

Marte Soland Asmussen

# Dealing with LGBTQ Right Infringements: The EU's Response to the violation of LGBTQ rights in Poland and Hungary

Bachelor's project in European Studies

Supervisor: Carine Germond

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Faculty of Humanities  
Department of Historical Studies



Kunnskap for en bedre verden



## **Abstract**

The European Union (EU) has over the last decades emerged as one of the most prominent actors in the promotion of lesbian, gay, bisexual and transgender (LGBT) rights worldwide. In the last decade, however, the Union has faced increased resistance from some of its own member states. As the increase in negative attitudes towards LGBT people in states such as Poland and Hungary shows, the member states' adherence to the founding values of the Union can no longer be presumed. This thesis aims to explore the EU's response to the LGBT rights violations in Poland and Hungary, and to what extent the Union's response has been adequate when it comes to limiting and preventing such situations from happening in the future.

With the assumption that the EU plays a normative role in promoting LGBT rights globally, this thesis will with help of the Normative Power Europe (NPE) theory and norm diffusion provide a case study of the EU's response to the violations against LGBT minorities in Poland and Hungary. The findings in this thesis show that these developments are closely linked to the nationalist, conservative and heretionormative discourses fronted by the government in both countries. Moreover, these political movements have close ties to the anti-gender campaigns that have spread across the world in the past decade.

The thesis will then have a look at the tools available to the EU when member states purposefully go against the norms and values that are promoted by the Union. As the available options reveal, the institutional makeup and the normative inconsistencies within the Union itself, makes the process of punishing "rogue" states difficult to navigate. The case of Poland and Hungary shows that the EU is failing to reach its full potential as a normative power - much due to its inconsistent demands and practices. At the same time, it is hard to see clearly whether the EU really has any other (realistic) options available with the current legislative and institutional framework.

## Sammendrag

Den Europeiske Union (EU) har i løpet av de siste tiårene vokst fram som en av de mest prominente aktørene som fremmer lesbiske, homofile, biseksuelle og transseksuelle (LGBT) personers rettigheter på verdensbasis. Over det siste tiåret har EU imidlertid måttet hanske med en økende grad av motstand fra enkelte av sine egne medlemsland. Som økningen i negative holdninger mot LGBT-personer i stater som Polen og Ungarn viser, kan man ikke lenger anta at medlemsstater skal holde seg tro til Unionens grunnleggende verdier. Denne oppgaven har til hensikt å se nærmere på EUs reaksjoner på rettighetsbruddene mot LGBT-personer i Polen og Ungarn, og hvorvidt Unionens reaksjoner har vært tilfredsstillende med tanke på å begrense og forhindre slike situasjoner fra å oppstå i framtiden.

Med antakelsen om at EU inntar en normativ rolle i å fremme LGBT-rettigheter globalt, vil denne oppgaven bruke Manners' Normative Power Europe (NPE)-teori og spredning av normer til å presentere en casestudie av EUs svar på rettighetsbruddene mot LGBT-minoriteter i Polen og Ungarn. Funnene som blir gjort i denne oppgaven viser at disse utviklingene er tett knyttet til de nasjonalistiske, konservative og heteronormative diskursene som blir fremmet av myndighetene i begge stater. De politiske bevegelsene har dessuten sterke tilknytninger til "anti-gender" kampanjene som har spredt seg over hele verden i løpet av det siste tiåret.

Oppgaven vil så se nærmere på verktøyene EU har tilgjengelig når medlemsstater velger å gå imot Unionens normer og verdier med vilje. Som de tilgjengelige alternativene avslører, gjør den institusjonelle sammensetningen og de normative motsetningene innad i Unionen, prosessen å straffe ustyrlige stater vanskelig å navigere. Casen med Polen og Ungarn viser at EU mislykkes med å nå sitt fulle potensiale som en normativ makt - mye takket være Unionens selvmotsigende krav og praksiser. Samtidig er det vanskelig å se tydelig hvorvidt EU i egentlig har andre (realistiske) muligheter tilgjengelige med dagens lover og institusjonelle rammeverk.

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## List of abbreviations

CFR	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
ECHR	European Court of Human Rights
ECSC	European Coal and Steel Community
EU	European Union
EEA	European Economic Area
EP	European Parliament
FRA	European Union Agency for Fundamental Rights
ILGA	International Lesbian, Gay, Bisexual, Trans, and Intersex Association
KDNP	Christian Democratic People's Party [Hungary]
LGBTI	Lesbian, Gay, Transgender, Intersex
NPE	Normative Power Europe
PiS	Law and Justice Party [Poland]
PO	Civic Platform [Poland]
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UN	United Nations



## 1. Introduction

The European Union (EU) has over the last decades emerged as one of the most prominent actors in the promotion of lesbian, gay, and transgender (LGBT) rights worldwide. The acronym LGBT is one of many umbrella terms used when referring to sexual, gender and bodily minorities. Other common terms include LGBT+, LGBTI, LGBTQ, queer, etc. These terms are used to describe the diverse group of people whose sexual orientation and/or gender identity diverge from more conventional understandings of sexuality, relationships, gender, and gender roles (European Commission, 2018). However, for the sake of simplicity I will mainly be using the term LGBT.

Driven by the concern of human rights violations being committed against LGBT individuals, advocacy groups, countries with progressive LGBT policies, and international actors like the EU have campaigned for LGBT acceptance by defending it as a European value that is an ethical requisite for all who consider themselves European (Vasilev, 2016, p.2). Thanks to their effort, negative attitudes towards LGBT individuals have been declining steadily over the past decades (Redman, 2018, p.629). As the EU identifies as a value-based community, new member states are expected to adhere to the founding values of the Union - as stated in Article 2 of the Treaty on European Union (TEU): “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” (Art. 2 TEU). This serves as a basis for the EU’s human rights identity, as well as the identity of being a community of values. With basis in the European Union’s normative values, this thesis explores the questions on how the EU has responded to LGBT rights violations in Poland and Hungary, and to what extent the EU’s response has been adequate when it comes to limiting and preventing such situations from happening in the future.

The Union’s efforts concerning LGBT equality suggests that the EU plays a normative role in the promotion of sexual minority rights. I will therefore use Manners’ (2002) Normative Power Europe (NPE) theory as the theoretical framework for a case study on how the Union has reacted to the violations of LGBT rights in Poland and Hungary. Manners’ framework is useful as it helps explaining both the extent to which the Union is able to act as a normative power in its promotion of LGBT rights, and its shortcomings. Mos (2013) highlights these, by pointing out how the Union’s ability to influence international norms and values regarding LGBT rights is obstructed by its own internal inconsistencies. Moving on, I will dive into the present legal and normative obstacles LGBT minorities in Poland and Hungary have been

facing. Paternotte & Kuhar (2018) and Vida (2019) explain how the developments in both countries are connected to the rise in right-wing populism and anti-gender campaigns that have unfolded across Europe. De Schutter (2017) then provides an overview of the tools available to the EU when dealing with “rogue” states, and how a more systematic and principled use of infringement proceedings would help with compliance of the fundamental rights in member states (De Schutter, 2017, p.7). Finally, I will discuss how the EU has utilized these in the cases of Poland and Hungary.

This thesis starts by introducing the NPE framework and norm diffusion as its theoretical framework, and how these affect the EU’s LGBT human rights identity. The next section discusses the situation of LGBT people in Poland and Hungary, and how the rise of far-right populism and anti-gender movements have contributed to an increase in negative attitudes towards LGBT minorities in both countries. The following section discusses the EU’s response to these developments by presenting the legal tools available to the EU when member states no longer adhere to the Union’s fundamental norms and values, and subsequently looking at the Union’s discursive reaction to the violations. Finally, I will use the findings from each section to discuss how the EU has responded to the LGBT rights violations in Poland and Hungary, and to what extent the response has been adequate when it comes to limiting and preventing such violations from happening in the future.

## **2. Theoretical framework: NPE and norm diffusion**

On the global spectrum, the EU appears to be in the vanguard when it comes to the promotion and institutionalization of LGBT human rights (Mos, 2013, p.79, p.8; Shreeves, 2020, p.2). Through measures such as including sexual orientation in the Amsterdam treaty, the repeated appeals by the European Parliament (EP) to open up marriage for same-sex couples, and the binding decisions by the European Court of Human Rights (ECHR) that prohibit discrimination against LGBT people, the European institutions have helped pave the way for the recognition of sexual and gender minority rights as human rights (Kollman, 2009, p.38). Europe’s leading role in this policy area was corroborated with the 2009 ratification of the Lisbon Treaty, and the European Charter of Fundamental Rights became the first international document to condemn LGBTI discrimination. Through such legislative actions, the EU appears to be leading by example in its promotion of LGBT human rights, which places the Union’s LGBT rights policy within the NPE framework (Mos, 2013, p.79).

## *2.1 Normative Power Europe*

Conceptualized by Ian Manners in the early 2000s, NPE is a theoretical approach that emphasizes the normative effect the EU holds internationally. According to Manners, the geopolitical developments in the 1990s initiated a new understanding of Europe's international power as ideational, rather than the more conventional understanding of power in either civilian or military terms (Manners, 2002, p.236; Whitman, 2011, p.2). Consequently, the emphasis has since shifted away from a debate over military and civilian power and onto the ideational impact the Union holds internationally. This ability to define what passes for "normal" in world politics, is considered to be the defining feature of NPE (Manners, 2002, p.236; Mos, 2013, p.80). In other words, the main idea of NPE is that as norms and values have become a more eminent part of the EU's international identity (Mos, 2013, p.80), the ability to define what passes as "normal" in world politics has become increasingly important.

The European Union's ability to shape what is considered normal in global politics, lies in the normative difference at the heart of the collective European identity (Mos, 2013, p.81). The origin of the Union's basis can be traced back to the European Coal and Steel Community (ECSC), and the numerous treaties, policies, declarations, and criteria that have followed. Out of the body of EU laws and policies, it is possible to identify a set of core norms such as peace, liberty, democracy, the rule of law, and respect for human rights (Manners, 2002, p.242). Combined with its rich history and unique institutional hybridity, the EU's legal framework and core norms adds a normative dimension to the Union that sets it apart from other actors (Mos, 2013, p.81). Through questioning the EU's policies and institutions in terms of essence, actions, and impact, the NPE framework facilitates an alternative conceptualization of Europe and the role it has, rather than taking the influence Europe has on world politics for granted (Manners, referenced in Whitman, 2011, p.3). This approach further enables us to look closer at the extent to which the EU manifests its ability to act as a normative power.

## *2.2 Norm diffusion*

Norm diffusion is a central aspect of how the EU is able to influence what is "normal" in international politics. Norms are "[...] collective expectations about proper behavior for a given identity" (Jepperson et al., 1996, p.54). As the European Union identifies as a community of like-minded individuals, diffusion of norms, such as respect for LGBT minority rights, is a central aspect to the accession process when a state seeks to join the EU. The developments unfolding in Poland and Hungary, however, have made it clear that the member state's

adherence to the founding values of Article 2 TEU no longer can be presumed (De Schutter, 2017, p.7). So how can the Union ensure continued respect for diffused norms once states have become members and no longer abide by the diffused norms?

Norm diffusion is not always a consciously executed process; Manners explains that norms can be “contagious”, which implies that norms can be transferred from one actor to another through simply doing, as illustrated by the EU’s implementation of LGBT-friendly policies, which can inspire other states and actors to follow in its footsteps (Manners, 2002, p.244). Diffusion can also result from mere exposure and repetition, which generates familiarity around a foreign norm and thereby also increase the likelihood of its internalization (Vasilev, 2016, pp.4-5). The continued exposure to LGBT-friendly attitudes and legislature will therefore have the potential to help with the internalization of norms in member states where LGBT norms are not yet fully internalized.

Although norm diffusion can be an authorless process, it can also be the result of goal-oriented action motivated by the desire to reshape thought patterns and behaviors toward one’s own understanding of what is appropriate. This kind of socialization is common where new norms are met with resistance and is often categorized into “incentive-based” and “discursive” modes of influence (Vasilev, 2016, p.5). Incentive-based modes of influence involves extending and retracting material rewards, with the final goal being conformance. Those who positively respond to this mode of influence, anticipate that the benefit of conforming will outweigh the costs, while those who respond negatively anticipate that the cost of compliance will outweigh any of the potential benefits. In the context of EU accession, the rewards at the center of these cost-benefit calculations, are typically of either political, economic, or social nature (Manners, 2002, p.244; Vasilev, 2016, p.5). Incentive-based influence is central to the Union’s conditioning process, where aspiring member states advance up the accession ladder when they behave in line with EU norms and delay their progress when they do not (Vasilev, 2016, p.5). With this being said, the European Union has in the past advanced states with deeply homophobic policies up the accession ladder (Kochenov, 2007, p.16; Vasilev, 2016, p.7), as was the case with a majority of the Central and Eastern European countries seeking Union membership in the early 2000s.

Discursive modes of norm diffusion try to advance the process through the interrelated logics of “arguing” and “appropriateness”. States who react positively to discursive strategies do so because they are convinced that reform is valid, want to protect their reputation, and/or sees the social world through a frame of reference that translates their values and interests as compatible with reforms (Vasilev, 2016, pp.5-6). Drawing from the process leading up to the

Eastern enlargement of the mid to late 2000s, Estonia stood out from the group of applicants when it, unlike the other states, amended its criminal code to abolish discrimination against sexual minorities without a demand from the Commission (Kochenov, 2007, p.19-20).

Overall, norm diffusion is shaped by cultural filters, which affects the impact norms have in third countries and institutions, and thus further determines the potential for adoption, learning or rejection of norms. The cultural filter is closely tied to the interplay between knowledge and the construction of an actor's political and social identity (Manners, 2002, p.245), and the EU must tread lightly on the line between rejection and the successful transfer of norms. This can be exemplified with the Union's political use of human rights. The EU regularly includes human rights, including LGBT human rights, in the political dialogues it has with third countries and regional organizations (European Parliament, 2020, p.2). The EU, along with Western governments like the USA and the UK, has been criticized for being selective in its application of normative principles (Kollman & Waites, 2009, p.7; Friis & Juncos, 2019, p.289), and while the human rights discourse should be included in such interactions, it must be considered in light of the global South and post-colonial perspectives. If one does not tread carefully, the rigid universalism of the human rights lexicon is at risk of being perceived as part of Western imperialism, which ultimately could impede dialogue with other actors (Kollman, & Waites, 2009, p.7).

### *2.3 Normative Power Europe and LGBT rights*

In its promotion of LGBT rights, the European Union emphasizes the extensive legal basis in the EU treaties, such as Articles 2 and 3 of TEU, as well as the Charter of Fundamental Rights (CFR), which has the same legal value as the Treaties (Shreeves, 2020, p.4). This value-based approach is also apparent in the Union's strong preference for non-coercive action when it confronts other actors with their shortcomings on this policy area (Mos, 2013, p.82). Even though the EU has gone further than most international actors in its promotion of LGBT rights as part of the human rights canon, it can be argued that the Union's performance with regards to sexual minority rights is currently not fully aligned with the principles of NPE. Though the potential is there, the EU must overcome the contradictions it is riddled with in its implementation of LGBT-related norms before it can be acknowledged as an effective, and credible norm diffusing bureaucracy in this policy area. It can therefore be argued that the European Union currently can be perceived as a conflicted normative power in its dealings

with LGBT rights (Mos, 2013, p.80), which in large can be traced back to how the Union has dealt with the LGBT right infringements that have taken place within the union itself.

### **3. The situation for LGBT people in Poland and Hungary**

The experience of LGBT people in Central and Eastern Europe illustrates how the EU's influence in the region is far from straightforward. In the context of EU enlargement, LGBT milestones have been realized through the adoption of LGBT-friendly laws and following changes in attitudes in several accession states (Vasilev, 2016, p.7). Even so, the first effect of accession in many new member states has not been greater LGBT acceptance and increased policy influence for activists, but rather a major backlash (O'Dwyer, 2012, p.333; Sloomaeckers, 2020, p.353) Although the conditionality of implementing anti-discriminatory and LGBT-friendly legislation did not initially have the desired effect, the increase of homophobic politics did in fact have a positive effect on activist movements by forcing them to become more resourceful, better organized and stronger (O'Dwyer, 2012, p.334). Additionally, European integration has brought domestic rights activists into contact and collaboration with Western organizations in a way not possible without the EU's presence (O'Dwyer, 2012, p.333). The activity of the EU and LGBT rights organizations has also drawn international attention to the injustices experienced by LGBT persons in accession states. This has compelled the EU and some of its members to actively take stand against such actions and using the resistance against adaption of its LGBT equality norms, which has helped re-enforce their own LGBT-friendly image (Sloomaeckers, 2020, p.356 Vasilev, 2016, p.7). Though the Eastern enlargements were intended to reunite Europe, they also created an implicit tension within the Union as it now included countries that previously were considered "other" (Sloomaeckers, 2020, p.353), which has led to Western and Central, and Eastern European countries being discursively kept separate (Kulpa & Mizielinska, 2011, p.17). Since the new member states have not necessarily agreed with all EU decisions, this can also be seen as the beginning of Europe's conflicted normative identity.

Notably, the Central and Eastern European countries did not automatically initiate the process of joining the EU after the fall of the Iron Curtain. It was rather the Western actors who initiated processes of social learning and argumentative exchange. These interactions helped reshape many Central and Eastern European countries' ideas of government, security, and human rights in such a way that joining the European Union was seen as desirable and the most rational foreign policy choice (Vasilev, 2016, p.6). The desire to join the Union, however, did

not mean that the norm of equal rights for all, including LGBT people, was automatically accepted in all the new member states. Because a majority of policy areas linked to LGBT equality are national responsibilities (European Commission, 2020), the EU has little to say when it comes to the slow progress on LGBT rights. This is also why the legally enshrined rights and protections for LGBT minorities remain underdeveloped, and the legal understanding of LGBT rights varies tremendously between member states (Vasilev, 2016, p.4).

The 2019 Eurobarometer Discrimination survey revealed that attitudes towards LGBT people varies greatly across member states, with the Western European States generally being more accepting than the Central and Eastern European countries (European Commission, 2019). Although progress has been moving slow and has provoked counter-movements intent on blocking progressive bills, the proliferation of LGBT-friendly legislation has amplified the voice of a previously politically invisible group and made LGBT rights a recurring theme in European politics (Ayoub, 2015, p.294). Nevertheless, there is still a long way to go for equality within the Union. If the European Union wants to be perceived as an effective and legitimate normative power, it needs to be consistent in carrying out its internal and external policies. For this to happen, the EU must reach a consensus on which values it wants to promote and what legal rights should be met - including the lived experience of sexual and gender minorities within the EU itself (Mos, 2013, p.83).

### *3.2 Poland*

The governing Law and Justice Party (PiS) came to power after the 2015 general elections in Poland. PiS' victory came at a time where the public had become disenchanted with the previous government's policies. Led by the liberal Civic Platform (PO), the government was caught between its own ideological compulsions and its attempts to soften the economic backlash after the European financial crisis. Even though the economic situation in Poland was stable at the time, there was a rising fear of unemployment, which was made worse with social benefits being seen as unsatisfactory and the securitization of the discourse surrounding the migration crisis (Zamecki & Glied, 2020, p.71). During the campaign leading up to the elections, PO passed progressive legislation on in vitro fertilization and transgender rights in an attempt to strengthen its image as a defender of liberal values (Marcinkiewicz & Stegmaier, 2016, p.2). PiS responded by using social media to highlight the scandals of the PO government

and calling its liberal policies unacceptable to their conservative values (Zamęcki & Glied, 2020, p.71).

Anti-gay politics and the promotion of “traditional family values” are major parts of PiS’ governing platform, and party leaders have ever since they came to power, actively spoken against LGBT people and linked LGBT rights with EU overreach (O’Dwyer, 2018, p.904; Douglas, 2020). The framing contest between the traditional Polish identity and EU norms helped the LGBT human rights frame gain resonance and credibility beyond the small core of activists where it started (O’Dwyer, 2018, p.904). However, with the right-wing political shift and the increase in anti-LGBT rhetoric fronted by PiS, activists have started to feel less optimistic towards the Union’s ability to introduce or support anti-discriminatory regulations (Struzik, 2020, p.271). The political elite in Poland thereby continues to hamper the LGBT movement’s collective actions significantly by undermining their position within civil society.

Poland does not have comprehensive anti-discriminatory and pro-equality regulations in place when it comes to sexual orientation and gender identity (Struzik, 2020, p.271). This puts the increase in violence experienced by LGBT persons in Poland since 2015 in a broader context of the insufficient legal protection of minorities, which is made worse by the growing institutionalization of homophobia and transphobia (European Union Agency for Fundamental Rights, 2020, p.12; Santo, 2020). The proliferation of anti-LGBT legislation, such as the recent ban that prevents same-sex couples from adopting children (Baczynska & Włodarczak-Semczuk 2021), has been accompanied by other legal measures and policy changes encroaching on gender equality and women’s rights. These worrying developments, like the recent decision to ban abortion under almost every circumstance (Euronews, 2021), have been driven by the same far-right groups campaigning against LGBT rights (Santo, 2020), which further shows how closely the campaigns for gender equality and LGBT rights are tied together.

To make matters for the LGBT community worse, starting in 2019, Polish provinces and municipalities began declaring themselves “LGBT-free zones” under encouragement from PiS. Though party leaders claimed this was a way of promoting family values, the move coincided with a widespread ban of LGBT-led events. By the end of 2020 over 100 zones had made the change (Douglas, 2020; Santo, 2020). The situation was made even more dire with the reelection of President Andrzej Duda, a conservative independent endorsed by PiS, in July 2020 (Douglas, 2020). Duda has repeatedly made vows to never allow same-sex marriage or adoption by same-sex couples in the country. He has also claimed that the existence of LGBT



people in Poland is the result of “foreign ideologies”. By denying the existence of LGBT people in Poland, Duda aspires to strip away fundamental human rights from LGBT minorities (Douglas, 2020). According to the Polish Commissioner for Human Rights, the public acceptance of non-heteronormative people decreased in 2019, which can be directly linked to the increase in homophobic and transphobic rhetoric, as well as the repeated hate speech coming from politicians and media personalities (Santo, 2020).

Activists have in reaction to these developments called to the EU for concrete actions, namely that the Union must launch an official infringement process under Article 7 TEU. They argue that Poland has been non-compliant with the founding values listed in Article 2 TEU, which would allow the Commission to do so. Another demand is to continue to withhold EU/EEA funding from Poland until the government starts to respect EU values and Fundamental rights, and dissolves the LGBT-free zones (Douglas, 2020). The EU’s (re)actions could not only be fundamental for Poland’s future in the Union, they are also preemptive in showing what reactions one can expect from the Union in similar situations in the future.

### *3.3 Hungary*

The Hungarian government has utilized nationalist and conservative ideas to attack women’s and minorities’ rights ever since the conservative right-wing Fidesz and Christian Democratic People’s Party (KDNP) coalition came to power in 2010 (Vida, 2019, p.14). This transition came as the effects of the 2008 financial crisis reached Hungary’s already shrinking economy (Zamecki & Glied, 2020, p.63). Similar to its Polish colleagues, Orbán’s governing platform is based on the creation of a conservative, nationalist patriarchal discourse that sees the heteronormative family as the foundation of the nation. His government also seeks to undermine democratic values and the European human rights agenda (Vida, 2019, p.15). Accordingly, the far-right government has over the last decade composed a long list of perceived enemies, including (Muslim) migrants, the European institutions and the Brussels elite, civil society, homeless people, and an independent press. With migration fading as a potent issue, the government started to hone in on LGBT rights as a national threat (Novak, 2020b). According to national law, sexual orientation and gender identity are not covered as prohibited grounds for discrimination. This permits further discrimination, harassment, stigmatization, and violence against members of the LGBT community, and seems to be escalating under the current regime (Vida, 2019, p.14-15).

The government's preference for the heterosexual family is not only apparent in the policies and discourses promoted by its politicians; it was solidified once and for all in a 2011 law that defines marriage as the union between a man and a woman (Béres-Deák, 2020, p.313; Vida, 2019, p.14). Even though Hungary has allowed registered partnerships for same- sex couples since 2009, which provide almost all the benefits of marriage, partners cannot take each other's names, and are also banned from all means of becoming joint parents of the same child (Béres-Deák, 2020, p.313). In December 2020, the parliament effectively banned same-sex couples from adopting by limiting adoption to married couples, since only heterosexual partners are allowed to get married, this further limits the options for LGBT-couples to have families as it in previously was possible to work around the law by having one partner handle the adoption (Schultheis, 2021).

This blow came after the Hungarian parliament in May 2020 passed a law that made it impossible for transgender or intersex to legally change their gender on their birth certificate, which puts them at risk of discrimination, harassment, and violence in situations calling for the use of identity documents (Knight & Gall, 2020). Before the law restricting transgender rights was passed, it was possible for individuals to achieve legal gender recognition through forensic medical evaluations, which will no longer be the case under the new law (Novak, 2020b). This is a major step backwards on transgender and intersex rights, in addition to being a violation of Hungary's commitment to the fundamental values of the EU (Knight & Gall, 2020). The laws passed in May and December, are both the result of Orbán using the pandemic as a pretense to grab more power and is yet another step in Orbán's overhaul of the country's democratic system (Knight & Gall, 2020; Novak, 2020b). Unsurprisingly, Orbán's policies have drawn criticism from the EU (Novak, 2020b), though we have yet to see any major repercussions from the government's actions.

### *3.4 Why are the(se) violations happening now?*

Although it is important to remember that Poland and Hungary differ significantly in terms of history, social dynamics, and systems of government, it is hard to ignore the similarities in how their governments have undermined the democratic institutions and processes under the pretence of conserving their respective cultures and traditional values (Schultheis, 2021). The first similarity is the scholarly consensus that democratic backsliding has been going on in Hungary since 2010 and 2015 in Poland (Bakke & Sitter, 2020, p.4). Though many factors were at play, these dates can be seen in relation to the 2008 economic crisis in Europe, and the

so-called refugee crisis of 2015. Democracies are fragile by nature and are therefore always in danger of developing authoritarian tendencies. Situations that make political actors question the democratic set-up can arise for several reasons, like for instance legitimate responses to economic and/or political crises, which highlights certain elements of the rule of law (Zamęcki & Glied, 2020, p.58). Subsequently decision-makers will justify their efforts to undermine the rule of law by arguing that a well-functioning government has to react to social challenges efficiently and that such reactions are just as important as protecting liberal values (Zamęcki & Glied, 2020, p.59). Both the Polish and the Hungarian governments have used these crises to legitimate their conservative social policies, and have since they came to power increased the political control of the media, reduced civil liberties, distorted the electoral process, and limited the power and independence of the judiciary (Bakke & Sitter, 2020, p.4). Without these efforts, it would probably be much harder to pass legislation that discriminates LGBT minorities, such as the new laws limiting adoption to married couples.

Over the last decade the EU has been forced to come to terms with the cultural differences within Europe. Gender and sexual politics has become a sphere where these cultural differences are particularly discernable (Binnie, 2016, p.1636). As mentioned above, the EU has responded to resistance against its LGBT norms by reinforcing its identity of Europe as a place where LGBT people are well accepted and protected (Slootmaeckers, 2020, p.356). However, gender and LGBT equality as a human rights issue and a foundational norm of the EU has been met with increasing resistance with the rise of anti-gender movements across Europe (Vida, 2019, p.15). Anti-gender movements have close ties to conservative populist right-wing movements and share the common goal to mobilize against so-called “gender ideology”, which refers to “the opposition to progressive women’s and [LGBT] rights activism as well as the scholarship deconstructing essentialist and naturalistic assumptions about gender and sexuality” (Vida, 2019, p.13). The movement uses “gender ideology” to frame progressive ideas about human rights, gender, and LGBT identities as a threat to their traditional values and identities (Vida, 2019, p.13). This rhetoric resonates well in some Central and Eastern European contexts, like Poland and Hungary, where “gender ideology” is interpreted as imposed on them by the West (Paternotte & Kuhar, 2018, p.9).

The actors behind these anti-gender campaigns are closely linked to the ruling parties in Poland and Hungary, which has helped turn the struggle against “gender ideology” into state policy. Central to the anti-gender and right-wing populist discourses is the skepticism towards the European project, which is often denounced as neocolonialism that seeks to limit national sovereignty and export their decadent values upon them (Paternotte & Kuhar, 2018, p.12).

Their fears often intersect with fears about national and racial identities, which was a central issue to the so-called refugee crisis and the global discussion about Islam. This explains their opposition to non-traditional forms of parenting, which partly ensues from their discourse on the child as the future of the nation, and the subsequent worries about the (re)production of the nation (Paternotte & Kuhar, p.2018, p.12). In sum, the movement relies on politics of fear, and instrumentalizes minorities, such as migrant and LGBT persons, to create scapegoats (Paternotte & Kuhar, 2018, p.12; Novak, 2020b). The discourse has become even more visible due to the increased control the governments have over the media, making it harder for LGBT people to disprove the falsehoods.

Another reason why these violations started happening, is that with Poland and Hungary's entries into the EU in 2004, the EU lost its leverage of conditionality. Since many of the policy areas linked to LGBT are national responsibilities (European Commission, 2020), gay rights have since been domestic affairs, and though infractions against Union law can be brought up before the courts, this constitutes a weaker monitoring than was possible during the accession phase. Public criticism on anti-LGBT policies has thus been the main source of leverage ever since (O'Dwyer, 2012, p.344). The clearest indication of the changed political opportunity structure is the absence of legal advances on LGBT rights in Poland since becoming a member: Poland has not made any major advances on legal rights for LGBT people since changing its labor code as a condition for accession in 2002 (O'Dwyer, 2012, p.344). While Hungary has enacted some legal advances, like the introduction of same-sex civil unions in 2009 (Béres-Deák, 2020, p.313), the setbacks have been so substantial that they negate the progress that has been made. This emphasizes that although EU conditionality can be a sharp instrument for shaping states' policies before accession, EU law is a blunt instrument for advancing LGBT legislation after a state has joined (O'Dwyer, 2018, p.897).

#### **4. The EU's response to LGBT right infringements in Poland and Hungary**

In response to the backsliding of sexual and gender minority rights in EU member states, the Commission presented its first ever strategy for LGBT equality in November 2020. The strategy laid out a series of actions focusing on tackling discrimination, ensuring safety, building inclusive societies, and leading the call for LGBT equality around the world (European Commission, 2020). With this the EU once again asserted itself as an example to follow in the fight for diversity and inclusion. Though the Commissioner for Equality, Helena Dalli, stressed that "We are still a long way from the full inclusion and acceptance that LGBTIQ

people deserve” (European Commission, 2020). With this she noted that although the Union is trying to lead by example in the recognition of LGBT equality, the Union and its members still have a job to do before all Europeans are accepted for who they are.

#### *4.1. The consequences of breaking the rules: the legal response*

For the EU to be considered a true normative actor, it has to actively promote and enforce the principles it stands for (Mos, 2013, p.81). With the developments that have happened in Poland and Hungary over the past years, the question on what the European Union can do when member states no longer reliably play by the most fundamental European rules, has become increasingly relevant (Scheppelle, 2013). Although the EU has options such as Article 7 TEU and the case-by-case approach where individual claims are filed before domestic courts and then referred to the Court of Justice of the European Union (CJEU), neither of them are sufficient substitutes for the Commission to use the infringement proceedings more robustly (De Schutter, 2017, p.7). In this section I will explore the various legislative and other tools that the EU has at its disposal for dealing with infringements.

##### *4.1.2. Article 258 TFEU*

Infringement proceedings play a key role in ensuring that the fundamental rights are fully complied with in the member states’ implementation of Union Law (De Schutter, 2017, p.7). The conditions for bringing up infringement proceedings against a member state are defined in Article 258 of the Treaty on the Functioning of the European Union (TFEU), which states that: “If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations” (Art. 258 TFEU). If the state concerned does not comply with the EU’s opinion within the period laid down by the Commission, the latter can refer the issue to the CJEU. If the country, despite the Court’s judgement, does not rectify the situation, the Commission may refer the country involved back to the Court for a second time. When referring a state back to the Court, the Commission will propose that the Court imposes financial penalties. To ensure a deterrent effect moving forward, the penalties are calculated based on factors such as the importance of the law breached, how long it has not been applied, and the member state’s ability to pay the fines (European Commission, n.d.). Altogether, actions filed by the Commission under Article 258 TFEU, with the goal of obtaining a judgement from the CJEU that finds the state concerned guilty in its failure to comply with its

obligations under EU law, have the potential to be a powerful tool in ensuring that member states respect the European values and do not violate the fundamental rights (De Schutter, 2017, p.27). So why does the Union refrain from using infringement proceedings more actively in its protection of LGBT Europeans?

A possible explanation might be that even though the importance of democratic structures, the rule of law, and respect for human rights, has been emphasized since the founding of the ECSC (Marktler, 2006, p.345), sexual orientation did not receive status as a group covered by the Union's anti-discrimination policy until the 1999 Treaty of Amsterdam. Additionally, the general principle of law before the CJEU has not been uniform in the development of the principle of nondiscrimination on the grounds of sexual orientation, developing a body of decisions that are both incoherent and irreconcilable (Kochenov, 2007, p.23; Shreeves, 2020, pp.4-5). Combined, these factors may play a part in the Commission's reluctance to launch infringement proceedings without knowing for sure that the state in question will be found guilty.

#### *4.1.3. Article 2 TEU*

It remains debated whether the Commission could file a direct action against an EU member state for failure to comply with the values listed in Article 2 TEU once a certain threshold is reached. A resolution adopted in October 2016 on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights, the EP suggested that the Commission could decide to bundle several infringement cases together in order to launch a "systematic infringement" action under Article 2 TEU and Article 258 TFEU, as this appears justified based on findings by the European Union Agency for Fundamental Rights (FRA), the council of Europe, and other relevant authorities on this field (De Schutter, 2017, p.28). A systematic infringement action, along with ordinary infringement actions, would be based on specific complaints against the national law or the consistent practice of a member state for violating particular provisions of Union law. Hence, a systematic infringement action would have a solid basis, like a conventional infringement action brought up under Article 258 TFEU. By grouping related complaints together under Article 2 TEU, the Commission could additionally argue that the whole is more than the sum of its parts, and that the set of alleged infringements combined raises the action to the systematic breach of Europe's founding values (Scheppelle, 2013). However, relying on Article 2 TEU in the context of infringement proceedings will likely meet several obstacles, and it is doubtful that the Court of Justice would consider a systematic

infringement action a proper use of Article 258 TFEU (De Schutter, 2017, p.34). In other words, the road to infringement is not as straight forward as it appears at first, so what other options does the European Union have at its disposal?

#### *4.1.4. Article 7 TEU*

Member states are expected to comply with the founding values listed in Article 2 TEU. The treaties provide for this duty to be enforced through the non-judicial, remedial, and preventative means as outlined in Article 7 TEU (De Schutter, 2017, p.34). When brought up, Article 7 TEU is often referred to as a “nuclear option” for launching an infringement process against an EU member. Unlike a regular infringement proceeding, Article 7 TEU can be invoked on a “[...] reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament,” (Art. 7 TEU), if it is determined that there is a clear risk of a serious breach of the values listed in Article 2 TEU. The Council shall according to the procedure hear the member state in question and address its recommendations to the state accordingly (Art. 7 TEU). Although invoking Article 7 is a solid option, the ultimate sanction under the Article, such as the suspension of certain advantages of membership, requires unanimity among the remaining states. This is not only a matter of Poland and Hungary safeguarding each other; other states expressed hesitance when asked to consider an Article 7 move against Poland in 2017 (Bakke & Sitter, 2020, p.11).

When comparing the different options for the protection of fundamental rights, it is important to make clear the conditions under which these proceedings may be filed by the Commission. Article 7 TEU enables the Council of the EU to address recommendations to a member state, or to conclude that there is a clear risk that an EU member will breach the founding values of the Union. Though the latter does not require that the risk already has been materialized, the risk must be noticeable (De Schutter, 2017, p.37). In contrast, infringement proceedings cannot be launched based on the notion of a state potentially violating Union law. However, proceedings like these can be filed before the measures concerned will affect specific individuals. This is to say that the Commission in specific cases does not have to wait to act if it considers the legislation in question to be in violation of EU law. If applied like this, infringement proceedings have the potential to provide protection against violations of Union law that is more effective than the one provided by domestic courts, where the courts typically

only are able to intervene after an individual has been affected by the violations in question (De Schutter, 2017, p.37).

As this section has uncovered, the European institutions simultaneously need to be stricter and more consistent in its dealings with “rogue” states. A clear enforcement of respect for fundamental rights within the Union will help to build mutual trust between the member states, in addition to increase public confidence in EU policies (European Commission, 2010, p.4). Indeed, the emergence of “illiberal democracies”, despite the threat of Article 7 TEU being activated, is only one indicator that the current system of supervising compliance with the founding values of the European Union is deficient (De Schutter, 2017, p.7). In order to secure the fundamental rights of all Europeans, it is vital that the EU develops an approach to enforce these rights that not only will deter other states from moving in the same direction as Poland and Hungary, but also shows the public that the EU is more than a union of empty words.

#### *4.2. The discursive response*

In March 2021, the EP responded to the LGBT rights infringements in Poland and Hungary by declaring the EU an “LGBTIQ Freedom Zone” - two years after the first local authority in Poland declared itself an “LGBT-free zone”. The EP also addressed that the increased discrimination and attacks on the community is part of a broader context where public authorities and elected officials promote hate speech and discrimination against LGBT minorities (European Parliament, 2021). Respondents to the FRA’s 2020 equality survey, cited “negative public discourse by politicians and/or political parties” as well as “lack of enforcement of existing laws or policies” and “lack of visibility for LGBTI persons” as the main contributing factors for the decline in LGBT acceptance in their countries (European Union Agency for Fundamental Rights, 2020, p.13). This tells us that even though the legislative road is slow, it is just as important that queer stories are made visible in the public discourse.

Although the Commission rejected applications for EU/EEA funding from Polish towns that adopted the “LGBT-free zones” (European Parliament, 2021; Douglas, 2020), the EP has urged the Commission to use all tools available to them to address the violations of the fundamental rights of LGBT people in the EU. Including infringement proceedings, Article 7 TEU, and the recently adopted mechanism on Rule of Law Conditionality, which aims to



sanction rule of law violations and the protection of values such as democracy and the protection of fundamental rights (European Parliament; 2021; Milojkovic & Garner, 2021).

The rule of law principle comes after EU leaders in the fall of 2020 had to compromise with Poland and Hungary after vetoed the bloc's budget and stimulus plans over threats that they would lose access to funds (Stevis-Gridneff et al., 2020). The budget originally had built-in measures to ensure that member states would have to adhere to the rule of law in order to receive funds (Novak, 2020a). Though the compromise still tied funding to adherence to the rule of law-standards, the legally binding measure was watered down by allowing any country that disagrees with the terms that tie EU-funding to the rule of law, to enable to challenge the arrangement in the CJEU, which could delay any real enforcements for months. Parliament has been advancing this new way to check Poland and Hungary's democratic backsliding for quite some time, and the addition of the rule of law principle is a step in the right direction of holding EU members accountable (Stevis-Gridneff et al., 2020).

Despite the EU institutions having started to take concrete actions against the LGBT rights violations in Poland and Hungary, it is important to remember that these plans and measures did not come until two years after Polish authorities started to declare themselves "LGBT-free zones", which many would argue is two years too late. Citing the Hungarian's attack on democracy and the rule of law, the EP voted to initiate a procedure against Hungary in 2018, which could potentially strip the Hungarian government of its right to vote in the European Council, though no substantial moves were made further (Novak, 2020b). This makes one wonder whether these new initiatives will help the situation of LGBT people going forward. Is the rule of law budget conditionality going to be a game-changer amidst the European value crisis, or will this be another dead end as with the Article 7 procedures and systematic infringements (Milojkovic & Garner, 2021)?

## **5. An (in)effective response? Assessing the Union's limits when dealing with rogue states**

The main thing holding the EU back when dealing with "rogue" states, appears to be the EU itself. The first reason being that the Union's institutional arrangement makes it difficult to speak with one voice. The institutions appear to disagree on how LGBT rights should be enforced, which makes it hard for the EU to present itself as a united front outward (Mos, 2013, p.85). Like the EU itself, the Commission's LGBT rights record is mixed. On the one hand, it has through the Europeanization of social policy helped bring matters like sexual orientation

and gender identity under a European purview, while additionally funding organizations like ILGA-Europe in their fight for the advancement of LGBT rights. On the other hand, it was the Commission who in 1997 found that the Central and Eastern European countries met the Copenhagen criteria for accession, notwithstanding that Romania *de facto* still criminalized consensual same-sex relationships between adults, and the other states had discriminatory legislation in place as well (Kochenov, 2007, p.16). The Commission also proved unwilling to acknowledge and criticize the “numerous problems” of other candidate countries in the domain of LGBT rights, but was eventually forced to address this after tireless advocacy from the EP (Kochenov, 2007, p.17; Mos, 2013, p.85).

The Parliament stands out as a patron for the LGBT community within the EU. Its position on LGBT issues has been remarkably consensual, despite it consisting of groups that span the political spectrum. It can thus be said that the EP has been consistently supportive of LGBT rights (Mos, 2013, p.85). Unlike the Parliament, the CJEU has been conservative in most of its rulings concerning the rights of LGBT minorities. As Court cases impact upon the community at large, the Court’s general reluctance to advance LGBT rights at the European level, has had a deaccelerating effect on LGBT rights on national level as well (Kochenov, referenced in Mos, 2013, p.86). It can thus be said that the Unions involvement in LGBT matters has shown considerable divergence between its institutions. This inability to streamline its viewpoints and policy actions strips the Union of its external authority and credibility (Mos, 2013, p.86).

A further problem is that the EU has shown normative inconsistencies in its enforcement of LGBT rights. In the process leading up to the 2004 accession, the Commission and Parliament stressed the need for the Central and Eastern European states to remove discriminatory provisions from their national legislature. These demands were slightly odd as there at the time was no consensus regarding the level of gay rights protection in the existing member states (Kochenov, 2007, p.19). This was also an issue in 2006, when the Parliament responded to the increase in homophobic politics in the new member states by passing resolutions denouncing homophobia. Although the resolutions condemned homophobia throughout the Union, the Central and Eastern European countries were singled out, with the Western states being almost absent from the critique, which gives the impression that homophobia is more of an issue in the East (Slootmaeckers, 2020, p.353), giving the impression that different states are held to different standards.

Finally, the EU is inconsistent in its definition of acceptable norms and values. Poland and the Czech Republic, for instance, negotiated opt-outs of the CFR as a condition for signing

the Lisbon Treaty. In the case of Poland, the opt-out was motivated by concerns about the country's social values, including fears that the CFR would undermine the traditional conception of marriage in Poland (O'Dwyer, 2012, p.345). The opt-out prevents the CJEU and national courts from finding Polish law to be in violation with the fundamental rights and freedoms declared in the Charter. Consequently, the non-discrimination principle cannot be held to be binding with respect to sexual orientation in cases involving Poland. As a normative power, the EU cannot let members cherry-pick between the policies that fit them best. This display of "Europe à la carte" eats away at the Union's credibility in its foreign policy on sexual minority rights (Mos, 2013, p.84). Thus, it is necessary to make sure that fundamental rights are anchored in the legal framework in a way that ensures compliance by all member states.

The Union's belated response to the LGBT rights violations in Poland and Hungary raises doubts on the EU's ability to act as a defender of human rights and democracy in times of crises (Vida, 2019, p.15). While the most acute issues involve Poland and Hungary, rule of law problems and LGBT right infringements lurk in other states as well. If the EU fails to deter Poland and Hungary, this could possibly enable more violations elsewhere (Stavis-Gridneff et al., 2020). The Union needs to be leading by example, this is not only vital for the people living in the EU, but also for future development of the Union. Respect for its founding norms and values is not only important for building mutual trust between member states, it will also increase the public's confidence in EU policies (European Commission, 2010, p.4). Until then, the EU will continue to present itself as a conflicted normative power on LGBT rights.

## **6. Conclusion**

Over the last decade, the European Union has had to come to terms with the fact that member states' adherence to the founding values of the Union can no longer be presumed (De Schutter, 2017, p.7). The case of Poland and Hungary shows that the EU is failing to act fully in line with the NPE framework. Although the EU has started to respond more vigorously to the LGBT rights violations in the two states in the past year, the Union's responses to the developments in Poland and Hungary have generally been slow and fruitless. The Commission and the Parliament's previous efforts to initiate procedures against Poland and Hungary have resulted in minimal repercussions (Novak, 2020b), which have made LGBT citizens question whether new initiatives will help their situation in the future. Is the recently introduced rule of law principle of budget conditionality going to be a transformative measure in Europe's efforts to

resolve its internal value crisis, or will it like the Article 7 procedure and the systematic infringement action be another dead end in the fight for equality?

The current institutional and legal makeup makes it difficult for the EU to speak with one voice on LGBT-related issues. This is mainly due to the institutions' assumed disagreement on how LGBT rights should be enforced, which essentially makes it impossible for the Union to present itself as a united front outward (Mos, 2013, p.85). Furthermore, the Union has to be consistent in its definition of acceptable norms and values and ensure that they are anchored in the legal framework in a way that ensures compliance by all member states. If the EU does not start rethinking its commitment to LGBT equality, this will continue to leave a space open for further discrimination against women and LGBT people (Vida, 2019, p.15). With the rise of nationalist, conservative, and heteronormative rhetoric and the anti-gender movement across Europe, it is more important than ever that the EU stands united in the fight for equal rights for all Europeans – including the queer ones.

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