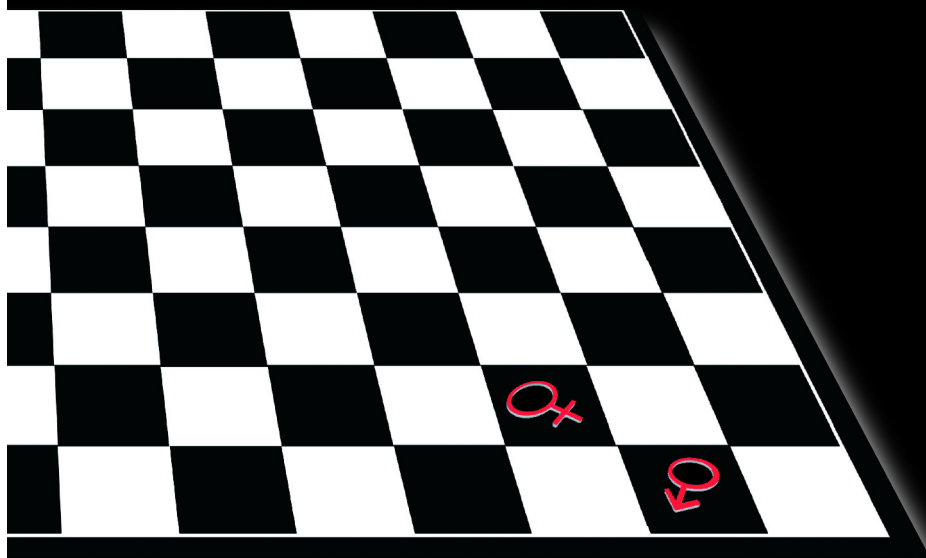


Judit Takács
HOW TO PUT EQUALITY INTO PRACTICE?

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AZ EGYENLŐ BÁNÁSMÓD GYAKORLATAI



Ú·M·K

Takács Judit

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TO PUT
EQUALITY
INTO PRACTICE?**

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I. Introduction

In 1998 the European Parliament issued a special declaration emphasizing that it would not support the membership of those applicant countries, whose legislation or political state does not acknowledge the human rights of homosexual people. The main criterion of acknowledging the human rights of homosexual people was the elimination of discriminative parts of the national Penal Codes treating homosexual and heterosexual relationships unequally, especially concerning age of consent issues. This criterion was fulfilled by Hungary in 2002 following the ruling of the Constitutional Court eliminating the previously existing discriminative aspects of the Hungarian Penal Code relating to different age of consent definitions concerning same sex and different sex sexual practices.

The new Hungarian anti-discrimination and equal treatment policy, developed in 2003 (and being in force since January 2004), includes sexual orientation and gender identity among other protected categories and provides these categories with the same general protection as the others (such as women, disabled people, ethnic minorities). Therefore it can be said that concerning the official EU membership requirements Hungary has not only eliminated the discriminative legislative aspects relating to the age of consent issue, but also “over-fulfilled its duties”.

Since the European Union’s expectations in the field of sexual orientation based discrimination seem to have weaker influence, when compared with other categories of discrimination – such as ethnic discrimination – special attention must be paid to the specific Hungarian developments, and especially the role of NGOs active in this field.

In this context activities of NGOs involved in human rights issues, specifically those representing the interests of sexual minorities can be seen as part of what Nancy Fraser refers to as “subaltern counterpublic

spheres”, i.e. “parallel discursive arenas where members of subordinated social groups invent and circulate counterdiscourses to formulate oppositional interpretations of their identities, interests, needs” (1998:123), functioning as “bases and training grounds for agitational activities directed toward wider publics” (124).

There has been an ongoing theoretical debate in studies of sexual politics about the costs and benefits of normalizing “mainstream sexual difference” defined on the basis of monolithic sexual identity frameworks. While sexual orientation based anti-discrimination and equal treatment policymaking can be interpreted as a tangible beneficial consequence of these normalizing tendencies, it can be argued that the basic structures of discrimination remain; just its scope veers away towards newly defined targets.

The main focus of my research is directed towards possible sources of arguments that might be rooted in different national contexts but can also be used at the international level, acknowledging that LGBT rights are not special privileges but basic human rights. I want to collect these arguments in order to present them as potential elements of future strategies to further human rights development, especially concerning issues of human dignity and free choice of lifestyles.

II. Social visibility and acceptance of LGBT people in Hungary

Social visibility and acceptance of LGBT people in Hungary will be examined in this chapter from three perspectives. First, I will present Hungarian as well as international opinion poll findings indicating the social acceptance level of homosexuality in Hungary, including important issues such as same-sex marriage and adoption of children by same-sex couples. In this section I won't be able to present anything in relation to transgender or transsexual issues, simply because I have not found any such data relevant to Hungary. Naturally, the fact that there is no available data is informative in itself: it can show the lack of social awareness, visibility and acceptance of transgender issues – all at the same time.¹

Second, I will present the findings of a study on mainstream media visibility of homosexuality. Again, I have not found any Hungarian media analyses related to transgender issues.

Third, I will sketch the socio-cultural infrastructure available for LGBT people in Hungary. Here the officially functioning organisations representing the – political and various other – interests of LGBT people are introduced as well as the main events and places where their constituencies can meet, organise themselves and socialise with each other. This section is extended with a brief description of the main actors of LGBT media products, followed by a short analysis about the main features and the significance of creating and using “Own media”. It is important to note that this is the only part of this chapter where we can find traces of transgender existence in Hungary mainly in the form of an internet portal called TransSexual Online.²

1 In 2003 Háttér Support Society for LGBT People in Hungary undertook research into the situation of transgender people in the social and health care system in Hungary. About the research findings see: Takács, 2006; Solymár-Takács, 2006.

2 <http://tsonline.uw.hu/>

II.1. Opinion poll findings

Social acceptance of homosexuality can be measured by opinion poll questions in which people are asked what they think about issues related to homosexuality. According to the findings of an international research project in 1991 Hungary was rated higher than average in comparison with other Eastern European countries – and Western European ones, too – in accepting homosexuality.³ According to another finding from 1993, 85 percent of the Hungarian respondents thought that homosexuality was “unforgivable”.⁴ Data of a Hungarian survey of 1994 showed that 78,6 % of the respondents thought that it was always inappropriate if two same-sex grown-ups have sexual relationship with each other.⁵ According to a Hungarian result from 1995 74,6% of the respondents found same-sex cohabitation acceptable.⁶ According to the research findings of Hungarian sociologist László Tóth between 1991 and 1996 the social rejection of homosexuality radically decreased and the level of tolerance increased in Hungary.⁷

According to the most recent research findings⁸ in 2003 more than one third of Hungarian respondents viewed homosexuality as an illness, almost one third thought that homosexuality was a private matter of the individual, about every seventh respondent considered homosexuality to be a form of deviant behaviour, while only about one tenth of respondents thought that choosing a same-sex sexual partner was a basic right. (See: Table I.)

3 Permissive attitudes towards homosexuality (8–10 values on a one to ten scale. Percentage of respondents given.): Czech Republic – 17,4; East-Germany – 18,8; Poland – 3,6; Slovakia – 10,2; *Hungary* – 14,7; Bulgaria – 3,8; *Eastern-Europe (average)* – 9,1; *Western Europe (average)* – 13,9 (cf. Ester et.al. 1994:223).

4 Data from surrounding countries (Percentage of respondents expressing total agreement with the statement): Austria – 52; Italy – 49; Slovenia – 66; Croatia – 49; Romania – 87 (cf. Inglehart [et al.], 1996; Stulhofer, 1996:157).

5 TÁRKI – ISSP Family Model research project 1994 – I would like to thank Olga Tóth for providing me with the data.

6 The survey was conducted by the Medián Opinion and Market Research. Omnibusz research project 1995. – I would like to thank László Tóth for providing me with the data.

7 According to the research findings of László Tóth in 1991 69,2%, in 1996 30,8% of the population viewed homosexuality as something to be rejected, while in 1991 17,4%, in 1996 45,4% viewed homosexuality as socially acceptable. (cf. *HVG*, 1997.08.30. p. 87.)

8 The surveys were conducted by the Medián Opinion and Market Research. Omnibusz research project 1997, 2002, 2003. (Sample size: N=1200.) – I would like to thank Tímea Venczel for providing me with the data.

TABLE I. Views on homosexuality in Hungary in 1997, 2002 and 2003

View on homosexuality	1997 January (%)	2002 July (%)	2003 August (%)
Sin (against God)	5,6	4,5	6,2
Crime (against society)	4,0	2,1	3,5
Illness	38,6	34,1	34,3
Behaviour diverging from social norms	17,8	18,3	14,1
Private matter of the individual	20,4	25,7	29,8
Basic right (to choose same-sex sexual partner)	10,3	12,5	10,5

In 2003 almost one third the respondents stated that the life of homosexuals should be regulated by the state, by legal means, while almost two thirds rejected the possibility of state intervention. (See: Table II.)

TABLE II. Life of homosexuals should be regulated... (in 1997, 2002, 2003)

State intervention	1997 (%)	2002 (%)	2003 (%)
... would be necessary.	37,4	24,8	30,7
... would not be necessary.	53,8	66,9	62,3
No answer OR "I don't know"	8,8	8,3	7,0

Respondents were also able to express their views on homosexual organisations, gay marriage and adoption issues: in 2003 41,8% would approve if homosexuals established an organisation to represent their interests, 21% would approve gay marriage and 17,9% would approve child adoption by same-sex couples. (See: Table III–V.)

TABLE III. Approval of establishing organisations representing the interests of homosexuals in 2002 and 2003 in Hungary

Organisation	2002 (%)	2003 (%)
Approval	51,2	41,8
Disapproval	35,7	47,0
No answer	13,1	11,2

TABLE IV. Approval of same-sex marriage in 2002 and 2003 in Hungary

Same-sex marriage	2002 (%)	2003 (%)
Approval	27,8	21,0
Disapproval	63,9	72,9
No answer	8,3	6,1

TABLE V. Approval of same-sex adoption in 2002 and 2003 in Hungary

Same-sex adoption	2002 (%)	2003 (%)
Approval	26,2	17,9
Disapproval	66,0	76,2
No answer	7,8	5,9

As we could see, the above presented opinion poll and research findings are rather controversial. Still, it can be assumed that the social acceptance level of homosexuality is relatively low in Hungary. Especially in the light of the results of 2003, it seems that the majority (about 60 percent) of Hungarians still express negative views on homosexuality by considering it to be a form of sin, crime, illness or deviant behaviour, while only about 10 percent acknowledge the right to choose a same-sex partner.

At the same time according to the data of the European Social Survey (ESS) in 2002 and 2005 almost half (48,7%; 47,5%) of the Hungarian respondents agreed or rather agreed with the statement that gays and lesbians should be free to live as they wish.⁹ (See: Table VI.) Age, educational background and place of living seemed to be determining factors in supporting this issue, while the gender of the respondents did not seem to affect their views.

TABLE VI. "Gays and lesbians should be free to live as they wish."
Agreement – disagreement level (2002, 2005)

	2002 (%)	2005 (%)
Absolutely agree	16,4	15,0
Rather agree	32,3	32,5
So-so	22,5	20,7
Rather disagree	16,1	18,9
Absolutely disagree	12,8	13,0

9 European Social Survey (ESS) 2002–2005. – I would like to thank László Füstös and Tímea Szabados for providing me with the data.

A relatively low level of social acceptance of homosexuality in Hungary was also reflected by the international comparison: among the 24 countries Hungary – with its mean value of 2,8 (where 1 = absolute agreement and 5 = absolute disagreement) – had the 20th place. The result of all the examined countries were the following: the Netherlands (1,7), Denmark (1,7), Iceland (1,7), Sweden (1,9), Belgium (1,9), Luxembourg (1,9), France (2), Norway (2), Switzerland (2,1), Ireland (2,1), United Kingdom (2,1), Austria (2,1), Germany (2,2), Spain (2,2), Finland (2,3), Portugal (2,4), Czech Republic (2,4), Slovenia (2,6), Greece (2,7), Hungary (2,8), Slovakia (2,8), Estonia (2,9), Poland (3), Ukraine (3,1).¹⁰

In 2003 EOS Gallup Europe conducted a large scale (N=15,074) opinion poll concerning the authorisation of homosexual marriage and the adoption of children by homosexual couples in 30 European countries, including Hungary (N=500).¹¹ (See: TABLE VI–IX.) According to the findings, in the 15 old member states of the European Union 57% of respondents were in favour of authorising the marriage of homosexual couples, and 42% of respondents were in favour of authorising the adoption of children by homosexual couples throughout Europe. While in the ten new member states there was a much lower level of support: only 28,8% of respondents were in favour of same-sex marriage (64% opposed it), and 19,3% were in favour of adoption of children by same-sex couples (73,7% opposed it). In this light the Hungarian results of 37% of respondents supporting (55% opposing) same-sex marriage and 34% supporting (60% opposing) adoption of children by same-sex couples are not too discouraging.

From the findings, it turned out that gender, age, educational level, religious background and political orientation seemed to be determining factors in supporting these issues: women, younger people, people with higher educational level, non-religious background and left-wing political orientation tended to be more supportive than others. It was also noted that the level of support towards these issues varied in accordance with the current national legislation: countries having already adapted their laws, or in the stage of doing so, received firm support according to their respective public opinions.

¹⁰ ESS, 2005.

¹¹ www.cosgallupeurope.com/homo/index.html

According to the findings of the Eurobarometer 66¹² (N=29.152), conducted in September and October of 2006, covering the population aged 15 years and over in the 25 EU member states as well as in Bulgaria and Romania, on average 44% of the respondents from the European Union agreed that homosexual marriages should be allowed throughout Europe (See: TABLE X–XI.). The Netherlands (82%), Sweden (71%), Denmark (69%) were characterised by the highest levels of acceptance, while responses from Cyprus (14%), Latvia (14%) and Romania (11%) indicated the lowest level of acceptance. In Hungary 18% of the respondents (N=1005) agreed with this statement. Concerning the question whether adoption of children should be authorised for homosexual couples throughout Europe, 32% of the respondents from the European Union agreed: the Netherlands (69%), Sweden (51%), Denmark (44) were characterised by the highest levels of acceptance, while responses from Romania (8%), Malta (7%) and Poland (7%) indicated the lowest level of acceptance. In Hungary 13% of the respondents expressed their agreement.

II.2. Mainstream media visibility

Mainstream media visibility can be another indicator of the social acceptance level of homosexuality in a society. Here I would like to refer to the findings of a Hungarian study analysing media representations of homosexuality to be found in *HVG* – a Hungarian economic, political news magazine with a circulation of around 115.000 issues per week – between 1993 and 2000.¹³

HVG – modelled on *The Economist* – closely follows the developments within Hungarian society but at the same time it provides the Hungarian reader with a broad review of current international political, economic, social, cultural as well as scientific issues. If we accept that even though weekly papers cannot be considered primary sources of information, their content can nevertheless be assumed to be equal to that of such primary information sources as television and the daily papers (cf. Funkhauser, 1973), then it can be asserted that the

12 European Commission (2006) STANDARD EUROBAROMETER 66 – Public Opinion in the European Union. First Results. Autumn 2006 – *TNS Opinion & Social*. http://ec.europa.eu/public_opinion/archives/cb/cb66/cb66_en.htm

13 cf. Takács, 2004:97–139.

TABLE VII. Attitudes to homosexual marriage in Europe – 2003

	Absolutely agree	Rather agree	Rather disagree	Absolutely disagree
BELGIUM	37%	30%	9%	22%
DENMARK	66%	16%	5%	12%
GERMANY	36%	29%	13%	20%
GREECE	5%	11%	10%	71%
SPAIN	28%	40%	10%	14%
IRELAND	16%	30%	16%	32%
ITALY	17%	30%	15%	37%
LUXEMBOURG	35%	36%	9%	15%
NETHERLANDS	62%	18%	6%	12%
AUSTRIA	24%	24%	13%	28%
PORTUGAL	9%	34%	25%	28%
FINLAND	33%	23%	11%	29%
FRANCE	25%	33%	14%	26%
SWEDEN	51%	18%	5%	21%
UNITED KINGDOM	17%	30%	15%	30%
15 EU States up to 2004	27%	30%	12%	27%
BULGARIA	6%	13%	14%	55%
CYPRUS	4%	5%	4%	76%
CZECH REPUBLIC	17%	33%	20%	28%
ESTONIA	13%	22%	14%	42%
HUNGARY	14%	23%	12%	43%
LATVIA	4%	15%	9%	65%
LITHUANIA	6%	20%	20%	42%
MALTA	6%	17%	16%	54%
POLAND	7%	11%	14%	56%
ROMANIA	7%	10%	9%	69%
SLOVAKIA	4%	26%	29%	41%
SLOVENIA	19%	21%	5%	50%
TURKEY	1%	15%	26%	53%
13 Candidate States	6%	16%	18%	52%
25 EU States after 2004	25%	28%	13%	30%
SWITZERLAND	37%	28%	11%	20%
NORWAY	40%	26%	14%	17%

TABLE VIII. Positive and negative attitudes
to homosexual marriage in Europe – 2003

	(++/+) agree	(– –/–) disagree
BELGIUM	67%	31%
DENMARK	82%	17%
GERMANY	65%	34%
GREECE	16%	80%
SPAIN	68%	24%
IRELAND	46%	48%
ITALY	47%	52%
LUXEMBOURG	71%	24%
NETHERLANDS	80%	18%
AUSTRIA	48%	41%
PORTUGAL	43%	53%
FINLAND	56%	39%
FRANCE	58%	40%
SWEDEN	70%	26%
UNITED KINGDOM	47%	45%
15 EU States up to 2004	57%	39%
BULGARIA	20%	69%
CYPRUS	9%	81%
CZECH REPUBLIC	50%	48%
ESTONIA	35%	56%
HUNGARY	37%	55%
LATVIA	19%	74%
LITHUANIA	26%	62%
MALTA	23%	69%
POLAND	19%	70%
ROMANIA	17%	77%
SLOVAKIA	30%	70%
SLOVENIA	40%	55%
TURKEY	16%	79%
13 Candidate States	23%	70%
25 EU States after 2004	53%	43%
SWITZERLAND	65%	31%
NORWAY	66%	31%

TABLE IX. Attitudes to child adoption
by homosexual couples in Europe – 2003

	Absolutely agree	Rather agree	Rather disagree	Absolutely disagree
BELGIUM	19%	28%	16%	34%
DENMARK	31%	23%	14%	31%
GERMANY	26%	31%	19%	22%
GREECE	4%	6%	10%	77%
SPAIN	24%	33%	17%	20%
IRELAND	10%	24%	23%	38%
ITALY	9%	16%	24%	50%
LUXEMBOURG	19%	30%	19%	31%
NETHERLANDS	39%	25%	17%	18%
AUSTRIA	14%	18%	20%	38%
PORTUGAL	5%	20%	33%	37%
FINLAND	13%	18%	19%	46%
FRANCE	12%	27%	22%	38%
SWEDEN	27%	16%	12%	38%
UNITED KINGDOM	12%	23%	22%	38%
15 EU States –2004	18%	25%	20%	35%
BULGARIA	5%	9%	12%	64%
CYPRUS	3%	3%	4%	80%
CZECH REPUBLIC	9%	26%	23%	41%
ESTONIA	9%	18%	14%	52%
HUNGARY	13%	21%	14%	47%
LATVIA	2%	9%	9%	72%
LITHUANIA	3%	10%	20%	55%
MALTA	3%	7%	12%	74%
POLAND	3%	7%	12%	63%
ROMANIA	5%	6%	8%	77%
SLOVAKIA	3%	14%	32%	51%
SLOVENIA	12%	18%	7%	60%
TURKEY	1%	15%	30%	48%
13 Candidate States	4%	13%	19%	57%
25 EU States after 2004	16%	23%	19%	39%
SWITZERLAND	18%	29%	20%	31%
NORWAY	12%	25%	26%	33%

TABLE X. Positive and negative attitudes to child adoption
by homosexual couples in Europe – 2003

	(++/+) agree	(--/-) disagree
BELGIUM	47%	50%
DENMARK	54%	45%
GERMANY	57%	41%
GREECE	11%	87%
SPAIN	57%	37%
IRELAND	34%	61%
ITALY	25%	74%
LUXEMBOURG	49%	50%
NETHERLANDS	64%	35%
AUSTRIA	33%	58%
PORTUGAL	25%	69%
FINLAND	30%	65%
FRANCE	39%	60%
SWEDEN	42%	50%
UNITED KINGDOM	35%	60%
15 EU States –2004	42%	55%
BULGARIA	14%	76%
CYPRUS	6%	84%
CZECH REPUBLIC	35%	63%
ESTONIA	27%	65%
HUNGARY	34%	60%
LATVIA	11%	81%
LITHUANIA	13%	75%
MALTA	10%	86%
POLAND	10%	75%
ROMANIA	11%	85%
SLOVAKIA	17%	82%
SLOVENIA	30%	66%
TURKEY	16%	78%
13 Candidate States	17%	76%
25 EU States after 2004	38%	57%
SWITZERLAND	47%	51%
NORWAY	37%	59%

TABLE XI. Homosexual marriages should be allowed throughout Europe – 2006. Level of agreement (%)

Netherlands	82
Sweden	71
Denmark	69
Belgium	62
Luxembourg	58
Spain	56
Germany	52
Czech Republic	52
Austria	49
France	48
UK	46
Finland	45
EU-25	44
Ireland	41
Italy	31
Slovenia	31
Portugal	29
Estonia	21
Slovakia	19
<i>Hungary</i>	<i>18</i>
Malta	18
Lithuania	17
Poland	17
Greece	15
Bulgaria	15
Cyprus	14
Latvia	14
Romania	11

themes of the articles in *HVG* are most probably in accordance with the most important Hungarian and international developments and by their analysis we can have a picture of what were the most important events and news items in the world from a Hungarian perspective in a given period.

The scope of this examination covered 8 annual issues of *HVG* with a total of 40.332 articles, out of which there were 189 articles with references to homosexuality or homosexuals. Within the 189 articles, 33 were written specifically about homosexuals or homosexuality.

By analysing these media representations the “news value” of homosexuality could be detected, i.e. how, when and why homosexuality became a topic worthwhile to write about not on the level of daily sensationalism but especially on the level of arousing and reflecting more durable, more serious public attention.

TABLE XII. Adoption of children should be authorised for homosexual couples throughout Europe – 2006. Level of agreement (%)

Netherlands	69
Sweden	51
Denmark	44
Austria	44
Belgium	43
Spain	43
Germany	42
Luxembourg	39
France	35
UK	33
EU-25	32
Ireland	30
Italy	24
Finland	24
Czech Republic	24
Portugal	19
Slovenia	17
Estonia	14
<i>Hungary</i>	<i>13</i>
Lithuania	12
Slovakia	12
Bulgaria	12
Greece	11
Cyprus	10
Latvia	8
Romania	8
Malta	7
Poland	7

According to the findings the topic of homosexuality was continually present in *HVG* from the beginning of the examined period, though this continuity started in articles written about Hungary only from 1995–96. From 1996 – and especially from 1998 – the visibility of homosexuality in Hungary became stronger by the growing opportunity for homosexual self-expression. Practically it meant more direct voicing of individuals identifying themselves as gays and lesbians, which could also be interpreted as a sign of Hungarian homosexual activism becoming more effective. (See: TABLE XIII.)

Within the thematic group of homosexuality – i.e. those articles focusing on the subject of homosexuality – especially those initiatives had the chance to gain news value that targeted changes in the existing penal and civil codes (in relation to decriminalisation and the legal acceptance of same-sex relationships, for example by claiming non-

TABLE XIII. Frequency and size of articles focusing
on homosexuality in the HVG¹⁴
(1993–2000)

Year of publication	I. Frequency and size of articles focusing on homosexuality		II. Articles on Hungary (Within I.)		III. Direct voicing of gays and lesbians (Within II.)	
1993	4	20166 ¹ (14,86%)	1	5275 (8,7%)	–	–
1994	2	6137 (4,52%)	–	–	–	–
1995	3	18576 (13,7%)	1	7458 (12,3%)	–	–
1996	7	24130 (17,8%)	6	17747 (29%)	1	1554 (13%)
1997	3	15112 (11,14%)	2	11047 (18,1%)	1	1502 (12,6%)
1998	6	25050 (18,46%)	3	10694 (17,5%)	2	5620 (47,2%)
1999	3	9357 (6,89%)	1	883 (1,4%)	–	–
2000	5	17131 (12,62%)	3	8021 (13%)	1	3242 (27,2%)
Total	33 articles	135659 (100%)	17 articles	61125 (100%)	5 articles	11918 (100%)

discriminatory age of consent and officially recognised forms of cohabitation for same-sex partners). From the beginning *HVG* described the “special homosexual issues” in a broader human rights context. Therefore there was increasing attention focusing on the claims that the social discrimination of homosexuals should be interpreted as a form of human rights violation to be dealt with by introducing anti-discriminatory legislation being an official expectation or already implemented practice in the European Union.

The strongest stereotype about homosexuals seemed to be their promiscuity. In maintaining this stereotypical view references to homosexuals being an “AIDS risk group” played an important role. Here the illusory correlation between homosexuality and the practice of frequent change of sexual partners could be detected. Probably it was not a coincidence that homosexuals were described in the most homogenised way in this context: being referred to as members of a unified, homogenous “risk group”; and in judging them group membership gained primary importance in relation to the reality of their sexual practices.

¹⁵ The size of the articles is given in the number of characters.

By examining the terminology used in *HVG* to describe homosexuals it turned out that besides the “traditional” use of words with negative or even obscene connotation – functioning mainly as signs to emphasise the social distance between the speaker and “the homosexuals” –, by the second half of the 1990s the word ‘meleg’ (which can be interpreted as the Hungarian version of “gay”, with the literary meaning “warm”) suggesting respect for the self-definition of homosexuals gradually became widely accepted and entered into everyday use.

The media representations of *HVG* on homosexuality between 1993 and 2000 can be interpreted as documents of growing social visibility of homosexuality in Hungary, the extension of which can show on the one hand the level of cultural and social integration of homosexuality in society, while on the other hand it can reflect the power relations of homosexual groups in society and their abilities or opportunities for self-expression.

II.3. The socio-cultural infrastructure of LGBT people in Hungary

The scope of the socio-cultural infrastructure for LGBT people in Hungary covers organisations representing their various kinds of interests, events and virtual as well as real places where they can meet, organise and socialise.

There are several officially functioning organisations representing the interests of LGBT people in Hungary at present. These are the Háttér Support Society for LGBT People, the Labrisz Lesbian Association, the Lambda Budapest Gay Association, the Habeas Corpus Working Group, the Five Loaves of Bread Community (“Öt kenyér” Christian Community for Homosexuals), the “DAMKÖR” Gay Association, the “Együtt Egymásért Kelet Magyarországon” (Together for Each Other in East-Hungary) Gay Association, the Szimpozion Association, the Atlasz LGBT Sport Association, and the Rainbow Mission Foundation. The Homeros-Lambda, the first officially recognized Hungarian homosexual organisation was established in 1988 – but it does not function any longer.

Háttér Support Society for LGBT people was established in 1995 with the objectives “to further the self-organisation of Hungarian sexual minorities, to dissolve nonsensical, but widely spread stereotypes and

prejudices about LGBT people, to facilitate a more open social dialogue, to stop the direct and indirect discrimination of LGBT people”.¹⁵ From 1996 they have been operating information as well as personal and telephone counselling services. In 2000 they started their legal aid program. This organisation has the largest number of members and activities in Hungary.

The Labrisz Lesbian Association was founded officially in 1999 but the core of the organisation existed already from 1996. Their main goals include organising community building activities, increasing social visibility of lesbian and bisexual women, publishing relevant material to further a social dialogue and spread information in order to draw attention to discrimination of female sexual minorities and fight against prejudices and stereotypes.¹⁶ With the support of the PHARE Democracy Micro-projects Program of the European Union in 2000, Labrisz introduced a ground-breaking educational program for secondary school students and teachers with the main aims of creating a safe and unbiased environment in schools, helping students learn to respect other people, and increasing teachers’ awareness that their students might be gay or lesbian, and instructing them in ways to help lesbian and gay students.

The Lambda Budapest Gay Association, the oldest Hungarian gay organisation that is still functioning, was founded in 1991. Their main activity has been to publish the monthly gay magazine “Mások” – the first unofficial issue of which came out as early as 1989.¹⁷

The Habeas Corpus Working Group, a human rights NGO was founded in 1996 and their legal aid service has been active since 1997. In the past few years they primarily focus on the equality of women and sexual minorities, and rights connected to sexual autonomy.¹⁸

The Five Loaves of Bread Community (“Öt kenyér” Christian Community for Homosexuals) – started as a strictly Catholic, but now an ecumenical Christian group – was founded in 1996 with a main objective “to support those gay and lesbian people trying to live with their orientation as Christians, seeking solution for emerging problems”.¹⁹

15 Cf.: www.hatter.hu

16 Cf.: www.labrisz.hu

17 Cf.: www.masok.hu

18 Cf.: <http://hc.netstudio.hu/>

19 www.otkenyer.hu

The “DAMKÖR” Southern Hungarian Gay Association is the first one of its kind functioning outside the capital of Hungary. It was established in 1999 in the city of Szeged, a major regional centre of South East Hungary. Their main activities are organising a gay and lesbian student club at Szeged University, another club for people over thirty, and other community building activities as well as maintaining a telephone help-line in order to further the social emancipation and integration of gays and lesbians.²⁰

The “Együtt Egymásért Kelet Magyarországon” (Together for Each Other in East-Hungary) Gay Association is the second officially registered group functioning outside Budapest. They are involved in community building and AIDS prevention activities. They also cooperate with the www.melegkelet.ini.hu (Gay East) internet portal.

The Szimpozion Cultural, Educational, and Leisure Association of Young GLBT People²¹ was founded in 2002. They organise the biweekly meetings of the Pocok Club, a youth club with a cultural orientation. In 2006 they started the “Bújj elő!” (Come out!) campaign by launching the www.melegvagyok.hu (‘meleg vagyok’ = I am gay) internet portal.

The Atlasz LGBT Sport Association was officially registered in 2004. It has ten sections: running, rock climbing, soccer, cycling, handball, basketball, dance, badminton, hiking, swimming.²²

The Rainbow Mission Foundation was established by the Háttér Support Society for LGBT People, the Labrisz Lesbian Association and the Lambda Budapest Gay Association in 2001 with the primary aim of organising the events of the yearly Gay and Lesbian Cultural Festival and the Gay Pride Day.²³

The annual Gay and Lesbian Cultural Festival is probably the most important cultural event for LGBT people in Hungary. The festival was organised for the ninth time in 2004 in Budapest, and besides the “traditional” gay pride march its program covered several workshops – on community building and coming out issues, HIV prevention, transgender issues, and legal issues such as same-sex partnership and equal treatment legislation etc. – book presentations, art exhibitions, parties and film screenings.

20 www.tar.hu/damkor

21 <http://szimpozion.hu>

22 www.atlaszsport.hu

23 www.szivarvany-misszio.hu

In Budapest mainly for the gay public there are several bars, cafés, clubs, hotels, restaurants and cruising areas available that can sometimes also serve the needs of other segments of the LGBT crowd. Exclusively lesbian places are hard to find but special “women only” events are regularly organised in Budapest. During the last few years the Hungarian countryside offers a growing number of parties and clubs, frequented mainly by gay men.

II.3.1. Own media: creating symbolic environments

Besides two newsletters of gay and lesbian organisations, which are not available publicly (and two issues of the *Hom-Eros*, published by the first Hungarian homosexual organisation in the early 1990s), there was only one gay magazine, *Mások* (founded in 1989, officially published from 1991, now also available online²⁴) between 1989 and 2006 in Hungary. Though *Mások* was – open to lesbians in theory, in practice it became an almost exclusively gay magazine, made almost entirely by gay men.

The choice of the name “*Mások*” (Others) reflected a certain message. According to the editors if they were to start a gay magazine today, they would choose a different name, but at the very end of the 1980s and the very beginning of the 1990s *Mások* seemed to be the right choice: “Nowadays people have a very different approach to this than then. It became a part of everyday life that gays exist in the world, too. But when we started, it was a completely different world. During the last ten years the situation changed so much that there is no reason to choose such a name now. If we would look for a new name for the magazine, I am sure that we would not call it ‘others’ because it has a completely different meaning now. At that time it meant that we had to assume our identity, but nowadays it rather suggests separation. So this is a very different world now.”²⁵

In April 2006 the first issue of the *Boxer* magazine was published: this glossy gay lifestyle magazine represents a new product targeting primarily middle class gay men with considerable consuming power. After appearing at first in two monthly issues and as a third bimonthly issue, the magazine ceased publication appearing again only at the end of the year.

24 www.masok.hu

25 Source: Interview conducted with Gábor Bencze, editor in chief of *Mások* magazine by Judit Takács in 2002.

There is also an advertisement leaflet-like monthly publication, called *Na végre! 100% GAY* (published from 2001 by the owner of a gay fitness centre). It is a free publication, based on a business venture, gaining income from advertisements. The fact that *Na végre!* exists now for more than four years can be interpreted as the sign of the strengthening pink economy in Hungary.

In 1997–98 four issues of the lesbian *Labrisz* zine were published. Though there is no Hungarian lesbian magazine, Hungarian lesbians are in fact quite active in publishing. At a certain point when they were granted a substantial amount of money by an American foundation (ASTRAEA), they decided to start publishing a book series instead of starting a “proper” magazine. There were attempts to establish a Hungarian lesbian magazine in 1997–98, but after four issues these stopped. Therefore nowadays *Labrisz*, the only independent Hungarian lesbian organisation regularly publishes a minimum budget, photocopied newsletter primarily to inform their members and a book series on lesbian themes.

At present there are only a few Hungarian LGBT radio programmes: the *Önazonos* (broadcast from 1994 on the national radio); the *Szappanopera helyett* (from 1996) and the *Zártkörű lányok* (from 2000 on a non-profit alternative radio, during 2001–2002 available only on the internet); and the *Meleg helyzet* (from 2005 on a commercial radio). In January 2007 the *GayRadio.hu* community radio started to broadcast on the internet. Previously there were the non-profit internet radio, the *Pararádió* (from 1997), and the *Ki más?!* programme (also from 1997 on a non-profit community radio) – but these do not exist any longer. It is important to note that producing radio programmes can be very cost-effective compared with publishing, printing costs on the one hand and television programme producing costs on the other hand.

The three main GLBT internet portals are the *gay.hu*, functioning from 1996, the *pride.hu*, the “first Hungarian gay portal”, an officially registered internet portal, established in 2001, and from 2001 the *TranSexual Online*, the “most significant transsexual related site in Hungary ... and probably in East-Europe” which is about transsexuality for transpeople and those interested, providing advice, reference, communication forums, and support for the transsexual minority.²⁶ These internet portals are gaining growing importance as there is growing internet access in Hungary.

26 <http://tsonline.uw.hu/>

27 Interview conducted with László Mocsonaki, Board Member of Háttér Society for LGBT People, by Judit Takács.

LGBT media content is typically produced by sexual minority groups: mainly gays and lesbians. These minority groups usually share a common “mainstream media fate” with other relatively powerless – for example, ethnic – minority groups, which can be characterised by low visibility and stereotypical representation. Therefore sexual minority media products can be seen as means of creating a symbolic environment where people belonging to these groups can feel at home (cf. Gross, 1991). It is also important to emphasise that the position of sexual minorities differs from that of “traditional” minorities in two aspects: they are usually not marked by their bodies – for example, by their skin colour –, thus they are not recognisable at first sight; and their existence challenges the “natural order of things”, thus their media appearances can become problematic. Still, their media products can be perceived to be documents of, as well as tools for promoting the successful social integration of relatively powerless social groups, and – in some cases – struggling against social intolerance.

LGBT media is usually made for and by members of sexual minorities but it does not have to be exclusively so. According to a leading Hungarian gay activist “of course, it helps if you are gay, but [...] I don’t think that just because you are gay you are able to create good quality gay media”.²⁷ The peripheral of the target audience necessarily interfaces with mainstream society – through, for example, parents, friends and colleagues – and some sexual minority media producers take this into account.

As LGBT media productivity matures there appears to be a trend towards specialisation: mixed media – i.e. media produced by gays and lesbians working together, for an aggregate gay and lesbian public – tend to become more homogenous: either lesbian or gay only. *Mások*, the only Hungarian gay magazine targeted lesbians, too when it started, but it has now become – according to its editors – “98% gay”. Specialisation is an indicator of development. However, it does not necessarily imply that cooperative networks stop functioning: joint events, like pride and film festivals, will continue to be organised by a broad spectrum of LGBT activists working together – as this could be observed in the case of organising the Hungarian Gay and Lesbian Cultural festivals during the last nine years.

There can be cultural indicators for including erotic material, particularly in gay specialised magazines. Additionally there can be commercial reasons for doing so. On the other hand, there can be

cultural indicators against the inclusion of naked images: besides the danger of over-sexualisation, or that of intimidating the public with picture-perfect bodies, the distinction between pornography and cultural eroticism is a hard one to make objectively.

Probably the most stable function of LGBT media is the information function. It is stable in the sense that the importance of this function seems to be independent from changing socio-cultural contexts. While the importance of other functions – such as community building, helping people in their coming out, or entertaining them – can change according to the changing social environments. Identity politics is a system-specific concept: it can hardly be interpreted in anti-democratic political systems characterised by the extensive erosion of private identities as well as the rigid and forced separation of public and private identities. The natural context of identity politics is civil society, the field of social self-organisation, being the framework as well as the guarantee of modern identity formations (cf. Erős, 1994). In Hungary, where involvement in civil activities still counts as a relatively new and not at all wide-spread experience, LGBT identity building is still an important media function. However, the very strong connection between LGBT activism and sexual minority media production characteristic especially in the early 1990s seems to be diminishing gradually.

In places where mainstream media are unable to mediate the special needs and claims of sexual minorities, special media segments must be created by the concerned groups in order to provide their constituencies with positive reference points for identity formation. Inability to use mass media to project LGBT cultural elements into the mainstream can reflect the relatively high level of social discrimination of LGBT people in present day Hungary. Probably the ideal of Hungarian activists would be that sexual minority media would no longer be necessary as an autonomous entity, the mainstream media would encompass the various sexual minority media products, thus nullifying the distinction between sexual minorities and the majority in this respect.

Once LGBT media production outgrows the no-budget, self-financing, small scale stage, further expansion is only possible either through commercial financing or through grants. This usually implies that a choice has to be made: commercial financing can lead to compromises in politics, while the grant option faces the problem that grants are hard to find. Activists dream of large grants with no strings attached, but market rules can force their hand too. So, whereas in some

cases only the philanthropic finance option is possible, in other cases a commercial approach may be the only option for survival.

Ultimately these types of media must be of a transient nature as they are in a way working towards making themselves irrelevant politically, but on the other hand, they advance themselves culturally doing so. Own media have a cultural impact. LGBT media can provide a cultural counterweight against societal oppression. It seems that in the long run culture is at least as an effective emancipatory agent as legislation.

*III. Development of sexual
orientation related
anti-discrimination
and equal treatment
policymaking in Hungary*

This part of my paper will give an overview of the history of sexual orientation and gender identity related anti-discrimination and equal treatment policymaking in Hungary, by emphasising not only the role of European institutions but also that of national and international NGOs in advancing this issue in the Hungarian context. Examples of practical application of equal treatment claims will also be presented in order to highlight the opportunities provided by equal treatment legislation for LGBT people to fight against discrimination in their everyday life.

III.1. Looking back

In Hungary the legislation concerning same-sex relations was clearly discriminative before 2002. Certain provisions of the Hungarian criminal law functioned as the basis of institutionalised discrimination of homosexuals: “illegitimate” relationships between same-sex partners suffered more serious consequences than those of different-sex partners. (For example, the age of consent was 18 for same-sex partners whereas it was 14 for different-sex partners.) The obsolete terminology used in legislation for same-sex relationships (for example, the use of the term ‘*természet elleni fajtalanság*’: “perversion against nature” that remained in operation in some sections of the criminal law even after 2002) also suggested social rejection and discrimination.

The Hungarian history of legal persecution of homosexuals (See: Table A) shows that the social rejection reflected by the penal codes was rooted in a kind of moral judgement, inherited from Christian doctrines. Though certain European authors raised their voice against the legal discrimination of homosexuals already from the second half of the 19th century, and some of these early anti-discriminatory

Table A: Overview of the legal prosecution
of same-sex sexual relationships in Hungary

1978–2002	Different ages of consent: 14 for heterosexual relationships, 18 for homosexual ones; maximum penalty for conducting “perversion against nature” (p.a.n.) with same-sex partner under the age of 18 is 3 years imprisonment ²
1961–1978	Different ages of consent: 14 for heterosexual relationships, 20 for homosexual ones; For committing p.a.n. men as well as women could be prosecuted; P.a.n. conducted with an animal is not penalised any longer; Special clause on “perversion against nature conducted in a scandalous manner”, causing a public scandal; “Coerced perversion against nature” – only applicable outside the institution of marriage (special clause providing that if the perpetrator and the victim get married before the first judgement, the punishment can be mitigated to any extent) ³ General prosecution of p.a.n. ceased (citing medical arguments saying that homosexuality is a biological phenomenon therefore it cannot be handled legally as crime); maximum penalty for conducting p.a.n. with a partner under the age of 20 or causing a public scandal is 3 years imprisonment
1878–1961	Three forms of p.a.n. are distinguished: conducted with an animal; with a same-sex partner; with a different-sex partner in an unnatural way. Consensual same-sex relationships were considered to be milder crimes and punishable with a maximum of one year imprisonment; the coerced forms with up to five years imprisonment. ⁴
Before 1878	There was no punishment defined for p.a.n. and women could not be prosecuted for p.a.n. according to Hungarian law. Explanation for the lack of actual penalisation can be found in Bodo’s <i>Jurisprudentia Criminalis</i> of 1751 stating that “the Hungarian people have attained virtue and chastity to such a degree that there was no need for a special law like this; so imposing no punishment meant that even the reference to the possibility that this kind of crime is at all committable was to be avoided”. Penalty for p.a.n. thus depended on the “wisdom of the judge”. Death penalty for sodomy was forbidden by the enlightened Austrian emperor and Hungarian king, Josef II. in 1787. (According to the 1767 decree of his mother, Marie Therese sodomy was still to be punished by being burnt to death.)

arguments – especially those of Károly Kertbeny, who coined the word ‘homosexual’ in 1868–69 – emphasised in a very modern manner that the state should not intervene in the private lives of individuals. However, European legislation – and Hungarian law, also – soon became dominated by a “medicalised” model of homosexuality (cf. Takács, 2004:81–92).

In the second half of the 20th century Hungarian law makers defined homosexuality as an “abnormal” biological phenomenon which at the same time – surprisingly – can be learnt, and this learning process can have dangerous consequences. By the end of the 1990s the contradictions inherent in views of Hungarian legislation on homosexuality became apparent: in certain court cases judges stayed the proceedings referring to provisions discriminating against same-sex relationships as being unconstitutional. The expectations of the

1 Act No. IV of 1978. (Hungarian Penal Code).

2 Act No. V of 1961. (Hungarian Penal Code).

3 Act No. V of 1878. (Hungarian Penal Code).

international legal environment especially those of the European Union also projected the necessity of re-examining the discriminative legal treatment of same-sex relationships (cf. Takács, 2004:92–94).

By examining the historically changing views on homosexuality reflected by Hungarian legislation, especially during the 19th and 20th century, we can find different versions of the social categorisation of homosexuality: it was defined as a sin until the end of the 19th century, as an illness until the second half of the 20th century and later as a form of a somewhat dangerous social deviance. Therefore viewing homosexuality as a freely chosen lifestyle did not appear – and still does not seem to appear – to be part of the choices reflected by Hungarian legislation.

III.2. Fighting against the legal discrimination of LGBT people

In a broad sense the development of sexual orientation related anti-discrimination and equal treatment legislation can be traced back to 1989 when the clause on prohibition of discrimination became a part of the Hungarian Constitution.

Before the introduction of the law on equal treatment and the promotion of equal opportunities⁴ in 2003, Hungary already had national laws prohibiting discrimination, such as the Constitution, the Labour Code, the Act on Public Education and the Act on Public Health,⁵ but only the latter explicitly prohibited sexual orientation-based discrimination (cf. Farkas, 2001). In all other cases, the question whether sexual orientation is included under the heading “other situations”, usually ending the list of discriminatory forms based on “race, colour, sex, language, religion, political or other opinion, national or social origin, circumstances of wealth and birth”⁶ was a matter for interpretation.

During the 1990s there was no sexual orientation related anti-discrimination and equal treatment policymaking on the political agenda. However, the practical application of the general anti-discrimination

4 Act No. CXXV of 2003.

5 The first Hungarian law explicitly recognising the necessity of equal treatment on the basis of sexual orientation was the Act on Public Health, introduced in 1997. (Act No. CLIV of 1997.)

6 Hungarian Constitution, 70/A §.

clause of the Constitution in relation to sexual orientation as a basis for discrimination could be observed in two occasions in the decision making processes of the Hungarian Constitutional Court. Therefore we can agree with the interpretation stating that “because of the weakness of Hungarian anti-discrimination legislation, the Constitutional Court, generally known in Central and Eastern Europe for its pro-active attitudes, seems to have taken the lead in shaping lesbian and gay rights with a more or less progressive attitude” (Farkas, 2001:564).

In the 1990s the Hungarian Constitutional Court reached two decisions involving discrimination based on sexual orientation: one in 1995 and one in 1999.

In 1995⁷ in the constitutional examination of marriage between persons of the same-sex and the recognition of partnerships, the Hungarian Constitutional Court rejected in its decision of 14/1995. (III. 13.) that the determination of marriage as a communion of a man and a woman be a case of discrimination infringing on the constitution. According to their arguments “in our culture and in law the institution of marriage is traditionally the union of a man and a woman”, therefore the state “can offer different legal options for traditional and currently exceptional communities” because “the right of the affected person is not that the same institutions be available to everybody” (cf.: Farkas, 2001:567–568).

At the same time the Hungarian Constitutional Court stated that a lasting communion of two persons could constitute such values that they were entitled to legal recognition of their communion based on a fair recognition of the personal dignity of the involved persons irrespective of their sexes. According to the Court’s argumentation the question, as to whether the partners are of different sexes or of the same-sex, is related to disadvantageous differentiation: “The cohabitation of persons of the same-sex, which in all respects is very similar to the cohabitation of partners in a [different-sex] domestic partnership – involving a common household, as well as an emotional, economic and sexual relationship [...] – gives rise today, albeit to a lesser extent, to the same necessity for legal recognition as it did in the 1950s for those in a [different-sex] domestic partnership. [...] The sex of partners [...] may be significant when the regulation concerns a common child or [...] a marriage with another person. However, if these exceptional considerations do not apply, the exclusion from regulations covering [...] [different-sex] domestic partnership [...] is arbitrary and

7 14/1995. (III.13.)

violates human dignity; therefore it is discrimination contrary to Article 70/A [...] The benefits (social and social security) that can be given only on the basis of a domestic partnership cannot depend only on the sex of the two people living together” (Farkas, 2001:568).

Thus in 1995 the Court legalised lesbian and gay partnership by declaring that the previous law limiting partnerships to *those formed between adult men and women* was unconstitutional. The Parliament was ordered to make the changes necessary to recognise same-sex partnerships by 1 March 1996. The partnership law in Hungary in its present form – after changing Art. 578/G and Art. 685/A of Act No. 4 of the Hungarian Civil Code – includes any couple, of whatever sex, that live together permanently in a state of ‘financial and emotional communion’. It is a factual legal relationship, which comes into existence without official registration; thus it has underlying problems of proof. Law reform is, therefore, needed to institutionalise – at least to a certain degree – same-sex relationships and to prevent family and other policy practices discriminating against same-sex couples.

In 1999 the Court found the sexual orientation based differentiation in paragraph 203 of the Penal Code (punishing incest of siblings) unconstitutional.⁸ In the case of the various deeds determined as incest in the Criminal Code § 203 the constitutional examination had to answer the question whether § 70/A of the Hungarian Constitution, forbidding discrimination was infringed by the fact that the law only punished sexual relations between siblings of the same-sex. Incest between siblings of differing sexes was after all not liable to any criminal sanctions, that is to say, the law differentiates on the grounds of sexual orientation between siblings of the same-sex on the one hand and those of differing sexes on the other.

The Hungarian Constitutional Court established in its 20/1999.(VI. 25.) decision that this differentiation on the grounds of sexual orientation is covered by the item “other cases” in the introduction of § 70/A. of the Hungarian Constitution. The judgment had to examine whether there are substantial reasons for this differentiation. The Hungarian Constitutional Court found no such reason in the examined

8 20/1999. (VI. 25.)

case therefore there were no grounds for different criminal measures against incest between siblings of different sexes and incest between siblings of the same-sex. Nor could it be shown that the dangers posed to society by these actions would be different.

At the beginning of the 21st century Hungary was among the very few European countries – besides, for example, Austria – where the national Penal Code openly discriminated between same-sex and different sex partners concerning the age of consent in a sexual relationship.

In June 2002 the European Parliamentary Committee on foreign affairs issued a recommendation that “reiterate[d] its call upon the Hungarian government to eliminate provisions in the penal code which discriminate against homosexual men and lesbian women, notably article 199”.⁹ Soon after this recommendation, in September 2002 the Hungarian Constitutional Court – perhaps with a view that a country being at that time at the threshold of the European Union membership cannot wait any longer with such decisions – ruled that paragraphs 199 and 200 of the Hungarian Penal Code were unconstitutional and eliminated them.¹⁰

In the following I would like to quote from the statements of the Hungarian Constitutional Court on discrimination based on sexual orientation, published with its ruling in 2002:¹¹

In 1984 the European Parliament accepted a resolution for the first time, in which it called on member states to stop prosecuting adults for consensual homosexual relations on the one hand, and to determine equal ages of consent for heterosexual and homosexual relations on the other. Following this, in the yearly Human Rights Assessment Reports, as well as in the special resolutions of 1994 and 1998, the European Parliament took a position on the issue of equal rights for homosexuals and lesbians and again urged that criminal law measures based on sexual orientation be resolved, including the ending of unequal ages of consent. The special resolution passed in 1998 confirmed that the European Parliament would not approve the admission of such a member state, whose law, or political practice infringes on the human rights of homosexual persons.

9 Recommendation 72 of the EP Committee on foreign affairs; from the Information officer of ILGA–Europe Cf.: <http://www3.europarl.eu.int/omk/omnsapir.so/>

10 37/2002. (IX.4.)

11 Ibid. – Translated from Hungarian by Chris Swart.

The Hungarian Constitutional Court, in considering the present case, paid special attention to relevant documents of the European institutions devoted to the protection of human rights: the Legal Affairs and Human Rights Committee of the Parliamentary Assembly of the Council of Europe (henceforth: LAHRC – Committee) and the European Court of Human Rights (henceforth: ECHR – Court), as well as the Parliamentary Assembly of the Council of Europe (henceforth: PA – Assembly).

The main elements of the ECHR's decisions in the matter of the criminal regulation of homosexual behaviour can be gathered as follows:¹² Criminal measures against voluntary, consensual homosexual activity constitute interference into the private lives of individuals on the part of the state or, more precisely an infringement of the right to maintain respect for the chosen sexual practice [European Convention on Human Rights – Rome, November 4th, 1950, Article 8.](Henceforth: Convention). State interference in the most intimate aspect of private life encroaches on the most personal manifestation of an individual therefore the state is only entitled to do so on the grounds of extraordinarily serious reasons.

The ECHR entrusts nation states with the greatest possible degree of consideration, so that they decide on the necessary measures to protect morality, or the rights and freedoms of others, in the given society. This is valid, in particular, in determining the age up to which it is justified to use criminal measures to protect the young from such sexual behaviour with which they may exclude themselves from the majority of society and which they may themselves regret later. According to the ECHR's position, criminal measures may be necessary in a democratic society to protect those, who are particularly vulnerable due to their age, from corruption and sexual exploitation.

The ECHR did not take a position on whether the differences in criminal penalties applicable to men and those applicable in the cases of heterosexual or lesbian relations are discriminatory. According to the view of the ECHR no further examination was necessary once violation of Article 8 of the Convention – e.g. state interference into the private lives of individuals – was established.

The Hungarian Constitutional Court stated that the combined consideration of Articles 8 and 14 of the Convention as in the Sutherland case¹³ were relevant and could therefore be applied in their decisions: The LAHRC (Legal Affairs and Human Rights Committee) did not find objective and reasonable grounds for holding that the age of consent for homosexual relations between men should be higher than that for lesbian and

12 Eur. Court. H.R., *Dudgeon v. United Kingdom* judgment of October 22nd, 1981, Series A no. 45; Eur. Court. H.R., *Norris v. Ireland* judgment of October 26th 1988, Series A no. 142; Eur. Court. H. R., *Modinos v. Cyprus* judgment of April 22nd 1993, Series A, no. 259; Eur. Court. H. R., *A. D. T. v. United Kingdom* judgment of July 31st, 2000.

13 No. 25186/94, 1/7/1997.

heterosexual relations in examining the complaint against the legislation at that time in force in Great Britain and Northern Ireland. The appropriate instruments of the criminal law and their application were discriminatory infringing the Convention in its provisions for the right to maintain respect for private life. The ECHR Court did not in the end take a position in the case, since the offending legislation changed in the meantime.¹⁴

The LAHRC (Committee) considered the case to be the appropriate occasion to review the precedent law in the light of the changes that had occurred in the past twenty years and found – contrary to its previous standpoint – that there were no reasonable and objective grounds to maintain differing ages at which homosexual and heterosexual actions could legally be initiated, or that the determination of such differing ages was not a commensurate means to achieve the intended goals. The LAHRC (Committee) did not recognise the submission that society supports the heterosexual lifestyle and condemns the homosexual one as an acceptable justification for differing criminal laws.

The LAHRC (Committee) drew attention to the fact that Article 14 of the Convention protects against the discrimination without adequate cause of persons who are in largely similar situations: The differing treatment is especially hurtful if it does not serve any lawful purpose, or if the applied instruments are not commensurate with the intended goals. Nevertheless, the Committee recognised that states have a certain degree of freedom to determine how to justify and which degrees of difference justify separate treatment of similar circumstances.

At the time of the first decision of the Court in the matter of the criminal prosecution of homosexual behaviour in 1981, the Assembly made a statement in defence of the rights of homosexual persons. The Assembly called on the World Health Organisation to delete homosexuality from the international list of diseases (this happened in 1991) and accepted a motion against various forms of discrimination of homosexuals, including, among others, the matter of the ending of differing ages of consent. Almost twenty years later, on September 26th, 2000, the Assembly accepted a motion to review the situation of homosexuals again. The Assembly called on the Council of Ministers to demand that member states determine equal ages of consent for homosexual and heterosexual activities in their criminal laws.

This jurisprudence clearly shows that rulings of the ECHR and even statements by the various committees of the Council of Europe played a crucial part completing an anti-discrimination legislation project in member states, in this case Hungary.

There are several decisions of the European Court of Human Rights that were or can be potentially influential on national LGBT anti-discrimination legislation. These decisions are collected in the following Table. (See: Table B.)

14 Eur. Court H. R., *Sutherland v. United Kingdom* judgment. March 27th, 2001.

TABLE B: European Court of Human Rights decisions potentially influential on national LGBT anti-discrimination legislation¹⁵

1981	In the case of <i>Dudgeon v. UK</i> (Judgment: 1981 October 22), the European Court of Human Rights for the first time declared that legislation criminalising consensual sexual acts between adult men in Northern Ireland was in breach of Convention Article 8 which provides a right to a private life. The Court also confirmed that such legislation contradicted the right to a private life in the case of <i>Norris v. Ireland</i> (1988 October 26), <i>Modinos v. Cyprus</i> (1993 April 22), and <i>A.D.T. v. UK</i> (2000 July 31)
1999	In the case of <i>Salgueiro Da Silva Mouta v. Portugal</i> (1999 December 21), the Court declared that refusing child custody to a gay man simply because of his homosexuality was in breach of Article 8 of the Convention, the right to a private life. It was declared discrimination on the grounds of sexual orientation, and violation of Article 14 of the Convention which prohibits discrimination. In this case, after divorcing his wife, Mr Mouta was granted access to his child. However, his former wife did not comply with the agreement and did not allow Mr Mouta to visit their child. During the court battles in Portugal, Mr Mouta lost his case and child custody was granted to his former wife. The reason given to justify refusing him child custody was his homosexuality and cohabitation with another man.
2001	In the case of <i>Sutherland v. UK</i> (2001 March 27 – striking out) the Court found that the higher age of consent for gay men was discriminatory and violated a right to a private life. This case was supported by Stonewall, a British LGB NGO and resulted in an equal age of consent in the UK (from January 2001). The European Court of Human Rights confirmed that the higher age of consent for gay men was discriminatory and in breach of the European Convention on Human Rights in two more recent judgements, <i>L. and V. v. Austria</i> (2003 September 9) and <i>S.L. v. Austria</i> (2003 September 9).
2001	The <i>Goodwin v. UK</i> (2001 July 11) case is related to the legal status of transsexuals in the UK (treatment in relation to employment, social security, and pensions, and inability to marry). The Court found a test of congruent biological factors could no longer be decisive in denying legal recognition to the change of gender of a post-operative transsexual, and found no justification for barring the transsexual from enjoying the right to marry under any circumstances. In July 2004 the Gender Recognition Act was introduced in the UK.
2003	<i>Karner v. Austria</i> (2003 July 24) is the first ever case relating to the rights of same-sex partners that the Court has agreed to consider. It involved a complaint from Siegmund Karner, an Austrian gay man who has lived in his male partner's flat since 1989 and shared the expenses of the flat. Mr Karner's partner died in 1994 and designated Mr Karner as his heir. However, the landlord of the property started the process of terminating the tenancy with Mr Karner. District and Vienna Regional Courts interpreted the term 'life companion' of the Rent Act as including same-sex partners who lived together for a long time. However, the Supreme Court disagreed with this interpretation. For the first time in its history, the European Court of Human Rights ruled that this was discrimination based on sexual orientation and that the Convention has been breached.

However, it is important to note that decisions of national legislative bodies can also influence the judgments of the European Court of Human Rights. For example, in 2003, in the *Karner versus Austria* case Robert Wintemute, Professor of Human Rights Law at King's College, London prepared a third party intervention on behalf of ILGA Europe and two other British NGOs. In this intervention the Hungarian Constitutional Court's decision of 1995¹⁶ – legalising lesbian and gay partnership by declaring that the previous law limiting

15 Sources: <http://cmiskp.echr.coe.int/>
and www.stonewall.org.uk/stonewall/information_bank/

16 14/1995. (III. 13.)

partnerships to ‘those formed between adult men and women’ was unconstitutional – was also cited.

According to Robert Wintemute, the main issue of the Karner case – which is the most recent decision of the ECHR relating to LGBT rights – was to decide who has the right to take over a flat when the tenant dies:

Is it only a spouse? For the moment that’s up to each country to decide. What happened was that Austria’s legislation from the 1970’s said a ‘*lebensgefahnte*’, life companion, or life partner could take over the flat, and it was actually completely gender neutral. So in theory it could have covered a same-sex partner but the case went to the Austrian Supreme Court, and they said: no, back in the 1970’s the legislature was only thinking about unmarried different-sex partners so those are the only partners covered by this legislation, and so then Mr. Karner went to the European Court of Human Rights, except that he died before the case was decided. But he won and they said same-sex partners had to be treated in the same way if they were unmarried. What made that case stronger was that it didn’t involve marriage; that made it less controversial. Also there was a strong trend in Western Europe especially, – but actually here Hungary was cited to the court – the trend of giving at least the same rights to same-sex partners as are given to unmarried different-sex partners. I prepared what is known as a third party intervention in that case. Non-governmental organisations are allowed to ask the court to intervene and present additional arguments and information. In this case, because the lawyers in Austria were not specialists on the European convention, they didn’t have access to comparative law, to what was going on in other countries, so I prepared the intervention on behalf of ILGA Europe and two other NGOs in Britain. One thing that is helpful for judges is if you just tell them what legislatures have been doing. That’s useful information, but what gives them even more courage is if you can quote a court from another country that has reached the same conclusion. Fortunately there were a lot of good decisions from Canada, the U.S., South Africa, even the U.K. provided a positive case and also Hungary: it was the famous Constitutional Court decision of 1995. Fortunately I found an English translation and quoted it to the court. That led them to decide that this was now a minimum standard of equal treatment.¹⁷

This example indicates that human rights related legislation at the European level is not only a one-way street, but it can have several directions and intersections. As I already pointed out, European

17 Interview with Robert Wintemute, Professor of Human Rights Law, King’s College, London – conducted by Judit Takács on October 31, 2004. Used by permission.

Institutions, especially the rulings of the ECHR, greatly affected the Hungarian Constitutional Court's judgment of 2002, eliminating the different age of consent for heterosexual and homosexual relationships. On the other hand, a previous decision of the Hungarian Constitution Court was used – together with various court rulings from other countries – in pleading for a positive judgement of the ECHR in an LGBT rights related case.

Hence we see the importance of appropriate national and European level legislation as well as the coordinated work of national and European level NGOs in advancing LGBT rights.

III.3. Developing and applying equal treatment legislation for LGBT people

After completing an anti-discrimination legislation project – e.g. a legal reform eliminating discriminative parts of mainly the national penal code –, the next step is to advance LGBT people's rights in the form of equal treatment policymaking. Again European institutions can significantly drive these legal reforms. This seems to be true especially in the case of countries preparing for European Union accession.

III.3.1. Development of Hungarian law on equal treatment and promotion of equal opportunities

The first initiatives to develop an antidiscrimination and equal treatment legislation can be traced back to 2000–2001 in Hungary. Developing the law on equal treatment and the promotion of equal opportunities in Hungary took several years. (The main stages of this development are listed in Table C.) Following two attempts to propose special anti-discrimination bills (focussing on racial and gender equality, respectively), the first general anti-discrimination draft bill was submitted by Magda Kósáné Kovács and Katalin Szili (MPs, Hungarian Socialist Party) in April 2001. This draft bill included the prohibition of discrimination based on sexual orientation, and clear references to the 2000/43 Racial Equality Directive as well as the 2000/78 Employment Equality Council Directive. The latter is the first directive explicitly referencing sexual orientation as a protected category.

In the first public version of the concept of the would-be equal treatment act – published on the homepage of the Ministry of Justice in November 2002 – all fourteen protected categories listed in the Employment Directive could be found. (These are the following: race, skin colour, ethnicity, language, disability, state of health, religion, political or other views, sex, sexual orientation, age, social origin, circumstances of wealth and birth, and other situations.)

By the time the draft bill on “equal treatment and the promotion of equal opportunities” reached the stage of parliamentary discussion at the end of 2003, additional categories such as family status, motherhood (pregnancy) or fatherhood, gender identity, part-time or limited period employment status, membership of interest representing bodies, were inserted into the list of protected categories. The bill passed in December 2003 and came into force on January 27th 2004.

According to experts who worked on the preparation of the conceptual framework of the Hungarian Equal Treatment Act, the concept of the new law closely follows the practice of the Hungarian Constitutional Court, the provisions of relevant Hungarian legislation, and the European Union’s requirements. These experts emphasised that according to the European Commission the main goal of the European anti-discrimination legislation is to provide for effective protection from discrimination and one of the means to achieve this goal, perhaps the most desirable one, is to introduce a separate anti-discrimination act with general effect (cf. Bitskey–Gyulavári, 2004:19). Though in the “old” European Union member states we can find examples of having general anti-discrimination acts (as in the Netherlands) as well as applying different acts to promote equal treatment of various disadvantaged social groups (as in the United Kingdom and Ireland), in Hungary it was decided to go for the first, “more desirable” option. In other – present and future – accession countries we can observe the same development. New general anti-discrimination acts were introduced in Romania in 2000 and in Slovakia in 2004, while in Bulgaria they are already working on one.

Table C: Development of Hungarian law on equal treatment and promotion of equal opportunities

2000 May	Proposal for an anti-discrimination bill (focusing on fighting against racism and xenophobia) drafted by Jenő Kaltenbach, Parliamentary Commissioner for Minorities.
2001 February	Anti-discrimination draft Bill (focusing on promoting equal opportunities for women and men) submitted by Péter Hack and Mária Kórodi (MPs, Alliance of Free Democrats). ⁶
2001 April	Anti-discrimination draft Bill (general – including the prohibition of discrimination based on sexual orientation) submitted by Magda Kósáné Kovács and Katalin Szili (MPs, Hungarian Socialist Party). ⁷ Here there are references to the 2000/43 Racial Equality Directive and the 2000/78 Employment Equality Council Directive already mentioning sexual orientation as a protected category.
2002 November	In a Ministry of Justice document published in November 2002, outlining the concept of a new anti-discrimination and equal treatment law, there were fourteen categories specified as possible causes of discrimination, including sexual orientation . (The other protected categories were race, skin colour, ethnicity, language, disability, state of health, religion, political or other views, sex, age, social origin, circumstances of wealth and birth, and other situations.)
2003	Following inter-ministerial negotiations and public consultations in which NGOs were able to express their views, the final text of the law listed additional protected categories including gender identity . (Other inserted categories were family status, motherhood, pregnancy and fatherhood, part-time or limited period employment status, membership of interest representing bodies.)
2003 December	During the parliamentary debate of the draft bill there was a certain level of rejection expressed and a lack of comprehension voiced against the inclusion of sexual orientation and gender identity into the protected categories by representatives of the opposition parties. Nevertheless, the bill passed.
2004 January 27	The new law comes into operation with the proviso that a new administrative body, an Equal Treatment Authority is to be established by January 1, 2005.
2004 December 22	A government decree is issued establishing the new Equal Treatment Authority in January, 2005.
2005 January	Setting up the Equal Treatment Authority

The idea to introduce a general equal treatment act was not received with uniform enthusiasm in the Hungarian political arena, nor in civil society. Counter arguments were cited by politicians as well as NGOs stating that from the perspective of providing really effective, “tailor-made” social protection for certain social groups – especially for women and Roma people – it would be more suitable to introduce separate acts dealing with their special problems (cf. Bitskey–Gyulavári, 2004:22).

During the parliamentary debate of the draft bill there was a certain level of rejection expressed and a lack of comprehension voiced against the inclusion of sexual orientation and gender identity into the protected categories by representatives of the opposition parties.

18 T/3804.

19 T/4244.

It is instructive to cite some of the views and worries expressed in the debate:

Flórián Farkas (MP, Fidesz – Hungarian Civic Union) stated that it was not correct to treat various groups with different situations in a uniform way. He pointed out that “being a gipsy is not an illness, neither a birth defect, nor the result of an accident; it cannot be compared with problems of sexual orientation or gender identity. Perhaps it is not a coincidence that the draft proposed by the Minority Parliamentary Commissioner in 2000 was limited to national and ethnic minorities. I propose to start drafting this law afresh. I am among the first ones to support the idea of draft bills concerning the other groups to be protected at the same time [...] This would be better for everyone.”²⁰

Erika Szabó (MP, Fidesz – Hungarian Civic Union) argued that “other situations” could replace all the protected categories. Sexual orientation and gender identity as protected categories did not seem to make sense to her. She posed the following ambiguously poetic question: “According to the draft does it mean sexual orientation appropriate to general social norms and expectations, or does it refer to the opposite [e.g. sexual orientation opposing general social norms]?”²¹ Szabó also agreed with Farkas that the ethnic group of gypsies should not be categorised together with other “otherness”: “gypsies being an ethnic category struggle with very many problems and obviously feel that they should not necessarily be listed with sexual identity or otherness.”²²

László Nógrádi (MP, Fidesz – Hungarian Civic Union) emphasised the need to protect certain values: “Protecting our values is not the same as discriminating others. When for example, a religious school pays attention that in the case of hiring a teacher, practising Christian values or at least, identifying with them, is a requirement, then if they don’t hire a homosexual person, or a person representing other values or having another gender identity, it does not mean turning against them; in these cases they protect their own values, and represent the interests of parents whose children are enrolled in such a school because they want the children to be brought up in accordance with their own values.

20 Comment in the parliamentary debate on 25 November, 2003.
www.parlament.hu

21 Comment in the parliamentary debate on 27 October, 2003.
www.parlament.hu

22 Comment in the parliamentary debate on 26 November, 2003.
www.parlament.hu

A school has the right to pose such a value system. The other problem with this draft is that it mixes together concepts belonging to different dimensions and different categories. One's skin colour or ethnic background is not the same as one's gender identity or state of wealth. These should not be brought to the same dimension and mixed [...] I am afraid that if we are not careful, the vision of Orwell may come true when all people are equal but some are more equal than others.”²³

Sándor Lezsák (MP, Hungarian Democratic Forum) expressed his surprise that sexual orientation and gender identity were included as protected categories:

I do emphasise my surprise that the law would prohibit discrimination based on vaguely defined 'gender identity', instead of discrimination between the sexes, e.g. between men and women. Concerning identity consciousness, as it is commonly known, the conceptual counterparts are not women and men, but women with female gender identity and male transvestites having female identity together constitute one pole, while the rest belongs to the other. I don't understand why the draft prioritises the less tangible gender identity over the objectively existing sex categorisation. According to the draft sexual orientation cannot be the motive of disadvantageous discrimination either. In the view of the author of the draft, and this is how we understand the draft, it would be a completely normal case if one's sexual interest turns in the direction of animals and reproaching this would be forbidden. According to this law it would be completely normal to have necrophiliac pathologists or paedophile teachers, and their discrimination would be prohibited. This draft leaves it vague what would be considered disadvantageous treatment in the field of sexual orientation. For example, does it qualify as disadvantageous treatment if parents or teachers want to change the sexual orientation of young people with medical treatment, while those with usual orientation wouldn't be urged to have such an intervention? It is not a problem gathered from thin air because American courts have been occupied for some time with the question whether the director can prescribe medical treatment for homosexual boys in state homes, or not. According to medical opinion on this issue, male homosexuality can be cured with a good chance until the end of puberty, while lawyers – who are not physicians! – find posing this question about the necessity of treatment in itself humiliating and discriminative. Unfortunately this draft is so terse concerning the field of prohibiting discrimination on the basis of sexual orientation that it could even include all aberrations seen in horror movies as permissible and legally protected forms of sexual orientation.²⁴

23 Comment in the parliamentary debate on 25 November, 2003.
www.parlament.hu

24 Comment in the parliamentary debate on 25 November, 2003.
www.parlament.hu

From the arguments I have just presented as well as those of certain other Hungarian politicians and NGOs a certain hierarchical preference can be observed in the different grounds for equal treatment policymaking where providing ethnic groups and women with special protection claims a higher priority than the “special rights” or “privileges” demanded by surprise categories like sexual orientation and gender identity. The reluctance to include new “unusual items” into the list of protected categories of anti-discrimination legislation seems to be not only a Hungarian phenomenon. According to an American legal expert in “popular discourse, the distinction between laws prohibiting discrimination against members of certain groups and affirmative action laws that provide special benefits to members of these groups is breaking down. Laws to protect members of different groups from discrimination are decreed with increasing frequency on the basis that they will provide those groups with ‘special rights’ or preferential entitlements. This characterization is used most frequently to describe the extension of the protection of antidiscrimination law to groups that have not previously been protected. The argument that antidiscrimination laws provide special treatment for members of the group that is, or may be, newly protected from discrimination is thus frequently used to oppose laws that prohibit discrimination on the basis of sexual orientation” (Rubin, 1998:568).

On the other hand, it is important to note that a different, positive approach towards the inclusion of sexual orientation and gender identity as protected categories could also be observed in Hungary. The Equal Treatment Act was conceived with this approach, focussing on protecting the rights of precisely those categories of people who appeared to have the highest vulnerability to discrimination gauged on previous court cases. In the view of governmental officials directing the introduction of the new act the two most important practical target groups were Roma people and gays. A government official – who did not wish to be named – reported on lawmakers’ dilemmas concerning the issues of target groups, state responsibilities as well as civil consultation, in the following way:

We wanted an act protecting rights by focusing on redressing grievances; as opposed to ‘actionist’ legislation pushing societal reform through ‘positive’ state measures. The aim was that the law should provide legally aggrieved people with proper satisfaction in appropriate procedures. Therefore we had to rely on professionals who had had experience with these kinds of cases because they could tell where the jurisdiction to be handled by this act might run into problems. Obviously the Hungarian Helsinki Committee was

able to write good consultation material because they had the necessary experience with jurisdiction, while other activists who tend to focus less on rights representation before courts, wrote observations from other approaches which were not of as much use.

... Last year the Ministry of Justice presented the bill for an Act on Legislation (*jogalkotási törvény*) to Parliament making civil consultation [i.e. consultation with concerned NGOs] the general rule: putting bills on the internet where anyone can read and comment on them. [...] The idea to make them public on the internet was also widely criticised [...] but in my view, it is still a better solution than that the ministry should decide whom they choose as their partners. That is a greater danger. In any case, draft bills are always sent to the Hungarian Press Bureau and the idea is that there should be a central government internet site where you can find all the texts to be commented on. As the law making programme of the government is public, it can be followed easily what is on the law making schedule for the next half year. And at least it could be expected from serious NGOs that they should be able to check this site.

... Naturally, there are always proposals [from NGOs] that cannot be realised, but there are many things that can be done not only with very important acts like this one, but also with the various enacting clauses of acts. It would be good for us, too, because they obviously represent views and knowledge different from ours. Still, it must be noted that the responsibility associated with preparing the law cannot be taken over by NGOs [...] because consultation does not mean that composing the main goals would be yielded to NGOs who represent only a part of the views [their own among many]. So if everything would go the way that NGOs want, it would not necessarily lead to embracing all the important social interests. [...] Therefore here [in the civil consultation] the main thing is not to channel the views of their constituencies – parliament is there for dealing with interest channelling. We were not interested in the number of their members but in how useful their comments can be in the codification process. [...] If they bring up professionally good points and they are able to argue for it, like for example in this case when they pointed to transsexuals, what will happen to them, then we replied that “of course, the act should apply to them, too”. When it [inserting gender identity into the list of protected categories] was discovered later during the parliamentary debate, representatives asked what it referred to, and we told them what it meant. There was some pulling of faces – but that was all. [...] It is true that during the preparation work, it was a kind of subsidiary proposition that – exactly because we wanted a rights protection kind of act, instead of a positive state action kind – we focussed on the groups that experience the harshest types of discrimination which is actual infringement of lawful rights. For example, an anti-discrimination act cannot do too much with cases like women who cannot do overtime work because they have to go home to take care of their children. These kinds of problems cannot be tackled by a rights protection type of act. Therefore we concentrated on two target groups: Roma people and people being in a

minority position on sexual orientation grounds. [...] It does not mean that the law does not apply to others, too – but as legally they are the prime targets of discrimination, an external observer could have the impression that this law was especially “tailor-made” for them. [...] For example, female grievances are crucially different from those of gays and Roma people. While Roma people are not allowed to enter to a club or a restaurant, or gays are sacked from their job just because they are gay, it is less typical that one becomes the target of such serious infringements because of being a woman. And what is beyond the handling of these infringements, that is not rights protection any longer but that is positive state action.

... To be precise, this law tries to give a framework for positive state action by introducing the national equal opportunities programme. It is not a coincidence that it has a double title: equal treatment and promotion of equal opportunities. We wanted to emphasize that equal treatment is a right that can be enforced at court, if this right is infringed. So unambiguous specific prohibitions can be composed and forbidding their infringement is a requirement. On the other hand, having equal opportunities is not a right. There are state programmes, state measures to decrease social injustice. For example, work time advantage can be given to women. But this is a positive role the state plays, and not rights protection. [...] And it [positive state action] cannot really be incorporated into the law because issues like who are considered to be the main target groups for a government, for what they provide more money – because it costs a lot of money –, whether it concentrates on people with large families or on the Roma, how they divide the resources, are political issues. These are political decisions made by the government which will also take the political responsibility for these decisions. But it is impossible to say that it is a state obligation that every year a certain amount of money must be spent on, for example, building houses for Roma people. On the other hand, we can say that it is a state obligation to protect the rights of Roma people when they are at risk of being forced out of their houses

... This present law is not about eliminating all discrimination. The goal was not to decrease everybody's disadvantages. [The targets were those who] suffer the most severe infringements. And we did not pronounce it [that the practical target groups are Roma and gay people] but it is a rather closed circle, the circle of lawyers dealing with these issues, and among them it is well known that there are these two target groups. It would not be true to say that these two target groups would be our special interest and therefore we shaped the law to them. Simply the situation is such that they have the greatest need of rights protection. Therefore when we create a rights protection law, it will be most applicable to their situation because it tries to offer a solution to their problems.²⁵

25 Interview with a Hungarian government official who did not wish to be named – by Judit Takács on September 1, 2004. Used by permission.

From this account it is clear that the intention of the Hungarian government officials preparing the new law was to focus on practical legal problems from a specific rights protection perspective. In this context the role of NGOs was to provide practical knowledge accumulated – in this case mainly – from legal practice gained from court jurisdiction, while the government policymakers’ role, especially through the work of ministerial as well as external experts, was to elaborate a theoretical framework that can be effectively applied to practical cases. The main scope of the Hungarian Equal Treatment Act is rights protection: this is the “hard core” to which the “softer” field of promoting equal opportunities was added as a kind of direction indicator. Hungarian law makers seemed to be aware of how difficult – if at all possible – it is to regulate social problems associated with the promotion of equal opportunities by legal means, and they chose to concentrate on more tangible assets.

Focussing on people being in a minority position on sexual orientation grounds as a primary target of the Hungarian Equal Treatment Act – besides the ethnic minority group of Roma – might sound surprising at first but it follows logically from a rights protection perspective: given the fact that there is enough evidence gained from previous court – or legal defence – cases to prove that effective redressing is needed for the legal grievance of certain categories of people.

As far as the inclusion of the “real surprise” category of gender identity is concerned, that can also be explained as a logical extension of applying a rights protection approach. Even though there has not been too much experience accumulated in this field in Hungary as yet, gender identity is a possible ground for discrimination that could have been – and was – taken into consideration.

Finally, it should be emphasised – again – that inclusion of sexual orientation seemed to be in perfect harmony with EU trends reflected by the 2000/78 Employment Equality Council Directive. This fact obviously helped to retain sexual orientation as a protected category despite some of the opposing views. It should also be mentioned that the inclusion of sexual orientation into the list of protected categories was more than just a cosmetic exercise: interestingly, during 2002 the Ministry of Defence eliminated certain parts of two decrees (one from 1996 and one from 2000) according to which homosexuality was regarded as a “personality disorder” and therefore made one unsuitable

for compulsory or professional service in the armed forces.²⁶ The detail of this example shows that the government was in earnest in implementing its anti-discrimination policy.

The appearance of gender identity among the protected categories, on the other hand, cannot be explained by EU trends or expectations: this was achieved mainly because of the effective interest representation strategies applied by Hungarian NGOs, namely the *Háttér Support Society for LGBT People* together with the *Hungarian Helsinki Committee* in the course of public consultations, initiated by the Ministry of Justice that provided real opportunities for the interested actors of Hungarian civil society to voice their views. To be fair, it must also be mentioned that – as can be seen from the minutes of the parliamentary debates – a lot of Hungarian MPs were still quite unfamiliar with the concept of “gender identity” and at least one of them interpreted its inclusion as a scandalous surprise.

Therefore it can be said that the power of determination – on the part of the two above mentioned NGOs as well as that of government officials preparing the act in compliance with rights protection principles – provided us with a new law including progressive elements, even when judged in a modern European context.

III.3.2. Practical application of equal treatment claims I. – Actio popularis

Besides the inclusion of gender identity another important novelty of the new law is the possibility for initiating *actio popularis* e.g. NGOs (societal bodies and special interest groups) can start legal action if the mistreatment is based on a category which is an essential feature of the individual's personality, also applies to persons belonging to a larger group which may not be exactly determined.²⁷

The first such *actio popularis* was initiated by the Háttér Support Society for LGBT People in February 2004. The case was based on the fact that the Károli Gáspár University of the Hungarian Reformed Church – a university established and maintained by the Hungarian Reformed Church but receiving state support and issuing diplomas accepted by the

26 9/2002. (II.28.) HM-EüM joint decree; 28/2002. (X.17.) BM-IM-McHVM joint decree.

27 2003/CXXV. Law 20. § (1).

Hungarian state – published on its webpage that persons propagating and living homosexual lifestyles are *persona non grata* in their pastoral and theology teacher training programs. To prove the discriminative practice the NGO referred to the fact that in the previous year a student was expelled from this university because of his homosexuality. The Metropolitan Court (Fővárosi Bíróság) rejected the case in the first degree, stating that the declaration on the homepage was only an expression of opinion and not discrimination. However, it acknowledged the right of an NGO to start a case on such an abstract basis, and it implicitly accepted that equal treatment legislation also applies to universities maintained by a church and supported financially by the state.

The NGO appealed against the ruling saying that an act cannot be regarded only as an expression of view if a person covered by the protected category suffers disadvantages as a consequence. The second degree court case was also lost by the Háttér Support Society in December, 2004. They are now seeking permission to appeal to the High Court for the case to be reconsidered, and in the event that that is unsuccessful, they will examine the possibility to turn to the European Court of Human Rights.

III.3.3. Practical application of equal treatment claims II. – “Let’s start a family!”

Since same-sex marriage is not possible in Hungary, same-sex partners can emulate some of the conditions of married life only with the help of private legal contracts. The “Let’s start a family!” programme of the Legal Aid Office of Háttér Support Society for LGBT People offers different means for arranging a legal framework to start same-sex family life. These means include a civil union contract for arranging property, financial and personal relationships: encompassing important issues such as providing rights to obtain medical information about the partner’s state of health, and rights of disposal over the partner’s assets when that partner is in a helpless state; preparation of a will; appointment of guardians (if there are children). The existence of this program shows that same-sex couples need to make extra efforts if they want to establish a level of family security similar to that inherently enjoyed by married couples.

Establishing legal frameworks for same-sex family life can be even more complicated when one of the partners is a foreign citizen. The

following example indicates how difficult it can be if persons want to live together with their partners having a foreign citizenship, especially in the case of same-sex partners.

A same-sex male couple has been living together in Hungary for three years. One of them is a Hungarian, the other is a Romanian citizen. They participated in the “Let’s start a family” programme of Háttér Support Society and made a private life partnership contract with each other. After three years of uninterrupted official stay in Hungary, the man with Romanian citizenship applied for a residence permit: he had a work permit, he had a job and he had a regular income exceeding the Hungarian minimal wage. The Hungarian partner declared in a notarised document that he would provide his partner with free accommodation and any necessary financial – or other type of – support. In order to prove that he was capable of providing this support, the Hungarian partner presented a portfolio worth ten million HUF at the court. However, the Romanian partner’s application for a Hungarian residence permit was rejected by the Hungarian Immigration Office. The main problem with the application was that the Hungarian Immigration Act does not acknowledge one’s cohabiting partner to be a family member as opposed to one’s spouse. According to the law: in the course of applying for a residence permit an official declaration provided by a family member for proving that you have subsistence and accommodation is “especially” appropriate.

In this case the legal problem was that if the Immigration Act legally acknowledged a same-sex partner to be a family member, he would have been able to receive the necessary permission without any difficulty – as in fact otherwise everything was in order. But as this is not the case in Hungary, the Immigration Office did not accept the declaration of the Hungarian same-sex partner as he was not considered to be a “proper family member”. In the second degree procedure, the Immigration Office has already accepted the fact that one partner can provide the other with free accommodation – as at this time their private life partnership contract was attached as an official document. However, there were still some problems with the necessary subsistence level.

At this point the Legal Aid Service of Háttér Support Society, which represented the same-sex couple legally, had two possibilities: First, it could be argued that the disadvantageous discrimination between partners and family members in this context was unconstitutional. However, applying this approach would not promise a practical solution

in the short run, and time is a very important factor when people's everyday life becomes impossible. Secondly, according to Hungarian law in these procedures the principle of free proof has to be applied, e.g. if the law does not order otherwise, any proof can be used freely. The lawyer of Háttér Support Society chose the second option, while also pointing to the text of the Immigration Act referring to the necessary declaration that is "especially" appropriate if provided by a family member. This wording implies that declarations provided by people who are not family members can also be – if not "especially" then just simply – appropriate.

In the meantime the Equal Treatment Act came in force, on the basis of which this case can be interpreted as an example of indirect discrimination, e.g. a seemingly neutral condition, provision, or practice that brings a person covered by a protected category into a substantially more disadvantageous situation than a comparable situation of another person not belonging to the protected category. According to the Equal Treatment Act, it is sufficient to prove that a person belonging to a protected category is brought into a disadvantageous situation therefore in this case it would be the obligation of the Immigration Office to prove that they were not discriminating.

In the course of an administrative procedure the Metropolitan Court (Fővárosi Bíróság) ruled that the previous decision of the Immigration Office should be repealed and that they should start a new immigration procedure. However, the court's ruling was based on the observation that the state of affairs was not explored sufficiently, and it did not use the indirect discrimination argument at all.

III.3.4. Practical application of equal treatment claims III. – "The pension case"

A good example that can show the influence of European institutions on Hungarian jurisprudence is the following. In 2003 a person died who had been living in cohabitation with his same-sex partner since 1991. The surviving partner applied for a widower's pension. (As there is no registered partnership for same-sex couples in Hungary, the existence of the partnership had to be proved by a special official certificate.) The National Pensions Authority (Nyugdíjfolyósító Igazgatóság) rejected

the pension application in the first and second degree arguing that according to the social security law in the case of the death of one partner in a cohabiting partnership not having children, the surviving partner is eligible for a widow's or widower's pension only if ten years of uninterrupted cohabitation can be proved. However, the authority argued, as the modification of the Hungarian Civil Code legalising same-sex partnerships (following the decision of the Hungarian Constitutional Court in 1995)²⁸ became operational only in 1996, the ten years cohabitation period could only be completed in 2006.

The Háttér Support Society encouraged the surviving partner to let their lawyer represent him and start an action in the Employment Court of Budapest (Fővárosi Munkaügyi Bíróság), arguing that the law maker's intention in 1996 was to end discrimination in 1996, not in 2006. Therefore any period of cohabitation preceding the legislation should be taken into account. Furthermore, the lawyer of Háttér Support Society showed that a different interpretation of the legislation would lead to consequences at loggerheads with the Constitution.

This case was not only prosecuted at court. Simultaneously, a coordinated lobbying offensive was launched. In October 2003 three NGOs (the Hungarian Civil Liberties Union, the Háttér Support Society and the Hungarian Helsinki Committee) issued a protest declaration. The Minister without Portfolio responsible for equal treatment affairs was approached by activists, leading her to publicly express an opinion in the case saying that she considered it discriminatory. The Minister also turned to the Hungarian Prime Minister's Office with a view to obtain a government order ending the ambiguity of the social security law. At the same time Háttér Support Society escalated their lobbying to the European level by contacting ILGA-Europe (of which it is a member) and asking them for support in the form of a letter addressed to the Hungarian Prime Minister and government. In this letter ILGA-Europe asked how it was possible that during the final stages of negotiations on Hungary's accession to the European Union and in the course of codifying national equal treatment legislation of a high European standard, a public body under the direction of the government – the National Pensions Authority – can openly discriminate against same-sex couples.

The government responded by issuing an executive order effective from January 1, 2004 acknowledging that any period of cohabitation prior

28 For more details see: the "III.2. Fighting against the legal discrimination of LGBT people" section.

to 1996 is to be taken into account in the assessment of widow's or widower's pensions rights. This order provides an underlying assumption namely that if at the time of the death of a partner, the partners are registered at the same address, then the burden of proof is reversed and it is to be assumed that at the time of death the cohabiting partnership existed unless facts emerge that show the opposite. This develops the Constitutional Court's factual legal relationship into an implied factual relationship based on registered address: thus the registered address carries certain rights with it. Although Háttér Support Society was delighted with this victory, it was decided to continue the case at court asking a retrospective judgement covering the period before the government order came into effect on January 1, 2004, as the case had been before court since February, 2003. The court ruled in favour of this request in September, 2004.

From the point of view of developing anti-discrimination and equal treatment legislation and policymaking the analysis of this case raises two important points. In the first place a precedent was created with potentially far reaching consequences in other fields of law (especially in disputes involving probate law between relatives and surviving partners of the deceased). In the second place this judgement can be interpreted as a symbolic compensation for same-sex partners as it creates a retrospectively valid legal framework covering a period when suitable legislation for same-sex partnership was nonexistent.

This example also clearly illustrates that the existence of internationally operating NGOs acting for and on behalf of their national constituencies can create a new dimension of European-wide activism towards sound policymaking and implementation.

IV. Putting equality into practice

In this chapter I will focus on the main nodes of the processes through which theoretical and legal opportunities provided for equal treatment of LGBT people can be transformed into social practices. After presenting some basic concepts, such as minority and identity threats, being part of my theoretical toolkit, I will identify fields of action in need of further development in Hungary. An analysis of international experts' views based on their experiences with equal treatment policies already in place will also be presented in order to place the Hungarian LGBT policymaking issues in a broader perspective.

IV.1. The use value of the minority concept

The modern social movement(s) representing the interests of LGBT people that started as a struggle against legal discrimination of men enjoying same-sex attraction at the end of the 19th century in Germany was/were renamed and restructured several times during the last century. At the beginning, for historical-patriarchal reasons, the fight was focussed only on men as women with same-sex attraction or non-conventional sexual desires were unimaginable, and/or simply their activities, thoughts and desires did not enjoy the same social significance as those of men. Later men's and women's rights to be different from the majority's heteronormative expectations started to be heard, gay men and lesbian women started to fight in coalition in the various scenes of an increasingly internationalising gay and lesbian movement. Eventually, there was a growing awareness within the gay and lesbian movement applying political strategies that operate with more or less monolithic identities that there are not only problems with definitions of homosexuality as well as heterosexuality but there are

also problems with the lack of acknowledgment of the difference within “the community”. Revisiting and tackling any suspicious concepts such as “normal”, “legitimate”, “dominant” became targets of queer criticism (cf. Halperin, 1995:62). As a result, the gay and lesbian movement had to face its own oppressive potentials, and as an act of possible self-criticism in certain places the G & L movement extended into LGBT or even LGBTQ – lesbian, gay, bisexual, transgender, queer – representation, at least at a rhetoric level.

However, there can be serious practical difficulties when trying to represent the interests of a very heterogeneous LGBTQ crowd. It is hard to campaign for rights and, at the same time, emphasise culture-specific interpretations, historically changing roles and fluid identities. It is also hard to introduce new, previously unvoiced and unheard claims – such as claims for transgender rights – into already very densely populated political agendas. Assumptions that not sex, but gender can be the fixed component of one’s self – “the soul is fixed, not the body!” –, or that there can be several other ways to express one’s gender identity outside the traditional dualism of being ‘he’ or ‘she’, are still “frightening” for many. Therefore in the LGBT front parallel to “extensions” to embrace broader constituencies, we can witness the successful functioning of organisations with “clearer profiles”: either focusing exclusively on lesbian and/or gay, or on transgender and/or transsexual issues.

LGBT people are often (re)presented as members of minority groups, i.e. social groups characterized by a relative powerlessness regarding their interest representing abilities. For example, a report published by Hungarian lesbian and gay activists in 2001 points out that “statements and actions that would be unthinkable if directed toward ethnic or religious minorities are commonplace with regard to lesbian, gay and bisexual minorities. [...] Hungary is characterised by] a social climate in which very few lesbians, gays and bisexuals dare to live openly, and in which an extraordinarily high number of lives are ruined because of discrimination and homophobia. Family ties loosen, students are bullied, gay men are bashed, lesbians and gays are forced to leave their jobs – something they almost always do in silence, not daring to complain”.¹

1 Sándor B. (2001): Report on the Discrimination of Lesbians, Gay Men and Bisexuals in Hungary. Háttér Society for Gays and Lesbians in Hungary and Labrisz Lesbian Association. Budapest, 2001. www.policy.hu/sandor/report.html

Lesbians and gay men comprise one of the least recognised minorities in Eastern Europe. Their rights are violated in state legislation, judicial decisions and everyday practice. Even worse, they are not even conceived as people who are systematically oppressed as a group.

Csaba Tabajdi (Hungarian member of the European Parliament, member of the Hungarian Socialist Party, rapporteur of the Council of Europe on the *Situation of lesbians and gays in Council of Europe member states*² leading to the EC Recommendation 1474 in 2000³) argues that as a result of the struggle of human rights and gay rights organisations in Hungary the scope of the political minority concept has been gradually extended to include not only ethnic and national minority groups, who were considered to be the only “true” minorities at the time of the systemic change, but also women, religious minorities, disabled people and also since the beginning the 1990s sexual minorities, eg. lesbians, gays, bisexuals and transgender people:

This comprehensive minority concept was codified in the form of the new Equal Treatment Act. However, certain distinctions should be made when referring to minorities. For example, equal treatment is a necessary but not sufficient condition for national-ethnic minorities, while for sexual minorities equal treatment together with prohibition of discrimination is an appropriate social condition, and they do not demand preferential treatment as national-ethnic minorities do.⁴

Minority can be seen as a useful – political – concept in a society or in a phase of socio-cultural, historical development when/where non-conventional sexual interests or gender expression have discriminative consequences. In places where normative heterosexuality is losing its social organising power, non-conventional sexual habits, interests, orientation based identities are not forced to develop, or are at least not likely to develop into *threatened identities*. Similarly: in places where

2 Situation of lesbians and gays in Council of Europe member states, Doc. 8755, 6 June 2000. Report, Committee on Legal Affairs and Human Rights, Rapporteur: Mr Csaba Tabajdi, Hungary, Socialist Group – <http://assembly.coe.int/Documents/WorkingDocs/doc00/edoc8755.htm>

3 Recommendation 1474 (2000) “Situation of lesbians and gays in Council of Europe member states” – <http://assembly.coe.int/Documents/AdoptedText/TA00/EREC1474.htm>

4 Interview conducted with Csaba Tabajdi, 2004 July 1. The edited version of the interview was published as Láner László: “A meglegkérdeés megkerülhetetlen” – Interview with Csaba Tabajdi. *Mások*, 2004 August pp. 14–16.

normative gender role concepts and gender identities are losing their social organising power, non-conventional gender expression won't necessarily lead to the development of threatened identities.

Here we can refer to theories of social identity and social representation as the broader framework of analysis. These theories emphasise the socially constructed nature of reality, which is represented by social representations developed in social interaction processes (cf. Moscovici 1976). The common sense content of social representations reflect the ways in which individuals and groups interpret reality, and these reality interpretations serve as a base for building up individual and group identities. The interaction of social representations and identities is a central feature of Breakwell's theory on identity processes: in order to understand identity threats hindering the effective functioning of identity processes, and strategies applied to cope with these threats, it is necessary to examine social representations, being synonymous with social beliefs and social attributions.

Breakwell emphasised the importance of those factors which can endanger the basic principles of identity processes (i.e. assimilation-accommodation and evaluation). Therefore in the case of developing threatened identities the distinctiveness and the continuity of one's identity, one's self-esteem or, in some cases, one's desire for autonomy can be threatened (cf. Breakwell, 1986:23).

If we interpret same-sex desire and/or non-conventional sexuality as possible bases for developing threatened identities, the social representation of homosexuality plays a very important part in this process. From previous research findings it turns out that the social category of homosexuality gains its identity constructing capacity mainly from the negative contents of the social representation of homosexuality, which negative contents appear as identity threats (cf. Takács, 2004). In this context homosexual identity seems to be much more a social fiction produced by social discrimination than one of the main supporting pillars of individual self-identity.

In the case of gender expression non-conformity, gaining social acceptance for a revised identity can be highly problematic. Transgender and transsexual people can suffer from the lack of continuity in their identity, a lack of self-esteem closely related to the lack of their social acceptance as well as from their overemphasised and unwanted distinctiveness (cf. Breakwell, 1986).

Hungary can be characterised by a lot of threats to cope with when realising one's non-conventional sexual and/or gender identities. Therefore here the political concept of minority can be applied when trying to create a more tolerant, identity threat free social environment for people with same-sex sexual desires and experiences, and/or non-conventional gender expression, developing – sometimes changing or fluid – identities, based on these desires and experiences.

Though minority is a term usually referring to ethnic or national minorities, it is recognised by LGBT and human rights activists that certain equal treatment opportunities and anti-discriminative guarantees can be gained by applying the minority concept to gay, lesbian, transgender people and/or others characterised by sexual and/or gender non-conformity.

However, using the minority concept can also have disadvantages: It does not only imply the acknowledgement of the relative powerlessness of the social groups in question but it also has to operate with fixed – identity – categories, as if anyone could come up with “the correct” definition of being gay, lesbian, transgender etc.

In short, the use of the minority concept can reflect a practical political strategy towards gaining equal rights and – at least temporary – shelter from discrimination, but it naturally makes more sense in a social context that can be characterised by pronounced inequalities, where there are still a lot of things to fight for.

IV.2. A lot of things to fight for...

In Hungary there are various levels at which LGBT people can find themselves in a disadvantageous or discriminated situation that affects them specifically because of their LGBT status. At the individual level a typical case can be discrimination suffered by LGBT people at the workplace, when one is fired or harassed because of one's LGBT status; or in child custody cases when a parent's sexual orientation can be used to put him or her in a “bad light”.

At the level of life as a couple there can also be several problems to overcome: when same-sex couples want to establish a certain level of secure family life, they must make extra efforts to cover various aspects of married and family life including inheritance, pension, child custody,

guardianship, residence permit, as well as other property related and financial issues.

At the community level it can be hard to establish formal organisations for LGBT people. For example, in 1994 the Rainbow Association was refused registration as an association by the Metropolitan Court. The main argument of the Metropolitan Court was that persons under eighteen should not be allowed to become members of an organisation advocating the rights of homosexuals because, in their view, creating “an infrastructure necessary for institutionalised homosexual life bore the risk of causing the crime of ‘unnatural sexual conduct’ (same-sex sexual activity with a person under eighteen) to be committed” (Farkas, 2001:572). Since this decision – the main argument of which was maintained by the Hungarian Constitutional Court as well as the European Court of Human Rights – Hungarian LGBT organisations have to struggle with the shadow of an alleged “child molesting potential” when trying to formalise themselves.

Previously informal LGBT groups nowadays increasingly tend to choose the option of becoming formal NGOs having a personality in law, because in a more formalised setting they have more chance to increase their visibility, apply successfully for grants supporting their activities, function in a more effective way and provide useful frameworks for individual LGBT identity developments. Formal organisations tend to raise their voice more effectively against homophobic or transphobic statements by politicians, scientific experts or media actors often targeting general categories like “the homosexuals” or “the transvestites”, and not particular individuals. However, even those formally established LGBT organisations, which fulfil functions for public use: for example, provide telephone counselling for people being in a psychological crisis situation or in need of HIV prevention information, lack state support.

In 2001 gay and lesbian activists collected practical examples of discrimination by state and private actors in Hungary. They pointed to eight problem areas: Discrimination in the workplace in form of dismissal, discrimination with respect to employment opportunities, harassment in the workplace, and discrimination in spousal remuneration benefits; Gay bashing; Homophobia and discrimination by public authorities and institutions (such as the police); Homophobic reactions and opinions of politicians; Homophobia in the media; Psychology and psychiatry; Youth (being especially vulnerable); Legal and judicial practices.

They also emphasised the dangerous joint effect of these discriminative practices:

Politicians, the media and psychologists are in perfect agreement that gay, lesbian and bisexual 'lifestyles' are unnatural, deviating from the norms of society and nature, and that gay men, lesbians and bisexuals are sick people – and these politicians and other actors have the power to broadcast their opinion to the general public. [...] Judges and criminal psychologists are strongly influenced by homophobic messages that are disseminated by politicians, the educational system and the media. Consequently, their policies and decisions adhere strongly to stereotypical notions of lesbians, gay men and bisexuals and largely regard homosexuality as an illness.⁵

In their recommendations they pointed to the need to reform the Hungarian Penal Code, to introduce anti-discrimination legislation applying to both the state and private sectors, and to combat society-wide homophobia by establishing educational policies and programs for children, teenagers, and public employees such as law enforcement officers, administrators, judges and politicians. They also recommended the inclusion of sexual orientation discrimination into the 70/A § of the Hungarian Constitution; the recognition of unmarried heterosexual and same-sex partnerships in a legal framework that is closer to marriage – i.e., create the possibility of registered partnerships; guaranteeing equal rights for same-sex partners, making double adoption and artificial insemination possible; providing legal protection for children with homosexual parents by legalising adoption by non-biological same-sex parents; the penalisation of homophobic political statements and incitement to homophobia; directing necessary action toward the medical and psychological professions in order to ensure the full declassification of homosexuality as an illness in all guidelines and practices; organising training programs for judges, law enforcement officers and psychologists on the issues of women's rights and homophobia; supporting the projects of lesbian and gay organisations that seek to combat society-wide homophobia and to provide assistance for victims of discrimination.

By 2005 some of these grievances were litigated – such as reforming the Hungarian Penal Code by eliminating the most discriminative clauses affecting same-sex relationships, and introducing the Equal

5 Ibid. p. 36. www.ilga-europe.org/m3/equality_ac/disc-study_hungary.pdf

Treatment Act in 2005 –, nevertheless most of the recommendations are still awaiting implementation.

In Europe we can find similar experiences to the Hungarian situation as far as the various levels of disadvantages experienced by LGBT people are concerned. Even in countries which can serve as models in LGBT emancipation for other European countries – such as the Netherlands, the first country in the world where same-sex marriage and same-sex adoption became possible, or Sweden, the only country in the world where there is a specialised ombudsman office established focussing only on sexual orientation based discrimination – there are still a lot of complaints. According to Hans Ytterberg, the Swedish Ombudsman against Discrimination on Grounds of Sexual Orientation discrimination can be found in all fields of life:

When we look at complaints it is really about everything and anything. It is about people who have been harassed at their workplace, people who have not been allowed to continue in their workplace, because the employer has found out that they are gay or lesbian. It is about students in schools who are being discriminated against, either by staff or teachers or bullied by friends and the school doesn't do anything. It is about commercial establishments like restaurants, travel agents, landlords who will not allow a same-sex couple to rent an apartment, travel agents who will not sell family reduced fare tickets to same-sex couples. It is about pension schemes, employment benefits. It is really anything and everything. [...] Discrimination on the grounds of sexual orientation is everywhere.

Kees Waaldijk, a Dutch legal expert of sexual orientation discrimination also emphasised the same point:

Some issues which come up very often are health issues: the right to visit a hospital, the right to take decisions if the partner cannot. Many hospitals in many countries only accept a married partner. [...] It's the same for prisons: if you go to prison, then the partner can't visit. So there's all this discrimination. It's almost always indirect discrimination, the rules are only made for heterosexual married couples and homosexuals fall outside it. Those rules you also have in the financial services. If you want to have a bank loan, they will take your partner into account only if you live in a heterosexual marriage. Otherwise they don't take your partner into account: so you can borrow less, or you have to pay more for insurance, and in some social security schemes your partner is not covered. So there is this whole range of public social services and financial services in which it plays an important role. There is in the field of commercial goods and services a typical case, and the first court case

on sexual orientation discrimination in various countries – I think that is true for Spain, for Finland, for Sweden, for Ireland – was kissing in a bar or restaurant, and then being asked to leave the place or actually being pushed out. So that is not employment. You go out and you have a romantic or whatever kiss on the dance floor, and it is a public scandal. They say: [...] “We’re not against homosexuals, but our other clients don’t like it.” So that is a very typical case and that happens often. But it is difficult to say where the main problem is, it can be in all fields.

In countries where legal emancipation of LGBT people is considered to be completed by the national government, like in the Netherlands, there can be problems deriving from the fact that the government is reluctant to deal with the “already solved” LGBT emancipation, while practical implementation issues are delegated to the regional or local level where state institutions are often unprepared to deal with such tasks. According to Judith Schuijf, Senior Consultant of the Dutch Expertise Centre on Gay and Lesbian Policy Issues, the government wants them to cater mainly for local and regional policies:

...they said that the framework of gay and lesbian emancipation in the Netherlands was complete – we do not agree with that, but that is the official version according to the ministry – and what was lacking was local-level implementation.

Tania Barkhuis, consultant of the COC Netherlands, the Federation of Dutch Associations for the Integration of Homosexuality also pointed out that there were several issues that would need further attention in the Netherlands:

In Holland we are now in a situation where the national government said that these issues on, for example, community centres, family of choice support, were local issues and should be locally addressed. So they have placed the burden on the local municipalities and they said, well, then we are finished and we can stop. We have persuaded them that they still have to direct local activities because even though Amsterdam or Rotterdam may be very obliging in that, if you are lucky enough to be born in a village somewhere in the East of the Netherlands then there is a big chance that your local municipality will not be complying with those needs, so there is still a need for supervision and development from the national government on these issues.

... We have quite some problems with the government. As you may know, marriage has been opened up to same-sex couples three years ago and since then the government believes that gay liberation is finished, we can cross it off, and we don’t need a budget any more, so we’re in the

clear. We have been trying to persuade the government that that is not the case. Especially within the migrant communities homosexuality is still a very important taboo and also a very important issue. Next to that, for instance, if you look at the sports situation the most used screaming word in football stadiums today is “gay, gay, gay”, and you do not come out as a professional football player. [...] We were trying to express to the Ministry of Welfare that there are quite some issues that have not been resolved, even in the Netherlands and although we do have gay groups within the trade unions, within the army, within the police, there is still a lot of work to be done.

Examining LGBT rights issues on the global level we must observe that there are still many countries where legislation – for example, in the form of “sodomy laws” – makes LGBT life impossible. However, in the view of Scott Long, director of the Lesbian, Gay, Bisexual and Transgender Rights Project of Human Rights Watch, problems go much beyond the criminalisation issue:

There are anywhere between eighty and a hundred sodomy laws still in existence. The counts vary: Egypt used to be listed by ILGA [International Lesbian and Gay Association], for instance, as not criminalising homosexuality, but it is quite apparent that if you go back and look at Egyptian law, since at least 1975 there has been an interpretation of the existing statute which takes this one term in Egyptian law and says that it describes homosexual conduct between men. So I think there is a tendency to go out and look for laws that say homosexuality and if you don't find the term you assume it is legal, whereas in fact it is not. But of course, the problems go much beyond the criminalisation of homosexuality. Even before you get to the question of social discrimination, economic discrimination, there are other laws which can be used to make certain kinds of gay and lesbian activism or life impossible. [...] There are places where you have laws on public decency or public immorality or even laws which penalise wearing clothing of the opposite sex. In South Africa, which has this incredible liberal constitution and which is on the verge of legalising same-sex marriage, at the same time [yet] at the gay pride parade last year there was an attempt to prevent drag queens from marching in the gay pride parade because there is a statute against fraud which prohibits wearing clothing of the opposite sex in public. It is just ludicrous, but it is an example. Those laws can be taken very seriously in some countries. In many African countries, women are not allowed to go into public offices wearing skirts above the knee. When you have that kind of control, that kind of policing of people's appearance and the sexuality that is conveyed by their appearance then of course drag queens are in a class that is really beyond the pail.

In the ideal case legal emancipation of LGBT people would go together with social emancipation – almost as if the latter would be the logical heir of the former. In reality, social emancipation is not brought about by simply eliminating discriminative clauses of penal codes or by providing legal frameworks forbidding discrimination. Social emancipation of LGBT people is exactly about transforming their theoretically existing equality into everyday practice. In order to examine the possibilities of advancing the social emancipation of LGBT people in Hungary, I will analyse the international policy context by highlighting problematic issues as well as good practices.

IV.3. Modelling the international policy context

In the following part of my paper I will give an overview on how international experts and stakeholders analyse the interwoven issues of LGBT legal emancipation, political emancipation and citizenship, social emancipation and cooperation, awareness-raising, and policy implementation at different levels. In my overview I will rely on information and opinions gained from research interviews I have conducted with the following international experts in the course of my IPF policy research project in 2004–2005, most of whom are actively involved in sexual orientation and gender expression based anti-discrimination and equal treatment policymaking:

Tania Barkhuis, Consultant of COC Netherlands, the Federation of Dutch Associations for the Integration of Homosexuality – (T. B.);

Florin Buhuceanu, Executive Director of ACCEPT, Romania – (F. B.);

Barry Fitzpatrick, Head of Legal Policy and Advice at the Equality Commission for Northern Ireland – (B. F.);

Gert Hekma, Lecturer of Gay and Lesbian Studies at the Department of Sociology and Anthropology of the University of Amsterdam – (G. H.);

Scott Long, Director of the Lesbian, Gay, Bisexual and Transgender Rights Project of the Human Rights Watch – (S. L.);

Judith Schuijf, Senior Consultant at the “Homo Emancipatiebeleid”, the Expertise Centre on Gay and Lesbian Policy Issues in the Netherlands – (J. S.);

Anette Sjödin, Project Coordinator of RFSL, the Swedish Federation for Lesbian, Gay, Bisexual and Transgender Rights – (A. S.);

Gunnar Svensson, Project Manager of “Norm-giving diversity”, a project within the Equal program focussing on the situation of LGBT personnel within the Church of Sweden, the Swedish Police and the Swedish Armed Forces – (G. S.);

Hans Ytterberg, Ombudsman against Discrimination on Grounds of Sexual Orientation in Sweden – (H. Y.);

Kees Waaldijk, Senior Lecturer at the Faculty of Law of Leiden University, Head of the European Group of Experts on Combating Sexual Orientation Discrimination – (K. W.);

Robert Wintemute, Professor of Human Rights Law at King’s College in London – (R. W.).

As a general framework I will apply a three level model: anti-discrimination policy making is the first level, promoting equality of opportunity the second, and promoting diversity is the third level.

Anti-discrimination policymaking can usually start after penal codes have been reformed by eliminating the main forms of direct legal discrimination targeting LGBT people. The main goal of the anti-discrimination policymaking process is defining certain segments of the population as being in a disadvantageous situation to be protected, and introducing the idea that discriminating them is wrong, and furthermore punishable by law. In theory the anti-discrimination principle is a symmetrical one applying to members of both social minority and majority groups but in practice it is applied most of the time to people characterised by socially disadvantaged minority positions.

In a sense the first level is what I would call highly symmetrical in the sense that technically the anti-discrimination principle is going to apply as much to men and women, to whites and blacks, to straights and gays, but really that is a sort of formal equality. But behind each of these anti-discrimination grounds, not necessarily every one, but most of them, there is a clear much more collective issue in terms of groups that suffer particular disadvantage because of the prohibited factor, particularly when you are looking on a policy level, or if maybe you are an equality agency. Although you will technically be even handed, you will put most of your resources into questions of disadvantage suffered by women, by racial minorities, by gays and lesbians... (B. F.)

As anti-discrimination policymaking has a less direct focus on social disadvantage, than positive – or affirmative – action at the level of promoting equality of opportunity, it has the potential to address the main issue of social inclusion in a broader sense in society at large:

It is much easier on a public relations level to sell anti-discrimination simply because it is seen more as a human rights issue and also to some extent the advantaged group can buy in: [...] you sort of buy people in by saying this applies to you as well. The vast focus of policymaking and resources and ultimately litigation in the legal system is going to be in relation to the disadvantaged groups because essentially you are using equality law as a vehicle for social inclusion by removing disadvantage: challenging, tackling disadvantage and seeking to remove it. (B. F.)

The second level is promoting equality of opportunity, often manifested in the form of taking positive action measures directly in favour of the disadvantaged groups. At this level the main focus is on systemic discrimination embedded in the system. For example, only after identifying and uncovering indirect forms of discrimination can one start introducing positive action measures in an effective way. Mainstreaming is a method that can be effectively applied at this stage: “Mainstreaming equality is the systematic consideration of the particular effects of all policies, at the point of planning, implementation and evaluation, on disadvantaged groups. Equality is the goal. Mainstreaming is a process that aims to achieve the goal. Mainstreaming should bring consideration of equality issues right into the core of all policy work, so that they are central to all activities: policy development, research, advocacy, dialogue, legislation, resource allocation, the planning, implementation and monitoring of programmes and projects etc. This should come not only from ‘equality specialists’ but should involve everyone working in any aspect of policy” (SCVO, 2002).

We can distinguish micro level mainstreaming concentrating on particular policies and macro level mainstreaming that focuses on the overall position of certain disadvantaged groups – such as women, ethnic minorities, disabled people, or LGBT people – in society. In some cases the mainstreaming analyses can result in the recognition of the necessity to introduce positive action measures:

You may at that macro level [of mainstreaming] determine that women are still so significantly under-represented in certain labour market positions or ethnic minorities are significantly disadvantaged in the education

system – and you could still try to take the micro level to see what can be done at that level, but you may actually determine that the solution is not simply to alleviate disadvantage, but to actually take positive measures to encourage ethnic minorities into the education system. (B. F.)

Mainstreaming and the rights based approach characterising the anti-discrimination policymaking stage can also overlap in those instances when the existence of anti-discrimination legislation leads social actors to pursue a mainstreaming-like self-analysis in order to avoid litigation against them:

[Mainstreaming] is a very different type of energy to a rights based approach, though there can be a large overlap between them, if a rights based approach actually does raise consciousness outside the judicial process, simply by saying: “Oh, this is now unlawful. What are we going to do about it?” For example, any employer or provider of services who is subject to the indirect discrimination principle should actually be looking to see whether or not what they do places, say, gays and lesbians, at a particular disadvantage – because somebody may, somewhere down the line decide to litigate against them. So a rights based approach is clearly not just about what happens in the courts and winning court cases. Although the rights based approach that does not have the ultimate possibility of going to the judicial process – in a judicial process that understands the issues and can actually come out with the proper solution – is not worth much. (B. F.)

The mainstreaming method can also be applied at the third stage which is often referred to as promotion of diversity characterised by the aim to find an optimal balance between respecting – as well as celebrating – diversity while seeing it as an integrated part of social reality.

... there has to be some sense of balance between including disadvantaged groups and respecting the fact that there is very significant diversity in society and so the system to some extent has to acknowledge diversity. Now to some extent diversity has been hijacked by a sort of American notions of human resource management, it is almost like: we cannot sell equality to business but we can sell them diversity. That is useful because business is saying: well, we are going to get better quality people if we respect diversity, our customers are diverse therefore we have to be seen to respect diversity to maximise our market and that is all quite positive. But it also involves respecting diversity by saying that gays are not straight, that women are not men. [...] So the system has to, first of all, have as its floor anti-discrimination, this is very important. But it has to accept that in reality most of the discrimination is asymmetrical: it is directed against

disadvantaged groups and the focus has to be on the disadvantaged groups and redressing that disadvantage. And the groups are disadvantaged because they are different and you have to be able to get a balance between including disadvantaged groups in workforces and in society without actually destroying that sense of diversity and allowing for minority groups to maintain their own culture: allowing women to be different to men, allowing gays and lesbians, obviously in a much more integrated way, to still be different and that has to be where the three levels lead to.

IV.3.1. Legal emancipation

In Europe – and especially in the European Union – legal emancipation of LGBT people has been articulated as a human rights issue and manifested in the fight against sexual orientation and gender expression based discrimination. “Gay and lesbian rights” can therefore be defined as human rights that are specifically needed for gays and lesbians:

There are general Human Rights that are well established and apply to all lesbian women and all gay men and these are fairly obvious: right to life, freedom from torture, freedom from arbitrary arrest by the police, right to a fair trial, freedom of expression, assembly and association, all those rights should be available without any discussion. Lesbian and gay rights to me mean rights that heterosexual people don't need. So it's going beyond those basic rights I have just mentioned. The starting point was nothing, because we had criminal laws [prohibiting or discriminating against same-sex sexual activity] in many parts of Europe. (R. W.)

The arguments most commonly used in challenges to sexual orientation based discrimination brought under the European Convention on Human Rights and the United States Constitution are the following:

1. An immutable status argument: because many gay men and lesbian women believe that their sexual orientation (as direction of attraction) is unchosen, sexual orientation may be an ‘immutable status’ like race or sex.
2. A fundamental choice argument: because every person's sexual orientation (as direction of conduct) is chosen and is extremely important to their happiness, it may be a ‘fundamental choice (or right or freedom)’, like religion or political opinion, and come wholly or partly within a specific ‘fundamental right’ such as freedom of expression, association or religion, or a residual and more general ‘right of privacy’ or ‘right to respect for private life’.
3. A sex discrimination argument: because the acceptability of the direction of a person's emotional-sexual attraction or conduct depends on

their own sex, sexual orientation discrimination may be a kind of sex discrimination, like sexual harassment or pregnancy discrimination.” (Wintemute, 1995:17)

Among these three arguments the sex discrimination argument seems to be the least popular one:

... it has almost never been accepted by courts, because once they start analysing things in terms of sexual orientation – lesbian and gay versus heterosexual – , they cannot get away from that analysis. They cannot just say, let’s throw those terms away for a minute and just think about women and men and their choices: do both sexes have the same choices? If you did it that way, you would see clearly that there is sex discrimination, but the courts don’t like it. So that analysis is theoretically interesting, but it has largely failed. (R. W.)

In the United States the perception of sexual orientation as an immutable status became popular at the end of the 1960s – marked by the Stonewall riot –, when “lesbians and gay men moved from assimilationism to an ‘ethnic’ model of oppression and counterculture, perceiving themselves as akin to a racial minority in a white racist society, drawing on civil rights language, developing equivalent ‘ethnic’ explanations of oppression such as ‘homophobia’ to strengthen the parallel with racism” (Evans, 1995:188). However, in Europe the fundamental choice argument seems to be the most favoured one, as it is also indicated by the decisions of the European Court of Human Rights:

Particularly in the U.S. the idea of immutable status is popular because it allows for analogies to race in particular, but the reason that I reject that [...] is the problem that most controversial issues relating to sexual orientation involve chosen conduct or behaviour. You could get the Roman Catholic Church to accept immutability, because they say respect the homosexual person, they just say don’t do it, don’t practice! So it doesn’t get you very far. For that reason, in the European context, the starting point has been the right to respect for a private life, and that has lead to the first decision in 1981 in the Dudgeon case. Now, a lot of people, initially, when they read that, they think: oh, that is very limiting, private life means that you can have private sexual activity and nothing else, no public manifestations. But that doesn’t necessarily follow, because the European Court of Human Rights has its own distinct approach to private life, but there are some similarities with the U.S. Supreme Court’s cases. In the U.S. they have a well developed concept of privacy of decisions as opposed to privacy of spaces, so there are some decisions that are considered private in the sense of being personal,

intimate, that should be respected, even where they have public manifestations.

... private life is not as limiting as people think. The way the legal argument works under the European Convention on Human Rights is that first in the Dudgeon case in 1981 the European Court of Human Rights said that an individual's sexual life is part of their private life. That was a big step there and then. In 1997 in the Laskey case they said that sexual orientation is part of private life, an intimate aspect of private life. I would say that that concept of the Court has been written into article eight, so that is the argument that has succeeded and now it is just a question of applying it.

... That is where we stand at the moment: pretty much we have a principle of non-discrimination. (R. W.)

In cases where a national, federal or state constitution explicitly prohibits sexual orientation based discrimination, the application of none of these three arguments is necessary. However, it is important to note that there is only any real chance to put sexual orientation into the constitution if it is being revised or a totally new one is being adopted, therefore in most of the countries it is not a very promising expectation to find the prohibition of sexual orientation based discrimination in the constitution. In Hungary, for example, in 1989 a new general anti-discrimination clause was inserted into the old constitution but sexual orientation based discrimination is covered only by the general umbrella term of "other situations".⁶

State level constitutions prohibiting sexual orientation discrimination were introduced first in two Brazilian states – in Mato Grosso and in Sergipe – in 1989. The Brazilian example was followed by two German states: Brandenburg in 1992, and Thuringia in 1993. The first national level constitution that included reference to sexual orientation discrimination was the South African Act No. 200 of 1993, Section 8(2) (cf. Wintemute, 1995:265). At present there are altogether four countries having national constitutions prohibiting sexual orientation based discrimination including Ecuador (1997), Fiji (1998) and Portugal (2004).

Nevertheless, it can still remain problematic to decide what sexual orientation based discrimination covers exactly: whether it refers to discrimination against same-sex sexual activity, or it also covers discrimination against same-sex couples. While in Europe the decriminalisation of same-sex sexual activity of consenting adults has been becoming a legal norm cultivated by the European Union as well as the Council of Europe, there are still some more or less interwoven

⁶ For more details see: Chapter III.3.

problem areas in the field of legal emancipation of LGBT people including the legal treatment of LGBT couples and parenting rights. Same-sex marriage, marriage of transsexual people, individual adoption by openly gay men or lesbian women, or joint adoption by same-sex couples are still controversial legal issues that are addressed only in a few countries in Europe and worldwide:

The only areas that remain controversial or unclear are with regard to treatment of couples compared with married couples. That is the next stage. If you are a same-sex couple and you are denied a right because you are not married you can – without challenging the exclusion from marriage – make an indirect discrimination argument. [...] The final question with couples will be access to marriage. But that needs a bit more evolution of European consensus, because the reality with the court is that it is an international court and theoretically any country can decide to denounce the European Convention on Human Rights, and leave the system. Not countries that want to join the EU, they cannot do it. But actually once you are in the EU you could theoretically do it. So they have to be careful about backlash. So what they try to do in difficult cases is to identify the trend in the law of European countries: There is no set percentage, the higher the better. But I think it is hard to imagine with less than a third of countries having made an important change that they would be willing to decide that all countries had to adopt this approach. So at the moment if Spain becomes the third country out of forty-six member states, I think we really need more than that. So marriage will take a while. But what the court did in 2002, in the Christine Goodwin case on transsexual marriage⁷ was basically to prepare the decision. They were careful not to say anything that would rule it out in the future. In fact, it was interesting in that case that they rejected the argument that having the capacity to procreate is necessary for the right to marry. [...] In the marriage context a classic argument is that different sex couples have the capacity to procreate, the majority do, [while] same-sex couples never do without the assistance of a third party, and in the transsexual case because any transsexual person who undergoes gender reassignment becomes infertile automatically, in their marriages there is no procreative capacity. And they said no, that is not necessary. So in effect that argument is rejected for the future. [...] Marriage will be the final frontier with couples. (R. W.)

According to Stephen Whittle, British transsexual activist and legal expert⁸ the concept of marriage is a historically changing construction and today it can be seen as a “social and contractual arrangement which has little to do with sex, sexuality, sexual orientation or sexual activity”

7 For more details see: Chapter III.2. – Especially Table B.

8 www.pfc.org.uk/campaign/people/swhittle.htm

(Whittle, 2001:697). It is important to observe how transsexual rights cases can provide arguments for the legalisation of same-sex marriage. There is growing awareness concerning the problems of defining marriage exclusively as a heterosexual procreative unit. Transsexuality – especially if interpreted as the manifestation of a “medical condition” and thus legally as an “immutable status” – can bring into question the validity of this definition by challenging not only procreation as the primary purpose or at least an essential element of marriage but also by questioning in it the relevance of sex – “whether chromosomal or an act” (Whittle, 2001:712). It is also interesting to note that in those places where sex reassignment surgery can effect only one’s “medical sex” while leaving unchanged one’s “legal sex”, transsexuals can factually contract same-sex marriages: “There is a certain irony to this though; in those jurisdictions where transsexual people cannot marry in their new gender role, they can marry in their ‘old’ gender role. Thus we see a situation in which legally different-sex but factually same-sex marriages are contracted, as gay transsexual men marry their male partners, and lesbian transsexual women marry their female partners” (Whittle, 2001:702).

Besides marriage, the field of parenting rights is another problematic area of achieving legal emancipation for LGBT people. Parenting is an especially heated issue because of the widespread assumption that children of a non-heterosexual or transsexual parent or same-sex parents can become especially vulnerable to social prejudice directed primarily at the parent(s). However, it is often forgotten that if “social prejudice were grounds for restricting rights to parents, a limited pool of adults would qualify” (Stacey–Biblarz, 2001:178). Today there is little empirical evidence about advantages and disadvantages of children growing up with LGBT parents but – as American sociologists pointed out – it is important to note that “social science research provides no grounds for taking sexual orientation into account in the political distribution of family rights and responsibilities” (Stacey–Biblarz, 2001:179).

The first decision of the European Court of Human Rights concerning gay and lesbian parenting rights was issued as early as 1999 in the *Mouta* case⁹ when refusing child custody to a gay man on the basis of his homosexuality was found to be unacceptable. However, the claim for individual adoption rights by a gay man was still considered to be “excessive” by the Court in 2002.

9 For more details see: Chapter III.2. – Especially Table B.

The Court has already said that if you are a genetic or biological parent of your child and you are a lesbian or gay parent, your sexual orientation is not to be considered in any decisions about your legal relationship with your child. That was a major battle.

... In the *Fretté versus France* case in 2002,¹⁰ which I had the great honour of arguing before the European Court of Human Rights we were hoping that the court would take the next step: so that if sexual orientation is irrelevant when an individual lesbian or gay is claiming custody of their biological child, it should also be irrelevant when they are proposing to create a new parent child relationship with an adopted child. I argued to the Court that even though there might be a lot of practical difficulties in most countries for an openly lesbian or gay person to adopt a child as an individual, no country had any legislation that says lesbians and gays cannot adopt as individuals [...] Three and a half months later another case was before the highest administrative court in France: this time involving a lesbian woman who wants to adopt and the French court reached the exact same conclusion and her case is now before the European Court of Human Rights and I am organising an intervention with ILGA Europe and APGL which is the association of lesbian and gay parents and future parents in France. [...] My hope is that the second time round the Court will decide differently. If we can win this case that will establish the basic principle that when individuals are allowed to adopt: no discrimination based on sexual orientation. (R. W.)

In comparison to child custody and individual adoption cases, adoption by same-sex couples can be even more complicated. We can distinguish between joint adoption of an unrelated child by a same-sex couple and joint adoption of the biological child of one of the same-sex partners, where the latter option seems to be achieved more easily. During the last few years there have been a lot of changes in the legislation of European countries concerning joint adoption by unmarried couples in general:

The law is starting to change in this area. Even six years ago I don't think there was anywhere in Europe where an unmarried couple could adopt jointly. Now we can point to Sweden where registered same-sex partners can adopt without being married, they still have to register. In the Netherlands now a same-sex couple can be married, registered or unregistered and they can adopt jointly. [You can adopt your partner's child] in Denmark, Iceland and Norway... People use different terms, I distinguish between what I call joint adoption, some people call it 'stranger adoption' meaning adoption of an unrelated child and both adopt

10 *Fretté v. France* case – Application no. 36515/97. Judgment: 26 February 2002. <http://cmiskp.echr.coe.int/>

at the same time, on the one hand, and what I call 'second parent adoption', some call it 'step parent adoption', or 'co-parent adoption' [on the other hand] where the child is already usually the genetic biological child of one partner – typically the case where one from a lesbian couple has done artificial insemination – and then the question is the other partner adopting. Now actually that would be the most sympathetic case to take to the European Court of Human Rights. Because in both individual and joint adoption of an unrelated child there is theoretical competition: the idea is that there is the ideal married heterosexual couple out there who will swoop down and take the child away to a wonderful life – and so, how could you think of condemning the child to a horrible life with this same-sex couple or lesbian or gay individual parent? But that issue doesn't arise with the second parent situation, because the child is going to stay in the household with the family where they are, no matter what happens. There is no competition with anyone else. So the only question is whether it is better for the child to have two legal parents or one. (R. W.)

Even in the Netherlands, the pioneering country in lesbian and gay emancipation, joint adoption by same-sex couples is connected to yet unresolved legal problems:

One of the remaining legal issues in the Netherlands is the uncertain position of adoption. That is really one of the last high legal points that has still not been resolved. There are two dimensions. One dimension is the fact that most third country adoptions are not allowed and not accepted. [...] The other issue is the position of the lesbian co-mother in a lesbian relationship who cannot adopt a child and cannot exercise full family responsibilities because Dutch law presupposes that there is always a guy somewhere around who is the father of the child, the so called natural father. (J. S.)

Adoption rights are only possible when the child comes from the Netherlands. You cannot adopt a foreign child, not jointly at least, because most foreign countries don't want to give up children to same-sex partners, so even if the Dutch law was changed, it wouldn't mean much. That is one exception still. And the other thing is that if a man and a woman adopt a child, and if they are married, the man is automatically the legal father and if they are not married they can quite easily deal with it, just by going to the town hall and saying "I am the father", and then he is the father. If two women get a child, then the other woman cannot do that, so they have to go through an adoption procedure for the other woman to be a full parent. If they are registered or married they do get automatic duty to look after the child and have authority over the child, so that is quite good, but they do not become a parent so if the second parent dies the child does not inherit from the other parent. Therefore you would need a will or an adoption first. So that is more complication,

especially for lesbian couples, than for heterosexual couples. These are the two main exceptions in the law itself. (K. W.)

In most places where joint adoption by same-sex couples is a legal option, it is interpreted within a general discursive framework pointing to the necessity to extend the pool of potential adoptive parents. Therefore it is usually presented in the political agenda as a children rights issue having the “side effect” of advancing same-sex couples’ rights. This is what happened in the U.K.:

There is one thing I can say: the U.K. has not been a leader on lesbian and gay rights. [...] There seems to be a split between continental Europe and the U.K., Canada, the U.S., Australia, I suppose, Anglo-Saxon, English speaking countries and continental Europe with regard to the desirability of adoption. Somehow there is a sense in continental Europe that it is undesirable, that to cut off a child from its heritage is a last resort. Maybe you do it with an abandoned baby, because they get a completely fresh start, but if the child is two, three, four or more years old, they already have ties with their birth parents. My understanding is that the general approach is that they go into state care, they go into temporary foster families, but permanent adoption is just not considered an option, whereas the complete opposite approach is taken in these English speaking countries. [...] I would say there is a much more pragmatic approach to adoption in the English speaking countries. There the view is that it is better for the child to be in a permanent family where there will be a better situation. So that is what happened in the U.K. [...] There are some fifty thousand children in state care in the U.K. I am not sure how this figure breaks down: some of them might only be in temporary care and eventually go back to their birth parents, but anyway there were many who were just waiting for adoptive parents. [The] idea was to try and speed up the process, and expand the pool of potential adoptive parents – that was the number one consideration. [...] The new law comes into effect in September 2005 probably. Under the old law only a married couple could adopt a child jointly. The Adoption and Children Act 2002 says that a child can be adopted jointly by a married couple or an unmarried couple. An unmarried couple is defined as including different sex or same-sex couples. This is written right into the legislation. It is an amazing reform coming from the U.K., but politically the way it was presented was that this was all about the best interests of children, the rights of children. [...] That is how it was presented politically and that is how it made it hard for the conservatives to oppose it. Eventually they gave in and let it go through. Personally I don’t like that approach, because there are two issues in this situation: one is the best interests of children and the other is ending discrimination against same-sex couples. You can pursue both objectives and they are not inconsistent. In fact, in 2002, the Constitutional Court of South Africa

decided a case on joint adoption by same-sex couples. It was a situation of two women, where one of them could have adopted on her own, and her partner would have had no rights. But they didn't want to do it that way. They said we should have the same right as a married couple to adopt jointly. They went up to the Constitutional Court and they won, and the Court decided it on both those grounds, because the South African Constitution has a section that refers to the rights of the child and another section says no discrimination based on sexual orientation and they cite both and that is the way it should be analysed. (R. W.)

The LGBT legal emancipation project has not been completed even in Europe. There are a lot of countries in the world where the idea is not accepted that people cannot be discriminated just because they want to lead a different lifestyle or want to live with different partners than the majority, and LGBT rights are seen as special privileges. Legal emancipation of LGBT people can be defined as a process characterised by criminal law reform – i.e. elimination of discriminative aspects of penal codes – as a starting point, leading to anti-discrimination protection and promotion of equality:

There are cases where the law, specially the criminal law actively discriminates. For example, you could have a law saying no lesbians and gays in the armed forces. You can get this kind of thing. But if you eliminate those that is not enough at all, because you have both public officials and private parties who can discriminate without any legislation being involved, so I would tend to call that more a shift from criminal law reform to anti-discrimination protection and that usually involves prohibitions that apply to all of the public sector and certain parts of the private sector. That is where you get this question of which fields are covered: employment, housing, education, services and which exceptions are made, because you actually cannot have a blanket prohibition of discrimination in the private sector. There are areas in the private sector where freedom to discriminate has to be respected: for example, decisions about who your friends are, whom you invite to your parties. Some religious institutions, you may argue, need their own little space where they can do what they want. That is why it gets very technical, because you just cannot say across the board. So, I would see it as a shift from criminal law reform to anti-discrimination protection. (R. W.)

Anti-discrimination protection can be analysed at an individual level, when the focus is on the protection of individuals, and at a relational level, when the focus of protection is the individuals' relationships with other partners such as partners or children:

Within anti-discrimination protection there are actually two phases. One is protecting the individual without reference to any partner or child, and then there are couples and parents. The easier issues are protecting the individual in employment and housing etc. The more difficult ones are the partners and children, but it is still the same anti-discrimination principle that is being applied, it is just that certain areas are more difficult. (R. W.)

Anti-discrimination protection is a very important phase of legal emancipation but its essential element is prohibition of already existing and often widespread social practices pushing LGBT people into disadvantageous situations. Therefore it can be seen as a correcting device of older norms and practices:

If we have criminal law reform, anti-discrimination protection in all areas of life, the third phase [...] is positive action or promoting equality as it is called in the U.K. [It] is an idea of going beyond prohibition and acting after the fact. Anti-discrimination tends to be viewed as a matter of curing... It is always better to prevent rather than to cure. But it is more difficult. (R. W.)

Contrary to criminal law reform and anti-discrimination protection, promotion of equality with its pronounced future orientation represents not only a different phase of legal emancipation process but also a different paradigm: it is not just against maintaining social inequalities developed in the past and suffered from in the present, but very much for setting new norms of social coexistence. However, applying the promotion of equality principle goes beyond rights protection: it is rather a political than a legal issue. As a Hungarian government official pointed out:

Having equal opportunities is not a right. There are state programmes, state measures to decrease social injustice. [...] [Positive state action] cannot really be incorporated into the law because issues like who are considered to be the main target groups for a government, for what they provide more money – because it costs a lot of money –, [...] how they divide the resources, are political issues.¹¹

Promotion of equality formulated as a broader political issue leads us to the discussion of political emancipation of LGBT people, and especially to the analysis of the concept of sexual citizenship.

11 For more details see: Chapter III.3.1.

IV.3.2. Political emancipation and citizenship

In social sciences the modern interpretation of citizenship was greatly inspired by the classic theory of English sociologist Thomas H. Marshall, according to which interpretation citizenship is defined as a status enjoyed by persons who are full members of a community. Citizenship is therefore crucially about social inclusion and exclusion.

In Marshall's view citizenship had three consecutive elements: The civil element includes "the rights necessary for individual freedom – liberty of the person, freedom of speech, thought and faith, the right to own property and to conclude valid contracts, and the right to justice". The political element refers to "the right to participate in the exercise of political power, as a member of a body invested with political authority or as an elector of the members of such a body", while the social element is about right to a certain standard of economic welfare as well as "the right to share to the full in the social heritage and to live the life of a civilised being according to the standards prevailing in the society" (Marshall, 1963:8).

During the 1990s various concepts of citizenship – such as feminist citizenship (Walby, 1994), sexual citizenship (Evans, 1993), intimate citizenship (Giddens, 1992; Plummer, 1995) – were introduced that emphasised the necessity to broaden the scope of modern citizenship to consider full participation opportunities of social groups, including LGBT people, being formerly deprived of full community membership. The broader concept of *intimate citizenship* is centred around a fourth component besides social, political and economic rights that "is concerned with all those matters linked to our most intimate desires, pleasures, and ways of being in the world" (Plummer, 1995:151), and "examines rights, obligations, recognition and respect around those most intimate spheres of life – who to live with, how to raise children, how to handle one's body, how to relate as a gendered being, how to be an erotic person" (Plummer, 2001:238). Intimate citizenship is focussing less on sexual matters or one's sexual status, and more on "analysing a plurality of public discourses and stories about how to live the personal life in the late modern world where we are confronted by an escalating series of choices and difficulties around intimacies" (Plummer, 2001:238).

Similarly, the concept of *sexual citizenship* is concerned with the genders, sexualities and bodies of citizens: "Citizens have genders, sexualities, and bodies that matter in politics. The rights of free expression,

bodily autonomy, institutional inclusion, and spatial themes are all pertinent to the concept of sexual citizenship. [...] [It] draws our attention to all kinds of social exclusions that the various sexual communities experience. These exclusions inhibit their political, social, cultural, and economic participation. The various constraints point to the necessity of queering all kinds of institutions. Simply allowing sexual minorities into these organizations on an individual basis does not challenge the heterosexist assumptions that govern most societies" (Hekma, 2004).

For example, according to Evans the parameters of homosexual citizenship in Britain in the mid 1990s could be described in the following way:

- (i) The existence of a status-group defined by homosexual orientation and/or activity, its sexual difference being predominantly ascribed to innate factors by those within and supporters without, whilst, albeit inconsistently, to social factors by conservative opposition without;
- (ii) This sexual status group is increasingly defined by distinct constellations of civil, political and social rights, which incorporate its continuing immorality and stigma;
- (iii) which normally consigns the group's 'open' or 'out' presence to distinct formally and informally defined and policed territories set apart from the 'moral community';
- (iv) territories concerned with a range of 'community' social, sexual and political services of increasingly leisure and life-style commodified form;
- (v) These territories play host to other less developed but growing 'immoral' sexual status groups: lesbians, bisexuals, transvestites, transsexuals etc;
- (vi) Most group 'members', participate in these territories 'part- (that is, leisure/consumption) time', the territories themselves are dispersed and diverse, idiosyncratic structural characteristics which make the oft-used term 'gay community' at least problematic;
- (vii) From these territories specific political 'parties' develop, but the 'politicisation' [...] is effected more by routine commercial leisure and life-style than by explicit political discourses, leaving
- (viii) political campaigns over issues such as the age of consent, rare, and attracting minority active support despite attempted mobilisation by use of the rhetoric of 'equality'. (Evans, 1995: 177-8).

Here homosexual men are pictured as constituting a sexual status group characterised by heterogeneousness from inside, and stigmatisation from outside, who are not enjoying full membership in the – 'moral' – community and therefore being deprived of legitimate grounds for their equality claims in society. Consequently, it can be

easily concluded that only “normal” or “good citizens” should be entitled to full rights of citizenship and as the “good citizen” tends to be heterosexual, it seems that “heterosexuality is a necessary if not sufficient basis for full citizenship” (cf. Phelan, 2001 – cited by Richardson, 2004a:1).

In the context of sexual citizenship the great dilemma of political emancipation is whether to claim equal rights for LGBT people on the basis of a normalising politics presenting them as normal, good citizens – deserving respect and integration because of their conformity to dominant social norms – who are “expected to be gender conventional, link sex to love and a marriage-like relationship, defend family values, personify economic individualism, and display national pride”. This approach would imply a “political logic of tolerance and minority rights that does not challenge heterosexual dominance” (Seidman, 2002:133).

There is a certain ambiguity in interpreting the extension of certain rights associated with citizenship to embrace lesbians and gay men as a success, if equality and normality is still “defined in terms of sameness with heteronormative mainstream values and practices” (Richardson, 2004b:407). This kind of mainstreaming can be – and according to some should be – challenged. In Steven Seidman’s view a rights-oriented political agenda should be broadened at least in three dimensions: in gaining respect and representation in national institutions including the government, the workplaces, schools, families, welfare and health care institutions; in having social dialogues encouraged by institutions, and in the manner of equal partnership where concerns of all the parties can be voiced and heard; and by revisiting the norm of the “good citizen”. The main problem with a narrow rights agenda is that it “leaves the dominant sexual norms, other than gender preference, in place and removed from the political debate”, while it “ignores the ways ideas of sexual citizenship establish social boundaries between insiders (good citizens) and outsiders (bad citizens). And, while same- or opposite gender preference is surely one boundary issue, there are many other dimensions of sexuality that are used to separate the good and the bad sexual citizen; for example gender norms, the age of the sex partners, whether sex is private or public, commercial or not, causal or intimate, monogamous or not, gentle or rough” (Seidman, 2002:189).

Sexual citizenship can be a useful reference point in the political struggle gaining “full community membership”, if carefully applied. However, one of the main questions here is whether equality is

interpreted in a static social context or moral universe where the only active agents of change are social minority groups who should actively assimilate to the norms handed down to them by the majority, or equality is interpreted in more flexible terms as a joint achievement resulting from mutual efforts of various social segments and coalitions oriented towards gaining 'different but equal' rights and opportunities.

Following Carl F. Stychin's analysis of sexual citizenship in the European Union, differences between active and passive citizenship could be observed: in comparison with the 'passivity' of European citizenship characterised by enjoyment of rights being – handed down from above and – “centred in a private, depoliticized sphere”, sexual citizenship involving the achievement of rights through social struggle can be seen as “an active, public, and potentially democratic endeavour” occurring now in national as well as in broader, European transnational contexts (Stychin, 2001:292). In the European Union sexual orientation has been becoming an identity with ‘anti-discrimination rights attachments’ which “raises the possibility of a movement towards a European-wide consensus around the *meaning* of sexuality, not only as warranting anti-discrimination protection, but also more fundamentally as a politicized identity” (Stychin, 2001:295). Sexual citizenship is therefore increasingly being grounded in a ‘politics of affinity’ operating with politicized flexible ‘affinities’ and coalitions, rather than with fixed, monolithic identities (cf. Phelan, 1995). However, this new politics of affinity is meaningful only as being part of a coalition-based model that allows for the effective political cooperation of heterogeneous LGBT crowds: “It is through active, democratic political strategies that coalitions will continually emerge, change, and evolve, as individuals identify (or not) with particular trajectories of rights struggles. Sexual identification undoubtedly is a bond which may bring peoples together, but the differences between them seem far too great to establish anything like a fixed and stable identity. [...] An example could be common endeavours and mutual support around rights struggles between transgendered people and lesbians, gays, and bisexuals, which have been facilitated by the character of EU anti-discrimination law with its focus on ‘sex’ discrimination. While dialogue across identifications here may prove valuable, any attempt to construct a single, dialogic public sphere grounded in a fixed identity would not reflect the differently located subjects at issue” (Stychin, 2001:295).

Applying a coalition based strategy can also be useful in activating transgender citizenship. A wide variety of people transgressing the traditional gender binaries can identify themselves as a transgender person including “transsexuals, transgenderists, transvestites, cross-dressers, third sex, intersex, non-labelled, drag queens, drag kings, gender challenged, gender-gifted, shapeshifters etc.” (Nataf, 1996:16). It would be hard to use the transgender category – being perhaps even more fictitious than homosexuality – in the course of a unifying sexual identity based politics. However, we can witness the effective functioning of ‘transgender rights coalitions’ – such as the Press for Change¹² in the UK – in gaining gradually ‘fuller’ community membership for some transgender people in some cases, while being aware of the fact that “fighting for rights for all transgender people would entail substantial social change, such as the creating of ‘third and other’ sex/gender categories and legislative support for marriage between people of all genders” (Monro–Warren, 2004:357).

Political emancipation is inseparable from social emancipation of LGBT people. Social emancipation is an umbrella term embracing the whole spectrum of life from legal frameworks and political participation opportunities to cultural representations.

IV.3.3. Social emancipation and cooperation

Social emancipation of LGBT people is often interpreted as a kind of consecutive phase of legal emancipation.

We have had a century of the struggle against the legal discrimination of homosexuals. That was the gay rights movement. It was about rights and legal issues. Now comes the much more difficult sequence of getting social equality. There is the much more difficult struggle for social emancipation. We have had the legal emancipation, now we need social emancipation which is still only in the starting blocks. (G. H.)

In this context anti-discrimination legislation is seen as a foundation stone in a process of “social equality construction”:

A very good starting point is when you have strong legislation. In Sweden, both counterparts: employers and trade unions are aware of this legislation and no employer wants a bad reputation. (G. S.)

12 www.pfc.org.uk

Maybe it is easier for you to start by saying: “Look, we have a law and someone will be discriminated against if you don’t do anything.” So starting anti-discrimination by threatening with the law, maybe that could be the right thing for you to do in your situation and then, when people are listening, you talk about other things. (A. S.)

The law provides structures, procedures that people can use. They can go to a commission or to an authority or to a court, or just to their employer and say: “Well, here it says that you should do A, you have done B, so there is something wrong here. You should change it.” Some employers will then say: “Yes, I will then do the other thing.” (K. W.)

We [ACCEPT, Romanian NGO] have the legal right to defend [represent] someone in court, which means that we can defend [represent] a group of persons or a community which is extremely important. So this anti-discrimination legislation is crucial for defending and promoting our rights at the same time. I can give you a case. Recently we noticed that there was a form of negotiation and memorandum established between the Ministry of Education and the Ministry of Health attempting to produce a list of main criteria for which someone can be stopped from teaching in the public education sector. [...] Sexual orientation was mentioned as such at the beginning, after that they changed it to sexual identity. They tried to use several different phrases, but the meaning was similar. But we were able use the anti-discrimination framework to put pressure both ministries without suing them. (F. B.)

Legal discrimination is a much more tangible asset than social discrimination. It is easier to identify and thus fight against legal grievances than “amorphous bad feelings” lurking in society:

The problem with the end of legal discrimination is that it makes it difficult for people to target exactly what is wrong. If the mayor of Budapest or Sofia says “I don’t like gay or lesbian people” then it is very clear cut what you have to do. But in the Netherlands very few people will be explicitly anti-homosexual and against gay or lesbian rights. People know that they cannot do that any more. Social discrimination exists but has become very covert, but it has not disappeared. [...] It makes it very difficult for gays and lesbians to fight for gay and lesbian rights. So if you have Bush saying that he doesn’t want same-sex marriage that is an easy target. If you have an army that says it won’t allow openly gay and lesbian people into the army then that is a clear cut target. If you have Buttiglioni who says homosexuality is a sin, then you have an easy target. (G. H.)

Law can – and should – reflect and promote social change, but it is far from being the only or the main force of change. Law can be

effective if people are able to accept or even internalise the normative expectations it represents.

If any law works, it works because people know it is wrong or considered wrong and therefore they change their behaviour. Not everyone on the motorway is arrested or stopped for speeding, many people just don't speed because they think that there is a chance of trouble, or it is wrong or dangerous. (K. W.)

Legal and social emancipation can also be interpreted as interwoven issues or different aspects of the same process. If legal emancipation can be measured by the changes in the codified norm system of society, social emancipation is closely connected to the development of civil society, and the ability of social groups to represent their interests. In this context cooperation skills and opportunities – for example, cooperation of LGBT people to form organisations; cooperation between different, national and international, NGOs to form broader coalitions; cooperation between the state and NGOs – can become very important.

At a certain level of socio-cultural development LGBT social emancipation is inseparable from public manifestation of distinct identities and lifestyles (cf. Bech, 1993), and thus from the effective functioning of identity politics. Identity politics is a system-specific concept: it can hardly be interpreted in anti-democratic political systems characterised by the extensive erosion of private identities, and the rigid – often forced – separation of public and private identities. The “natural” context of identity politics is civil society, the field of social self-organisation, being the framework as well as the guarantee of modern identity formations (cf. Erős, 1994). According to a Hungarian gay activist social exclusion can have activating effects by pressing stigmatised people towards organising and thus protecting themselves:

The self-organisation of the [GLBT] community is also a process of consciousness raising. For this an outside pressure is necessary: the experience of being excluded and stigmatised brings people together. But there is something else in present day Hungarian reality. People now start to take their life into their hands, they start to feel that in certain ways they can indeed have a say in the development of their own lives.¹³

13 Interview with László Mocsonaki, Board Member of Háttér Support Society – conducted by J. Takács in 2002 in Budapest. Used by permission.

Effective functioning of LGBT civil organisations can be enhanced by forming broader coalitions. National LGBT organisations often seek international support from international LGBT associations – such as ILGA – or national organisations of other countries.

What you see quite often is that the [Eastern European] gay movement is looking towards the Western side of Europe especially as the saviours: ‘you are the ones who are finished, now please help us’. The COC [Netherlands] will do that quite often. We have projects of support in Romania, Bulgaria, Moldavia, and currently in the former Yugoslavia. [...] That kind of solidarity is very important, but it is not the only kind of solidarity. (T. B.)

On the national level these broader coalitions may include other actors of civil society representing the interests of other minority groups, religious organisations, human rights organisations – LGBT people as well as “their heterosexual friends”.

You form coalitions. It doesn’t have to mean that you must work together, but it does mean that you support each other in what you do. [...] It is not something I have thought of, it is something I have also observed, it is also what happens in countries like Turkey, countries where we [COC Netherlands] have been working before: Romania, Bulgaria. These are ways of not singling out yourself as an entity that can be neglected, but showing that there is a front of different minorities, different issues like women, or ethnic minorities, or student groups. All these kinds of coalitions are possible. [...] we are working with Imams on Muslim issues, though perhaps it is even more difficult to get a Polish bishop to be complimentary or open about homosexuality, but it does not mean that you don’t have to deal with that first hand because this is your own environment. As I said, it is quite possible to work together with different minorities and express needs and issues to your government and say: “You have to address these”, whether that is local or national government. (T. B.)

ACCEPT [Romanian NGO] is part of the civil society. Well, it was one of the main actors in this informal coalition. This coalition made several proposals [...] ACCEPT, but also Centre for Legal Resources, which is also a member of Soros Open Network, Romanian Helsinki Committee, Romani Kris, which is the main Roma NGO and Pro Europe League, which is based in Turga Mores, in the Northwest of Romania. [...] these are the main Human Rights organisations. (F. B.)

One thing I had learned from my first experience with the Fretté versus France case is the importance of coalitions with mainstream heterosexual majority NGOs. If lesbian and gay NGOs go to the court or it could be a

legislature anywhere on their own, there is a tendency to dismiss their arguments: well this is just because this will benefit you, why should we listen to you, of course you would say it is a violation of human rights. If you get your heterosexual friends to go with you, it strengthens your case. (R. W.)

However, while forming broader coalitions can provide for strategic political advantages, the constituencies of the different minority groups suffering from different – though sometimes overlapping – aspects of social inequalities are not necessarily very enthusiastic about solidarity and cooperation with other minorities.

We [the Expertise Centre on Gay and Lesbian Policy Issues] have tried to get together with the other anti-discrimination institutions in the Netherlands, with some very interesting progress. [...] At an executive level we are quite sure that in most cases the reasons that people discriminate are more or less the same – I mean that people who discriminate can just as easily discriminate blacks as gays, and also the ways to combat that are more or less the same, so we are experimenting on a certain level to deal with that, but we see that all our grass roots do not want it. [...] Probably because they have learnt so much to fend for themselves that they have no sense of solidarity among the groups and of course there are real problems to put it very bluntly between some Muslims, and gays and lesbians. There is an increasing tension also among the grass roots of these groups. (J. S.)

Trade unions can play an important part in these coalitions, too. For example, in Sweden there were two awareness-raising projects completed based on the cooperation of LGBT NGOs and trade unions, while in Romania an LGBT organisation plans to initiate cooperation with trade unions.

The ‘Homosexuals and Bisexuals in the Care System’ project, we call it ‘HOBICARE’ for short [...] works with municipalities and especially child care and elderly care. In the project there are four organisations: three trade unions and one NGO [RFSL – The Swedish Federation for Lesbian, Gay, Bisexual and Transgender Rights] (A. S.)

‘Norm-giving Diversity’ [...] is a project which focuses on the Church of Sweden and the police and the armed forces – institutions which you can say set norms in society. So we work both with the employer organisations and a lot of trade unions organising these branches and they are partners in the project. (G. S.)

Mainly it is about NGOs, but labour unions are also instrumental in this framework. We should start a dialogue with them. (F. B.)

LGBT NGOs can also cooperate effectively with quasi autonomous governmental organisations (quango's), such as equality bodies, especially if there is opportunity for regular consultation between them.

Any autonomous state body sits in this world between the state and civil society. To some extent we [Equality Commission for Northern Ireland] are part of the state, because we are state funded, on the other hand obviously we have particularly close relations with civil society, particularly the different NGOs that represent the different constituencies that we are effectively working for. So we are not part of civil society and we are not per se part of the state. So sometimes people get very confused and there are times when civil society is screaming at us to do certain things and also we have a commission of eighteen commissioners, so it is all very well when officers of the commission are saying that we have to do this or that, but at the end of the day we have to persuade eighteen autonomous people who have been put on the board of the commission as to what is the right thing to do. And sometimes government departments will get very excited about something that we are doing, and on other occasions civil society will get very excited because we are not doing something else that they want us to do, but this is what we call quango's, and we are sitting on the fence which is never comfortable. (B. F.)

[The Office of the Swedish Ombudsman against Discrimination on Grounds of Sexual Orientation has regular contact] [...] with public administration, and with labour unions, with employer's associations, with the universities, with Human Rights organisations, and with NGOs in the field of sexual orientation as well. Partly we deal with different projects that we do together, but we also at least try to meet regularly so that we know what is on the priority agenda of the NGOs and they will know what our priorities are and what we can do and also what we cannot do. The roles are different, but they complement each other I would say. And I think it is important that we do have that continuing contact. (H. Y.)

Achieving a certain level of social visibility for social groups suffering from social disadvantages seems to be a precondition for claiming rights. However, visibility can make individuals vulnerable and therefore not everyone can "afford" coming out. On the other hand, a relatively high level of social visibility does not necessarily correlate with positive developments in legal emancipation.

The law on its own cannot change society. It can encourage change. With the particular phenomenon of discrimination against lesbian and gay minority, probably the key factor is the ability to come out, initially to oneself, to other lesbians and gays, to friends, family, to co-workers and if

you have a society where that is not possible where you cannot have a visible lesbian and gay community, organisations, it is a kind of chicken and egg situation because there often won't be discrimination, there won't be cases invoking the law, because people are too afraid to come out, so they avoid discrimination by hiding. The few brave ones who do come out may suffer discrimination, but they may be afraid to enforce their rights. I remember thinking that this distinction between law and society was quite dramatically illustrated with regard to the criminal law, because a lot of Eastern European countries would have no prohibition of sexual activity between men or between women, particularly, say, fifteen years ago, whereas in all of the Southern U.S. states you would, I mean some ten years ago. Whereas in, say, Texas you would have vibrant lesbian and gay communities in Dallas and Houston and parades and organisations and bookshops and all this, all in a state where officially according to the law all their sexual activity was illegal, or most of it. Whereas you might go to an Eastern European country where theoretically it was all legal, but if you looked around, you would see no community. I suppose all that law and the state can do is to encourage the development of lesbian and gay civil society so to speak and that is a big issue of supporting these groups that are developing in Eastern Europe, because they can draw in people, they can support those who have faced discrimination and try and help them to use their rights and try to enforce them. (R. W.)

It is very hard – if not impossible – to articulate the interest or defend the rights of socially invisible actors. Discrimination against LGBT people can remain hidden in a lot of instances. This can be explained in part with the preference of victims to avoid publicity on the individual level:

In the first place sexual orientation based discrimination is very much hidden, and it is not direct. The second problem is that gays and lesbians, in many cases, move to jobs and locations where they are not discriminated against. And even if they are being discriminated against they are reluctant to complain about it. [...]

The problem with gays and lesbians is that they move to places where they feel safe and happy and they forget about the place they come from. So all these gay and lesbian people who come from the provinces and from the countryside and from the suburbs – which are highly homophobic – they discontinue to live there, or to work there, or to go to sport organisations, to schools. They go to places where they feel free and happy. So there is a movement, not only to the city, but also to safe places. They like to forget about the places they come from. They don't want to be reminded that they were so unhappy in Amersfoort or Putten or whatever place, that people were sending them away from school, that they were insulted in the workplace. (G. H.)

The chances that a victim of discrimination will actually go to court and fight are very small, since for most people that is not an interesting option. You had better find another job, and forget about the bad employer and you go to the good employer. Hopefully you will find one. Or you just keep silent and you are not discriminated. So there are all kinds of reasons and many more mechanisms why people don't go to court. (K. W.)

The hidden nature of discrimination against LGBT people can also be explained in part with the lack of appropriate responsiveness and incentives on the institutional level. Existing but not effectively functioning – i.e. for those in need socially invisible – institutions can contribute to the fact that certain forms of discrimination remain hidden:

If you are talking about people in the townships in South Africa, to go to one of these [equal treatment] commissions for redress is not necessarily going to be the first thing they are going to think of in any case. And when these commissions aren't out there promoting the fact that within their sphere of work they ceased with the question of sexual orientation, then a lesbian who is facing abuse in a local community in Cape Flats or Soweto is going to think "Why [...] should I go to them?" It is not even going to occur to her. (S. L.)

Lack of incentives to turn to a specialised official body responsible for equal treatment issues can also decrease the determination of people to complain about discrimination. For example, in Romania – as well as in Hungary and in various other countries – the victims of discrimination cannot be compensated financially from the fine to be paid to the equal treatment authority by the party committing the discrimination. Victims have to start a court case asking for personal compensation, a procedure – often costly in time and money – that complicates the victims' life and thus is therefore rare:

[In Romania] the National Council for Combating Discrimination (NCCD) is much more powerful than the Ombudsman. [...] simply because they have ministerial competence to administrate a ministerial fine against the agents of discrimination.

... The fine goes to the state, not to the victim, which is extremely regrettable, because a lot of people will not be interested in turning to the NCCD.

...It means in the practical world that the victims of discrimination are supposed to go to a court in order to obtain some financial compensation for what they suffered. This is critical. I do not know of any cases in which we have been successful in this field. (F. B.)

Hidden discrimination can result from subtle prejudice as well as from the lack of considering the possible negative consequences of certain policies for different social groups. The latter type is referred to as indirect discrimination which is hard to avoid once the policy is in operation but can be prevented with careful examination during the policymaking process.

Our criticism of anti-discrimination law is often that it is effective against the most obvious forms of discrimination, but more subtle forms are very resistant and that is generally true. [...] One thing to remember about subtle discrimination is that whenever discretion can be exercised, discrimination can hide. And as long as people are carefully subtle, and they don't say anything, it is almost impossible to prove. That is what we call direct discrimination: the obvious treating someone less favourably because of their race, sex or sexual orientation. That tends to be driven underground. And then you need to focus more on indirect discrimination: are rules applied that disproportionately exclude certain groups? [...] Some would argue that because direct discrimination can be so subtle, so hard to prove, the only way really to counteract it and to try and improve the position of this group in society, to increase their representation in various sectors of society is to actively prefer them, and that has its own problems. [...] Anti-discrimination law is by no means perfect, but it is much better than not having it at all. (R. W.)

The level of social emancipation of LGBT people is closely connected to the development of anti-discrimination legislation and policymaking as well as to the practical application of preventive measures to avoid the occurrence of discrimination.

IV.3.4. Raising awareness

One of the main tools of preventing discrimination is awareness-raising. There are different possibilities to raise awareness about a certain issue. The main forms of awareness-raising include information exchange and communication, education and training, as well as providing people with a personal experience, and participation and involvement opportunities. Information exchange and communication can be realised in several contexts: within formal institutional procedures, for example, in the course of litigation or policymaking; in the – mainstream as well as “own” – media; in publications – such as reports,

information booklets, fact sheets, brochures, scientific publications; in meetings – such as workshops, exhibitions, conferences; and in events like festivals or demonstrations (cf. FAO/ECE/ILO, 2003:9–10).

Awareness-raising in the form of education and training can be realised through developing specific educational programs (lectures, courses etc.) and educational materials (text books, chapters in school books, training manuals etc.) – within the schooling system by targeting students as well as teachers, and outside the schooling system by targeting the general public or its certain segments –, and also through conducting social scientific research and disseminating research findings. Participation and involvement opportunities include, for example, consultations on official reports, documents and decisions – provided that there is intention to involve people in these activities on the “official side”.

It is hard to give an exact definition of awareness-raising but it certainly implies an element of discontent regarding a problematic situation as well as reference to the need of change and mobilisation. Awareness-raising efforts are often initiated to popularise issues that – according to at least certain social groups – deserve greater attention in society. To put it simply: the main goal is to convince more people – preferably “society as a whole” – about the great importance of something that is seen to be important by a smaller group of people that can consist of activists, governmental or academic experts, party politicians etc. In the practical sense awareness-raising can be seen as part of political agenda setting where the problems of a smaller social group have to be transformed into a socio-political issue of greater general significance by a two-phase process of meaning definition and message transmission (cf. Gamson, 1988). A crucial element of awareness-raising is therefore the meaning management of the original issue: it has to be presented with a socially digestible flavour that is still acceptable by the issue-initiators who feel the need for social change in a specific field the most.

There is more chance for effective awareness-raising if the issues one wants to direct more social attention to are in harmony with the general value preferences of a society. According to the empirical findings of the World Values Survey – measuring values and beliefs of the publics of more than sixty societies representing about 75 percent of the world’s population – advanced industrial societies can be characterised by a shift from ‘materialist’ to ‘postmaterialist’ values: “In these societies hardly anyone starves, and a growing share of their population takes survival for granted. Though still interested in a

high, material standard of living, they take it for granted and place increasing emphasis on the quality of life. [...] during the past few decades, a new set of postmodern values has been transforming the social, political, economic, and sexual norms of rich countries around the globe. [...] Postmodern values emphasize self-expression instead of deference to authority and are tolerant of other groups and even regard exotic things and cultural diversity as stimulating and interesting, not threatening. [...] This change in world views has given rise to a wide range of new social movements, from the environmentalist movement to the women's movement, and to new norms concerning cultural diversity and growing acceptance of gay and lesbian lifestyles" (cf. Inglehart, 2000:220–224).

On the basis of these findings we can state that there is more chance to effectively raise awareness about LGBT issues in a social setting characterised by postmodern world views than in other places: as "equal rights for women, gays and lesbians, foreigners, and other outgroups tend to be rejected in societies where survival seems uncertain and increasingly accepted in societies that emphasize self-expression values" (Inglehart–Baker, 2000:28). On the other hand, we can also assume that LGBT people living in societies less imbued with postmaterialist value orientation are in greater need of awareness-raising concerning their special issues.

When referring to awareness-raising as a means of preventing discrimination against LGBT people, we can apply a general mobilisation model of awareness-raising focussing on, for example, environmental protection – an issue also gaining increasing social relevance in the context of postmaterialist value orientation. Within such model awareness-raising can be interpreted as a process of communication and interaction providing opportunities for dialogue, mutual learning, and trust-building in order to empower people, and strengthen their interest and commitment to the given issue (cf. FAO/ECE/ILO, 2003:7). This process can be divided into different phases:

1. Raising people's attention and interest – by recognising the problem, identifying the context, and defining self-interest.
2. Improving public knowledge and understanding – by gathering and exchanging information, improving self-understanding of the situation, and building trust in decision-making.

3. Increasing social skills and competencies for change – by inventing new solutions and balances of interest, developing greater interaction and new relationships.
4. Increasing people's ability to implement change – by mobilising willingness to act, gathering adequate resources, and fostering new partnerships.
5. Implementing change and evaluating progress – by changing social attitude and behaviour leading to an active commitment and participation, monitoring progress in implementation, and evaluating results (cf. FAO/ECE/ILO, 2003:8).

However, this model can be applied to LGBT issues only within a limited scope because of their specific socio-cultural contexts. We cannot forget that LGBT equal treatment claims have been historically charged with negative loads, which are not – or to a lesser extent – hindering features in the case of environmental protection issues. Therefore raising awareness about LGBT issues can utilise some elements of social mobilisation strategies proved to be useful in other fields but it certainly has its own unique mode of development.

As far as problem recognition is concerned, initially people should be made sensitive towards LGBT discrimination: they must be able to identify it in order to prevent it, and/or they must be able to recognise it in order to do something against it. The law can be helpful in this respect: the fact that anti-discrimination legislation exists can have awareness-raising effects in itself as it conveys the message that according to the state discrimination is a wrong social practice with punishable consequences:

Law is like a PR thing as well: it can give publicity to the notion that it is wrong to discriminate on certain grounds, so more people think that this may be discrimination. Whereas for many people discrimination was very much race discrimination, it took a long time to get sex discrimination recognised as a form of discrimination. And the whole political process, at the European level and at implementation, helps to make people aware that discrimination can be on the grounds of sexual orientation as well. (K. W.)

In the European context the learning process of making people realise that discrimination is wrong first started with targeting racial discrimination, and continued with gender discrimination. In this sense LGBT people can follow a beaten track.

They have internalised the notion that it is wrong to discriminate and it is mostly via racial discrimination, but also during the last few decades via gender discrimination [...] So you don't have to internalise the norm, you only have to change the norm in the sense that discrimination is a general term. This is called the single equality approach. [...] the whole European Union debate is that all citizens of the European Union are equal: having the same rights to move to another country, the same rights to start a business, the same rights to export, and so on. On many levels the notion that discrimination is wrong is there: legal, economic, social, moral levels. So you just have to insert into that awareness [on] sexual orientation, and the awareness may be higher in some countries than in others. (K. W.)

Discussing antidiscrimination legislation can become a lecture topic or it can even be integrated into the school curriculum.

You talk about law. It is something that can obviously be invoked in education. You can talk, you can give a lesson about discrimination or a lesson about discrimination law even. And then the fact that there is a law, makes it easier for the teacher to explain it to the children. And the children, or the students or the television viewers will more easily see that this is something important because it has been approved by all these countries in Europe and by all the governments. (K. W.)

However, the existence of anti-discrimination legislation in itself does not mean too much, if people do not know about the law – because it is not publicised or applied very often –, or if they do not make practical use of it because of fear and/or the silent acceptance of a “second class citizen status”.

In the first place gays, lesbians and straight people should be made aware of the discrimination. And it also has to do with the idea of public versus private. [...] They always say that sexual orientation is a private affair, so it has nothing to do with your public functioning. This is also the feeling that gays and lesbians and even most straight people have. So this privatisation of sexual orientation makes it difficult to raise the topic of sexual orientation in public. We can have this emancipation of gays and lesbians in the Netherlands, we say we are the most tolerant country in Europe or in the World, but at the same time discrimination is very clear cut, because the sexual orientation of straight people is always mentioned in public. There is no hesitation to discuss heterosexual issues in public. I would say the public norm is heterosexual and if you are homosexual you have to return to your privacy. Most gays and lesbians seem to accept this dichotomy and this setback. Because of this straight public norm, homosexuality is still a second choice: gays and lesbians are still second class citizens. [...]

They don't know about the law in the first place and if they know about the law then they don't dare to go the court to defend themselves as gays and lesbians. So it is of course very important to have a law, but at the same time it is also about mentality. The main thing is the mentality in the end. (G. H.)

Raising awareness about LGBT issues can also be presented as part of a broader educational program with the focus on accepting and appreciating diversity in several aspects of life. This education is more likely to be successful if started quite early in life and being integrated into the socialisation process during one's formative years.

There is really only one way, I think, to deal with that [increasing intolerance], which is to do it in education and start quite early. It is not just about gay and lesbian issues, it is about the whole sexuality. But there is that typically Dutch "het gedogen" [tolerating] [...] the Dutch always tend to put up with things and experience them until suddenly they find that enough is enough but that always happens when it is already absolutely too late. [...] You have to act in an early phase and say: "look, enough is enough this is not how we are going to treat each other". [...] So, on the one hand it is education, on the other hand – like you do with young children, you bring them up and you say very clearly this is rule A and that is rule B, and these are the rules you have to adhere to. (J. S.)

An effective means of awareness-raising would be to provide civil servants and other state officials with training and guidelines on how to deal with LGBT issues.

One of the things that I would like to see is that having a professional vision on how to deal with gay and lesbian issues would be part and parcel of what every civil servant who works in that particular field would see as part of their own professional standards. Like you know about the environment, or like you know about civic duties, or whatever, the expertise should be handed down from one person who is dealing with that to the next without the gay and lesbian movement every time having to invent the wheel again. (J. S.)

In most cases the problem is not only about the lack of publicizing the existing human rights protections from the government's side, but also about the lack of accurate information on discrimination provided for the government.

[In South Africa] the government has done very little to publicise at a local level the fact that there are constitutional protections. And without publicising the fact, those protections inevitably don't have teeth. There

are also endemic problems with the way that information is fed to the government because the efficacy of any of these mechanisms depends on whether they are getting accurate information about the scope and extent of discrimination. (S. L.)

In countries where there is a single equality body that can also deal with LGBT issues or where one of the specialised equality bodies focuses exclusively on LGBT issues, the functioning of these institutions can contribute to a great extent to awareness-raising as well as implementation of equal treatment principles.

Human rights protecting NGOs, including LGBT associations, can play a significant role in awareness-raising, too. They can help victims of discrimination by providing them with information and legal assistance – and often with emotional support to persevere. In a number of countries there is also a legal possibility for initiating *actio popularis* that enables societal bodies and special interest groups to start legal action without the personal involvement of the individual victim if the mistreatment is based on a category which is an essential feature of the individual's personality.¹⁴

I think it [the role of NGOs] is not just about lobbying. It is also about creating awareness on these issues which is crucial if we want to apply such anti-discrimination legislation in the practical field. [...] We [ACCEPT, Romania] made it known that we can offer independent legal assistance to the victims of discrimination, simply because the NCCD [National Council for Combating Discrimination] cannot play this role due to their legal constraints. We can play several roles: ...one of them is protecting the rights of the victims, which is done by writing out their complaints, an administrative complaint toward NCCD. We can play this role by documenting their cases which is actually the most difficult part of this job. Secondly, we can convince the victims to do something in order to protect their rights. That is important, because otherwise the NCCD would not receive any direct complaints. Knowing that the NCCD is not a very visible institution right now – they [only] just created a website – so a lot of people have no idea about the methods of NCCD, where they are located, what it means, basically what their rights are under this law. This can be an important role of an NGO. We, as an NGO, can try to defend the collective rights of our minorities and not just individual rights. [...]

So you can prevent discrimination using your status as an organisation which has a legitimate interest and the power to protect the rights of the

14 For more details on *actio popularis* in Hungary see: Chapter III.3.2.: Practical application of equal treatment claims I.

minorities you are representing in court or in relations with other institutions. (F. B.)

Successful antidiscrimination court cases can provide media visibility that can encourage other victims of discrimination to step forward on the one hand, and discourage those who would be inclined to discriminate on the other.

If you have one determined individual who can handle media pressure [...] and they take the case to court and they win and there is publicity for the decision that can help educate society. And what we never know about are the cases of discrimination that do not occur, because somebody has heard about the law and has been influenced and they do not discriminate. (R. W.)

Besides media visibility, another important factor of increasing public knowledge and understanding concerning LGBT issues is gaining 'political visibility'. At present sexual political themes do not seem to enjoy great popularity – if they are present at all – in the political arena. Governments and political parties do not have well-considered sexual political programs and they do not like to think of people as *sexual citizens*.

Sexual citizenship is about citizens as sexual beings. [...] We must realise that if there is citizenship, then citizenship is about gender, it is about economics, it is about politics, and it is also about sexuality. So there should be a public political discussion about sexual citizenship. People have sexual rights, sexual obligations: you can do this, you should not do that. [...] There is no political party in the Netherlands that has a chapter on "What are our sexual politics?". I would say that this is utterly shameful and stupid, because if you look, one of the major issues in the Netherlands is ethnic tension, or religious tension between the Muslims, on the one hand and non-religious people, or Christians on the other. It is mostly about sex: it is about circumcision, it is about the veil, it is about homosexuality, it is about Moroccans having missed the sexual revolution, it is about sexual insults [...] Ethnic and religious tension has a largely sexual connotation, and it is very much underestimated as a topic. (G. H.)

A basic ingredient of awareness-raising is the accumulation of information and knowledge about LGBT issues in form of reports describing problematic situations, and research studies attempting to analyse the causes and consequences of certain social problems. Reports can play a very important role in problem recognition and context identification by drawing attention to facts proving that the problem exists.

The classic Human Rights product is the report. [It] is particularly suited to work on LGBT issues. [...] primarily because we are always being told that rights abuses against us are rather sporadic, or insignificant against larger patterns of abuse. Or simply that we don't exist in a given culture in society and doing the detailed documentation on how widespread abuses are and about the extent of the population they affect is for me really the most effective way of establishing that this is an important rights issue. (S. L.)

Reports – providing a map of problems – and systematically collected information contribute to effective policymaking and policy-monitoring. Even the fact that someone – let it be an NGO, an equality body, an academic, or a political party – is interested in collecting certain types of information can have awareness-raising effects.

We [the Dutch Expertise Centre on Gay and Lesbian Policy Issues] see ourselves also as brokers between people who do have expertise and those who are in need of expertise on gay and lesbian issues and the final thing is that we quite soon realised that one of the problems in dealing with local governments and local councils [that] some councils simply said: Gays and lesbians? Oh, we don't have any! When they realised that they did have some gays and lesbians, they said that they never had any problems with them or never heard of any problems. So one of the very important tasks that we have is to train local gay and lesbian organisations to gather information about the local situation and to translate that into direct questions which they can put to the local councils and then we can come in and say, OK, we have the expertise for you to solve this particular problem. [...] Now one of the things that we started out doing was to make an inventory of all existing local policy. [...] It focussed not only directly on the question "Do you have any gay/lesbian policies?" – it could have been finished very quickly in that case – but it had a whole range of questions: if they were in contact with local gay or lesbian organisations, if they had any idea of local civil servants who wanted to do things, if they supported such initiatives, and if so, whether that support was moral, financial or material. It had questions if they recognised – and we gave them a list of possible problems around gay and lesbian issues we thought might occur, like the position of young gays and lesbians in schools, and the fact that there is no specific work for gay and lesbian elderly – a whole range of possible problems which we submitted to them and they could say whether they had those sort of problems in their city or not. [...] There was a report made out of that inventory and roughly speaking it turned out that only eleven city councils had actually any official gay and lesbian policy left at all in the sense that there was still a policy document or a civil servant particularly doing that kind of work. There were about twenty who were given some sort of financial assistance either through the COC [the Federation of Dutch Associations for the Integration of Homosexuality] or

through one of the other local organisations and there were a further twenty nine I think who recognised that they had problems around gay and lesbian issues and that it would probably be a good idea to do something about it. [...] so it turns out that well under ten per cent of Dutch cities actually do anything about gay and lesbian issues. (J. S.)

Knowledge accumulation can also be done in a more analytically focussed way: in the form of social scientific research studies. In the context of making and evaluating different policy measures qualitative data collection and analyses are especially important elements of the diagnostic process that can inform decision makers on not just the existence of the problem but also on its content as well as the indications of its possible solutions.

To some extent the bureaucratic mind does like to deal with statistics. At the end of the day people in public service have to justify what they do to politicians, to tax payers, to the general public and they do like to have hard statistics. And if you are running government policy or the policy of a local authority you want to have some sort of statistical basis upon which you can say therefore we have to do this. ...

Even if you have statistics that are only the first stage of a diagnostic process – and the point of mainstreaming or even responding to indirect discrimination or whatever else is to actually diagnose where the inequalities are and what you are going to do about them. In certain areas like disability and race and sexual orientation for various reasons that sort of number crunching is not really going to get you anywhere. In disability because there are so many types of disability; in race because there are so many different racial minorities; in sexual orientation because nobody is going to tell you, and it may be a separate issue, for gays and lesbians, even if you could tell the difference. [...] So what we are saying is that really the first stage of the diagnostic process must be a combination of statistical collection if you can, but also qualitative data collection [...] by talking to people who either represent or are experiencing inequality and disadvantage and asking “What is your experience? Where are the obstacles? What are the difficulties?” – That sort of qualitative data is actually much more useful for the diagnostic process. The statistics will only show you that you have got a problem, but the consultations may actually tell you what the problem is, and then you can start solving it. So what we are saying is that the mainstreaming exercise is a question of collecting evidence. That evidence can be statistical, but in fact even in the areas where statistics are available, you are still going to have to talk to people. If it is in the labour market, perhaps you talk to the trade unions, if it is in wider society you talk to the NGOs. You need to get that sort of consultative model in place so that you can actually genuinely identify what the issues that need to be addressed are, and then you can set yourself targets and measure whether you achieved your targets [...] (B. F.)

Awareness-raising is a complex process providing several opportunities to increase public knowledge and understanding concerning LGBT issues. Even though raising awareness refers to mobilisation more on the cognitive – or emotional – than on the practical level, by increasing people's ability to implement change it can contribute to practical changes, too.

IV.3.5. Implementation at the level of equality bodies

Implementation often refers to implementing legal changes in order to advance social emancipation of LGBT people. One of the most important preconditions of effective implementation is the existence of a well-functioning institutional framework including human rights commissions, specialised equal treatment bodies, and expertise centres. However, implementation can still be problematic in various ways. In some countries there is anti-discrimination legislation in operation but there are no equality-body like institutions to monitor its effects:

When we are talking about equality bodies I would like to point out a difference between Sweden and Finland that I think is interesting. Finland has had a law against discrimination in the workplace longer than Sweden, but it has never been used and as far as I know, nobody knows of it. There is a law, but nobody knows about it. In Sweden, when we got the law, we also got the Ombudsman against discrimination, and I think that the context where you use the law, how you put it together with society is very important. We have the Ombudsman and the Ombudsman supervises how the law is applied or whether it is needed to apply. So when a company does something foolish, the Ombudsman would look at it and say: "This is not OK", and then the company would say: "Oh, we didn't mean anything bad, we will change." This way you've got real change and you raise awareness. But if you don't have anyone supervising it, nothing will happen. There should be some kind of equality body in all countries. I suppose they will get one in Finland if they haven't already, but at least in the past it was like that. (A. S.)

In other cases the existing equality bodies are not functioning very effectively. For example, in South Africa – one of the few countries providing constitutional protection against discrimination on the ground of sexual orientation – the human rights and the gender commissions seem to lack the expertise on sexual orientation issues:

Look at South Africa, which passed this liberal constitution in 1996 and since then in a series of court decisions has expanded on the implications of that decision, abolishing sodomy laws, recognising same-sex relationships in a variety of legal ways now moving very close to recognising same-sex marriage. But at the same time the implementation of day-to-day protections against discrimination is still very weak. There are a number of levels on which that is so. There is the macro level where you have two chapter nine [reference to the relevant chapter of the Constitution] commissions named after the provision of the constitution that created them: the two commissions acting against discrimination. There is a human rights commission and a gender equality commission. The question of sexual orientation has tended really to get lost between them. There is no single dedicated person at either one whose job is to be the centre of expertise on these issues and so it is always a question about the efficacy of response. (S. L.)

There are two main forms of equality bodies: a country either has a general body responsible for all sorts of equal treatment issues – such as the Equal Treatment Commission in the Netherlands, the Equality Commission for Northern Ireland, the National Council for Combating Discrimination in Romania, the Equal Treatment Authority in Hungary –, or it has several specialized institutions, each dedicated to different scopes. Sweden is the only country in the world that – besides other specialised ombudsman offices such as the disability ombudsman, the ombudsman for equal opportunities between women and men, or the ombudsman against ethnic discrimination – has the “HOMO”, the Office of the Ombudsman against Discrimination on the Grounds of Sexual Discrimination.

In Sweden, the Office of the Ombudsman against Discrimination on the Grounds of Sexual Orientation is a national Human Rights institution. It is an institution that was created by Parliament [...] and then the government has widened the mandate of the ombudsman to cover basically all areas of Swedish public life. The task of the ombudsman is to enforce anti-discrimination legislation, but also to combat discrimination on the grounds of sexual orientation in all areas of Swedish life. More specifically the office receives individual complaints from persons who feel that they have suffered discrimination on the grounds of being gay, lesbian, or bi-sexual. When it comes to employment discrimination, discrimination against students in the Universities or other establishments of higher education, and when it comes to goods and services including housing, the ombudsman can ultimately go to court on behalf of the discriminated person and demand financial compensation through the courts for that person. [...] Apart from dealing with individual complaints we can also start investigations on our own initiative to look into things that we think seem strange or fishy. We do a lot

of education, information, awareness-raising; so it is a lot of preventative work, promoting equal rights to prevent discrimination from ever occurring. Actually I would say that that is the major part of our work to make other public and private actors, like other authorities, or employer's associations or labour unions, work in a pro-active way and to raise awareness and to do educational and outreach work. [...] It is also a part of the ombudsman's task to propose legislative or other kinds of measures that the ombudsman feels are necessary to combat discrimination on the grounds of sexual orientation. So we do that on our own initiative, but also, mainly I would say, we are consulted on a large number of legislative proposals in all fields of legislation, where we have to give feed-back to government on what the impact of the proposed legislation would be on the situation of gays and lesbians for instance. (H. Y.)

According to the Swedish sexual orientation ombudsman a public body responsible for anti-discrimination issues is endowed with official competence and authority backed up by the state. Therefore in certain fields it can be more effective – or it can be effective in different fields – in fighting against discrimination than an NGO having limited access to information and resources. For example, a specialised public agency can play an active role in preventing discrimination by pre-monitoring public policies in their planning stage and drawing attention to their possible negative consequences for LGBT people.

That is one of the experiences, definitely in Sweden, that something totally different happens when you have a government body dealing with these issues as opposed to just NGOs dealing with these issues. When my office was set up, one of the first things I started doing was to look into all the different ministries and their responsibilities, all the ministers, [...] each and every one of them, what are the specific gay and lesbian or sexual orientation issues, and then I would meet with each and every of the ministers and go through: "Under your responsibility the most important sexual orientation related issues are [...] I have certain ideas about what needs to be done there, what are your ideas and what are you going to do?" You can start at the top there and go downwards and outwards in the public administration. Of course, you cannot call the minister every month, or demand to see the minister every month, but if my office feels that there is a need for action within the field of the different public bodies: within the law enforcement system, police, public prosecutors, judges, etc., then I go to talk to the leadership of for instance the court administration or the prosecutor general's office, and, first of all, they will not say no. Maybe they will not say no to an NGO either which wants to go and see them, and they may receive them, but they will certainly not say no to a public government agency which has a legal mandate to deal with these issues and if I am not

satisfied with the results of those discussions I can come back, and I will come back next month, or in six months and check up on what has been going on. And if I am not satisfied with that I can make proposals to the government and they know that I can do that, which may in turn perhaps lead to other kinds of actions, new laws, or executive orders to the law enforcement bodies from the government doing things on sexual orientation. Whilst an NGO will be received, probably in my country at least, with a lot of interest and very politely, and hopefully that will have good effects, but if an NGO is not happy, what are they going to do? They can come back and complain. [...] What we have seen is that something very, very different happens when you have this actual official body that says: "look, it's the law. I didn't invent this". I can say that to government as well: "If you think I am being difficult, then sorry, you told me to be difficult. The parliament told me to be difficult. It is not my idea, this is the law, this is the government regulation dealing with the office". And that gives a totally different locomotion to the whole issue. I have been really surprised: I could not have dreamed of the possibilities that would open up just by the fact that this is a public body, not just an NGO. (H. Y.)

On the other hand, in some cases NGOs can actively contribute to the establishment of equality bodies, by using their lobbying efforts and offering their practical expertise accumulated in the course of their interest representing activities. This can indicate that having a public anti-discrimination agency is also perceived to be important and useful by civil society actors. This is what happened in Romania:

We had an emergency ordinance in 2000 which collected all these anti-discrimination provisions. It was specifically mentioned in the ordinance that this law should be implemented by an anti-discrimination body. This is instrumental, because without a specialised agency you cannot expect practical effects from this law which is the Hungarian case or the Bulgarian case right now [in 2004]. [...] Civil society realised that the political will of the new government which was elected in November 2000 was not strong enough to implement an anti-discrimination law, which gave us enough opportunity to discuss and to come up with a solution we can achieve at that moment in order to have an anti-discrimination body. [We] actually made a proposal [...] to sue the Romanian government because they [the government] did not respect the terms of the law. In less than two weeks the government issued a decision, a governmental decree, establishing an anti-discrimination body which is called the National Council for Combating Discrimination. That was a good example of applying pressure. [...] In 2001 the Romanian government issued a decree, but it took at least another year till the moment of the creation of that body. In the meantime we [ACCEPT] again tried to put pressure on the Romanian government to come up with a decent list of people who could be nominated to the board

of directors of this anti-discrimination agency. And we wanted to be sure that these guys didn't discriminate previously and had at least some minimum standards of anti-discrimination, and we wanted to be sure that at least one representative of a minority would be among the members of the board of directors and also we expressed our concern related to their level of expertise. So we wanted to be sure that these people would have a minimum knowledge of what this was about. [...] In 2002 ACCEPT and the Open Society Foundation initiated a meeting with this board of directors trying [...] at least, to initiate a debate on the most pressing issues which should be dealt with at the beginning in the activity of such an institution without any experience. The first moment was confusing simply because the newly elected body did not know what they had to do at the beginning. They did not have a strategy, they admitted that their expertise in this field was very minimal, so they would be very glad if civil society would support them to be trained, and of course they had asked for money [...] for the expertise, for the logistics. It was obvious that this issue was not a very important one for the Romanian government, so they gave very little money for the existence of such a kind of institution, they did not even have an office at that time. (F. B.)

In most countries where there is anti-discrimination legislation in operation one general equal treatment institution was set up embracing various equal treatment issues based on several grounds such as ethnicity, gender, age, disability, sexual orientation etc. In some places – like in Northern Ireland – a single equality body is formed by uniting previously independent specialised anti-discrimination agencies and by integrating the “other article thirteen grounds” into the scope of the already existing institutional framework:

[The Equality Commission for Northern Ireland] was established five years ago, but it is a merger of two commissions which are over twenty-five years old. So we had commissions for religion and gender from the mid seventies, nearly thirty years, and then much more recently a commission for racial equality. In Great Britain there was a commission for racial equality from the mid seventies also, but we only had one in 1997 and then we did not even get a disability rights commission because our commission was formed before, so effectively we are a merger of four different equality bodies into one: race, religion, gender, disability. We have overall responsibility for the nine section seventy-five crimes in relation to the statutory duty, so now we have had sexual orientation added to that list simply because we are a single equality body already in place and therefore when the sexual orientation law came into force the natural way was to add it. [...] So I think it is important in different countries where there is an obligation to set up a race body and a gender body that they say, well, if we've got to do race and gender and there are

these other article thirteen grounds, we should simply have a body with centralised focus of expertise that promotes equality. [...] There is still a lot of work to be done on the NGO level and there is a lot of work left to be done in terms of visibility of gays and lesbians but it is, I think, important for the state to establish a focal point of expertise, of assistance, of promotion and if it is possible to get sexual orientation included in that agency, this is a really significant development. (B. F.)

According to the Swedish sexual orientation ombudsman having a single equality body responsible for all the “article thirteen grounds” should be an obligatory requirement in the European Union:

I think one of the most important things to try to go for at the European Union level is to make the member states have an obligation to have a specialised body, not just on ethnic discrimination – they have to set up a specialised body on ethnic discrimination according to the race directive – that should be a top priority to extend that obligation to include all the article thirteen grounds. (H. Y.)

The main advantage of having a general public agency seems to be that it tends to have more competence and resources than a specialised body focusing on only one field, and it can also be better equipped to deal with multiple discrimination cases, when persons are being discriminated on more than one ground at the same time. However, within a general equality body there is a higher risk to develop a certain hierarchy of rights, where certain forms of discrimination tend to attract more attention than others.

The advantage of having a body that deals exclusively with sexual orientation issues is that you can get focus on an issue and you can get high level competence in that field, but in the long run I don't think it is the ideal way of doing it, because you can get a lot more weight behind what you are doing if you are a larger Human Rights or fundamental rights agency or fundamental rights body. So I think there are a lot of advantages of having a single equality body in that sense, but then it is also important to set up that single body in such a way that you do not risk losing some of the stuff, you do not risk getting a hierarchy of rights, where gender will be at the top and disability and sexual orientation will be battling at the end. But there are ways of avoiding that. If you set it up as a commission for instance, with a collective leadership of that body, with a body of commissioners, [...] where each commissioner – of course, taking general responsibility for the whole running of the agency, – actually has a specific responsibility for a certain ground. So you would have a gender commissioner, you would have a sexual orientation

commissioner, you would have an ethnicity commissioner etc. then I think it is possible to avoid the negative things and still make use of the positive impact of one single Human Rights body. (H. Y.)

Other countries prefer to have several anti-discrimination laws, which creates much more difficulty in parliament and they need several anti-discrimination agencies to cover several different fields. And sometimes it is quite difficult to insist on precise collaboration between them, when we have multiple discrimination, for example, where someone is gay or lesbian and a Jew. Or you are in trouble as a gay and you are in trouble as a refugee. [...] On the other hand there is some disadvantage if they do not have specific expertise on each field they are supposed to cover, for example, if they do not know various [pieces of] information about sexual orientation, which is the case with our NCCD [National Council for Combating Discrimination]. It is regrettable that we do not have a kind of "Homo", which is the Swedish ombudsman for sexual orientation. [But] there are advantages and disadvantages at the same time. (F. B.)

On the other hand, the main advantage of having several specialised equality agencies each focusing on only one special field is the potential to accumulate greater expertise on one given field. It seems that an optimal solution would be to combine the functioning of a single equality body with specialised expertise centres:

In an ideal society you would have a generalised anti-discrimination body especially dealing with policy issues and with legal aspects and you would have specific organisations like ours ['Homo Emancipatiebeleid', the Expertise Centre on Gay and Lesbian Policy Issues in the Netherlands] that can train and implement programmes at local and national levels. (J. S.)

At present the Netherlands can be characterised by the most developed system concerning the implementation and monitoring of LGBT equal treatment issues. The Commissie Gelijke Behandeling (CGB; Equal Treatment Commission)¹⁵ was established in 1994 with the primary goal to promote and monitor compliance with the existing equal treatment laws. However, there are additional advantages of having such a commission including the possibility to avoid potentially costly, time consuming and humiliating court cases as well as the concentration of practical knowledge on various types of discrimination which can be also used by researchers and policy makers.

15 www.cgb.nl

It is difficult to go to court, it costs a lot of money, it costs a lot of time [...] it can be humiliating. So if there is a body, which is not quite a court, which has some authority, but a lower threshold to go to, cheaper, quicker, more informal, more knowledgeable, friendlier, then it may be easier for people to go there and that also means that employers will know that people have an easy option to go to and therefore they might be easier for the employees. [...] One of the things is that there may be a court case here and a court case there, but there will always be only a few cases, whereas these commissions get many more cases, so they get the expertise as a body, which they can use in subsequent cases, and they can produce press releases and they can work together. [...] And then a researcher, a legal researcher, or a social researcher can go to the commission or to the ombudsman or whatever and ask: "what cases did you have?" or read the annual report of them. It has a greater social impact than most court cases. (K. W.)

A specialised expertise centre on gay and lesbian policy issues started to operate in 2002 in the Netherlands, offering a steady source of expertise for policy makers especially on the level of local politics.

The Expertise Centre on Gay and Lesbian Policy Issues was founded about two and a half years ago and it is operated on a grant given by the Dutch Ministry of Welfare, Health and Sports. These funds are for a project of four years, funded in reaction to an appeal by the gay and lesbian movement, because, increasingly, there was an idea that even though the ministry has been co-ordinating gay and lesbian policy issues, not much was being done in the field of implementation, and expertise had been slipping away. [...] the endorsement of such policies by public authorities would be the most important thing [...] the problem is that the moment somebody gets pensioned off or dies or gets another job, the whole expertise is gone. (J. S.)

Equality bodies and expertise centres can provide major means of implementing equal treatment for LGBT people in everyday life, especially in a social environment where there is still limited awareness concerning these issues among civil servants, state officials, politicians and members of the general public.

IV.3.6. Implementation problems of equal treatment practices in different social settings

There are several fields where implementing LGBT equal treatment practices is perceived to be especially problematic, including workplaces, religious settings, and social contexts relevant to young people and old people respectively.

According to the experiences accumulated by two Swedish EQUAL projects – *Homosexuals in the Care System* and *Norm-giving Society* – heteronormative expectations prevail in most workplaces: everyone is automatically considered to be heterosexual. Non-heterosexuals have to make extra efforts for being accepted by their colleagues when trying to enlighten them by contrasting the content of widespread stereotypes with real life. For LGBT employees the first important step in the workplace is the decision to come out as a non-heterosexual person.

To start the work you need to direct attention to openness and the opportunity to be open as a gay or a lesbian in the workplace. Why is it that important? You need to start to talk about that, to educate so to say the heterosexual staff and employees about why that is important and how it looks in real life. So we often come down to the room for coffee breaks and a lot of things and discussions are going on there, not just about the work, but also about life outside work. It is very heteronormative as we used to say. It is standard that everyone is supposed to be straight before you come to the point where you come out yourself and until you do that everyone supposes that you are straight. That is some kind of starting point for the education I would say. (G. S.)

Awareness-raising programs can help to motivate people to see diversity, including sexual and gender diversity, as an enriching feature that can make the workplace a better place to be. However, awareness-raising at the workplace can work more effectively if it is backed up by sufficient equal treatment legislation, and if for example, trade unions are also committed to the implementation of equal treatment practices.

We also have to motivate the supposedly straight administration in the workplace that they, and all, can benefit from this. It is not enough to say that you should do this for the gays and lesbians because you are a good human being. They have to know why: You can argue that it is a human right, but you can also argue that it is good for everybody to have this kind of workplace. You can also say that people who are homophobic are also racist. [...] It goes in one package, and by working with these issues

you get better in every sense and you get a better workplace. So you have to motivate people [...] [and] that is a hard part. In Sweden we have had a lot of help from the law, because the law puts responsibility on the employer and on the trade unions. I think that's why the trade unions are eager to work with these issues, because they want to do a good job. If they don't do a good job, there will be change in the law and they want this power so they have to behave themselves. (A. S.)

Creating a more tolerant, friendlier work environment for LGBT people can positively affect the productivity level of work: if LGBT people are free to be themselves, they can focus more on their work, and less of their energy will be wasted on trying to conceal the non-heteronormative aspects of their lives.

If you are gay or lesbian and not open, that takes a lot of energy from you and if you could put that energy into productivity you will be more effective and the organisation benefits from that, and also the climate benefits from the fact that everyone can be open. If you could clean homophobic jokes and assumptions out of the climate you will get a better working climate for all. For example, it was very usual ten years ago to make jokes about women, but it is not any more, because we have raised the standard so to speak. [...] It is a slow process, it has taken several years to get where we are right now, but I think that in new EU member states like Hungary for example, – of course there is a long way to go –, but it could go faster if you look historically at what we have done. (G. S.)

In awareness-raising trainings addressing workplaces, arguments about the potential increase of productivity resulting from a more LGBT friendly workplace climate sometimes can work even better than references to human rights.

I think that it is also very important to speak the same language as the organisation you are addressing. We speak a lot about human rights, but when it comes to companies it isn't enough. You have to speak about money, profit and productivity. [...] It takes a lot of energy not to be open, but it is also a bit dangerous to talk about that because [perhaps] the best thing for them [the employers] when they find out that someone is gay is not to hire them at all. So you have to focus on the whole working climate and you can argue that they can make a better profit if there is a good climate. There are a lot of arguments and you have to use the right one for the right organisation. (A. S.)

In the context of implementing equal practices for LGBT people there is still a lot to do with the problems of young LGBT people.

According to the Swedish sexual orientation ombudsman young non-heterosexuals are especially vulnerable to discriminatory practices in the school system which can be manifested in the behaviour of their teachers and peers, or it can also be embedded in the school curricula.

What I feel very strongly about is that the most vulnerable people are young people. I have always tried during these five and half years and I will continue to try to put a priority on the situation of children and young adults who are gay and lesbian or bi-sexual, because they are in a very vulnerable position. The role of the school system is extremely important. First of all, children cannot choose. They have to go to school. It is compulsory to go to school. They must be in school. So therefore the responsibility of the school system, of how children, teenagers and young adults, how their every day life looks in schools, that is a very important responsibility for the school system. So we are trying to put a priority on that... [and] making the local authorities aware that educational material can still be very discriminatory in many ways, but also to actively promote good things and good practice, those are very important things. (H. Y.)

NGOs can also offer assistance for young LGBT people by providing them with an accepting family-like environment where they can feel at home. In this context *the community* can serve for young LGBT people as their *family of choice*, especially if we take into consideration that “for non-heterosexuals the idea of a *chosen* family is a powerful signifier of a fresh start, of affirming a new sense of belonging, that becomes an essential part of asserting the validity of homosexual ways of life” (Weeks [et al.], 1999:88).

The special thing about being gay is that it is something that you do not get from your parents. It is something that you develop completely by yourself. It doesn't matter whether it takes you one second to think about it, or whether it takes you twenty years to think about it, the moment you discover that you have feelings that are not common with your peers or your family, you have to personally take a decision: you have to decide whether to come out, or not to come out. The decision is yours. But what is quite often forgotten is that it can mean and far too often does mean that you break up partly with your social background, whether it is just a friend who doesn't like you any more because you were football team mates, or whether it is a real big break up within your family with your parents or your siblings. There is this moment of decision and there can be serious consequences of that decision. And that means that we are pleading very much for sustaining family of choice structures, whether that be within a grass roots organisation, or whether that be within openness about homosexuality in all aspects of life, but it is very

important for young people to be able to introduce themselves within a kind of open gay community because they lose their heterosexual natural family in a small or a large way. (T. B.)

In comparison to young LGBT people there is even less attention paid to the special needs of old ones. In the aging societies of the developed world in a certain stage of their life LGBT people are likely to find themselves in old people's homes where they can start their "liberalisation" or coming out process all over again.

Our society, our population is becoming older because there are fewer children the past forty-fifty years. That means that older gays and lesbians find that after they have been out and been living in the gay community, they have to return to the heterosexual community when they go into old people's homes where they have to face regulations in which there is often no place for gay and lesbian people. If people are living in a heterosexual relationship and one dies and the other needs more help, that person can meet others in an old people's home, but if a lesbian or gay is coming into that home, then they have to start their whole liberation all over again. (T. B.)

Implementing equal treatment practices for old LGBT people is therefore an issue that can be expected to attract increasing social attention in the future. In addition it can be mentioned that LGBT people who have to spend some time in hospitals or other institutions of the health care and the social care system can also have similar experiences, though – if it is only a temporary stay – perhaps to a lesser extent.

Harmonising religious beliefs with one's non-heterosexual sexual orientation is often regarded as an issue not to be included in the scope of equal treatment practices. However, it can still be important to refer to the findings of *The Social Dialogue on Homosexuality, Religion, Lifestyle, and Ethics* project initiated by the Dutch COC together with religious organisations, especially because certain discriminatory practices seem to be closely related to religious beliefs. On the other hand, it can also be pointed out that in the present European context it can be increasingly problematic to define the LGBT movement as being an exclusively "white and secular" movement.

A lot of religious gays, whether they are Christian, Catholic, or whatever, feel they belong to their religion in the first place and in the second place they try to find an expression for their sexual orientation. I won't say that this accounts for everybody, but it does make a large difference. If you look at it from that point of view, then you will find that the current

gay movement is quite often a white secular movement and then you get into all kinds of discussions that follow from there. (T. B.)

The *Social Dialogue* project reached several conclusions, including that the modern Western concept of homosexuality – referring to “a relationship based on love between two people who are of equal importance and there is no power struggle between these people” (T. B.) – is not necessarily understood in the same way by people coming from other cultural backgrounds. Therefore instead of ethnocentric assumptions a more culturally relativistic approach had to be applied in order to highlight the potentially very different contents of the ‘homosexuality’ concept:

We worked out that homosexuality from the Islamic point of view is a container concept and paedophilia, rape and sodomy are all included in that concept. So if you come to somebody’s door and say: “Could I talk about the rape of your son please?”, then you’re in big trouble. This is what happens quite often: when people from the gay community come into an Islamic community and say “Could we please talk about homosexuality”, what the Muslims actually hear is “Could we please talk about the rape of your son” so they will usually try to get out of that, because they don’t understand how Europeans can be about raping each other constantly. It’s true, they think in terms like that because a lot of Muslims who are migrants come from rural areas within Turkey and Morocco and Northern Africa, which are not very enlightened in the sense that they don’t really know about these modern-day concepts. (T. B.)

Awareness of these interpretational differences can help to start an effective interaction between LGBT NGOs and religious organisations. Leading a dialogue seems to be one of the most important means of effective interaction in this level:

Dialogue is a concept very well known within religious communities; it means that you share your views, but you don’t try to put values on the views of the other. [...] If you find that there is misinformation you can try to explain the misinformation. One of the concepts that we learned [is that]... if you belong to a certain faith, then the concept of sin within that faith is your personal concept. It’s your concept that homosexuality is a sin for instance, which does not mean that all homosexuals are sinning because if they are not of that faith, then it’s not their problem. That also needs explaining quite a lot, because a lot of gays and lesbians think that they are supposed to be sinners and that they will be discriminated personally because of that. People who belong to a certain faith can express that in another sense it is not that you should be discriminated by me, it is just that within my faith and my relationship with my God I have to be aware

of punishment... The same goes for Muslims. Of course, many Muslims will say that there is no homosexuality within their community. If it is a sin within a certain faith, then believers of that faith have a problem. (T. B.)

For LGBT people whose religious or ethnic background is not tolerant towards their sexual orientation or gender identity LGBT civil society can offer a shelter where they can try to be themselves. In this context “coming in” – coming into the community – becomes an important concept.

The gay community is very keen on the concept of coming out. Once you're out, you're open, you're freed of the restraint that you've always felt, so you can be yourself more and better than you could before. But, of course, there is a balance between coming out and the price you have to pay for coming out. In several ethnic communities the social relationship that you have with your community is so important that coming out is not an option for these people. That means that we have developed the concept of coming in. It means that people come into the gay community: they strive to find their own place within the gay community before they even think of coming out to their larger families, their own social environment. (T. B.)

With these examples of implementation problems of equal treatment practices in different levels of social institutions, including the workplace, the school, the family, the old people's home and the church, I tried to point to important areas where further developments are needed.

V. Conclusions and recommendations

By examining social visibility and acceptance of LGBT people in Hungary I have reached the following conclusions:

According to opinion poll findings the social acceptance level of homosexuality is relatively low in Hungary, while there is no data available about the social acceptance level of transgender people. The majority of Hungarians seem to have negative views on homosexuality and consider it a form of sin, crime, illness or deviant behaviour, while only about ten percent acknowledge the right to choose a same-sex partner. According to the findings of a large scale opinion poll survey conducted by EOS Gallup Europe in 2003 in thirty European countries, only 37% of Hungarian respondents supported (while 55% opposed) the authorisation of same-sex marriage, and 34% supported (while 60% opposed) the adoption of children by same-sex couples.

Mainstream media visibility of LGBT people in Hungary is also relatively low. LGBT people usually share a common “mainstream media fate” with other relatively powerless – for example, ethnic – minority groups, which can be characterised by low visibility and stereotypical representation. Therefore there is an increased need for creating “own media products” that can provide people belonging to these groups with a symbolic environment where they can feel at home. The position of LGBT people differs from that of “traditional” minorities in two aspects: they are usually not marked by their bodies – for example, by their skin colour –, thus they are not recognisable at first sight; and their existence is perceived as challenging the “natural order of things”, thus their media appearances can become problematic. LGBT “own media” products can be perceived to be documents of, as well as tools for promoting the successful social integration of relatively powerless social groups, and – in some cases – struggling against social

intolerance. In places where mainstream media are unable to mediate the special needs and claims of sexual minorities, special media segments must be created by the concerned groups in order to provide their constituencies with positive reference points for identity formation. Inability to use mass media to project LGBT cultural elements into the mainstream can reflect the relatively high level of social discrimination of LGBT people in present day Hungary.

The socio-cultural infrastructure for LGBT people is not very well developed in Hungary. Even though there is an increasing number of officially functioning organisations representing LGBT people's interests – including the Háttér Support Society for LGBT People, the Labrizs Lesbian Association, the Lambda Budapest Gay Association, the Habeas Corpus Working Group, the Five Loaves of Bread Community (“Öt kenyér” Christian Community for Homosexuals), the “DAMKÖR” Gay Association, the “Együtt Egymásért Kelet Magyarországon” (Together for Each Other in East-Hungary) Gay Association, the Szimpozion Association, the Atlasz LGBT Sport Association, and the Rainbow Mission Foundation –, the number of activists, LGBT social and cultural venues, and events is still very limited.

As a result of examining the development of sexual orientation and gender identity related anti-discrimination and equal treatment policymaking in Hungary I have reached the following conclusions:

I. Anti-discrimination legislation

Hungarian legislation concerning same-sex relations was clearly discriminative before 2002 when certain regulations of the Hungarian criminal law functioned as the basis of institutionalised discrimination of homosexuals. Illegitimate relationships between same-sex partners suffered more serious consequences than those of different-sex partners: for example, the age of consent was 18 for same-sex partners whereas it was 14 for different-sex partners.

The Hungarian history of legal persecution of homosexuals shows that the social rejection reflected by the discriminative penal codes was originally rooted in a kind of moral judgement, inherited from Christian doctrines. In the second half of the 20th century Hungarian law makers

defined homosexuality as an “abnormal” biological phenomenon which at the same time – surprisingly – can be learnt, and this learning process can have dangerous consequences. By the end of the 1990s the contradictions inherent in views of Hungarian legislation on homosexuality became apparent: in certain court cases judges stayed the proceedings by referring to the regulations discriminating same-sex relationships as being unconstitutional. The expectations of the international legal environment especially those of the European Union also projected the necessity of re-examining the discriminative legal treatment of same-sex relationships.

The historically changing views on homosexuality reflected by Hungarian legislation provide different versions of the social categorisation of homosexuality: it was defined as a sin until the end of the 19th century, as an illness until the second half of the 20th century and later as a form of a somewhat dangerous social deviance. Viewing homosexuality as a freely chosen lifestyle did not appear – and still does not seem to appear – to be part of the choices reflected by Hungarian legislation.

During the 1990s there was no sexual orientation related anti-discrimination and equal treatment policymaking on the political agenda. However, the practical application of the general anti-discrimination clause of the Constitution in relation to sexual orientation as a basis for discrimination could be observed in the decision making processes of the Hungarian Constitutional Court: In 1995 the Court legalised lesbian and gay partnership by declaring that the previous law limiting partnerships to ‘those formed between adult men and women’ was unconstitutional. The Parliament was ordered to make the changes necessary to recognise same-sex partnerships by 1 March 1996. The partnership law in its present form includes any couple, of whatever sex, that live together permanently in a state of ‘financial and emotional communion’. It is a factual legal relationship, which comes into existence without any official registration; thus it has underlying problems of proof. *Law reform is therefore needed to ‘institutionalise’ same-sex relationships and to prevent family and other policy practices discriminating against same-sex couples.*

At the beginning of the 21st century Hungary was among the very few European countries – besides, for example, Austria – where the national Penal Code openly discriminated between same-sex and different-sex partners concerning the age of consent in a sexual relationship.

In June 2002 the European Parliamentary Committee on foreign affairs issued a recommendation that reiterated its call upon the Hungarian government to eliminate provisions in the penal code which discriminate against homosexual men and lesbian women. Soon after this recommendation, in September 2002 the Hungarian Constitutional Court – perhaps with a view that a country being at that time at the threshold of the European Union membership cannot wait any longer with such decisions – ruled that paragraphs 199 and 200 of the Hungarian Penal Code were unconstitutional and eliminated them.

The rulings of the European Court of Human Rights and even statements by the various committees of the Council of Europe played a crucial part in completing the anti-discrimination penal code reform in Hungary as the Hungarian Constitutional Court, in reaching its 2002 decision, paid special attention to relevant documents of the European institutions devoted to the protection of human rights. The views of these European institutions can be summarised in the following way: Criminal measures against voluntary, consensual homosexual activity constitute interference into the private lives of individuals on the part of the state or, more precisely an infringement of the right to maintain respect for the chosen sexual practice; state interference in the most intimate aspect of private life encroaches on the most personal manifestation of an individual, therefore the state is only entitled to do so on the grounds of extraordinarily serious reasons.

The most important ECHR decisions, potentially influential to national anti-discrimination legislation, were the following: In the case of *Dudgeon v. UK* (Date of judgment: 1981 October 22), the European Court of Human Rights for the first time declared that legislation *criminalising consensual sexual acts between adult men* in Northern Ireland was in breach of Convention Article 8 which provides a right to a private life. In the case of *Mouta v. Portugal* (Date of judgment: 1999 December 21), the Court declared that refusing *child custody* to a gay man simply because of his homosexuality was in breach of Article 8 of the Convention, the right to a private life. It was declared discrimination on the grounds of sexual orientation and violated Article 14 of the Convention which prohibits discrimination. In the case of *Sutherland v. UK* (Date of judgment: 2001 March 27 – striking out) the Court found that the higher *age of consent* for gay men was discriminatory and violated a right to a private life. The *Goodwin v. UK* case (Date of judgment: 2001 July 11) was related to the *legal status of*

transsexuals in the UK (treatment in relation to employment, social security, and pensions, and inability to marry): the Court found that a test of congruent biological factors could no longer be decisive in denying legal recognition to the change of gender of a post-operative transsexual, and found no justification for barring the transsexual from enjoying the right to marry under any circumstances. The *Karner v. Austria* (Date of judgment: 2003 July 24) was the first ever case relating to the *rights of same-sex partners* that the Court has agreed to consider. It involved a complaint from Siegmund Karner, an Austrian gay man who has lived in his male partner's flat since 1989 and shared the expenses of the flat. Mr Karner's partner died in 1994 and designated Mr Karner as his heir. However, the landlord of the property started the process of terminating the tenancy with Mr Karner. District and Vienna Regional Courts interpreted the term 'life companion' of the Rent Act as including same-sex partners who lived together for a long time. However, the Supreme Court disagreed with this interpretation. For the first time in its history, the European Court of Human Rights ruled that this was discrimination based on sexual orientation and that the European Convention on Human Rights had been breached.

Decisions of national legislative bodies can also influence the judgments of the European Court of Human Rights. For example, in 2003, in the *Karner versus Austria* case Robert Wintemute, Professor of Human Rights Law at King's College, London prepared a third party intervention on behalf of ILGA Europe and two other British NGOs. In this intervention the Hungarian Constitutional Court's decision of 1995, legalising lesbian and gay partnership by declaring that the previous law limiting partnerships to 'those formed between adult men and women' was unconstitutional, was cited – together with various court rulings from other countries – in pleading for a positive judgement of the ECHR. This example indicates the importance of appropriate national and European level legislation as well as the coordinated work of national and European level NGOs in advancing LGBT rights.

II. Equal treatment legislation

Before the introduction of the law on equal treatment and the promotion of equal opportunities in 2003, Hungary already had national laws prohibiting discrimination, such as the Constitution, the Labour Code, the Act on Public Education and the Act on Public Health, but only the

latter explicitly prohibited sexual orientation-based discrimination. In all other cases, the question whether sexual orientation is included under the heading “other situations”, usually ending the list of discriminatory forms based on “race, colour, sex, language, religion, political or other opinion, national or social origin, circumstances of wealth and birth” – given by the Constitution – was a matter for interpretation.

The first general anti-discrimination draft bill, submitted to the Hungarian Parliament in April 2001, included the prohibition of discrimination based on sexual orientation, and clear references to the 2000/43 Racial Equality Directive as well as the 2000/78 Employment Equality Council Directive. By the time the draft bill on “equal treatment and the promotion of equal opportunities” reached the stage of parliamentary discussion at the end of 2003, besides the protected categories listed in the Employment directive – including race, skin colour, ethnicity, language, disability, state of health, religion, political or other views, sex, sexual orientation, age, social origin, circumstances of wealth and birth, and other situations – additional categories such as family status, motherhood (pregnancy) or fatherhood, gender identity, part-time or limited period employment status, membership of interest representing bodies, were inserted into the list of protected categories. The bill passed in December 2003 and came into force on January 27th 2004.

The introduction of a general equal treatment act was not received with uniform enthusiasm in the Hungarian political arena, nor in civil society. Counter arguments were cited by politicians as well as NGOs stating that from the perspective of providing really effective, “tailor-made” social protection for certain social groups – especially for women and Roma people – it would be more suitable to introduce separate acts dealing with their special problems. During the parliamentary debate of the draft bill there was also a certain level of rejection expressed and a lack of comprehension voiced against the inclusion of sexual orientation and gender identity into the protected categories. These counter arguments reflected a certain hierarchical preference concerning the different grounds for equal treatment policymaking where providing ethnic groups and women with special protection claims a higher priority than the “special privileges” demanded by surprise categories like sexual orientation and gender identity.

The main scope of the Hungarian Equal Treatment Act is rights protection: this is the “hard core” to which the “softer” field of promoting

equal opportunities was added as a kind of direction indicator. Hungarian law makers seemed to be aware of how difficult – if at all possible – it is to regulate social problems associated with the promotion of equal opportunities by legal means, and they chose to concentrate on more tangible assets. The intention of the Hungarian government officials preparing the new law was to focus on practical legal problems from a specific rights protection perspective, and to protect the rights of precisely those categories of people who appeared to have the highest vulnerability to discrimination gauged on previous court cases. In this context the role of NGOs was to provide practical knowledge accumulated – in this case mainly – from legal practice gained from court jurisdiction, while the government policymakers' role, especially through the work of ministerial as well as external experts, was to elaborate a theoretical framework that can be effectively applied to practical cases.

The inclusion of the “real surprise” category of gender identity can also be explained as a logical extension of applying a rights protection approach. Even though there has not been too much experience accumulated in this field in Hungary as yet, gender identity is a possible ground for discrimination that could have been – and was – taken into consideration. As opposed to the inclusion of sexual orientation – that seemed to be in perfect harmony with EU trends reflected by the 2000/78 Employment Equality Council Directive –, the appearance of gender identity among the protected categories of the Hungarian Equal Treatment Act cannot be explained by EU trends or expectations. This was achieved mainly because of the effective interest representation strategies applied by Hungarian NGOs, namely the *Háttér Support Society for LGBT People* together with the *Hungarian Helsinki Committee* in the course of public consultations, initiated by the Ministry of Justice that provided real opportunities for the interested actors of Hungarian civil society to voice their views. Therefore it can be said that the power of determination – on the part of the two above mentioned NGOs as well as the fact that of government officials involved in preparing the act in compliance with rights protection principles – provided us with a new law including progressive elements, even when judged in a modern European context.

III. Practical application of equal treatment claims

By examining practical applications of equal treatment claims for LGBT people in Hungary, the legal possibility provided by the Equal Treatment

Act for initiating *actio popularis* – that enables societal bodies and special interest groups to start legal action without the personal involvement of the individual victim if the mistreatment is based on a category which is an essential feature of the individual's personality – seemed to be a useful and practical means to fight against discriminatory practices.

The practical realisation of equal treatment claims for LGBT people in the field of family and partnership rights is still quite limited in Hungary. Since same-sex marriage is not possible in Hungary, same-sex partners can emulate some of the conditions of married life only with the help of private legal contracts. The “Let’s start a family!” programme of the Legal Aid Office of Háttér Support Society for LGBT People offers different means for arranging a legal framework to start same-sex family life. These means include a civil union contract for arranging property, financial and personal relationships: encompassing important issues such as providing rights to obtain medical information about the partner’s state of health, and rights of disposal over the partner’s assets when that partner is in a helpless state; preparation of a will; appointment of guardians (if there are children). The existence of this program shows that same-sex couples need to make extra efforts if they want to establish a level of family security similar to that inherently enjoyed by married couples.

The difficulties caused by the lack of institutionalisation of registered partnership (available also for same-sex couples) were highlighted in a case in 2003: the pension application of a surviving partner (of a same-sex couple) was initially rejected by the Hungarian National Pensions Authority on the ground that the social security law in the case of the death of one partner in a cohabiting partnership not having children, the surviving partner is eligible for a widow’s or widower’s pension only if ten years of uninterrupted cohabitation can be proved. However, the authority argued, as the modification of the Hungarian Civil Code legalising same-sex partnerships (following the decision of the Hungarian Constitutional Court in 1995) became operational only in 1996, the ten years cohabitation period could only be completed in 2006. In the court cases, following the rejection of the widower’s pension application, however it was successfully argued that the law maker’s intention in 1996 was to end discrimination in 1996, not in 2006, and therefore any period of cohabitation preceding the legislation should be taken into account.

From the point of view of developing anti-discrimination and equal treatment legislation and policymaking the analysis of this case

raised two important points. In the first place a precedent was created with potentially far reaching consequences in other fields of law (especially in disputes involving probate law between relatives and surviving partners of the deceased). In the second place this judgement could be interpreted as a symbolic compensation for same-sex partners as it created a retrospectively valid legal framework covering a period when suitable legislation for same-sex partnership was nonexistent.

By examining the international policy context of LGBT equal treatment issues I have come to the following conclusions:

The international policy context of LGBT equal treatment issues can be described by a three level model, in which anti-discrimination policymaking is the first level, promoting equality of opportunity the second, and promoting diversity is the third level.

Anti-discrimination policymaking usually starts after penal codes have been reformed by eliminating the main forms of direct legal discrimination targeting LGBT people. The main goal of the anti-discrimination policymaking process is defining certain segments of the population as being in a disadvantageous situation to be protected, and introducing the idea that discriminating them is wrong, and furthermore punishable by law. In theory the anti-discrimination principle is a symmetrical one applying to members of both social minority and majority groups but in practice it is applied most of the time to people characterised by socially disadvantaged minority positions. As anti-discrimination policymaking has a less direct focus on social disadvantage, than positive – or affirmative – action at the level of promoting equality of opportunity, it has the potential to address the main issue of social inclusion in a broader sense in society at large, by presenting anti-discrimination principle as a general human rights issue that applies to everyone.

The second level is promoting equality of opportunity, often manifested in the form of taking positive action measures directly in favour of the disadvantaged groups. At this level the main focus is on systemic discrimination embedded in the system. For example, only after identifying and uncovering indirect forms of discrimination can one start introducing positive action measures in an effective way. Mainstreaming – the systematic consideration of the particular effects of all policies, at the point of planning, implementation and evaluation, on

disadvantaged groups – is a method that can be effectively applied at this stage. We can distinguish micro level mainstreaming concentrating on particular policies and macro level mainstreaming that focuses on the overall position of certain disadvantaged groups – such as women, ethnic minorities, disabled people, or LGBT people – in society. In some cases the mainstreaming analyses can result in the recognition of the necessity to introduce positive action measures. Mainstreaming and the rights based approach characterising the anti-discrimination policymaking stage can also overlap in those instances when the existence of anti-discrimination legislation leads social actors to pursue a mainstreaming-like self-analysis in order to avoid litigation against them.

The mainstreaming method can also be applied at the third stage which is often referred to as promotion of diversity characterised by the aim to find an optimal balance between respecting – as well as celebrating – diversity while seeing it as an integrated part of social reality. At this stage the main emphasis is not only on the right to be different, but also on viable options in practice that do not threaten one with being socially excluded.

By examining the interwoven issues of LGBT legal emancipation, political emancipation and citizenship, social emancipation and cooperation, awareness raising, and policy implementation on different levels, several good practices and problematic areas can be highlighted.

In the context of LGBT *legal emancipation* the starting point was that the fight against sexual orientation and gender expression based discrimination has been articulated as a human rights issue. The two main arguments most commonly used in challenges to sexual orientation based discrimination brought under the European Convention on Human Rights and the United States Constitution are the “*immutable status argument*”, presenting sexual orientation as a fixed condition like one’s race or sex, and the “*fundamental choice argument*” presenting sexual orientation as chosen like one’s religious belief or political opinion. While in the United States the perception of sexual orientation as an immutable status became popular from the 1960s, in Europe the fundamental choice argument seems to be the most favoured one, as it is also indicated by the decisions of the European Court of Human Rights concerning the right to respect for private life.

Including the explicit prohibition of sexual orientation based discrimination into a national, federal or state constitution is a very good practice. However, there is only real chance to put sexual orientation

into the constitution if it is being revised or a totally new one is being adopted, therefore in most of the countries it is not a very promising expectation to find the prohibition of sexual orientation based discrimination in the constitution. At present there are altogether four countries having national constitutions specifically prohibiting sexual orientation based discrimination including South Africa (1993), Ecuador (1997), Fiji (1998) and Portugal (2004).

Nevertheless, it can still remain problematic to decide what sexual orientation based discrimination covers exactly: whether it refers to discrimination against same-sex sexual activity, or whether it also covers discrimination against same-sex couples. While in Europe the decriminalisation of same-sex sexual activity of consenting adults has become a legal norm cultivated by the European Union as well as the Council of Europe, there are still some more or less interwoven problem areas in the field of legal emancipation of LGBT people including the legal treatment of LGBT couples and parenting rights. Same-sex marriage, marriage of transsexual people, individual adoption by openly gay men or lesbian women, or joint adoption by same-sex couples are still controversial legal issues that are addressed only in a few countries in Europe and worldwide.

Parenting is an especially heated issue because of the widespread assumption that children of a non-heterosexual or transsexual parent or same-sex parents can become especially vulnerable to social prejudice directed primarily at the parent(s). However, in the political distribution of family rights and responsibilities social prejudice cannot be taken into consideration in order to restrict parenting rights.

In comparison to child custody and individual adoption cases, adoption by same-sex couples can be even more complicated. We can distinguish between joint adoption of an unrelated child by a same-sex couple and joint adoption of the biological child of one of the same-sex partners, where the latter option seems to be achieved more easily. In most places where joint adoption by same-sex couples is a legal option, it is interpreted within a general discursive framework pointing to the necessity to extend the pool of potential adoptive parents. Therefore it is usually presented in the political agenda as a children rights issue having the “side effect” of advancing same-sex couples’ rights.

In general legal emancipation of LGBT people can be defined as a process characterised by criminal law reform – i.e. elimination of discriminative aspects of penal codes – as a starting point, leading to anti-

discrimination protection and promotion of equality. Anti-discrimination protection can be analysed on an individual level, when the focus is on the protection of individuals, and on a relational level, when the focus of protection is the individuals' relationships with other partners such as partners or children. Anti-discrimination protection is a very important phase of legal emancipation but its essential element is prohibition of already existing and often widespread social practices pushing LGBT people into disadvantageous situations. Therefore it can be seen as a correcting device of older norms and practices. Contrary to criminal law reform and anti-discrimination protection, promotion of equality with its pronounced orientation on the future, represents not only a different phase of the legal emancipation process but also a different paradigm: it is not just against maintaining social inequalities developed in the past and suffered from in the present, but very much for setting new norms of social coexistence. However, applying the promotion of the equality principle goes beyond rights protection: it is rather a political than a legal issue. It is hard to incorporate positive state action into law because it involves political decisions about the distribution of state or government resources that always tend to be limited.

Political emancipation of LGBT people can be analysed by applying the concepts of intimate citizenship and sexual citizenship emphasising the necessity to broaden the scope of modern citizenship to consider full participation opportunities of social groups, including LGBT people, being formerly deprived of full community membership. Intimate citizenship focuses on rights and obligations connected to the most intimate spheres of life: with whom and how to live one's personal life, how to raise children, how to handle one's body or one's self-perception as a gendered being and so on. Sexual citizenship is concerned with bodily autonomy, institutional inclusion, rights of free expression, and spatial themes, and draws attention to the various types of social exclusion that can limit citizens' political, social, cultural, and economic participation because of their genders, sexualities and bodies.

In the context of sexual citizenship the great dilemma of political emancipation is whether to claim equal rights for LGBT people on the basis of a normalising politics presenting them as normal, good citizens who deserve respect and integration because of their conformity to dominant social norms, since this approach would still imply a political logic of minority rights grounded in heterosexual dominance. It is ambiguous to interpret the extension of certain rights associated with

citizenship to embrace lesbians and gay men as a success, if equality and normality is still defined in heteronormative terms. In order to gain full citizenship rights for LGBT people the political agenda should be broadened at least in three dimensions: in gaining respect and representation in national institutions including the government, the workplaces, schools, families, welfare and health care institutions; in having social dialogues encouraged by institutions, and in the manner of equal partnership where concerns of all parties can be voiced and heard; and by revisiting the norm of the “good citizen”.

Sexual citizenship can be a useful reference point in the political struggle to gain “full community membership” for LGBT people, if carefully applied. However, one of the main questions here is whether equality is interpreted in a static social context or moral universe where the only active agents of change are social minority groups who should actively assimilate into the norms handed down to them by the majority, or whether equality is interpreted in more flexible terms as a joint achievement resulting from mutual efforts of various social segments and coalitions, oriented towards gaining ‘different but equal’ rights and opportunities.

Sexual citizenship is increasingly being grounded in a ‘politics of affinity’ operating with politicized flexible ‘affinities’ and coalitions, rather than with fixed, monolithic identities. However, this new politics of affinity is meaningful only as being part of a coalition-based model that allows for the effective political cooperation of heterogeneous LGBT crowds. Applying a coalition based strategy can also be useful in activating transgender citizenship. A wide variety of people transgressing the traditional gender binaries can identify themselves as a transgender person; therefore it would be hard to use the transgender category – being perhaps even more fictitious than homosexuality – in the course of a unifying sexual identity based politics. However, we can witness the effective functioning of ‘transgender rights coalitions’ in gaining gradually ‘fuller’ community membership for some transgender people in some cases.

Political emancipation is inseparable from social emancipation of LGBT people. Social emancipation is an umbrella term embracing the whole spectrum of life from legal frameworks and political participation opportunities to cultural representations.

Social emancipation of LGBT people is often interpreted as a kind of consecutive phase of legal emancipation. In this context anti-discrimination legislation is seen as a foundation stone in a process of constructing social equality. Legal discrimination is a much more

tangible asset than social discrimination, as it is easier to identify and thus fight against legal grievances than against “amorphous bad feelings” lurking in society. Law can – and should – reflect and promote social change, but it is far from being the only or the main force of change. Law can be effective if people are able to accept or even internalise the normative expectations it represents.

Legal and social emancipation can also be interpreted as interwoven issues or different aspects of the same process. If legal emancipation can be measured by the changes in the codified norm system of society, social emancipation is closely connected to the development of civil society, and the ability of social groups to represent their interests. In this context cooperation skills and opportunities – for example, cooperation of LGBT people to form organisations; cooperation between different, national and international, NGOs to form broader coalitions; cooperation between the state and NGOs – can become very important.

In a certain level of socio-cultural development LGBT social emancipation is inseparable from public manifestation of distinct identities and lifestyles, and thus from the effective functioning of identity politics. Identity politics is a system-specific concept: it can hardly be interpreted in anti-democratic political systems characterised by the extensive erosion of private identities, and the rigid – often forced – separation of public and private identities. The “natural” context of identity politics is civil society, the field of social self-organisation, being the framework as well as the guarantee of modern identity formations.

Effective functioning of LGBT civil organisations can be enhanced by forming broader coalitions. National LGBT organisations often seek international support from international LGBT associations – such as ILGA – or national organisations of other countries. On the national level these broader coalitions may include other actors of civil society representing the interests of other minority groups, religious organisations, human rights organisations – LGBT people as well as “their heterosexual friends”. LGBT NGOs can also cooperate effectively with quasi autonomous governmental organisations (quango’s), such as equality bodies, especially if there is opportunity for regular consultation between them.

Achieving a certain level of social visibility for social groups suffering from social disadvantages seems to be a precondition for claiming rights.

However, visibility can make individuals vulnerable and therefore not everyone can “afford” to come out. On the other hand, a relatively high level of social visibility does not necessarily correlate with positive developments in legal emancipation. It is very hard – if not impossible – to articulate the interests or defend the rights of socially invisible actors. Discrimination against LGBT people can remain hidden in a lot of instances. This can be explained in part with the preference of victims to avoid publicity on the individual level: in this context fear of humiliation is an important factor. The hidden nature of discrimination against LGBT people can also be explained in part with the lack of appropriate responsiveness and incentives on the institutional level. Existing but ineffectively functioning – i.e. socially invisible for those who would have need of these – institutions can contribute to the fact that certain forms of discrimination remain hidden. Lack of incentives to turn to a specialised official body responsible for equal treatment issues can also decrease the determination of people to complain about discrimination. In certain countries – including Hungary and Romania – the victims of discrimination cannot be compensated financially from any fines to be paid to the equal treatment authority by the perpetrator of the discrimination. Victims have to start a court case to seek personal compensation, a procedure – often costly in time and money – that complicates the victims’ life and is therefore rare.

Hidden discrimination can result from subtle prejudice as well as from the lack of considering the possible negative consequences of certain policies for different social groups. The latter type is referred to as indirect discrimination which is hard to avoid once the policy is in operation but can be prevented with careful examination during the policymaking process

The level of social emancipation of LGBT people is closely connected to the development of anti-discrimination legislation and policymaking as well as to the practical application of preventive measures to avoid the occurrence of discrimination. One of the main tools of preventing discrimination is *awareness-raising*. The main forms of awareness-raising include information exchange and communication, education and training, as well as providing people with a personal experience, and participation and involvement opportunities. Information exchange and communication can be realised in several contexts: within formal institutional procedures, for example, in the course of litigation or policymaking; in the – mainstream as well as “own” – media; in

publications – such as reports, information booklets, fact sheets, brochures, scientific publications; in meetings – such as workshops, exhibitions, conferences; and in events like festivals and demonstrations.

Awareness-raising in the form of education and training can be realised through developing specific educational programmes (lectures, courses etc.) and educational materials (text books, chapters in school books, training manuals etc.) – within the schooling system by targeting students as well as teachers, and outside the schooling system by targeting the general public or its certain segments –, and also through conducting social scientific research and disseminating research findings. Participation and involvement opportunities include, for example, consultations on official reports, documents and decisions – provided that there is intention to involve people in these activities on the “official side”.

It is hard to give an exact definition of awareness-raising but it certainly implies an element of discontent regarding a problematic situation as well as reference to the need of change and mobilisation. In the practical sense awareness-raising can be seen as part of a political agenda setting where the problems of a smaller social group have to be transformed into socio-political issues of greater general significance by a two-phase process of meaning definition and message transmission. A crucial element of awareness-raising is therefore the meaning management of the original issue: it has to be presented with a socially digestible flavour that is still acceptable by the issue-initiators who feel the most urgent need for social change in the given field.

As far as problem recognition is concerned, initially people should be made sensitive towards LGBT discrimination: they must be able to identify it in order to prevent it, and/or they must be able to recognise it in order to do something against it. The law can be helpful in this respect: the fact that anti-discrimination legislation exists can have awareness-raising effects in itself, as it conveys the message that according to the state, discrimination is a wrong social practice with punishable consequences. In the European context the learning process of making people realise that discrimination is wrong first started with targeting racial discrimination, and continued with gender discrimination. In this sense LGBT people can follow a beaten track.

Discussing anti-discrimination legislation can become a lecture topic or it can even be integrated into the school curriculum. However, the existence of anti-discrimination legislation in itself does not mean too much, if people do not know about the law – because it is not

publicised or applied very often –, or if they do not make practical use of it because of fear and/or the silent acceptance of a “second class citizen status”.

Raising awareness about LGBT issues can also be presented as part of a broader educational program with the focus on accepting and appreciating diversity in several aspects of life. This education is more likely to be successful if started quite early in life and being integrated into the socialisation process during one's formative years.

An effective means of awareness-raising would be to provide civil servants and other state officials with training and guidelines on how to deal with LGBT issues. However, in most cases the problem is not only about the lack of publicity of existing human rights protections from the government's side, but also about the lack of accurate information on discrimination provided for the government. In countries where there is a single equality body that can also deal with LGBT issues or where one of the specialised equality bodies focuses exclusively on LGBT issues, the functioning of these institutions can contribute to a great extent to awareness-raising as well as implementation of equal treatment principles.

Human rights protecting NGOs, including LGBT associations, can play a significant role in awareness-raising, too. They can help victims of discrimination by providing them with information and legal assistance – and often with emotional support to persevere. In a number of countries there is also a legal possibility for initiating *actio popularis* that enables societal bodies and special interest groups to start legal action without the personal involvement of the individual victim if the mistreatment is based on a category which is an essential feature of the individual's personality. Successful anti-discrimination court cases can provide media visibility that can encourage other victims of discrimination to step forward on the one hand, and discourage those who would be inclined to discriminate on the other.

Besides media visibility, another important factor of increasing public knowledge and understanding concerning LGBT issues is gaining ‘political visibility’. At present sexual political themes do not seem to enjoy great popularity – if they are present at all – in the political arena. Governments and political parties do not have well-considered sexual political programs and they do not tend to think of people as *sexual citizens*.

A basic ingredient of awareness-raising is the accumulation of information and knowledge about LGBT issues in form of reports describing problematic situations, and research studies attempting to

analyse the causes and consequences of certain social problems. Reports can play a very important role in problem recognition and context identification by drawing attention to facts proving that certain problems exist. Reports – providing a map of problems – and systematically collected information contribute to effective policymaking and policy-monitoring. Even the fact that someone – let it be an NGO, an equality body, an academic, or an influential politician – is interested in collecting certain type of information can have awareness-raising effects.

Knowledge accumulation can also be achieved in a more analytically focussed way: in the form of social scientific research studies. In the context of making and evaluating different policy measures qualitative data collection and analyses are especially important elements of the diagnostic process that can inform decision makers not just on the existence of the problem but also on its content as well as the indications of its possible solutions.

Awareness-raising is a complex process providing several opportunities to increase public knowledge and understanding concerning LGBT issues. Even though raising awareness refers to mobilisation more on the cognitive – or emotional – than on the practical level, by increasing people's ability to implement change it can contribute to practical changes, too.

Implementation often refers to implementing legal changes in order to advance social emancipation of LGBT people. One of the most important preconditions of effective implementation is the existence of a well-functioning institutional framework including human rights commissions, specialised equal treatment bodies, and expertise centres. There are two main forms of equality bodies: a country either has a general body responsible for all sorts of equal treatment issues – such as the Equal Treatment Commission in the Netherlands, the Equality Commission for Northern Ireland, the National Council for Combating Discrimination in Romania, the Equal Treatment Authority in Hungary –, or it has several specialized institutions, each dedicated to different scopes. Sweden is the only country in the world that – besides other specialised ombudsman offices such as the disability ombudsman, the ombudsman for equal opportunities between women and men, or the ombudsman against ethnic discrimination – has “HOMO”, the Office of the Ombudsman against Discrimination on the Grounds of Sexual Discrimination.

In certain fields a public body responsible for anti-discrimination issues, endowed with official competence and authority backed up by

the state, can be more effective – or it can be effective in different fields – in fighting against discrimination than an NGO having limited access to information and resources. For example, a specialised public agency can play an active role in preventing discrimination by pre-monitoring public policies in their planning stage and drawing attention to their possible negative consequences for LGBT people.

In some cases NGOs can actively contribute to the establishment of equality bodies, by using their lobbying efforts and offering their practical expertise accumulated in the course of their interest representing activities. This can indicate that having a public anti-discrimination agency is also perceived as important and useful by civil society actors.

In most countries where there is anti-discrimination legislation in operation one general equal treatment institution was set up embracing various equal treatment issues based on several grounds such as ethnicity, gender, age, disability, sexual orientation etc. In some places – like in Northern Ireland – a single equality body is formed by uniting previously independent specialised anti-discrimination agencies and by integrating the “other article thirteen grounds” into the scope of the already existing institutional framework.

The main advantage of having a general public agency seems to be that it tends to have more competence and resources than a specialised body focusing on only one field, and it can also be better equipped to deal with multiple discrimination cases, when persons are being discriminated on more than one ground at the same time. However, within a general equality body there is a higher risk of the emergence of a certain hierarchy of rights, where certain forms of discrimination tend to attract more attention than others. On the other hand, the main advantage of having several specialised equality agencies each focusing on only one special field is the potential to accumulate greater expertise on one given field. It seems that an optimal solution would be to combine the functioning of a single equality body with specialised expertise centres.

At present the Netherlands can be characterised by the most developed system concerning the implementation and monitoring of LGBT equal treatment issues. The Commissie Gelijke Behandeling (CGB; Equal Treatment Commission) was established in 1994 with the primary goal to promote and monitor compliance with the existing equal treatment laws. There are additional advantages of having such a commission including the possibility to avoid potentially costly, time consuming and humiliating court cases as well as the concentration of

practical knowledge on various types of discrimination which can also be used by researchers and policy makers. A specialised expertise centre on gay and lesbian policy issues started to operate in 2002 in the Netherlands, offering a steady source of expertise for policy makers especially on the level of local politics.

Equality bodies and expertise centres can provide major means of implementing equal treatment for LGBT people in everyday life, especially in a social environment where there is still limited awareness concerning these issues among civil servants, state officials, politicians and members of the general public.

Additionally there are several fields where implementing LGBT equal treatment practices is perceived to be especially problematic, including workplaces, religious settings, and social contexts relevant to young people and old people respectively.

According to the results of European EQUAL projects, heteronormative expectations prevail in most workplaces: everyone is automatically considered to be heterosexual. Non-heterosexuals have to make extra efforts to be accepted by their colleagues when trying to enlighten them by contrasting the content of widespread stereotypes with real life. For LGBT employees the first important step in the workplace is the decision to come out as a non-heterosexual person. Awareness-raising programs can help to motivate people to see diversity, including sexual and gender diversity, as an enriching feature that can make the workplace a better place to be. However, awareness-raising at the workplace can work more effectively if it is backed up by sufficient and effective equal treatment legislation, and if for example, trade unions are also committed to the implementation of equal treatment practices. Creating a more tolerant, friendlier work environment for LGBT people can positively affect the productivity level of work: if LGBT people are free to be themselves, they can focus more on their work, and less of their energy will be wasted on trying to conceal the non-heteronormative aspects of their lives. In awareness-raising trainings addressing workplaces, arguments about the potential increase of productivity resulting from a more LGBT friendly workplace climate can sometimes work even better than appeals to human rights.

In the context of implementing equal practices for LGBT people there is still a lot of work to be done concerning the problems of young LGBT people. Young non-heterosexuals seem to be especially vulnerable to discriminatory practices in the school system which can

be manifested in the behaviour of their teachers and peers, or it can also be embedded in the school curricula. NGOs can offer assistance for young LGBT people by providing them with an accepting family-like environment where they can feel at home. In this context *the community* can serve as the *family of choice* for young LGBT people. LGBT civil society can provide young LGBT people – and LGBT people in general – whose cultural, religious or ethnic background is not tolerant towards their sexual orientation or gender identity, with a shelter where they can try to be themselves. In this context “coming in” – coming into the community – becomes an important concept.

In comparison to young LGBT people there is even less attention paid to the special needs of old ones. In the aging societies of the developed world in a certain stage of their life LGBT people are likely to find themselves in old people’s homes where they can start all over again their “liberalisation” or coming out process. Implementing equal treatment practices for old LGBT people is therefore an issue that can be expected to attract increasing social attention in the future. In addition, LGBT people who have to spend some time in hospitals or other institutions of the health care and the social care system can also have similar experiences, though – if it is only a temporary stay – perhaps to a lesser extent.

Harmonising religious beliefs with one’s non-heterosexual sexual orientation is often regarded as an issue not to be included in the scope of equal treatment practices. However, as certain discriminatory practices seem to be closely related to religious beliefs, it can be important to refer to the findings of *The Social Dialogue on Homosexuality, Religion, Lifestyle, and Ethics* project initiated by the Dutch COC together with religious organisations.

According to their findings in the present European context it can be increasingly problematic to define the LGBT movement as being an exclusively “white and secular” movement. The modern Western concept of homosexuality is not necessarily understood in the same way by people coming from other cultural backgrounds, therefore instead of ethnocentric assumptions a more culturally relativistic approach had to be applied in order to highlight the potentially very different contents of the ‘homosexuality’ concept. Awareness of these interpretational differences can help to start an effective interaction between LGBT NGOs and religious organisations. Leading a dialogue seems to be one of the most important means of effective interaction in this level.

On the basis of my research findings I have formulated the following recommendations:

Recommendations for improving Hungarian anti-discrimination and equal treatment policies concerning LGBT people

1. Law reform is needed to institutionalise same-sex relationships in the form of registered partnership or same-sex marriage and to prevent family and other policy practices discriminating against same-sex couples.

Legislative development introducing registered partnership can be beneficial to everyone. The present factual legal relationship of cohabiting partners could be transformed into a more institutionalised form of relationship by the act of official registration. This way it would become unnecessary to make specific arrangements concerning property, financial and personal relationships: encompassing important issues such as providing rights to obtain medical information about the partner's state of health, and rights of disposal over the partner's assets when that partner is in a helpless state; preparation of a will; appointment of guardians (if there are children) etc. It is not a specific LGBT issue, and there are international examples that can be followed (like the institution of PACS in France).

Legislative changes to introduce same-sex marriage would mean "opening up" marriage for non-heterosexual people and provide them with the same rights, obligations that married people have at present. Opening up heterosexual marriage would also lead to constructing a legal framework for adoption of children by same-sex partners.

2. Law reform is needed to provide a legal framework for adoption of children by same-sex partners in the form of joint adoption of the biological child of one of the same-sex partners, and joint adoption of an unrelated child by a same-sex couple.

Legislative changes allowing adoption of children by same-sex partners can be presented in Hungary mainly as a children right issue – similarly to what happened in the United Kingdom where joint adoption by same-sex couples was interpreted within a general discursive framework pointing to the necessity to extend the pool of potential adoptive parents, having the "side effect" of advancing same-sex couples' rights, too. Here one of the main points is that in the political distribution of family rights and

responsibilities social prejudice cannot be taken into consideration in order to restrict parenting rights. It is also important to emphasise that children living in different family arrangements must not be discriminated on grounds of a state supported normative hierarchy of less or more desirable family arrangements, as children usually have little control over these developments; they just suffer the disadvantageous consequences.

3. On the level of implementing legal changes concerning LGBT people appropriate conditions for effective functioning have to be provided for the Hungarian Equal Treatment Authority.

In order to prevent the development of a hierarchical scale of different grounds of discrimination where LGBT issues might not receive sufficient attention, a capable body or person with commensurate expertise on LGBT issues must be given responsibility for that area of the functioning of the Hungarian Equal Treatment Authority. Furthermore, no one person or committee can be expected to know all there is to know about current LGBT issues at the local, national and international levels, therefore there is a great need to establish expertise centres in this field.

4. Awareness-raising programs are needed in order to prevent discrimination against LGBT people.

Information exchange and communication can be realised in several contexts: within formal institutional procedures, for example, in the course of litigation or policymaking; in the – mainstream as well as “own” – media; in publications – such as reports, information booklets, fact sheets, brochures, scientific publications; in meetings – such as workshops, exhibitions, conferences; and in events like festivals and demonstrations.

Awareness-raising in the form of education and training can be realised through developing specific educational programs (lectures, courses etc.) and educational materials (text books, chapters in school books, training manuals etc.) – within the schooling system by targeting students as well as teachers, and outside the schooling system by targeting the general public or its certain segments –, and also through conducting social scientific research and disseminating research findings. Participation and involvement opportunities include, for example, consultations on official reports, documents and decisions – provided that there is intention to involve people in these activities on the “official side”.

Therefore raising awareness of LGBT issues should be a standard part of school curricula, the training arrangements and guidelines for civil servants and other state officials. Similarly special programs targeting the workplaces are needed to tackle the heteronormative climate. Good and effective publicity discussing anti-discrimination and equal treatment legislation and policies, as well as producing professional reports and study findings about LGBT issues are essential to achieve practical progress realising the theoretical possibilities of the existing framework.

5. LGBT people should be empowered to occupy social space to represent their interests and serve their needs.

In Hungary a number of NGOs has been at the forefront of the struggle for social acceptance of LGBT people. Besides promoting the manifestations of various viable LGBT lifestyles, they have provided much needed public services including personal and telephone counselling services, legal aid, AIDS and STD prevention programs, and awareness-raising material for schools. Effectively functioning LGBT organisations can provide young LGBT people with a *family of choice* that they can come into before coming out in society at large. Senior LGBT people also have a great need for this kind of support when they find that the struggle for their social emancipation will start all over again in old age if they come to depend on the heteronormative health and social care systems.

As NGOs in this way act like proxies of the state in the sense that they provide public services which should by rights be provided by the state, adequate funding through the public purse is in order.

6. LGBT people should be provided with full community membership.

Political emancipation of LGBT people should be advanced by highlighting the various types of social exclusion limiting citizens' political, social, cultural and economic participation because of their genders, sexualities and bodies. LGBT people should be provided with full community membership by gaining respect and representation in national institutions including the government, the workplaces, schools, families, welfare and health care institutions; by having social dialogues in the manner of equal partnership, encouraged by state institutions; and by revisiting the norm of the "good citizen" who tends to be heterosexual and gender-unambiguous.

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