Theme 4
Constructing Cultural Identity in Europe and Beyond
Normative goals, Means and Results in the EU’s Promotion of LGBT Rights in Poland

Joyce Lagerweij

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.

Treaty of Lisbon

Introduction

In 2002, Danish political scientist Ian Manners provoked an academic debate on the normative foundations of the European Union (EU) with his article “Normative Power Europe, A contradiction in terms?”. Manners argues that the EU is normative by nature because of its historical context, hybrid polity and legal constitutions based on external reference points. To illustrate, Manners ends his thesis with an outline of the EU’s actions in pursuit of the abolishment of capital punishment. His example to demonstrate the EU’s power as a ‘force for good’ is quite conveniently chosen. The Council of Europe (CoE) had already done the EU’s pre-work by successfully promoting the abolishment of the death penalty and, in Manners own words, making that the norm.1 Besides meeting little resistance, once the EU’s normative influence led a state to ban capital punishment, its job was done so there is no need to take the aftermath of the changed legislation into account. In other cases, when there is more political and societal contestation and the results are not as immediate, the EU’s normative power might be harder to prove. The EU’s efforts in promoting Lesbian, Gay, Bisexual and Transgender (LGBT) rights and combating homophobia in the post-communist Central and Eastern European countries is an example of such a case. With a shared lowest ranking of the EU-27 in ILGAs 2010 report on the situation of LGBT persons, Poland has been known to strongly contest the EU’s norms on LGBT rights.2

Nevertheless, as Graff argues:

True, we are dealing with a massive outburst of homophobia in a deeply conservative Roman Catholic country, but we are also witnessing the birth of a gay and lesbian identity and movement in a place which has long aspired to the status of being ‘modern’ and ‘western.’ This activism, the development of queer studies in Poland, as well as the intense (and largely homophobic) public debate on the issue, can only be understood in their historical and political context – at the intersection of hopes and anxieties concerning Poland’s place in Europe.

I will compose a conceptual framework on normative power that subsequently will allow me to review the EU’s normative power in promoting LGBT rights and combating homophobia in Poland. I will start with an introduction to the normative power thesis. In the second section I will present ways of analysing first the EU’s pursuit of normative goals, second the EU’s normative means, and third the EU’s fulfilment of normative intent. The third section will be a case study, which is as much an analysis of the EU’s influence on LGBT rights and homophobia in Poland as it is a test of Manners’ concept. I will end with conclusions on both.

**Normative Power Europe**

Normative power refers in the first place to a specific kind of actor in international politics. Ian Manners, in his original thesis, argues that the international role of the European Union is that of a normative power of an ideational nature, characterized by common principles. He describes normative power as the ability to shape conceptions of ‘normal’ in international relations. Manners defends himself against the relativist claim that the EU is really after maximizing its own interest and promoting its own norms in an imperial way, by arguing that the EU derives its normative status above all from what it is, rather than what it does or say.

As such, the basis of the EU’s normative power is the combination of its historical context,

---


6 Manners, “Normative Power,” 239.

7 Ibid., 239.


hybrid polity and legal constitution. These factors, according to Manners, have led the EU to make its external relations “informed by, and conditional on, a catalogue of norms which come closer to those of the Council of Europe’s European Convention on Human Rights and Fundamental Freedoms (ECHR) and the Universal Declaration of Human Rights (UDHR) than most other actors in world politics.”

A second characteristic of normative power is the aim of spreading particular norms and values. While Thomas Diez argues in his criticisms of Manners’s thesis that this power to shape the values of others exemplifies a hegemonic power relationship, the “setting of standards” is described as a “specific aim” which does not entail a relationship in their joint article.

Manners identifies five core EU norms, and four minor ones. The first core principle, that of peace, has been central to the European community ever since Robert Schuman’s declaration of 1950. The other four core norms – those of liberty, democracy, rule of law and human rights – were first constitutionalised as founding principles in the 1992 Maastricht Treaty of the European Union (TEU). According to Manners, these norms had grown out of the importance of distinguishing democratic Western Europe from communist Eastern Europe. After communism fell, the same principles became part of the membership criteria for the post-communist Central and Eastern European Countries (CEEC), as laid down at the 1993 Copenhagen European Council. The four minor norms mentioned by Manners are those of social solidarity, anti-discrimination and the protection of minorities, sustainable development, and that of good governance. Except for good governance, all norms that Manners identifies are explicitly stated in the 2000 Charter of Fundamental Rights of the European Union.

Thirdly, a normative power is believed to primarily employ normative means, rather than military or economic instruments. This however does not mean that a normative power

---

10 Ibid., 241.
11 Ibid.
12 Diez, “Constructing the Self,” 625.
13 Ibid., 616.
14 Manners and Diez, “Reflecting on Normative Power Europe,” 175.
18 Ibid., 242.
19 Ibid., 243.
21 Diez, “Constructing the Self,” 616; Manners and Diez, “Reflecting on Normative Power Europe,” 175.
cannot employ also economic and military forms of power. Manners and Diez argue that the EU is most likely to “shape conceptions of the normal” (and therefore have greater normative power) in the context of EU membership candidacies, when perceived economic benefits of joining the EU can be assumed to be important factors for compliance with EU norms.²²

Manners identifies five ways through which the EU promotes its norms. The first, unintentional spreading of norms, takes place through a process of leading by example. This process is labelled “contagion” by Manners, a term he adopts from Laurence Whitehead.²³ A second possibility, “informational” diffusion, can be a result of strategic communications through EU declarations and initiatives.²⁴ “Procedural” diffusion works through the institutionalizing of a relationship between the EU and a third party, while “transference” of norms takes place with the help of substantive or financial incentives. “Overt” diffusion, finally, happens as the result of the physical presence of the EU in a third party.

Next to the five different ways in which the EU influences other polities, Manners mentions one condition, the cultural filter, which affects the impact of the promoted norms, thus leading to the possible outcomes of learning the norms, adapting the norms, or rejecting these completely.²⁵

**Assessing normative power: a framework**

A normative foreign policy would pursue normative goals through normatively deployed means and it would be effective in fulfilling its normative intent.²⁶

**Pursuing normative goals**

Thomas Diez warns that if the EU fails to take a reflexive stance towards the norms it seeks to promote, it risks assuming that its own standards are superior and even of a universal validity. This might lead to the belief that third parties should be convinced or made to accept the EU norms²⁷. Contradicting his own assertion that normative power by nature concerns particular

---

²² Manners and Diez, “Reflecting on Normative Power Europe,” 176.
²³ Manners, “Normative Power,” 244.
²⁴ Manners, “Normative Power,” 244.
²⁵ Manners, “Normative Power,” 245.
²⁷ Diez, “Constructing the Self,” 628.
norms and values, Diez suggests that whether the EU is a normative power, can be judged by the role that universal norms play as aim and means for the projection of power.

In a response to Diez, Manners acknowledges the importance of an external reference point and emphasizes his previous account of the EU’s subscribing to the European Convention of Human Rights (ECHR) and the Universal Declaration of Human Rights (UDHR), in the case of human rights. Nathalie Tocci agrees with Diez and Manners on the importance of external reference points for a normative power, but also adds a side note to it. Whereas Manners argues that acting in accordance with internationally institutionalized norms makes for a normative actor, Tocci accepts the limitation of this because of the historical development out of power relations also of international law. She argues that international law therefore is not completely objective and universal, but nevertheless provides a set of standards that are as universally accepted and legitimate as possible. As such it is ‘as good as it gets’ by providing at least a normative boundary within which interests are constructed, interpreted and pursued.

Helene Sjursen offers another method to assess the universal nature of the norms promoted by the EU, by using Jürgen Habermas’s principle of universalisation. According to this principle, universal norms are norms “that can be expected to gain approval in a free and open debate between all parties concerned”. Sjursen argues that if the EU does not take this principle into consideration, it risks pursuing particularistic values which might lead to Eurocentric cultural imperialism. Rather than comparing the norms the EU promotes with those laid down in international law, Sjursen thus suggests a comparison with the norms present in the third country.

Sjursen’s suggestion is useful, because it allows for a more equal comparison between two bodies of norms. Whereas the ECHR and UDHR consist of broad formulations of universal norms, political actors such the EU and third countries, base their actions on interpretations of those norms. This is unavoidable when abstract notions of human rights have to be turned into

28 Ibid., 615.
29 Ibid., 620; Manners, “The European Union as a Normative Power,” 170.
31 Tocci, Profiling Normative Foreign Policy, 10. Also Hartmut Behr provides an interesting historical account of the development of international law with attention for the power relations at work. Behr, Hartmut, “The European Union in the Legacies of Imperial Rule? EU Accession Politics Viewed from a Historical Comparative Perspective,” European Journal of International Relations 13, no. 2 (2007): 239-262.
32 Ibid., 3-5.
33 Ibid., 5.
policy. The EU’s institutionalised norms and those of a third country might both make a legitimate claim to be in accordance with universal norms, and still collide with each other.\footnote{Sonia Lucarelli, “Values Images and Principles and European Union Foreign Policy,” In Values and principles in European Union Foreign Policy, ed. Sonia Lucarelli and Ian Manners (London: Routledge, 2006), 10-11.} Therefore, the loyalty of a political power to international agreements on human rights is not enough to ensure that it is a normative power.

**Employing normative means**

Normative power in the relational sense is closely related to François Dûchene’s concept of “civilian power”.\footnote{Tocci, Profiling Normative Foreign Policy, 5.} Civilian power entails the use of economic, social, diplomatic and cultural instruments, rather than military ones.\footnote{Tocci, Profiling Normative Foreign Policy, 5.} While deriving from different positions on this, Manners and Diez came to agree that a normative power preferably employs “norms as its means”, but may also make use of economic incentives and military measures.\footnote{Manners and Diez, “Reflecting on Normative Power Europe,” 179-181.}

Nathalie Tocci on the other hand, argues that in order to evaluate relational normative power, we should pay attention to how rather than to which policy instruments are used. She believes that economic sanctions have the potential to be at least as harmful as military means.\footnote{Tocci refers to Joseph Nye’s\footnote{Joseph Nye, Soft Power: The Means to Success in World Politics (New York: Public Affairs, 2004), quoted in Tocci, Profiling Normative Foreign Policy, 1-7.} definition of soft power as power that relies on co-optation, as a positive opposite to the coercive imposing of “allegedly ‘universal’ norms through sheer power and against the needs and desires of local populations”.\footnote{Tocci, Profiling Normative Foreign Policy, 5.} Nye’s concept is of a more empirical nature than Manners’s “normative power”\footnote{Manners and Diez, “Reflecting on Normative Power Europe,” 180.} and as such it can be helpful in assessing how normative the means are that the EU employs in its norm diffusion. With the two extremes of soft power and coercion, it is possible to see the five ways of norm promotion by the EU that Manners identifies on a continuum of normativity. The order, starting with the most normative approach, would be: contagion, informal diffusion, procedural diffusion, transference, and overt diffusion.

**Fulfilling normative intent**

---

\footnote{Tocci, Profiling Normative Foreign Policy, 5.}
Next to assessing a polity’s goals and means in relation to a third party, a third way to assess normative power is by looking at the impact it has on what is considered appropriate behaviour by other actors.\textsuperscript{44} Tocci gives the following definition of a “normative impact”:

A normative impact is one where a traceable path can be drawn between an international player’s direct or indirect actions and inactions (or series of actions) on the one hand and the effective building and entrenchment of an international rule-bound environment on the other.\textsuperscript{45}

With this definition Tocci refers to changes on the institutional, policy or legal level of the third country. The difficulty in analysing such a normative impact is making sure that the traceable path between the international player’s actions and the changes in the third country, is the right and only path that leads to the changes in question. This is easiest to prove in the case of coercion and gets harder when the international player’s action move more towards the soft power side of the spectrum discussed in the above sub-chapter.

Another shortcoming of Tocci’s definition and proposed way of analysis, is its lack of attention for the possible discrepancy between the official adoption of EU norms by a third party and the actual normative change that takes place (or doesn’t), especially in the case of new Member States. Such possible incongruities can be explained with the use of Antje Wiener’s concept of “contested compliance”. This concept evolved from a sociological perspective and entails a bottom-up viewpoint, rather than the top-down perspective that is typically adopted in the normative power discourse. It has therefore also a better chance of finding other factors that contributed to a country’s normative change, besides the expected and direct influence of the EU’s request of compliance to its norms.

Following Wiener, philosopher and sociologist Józef Niźnik has identified three types of contested compliance.\textsuperscript{46} In the first case, the norm is not appreciated, but does fit within the shared normative structure. Contestation in this case is likely to be strategic and compliance will cause relatively little problems because contestation was merely motivated by political calculations. The other two kinds of contested compliance occur when there is a lack of a shared normative structure. The norm that is promoted by the international actor is in these cases not part of the third country’s body of internalized principles and may or may not collide with an already existing norm. In both cases compliance is likely to be more problematic, because it tends to take place either as a result of coercion or because there are

\textsuperscript{44} Diez, “Constructing the Self,” 615.
\textsuperscript{45} Tocci, Profiling Normative Foreign Policy, 7.
large gains attached to compliance (EU membership for example) or large political, financial or moral losses to non-compliance. Non-compliance is unlikely to happen because of the major consequences attached to it, but another possible strategy the third country might employ is to try and change the contested norm after initial compliance.\textsuperscript{47}

**Does the EU pursue normative goals in its promotion of LGBT rights and combating of homophobia in Poland?**

Promoting LGBT rights and combating homophobia falls within the domain of human rights. The most obvious human rights norms related to LGBT rights are non-discrimination and equality, but many other social, political and economic principles concern LGBT rights as well.\textsuperscript{48}

**EU norms on LGBT rights and homophobia**

The Treaty of Amsterdam, which came into force in 1999, was the first international treaty to explicitly mention and protect sexual orientation:\textsuperscript{49} its Article 13, granting the EU the possibility to combat discrimination based on sex, racial or ethnic origin, religion or disbelief, disability, age or sexual orientation,\textsuperscript{50} provided the basis for the Framework Directive 2000/78/EC on Equal Treatment in Employment and Occupation.\textsuperscript{51} The Directive was adopted by the Council in 2000 and obliged all EU member states, as well as the CEEC candidates, to introduce legislation banning discrimination in the workplace on a number of grounds, including sexual orientation.

The European Charter of Fundamental Rights, adopted during the 2000 Council of Nice, and made legally binding since the Lisbon Treaty went into force, became the first international human rights document to explicitly mention sexual orientation in its article on the prohibition of discrimination:

\begin{itemize}
\item The right to non-discrimination and to be free from violence and harassment;
\item the right to life;
\item the right to be free from torture or cruel, inhuman or degrading treatment;
\item the right to freedom of expression;
\item the right to freedom of association;
\item the right to privacy;
\item the right to be protected from arbitrary arrest;
\item the right to work;
\item the right to social security, assistance and benefits;
\item the right to religion;
\item the right to physical and mental health;
\item the right to education;
\item the right to form a family;
\item the right to a fair trial;
\item and the freedom of movement.
\end{itemize}

\textsuperscript{47} Ibid.
\textsuperscript{48} The Human Rights Education Associates’ *Guide to Sexual Orientation and Human Rights* (2003) lists in this respect: the right to non-discrimination and to be free from violence and harassment; the right to life; the right to be free from torture or cruel, inhuman or degrading treatment; the right to freedom of expression; the right to free association; the right to privacy; the right to be protected from arbitrary arrest; the right to work; the right to social security, assistance and benefits; the right to religion; the right to physical and mental health; the right to education; the right to form a family; the right to a fair trial; and the freedom of movement.


\textsuperscript{50} “Treaty of Amsterdam”, Article 13.

Any discrimination based on ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.\textsuperscript{52} Next to the binding Directive 2000/78/EC and European Charter of Fundamental Rights, the European Parliament (EP) has passed several non-binding resolutions on human rights and sexual orientation. As early as 1994, the Roth Report, an inventory of discrimination against lesbians and gays in the EU, led to a Resolution on equal rights for homosexuals and lesbians in the European Community which included a call for the right of lesbian and homosexual couples to marry and to be parents or to adopt or foster children.\textsuperscript{53} The Resolution resulted in a Recommendation by the Commission on the abolition of all forms of sexual orientation discrimination.\textsuperscript{54} Regarding the enlargement of the European Union, the EP adopted in 1998 an Urgency Resolution on equal rights for gays and lesbians in the EU which included the statement that it would not give its consent to the accession of any country that, through its legislation or policies, violates the human rights of lesbians and gay men.\textsuperscript{55} A year later, the EP requested the Council and the Commission to “raise the question of discrimination against homosexuals during membership negotiations where necessary”.\textsuperscript{56} In 2006, the observation of increased racist and homophobic violence in Europe, led to a Resolution on homophobia.\textsuperscript{57}

**EU norms on LGBT rights and homophobia in comparison to ‘universal norms’**

In the previous section, it was mentioned that Manners takes the “external reference points” of the norms promoted by the EU to be a sufficient legitimation of its normative power. With regard to the norm of human rights, Manners argues that the EU’s commitment to individual rights and principles is in accordance with the CoE’s ECHR and the United Nations’ UDHR, as well as with the case law of the European Court of Human Rights.\textsuperscript{58} However, as I previously suggested, it is possible to pursue both a universal norm and a cultural

\textsuperscript{52} “Charter of Fundamental Rights of the European Union”, Article 21-1.
\textsuperscript{54} Human Rights Education Associates, Guide to sexual orientation and human rights.
\textsuperscript{58} Manners, “The European Union as a Normative Power,” 171; Manners, “Normative Power,” 241. Manners refers here to Articles 6 and 11 of the Maastricht Treaty.
particularistic interpretation thereof simultaneously. The Charter of Fundamental Rights largely follows the ECHR and UDHR but gives more direction. The explicit mentioning of many grounds of discrimination, including sexual orientation, in Article 21 is an example hereof.\textsuperscript{59}

**EU norms on LGBT rights and homophobia in comparison to Polish norms**

In May 2010, ILGA Europe published a report on the legal situation for lesbian, gay and bisexual people in European countries. The report includes a Rainbow Europe Country Index for which the countries were rewarded 1 point for every protection or reaffirming measure in place, while they lost one point for every discrimination or violating type of legislation.\textsuperscript{60} Poland scores one point for protection in employment and occupation against discrimination on the ground of sexual orientation and loses one point for violating the human right of freedom to assembly.\textsuperscript{61}

Poland adopted the law that protects workers against discrimination on the basis of their sexual orientation in 2003. As was mentioned earlier, adoption of legislation against workplace discrimination on a number of grounds, including sexual orientation, was made obligatory by Directive 2000/78/EC for all EU member and candidate states. The right to freedom of peaceful assembly has been breached several times with the banning of ‘equality marches’. Poland shares with Cyprus the lowest ranking of the EU-27 in ILGAs Rainbow Europe Country Index.

Poland has opted out of ratifying the Charter of Fundamental Rights of the European Union.\textsuperscript{62} This is more of a symbolic than an effective measure, since the Charter is entirely based on existing EU legislation. However, the declaration of Poland indicates a clear stance towards this human right norm transfer by stating that “The Charter does not affect in any way the right of Member States to legislate in the sphere of public morality, family law, as

\begin{itemize}
\item \textsuperscript{59}“Charter of Fundamental Rights of the European Union,” Article 21-1.
\item \textsuperscript{60}The report lists the following positive types of legislation: anti-discrimination legislation referring to sexual orientation (constitutional, solely in employment, or in employment and goods and services); criminal law against hate speech/crime with reference to sexual orientation; partnership recognition of same-sex couples (marriage, registered partnership, or cohabitation); parenting rights of same-sex couples (joint adoption, second parent adoption, fertility treatment). Further, it lists the following types of negative legislation; violation of freedom of assembly: violation of freedom of association/expression; unequal age of consent; same-sex acts are illegal.
\item \textsuperscript{62}See Polish declaration in annexes no. 61-62 to the *Charter of Fundamental Rights of the European Union*; Protocol 30 to the *Lisbon Treaty*.
\end{itemize}
well as the protection of human dignity and respect for human physical and moral integrity”. Moreover, none of the non-binding Resolutions and Recommendations regarding LGBT rights have influenced Polish legislation.

Poland had no legislation concerning LGBT rights in place before it became a candidate for EU membership. During the accession process and since, it has limited its affirmation of LGBT rights to the only binding piece of EU legislation on this, and even the implementation thereof is questionable as will be argued below.

**Does the EU employ normative means in its promotion of LGBT rights and combating of homophobia in Poland?**

Normative power usually refers to the EU’s external relations. Normative means as such are normally understood to be foreign policy instruments. The EU had, according to Diez, the most powerful tool to exert normative power on Poland in hands when the country had candidate status. The interest to join the EU was a great incentive to agree on issues that would otherwise find resistance. I will therefore first pay attention to the normative means the EU used to promote LGBT rights in Poland during the accession process. Since a normative power should also practice what it preaches, I will subsequently reflect on the instruments the EU has used to protect LGBT rights in Poland since it became a member state.

**Promoting LGBT rights in the accession process**

The criteria for EU membership for the post-communist CEEC wanting to join were laid down by the European Council in the 1993 Copenhagen Criteria:

> Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for, and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union. Membership presupposes the candidate’s ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union.

Next to the Copenhagen Criteria and the general criteria for accession as stated in article 49 (1) of the TEU, the CEE candidate states were required to join the Council of Europe (CoE).

---

64 ILGA Europe, *Rainbow Europe Map and Country Index*.
65 Ibid.
66 Diez, “Constructing the Self,” 616.
This entailed ratifying the CoE’s European Convention of Human Rights. Directive 2000/78/EC against workplace discrimination also had to be in place before the countries could join the EU.

The accession process started with an Opinion by the Commission on the countries’ applications for accession. This provided the basis for the Council’s Accession Partnerships with the countries, which outlined a set of priorities for each country to work on. During the accession process, the CEEC were under constant monitoring by the Commission which published annual Regular Reports on the candidates’ progress on the economic, democratic, rule of law and human rights criteria that were set in Copenhagen. Aid and assistance were linked to the achievement of certain standards by the countries. In a policy of ‘naming and shaming’, the Commission made public on their website which countries were doing well in preparing for accession and which were lacking behind. The screening of developments toward accession ended with Comprehensive Country Monitoring Reports.

Although the Copenhagen Criteria include the requirement for the protection of human rights, this is a rather vague condition. The human rights are not specified and neither are the instruments of protection that should be in place. The assessment of the fulfilment of this condition was as such subject to change under the influence of changing conceptions of human rights. The Opinion on the accession of Poland, which should have provided the basis for subsequent evaluation of progress, stated that “Poland presents the characteristics of a democracy, with stable institutions guaranteeing the rule of law, human rights and respect for and protection of minorities”. Regarding equality, it was mentioned that the basic provisions of EC non-discrimination law between women and men were covered by Polish legislation, but that the difference in pay for men and women was considerable nonetheless.

In the period between the publication of Agenda 2000, which contained all Opinions and the general enlargement strategy, in 1998, and the closing of the accession negotiations with Poland in 2002, The Commission published five Regular Reports on Poland’s progress towards accession. In the first three years, the Reports concluded that Poland continued to fulfil the Copenhagen Criteria on human rights and only mentioned gender discrimination

70 Ibid.
Regarding equality. In 2001, after the adoption of two Directives on non-discrimination as had been made possible by Article 13 of the Amsterdam Treaty, the problem of discrimination was for the first time formulated to extend beyond gender. Regarding equality and non-discrimination, the 2001 Regular Report stated that “Poland’s labour law is not aligned with the relevant Community acquis and will require the adoption of further amendments to the Labour Code”. According to the report, there were no problems regarding human rights.

Again, in the 2002 Report, it was concluded that ever since the Opinion, no problems with human rights had manifested in Poland. The accession requirement to establish a body to fight discrimination on the grounds of racial or ethnic origin, religion or belief, age or sexual orientation had not been fulfilled, but the intention for it was expressed in the Report. The Report went on to state that negotiations on the chapter had been provisionally closed and that Poland had been granted a transitional arrangement.

According to legal scholar Dimitry Kochenov, the conditionality principle that was established in Copenhagen “allowed the EU to ‘steer’ the national developments in the CEEC”, precisely because the conditions were so vague and needed constant clarifying through close monitoring and directions. Within Manners’s categorization of norm diffusion strategies, conditionality is first of all a procedural process because it works through the institutionalizing of a relationship between the EU and a candidate state. Besides being a procedural process, the accession strategy, as described above, certainly also fits the “transference of norms” category, which works through substantive or financial incentives. The EU used the strongest incentive it had to offer: becoming a member of the club.

Ensuring human rights was one of the Copenhagen Criteria and because human rights had been known to include LGBT rights before in the EU, the institutionalizing of a relationship and the incentive of membership, could have been used by the EU to promote LGBT rights in the CEEC joining. However, as Kochenov puts it: “The powerful principle of conditionality

---

76 Ibid.
in the possession of the EU was largely disregarded in the course of pre-accession gay rights promotion”.  

**Protecting LGBT rights within the European Union – Poland as Member State**

The 2008-2009 Human Rights Report of the EU states that “the primary responsibility for ensuring the rights of their citizens naturally rests with the EU’s Member States. All of them have strong, independent judiciaries, and all are party to the European Convention on Human Rights (ECHR)”.

Several EU bodies deal with human rights, but the bulk of their activities is focused on third countries. The Council of the European Union established a Human Rights Working Group (COHOM) in 1987, but this focuses exclusively on external relations. The European Commission’s Directorate-Generals (DGs) concerned with human rights, are those for Justice, Liberty and Security and the DG for Employment and Social Affairs. The Commission publishes annual reports on human rights and democracy, but these discuss the EU’s external actions rather than the internal situation. Within the European Parliament, a Subcommittee on Human Rights deals with external human rights policy. Eighty-seven Members of Parliament form an informal intergroup on LGBT rights which monitors the work of the EU, keeps an eye on the situation of LGBT people both inside and beyond the EU and also aims to work together with civil society groups. In its (external) human rights policy, the EU follows eight guidelines which express the EU’s political priorities. Promotion of LGBT rights and/or the combating of homophobia are not included in the EU’s guidelines on human rights.

This is not to say that the monitoring of Poland stopped immediately after it entered the EU. The Comprehensive Country Monitoring Report, the final pre-accession report, emphasized the need for Poland to fully implement the anti-discrimination *acquis*. When this did not happen, the Commission started an infringement procedure against the new Member State. Poland received first a letter of formal notice and then a Reasoned Opinion on 28 January 2010, regarding its implementation of Directive 2000/78/EC. One of the things the Commission pointed out in this opinion is that “regulations on access to certain professions do

---

77 Ibid, 466.

260
Moreover, the EU kept promoting LGBT rights and combating homophobia in Poland through a variety of instruments. Even the ‘naming and shaming’ strategy was still occasionally used. The 2006 EP Proposal on homophobia included specific references to Poland and in the same year, then-Commission president José Manuel Barroso publicly warned former Prime Minister Jarosław Kaczyński that Poland is seen as a threat to European values because of the right-wing coalition’s conservative views on, most notably, homosexuality and the death penalty. Jarosław’s brother, late President Lech Kaczyński, received an official warning from the Commission in 2005, saying that Poland may lose its right of vote in the EU if he would continue to deny the rights of homosexual people. Arguably more normative, at least in means, is the funding available for education and training. A number of Polish NGOs have received grants from the EU through the 2007-2008 PROGRESS funding program, and used it to give anti-discrimination training activities in Warsaw. Several MEPs showed their support in the banned Equality marches of 2004-2006 by coming to Poland and joining the marches.

The EU has recently established two institutions that will focus on internal problems with equality and discrimination. In 2008, the Commission installed a governmental expert group on non-discrimination and the promotion of equality. Since 2007, the EU’s former European Monitoring Centre on Racism and Xenophobia has been replaced by the broader oriented Agency for Fundamental Rights (FRA). In 2008 and 2009 the FRA published an extensive analysis of the legal and social situation of LGBT persons in the EU. In the legal analysis the FRA asserts the opinion that the principle of non-discrimination requires legislation beyond the context of employment to encompass all social domains. This would also entail the

---

ensured possibility of same sex marriage or equivalent registered partnership in the EU.\textsuperscript{85} The report on the social situation concludes with a number of opinions on how to combat homophobia, including the need for more research, data collection and monitoring; the need for training and education initiatives; and the need for information campaigns to tackle prejudice towards LGBT persons.\textsuperscript{86}

\textit{Does the EU fulfil normative intent in its promotion of LGBT rights and combating of homophobia in Poland?}

In 2008, a report on homophobia and discrimination on grounds of sexual orientation in Poland was commissioned for a comparative assessment by the EU Agency for Fundamental Rights.\textsuperscript{87} In it, special concern is expressed over the violation of the right to freedom of assembly, over limitation of the freedom of movement and family reunification and over the lack of protection for LGBT persons in criminal law.

On the implementation of Directive 2000/78/EC, the report concludes that the Polish Labour Code has a too broad conception of Article 4.1 of the Directive. This Article holds that difference in treatment may be justified “where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate”\textsuperscript{88}. This article in the Labour Code says that exceptions can be made if “it is justified due to the type of work, terms and conditions of its performance or professional requirements expected from employees”.\textsuperscript{89} Furthermore, there is no principle of proportionality included in the Labour Code exception rule. The author of the report expresses its concern over possible misuse of this provision especially in work with young people, including education.\textsuperscript{90}

\textsuperscript{88} Ibid., 8. Emphasis added.
\textsuperscript{89} Ibid., 9. Emphasis added.
\textsuperscript{90} Ibid.
**Discussion and conclusions**

In the previous pages I first put together a conceptual framework that breaks down Ian Manners’s abstract notion of “normative power Europe” and allows for an empirical test of the normative goals, means and results of the European Union. I then applied this framework to a case study on the promotion of LGBT rights and the combating of homophobia in Poland.

Both Manners and Diez have suggested that “normative power Europe” is at its best when it can make use of the principle of conditionality in accession politics. The incentive of future membership is a powerful ‘bargaining’ tool. There is no actual bargaining involved in the negotiations between the candidate state and the EU, all the conditions that must be met before accession could take place are supposed to be laid down in the Copenhagen Criteria. Since these are very broadly formulated and the Commission gets to adjust its priorities each year through the monitoring process, the EU can be flexible in its demands to candidate states. This ensures an uneven power balance, in which the candidate state is completely dependent on the Commission’s liking. This dynamic can hardly be called a normative means, but it has proven to be somewhat of an advantage for the promotion of LGBT rights and the combating of homophobia in Poland. It took until 2001 for sexual orientation to be even mentioned in the annual Regular Report on Poland’s progress. This happened to coincide with a raised profile for LGBT rights within the EU since the Amsterdam Treaty and the European Charter of Fundamental Rights – both being the first documents of their kind to explicitly include sexual orientation – had just come into force. The non-normative means thus allowed for normative goals to appear in the conditions for accession.

While the European Parliament has been the most progressive Community body in promoting LGBT rights, its power is limited, which means that its normative goals and means do not necessarily fulfil normative intent. In this case, these seem to have had no influence at all. The normative goals that the EP already put forward in 1994 never played a role in the conditionality strategy towards Poland through procedural diffusion or transference. Not surprisingly, these normative goals concerning equal rights for gay and lesbian couples in, amongst other things, marriage and having children, did not find their way to Poland through the informal process of contagion either.

Of these two examples, the first combines non-normative means with normative goals, while the other pursues normative goals but lacks the means to ensure normative results. This might form a common problem for powers who strive to be normative in their foreign policy. The diffusion of norms automatically implies that the third country does not have those norms
in its internalized body of norms (yet). For that country to challenge its normative framework, it makes sense that the foreign norm would have to either be imposed upon it, through coercion or overt diffusion, or be compensated with a strong incentive, through transference or procedural diffusion.

Furthermore, by also assessing what happened after the accession preparations that were identified as transference and procedural diffusion, something else became clear. Poland is now part of the normative actor that promotes certain norms, such as protection against discrimination on grounds of sexual orientation. However, it still seems to be fighting these same norms, thereby making the EU a less credible normative power.

Untangling the three dimensions – goals, means and results – of a normative power has shown what it would take for a power to be normative, and that the EU, in promoting LGBT rights and combating homophobia in Poland, did not prove itself to be “normative power Europe”.
Bibliography


