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Unpacking normative resonance: The attitudinal panopticon and the implementation gap of LGBT rights in Serbia

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Abstract

Although equality policies have been promoted by the EU in its enlargement process, their implementation often remains weak. Whilst normative resonance is considered as a key factor for their proper implementation, why it matters remains theoretically underexplored. Addressing this gap, the article develops the notion of the attitudinal panopticon. Through the analysis of the implementation gap of LGBT rights in Serbia, it is demonstrated how the lack of normative resonance and social change becomes a disciplining environment that prevents people from using equality measures out of fear of further and more severe violations of their rights.

Introduction

Although the EU enlargement process has been described by some as 'the most successful democracy promotion policy ever implemented by an external actor' (Vachudova 2014, 122), recent moves towards illiberalism and authoritarianism in new EU member states have demonstrated that such earlier positions might have been too optimistic. Democratic backsliding has become a real concern in recent years and scholars have devoted significant attention to the process (see e.g. Krizsan and Roggeband 2018). With reference to developments in some new EU member states, Bermeo (2016, 6) has pointed out that these forms of backsliding "are legitimated through the very institutions that democracy promotors have prioritized." This being the case, it is important we do not just analyze the process of democratic backsliding but also how the earlier processes of democracy promotion have created the possibility for these so-called democratic institutions to be transformed in legitimizing forces for non-democratic practices. Moreover, the fact that institutions can be made to work both in favor of and against democratic principles means that an institutional analysis of the impact of democracy and fundamental rights promotion might no longer suffice.

Indeed, there are two more problems with such institution-orientated analyses of norm promotion and implementation (particularly within the context of EU enlargement). First, on a more abstract level, the institution-focused analysis of the Europeanization of fundamental rights is problematic because it seems to take for granted that the EU is a so-called community of values in which the meanings of these fundamental rights are well defined and understood. Here, I do not refer to the idea that there is no internal debate within the EU as to what these fundamental rights entail (see e.g. Mos 2018), but rather to the fact such contestations are often written out of the analysis by taking the EU values for what they are, ignoring the fact that these values play a political function in the maintenance of the EU's symbolic boundaries (see e.g. Slootmaeckers 2020). The second problem with the institution-focused analysis of the 'successfulness' of the EU's fundamental rights promotion is that such analysis tends to reduce fundamental rights to public policy measures and institutional change, and thus ignores their social and cultural underpinnings. In other words, the adoption of laws and institutions becomes an end in itself; a point of view which implicitly considers that these new institutions will eventually lead to social change. With similar implicit assumptions, the vast Europeanisation literature has focused on a rather narrow understanding of the EU's impact on domestic politics, orienting itself toward changes in public policy, not in values and attitudes (Slootmaeckers and O'Dwyer 2018). While perhaps of little practical consequence in those technical policy areas not involving the public, for areas such as fundamental rights — which by definition involve both elites *and* publics — this elision is problematic. This is not only because it limits our understanding of why progressive policy changes might not lead to the desired outcomes but also because such analyses have influenced EU enlargement policies. This constitutes a vicious cycle of policies that do not deal with the real causes of lack of change and by extension the possibility of backsliding.

This article seeks to break such a research-policy cycle. Whilst recognizing the importance of laws and institutions, it challenges the notion that change in countries' institutional settings over time will lead to social change. Whereas the EU enlargement process and Europeanization studies seem to

reproduce, what Scheingold (2004) calls, the 'Myth of Rights' which directly links legal change, rights and remedies to social change, this article, in line with Scheingold, considers that laws and rights institutions are embedded in a wider political and normative system. Hence, the ability of laws and institutions to generate social change is dependent on their relation to said system. Through an analysis of the promotion of anti-discrimination laws as part of the EU enlargement process, the article demonstrates that the simple translation of fundamental rights and democracy into public policy and institutions in itself contributes to a lack of social transformation that is needed for the underpinning values to become embedded in the cultural fabric of candidate countries. In particular, it zooms in on the concept of *normative resonance* (Brosig 2010) that, although it has been often referred to as an important element for successful norm diffusion and implementation, remains a black box in terms of *how* its absence hinders norm implementation. More generally, the article asks: Why does the adoption of fundamental rights policies not always lead to the expected change? The analysis draws particular attention to the political, institutional, and societal barriers to implementation. For the latter, the article presents a Foucauldian inspired theory of the *attitudinal panopticon*. This theory considers the visibility regimes created by the persistence of prejudice, and argues that under the guise of these visibility regimes speaking out against an injustice makes one subject to disciplining powers aimed to maintain the status quo. By providing an explanation of why people might not use the law as a remedy for injustice, the theory of the attitudinal panopticon provides a mechanism to explain *how* the lack of normative resonance can lead to limited implementation.

This theoretical account is developed through an in-depth analysis of the Europeanisation of Serbia's anti-discrimination framework, with special attention to the sexuality-related aspects of this legal framework. Serbia provides a good case study because the laws were adopted through external incentives without normative resonance. The latest surveys point to high levels of homophobia in Serbia, with 40.2 percent of the population disagreeing with the statement that gays and lesbians should be able to live their life as they wish; 50 percent indicating they would be ashamed if a close

family member would be gay; and 74.9 percent being against adoption rights for same-sex couples (European Social Survey 2019).

The EU's promotion of Lesbian, Gay, Bisexual and transgender (LGBt[1]) right through the EU enlargement process represents a critical case for the processes analyzed; particularly because it has developed as a litmus test for Europeanness and fundamental rights within the enlargement process (see e.g. Slootmaeckers 2017). Analyzing such a politically salient issue will not only highlight how we should broaden our theoretical and empirical analyses of norm diffusion and the implementation gap but also allows for a more critical engagement with the EU practices of othering (Slootmaeckers 2020). Thus, by analyzing such a contentious issue, I demonstrate how the diffusion of norms through institutions is problematic for two reasons. First, the introduction of values and fundamental rights as institutions through external pressure does not lead to the desired results due to both political and institutional barriers to their implementation. Second, when such institutions are introduced without normative resonance, the resulting lack of social change will in turn limit the ability of these new institutions to generate future change. For institutions and laws to contribute to social change, they need to become political and be used as a tool to challenge hegemonic societal values (Scheingold 2004). Yet, the persistence of societal prejudice constitutes a disciplining environment, an *attitudinal panopticon*, through which people whose rights have been violated are prevented from seeking justice out of fear of further and more severe violations of their rights. Although Europeanisation is a particular type of norm diffusion and democracy promotion, the theoretical implications of the analyses will travel well beyond this process and will be of relevance to scholars interested in democracy promotion, norm diffusion and the implementation of equality policies more generally.

In the remainder of the article, I will develop the theoretical framework by both considering the institutional explanations of the implementation gap and by opening the black box of normative resonance. For the latter, I develop the concept of the attitudinal panopticon. Next, I will demonstrate these theoretical arguments through the case of LGBt related anti-discrimination provisions in Serbia. The empirical part of the article is based on a process-tracing analysis of the adoption of the anti-

discrimination legislation in Serbia and how the law has been implemented between 2009 and 2016. The lack of a centralized and standardized system for recording, collecting and analyzing data on instances of discrimination has made analyzing how widespread discrimination against LGBt people is and how well the law is implemented inherently complex. In order to overcome the lack of in-depth statistical and case-specific data, the article relies on a wealth of new empirical materials, which is derived from a total of 89 semi-structured interviews conducted between 2012 and 2016 with a variety of actors, including but not limited to (LGBt) activists, legal aid providers, legal scholars, the former Commission for the Protection of Equality (CPE), as well as representatives of the Judicial Academy, OSCE office in Serbia, the Ministry of Justice, the Serbian equality bodies, and the community policing department. The data from the interviews is triangulated with and expanded by document analysis of the (annual) reports produced by the CPE and civil society organizations, as well as a review and secondary analysis of existing resources.

Understanding the impact of normative dissonance: The disciplining nature of attitudes

The literature on norm diffusion has a predominant focus on the processes of said diffusion and its scoping conditions (Finnemore and Sikkink 1998; Checkel 2001). Coming from a variety of theoretical backgrounds, the literature converges around the notion that norm adoption is either guided by a behavioral *logic of consequences* or *appropriateness* (see March and Olsen 1998), with the former emphasizing cost-benefit analyses and the latter considering the roles of identities. This is particularly true for the Europeanization literature, which, as a special form of norm diffusion process (Börzel and Risse 2012), focusses on how policies and norms diffuse from the EU to candidate member states. Whilst the focus of this article is not on the process of Europeanisation *per se* but rather on the implementation of policies after adoption, an understanding of the underlying processes is nevertheless important as the way in which policies are adopted matters for their later implementation. Indeed, with reference to the EU enlargement process, Schimmelfennig and

Sedelmeier (2005) argued that rules adopted following a rational choice cost-benefit analyses are most likely to be instrumental changes with little impact beyond their formal adoption, whereas the adoption of policies guided by a *logic of appropriateness* are expected to be much less contested domestically, and their implementation is more likely to be thorough. These theoretical expectations have been corroborated by the vast literature on "shallow Europeanisation" (see e.g. Czernielewska, Paraskevopoulos, and Szlachta 2004; Rechel 2008), particularly those focusing on the implementation of gender and minority rights in new member states (see e.g. Brosig 2010; Sasse 2008).

By now it is well established that the conditionality principle (which relies on a *logic of consequences*) has been much less effective in driving sustained change for the EU's soft policy areas (Epstein and Jacoby 2014). A case in point is the limited impact of the EU's effort to introduce minority rights and build functioning democracies (see e.g. Haughton 2011). While candidate countries did adopt minority legislation under EU pressure, these rules did not penetrate the new member states beyond formal compliance (Huszka 2017). Overall, these findings tend to confirm the theory that when reforms are inspired by external conditions, governments are likely to adopt these at a minimal cost (Schimmelfennig and Sedelmeier 2005). In other words, governments engaged with institutional change merely to gain and secure rewards (Grabbe 2006). The adoption of EU rules is thus nothing more than a 'chimera, in that formal structures [are being] put in place without any real chances of implementation' (Jacoby 2001, 175).

In addition to the flaws of the conditionality principle itself, several other explanations for limited implementation have been identified within the EU Enlargement process itself. These include a dearth of expertise on the issue within EU institutions, lack of standards, and heterogeneity in the protection of minorities rights among member states gave candidate countries leeway to maneuver politically on the issue (Rechel 2008). Similarly, the inconsistent application of conditionality and superficial monitoring of minority issues also contributed to the limited implementation of the newly introduced policies (Nancheva 2007; Rechel 2008).

Moving away from the EU process itself, the domestic institutional setting is considered to be another explanation for limited implementation. Falkner and Treib (2008), for example, argued that the limited implementation of equality policies is due to weak local enforcement mechanisms of the new adopted rules. They highlighted how the new equality norms are 'empty letters', unable to be implemented due to the malfunctioning of the judiciary system as well as due to the fact that equality bodies are lacking the capacity and/or visibility to fully function.

More recently, scholars have also started to pay attention to the interplay between the Europeanisation process and domestic structures to explain limited implementation as well as the EU's potential unintended and negative consequences (Börzel and Pamuk 2012). For example, Mendelski (2016) has argued that under sub-optimal domestic conditions, including limited stateness (see also Elbasani 2013), EU conditionality is not just limited, but can actually be harmful by negatively reinforcing existing modes of governance. In relation to the rule of law, they found that the 'instrumentalization of reforms' by local empowered yet unaccountable elites may lead to an abuse and politicization of newly created state structures, especially when the EU measures progress in outcomes rather than the processes of reforms (Mendelski 2016). In relation to social dialogue, Grosse (2010) and Malová and Dolný (2008) also hold that the EU accession process had a contradictory impact in Central and Eastern European countries. While the EU aimed at promoting the involvement of civil society in policy making, the technocratic character of the enlargement process achieved the opposite. Politicians focused more on accountability to the EU than to their own citizens, with electoral accountability also prevailing over political accountability. Hence, the EU enlargement process brought forth institutional change but failed to transform the political culture of the candidate countries.

The observation that there has been limited transformation of the political culture points to an important elision in the literature. Whilst it has been argued that the EU enlargement is an elite driven process which fails to produce a societal re-adjustment (Galbreath 2003), and the implementation gaps are therefore due to a lack of "normative resonance" (Brosig 2010), our understanding of *how*

the lack of normative resonance (and social change) contributes to the implementation gap remains limited. Thus far, the argument is twofold. First, normative resonance of international policies with the domestic norms will result in a smoother diffusion process. When international policies or standards are adopted in the domestic arena, it is argued that a lack of normative resonance will result in an implementation deficit.

How the latter happens, however, remains insufficiently theorized to date. In fact, when providing potential solutions to the implementation gap, scholars often suggest a strengthening of the institutional structures (see e.g. Falkner and Treib 2008). Such solutions, however, do not take the issue of normative resonance seriously (for an exception where attitudinal change is mentioned see Ram 2003). Rather, they rely on and reinforce the 'myth of rights' and its implicit assumption that formal compliance and the adoption of new rules and institutions will in time lead to social change. Whilst Bermeo's (2016) observation that recent processes of democratic backsliding are legitimized through newly established institutions demonstrates the inherent flaws of such assumptions, it is also worth emphasizing fundamental rights are not just situated in law but are inherently embedded within the social fabric of societies (Slootmaeckers and O'Dwyer 2018). In other words, in order to fully grasp the implementation gap, we need to move beyond an institutional analysis of norm promotion and take the societal factors more seriously. We need to unpack why normative resonance matters.

To do so, I take inspiration from Butterfield's (2020) recent analysis of the anti-discrimination legislation in rural communities in Croatia. Whilst her main argument successfully problematizes the neoliberal, individualistic and legal approach to the protection of human rights, her findings with relation to why LGBt people in rural communities are reluctant to use legal remedies provide a good entry point to conceptualize how the lack of normative resonance leads to limited implementation. In particular, Butterfield (2020) highlights the psychological burden that people experience in small community with the need to "come out" as part of anti-discrimination proceedings. Whilst such a psychological burden is not to be underestimated, in this article, I argue that said burden is a symptom of wider power structures in society that undermine the potential of anti-discrimination legislation.

To conceptualize these processes, I propose a mid-range theory of how the lack of normative resonance contributes to and reinforces the implementation gap of new policies and institutions. Drawing on Foucault's (1977) notion of the panopticon, I propose to consider the power structures present in society and how visibility regimes influence people's behaviors. The panopticon has been described as a general model of functioning, as a disciplining mechanism which structures power relations in the everyday lives of people. Visibility, within this governance structure, is a 'trap'. The panopticon creates disciplining power by maintaining a state of (presumed) permanent visibility for people. As the central governing body remains unseen, the experience of (presumed) visibility makes that people themselves embody the disciplining power of the central system and self-regulate their actions to normalize them, to avoid scrutiny and negative consequences.

As eluded to in the work of Butterfield (2020) and demonstrated in more detail in this article, similar processes of visibility regimes and disciplining power operate in the case when fundamental rights laws and institutions are adopted without normative resonance. As discriminatory attitudes constitute and are based on hierarchical structures, the presence of such attitudes, when held by the majority of a society, creates a vernacular panopticon wherein those who differ from the norm are in a constant state of (presumed) visibility (Manning and Stern 2018). To escape the negative consequences of such visibility, one has to self-regulate their actions to appear 'normal' (on the "closet" as such self-regulating structure for LGBt people, see Sedgwick 1990). In the context of the lack of normative resonance, power and control is not emanated from a central authority, but rather it is the persistence of attitudes and values in society that generates a more vernacular version of these disciplining power relations – they are exercised and create by the prevailing attitudes in society. To capture this more vernacular version of the panopticon, I propose the concept of the *attitudinal panopticon* as a means to emphasize the disciplining nature of attitudes and values.

The attitudinal panopticon, as a concept that captures visibility regimes created by societal attitudes and the disciplining power emanating from it, enables us to conceptualize how the lack of normative resonance leads to an implementation gap. This process can be described as follows: the attitudinal

panopticon acts as a barrier to the implementation of anti-discrimination policies by making it socially costly to visibly differ from the norm, which in turns prevents people from engaging with their rights. Seeking justice through fundamental right mechanisms requires from those who are different to stand up, to speak out and become visible as an act of resistance to the dominant discriminatory culture. However, when the attitudinal panopticon is strong enough – i.e. discriminatory attitudes are held by a majority of the people – such acts may lead to increased visibility and potentially new forms of discrimination (or more generally, punishment). As Sara Ahmed (2017, 141) explains, "to expose a problem is to pose a problem". Posing a problem is to invite the disciplinary processes to engage you in order to maintain the status quo. Writing about sexual harassment, but referring to bullying and discrimination in more general terms, she explains that these processes work

> by increasing the costs of fighting against something, making it easier to accept something than to struggle against something, even if that acceptance is itself the site of your own diminishment; how you end up taking up less and less space. It is because we perceive this wall [attitudinal panopticon] that we end up having to modify our perception (perhaps this is what it means to get "used to it"). You might feel you cannot afford to become alienated from those around you; not only might you lose access to material resources […], but you might lose friends, connections that matter. (Ahmed 2017, 141)

Speaking out about injustice makes one more visible, a problem, and thus more vulnerable for social repercussions and allows for the activation of different social forces that lead to exclusion. This being the case, it is expected that the fear of becoming visible as being different or a member of an unwanted group in society through exercising of one's rights and the social exclusion and further discrimination that would follow acts as a barrier to doing so. As a consequence of the attitudinal panopticon, it is expected that people would rather endure relatively small instances of discrimination in order to avoid future more extreme forms of discrimination and exclusion.

At this point, it is important to note that the attitudinal panopticon provides an analytical tool to understand why the lack of normative resonance contributes to and maintains the implementation gap. It highlights the importance of visibility regimes and its associated disciplining power structures as barriers to exercising one's rights. It does not aim to provide a comprehensive overview of how these disciplining powers work in practice at the individual level, as such a theoretical endeavor would

risk decontextualizing said structures and homogenizing lived experiences. Indeed, building on long-standing insights from feminists of color (see e.g. Crenshaw 1989; hooks 2000), it needs to be emphasized that the disciplining power structures generated by the attitudinal panopticon do not work in isolation but rather intersect with other power structures in society, such as for example socio-economic structures. The intersectionality of these different power structures further explains why not all members of marginalized communities are equally vulnerable to the disciplining nature of the attitudinal panopticon.

In sum, the mid-range theory of the attitudinal panopticon explains how the lack of normative resonance leads to limited implementation of fundamental rights policies. It does so by highlighting the visibility regimes and disciplining powers created by the persistent presence of prejudices. This lack of social change, then, becomes a disciplining environment in which people whose rights have been violated are prevented from seeking justice out of fear of further and more severe violations of their rights. As such, the assumption within the Europeanization literature (and the norm diffusion literature more generally) that social change will follow the adoption of new institutions when they are strong enough does not hold, as the absence of societal transformation itself becomes a barrier to the working of these institutions. For these institutions to lead to social change, they need to be combined with active attempts to break the presence of discriminatory attitudes and shift the societal attitudinal power structures.

The importance of societal factors, and the attitudinal panopticon, as a barrier to implementation is demonstrated in the next sections through the detailed analysis of the anti-discrimination law in Serbia, with a particular emphasis on LGBt issues. First, I will provide a very brief overview of the adoption process of the anti-discrimination legal framework in Serbia. The final section analyses the implementation gap and demonstrates how the attitudinal panopticon contributes to and reinforces already existing political and institutional barriers to the full implementation of the anti-discrimination law.

The adoption of Serbia's 2009 Anti-Discrimination Law

Whilst it is beyond the scope of the article to analyze how Serbia's anti-discrimination framework has been adopted as part of the country's European integration process, some observations can be made about this process based on the research presented elsewhere (see Slootmaeckers 2017). Whilst EU conditionality played an important role in this process, it must be noted that the role of the domestic actors and LGBt human rights activists cannot be ignored. After all, they have been active in advocating anti-discrimination policies long before it became part of EU (and/or other international) conditionality. Moreover, civil society groups, together with their transnational network, were able to influence the EU's agenda to include anti-discrimination as part of the visa-liberalization process at a time when the political Copenhagen criteria conditionality as part of the Stabilization and Association Agreement negotiations had become 'perverted' (Stahl 2011).

Whilst the opening of the visa liberalization process provided the EU the space to reintroduce some of its political conditions, the victory of a pro-European coalition in the 2008 elections made the government more willing to comply with EU demands. Indeed, the adoption of the LGBt-friendly clauses in the 2009 anti-discrimination law can only be fully understood by considering the increased conditionality associated with the visa liberalization process. The promise of visa-free travel allowed the government to overcome the strong opposition to the law and its LGBt protections, with only a few compromises made to the religious and nationalist opposition to the law (for more details see Slootmaeckers 2017, 111–47).

Due to the fact that the reforms were adopted as a consequence of external incentives and due to the strong external justification of the reforms, it can be expected they will remain in the realm of formal compliance, with limited implementation. Indeed, observers and the majority of interviewees have described the implementation of the anti-discrimination law as generally lacking. Take for example the European Parliament resolution on Serbia's 2015 Progress Report which whilst welcoming 'the fact that Serbia has an adequate legal and institutional framework for protecting human rights and fundamental freedoms', it also expressed concerns about 'the remaining shortcomings in its

implementation, particularly with regard to preventing discrimination against vulnerable groups, including […] LGBTI people' (European Parliament 2016: art. 18). Despite the fact that a strategy and subsequent action plan to combat discrimination have been adopted in 2013 and 2014, respectively, the anti-discrimination legal framework seems to only exist in written form. The next section will look more closely at the implementation gap of Serbia's anti-discrimination framework. First, I will analyze the political and institutional explanations, followed by an exploration of how the attitudinal panopticon further contributes to the implementation gap.

Implementing the Anti-Discrimination Law: Trapped by Attitudinal Panopticon

The first step in implementing the 2009 anti-discrimination law was the establishment of a new equality body, the Commissioner for the Protection of Equality (CPE). However, the process through which the CPE was elected demonstrated that the government had not been very keen on the law and its underpinning values. Not only did the ruling parties submit their candidates after the set deadlines, but also the debates surrounding them indicated limited positive engagement with the anti-discrimination ideal. To illustrate, the first candidate proposed by the government, Milutin Djuricic, had, according to civil society organizations, questionable professional qualities with relation to fundamental rights, as he had actively contributed to the 1994 propaganda book *Recnik Zabluda* (A Dictionary of Misconceptions) that openly supported the Milosevic regime. At the same time, the government employed homophobic tactics to oppose the opposition's candidate, Goran Miletic, who was involved in attempts to organize Pride Parades in Belgrade. In a newspaper interview, Svetozar Ciplic, Minister for Human and Minority Rights stated that the government would never support Miletic as CPE (cited in Beta and Vecernje Novosti 2010). He claimed that by not supporting him, the government was ensuring the impartiality of the CPE institution. In fact, referring to Miletic's sexuality and his involvement in the organization of the Belgrade Pride, Ciplic argued that the CPE must defend the interests of all minority groups and not only of those to which the CPE belongs. The homophobic undertones of such statements became more explicit in an informal, behind-the-scenes political

campaigns in which it was claimed that Goran Miletic would push for Pride parades all over Serbia. After some delays and a compromise with civil society, Nevena Petrusic, dean of the Law Faculty of the University of Nis, was appointed as CPE by the parliament on 5 May 2010 (V. Petrovic 2011).

The lack of political will to engage with the new legislation has had a significant impact on the CPE's institutional capacities. Despite the fact that the annual budgets and the rulebook on the functioning of the CPE allow for the employment of 60 civil servants, these plans have yet to be realized as the 256 m^2 apartment — where the CPE resided until late 2016 — only provided the physical space for 23 employees. Working with less than half of the envisioned capacity combined with working from the temporary premises, in turn, limited 'the development of the Office of the Commissioner to its full capacity, which can be [of] negative effect to the efficiency of the work and tasks given to the Commissioner' (Petrusic 2012, 16). Although the lack of political support and institutional capacity was in part mitigated through international funding and networks, it is cited as a key barrier for its work.

Another barrier highlighted by Nevena Petrusic, in an interview with the author, relates to the independence of the institution. She noted that as the institution became more visible and active, she experienced increasing (indirect) political pressure on the institution and her person. To illustrate, she revealed in this interview that, as CPE, she had been blackmailed to hire some individuals 'who are close to the authorities', which was aimed to compromise the independence of the CPE – a practice not uncommon in Serbia (see Aleksic 2015). Petrusic narrated that when she went to report the 'assistant who was blackmailing [her …], the prosecutor told [her] that they did not have the authority to prosecute [the assistant], but that [she] can sue them privately'. When she questioned this response, she recalled how the prosecutor threatened her:

> He [the prosecutor] threatened me. He demanded that I would hire the person and said 'if that does not happen' — so he was issuing the threats —, and when I asked 'what will happen if I do not do that?', he said 'Well, there will be an awful media campaign and you will resign after this campaign'.

Commenting on the political pressure that she experienced and reflecting on her time as CPE more broadly, Nevena Petrusic concludes that

> what actually can be said is that the role of independent institutions is still not understood. [...] In general, I have the impression that the whole story about human rights is essentially not understood by our politicians. So, I have the impression they are really doing that [human rights protection] because of someone over there [the EU], and not because our society needs it.

A wide variety of interviewees — including legal scholars, the independent institutions, and activists — have identified the lack of systematic training of judges and other functions in the judiciary is another important factor hindering the implementation of the anti-discrimination legislation. This has led observers to conclude that the discrimination and hate crime cases remain sensitive to individual (mis)understandings of the law and sensitivities to the issue (Stjelja et al. 2014). In a review of the judicial practice on discrimination cases, the CPE found that judges do not recognize the case of discrimination as such, and that court decisions on cases of discrimination, amongst other things, fail to take into consideration the reversed burden of proof (Petrusic 2013). Indeed, courts have interpreted the reversed burden of proof in such a way that plaintiffs are still expected to *actively* prove discrimination. Demonstrating the potential that discriminatory treatment has occurred is considered to be a mere procedural precondition for further litigation (Antonijevic et al. 2014, 12). Such interpretation leaves victims at a disadvantage given that discrimination is difficult to prove, particularly when indirect and/or covert.

Additionally, the limited (and unsystematic) training of judges in the anti-discrimination legislation has led to a persistent confusion about how the legislation should be applied. The case (case P-17987/2011) against the MP Dragan Markovic (Palma) for aggravated discrimination on the basis of sexual orientation provides a good example of the inconsistent application of the anti-discrimination

law and the lack of understanding of the underlying principles of the law. Whilst the first instance judgement found Palma guilty of severe discrimination, the same judge reversed their opinion during the retrial, which was ordered by the Court of Appeal after it had squashed the initial verdict based on technical errors. Based on the fact that the CPE had issued an opinion and recommendation against Palma for the same incident of hate speech, the judge argued that Palma has already been sanctioned enough by the CPE and that the 'court should not be a government body which will establish whether there was a discriminatory behavior every time one of the social categories listed in the Anti-discrimination Law finds itself offended or discriminated according to its own value system' (quoted in Micic 2014, 51–52).[2]

Similar observations can be made with reference to the Police. An activist who supports hate crime victims concludes that how a victim is treated in the reporting stage still 'depends on the personal attitudes of the person [to whom discrimination and/or violence is reported]'. Others have also noted that some police officers still respond to LGBt victims with a lack of understanding and sometimes even prejudice (see also Petrusic 2015). In the least extreme cases of misunderstandings by police officers, the hate-based motive of violence against LGBt people are simply not registered as such and incidents are instead classified as, for example, street fights. A more extreme illustration is the inappropriate police response to a hate crime against a trans* man in Vlasotince, a town in South-East Serbia. In October 2016, the NGO Egal reported in an email bulletin that a trans* man was physically attacked by a group of men, already known by authorities for harassing the man for over a year without legal repercussions. When the police arrived at the scene, the officers' behavior was described as unprofessional as they reportedly did nothing to apprehend the attackers, but instead laughed at the victim while seemingly dismissing the incident.

Whilst these barriers relate to the lack of political will and limited institutional capacities to implement the laws — barriers already frequently covered in the Europeanisation literature—, they are insufficient to understand the lack of implementation and another barrier is to be located in the social domain. Indeed, a majority of interviewees echoed the view that persistent underreporting of

discrimination by victims is a major barrier to the implementation of the anti-discrimination law. Although underreporting occurs for all forms of discrimination and in most countries, it is said to be especially true for LGBt-related cases. According to a recent European Union Agency for Fundamental Rights (FRA) (2020) survey, only 9 percent of LGBt people who experienced discrimination reported the last instance. The low percentage of reported cases is a serious barrier considering that, to use the words of one activist, 'laws can remain just on paper for a long time if there is nobody to use them', and as explained by a social worker LGBt activist, 'the conditions for LGBt people to use the Law on the Prohibition of Discrimination are still not met'. In other words, in order to understand the implementation gap, we need to understand the causes of underreporting.

The weakness of the institutions, as explained above, are a partial explanation for underreporting. On the basis of interviews with LGBt and human rights activists, there is strong evidence to suggest that a major reason why non-activist LGBt people do not want to report instances of discrimination or hate crimes is a fear that doing so would result in further victimization and/or humiliation, or that their complaint would not be taken seriously by the police (cf. supra, but also consider some statements by hate crime victims in Stjelja et al. 2014). This is further corroborated by the FRA (2020) survey, which indicated that one in five LGBt people did not report hate crimes out of fear of homophobic/transphobic reactions from the police.

The weakness of institutions and the limited training of relevant authorities, although important, is not a sufficient explanation for underreporting of discrimination. Solely focusing on the weakness of institutions assumes that the law and its institutions will lead to social change if they are strong enough. Yet, such linear point of view reproduces the 'myth of rights' and does not consider that the law implementation and social culture are inherently intertwined and that the law can change society when it is implemented well, but also that it needs to change society to be implemented well (cf. Scheingold 2004). In other words, we need to consider how the hegemonic value system of society also constitutes a barrier to the implementation of the law.

It is here that the theory of the attitudinal panopticon helps us to understand how the lack of social change and normative resonance leads to the implementation gap of the anti-discrimination law by preventing victims of discrimination of engaging with the law. Indeed, a frequently mentioned reason why LGBt people do not report discrimination and/or hate crimes is a fear of the social repercussions of doing so. In order to understand why this is the case, let us consider the Serbian cultural and attitudinal landscape, in terms of views on discrimination and homophobia, and how this impacts LGBt people.

First, survey evidence suggests that the belief that discrimination is justifiable in certain instances still lingers in Serbian society. A 2013 survey revealed that a substantial proportion (16 percent) of the population indicate they consider discrimination is justified in certain circumstances (CeSID 2013). Although 16 percent seems like a small proportion of society at first glance, a more detailed analysis of the survey design suggest that this is an underestimation of the proportion of people who believe discrimination is justifiable. Indeed, the survey item shows errors, such as unbalanced question wording, unbalanced response scale and priming towards certain instances of discrimination, that may have led to social desirability bias. Second, considering homophobic attitudes in Serbia the picture is much more dire. Several surveys, commissioned by Gay-Straight Alliance (GSA, 2010), the CPE (CeSID 2013), and National Democratic Institute (NDI, 2015), have repeatedly shown that a large proportion of the Serbian population consider homosexuality a disease and think homosexuals should keep their identity and actions within 'four walls', i.e. homosexuality should remain invisible. Similarly, surveys have consistently demonstrated that there is a considerable social distance between citizens and LGBt people in Serbia (CeSID 2013). These findings were confirmed by the European Social Survey (2019), which found that one in two would be ashamed if a close family member would be gay.

Surrounded by such an environment, LGBt people internalize the societal and institutionalized homophobia and self-regulate their actions to avoid homophobic abuse (Stojcic and Petrovic, 2016; see also Kuhar and Švab, 2008). Research by the Centre for Queer Studies has shown that, in Serbia, 'becoming aware of one's own homosexuality mostly happen[s] through awareness of one's

difference in relation to the majority', moreover it is 'a process, not at all simple, followed by insecurity, the feeling of guilt, loneliness, fear or rejection by family and friend and the feeling that they let them down, as well as fear for one's safety' (Stojcic and Petrovic 2016, 166). The authors of this report conclude that coming out in Serbia thus remains a daunting act, with rejection and ostracization from friends and family or being fired from their job being perceived as the most likely consequences.

The risk of losing employment also highlights how the disciplining powers of the attitudinal panopticon intersect with other power structures such as socio-economic status. Indeed, employment and the work environment have been highlighted as the place where LGBt people are most vulnerable to discrimination (see e.g. Petrusic 2015). With the current poor economic situation in Serbia and the high degree of unemployment as well as the high level of homophobia, being out as LGBt becomes a barrier to employment (Stojcic and Petrovic 2016). With the dire economic situation in Serbia, the high rate of unemployment, (young) LGBt people often need the support from their family to survive. Being outed, thus, does not only have personal/psychological (Butterfield 2020) and social consequences, but also a real material impact on the economic situation of LGBt people.[3]

Against this background and considering that reporting hate crimes and/or discrimination inevitably means coming out as one must declare the grounds of discrimination, being 'out' and visible is perceived by LGBt people as dangerous and something better avoided. Indeed, according to the FRA (2020) survey 81 percent of LGBTI people in Serbia are never or rarely open about their sexuality/gender identity.

The above provides evidence of the existence of an attitudinal panopticon where LGBt people generally seek to remain invisible to avoid the negative consequence that is associated with coming out. Within such a context, we can expect, based on the theory, that victims refrain from reporting discrimination and/or hate crimes out of fear of the consequences that come with the increased visibility of their identity. Interviews with activists who work with LGBt people who have become victims of discrimination provides ample anecdotal evidence for the theory. Consider, for example,

the case of a gay man who was blackmailed with his sexuality. An activist who provided support in the case, narrates how the victim refused to pursue a court case out of fear of being outed:

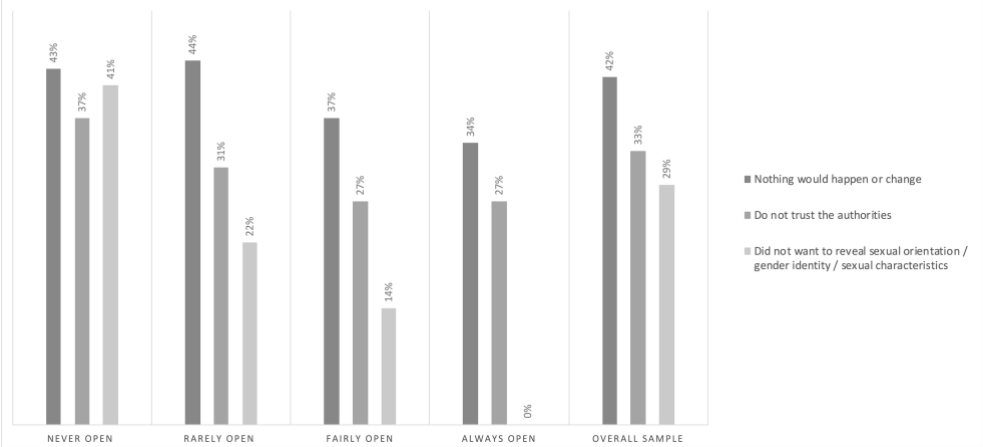
> During one of my last cases, I was taking a guy to the police station. The issue was blackmailing. The worst part was that he was blackmailed by LGBT people, and that is very common […] He [the victim] had already given €200 a few times, and when they asked for €500, he did not have the money and turned to me. […] I suggested to him that we go to the police together. [… The officer explained that] blackmail is a severe criminal offence and that everything said at that time would remain within these four walls, but from the moment he gives a statement and when they arrest the suspects they [the police], ex officio, have to submit the case to the prosecutor, and then the case goes to the registry office of the court, the investigating judge, the lawyers of the accused, their family and perhaps the media too. The guy said: 'No, I do not want to report, I will rather give money than have my family finding out. I am giving money in order for my family not to find out.'

As explained in the quote above, pursuing a case of discrimination or hate crimes inevitably means that the victims' statement, including their sexual orientation, enters the public domain. Even if the media does not get involved, the danger of becoming outed — and the associated repercussions — remains real as the victim will receive an invitation to the court to their address, often the parental home. Such an invitation to the court is a distinctive blue envelope, which sparks parents to raise difficult questions about the reasons for the invitation; questions that many victims rather avoid.

Whilst this anecdotal evidence already provides support for the theory of the attitudinal panopticon, further evidence of the disciplining nature of persistent societal discriminatory attitudes can be found in the preliminary results of the recent FRA (2020) survey. If the theory of the attitudinal panopticon helps us to explain the limited implementation of the anti-discrimination legislation, then we would expect to find visibility-related reasons for not reporting discrimination amongst the top mentioned reasons amongst LGBt people. Moreover, as the theory stipulates that not everybody is equally vulnerable to the disciplining nature of the attitudinal panopticon, we would expect that for those

people who feel they cannot be open about their sexuality, the power of the panopticon would be stronger, and visibility reasons for not reporting discrimination would be more prevalent. As demonstrated in figure 1, such patterns are observed in Serbia. Moreover, the fact that both the feeling that reporting the discrimination would not lead to any change and the unwillingness to out oneself in the process are amongst the top three cited reasons for not reporting discrimination provides further support for the attitudinal panopticon theory as it seems to confirms the idea that reporting is associated with more risk than benefits.

Figure 1. Reason for not reporting last incident of discrimination (top 3 mentioned in overall sample) By Openness of Identity



Source: based on data from FRA (2020)

I want to conclude the analysis with a final observation on how the problem of underreporting is further amplified by the institutional setting discussed earlier as well as a general disconnect between LGBt activists and the LGBt people in Serbia. Although it is beyond the scope of this article to examine this dynamic to the fullest, one must understand that this disconnect is largely due to the project-based professionalized nature of LGBt activism in Serbia. As all LGBt organization are largely dependent on foreign donors for their resources, they are heavily influenced by donors' agendas (see also Fagan 2008). As the EU prioritizes cooperation with the state in its funding schemes, and donors have an outcome and policy driven funding scheme, LGBt organizations rarely get funding for 'community' oriented projects. This disconnect with LGBt people is not necessarily a unique feature of Serbia (see Bilić 2016), but reflect the international depoliticisation of the LGBt struggle as part of

the human rights paradigm. Indeed, over the years, LGBt activists have reported that their work, with a few exceptions, has predominantly focused on advocacy initiatives and the Belgrade Pride, both activities that strongly rely on cooperation with the state. Consequently, an activist dealing with hate crime victims concludes that in general 'organizations that deal with LGBt rights have not done enough regarding the empowerment of LGBt people to report [discrimination and or hate crimes]' as community work has shifted to the background. And as activists acknowledge, there actions are important in order to break the status quo and the disciplining power of the attitudinal panopticon.

Conclusion

This article has analyzed the issue of the implementation gap in norm diffusion processes. Drawing on the example of the promotion of LGBt rights within the EU enlargement process, and building on the existing literature which has highlighted EU practices, and domestic institutional and political barriers explanations for limited implementation of new laws, I have argued that although they are important, they remain insufficient to fully grasp why fundamental rights legislation remains weakly implemented. As such, scholarly enquiry into the fundamental rights promotion should not follow the EU practice of limiting fundamental rights and even democracy to its institutional incarnations, but rather recognize that the so-called European norms have an inherently normative and societal base. In other words, I have challenged the overly institution-focused analysis of the implementation gap and argued that by reducing the norms of anti-discrimination, and fundamental values more broadly, to public policy measures and institutional change, scholarship risks obscuring the social and cultural underpinnings of these norms. Indeed, the vast Europeanisation literature has focused on a rather narrow understanding of the EU's impact on domestic politics, orienting itself toward changes in public policy, not in values and attitudes. With its implicit assumption that (formal) compliance with EU rules and adoption of institutions eventually lead to social change, this institutional focus ignores broader processes of social change. As such, I have argued for an analysis that unpacks the black box of normative resonance to understand how the lack of social change (and normative resonance) in

itself contributes to and perpetuates the implementation gap. Theorizing the *attitudinal panopticon*, I have argued that persistent societal attitudes create visibility regimes that govern people who are different from the norm to self-regulate their actions and stop them from challenging the status quo by reporting injustices. The lack of social change becomes a disciplining environment in which people's whose rights have been violated are prevented from seeking justice out of fear of further and more severe violations of their rights.

Whilst theorized with relation to LGBt people, the notion of the attitudinal panopticon should not be considered to be limited to LGBt people alone, as most prejudices and discrimination are based on notions of perceived difference which are all regulated through visibility regimes (see e.g. Pap and Balogh 2018). The discrimination of the Muslim Other in Europe is only one such example (see e.g. Hancock 2013), as even the more visible markers of differences, such as ethnicity and race have different degrees of visibility (see e.g. Wigerfelt, Wigerfelt, and Kiiskinen 2014), as do disabilities. Whilst for these difference markers the issue of 'coming out' might not always be relevant, exercising your right and standing up against discrimination will nevertheless increase one's visibility and subjectification to disciplining forces (Ahmed 2017). This is also true for those standing up for liberal democracy. In a society with dominant illiberal attitudes, standing up against illiberal democratic tendencies comes at the cost of increased visibility within the public realm and thus becoming a target for illiberal forces. Hence, the notion of the attitudinal panopticon helps explain *how* the lack of normative resonance leads to the limited implementation of not only fundamental rights policies but also democratic changes more generally. Moreover, the theory of the attitudinal panopticon can transcend disciplinary boundaries and can be used as a more general explanation for underreporting of rape, sexual harassment, and other crimes which have foundations in normative power structures. Finally, by demonstrating the importance of societal factors in understanding why norm promotion does not lead to the hoped-for outcomes, the analysis revealed a major flaw in the EU enlargement strategy. In particular, I demonstrated that the EU's current focus on the adoption of policies and the creation of institutions (which often remain quite weak) is not sufficient for the promotion of

fundamental values abroad. Rather than directing its energy to the so-called socialization of elites, the EU should actively involve the publics in its enlargement process to engage in actions and policies that enable social transformations and cultural shifts. Without doing so, the social environment may become a barrier for the envisioned reforms. Secondly, the EU should also become aware of the political process that underpins the enlargement process. Doing so would enable it to move beyond using fundamental rights as a means to demark differences, and to engage with its own fundamental right regime more intensely. Such a more honest fundamental rights policy requires the EU to first define more clearly what it considers to be its values and norms (beyond their institutional incarnations), but also help to overcome current unaccountability of member states in regard to norm violations. Hence, in order to overcome the problems identified in this research, the EU needs to develop a policy that engages more deeply with the content of the EU's normative regime rather than its form, both within and outside its borders.

Notes

[1] The lowercase 't' in the LGBt acronym is to acknowledge that the research presented in this article relates predominantly to issues of sexual orientation and thus LGB experiences. Although trans* issues are not completely absent, these voices are at the margins of the research.

[2] The Court of Appeal overturned this verdict in 2014 and found that Palma discriminated against the LGBt population (Gay Straight Alliance 2014).

[3] Whilst it is beyond the scope of this article to fully unpack the intersectionality of LGBt discrimination and social class, the points made here demonstrate the need that any societal analysis of the implementation gap should take an intersectional approach to fully understand the underpinning power dynamics that underpin the attitudinal panopticon.

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