

Members' Privilege: The Influence of EU Membership and Accession on LGBT+ Rights Protection in Croatia and Serbia

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Abstract

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Introduction

The indivisibility of human rights and fundamental freedoms' is one of the values entrenched in the founding Treaty of the European Union. To become a member, candidate states must demonstrate a high standard of human rights protection (European Parliament, 2019). But are European Union (EU) institutions able to ensure compliance once a candidate becomes a member? Lesbian, gay, bisexual and transgender (LGBT+) people are disproportionately victims of violence and discrimination (Human Rights Watch, 2019). The research question is: 'what is the influence of membership of the European Union on the protection of LGBT+ rights in Croatia and Serbia, as opposed to a candidate status?' LGBT+ rights are protection from discrimination and violence based on sexual orientation or gender identity (ILGA, 2019). The independent variable is membership of the EU, while the dependent variable is the LGBT+ rights situation in the country.

The thesis is that membership has a negative influence on the protection of human rights. Serbia, as a candidate country, is subject to institutional pressure to conform to European standards, while Croatia is already a member. EU institutions are insufficiently equipped to guarantee human rights protections in member states (Kristofferson et al., 2016, p. 55). This research is relevant because

the EU's ability to protect its citizens from human rights infringements weighs heavily on its institutional legitimacy. Swimelar (2017) framed the spread of human rights around Eastern Europe as the work of civil society organisations, while Mikuš (2011) framed it as an imposition of the state onto society (Swimelar, 2017, pp. 931-942; Mikuš, 2011, pp. 836-837). This study will add consideration of EU institutions as a driving force of change to the existing literature.

Institutional pressures

In Europe, there are two main human rights treaties. The first is the European Convention on Human Rights (ECHR), which is a part of the Council of Europe, an entity separate from the European Union. Serbia and Croatia are both party to this treaty. The treaty is legally binding and includes an enforcement body, the European Court of Human Rights (ECtHR). Citizens can appeal to the court for breaches of the ECHR by public entities (Council of Europe, 1950). Although sexual orientation and gender identity are not explicitly mentioned in the ECHR, judicial precedence has shown that appeals to a combination of article 8 (the right to respect for private life) and article 14 (freedom from discrimination) have resulted in legal protections for LGBT+ people (Wintemute, 2017, p. 186).

The second human rights treaty is the Charter of the Fundamental Rights of the European Union (CFREU). As this is a part of the European Union, Serbia is not a party. This document does explicitly mention sexual orientation as a protected category, although it only applies to EU legislation and national legislation implementing this, and thus cannot protect LGBT+ citizens from discrimination by a private entity (European Union, 2012). This is partly countered by EU Directive 2000/78/EC, which demands equal treatment in the domain of employment. EU law does not prohibit discrimination against LGBT+ citizens in public and private services such as hospitals, hotels, and housing. (Wintemute, 2017, p. 191).

Serbia, as a candidate state, is in the process of accession, meaning it has to make drastic changes to its laws, institutions and behaviour in order to adhere to EU standards (European Commission, 2017). The three Copenhagen criteria must be satisfied, and are: political criteria, which include stable democratic institutions and protection of minority rights; economic criteria, including a competitive market economy, and; administrative and institutional ability to successfully implement the *acquis*. The *acquis* is a collection of 35 chapters, each

corresponding to a policy area which must adhere to EU standards before a state can accede. LGBT+ rights fall under chapter 23: Judiciary and fundamental rights. The EU establishes precise benchmarks which must be reached by a candidate state before the chapter can be closed.

Currently, Serbia is in the process of formal membership negotiations. The EU releases annual Progress Reports to monitor the steps taken and to give advice on further necessary steps (European Commission, 2019). In these Progress Reports, LGBT+ organisations are consulted on the state of LGBT rights in their country. These rights are thus explicitly considered in the evaluation of the state's advancement towards EU membership (Mikuš, 2011, p. 842).

As far-reaching as the influence of the EU during the accession process is, inside the Union there is little enforcement of EU standards. Progress in LGBT+ rights that has been made during the accession process cannot ensure that a state does not regress as a member. The EU has limited enforcement mechanisms (Kristofferson et al., 2016, pp. 54-61). The most prominent is the procedure outlined in article 7 of the Treaty of the European Union, the so-called 'Article 7 Procedure'. This article allows EU institutions to interfere when member states seriously infract on any of the values outlined in article 2 of the same treaty, including respect for human rights and the rule of law. There are two phases to the procedure. The first is a preventive phase, where an inquiry into the infraction takes place. The second phase provides sanctioning mechanisms which could strip a state of its voting rights in the European Council (European Union, 2007). However, only the preventive phase of article 7 has ever been reached, in the cases of Poland and Hungary in 2017 and 2019 (European Parliament, 2019).

Methodology

To answer the research question 'What is the influence of membership of the European Union on the protection of LGBT+ rights in Croatia and Serbia, as opposed to a candidate status?' this study will make use of a small-n case study approach with a similar systems design. By evaluating and comparing two states which are similar in all but their status vis-à-vis the European Union, the influence of the EU on their LGBT+ rights situations can be examined. A small-n case study is useful because it allows for in-depth analysis into the situations of the cases, and the possibility for the consideration of multiple factors. A shortcoming of this approach is that it has a low external validity, meaning that the results cannot easily be generalised to the larger population of European states.

The cases that will be examined in this study are Croatia and Serbia. Croatia has been a member of the EU since its accession in 2013, while Serbia is an official candidate country in the pre-accession process. Both countries are similar in history, political system, and ethnic homogeneity (see Table 1).

	Croatia	Serbia
<i>History</i>	Former Yugoslavian state	Former Yugoslavian state
<i>Ethnic make-up</i>	90.4% Croat	83.3% Serb
<i>System of government</i>	Parliamentary republic	Parliamentary republic
<i>Dominant religion?</i>	Yes; 86.3% Catholic	Yes; 84.6% Orthodox Christian
<i>EU membership status</i>	Member since 2013	Official candidate country

Table 1: State characteristics - Source: *CIA World Factbook (2019)*

Since Croatia and Serbia are similar, large differences in the situations of the countries' LGBT+ communities could be explained by differences in EU institutional influences, thus proving the thesis. If the situations of the LGBT+ communities in both countries are positive, the thesis is disproven. If the situations are negative in both countries, the thesis is partially proven; the accession process is not able to create a positive situation, but neither is EU membership.

The analysis will consist of both legal factors and empirical evidence in NGO reports, as well as data from the EU itself. The legal data will be gathered from Equaldex, an online database of LGBT+ legislation around the world. Empirical human rights data will be gathered from reports by credible NGOs with connections in the countries. Official EU Progress Reports can add to the analysis of the situation in Serbia, while World Bank survey data analyses the situation in Croatia.

Analysis of results

This analysis will be split into two parts: an overview of the legal protections of LGBT+ citizens in Croatia and Serbia, followed by a description the real-life situations of the LGBT+ community.

Legal overview

	Croatia	Serbia
<i>Decriminalisation of same-sex activity</i>	Yes (1977)	Yes (1994)
<i>Legalisation of same-sex marriage</i>	No, civil unions (2014)	No, no civil unions
<i>Constitution defines marriage as between a man and woman</i>	Yes (2013)	Yes (2006)
<i>Right to change legal gender</i>	Yes, requires surgery (1994)	Yes, requires surgery and sterilisation (2018)
<i>Comprehensive anti-discrimination law</i>	Yes (2008)	Yes (2009)
<i>Anti-discrimination law (employment)</i>	Yes, only sexual orientation (2008)	Yes, sexual orientation and gender identity (2009)
<i>Equal age of consent</i>	Yes (2002)	Yes (2006)
<i>Ban of conversion therapy</i>	No	No

Table 2: Overview of legal protections – Source: equaldex.com

Table 2 shows that many of Croatia’s LGBT+ protections were written into law before the state became an official EU candidate country in 2004. However, the accession process is visible; Croatia’s anti-discrimination laws were both adopted in 2008, the same year that the EU integrated LGBT+ rights into chapter 23 of the *acquis* (Kristofferson, 2016, p. 62). In 2013, 5 months after Croatia’s accession into the European Union, a referendum was held to change the definition of marriage in the constitution as being between a man and a woman (Horvat, 2013). As Croatia was by then a member of the Union, there was nothing that EU institutions could do. However, the legal status of registered and unregistered same-sex relationships was guaranteed in 2014 (European Commission, 2018).

Serbia became an official candidate country in March 2012 (European Commission, 2019). None of Serbia’s laws protecting LGBT citizens were adopted after this time. Same-sex couples are invisible in Serbian law, leaving them vulnerable to discrimination in matters like social security, pension and inheritance (ILGA, 2016).

Both states have comprehensive anti-discrimination laws and protection from discrimination in the context of employment in place, and transgender people can legally change their gender. On the other hand, same-sex marriage is illegal in both states, with constitutions defining marriage as being between a man and a woman. The legality of conversion therapy leaves LGBT+ people in religious communities vulnerable. The accession process cannot be said to have a large influence on the adoption of LGBT+ legal protections by Serbia, but is more visible when it comes to comprehensive anti-discrimination laws in Croatia.

Experiences of LGBT+ people

	Croatia	Serbia
<i>Verbal abuse</i>	85%	72%
<i>Physical/ sexual violence</i>	29%	23%
<i>General discrimination</i>	52%	51%
<i>Discrimination in the workplace</i>	17%	16%

Table 3: Experiences of discrimination – Sources: *World Bank Group (2018)*; *National Democratic Institute (2015)*.

Croatia

Discrimination against LGBT+ people is prevalent in Croatia. The legal framework is largely present, but the implementation of policies is insufficient (Amnesty, 2018; ILGA, 2019). When their rights are violated, LGBT+ citizens can file a claim, but this method is not effective; proceedings are slow and often do not succeed. Another option is filing a complaint to the Ombudsperson for Gender Equality, but they cannot make binding decisions or impose any sanctions (European Commission, 2018).

It is difficult to exactly estimate the number of anti-LGBT+ hate crimes, as victims widely underreport. This could be because they are closeted and fear publicity (European Commission, 2018). There is a low level of trust towards law enforcement; 86% of LGBT+ Croatians who are victims of harassment do not report, while 47% of those who did report said nothing came out of it (World Bank Group, 2018). Another reason why it is difficult to make an estimate is that there is no central database of disaggregated crime data. Thus, records do not show whether violence was motivated by homophobia or not (Ombudsperson of Gender Equality, 2018).

Many LGBT+ Croatians are wary of public spaces. 60% reported feeling unsafe in public, while 83% avoid holding hands with their same-sex partner (World Bank Group, 2018). 39% of LGBT+ Croatians is closeted, which could have serious influence on their mental health; hiding one's identity could cause anxiety, depression, and stress (ILGA, 2019).

Serbia

LGBT+ people in Serbia are widely discriminated, and regularly threatened with violence and physically attacked (Amnesty International, 2018; European Commission, 2019). The country has anti-discrimination laws but lacks the institutional infrastructure and political will to enforce them. Hate crimes are allowed to happen, and when reported investigations are slow and perpetrators are rarely prosecuted (ILGA, 2016; ERA, 2018).

Serbia has a Commissioner for Protection of Equality, but they do not have the power to make binding decisions or impose sanctions. Many LGBT+ people are not informed on the existence of the Commissioner. When they are, many do not report discrimination due to a fear of outing themselves (Equal Rights Trust, 2019). This underreporting of incidents is one reason that it is difficult to estimate the extent of discrimination in Serbia. Just like in Croatia, there is no centralised database of disaggregated crime data (ILGA, 2016).

When it comes to the workplace, 60% of LGBT+ people are closeted, while 16% experience discrimination. This can have negative effects; people who face workplace discrimination have a lower median income and can be barred from fulfilling their full potential. There are also significant mental health risks. A significant percentage of LGBT+ people in Serbia say they 'experience negative emotions all of the time' (World Bank Group, 2019).

Counterargument

Ayoub (2014) and Swimelar (2017) argue that the EU has a limited influence on the protection of LGBT+ people in countries who are behind on human rights, ascribing a large role to transnationally embedded civil society organisation (CSOs). In Serbia this is relevant, as citizens use CSOs to report discrimination and acquire resources (ERA, 2018). LGBT+ organisations collaborate with political institutions to ensure protection in the law, but they have more leverage when it comes to the collection of data and protection on the ground (Swimelar, 2017, p. 932; Ayoub, 2014, p. 344). This suggests that CSO activity is more important than EU institutional factors. This argument can be

used to slightly modify the thesis, adding a consideration of civil society influence. However, while it is evident that EU institutions cannot adequately protect LGBT+ rights themselves, neither can CSOs. Where the European Union can pressure a country to enact laws, it needs CSOs to help hold governments and civil society accountable to enact substantive change. Neither can succeed without support from the other.

Conclusion

There is no significant difference between the legal protections and situations of LGBT+ people in Croatia and Serbia. The EU accession process is visible in the adoption of some legal protections, but neither country adequately implements them. Following from this, the thesis that membership has a negative influence on the protection of human rights is partially supported. Institutional pressures during the accession process do not sufficiently improve LGBT+ rights in Serbia, but the LGBT+ rights situation in Croatia shows that the EU is insufficiently equipped to guarantee human rights protection in member states.

These findings add to academic literature because they confirm that the EU and its institutions cannot adequately protect LGBT+ rights in Eastern Europe, despite its reputation as a promoter of human rights. Further research can be done into the role of transnational networks of civil society organisations in supporting LGBT+ people and putting pressure on government institutions to sufficiently implement anti-discrimination laws.

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