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Lydia Malmedie

## Contested Issue and Incremental Change The Example of LGBTI in EU Foreign Policy

### Abstract

Ten years ago, sexual orientation and gender identity were not considered topics that should be worked on as part of EU foreign policy. Today we can say that these issues are institutionalized and formalized as Council Guidelines for the promotion of the human rights of lesbian, gay, bisexual, transgender and intersex people. This paper addresses the question of how this was possible, given the contested nature of the topic and absence of apparent external shocks that are often cited by institutional literature to explain such radical changes. The analysis of interviews suggests that the interplay between the external political context and internal factors shaped a series of incremental changes, each building on the previous one. It confirms the dynamic nature of institutions and shows how actors, enabled and constrained by institutions, act less strategically than is often assumed.

*Key words:* Institutional change, incremental change, EU foreign policy, LGBTI, human rights

### Zusammenfassung

*Umstrittener Wechsel durch schrittweisen Wandel – Wie LGBTI Teil der EU-Außenpolitik wurde*

Vor zehn Jahren waren sexuelle Orientierung und soziales Geschlecht noch Tabuthemen und weit davon entfernt, Teil der EU-Außenpolitik zu sein. Heutzutage jedoch sind sie in Form von EU Guidelines zur Verbreitung von Menschenrechten für lesbische, schwule, bisexuelle, transgender und intersexuelle Menschen formalisiert und institutionalisiert. Solch grundsätzlicher Wandel wird in der Literatur oft durch externe Schocks erklärt, die jedoch in diesem Fall fehlen. Basierend auf Interview- und Dokumentenanalyse zeigt dieser Aufsatz, dass durch das Zusammenspiel von internen und externen Faktoren eine Serie kleinerer Veränderungen zu dem Wechsel führen konnten. Zudem wird deutlich, dass Akteure weniger strategisch handeln als oft angenommen wird.

*Schlagworte:* Institutioneller Wandel, inkrementeller Wandel, EU-Außenpolitik, LSBTI, Menschenrechte

## Introduction<sup>1</sup>

Ideas about sexual orientation and gender identity are fundamental to the organization of societies. Change with regard to these concepts therefore has the potential to call into question some of the strongest and most entrenched social norms and institutions. Unsurprisingly, lesbian, gay, bisexual, transgender and intersex (LGBTI) issues can be a contested topic area. Within the European Union (EU), for example, protection against discrimination on grounds of sexual orientation and gender identity varies greatly across member states (*Fundamental Rights Agency* 2014; *ILGA Europe* 2015).

Just ten years ago, LGBTI issues were not even regarded as topics that should be worked on in EU external policy. Today, the topic of LGBTI is not only on the agenda, but has a permanent place within EU foreign policy. This change is puzzling since LGBT (the 'I' was only added later) as a topic was contested on the staff level in the administration and at the EU member state level, where decisions are made unanimously on EU foreign policy issues. Yet today, the topic has been institutionalized to the point where LGBTI is mentioned in all European External Action Service (EEAS) annual Human Rights and Democratization Reports and there are far-reaching Council Guidelines to promote and protect the enjoyment of all human rights by lesbian, gay, bisexual, transgender and intersex (LGBTI) people, which direct EU action towards third states.

On a theoretical level, a large body of institutionalist literature points towards external factors, crises or top-down decrees to explain drastic institutional change within an organization (*Pempel* 1998; see for example *Fligstein* 2001; *Jacobs* 2010, S. 9; *Greenwood u.a.* 2013, S. 19). A recent example of change due to shock in relation to sexual orientation is for example the referendum in Ireland to open up marriage to same-sex couples.

However, in the example discussed here, there is not one obvious shock or top-down force that neatly explains the institutional change from a near taboo topic to one cast into Council Guidelines. This directs attention to smaller and more endogenous factors. In this article, the aim is therefore to explain the change as incremental and describe how internal and external factors made it possible for LGBTI to become institutionalized in EU foreign policy, thereby addressing the questions regarding the external and internal factors that contributed to this change. How can the change that took place be classified? And what was the role of change agents?

Institutional change is understood here as “a difference in form, quality, or state over time ... determined by observing the arrangement at two or more points in time on a set of dimensions” (*Hargrave/Van de Ven* 2006, S. 866). To observe this change, this paper draws on a comprehensive model developed by *Mahoney and Thelen*, which takes external and internal factors into account. Based on the combination of a) the veto possibilities of change opponents as more external political context factors and b) change agents' level of discretion in interpretation of rules as internal factors, the authors establish four different types of institutional change: layering, drift, conversion and displacement (*Mahoney/Thelen* 2010).

Applying this model, we find that the contested institutional change in this case can be explained as a series of different incremental changes starting with layering, then conversion and drift followed by displacement, with each previous change paving the way for the following. These were influenced by a combination of interlinking endogenous processes and more exogenous developments. The interpretation of rules at the micro-level was crucial for this process at all stages, but in particular at the beginning. Once the topic was formally linked to human rights, it gained legitimacy but remained contested, making other changes necessary before it became institutionalized.

The topic of EU LGBTI policy has been subject to a number of studies shedding light on how the issue gained prominence. Some focus more on norm diffusion (*Kollman* 2009; *Kollman/Waites* 2009) and the role of social movements (*Ayoub/Paternotte* 2014), some more on the legal aspects (*Bell* 2002), while others look at promotion in third countries (*Cierco* 2011). However, it is equally important to take a close look at processes within organizations at the level of interpretation, and it is in this respect that this study can offer valuable insights.

The following section starts by conceptualizing incremental change in a way that takes external and internal factors into account. This is followed by information on data and methodology, and a brief outline of how an unwanted LGBT file turned into a Toolkit, made it into an Action Plan and then became LGBTI Council Guidelines. I then discuss the incremental change that took place with help of the conceptual framework outlined below.

## Conceptual Framework

While earlier academic work on institutions was interested in their persistence, more recently change, or ‘dynamics and contestation’, have become the focus (*Garud/Hardy/Maguire* 2007, S. 959; *Powell/Colyvas* 2013, S. 277). However, institutionalists struggle to explain change, since the idea of stability is inherent in institutions (*Mahoney/Thelen* 2010, S. 4). Many have attributed change to external factors such as shocks (*Fligstein* 2001; *Ira Katznelson* 2003) or frames imported for example by social movements (*Ayoub/Paternotte* 2014, S. 13). This makes exogenous forces seem like the main change agents but we know from studies such as Kellogg’s on hospital reforms that institutional stability, as well as change, also very much depend on mobilization from within (*Kellogg* 2011). It is therefore important not to neglect internal organizational factors to understand the full picture of how change happens.

Where change is obvious but shocks appear to be absent, as is the case discussed here, we need to turn to an alternative explanation that directs attention more to the institutions themselves and to the micro-level where they are enacted through everyday interactions. This ‘institutional maintenance’ can be regarded as an active process and one that relies on actors to mobilize rules, rather than the self-reinforcing nature which path dependency assumes (*Streeck/Thelen* 2005, S. 24). Yet, rules can never be specific enough to only allow for one approach to cover all possible aspects. They are always ambiguous and have to be interpreted to be re-enacted and they are continuously based on negotiations and contestation (*Sheingate* 2010, S. 180). Through everyday repetition, ‘continuity and change’ are produced (*Powell/Colyvas* 2013, S. 277). Therefore we can assume that “[i]ncremental change takes place in the “gaps” or “soft spots” between rule and interpretation or rule and enforcement” (*Mahoney/Thelen* 2010, S. 14). This also means that institutions constitute temporary agreements always in danger of change. It is these incremental modifications in everyday practice that can “cumulate into significant institutional reforms” (see also *Falletti* 2010; *Mahoney/Thelen* 2010, S. xi).

When we look a bit more closely at these soft spots, the interpretation happens on the individual level where people translate rules into their local context (*Czarniawska/Sevón* 2005) and thus institutional change is as political as the institutionalization process itself (*Scott* 2014, S. 114-115), and implies power (*Hall* 2010). Understood as a resource of a specific institutional constellation rather than an attribute of a particular actor (*Czarniawska/Sevón* 1996, S. 7), power in form of legitimacy “can be crucial to garnering resources from external audiences, to commanding the loyalty of internal participants...” (*Greenwood/Suchman* 2013, S. 63).

A changed institution must also become externalized, objectified and internalized (*Berger/Luckmann* 2013). We can consider the file on LGBT issues, the LGBT Toolkit, Action Plan with LGBT action point, and LGBTI Guidelines as objectifications of an idea

(Czarniawska/Joerges 1996) and them being cast into formal rules as quasi-objects, which then again undergo a process of interpretation before being locally embedded again. The literature suggests several different ways in which this takes place based on a combination of internal and external factors.

Rooted in more historical institutionalist understanding and bringing together insights from earlier work on incremental institutional change, *Mahoney and Thelen* suggest four modes of institutional change (see *Thelen* 1999, 2002; *Mahoney/Rüschemeyer* 2003; *Streeck/Thelen* 2005). They distinguish between complete *displacement* of existing institutions, *layering* of new institutions onto or alongside existing ones, *drift* where environmental change is not reflected in existing institutions, and *conversion* where existing rules are enacted differently. The authors suggest that these changes depend on a more external political context and the characteristics of the institutions, the former being determined by the existing veto power opportunities and the latter more internally by the levels of discretion in interpretation and enforcement (*Mahoney/Thelen* 2010).

*Table 1: Contextual and Institutional Sources of Institutional Change based on Mahoney/Thelen 2010, S. 28*

		Characteristics of the Targeted Institution	
		Low Level of Discretion in Interpretation/Enforcement	High Level of Discretion in Interpretation/Enforcement
Characteristics of the Political Context	Strong Veto Possibilities	Layering	Drift
	Weak Veto Possibilities	Displacement	Conversion

## Methodology and Data

Institutional change is most visible where it manifests itself in quasi-objects, such as a Toolkit or Guidelines. This paper is based on 28 semi-structured background interviews, conducted between December 2013 and November 2014 in Brussels, Belgium. A number of the interviewees selected by the snowball system provided background knowledge as representatives of NGOs, while others work or worked on the topic of LGBTI specifically within the EEAS or the relevant Directorates-General (DGs) at the EU Commission. Created in 2009 with the ratification of the Treaty of Lisbon, the EEAS is the diplomatic service of the EU and supports the High Representative of the EU. Some of the interviewees had already worked at the European Commission before the EEAS entered service in 2011 as part of the DG for External Relations (RELEX). Others work for the EU Commission's DG for Development and Cooperation – EuropeAID (DEVCO).

The interviews covered questions around the interviewee's work on LGBTI issues, EU foreign policy and LGBTI more generally, but also specifically about the processes that led to the Toolkit and Guidelines. While a small number of interviews were recorded, I relied on note-taking in most cases and any quotes are from my own notes. For the analysis, I used Atlas.ti to sort the relevant interview notes and to carry out simple initial descriptive coding. Next, I conducted a directed content analysis of the interviews to reconstruct the process. I triangulated this with relevant official documents such as the minutes

of meetings and correspondence between the EEAS and Council of the European Union to piece together the developments within the organization on the particular topic in question. This analysis allowed me to piece together the story outlined below which is followed by the analysis and discussion of results.

## The Story

Today, LGBTI can be regarded as institutionalized within the human rights foreign policy of the EU administration working in Brussels. Prior to 2005, however, the topic of LGBT people was addressed by the EU Commission as part of RELEX and under the topic of non-discrimination. “There was no real appetite from the Member States or the EU Commission to push LGBTI through at high level” [Primary Document Atlas.ti (PD) 5]. There were several staff members who worked on different topics under non-discrimination but the LGBT file was managed by an openly gay employee within that unit. When this first staff member left, “no one wanted to do it and it got pushed around a bit ... It was the only file where colleagues thought that their stance on this reflected on them personally” [PD 23].

Finally it landed on the desk of another member of staff who did not have any negative associations with LGBT issues. “I had no issues personally. I have gay people in my family and in the school I went to” [PD 23]. This meant that the file was taken up and taken seriously, yet it took some convincing of colleagues that the file was something that should be worked on and was indeed a human-rights issue. “It provoked sexist comments” and colleagues felt entitled to make sex-jokes [PD 23]. Also superiors were irritated by the topic and even those who actually cared about human rights would ask “Why are we doing this again?” and then were reminded that there “are seven countries where there is the death penalty [on homosexual acts] and people experience torture because of it etc.” [PD 23].

When, during a period of absence, the position with the whole portfolio was covered, the person tasked to step in “hadn’t done anything” and did not justify this [PD 23]. When the staff member returned from leave, they were only told there were “four days to do a Toolkit” on LGBT [PD 23]. In the meantime, the International Gay and Lesbian Association (ILGA) Europe and the Government of the Netherlands (which had received input from a national NGO) had submitted a suggestion for an LGBT Toolkit. There “was little time so I said, ok, I will write this Toolkit and I rewrote the NGO document and ‘councilified’ it so to speak” [PD 23]. The document was rendered in an appropriate form so it could be considered by a task force from the Council’s Working Group on Human Rights (COHOM), and “there was quite a discussion in COHOM, we couldn’t get the Yogyakarta Principles in for example” [PD 23]. With first Sweden and then Spain taking over the Council’s presidency, they pushed for the creation of an LGBT Toolkit and “everyone was surprised about that” [PD 14]. Spain, which held the presidency from January to July 2010, is said to have played an especially “important role” during the negotiations in the Task Force of the COHOM [PD 18]. This does not seem to be an unusual thing: “It only takes two people to push something like the Toolkit through. They convince others. There is often not much on the Council’s agenda and so the question is ‘Who has prepared something? – We’ll take that.’ Or there is a new presidency and they wonder ‘What can we sell?’” [PD 11].

When it came to the discussion in the Task Force negotiating the Toolkit, one of the main points was whether it should be LGBT Rights or Human Rights for LGBT Persons. It was suggested that this was due to “sloppy language” in the initial draft document that did not distinguish between the two concepts and was inconsistent in its language use [PD 23]. The latter having been decided on, the LGBT Toolkit was passed on 8 June 2010. Nine days later, on June 17 2010, the COHOM sent a written note with the Toolkit to the Political and Security Committee of the Council (*Council of the European Union* 2010). Countries that would have opposed the change were not really involved in the task force, an informal sub-group within COHOM formed of representatives from interested member states. In this case “it was all the progressive Member States plus Malta, whose representative never said a word but wanted to make sure to know what was going on” [PD 23]. Generally the “conservative member states stay neutral” on this topic [PD 10]. Even when the Toolkit was there, the topic continued to be contested. Some colleagues would ask, “Do we really need to work on this? Is it a Council decision?” [PD 23].

At the time when the Toolkit passed, the EEAS had already been founded by the Treaty of Lisbon. However, it was not until one year after, in 2011, that the EEAS took up its work. Many staff members who had been working on foreign affairs for the Commission became EEAS staff and so the LGBT file passed over to the EEAS together with the responsible staff member.

Leading up to the adoption of the EU Strategic Framework and Action Plan on Human Rights and Democracy on June 25 2012, “there was a consultation and so on but no one really had an overview of what was going on and I didn’t either. At some point it came back from ILGA Europe with the Guidelines included in the Action Plan” [PD 23]. The staff member responsible for the file passed it on and the suggested amendment was included in the draft and passed as part of the whole Action Plan package in the Council. It was the only way it could have been included, “because if one of the member states would have included it, it could have caused a split between those [member states] more motivated and the others and they would have seen it as the issue of a few member states. We couldn’t put it in because it hadn’t come from member states” [PD 23]. The amendment was included despite a potential risk that “we would have Guidelines but we would risk it being weaker in content” than the Toolkit [PD 23]. “A lot of the work is very tedious and reactive but that once in a while, something flies by and you have to grab it. You need to be prepared to do it” [PD 23]. It was said that “because it is a package, also with the Guidelines on Freedom of Religion, I thought, let’s see if it’s going to be accepted. And it went through as a package” [PD 23]. Someone higher up in the hierarchy said, “...I don’t remember why they put it in the action plan. Probably because in the Action Plan there is everything which relates to human rights so someone said, oh oh, don’t forget the rights of LGBTI persons” [PD 22].

Formulated as an action point, the drafting of Council Guidelines then followed the usual procedure. The Guidelines happened “because the Strategic Framework document included the action point to develop Guidelines, building upon the EU’s LGBT Toolkit, the Guidelines were created” [PD 18] and that the LGBTI Guidelines happened because “it was in the Action Plan” [PD 22]. The Action Plan in Action 22 instructed development of “public EU guidelines, building upon the EU’s LGBT (lesbian, gay, bisexual, transsexual) toolkit” (*Council of the European Union* 2012). In the working group tasked with drafting the Guidelines, “the main question we asked ourselves in the beginning was, do we start from scratch or do we use the Toolkit?” [PD 18]. After consultations with NGOs

as well as the then LGBT Intergroup of the European Parliament, the comments were merged and discussed in the Council. “All were in agreement that the Toolkit is a very good document, especially the annex which can be used for the implementation and to measure. We decided to use the Toolkit text, consulted with NGOs, then with the LGBT Intergroup of the EU Parliament. We then merged the comments and negotiated it in the Council” [PD 18]. After this decision, standard procedure applied. “We worked on the Guidelines for eight months. It was more like, ‘we have the Toolkit, it’s an emerging issue, let’s upgrade it’” [PD 7]. The ‘upgrade’ of the Toolkit to Guidelines was a mere “technical process” [PD 23]. After the topic was “discussed quite a bit in COHOM working group”, it was approved by COREPER, the Council’s main preparatory body, on June 19 2013 and was formally “rubber stamped without discussion” by the Council in its meeting on June 24 2013 in Strasbourg [PD 7] (*Council of the European Union* 2013).

Today, staff agree that LGBTI “is not a taboo subject anymore for us” and the “work we do on LGBT is part of the broader human rights work we do” [PD 20]. The LGBTI Guidelines now form part of a suite of a total of 11 official Council Guidelines, aimed at EU institutions and member states when they engage with third countries and international civil society organizations.

## Classifying Institutional Change

With this account in mind, the first step is to classify the kind of institutional change that took place by paying attention to the internal and external factors influencing change. “The characteristics of institutions themselves, especially the ambiguity of their rule structure and the attendant struggles over the meanings of rules, help explain how institutions evolve” (*Sheingate* 2010, S. 170). Rather than trying to look at the whole process as one, it is useful to look at segments that implicitly were identified by interviewees but that also serve as analytical units of incremental change. We can distinguish four phases: the period of high contestation before the Toolkit, then the negotiations that led to it, the inclusion of LGBTI in the Human Rights Action Plan and lastly the LGBTI Council Guidelines. First, I will identify the political context conditions in form of veto power and discuss the discretion granted to participants to interpret rules. I will then take a closer look at the change agents themselves.

## Countering Contestation through Layering

Initially there is a file on LGBT and formally the topic exists as part of EU foreign policy on non-discrimination more generally. However, despite its existence, it was apparently sidelined or possible to not work on it at all. There are two rules clashing here: On one hand, the idea that where a file exists the topic is regarded to be of some relevance to the organization, on the other the notion that sexual orientation and gender identity is not something that should be of general concern within the unit working on EU foreign policy.

*Mahoney and Thelen* define veto powers as high “where there exist actors who have access to institutional or extrainstitutional means of blocking change” (*Mahoney/Thelen* 2010, S. 10). The inactivity with regard to the file in the beginning could be blamed on



strong veto powers exercised by actors drawing on a competing, deeply engrained institution, that of heteronormativity. This renders any alternatives to heterosexuality and associated gender conformity inferior. The interviewee suggests this notion when explicitly mentioning that they had no problem with taking up the task because they knew gay people.

The veto power of colleagues and superiors against attempts to reinterpret LGBT as being part of the work remained strong as the ‘inappropriate’ comments indicate. This lack of sanctions of otherwise unacceptable behavior shows how strong the institution of heteronormativity proved to be i.e., how little room for interpretation there was and that there were no negative consequences for someone simply ignoring this part of the work. On the contrary, the person working on the file had to justify why they did so. Within the justification, we can identify attempts of layering whereby “new rules are introduced on top of or alongside existing ones”, namely those of human rights (*Mahoney/Thelen* 2010, S. 15).

The starting constellation of high veto powers opposing the change and little room for interpretation shows the highly contested nature of institutional change. Layering and placing the new rule of LGBT issues as a topic next to the established institution of human rights was not successful in establishing LGBT as a fully accepted topic as one of general interest. However, it placed the topic alongside a more established one that is no longer questioned, and therefore laid important groundwork for the next change to come.

## Conversion towards Greater Formalization

With this scenario in mind, we turn our attention to the creation of the Toolkit where the veto possibilities of change opponents were much weaker. It appears to have been difficult to do any work on the file in light of comments from colleagues, let alone come up with the idea for a Toolkit. The Netherlands introduced the idea and it was then pushed by the Council during the presidencies of Sweden and Spain, both countries with advanced protection for LGBTI persons in their national policies; this made a difference. It influenced the power dynamics inside of the organization and created openings that had not been there before.

The external influence here was clearly important in that it changed the conditions and legitimized the agents becoming more active. It can also be understood as these temporarily more powerful actors bringing their “power to bear against the institutional system” (*Onoma* 2010, S. 70). While most countries have plans to push particular issues, only few are realized. The example here also shows that the internal condition is equally important. If the file had still not been allocated at this point, it would have created a different scenario. Similarly, if the person who had been allocated the file had not been able to make sense of it by taking the ideas offered in the draft submitted and turned it into a format the Council would consider, it is probable that nothing much would have materialized. And if it had, a document ‘weak’ in content could have emerged, possibly sidelining the topic further by making it a minority issue rather than a human rights topic.

Within the logic of the framework proposed by *Mahoney and Thelen*, these contextual and institutional sources would point towards conversion as institutional change which “normally occurs when rules are ambiguous enough to permit different (often starkly contrasting) interpretations” (*Mahoney/Thelen* 2010, S. 21). While not necessarily con-

trasting, there was definitely much ambiguity in the Council's demand. The form this Toolkit should take or the exact content left much room for interpretation, a situation substantiated by the fact that one main discussion point in the task force in COHOM at the time was whether it should be 'LGBT rights' or 'human rights for LGBT people'. This shows how much was left unspecified, namely how closely the topic would be linked to this comparatively well-developed framework of human rights, or whether it would be considered a separate topic.

The change that can be identified is how the LGBT topic morphs from ambiguous within EU human rights policy, via negotiations within the COHOM's task force, to become much more codified and defined as a set of formalized rules in form of the Toolkit, and clearly embedded in the human-rights agenda. However, this next level of formalization, while leading to a more general recognition that the LGBT issue is part of EU foreign policy, did not mean staff felt automatically bound by it. This is apparent in colleagues querying whether it also applied to them, even though the Toolkit itself has a global reach that demonstrates again the contested nature of the subject and the amount of internal mobilization it required to become institutionalized.

With the topic being formalized in form of a Toolkit, it became 'objectified' and more of a collective responsibility as a result. While before, one person was responsible for the file, with the inception of the Toolkit the topic became much more mobile and the connection between human rights and LGBT was no longer only in the head of individual staff members. "In order to become public knowledge, though, an idea must become objectified ... This process can be bolstered by willing political agents, but it is also shaped by contingent events and little controlled processes ..." (Czarniawska/Joerges 1996, S. 44). The constellation of first Sweden and then Spain holding the Council presidency could be regarded as such an external process.

## Between Drifting and Conversion

The next stage on the way of LGBT issues becoming institutionalized was the inclusion as one of 97 action points in the EU Strategic Framework and Action Plan on Human Rights and Democracy (*Council of the European Union* 2012). This kind of document also needs to be agreed on by all EU member states. Therefore there were formally strong veto possibilities for the representatives of the countries opposing the greater formalization of LGBT issues as part of the EU's foreign policy on human rights. High levels of discretion on interpretation can be attributed to the complexity of the process. This also posed a challenge for any strategic intervention – internally or externally. The submission of an amendment including the LGBTI Guidelines was not planned and organizational rules made it impossible for a staff member to introduce a change, even if they had had the idea. Similarly, it was not listed as a long-standing strategic aim of ILGA Europe in a document on strategic lobbying post-Lisbon Treaty (*De Schutter* 2011). Hence it was very much an ad hoc development and more coincidental than strategic.

Put abstractly, we could summarize that due to the complexity of the process, and weak enforcement on the part of opponents, a gap opened. The gap was turned into an opportunity by someone who was able to recognize it as such. This is crucial because we are constrained and enabled by our institutional environment, "we cannot actually perceive something unless it relates to something we already know" (*Czarniawska/Sevón*

1996, S. 27). Hence, one way to classify and explain this change based on the environment would be through drift, “which can occur when a gap opens up between rules and enforcement (in this case, often a gap due to neglect)” (*Mahoney/Thelen* 2010, S. 21).

While this view takes formal veto power by member states into account, we could also argue that the de facto veto power was significantly lower by the time it came to voting on the whole proposal. The Freedom of Religion Guidelines were mentioned specifically, and there was also the fact that it passed as a package. Presumably, it would have been hard for some member-state representatives to argue why there should not be Guidelines on LGBTI but on Freedom of Religion and Belief. However, this only holds true, if by this point, the link to human rights had been formally established and accepted more generally; the basis for this was the LGBT Toolkit. The staff member guessing that it was included because someone said ‘don’t forget about LGBTI’ further confirms this assumption. This change also suggests that now the power had shifted and previous opponents of the new rule would have found themselves in the role of opposition to the changed rule.

### Displacing a Rule?

With regard to the LGBTI Guidelines, it was thought that there was no alternative but to create them, as they were included as a task in the Action Plan that had been agreed by the Council. However, there was the question about the Guidelines, content and reach, and there was the fear that they would fall short of what had been secured with the Toolkit. So while the veto possibilities can be described as very low, there was a level of discretion in the interpretation of what they should look like in the beginning.

Once it was decided that the Toolkit would indeed form the basis, the room for interpretation was much lower as standard procedures kicked in. Even though the draft was discussed over the course of several months, it was in the end described as a technical process based on legalistic arguments and then rubber-stamped in the final instance without any further discussion.

From the moment that it was decided within the COHOM to use the Toolkit as a base, the veto possibilities were low and so was the level of interpretation. The literature would suggest that this kind of situation leads to institutional change through *displacement* that happens “when existing rules are replaced by new ones” (*Mahoney/Thelen* 2010, S. 16). This (preliminary) last step in the change process I analyzed here certainly does not seem like a very radical and abrupt change in consideration of the incremental changes that occurred beforehand. However, *displacement* can also be a slower process where new rules compete with old institutions (*Mahoney/Thelen* 2010, S. 16). This seems to hold true in this case. The change we can observe is that the discussion was no longer ‘whether’ LGBT should be included in EU human rights policy, but more about ‘how’ it should be included. Hence the change towards institutionalization had happened and its place within EU foreign policy and as part of human rights was no longer questioned.

### Discussion

This paper was motivated by the question of how human rights for LGBTI persons, a contested issue, came to be included in EU foreign policy in the form of Council Guidelines,

and in the absence of a major external shock. It asked: Which are the external and internal factors that contributed to the change? How can the change that took place be classified? And what was the role of change agents? It was suggested that incremental institutional change occurred and conceptualized this transformation as taking place in the gaps between institutions and their interpretation. I then explained how the LGBT file, Toolkit, Human Rights Action Plan and the LGBTI Guidelines can be regarded as objectifications of an idea, and then analyzed the change taking place by paying attention to the altered veto possibilities and scope for interpretation for each change segment. Below follows an outline of the findings and a discussion of their theoretical implications.

## Incremental Change on the Way to Institutionalization

The institutional change observed in the case at hand can be explained by a series of incremental changes. It would have been difficult to capture the change by applying the *Mahoney/Thelen* model to the whole process from LGBT File to LGBTI Guidelines at once. However, by taking into account the political context and the type of institution, we can then classify the type of institutional change for different stages. This allows for a clearer view on the dynamics and how conditions change, also based on the previous situation. This does not mean re-introducing the idea of ‘critical junctures’, but rather that analytical sections are important to understand the processual nature. The stages emerged from the data (interviewees mentioning the documents as important) but they must also be seen as analytical sections necessary to capture the incremental nature of the process. It would be possible to further divide those used here into even smaller units of change, for example different draft stages of the Guidelines and the negotiations around them, if we looked in more detail into each aspect and were able to gather the relevant data. In any case, it makes sense to follow some important ‘linguistic artifacts’ as manifestations of rules where we are reconstructing a past process.

The dynamics, also depicted in the table below, can be described as follows. There is little room for manoeuvre to start with, which makes it a contested case and that makes layering necessary. It also seems logical that the displacement of a rule by a new one would be at the very end of the change process as is the case here with the Council Guidelines. For this to take place, some higher level of discretion in the interpretation is a prerequisite. This does not mean that each institutional change leads to a displacement; many will not. However, we can understand it as an indicator of successful institutionalization of a new rule that it is no longer questioned i.e., an old rule contradicting it has to be replaced, at least momentarily, before it is challenged again.

Between these two processes of layering and displacement, depending on what we emphasize, drift or conversion can be observed. The dynamic nature of the process is therefore visible also in the different kinds of changes taking place. It is possible for a less contested change to occur only because of drift for example. If a contested issue had gone from layering directly to displacement, the influence of an external shock would be evident. Here, however, we can see incremental steps taking place.

The political context conditions for the drift to take place are based on a change in external power dynamics. However, discretion in interpretation building on earlier layering work was equally important.

Table 2: Contextual and Institutional Sources of Institutional Change based on Mahoney/Thelen 2010, S. 28

		Characteristics of the Targeted Institution	
		Low Level of Discretion in Interpretation/ Enforcement	High Level of Discretion in Interpretation/ Enforcement
Characteristics of the Political Context	Strong Veto Possibilities	Layering <b>LGBT File</b>	Drift <b>LGBTI Guidelines as Action Point</b>
	Weak Veto Possibilities	Displacement <b>LGBTI Guidelines</b>	Conversion <b>LGBTI Toolkit</b>

The sequence of smaller changes traced here on the way to institutionalization highlights the iterative nature of change and also shows how the changes build on each other. In a small way, it reflects that “change in one direction or another, at any one point in time, is affected by the outcomes of previous episodes of institutional change” (Hall 2010, S. 211).

### Formalization of Rules as New Openings for Interpretation

Mahoney and Thelen suggest that even “when institutions are formally codified, their guiding expectations often remain ambiguous and always are subject to interpretation, debate and contestation” (Mahoney/Thelen 2010, S. 10-11). This continued ambiguity is mirrored in the developments of the case. It is especially apparent in the challenges made to the Toolkit by staff members as well as the discussions that took place in preparation of the Guidelines as to whether or not the Toolkit should be used as a basis. However, it is also apparent that greater formalization grants further legitimacy to those working on the issue because of the “possibility of third party enforcement” (Streeck/Thelen 2005, S. 11), thus providing the basis for the next possible change.

Any change, including change in the level of discretion when it comes to interpretation, is relative to a previous state. While a file called LGBT can be ignored, a Toolkit is much more concrete and offers less room for interpretation by adversaries. Yet, it does not take long for opponents of change to identify the ‘gaps’ – in this case, the fact that it is not ‘legally binding’.

## Actors, Intentionality and Allies

When talking about change agents and power, the strategic nature of change is often assumed and individual actors are endowed with intentions, interests, and strategies. *Mahoney and Thelen* suggest that incremental changes do not have to be intentional but instead can be outcomes of compromises (*Mahoney/Thelen* 2010, S. 8). Others also concede that often actors might often not even “consider that they were taking risks and instead were responding to unanticipated circumstances” (*Powell/Colyvas* 2013, S. 285). This study confirms that actors “operate in settings of tremendous complexity” (*Pierson/Skocpol* 2002, S. 709), are not consciously following a strategy, and are not necessarily clear about their own interests. This is unsurprising when taking into account the cognitive limitations to consider all possible consequences, and the lack of capacity when actors are busy with their daily work. The example discussed here supports this as the actions appear to be “ad hoc adjustments to standard operating procedures” (*Hall* 2010, S. 218), as staff react, for example, to the ‘energy overload’ of ‘let’s do something’ which perhaps was behind the Council’s pressure for a Toolkit as suggested by one interviewee (*Czarniawska/Joerges* 1996, S. 40). Yet again, this also seems to be far from a strictly strategic move.

Similar considerations are true when it comes to allies. *Sheingate* suggests that “where new institutions require mobilizing, this can be central for leaders to gather support” (*Sheingate* 2010, S. 211). In a case like the one discussed here, actor’s ability to identify with the topic and make sense of it can be more important than top-down mobilization, especially where there seem limited resources to mobilize strategically. “In other words, *even* if the relevant outcome – understood as the position taken by an actor or as the institutional result that follows from aggregating those positions – is driven largely by the consideration of material interests, issues of identity can be important determinants of the result” (*Hall* 2010, S. 212). Therefore we should not underestimate the importance of normative beliefs and interests.

## Conclusion

This empirical study contributes to a better understanding of how LGBTI, as a contested issue, entered EU foreign policy. In addition to empirical insights, this study not only illustrates, but also adds to, the model of *Mahoney/Thelen* on incremental change. It goes beyond mere classification of different segments of the change process based on external and internal factors, and suggests a specific dynamic instead in the case of institutional change around a contested issue: a) layering as a first step; b) drift and conversion occur as interim stages before any displacement which may or may not take place.

In line with *Mahoney/Thelen*, the study suggests that even if they are formalized, rules always remain ambiguous and open to interpretation. However, it also shows that greater

codification in the first instance also grants greater legitimacy and can lead to a shift in the veto power constellation. Formalization is always relative to the previous state.

The strategic behaviour often assumed of actors is cast into doubt by a close look at the gaps where the interpretation takes place, and suggests more ad hoc and coincidental navigation of complex processes by staff. They are clearly enabled and limited by institutions surrounding them. Therefore identification with a topic and an ability to help others make sense of it by embedding it into a larger framework outweighs strategic considerations.

The nature of institutions is dynamic, as we have seen. Therefore change will continue over time and space and the LGBTI Council Guidelines are only ever a momentary settlement and in turn will be interpreted. On the time dimension it will therefore be interesting to see whether the formal institutionalization will endure and will continue to be enacted or whether it will be successfully challenged, turning it into a document the LGBT File once was.

With EU foreign policy as the research object, of course the dimension of space is also crucial and an area for future enquiry. While LGBTI can be considered institutionalized within EU foreign policy in Brussels at the moment, the topic is still much contested in many third countries where EU delegations and member state embassies (as the main LGBTI Guideline addressees) are located. Given the different political context where veto possibilities remain very strong and ways of interpretation will differ as well, LGBTI is bound to remain contested. This is therefore a promising area for further study.

## Note

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## Literature

- Ayoub, Phillip/Paternotte, David*, 2014: Introduction, in: *Ayoub, Phillip/Paternotte, David* (Hrsg.), *LGBT Activism and the Making of Europe: A Rainbow Europe*, Houndmills, Basingstoke, Hampshire: Palgrave Macmillan, S. 1-25.
- Bell, Mark*, 2002: *Anti-Discrimination Law and the European Union*, Oxford: Oxford University Press.
- Berger, Peter L./Luckmann, Thomas*, 2013: *Die gesellschaftliche Konstruktion der Wirklichkeit: Eine Theorie der Wissenssoziologie*, 19. Aufl., Frankfurt am Main: Fischer Taschenbuch-Verlag.
- Cierco, Teresa Maria*, 2011: Human Rights promotion in Serbia: A difficult task for the European Union, in: *Revista Brasileira de Política Internacional*, 54 (1), S. 142-158.
- Council of the European Union*, 2010: COHOM 162, PESC 804 (EU Council) Toolkit to Promote and Protect the Enjoyment of all Human Rights by Lesbian, Gay, Bisexual and Transgender (LGBT) People, 11179/10, <http://www.consilium.europa.eu/uedocs/cmsUpload/st11179.en10.pdf> (Stand: 6.11.2012).
- Council of the European Union*, 2012: EU Strategic Framework and Action Plan on Human Rights and Democracy, 11855/12.
- Council of the European Union*, 2013: (Foreign Affairs Council meeting Luxembourg) Guidelines to Promote and Protect the Enjoyment of All Human Rights by Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Persons.
- Czarniawska, Barbara/Joerges, Bernward*, 1996: Travels of Ideas, in: *Czarniawska, Barbara/Sevón, Guje* (Hrsg.), *Translating Organizational Change, Studies in Organization*, Berlin: Walter de Gruyter, S. 13-48.

- Czarniawska, Barbara/Sevón, Guje*, 1996: Introduction, in: *Czarniawska, Barbara/Sevón, Guje* (Hrsg.), *Translating Organizational Change*, Studies in Organization, Berlin: Walter de Gruyter, S. 1-12.
- Czarniawska, Barbara/Sevón, Guje*, 2005: Translation Is a Vehicle, Imitation its Motor, and Fashion Sits at the Wheel, in: *Sevón, Guje/Barbara Czarniawska* (Hrsg.), *Global Ideas. How Ideas, Objects and Practices Travel in the Global Economy*, S. 7-12.
- De Schutter, Olivier*, 2011: Exploring the Lisbon Treaty. New opportunities for equality and human rights applied to sexual orientation and gender identity, ILGA Europe.
- Falleti, Tulia G.*, 2010: Infiltrating the State. Health care reform in Brazil 1964-1988, in: *Mahoney, James/Thelen, Kathleen* (Hrsg.), *Explaining Institutional Change. Ambiguity, Agency and Power*, Cambridge: Cambridge University Press, S. 38-62.
- Fligstein, Neil*, 2001: Institutional Entrepreneurs and Cultural Frames – The case of the European Union's Single Market Program, in: *European Societies*, 3 (3), S. 261-287.
- Fundamental Rights Agency*, 2014: EU LGBT Survey, Fundamental Rights Agency, [http://fra.europa.eu/sites/default/files/fra-eu-lgbt-survey-main-results\\_tk3113640enc\\_1.pdf](http://fra.europa.eu/sites/default/files/fra-eu-lgbt-survey-main-results_tk3113640enc_1.pdf) (Stand: 16.11.2014).
- Garud, Raghu/Hardy, Cynthia/Maguire, Steve*, 2007: Institutional Entrepreneurship as Embedded Agency: An Introduction to the Special Issue, in: *Organization Studies*, 28 (7), S. 957-969.
- Greenwood, Royston/Oliver, Christine/Sahlin, Kerston/Suddaby, Roy*, 2013: Introduction, in: *Greenwood, Royston/Oliver, Christine/Sahlin, Kerston/Suddaby, Roy* (Hrsg.), *The SAGE Handbook of Organizational Institutionalism*, London: SAGE Publications, S. 1-46.
- Greenwood, Royston/Suchman, Mark*, 2013: Legitimacy in Organizational Institutionalism, in: *Greenwood, Royston/Oliver, Christine/Sahlin, Kerston/Suddaby, Roy* (Hrsg.), *The SAGE Handbook of Organizational Institutionalism*, London: SAGE Publications, S. 49-77.
- Hall, Peter A.*, 2010: Historical Institutionalism in Rationalist and Sociological Perspective, in: *Mahoney, James/Thelen, Kathleen* (Hrsg.), *Explaining Institutional Change. Ambiguity, Agency and Power*, Cambridge: Cambridge University Press, S. 168-203.
- Hargrave, Timothy J./Van de Ven, Andrew H.*, 2006: A Collective Action Model of Institutional Innovation, in: *Academy of Management Review*, 31 (4), S. 864-888.
- ILGA Europe*, 2015: ILGA-Europe Rainbow Map 2015, [http://www.ilga-europe.org/sites/default/files/Attachments/side\\_a\\_rainbow\\_europe\\_map\\_2015\\_a3\\_no\\_crops.pdf](http://www.ilga-europe.org/sites/default/files/Attachments/side_a_rainbow_europe_map_2015_a3_no_crops.pdf) (Stand: 16.1.2014).
- Ira Katznelson*, 2003: Periodization and Preferences: Reflections on Purposive Action in Comparative Historical Social Science, in: *Mahoney, James/Rüchemeyer, Dietrich* (Hrsg.), *Comparative Historical Analysis in the Social Sciences*, S. 270-304.
- Jacobs, Alan M.*, 2010: Policymaking as Political Constraint: Institutional Developments in the U.S. Social Security Programme, in: *Mahoney, James/Thelen, Kathleen* (Hrsg.), *Explaining Institutional Change. Ambiguity, Agency and Power*, Cambridge: Cambridge University Press, S. 94-131.
- Kellogg, Katherine C.*, 2011: *Challenging operations: medical reform and resistance in surgery*, Chicago; London: University of Chicago Press.
- Kollman, Kelly*, 2009: European institutions, transnational networks and national same-sex unions policy: when soft law hits harder, in: *Contemporary Politics*, 15 (1), S. 37-53.
- Kollman, Kelly/Waites, Matthew*, 2009: The global politics of lesbian, gay, bisexual and transgender human rights: an introduction, in: *Contemporary Politics*, 15 (1), S. 1-17.
- Mahoney, James/Rüchemeyer, Dietrich*, 2003: Achievements and Agendas, in: *Mahoney, James/Rüchemeyer, Dietrich* (Hrsg.), *Comparative Historical Analysis in the Social Sciences*, S. 3-40.
- Mahoney, James/Thelen, Kathleen*, 2010: A Theory of Gradual Institutional Change, in: *Mahoney, James/Thelen, Kathleen* (Hrsg.), *Explaining Institutional Change. Ambiguity, Agency and Power*, Cambridge: Cambridge University Press, S. 1-37.
- Onoma, Ato Kwamena*, 2010: The Contradictory Potential of Institutions. The Rise and Decline of Land Documentation in Kenya, in: *Mahoney, James/Thelen, Kathleen* (Hrsg.), *Explaining Institutional Change. Ambiguity, Agency and Power*, Cambridge: Cambridge University Press, S. 63-93.
- Pempel, T. J.*, 1998: *Regime Shift: Comparative Dynamics of the Japanese Political Economy*, Cornell University Press.



- Pierson, Paul/Skocpol, Theda*, 2002: Historical Institutionalism in Contemporary Political Science, in: *Katznelson, Ira/Milner, Helen V./Finifter, Ada W.* (Hrsg.), *Political science: the state of the discipline*, New York, N.Y.: W.W. Norton, S. 693-791.
- Powell, Walter W./Colyvas, Jeanette A.*, 2013: Microfoundations of Institutional Theory, in: *Greenwood, Royston/Oliver, Christine/Sahlin, Kerston/Suddaby, Roy* (Hrsg.), *The SAGE Handbook of Organizational Institutionalism*, London: SAGE Publications, S. 276-298.
- Scott, W. Richard*, 2014: *Institutions and Organizations: Ideas, Interests, and Identities*, SAGE Publications.
- Sheingate, Adam*, 2010: Rethinking Rules. Creativity and Constraints in U.S. House of Representatives, in: *Mahoney, James/Thelen, Kathleen* (Hrsg.), *Explaining Institutional Change. Ambiguity, Agency and Power*, Cambridge: Cambridge University Press, S. 168-203.
- Streeck, Wolfgang/Thelen, Kathleen*, 2005: Introduction: Institutional Change in Advanced Political Economies, in: *Streeck, Wolfgang/Thelen, Kathleen Ann* (Hrsg.), *Beyond continuity: institutional change in advanced political economies*, Oxford ; New York: Oxford University Press, S. 3-39.
- Thelen, Kathleen*, 1999: Historical Institutionalism in Comparative Politics, in: *Annual Review of Political Science*, 2 (1), S. 369-404.
- Thelen, Kathleen*, 2002: The Explanatory Power of Historical Institutionalism, in: *Mayntz, Renate* (Hrsg.), *Akteure – Mechanismen – Modelle. Zur Theoriefähigkeit makro-sozialer Analysen*, Frankfurt/Main ; New York: Campus Fachbuch, S. 91-107.

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