

‘Should States Ratify Human Rights Conventions?’

Research Plans

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Human Rights, legitimacy and multi-level political orders

Andreas Føllesdal

Legitimacy and Human Rights:

The conception of normative legitimacy I now favour focuses on one of several questions of legitimacy:

When and why, if at all, do citizens have a moral duty to obey the regulations that arise within multi-level political orders? At issue is whether these regulations, - regimes, institutions, policies or officials' actions etc are justifiable to those affected by them, and particularly toward those required to uphold them. If so, those subject to them – for instance citizens – may have a moral obligation to obey. They are said to have a 'political obligation', at least when others comply. I thus seek to distinguish between the *normative legitimacy* of a political order or regime, which is a question of whether the rules and practices satisfy certain standards of legitimacy; and the more demanding conditions for when citizens have a *political obligation* or a normative duty to comply with such rules and commands. Political obligation requires more than that the rules are normatively legitimate: Citizens have a political obligation only if such rules are also actually generally complied with.

One fruitful way to explore one role of human rights in such discussions about normative legitimacy is to consider how such rights may help alleviate certain *assurance problems* in this account.

General if not universal compliance – and public assurance thereof – seems to affect the existence of political obligations. International institutions that respect, monitor - and sometimes sanction - human rights may bolster such assurance. Crucial to this account is the situation of 'contingent compliers.' Such a person decide to comply with rules and institutions, and otherwise cooperate with officials' decisions, because she

A) perceives the government as trustworthy in making and enforcing normatively legitimate policies; and

B) she has confidence that other actors, both officials and citizens, will do their part.

This maps well onto discussions about individuals' sense of justice.

Human Rights in multi-level political orders, including federations

Much but not all philosophical work on human rights has focussed on their roles in unitary states with centralised governments. The challenges of federations and the contributions of human rights has received some attention, indeed already in the Federalist Papers. I seek to contribute to these insights, including on issues of

Political rights/majority rule: The power that sub-units wield in federations often restricts or violates majority rule. Federal political orders often skew citizens' voting weight in favor of inhabitants of smaller sub-units, or by granting sub-unit representatives veto rights on central decisions. Minorities thus exercise control in apparent violation of principles of political equality and one-person-one-vote — more so when sub-units are of different size. These features raises fundamental normative questions concerning why sub-units should matter for the allocation of political power among individuals who live in different sub-units.

The Functions of Human Rights:

Human rights serve at least three functions in federal political orders, and this may give rise to, but also alleviate, worries about double standards.

1) Human rights norms and bodies may specify the scope of immunity and discretion for sub-units and their citizens, to protect them from central authorities. For instance, citizens may be granted some scope of cultural and institutional variation to allow for expressions of national identity and sub-unit preferences. Violations may merit reactions by sub-units against central authorities, or even secession. Discussions about 'Subsidiarity' in the EU partly reflect this concern (Føllesdal, 1998).

2) Human rights norms and bodies may protect minorities from abuse by their local government. Violations may warrant rescue by other subunits or by the central authorities against the local tyrant.

So hoped Montesquieu (Montesquieu, 2002, book 9). This seems to be the role of intervention into a Member State based on suspicion of human rights violations – as was considered in the “reactions against Austria” in 2000 against the inclusion of the allegedly xenophobic Freedom Party in government. The Portugal Presidency of the Council invited the President of the European Court of Human Rights to appoint a committee of experts to determine whether minorities were sufficiently protected.

3) A further task may be to promote trustworthiness among sub-units who cooperate within common schemes and who share decision making power. Thus Europeans of different Member States agree to be jointly governed by bodies that consist of representatives of all sub-units, and who sometimes decide by majority rule. These representatives must be trusted to not only serve their own electorate, but also be guided by common European values and an ‘overarching loyalty’ to Union citizens. If *one* government in the EU violates human rights, this may serve as a trigger for other governments and union citizens that it can no longer be trusted to exercise Union political authority responsibly on their behalf. Public officials of a subunit that violates even its own citizens’ human rights can hardly command such trust among other authorities of other sub-units – or their citizens. Thus, some of EU member states reacted against Austria by refusing to support Austrian nominees for international offices.

There is no obvious reason to believe that the same human rights norms should regulate reactions by international or regional human rights bodies in these three cases, and that they should be similar to the triggers to permit or require humanitarian international interventions, or those human rights that regulate the right to secession or revolution....

Edited Book

Geir Ulfstein

I plan to edit a book involving residents of “Should States Ratify..?” and others on treaty bodies in international human rights. The book will focus on the legal aspects, effects and legitimacy of such treaty bodies in the exercise of their four functions: a) adoption of general comments, b) examination of state reports, c) expressing views on individual complaints, and d) undertaking inquiries. It will examine the legal character of each of these functions: is it law-making, executive/administrative acts or dispute settlement – or something else? What methods of interpretation are applied by the treaty bodies? Do economic, social and cultural rights create special challenges? What is the international legal status of decisions in these functional areas? Are the bodies well-suited to undertake these functions in terms of their composition, structure and procedure? What is the legal status of the different decisions in national law? Should such infringement on national sovereignty be considered legitimate? I also plan to write one article in Norwegian on ‘legalization’ with reference to the Norwegian debate about incorporation of human rights convention in national law, and restrictions on the national democratic freedom as a result of jurisprudence by European Court of Human rights and its dynamic (‘evolutive’) interpretation, and decisions by human rights treaty bodies. These issues will be developed into a more general article in English.

Explaining ratification and non-ratification

Anne Julie Semb

The project "Explaining ratification and non-ratification (working title)" aims at explaining why Sweden and Finland have chosen not to ratify the ILO Convention 169, whereas Norway was the very first country to ratify this particular convention.

The project "What ever happened with the 'self'?" aims at exploring the driving forces behind the inclusion of indigenous peoples in the scope of the principle of self-determination.

CEDAW and the Right to Health

Henriette Sinding Aasen

My research concerns effects and implementation of human rights conventions, more concrete the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). In particular, I will look at the implementation of CEDAW, Article 12, on the right to health, and related provisions. Initially, I will look into state reports and comments from the CEDAW Committee concerning the implementation of Article 12. What is the effect of CEDAW, Article 12, in countries with different legal systems and various forms of protection of the right to health? I am particularly interested in states who have included socio-economic rights in their constitutions. How does this affect their implementation of the right to health? In addition, I have a special interest in maternal health issues. WHO reports that over 500.000 women per year die as a result of obstetric complications, mostly in developing countries, especially in parts of Africa and Asia. Thus, this is an urgent issue when it comes to women's lives and health. I would like to focus on women's right to health in connection with pregnancy and birth, and the legitimacy and effectiveness of the human rights approach for the improvement of maternal health.

The evolutive interpretation of the ICCPR through General Comments and the legitimacy question

Hellen Keller

I recently returned from the UN Human Rights Committee session in New York and am in a position to respond to your query about what I would like to work on while at the CAS. I was present during the difficult adoption phase of General Comment No. 33, which brought to mind a research question with the following working title: “The evolutive interpretation of the ICCPR through General Comments and the legitimacy question”.

Over the last 25 years, the Committee has developed human rights guarantees in an effective and creative way. Since 1981, the Committee has adopted 33 General Comments providing its views about the existing obligations of States Parties in authoritative terms. States Parties were not always comfortable with this development and insisted that they are the masters of the Covenant. Nevertheless, the General Comments have acquired considerable significance in the human rights practice. Several treaty bodies refer to them regularly, practitioners in the field consult them and human rights literature recognizes them as important sources for interpreting the Covenant.

In my research project, I would like to sketch the history of General Comments, in particular those for the ICCPR. My guess is that, in the archives of the Human Rights Commission in Geneva, all the *travaux préparatoires* of their adoption are available (including the comments that State Parties addressed to the Committee). In addition to reviewing these documents, I would like to use a standardized questionnaire to interview some former as well as longstanding current Members of the Committee about difficulties arising in the adoption process and their insights as to the effectiveness of General Comments. The information gathered from these sources would enable me to answer a more general question concerning the working methods of the Committee: Is the adoption of General Comments a viable and effective instrument for the protection of human rights on the international level? And last but not least, how can we legitimize General Comments, especially in the eyes of States?

In order to be ready with these materials in January 2010, I would start to prepare and collect documents in the summer and fall of this year. I would therefore use the meetings in July and October as an opportunity to speak informally with the Secretary and the staff. Of course, I cannot do substantial research during these sessions. I would, however, like to commission one or several of my assistants to start collecting the materials needed. This brings me to my question: Would it be possible to fund my assistants (e.g. for the expenses in Geneva, hotel, travel etc.)? Would it be possible to invite them to one of our congresses in Oslo? I would appreciate it if I could integrate my assistants into this research project and give them the opportunity to present some of our results to the CAS.

Policy Diffusion and International Cooperation: the Functions of *Treaties* and *Ratification*

Arild Underdal

The legalization of international human rights standards raises interesting challenges for mainstream theory of international cooperation. Simmons book (2009) is a great leap forward in answering some of the most important questions, and my work at CAS will be a much more modest attempt at contributing to our understanding of (1) the relationship between policy *diffusion* and international *cooperation*, and (2) the functions of international *legal* instruments and the specific *act* of ratification in this particular field.

Research on policy diffusion and international cooperation has developed largely as separate fields. But the two processes often *interact*. For example, learning (an important mechanism of diffusion) plays an important role also in negotiations (the process through which international agreements are established); international conferences often serve as important arenas for the exchange of information and ideas and IGOs (and NGOs) as important agents in diffusion processes; and diffusion may facilitate cooperation, enhance its effectiveness – or make it redundant. Moreover, the two processes *share* important characteristics, such as path dependence, critical thresholds, and certain feedback mechanisms. The former observation raises the question of what exactly does each of these processes contribute to a particular output (such as a particular human rights *treaty*) or outcome (*practice*). Taken together, the two observations suggest that additional mileage might be gained by developing models or frameworks that better capture the *interplay* between diffusion and cooperation.

Answers to these questions may help us better understand the functions of international *legal* instruments and of the *act* of ratification more specifically in the human rights area. Theories of international cooperation suggest that the value added by *formal* agreements and *legal* instruments (relative to informal norms and standards) depends on, inter alia,

- The *political malignancy* of the problem. Stein's (1982) basic distinction between games of "coordination" and games of "collaboration" provides one important clue, and efforts at developing more complex notions of "malignancy" (e.g. Underdal 2002) also seem useful)
- The *complexity* of the problem or system of activities to be governed
- The value of *precision* (in rules and regulations)
- The value of (regulatory) *consistency*
- The *expressive* value of a particular agreement or behavior.

These and other propositions suggest that in order to understand the role of formal instruments we need (a) *analytic* categories to distinguish different *types* of problems and issues (to supplement categories referring to broad policy domains, such as "human rights", "trade", "environment" etc.), and (b) models that better capture *non-regulatory* functions, in particular the *expressive* (symbolic) value of a particular agreement or instrument in *domestic* politics (see Simmons 2009), and of *process-generated* stakes.

References:

- Simmons, Beth A. (forthcoming 2009). *Mobilizing for Human Rights: International Law in Domestic Politics*. Cambridge: Cambridge University Press.
- Stein, Arthur A. (1982). Coordination and collaboration: regimes in an anarchic world. *International Organization*, 36(2): 299-324.
- Underdal, Arild (2002). One Question, Two Answers. In Edward L. Miles et al., *International Regime Effectiveness: Confronting Theory with Evidence*. Cambridge, MA: MIT Press.

Legitimacy and the Authority of Supranational Human Rights Courts.

Basak Cali

The first aspect concerns the normative aspects of the legitimacy of human rights courts - as a distinct type of international court, the assessment of different accounts of legitimacy that are proposed and the assessment of the adequacy of such accounts. The UCL working paper entitled 'The Authority of International Bodies: The Case for Human Rights Bodies' will be the basis of this work (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1278582). In particular, I aim to question state consent and its democratic variant democratic consent as adequate standards of legitimacy and to develop a legitimacy argument that takes into account a purposive/evaluative element given that courts interpret law for a community of states rather than for a single state.

The second aspect of my project is the empirical analysis of the qualitative data collected during 08-09 from elite interviews in five Council of Europe member states on the motivations of domestic actors, i.e. politicians and judges, for complying with human rights judgments. I build on the elite interviews carried out in Germany, the UK and Ireland, Turkey and Bulgaria in relation to their compliance with the human rights judgments of the European Court of Human Rights for a 'trial run' of a number of hypotheses on democratic compliance with human rights judgments. This aspect of the research has an interpretivist and social constructivist approach to explaining compliance and will build on a draft paper entitled 'Why do democracies comply with human rights judgments? A Comparative Analysis of the UK, Germany and Ireland'.

More information on this research project can be found at ECtHR Project Website: <http://ecthrproject.wordpress.com>

Policy views on ratification of Protocol no. 12 to the European Convention on Human Rights: General prohibition against discrimination.

Hege Skjeie

The protocol was signed by Norway in 2003 but has not yet been ratified. A governmental appointed commission has recently recommended that Norway does not ratify the protocol (The discrimination law commission, see NOU 2009:14: A comprehensive protection against discrimination). The commission was, however, close to evenly split on this issue. This autumn, there will be an extensive public hearing on the recommendations.

The disagreement reflects increased political controversy over the more general question of a “proper” national implementation of international human rights, also in light of the interpretation power which is granted international supervision bodies - in particular the Strasbourg Court. Norway has so far chosen a comparably radical implementation strategy, granting a series of international conventions priority in Norwegian law through the Human Rights Act. Increasingly, this implementation strategy is challenged by warnings about national and international “judicialization” and “power transfer” effects.

I will spend two months at CAS this autumn analysing current and previous policy positions with regard to Protocol 12, particularly in light of “judicialization” claims. This will be done also with reference to Protocol 12 debates in other Nordic countries. In spring 2010 I plan to analyse the public hearing, mapping and comparing positions on Protocol 12 to those taken in the lengthy political debate on the incorporation of CEDAW into the Human Rights Act (effective as of June 2009). The work will thus build on an analysis recently published in Nordic Journal of Human Rights (Vol. 27, no.2) - a thematic issue on judicial review in the Nordic countries. The aim of the analysis is to conclude about a possible shift in governmental positions on the further implementation of international human rights, and, anyhow, identify and evaluate the legal-political arguments in favour of such a shift.

The normative justifiability of state ratification of international human rights conventions

Lynn Dobson

I'm a political theorist and will work on issues around the normative justifiability ('legitimacy', on some readings) of state ratification of international human rights conventions. My main interest will be to explore what kinds of normative justifiability are at stake in these debates and how these may affect our responses to substantive questions about, eg, state sovereignty. I will start with what, if anything, the idea of legitimacy adds, theoretically and normatively (and indirectly, practically) to the debates. If we accept (a) the two sets of distinctions between i) just institutions and legitimate institutions and ii) natural duties and political obligations together with (b) the (widely-accepted) proposition that individuals are under a natural duty to support just institutions, it is not immediately obvious that the claim that states ought to ratify international human rights need rely on notions of legitimacy or obligation at all. On the other hand, one could conceive of arguments according to which ratification would be normatively justifiable if grounded through legitimacy and obligation but not on the basis of claims about universal rights and duties. Secondly, whether or not 'legitimacy' and 'obligation' are needed, it may be that they are useful. I plan to explore in some detail the nature and limits of their value to these discussions, focusing in particular on two aspects that to my mind are under-researched yet crucial for the substantive debates: (c) the 'selecting' (or particularising) functions of the idea of legitimacy and (d) the distinctive and quite different 'reasons for action' or grounds provided by the ideas of 'natural duty' and 'political obligation'.

On the basis of this work I expect to formulate a statement of the relationships between i) and ii) above, and use it to, thirdly, engage some theoretical and/or normative debates and especially the questions that his project is centrally concerned with. With respect to that latter, for instance, it is not clear to me that a cogent re-conceptualisation of sovereignty could dispense with a detailed account of the type I'm proposing. Further, the normative weight(s) to be accorded to 'the motivations of states when they enter into conventions' and 'the effects of the conventions on states' will probably turn out to be quite different depending on whether the account of justifiability to be adopted appeals to natural rights and duties or alternatively to acquired obligations and correlative claim-rights to rule.