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GRIFFITH LAW JOURNAL OF HUMAN DIGNITY

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

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ABSTRACT

On 1 August 2022 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.

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

* 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.

** Justice of the High Court of Australia (1996-2009); President of the Court of Appeal of New South Wales (1984-96); One time Patron of Reprieve Australia.

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 in any steps:

- * The early systems of trial by ordeal and combat was 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

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

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. It is why we have gathered to remember the continuing significance of this radical change in criminal punishment.

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 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

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

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 had 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.

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

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 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", i.e. 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.

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

⁵ *Ibid* at 45-6.

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 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.⁶ 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*⁷ where the court overturned the sentence of death of the prisoner, described as a “completely uncivilised Aboriginal native”.⁸ 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.⁹ Overwhelmingly, sentences of death were confirmed. No techniques of constitutional 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.

⁶ M.D. Kirby, “The High Court of Australia and the Death Penalty” (2003) 77 ALJ 804.

⁷ (1934) 52 CLR 335.

⁸ *Ibid*, 389, per Gavin Duffy CJ, Dixon, Evatt and McTeirnan JJ.

⁹ See e.g. *Sodeman v The King* (1936) 55 CLR 192.

Specially shocking amongst the cases was the decision of the High Court in the case of an Aboriginal prisoner, Rupert Max Stuart.¹⁰ 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). It is a story that, arguably, displays the worst of the judicial heartlessness about which Bentham and Mill had repeatedly complained.¹¹

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.¹² 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. Eventually, Lord Cooke’s approach was adopted by the Privy Council.¹³ 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’, ultimate guardians of justice, to embrace. However, in the High Court of Australia decisions, over its first century, only Justice Isaacs (later

¹⁰ *Stuart v The Queen* (1939) 101 CLR 1.

¹¹ M.D. Kirby, “Black and White Lessons for the Australian Judiciary” (2003) *AdelLRev* 195.

¹² *Higgs and Mitchell v Minister of Social Security (Bahamas)* [2000] 2 AC 228.

¹³ *Lewis v Attorney General of Jamaica* (2001) 2 AC 50.

Chief Justice); Justice Evatt; and sometimes Justice Dixon (also later Chief Justice) exhibited any inclination to such a vigilant approach of special scrutiny.¹⁴ It is not a famous chapter in the High Court's legal history.

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.¹⁵ That case showed what could happen when judges were insensitive to the risks of error later revealed. The still later wave 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 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'.¹⁶ 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

¹⁴ M.D. Kirby, "The High Court and the Death Penalty: Looking back, looking forward, looking around" (2003) 77 ALJ 811, 812, 816-7.

¹⁵ *Inquiry into the Conviction of Timothy John Evans*, J.S. Henderson QC, Cmd 8896, 1-1MSO, 1963. *Supplementary Report* Cmd 8946, 1963; Ludovic Kennedy *Ten Rillington Place*, London Victor Gollancz, 1961.

¹⁶ S. Lewis, "Terrorists Should Die" poll (198-200, p1). See Kirby, n24.

subject is a relatively recent achievement in most English-speaking jurisdictions. Restoration is far from impossible.¹⁷

In many countries of the Commonwealth of Nations, the continued imposition of the death penalty has endured hand in hand with criminal punishment for homosexual offences. Two of the 35 countries in the Commonwealth of Nations that retain the death penalty also favour the retention of the criminal offence of consensual, private sexual conduct involving adult participants of the same sex. 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.

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 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

¹⁷ Nigel Jones, “Is the death penalty making a comeback?”, *The Spectator* 22 March 2022, <https://www.spectator.co.uk/article/the-shadow-of-the-noose---is-the-death-penalty-making-a-comeback->

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 CIS countries.

Nevertheless, the office on SOGIE has survived. In a recent vote 22 countries voted for continuance, 17 countries voted to terminate the mandate; 7 countries abstained, and a number were absent from the vote. 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 the death penalty. The same countries would probably be found in an open vote in the Human Rights Council 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:

- * *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). 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 Watch and Joint Submission 7. 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 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. 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. 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.¹⁸

- * *Kazakhstan*: Another country that has recently abolished the death penalty in recent times is Kazakhstan. It has ratified the *Second Optional Protocol* to the ICCPR. The IBA Human Rights Institute has

¹⁸ Amnesty International Public Statement. <https://www.amnesty.org/en/documents/asa34/5479/2022/en/>

welcomed the abolition of the death penalty in Kazakhstan.¹⁹ 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 LGBTIQ people also tend to favour retention of capital punishment. Some common components of cultural traditionalism and adherence to disproportionate overreach in criminal punishment is in play.

- * *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 of that country had agreed to abolish the mandatory sentence of death in Malaysia. 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.²⁰ This is not as welcome an outcome as outright abolition. Nevertheless, it is the more 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. A spokesman for the Malaysian Cabinet agreed that further research should be carried out concerning further reform.²¹

¹⁹ IBAHRI welcomes the abolition of the death penalty in Kazakhstan (25 June 2022).

<https://www.ibanet.org/IBAHRI-welcomes-the-abolition-of-the-death-penalty-in-Kazakhstan#:~:text=%20On%2029%20December%202021%2C%20the,replacing%20it%20with%20life%20imprisonment.>

²⁰ Statement by Prime Minister's Office Malaysia on Reform of the Death Penalty, 10 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>

²¹ Under s39B of the 1952 (Malaysia) Act No. 234.

The progress reported in Malaysia followed the report of a special committee on substitute sentences instead of the mandatory death penalty. That committee was chaired by the former Chief Justice of Malaysia, Tun Richard Malanjum. It included further recommendations. The Government of Malaysia has announced that it will 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.

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.

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 community death sentences and substituting life imprisonment during times when the ALP formed the government. Repeal of the criminal provisions requiring, or permitting, capital punishment became available as a priority policy where 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 1967.²²

²² Patrick Tennison, "The Death of Donald Ryan" (Chapter 26) in BO Jones (ed) *The Penalty is Death: State Power, Law and Justice*, Scribe, Melbourne, 2022.

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.²³

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.²⁴

²³ The story is discussed and explained in B.O. Jones, *loc cit.*

²⁴ Capital punishment was effectively abolished between 1956 and 1972 in the United States of America.

In 1972 the US Supreme Court quashed all sentences providing for 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.²⁵ 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.²⁶

Eventually, in 1976, in *Gregg v Georgia*,²⁷ 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,²⁸ 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”.²⁹ 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

²⁵ Lief H. Carter, “Capital Punishment” in Kermit L. Hall (ed), *The Oxford Companion to the Supreme Court of the United States* (OUP), Oxford, 1992 (“Capital Punishment” at 125).

²⁶ *Furman v Georgia* 408 US 238 (1972).

²⁷ 428 US 153 (1976).

²⁸ Following the decision in *Roe v Wade* 410 US 113 (1973), it was overruled by a majority by *Dobbs v Jackson Women’s Health Organisation* 597 US (2022)

²⁹ L. Carter, above n24 at 126.

punishment long preceded adoption of human rights law this outcome was not especially surprising.³⁰

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. Some countries have abolished it, except of defined cases 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.³¹ On the other hand in 54 countries, capital punishment has been retained and is available in defined cases.³² In countries that have ratified the *European Convention on Human Rights*, 46 member states have abolished capital punishment.³³ 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

³⁰ 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”.

³¹ Amnesty International, *Death Sentences and Executions*, 220 (published 9 May 2021).

³² *European Charter on Human Rights* (EU), Art 2 of the *Charter*.

³³ European Commission, Art 2: Criminal Justice: Capital Punishment, Power.

to its eventual abolition. 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.

The jurisdictions that have retained capital punishment include a number of 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:

- * *Iran*: In a number of recent reports, it appears that instances of multiple executions have occurred in Iran. 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.³⁴ Iran has been reported as having repeatedly executed enemies of the regime. The execution of Swedish-Iranian academic, Ahmad Reza Djalali is a case in point.³⁵
- * *Singapore*: 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

³⁴ Emily Maskell, “Gay Man in Iran Executed on “Sodomy” Charge” (*Jerusalem Post*), <https://www.jpost.com/middle-east/iran-news/article-710848>;

³⁵ IBAHRI calls for revocation of scheduled execution of Swedish-Iranian Academic Ahmad Reza Djalali, *News Release*, 12 May 2022, IBAHRI calls for termination of scheduled execution (5 January 2022).

proponent of capital punishment. On 7 July 2022, 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.³⁶ 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. Particularly disappointing was the way that the Singapore Government appeared to insist on, and to defend, discredited laws inherited from colonial times. 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.³⁷ 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. Thus the reform in Singapore continues to send mixed messages.

- * *Myanmar/Burma*: 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 in Myanmar/Burma are currently subject to

³⁶ Singapore, IBAHRI calls for revocation of scheduled execution (5 January 2022).

³⁷ *Prosecutor v Mohamad Yazid Bin Md Yusof and Ors* [2016] SGHC 102 (High Court); *Norasharee Bin Gouse v Public Prosecutor* ([2017] SGCA 17 (Court of Appeal). IBAHRI, *News Release*, “condemns use of death sentences, (20 June 2022).

arbitrary detention. The trials of the four executed men were described as a travesty and a “sham disregard for basic fair trial standards and due process”.³⁸ 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.³⁹ 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.

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.

³⁸ “Myanmar’s Junta Nod for Activists’ Death Sentences Draws Global Ire”, *The Irrawaddy*, <https://www.irrawaddy.com/news/burma/myanmar-juntas-nod-for-activists-death-sentences-draws-global-ire.html>

³⁹ Ian Manix, “Wong Challenge to Support Humanitarian Intervention in Myanmar”, Article published 25 July 2022. <https://johnmenadue.com/wong-challenged-to-support-a-humanitarian-intervention-in-myanmar/>

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 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.