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# FOREWORD

## THE TRIAL OF ANWAR IBRAHIM SODOMY II

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### THE HON. MICHAEL KIRBY AC CMG*

Trial observers constitute a rare, but important, breed of lawyers and other trusted citizens. In the 1990s, I had their usefulness brought to my notice in a most direct way. At the time I was the Chairman of the Executive Committee of the International Commission of Jurists, based in Geneva. Following the first multi-racial elections conducted in South Africa, after the much delayed enfranchisement of all its citizens, I was invited to Pretoria to witness the inauguration of Nelson Mandela as the country's first black President. On 27 April 1994, under the shadow of impressive Union Buildings, in the very centre of Afrikanerdom, I watched the new President take his oaths of office before Chief Justice Michael Corbett of the Appellate Division of the Supreme Court of South Africa. And I saw him receive the salute from the three white heads of the armed forces of South Africa, their medals, glistening in the afternoon sunlight, won in the long campaign to prevent this moment coming to pass.

President Mandela had asked me to attend the inauguration because he had particular reason to be appreciative of the International Commission of Jurists. In August 1962, whilst he was serving a sentence for leading a workers' strike, he was charged, in the Rivonia Trial, of the capital crime of sabotage. Equivalent to treason, it was a charge easier for the prosecution to prove. Nelson Mandela stood at peril of his life. His lawyers' task was not made easier by the fact that he insisted on admitting the specifics of the several charges involving conspiracy with the African National Congress and the South African Communist Party to use explosives to

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destroy water, electrical and gas utilities. In his statement from the dock, at the opening of the defence case, Mandela laid out the reasons why he had taken to violence. All of this brought him within the shadow of the gallows. It was a fact that he recognised by acknowledging that "if needs be, [my] ideal [is one] for which I am prepared to die".

The International Commission of Jurists had arranged for Nelson Mandela's trial to be observed throughout the proceedings by a distinguished Australian barrister, Edward St. John Q.C. of the New South Wales Bar. The trial judge afforded him the facility of attending throughout. Mr St. John regularly reported to the Commission in Geneva and to his colleagues in Australia, waiting anxiously for news.

In the end, all but one of the accused, including Nelson Mandela, were found guilty. However, they escaped the gallows. On 12 June 1964, they were sentenced by the trial judge to life imprisonment. Nelson Mandela considered that the simple vigilance of the observers at his trial had enhanced the fairness of his proceedings. It had also contributed to the avoidance of the imposition of the death penalty.

Ted St. John, in Australia, had died by 1994. That is how the invitation to President Mandela's inauguration fell to me. As I sat there during the ceremonies, and watched the rainbow flag of a newly freed nation unfold, I reflected on the growth of the international scrutiny of contested laws in every country, including my own. And on the utility of outside observers watching sensitive national trials. Occasionally trial observance has helped those on trial. At the very least, it can serve to remind the judge of the basic principle, oft repeated in the common law, that judges, when performing their duties, are themselves on trial. This is why the principle of open justice is so important to our legal tradition. It is why, in today's world of global news, the commitment to open justice often demands the opportunity for outside scrutiny, lest local passions add to the dangers of miscarriage and to the risks of injustice.

In this highly readable account of the background, circumstances and outcome of the second trial for sodomy offences initiated against Dato' Seri Anwar Ibrahim in the High Court of Malaysia, Mark Trowell Q.C., of the Bar of Western Australia, has sought to continue in the high tradition performed by Ted St. John Q.C. years earlier.

There are, of course, many differences in the circumstances that each observer faced. Malaysia was no apartheid state. Yet its *Internal Security Act* contains, to this day, remnants of a harsh regime addressed to political dissidents. That regime was often a feature of the late imperial laws of the British Empire, including in South Africa. An attempt to introduce such a law in Australia in 1950, in the form of the *Communist Party Dissolution Act* 1950 (Cth) was, happily, struck down by a decision of the High Court of *Australia* as incompatible with the Australian Constitution *in Australian Communist Party v the Commonwealth* (1951). The endeavour of Prime Minister R.G. Menzies and his government to overcome this judicial obstacle, by amending the Australian Constitution to empower the Australian Parliament to enact such a statute, necessitated a vote by the electors in a referendum held in September 1951. Happily again, the electors of Australia rejected the proposal. They showed a wisdom remarkable for those times, particularly because an Australian battalion was by then fighting in Korea against the 'communist menace'. And soon another battalion would be fighting in Malaya against the communist insurgency there that threatened the smooth passage to independence of colonial rule and full democracy.

The second trial of Anwar Ibrahim, between July 2000 (when he was arrested and charged) and January 2012 (when he was acquitted by the trial judge) (Sodomy II) captured the attention of the world. It had all of the ingredients likely to entrance, and sustain media attention on every continent. There had already been an earlier trial in 1998-9 (Sodomy I). In that trial the accused had been convicted of sodomy and sentenced to 9 years in prison. This conviction appeared to destroy the political career of a man who had been viewed as heir apparent to the office of Prime Minister, of Malaysia, at the time held by Tun Dr Mahathir Mohamad.

The fallout between these two successful and impressive politicians, and the exotic nature of the sexual offence of sodomy alleged, secured an international fascination for each of the trials and for the legal processes they involved which more mundane allegations of corruption, fraud or gambling offences would not have done. Here was the stuff of infotainment: the apparent fall from grace of a brilliant exponent of the political arts, in a country to whose astonishing economic advancement, the accused had apparently made significant contributions. A shattered political, and almost filial, affection, mixed with charges of the "abominable crime", said to be "against the order of nature", delivered a news cocktail that the global media could simply not resist. Satellite television, rapidly enlarged by the advent of the internet, blogs, informal media, social networks and the rumour mill presented the world with a mouth watering story presented as politics wrapped in passion. Moreover, it was a story that, like soap operas and the chronicles of sharks (*Jaws*) or fearsome violence (*Terminator*), came with a sequel.

When the first conviction of Anwar Ibrahim in Sodomy I was set aside on appeal, in September 2004, and he returned to an increasingly successful role in national politics, the initiation of a second trial for the same offence seemed to hard-nosed editors too good to be true. One can only imagine them at their desks, the pundits and commentators in broadcasting studios and the associated advertised gurus all salivating at the thought of another round of the media merry-go-round of sodomy and politics.

The author of this book has told the story of the two trials, but particularly the second. He has done so in the generally dispassionate way expected of a neutral observer who is a senior advocate: one of Her Majesty's Counsel learned in the law. Towards the close of the book, he admits that he was surprised by the outcome of the second sodomy trial when it was announced by Justice Zabidin on 9 January 2012. He explains his reaction by reference to "the several key rulings made during the trial, all of which were against the accused, but importantly the Judge's ruling on

the no case submission". He admits: "I was absolutely wrong. Like many others, I was completely surprised by the acquittal".

Yet, because it is impossible normally to get into the mind of a judge, every experienced advocate is aware of the fact that the way a decision will fall out is quite often unknown, including to the judge personally, until the very last moment when the decision is announced. What may appear to be an adverse signal given by a judge (including in judicial rulings) might be no more than ideas blowing in the wind, so that even the judge may not, at the time the signals are given, be certain of how things will finally pan out.

I have known very experienced advocates to swear that they can predict with total accuracy how a jury, say, will respond to an accusation or a judge or bench of judges to the evidence and the advocate's submissions. But as one who was on the receiving end of such submissions for 34 years, I have always been sceptical of such assessments. Especially because I was often myself uncertain, when reserving a decision, as to how I would ultimately decide a case. Or perhaps I had a strong conviction at the end of submissions that it would be resolved one way, only to find (on further study, reading and reflection) that my initial inclination had to be abandoned. Intuition and overall assessment may be useful to human decision making. But the judicial process is expected to be more analytical and painstaking. Especially so where another person's liberty, reputation, public office and human potential are at risk. As was the case with Nelson Mandela (whose life was also on the line). And as was the case with Anwar Ibrahim in both of his trials.

Many of the broad contours of the Anwar trials are generally known by lawyers and other members of the international audience that consumed the two sagas over the many years that they processed through the courts of Malaysia. However, the value of this book is that it recounts the two trials in a compendious way. It affords a well written and readable account of extraordinary events that are of significance to Malaysia, its law and politics. But they are also important to countries in the region

and to the world that has looked with admiration at the amazing advances in the Malaysia's economy and standards of living. With this admiration has come occasional anxiety about the political and legal scene that, to outsiders, has sometimes appeared to be locked in a time warp that has sometimes failed to permit the nation to enjoy the full fruits of its economic progress by permitting a greater freedom in politics and civil society. In short, Malaysia has sometimes seemed a country that is surprised by its own material advancement but unwilling to loosen the inherited colonial restraints that would permit a more vibrant political and social life to flourish as the counterpart to, and product of, its economic 'miracle'. Amongst some foreigners, there was occasionally a hope that Anwar Ibrahim might prove to be a catalyst to help Malaysia to resolve this paradox of its material success and domestic uptightness that made his repeated trials so fascinating and noteworthy.

Over the years, I have had the privilege of knowing some of the *dramatis personae* described in this book. I have had the pleasure, on many occasions, in my own country, in the region and in Malaysia itself, of receiving hospitality from the judiciary and legal profession of Malaysia, and public courtesy from Malaysian politicians, past and present. By and large, Australians get along well with Malaysians. We have many links of history, law, military and economic interests. And we also share an irreverent sense of humour that sets us apart from more solemn societies. There have been moments of tension. I do not refer only to the unhappy relationship that arose between Prime Ministers Mahathir and Keating, when the later described the former as 'recalcitrant', although this was a comparatively mild epithet in Paul Keating's lexicon, when deployed against his fellow Australians. For me, the worrying events involved in the removal of the then Lord President of the Federal Court of Malaysia, Tun Mohamed Salleh Abas, was enough to persuade me to write an earlier foreword, published in the latter's biographical reflection, after he has been removed from judicial office *May Day for Justice* (1989). On that occasion, I shared the pages of that book with the foundation Prime Minister and Independence Leader, of Malaysia, Tunku Abdul Rahman Putra Al-Haj. But that was an incident in the past. By the late 1990s it was largely behind us.

I do not intend, on this occasion, to make inappropriate comments on the conduct of the Anwar trials, as revealed in Mark Trowell's book. I will leave any comments to him and to those whom he has quoted in these pages. By reason of a prosecution appeal against the acquittal in the second trial, the judicial process in Sodomy II is not yet finally completed. Moreover, I am aware that other proceedings (some of them mentioned in an epilogue by the author) are pending before the courts of Malaysia. This book shows that Malaysians sometimes pursue their litigation with ferocious vigour. The High Court of Australia has set its face against interlocutory appeals in criminal proceedings, except for the most unusual and special of circumstances: *In re Elliot* (1996). So every country has its own laws, conventions, practices and peculiarities. Malaysia is no exception.

During the saga, Anwar Ibrahim and his lawyers left few, if any, litigious stones unturned, as this book demonstrates. Others may be in the offing, despite the fact that litigious luck sometimes runs out for any litigant. And, anyway, courts are not always the best venues for politicians to fight battles that will often be more prudently waged in the media or at the hustings. Litigants, rightly, have no control (and only limited opportunities to influence) the outcomes of litigation. My own involvement at the Bar, and in many judicial posts, has taught me that to resort law should generally be seen as a final option: to be avoided wherever possible and brought to conclusion as quickly as may be. The central character in the drama described in these pages sometimes appears to outsiders to be a man of courage, determination and a great curial risk taker. Whilst these qualities can be great strengths in a politician, they can sometimes be unwise in a litigant.

However all this may be, there is a final and an important, observation that this book calls forth. It was mentioned, but not elaborated, in a statement issued by the Malaysian Bar Association in welcoming the decision of the trial judge to acquit Anwar Ibrahim at the end of his second trial. In that statement, the Bar, speaking from its high tradition of robust independence and scepticism of authority observes (p.254):

> "The charge against Dato' Seri Anwar Ibrahim, *which is based on an archaic provision of the penal code that criminalises consensual sexual relations between adults*, should never have been brought. The case has unnecessarily taken up judicial time and public funds".

Of course, if the complainant's assertions in the second trial had been believed, the charge against Anwar Ibrahim, based on s377A of the *Malaysian Penal Code*, was not an instance of 'consensual sexual relations'. It was one of a forced and unwelcome intrusion upon the privacy and dignity of another human being. Nonetheless, the singling out of particular sexual activity, with specified body parts; its description in the law as an 'unnatural offence' and one deemed "against the order of nature"; its appellation by reference to the obscure Biblical term of 'sodomy'; and the assignment to it of condign punishment, all present elements designed to raise a special public horror and stigma about the case. Such a charge is bad enough in the case of any individual. But it is specially damaging when the accusation is made against an important public figure. Indeed, against the alternate head of government of a nation.

Following scientific research by Dr Alfred Kinsey in the 1940s and 50s in the United States of America, steps were taken in the United Kingdom that led, in 1967, to the repeal of the sodomy offence in most cases and ultimately to its being subsumed in categories of sexual offence of general application. This development led to legislative and judicial reforms to the penal codes bequeathed by the British colonial administrators to the old dominions of the Crown (first Canada, then New Zealand and finally Australia) and to judicial decisions in post Mandela South Africa and in the Fiji Islands. Most recently, in an important decision of the Delhi High Court in India, in *Naz Foundation v Union of India* (2010), the judges confined the application of S377 of the *Indian Penal Code* (upon which the Malaysian provision was based) solely to cases concerned with underage sexual offences. Unfortunately, beyond a small collection of the older overseas possessions which were once the British Empire, little progress has been made to rid the statute book of this unlovely relic of the past.

In 41 of the 54 countries of the Commonwealth of Nations the sodomy offence remains in force. In the contemporary world, this is a particular misfortune. The offence, with the stigma that its name, description and other features attracts, impedes the educative and other efforts to reduce the contemporary, scourge of HIV/AIDS. Which is why leaders of the United Nations, notable scientists and important citizens (including in Malaysia) have proposed that the offences, like s377A, should be repealed and replaced by more generic crimes. As they have been elsewhere for reasons of legal principle and also current epidemiological prudence.

By chance, between the first and second sodomy trials, I had the privilege to meet Dato' Seri Anwar Ibrahim at a seminar of lawyers that he attended on the Gold Coast in Queensland, Australia. It was my task to chair the sesion. It provided an occasion to reflect on the lessons to be derived, for Malaysia and other countries, from the course and outcome of the first trial.

I took the occasion of that seminar to urge upon the distinguished Malaysian visitor the need for him to embrace the repeal, or at least the significant reform, of the sodomy offence in S377A of the Malaysian code. I urge this course so, as I put it, that some good should come out of his ordeal. As long as the offence remained, it would be available to be deployed to the scandal of the public, the titillation of the media and the destruction of personal reputations in the future. The fact that any such offence would ordinarily take place behind closed doors and be easy to allege but difficult to disprove, made it important to remove it, lest it continued to afflict Malaysians and their body politic. Whilst my listener afforded me a polite hearing, he was non committal. Little did I imagine that so soon after our conversation in Queensland, he once again face a charge of sodomy. And that a second bandwagon of litigation and media attention would begin its journey to an uncertain outcome.

In the course of this book, Mark Trowell has ascribed to the current Prime Minister of Malaysia, Dato' Sri Najib Razak, a conviction that Anwar's second trial, on another sodomy charge, was an "unwelcome distraction from the serious business of running our country in the interests of the Malaysian people." [p.252]. However that may be, it became a distraction, in part at least, made possible by the survival of the peculiar and exotic features of the sodomy offence. And by the deep wells of prejudice that this offence is designed to conjure up.

By a further irony of history, I was later to take part in two international bodies that, more recently, have examined the persistence, mainly in countries of former British rule, of the sodomy offence and its unfortunate consequences for the urgent task of HIV/AIDS prevention in our world. One of these bodies, which reported to the Secretary-General of the United Nations as recently as July 2012, was the Global Commission on HIV and the Law initiated by the United Nations Development Program. The other was the Eminent Persons Group of the Commonwealth of Nations. It reported in October 2011 to the Commonwealth Heads of Government Meeting in Perth, attended by Prime Minister Najib. Each of these reports urged prompt attention to the urgency of reform and repeal of provisions such as S377A. Specifically, the latter report pointed out that Commonwealth countries "comprise over 30% of the world's population and over 60% of people living with HIV. There is still no cure for, or vaccine against, HIV/AIDS. Providing the anti-retroviral medicines that palliate against the 32 million people infected in our world has become more difficult with the Global Financial Crisis". All countries must take their own urgent steps to make it easier to advance education and to prevent the spread of infection. Unanimously, the Eminent Persons Group went on:

> "These laws [sodomy] are a particular historical feature of British colonial rule. They have remained unchanged in many developing countries of the Commonwealth despite evidence that other Commonwealth countries have been successful in reducing cases of HIV infection by including repeal of such laws in their measures to combat the disease. Repeal of such laws facilitates the outreach to individuals and groups at heightened risk of infection. The importance of addressing this matter has

> received global attention through the United Nations. It is one of concern to the Commonwealth, not only because of the particular legal context, but also because it can call into question the commitment of member states to the Commonwealth's fundamental values and principles including fundamental human rights and non-discrimination".

The people of the Commonwealth are still waiting for the response to these recommendations of the member governments, leaders and officials. But it is important to notice that the Chair and leader of the Eminent Persons Group, that made these recommendations unanimously, was himself a former Prime Minister of Malaysia, mentioned in these pages, Tun Abdullah Ahmed Badawi. As is revealed here, he was to succeed Prime Minister Mahathir. And he played a moderating role in the Anwar affair, described in this book, that gained the approbation of the author and of many others.

Some good should surely come out of the unhappy story recounted by Mark Trowell. Of course, it is impossible to retrieve and expunge the sensational headlines, the pain to Anwar Ibrahim's wife, family and friends, the distraction to the Malaysian nation and the words said at home and abroad about its politics, judicial and legal system. Still, good would certainly come for the proper boundaries of criminal law; for a scientific approach to sexual offences; and for a reduction of discrimination, stigma and disease in the world, if offences such as s377A were removed and replaced by modern provisions that concentrate on elements of the age of a complainant; the privacy or public character of the event; and the presence or absence of consent. These considerations, rather than the particular organs of the human body, gender of the actors and special features of an antique offence prone to whip up sensational tabloids, seem to be the way forward. The present offence does damage, that renders even the highest in the land vulnerable, in ways that can never be fully repaired.

Those who do not learn from the lessons of history are condemned to repeat its mistakes. The greatest lesson of the Anwar trials, I would suggest, is the need in the criminal laws of Malaysia, to capture the same energy, dynamism and activism that has been so evident in the country's remarkable economic growth. And to modernise the statute book in the way the landscape and beautiful country of Malaysia has been re-created since *Medeka*. It is in the hope that this book by Mark Trowell will contribute to a thoughtful reflection that produces this resolve in the judiciary, the legal profession and the political process of Malaysia, that I commend the author for presenting this story. Truly, the Anwar trials have been a distraction. But in a sense it has been a distraction of Malaysia's own making. That is a vital lesson of this book. But is it a lesson that will now be heeded?

Sydney, Michael Kirby

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