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13 Leader or laggard? Diversity and minority rights in a union under strain

Abstract: In the 1990s, the European Union played a leadership role on minority rights. In particular, it used the Copenhagen criteria to instruct candidate states on respecting both national and sexual minority (LGBTI) rights and recognising those minorities as a fundamental component of the EU's identity. But is the Union still a trailblazer three decades later? Although it continues to insist that third countries respect minority rights, within its own borders their commitment looks uncertain. The EU has taken few steps to advance the protection of minority rights since the 'big bang' enlargement of 2004. Moreover, the EU arguably lacks the executive powers necessary to ensure its own member states comply with the same values that it successfully imposes on candidate states. The so-called Copenhagen dilemma makes it difficult to respond effectively when member states backslide on minority rights. This chapter argues that, because of the lack of EU-level progress and national-level rights retrenchment, today's Union no longer sets the pace on minority rights. Yet, important variations exist across the main institutions. Whether the EU is a leader or a laggard on minority rights thus depends on the concrete actors that one looks at.

The chapter substantiates this argument by looking at how EU bodies responded to two issues: the Minority SafePack initiative on national minority rights and member states' adoption of anti-LGBTI policies. The European Parliament has argued that the EU must do more to protect both types of minorities. The Commission and the Council, in turn, dismissed calls for action. This remains true for national minority rights. When it comes to LGBTI rights, however, the chapter identifies lagged leadership: while the European Commission and the Council refused to intervene when Lithuania passed an anti-gay propaganda law, they have taken decisive action against similar, more recent developments in Hungary and Poland.

Keywords: National minority rights; LGBTI rights; Backsliding; European Citizens' Initiative; European Union.

Introduction

At the end of the 1990s, the European Union (EU) assumed a leadership role with respect to minority rights. National leaders assembled in the Danish capital in 1993 to formalise the requirements that candidate countries had to meet to be allowed

into an elite club of EU member states. The resultant Copenhagen criteria concerned more than economic standards and technical harmonisation; the European Council (1993) broke new ground by insisting that applicant states guaranteed “human rights and respect for and protection of minorities.” The primary focus understandably lay with national minorities, given the history of ethnic strife in Central and Eastern Europe. The European Parliament, however, broadened the criteria’s scope. It vowed to block the accession “of any country that, through its legislation or policies, violates the human rights of lesbians and gay men” (European Parliament 1998). What is more, in 1999 the EU drafted the Charter of Fundamental Rights prohibiting discrimination based on sexual orientation and membership of a national minority. The Charter also urged the Union to respect linguistic diversity, an issue of great concern for many national minorities. The EU thus sent out a clear message at the turn of the millennium: respect for both national and sexual minority rights is a defining feature of EU membership.

However, thirty years after that momentous meeting in Copenhagen, the EU’s commitment to minority rights has come under strain. On the one hand, the EU has made little progress with the protection of minority rights. For national and sexual minorities, the current legal situation at the supranational level looks remarkably like it did before the ‘big bang’ enlargement of 2004. On the other hand, there is evidence of national-level backsliding on minority rights. The EU has struggled to ensure compliance with the very values that it successfully promoted during the accession process. At a General Affairs Council in 2013, Viviane Reding, then the European Commissioner tasked with fundamental rights, spoke frankly of a “Copenhagen dilemma”: whereas the EU uses carrots and sticks to ensure that candidate countries meet the Copenhagen criteria, it lacks an effective mechanism to ensure that actual member states do the same (European Commission 2013a). This dilemma meant that some member states could target minorities, for example, by outlawing gay ‘propaganda’ or by penalising the public use of minority languages, without fear of being sanctioned by Brussels. When taken together, the lack of EU-level progress and rights retrenchment at the national level make the Union look more like a laggard than a leader on minority rights.

This chapter substantiates this assessment but nuances it at the same time. It argues that the EU can be characterised as both a leader *and* a laggard on minority rights, but that the right ascription depends on the institutional actors that one looks at.¹ The European Parliament qualifies as a leader. It has consistently called

¹ The chapter focuses on the EU’s executive and legislative bodies. To be sure, the European Court of Justice has also impacted the development of sexual minority rights. Its role can even be described as judicial activism (De Waele & Van der Vleuten 2011). However, because the Court can only interpret and clarify existing legal obligations, such activism is distinct from political or policy

for further protections at the supranational level and has reminded member states of their obligation to respect minority rights. The Council, meanwhile, has frustrated progress on the topic. It opposes collective action on minority rights because it sees the issue primarily as a national competence. Lastly, the Commission's approach to minority rights has been reactive. Wary of overstepping its bounds, the Commission has often shown deference to member states.

The chapter uses concrete examples to support this argument. With respect to national minority rights, I focus on the EU's response to the Minority SafePack. This 2013 European Citizens' Initiative put forward recommendations for legal changes that would strengthen the position of national minorities. With respect to sexual minority or lesbian, gay, bisexual, transgender, and intersex (LGBTI) rights, I analyse the EU's evolving response to anti-LGBTI legislation by contrasting Lithuania's anti-gay propaganda law with similar, more recent events in Hungary and Poland. Because they concern some of the most significant developments in the EU's internal policy on national and sexual minority rights since the 'big bang' enlargement of 2004, I use these examples to illustrate the attitudes of the different EU institutions.

The chapter proceeds as follows. The first section briefly compares the ways in which the EU administers national and sexual minority rights among its member states and in candidate countries. I suggest that two shortcomings beset the EU's approach towards its own members: double standards and limited powers of enforcement. This creates a potential for backsliding on human rights. The second section uses the example of the Minority SafePack initiative to exemplify the first shortcoming. Although the EU requires candidate countries to protect and respect the rights of national minorities, only the European Parliament is willing to adopt EU legislation to ensure that member states do the same. The second shortcoming is evident in the section on sexual minority rights. A perceived lack of competence prevented the Commission from intervening whenever a member state targeted such rights. The section also observes, however, that a surge of anti-LGBTI laws has motivated the Commission and the Council to act on the claim that LGBTI rights are EU values. This development, which I term lagged leadership, results in an increasing divergence between national and sexual minority rights; whereas the latter has received renewed attention, all EU institutions other than the European Parliament continue to give short shrift to the former. The conclusion summarises the findings.

leadership (Cini & Šuplata 2017). The chapter therefore does not discuss the judiciary. When it comes to national minority rights, the Court's impact has been negligible due to a lack of relevant treaty-based competences and corresponding hard law.

From the Copenhagen criteria to the Copenhagen dilemma: The potential for backsliding

The Copenhagen criteria ensured that the rights of national and sexual minorities played an important role in the accession process. It resulted in a carrot-and-stick approach, which motivated candidate countries to recognise new rights and amend or annul discriminatory policies. Indeed, scholars attributed a slew of legislative improvements to EU conditionality (e.g. Kelley 2004; Kristofferson et al. 2016). Prominent examples include the liberalisation of citizenship and language laws in Estonia and Latvia (Sasse 2008) and Romania's decriminalisation of homosexuality (Buzogány 2012).

To be sure, the EU's leverage was imperfect. Conditionality mostly failed to override domestic considerations in anti-liberal regimes, such as Vladimír Mečiar's Slovakia (Kelley 2004; Schimmelfennig 2005). The Commission's monitoring also suffered from "ad hocism" and inconsistencies, as the conditions that candidate countries had to meet lacked both clarity and foundation in EU law (Hughes & Sasse 2003: 16; Rechel 2008). More generally, minority rights were not a key priority for the EU. Latvia, for instance, was allowed to accede without having addressed all of the EU's concerns related to the Russian minority (Galbreath & Muiznieks 2009). Slovakia became a member state before it had even prohibited discrimination on grounds of sexual orientation. Notwithstanding these shortcomings, there is a scholarly consensus that the Copenhagen criteria helped to liberalise minority rights.

The EU's ability to enforce minority rights standards in candidate countries, however imperfect, far exceeds the organisation's influence in the same realm, *vis-à-vis* its own members. After accession, the Copenhagen criteria give way to the Copenhagen dilemma. The EU may expect member states to respect its fundamental values, which include LGBTI and national minority rights, but it finds itself hamstrung in the face of noncompliance. There is even a danger that newcomers will backslide. As one scholar warned, "it is possible that minority issues will again disappear from the policy agenda or, worse, that the absence of conditionality gives rise to a political backlash" (Rechel 2008: 188). A post-enlargement EU loses most of its ability to dissuade politicians from targeting minority rights.

Two interrelated factors put a strain on the EU's self-image as a community of values: ambiguity and unenforceability. Importantly, these preconditions for backlash apply to *all* of the EU's fundamental values. Indeed, some scholars have argued that the EU is experiencing "democratic backsliding" and a "rule of law crisis" (e.g. Emmons & Pavone 2021; Kelemen & Blauburger 2017; also see Bogdanowicz, this volume). This chapter shows that values other than democracy and the rule

of law may experience similar strains. Indeed, resistance to minority rights contributes to what Scheppele et al. (2021: 10) call the Union's broader "values crisis."

The first stressor concerns the ambiguity in which the EU's fundamental values are shrouded (Mos 2020a). Throughout the accession process, the Commission instructs candidate countries on what compliance with these values entails. This guidance is seldom based on EU law. For example, it was not at all obvious that hosting LGBTI pride marches would become a "litmus test of Europeaness" during the accession process (Slootmaeckers 2017: 518). The demand for candidate countries to allow such marches to be organised is not rooted in the EU's own body of law and legal obligations, the so-called *acquis*. Similarly, because internal standards with respect to national minority rights were altogether absent, the EU borrowed its enlargement requirements from the Council of Europe and the OSCE High Commissioner on National Minorities (Sasse 2008). This arbitrary approach enabled the EU to tell candidate states what its values meant. It did not apply, however, to actual member states.

Indeed, scholars often speak of double standards when they contrast the formulation of external requirements with the absence of internal benchmarks (Kristofferson et al. 2016: 61; Rechel 2008). The expectation appears to be that member states are already in good standing and therefore do not need to be told explicitly what 'respect for minority rights' entails; compliance is assumed. As Müller (2013: 139) summarises it, "once inside the club, or so the rather complacent reasoning seemed to go, new democracies would count their blessings and never look back".

The presupposition that member states will behave responsibly has two important consequences. On the one hand, it takes away the need for further action. Member states already respect minority rights, so new policies would only be redundant. On the other hand, policymakers see no need to spell out precisely what the EU's fundamental values entail. They are supposedly so widely shared that their meaning is intuitive. The result is that these values, especially as they pertain to national and sexual minority rights, remain opaque. This is not just a semantic observation: because member states, unlike candidate countries, are not held to any explicit standards, they may feel encouraged to dismantle progressive policies or implement discriminatory laws (Mikalayeva et al. 2012; O'Dwyer 2012). After all, if legal standards are not written down, the letter of the law cannot be broken. As will become clear, these consequences are both evident with respect to national and sexual minority rights: there is little appetite for new supranational initiatives as well as evidence of national-level backsliding.

It is not just ambiguity that facilitates backsliding. The second relevant factor concerns the EU's limited toolkit with which it can respond to such backsliding. The Union can rely on a sophisticated system of infringement proceedings to challenge noncompliance with EU directives. For example, the Commission can invoke the

Employment Equality Directive when states discriminate against homosexuals in employment matters (Mos 2014). This directive is, however, an exception; few supranational laws speak directly to national and sexual minority rights. Such rights fall instead under the rubric of fundamental values. Member states must uphold them, but, as Hungary and Poland's persistent disrespect for a plethora of such values shows, the EU struggles to enforce this obligation. The most forceful enforcement mechanism, in theory, the famously "nuclear option" of Article 7 TEU that empowers the Council to respond to serious and persistent breaches of EU values by suspending the violating state's privileges of EU membership, has proven unworkable in practice (Priebus 2022). Scholars have suggested that there are nonetheless more circuitous ways of enforcing fundamental values, and EU institutions have taken up some of these suggestions (e.g. Blauburger & Kelemen 2017; Blauburger & Van Hüllen 2021; Müller 2013; Scheppele et al. 2020). This is not the place to describe these developments in detail. What matters here is that minority rights play at best an auxiliary role in these debates and improvised solutions. The names of instruments such as the Rule of Law Framework and the EU Justice Scorecard indicate that, among all fundamental values, the EU is primarily concerned with the rule of law. Analogous initiatives to enforce minority rights are absent.

EU institutions thus long assumed that member states do not violate fundamental values. Where candidate countries required instructions, the meaning of these values was supposedly readily apparent to member states. The latter supposedly lead by example. This makes further supranational policies to advance these core principles appear redundant. Similarly, where the EU relied on external incentives to bring applicants up to speed, the belief that backsliding would not happen made parallel enforcement mechanisms irrelevant internally. Because they are ambiguous and practically unenforceable, all EU values may come under strain. The remainder of the chapter explores how this has affected the Union's leadership on minority rights. As the next two sections show, the EU combines a lack of supranational progress on national and sexual minority rights with evidence of national-level backsliding. This blanket assessment, however, obscures important differences in orientation across the European Commission, Council, and Parliament.

The neglect of national minority rights

Double standards are conspicuous in the EU's approach to national minority rights. Candidate countries are asked to meet criteria that various member states fall short of. For example, take the Framework Convention for the Protection of Na-

tional Minorities. Although this treaty is prominently featured in the accession process, four member states – Belgium, France, Greece, and Luxembourg – have neither signed nor ratified it. “Do as I say, not as I do” best summarises the EU’s approach (Johns 2003). This example also illustrates how the EU relied on external standards to enforce minority rights norms: the Framework Convention is a treaty of the Council of Europe. The EU had no standards of its own to impose.

How has the status of national minority rights under EU law changed after enlargement? On the one hand, the Treaty of Lisbon codified “the rights of persons belonging to minorities” as a foundational value of European integration (European Union 2007). It also gave the Charter of Fundamental Rights, including its prohibition on discrimination against national minorities, legal force. These changes, on the other hand, have left no identifiable imprint on supranational policymaking. The fate of the Minority SafePack, a proposal for a supranational policy on national minorities, helps to explain why.

The Minority SafePack Initiative

The Lisbon Treaty’s relevance lies not just in its explicit references to national minorities. It also contains articles highlighting the importance of representative democracy, which kickstarted the creation of a novel instrument: the European Citizens’ Initiative (ECI) (Szeligowska & Mincheva 2012). Since 2011, this instrument has enabled ordinary citizens to submit a legislative proposal for EU action. The Commission is obliged to give serious consideration to all proposals that meet the procedural and formal requirements. Minority representatives have therefore used this instrument to underscore the importance of, and widespread support for, supranational action to protect national minorities.

The initiative ‘Minority SafePack: One Million Signatures for Diversity in Europe’ marks the most prominent and sophisticated attempt.² The Federal Union of European Nationalities (FUEN), an umbrella organisation of autochthonous national minorities spanning across Europe, first registered this initiative in 2013. The ECI calls upon the EU “to adopt a set of legal acts to improve the protection of persons belonging to national and linguistic minorities and strengthen cultural and linguistic diversity in the Union” (European Union 2017). The organisers argue

² Another relevant ECI is the Initiative for the Equality of the Regions and Sustainability of the Regional Cultures (Toggenburg 2018). At the time of writing, verification of the signatures was still ongoing.

that their mission builds on treaty references to fundamental values and the respect for cultural and linguistic diversity, and that it even resonates with the Union's official motto 'United in Diversity' (European Union 2017).³ They note that the EU often fails to live up to these lofty proclamations. Indeed, the ECI invokes the Copenhagen dilemma to underscore the proposal's urgency:

Because of these [Copenhagen] criteria, many new Member States in central Europe have enacted advanced models to protect their national minorities. [...] Once a state has entered the Union, however, this lever no longer works, and we have seen some worrying developments in recent years. (European Union 2017)

The ECI thus urges the Commission to step up its support for national minorities. Thematically, its recommendations run the gamut of minority protection: language, education, culture, audio-visual media, regional policy, participation, and non-discrimination. The proposed instruments range from non-binding recommendations to binding regulations and directives (see Crepaz 2018; Toggenburg 2018). All in all, the Minority SafePack ambitiously sought to carve out space for national minority rights within the EU's treaties.

This effort came to naught. The ECI's lack of success is instructive for understanding why the Union has thus far not translated its treaty-based commitment to minority rights into concrete action. In fact, the Commission has steadfastly rejected calls for a supranational policy on national minorities. In 2013, it refused to register the Minority SafePack, which prevented the organisers from initiating the collection of signatures. The Commission all but acknowledged the unenforceability of the Union's fundamental values stating: "While the respect for rights of persons belonging to minorities is one of the values of the Union referred to in Article 2 TEU, [EU treaties do not] provide for a legal base as regards the adoption of legal acts aiming at promoting the rights of persons belonging to minorities". The Minority SafePack thus fell "manifestly outside the framework of the Commission's powers" (European Commission 2013b).

The organisers successfully appealed this decision on procedural grounds. The Commission subsequently registered the initiative and, in January 2020, received 1,123,422 valid signatures. Although the ECI cleared all procedural hurdles, it was not able to convince the Commission of the proposal's merits. Commissioner Věra Jourová avowed that "respect for the rights of persons belonging to a minority is one of the core Union values, and the Commission is committed to promoting

³ The ECI carefully avoids any mention of group rights. These would be incompatible with the EU's focus on individual rights, as evidenced by Article 2 TEU's reference to the rights of persons belonging to minorities.

this agenda,” but did not translate this commitment into action (European Commission 2021c). The Commission repeated its earlier claim that “the EU has no general legislative competence specifically on the protection of national minorities” (European Commission 2021a). The primary responsibility for minority rights rested instead with the member states. While the Commission may provide support through programs, such as Erasmus+ and the European Regional Development Fund, it saw neither a legal basis nor a need for “further legislative action” on any of the ECI’s proposals (European Commission 2021a). This rejection of the Minority SafePack demonstrates the Commission’s reluctance to stretch its competences in this field. Consequently, FUEN (2021) somberly concluded that the Commission had “turned its back on national minorities.”

The Commission’s reticence makes sense when one realises that it cannot rule by decree. The Commission may propose legal actions, but it is ultimately the Council, usually in conjunction with the Parliament, that decides. The preferences of these other bodies therefore drive the decision to initiate legislation; the Commission will not put forward proposals that lack political support (Kreppel & Oztas 2017). Such support for minority rights is certainly absent in the Council. Some member states, such as France and Greece, refuse to recognise some minorities altogether (Dimitras 2004). Other national governments, due to the tension between minority-majority relations in their societies, jealously guard their competences in many of the Minority SafePack’s issues, such as language equality (Arzoz 2020; Mos 2020b).

In fact, some member states were so opposed to an EU policy on national minorities that they took legal action in efforts to frustrate the ECI. When the initiative’s organisers challenged the refusal of registration in Court, Romania and Slovakia, both home to a sizeable Hungarian minority, intervened in support of the Commission.⁴ Subsequently, the Romanian government sought to annul the registration of the ECI.⁵ It not only held that most of the Minority SafePack’s aims fell within the “exclusive competence of the Member States,” but also insisted that some proposals were discriminatory and therefore violated, rather than embodied, the EU’s fundamental values (*Romania v European Commission* 2019). These legal efforts to block the Minority SafePack proved fruitless.⁶ Still, they indicate how resistant some member states are to the Europeanisation of national mi-

4 The Hungarian government, on the other hand, intervened in support of the Minority SafePack. See Case T-646/13 (2017), *Bürgerausschuss für die Bürgerinitiative Minority SafePack – One Million Signatures for Diversity in Europe v European Commission*.

5 Slovakia initially supported the Romanian endeavor, but later withdrew its intervention.

6 Romania also unsuccessfully appealed the 2019 ruling. See Case C-899/19 P (2022), *Romania v European Commission*.

minority rights. If a non-binding citizens' initiative already managed to ruffle feathers, the opposition is sure to be particularly intense should the Council ever scrutinise legislative proposals to advance national minority rights. This has not yet happened; the Commission, aware of the Council's misgivings, has not submitted any proposals on this topic.

This is not to say that minority activists lack allies within the EU institutions. For one, Hungary advocates for an EU policy on minority rights across multiple venues, including within the European Parliament (Waterbury 2017). Representatives of Fidesz, the party of Prime Minister Viktor Orbán, are highly active within the parliamentary Intergroup on Traditional Minorities, National Communities, and Languages. Their belief that the EU should do more to protect national minorities is widely shared. In fact, the European Parliament explicitly endorsed the Minority SafePack. In December 2020, it adopted a resolution in which it "expresses its support" for the ECI and "calls on the Commission to act on it and to propose legal acts [...] in accordance with the principles of subsidiarity and proportionality" (European Parliament 2020). MEPs, in other words, believe that there is room within the Union's competencies to enshrine national minority rights in supranational legislation.

The endorsement of the Minority SafePack is emblematic of the European Parliament's outsized willingness, relative to the other EU institutions, to protect national minorities. Already in 2005, MEPs, observing that minority rights are a core component of the Copenhagen criteria but that "there is no standard for minority rights in Community policy," adopted a resolution in which they demanded an end to the Union's double standard (European Parliament 2005). In 2018, they reiterated their belief that "the EU has a responsibility to protect and promote the rights of minorities" (European Parliament 2018).

When MEPs voice concerns on minority rights in the context of enlargement and foreign policy, the Commission typically vows to take action. Whenever they address the EU's internal dimension of minority rights, however, they are rebuffed. A sense of powerlessness pervades these replies. Thus, when MEPs provided evidence of backsliding on the language rights of minorities in Slovakia, Commissioner Leonard Orban drily noted that "the Member States remain the decision-makers with respect to their internal language policy" (European Commission 2009). He stated this despite his colleagues' intervention in similar developments in candidate states. The Copenhagen dilemma, in short, weakens the EU's hold over national minority rights after enlargement.

The example of the Minority SafePack illuminates three dimensions to the position of national minority rights within the EU. First, the Europeanisation of this issue faces strong resistance. There is no appetite for a supranational policy that would hold member states to the same standards as candidate countries. Second,

the absence of hard law has a crippling effect on the Commission's willingness to counteract backsliding. Although the Copenhagen dilemma besets all fundamental values, the politically sensitive nature of minority rights makes the dilemma especially hard to solve. Third, this general assessment obscures important inter-institutional differences. Whereas resistance in some member states feeds into the Commission's reluctance to act, the European Parliament has repeatedly argued that the EU can and ought to do more to protect national minorities. The latter's exhortations, however, have fallen on deaf ears. As a result, the problems of double standards and unenforceability continue to plague the Union's core principle of respect for national minorities.

Sexual minority rights: A case of lagged leadership

The Commission, wary of overstepping its bounds, refuses to initiate supranational legislation on national minority rights. It does not have to tread as carefully on the issue of sexual minority rights, because the Treaty of Amsterdam established an EU competence to tackle discrimination on the basis of sex and sexual orientation (Mos 2014).⁷ This competence already led to hard law in 2000, with the adoption of the Employment Equality Directive. Since 2008, the Commission has pushed for a follow-up directive that would prohibit discrimination beyond the employment realm, including access to goods and services, healthcare, and education. It has even published strategic documents – the 'List of Actions to Advance LGBTI Equality' in 2015 and the 'LGBTIQ Equality Strategy' in 2020⁸ – that outline how the Commission integrates sexual minority rights into much of its work. In the 2020 State of the Union, Ursula Von der Leyen underscored her Commission's unwavering support for these rights:

I will not rest when it comes to building a Union of equality: A Union where you can be who you are and love who you want – without fear of recrimination or discrimination. Because being yourself is not your ideology. It's your identity. (European Commission 2020a)

⁷ The treaties do not explicitly refer to gender, but Court rulings have clarified that sex-based discrimination encompasses gender identity (Stychin 1997).

⁸ The changing acronyms also reveal how the Commission's thinking about sexual diversity has evolved. Prior to 2015, EU documents spoke mostly of lesbian, gay, bisexual, and transgender people (LGBT). The Commission added intersex people in 2015 (LGBTI) and queer people in 2020 (LGBTIQ).

Evidently, the charge of double standards does not seem to apply here; candidate and member states alike must respect sexual minority rights.

At the same time, the Commission's ability to promote and protect LGBTI rights is seriously constrained. For one, its anti-discrimination competence is limited. The Commission recognises this. It admits that in some areas, such as family law, it can do little more than encourage national governments to “complement” its actions with measures “in areas of Member State competence” (European Commission 2020b). Even where it has competence, its initiatives may fall through. The proposed follow-up to the Employment Equality Directive, for instance, has lain dormant for well over a decade, in part because some member states cite “cultural incompatibilities” with respect to sexual orientation (Thiel 2015: 76). Without such a law, the Commission can only address discrimination unrelated to employment by invoking the EU's fundamental values. At this point, however, the Copenhagen dilemma rears its head. The mantra that LGBTI rights are a constitutive part of the EU's identity then proves to be merely an unenforceable illusion.

This unenforceability becomes apparent when looking at the EU institutions' efforts to curb human rights infringements. More so than with national minority rights, some countries began to contest LGBTI rights after accession. In what follows, I explore how the different EU institutions responded to such backsliding. I describe the Commission and Council's behaviour as *lagged leadership*: they initially did little to counteract anti-LGBTI developments but have more recently embraced an interventionist stance.

The EU's response to backsliding on sexual minority rights

For many candidate countries, where religious beliefs and traditional views on sexuality were dominant (Gerhards 2010; Mole 2016), the imposition of LGBTI rights was a hard price to pay to secure membership. This lay the foundation for backsliding. As O'Dwyer (2018: 900) notes, “the potential for backlash builds with the EU's endorsement of LGBT norms, but it is activated when EU leverage wanes”. The backlash soon materialised. Already a year after its accession, the nationally conservative government in Poland, among other measures, abolished a government unit tasked with an anti-discrimination policy that had been created in response to the accession requirements; banned educational material that supposedly promoted homosexuality; and introduced an internet filter to prevent pupils from accessing websites about homosexuality in schools (Pankowski 2010). Anti-

gay politics also played out at the subnational level, as municipal governments in Poland and also in Latvia banned pride marches.

Until recently, the response to these episodes of backlash was consistent across the main EU institutions. The European Parliament denounced the restrictions on LGBTI rights as violations of the EU's fundamental values. In various resolutions, it not only expressed its concerns over a surge in homophobia in the respective member states but also accused the Commission of standing idly by. The Commission replied that its hands were tied. In 2006, for example, Commissioner Franco Frattini stated that he was "quite sure that the Commission does not currently have the necessary powers to take action" against most of the rights violations that MEPs informed him about (European Parliament 2006). The Commission consequently took no legal measures to redress anti-LGBTI developments in Latvia, Poland, and other member states. The Council, meanwhile, stayed on the sidelines altogether.

Yet, these institutional dynamics have begun to shift in recent years. Particularly instructive is the contrast between the EU institutions' response to a Lithuanian law that prohibited the promotion of homosexuality and similar, but more recent initiatives in Hungary and Poland. The former concerned changes to a law shielding minors from harmful public information. In 2009, the Lithuanian parliament added new categories that it believed detrimentally affected the mental and moral well-being of persons under the age of 18. This included information:

which expresses contempt for family values, encourages the concept of entry into a marriage and creation of a family other than stipulated in the Constitution of the Republic of Lithuania and the Civil Code of the Republic of Lithuania. (Republic of Lithuania 2009)

Lithuanian lawmakers, simply stated, classified same-sex families and marriages as damaging to minors (see Mos 2022). They also prohibited the distribution of information "which promotes sexual relations" (Republic of Lithuania 2009). Because the amendment originally referred to homosexual, bisexual or polygamous relationships, the lawmakers' main target was clear.

Critics decried the initiative as a "Russian-style anti-gay propaganda law" (LGL 2014). The bill attracted the ire of the European Parliament, which adopted two resolutions condemning Lithuania for running afoul of EU values (European Parliament 2009b, 2011). MEPs also urged the Commission and Council to act. As one representative put it, "We must take action to stop this. The values and laws of the EU cannot be treated like an *à la carte* menu" (European Parliament 2011).

The Council did not heed this appeal. The bill provoked some pushback from individual member states, including the Swedish Presidency of the EU, but not a

collective response (European Parliament 2009b). Indeed, MEPs were told that the Council “has not discussed the matter” (European Parliament 2009a).

The Commission also did not intervene. It argued that “it is for Member States [...] to ensure that fundamental rights are effectively respected and protected,” and that its own competence “is limited to cases when the implementation of European Union law is at stake” (European Parliament 2013). Two human rights organisations, the Lithuanian Gay League and ILGA-Europe, complained that Lithuania had in fact violated hard law, namely the Audiovisual Media Services Directive. The Commission disagreed. Because the Lithuanian law did not affect “broadcasts from other Member States” in Lithuania – that is, there was no cross-border dimension to the LGBTI rights violations – there were “no grounds to establish an infringement” of the directive (European Commission 2016). Lithuania could keep the anti-LGBTI law on its books.

Yet, when LGBTI rights came under fire in Hungary and Poland less than a decade later, the Commission shifted gears. In June 2021, the Hungarian National Assembly approved a series of amendments that restricted communication about sexual minorities, supposedly to protect children. Under the revised Child Protection Act, for instance, it is forbidden “to make accessible” to persons under the age of 18 information that “propagates or portrays divergence from self-identity corresponding to sex at birth, sex change or homosexuality” (Venice Commission 2021). Other amendments contain similar language. Critics described these changes like they had condemned the Lithuanian bill: by labelling it as “Russian-style” legislation (ILGA-Europe 2021). Indeed, although the Hungarian amendments target gender identity in addition to homosexuality, the similarities between the two countries’ bills are striking.

Similar legislation looms in Poland. Days after Hungary’s restriction of LGBTI rights, the Deputy Minister of Justice announced that his ministry was preparing a bill outlawing “LGBT propaganda activities” (Rębisz 2021). In the meantime, Polish officials had found other ways of shielding children from the alleged spectre of sexual diversity by, for instance, banning adoption by same-sex couples. The most prominent initiative concerned the creation of so-called ‘LGBT-free zones’. By February 2020, almost one hundred municipalities and five voivodeships had passed variously phrased resolutions extolling the virtues of the traditional family or, more explicitly, denouncing “homopropaganda” or “sexual depravity and indoctrination” (Ciobanu 2020).⁹ The Lithuanian, Hungarian and Polish initiatives thus have comparable aims.

⁹ The former concerned the adoption of a Local Government Charter of the Rights of the Family. This initiative of Ordo Iuris, an ultra-conservative think tank with close ties to the ruling Law and

Whereas only the European Parliament reacted strongly to Lithuania's anti-LGBTI law, all EU institutions denounced the developments in Hungary and Poland. The European Parliament (2021a), observing a "clear breach of the EU's values", called upon the Commission and, where necessary, member states to "immediately take legal action" against Hungary. MEPs countered Poland's LGBT-free zones by declaring the EU an "LGBTIQ freedom zone" (European Parliament 2021b). These resolutions only reinforced the Parliament's supportive record on LGBTI rights.

More remarkable were the reactions of the other two institutions. The Commission's response, in particular, suggests a transformation from indecision to lagged leadership. Not only did Von der Leyen call the Hungarian law "a shame," she also saw it as discriminatory "against people on the basis of their sexual orientation" and as a clear violation of "all the values, the fundamental values, of the European Union" (Eder & Von der Burchard 2021). The Commission President similarly held that "LGBTIQ-free zones are humanity free zones" which have "no place in our Union" (European Commission 2020a). The decision of the Commission's highest official to call out member states' violations of LGBTI rights marked a sea change in her organisation's management of EU values.

Moreover, the Commission did not just use words to express its indignation. In July 2021, it launched infringement proceedings against both Hungary and Poland. Concerning the latter, the Commission argued that the Polish government had, in violation of the principle of sincere cooperation, frustrated the Commission's inquiry into the compatibility of the LGBT-free zones with EU law.¹⁰ Concerning Hungary, the Commission cited a list of legal breaches. These included the Audiovisual Media Services, the same law that the Commission had deemed irrelevant in the Lithuanian case (European Commission 2021b). The charges extended to other hard law, several provisions of the Charter of Fundamental Rights, and, groundbreakingly, "the values laid down in Article 2 TEU" (European Commission 2021b). Hungary did not address these concerns; the Orbán government even doubled down by organising a referendum in support of its anti-LGBTI policies.¹¹ The Commission therefore referred Hungary to the European Court of Justice (European Commission 2022). The proceedings against Hungary and Poland were still unfolding at the time of writing. Regardless of the outcome, their import is apparent:

Justice party, does not explicitly refer to LGBTI rights. Nevertheless, the project's coordinator explained that the charter, in direct response to "the threat posed by LGBT ideology," intends to "defend children from demoralisation and depravity" (Ciobanu 2020).

¹⁰ Under the EU's twinning scheme, the Commission also denied funding to municipalities declaring themselves to be LGBT-free zones (Wanat 2020).

¹¹ Because the referendum failed to draw quorum, its outcome was non-binding.

for the first time, the Commission took legal action to protect the EU's fundamental values as they pertained to LGBTI rights.

Given Hungarian and Polish opposition, the Council has not been able to speak with one voice on the events in the two countries. Still, a majority of member states came together to denounce the anti-LGBTI laws. Following the General Affairs Council of 22 June 2021, eighteen member states (ironically including Lithuania) adopted a joint declaration on Hungary. They called the legal changes a “flagrant form of discrimination” and urged the Commission “to use all the tools at its disposal” to ensure that Hungary respects EU law (Wilmès 2021). Two days later, Viktor Orbán drew the ire of some colleagues within a European Council meeting. The Dutch Prime Minister Mark Rutte told Orbán outright to either respect the EU's fundamental values or to “get out” of the Union. That same day, sixteen heads of state expressed their “attachment to our common fundamental values” in a statement that was issued “in the light of threats against fundamental rights and in particular the principle of non-discrimination on grounds of sexual orientation” (De Croo 2021). These forceful reactions contrast sharply with the reaction to the Lithuanian anti-LGBTI law, which the Council did not even discuss.

In sum, the EU's protection of LGBTI rights constitutes lagged leadership. The European Parliament for a long period was the only institution calling for decisive action against member states that violated these rights. As the nonresponse to Lithuania's anti-LGBTI law showed, neither the Commission nor the Council wished to intervene. However, both institutions have become convinced of the importance of responding to violations of sexual minority rights. The response to anti-LGBTI initiatives in Hungary and Poland shows a newfound commitment to overcome the Copenhagen dilemma on this issue. As one Commissioner put it, “we have entered a new era in the fight for equality” (Wanat 2020).

Conclusion

The Copenhagen criteria at once enabled and constrained the EU's ability to lead by example on minority rights. On the one hand, they were the vehicle through which the Commission imposed its vision of human rights and the respect for and protection of minorities on candidate states. On the other hand, the criteria fed into a paradox: within its own borders, the EU struggles to uphold the self-same values it so successfully diffuses abroad. As result, the EU's representation of itself as a community of values looks increasingly strained.

This chapter has addressed two dimensions of the paradox across two types of minority rights. Double standards are most evident with respect to the rights of national minorities. The EU institutions emphasise this issue during the accession

process, but a post-enlargement commitment to this minority can only be discerned within the European Parliament. The varied reactions to the Minority Safe-Pack illustrated this: while MEPs endorsed this proposal for legislative action on national minority rights, the Council ignored it altogether, and the Commission, citing competence limitations, dismissed the initiative. As a result of this lack of supranational decision-making, the claim that the rights of national minorities are among the EU's fundamental values rings hollow.

The paradox's second dimension concerned the unenforceability of minority rights. This Copenhagen dilemma is well-documented within the context of democracy and the rule of law, but this chapter has shown that it also besets minority rights. The difficulty of enforcing the EU's fundamental values applies to both national and sexual minorities. In practice, however, it is predominantly the latter whose rights have come under strain. The example of Lithuania, which prohibited the distribution of public information about non-heteronormative families and marriage to minors, demonstrated the Commission and the Council's reluctance to respond to a post-enlargement backlash against LGBTI rights. Only the European Parliament saw this as a threat to the EU's fundamental values that required decisive action.

Yet, recognising that its values are under threat, the EU has begun to address the Copenhagen dilemma. The EU institutions initially focused on democracy and the rule of law in Hungary and Poland. When these two countries followed Lithuania's lead by targeting the supposed promotion of homosexuality and gender ideology, however, they galvanised the EU into defending LGBTI rights. MEPs were predictably outraged over the anti-LGBTI initiatives. The other institutions' reaction, which I have described as lagged leadership, was more surprising. A clear majority of member states castigated the two countries for violating the EU's fundamental values and called on the Commission to intervene. The Commission did just this. For the first time ever, it initiated infringement proceedings against two member states for violating LGBTI rights. This watershed moment marks an ambitious attempt to ease the strain on the Union's fundamental values as they apply to sexual minorities. Whether the attempt will succeed, and whether the EU institutions would be equally willing to take legal action in defence of national minorities, remains to be seen.

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