

FOREWORD

The Hon. Michael Kirby AC CMG

## FOREWORD

The Honourable Michael Kirby AC CMG\*

*This is not a text solely about capital punishment. It is not a text only about the human rights of sexual minorities. It is a text that requires us all to meditate on how we can turn empirical analysis and principled reflection into action and reform.*

### POWERFUL FORCES

This book describes a number of powerful forces at work in the world. These forces include *Death* and the infliction of death as a punishment for crimes treated as specially repugnant and heinous. *Love*, that is part of the redeeming elements in the life of human beings in relation to one another. *Sex*, which is a remarkable driving force in human beings, celebrated by poets but feared by rulers and others because of the strength of its emotive forces. *Dignity*, which is an inherent feature of living creatures, but especially of humans. For them, endowment with inherent dignity is declared to be a source of universal human right. *Law*, both national and international, which has grown in power and influence to replace brute force and wealth and other sources in the organisation in nations and communities and in controlling human conduct and restraining violence and disorder. *Customs and religion*, that can play an important and continuing role in offering guidance for human life and inspiration for how to live life to the full. *Rationality*, that drawing on

---

\* Patron of the Capital Punishment Justice Project; Former Justice of the High Court of Australia (1996-2009); President of the International Commission of Jurists (1995-8) and Co-Chair of the International Bar Association Human Rights Institute (2017-21).

science, research and human inquisitiveness and sometimes encourages the modern generation to question old beliefs and to search for justice, peace, security, equality and mutual respect, according to new and ever-changing principles.

This is a book of research and scholarly investigation. It explains the evolution of human rules, derived from centuries of understanding and misunderstanding, often expressed in spiritual texts, commonly upheld by religious institutions but also by prejudice and dislike for those perceived as being different from oneself. *Violence*, which is often mobilised, dating back to historical times, to enforce scriptural rules and suggested laws of nature that can brook no exceptions and variations. It is when ancient instruction based on suggested religious imperatives come into conflict with scientific research, love and respect for fellow human beings and the apparent demands of rationality that a serious interplay of potent forces presents our world with uncomfortable and difficult challenges.

This book offers guidance to the reader, and especially to human beings with power and influence over law and human society, to reconcile past norms with modern principles and knowledge. As the book demonstrates, the process of reconciliation between all these forces is difficult, often slow and commonly painful. In these introductory remarks I wish to explore ways in which a book of research like this can contribute to the reconciliation of the powerful forces that struggle to prevail in our world. How the lessons of this book, and the research that it provides to us, can be turned into persuasion, action and the triumph of positive forces that reflect the better angels in human nature.

## *WHAT'S THE FOCUS?*

In one sense, this is a book of empirical and painstaking legal research. It has attempted to gather the provisions of legal codes and statutes in many countries, providing for the imposition of capital punishment on the forbidden conduct of people in the sexual minorities (LGBTIQ). However, it acknowledges that any such research might produce outcomes that are over broad. The enactment or proclamation of criminal laws to punish so-called “sodomy”, “buggery” and other “unnatural crimes” was part of the invariable inheritance of British colonial rule. It could also be traced to various religious sources. Yet, in part as a response to the growing scientific acceptance of the commonality of human and other mammalian sexual variation, the prosecution of such offences, and particularly the imposition of the death penalty following conviction, have long since receded on every continent. Other crimes carrying lesser punishments (such as ‘gross indecency’) had been substituted. Still other offences have charted the proper limits of unconsensual conduct.

The authors did not wish to overstate the reality of the role that capital punishment plays in the suppression of same-sex conduct or desire. Moreover, in some jurisdictions, the worldwide tendency to abolish the death penalty has caught up with the reform of same-sex punishment. The researchers wanted to get right their description of the excessive burden of the death penalty. They also wished to avoid any understatement of the punitive impetus that still exists in respect of such crimes in many countries.

In some, the provision of the death penalty in the formal criminal code or statute was not the problem. That problem arises from the availability to prosecutors of various offences punishable under the religious (*Sharia*) law rather than secular laws. Moreover, in still other countries, especially after growing protests about the imposition of the death penalty for consensual sexual conduct became marked and persistent, the offences charged were dressed up to include references to other crimes (such as terrorism) or other elements (involvement of minors or the presence of other aggravating features, such as the marriage or religion of the 'victim').

Yet when the gathered research was examined, with all these variables in mind, there were still 11 countries in which same-sex sexual acts might carry the death penalty and at least 3 where it commonly did so in practice. The actual imposition of that penalty, solely because of the same-sex element, might reduce the number of offending nations to a pitiful few. But to confine the full description of same-sex 'offences' that attracted state sanctioned violence and the punishment of death by these formal criteria would seriously understate the spread of the ambit of the violence to which sexual minorities were constantly exposed.

The clearest instance of cases where penal statutes or codes permitted the infliction of death arose in cases where the law afforded a defence for the murder of a same-sex attracted person and arose where self-defence or provocation could be invoked successfully affording a disproportionate way of escaping public punishment. Such a defence was invoked in a case before the High Court of Australia in which I participated early in my service there: *Green v The Queen* (1998) 191 CLR 334. When the prosecutor in

that appeal questioned the legal justification of permitting such a defence for an “amorous” approach on the part of the dead victim, that adjective was rejected vigorously by the majority. They held that it was open to a jury to find that a gentle approach by the same-sex deceased was so utterly offensive as arguably to warrant violently stabbing an acquaintance to death. With one other judge, I dissented. Fortunately, every Australian State has since redefined that decision on the defences to homicide to make it clear that this view of the law is wrong.

Still the case of *Green* showed the extent to which the justification of state sanctioned violence against LGBT victims needed to be examined outside the ambit of the formal imposition of the death penalty. As the authors of this book point out, when one goes beyond cataloguing the actual infliction of a state condoned death penalty, it quickly becomes difficult, in many countries, to identify the element that sexuality has played in the death in question. This book makes it clear that, in many countries, so hostile is the antipathy targeted at same-sex people, that complaints by them, or in the case of their death by others for them, are rarely made. So deeply offensive were the acts constituting same-sex offences that they were not to be even spoken of by decent human beings. These were the so called “unnatural” offences. Best not to spell them out at all, lest doing so might enhance their prurient fascination for the weak.

In identifying and classifying the causes of death arising from violence targeted at same-sex victims, even judicial colleagues, defence lawyers, families and civil society frequently retreated in horror. Above all, the victims themselves were driven into abject silence by the fear of death or deadly

shame. This was the infrastructure of legal enforcement of self-loathing that the same-sex offences were designed to reinforce amongst those who might be attracted to perform them. When otherwise enlightened politicians in Singapore and elsewhere defended the retention of the same-sex crimes in the penal code, on the ground that prosecutions were rarely brought so that they were “harmless” and undeserving of judicial curative attention, the operation of shame and self-hatred were overlooked. Thus these were crimes where the language of the offence, the disgust they engendered and the community anger they promoted were all designed to suppress any open challenge or questioning. If, for fear, every member of the same-sex minorities embraced silence and deception as the best means to escape such hostility, it was easy to understand how hatred and violence could be whipped up to do their dirty work without necessarily prosecuting a victim for punishment for a capital crime.

### *WHAT CAN BE DONE?*

The ultimate lesson of this book is therefore that, to confine the problem of violence against sexual minorities, suffering because of their sexual orientation or gender identity, to those who are actually executed on conviction of a capital offence, derived from the colonial law books or religious texts, would gravely underestimate the challenge that such violence presents to these minorities and to those who champion their fundamental human dignity and universal human rights.

The research conducted by the authors, and their extension of that research into the disclosure of the accurate description of the true ambit of the

problem, helps to explain why it is essential to view the issue in hand as one that is even larger than a special category of the global movement for the abolition of capital punishment. Nor is it simply a particular, specialised category of contemporary global human rights challenges. Nor (as the authors point out) is it solely a special issue for Islamic states or parts of nations where the criminal law is influenced by a local Islamic majority in the population. Apart from somewhat esoteric debates concerning what the provisions of the *Holy Koran* or the *Hadith* say on the subject, it is abundantly clear, from the authors' research, that the hostility, even hatred, toward sexual minorities is not confined to adherents of Islam or to citizens of Islamic countries. As the authors point out, there are many nations, often actually or nominally Christian in religion, that may not provide for infliction of capital punishment on same-sex attracted accused or even the retention of criminal laws that provide for its occasional use. Yet they might foster the hostility that denies those in sexual minorities the "dignity and rights" that is their birth right, as the distinguished United Nations Independent Expert on Sexual Orientation Gender Identity mentions in his Introduction.

Sadly, many of the countries that retain colonial criminal laws against sexual minorities are members of the Commonwealth of Nations. They are not aware of, or defiantly ignore, the commitment of the Commonwealth family to, human rights and equality and to tolerance, mutual respect and understanding, amongst the values unanimously adopted in the *Charter of the Commonwealth* of 2013. Astonishingly, this is so in 2021, more than 75 years after the adoption of the *Charter* of the United Nations and well after the acceptance of the *Universal Declaration of Human Rights*, 1948 the *International Covenant on Civil and Political Rights*, 1966 and the *Second*



*Optional Protocol*, to that Covenant that points the world in the direction of the total abolition of the death penalty in all cases.

The Human Rights Commission of the United Nations, and more recently the Human Rights Council, its Special Procedures, the work of the Independent Expert on SOGI, and the decisions of regional courts and commissions may condemn those who inflict or condone violence and would humiliate these minorities. But what can be done to convert detailed findings and well-grounded advocacy in books such as this into principled responses, political reform, community and professional education? What more can be done to advance the momentum of this international movement? Calling out the oppressors may itself stimulate and contribute to recalcitrant nations questioning their resistance to change. It may inspire dissident voices. It may encourage trans-national sharing of viewpoints and openness to reform. It may evoke calls for reform in civil society. It may give rise to new insights in religious institutions.

At various points in this book, the authors demonstrate the extent to which countries that formerly may have imposed, and even welcomed, the infliction of the death penalty on sexual minorities for their ‘unspeakable crimes’, are now gradually backing away from doing so. This is a virtue of the transparent global dialogue, in the organs of the United Nations, particularly the General Assembly, the Human Rights Council and the work of the Office of the High Commissioner for Human Rights. Data and information appeal to the human emotions of love, respect for human dignity, the embrace of rationality and the advance of scientific knowledge.

But what of countries that still will not change? What if they advocate and impose the death penalty, contrary to international law, on consensual, adult, private sexual conduct? Must the world simply shake its head and look the other way in despair? Must it accept that the global response has limits to unbridled violence against vulnerable minorities as an inescapable residuum of the ultimate power of the nation state to do its own thing?

These are questions that are frequently presented in our world in cases of grave human rights crimes, crimes against humanity, genocide and war crimes. For example, this was the dilemma presented by the report of the Commission of Inquiry on Human Rights Violations by North Korea of 2014. In the hope of gaining concessions on the admittedly very dangerous new initiatives with nuclear weapons and missiles, President Trump of the United States refrained from ever mentioning the human rights, infractions, even crimes against humanity of North Korea. He did this lest doing so should slam the door in the face of those tackling nuclear weapons. Fortunately, President Biden does not appear to be inclined to a similar silence. Fundamental human rights abuses do not disappear because they are politely dropped from unsettling mention.

The ultimate value of this book is that it calls out the conduct of oppressive states and governments. It does so on a foundation of detailed and accurate analysis conducted with scrupulous fairness. It truthfully charts the dimensions of the challenge that sexual minorities face in our world. It describes the dimensions of the violence, the cruelty, irrationality and the unscientific character of what is happening both in the letter of the law and in practice. In doing this, it speaks up for humanity. It beckons its readers

to a future time when the human dignity of sexual minorities will be respected, and their rights protected.

This will not happen overnight. But it will not happen at all if the wrongs that are happening are hidden under a blanket of silence and fear of retaliation.

In this way, the authors have rendered an admirable service to the struggle of humanity to attain universal human rights and to ensure the accountability of those who are in breach of those rights. Even if there is no tribunal or these are no blue helmets to provide immediate sanctions for the wrongdoing chronicled in this book, we have here still further evidence of the need to abolish the death penalty worldwide in every case. We also have still further evidence to support the continuing advance of the fundamental rights of sexual minorities. We also have a demonstration that particular religions are not entirely to blame. That the problem has many dimensions. And that we must look into ourselves, all of us, for the explanations and the solutions. Because they have contributed in these most useful ways to the human rights journey of humanity, I express thanks to the authors and praise for their book.

A handwritten signature in black ink, appearing to read 'W. W. W. W.', written in a cursive style.

Sydney

21 February 2021