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**THE CENTENARY OF THE FIRST ABOLITION OF CAPITAL PUNISHMENT IN
QUEENSLAND: A STUDY IN LAW AND HUMAN DIGNITY***

Michael Kirby AC CMG**

On 1 August 1922 the Parliament of Queensland enacted a Bill to abolish capital punishment. This was the first jurisdiction in the common law world at that time to take that step. It afforded an example and a challenge to the global community. In this article, which derives from the author's speech to a centenary celebration of the Queensland innovation, the author explains the background of reforms and modernisation of the criminal law and procedure that stimulated the reform. He explains the opposition to reform of many judges and other lawyers and the disappointing record of the High Court of Australia in capital punishment decisions. He also explains recent reforms that have been adopted in Papua New Guinea, Kazakhstan, Malaysia and elsewhere. He recounts earlier instances of partial reform in the United States and other countries, and he lists the continuing opposition to reform in Iran, Singapore, and Myanmar/Burma. Whilst such 'hold outs' remain, Australians must continue to advocate abolition. They can take encouragement and inspiration from the innovative reform achieved in Queensland a century ago.

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* This article is based on an address by the author at the centennial celebratory conference held in the Premier's Hall, Parliament of Queensland on 1 August 2022.

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I WHAT IS PAST

English traditions, from which Australia derived the common law system of law and the Westminster Parliament, constitute a mixed bag of positive and negative gifts. This can also be said for the athletes of many popular sports: exhibiting a dedication to fierce contest, fought under rules of fair play but resulting in savage outcomes. The legal system of the common law includes peculiar features: the accusatorial trial and the adversarial system. These elements of English culture have also influenced parliamentary systems for resolving large political and like disagreements. A growing revulsion against aristocratic rule and unequal representation in the legislature led, in the first years of the 20th century, both in Britain and Australia, to universal franchise and forms of electoral democracy, organised through parliamentary representation of local constituencies. The gradual advance of this system ultimately resulted in rule by legislation approved in broadly representative parliaments. A reflection on the potential for chaos inherent in the American presidential system, copied from the norms of Hanoverian traditions, led eventually to a much fairer institution of governance by the Westminster legislature, preferable by far to the American Constitution – a system frozen in time by the governmental model of King George III.

The evolution of the English criminal trial system also witnessed many steps:

- The early systems of trial by ordeal and combat were replaced by a mode of contest, intellectual rather than physical;
- The accused was permitted to give an unsworn statement of their version of the facts that was not sworn on oath lest accused persons might imperil their immortal souls by a temptation to self-defensive perjury;
- The alteration of the earlier rules of trial, so as eventually to permit the accused person to give his or her evidence about contested issues previously forbidden;
- The creation of a trained police force and professional prosecutors succeeding the armed corps of citizens and subjecting the players to rules of

law and procedure devised and enforced by judges who were, in theory at least, independent and neutral as between the Crown and the accused;

- Enlarging the procedures by way of permitting reserved points of law to be reserved for scrutiny by a special court after the trial so as to examine the legal accuracy of judicial directions given by the presiding judge to the jury;
- Ultimately, the right of the accused to give sworn evidence if that was elected and the winding back of unsworn statements as the principal mode of putting forward the accused's version of events contested before the jury;
- Enlarging in 1909 the grounds of appeal to permit appellate reconsideration, not only of reserved points of law and the accuracy of judicial directions and rulings, but also provision for consideration of the risk that a miscarriage of justice had occurred, against which appellate protection was justified and provided;¹ and
- Ultimately replacing petitions to the Crown's prerogative of mercy by a recent change allowing a second appeal where the appellate court is convinced that "fresh and compelling evidence" exists to justify the provision of leave for a retrial or proceeding directly to a judicial order of acquittal.²

The foregoing list of reforms in criminal procedures by no means exhausts the attempts of the criminal justice system to avoid the previous risks of serious miscarriages of justice. However, one particular feature of the trial system of British criminal procedure actually multiplied the risk of uncorrectable error. This was occasioned by a long persisting fairly universal feature of cruel punishments. These included the availability of the sentence of death that applied to a very large and persisting number of criminal convictions in England. Capital punishment was quickly adopted in England's overseas colonies including Australia, notably in Queensland. The reform of this aspect of criminal punishment proved most resistant to change. This is why the abolition of the availability of the sentence of death in Queensland on 1 August 1922 – a century ago – is so worthy of remembrance in 2022. Not long after I first became a judge in 1975, I sat in the sunshine in a park in Shepparton, Victoria. I conversed about the older times with Justice (later Sir) Murray McInerney, Judge of the Supreme Court of Victoria. We conversed

¹ As in *Pell v The Queen* (2020) 268 CLR 123.

² Legislation to permit a second application for leave to appeal to a court of criminal appeal applies in South Australia, Tasmania, Victoria, and Western Australia.

during our respective lunch hours. He answered my questions about the particular burdens that he remembered from those days. This fine, sensitive, and experienced judge was heavy with honours for his long service to the law. Into his mind, came swimming a recollection of a capital case long ago. In it he had had picked up a “dock brief”, a rough form of legal aid by which the youngest barristers were assigned a brief for an accused person in a criminal trial. “Do your best” he was enjoined as the trial soon to open. The young lawyer, who had entered the legal profession believing in its nobility and dedication to justice, suddenly came face to face with the remembrance of things past. A day he had never forgotten. In the case according to his remembrance, he did not secure the miracle of an acquittal for his client. The prisoner had neither the merits nor the barrister with technical magic to ensure success in that trial. It was technically just; but unimaginably a horror story for client and lawyer alike. An old judge conversing in a country park with a young judge, listening in astonishment and dread to the story. I saw that the old judge was weeping at the memory of that far off ordeal. Imagining the tears of the accused, when told that his young and inevitably inexperienced counsel had done his best in the circumstances. The statute book and the old common law contained hundreds of offences for which the death penalty was prescribed. In fact, hanging was a comparatively benign form of capital punishment for the English. Offences recorded in the English State Trials involved many features worse than hanging.³ Burning, drowning, and drawing and quartering together with public exhibition of the end of a former human life and its display, on a pike, showed how ferocious the punishments prescribed by the English law for the King’s enemies amongst “the criminal classes”. It did not stop in England.

The spread of hanging as the common form of punishment on conviction of a felony anywhere in the British Empire was not considered in the early days of Empire particularly disproportionate or shocking to most. The advance of the reform movement owed little credit to Blackstone or other legal scholars. They accepted the death penalty for it had long been thus. For the cause of reform, much more was owed to Blackstone’s contemporary Bentham, and the latter’s successor and disciple J S Mill, writing from the standpoint of rational utilitarianism. Drawing ideas from scholars of the European enlightenment who did not share the English complacency about the widespread

³ See *Hayne’s Case* [1614] 13 Co Rep 133 (theft of a winding sheet from bodies of disinterred deceased).

punishment involving deliberate killing of convicted felons and antipathy towards reform.⁴ Bentham and Mill attributed most of the opposition to reform, to “Judge and Co”, ie the Bench and Bar whom they blamed for the overly complex, chaotic and punitive system of criminal liability and punishment.⁵ The invention of transportation to far distant colonies (in America and Australia) were an illustration of how slow the process of reform in criminal punishment took in English-speaking countries. This was the ‘civilised’ system that helped the ‘white’ newcomers to rule the new Great South Land. Ultimately, it was to prevail over the First Nations people protected by a criminal justice system they had convinced each other was proportionate, just, and equal in its application to people of every race. Little did they acknowledge that such system was specifically harsh in its impact on the lower class ‘whites’ and the dispossessed ‘blacks’ alike.⁶ After the establishment of the convict colonies in Australia and the passage of a little more than a century of colonial rule, the Commonwealth was created. The first century marked the creation of the establishment of the High Court of Australia. For a celebration of these notable achievements, the centenary of the High Court of Australia was marked. I wrote a critical description of the role of the High Court of Australia in a century of capital cases.⁷ There were occasional glimpses of enlightenment in some of the cases. On the whole, however, many of the cases revealed the same judicial hostility to reform that Bentham and Mill had complained of a century earlier and on the opposite side of the world. Sixteen reported appeals against convictions carrying the death penalty were reported. Some of them provided a reprieve for the convicted prisoner. These included *Tuckiar v The King*⁸ where the court overturned the sentence of death of the prisoner, described as a ‘completely uncivilised Aboriginal native’.⁹ However, in most other cases the trial judge’s conduct of the trial was accepted as having offered an accurate trial. The majority of the High Court repeatedly refused to intervene.¹⁰ Overwhelmingly, sentences of death were confirmed. No techniques of constitutional

⁴ HLA Hart, ‘Jeremy Bentham’ in AWB Simpson (ed), *Biographical Dictionary of the Common Law* (Butterworths, 1984) 44.

⁵ *Ibid* 45-6.

⁶ See Michael Kirby, ‘Black and White Lessons for the Australian Judiciary’ (2003) 23 *Adelaide Law Review* 195.

⁷ Michael Kirby, ‘The High Court and the Death Penalty: Looking back, looking forward, looking around’ (2003) 77(12) *Australian Law Journal* 811.

⁸ (1934) 52 CLR 335.

⁹ *Ibid* 339 (Gavin Duffy CJ, Dixon, Evatt and McTeirnan JJ).

¹⁰ See eg, *Sodeman v The King* (1936) 55 CLR 192.

reasoning were invoked to cast doubt on the punishment. Even in obiter dicta, the justices of the High Court never expressed doubts as to its legitimacy or about the part they were playing in the judicial orders followed soon after by the imposition of the sentence of death.¹¹

Specially shocking amongst the cases was the decision of the High Court in the case of an Aboriginal prisoner, Rupert Max Stuart.¹² He was ultimately saved from hanging, not by the judiciary or legal reasoning, but by political pressure exerted on the executive government in his newspaper by another Adelaide Rupert (Rupert Murdoch).¹³ It is a story that, arguably, displays the worst of the judicial heartlessness about which Bentham and Mill had repeatedly complained.

For most of the last century, the Judicial Committee of the Privy Council in London provided the last word in appeals against the imposition of the death penalty. Surprisingly perhaps, that imperial court in London came by 2000 to adopt an approach urged by a New Zealand member, Lord Cooke of Thorndon. Drawing on principles of international human rights law, Lord Cooke said that special ‘vigilance’ was required before upholding convictions and sentences including a death sentence.¹⁴ Eventually, Lord Cooke’s approach was adopted by the Privy Council.¹⁵ Possibly they were influenced by the fact their decisions were subject to a petition to the Inter-American Commission on Human Rights. Looking back, the notion that “special vigilance” was required where rejection of consideration of legal and factual arguments would result in the execution of the prisoner, it was not an especially surprising principle for the highest judges, the ultimate guardians of justice, to embrace. However, in the High Court of Australia decisions, over its first century, only Justice Isaacs (later Chief Justice); Justice Evatt; and sometimes Justice Dixon (also later Chief Justice) exhibited any inclination to such a vigilant approach of special scrutiny.¹⁶ It is not a famous chapter in the High Court’s legal history.

¹¹ Kirby, ‘The High Court and the Death Penalty’ (n 7).

¹² *Stuart v The Queen* (1939) 101 CLR 1.

¹³ M Kirby, ‘Black and White Lessons for the Australian Judiciary’ (2002) 23 *Adelaide Law Review* 195, 204.

¹⁴ *Higgs v Minister of National Security* [2000] 2 AC 228, 260 (Lord Cook in dissent).

¹⁵ *Lewis v Attorney General of Jamaica* [2001] 2 AC 50.

¹⁶ Kirby, ‘Black and White Lessons for the Australian Judiciary’ (n 6) 812, 816-7.

In a way, this was a particularly astonishing feature because of the attention given about the highly publicised wrongful conviction of Timothy Evans for the actions later found to have been performed by the mass murderer John Christie.¹⁷ That case showed what could happen when judges were insensitive to the risks of error later revealed. The emergence of DNA and other forensic exculpation of convicted prisoners, increased, at last, the approach of “special vigilance” in capital cases. Eventually, such shocking cases led to an approach calling for the abolition of the death penalty in England, Australia and elsewhere. In this, the repeal in Queensland was a forerunner.

By August 2003, the time of my review of the dismal record of decisions in the High Court involving capital crimes, a poll of Australians showed that about 56% were still in favour of the death penalty for those found guilty of committing ‘major acts of terrorism’.¹⁸ Gradually, the proportions changed. Political and public opinions in many jurisdictions shifted in favour of abolition. However, the fact that, in the present century, a majority were still in favour of executing some prisoners convicted of crimes of seriousness, shows that the shift towards abolition is far from deeply entrenched. Barbaric or uncivilised overreach of the law can still return. Enlightenment on this subject is a relatively recent achievement in most English-speaking jurisdictions. Restoration is far from impossible.¹⁹ In many of the 56 member countries of the Commonwealth of Nations,²⁰ the continued imposition of the death penalty has endured hand in hand with criminal punishment for homosexual offences. Of the 56 countries, 32 retain the death penalty either on the books or in practice,²¹ and 34 countries in the Commonwealth of Nations also favour the retention of the criminal offence of consensual, private sexual conduct

¹⁷ J Scott Henderson QC, *Report of an inquiry into certain matters arising out of the deaths of Mrs Beryl Evans and of Geraldine Evans and out of the murder of Geraldine Evans* (House of Commons, Command Paper No 8896, 29 July 1953); J Scott Henderson QC, *The case of Timothy John Evans* (House of Commons, Supplementary Report, Command Paper No 8946, 5 November 1953); Ludovic Kennedy, *Ten Rillington Place* (Victor Gollancz, 1961).

¹⁸ Steve Lewis, ‘Terrorists Should Die: poll - Majority in support of Amrozi execution’, *The Australian* (19 August 2003) 1.

¹⁹ Nigel Jones, ‘Is the death penalty making a comeback?’, *The Spectator* (online, 30 July 2022) <<https://www.spectator.co.uk/article/the-shadow-of-the-noose---is-the-death-penalty-making-a-comeback-/>>.

²⁰ See generally ‘Member countries’, *The Commonwealth* (Web Page) <<https://thecommonwealth.org/our-member-countries>>.

²¹ Amnesty International, *Death Sentences and Executions 2021* (Amnesty International Global Report No ACT 50/5418/2022, 2022) 63 <https://www.amnesty.org.au/wp-content/uploads/2022/05/REPORT_-Amnesty-Death-Sentences-and-Executions-2021-v2-web.pdf>.

involving adult participants of the same sex.²² Importantly, of these 34 countries, 26 countries still either retain the death penalty in theory or practice.²³ As Jeremy Bentham pointed out, acceptance of serious overreach of the criminal law often coincides with attitudes of indifference to arguments of disproportionality and excessive punishment for crimes generally. These attitudes often coincide with, and reveal, a common attitude to traditional crimes and punishment.

II WHAT IS PASSING

Reform of criminal laws against sexual minorities has seen progress steadily, but slowly. Progress on the death penalty might benefit from lessons deriving from the help of the United Nations in upholding civilised rules that restrain excess and disproportionality in criminal law and punishment more generally. Within the United Nations system, an Independent Expert on Sexual Orientation, Gender Identity and Expression ('SOGIE') was created by the United Nations Human Rights Council in 2016. The first person elected to that office was Professor Vitit Muntarbhorn (Thailand). On his resignation in 2018, he was replaced by Mr Victor Madrigal-Borloz (Cost Rica). Within the Human Rights Council, on each occasion that the mandate of the Independent Expert on SOGIE has come up for extension, there have been strong statements in opposition. These have mainly come from African countries, China and some Asian countries, the Russian Federation, and some Commonwealth of Independent States countries. Nevertheless, the office on SOGIE has survived. In a recent vote, 23 countries voted for continuance, 17 countries voted to terminate the mandate, seven countries abstained, and a number were absent from the vote.²⁴ A shift of a few countries to join the opposition to continuance would have terminated this office. That indicates the fragility of support for the mandate. However, it continues to exist as a flash point for international progress on LGBTIQ issues. The same hostility overlaps with the identity of opponents to national and international action on

²² Mai Sato and Christopher Alexander, 'State-sanctioned Killing of Sexual Minorities: Looking Beyond the Death Penalty' (Report, 4 March 2021), 79 (Appendix 1) <<https://doi.org/10.26180/14069318.v3>>.

²³ That is to say, 15 countries are retentionist (Antigua & Barbuda, Barbados, Bangladesh, Dominica, Guyana, Gambia, Jamaica, Malaysia, Nigeria, Pakistan, Saint Lucia, St Kitts and Nevis, St Vincent and The Grenadines, Singapore, and Uganda) and a further 11 countries retain the death penalty however are abolitionist in practice (Brunei, Cameroon, Grenada, Ghana, Kenya, Malawi, Mauritius, Sri Lanka, Sierra Leone, Tonga, and Zambia). See Amnesty International, *Death Sentences and Executions 2021* (n 21).

²⁴ Human Rights Council, *Mandate of Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity*, 50th sess, A/HRC/RES/50/10 (7 July 2022) <<https://undocs.org/A/hrc/res/50/10>>.

the death penalty. The same countries would probably be found in an open vote in the Human Rights Council ('HRC') concerning the strengthening of the opposition, on human rights grounds to the continuance of the death penalty. Nevertheless, the degree to which the mandate on the Independent Expert on SOGIE has survived shows the way in which the international community has increasingly come to accept that mandate as representing the future enlightenment of the international legal order. This affords both encouragement and an example to international endeavours to view capital punishment, like sexual orientation crimes, as a global project, not just an issue reflecting local culture and individual differences. There are only so many such projects that the international community can ordinarily tolerate at any given time. However, the lesson of the HRC response to sexuality crimes and other human rights abuses carries a message for the continuation and enlargement of the global community's response to resistance to the death penalty.

Strangely, perhaps more progress may be anticipated in respect of progress on abolition of the death penalty than in respect of sexuality. Three notable recent instances illustrate this proposition.

Firstly, Papua New Guinea. On 23 March 2022, Papua New Guinea ('PNG') presented a response to the HRC's recommendations that PNG had received as a result of its third cycle of Universal Periodic Review ('UPR').²⁵ UPR is the procedure, adopted by the UNHRC, to limit special human rights mandates and procedures to the most egregious cases. Consideration of themes and issues on the global human rights agenda, has produced a rotating procedure for scrutiny of countries' own reports. The objective of UPR is to engage in open dialogue, at the HRC, targeting improvements in the human rights records common to many countries. Country-specific mandates tend to be more controversial. In the case of PNG, an increased presence of civil society participants in the UN process of UPR (doubling since the last cycle) encouraged increasing attention to the call to end provisions in the PNG *Criminal Code* providing for imposition of the death penalty. On 4 November 2021, 22 countries in the HRC called on PNG to abolish its statutory provisions authorising the death penalty. This constituted adoption of a recommendation made in the submissions of Amnesty International, Human Rights

²⁵ Human Rights Council, 'About the UPR', *Universal Periodic Review*, (Webpage) <<https://www.ohchr.org/en/hr-bodies/upr/upr-main>>.

Watch and Joint Submission 7.²⁶ In 2016, only 12 countries had occasioned a like recommendation for the abolition of the death penalty. The increased number of countries voting to that end, and international diplomatic pressure led on 22 January 2022 to the PNG Parliament passing amendments to the *Criminal Code* to abolish the death penalty wherever appearing in PNG law.²⁷ This change in the law would make PNG the 21st country in the Asia and Pacific Region to have abolished the death penalty and the 110th country worldwide. Amnesty International, in a published statement of 13 April 2022, welcomed this move to enshrine PNG's commitment to abolition of the death penalty under international law by urging ratification by PNG of the *Second Optional Protocol to the International Covenant on Civil and Political Rights* (ICCPR). That Protocol aims at the eventual abolition of the death penalty worldwide.

PNG's *Criminal Code* continues to criminalise consensual adult same-sex activity.²⁸ That code was originally inherited from Queensland during the colonial and trusteeship eras. Reform for attaining other specific rights were referred to in the Amnesty International statement. It may be hoped that once the reform agenda gathers momentum a broad range of recommendations will be adopted.²⁹

Secondly, Kazakhstan has recently abolished the death penalty. It has ratified the *Second Optional Protocol* to the ICCPR. The International Bar Association's Human Rights Institute ('IBAHRI') has welcomed the abolition of the death penalty in Kazakhstan.³⁰ It also shows how the issues of capital punishment and same-sex criminality tend to go hand in hand. Those who seek to preserve and defend the criminal offences against

²⁶ See generally, 'Universal Periodic Review Third Cycle - Papua New Guinea - Reference Documents', *United Nations* (Web page) <<https://www.ohchr.org/en/hr-bodies/upr/uprpg-stakeholders-info-s39>>.

²⁷ Amnesty International, 'Papua New Guinea: Increased participation of civil society hailed a success in human rights review' (Public Statement ASA 34/5479/2022, 13 April 2022) 1 <<https://www.amnesty.org/en/wp-content/uploads/2022/04/ASA3454792022ENGLISH.pdf>>; see also Moses Sakai, 'The PNG Parliament abolishes the death penalty for the second time' (Monash University, Eleos Justice Blog Posts, 27 January 2022) <<https://www.monash.edu/law/research/eleos/blog/eleos-justice-blog-posts/the-png-parliament-abolishes-the-death-penalty-for-the-second-time>>.

²⁸ See *Criminal Code Act (PNG)* ss 210 and 212: 'unnatural offences' and 'indecent practices between males' respectively.

²⁹ Amnesty International, 'Papua New Guinea: Increased participation of civil society hailed a success in human rights review' (n 27) 1.

³⁰ International Bar Association, 'IBAHRI welcomes the abolition of the death penalty in Kazakhstan' (Media Release, 23 June 2022) <<https://www.ibanet.org/IBAHRI-welcomes-the-abolition-of-the-death-penalty-in-Kazakhstan>>.

LGBTIQ people also tend to favour retention of capital punishment.³¹ Some common components of cultural traditionalism and adherence to disproportionate overreach in criminal punishment is in play.

Thirdly, is the situation in Malaysia. On 10 June 2022, a statement by a Minister in the Prime Minister's office of the Government of Malaysia, reported that the government had agreed to abolish the mandatory sentence of death. It would substitute in cases of death penalty a limitation that would recognise a discretion of the court having regard to the circumstances of the case.³² Since that speech was delivered, however, in the draft Bills tabled in early October, in most instances a natural life-sentence was proposed as an alternative – ie with no prospect of parole. The legislation has not yet been debated, as the following day the Malaysian Parliament dissolved, and an election was called. It is therefore unclear whether the new government will proceed with the move to a discretionary death penalty at all, and if so, whether the legislative change will provide significant relief to those currently on death row.³³ This is not as welcome an outcome as outright abolition. Nevertheless, it is noteworthy because, in the past, persons (including Australian citizens) imprisoned in Malaysia, commonly on charges of possession of prohibited drugs, have had sentences of death confirmed by the Executive and carried out against global opposition, including protests from Australia.³⁴ A spokesman for the Malaysian Cabinet agreed that research should be carried out concerning further reform.³⁵ Proposals for change in Malaysia followed a 'presentation of the Substitute Punishment Review Report Against the Mandatory Death Penalty at a Cabinet Meeting on the 8 June 2022.'³⁶ That committee was chaired by the former Chief

³¹ Although same sex relations were legalised in 1997, same sex marriage is not recognised and there are no protections against discrimination. See eg, Equaldex, *LGBT Rights in Kazakhstan* (Webpage, 2023) <<https://www.equaldex.com/region/kazakhstan>>.

³² See generally, Vincent Tan, 'Malaysia government agrees to abolish mandatory death penalty' (Channel News Asia, Web Page, 10 June 2022) <<https://www.channelnewsasia.com/asia/malaysia-abolishes-death-penalty-wan-junaidi-2738916>>; and the statement of the Malaysian Bar in response to the Ministers announcement, Karen Cheah Yee Lynn, 'Abolition of Mandatory Death Penalty a Step Towards the Right Direction, But Abolish Capital Punishment Entirely' (Press Statement, 11 June 2022) <<https://www.malaysianbar.org.my/article/about-us/president-s-corner/presstatements/press-release-abolition-of-mandatory-death-penalty-a-step-towards-the-right-direction-but-abolish-capital-punishment-entirely>>.

³³ See Jia Vern Tham, 'What comes after the mandatory death penalty in post-GE15 Malaysia?', Malay Mail (online, 28 October 2022) <<https://www.malaymail.com/news/what-you-think/2022/10/28/what-comes-after-the-mandatory-death-penalty-in-post-ge15-malaysia-jia-vern-tham/36043>>.

³⁴ *Dangerous Drugs Act 1952* (Malaysia) s 39B(2).

³⁵ Tan (n 32).

³⁶ Thaatchaayini Kananatu, 'Framing Death Penalty Politics in Malaysia' (2022) 11(3) *International Journal for Crime, Justice and Social Democracy* 57, 63.

Justice of Malaysia, Tan Sri Richard Malanjum, and included further recommendations. The Government of Malaysia announced that it would establish a law reform commission for the reform of prison institutions and the imposition of punishment based on principles of 'restorative justice'. The influence of friendly neighbouring countries in these developments cannot be underestimated. Still, the criminalisation of same sex acts in Malaysia remains.³⁷

There are other instances where reform of imposition of the death penalty, or its complete abolition, have been reported. The importance of the foregoing instances illustrates the useful impact of international agencies, the United Nations Human Rights Council and civil society support, in persuading longstanding supporters of the death penalty to reconsider the proportionality and arguability of their previous provisions.

It must be hoped that, in the future, the human rights procedures of the United Nations HRC will continue to provide the gradual reform and repeal of the long-standing laws on capital punishment dated back to colonial times. A neighbouring advantage of this procedure may be that reform in one country in the region may offer encouragement to reform in other countries nearby. Propinquity and shared legal, religious, and historical tradition may more readily secure legal reforms. Clearly, this is what is needed in the case of capital punishment.

III WHAT IS TO COME?

The numbers of hangings in Australia diminished markedly after the end of colonial period. The reduction and reform of capital punishment gathered pace beginning with advent of the Commonwealth, and Australia's progress as an independent nation on the world stage. To some extent, such change in Australia may be attributed to a policy adopted by the Australian Labor Party (ALP). That party, throughout the 20th century had a uniform policy of commuting death sentences and substituting life imprisonment during times when the ALP formed the government.³⁸ Repeal of the criminal provisions requiring, or permitting, capital punishment became available as a priority policy where

³⁷ Equaldex, *LGBT Rights in Malaysia* (Webpage, 2023) <<https://www.equaldex.com/region/malaysia>>; 'Malaysian Authorities Raid LGBT Halloween Party', *VOA News* (online, 30 October 2022) <<https://www.voanews.com/a/malaysian-authorities-raid-lgbt-halloween-party/6811548.html>>.

³⁸ See eg, Carolyn Strange, 'Ambivalent Abolitionism in the 1920s: New South Wales, Australia' (2022) 11(3) *International Journal for Crime, Justice and Social Democracy* 33.

the ALP enjoyed the necessary power in both Houses of Parliament. To some extent, the proof of serious miscarriages of justice and wrongful executions undermined the unquestioning faith in the neutrality and expertise of the judiciary and the unwavering correctness of jury verdicts. To some extent the change in the law and practice on capital punishment was simply the result of growing knowledge about, and developing repugnance towards, the unpleasant details of capital punishment.

Gradually, capital punishment came to be deleted from the criminal calendar in the United Kingdom, Canada, New Zealand, and Australia. The last hanging to occur in Australia was that of Ronald Ryan on 3 February 1967.³⁹

I remember that day. There was much discussion in society and in the media of the circumstances of the punishment, before and after it occurred. I was preparing for university examinations. At 8am, the appointed hour, in my family home in Sydney, I was alone with my books. I interrupted my reading to reflect on what was happening at that very moment in Melbourne. I did not then know that this would be the last hanging to be carried out as punishment for conviction of the crime of murder (in that case of a prison warden). After that event, Australia's politicians began to adopt a substantially bipartisan policy of repealing statutory provisions providing for capital punishment. Thereafter, some monitors of non-ALP governments occasionally engaged in debate over the restoration of capital punishment. However, restoration has never happened. With every passing year, operating under reformed abolitionist laws, the possibility of restoring capital punishment appears to have become increasingly remote.⁴⁰ An anxiety about capital punishment in the United States of America was allayed by the substitution for hanging (the favoured British means of capital punishment) of administration of poison gas or other lethal injection or by using electric shock. These were advocated as more 'modern and humane' forms of the death penalty. Much empirical research cast serious doubt on that proposition. Although the 14th Amendment to the US Constitution prohibited the infliction of "cruel and unusual punishments" no stable Supreme Court majority could be assembled to apply that provision to prohibit capital punishment in all circumstances.⁴¹ In 1972 the US Supreme Court quashed all sentences providing for

³⁹ Patrick Tennison, 'The Death of Ronald Ryan' in Barry Jones (ed), *The Penalty is Death: State Power, Law and Justice* (Scribe Publications, 2022) ch 26.

⁴⁰ The story is discussed and explained in Barry Jones (ed), *The Penalty is Death: State Power, Law and Justice* (Scribe Publications, 2022).

⁴¹ Capital punishment was effectively abolished between 1956 and 1972 in the United States of America.

capital punishment where they had been imposed under laws that failed to address the particular moral questions associated with particular offences or omitted to spell out statutory guidelines.⁴² However, because of the reported continuation of public support for the death penalty in the United States, the moratorium on the death penalty came under increasing attack.⁴³

Eventually, in 1976, in *Gregg v Georgia*,⁴⁴ the judicial moratorium was lifted. Instead, the 8th Amendment was reinterpreted to remove obligatory execution and requiring that consideration of aggravation or mitigation was obligatory. In the result, although capital punishment was restored, initially by ‘originalist’ interpretation, the overwhelming proportion of executions has been restricted to cases of discretion. In more recent decades, increasing conservative majorities in the Supreme Court retreated from a ‘rights’ based constitutional reasoning. In language with a contemporary familiarity,⁴⁵ Supreme Court majorities in the United States have preferred interpretations that ‘turn over the development of capital punishment policies and procedures to State legislatures and courts’.⁴⁶ In jurisdictions having constitutional protections for the right to life and to be free of “cruel and unusual punishments” arguments based on constitutional rights, the permissibility of capital punishment has been upheld. Given that capital punishment long preceded adoption of human rights law, this outcome was not especially surprising.⁴⁷ Driven back in this way to invocation of perceptions of the unacceptability of the death penalty, the achievement of reform to restrict, narrow or prohibit imposition of the death penalty, has depended upon the trends in popular opinion and on civic awareness and leadership embracing legislative reform. This notwithstanding, the majority of nations throughout the world have gradually been persuaded to embrace the termination of capital punishment. By 2022, starting from the abolition in Queensland a century ago, 109 countries have completely abolished the availability of capital punishment for any crime.⁴⁸ Some countries have abolished it, except of defined cases

⁴² Lief H Carter, ‘Capital Punishment’ in Kermit L Hall (ed), *The Oxford Companion to the Supreme Court of the United States* (Oxford, 1992)125.

⁴³ *Furman v Georgia*, 408 US 238 (1972).

⁴⁴ 428 US 153 (1976).

⁴⁵ Following the decision in of *Roe v Wade*, 410 US 113 (1973), it was overruled by a majority by *Dobbs v Jackson Women’s Health Organization* 597 US (2022).

⁴⁶ Carter (n 42) 126.

⁴⁷ A similar reasoning explains the adoption of the Second Optional Protocol to the ICCPR which assumes that the death penalty is not already outlawed by the traditional language of that Covenant prohibiting “cruel and unusual punishment” or “failure of due process”.

⁴⁸ *World Coalition Against the Death Penalty* (Web page, January 2023) <<https://worldcoalition.org/>>.

involving special or aggravated circumstances such as war crimes, deliberate murder or murder involving particular victims such as police or prison officers; children or spouses. In the case of 25 countries, although capital punishment has remained part of the law, in practice many countries may never actually carry out this form of punishment.⁴⁹ On the other hand, in 54 countries, capital punishment has been retained and is available in defined cases.⁵⁰ In countries that have ratified the *European Convention on Human Rights*, 46 member states have abolished capital punishment.⁵¹ During the past 15 years, the UN General Assembly has adopted 8 non-binding resolutions calling for a moratorium on the death penalty with a view to its eventual abolition.⁵² Although the current trend in the world appears to be moving strongly towards abolition of capital punishment, a number of states worldwide continue to insist on the need for such punishment in particular circumstances. Among the jurisdictions that have retained capital punishment are states including the United States of America, Japan, and India. Recent publicity given to particular executions show that the struggle is by no means over.

In a number of recent reports, it appears that instances of multiple executions have occurred in Iran.⁵³ On 29 June 2022, ten inmates at the Rajai Shahr facility in Iran were executed including Iman Sarfari-Rad. He was executed on conviction on a “sodomy” charge, alongside other named prisoners who had been charged with “rape”. According to reports, the execution of LGBTIQ prisoners in Iran for crimes related to their suggested SOGI status are commonly described in this way.⁵⁴ Iran has been reported as having

⁴⁹ ‘Death Penalty’, *Amnesty International*, (Web page, 9 May 2021) <<https://www.amnesty.org/en/what-we-do/death-penalty/>>.

⁵⁰ Amnesty International, *Death Sentences and Executions 2021* (n 21); cf World Coalition Against the Death Penalty (n 48) currently lists 55 countries as retentionist.

⁵¹ *Charter of Fundamental Rights of the European Union* (EU) Art 2.

⁵² ‘Helping the World Achieve a Moratorium on Executions’, *World Coalition Against the Death Penalty* (Webpage, 20 December 2022) <<https://worldcoalition.org/campagne/helping-the-world-achieve-a-moratorium-on-executions/>>.

⁵³ Amnesty International reported prior to the recent September 2022 uprisings concerning Mahsa Amini’s death in custody, at least 251 executions, between 1 January 2022 and 30 June 2022, in ‘Iran: Horrific wave of executions must be stopped’, *News, Amnesty International* (Web page, 27 July 2022) <<https://www.amnesty.org/en/latest/news/2022/07/iran-horrific-wave-of-executions-must-be-stopped/>>. See also ‘Iran: Urgent international action needed to ensure accountability for Mahsa Amini’s death in custody’, *Amnesty International* (Public Statement MDE 13/6060/2022, 27 September 2022) <<https://www.amnesty.org/en/documents/mde13/6060/2022/en/>>.

⁵⁴ Emily Maskell, ‘Gay Man in Iran Executed on “Sodomy” Charge’, *Jerusalem Post* (Web Page, 1 July 2022) <<https://www.jpost.com/middle-east/iran-news/article-710848>>; Sato and Alexander (n 22) 32, 42-3.

repeatedly executed enemies of the regime. The planned execution of Swedish-Iranian academic, Ahmad Reza Djalali, is a case in point.⁵⁵

For an instance of stubborn adherence to the death penalty (and also statutory provisions against LGBTIQ citizens), Singapore is hard to beat. It has been a long-standing and consistent proponent of capital punishment. Kalwant Singh, a young Malaysian citizen, was informed that his conviction of being a courier in a drug offence had been confirmed. Kalwant was believed to be mentally disabled.⁵⁶ He had earlier served a prison sentence awaiting challenges to the death penalty for 9 years. Such prison punishment was not regarded as sufficient expiation and he was executed on 7 July 2022. Particularly disappointing was the way that the Singapore Government appeared to insist on, and to defend, discredited laws inherited from colonial times.⁵⁷ Yet hope may be dawning. The Singapore courts have repeatedly interpreted constitutional provisions, so that they offered no apparent redress for challenges to anti-LGBTIQ offences or convicted drug offenders.⁵⁸ Still, in August 2022, the Singapore Prime Minister announced that the criminal law against sexual minorities would be repealed. At the same time, he proposed that the Constitution of Singapore would be amended so as to outlaw same-sex marriage in the City State hence the reform in Singapore continues to send mixed messages.

The most recent outrageous instances of capital punishment to attract international attention have been those of four opponents of the military junta who had overthrown the elected government of Myanmar/Burma. Despite an informal moratorium on capital punishment since 1986, the four prisoners were put to death. More than 11,000 people

⁵⁵ International Bar Association, 'IBAHRI calls for revocation of scheduled execution of Swedish-Iranian academic Ahmadreza Djalali' (Media Release, 12 May 2022).

⁵⁶ Although Kalwant Singh did not argue a mental impairment, see Kokila Annamali, 'I will fight till the noose is around my neck', Transformative Justice Collection (Web page, 4 July 2022) <<https://transformativejusticecollective.org/?s=Kalwant+Singh>>.

⁵⁷ Nagaenthran K Dharmalingam was executed on 27 April 2022, despite having an IQ of 69 and ADHD. The Singapore Ministry for Home Affairs took issue with Nagaenthran being referred to as 'intellectually disabled' see <<https://www.mha.gov.sg/mediaroom/press-releases/ministry-of-home-affairs-response-to-sir-richard-branson-blog-post-on-10-october-2022>>; In response, the Anti-Death Penalty Asia Network addressed Nagaenthran's disability in detail, see Dobby Chew, 'Singapore: It's time for meaningful engagement with civil society on the death penalty', Anti-Death Penalty Asia Network (Statement, 31 October 2022) <<https://adpan.org/wp-content/uploads/2022/10/Singapore-its-time-for-meaningful-engagement-with-CSO.pdf>>; International Bar Association, 'Singapore: IBAHRI calls for revocation of scheduled execution of Nagaenthran Dharmalingam', (Statement 8 November 2021) <<https://www.ibanet.org/Singapore-IBAHRI-calls-for-revocation-of-scheduled-execution-of-Nagaenthran-Dharmalingam>>.

⁵⁸ *Public Prosecutor v Mohamad Yazid Bin Md Yusof* [2016] SGHC 102; *Norasharee Bin Gous v Public Prosecutor* [2017] SGCA 17.

in Myanmar/Burma are currently subject to arbitrary detention.⁵⁹ The trials of the four executed men were described as a travesty and a ‘sham disregard for basic fair trial standards and due process’.⁶⁰ The four executed men were described by their supporters as “freedom fighters”. The call has been made for the new Australian Foreign Minister Senator Penny Wong to support a humanitarian intervention in Myanmar/Burma for death penalty cases.⁶¹ The work of all of them should be remembered, as should their courage. They include Phyo Zeya Thaw (former opposition lawmaker) and Kyaw Min Yu (a human rights activist). They were charged with treason and terrorism. They were sentenced to death following closed door military trials. They are heroes of liberty and brave examples of how the death penalty can be used in the attempt, ultimately futile, to suppress opposing voices.

IV CONCLUSION

The republished book edited by the Hon. Barry Jones AC, *The Penalty is Death*, was launched in Brisbane to coincide with the centenary of the abolition of capital punishment by the Queensland State Parliament in 1922. The book lays out the compelling case that exists against retention of this barbaric mode of responding to the crime. So long as such punishment remains on the statute books, there will be a temptation by tyrants and autocrats to carry out the executions. Australians should not be content with the situation that we have achieved. So long as countries close to our shores continue with the barbaric practice of capital punishment, it survives. Australians should lift their voices against the countries and regimes concerned. Australia’s governments should express, in clear terms, both the experience and resolution of the Australian people. Lawyers, who necessarily play a large part in the criminal justice system, have a special responsibility

⁵⁹ Cf Office of the High Commissioner for Human Rights, ‘Myanmar: Bachelet condemns executions, calls for release of all political prisoners’, *United Nations* (Press Release, 25 July 2022) <<https://www.ohchr.org/en/press-releases/2022/07/myanmar-bachelet-condemns-executions-calls-release-all-political-prisoners>>:11,500 according to this statement as at July 2022; According to the Assistance Association for Political Prisoners over 12,800 people detained and 2413, ‘Daily Briefing in Relation to the Military Coup’, Assistance Association for Political Prisoners (Web page, 4 November 2022) <<https://aappb.org/?p=23344>>.

⁶⁰ ‘Myanmar’s Junta’s Nod for Activists’ Death Sentences Draws Global Ire’, *The Irrawaddy* (Web Page, 6 June 2022) <<https://www.irrawaddy.com/news/burma/myanmar-juntas-nod-for-activists-death-sentences-draws-global-ire.html>>.

⁶¹ Ian Mannix, ‘Wong challenged to support a humanitarian intervention in Myanmar’, *Pearls and Irritations: John Menadue’s Public Policy Journal* (Web Page, 26 July 2022) <<https://johnmenadue.com/wong-challenged-to-support-a-humanitarian-intervention-in-myanmar/>>.

to speak up and to act. Whilst punishments include the death penalty survive, and are carried out, the project begun on 1 August 1922 remains incomplete. Humanity must not endure a further century of argument, attempted persuasion, and agitation to complete the challenge launched in the Queensland Parliament in 1922. Australians should honour and remember the political leaders, judges and advocates, politicians, and civil society leaders for standing up and speaking out on the death penalty. That is why it is still relevant and useful to celebrate the relaunch of Barry Jones's book of 1965. I honour those who gave early leadership for what has been achieved. I congratulate Barry Jones, Stephen Keim, Richard Bourke, Julian McMahon, and many others. The struggle is not over. In a world of violence and injustice, it has only begun.

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