



**Universiteit
Leiden**
The Netherlands

**Standard sequences in the legal recognition of
homosexuality - Europe's past, present and future**
Waalwijk, C.

Citation

Waalwijk, C. (1994). Standard sequences in the legal recognition of homosexuality - Europe's past, present and future. *Australasian Gay & Lesbian Law Journal*, 1994(4), 50-72. Retrieved from <https://hdl.handle.net/1887/3624>

Version: Publisher's Version
License: [Leiden University Non-exclusive license](#)
Downloaded from: <https://hdl.handle.net/1887/3624>

Note: To cite this publication please use the final published version (if applicable).

Standard Sequences in the Legal Recognition of Homosexuality – Europe's Past, Present and Future¹

Kees Waaldijk

Lecturer in Public Law, University of Limburg, Maastricht, Netherlands

FINDING A PATTERN IN THE CHAOS OF LEGAL DISCRIMINATION AND ANTI-DISCRIMINATION

For several years now, I have been collecting information on anti-homosexual discrimination in European countries. As a gay man, I have been amazed and shocked by the perverse *variety* of ways that so-called "civilised" societies have found to discriminate against us. However as an optimist, I have also gathered information on *anti-discriminatory* measures. As a lawyer, I have of course been focusing on the *legal* situation in these countries. As the co-ordinator of "Iceberg", a project of ILGA (the International Lesbian and Gay Association), I have been trying to find a way to present the *chaos* of legal discrimination and anti-discrimination

¹ Lecture presented at the International Conference Lesbian, Gay and Bisexual Rights in New Europe, Helsinki, 4/5 April 1992, organised by the national Finnish lesbian and gay organisation SETA, at the occasion of the (diplomatic) Conference on Security and Co-operation in Europe (Helsinki), March/July 1992) The main text of the lecture refers to the law as it stood in April 1992. Footnotes provide information on some legal developments up to mid-1993. A more detailed description of the law in the twelve European Community countries can be found in the author's chapter "The Legal Situation in member States", in the book *Homosexuality a European Community Issue, Essays on Lesbian and Gay Rights in European Law and Policy*, edited by Kees Waaldijk and Andrew Clapham, Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1993, pp 70-130

that I have found. As an academic, I have been tempted and challenged to find a standard *pattern* in this chaos.

First I thought that it should be possible to give a *ranking* of countries. In some countries, like Denmark, the legal situation of lesbians and gays is pretty good. In other countries, like Rumania, things are very bad. And all other countries should fall somewhere in the middle.

However, there are difficulties, with such a ranking of countries. Should the United Kingdom be given a higher ranking than Ireland, because of the total prohibition of gay sex in Ireland?² Or should the order be the other way around because in Ireland hardly ever a man is arrested for consensual sex with another man, whereas in Britain each year thousands of men are arrested and sentenced for specifically gay sexual offences.³ And should we put Cyprus and Russia⁴ on the same level as Rumania (because all gay sex is illegal) or on the same level as Italy and Switzerland (because lesbian sex is not forbidden)? We would need at least two rankings – one for women and one for men.

In many countries the legal situation of homosexuality seems to be static. However, if you look at the information from many (European) countries, and over a longer period of time, the picture becomes much more dynamic. Constantly legal changes occur. Here are a few recent examples: in February 1992, a Dutch anti-discrimination law finally came into force;⁵ since July 1990, French anti-discrimination law has also covered dismissal from a job; also in 1990, in Czechoslovakia, the age of consent for gay and lesbian sex was reduced to the same age as that for hetero-sex;⁶ and recently the Parliament of the Isle of Man voted to lift the complete ban on gay sex.⁷

There seems to be a general trend of progress; where there is legal change it is change for the better. Countries are not all moving at the same time and certainly not at the same speed, but they are moving in the same direction – forward.

The law in most countries seems to be moving on a line starting at (0) total ban on homo-sex, then going through the process of (1) the decriminalisation of sex between adults, followed by (2) the equalisation of ages of consent, (3) the

2 Note that this total prohibition was abolished by the Irish Parliament in 1993

3 See Peter Tatchell, *Europe in the Pink – Lesbian & Gay Equality in the New Europe*, London, Gay Men's Press, 1992, pp 88-89

4 Note that the total prohibition of gay sex was abolished by the Russian Parliament in 1993

5 In 1993 Ireland extend its anti-discrimination law

6 In 1992 Iceland and Luxembourg also extended its anti-discrimination law

7 See the *Sexual Offences Act 1992*. The same was done in the Ukraine in 1991, in Latvia, Estonia and Gibraltar in 1992, and in Russia, Lithuania and Ireland in 1993

introduction of anti-discrimination legislation, and (4) the introduction of legal partnership. A fifth point on the line might be the legal recognition of homosexual parenthood.

In France, for example, point (1) was reached in 1971, point (2) in 1981, point (3) in 1985, and now they are discussing partnership. In Denmark, point (1) was reached in 1930, point (2) in 1976, point (3) in 1987, point (4) in 1989 and now they are discussing parental rights. In Finland point (1) was only reached in 1971, and now the equalisation of ages of consent is on the cards.

There are problems with this model, too. Occasionally, a country takes a step backwards. The clearest example is Great Britain, where in 1988 a new anti-homosexual law was introduced: "Section 28", which made it illegal for local authorities to promote homosexuality.⁸

And some countries do not stick to the general (and logical) order of steps. For example, Ireland already introduced some form of anti-discrimination legislation (against incitement) in 1989 but in 1992 it still had not complied with the judgment of the European Court of Human Rights to decriminalise sex between adult men.⁹

It appears that my "straight" linear model is too "continental" for the "bent" lines of development on some European islands. So we should look further for a dynamic model that gives a clear picture of the legal developments in all European countries. In that model at least the time-factor and the quality of the legal situation of lesbians and gays should be represented.

It is, of course, not Ireland's fault that it provides homosexual rights in a unusual order. The main problem is that most people think of the legal recognition of homosexuality (or of homosexual emancipation in general) as *one single development*. That is a mistake. Homosexuality is a complicated phenomenon, with different aspects of feeling and of behaviour – in the words of the song-writer: a many splendoured thing. Or in the words of the Norwegian Criminal Code: a combination of inclinations, orientations and lifestyles (see the anti-discrimination articles 135a and 349a).

The law concerns itself with many different aspects of homosexuality – not just with what we do in bed (or in the park). The law also deals with the way we meet, the way we organise, the way we live together or the way in which we bring up children. There are laws on information about, for and from us. Laws about our right to work. And laws about violence against us.

⁸ See *Local Government Act* 1988 (UK).

⁹ *Norris* case, 26 October 1988, Series A, No 142. In 1993 Ireland finally complied with this judgment and extended its anti-discrimination legislation.

In all these fields, in most European countries, a certain development of legal recognition of homosexuality can be found. However, the developments in these different fields of law are, to a large degree, *separate developments*.

Consequently most lesbian and gay movements are not just working towards one improvement in one single field. Such movements have different demands for different fields. In some fields they fight for the abolition of discriminatory laws, in other fields they press for anti-discrimination laws.

So in presenting an overview of the legal recognition of homosexuality in different countries, it seems useful to distinguish between the different fields.¹⁰ I have identified at least *eleven fields* of legal recognition. There is some overlap between certain fields; especially relating to "non-discrimination" and "homosexual safety". Almost all issues of "law and homosexuality" that I have come across so far, can be located in one (or more) of these eleven. The legal developments appear to be different for women and men only in the area of sex ("women touching women"/"men touching men"). Therefore, field I is purely female and field II purely male. In all other nine fields the legal developments are basically the same for lesbians and gays (although some forms of parenthood are only relevant to women).

The legal recognition of sex between women or between men normally starts with (1) the decriminalisation of sex between adults, followed by (2) the equalisation of ages of consent, and would be concluded by (3) the removal of extra-strict limits on homosexual affection in places that are more or less "public".¹¹

The legal recognition of the principle of non-discrimination in relation to homosexuality appears to normally start with (1) the formulation of a general principle of law, followed by (2) political and official declarations condemning anti-homosexual discriminations, to be concluded by (3) the introduction of specific laws against anti-homosexual discrimination.¹²

All eleven sequences consist of three main steps ((1), (2) and (3); the level of no legal recognition can be seen as point (0)). This is of course a great simplification, here made for the sake of clarity. In reality many *intermediate steps* can be distinguished. Once we know enough about the detail of the legal recognition of homosexuality in European countries, it would be possible to discover the standard sequences of all these small steps.

¹⁰ See Appendix.

¹¹ See Appendix pt I and pt II.

¹² See Appendix pt VII.

We now have a model that we can use to give an overview of developments in the legal recognition of homosexuality. We can use the model to understand the past and the present, and to predict and change the future.

UNDERSTANDING THE PAST

One of the great similarities between the countries of the Conference for Security and Co-operation in Europe (CSCE) is that they claim to have respect for human rights. These include the fundamental principle of non-discrimination. This principle can be found both in national constitutions and in international treaties and declarations. Mostly its wording is general – not limited to particular discrimination grounds. So it can be said that in the field of "non-discrimination", all European countries have taken step (1) (see Appendix VII).

Some countries have gone further. In many countries at least some politicians and advisory bodies have spoken out against anti-homosexual discrimination (step (2)). In some of these countries these declarations paved the way for the introduction of anti-discrimination legislation. In six countries specific legislation against anti-homosexual discrimination has been enacted: Norway in 1981,¹³ France in 1985,¹⁴ Denmark¹⁵ and Sweden¹⁶ in 1987, Ireland in 1989¹⁷ and the Netherlands in 1992.¹⁸ In all six this has been done by extending the criminal law (step (3 2)). In France discrimination has also been forbidden in employment law,¹⁹ in the Netherlands private law prohibitions against discrimination have been proposed in Parliament²⁰ (step (3 3)).

A similar path is being followed by European institutions, in 1981 the Parliamentary Assembly of the Council of Europe adopted a resolution condemning anti-homosexual discrimination²¹ (step (2 3)). In 1984 the European Parliament did

13 Articles 135A and 349A of the Norwegian Penal Code

14 Articles 187-191, 187-192, 416 and 416 51 of the French Penal Code

15 Article 266B of the Danish Penal Code and Article 1 of Law 289 of 9 June 1971 as amended in 1987

16 Articles 5 5 and 16 9 of the Swedish Penal Code

17 *Prohibition of Incitement to Hatred Act* 1989

18 Articles 137C, 137D, 137E, 137F and 429 of the Dutch Penal Code

19 Articles L 122-135 and L 122-145 of the French Code of Labour Law

20 Proposal 22014 of 1991, adopted by the Lower Chamber of Parliament in 1992, expected to be approved by the Senate and be in force in 1994

21 Recommendation 924 on discrimination against homosexuals, adopted on 1 October 1981

the same²² In 1991 the Commission of the European Community (EC) followed by including a reference to anti-lesbian and anti-gay harassment in its code of practice on sexual harassment²³ (step (2 4)) Maybe, within a few years, EC-directives will be produced that specifically outlaw certain forms of anti-homosexual discrimination (step (3)) It will probably take a much longer time before the countries of the Council of Europe will add an explicit prohibition of discrimination on the basis of sexual orientation to the European Convention on Human Rights (In 1988 a protocol to that effect was proposed by the International Lesbian and Gay Association)

As yet, the CSCE has not gone further than step 1 – general recognition of the right to non-discrimination²⁴

The history of homosexual emancipation is very much the history of lesbian and gay *organisations* This is another field in which very clearly three stages of recognition by the legal system can be seen (see Appendix IV)

In the beginning, in many countries, such organisations are not even permitted Until very recently the complete illegality of any lesbian or gay organisation could be seen in the Soviet Union and in some other communist countries Even today, in Austria and Liechtenstein it is officially a criminal offence to found or join an organisation that "promotes" homosexuality In recent times, lesbian and gay organisations seem to be tolerated in almost all countries, even Central and Eastern Europe In several countries in Western Europe homosexual organisations had already emerged from illegality in the years after the Second World War (Norway DNF-48, Denmark F-48, Netherlands COC founded in 1949)²⁵

After (semi-)official permission (step (1)) comes official recognition (step (2)) Without official registration an organisation would normally not have legal persona That would make it very difficult for the organisation to enter into contracts, receive gifts, etcetera In many countries official registration of homosexual organisations

22 Resolution on Sexual Discrimination at the Workplace, *Official Journal*, 1984 C 104/46-48

23 "Commission Recommendation of 27 November 1991 on the protection of the dignity of women and men at work' which includes 'A Code of Practice on Measures to Combat Sexual Harassment', *Official Journal*, 1992 C 27/04 and 1992 L 49

24 In spite of intense lobbying the International Lesbian and Gay Association at the Helsinki Meeting, and of helpful responses from several governments, the proposed lines on discrimination based on sexual orientation did not make it into the Final Document of the Helsinki Meeting

25 The name of these organisations ('the Norwegian association of 1948', the "association of 1948" and the 'cultural and recreational center') give no clues as to what they have become, the principal lesbian and gay rights organisations in the respective countries

only started very recently (Netherlands 1973,²⁶ Spain 1980,²⁷ Greece 1984,²⁸ Hungary 1988,²⁹ Russia 1991)³⁰

After this technical-legal recognition, lesbian/gay organisations may start to get support from the authorities (step (3))

Normally this begins with the government consulting them on issues relevant to the position of gays and lesbians (step (3a)) This step has now been taken in many countries (for example, in Spain³¹ in 1984 and in Czechoslovakia³² in 1990) However, in some countries representatives from lesbian/gay organisations were refused seats in national commissions on AIDS (Finland in 1985, Italy in 1987)³³

Next, lesbian/gay organisations may get the right to take cases of discrimination directly to court – on behalf of the lesbian/gay community (step (3b), France law of 1985,³⁴ Netherlands court case of 1988³⁵

A third form of official support is financial (step (3c)) Several public bodies have made some money available to certain activities of lesbian/gay organisations (in 1968 the Dutch national government was probably the first to do so, the national government of Norway, Denmark and Sweden have followed)³⁶ In a greater number of countries (including Germany, Great Britain, Italy) some local authorities have given subsidies, however in 1988, both in Bavaria³⁷ and Great Britain,³⁸ measures are taken to restrict local funding of lesbian/gay organisations Since 1989 the Commission of the EC is funding an inter-university summer course in gay and

26 Rob Tielman, "Dutch Gay Emancipation History (1911-1986)" in (1986-87) 13 *Journal of Homosexuality* nn 2/3, p 14

27 Press-report, *Madrid Gay*, September 1983, p 1

28 Press-report, *Gai Pied Hebdo*, 1984, n 146, p 7

29 Press-report, *Gai Pied Hebdo*, 1989, n 378, p 8, *De Gay Krant*, 6 May 1989, p 21

30 Press-report, *ILGA Bulletin* 1992, n 1, p 16

31 Press-report, *Sek*, November 1984, p 9

32 A representative from the gay community was appointed to the National AIDS Committee, see Kees Waaldijk, *Tip of an Iceberg Anti-lesbian and anti-gay discrimination in Europe*, draft-version, 16 December 1991, Utrecht, Department of Gay and Lesbian Studies, University of Utrecht, 1991, p 67

33 *Idem*

34 Articles 2-6 of the French Code of Criminal Procedure

35 Judgment of President Rechtbank Utrecht, 4 March 1987, *NJCM-Bulletin*, 1989, p 305

36 Russell Child "The Economic Situation in the Member States" in Waaldijk, K & Clapham, A (eds), *Homosexuality a European Community Issue – Essays On Lesbian And Gay Rights In European Law and Policy*, International Studies in Human Rights Series – Vol 26, Coordinated by the European Human Rights Foundation, 1993, Martinus Nijhoff Publishers, Netherlands, ch 5

37 Press-report, *De Gay Krant*, July 1988, p 9

38 After the enactment of s 28 (see text at note 1) several local authorities use the prohibition to "promote homosexuality" as a reason to refuse subsidies to gay and lesbian organisations (Philip Thomas & Ruth Costigan, *Promoting Homosexuality – Section 28 of the Local Government Act 1988* Cardiff, Cardiff Law School, 1990, pp 4 and 22)

lesbian studies.³⁹ And in 1991 the Commission decided to fund research into the position of lesbians and gay men in the Common Market.⁴⁰

A fourth form of official support consists of institutional structures specifically designed to promote homosexual emancipation (step (3d)). In Sweden (1978), Netherlands (1979)⁴¹ and Denmark (1984)⁴² governmental commission was established to report on the position of lesbians and gay men. Homosexual affairs are becoming the specific responsibility of a growing number of civil servants (in Spain⁴³ and France⁴⁴ since 1984, in the Netherlands from 1987, in the city of Berlin, and since last year also in the police force of London⁴⁵ and in one of the Directorates-General of the Commission of the EC).⁴⁶ In Belgium⁴⁷ and the Netherlands⁴⁸ the Parliaments are debating legislative proposals to establish a permanent governmental body to monitor the (proposed) prohibitions of discrimination.

The conclusion from recent history seems to be that in many countries the legal recognition of homosexuality is *gradually* moving forward. Anti-homosexual discrimination is not outlawed in one big stroke but is brought under the general principal of non-discrimination by more and more specific and more and more legally binding measures. Similarly, it is not in one go that lesbian and gay organisations are accepted as part of "official society"; instead they obtain permission, legal registration and official support through a great number of small steps. This insight may help us to predict the future in countries which have not moved as far yet. I will come back to that.

39 The first course was given at the University of Utrecht (NL) in 1989, the second at the University of Essex (UK) in 1991. These courses are part of the European Community's ERASMUS programme.

40 The results of this research have been published in the book *Homosexuality a European Community Issue* (see note 1). Funding of the European Community also made the production possible of an education pack under the title *Human rights for all? A Global View of Lesbian and Gay Oppression and Liberation*, Reading, Reading International Support Centre, 1992. In 1991 the European Community commissioned the International Lesbian and Gay Association and the National Danish Organisation for Gays and Lesbians to carry out research on lesbian visibility.

41 Kees Waaldijk "Constitutional Protection Against Discrimination of Homosexuals" in (1986-87) 13 *Journal of Homosexuality* nn 2/3, p 62.

42 Waaldijk 1991 (see note 33), p 12.

43 Press-report, *Sek*, November 1984, p 9.

44 Press-report, *Gai Pied Hebdo*, 1984, n 115, p 6.

45 Evert van der Veen & Adrienne Dercksen, "The Social Situation in the Member States" in *Homosexuality A European Community Issue* (see note 1, p 142).

46 *Homosexuality A European Community Issue* (see note 1, p xv).

47 Proposal 1219/1 of 23 May 1985, reintroduced 29 March 1988 under n 339/1.

48 See note 21.

Lesbian and gay *parenthood* is often seen as *future* development. It is therefore good to point out that in the recent *past*, several forms of homosexual parenthood have already been legally recognised in various countries.

There are many possible forms of lesbian and gay parenthood (see Appendix XI). Much of the present debate in and around the lesbian/gay movement is concerned with ways of *becoming* a parent – of *getting* children. However, in many situations, lesbians and gay men already are parents; their concern is to *remain* a parent – to *keep* their children (step (1)). Most legal systems have been more helpful for these parents and their children than they have for lesbians and gays who want to become parents.

The first situation is when two people are married and have a child and then one of the parents discovers they have homosexual preferences (1a). I do not know of any legal system where, in such a situation, it would be considered to be in the child's best interests to take him or her away from the parents, as long as the parents remain married.

Children are more likely to be taken away from their unmarried mother, but I have not heard of any case where the authorities took a child away because of the lesbian preferences of the single mother (1b).

However, there have been many court cases, about custody after divorce. In divorce cases, courts in several countries have ruled that it would be better for a child not to grow up with a lesbian mother or gay father (eg in both the United Kingdom⁴⁹ and Spain.⁵⁰ A greater number of courts have ruled that after divorce a child should not be brought up by his or her lesbian mother or gay father if that parent is actually living with a lover of the same sex (Netherlands,⁵¹ France,⁵² Belgium,⁵³ United Kingdom,⁵⁴ Germany⁵⁵). On the other hand (some) courts in some countries now accept that a parent's homosexual orientation as such cannot be a valid reason to deny custody, for example, Belgium,⁵⁶ France,⁵⁷ United Kingdom.⁵⁸ This position (steps (1c) and (1d)) is in accordance with the 1981

49 Press-report, *Lesbian Information Service*, September 1988, p 2.

50 Press-report, *Lambda Nachrichten*, 1988 n 1, p 54.

51 Court of Appeal Arnhem, 22 January 1974, *Nederlandse Jurisprudentie*, 1974, n 492.

52 Press-report, *Gai Pied Hebdo*, 28 May 1983, p 21.

53 Press-reports, *De Gay Krant*, April 1985, p 17, January 1989, p 26; *Lesbia*, December 1989, p 18.

54 Paul Crane, *Gays and the Law*, London, Pluto Press, 1982, pp 122-128.

55 *Schwule im Recht – Rechtsratgeber für homosexuelle Menschen*, SchwuIPs – Schwule Initiative gegen den Paragraphensumpf (ed) Bamberg, Palette Verlag, 1992, 89.

56 Court of Appeal Gent, 10 December 1982, *Rechtskundig Weekblad*, 1984-85, 2134-2137.

57 Press-report, *Lesbia*, May 1988, p 4.

58 Press-report, *Gay Times*, December 1990, p 8.

Recommendation of the Parliamentary Assembly of the Council of Europe, "that custody, visiting rights and accommodation of children by their parents should not be restricted on the sole grounds of the homosexual tendencies of one of them" ⁵⁹

Many legal systems have also been permissive with regard to some ways for lesbians and gay men to "get" children by becoming *factual* parents (step (2))

The easiest way to become a lesbian or gay parent, and the way that is most acceptable to the law of most European countries, is social co-parenting (step (2a)) – find yourself a partner who already has a child, and then jointly bring it up

In most countries same sex couples are not – by law – excluded from fostering either (step (2b)) However, in practice, in only a few countries, so far, have lesbian and gay couples been allowed to become foster-parents (Germany,⁶⁰ United Kingdom,⁶¹ Netherlands)

Gay couples who want to have a child by using the services of a surrogate mother (step (2c)) will experience great practical and legal difficulties in most countries And so will lesbians who want to have a child by artificial insemination (step (2d)) In some countries legal measures have been proposed to stop lesbians from receiving artificial insemination (Norway,⁶² Italy,⁶³ France,⁶⁴ United Kingdom) ⁶⁵ So far no country has made it illegal for clinics to refuse insemination to lesbians

The law of all European countries is still very restrictive with regards to ways of becoming a *legal* parent (step (3))

In most countries adoption is only possible for married couples Only in some countries is adoption by a single person also possible (Germany,⁶⁶ Belgium,⁶⁷ France,⁶⁸ United Kingdom⁶⁹) So in theory it would be possible for one partner in a lesbian or gay couple to legally adopt a child (step (3a)) – however, in practice, this is hardly possible

A co-parent in a same-sex relationship cannot acquire the legal co-responsibility over the child of their partner (step (3b)), in Denmark this is

59 See note 22

60 *Schwule im Recht* (see 56), pp 91-92

61 Crane 1982 (see note 55) pp 145

62 Press-report, *ILGA Bulletin*, 1984, n 2, p 9

63 Press-report, *Babiloma*, July/August 1985, p 51

64 Press-report, *Gai Pied Hebdo*, 1986, n 249/250

65 Press-report, *Gai Times*, June 1990, p 6

66 Article 1741 of the German Civil Code

67 Article 346 of the Belgian Civil Code

68 Article 343/1 of the French Civil Code

69 *Adoption Act* 1976 (UK)

specifically excluded by Article 4(3) of the *Law on Registered Partnerships* of 1989 and in the same year it has been ruled out by the Supreme Court of the Netherlands⁷⁰

In no country can a lesbian or gay couple jointly adopt a child (step (3c))

The conclusion could be that the process of legal recognition of lesbian and gay parenthood has already started in a great number of countries. Gradually – and slowly – "the sex of the parents" is being replaced by "the child's best interest" as the crucial criterion of the law. Most countries have started by accepting certain forms of existing or factual parenthood – leaving a lot of uncertainty around other forms of factual same sex parenting. As yet, no legal system has taken the further step of allowing lesbian and gay couples to acquire full legal responsibility for the children that they are jointly bringing up.

UNDERSTANDING THE PRESENT

I have just demonstrated some parallel developments in the recent past of various European countries. The legal recognition of homosexuality appeared as a process in which legal discrimination and official oppression were only gradually replaced by official support and legal protection against discrimination. It is important to see that this is not only a process of the past but still very much a process of the present. Very clearly this can be seen in the field of "Homosexual safety".⁷¹

The developments seem to be similar in almost all countries but, obviously, the speed of legal recognition is very different in different countries. Therefore, the model that I am presenting to you can be used at any moment of history – for example today – to establish which countries fall below a certain minimum standard. Such minimum standards have been set by

- The European Court of Human Rights (*Dudgeon* judgment of 1981⁷² and *Norris* judgment of 1988),⁷³

⁷⁰ Hoge Raad, 24 February 1989, *Nederlandse Jurisprudentie*, 1989, n 741. A further "appeal" to the European Commission for Human Rights was declared "inadmissible" by this Commission (*Kerkhoven Hink and Hunke v the Netherlands*, decision of 19 May 1992, application 15666/89).

⁷¹ See Appendix III.

⁷² Judgment of 22 October 1981, Series A, 45.

⁷³ See note 10.

- The Parliamentary Assembly of the Council of Europe (Recommendation 924 of 1981),⁷⁴
- The International Lesbian and Gay Association (in various resolutions and countless protest letters)

Let me illustrate this with the field that is most prominent in most people's mind sex

The European Court has ruled that there is no justification to prohibit all sex in private between adult men⁷⁵ (it would no doubt come to the same conclusion with regard to women) The Parliamentary Assembly went one step further by recommending that member states should "apply the same minimum age of consent for homosexual and heterosexual acts" ⁷⁶ (For the European Court it has never been necessary to rule on the acceptability of different ages of consent – but it may have to give its opinion in the case recently started by the complaint about the discriminatory ages of consent in the United Kingdom ⁷⁷) The minimum standards of ILGA go even further it has always opposed any criminal law difference between gay and lesbian sex on the one hand and straight sex on the other

In reality, the official repression of sex between women and sex between men has been rather more complex than these three simple minimum standards suggest Several legal systems have known specific limits on sex for money, on sex by members of the armed forces and on sex in public I believe that the standard sequence of steps taken in the process of legal recognition of "women touching women" can be represented as is shown in Appendix I For "men touching men" the steps are the same as for "women touching women" (see Appendix II) and so are the levels of the three minimum standards The difference is that some legal systems are more steps behind with regard to men than with regard to women

The European Court has made it clear that non-prosecution (step (1a)) is not enough ⁷⁸ The European Convention on Human Rights requires the formal decriminalisation of any general prohibition of homosexual sex (step (1b)) ⁷⁹ Until this month, the Isle of Man was one of the very few countries that had not even taken step (1a) ⁸⁰ Actual enforcement of the total prohibition of gay and lesbian sex

⁷⁴ See note 22

⁷⁵ See notes 72 and 10

⁷⁶ See note 22

⁷⁷ Press-report, *ILGA Bulletin*, 3/1993 p 4

⁷⁸ *Norris* case (see note 10) and *Modinos* case (see note 85)

⁷⁹ *Idem*

⁸⁰ In the months before the *Sexual Offences Act* 1992 which abolished the total prohibition on gay sex, several men had been charged with the offence See press-report, *ILGA Bulletin* 2/1992, p 18

is still taking place in Rumania,⁸¹ and possibly also in Albania and in some countries that belonged to the Soviet Union.⁸² They anyhow fall below the minimum standard set by the European Court. This can also be said of Ireland,⁸³ Cyprus⁸⁴ and Gibraltar,⁸⁵ where the existing laws against adult gay sex are not enforced (step (1a))

A great but shrinking number of countries in Europe still have higher *minimum ages* for homosexual sex than for heterosexual sex. An extra high age for gay and lesbian sex is in force in Hungary,⁸⁶ Bulgaria,⁸⁷ Luxembourg,⁸⁸ Iceland⁸⁹ and Finland.⁹⁰ Extra high ages for *only gay* sex apply in Austria,⁹¹ Liechtenstein,⁹² the United Kingdom⁹³ and in the western part of Germany.⁹⁴ In the United Kingdom,

-
- 81 In one such case the Tribunal Court in Sibiu, on 21 July 1993, asked the Constitution Court to rule on the constitutionality of the total prohibition of gay and lesbian sex (press-report, *Gay Times*, September 1993, p 20)
- 82 The total prohibition of gay sex has been lifted in the Ukraine (1991), Latvia (1992), Estonia (1992), Lithuania (1993) and Russian (1993). It is still in force in Moldavia and Belarus
- 83 See note 10
- 84 On 22nd April 1993 the European Court of Human Rights ruled that the total prohibition of gay sex in Cyprus violates the European Convention on Human Rights (*Modinos* case, Series A, n 259)
- 85 The total prohibition of gay sex has been lifted at the end of 1992 (press-report, *ILGA Bulletin*, 1/1993, p 22)
- 86 The heterosexual age is 14 (article 201 of the Hungarian Penal Code) and the homosexual age 18 (article 199)
- 87 The heterosexual age is 14 (article 151 of the Bulgarian Penal Code) and the homosexual age 18 (article 157)
- 88 The heterosexual age is 14 (article 372 of the Luxembourg Penal Code) and the homosexual age 18 (article 372bis). The Law of 10 August 1992 abolished article 372bis and changed article 372 to provide a general minimum age of 14
- 89 The heterosexual age was 14 (articles 200 1 and 202 of the Icelandic Penal Code) and the homosexual age was 18 (article 203). In 1992 these age limits were replaced by a general minimum age of 14 (article 202 1, press-report, *ILGA Bulletin*, 5/1992, pp 18-19)
- 90 The heterosexual age is 16 (article 20 3 and 20 6 of the Finnish Penal Code) and the homosexual age 18 (article 20 5,2)
- 91 For sex between men the age is 18 (article 209 of the Austrian Penal Code) and for heterosexual and lesbian sex the age is 14 (article 206)
- 92 For sex between men the age is 18 (article 208 of the Liechtenstein Penal Code) and for heterosexual and lesbian sex the age is 14 (article 205)
- 93 For sex between men the age is 21 (ss 1 and 3 of the *Sexual Offences Act* 1967, s 80 of the *Criminal Justice (Scotland) Act* 1980 and the Homosexual Offences (Northern Ireland) Order 1982), and for heterosexual and lesbian sex the age is 16 in Scotland and in England and Wales (s 14 of the *Sexual Offences Act* 1956) and s 17 in Northern Ireland (see Crane 1982 (note 55 above), pp 8 and 15)
- 94 In the eastern part (which before 3 October 1990 formed the German Democratic Republic) a general minimum age of 14 applies (article 148 of the GDR's Penal Code, this article remained temporarily in force at the reunification of Germany in 1990). For sex between men in the western part of Germany the minimum age is 18 (article 175 of the Penal Code of the Federal Republic of Germany) and for heterosexual and lesbian sex the minimum age is 14 (article 176). The German government has proposed to replace all these age limits with a general minimum age of 14 (see *Schwule im Recht* (note 56 above), pp 198-202)

gay sex is even illegal if *both* men are under the minimum age of 21 (another step to take (2a)) In most of the other countries with discriminatory ages of consent step (2a) has already been taken, there homosexual sex is only illegal if one partner is older and the other younger than the specific minimum age (normally 18) ⁹⁵

Switzerland is a strange country It has taken step (2b) more than 50 years ago, by introducing an equal age of consent of 16 years for straight, gay and lesbian sex However, homosexual "seduction" of someone under 20 years of age is a criminal offence, whereas heterosexual "seduction" is only a crime if the seduced person is younger than 18 Recently a law has been adopted to remove this difference (step (2c)) This law has not come into force yet, because it will first be subjected to a referendum ⁹⁶

In most countries which still have discriminatory ages of consent, proposals to abolish these differences seem to be under way (especially in Germany,⁹⁷ Austria, Finland and probably also in the United Kingdom) ⁹⁸ But even if all these proposals succeed, and the requirements of the Parliamentary Assembly are thus met, then the ILGA will still not be satisfied The reason is that various other forms of legal oppression of homosex exist

In some countries all or some forms of homosexual prostitution are still illegal (Liechtenstein,⁹⁹ Bulgaria,¹⁰⁰ Greece¹⁰¹ and the United Kingdom¹⁰² have not taken step (3a)) The United Kingdom¹⁰³ also prohibits homosexual sex by members of the armed forces (step to be taken, (3b)) In Bulgaria¹⁰⁴ and in the United Kingdom¹⁰⁵ the law is extra strict on gay and lesbian sex in so-called "public" places, and in

95 A very detailed study of sexual age limits in the criminal law of most European countries can be found in the appendix to the dissertation written at the University of Vienna Helmut Graupner, *Jugendschutz im Sexualstrafrecht (Internationaler Rechtsvergleich)*, Anhang zu, H Graupner, *Sexualität Jugendschutz und Menschenrechte*, Wien, Universität Wien, 1992 (Auszug aus dem Manuskript)

96 In the referendum of 17 May 1992, 73% of the voters approved the reform (press-report *ILGA Bulletin*, 3/1992, p 22) Article 187 of the Swiss Penal Code now provides a general minimum age of 16

97 See note 95

98 Press-report, *Gav Times*, September 1993 pp 8-10

99 Article 209 of the Liechtenstein Penal Code

100 Article 157(4) of the Bulgarian Penal Code

101 Article 347 of the Greek Penal Code

102 Sections 4 and 5 of the *Sexual Offences Act* 1967 and s 80 of the *Criminal Justice (Scotland) Act* 1980 See Crane (note 55), pp 26-29

103 *Army Act* (UK) 1955, *Air Force Act* (UK) 1955, *Naval Discipline Act* (UK) 1957

104 Article 157(3) of the Bulgarian Penal Code

105 Section 1 of the *Sexual Offences Act* 1967, s 80 of the *Criminal Justice (Scotland) Act* 1980, s 3 of the *Homosexual Offences (Northern Ireland) Ordinance* 1982

some countries (including Italy,¹⁰⁶ Spain¹⁰⁷ and again the United Kingdom)¹⁰⁸ laws on "public indecency" are used against lesbians and gays who show affection in public (another step to be taken: (3c)).

Finally, suppose all forms of legal discrimination were repealed; that does not yet imply the full legal recognition of lesbian and gay sex and affection. For the completion of this process of recognition it is also necessary that "the law" protects against attacks on people who show same sex affection in public places. From almost all countries, incidents have been reported of violence against lesbians and gay men who kiss, or cruise, or make love in more or less public places. These incidents, together with the numerous reports about less than helpful responses from the police – and from the courts suggest that very few countries have completed step (3d).

PREDICTING THE FUTURE

The fields that I have discussed so far, all suggest that there is a certain set pattern in the process of legal recognition of different aspects of homosexuality. Different countries seem to be doing things in the same order. Therefore it seems likely that developments in other countries will be roughly along the same lines. Of course, I shall not claim that there is some "law of nature" prescribing the same specific sequences of steps in all countries (of Europe). And I shall certainly not guarantee that in the future each country will follow the same sequences of steps as were followed by other countries in the past.

Nevertheless, I believe, this model of steps can be used as an instrument to predict future developments in European countries. For each field it will indicate which step is the most likely to be taken next. In addition to that, it becomes possible to predict whether or not a number of consecutive small steps could be taken in one go; for this we will of course need to have detailed knowledge on when exactly these steps were taken in comparable other countries.

In the field of employment, for example (see Appendix IX), so far only a few countries provide any legal protection against anti-homosexual discrimination in the

106 Press-reports, *Sek*, November 1981, p 20; *Bolletino der CLI*, January 1983, p 7.

107 Press-report, *ILGA Bulletin*, 2/1987, p 22.

108 *Masterson v Holden* [1986] 1 WLR 1017 at 1024.

field of employment (France,¹⁰⁹ Netherlands).¹¹⁰ In some other countries several cases of employment discrimination have been taken to court (United Kingdom,¹¹¹ Germany).¹¹² Experiences in both categories of countries suggest the following:

- Prohibitions of employment discrimination in "sensitive" sectors, like the military, schools and religious organisations (step (2)), will take much longer to establish than in non-sensitive sectors (step (1)).
- Prohibitions of discrimination in the private sector (steps (1c) and (1d)) will normally come later than prohibition of discrimination in the public sector (steps (1a) and (1b)).
- Prohibitions of discrimination with regard to recruitment and conditions of employment (steps (1b) and (1d)) will take longer than prohibitions of discriminatory dismissal (steps (1a) and (1c)).
- Positive action ("positive discrimination") in favour of lesbians and gay men (step (3)) has not been incorporated in any legal system in Europe this is remarkable, given the prominence of positive action among modern measures to combat discrimination against blacks, women and the disabled.

The field of partnership also makes it possible to make some predictions (see Appendix X).

- The admission of same sex couples to marriage (step (3)) only becomes likely after first a form of "registered partnership" has been introduced with some of the legal consequences of marriage. So, since the 1989 law on partnership¹¹³ Denmark could now start to move towards step (3).
- The introduction of registered partnership (step (2)) only becomes likely after it has first been accepted that some legal consequences should be attached to the living-together of two people of the same sex. Sweden, Norway¹¹⁴ and the Netherlands¹¹⁵ are now indeed moving towards step (2).

109 Articles L 122-35 and L 122-45 of the French Code of Labour Law, these were interpreted in a judgment of the Cour de Cassation of 17 April 1991 (*Juris classeur periodique*, 1991, 21724).

110 Article 429quater of the Dutch Penal Code

111 For example, *Wiseman v Salford CC* [1981] IRLR 202 and *Saunders v Scottish National Camps Association Ltd* [1980] IRLR 174 and [1981] IRLR 277

112 For example, *Truppendienstgericht Sud*, 4 Kammer, Karlsruhe, 17 August 1987, S 4 - BLa 1/87. Bundesverwaltungsgericht, 8 November 1990, I WB 61/90

113 The "Law on Registered Partnership" came into force on 1 October 1989. On 1 August 1993 an almost identical law came into force in Norway (press-report, *ILGA Bulletin*, 3/1993, p 22)

114 *Idem*

115 In 30 March 1993 the Dutch government announced its plan to introduce a bill on Registered Partnership (Parliamentary Paper 22700, n 3)

- The legal recognition of lesbian and gay cohabitation (step (1)) only becomes likely after first heterosexual cohabitation has been recognised for some legal purposes. So, France could be moving towards step (1). However, legislation will be required because in 1989 the French Supreme Court explicitly refused to treat homosexual cohabitation in the same way as heterosexual cohabitation.¹¹⁶

CHANGING THE FUTURE

More important than predicting the future is changing it. My modest model can be used for that, too.

First, lesbian and gay organisations can use the model to make priorities for their political actions. Gay and lesbian organisations always face the problem that there is too much to fight against and too much to fight for. Nationally, the model can be used to find out which of all the desired steps are most likely to be taken first. Then political pressure (for example in the form of test-cases) can be concentrated on those steps so as to ensure that the legal system does indeed take these steps as soon as possible. Internationally, the model helps to highlight those countries which, in a certain field, are falling far behind most other countries. Specific international pressure can then be concentrated on those countries. In short, the model may help to avoid wasting too much energy on campaigns for homosexual marriage in Italy or for legalising gay sex in the Albanian army.

Second, the structured information of the model may be used to influence national and international authorities. In a Europe that is integrating and democratising, most countries do not like to be seen to have a bad human rights record. A national government (or parliament or court) may therefore be intimidated with the information that its country is one of the very few that has not taken a certain elementary step in the recognition of the human rights of lesbians and gay men. The European Court of Human Rights, and also the European Parliament and most other international bodies tend to be reluctant to move far ahead of the countries that they represent but if there is a large majority of countries which have moved in a certain direction then these international bodies may be quite willing to

¹¹⁶ Two judgments of 11 July 1989, *Bulletin Civil des arrêts de la Cour de Cassation*, 1989, V nn 514-515. A law of 27 January 1993 (*Journal officiel*, 30 January 1993) has now made it possible to be covered by the social health insurance of one's same-sex partner (press-report, *Le Monde*, 6 August 1993).

use that almost consensus as a basis from which to speak out against the few countries that have fallen behind. Therefore, it is essential that the lesbian and gay movement provides the various European bodies with specific information on the steps already taken in most of the countries of Europe.

Third, the model contains a warning against over-ambition as well as a warning against under-ambition.

We all know some over-ambitious lesbian or gay activists (sometimes by knowing ourselves). In Britain there are activists who would only work towards the abolition in one stroke of the more than ten existing legal restrictions on gay sex. In the Netherlands there are activists who would only campaign for an anti-discrimination law that would cover all the sensitive (religious) sectors of society. And in the Nordic counties (as well as in the Netherlands) there are activists who are only prepared to promote registered partnership if it carried all the existing privileges of marriage. These can all be useful perspectives at times but the comparative analysis of recent history shows that lesbian and gay rights are won *step-by-step*. And most steps in the process of legal recognition have been *small* steps.

The lesbian and gay movement also knows many under-ambitious people. Imagine a long and tiring campaign which eventually resulted in the desired legal reform. The under-ambitious activist will then be satisfied, thinking that further legal reform is unlikely and not very necessary after the recent much hoped for victory. That is understandable (and indeed, after hard work you want to party and relax) but comparative analysis of recent history shows two things: any small legal victory may be used as the starting point for another – earlier legal reforms become extra arguments that can be used in the debate for further (small) legal steps; and the repression of homosexuality tends to use whatever anti-homosexual law is available. The classic example of that is England; after the decriminalisation in 1967 of adult gay sex in private the number of arrests and convictions for gay sex actually went up; other anti-homosexual laws were now used. Similarly,¹¹⁷ the continuing legal exclusion from marriage and certain forms of parenthood in Denmark, after the 1989 registered partnership provisions were enacted,¹¹⁸ can work as a powerful social stigma that lesbians and gay men still are second-rate citizens. Therefore, it is essential to get rid of all remaining anti-homosexual laws.

¹¹⁷ See Tatchell 1992 (note 4 above), pp 84-92.

¹¹⁸ See note 114.

Let me conclude by summarising the advice for the lesbian and gay movement that follows from my model of standard sequences in the legal recognition of homosexuality:

1. Think of the legal recognition of homosexuality as a number of parallel developments in more than ten different fields.
2. Think of the developments in each field as a series of many small steps.
3. Look at the experiences in other countries to find out what these steps normally are, and what their standard sequence is.
4. Look at the experiences in other countries to find out where, at this moment of time, political pressure for legal reform can be most effectively applied.
5. Do not try too hard to make your legal system jump; be content with it only taking steps. But do keep the system walking.

APPENDIX

I WOMEN TOUCHING WOMEN

- 1 Decriminalisation of sex between adult women in general
 - 1a Non-prosecution
 - 1b Formal repeal of law
- 2 Equalisation of age limits
 - 2a Sex between young women
 - 2b Sex with a young woman (in general)
 - 2c Seduction of a young woman
- 3 Acceptance of lesbian sex and affection in specific circumstances
 - 3a Prostitution
 - 3b Sex in the military
 - 3c Lifting of extra restrictions on affection in public
 - 3d Protection against attacks by others on women showing affection in public

II MEN TOUCHING MEN

- 1 Decriminalisation of sex between adult men in general
 - 1a Non-prosecution
 - 1b Formal decriminalisation
- 2 Equalisation of age limits
 - 2a Sex between young men
 - 2b Sex with a young man (in general)
 - 2c Seduction of a young man
- 3 Acceptance of gay sex and affection in specific circumstances
 - 3a Prostitution
 - 3b Sex in the military
 - 3c Lifting of extra restrictions on affection in public
 - 3d Protection against attacks by others on men showing affection in public

III HOMOSEXUAL SAFETY

- 1 Ending "official" oppression
 - 1a No more police raids
 - 1b Safety in prisons
 - 1c No more police registration
 - 1d Remembrance of historic oppression

- 2 Application of general laws
 - 2a On murder
 - 2b On assault
 - 2c On rape
 - 2d On asylum for refugees
 - 2e On sexual harassment
- 3 Special provisions for safety of lesbians/gays
 - 3a Institutional
 - 3b Qualification of hate crimes

IV LESBIAN/GAY ORGANISATIONS

- 1 Permission to organise
- 2 Official registration (legal persons)
- 3 Support from the authorities
 - 3a Government consultation
 - 3b Standing in court
 - 3c Financial support
 - 3d Institutional structure

V LESBIAN/GAY LEISURE

- 1 Permission
 - 1a Lesbian/gay bars
 - 1b Same-sex dancing
 - 1c Gay saunas
 - 1d Outside cruising
- 2 Fair control
 - 2a Lesbian/gay bars
 - 2b Lesbian/gay dancing
 - 2c Gay saunas
 - 2d Outside cruising
- 3 Protection against attacks
 - 3a In straight bars, etc.
 - 3b In lesbian/gay bars, etc.
 - 3c On outside cruisers

VI INFORMATION ABOUT HOMOSEXUALITY

- 1 Permission of neutral information
 - 1a Information in general
 - 1b Erotic material
- 2 Permission of positive information
 - 2a In the media
 - 2b In schools
- 3 Prohibition of negative statements
 - 3a Incitement
 - 3b Insults in general
 - 3c Religious opinions

VII NON-DISCRIMINATION

- 1 General principle of law
- 2 Declarations against anti-homosexual discrimination
 - 2a By parties
 - 2b By advisory bodies
 - 2c By parliament
 - 2d By government
- 3 Specific laws against anti-homosexual discrimination
 - 3a Public law
 - 3b Criminal law
 - 3c Private law

VIIISERVICES FOR LESBIANS/GAYS

- 1 Prohibition of discrimination in public services
- 2 Prohibition of discrimination in commercial services
- 3 Prohibition of discrimination in non-profit services
 - 3a Health
 - 3b Residential care
 - 3c Education

IX EMPLOYMENT OF LESBIANS/GAYS

- 1 Prohibition of discrimination (in general)
 - 1a Public sector (dismissal)
 - 1b Public sector (recruitment and conditions)
 - 1c Private sector (dismissal)
 - 1d Private sector (recruitment and conditions)

- 2 Prohibition of discrimination in "sensitive" sectors
 - 2a Military/diplomacy/intelligence services
 - 2b Work with children
 - 2c Religious employment
- 3 Positive action

X SAME-SEX PARTNERSHIP

- 1 Recognition of lesbian/gay cohabitation (on the same footing as heterosexuals living together)
 - 1a Income tax/social security
 - 1b Housing
 - 1c Conditions of employment
 - 1d Inheritance
 - 1e Immigration
- 2 Introduction of registered partnership
- 3 Admission to marriage

XI LESBIAN/GAY PARENTHOOD

- 1 Allowing lesbians and gays to remain parents
 - 1a Married parent
 - 1b Unmarried mother
 - 1c Divorced parent (single)
 - 1d Divorced parent (with same-sex partner)
- 2 Allowing lesbians and gays to become factual parents
 - 2a Social co-parenting
 - 2b Fostering
 - 2c Surrogacy
 - 2d Artificial insemination
- 3 Allowing lesbians and gays to become legal parents
 - 3a "Single" adoption
 - 3b Legal co-parenting
 - 3c Joint adoption