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The co-evolution of EU's Eastern

Enlargement and LGBT politics: An Ever

Gayer Union?

Koen Slootmaeckers and Heleen Touquet

1 Introduction

The EU identifies and presents itself as an organisation founded on ‘fundamental values’ and as a defender and guardian of fundamental rights. The development of this ‘fundamental rights myth’¹ (Smismans, 2010) has taken place against a broader background of the globalization of human rights discourse (Smismans, 2010; Stychin, 2004). The discourse of fundamental values has also increasingly become the driving narrative of the EU's foreign policy, including the Enlargement and Neighbourhood policies. Article 3(5) clarifies that ‘In its relations with the wider world, the [European] Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to [...] the protection of human rights.’ Article 49 makes respect for the so-called founding values — ‘respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights’ (Art. 2 TEU) — a precondition for EU membership.

In recent years, LGBT rights have become part and parcel of this fundamental rights myth (Ayoub and Paternotte 2014a, p.3): being ‘gay-friendly’ has now become a symbol for

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what it means to be truly European and vice versa.² And with this evolution, the EU's

Enlargement policy has become an important mechanism of transforming candidate member states into countries ready (and worthy) to become a member of the EU and take up the responsibilities of such membership, including being LGBT friendly. Whilst there is an expanding body of literature on the impact of EU accession on LGBT rights in new member states, little has been done to map the evolution of LGBT rights within the enlargement policy. Our chapter aims at exactly doing this.

Our focus in this chapter is tracing the place of LGBT rights within the Enlargement process from the 1990s onwards. In the first part of this chapter we trace how fundamental rights and LGBT rights in particular have become an important element of the EU enlargement process over time. Our approach is institutional³, focusing on changes within the EU and its policies over the different iterations of the EU Eastern Enlargement. The second part of the chapter focuses on what we identify as two turning points in this process: the fifth and sixth Enlargements.⁴ Here, the case study of Croatia receives more attention as it presents valuable insights in the processes described earlier on in the chapter. In conclusion, we examine the Western Balkan countries still in the accession process and evaluate the prospects for LGBT rights in these countries, given the new focus of the EU on LGBT rights.

2 The growing importance of LGBT rights in the accession process

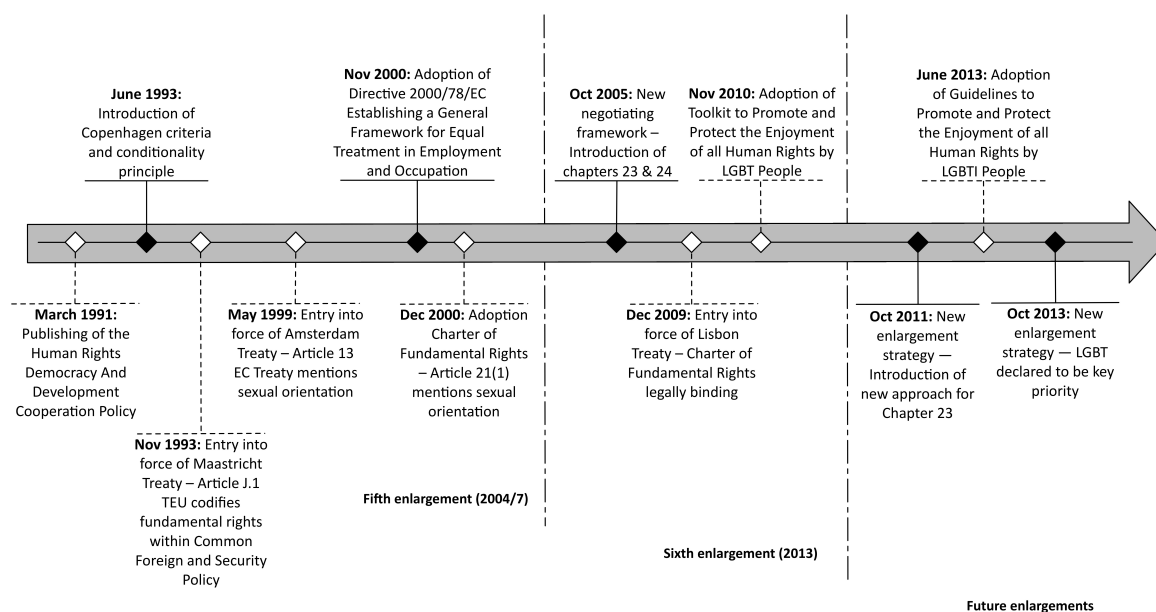
In order to trace the evolution of the place of LGBT rights within the Enlargement process, we have classified the changes in EU policies in two analytically different, but

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interrelated, categories, namely, whether the changes have a *direct* or *indirect* effect on the

position of LGBT rights in the Enlargement policy (see Figure 1.1).⁵ We first discuss the changes with an indirect impact, which refer to the increased importance of the fundamental rights within EU's (foreign) policies. These changes are reflected in Figure 1.1 with white diamonds and dotted lines. Next, we will focus on the changes that have a direct effect on the Enlargement policy and the position of LGBT rights within it (black diamonds and full lines in the figure).



[Figure 1.1 : The co-evolution of EU Enlargement and the EU's Fundamental and LGBT rights policies

Note: Black diamonds: changes that had a direct effect on LGBT rights within the EU Enlargement process

White diamonds: indicators of a larger shift at the EU level towards an increased focus on fundamental and LGBT rights]

2.1 The larger shift in the EU's changing fundamental rights policy

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Although the concept of fundamental rights was occasionally mentioned and referred to in the EU's relations with the wider world and candidate countries from the 1970s (see William, 2004, p.40-4, 54-58), an explicit narrative on fundamental rights within the EU's external relations only developed from the 1990s onwards (Smismans, 2010). After the fall of the Iron Curtain and the prospect of EU Enlargement to post-communist countries with a questionable track record in human rights protection, the European Commission,⁶ published the *Human Rights Democracy And Development Cooperation Policy* on 25 March 1991 (first change in Figure 1.1). It was the first time a European policy on development, democracy and human rights in external relations was developed (Smismans, 2010). In November 1991, the Council and the Member States responded by issuing a Joint Resolution giving high priority to the stimulation of human rights in the EU's relations with third (developing) countries. But more importantly, in the same month, the Maastricht Treaty (1991; entry into force 1993) was signed, which codified the goal to promote, develop and consolidate democracy, rule of law, and the respect for human rights and fundamental freedoms via the EU's external relations. At this point in time, LGBT rights were not part of the EU's commitment to human rights, despite the fact that LGBT rights (particularly anti-discrimination) were part of the European Parliament's agenda in the 1980s and 1990s (see Mos, 2014; Swiebel, 2009).

It is only with the Treaty of Amsterdam (1997; entry into force 1999) — that the concept of fundamental rights in the EU is further developed, and that the EU is given legislative competences to defend human rights and LGBT rights. Not only does the Treaty of Amsterdam amend the Treaty on the European Union (TEU) to include the idea that the EU is 'founded on the principles of liberty, democracy, respect for human rights and

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fundamental freedoms, and the rule of law, principles which are common to the Member

States' (Article 6(1), TEU);⁷ but it also expands the legislative competences of the EU

regarding anti-discrimination policies. The Treaty of Amsterdam introduced Article 13 to the

Treaty Establishing the European Community (EC Treaty),⁸ creating the legal basis for EU

institutions to combat discrimination based on, amongst other grounds, sexual orientation. A

year later the EU consolidated its new competences by adopting the Employment Directive

(2000/78/EC Directive) and the Charter of Fundamental Rights, both referring explicitly

mentioning sexual orientation as ground for non-discrimination. While the newly created

Article 13 of the EC Treaty has no direct effect on candidate member states and the Charter

of Fundamental Rights does not create new competences for the EU, both documents are

important for the Enlargement process' impact on LGBT rights, as their explicit reference to

sexual orientation strengthens the idea that discrimination of LGBT people are not in

coherence with the so-called 'European values' (Waaldijk, 2006). The 2000/8/EC directive,

on the other hand, did have a direct impact on the EU accession process as it created EU

acquis on LGBT rights (see section 2.2).

The next important change in the EU's fundamental rights policy comes with the Treaty of Lisbon (2007; entry into force 2009). This treaty, particularly provision 8, changes article 6 of the TEU, giving the Charter of Fundamental Rights the same legal value as the (founding) treaties, without expanding EU's competences, however. As the provisions of the Charter are directed at the EU institutions and only applies to member states when they are implementing EU legislation, the impact of the Charter on the accession process is rather limited (Ficchi, 2011). In this regard, the added value of a binding charter is more symbolic. It promotes and strengthens the perception that the EU is a legitimate political actor founded on shared values, which are codified in one document. The new character of the Charter thus

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increases the legitimacy of the accession criteria for candidate countries, as the EU now is

legally obliged to uphold the same values it demands from the candidate countries.

Finally, in 2010 a toolkit was issued to instruct EU diplomats to protect the human rights of LGBT people. The aim of the *Toolkit to Promote and Protect the Enjoyment of all Human Rights by Lesbian, Gay, Bisexual and Transgender People* to ‘help the EU institutions, EU Member State capitals, EU Delegations, Representations and Embassies to react proactively to violations of the human rights of LGBT people, and to address structural causes behind these violations’ (Council of the European Union, 2010, p.1). This toolkit was expanded in 2013 with a set of guidelines, which are binding for EU delegations (the toolkit was not binding). The aim of these *Guidelines to Promote and Protect the Enjoyment of all Human Rights by Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Persons*⁹ is to ‘provide officials of EU institutions and EU Member States, with guidance to be used in contacts with third countries and with international and civil society organisations [...] in order to promote and protect the human rights of LGBTI persons within its external action’ (Council of the European Union, 2013, p.2). Although these documents are created with an eye on (re-)affirming the place of LGBT rights within the EU’s external relations, they only indirectly impact the EU Enlargement process. The reason for this is the institutional division of labour within the EU and its external relations policies: whilst the Commission is in charge of the Enlargement policy, the European External Action Service (EEAS) is responsible for the EU’s relations with the rest of the world. Both the *toolkit* and the *guidelines* relate to the work of the EEAS and provide the EU delegations around the world with a checklist to assess LGBT human rights issues. However, because the EU has limited *acquis* regarding LGBT rights¹⁰, the European Commission uses all the existing tools, including the guidelines to promote the protection of sexual minorities in candidate countries.

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All these changes together have contributed to a greater focus on Fundamental rights, and LGBT rights in the European Union institutions. In the next section we will review the evolution of the Enlargement policy (black diamonds on Figure 1.1), highlighting its increased focus on fundamental rights.

2.2 Direct changes to LGBT rights in the Enlargement process

Apart from a more general shift in focus towards fundamental rights within the EU, several changes to the EU Enlargement strategy had a direct impact on the position of LGBT rights within the Enlargement policy.

The 1993 Copenhagen European Council summit adopted a set of criteria for EU accession, demanding that candidate countries must i) have stable institutions guaranteeing democracy, rule of law and human rights (political conditions); ii) have a functioning market economy (economic conditions); and iii) accept the established EU law and practices (legal conditions) (Nenadović, 2012). Next to formalising the EU accession process, these criteria created a much wider leverage on candidate countries (Grabbe, 2006), enabling the European institutions ‘to steer the pre-accession developments in the candidate countries’ (Kochenov, 2008, p.34). Compliance with EU accession requirements has evolved from a mere fact — either a country complies or it doesn’t — to a dynamic process, wherein progress is constantly monitored and (re-)evaluated. Although these Copenhagen criteria do not explicitly mention LGBT rights, they did bring LGBT rights within the scope of the accession process, via the requirement that candidate countries must be members of the Council of Europe (CoE).¹¹ As a consequence, the decriminalisation of homosexual acts and

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the equalisation of the ages of consent became part of the Enlargement process (Kochenov, 2007).

The adoption of the 2000/78/EC directive was a key turning point when it comes to the position of LGBT rights in the Enlargement policy. It was the first time a document directly banning discrimination on sexual grounds became part of the *acquis*: candidate countries have to adopt legislation protecting LGBT people from discrimination in employment.

In 2005 the European Commission amended the Enlargement policy so that fundamental rights would become a key part of the pre-accession negotiations. It introduced a chapter specifically dealing with fundamental rights to the negotiations: chapter 23 (on judiciary and fundamental rights) (see Nozar, 2012).¹² The creation of a separate chapter gave the EU the opportunity to focus on particularly critical areas (Neuman Stanivukovi, 2012), fundamental rights were no longer merely a 'precondition' to open accession negotiations, but became an integral part of the negotiations. Progress in the areas of judiciary and fundamental rights became the keystone of the advancement of the entire accession process (Hillion, 2013).¹³ However, as Nozar (2012) points out, there is only a limited amount of hard *acquis* in many of the areas covered by chapter 23. The requirements are mainly general principles and so-called European standards. In order to clearly determine exact targets and measure progress, a benchmarking system was introduced. Candidate countries need to meet opening benchmarks in order to open negotiations on a particular chapter, and closing benchmarks to conclude negotiations. In the 2006 Enlargement strategy paper, the European Commission describes these benchmarks as

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measurable and linked to key elements of the Acquis chapter. In general, opening

benchmarks concern key preparatory steps for future alignment (such as strategies or

action plans), and the fulfilment of contractual obligations that mirror Acquis

requirements. Closing benchmarks primarily concern legislative measures,

administrative or judicial bodies, and a track record of implementation of the Acquis.

(COM (2006) 649, final, p.6)

After the conclusion of the accession negotiations with Croatia in 2011, the Commission again amended the Enlargement strategy with the so-called new approach for chapter 23 (COM (2011) 666, final; see also Hillion, 2013). The purpose of this new approach is to ‘invigorate the monitoring of the candidates’ absorption of the EU fundamental rights *acquis* in the context of accession negotiations’ (Hillion, 2013, p.6). This new approach is based on the principle that:

[Issues related to the judiciary and fundamental rights and to justice and home affairs] should be tackled early in the accession process and the corresponding chapters [23 and 24] opened accordingly on the basis of action plans, as they require the establishment of convincing track records. The Commission would report regularly, at all stages of the process, on progress achieved in these areas along milestones defined in the action plans with, where appropriate, the necessary corrective measures. (COM (2011) 666, final, p.5)

Finally, in 2013 LGBT issues are *explicitly* identified as a key issue of Chapter 23 in the Enlargement Strategy and Main Challenges 2013-2014 (COM (2013) 700, final).¹⁴ Based

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on the observation that homophobia, discrimination and hate crimes based on sexual

orientation are widespread in the Western Balkans and Turkey, partly due to incomplete

legislative frameworks and inconsistent implementation of the legal provision in place, the

European Commission finds that:

There is an urgent need for *anti-discrimination legislation* to be extended to include sexual orientation and gender identity within its scope in Turkey and the former Yugoslav Republic of Macedonia. *Hate crime legislation* still needs to be introduced in most countries. Training of law enforcement, ombudsman institutions, judges and media professionals is needed to raise awareness of new legislation, *to ensure proper implementation* and contribute to increasing understanding. Countries must pursue a *zero-tolerance approach to hate speech, violence and intimidation* and take steps as a matter of priority to address cases from the past and be prepared to react robustly to new cases in the future. Countries need to take measures to *counter stereotypes and misinformation*, including in the education system. Religious or cultural values cannot be invoked to justify any form of discrimination. Freedom of assembly and expression should be protected, including through appropriate handling of pride parades [...].

(COM (2013) 700, final, p.11, original emphasis)

This excerpt from the strategy paper shows that the EU did not only identify LGBT issues as a key priority, but the Commission also formulates demands that go beyond the hard *acquis* (i.e. with regard to ‘zero-tolerance approach’, ‘education’ and ‘appropriate handling of pride parades’). The emphasis on pride parades in particular has garnered a lot of media

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attention and has made the holding of pride parades a litmus test for readiness for EU

membership (for a critical view on Pride as a litmus test see Bilic, this volume).

3 The Europeanisation of LGBT rights during the fifth and sixth enlargement rounds¹⁵

3.1 Tracking the impact of Enlargement on LGBT rights in CEE

Our overview of the co-evolution of the EU Enlargement policy and EU's fundamental rights policies has shown that fundamental rights have become prominent in the accession negotiations with every Enlargement round. These changes have been a result of the lessons learned over the different iterations of the Eastern enlargement. In this section we take a closer look at the different enlargement rounds to identify the concrete impact of the increased focus on fundamental and LGBT rights in acceding countries. It is beyond the scope of this article, however, to provide a detailed overview of the impact of Europeanisation on LGBT issues in CEE, instead we focus on three relevant aspects: the top-down approach of the EU, the lack of public debate and the backlash after accession.

In line with the analysis presented above, it is said that LGBT issues were not a priority for the EU for the 2004/2007 Enlargement (Ames, 2004; Kochenov, 2006). In the annual *Regular Reports* (now called *Progress Reports*, i.e. the annual reports monitoring candidate countries progress), LGBT rights were barely touched upon (Ames, 2004). The EU considered the protection of ethnic minorities, like the Roma, of greater importance for EU

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membership. Several of our interviewees maintained it was a political decision by the EU to focus more on ethnic minority rights and less on sexual minority rights.¹⁶ LGBT rights were almost absent from the negotiations: ‘for those 10 accession countries, nobody spoke about LGBT. There was the human rights chapter, but LGBT was not really visible.’¹⁷

This is not the only reason the impact of the EU accession on LGBT rights in CEE countries was generally considered to be limited (Kochenov, 2006). New legislation was adopted due to European pressure, in a very top-down technocratic process, without public debate (Chetaille, 2011; Roseneil and Stoilova, 2011). This caused the new laws to be ‘chimera, in that formal [laws are being] put into place without any real chance of implementation’ (Jacoby, 2001, p.175). Or as a Lithuanian activist phrased it:

I interpret it as a huge drawback, because the discussion was absent and you know the LGBT rights issue is still heavily sexualised. People first of all think that it is about sex and not about civil and political rights, and because the discussion is missing, because the legal reforms were forced upon the country by external pressures. I don't think it was the cleverest way to do it.¹⁸

Moreover, the lack of expertise on LGBT rights, lack of standards and heterogeneity among member states created the space for candidate countries to politically manoeuvre on the issue (Ames, 2004; Kochenov, 2006; 2007; O'Dwyer, 2010; 2012; O'Dwyer and Schwartz, 2010). ‘Talking the talk’ was enough to convince the EU of compliance (Haughton, 2007). This was largely due to the accession process itself, which was rather top-down and elite driven, with civil society being only marginally involved (Galbreath, 2003; Kutter and Trappmann, 2010) and hardly any instruments to stimulate social learning

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processes. A representative of ILGA-Europe stated that throughout the process local activists did not have many opportunities to raise LGBT issues at the local level.¹⁹ However, ILGA-Europe did create opportunities for these activists to access the European Institutions (see Kristofferson, Van Roozendaal and Poghosyan, this volume).

After accession, social and public debate on LGBT issues became very lively after the CEE countries became members of the European Union (O'Dwyer, 2010; 2012; O'Dwyer and Schwartz, 2010). In several countries, state-sponsored homophobia is found as politicians utilized homophobic (nationalist) discourse to gain political capital (Mole, 2011). Some countries even turned back the clock on LGBT rights, banning gay prides and introducing homophobic legislation.²⁰ The two clearest examples are Poland and Lithuania.²¹ In Poland, during the Kaczyński period²² gay prides were not only banned (by Lech Kaczyński when he was the mayor of Warsaw), but the government also attempted to implement anti-gay legislation (Boersema, 2010; O'Dwyer and Schwartz, 2010), by proposing a bill prohibiting homosexuals to teach. In Lithuania, four years after accession, the government authorized the *Law on the Protection of Minors against the Detrimental Effects of Public Information*. In the initial draft of this bill, all information about homosexuality, whether it be sexual or not, was defined as detrimental. After strong international pressure, the bill was amended. The word *homosexuality* was, yet the nature of the law remained the same. 'In essence [the law] means, because [the Lithuanian] constitution defines marriage between a man and a woman, that [...] any information regarding homosexuality as such can be qualified as having a detrimental effect [as all information undermining the constitutional conception of family is considered to be so].'²³

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3.2 Lessons learned? The case of LGBT rights in Croatia

The accession process of Croatia was the first to include the specific chapter (23) on judiciary and fundamental rights (cf. section 2.2). Croatia's accession process however, suffered setbacks due to the country's lack of cooperation with the ICTY, one of the preconditions for accession. These delays even led to the temporary closing of negotiations on Chapter 23 (Neuman Stanivukovi, 2012).²⁴ As a consequence, the negotiation period for the chapter was short (less than 2 years) and EU officials acknowledged that some of the changes were rushed through,²⁵ as the negotiations were governed by a dynamic oriented towards closure.²⁶

In spite of this, the legislative impact of the process was quite substantial. The 2013 annual Rainbow Index, published by ILGA-Europe (2013) published months before Croatia's accession, shows that anti-discrimination legislation in the EU's latest member state not only exceeded EU requirements but also the level of protection of most fifth Enlargement countries and some older EU member states. Apart from legislation, we note three other important changes in comparison with the 2004 accessions: there was more involvement of civil society groups, there was more public debate on LGBT rights, and political elites vocally supported LGBT rights.

LGBT organisations in Croatia were much more involved in the accession process. Croatian LGBT NGOs said they were able to use the EU pressure in their advocacy work. Using the annual monitoring of the EU and the *Progress Reports*, issued by the Commission, as a tool and framework in their advocacy and campaigns, LGBT activists said they were able to push for legislative changes beyond the EU membership requirements.²⁷ At the same

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time, our interviewees all mentioned that these laws lacked adequate implementation (see also Kahlina, 2015).

Croatia also had much more of a public and political debate on LGBT issues: For example, pride parades have been happening in Zagreb since 2002. After the opening of Chapter 23 in the EU negotiations (2009), LGBT rights became a prominent political topic.²⁸ It was no longer possible for those in power to ignore LGBT rights, as these issues became part of the public debate.²⁹ The events regarding the gay pride in Split (see also Moss, 2014) provide clear evidence for these statements. After the first Split Pride was met by violent counter demonstrators in 2011, Prime Minister Zoran Milanović (SDP) called in 2012 on the residents of Split to show tolerance and accept the 'standard democratic practice of Western Europe' (quoted in msnbc.com news services, 2012). Minister of Foreign and European Affairs Vesna Pusić (SDP) and the newly elected mayor of Split Ivo Baldasar (SDP) joined the 2013 pride.³⁰ Both politicians referred to the European values and standards in their speeches on the event, with Vesna Pusić (Media Servis, 2013) declaring that 'politically we have become Europe, it is time to begin to behave as such.' Further proof is provided by the election campaign of Ivo Baldasar weeks before the Split Pride parade. During his campaign Baldasar openly showed his support for the LGBT issue and actively advocated for LGBT rights.³¹ At that time, Baldasar did not only promise he would attend the (2013) pride, but also committed to support the creation of an LGBT centre in the city. Although activists remain sceptical whether politicians actually believe in LGBT rights, they see it as a sign that times are changing, as politicians start using LGBT rights to gain political capital.³² There was also a wide cross-party consensus on the desirability of accession to the European Union, and LGBT issues therefore did not become a topic of political contestation.³³ The accession process for Croatia was partly a way of proving its Europeanness and distancing itself from

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the Balkans (Kahlina, 2015). Support for LGBT rights positioned Croatia within 'LGBT tolerant Europe' (Kahlina, 2015; Moss, 2014).

Immediately after Croatia's accession in June 2013, there was a backlash for LGBT rights with the Marriage referendum.³⁴ The citizens' initiative *U Ime Obitelji* (In the Name of the Family), started collecting signatures to demand a referendum on the constitutional definition of marriage in spring 2013. They succeeded in collecting almost twice the amount of required signatures. The referendum was held and Croatia voted in favour of the introduction of a heterosexual definition of marriage in the constitution (65% voted for and 35% against with a turnout of 37%). Despite this backlash, the political elite at the time remained committed to LGBT rights. After the referendum, the centre-left government continued to push for the *life partnership bill* [*Životnom Partnerstvu*])³⁵ disregarding the initiative's 'protect the family' discourse (the law was adopted summer 2014). Even during the referendum campaign high level politicians, especially Prime Minister Zoran Milanović, Deputy Prime Minister Vesna Pusić and president Ivo Josipović, argued against the referendum (Hina, 2013; Pavelić, 2013), as did many public figures and celebrities.³⁶

The Croatian case suggests the EU's increased attention for fundamental rights has paid off. The EU managed to push actual legislative reform and there is some evidence of social learning on the part of political elites as well (Slootmaeckers, 2014). While these changes can be seen as effects of the new Enlargement strategy and the new leverage tools (see section 2.2), two other contributing factors should be taken into account. First, there is the global 'mainstreaming' of LGBT rights³⁷ that might have accelerated the changes in Croatia, especially the elite discourse on the issue. A second important factor is that of the increasing transnationalisation of civil society (see Ayoub, 2013). LGBT rights groups in Croatia — and in other WB countries — have received a lot of support from their

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counterparts in the West, who have shared their knowledge and tactics. Most of these groups are also members of various transnational networks.³⁸ Moreover, whilst European LGBT activism (especially ILGA-Europe) was still consolidating its position in Europe during the fifth Enlargement, it now has become a high-capacity organisation with a great amount of experiences it can share with local activists (see also Kristofferson, Van Roozendaal and Poghosyan, this volume). Many of the CEE groups as well, have learned from their experience, and are in contact with the groups from the Balkans. This results in a growing LGBT activism and in civil society groups that have been more effective than the ones in CEE in 2004.

4 En lieu of a conclusion: Food for thought on the future of LGBT rights in the Western Balkans

The previous sections have illustrated the co-evolution of the EU Enlargement process and the EU's fundamental rights, including LGBT rights, policies and its impact on the new member states. With fundamental rights increasingly moving to centre of the Enlargement process, we have found that the impact of the EU accession process on candidate countries seem to be expanding with each iteration of the Eastern Enlargement. However, the Croatian case has also shown that the EU does not work in isolation and that to understand the impact of EU Enlargement on LGBT rights in candidate countries different processes need to be taken into account. Consequently, despite the fact LGBT rights have become even more central in the accession process after the Croatian experience, we cannot be sure about the impact on the countries currently in the EU 'waiting room'.

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Instead of a traditional conclusion to this chapter, we want to make a brief reference to the future and what can be expected of the impact of EU accession on LGBT rights in the rest of the Western Balkan countries. While legal changes have already occurred in most countries, the continued impact of EU accession on the LGBT politics in (potential) candidate countries will be dependent both on domestic factors that might limit EU influence and the politics surrounding the Enlargement, i.e. willingness of the EU to prioritise LGBT rights.

With regard to the domestic factors the main problem is the limited statehood of several Western Balkan countries (see Börzel, 2013; Elbasani, 2013; Noutcheva and Aydin-Düzgit 2012). The status of Bosnia and Kosovo as semi-protectorates and the internal problems of The Former Yugoslav Republic of Macedonia (henceforth Macedonia) make it unlikely that they will achieve member status very soon. Bosnia's EU integration process, for example, is being held up by the country's constitutional problems (cf. Sejdić & Finci ruling), whilst Kosovo's progress is slowed down by its contested statehood (and nationhood). Similarly, despite being granted candidate status in 2005 and 2013, respectively, the progress of both Macedonia and Albania is stagnating. Although the European Commission recommended the opening of negotiations with Macedonia in 2009, Macedonia's progress seems deadlocked due to its name dispute with Greece; and the accession process of Albania is hampered by its weak state capacity and political elites' unwillingness to introduce reforms beyond formal compliance (Börzel, 2013; Elbasani, 2013). Therefore, the incentive for reform and the ability of the EU to coerce these states will be much lower than elsewhere.

This is particularly evident in the case of Macedonia. Regarding LGBT rights, the Macedonian government adopted anti-discrimination legislation in 2010 (SEC (2010) 1332, final), but the new law is 'still not in line with the *acquis* as it does not explicitly prohibit

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discrimination on grounds of sexual orientation in employment and occupation' (SWD

(2013) 413, final, p.37). For those countries where legislation is in place, problems with the rule of law limit the proper implementation of these laws. Throughout the region attacks against LGBT activists occur regularly (for a detailed overview see Pearce & Cooper, 2014). For example, when the magazine *Kosovo 2.0* published its fourth edition *Sex* — which included stories of LGBT people in the offices of LGBT activist are repeatedly vandalised, attacked and at one point even set on fire. Pearce and Cooper (2014), continue their overview with similar events in Albania, Bosnia and Herzegovina, and Serbia. In many cases the perpetrators of these attacks have not been identified, brought to courts and convicted (see ILGA-Europe, 2015). Activists have complained of poor police investigations into attacks and the limited capacity (and/or willingness) of the court system to deal with anti-discrimination and hate-crime legislation.

Another important domestic factor influencing the impact of EU accession on LGBT rights is the extent to which ruling political elites identify as 'European' or Western (see also Freyburg and Richter, 2010; Subotić, 2010; 2011). This is highly dependent on the parties voted into government. A case in point is Serbia. The Serbian government consists of a majority of right-wing nationalist parties that do not exhibit a sense of a European identity. Although they claim to be in favour of EU membership, the Serbian government is not willing to accept just anything from the EU. Especially when it comes to Kosovo or the Gay Pride in Belgrade, the Serbian authorities are reluctant to give in to EU demands (for a more elaborate account on the political will regarding the Belgrade Pride, see Fagan and Slootmaeckers, 2014).³⁹ The Montenegrin government, on the other hand, does have a distinct pro-European attitude, which has also helped to improve LGBT rights in Montenegro.⁴⁰ The government adopted a 2013–2018 strategy and action plan to improve the

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quality of life of LGBT persons (LGBT Forum Progress, 2013); it provided protection for the first Pride events in the country (in Budva and Podgorica), and even announced that they would initiate drafting a same-sex partnership law (Tomovic, 2014). Local activists also noted that some institutions (e.g. police, the ombudsman, and the Ministry of Justice) have started to recognize the need for the protection of human rights of LGBT persons as part of their work, and not just as something they have to do.⁴¹

Finally, when considering the impact of the EU on LGBT rights in the Western Balkans, one has to take into account that the decisions about Enlargement have become increasingly politicised and less technical than in previous rounds. First, some member states are suffering from what is called Enlargement fatigue and question the absorption capacity of the European Union (Neuman Stanivukovi, 2012). Secondly, what is supposed to be a technical process of aligning legislation has been tainted by political considerations. As a result, LGBT rights are often on the losing side when it comes to trade-offs with other issues the EU regards as more important, especially regional security. When Macedonia was negotiating the visa liberalisation agreements, anti-discrimination based on sexual orientation was one of the four EU requirements in order for the deal to go through. However, due to the pressure by conservative groups in the country which resonated with the conservative agenda of the government, the explicit reference of sexual orientation was dropped. According to the minister of Social Policy LGBT people would be protected under the 'other grounds' mentioned in the law (see also Fouéré, this volume).⁴² These groups framed the issue as one of choosing for or against same-sex marriage, an issue that has nothing to do with anti-discrimination. Despite the pressure by the EP LGBT Intergroup and other actors, the visa-liberalisation deal went through. In Kosovo, the EU's leverage with regard to LGBT rights is also through the visa liberalisation negotiations. It remains to be seen whether the conditions

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will be fulfilled here, and whether the normalisation of relations between Serbia and Kosovo will distort the process.

The importance of this latter process for the EU and its impact on the EU Enlargement process has already been seen in Serbia accession process. The trade-off between regional security (and a solution to the 'Kosovo problem') and LGBT rights has not been in favour of LGBT rights. This has become evident in the debates surrounding the Pride Parades in Serbia (see Fagan and Slootmaeckers, 2014). At the time, the normalisation of relations between Serbia and Kosovo were a key priority for the EU. Even more so, it appears from EU documents that the EU would not sanction Serbia for banning the Pride Parade as long as they made progress on the more important issue of Kosovo. For example, EU officials stated in 2012 that holding a Pride Parade would help Serbia on its path to the EU, but the accession process will not be halted if the parade would not be held (B92, 2012). Furthermore, the European Commissioner for Enlargement Štefan Füle did not discuss the Pride ban with the Serbian authorities when he visited Belgrade a week later (Korica, 2012). Despite regretting that the threats of radical groups were assessed serious enough to justify a ban, Füle's spokesperson indicated that there are more important issues to be discussed (Korica, 2012). It is only after the signing of the Brussels Agreement (Spring 2013) that the EU language on the bans of the Pride Parade changes. In the *2013 Progress Report*, the EU for the first time mentioned 'lack of political will' as reason for the ban. Coincidence or not, that year LGBT issues were also identified as a key priority within the fundamental rights chapters of the Enlargement strategy.⁴³ However, an EU Official from the Commission admitted that although a new trend has been established since 2013, the prioritisation of LGBT in the Enlargement process remains subject to the developments on the main driver of this Enlargement round, i.e. regional stability.⁴⁴

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To summarise the overarching argument of the chapter, we have seen that since the formulation of the Copenhagen criteria (1993), the role of fundamental rights have become increasingly important in the Enlargement process. With the increased attention within the EU for LGBT rights (especially in its external relations), these rights have recently been declared a priority within the fundamental rights section of the EU Enlargement. Although these changes at the EU level have contributed to positive changes in the new member states, especially in Croatia, we advocate caution when thinking about the potential impact of the EU on the current (potential) candidate countries. Not only is the potential impact of the EU dependent on domestic factors like the countries (limited) statehood and state identity, i.e. the orientation of politicians towards the EU, but it is also affected by, the particular position of (potential) candidate countries within the EU's foreign policy — i.e. neither fully external policy, neither internal but still expected to adhere to EU's rules — and the discrepancy between the comprehensive external and limited internal policy regarding LGBT rights which limits the EU's persuasiveness on the issue.⁴⁵ Consequently, the impact of the EU on LGBT rights is highly dependent on the EU's priorities and whether issues like regional stability will push LGBT rights into the background.

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¹ Smismans (2010) debunks EU's idealised relationship with fundamental rights, highlighting that the EU was founded on ideas of economic cooperation, which sometimes threatened fundamental rights.

² One needs to remain aware that this EU's exceptionalism on LGBT rights is part of the fundamental rights myth, and does not necessarily reflect the reality. One mechanism of keeping this myth alive consists of constantly identifying a 'homophobic other' both within and outside the borders of the EU (often in the 'imagined East'). For more critical engagement with this East-West divide and LGBT issues, see Ammaruto (2015), Kulpa (2014) and Kulpa and Mizielińska (2011).

³ This chapter does not address the influence of local and regional LGBT activism on EU policy, for this perspective see the chapter of Kristofferson, van Roozendaal, and Poghosyan (this volume).

⁴ The fifth enlargement occurred in two waves. In the 2004 wave, the EU welcomed as new member states eight CEE countries (Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, and Slovenia), and Cyprus and Malta. In the second wave of the fifth enlargement (2007), two more CEE states joined: Bulgaria and Romania. The sixth enlargement round marked the accession of Croatia (2013).

⁵ For reasons related to parsimoniousness, we have opted to focus on changes made by the European Commission and the Council of the European Union. Although the European Parliament (EP) has played an important role in putting LGBT rights on the EU's political agenda, its role within the EU Enlargement process remains rather limited. Furthermore, adding all the resolutions and reports drafted by the EP to our timeline would result in an overcrowded figure with reduced readability.

⁶ At the time known as the Commission of the European Communities.

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⁷ This statement was further expanded with the Treaty of Lisbon (2007), and now states: ‘The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail’ (Article 2, TEU).

⁸ The Treaty of Lisbon changed the name of the EC Treaty to the Treaty on the Functioning of the European Union (TFEU) and changed the numbering to article 19, TFEU.

⁹ The ‘I’ in LGBTI stands for Intersex.

¹⁰ Two recent initiatives for change are worth mentioning here. The *equal treatment horizontal directive* which would provide protection on all grounds mentioned in Article 19 of the TFEU (and Article 21 of the Charter of Fundamental Rights) in all fields, akin to the 2000/43/EC Directive on racial discrimination. This horizontal directive, however, has been blocked in the council since 2009, with financial issues regarding accessibility criteria being the main stumble block. Additionally, there is movement within the Juncker Commission to introduce an EU-wide action plan (or framework strategy) to protect LGBT people from discrimination within the EU (Intergroup LGBT Rights, 2014; 2015).

¹¹ Although it is a rather odd condition, not mentioned in any of the treaties, the EU has explicitly demonstrated that membership to the CoE is considered a necessary step towards accession (Kochenov, 2008).

¹² See the approval of the negotiations framework for Croatia:

http://ec.europa.eu/enlargement/pdf/croatia/st20004_05_hr_framedoc_en.pdf

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¹³ The importance of Chapters 23 and 24 for the EU Enlargement process is further acknowledged in the negotiating framework for Montenegro (CONF-ME (2012) 2) and Serbia (CONF-RS (2014) 1).

¹⁴ In recent years the EU started using the acronym LGBTI instead of LGBT to include intersex people in their policy. To avoid confusion, we only use the LGBT acronym in this chapter, except when directly quoting EU documents.

¹⁵ This section is based on data from six countries from the new CEE member state from the fifth Enlargement, i.e. Hungary, Latvia, Lithuania, Poland, Romania, and Slovenia. We are aware that the experiences from other countries vary from the experiences presented here. However, the general trend described in this section can be applied to almost all CEE new member states. For a more detailed analysis of the impact of EU accession on LGBT rights in the CEE new member states, especially on the national differences, we refer to the work of Ayoub (2014; 2015).

¹⁶ Face-to-face Interview with representative of Mozaika, on 19 October 2012 in Dublin; Face-to-face Interview with representative of Campaign Against Homophobia, on 19 October 2012 in Dublin; personal communication with EU official (European Parliament), on 19 October 2012 in Dublin.

¹⁷ Face-to-face Interview with representative of Mozaika, on 17 October 2012 in Dublin.

¹⁸ Skype Interview with representative of Lithuanian Gay League, on 4 December 2012.

¹⁹ Face-to-face Interview with representative of ILGA-Europe, on 30 August 2012 in Brussels.

²⁰ These backlashes are not only due to the fact that there was no social learning during the pre-accession period, but they were also due to the lack of infringement mechanism in EU's

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legal framework that allows sanctioning those countries breaching the basic rules of democracy and human rights (Inotai, 2012).

²¹ Backlashes also occurred in other countries. In Latvia (2006), and Hungary (2012), for example, the government changed the constitutional definition of marriage so that marriage is defined as a union between a man and a woman. Also in Romania marriage has a heterosexual definition, but this definition never entered the constitution despite some attempts. Although the family code remains outside EU competence, this shows that ‘without pressure from the EU, politicians do not care anymore, and now [in some countries] the situation is worse than before’ (Face-to-face Interview with representative of ACCEPT Association, on 19 October 2012 in Dublin).

²² Kaczyński brothers were in power from 2005 to 2010: Jarosław Kaczyński as Prime Minister (2005 – 2007) and Lech Kaczyński as president (2005-2010)

²³ Skype Interview with representative of Lithuanian Gay League, on 4 December 2012.

²⁴ For an overview of the troublesome cooperation with the ICTY in the accession process of Croatia see Boduszyński (2013, pp.48-50).

²⁵ Face-to-face Interview with EU official, European Commission (DG Enlargement), on 29 May 2013 in Brussels; Phone Interview with Ulrike Lunacek, Member of European Parliament and Co-president of LGBT Intergroup, on 15 May 2013.

²⁶ Face-to-face Interview with EU official, European Commission (DG Enlargement), on 24 October 2013 in Zagreb.

²⁷ Face-to-face Interview with representative of Iskorak, on 20 October 2012 in Dublin; Face-to-face Interview with representative of Croatian Labour Party (and founder of Iskorak), on 21 October 2013, Zagreb; Face-to-face Interview with Representative of Zagreb Pride, on 24 October 2013 in Zagreb.

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²⁸ Face-to-face Interview with Representative of Zagreb Pride, on 24 October 2013 in

Zagreb; Face-to-face Interview with Representative of Zagreb Pride, on 29 October 2013 in Zagreb.

²⁹ Face-to-face Interview with independent Croatian activist, on 12 June 2014 in Zagreb.

³⁰

³¹ Informal conversation with LGBT activist from Split

³² Face-to-face Interview with Representative of Zagreb Pride, on 24 October 2013 in

Zagreb; Face-to-face Interview with independent Croatian activist, on 12 June 2014 in Zagreb.

³³ The issue of state identity and the collective identity of the governing political elite is a factor that also played a significant role during the fifth Enlargement. In Poland, for example LGBT rights were often discursively contrasted with the country's national identity. As O'Dwyer (2012, p.342) has shown, the EU pressure for LGBT rights caused the issue to be 'framed as a question of national identity. Homosexuality mapped very easily onto a broader debate about Polish identity'.

³⁴ Although we use the word 'backlash' here in similar way as in the fifth enlargement round backlashes, it is important to address one key difference between the Croatian and the CEE cases. Whereas in CEE most backlashes resulted from political (and state-sponsored) homophobia, the Croatia backlash was the result of a grassroots initiative.

³⁵ This piece of legislation would give same-sex couples almost the same rights as married couples, except for adoption. It does regulate those who already live with children, however (Milekic, 2014).

³⁶ Face-to-face Interview with Representative of Zagreb Pride, on 24 October 2013 in Zagreb.

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³⁷ See Pearce & Cooper (2014, p.324) for a timeline of international instruments addressing LGBT rights.

³⁸ E.g. ILGA -Europe, BABELNOR, and IGLYO

³⁹ Face-to-face Interview with representative of Labris, on 20 October 2012 in Dublin.

⁴⁰ Face-to-face Interview with representative of LGBT Forum Progress, on 15 October 2012 in Dublin.

⁴¹ Skype Interview with representative of Queer Montenegro, on 20 August 2014.

⁴² Interview with former EU official, Brussels May 2013

⁴³ When Pride happened in 2014, Prime Minister Aleksandar Vučić did not attend, nor did he defend the event. On the contrary, in a press conference afterwards he thanked the opponents of the pride for their tolerance and for refraining from violence.

⁴⁴ Face-to-face Interview with EU official, European Commission (DG Enlargement), on 6 March 2014 in Brussels.

⁴⁵ Face-to-face Interview with EU official, European Commission (DG Near), on 26 May 2015 in Brussels.