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# Conflicted Normative Power Europe: The European Union and Sexual Minority Rights

*Martijn Mos*

## **Abstract**

This paper will evaluate the extent to which the European Union (EU) manifests the ability to act as, and possesses the potential to develop into, a norm-setting bureaucracy in its external relations when it comes to the protection and promotion of sexual minority rights. In order to examine this, an overview of the theoretical notion of Normative Power Europe, as developed by Ian Manners, is offered. This is followed by an evaluation of the EU's international identity regarding LGBT rights. Ultimately it is concluded that the ability of the EU to shape international norms and values concerning this policy issue is severely undercut by a set of internal, institutional and conceptual inconsistencies. Only by overcoming this confliction and inconsonance can the EU develop into a full-fledged, credible and effective normative power in the case of sexual minority rights. It is concluded that the recently launched LGBT toolkit could constitute an important step in this direction.

## **Keywords**

Normative Power Europe, Sexual Minority Rights, LGBT, Ian Manners, Norms.

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## **1 Introduction**

Since 2010 a chorus of high-ranking European Union (EU) officials has invoked the International Day against Homophobia and Transphobia (IDAHO) as an occasion on which to condemn discrimination on the basis of sexual orientation and gender identity, while

simultaneously stressing the advances that have already been made in and by the EU. The official statements give the impression that the EU is in the vanguard of institutionalising and promoting sexual minority rights. Not only do all EU representatives stress the importance of human dignity and how homophobia constitutes a breach thereof, their statements are also rife with references to the principles, articles and legal documents upon which the EU is founded. This suggests that Europe is playing, or is aspiring to play, the role of a leading norm-setting bureaucracy in the global arena.

Furthermore, the EU's condemnation of the violation of the human rights of LGBT people seems to have received support on 1 December 2009, when the Charter of Fundamental Rights of the European Union (CFR) became legally binding upon all member states, when implementing Community legislation, with the entry into force of the Treaty of Lisbon<sup>1</sup>. Article 21 of the Charter expressly prohibits "any discrimination" based on, *inter alia*, sexual orientation<sup>2</sup>. Because the CFR forms an integral part of the Lisbon Treaty<sup>3</sup>, the latter has become the first international treaty which explicitly prohibits this type of discrimination. As such, the EU appears to be leading by example.

This situates the EU's external policies on Lesbian, Gay, Bisexual and Transgender (LGBT) issues within the framework of Normative Power Europe (NPE). Developed by Ian Manners in the early 2000s, NPE represents a move away from more conventional interpretations of Europe's international sway. According to this perspective, the EU's ability to get external actors to do what it wants is not derived from a military *force de frappe*, as is commonly argued by realist conceptions of power, nor is it entirely borne out of economic might, as is assumed by Civilian Power Europe (CPE). Instead, the EU is thought to play a leading role in some policy areas or issues because the norms and values it holds are morally persuasive in and of themselves.

The applicability of the framework to the EU's role concerning sexual minority rights has not yet been subjected to academic scrutiny. In fact, while a limited number of authors have written on the development and status of sexual minority rights within Europe<sup>4</sup>, scholarly work

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<sup>1</sup> While the official name of this document is the 'Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community', the short version will be referred to throughout this thesis.

<sup>2</sup> Charter of Fundamental Rights of the European Union [2000] OJ C(364).

<sup>3</sup> This becomes clear from Article 6 of the Treaty of Lisbon, which states that "the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union [...], which shall have the same legal value as the Treaties".

<sup>4</sup> See, for example, Beger (2004), Kochenov (2007, 2009), Swiebel (2009), Swiebel & Van der Veur (2009), Waaldijk & Clapham (1993), Weyembergh & Cârstocea (2006).

that centres upon the external dimension of this policy area itself is wanting<sup>5</sup>. This paper seeks to fill these lacunae by taking the intersection of ethics and policy-making *in casu* sexual minority rights as a starting point. More concretely, the objective of this paper is to evaluate the extent to which the EU manifests the ability to act as, and possesses the potential to develop into, a normative power with regards to sexual minority rights. In the first section, Ian Manners' theoretical framework of Normative Power Europe will be laid out. NPE will be situated within the historical context out of which it sprang up, after which its core tenets and propositions will be addressed. The second section investigates the fit between theoretical conceptions of the EU as a principled Maecenas of sexual minority rights and the practical reality of policy-making. It will become evident that the ability of the Union to credibly shape international norms and values regarding sexual minority rights is severely undercut by three types of inconsistencies: the EU is revealed to be internally, institutionally and conceptually conflicted.

From this, it can be concluded that the performance of the Union with regards to sexual minority rights is currently not in line with the tenets of Normative Power Europe. The EU can only develop into a full-fledged, credible and effective norm-setting bureaucracy in this policy area if it manages to overcome the contradictions it is riddled with. Ultimately, while the EU manifests some aspects of NPE in the case of sexual minority rights, and while it could develop into a more mature normative actor, it is argued that it is currently at best conceived of as a conflicted normative power<sup>6</sup>.

## 2 Normative Power Europe

In theorising on the influence the European Union holds in international affairs, the notion of Normative Power Europe developed out of, and in reaction to, more traditional views that define the EU's international role in predominantly military or civilian terms. This is not to suggest a linear evolution from Realist Power Europe (RPE) into CPE and ultimately into NPE. Rather, while it is acknowledged that different conceptions of power continue to coexist, the idea is that norms and values have become a relatively more eminent part of the EU's international identity. The emphasis has thus shifted away from security and defence matters

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<sup>5</sup> Cf. Kelly Kollman & Mathew Waites, 'The Global Politics of Lesbian, Gay, Bisexual and Transgender Human Rights: An Introduction' (2009) CP 15, 2.

<sup>6</sup> Cf. Meunier and Nicolaidis (2006), who describe the EU as a conflicted trade power.

onto the trade realm and subsequently onto “the ability to define what passes for ‘normal’ in world politics”<sup>7</sup>. This norm-setting ability is considered to be the defining feature of NPE.

## 2.1 *The ‘Normative Power Europe’ Thesis*

That the framework of Normative Power Europe should be analysed in connection with the debate on the EU’s military and civilian power which engulfed many scholars in the 1970s and 1980s is indicated by the title of the foundational article in which Ian Manners developed the idea of NPE, “Normative Power Europe: A Contradiction in Terms?”<sup>8</sup>. This title refers directly to the title of the 1982 article<sup>9</sup> in which Hedley Bull, the leading academic of the English School, discredited François Duchêne’s concept of Civilian Power Europe. In fact, it is Bull’s claim that “‘Europe’ is not an actor in international affairs, and does not seem likely to become one”<sup>10</sup> that Manners ultimately sets out to disprove through conceiving of the EU as an ideational actor. Manners suggests that Bull’s military focus and Duchêne’s civilian conception have become outdated and that it is not, or no longer, a contradiction in terms to call the EU a normative power.

In an attempt to undo the stranglehold that this civilian-military debate had on the theorising on the EU’s international identity, Manners places an emphasis on the ideational dimension of the Union’s external role. According to him, proponents and critics of CPE share a larger common ground than is commonly acknowledged. They are alike in their emphasis on the Westphalian nation-state, the assumed prevalence of European interests over universal objectives and their valorisation of physical forms of power, whether manifested militarily or economically, over the sway that values, norms and ideas might hold. Manners saw these attributes as no longer fully and adequately capturing European reality, and therefore introduced the normative power concept in order to advance the academic debate.

The normative difference that is at the heart of the Union’s collective identity, which in turn enables the EU to shape what is ‘normal’ in the global realm, flows from three interconnected sources. Firstly, Manners points to historical context: the Union emerged out of, as well as constitutes, an “explicit rejection of the divisive nationalisms, imperialism and war of

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<sup>7</sup> Ian Manners, ‘Normative Power Europe: A Contradiction in Terms?’ (2002) *JCMS* 40, 236

<sup>8</sup> *Ibid.*, 235

<sup>9</sup> Hedley Bull, ‘Civilian Power Europe: A Contradiction in Terms?’ (1982) *JCMS* 21

<sup>10</sup> *Ibid.*, 151

Europe's past"<sup>11</sup>. Secondly, the Union is a hybrid polity whose character both defies classification as a Westphalian state and as a standard international organisation. Thirdly, arguing that the EU is a value-based community is not a mere declarative statement; the genesis and development of the EU as a collective entity that is founded in and guided by fundamental principles is reflected by its legal constitution. This normative difference is illustrated by several treaty articles<sup>12</sup>, as well as by references to international documents such as the European Convention on Human Rights (ECHR) and the Universal Declaration of Human Rights (UDHR) in EU legislation. In conjunction with its unique historical roots and unparalleled, fluid institutional framework, this legal constitution accords a normative dimension to the Union that definitively sets it apart from other institutional actors.

The NPE-framework depicts the EU's normative basis as consisting of nine core norms: sustainable peace, social freedom, consensual democracy, associative human rights, the supranational rule of law, inclusive equality, social solidarity, sustainable development, and good governance<sup>13</sup>. While it is self-evident that these norms often overlap and impact upon each other, they were legally enshrined at different times, reflecting the norms' historical contingency. The Charter of Fundamental Rights "restates and re-emphasizes"<sup>14</sup> all norms, save for good governance, and can therefore be regarded as the culmination of the legal articulation of the EU's normative difference. Moreover, while these principles might constitute a specifically *European* normative basis, they themselves transcend the EU; the specificity of the EU as a normative actor is in fact founded on norms that are taken to be "universally applicable"<sup>15</sup>.

If the EU is to be considered a true normative actor, it needs to actively promote these principles. There are six such channels of norm diffusion<sup>16</sup>:

- *Contagion*, or unintentional diffusion, such as when the EU leads by example;
- *Informational diffusion* through strategic and declaratory communications;
- *Procedural diffusion* via the institutionalisation of the EU's relationship with a third party;

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<sup>11</sup> Charlotte Bretherton & John Vogler, 'The European Union as a Global Actor' (Routledge 2006), 42

<sup>12</sup> See Article 3 (Lisbon) and Articles 6 and 11 (TEU).

<sup>13</sup> Even though Manners originally developed these nine principles in 2002, he slightly amended and qualified them in his 2008 article in *International Affairs*. This paper is written with the most up-to-date set of norms in mind.

<sup>14</sup> Ian Manners, 'Normative Power Europe: A Contradiction in Terms?' (2002) *JCMS* 40, 244

<sup>15</sup> Ian Manners, 'The Normative Ethics of the European Union' (2008) *IA* 84, 66

<sup>16</sup> Ian Manners, 'Normative Power Europe: A Contradiction in Terms?' (2002) *JCMS* 40, 244-45

- *Transference* through the exchange of goods, trade, aid and assistance;
- *Overt diffusion* by virtue of the EU's physical presence in third states or IOs;
- *Cultural filter* or "the impact of international norms and political learning in third states and organizations leading to learning, adaptation or rejection of norms"<sup>17</sup>.

Such different pathways reflect how the Union's normative ethics variably revolve around living by example, being reasonable and doing least harm<sup>18</sup>. Consequently, the EU's normative identity is highly variegated; there is not but one way in which the Union can behave normatively in its external relations.

In order to substantiate his claims, Manners looked at the EU's norm advocacy in abolishing the death penalty. He argues that the EU successfully managed to frame capital punishment as a human rights issue that falls within the scope of the international community, and as such uncoupled it from the realm of the sovereign state. Following this reframing, the EU contributed significantly to the abrogation of death penalty statutes in a number of European states<sup>19</sup>. This case study also illustrated the wide set of policy tools that the Union can make use of in the pursuance of its core and subsidiary norms. These findings were confirmed by Lerch and Schweltnus, who conclude that the EU is able to "make coherent human rights arguments externally without being accused of hypocrisy"<sup>20</sup>.

The abolition of the death penalty is only one illustration of how the Union has increasingly displayed this ability to act as a normative power by projecting its values and by "promoting the establishment of related norms for the governance of international behaviour"<sup>21</sup>. Szymanski and Smith see the Union's successful effort to insert a human rights suspension clause into the EU-Mexico Global Agreement as lending support to Manners' thesis. Other research indicates that the EU's championing of the International Criminal Court (ICC) and the Kyoto Protocol in the international arena largely derives from universalist moral arguments and political convictions. Importantly, Scheipers and Sicurelli emphasise how the EU's normative power in both cases hinges on a progressive self-representation that is constructed in credible opposition to American laggardness and on creating binding rules<sup>22</sup>. Groenleer and Van Schaik

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<sup>17</sup> Ibid.

<sup>18</sup> Ian Manners, 'The Normative Ethics of the European Union' (2008) IA, 80

<sup>19</sup> Ian Manners, 'Normative Power Europe: A Contradiction in Terms?' (2002) JCMS 40, 249-51

<sup>20</sup> Marika Lerch & Guido Schweltnus, 'Normative by Nature? The Role of Coherence in Justifying the EU's External Human Rights Policy' (2006) JEPP 13, 312

<sup>21</sup> Charlotte Bretherton & John Vogler, 'The European Union as a Global Actor' (Routledge 2006), 42

<sup>22</sup> Sibylle Scheipers, & Daniela Sicurelli, 'Normative Power Europe: A Credible Utopia?' (2007) JCMS 45, 451-52

see unitary European actorness in the same cases as contingent on “the internationalization of values [...] and norms”<sup>23</sup>. Severe empirical and conceptual criticism notwithstanding, these examples thus lend support to the NPE-thesis by indicating how the Union has apparently been able to set international standards in several cases spanning different policy areas<sup>24</sup>. Whether this verdict applies to the EU’s promotion of sexual minority rights is investigated next.

### 3 Normative Power Europe and Sexual Minority Rights

In conceptualising the Union’s international identity it has become almost prosaic to point out that the EU is an exemplar of multi-level governance rather than an institutional monolith. Concerning foreign policy, the fluidity and dispersiveness of the Union’s institutional arrangements make coherence, congruence and consistency particularly difficult to attain. This hybrid identity is thus often associated with tensions and inconsistencies between roles and associated practices, which constrains the EU’s external projection of power<sup>25</sup>.

As an illustration of this, Meunier and Nicolaidis, focusing on the EU’s role in the global marketplace, note that the EU is indubitably a “power *in* trade”, but that this does not automatically translate into being a “power *through* trade”<sup>26</sup>. The conclusion of their deconstruction of the image and self-representation of the Union as an economic powerhouse was rather sobering to Europhiles: the EU was a “conflicted trade power” in need of “strategies of reconciliation”<sup>27</sup>.

Such an uncovering of the confictions that flow from hybrid governance is especially critical at a time when the EU is arguably stepping up its efforts as a normative foreign policy actor. While the EU propagates values such as equality and non-discrimination internationally, it frequently violates these very principles due to the complex nature of its internal and institutional dynamics. This contradiction of outward saintliness and internal noncompliance might consequently hamstring the Union in its exercise of normative power. This section investigates this concern by placing the argument made by Meunier and Nicolaidis in a

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<sup>23</sup> Martijn L. P. Groenleer & Louise G. van Schaik, ‘United We Stand? The European Union’s International Actorness in the Cases of the International Criminal Court and the Kyoto Protocol’ (2007) *JCMS* 45, 989-90.

<sup>24</sup> Space limits preclude an elaborate overview of the critique of NPE. Concerning empirical criticism, interested readers are referred to Lightfoot and Burchell (2005), Forsberg and Herd (2005), Zimmermann (2007), Scheipers and Sicurelli (2008), Kratochvil (2008) and Jones and Clark (2008). For conceptual criticism, see Youngs (2004), Diez (2005), Hyde-Price (2006; 2008), Sjursen (2006), Merlingen (2007) and Zielonka (2008).

<sup>25</sup> Charlotte Bretherton & John Vogler, ‘The European Union as a Global Actor’ (Routledge 2006), 59

<sup>26</sup> Sophie Meunier & Kalyso Nicolaidis, ‘The European Union as a Conflicted Trade Power’ (2006) *JEPP* 13, 907

<sup>27</sup> *Ibid.*, 915

normative context. Whereas their emphasis on trade recalls the notion of CPE, Manners' argument that this concept is incapable of capturing the growing significance of non-physical forms of power suggests the need for such a transposition.

This is certainly true in the case of sexual minority rights, where the rhetoric of EU actors has revealed a strong preference for value- and rights-based, non-coercive action, both within and outside of the EU's borders. Concerning Manners' typology of normative principles, the "reinforcement and expansion" of which "allows the EU to present and legitimate itself as being more than the sum of its parts"<sup>28</sup>, the norm of associative human rights is evidently preeminent in the LGBT-related parts of its foreign policy. Inseparable from the human rights norm is the principle of the supranational role of law. Here cosmopolitanism is emphasised, as becomes clear from Article 21 of the Lisbon Treaty, which reads that the EU "shall promote multilateral solutions to common problems, in particular in the framework of the United Nations"<sup>29</sup>. A third normative principle that has a bearing on the external protection and promotion of LGBT rights is inclusive equality, which is epitomised by Article 21 of the CFR. Of auxiliary importance are the norms of social solidarity, especially through combating social exclusion, and good governance, by virtue of "the participation of civil society and the strengthening of multilateral cooperation"<sup>30</sup>. It is the interplay of these five principles that underlies the EU's norm entrepreneurship regarding sexual minority rights.

The remainder of this section will examine the extent to which this interplay is plagued by contradictions and fault lines that undermine the Union's credibility and, concomitantly, reduce the EU to a conflicted normative power with regards to the human rights of LGBT people. Three sets of contradictions will be addressed: internal, institutional and conceptual<sup>31</sup>.

### 3.1 *Internal Inconsistencies*

For the Union to be an effective and legitimate normative power it must exercise consistency between its internal and external policies. If the Union wants to speak

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<sup>28</sup> Ian Manners, 'Normative Power Europe: A Contradiction in Terms?' (2002) *JCMS* 40, 244

<sup>29</sup> Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2008] OJ C115/01

<sup>30</sup> Manners, 'The Normative Ethics of the European Union' (2008) *IA* 84, 74

<sup>31</sup> In addition, the Union appears to be instrumentally conflicted, because it can be argued that third countries' compliance with the norm that LGBT rights are human rights is more the result of the size of the European market than of the moral persuasiveness of the EU's argument. This is a comparatively minor point and has been left out due to space constraints.

authoritatively on LGBT-related human rights issues, it must thus not only reach a certain “value consensus of *acquis éthique*”<sup>32</sup>, but this *de jure* situation must also be reflected in the lived experiences of LGBT people in the EU itself.

However, a closer look at the intra-European dimension reveals that the human rights situation of LGBT people in the member states is far from a level-playing field. In 2006 and 2007 the European Parliament adopted a series of resolutions in which it remarked upon the surge of homophobia, in its many forms, in Europe<sup>33</sup>. These resolutions reveal that homophobia is notably rampant in the eastern member states, in particular in Poland and Lithuania. In Poland, leading politicians incited hatred and violence against LGBT people and the government announced a number of discriminatory measures in the field of education, such as drafting legislation “punishing ‘homosexual propaganda’ in schools”<sup>34</sup> and firing openly homosexual teachers. In 2009, the Lithuanian Parliament amended a law that prohibits the dissemination of public information to minors through which “homosexual, bisexual or polygamous relations are promoted”<sup>35</sup>. The involvement of governmental actors in both countries hints at institutionalised homophobia.

These developments in part inspired the EP to ask the Union’s fundamental rights agency “to launch a comprehensive report on homophobia and discrimination based on sexual orientation” in the member states<sup>36</sup>. This resulted in a legal and a social report. The results of the former were mixed. FRA partly lauded the many member states that have gone beyond the minimal legal requirements, but was particularly critical of the legal uncertainty surrounding transgender people in the EU, owing to the fact that discrimination of this group is not treated as either sex- or sexual orientation-based discrimination in almost half of the member states. Moreover, a number of EU legislative instruments “do not take explicitly into account the situation of LGBT persons”<sup>37</sup>. Such legislation concerns, *inter alia*, the freedom of movement, asylum and family reunification. In sum, the legal situation of LGBT people in the member states is seen as calling “for serious considerations”<sup>38</sup>.

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<sup>32</sup> Marika Lerch & Guido Schwellnus, ‘Normative by Nature? The Role of Coherence in Justifying the EU’s External Human Rights Policy’ (2006) JEPP 13, 312

<sup>33</sup> European Parliament Resolutions P6\_TA(2006)0018) on Homophobia in Europe; P6\_TA(2006)0273 on the Increase in Racist and Homophobic Violence in Europe; and P6\_TA(2007)0167 on Homophobia in Europe

<sup>34</sup> *Ibid.*

<sup>35</sup> European Parliament Resolution P7\_TA(2009)0019 on the Situation in Lithuania Following the Adoption of the Law on Protection of Minors

<sup>36</sup> European Union Agency for Fundamental Rights, Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States: Part I - Legal Analysis (2009), 3

<sup>37</sup> *Ibid.*, 4

<sup>38</sup> *Ibid.*

These legal sore spots are compounded by the “worrying” and “not satisfactory” social situation<sup>39</sup>. The Agency argues that “discrimination, bullying and harassment” are pervasive throughout the Union and across a wide range of areas of social life, including the freedom of assembly, the labour market, education, the health sector, religious institutions, sports, the media and asylum<sup>40</sup>. More generally, Eurobarometer studies reveal that “openness towards homosexuality tends to be quite limited”<sup>41</sup> and that discrimination on the basis of sexual orientation is the most widespread form of discrimination in the EU, apart from ethnic origin-induced discrimination<sup>42</sup>. FRA also noted the particular vulnerability of transgendered people, who, as a minority within a minority, “face more negative attitudes” than lesbians, gays and bisexuals (LGB)<sup>43</sup>. The Agency’s general conclusion is that it is “unacceptable”, in a Union that prides itself on being founded on values that should obviate this very behaviour, that many LGBT people adopt a strategy of invisibility in order to avoid being discriminated against<sup>44</sup>.

Perhaps the most significant conclusion of the report, however, is how greatly attitudes towards LGBT people vary across member states. An attitudinal chasm can be observed between relatively open-minded countries such as the Netherlands and Sweden and less tolerant states such as Romania, Bulgaria and Latvia. Such differentiation is also evident in the *de facto* treatment of sexual minorities. As a case in point, while some countries consider homophobic intent an aggravating factor in the practice of hate speech or hate crimes, thirteen member states treat it as “neither a criminal offence nor an aggravating factor”<sup>45</sup>. The variance also becomes visible with respect to gay pride marches: while leading politicians in some EU member states actively take part in such parades, the freedom of assembly has in recent years in fact been infringed in several Baltic and Eastern European states. These findings, in short, unveil the EU’s motto of *Unity in diversity* as a double entendre and are suggestive of an ethical divide.

Two main conclusions can be drawn from this. Most optimistic is the assumption that the unsatisfactory human rights situation of LGB people could best be redressed once the new

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<sup>39</sup> European Union Agency for Fundamental Rights, *Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States: Part II - The Social Situation* (2009), 3

<sup>40</sup> *Ibid.*, 8

<sup>41</sup> Eurobarometer 66 on Public Opinion in the European Union [2006], 41

<sup>42</sup> Special Eurobarometer 296 on Discrimination in the European Union: Perceptions, Experiences and Attitudes [2008], 52

<sup>43</sup> European Union Agency for Fundamental Rights, *Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States: Part II - The Social Situation* (2009), 15

<sup>44</sup> *Ibid.*, 4

<sup>45</sup> European Union Agency for Fundamental Rights, *Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States: Part II - The Social Situation* (2009), 37

members were firmly bound by the Union's *acquis*. O'Dwyer rejects this interpretation, however, by noting how "the ability of the EU to impose pressure [...] has drastically diminished" following accession and how the EU must now rely on "methods that are based on voluntarism"<sup>46</sup>.

Correspondingly, Kochenov describes the EU's actions in the 2004 and 2007 enlargements as "timid, ill-focused, and stopped short of realising the potential for change"<sup>47</sup>. More bleakly, ILGA-Europe claims that sexual orientation "has received limited attention in the EU enlargement process"<sup>48</sup>, suggesting that the rights of LGBT people were firmly at the bottom of the hierarchical pyramid of concerns that marked the accession talks. It is thus clear that the 2004 enlargement is more indicative of the Union's moral relativism than of normative ascendancy with respect to LGBT rights.

Finally, the opting out of the CFR by the United Kingdom, Poland and the Czech Republic is illustrative of legal incongruence at the EU-level. The opt-outs prevent the ECJ and national courts from finding these countries' laws to be in violation of the fundamental rights and freedoms declared by the Charter. As a consequence, the non-discrimination principle cannot be held to be binding with respect to sexual orientation. Even though the British and Czech exceptions were secured for reasons that were not directly related to sexual orientation, the opt-outs do impact negatively upon LGBT people. The same cannot be said for Poland; the political elite considered the CFR's provisions on moral and family issues, especially with respect to the legal recognition of same-sex unions, to be contrary to Polish culture<sup>49</sup>. Resultantly, this display of *Europe à la carte* eats away at the Union's credibility in its foreign policy on sexual minority rights.

To conclude this subsection, it has become clear that the Union's potential to lead by example on rights-related issues concerning LGBT people is severely compromised by the observation that *de facto* and *de jure* homophobia and discrimination remain rife, or may even be on the rise, within the member states. Recent enlargements appear to have led to the incorporation of a moral east-west chasm with respect to sexual morality and ethics. This incongruous human rights situation leaves the Union open to charges of double standards in its efforts to promote LGBT rights abroad.

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<sup>46</sup> Tove Stenqvist, 'After Entry into the EU, Homophobia Was Let Loose' (2009) BW 2, 7

<sup>47</sup> Dimitry Kochenov, 'Democracy and Human Rights – Not for Gay People?: EU Eastern Enlargement and Its Impact on the Protection of the Rights of Sexual Minorities' (2007) TWLR 13, 460

<sup>48</sup> ILGA-Europe, Meeting the Challenge of Accession: Surveys on Sexual Orientation Discrimination in Countries Joining the European Union (1/2004/EN, 2004), 7

<sup>49</sup> Anon, 'No EU Rights Charter for Poland' (BBC News, 23 November 2007) <<http://news.bbc.co.uk/2/hi/europe/7109528.stm>> accessed 22 July 2010

### 3.2 *Institutional Inconsistencies*

Following from the EU's nature as a multi-actor constellation, and given the fact that several institutional actors have been invested with at least some political authority over or say in sexual minority affairs, it becomes possible to compare the positions that different EU bodies have taken regarding LGBT human rights. Such a comparison reveals that institutional arrangements not only make it difficult for the Union to speak with one voice, but that they, at times, appear to reach little more than cacophonous disagreement.

Even though its relative powerlessness might suggest a rather modest human rights role, Parliament has in fact frequently acted as a patron of the LGBT community. Parliament's positions on LGBT-related human rights issues are remarkably often consensual despite the EP being made up of groups that span the political spectrum. Even when some issues might prove contentious, "human rights rhetoric appears on a very regular basis and is considered pivotal to all MEPs and parties"<sup>50</sup>. Such a view is corroborated by the Fundamental Rights Agency, which describes Parliament as having been "consistently supportive of gay and lesbian rights"<sup>51</sup>.

The record of the European Commission is mixed. On the one hand, it has been ascribed a role of "political entrepreneurship"<sup>52</sup>. This partly accounts for the Europeanisation of social policy, which has brought matters of sexual orientation and gender identity under a European purview, especially in relation to employment. The Commission also funds NGOs with a view to maintaining a social dialogue with civil society. As ILGA-Europe's largest donor, the Commission has contributed to the professionalisation of LGBT interest representation. Furthermore, following the entering into force of the Amsterdam Treaty, Commission entrepreneurialism was at the heart of a watershed moment in the development of LGBT rights in the EU: the 2000 Employment Directive. On top of this, a 2008 proposal revealed the Commission's wish to "implement the principle of equal treatment [...] outside the labour market"<sup>53</sup> in order to address allegations that some grounds of discrimination are treated as relatively more equal. In this light, the Commission seems to be a driving force behind the European-level institutionalisation of LGBT rights.

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<sup>50</sup> Nico J. Beeger, *Tensions in the Struggle for Sexual Minority Rights in Europe: Que(e)rying Political Practices* (Manchester University Press 2004), 80

<sup>51</sup> European Union Agency for Fundamental Rights, *Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States: Part I - Legal Analysis* (2009), 9

<sup>52</sup> Joke Swiebel, 'Lesbian, Gay, Bisexual and Transgender Human Rights: The Search for an International Strategy' (2009) CP 15, 22

<sup>53</sup> European Commission Proposal for a Council Directive on Implementing the Principle of Equal Treatment between Persons Irrespective of Religion or Belief, Disability, Age or Sexual Orientation. [2008] COM(2008) 426 Final

On the other hand, this apparent political avant-gardism needs to be put in perspective. Concerning the aforementioned directives, Swiebel notes that the Commission could only be persuaded to act “after strong lobbying” from NGOs and Parliament, and then did so with a considerable delay<sup>54</sup>. Kochenov is even more scathing in his review of the Commission’s role in the enlargement process leading up to the 2004 and 2007 accessions. He notes how the Commission was “unwilling to acknowledge and criticise the candidate countries’ numerous problems” in the domain of sexual minority rights, eventually being forced to address them due to Parliament’s tireless advocacy<sup>55</sup>. As a case in point, in summarising Romania’s compliance with the political subset of the Copenhagen criteria, the Commission in 1997 remained entirely silent on the human rights situation of LGBT people<sup>56</sup> at a time when Romania “*de facto* criminalised consensual, same-sex relations between adults”<sup>57</sup>. Even though the Romanian situation was later redressed, this shows how the Commission has been infirm of purpose when it comes to sexual minority rights.

The Union’s institutional set-up accounts for the rather passive role that the Council has played in the promotion and protection of LGBT rights. Because it is comprised of government representatives from the different member states, many of which are, as we have seen, rather unenthusiastic about gay rights protection, it has seldom played a leading role. This is connected to the Council’s consensus-seeking tendency. Because such an institutional culture generally results in lowest-common-denominator policies, this fits poorly with how contentious LGBT rights are considered to be in certain member states.

Finally, the ECJ has been astoundingly conservative in most of its rulings on the rights of sexual minorities. Whereas the Court has generally been accused of engaging in judicial activism, persistently promoting its “own political agenda of European integration”<sup>58</sup>, such behaviour has been absent regarding LGBT-issues. This is surprising, because court rulings could have brought this issue area, which by and large remains a member state competence in spite of greater European-level involvement in sexual minority rights, within a supranational scope<sup>59</sup>. The ECJ’s

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<sup>54</sup> Joke Swiebel, ‘Lesbian, Gay, Bisexual and Transgender Human Rights: The Search for an International Strategy’ (2009) CP 15, 23

<sup>55</sup> Dimitry Kochenov, ‘Democracy and Human Rights – Not for Gay People?: EU Eastern Enlargement and Its Impact on the Protection of the Rights of Sexual Minorities’ (2007) TWLR 13, 479

<sup>56</sup> European Commission Agenda 2000 - Commission Opinion on Romania’s Application for Membership of the European Union [1997] DOC/97/18

<sup>57</sup> Dimitry Kochenov, ‘Democracy and Human Rights – Not for Gay People?: EU Eastern Enlargement and Its Impact on the Protection of the Rights of Sexual Minorities’ (2007) TWLR 13, 474

<sup>58</sup> Ilias Kapsis, ‘The Courts of the European Union’ in Michelle Cini (Ed.), *European Union Politics* (OUP 2007), 198

<sup>59</sup> This possibility exists because the ECJ is authorised to draw upon the European Court of Human Rights’ interpretation of the ECHR. For a more elaborate explanation, see Kochenov (2007, pp. 480-88).

general reluctance to advance LGBT rights at the European level has resulted in “a conjugal hierarchy” topped by heterosexual married couples that can freely exercise the freedom of movement, while same-sex couples find their rights restricted<sup>60</sup>. In the light of this paper’s political focus, this legal point need not be elaborated upon. It is, however, important to note that this conservatism has also had a decelerating effect on the development of LGBT rights at the European level, because cases at the Court impact upon the policy behaviour of the Community at large. In sum, the fact that the ECJ has at times “simply refused to protect sexual minorities”<sup>61</sup> leads Kochenov to conclude that it has a “questionable gay rights record”<sup>62</sup>.

In short, the EU’s involvement in LGBT matters has shown considerable institutional fragmentation and differentiation. While this might present civil society actors such as ILGA-Europe with the opportunity to engage in venue shopping, its influence on the Union’s external sway is mostly disempowering; its institutional inability to streamline its viewpoints and policy actions with regard to sexual minority rights strips the Union of external authority and credibility.

### 3.3 *Conceptual Inconsistencies*

Coherence and consistency are also found wanting in the EU’s policies towards sexual minorities from a conceptual level. Both the Union’s definition and application of the ‘LGBT’ concept evidence a lack of parallelism. Fundamentally, most European-level policies referring to sexual orientation and gender identity fail to define these concepts altogether. In the light of the academic debate surrounding these concepts, this lack of reflexivity is bewildering. Such debate has displayed a growing tendency to describe these terms as located on a spectrum rather than as categorical identity markers. This suggests against straightforward classification and points to the need for clear and consistent definitions when they are put to policy use. Virtually all EU documents, however, exhibit a lack of definitional clarity, which prepares the ground for arbitrariness and legal uncertainty.

Nonetheless, an upward trend appears to have been set into motion recently, because the FRA’s social analysis, the Toolkit to Promote and Protect the Enjoyment of all Human Rights

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<sup>60</sup> Dimitry Kochenov, ‘On Options of Citizens and Moral Choices of States: Gays and European Federalism’ (2009) FILJ 33, 201

<sup>61</sup> Dimitry Kochenov, ‘On Options of Citizens and Moral Choices of States: Gays and European Federalism’ (2009) FILJ 33, 187

<sup>62</sup> Dimitry Kochenov, ‘Democracy and Human Rights – Not for Gay People?: EU Eastern Enlargement and Its Impact on the Protection of the Rights of Sexual Minorities’ (2007) TWLR 13, 460

by Lesbian, Gay, Bisexual and Transgender People<sup>63</sup>, and a recent policy paper on transgender persons' rights in the EU requested by Parliament<sup>64</sup> to some extent define the different components of which the LGBT-concept is made up. The Agency has based itself on existing conceptualisations and has, where possible, aligned itself with accepted international principles. This is illustrated by its definitions of sexual orientation and gender identity, which have been directly taken from the *Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*. The Yogyakarta Principles constitute an attempt to rectify the "fragmented and inconsistent" international response to human rights violations based on sexual orientation and gender identity<sup>65</sup>. The parliamentary policy paper also cites the Yogyakarta Principles. In conceptualising transgenderism and gender expression, FRA draws from definitions used by leading NGOs. The LGBT toolkit's interpretation of core concepts largely corresponds to these references. This illustrates how different EU actors have started to carefully embed their communications into the existing civil society dialogue on LGBT rights with a view to enhancing their authoritativeness. These developments could prepare the ground for a conceptual blueprint upon which future EU involvement in LGBT matters could be based, so as to improve the Union's coherence and consistency.

The scattered approach that the Union has taken to sexual orientation and gender identity is another grave cause for concern. Sometimes EU policies and statements box people of different non-mainstream sexual orientations and gender identities together, treating 'LGBT' as a unitary concept, whereas such indivisibility is done away with on other occasions. At face value this might appear to be the case because LGBT people constitute a highly diverse group, and such heterogeneity inevitably brings about different challenges. Perhaps the most important distinction that has to be made here is between sexual orientation, defined by the Yogyakarta Principles as a person's "capacity for profound emotional, affection and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender", and gender identity, which can be summarised as a person's "deeply felt internal and individual experience of gender, which may or may not

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<sup>63</sup> Toolkit to Promote and Protect the Enjoyment of all Human Rights by Lesbian, Gay, Bisexual and Transgender (LGBT) People [2010] 11179/10 LIMITE

<sup>64</sup> European Parliament Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, *Transgender Persons' Rights in the EU Member States* (PE 425.621, 2010), 3

<sup>65</sup> Anon, 'Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity' (Yogyakarta Principles, 2007) <[http://www.yogyakartaprinciples.org/principles\\_en.pdf](http://www.yogyakartaprinciples.org/principles_en.pdf)> accessed 21 July 2010, 6-7

correspond with the sex assigned at birth”<sup>66</sup>. Differentiated policy solutions thus imply a Union that is attuned to the specific needs of lesbians, gay men, bisexuals, transsexuals, transgendered people, intersex people and other sexual minorities that are frequently collapsed under the heading ‘LGBT people’.

According to Swiebel, however, the real cause of the Union’s conceptual inconsistency can be found in its “lack of competence” to fully take transgender and other gender identity issues on board<sup>67</sup>. This explains why the Amsterdam Treaty, the Employment Directive and the CFR only apply the non-discrimination principle to sexual orientation. EU regulations also account for the fact that ILGA-Europe can only use Commission funding for its LGB-related advocacy and not for matters concerning gender identity<sup>68</sup>. In consideration of the FRA’s findings that attitudes towards transgender persons are significantly more negative compared to LGB people<sup>69</sup> and that they might face very low acceptance by other LGBT people<sup>70</sup>, this legal imbalance is particularly distressing. Instead of paying due attention to a particularly vulnerable group, EU legislation thus makes transgender people more likely to being doubly marginalised.

In the cases that the EU does address transgenderism, such as in the Recast Directive, this is done with respect to equal treatment and non-discrimination on the basis of sex. The Union’s provisions then only apply when the process of gender reassignment has been completed. This is estimated to cover only roughly ten percent of the transgender population<sup>71</sup>, leaving a large number of people with a non-conforming gender identity in legal limbo. This is in spite of the FRA’s observation that “there is no reason not to extend the protection” to those transgendered persons that are currently not covered by EU legislation<sup>72</sup>. While the Union thus verbally proclaims to be a staunch advocate of LGBT people as a whole, its legal incapacity to adequately address the component of gender identity exposes such language as flawed.

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<sup>66</sup> European Union Agency for Fundamental Rights, *Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States: Part II - The Social Situation* (2009), 24-5

<sup>67</sup> Joke Swiebel, ‘Lesbian, Gay, Bisexual and Transgender Human Rights: The Search for an International Strategy’ (2009) CP 15, 25

<sup>68</sup> Cf. Nico J. Beger, *Tensions in the Struggle for Sexual Minority Rights in Europe: Que(e)rying Political Practices* (Manchester University Press 2004), 34

<sup>69</sup> European Union Agency for Fundamental Rights, *Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States: Part II - The Social Situation* (2009), 10

<sup>70</sup> *Ibid.*, 125

<sup>71</sup> European Parliament Directorate General for Internal Policies, Policy Department C: Citizens’ Rights and Constitutional Affairs, *Transgender Persons’ Rights in the EU Member States* (PE 425.621, 2010), 5

<sup>72</sup> European Union Agency for Fundamental Rights, *Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States: Part I - Legal Analysis* (2009), 131. This group includes pre-operative transgender people, those that are not willing or able to undergo gender reassignment, intersex people and transvestites.

Correspondingly, EU communications on sexual minority rights rarely mention bisexuality. There appears to be an “incompatibility of ‘sexual orientation’ with ‘bisexuality’”<sup>73</sup> so that sexual orientation is reduced to either hetero- or homosexuality. In connection with EU-level LGBT politics, this effectively forces bisexuals in the Union to identify with, or conform to, one of these two categories in order to be recognised. Those who do not associate with the conventional categories of ‘LGBT’ also lose out at the intersections. While Beger rightly observes that the belief that legal reality can accommodate the fluidity of sexual and gender identities is “a fantasy never to be fulfilled”<sup>74</sup>, and without trying to embark on a post-structuralist reading of LGBT politics at the level of the EU, this does illustrate anew the importance of bearing in mind the heterogeneity of the alleged LGBT ‘community’ as well as how political discourse is invariably informed by the politics of identity.

A final, important conceptual contradiction concerns the relationship between Eurocentrism and cosmopolitanism. Even though European rhetoric contains many references to universal principles such as equality and non-discrimination, Kollman and Waites argue that such “rigid universalism” can “impede dialogue, and risks being perceived as part of Western imperialism”<sup>75</sup>. Such perceptions are clearly at odds with the dialogue and persuasion upon which a legitimate NPE relies; a truly normative actor convinces third country representatives in a non-coercive manner of the moral supremacy of its arguments. This is especially applicable when sexual minority rights are introduced into the international political arena, because of the contentiousness of sexual politics and because of the leading role that European institutions have played in defining “the rights of LGBT people as human rights”<sup>76</sup>. Sexual minority rights are often perceived of as a specifically European social construct that is completely alien to many countries’ domestic culture. Promoting LGBT rights through a cosmopolitan rhetoric runs the dual risk of further obscuring this power imbalance in defining sexual minority rights and of perpetuating the marginalisation of non-Western categories of sexual orientation and gender identity. This dialectical tension between European values and universalism is reflective of a Habermasian paradox according to which “the common denominator for Europeanness is the

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<sup>73</sup> Mathew Waites, ‘Critique of ‘Sexual Orientation’ and ‘Gender Identity’ in Human Rights Discourse: Global Queer Politics beyond the Yogyakarta Principles’ (2009) CP 15, 145

<sup>74</sup> Nico J. Beger, *Tensions in the Struggle for Sexual Minority Rights in Europe: Que(e)rying Political Practices* (Manchester University Press 2004), 71

<sup>75</sup> Kelly Kollman & Mathew Waites, ‘The Global Politics of Lesbian, Gay, Bisexual and Transgender Human Rights: An Introduction’ (2009) CP 15, 7

<sup>76</sup> Kelly Kollman, ‘European Institutions, Transnational Networks and National Same-Sex Unions Policy: When Soft Law Hits Harder’ (2009) CP 15, 38

universalist meaning of human rights”<sup>77</sup>; for a norm to be a norm propagated by the EU, it must be universal, which automatically erodes its uniquely European character. Consequently, the very fact that the EU must actively frame sexual minority rights as a universal issue in its external relations puts a question mark over this very universality and, by implication, suggests a more Eurocentric ethics.

In conclusion, the Union’s conceptualisation of LGBT people, and the way that this has been translated into actual policies, is fraught with disjunctures, definitional slippages and omissions of definitions. The Union will only be able to act as an effective and legitimate normative power in its relations with third countries if it embarks upon a volte-face by virtue of addressing these critical points.

#### 4 Conclusion

The rhetoric of EU self-representations suggests that the Union’s external relations regarding the human rights of LGBT people should showcase all the hallmarks of Ian Manners’ Normative Power Europe; the EU seems to possess the potential “to define what passes for ‘normal’” when it comes to the global politics of sexual identity<sup>78</sup>. Such a tentative conclusion is based on the observation that the Union’s norm-setting activities in this issue area largely consist of declaratory politics and dialogue that are informed by cosmopolitan arguments, are promoted non-coercively, and are made more credible by evidencing that the Union is itself committed to and bound by the principles that it propagates. On the face of it, the EU is thus well-positioned to act as a normative power concerning LGBT rights.

Nonetheless, the Union’s ability to project its sexual ethics into the international realm is severely hamstrung by a series of inconsistencies. Internally, even though European-level provisions should have created a situation of *de jure* equivalence with regards to the principles of equal treatment and non-discrimination, reports on the pervasiveness of institutionalised and societal homo- and transphobia showed how there is no *de facto* level-playing field. Institutionally, the Union’s hybrid set-up predisposes it to an organisational inability to speak with one voice. Here, positive evaluations of Parliament as “the most reliable ally for European

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<sup>77</sup> Nico J. Beger, *Tensions in the Struggle for Sexual Minority Rights in Europe: Que(e)rying Political Practices* (Manchester University Press 2004), 80

<sup>78</sup> Ian Manners, ‘Normative Power Europe: A Contradiction in Terms?’ (2002) *JCMS* 40, 236

NGOs in the advancement of social rights”<sup>79</sup> need to be placed aside more mixed or even critical interpretations of the LGBT rights record of the Commission, Council and the Court of Justice. Finally, at a conceptual level, the EU manifests definitional omissions, practical inconsistencies and conceptual tensions in addressing sexual minority rights.

The combination of these internal, institutional and conceptual inconsistencies produces a dissonance in the Union’s external relations that has a crippling effect on the EU’s ability to shape international norms and values. These schisms directly call into question the Union’s credibility, which, by implication, corrodes its authority in international affairs. Because a truly normative actor relies upon the compelling integrity and righteousness of its values, a Union that is riddled with incongruence is not fully qualified to take up this role.

These sobering conclusions notwithstanding, recent policy developments are a cause for optimism in evaluating the fit between normative power and the Union’s advancement of sexual minority rights in third countries. The Council launched the *Toolkit to Promote and Protect the Enjoyment of all Human Rights by Lesbian, Gay, Bisexual and Transgender (LGBT) People* in June 2000. The toolkit possesses the potential to overcome the majority of the inconsistencies that currently have an enervating effect on the Union’s foreign policy on sexual minorities: it constitutes a policy instrument that is to be used across the EU’s institutions and member states, it stresses non-coercive policy tools such as multilateralism and civil society dialogue, it is attuned to the particular vulnerability of transgender people and women, it provides conceptual and definitional clarity and it is replete with references to cosmopolitan law. Future research will have to closely monitor its development in order to see whether the toolkit can fulfil its promise of increasing the EU’s normative strength in promoting and protecting the human rights of LGBT people in the EU’s external action. Until such potential materialises, however, the role of the Union in this policy field is best summarised as that of a conflicted normative power.

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<sup>79</sup> Nico J. Beger, *Tensions in the Struggle for Sexual Minority Rights in Europe: Que(e)rying Political Practices* (Manchester University Press 2004), 23

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