THEORIZING THE TRANSFORMATIVE IMPACT OF THE EU'S FOREIGN POLICY ROLE: A CRITICAL APPRAISAL

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Submitted to
Central European University
Department of International Relations and European Studies

In partial fulfilment of the requirements for the degree of Master of Arts in International Relations and European Studies

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17,164 Words

Budapest, Hungary
2008

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ABSTRACT

The present thesis focuses on academic attempts to theorize the EU's transformative foreign policy role and examines the various rhetoric and narrative patterns emerging from such theorizing through the analysis of a representative sample of academic contributions belonging to the Normative Power Europe (NPE) and Ethical Power Europe (EPE) scholarships.

The main argument of this thesis is that the normative content of NPE/EPE accounts contribute to the legitimization of the EU's transformative activity in its external relations and consequently, to the silencing of new local agencies in the European periphery by stripping them of their autonomous "political" capacity. By means of a critical discourse analysis, it is showed *how* the normative content of NPE/EPE contributions are being constructed and operated discursively. This is achieved (1) by problematizing the images of law and ethics as unfolding from these texts according to the visions of "normality" they contain and (2) by setting them against alternative readings, which are expected to reveal what practices are naturalized by these specific images of normality.

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INTRODUCTION

The increasing foreign policy activity of the European Union (EU) in the past decade brought about a problem shift for many academics researching the field: from the initial debate on whether the EU has a foreign policy or not now the focus has shifted to the substantive characteristics and implications of European Foreign Policy (EFP). In this context, one of the topics occupying the centre of academic attention is the EU's developing self-image as a global player with a broad spectrum of civilian and military capabilities, which at the same time also claims to be a positive transformative force in world politics contributing to a "better world".

This thesis focuses on certain academic attempts to theorize the EU's transformative foreign policy role and seeks to investigate various rhetoric and narrative patterns emerging from such theorizing through the analysis of a representative sample of academic contributions belonging to the Normative Power Europe (NPE) and Ethical Power Europe (EPE) scholarships. On a general level, we can characterize these selected articles as varying from scientifically-inspired research agendas with the purpose of explaining what the EU is, what it does, what it can and cannot do internationally through how effective it is what the EU does in world politics to more explicitly normative contributions answering the question of what the EU *should* do on the global stage. In this context, although many authors seek to distance themselves from the official EU rhetoric in a 'critical' attitude, most of them occupy a pro-European stance, addressing the issue of EFP in a positive (or at least neutral) connotation.

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Treating "theorizing" as practice, the starting point of this thesis is the intuition that despite the proclaimed objectivity or even 'critical' self-positioning of these writings, they convey certain *normative* agendas with respect to their field of study, the politics of European external relations. In this context, NPE/EPE writings selected for the purposes of this thesis are viewed as instances of 'normative theorizing'. The main argument of this thesis is that the normative content of NPE/EPE accounts contribute to the legitimization of the EU's transformative activity in its external relations and consequently, to the silencing of new local agencies in the European periphery by stripping them of their autonomous "political" capacity.

In order to provide deeper insights with respect to the discursive (and pragmatic) effects of NPE/EPE contributions, we seek to engage with certain themes emerging from these academic streams from a critical perspective. With the assistance of concepts and theoretical perspectives borrowed from a broad range of critical thinking encompassing critical legal studies, postcolonial critical theory, poststructuralist accounts of international relations and neo-Marxist readings of world politics, the thesis examines NPE/EPE arguments with respect to their take on the role of "law" and "ethics" in guiding the development of a more appropriate EFP. The main aim of this thesis is to show through a critical discourse analysis *how* the normative content of NPE/EPE contributions are being constructed and operated discursively. This will be done (1) by problematizing the images of law and ethics as unfolding from these texts according to the vision of "normality" they contain and (2) by setting them against alternative readings, which are expected to reveal what practices are naturalized by this specific image of normality.

Accordingly, the thesis proceeds along the following structure. In the first chapter, through the brief discussion of the main arguments of representative NPE/EPE authors, we

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seek to provide a comprehensive picture of the relevant law- and ethics-related narrative patterns coming up in the current state of normative theorizing.

The second chapter focuses on the positive/neutral images of law unfolding from NPE accounts and seeks to destabilize the narratives building up these images by providing a more complex and balanced understanding of the implications of the legal form and appeals to universal content from various critical angles, drawing attention to the (non-neutral) power-dynamics intrinsic to law.

The third chapter embeds these findings within a broader political context; in this case, by highlighting the internal connections of the operation of "the political", "politics" and law, we seek to identify the ways in which law may serve as a form of expression of "the political". Rereading this insight in light of the notion of Empire, the chapter points out some of the dangers related to foreign policy theorizing that argues for a (seemingly) universalist and antipolitical frame of legal action.

In the fourth chapter, similarly to the critical investigation of legal arguments, the images of ethics coming up in EPE contributions will be scrutinized by unpacking their hidden power-implications, and showing how they prevent the development of creative agency arising from the uniqueness of each situation.

As a result, based on these expected findings, it should be possible to see NPE/EPE theorizing in a different, more critical light. Through the deconstruction of narrative patterns promoting a more legal/ethical foreign policy, the underlying rationalities and assumptions driving such normative theorizing should become visible – which also represent the point of departure for a less hegemonic academic discourse on EFP.

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CHAPTER 1 - MAPPING THE NORMATIVE AGENDA OF NORMATIVE/ETHICAL POWER EUROPE

1.1. Two Meta-narratives

One possible way of mapping the current state of normative theorizing with respect to the external relations of the EU is to distinguish between different narratives emerging from the various contributions in the field of the Normative/Ethical Power Europe scholarship (N/EPE). In doing so, we assume that in each case of story-telling we find certain empirical, factual aspects of the EU merged together with a specific ontological image or claim attached to the selected slice of "European reality". In Bakthinian terms, this exercise may be viewed as the first step towards conducting an investigation in "sociological poetics", which focuses on "the question of the reflection of the ideological horizon in the content of the work and of the functions of this reflection in the whole structure".[1] Thus, before turning our attention to the broader ideological/political context of the representative circle of works chosen for the purposes of this thesis, the classification of the above-mentioned narratives is expected to yield a deeper understanding of the general structure and content of these texts.

In this sense, two meta-narratives can be discerned from the selected accounts concentrating on the 'normative/civilian/civilizing' or 'ethical' dimensions of EFP. The first category of writings works similarly to a blow-up: by zooming in on a given characteristic of the EU's foreign policy behaviour and, abstracting from this segment, the authors present an

[1]Mikhail Mikhailovich Bakhtin, *The Formal Method in Literary Scholarship*. (Baltimore, MD.: Johns Hopkins University Press, 1991) 10-11, 30.

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ontological claim related to the EU, which accounts for its activity in the broadly defined European neighbourhood. In contrast, the second category of works starts from an abstract, imaginary picture of what a 'normative' or an 'ethical' power would look like, which is then set against the empirics of EFP. While in the first case the authors seek to explain a formerly undertheorized aspect of EU external relations with reference to what the EU 'is' or how it works internally, in the latter an 'ideal-type' power is constructed, which serves as a tool to directly evaluate what the EU 'does'. In the next few sections these two meta-narratives will be elaborated in detail.

1.2.1. The "Ontological" Meta-narrative

The first, 'ontological' category is first and foremost exemplified by Ian Manners' concept of 'Normative Power Europe', possessing the "ability to shape conceptions of 'normal' in international relations", through a foreign policy which "works through ideas and opinions".[2] Here, the author's starting point is the EU's putative ontological uniqueness, which substantiates a 'strong' interpretation of its normative role in its foreign relations.[3] As Manners observes, "the EU's normative difference comes from its historical context, hybrid polity and political-legal constitution", having been created in a post-war historical environment with the aim of strengthening peace, in a political form that transcends the Westphalian order, placing strong emphasis on the issue of human rights. The ontological uniqueness of the EU as a normative power is then argued to inform the EU's foreign policy behaviour in terms of *what* is does and *how* it is being done. As the author emphasizes, "the

[2] Ian Manners, "Normative Power Europe: A Contradiction in Terms?," *Journal of Common Market Studies* 40 (2002): 239; Thomas Diez, "Constructing the Self and Changing Others: Reconsidering 'Normative Power Europe'," *Millennium* 33 (2005): 615.
[3] "Strong" in this case means going beyond the study of (the impact of) norms, ideas, values as power resources in foreign policy.

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central component of normative power Europe is that it exists as being different to pre-existing political forms, and that *this particular difference pre-disposes it to act in a normative way*".[4]

As it further unfolds from the author's argument, the content of "acting in a normative way" entails a significant element of change, making the EU appear as a *norm-changer*. Accordingly, the EU is seen as seeking "to redefine international norms in its own image" by "trying to reorder the language of international society" and "shaping the dialogue" between states through either direct engagement with other parties, or, more importantly, by acting non-relationally through the power of norms as "presence".[5]

A number of other approaches operate with a similar logic in accounting for European foreign relations. Jennifer Mitzen's conception of "ontological security" applied to the EU-context, in a similar vein, highlights the externally constitutive impact of certain decision-making routines within the EU referred to as a "habit of deliberation" or "coordination reflex", which serve as preconditions to a stable ("civilizing") identity on the EU's part, making normative interaction possible with its environment.[6] In this context the author proposes that "because the habit of deliberation tames anarchy 'inside', it also produces the potential to civilize EU relations with the 'outside': EU foreign policy is not only 'inter-action' with outsiders but always 'intra-action', and this makes all the difference".[7] What is being argued in this case is that the procedural automaticity of EU decision-making in the domain of foreign affairs disciplines external practices, which in turn anchors and strengthens the EU's identity and role as a "civilizing power".

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[4] Manners, "Normative Power Europe", 240-2. my emphasis. For a further description on the EU's "normative difference" see Idem, "The European Union as a Normative Power: A Response to Thomas Diez," *Millennium* 35 (2006): 167-80.

[5] Manners, "Normative Power Europe", 252; Idem, "Response", 176-7.

[6] Jennifer Mitzen, "Anchoring Europe's Civilizing Identity: Habits, Capabilities and Ontological Security," *Journal of European Public Policy* 13 (2006): 276.; Idem, "Ontological Security in World Politics: State Identity and the Security Dilemma," *European Journal of International Relations* 12 (2006): 342, 346.

[7] Mitzen, "Anchoring Europe's Civilizing Identity", 275.

As we have seen, Manners' and Mitzen's argumentations follow the same rhetoric structure: both of them highlight an unreflective, non-agency related element of the EU's internal characteristics (such as norms or routines), which contributes to the EU's unique quality (expressed in terms of a "normative difference" or a "coordination reflex") directly linked with (the desirability of) normative change in European external relations. As for the latter momentum, the authors are explicitly in favour of a norm-based EFP: as Manner claims, "the EU *should* act to extend its norms into the international system" and in this regard, according to Mitzen, the EU is "uniquely capable of 'externalizing' its civilizing mission".[8]

From a more critical perspective, Adrian Hyde-Price seems to develop a greater distance towards the EU's transformative role in its broadly defined neighbourhood. Hyde-Price, in putting forward a neorealist critique of the "normative power" approach, makes at least two important assumptions: first, from a structural realist perspective, ethical issues are always seen as 'second-order' concerns ranking below fundamental interests such as national security, and second, it is assumed that states are interested in (stable) regional governance and thus, in fulfilment of this collective need, great powers engage in "milieu-shaping". In this context, according to the author "EU external policy co-operation constitutes a collective attempt at milieu shaping, driven primarily by the Union's largest powers."[9] In contrast to Manners' and Mitzen's accounts, Hyde-Price's contribution is not explicitly normative in a sense of overtly supporting the expansion of "European norms". However, the reason why his work may still belong to the meta-narrative of *normative* theorizing as defined above is to be found in the structure of his argument: by positioning "milieu-shaping" as a core assumption of the theoretical framework he utilizes, the EU's transformative power and its exercise as exemplified by the EFP appear as taken for granted, and thus, remain immune to scrutiny. In

[8] Manners, „Normative Power Europe", 252; Mitzen, "Anchoring Europe's Civilizing Identity", 275.
[9] Adrian Hyde-Price, "Normative' Power Europe: a Realist Critique," *Journal of European Public Policy* 13 (2006): 222.

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this sense, the totality of the EU's external activity vis-à-vis third states in a broadly defined European neighbourhood is subsumed under a single, abstract term, which in turn, by *naming* them, homogenizes and naturalizes the phenomena (presumably) falling under its reach.

1.2.2. The "Ideal-typical" Meta-narrative

The second type of meta-narrative starts from an 'ideal-typical' definition of what a 'normative' or 'ethical' power might mean - in Helen Sjursen's terms, "how do we know a 'normative' or 'ethical' power when we see one?" – and continues with an evaluative momentum: according to the specified definition, is the EU a normative/ethical power?[10] The following sections seek to address first, the 'normative', then the 'ethical' power ideals in scholarly analyses of the EU's foreign policy behaviour.

1.2.2.1. Defining "Normative Powerness"

For many, the distinguishing feature of 'normative powerness' is a specific attitude towards law, which is presented as an antidote against (Eurocentric) imperialism by virtue of its capacity to regulate behaviour in consonance with a 'higher ranking' (cosmopolitan) order. The constituents of such images of law, in the works of i.e. Helen Sjursen, Erik Oddvar Eriksen, or Nathalie Tocci, include on the one hand, statements on the role of law as a 'means', and, on the other hand, a specific idea of international order posited as an 'end'. Ultimately, as it will be illustrated, both dimensions go down to particular ontological

[10] Helen Sjursen, "The EU as a 'Normative Power': How Can This Be?," *Journal of European Public Policy* 13: (2006): 236.; See also Idem, "What kind of Power?", *Journal of European Public Policy* 13 (2006): 170, 176.

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assumptions related to 'the social', meaning here the nature of actors and the type of interaction taking place among them.

For Sjursen, the main task is to come up with precise criteria to assess what is "distinctive about the EU's foreign policy", understood in terms of the claim that the EU is a 'force for good'. As the author argues, "a core distinguishing feature of a 'normative' power might be that it seeks to overcome power politics through a strengthening not only of international but cosmopolitan law, emphasizing the rights of individuals in the international system" vis-à-vis the rights of states to sovereign equality.[11] Sjursen reaches this conclusion through a number of logical steps, starting from the premise that 'norm-promotion' in itself is no guarantee against the imposition of particular values or interests on others, and then shifting the focus to what might qualify as 'legitimate' norm promotion in general and in the EU's context in particular. In turn, the author locates the measure for legitimate foreign policy action in the terrain of international law, which, however, presupposes a specific image of the world that calls for a preference for law. Here the author embraces the idea of a cosmopolitan international order based on a 'common judicial order' with a strong emphasis on human rights, in contrast to the current state of international affairs operating within the confines of traditional power politics, necessarily entailing a measure of "arbitrariness". In this case law is viewed as the opposite of and remedy to (excessive) political discretion: it appears as a "system of action that makes it possible to implement moral duties and commitments".[12] Law secures this aim in two interconnected ways. As it unfolds from the author's argumentation, on the one hand, law functions as a corrective to the ambiguity surrounding the pursuit (and rhetoric) of norms: through self-binding to law the risks of a self-interested application of norms can be reduced, ensuring their consistent application.[13] On the other hand, law, and

[11] Sjursen, "The EU as a 'Normative Power'", 236, 249.
[12] Ibid. 244.
[13] Ibid.

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especially 'rights', display a strong *consensual* element, which in turn generates legitimacy for law-driven foreign policy behaviour. Sjursen emphasizes the 'universal' character of rights, which, quoting Habermas, makes sure that "*all* affected can accept the consequences and the side effects its *general* observance can be anticipated to have for *everyone's* interest".[14] The cosmopolitan law of a cosmopolitan order therefore (1) establishes a hierarchy between norms (where human rights represent 'higher order norms') and subsequently, (2) subjects "interests" and "action" to this standard which delineates what constitutes "legitimate" in these domains. The EU is therefore expected "to transform the parameters of power politics" according to the cosmopolitan ideal through the means most appropriate for this aim, international law. The emphasis here is not so much on the legal form, but rather on the specific universal/cosmopolitan content *a* cosmopolitan law is meant to enforce: for Sjursen, a strong indicator of the EU's normative powerness would be the promotion of norms with "intersubjective transcultural validity" with a general transformative aim, as opposed to a scenario when it simply "write[s] itself into the existing international system through an emphasis on multilateralism."[15]

Eriksen shares Sjursen's cosmopolitan ideal and establishes his criteria for defining 'normative power' similarly with reference to law: normative quality in this case is measured as to whether a polity "subjects its actions to the constraints of a higher ranking law".[16] Just as in Sjursen's case, the notion of 'higher ranking law' refers to "human rights and criteria of justice", where human rights are featured with reference to their essentialist-universal content. In Eriksen's words, "human rights are universal – they appeal to humanity as such, to the interests of irreplaceable human beings and exhibit a categorical structure – and they have a

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[14] Ibid. 243. emphasis in the original; Jürgen Habermas, *Moral Consciousness and Communicative Action* (Cambridge: Polity Press, 1990), 65.
[15] Sjursen, "The EU as a 'Normative Power'," 248-9.
[16] Erik Oddvar Eriksen, "The EU – a Cosmopolitan Polity?", *Journal of European Public Policy* 13 (2006): 252.

strong moral content: 'Human dignity shall be respected at all costs!'".[17] Besides this common conceptual background, however, the author places prominent emphasis on the element of "constraint", which simultaneously presupposes a more functional concept of law.

As Eriksen argues, "law is a functional complement to politics and morality as it stabilizes behavioural expectations and solves the collective action problem". In this sense

> "[law] alleviates co-ordination problems by signalling which rule to follow in practical situations. […] Second, the sanctioning of non-compliance and defecting makes it less risky for actors to act in a morally adequate manner."[18]

As compared to Sjursen's emphasis on law's consensual character, for Eriksen law in the first place is *authority*, which makes social relations calculable and transparent through obligation and coercion, seen as a precondition to bringing about a cosmopolitan democracy where the existing state of nature between states is domesticated by means of human rights.[19] In this case

> "the legitimacy of laws stems […] from the very fact that they are obligatory and coercive. The law is a means to compel compliance, but it can only do so without unleashing the potential threat of force when it applies to all and when it is in compliance with moral principles, which under modern conditions, means that it must be just and made by the people".[20]

Law in this perspective serves as a force which represents a universal check on power (by bringing in the counterpart of obligation, accountability). In this case "universality" is understood more as the form than the content of (justly adopted) law: as the author reiterates several times, to secure the rights of (global) citizens, it is necessary that the law is "made binding on every part to the same degree and amount."[21]

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[17] Ibid. 253, 256.
[18] Ibid. 256.
[19] Ibid. 254
[20] Ibid. 265.
[21] Ibid. 255, 264.

In a similar vein, Tocci seeks to define 'normative foreign policy' according to "set standards that are as universally accepted and legitimate as possible" based on an "external reference point".[22] From this perspective

> "what is 'normative' […] is strongly based on international law and institutions, claiming that law, while man-made and far from immune to international power politics, represents the most universal and universalisable 'normative boundary' within which to assess foreign policy".

Again, law serves here as a restraint on power: as Tocci elaborates, "a focus on law diminishes the risks of imposing one's chosen definition of norms on others through the sheer exercise of power, as well as of acting inconsistently and selectively in world affairs". [23] In other words, law is meant to be "taming the power of the strong while protecting that of the weak" while it "ensures that choices are not crude reflections of political contingency, but rather are made within the boundaries of legally permissible acts".[24] In this context a "normative foreign policy" is driven by normative goals, acts through normative means and achieves (intended) normative impact. More precisely, normative foreign policy

> "thus justifies its foreign policy actions by making reference to its milieu goals that aim to strengthen international law and institutions and promote the rights and duties enshrined and specified in international law. It does so by respecting its internal and international legal obligations".[25]

Here the 'telos' remains more modest, not going as far as to explicitly argue in favour of a cosmopolitan world order. International law functions as an external standpoint for measuring foreign policy behaviour, which is an end in itself: a world in which foreign policy is measured by compliance with legal standards is ethically desirable *per se*, without direct reference to cosmopolitan (or alternative) foundations or goals to achieve. Law in this case is meant to demarcate its own terrain of operation, constituting an ameliorated space for the current state of international affairs.

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[22] Nathalie Tocci, "Profiling Normative Foreign Policy: The European Union and its Global Partners", CEPS Working Document No. 279/December 2007. 3.
[23] Tocci, 13, 5.
[24] Ibid. 6.
[25] Ibid. 9.; For an account focusing explicitly on the coherence of law-based foreign policy justification, see Marika Lerch and Guido Schwellnus, "Normative by Nature? The Role of Coherence in Justifying the EU's External Human Rights Policy," *Journal of European Public Policy* 13 (2006)::304-21.

In sum, in this narrative, law is represented as an instrument that is expected to restrain power through its own (legal) force, stabilize society and enable moral action by making social behaviour calculable, and to demarcate its own terrain of operation from political contingency in order to either strengthen "cosmopolitan law" (Sjursen) or substantiate a "democratic law-based supranational order" (Eriksen) or to help engage in the "effective building and entrenchment of an international rule bound environment" (Tocci). These ends are explicitly formulated against the potential 'Other' of normative power: a (Eurocentric cultural) imperialism[26], or an 'imperial foreign policy'.[27] In Sjursen's case, a Eurocentric cultural imperialism would mean the promotion of particular interests and values instead of universal ones, while for Eriksen, imperialism is bound up with political arbitrariness, both of which are expected to be avoided by increasing legalization, especially in the domain of human rights. For Tocci, an imperial foreign policy's distinguishing feature is that it is purely interest-driven, described as a type of foreign policy that "claims to pursue normative policy goals, yet not in a manner that binds itself". As the author further specifies, the imperial type is "like a Gramscian hegemon, it shapes the normative milieu by abrogating existing rules, promoting or preventing the adoption of others and playing a dominant role in creating others still in order to regulate its subjects in a manner that serves its best interest.[28] In this context, according to the criteria of normative powerness, the EU is expected, at a minimum, to conduct its external relations within the confines of international law, and as for the next level, shift current international politics towards a cosmopolitan order.

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[26] Sjursen, "The EU as a 'Normative Power'," 248, 249; Eriksen, 253, 255; Tocci 3, 7.
[27] Tocci 3, 7.
[28] Ibid. 8.

1.2.2.2. Defining "Ethical Powerness"

Turning to the ideal-typical definition of 'ethical' power in the second meta-narrative, two dominant narrative patterns seem to emerge from the works selected for the purposes of this thesis. On the one hand, several authors aim at theorizing the phenomenon of "ethical foreign policy" by specifying the potential added value of ethics to the existing scholarly inquiry in the field, while on the other hand, moving to a more concrete level, a number of contributions are devoted to the establishment of specific ethical guidelines and principles, which sketch out an ideal-type of EFP and at the same time, are expected to steer future EU practice.

As for the first narrative pattern, the notion of Ethical Power Europe (EPE), as the contributors of recent issue of International Affairs substantiate, seeks to mark out a new research agenda for studying the EU's international role with a critical aim. Lisbeth Aggestam sees at least five ways in which EPE would theoretically contribute to the existing debate on the EU's foreign policy role, currently dominated by the Normative Power Europe (NPE) scholarship. To highlight two of these, first, according to the author, EPE represents a progressive shift compared to NPE since it concentrates on the (possibilities of) active exercise of the EU's power as opposed to images of an indirect or passive power presumably characterizing some of the NPE writings. In Aggestam's words "EPE seeks to problematize the power of the EU by focusing on the agency involved – moving from institutional make-up (what it 'is') to its behaviour (what it 'does')".[29] This undertaking necessarily involves the rethinking of the possibility conditions of EFP: as the author argues, while NPE tended to focus on the EU's internal characteristics, which were assumed to determine its

[29] Lisbeth Aggestam, "Introduction: Ethical Power Europe?" *International Affairs* 84 (2008): 1, 3.

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transformative international role, EPE *reverses* the argument that the normative globalization taking place after the Cold War

"reflects the ability of the EU to shape what has come to pass as 'normal' in international politics (the idea of the EU domesticating international relations in its own image) and suggests instead that this normative development on the international level has had a profound effect in legitimizing and enabling the EU to assume a more assertive role in foreign, security and defence policy".[30]

The turn to ethics (both as an element of the official rhetoric and a subject of academic inquiry) in this case is seen as a natural corollary of increasing EU activity in its external relations: from Aggestam's point of view

"it is evident that with the conceptual shift in the EU's role from what it 'is' to what it 'does', a greater importance has been given to justifying this behaviour in terms of responsibilities or duties beyond Europe's borders in defence of universal values, such as human rights, physical security, economic prosperity, democracy and social well-being".[31]

Linking ethics to the justification of foreign policy behaviour in this fashion represents a twofold divergence from the normative power-images presented earlier. On the one hand, here ethics is divorced from the identity of the EU, to which, according to Aggestam, ethics is intrinsic in the NPE scholarship.[32] On the other hand, as opposed to accounts calling for more legalization in European external relations, ethics in this case is celebrated for its flexibility. To quote Esther Barbé and Elisabeth Johansson-Nogués in length, "ethical action is essentially subjective, relational and open to interpretations. This is why analysts normally call for legal restraints on the international action of foreign policy actors." However, as the authors further elaborate, "a legal framework marks only the outer boundaries of politics and is too blunt an instrument for regulating political action satisfactorily". Consequently, "there is a need for the elaboration of *political* rules of action, or best practices", in which case international actors are assumed to have the capability of moral action and "the political", seen as a "less clear-cut approach" as compared to law, "still represents a more flexible

[30] Ibid. 4.
[31] Ibid. 6.
[32] Ibid. 4.

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format than the legal, given its ability to change and adapt to different situations over time without becoming meaningless."[33]

On a pragmatic-general level, Barbé and Johansson-Nogués suggest that "the policy can be recognized as ethical if all parties—whether EU or non-EU actors—irrespective of their particular interests, perceptions of identity or values, local interpretation of universal norms and views on public administration, find the policy 'just'".[34] The next few sections will proceed by briefly summarizing four takes on normative ethics in the EU's context, which display a similar structure in terms of setting guidelines for foreign policy action but differ in their view of the EU's agency subject to these normative principles.

In this context, Ian Manners develops further his image of 'normative power', which for our purposes represents a full scope of agency imputed to the EU, acting in its capacity of a norm-changer "towards the achievement of a more just, cosmopolitical world which empowers people in their actual lives".[35] Manners supplements his concept of Normative Power Europe with a "procedural normative ethics", which concentrates on the *way* in which the EU promotes certain norms, concretized by the author via nine "substantive normative principles" (such as sustainable peace, freedom, democracy, human rights, rule of law, equality, social solidarity, sustainable development and good governance, respectively).[36] According to the suggestions of the author, at the level of principles, the EU's normative ethics should be based on a moral character, best described as 'living by virtuous example'.[37] Turning to the terrain of actions, Manners prescribes a duty for the EU of 'being reasonable' in its actions, which involves ensuring that the EU reasons and rationalizes its external actions through processes of engagement and dialogue with all others implicated in EU external

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[33] Esther Barbé and Elisabeth Johansson-Nogués, "The EU as a Modest 'Force for Good': the European Neighbourhood Policy," *International Affairs* 84 (2008): 83, 84. emphasis in the original.
[34] Ibid. 85.
[35] Ian Manners, "The Normative Ethics of the European Union," *International Affairs* 84 (2008): 60.
[36] Ibid. 46.
[37] Ibid. 56.

relations. As for the ethical standard to evaluate the outcomes of actions conducted in such a way, the author suggests that "the EU should 'do least harm' in world politics", which entails that "the EU thinks reflexively about the impact of its policies on partner countries and regions, in particular through encouraging local ownership and practising positive conditionality".[38]

As compared to Manners' tripartite presentation of a normative ethics designed to provide a comprehensive guidance for the EU's foreign policy behaviour, Hartmut Mayer concentrates on a narrower agenda. In his account, six 'action'-related general principles are offered, each formulated in terms of 'responsibility', which are meant to pave the way for the EU's becoming a 'responsible global institution'. [39] 'Responsibility' and 'institution' in Mayer's contribution are especially significant, since they delineate the scope of reference of the author's ethical stance. First, 'responsibility' is strongly connected to and inspired by the EU's official rhetoric, which abounds in ethical and normative references.[40] On this ground, Mayer calls for the "clarification of the EU's official rhetoric" by a better-defined notion of responsibility based on six general principles, (that of 'Contribution', 'Beneficiary', 'Community', 'Capacity', 'Legitimate Expectations', and 'Consent'), which are meant to serve as practical guidelines for shaping the EU's activity in international affairs.[41] Second, at the same time, the emphasis on 'institution' as opposed to 'power' in the EU's context functions as an asset mitigating the scope of responsibility: the author's preference for "responsible global institution" over stronger concepts, such as i.e. "ethical power" derives

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[38] Ibid. 58, 59.
[39] Hartmut Mayer, "Is it still called 'Chinese Whispers'? The EU's Rhetoric and Action as a Responsible Global Institution," *International Affairs* 84 (2008): 61-2.
[40] Ibid.; See also Henri Vogt, "Introduction", in *A responsible Europe? Ethical Foundations of EU External Affairs*. ed. Hartmut Mayer and Henri Vogt (Basingstoke: Palgrave Macmillan, 2006), 2.
[41] Mayer, "'Chinese Whispers'", 65-66; for a more detailed description of the content of these principles, see András Szigeti, "The Problem of Institutional Responsibility and the European Union," in *A responsible Europe? Ethical Foundations of EU External Affairs*. ed. Hartmut Mayer and Henri Vogt (Basingstoke: Palgrave Macmillan, 2006), 26-32.

from the presumption that "institution implies less agency".[42] In order to develop a more 'responsible rhetoric' for the EU, a 'new narrative' is proposed, which, "ideally, exactly the same for Europeans and non-Europeans, must therefore be centred on a theme that would broadly read as follows: 'Global responsibility in a pluralistic, non-hegemonic world with Europe in an increasingly peripheral position'"[43] Ethical powerness would therefore entail the following requirements: first, "enhancing capacities where needed to meet existing global responsibilities", second, "reducing expectations through a more realistic assessment of the EU's abilities, being guided by responsible modesty and an awareness of the Union's own priorities and limits rather than by ambitious exaggeration", and third, "developing a new and credible discourse within Europe and outside on the EU's responsibility in a non-European world".[44]

Mayer's propositions regarding the EU's foreign policy role fit within a broader normative take on the current international order; as the author argues elsewhere, "there is a moral obligation to keep the West together", expressed in terms of tripartite notion of responsibility equally binding the EU and the US towards the 'global community'.[45] In this sense a "functioning transatlantic partnership" is seen as a moral duty; for this aim 'mutual responsibility' requires that "the EU and the US to appreciate their common heritage and set of values and use this common understanding as a reference point for the treatment of one another", and based on this, they have a 'shared responsibility' to "sustain global order" along three dimensions, "security, economic and political governance at a global scale". The third element of moral duty serves as a safeguard against each other: 'dual responsibility' prescribes that "if one player violates the principles of responsibility, the other must bring it

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[42] Mayer, "'Chinese Whispers'", 65.
[43] Ibid. 78.
[44] Ibid. 77.
[45] Hartmut Mayer, "The 'Mutual', 'Shared' and 'Dual' Responsibility of the West: the EU and the US in a Sustainable Transatlantic Alliance," in *A responsible Europe? Ethical Foundations of EU External Affairs*, ed. Hartmut Mayer and Henri Vogt (Basingstoke: Palgrave Macmillan, 2006), 72, 60-71.

back into line". In the latter aspect, as the author emphasizes, the EU's share of preserving the unity of the West even against the US is a "moral duty to play its normative role as the most vocal advocate of the rule of law".[46]

For others, like Tim Dunne and Adrian Hyde-Price, the possibilities for ethical action in world politics are seen as restricted by a number of *external* factors. For Dunne possibility conditions of ethical foreign policy in the EU's case are delineated by two concurring options: proto-superpowerness, Europe as the 'great power in the waiting' and "EUtopia", a post-sovereign universal community. The author advocates a moral middle way, that of 'good citizen Europe'[47], "a regional engine for the world common good", the success of which, however, depends on its ability to negotiate between normative orders coexisting *within* the EU and beyond it. The author concludes that "for Europe to play a positive role in world affairs it needs both to develop and integrate its military capability and to deepen its commitment to cosmopolitan values which have shaped its identity".[48] This normative stance is then supported by a number of concrete principles (centred on such issues as sovereignty, human rights protection, or diplomacy) compatible with the idea of good citizenship in solidarist and pluralist interpretations of international society.[49]

Hyde-Price's structural realist starting points, on the other hand, are the 'parameters of the possible', referring to the extent to which structural factors either enable or constrain political choices in international relations.[50] Here the emphasis is on the structural constraints of action which delineate the confines of ethical behaviour, presuming the actor's ability to choose between alternative courses of action. Therefore,

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[46] Mayer, "Responsibility", 71, 59-71.
[47] Tim Dunne, "Good Citizen Europe," *International Affairs* 84 (2008): 13-15.
[48] Dunne, 14-16. emphasis in the original.
[49] Ibid. 22-27.
[50] Adrian Hyde-Price, "A 'Tragic Actor'? A Realist Perspective on 'Ethical Power Europe'," *International Affairs* 84 (2008): 38.

"in contexts where the structure is indeterminate and vital interests are not at stake, and consequently, where the pursuit of a normative or political agenda is feasible, the ethical dimension of the EU's foreign and security policy should be limited to a modest set of three principles of statecraft rooted in the Weberian 'ethic of ultimate ends', namely prudence, scepticism and reciprocity"[51]

In this case, according to the author, the limited scope for ethical action should be governed by a modest and self-restraining attitude that seeks the lesser evil (instead of perfection), exhibits scepticism "about the prospects for progress in the human condition" and calls for compromise and mutual accommodation between sovereign political communities, formulated in terms of reciprocity.[52]

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[51] Ibid. 38.
[52] Ibid. 42-3.

CHAPTER 2 – UNPACKING LEGAL ARGUMENTS

2.1. The (Im)possibility of Universalisms

As it was illustrated earlier, in the 'normative power' division of the second meta-narrative the authors started from an imaginary, ideal-typical picture of the EU's normative powerness, which, set against the "realities" of the EU's foreign policy behaviour, served as a basis for normative statements on what developments would be preferable in the realm of European external relations. This emphasizes the significance of the EU's compliance with international law and the desirability of further legalization in its foreign affairs. In specific texts, the notion of 'universality' as a positive asset was frequently invoked with reference to both form and content. While Sjursen and Eriksen emphasized the universal character of (human) rights constituting the basis of a cosmopolitan order, Eriksen also focused on the possibility of coercion made equally threatening to all actors by the universalisability of the legal form, whereas Tocci, combining the two aspects, depicted law as the "most universal and universalisable" 'normative boundary' within which foreign policy should be assessed. At the bottom line, with some simplification, the general formula of a cosmopolitan or simply law-bound international order can be summarized as follows: the authors (explicitly or implicitly) set an universalisable aim (which, in the case of cosmopolitan accounts, goes back to the universal content of human rights), which is to be achieved through the universalisation of the legal form. In the following sections, by borrowing insights from critical and postcolonial legal studies as well as poststructuralist accounts of international relations, the neutral or even

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positive connotation of 'universality' coming up in these accounts will be problematized by the presentation of a more complex, and thus, more political reading of thinking in universals.

On a general conceptual level, Véronique Pin-Fat draws attention to certain common structural characteristics of claims and arguments related to universality, which help re-read the above-mentioned narrative patterns of the NPE scholarship in a different light. The primary point of reference in this case is the notion of (im)possibility, which points to the inscribed duality of universalist arguments, revealing their essential instability.

According to the author, one significant aspect regarding universality-claims is that

> "context proposes a form of semantic holism whereby justifications of universality owe just as much to what they try to keep out (conditions of impossibility) as to what they delineate as present (conditions of possibility). *What counts as possible depends upon what is already tacitly accepted as impossible.* This dynamic is what I call (im)possibility."[53]

This logic on the one hand, reveals the (im)possibility of defining a universal content. Going back to f.i. Eriksen's essentialist view of an intrinsic human value assumed to be present in all human beings, to be protected by human rights, what counts as 'human' in this (and every other) case is itself a matter of definition (or more strongly put, political decision) formulated against something that is in-human or non-human. Or in more general terms, any (legal or other) content claiming universal validity inevitably implies its negation, its Other. Accordingly, there are two implicit, politically non-neutral features inherent in universalistic argumentations: first, they assume an unavoidable cleavage between the self and the Other, and, second, as it will be illustrated, this cleavage is necessarily obscured since it goes against the very meaning of universality.

Turning more specifically to the internal dynamics of international law both in terms of content and form, Sundhya Pahuja describes the functioning of international law from a postcolonial perspective. As a starting point, Pahuja cites a "truism" of postcolonial literature,

[53] Véronique Pin-Fat, "(Im)possible Universalism: Reading Human Rights in World Politics," *Review of International Studies* 26 (2000): 664., my emphasis.

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namely "that European or Western identity is constituted in opposition to an alterity that it has itself constructed".[54] Identifying this logic in the operation of international law, the author reflects on the process of its universalisation in the following manner:

"Wherever international law goes, it claims to already have the jurisdiction to act as the law and extend to everyone. At the same time as international law claims to extend to everyone, there is a formation of and differentiation between the self who is the subject of law and the Other who is encompassed by this speaking of the law but not able to claim subject-hood within it"[55]

Formulating this argument more specifically in the context of the postcolonial era, in Pahuja's narrative on the interaction of the legal form and content, the dynamics of Pin-Fat's (im)possibility are clearly pronounced:

"the universalization of international law after decolonization can be seen on the one hand to mark a capture by the newly decolonized peoples of the promise of a generally applicable law, an on the other hand to show the way this promise could only be made good through the adoption of legal forms already commensurable with international law. This demand for commensurability is produced by the way in which universalization is a definite process that requires a specific form to *be* universalized but which depends on the paradoxical claim that what is being universalized is *already* universal".[56]

As a conclusion, the author sums up the paradox inherent in the operation of international law, which, when set against the images of law unfolding from the selected NPE writings, makes also visible their ultimate one-sidedness:

"This postcoloniality, in part, describes the way in which international law must continually effect a cut between "self" and the "Other", rendering that which is excluded crucial to the formation of the included, but it also makes a claim to universality antithetical to this exclusion and which in its encompassing brings this productive instability to the heart of international law"[57]

While Pin-Fat draws our attention to the dynamics inherent in the structure of universal claims and Pahuja identifies this mechanism in the domain of international law seen as a specific relation between the universalisation of the legal form and its universal content, the significance of the legal form itself remains undiscovered. To the question of whether the legalness of international/cosmopolitan law is of any special importance in our attempt to

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[54] Sundhya Pahuja, "The Postcoloniality of International Law," *Harvard International Law Journal* 46 (2005): 460, citation from Eve Darian-Smith and Peter Fitzpatrick, "Law of the Postcolonial: An Introduction" in *Laws of the Postcolonial,* ed. Eve Darian-Smith and Peter Fitzpatrick (Ann Arbor: University of Michigan Press, 1999), 1.
[55] Pahuja 462.
[56] Ibid. 466., emphasis in the original.
[57] Pahuja, 469.

present an alternative reading of the claims for increasing legalization that we observed in Sursen's, Eriksen's and Tocci's contributions, one possible answer is offered by Chine Miéville, who argues that "the universalization of international law is predicated on the legal form" through bringing to light its material and social underpinnings.[58]

Building on Evgeni Pashukanis' Marxist theory of law, Miéville's basic claim is that the legal form is the form of a particular kind of relationship, which arises in the context of commodity exchange. In this sense, "the logic of the commodity form is the logic of the legal form"; as it is further argued, "in exchange, each commodity must be the private property of its owner, given in return for the commodity owned by the other. Each agent in the exchange must be an owner of private property, and formally equal to the other agent(s)".[59] In this case, law regulates this (legal) relationship between agents by first, creating the legal subject, the basic unit of legal theory, who is "defined by virtue of possessing various abstract rights.[60]" The importance of this move is that "this formal equality of distinct and different individuals is in exact homology with the equalization of qualitatively different commodities in commodity exchange, through the medium of abstract labour (the stuff of value)."[61] Second, law is also seen as a medium arising from the need to regulate disputes between legal subjects, since "without dispute, there would be no need of regulation".

According to Miéville, these legal relationships reproducing the logic of commodity exchange are violently coercive in themselves, even without the backing force of an overarching authority, such as the state. As she argues,

"contrary to some of Pashukanis's claims, disputation and contestation is implied in the very form of the commodity, in the fact that its private ownership implies the exclusion of others. Violence –

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[58] China Miéville, "The Commodity-Form Theory of International Law: An Introduction," *Leiden Journal of International Law* 17 (2004): 276; for a more detailed exploration of this argument, see Idem, *Between Equal Rights: a Marxist Theory of International Law* (Leiden: Brill, 2005)
[59] Miéville, "Commodity Form", 282-3.
[60] Ibid. 284; citation from von Arx, S. "An examination of E.B. Pashukanis's General Theory of Law and Marxism', PhD diss., SUNY, 1997, 69.
[61] Miéville 284.

coercion – is at the heart of the commodity form. For a commodity meaningfully to be 'mine-not-yours' – which is, after all, central to the fact that it is a commodity that will be exchanged – some forceful capabilities must be implied. If there were nothing to defend its 'mine-ness', there would be nothing to stop it becoming 'yours'. Coercion is implicit."[62]

In this sense, in the absence of the state, the legal relations of owners are regulated by self-help, meaning "the coercive violence of the legal subjects themselves". Accordingly, "on the one hand, law is an abstract relationship between two equals, on the other the naked imposition of power in a legal form".[63] Violence is therefore seen as being intrinsic to law, even if it retains its particularistic character without a sovereign.[64]

In this context international law is conceived of as the legal form of the capitalist states' struggle for resources and capital, the universalisation of which goes back to the globalization of trade in the seventeenth-eighteenth centuries. Projecting the general logic of (domestic) law to the state system, the author makes the following comments on the how the material differences between states are inscribed in the very functioning of international law, leading us to towards an imperialistic image:

„What has emerged is a fascinating circularity. Capitalism is based on commodity exchange, and contrary to appearances […] such exchange contains violence immanently. However, the universalization of such exchange has tended to lead to the abstraction of a 'third force' to stabilize the relations, and that force has been the state. Thus politics and economics have been separated under the generalized commodity exchange which reaches a zenith under capitalism. At exactly the same moment, the flipside of that separation and the creation of a public political body was the investiture of that body – the state – as the subject of those legal relations which had long inhered between political entities, and which now became bourgeois international law. But that process itself necessitated the self-regulation of the legal relation internationally by its own subjects, which was a simultaneously 'political' and 'economic' function, and a manifestation of the collapse of the distinction between politics and economics inherent in the very dynamic which had separated them."[65]

For a provisional conclusion, what Miéville's arguments tell us is an alternative narrative on the institutionalization of an already existing cleavage separating the (materially, and thus, politically) powerful from the weak: (international) law centred on a form of self-

[62] Ibid. 287.
[63] Ibid. 289, 291.
[64] Ibid. 291.
[65] Ibid. 292.

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regulation and an essentially coercive content cements the inequalities inherent in the state-system. The author formulates the legal dimension of this structure of domination as follows:

"Although both parties are formally equal, they have unequal access to the means of coercion, and are not therefore equally able to determine either the policing or the content of the law. The policing of the form, and therefore its interpretation – its investiture with particular content – is down to the subjects themselves."[66]

As the above-mentioned arguments of Pin-Fat, Pahuja and Miéville illustrated, neither the legal form, nor the (universal) content of law are neutral phenomena in a sense that they inherently contain a self-Other relationship and respectively, a relationship of domination, which are obscured in positively or neutrally valued images of law unfolding from the selected contributions of the NPE scholarship. At this point it can be ascertained that no universal content can ever be all-encompassing since it is defined against its own impossibility and that law's constraining force is not an objective, functional, impartial asset but is necessarily conditioned by material and political realities. The following sections seek to introduce an additional, psychoanalytical perspective, which concentrates on the relationship of law and the self, or in other words, the construction of the legal subject, which also illuminates the micro-mechanisms taking place in the broader social context producing and produced by this relationship. These theoretical insights are expected to yield a critical perspective which would allow us investigating the issue of human rights more closely and evaluating their (possible) place(s) in the legal universe.

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2.2. The Birth of the Legal Subject

To start sketching out an image of the self and its socially constructed subjectivity, the following, much simplified theoretical basics have to be put in place. As opposed to the

[66] Ibid. 293.

modern understanding of the individual as being autonomous, rational, and conscious, according to Jenny Edkins, "the postmodern subject is not only fragmented but irretrievably split."[67] The self's incompleteness is embedded in the following, Lacanian conceptualization of the social sphere:

"[i]n the psychoanalytic account the subject is formed around a lack, and in the face of trauma. We become who we are by finding our place within the social order and family structures into which we are born. That social order is produced in symbolic terms, through language. […] Language divides the world in particular ways to produce for every social grouping what it calls 'reality'. Each language – each symbolic or social order – has its own way of doing this. Crucially, none of these are complete.".[68]

In this context, what follows is that "from a Lacanian perspective, the human subject is condemned to endlessly search for an imaginary whole-ness or unity that it will never attain."[69] This imaginary whole-ness represents the self's primary union with 'the real' lost at the momentum of birth, which is impossible to achieve or symbolize but nonetheless remains to constitute not only the cause, but also the object of the self's interminable desire animating its behaviour.[70] It is the self's desire that leads it to assume a subject position vis-à-vis the (assumed) social or symbolic order. As Edkins clarifies this process,

"desire takes the form of a questioning of the desire of the Other, the social order. The subject seeks a place in the social, a place that will confirm its existence as subject. It does this by asking what the social order wants of it, what is required. […] This question from the subject constitutes it as subject by positing the existence of a social or symbolic order. The subject then becomes the object of the desire of the Other – the symbolic order. In other words, the subject is constituted as that which (it appears) answers the desire of the Other – it becomes what (it supposes) the Other wanted. It answers to a "lack" in the Other. It does this by taking on or assuming certain mandates or roles – subject positions – within the symbolic order."[71]

At the same time, however, the assumed subject position cannot fulfil the lack in the self (since the Other, the symbolic order can never be complete either), and as a result, the split, fragmented, lacking subject creates a fantasy of identity which projects existential

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[67] Jenny Edkins, "The Subject of the Political," in *Sovereignty and Subjectivity*, ed. Jenny Edkins, Nalini Persram and Véronique Pin-Fat (Boulder: L. Rienner, 1999), 4.
[68] Jenny Edkins, *Trauma and the Memory of Politics* (Cambridge: Cambridge University Press, 2003), 11-2.
[69] Jenny Edkins, "Subject," 4.
[70] Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Oxford: Hart Publishing, 2000), 306-8.
[71] Edkins, "Subject" 4-5.

integrity and completeness. In this process, law and its functioning can be interpreted from the subject's perspective in the following manner, in which it is seen as a constituting element of the subject's imaginary wholeness defined vis-à-vis the symbolic order. As Douzinas observes,

"The desire of the subject is the desire of the law: the person takes his marching order from law and, for this operation to succeed, the law must be seen as non-lacking, as a complete whole which knows, and has the answer to all problems of conflict. The desire of the Other as complete and non-lacking is therefore a function of the subject. I need the law to be gapless, to be Dworkin's "seamless web", in order to accept my subjection […]"[72]

Law's desired imaginary seamlessness, however, obscures on the one hand, the way the legal subject is created and shaped by law, and on the other, the creative potential lost in course of this transformation. Piyel Haldar in his account of law's complicity in colonial expansion highlights the process of "rationalization", which "accounts for the manner in which law storms the bastions of life, taking life over and camping upon its alien territories".[73] In this process, for one, the natural integrity of the community and the organic unity of the self are distorted. As the author observes, "the effect of rationalization, as law inches its way across social life occupying every available space, is that indigenous custom has to surrender to the logic of reason."[74] This is necessitated by, as Haldar claims, the interconnectedness of law's claim of rationality and universality, since

"rationality must necessarily claim a condition of universality. From the precepts of Roman law onwards, legal rationality applies across peoples and across territories. It cannot, by definition, co-exist with any other system of though; to do so would risk contamination by the irrational."[75]

In this context, the legal subject, representing the locus of the direct encounter of law and the self, is born out of the following sequence:

"the definition of law breaks down into the pedagogic micro-forms of rationalizing and taming the behaviour of the civilized subject. The resulting fiction of the subject is a legally constituted entity

[72] Douzinas, *End of HRs*, 328.
[73] Piyel Haldar, *Law, Orientalism and Postcolonialism: the Jurisdiction of the Lotus Eaters* (London: Routledge-Cavendish, 2007), 7.
[74] Haldar, 11.
[75] Ibid 14.

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with a supposed set of noetic abilities and affective orders; it has will, capacity, emotions and desires."[76]

Douzinas depicts this process more specifically with respect to rights, traditionally seen as the limits of power in liberal societies protecting individual agency. In his account the following paradox becomes obvious: when the self's interminable desire (centred around its constitutive lack) is projected onto the putative completeness of law, the result is a decrease of freedom and loss of productive heterogeneity. For him, "law breaks down the body into functions and parts and replaces its unity with rights, which symbolically compensate for the denied and barred bodily wholeness."[77]

From this perspective, at least two additional claims can be made with respect to the preference for increasing legalization that we saw in some of the NPE contributions. On the one hand, when i.e. Eriksen defines law's basic function as making social relations calculable in a positive/neutral connotation, what remains silenced can be best captured by one of Douzinas' further comments. According to the author, one of the dark sides of overstressing rights and their proliferation is that "new rights remove activities and relations from their communal habitat and make them calculable, exchangeable, cheap. […] the "rights culture" turns everything into a legal claim and leaves nothing to its "natural" integrity". Besides this, there is also a danger on the level of the subject that "as the law colonises life and the endless spiral of more rights and possessions and acquisitions fuels the subject's imagination, the Other of law dominates her symbolic and the other person's recognition becomes secondary."[78] In this sense, the putative universal content of cosmopolitan law can be questioned from a different angle, which brings us closer to understand why the overstressing of human rights in political rhetoric in the 20th century is consistent with their simultaneous massive-scale violation.

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[76] Ibid 7.
[77] Douzinas, *End of HRs*, 322.
[78] Ibid 318.

At the same time, however, the question arises whether there is still more to human rights than being the object of the self's desire and her reward for accepting the dominant order.[79] Commonsensically, according to the liberal image of (domestic and international) politics, human rights serve as guarantees of individual freedom and human agency by virtue of their very capacity to put a limit to sovereign power. From a Western perspective, it would be counterintuitive to dismiss the emancipatory potential associated with human rights out of hand, even if this promise no longer seems utterly credible in the contemporary era.

2.3. Ends and Human Rights

As Douzinas himself formulates, ""Human rights" is a combined term", where "human" seeks to capture some element of humanity or human nature, while "rights" indicate their implication with the discipline of law, with all as we it was pointed out above.[80] In this sense, there emerges a duality in the structure, and consequently, also in the operation of human rights. With regard to the structural aspect, the author makes the following argument.

> "while human rights replace the body with linguistic and legal signs and split it into many disconnected parts, they also introduce the split subject to a utopian humanity, to an idealised self-image that bring together the various parts into its formal contours. Human rights construct both a dismembered self, dissolved in a plurality of entitlements, and the imago of a whole person which assumes 'the recognition of the alterity of the future from which the self has been constituted, and, on which, through a projection, it depends for its survival as a self'"[81]

As for the latter, operational aspect, human rights operate in a dual manner: they function both as ideology and critique. By virtue of their "rightness" which embeds them in the terrain of law, they both conceal and affirm the dominant structure by accepting the given distribution of power, hence contributing to a politics of consent. With respect to their utopian

[79] See Idem, *Human Rights and Empire: The political philosophy of cosmopolitanism* (London: Routledge-Cavendish, 2007), 108.
[80] Douzinas, *End of HRs*, 18.
[81] Ibid. 338, cites Drucilla Cornell, *The Imaginary Domain* (New York, Routledge, 1995), 41.

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end (to come), envisioning "a future in which people are not degraded, despised or oppressed", they can "also reveal inequality and oppression and help challenge them".[82] Whereas the first, ideological aspect represents the affirmation of the present state of affairs together with its fixed meanings, social striations and categories, the latter, critical aspect projects the imaginary of a "social organisation which recognises and protects the existential integrity of the people expressed in their imaginary domain", thus, leaving the concept of "freedom" substantially undefined.[83] Ultimately, "the end of human rights, like that of natural law, is the promise of the "not yet", of the indeterminacy of existential self-creation against the fear of uncertainty and the inauthentic certainties of the present."[84]

Following this logic, Douzinas elaborates at length how "human rights became an instrument for underpinning the power of states" in support of the ideology of the contemporary 'new world order' resonating with Fukuyama's 'end of history' and the principles of cosmopolitan philosophy.[85] In this context Eriksen's and Sjursen's call for the positivization of human rights appear naive at best. As Eriksen remarks, "as long as human rights are not positivized and law is not made equally binding on each of the member states, human rights politics easily degenerate into empty universalistic rhetoric."[86] In a similar vein, following Eriksen, Sjursen also makes the claim that

> "unless the principles of human rights also become positive legal rights that can be enforced, it is difficult to avoid the fact that the most powerful only use a 'moral' foreign policy for their own interest and that even when they don't, they are still suspected of doing so."[87]

Applying Douzinas' perspective to these two accounts and reiterating the power-dynamics of rights and law elaborated above, what is almost entirely missing from the imaginary, utopian dimension of Eriksen's and Sjursen's concept of human rights is their

[82] Douzinas, *End of HRs*, 342; Idem, *HRs and Empire*, 108.
[83] Douzinas, *End of HRs*, 341.
[84] Ibid. 380
[85] Idem. *HRs and Empire*, 179.
[86] Eriksen, 255.
[87] Sjursen, "The EU as a 'Normative Power'," 255.

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capacity to "generate a powerful political and moral energy", which constitutes the very basis of their creative and critical potential for bringing about social and political change.[88] As Douzinas remarks with respect to the contemporary, co-opted variant of human rights (by state power) and bereft of a utopian end, "they conceal the deep roots of conflict and domination by framing struggle and resistance in terms of legal and individual remedies, which, if successful, lead to small individual improvements and a marginal rearrangement of the social edifice."[89]

Returning to the initial question regarding the possibility of emancipaton (as an end) through the means of human rights, according to an even more radical argument, the restricted purview of human rights in this regard is not a matter of political cooptation, but is inherent in their very structure dominated by the quality of *legal-ness*. In a critique raised against Douzinas' dual image of human rights, Motha and Zartaloudis powerfully assert that

> "The utopian element is always-already framed in the language of rights. A peculiar juridical-linguistic framing, if the future anterior of utopia is to maintain its potentiality. It is always-already a return-to-rights, as it seems, always already, rather than an affirmation of multiple potentialities of struggle. The 'here-now', is the present-presence as a presupposition of such circularity, which (de)limits actuality and potentiality to the technology of rights."[90]

In this sense, if we agree with Motha and Zartaloudis, neither law and rights in general, nor human rights in particular offer a credible emancipatory promise by virtue of the legal form and its inherent dynamics.

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[88] Douzinas, *End of HRs*, 342.
[89] Idem, *HRs and Empire* 109-10.
[90] Stewart Motha and Thanos Zartaloudis, "Law, Ethics and the Utopian End of Human Rights," *Social & Legal Studies* 12 (2003): 262.

CHAPTER 3 – LAW AND THE POLITICAL: THE SPECTRE OF EMPIRE

3.1. Defining the Political, Politics and Law

After having identified possible points of critical engagement with the legal images in NPE scholarship, this chapter seeks to situate these findings within a broader, essentially political perspective. While in the previous chapter we sought to illuminate the ways in which the legal form and certain contents expressed in legal terms may reflect the operation of forces situated by beyond the realm of law, the next sections seek to expose the same structural characteristics from a different angle, starting from the internal dynamics of these forces themselves. In this case we aim at sketching out a political framework which is seen as incorporating and at the same time, animating law. By introducing a master-perspective we seek to rephrase the 'normative power' division of the second meta-narrative so as to provide a more comprehensive critique of some of the NPE themes. For these purposes, in order to define a few basic concepts first, we start off by briefly summarizing Jenny Edkins' formulation of the distinction between "politics" and "the political", with special emphasis on the element of "forgetting" connecting these two concepts.

In an attempt to specify the relationship between "the political" and "politics", Edkins argues that ""the political" has to do with the establishment of that very social order which sets out a particular, historically specific account of what constitutes as politics and defines other areas of social life as *not* politics".[91] Accordingly, in Douzinas' words, "the political […] refers to the way in which the social bond is instituted and concerns the deep rifts in

[91] Jenny Edkins, *Postructuralism & International Relations: Bringing the Political Back In* (Boulder, Colorado: Lynne Rienner, 1999), 2. emphasis in the original.

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society."[92] In this sense, invoking Žižek, "the political" is conceptualized as "the moment of openness, of undecidability, when the very structuring principle of society, the fundamental form of social pact, is called into question – in short, the moment of global crisis overcome by the act of founding a "new harmony".[93] This historically specific, transformative moment, however, as Edkins argues, "is not limited to the grand moments of openness or undecidability that arise in between established social systems, where the whole system of legitimacy previously in place has been effectively challenged and a new one not yet installed."[94] More importantly, "it also arises in the undecidability that is found in every moment of decision, since such moments, according to Derrida, are not guaranteed by law, technology or custom".[95]

For the purposes of this thesis, it is important to examine what the relationship is of "the political" to law and ethics. As for ethics, the very undecidability of the political moment can be conceived of as the possibility condition for an ethical attitude towards it. Edkins refers to the Weberian notion of charismatic authority by invoking the figure of "the political leader" who "has to take responsibility for decisions in a way that the civil servant or administrator does not, and this involves "impossible" choices".[96] In this understanding,

> "political leadership as charismatic authority involves an ethics that cannot be simply an ethics of ultimate ends or an ethic of responsibility but a fusion of the two. It is in one sense an *ethic of decision*: once the decision has been taken, there is no other response that that of the person or subject produced in that process: "Here I stand; I can do no other"".[97]

The undecidability of the political moment, while it makes possible an ethical stance through the *acceptance* of the inherent, undecidable antagonism of the situation, as a consequence, also entails a measure of unfoundedness regarding the decision, appearing as an

[92] Douzinas, *HRs and Empire*, 103.
[93] Slavoj Žižek, *For They Know Not What They Do: Enjoyment as a Political Factor* (London: Verso, 2002), 193-5.
[94] Edkins, *Postructuralism & International Relations, 5.*
[95] Ibid. 5
[96] Ibid. 4
[97] Ibid. my emphasis.

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instance of "impossible choice". Turning to law, the detachment of the decision from the existing social order, the fact that it does *not* derive legitimacy from it, becomes obvious. For Edkins, "the act of decision is a matter of a specific historical moment; it cannot be justified by an appeal to a general law." However, at the same time the decision "both applies an institutes the law. Once the act, or moment of decision, is past, it disappears: Even the fact that it has taken place cannot be confirmed. The law appears retrospectively merely to have been followed."[98] The political's relationship with law reveals its double-character: the transformative momentum of the political (taking place beyond the law) is at the same time becomes obscured in the new order it constitutes (operating under the same law in retrospect). With the political moment "not only is the new society founded, but it is produced as inevitable, authoritative, and legitimate: as if it has always already existed or been prophesied. The contingency of its origin is concealed."[99]

The latter aspect leads us to the definition of the domain of "politics", which refers to a subsystem of the social order characterized by a Weberian legal-rational authority, and its emblematic figure, the "bureaucracy attendant" who is subjected to law and exempted from political responsibility. According to Douzinas' definition, "politics organizes the practices and institutions through which order is created, normalising social co-existence in the context of conflict provided by the political".[100] From a different angle, the realm of "politics" "represents *within* society its own forgotten foundation", the moment of "the political" since "once the foundational myth of a new social or symbolic order is (re)instated, the subject as such disappears, and with it the "political" – to be replaced by "politics".[101] In sum, "politics"

> "enables us to escape or forget the lack of "the political" and the absence of the possibility of any political action. We are confined by this process to activity within the boundaries set by existing social and international orders, and our criticism restricted to the technical arrangements that make up

[98] Ibid. 5.
[99] Ibid. 8
[100] Douzinas, *HRs and Empire*, 103.
[101] Edkins, *Postructuralism & International Relations*, 8

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"politics" within which we exist as "subjects" of the state. The political subject and the international subject, too, are safely caged and their teeth pulled out".[102]

These characteristics, however, bear historically specific qualities in the (post)modern era. As Edkins further elaborates on the contemporary connotations of the (absence of) the political, "in modern Western societies, "politics" is limited to the calculable, the instrumental", characterized by "depolitisation" and "technologization". While the former signifies the absence of the political, the latter refers to an active process which seeks to substitute the heterogeneity of truth regimes with "objective knowledge" (presupposing a notion of language as a neutral medium) and through certain "dividing practices" it aims at regulating the normal, natural way of 'doing things'.[103] In this context technologization can be further exemplified by a particular linear notion of time that makes possible ideological story-telling in terms of cause-effect causations; an image of the subject defined in substantial terms, viewed as pre-existing politics and a notion of reality or the real as separable from thought about it.[104] Turning to the international domain, according to the author

"international politics is a specific site where technologization occurs. International relations as a discipline "dissipates the concern with the political and substitutes, instead, a fascination with the manifold globalised and globalising technologies of order that have emerged to administer human being."[105]

In this light, law can be seen as operating in the domain of "politics" with the function of contributing to the depoliticazion-technologization of the social field. As Douzinas observes,

"the role of law is to transform social and political tensions into a set of solvable problems regulated by rules and hand them over to rule experts. This is how rights work in their daily routine operation. They are tools for expressing and promoting established political arrangements and socio-economic distributions. In this case, legal rights belong to the consensual domain of politics".[106]

Going back to the issue of human rights, in the same vein, by virtue of their dual operation (as addressed above) the author finds that "their effect is to depoliticize conflict, to

[102] Edkins, *Postructuralism & International Relations,* 9.
[103] Ibid. 9, 12.
[104] Ibid. 14-5.
[105] Ibid. 9.
[106] Douzinas, *HRs and Empire*, 107.

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remove any possibility of radical change". In this sense, law in general, and human rights in particular prevent the emergence of the "surplus subject" which may give rise to the "political subject": as Douzinas ascertains, "on the way to the new world order, human rights as the ideology at the 'end of history' plugs the interval between man and citizen, universal and particular, law and fact, appearance and reality, the spaces that generated exclusions and created hope for its transcendence".[107] In this understanding, law and human rights operate in the domain delineated by the political act, which by definition impede their emancipatory, transcendental potential as means and in addition, they "tame" the subject through which its "surplus", potentially embodying a transformative content, is removed. In this light, again, the representation of law as an instrument taming or checking political power and discretion as appearing in Eriksen's, Sjursen's and Tocci's writing can be seen as excessively one-sided: from a "political" perspective, although law can be used to enforce rights within a politically delimited terrain, what it tames is just as much the subject (and her creative potential) and what it protects is the normal course of politics vis-à-vis challenges coming from dissenting (political) voices.

3.2. The Implications of "Empireness"

Based on the above insights, it has become visible why law and human rights cannot guard against (Eurocentric) imperialism, which appears as the threatening Other against which desirable normative images of the EU are defined in NPE contributions. Law's subordination to the political (and politics) and its role in maintaining and constituting the political-politics dynamics as elaborated above is discussed by a number of authors. *One important, common argument unfolding from these accounts is that in the contemporary age*

[107] Ibid. 108.

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law does not only function as an instrument that contributes to the normalizing, regulatory processes of politics, but is seen as a primary form of expression of the political itself. Returning to Miéville's account on the legal form, in this sense he argues that imperialism does not contradict, moreover, it is embedded in, international law. The author's starting point is that "intrinsically to the legal form, a contest of coercion occurs, or is implied, to back up the claim and counterclaim. […] The international legal form assumes juridicial equality and unequal violence – the political violence of imperialism."[108] In this context, ascertains Miéville,

"the imperialism of international law […] means more than just the global spread of an international legal order with capitalism – it means that the power dynamics of political imperialism are embedded within the very juridical equality of sovereignty."[109]

As the author further clarifies the intertwined relationship of international law and imperialism, we learn that

"This is not about the ultimate triumph of some hypostatized 'power politics' […] The point, rather, is that the 'power politics' of modernity are the power politics of a juridicially constructed system. […] There is no separation of these juridical forms from 'pure politics', because there is no pure politics: there are instead the politics of juridical units"[110]

Another contemporary, even more encompassing account of the operation of the triangle of the political, politics and law can be found in Michael Hardt and Antonio Negri's *magnum opus*, *Empire*, where the political and law are seen as being closely intertwined as well. The authors' point of departure for the conceptualization of Empire is "a new notion of right, or rather, a new inscription of authority and a new design of the production of norms and legal instruments of coercion that guarantee contracts and resolve conflicts".[111] In this sense the basic hypothesis is that a new imperial form of sovereignty has emerged, which is

[108] Miéville, "Commodity Form", 294.
[109] Ibid. 297.
[110] Ibid.
[111] Michael Hardt and Antonio Negri, *Empire* (Cambridge, Mass.: Harvard University Press, 2000), 9.

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supported by a corresponding juridical model characterized by a specific form of right, that of the *right of the police*.[112]

In this context, the authors describe the characteristics of Empire in the following way.

"The concept of Empire is characterized fundamentally by a lack of boundaries [...] First and foremost, then, the concept of Empire posits a regime that effectively encompasses the spatial totality, or really that rules over the entire "civilized" world. [...] Second, the concept of Empire presents itself not as a historical regime originating in conquest, but rather as an order that effectively suspends history and thereby fixes the existing state of affairs for eternity. [...] Third, the rule of Empire operates on all registers of the social order extending down to the depths of the social world. Empire not only manages a territory and a population but also creates the very world it inhabits. [...] Finally, although the practice of Empire is continually bathed in blood, the concept of Empire is always dedicated to peace – a perpetual and universal peace outside of history."[113]

Within the order of Empire, the law and sovereign power are defined by the logic of (the state of) exception, which, following Carl Schmitt, highlights the performative momentum of the suspension of law by the sovereign power as an intrinsic element of the political decision. In the imperial context,

"domestic and supranational law are both defined by their exceptionality. The function of exception here is very important. In order to take control of and dominate such a fluid situation, it is necessary to grant the intervening authority (1) the capacity to define, every time in an exceptional way, the demands of intervention; and (2) the capacity to set in motion forces and instruments that in various ways can be applied to the diversity and the plurality of the arrangements in crisis."[114]

In a further step, the authors bring together law and political authority as contained in the figure of the police (which can be seen as being situated in-between the Weberian images of the charismatic leader and the civil servant). Accordingly,

"The formation of a new right is inscribed in the deployment of prevention, repression, rhetorical force aimed at the reconstruction of social equilibrium: all this is proper to the activity of the police. We can thus recognize the initial and implicit source of imperial right in terms of the police action and the capacity of the police to create and maintain order. […] The juridical power to rule over the exception and the capacity to deploy police force are thus initial coordinates that define the imperial model of authority"[115]

Policing in this sense represents a historically specific, legally-defined form of the operation of the political, embodied in the figure of a single power, that of "imperial

[112] Ibid. 8-9, 16-7, emphasis in the original.
[113] Hardt and Negri, xv.
[114] Hardt and Negri, 16-7.
[115] Ibid 17.

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sovereignty" in Hardt and Negri's formulation. However, the Schmittian disjunction between the political and law does not hold anymore in the case of imperial sovereignty and policing actions. As the authors highlight, the juridical power to rule over the exception and the material capacity to deploy police force are constitutive of the imperial model of authority, representing the interconnectedness of law and the military of political power in the notion of policing. On a more general level, this represents a permanent state of exception – not as envisioned by Schmitt, but as famously conceptualized by Giorgio Agamben: a zone where law does not disappear from – instead, it merges inseparably with the political.[116] As Agamben writes,

"the situation created in the exception has the peculiar characteristic that it cannot be defined either as a situation of fact or as a situation of right, but instead institutes a paradoxical threshold of indistinction between the two. It is not a fact, since it is only created through the suspensions of the rule. But for the same reason, it is not even a juridical case in point, even if it opens the possibility of the force of law."[117]

The state of exception producing a zone of indistinction, argues Agamben, is not only constitutive of sovereignty (as Hardt and Negri formulate with respect to the "initial coordinates" of imperial authority), but it is *the structure* of sovereign power. Accordingly, we read the following statement with respect to the relationship of law and the political:

"if the exception is the structure of sovereignty, then sovereignty is not an exclusively political concept, an exclusively juridical category, a power external to law (Schmitt), or the supreme rule of the juridical order (Hans Kelsen): it is the originary structure in which law refers to life and includes it in itself by suspending it."[118]

As we can see, similarly to the double-character of the political (meaning the transformative momentum of the act and the forgetting of this momentum through the normalizing operation of "politics") discussed above, law displays a dual function as well: on

[116] Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, transl. Daniel Heller-Roazen, (Stanford: Stanford University Press, 1998), 18.
[117] Ibid., 18-9.
[118] Agamben, 28.

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the one hand, as it was discussed above, it contributes to the regulatory processes of politics which conceal the political act, but at the same time, on the other hand, through the in-built element of exception, it becomes the primary form of expression of the political itself, through which the political enters "life".

The Agambenian dismantling of Schmitt's rhetoric has therefore profound consequences for a critique of NPE scholarship, which refers to law in a positive/neutral understanding. Applying Agamben's and Hardt and Negri's insights to the domain of European external relations, it can be argued that NPE's one-sided reference to law results in the following discursive effects. On the one hand, as it was argued earlier, the call for more legalization also calls for the forgetting of the possibility of the political, legitimizing the constitution of the social order as "natural" and impeding its potential challenge. On the other hand, what is also obscured is law's political potential, not in terms of legal enforcement but by means of the exception. In this sense, while this reading does not equate the European neighbourhood with the contested and blood-soaked soil of earlier imperialism, it does raise the spectre of Empire as lurking behind the concept of a benevolent normative power. By the uncritical promotion of legalization what remains invisible is the danger inherent in Empire's policing activity taking place without territorial boundaries, with the possibility of the use of force, and within the frameworks of a putative order with an eternal appeal. In light of the "realities" of EFP, NPE accounts warrant looking for traces of police-type political exceptions in what is *projected* as a purely legal ordering, interventions that seem to have empirical support in the repeated vetoes of EU special representatives and consultants, colloquially referred to as "supersovereigns" in much of the policy establishment. Similarly, EU rule of law and police missions aiming at "the establishment of sustainable and effective civilian

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policing arrangements" in target countries can be interpreted as the promotion of the order of Empire, an order which operates on the basis of exception.[119]

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[119] See esp. the aims of EUPOL AFGHANISTAN, http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=1268&lang=HU (Accessed: 4 June 2008)

CHAPTER 4 – UNPACKING ETHICAL ARGUMENTS

4.1. Two Ethical Themes and their Power-dynamics

Turning to the ethical dimension of the second meta-narrative emerging from ideal-typical definitions of the EU's 'ethical' powerness, we distinguished two sub-categories: contributions in which authors concentrate on the potential added-value of ethics to foreign policy theorizing and other accounts in which the emphasis is put on the formulation of specific ethical guidelines and principles, sketching out an ideal-type of EFP.

As compared to our investigation with respect to the roles, impacts and operations of law, marked by a one-way process of the creation of the legal subject, ethics, framed as a guide for action in NPE contributions, is considered to be a two-way interaction, which in principle makes possible a dialogue between the self and the Other. In this case while Manners proposes a tripartite "procedural normative ethics", Mayer formulates six plus three "principles of responsibility", Dunne proposes an ethical middle ground of "good citizen Europe" and Hyde-Price argues in favour of a "modest set of three principles of statehood" mirroring the Weberian 'ethics of ultimate ends', we learn from Aggestam's and Barbé and Johansson-Nogués' accounts why ethics is a more appropriate tool to analyse EFP and to make prescriptions as to the EU's future behaviour than i.e. norms or legal measures.

As for the latter insights, there are two major themes that bear special relevance for the purposes of this thesis: first, the role of the political and second, the goals of ethical foreign policy (in consonance with a desirable ideal of world order implied by the authors). To continue with the former aspect, Aggestam sees ethics as a foreign policy justification, which

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appears as a natural corollary of the increasing EU activity in its external relations: ethics in this sense is considered to be a non-identity dependent asset (as opposed to NPE contributions) which is applied to what the EU 'does'. At this point a discursive niche is opened for the return of "the political": as Barbé and Johansson-Nogués make it clear, as opposed to NPE calls for legal restraints, "there is a need for the elaboration of *political* rules of action or best practices".[120] This is, however, supported by a functional argument: ethical guidelines are more desirable than legal ones by virtue of their *flexibility*. Accordingly, although "the political is plainly a less clear-cut approach than the legal", nevertheless, "it still represents a more flexible format than the legal, given its ability to change and adapt to different situations over time without becoming meaningless."[121]

As for the second theme, the issue of goals related to a normative order, and the possible ways of bringing them about in course of the EU's foreign policy. In this context, most authors explicitly formulate their ethical suggestions in terms of a 'higher' aim, and evaluate their own activity as a contribution towards that aim. In this sense, the following citations from the formerly introduced EPE articles offer a comprehensive overview of these normative ambitions.

To start with Barbé and Johansson-Nogués understanding of ethical action, "just" action, the EU's benevolent profile and the expected global benefits of ethical foreign policy are ordered in a logical chain. First, "the policy can be recognized as ethical if all parties—whether EU or non-EU actors—irrespective of their particular interests, perceptions of identity or values, local interpretation of universal norms and views on public administration, find the policy 'just'. Therefore, it follows that "the EU could consequently be considered a 'force for good' if it manages to balance member and non-member concerns and satisfy the

[120] Barbé and Johansson-Nogués, 83. emphasis in the original.
[121] Ibid. 84.

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preferences of *all actors involved*." Finally, as a consequence, "the preference equilibrium would result in collective welfare."[122]

In a similar vein, Manners embraces an equally encompassing view of world order to be achieved, however, here the causal chain seems to be the reverse: it is the universal validity of certain pre-set values than may facilitate a "global" agreement. Accordingly,

„The creative efforts and longer-term vision of EU normative power towards the achievement of a more just, cosmopolitical world which empowers people in the actual conditions of their lives should and must be based on more universally accepted values and principles that can be explained to both Europeans and non-European alike."[123]

For Mayer, based on the six principles identified earlier, a more appropriate language to talk to the world would sound as follows:

„The point of departure for a 'new responsible rhetoric for Europe' would be the acknowledgement that global responsibility, and different regional definitions and narratives of such responsibility, must be the central reference point for EU ambitions, both in rhetoric and in action. Shifting from Eurocentrism to global reasoning, Europe should offer but never simply promote its own understanding of global responsibility, and invite others to do the same in open dialogue."[124]

Finally, for Dunne, the desirable course of development of EFP would be the following:

"For Europe to play a positive role in world affairs it needs *both* to develop and integrate its military capability *and* to deepen its commitment to cosmopolitan values which have shaped its identity. The purpose of this article is to lend a voice to those seeking to find this middle ground."[125]

From a critical perspective, it can be argued that both types of arguments – similarly to what we have observed in the cases promoting legalization – fall short of their putatively progressive aims and in turn contribute to the legitimization of the status quo of contemporary power relations, serving as a basis for EU foreign activity. In case of the EPE scholarship, this effect can be unmasked by re-reading the arguments attached to these two themes from the perspective of the characteristics and the operations of "the political", as set out in the previous chapter.

[122] Ibid. 85, my emphasis
[123] Manners, "Normative Ethics", 60.
[124] Mayer, "Chinese Whispers", 78.
[125] Dunne, 15.

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Concerning the first theme, the possibility of addressing the loci of "the political" in EFP is opened up in Aggestam's and Barbé and Johansson-Nogués writings when ethics is defined as being divorced from identity, thus appearing as an autonomous motivation of action, and subsequently, the authors call for the elaboration of *political* rules. In this sense, based on the earlier insights related to the political, a reading begs itself in which this image of ethics is assessed in view of the responsibility Edkins identifies regarding the undecidability of the political momentum. In this context, the question arises: cannot we still conceive of these writings as essentially critical contributions, which facilitate the *remembering* (as opposed to the forgetting) of the political? As compared to NPE accounts prescribing more legalization, cannot we still consider the introduction of an ethical perspective as a progress towards a more originary reading of politics?

If we take a closer look at the structure of i.e. Barbé and Johansson-Nogués' argument, however, it becomes visible that the authors understanding of 'ethics' crucially differs from that of Edkins. While for Edkins, the possibility condition for an ethical approach presupposes the acceptance of the undecidability inherent in the political decision, which stands beyond the good/evil dichotomy, producing therefore "impossible choices". To quote the author again,

> "political leadership as charismatic authority involves an ethics that cannot be simply an ethics of ultimate ends or an ethic of responsibility but a fusion of the two. It is in one sense an *ethic of decision*: once the decision has been taken, there is no other response that that of the person or subject produced in that process: "Here I stand; I can do no other"".[126]

In contrast, for Barbé and Johansson-Nogués, ethics, by virtue of its celebrated flexibility, appears as a functional tool to overcome the undecidability inherent in the political momentum and as a result, avoid/ignore responsibility in Edkins' understanding. It can be argued that this image of ethics qualifies as an instance of ideology from Edkins' perspective, where "the role of ideology […] is to conceal the illegitimate, unfounded nature of what we

[126] Edkins, *Postructuralism & International Relations*, my emphasis.

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call social reality […]. Ideology supports the principle of legitimacy upon which the new state is "founded" and conceals its "impossibility".[127]

Turning to the second theme of the issue of ethical goals and world order, it can be argued that the aims and world orders unfolding from the selected EPE accounts reflect a certain ideological position (and fulfil a certain ideological function) as well. Here we encounter a number of references to "universal values" and "just policies" accepted by "all", tasks formulated in "global" terms, or the desirability of "global reasoning". Besides the dark sides arising from the (im)possibility of universal claims as elaborated in earlier in this thesis, there is a further point of departure for critical engagement.

In this case, an argument can be made that most of the investigated accounts assume the existence of a global community made up of autonomous units, usually conforming to a cosmopolitan ideal of world order. In this context language and communication are depicted as a neutral medium, bringing the imaginary discourse between the members of the putative global community close to the Habermasian idea of "ideal speech situation". To cite Habermas,

> "The goal of coming to an understanding is to bring about an agreement that terminates in the intersubjective mutuality of reciprocal understanding, shared knowledge, mutual trust, and accord with one another. Agreement is based on recognition of the corresponding validity claims of comprehensibility, truth, truthfulness [or sincerity], and rightness"[128]

This understanding of speech and language, according to Edkins, can be described as one in which "disturbances or distortions of rational argument are contingent, discourse itself is inherently nonauthoritarian, and prejudices can be gradually removed to reach an ideal situation of rational exchange of views."[129] However, as the author further elaborates, this situation can only be illusory, since

[127] Ibid. 8.
[128] Jürgen Habermas, "What is universal pragmatics?" in *Communication and the Evolution of Society* (Boston: Beacon Press), 3.
[129] Edkins, *Postructuralism & International Relations*, 100.

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"For discourse analysis, this very notion – that access to reality unbiased by any discursive devices or conjunctions with power is possible, and that we can distinguish between truth and distortion – is itself ideological. That is, what Habermas perceives as the step out of ideology is here perceived as ideology par excellence: "The 'zero-level' of ideology consists in (mis)perceiving a discursive formation as an extra-discursive fact."[130]

Based on these insights, we may conclude that both ethics as a tool guiding foreign policy action and the cosmopolitan connotations of the aims to be achieved this way can be seen as vehicles of ideology which prevent us from engaging with the contingency of the political and the social order it creates.

4.2. What is at Stake: Encountering "the Real"

While the prior sections sought to reveal the hidden power-dynamics of ethics as appearing in EPE accounts, the following discussion attempts to illuminate the very same images from the perspective of their relationship with the transformative potential of the Real. In this sense, a powerful argument can be made with reference to the work of Alain Badiou, who offers a different perspective on the possibility conditions of ethics. With much simplification, it can be said that for Badiou, for one, it is the "singularity of situations" which represent an "obligatory starting point for all properly human action" that should constitute the subject-matter of ethics.[131] Accordingly, "there is no ethics in general. There are only – eventually – ethics of processes by which we treat the possibilities of a situation".[132] In this sense, Badiou distinguishes an "ethical ideology" versus the "ethics of truth."

In this sense, "ethical ideology" presupposes consensual ethics accepting the status quo, where

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[130] Ibid 109; cites Slavoj Zizek "The Spectre of Ideology" 10, in Mapping Ideology (Zizek ed.) (London, Verso, 1994)
[131] Alain Badiou, *Ethics: An Essay on the Understanding of Evil*, transl. and introd. Peter Hallward (London, Verso, 2001), 14.
[132] Ibid. 16

"Ethics is conceived […] both as an a priory ability to discern Evil (for according to the modern usage of ethics, Evil – or the negative – is primary: we presume a consensus regarding what is barbarian), and as the ultimate principle of judgement, in particular political judgement: good is what intervenes visibly against an Evil that is identifiable a priori."[133]

In contrast, for an "ethics of truth", the starting point is the singularity of all situations and the aim is to enable the continuation of a "truth-process" arising from "the event". In Badiou's words,

„Truth must be submitted to thought not as judgment or proposition but as a process in the real. […]For the process of truth to begin, something must happen. Knowledge as such only gives us repetition, it is concerned only with what already is. For truth to affirm its newness, there must be a supplement. This supplement is committed to chance—it is unpredictable, incalculable, it is beyond what it is. I call it an event. A truth appears in its newness because an eventful supplement interrupts repetition."[134]

In this understanding, ethics is what helps the subject to "endure" the encounter with the event, and its consequences – calling for fidelity, a commitment to truth on her part.[135] Drawing a comparison with Edkins' ethics of decision, in this case the undecidability of the political situation can be paralleled with the self's encounter with the unsymbolizable, strictly situation-specific Real. From this perspective, since all events are happenings that escape all structuring 'normality', no a priori prescriptions can ever serve as valid means to guide action – in the context of EPE, pragmatic guidelines (all presupposing a negative other or in Badiou's terms, an a priori Evil) would not suffice here either. From this perspective, Europe's and the West's global responsibility (serving against the dissolution of the transatlantic dominance), "procedural normative ethics" (securing the continuing non-military character of EFP), the notion of "good citizen Europe" (protecting the EU from appeals to proto-superpowerness or "Eutopia"), a "just ethical foreign policy" (trying to exclude dissent) and even the "three modest principles of statecraft" (instead of seeking the greater evil of more ambitious ethics) all appear as ideological elements. As Hallward notes, "'Ethics' here simply means protection from abusive interference. It amounts to an intellectual justification

[133] Badiou Ethics 8
[134] Alain Badiou On the truth process: An open lecture by Alain Badiou, 2002, The European Graduate School, Switzerland, http://www.egs.edu/faculty/badiou/badiou-truth-process-2002.html, Accessed: 04-05-2008
[135] See Translator's Introduction In Badiou Ethics, x, xvii.

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of the status quo. Operating exclusively in the realm of consensus, of the 'self-evident', ethics is intrinsically conservative".[136]

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[136] Peter Hallward, Translator's Introduction, Badiou Ethics xiii.

CONCLUSION

This thesis set out to critically examine the legal and ethical arguments coming up in academic contributions of the NPE/EPE scholarships, with the aim of demonstrating that, contrary to the authors' emphasis on objectivity and critical attitude, these writings convey a strong normative agenda which contributes to the legitimization of the EU's transformative activity in its external relations and consequently, to the silencing of new local agencies in the European periphery.

For this aim, a representative sample of the NPE/EPE literature were selected and arranged in a fashion of two meta-narratives, out of which the second, consisting of ideal-typical representations of ethical- and normative powerness bears special relevance. As for the first, legal subsection of the second meta-narrative, the authors' stance with respect to a desirable, more legalized idea of EFP can be summarized as follows. While both Sjursen and Eriksen considered the universalisation of cosmopolitan law as a means towards a more cosmopolitan world order, they differed as to the role of law in this undertaking. Sjursen emphasized the consensual nature of universal values, while Eriksen expressed a stronger belief in the coercive force of law universally binding all. Tocci emphasized the capacity of law to check and tame political power, thus, to create a rule-bound international environment.

The second subcategory concentrated on different images of ethics, starting from Aggestam's linking ethics to the increasing foreign policy activity of the EU as a natural corollary, and Barbé and Johansson-Nogués' preference for ethical and political rules by virtue of their flexibility. In addition, Manners, Mayer, Dunne, and Hyde-Price sought to

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formulate specific ethical principles to guide foreign policy action, emphasizing its benefits in "global" terms.

However, if a closer look is taken at these arguments from a critical perspective, the one-sidedness of these monologues of the self becomes visible. As it was illustrated by Pin-Fat, Haldar, Miéville, Pahuja and Douzinas, universalisation both with respect to the legal form and the legal content has violent dimensions. One such violent dimension of law is embodied in a self-Other relationship, where law substantiates and guarantees the dominance of the self over the Other As Pin-fat and Pahuja showed us, the (im)possibility the self's universal claims always presuppose an Other, who is part of the definition but at the same time excluded from the domain of the universal as being its negation. By unmasking the violence intrinsic to the legal form, Miéville points out the vertical subordination of the Other vis-à-vis the dominant self as a matter of difference in their material and power capabilities. Another violent dimension of law unfolds from its regulatory impact on the Other *to whom* law is applied. In this sense Douzinas and Haldar direct our attention to the creation of the legal subject, who is rationalized, dismembered, and stripped of her natural integrity and creative potential in exchange for an illusion of self-fulfilment. Even in the case of human right, their legal-ness delimits their emancipatory promise and makes them prone to co-optation by the state, in which case they reinforce a politics of consent. In sum, law as an (universal) enabler or constrainer can never be the end of the story – as the authors mentioned above point out, law's entering into life is a process, constituted by various, often coercive micro-elements that go unnoticed in any one-sided call for more legalization.

Embedding these findings in the purview of the political, an even more revealing picture unfolds. In this case, the insights of Edkins, Douzinas and Hardt and Negri highlight the double character of law following the double character of the political: on the one hand, law contributes to the forgetting of the (unfoundedness of) the political momentum through its

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regulatory function which normalizes life in the domain of politics. On the other hand, through the in-built element of exception, law appears as a form of expression of the political momentum itself. As for the latter aspect, if we consider the *modus operandi* of Empire defined in terms of the right of police, what a simplistic image of law conceals is the immanent possibility of political violence exercised through the state of exception. Law in this case can never be a universal enabler or constrainer, let alone a check on power.

Turning to ethics, the focus of attention shifts to what is at stake for a (narrative on) foreign policy driven by a purportedly antipolitical and universalist frame of legal and ethical action. While with the help of Edkins' concept of "ethics of decision" and her critique of the Habermasian notion of "ideal speech situation" the ideological implications of both justifying an ethical foreign policy and prescribing behavioural principles with a global appeal were brought to light, Badiou's concept of ethics of truth questions the grounds of any a priori substantial definition of ethical action. In this context the concrete ethical principles established by Manners, Mayer, Dunne and Hyde-Price appear as intellectual justifications of the status quo, securing the self's protection from abusive interferences. From this perspective, EPE arguments drawing legitimacy from the promise of global benefits appear as excessively self-referential. The extension of these ethical principles to the broadly defined European neighbourhood does not only deprive the European self from the creative potentials inherent in truth-processes, but more importantly, bereaves local agencies from this possibility by securing its own domination.

As a result, the unreflective invocations of law and ethics in NPE/EPE contributions, contrary to the positive/neutral rhetoric in which they are embedded, in fact justify the EU's transformative role in its external relations without challenging its content. This results in the cultivation of local agencies by conserving the (alleged) insufficiency of the local, failing to answer the question of how to overcome the abyss between such limited selfhood and our

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self-image of a participatory political agency serving as the foundation of democratic political life. Barring an answer to this question, normativity remains embedded in Empire's forgotten Political, creating an indistinguishable merging of law and power, a fight to eliminate exception that reproduces the arbitrariness of policing – in short, hostage to a paradigm of order that cannot accommodate emancipation and agency. Finding the niche for the emancipatory element – perhaps even for the local-revolutionary agent – in a thoroughly ethical European foreign policy remains, as before, a daunting task.

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