

## **EU LGBTI Rights Promotion: Crafting consensual norms where none exist?**

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### **Introduction**

The European Union (EU) is a major player on the international stage. Aside from its sheer economic power, the Union aspires to be viewed as a normative power (Manners 2002) that persuades others to follow its practices. In its updated neo-normative rendering, this perspective also moves away from the power-laden state-centrism and perceives of the EU's normative power as a result of the interaction of its goals, means and justifications (Whitman 2013). In recent years, the Union has stepped up to take a global stance on promoting human rights to approximate EU laws requiring certain standards of human rights in all its member states. This extends to respecting LGBTI human rights, which the EU has made a priority for all countries who want to establish formal association or trade agreements or receive EU aid (European Parliament 2014). Yet the EU's internal LGBTI rights policy is less firmly established and recognized by its own member states, and its external promotion of norms and policies have led to conflict in recent years, e.g. in a number of EU member states (mostly in Central/Eastern Europe), African nations (Uganda, Gambia) or in the EU's Eastern neighborhood (Ukraine, Georgia, Russia). This pushback makes it harder for the Union to exert international influence, particularly if it aims to be seen as a normative model for others, which can be assumed given the absence of military might and the EU's own rhetoric as a normative power promoting human rights, democracy and the rule of law as enshrined in its accession conditions. This paper, part of a larger project that critically analyzes the EU's promotion of LGBTI rights in the international arena, examines through a combination of sociological institutionalism, constructivism and critical/queer theory the apparent normative clash ensuing between the EU member states when trying to develop a common position on an international, Western-centric conception and promotion of LGBTI rights as liberal human rights. The book project extends this dispute to the ensuing pushback by culturally and politically conservative states outside the EU which contest

the bloc's strategy with their own normative nationalist and/or cultural relativist counter-narrative.

This paper then focuses on elaborating the difficult norm negotiations when attempting to internally diffuse LGBTI rights policy. It highlights the role of norms in this process, and links this domestic normative incoherence among member states to an ambiguous and deficient EU-level 'constitutive' norm (Finnemore and Sikkink 1996) of LGBTI rights promotion. In doing so, the more general question in how far the EU is, can or should be a 'normative' agenda-setting power on the world stage (Manners 2002) and diffuse policies externally is of lesser significance here as this requires a separate discussion. Norms can be defined as "a standard of appropriate behavior for actors with a given identity" (Katzenstein 1996:5), already indicating a sociologic-institutionalist logic of appropriateness based on constructivist ideational motivations. In addition, other scholars have highlighted the role of social learning, persuasion and adaptation as mechanisms of Europeanization (Sedelmeier & Schimmelfennig 2005), which arguably is part of the larger process in which LGBTI norm diffusion from older to newer member states occurs. Yet the contested but also popular ideational concept of norm diffusion glosses over the limited consensus that exists in the EU with regards to many of its policies and the role it should assume in international affairs. This is particularly evident in such a normatively contested and geopolitically intertwined area such as sexual rights and equality (ranging from non-discrimination based on sexual and gender expression to positive rights of partnership recognition and childcare). Moreover, queer theory highlights that such norms are always performatively and contextually contingent, negotiated and contested. Each (EU) state perceives differently of any given set of norms, so that simplistic norm transfer/diffusion models often neglect the complexity involved (Wiener 2015). Rather, norm resistance is increasingly noted as a reaction to unilaterally 'imposed' norms (Wilkinson & Langlois 2014).

The Western-, or more precisely, EUro-centricity of this policy, linking advances in LGBTI rights to supranational modernity is not only responsible for creating a binary discourse judging less progressive EU states or counterparts as 'undeveloped' or 'undevlopable' (Weber 2016), but also leads resistant agents within and outside the EU to respond to this exclusionary vision with their own conservative message, as we can see in a number of states such as Poland, Hungary or even Turkey and the US right now. Moreover, European states' legacy as colonial

powers that in part even criminalized homosexuality further discredits a strongly normatively framed LGBTI inclusion argument. In the following, I'll theorize the norm disparities among EU member states to evidence the lack of a common vision for the promotion of LGBTI rights, and then analyze to what extent attempts to craft a common position through interactive exchanges on the EU level of governance can occur. Given that norm diffusion is theorized as a process of social learning and persuasion rather than a materially or power-based policy transfer, the discursive and social aspects of an assumed EU transference of norms is highlighted below.

Today, LGBTI rights norms across EU member states have been internalized as part of the umbrella of human rights, in accordance with the highly popularized statement that then US Secretary of State Clinton made at the UN in 2011 that 'gay rights are human rights'. All major European LGBTI activist groups have adopted the human rights frame, and the EU institutions also use it, irrespective of the ambiguous pressing of a range of non-heterosexual identities into a politically useful 'LGBTI' category. But this generalization only holds true to the extent that governments accept this equation, as Poland or Lithuania dispute it by pointing to the rights of e.g. religious persons (Ayoub 2016), and contest this frame's universal relevance. At the same time, the framing of LGBTI rights as human rights connects to the extensive European legal human rights framework established through the European Convention on Human Rights or the Charter of Fundamental Rights, and thus in theory aids in backing sexual minority rights claims. Hence norms, and their international diffusion, function differently than policy diffusion, the latter which is largely an effect of material and political influence (Boerzel & Risse, 2012). Similarly, this case study is less about norms transfer –to the extent that is possible- but a case of norm contestation.

It is outside of the scope of this paper to theorize the norm creation or diffusion in the general populace (which, while less significant for EU policy outcomes, is important as it provides the popular legitimacy base for the expression of domestic policy preferences). A look at the EU's public opinion instrument, Eurobarometer found that 71% of Europeans support equal rights for LGBTI citizens, but 60% believe that discrimination based on sexual orientation and gender identity (SOGI) is widespread. 61% are in favor of marriage equality, yet only 54% of Europeans would feel comfortable with a LGB person in a country's highest office. These numbers evidence that while there is a general pro-LGBTI sentiment among Europeans –

compared to other world regions – many rights and privileges that are taken for granted by heterosexuals, are still at the tipping point indicating an irreversible norm (Finnemore and Sikkink 1996). Moreover, these aggregate figures hide significant national variations that closely mirror the East-West split on sexual orientation and gender identity (Eurobarometer 437, 2015).

### **Norm disparities among EU member states**

When policy issues of sexuality and gender emerged on the EU's radar in the mid-1990s, it was clear that the topic would receive more attention, positive and negative, in the future alongside the EU's constitutionalization of internal and external human rights provisions. More than twenty years later, the situation of LGBTI people in the EU looks comparatively rosy: over thirteen states have introduced same-sex marriage and many others recognize civil unions, non-discrimination protections are widespread in European states and embedded in EU law, the EU funds LGBTI initiatives to the tune of hundreds of million Euros over the past decade (European Parliament briefing 2015), and popular levels of homophobia are comparatively low when measured by global standards. Yet if one looks more closely, a populist *and* political backlash to more visible, progressive politics has emerged in the past few years, in particularly in Central- and Eastern European (CEE) states. In the past few years, for every country that implemented marriage equality, another one chose to constitutionally limit such rights - seven CEE EU member states as of 2016 (ILGA 2017). And the call of advocacy groups throughout Europe for hard-law LGBTI protections have laid bare the comparatively advanced status of such claims, but have also exposed a gap between those and the more basic needs of LGBTI individuals, particularly transgender individuals, still dealing with discrimination, unemployment and hate-crimes. Moreover, the success of the European LGBTI movements also highlights disparities between their own record, and the difficulty of advocating for LGBTI rights abroad, in particular in the Global South.

Given the absence of broader legal protections of LGBTI rights in the EU outside the employment sector, and the reliance on norm diffusion across the Union, it is important to recognize that domestic or even regional norms don't remain immutable. As the EU enlargement process has shown, given a strong incentive (EU membership) and consistent application (such

as Annual Progress reports), norms revolving democratic governance, rule of law and human rights, can change (Sedelmeier and Schimmelfennig 2005). At the same time, regressive tendencies in these areas have become more pronounced after accession to the EU in a few countries, such as Poland or Hungary. Once conditionality does not apply anymore with membership, theoretically other normative diffusion strategies involving social learning/adaptation as well as negotiation should occur. Though in reality we have seen more of a contestation of LGBTI rights norms, as there was little time for social learning given the fast incorporation of CEE states into the EU, limited choices other than to adapt to the preset normative expectations of the EU's Western states, and little negotiation over the requirement of such norms.

Focusing on the (sub)national level, research on the comparative relationship of Lesbian and Gay movements and the state (Tremblay et al. 2010) evidences that states respond differently to LGBTI claims depending on their spatial-political, including federal-unitary, configuration. Applied to the European context, this means that states with regional autonomy provisions such as Belgium, Germany, Austria or and the United Kingdom may make it easier for policy changes on a sub-national level. These, in turn, enable pressures to be uploaded onto the national level, and eventually onto the EU level once a majority of pro-LGBTI member states exist, though in reality this theory has had mixed results when looking at the above mentioned states. Domestically focused activists can also make use of wide array of political opportunity structures, i.e. potentially supportive domestic as well as international institutions and actors, and increase their visibility through transnational activism (Ayoub 2016). This assertion highlights the pluralist influence on LGBTI rights, positing that countries that have many diverse political parties, civil society groups, and other public actors may be able to use these for strategic coalition-building and framing of issues so that the newly visible norms become internalized on the political elite and mass level. But this kind of visibility push by activists also engenders counter-movements that are ‘un-civil’ and exclusive in nature (Ruzza 2009).

EU member states are not discrete and closed polities, but can change with exposure to other countries, transnational actors and intergovernmental influences. Countries which have had a long history of liberal democracy and transnational trade linkages may more easily adapt to emerging LGBTI rights claims in the region (think of progressively open Scandinavian states as

opposed to more closed Balkan or CEE countries). Yet the largely neoliberal positioning of the EU as rights community based on trade also constraints the extensions of variably conceived human rights based on market freedoms, as rights and economic growth operate on different principles and values (Woodward & Van der Vleuten 2016: 70). The limitations of the existing EU antidiscrimination directive, only applicable in employment matters, or the attitudes of some member states preferring the EU's market logic but rejecting any EU-led rights advances, exemplified by the UK, Poland's and Czech opt-out of the Charter of Fundamental Rights incorporation into the Lisbon Treaty, show the limitations of this argument. Queer Theory further questions the marketization of rights and inclusion into heteronormative social orders (Duggan 2004), which can be applied to the EU as well.

In order to obtain a comprehensive overview of the resulting diversity of Europe's LGB policies and laws, it is worth taking a look at ILGA-Europe's annual 'Rainbow Map' (established 2009, see below) which highlights differences in the region. Based on cumulative sub-scores relating to each country's non-discrimination and hate crime laws, family policies, gender and asylum recognition and civil freedoms, country scores range from a mediocre 10% in the Ukraine to 86% in the United Kingdom. There is a stark difference in the averages between West European countries (which range from 50-80%), and CEE countries that hover in the 10-40% range. Tracking the scores from 2013 below –the first time the same percentage-scoring system was used – one notices that while most West European, and older member states, maintained or slightly improved in terms of LGBTI rights, five CEE states deteriorated (Latvia, Lithuania, Poland, Czech Republic and Hungary). Previous editions, which operated on a slightly different scale, evidence the same East-West split, with similar country scores.