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Between Sisyphus and the Danaïdes? The European Union's Efforts to Promote and Protect the Human Rights of LGBTI Persons in its Eastern Neighbourhood

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About the Author

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Abstract

In recent years, there have been accentuated efforts by the European Union (EU) to integrate the human rights of Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) persons into the universalist and indivisible epistemological underpinnings of its external action. The most emasculated form of these efforts are the Council's 2013 LGBTI Guidelines. This paper examines the effectiveness of the EU's efforts to promote and protect the universal human rights of LGBTI persons in two European Neighbourhood Policy (ENP) countries, Georgia and Ukraine. It is argued that the EU's normative proclivity to uphold the human rights of LGBTI persons in these countries have been significantly atrophied. Its commitment has been beset by a number of interconnected factors, confounded with, and conditioned by, both exogenous and endogenous constraints. Moreover, there is the unfortunate contemporaneous geopolitical conjuncture with the Russian Federation. The EU's various diplomatic initiatives, certain financing and capacity-building measures struggle to transcend to the more tangible sectoral areas of most salience to LGBTI persons. In addition to the regional particularities making localised action plans more salient to the realities of civil society, it would be equally perspicacious to lift the application of the LGBTI Guidelines to a more systematic level in the EU Delegations.

Introduction

The European Union (EU) aspires to placing human rights at the heart of its external relations.¹ The universalist epistemological underpinnings of the EU's conceptualisation of human rights is notably challenged by the proponents of an illiberal, sovereigntist democracy on grounds of respect for tradition.² The EU endeavours to improve the enjoyment of the rights of Lesbian, Gay, Bisexual, Transsexual and Intersex (LGBTI) persons through focusing on, *ad minima*, the abolition of discriminatory laws and promoting equal treatment.

In this paper the conundrum is situated along a paradigmatic lens situated between two Hellenic myths: Sisyphus and the Danaïdes. The pre-Greek era myth of Sisyphus, son of Ephyra, who was forced to endlessly push a boulder up a hill for eternity on account of his own hubristic confidence and over-inflated idea of his capacities, is today synonymous with a pointless action since Zeus would systematically draw the boulder away from Sisyphus as it would reach the peak. The myth hides behind it a more nuanced idea relative to the vicissitudes of norms diffusion and societal transformation. Are the EU's actions Sisyphean in that they are frustrated and overly grandiose in their perceived effectiveness or kept modest, so goal attainment can practically always be claimed? Have they been 'Sisypheanised' by the range of heterogeneous obstacles, that shall be examined along with the data collected. Or, are the EU's actions futile along the lines of the Kafkaesque chore of the Daughters of Danaïdes? The daughters of the latter avenged their arranged marriages with the sons of Aegyptus by seeing all but one of the putative husbands killed. For the murders, a perpetual punishment awaited his daughters in the Underworld. There in Tartarus, the daughters as inmates were compelled to refill a bath using a leaky jug, with the flowing water absolving them from their sin. Are the EU's actions on the whole futile in the same way the bath would never be refilled? Or is either Ukraine or Georgia distinguishing itself in a way Lynceus did, this case in respecting the *raison d'être* of the EU's normative actions in a region traditionally so fervently hostile to the acceptance of LGBTI human rights?

¹ Council of the European Union, "Council Conclusions on the Action Plan on Human Rights and Democracy 2015-2019", Document 10897/15, 20 July 2015.

² European Commission, FRAME, "Fostering Human Rights among European Policies. Report on factors which enable or hinder the protection of human rights", Work Package No. 2 – Deliverable No. 2.1, 4 November 2014, p. 17.

The first section of the paper provides the theoretical framework through which the EU's action in the promotion of the human rights of LGBTI persons is assessed. It then deals with the EU's goal-attainment.³ In the following section, the EU's panoply of human rights mechanisms that include LGBTI issues shall be considered in the first instance. The subsequent two sections are dedicated to an examination of the EU's efforts in Georgia and Ukraine where salient sectoral areas will be assessed. In the interest of succinctness and intelligibility, only certain of the most relevant areas generally considered to be of greatest importance are examined. In the conclusion, I seek to collect the research findings.

The EU signed Association Agreements (AAs) with Moldova, Georgia and Ukraine in June 2014, both countries prominent partner countries of the European Neighbourhood Policy (ENP). It has been claimed that these countries "had been gearing up for this moment for a decade".⁴ The increased rapprochement with the EU provides a trigger for the inclusion of Georgia and Ukraine in this paper. Moldova's European perspective has evolved at yet again, a different, differentiated speed and has benefited now for some time from a visa-free regime with the EU. Its LGBTI community faces an array of significant albeit dissimilar problems than the two other countries. The situation for LGBTI persons has marginally improved in ways dissimilar to Georgia and Ukraine.⁵

Conversely, the Southern Caucasus country been moving increasingly towards a 'European Way' integration under coalitions lead by the 'Georgian Dream'. By signing the 2014 AA/DCFTA, Georgia's cooperation with the EU became more pluri-sectorised since the AA incorporates advanced cooperation, commitment to the rule of law and respect for human rights. Ukraine represents a challenging case for the EU. It is the largest of the Eastern Partnership (EaP) countries within the ENP and has had a precocious engagement with the EU since its independence. It has, since early 2014, been at the centre of an enduring conflict with the Russian Federation after the annexation of Crimea and a conflict on its South-Eastern territory.

³ S. Blavoukos and D. Bourantonis, *Struggling with Performance: An Analytical Framework for the EU International Interactions*, Paper prepared for the EUSA Thirteenth Biennial Conference, Baltimore, Maryland, USA, 9-11 May 2013.

⁴ F. Gaub and N. Popescu, "The EU Neighbours 1995-2015: Shades of Grey", *Chaillot Paper*, no. 136, European Union Institute for Security Studies, Paris, December 2015, p. 54.

⁵ D. Sindelar, "Bucking the Trend, Moldova Emerging As Regional Leader in LGBT Rights", 9 April 2013.

Theoretical Framework: Normative Power Europe

In the existing academic literature, debates on the EU's own identity are well ensconced amongst scholars. Ian Manners's conceptualisation of the EU as a fundamentally different actor in the international system shall provide the marker for identifying the EU's capacity to engender normative, positive change.⁶ Indeed, Manners came to write in a follow-up article how international order is nonetheless influenced "by the EU's mere existence",⁷ basing his understanding of the EU on three central axes: the EU's normative difference, normative basis, and means of norms diffusion.⁸ He sees EU norms diffusion through informational, procedural, transference, contagion, overt diffusion and by cultural filter.⁹ The relevance of these means to the two ENP countries studied in this paper varies and shall be raised to varying levels of application. Informational diffusion is closely linked to declaratory diplomacy, communications and dialogue briefs. Meanwhile, procedural diffusion is largely enveloped with inter-regional initiatives. Overt diffusion, synonymous with the EU's physical presence, shall be examined in the case of the EU Delegations in Tbilisi and Kiev. Furthermore, we shall see a specific form of 'transference', namely that of 'carrot and stickism'¹⁰ in what transpired to be a 'stand-off' regarding the Visa Liberalisation Action Plan (VLAP) with both countries.

Characterised by immense global inter- and intra-regional disparities, the accusation of some sort of foreign 'doctrinaire' agenda¹¹ being imposed, as is the framing of this question as an interference with culture, religion, tradition, and belief is a recurring accusation. Kollman and Waites opine that "the global politics of lesbian, gay, bisexual and transgender (LGBT) human rights has emerged at the heart of global political struggles over culture and identities".¹² Yet there is growing authority for the idea that what is framed as 'LGBT rights' characterises an era of "norm polarization".¹³ For Manners, taking normative power as "the ability to define what passes for 'normal'

⁶ I. Manners, "Normative Power Europe: A Contradiction in Terms?", *Journal of Common Market Studies*, vol. 40, no. 2, 2002, pp. 235-258.

⁷ I. Manners, "The European Union as a Normative Power: A Response to Thomas Diez", *Millennium*, vol. 35, no.1, 2006 p. 170.

⁸ Manners, "Normative Power Europe: A Contradiction in Terms?", *op. cit.*, p. 236.

⁹ *Ibid.*, p. 245.

¹⁰ *Ibid.*

¹¹ See P. Ayoub, "With Arms Wide Shut: Threat Perception, Norm Reception, and Mobilized Resistance to LGBT Rights", *Journal of Human Rights*, vol. 13, no. 3, 2014, pp. 337-362.

¹² K. Kollman and M. Waites, "The Global Politics of Lesbian, Gay, Bisexual and Transgender Human Rights: An Introduction", *Contemporary Politics*, vol. 15, no. 1, March 2009, p. 1.

¹³ This term was used by Philip Ayoub in e-mail correspondence, 19 April 2016.

in world politics",¹⁴ the EU is doing precisely that. The 'pooling of sovereignty', and attachment to human rights protection, sets the EU apart in international relations as it reshapes 'normality'.¹⁵ In this sense, activists in favour of the cause advancing LGBTI equality, including the non-governmental organisations (NGOs) supported by the EU, use the European paradigm to capitalise on this identity of tolerance and inclusions.¹⁶

Building on the explanatory potential of Normative Power Europe, this paper includes an analytical framework to consider the EU's normative effectiveness from the aspect of goal-attainment under performance analysis. Blavoukos and Bourantonis' performance-based conceptualisation of the EU in the international order is used.¹⁷ Built on three separate but linked analytical levels, they are output, outcome, and impact.

The first of the three elements of performance analysis examines the policy formation within the Union. This is referred to as (micro)output. Action Plans, strategic frameworks, and other official documents all fall into this bracket. Once an output is identified, four criteria will be used to assess the EU's action: 'clarity', 'meaningfulness', 'relevance to the stakeholders', and 'inclusiveness'.¹⁸ Responses of clarity denote a clearly distinct direction for the EU.¹⁹ Inclusiveness is closely concerned with relevance and endeavours to integrate different perspectives in the hope of achieving a 'synthesis'.²⁰ Here, the non-monolithic and porous nature of the EU's identity, composed of 28 heterogeneous member states may intervene as an endogenous factor limiting the output capacity.²¹ In the case of LGBTI issues, a profound realisation of the low-starting point in Georgia and Ukraine forms part of the EU's modicum. Next, the outcome pertains to the EU's deliverability on the agreed outputs. Again, Blavoukos and Bourantonis provide three indicators to assess the EU's performance at a meso level: cohesion, continuity and international leadership qualities.

For the purposes of critically examining EU effectiveness, this paper is especially concerned with the final factor that is impact since it needs to argue counterfactually *vis-à-vis* the EU's international outcomes in the field of LGBTI issues in Georgia and

¹⁴ Manners, *op. cit.*, p. 253.

¹⁵ *Ibid.*, p. 253.

¹⁶ C. Wilkinson, "LGBT Activism in Kyrgyzstan: What Role for Europe?", in P. Ayoub and D. Paternotte (eds.), *LGBT Activism and the Making of Europe: A Rainbow Europe?*, Basingstoke, Palgrave Macmillan, 2014, p. 52.

¹⁷ Blavoukos and Bourantonis, *op. cit.*

¹⁸ *Ibid.*, p. 8.

¹⁹ *Ibid.*

²⁰ *Ibid.*, p. 9.

²¹ *Ibid.*, p. 11.

Ukraine. This, to try to establish causality in order to credit the EU with eventual policy formation and practical changes. For a more holistic approach, 'effectiveness' marks the degree of goal attainment.²² Finally, concerning the impact level of performance, the EU's bargaining power in terms of negotiating capital, and the endogenous role of others shall be included in the analysis,²³ with inclusion of LGBTI, female advocacy and other human-rights NGOs.

Swathes of academic literature have pointed to the pitfall from the "split personality syndrome" perspective of the European Union as a multilevel polity for articulations of power.²⁴ Added to this is Elgström and Smith's synopsis of the fluid nature of the EU's own nature as "negotiated multilateral order".²⁵ Zielonka rather analyses the emergence on the continent of a "polycentric polity".²⁶ The generally accepted dictum in the academic writings is that the more coherent, cohesive and less contradictory EU positions are, the stronger its image and action transpire to be for its foreign policy since cheap 'tit for tat' political strokes on the EU's own human rights record can be nipped early on and rendered void of their traction.²⁷ Within the Union, there are vast disparities on the status of human rights protection, and all the more so with regard to LGBTI and Sexual Orientation and Gender Identity (SOGI) issues. The situation *vis-à-vis* civil union and marriage of same-sex couples is only one more mediatised example, amongst others. Some scholars propose a 'lowest common denominator' within the Union, where the EU advances minimalist positions on most fundamental civil rights and non-discrimination on account of the contested universality on issues perceived as 'next-generation' rights,²⁸ including within the Union.²⁹ One EEAS official added how the EU neither has a mandate for same-sex marriage, nor is it a subject of unanimity within the Union.³⁰ For Blavoukos and

²² *Ibid.*

²³ *Ibid.*, p. 13.

²⁴ *Ibid.*, p. 11.

²⁵ S. Blavoukos and D. Bourantonis, "Introduction: The EU Presence in International Organizations", in S. Blavoukos and D. Bourantonis (eds.), *The EU Presence in International Organizations*, London, Routledge, 2011, p. 7.

²⁶ J. Zielonka, *Europe as Empire: The Nature of the Enlarged European Union*, Oxford, Oxford University Press, 2010, p. 1.

²⁷ S. Biscop (ed.), "The Value of Power, The Power of Values: A Call for an EU Grand Strategy", *Egmont Paper*, no. 33, Brussels, Egmont: The Royal Institute for International Relations, October 2009, p. 15.

²⁸ Anonymous interview on a non-attributable basis with a European External Action Service official (EEAS official 4), EEAS Directorate for Human Rights and Democracy, Brussels, 22 March 2016.

²⁹ Biscop, *op. cit.*, p. 15.

³⁰ Interview was EEAS official 4, *op. cit.*

Bourantonis, the question of “legal and institutional provisions” is a central delimitation of the EU’s potential ‘outcome’.³¹

Moreover, Van Schaik has analysed the significance of ‘preference homogeneity’ in relation to nationally defined priorities being brought to the EU level. Its negative effects, even when EU member states may eventually defend positions that resemble each other more closely, other EU member states rather than non-EU countries can be seen in multilateral fora most evidently.³² For the member states, a logic of appropriateness on the EU level to defend human rights promotion as part of the EU’s action, after successive waves of enlargement, has arguably emerged on account of ‘social interaction’.³³

Conversely, discrepancies may indeed manifest themselves positively in certain areas to counterbalance greater EU institutional shortcomings. The example of a select few member states and their commitment to SOGI-themed issues was highlighted by many EEAS officials interviewed and will be touched upon later in the case studies.³⁴ Balducci has notably studied the role of the Scandinavian countries, the United Kingdom and also The Netherlands in the promotion of human rights.³⁵ They correspond in this case to a preponderance to promote SOGI dossier in Georgia and Ukraine.

While some of the Union’s limitations are tied to its own internal wrangling, others are more exogenous, pertaining to the troubled international systemic order.³⁶ There is a much studied propensity on the wider ‘European’ side to consider its regional ‘particularities’ through a universalised lens integrally applicable to humanity as a whole.³⁷ Indeed, Thomas Diez outlines how the EU’s ‘othering’ process to domesticate

³¹ Blavoukos and Bourantonis, “Introduction”, *op. cit.*, p. 12.

³² L. Van Schaik, “The EU’s growing pains in negotiating international food standards”, *International Relations*, 2013, vol. 27, no. 3, p. 295.

³³ G. Balducci, “The EU’s Promotion of Human Rights”, in Jørgensen, K.E. and K.V. Laatikainen (eds.), *Routledge Handbook on the European Union and International Institutions: Performance, Policy, Power*, Abingdon, Routledge, 2013, p. 198.

³⁴ Anonymous, interview on a non-attributable basis with a senior European External Action Service official, (EEAS official 3), EU Delegation, Geneva, 22 February 2016.

³⁵ Balducci, *op. cit.*, p. 196.

³⁶ Blavoukos and Bourantonis, “Introduction”, *op. cit.*, p. 3.

³⁷ M. Koskeniemi, cited in R. Burchill, “Assessing the EU’s Position on Human Rights: Is It a Desirable One?”, in J.E. Wetzel (ed.), *The EU as a “Global Player” in Human Rights?*, London, Routledge, 2011, p. 30.

support for its values consists of value-judgements “that the other should be convinced or otherwise brought to accept the principles of the self” .³⁸

However, at its most basic form, the EU is challenged in what Manners termed its ‘normative project’ since its supposedly post-Westphalian constellation challenges existing state-centric order. Nowadays, the rise of ‘sovereignist democracy’³⁹ and LGBTI issues being portrayed as counter to ‘national’, since they engender in parts, animosity caused by the destabilisation of a constructed ‘national’ narrative.⁴⁰ This presents a challenge for the EU in the region of the Southern Caucasus and Georgia especially, and *a fortiori*, Ukraine. There is an escalated instrumentalisation of SOGI human rights by the Russian Federation as a conduit of confrontational divergences with the EU on an array of other, even hardly connected issues that evinces current geopolitical challenges. In this sense, the Union can be limited in its actions by hostile institutional features of multilateral fora,⁴¹ needing to deploy extra efforts in order to trump the “recalcitrant members and improve” the performance of certain International Organisations.⁴²

The EU’s external action in human rights for LGBTI persons: what *modus operandi*?

The most recent European Instrument for Democracy and Human Rights (EIDHR) allocated on a global level €5 million to specific LGBTI human rights issues.⁴³ The financing provided by the instrument acts as a lifeline in many instances. Apart from the political support, the capacity to organise events and attend conferences essentially comes from the centrality of the EU’s funding, and otherwise, EU member states’ bilateral funding.⁴⁴

The Council of the EU adopted a Strategic Framework and Action Plan on Human Rights and Democracy in June 2012 that saw LGBTI included in how the EU could

³⁸ T. Diez, “Constructing the Self and Changing Others: Reconsidering ‘Normative Power Europe’”, *Millennium*, vol. 33, no. 3, 2005, p. 628.

³⁹ J. Headley, “Russia’s Complex Engagement with European Union Norms”, in A. Björkdahl, N. Chaban, J. Leslie and A. Masselot (eds.), *Importing EU Norms, Conceptual Framework and Empirical Findings*, Springer, United Nations University Series on Regionalism, 2015, p. 219.

⁴⁰ P. Ayoub, “With Arms Wide Shut”, *op. cit.*, p. 338.

⁴¹ Blavoukos and Bourantonis, “Introduction”, *op. cit.*, p. 3.

⁴² Blavoukos and Bourantonis, *Struggling with Performance*, *op. cit.*, p. 7.

⁴³ European External Action Service, Human Rights, “EU Annual Report on Human Rights and Democracy in the World in 2014”, p. 59.

⁴⁴ Wilkinson, *op. cit.*, p. 59.

meaningfully promote and protect their human rights in external action.⁴⁵ Setting ambitious benchmarks, its resounding objective was to correct pitfalls, address policy lacunas to “improve *qualitatively* the EU’s performance”⁴⁶ in human rights diplomacy. The EU rang true on its commitment in the 2012 document to “develop public EU guidelines, building upon the EU’s LGBT toolkit” by June 2013.⁴⁷ An interesting omission is the absence of ‘Intersex’ in the Council’s 2012 document. The Council of Europe in conjunction with the Fundamental Rights Agency of the EU played a consequential role in boosting coverage given to issues related to intersex persons. They were included in the 2013 Guidelines, adding inclusiveness to the EU’s human rights action, as was the commitment that EU strategies in multilateral fora would be elaborated.⁴⁸

The Foreign Affairs Council’s Guidelines on LGBTI Human Rights of 2013 (hereafter referred to as the Guidelines) marked a milestone in adding to the existing set of EU Guidelines in Human Rights, a guiding framework document devoted to the human rights of LGBTI persons, *a priori inter pares* with the nine other Guidelines in place at the time.⁴⁹ The Guidelines aim to “promote and protect” the universal human rights of LGBTI persons, and are meant to serve as a “pragmatic” instrument of the EU’s foreign policy founded around “practical tools”.⁵⁰ A novel aspect of the Guidelines was the inclusion of issues of great concern to transgender and intersex people, including the fundamental questions of gender reassignment and appropriate identity documents.⁵¹ Recent research from the South Caucasus region repeatedly referred to the pressing shortcomings of official documentation for intersex persons.⁵²

Within the new EU Action Plan on Democracy and Human Rights 2015-2019, the EU commits itself to have greater cooperation with civil society in the fight to eliminate

⁴⁵ Council of the European Union, “EU Strategic Framework and Action Plan on Human Rights and Democracy”, Luxembourg, 25 June 2012, 11pa855/12.

⁴⁶ R. Balfour, *The Role of EU Delegations in EU Human Rights Policy*, European Parliament, Directorate General for External Policies of the Union, Policy Department, Brussels, July 2013, *op. cit.*, p. 8 [emphasis added].

⁴⁷ Council of the European Union, “EU Strategic Framework and Action Plan on Human Rights and Democracy”, *op. cit.*, p. 24.

⁴⁸ Anonymous, interview on a non-attributable basis with a European External Action Service official (EEAS official 1), Human Rights Strategy and Policy Implementation Division, Brussels, 1 March 2016.

⁴⁹ European External Action Service, Human Rights Documents, *op. cit.*

⁵⁰ *Ibid.*

⁵¹ Council of the European Union, “Guidelines to promote and protect the enjoyment of all human rights by Lesbian, Gay, Bisexual, Transgender and Intersex Persons”, Foreign Affairs Council, Luxembourg, 24 June 2013, p. 5.

⁵² Centre for Information and Counselling on Reproductive Health – Tanadgoma, “Identifying needs for and accessibility of HIV-related services for transgender individuals in the South Caucasus”, 2013, p. 34.

discrimination on grounds of sexual orientation.⁵³ There is an accrued importance given to the role of EU officials, be they in Brussels or in one of the 140 Delegations, in addition to the EU member state embassies taking up LGBTI issues.⁵⁴ It includes a novel section on the challenges embedded in bringing the fight for LGBTI equality to rural areas in third countries.⁵⁵ This is to be welcomed since to-date, there is a schism on this issue and its pre-dominant focus on urban centres.

The following section introduces the first case study, examining Georgia and its engagement with the EU concerning LGBTI human rights.

Georgia – not yet ready to come out of the closet?

First, an examination of the EU-Georgia Human Rights Dialogue is provided, followed by a brief analysis of the Georgian National Human Rights Strategy. Then, a limited number of areas of relevance to LGBTI persons is examined. Finally, a brief passage on the EU Delegation's involvement is assessed.

EU-Georgia annual Human Rights Dialogue – a neglected 'outside-in' perspective

As part of the EU-Georgia Human Rights Dialogue, questions of non-discrimination and the rights of freedom of association and assembly are traditionally discussed, without LGBTI forming part of a stand-alone element thereof. Since LGBTI people constitute a particularly vulnerable group who regularly suffer from breaches of their human rights, this hyper-cautious approach could be reasonably questioned. By the same token, the 2013 Guidelines do favour a tailored approach. One academic has criticised an identical approach that can be observed having been adopted by the EU Delegation in Bishkek, where LGBT rights form part of broader human rights projects, thus not acknowledging the specific needs of the LGBT persons that are anomalous in certain sectors.⁵⁶ The recent acquittal of three individuals responsible for the violence that marred the International Day Against Homophobia and Transphobia (IDAHOT) 2013 demonstrations was raised at the 2016 Human Rights Dialogue.⁵⁷ In that round of the

⁵³ Council of the European Union, "Council Conclusions on the Action Plan on Human Rights and Democracy 2015-2019", *op. cit.*

⁵⁴ *Ibid.*, p. 15.

⁵⁵ *Ibid.*, p. 10.

⁵⁶ Wilkinson, *op. cit.*, p. 55.

⁵⁷ Interview with EEAS official 6, *op. cit.*

Dialogue, the EU commended Georgia for its action in defending the universality of human rights, including tackling discrimination on grounds of sexual orientation.⁵⁸

The active 'othering' vis-à-vis sexual minorities⁵⁹ was described by the Director of a prominent LGBTI and Women's rights NGO, as having been artificially mounted by political elites to divert attention from more pressing 'existential' problems facing Georgians.⁶⁰ The Georgian Orthodox Church plays a frontal role in opposing any prominence awarded to non-discrimination issues pertinent to LGBTI persons on the political agenda of the Georgian government, currently led by the 'Georgian Dream' coalition. This assessment was shared and substantiated by the Director of a prominent human rights group, where the Church was described as an integral 'political player' in Georgia.⁶¹ Moreover, an EEAS official believes the Church to be in receipt of financial support and technical resources for its rabid anti-LGBTI postures that are regularly mobilised in cultural, religious and political demonstrations.⁶² Nonetheless, in advance of the 2016 Human Rights Dialogue, an Anti-Discrimination Coalition was being prepared with a 'mainstream' NGO that appeared to be unprecedented. This leaves the door open for great coalition building that the EU often looks for in 'Calls for Proposals'. Furthermore, the 'mainstreaming', or integration into dominant civil society organisations (CSOs) of LGBTI issues was explicitly listed in the 2013 Guidelines as a recommended action for the EU to follow.⁶³

In its judgment in *Identoba v Georgia*, which found violations of Articles 2 and 11, read in conjunction with Article 14 of the European Convention on Human Rights (ECHR), after violent attacks on anti-homophobia demonstrations in Tbilisi on the occasion of IDAHOT 2012, the European Court of Human Rights (ECtHR) notably opined in its introduction that "negative attitudes against members of the [LGBTI] community were widespread in some parts of Georgian society".⁶⁴ In attempts aimed at quelling

⁵⁸ European External Action Service, "Joint Press Release on the EU-Georgia Human Rights Dialogue", Brussels, 160421_01, 21 April 2016.

⁵⁹ T. Hammarberg, "Georgia in Transition, Report on the Human Rights Dimension: Background, Steps Taken and Remaining Challenges", September 2013, p. 42.

⁶⁰ Interview with Natia Gvianishvili, Director of the Women's Initiatives Supporting Group, Skype, 2 April 2016.

⁶¹ *Ibid.*

⁶² Anonymous interview on a non-attributable basis with a European External Action Service official (EEAS official 5), Brussels, 22 March 2016.

⁶³ Council of the European Union, "Guidelines to promote and protect the enjoyment of all human rights by Lesbian, Gay, Bisexual, Transgender and Intersex Persons", *op. cit.*, p. 9.

⁶⁴ European Court of Human Rights, "Police failed to protect participants in march against homophobia from violent attacks of counter-demonstrators", *Press Release*, ECHR 157, (2015), 12 May 2015, p. 2.

resistance to the Association Agreement prior to signing in June 2014, the European Commission put together an 11-page ‘mythbuster’ document, responding to forty apparently common misperceptions. In this document, the issue of gay marriage is listed second.⁶⁵ Responding to the charge that the EU wishes to reduce the role of the Church in Georgian society, the Commission advances how “[t]he European Union has the greatest respect for the Georgian Orthodox Church and its important role in Georgia’s national life”.⁶⁶ It concludes that Commissioner Füle had received the support of the Patriarch, Ilia I, who supported Georgia’s “European choice”.⁶⁷

Georgian National Human Rights Strategy and Action Plan

The adoption of a Georgian National Human Rights Strategy and attendant Action Plan (NHR SAP) formed part of the recommendations of the VLAP that will be examined later.⁶⁸ In 2014, the NHR SAP was published and included a sentence on SOGI that a future task would be to “combat discrimination on the basis of sexual orientation and gender identity”.⁶⁹ Human rights activists fought a battle to have this included after a series of removals from the Justice Ministry’s draft proposals.⁷⁰ From the outset, the NHR SAP emphasised the role of the EU and referred to the implementation of Thomas Hammarberg’s report written for the EU authorities as a “foremost priority”.⁷¹

In Georgia, the EU finances the quasi-totality of the ‘Human Rights for All’ initiative which adopts a multi-donor approach implemented in large part by the United Nations Development Programme in Georgia, following on from closely formulated EU-Georgia priorities for human rights.⁷² It may be appropriate to ascribe to the EU, on the basis of an identifiable output (in this case the Project Strategy Financing in Georgia), a certain effectiveness from the intra-EU policy stage to the concretisation

⁶⁵ European Commission, Directorate General Trade, “Myths about the EU-Georgia Association Agreement (AA) and Deep and Comprehensive Free Trade Area (DCFTA) - Setting the facts straight”, 26 March 2014.

⁶⁶ *Ibid.*, p. 2.

⁶⁷ *Ibid.*

⁶⁸ European Commission, *Report from the Commission to the European Parliament and the Council, First Progress Report on the implementation by Georgia of the Action Plan on Visa Liberalisation*, COM(2013) 808 final, 15 November 2013, Brussels, p. 25.

⁶⁹ Government of Georgia, *National Strategy for the Protection of Human Rights in Georgia 2014-2020*, March 2014, p. 17.

⁷⁰ Interview with Gvianishvili, *op. cit.*

⁷¹ *National Strategy for the Protection of Human Rights in Georgia 2014-2020, op. cit.*, p. 5.

⁷² United Nations Development Programme in Georgia, “UN Joint Programme: Human Rights for All – Support to the Implementation and Monitoring of the National Human Rights and Strategy Plan, Summary”, p. 2.

of output.⁷³ The principal criteria here to the EU's credit, are those of 'meaningfulness' and also 'relevance to the stakeholders'. The EU acted as a multiplier of influence. It provided significant input into the NHRSAP, with Hammarberg's report informing the composition of it.⁷⁴ The impulse came from the EU to proceed with and maintain the establishment of a human rights 'architecture' in Georgia. The extent to which the EU's priorities ended up being included in national human rights strategies and legislative changes can help to determine the effectiveness of the EU's norms diffusion.

What follows is an examination of relevant areas of where shortcomings have been identified and signalled out for improvement in Georgia concerning LGBTI citizens. The first area is the freedom of assembly for LGBTI persons. The second is concentrated media ownership, while the third focuses on domestic challenges to civil society. The fourth and final section looks at equality, non-discrimination and access to justice and health services.

The question of freedom of assembly has featured the double standards in police protection concerning LGBTI-organised events in contrast with the 2015 initiative 'Family Sanctity Day' of the Georgian Orthodox Church.⁷⁵ Furthermore, members of LGBTI associations in Georgia feel compelled to withhold their identity, a situation already identified laid out in the 2013 Guidelines that needs to be addressed urgently.⁷⁶ For this reason, there is residual uptake in cases to the Georgian Courts on grounds of LGBTI-bias crimes. Ayoub has found that LGBTI visibility leads to a mobilisation of actors, thus contributing directly to the effectiveness of vulnerable sections of society, by asserting themselves and engaging in political struggle for recognition.⁷⁷ So, coming out, or the act of making the invisible visible, is a first step in un-alienating segments of society perceived as deviant and hostile counter to national identity.⁷⁸

⁷³ Blavoukos and Bourantonis, *Struggling with Performance*, *op. cit.*, p. 8.

⁷⁴ European Commission, *Implementation of the European Neighbourhood Policy in Georgia Progress in 2014 and recommendations for action*, SWD(2015) 66 final, Brussels, 25 March 2015, p. 7.

⁷⁵ ILGA-Europe, *Annual Review 2015, "Georgia"*, Brussels, 2015, p. 79.

⁷⁶ Council of the European Union, "Guidelines to promote and protect the enjoyment of all human rights by Lesbian, Gay, Bisexual, Transgender and Intersex Persons", *op. cit.*, p. 17.

⁷⁷ P. Ayoub, *When States Come Out: Europe's Sexual Minorities and the Politics of Visibility*, Cambridge, Cambridge University Press, 2016 (forthcoming), p. 200.

⁷⁸ *Ibid.*, p. 202.

Entangled with the issue of freedom of assembly is the concentrated media ownership in a socially and politically polarised Georgia,⁷⁹ highlighted as an impediment to social development in successive ENP Progress Reports.⁸⁰ Substantiated by official documents, this phenomenon has been identified as an impediment by an EEAS official, where a pervasive and deeply engrained pattern of 'othering' was highlighted.⁸¹ For the Head of the Council of Europe's SOGI Unit, the framing and portrayal of these questions is crucial since "it affects the mind-set of the whole society".⁸² Although scuppered by a call for differentiation through "appropriateness", support through public statements for pride marches is *per se* contained within the 2013 Guidelines.⁸³ Moreover, it has to be stated that the presence of foreign diplomats at such marches, obliges, *de jure*, police protection for the congregation.⁸⁴ ILGA Europe has highlighted a wider obstructive attitude to the organisation of LGBTI-themed events in Georgia with "notice of no guarantee of necessary police presence at the event".⁸⁵

The 2012 local attempts to organise a public demonstration against homophobia on the occasion of the International Day against Homophobia, were marred by violent protests.⁸⁶ The following year, again on the occasion of IDAHOT, marked a significant inflection in violent homophobia when a mob of around 20,000 people,⁸⁷ led by Orthodox priests, assembled to protest against a demonstration led by Identoba, one of Georgia's best known LGBTI organisations.⁸⁸ The EU exerted pressure on local authorities to condemn the thuggish events of the day.⁸⁹ A prominent Georgian Orthodox priest and three other participants who perturbed the 2013 IDAHOT rally

⁷⁹ Hammarberg, *op. cit.*, p. 41. For further analysis of polarisation in Georgia see Human Rights Watch, *World Report*, "Georgia", 2016.

⁸⁰ See, for example, European Commission, *Implementation of the European Neighbourhood Policy in Georgia Progress in 2014 and Recommendations for Action*, *op. cit.*, pp. 3-5.

⁸¹ Interview with EEAS official 5, *op. cit.*

⁸² Tsetsekou, Eleni, "Beating the Stigma the CoE on LGBT Rights", *Georgia Today*, 21 January 2016.

⁸³ Council of the European Union, "Guidelines to promote and protect the enjoyment of all human rights by Lesbian, Gay, Bisexual, Transgender and Intersex Persons", *op. cit.*, p. 8.

⁸⁴ Ayoub, Philip, "Contested Norms in New Adopter States: International Determinants of LGBT Rights Legislation", *European Journal of International Relations*, vol. 21, no. 2, 2015, p. 311.

⁸⁵ ILGA Europe, "Strategizing event on 'Shrinking civil society space for LGBTI organisations'", Summary paper, September 2015, p. 3.

⁸⁶ Hammarberg, *op. cit.*, p. 26.

⁸⁷ European Commission, *Implementation of the European Neighbourhood Policy in Georgia Progress in 2013 and recommendations for action*, SWD(2014) 72 final, Brussels, 27 March 2014, p. 6.

⁸⁸ Hammarberg, *op. cit.*, p. 35.

⁸⁹ *Ibid.*, p. 26.

were acquitted by the Tbilisi City Court in October 2015.⁹⁰ Already in its March 2014 Progress Report, the Commission had warned that “the failure of the prosecution and judiciary to bring the attackers to justice in a credible way raises questions about impunity”.⁹¹

Another example of the challenging environment to promote and protect the human rights of LGBTI persons is in the area of civil society. An EEAS official interviewed lamented the ‘silo mentality’ of some of its NGO interlocutors and human rights defenders in Georgia. Thematic or sub-thematic specialisations may naturally arise in human rights promotion. However, the same EEAS official found that some are clearly unwilling to deal with LGBTI-related questions in their work, and are instead ‘picking and choosing’ what areas to work on.⁹² Conversely, it was the opinion of an EEAS official in the Tbilisi Delegation of the EU that LGBTI specialist human rights organisations in Georgia themselves need greater “streamlining”, lacking cooperation and showing signs of “falling apart” with inter-LGBTI organisational relations at a low point.⁹³

The EU faced two exogenous constraints in Georgia over the past number of years. The first is the fraying of relations within the LGBTI activist community in 2015 as regards the response to post-2012 ‘17 May’ events, leading to a splintering effect with three small demonstrations being held⁹⁴ on this symbolic occasion that marks IDAHOT internationally. The second is the establishment of ‘Family Sanctity Day’,⁹⁵ an initiative of the Georgian Orthodox Church, which curiously takes place on 17 May, the same day as IDOHAT. Moreover, in May 2016, Georgia hosted the 10th ‘World Congress of Families’ a three-day event backed by an American anti-LGBT advocacy group, again coinciding with IDOHAT.⁹⁶ It is an unwelcome development described as a “provocation” by an EEAS official in the EU Delegation in Tbilisi.⁹⁷

Moving on to another area of interest is equality, non-discrimination and access to justice and health services. In 2013, a legislative proposal for the banning of “propaganda of homosexuality and indecency” did receive criticism from parts of the

⁹⁰ Human Rights Watch, *World Report, “Georgia”*, 2016, 27 January 2016.

⁹¹ European Commission, *Implementation of the European Neighbourhood Policy in Georgia Progress in 2013 and Recommendations for Action*, *op. cit.*, p. 6.

⁹² *Ibid.*

⁹³ Interview with EEAS official 6, *op. cit.*

⁹⁴ Interview with Gvianishvili, *op. cit.*

⁹⁵ Government of Georgia, “Prime Minister comments on May 17 Rallies”, May 2015.

⁹⁶ World Congress of Families X, Tbilisi 2016.

⁹⁷ Interview with EEAS official 6, *op. cit.*

government in addition to NGOs working on LGBTI issues.⁹⁸ After the outbreaks of violence that came with the 2012 and 2013 attempts at local anti-homophobia rallies, some political leaders were ‘pressurised’ by international groups and European embassies to speak out against such violence. One clearly identifiable manifestation of the Programmatic Cooperation Framework between the European Commission and the Council of Europe was a seminar in November 2015 held in Georgia to train prosecutors on matters of discrimination, including that on grounds of sexual orientation in order to harmonise judicial practice with those of the ECHR.⁹⁹

Georgia is the third biggest recipient of funds from the Global Fund to Fight AIDS, Tuberculosis and Malaria. Moreover, research from the Foundation for AIDS Research has shown that unprotected sexual intercourse amongst gay men is highest in Georgia amongst the countries in the Southern Caucasus.¹⁰⁰ Through the EIDHR the EU financed an HIV/AIDS prevention strategy in Georgia that was, however, not specifically aimed towards the vulnerable group that constitutes LGBTI persons.¹⁰¹ Hence, the relevance to stakeholders and clarity of objective could be questioned since *a priori* the EU has identified LGBTI as being a particularly high-risk group in this region.

Association Agreement and Visa Liberalisation Plan

The adoption of an anti-discrimination law, in line with international legal standards, was a requirement under the VLAP process with Georgia, examined in successive ENP Progress Reports.¹⁰² To start with, short-stay visa liberalisation represented a ‘major tangible carrot’ for Georgians, not just the ruling political elites.¹⁰³ The VLAP provided a major incentive for the Georgian government to comply with *volens nolens*, the required package of cross-cutting reforms. It comes under what Manners terms ‘transference’ based on ‘attractivity’ of rewards. Attempting to quell disquiet amongst traditional elements of society, Commissioner Füle was keen to stress: “I have heard it said that the Association Agreement would force Georgia to allow same-sex

⁹⁸ ILGA-Europe Annual Review 2013, Georgia, p. 104.

⁹⁹ Council of Europe, Sexual Orientation and Gender Identity, News, “Training of trainers for prosecutors”.

¹⁰⁰ Centre for Information and Counselling on Reproductive Health, *op. cit.*, p. 30.

¹⁰¹ European External Action Service, EU Delegation in Georgia, Project fiche, “Enhancing HIV prevention strategies in Georgia”, 2011.

¹⁰² European Commission, *Report from the Commission to the European Parliament and the Council, First Progress Report on the implementation by Georgia of the Action Plan on Visa Liberalisation*, COM(2013) 808 final, Brussels, 15 November 2013, p. 24.

¹⁰³ Interview with Gvianishvili, *op. cit.*

marriages. There is nothing at all in the Agreement that would force Georgia to adopt any such legislation.”¹⁰⁴

The EU’s recommendation that in line with the declared objective of adoption of an anti-discrimination law, some sort of public conversation take place on the issue, “given the sensitivity of the matter”,¹⁰⁵ was not taken up, and this was highly regretted by an interviewed LGBTI activist.¹⁰⁶ One major shortcoming is the abandoning of the creation of an ‘Equality Protection Inspector’ in Georgia. It featured early on in 2013 in the draft proposals and was mentioned in the Commission’s first Progress Report of 2013.¹⁰⁷ It no longer formed part of the anti-discrimination package in 2014, and no subsequent Progress Report made reference to it. Since implementation is often a weak spot as identified by international bodies and CSOs alike, this legally binding mechanism was precisely the sort of high-level position office that civil society stakeholders were pleading for.¹⁰⁸ The government interlocutors instead favoured the strengthening of the Public Defender’s Office, which continued to have no power to oblige private entities to follow through on its recommendations.¹⁰⁹

EU Delegation in Georgia – Human Rights Focal Point and the EIDHR

The EU Delegation in Georgia raises LGBTI equality under human rights concerns in the Political Dialogue and the Human Rights Dialogue the EU entertains with Georgia.¹¹⁰ However, in a society lacking independent media and low levels of acceptance for sexual diversity, convincing the population at large of the benefits of economic integration in tandem with greater commitment to civil equality was poorly delivered. Assessing performance, the EU in this sense lacked clarity in its output.¹¹¹ The Delegation’s Focal Point on Human Rights meets regularly with EU member state

¹⁰⁴ Š. Füle, EU Commissioner for Enlargement and European Neighbourhood Policy, in “Patriarch: ‘Church will do everything to make Georgia EU member’”, *Daily News Online*, 4 March 2014.

¹⁰⁵ *Ibid.*

¹⁰⁶ Interview with Gvianishvili, *op. cit.*

¹⁰⁷ European Commission, *Report from the Commission to the European Parliament and the Council, First Progress Report on the Implementation by Georgia of the Action Plan on Visa Liberalisation*, *op. cit.*, p. 23.

¹⁰⁸ Interview with Gvianishvili, *op. cit.*

¹⁰⁹ *Ibid.* The Public Defender’s Office was, up until April 2016, even void of jurisdiction to summon private entities to provide documents as part of their investigations into possible breaches of anti-discrimination measures.

¹¹⁰ European External Action Service, European Union Delegation in Georgia, “Sector Policy Support Programme, Annex 1: Action Fiche for Georgia AAP 2011”, p. 3; and interview with EEAS official 6, *op. cit.*

¹¹¹ Blavoukos and Bourantonis, *Struggling with Performance*, *op. cit.*, p. 10.

embassy officials to coordinate reporting, especially in preparation for the Human Rights Dialogues.

The Delegation has a current call for proposals that aims for support towards “most vulnerable groups”, with LGBTI being included in the foreseen target categories.¹¹² Capacity building within the EU Delegation with training and seminars on these issues, with constructive interaction and learning experiences from other Delegations were said to form a welcome and useful component of ‘intra-EU’ capacity-building to deal better with LGBTI issues.¹¹³ Such measures are included in the 2013 Guidelines. Indeed, an EEAS official emphasised how some EU member states advance this dossier, notably the Netherlands and Sweden, going beyond the provisions of the Guidelines.¹¹⁴ Sweden has placed significant interest in the establishment of a specific Hate Crimes Unit within the Georgian National Police force.¹¹⁵

In relation to the EU’s efforts in Georgia, the EU’s main achievement over the past number of years in the field of LGBTI human rights has been to work with the national authorities to gradually construct a sound foundation that establishes a satisfactory human rights architecture inclusive of LGBTI persons’ rights. The EU’s impact can mainly be assessed through its negotiating capital. LGBTI human rights promotion in Georgia is not pigeon-holed and separated from universal human rights but tackled holistically as part of an anti-discrimination discourse. The EU’s approach exudes inclusiveness and retains meaningfulness to the stakeholders as a starting point.

What follows is the second case study, examining Ukraine and its engagement with the EU concerning LGBTI human rights.

Ukraine – “We’re doing it for the EU, not for the people”¹¹⁶

First, an examination of the EU-Ukraine Human Rights Dialogue is provided, followed by a brief analysis of the Ukrainian National Action Plan on Human Rights. Then, a

¹¹² Interview with EEAS official 6, *op. cit.*

¹¹³ *Ibid.*

¹¹⁴ The role of EU member states in the Council of Europe, the OSCE, supporting civil society, and general priorities are included in the Guidelines of 2013. Information gained from interview with EEAS official 6, *op. cit.*

¹¹⁵ ILGA Europe, “Statement on behalf of Federatie van Nederlandse Verenigingen tot Integratie van Homoseksualiteit - COC Nederland, ILGA Worldwide and WISG Georgia”, 31st session of the Human Rights Council – Item 6 – UPR Outcome Georgia, Geneva, 18 March 2016.

¹¹⁶ Political logic attributed to the ruling bloc in Ukraine, by Anonymous, interview on a non-attributable basis with a European External Action Service official, (EEAS official 2), Skype, 27 January 2016.

limited number of areas of most relevance to LGBTI persons is examined. Finally, a brief passage on the EU Delegation's involvement is assessed.

EU-Human Rights Dialogue

Since the establishment of the Association Agreement, the consequent EU-Ukraine Human Rights Dialogue has raised more sensitive matters such as non-discrimination policy that touch on political questions linked to societal acceptance of difference. The 2015 Dialogue, explicitly raised the rights of LGBTI persons.¹¹⁷ The post-Soviet environment was specifically considered as 'shadowing' the human rights space for dialogue in Ukraine.¹¹⁸ One senior EEAS official interviewed also pointed to the asymmetrical commitment the EU encounters in its endeavours to promote the human rights of LGBTI people.¹¹⁹ This limiting factor, referred to as "post-Communist syndromes" plays out in atypical ways *vis-à-vis* LGBTI.¹²⁰

As a "rhetorical vehicle", SOGI affairs are usually connected to Europe by those proposing an "alternative cultural paradigm to the EU",¹²¹ an alternative to a 'decadent', homophile West.¹²² Between 2011 and 2013, there was a flurry of Russian Federation-inspired 'anti-propaganda' bills, a reactionary phenomenon which mushroomed into a regional trend across neighbouring countries, including those proposed in the Verkhovna Rada.¹²³ Alexi Pushkov, Chairman of the Duma's Foreign Affairs Committee, illustrates the contentious dimension of the increasingly geopoliticised role that LGBT politics represents in the region by declaring: "of course, this means the expansion of the so-called gay culture, which has now turned into the official policy of the EU".¹²⁴ In this sense, the EU's action is conditioned by exogenous factors, alimented by geopolitical tensions with the Russian Federation that uses its 'gay card' as a political tool.

¹¹⁷ European External Action Service, "EU-Ukraine hold Human Rights Dialogue", Press, 150725_01, Kyiv, 25 July 2015.

¹¹⁸ Interview with EEAS official 2, *op. cit.*

¹¹⁹ Interview with EEAS official 5, *op. cit.*

¹²⁰ Ayoub, *When States Come Out*, *op. cit.*, p. 205.

¹²¹ *Ibid.*

¹²² *Ibid.*, p. 218.

¹²³ They include Bill No. 1155 of December 2012, Bill No. 0945 of June 2011, and Bill No. 2133. See Gay Alliance Ukraine, "Ukrainian legislative processes towards LGBTI rights", 16 September 2013; and Human Rights Watch, "Submission on Ukraine to the National Human Rights Committee", 20 June 2013.

¹²⁴ Quoted in Ayoub and Paternotte, *op. cit.*, p. 1.

Ukrainian National Action Plan on Human Rights

In late August 2015, the Ukrainian National Strategy for Human Rights was approved by a decree of President Poroshenko. During November, the Action Plan for its Implementation until 2020 was voted through by the Presidential bloc in the Parliament.¹²⁵ The government henceforth committed to develop policies and introduce legislative changes to bring an end to discrimination of LGBTI persons.¹²⁶ The proposals are far-reaching, addressing intersexuality, a relatively neglected aspect of SOGI issues.¹²⁷ The Action Plan has been welcomed by EU officials and its partner NGOs in Ukraine.¹²⁸ It lays down concrete actions to follow in central areas of relevance to LGBTI persons. The Action Plan notably includes the introduction into law of changes to the Criminal Code to include hate speech as aggravated grounds when it comes to sentencing and some form of registered civil partnership for same sex couples by 2017. Moreover, some far-reaching proposals feature within the plan, such as facilitated gender reassignment surgery or the removal of a ban on adoption by transgender people.¹²⁹ However, the unstable political environment and changing political affiliations within the Verkhovna Rada will ultimately decide whether changes will come about in law.¹³⁰ Volodymyr Groysman in the course of 2016 assumed the post of Prime Minister of Ukraine and much of the consensus-building involved in securing support involved vacillations between conservative factions in parliament.

What follows is an examination of relevant areas of where shortcomings have been identified and signalled out for improvement in Ukraine concerning LGBTI citizens. The first to be examined is the freedom of assembly and association, and awareness raising. The second considers access to the labour market, while the third looks at access to health services.

The question of freedom of assembly and association has long dogged those fighting for LGBTI equality in Ukraine. A two-year long project between two NGOs destined to “empower civil society to challenge discrimination against LGBTI persons in Ukraine”¹³¹

¹²⁵ LGBT Human Rights Nash Mir Centre, “The ice is broken”, *LGBT Situation in Ukraine in 2015*, Kyiv 2016, p. 3.

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*, p. 4.

¹²⁹ *Ibid.*

¹³⁰ *Ibid.*

¹³¹ European External Action Service, Delegation to Ukraine, Projects, “Empowering civil society to challenge discrimination against LGBTI persons in Ukraine”.

that used a disbursement of the EIDHR (to the extent of 95% of the project's total),¹³² represents one of the EU's limited projects to support key stakeholders. Support from political authorities for LGBTI marches sees trade-offs between satisfying international obligations on basic civil rights of assembly and caring for political survival and alienating voters who are hostile to demonstrations of sexual diversity. The President himself attempts to reconcile both tendencies: "I regard the March of Equality as a Christian and as a European president. These two things are compatible. I will not participate in it, but I see no reason for someone to interfere, because it is the constitutional right of every Ukrainian citizen."¹³³

The much mediatised anti-discrimination package, added to Article 21 of the existing Soviet-era Labour Code, initially excluded gender identity from grounds of employment discrimination. In relation to performance analysis, the EU, boosting its own 'output', lobbied to have the parliamentary majority unite around the inclusion of SOGI in the pending legislation to alter the Labour Code.¹³⁴ This happened after significant protestations from some international human rights stakeholders. Since the output's implementation involved a clearly identifiable 'behavioural adjustment' on the part of the EU's international engagement, namely expanding the legislative portfolio to bring greater inclusiveness, a visible outcome can be detected, in accordance with Blavoukos and Bourantonis' performance analysis.

However, a concomitant law reform bill emerged proposing a new Ukrainian Labour Code. Bill 1658, the draft new Labour Code is to undergo a second reading in the Verkhovna Rada of Ukraine. Unlike the Code in force, the draft contains no direct prohibition of discrimination on grounds of sexual orientation and gender identity.¹³⁵ An EEAS official in the Kyiv Delegation described the ruling bloc as 'having duped' the EU since parliamentarians were well aware of the legislative agenda, and so far, no member of the Verkhovna Rada has proposed, nor is any likely to, the inclusion of anti-discrimination laws into the new Labour Code.¹³⁶ Furthermore, the same EEAS official emphasised the role of Volodymyr Groysman in "twisting the arms"¹³⁷ of the President's allies to push through the legislative reforms as part of the Association Agreement.

¹³² *Ibid.*

¹³³ P. Poroshenko, quoted in LGBT Human Rights Nash Mir Centre, "The ice is broken", *op. cit.*, p. 5.

¹³⁴ Human Rights Watch, "Submission on Ukraine to the UN Human Rights Committee", *op. cit.*

¹³⁵ *Ibid.*, p. 24.

¹³⁶ Interview with EEAS official 2, *op. cit.*

¹³⁷ *Ibid.*

Next, the issue of access to healthcare shall be examined. The HIV/AIDS epidemic is growing fastest in Eastern Europe, and Ukraine is by far the largest target country in Eastern Europe and Central Asia for the Global Fund.¹³⁸ HIV/AIDS is indeed “the predominant issue” of the EU’s focus according to a European Commission official working on associated topics in the Eastern neighbourhood.¹³⁹ The 2013 Guidelines recall the right to health under their analysis regarding LGBTI human rights. On the issue of HIV/AIDS, the Guidelines raise certain indicators for analysis by EU officials working on fundamental freedoms that encroach on LGBTI human rights. Amongst them figure the existence of regressive legal regimes that complicate access to healthcare, and the provision of unbiased healthcare to LGBTI persons. In Ukraine, the Police Act allows for any person part of a high risk group, so decided by police officers, to be arbitrarily detained for testing.¹⁴⁰

Between 2011-2015, nineteen EU projects totalling €40 million have been earmarked, with €9 million set aside for tackling HIV/AIDS.¹⁴¹ In 2010, there was a specific call for applications for funding in Ukraine by the Commission on HIV/AIDS. The Commission at the last global pledging conference of the Global Fund in December 2013 set aside a total of €370 million for 2014-2016. The role of EU member states cannot be understated in this sector with regard to Ukraine.¹⁴² The Commission is currently providing €29 million for HIV/AIDS prevention and care in Ukraine.¹⁴³ Ukraine is massively donor-dependent since over 70% of treatment provision depends on external funding. Under the European Neighbourhood Instrument, €40 million for 2011-2015 was set aside for HIV/AIDS prevention.¹⁴⁴

Association Agreement and Visa Liberalisation Plan: a victory ‘en trompe l’œil’?

The inclusion of an anti-discrimination clause in the Visa Dialogue repeatedly formed a central tenet of a range of four blocks that required legislative changes by the EU in

¹³⁸ “Ukraine Aims for Better HIV and TB Patient Care”, *The Global Fund*, 24 February 2015. See also, The Global Fund, “Turning the Tide Against HIV and Tuberculosis Global Fund Investment Guidance for Eastern Europe and Central Asia”, Geneva, 2016, p. 16.

¹³⁹ Anonymous, interview on a non-attributable basis with a European Commission official, DG NEAR (Commission official 2), Brussels, 11 March 2016.

¹⁴⁰ Council of Europe, *Discrimination on Grounds of Sexual orientation and Gender Identity in Europe*, 2nd edition, Council of Europe Publishing, 2011, p. 107.

¹⁴¹ *Ibid.*

¹⁴² The Global Fund, Donor Sheet, “Partnership: The European Union, Belgium, Luxembourg and the Global Fund”, p. 1.

¹⁴³ *Ibid.*

¹⁴⁴ Interview with Commission official 2, *op. cit.*

its Action Plan on Visa Liberalisation.¹⁴⁵ The vote on the non-discrimination clause eventually went through on the third vote in one month alone in November 2015.¹⁴⁶ It drew vitriolic criticism from its opponents with one Member of Parliament castigating the provision:

“I have deliberately sinned and voted in favour of an amendment to prevent discrimination of sexual minorities when hiring. (...) So, you can be a sissy when you have both a diplomatic passport and a 5-year multi-entry visa in your pocket, but I support real not declarative European integration for all, not only for the chosen ones.¹⁴⁷

Even within the ranks of the ruling Poroshenko bloc, some parliamentarians were hostile to the importance given to the non-discrimination clause, with one predicting:

“I know what will happen after this amendment – the European Union's requirement will appear as follows: we will not give you the money unless you adopt the law on same-sex marriages. It is unacceptable for society. We are not ready for that either mentally or historically”.¹⁴⁸

In the ENP 2014 Implementation Report, the EU lamented how “the amended anti-discrimination law did not introduce an explicit reference to sexual orientation as prohibited grounds for discrimination”.¹⁴⁹ Generally, however, ILGA Europe positively assesses Ukraine's rapprochement with the EU.¹⁵⁰ The EU Delegation is cautious of not pushing this issue in a confrontational manner. One prominent openly gay Ukrainian journalist interviewed regretted that the High Representative did not remain in Ukraine for the vote pertaining to the package of anti-discrimination legislative changes.¹⁵¹ The High Representative missed an opportunity to provide solace for an already isolated and vulnerable group, thus backsliding on the ‘overt diffusion’ purportedly so

¹⁴⁵ The four blocks are A) Document security, including biometrics, B) Integrated border management, migration management, and asylum, C) Public order and security, D) External relations and fundamental rights. See European Commission, *Report from the Commission to the European Parliament and the Council, Fifth Progress Report on the Implementation by Ukraine of the Action Plan on Visa Liberalisation*, SWD(2015) 104 final, Brussels, 8 May 2015.

¹⁴⁶ ILGA Europe, “Greater protection for LGBTI citizens as Ukraine finally approves anti-discrimination clause”, 12 November 2015. See also the statement of the Nash Mir Centre, Ukraine, “Statement”, 5 November 2015.

¹⁴⁷ V. Aryev, Member of the Verkhovna Rada, Facebook, 5 November 2015, as in LGBT Human Rights Nash Mir Centre, “The ice is broken”, *op. cit.*, p. 7.

¹⁴⁸ LGBT Human Rights Nash Mir Centre, “The ice is broken”, *op. cit.*, p. 9.

¹⁴⁹ European Commission, *Implementation of the European Neighbourhood Policy in Ukraine Progress in 2014 and Recommendations for Actions*, SWD(2015) 74 final, Brussels, 25 March 2015, p. 8.

¹⁵⁰ ILGA Europe, “Dutch vote could set back LGBTI rights in Ukraine”, 29 March 2016.

¹⁵¹ M. Eristavi, interview with Ukrainian journalist and LGBTI campaigner, Skype, 5 March 2016.

well suited to the EU's normative identity.¹⁵² One senior EU diplomat emphasised the need for caution on "inculcating ideas" out of a danger of consequential confrontation, the case of 'pride marches' given as an explicit example.¹⁵³

The EU's normatively 'benign' package rested on conditionality.¹⁵⁴ This is generally the case in instances of asymmetrical 'structural dominance'. The norms 'transference' was one-way. The perceived tough stance on Ukraine is in contrast to some extent with the data gathered from an interview with a Vice-President of the European Parliament's LGBT Inter Group. For Sophie In t'Veld, the Commission was willing to forego the LGBTI criteria under the 4th block of the VLAP, namely fundamental human rights and anti-discrimination measures.¹⁵⁵ Turning to the impact of the law, the anti-discrimination measures are deemed to have been "very small and very decorative"¹⁵⁶ by local LGBTI activists lamenting a continuing absence of an effective law that criminalises violence on grounds of LGBTI phobia.

EU Delegation in Kiev: what room for manoeuvre and leverage for overt norm diffusion against an adverse cultural filter?

The EU has some leverage with the Ukrainian authorities since the latter are pursuing their own path-dependent interests in greater cooperation with the EU.¹⁵⁷ Pressure was maintained to pass an anti-discrimination law, as outlined above. However, there is a vagueness in the objectives of the EU Delegation on human rights, and an ambiguity *vis-à-vis* the SOGI dossier. Although the EU Delegation in Ukraine frequently receives human rights activists, including representatives from LGBTI NGOs, its interlocutors on these issues with the Ukrainian government are on expert or middle management level, and rarely reach Ambassadorial level within the Delegation.¹⁵⁸ One EEAS official in the EU Delegation emphasised the cultural argument that negatively links the EU's own output. The EU Delegation was keen to avoid escalation on the issue of non-discrimination, citing a negative backlash or 'boomerang' effect for LGBTI persons in

¹⁵² Manners, "Normative Power Europe", *op. cit.*, p. 244.

¹⁵³ T. Mayr-Harting, Compact Seminar, "Multilateral diplomacy in practice", College of Europe, Bruges, 4 March 2016.

¹⁵⁴ Zielonka, *op. cit.*, p. 57.

¹⁵⁵ Interview with S. In t'Veld, Member of the European Parliament, ALDE Group, Vice-President of the European Parliament's LGBT Inter Group, via telephone, 23 April 2016.

¹⁵⁶ Hromadske International, "LGBTI Community Under Rising Pressure in Eastern Europe", *op. cit.*

¹⁵⁷ Anonymous, interview on a non-attributable basis with a European External Action Service official (EEAS official 1), *op. cit.*

¹⁵⁸ Interview with EEAS official 2, *op. cit.*

Ukraine themselves. Since LGBTI issues vote winners in Ukraine (transpiring into a lack of domestic support),¹⁵⁹ the EU Delegation wanted to avoid the 'habitual' discourse that the EU is importing a Western agenda on 'gay rights'.

The EU's 'actorness' in Kiev on SOGI issues was described as "low-profile" by an EEAS official working there.¹⁶⁰ Two LGBTI activists interviewed also concurred with this assessment.¹⁶¹ There is a perceived risk from the EU Delegation that overt support for such a contentiously visible show of support for LGBTI equality would, *mutatis mutandis*, be counter-productive. This matches similar trends in Central Asia where a study of the EU's efforts to promote and protect the human rights of LGBTI persons in Kyrgyzstan was tempered by a reluctance of the EU to be "overly strident" on raising this dossier with the central government.¹⁶²

In sum, the EU has had difficulty punching above its weight concerning LGBTI human rights in Ukraine. Recognition is amongst the fundamental elements at the core of the heuristic device of 'actorness', an element that can only be attributed by other actors.¹⁶³ LGBTI human rights activists interviewed, while grateful for the 'ideational' leadership and funding measures, play down the influence exerted by the EU. In the Ukrainian case, a very limited EU presence on the issue of SOGI can be attributed. Through identifiably coercive diplomatic means, namely the "take it or leave it"¹⁶⁴ attitude of the EU, the non-discrimination clause was included, only for it to be at risk now through a draft Labour Code. By the EU officials emphasising 'leverage' throughout the interviews conducted, it would seem reasonable to conclude that the (non-linear) norms diffusion resembles a case of "imposed compliance".¹⁶⁵ The myriad of exogenous challenges, not least the Russian-inspired 'anti-propaganda' draft bills, and divisive political culture impinge on the EU's normative forbearance.

¹⁵⁹ *Ibid.*

¹⁶⁰ Interview with EEAS official 2, *op. cit.*

¹⁶¹ Y. Yoursky, interview with Program Director of Gay Alliance Ukraine, Skype, 28 January 2016, interview with Eristavi, *op. cit.*

¹⁶² Wilkinson, *op. cit.*, p. 68.

¹⁶³ Blavoukos and Bourantonis, *Struggling with Performance*, *op. cit.*, p. 4. See Jupille and Caporaso, *op. cit.*

¹⁶⁴ This expression was specifically used in the interview with EEAS official 1, *op. cit.*

¹⁶⁵ G. Noutcheva, "Fake, Partial and Imposed Compliance: The Limits of the EU's Normative Power in the Western Balkans", *Journal of European Public Policy*, vol. 16, no. 7, 2009, pp. 1056-1084.

Conclusion

This paper examined the extent to which the EU has managed to improve the human rights situation of LGBTI persons in Georgia and Ukraine, two ENP countries. It first introduced the topic by providing a brief introduction with an analytical framework, an approach that combines the EU's normative identity with an analysis of the EU's actual performance. The paper then considered the EU's most searching tool in the field, the 2013 LGBTI Guidelines.

In both Georgia and Ukraine, the framing of LGBTI rights as integral human rights, an approach the EU has fully adopted in its official documents and statements, is playing a catalytic, albeit yet nascent role for its regional partner NGOs that struggle with finding a yet elusive local legitimacy. For example, in both countries, dependency on foreign financing has a sort of 'Pyrrhus' effect. While the EU is keen to deliver an often existential support to needy organisations, the accusation of 'foreign interference' amounts to a potential handicap in demonstrating working independence, and by extension, sits uneasily with "socio-political processes driven by citizens".¹⁶⁶

Returning to the three levels of the analytical framework, the act of financing CSOs often amounts to a high proportion of the EU's output and outcome in both countries. Financing is a prominent indicator of crediting the EU with assistance in matters of human rights defence as the EU endeavours to provide leadership on the issue. Concerning the EU's overall impact, linked to deliverability of the agreed outputs, it is difficult to establish an overall assessment in the case of Georgia and Ukraine. Going through area by area seems to be of greater relevance. The Association Agreements with both ENP countries represent a baseline rather than a ceiling where more work is necessary at implementation level.¹⁶⁷ At the micro-level, it has made some limited inroads on the promotion of the SOGI dossier in both countries. However, it is not the case that the EU at large is maximizing its potential or benefiting from the "full spectrum of its policy toolbox".¹⁶⁸ In Georgia and Ukraine, there are notable discrepancies in when and how LGBTI issues are raised, from the ambitious and systematic application and cohesive approach of the 2013 Guidelines, and conversely the real situation. In essence, the EU's policy articulations in both ENP countries have been conditioned by

¹⁶⁶ R. Wagner and J. Dankova, "The CSO's Shrinking and Closing Space Tendency – How EU Institutions Can Support CSOs Worldwide", Heinrich-Böll-Stiftung European Union, 7 April 2016.

¹⁶⁷ Interview with EEAS official 4, *op. cit.*

¹⁶⁸ S. Keukeleire and T. Delreux, *The Foreign Policy of the European Union*, Basingstoke, Palgrave Macmillan, 2014, 2nd edn., p. 243.

local agendas, oriented to more burning matters of the moment. In this light, Normative Power Europe has known better days.

Worryingly, if as has shown to be the case, the EU provides an 'ideational' pillar to LGBTI activists in the Eastern neighbourhood, this is being undermined due to perceived double standards that lead to a creeping effect that inhibits the EU to push forward its 'Union of values' narrative.¹⁶⁹ Different LGBTI activists interviewed highlighted how the EU is content to 'bandwagon' on the fervour of some of its constituent states vocally dedicated to LGBTI human rights, notably on the issue of financial and technical support for 'pride marches'.¹⁷⁰ However, it was submitted by one Dutch Member of the European Parliament that this is largely dependent on ephemeral changes in Heads of Mission and Ambassadorial priority-setting.¹⁷¹

More broadly, EU diffusion of norms bolstering LGBTI equality are internalised in both countries in a non-linear way and influenced by domestic power dynamics. Although an all-encompassing policy, the ENP nevertheless takes heed of the historical idiosyncrasies, intensity of state relations with the EU and depth of political and human rights dialogue. It is precisely the heterogeneity of the ENP countries that make overarching recommendations difficult to provide in the case of LGBTI human rights promotion. However, providing support to human rights organisations willing to take on the defence of all-inclusive portfolios, including LGBTI, could break down existent social barriers, that label LGBTI groups as fundamentally different from other organisations. Another modest suggestion would be to encourage local authorities to raise the issues with more senior elected officials, since a great deal of behind-the-scenes negotiations on LGBTI matters is taken up with administrator-level bureaucrats. Increasing societal acceptance passes by increased visibility of LGBTI persons and a gradual internationalisation of the norms espoused by anti-discrimination measures.¹⁷²

In the case of Georgia, some concrete improvements have materialised in the field of judicial reform. However, societal attitudes coupled with a ram shackled space for civil society has led to a beleaguered situation for LGBTI human rights activists. An anaemic constellation of societal solidarity means that the EU's own output and outcome, even when there appears to be some international leadership qualities and

¹⁶⁹ Interview with Eristavi, *op. cit.*

¹⁷⁰ Interview with Eristavi, *op. cit.*

¹⁷¹ Data gathered from interview with In t'Veld, *op. cit.*

¹⁷² Ayoub, *When States Come Out*, *op. cit.*, p. 200.

cohesion and continuity in the EU's actions, make it difficult to attribute improvements to the EU's tangible presence.

In the case of Ukraine, while the ENP is, by its own objectives, meant to strengthen institutions, promote the rule of law, and advance human rights standards,¹⁷³ its paltry embrace of "partnership, common interests, and joint ownership"¹⁷⁴ have led to a situation where the extent of the EU's engagement with LGBTI human rights remains on a "stratospheric" level, inhibited by a 'sub-prioritisation' of LGBTI issues, and a cautious declaratory diplomacy from Brussels and the EU Delegation in Kiev, especially in the current stand-off with the Russian Federation.¹⁷⁵ Ukraine does appear to be the greater laggard of the two countries.¹⁷⁶ The case of the Visa Dialogue and the anti-discrimination clause being inscribed into a potentially redundant Labour Code would suggest a victory *en trompe l'oeil* in an area the EU placed a great deal of emphasis.

While the 2013 Guidelines are well ensconced declaratorily into official EU positions, an integrative and consistent approach with a take up and operationalisation of recommended actions has not followed with the same vigour. In brief, the output of the EU is stymied, *inter alia*, by its select NGO contacts in Georgia and Ukraine whose commitment to LGBTI fits well with the EU's own value system but is antagonistic to the majority of local politico-social actors.¹⁷⁷ Returning to the second Hellenic myth, it would be presumptuous to assume that the EU's actions on the whole are futile in the same way the bath would never be refilled. If for Manners, Normative Power Europe is fundamentally "a normative claim with a normative aim",¹⁷⁸ it is also a prerequisite that for the effective operationalisation of EU human rights promotion anywhere, but especially in the EU's neighbourhood of states, on issues pertaining to LGBTI, it takes (at least) two to tango.

¹⁷³ *Ibid.*

¹⁷⁴ *Ibid.*

¹⁷⁵ Interview with EEAS official 2.

¹⁷⁶ Interview with Commission official 2, *op. cit.*

¹⁷⁷ Keukeleire, "Lessons for the Practice and Analysis of EU Diplomacy from an 'Outside-In' Perspective", *op. cit.*, p. 235.

¹⁷⁸ Manners, "The European Union as a Normative Power", *op. cit.*, p. 170.

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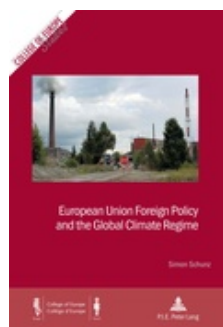
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