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

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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

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. Article 21 of the Charter expressly prohibits "any discrimination" based on, *inter alia,* sexual orientation (European Communities 2000). The ratification of the Lisbon Treaty made the CFR the first international document that 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 (see, for example, Beger 2004; Kochenov 2007, 2009; Swiebel 2009; Swiebel & Van der Veur 2009; Waaldijk & Clapham 1993; Weyembergh & Cârstocea 2006), scholarly work that centres upon the external dimension of this policy area itself is wanting (Kollman & Waites 2009: 2). 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 (NPE) 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.[1]

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 onto the trade realm and subsequently onto 'the ability to define what passes for "normal" in world politics' (Manners 2002: 236). This norm-setting ability is considered to be the defining feature of NPE.

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?" (2002: 235). This title refers directly to the title of the article in which Hedley Bull (1982), 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" that Manners ultimately sets out to disprove through conceiving of the EU as an ideational actor' (Bull 1982: 151). 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 (2002: 240) points to historical context: the Union emerged out of, as well as constitutes, a rejection of the nationalist antagonism that generated the Second World War. The second fountainhead concerns the Union's institutional hybridity, which turns the EU into a polity that defies classification both 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 (see Article 3 (Lisbon) and Articles 6 and 11 (TEU)), 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.[2] 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' all norms, save for good governance, and can therefore be regarded as the culmination of the legal articulation of the EU's normative difference (Manners 2002: 244). 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' (Manners 2008: 66).

If the EU is to be considered a true normative actor, it needs to actively promote these principles. Manners (2002: 244-45) outlines six such channels of norm diffusion. These different pathways reflect how the Union's normative ethics variably revolve around living by example, being reasonable and doing least harm (Manners 2008: 80). 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 (Manners 2002: 249-51). 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 Marika Lerch and Guido Schwellnus (2006: 312), who conclude that the EU is able to 'make coherent human rights arguments externally without being accused of hypocrisy'.

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' (Bretherton & Vogler 2006: 42). Stefan Szymanski and Ron Smith (2005) 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, Sibylle Scheipers and Daniela Sicurelli (2007: 451-52) 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. Martijn Groenleer and Louise Van Schaik (2007: 989-90) see unitary European actorness in the same cases as contingent on 'the internationalization of values […] and norms'. 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.[3] Whether this verdict applies to the EU's promotion of sexual minority rights is investigated next.

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 (Bretherton & Vogler 2006: 59).

As an illustration of this, Sophie Meunier and Kalypso Nicolaïdis (2006: 907), 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". 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" (Meunier and Nicolaïdis 2006: 915).

Such an uncovering of the conflicts 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 Nicolaïdis in a 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', the norm of associative human rights is evidently preeminent in the LGBT-related parts of its foreign policy (Manners 2002: 244). Inseparable from the human rights norm is the principle of the supranational role of law. Here cosmopolitanism is emphasised: the EU 'shall promote multilateral solutions to common problems, in particular in the framework of the United Nations' (European Union 2008). 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' (Manners 2008: 74). 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.[4]

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 authoritatively on LGBT-related human rights issues, it must thus not only reach a certain 'value consensus of *acquis éthique*' (Lerch & Schwellnus 2006: 312), 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 (European Parliament 2006a; 2006b; 2007). 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' and firing openly homosexual teachers (European Parliament 2007). 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' (European Parliament 2009). The involvement of governmental actors in both countries hints at institutionalised homophobia.

These developments in part inspired the EP to ask the European Union Agency for Fundamental Rights (FRA) 'to launch a comprehensive report on homophobia and discrimination based on sexual orientation' in the member states (European Union Agency for Fundamental Rights 2009a: 3). 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' (European Union Agency for Fundamental Rights, 2009a: 4). 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' (European Union Agency for Fundamental Rights 2009a: 4).[5]

These legal sore spots are compounded by the "worrying" and "not satisfactory" social situation (European Union Agency for Fundamental Rights 2009b: 3). 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 (European Union Agency for Fundamental Rights 2009b: 8). More generally, Eurobarometer studies reveal that 'openness towards homosexuality tends to be quite

limited' (European Commission 2006) 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 (European Commission 2008a). 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) (European Union Agency for Fundamental Rights, 2009b: 15). 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 (European Union Agency for Fundamental Rights 2009b: 4).

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. Discrimination on grounds of sexual orientation is also perceived to be widespread in the Mediterranean Member States (European Commission 2009: 85).

Such differentiation is further 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" (European Commission 2009: 37). 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 members were firmly bound by the Union's *acquis*. (O'Dwyer in Stenqvist 2009: 7) 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'. Correspondingly, Dimitry Kochenov (2007: 460) describes the EU's actions in the 2004 and 2007 enlargements as 'timid, ill-focused, and stopped short of realising the potential for change'. More bleakly, ILGA-Europe (2004: 7) claims that sexual orientation 'has received limited attention in the EU enlargement process', 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 (Anon 2007b). The Polish government also used the final meeting of the Intergovernmental Conference to append a declaration to the Lisbon Treaty stating that the Charter does not impinge on a member state's ability to legislate 'in the sphere of public morality, family law, as well as the protection of human dignity and respect for human physical and moral integrity' (European Union 2007). 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 thrown the attitudinal chasm with respect to sexual morality and ethics into sharper relief. This incongruous human rights situation leaves the Union open to charges of double standards in its efforts to promote LGBT rights abroad.

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 lack of formal (veto) competences might suggest that Parliament is relatively powerless in the area of human rights, it has in fact frequently acted as a patron of the LGBT community. Since the contentious and path-breaking Squarcialupi and Roth parliamentary reports (see European Communities 1984; 1994), the 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' (Beger 2004: 80). Such a view is corroborated by the Fundamental Rights Agency (2009a: 9), which describes Parliament as having been 'consistently supportive of gay and lesbian rights'.

The record of the European Commission is mixed. On the one hand, it has been ascribed a role of "political entrepreneurship" (Swiebel 2009: 22). This partly accounts for the Europeanization of social policy, which has brought matters of sexual orientation and gender identity under a European purview, especially in relation to employment.[6] 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' in order to address allegations that some grounds of discrimination are treated as relatively more equal (European Commission 2008b). In this light, the Commission seems to be a driving force behind the European-level institutionalisation of LGBT rights.

On the other hand, this apparent political avant-gardism needs to be put in perspective. Concerning the aforementioned directives, Swiebel (2009: 23) 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. Kochenov critically assesses 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 (Kochenov 2007: 479). 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 at a time when Romania '*de facto* criminalised consensual, same-sex relations between adults' (Kochenov 2007: 474; see European

Commission 1997a). 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. For example, it removed references to sexual orientation in proposals for three directives between 1996 and 1998.[7] 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.[8] Whereas the Court has generally been accused of engaging in judicial activism, persistently promoting its 'own political agenda of European integration' (Kapsis 2007: 198), 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.[9] The ECJ's 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 (Kochenov 2009: 201). In the light of this paper's political focus, this legal point need not be elaborated upon (see also Beger 2000; Toggenburg 2009). 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. The fact that the ECJ has at times 'simply refused to protect sexual minorities' (Kochenov 2009: 187) leads Kochenov (2007: 460) to conclude that it has a 'questionable gay rights record'.

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.

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 by Lesbian, Gay, Bisexual and Transgender People (Council of the European Union

2010), and a recent policy paper on transgender persons' rights in the EU requested by Parliament (Castagnoli 2010) 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 (Anon 2007a: 6-7). 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 correspond with the sex assigned at birth' (European Union Agency for Fundamental Rights 2009b: 24-25). 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 (2009: 25), 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. 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 (Beger 2004: 34). In consideration of the FRA's findings that attitudes towards transgender persons are significantly more negative compared to LGB people and that they might face very low acceptance by other LGBT people (European Union Agency for Fundamental Rights 2009b: 10 and 125), 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 10 per cent of the transgender population, leaving a large number of people with a non-conforming gender identity in legal limbo (Castagnoli 2010: 5). 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 (European Union Agency for Fundamental Rights 2009a: 131). 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.

Correspondingly, EU communications on sexual minority rights rarely mention bisexuality. There appears to be an 'incompatibility of "sexual orientation" with "bisexuality'" so that sexual orientation is reduced to either hetero- or homosexuality (Waites 2009: 145). 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 (2004: 71) rightly observes that the belief that legal reality can accommodate the fluidity of sexual and gender identities is 'a fantasy never to be fulfilled', 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 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, Kelly Kollman and Matthew Waites (2009: 7) argue that such "rigid universalism" can 'impede dialogue, and risks being perceived as part of Western imperialism'. 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' (Kollman, 2009: 38). 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 universalist meaning of human rights' (Beger 2004: 80); 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. It is not readily apparent how the advice of Immanuel Wallerstein (2006) to discard a "European universalism" in favour of a truly global universalism can be heeded with respect to sexual minority rights. The response of several African countries to the recent decision of the United Kingdom to withhold development aid to countries that ban homosexuality pointedly illustrates how the legitimacy of norm promotion is dependent on relieving the tension between Eurocentrism and cosmopolitanism (Anon 2011).

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.

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 (Manners 2002: 236). 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 NGOs in the advancement of social rights' (Beger 2004: 23) 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 may have 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, has the potential to corrode its authority in international affairs. As Elizabeth De Zutter (2010: 1117) has argued, identifying a normative power hinges, *inter alia*, on the '(perceived) consistency between role, norms and practice' (see also Lucarelli & Manners 2006: 207-209). EU policy concerning LGBT rights thus echoes the conclusion that 'normative power can be seen more as an ideal-type than a description of what the EU truly is' (Forsberg, 2011: 1192). In sum, 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 2010. 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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[1] The terminology follows Meunier and Nicolaïdis (2006), who describe the EU as a conflicted trade power.

[2] 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.

[3] 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), Kratochvíl (2008), Jones and Clark (2008) and Wagnsson (2010). Developments in North Africa and the Middle East, culminating in the so-called Arab Spring, sparked a scholarly debate on the EU's attempts at democracy promotion in the region. The tenor of most studies is contrary to the Normative Power Thesis (see Powel, 2009; Cavatorta & Pace, 2010; Durac, 2010; Bauer, 2011). For conceptual criticism, see Youngs (2004), Diez (2005), Hyde-Price (2006; 2008), Sjursen (2006), Merlingen (2007), Zielonka (2008), De Zutter (2010) and Forsberg (2011). Whitman (2011) offers a good up-to-date overview of the NPE literature.

[4] 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 is not developed further due to space constraints.

[5] Missing from this report is the difference in the age of consent for heterosexual (15) and homosexual (17) acts (see Waaldijk 2009).

[6] This began in 1996, when the Commission included a reference to sexual orientation in its proposal for a Parental Leave Directive (COM(96) 26). The reference was subsequently removed by the Council.

[7] The three proposals in question are the Parental Leave Directive (European Commission 1996), the Part-Time Workers Directive (European Commission, 1997b) and the Transfer of Undertakings Directive (amendment by the European Parliament, see European Communities 1997).

[8] Important cases in point are *Grant v South West Trains Ltd* and *D and Kingdom of Sweden v Council of the European Union* (European Court of Justice, 1998; 2001). This is not to deny the importance of the jurisprudence of the European Court of Human Rights (ECtHR), a court adopted under the auspices of the Council of Europe, to the development of LGBT rights in the EU. This topic is beyond the scope of this article, but the reader is referred to Graupner (2010) for an overview of cases at the ECtHR.

[9] 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: 480-488).

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