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THE FINAL TWIST

FOREWORD

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## FOREWORD

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This is a further revised and updated edition of a book on the roller-coaster life of Anwar Ibrahim, a Malaysian leader of remarkable political skills, personal gifts and charismatic personality. When in 2015 he returned to prison, after the imposition upon him of a second conviction for the crime of sodomy, he declared to his political supporters: “I will again, for the third time, walk into prison. But rest assured my head will be held high. The light shines on me.”

So it has proved. On 16 May 2018, Anwar was released from prison. He was granted an audience with the King of Malaysia, Sultan Muhammad V. On the advice of a new government, Anwar received a royal pardon. In the election that preceded these events, contrary to many expectations, the government parties that had ruled Malaysia since independence lost their majority. The Opposition party, of which Anwar had become founder and leader, won their majority of seats in the new ruling Coalition. The newly elected Prime Minister who, returned to that office with a commitment to stand aside for Anwar “after one or two years”, was none other than his erstwhile nemesis Yang Amat Berhormat Tun Dr Mahathir Mohamad. The long-time collaborators, once turned deadly enemies, had restored their friendship and alliance. It was Dr Mahathir who had

provided the advice to the King to pardon Anwar. From prison, Anwar watched the doughty campaigner oust Prime Minister Najib Razak to become the world's oldest serving head of government. Now Anwar waits in the wings for re-election to parliament, ascension to the post for which he had earlier seemed destined; and restoration of his reputation and dignity.

There are few, if any, equivalent tales of changing fortune, alliances and commitments in the world of politics today. The saga is captured here. If, when it began, in 1998, the tortured course of events had been predicted, they would have been dismissed as an impossible fantasy. However, fact is sometimes stranger than fiction. And the facts of Malaysian political and legal events are sometimes specially curious. It takes an author of considerable legal experience, discipline and attention to detail to recount the astonishing and curious tale recorded in this book. Those who predict that the twists and turns of fate have concluded and that there are no fresh surprises still in store, may yet be disappointed. However that may prove to be, Mark Trowell has performed a service for the people of Malaysia and their friends by recording this chronicle and bringing up to date the latest remarkable developments that appear to bear out Anwar's claim that the "light shines" upon him.

There are many precedents for the emergence of charismatic leaders from imprisonment to political leadership, triumph and vindication. Such leaders include Mohandas Gandhi, Jawaharlal Nehru and other principals of the Indian independence movement. They also include Nelson Mandela, who underwent trial for sedition in apartheid South Africa. He was convicted and imprisoned on Robben Island, only to emerge decades later to universal acclaim as the elected leader of a new rainbow nation.

These leaders in India and South Africa (earlier remnants of the British Empire) had, like Anwar, been tried in public courts conducted under the scrutiny of the world's media and with the informed observation of their trials, undertaken by experienced lawyers vigilant to detect, record and report any departures from basic justice and due process.

The trials of Gandhi, Nehru, Mandela (and of Kenyatta, Makarios and many others) certainly captured world attention. But none of them was quite like the trials of Anwar.

As Mark Trowell explains, in the generally dispassionate way that could be expected from an experienced senior advocate, Anwar's trials were not imposed upon him by the functionaries of a receding imperial regime, seeking to cling to power and to delay the loss of it. Instead, they were unveiled sober judicial proceedings of a highly personal and politically embarrassing character, by which the accused was twice obliged to answer to charges of the "unnatural" offence of sodomy. After convoluted judicial proceedings, Anwar in April 1999 was sentenced to six years imprisonment on a charge of sodomy. This was the trial that Malaysian media has called Sodomy I. On that occasion, the Federal Court of Malaysia finally quashed Anwar's conviction and released him from imprisonment in September 2004, thereby permitting him to resume his political career in Opposition.

After an interval, there then followed a second charge of sodomy in July 2008 (Sodomy II). This alleged that Anwar had unconsensual penetrative sex with one of his male aides. In July 2012, he was acquitted of this charge. The trial judge rejected DNA evidence that had been tendered as having been compromised and being unreliable. However, in March 2014

an appellate court reversed this acquittal. Surprisingly, it substituted a conviction and Anwar was committed to prison. A further appeal to the Federal Court of Malaysia, the nation's highest court, was rejected. Anwar thereupon began serving a sentence of five years imprisonment. This put him out of the political running during that sentence and for five years thereafter.

Just as that second sentence was approaching its conclusion fate intervened once again, this time from a political not judicial source. The stunning defeat of the Malaysian Government resulted in the restoration of Anwar's freedom; the removal of his impediment in politics; and the opening up of political opportunities that just months earlier seemed like dreams, destined to be unfulfilled.

At the time of Anwar's second conviction in 2012, the Malaysian Bar Association, a vigorous and independent group of advocates for Justice and the rule of law, condemned the conviction of Sodomy II. It claimed that it had been "based on an archaic provision of the Penal Code that criminalises consensual sexual relations between adults". It declared that such charges "should never have been brought. The case had unnecessarily taken up judicial time and public funds".

In a foreword written to an earlier edition of this book I disclosed a chance meeting I had enjoyed with Anwar between his first and second sodomy trials. It took place at a conference of lawyers which he attended on the Gold Coast in Queensland, Australia. My task was to chair his session. It provided an occasion to reflect on the lessons to be derived, up to that time, from the course and outcome of his first trial, both for Malaysia and for other countries in the region. I described what happened:

“I took the occasion to urge upon the distinguished Malaysian visitor the need for him to advocate the repeal, or at least significant reform, of the sodomy offence in s377A of the Malaysian Code. I urged this course so, as I put it, that some good should come out of his ordeal. As long as the offence remained in the books, 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 would be easy to allege but difficult to disprove, made it important to remove it, lest if 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, he would once again face a charge of sodomy. And that a second bandwagon of litigation and media attention would begin its journey to a contested outcome.

Many well informed and careful international civil society organisations attacked the charges, and criticised the process, and outcome of Sodomy II. They alleged defects in the evidence. They alleged political motivation in the prosecution. They criticised defects in the testimony and the selection of a sodomy offence (for the second time) because of the particular political harm that it would likely inflict upon Anwar in the traditionally conservative Malay politics where it was viewed as an offence not only against civil, but also religious law.

The curious feature that the alleged “victim” in Sodomy II had admitted to taking KY lubricant to his private meeting with Anwar suggested possible

arguments that what had occurred constituted private, adult, consensual conduct. To prosecute such an offence in the present age would appear excessive and had been held contrary to universal human rights by many courts and expert bodies. But consent was no defence for the crime of sodomy as expressed in *Malaysian Penal Code*, even if consent could be proved. Moreover, it was not an argument that had any attractions to Anwar, the politician. His defence was always that the crime did not take place and was a political concoction invented by the Najib administration to rid itself of someone whose political star was rising once again.

After all the ordeals he has undergone, and the repeated subjection to trials for the crime of sodomy, humiliation and incarceration one might hope that Anwar, flush from his latest belated victory and apparent vindication, will rid Malaysian law of this colonial relic immediately he has the opportunity to do so.

The nature of the crime is that it is prone to be invoked so as to shame the accused, whatever the facts. It is frequently easy to assert but difficult to repel. The proper boundary of the criminal law in such private activities should be chartered by the age of the alleged participants and the presence or absence of consent. International human rights law, in the decades of Anwar's ordeals, has advanced strongly and firmly to strike down the sodomy crime as contrary, by its overreach, to universal human rights. Even in the socially conservative environment of Malaysia's region, moves have been made a proposal to remove the crime or to replace it with more conventional criminal offences. In none of the countries of the region which trace their laws to the civil tradition of France or the Netherlands rather than Britain, were such crimes part of the imperial donation. So long as the sodomy crime survives in Malaysia, it will lie in

wait to hound public figures; shame their families; risk misuse of the criminal process; oppress sexual minorities; impede the response to HIV; and ignore empirical scientific evidence about the variety of human and other mammalian sexual activity.

Anwar Ibrahim has already enjoyed five political lives. In his previous life in government as Deputy Prime Minister of Malaysia, Minister of Finance and Education Minister, he was to preside (with Dr Mahathir) over an amazing economic era. During his long period spent in prisons, often in circumstances of solitary confinement, his high intelligence and sharp mind will have been focused frequently on existential matters. The meaning of life. The purposes of public power. The importance of love, family, kindness and forgiveness. Whatever the human foibles of Datuk Seri Anwar Ibrahim, he had endless hours and lonely days to reflect on these values.

Nelson Mandela, decades earlier, invited me to witness his inauguration as President of South Africa. He did so because my predecessor as President of the International Commission of Jurists had been appointed a trial observer, like the author of this book, to attend, to closely watch and to report internationally on his trial. Nelson Mandela believed that the world's scrutiny at his trial had played a part in saving the lives of himself and his co-accused from the capital crime of sedition, with which he had been charged. And in assuring the ultimate arrival of his release, vindication and political re-emergence. But in Mandela's case, his vindication owed much more to his luminous spirit of optimism, forgiveness, kindness to others and determination to right the wrong in his country and its divided society.



Now the world will be watching to see whether Anwar has derived from his detention and suffering the qualities that Mandela displayed. Those virtues of reconciliation, reform and outreach will be important for Malaysia as it moves into the new, uncharted and unexpected paths of true democracy, institutional integrity and universal human rights that lie ahead. A testing time is now upon Anwar, upon Dr Mahathir, upon civil society and the country.

The greatest leaders in world history are not normally merely crafty politicians or successful economists or generals. They are those who capture a particular moment in the life of their nation and embody it with vigour, creativity and above all inclusiveness. After a sometimes difficult journey, Anwar Ibrahim may now obtain his long delayed chance. Admirers will hope that he can see over the horizon and take Malaysia in the direction of modernity, non-corruption and respect for the equal dignity of every human being. The last 20 years will surely have taught him the importance of these goals. Now he must express a spirit of the times and display the generosity that his friends and admirers have long believed in. Then indeed the light will truly shine upon him.

Sydney

22 June 2018