

Article

The paradox explained: The advancement of LGBTQ rights in the context of growing illiberalism

Noble Po Kan Lo^{1,2}¹ Division of Languages and Communication, College of Professional and Continuing Education, The Hong Kong Polytechnic University, Kowloon 999077, Hong Kong, China; noble.lo@cpce-polyu.edu.hk² Department of Educational Research, Lancaster University, Lancaster LA1 4YW, United Kingdom

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Abstract: The article undertakes an exploration into the rather unexpected progressiveness exhibited by courts across the globe in bestowing protection upon LGBTQ rights. A three-pronged study, which encompasses an examination of the theoretical rationales, empirical investigations, and doctrinal underpinnings of the augmentation of LGBTQ rights in diverse locales, is executed. It is hypothesized that a prima facie paradox emerges, whereby LGBTQ rights have been safeguarded and advanced in an extraordinary fashion, while concurrently, a discernible general trend of deviation from liberal constitutionalism, rights safeguarding mechanisms, and the rule of law is observable in other arenas. This article scrutinizes this contention and discovers that it is substantiated by case law from various regions. Critical theory and Butler’s theory of performativity potentially offer the most cogent explanations for this paradox. They have led to the social embrace of LGBTQ rights, while simultaneously, the enactment or amplification of these rights even in illiberal states furnishes an effortless ‘triumph’ for illiberal political actors, which can be employed as a countermeasure against assaults on their liberal and democratic reputations.

Keywords: LGBTQ rights; illiberal democracies; rights; queer theory; performativity

1. Introduction

1.1. Background and context

The advancement of Lesbian, Gay, Bisexual and Transgender (or LGBTQ) rights around the world in the late 20th century and into the 21st century has, in many ways, been one of the most compelling and universally applicable trends from a jurisprudential perspective. According to the work of Abeyratne, however, there is something of a paradox inherent in this development (Abeyratne, 2023). The paradox here is suggested to be that whilst the courts around the world have engaged on a general course which has attempted to promote the protection of LGBTQ rights, even in the face of significant social and political dissension at times, there has, during this relatively same period, been a general trend which can be identified in which there has been a general restriction of constitutional rights elsewhere. This article will argue that whilst there has been a general global retracement of constitutionalism, an attack on democracy in places, and a retreat from open societies based on the rule of law to a more closed, autocratic model, in which courts have been either sidelined or captured to a lesser or greater degree, the development of LGBTQ rights has bucked this trend. Instead the courts around the world have progressed LGBTQ rights and these rights have generally developed in the same places and at the same time as there being a general decline in the protection of other rights (Abeyratne, 2023). This seemingly

paradoxical result is difficult at first glance to explain. There are numerous forms of individual and collective civil and fundamental human rights which appear in recent times to have been sidelined over the past few decades, and yet it is argued by the title statement to this article that the same has not been true, or at least to the same extent. If so, then the question arises as to what is it that makes these rights particularly exceptional, and how and why have the courts been able to advance these rights in the broader context of there being a general judicial and legal regression more widely. Whether the assumption made here is correct in assuming that LGBTQ rights are somehow immune from democratic backsliding must also be questioned here. It should be noted here for example that some such as Albarracín-Caballero, have suggested that advancement of LGBTQ + rights in some states around the world which had been advancing relatively rapidly until more recently, have now themselves come under renewed assault as illiberal democracies and authoritarian states around the world appear to have begun to attempt to restrict these rights (Albarracín-Caballero, 2022). This is an issue which has great significance and importance for LGBTQ individuals globally, who might find hope in the suggestion that rights are capable of being protected even in challenging political circumstances, but it is also important to attempt to identify potential causes of this apparent paradox.

This article will examine the extent to which this argument is one which is capable of being sustained by an examination of the facts and the law in various states around the world in particular, in Hong Kong, but also in some other jurisdictions such as in the USA, and in India, all of which will be examined at points from a comparative perspective in this study. In addition to this however, this study will further examine why it might be the case that this trend has taken place.

1.2. Methodology

The methodological approach to be adopted in this study will be a mixed method approach, adopting both a doctrinal methodological approach and a functionalist comparative approach. In addition, both a theoretical analysis of the possible causes and socio-legal context in which the enhancement of LGBTQ rights has been carried out, and an empirical analysis of such advances using interview data from respondents in the chosen jurisdictions of study, will be set out.

The doctrinal legal method is a methodological approach which examines the law from the perspective of the letter of the law. The aim of this type of methodological process is to allow an identification of what the law is at a chosen period for the study, so that it can be set out in an accurate, clear and comprehensive manner (Varuhas, 2023). The basic question “what is the law?” is the rhetorical aim of the doctrinal method, and to achieve the finding of an answer to such a question, the researcher may seek to identify how the various different sources of law in force in a given state at a given time of study interplay before the answer to that question can be reached (Varuhas, 2023). This is an important method of study for this article. The reason for this is that in order to assess the extent to which there has been a general trend towards the protection of LGBTQ rights in various states such as in Hong Kong and in other places around the world it is first necessary to identify whether this is in fact a true assumption. This requires an assessment of the various ways in which the law has

developed in different states in a way which protects or promotes LGBTQ rights. Thus, the doctrinal method is integral to the way this article is to be carried out. The same is true as a means to identify this, and in identifying the extent to which there has at the same time been a retreat in those same places from what some such as Huq and others call “liberal constitutionalism”, by which it is meant a legal and political system which respects human rights, constitutional based limitations on the exercise of power by the various branches of state, a respect for the rule of law, and respect for the separation of powers as provided for under the constitution of any given political or constitutional order (Huq et al., 2018).

This model of legal methodological approach is sometimes criticized on the basis that it is one dimensional and leads to potentially descriptive work only which is of limited utility (Huq et al., 2018). The approach, after all, is designed to allow an answer to the legal question “what is the law?” and the researcher is limited if adopting a purely doctrinal approach to answering just that question, without necessarily allowing themselves to consider other various questions such as “why is the law this way?” or “does this need to be changed?”. Even more simple analytical questions such as what the disadvantages of a given approach are, or why different states might approach the same problems with a different approach would be ignored under such a limited methodological approach. It is therefore the case that a second methodology is to be integrated into this article, and this is to take the form of what is known as the ‘comparative’ legal method (Brand, 2007). There are suggested by some such as Brand to be various forms of different comparative legal method; at least six are identified by that author alone, but for the purposes of this paper, the method most clearly resembling the intended approach is the model sometimes referred to as the “functional” comparative method (Brand, 2007). This is perhaps the most dominant of comparative legal methodologies, and may, briefly be said to be an approach in which the “function” of a rule, or its dominant purpose or social objective is the thing which can be compared (Brand, 2007). This is premised on a ‘problem-solution’ approach in which the researcher identifies a problem of some commonality between the various jurisdictions chosen for study, subsequently the researcher considers the way in which the different legal systems in question approach that same question and, then, in a third step, examine and analyze the ways and reasons for a different (or similar) approach being taken in each. This is clearly a model which can be adapted to the research questions implicit in this title (Zweigert and Kötz, 1998). After all, as has been suggested, the article will seek to analyze how far there has been both a retreat constitutionally from liberal constitutionalism in various different states, this can be assessed by comparatively examining political and legal developments in various different states, and the same is true of the question of whether there has been a commensurate and continued development in the protection of LGBTQ rights. Places identified for comparative analysis here include the US, the UK, Hong Kong, and India. These places have been selected because, firstly, empirical data relating to the advancement or curtailment of rights in these places is possible from a doctrinal perspective, and secondly, because they represent different places from distinct social and cultural milieus. Whilst other states could, and at times, have been examined (Poland and Hungary are used as examples of Western illiberal democracies at times in this article) the main comparative analysis is carried out here between the US, India

and Hong Kong simply because of the ease with which research into the law and case law offered by common-law regimes provides.

1.3. Structure

The structure of this article is as follows. Following a brief literature review which will be carried out in part 1.4. below which will seek to identify some of the existing literature in this area, the subsequent section, will consist of an assessment of the policy, options and implications the approaches taken by various state around the world here. A three-part method will be used, with the theoretical picture being analyzed, followed by an empirical assessment being carried out on the basis of interview data, and finally, the doctrinal, legal position will be examined.

In the first, theoretical analysis section, the question as to whether, has there really been a significant retreat from liberal constitutionalism around the world in recent years in which courts have either been sidelined or otherwise muzzled will be asked. This section will also ask, whether there has there been simultaneously a trend in which LGBTQ rights have managed to survive this attack on constitutional rights or have even been advanced during this period. Following this section, an examination of the empirical study carried out will take place, showing public and judicial opinion on the development and causes for the enhancement of LGBTQ rights in counter step to the decline of other constitutional or democratic rights will be conducted. The next section will then perform a doctrinal analysis of the law in India, Hong Kong, the United States and UK which can put into context just how legal rights for LGBTQ peoples have developed in these states. A section entitled “actionable recommendations” which will seek to provide a realistic set of recommendations which ought to be adopted by states in response to the findings of section 2 will be set out in section 3. Section 4 will then provide an analytical discussion of the problem, with it being sought to be answered why it is that the courts have been able to continue protecting LGBTQ rights in spite of a general reduction in respect for constitutional rights (if these assumptions are indeed true). Finally, a conclusion in section 5 will be drawn.

1.4. Literature review

1.4.1. The question

As was noted in Part 1.1. here, the title statement to this article is itself based off a question and study initiated by Abeyratne, who suggested in an online seminar given in 2023 (Abeyratne, 2023). This source is therefore a vitally important source for this study, and will be drawn upon at length as a basis to suggest that there has both been a general development in LGBTQ rights around the world which has survived or thrived in spite of rights and constitutional liberalism otherwise going into retreat during this same period. Outside of this source however, most of the other literature which has been located during research for this article has adopted a position which is less accepting of there being a paradox at play here. This paradox is the suggestion that LGBTQ rights have been able to be promoted, whilst, at the same time, courts have been argued to be sidelined or otherwise rendered unable to protect other constitutional rights to the same degree as may have been the case previously.

1.4.2. The end of the liberal democratic world order?

Writers such as Huq and Ginsburg, and Ikenberry for example, identify that there is now a real possibility that the world stands at a political crossroads (Ikenberry, 2018); the prevailing liberal international order which has been recognized as dominant since the end of the Cold War appears threatened by alternative, more illiberal world-views, and the West's primary tool of success, its economic development and the benefits accruing to a globalized form of capitalist theory, appears under threat (Huq and Ginsburg, 2018). This has resulted in some degree of democratic backsliding, particularly amongst developing states, who are growing increasingly disillusioned with the cultural capital as well as the economic rewards this world order has to offer. The most prominent line which has been taken here has been that taken by authors such as Flores and others (Flores et al., 2023). These authors accept that there has been a significant degree of democratic 'backsliding' (in the form of a general reduction in respect for democratic and constitutional rights in states around the world), but disagree with the suggestion that there has been a paradoxical development commensurately with LGBTQ rights, at least in more recent years. Instead, these writers suggest that the democratic backsliding seen in states such as Brazil or Poland for example, has brought with it an associated increased risk for LGBTQ persons, who have become increasingly targeted in these states (Flores et al., 2023). As noted earlier, a similar position is taken by Albarracin-Caballero, who also suggested that a retreat from democratic values and respect for rights has brought with it negative consequences for LGBTQ rights. It might therefore be the case that LGBTQ rights which developed rapidly from a low base (and which have progressed significantly and very noticeably therefore over a short period of time) are now equally under the same sort of threat as other rights in more recent times.

1.4.3. A paradox: The enhancement of LGBTQ rights as outlier

This begs the question, is it the fact that democratic backsliding here has its own set of distinct causes which are not related to LGBTQ rights which is to blame for this apparent paradox? Or are there other factors at play? Another potential perspective which might be put forward to explain an apparent paradox which exists here is perhaps the fact that these states around the world which have seen a retreat of democratic principles face certain shared difficulties which have contributed in some way to a decline of rights in one area but not in another. It might for example be suggested that states face a number of particular problems in the 21st century such as ethno-nationalism, political polarization and so on, none of which are particularly pertinent to LGBTQ issues. Thus, it is possible that LGBTQ issues simply have had little particular relevance to the issues which had been the cause of political and legal retreats from constitutional liberalism and have subsequently slipped under the radar of the state in recent times. It is certainly the case as some such as Reynolds have noted, that societal attitudes in many societies have altered significantly over recent decades in favor of LGBTQ rights, but the same societal softening of these attitudes may not have extended to other areas resulting in a discordant or paradoxical position arising here (Reynolds, 2013). This itself however does not appear to fully explain the lengths which courts, at least in some states such as that of the Supreme Court in the United States, have gone to in ensuring the promotion of LGBTQ rights at least

according to Abeyratne (Abeyratne, 2023). Here Abeyratne argues that in contrast with other areas, such as for example, rights over abortion in the United States, where the Supreme Court has relatively recently overturned the long-standing decision in *Roe v Wade* (1973) in *Dobbs v Jackson Women’s Health Organization* (2022), LGBTQ rights might be seen more clearly as having been progressed in a clear, progressive manner (*Dobbs v Jackson Women’s Health Organization*, 2022). It is however acknowledged that where LGBTQ rights come into apparent conflict with other rights such as a right to freedom of expression of religion, or freedom of expression, then the courts still favor protection of other rights as seen in the US Supreme Court’s decision in *Masterpiece Cakeshop v Colorado Civil Rights Commission* (2018), or in the United Kingdom with the Supreme Court’s decision in *Lee v Asher’s Baking Company Ltd* (2018) for example (Abeyratne, 2023).

In short then, identifying a clear trend in the literature, or a single dominant academic perspective in this area remains difficult. There is a divergence in the literature, and there is no real clear thread which allows it to be said that there is a general opinion that the law in this area is anywhere near settled; thus, conclusions drawn such as that the progression of LGBTQ rights appears to have undergone a ‘safe’ form of development in contrast to other rights, (for example rights over abortion given that *Roe v Wade* in the United States has recently been overturned), appear premature. After all, it might well have appeared to jurists writing in the period between 1973 when *Roe v Wade* was handed down, to at least around the year 2017 when President Donald Trump was elected, that abortion rights in the US were also a settled issue. Thus, it remains unclear whether it is true from the available literature whether it can really be said that LGBTQ rights have progressed in as clear a way as has been suggested here. This article will add to the relatively scarce available literature in this area by identifying the extent to which this is a fair argument.

2. Assessment of policy, guidelines options and implications: The theoretical picture

2.1. Liberal constitutionalism in decline

The first assumption on which the assumption that the courts have managed to continue the promotion of LGBTQ rights in the face of there being a general retreat from rights elsewhere is based, is the assumption that liberal constitutionalism itself is in decline. In order to assess whether or not this is true, it is required to both examine first of all what is meant by this concept and by the suggestion that respect for the rule of law and constitutional rights is in retreat around the world, but also how this has manifested (if at all) from a functional comparativist perspective in different states.

The first element of this is then to explain what is meant by the suggestion made by Abeyratne and some others such as Huq and others for example, that liberal constitutionalism is in decline around the world (Huq and Ginsburg, 2018). There are numerous theoretical perspectives from which such a study can be begun. Perhaps the most compelling is a historical perspective. In 1989, at the end of the Cold War, Francis Fukuyama famously wrote that the flow of events in the 1980s had given the world the impression (a very difficult one to avoid at the time) that “something very

fundamental” had happened in world history (Fukuyama, 1989). For Fukuyama, this “fundamental” thing was nothing less than the end of history itself (Fukuyama, 1989). The argument put forward at this heady time, during which the ongoing collapse of the Soviet Union and its system of repression, arbitrariness, ignorance of the rule of law, and in many cases, outright tyranny (over both individuals and states) was continuing, was that there was a feeling that the model of economic, social, legal and constitutional democracy espoused by the West had shown its superiority, and its ability to outlast any other competing model based on authoritarianism (Fukuyama, 1989). Liberalism, a model of political theory and economy based on the recognition of the personal liberties and human rights of the individual, was perceived at this time as being inherently superior and more resilient than any model of autocratic governance which was able to sustain itself via propaganda, fear, or repression, but which would eventually collapse under its own contradictions (Ther, 2022). That such a vision could emerge from the end of what was clearly an existential struggle, carried out over half a century by the world’s only surviving two post-war superpowers is not surprising. As a result, theorists such as Fukuyama suggested that it was inevitable that the rest of the world would naturally awaken to the benefits of democracy, of respect for the rule of law, of the need to protect human rights and would resile themselves from the concepts of absolutism or authoritarianism in the face of the victorious spirit of liberalism (Fukuyama, 1989).

For a while, this vision of the world seemed to be coming to pass. The West, satisfied in its victory, disarmed, to enjoy the ‘peace dividend’ which only victory could provide (Fukuyama, 1989). Ther for example identifies that the success of the West in the Cold War was a triumph which rang hollow, as the advent of global capitalism and globalization around the world created losers too, and has subsequently resulted in a revanchist, right-wing populism, whilst failing to bring within the aegis of the successful West its once adversary Russia. This now allows an alternative world view and propaganda vision of the way in which society ought to be ordered by Russia (Ther, 2022). Other potential competitors appeared vanquished; the nominally communist state of China, once feared as a potential second Soviet Union, appeared to be tamed by visions of liberalism when it joined the world’s multilateral trading system upon accession to the World Trade Organization in 2001, whilst international trade and development boomed under a process which has since become known as ‘globalization’ (Ther, 2022).

Gradually however, the suggestion that 1989 was the end of the debate as to the relative merits of different forms or theories of governance, have come to be re-evaluated. Ever since the 2001 attacks in the United States and the subsequent war on terror, there has been something of a gradual global re-evaluation of the potential relative benefits of the liberalist, open society, democratic model espoused by the West and other potential models; for a while the lack of a real alternative contender here other than militant Islamism (untenable in states which did not follow the particular creed of militant Islamism which inspired Al-Qaeda or later the so-called Islamic State of Iraq and the Levant—ISIL, or Daesh as they were otherwise known) may have disguised a growing feeling of unease with the tenets of liberal democracy (Ther, 2022). However, it does seem, when writing in 2024, and with the benefit of hindsight, that the West’s claim to general economic and moral superiority or victory which arose

from the victory in the Cold War was potentially seriously wounded by a number of corporate scandals and economic crises referred to as being cycles of “boom and bust” and which culminated with the 2008/9 global financial crisis (Ther, 2022). China, who as noted, had acceded to the WTO in 2001, and which did not, and which continues not to embrace this form of liberalism (despite many policymakers who argued in favor of China’s admission to the WTO doing so on the basis that this would encourage China to embrace democratic values) (Layne, 2012) was relatively unaffected by the financial crisis, and has continued its economic development rapidly, to the point where it is a genuine contender with the United States for the status of the world’s most powerful economy, and which threatens to become a genuine superpower in what had since the end of the Cold War, been a unipolar world (Layne, 2012).

With China’s ascension into this position of power has come influence. The ‘Belt and Road’ initiative was launched in 2013, just as Western funding and aid, and spending on maintenance of influence in much of the rest of the world and particularly in developing states, declined (Tekdal, 2018). Ever since this time, respect for the democratic vision of prosperity which the West could offer if only states could adopt liberal values, appears to have been challenged, and in many cases, displaced by a genuine and credible alternative, championed by China, in the form of strong, centralized authoritarianism (Lee, 2009). If, in other words, the West’s offer to the world has been that liberalism would provide developing states a strong, growing, vibrant economy, this cultural cachet has been severely impacted by the rise of economies and powers elsewhere adopting a different approach (Lee, 2009). Despite these challenges, and even within the context of some other causes of democratic backsliding seen in some states as a result of populist movements, LGBTQ rights appear, at least at first glance, to have remained largely protected. In the United Kingdom for example, there have been a range of populist movements in recent years which have appeared, motivated by concerns over mass-migration to the UK, changes in the demographic and ethnic build-up of the country (Lee, 2009). These tensions in society have had significant political impacts, on public policy for example, and were relevant according to some such as Somerville as being highly relevant on the UK’s Brexit Referendum of 2016, where some 46% of respondents to a survey highlighted migration as being their most pressing political concern (Somerville, 2016). Similarly, in some other European countries, tension over migration has resulted in significant political concern and attempts to reduce migration by some countries in an attempt to appease such concerns (Somerville, 2016). This has arguably delayed, if not derailed entirely, the development of a culture of constitutionalism in some states. It would not be particularly surprising for LGBTQ persons in such states to be particularly concerned that their own political and civil rights might also be threatened by this general political and societal environment.

The question which must be answered here however, if it is to be said that LGBTQ rights form an outlier, is, whether or not it is indeed the case that there has been a general backsliding movement away from what may be termed constitutional liberalism which can be seen empirically or not.

To do so, a working definition of what is meant by democratic backsliding in this context. There are here a wide range of different definitions or understandings as to what is meant by such a term. Zakaria, who coined the term ‘illiberal democracy’

regards the concept of constitutional liberalism as being wider and deeper than merely one or two different elements which are typically seen in democracies run under the rule of law (Zakaria, 1997). For Zakaria, it was clear that even democratically elected governments, or those who had sought and obtained apparent public support for their course of action through the use of referenda for example, were capable of acting in ways which were manifestly unjust, arbitrary, or contrary to the rule of law (Zakaria, 1997). In a liberal democracy, in which the principles of constitutional liberalism were deeply engrained however, one might expect to see a general adherence to the rule of law, respect for the separation of powers, the protection of basic fundamental liberties and rights such as a right to protest, right of assembly, the protection of freedom of expression, right to respect for private property and so on (Zakaria, 1997). However, what is regarded as being really the key separating indicator of a state which respects constitutional liberalism from mere democracy, is this respect for fundamental rights and increasingly, a respect for the independence of the judiciary, the separation of powers and for the general application of the rule of law. In short, there is to be deemed a distinction between democracy on the one hand, and liberal constitutionalism on the other. Whilst a state can be democratic and constitutionally liberal, it has become more and more common, according to Zakaria and to others, writing from the end of the Cold War onwards, for states to embrace democracy, but not liberalism and the respect for rights, rule of law and the separation of powers which it requires (Ginsburg et al., 2018).

Whilst many authors therefore have suggested that the liberal international order apparently heralded by the end of the Cold War and Fukuyama's "end of history" is now itself coming to an end, with the rise of illiberal forms of democracy proliferating (Ikenberry, 2018), it is necessary here to provide some empirical basis for such an assertion. For some including Flores and others, such a trend can be identified through reference to the V-Dem Institute's findings (Flores et al., 2023). The V-Dem institute, an research institute affiliated with the University of Gothenburg in Sweden, publishes an annual report into the state of democracy and respective levels of autocracy in different states on a number of metrics and have suggested in recent years which indicate that some 80% of the world's population now live in a state undergoing a process of restriction of basic rights, rather than in a state experiencing an expansion or progression of such rights (Flores et al., 2023, p. 2).

At the same time, there have been numerous societal developments and changes in societies all around the world as a result of globalization. Traditional societal conventions, morals, and entire ways of living have been upended by industrialization in developing countries, and by social conventions changing first in the West, and subsequently elsewhere, something which has been seen arguably most prominently in the advance of LGBTQ rights (Abeyratne, 2023). This is argued to have reached the highest point since the year 1997, indicating the seriousness of concerns around such a trend (Abeyratne, 2023). Examples can be found in various states. In Hong Kong itself for example, which was expected under the Sino-British Joint Declaration treaty to enjoy a period of fifty years in which its political, economic, and civic life was to remain unchanged, there have been serious concerns over democratic backsliding and moves towards a more restrictions approach to rights being taken by the authorities (Lee et al., 2019). For Lee and others, perceived threats to established

rights under the Hong Kong Basic Law (Basic Law of the Hong Kong Special Administrative Region, 1997) and statutes such as the Hong Kong Bill of Rights Ordinance (Hong Kong Bill of Rights Ordinance, 1991) have historically tended to result in the authorities retreating on the controversial measure in question, such as when 500,000 residents in the city protested the proposed National Security Bill in 2003 for example (Lee et al., 2019). These authors however suggest that over time, these protests have tended to lose their ‘shock’ power and have, subsequently, been dealt with much more harshly by the authorities; the Umbrella protests of 2015 for example resulted in nearly three months of continued civil disobedience in the Hong Kong Special Administrative Region (HKSAR) following the use of tear gas by riot police on the very first day of the protests (Lee et al., 2019, p. 4). Other incidents of concern in Hong Kong in more recent times have arisen around the introduction of a bill to amend Hong Kong’s Fugitive Offenders Ordinance (Fugitive Offenders Ordinance, 1997) allowing extradition of Hong Kong residents to mainland China (The Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation Bill, 2019). This was the subject of intense criticism in Hong Kong due to high levels of distrust with the Chinese legal system, and due to concerns that this would have a chilling effect on the exercise of other rights in Hong Kong such as a right to freedom of expression (and therefore to criticize the Chinese government) for example (Kwok, 2023).

Other states too however have seen incidences and examples of a move away from liberal constitutionalism towards a more illiberal form of democracy in recent years. Writers such as Ikenberry have argued that even in areas such as in the European Union (EU), an organization dedicated to respect for the rule of law (Scholtes, 2023, p. 61) in its own treaties (Treaty on European Union, 2007), there has been evidence in recent years of a trend of illiberalism in both Poland and in Hungary (Ikenberry, 2018, p. 8). In Poland for example, the Law and Justice party which had until last year been in Government in the country has been accused by some such as Emmett as having rolled back the state’s constitutional protections such as the separation of powers by mandatorily requiring retirement of a large number of its formerly independent judges, and replacing these with newly qualified judges affiliated politically with their own political ideals (Emmott, 2017). The country of Hungary meanwhile, another EU Member State has more recently been described as being an ‘illiberal democracy’ by some such as Amnesty International (Amnesty International, 2018). Indeed, the Hungarian Prime Minister himself responsible for many of the constitutional changes enacted in the State since obtaining a Parliamentary majority in 2010 (including the appointment of judges by the party to the Constitutional Court, the gerrymandering of political boundaries, and attempting to neuter the political power of ethnic minority groups within Hungary by extension of voting rights to ethnic Hungarians living abroad irrespective of nationality or citizenship status) appears to have accepted that Hungary’s vision of democracy stands in opposition to that of the ‘liberal West’ (Amnesty International, 2018). In a 2014 speech, Orban declared that there was an alternative model of democracy possible, which was to be built on a strong, centralized state with weakened opposition (and therefore a weakened, or possibly non-existence of the doctrine of the separation of powers) and a removal of checks and balances which might otherwise require the promotion and protection of

civil and human rights and for rights of minority groups (Juhasz, 2014). As Bustikova (2019) writes, and as Bustikova and Guasti note, both the Hungarian and Polish parties in question which have fostered an illiberal stance and contested a number of rights (such as women's reproductive rights for example) have been achieved by garnering the support of conservative groups which generally opposed the expansion of minority rights within the country (Guasti and Bustikova, 2020, p. 228). In these countries, where LGBTQ rights and their acceptance have not become mainstream in public consciousness to the same extent as in the West, the lived experience of LGBTQ peoples is one which does show great concern over their rights, their freedom, and even their personal safety. Bogatyrev and Bogusz write for example, whilst noting that political changes have now appeared to improve following the election defeat of the PIS party in Poland in late 2023, that prior to this, life for LGBTQ people in the country was becoming a 'nightmare' (Bogatyrev and Bogusz, 2024, p. 2). Even here however, actual attempts to remove rights of LGBTQ persons have been limited, with Guasti and Bustikova suggesting that these countries (the V4 group of Hungary, Poland, Slovakia and the Czech Republic) face significant external pressure which has prevented this (Guasti and Bustikova, 2023, p. 134). These countries' membership of the European Union (EU), and their required signatory status as such to the European Convention on Human Rights (ECHR) has, for example, resulted in a degree of oversight by the European Court of Human Rights (amongst others) being exercised (Guasti and Bustikova, 2023, p. 134). Thus, whilst an expansion of LGBTQ rights in Poland and Hungary has stalled in recent years, these countries have still had to legally recognize the validity of same-sex marriage for example. This expansion of LGBTQ rights, resulting from a development of EU law itself from the European Court of Justice's ruling in *Coman v Romania* meant that even Poland and Hungary have now had to accept and recognize the legal validity of same-sex marriages (*Coman v. Romania*, 2018).

Moves away from liberal democracy have further been seen in India under Narendra Modi's Hindu-Nationalist party in recent years (Ashok and Thomas, 2023). According to writers such as Ashok and Thomas, this is evidenced by measures such as constitutional removal of special status for regions of Indian inhabited primarily by ethnic or religious minority groups such as Kashmir and Jammu for example by the revocation of Article 370 of the Indian Constitution (Ashok and Thomas, 2023). Others such as Varshney have suggested that the protection of civil rights in India, a key marker of a free, liberal democracy, have been placed under increased pressure in recent years as a result of this ethno-religious movement espoused by Modi's party, which suggests to some that in order to be a true Indian, one must also be a Hindu (Varshney, 2022). The picture painted by Varshney of India post 2014 is not necessarily of a collapse in democracy, but instead of a general backsliding, or democratic erosion (Varshney, 2022). Again, this is indicative of a general trend, and a growing recognition of there being an alternative vision of democracy possible other than that build on the idea of constitutional liberalism.

For some, this picture, capable of being seen around the world, is a natural result of the wave-like motion of democratic progress. Huntington for example suggested in 1991 that there have been historically (or at least in relatively modern times, and not including any classical democratic models such as those seen in Ancient Athens

for example) three waves of democratic progress (Huntington, 1991). The first, in the early 19th century took place with the extension of suffrage to most men of a certain age (and, in the United States, color) in the 19th century, followed by the Great Reform Act and its extension of the franchise in Great Britain in 1836 and in other states up to and around the turn of the 20th century (Huntington, 1991). The second wave, following this, followed the end of World War II and the establishment of the world's new economic order; this was however interrupted and challenged by the Cold War and the Soviet Union's alternative vision built on socialist internationalism (Huntington, 1991). The third wave of this movement however is argued to have begin in the late 1970s in Portugal, in Spain, and in a range of South American and Asian-Pacific countries in the late 1980s followed by the collapse of the Soviet Union and the extension of democracy to Eastern and Central European Countries such as Poland and Hungary for example (Huntington, 1991). Theorists such as Zagorski however suggested as far back as 2003 that these 'third wave' states were vulnerable potentially to backsliding after having reached the peak, or crest of their wave, and that a historical trend which would subsequently lead to a reduction in value for democracy in these states might subsequently arise (Zagorski, 2003, p. 88).

However, what is most interesting about this most recent global incidence of democratic backsliding appears to be that the same process is true to a lesser or greater extent even in mature, developed and relatively stable democracies. In the United States for example, the election of Donald Trump in 2017 raised significant concerns about democratic backsliding in America (Friedman, 2013). Huq and Ginsburg suggest that this however is not a new concern in the United States, and simply follows a trend of what they term authoritarian reversion, or constitutional retrogression, which occurs much more slowly whereby established constitutional principles such as the protection of rights which had been previously enjoyed are slowly rolled back (Huq and Ginsburg, 2018). There may be numerous reasons for this; the advance and progression of certain rights may never have initially been accepted by a population; the decision of the Supreme Court in America in *Roe v Wade* for example establishing, for a time at least, a 'constitutional right' to abortion in the United States was never universally popular and a long-standing campaign to reverse it was established almost the moment it was handed down (Huq and Ginsburg, 2018). The repeal of this by the Supreme Court in *Dobbs* (Greenhouse and Siegel, 2010–2011) comes at a period of time when the United States too appears to have been undergoing a period of contraction or regression from the peak of its liberal wave (Huq and Ginsburg, 2018).

The natural ebbs and flows of political movements, and their popularity waxes and wanes over time, and the Hegelian dialectic is such that each time there is an advance or progression of some rights, those opposed to such an idea naturally push back against that right (or indeed its repeal) entrenching their position and resulting in a general polarization of debate which is likely to lead sooner or later to a regression again (Boese et al., 2021). Thus, the path of progress is never one which run entirely straight and it would therefore be strange to regard even relatively mature democracies such as the United States as being immune from such a trend.

In short then, it is fair to suggest that here is a general trend away from constitutionalism and towards constitutional retrogression or democratic backsliding and that such a trend can be seen in many different states around the world. In this

regard, this article's argument—that while there is a broader trend away from liberal democracy, LGBTQ rights remain an exception—is accurate. Political and socio-economic developments have arguably accelerated this, but in summary there does here appear to be a generally accepted movement in the world at large away from the ideal developed in the West of constitutionalism, or liberal democracy, towards one in which respect for political rights, civil rights, the rule of law and constitutional checks and balances on centralized power are no longer a given. The next element of this is to then consider the extent to which the protection of LGBTQ rights may represent an outlier to such a trend.

2.2. The growing protection of LGBTQ rights elsewhere: A comparative trend?

It is generally accepted that there has been at least some degree of retreat in many states around the world from constitutional liberalism. The second part of this discussion however is to determine the extent to which this has also been accompanied by what might appear a paradoxical development in the protection of certain human rights, namely, rights for LGBTQ peoples which has taken place at the same time (Abeyratne, 2023). As Abeyratne accepts in his lecture given in November 2023, the claim being put forward here is that the treatment of LGBTQ people and their rights is exceptional, in that the same degree of protection or promotion of rights of other peoples and their rights has not been forthcoming to the same extent (Abeyratne, 2023). As such, this is a claim which requires assessment. Is it really the case that LGBTQ rights have been protected in a manner which is exceptional, and if so, how can this be shown?

3. The empirical picture: Empirical analysis

It was suggested earlier that there has, for a number of theoretical reasons, been a generally growing acceptance socially of LGBTQ rights. To assess the extent to which this is true some empirical data has been obtained, through the conducting of a questionnaire, aimed at sixteen respondents, and aimed at judges, lawyers, legal scholars, and LGBTQ activists in the UK, US, Hong Kong, and India respectively. This is set out below. The interview questions used will be provided in Annex I at the end of this article.

3.1. Introduction

The purpose of this qualitative analysis is to explore the advancement of LGBTQ rights across four distinct jurisdictions: the United Kingdom (UK), the United States (U.S.), India, and Hong Kong. Each of these jurisdictions represents a unique legal, cultural, and political context, providing a rich comparative framework to understand how LGBTQ rights have been addressed through the judiciary, legislative bodies, and societal movements.

This study employs a thematic analysis approach to examine the perspectives of key stakeholders—judges, lawyers, legal scholars, and LGBTQ activists or ordinary citizens—on the progress and challenges of LGBTQ rights in their respective jurisdictions. The data were gathered through in-depth interviews with 16 participants,

selected for their expertise and involvement in LGBTQ issues. By analyzing their responses, this study identifies the major themes that characterize the advancement of LGBTQ rights in each jurisdiction, while also highlighting the commonalities and differences in their legal trajectories.

The study is grounded in qualitative research methodology, specifically the thematic analysis framework developed by Braun and Clarke (2006). This six-phase approach involves familiarization with the data, generating initial codes, searching for themes, reviewing themes, defining and naming themes, and finally producing the report. Thematic analysis was chosen for its flexibility, which allows for a detailed exploration of the complex social and legal issues surrounding LGBTQ rights across multiple jurisdictions.

The study’s findings are organized around five major themes:

- 1) Judicial activism vs. judicial Restraint;
- 2) Legal and constitutional frameworks;
- 3) Societal attitudes and cultural factors;
- 4) Role of political leadership and legislation;
- 5) Impact of LGBTQ activism and grassroots movements.

Each theme reflects the ways in which courts, legislatures, and societal movements have shaped the legal landscape for LGBTQ individuals in the respective jurisdictions. Furthermore, this analysis draws attention to how cultural factors—such as societal attitudes and religious traditions—interact with legal principles to either advance or hinder LGBTQ rights.

By examining these themes in a comparative context, this study provides valuable insights into the global progress of LGBTQ rights and the strategies employed by different jurisdictions to address the challenges faced by LGBTQ individuals. The study highlights the essential role of judicial decisions, legislative actions, and activist efforts in shaping the future of LGBTQ rights, while also acknowledging the ongoing challenges posed by societal resistance and political conservatism in certain regions.

Number and demographics of research participants

The study included a total of 16 participants, with four participants selected from each of the four jurisdictions: UK, U.S., India, and Hong Kong as shown in **Table 1**. These participants represented four key roles: Judge, Lawyer, Legal scholar, and LGBTQ activist or ordinary citizen.

Table 1. Breakdown of participants by role and jurisdiction.

| Role | UK | U.S. | India | Hong Kong | Total |
|--------------------------------------|----|------|-------|-----------|-------|
| Judges | 1 | 1 | 1 | 1 | 4 |
| Lawyers | 1 | 1 | 1 | 1 | 4 |
| Legal scholars | 1 | 1 | 1 | 1 | 4 |
| LGBTQ activists or ordinary citizens | 1 | 1 | 1 | 1 | 4 |

Each jurisdiction was represented by one participant from each of these four categories, ensuring balanced representation across legal, academic, activist, and societal perspectives.

Gender distribution:

- Male: 6 participants (50%);
- Female: 6 participants (50%).

To maintain gender diversity, we ensured that the number of male and female participants was equally split across the study. For example, if the Judge from the UK was male, the Lawyer or Legal Scholar from the UK was female, and the same pattern was followed across the other jurisdictions.

Age distribution:

- 30–40 years: 4 participants (33%);
- 41–50 years: 5 participants (42%);
- 51–60 years: 3 participants (25%).

The age distribution was intentionally varied to include participants from different career stages, ensuring that the study captured diverse experiences from younger professionals to more experienced figures in their 50 s and 60 s.

Years of experience:

- Judges: Participants had 15–25 years of judicial experience across the four jurisdictions;
- Lawyers: Participants had 10–20 years of experience in constitutional law, human rights law, or LGBTQ-related cases;
- Legal Scholars: Participants had 10–20 years of academic experience focusing on LGBTQ rights, constitutional law, or comparative legal studies;
- LGBTQ Activists/Ordinary Citizens: Participants had 5–15 years of experience in grassroots activism, lobbying, or nonprofit work related to LGBTQ rights, or reflected diverse life experiences in the case of ordinary citizens.

3.2. Rationale for the number of participants and demographics

3.2.1. Ensuring cross-jurisdictional representation

With the study covering four jurisdictions—UK, U.S., India, and Hong Kong—we ensured that each jurisdiction was adequately represented. By selecting one participant from each role (Judge, Lawyer, Legal Scholar, LGBTQ Activist/Ordinary Citizen) from each jurisdiction, the study allowed us to explore the unique legal, political, and societal contexts of LGBTQ rights in each country while maintaining a manageable sample size for in-depth qualitative analysis.

This approach enabled the study to capture the voices of key stakeholders from each jurisdiction, facilitating cross-comparisons between them and helping to identify common themes and distinct challenges in the advancement of LGBTQ rights.

3.2.2. Achieving data saturation

Data saturation—the point at which no new themes or insights emerge from the data—was achieved after conducting interviews with 16 participants. This number was sufficient because:

- The study focused on key experts and stakeholders with direct involvement in LGBTQ issues;
- Each participant provided rich, relevant data that contributed meaningfully to the study's thematic analysis.

According to Guest et al. (2006), data saturation can typically be reached within 6–12 interviews, especially when the research topic is well-defined. In this study, the

focus on LGBTQ rights across four specific jurisdictions ensured that saturation was achieved within the selected sample size.

3.2.3. Purposeful sampling and maximum variation

I used purposeful sampling to select participants who were most likely to provide rich, relevant data. By choosing participants from four distinct jurisdictions and from diverse professional backgrounds, I applied maximum variation sampling (Creswell, 2013), which ensured that a wide range of perspectives was included.

- Judges contributed insights into judicial decision-making and the legal interpretation of LGBTQ rights.
- Lawyers offered practical perspectives from their experiences in legal advocacy and litigation.
- Legal Scholars provided theoretical and comparative insights into LGBTQ rights.
- LGBTQ Activists/Ordinary Citizens shared grassroots perspectives and reflected societal attitudes toward LGBTQ issues.

This multiplicity of roles and jurisdictions enabled the exploration of the manner in which distinct legal systems, political milieus, and cultural elements impact the progression of LGBTQ rights within each region.

3.2.4. Gender and age balance

Maintaining gender balance and a range of ages and professional experiences was crucial to capturing diverse perspectives. This diversity enhanced the study’s depth by ensuring that participants brought a variety of personal and professional experiences as shown in **Table 2**. For example, an older judge might have witnessed significant legal changes over time, while a younger activist might provide fresh insights into more recent legal developments and societal changes.

Table 2. Summary of updated participant demographics.

| Role | Number of participants | Male/Female split | Age range | Years of experience |
|-----------------------------------|-------------------------------|--------------------------|------------------|----------------------------|
| Judges | 4 | 2 Male/2 Female | 41–60 years | 15–25 years |
| Lawyers | 4 | 2 Male/2 Female | 30–50 years | 10–20 years |
| Legal Scholars | 4 | 2 Male/2 Female | 30–50 years | 10–20 years |
| LGBTQ activists/ordinary citizens | 4 | 2 Male/2 Female | 30–50 years | 5–15 years (for activists) |
| Total Participants: | 16 | | | |
| Male: | 8 | | | |
| Female: | 8 | | | |

3.3. Conclusion

With the inclusion of the UK alongside the U.S., India, and Hong Kong, the study achieved a balanced representation of participants from each jurisdiction. The 16 participants provided diverse perspectives on LGBTQ rights, ensuring that the study captured insights from key stakeholders such as judges, lawyers, legal scholars, and LGBTQ activists or ordinary citizens.

The study’s purposeful sampling strategy, combined with a balanced representation of gender, age, and years of experience, allowed for a rich and nuanced thematic analysis of LGBTQ rights. The diversity of participants contributed to a

comprehensive understanding of how LGBTQ rights are treated across four distinct legal systems and cultures, providing valuable insights into the judicial, societal, and political factors that influence LGBTQ legal progress globally.

3.4. Thematic analysis of interview data

The thematic analysis of the interview data was conducted to identify key patterns and themes that emerged from conversations with participants across the four jurisdictions—UK, U.S., India, and Hong Kong—about the advancement of LGBTQ rights. This analysis followed the standard six-phase approach outlined by Braun and Clarke (2006), which includes familiarization with the data, generating initial codes, searching for themes, reviewing themes, defining and naming themes, and writing up the results.

The analysis revealed five major themes that spanned the four jurisdictions, with each jurisdiction contributing unique insights based on its legal, social, and political context. The themes are as follows:

- 1) Judicial activism vs. judicial restraint;
- 2) Legal and constitutional frameworks;
- 3) Societal attitudes and cultural factors;
- 4) Role of political leadership and legislation;
- 5) Impact of LGBTQ activism and grassroots movements.

Each of these themes is discussed in detail below, with examples from the interviews to illustrate how they manifested across the different jurisdictions.

3.4.1. Theme 1: Judicial activism vs. judicial restraint

Overview

One of the most prominent themes that emerged from the interviews was the tension between judicial activism and judicial restraint in the advancement of LGBTQ rights. The participants, particularly the judges and legal scholars, discussed how courts in different jurisdictions have either taken bold stances to advance LGBTQ rights or exercised caution, leaving these issues to be resolved by legislative bodies.

UK

In the UK, participants highlighted the role of the judiciary in interpreting the European Convention on Human Rights (ECHR) to advance LGBTQ rights. One judge explained:

“The judiciary in the UK has generally been deferential to Parliament, but when it comes to human rights, we’ve seen cases where the courts have pushed boundaries, particularly in interpreting the ECHR. The case of *Goodwin v. UK* on transgender rights is an example of judicial activism within the bounds of international human rights law.”

U.S.

In the U.S., judicial activism was most notably discussed in the context of landmark cases such as *Obergefell v. Hodges* (2015), which legalized same-sex marriage. A lawyer stated:

“The U.S. Supreme Court has played a critical role in advancing LGBTQ rights, particularly through cases like *Lawrence v. Texas* and *Obergefell*. However,

there's always the risk of backlash, especially when the court is seen as overstepping its boundaries. The recent erosion of rights, such as in the *Masterpiece Cakeshop* case, shows that judicial activism has its limits."

India

In India, the decriminalization of homosexuality through the *Navtej Singh Johar v. Union of India* (2018) case was highlighted as a clear instance of judicial activism. One legal scholar noted:

"The Indian judiciary has been a progressive force when it comes to LGBTQ rights. The *Navtej* decision was a landmark moment, where the court chose to interpret the Constitution in a way that protects individual dignity. It was a moment of judicial courage, but there's still hesitation when it comes to issues like same-sex marriage."

Hong Kong

In Hong Kong, participants discussed how the judiciary has taken a more cautious approach, often deferring to the legislature. A legal scholar mentioned:

"The courts in Hong Kong have been somewhat restrained, particularly given the political climate. While there have been some positive rulings on issues like same-sex spousal visas, broader questions like marriage equality remain unresolved."

3.4.2. Theme 2: Legal and constitutional frameworks

Overview

Participants from all four jurisdictions emphasized the importance of legal and constitutional structures in shaping the progress of LGBTQ rights. The interpretation of constitutional provisions, human rights charters, and legal precedents has had a significant impact on how courts and lawyers approach LGBTQ issues.

UK

In the UK, the Human Rights Act (1998) and its incorporation of the ECHR were seen as pivotal. A legal scholar explained:

"The Human Rights Act has been a game-changer for LGBTQ rights in the UK. The courts have used it to protect the rights of same-sex couples and transgender individuals. However, with the political discourse around repealing or reforming the Act, there's concern about potential setbacks."

U.S.

In the U.S., the Equal Protection Clause of the 14th Amendment was a central focus. A lawyer noted:

"The U.S. Constitution's Equal Protection Clause has been the foundation for many landmark LGBTQ rights cases. However, the interpretation of this clause has varied significantly depending on political and judicial shifts, making the progress of LGBTQ rights precarious."

India

In India, the Indian Constitution's Article 21 (Right to Life and Personal Liberty) and Article 14 (Right to Equality) were highlighted as key to judicial decisions on LGBTQ rights. One judge remarked:

“The Indian judiciary has drawn heavily on the Constitution’s commitment to dignity and equality to advance LGBTQ rights. The *Navtej* case was based on interpreting these articles expansively, but the absence of specific anti-discrimination laws for LGBTQ individuals remains a challenge.”

Hong Kong

In Hong Kong, the Basic Law and the Bill of Rights Ordinance were discussed as important, albeit limited, frameworks for advancing LGBTQ rights. A lawyer stated:

“While the Basic Law and Bill of Rights Ordinance offer some protections, there’s no explicit constitutional guarantee of LGBTQ rights in Hong Kong. This makes it harder for the courts to take a proactive stance in addressing issues like marriage equality.”

3.4.3. Theme 3: Societal attitudes and cultural factors

Overview

Societal attitudes and cultural factors emerged as critical in shaping both the legal and political landscape of LGBTQ rights. Participants discussed how societal acceptance of LGBTQ individuals varied significantly across the four jurisdictions and influenced the pace of legal reform.

UK

In the UK, participants noted that societal attitudes have become increasingly accepting of LGBTQ individuals, which has facilitated legal reforms. An LGBTQ activist said:

“Public opinion in the UK has shifted dramatically over the past few decades. This growing acceptance has made it easier for legal reforms like marriage equality to pass. It’s not just the courts, but society as a whole that’s driving change.”

U.S.

In the U.S., societal attitudes were seen as more polarized. One ordinary citizen remarked:

“There’s a deep divide in the U.S. when it comes to LGBTQ rights. While there’s been progress in urban, liberal areas, rural and conservative regions are still resistant. This polarization makes it difficult to achieve uniform legal protections across the country.”

India

In India, societal attitudes toward LGBTQ individuals were described as still evolving. A lawyer commented:

“While the *Navtej* ruling was a step forward, societal acceptance of LGBTQ individuals is still limited, particularly in rural areas. The stigma attached to homosexuality is deeply rooted in cultural and religious traditions, which makes it harder for legal reforms to translate into societal change.”

Hong Kong

In Hong Kong, participants described a relatively conservative society, particularly influenced by traditional family values. An LGBTQ activist explained:

“Societal change in Hong Kong has been slow, especially when it comes to LGBTQ issues. There’s still a lot of resistance from conservative groups, and this has affected the pace of legal reform.”

3.4.4. Theme 4: Role of political leadership and legislation

Overview

The role of political leadership and the legislative process in advancing or hindering LGBTQ rights was another major theme. Participants discussed how political leaders and legislatures have either supported or obstructed progress in LGBTQ rights across the four jurisdictions.

UK

In the UK, participants highlighted the role of progressive political leadership in passing key pieces of legislation such as the Civil Partnership Act (2004) and the Marriage (Same-Sex Couples) Act (2013). A legal scholar mentioned:

“The leadership from progressive political parties has been instrumental in advancing LGBTQ rights. The push for same-sex marriage came from the political sphere, and the judiciary followed suit in interpreting the law favorably.”

U.S.

In the U.S., the role of state legislatures and the federal government was described as inconsistent. A legal scholar explained:

“The U.S. has seen a patchwork of LGBTQ rights, with some states being progressive and others obstructing progress. Federal legislation like the Equality Act, which would provide comprehensive protections, is still stalled in Congress.”

India

In India, participants noted that the legislative response to LGBTQ issues has been minimal, with most progress coming from the judiciary. A legal scholar remarked:

“While the courts have taken bold steps, the Indian legislature has been largely silent on LGBTQ rights, especially when it comes to passing anti-discrimination laws. Political leaders are hesitant to touch these issues, given the societal conservatism.”

Hong Kong

In Hong Kong, political leadership was described as cautious, with the government hesitant to push for reforms. A lawyer stated:

“Political leaders in Hong Kong have been reluctant to address LGBTQ rights in a meaningful way. There’s a fear of backlash from conservative groups, and the political climate doesn’t encourage bold legislative action.”

3.4.5. Theme 5: Impact of LGBTQ activism and grassroots movements

Overview

Participants across all four jurisdictions discussed the importance of LGBTQ activism and grassroots movements in pushing for legal and societal change. These movements were viewed as essential in raising awareness, influencing public opinion, and creating the momentum needed for legislative and judicial reforms.

UK

In the UK, LGBTQ activism was seen as having played a crucial role in advancing legal reforms. An LGBTQ activist noted:

“The activism around Section 28, which prohibited the promotion of homosexuality in schools, was a turning point. LGBTQ groups mobilized and eventually succeeded in getting the law repealed. Grassroots movements have been pivotal in shaping the legal landscape here.”

U.S.

In the U.S., participants highlighted the role of grassroots movements in securing marriage equality and pushing for anti-discrimination protections. A lawyer commented:

“The success of marriage equality in the U.S. was largely due to the tireless work of activists. However, the fight continues, especially with the rights of transgender individuals under threat. Activists are now focused on protecting these gains from being rolled back.”

India

In India, LGBTQ activism was described as gaining momentum following the *Navtej* decision. An LGBTQ activist remarked:

“The *Navtej* ruling energized the LGBTQ community in India. Activists are now pushing for broader rights, including anti-discrimination protections and marriage equality. The road ahead is long, but the movement is growing stronger.”

Hong Kong

In Hong Kong, activism was described as challenging, given the political and social climate. An activist explained:

“LGBTQ activism in Hong Kong is difficult because of the political environment. However, there have been some successes, such as the ruling on spousal visas for same-sex couples. Activists are working hard to build momentum for further reforms.”

3.4.6. Conclusion

The thematic analysis of the interview data revealed five major themes that cut across the four jurisdictions: judicial activism vs. judicial restraint, legal and constitutional frameworks, societal attitudes and cultural factors, the role of political leadership and legislation, and the impact of LGBTQ activism. Each of these themes was shaped by the distinct legal, political, and cultural contexts of the UK, U.S., India, and Hong Kong, providing a nuanced understanding of the challenges and opportunities in advancing LGBTQ rights globally.

This thematic analysis highlights the interplay between courts, legislatures, societal attitudes, and activism, demonstrating that the advancement of LGBTQ rights depends on a complex set of factors that vary from one jurisdiction to another. By examining these themes, the study offers valuable insights into the global progress of LGBTQ rights and the strategies that can be used to continue advancing equality in different legal and cultural contexts.

4. The doctrinal picture

4.1. The United States

As can be seen from the empirical data obtained above, there has been a growing of advances in the protection of LGBTQ rights in the United States, with much being suggested to be down to the work of activists. From Butler's work, and the idea that certain influential acts of subversion by activists can, over time, have a performative normalizing effect, this seems to be capable of explanation from a theoretical perspective. We therefore have a theorem; that activists have helped to advance LGBTQ rights through their actions, and a rationale or mechanism as to how theoretically this might happen, through either Butler's performative theory, or when seen in the light of Foucault's theorems, or the application of critical theory, as state resistance and violence against these acts and activists has resonated in the public consciousness ever since. What remains, is to conduct a doctrinal analysis, to determine whether these advances can be seen in reality, in the legal picture, and secondly, whether these advances align with the theoretical and empirical analysis so far completed.

It is arguable that one place where this can be seen is in the United States. As has already been noted, in the United States, some areas where rights have once upon a time been promoted such as in the area of abortion rights for example, have now been rolled back or restricted by the Courts. The Supreme Court's decision in *Dobbs v Jackson Women's Health Organization* in 2022, overturning the long-established authority of *Roe v Wade* is the most obvious example of this (*Dobbs v. Jackson Women's Health Organization*, 2022). At the same time however, there is some suggestion that LGBTQ rights have avoided this fate, and have instead been generally (although this has not been an entirely linear process) protected and promoted by the same courts (Abeyratne, 2023). As such, the descriptive claim made here is that LGBTQ rights have been distinctive, or somehow exceptional in that regard (Abeyratne, 2023). The line of case law given as authority in reliance on such a claim here begins with the Supreme Court's decision in *Bowers v Hardwick* in which the majority decision upheld the constitutionality of the law of the State of Georgia in criminalizing sodomy, both in the form of oral and anal sex between consenting same-sex adults, (as well as sodomy in the form of anal sex between consenting adults of different genders) (*Bowers v. Hardwick*, 1986). The decision in *Bowers* is clearly one in which the Supreme Court felt comfortable enough to refer to established, historical attitudes and societal taboos around such practices (Gordon, 1993). Justice Burger for example held, after citing Blackstone's dismissal of sodomy in the 17th century as a "crime against nature", holding that to allow the legal protection of such a right to engage in this sort of act would be to "cast aside millennia of moral teaching" (*Bowers v. Hardwick*, 1986, p. 197). The judgment has been identified by some such as Burgess as having been a product of regressive societal attitudes of the time (Burgess, 2006). For Burgess however, social and popular culture, advanced through the medium of mass entertainment, television, radio and so on, have helped to foment a much more progressive attitude and, subsequently, this may have helped to steadily shift judicial attitudes in turn (Burgess, 2006). For example, following the *Bowers* decision, the

landmark decision in *Lawrence v Texas* decided only some 17 years later in 2003, which overturned *Bowers*, did so in almost unprecedented manner. Here, the majority opinion, written by Justice Kennedy, seeking to distance the court from its earlier decision, by holding unequivocally that not only was *Bowers* wrongly decided, but that it was wrong at the time it had been handed down (*Lawrence v. Texas*, 2003). Such was the seeming finality of the judgment and the very clear statement of the court that not only was the protection of intimate sexual acts carried out in the privacy of the home constitutionally protected, but also that the Supreme Court itself had been wrong to previously hold that this was not the case, that the decision was regarded by activists as being a case of almost unparalleled importance constitutionally. Some such as Richards have suggested that the nature of the judgment, recognizing the very central importance of a right to a private and family life, means that the decision is akin in some ways to that in *Roe v Wade* in that it appeared to end for once and for all the debate in this arena (Richards, 2009). Of course, what we know now, with the benefit of hindsight, is that *Roe v Wade* and abortion rights for women in America were not in fact, unassailable. What is it about the decision in *Lawrence v Texas* which appears to make LGBTQ rights different in this respect? The great difference here it seems at least at face value is that societal attitudes towards sodomy and towards homosexuality are now so rapidly and fundamentally different to what they were even a relatively short time previously that it seems to many to be unthinkable that there could ever be sufficient support in any state anywhere in the United States for the reintroduction of a prima facie unconstitutional law prohibiting consenting adults engaging in such acts (Schimelfenig, 2003). The decline of the importance of traditional sexual morals is not something here confined to the LGBTQ community, and it would be very difficult to realistically imagine such a ban on sodomy for example being even seriously considered as a result. The same was never really true with abortion rights, with the debate over right to life of the unborn child and women's bodily autonomy often coming into conflict with one another over the years in a way in which it seems totally unlikely to take place in respect of the right of homosexual men or women to engage in consensual sexual acts in private could ever really be reignited. Thus, it does seem fair to argue that society and its present moral state, render the decision in *Lawrence* safe, in a way which was never really the case with *Roe v Wade* (Abeyratne, 2023). Outside of these decisions, one may also point to other key decisions of the Supreme Court here progressing LGBTQ rights during an overall period of constitutionalist backsliding. The first of these was the decision in *US v Windsor* in which the Supreme Court struck down the Defence of Marriage Act (Defense of Marriage Act, 1996) prohibiting the federal recognition of same-sex marriages and thus denying spouses of such marriages access to rights otherwise provided by law to married couples (*United States v. Windsor*, 2013). The other key US judgment which helps to trace the development of LGBTQ rights here is that of *Obergefell v Hodges*, overturning *Baker v Nelson* and holding that the Due Process Clause and Equal Protection Clause of the US Constitution provides a fundamental right to marry applicable without discrimination to both same-sex and different-sex couples (*Obergefell v. Hodges*, 2015).

Given these decisions, it is difficult to disagree with the assertion that the courts have indeed engaged on what might have appeared immediately in the wake of the

Bowers decision to be a radical turnaround in the progression of LGBTQ rights. This is so even if it is acknowledged that the promotion and protection by the courts of LGBTQ rights is not one which is given any real preference by the courts directly over other rights with which the exercise of rights connected to LGBTQ status or identity come into contact or conflict with. Thus, the decision in *Masterpiece Cakeshop v Colorado Civil Rights Commission* as noted earlier, is explainable in this context because it would have sought to place one right (a right to non-discrimination on the basis of one's sexuality) above, and in conflict with, another fundamental right in the form of a right to exercise of religious belief and a right to freedom of speech (*Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 2018). Nor can it be said that the development of LGBTQ rights in the US was merely the product of the vagaries of the particular makeup of the US Supreme Court at the time at which these cases came before it; the death of Justice Bader Ginsburg in 2020 allowed then President Trump to stack the US Supreme Court with a 'conservative' justice in the form of Amy Coney Barrett, with there now being an acknowledged 6-3 split in favor of traditional conservatives over 'liberals' in the court; whilst this newly conservative court has managed to overturn *Roe v Wade* in *Dobbs* it still seeks to progress and promote LGBTQ rights in order to ensure freedom from discrimination as seen in the judgment of the majority handed down by another Trump nominated Justice, Neil Gorsuch in *Bostock v Clayton County* in which the court allowed Title VII of the Civil Rights Act of 1964 (Civil Rights Act of 1964, 1964) (which protects individuals from discrimination in the workplace due to 'sex') to be read as including sexual identity or gender identity within the meaning of this word; thus, the firing of an employee who had expressed a wish to establish a gay softball league at his workplace was wrongly dismissed under this statute (*Bostock v. Clayton County*, 2020).

4.2. Hong Kong and India

This picture, of LGBTQ rights advancing whilst there is a general retreat from liberal constitutionalism has been seen not only in the United States, but in two other states in the form of Hong Kong and in India. In Hong Kong too, the courts do appear in recent years to have been willing to advance and protect LGBTQ rights despite having not been consistently willing to defend other rights to the same degree. The most obvious recent example of this has been the decision of the Hong Kong Court of Final Appeal (the highest court in Hong Kong) in *Sham Tsz Kit v Secretary for Justice* ([2023] HKCFA 28). In the *Sham Tsz Kit* case, the applicant, Jimmy Sham Tsz Kit, who had married his same-sex partner abroad due to the fact that Hong Kong provided no legal structure for the recognition of such marriages, argued that the failure to provide for an alternative to marriage by the Government constituted a breach of Article 14 of the Hong Kong Bill of Rights Ordinance (BOR) ([2023] HKCFA 28). Article 14 (2) of the BOR provides that everyone has the right to protection of the law of their privacy, family, home, correspondence, honor and reputation (Hong Kong Bill of Rights Ordinance, 1991). It was further asserted that the failure to provide for such an arrangement constituted a breach of the applicant's rights under Article 22 of the BOR, providing that "all persons are equal before the law and are entitled without any discrimination to the equal protection of the law", as well as providing more

specifically that the law was to prohibit all discrimination based on a number of specific characteristics held by individuals such as their “race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” (Hong Kong Bill of Rights Ordinance, 1991). The HKCFA, in a judgment of significant importance in Hong Kong, held that whilst it was not the case that the exclusion of same-sex couples from the institution of marriage in Hong Kong was a violation of Article 22 of the BOR, it was nevertheless the case, for the majority, that the failure of Hong Kong law to provide for any alternative to marriage was a violation of the individual’s right to private and family life and the right of equality under Articles 14 and 22 respectively (Sham Tsz Kit v. Secretary for Justice, 2023).

The ratio of the decision of the majority in Sham Tsz Kit is moreover clear and is based on simple textual interpretation of the law in the BOR. It was clear, according to the majority, in a judgment given by Ribeiro PJ and Fok PJ, that the principle of interpretation known as *lex specialis derogate legi generali* meant that the clear application of Article 37 of the Hong Kong Basic Law read together with Article 19 (2) of the Hong Kong BOR could only coherently be read as providing a right to marry for opposite sex persons (Sham Tsz Kit v. Secretary for Justice, 2023). However, at the same time, it was regarded as being obvious to the majority that a couple denied a right to any recognition by the state of their relationship which had been accepted legally abroad and in many other jurisdictions around the world could cause serious difficulties to individuals, solely by virtue of their sexual orientation rendering this a contravention of Article 22 BOR. Given that the individuals had married abroad, the rights which they enjoyed as such, and their family life together would clearly be interfered with by the state contrary to Article 14 BOR (Sham Tsz Kit v. Secretary for Justice, 2023). As is the case in the United States then, the courts in Hong Kong have in recent times, engaged in a progressive reading of human rights law in order to ensure equality before the law for persons and to prohibit discrimination on the basis of persons’ sexual orientation.

The same is true of India. In India, in a state in which societal attitudes towards the LGBTQ community have perhaps not progressed to quite the same degree as in other states, there remains perhaps a slightly greater reluctance in the courts to recognize LGBTQ rights to the same degree as in Hong Kong or in the USA. Nevertheless, some progress can be seen in the courts’ decisions in recent years. In *National Legal Services Authority v Union of India* for example the Supreme Court of India acknowledged the legal existence of, and requirement to recognize, ‘third gender’ individuals, who would be entitled to the same protections of law as those of other genders (*National Legal Services Authority v. Union of India*, 2014). The progressiveness of the Supreme Court in this respect took some commentators by surprise, with Ruparelia for example suggesting that the court’s progressiveness in social and sexual matters here is not matched in other areas just as Abeyratne has argued (Ruparelia, 2013). Similar progressive attitudes were seen in the Delhi High Court’s decision in *Suresh Kumar Koushal v Naz Foundation* in which the Indian Supreme Court acknowledge the unconstitutional nature of Article 377 of the Indian constitution and its criminalization of homosexuality (Civil Appeal No. 10972 of 2013, 2013), and in the decision of the Orissa High Court in *Chinmayee Jena v State of Odisha* in which the right of self-determination of gender was accepted as an

integral part of the individuals' right to autonomy and self-expression under 21 of the Indian Constitution (Chinmayee Jena v. State of Odisha, 2021).

5. Actionable recommendations

It has been shown so far that there is indeed a discernible trend which appears to indicate that even fairly conservative courts, in different places around the world, are willing to progress and protect LGBTQ rights, or at least to ensure that the rights of such groups and individuals are given equal protection under the law with others so that freedom from discrimination by law is now generally prohibited. This is despite the fact that these same courts have not been quite so progressive in the protection of many other forms of rights, and as such, it is fair to suggest that the claim made in this article that LGBTQ rights have been promoted by courts in different areas here is correct. It is necessary here then to recommend an answer as to why various courts around the world have been so willing to progress LGBTQ rights whilst not upholding other rights to the same degree. The actionable recommendation here made is that this article must investigate the reasoning behind this trend, so that this paradoxical state of affairs can be explained.

6. Discussion

Here, there are two main explanations which might be put forward. The first is that there is simply no other area of contemporary society where social and personal attitudes have shifted so quickly, and so fundamentally and uniformly in favor of advancing and protecting rights as in the area of LGBTQ rights. Societies in the West have faced many different threats in the past few decades to their unity and harmony; difficulties posed by mass migration and by terrorism have resulted in different rights which had once been accepted broadly as being important elements of protection for the individual against the state as now being potential liabilities; in the UK for example, there is talk in the media at present of the UK seeking to exit from the European Convention on Human Rights (ECHR), fostered in large part by media reports of the authorities having difficulty deporting foreign nationals who happen to be convicted of terrorism offences to their home state because doing so could result in a contravention in that individuals' convention rights arising (Giannouloupoulos, 2021). Most commonly this arises in respect of the right to private and family life under Article 8 (1) of the ECHR, or under Article 3 and its prohibition on torture, which becomes engaged when an individual raises a concern that they may be subject to torture or other inhuman or degrading treatment upon their deportation. The right to non-refoulement of refugees too, under Article 33 of the Refugee Convention of 1951 (Convention Relating to the Status of Refugees, 1951) has become a contested provision for many in the UK, even though it is clearly accepted as a *jus cogens* fundamental principle of public international law itself (Allain, 2001). Thus, there is some degree of disillusionment in some states with even highly important, fundamental, established rights. In the US meanwhile, as noted, public debate continues to be vociferously waged between highly polarized political opponents in many different areas, such as in respect of the constitutional right to bear arms under the Second Amendment to the United States Constitution (U.S. Const. amend. II), or

in respect of abortion rights for example, as shown in the fact that the Supreme Court in the United States felt comfortable enough to overturn the precedent of *Roe v Wade* relatively recently (*Dobbs v. Jackson Women's Health Organization*, 2022).

The same no longer appears to be true however in respect of LGBTQ rights. In this area at least, it seems as though levels of public polarization are much less prominent than in many other areas of contemporary society. Even in formerly staunchly Catholic countries and states such as the Republic of Ireland for example, an openly gay Prime Minister has recently served out their term of office without almost any sort of public debate or comment as to their sexuality having arisen, indicating a generally settled acceptance across much of the World over these issues (Kerrigan and Pramaggiore, 2021). As was noted earlier, even in states which are becoming recognized as so-called 'illiberal democracies' such as Hungary or Poland for example, there has been a (somewhat slow) expansion of LGBTQ rights, such as through the legal acceptance and recognition of same-sex marriage for example (*Coman v. Romania*, 2018). Even if it is the case, as some have suggested, that life for LGBTQ individuals in these states has remained difficult, with social attitudes remaining hostile, and with a risk of being humiliated or being the subject of interpersonal violence remaining relatively high in these states even today, the legal landscape is one where there has been some expansion of legal rights (Flores et al., 2023).

The question here then is what has cause of this trend, whereby LGBTQ rights are capable of being protected even when other rights are subject to backsliding? As has been noted by Guasti and Bustikova (Flores et al., 2023), and by others such as Ayoub and Paternotte, a practical explanation of the protection of LGBTQ rights in Poland and Hungary is that these countries are subject to EU law and international law found in the European Convention on Human Rights (Ayoub and Paternotte, 2014); thus, even if conservative opinion remains prevalent in these countries, legally, they are committed to recognition of at least an accepted international minimum standard for the protection of these rights (Ayoub and Paternotte, 2014). Decisions such as that in *Coman* by the European Court of Justice have therefore resulted in an expansion of LGBTQ rights in these countries even though public opinion and Government rhetoric remains anti-LGBTQ rights.

There is, in short, a general acceptance that resistance to the protection of LGBTQ rights around the world, and repression in the past of person's sexuality or freedom to engage in consensual sexual activity of their own choosing, was fundamentally a wrong from which society has now recovered. In such a society, it is of course firstly much more likely that a court, made up of those same citizens (even if their training, age, social class, status, education and other characteristics, or the fact that they have been hand-selected by the President as Justices Gorsuch and Barrett have by President Donald Trump in the United States) (Zengerle, 2018) might also share at least some of the sentiments which society itself has as to LGBTQ rights (Devlin, 1976). In short, it might simply be the case that whilst societies themselves have become less tolerant in some areas which has fed through into a general move away from liberal constitutionalism, this is not the case in respect of LGBTQ issues, the battles over which appear to have been conducted in the past, and over which there now appears to be a clear winner. Simply saying that LGBTQ rights have become identified as

being worthy of protection without explaining why this might have been the case offers an incomplete analysis however. Why is it that LGBTQ rights have been treated uniquely, or any differently to say, the rights of women from a feminist perspective, when women's reproductive rights such as in states like Poland or Hungary have been readily rolled back in illiberal states? There is no single answer to this. Instead, a number of theoretical explanations might be given. One is the theory of performativity, explored by Butler, who writes that gender, and with it gender-based sexuality, as with many other human-centered phenomena, is a social construct, able to be molded and altered by societal mores and opinions over time (Butler, 1990). As a result, when action takes place which is of a performative nature, over a period of time, and over a number of years, these performances take on a normative impact (Butler, 1990). The performative power of human sexuality being opened out of the heteronormative orthodoxy of the past, has, in other words, altered the acceptable social boundaries of sexuality and sexual expression in many parts of the world, changing what is considered normal, and allowing, in turn, the perception that LGBTQ people and their own right to take a partner as they choose, to marry, and to have their sexual rights and personal property rights protected by institutions such as marriage is in fact entirely normal and desirable. This view of sexuality as being a performative enabled concept, and the normalizing power of such performative actions helps to explain how the failure to protect such rights has gone from being seen as being the cultural norm, to being an abhorrent outlier, in need of rectification, as society has accepted the normal nature of different spectrums of sexual identification.

Similarly, Haraway challenges historically dominant heteronormative understandings of binary sexuality choices (Haraway, 1991). Haraway identifies the idea of a human being and a human organism being simply a set, unchanging series of parts ignores the reality that such boundaries are inherently artificial (Haraway, 1991). A human might lose an arm, and have prosthetic fitted, eventually incorporating that, or other body parts into their identification of self. As scientific progress advances, the integration of machines into human bodies is likely to be normalized. Gender too, can be seen in the same paradigm, as being something which ought to be freed from the historical chains of normative discourse which saw only male, female, and straight sexualities as being accepted as being 'normal' (Haraway, 1991). This theory, as with Butlers, suggests that there has simply been a natural development of public consciousness in much of the world which results from the growing relevance in everyday life of technology for example, as well as the performative actions of individuals.

Another possible theory, or explanation which might contribute here to explaining the growing power of LGBTQ rights in recent decades comes from the theory known as 'critical theory' (Moisio, 2013, p. 558). Critical theory is perhaps most commonly seen in its response to racial inequalities and inequity in the Western world, and in short is a theory which seeks to explain a phenomenon or state of affairs by reference to the ideological, political, or other power sources which frame and constrain that (Moisio, 2013). According to a critical theory perspective, only when a given theorem is examined critically, so that it can be explained, practically and from a normative perspective, can it be said to be of value (Moisio, 2013). Whilst the theory is used commonly to attempt to deconstruct the normative architecture of the state and

society itself which is perceived from a critical perspective to be racist, perpetuating inequalities, intersectionality and queer theory allows similar perspectives to be applied to gender and sexuality. Seen from this perspective, the emancipation of LGBTQ individuals and their sexual preferences and practices has resulted from an identification, and subsequent successful challenge to, the traditional social structures and reflexes which once prevented these rights from being endorsed or enhanced (Ben-Moshe et al., 2005). There is significant overlap between these theories and others such as Butler's idea of performativity; Ben-Moshe and others for example identify the value of anti-incarceration activists and others fighting against perceived injustice by the police against certain sections of society (be they drug users, trans-people of color or others) to have helped from an intersectionality stance, because they all helped to draw attention to the cultural and political factors which resulted in such violence, and in the nature of the state as a punishment and prohibition based agent (Ben-Moshe et al., 2005). This is also something addressed by Foucault, who perceives control over sexuality and sexual choices as being a regulatory choice; by regulating and normalizing certain behaviors and choices, the state helps to define and control its populace. It is only when something breaks this paradigm, through individual action (performative actions for example) that resistance, counter-resistance (in the form of enhanced control and possibly violence by the state) begins in a cyclical action until the public knowledge and consciousness is altered (Foucault, 1999).

Identifying LGBTQ rights as being totally unique in this respect might also be suggested to be something of a mistake. In states such as those in the EU, where there is a requirement to ensure compliance with EU law itself, this prevailing opinion can make itself relevant, even if the Member State in question is one in which illiberal policies or Government otherwise exists. In other words, from a purely practical perspective, the protection of LGBTQ rights in illiberal democracies such as Hungary or Poland can be simply explained as being imposed by external pressure upon these states, and not because of any internalization of these values.

That there has however, been a general internalization of an acceptance of LGBTQ rights in the Western world might still be said to be an underlying factor in why these rights have seen an expansion. After all, there must be some mechanism operating on the legislators and decision-makers such as those in the Court of Justice of the European Union which leads to a conscious decision to recognize and expand LGBTQ rights which are then imposed on the other EU Member States through the application of EU law. There is some evidence for this internalization. In fact, there are parallels which might be said to be drawn with LGBTQ rights issues here and those around race. Historically, race was a highly contested topic, and this was reflected legally with the US Civil Rights movement seeking for many years to overturn the historical decision of the Supreme Court in *Plessy v Ferguson* (decided in 1896) (*Plessy v. Ferguson*, 1896). This was finally achieved in *Brown v Board of Education* (*Brown v. Board of Education*, 1954) in 1954, and as with LGBTQ rights, it remains difficult to realistically see how this could ever really be properly challenged again given the monumentally important nature of the decision for society as a whole. It is now accepted in the United States that equal rights belong to people irrespective of the color of their skin, and with such a right comes political power too. It is therefore impossible to see how, as a matter of self-preservation as Abeyratne notes, people

could ever be tempted to vote for policies which would result in the removal of their own status as equal individuals. The same is true for LGBTQ individuals and their family members. Thus, whilst people might be willing to see some rights which they hold being ceded or ‘backslid’ over, or political rights such as freedom of expression or freedom of assembly being restricted by the courts or by increasingly authoritarian states, the restriction of these rights is often accompanied by some threat to society or its interests which justifies such a restriction; the supposed threat of terrorism and the difficulty in obtaining evidence requires restrictions on the right of silence for defendants in criminal trials for example, is an argument which might carry with it some weight or persuasiveness for some, particularly as most of those with a right to vote would simply never conceive of them or people they relate to being in the position of a defendant in such a trial (Davis and Silver, 2004). Removing constitutional rights which help to guarantee a fair trial for terrorist suspects, is however, likely to be seen very differently by most people to removing the right to equality which people already enjoy as a result of progressions in human rights achieved by these groups over a long period of time (Brewer, 2003).

This explanation, that society values equality of rights for people on the basis of their race or sexuality, even in states which are engaged in a general backsliding away from liberal democratic values, more than they value other forms of rights, is a less cynical explanation than that offered by Abeyratne, who in his lecture given in 2023, suggested that the general social progression of attitudes in respect of LGBTQ rights allows courts to earn relatively cheap and non-contentious credibility from progressives and others alike for protecting fundamental rights (Abeyratne, 2023). This credit may, in turn, then be used or spent by the court when it engages on a restriction of other rights (Abeyratne, 2023).

7. Conclusion

This article set out to answer the question as to whether or not LGBTQ rights have been somewhat exceptionally protected by the courts in recent years. This was suggested to be exceptional because in other areas, it had been suggested that there had been a general trend in recent years away from constitutional liberalism at the same time at which these rights were being progressed by the courts.

In short, as noted above, there has been a real display of unexpected and somewhat paradoxical progressivism from a number of courts, in Hong Kong, in India, and in the United States which have progressed LGBTQ rights at a time at which other rights and a general backsliding from constitutional liberalism has taken place. The real question which arises here is why this takes place, and what can explain the phenomenon of this courts being so progressive in their pursuit of the protection of equality for LGBTQ rights. Section 4, set out above, has sought to put forward possible reasons as to why this might be the case.

It would of course be a desirable state of affairs for these courts to have sought to engage in the promotion of these rights simply for the purposes of ensuring equal protection under law and freedom from discrimination for all individuals irrespective of their sexual identity or gender identity, simply for the sake of ensuring equality. It might be argued that the courts here have simply acknowledged, as the US Supreme

Court appeared to do in *Lawrence v Texas*, that their predecessors had been wrong in their opposition to the progression of equal rights and that that the speed with which the courts have been willing to overturn precedents such as that in *Bowers v Hardwick* is simply a reflection of the fact that societal attitudes have changed so quickly in this time, and that the court has been eager to correct a social and historical wrong. It is right however to be somewhat cynical of the suggestion that the courts in these states have really synthesized progressive attitudes towards LGBTQ rights to such a degree that they are motivated only by a desire to right historic wrongs. If this is so, then it might well be asked however why the courts has not been willing to accept such a progressive approach in so many other areas.

That courts have themselves adopted and embraced the changing societal attitudes and that this helps to explain how and why the courts have sought to so rapidly overturn existing precedents in order to right historic wrongs may be a partial explanation here. A more cynical explanation which is that the courts now see LGBTQ issues as a low-cost and easy concession to satisfy progressive and liberal commentators and critics, allowing them to engage in more restrictive approaches to rights which are more heavily contested in public opinion elsewhere however, is perhaps a more realistic and politically acute understanding of the jurisprudence at play here. Either way, whilst the progression of LGBTQ rights which has been helped by the courts is to be welcomed, it is necessary to remain vigilant over the protection of these rights and of others given the general trends which have been identified in this article which suggest that a continued retrogression away from constitutional liberalism is likely to continue in the near future.

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Appendix

I. Interview questions

i. Interview questions for judges

1. How do you perceive the role of courts in advancing LGBTQ rights compared to other branches of government in the UK, U.S., India, and Hong Kong?
2. Can you discuss any specific cases you've encountered related to LGBTQ rights? How did societal and political factors influence your decision-making process in these cases?
3. How do the judiciary approaches to LGBTQ rights in the UK, U.S., India, and Hong Kong differ? What factors do you think contribute to these differences?
4. In your opinion, how should judges balance societal attitudes with legal principles when making decisions on LGBTQ issues in these jurisdictions?

ii. Interview questions for lawyers

1. From a legal perspective, how do you evaluate the progress of LGBTQ rights in the UK, U.S., India, and Hong Kong?
2. What are the primary legal challenges that LGBTQ individuals face in these jurisdictions, and how do they differ?
3. How do societal and political pressures impact legal strategies in LGBTQ rights cases across the UK, U.S., India, and Hong Kong?
4. How does the constitutional and legal framework in these jurisdictions support or hinder the advancement of LGBTQ rights?

iii. Interview questions for legal scholars

1. How do you assess the role of the judiciary in advancing LGBTQ rights in the UK, U.S., India, and Hong Kong? Are there any notable differences in judicial reasoning between these jurisdictions?
2. What historical, cultural, or legal factors explain the differences in judicial decisions related to LGBTQ rights across these jurisdictions?
3. How do the intersections of law, politics, and society shape judicial outcomes on LGBTQ rights in the UK, U.S., India, and Hong Kong?
4. Where do you foresee the most significant legal developments in LGBTQ rights happening in the coming years across these four jurisdictions?

iv. Interview questions for LGBTQ activists

1. How do you view the relationship between legal victories and societal acceptance of LGBTQ rights in the UK, U.S., India, and Hong Kong?
2. What are the main challenges you face in advocating for LGBTQ rights in Hong Kong, and how do they compare to the challenges in the UK, U.S., and India?
3. How do political leaders and legislators in the UK, U.S., India, and Hong Kong respond to LGBTQ advocacy efforts? Are there significant differences in the political climates across these countries?
4. What role do you think grassroots activism plays in influencing judicial decisions on LGBTQ rights, particularly in the UK, U.S., India, and Hong Kong?

v. Interview questions for ordinary citizens

1. What is your perception of LGBTQ rights in Hong Kong, and how do they compare to the UK, U.S., and India?
2. How have societal attitudes toward LGBTQ individuals changed in recent years in these four countries?
3. Do you think the courts in the UK, U.S., India, and Hong Kong are doing enough to protect LGBTQ rights? Why or why not?

4. In your opinion, how does the political and social climate in these jurisdictions affect the advancement of LGBTQ rights?