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# Constitutional Politics and the ‘Embedded *Acquis Communautaire*’: The Case of the EU Fourteen Against the Austrian Government

by Michael Merlingen, Cas Mudde and Ulrich Sedelmeier<sup>1</sup>

## I. Introduction<sup>2</sup>

The story of the measures that fourteen European Union (EU) governments recently adopted against the Austrian government is well known. On 4 February 2000, a new Austrian government was formed, consisting of the centre-right People’s Party (ÖVP) and Jörg Haider’s (alleged) extreme right Freedom Party (FPÖ). The reaction of Austria’s EU partners was an unprecedented move in the history of European integration. The EU Fourteen imposed a set of sanctions which they had already announced on 31 January in case the new government was to involve the FPÖ. There would be no bilateral official contacts at the political level with the new government, Austrian ambassadors in their respective capitals would be received only at a technical level and they would not support any Austrian candidates for positions in international organisations.

It is important to underline that while these sanctions were adopted collectively, they were not as such EU measures, but rather 14 bilateral, albeit coordinated moves which only concerned bilateral relations between the Austrian government and its EU partners. None the less, *de facto* they had made Austria overnight a pariah within the EU. The EU Fourteen justified their action by pointing to the nature of the FPÖ. In their interpretation, in particular the FPÖ’s xenophobic stance on minorities, refugees and immigrants was incompatible with the normative vision of the EU as embodied in EU law. Seven months later, on 12 September 2000, the EU Fourteen lifted the sanctions unconditionally, after a ‘wise men’ report gave the Austrian government a clean bill of health on its human rights record.

In this paper, we explore the imposition of the sanctions from the perspective of the *acquis communautaire*. This perspective is pertinent both for an explanation of this particular case and for its broader reverberations. Thus, while our main question is how the *acquis* affected the imposition of the sanctions, we also consider how the way this case developed and how it was resolved might affect the *acquis*. We want to emphasise that in exploring these issues, we are not passing comment on the desirability or effectiveness of the measures taken by the EU Fourteen. Rather, we explore the relevance of institutional conditions and different sources of causal pressure that led to the imposition of these sanctions, as well as the position of such practices within the EU’s constitutional canon, and their implications for EU

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<sup>1</sup> For the complete addresses of the authors, please consult the last page.

<sup>2</sup> This paper develops from a legal-constructivist perspective certain arguments that we made elsewhere (Merlingen, Mudde and Sedelmeier, forthcoming). We would like to thank in particular the ConWEB editors, Antje Wiener and Jo Shaw, as well as Yoichiro Usui for their very helpful comments in writing this paper.

constitutional pretensions.

In brief, in this paper we argue that the boycott by the EU Fourteen was the result of a conjuncture of two separate developments. On the one hand, new social and legal EU norms emerged which only acquired their full structuring effect on policy by the end of the 1990s. On the other hand, recent developments in the domestic politics of certain countries created incentives for politicians to act as strong advocates of punitive measures against the new Austrian government. The crucial point is that they were able to rally support for the measures against Austria by forging a link between these measures and the new norms and previous practices. Thus, we highlight how both social and legal norms (structure) and selfish interests (agency) matter to the policy formation in the EU. We conclude by exploring the potential significance of this particular case for the development of Articles 6 and 7 TEU - the liberal underpinnings of the constitutional framework of the EU.

## II. A Legal-Constructivist Approach to the Sanctions against the Austrian Government

Our analytical starting point for tackling these questions is a particular understanding of law. In this understanding, law is both a tool or resource that actors might employ to further their goals, and a normative structure that shapes how actors line up and act on issues (Armstrong 1998, 156). Furthermore, we eschew the formal style of inquiry favoured by positivist legal scholarship, and opt for an interdisciplinary approach that draws on constructivist scholarship in integration research and legal studies (Shaw 1996; Shaw and Wiener 1999, 3-9).

Our assumption is that people act towards legal institutions and norms on the basis of the meanings that these objects have for them (Wendt 1999, 140). These meanings are not fixed. Nor are they the result of ‘correct’ judicial interpretations of the law by judges who rationally reconstruct the essence of legal texts and monologically formulate their case law. From our interdisciplinary perspective, we conceive of the meaning of law as being produced, reproduced, contested and changed through practices (discursive and non-discursive). The agents that are engaged in these practices might be courts, lawyers and litigants but also other actors such as politicians. There is a complex relationship between law and politics, with both spheres of activity having their own institutional structures that enable some actions while constraining others. We can only understand the social construction of law and its effects on policy, if we explore in which ways legal discourse and the meaning it produces are shaped by two distinctive processes, namely internal processes of argumentation and persuasion as well as external social and political processes.

Our legal-constructivist approach leads us to conceptualise the *acquis* not simply *strictu sensu* as a body of legal texts consisting of formalised rules and procedures, but as an institution. As Antje Wiener (1998) has argued, the *acquis* is embedded in social structures. This meaning structure constitutes the shared understandings on which actors draw in order to give abstract legal norms their precise, situation-specific meaning, thereby pushing policy in a particular direction. ‘Embeddedness’ of the *acquis* means that changes of the ‘formal resources’ of the *acquis* – such as rules, regulations, and procedures – are interrelated with changes of the ‘informal resources’ of the *acquis*, which in turn are distinguished according to two categories: shared values and ideas on the one hand, and routinised practices on the other (Wiener 1998, 302).

Guided by these premises, our argument proceeds as follows. In the first section, we

document recent changes to the *acquis*. By the end of the 1990s, the protection of democracy and human rights in Europe had become a central component of the social and legal norms structuring policy in the EU. These changes were crucially shaped by political practices related to the eastern enlargement of the EU. However, policy impact does not follow automatically from the existence of such structures of shared understanding. In section two, we argue that policy entrepreneurs, particularly from France and Belgium, drew on the resources of the embedded *acquis* in order to mobilise collective action by the EU Fourteen against the Austrian government. Our analysis suggests that these policy entrepreneurs were at least partly motivated by self-interested, party-political goals, and that they used the normative structure of the EU as part of their domestic political struggles. However, without the legitimating power of the normative vision embodied in the *acquis*, i.e., without the structuring effect of shared norms, it is unlikely that the policy entrepreneurs' initiative would have been able to elicit such broad support among the other member governments. Put in meta-theoretical terms, the actions of French and Belgian politicians played a *causal* role in the case: their motivations triggered the process and explain why this particular initiative for sanctions came onto the agenda. The embedded *acquis* played a *constitutive* role: it constituted the shared meaning which made possible the collective action by the EU Fourteen (Wendt 1998).

### **III. The EU and Human Rights: Tracing the Emergence of Social Norms and their Constitutionalisation**

Constructivist scholarship, drawing on symbolic interactionism, social psychology, critical hermeneutics or other approaches sensitive to the microprocesses involved in the mutual constitution of self and society, emphasises that social norms are constructed in processes of interaction.<sup>3</sup> Through interaction with others, states become aware of their similarities and differences (Wendt 1992, 403-7). In the EU such interaction is intensive, and its member states have recognised for a long time that they share certain common *constitutional* characteristics which differentiate them from other states in Europe. For instance, in the 1960s the European Court of Justice (ECJ) affirmed the respect for fundamental rights as part of the European Community's legal heritage (Alston and Weiler 1999, 4). However, in the context of enlargement this sense of constitutional commonality was significantly reinforced.

Social psychological approaches such as social identity theory argue that comparisons between self and other, or in-group and out-groups, play a crucial role in the formation of social identities and the norms of which they are made up (Abrams and Hogg 1998). Being confronted with a large group of central and eastern European states applying for accession to the EU, the member states began to compare themselves more systematically with this out-group. This set in motion a process in which the in-group articulated its self-definition with reference to the out-group, and thus concretised and strengthened what had hitherto remained more implicit. The conceptual clarification of what the EU is resulted in changes to the formal and informal *acquis*.

Seen through this prism, enlargement is not only about the geographical expansion of a ready-made supranational polity. It is also about evolving normative standards of civilisation to

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<sup>3</sup> See Barnett 1999; Cronin 1999, 19-23; Risse 2000, 8-11; Wendt 1999, 313-36.

which the members (old and new) of this community are expected to adhere. Through the politics of enlargement new EU norms emerged and achieved structuring power. As the former European Commission member Hans van den Broek observed, the ‘enlargement of the European Union is more than simply a political or economic process: it is another milestone in the development of our civilisation.’<sup>4</sup> In the remainder of this section, we focus on one crucial normative implication of the eastward enlargement policy. These policy practices articulated and constitutionalised important aspects of the EU’s collective values, and thereby reinforced the formal constitutional legitimacy of the protection of human rights in the EU.

The story of how the ECJ carved out a role for itself in the protection and promotion of human rights is well known (Clapham 1991). It begins with the observation that neither the Treaty of Paris nor the Treaty of Rome included any stipulations regarding the protection of fundamental human rights. This is followed by the history of how an activist ECJ filled this gap, especially through its jurisprudence in the 1960s and 1970s, for instance by stating that it had a role to play in safeguarding fundamental rights which form an integral part of the general principles of the law (Shaw 2000). What is less well known is the evolution of the constitutionalisation of human rights in the 1990s. To begin with, it was only in the 1990s that the protection of human rights started to play a central role in public discourse. A flurry of recent developments attests to the new salience of human and fundamental rights at the EU level. These include, for example, the declaration of the Luxembourg European Council in December 1997 on the 50<sup>th</sup> anniversary of the Universal Declaration of Human Rights, or the ongoing debates about an accession of the EU to the European Convention on Human Rights and about the establishment of a Charter of Fundamental Rights. However, it was the EU’s policy on eastern enlargement which was a crucial focal point for a discursive strengthening and legal formalisation of norms related to the protection of human rights.

There is a threefold link between the discourse and the policy practices of eastern enlargement on the one hand and the process of norm formation in the EU on the other (Sedelmeier 2000, 10-16). First, there is the frequent assertion of the promotion of human rights and democracy as a rationale for eastern enlargement in EU policy makers’ discourse. Successive European Council declarations affirmed the promotion of democracy and human rights as a distinctive goal to be served (indirectly) through the integration of the central and eastern European countries. Other aspects of EU policy were directly aimed at promoting these goals, such as the Phare Democracy Programme.

Second, the EU established respect for human rights and democracy as an explicit condition for offers of aid, trade and eventual membership. The European Agreements with Romania and Bulgaria included a suspension clause, a measure that the majority of the member governments had still rejected in the earlier agreements, but which from then on became an integral part of all EU agreements with third countries. As to the political preconditions for EU membership, the Copenhagen European Council in June 1993 specified that ‘[m]embership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities’ (Council 1993, 5). These conditions subsequently became a central part of the Commission’s assessment of the candidates’ accession prospects. A key example of a strict application of this political conditionality was EU policy towards the Meciar government in

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<sup>4</sup> Hans van den Broek, speaking at the ‘Forum 2000’ Conference, Prague, 13 October 1998.

Slovakia. After the EU had on various occasions expressed its concerns about the respect for human rights, democracy and freedom of the press, the Commission's opinion on Slovakia's membership applications was the only one in which the situation concerning the political conditions was judged unsatisfactory (Commission 1997, 9-18). It recommended that the Council should not open accession negotiations, even though the economic record might have allowed to do so. The Luxembourg European Council of December 1997 followed this recommendation. It was only after the election of the new government in September 1998 that the Commission suggested opening the accession negotiations with Slovakia 'on condition that the regular stable and democratic functioning of its institutions are confirmed' (Commission 1998, 29).

Finally, the discourse about the importance of democratic principles in view of enlargement also reverberated within the EU, as the member states articulated their commitment to human rights in amendments to the Treaty. There are precedents to such practices. For example, in the context of the Mediterranean enlargement, concerns about the fragility of democracy in the applicant countries led the European Council to adopt a 'declaration on democracy' in 1978. While this declaration was nominally made in the context of the first direct elections to the EP, in the interpretation of many commentators, it was 'intended to strengthen the Community's leverage against any future member which might slip towards authoritarian rule' (Wallace 1996, 16). In the case of the EU's eastern enlargement, similar concerns are reflected in the insertion of Article F in the Maastricht Treaty and Articles 6 and 7 in the Amsterdam Treaty. In turn, these articles may be said to provide a constitutional *Grundnorm* for the EU. Article 6 proclaims that '[t]he Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law'. Article 7 provides the means to suspend a member state's rights under the Treaty if it breaches these principles in a 'serious and persistent' way.

Our brief sketch of the enlargement-related practices in the political and legal sphere highlights a dimension of the enlargement policy which is neglected by rationalist-materialist approaches in integration research or legal positivist scholarship. The former emphasise the material costs and benefits of enlargement, while the latter focuses on the progress of the candidate countries in the adoption of the formal *acquis*. A legal-constructivist approach, on the other hand, brings to the fore the production, reproduction or modification of the EU's normative structures through processes of interaction. In the case at hand, it helps us understand how the interaction between member states and applicant countries strengthened and concretised the idea that the EU has an obligation to promote human rights and democracy both internally and externally, even if this means interfering in states' domestic affairs.

#### **IV. From Social and Legal Norms to Political Action Against the Austrian Government**

In the preceding section, we traced the formation of social norms through enlargement practices. Now we want to show that these norms mattered in the decision by the EU Fourteen to sanction Austria. Our argument is that while there are no 'obvious' material interests which could have motivated the punitive measures, there was a widespread perception that the new Austrian government failed to identify itself with the fundamental values of the EU. Key EU decision-makers agreed that the FPÖ and in particular its chairman at the time, Jörg Haider, subscribe to an ideology which is opposed to the norms of the 'embedded *acquis*'.

For instance, the Portuguese prime minister, Antonio Guterres, insisted that the EU was ‘a Union based on a set of values and rules and on a common civilisation’ (*Agence Europe*, 29 January 2000, 3) and described the FPÖ as a ‘party which does not abide by the essential values of the European family’ (*Guardian*, 1 February 2000).<sup>5</sup> British foreign secretary Robin Cook said that the ‘naked appeal to xenophobia on which Mr. Haider has based his platform ... is something that strikes against the basis of the European Union’ (*Europe*, March 2000). The German chancellor, Gerhard Schröder, pointed out that the anti-Haider coalition was ‘an expression that we stand for a Europe based on shared values [that] Mr Haider has constantly violated’ (*Guardian*, 10 February 2000). And the Italian prime minister, Massimo D’Alema, emphasised that ‘Europe has certain criteria and values that unite it. If these are thrown into question, Europe has a right to speak its mind’ (*Guardian*, 1 February 2000).

Clearly, there was a consensus among the governments of the EU Fourteen, shaped by the ‘embedded *acquis*’, that the FPÖ deviated from accepted standards of political conduct. But how are we to think about the link between a shared assessment of this sort and the adoption of sanctions against Austria? We argue that this link was provided through the advocacy of politicians like the French President Jacques Chirac and the Belgian Prime Minister Guy Verhofstadt.<sup>6</sup>

These policy entrepreneurs drew on the ideational resources of the ‘embedded *acquis*’ in their attempt to mobilise collective action against Austria. The normative structure-of-meaning-in-use enabled them to successfully rally support for their demarche by arguing that Europe had an obligation to ‘make sure that all its members share its common ideals’.<sup>7</sup> Moreover, the embedded *acquis* constituted a meaning context in which it was taken for granted that, as the European Parliament (EP) stated, the EU ‘cannot demand of candidate states standards which are not seen to apply with equal force to Member States’ (*Agence Europe*, 4 February 2000, 3). In short, by arguing that failure of the EU Fourteen to act in this case could threaten the credibility and stability of the normative foundation on which the whole project of European integration was built, the advocates of sanctions were able to build a consensus among their EU colleagues to isolate Austria.

Arguing that the social and legal norms of the ‘embedded *acquis*’ mattered in this case is one thing. Identifying the precise mechanism by which norms prompted governments initially sceptical of the boycott to agree to take measures against Austria is another. Our conceptualisation of the *acquis* as an institution embedded in a structure of intersubjective ideas and values is in principle compatible with two different causal mechanisms.

One possible link between behaviour and shared norms is captured by the logic of what Thomas Risse, drawing on Jürgen Habermas, calls argumentative rationality: the participants in a debate are open to being persuaded by the better argument and relationships of power recede in the background.<sup>8</sup> In this constructivist view, processes of persuasion and justification on the basis of norms play a crucial role in the formation of actors’ interests. Applied to the case at hand, this means that initially sceptical governments were persuaded of

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<sup>5</sup> Most of our quotes from newspaper have been taken from internet editions. Where no page numbers are provided, we have included the web addresses in the bibliography.

<sup>6</sup> On the leading role played by French and Belgian politicians, see e.g. *Guardian*, 29 January 2000.

<sup>7</sup> The statement was made by President Chirac’s spokesperson. *Business Week*, 14 February 2000, 31.

<sup>8</sup> Risse 2000, 8-11; see also Habermas 1997, 98-101; Slaughter et al. 1998, 381-2.

the normative validity of the above mentioned arguments for sanctions raised by Belgium and France.

Another mechanism through which behaviour and norms might be linked is captured by the logic of rational choice: selfish governments conform to group norms in order to avoid the costs of non-compliance and/or to gain *quid pro quos*.<sup>9</sup> Applied to the case at hand, this means that reluctant governments decided to back the sanctions because they wanted to avoid the costs to themselves of failing to act in accordance with the professed group norms. For instance, they might have been afraid of ‘awkward partner’ charges if they did not join the sanctions. Alternatively, they might have felt that it was worth acting strategically on this issue in order to extract concessions on other issues from the sanction leaders. Governments might also have been worried about damaging the credibility of the Union’s policies, in particular the legitimacy of its eastern enlargement policy (Wiener 2000, 5-6). For instance, non-compliance with institutional norms in this case could have undermined the EU’s bargaining position vis-à-vis the candidate countries.

We do not have enough hard evidence to decide which of these two behavioural logics - the logic of appropriateness and of arguing or the logic of consequences - was operative in the case at hand. What we can say is that the EU Fourteen consistently framed their actions publicly in terms of the defence of EU norms and values. This suggests to us that the ‘embedded *acquis*’ was an important enabling condition in the decision by the EU Fourteen to back the sanctions against Austria. The following statement by Portuguese Secretary of State for European Affairs, Francisco Seixas de Costa, speaking on behalf of the Council Presidency, illustrates our claim.

[O]ur joint interpretation [of the Austrian case] is that we must continue to defend the essential values that underpin European construction and which are also the reference framework for the way the European Union behaves in its external relations ... Respect of human rights and the main democratic principles, the fight against racism and xenophobia do not only concern one country, if this country belongs to a community whose members share a project of civilisation and hope to create a common area of freedom, justice and security (*Agence Europe*, 3 February 2000, 3).

Yet, while we believe that norms were a crucial factor in the decision-making process of the EU Fourteen, we do not believe that they were the ‘cause’ of the collective action: without policy leaders like President Chirac and Prime Minister Verhofstadt, it is unlikely that Austria would have been isolated. After all, it is far from obvious that EU norms would have required such drastic measures.

First, it is certainly not unreasonable to interpret the imposition of the sanctions as a breach of countervailing EU norms. For example, it could be argued that a social norm in the EU prescribes not to isolate individual governments, which is also reflected, for example, in the informal voting practices in the Council whereby attempts are made not to overrule minorities (see e.g. Bulmer 1997, 375). This is precisely the point made by Romano Prodi, the Commission president. In a barely veiled criticism of the unilateral action of the fourteen member governments, he emphasised that ‘when one of its members is in difficulty, the whole

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<sup>9</sup> See Schimmelfennig 2000, 116-9; more generally Goldstein et al. 2000.



Union is in difficulty. It is the duty of a strong supranational institution not to isolate one of its members, but instead to keep it firmly in the fold' (*Agence Europe*, 3 February 2000, 3).

In addition to such social norms, the sanctions could also be seen as a breach of legal norms. In addition to the general constitutional norm to treat the other member states with equal respect, some of the measures taken against Austria might be interpreted as constituting a breach of Article 12 EC according to which 'any discrimination on grounds of nationality shall be prohibited'. Crucially, there is the issue of 'due process.' The EU Fourteen acted outside the Treaty framework, despite the fact that the TEU precisely provides proper procedures, such as Article 7 itself, as well as Article 227 EC, so far as there might have been a breach of the EC Treaty by the Austrian government. The existence of such procedures is so important, because they are meant precisely to prevent recourse to such forms of self-help among the member states.

Second, it seems puzzling that the sanctions were imposed despite any explicit violation of EU rules by the new Austrian government. This absence of a legal basis for the sanctions explains in part why it was not the EU as such, but rather the fourteen governments bilaterally that imposed the sanctions. Still, a counterfactual argument would suggest that the EU Fourteen should have expressed their concern, once the government had taken office, and declared that they would monitor the situation closely. They would then have imposed sanctions only once EU norms had been breached, in particular since Schüssel and Haider had both signed a declaration, drafted by Austrian president Klestil, which clearly stated Austria's adherence to European values (*Agence Europe*, 5 February 2000, 3-4).

Thirdly, as mentioned earlier, such a more reserved position was precisely the one adopted by the European Commission, with which we should expect EU norms to resonate most strongly. Romano Prodi thus declared that while the Commission 'shares the concerns which underlie that decision', and 'will follow the situation carefully', it would 'maintain its working relationship with the Austrian authorities' (*Agence Europe*, 2 February 2000, 3). Furthermore, not all member states were equally eager to see Austria isolated. In particular, the governments of the United Kingdom, Sweden and Denmark expressed reservations (*Guardian*, 3 February 2000). In Germany, the opposition parties Christian Democratic Union (CDU), the Christian Social Union (CSU) and the opposition Free Democratic Party (FDP), certainly part of the EU mainstream, were strongly critical of the sanctions. Likewise, although the EP adopted with an overwhelming majority a resolution which welcomed 'the timely political intent of the statement of the Portuguese Presidency in so far as it reiterates Member States' concern to defend common European values as an act of necessary heightened vigilance', this did not disguise the fragility of the agreement between the two main parliamentary groups (*Agence Europe*, 4 February 2000, 3). Similar divisions appeared within the European Peoples Party, particularly during the debate about an expulsion of the ÖVP (*Agence Europe*, 11 February 2000, 5).

In sum, norms by themselves cannot account for the imposition of the sanctions. However, they help us understand how policy entrepreneurs such as President Chirac and Prime Minister Verhofstadt were able to mobilise collective action against Austria. Once these politicians framed the formation of the new Austrian government as a matter of defending the EU's *acquis*, i.e., its commitment to promote human rights inside and outside its borders, governments felt compelled, for moral or selfish political reasons, to act in accordance with the norms of the European polity. Yet, in order to explain the severity of the sanctions and,

more importantly, why certain politicians from particular member states were at the forefront of forging support for the actions, we have to turn to domestic politics.

## **V. Domestic Politics, or Why France and Belgium Were at the Fore of the Sanctions Against Austria**

In this section, we explore salient developments in the domestic setting of the EU Fourteen with a view to providing a contextualised interpretation of the motives which led policy entrepreneurs like Jacques Chirac and Guy Verhofstadt to act as sanction leaders. They were crucial in forging a consensus on the measures against Austria and bilaterally went further than most other national decision-makers in their attempts to ostracise Austria.

We claim that in order to understand why they acted the way they did, one has to go beyond the social and legal norms of the EU: it is domestic party-political and electoral considerations which explain why these politicians were at the fore of the EU actions. By invoking EU solidarity as a weapon against the FPÖ, they sought to reinforce their own position. To fully understand the domestic politics argument, we have to consider the changing role of ‘extreme right parties’ (ERPs)<sup>10</sup> in Western Europe over the last two decades.

What has been termed ‘the third wave of right-wing extremism’ (Von Beyme 1988) started in the early 1980s with small electoral successes of parties like the Dutch Centre Party (CP), the Belgian Flemish Block (VB), and the French National Front (FN). By the early-1990s ERPs had become (fairly) established actors in Austria, Belgium (Flanders), Denmark, France, Italy and Norway, while in Germany, the Netherlands and Sweden there was general concern about similar developments. In reaction, both left-wing and right-wing parties began to pay increasing attention to the ERPs, perceiving them as an ‘ideological threat’, i.e. juxtaposed to their own ideals. However, parties of the second group were alleged by some to see them mainly as an ‘electoral threat’, a potential competitor for right-wing votes. The truth is that probably both left-wing and right-wing parties, except for the Greens, saw the ERPs as both an electoral threat and an ideological one, and deservedly so: in countries like Austria and France, ERPs commanded growing numbers of blue-collar votes (Betz 1994). In short, in the early 1990s there was a belief in a virtually Europe-wide resurgence of ERPs and in various countries fierce debates were held over the question how to cope with this phenomenon (Van Donselaar 1995).

By the late 1990s the electoral successes of the extreme right party family had become increasingly diversified. The breakthrough in Germany and the Netherlands, for example, had failed, while in Austria, France and Flanders ERPs had become major players in the political arena. While parties like the FN and FPÖ were still treated by the mainstream as outsiders, they did set the themes in most electoral campaigns and were gaining between ten and twenty per cent of the votes. Most importantly, however, they became a problem for the internal cohesion of mainstream right-wing parties. The durability of the electoral successes of the ERPs, and their more co-operative strategy, led to heated debates within right-wing parties over how to deal with the extreme right.

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<sup>10</sup> The term ‘extreme right party’ is used here in a broad sense, including all parties that are generally referred to in the public debate as ‘extreme right’ (see Mudde 2000).

This had the most devastating effect on the French mainstream right-wing. Here, the overtures of Bruno Mégret, then vice-chairman of the FN and now leader of the FN-split National Movement, towards most notably regional leaders of the Union of Democratic Forces (UDF) and the Rally for the Republic (RPR) caused considerable embarrassment to party members who argued that the mainstream right-wing parties were also part of the 'anti-fascist' democratic spectre. Moreover, when in the 1998 governmental elections various right-wing leaders were elected with FN support, and did not respond to the decree from the party top to resign, both mainstream parties split and some commentators spoke of 'the end of the French Right' (Knapp 1999). At the head of the anti-FN wing of the RPR was President Chirac. In the UDF, this role was played by party leader François Bayrou. Later, both politicians were among the main protagonists of sanctions against Austria (e.g. *Libération*, 25 February 2000).

A similar, though less dramatic development can be seen in Flanders, where the Flemish Liberals and Democrats (VLD) are increasingly haunted by the VB. The 1999 parliamentary elections were considered crucial for the leadership to finally show that the VLD was not just an opposition party with populist slogans, but a serious governmental party with policies. 1999 had to bring governmental power at all costs, which meant for some within the party a coalition with the extreme right. In the end, the leadership opted for a coalition with the socialists and greens, partly pressured by their 'brethren' of the Walloon Liberals (PRL), who, like virtually all Walloons, are deeply fearful of the Flemish nationalist, and anti-Belgian VB.<sup>11</sup> Not surprisingly, particularly given the local elections scheduled for October 2000, the Belgian liberals in general, and prime minister Guy Verhofstadt (VLD) in particular, were the other main protagonists of EU sanctions.

The point to be made here is that not only did the extreme right 'threat' change over the past decade in quantitative terms, i.e. 'threatening' fewer countries than before, it also changed in qualitative terms, i.e. in the 'nature' of the threat. The first point largely explains the pattern of sanction leaders and followers we can observe in the case at hand. Closely related, the second point explains why particularly France and Belgium were at the fore and why they took the unprecedented step of calling for sanctions. After all, in these two countries the extreme right was not anymore merely an external threat, possibly influencing policies or taking away seats. Far more importantly, the extreme right had become a threat to the position of leaders such as Jacques Chirac and Guy Verhofstadt within their own parties. If co-operation between mainstream right-wing and extreme right parties like in Austria would prove a successful option, their position could be challenged.

This is also a main reason for the particularly radical opposition of the socialist parties in these two countries to the 'Austrian model'. Pure ideological threat arguments can not explain it, as other socialist and social democratic parties, like the Swedish or even the Dutch, took a far more moderate position. But then, these parties have little to fear from a possible coalition between mainstream and extreme right-wing parties in their own country. In France and Belgium, on the other hand, keeping the mainstream Right away from the extreme right is the only way for the Left to keep its comparative advantage in terms of coalition potential. In both countries it kept the socialist parties in power, if only in a coalition or *cohabitation* with the

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<sup>11</sup> The Belgian foreign minister Louis Michel (PRL) was perhaps the most outspoken critic of Austria. He explicitly referred to the electoral threat of the VB, saying: 'Of course, that is one of the reasons I reacted so quickly and violently. I feel the risk here in Belgium' (*The Economist*, 26 February 2000, 41).

mainstream Right. Should the ‘Austrian model’ find resonance in other EU countries, most notably these two, the Left could be faced with a possibly long period of opposition politics.

In sum, while the embedded *acquis* provided the meaning context in which the sanctions against the Austrian government could be legitimised, and hence a resource for policy entrepreneurs, the story of is more complex. We have to focus on domestic party politics in order to understand fully why certain governments were at the forefront of forging support for the sanctions against the Austrian government.

It is important to point out that our argument should not be interpreted as a claim that the advocates of sanctions were *only* driven by selfish electoral motives. Nor do we suggest that concerns about the rise of domestic far-right parties and a genuine interest in the protection of human rights in the EU are mutually exclusive. We simply argue that important characteristics of the case - such as the fact that there were agenda-setters and followers, as well as the intensity of the policy entrepreneurs’ preference for the sanction and arguably their severe form - are best explained by party political, rather than ideational, factors. The German foreign minister, Joschka Fischer, for example, explicitly portrayed the sanction not only as a measure against Haider in Austria, but also as a means to combat domestic far-right parties (*Süddeutsche Zeitung*, 3 February 2000). However, we underline that this is perfectly compatible with our explanation of the constitutive role of the *acquis* and the causal role of policy entrepreneurs.

## VI. What Future for Articles 6 and 7 TEU?

So far we have provided an account, based on causal and constitutive explanations, of the sanctions by the EU Fourteen against the Austrian government. We conclude by considering how the boycott, conceptualised as practice, affected the meaning context of Articles 6 and 7 TEU, and indicate the possible changes to the Treaty which might result from this change.

Looked at through the lens of legal positivism, the sanctions against Austria by the EU Fourteen document major deficiencies in the judicial provisions of the *acquis*. The TEU does not define in precise legal language what constitutes grounds for the initiation of an Article 7 procedure. The Treaty neither elaborates on the conditions of application for such a procedure nor does it provide examples of the behaviour proscribed or prescribed by Article 6. Rather, the TEU simply states that an Article 7 procedure may be initiated by the Council if it determines that there exists a ‘serious and persistent breach’ of the principles mentioned in Article 6. But what does this mean? Can a governmental party by its very nature violate the EU’s Article 6 principles or is it to be judged by its actions? If so, should the assessment proceed on the basis of the practical measures the party in question takes when in government or is it enough to look at the campaign rhetoric? In brief, the lack of precision of Article 7 opens up a large scope for reasonable interpretations, including self-serving interpretations. From the perspective of legal positivism, a lack of *ex ante* clarity of this sort undermines the force of law and raises questions about the legitimacy of the measures taken to uphold the law.

This view seems to inform the recommendations of the so-called ‘wise-men’ report. Martti Ahtisaari, the former president of Finland, Jochen Frowein, the director of the Max-Planck-Institute for comparative public law and international law, and Marcelino Oreja, a former

member of the European Commission, had received a mandate from the EU Fourteen through the president of the European Court of Human Rights to evaluate the Austrian government's commitment to the common European values. In their report, the 'wise men' called for 'the development of a mechanism within the EU to monitor and evaluate the commitment and performance of individual Member States with respect to the common European values'. To this end, they recommended 'the introduction of preventive and monitoring procedures into Article 7 of the EU Treaty, so that a situation similar to the current situation in Austria would be dealt with *within* the EU from the very start' (Report 2000, 34; our emphasis).

A legalistic analysis highlights the dubious legal nature of the sanctions against Austria by the EU Fourteen and, more importantly, helps us identify formal rules and procedures needed to avoid 'extra-constitutional' actions in the future. However, it pays little attention to the political and social significance of the collective action in question and may thus be accused of being overly formalistic. If there is a change to Article 7 in the future, it will not (simply) be the result of disinterested legal analysis aimed at increasing the clarity and precision of EU law. Constitution-making is crucially shaped by exogenous factors such as politics and, more fundamentally, the shared understandings of the involved actors which are produced and reproduced through practices. Therefore, we now turn to the debate about the sanctions ensuing in the period after their imposition with a view to showing how the ideas entailed by the embedded *acquis* underwent a subtle change, thereby modifying the meaning context which had originally enabled policy entrepreneurs like Jacques Chirac and Guy Verhofstadt to mobilise the collective action against the Austrian government.

By the end of the Portuguese Presidency, concern about the ramifications of the measures against Austria was rising among key EU players. There was a growing feeling among many EU governments that the sanctions had become counterproductive. The evidence was mounting that instead of undermining the Austrian coalition government, the measures by the EU Fourteen led to a rally-round the flag effect and to widespread anti-EU sentiments in the country (*The Economist*, 2 September 2000, 25).

In other EU countries, too, the unease about the sanctions among ordinary citizens was rising. The argument of the Austrian government that the larger EU countries had ganged up to interfere in the democratic process of a small member state strung a cord with voters in other small countries, especially Nordic ones. For the Danish government this was particularly unwelcome. It worried that a continuation of the measures would undermine its efforts to secure a positive outcome in the Danish referendum on joining EMU which was scheduled for the end of September 2000. Therefore, Prime Minister Poul Nyrup Rasmussen took a leading role in persuading hardline EU members, particularly France and Belgium, to lift the sanctions unconditionally. His efforts at the European Council in Feira in June 2000 were crucial in making the call for a 'wise men' report acceptable to the other thirteen EU governments (*Der Standard*, 12 September 2000). Once the report had been submitted to the French Presidency, Prime Minister Rasmussen urged his colleagues to quickly act on the recommendation to lift the sanctions, indicating that Denmark was ready to act alone in this matter (*TF1 Les News*, 13 September 2000).

This brief analysis suggests that the embedded *acquis* understood as a normative structure-of-meaning-in-use changed subtly through a public process of argumentation and persuasion in which the opponents and the supporters of the sanctions against Austria engaged. Initially,

many governments and citizens seemed to regard the measures as an unambiguous reflection of the high standard of civilisation that characterises the EU: the member states stood up for their professed values by sanctioning one of their own, thus demonstrating that they applied a single standard to themselves and the central and eastern European candidate countries. Subsequently a number of governments and their citizens apparently began to look at the case also from the perspective of the relative influence in the EU of larger and smaller member states. Furthermore, this interpretative shift has to be seen in the context of the current intergovernmental conference in which large and small states are pitted against each other on a number of issues related to the size and the composition of the Commission and the re-weighting of votes in the Council of Ministers (*European Voice*, 19 October 2000, 8). What is the likely effect of these ideational changes to the embedded *acquis* on the further constitutionalisation of human rights in the EU?

Most member states now apparently agree that the defence of human rights in the EU should take place within the institutional framework of the EU, based on a new decision-making procedure and new legal instruments which provide member states with options short of the suspension of the membership rights of the government in question (*European Voice*, 12 October 2000, 4). One proposal which seems to garner widespread support is that there should be a change to the existing rules such that wayward countries could be given a formal warning that they are in danger of deviating from the core values of the EU. The decision to issue such a warning would be taken by qualified majority, however defined, rather than by unanimity as currently prescribed. Were these changes to the TEU to take place, the EU would limit the counterproductive implications of imposing sanctions on one of its member states, without abandoning altogether its claim to define its group identity in parts through Article 6(1). However, this scenario also has a drawback. The EU would once again become vulnerable to accusations that it follows a double-standard in defending and promoting human rights in the member states and the applicant countries from central and eastern Europe (Witte 1998), since for the latter compliance with the political criteria for EU membership as specified by the Copenhagen European Council in June 1993 are a prerequisite for successfully concluding the accession negotiations.

## VII. Conclusion

In this paper, we explored the role the *acquis communautaire* played in the imposition of sanctions by the EU Fourteen against the Austrian government, and we explored how the development and resolution of the case might affect key constitutional principles of the EU. Our analysis was informed by a legal-constructivist conception of EU law which highlights the social embeddedness of the formal *acquis* in a structure of intersubjective ideas and values. From this perspective, we showed how the policy practices related to the eastern enlargement of the EU affected both the formal and the informal part of the *acquis*: the EU's commitment to fundamental human rights was discursively strengthened and legally concretised. We argued that this evolution of the Union's normative structure provided the condition of possibility for the mobilisation of collective action against the Austrian government by self-interested policy entrepreneurs. In particular politicians from France and Belgium, whose preference for sanctions we derived from an analysis of recent party political developments in their countries, drew on the formal and informal norms entailed by the 'embedded *acquis*' in order to make their case for taking measures against Austria. By arguing that the self-understanding of the EU as a group of states committed to upholding human rights inside and

outside its borders was at stake, the sanction leaders were able to prompt EU governments initially sceptical of the punitive measures to agree to the collective action. In short, we showed that in this case law was both an instrument of political actors and a meaning structure conditioning political action: the interpretation by the EU Fourteen that the Austrian government was in breach of its Article 6 commitments was contingent on politics, and the pursuit of political goals by means of sanctions was dependent on the legitimacy of social and legal EU norms.

As to the question how the case of the EU Fourteen against Austria might affect Articles 6 and 7 TEU, a legalistic analysis would try to answer it by focusing on only the internal dynamics of legal discourse. We went beyond such an analysis and tried to explore how legal reasoning and political processes interacted in this case, thereby pushing the further constitutionalisation of human rights protection in the EU in a particular direction. Our approach showed that the political debate triggered by the sanctions effected a subtle change to the intersubjective meaning embodied in the embedded *acquis*, which is not captured by a legalistic analysis. As a result of this change, a more cautious approach to the fight against racism and xenophobia in the EU seems likely to prevail in the future. This might lead to the introduction of new procedures into Article 7 TEU which would enable governments to publicly express their concern about a wayward member state without having to resort to outright sanctions or to collective actions outside the framework of the EU.

## References

- Abrams, Dominic and Michael A. Hogg (1998). *Social Identity and Social Cognition* (Oxford: Blackwell).
- Ahtisaari, Martti, Jochen Frowein and Marcelino Oreja (2000). 'Report' ('Wise Men Report'). Adopted in Paris, 8 September 2000.
- Alston, P. and Weiler J.H.H. (1999) 'An "Ever Closer Union" in Need of a Human Rights Policy: The European Union and Democracy'. *Harvard Jean Monnet Working Papers*, No. 1/99.
- Armstrong, Kenneth A. (1998). 'Legal Integration: Theorizing the Legal Dimension of European Integration', *Journal of Common Market Studies* vol. 36, no. 2, 155-174.
- Barnett, Michael N. (1999). 'Peacekeeping, Indifference, and Genocide in Rwanda', in *Cultures of Insecurity: States, Communities, and the Production of Danger*, eds. Jutta Weldes, Mark Laffey, Hugh Gusterson and Raymond Duvall (Minneapolis: University of Minnesota Press, 1999), 173-202.
- Betz, Hans-Georg (1994). *Radical Right-Wing Populism in Western Europe* (Houndmills: Macmillan).
- Beyme, Klaus von (1988). 'Right-wing Extremism in Post-War Europe', *West European Politics*, vol. 11, no. 2, 1-18.
- Bulmer, Simon (1997). 'New Institutionalism and the Governance of the Single European Market', *Journal of European Public Policy*, vol. 5, no. 3, 365-386.
- Clapham, Andrew (1991). *Human Rights and the European Community: A Critical Overview* (Baden-Baden: Nomos).
- Commission (1997). 'Commission Opinion on Slovakia's Applications for Membership in the European Union', *COM (97) 2004*, 15 July 1997.
- Commission (1998). 'Composite Paper. Reports on Progress Towards Accession by Each of the Candidate Countries', *COM (98) 700-712*, 4 November 1998.
- Council (1993). 'European Council in Copenhagen, 21-22 June 1993, Presidency Conclusions', *Europe Documents*, no. 1844/45, 24 June 1993.
- Cronin, Bruce (1999). *Community Under Anarchy: Transnational Identity and the Evolution of Cooperation* (New York: Columbia University Press).
- Der Standard*, available at <http://derStandard.at/Archivsuche>.
- Europe*, available from EBSCO.
- Guardian*, available at <http://www.guardianunlimited.co.uk/Archive>.
- Goldstein, Judith, Miles Kahler, Robert O. Keohane and Anne-Marie Slaughter (2000). 'Legalization and World Politics', *International Organization, Special Issue* vol. 54, no. 3.
- Habermas, Jürgen (1997). *The Theory of Communicative Action: Reason and the Rationalization of Society* (Cambridge: Polity).
- Knapp, Andrew (1999). 'What's Left of the French Right? The RPR and the UDF from Conquest to Humiliation, 1993-1998', *West European Politics*, vol. 22, no. 3, 109-138.



*Libération*, available at <http://www.liberation.fr>.

- Merlingen, Michael; Cas Mudde and Ulrich Sedelmeier (forthcoming). 'The Right and the Righteous? European Norms, Domestic Politics, and the Sanctions Against Austria', forthcoming in *Journal of Common Market Studies*.
- Mudde, Cas (2000). *The Ideology of the Extreme Right* (Manchester: Manchester University Press).
- Risse, Thomas (2000). 'Let's Argue!': Communicative Action in World Politics', *International Organization* vol. 54, no. 1, 1-39.
- Schimmelfennig, Frank (2000). 'International Socialisation in the New Europe: Rational Action in an Institutional Environment', *European Journal of International Relations* vol. 6, no. 1, 109-139.
- Sedelmeier, Ulrich (2000). 'Eastern Enlargement: Defining the EU's International Role', paper presented at the joint ARENA and ESRC 'One Europe or Several' Programme workshop 'Redefining Security? The Role of the European Union in European Security Structures,' Oslo, 9-10 March.
- Shaw, Jo (1996). 'European Union Legal Studies in Crisis? Towards a New Dynamic', *Oxford Journal of Legal Studies* vol. 16, no. 2, 231-253.
- Shaw, Jo (2000). *Law of the European Union*. 3 ed. (Basingstoke: Palgrave).
- Shaw, Jo and Antje Wiener (1999). 'The Paradox of the 'European Polity'', *Harvard Jean Monnet Working Paper* 10/99.
- Slaughter, Anne-Marie, Andrew S. Tulumello and Stepan Wood (1998). 'International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship', *American Journal of International Law* vol. 92, no. 3, 367-397.
- Süddeutsche Zeitung*, available at <http://www.szarchiv.de>.
- TF1 Les News*, available at <http://infos.tf1.fr/info>.
- Van Donselaar, Jaap (1995). *De staat paraat? De bestrijding van extreem-rechts in West-Europa* (Amsterdam: Babylon-De Geus).
- Wallace, William (1996). *Opening the Door. The Enlargement of NATO and the European Union* (London: Centre for European Reform).
- Wendt, Alexander (1992). 'Anarchy is What States Make of it: The Social Construction of Power Politics', *International Organization* vol. 46, no. 2, 391-425.
- Wendt, Alexander (1998). 'On Constitution and Causation in International Relations', in *The Eighty Years' Crisis: International Relations 1919-1999*, eds. Tim Dunne, Michael Cox and Ken Booth (Cambridge: Cambridge University Press), 101-118.
- Wendt, Alexander (1999). *Social Theory of International Politics* (Cambridge: Cambridge University Press).
- Wiener, Antje (1998). 'The Embedded *Acquis Communautaire*: Transmission Belt and Prism of New Governance', *European Law Journal* vol.4, no.3, 294-315.
- Wiener, Antje (2000). 'Effects of Compliance - Norm-Resonance and the EU Enlargement *Acquis*', unpublished research proposal, Belfast.
- Witte, Bruno de (1998). 'Ethnic Minorities, the European Union and its Enlargement', paper presented to the Reflection Group on 'Long-term Implications of EU Enlargement: the

Nature of the New Border', Florence, 18-19 June.

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