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CENTRE FOR AUSTRALIA-INDIA STUDIES

INDIAN LAW INSTITUTE, NEW DELHI

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INDIAN AND AUSTRALIAN CONSTITUTIONAL LAW: A RECENT STUDY IN CONTRASTS

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The Hon. Michael Kirby AC CMG[**]

ABSTRACT

In this article, based on an address for Jindal Global Law School to the India Law Institute in New Delhi, the author, a former Justice of the High Court of Australia, lists ten features of the national constitutions of Australia and India that exhibit similarities; ten features where there are sometimes marked differences; and two areas of operation that clearly illustrate the fact that, in constitutional adjudication, judicial decision-makers often face what Professor Julius Stone described as "leeways for choice". By reference to decisions in Australia and India on issues of race, Aboriginality and human sexuality, the article identifies the inescapable challenge of judicial choice. It suggests some useful guideposts.

CONSTITUTIONAL SIMILARITIES

1. *Constitutional Democracies:* India and Australia occupy comparatively large portions of the landmass of the Earth. India is described as a "sub-continent". Australia sometimes describes itself as

[*] Text on which was based an address at the India Law Institute, New Delhi, 10 January 2018.

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a “continent”, although some reject this pretention and regard it as part of the continent of “Oceania”. Still, both India and Australia represent very large portions of the world governed as a single nation. Moreover, they are both parliamentary democracies. Their national legislatures are elected by direct popular vote in nation-wide polls conducted by secret ballot in which the citizens, as electors, participate at regular intervals.[1] The peaceful and substantially unchallenged conduct of national elections in India is a great achievement of the constitution. So it is also in Australia. Since 1923, in Australia, voting in federal elections has been compulsory for all electors. Defaulters are subject to a modest fine. In both countries, the typical electoral turnout is very high.

2. *Federal System:* India and Australia have federal systems of government. Although the federal character is more clearly stamped on the text establishing the Australian constitutional system, in practice judicial interpretations of the Australian constitution have repeatedly favoured the accretion of constitutional powers to the Federal Parliament.[2] In the Australian constitution a list of specified legislative powers are granted to the Federal Parliament. Unless and until exercised by the Federal Parliament, the enumerated legislative powers remain with the States (and effectively the self-governing Territories).[3] A limited number of legislative powers are conferred exclusively on the Federal Parliament.[4] In India, a generally geographical distribution and

[1] In India the House of the People of Parliament (Lok Sabha) has a maximum ordinary term of 6 years (originally 5 years). *The Indian Constitution* [IC], art. 83(2), as altered by 44th Amendment Act 1978 (In). In the Australian constitution [AC], the House of Representatives serves for a maximum term of 3 years “and no longer”. AC, s 28. The Australian Senate’s ordinary term is 6 years: AC, s 7. In India, the Council of States (Rajya Sabha) members also have a 6 year term; although one third of members retire at the end of each 2 year interval: IC, art 83(1).

[2] See e.g. *Amalgamated Society of Engineers v Adelaide Steamship Co. Ltd* (1920) 28 CLR 129; (1921) 29 CLR 406 (“*Engineers Case”*). See also *Work Choices Case* (*New South Wales v The Commonwealth*) (2006) 229 CLR 1.

[3] AC, s 51. See also s.109.

[4] AC, s 52.

limitation of powers is provided for.[5] The Union Parliament has exclusive powers to make laws with respect to any of the matters enumerated in the "Union List" in the schedule.[6] In India, there is also a "Concurrent List", in respect of which the Union Parliament and the Legislature of any State share specified powers.[7] As well, the Legislature of any State has exclusive power to make laws for such State, or any part thereof, with respect to the matters enumerated in the "State List".[8]

Although the federal division of powers in India is an important feature of the Constitution, its federal character is not amongst the stated essential characteristics in the Preamble ("… A sovereign, socialist, secular, democratic republic").[9] The comparative ease of amendment of the Indian Constitution, through parliamentary procedures, has reduced the significance of the federal divisions because they can be altered more quickly and readily in India than under the federal constitutions of the United States of America, Canada, Australia and Nigeria. This feature of Indian constitutionalism has enhanced the flexibility and changeability of its distributed heads of governmental power.

3. *Rule of Law:* In both India and Australia, the rule of law is a strong feature of constitutionalism. In India, express provisions of the constitution establish the Supreme Court of India[10] and the High Courts of the States.[11] The law of India, as declared by the Supreme Court of

[5] IC, art 245.
[6] IC, art 246(1). See also the Union List (List I) in IC, 7th Schedule.
[7] IC, art 246(2). See also IC, List III, 7th Schedule ("Concurrent List").
[8] IC, art 246(3), List II.
[9] IC, Preamble.
[10] IC, Ch IV.
[11] IC, Ch V.

India is expressed to be binding on all courts in the territory of India.[12] The law declared by a High Court is binding on all subordinate courts within the State concerned.[13]

There are no exactly similar provisions in the Australian constitution, although there is a separate chapter of the constitution, Ch. III, providing for "the Judicature". This separate treatment has been held to have important consequences for the independence, work and role of the courts in Australia.[14] The rule upholding the paramountcy of judicial determinations as to the constitutionality and lawfulness of federal, state and territorial laws in Australia was derived from a constitutional principle copied from the Supreme Court of the United States.[15] In this sense, in both countries, the courts are accepted as holding the power to disallow federal State and Territory legislative, executive and judicial acts. Thus the Supreme Court (and, within jurisdiction, the State courts) are the independent, neutral arbiters of constitutional and other legal questions. Their orders are obeyed as an attribute of constitutional governance. Rarely indeed is it necessary to summon an official to enforce the law against legislative, executive or judicial recalcitrance.[16]

4. *Character of the Supreme* Court: As well, in both India and Australia, the appellate jurisdiction is highly integrated. The Supreme Court is not confined (as in the United States) to federal constitutional

[12] IC, art 141.
[13] IC, art 226. *East India Commercial Co v Collector of Customs* 1962 SC 1895.
[14] *R v Kirby; ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.
[15] *Marbury v Madison* 1 Cranch (5 US) 137 (1803). This was the first Supreme Court decision in the United States to apply the doctrine of judicial review as to the validity of a congressional statute. The decision was copied in the earliest days of the High Court of Australia. See *Ah Yick v Lehmert* (1905) 2 CLR 593; *ex parte Whybrow* (1910) 11 CLR 1.
[16] See however, *Tait v The Queen* (1962) 108 CLR 620, a case of a clash between the High Court of Australia and the Executive of the State of Victoria concerning enforcement of a death sentence, pending disposal of an appeal application. The court prevailed.

and legal issues and orders. As in the United Kingdom and Canada, the final national court is a general court of law, resolving both constitutional and general legal disputes and those arising in State as well as federal and Territory jurisdiction. This general feature of the courts' jurisdictions has influenced the character and self-perception of the final national court and other courts and their techniques of reasoning and argumentation.

5. *Responsible and Representative Government:* Although India has a President, its system of government is essentially parliamentary, not presidential. The President must, in the exercise of his functions, "act in accordance with [the] advice [given by the Government]".[17] As that great judge of the Supreme Court of India, V.R. Krishna Iyer, observed in *Shamsher Singh v State of Punjab,*[18] "Not the Potomac, but the Thames, fertilises the flow of the Yamuna".

In the Australian constitution, the Governor-General is provided for in terms that likewise (with due adaptations) follow the British Constitution. The executive power of the Commonwealth is "vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth".[19]

Although there is a separation of powers in the Australian and Indian constitutions, between the Executive and Legislative powers respectively as therein specified, there is no strict separation between the Executive power and the Legislature. The Prime Minister and the Government are

[17] IC, art 74.
[18] AIR 1974 SC 2192 at 2212. C.f. M.D. Kirby, "Foreword" in L. Malik, *Selected Reflections on the Indian Presidency: Essay in honour of President Shri Pranab Mukherjee*, Satyam Law Int., New Delhi, 2017, vii.
[19] AC, s 61.

elected by the members of the lower House of Parliament and in both countries Ministers must be elected by the members of the lower House of Parliament, although they may be chosen from both Houses. However, both in India and Australia there is provided a short period of grace for ministerial membership of Parliament. In the Australian constitution it is stated that "No Minister of State shall hold office for a longer period than three months unless he is or becomes a Senator or a member of the House of Representatives".[20] In India, it is provided that "A Minister who for any period of six consecutive months is not a member of either House of Parliament shall at the expiration of that period cease to be a Minister."[21] Both in India and Australia, the Prime Minister is formally appointed by the Head of State (the President of India in India or in Australia the Governor-General representing the Queen). However, in Australia, the Prime Minister is not mentioned in the constitutional text, although constitutionally he or she is the most important politician and political leader in the country.

In India, the Prime Minister is the head of the Council of Ministers[22] and is expressly named in the constitutional text. In Australia, whilst a Federal Executive Council is provided for to "advise the Governor-General in the government of the Commonwealth" the selection, appointment and termination of appointment are left to inference drawn from the constitutional text or vestigial provisions of the Royal Prerogative.[23] In India, an express duty is imposed upon the Prime

[20] AC, s 64.
[21] IC, art 75(5).
[22] IC, art 74(1). Cf. *Government of India Act* 1935 (UK), s 10(4) and s 51(4).
[23] AC, s 62. These gave rise to the controversy, after 11 November 1975, when Governor-General Sir John Kerr terminated the commission appointing Mr E.G. Whitlam as Prime Minister of Australia, notwithstanding that the latter continued to enjoy the support of a majority in the House of Representatives. The Governor-General then appointed the Leader of the Opposition (Mr M. Fraser) as caretaker Prime Minister on condition that he would secure supply and proceed immediately to a federal election (which he did and in which he was returned to office).

Minister to furnish advice to the President as to all decisions of the Council of Ministers.[24] In Australia, that duty also is governed by established conventions and traditions.

Under both constitutions, the role of the President or the Governor-General, like that of the British Sovereign is, in the words of Walter Bagehot, "to advise, encourage and warn" the ministers in respect of the advice which they give to him or her.[25] Whether in a republic or a constitutional monarchy, the powers given to the head of the Executive are not those of a "rubber stamp or a glorified cypher".[26] In neither constitution is there an express power in the President or the Governor-General to dismiss a Prime Minister for a perceived breach of duty.[27] In India, it is said that such power resides in Parliament. But in Australia, it has been exercised by the Governor-General and by State Governors, invoking the Royal Prerogative, said to be implied by the role, title and functions of the Vice Regal representatives of the Queen.[28]

The United States constitution, on the other hand, was greatly influenced by the then unevolved version of the British constitution as understood by the American settlers at the time of the American revolution. The office of the President was modelled in part on the British monarch who, at the time, was often an active and powerful head of the Executive. Subsequently to 1776, the British constitution continued to evolve to the form of constitutional monarchy recognised today. That form

[24] IC, art 78.
[25] *Shamser Singh v State Punjab* AIR 1974 SC 2192 at 2212. See also Walter Bagehot, the *English Constitution* (Chapman and Hall, London, 1867) reprinted Fontana Press 1991, 113 on the right of the President of India to relevant information. See Malik, 94-95 and IC, art 78.
[26] Malik, op cit, 94.
[27] Ibid, 104.
[28] The Kerr/Whitlam Case (1975), above n23, was preceded in Canada by the case of Governor-General Lord Byng of Vimy and Prime Minister McKenzie-King (1926) and by a case in New South Wales, Australia, in 1932 (Governor of Philip Game and State Premier J. Lang). See Kirby in Malik, above n. 18 at ix.

emphasises the predominance of Parliament. The Westminster system affords a more swift and flexible means of terminating an incompetent, unpopular or misbehaving head of government. The resulting political system chooses its leaders from politicians who have typically already been tested in the parliamentary chamber and who continue to be so tested while in office. It is less prone to executive autocracy. Whilst it has its own weaknesses, in part as a consequence of the emergence of political parties, most observers, including some in the United States today, consider it a preferable, flexible form of government, when contrasted to the executive presidential system. [29]

6. *Separating Head of State and Government:* Consequent upon the pre-existing points of similarity is the way the Indian and Australian forms of constitutional government separate the ceremonial, military and bureaucratic functions of the chief executive from the functions of the head of government. [30] The differentiation is expressly reflected in the Indian constitution by the description and specification of the respective powers of the President and Prime Minister. The head of state enjoys control over the grant of pardons and commutation of criminal sentences.[31] It is a considerable burden to impose on the one individual (even enjoying assistance and powers of delegation) to perform so many time consuming functions as occur where of the powers of head of state and head of government are combined, as in most presidential models. Simply receiving the credentials of diplomats, participating in military and civil ceremonies, retaining engagement with huge modern bureaucracies and being involved with the vast modern civil society and the general

[29] Professor Bruce Ackerman (Yale University) has written on the advantages of the parliamentary system. Many consider that the model of Executive President places undue demands on the Chief Executive.
[30] IC, art 53(1) and (2). See also arts 74, 75, 78. Cf. AC ss 61, 68, 70.
[31] IC, art 72(1).

community consume enormous time. Such functions necessarily distract the political head of government from the burdensome functions of actual political, economic and social leadership. They also combine, in the one person, ceremonial functions that are designed to be uniting, neutral and shared by all people with political functions that tend to be contested and even divisive, concerning the economic, political and social differences that inevitably exist in any modern society.

In this sense, the differentiation in functions, reflected in the parliamentary system operating in India and Australia, is more apt to the modern age and to the functions of the two principal offices. In essence, those functions are separate and different. The proper place for the head of government is in the place where political government mostly goes on, namely parliament. The proper place for the head of state is in the chief executive's mansion. Moreover, conferring on a head of government the role of commander-in-chief of the military forces may be prone to result in false or undesirable opinions or beliefs as to the ambit and availability of such powers. The lesson of history is that it is preferable to keep them separated.[32]

7. *Legal traditions:* Many of the distinctive legal traditions of India and Australia are identical or similar. The judges of the superior courts are commonly respected and uncorrupted. The robes of the judges and advocates in India and Australia are similar, especially now that the Justices of the High Court of Australia, the Federal Court of Australia and other courts have dispensed with the wearing of judicial wigs. Judges are given deferential titles (in India 'My Lord' and in Australia

[32] IC, art 53(2); AC, s 68. The position under the Indian and Pakistan constitutions and their history may be contrasted.

'Your Honour'). Under the provisions of the respective constitutions, the formal appointment of superior court judges is made by the Executive Government. Except that the members of the Executive must participate in, and be answerable to, Parliament there is no express provision akin to the engagement with the legislature in the confirmation of judicial appointments as happens in the case of federal judges and the Senate in the United States.[33] The sole obligation upon the Executive in India is to "consult" with judges, including always in the case of the appointment of a judge other than the Chief Justice of India, to consult with the holder of that office.[34]

In Australia, the Executive power of appointment is, so far as the constitution is concerned, plenary and uncontrolled.[35] Recently, a statutory provision has been enacted in Australia to require "consultation" with State governments in respect to appointments of Justices to the High Court of Australia.[36] Whereas in Australia "consultation" means just that and implies a serious but not binding process of discussion, in India, as a result of the series of *Judges Cases,* the requirement of "consultation" has (by a narrow judicial majority) been held to afford a virtual veto on appointments to the Chief Justice or to a *Collegium* of senior justices. Justice Krishna Iyer criticised this as a "judicial coup" affecting the process of judicial appointment.[37]

[33] IC, art 124(2).
[34] IC, art 124(2).
[35] AC, s 72(2).
[36] *High Court of Australia Act* 1979 (Cth), s 6 ("Consultation with State Attorneys-General on appointment of Justices")
[37] V.R. Krishna Iyer J ["Judicial coup" in Judges Cases].

Both in India and Australia, there are strong constitutional provisions protecting the tenure of superior court judges, federal and State, by the imposition of the necessity of an affirmative parliamentary vote for the removal of judges from office. In India, there is a limitation upon such removal requiring the approval of a majority of not less than two thirds of the members of the House present and voting upon a motion alleging "proved misbehaviour or incapacity".[38] So severe are these requirements that they have rarely been invoked and are most difficult to satisfy. In Australia, the power has never been invoked successfully in the federal sphere and has only once succeeded in the State sphere.

8. *Territories:* Both in India and Australia, territories that are not States are generally the constitutional responsibility of the Federal Government, with an administrator appointed to be the chief executive of each territory.[39] In the Indian case, provision was originally made for forms of self-government for the Union territories, contemplating application by Goa, Daman and Diu (previously Portuguese colonies). This provision later extended to the territory of Pondicherry (previously a French colony).

In Australia, self-government was successively enacted in the Federal Parliament for the electors in the Northern Territory of Australia and the Australian Capital Territory. In each of these territories a unicameral legislature has been created by federal legislation. Although the Federal

[38] IC, art 124(4); AC, s 72(ii). In the Australian Constitution an "address" to the Governor-General from both houses is required, inferentially a single majority will suffice.
[39] IC, art 239 A, AC, s 122.

Parliament has the power to disallow legislation enacted by the Territory legislatures, this step has only once been taken in each case.[40]

In India, an express constitutional amendment was adopted to permit a high measure of self-government in the case of the national capital territory of Delhi.[41] The representation in the Federal Parliament of the electors of the Commonwealth resident in the territories was expressly contemplated by the Australian Constitution.[42] Despite two vigorous challenges, legislation providing for the representation of the electors in the mainland territories in the Federal Parliament was twice upheld by the High Court of Australia.[43]

9. *Common market:* One of the most important provisions of the Australian constitution was the one that ensured that, throughout that vast nation, there would be a single common market which could not be diminished by State laws imposing taxes or fiscal impediments aimed at securing local advantage. In the Australian case, the provision (which became one of the most litigated under the constitution), s.92, declared that "on the imposition of uniform duties of customs, trade, commerce and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free".

This provision was influential in the drafting of art 301 of the Indian constitution. This declared that "subject to the other provisions of this

[40] In the case of the Northern Territory of Australia, to disallow legislation of euthanasia, enacted by the Legislative Assembly. In the case of the Australian Capital Territory, to disallow legislation successively enacted to permit "civil unions" and then "civil partnerships" for same-sex couples. The *Marriage Act* 1961 (Cth) was eventually amended in December 2017 by federal legislation to permit same-sex marriage throughout Australia.
[41] IC, art 239AA
[42] AC, s 122 ("May allow the representation of such territory in either House of the Parliament to the extent and on the terms to which it thinks fit").
[43] *Western Australia v The Commonwealth* (First Territory Senators' Case) (1975) 134 CLR 201; *Queensland v The Commonwealth* (Second Territory Senators' Case) (1977) 139 CLR 585.

Part, trade, commerce and intercourse throughout the territory of India shall be free".

There were, of course, important textual differences between the two constitutional provisions. The adjective "absolutely" was prudently deleted from the Indian text. As well, a specific contemplation of the enactment of possible derogations was mentioned in the Indian case. Moreover, the derogations referred to in Pt XIII of the Indian constitution were expressed in broad terms such as "public interest"[44] and "reasonable restrictions".[45] Notwithstanding these differentiations, and the practical necessity in Australia to read down somewhat the requirement of "absolutely free", the respective provisions have been utilised in the development, under both constitutions, of a free market avoiding internal taxes whilst allowing sensible regulatory control.[46] The adoption of a common market in both countries has been an extremely important contribution by the national constitution, and by lawyers, to the economic advancement of each country. Economic development goes hand in hand with legal, social and human development. The free market provisions in India and Australia have been essential for nation-building and to prevent the dangers of selfish localism in each country that surface from time to time.

10. *Specially vulnerable citizens:* Both in India and Australia, it was recognised from the start that there were specially disadvantaged groups and individuals who might need extra protection under the

[44] IC, art 302. But see art 303.
[45] IC, art 304(b) but subject to a proviso.
[46] See e.g. *Automobile Transport (Rajasthan v State of Rajasthan* [1963] SCC 491 at 521 per Das J applying *Duncan v State of Queensland* (1916) 22 CLR 556 at 573.

constitution, and legal differentiation for that purpose. The vulnerable communities were, in each case, a product of history.

In Australia, the point of differentiation was generally race, skin colour and ethnic culture. In India the points of differentiation were caste, religion and associated differentiation. In Australia, the colonists faced opposition from the British Government and the Imperial Parliament in relation to their endeavours to impose racial distinctions that were deemed hostile, or embarrassing, to other British possessions. However, the Australian colonists and their successors insisted on a "White Australia" immigration policy in the 19th century and much of the 20th. That policy was to last in all, for nearly 70 years of federal government. The settlers, voting through their colonial legislatures, also insisted on a power to enact laws based on racial grounds. They enacted discrimination against the Aboriginal and Chinese people of the continent.

In India, the points of differentiation included religious differences that were ultimately to result in the Partition of the former British India and an only partly solved problem affecting "certain classes", namely "the scheduled castes" and "the scheduled Tribes" in the autonomous districts of Assam.[47] In India, special representation in the House of the People for the "Anglo-Indian community" was also provided for.[48]

The adoption in Australia of a specific legislative power for the Federal Parliament to enact laws with respect to "the people of any race, other than the aboriginal race in any State, for whom it is deemed necessary

[47] IC, Pt XVI art 330.
[48] IC, art 331.

to make special laws" was not intended to be a provision for the rapid advancement of minorities by reference to their races. Essentially, it was intended to be a federal power to continue into federation discriminatory laws on the grounds of race that had existed in Australia from colonial times. These included laws adverse to the rights of the Aboriginal people of Australia; but also to Torres Strait Islanders, Pacific Islanders and people of Chinese and other Asian origins. The settlers believed that they were entitled to maintain in Australia a society similar to that built by their settler forebears. That required, so they thought, the power to exclude, disadvantage or expel non-Caucasian people.

Eventually, in 1967, in one of the rare alterations to the Australian constitution adopted with the approval of the electors,[49] the exclusion of authority to make federal laws for the Aboriginal race in any State was itself removed. This permitted the Federal Parliament, thereafter, to make special laws for people of the Aboriginal race. Politically, this was intended to be for the advancement of such people in Australia under federal law.[50] Another prejudicial provision was wholly repealed, namely s 127 of the original Australian constitution. This had relieved the federal authorities from counting the Aboriginal population in the national census. That provision had assumed that the Aboriginals would basically disappear by assimilation and that counting such insignificant matters was more trouble than it was worth.

The divisive burden of Australian constitutionalism was therefore race. In part, this remains so to this day as recent legislative enactments and policies on the treatment of refugee applicants seems to demonstrate.

[49] AC, s 51 (xxvi). See also s 129 (deleted). The constitutional amendment was effected by *Constitutional Alteration (Aboriginals)* 1967 (Cth), Act No. 55 of 1967.
[50] *Kartinyeri v The Commonwealth* (1998) 195 CLR 337.

The divisive burden in India was principally religion, and specifically, mostly, as between Hindu and Islamic Indians. This was, in part, addressed by the geographical and political division of the sub-continent in 1947. However, empowerment of special provisions for the representation and different treatment of Indian nationals by reference to their caste and tribe (where such special provision was thought necessary) was adopted. In neither the Australian nor Indian case would law, or a bold stroke of the constitution, remove the divisive burden on each society. Law, and legal discrimination, are only part of the problem. Both Australia and India remain today subject to special constitutional provisions addressed to race (in the case of Australia) and to caste and tribe (in the case of India).

Neither India nor Australia have completely resolved their deep social challenges on the basis of these respective constitutional provisions. However, those provisions have signalled that this is a challenge to be addressed. It is a work in progress. In each case, it is a challenge that exists on the face of constitutional texts.

CONSTITUTIONAL DIFFERENCES

1. Autochthonous law: The Australian constitution is, historically, an enactment of an Imperial statute, passed by the United Kingdom Parliament.[51] In later judicial reasoning, the High Court of Australia has declared that the true foundation of the sovereignty expressed in the Australian Commonwealth is the will of the Australian people.[52]

[51] *Commonwealth of Australia Constitution Act* 1900 (Imp.) (63 & 64 Vict. c12).
[52] *Kirmani v Captain Cook Cruises Pty Ltd* (1985) 159 CLR 351 at 441-442; *Breavington v Godleman* (1988) 169 CLR 40 at 123; *Leeth v The Commonwealth* (1992) 174 CLR 455 at 485-486; *McGinty v Western Australia* (1996) 186 CLR 140 at 230.

Although that will was expressed historically in referendums approving the successive draft texts for the Australian federal constitution in the 1890s, the fact remains that it was considered necessary for the Australian colonists to procure the transfer of legislative power by an imperial enactment. This was also the way in which legislative power was initially transferred to the original American colonies of Great Britain and subsequently to Canada (1867), New Zealand (1907), South Africa (1910) and Ireland/Eire (1923). New Zealand's alteration had been made by royal Proclamation. The original plan for India was for an imperial statute constituting a self-governing Dominion of India,[53] a plan postponed following the outbreak of War in 1939 until the end of those hostilities.[54] Eventually, it was given effect with the Partition and independence of India [and Pakistan] in 1947.

After 1949, the character and status of the Indian constitution was different. The constitution of India begins, in its Preamble, with the assertion:

> "We, the people of India, … in our Constituent Assembly this twenty sixth day of November nineteen forty nine do hereby adopt, enact and give to ourselves this Constitution."

Inevitably, both in Australia and India, there are legal links to the preceding enactments of the United Kingdom Parliament. Those links are unbroken in the case of Australia. In the case of India they are deliberately severed by the interposition of the Constituent Assembly and the specification, in terms, of the source of popular authority for the

[53] Cf. *Government of India Act* 1919 (UK); *Government of India Act* 1935 (UK) and *Indian Independence Act* 1947 (UK) (10 & 11 Geo VI Ch 30, s7). See now IC, art 6(b) and art 8.
[54] Cf., IC, arts 6(b); 361A (15), 367(1).

binding character of the Indian text. Nehru and the other independence leaders, including Jinnah, were insistent on this severance. Whatever arguments can still arise in Australia about the *Grundnorm* of the Australian constitution[55] there is no such doubt in the case of India. Politically, spiritually and textually, it is the will of the people of India.

2. *Crown and republic:* Consistent with this change, a fundamental feature of the basic structure of the constitution of India is that it is a sovereign, democratic *republic*.[56] Australia, on the other hand, is a constitutional monarchy. By section 2 of the *Imperial Act* of 1900 it is stated that "The provisions of this Act referring to the Queen shall extend to Her Majesty's heirs and successors in the sovereignty of the United Kingdom". The oath of allegiance contained in the Schedule of the Australian Constitution requires loyalty to the Queen, "Her heirs and successors according to law".[57] The oath of allegiance provided for in the Third Schedule to the Indian constitution requires "true faith and allegiance" to "the constitution of India, as by law established".

Although there had been discussion in the Australian colonies, prior to Federation, about adopting a republican form of government, following the model of the United States of America, this was not favoured by a majority, at that time. A proposal, by referendum, to delete references to the Queen and the Crown in the Australian Constitution was submitted to the electors of the Commonwealth of Australia in 1999. It did not secure a majority vote of the electors nationally or in a single State,

[55] A "fundamental" or "basic" legal norm or foundation of the Constitution. See J. Stone, *Human Law and Human Justice* (Maitland, Sydney, 1965) discussing G. Radbruch's *Grundnorm,* 233-236.
[56] IC, Preamble.
[57] AC, Schedule.

although the Australian Capital Territory voted in favour.[58] Discussion concerning a republic on the demise of the Crown has again lately arisen in Australia. However, any change may be delayed during the lifetime of the present monarch. Many previous dominions of the Crown (although not all) became republics upon achieving self-government and independence after 1947.

The compromise formula by which King George VI became *ex officio* the Head of the Commonwealth of Nations was invented by Indian Prime Minister Jawaharlal Nehru and was adopted at the Commonwealth Prime Ministers' Conference in 1949.[59] When Dr Daniel Malan of South Africa, formerly a minister of religion, said that such a division of functions was impossible in the case of a monarch who was a living person, Nehru replied:

> "Have you perhaps heard of the Father, the Son and the Holy Ghost?"

Divisibility was accepted. India, as Australia expressly wished, remained a member of the "Commonwealth of Nations". It is not properly styled the British Commonwealth: it is a group of independent nations most (but not all) of which are now republics and most (but not all) have a history of British colonial rule.[60] India became a republic. So, later, did Pakistan, Sri Lanka and Bangladesh. Burma did also but it did not

[58] The Republican referendum was held on 6 November 1999. It resulted in a 44.74% vote in favour; 54.40% against.
[59] D. Fettling, "When Chifley met Nehru: Compromise in the International Order" in J. Schultz and J. Camens (eds.), "Commonwealth Now" (*Griffith Review* 59), (2018), 68 at 74.
[60] E.g. Mozambique and Rwanda were never part of the British Empire. Cameroon was a condominium as was Sudan and New Hebrides (since 1980, Vanuatu).

apply, either as Burma or Myanmar, to join the Commonwealth of Nations.

The Nehru compromise, by his suggestion, continued on the accession by Queen Elizabeth to the Crown of the United Kingdom in 1952. It remains in place to this day. India remains a republic. Australia remains a constitutional monarchy. The monarch of the United Kingdom (and her other realms and territories, including Australia) remains, at least at this time, Head of the Commonwealth. At the April 2018 meeting of the Commonwealth Heads of Government in London, the leaders, including the Prime Ministers of India and Australia, agreed that, at the demise of the Crown, the Queen's heir apparent, the Prince of Wales, will become Head of the Commonwealth. But the decision remains consensual and personal not institutional.

3. *Evolution and freedom struggle:* Whereas Australia's emergence as an independent nation was gradual and substantially evolutionary, India's was the result of a long and sometimes bitter struggle, involving bloodshed, the imprisonment of many Indian leaders and acrimony, together with recriminations.

There was some acrimony concerning particular aspects of the proposed Australian constitution. Most of the differences in the negotiations concerned the retention of the functions of the Judicial Committee of the Privy Council. Some Australian colonists urged termination of all appeals, noting the difficulty that British officials including judges were said to have with understanding federalism in Canada, a concept alien to their legal and constitutional system. The British negotiators, led by Joseph Chamberlain, Secretary of State for

the Colonies, considered that the Privy Council should be retained, in part (inferentially) to protect the large British investments in Australia.[61]

In the end, the draft Australian Constitution submitted by the colonists was amended to retain appeals to the Queen in Council, including in defined constitutional matters. However, two exceptions were carved out. There were to be no appeals in questions involving the limits of constitutional powers ("inter se") in respect of a contest between federal and State powers. And the Federal Parliament was empowered to "limit" matters in which leave to appeal might be asked of the Privy Council. Any law providing such proposed limitations was required to be reserved for the personal decision of the monarch.[62] Eventually, by an enactment of the Federal Parliament and each Australian State Parliament and of the United Kingdom Parliament, all remaining Australian appeals to the Privy Council were ended by the *Australia Act* 1986 (Cth) (Also 35 Eliz II c 2).

In India, from the start of the republican instrument, the constitution provided for a completely independent system of courts. Indeed, it provided not only for the national Supreme Court[63] and the High Courts of the States,[64] but also for the appointment of subordinate courts[65] and for High Courts in the Union territories.[66] It allowed no exceptions and specifically no residual right to appeal to the Privy Council. The important role which that imperial court, and the earlier Federal Court of India, had played in the governance of India was brought to an end.

[61] D. Headon and J. Williams, *Makers of Miracles – the Cast of the Federal Story* (Melbourne Uni Press, 2000), 202-208.
[62] AC, s74.
[63] IC, Pt V Ch IV arts 124-147. See also IC, Pt V, Ch VI.
[64] IC, arts 125-138.
[65] IC, Pt VI, Ch VI.
[66] IC, Pt VIII, s 241. See also Pt XVIA ("Tribunals").

Citation of Indian Privy Council and Federal Court authorities continued, as part of the seamless preservation of most existing legal rights and duties in India, when not otherwise affected by the Indian Constitution. Likewise, on 26 January 1950 the last Chief Justice of the Federal Court of India (Mr Justice Sir Harital Jekisundas Kania) became the first Chief Justice of the Supreme Court of India. But the institutional arrangements were fundamentally altered.

4. *Subject and citizen:* At the time of Federation, Australians had a single nationality status, namely that of British subject. This had also been the nationality status of all persons born in British India. Upon federation, both countries contemplated the retention of a single, undivided nationality. Upon the advent of the republic in India, the status of subject of the British Crown was terminated.[67] Provision was made for the citizenship of persons born in the territory of India, as defined or either of whose parents had been born in that territory.[68] Particular provision was made to cover the influx of persons following the Partition, whose parents or grandparents had been born in India, as defined pre-partition by the *Government of India Act* 1935.[69]

The status of "citizenship" of Australia was not expressly mentioned in its constitution. No power was conferred expressly to enact a law on "citizenship"; but there were express provisions to allow the Federal Parliament to make laws in respect to "naturalization and aliens";[70] and

[67] Cf. *Joyce v Director of Public Prosecutions* [1946] AC 347 (HL). The appellant was a US citizen but held a British Passport. After the outbreak of war between Great Britain and Germany in 1939, he broadcast radio talks in English hostile to Britain. His conviction of treason was upheld despite his assertion of his termination of his status as a British subject. Cf now in Australia *Re Canavan* (2017) 91 ALJR 1209 concerning s 44(i) of the AC.
[68] IC, art 5.
[69] IC, art 6(a) and (b). See also art 7.
[70] AC, s 51(xix) 71.

"immigration and emigration".[71] Moreover a provision for the disqualification of election to the Federal Parliament included[72] any person who "is under any acknowledgement of allegiance, obedience or adherence to a foreign power, or is a subject or a citizen or entitled to the rights and privileges of a subject or a citizen of a foreign power".

The first statutory mention of Australian citizenship appeared in a 1948 federal enactment.[73] Until much later, Australians travelling overseas carried a passport declaring they were a "British subject and Australian citizen".[74] It was by the provisions of the Indian constitution, and local law, that Australians and Indians, for the first time in the case of most of them in 1950, obtained a different nationality status. Determined to carve out a different, distinctive and local citizenship, India originally went in a direction different from Australia. However, subsequent Australian legislation proceeded to catch up. It dropped references to the status of 'British subject' and, for the future, removed the privileged treatment that United Kingdom citizens had originally enjoyed, equivalent to the rights of Australian citizens.[75] In this matter, India led the way. Australia followed as it sought to assert, and provide for, its separate nationhood comprised of its own citizens.

5. *Fundamental rights:* It is not quite true to say that the Australian constitution contains no provisions for the protection of the fundamental rights of those living under its protection. Thus, a number of express provisions protect the right to enjoy just terms on the acquisition of

[71] AC, s 51 (xxvi).
[72] AC, s 44(i).
[73] *Australian Citizenship Act* 1948 (Cth).
[74] K. Rubenstein, "Citizenship and the Centenary – Inclusion and Exclusion in 20th Century Australia" (2000) 24 *Melbourne Uni LRev.* 576 at 582-588.
[75] *Re Patterson; ex parte Taylor* (2001) 207 CLR 391.

property under federal law;[76] and the right to trial by jury in certain federal criminal matters.[77] Moreover, non-discrimination against residents of different States is guaranteed;[78] as is the free exercise of any religion and invalidation of establishing a religion, imposing religious observance or obliging religious tests to be applied as a qualification for specified offices.[79] There are also implied protections in the Australian constitution against laws interfering with free speech, essential to the attainment of the democratic system expressly established by the constitution.[80] Additionally, there are implied guarantees of judicial independence and impartiality that have been spelt out from the separate constitutional treatment of the Judicature.[81] It has also been repeatedly said that the Australian constitution impliedly demands observance of the rule of law.

However, the foregoing list represents a meagre collection of rights when contrasted with those spelt out in the Indian constitution. Emphasising their importance, "Fundamental Rights" are collected up front in Pt. III of the Indian constitution. They include the right to equality; to freedom; to protection against exploitation; to freedom of religion; and to cultural and educational rights.

The foregoing provisions, followed immediately by Pt. IV of the Indian constitution ("Directive Principles of State Policy"), indicate more clearly the way in which that charter was designed to enlarge and protect the rights of natural and legal persons in India. By way of contrast, the

[76] AC, s 51(xxxi).
[77] AC, s 80.
[78] AC, s 118.
[79] AC, s 116.
[80] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.
[81] In the Australian constitution, Ch III. See *R v Kirby; ex parte Boilermakers' Society* (1956) 94 CLR 254. Cf. IC, art 50 (Separation of Judicial from Executive Power).

Australian document basically leaves the protection of such rights to the enactments of the Federal Parliament and State and Territory legislatures, on the assumption that (being regularly, periodically and democratically elected) they would safeguard the provision of fundamental rights to those subject to their enactments.

Unfortunately, much experience shows that, whilst an elected legislature is generally well placed to protect and respond to pressure from, majorities and powerful interests, it is not necessarily so well organised (or inclined) to protect vulnerable and unpopular or comparatively powerless minorities.[82] The recognition that this was so explains the adoption of the United States constitutional Bill of Rights and similar provisions in virtually all national constitutions of Commonwealth countries drafted in the 20th century. The Australian constitution, having originated in the 19th century, reflects a somewhat naïve earlier faith in the legislature that sometimes needs to be supported, stimulated and provoked by the intervention of courts, tribunals and officials.

The Directive Principles of State Policy in the Indian constitution copied an idea borrowed from the Irish constitution of 1923. It is the early drafting and long duration of the Australian constitution that explains why it is largely bereft of express provisions protecting fundamental rights and desirable policies. The Canadian constitution has now been supplemented by the *Canadian Charter of Rights and Freedoms*. In New Zealand, general human rights laws have been enacted based on

[82] *The Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 82; *Plaintiff S157/2002* (2003) 211 CLR 476 at 513 [103]. *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399.

international treaty law, as has also happened in the United Kingdom, the original source of the hostility to such provisions.[83]

The South African constitution has now embedded large and novel provisions as to basic rights.[84] It now contains substantial protections of fundament rights. However, an attempt to insert various protections against State laws in the Australian constitution failed in 1988. Two legislative attempts and many proposals for a federal statute of fundamental rights in Australia have also failed to attract federal parliamentary support. The usual explanations given are that such laws would create activist judges; politicise the judiciary; diminish the legislatures; and not be needed in a democratic society.

6. *Protection of religious freedom:* As stated, the Australian constitution does contain some provisions for the protection of freedom of religion. However, the language of s. 116 of the Australian constitution has been given a very narrow reading by the High Court of Australia. Although in one case the court defined "religion" broadly, emphasising a criterion of universal spirituality over adoption of a particular religious doctrine,[85] in another case, a majority of the Justices gave the prohibition on the "establishment" of religion an extremely narrow meaning.[86] That meaning was suggested to be, essentially, to prevent any religion being given the status in Australia of the established state religion, as enjoyed by the Church of England in the United Kingdom. Because historically any such risk had entirely receded

[83] *Human Rights Act* 1993 (NZ). See G. Palmer and M. Palmer, *Bridled Power, New Zealand Government Under MMP* (OUP, Oxford, 1987) 229-231, 265; See also *Human Rights Act* 1998 (UK).
[84] E.g. provisions forbidding discrimination on grounds of sexual orientation and providing for economic social and cultural rights (e.g. right to healthcare, housing etc).
[85] *Church of the New Faith v Commissioner of Payroll Tax (Vic)* (1983) 154 CLR 120.
[86] *Attorney-General (Vic)*; *ex rel Black v The Commonwealth* (*Defence of Government Schools Case*) (1981) 146 CLR 559.

following the earliest days of Australian colonisation, this was an interpretation that ignored the background of history against which the Australian constitution had been written. It also failed to give the guarantee any substantial functional work to perform. Yet such work was arguably necessary to prevent the abuse of political power by religious organisations and the effective imposition of the burden of religious beliefs upon persons who did not share those beliefs, especially when undertaken at public expense.

This was a necessity appreciated by the decisions of the Supreme Court of the United States, dealing with substantially the same language contained in the First Amendment to that country's constitution.[87] In the United States, strict limits have been imposed on public financial support for religious institutions.[88] In Australia, direct subventions in favour of organised religious bodies, to support their schools and other institutions, have been upheld. So too have been provisions to support religious events and celebrations (like the Roman Catholic World Youth Day).[89]

7. *Secularism:* In India, the divisions between Hindu, Sikh and Buddhist members of the population and Islamic adherents erupted into bloody conflict during the Partition of British India in 1947-9. That action followed the decision to create two successor states to the Dominion of India, namely India and Pakistan. That terrible period of conflict has had no parallel in Australia where, until recently, the overwhelming majority of the population identified as Christian, although divided into

[87] *Lemon v Kurtzman* 403 US 602 (1971). See also *Everson Board of Education* 330 US 1 (1947).
[88] *Larkin v Grendel;* Den 459 US 228 (1982).
[89] Cf. *DOGS case* (above n86).

denominations sometimes reflecting traditional animosities and rivalries. Even these divisions have declined in importance in recent decades in Australia with the erosion in church attendances by the population and the increasing number of Australian citizens responding to the national census question that they have 'no religion' (currently about 20%).

The commitment to a "secular" republic in the Preamble to the constitution of India confirms that, unlike Pakistan, the Indian State has no official religion. The preamble is part of the constitution of India. It asserts that the State allows no discrimination on the grounds of religion. Reinforcing this ideal, art.25 of the Indian constitution declares that "all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion being available to all religions equally". This provision has been viewed as conducing to secularism in India.

The specific relevance of affording protection to the active engagement of professing, practising and propagating religion has been held in India to extend beyond holding or believing particular aspects of a religious faith or doctrine privately.[90] However, the right to communicate beliefs has been held not to include a right to forcible religious instruction or conversion.[91] Limits are specifically spelt out on the imposition of taxes, the proceeds of which are appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination.[92] Nor may religious instruction be provided within any

[90] *Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225.
[91] *Commission for Hindu Religious Endowment v Lakshmindra* (1954) SCR 1005; *Stainslaus v State of MP* AIR 1977 SC 908.
[92] IC, art 27.

educational institution "wholly maintained out of state funds".[93] This last provision contrasts with a practice that crept into some colonial laws during the 19th century in Australia, by which "special [religious] instruction for one hour a week" was permitted in publicly funded schools. This 'compromise' continues to be followed in most parts of Australia, more than a century later. In some Australian States, parents and children can opt out of the provision of such denominational religious instruction.[94]

Although in India the affirmative protection of "freedom of conscience" and the free "practise… of religion" does not extend expressly to 'freedom *from* religion', i.e. the entitlement to be free from propagation or enforced practice of religious beliefs, such a freedom is inherent in secularism. It involves reading down the religious entitlements of some people so as not to be inconsistent with the religious and non-religious entitlements of others.

The secular character of government, enshrined expressly in the Indian constitution and partly expressly and partly implicitly in the Australian constitution are amongst the most valuable characteristics of the respective governmental qualities, derived from the general tradition of England and its laws. In Australia, because of the narrow interpretation of the prohibitions in s.116 of the Australian constitution, controversial decisions have sometimes upheld contested tax advantages for religious institutions.[95] With the growth of the political influence of "faith

[93] IC, art 28.
[94] See e.g. *Public Instruction Act* 1880 (43 Vic No. 23) (NSW), s 17, s 18.
[95] *Federal Commissioner for Taxation v Word Investments Pty Ltd* (2008) 236 CLR 204 in which a taxation advantage for a religious organisation, whose objectives included propagation of religion, was extended (over the writer's dissent) to a funeral business. See *ibid* at 252 [124]. The legislative provision was subsequently amended by the Federal Parliament to reflect the minority view.

organisations", associated with particular religions, in both India and Australia, it must be expected that there will be more challenges in coming years to the ambit of constitutional guarantees and prohibitions on the grounds of religion.

8. *Judicial appointment and retirement:* Initially, the Australian Constitution made no provision for the retirement for the Justices of the High Court of Australia or other federal courts, once appointed. This omission was interpreted by the High Court of Australia to imply that, as in the United States, federal judges were appointed for life. In the Australian colonies and later the States, legislation expressly provided for the compulsory retirement of judges. The retiring ages differed, mostly according to the status of the court to which the judge was appointed. Most State Supreme and District Court judges served to age 70 (in Victoria, 72). Magistrates and some Industrial Court judges served to age 65. In recent years, these retiring ages have been increased in the Australian States and Territories to age 72 and in some cases (with approval of the relevant chief justice) to age 75 years.

The introduction of a power to enact an age of retirement for federal judges in Australia was addressed in an amendment to the Australian constitution adopted following the *Constitution Alteration (Retirement of Judges)* 1977. That alteration expressly provided, in respect of Justices of the High Court, that future appointees could serve until attaining the age of 70 years. It was left to the Federal Parliament to decide the maximum age of retirement for other federal judges, although the maximum was to be no more than, and was later enacted as, 70 years.[96]

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[96] AC, s72 (paras 2, 3 and 4 inserted 1977).

The appointment of a Justice of the Supreme Court of India lasts "until he attains the age of sixty-five years". The term of a judge of a State High Court is until he attains the age of sixty-two years.[97] These are very low judicial retirement ages by comparison with most countries. They are influenced by the historical provisions formerly applicable to the judiciary in colonial times and in the Dominion of India where most of the judges, before 1935, were British officials who returned 'home' on pensions after the completion of their judicial service.

There appears to be no good reason of principle why such early retirements should continue to be imposed in India. This is particularly so given the Indian tradition (not observed in Australia) of invariably appointing as chief justice the judge next in seniority to the retiring incumbent. That tradition has itself meant that many chief justices of India have served extremely short periods of time because of the inevitable proximity of their 65th birthdays. Suggestions have occasionally been made for the adoption of later retirement ages for the Supreme and High Courts in India, but to no avail. Inferentially, the political consensus has not been present to sustain the constitutional amendment.

No difficulties have followed Australian State provisions for the termination and later extension for the normal service of superior court judges. Nor have difficulties arisen from the removal of life tenure and the substitution of attaining 70 years, in the case of federal judges. Life tenure restricts the regular and desirable turnover of high public

[97] IC, art 124(2).

officeholders, appropriate to an age of rapid technological and social change. Extending judicial service in India to 68 or 70 years would appear to be a sensible means of avoiding wastage of valuable, accumulated, judicial experience with no commensurate disadvantage. I express this opinion as one who is in favour of compulsory judicial retirement, including my own. as a means of ensuring change in the enjoyment of all public offices, given the desirability of reflecting generational change in the community that is served by the judiciary. [98]

9. *Emergency provisions:* There is no express provision in the Australian constitution for the suspension of the legislature or any other constitutional institution and the imposition of emergency rule. Nor has any such emergency been authoritatively suggested to interrupt the operation of the constitution. Various national security regulations and specific laws were enacted in Australia during the two world wars.[99] However, these were an application of the constitution, not an interruption of it.

Views have been expressed in Australia that a power to invoke a "special emergency prerogative lies dormant in the fabric of executive powers [in the Australian constitution]. It has been suggested that such a "prerogative awaits activation in the face of extreme necessity." … Another assertion has been made of an extraordinary prerogative which extends to the assumption of legislative power when the legislative arm of government is paralysed. In recent years, the enactment of laws on

[98] IC, art 217. Initially this provided for retirement at age 60. This was extended following the adoption of the constitution, *15th Amendment Act* 1963 (In), s 4.
[99] H.P. Lee, *Emergency Powers* (Law Book, Sydney, 1984) 322. See also M. Head, *Emergency Powers in Theory and Practice – The Long Shadow of Carl Schmitt* (Ashgate, London) 211.

anti-terrorism have greatly enlarged the executive power in Australia concerning alleged cases of terrorism.[100]

In a majority decision of the High Court of Australia, anti-terrorism legislation, enacted by federal and State legislatures and introduced after 2002, was upheld over my dissent.[101] Justice Hayne joined in rejecting the assertion that the federal defence power, provided under the Australian Constitution, was enlarged to afford the federal government a constitutional foundation for military and naval defence for domestic purposes in time of peace. I considered that such a view was incompatible with the constitutional text and with the strong earlier decision of the High Court of Australia in *Australian Communist Party v The Commonwealth.*[102] In that decision the court insisted that neither the Government nor the Federal Parliament could "recite" itself into constitutional power simply by asserting an existential danger in an enacted statute.[103]

In the Indian constitution, express provision is made for the proclamation of an emergency.[104] The precondition for such a proclamation is the satisfaction of the President of India "that a grave emergency exists whereby the security of India, or of any part of the territory thereof, is threatened, either by war or external aggression [armed rebellion].[105] Such a proclamation is only to last for a maximum period of six months.[106] Further provisions are made for a case of satisfaction by the

[100] *Thomas v Mowbray* (2007) 233 CLR 307.
[101] *Thomas v Mowbray* (2007) 233 CLR 307 per Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ. See now also *Pape v Commissioner of Taxation* (2009) 238 CLR 1.
[102] (1951) 85 CLR 30.
[103] (1951) 85 CLR 30 at 187 per Dixon J.
[104] IC, art 352.
[105] Ibid.
[106] IC, art 252 (5).

President of “a situation… in which the government of the State cannot be carried on in accordance with the provisions of this Constitution.”[107]

Despite the suspension and enforcement powers provided for in these articles, the ordinary operation of the constitution of India has been maintained with few interruptions. Most importantly, the military forces in India have avoided intrusion into civilian government which has been such a feature of many other post-colonial nations.

10. *Amendment provisions:* Finally, it is appropriate to mention the very different amendment provisions provided for in the Australian and Indian constitutions.

The Australian provision was copied from a model derived from Switzerland.[108] For a formal amendment to the text of the Australian constitution, a proposed law for such alteration must have passed with an absolute majority through each House of the Federal Parliament. It must then be submitted to the electors in each State and Territory of Australia. A referendum must then be held. The law may not be presented to the Governor-General for the Royal Assent unless a double majority of the electors voting is secured. There must be a majority of the national vote in favour of the proposed law and a majority in favour of that law recorded in a majority of the States of Australia (i.e. in at least at least four of the six States).[109]

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[107] IC, art 356.
[108] AC, s 128.
[109] A.R. Blackshield and G. Williams, *Australian Constitutional Law and Theory* (Federation Press, Sydney, 2014, 6th Ed.) 1338. Of the eight proposals that secured the double majority requirement in AC, s 128, seven of them won majorities in every State.

These provisions have proved extremely challenging for those who have proposed formal changes to the Australian constitution. In the 118 year history of the Australian Commonwealth, there have been 44 proposals for the amendment of the Constitution. There have been no such proposals in the past 20 years. Only 8 proposals have succeeded. In the case of some proposals, where the suggested amendment has been submitted successively two or three times, the experience has been that the proposal has been lost again, usually with an increased majority of opponents. Similarly, analysis has shown that, if the double majority requirement were removed and it were sufficient to secure a national majority for alteration and a majority in three of the six States, the number of referendum proposals that would have been adopted would not have been increased.

Constitutionally speaking, Australia is therefore a nation where it is extremely difficult to achieve a formal amendment to the constitution. Only possibly the United States of America has a constitutional amendment requirement in which it is more difficult to succeed.

Given the huge population of India, its many unique challenges, the responsibilities imposed on its institutions of government for such a large segment of humanity, and the perils that accompanied its emergence to nationhood, as well as the length and detail of its constitutional text, it is not surprising that the provisions for amendment of the constitution should have been markedly simpler and more flexible. A power is granted to the Parliament of India, to add to, vary or repeal “any provision of this constitution” in accordance with the procedures laid

down.[110] The general textual requirement is that the Bill proposing the amendment must be passed in each House of Parliament by a majority of not less than two thirds of the members of that House present and voting.[111] Certain special provisions are made in the case of certain amendments. And it is declared "for the removal of doubts" that "there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article".[112]

Notwithstanding the last mentioned emphatic provision, and the purported prohibition on any court calling into question an amendment passed in accordance with the article,[113] the Supreme Court has repeatedly held that a privative clause, excluding judicial review, is incompatible with the Indian constitutional scheme as to the distribution of constitutional powers.[114] The court has determined, on the contrary, that the "amendment" power is subject to the "basic structure" of the Indian constitution because an amendment must leave sufficient of that which is "amended" in place in order to constitute an "amendment". It must not be characterised as an overthrowal of the Constitution as a whole.[115]

In Australia, the importance attached throughout the life of the constitution to the judicial power in Ch III of the constitution might conceivably invite similar reasoning, in the event of a relevant

[110] IC, art 368(1).
[111] IC, art 368(2).
[112] IC, art 368(5).
[113] IC, art 368(4).
[114] *Indira Gandhi v Raj Narain* AIR 1975 SC 2299.
[115] *Kesavananda Bharati v State of Kerala* AIR 1973 SC 1461, paras 292, 437, 599; see also *Indira Gandhi*, above, paras 251-252 (per Khanna J); [664]-[665] [691] (Chandrachud J) and [555]-[575] (Beg J).

challenge.[116] For example an attempt to change the Australian constitution from a constitutional monarchy to a republic might possibly fail, unless the change were approved by the electors in every State of the Commonwealth, or possibly every jurisdiction. This is because each constituent part of the Australian Commonwealth is itself a constitutional monarchy. Accordingly, an altered Commonwealth, that was partly republican and partly monarchical, might be held antithetical to the scheme of the "alteration" of something so basic. This question has not yet been considered by the High Court of Australia. It may never arise. But the "basic structure doctrine", in the context of the Indian Constitution, affords food for thought for Australian reformers. The Indian doctrine is not an instance of judicial invention or activism. It is not a departure from the constitutional text. On the contrary, it is rooted in the text and the meaning in a constitutional context of the word "amendment". A line has to be drawn. The Supreme Court has to state where the line lies.

It is not surprising that the Indian and Australian constitutions were so similar in basic features so that the differences in their provisions can be confined to specifics. After all, until 1935, India was thought to be moving towards full dominion status within the British Empire, as Australia, Canada, New Zealand and South Africa had earlier done. Four stone pillars still stand in the forecourt of the original Secretariat Buildings in New Delhi. They conform to Lutyens' grand scheme and his design instructions. Those pillars represent gifts from Canada, Australia, New Zealand and South Africa. India was planned to be next such dominion. Inevitably, the Constituent Assembly, drafting the India Constitution, drew on the earlier drafts. So there remain many strong

[116] *Boilermakers' Case* (1956) 94 CLR 254 at 267, 270-274.

constitutional similarities. Their existence should encourage greater knowledge and awareness in both India and Australia of our shared constitutional heritage, so that we continue to learn from each other and to draw, as appropriate, on the experiences of each other. It is with that hope in mind that this article has been written.

CLOSING REFLECTION: OUR BETTER ANGELS

1. *Race:* I have reviewed some of the main points of similarity and difference between the Indian and Australian constitutional documents. Before parting from this subject, I will address two particular topics to show the ways in which the interpretation of constitutional principles can take a wrong turning or, contrariwise, a right turning. Of course, what is 'wrong' or 'right' will usually depend upon individual opinions. Objective error may not became clear for decades or longer, if ever.

Constitutional principles, and doctrine, being expressed in words, will often be unclear. My teacher of jurisprudence, Professor Julius Stone, insisted that judges necessarily possess "leeways for choice" in expressing the correct law.[117] Especially so in constitutional law where the language is sometimes particularly opaque and the values are so contestable. Stone urged that, in the choices they made, judges should be transparent and candid in their reasoning. Sometimes in making their choices, the judges' lesser angels will prevail. At other times their better angels will gain the upper hand.[118]

[117] J. Stone, *Social Dimensions of Law Justice* (Maitland, Sydney) 1966, a view propounded by Karl Llewellyn.
[118] Cf Shakespeare, Sonnet No. 144 (1599); see also A Lincoln, First Inaugural Address, 3 March 1861.

Every constitutional decision-maker or court is challenged from time to time by cases presenting difficult issues. It is the nature of constitutional law that it will raise contests about fundamental questions going to the very heart of the governance of the people of the jurisdiction concerned. Where those questions concern minorities in a nation's population they demand a special wisdom on the part of the decision-makers. This is true in India as it is in Australia.

I begin with the issue of race. The history of the 20th century demonstrated, or many occasions, the deep wells of prejudice and hostility that may arise towards racial minorities, including in the course of constitutional adjudication. It happened many times in the United States in relation to the African-American minority.[119] Likewise it has arisen in relation to Hispanic- American and Japanese-American nationals.[120] Later decisions sometimes reversed the earlier ones and redressed the prejudice and discrimination evident in the earlier decisions. The "better angels" of the United States Supreme Court then came to the fore.[121]

Because India, in colonial times, was subjected to unequal treatment of individuals on the grounds of their, race, caste, sex, religion and place of birth, it was unsurprising that the right to equality, covering all of these grounds of discrimination was expressly included in the fundamental rights guaranteed by the Indian constitution.[122] Yet discrimination on the basis of race, caste, sex and place of birth remained serious issues in

[119] *Scott v Sandford* (*Dred Scott Case*), 60 US 393 (1857) and *Loving v Virginia* 388 US 1 (1967).
[120] *Hirabayashi v United States* 320 US 81 (1943); *Korematsu v United States* 323 US 214 (1944) per Jackson J and Roberts J in dissent.
[121] See e.g. *Brown v Board of Education* 347 US 483 (1954); *Griggs v Duke Power Co.* 438 US 59 (1978).
[122] IC, art 15.

independent India. From the beginning of the operation of the Indian constitution, strong protections were afforded.

This was not so in the case of the Australian constitution. There was no acknowledgment in that document of the rights of the Aboriginal minority (although they were the First Peoples of the land and numbered between 1-2% of the population). Originally, they were not even counted in the census of the population.[123] They were largely ignored and substantially deprived of civil rights essential for their economic wellbeing, specifically in relation to the recognition of their land rights.

A most significant Indian jurist played an indirect part in suggesting a novel remedial approach to Australia's legal discrimination on the grounds of race, specifically the Aboriginal race. In 1988, Justice P.N. Bagwhati, who had served as a Justice and later Chief Justice of India, convened a meeting of senior judges from many lands in Bangalore. I participated in that meeting. It adopted principles that addressed humanity's "better angels" in a clear and practical way; but also a legal way. The *Bangalore Principles on the Domestic Application of Universal Human Rights Norms,* adopted at the conclusion of that conference, suggested that, where there was ambiguity in the law on a particular legal question, a court should prefer the expression of the law that conformed to international human rights norms rather than one that did not.[124] No differentiation was drawn between constitutional and other varieties of law. This was a tool afforded to judges in the performance of their judicial duties generally.

[123] AC, s 127 (repealed in 1967).
[124] *The Bangalore Principles* are annexed to M.D. Kirby, "The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms" (1988) 62 ALJ 514 at 531-532.

It was essentially this principle, that was invoked by the High Court of Australia in its *Mabo* decision in 1992.[125] In that decision, on a matter concerning the content of the common law of Australia, the majority of the High Court of Australia re-expressed the land law of Australia so as to recognise, for the first time, the rights of indigenous people to a recognisable title in their traditional lands. Such recognition would be given where the traditional rights had not already been alienated to third parties, as by a grant of freehold or another inconsistent title.[126] This was an important legal step favouring the indigenous people of Australia. So too was the later apology to them given in the Australian Parliament in 2008 by Prime Minster Kevin Rudd.[127]

In 1967, to remove language that had excluded the power of the Federal Parliament to enact laws favourable to the Aboriginal people, the constitutional text itself had been amended.[128] In 1998, a question arose before the High Court of Australia as to whether the amended constitutional provision would, according to its amended terms, support new federal legislation that was arguably averse to the legal rights and interests of Aboriginal objectors. [129] The attention of the Justices of the High Court of Australia deciding the case, focused on the language of the legislative power granted to the Parliament in the Australian Constitution. The relevant power, as amended, was to make laws with respect to:

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[125] *Mabo v Queensland [No.2]* (1992) 175 CLR 1 at 42.
[126] *Wik Peoples v Queensland* (1996) 187 CLR 1.
[127] The National Apology to Indigenous Australians was delivered in the House of Representatives of the Australian Federal Parliament on 13 February 2008 by Prime Minister Kevin Rudd. It was supported by the Leader of the Opposition, Brendan Nelson, *The Age* (Melbourne) 13 February 2008 and *Hansard (H of R)* , 13 February 2008.
[128] Amending AC, s51 (xxvi).
[129] *Kartinyari v The Commonwealth* (1998) 195 CLR 337.

"(xxvi.) The people of any race, ~~other than the aboriginal race in any State~~, for whom it is deemed necessary to make special laws: …"

The argument for the Federal Government, supporting the challenged enactment, was that there was no ambiguity. A law limiting, restricting or diminishing the rights of Aboriginal citizens was still a law "with respect to the people of any race for whom" it had been "deemed necessary [by the Federal Parliament] to make special laws". They must take the good with the bad. Otherwise, it was argued, every favourable enactment would effectively be constitutionalised. It could not be amended because any change, if arguably unfavourable, would fall outside the power of law-making involving amendments.

For textual and contextual reasons, I concluded that it could be safely left to the courts to decide whether a particular enactment fell within or outside the power considered as beneficial in character. The textual support lay in the use of the words "for whom". This did not mean "with respect to" whom, because when the Australian constitution intended that large ambit, it said so specifically, as it had done in the opening words of s 51 granting the relevant legislative power.

The contextual elements were even stronger. The amendment to the Australian constitution (one of the comparatively few that had secured the approval of the electors in a referendum) was achieved against the background of the political, historical and popular endorsement of a commitment to improving the legal, social and economic status of Australia's Aboriginal people. The change in 1967 was not intended to support laws unfavourable to their interests. At least it should not be so interpreted in discharging the judicial "leeway for choice".

In support of that approach, I invoked the "interpretative principle" expressed in *Mabo* in 1992,[130] and reflected earlier in the *Bangalore Principles* of 1988. As stated by the judges in *Mabo*, one rule upon which the international law on human rights had been clear and unanimous was that laws should not be interpreted, where another interpretation was available, that prejudiced individuals on the basis of their race. In utilising the new lawmaking power afforded by the enlarged ambit of s 51(xxvi.) of the Australian constitution, the terms of the grant of power should not be construed to sustain an adverse enactment.[131] My view was a minority one. The majority upheld the power to enact legislation that was adverse and arguably discriminatory.

This case illustrates the importance in constitutional adjudication of resolving the choices that fall to judges who enjoy the power and responsibility of decision-making. Especially at the level of an apex court, decision making in such cases is rarely clear-cut and unarguable. Inevitably, constitutional values, sometimes illuminated by universal human rights, will have a part to play.

2. *Sexual Orientation*: An issue that was not generally discussed in polite legal circles at the time of the drafting of the Australian or the Indian constitutions has lately arisen before many constitutional courts of the world, including those in India and in Australia. I refer to the issue of discrimination, violence and criminalisation against LGBT persons - a

[130] *Mabo v Queensland [No.2]* (1992) 175 CLR 1 at 42.
[131] *Kartinyari*, above n. 129 at 419 [167].

hitherto stigmatised and silent minority defined by reference to their sexual orientation and gender identity or expression (SOGI).[132]

The reasons for the silence on the part of this minority can be traced to a small number of now widely contested passages in religious scripture, specifically the Jewish and Christian Bibles (and the Holy Koran). On the basis of these passages, British administrators, imposed severe criminal penalties, copied from England, on persons who were convicted of same-sex activity. Upon conviction, such activity attracted, grave punishment (originally including the death penalty), allegedly because of the supposed wrath of God towards those guilty of such conduct. The fact that "the offence" occurred in private, between persons of full age and competence, and although they were consenting, was deemed irrelevant. These factual features provided no legal defence.

Such provisions were in force throughout the British Empire. In the *Indian Penal Code* (IPC),[133] the relevant provision was s 377. In an otherwise astonishing and beneficial legal achievement, the IPC thereby rendered indelible the stigmatisation of a minority of the population of the Indian people. This was a relic of colonial thinking. Yet, although the offence was abolished by legislation in the land of its origin in 1967,[134] and in all Australian States by 1998,[135] no effective steps have been taken by the 21st century in the Indian Parliament to repeal s 377. This was so, despite the increasing and worldwide awareness of the scientific

[132] LGBT stand for Lesbian, Gay, Bisexual, Transgender and includes, Intersex or otherwise Queer persons (sometimes LGBTIQ).
[133] Drafted by Thomas Babington Macauley in 1837; enacted by the Governor-General's Council of British India in 1860; entered into force 1862.
[134] *Sexual Offences Act* 1967 (GB).
[135] When the *Criminal Code Act* 1924 (Tas), s 122 and 127 was repealed in 1998. This followed the enactment in Australia by the Federal Parliament of the *Human Rights (Sexual Conduct) Act* 1994 (Cth) which in turn followed *Toonen v Australia* (1994) 1 *Int Hum Art Rt Reports* 97 (No.3), a decision of the UN Human Rights Committee. See *Croome v Tasmania* (1998) 191 CLR 119.

characteristics of sexual variation and strong statements of the Human Rights Committee of the United Nations and courts and other bodies determining that such penal laws are inconsistent with universal human rights.[136]

In the face of legislative inactivity in India, proceedings were ultimately brought in the courts to challenge the constitutional validity of the impugned provision. Indian citizens and community organisations commenced proceeding in the courts submitting that s 377 of the IPC was invalid because it violated articles 14, 15 and 21 of the Indian constitution. The arguments claimed that the section invaded, relevantly, the most private consensual activities of adult citizens; was contrary to the protections of life, dignity, autonomy and privacy provided by article 21 of the Indian constitution; and violated the constitutional guarantee of equality in article 14 of the Constitution; infringing also article 15 because sexual orientation was a ground analogous to sex, a protected category under the Constitution of India.

In the Delhi High Court, a declaration was made by Chief Justice A.P. Shah and Justice Muralidhar (constituting the Court) that s 377 IPC, so far as it criminalised consensual sexual acts of adults in private, breached articles 14, 15 and 21 of the Indian constitution. That Court held that the terms of s 377 had to be read down so as to be confined in their operation to the constitutionally permissible ambit left over by the protective operation of the Constitution. In its most impressive judicial opinion, the Delhi High Court held: [137]

[136] Ibid. There have been many other decisions of national and international courts on this topic, most of them favourable to the provision of protection and equality. See M.D. Kirby, *Sexual Orientation & Gender Identity – a New Province of Law for India*, Tagore Law Lectures, Universal Law Publishing, New Delhi, 2015.
[137] *Naz Foundation v Union of India* [2009] 4LRC 835 at [130]-[131]; (2009) 1 DLT 277 (Del HC).

> "If there is one constitutional tenet that can be said to be an underlying theme of the Indian Constitution, it is that of 'inclusiveness'. This court believes that the Indian Constitution reflects this value deeply engrained in the Indian society, nurtured over several generations. The inclusiveness that Indian society traditionally displayed, literally in every aspect of life, is manifest in recognising the role in society for everyone. Those perceived by the majority as 'deviants' or 'different' are not on that score excluded or ostracised. Where society can display inclusiveness and understanding, such persons can be assured of a life of dignity and a life of non-discrimination. … It cannot be forgotten that discrimination is the antithesis of equality and that it is the recognition of equality that will foster the dignity of every individual."

The decision and orders in the *Naz Foundation* case were made the subject of appeal to the Supreme Court of India. On 11 December 2013, that court, constituted in a two Justice Bench in *Suresh Kumar Koushal v Naz Foundation,*[138] upheld the appeal. It quashed the orders of the Delhi High Court and confirmed the validity of s 377 IPC. It thereby effectively "recriminalised" millions of LGBTIQ Indian people. The outcome caused dismay in national and international circles. However, a most disappointing feature of the decision lay in the reasoning of the Supreme Court. Its decision had been delayed for a long interval. It was delivered at the last moment, just before the retirement of one of the two presiding Justices. The reasoning was dismissive of the respondents' appeal to constitutional rights, although it was the duty of

[138] [2014] 2 LRC 555; 2013 (15) SCALE 55; (2014 1 SCC 1.

the court to determine these rights. It referred to those rights as "so-called" rights of the gay minority in India. It opined that determination of the claims to protection was for parliament not the courts. This was despite the fact that no action had been taken to afford (or even consider) protective legislative change in parliament. A curative petition to allow re-consideration of the decision in *Koushal* was later brought; but has not yet been determined, although that petition was still pending.

Meantime, in another matter coming before the Supreme Court of India in the *Justice Puttaswamy (Privacy) Case*[139] concerning privacy rights, Justice D.Y. Chandrachud,[140] (after citing the above passages in *Koushal* about the "so-called rights of LGBT persons") went on: [141]

> "Neither of the [stated] reasons [in *Koushal*] can be regarded as a valid constitutional basis for disregarding a claim based on privacy under article 21 of the Constitution. That "a miniscule fraction of the country's population constitutes lesbians, gays, bisexuals or transgenders" as observed in the judgment of this Court is not a sustainable basis to deny the right to privacy. The purpose of elevating certain rights to the stature of guaranteed fundamental rights is to insulate the exercise from the disdain of majorities, whether legislative or popular. The guarantee of constitutional rights does not depend on their exercise being favourably regarded by majoritarian opinion. The test of popular acceptance does not furnish a valid basis to disregard rights which are conferred with the sanctity of constitutional protection. Discrete

[139] (2017) 10 SCC 1 (A nine judge bench of the Supreme Court).
[140] With whom Khehar CJ, Agrawal and Nazeer JJ concurred. Nariman J, Kaul J, Robhe J, Sapre J, and Chelameshwar J each wrote concurring reasons.
[141] (2017) 10 SCC 1, per D.Y. Chandrachud J [126]-[127].

and insular minorities face grave dangers of discrimination for the simple reasons that their views, beliefs or way of life do not accord with the 'mainstream'. Yet in a democratic Constitution founded on the rule of law, their rights are as sacred as those conferred on other citizens to protect their freedoms and liberties. Sexual orientation is an essential attribute of privacy. Discrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual. Equality demands that sexual orientation of each individual in society must be protected on an even platform. The right to privacy and the protection of sexual orientation lie at the core of the fundamental rights guaranteed by articles 14, 15 and 21 of the Constitution.

Justice D.Y Chandrachud went on in the *Justice Puttaswamy Case:*

The view in *Koushal* that the High Court had erroneously relied upon international precedents "in its anxiety to protect so-called rights of LGBT persons" is similarly, in our view, unsustainable. The rights of the lesbian, gay, bisexual and transgender population cannot be construed to be "so-called rights". The expression "so-called" seems to suggest the exercise of a liberty in garb of a right which is illusory. This is an inappropriate construction of the privacy based claims of the LGBT population. The rights are not "so-called" but are real rights founded on sound constitutional doctrine. They inhere in the right to life. They dwell in privacy and dignity. They constitute the essence of liberty and freedom. Sexual orientation is an essential component of identity. Equal protection demands protection of the identity of every individual without discrimination."

There were other criticisms of *Koushal.* However, because an appeal in that matter (or the curative petition) were not their before the Supreme Court in the *Privacy Case*, the Supreme Court withheld relief and left this to be addressed at a later time. That later time arrived quickly in 2019 when the writ petition in *Navtej Singh Johar v Union of India*[142] was returned before the Supreme Court of India to determine a direct challenge to the validity of s.377 IPC. On this occasion the Bench comprised five justices and Dipak Misra CJI presided. The Court unanimously concluded that "section 377 has to be read down as not applying to… consensual sex… between two consenting adults". The section was held to fall foul of article 14 of the Indian constitution and, for reasons given, was additionally inconsistent with articles 15, 19 and 21, "without any legitimate state rationale to uphold such provisions." *Koushal* was overruled. The unanimous Supreme Court finally observed:

> "We may conclude by stating that persons who are homosexual have a fundament right to live with dignity, which, in the larger framework of the Preamble… will assure the cardinal constitutional value of fraternity that has been discussed in some of our judgments… We further declare that such groups are entitled to the protection of equal laws, and are entitled to be treated in society as human beings without any stigma being attached to any of them. We further declare that section 377 in so far as it criminalises homosexual sex and transgender sex between consenting adults is unconstitutional."

[142] (2017) 10 SCC 1, loc cit.

Many passages in the rich jurisprudence of the court in *Navtej Singh Johar* deserve close attention. In his reasons, Dipak Misra, CJI returned to his opinion that constitutional morality" demanded consistence with "inherent elements in constitutional norms and the conscious of the constitution." It was "constitutional morality" not transient "societal morality" that governed determination of constitutional challenges. He insisted the founders of the Indian constitution had adopted an inclusive document which directed the State "to undertake affirmative action to eradicate the systematic discrimination against the backward sections of society and the expulsion and censure of the vulnerable communities by the so-called upper caste/sections of the society that existed in a massive scale prior to coming into existence of the constituent assembly."[143] He emphasised that "a country or a society which embraces constitutional morality has at its core the well-founded idea of inclusiveness".[144] He reverted to a quotation of something I had written,[145] that the *Universal Declaration of Human Rights* of 1948 (UDHR) was uncompromising in its generality of application. I had said:

> "This language embraced every individual in our world. It did not apply only to citizens. It did not apply to 'white' people. It did not apply only to good people. Prisoners, murderers and even traitors were to be entitled to the freedoms that were declared. There were no exceptions to the principles to equality."

In a remarkable review of judicial opinions, philosophical writings, emerging international law and scientific research, Misra CJI embraced

[143] *Johar* per Misra CJ [97] Supreme Court of India, decided 6 September 2018.
[144] Expressed in G*overnment of National Capital Territory of Delhi v Union of India* 2018 (8) SCALE 72. See *Johar* per Misra CJ [118].
[145] *Johar v Union of India,* per Misra CJ [123].

the reasoning of Chandrachud J in the *Puttaraswamy case* that *Koushal* had struck "a discordant note" and could not be regarded as having provided a "valid constitutional basis for disregarding a claim on privacy under article 21 of the constitution" in the case of LGBT people.[146] In a riposte to the *Koushal* reasoning he declared:

> "… The privacy claims of the LGBT population… are not at all "so-called" but are real rights founded on sound constitutional doctrine."[147]

With great insight into the lives of LGBT people, as lived by them, he declared that the constitution of India "allows an individual to lead… a life that one's natural orientation commands" and that by criminalising even consensual sexual acts between adults, s 377 imposed a manifestly arbitrary burden upon adults in the private space.[148] Special mention was made of the "stigma, oppression and prejudice" that had been imposed by s 377 and specifically in relation to transgender people.[149] He called for India to "move from darkness to light, from bigotry to tolerance and from the winter of mere survival to the spring of life – as the herald of a New India – to a more inclusive society."[150] Nothing less than the "right to live with dignity" was acceptable given that "sexual orientation is one of the many biological phenomena that is natural and inherent in an individual and is controlled by neurological and biological factors."

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[146] *Ibid* [123].
[147] M.D. Kirby, "Human Rights, Gay Rights" in H. Sykes and S. Zifcak (Eds) *Humane Rights* 2016 at 5.
[148] *Johar* per Misra CJ [160].
[149] *Ibid*, per Misra CJ [164].
[150] Loc cit, per Misra CJ [238]-[239].

Other reasons of the Justices are equally powerful. The decision in *Navtej Singh Johar* is one that will resonate in the decades to come. It speaks not only to the disadvantaged LGBT population of India. It speaks to all vulnerable minorities, stigmatised for no reason only than for being themselves. This is the abiding and central message of the "constitutional morality" of this important decision.

In Australia, denied of a constitutional bill of rights (or even in most jurisdictions of a statutory charter of human rights and obligations) there have been no equivalent decisions of the High Court of Australia that even begin to approach the effect and ringing language of the Supreme Court of India in respect of the rights of Australia's LGBT community. Little steps have been taken which have afforded confined protections. Thus, in *Croome v Tasmania,*[151] the High Court of Australia upheld the standing of Tasmanian activists to challenge the validity of the state criminal code providing a law similar to s 377 IPC. That challenge was brought on the basis of inconsistency with a new federal Act[152] that had been adopted, based on a decision of the UN Human Rights Committee declaring that the Tasmanian criminal law was contrary to the obligations Australia had assumed under the *International Covenant on Civil and Political Rights* to protect the privacy of people in Australia.[153] Faced with that ruling, the resisting government of Tasmania dropped its opposition to the amendment to the criminal code and adopted reform by legislation. This abolished the last Australian law equivalent to s 377 IPC.

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[151] *Johar*, loc cit [249]-[250].
[152] *Johar*, loc cit [253(vii)].
[153] There are a few limited constitutional rights expressed in the AC. However, none has been held to be specifically relevant to the rights of LGBT people in Australia. Human rights statutes have been enacted in the ACT (*Human Rights Act* 2004 (ACT)), Victoria: *Charter of Human Rights and Responsibilities Act* 2006 (Vic) and Queensland: *Human Rights Act* 2019 (Qld).

Nevertheless, although there have been occasional non-constitutional decisions protective of LGBT people,[154] the landscape has been substantially barren.

When the Federal Parliament twice disallowed legislation permitting recognition of civil unions and civil partnerships in the Australian Capital Territory, enacted under self-government legislation there, an appeal to the High Court of Australia to uphold a third attempt by that Territory's legislature, failed.[155] However, when that decision was announced that disappointed LGBT activists, there was a silver lining. It was the unanimous rejection by the court of any argument that the federal legislative power over "marriage" in the Australian Constitution was confined to a concept of heterosexual marriage. That was predominant when the constitution was adopted in 1901. This ruling made clear the ambit of constitutional power to enact same-sex marriage, if only Parliament agreed.

When such enactment was stalled by resistance in the governing parties in Australia, proposals were made for a national plebiscite to break the deadlock. These proposals were opposed by LGBT representatives as interposing a discriminatory and prejudicial obstacle; of subjecting those affected to animosity and hostility; and imposing costs without proper parliamentary appropriation.[156] These objections were overruled by the High Court and a voluntary "postal survey" was conducted.

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[154] (1998) 191 CLR 119.
[155] *Human Rights (Sexual Conduct Act)* 1994 (Cth). See also *Toonen v Australia* (1994) 1 Int Hum Rts Reports 97 (No.3).
[156] *Toonen v Australia* (1994) 1 Int Hum Rts Reports 97 (No.3). See discussion *Johar v Union of India* per Nariman J [42]-[43].

Again there was a sliver lining. The survey resulted in a strong national vote in favour of marriage equality. The consequence was the *Marriage Act* 1961 was amended in 2016 to allow same-sex marriage throughout Australia. I myself have taken advantage of this amendment in 2019 to marry my partner, Johan van Vloten. Our marriage occurred on exactly the 50th anniversary of our meeting. This long delay illustrated the injustice, inequality and discrimination of denying civil legal recognition to our relationship. In the end, the courts in Australia played only a minor role in securing equality under the law for sexual minorities. There was no equivalent for LGBT minorities like the equality reasoning of the High Court of Australia in *Mabo*, concerning Aboriginal inequality under the law. It is a matter of opinion as to whether the "better angels" of Australian law have been much in evidence in Australian courtrooms, in defence of sexual minorities. Or indeed of other minorities including refugees, prisoners and the disabled.[157]

A lesson of constitutionalism, arising out of the contrasts between developments between the law in India and Australia is, I suggest, the need in contemporary society to provide supplements to the legislative process for protecting, defending and asserting the rights of minorities. Australia's constitution, and its "constitutional morality" developed in a time much earlier than the Indian constitution did. Looking back, it must be acknowledged that it developed in an era of endemic injustice to vulnerable citizens. To women. To Indigenous people. To people of non-Caucasian ethnicity. To LGBT people. To the disabled. To prisoners, refugee applicants and others. The parliamentary process could generally be relied upon to protect the basic rights of the majority, for they elected and were influential upon the governments that come

[157] *Appellant s 395/202 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473.

and go. But for minorities, and especially sometimes unpopular minorities, the record has been patchy and sometimes discouraging to a lawyer believing in equal justice under law.[158]

Modern constitutionalism repeatedly demonstrates the need for an interactive dialogue between the legislative role in upholding the fundamental rights of minorities and the role of the courts in doing so. Providing such a role to the court is justified not only by the growing power of the international human rights movement, evident since the *Charter* of the United Nations in 1945 and the *UDHR* in 1948. It has also been demonstrated in instances where legislatures have failed to address the basic rights of minorities, obliging courts to step in to do so. Charters of rights, whether expressed in national constitutions or in statutory enactments can contribute to civic education in "constitutional morality". They can promote respect for human rights in the legal profession, the judiciary and the bureaucracy, so that most derogations can be dealt with outside courts because fundamental principles have been put beyond unedifying political hostilities.

In this respect, the Indian constitution, as a product of a later time and of a great popular struggle against injustice and inequality, is more modern and effective as an instrument of government than the Australian constitution now is. That is why constitutional dialogue between judges and lawyers in India and in Australia is beneficial, especially to the latter. For any who are in doubt, a reading of the inspiring language of the Supreme Court of India in *Navtej Singh Johar* will be a beneficial experience.

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[158] *The Commonwealth v ACT* (2013) 250 CLR 441 at 459 [23].