nd ed. Oslo: Universitetsforlaget.
- Arnesen, F., Graver, H. P. and Sverdrup, U. (2001) *Vetoretten i EØS*, ARENA Working Paper No. 2, 2001 (Oslo: ARENA).
- Beetham, D. and C. Lord (1998) *Legitimacy and the European Union* (London: Longman).
- Blichner, L. and Molander, A. (2008) 'Mapping Juridification', *European Law Journal*, Vol. 14, No. 1, pp. 36-54.
- Bohman, J. (2005) 'Reflexive Constitution-Making and Transnational Governance'. In Eriksen, E. O. (ed.) *Making the European Polity: Reflexive Integration in the EU* (London: Routledge).
- Bovens, M. (2007) 'Analysing and Assessing Accountability: A Conceptual Framework', *European Law Journal*, Vol. 13, No. 4, pp. 447-68.
- Dahl, R. (1982) *Dilemmas of Pluralist Democracy: Autonomy Vs. Control* (New Haven, CT: Yale University Press).
- Dahl, R. (1989) *Democracy and Its Critics* (New Haven, CT: Yale University Press).
- Eriksen, E. O. and Fossum, J. E. (2008) *Reconstituting European Democracy*, ARENA Working Paper No. 1, 2008 (Oslo: ARENA).
- Frankenberg, G. (2000) 'The Return of the Contract: Problems and Pitfalls of European Constitutionalism', *European Law Journal*, Vol. 6, No. 3, pp. 257-76.
- Graver, H. P. (2005) *EEA, Supremacy and the Liquidity of Law – does EU Law Trump the Norwegian Constitution?*, mimeo.
- Habermas, J. (1996) *Between Facts and Norms. Contributions to a Discourse Theory of Law* (Cambridge, MA: MIT Press).

- Habermas, J. (2001) *The Postnational Constellation: Political Essays* (Cambridge: Polity Press).
- Held, D. (1995) *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Stanford, CA: Stanford University Press).
- Nordby, T. and Veggeland, F. (1999) 'Lovgivningsmyndighetens suspensjon: Stortingets rolle under EØS-avtalen', *Tidsskrift for samfunnsforskning*, Vol. 40, No. 1, pp. 87-109.
- Offe, C. and Preuss, U. K. (2007) 'The Problem of Legitimacy in the European Polity; Is Democratization the Answer?'. In Crouch, C. and Streek, W. (eds) *The Diversity of Democracy: Corporatism, Social Order and Political Conflict* (Cheltenham: Edward Elgar).
- Olsen, J. P. and Maasen, P. (eds) (2007) *University Dynamics and European Integration* (Dordrecht: Springer).
- Pettit, P. (1997) *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press)
- Ringdal, K. (1995) 'Velgernes argumenter'. In Jenssen, A. T. and Valen, H. (eds) *Brussel midt imot* (Oslo: Ad Notam Gyldendal).
- Schönberger, C. (2004) 'Die Europäische Union als Bund: Zugleich ein Beitrag zur Verabschiedung des Staatenbund-Bundesstaat-Schemas', *Archiv des öffentlichen Rechts*, Vol. 129, No. 1, pp. 81-120.
- Sejersted, F. (2004a) 'Hovedtrekk ved EØS-avtalen'. In Sejersted, F., Arnesen, F., Rognstad, O.-A., Foyn, S. and Kolstad, O. *EØS-rett*, 2nd ed. (Oslo: Universitetsforlaget).
- Sejersted, F. (2004b) 'Institusjoner i EØS', in Sejersted, F., Arnesen, F., Rognstad, O.-A., Foyn, S. and Kolstad, O. *EØS-rett*, 2nd ed. (Oslo: Universitetsforlaget).
- Sverdrup, U. and Trenz, H.-J. (2008) 'Begrenzte Autonomie: Die norwegische Europapolitik im Spannungsfeld des EWR-Abkommens'. In Hüttmann, M. G., Chardon, M. and Frech, S. (eds) *Das neue Europa* (Schwalbach: Wochenschau Verlag).
- Trondal, J. (2006) 'Norske departementer og beslutningsprosessene i EØS'. In Fonn, B. K., Neumann, I. and Sending, O. J. (eds) *Norsk utenrikspolitisk praksis: Aktører og prosesser* (Oslo: Gyldendal Akademiske).

van Stiphout, T. (2007) 'Homogeneity vs. Decision-making Autonomy in the EEA Agreement', *European Journal of Law Reform*, Vol. 9, No. 3, pp. 431-447.

Veggeland, F. (2002) 'EØS, folkerett og maktfordeling: Høyesteretts dom i Finanger-saken', *Norsk Statsvitenskapelig Tidsskrift*, Vol. 18, No. 4, pp. 328-55.

Zürn, M. (1998) '*Regieren jenseits des Nationalstaates: Globalisierung und Denationalisierung als Chance*' (Frankfurt: Suhrkamp).