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LGBT Rights in the EU Accession Process

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Abstract

LGBT rights has become an increasingly important part of the EU's founding values. Yet, large discrepancies exist within the Union regarding the protection of sexual minorities. Using the Europeanisation theories of external incentives and social learning, this paper seeks to assess what impact the European Union has on the implementation of LGBT rights during the accession process. By contrasting the 2004 enlargement to the current accession of Croatia to the Union, it is examined whether the EU has learned from its previous experiences and altered its mechanisms. It is concluded that the EU has strengthened its accession mechanisms in a number of ways. It is however too soon to tell whether this will result in enduring post-accession compliance.

Keywords: EU, LGBT, accession process, social learning, Europeanisation, external incentives.

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1 Introduction

In the past 20 years, lesbian, gay, bisexual, and transgender (LGBT) rights has become increasingly important to the European Union (EU or hereinafter Union). Today, the norm of LGBT equality is firmly anchored in EU legislation, as well as part of the founding values of the Union. Yet, almost a decade after the EU's expansion to the east, large discrepancies can be found between as well the EU and some Member States, as between the Member States themselves. Non-discrimination towards sexual minorities, a part of the *acquis communautaire*, has still not become fully internalised in some Member States. The EU has considerable influence on its candidate states during the accession period, and the Copenhagen criteria puts strong pressure on the candidate states to adopt EU norms and rules. Still, after the 2004 and 2007 enlargements, there appears to have been a backlash with regards to LGBT rights.

On 1 July, 2013, Croatia becomes the 28th member state of the European Union. Given the increased importance ascribed to LGBT rights since the last enlargement, has the EU made changes in its accession process, to better safeguard the norm of LGBT equality?

1.1 Statement of Purpose

The purpose of this thesis is to examine what can be done within the framework of the EU accession process, to promote the norm of LGBT equality to candidate states. Experiences from previous enlargements suggests that the EU has not succeeded in securing post-accession compliance to a culturally sensitive norm. More specifically, the thesis therefore aims at investigating whether the EU has learned from its previous experiences and adapted its accession process.

- Has the EU learned from its previous experiences and changed its methods in the accession process?

1.2 Method

I answer the question by first assessing the EU commitment to LGBT equality, and argue that there is a strong legal and political norm of LGBT rights, that is anchored both in the EU's founding documents, as well as in the political culture. The norm is expressed not only within the Union, but also in its external relations. I then contrast this normative commitment to the situation for LGBT people in many of EU's eastern Member States, to establish that there is a discrepancy between EU policy and practice. To assess what impact the EU may have had on LGBT rights in the accession process, and whether more could have been done to ensure post-accession compliance to the norm, I then analyse the 2004 enlargement round, using the Europeanisation theories of social learning and external incentives. Both are models that have been specifically adapted for the EU Eastern enlargement. Finally, I look at the current accession process in Croatia, and compare it to the 2004 enlargement process. What has been done differently? Has the EU learned from its experiences?

I take a constructivist approach to my study. Constructivists emphasizes the importance of identities and norms. This reflects on my initial thesis that values and norms are important to the the EU identity, and that this identity in turn controls much of EU action.

2 LGBT Rights in the EU

2.1 The Normative Foundation of the EU

Over the past 20 years, the EU has steadily moved from maintaining a nearly exclusive focus on economic matters to embracing human rights as part of the supranational agenda. During these years, human rights has become a central component of the EU's work, both within the Union and in its external relations.¹

It has often been argued that the EU is first and foremost a peace project, and that the economic and political cooperation is to a large extent a mean to achieve the ultimate goal of peace.² Finding a common European identity that binds Europe together is thus of importance. Already in Article 2 of the Treaty of the European Union (TEU), explicit reference is made to human rights:

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.

Human rights and minority rights, along with principles of non-discrimination and tolerance, are thus explicitly referred to as the founding values of the European Union. The importance attested to these values are further demonstrated by the provisions of Article 7 of the TEU, according to which the Council, if they determine that there is a "serious breach by a Member State of the values referred to in Article 2", may decide to suspend certain of the rights of the Member State, including its voting rights in the Council.

¹ Karen E. Smith, 2003. *European Union Foreign Policy in a Changing World*. Cambridge: Polity Press, p. 12f

² Birger Möller, 2005. *Vad är EU - och vad kan det bli?* Stockholm: Santérus, p. 11

Even though such extreme measures are unlikely to happen, it is a powerful testament to the importance the EU attests to human rights.

In 2000, the EU adopted the Charter of Fundamental Rights. The Charter brings together in a single document the fundamental rights protected in the EU, to make them more visible and to anchor them in EU law. The Charter is to ensure that EU Member States are protecting the fundamental rights when implementing EU law. Through Article 6.1 of the Lisbon Treaty, which entered into force in December 2009, the Charter became legally binding in the EU, and has the same legal standing as the Treaties.³

Human rights have also become increasingly more visible in the EU external relations. Article 3.5 of the TEU states that “[i]n its relations with the wider world, the Union shall uphold and promote its values and interests”, and contribute to peace, security and the promotion of human rights.⁴ The EU can thus in many ways be regarded as a value-based community, with a distinct normative dimension. Its identity is largely based upon these “European” values of human rights.⁵

2.2 LGBT Rights in the EU

In this section I map out the EU legislation in the area of LGBT rights. I also argue, that in addition to the legislation, the EU has made a strong commitment to LGBT equality, something that is expressed through, *inter alia*, public declarations from EU officials and various policies.

2.2.1 Legislation

Up until the entry into force of the Amsterdam Treaty in 1999, the EU had only made tentative attempts at discussing the issue of LGBT rights. The European Parliament had

³ European Union, 2010. “Charter of Fundamental Rights of the European Union”. (2010/C 83/02)

⁴ European Union, 2012. “Consolidated version of the Treaty on European Union”

⁵ Martijn Mos, 2013. “Conflicted Normative Power Europe: The European Union and Sexual Minority Rights”, *Journal of Contemporary European Research*, Vol. 9, No. 1, p. 81.

during the 1980's adopted two non-binding resolutions that highlighted the issue,⁶ but no policy proposals had been put forward. A major shift occurred with the so called Roth report in 1994,⁷ which has been described as a cornerstone in the Parliament's work on LGBT rights. The Roth report brought up the issues of wide-spread sexual orientation discrimination in the areas of employment, marriage, adoption, and privacy. The report led the Parliament to call upon the Commission to draft anti-discrimination recommendations for sexual orientation.⁸ The Parliament requested that such recommendations should, at a minimum, seek to end different and discriminatory ages of consent for homosexual and heterosexual acts, all forms of discrimination in labor law, the barring of gay and lesbian couples from marriage (or equivalent legal framework) and to have children. These developments coincided with an increased lobbying from various minority groups, who called for stronger action from the EU Member States to eradicate discrimination on various grounds. In the Amsterdam Treaty, the Member States addressed the issue. Article 13⁹ of the Treaty now allowed for the EU to adopt legislation banning all forms of discrimination, including sexual orientation.¹⁰ Up until this point, there was no legal protection at the EU level from discrimination on the grounds of sexual orientation. Rather, two decisions from the Court of Justice of the European Union (ECJ) (*Grant v. South-West Trains Ltd.* and *D. v. Council of the European Union*) had demonstrated the need to protect the rights of LGBT people. Under current Community law, negative treatment of homosexuals did not constitute gender discrimination, as long as both male and female homosexuals were treated equally.¹¹

On the basis of these new treaty provisions, two landmark anti-discrimination Directives were shortly after adopted: the Race Equality Directive (2000/43/EC) and the

⁶ Resolution by Parliament on sexual discrimination at the workplace (*Official Journal No C 104 of 16 April 1984*; Resolution by Parliament on discrimination against transsexuals (*Official Journal No. C 256 of 9 October 1989*)

⁷ Report of the Committee on Civil Liberties & Internal Affairs on Equal Rights for Homosexuals & Lesbians in the European Community (EUR. PARL. DOC., A3-0028/94)

⁸ Resolution by Parliament on equal rights for homosexuals and lesbians in the EC (*Official Journal No. C 061 of 28 February 1994*)

⁹ Now Article 19 in the Treaty on the Functioning of the European Union (TFEU).

¹⁰ Travis J. Langenkamp, 2003. "Finding Fundamental Fairness: Protecting the Rights of Homosexuals Under European Union Accession Law", *San Diego International Law Journal*, Vol. 4, p. 440f.

¹¹ *Ibid*, p. 442f.

Framework Employment Directive (2000/78/EC).¹² The Framework Employment Directive obliges Member States to adopt anti-discrimination legislation in the workplace on the grounds of disability, sexual orientation, religion or belief, and age. It is however much narrower in scope than the Race Equality Directive, which prohibits discrimination in the areas of employment, education, social protection including social security and healthcare, and access to and the supply of goods and services, including housing. This effectively means that there is no EU legislation protecting LGBT people from discrimination such as impossibility to visit partners in hospitals, paying higher premiums on health insurance, being denied social benefits reserved for married couples, or being refused to rent, to name a few.¹³

When the Charter of Fundamental Rights became legally binding it further emphasized the norm of non-discrimination on the grounds of sexual orientation, as Article 21.1 of the Charter states that:

Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.¹⁴

The Lisbon Treaty also put the entry into force of the Treaty on the Functioning of the European Union (TFEU). Beyond obliging the EU to ensure that all EU legislation conforms with the Charter, the TFEU puts an obligation on the EU to *actively* mainstream equality in its work and activities.¹⁵

2.2.2 A Political Commitment

¹² Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

¹³ Piotr Bakowski, 2010. "The European Union and rights of LGBT people". *Library Briefing*, 100048REV2. Library of the European Parliament, p. 2f

¹⁴ European Union, 2010.

¹⁵ European Parliament, 2009a. "Report on the situation of fundamental rights in the European Union 2004-2008". (2007/2145(INI)), p.13

Although the current legislation is not comprehensive in its scope, the EU thus have some competence to act on LGBT issues. Beyond the anti-discrimination legislation, I argue that there is also a clear political norm on LGBT rights in the EU. This norm expresses itself, *inter alia*, through the open support from EU officials and institutions. The European Parliament has become the principal driving force in bringing the issues of LGBT equality onto the EU political agenda. Although the Parliament is arguably the weakest among the major EU institutions in terms of political power, it plays a significant role in influencing legislation by drafting amendments to Commission proposals, and in raising awareness of different issues. Each year the Parliament drafts and adopts a significant number of resolutions and reports. These resolutions are non-binding, but they serve as important tools in the EU's political context.¹⁶ Examples of resolutions and reports from the Parliament includes support for mutual recognition of same-sex partnerships between EU Member States, a call for a comprehensive anti-discrimination Directive, and a call for the revision of a homophobic law in Lithuania.¹⁷

Leading EU officials, such as Viviane Reding, Commissioner for Justice, Fundamental Rights and Citizenship, has on several occasions voiced their support for LGBT rights. In an op-ed piece, Reding testified to the Commission's devotion to the issue when stressing "the importance of pursuing a determined effort in fighting against homophobia and in promoting equality for LGBT people", because homophobia is an "unacceptable violation of human dignity" and is incompatible with the founding values of the EU¹⁸.

The EU commitment to LGBT rights can also be discerned in its external policies. Protecting and promoting the rights of LGBT people is now one of the EU's priorities in its foreign policy. Through the "European Instrument for Democracy and Human Rights" (EIDHR), adopted in 2007, the EU channels financial and organizational support to local NGO's, and promotes, *inter alia*, non-discrimination on grounds of sexual

¹⁶ ILGA-Europe, 2013a. "What has the European Parliament done for LGBT rights?"

¹⁷ European Parliament, 2009b. "European Parliament resolution of 17 September 2009 on the Lithuanian Law on the Protection of Minors against the Detrimental Effects of Public Information".

¹⁸ Viviane Reding, 2010. "Homophobia must be stamped out across Europe, east as well as west", *EU Observer*, 17 July 2010.

orientation.¹⁹ In 2010, a “LGBT Toolkit” was adopted by the Council’s working party on human rights. The toolkit aims 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”. This is to be done by outlining operational tools for raising issues of persecution, discrimination and ill-treatment of LGBT people in dialogues with third country representatives.²⁰ Even though the toolkit is not legally binding for the Member States, it draws its legitimacy from the TEU, and illustrates the EU’s commitment to LGBT equality. It explicitly states that the EU will work actively to ensure that LGBT people can enjoy their human rights, and seeks to facilitate for the Member States to address the human rights of LGBT people in their external relations.

In addition to this, High Representative Catherine Ashton, as well as other high-ranking EU diplomats, are frequently speaking out on issues of LGBT rights in third countries:

The EU campaigns tirelessly for the respect of human rights, irrespective of sexual orientation and gender identity. We raise the issue of LGBTI rights during our Human Rights dialogues, we speak out through public statements, and we work behind the scenes with our Delegations to argue the case for justice and human rights.²¹

In this section I have argued that there is a clear EU norm of LGBT equality. This norm is expressed not only in EU law, but also as a political norm, through statements and proposals from EU officials and institutions. In these statements, LGBT rights are often framed as being part of the EU’s fundamental values, such as non-discrimination, equality, and freedom of assembly.

2.3 Discrepancies Between the Member States

¹⁹ European External Action Service, 2013. “Protecting and promoting the rights of LGBT people”.

²⁰ Council of the European Union, 2010. “Toolkit to Promote and Protect the Enjoyment of all Human Rights by Lesbian, Gay, Bisexual and Transgender (LGBT) People”, p. 1,

²¹Catherine Ashton, 2013. “Declaration by the High Representative, Catherine Ashton, on behalf of the European Union on the occasion of the International Day Against Homophobia, 17 May 2013”

We have thus far established that the EU has made a clear commitment to LGBT equality. Prior to the 2004 enlargement, there were concerns that the new Member States would not sustain the compliance with the EU *acquis* after accession, when the most powerful compliance mechanism - the promise of EU membership - was no longer present. Even if these fears have proven to be overstated on most policy areas,²² there are reasons for concern in the area of LGBT rights. As I will show in the following section, the human rights situation for LGBT people in the Member States are far from being equal.

In a 2006 Eurobarometer survey, the discrepancy between old Member States and the new, eastern Member States is evident. On the issue of gay marriages, on average 44 % of EU citizens agreed that gay marriages should be allowed throughout Europe. However, with the exceptions of the Czech Republic (52 %) and Slovenia (31 %), in none of the Member States from the 2004 enlargement that number exceeded 21 %.²³

The level of acceptance of gay marriages is, however, not an ideal indicator of homophobia. It is possible to imagine that one could be against gay marriage for religious reasons, without for that matter being of the opinion that LGBT people are not entitled to the same human rights as everyone else. Statistics from the World Values Surveys of 1999 and 2005/2006 come closer to finding evidence of homophobia in the eastern Member States. In the survey 54,5 % of the respondents in Latvia, 55, 2 % in Poland, and 67,5 % in Lithuania responded that they would not want a homosexual neighbour. The corresponding statistics for the EU-15 was 18,8 %, with the highest numbers being 25-28 %. Even more astonishing are the replies to whether homosexuality is justifiable. 76,9 % of the respondents in Latvia, 59,9 % in Poland, and 78 % in Lithuania considered homosexuality to never be justifiable. This is to be compared with the EU-15, where the average number was 23, with the highest numbers being 35-40 %.²⁴ The World Values Survey thus echoes the findings of the Eurobarometer survey - that there are significant differences between old and new Member States, in the attitudes towards homosexuality.

²² Jonas Tallberg, *et al.*, 2009. *Europa efter utvidningen*. 1. uppl. Stockholm: SNS Förlag, p. 125

²³ European Commission. 2006. "Eurobarometer 66: First results", p. 41.

²⁴ World Values Survey, 2009. "1981-2008 OFFICIAL AGGREGATE v.20090901".

In several eastern Member States, Pride Parades have been denied permission. Reasons given for the bans include participant and public safety, the violation of public morals, and the preservation of public order.²⁵ This was the case in 2008 in Lithuania, and the year after in Latvia.²⁶ In 2010, a local court suspended a permit given for a pride march in Vilnius. The march could later take place, but only after a ruling in the Supreme Administrative Court upheld the permission.²⁷ Similar bans on pride parades has occurred in Poland, although the situation there has improved significantly in recent years, with the successful completion of “Europride” in 2010 as a prime example.²⁸

The European Parliament has acknowledged the surge in homophobia in the eastern Member States in a number of resolutions. In a resolution from May 2012, the Parliament strongly condemned “any discrimination on the basis of sexual orientation and gender identity”. It further regretted that “in the EU, the fundamental rights of LGBT people are not always fully upheld”.²⁹ The resolution explicitly singled out Hungary, Lithuania, and Latvia for their deficits in the area of LGBT rights. In 2009, the Parliament adopted a resolution where they declared that a Lithuanian law (the law of Protection of Minors against the Detrimental Effects of Public Information) was in breach of EU and international human rights obligations, and called for the revision of the law.³⁰ The law would, *inter alia*, forbid so called “propaganda” of homosexual relations to minors.

While the situation for LGBT rights has improved in some Member States in the past years, a recent study from the European Union Agency for Fundamental Rights (FRA), with more than 93 000 respondents from the EU Member States and Croatia, concludes that discrimination still takes place in all Member States of the Union. Nearly half of all respondents reported that they had felt personally discriminated against or harassed due to their sexual orientation in the last year. A quarter had experi-

²⁵ European Union Agency for Fundamental Rights, 2010. “Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity - 2010 Update. Comparative Legal Analysis.”, p. 31.

²⁶ Euobserver, 100507. “Europe’s shame”.

²⁷ European Union Agency for Fundamental Rights, 2010, p. 33.

²⁸ Ibid, p. 32.

²⁹ European Parliament, 2012. “European Parliament resolution on the fight against homophobia in Europe (2012/2657(RSP)”, para. 1.

³⁰ European Parliament, 2009, para. 4.

enced violence in the past five years. The study also confirms that there has been an increase in homophobia in many eastern European states.³¹ In response to the question “how widespread is offensive language about lesbian, gay, bisexual, and/or transgender people by politicians where you live?”, a distinct difference could be seen between eastern and western Member States, where in the western states, generally fewer than 10 % of the respondents answered “very widespread”, whereas in the eastern states, up to 30-40 % of the respondents gave the same answer.³²

2.4. LGBT Rights in Croatia

Currently, the European Union is in the concluding stage of its seventh enlargement. On 1 July 2013, Croatia will become the 28th member of the Union. I will in the following section briefly outline the status of LGBT rights in Croatia.

The situation for LGBT rights in Croatia is similar to that in many of the eastern European Member States, prior to accession. Prior to the initiation of accession negotiations, few legal protections for LGBT people existed. In 2003, Croatia passed an “Act on Homosexual Unions”, which gave same-sex unions the same legal recognition as non-marital partnerships between people of the opposite sex.³³ It is however important to note that numerous rights from other laws are applied only to marital partners, and are thus not applicable to partners of same-sex unions³⁴. Prohibitions of discrimination based on sexual orientation were also introduced into the Gender Equality Act, Criminal Code, Labour Act, and into schoolbook standards. In 2006 a definition of hate crimes, which included sexual orientation, was introduced in the Criminal Code. In 2008, the Anti-Discrimination Act was passed by the Croatian parliament. For the first time in Croatian legislation, a ban on discrimination on the basis of gender identity was

³¹ European Union Agency for Fundamental Rights, 2013a. “EU LGBT survey. European Union lesbian, gay, bisexual and transgender survey. Results at a glance”, p. 7,9

³² European Agency for Fundamental Rights, 2013b. “LGBT Survey Data Explorer”.

³³ European Commission, 2005. *Croatia - 2005 Progress Report*. SEC (2005) 1424, p. 89.

³⁴ Sanja Juras, 2010. “2010 Annual Report on the Status of Human Rights and Gender Minorities in Croatia”, p. 23.

introduced.³⁵ However, as there are no specific guidelines for the police, physical attacks on LGBT people were not always classified as hate crimes, and sometimes even treated as minor offences. In 2013, a new Criminal Code entered into force, which acknowledged that hate crimes can be perpetrated on the additional basis of gender identity of the victim. Other improvements to the legal protection against homophobic hate crimes include the adoption of Rules of Procedure, and police training undertaken in cooperation with LGBT organisations.^{36,37}

Similar to the situation in the eastern Member States, homophobic hate crimes and disruptions have occurred during Pride parades in Croatia. During the 2011 Pride parade in Split, a large number of counter-protesters disrupted the march by shouting violent threats and throwing stones at the participants. The counter-demonstration had been announced several weeks ahead, and some members of the local clergy had opposed the march, and even explicitly called on the congregations to protest against it. Still, the police did not provide adequate protection for the march, and counter-protesters could not be held at a safe distance from the march. 26 people were prosecuted for offences with a hate bias, and an additional 103 with minor offences perpetrated with a homophobic motive.³⁸

The general societal acceptance for homosexuality is relatively low. Homophobic declarations of public persons continue to be frequent. Croatian LGBT NGO's testify to the widespread use:

On 7 November 2010 when asked by a journalist "Could a player play for the Croatian national team if he was openly gay?", Mr Markovic [president of the Croatian Football Association] stated for Vecernju List: "While I am president, definitely not." When further asked: "Did you ever meet such a player in your career?" Mr Markovic replied: "No, fortunately only healthy people play football."³⁹

³⁵ Ibid, p 4f, 16.

³⁶ Amnesty International, 2012, *Inadequate Protection. Homophobic and Transphobic Hate Crimes in Croatia*. EUR 64/001/2012, p. 3

³⁷ Amnesty International, 2013, *International Report 2013. The State of the World's Human Rights*. POL 10/001/2013, p. 73.

³⁸ Amnesty International, 2012, p. 5f.

³⁹ Sanja Juras, 2010, p. 52.

Unfortunately, similar remarks are not uncommon, even among politicians:

On 13 July 2010 an interview was published in Vecernji List with a member of Parliament from the Croatian Peasants Party, Mrs Marijana Petir. Among other things, the article stated: "But she is not happy with the educational programme either. 'I remember that on 1 December 2008 a programme for children was broadcast in the morning which propagated homosexual behaviour", said Petir, disgusted.⁴⁰

It should be noted that positive developments has taken place as well. The 2001 Zagreb Pride parade, held only a week after the Split march, attracted more than 4000 participants, and a large number encouraging bystanders, and was able to proceed without violence and disruptions. was encouraged by supportive bystanders. In May 2013, Croatia's first same-sex marriage march took place, with over 400 participants. The government has also announced plans to boost gay couples' rights, albeit without providing much details.⁴¹

⁴⁰ Ibid, p. 52f.

⁴¹ ILGA-Europe, 2013, "Croatia holds first same-sex marriage march".

3 Theoretical Framework

3.1 Previous Research

This study positions itself within the field of Europeanisation research, more specifically the Europeanisation of new member and candidate states of the European Union. One of the main critiques against Europeanisation as a research agenda is that researchers often use the term without giving it a precise definition. As Kevin Featherstone notes, “the faddish use of ‘Europeanisation’ in different contexts can easily obscure its substantive meaning”⁴². However, he argues, “precisely the breadth of application and the demanding explanatory framework needed, attests to the value and importance of the term”.⁴³ The term provides a gateway to understanding the complex web of developments that characterizes the politics of the EU today.

In order to avoid the critique that the scope of Europeanisation is too wide to be used as a research agenda, it is important to specify what is meant by “Europeanisation”. Even though the term can have a wider usage than just issues concerning the EU, (such as increasing transnationalism, where ideas and norms spread across Europe), the term is today most associated with domestic adaptation to the pressures emanating directly or indirectly from EU membership.⁴⁴⁴⁵

One commonly used definition of the term is that of Claudio Radaelli. He states that Europeanization refers to:

processes of (a) construction (b) diffusion and (c) institutionalization of formal and informal rules, procedures, policy paradigms, styles, ‘ways of doing things’, and shared beliefs

⁴² Kevin Featherstone, 2003. “Introduction: In the name of ‘Europe’” in Featherstone, Kevin & Claudio M. Radaelli (eds.). *The Politics of Europeanization*. Oxford: Oxford University Press, p. 3

⁴³ Kevin Featherstone, 2003, p. 19.

⁴⁴ Ibid, p. 7f.

⁴⁵ Claudio M. Radaelli, 2003. “The Europeanization of Public Policy” in Featherstone, Kevin & Claudio M. Radaelli (eds.). *The Politics of Europeanization*. Oxford: Oxford University Press, p. 27

and norms which are first defined and consolidated in the EU policy process and then incorporated in the logic of domestic (national and subnational) discourse, political structures, and public policies.⁴⁶

In other words, actors redefine their their interests and behavior to meet the imperatives, norms, and logic of EU membership.

On Norms and Norm Diffusion

Before going into the specifics of the norm diffusion process, a brief conceptualization of what I mean by “norms” are in order. In the social constructivist literature, definitions of norms are often based on behavior, prescription, and shared expectations. Norms represent standards of behavior that often result from common practices, but who also have proscriptive or prescriptive qualities: they deem what is considered appropriate.⁴⁷ It is this prescriptive quality that sets norms apart from ”rules”.

In the norm diffusion process, two separate logics of action can be discerned to explain the reason behind actors’ behavior. Actions can be seen as driven by a logic of consequence, where the anticipated consequences of the action and the prior preferences of the actor determines actor behavior. The actor thus makes a rational calculation of what consequence a certain action will result in.⁴⁸ Within the logic of appropriateness, on the other hand, actions are seen as rule-based. As March and Olsen explains, “[t]he pursuit of purpose is associated with identities more than with interests, and with the selection of rules more than with rational expectations”.⁴⁹ Thus, in the present case, if a state, or state actor, is driven by a logic of appropriateness, it adheres to a norm because it is convinced of the merits of the norm. In contrast, if it is driven by a logic of consequence, it adheres to the norm because it believes that there is something to be gained from doing so, and not necessarily because it believes in the merits of the norm.

⁴⁶ Claudio M. Radaelli, 2003, p. 37

⁴⁷ Annika Björkdahl, 2002. *From Idea to Norm: Promoting Conflict Prevention*. Diss. Lund: Dept. of Political Science, Univ., p. 40.

⁴⁸ James March & Johan Olsen, 1998. ”The institutional dynamics of international political orders”, *International Organization*, Vol. 52, No. 4, p. 950.

⁴⁹ *Ibid*, p. 951.

The two logics place themselves under different theoretical approaches: the sociological institutionalist versus the rationalist institutionalist.⁵⁰ However, as both Featherstone and March & Olsen points out, the two logics are not incompatible. Rather, as we shall see, the two logics often occur simultaneously or they characterize different phases of the Europeanisation process. The impact of Europeanisation is also differential across policies, polities, and politics, which is why different explanations for action and different basis for institutional change may be required.^{51 52}

In their work on international norm dynamics, Martha Finnemore and Kathryn Sikkink argue that norms evolve in a certain pattern they describe as the norm's "life cycle".⁵³ The "life cycle" consists of three stages - norm emergence, norm cascade and internalisation. This study concentrates on the second stage in the norm life cycle, the norm cascade. In this stage, norm leaders attempt to socialise other states to become norm followers.⁵⁴ When a critical mass of relevant state actors has adopted a norm, the norm has reached its "tipping point", and will thereafter become internalised - "taken for granted".

Socialisation

In his work on the socializing potential of international institutions, Jeffrey Checkel defines socialisation as "a process of inducting actors into the norms and rules of a given community. Its outcome is sustained compliance based on the internalisation of these new norms".⁵⁵ During the socialisation process, the actor switches from following a logic of consequences, to a logic of appropriateness. However, Checkel argues, agents may follow a logic of appropriateness in more than one way. Agents may, for example, simply act in accordance with what is expected of them by others. They adopt a role, regardless if they agree with the role or not. "The key is the agents knowing what is so-

⁵⁰ Kevin Featherstone, 2003, p. 15f.

⁵¹ Ibid, p. 16

⁵² James March & Johan Olsen, 1998, p. 953f.

⁵³ Martha Finnemore & Kathryn Sikkink, 1998. "International Norm Dynamics and Political Change", *International Organization*, Vol. 52, No. 4, p. 888.

⁵⁴ Ibid, p. 895.

⁵⁵ Jeffrey T. Checkel, 2005. "International Institutions and Socialization in Europe: Introduction and Framework", *International Organization*, Vol. 59, No. 4, p. 804.

cially accepted in a given setting or community”.⁵⁶ But the interests and values of the agent may also change, resulting in another type of internalisation. Community norms are then accepted as “the right thing to do”, and the values and sometimes also the identity of the community are adopted by the agent.⁵⁷

To summarize, socialisation is a process, with the end goal of internalisation. This process can occur through different mechanisms. Two examples of such mechanisms are external incentives and social learning. External incentives theory and social learning are not the only models of norm diffusion and Europeanisation, but they are models who have been explicitly adapted to the Eastern enlargement, particularly regarding liberal democratic norms, and are therefore suitable for this analysis.⁵⁸

3.2 External Incentives Theory

One of the major approaches in the field of EU enlargement studies regarding the Central and Eastern European (CEE) countries’ adaption into the EU norms and rules is the “external incentives model”. In this model, it is argued that the rule adaption of the CEE candidate countries was mainly driven by the reward of EU membership, promised by the EU as an external actor.⁵⁹ As adopting norms are politically and economically costly for states, external incentives, such as EU conditionality, has been considered the most effective mechanism.⁶⁰

Frank Schimmelfennig, one of the major scholars on Europeanisation in the CEE countries, argues that “only the credible conditional promise of membership in the EU (and NATO) has the potential to produce compliance with liberal-democratic norms in

⁵⁶ Ibid, p. 804.

⁵⁷ Ibid, p. 804.

⁵⁸ Frank Schimmelfennig & Ulrich Sedelmeier, 2005. “Conclusions: The Impact of the EU on the Accession Countries” in Schimmelfennig, Frank & Ulrich Sedelmeier (eds.), 2005. *The europeanization of Central and Eastern Europe*. Ithaca, NY: Cornell University Press, p. 230.

⁵⁹ Gerda Falkner & Oliver Treib, 2008. “Three Worlds of Compliance or Four? The EU-15 Compared to New Member States”, *Journal of Common Market Studies*, Vol. 46, No. 2, p. 294.

⁶⁰ Conor O’Dwyer, 2010. “From Conditionality to Persuasion? Europeanization and the Rights of Sexual Minorities in Post-Accession Poland”, *Journal of European Integration*, Vol. 2, No. 3, p. 229.

norm-violating transformation countries”.⁶¹ Schimmelfennig argues that the democracy promotion by European regional organisations has been effective in producing durable democratic change. Political conditionality is used by international organisations to induce political change at the state level. In the CEE countries, the adoption of liberal-democratic norms became the condition for attaining EU membership. The EU has employed political conditionality based on rewards. Candidate states has not been coerced into adapting their political systems according to the EU demands, but the reward of EU membership has been withheld if the states have not complied.⁶²

According to the external incentives theory, the adoption of EU norms of democracy and human rights depends on “the size and credibility of tangible, material incentives provided by external actors as well as on the political costs that target governments occur when adopting and implementing these rules domestically”.⁶³ The size of the reward must be bigger than the domestic costs of imposing the norm, and the target government must be certain that the reward will be paid if the conditions are met.

If EU membership is the single most important factor in candidate state compliance of EU norms, one would expect compliance to weaken after EU membership is obtained, as there is thus no longer any strong external incentives for compliance. Then how can external incentives be perceived as being a method for true democratic consolidation? According to social constructivist theories, the rationale behind using conditionality for imposing certain rules and norms on states lies in the perception that “legal rules and norms operate by changing interests and thus reshaping the purposes for which power is exercised”.⁶⁴ Norms and rules shape and constrain states in their decision-making, by obliging them to observe the norms. By taking part in the process of norm-creation, state actors begin to think that complying with the norm is in their own self-interest. There has been a gradual shift from a logic of consequences to a logic

⁶¹ Frank Schimmelfennig, 2007. “European Regional Organizations, Political Conditionality, and Democratic Transformation in Eastern Europe”, *East European Politics and Societies*, Vol. 21, No. 1, p. 126.

⁶² *Ibid*, p. 127

⁶³ Arista Maria Cirtautas & Frank Schimmelfennig, 2010. “Europeanization Before and After Accession: Conditionality, Legacies, and Compliance”, *Europe-Asia Studies*, Vol. 62, No. 3, p. 424.

⁶⁴ Pamela Jordan, 2003. “Does Membership Have Its Privileges?: Entrance into the Council of Europe and Compliance with Human Rights Norms”, *Human Rights Quarterly*, Vol. 25, No. 3, p. 664.

of appropriateness. What starts as a so called instrumental adoption of a norm, when states choose to conform to a certain norm if they believe that it will facilitate cooperation and minimize transaction costs, may lead to a process of identity transformation. A state may choose to conform to *inter alia* a human rights norm because it believes that it will gain advantages in forms of *inter alia* international prestige or improved trade conditions. But if this adoption of the norm leads to a domestic structural change (such as increased democratization), this spills over into a process of identity transformation. Thus, norms that are initially adopted for instrumental reasons, are later maintained because they have become a part of the state's belief and identity.⁶⁵ In other words, after “imposing” the norms through conditionality, the states begin to act in accordance of the norm because it has become part of their self-identity. One of the main concerns in the period around the 2005 EU enlargement was that the norm compliance of the new members would decrease after membership was obtained.⁶⁶ However, the high-intensity involvement of the Commission during the accession process was believed to create a momentum, where the states themselves would want to follow the EU norms even after becoming members, i.e. when the external incentive was no longer present.⁶⁷

3.3 Social Learning

Unlike the external incentives theory, which proscribes that states choose to proscribe to a norm in order to reap a reward, the theories of social learning argues that durable conformity to a norm occurs when states are persuaded by the appropriateness of the norm. Europeanisation thus follows when a member or candidate state are convinced of the suitability of the EU norms, and the beliefs and preferences of domestic actors thereby are altered.⁶⁸ This persuasion of the suitability of a norm is often the result of the activity of transnational networks of actors, and international organisations, who puts pres-

⁶⁵ Ibid, p. 664ff.

⁶⁶ Conor O'Dwyer, 2010, p. 229.

⁶⁷ Gwendolyn Sasse, 2008. "The Politics of EU Conditionality: The Norm of Minority Protection During and Beyond EU Accession", *Journal of European Public Policy*, Vol. 15, No. 6, p. 842.

⁶⁸ Conor O'Dwyer, 2010, p. 230, 232.

sure on domestic governments to endorse European norms in the domestic political discourse. Such persuasion is easiest where the EU norms “resonate” with domestic norms, i.e. when the new norm is not in direct opposition to previous, dominant norms.⁶⁹ Given the controversy surrounding issues of LGBT rights in many Member States, social learning should be expected to be harder in this policy area than in many others.

This mechanism, just as the name implies, emphasizes learning. States are expected to be open to updating and altering their practices and beliefs in the light of new information. There is thus a focus on deliberative processes, where agents are open to be persuaded by “the better argument”. By developing and supporting transnational networks that include domestic, as well as European actors, the EU can foster social learning. This would also have the benefit of increasing the perception of “norm ownership”, that the norm is not considered as imposed and foreign. Further, these networks can be used to channel financial support.⁷⁰ Organized domestic advocacy networks are necessary to represent the issue and lobby the national governments. Social learning will then occur as governments are being presented with arguments and beginning to accept them. The EU institutions can assist in supporting these advocacy networks, not least financially. It may be hard to determine whether social learning is taking place, but indications of social learning is when transformative public deliberations are taking place on the issue. In the case of LGBT rights, social learning is believed to occur when LGBT rights become a salient political issue, on which political parties differentiate themselves: “[i]f an issue is not salient in party competition, it constitutes part of the assumed status quo, or the ‘regime of silence’”.⁷¹

During the accession process, there has been an emphasis on external incentives, such as conditionality. Even if this strategy has overall been successful in getting candidate states to internalise EU norms, as actors gradually start to identify themselves with their behavior, there is a risk that the norm is not fully internalised. If actors are not fully convinced of the appropriateness of the norm, the norm may not be adhered to in the absence of the external incentives. This is particularly a risk in culturally sensitive

⁶⁹ Conor O’Dwyer, 2010, p. 232f; Jeffrey T. Checkel, 2005, p. 813.

⁷⁰ Conor O’Dwyer, 2010, p. 233.

⁷¹ Ibid: 233f.

issues, such as LGBT rights. In my analysis of the two enlargements, I will examine whether the EU has increased its social learning mechanisms to promote LGBT rights in the accession process.

4 LGBT Rights During the 2004 Enlargement

The discrepancy between the EU legal and political norms on LGBT equality and the reality in some of the “new” Member States implies that the EU accession might not be as efficient in securing compliance to the norms as one could have wished. The question thus arises: how was LGBT issues handled in the previous enlargement of 2004?

In the following chapter, I will evaluate how LGBT rights was handled in the previous enlargement. The examples used here is Poland and Latvia, but as we saw in section 2.3, the weak resonance of the norm of LGBT equality is evident in several other new Member States.

As been discussed in section 3.1, scant scholarly attention has been given to LGBT issues in the Europeanisation literature. Two scholars that has addressed the issue is Conor O’Dwyer and Katarina Schwartz. In their study on antigay politics in post-accession Poland and Latvia, they find that equal rights for sexual minorities have proved controversial in Poland and Latvia, much like the rights of ethnic minorities have been in a number of new Member States. But in the LGBT case, they argue, the EU failed in spreading the norm of non-discrimination.

The authors provide three findings that support their argument that the norm has not been internalised. Firstly, the failure of institutional protection for minorities. Through the obstruction of Pride marches, and discriminatory legislation, as well as a clear unwillingness to uphold LGBT rights, LGBT people are excluded from public life.⁷² Secondly, the inclusion of illiberal elites in “legitimate politics”. In both Poland and Latvia, during the first years after accession, the parties with stridently antigay rhetorics and

⁷² Conor O’Dwyer & Katarina Z.S. Schwartz, 2010, ”Minority rights after EU enlargement: A comparison of antigay politics in Poland and Latvia”, *Comparative European Politics*, Vol. 8, p. 224ff.

politics took place in government, proposing antigay legislation.⁷³ And thirdly, the aggressive rhetoric by political elites in the public sphere, often equating homosexuality with criminality, mental illness, pedophilia, and necrophilia, illustrates how dramatically Poland and Latvia deviate from core EU norms.⁷⁴

The authors argue that this backlash of LGBT rights in the two countries was the result of a combination of factors. First of all, the EU employed weak conditionality after the accession. Just as the external incentives model would predict, neither Polish, nor Latvian politicians voiced antigay rhetorics before the EU membership was secured. After membership was accomplished, however, the EU had lost its most powerful incentive. Before accession, candidate state compliance was monitored rigorously by the Commission, which produced regular Progress Reports on the states' compliance to the Copenhagen Criteria. After accession, the Commission can initiate infringement procedures if a Member State is not complying with EU law, but this is a case-by-case approach, and is only initiated after the Commission has been alerted to the problem. Thus, the monitoring of Member States is much weaker than that of candidate states. With decreasing monitoring capabilities, the credibility of the norm becomes more important. The variation in treatment of sexual minorities among the old Member States, did not give sufficient credibility to the norm. Further, the EU itself did not put enough emphasis on the issue.⁷⁵ With regards to the criteria of minority protection, the Commission put much greater emphasis on ethnic nondiscrimination. For a long time, the Commission only mentioned the area of LGBT rights very briefly in their Progress Reports. There was no comprehensive and co-ordinated strategies for implementing the issue of LGBT rights in the accession negotiations, making the issue disconnected from the general provisions of the Copenhagen political criteria. Rather, it was the European Parliament who was moving the issue forward, in repeatedly calling attention to the issue, and calling on candidate states to repeal discriminatory provisions and practices.⁷⁶

⁷³ Ibid, p. 229.

⁷⁴ Ibid, p. 230.

⁷⁵ Ibid, p 233ff.

⁷⁶ Joke Swiebel, 2002. "Gay and Lesbian Rights and EU Enlargement", *Open Society Institute - EU Monitoring and Advocacy Program*, p. 1.

ILGA-Europe, the leading LGBT advocacy NGO in Europe, concluded in a 2001 report that:

[T]here is little will on the part of existing EU-members states and institutions to make the treatment of LGBT persons an integral part of the enlargement process. (...) It is difficult for the European Union to put real pressure on the applicant states to improve their treatment of LGBT persons when the legal situation in some of the existing Member States [such as Austria, Greece, and the UK] is comparable, if not worse, to that in some of the applicant states.⁷⁷

The shortcomings of the external incentives could have been compensated for by active persuasion from the EU's side, on the legitimacy of the norm. But little such persuasion took place, the O'Dwyer and Schwartz argue. Compared to the field of environmental policy, where social learning had been an integral part of the EU's strategy, both before and during the accession period, the EU did not foster networking among experts or policymakers. International cooperation, such as "The Environment for Europe" initiative, had provided a platform that fostered deliberation, information exchange, and technical assistance, which all contributed to internalizing the EU norm.⁷⁸

Another factor that aggravated the internalisation of the norm was the fact that the norm of LGBT equality had very little resonance in both Poland and Latvia, for reasons of religious and national heritage. In the Polish case, the authors claim that the Commission was unwilling to agitate the Catholic Church, whose support was needed for strengthening the public opinion of the EU.⁷⁹

The failure to get Poland and Latvia to adopt the EU norms of LGBT equality can thus be seen as a combination of weak external incentives, combined with lacking deliberative mechanisms to foster social learning. To avoid repeating the same mistakes in the Croatian accession, the EU should thus have developed its mechanisms for persuasion, in order for the norm to be successfully internalised.

⁷⁷ Mark Bell, 2001. "The European Union - A new source of rights for citizens in the accession countries?" in Jackie Lewis et al. (eds), *ILGA-Europe, Equality for Lesbians and gay Men. A Relevant Issue in the EU Accession Process*. Brussels: ILGA-Europe, p. 88f.

⁷⁸ Conor O'Dwyer & Katarina Z.S. Schwartz, 2010, p. 235f.

⁷⁹ Ibid, p. 236ff.

Does the post-accession development in Poland and Latvia have predictive power for the current accession process in Croatia? There are considerable similarities between Croatia and Poland, which should qualify Poland as a reference point to the socialisation of sexual minority norms. They are both post-communist states, with a conservative history, and large societal influence from the catholic church. In the following chapter, i will examine the current accession process, to determine whether the EU has learned from previous experiences and adapted its accession mechanisms.

5 LGBT Rights in the 2013 Enlargement

We have seen that in Croatia, like in pre-accession Poland, there has not been a political and societal consensus on the norm of LGBT equality. How has the EU dealt with the issue of LGBT equality in Croatia's accession process? Has there been any changes in the accession process compared to the previous enlargements? Is a backlash similar to the ones in Poland and Latvia to be expected after Croatia's accession to the European Union?

5.1 The Anti-Discrimination Directive

Since the previous enlargement, some major changes has been made to the EU accession machinery. Firstly, the Anti-Discrimination Directive (2000/78/EC) entered into force in 2000. It was thus already a part of the EU *acquis communautaire* at the time Croatia started accession negotiations in 2003. During the previous enlargements, the Directive entered into force in the late stages of accession negotiations. There was thus little room for deliberation on how to implement the Directive into the national legislation, and even less room for deliberating on the merits of the Directive and how it corresponds to the EU core norms. With the Directive in force, non-discrimination towards sexual minorities became closely tied to the fundamental values of the EU, and not merely a part of a (very large) *acquis*.

The central part of the Directive in the EU *acquis*, led to LGBT rights having a more prominent position in the negotiations. Already in the early stages of negotiations the issue was raised, and as Croatia knew that they had to implement the full *acquis*, there was a clear and distinct credibility to the expectation. Thus, both external incentives and social learning aspects were reinforced.

The clear and unambiguous commitment to LGBT rights in the *acquis*, has also led to a higher degree of public debate on the issue in Croatia. As we could see in the previous sections, the issue of LGBT rights was largely absent from political debate in Poland and Latvia. The increased openness facilitates a deliberative process, and increases the likelihood of internalisation of the norm.

5.2 The Charter of Fundamental Rights and Political Commitment

Secondly, the Charter of Fundamental Rights has become legally binding before Croatia's accession. Discrimination on the grounds of sexual orientation is now anchored in a document with the same legal character as the Treaties, and Member States are obliged to ensure that the Charter's provisions are respected when implementing EU law. Again, this makes visible the issue of LGBT rights all through the negotiations, as it must be ensured that sexual minorities are not discriminated against during the transposition of the *acquis* into national legislation.

Thirdly, the strong political commitment the EU has placed on LGBT equality has, at least indirectly, affected also the enlargement process. According to the *toolkit*, all Member States' representations, as well as EU Delegations, shall now promote the EU norms of LGBT equality in its relations with third countries. The impact on Croatia is seen in the fact that LGBT rights has now become one of Croatia's priority areas in its foreign policy (towards multilateral organisations), in an attempt to adapt to the EU norms and values.⁸⁰

5.3 The Modified Mechanism

Lastly, a new, modified pre-accession monitoring process has been introduced. To ensure that Croatia complies with all the accession requirements, the Accession Treaty included a formal pre-accession monitoring requirement. Croatia is the first candidate

⁸⁰ Vesna Pusic, 2012. "Croatian Foreign Policy in the Context of European Union Membership", *Mediterranean Quarterly*, Vol. 23, No. 3, p. 2.

state to have such a mechanism applied. The modified mechanism allows the Commission to continue to monitor Croatia in the last stage of the accession period. Before, once the accession negotiations was concluded, and up until accession, the Commission did not produce any Progress Reports (as the requirements were considered to be fulfilled, otherwise negotiations would not be closed). With the new mechanism, the Commission continue to monitor Croatia's developments, and has the option to produce a Monitoring Report every six months.⁸¹ Croatia completed the negotiations on June 30, 2011, and during this period, the Commission can follow up on Croatia's fulfilment of the accession criterias. The Commission has released three Monitoring Reports, the latest on March 26, 2013.⁸²

This provides the Commission with increased opportunities to monitor and to reprimand Croatia, and point out areas that need improvement before accession. Throughout the Monitoring Reports, the Commission has continued to stress the importance of LGBT rights. In the report of October 2012, the Commission states:

With regard to human rights and the protection of minorities, human rights continue to be generally well respected, with attention still needed for the respect of lesbians, gays, bisexual and transgender people (LGBT) rights. The gay pride events in Split and Zagreb took place without major incidents, with strong commitment of the Croatian government to their smooth organisation.⁸³

In the report the Commission put forward ten priority actions, with commitments in the areas of competition, the judiciary and fundamental rights and justice, freedom and security. Croatia has completed them all. Critique against the new monitoring mechanisms has been that, although it is a positive contribution to the EU accession process, the mechanism and the related penalties are too vague.⁸⁴

⁸¹ Nicole Wells, 2011, "The Modified Mechanism in EU Accession: A Look at Croatia's Accession to the EU and the plight of Croatia's Roma Population", *Wisconsin International Law Journal*, Vol. 29, No. 3, p. 597f.

⁸² European Commission, 2013. "Delegation of the European Union to the Republic of Croatia - Accession treaty with Croatia."

⁸³ European Commission, 2012. Communication from the Commission to the European Parliament and the Council on the Main Findings of the Comprehensive Monitoring Report on Croatia's state of preparedness for EU Membership (COM(2012) 601 final., p. 4.

⁸⁴ Wells, Nicole, 2011, p. 583.

5.4 Conclusion

In conclusion, there has been some significant changes in the EU's accession mechanisms. The EU now have a stronger commitment to LGBT rights, and more clearly defined expectations on the candidate states. The Charter and the Anti-Discrimination Directive have anchored LGBT rights more firmly in the EU *acquis*, and given them a more prominent place in the accession negotiations.

It is not yet possible to predict whether Croatia will experience a post-accession backlash regarding LGBT rights, as was the case in many of the former candidate states. Issues of LGBT rights are socially and culturally sensitive, and it will take time to change public perception on the matter. But there are indications of a political will from the ruling elite to address these issues, and important policy decisions have been made, *inter alia* in the foreign policy.

Only time will tell if the new pre-accession monitoring mechanism, along with the use of conditionality and social learning, was enough to secure post-accession compliance to the EU rules and norms on LGBT equality, or if a backlash similar to the one that occurred in Poland is likely to happen.

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