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Abstract

This article argues that a key to the influence of the EU in foreign policy is its consistent basis for the latter in terms of the legitimacy of human rights in current international affairs. Human rights norms today carry both normative power in a public discourse on foreign policy, and is are embedded in legal regimes in and around the UN system. The EU's post-national foreign policy is based on these norms, as expressed in the Copenhagen criteria of admission: Human rights, democracy, rule of law and the market economy. This article explores the relationship between legitimacy and legality in this type of foreign policy, arguing that the EU can develop into the major post-national foreign policy actor with its normative basis.

Introduction

The role that human rights play in foreign policy is contested and has not been extensively studied to date. However, it has been argued that human rights play an increasing role whenever there is a public process of policy-making and that they constitute a major basis for justification in such transparent public processes (Risse, 2000). Moreover, such norms seem to play an increasing role in a world where 'soft power' resources have become more significant (Nye, 1985; Nye, 2002; Matlary, 2002). The general thrust of this statement may be contested if one looks at the American emphasis on hard power and coercive diplomacy (Bacevich, 2002). But the 'mix' of moral argument and interest-based discourse is clearly different in the United States and Europe. Whereas US foreign policy combines references to national security, a highly moral discourse and coercive diplomacy, European foreign policy, especially as promoted by the European Union (EU), refers to international legal norms, above all those embedded in the United Nations. Whichever 'model' is regarded as typical of contemporary foreign policy, it can at least be argued that these are two very different models both in terms of types of power deployed and the justification offered for the use of such power. This chapter focuses on the EU, arguably the most 'legalized' foreign policy actor in the world and asks how important legalization is for legitimacy.

Public diplomacy and justificatory politics

In public diplomacy, the mode of discourse is typically tied to rights and cast in terms of moral categories (Leonard, 2002). This can be described as a *justificatory* mode of discourse in contrast to the *bargaining* mode typical of policy-making concerning distributive outcomes. Justification here refers to arguments about right in the sense of just decisions according to some standards, for example, legal canons, rather than pretexts for action, such as 'he justified the invasion with humanitarian arguments'.

Though political scientists know a lot about bargaining and have developed complex theories of different types of bargaining, they are only beginning to study policy processes where justification is the main mode of decision-making. Chayes and Chayes (1995) for example, note that the legal regimes they study have to be complied with through justification based on interpretation of legal rules and that states often are not the main decision-makers in such justificatory processes. Those with superior legal knowledge are the ones who decide what is

valid and reasonable and, therefore, decide what are the ‘correct’ interpretations of compliance and non-compliance in such regimes. Thus, there are canons of interpretation that limit the scope for interpretation and determine what is legitimate. Likewise, in human rights regimes, there are certain standards of interpretation that determine what can be a legitimate interpretation, though the scope is wide.

Goldstein et al (2001) make the point that world politics is increasingly ‘legalized’, meaning regulated through hard and soft law, and that when this obtains, the application of the regime enables and empowers actors like lawyers, NGOs and experts of various kinds. In short, justification as a mode of decision-making in a legalized regime implies that there are *correct* ways of applying regimes and *correct* interpretations of regime rules. Such regimes naturally privilege actors who can claim valid qualifications for making such interpretations.

Significantly, sheer power does not apply here, although the most powerful states naturally will be able to hire the best lawyers. But the main point about justification is that there are canons of interpretations of rules that cannot be altered by sheer force. If they are, then the regime appears to be illegitimate, and rightly so. Justification has to do with right application according to rules and must be seen by stakeholders as just, right and persuasive. Though in a regime with norms that are not very specific, as in many human rights regimes, there is more scope for interpretation than in very specified regimes.

The differences between bargaining and justificatory modes of decision-making are important for political outcomes, and this chapter develops the relationship between general insights about justification in legalized regimes and puzzles about the role of human rights in foreign policy-making in Europe. On the one hand, many argue that human rights have little ‘real’ impact on foreign policy when confronted with competing security and/or economic factors. On the other hand, we have the general argument in the IR literature noted earlier about the salience of soft power which argues that legitimacy also is a key resource in foreign policy. From this perspective, normative legitimacy itself becomes a major resource in a ‘post-national’ foreign policy.

The argument for soft power seems most appropriate in the EU where the use of hard power is extremely rare. The EU has in fact been dubbed a ‘civilian’ power (Duchene, 1972), a designation at the time that implied the lack of military tools. However, the very civilian, soft

character of the EU may increasingly come to represent the modern, legitimate type of foreign policy in a transparent world where citizens and NGOs play ever greater roles in policy-making.

Human Rights In European Foreign Policy

In 1999, the EU developed its own Charter of Fundamental Rights (Eriksen, 2001). This marks a watershed in the development towards political union and the Charter will be incorporated in the new EU constitution which, if adopted, will become legally binding with a supranational court for its implementation, the European Court of Justice (ECJ) in Luxembourg. Future legal codification will mean that the Council of Europe (COE) and the EU will have legally binding and enforceable human rights legislation through their own courts which, if we take into account the direct effect (see below) and the individual right of petition, represents the most supranational of all international legislation in this area.

Chris Patten, the EU's External Relations Commissioner has stated that 'we have a legal framework for human rights in our external policy' and he offers an analysis of the tools of human rights policy that the EU has at its disposal (Patten, 2000; see also below). However, these tools are not very 'streamlined' in actual policy-making and the EU does not yet have a common human rights policy. The major volume edited by Alston (1999) is the most comprehensive study to date of human rights in the EU. It is written largely by legal scholars who conclude that the EU is at a preliminary stage of development as a human rights organization.

The legal basis for human rights tools stems from the inclusion of human rights in the Treaty on European Union (TEU) in 1992 and their elaboration in the 1997 Amsterdam Treaty. Article 6 of the TEU stipulates that 'the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law'. Paragraph 2 asserts that 'the Union shall respect fundamental rights, as guaranteed by the ECHR'. The TEU also established 'union citizenship' (article 8) as a general category and specified some rights for citizens, such as the right to stand for office, to vote in local elections and the right to consular assistance from any EU country. Citizenship, of course, is a constitutional notion; a state or some other political entity confers citizenship on someone. It

is not an intergovernmental notion but rather a concept that defines the union as a contract between ruler and ruled.

The Human Rights ‘Tool-Box’

The EU deploys a number of policy tools for dealing with human rights as a cross-cutting theme in its foreign policy.

legal tools:

The EU is a community based on law. As discussed earlier, the use of the ECJ to judge on human rights cases is well established as political practice. Weiler (1996) has noted what he calls a ‘creeping constitutionalism’ which has created legal supremacy for the EU in the form of direct effect. This means that the ECJ has interpreted its mandate in a supranational way by making its judgements apply directly to all states and citizens of the union (Weiler and Friis, 1999).

conditionality in aid programmes and trade agreements:

The EU’s development policy aims to ‘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’ (TEU article 130u). Thus, there is a conditionality clause in all aid programmes except emergency aid (Riedel and Will, 1999).

suspension of membership and partnerships:

Agreements with third states must now include a ‘human rights clause’. Since 1995, more than 20 agreements containing human rights clauses have been signed including the revised Lome convention. To date, no suspensions have been made, and there is a ‘clear preference for---- a positive approach’ (Smith, 2000: 8). Only in grave cases, such as Lukashenko’s Belarus, has there been a suspension of a partnership and cooperation agreement.

shaming in public diplomacy:

The EU has one voice at the United Nations, in the UN Human Rights Commission as well as in the Third Committee which deals with human rights. Next to the US, the EU is arguably the most important actor in the world. Thus, its stance on human rights resolutions is of key importance (Smith, 2003).

sanctions:

The EU has also used hard power in the form of sanctions. Like the US, the EU is large enough to have a real impact with this tool. It has deployed sanctions against, *inter alia*, South Africa in 1985-6; an arms embargo and economic and diplomatic sanctions against China in 1989; diplomatic but not economic sanctions against Nigeria in 1993 and also in 1995 after the execution of Ken Saro-Wiwa.

Case Study: Human Rights and Enlargement

As Schimmelfennig (1999) has shown in his analysis of enlargement, all EU member states were agreed on the need to extend the values of democracy, the rule of law and human rights to the newly independent states of Europe. With the exception of long term prospects for trade, there were no economic reasons why enlargement had to happen. Indeed, for some states such as Spain, the fear of losing substantially in terms of structural funds was a real concern. Schimmelfennig describes how this agenda-setting was accomplished by the Commission and key member states in an act of public diplomacy which left the recalcitrant states unable to stop the process.

This is in fact an excellent case study of the impact of human rights norms: no state could oppose a values-based discourse with narrow, national interests. It was possible to prolong the process of enlargement and procrastinate over it, but it was not possible to halt it. Here is the difference between two types of political processes and their different logics. In a process of justification, such as the debate over values, rights and what the EU is obliged to do with respect to central and east Europe, it is not legitimate to bargain over narrow national interests. The discourse, the very terms of the debate, is in the justificatory mode. One debates what the duty, the obligation, the just course or action on the part of the EU should be: to enlarge or not?

Sjursen (2002: 508)) juxtaposes economic, security and value-based explanations for enlargement. She suggests that the values underlying the EU help to explain the decision to enlarge: 'a sense of "kinship-based duty" contributes to an explanation not only of the general decision to enlarge but---of the differentiated support for enlargement to this group of states in comparison to Turkey'. It is the feeling of belonging to Europe and having a duty towards

other Europeans that makes the crucial difference. This takes precedence over general human rights - which should suggest equal treatment to all applicant states regardless of geographical location and cultural legacy - and also over economic and security interests. Sijursen finds that the acceptance of the case for enlargement to the east was much clearer than in the Turkish case, which enables her to distinguish between human rights as a general set of norms and the specific 'EU values' that appear to obligate Europeans. These values are identity based and include human rights and democracy.

Understanding the Role of Human Rights in European Foreign Policy

The discussion so far in this chapter has indicated that human rights norms have a growing impact on European foreign policy, particularly towards third countries. This is largely explicable in *instrumental* terms - these states are told to comply; conditionality is applied. Compliance is achieved through pressure, incentives or coercive diplomacy. But it is also apparent from the discussion that norms matter for *non-instrumental* reasons. This is much more difficult to explain because we must then assume that norms are complied with for other reasons, such as rightness, justice or identity. Motivations for political action may thus be rooted in a conviction that something is just and right, and that it should be supported because it is 'European' and conforms to European values and identity. But, as Sedelmeier notes in his chapter in this volume, identity is a very hard concept to theorize about and even to define. What ultimately is a European identity and how do we bridge the gap between identity and interest? In other words, when does an identity become politically relevant as a preference or an interest, which in turn leads to political action?

Sijursen (2002) suggest there are three types of explanation for political action in the case of enlargement - instrumental, rights-based and value-based, with the latter referring to the specific normative context of a political actor, in this case the EU. She finds that the identity of the EU as a European political project plays a key role in explaining the willingness to expand to the east. Thus, there are more than instrumental interests of an economic and security kind at stake in EU policy-making as these interests alone cannot account for the admission of new members.

Value-Based Interests

Are human rights drivers of foreign policy? Elsewhere (Matlary, 2002), I have proposed three types of interests, security, economic and value-based, as the relevant categories of foreign policy analysis. The poverty of IR theory lies in its assumption that only material - security and/or economic - interests exist. Today, however, norms such as human rights may matter increasingly as new types of actors such as NGOs and concerned citizens participate in foreign policy-making through their voice in the public debate.

Rationalist explanations in IR have often been confused with economic interests as the motivating force. But rational actions are those based on an individual actor's strategic goals, and rational man, in Elster's formulation (cited in Kahler, 2000:?), may make 'non-Archimedean choices and may be moved by concern for others'. Thus, to be rational does not imply pursuing utility-maximizing economic preferences, but rather it refers to a political strategy to attain a given goal, which can include human rights as well as an economic and/or security tools.

To be rational is to be strategic in terms of adopting the most useful means to reach a given goal.

The limitation of modern rational choice theories is underlined by Kratochwil's intellectual history of the concept of national interest. He argues that the concept of *staatsraison*, which followed a logic of public reasoning based on commonly accepted norms was only replaced at a late stage historically by a privatized assumption of an 'unbridled self-interest'. 'The glorification of unbridled self-interest as the essence of politics remains one of the sad achievements of the period before World War I' (Kratochwil, 1982: 22). Significantly, he adds that '*the discourse on interests had a discernable logic and the arguments it sustained had to satisfy certain criteria*, which turned out to be those of a weakened form of the public interest discourse' (Kratochwil, 1982: 25. my emphasis).

Combining rationalist strategic models with interest formation on the basis of learning, cultural inculcation and persuasion seems both necessary and feasible for future study of the relationship between interests and values. Moderate constructivist approaches take account of this possibility, yet many other approaches continue to juxtapose rationalism and constructivism. While it may be theoretically productive, this juxtaposition is rather fruitless

in empirical terms. Yet much debate at the meta-theoretical level between these two schools of thought remains sterile and is best characterized, in Jupille et al's (2002: ?) phrase, as 'wars of religion', rather than as open-ended scholarly debate.

This chapter follows their argument in calling for empirical testing of both alternative and complementary hypotheses. Noting that 'only in the rarest of cases is there but one plausible account to explain an outcome', Jupille et al (2002: 17) call for the specification of domain and scope conditions for rationalist and constructivist theories about interests and values. In his study of the impact of human rights, Risse et al (1999) conclude that initial explanations of human rights compliance are usually instrumental. The longer term impact, however - explored through a 'spiral model' - may be the result of real conviction through learning and persuasion. The *sequencing* of explanations thus appears to be a salient consideration.

To summarize the argument at this point, it makes analytical sense to focus upon three main types of motivational driving forces for foreign policy action. If we presuppose a strategy of means-ends rationality, these forces become preferences when they are put into a political context of action. There will often be conflicts between preferences, but also 'mixed' preferences where values matter alongside other motivating factors like security. Thus, in the real world, alternative 'either--or' preferences may be rare. Likewise, in the early stages of political processes such as EU enlargement, values may be held instrumentally where human rights conditionality is applied. But values may be held for non-instrumental reasons at a later stage. The complexity of this analytical framework seems warranted if we are to study the role of human rights norms empirically.

The Concept of Legitimacy

What is the power behind human rights? They may matter simply because we regard them as important, and therefore they motivate our action. They may be more or less imposed on us by coercive diplomacy, so they are powerful for that reason. They may explain political action because we are afraid of being 'shamed' for violating norms that are widely regarded in society around us as being legitimate. Normative legitimacy is increasingly important when a justification for policy is sought in a public process. As the traditional nation-state is integrated in EU networks and policies, justification based upon 'national interests' appears to carry less and less normative legitimacy. We can assume that human rights as a basis for

justification is becoming increasingly important. British Prime Minister Blair, for example, justified the war on Iraq in 2003 not only in terms of British security interests, but also as a war for the just cause of democracy and human rights. Deposing the tyrant is a moral argument, quite separate from a traditional security justification.

But how can we understand normative legitimacy and assess its importance in political processes? Legitimacy is a term often invoked in political debates but seldom defined. Historically, it referred to the rightful ruler of a state: the legitimate king was the first-born male heir to the throne. Likewise, an illegitimate child was a standard term until recent times, denoting a child born outside of the juridical contract between its parents, the marriage. But the term has received scant scholarly attention (Hurd, 1999).

Follesdal (2002: 6) notes broad, confusing and conflicting uses of the term in the literature and cites at least three meanings. 'Laws and authorities are *legally legitimate* insofar as they are enacted and exercised in accordance with constitutional rules and appropriate procedures. Laws and authorities are *socially legitimate* if the subjects actually abide by them. Finally, they are *normatively legitimate* insofar as they can be justified to the people living under them, and impose a moral duty on them to comply'. We speak about legitimate rule when the rules of democracy have been followed, while we speak about legitimate views when they conform to the dominant norms of society. Thus, while it may be legitimate to discriminate against women in one country, it may be illegitimate in another even when the legislation in both countries is the same. In some cases, there is no relationship between legal and normative legitimacy.

The general assumption here is that legal legitimacy is a necessary but not a sufficient condition for normative legitimacy. To illustrate, a UN Security Council mandate is usually a necessary condition for normative legitimacy with respect to the use of force but it may not be sufficient for normative legitimacy if the mandate is arrived at through undue pressure and threats. If all the votes in favour are bought or otherwise extorted, the mandate is legal but not legitimate. In the 2003 Iraq case, the legal legitimacy of the action mattered very much and appeared to be a *sine qua non* for normative legitimacy. There are, however, legal disputes about what constitutes a legal mandate in this case (see Thune et al, 2003).

In other interventions, such as Kosovo in 1999, there was no legal mandate but an overwhelming degree of normative legitimacy for the intervention. Normally though it does matter whether or not a state is in compliance with international law. The United States under George Bush Snr sought the legitimacy of the UN Security Council when attacking Iraq in 1991 although this was not strictly necessary given the Kuwaiti demand for assistance against an aggressor

which allowed for the lawful invocation of the self-defence Article 51 of the UN Charter. The reason for seeking a mandate from the UN was the perceived need for legitimacy. Likewise, George W. Bush sought a similar mandate before attacking Afghanistan in 2001 and later sought a mandate to attack Iraq despite the parallel claim that the US had a right to attack on the basis of previous UN resolutions. Thus, to have a legitimate basis for action is evidently very important, even for the world's superpower.

What are the scope conditions for legitimacy based on human rights? Preliminary empirical evidence suggests that only in Western ambits and under conditions of normal politicization will legitimacy play a key role. This author's study of human rights conditionality in Europe showed that the possibilities of coercion enhanced the impact, making the EU a much more powerful actor than the Organization for Security and Cooperation in Europe (OSCE) or the COE. But it also showed that 'shaming' rather than coercion worked with states that were in European ambits already, though not with those outside. Those states still required coercion for compliance (Matlary, 2002). Risse at al make a similar observation: first one learns to 'talk the talk' of human rights, then one learns to 'walk the walk' (Risse et al, 1999). Thus, the reasons for human rights compliance vary in and around the EU. We know that both cooperation and shaming are motivations for government elites that seek membership of the EU. But are there instances also of persuasion? If so, how do we study them ?

As argued earlier, political scientists appear to have overlooked the possibility that norms of right and justice, human rights norms in this context, may well matter in and of themselves. To be persuaded of values, norms and just causes is clearly much more important than mere instrumental adaptation to such norms because a conviction is lasting and less likely to disappear when the pressure or threat itself disappears. Indeed, we can argue that the relationship between positive law and normative legitimacy is really about the relationship between law and justice, which is what law is supposed to codify. By and large, we expect

laws to tell us what is right and wrong, therefore law carries a higher status than ‘mere’ politics. If something is allowed by law, then we usually assume that in a general sense it must be right. The law must be just; we react against unjust laws. This normative reaction tells us that it is very important that laws are in conformity with a general sense of justice. The legal positivist who denies any relationship between justice and law, or indeed denies that justice is a meaningful concept, should logically do away with law altogether and simply reduce it to politics with a ‘time lag’ and not expect law to carry any legitimacy as such.

To summarize again at this point: the search for legal legitimacy attains special importance when the issue is discussed in a public-political process where the terms of the debate are already those of justification. The debate about just military intervention will then centre on whether there is a mandate from the UN Security Council and on whether this mandate is arrived at through a just political process. As a general rule, normative legitimacy will result if this is the case. Applied to human rights in the EU, a similar justification is possible if the policy is mandated on existing legal norms which are argued to be just in and of themselves. The fact that human rights are legalized matters but also the fact that they are justified in a public debate is important. The point here is that the legal and the public aspects of policy-making strengthen each other. When the case is human rights, this seems very obvious. We have more respect for a policy based on a legalized regime than one based upon some political deal. The same applies to justificatory processes of policy-making: if they succeed, we are persuaded and grant normative legitimacy to a policy. Normative legitimacy also strengthens the the foreign policy identity of the EU. A good example of a persuasive EU foreign policy on human rights is the work done to date to abolish the death penalty where the the EU has been the key European actor (Manners, 2002). Significantly, this policy is based upon a legal regime, Protocol 6 of the European Convention of Human Rights.

An Analytical Framework for the Study of European Foreign Policy

These general assumptions can provide a basis for further empirical work on how the EU enhances its foreign policy power through the creation of normative legitimacy for a foreign policy based upon a (legalized) human rights regime. The ‘outward’ foreign policy in this context has already been fairly well researched, with the general conclusion that ‘compared to the situation at the start of the 1990s, the place of human rights considerations in the EU’s

external relations has radically changed---They now form an important part of the EU's international identity' (Smith, 2001: 202). Smith also notes that the norms of international society are changing in the direction of conditional sovereignty: only states that respect and implement human rights are legitimately sovereign (Smith, 2001: 203). This adds weight to the argument here about the importance of normative legitimacy in the human rights arena for foreign policy. The EU, which lacks the traditional identity of a nation-state with national interests to pursue, may have been regarded as a foreign policy anomaly. Today, however, human rights provides an increasingly legitimate basis for the power-projection of a post-national foreign policy.

We now turn to the empirical research about how the EU's foreign policy identity is constructed. We need to study not only foreign policy practices justified in terms of the promotion of human rights - Solana's peace mediation efforts and the EU coordination of a common UN policy, for example - but also the ways in which external foreign policy manifestations are 'matched' by internal EU processes of making the Union based on the constitutional human rights of the charter. Is there a process of persuasion that is redefining foreign policy between and amongst member states in the direction of a unified EU human rights policy? The interesting research questions are first, whether there is an 'inside' process of foreign policy-making which is creating a foreign policy identity based on human rights in the charter, treaties and perhaps the constitution, and second, whether this process results in conviction, in short, in a normative legitimacy for European foreign policy. Having argued here that the power of legitimacy is very important in post-national foreign policy, the expectation is that such an EU process would translate into a very powerful European foreign policy.

Instead of juxtaposing interest and identity, as much of the current constructivist literature does, we should look closely at the genesis of agenda-setting in terms of whether there is a justificatory logic proposed. In his contribution to this volume, Sedelmeier concludes that 'we can gain important insights into European foreign policy from a perspective that acknowledges that the EU's identity matters *causally* for foreign policy' (Sedelmeier, my emphasis) and that this is particularly important in the area of human rights. If we assume that political identity matters in the very basic sense that the EU is a much stronger political actor if it sees itself and is seen by others as a political union promoting human rights, democracy

and the rule of law, then these values are given substance and ‘life’ through being acted upon. When the High Representative of the the CFSP, Javier Solana, appears in trouble spots around the world in an attempt to negotiate peace, this is a policy practice that tells the world that the EU is an actor that promotes such values. The mandate for this is already there in the treaties, but such mandates can also be found in state’s constitutions. Virtually all states and international organizations can find a mandate based upon such values, but the basic identity is only created when the values and norms are ‘concretized’ in terms of policy practice. This practice has the most effect when it is highly visible, as a way of saying ‘this is what the EU is about’.

The formation of an identity is of critical importance to an actor, such as the EU, that is in the process of transformation and needs publicity in order to communicate what the union is to its citizens and to other international publics. The strong element of law underpinning the EU is a great advantage here. In a world where hard power and unilateralism is advocated by the United States, the EU can promote itself as a law-based, multilateral polity which should enjoy wide legitimacy. The process of constructing a link between citizen and union through citizenship and human rights is the way of creating democratic legitimacy for a new type of foreign policy from a new type of foreign policy actor. The foreign policy activities which take their point of departure from these rights show the world what the EU is about - its identity. The promotion of the EU as a new type of polity based on particular values must be assumed to be of key importance to EU institutions such as the Commission, the European Parliament and the European Court of Justice. One would therefore expect that the rights language of justification would be the dominant mode of political discussion and agenda-setting on the part of these actors. The Commission in particular as a formal agenda-setter can be expected to frame policy in such terms in order to increase its own and the EU’s legitimacy. As discussed earlier, this is what happened with respect to the enlargement issue. Agenda setting was successful here insofar as a bargaining mode of decision-making became the secondary and less legitimate mode.

Three Hypotheses about Human Rights in the EU

Drawing on the general foreign policy literature on why human rights matter and on their scope conditions, three hypotheses are formulated in this final section that need empirical investigation to establish how they might ‘work’ in the EU. These hypotheses may also be

applicable to other international organizations where there are extensive legalized human rights regimes, such as the Council of Europe and the UN Security Council. To reiterate, justification is regarded here as the main mode of decision-making in the human rights arena. Bargaining is less important though, of course, it may enter into, for example, a closed door deal between the Commission and an applicant state. How much reform of the prison system do we have to make in order to join the EU? If we do more on the penal code, can we postpone prison reform? Clearly, this kind of bargaining takes place but it is a practical adjustment process rather than a dispute over human rights norms themselves.

It has been argued that human rights are complied with for three reasons or combinations of reasons. They are the same ones that apply domestically when we obey the law: coercion, 'shaming' or persuasion. We pay the tram ticket either because the punishment, a heavy fine, is too heavy; or because we are afraid of being caught and seen by people who know us; or because we want to obey a law that we are convinced is right and just. Abbott et al (1999: 13) propose that 'a key consequence of legalisation for international cooperation lies in its effects on compliance with international obligations'. Compliance is analysed along three dimensions: *delegation*, *legalization* and *precision*. These variables are also useful for formulating hypotheses about the role of human rights in European foreign policy.

As we have seen, the EU's human rights regime is embedded in a very powerful organization with a range of policy tools delegated to it by member states. In terms of delegation, therefore, the regime is strong. Not only are there a number of foreign policy tools available to impose human rights on applicant states and other third countries but the regime has a supranational court that can define what these rights mean and can impose its rulings directly on member states. The supranational role of the ECJ is well documented and, as Menendez points out in this volume, it is already referring to the human rights charter. If the charter becomes legally binding, the EU in effect has its own human rights court.

Furthermore, the work on human rights conditionality shows that the EU wields considerable power over formerly recalcitrant countries such as Turkey (Matlary, 2002). Hence, a tentative conclusion may be that the EU human rights regime is very powerful in terms of delegation, and that compliance in this context happens for instrumental reasons - coercion

and ‘shaming’. There is not much justification and persuasion at work in this kind of human rights work. We can formulate a first hypothesis thus:

*The EU’s human rights regime is powerful in terms of **delegation** and works through coercion and shaming which represent instrumental motivations with respect to third countries and applicant states*

The EU human rights regime is likely to become more legalized in a ‘hard’ law sense if it becomes a legally binding charter in the new constitution. Such a legal status will add to the power of the EU in human rights and the justificatory process with respect to the interpretation of rules will increasingly involve legal experts. This would make member state influence less salient and more distant.

But we can also expect the process to become more public and transparent as well as more principled the more legalized the regime becomes. This empowers EU actors, the ECJ in particular, as well as other stake-holders in a general European debate. If there is a public debate which empowers citizens, it also puts the justificatory mode of decision-making at the forefront. A second hypothesis is thus:

*The more **legalized** the EU’s human right regime becomes, the more justification as a mode of deliberation predominates. Legal experts, the ECJ and other non-state actors are empowered, and persuasion rather than coercion and shaming becomes the dominant motivation for compliance.*

The EU ‘scores’ high on delegation and legalization (especially if the charter becomes legally binding), but human rights are often contested in terms of what they should mean in practical politics. There is much room for debate here: is the proposed policy an instance of this or that human right? Since the specification of human rights regimes is relatively low, we can expect major debates on their political implications. If it is correct that legal status is a necessary but not a sufficient condition for normative legitimacy, then the EU is in a good position to acquire the ‘power of legitimacy’ through an open-ended debate about what constitute appropriate policies according to human rights norms. A third hypothesis is thus:

*The less **specific** the EU human rights regime, the more public debate offers scope for persuasion and justification, creating normative legitimacy for the Union.*

Risse argues that ‘processes of argumentation, deliberation and persuasion constitute a distinct mode of social interaction to be differentiated--- from strategic bargaining’ and adds that ‘the more norms are contested---(the more) the logic of truth seeking and arguing (obtains)’ (Risse, 2000: 1, 6). Since the policy implications of human rights are at best unclear because of the very general nature of human rights, we can, nevertheless, expect the EU process of policy-making in the justificatory mode to be highly significant in the future when the issue is not only compliance with minimum standards for applicants and third countries, but also how the EU will ensure human rights for its own citizens. The charter may mark the beginning of a real process of justificatory politics in the EU involving both rulers and ruled within a new type of polity. This process in turn will add substance and power to European foreign policy.

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