

# THE BOUNDARIES OF SOCIAL TRANSFORMATION THROUGH LITIGATION: WOMEN'S AND LGBT RIGHTS IN ISRAEL, 1970–2010

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*The global expansion of judicial power and the rise of litigation as a vehicle for social transformation are two conspicuous social phenomena that are subject to intensive research by social scientists and lawyers alike. One of the most hotly debated questions in this regard relates to the potential value of law in general, and litigation in particular, as a strategy for social change. This article examines the question by comparing the struggle for equality in Israel by two groups – women's rights activists and lesbian, gay, bisexual and transgender (LGBT) rights activists – between 1970 and 2010. The struggles of women and LGBT people for equality have many shared characteristics, since both challenge the traditional conservative patriarchal social model. In Israeli society, moreover, both LGBT rights activists and women's equality activists faced the same political rivals: the powerful macho-type socio-political mentality, rooted in the central status of the military in Israeli society, and the strong hold of Jewish ultra-orthodox parties in the political system. The strategies that the two groups adopted to overcome these obstacles, however, were markedly different. While women's groups adopted an elitist strategy of struggle that concentrated on legal measures, LGBT rights groups adopted a variety of strategies that emphasised grassroots political tactics. The article examines the success of each group in achieving its political objectives by using cross-country comparative indexes of LGBT and women's rights. I argue that the comparison between the two groups points to the relative weaknesses of legal and litigation-centred strategies as vehicles for social transformation.*

**Keywords:** litigation, legal mobilisation, LGBT rights, women's rights

## 1. INTRODUCTION

The global expansion of judicial power and the rise of litigation as a vehicle for social transformation are two conspicuous social phenomena that social scientists study intensively. One of the most hotly debated questions in this regard relates to the potential value of law in general, and litigation in particular, as a strategy for social change. Some scholars view litigation as an effective vehicle for social reform in the hands of disadvantaged groups or, at the very least, as a source for self-empowerment in the hands of such groups,<sup>1</sup> or as a vehicle for reconceptualising their claims and agendas.<sup>2</sup> Many others, however, tend to doubt the social benefits that groups are

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<sup>1</sup> For example, Ronen Shamir, 'Litigation as a Consummatory Action: The Instrumental Paradigm Reconsidered' (1991) 11 *Studies in Law, Politics and Society* 41; Michael W McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (Chicago University Press 1994).

<sup>2</sup> Anna-Maria Marshall, 'Injustice Frames, Legality and the Everyday Construction of Sexual Harassment' (2003) 28 *Law and Social Inquiry* 659; Nicholas Pedriana, 'Help Wanted NOW: Legal Resources, the Women's Movement and the Battle over Sex-Segregated Job Advertisements' (2004) 51 *Social Problems* 182; Nicholas Pedriana, 'From Protective to Equal Treatment: Legal Framing Processes and Transformation of the Women's Movement in the 1960s' (2006) 111 *American Journal of Sociology* 1718, 1720. Litigation may sometimes

able to obtain by adopting litigation as a key strategy for social transformation.<sup>3</sup> These scholars point to the severe institutional limitations of courts when faced with complicated questions of social policy.<sup>4</sup> They suggest that, in most cases, there are significant gaps between court victories, celebrated through the elevated rhetoric of judges, and the social realities outside the courtroom.<sup>5</sup> They argue that, at the very least, the use of litigation diverts a movement's energies away from more effective options for social transformation. Further, they argue that resorting to litigation may have the adverse effect of reinforcing the social status quo, rather than effectively challenging it.<sup>6</sup>

In the present article I seek to join this line of scepticism by indicating the limitations of litigation as a vehicle for social change, and its potentially harmful implications for groups that focus on litigation as a key strategy for social reform. I do so by comparing the struggle for social equality in Israel waged by two groups: women and the LGBT community.<sup>7</sup>

The struggle for social equality of both women and gays has been the subject of substantial research by social scientists. Central questions such as abortion rights, equal pay for women and gay marriage have been intensively researched with regard to the social role of law and litigation.<sup>8</sup> Central arguments over the efficacy of law and litigation as vehicles for social change

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carry other benefits for movements for social change. It can provide groups with more media coverage and thus generate power at grassroots levels (eg McCann (n 1) 58). Litigation may also help social movements to reconstitute and shape their claims and the organising principles for their actions, thus serving as a process of 'framing' and 'reframing' the conceptual tools and perspectives of such movements (see references in this note). This may be the case even if the litigation ended in the social movement's defeat: Douglas NeJaime, 'Winning through Losing' (2011) 96 *Iowa Law Review* 941, but cf Catherine Albiston, 'The Dark Side of Litigation as a Social Movement Strategy' (2011) 96 *Iowa Law Review Bulletin* 61.

<sup>3</sup> Michael W McCann and Helena Silverstein, 'Rethinking Law's Allurements: A Relational Analysis of Social Movement Lawyers in the United States' in Austin Sarat and Stuart A Scheingold (eds), *Cause Lawyering: Political Commitments and Professional Responsibilities* (Oxford University Press 1998) 261.

<sup>4</sup> Lon L Fuller, 'Law as an Instrument of Social Control and Law as a Facilitation of Human Interaction' [1975] *Brigham Young University Law Review* 89; Donald L Horowitz, *The Courts and Social Policy* (Brookings Institution Press 1977).

<sup>5</sup> Stuart A Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change* (Yale University Press 1974); Ronen Shamir, "'Landmark Cases" and the Reproduction of Legitimacy: The Case of Israel's High Court of Justice' (1990) 24 *Law and Society Review* 781; Gerald N Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (2nd edn, Chicago University Press 2008).

<sup>6</sup> Scheingold, *ibid*; McCann and Silverstein (n 3).

<sup>7</sup> Throughout the article I use the terms 'gay', 'gay and lesbians' and 'LGBT' interchangeably unless otherwise specified. Women's and gays' groups overlap with regard to lesbian women. In the current research I refer to lesbian women as part of the gay group movement since analytically the struggle of lesbians *qua* lesbians to promote their right to equality should be regarded as part of the gay rights movement, and empirically the struggle of lesbians for social equality in Israel was intertwined with the gay rights movement. This, of course, does not imply that some lesbian women were not involved as individuals in the struggle to promote women's equality.

<sup>8</sup> For example, Rosenberg (n 5); McCann (n 1); Charles R Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Chicago University Press 1998); Jonathan Goldberg-Hiller, *The Limits to Union: Same-Sex Marriage and the Politics of Civil Rights* (Michigan University Press 2004); Mark Strasser, *On Same-Sex Marriage, Civil Unions, and the Rule of Law* (Greenwood 2002); William N Eskridge Jr and Darren R Spedale, *Gay Marriage: For Better Or For Worse?: What We've Learned from the Evidence* (Oxford University Press 2006); Daniel R Pinello, *America's Struggle for Same-Sex Marriage* (Cambridge University Press 2006); Evan Gerstmann, *Same-Sex Marriage and the Constitution* (2nd edn, Cambridge University Press 2008).

have been structured through research in respect of these two groups. The rights of women and lesbian, gay, bisexual and transgender (LGBT) people are interrelated in the sense that societies which acknowledge equality for women are often more tolerant of and receptive to issues affecting LGBT rights.<sup>9</sup> The link between the statuses of these groups is relevant for Israel no less than for any other state, since the social forces that oppose women's equality (in particular, the militarist macho-type culture in Israel and the ultra-orthodox religious establishment) are also highly hostile towards the idea of LGBT rights.<sup>10</sup> While the interests of these two groups seem closely related, and the conditions under which each group conducted its struggle were quite similar, the strategies for social transformation that each has adopted over the past three decades seem to have been quite different. Women's advocacy groups concentrated on legislation and transformative higher court litigation as their principal strategy of social action. Gay rights groups, on the other hand, invested in a much wider range of strategies, in which litigation (mostly, though not exclusively, in lower courts) and other legal-oriented activities served as only one, and not necessarily the central, vehicle for social transformation. The outcome, I argue, is that there seems to be a notable difference between the success of each group in its struggle for equality and social empowerment. Despite various reforms in *the formal legal status* of women in Israel during the research period, Israeli women have largely failed to achieve many of the central goals of their struggle for equality. In the absence of an effective political mechanism and grassroots social movement, many of the celebrated court victories and successful legislative initiatives in the field of women's rights remain no more than dead letters of the law. The gay rights movement in Israel, on the other hand, has succeeded in bringing about a dramatic, even revolutionary, change in the social status of gay people in Israel within the short period from 1990 to 2000. This success, I suggest, results primarily from the fact that the LGBT rights movement did not focus its efforts solely on legal channels. Rather, it prudently used litigation as an effective tool within its wider political struggle, which focused on grassroots organisations, demonstrations, market-oriented strategies and various other political tactics.

Studying the social impact of litigation is a messy task. How can one define, let alone accurately measure, the 'success' of a certain group's struggle for equality? And how can one measure the exact impact of certain court victories on the social status of a given group? It is undoubtedly extremely difficult to isolate the impact of litigation from various other factors and events that influence the struggle of groups for social reforms. In the present study, this task is particularly demanding since I aim to make a comparison between changes in the social status of two different groups:

<sup>9</sup> Lior Ben David, 'The Rights of Same-Sex Partners in Israel', *Research and Information Center of the Knesset*, 28 November 2004, <http://www.knesset.gov.il/mmm/data/pdf/m01045.pdf> (in Hebrew).

<sup>10</sup> Dan Horowitz and Baruch Kimmerling, 'Some Social Implications of Military Service and the Reserve System in Israel' (1974) 15 *European Journal of Sociology* 262; Yoav Dotan, 'The Spillover Effect of Bills of Rights: A Comparative Assessment of the Impact of Bills of Rights in Canada and Israel' (2005) 53 *American Journal of Comparative Law* 293; Amit Kama, 'From Terra Incognita to Terra Firma: The Logbook of the Voyage of Gay Men's Community into the Israeli Public Sphere' (2000) 38(4) *Journal of Homosexuality* 133.

In 2001, a comprehensive report was issued by the Political Council for Gays Rights in Israel: see Political Council for Gays Rights in Israel, 'The Annual Report', 26 August 2001, [http://gibt.org.il/Files/1254693922\\_first\\_gay\\_political\\_report.pdf](http://gibt.org.il/Files/1254693922_first_gay_political_report.pdf).

women and the LGBT community. Arguably, despite the apparent similarities between these two groups, it is very difficult to make a reliable comparison between processes related to them since the points of origin in the status of each group are very different, as are our expectations and our criteria for evaluating their 'success'. I seek to overcome these difficulties by using various longitudinal and cross-country comparative measurements.<sup>11</sup> Admittedly, however, the methodological tools I use in order to deal with these enormous difficulties are not devoid of limitations (which are further discussed below). Accordingly, I suggest that the reader should view my findings not as a basis for reaching definite conclusions but rather as yet another reason to develop healthy scepticism with regard to the 'allures' of litigation as a mechanism for social change.<sup>12</sup>

The order of the argument is as follows. First, I provide a background for the rise of judicial activism in Israel and also describe the use of legislation and litigation by women's and LGBT groups (Section 2). I then review the non-legal activities of these two groups in the course of their social struggle (Section 3), and in Section 4 I evaluate the relative success of each group in its social struggle for equality. In Section 5, I provide an analysis to examine the relationship between the tactics adopted by each group and their success in their social struggle, and conclude with some general observations regarding the pros and cons of litigation as a strategy for social change.

## 2. LITIGATION FOR THE RIGHTS OF WOMEN AND LGBT PEOPLE IN ISRAEL

### 2.1. JUDICIAL REVIEW IN ISRAEL – BACKGROUND

Israel has no formal constitution, and the only basis for judicial review of legislation are some of the Basic Laws enacted by the Knesset (the Israeli parliament) on which the Supreme Court has conferred constitutional status.<sup>13</sup> The most important of these is Basic Law: Human Dignity and Liberty, adopted in 1992. This Law, however, comprises only a partial bill of rights and does not contain any equality provisions (let alone any reference to women's or LGBT rights).<sup>14</sup> Accordingly, Israeli public law is almost entirely judge made, created and shaped by decisions of the Supreme Court. The principal forum for judicial review is the Supreme Court itself, sitting as the High Court of Justice (HCJ).<sup>15</sup>

<sup>11</sup> See Section 4.1 below.

<sup>12</sup> See McCann and Silverstein (n 3).

<sup>13</sup> CA 6821/93 *United Mizrahi Bank v Migdal* 1995 PD 49(4) 221.

<sup>14</sup> Dotan (n 10).

<sup>15</sup> The HCJ is one of the functions of the Supreme Court of Israel. When a civil or criminal dispute arises in Israel, it normally makes its way into a county court and then, on appeal, to a district court. Only a handful of such cases reach the Supreme Court as a third instance of *cassation*. The Supreme Court also sits as an appellate court for cases involving serious criminal offences and high-value civil disputes. Such cases are referred directly to a district court and, on appeal, to the Supreme Court. Most cases involving the exercise of legal powers by public agencies are brought directly before the Supreme Court, and are resolved by this Court with no right of appeal. Therefore, the Supreme Court in Israel, in fact, serves as three different functions: as a court of *cassation*, as a court of appeal, and as a court of first (and last) instance in judicial review cases (HCJ). The structure of public law litigation was reformed in 2000, with various categories of litigation being placed under the jurisdiction of the district courts

During the 1960s and 1970s, the HCJ tended to impose strict limitations on the ability of litigants to raise political issues in court. To meet the requirement of *standing*, the petitioner had to show direct and genuine personal interest in the state action in question. Furthermore, the petitioner's standing was likely to be jeopardised if the same action caused similar harm to a large group of people, or to an entire sector of which it formed a part. This narrow concept allowed the Court to refrain from interfering in sensitive issues such as law enforcement with respect to high-ranking political figures<sup>16</sup> and controversies related to religion and state.<sup>17</sup>

Another concept with a similar limiting effect on the accessibility of courts by interest groups was that of *justiciability*. Until the late 1970s, the Supreme Court adopted a narrow conception of justiciability in deciding that petitions involving issues of foreign policy, military actions or other questions concerning sensitive political issues were 'unsuitable' for judicial determination and were therefore non-justiciable.<sup>18</sup> The Court also adhered to a narrow concept of judicial review.

The 1980s saw a major shift in almost all aspects of judicial review mentioned above. There was a dramatic change in the principles concerning access to the courts. In its landmark decision in *Ressler v Minister of Defence*<sup>19</sup> the Court revised its standing doctrine to allow *any* person to petition the Court in cases involving major constitutional questions or gross violations of the rule of law. Accordingly, the Court ruled that the political sensitivity of a given case does not negate the Court's duty to deal with the legal questions involved, thus effectively disposing of the previously accepted doctrine of justiciability.

The reform of the rules concerning access to court was followed by a similar revision of the rules of judicial review. During the 1980s and 1990s, the courts showed a growing tendency to broaden the scope of judicial review. They developed new tools for judicial review and imposed new requirements on administrative authorities, such as the duties of reasonableness,<sup>20</sup> rationality of the decision-making process<sup>21</sup> and proportionality.<sup>22</sup> The courts also displayed a willingness to

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(Administrative Affairs Courts Law, 2000 (Israel)). The HCJ still serves as the principal court for judicial review in Israel.

<sup>16</sup> HCJ 26/76 *Bar-Shalom v Zore'a* 1977 PD 31(1) 796.

<sup>17</sup> HCJ 287/69 *Meiron v Minister of Labour* 1970 PD 24(1) 337; HCJ 11/79 *Mirkin v Minister of Interior* 1979 PD 33(1) 502. cf in the United States where the doctrine of standing is still kept within similar boundaries (eg *Simon v Eastern Kentucky Welfare Rights Organization* 426 US 26 (1976); *Lujan v Defenders of Wildlife* 504 US 555 (1992) 560; Anthony Clark Arend and Catherine B Lotrionte, 'Congress Goes to Court: The Past, Present, and Future of Legislator Standing' (2001) 25 *Harvard Journal of Law and Public Policy* 209, 213–18.

<sup>18</sup> HCJ 186/65 *Reiner v Prime Minister of Israel* 1965 PD 19(2) 485; HCJ 561/75 *Ashkenazi v Minister of Defence* 1976 PD 30(3) 309; Menachem Mautner, *Law and the Culture of Israel* (Oxford University Press 2011) 56. The doctrine of justiciability was applied by Israeli courts in a way that was roughly equivalent to the use of the doctrine of equitable discretion with regard to congressional suits in some federal cases in the US: see, eg, *Riegle v Federal Open Market Committee*, 656 F 2d 873 (DC, Cir 1981) 882; Arend and Lotrionte (n 17) 236 and fn 149.

<sup>19</sup> HCJ 910/86 *Ressler v Minister of Defence* 1988 PD 42(2) 441.

<sup>20</sup> HCJ 389/80 *Dapei Zahav v Israel Broadcasting Authority* 1980 PD 35(1) 421.

<sup>21</sup> HCJ 297/82 *Berger v Minister of Interior* 1983 PD 37(3) 29.

<sup>22</sup> HCJ 5510/92 *Turkeman v Minister of Defence* 1994 PD 48(1) 217; Itzhak Zamir, 'Unreasonableness, Balance of Interests and Proportionality' in Itzhak Zamir and Allen Zysblat (eds), *Public Law in Israel* (Clarendon Press 1996) 327.

review the actions of institutions that had previously been held to be partly or wholly immune from judicial supervision, such as the military and the security services.<sup>23</sup>

The result of all of these developments was that Israeli courts became quite a tempting option for all kinds of political and social groups, trying to further their agenda through litigation, as well as for other players in the public arena, such as public interest groups.<sup>24</sup> As we shall see, both women's action groups and LGBT rights groups (among many other groups representing a diversity of interests) were quick to pick up on the willingness of the court system to become a key player in Israel's public arena.

## 2.2. LITIGATION BY WOMEN'S GROUPS

The founding of Israel appeared to carry great promise for Israeli women. The dominance of the socialist ideology espoused by the main political forces of the time, combined with the European background of some prominent elite groups, seemed to create a policy that would favour equal rights for women.<sup>25</sup> Indeed, Israel's Declaration of Independence specifically denounces gender-based discrimination and, shortly after statehood, the Knesset passed the Women's Equal Rights Law in 1951, which provides for 'one law for men and women'. Prohibitions against gender-based discrimination were also included in many pieces of legislation relating to labour issues.<sup>26</sup>

Nevertheless, despite the seemingly egalitarian aspirations of the founders, two strong social forces constantly worked against equality for women in Israeli society. First, there were security pressures which made military service a central part of Israeli society, culture and politics. Officially, military service was open to both sexes;<sup>27</sup> in practice, however, all combat positions were closed to women.<sup>28</sup> This had wide-ranging effects on career options available for women

<sup>23</sup> HCJ 680/88 *Schnitzer v Chief Military Censor* 1989 PD 42(4) 617; HCJ 428/86 *Barzilai v Government of Israel* 1986 PD 40(3) 505; Yoav Dotan and Menachem Hofnung, 'Legal Defeats – Political Wins: Why Do Elected Representatives Go to Court?' (2005) 38 *Comparative Political Studies* 75.

<sup>24</sup> Since 1980 there has been a dramatic rise in the number of petitions issued by interest groups. In 1980 only 1.5 per cent of the petitions to the HCJ were filed by interest groups; their share of the HCJ docket climbed to 5.9 per cent in 1989, and 12.4 per cent in 1995 (see Yoav Dotan and Menachem Hofnung, 'Interest Groups in the Israeli High Court of Justice: Measuring Success in Litigation and in Out-of-Court Settlements' (2001) 23 *Law and Policy* 1, 16.

<sup>25</sup> While the current analysis focuses on women's rights after the formation of the State of Israel, it is worth mentioning that women in the pre-state period also struggled for gender equality. For a description of women's efforts to enter the legal profession in Mandatory Palestine see Eyal Katvan, 'No More "Parsley to the Salad": The Entrance of Women to the Bench and the Legal Profession in Mandatory Palestine and in Israel' (2010) 32 *Iuinei Mishpat* 69 (*Tel Aviv University Law Review*) (in Hebrew); Eyal Katvan and Ruth Halperin-Kaddari, 'The Feminist Proposal is Really Ridiculous: The Struggle for Women's Right to Enter the Legal Profession in Mandatory Palestine' (2009) 25 *Mechkarei Mishpat* 237 (in Hebrew).

<sup>26</sup> Under the Employment Service Law, 1959, employers are prohibited from discriminating on the basis of sex (as well as on other grounds such as race, nationality and sexual orientation) in respect of hiring workers, their salaries, working conditions, promotion and so forth. See also the Male and Female Workers Equal Pay Law, 1996.

<sup>27</sup> Daphne Barak-Erez, 'The Feminist Battle for Citizenship: Between Combat Duties and Conscientious Objection' (2007) 13 *Cardozo Journal of Law and Gender* 531.

<sup>28</sup> Dafna N Izraeli, 'Gendering Military Service in the Israel Defense Forces' (1999) 14 *Theory and Criticism* 85 (in Hebrew); Yael Yishai, *Between the Flag and the Banner: Women in Israeli Politics* (SUNY Press 1997); Ruth

within and outside the military, and on their social status in general.<sup>29</sup> The second force that worked against equality for women was the Jewish religious establishment. Under Israeli law (as shaped during the 1950s), matrimonial issues are subject to the ultimate jurisdiction of religious tribunals. Since the legal codes under which the rabbinical (as well as the Muslim) tribunals function are ancient, the idea of gender-based equality is wholly absent from them. As a result, Israeli family law reflected gross discrimination against women. The application of religious law to matrimonial issues was also exempt from any influence of egalitarian legislation (such as the above-mentioned Women's Equal Rights Law) by specific order of the legislature.<sup>30</sup> Moreover, the strong foothold of the religious parties in Israeli politics precluded any possibility of a significant reform in the fields of family law and matrimonial status.<sup>31</sup>

Since the early days of the state, the Israeli judiciary has reflected a tendency to minimise – to the extent possible under statutory limitations – the non-egalitarian impact of the religious establishment on family law. During the 1960s and 1970s, the Supreme Court delivered some prominent decisions with the aim of narrowing the jurisdiction of religious tribunals. These decisions were intended to enable some groups to evade religious prohibitions against various kinds of marriage that would otherwise have been strictly enforced by the religious tribunals.<sup>32</sup> The Supreme Court also developed a doctrine of strict scrutiny of the practices of religious tribunals in order to ensure their compliance with fundamental principles of procedural justice.<sup>33</sup>

The rise of judicial activism that began in the early 1980s, however, marked a new era for litigation over women's rights. Several organisations were advocating women's rights, including the Association for Civil Rights in Israel (ACRI) and the Israel Women's Network (IWN). The latter organisation was founded in 1987 and soon after adopted litigation as a central strategy for achieving social reform. Both ACRI and the IWN brought before the Supreme Court several cases relating to the equality of women, most of which were decided in favour of women's rights. In this manner, the Court ordered the government to ensure reasonably sufficient representation for women on boards of government corporations and other public institutions.<sup>34</sup> Similarly, the

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Halperin-Kaddari, *Women in Israel: A State of Their Own* (Pennsylvania University Press 2004) 153; Noya Rimalt, 'Equality with a Vengeance: Female Conscientious Objectors in Pursuit of a Voice and Substantive Gender Equality' (2007) 16 *Columbia Journal of Gender and Law* 97.

<sup>29</sup> Izraeli, *ibid*; Rimalt, *ibid*.

<sup>30</sup> See, eg, s 5 of the Women's Equal Rights Law, 1951, which provides that the law does not affect matrimonial issues. For a critical discussion of the impact of Jewish rabbinical law on the endeavours of the founders to establish gender equality see, eg, Zvi H Triger, 'The Gendered Racial Formation: Foreign Men, "Our" Women and the Law' (2009) 30 *Women's Rights Law Reporter* 479, 496ff.

<sup>31</sup> Frances Rada, 'Religion, Multiculturalism and Equality: The Israeli Case' (1996) 25 *Israel Yearbook on Human Rights* 193; Ruth Halperin-Kaddari, 'Women, Religion and Multiculturalism in Israel' (2001) 5 *UCLA Journal of International Law and Foreign Affairs* 339.

<sup>32</sup> HCJ 143/62 *Funk-Schlesinger v Minister of Interior* 1963 PD 17 225; Amnon Rubinstein and Barak Medina, *The Constitutional Law of Israel* (6th edn, Shoken 2005) 385 (in Hebrew).

<sup>33</sup> HCJ 202/57 *Sides v Great Rabbinical Court* 1958 PD 12 1528; HCJ 10/59 *Levi v District Rabbinical Court* 1959 PD 13 1182.

<sup>34</sup> HCJ 453/94 *Israel Women's Network v Government of Israel* 1994 PD 48(5) 501; HCJ 2671/98 *Israel Women's Network v Minister of Labour* 1998 PD 52(3) 630; HCJ 2754/02 *Israel Women's Network v Government of Israel* (unpublished, 13 November 2002).

Court has struck down retirement practices that were held to be flawed by gender-based discrimination.<sup>35</sup>

No less impressive, however, was the record of the Supreme Court in intervening and striking down gender-based discriminatory practices based upon or related to religious institutions or religious practices. In 1988 the Supreme Court intervened twice to strike down practices that prohibited women's representation in religious municipal councils.<sup>36</sup> In a 1994 landmark decision, the Court ruled that the right of women to an equal share in property applies to any matrimonial litigation, regardless of the forum in which it took place. This meant that religious tribunals were thereafter subject to a secular norm of equality that overruled any contradicting religious norm. The Court went on to proclaim that, in general, religious tribunals should abide by the state's constitutional and legal principles, both statutory and based on precedent. In so ruling, the Court confined to a minimum the implications of the autonomy of religious tribunals provided by the relevant legislation.<sup>37</sup> The Court subsequently ordered the religious authorities in charge of the Jewish holy places in Jerusalem to allow a group of women (Women of the Wall) to conduct prayers within the main prayer location near the Western Wall, which until then had been restricted to men.<sup>38</sup>

Another important aspect of judicial intervention with regard to women's equality is that referring to the status of women in the Israeli Army (IDF). In a landmark decision in 1995, the Court quashed the Israeli Air Force's practice that barred women from admission to the IAF's Flight School and becoming combat pilots.<sup>39</sup> Its decision thus put an end to male monopoly in one of the most prestigious fields of military activity, and opened the way for women's access to most military posts and security careers.<sup>40</sup>

<sup>35</sup> HCJ 104/87 *Nevo v National Labour Court* 1990 PD 44(4) 749.

<sup>36</sup> HCJ 953/87 *Poraz v Mayor of Tel Aviv-Jaffa* 1988 PD 42(2) 309; HCJ 153/87 *Shakdiel v Minister of Religious Services* 1988 PD 42(2) 221.

<sup>37</sup> HCJ 1000/92 *Bavli v Great Rabbinical Court* 1994 PD 48(2) 221. In this manner, the Supreme Court has ruled that a woman's right to an equal share in property (following divorce) is based upon the woman's right to equality in marital life, and upon the fact that there are 'non-economic' ways in which a woman can contribute to marital life (such as childcare) that are no less important than 'economic' ways (such as labour). Therefore, the woman's right to an equal share in property does not depend on a matrimonial agreement (whether express or implied) or the 'economic' contribution that she makes to the marriage (CA 1880/95 *Drahm v Drahm* 1997 PD 50(4) 865). The Supreme Court has also ruled that the above mentioned rationales render the woman's right to an equal share in property applicable not only to property acquired during the marriage, but (in some cases) also to property acquired before the marriage by the husband (CA 4151/99 *Bril v Bril* 2001 PD 55(4) 709).

<sup>38</sup> The decision in HCJ 3358/95 *Hoffman v Director General of the Prime Minister's Office* 2000 PD 54(2) 345 was somewhat qualified in a later decision of the Court in this case (FHCJ 4128/00 *Director General of the Prime Minister's Office v Hoffman* 2003 PD 57(3) 289) in which the Court decided to designate a location adjacent to the Wall for women's prayers.

<sup>39</sup> HCJ 4541/94 *Miller v Minister of Defence* 1995 PD 49(4) 94.

<sup>40</sup> *Nevo v National Labour Court* (n 35); *Israel Women's Network v Government of Israel* (n 34); *Israel Women's Network v Minister of Labour* (n 34); Lauren Gelfond Feldinger, 'Skirting History', *The Jerusalem Post*, 18 September 2008, <http://www.jpost.com/Home/Article.aspx?id=114834>; Noya Rimalt, 'Women in the Sphere of Masculinity: The Double-Edged Sword of Women's Integration in the Military' (2007) 14 *Duke Journal of Gender Law and Policy* 1097; Dotan (n 10). The decision also brought about the amendment of the law regarding women's service in the IDF: see Women's Equal Rights Law (Amendment No 2), 2000. This amendment later became s 16(a) of the Defense Service Law (Consolidated Version, 1986; Defence Service Law (Amendment



### 2.3. GAY RIGHTS LITIGATION IN ISRAEL

Unlike the case of women, at the time of the founding of the State of Israel the legal and social status of gays was very low. Homosexuality in Israel's early days was criminally outlawed and socially condemned.<sup>41</sup> During the 1990s, however, Israeli society underwent a significant, even revolutionary, social change. This revolution took place in various social spheres (see below), but for now we shall concentrate on its impact in the legal field.

In 1988 the Knesset repealed the criminal prohibition on homosexual relationships, and 12 years later it equalised the minimum age of consent for such relationships to the general age of consent in criminal law.<sup>42</sup> In 1992 the Employment (Equal Opportunities) Law was amended to prohibit any discrimination against workers in hiring, promotion and other aspects of labour relations on the basis of the worker's sexual orientation.

In its struggle for equality, the LGBT community has made ample use of higher court litigation. The landmark case in this field was *El Al v Danilovitz* in 1994 in which the Supreme Court ordered that homosexual partners are entitled to all the benefits enjoyed by spouses of aircrew in El Al Airlines under their collective employment agreement.<sup>43</sup> While this decision could have been subject to a narrow reading, based on interpretation of the specific employment agreement, it in fact paved the way for the recognition of various other spousal rights of homosexual partners, such as those relating to government benefits, pensions and inheritance law.<sup>44</sup>

The judicial reform of the legal status of LGBTs in Israel has continued throughout the past decade via a series of decisions that have bestowed on same-sex partnerships the status of 'common-law marriage'. In 2001, lower courts acknowledged the legal validity of cohabitation agreements by same-sex partners.<sup>45</sup> In 2006 the HCJ acknowledged the status of same-sex marriages performed abroad as legally valid for the purpose of registration at the Official Registry.<sup>46</sup> This ruling provided homosexual partners with most of the rights and benefits accruing to married

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No 11) (Women in Combat Units), 2000, s 6(d). For a feminist critique on the implications of the legal reforms in this field, see Rimalt (n 28) 117–18; Orna Sasson-Levy, 'Feminism and Military Gender Practices: Israeli Women Soldiers in "Masculine" Roles' (2003) 73 *Sociological Inquiry* 440.

<sup>41</sup> CrimA 224/63 *Ben-Ami v Attorney General* 1964 PD 18(3) 225; Yuval Yonay, 'The Law Regarding Homosexuality – Between History and Sociology' (1998) 4 *Mishpat Umimshal* 531 (in Hebrew); Kama (n 10); Amit Kama, 'Parading Proudly into the Mainstream: Gay and Lesbian Immersion in the Civil Core' in Brian S Turner and Guy Ben-Porat (eds), *The Contradictions of Israeli Citizenship: Land, Religion and State* (Taylor and Francis 2011) 180. The Attorney General of Israel, in 1953 and 1972, issued instructions not to prosecute for consensual homosexual relationships; therefore, in practice, the criminal prohibition was seldom enforced: Alon Harel, 'Overview and Commentary: Bagatz 721/94 *El Al v Danilowitz* and the Future of Sexual Minority Rights in Israel' (1995) 1 *National Journal of Sexual Orientation Law* 302, 303; Rubinstein and Medina (n 32) 1015).

<sup>42</sup> Kama (n 10).

<sup>43</sup> HCJ 721/94 *El Al v Danilovitz* 1994 PD 48(5) 749.

<sup>44</sup> HCJ 5398/96 *Steiner v Minister of Defense* (unpublished, 27 February 1997); Tzili Mor, 'Law as a Tool for a Sexual Revolution: Israel's Prevention of Sexual Harassment Law 1988' (2001) 7 *Michigan Journal of Gender and Law* 291; Ben David (n 9).

<sup>45</sup> *Ben David* (n 9).

<sup>46</sup> HCJ 3045/05 *Ben-Ari v Director of Civil Registry* 2006 PD 61(3) 537.

people under Israeli law.<sup>47</sup> A year earlier, the Court had given a broad interpretation to the Adoption of Children Law of 1981 in order to acknowledge the right of lesbian partners to adopt each other's child under that Law,<sup>48</sup> and in 2008 the Attorney General gave his approval for the adoption of non-biological children by homosexuals.<sup>49</sup> The *Yeros-Hakak* decision was followed by the decision of a lower court in 2010 that affirmed the petition of a homosexual partner to adopt his spouse's son, who had been born to a surrogate mother.<sup>50</sup> In 2006 a civil court also acknowledged the validity of a divorce matrimonial agreement made by a lesbian couple,<sup>51</sup> and similar recognition has been granted to rights of LGBT couples for inheritance purposes.<sup>52</sup>

All of these rulings by the courts were made despite the fact that, under the law, marriage and divorce of Jews in Israel are subject to the jurisdiction of religious tribunals that adjudicate on disputes according to the Jewish Halacha (under which homosexuality is a serious sin and same-sex marriage has no legal status).

Similarly, several statutes enacted during the last decade and court decisions have entrenched the prohibition on discrimination on the basis of sexual orientation in various fields, including consumer rights, state contracts and state subsidies.<sup>53</sup>

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<sup>47</sup> The bundle of rights granted by this ruling to same-sex partners is roughly equivalent to the rights provided by a 'registered partnership': Robert Wintemute, 'The Massachusetts Same-Sex Marriage Case: Could Decisions from Canada, Europe and South Africa Help the SJC?' (2003–04) 38 *New England Law Review* 505. On the surface, being registered as a married couple with the Official Registry does not grant the couple any material rights since it functions merely as a *statistical* tool (*Funk-Schlesinger v Minister of Interior* (n 32)). Nevertheless, as a practical matter, registration with the Official Registry means a great deal, especially with regard to day-to-day contact with the bureaucracy. For example, in order for a same-sex couple to obtain a mortgage (which is subsidised by the government) as a married couple, they must present evidence to the bank that they are registered as such (even though their marriage is not recognised under Israeli law: see Arnon Ben-Yair, 'Marriage in the Version of Barak', *Ha'aretz*, 29 May 2007, <http://www.haaretz.co.il/hasite/pages/ShArtPE.jhtml?itemNo=864446> (in Hebrew)).

<sup>48</sup> CA 10280/01 *Yeros-Hakak v Attorney General* 2005 PD 59(5) 64.

<sup>49</sup> Yuval Yoaz, 'AG Okays Wider Adoption Rights for Same-Sex Couples', *Ha'aretz*, 10 February 2008, <http://www.haaretz.com/print-edition/news/ag-okays-wider-adoption-rights-for-same-sex-couples-1.239054> (in Hebrew); Kama (n 41).

<sup>50</sup> Aviad Glickman, 'Court Precedent: A Child To Be Adopted by His Father's Male Spouse', *Ynet*, 16 December 2010, <http://www.ynet.co.il/articles/0,7340,L-4000371,00.html> (in Hebrew); Dana Weiler-Polak, 'Adoptions by Same-Sex Couples, Single Parents See Uptick', *Ha'aretz*, 19 September 2010, <http://www.haaretz.com/print-edition/news/adoptions-by-same-sex-couples-single-parents-see-uptick-1.314661> (in Hebrew).

<sup>51</sup> FamC (TA) 47720/06 *M and N* (unpublished, 20 December 2006).

<sup>52</sup> Kama (n 41); see also FamC (TA) 11264-09-12 *X v Ministry of Interior* (unpublished, 21 November 2012), in which the Court ordered the Ministry of Interior to acknowledge the annulment of the marriage of a gay couple, based on the HCJ ruling in *Ben-Ari v Director of Civil Registry* (n 46). In another recent decision, a family court ruled that a lesbian woman, who donated her ovum in an artificial insemination procedure with her partner, should be acknowledged as a second mother in a direct manner and not by the adoption procedure (subject to a professional opinion on the child's best interest (FamC (TA) 60320/07 *T Z v Attorney General* (unpublished, 4 March 2012)). Furthermore, a magistrates court ordered the owners of an events hall to compensate a lesbian couple for their refusal to allow the couple to hold their wedding there, according to the Prohibition of Discrimination in Products, Services and Entry into Places of Entertainment and Public Places Law, 2000 (CC (Jer) 5901/09 *Ya'acobovich v Yad Ha'shmona Festivities Hall* (unpublished, 3 September 2012)).

<sup>53</sup> For example, AdminA 343/09 *Open House for Pride and Tolerance in Jerusalem v Municipality of Jerusalem* (unpublished, 14 September 2010); Dana Weiler-Polak, 'Same-Sex Couples Entitled to Subsidies for Day Care', 8 February 2010, *Ha'aretz*, <http://www.haaretz.co.il/hasite/spages/1148348.html> (in Hebrew).

### 3. NON-LITIGATION RELATED ACTIVITIES AND THE PLACE OF LITIGATION – WOMEN’S AND LGBT GROUPS

#### 3.1. WOMEN’S GROUPS

As we have seen, during the past three decades both women’s groups and gay rights activists have used litigation extensively in order to promote their interests, rights and social status. There seem to be, however, some notable differences between these two groups with regard to the role of law in general, and higher court litigation in particular, within the overall range of their activities. The first, and perhaps the most conspicuous, difference refers to the *centrality* of litigation for each group.

The principal women’s groups in Israel (most notably the IWN and Na’amat – a women’s organisation affiliated to Israel’s main labour union) regarded legal tactics and litigation as their paramount mode of social activity and largely stayed away from grassroots political activities. The centrality of the legal strategy is particularly evident when one looks at what women’s groups in Israel *did not do* (or at the very least did not do intensively) during the research period – that is, if one looks at the overall picture of their political activities. Although females constitute over 50 per cent of the population, Israel has no women’s parties at either the national level or the municipal level; nor was there any significant grass-roots organisation that aimed to mobilise women voters in politics during the research period.<sup>54</sup> The lack of effective political organisation is reflected also in the relative scarcity of grassroots political activities. Hardly any significant events during the research period spring to mind – for example, demonstrations and parades, or even picketing organised by women’s groups or activists regarding the major issues on the agenda of women’s equality rights, such as equal pay, political representation for women, equality within the family and violence against women. All of these are major issues that address significant disadvantages of women in Israeli society and yet, unlike many other countries, women’s groups in Israel have failed to use them for mobilising meaningful grassroots activity.

It should be clarified at the outset that I am not suggesting that women remained completely uninvolved in politics during the research period. On the contrary, one can point to various social and political activities by women’s groups and organisations. For example, since the early days of the State of Israel women’s labour organisations (mostly Na’amat and WIZO) have established a network of day-care centres for young children, thus enabling mothers to work.<sup>55</sup> Most of the

<sup>54</sup> In 1977 a Women’s Party was established in Israel and it participated in the elections; nevertheless, it did not cross the election threshold, and thus did not receive any parliamentary seats: see Ruth Reznik, ‘Patriarchal Society, Chauvinism and Violence against Women’, *What About – A Journal for Women Rights*, 2001, <http://lib.cet.ac.il/pages/item.asp?item=8542> (in Hebrew).

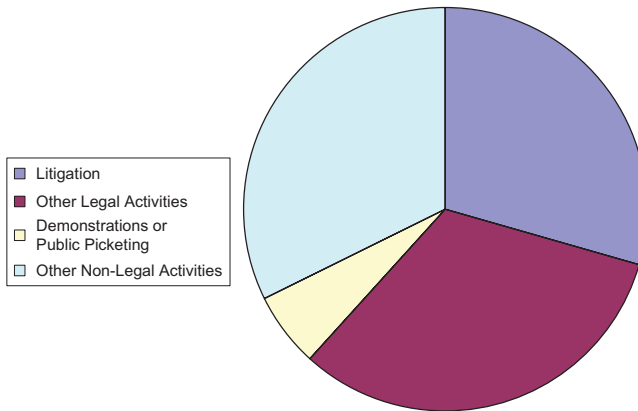
<sup>55</sup> The early-childhood educational network of Na’amat operates 280 day-care centres for over 20,000 children from the age of three months to four years: see <http://www.naamat.org.il/aboutE.php?cat=102&in=0>. WIZO operates multi-purpose day-care centres which are open until the evening in order to provide a solution for children whose parents work long hours: see its wide range of activities at WIZO, ‘Advisory Call Center for Parents of Early Age Children’, [http://www.wizo.org/page\\_14664](http://www.wizo.org/page_14664).

political activities by women's organisations, however, were either largely unrelated to women's rights or focused on women's issues in specific communities or with regard to issues that were peripheral to the main agenda of women's equality; for example, women's groups (such as Women in Black and Checkpoint Watch) conducted picketing, demonstrations and other grass-roots activities with regard to Palestinian rights, while other organisations were active against discriminatory practices in the orthodox Jewish community (such as Kolech (Your Voice) and Women of the Wall),<sup>56</sup> or with regard to women's rights in the Jewish Mizrahi (oriental) population (such as Achoti (My Sister)).<sup>57</sup> Most of these activities, however, were not directed towards the main issues of the women's rights movement agenda (equality in political representation, equal pay for women and combating violence against women). Thus, in this respect, the magnitude and nature of women's political activities stand in sharp contrast to those of the LGBT rights movement during the research period (see below).<sup>58</sup>

<sup>56</sup> Efrat Weiss, 'Police Arrest Woman Praying at Western Wall', *Ynet*, 18 November 2009, <http://www.ynetnews.com/articles/0,7340,L-3807090,00.html>. Recently, as a result both of political pressure by American Jewish organisations and of several mass prayer sessions by women at the start of the Hebrew month in the Western Wall, Prime Minister Benjamin Netanyahu asked the chairman of the Jewish Agency, Nathan Sharansky, to work on a solution for the situation and present recommendations after the elections: see Kobi Nahshoni, 'Netanyahu Initiates Lighter Limitations on Women and Reforms in the Western Wall', *Ynet*, 27 December 2012, <http://www.ynet.co.il/articles/0,7340,L-4325208,00.html> (in Hebrew)). On the activities of the Kolech organisation, see its website at <http://www.kolech.com/english>. Kolech has also filed a class action against Kol Ba'Rama, a radio station that continues to bar women from broadcasting in its programmes, even though the Second Authority for Television and Radio has issued special orders on the matter (see CA (Jer) 23955-08-12 *Kolech v Kol Ba'Rama* (unpublished, case filed 30 August 2012)).

<sup>57</sup> See, eg, Henriette Dahan-Kalev, 'Feminism between Mizrahi and Ashkenazi' in Dafna Izraeli and others (eds), *Sex Gender Politics* (Hakkibbutz Hameuchad 1999) 217 (in Hebrew). For further information about the activities of the Achoti organization see its website [http://www.achoti.org.il/?page\\_id=408](http://www.achoti.org.il/?page_id=408). cf Jayanth Kumar Krishnan, 'Public Interest Litigation in a Comparative Context' (2001) 20 *Buffalo Public Interest Law Journal* 19, 49: Krishnan found that 57 per cent of the women's rights groups studied in his research reported that they used demonstrations and protest as part of their tactics; however, Krishnan does not list the groups that he classifies as women's rights groups for this quantitative analysis; nor does he provide clear criteria for such classification. Some groups referred to in his study as women's rights groups focus on issues that seem peripheral to the principal claim of the women's rights movement (eg New Family (Krishnan, *ibid* 62) – an organisation that focuses on the rights of alternative forms of family partnership, including common law marriage, gay families and so on). It is unclear from these findings how intensive or frequent was the groups' use of demonstrations, and the study does not list or even cite actual cases of demonstrations or picketing conducted by women's groups. The study also found that women's rights groups are among the 'heavy' users of litigation (Krishnan, *ibid* 72).

<sup>58</sup> This state of affairs seemed to be changing, at least to some extent, towards the end of the research period. Thus there was one notable case of mass demonstrations against the Attorney General's decision in July 2007 not to pursue criminal charges of rape against the President of the State, Moshe Katzav. The President was accused in the press of being involved in various cases of sexual harassment and other sexual offences against women employed by him but, following a long investigation, the Attorney General announced that he agreed to a plea bargain without a sentence of imprisonment. The decision set off a huge public outcry, which included a massive demonstration in Tel Aviv. It should be noted, however, that these demonstrations seem to reflect a general sense of resentment by the Israeli public against political corruption rather than a reaction to orchestrated efforts by a women's organisation to mobilise for fundamental social change. Ultimately, Katzav decided to reject the plea bargain option. He was indicted on charges of rape and other sex offences, and convicted in December 2010. Similarly, in February 2010 the press reported a demonstration in the Arab city of Nazareth in protest against domestic violence: Jacky Huri, 'The War of the Druze Sheikh against Murder of Arab Women', *Ha'aretz*, 7 February 2010, <http://www.haaretz.co.il/hasite/spages/1147976.html> (in Hebrew). There were a number of political demonstrations and considerable picketing in 2011 against practices of gender separation in public



**Fig. 1** Activities of the Israel Women's Network: 1975–2004

*Note:*

One may argue that this single report provided by one women's organisation (albeit the major one) does not necessarily cover the whole range of the activities of the IWN, let alone the activities of all women's rights organisations during the research period. The fact I stress here, however, is that while the above reservation may be valid, the above publication well reflects those activities which the IWN itself regarded as its most important and central activities – worth being highlighted in its 20-year review.

The centrality of legal and litigation-related strategies in the agenda of Israel's main women's rights organisations can be demonstrated by looking at reports provided by the organisations themselves. In a booklet published by the IWN in 2004, the organisation reviewed its main activities during the 20-year period between 1985 and 2004. The document refers to 34 major events and initiatives of the IWN since its foundation. Of these, almost two-thirds (21) were related to legal activities: 10 events involving litigation (of which eight were petitions to the Supreme Court) and another 11 legal activities (most of which were legislative initiatives). Only 13 events mentioned in the report were non-legal activities, and most of them involved education (such as classes given to high school students to develop female leadership) or polls related to women's issues. Only two of the 34 events mentioned were demonstrations or public picketing (of which one was related to higher court litigation) (see [Figure 1](#)).

### 3.2. LGBT ACTIVITIES

The above description of the activities of the women's lobby stands in sharp contrast to the nature of activities by LGBTs in Israel. The LGBT rights movement in Israel is composed of a large

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transportation and in other public venues espoused in ultra-orthodox communities in Jerusalem and elsewhere: Dan Izenberg and Jonah Mandel, 'Court Scraps "Mehadrin" Buses', *The Jerusalem Post*, 6 January 2011, <http://www.jpost.com/NationalNews/Article.aspx?id=202456>. The issue also reached the High Court: see H CJ 746/07 *Ragen v Ministry of Transportation* (unpublished, 5 January 2011). In addition, over the past decade, women's grassroots activity has proliferated throughout the web, thus serving as a vehicle for women's empowerment: see, eg, the Facebook group 'One of One' (<http://www.facebook.com/oneofone1>) which collects and publishes women's personal stories of sexual harassment and sexual assault in order to let women share their experiences and find support from other members. In addition, the group aims to send the message that this reality is common in women's lives.

network of different organisations which collaborate effectively with each other.<sup>59</sup> Over the past two decades, these organisations have proved to be extremely successful in combining political lobby and grassroots activities with litigation to bring about social mobilisation. Unlike the case of women, LGBT grassroots political activity is commonplace in Israeli politics. These activities encompass every known aspect of politics, including a political lobby in the Knesset and at the level of local municipalities, party organisation and voter mobilisation, grassroots protest (via press articles, letters to politicians and so on), mass parades and demonstrations, as well as small-scale (but effective) picketing. I now review some of these activities in more detail.

Although LGBTs are a relatively tiny fraction of the general population (this is certainly true with regard to those members of the community who are willing to profess their sexual orientation in public),<sup>60</sup> the LGBT community has organised itself successfully and is effective at the party level. The community has managed to do this by concentrating its activities in those few political constituencies in which LGBTs have greater numerical significance, mainly in the Tel Aviv branches of the leftist parties of Meretz and Shinui.<sup>61</sup> This stronghold of the community in key branches of these parties has allowed them good access and influence at the national level (as well as in the Knesset), where they have effectively applied political lobbying.<sup>62</sup> No less impressive is the LGBT movement's ability to mobilise grassroots activities in the streets. The annual Gay Pride Parade in Tel Aviv is not only a large and colourful cultural event, but also a significant demonstration of political power. The success of this event in the social mobilisation of LGBTs' interests is reflected in the fact that (in addition to public financing) major utility

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<sup>59</sup> These organisations include the Israeli Gay, Lesbian, Bisexual and Transgender Association (commonly known as the Aguda), Lesbian Feminist Community (KLAF), Israel Gay Youth (IGY), Jerusalem Open House for Pride and Tolerance, Havruta and HOD (both founded to assist Jewish religious LGTBs), Hoshen: Education and Information Center of the LGTB Community in Israel; Bella Doeget (Worrying Bella), the Israel AIDS Task Force's education outreach arm for the LGBT community and various other organizations: see <http://www.gogay.co.il/index/Sites.asp?id=1> (in Hebrew). The relationships between these organisations are typified by collaboration and work division, each dealing with different aspects of gay interests and activities. The fact that different LGBT organisations collaborate with each other does not mean that the various organizations do not compete over prestige, resources etc: see, eg, Niv Sonis, 'An Interest Outing', *GoGay*, 20 January 2014, <http://gogay.co.il/item.php?id=17629>; Revital Gal, 'Small Community, Big Discrimination: Gay, Lesbians and What's in Between', *Mako*, 8 March 2012, <http://www.mako.co.il/pride-sex-and-love/identity/Article-ad9e1077122f531006.htm>; Tal Laor, 'Stop the Wars of Gay Jews', *NRG*, 13 August 2009, <http://www.nrg.co.il/online/1/ART1/929/669.html>.

<sup>60</sup> The relative number of gays and lesbians within the general population is an issue that sparks debates among researchers. The numbers that are cited in this respect range from 10 per cent to 3–4 per cent: William B Rubenstein, 'Do Gay Rights Laws Matter? An Empirical Assessment' (2001) 75 *Southern California Law Review* 65, 83–87 and *fn*s. For the purpose of this study, it is sufficient to say that the relative size of the gay and lesbian population within the general population is certainly far smaller than the relative size of the female population. Therefore, presumably, to the extent that the size of the social group has an influence on its relative power within the democratic system, women are expected to have far more influence on the political system than gay persons.

<sup>61</sup> Political Council for Gay Rights in Israel (n 10) 68.

<sup>62</sup> *ibid* 57; Kama (n 10). For a description of lobbying activities by the gay movement in the Knesset see, eg, Amir Shoan, 'Everyone Has Gone but I'm not Despaired', *Tel Aviv Magazine*, 14 July 2006 (copy with the author) (in Hebrew). In 2002, a report that reviewed the Knesset's activity in the field of gay rights over the previous years was issued by the Political Council for Gays Rights in Israel: see Shabi Gatenio, Amit Sha'anana and Yoki Lavi (eds), 'Pink Report: The FIRST Report to the Knesset on LGBT Rights in Israel 2000–2001', Political Council for Gay Rights in Israel, 2002 (in Hebrew).

companies and other national corporations sponsor the event (for significant sums of money in return for advertising, which presumably creates economic leverage for the movement).<sup>63</sup> The movement's presence at street level, however, does not end with this annual event. Gay activists have proved to be determined to picket any public figure in Israel (whether a politician, an intellectual or an artist) who publicly indulges in homophobic speech.<sup>64</sup> Gay activists are quick to insistently react to and condemn any infringement of LGBT rights or social status by letters to the press and other media channels and picketing, as well as by threats of litigation.<sup>65</sup> The movement is very active in negotiating issues relating to LGBT rights with the authorities (such as prison managements regarding prisoners' rights and health authorities regarding AIDs).<sup>66</sup> It also systematically detects and responds to violations of LGBT rights on the ground. Thus, for example, the movement acts to educate and train police officers to deal with assaults on homosexual youth in a park that serves the community for social interaction.<sup>67</sup>

A good illustration of the movement's activities can be extracted from a 2001 comprehensive report issued by the Political Council for Gay Rights in Israel.<sup>68</sup> The report, containing over a hundred pages, is divided into 14 chapters. Just one of these is entitled 'The Legal Chapter', although other chapters focus on legal issues (such as a chapter which addresses civil marriage, and one which relates to the rabbinical courts).<sup>69</sup> All in all, however, this comprehensive report deals with the activities of the LGBT rights movement in various fields, including health, education, politics, army service, prisoner rights and even LGBT tourism.<sup>70</sup> It is clear from this report that the LGBT movement in Israel regards litigation as just *one strategy among many others* for achieving its political goals, and that the legal strategy is intertwined with other aspects of the movement's activities.

The differences between the LGBT movement and the women's movement are discernible not only with regard to the relative centrality of litigation as a tool for social mobilisation, but also in terms of the *nature and tactics* of litigation that each movement has adopted. The IWN, as well as other women's activists, have concentrated on higher court litigation (mainly

<sup>63</sup> Ari Gilhar, 'Parade without Sponsors: Due to Haredi Boycott?', *Channel 7*, 25 June 2007, <http://www.inn.co.il/News/News.aspx/164038>; Kama (n 10); Kama (n 41). Gay parades in Jerusalem in recent years have generated a wave of resentment within religious circles in the city and brought about pressures against commercial sponsors of the gay parades: see Shlomit Zur, 'First Time: Tempo Boycott the Gay Parade', 2007 (copy with the author); Idan Yosef, 'Tempo Boycott the Gay Parade', *News 1*, 7 May 2007, <http://www.news1.co.il/Archive/001-D-130319-00.html>. Attempts to ban the parade through the courts have failed: see HCJ 8988/06 *Meshi-Zahav v Commander of Jerusalem Region* (unpublished, 27 December 2006); HCJ 5277/07 *Marzel v Commander of Jerusalem Region* (unpublished, 20 June 2007); Kama (n 41).

<sup>64</sup> Gatenio, Sha'anana and Lavi (n 62); Kama (n 10).

<sup>65</sup> Political Council for Gay Rights in Israel (n 10); Kama (n 10).

<sup>66</sup> Political Council for Gay Rights in Israel (n 10) 17 and 104 (chapters relating to health and prisoners).

<sup>67</sup> *ibid* 99 (chapter relating to the police).

<sup>68</sup> *ibid*.

<sup>69</sup> *ibid* 74 and 46.

<sup>70</sup> *ibid* 17, 6, 57, 86, 104 and 51; Aron Heller, 'Tel Aviv Emerges as Top Gay Tourist Destination', *Huffington Post*, 24 January 2012, [http://www.huffingtonpost.com/2012/01/24/tel-aviv-gay-travel-destinations\\_n\\_1227888.html](http://www.huffingtonpost.com/2012/01/24/tel-aviv-gay-travel-destinations_n_1227888.html).

before the HCJ).<sup>71</sup> LGBT organisations, on the other hand, while using petitions to the HCJ in some high-profile cases, have provided effective legal assistance to members of their communities in numerous ‘ordinary’ cases in lower courts on various legal issues: recognition of family rights and rights of same-sex partners, discrimination against homosexuals by property owners, and other issues that require litigation.<sup>72</sup> The fact that the LGBT movement regarded higher court litigation as just one aspect, and not necessarily the most central, of their political activities is also reflected by the *mechanism* adopted by the movement for such litigation. Almost all of the higher court litigation on women’s issues was conducted by the women’s organisations themselves (most commonly by the IWN or Na’amat) and occasionally in conjunction with ACRI.<sup>73</sup> LGBT organisations, on the other hand, seldom petitioned the HCJ themselves. In almost all high-profile cases they relied on the well organised and professional mechanism of ACRI to represent them in court. This fact indicates two points:

- LGBT organisations, while certainly aware of the importance of higher court litigation, did not seek to invest too much of their organisational and financial resources in conducting litigation since they knew that another organisation (that is, ACRI, which specialises in higher court litigation) could do the job for them.<sup>74</sup>
- Presumably the one real benefit that LGBT organisations lost in allowing a general civil rights organisation to litigate on their behalf is the *prestige* related to being the ‘leader’ in this litigation. However, it seems that unlike the IWN, which placed the credentials derived from conducting high-profile cases high on its agenda,<sup>75</sup> this seems to have been a small price to pay for the LGBT rights organisations.

To sum up this section, one can say that the important difference between the women’s movement and the LGBT movement does not rest on the question of which movement has used higher court litigation to promote its goals. Both movements have frequently engaged in such litigation, and both have benefited from victories in the HCJ. The real difference between these movements is related to the question of what else did the movement do *apart* from higher court litigation? In this respect, the previous section demonstrates significant differences. For the women’s rights movement in Israel, legal activity – particularly higher court litigation – seems to have been its most prominent and almost exclusive strategy for social mobilisation. For the LGBT rights movement, the use of law in general and higher court litigation in particular was simply one tool within the versatile array of political measures adopted by the movement to promote its

<sup>71</sup> One notable exception in this regard is Na’amat (a women’s organisation affiliated with Israel’s major labour union), which has legal offices providing some assistance to women in employment cases, and sometimes in family matters in lower courts).

<sup>72</sup> Political Council for Gay Rights in Israel (n 10) 25.

<sup>73</sup> For a discussion of success rates of women in litigation in Israeli higher courts see Dotan (n 10).

<sup>74</sup> ACRI has a very close relationship with gays’ organisations and collaborates with them on many levels: see Political Council for Gay Rights in Israel (n 10) 110 (Ch 15 dedicated to the activities of ACRI for gay rights). See also the New Israel Fund News (NIF), <http://www.nif.org/media-center/nif-in-the-news>. For the exceptional record of ACRI in higher court litigation in Israel see Dotan and Hofnung (n 24).

<sup>75</sup> Agate Krauss (ed), *Women in Israel: Compendium of Information and Data – 2004* (Israel Women’s Network 2004).



social platform. The ‘gay voyage into the heart of the public sphere’ was based on legal tactics combined with a wide range of grassroots and political activities.<sup>76</sup>

#### 4. THE SOCIAL IMPACT OF THE STRUGGLE BY WOMEN AND LGBT GROUPS FOR EQUALITY

##### 4.1. METHODOLOGY

In the earlier sections I reviewed the activities of women’s and LGBT groups in Israel, through litigation and other means, in the course of their struggle for equality and social mobilisation. What was the social impact of these activities? To what extent were those activities successful in promoting each community’s interests and goals? I have already remarked that measuring the social impact of litigation (or any other legal means) is a demanding task, which raises several methodological and empirical difficulties. Besides the general difficulties involved in identifying and measuring the impact of litigation and the need to substantiate a causal link, in the present study I wish to compare the social achievements of two different groups. Despite some common characteristics (described above), women and the LGBT community differ in many respects, which include their social and political status, the objects of their struggle for equality and the strategies that are relevant for that struggle. How, then, is it possible to make a meaningful comparison of the social impact of litigation for two such distinct groups? It may be no more than a futile effort to compare apples and oranges.

I seek to overcome these difficulties by using comparative, cross-country longitude measurements for the social achievement of each of these two groups. Rather than asking ‘how did women in Israel succeed, in comparison with LGBTs?’ I ask two questions: (i) how did women in Israel succeed in improving their social status *in comparison with women in other countries*, and then (ii) how did the LGBT community in Israel succeed *in comparison with LGBT groups in other countries*? Assuming that, in general, there is a link between the social status of each group, one would expect that this should also be the case for Israel. To use the above metaphor, I am not comparing how apples and oranges grow in Israel. Rather, I seek to study how apples grow in Israel, as compared with how they grow in other countries, and how oranges grow in Israel in that respect. Assuming that where apples *normally* grow well, so do oranges (and vice versa), one would expect that this should also be the case for Israel. If it is not, then it will enable us to offer some tentative explanations for such an aberration.<sup>77</sup>

<sup>76</sup> Kama (n 10) 21.

<sup>77</sup> The choice of the research period 1970–2010 was based on a number of considerations. First, this is a significant time span that presumably enables systematic comparison between the achievements of the two groups. Secondly, it is extremely difficult to gather data (let alone on a wide comparative basis, as done here) on any earlier period. These difficulties are particularly significant with regard to the LGBT movement, which started (in Israel) in the early 1970s. One possible objection to the choice of the research period is that this period misses some important developments with regard to women’s rights and women’s social status in Israel which took place during the 1950s and 1960s – ie prior to the research period. It should be noted, however, that even assuming that the ‘golden age’ of women’s rights in Israel occurred before 1970, at the end of that period (ie in 1970) the relative social status of Israeli women was still low relative to most Western countries, and remained largely unchanged

It should be noted that this methodology seems to be appropriate for settling possible objections as to the differences between Israeli women and Israeli LGBT groups. For example, one may argue that women as a group are far larger in numbers and far less cohesive than LGBTs, and so it is much more difficult for them to become organised for effective political action. It may similarly be argued that considerable differences exist between Israeli women and LGBT groups with regard to their political causes, and therefore the starting point of their struggle for equality. Thus, the argument goes, it is impossible to compare the struggle between the two groups. The methodology used here, however, accounts for such objections, since I am not comparing the relative status of Israeli women vis-à-vis LGBTs in Israel, but vis-à-vis women in other countries. Thus, assuming that it is more difficult for Israeli women to become politically organised, this should also account for women in Germany, Italy and all other countries included in my comparative analysis; the same goes for the case of Israeli LGBTs, whose social status is compared with LGBTs in those countries, but not directly with Israeli women.

Similarly, one may argue that there are special cultural or social circumstances that inhibit the ability of women to promote their social goals, but such circumstances do not apply to the LGBT community. Once again, I argue that the comparative methodology used here accounts for such an objection. If, for example, the objection refers to women in general, one should assume that it should apply not only for Israeli women but also for women in other countries; accordingly our comparative analysis accounts for it. If, on the other hand, the objection refers to some peculiarities of Israeli society, it should presumably apply to the Israeli LGBT community as much as it applies to Israeli women.<sup>78</sup>

Accordingly, the following quantitative analysis refers to the comparative assessment of the social achievements of Israeli women and of LGBT groups. For each group, the quantitative analysis is supplemented by a qualitative assessment.

## 4.2. WOMEN IN ISRAEL

### 4.2.1. QUALITATIVE ANALYSIS

A review of the struggle by women's groups in Israel for gender equality during the research period suggests that this resulted in rather limited achievements. This is not to say that interest group litigation failed completely to mobilise women's interests. Some court cases did indeed bring about significant changes in the status of women within the relevant social field. The most prominent example of this is the litigation concerning the right of women to serve in IDF combat units. The Supreme Court decision in the *Miller* case<sup>79</sup> seems to have had a profound

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throughout the research period (see below). Moreover, to the extent that some changes in the social status of women did occur during the 1950s and 1960s, this has very little to do with court litigation, since the phenomenon of using litigation as a tool for social change was hardly known in Israel during that period (see Section 2.1 above). Lastly, there is hardly a doubt that women's organisations sought to *improve* their social status and fought for equality *after* the 1970s and throughout the research period. Therefore, there is a substantial need to study their relative success during that period, as I do here.

<sup>78</sup> See the discussion above in text at n 9.

<sup>79</sup> *Miller v Minister of Defense* (n 39). See also text after n 39.

Table 1: Representation of Women on the Boards of Governmental Corporations in Israel

Year	Number of directors	Number of women directors	Percentage
1993	800	59	7.4
1997	699	196	28.04
2000	584	221	37.8
2002	624	209	33.5
2003	566	197	34.81
2004	543	202	37.2

Source: Women's Lobby in Israel, *Women in Israel: Information and Data* (Agate Krauss ed., Ramat Gan 2004).

impact on the practices of women's service in the IDF. Until then, almost all combat professions in the IDF were completely closed to women. Shortly after the decision, the IDF reformed its practices and began to admit women not only as combat pilots but also to most other combat military professions, and the reform has had an impact on women's service across the board. Female service following *Miller* is completely different from its position beforehand.<sup>80</sup> Litigation on behalf of women's groups has had an impact on other issues: for example, the struggle of women's groups and activists led to the enactment of the Prevention of Sexual Harassment Law (in 1998) and thereby in this respect brought about significant changes in the status of women in the workplace and in society at large.<sup>81</sup> In addition, one of the main targets of the IWN's litigation during the 1990s was to increase women's representation on the boards of government corporations.<sup>82</sup> These efforts seem to have been fruitful: shortly after the HCJ decision in the first major case in this field,<sup>83</sup> the presence of women on boards jumped from 7.4 per cent (in 1993) to 28 per cent (in 1997) and continued to rise to 37 per cent in 2004 (see Table 1).<sup>84</sup>

<sup>80</sup> Guy I Seidman and Eyal A Nun, 'Women, the Military and the Court: Israel at 2001' (2001) 11 *Southern California Review of Law and Women's Studies* 91, 125–27; *20 Years of the Israel Women's Network* (Israel Women's Network 2004) 10 (in Hebrew); Rimalt (n 40). Still, arguably, there were other factors that contributed to the change of policy regarding women's service in the IDF at the time the decision was rendered. In particular, the incoming Chief of Staff at that time, General Shaul Mofaz, was known for his strong support for gender equality in the IDF: see 'Israeli Manpower Directorate', *Aka* (2005), <http://www.aka.idf.il/yohalan/main/main.asp?catID=56988>.

<sup>81</sup> Orit Kamir, 'Rethinking Sexual Harassment in Terms of Human Dignity-Respect' (1998) 29 *Mishpatim* 317, 361 (in Hebrew); Orit Kamir, 'The Israeli Law for the Prevention of Sexual Harassment: Where Are We After a Decade?' (2008) 9 *Law and Business* 9 (in Hebrew); Noya Rimalt, 'On Law, Feminism and Social Change: The Sexual Harassment Prevention Law as a Case Study' in Daphne Barak-Erez (ed), *Gender, Law and Feminism* (2007) 95 (in Hebrew); Orit Kamir, 'Dignity, Respect and Equality in Israel's Sexual Harassment Law' in Catharine A Mackinnon and Reva B Siegal (eds), *Directions in Sexual Harassment Law* (Yale University Press 2004) 561.

<sup>82</sup> See text after n 30 above. Governmental corporations are controlled by the government and regulated by the Governmental Corporation Law, 1975. The statute includes a specific provision (s 18a) providing for gender equality on the boards of governmental corporations.

<sup>83</sup> *Israel Women's Network v Government of Israel* (n 34).

<sup>84</sup> The rise in the percentage of women in managerial jobs in general during the same period has been far less steep – from 15 per cent in 1986 to 26 per cent in 2000: Krauss (n 75) 91. See also data on the representation of women on the boards of private companies (ibid 102).

## 4.2.2. QUANTITATIVE COMPARATIVE ANALYSIS

Notwithstanding these achievements, an evaluation of the overall success of Israeli women in their struggle to achieve social equality elicits a rather gloomy picture. Such an assessment can be made by using some of the major accepted indicators for the status of women in society, such as political representation and relative pay. These indicators suggest that the quest for gender equality in Israel is far from being fulfilled. Political representation of women in Israel is still much lower than it is in most Western (and, in fact, also many non-Western) countries. For example, in 1987 Israel was ranked 63 of 135 states in a comparative study on the relative representation of women in national parliaments. In 2001 Israel was ranked 57 out of 170 states<sup>85</sup> and fares no better in the global ranking of representation of women in cabinets.<sup>86</sup> In the 2009 elections for the Knesset, the number of women elected scored a record high of 21 representatives (17.5 per cent of all seats), which still leaves Israel far behind most Western democracies (63 out of 134 countries ranked for political representation, in a major cross-national indicator).<sup>87</sup> This low score for female representation is particularly troubling because many parties have special provisions in their constitutions that guarantee quotas for women on their candidate lists.<sup>88</sup>

Similarly the struggle for gender equality has had little impact on the gaps in terms of salaries and only 20 per cent in terms of payment per hour for work),<sup>89</sup> despite a law passed by the Knesset in 1996.<sup>90</sup> The gap between men and women persists, even for state employees who are presumably subject to a strictly regulated regime of gender equality.<sup>91</sup>

For an overall quantitative picture of the relative social status of Israeli women, one may look to the international indicators published by the United Nations Development Programme. These indicators, published annually since 1990, provide comparative illustrations of the human development status of various nations worldwide.<sup>92</sup> One such indicator, the Gender-related

<sup>85</sup> *ibid* 144–45.

<sup>86</sup> Seidman and Nun (n 80) 93.

<sup>87</sup> Ricardo Hausmann, Laura D Tyson and Saadia Zahidi, *The Global Gender Gap Report* (World Economic Forum 2010) 9, [http://www3.weforum.org/docs/WEF\\_GenderGap\\_Report\\_2010.pdf](http://www3.weforum.org/docs/WEF_GenderGap_Report_2010.pdf); Ofer Kenig, *Women in Key Positions: Israel in Comparative Perspective* (Israel Democracy Institute 2010), <http://www.idi.org.il/BreakingNews/Pages/289.aspx>. During the Knesset term, two more women were substituted for retired MKs. In the recent elections of 2013, 27 women were elected (ie 22.5 per cent of all seats). See also Orly Almog-Lotan and Hodaya Kain, 'Women in Politics', Research and Information Center of the Knesset, 2010, <http://www.knesset.gov.il/mmm/data/pdf/m02446.pdf> (in Hebrew).

<sup>88</sup> Israel Democracy Institute, 'Women Quota: Is Reverse Discrimination Good for Women?', 2002, [http://www.idi.org.il/Parliament/2002/Pages/2002\\_35/A\\_35/Parliament\\_Issue\\_35\\_A.aspx](http://www.idi.org.il/Parliament/2002/Pages/2002_35/A_35/Parliament_Issue_35_A.aspx) (in Hebrew).

<sup>89</sup> Krauss (n 75) 70.

<sup>90</sup> Ruth Ben-Israel, *Equal Opportunities and the Prohibition of Discrimination in Employment* (The Open University 1998) 751 (in Hebrew).

<sup>91</sup> According to a recent official report, the gap between men and women is around 25 per cent and very little change has occurred during the last decade: see Ministry of Finance, 'The State Salary Commissioner Report', 2009, 48, <http://hsgs.mof.gov.il/Documents/2009-3.pdf> (in Hebrew).

<sup>92</sup> Admittedly, the choices made in these indexes can be regarded as somewhat arbitrary, at least in the sense that one could suggest indexes that would be based on somewhat different indicators, or challenge the relative weight attributed to each indicator within the overall rating of each country. I use these indicators for two main reasons: (i) to the best of my knowledge, the UN indicators are the only ones which contain comprehensive information that

Development Index (GDI), tests the status of the gender gap in various countries and ranks them accordingly. The ranking is based on indicators such as life expectancy, literacy rate, education and income, and for each indicator it tests the gap between men and women in each country. We have examined the ranking for the years 1995, 1998, 2002 and 2005.<sup>93</sup> According to these indicators, between 1990 and 2010 Israel has been constantly ranked 22–23, behind most Western democracies and without any apparent change in the social status of women compared with women in other countries.<sup>94</sup>

### 4.3. LGBT RIGHTS IN ISRAEL

#### 4.3.1. QUALITATIVE ANALYSIS

Turning now to the evaluation of the success of the LGBT rights movement in Israel in creating social mobilisation, the picture seems to be very different. In fact, the Pink Revolution of the 1990s in Israeli society is arguably the most successful of all group struggles for social equality in Israel, and perhaps one of the most prominent examples across the world of a successful social struggle for equality.<sup>95</sup> Although the homosexual community comprises a small fraction of the population with an extremely low social and legal status until the 1980s, despite the military-macho nature of Israeli society, and even though the LGBT community had and still has powerful political enemies within the Israeli religious establishment, the movement has succeeded in producing comprehensive reforms in the status of LGBT people in Israeli society in almost every field and at all levels. I mentioned above the major legal reforms that repealed the criminal prohibitions on homosexuality and the Supreme Court decisions that opened the gate for the *de facto* recognition of the homosexual partnership as ‘common law marriage’ for most legal and administrative purposes.<sup>96</sup> Yet the Pink Revolution’s achievements go well beyond the legal arena. They are reflected by numerous indicators: the popularity (and size) of gay pride parades (see 3.2

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includes references to a sufficiently large number of countries during the research period; and (ii) it is exactly because *any choice* of the relevant indicators for such an analysis must to some extent be arbitrary, I prefer to use accepted indicators already in use for that purpose rather than creating special indexes for the current study.<sup>93</sup> See United Nations Development Programme (UNDP), ‘Human Development Reports (1990–2010)’, <http://hdr.undp.org/en/humandev>. While the UN has published its HDI Indicator for every year since 1990, the Gender-related Development Index varies with respect to the indicators it measures. I refer to those years in which data appears that refers to income levels of men and women.

<sup>94</sup> UNDP, ‘Human Development Report 1998’, [http://hdr.undp.org/en/media/hdr\\_1998\\_en\\_indicators1.pdf](http://hdr.undp.org/en/media/hdr_1998_en_indicators1.pdf); UNDP, ‘Human Development Report 2000’, [http://hdr.undp.org/en/media/HDR\\_2000\\_EN.pdf](http://hdr.undp.org/en/media/HDR_2000_EN.pdf); UNDP, ‘Human Development Report 2004’, [http://hdr.undp.org/en/media/hdr04\\_complete.pdf](http://hdr.undp.org/en/media/hdr04_complete.pdf); UNDP, ‘Human Development Report 2008’, [http://hdr.undp.org/en/media/HDR\\_20072008\\_EN\\_Indicator\\_tables.pdf](http://hdr.undp.org/en/media/HDR_20072008_EN_Indicator_tables.pdf). Note that in the GDI for 2010, Israel is ranked 15th, but this ranking does not include data regarding the relative income of men and women: UNDP, ‘Human Development Report 2007/2008’ (1990–2010) 98, [http://hdr.undp.org/en/media/HDR\\_20072008\\_EN\\_Indicator\\_tables.pdf](http://hdr.undp.org/en/media/HDR_20072008_EN_Indicator_tables.pdf). Israel’s ranking in a recent report by the World Global Gender Gap Report is even lower than it is in the GDI Reports (49 out of 134 countries for economic participation and opportunity): see Hausmann, Tyson and Zahidi (n 87) 10.

<sup>95</sup> Kama (n 10).

<sup>96</sup> See text accompanying n 47 above.

above); a dramatic change in the way in which gay life and gay people are covered by the media;<sup>97</sup> and the proliferation of ‘pride’ sections in mainstream newspapers and major internet portals. Significant changes were also effected in the field of education and in the education system’s attitude towards LGBT students and the LGBT way of life in general.<sup>98</sup> The change in the social status of gays and lesbians in Israel is reflected in the popular media. Until the late 1980s, the media dealt with homosexuality only in a criminal context, and interviews with gays or programmes referring to homosexual relationships were often banned by media managements.<sup>99</sup> In the late 1980s, and particularly after homosexuality was decriminalised in 1988, this began to change. During the 1990s the media started to cover LGBT political activities and a dramatic change in the depiction of LGBTs in popular culture occurred.<sup>100</sup>

To this one may add the reform in the policies of the IDF and the Israeli police. Until 1973 homosexuality was defined as a mental illness in IDF regulations, but even after these regulations were repealed the general practice to send all gay soldiers for a psychiatric examination persisted until 1993. Homosexuals were discriminated against on the ground that their sexual orientation constituted a ‘security risk’. In 1998, however, the IDF repealed all limitations on the drafting and service of gay soldiers.<sup>101</sup>

To demonstrate the magnitude of the achievements of the LGBT rights movement one can refer to the fact that in 2010 the Israeli Ministry of Tourism launched a campaign to promote LGBT tourism to Israel. The campaign – which included a special governmental website, a Twitter account and a smartphone application – presented Tel Aviv as one of the most LGBT-friendly cities in the world. While this campaign was criticised by some as an attempt to ‘pinkwash’ Israel’s violations of human rights in other areas (particularly towards Palestinians in the Territories),<sup>102</sup> this official attempt to ‘brand’ Israel as a LGBT-friendly state<sup>103</sup> seems to reflect the long way that the LGBT rights movement in Israel has come during the last decades.<sup>104</sup>

<sup>97</sup> Meirav Gerenstein, ‘The Impact of Supreme Court Decisions on the Recognition of Gay Rights in Israel’ (1999) (unpublished student manuscript, Hebrew University) (on file with author); Kama (n 10); Kama (n 41).

<sup>98</sup> Political Council for Gay Rights in Israel (n 10) 6.

<sup>99</sup> Kama (n 10).

<sup>100</sup> *ibid.*

<sup>101</sup> Political Council for Gay Rights in Israel (n 10) 86; Aeyal Gross, ‘Sexuality, Masculinity, Military and Citizenship: The Service of Homosexuals and Lesbians in the IDF from a Comparative Perspective’ in Daphne Barak-Erez (ed), *Military, Society and Law* (Ramat 2002) 95; Kama (n 41).

<sup>102</sup> Aeyal Gross, ‘Israeli GLBT Politics between Queerness and Homonationalism’, *Bully Bloggers*, 3 July 2010, <http://bullybloggers.wordpress.com/2010/07/03/israeli-glbtpolitics-between-queerness-and-homonationalism/>; Katherine Franke, ‘Dating the State: The Moral Hazards of Winning Gay Rights’ (2012) 44 *Columbia Human Rights Law Review* 1.

<sup>103</sup> *ibid.*

<sup>104</sup> The proliferation of gay activities in Israel over the last decade was accompanied by some cases of extreme violence against gay persons and institutions. In 2005 an ultra-orthodox man stabbed and wounded three participants in the Jerusalem Gay Pride parade: Greg Myre, ‘Israel: Three Stabbed at Jerusalem Gay Parade’, *New York Times*, 1 July 2005, A9. In 2009 a masked man opened fire on the home of the National LGBT Association of Israel, killing two young people and wounding several others: Franke (n 102) 1.

## 4.3.2. QUANTITATIVE ANALYSIS

Conducting a quantitative comparative analysis of the social achievements of LGBTs in Israel has proved to be more difficult than performing the same task for women. This is because I am not aware of any formal international comparative ranking of the social status of LGBTs (similar to the GDI indicators published by the UN). An international comparison of the status of LGBT rights does appear in the Wikipedia 2011 entry for ‘LGBT Rights by Country or Territory’. This entry examines the social status of LGBT rights in several countries with reference to the following seven indicators:

- (a) gay relationship under *criminal law*;
- (b) recognition of same-sex relationship;
- (c) marital status;
- (d) family rights (the right to adopt children);
- (e) gay status in the military;
- (f) anti-discrimination laws (in the employment field, consumer rights and so on); and
- (g) laws concerning gay expression and identity.

Using these measurements, I developed a comparative index of the status of LGBT rights in 40 countries ranked at the top of the GDI ranking (described above in respect of women’s equality rights).<sup>105</sup> Admittedly, as in the case of cross-country comparisons of women’s achievements,<sup>106</sup> any choice regarding the various indicators in such an analysis is doomed to be somewhat arbitrary. One could think of other indicators that could have been included in such an analysis (such as the relative number of members in LGBT organisations, public opinion polls regarding gay status and the number and size of gay parades in different countries). The choice of the indicators that I made, however, can be justified by the fact that our analysis is based on a large-scale comparison of indicators from 40 countries over 40 years. It is inevitable that the only indicators that such an analysis can use are the most prominent *formal* indicators regarding gay rights; in other words, there is simply no available data regarding, for example, the size of gay parades in Ireland or Brazil during the 1980s or the number of members in LGBT organisations in Greece or Belgium during the 1970s. The indicators included in our analysis refer to prominent issues that are at the centre of the gay rights movement’s struggles across the globe and, as such, are included in the international indexes that deal with such cross-country comparisons.<sup>107</sup>

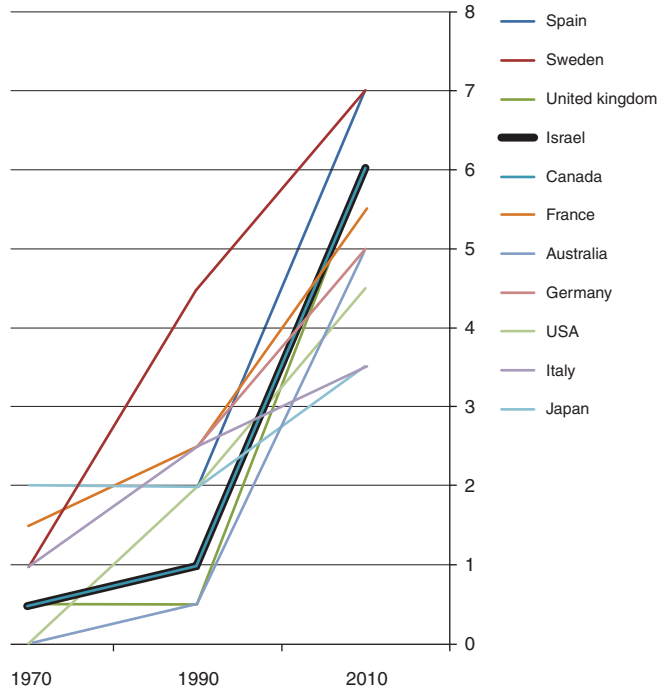
Accordingly, for each country the status of LGBTs in 1970, 1990 and 2010 was examined (see Tables 2.1, 2.2 and 2.3 respectively in the Appendix at the end of this article).

As Table 2.1 demonstrates, in 1970 the status of LGBTs in Israel was very low both in absolute terms and in comparison with many Western democracies. While this hardly changed until 1990 (Table 2.2), by 2010 Israel’s ranking had improved significantly. Israel today is ranked

<sup>105</sup> For this purpose, we used the GDI ranking for 2005.

<sup>106</sup> See n 92.

<sup>107</sup> For somewhat similar (and obvious) reasons we could not use the same indicators for women and LGBT status – ie there was little point in comparing women’s right to marry or gays’ estimated income as indicators for gay status. We focused on indicators related to the main issues at stake for the social struggle of each group.



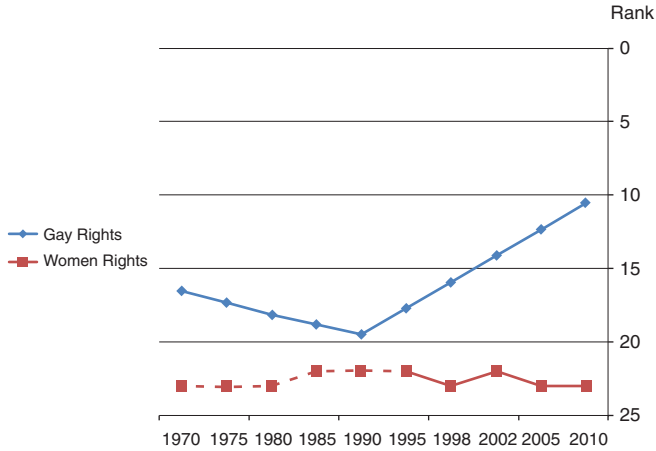
**Fig. 2** The Status of LGBTs in Israel in Comparison with Other Nations: 1970–2010

higher than many Western democracies, including the United States, Germany, France and various other countries that are constantly ranked higher than Israel in the UN major indicators for gender equality (Table 2.3). These measurements seem to corroborate my claim that the social status of gays and lesbians in Israel has improved sharply over the past two decades, not only in absolute terms (that is, in comparison with their status before 1990) but also in comparison with the social status of LGBTs in other Western democracies (see Figure 2).

The achievements of Israel's LGBT community seem to be particularly impressive since, according to comparative public opinion polls, the general Israeli public still seems to be less supportive of LGBT rights in comparison with the citizens of most Western European countries.<sup>108</sup> The relative progress of the social status of LGBTs in Israel in comparison with that of women, as reflected in international comparative rankings, is summarised in Figure 3.

<sup>108</sup> One nationwide poll regarding gay issues found that only 38 per cent of the Israeli public think that homosexuals 'should be accepted' while 50 per cent think they should be 'rejected'. This puts Israel behind most Western democracies, including the US (49 per cent to 41 per cent respectively): see Pew Global Attitudes Project, 'World Publics Welcome Global Trade – But Not Immigration: 47-Nation Pew Global Attitudes Survey', PEW Research Center, 2007, 35, <http://pewglobal.org/files/pdf/258.pdf>. Other public opinion polls, however, suggest that the Israeli public is supportive of gay service in the military (77 per cent), gay rights for civil union (61 per cent) and for adopting children (60 per cent): see Dialogue Poll, *Ha'aretz*, 8 August 2009. The Israeli public is also less receptive to the idea of full equality for women in leadership positions than are other Western Europeans (32 per cent agree with the statement that '[m]en are better in leadership positions than women', compared with 27 per cent in the US, 20 per cent in the UK and Germany and 15 per cent in Norway): see Asher Arian





**Fig. 3** The Status of LGBT and Women's Rights in Israel from a Comparative Perspective

## 5. ANALYSIS AND CONCLUSION

Before I embark on a discussion of the conclusions, a word of caution is required with regard to the degree of decisiveness in my claims. Throughout the discussion I have pointed out the apparent difficulties associated with the analysis of the 'success' of social groups in their struggle for equality, let alone with regard to any attempt to quantify and accurately measure such 'progress' or success. Social processes are complex, and social developments are usually the product of a variety of reasons and factors which are far from easy to isolate scientifically (as is usually performed under laboratory conditions). The cross-country comparative and longitudinal methods I have used in this study are no exception to these inherent difficulties. The main argument developed here is that the relative success or otherwise of LGBTs and women in their struggle for equality during the research period is likely to be associated with the different strategies adopted by each group to promote its goals. Accordingly, I invite the reader to look at my arguments more as illuminating an interesting *correlation*, rather than a straight claim of direct *causation* between the different choices that women and LGBTs have made among strategies for social change, and their relative success in promoting their social goals.

With that caveat in mind, the present study may serve as a good illustration of the many dangers involved in social movements' over-reliance on litigation. Our findings suggest that women's rights groups relied heavily on litigation (and legal advocacy) while neglecting other avenues for political and social mobilisation. As critics have suggested, adopting such a strategy may bring the movement to frame its vision and goals in legalistic terms and concentrate on elite-group strategies, while neglecting the opportunity to develop a genuine grassroots

and others, 'Israeli Democracy Indicator: Democratic Values in Israel' (2010) 2 *Israel Democracy Institute* 75, <http://www.idi.org.il/media/486465/madad%202010%20sofi.pdf> (in Hebrew).

base.<sup>109</sup> It may also encourage the movement's leaders to invest all their resources in litigation and to embrace the false belief that court victories are easily turned into genuine social reforms.<sup>110</sup> These dangers seem to have materialised in the case of the struggle of women in Israel for social equality. Despite a substantial body of legislation and higher court decisions, the struggle for true gender equality in Israeli society seemed as far from a true victory in 2010 as it was 40 years ago. In international comparative terms, the relative social status of Israeli women seems (if anything) to have deteriorated, rather than improved, during the last decade.

The failure of the women's equality movement to significantly change the political and economic status of women in Israel is not surprising. Bringing about such comprehensive changes requires major social reforms that can hardly be achieved through litigation, or even by legislation that is not supported by a strong political apparatus which ensures its acceptance and enforcement.<sup>111</sup> The victories of women's organisations in court, even when effectively enforced, could not significantly influence such fundamental issues. Thus, one may conclude by arguing that the failure of the women's equality movement to achieve its major goals was not the result of its failure to win the battles it chose to fight – in court – but because it failed to choose the right arenas in which to fight the battles that were truly important for the success of its overall mission.

The case of the gay and lesbian rights movement in Israel, on the other hand, suggests that litigation can certainly serve as an effective means for social mobilisation, provided that it is combined and coordinated with other political strategies and that the leaders of the movement are aware of the advantages and limitations of litigation as a political tool.<sup>112</sup>

In fact, over-reliance on litigation had some additional consequences which seem to have been particularly harmful for women's struggle for equality. Among the typical stereotypes that women's groups combat in their struggle for gender equality is the view of women as weak and dependent individuals, who always need *external* forces (stronger than themselves) to promote their causes. Paradoxically, over-reliance on litigation not only fails to refute these stereotypes, but in fact works to *bolster* such chauvinistic beliefs. In litigation (and, to some extent, in legal advocacy) it is usually the weak and dependent party who seeks the help of an authoritative third-party intervener to solve his or her difficulties vis-à-vis the opponents. Even a victory in court is a victory for the weak. In a political struggle, on the other hand, the opposing parties are required to *exert power*. Political victories are thus a manifestation of social power. Sadly, it seems that even in those cases where women's groups have succeeded in court, their victories to some extent have acted to reinforce their image as weak and dependent, particularly in cases where the group's only victories were achieved through litigation.

The most striking point raised by the comparison between women's and LGBT groups in Israel is that there is nothing *inherent* in the structure of these two groups or in the substance

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<sup>109</sup> Scheingold (n 5); Rosenberg 2008 (n 5).

<sup>110</sup> McCann and Silverstein (n 3).

<sup>111</sup> Epp (n 8).

<sup>112</sup> McCann and Silverstein (n 3); Epp (n 8).

of their causes that can explain the difference in their chosen strategies. Admittedly, women form a much larger social group than gays and lesbians, and are therefore far less cohesive in their social organisation and harder to mobilise politically. However, this difference can hardly explain the incredibly low profile of grassroots activity by Israeli women. In any case, if one aims to put forward such an explanation for the above difference between Israeli women and gays, one is also obliged to explain why such constraints on political activity *did not* apply to women's groups in other Western democracies which served as the basis for our comparative analysis.

The differences between the patterns of the social struggle for equality by women and the LGBT community seem to have been purely the result of *choices* made by the leaders of these groups. If anything, one might have expected that the choices would be the other way around. LGBTs are smaller in numbers than women. Resistance and hostility towards their causes in the general public (particularly in conservative and religious circles) go much deeper than in the case of the claim for gender equality. Litigation is commonly regarded as the weapon of the weak and socially alienated.<sup>113</sup> One might easily have anticipated that LGBTs would rely on litigation to a far greater degree than women. As this study demonstrates, the reality has been quite different. The leaders of the LGBT movement in Israel seem to have been far more sceptical (or realistic) about the prospects of social mobilisation through law than their female leader counterparts. It has proved to be a very healthy choice on their part. As our study suggests, even a 'discrete and insular' minority<sup>114</sup> (as, one could argue, was the case of homosexuals in Israel in 1970) must make every effort *not* to be swayed by the 'myth of rights' and try to include litigation in its tactics of political mobilisation. Arguably, if this has proved to work in the case of Israel's LGBT movement, it should have worked in the case of some other groups, women among them.

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<sup>113</sup> Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Bobbs-Merrill 1962); John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1980).

<sup>114</sup> *United States v Carolene Prods* 304 US 144 (1938); Ely, *ibid* 162.

## APPENDIX

Table 2.1: LGBT Rights – 1970

Rank	State	Same-sex sexual activity <sup>1</sup>	Recognition of same-sex relationships	Same-sex marriage	Same-sex adoption <sup>2</sup>	Allows gays to serve openly in military <sup>3</sup>	Anti-discrimination laws (sexual orientation) <sup>4</sup>	Laws concerning gender identity/expression <sup>5</sup>	Total
1	Japan	1	0	0	0	1 <sup>6</sup>	0	0	2
2–5	Switzerland	0.5**	0	0	0*	1	0	0*	1.5
	Czech Republic	0.5**	0	0	0*	1	0	0*	1.5
	Belgium	0.5**	0	0	0	1	0	0	1.5
	France	0.5**	0	0	0*	1	0	0*	1.5
6–13	Uruguay	1	0	0	0	0	0	0	1
	South Korea	1 <sup>7</sup>	0	0	0	0	0	0	1
	Italy	1	0	0	0	0 <sup>8</sup>	0	0	1
	Argentina	1	0	0	0	0	0	0	1
	Germany	0.5**	0	0	0	0.5 <sup>9</sup>	0	0	1
	Denmark	0.5**	0	0	0	0.5 <sup>10</sup>	0	0	1
	Sweden	0.5**	0	0	0.5 <sup>11</sup>	0	0	0	1
	Bahamas	0	0	0	0*	1	0	0*	1
14–21	Netherlands	0.5**	0	0	0	0	0	0	0.5
	Iceland	0.5**	0	0	0	No army	0	0*	0.5
	New Zealand	0.5 <sup>12</sup>	0	0	0*	0	0	0	0.5
	<b>Israel</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0.5<sup>13</sup></b>	<b>0</b>	<b>0*</b>	<b>0.5</b>
	Greece	0.5**	0	0	0	0	0	0*	0.5
	United Kingdom	0.5** <sup>14</sup>	0	0	0	0	0	0	0.5
	Canada <sup>15</sup>	0.5**	0	0	0	0	0	0*	0.5
	Luxembourg	0.5**	0	0	0*	0	0	0*	0.5
22–40	Australia	0	0	0	0	0	0	0*	0
	Finland	0	0	0	0	0	0	0	0
	Ireland	0	0	0	0*	0	0	0	0
	USA	0	0	0	0	0	0	0*	0
	Slovenia	0	0	0	0	0	0	0*	0
	Austria	0	0	0	0	0	0	0*	0
	Malta	0	0	0	0	0	0	0*	0
	Costa Rica	0	0	0	0	0	0	0*	0
	Portugal	0	0	0	0*	0	0	0	0
	Norway	0	0	0	0	0	0	0	0
	Cyprus	0	0	0	0	0	0	0*	0

Spain	0	0	0	0	0	0	0	0
Chile	0	0	0	0	0	0	0	0
Hong Kong	0	0	0	0	0	0	0	0
Singapore	0	0	0	0	0	0	0	0
Barbados	0	0	0	0	0	0	0	0
Antigua and Barbuda	0	0	0	0	0	0	0	0
Brunei	0	0	0	0	0	0	0	0
Trinidad and Tobago	0	0	0	0	0	0	0	0

### Notes

\* No data. When no positive provisions regarding the rights of LGBT people were found, I assumed that those rights were not yet recognised.

\*\* Unequal age of consent.

<sup>1</sup> Key: 1 – same-sex activity is legal; 0.5 – same-sex activity is legal, but the age of consent differs from that for heterosexual activity; 0 – same-sex activity is illegal.

<sup>2</sup> Key: 1 – LGBT couples may jointly adopt; 0.5 – LGBT couples allowed to adopt only their partner’s biological child, or as singles; 0 – LGBT people are not allowed to adopt at all.

<sup>3</sup> Key: 1 – LGBT people are allowed to serve openly in the army; 0.5 – while there is no formal prohibition on LGBT people’s service, there are some practical limitations; 0 – LGBT people’s service is explicitly prohibited by law.

<sup>4</sup> Key: 1 – discrimination against the backdrop of sexual orientation is prohibited in every field of life, while hate speech against LGBT people is considered a criminal offence; 0.5 – there is only partial protection against discrimination against the backdrop of sexual orientation; 0 – no protection at all.

<sup>5</sup> Key: 1 – people are allowed to change their gender, and the change is fully recognised by law; 0.5 – the right for ‘gender identity’ is not fully recognised; 0 – gender change is not recognised by law.

<sup>6</sup> There is no formal prohibition against service by LGBT people: see Palm Center: Blueprints for Sound Public Policy, ‘Asia’s Silence on Gays in Military Broken by Taiwan’, 15 May 2002, [http://www.palmcenter.org/press/dadt/releases/asias\\_silence\\_on\\_gays\\_in\\_military\\_broken\\_by\\_taiwan](http://www.palmcenter.org/press/dadt/releases/asias_silence_on_gays_in_military_broken_by_taiwan).

<sup>7</sup> Apparently there has never been formal prohibition – except in the army.

<sup>8</sup> Homosexuality was a basis for exemption from conscription: Gregory M Herek, Jared B Jobe and Ralph M Carney (eds), *Out in Force* (Chicago University Press 1996) 119.

<sup>9</sup> Homosexuals are prohibited from becoming officers – though not officially: *ibid* 121; see also [http://en.wikipedia.org/wiki/Sexual\\_orientation\\_and\\_military\\_service#Germany](http://en.wikipedia.org/wiki/Sexual_orientation_and_military_service#Germany).

<sup>10</sup> LGBT people were restricted to the Home Guard: <http://www.gaylawnet.com/laws/dk.htm#military>.

<sup>11</sup> LGBT people could adopt only as individuals: <http://www.gaylawnet.com/laws/se.htm#parenting>.

<sup>12</sup> Sexual activity between males was prohibited.

<sup>13</sup> Homosexuals were prohibited from occupying ‘sensitive positions’: Herek, Jobe and Carney (n 8) 124.

<sup>14</sup> Only in England and Wales.

<sup>15</sup> Parliament of Canada, Law and Government Division, ‘Sexual Orientation and Legal Rights’, 31 May 2007, [http://www2.parl.gc.ca/content/lop/research\\_publications/921-e.htm](http://www2.parl.gc.ca/content/lop/research_publications/921-e.htm).

Table 2.2: LGBT Rights – 1990

Rank	State	Same-sex sexual activity	Recognition of same-sex relationships	Same-sex marriage	Same-sex adoption	Allows gays to serve openly in military	Anti-discrimination laws (sexual orientation)	Laws concerning gender identity/expression	Total
1	Sweden	1	0	0	0.5 <sup>1</sup>	1	1	1	4.5
2	Denmark	1	1	0	0	1	0.5 <sup>2</sup>	0*	3.5
3	Netherlands	1	0	0	0	1	0	1	3
4–7	Norway	1	0	0	0	1	0.5 <sup>3</sup>	0	2.5
	France	1	0	0	0*	1	0.5 <sup>4</sup>	0	2.5
	Italy	1	0	0	0	0.5 <sup>5</sup>	0	1	2.5
	Germany	1	0	0	0	0.5 <sup>6</sup>	0	1	2.5
8–12	Czech Republic	1	0	0	0*	1	0	0*	2
	Japan	1	0	0	0	1 <sup>7</sup>	0	0	2
	Belgium	1	0	0	0	1	0	0	2
	Spain	1	0	0	0	1	0	0	2
	USA	0.5 <sup>8</sup>	0.5 <sup>9</sup>	0	0.5 <sup>10</sup>	0	0.5 <sup>11</sup>	0*	2
13–15	Finland	0.5**	0	0	0	1	0	0	1.5
	Switzerland	0.5**	0	0	0*	1	0	0*	1.5
	Slovenia	1	0	0	0*	0.5 <sup>12</sup>	0	0*	1.5
16–24	Argentina	1	0	0	0	0	0	0	1
	South Korea	1	0	0	0	0	0	0	1
	Uruguay	1	0	0	0	0	0	0	1
	<b>Israel</b>	<b>0.5**</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0.5<sup>13</sup></b>	<b>0</b>	<b>0*</b>	<b>1</b>
	Canada <sup>14</sup>	0.5**	0	0	0	0	0.5 <sup>15</sup>	0*	1
	Malta	1	0	0	0	0	0	0*	1
	Singapore	0	0	0	0	0 <sup>16</sup>	0	1 <sup>17</sup>	1
	New Zealand	1	0	0	0*	0	0	0	1
	Bahamas	0	0	0	0*	1	0	0*	1
25–33	Ireland	0	0	0	0*	0	0.5 <sup>18</sup>	0	0.5
	Portugal	0.5**	0	0	0*	0	0	0	0.5
	United Kingdom	0.5**	0	0	0	0	0	0	0.5
	Australia	0.5 <sup>19</sup>	0	0	0	0	0	0*	0.5
	Austria	0.5**	0	0	0	0*	0	0*	0.5
	Costa Rica	0.5	0	0	0	No army	0	0*	0.5
	Iceland	0.5**	0	0	0	No army	0	0*	0.5

	Greece	0.5**	0	0	0	0	0*	0.5
	Luxembourg	0.5**	0	0	0*	0	0*	0.5
34-40	Chile	0	0	0	0	0	0	0
	Hong Kong	0	0	0	0	0	0	0
	Cyprus	0	0	0	0	0	0*	0
	Barbados	0	0	0	0	0	0	0
	Antigua and Barbuda	0	0	0	0	0	0	0
	Brunei	0	0	0	0	0	0	0
	Trinidad and Tobago	0	0	0	0	0	0	0

### Notes

\* No data. When no positive provisions regarding the rights of LGBT people were found, I assumed that those rights were not yet recognised.

\*\* Unequal age of consent.

<sup>1</sup> LGBT people could adopt only as individuals: <http://www.gaylawnet.com/laws/se.htm#parenting>.

<sup>2</sup> Incitement to hatred based on sexual orientation was prohibited in 1987.

<sup>3</sup> Incitement to hatred based on sexual orientation was prohibited in 1981.

<sup>4</sup> Criminal law did not recognise hate speech against LGBT people as a criminal offence.

<sup>5</sup> Since 1985, homosexuality is no longer a categorical reason for exclusion: Gregory M Herek, Jared B Jobe and Ralph M Carney (eds), *Out in Force* (Chicago University Press 1996) 119.

<sup>6</sup> Homosexuals are prohibited from becoming officers – although not officially: [http://en.wikipedia.org/wiki/Sexual\\_orientation\\_and\\_military\\_service#Germany](http://en.wikipedia.org/wiki/Sexual_orientation_and_military_service#Germany).

<sup>7</sup> There is no formal prohibition against the service of LGBT people: see Palm Center: Blueprints for Sound Public Policy, ‘Asia’s Silence on Gays in Military Broken by Taiwan’, 15 May 2002, [http://www.palmcenter.org/press/dadt/releases/asias\\_silence\\_on\\_gays\\_in\\_military\\_broken\\_by\\_taiwan](http://www.palmcenter.org/press/dadt/releases/asias_silence_on_gays_in_military_broken_by_taiwan).

<sup>8</sup> Varies between the states.

<sup>9</sup> Yuval Merin, *Equality for Same-Sex Couples: The Legal Recognition of Gay Partnerships in Europe and the United States* (Chicago University Press 2002) 191.

<sup>10</sup> Some states recognised the right of LGBT people to adopt: Nancy D Polikoff, ‘Recognizing Partners but Not Parents/Recognizing Parents but Not Partners: Gay and Lesbian Family Law in Europe and the United States’ (2000) 17 *New York Law School Journal of Human Rights* 711.

<sup>11</sup> Wisconsin and DC prohibited discrimination based on sexual orientation in the field of employment.

<sup>12</sup> Although LGBT people are not prohibited from serving in the army, they are not ‘well accepted’ by their co-workers: [http://en.wikipedia.org/wiki/LGBT\\_rights\\_in\\_Slovenia](http://en.wikipedia.org/wiki/LGBT_rights_in_Slovenia).

<sup>13</sup> Homosexuals were prohibited from occupying ‘sensitive positions’: Herek, Jobe and Carney (n 5) 124.

<sup>14</sup> Parliament of Canada, Law and Government Division, ‘Sexual Orientation and Legal Rights’, 31 May 2007, [http://www2.parl.gc.ca/content/lop/research\\_publications/921-e.htm](http://www2.parl.gc.ca/content/lop/research_publications/921-e.htm).

<sup>15</sup> Some provinces prohibited discrimination based on sexual orientation: [http://en.wikipedia.org/wiki/LGBT\\_rights\\_in\\_Canada#1970s](http://en.wikipedia.org/wiki/LGBT_rights_in_Canada#1970s).

<sup>16</sup> [http://en.wikipedia.org/wiki/Sexual\\_orientation\\_and\\_military\\_service#Countries\\_that\\_disallow\\_homosexuals\\_from\\_serving\\_in\\_the\\_military](http://en.wikipedia.org/wiki/Sexual_orientation_and_military_service#Countries_that_disallow_homosexuals_from_serving_in_the_military).

<sup>17</sup> [http://en.wikipedia.org/wiki/Transgender\\_people\\_in\\_Singapore#Legal\\_reform](http://en.wikipedia.org/wiki/Transgender_people_in_Singapore#Legal_reform).

<sup>18</sup> Incitement to hatred based on sexual orientation was prohibited in 1989.

<sup>19</sup> Legality, as well as the age of consent, varies between the states.

**Table 2.3:** LGBT Rights – 2010

Rank	State	Same-sex sexual activity	Recognition of same-sex relationships	Same-sex marriage	Same-sex adoption	Allows gays to serve openly in military	Anti-discrimination laws (sexual orientation)	Laws concerning gender identity/ expression	Total
1–6	Netherlands	1	1	1	1	1	1	1	7
	Belgium	1	1	1	1	1	1	1 <sup>1</sup>	7
	Spain	1	1	1	1	1	1	1	7
	Sweden	1	1	1	1	1	1	1 <sup>2</sup>	7
	Iceland	1	1	1	1	1 <sup>3</sup>	1	1	7
	Norway	1	1	1	1	1	1	1	7
7	Portugal	1	1	1	0.5 <sup>4</sup>	1	1	1	6.5
8–13	United Kingdom	1	1 <sup>5</sup>	0	1 <sup>6</sup>	1	1	1	6
	Denmark	1	1 <sup>7</sup>	0	1	1	1	1 <sup>8</sup>	6
	<b>Israel</b>	<b>1</b>	<b>1</b> <sup>9</sup>	<b>0.5</b> <sup>10</sup>	<b>1</b>	<b>1</b>	<b>0.5</b> <sup>11</sup>	<b>1</b>	<b>6</b>
	Canada <sup>12</sup>	0.5 <sup>13</sup>	1	1	0.5 <sup>14</sup>	1	1	1	6
	Argentina	1	1	1	1	1	0.5 <sup>15</sup>	0.5 <sup>16</sup>	6
	Uruguay	1	1 <sup>17</sup>	0	1	1	1	1	6
14–16	France	1	1 <sup>18</sup>	0	0.5 <sup>19</sup>	1	1	1	5.5
	New Zealand	1	1 <sup>20</sup>	0	0.5 <sup>21</sup>	1	1	1	5.5
	Czech Republic	1	1 <sup>22</sup>	0	0.5 <sup>23</sup>	1	1	1 <sup>24</sup>	5.5
17–19	Australia	0.5 <sup>25</sup>	1 <sup>26</sup>	0	0.5 <sup>27</sup>	1	1 <sup>28</sup>	1	5
	Finland	1	1 <sup>29</sup>	0	0.5 <sup>30</sup>	1	0.5 <sup>31</sup>	1	5
	Germany	1	1 <sup>32</sup>	0	0.5 <sup>33</sup>	1	0.5 <sup>34</sup>	1	5
20–24	Austria	1	1 <sup>35</sup>	0	0	1	0.5 <sup>36</sup>	1 <sup>37</sup>	4.5
	Luxembourg	1	1 <sup>38</sup>	0	0.5 <sup>39</sup>	1	0.5 <sup>40</sup>	0.5 <sup>41</sup>	4.5
	Switzerland	1	1 <sup>42</sup>	0	0.5 <sup>43</sup>	1	0.5 <sup>44</sup>	0.5 <sup>45</sup>	4.5
	Ireland	1	1 <sup>46</sup>	0	0.5 <sup>47</sup>	1	1	0	4.5
	USA	1 <sup>48</sup>	0.5 <sup>49</sup>	0.5 <sup>50</sup>	0.5 <sup>51</sup>	1	0.5 <sup>52</sup>	0.5 <sup>53</sup>	4.5
25	Slovenia	1	1 <sup>54</sup>	0	0	0.5 <sup>55</sup>	0.5 <sup>56</sup>	1	4
26–29	Japan	1	0	0	0	1 <sup>57</sup>	0.5 <sup>58</sup>	1 <sup>59</sup>	3.5
	Malta	1	0	0	0	1	0.5 <sup>60</sup>	1	3.5



	Costa Rica	1	0	0	0.5 <sup>61</sup>	1 <sup>62</sup>	0.5 <sup>63</sup>	0.5 <sup>64</sup>	3.5
	Italy	1	0	0	0	1	0.5 <sup>65</sup>	1	3.5
30	Greece	0.5 <sup>66</sup>	0	0	0	0.5 <sup>67</sup>	0.5 <sup>68</sup>	1	2.5
31–34	Cyprus	1	0	0	0	0	0.5 <sup>69</sup>	0.5 <sup>70</sup>	2
	South Korea	1	0	0	0	0	0	1	2
	Chile	0.5 <sup>71</sup>	0	0	0	0.5 <sup>72</sup>	0	1	2
	Bahamas	0.5 <sup>73</sup>	0	0	0	1	0	0.5 <sup>74</sup>	2
35–36	Hong Kong	1	0.5 <sup>75</sup>	0	0	0	0.5 <sup>76</sup>	0	2
	Singapore	0.5 <sup>77</sup>	0	0	0	0.5 <sup>78</sup>	0	1 <sup>79</sup>	2
37	Brunei	0.5 <sup>80</sup>	0	0	0	0	0	0	0.5
38–40	Barbados	0 <sup>81</sup>	0	0	0	0	0	0	0
	Antigua and Barbuda	0	0	0	0	0	0	0	0
	Trinidad and Tobago	0 <sup>82</sup>	0	0	0	0	0	0	0

*Notes*

<sup>1</sup> Official recognition of a new gender is possible only following a medically supervised process of gender reassignment.

<sup>2</sup> Only unmarried, sterilised people who have lived for at least two years as the opposite gender are allowed to change their gender.

<sup>3</sup> Iceland has no armed forces.

<sup>4</sup> LGBT people may adopt only as individuals.

<sup>5</sup> Civil partnership.

<sup>6</sup> The situation in Northern Ireland is unclear.

<sup>7</sup> Registered partnership.

<sup>8</sup> Gender reassignment operations are approved only after sterilisation and castration.

<sup>9</sup> Unregistered cohabitation.

<sup>10</sup> Same-sex marriage cannot be performed inside Israel, but the country recognises foreign marriage.

<sup>11</sup> Criminal law does not recognise hate speech against LGBT people as an offence.

<sup>12</sup> Parliament of Canada, Law and Government Division, ‘Sexual Orientation and Legal Rights’, 31 May 2007, <http://www2.parl.gc.ca/content/lop/research/publications/921-e.htm>.

<sup>13</sup> Unequal age of consent for anal sex.

<sup>14</sup> Some provinces allow joint adoption by same-sex couples, while others only allow adoption of the partner’s biological child.

<sup>15</sup> Only in the cities of Buenos Aires and Rosario are LGBT people protected against discrimination.

<sup>16</sup> The right to change gender has been acknowledged by the courts, but in some areas transgender people are exposed to discrimination and harassment.

<sup>17</sup> Civil union.

<sup>18</sup> Civil pact of solidarity.

<sup>19</sup> Same-sex couples do not have the right to adopt jointly.

<sup>20</sup> Civil union.

<sup>21</sup> LGBT people may adopt only as individuals.

<sup>22</sup> Registered partnership

<sup>23</sup> LGBT people may adopt only as individuals.

<sup>24</sup> Gender reassignment operations must be approved by a special commission.

<sup>25</sup> Unequal age of consent in the state of Queensland.

<sup>26</sup> Recognition varies from civil partnership in AST to ‘de-facto partnership’ (unregistered cohabitation) in some other Australian states.

<sup>27</sup> While some states award LGBT people full adoption rights, in others same-sex couples cannot adopt at all.

<sup>28</sup> Australia does not outlaw discrimination based on sexual orientation at the federal level. Nevertheless, all states and territories in Australia have enacted legislation that renders discrimination related to sexual orientation unlawful.

<sup>29</sup> Registered partnership

<sup>30</sup> Same-sex couples do not have the right to adopt jointly.

<sup>31</sup> Criminal law does not recognise hate speech against LGBT people as an offence.

<sup>32</sup> Registered partnership.

<sup>33</sup> Same-sex couples do not have the right to adopt jointly.

<sup>34</sup> Criminal law does not recognise hate speech against LGBT people as an offence.

<sup>35</sup> Registered partnership.

<sup>36</sup> Protection against discrimination is limited to the field of employment. In addition, Austria’s criminal law does not recognise hate speech against LGBT people as an offence.

<sup>37</sup> European Union Agency for Fundamental Rights, ‘Annual Report 2010’, [http://www.fra.europa.eu/fraWebsite/attachments/AR\\_2010-conf-edition\\_en.pdf](http://www.fra.europa.eu/fraWebsite/attachments/AR_2010-conf-edition_en.pdf).

<sup>38</sup> Legal partnership.

<sup>39</sup> LGBT people may adopt only as individuals.

<sup>40</sup> Criminal law does not recognise hate speech against LGBT people as an offence.

<sup>41</sup> Only partial data is available regarding the process and consequences of gender change in Luxembourg.

<sup>42</sup> Registered partnership.

<sup>43</sup> LGBT people may adopt only as individuals.

<sup>44</sup> Criminal law does not recognise hate speech against LGBT people as an offence.

<sup>45</sup> No data.

<sup>46</sup> Civil partnership since 2011 (the bill was passed in 2010).

<sup>47</sup> LGBT people may adopt only as individuals.

<sup>48</sup> Although in Nevada the age of consent is unequal in seduction cases.

<sup>49</sup> Not recognised by the federal government; varies between states.

<sup>50</sup> Not recognised by the federal government; varies between states.

<sup>51</sup> Different provisions enacted by the states.

<sup>52</sup> Federal law recognises hate speech against LGBT people as a criminal offence. In any event, protection against discrimination varies between states.

<sup>53</sup> Recognition of gender reassignment is limited and varies between states.

<sup>54</sup> Registered partnership.

<sup>55</sup> LGBT people are not prohibited from serving in the army, but they are not ‘accepted well’ in their surroundings.

<sup>56</sup> Criminal law does not recognise hate speech against LGBT people as an offence.

<sup>57</sup> There is no formal prohibition against the service of LGBT people: see Palm Center: Blueprints for Sound Public Policy, ‘Asia’s Silence on Gays in Military Broken by Taiwan’, 15 May 2002, [http://www.palmcenter.org/press/dadt/releases/asias\\_silence\\_on\\_gays\\_in\\_military\\_broken\\_by\\_taiwan](http://www.palmcenter.org/press/dadt/releases/asias_silence_on_gays_in_military_broken_by_taiwan).

<sup>58</sup> Some cities in Japan have prohibited discrimination in some fields, but there is no federal law.

<sup>59</sup> Only people who have undergone gender reassignment surgery are allowed to change their gender.

<sup>60</sup> Protection against discrimination is limited to the field of employment. Malta’s criminal law does not recognise hate speech against LGBT people as an offence.

<sup>61</sup> LGBT people may adopt only as individuals.

<sup>62</sup> No army, but LGBT people are allowed to serve in the police: [http://en.wikipedia.org/wiki/LGBT\\_rights\\_by\\_country\\_or\\_territory#Central\\_America](http://en.wikipedia.org/wiki/LGBT_rights_by_country_or_territory#Central_America).

<sup>63</sup> Protection against discrimination is limited to the field of employment.

<sup>64</sup> No data.

<sup>65</sup> Protection against discrimination is limited to the field of employment. Italy’s criminal law does not recognise hate speech against LGBT people as an offence.

<sup>66</sup> Unequal age of consent

<sup>67</sup> Homosexuals are allowed to serve in the Greek army, though transvestism could lead to exemption: [http://en.wikipedia.org/wiki/LGBT\\_rights\\_in\\_Greece#Legal\\_status](http://en.wikipedia.org/wiki/LGBT_rights_in_Greece#Legal_status).

<sup>68</sup> Protection against discrimination is limited to the field of employment.

<sup>69</sup> Protection against discrimination is limited to the field of employment. Cyprus's criminal law does not recognise hate speech against LGBT people as an offence.

<sup>70</sup> No data.

<sup>71</sup> Unequal age of consent.

<sup>72</sup> There is no formal prohibition against LGBT people, but they could be discharged from the service on the ground of 'offences to the values and morals' of the army.

<sup>73</sup> Unequal age of consent.

<sup>74</sup> No data.

<sup>75</sup> In June 2009, the Hong Kong government extended limited recognition and protection to cohabitating same-sex couples in its Domestic Violence Ordinance.

<sup>76</sup> Protection against discrimination is limited to government sponsored actions.

<sup>77</sup> Illegal between males.

<sup>78</sup> Homosexual men are subject to conscription, but are not allowed to undergo command school or serve in sensitive units.

<sup>79</sup> [http://en.wikipedia.org/wiki/Transgender\\_people\\_in\\_Singapore#Legal\\_reform](http://en.wikipedia.org/wiki/Transgender_people_in_Singapore#Legal_reform).

<sup>80</sup> There are no prohibitions on female homosexuality.

<sup>81</sup> Rarely enforced.

<sup>82</sup> Rarely enforced.