

# EXPANDING INTERNATIONAL LGBTQ RIGHTS: INTERNATIONAL HUMAN RIGHTS LAW, EQUAL PROTECTION, AND FREEDOM OF EXPRESSION

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The issue of LGBTQ rights has a prominent place in the world's current legal landscape with regards to Equal Protection and Freedom of Expression. The Universal Declaration of Human Rights, formally adopted by the United Nations in 1948, states that every human is born free and equal and dignity and rights. The Supreme Court of the United States legalized same-sex marriage in the Obergefell decision under the Due Process Clause and the Equal Protection Clause. India's recent Supreme Court ruling in 2018 legalized same-sex marriage and outlawed sodomy laws that specifically targeted homosexual individuals. The purpose of this Note is to compare the history and legal landscape surrounding LGBTQ rights in the United States, India, the United Nations, and European Union with respect to the international sentiment of Equal Protection and Freedom of Expression clauses. After analyzing the bases upon which these governing bodies have extended rights to LGBTQ individuals, this Note will propose solutions, based upon language in the United Nations' Declaration of Human Rights, EU Charter of Fundamental Rights, and the United States' and India's interpretation of these laws and their own Freedom of Expression and Equal Protection clauses in their respective constitutions.

I. INTRODUCTION .....	79
II. INTERNATIONAL HUMAN RIGHTS .....	82
A. Freedom of Expression and Equal Protection as Defined and Interpreted by the United Nations and European Union.....	83
1. Freedom of Expression and Equal Protection in the Universal Declaration of Human Rights.....	84
2. Freedom of Expression in the Legal System of the European Union .....	88
B. A Legal History of Gay Rights in the United States.....	89
C. The Historical Background of <i>Navtej Singh Johar v. Union of     India</i> .....	91
1. History of Gay Rights in Indian Courts .....	91
2. <i>Navtej Singh Johar v. Union of India</i> .....	93
D. Comparing the United States and Indian Constitutions with regards to their Equal Protection Clauses .....	94
III. ANALYSIS .....	96
A. Explicit Inclusion of LGBTQ Rights.....	96
B. Incorporation of International Human Rights Laws as They Pertain to LGBTQ Individuals to Individual Country's Laws .	99
C. Non-Governmental Organizations.....	102
IV. CONCLUSION .....	105

## I. INTRODUCTION

Gay rights: in the United States, this terminology is almost exclusively synonymous for marriage equality for individuals who are gay.<sup>1</sup> However, in various countries around the world, marriage is only one of the many important components of “gay rights.”<sup>2</sup> Torture, execution, and other forms of oppression, such as lack of access to healthcare or parental rights, are unfortunate pieces of the struggle for equality internationally.<sup>3</sup> Struggles over the existence and livelihoods of individuals who identify as lesbian, gay, bisexual, transgender, and queer or questioning (hereinafter “LGBTQ”) continue to persist.<sup>4</sup> Equal protection under the law and freedom of expression are at the forefront of the issue.<sup>5</sup> A myriad of countries throughout the world continue to impose criminal sanctions regarding homosexual behavior.<sup>6</sup> There are, however, a growing number of international protections in place regarding human rights and dignity

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1. See Emma Green, *America Moved on From Its Gay-Rights Moment—And Left a Legal Mess Behind*, ATLANTIC (Aug. 17, 2019), <https://www.theatlantic.com/politics/archive/2019/08/lgbtq-rights-america-arent-resolved/596287/>. The word “gay” is an umbrella term for homosexual men and women, but traditionally does not include transgender, bisexual, or gender-nonconforming individuals. This Note uses the term “gay” in this manner and LGBTQ to include the aforementioned identities.

2. See *LGBT Rights*, HUM. RTS. WATCH, <https://www.hrw.org/topic/lgbt-rights> (last visited Feb. 2, 2020).

3. *Id.*; *Gay Rights in the U.S., State by State*, GUARDIAN (June 26, 2015), <https://www.theguardian.com/world/interactive/2012/may/08/gay-rights-united-states>.

4. See Christina Nunez, *Map Shows Where Being LGBT Can Be Punishable by Law*, NAT'L GEOGRAPHIC (June 16, 2016), <https://www.nationalgeographic.com/news/2016/06/lgbt-laws-gay-rights-world-map/>.

5. Dominic McGoldrick, *The Development and Status of Sexual Orientation Discrimination Under International Human Rights Law*, 16 HUM. RTS. L. REV. 613, 668 (2016).

6. See e.g., Avani Uppalapati et al., *Eighteenth Annual Review of Gender and the Law: International Regulation of Sexual Orientation, Gender Identity, and Sexual Anatomy*, 18 GEO. J. GENDER & L. 635, 641–47 (2017); #Outlawed: “The Love That Dare Not Speak Its Name” HUM. RTS. WATCH (last visited Nov. 20, 2020) [http://internap.hrw.org/features/features/lgbt\\_laws/](http://internap.hrw.org/features/features/lgbt_laws/) (noting the various anti-LGBTQ laws around the world).

afforded to individuals.<sup>7</sup> The International Covenant on Civil and Political Rights state that:

[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>8</sup>

Similarly, the Universal Declaration of Human Rights states that “[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”<sup>9</sup> Further, the Universal Declaration of Human Rights states that “[a]ll human beings are born free and equal in dignity in rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”<sup>10</sup>

Despite these inclusive laws, the legitimacy and recognition of LGBTQ rights internationally is not completely settled.<sup>11</sup> LGBTQ rights are “slowly taking center stage, but it is not at all clear what the UN deliberations will yield from the linkage between gay rights and human rights.”<sup>12</sup> One response after reading the Universal Declaration of Human Rights or the International Covenant on Civil and Political Rights would be that LGBTQ rights are already covered in these provisions of the text in the same way that gender equality has been implied from the text.<sup>13</sup> However, there are differences with how the rights of women are handled by international deliberative bodies and how the rights of LGBTQ

7. See, e.g., International Covenant on Civil and Political Rights art. 2, ¶ 1, Dec. 16, 1966, 999 U.N.T.S. 171; see also G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 19 (Dec. 10, 1948).

8. International Covenant on Civil and Political Rights, *supra* note 7, art. 2.

9. Universal Declaration of Human Rights, *supra* note 7, art. 7.

10. *Id.* art. 1.

11. Juneau Gary & Neal S. Rubin, *Are LGBT Rights Human Rights? Recent Developments at the United Nations*, 24 PSYCHOLOGY INT'L 14, 14 (June 2012), <https://www.apa.org/international/pi/2012/06/un-matters>.

12. *Id.*

13. See e.g., McGoldrick, *supra* note 5, at 668.

individuals are handled.<sup>14</sup> “No State argues that women’s rights are not part of existing international human rights. What arguably distinguishes sexual orientation discrimination claims has been the geographically widespread political and legal opposition.”<sup>15</sup> The issue is that different countries interpret provisions of international laws, which call for inclusivity and equal protection or freedom of expression, as excluding LGBTQ individuals.<sup>16</sup> An example where the laws have been interpreted as including LGBTQ individuals was *Toonen v. Australia*, a case before the United Nations Human Rights Committee.<sup>17</sup> The Committee struck down Australia’s last surviving sodomy law after holding that sexual orientation was protected under the International Covenant on Civil and Political Rights.<sup>18</sup> Contrariwise, the European Union (“EU”) does not have laws that protect freedom of expression, although there are court rulings that have discussed the issue and the United Nations (“U.N.”) has, in some situations, been inclusive of sexual orientation.<sup>19</sup> Consistency, either within the same country or different countries, can be achieved if International Law explicitly recognizes LGBTQ individuals as a protected class under the law.<sup>20</sup>

This Note sets out to do three things: to provide a legal background of LGBTQ rights internationally, specifically comparing the United States, India, the U.N., and the EU; to describe the Equal Protection Clauses and Freedom of Expression Clauses in their governing documents, constitutions, or resolutions; and to create a proposal for model solutions to make LGBTQ rights consistent throughout the world based on equal protection and freedom of expression, specifically explicit language including protections for sexual orientation, incorporation of international law on a State-by-State basis, and other international, non-governmental solutions.

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14. *Id.*

15. *Id.*

16. *See id.*

17. *Toonen v. Australia*, 488/1992 U.N. Doc CCPR/C/50/D/488/1992 (Mar. 31, 1994).

18. *Id.* ¶ 9–10.

19. Benjamin L. Apt, *On the Right to Freedom of Expression in the European Union*, 4 COLUM. J. EUR. L. 69, 70 (1998).

20. *See* OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, BORN FREE AND EQUAL: SEXUAL ORIENTATION, GENDER IDENTITY AND SEXUAL CHARACTERISTICS IN INTERNATIONAL HUMAN RIGHTS LAW 40–42 (2d ed. 2012) [hereinafter UN INTERNATIONAL HUMAN RIGHTS LAW].

This Note recognizes that international laws or declarations, even with the support of a multitude of countries and world leaders can only change so much, but the world has to start somewhere. There are plethora of other ways that non-governmental organizations and individuals can affect change where legislation cannot. Countries cannot be *forced* to support a U.N. resolution or any international law, and even those who claim to support such law cannot be *forced* to follow through in many circumstances. Individuals—world leaders or individual citizens—will have to make that choice.

## II. INTERNATIONAL HUMAN RIGHTS

What is international human rights law? International human rights law refers to the mandates of international human rights treaties or resolutions, such as those ratified by the U.N. or the EU, that impose obligations on other countries to “ensure that international human rights standards” are upheld.<sup>21</sup> However, the relevance of international human rights law has been called into question by different countries and society as a whole.<sup>22</sup>

The ongoing existence of genocide and torture throughout the world call into question the utility of international human rights laws as they pertain to their implementation and enforcement in different countries.<sup>23</sup> The process by which a country establishes protections for LGBTQ individuals within its constitution or by statute based upon international human rights law is called incorporation.<sup>24</sup> The U.N. or European Union are examples of international deliberating bodies that can pass resolutions

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21. *International Human Rights Law and Sexual Orientation & Gender Identity*, UNITED NATIONS HUM. RTS. OFF. OF THE HIGH COMM’R, [hereinafter *UN International Human Rights Law*] <https://www.unfe.org/wp-content/uploads/2017/05/International-Human-Rights-Law.pdf> (last visited Oct. 10, 2020) (stating that “[t]hrough ratification of international human rights treaties, Governments undertake to put into place domestic measures and legislation compatible with their treaty obligations and duties”).

22. See Ronald C. Slye, *International Human Rights Law in Practice: International Law, Human Rights Beneficiaries, and South Africa: Some Thoughts on the Utility of International Human Rights Law*, 2 CHI. J. INT’L L. 59, 59 (2001).

23. *Id.*

24. Farooq Hassan, *The Doctrine of Incorporation: New Vistas for the Enforcement of International Human Rights?* 5 HUM. RTS. Q. 68, 79–80 (1983); see also Slye, *supra* note 22.

or declarations that specifically mention LGBTQ rights from which other countries can look to incorporate the same rights.<sup>25</sup>

This section proceeds in four parts. First, this Note will explain how the U.N. and EU have dealt with the issue of LGBTQ rights and status. Second, it will provide a brief legal history of gay rights in the United States focusing specifically on Equal Protection and Freedom of Expression. Third, it will focus on the Constitution of India and the legal history of gay rights in the Indian courts. Lastly, this section will compare the United States' and India's Constitutions with respect to their Equal Protection Clauses and how they have, or have not, been interpreted as protecting LGBTQ individuals.

#### A. Freedom of Expression and Equal Protection as Defined and Interpreted by the United Nations and European Union

Following two world wars and worldwide political and social devastation, the U.N. passed the Universal Declaration of Human Rights on December 10, 1948.<sup>26</sup> The Declaration opens with the “recognition of the inherent dignity and equal and inalienable rights of all members of the human family” as the “foundation of freedom [and] justice and peace in the world.”<sup>27</sup> The Declaration also extends equal protection, freedom of expression, and states that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”<sup>28</sup> The EU's Charter of Fundamental Rights also contains similar provisions.<sup>29</sup> The issue in these instances is their interpretations among other countries as not including LGBTQ individuals, despite the efforts of the EU or the U.N. to pass resolutions or make statements to that effect.<sup>30</sup>

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25. See Hassan, *supra* note 24.

26. Tom Gjelten, *Boundlessly Idealistic, Universal Declaration of Human Rights is Still Resisted*, NPR (Dec. 10, 2018, 5:05 AM), <https://www.npr.org/2018/12/10/675210421/its-human-rights-day-however-its-not-universally-accepted>.

27. Universal Declaration of Human Rights, *supra* note 7, at preamble.

28. *Id.* art. 5.

29. See generally Charter of Fundamental Rights of the European Union, Dec. 7, 2000, 2000 O.J. (C 364) art. 4.

30. See McGoldrick, *supra* note 5, at 668.

1. *Freedom of Expression and Equal Protection in the Universal Declaration of Human Rights*

The Universal Declaration of Human Rights states that “[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”<sup>31</sup> The Universal Declaration of Human Rights also states that “[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers.”<sup>32</sup> Western concepts of human rights were the driving force behind the Declaration’s protections and purpose of promoting equality and support for human dignity.<sup>33</sup> In promoting the draft document, “Eleanor Roosevelt likened it to the Magna Carta, the 1789 French Declaration of the Rights of Man, and the U.S. Declaration of Independence and the Bill of Rights.”<sup>34</sup> The Universal Declaration of Human Rights states that “[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind.”<sup>35</sup> However, as the Declaration does not explicitly state sexual orientation as a protected class of individuals, countries struggle with ignorance toward LGBTQ rights that goes beyond deprivation of rights and has led to violence against LGBTQ individuals.<sup>36</sup>

Victor Madrigal-Borloz, a U.N. expert specializing in protection against violence and discrimination based on sexual orientation and gender identity, states that “policymakers in most parts of the world are taking decisions in the dark [regarding sexual orientation], left only with

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31. Universal Declaration of Human Rights, *supra* note 7, art. 1.

32. *Id.* art. 19.

33. Gjelten, *supra* note 26.

34. *Id.* (stating that “[t]he United Nations at the time, in fact, was still dominated by western interests. Africa remained largely under colonial rule, and British rule in South Asia had barely ended”).

35. Universal Declaration of Human Rights, *supra* note 7, art. 2.

36. Elizabeth Scaffidi, *Understanding of LGBT Realities ‘Non-Existent’ in Most Countries*, *Says UN Expert*, UN NEWS (June 12, 2019), <https://news.un.org/en/story/2019/06/1040381>.

personal preconceptions and prejudices.<sup>37</sup> From 2013 through 2016, Madrigal-Borloz served on the U.N. Subcommittee on the Prevention of Torture and focused on torture and violence toward LGBTQ individuals.<sup>38</sup> Part of the inability of the U.N. to adequately address the problem is the lack of data regarding a number of LGBTQ focused statistics, including population sizes and concerns of LGBTQ individuals in order to understand the root causes of violence toward this community.<sup>39</sup> Madrigal-Borloz states that “barriers created by criminalization, pathologization, demonization and stigmatization, hinder accurate estimates regarding the world population,” which results in U.N. representatives’ ignorance on these realities.<sup>40</sup> In addition to the negligence of countries to produce data focused on LGBTQ issues and individuals, “a substantial percentage of Member States that have sworn to protect the human rights of their citizens continue” to criminalize same-sex activity.<sup>41</sup>

This data deficiency directly impacts the U.N.’s lack of understanding of LGBTQ struggles with violence and extension of rights afforded to heterosexual individuals.<sup>42</sup> The issue is that different countries interpret provisions of international laws, which call for inclusivity and equal protection or freedom of expression, as excluding LGBTQ individuals.<sup>43</sup> An example where the laws have been interpreted of including LGBTQ individuals was *Toonen v. Australia*, where the Human Rights Committee struck down Australia’s last surviving sodomy law after holding that sexual orientation was protected under the International Covenant on Civil and Political Rights.<sup>44</sup>

Despite the lack of data and statistical knowledge regarding LGBTQ individuals, the U.N. has identified a multitude of general human rights violations against LGBTQ individuals that take place internationally.<sup>45</sup>

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37. Victor Madrigal-Borloz, U.N. HUM. RTS., OFF. HIGH COMM’R, <https://www.ohchr.org/EN/Issues/SexualOrientationGender/Pages/VictorMadrigalBorloz.aspx> (last visited Oct. 16, 2020); Scaffidi, *supra* note 36.

38. Madrigal-Borloz, *supra* note 37.

39. See Scaffidi, *supra* note 36.

40. *Id.*

41. Gary & Rubin, *supra* note 11.

42. See Scaffidi, *supra* note 36.

43. McGoldrick, *supra* note 5, at 668.

44. *Id.* ¶ 9–10.

45. UN Human Rights Council Report: *Discrimination and Violence Against Individuals Based on Their Sexual Orientation and Gender Identity Summary*, OFFICE HIGH

These violations include: violence or torture; criminalization of same-sex sexual behavior; free speech and expression restrictions on LGBTQ-related expression, often characterized as “propaganda”; and general, everyday discrimination.<sup>46</sup>

Without national laws prohibiting discrimination by third parties on grounds of sexual orientation and gender identity, such discriminatory treatment continues unchecked, leaving little recourse to those affected. In this context, lack of legal recognition of same-sex relationships or of a person’s gender identity can also have a discriminatory impact on many [LGBTQ] individuals.<sup>47</sup>

The U.N., however, has passed a number of resolutions to demand that countries protect the lives of LGBTQ individuals including measures to “ensure the protection of the right to life of all persons under their jurisdiction and to investigate promptly and thoroughly all killings including those motivated by the victim’s sexual orientation and gender identity.”<sup>48</sup>

“With the increased global media attention on violent acts of persecution inflicted on [LGBTQ individuals], a crucial question before the world community today is whether gay rights are included under [] basic human rights.”<sup>49</sup> In the face of resistance, determined efforts from the U.N., associated non-governmental organizations, and representatives of Member States to guarantee the human rights of LGBT persons have been gaining momentum.<sup>50</sup> “Today, under the leadership of Secretary-General Ban Ki-moon, there is no doubt that the U.N. is making progress toward the global inclusion of LGBT rights in our basic human rights.”<sup>51</sup> The U.N. has been increasingly interested in this area of human rights law and in 2011 published a brochure titled “The United Nations Speaks Out: Tackling Discrimination on Grounds of Sexual Orientation and Gender

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COMM’R FOR HUM. RTS., [https://www.ohchr.org/Documents/Issues/Discrimination/LGBT/A\\_HRC\\_29\\_23\\_One\\_page\\_en.pdf](https://www.ohchr.org/Documents/Issues/Discrimination/LGBT/A_HRC_29_23_One_page_en.pdf) (last visited Jan. 17, 2021).

46. UN INTERNATIONAL HUMAN RIGHTS LAW, *supra* note 20.

47. *Id.*

48. *Id.*

49. Gary & Rubin, *supra* note 11.

50. Gary & Rubin, *supra* note 11.

51. *Id.*

Identity.”<sup>52</sup> This brochure was the product of the U.N. Office for the High Commissioner for Human Rights (“OHCHR”), the U.N. Development Program (“UNDP”), the Joint U.N. Program on HIV/AIDS (“UNAIDS”), and the World Health Organization (“WHO”). The brochure cites statements that have been made by U.N. senior officials and human rights experts regarding “LGBT rights—including statements from the U.N. Secretary General and the U.N. High Commissioner on Human Rights.”<sup>53</sup> U.N. Secretary-General Ban Ki-Moon states in the brochure: “But let there be no confusion: where there is tension between cultural attitudes and universal human rights, rights must carry the day.”<sup>54</sup> Additionally, the U.N. High Commissioner, Navi Pillay, is quoted in the brochure as stating that “[l]aws criminalizing homosexuality pose a serious threat to the fundamental rights of lesbian, gay, bisexual and transgender individuals.”<sup>55</sup> These statements strongly and clearly advocate in favor of human rights protections for LGBTQ individuals. It is clear from the production of this brochure, although lacking a large data set about LGBTQ issues and not explicitly mentioning sexual orientation as a protected class in the Declaration of Human Rights, the U.N. and some Member States are aware of the existence of discrimination and need for support for the inclusion of LGBTQ rights within the broader lens of human rights.<sup>56</sup>

The OHCHR report was released in anticipation of a Human Rights Council meeting that was held in March 2012.<sup>57</sup> The Council meeting was opened with the following statements:

The High Commissioner’s report documents disturbing abuses in all regions. We see a pattern of violence and discrimination directed at

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52. *Id.*

53. *Id.*

54. *Id.*

55. Gary & Rubin, *supra* note 11.

56. Gary & Rubin, *supra* note 11; *The United Nations Speaks Out: Tackling Discrimination on Grounds of Sexual Orientation and Gender Identity*, UNITED NATIONS HUM. RTS. OFF. HIGH COMM’R (Apr. 2011), [https://www.ohchr.org/Documents/Issues/Discrimination/LGBT\\_discrimination.pdf](https://www.ohchr.org/Documents/Issues/Discrimination/LGBT_discrimination.pdf).

57. *The United Nations Speaks Out: Tackling Discrimination on Grounds of Sexual Orientation and Gender Identity*, UNITED NATIONS HUM. RTS. OFF. HIGH COMM’R (Apr. 2011), [https://www.ohchr.org/Documents/Issues/Discrimination/LGBT\\_discrimination.pdf](https://www.ohchr.org/Documents/Issues/Discrimination/LGBT_discrimination.pdf).

people just because they are gay, lesbian, bisexual or transgender. There is widespread bias at jobs, schools and hospitals, and appalling violent attacks, including sexual assault. People have been imprisoned, tortured, even killed. This is a monumental tragedy for those affected — and a stain on our collective conscience. It is also a violation of international law. You, as members of the Human Rights Council, must respond. To those who are lesbian, gay, bisexual or transgender, let me say: You are not alone. Your struggle for an end to violence and discrimination is a shared struggle. Any attack on you is an attack on the universal values of the United Nations I have sworn to defend and uphold. Today, I stand with you, and I call upon all countries and people to stand with you, too.<sup>58</sup>

Although the Universal Declaration of Human Rights does not explicitly mention sexual orientation, a number of U.N. resolutions have independently done so, and U.N. treaty bodies have confirmed that sexual orientation and gender identity are included.<sup>59</sup> The issue remains that sexual orientation, although a frequently discussed topic, is not treated the same as other aspects of an individual, such as gender or race.<sup>60</sup>

## 2. *Freedom of Expression in the Legal System of the European Union*

Article 11 of the EU Charter of Fundamental Rights states that “[e]veryone has the right to freedom of expression.”<sup>61</sup> This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.<sup>62</sup> The EU does not provide protections for freedom of speech, but the EU Charter of Fundamental Rights does protect freedom of expression as well as various anti-discrimination provisions.<sup>63</sup> However,

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58. Gary & Rubin, *supra* note 11.

59. *See, e.g.*, Human Rights Council Res. 32/2, U.N. Doc. A/HRC/Res/32/2, at 2–3 (June 30, 2016); *see also* Human Rights Council Res. 17/19, U.N. Doc. A/HRC/Res/17/19 (June 17, 2011); UN *International Human Rights Law*, *supra* note 19 (stating that “United Nations human rights treaty bodies have confirmed that sexual orientation and gender identity are included among prohibited grounds of discrimination under international human rights law”).

60. McGoldrick, *supra* note 5.

61. Charter of Fundamental Rights of the European Union, *supra* note 29, art. 11.

62. *Id.*

63. *Apt*, *supra* note 19.

opinions of the European Court of Justice (“ECJ”) have discussed free speech.<sup>64</sup> “In drawing up such opinions, the ECJ has had to look outside the European Community, [and the ECJ referred] instead to Article 10 of the European Convention on Human Rights, or to some unformed common spirit of the Member State legal traditions.”<sup>65</sup>

In contrast with the U.N.’s lack of explicit language protecting sexual orientation, the EU Charter of Fundamental Rights contains a provision that protect individuals on the basis of sexual orientation.<sup>66</sup> Article 21 Section 1 of the EU Charter of Fundamental Rights states that “[a]ny discrimination on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.”<sup>67</sup> Furthermore, the European Convention on Human Rights does contain provisions prohibiting torture and discrimination; however, it does not explicitly state sexual orientation or LGBTQ individuals as a protected class.<sup>68</sup>

## B. A Legal History of Gay Rights in the United States

To understand the pace at which gay rights has evolved, a brief history of gay rights in the United States is important. The United States Supreme Court heard its first case involving homosexuality in *One, Inc. v. Olesen* in 1958.<sup>69</sup> The entirety of the opinion of this landmark Supreme Court case is one sentence: “[t]he petition for writ of certiorari is granted and the judgment of the United States Court of Appeals for the Ninth Circuit is reversed.”<sup>70</sup> Length notwithstanding, the opinion recognized the free speech rights of gay media and its effect that “homosexuals had a right to

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64. See Charter of Fundamental Rights of the European Union, *supra* note 29, arts. 11, 21, 23.

65. Apt, *supra* note 19, at 69.

66. Charter of Fundamental Rights of the European Union, *supra* note 29.

67. *Id.*

68. See Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, E.T.S. No. 5, 213 U.N.T.S. 221.

69. David G. Savage, *Supreme Court Faced Gay Rights Decision in 1958 Over ‘Obscene’ Magazine*, L.A. TIMES (Jan. 11, 2015), <https://www.latimes.com/nation/la-na-court-gay-magazine-20150111-story.html>.

70. *One, Inc. v. Olesen*, 355 U.S. 371, 371 (1958).

express their own views and a right to their own literature.”<sup>71</sup> Fast forward to the 1980s—a period of serious social struggle for gay individuals.<sup>72</sup> *Bowers v. Hardwick* was decided in 1986, and the decision denied same-sex-partnered individuals the right of expression with regard to sexual intimacy.<sup>73</sup> Although the issue was not decided on the basis of the Freedom of Expression Clause of the United States Constitution, the Court held that there was no fundamental right for gay individuals to engage in acts of sodomy.<sup>74</sup>

In 2003, the Supreme Court overturned *Bowers* and struck down a law criminalizing same-sex sodomy in *Lawrence v. Texas* on the grounds that it singled out sodomy with regards to same-sex relationships as a violation of the Due Process Clause.<sup>75</sup> Justice Sandra Day O’Connor stated in her concurrence that the law violated the Equal Protection Clause of the Fourteenth Amendment.<sup>76</sup> However, even that holding would not have entirely protected individuals of same-sex orientation had the statute involved in the case had a disproportionate effect on gay individuals, rather than explicitly singling them out.<sup>77</sup> Thus, the ruling in *Lawrence* is said to have two major shortcomings: first, it has not advanced equality for LGBTQ individuals in subsequent litigation;<sup>78</sup> and second, it “collaborates with the forces that hide and protect sexual abuse.”<sup>79</sup>

In a historical United States Supreme Court decision, *Obergefell v. Hodges*, the Court held that the Due Process Clause guarantees that the

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71. Savage, *supra* note 69 (stating that the attorney who argued the case was “delighted to win, but disappointed the court had not issued a written opinion explaining its reasons”).

72. *Gay Rights*, HISTORY, <https://www.history.com/topics/gay-rights/history-of-gay-rights> (last updated July 3, 2019) (“Gay rights proponents held the second national march on Washington for Lesbian and Gay rights in 1987. The occasion marked the first national coverage of (AIDS Coalition to Unleash Power), an advocacy group seeking to improve the lives of AIDS victims.”).

73. *Bowers v. Hardwick*, 478 U.S. 186, 192–93 (1986).

74. *Id.*

75. *Lawrence v. Texas*, 539 U.S. 558, 558 (2003).

76. *Id.* at 581 (O’Connor, J., concurring) (stating that “[t]he Texas statute makes homosexuals unequal in the eyes of the law by make particular conduct—and only that conduct—subject to criminal sanction”).

77. Justin Reinheimer, Note, *What Lawrence Should Have Said*, 96 CAL. L. REV. 505, 528 (2008).

78. *Id.*

79. *Id.*

right to marry is a fundamental right that cannot be denied to gay individuals.<sup>80</sup> Additionally, the Court held that the Equal Protection Clause of the Fourteenth Amendment also guarantees the right of gay couples to marry.<sup>81</sup> Such a denial, of what is now declared a fundamental right for same-sex couples, is a violation of equal protection of the law.<sup>82</sup>

### C. The Historical Background of *Navtej Singh Johar v. Union of India*

In the New Delhi Court's decision in *NAZ Foundation*, “[d]rawing on multiple strands of fundamental rights doctrine,” the Court struck down the “criminalization of private sexual acts between consenting adults” as a violation of the implicit rights of “dignity, autonomy, and privacy.”<sup>83</sup> The decision in *Naz* was overturned by *Suresh Kumar Koushal v. Naz Foundation*.<sup>84</sup> *Suresh Kumar* was overturned by the 2018 case of *Navtej Singh Johar v. Union of India*.<sup>85</sup>

#### 1. History of Gay Rights in Indian Courts

To begin, like many countries in the world, the early legal landscape for gay individuals in India was oppressive with laws restricting and punishing consensual same-sex activities, and since 1861 same-sex sodomy was punishable by life in prison.<sup>86</sup> The legal landscape for gay individuals and the battles they would fight thereafter, began with the passage of the Indian Penal Code, specifically section 377, which categorized same-sex sexual activity as an unnatural offense.<sup>87</sup> This section stated that “[w]hoever voluntarily has carnal intercourse against the order of nature with any man, woman[] . . . shall be punished with

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80. *Obergefell v. Hodges*, 576 U.S. 644, 664–65 (2015).

81. *Id.* at 673–74.

82. *Id.*

83. Bret Boyce, *Sexuality and Gender Identity Under the Constitution of India*, 18 J. GENDER, RACE, & JUST. 1, 30 (2015).

84. *Suresh Kumar Koushal v. NAZ Found. (India)*, 1 S.C.C. 1 (2014).

85. *Navtej Singh Johar v. Union of India*, Case Analysis, <https://globalfreedomofexpression.columbia.edu/cases/navtej-singh-johar-v-union-india/> (last visited Nov. 14, 2020).

86. *Id.* at 15.

87. *Id.* at 16.

[imprisonment] for life, or with imprisonment of either description for term which may extend to ten years, and shall also be liable to fine.”<sup>88</sup> Section 377 of the Indian Penal Code was frequently used as a model for many laws in various countries throughout the world that criminalize “consensual homosexual conduct.”<sup>89</sup> Countries that adopted this model or adopted laws based off of Section 377 to criminalize same-sex conduct include Singapore, Pakistan, Bangladesh, Zimbabwe, and many others.<sup>90</sup>

As gay rights pushed their way to the forefront of political discourse in India, litigation ensued regarding Section 377.<sup>91</sup> The 2009 case of *NAZ Foundation*, stating that “Section 377 [of the Indian Penal Code], insofar as it criminalizes consensual sexual acts of adults in private, is violative of Article 21, 14, and 15 of the [Indian] Constitution,”<sup>92</sup> the Articles of protection of life and personal liberty, equality before the law, and prohibition of discrimination based on sex respectively.<sup>93</sup> Like the United States Supreme Court case of *Lawrence v. Texas*, the applicability to LGBTQ individuals in declaring this law unconstitutional was vague.<sup>94</sup>

*NAZ Foundation* would have a short lifespan: in 2013, the Indian Supreme Court overturned *NAZ Foundation* and held that Section 377 of the India Penal Code was constitutional.<sup>95</sup> In *Suresh Kumar Kaushal v. NAZ Foundation*, the Court held “Section 377 does not criminalise a particular people or identity or orientation. It merely identifies certain *acts* which if committed would constitute an offence. Such a prohibition regulates sexual conduct regardless of gender identity and orientation.”<sup>96</sup> The Supreme Court of India has held in the past that “popular morality” is not enough for a “compelling state interest” in “[invading] the zone of privacy of adult homosexuals engaged in consensual sex in private . . . the

88. PEN. CODE § 377 (India).

89. Boyce, *supra* note 83, at 16.

90. *Id.* at 16–17.

91. Uppalapati et al., *supra* note 6, at 662.

92. Asmita Sahay, *Naz Foundation v. Government of NCT of Delhi & Ors: Case Summary*, L. TIMES J. (Sept. 20, 2019), <http://lawtimesjournal.in/naz-foundation-vs-government-of-nct-of-delhi-ors/>.

93. INDIA CONST. art. 21, 14, 15.

94. *See* Sahay, *supra* note 92.

95. Uppalapati et al., *supra* note 6, at 662.

96. *Suresh Kumar Koushal v. NAZ Found. (India)*, 1 S.C.C. 1 (2014) (emphasis added).

criminalization of homosexuality . . . is a violation of constitutional morality.”<sup>97</sup>

## 2. *Navtej Singh Johar v. Union of India*

Most recently, in 2018, the Supreme Court of India overruled the decision in *Suresh* and held that Section 377 of the Indian Penal Code was unconstitutional as it pertained to private, consensual sexual activities of adults.<sup>98</sup> In addition to Articles 14, 15, and 21, which were cited in the previous *NAZ* decision, the Supreme Court of India cites Article 19 of the Indian Constitution as a basis for overturning the decision in *Suresh*.<sup>99</sup> Article 19 governs the Right to Freedom within Indian’s Constitution.<sup>100</sup> The text states that, “[a]ll citizens shall have the right—to freedom of speech and *expression*.”<sup>101</sup> The decision in *Navtej Singh Johar v. Union of India* is important because it specifically addresses sexual identity and sexual orientation within the opinion, instead of excluding the terminology or the reality of the legal landscape, as was the case in *NAZ* or the United States Supreme Court decision in *Olesen*.<sup>102</sup>

The decision in *Navtej* was based on India’s constitutional provisions protecting equal protection; anti-discrimination on the basis of race, religion, caste, or sex; freedom of expression, and freedom of life and liberty.<sup>103</sup> It is important to emphasize that, by citing these provisions in its Constitution, the Supreme Court of India has explicitly extended the protections of equal protection, anti-discrimination, freedom of

97. Boyce, *supra* note 83, at 35.

98. *Navtej Singh Johar v. Union of India*, Writ Petition (Criminal) No. 76. of 2016 (Supreme Court of India, 2018).

99. *Id.*

100. INDIA CONST. art. 19, § 1.

101. *Id.* (emphasis added).

102. *See Navtej Singh Johar v. Union of India*, Writ Petition (Criminal) No. 76. of 2016 (Supreme Court of India, 2018); *see generally Naz Found. v. Gov’t of NCT of Delhi*, WP (C) No. 7455/2001 (Del. HC) (India, 2009); *see also One, Inc. v. Olesen*, 355 U.S. 371, 371 (1958).

103. *Navtej Singh Johar v. Union of India*, Writ Petition (Criminal) No. 76. of 2016 (Supreme Court of India, 2018).

expression, and freedom of life and liberty to include sexual orientation and sexual identity.<sup>104</sup> The Supreme Court of India held that:

The overarching ideals of individual autonomy and liberty, equality for all sans discrimination of any kind, recognition of identity with dignity and privacy of human beings constitute the cardinal four corners of our monumental Constitution forming the concrete substratum of our fundamental rights that has eluded certain sections of our society.<sup>105</sup>

The Supreme Court of India took a rather emotional approach to overturning *Suresh* and incited arguments from nature and even quoting Shakespeare.<sup>106</sup> This emotional approach is evidenced by the text of the opinion.<sup>107</sup> “The natural identity of an individual should be treated to be absolutely essential to his being . . . Destruction of individual identity would tantamount to crushing the intrinsic dignity that cumulatively encapsulates the values of privacy, choice, freedom of speech and other expressions.”<sup>108</sup> The Supreme Court of India acknowledged that its Constitution is a dynamic and living document and that these rights are “the dynamic and timeless rights of ‘liberty’ and ‘equality’ and it would be against the principles of [the] Constitution to give them a static interpretation without recognizing their transformative and evolving nature.”<sup>109</sup> India has thus explicitly stated that its constitution is protective of the rights of individuals of same-sex orientation based on the provisions within its constitution upon which this case was ruled.

#### D. Comparing the United States and Indian Constitutions with regards to their Equal Protection Clauses

The Indian Constitution includes specific passages entitled fundamental rights whereas the United States Constitution does not

104. Vikram Kolmannskog, *Love in Law – The Indian Supreme Court Decides in Favour of LGBT Persons*, CMI BRIEF (2018), <https://www.cmi.no/publications/6678-love-in-law-the-indian-supreme-court-decides-in>.

105. Navtej Singh Johar v. Union of India, Writ Petition (Criminal) No. 76. of 2016, at ¶ 3 (Supreme Court of India, 2018).

106. *See id.* ¶ 2.

107. *See id.*

108. *Id.* ¶ 4.

109. *Id.* ¶ 85.

specifically label them as such. The Indian Supreme Court has since declared that sexual orientation on the grounds of equal protection, liberty, and freedom of expression.<sup>110</sup> The Constitution is not interpreted as having an explicit right to privacy, but rather that it is part of the implicit rights in the Constitution.<sup>111</sup> Similarly, the United States Constitution does not have an explicit right to privacy.<sup>112</sup> Case law provides that the right to privacy is found in the penumbras of the First Amendment in only certain situations.<sup>113</sup> India reads theirs as even narrower. Part III of India's Constitution is entitled *Fundamental Rights* and encompasses the "Right to Equality" therein.<sup>114</sup> Article 14 states that "[t]he State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."<sup>115</sup> Article 19(1)(a) of the constitution of India states that "[a]ll citizens shall have the right: to freedom of speech and expression."<sup>116</sup> Section 2 states further:

[N]othing in sub clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offense.<sup>117</sup>

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110. Navtej Singh Johar v. Union of India, Writ Petition (Criminal) No. 76. of 2016, at ¶ 3 (Supreme Court of India, 2018).

111. See Benjamin Kentish, *India Declares Freedom of Sexual Orientation a Fundamental Right*, INDEP. (Aug. 26, 2017), <https://www.independent.co.uk/news/world/asia/india-sexual-orientation-freedom-sexuality-fundamental-right-ruling-openly-lgbt-gay-lesbian-a7913681.html>.

112. Griswold v. Connecticut, 381 U.S. 479, 483 (1965) (stating that the Constitution does not explicitly guarantee privacy within the text of the Constitution, but the "penumbra" of the First Amendment protects it in certain circumstances).

113. *Id.*; see generally R.H. Clark, *Constitutional Sources of the Penumbra Right to Privacy*, 19 VILLANOVA L. REV. 833, 833 (1974), <https://digitalcommons.law.villanova.edu/cgi/viewcontent.cgi?article=2046&context=vlr>.

114. See INDIA CONST. art 14.

115. *Id.* art. 14.

116. *Id.* art. 19, § 1, cl. a.

117. *Id.* art. 19, § 2.

Freedom of expression is limited in the United States through case law, whereas, in India, freedom of expression is limited by Article 19, Section 2 of its constitution.<sup>118</sup>

### III. ANALYSIS

The protection of LGBTQ rights on an international basis is a possibility if the proper measures are taken.<sup>119</sup> There are several different approaches that can be taken in order to affect this change, including explicit language from the U.N. and EU to include LGBTQ or sexual orientation in their resolutions and international law; individual countries using existing international human rights laws to incorporate those protections in their own countries' executive, judicial, or legislative branches; or instead using the principles of international human rights laws and non-governmental organizations to ratify human rights laws.<sup>120</sup>

This section identifies three ways in which LGBTQ rights can be protected on an international basis. First, the U.N. and the EU can continue adopting resolutions that explicitly mention sexual orientation as within the protection of Equal Protection or Freedom of Expression. Second, individual countries can incorporate international human rights laws into their own legal system vis-à-vis their constitutions, or enforcement through executive, legislative, or judicial branches. Third, non-governmental organizations and lobbying groups can continue to advocate for LGBTQ rights as a fundamental part of Equal Protection and Freedom of Expression under the mandate of international human rights laws.

#### A. Explicit Inclusion of LGBTQ Rights

Decriminalization is one part of the goal in order to recognize the rights and dignity of LGBTQ individuals. Of course, in order to take this route, the international stage needs to be set to set an example for countries

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118. *Id*

119. *See generally* UN INTERNATIONAL HUMAN RIGHTS LAW, *supra* note 20; *see also* Slye, *supra* note 22, at 62 (“The international law-international relations body of scholarship directly address the question of how much law, as opposed to power, interests, or other forces, affect or constrain states.”).

120. *See* UN INTERNATIONAL HUMAN RIGHTS LAW, *supra* note 20; *see also* Slye, *supra* note 22, at 65.

around the world to look. Although the current attitude of U.N. officials are thought to be supportive of LGBTQ rights and protections, which has been seen by some countries in certain instances to translate to decriminalization of sodomy laws or acceptance of same-sex marriage laws, many other countries do not see the equal protection resolutions or free expression provisions of their constitutions as protecting same-sex individuals.<sup>121</sup>

To expedite the rate at which countries accept same-sex individuals, international laws should explicitly protect LGBTQ individuals. The Universal Declaration of Human Rights was adopted by the U.N. and recognizes the right to marriage, freedom of opinion and expression, innate freedom and equality, and equality under the law.<sup>122</sup> Additionally, the Article 16 of the Declaration only encompasses heterosexual marriage.<sup>123</sup> The U.N. has been critical of discrimination and violence toward LGBTQ individuals and has passed resolutions formalizing its disapproval.<sup>124</sup>

However, the language within the Declaration of Human Rights is not all encompassing. As the issue of gay rights takes center stage on an international level, there have been a number of countries that use existing provisions within their constitutions to legalize same-sex marriage or overturn sodomy laws.<sup>125</sup> The Equal Protection and Freedom of Expression clauses, although interpreted by some countries to include LGBTQ individuals, is still not an international norm. Unlike the rights of other historical minorities, such as women, rights of LGBTQ individuals have not been seen by the same countries as equally as urgent or included.<sup>126</sup> The U.N. and EU both consider human dignity and freedom

121. See generally Slye, *supra* note 22; see generally Navtej Singh Johar v. Union of India, Writ Petition (Criminal) No. 76. of 2016 (Supreme Court of India, 2018).

122. See generally Universal Declaration of Human Rights, *supra* note 7, arts. 16, 17.

123. *Id.* art. 16.

124. HRC Staff, *Ten Ways the United Nations has Protected LGBTQ Human Rights*, HUM. RTS. CAMPAIGN (Sept. 18, 2017), <https://www.hrc.org/blog/ten-ways-the-united-nations-has-protected-lgbtq-human-rights>. The United Nations has played a crucial role in advancing and protecting the human rights of LGBTQ people. *Id.*

125. See e.g., Navtej Singh Johar v. Union of India, Writ Petition (Criminal) No. 76. of 2016, at ¶ 3 (Supreme Court of India, 2018).

126. *International Human Rights Law and Sexual Orientation & Gender Identity*, UNITED NATIONS LGBT EQUALITY, <https://www.unfe.org/wp->

of expression in the Declaration of Human Rights.<sup>127</sup> Although these clauses have been interpreted in some cases, such as in Australia, to be inclusive of same-sex individuals, many countries do not. For these reasons, international laws should explicitly mention LGBTQ individuals in their text.

The EU has been facing issues regarding how to resolve this ongoing dilemma. “Various solutions for recognizing individual rights within the Community have been proposed over the years.”<sup>128</sup> These solutions range from adopting a “European Constitution,” to have the European Courts “unilaterally elaborate” on individual rights that are apparent throughout the courts’ case law, or to have the EU countries compose a “catalogue of basic rights.”<sup>129</sup> Regardless of which method the EU ultimately chooses, including language identifying LGBTQ status as a protected class from discrimination will remove confusion or attempts by countries to interpret the international state of human rights as stating otherwise.

One possibility is creating language within the Universal Declaration of Human Rights that expressly and unequivocally includes the rights of LGBTQ individuals to be viewed as equal under the law, in dignity, the freedom to express themselves through the institution of marriage. In this way, countries will no longer be able to deny the dignity that other countries have afforded to their LGBTQ population. The changes to Universal Declaration of Human Rights should be based off the rationales used by other countries to effect change. For example, the U.N. Human Rights Committee rationalized that sexual orientation was protected under the International Covenant on Civil and Political Rights in *Toonen v. Australia*.<sup>130</sup> Using the rationale from *Toonen*, the Declaration has precedent of supporting this type of action. This is still limited because in that case the U.N. Committee connected LGBTQ rights with privacy rights instead of the principle of non-discrimination.<sup>131</sup> Similarly, the European

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content/uploads/2017/05/International-Human-Rights-Law.pdf (last visited Nov. 16, 2020).

127. Charter of Fundamental Rights of the European Union, *supra* note 29, art. 1; Universal Declaration of Human Rights, *supra* note 7, art. 1.

128. *Apt*, *supra* note 19, at 70–71.

129. *Id.*

130. *Toonen v. Australia*, 488/1992, at ¶ 11, U.N. Doc CCPR/C/50/D/488/1992 (Mar. 31, 1994).

131. *Id.*

Court did not accept the violation under Article 14, which prohibits discrimination. Protecting LGBTQ rights with the right of privacy is inadequate in protecting legal rights generally of LGBTQ individuals, and a better response is to protect LGBTQ rights under the principles of anti-discrimination, Equal Protection, or Freedom of Expression.<sup>132</sup>

Additionally, the U.N. has been collaborating with its Member States to “reject discrimination in general, and in particular discrimination based on sexual orientation and gender identity.”<sup>133</sup> While the denial of human rights for LGBTQ persons persists throughout the world today, over 30 countries have decriminalized homosexuality in the past 20 years.<sup>134</sup> Gradually, despite the resistance, the U.N. and other non-governmental organizations, and other Member States have been speaking out to promote the acceptance of LGBTQ rights on an international basis.<sup>135</sup> Currently, with strong leadership from U.N. officials, “there is no doubt that the U.N. is making progress toward the global inclusion of LGBT rights in our basic human rights.”<sup>136</sup>

#### B. Incorporation of International Human Rights Laws as They Pertain to LGBTQ Individuals to Individual Country’s Laws

The incorporation of International Human Rights laws is another way in which LGBTQ rights can be recognized. The central inquiry is how many different countries incorporate, or choose not to incorporate, international human rights laws into their own constitutions or governing legal documents.<sup>137</sup> Incorporation occurs when a country’s executive, judicial, or legislative branches, or constitution itself, establish sexual-orientation-specific protections modeled after resolutions, declarations, or other sources international human rights law.<sup>138</sup> For example, the EU

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132. See Robert A. Ermanski, *The Right to Privacy for Gay People Under International Human Rights Law*, 15 B.C. INT’L & COMP. L. REV. 141, 146–47 (1992).

133. *Combatting Discrimination Based on Sexual Orientation and Gender Identity*, U.N. HUM. RTS., <https://www.ohchr.org/en/issues/discrimination/pages/lgbt.aspx> (last visited Nov. 18, 2020).

134. Gary & Rubin, *supra* note 11.

135. *Id.*

136. *Id.*

137. See *Same Sex Marriage Around the World*, PEW RSCH. CTR. (Oct. 28, 2019), <https://www.pewforum.org/fact-sheet/gay-marriage-around-the-world/>.

138. See Hassan, *supra* note 24; see also Slye, *supra* note 22.

Charter of Fundamental Rights includes Article 21, which explicitly prohibits discrimination based on sexual orientation.<sup>139</sup> If a country were to use Article 21 to establish the same LGBTQ rights within its constitution or to pass laws that have this effect, it will have “incorporated” the rights.<sup>140</sup> “The incorporation of international human rights law into domestic law transforms the inquiry concerning the relevance of human rights law into a variation on the question of what benefits a domestic legal system provides to its beneficiaries.”<sup>141</sup>

The country of India is an example of the incorporation of protections based on international human rights laws for LGBTQ individuals within their own constitution. Here, by acknowledging that its constitution is an evolving document,<sup>142</sup> India has incorporated gay rights explicitly into its constitution.<sup>143</sup> The Indian courts have used the method of incorporation to apply international human rights laws to their own governing documents and legal principles.<sup>144</sup> Not only did the Indian courts look to international human rights laws, but also the laws of other countries that have been in the midst of navigating the issue of LGBTQ rights.<sup>145</sup> Ultimately, the Indian courts have made the determination that Freedom of Expression and Equal Protection include rights for LGBTQ individuals—both with regards to the right to same-sex marriage and the outlawing of same-sex sodomy laws which have historically targeted same-sex oriented individuals.<sup>146</sup> Unlike *NAZ* or the United States Supreme Court decision in *Olesen*,<sup>147</sup> the Supreme Court of India held that Section 377 of the Indian Penal Code was unconstitutional as it pertained to private, consensual sexual activities of adults and explicitly addressed

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139. Charter of Fundamental Rights of the European Union, *supra* note 29, art. 21 §1.

140. *See Hassan, supra* note 24.

141. *Slye, supra* note 22, at 64.

142. *Kolmannskog, supra* note 104.

143. *See generally Navtej Singh Johar v. Union of India*, (2018).

144. *Navtej Singh Johar v. Union of India*, Writ Petition (Criminal) No. 76. of 2016, at ¶ 127 (Supreme Court of India, 2018).

145. *See id.* ¶ 21, 22.

146. *See id.*

147. *See id.*; *see generally Naz Found. v. Gov't of NCT of Delhi*, WP (C) No. 7455/2001 (Del. HC) (India, 2009); *see also One, Inc. v. Olesen*, 355 U.S. 371, 371 (1958).

sexual orientation within the opinion.<sup>148</sup> India incorporated these rights vis-à-vis its constitutional protection under equal protection, freedom of expression, and freedom of life and liberty.<sup>149</sup> Although India, has chosen this route, not every country has to follow the same process or use the same constitutional principles for incorporation to work.<sup>150</sup>

Other countries could choose to incorporate the principles of international human rights laws of protecting LGBTQ individuals through their legislative branches, as opposed to their executive or judicial branches.<sup>151</sup> Various options to legislatures include:

repealing laws that criminalize homosexuality, repealing laws that target same-sex intimate activity, abolishing the death penalty for offenses involving consensual sexual relations, enact comprehensive anti-discrimination laws, standardize the age of consent for sexual conduct, investigate all killings or serious violence against sexual orientation, ensure that asylum laws recognize sexual orientation and gender identity as a basis for claiming persecution, and enabling LGBTQ people fleeing persecution to avoid returning to countries or territories where their freedom is threatened.<sup>152</sup>

These protections for LGBTQ individuals would be based on a number of obligations that the U.N. has set forth with respect to international human rights.<sup>153</sup> These obligations include: protecting individuals from homophobic or transphobic violence or torture; repealing laws that criminalize same-sex behavior or “private sexual conduct between consenting adults”; legislating anti-discrimination laws; and safeguarding freedom of expression.<sup>154</sup>

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148. Navtej Singh Johar v. Union of India, Writ Petition (Criminal) No. 76. of 2016, at ¶ 252 (Supreme Court of India, 2018).

149. See generally Navtej Singh Johar v. Union of India, (2018).

150. Gary & Rubin, *supra* note 11.

151. Slye, *supra* note 22, at 68.

152. Gary & Rubin, *supra* note 11.

153. UN INTERNATIONAL HUMAN RIGHTS LAW, *supra* note 20 (stating that “[t]he right to equality and non-discrimination are core principles of human rights, enshrined in the United Nations Charter, The Universal Declaration of Human Rights (UDHR) and human rights treaties”).

154. *Id.*

There are, however, difficulties that can arise with incorporation.<sup>155</sup> It is clear that although the U.N. or other international deliberative body may approve specific resolutions promoting any kind of human rights—including LGBTQ rights—countries are sometimes slow to act to incorporate those resolutions and international law into their domestic policies.<sup>156</sup> Many times, politics plays a key role in whether certain legislation is successful. Thus, certain parts of the world may be more inclined to incorporate these rights than others.<sup>157</sup> On a different level, even different parts of the country may be more inclined than others to pass localized legislation that promotes human rights and incorporates domestic policy.<sup>158</sup>

### C. Non-Governmental Organizations

A Non-Governmental Organization (hereinafter “NGO”) is typically defined as “a voluntary group or institution with a social mission, which operates independently from the government.”<sup>159</sup> NGOs can be successful in advocating for a specific cause within the realm of human rights, specifically LGBTQ rights.<sup>160</sup> There are a plethora of ways in which NGOs can accomplish this goal.

Primarily, NGOs have the ability to lobby governments to pass legislation protecting human rights including treaties and “optional protocols.”<sup>161</sup> NGOs can advocate for new rights by “lobbying international human rights bodies,” such as the U.N. or EU, “to adopt recommendations, resolutions, international human rights conventions or

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155. See Simon Hoffman, *There’s Increasing Interest in ‘Incorporation’ of Human Rights through Welsh Legislation. But What Does This Mean, and How Would People Benefit?*, BEVAN FOUND. (Feb. 4, 2019), <https://www.bevanfoundation.org/commentary/incorporation-of-human-rights/>.

156. See *id.* (noting that the UK has been slow to incorporate human rights legislation in parts of the country).

157. See *id.*

158. See *id.*

159. *What is an NGO?*, NGOSOURCE, <https://www.ngosource.org/what-is-an-ngo> (last visited Mar. 14, 2020).

160. Guilia Dondoli, *LGBTI Activism Influencing Foreign Legislation*, 16 MELB. J. INT’L L. 124, 125 (2015).

161. *Id.*

non-binding statements.”<sup>162</sup> Aside from legislative action, these organizations can support individual applications and communications before international courts and bodies, as well as collect information on human rights violations and submit reports, to which they can follow up on decided international adjudications, resolutions, and recommendations and participate as observers in intergovernmental meetings.<sup>163</sup>

Decriminalization is only one of the first steps to protection of freedom of expression and equal protection for LGBTQ individuals. “This new paradigm raises a range of issues relating to positive political claims.”<sup>164</sup> More than one of these activities can be undertaken at the same time, and each activity can be associated with other non-legal actions, such as organizing campaigns of protest to raise public awareness, supporting informational and educational programs, and supporting individuals and disadvantaged groups with practical aid. “In general, the primary goal of most NGOs is to influence state conduct.”<sup>165</sup> To effectuate the goal of promoting LGBTQ rights, international organizations, such as the U.N. and EU, are used as the primary outlet.<sup>166</sup>

There are several different ways that NGOs can operate to effect systemic change.<sup>167</sup> NGOs can exist to engage in political activism or not.<sup>168</sup> Political activism within NGOs can focus on human rights laws or providing humanitarian aid.<sup>169</sup> Some examples of these include Amnesty International, Human Rights Watch, U.N. Watch, and European Centre for Minority Issues, or Oxfam.<sup>170</sup> Furthermore, NGOs focused on political activism “can be further subdivided into identity-based NGOs organizations.”<sup>171</sup> For example, an NGO that is subdivided into an identity-based organization would be one that focuses specifically on advancing

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162. *Id.*

163. *Id.*

164. Danish Sheikh, Note, *The Road to Decriminalization: Litigating India’s Anti-Sodomy Law*, 16 YALE HUM. RTS. & DEV. L.J. 104, 129 (2013).

165. Dondoli, *supra* note 160.

166. *See id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*; see also 25 *International Human Rights Organizations*, HUM. RTS. CAREERS, <https://www.humanrightscareers.com/magazine/international-human-rights-organizations/> (last visited Mar. 14, 2020).

171. Dondoli, *supra* note 160.

LGBTQ rights or the rights of other specific minority groups, such as Founders for Lesbian and Gay Issues or The World Congress of Gay, Lesbian, Bisexual and Transgender Jews.<sup>172</sup> There are also NGOs focused generally on international human rights but do not focus on one, or any, specific minority group.<sup>173</sup> Examples of general international human rights NGOs include Amnesty International, Human Rights Foundation, International Federation for Human Rights, and Human Rights Watch.<sup>174</sup>

Although there are a number of ways NGOs can have a positive impact on the rights of the global LGBTQ community, there are also negative repercussions as well.<sup>175</sup> NGOs committed to opposing LGBTQ rights “compete to promote their views and like-minded organizations cooperate or influence each other’s agendas to achieve common goals.”<sup>176</sup> Although there are less global initiatives that seek to counter global LGBTQ rights, some examples of NGOs that are not supportive of LGBTQ rights in the United States include the American College of Pediatrics, Americans for Truth about Homosexuality, Liberty Counsel, and Parents and Friends of Ex-Gays and Gays.<sup>177</sup> LGBTQ-specific NGOs may need to acknowledge that certain forms of passionate advocacy can lead to more negative ramifications on a global scale.<sup>178</sup> It is unlikely that many anti-LGBTQ NGOs will change their minds on the existence of LGBTQ rights (or even the existence of LGBTQ people), so different communication tactics between LGBTQ-specific NGOs can help minimize the “negative effects of their actions through communication and collaboration.”<sup>179</sup>

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172. *Directory of Organizations Relevant to the Human Rights of LGBT People*, OUTRIGHT ACTION INT’L, <https://outrightinternational.org/content/directory-organizations-relevant-human-rights-lgbt-people> (last visited Sept. 8, 2020).

173. 25 *International Human Rights Organizations*, *supra* note 147.

174. *Id.*

175. Dondoli, *supra* note 160, at 143.

176. *Id.*

177. *Anti-Equality Organizations*, PFLAG, <https://pflag.org/antilgbtq> (last visited Mar. 14, 2020) (“Disagreements over the roles and rights of LGBTQ individuals in society are not enough for us to label an organization anti-LGBTQ: It is the intersection of beliefs with actions taken based on those beliefs that help us (and others) make that determination. Several of the organizations . . . advocate for the criminalization and penalization of LGBTQ individuals, and for the use of so-called ‘reparative therapy,’ which seeks to ‘convert’ individuals to heterosexuality or ‘gender norms’ as an alternative to being LGBTQ.”).

178. Dondoli, *supra* note 160, at 143.

179. *Id.*

International law can also express support for a number of specific, practical solutions to protect the rights of LGBTQ individuals absent the existence of sexual-orientation-specific language in governing documents. The U.N. and EU can continue to condemn the use of torture directed toward LGBTQ individuals. This can be done in the form of hate crime laws or asylum laws that “recognize that persecution based on sexual orientation may be a valid basis for an asylum claim.”<sup>180</sup> Furthermore, looking to the country of India as an example, repealing anti-LGBTQ laws regardless of whether they have been enforced in recent years and whether they target marriage or other intimate actions that target LGBTQ individuals, such as sodomy laws.<sup>181</sup>

The most important focus of this Note was to include language within International Law to specifically include LGBTQ-specific language. Countries, on an individual basis, can enact legislation of their own that prohibits discrimination based on sexual orientation. Further, countries can provide “education and training to prevent discrimination and stigmatization of LGBT[Q]” individuals.<sup>182</sup> Specifically, international law and individual countries can continue to reinforce and “safeguard” freedom of expression and due process. These provisions can ensure that rights against LGBTQ individuals are not discriminatory on the grounds of sexual orientation.<sup>183</sup> Countries can ensure that “a culture or equality and diversity that encompasses respect for the rights of [LGBTQ] individuals”<sup>184</sup> even if their governing documents and constitutions do not include sexual-orientation-specific language—precisely the cases in countries such as the United States or India.

#### IV. CONCLUSION

This Note set out to do three things: first, to provide a legal background of gay rights internationally, specifically comparing the United States, India, the U.N., and the EU; second, to describe the Equal Protection

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180. UN INTERNATIONAL HUMAN RIGHTS LAW, *supra* note 20.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Fact Sheet: International Human Rights Law and Sexual Orientation & Gender Identity, FREE & EQUAL*, <https://www.unfe.org/wp-content/uploads/2017/05/International-Human-Rights-Law.pdf> (last visited Nov. 18, 2020).

Clauses and Freedom of Expression Clauses in their governing documents, constitutions, or resolutions; and, third, create a proposal for an international resolution that would incorporate the rationales behind these entities for supporting gay rights to include explicit language in international law that would protect the rights of LGBTQ individuals. This explicit language would benefit LGBTQ rights, and ultimately human rights, throughout the world. Because there are many countries throughout the world that struggle internationally to include gay rights in their constitution, international law should set the precedent. International human rights resolutions should include wording and language that specifically identifies LGBTQ people or non-discrimination provisions for sexual orientation.

Freedom of Expression and Equal Protection, stated generally, are not seen as inclusive of LGBTQ rights, and thus, sexual orientation should be included to make sure that countries do not oppress their people based on arguable vague, or under-inclusive language. Decriminalization is one part of the goal in order to recognize the rights and dignity of LGBTQ individuals. Of course, in order to take this route, the international stage needs to be set to give an example for countries around the world to look to. Although the current laws in the U.N. have been seen on some occasions to translate to decriminalization of sodomy laws or acceptance of same-sex marriage laws, many other countries do not see the equal protection resolutions or free expression provisions of their constitutions as protecting same-sex individuals. This Note recognizes that an international resolution, even with the support of a multitude of countries and world leaders, can only change so much—but the world has to start somewhere. There are a plethora of other ways that non-governmental organizations and individuals can affect change where legislation cannot. Countries cannot be *forced* to support a U.N. resolution or any international law, and even those who claim to support such law cannot be *forced* to follow through in many circumstances. Individuals—world leaders or individual citizens—will have to make that choice.