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# The European Constitution, Welfare States and Democracy

The four freedoms vs national  
administrative discretion

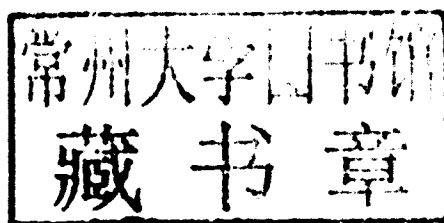
Christoffer C. Eriksen



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# **The European Constitution, Welfare States and Democracy**

This book explores how the right to the free movement in the European Union affects the capacity of national governments and administrative authorities both to govern economies and markets and to ensure the welfare of their citizens. The rights to free movement of goods, persons, services and capital, known as the four freedoms, have become vital instruments for the protection of a European market unencumbered by internal frontiers. They are also elements of the European Union's legal order which have inspired analyses of this as a constitutional order. *The European Constitution, Welfare States and Democracy* explores the relationships and the conflicts that have emerged between the legal order of the European Union and the legal regulation of mixed economies and markets within welfare states. In particular, the book examines the threat posed to the discretionary powers enjoyed by national governments and administrative authorities, and the democratic dilemmas produced by this.

Christoffer C. Eriksen has undertaken a comprehensive analysis of a series of judgments in which the European Court of Justice has clearly indicated the ways in which the four freedoms may be incompatible with the current practice of entrusting national administrative authorities with discretionary powers and thus highlights how the four freedoms are provoking democratic dilemmas, previously neglected in the academic literature. The book is written in a style which communicates beyond an audience of specialised legal scholars and although it includes analysis of black letter law, its methodology also draws from the disciplines of philosophy, political science and sociology.

**Christoffer C. Eriksen** is a research fellow in the Law Faculty at the University of Oslo. He has previously worked as a senior lawyer in the international law firm Wikborg, Rein & Co.

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# Preface and acknowledgements

Under the influence of the various process of globalisation, our knowledge of how we are governed is challenged. Intensified differentiation, escalating fragmentation and the emerging practices of multi-level governance all serve to increase the difficulties of identifying where authority is located, and for which purposes it is exercised. One type of actor which contributes to re-shaping the various forms of architecture of authority is the range of new courts operating across the boundaries of states, with a mandate to interpret and apply the legal obligations undertaken by states. The pioneer in this respect, and now the archetypical example of this type of institution, is the European Court of Justice. This court and its judgments have, for several decades, challenged national sovereignty and the democracies existing within the Member States. At the same time, it has helped to transform the legal order of the European Communities into a new legal order, with constitutional qualities, within a European Union. Through this, the court has contributed to redefine the age-old division of powers between states, supranational institutions, markets and citizens. It was a desire to understand the implications of these processes which triggered my academic interest in this field. Against this background, this book started out as an attempt to examine how one element of the case law of the European Court of Justice has changed the very manner in which we are governed, and how these changes could affect the possibility of attaining the governing ideals of constitutionalism and democracy, to which many societies have aspired since the age of Enlightenment.

In writing this book, I have benefited from the input of numerous academic communities and individuals. My research was funded by the Faculty of Law at the University of Oslo, and facilitated by its Department of Public and International Law. I also received valuable funding to my research from *Lovsamlingsfondet* and benefited from discussions at the Centre for European Law at the University of Oslo, as well as the Law Faculty's Research Group on Internationalisation of Law. I have also been involved in the Research Project on Democratic Theory and History funded by the Norwegian Research Council, located at the Faculty of Humanities at the University of Oslo. This provided a stimulating environment for democratic thinking. I received a generous grant for publication from the *Institutt for Demokrati og Legitimetsanalyse* (IDA), for which I would like to express my gratitude.

With regard to the many individuals who offered encouragement and inspiration during the writing process, I want to thank all my former colleagues at the Faculty of Law in Oslo, particularly the richly diverse group of people at the Department of Public and International Law, who were engaged in the process of writing their own doctoral dissertations. They generously shared their experiences and made the process of writing less lonesome. Thanks in particular to Anders, Alf Petter, Benedikte, Christina, Harald, Lars, Nicolai, Inger-Marie, Ivar, Ingunn, Jo, Maruis, Merete, Ola, Torunn and Runar. In addition, I would also like to thank all of the professors and researchers, both at the faculty and at other institutions, who gave their valuable time to listen to my presentation and generously discussed various aspects of the project; I mention here Finn Arnesen, Tarjei Bekkedal, Asmund Born, Erik Boe, Marius Emberland, Svein Eng, Ole Kristian Faculahld, Dag Michaelesen, Iver B. Neumann, Fredrik Sejersted and Eivind Smith. Several people have read and commented on earlier drafts of parts of the text or on the entire manuscript, including Andreas Føllesdal, Cecilia Baillet, Beate Sjøfjell, Jørgen Stubberud and Geir Ulfstein, all at the Faculty of Law in Oslo, and Niels Fenger, while he was at the EFTA Surveillance Authority. A special thanks to Chris Saunders and Chris Engert, who proofread the whole text.

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I would also like to thank the librarians at the Department of Public and International Law. They were unreservedly helpful and service-minded, and did their utmost at all times to obtain the relevant literature as fast as possible. Thanks to Karen Danbolt, Randi Halveg Iversby and Beate Heilman.

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Finally, I want to thank you, Astrid, for being so supportive, and for always reminding me that the most important things are beyond the text. Sofie, since you were born in the middle of this project, you have changed almost everything, and inspired me to finalise and move on.

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