



## CONSTITUTIONAL APPROACHES TO LGBTQ+ RIGHTS – A COMPARATIVE ANALYSIS OF INDIA, THE UNITED STATES AND THE UNITED KINGDOM

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Ankita Mishra\*

### INTRODUCTION

LGBTQ, a term that has gained popularity recently, refers to a broad spectrum of sexual orientations and gender identities that have existed in society since the 1990s. Let's clarify each component – L stands for Lesbians, typically women attracted to women; G stands for Gay, generally men attracted to men; B stands for Bisexuality, where individuals are attracted to both men and women; T stands for Transgender, individuals whose gender identity differs from their assigned sex at birth; and Q stands for Queer, a term often used by those who do not conform to heterosexual norms. The constitutional protection of LGBTQ rights highlights the complex relationship between law, society, and morality.

Over time, LGBTQ rights have evolved from being criminalised to gaining recognition in the United States. The Fourteenth Amendment's Due Process and Equal Protection Clauses protect both same sex relationships and marriages. The United Kingdom depends on the European Convention on Human Rights (ECHR) through the Human Rights Act 1998. In contrast, India is seen to have evolved from judicial conservatism in *Suresh Kumar Koushal v Naz Foundation* to remarkable progress in *Navtej Singh Johar v Union of India*.<sup>1</sup>

This article focuses on the core idea of how the constitutional systems of India, the UK, and the USA would safeguard the rights of LGBTQ people and what recommendations or lessons we can implement from this comparative analysis. This article will analyse primary judgments, statutory texts, and high-quality secondary materials from a legal perspective on the jurisdiction of gender Rights

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\*BANARAS HINDU UNIVERSITY.

<sup>1</sup> *Suresh Kumar Koushal v Naz Foundation* (2014) 1 SCC 1; *Navtej Singh Johar v Union of India* (2018) 10 SCC 1; Human Rights Act 1998, c 42 (UK); European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221.

**MAIN ISSUE (SHORT STATEMENT OF THE PROBLEM)**

This revolves around a core concern, that although LGBTQ rights have gained prominence in the 21st century but the realities faced by queer people, i.e discrimination, social stigma, as well as inequality. If we analyse this issue, it highlights the fact that India's legalised same sex marriage, despite that no further proceedings or measures have been made for legalising same sex marriage, inheritance rights or adoption rights.

In the USA and UK, despite successful landmark cases & progressive legislation, many states have still recorded cases or instances of a ban on gender- affirming care.

Thus, the issue is to lack of social acceptance seen in different parts of the states.

**RESEARCH OBJECTIVES**

1. To identify the constitutional tools involved in India, the United States, and the United Kingdom for identifying and safeguarding LGBTQ rights.
2. To analyse the judgements and how they have shaped LGBTQ rights.
3. Identifying the barriers that hinder the progress and implementation of gaps continues to limit the recognition of LGBTQ rights in society.
4. Lastly, to make some recommendations to eliminate these barriers and ensure full constitutional protection and inclusion of the LGBTQ community.

**RESEARCH QUESTIONS**

1. To portray how the constitutional framework evolved in India, the U.S., and the U.K. in the case of providing recognition to LGBTQ rights.
2. What are the societal barriers or other challenges that hinder equality among the LGBTQ community?
3. What are the similarities and dissimilarities among the three countries, and from that, draw a comparative analysis.

**RESEARCH METHODOLOGY**

The methodology involved in this research is doctrinal and comparative legal method. In this research, we will analyse all the landmark judgments, constitutional provisions made with respect to the recognition of LGBTQ rights. This would help us to analyse the evolutionary

progress and legislative frameworks of all three countries. The Data sources involved in this research are peer-reviewed academic articles, government websites and their publications, and law commission reports. This research also involves human rights instruments such as the Yogyakarta Principles (2006) and the European Convention on Human Rights (ECHR), which highlight the global laws that might influence constitutional interpretations.

## LITERATURE REVIEW

Over the last two decades, jurisprudential discussions on the constitutional rights of the LGBTQ community have developed significantly. In India, Madhavi Divan argued that the judgment passed in *Naz Foundation v Government of NCT of Delhi* and *Navtej Singh Johar v Union of India* depicts the transformative progress of the Indian judiciary, which reinterprets the fundamental rights with the evolving social morality.<sup>2</sup> Upendra Baxi highlighted the fact that after the *Navtej Singh Johar v Union of India* case, the judiciary focused on making a remarkable change by correcting the historical injustice done towards sexual minorities.<sup>3</sup> If we discuss internationally, Laurence Tribe and Cass Sunstein highlighted American perspectives in which the convergence of equal protection Clauses under the Fourteenth Amendment enabled the judiciary to formulate a doctrine that integrated both liberty and equality, which was evident in the case of *Obergefell v. Hodges*.<sup>4</sup> Robert Wintemute discussed about the transition of the United Kingdom from criminalisation to social recognition.<sup>5</sup> Likewise, Kieran Tranter and Paul Johnson explain that the Equality Act 2010 ensured strong protection against discrimination.<sup>6</sup> Despite these advancements under the *Gender Recognition Act 2004*, the legal procedure to claim one's rights by the transgender community is still complicated.<sup>7</sup>

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<sup>2</sup> *Naz Foundation v Government of NCT of Delhi* 160 Delhi Law Times 277 (Delhi HC, 2009); *Navtej Singh Johar v Union of India* (2018) 10 SCC 1; Madhavi Divan, *The Right to Love: Constitutional Morality and the Transformative Role of the Judiciary* (Oxford University Press 2020).

<sup>3</sup> Upendra Baxi, 'Recognising the Right to be Human: The Navtej Johar Judgment' (2018) 53(39) *Economic and Political Weekly* 10.

<sup>4</sup> Laurence H Tribe, *American Constitutional Law* (3rd edn, Foundation Press 2000) 1430; Cass R Sunstein, *Designing Democracy: What Constitutions Do* (Oxford University Press 2001) 75; *Obergefell v Hodges* 576 US 644 (2015).

<sup>5</sup> Robert Wintemute, *Sexual Orientation and Human Rights: The United States Constitution, the European Convention, and the Canadian Charter* (Clarendon Press 1995).

<sup>6</sup> *Equality Act 2010* (UK); Kieran Tranter and Paul Johnson, 'Gender, Law, and the Politics of Recognition in the United Kingdom' (2019) 46(2) *Journal of Law and Society* 123.

<sup>7</sup> *Gender Recognition Act 2004* (UK).

Despite remarkable research, there is still a distinct research gap present, as most of the jurisdictions fail to study the comparative constitutional development and analysis of all three countries. This paper would fill this gap by implementing a comparative doctrinal approach.

## **RESEARCH FINDINGS**

### **Constitutional Tools**

Courts in India, the UK, and the USA use common constitutional ideas referred to as doctrines to deal with cases involving LGBTQ rights. Although all three countries differ in their legal and constitutional system, they follow intersecting principles to deal with LGBTQ cases, which are as follows: Privacy and Autonomy, Equality, Dignity and Identity, as well as some statutory and legislative reforms.

### **India- Path from Criminalisation to Recognition**

#### **Key Judgements**

India incorporated from the British law, Section 377 of the Indian Penal Code (IPC), according to which “carnal intercourse against the order of nature,” which was against same sex sexual orientation.<sup>8</sup>

#### **1. Naz Foundation v. Government of NCT of Delhi (Delhi High Court, 2009)**

According to the Delhi High Court's judgment, it decriminalised same sex sexual orientation. The Court considered Section 377 to violate Articles 14, 15, and 21 of the Constitution by eroding the essence of privacy, dignity and equality.<sup>9</sup> Dr B.R Ambedkar's conception was borrowed by Justice A.P. Shah and Justice S. Muralidhar, “asserting constitutional morality must triumph over public morality”.<sup>10</sup> They used the technique of “reasonable classification test” under Article 14 and analysed that Section 377 was used to make a distinction between consensual and non-consensual activities.<sup>11</sup>

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<sup>8</sup> *Indian Penal Code 1860*, s 377 (as originally enacted under British colonial rule).

<sup>9</sup> *Naz Foundation v Government of NCT of Delhi* 160 Delhi Law Times 277 (Delhi HC, 2009).

<sup>10</sup> *ibid* [79] (Justice A. P. Shah quoting Dr B. R. Ambedkar on constitutional morality).

<sup>11</sup> *ibid* [94]–[98].

## **2. *Suresh Kumar Koushal v Naz Foundation (2013)***

The Judgement of this case was a setback because the two-judge bench (Justices G.S. Singhvi and S.J. Mukhopadhyaya) considered that Section 377 does not violate any rights and that “a minuscule fraction of the country’s population” comes under the LGBTQ community.<sup>12</sup>

## **3. *National Legal Services Authority (NALSA) v Union of India (2014): The Transgender Rights***

In the case of National Legal Service v Union of India, the Supreme Court, in a two-judge bench of Justices K.S. Radhakrishnan and A.K. Sikri, considered transgender individuals as the third gender. Thus, it was noted that each individual has the right to self-identity protected under articles 14, 15, 16, 19(1)(a), and 21.<sup>13</sup> The Supreme Court also focused on the international human rights instruments like the Yogyakarta Principles (2006), which assert that each individual has the right to gender identity.<sup>14</sup>

## **4. *Justice K.S. Puttaswamy (Retd.) v Union of India (2017): Privacy as the Foundation***

A nine-judge bench of the Supreme Court delivered the judgment in Justice K.S. Puttaswamy (Retd.) v Union of India (2017), stating that under Article 21, every individual has the right to privacy. The judgment also referenced Koushal, emphasising that privacy and the protection of one's sexual orientation are fundamental rights. According to Justice Chandrachud, “sexual orientation is an attribute to privacy.”

## **5. *Navtej Singh Johar v Union of India (2018)***

In 2018, the Supreme Court, with a five-judge Constitution Bench, unanimously ruled that same-sex sexual orientation is to be decriminalised. Ultimately, the court invalidated Article 377 “insofar as it criminalises consensual sexual conduct between adults in private.”<sup>15</sup> Justice Chandrachud claimed “constitutional morality cannot be martyred at the altar of social morality” as it is the utmost duty of the judiciary to safeguard the rights and interests of the minority.<sup>16</sup>

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<sup>12</sup> *Suresh Kumar Koushal v Naz Foundation* (2014) 1 SCC 1.

<sup>13</sup> *National Legal Services Authority v Union of India* (2014) 5 SCC 438.

<sup>14</sup> International Commission of Jurists, *The Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity* (March 2007).

<sup>15</sup> *Justice K. S. Puttaswamy (Retd.) v Union of India* (2017) 10 SCC 1.

<sup>16</sup> *ibid* [559] (Justice D. Y. Chandrachud).

Let's discuss its significance in Indian Law –

The core constitutional ideas of the Indian judiciary are based on dignity and identity. Articles 14 and 21 are responsible for protecting dignity and individual autonomy.<sup>17</sup> For instance, as seen in landmark judgements like the *Justice K.S. Puttaswamy v. Union of India* (2017) and *Navtej Singh Johar v. Union of India* (2018), where linkages were made to right to privacy, dignity and privacy of one's sexual orientation.<sup>18</sup> During the post-2014 era, the judiciary has not only given rulings. Still, it has also been involved in taking active steps towards it in the form of organising awareness programs, implementation of welfare schemes and also has proper data on LGBTQ and transgender discrimination.<sup>19</sup> In 2019 Transgender Persons (Protection of Rights) Act faced massive criticism for a lack of proper consultation with the transgender community, as well as the rules were perceived as being complicated. Thus, the judiciary has shifted towards providing easier identity documents, reservation benefits and formulation of welfare schemes.

### **United States- incremental constitutionalization & Federalism**

#### **Key Judgements**

##### **1. Bowers v. Hardwick (1986)**

In this case, a man named Michael Hardwick was arrested in Georgia for being allegedly involved in consensual sex with another man at his own house. The court passed a judgment stating that the judiciary is not responsible for protecting the rights of homosexuals, and the court is bestowed with the power to punish them on the grounds of public morality.<sup>20</sup> This was a major setback for the LGBTQ community.

##### **2. Lawrence v. Texas (2003)**

In this case, John Lawrence and Tyron Garner were arrested in Texas for violating the law on same sex sexual activity. They further challenged it in the court, stating that it violated their right to liberty and privacy under the Fourteenth Amendment. The judgment overruled

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<sup>17</sup> Constitution of India 1950, arts 14, 21.

<sup>18</sup> *Puttaswamy* (n 8); *Navtej Singh Johar* (n 10).

<sup>19</sup> Ministry of Social Justice and Empowerment, *National Portal for Transgender Persons* (2020) <https://transgender.dosje.gov.in/> accessed 18 October 2025.

<sup>20</sup> *Bowers v Hardwick* 478 US 186 (1986).

Bowers v. Hardwick, which is marked as a turning point.<sup>21</sup> Thus, Adults have the right to indulge in consensual private sexual orientation of the same sex. This judgement marked the decriminalisation of homosexuality across the United States.<sup>22</sup>

### 3. Romer v. Evans (1996)

In the state of Colorado, a law was passed named Amendment 2, which was meant to prevent cities and towns from making laws in favour of the LGBTQ community. Although the Supreme Court overruled this law, claiming it to be unconstitutional as it promoted animosity towards a community, which violated the Constitution's Equal Protection Clause.<sup>23</sup>

### 4. Obergefell v. Hodges (2015)

This case is considered to be one of the most famous cases in LGBTQ+ rights judgment cases. It was noted that there was a rising concern among this community for granting them the right to marriage. This turmoil was ended when the Supreme Court ruled (5–4) that same sex couples had their right to marry under the Fourteenth Amendment, which guarantees liberty and equality.<sup>24</sup>

### 5. Bostock v. Clayton County (2020)

The case revolves around the discrimination he faced at his workplace. Gerald Bostock was fired from his workplace, allegedly for being gay. A lawsuit was filed under Title VII of the Civil Rights Act of 1964, which bans discrimination “because of sex.” The Supreme Court ruled (6-3) that discriminating against someone because of their sexual orientation also violates the law of discrimination based on one's sex.<sup>25</sup>

Let's discuss its significance in the United States law:

In the United States, LGBTQ rights had evolved gradually and the principle of *stare decisis*. It was seen that essential constitutional changes were made with each judgement discussed above, from Bowers v Hardwick, which was seen as a major setback to doctrinal developments, as

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<sup>21</sup> *Lawrence v Texas* 539 US 558 (2003).

<sup>22</sup> *ibid* [578] (Justice Kennedy).

<sup>23</sup> *Romer v Evans* 517 US 620 (1996).

<sup>24</sup> *Obergefell v Hodges* 576 US 644 (2015).

<sup>25</sup> *Bostock v Clayton County* 590 US \_\_\_\_ (2020).

seen in the *Lawrence v Texas* case.<sup>26</sup> This phase highlights the core principle of federalism, where there is an interplay between the state courts and federal authority. The turning point was the case of *Obergefell v. Hodges* case, which validated same sex marriages.<sup>27</sup> This portrays the gradual and steady progress in the United States. Finally, according to the judgment made in the *Bostock* case, it was categorically clarified that no discrimination can be made for gay or transgender people, as it would be violating the basic clause of no discrimination based on sex.<sup>28</sup> Despite such judgments, there have been instances in some states that still pass laws which make life difficult for LGBTQ people in mere workplaces, schools, etc.

## **UNITED KINGDOM: PARLIAMENTARY REFORM, ECHR INFLUENCE, AND STATUTORY PROTECTIONS**

### **1. Sexual Offences Act 1967 (England & Wales)**

This case highlights the decriminalisation of homosexual acts between men aged 21.<sup>29</sup>

It was noted that before this, homosexual acts were considered a criminal offence, which was punishable by law. This law recognised the right to privacy of individuals for the first time in England and Wales, initially and did not apply to Scotland or Northern Ireland.<sup>30</sup>

### **2. Dudgeon v UK (1981) – European Court of Human Rights (ECHR)**

As discussed above, the right to privacy and personal autonomy was initially not applicable in Ireland. This case highlights that a gay man from Northern Ireland argued that its right to privacy under Article 8 of the ECHR. The judgment was in favour of Dudgeon, asserting criminalisation of private sexual orientation as violating one's right to privacy.<sup>31</sup>

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<sup>26</sup> Laurence H Tribe, *American Constitutional Law* (3rd edn, Foundation Press 2000) 1430.

<sup>27</sup> Cass R Sunstein, *Designing Democracy: What Constitutions Do* (Oxford University Press, 2001) 75.

<sup>28</sup> *ibid*; *Bostock v Clayton County* (n 6).

<sup>29</sup> *Sexual Offences Act 1967* (UK).

<sup>30</sup> Jeffrey Weeks, *Coming Out: Homosexual Politics in Britain from the Nineteenth Century to the Present* (Quartet Books 1990).

<sup>31</sup> *Dudgeon v United Kingdom* (1981) 4 EHRR 149 (ECtHR).



### 3. Gender Recognition Act 2004

This Act was formulated so that citizens can change their gender officially or legally on their essential documents, such as their birth certificate, passports, etc.<sup>32</sup> This step can be marked as the first step towards their legal recognition towards transgender communities in the UK.<sup>33</sup>

### 4. Civil Partnership Act 2004

This was introduced to provide same sex couples with all the legal rights, including inheritance rights, tax benefits, and parental rights. It tries to make LGBTQ marriages socially acceptable and publicly acknowledged, which is a progressive step.<sup>34</sup>

Let's discuss its themes & significance in the law of the United Kingdom:

In the United Kingdom, progress is noticeable and has been brought about by the judgments and laws made by the Parliament, as well as influenced by the European Court of Human Rights (ECHR), which is bestowed with the responsibility to guide the government to protect the human rights of the citizens.<sup>35</sup> Newer laws and improvisations are being made to make legal advances favouring the LGBTQ community on a wider spectrum.

## COMPARATIVE ANALYSIS

Here we will discuss all the convergences and divergences of all three countries – INDIA, THE UNITED STATES, AND THE UNITED KINGDOM.

According to the above analysis, it is visible that all three countries are based on a common foundational cornerstone, which is the idea of privacy, autonomy, and human dignity for safeguarding the rights of the LGBTQ community. Across India, the case of *Puttaswamy v. Union of India* (2017) judgment was a legal step towards recognising the right to privacy, & another remarkable judgment was passed in the case of *Navtej Singh Johar v. Union of India* (2018), in which same sex relations were decriminalised and the court struck down Section 377 of the Indian Penal Code.<sup>36</sup>

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<sup>32</sup> *Gender Recognition Act 2004* (UK).

<sup>33</sup> Paul Johnson, 'Transgender Rights and the UK Legal System' (2015) 37 *Journal of Social Welfare and Family Law* 1.

<sup>34</sup> *Civil Partnership Act 2004* (UK).

<sup>35</sup> *Human Rights Act 1998* (UK); *European Convention on Human Rights* (1950), arts 8 and 14.

<sup>36</sup> *Justice K.S. Puttaswamy (Retd) v Union of India* (2017) 10 SCC 1; *Navtej Singh Johar v Union of India* (2018) 10 SCC 1.

Similarly, in the USA, it's been noticed that the judgments have brought about a societal change, although the legislation was a bit hesitant regarding this.<sup>37</sup> Some divergences were also observed; in India and the USA, changes are primarily driven by the court's judgment, following a judicial path. In contrast, in the United Kingdom, changes mainly occur through legislative actions by Parliament, which are influenced by the European Court of Human Rights (ECHR).<sup>38</sup> All three countries follow different rules. For example, in the USA, LGBTQ+ rights are established through the 14th Amendment. It's formulated under Articles 14, 15, and 21 of the Constitution.<sup>39</sup> In the UK, the same is promulgated by the statutory equality laws, the Equality Act 2010 and human rights under the ECHR, as it does not have a written constitution.<sup>40</sup>

## DATA PRESENTATIONS

According to the reports of the Pew Research Centre (2023), the percentage of social acceptance of homosexuality has gone up to 80% in the UK, 71% in the U.S., and 53% in India, which shows a vivid distinction between legal recognition and social acceptance.<sup>41</sup> The National Human Rights Commission (2021) highlighted that approximately 52% of LGBTQ individuals faced harassment even after the Navtej case.<sup>42</sup> Similarly, in the Williams Institute (UCLA 2022), it was analysed that approximately 11.3 million adults in the U.S. identify themselves as LGBTQ, with approximately 61% living in states that claim to protect against any discrimination.<sup>43</sup> In the UK, the Government Equalities Office (2021) highlighted statistics of about two-thirds of transgender persons have claimed to have experienced discrimination in healthcare services.<sup>44</sup>

## RECOMMENDATIONS

Some recommendations that might be helpful are:-

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<sup>37</sup> *Obergefell v Hodges* 576 US 644 (2015).

<sup>38</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221.

<sup>39</sup> US Const amend XIV.

<sup>40</sup> Equality Act 2010 (UK); Human Rights Act 1998 (UK).

<sup>41</sup> Pew Research Center, *Global Divide on Homosexuality Persists* (2023) <https://www.pewresearch.org/>

<sup>42</sup> National Human Rights Commission of India, *Study on Human Rights of Transgender Persons in India* (2021) <https://nhrc.nic.in/>

<sup>43</sup> Williams Institute, UCLA School of Law, *LGBT Demographic Data Interactive* (2022) <https://williamsinstitute.law.ucla.edu/>

<sup>44</sup> Government Equalities Office (UK), *National LGBT Survey: Summary Report* (2021) <https://www.gov.uk/government/publications/>

1. India must formulate a Comprehensive Anti-Discrimination Law that would protect all types of sexual orientation, provide them with inheritance and adoption rights.<sup>45</sup>
2. In the United States, more state-level enforcement and protection in healthcare sectors must be ensured.<sup>46</sup>
3. Similarly, in the United Kingdom, eliminate systemic biases that are mainly observed in the public sector services.<sup>47</sup>
4. To promote equality among the citizens nationally and globally, it would be highly recommended to engage in international collaborations, for example, with the United Nations and Commonwealth platforms, as they promote best practices in equality through law.<sup>48</sup>

## CONCLUSION

The constitutional journey of LGBTQ community rights across India, the UK, the USA reveals the transition from social discrimination and criminalisation to social recognition and freedom of one's own sexual orientation. Each country has different aspects, like in the case of India, change is brought about by the judicial courts, constitutionally interpreted in the USA, and legislatively led by the UK. Despite these advancements, there are still difficulties faced by the LGBTQ community as well as severe harassment cases. Thus, implementing the recommendations made in the paper will help in overcoming certain barriers.

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<sup>45</sup> Arvind Narrain, *Queer Rights and the Law in India* (Oxford University Press 2020).

<sup>46</sup> Human Rights Campaign Foundation, *Healthcare Equality Index* (2022) <https://www.hrc.org/resources/hei>

<sup>47</sup> UK Parliament, *House of Commons Women and Equalities Committee Report on Transgender Equality* (2016) HC 390.

<sup>48</sup> United Nations, *Free & Equal Campaign for LGBT Equality* (2024) <https://www.unfe.org/>