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COMMENT ON NAVTEJ SINGH JOHAR AND ORS v UNION OF INDIA (2018)

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Chief Justice Misra served as the 45th Chief Justice of India from 28 August 2017 until his retirement on 2 October 2018. He has left a legacy of many memorable judicial decisions. Many of them concern the application of the Constitution of India.

There is a golden thread connecting several of the decisions, espousing the concept of the Indian nation and its people as a pluralistic, diverse modern society in which long established laws, found to be discriminatory, were held to be unconstitutional when tested on the "anvil" of the language and purpose of the Indian Constitution.[1] Submitted to the testing fire and scrutiny of constitutional doctrine, a number of important laws were found wanting, although Misra CJ's service as Chief Justice on the apex court was brief by international standards (little more than 13 months in all). There is a uniformity in the series of constitutional decisions in which he presided as Chief Justice, affecting basic individual rights and shared human dignity.

[**] Justice of the High Court of Australia (1996-2009); Co-Chair of the International Bar Association Human Rights Institute (2018-).

[1] *Natjev Singh Johar & Ors v Union of India*, unreported, Supreme Court of India, 27 September 2018 ("Johar") per Misra CJ and A.M. Khanwilkar (hereafter Misra CJ) [233].

Born in October 1953, Misra CJ came from a distinguished legal family. His uncle Justice Ranganath Misra served from 1990 to 1991 as the 21st Chief Justice of India. It has been my privilege, at least since the service of Chief Justices Y.V. Chandrachud (1978-85) and P.N. Bhagwati (1985-86), to have known personally many of the chief justices from that time. I included as personal friends several of the successors to the foregoing, including Chief Justice A.M. Ahmadi (1994-97), Chief Justice J.S. Verma (1997-98), Chief Justice V.N. Khare (2002-4) and Chief Justice R.C. Lahoti (2004-5). Justices and Chief Justices of final apex courts in Commonwealth countries share much in common. They attend conferences together; participate in the dialogue about law; face common problems; and sometimes enjoy correspondence and dialogue about topics of shared concern.

No doubt because of my retirement as a Justice of the High Court of Australia in 2009, my personal contacts did not extend to Misra CJ. Only in the closing days of his service as Chief Justice did I have the privilege of an extended engagement with him. This was at the National Law University Odisha in Cuttack. From his hands, as Visitor to the University, I received the honorary degree of Doctor of Laws of that University. Later on the same day I visited the High Court of Orissa in Cuttack before which he had practiced as an advocate and to which he was initially appointed as an Additional Judge in 1996.

Because Misra CJ was still in office at this ceremony, with important decisions pending, we did not discuss the decisions he had given, or was about to give, as Chief Justice of India. As I now look back on the panoply of remarkable judgments in which he led the court as chief justice, I can

see that there would have been many topics in which we would have had much to discuss.

These would have included the case on the entry of women to Sabarimala Temple and the principle of gender equality before the law; the case that removed adultery from the list of criminal offences in the *Indian Penal Code* (IPC)*;*[2] the case on a limited form of euthanasia, permitting the drafting of a "living will" to prevent the imposition of artificial life support systems on a person *in extremis*; the enhancement of the freedom of choice of women, including in the termination of unwanted or dangerous pregnancies; and, on 27 September 2018, the partial invalidation of the criminalisation of homosexual acts in India. In this last case, Misra CJ led the Supreme Court to 'read down', section 377 of the IPC, on the grounds of constitutional requirements. That section would continue to apply to unconsensual and public acts of accused persons; but no longer to adult, private, consensual acts. The burden of the penal law targeting sexual minorities was lifted.

One can see in the constitutional decisions of Misra CJ that I have mentioned, important, common themes. Derived from the text and purpose of the Constitution, the dignity and right of individuals in India to have control over their own adult behaviour were reaffirmed. Many of these decisions reflect controversies that are occurring in other countries at this present time. Faced with a choice, each of them adopts a position on the liberal side of the spectrum of individual rights. Each moves away from the control by the "nanny state" of the individual and upholds the free

[2] IPC, s 497.

choices that individuals make for themselves in self-regarding activity in the course of a life, lived in a modern, democratic society.

All of the foregoing decisions (and many more) would warrant detailed analysis and comprehensive scrutiny. Each would also deserve close attention to the judicial opinions of the other judges of the Supreme Court of India who participated in then with Misra CJ, notably R.F. Nariman J, D.Y. Chandrachud J and Indu Malhotra J. Each would warrant comprehensive reflections on the directions on which this remarkable collection of decisions appears to be leading for the future of Indian law and fundamental rights. [3]

There is no room for such a comprehensive dissection at this stage. Instead, I wish to examine the reasons of Misra CJ in *Johar*. I have three particular reasons for singling out that decision:

* *Johar* corrects a basic error of constitutional reasoning that had emerged in the 2013 decision of the Supreme Court of India in *Suresh Kumar Koushal v NAZ Foundation.*[4] It restores harmony with the treatment of transgender persons under the Constitution of India as stated in *National Legal Services Authority v Union of India.*[5] As I will explain, the decision in *Koushal* reversed an enlightened ruling of the High Court of Delhi in *NAZ Foundation v Union of India.*[6] That decision had been written by a court led by Chief Justice Ajit Prakash Shah. Coincidently, he was succeeded on his retirement as Chief Justice of the Delhi High Court, by Misra CJ. The effective

[3] [2014] 2 LRC 555; [2013] INSC 1096.
[4] [2014] 2 LRC 555.
[5] [2014] 4 LRC 629 (IndSC).
[6] [2009] 4 LRC 838.

restoration of the conclusion in the *NAZ Foundation* case is an outstanding illustration of the robust independence and adherence to principle of the judiciary in India. *Johar* marks constitutionalism in India as strong and distinctive, particularly when compared with what is happening in other constitutional courts in today's world;

* *Johar* was not only important for the liberty of many persons in India and their enjoyment of their fundamental constitutional rights. It was also extremely important, and likely to be influential, in other countries which inherited from colonial times provisions of criminal law similar to, or identical with, s 377 IPC; and

* Because of my own sexual orientation, I found the understanding, sensitivity and expression of legal principle appearing in the reasons of Misra CJ in *Johar*, and also of the other justices in that case, greatly moving and uplifting. Judges are often members of an elite professional class of lawyers whose lives have been very different from those of most of the litigants before them. For that reason, they often find it difficult to express (or even possibly to understand) the burden that the law sometimes casts upon women or minorities in their society. Yet that inhibition is missing from *Johar.* In the case of litigants who are lesbian, gay, bisexual, transgender, intersex or otherwise 'queer' (LGBTIQ) in their sexual orientation or gender identity (SOGI), the near universal practice of pretending to be different from their experienced reality has resulted in a kind of forced silence that has denied the majority (heterosexual) community a full opportunity to understand and work through the lived experience of the LGBTIQ minority.

What is striking about the reasoning of the Supreme Court of India in the *Johar* case is that each of the justices, led by Misra CJ, expressed their reasons in language that showed deep humanity and a determination that a true "constitutional morality"[7] would prevail. This would be so even if that should prove unpopular in the community. Even if it should be surprising to professional and social colleagues. Even if many or most people outside the LGBTIQ minority had little or no known contact with those within it. It was to correct this self-imposed anonymity that, earlier during my service as a justice of the High Court of Australia, I became open about my own situation in my long-term relationship (50 years) with my life partner, Johan van Vloten. Openness contributes to understanding and appreciation.

There have always been homosexual advocates and judges, including on the courts on which I previously served. By the 1990s, I became convinced that a time had come for an end to the "fairy-tale" of the exclusive sexual binarity. In many countries of our legal tradition, in courts of the highest authority, other judges have begun to take similar steps.[8] This is nothing to boast of, because it is an aspect of the true order of nature for variations in sexual orientation and gender identity to exist. Nor is it to be ashamed of. Changes in beliefs, attitudes and laws will happen more quickly through the healing balm of honesty and the embrace of complete scientific truth. That approach underlines the reasoning of Misra CJ in *Johar*.

[7] See e.g. Misra CJ in *Government of NCT of Delhi v Union of India and Ors* 2018 (8) SCALE 73 cited in his reasons in "Johar" at [118].
[8] For example, Justice Edwin Cameron (Constitutional Court of South Africa) and Justice Sir Terence Etherton MR (Court of Appeal of England and Wales).

It also supports the reasoning of the other justices of the Supreme Court of India in that case. It is why that decision in *Johar* is personally uplifting to me, both as a lawyer and former judge and as a homosexual man. It is not just the conclusion and judgment in *Johar* that are noble. It is the reasoning and powerful language that explains the decision.

The correction of Koushal

My engagement with s 377 of the IPC began in the 1990s. By that time, the World Health Organisation (WHO) had appointed me to its inaugural Global Commission on AIDS. In the absence of effective pharmaceuticals, the WHO addressed the initiatives that nations should take to reduce the spread of HIV, the virus that causes AIDS. Arising out of the work of WHO, a principle was adopted, known as the "AIDS paradox".[9] Paradoxically, the most effective way to contain the epidemic was to engage with the social groups most at risk. These included LGBTIQ people. By abolishing or reforming the criminal laws that targeted vulnerable groups, WHO secured reductions in HIV infections. In addition to other countries, I was invited to India to spread this message.

Amongst other initiatives in India, I took part in several workshops with the judiciary that drew attention to the counter-productive consequences of laws such as s 377 IPC. One outcome of this international effort was the initiation of a test case, before the courts of India, to challenge the constitutional validity of the section. That challenge was lodged by the NAZ Foundation, a civil society organisation. It was supported by the

[9] M.D. Kirby, "AIDS Legislation: Turning up the Heat" (1986) 60 *Australian Law Journal* 324.

HIV/AIDS Lawyers' Collective, based in Mumbai and Delhi led by Mr Anand Grover, senior advocate.

Eventually, after overcoming some initial obstacles, the challenge was heard by the High Court of Delhi. The conclusion and orders of that court were pronounced by A.P. Shah CJ and Muralidhar J on 2 July 2009. The court upheld the challenge. It declared that s 377 IPC, so far as it criminalised consensual sexual acts of adults in private, breached arts 14,15 and 21 of the Indian Constitution.[10] The decision was widely praised for its enlargement of individual liberty, reversal of historical discrimination and reduction in the overreach of the criminal law.

Not long after that decision, the University of Calcutta invited me to deliver the 2013 Tagore Law Lectures. These lectures represent one of the most enduring lecture series in the world, established in 1870. Encourage by the rigour and power of the *NAZ Foundation* reasoning, I elected to deliver my lectures on the reform of the law concerning sexual orientation and gender identity in India. The trigger for nominating that topic was the *NAZ Foundation* decision; but also other legal and constitutional rulings, in national and international courts and tribunals. These had rejected criminalisation of the acts of sexual minorities (LGBTIQ) and held such criminalisation to be incompatible with fundamental legal rights and universal human rights.

Shortly before my planned departure for Kolkata to deliver the lectures in December 2013, I was working for the United Nations in Geneva. The *NAZ Foundation* decision had been appealed to the Supreme Court of

[10] See [2009] 4 LRC 838 at 127.

India. Judgment had been reserved for more than a year. One of the judges who had participated in the appeal was about the retire from office. This necessitated the delivery of the judgment on 11 December 2013. The two-judge bench, comprising Justices G.S. Singhvi and Sudhansu Jyoti Mukhopadhaya, upheld the appeal.[11] They set aside the orders of the High Court of Delhi. Once again, the private, consenting sexual acts of adults were subjected the penal sanctions imposed by s 377 IPC. The decision was disappointing. Apart from everything else, it required me to rewrite my Tagore Law Lectures rapidly on the plane to India. My revised text discloses the shock and respectful criticism that I felt at the time.

As I pointed out in my Tagore Lectures,[12] the content of the reasons in *Koushal* substantially comprised a statement of the facts, the history of the provision and the arguments of the parties (including conflicting arguments advanced in submissions by the Government of India respectively by the Home Ministry and by the Additional Solicitor-General). The essential reasoning in response to the constitutional submissions was "extremely brief". [13] So was the stated conclusion which was that "the competent legislature shall be free to consider the desirability and propriety of deleting the section".[14] I observed:[15]

> "The fact that the legislature could, if it chose, change the law expressed in the section seems an immaterial reason to withhold constitutional protection to a minority, if such protection is otherwise

[11] Loc cit.
[12] M.D. Kirby, *Sexual Identity and Gender Orientation – A New Province of Law for India* (Tagore Law Lectures, 2015) Universal, New Delhi, 2015.
[13] Id, 25-29.
[14] [2014] 2 LRC 555 at 631 [56]. See also Tarunabh Khaitan, "Reading Swaraj into. Article 15: A New Deal for all Minorities" (2009) 3 *NUJS LRev* 419 at 422.
[15] Tagore Law Lectures, above n.12, 29.

applicable. After all, the Indian legislature has had plenty of time to act in such a way; but has failed to do so. In modern democracies courts exist to protect the fundamental rights of minorities when legislatures fail to act. That is not necessarily an excess of power on the part of courts. It is precisely how they are supposed to operate. … Legislative inactivity was a reason for action. It was the problem. Belated legislation was not the only solution."

The balance of my Tagore lectures was devoted to explaining the science of sexual variation;[16] the history, overreach and reform of criminal law like s 377 in other jurisdictions;[17] the content on criminal laws affecting LGBTIQ people and the growing impact on laws forbidding discrimination;[18] and the developments in the international community (United Nations, regional bodies and civil society) by which the global community was gradually responding to the perceived injustice of criminal laws and other inequalities affecting people because of their sexual orientation or gender identity.[19] In my concluding words, I quoted Rabindranath Tagore's poem: [20]

"Every moment and every age,
Every day and every night,
He comes, comes, ever comes."

[16] Ibid, Lecture II, 36 ff.
[17] Lecture III, id, 76 ff.
[18] Lecture IV, id, 136 ff.
[19] Lecture VI, id, 190 ff. There was also a lecture on "Relationships Recognition". See Lecture V ibid, 165 ff.
[20] R. Tagore, *Gitangali*. *Song Offerings*, 45. Cited Tagore Law Lectures above n.12, 4. The poem appears in Bangali in *Tagore Lectures*, id, 266.

I predicted that:[21] "Fundamental constitutional rights will be given due effect". And that: "The future is coming".

There followed the presentation to the Supreme Court of a "Corrective Petition" to invite a reconsideration of the *NAZ Foundation* case. One reason why such reconsideration was necessary was the publication, shortly after the decision in the *NAZ* case, of a closely reasoned and powerful decision of a different bench of the Supreme Court of India upholding the constitutional rights of transgender persons which it was extremely difficult to reconcile with *Naz*. [22]

In his reasons in *Johar*,[23] citing the earlier powerful opinion of Chandrachud J in *Puttaswamy,* Misra CJ rejected the dismissal by the *Koushal* bench of the right of redress from the courts in deference to the legislative power as based on "reasons [which] cannot be regarded as a valid constitutional basis for disregarding a claim…". Indeed, the passage in the reasoning in *Koushal* which had most surprised the present reader was the dismissal of the appeal to the courts in India based not on the legislative acts of the Union of India but on the IPC, a law adopted in colonial times by the British Governor-General in Council. Undoubtedly, the IPC was a mighty achievement. Overall, it is still a most impressive statement of the criminal law. With other codes from its era it has contributed importantly to the unity of the Indian nation. However, being an edict of a colonial power, it needs, when challenged, to be carefully reassessed by reference to the Constitution of independent India. This

[21] Tagore Law Lectures, above n.12, 28-29.
[22] *NLSA v Union of* India [2004] 4. LRC 629.
[23] Johar above n.5 per Misra CJ [164].

was what the NAZ Foundation sought. But it was denied by the two-judge bench of the Supreme Court in *Koushal*.

Just as Chandrachud J in *Puttaswamy* had criticised sharply the dismissal in *Koushal* of the invocation of "so called rights" of the LGBTIQ population of India on the basis of their "miniscule number", [24] Misra CJ also rejected such an approach: [25]

> "The rights of lesbian, gay, bisexual and transgender population as per the decision in *Puttaswamy* (supra), cannot be construed to be "so-called rights" as the expression "so-called" seems to suggest the exercise of liberty in the garb of a right which is illusory. The court regarded such a construction … as inappropriate in the privacy-based claims of the LGBT population for their rights are not at all "so-called" but are real rights founded on sound constitutional doctrine."

As to the fact that the LGBT community is small in comparison to the huge population of India, Misra CJ's reasons were firm and compelling:[26]

> "The constitutional framers could have never intended that the protection of fundamental rights was only for the majority population. If such had been the intention, then all provisions in Part III of the Constitution would have contained qualifying words such as "majority persons" or "majority citizens". Instead, the provisions have employed the words "any person" and "any citizen", making it

[24] *Justice K.S. Puttaswamy (Rt'd) and Anor v Union of India* (2017) 10 SCCI at para [144]. (*Puttaswamy*) per Chandrachud J. See also Nariman J in *Johar* at [58].
[25] *Johar*, *ibid* [169] per Misra CJ.
[26] Ibid [170].

> manifest that the constitutional courts are under an obligation to protect the fundamental rights of every single citizen without waiting for the catastrophic situation when the fundamental rights of the majority of citizens get involved.
>
> … What matters is whether the community is entitled to certain fundamental rights which they claim and whether such fundamental rights are being violated due to the presence of a law in the statute book. If the answer to both these questions is in the affirmative, then the constitutional courts must not display an iota of doubt and must not hesitate in striking down such provision of law on the account of it being violative of the fundamental rights of certain citizens, however miniscule their percentage may be."

The approach of the *Koushal* case had been basically contemptuous of the LGBTIQ minority. The approach of Chandrachud J in *Puttaswamy* and of Misra CJ and his colleagues in *Johar,* is respectful and inclusive.

Moreover, the foundation of Misra CJ's reasoning is what he earlier called "the sweep of constitutional morality".[27] This is something more than the views of a popular majority or a "societal morality". It is rooted in the "well-founded idea of inclusiveness".[28] This had been the *Grundnorm* to which Shah CJ had earlier appealed in his reasoning in the *NAZ Foundation* case. The vital point made by Mira CJ and his colleagues in *Johar* is that the LGBTIQ minority is part of, and incontestably included in, the diverse Indian nation for constitutional purposes. It is thus not only the disappointing order in *Koushal* that Misra CJ and his colleagues

[27] *Government of NCT Delhi v Union of India* (2018) (8) SCALE 72 cited *Johar* [118].
[28] Ibid, per Misra CJ [124].

overturned. It is the dismissive and even contemptuous language in which the rejection had been voiced in *Koushal* that was so surprising. Those who look deeply at the language of judicial reasoning see disclosed the fundamentals values of the judges and of the approach they have taken, especially where constitutional decision-making is concerned.

The influence of the IPC

The reasons of the Supreme Court of India in *Johar* make it clear that the decision, invalidating s 377 IPC, was particular to the judicial vision of articles 14, 15 and 21 of the Indian Constitution. Because constitutional jurisprudence is often related to considerations of history, culture and domestic precedents, what is done by the courts of one country will not necessarily afford a basis for action by the courts of another. Nevertheless, as the reasoning of Misra CJ and his colleagues in *Johar* demonstrates, it is by no means unusual today for a constitutional court in one country to be informed and influenced by judicial reasoning in another. This is so particularly in the case of countries with similar constitutional and legal traditions, using a common language of decision-making and a shared tradition of analogous reasoning.

Judges do not now hold themselves bound to apply the decisions of foreign courts. Some judges are quite hostile to references in constitutional cases to foreign authority.[29] However, the Supreme Court of India refers to such developments as they are relevant. Indeed, it was Bhagwati CJ of India, who in 1988, presided over the judicial meeting in Bangalore that adopted influential principles encouraging such

[29] See e.g. *Al-Kateb v Godwin* (2004) 219 CLR 562; [2004] HCA 37 at 592 [68] ff per McHugh J. Contrast at 618 [156] ff, per Kirby J.

reasoning.[30] True to this approach, Misra CJ and other justices, made numerous references in their reasoning to contemporaneous decisions of constitutional courts in considering the validity of homosexual offences, measured against the constitutional requirements of fundamental rights.[31]

Consistently with the *Bangalore Principles*, the reasons of Misra CJ in *Johar* contain important analysis describing the emerging constitutional jurisprudence respectively of the United States of America; Canada; South Africa; the United Kingdom and courts in other jurisdictions. [32] He traces the developments in the European Court of Human Rights and the evolution of thinking in the United States Supreme Court.[33] He also draws on a line of decisions of constitutional courts from Ecuador, South Africa, Fiji and recent decisions of Belize, Trinidad and Tobago, Hong Kong, Israel, Canada, Nepal and other lands.

This examination provides a powerful indication of the worldwide trend acknowledging the error of the approach previously taken in penal legislation like s 377 IPC. By reference to this stream of jurisprudence, it builds a most powerful case to show that criminal laws such as s 377 represent a serious overreach of the proper function of criminal law.[34] Moreover, it is an overreach that is incompatible with constitutional notions of human dignity, equality and privacy. I pay a tribute to the learned and comprehensive analysis which the reasons of the Supreme Court of India provide. It is a cornucopia of textual analysis; ancient and modern history;

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[30] M.D. Kirby, "The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms" (1988) 62 *Australian Law Journal* 514. Cf *Johar* (above) per Misra CJ [98] ff on "India's commitments at international law".
[31] *Johar*, per Misra CJ, ibid Part IV para [118]-[128].
[32] *Johar*, ibid [118]-[129].
[33] From *Bowers v Hardwick* 478 US 186 (1986) to *Lawrence v Texas* 539 US 558 (2003) and beyond.
[34] *Johar*, per Misra CJ [127] ff.

philosophical reasoning; and doctrinal application. Misra CJ draws deeply on the specific history of India.[35]

Thus Misra CJ cites Dr Ambedkar's remark in the Constituent Assembly of India that: "Democracy in India is only a top-dressing on an Indian soil which is essentially undemocratic". The building of true democracy, non-discrimination, equality, fraternity and secularism were the challenges that the Constitution of India accepted.[36] There is no more powerful and elegant portion of Misra CJ's reasons in the s 377 case than this. It calls in aid Dr Ambedkar's warning:[37]

> "Constitution morality is not a natural sentiment. It has to be cultivated. We must realise that our people have yet to learn it."

The courts, led by the Supreme Court, are amongst the greatest teachers. Courts must contribute by "transformative constitutionalism".[38] In the pantheon of affirmations of human dignity and liberty in this world, there will certainly be included the reasoning of Misra CJ in *Johar*:

> "We hold and declare that in penalising [consensual sexual conduct between adults of the same sex] the statutory provision violates the constitutional guarantees of liberty and equality. It denudes members of the LGBT communities of their constitutional right to live fulfilling lives. In its application to adults of the same sex engaged in consensual sexual behaviour, it violates the constitutional guarantee of the right to life and to the equal protection of law… Our

[35] Ibid [140].
[36] Id [141].
[37] Id [141] citing Dr Ambedkar.
[38] Id [147]-[148].

> constitution above all, is an essay in the acceptance of diversity. It is founded on a vision of an inclusive society, which accumulates plural ways of life."

The special significance of the *Johar* decision, even beyond the borders of India which mark out its immediate application, lies in the fact that the IPC also applies, in most of its language, in many neighbouring lands. It has been renamed but is still substantially applicable in Pakistan, Bangladesh, Burma (Myanmar), Malaysia and Singapore. It has been highly influential in other countries. It was one of the three codes which were exported to the far-flung colonies of the British Empire. The particular identity of the IPC as the inspiration for other national penal legislation makes it obvious that such countries must face and respond to the magisterial reasoning of the Supreme Court of India. They must do so not only out of respect for that Court and its most populous country; but also, for the enormous power of the judicial reasons that supported the conclusion in *Johar*. Especially is this so because in some countries the constitutional framework and the expressed fundamental rights (to life, equality, dignity and privacy) are also reflected in their national constitutions. So far, the analogical argument, based on the earlier decision of the High Court of Delhi in *Naz Foundation* has not persuaded courts in neighbouring lands.[39] But now *Johar* has been pronounced

In praise of constitutional morality

Prior to the decision in *Johar*, a majority of the states of the Commonwealth of Nations still adhered to the "unnatural offences" of the

[39] Cf *Lim Meng Suang v Attorney-General* (Singapore) [2013] 3 SLR 118. Discussed in Tagore Law Lectures above 127, 129-130.

kind contained in s 377 IPC. One, (Brunei) had even increased the punishments available on proof of homosexual offences, having reintroduced the death penalty (although reputedly this law has not commenced operation).[40] Others (for example Maldives) have repealed previous statutory provisions and applied Sharia Law and punishment.[41] Most have simply left the colonial law standing; with the result a log-jam has arisen, impeding the reform and repeal of sodomy laws. In many (but not all) countries in this category, securing change in the law is difficult. Politicians refer to local cultural and religious views to excuse reform and justify the status quo.[42] This is why, increasingly, reformers are returning to the courts with their appreciation of the limited functions and capacity of the criminal law and the attraction to the principles of rationality and proportionality.

The continuing deep division in the international community on this issue can be seen in the response within the United Nations to the invocation of the universal principles of human rights. Philosophers, sociologists, economists and lawyers may suggest that change is inevitable.[43] However, global politics all too frequently reveals the sharp division amongst the nation states. When the United Nations Human Rights Council created the office of an Independent Expert on violence and discrimination against people on the grounds of their sexual orientation and gender identity, repeated efforts were made in the Council, in the committees of the UN General Assembly and in the plenary sessions of the General Assembly to revoke the resolution creating the office, or to

[40] *Penal Code*, s 377 (Unnatural Offences).
[41] The *Penal Code of Maldives* from 19 September 20016 was repealed in its application to sexual offences to be replaced with Sharia Law.
[42] M.D. Kirby, "Asia and Oceania LGBTI Law Reform: Breaking the Log-Jam" (2016) *Hong Kong Law Journal* 1.
[43] See e.g. S. Pinker, *The Better Angels of our Nature: Why Violence has Declined* (New York, Viking, 2011, 1)

disallow the budgetary item necessary for its operation.[44] Eventually, in December 2016, following a number of forced votes, the office of Independent Expert survived. However, it did so by the narrowest of margins. It continues to be attacked with animosity.

It is hard to read the opinions of the Supreme Court of India in *Johar* and to compare them with the hostility and antipathy that remain in many hearts and minds. Especially in the case of mean of power. India consistently abstained in the votes on this issue. Thankfully, India's "constitutional morality" responded with power and decisiveness.

That imperative has now produced a decision which the government of India expressly left to the "wisdom of the Court", although it had not drawn on its own wisdom to lead the legislature to the same outcome.

In years and even centuries to come, constitutional lawyers, jurists and teachers of law will expound the erudition and wisdom of the Supreme Court in *Johar*. It is my prediction that it will be appreciated long from now as a high point in the jurisprudence of the Court. It will also be lasting legacy to the service of Misra CJ and the other participating justices.

Throughout his reasons there are many passages that provide persuasive argumentation and convincing rhetoric. Yet equally, there are many passages evidencing deep awareness of the human condition and the centrality of personal dignity and autonomy.[45] They appear in the explanations of why s 377 can be viewed as an affront to human dignity.[46]

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[44] M.D. Kirby, "A Close and Curious Vote Upholds the New UN Mandate on Sexual Orientation and Gender Identity" [2017] EHRLR, Issue 1 2017, 37-42.
[45] *Johar* (above) per Misra CJ [125], [129].
[46] *Ibid*, [133]-[134].

They appear in the empathetic understanding of the vital importance of companionship "so long as such companionship is consensual, free from the device of deceit, force, coercion and does not result in violation of the fundamental rights of others". [47] They are seen in the poetic words of Nelson Mandela[48] and of Martin Luther King Jr. [49] They can be found in the invocation of Sir Edward Coke,[50] Edmund Burke,[51] Alexis de Tocqueville[52] and the ever-stirring language of Justice Krishna Iyer.[53] Misra CJ insists on the dynamic capacity of transformative constitutional morality.[54] He rejects the subjection of a minority to social "pariah status".[55] He invokes the right and dream we all have to the "joy of life".[56]

Judges do not exercise their offices to secure praise, still less thanks. Generally speaking, the judicial life is lived in solitude and isolation. The cheers of the crowd are never heard or only at a great distance. Thanks is rarely expressed.

As one, in another country, who grew up alongside a law similar to s 377 IPC[57] the stirring and emphatic language of Misra CJ and his colleagues spoke directly to my mind and heart. Because it speaks to India with its mighty populous, and beyond India to countries facing an identical challenge, I felt gratitude and appreciation. Into the prose of *Johar* has been poured a huge labour of analysis, justification and explanation.

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[47] *Id* [137]; [155].
[48] *Id* [149].
[49] *Id* [174].
[50] *Id* [245].
[51] *Id* [178].
[52] *Id* [128].
[53] *Id* [131], [179], [232].
[54] *Id* [129]; [237 iv].
[55] *Id* [239].
[56] *Id* [246].
[57] *Crimes Act* 1900 (NSW), ss 79-80.

The minority immediately affected rejoices. But, in the end, the beneficiaries will be all people living in diversity and equality in a society that safeguards the fundamental rights of everyone: not just the majority and not just the popular.

> "We must realise that different hues and colours make the painting of humanity beautiful and this beauty is the essence of humanity… Attitudes and mentality have to change to accept the distinct identity of individuals and respect them for who they are rather than compelling them to 'become' who they are not".[58]

M.D. Kirby

[58] *Johar* above, [250], per Misra CJ