On 9 January 2012, after a lengthy two-year trial, Anwar Ibrahim was acquitted of charges of sodomy against his 23-year-old aide. The acquittal was a shock not only to Anwar, who expected to go to jail, but to most international observers who were convinced he would be found guilty.

This book recounts both the first sodomy episode (1998–2004) and the Sodomy II trial (2008–12). It then takes up the story after the acquittal, describing the events that led to the Malaysian Court of Appeal overturning the ruling in March 2014, convicting Anwar of the charge and sentencing him to five years' imprisonment; the final appeal against the conviction in the Federal Court of Malaysia in October 2014; and the guilty verdict that was finally delivered on 10 February 2015.

About the Author

Mark Trowell QC is co-chair of the criminal law standing committee of LAWASIA. In recent years, he has been an international observer reporting on behalf of LAWASIA, the Australian Bar Association, the International Commission of Jurists, the Commonwealth Lawyers Association and the Union Internationale des Advocats. He has also represented the interests of the Geneva-based Inter-Parliamentary Union at the criminal trials and appeals of opposition leaders Anwar Ibrahim in Malaysia and General Sarath Fonseka in Sri Lanka.

visit our website at:
www.marshallcavendish.com/genref

Marshall Cavendish Editions

POLITICS
ISBN 978-981-4561-61-7
9 789814 561617

MARK TROWELL

THE PROSECUTION OF ANWAR IBRAHIM

Marshall Cavendish Editions

THE PROSECUTION OF ANWAR IBRAHIM

The Final Play

by **MARK TROWELL** QC
Foreword by The Hon. Michael Kirby, AC CMG,
former Justice of the High Court of Australia

PRAISE FOR
Sodomy II: The Trial of Anwar Ibrahim

"... A well written and readable account of extraordinary events that are of significance to Malaysia, its laws and politics."
The Hon. Michael Kirby,
Former Justice of the High Court of Australia

"Mark Trowell exposes sharply the flawed prosecution of Anwar Ibrahim — an absolute read for every one interested in understanding how and why this happened."
Rogier Huizenga,
Head Human Rights Programme,
Inter-Parliamentary Union, Geneva

"The charges against Anwar Ibrahim for the offence of carnal intercourse against the order of nature, the criminal trial that followed and the strictures with respect to pre-trial disclosure, show us two things: it is high time such an offence is expunged from our statute books, and trial by ambush has no place in the criminal justice system. This book is a timely reminder that justice is a global concern."
Christopher Leong,
President, Malaysian Bar

"A contemporaneous and incisive account of a political trial disguised as a criminal case. A must-read."

Anil Divan,

Senior Advocate and President, Bar Association of India

"An eloquently analysed process of a case, which barely corroborates the judicial independence and the Rule of Law."

Akio Harada,

Former Prosecutor General, Japan

"An intriguing and internationally significant book about a monumental miscarriage of justice. Expertly told."

Thomas Percy QC,

Albert Wolff Chambers, Perth, Western Australia

THE PROSECUTION OF ANWAR IBRAHIM

The Final Play

MARK TROWELL QC

Marshall Cavendish Editions

Photographs courtesy of Mark Trowell

Cover and layout design by Bernard Go Kwang Meng
Cover photo of Anwar Ibrahim: Jimin Lai/AFP/Getty Images

Published by Marshall Cavendish Editions
An imprint of Marshall Cavendish International
1 New Industrial Road, Singapore 536196

This new edition is based on *Sodomy II: The Trial of Anwar Ibrahim*, first published 2012.

Other Marshall Cavendish Offices
Marshall Cavendish Corporation. 99 White Plains Road, Tarrytown NY 10591-9001, USA • Marshall Cavendish International (Thailand) Co Ltd. 253 Asoke, 12th Flr, Sukhumvit 21 Road, Klongtoey Nua, Wattana, Bangkok 10110, Thailand • Marshall Cavendish (Malaysia) Sdn Bhd, Times Subang, Lot 46, Subang Hi-Tech Industrial Park, Batu Tiga, 40000 Shah Alam, Selangor Darul Ehsan, Malaysia.

Marshall Cavendish is a trademark of Times Publishing Limited

National Library Board Singapore Cataloguing in Publication Data
Trowell, Mark, author.
The prosecution of Anwar Ibrahim : the final play / Mark Trowell, QC. – Singapore : Marshall Cavendish Editions, [2015]
pages cm
ISBN : 978-981-4561-61-7 (paperback)

1. Anwar Ibrahim, 1947- – Trials, litigation, etc. 2. Trials (Sodomy) – Malaysia. 3. Trials (Political crimes and offenses) – Malaysia. 4. Judicial process – Malaysia. I. Title.

KPG41.A58
345.595102536 – dc23 OCN899707186

Printed in Malaysia

To the memory of my late mother,
Patricia Aileen Powell.

This book is also dedicated to my friends
Datuk David Yeoh Eng Hok,
the late David Kingsley Malcolm AC QC
and the late Datuk Michael Bong Thiam Joon

Contents

Foreword

THE HON. MICHAEL KIRBY AC CMG[1]

This is a revised and updated edition of a book on the saga of Dato' Seri Anwar Ibrahim, a Malaysian leader of political skills, personal gifts and charismatic attraction. New sections have been added to an earlier edition, to bring the Anwar saga up to date. A new final chapter tells the dramatic story of the outcome of his appeal against a second conviction of the crime of sodomy. In February 2015, the Federal Court of Malaysia affirmed a decision of the Court of Appeal of Malaysia. That Court had taken a step, unusual in legal process, of setting aside an acquittal entered by the judge in Anwar Ibrahim's second sodomy trial and substituting a conviction of the crime. Judicial lightning could, it seems, strike twice. As he was led to commence serving his sentence of five years' imprisonment (which would prohibit him from political engagement for a further five years after his release), Anwar Ibrahim reminded his 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."

---

1 Former Justice of the High Court of Australia (1996–2009); member of the Eminent Persons Group on the Future of the Commonwealth of Nations (2010–11); UNDP Global Commission on HIV and the Law (2010–12); past President of the International Commission of Jurists (1995–98); and Chair of the United Nations Committee of Inquiry on the Democratic People's Republic of Korea (2013–14)

A number of international observers watched the Federal Court proceedings, as indeed they had the earlier appellate and trial hearings following the successive charges of sodomy. One such observer was the distinguished former Australian judge, the Hon. Elizabeth Evatt AC, a commissioner of the International Commission of Jurists (ICJ). As reported, she was critical of the intermediate court's reversal of the acquittal at trial, stating that it "adopted an approach wherein the burden was on Anwar Ibrahim to prove that he had a credible defence, rather than raising reasonable doubt as to the prosecution's case". Other international bodies had their own observers watching proceedings, including Human Rights Watch and Amnesty International. This book is written by Mark Trowell QC, of the Western Australian Bar. His mandate came from LAWASIA, the Law Council of Australia and the Inter-Parliamentary Union. Whilst all of the observers were critical of aspects of the judicial proceedings, Mr Trowell has turned his experience into this book. It is, at once, gripping, readable and disturbing.

Trial observers constitute a rare, but important, breed. In the 1990s, I had their usefulness brought to my notice in a direct way. At the time I was the chairman of the Executive Committee of the ICJ 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 the impressive Union Buildings, at the centre of Afrikanerdom, I watched the new president take his oaths of office.

President Mandela had invited me to attend the inauguration because he had particular reason to be appreciative of the ICJ. In August 1962, whilst he was serving a sentence for leading a workers' strike, he was charged, in the Rivonia Trial, with 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 allegations involving conspiracy with the African National Congress and the South African Communist Party to use explosives to 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 to 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 ICJ had arranged for Nelson Mandela's trial to be observed by a distinguished Australian barrister, Edward St. John QC 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 avoiding the imposition of the death penalty.

Ted St. John had died by 1994. That is how the invitation to President Mandela's inauguration fell to me. As I watched the ceremonies, and observed 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. 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 his trial observance, Mark Trowell has sought to continue in the high tradition performed by Ted St. John years earlier.).

There were, of course, differences in the circumstances that the observers faced. Malaysia is not an apartheid state. Its Internal Security Act had lately been repealed. However, the law of sedition was still used against those accused of disturbing the "racial and cultural harmony" desired by government and officials. Sedition was often a feature of the late imperial laws of the British Empire, including South Africa. Despite promises, later withdrawn, sedition has neither been repealed nor reformed in Malaysia.

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 world attention. It had all of the ingredients likely to entrance and sustain global attention. There had already been an earlier trial in 1998–99 (Sodomy I). In that trial the accused had been convicted of sodomy and sentenced to nine years in prison. This conviction appeared to destroy the political career of a man who had earlier 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 gifted politicians, and the exotic nature of the sexual offence of sodomy alleged, ensured an international fascination for each of the trials, and for the legal processes they involved, that 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 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 international 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 of politics wrapped in sexual passion. Moreover, it was a story that 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 legal proceedings, but particularly the second. He has done so in the generally dispassionate way expected of a neutral observer who is a senior advocate in Australia, 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 which 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 just before the decision is announced. What may appear to be an adverse signal

given by a judge (including in legal 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 assertions. 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. However, the judicial process is expected to be more analytical and painstaking. Especially where another person's liberty, reputation, public office and human potential are at risk. As was the case with Nelson Mandela (whose life was on the line). And as was the case with Anwar Ibrahim in both of his judicial ordeals.

Many of the broad contours of the Anwar court proceedings are generally known by lawyers and other members of the international audience who consumed the two sagas over the years that they processed through the courts of Malaysia. However, the value of this book is that it recounts the two proceedings 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 advances in Malaysia's economy and its 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 failed to permit the nation to enjoy the full fruits of its economic progress by permitting a greater freedom in politics, religion and civil society. In short, Malaysia has sometimes seemed a country that is surprised by its own material advancement yet 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 successive judicial proceedings 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, of course, been moments of tension. I do not refer only to the unhappy relationship that arose between Prime Ministers Mahathir and Keating, when the latter 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 Tun Salleh's biographical reflection *May Day for Justice* (1989), after he was removed from judicial office. On that occasion, I shared the pages of that book with the founding 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 everyone hoped that it was largely behind us.

I do not intend, on this occasion, to make inappropriate comments on the conduct of the Anwar proceedings, as revealed in this book. I will leave any comments to him and to those quoted in these pages. This revised edition concludes with the outcome of the judicial process in Sodomy II in February 2015. Apart from everything else, this book shows that Malaysians sometimes pursue their litigation with inordinate vigour.

During the saga, Anwar Ibrahim and his lawyers left few, if any, litigious stones unturned, as this book demonstrates. Others may, even now, still be in the offing, despite the fact that litigious fortune sometimes runs out for any litigant. Still, courts are not always the best venues for politicians to fight battles that will often be more prudently waged in the legislature chamber, 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 to law should generally be seen as a final option — to be avoided wherever possible and brought to conclusion as quickly as can be. The central character in the drama described in these pages sometimes appears to outsiders to be a great curial risk taker. Whilst risk taking can be a great strength in a politician, it can sometimes be unwise in a litigant. Nonetheless, in his appeal to the Federal Court in Sodomy II, following reversal of his acquittal at trial, Anwar Ibrahim really had no option left. He had to venture if he was to walk free. This book tells how his hopes, and those of his supporters, were to be dashed.

The last chapter in this revised edition on the saga recounts the adverse judgement of the Federal Court and the fiery speech that Anwar made, before being led away to prison. The chapter painstakingly analyses the issues that had to be resolved by the Federal Court. It explains certain

suggested defects in the Federal Court's reasons, complained of by Anwar's supporters. The reliance by appellate judges on a complainant whose testimony did not persuade the trial judge (with the advantages he enjoyed). The failure to deal adequately with the astonishing evidence that the complainant had purchased KY lubricant before visiting Anwar. The reliance placed by the Federal Court on the complainant's knowledge of homosexual acts, which any young person would know is readily available from plentiful pornography. The failure to deal with the complainant's personal relationship with a member of the prosecuting team. The reliance on DNA evidence collected 54 hours after the alleged offence, with respected experts asserting that it was unreliable, risky and flawed. The acceptance of the complainant, supposedly a devout Muslim, that he had not washed himself for 54 hours after the intercourse.

Every appeal on factual grounds is problematic. But that is a reason why appellate courts are always highly respectful of the overall assessment of the trial judge. This is not because he or she has magic powers to tell truthful witnesses from false. It is because the trial judge sees and hears all of the evidence in sequence, whereas appellate judges are heavily reliant on the passages that the competing advocates choose to emphasise. If the accused had not been the Leader of the Opposition, who came within a whisker of government in the 2013 elections and who had already been subjected to one sodomy trial that eventually failed, little attention would have been paid to this decision of the Federal Court. But because of the offices of state that the accused had held, and those that were possibly in prospect, this was no ordinary litigation. Years hence, lawyers and other citizens will be pouring over the Federal Court's reasons and the angry assertion of the prisoner that he was innocent "of this foul charge". "The incident never happened. This is a complete fabrication coming from a political conspiracy to stop my political career: ... [A] ... murder of

judicial independence and integrity [occurring in a] sea of falsehood and subterfuge".

However all this may be, there is a final and 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, observed [p.201]:

> "The charge against Datuk Seri Anwar Ibrahim, *which is based on an archaic provision of the Penal Code that criminalises consensual sexual relations between adults* [emphasis added], should never have been brought. The case has unnecessarily taken up judicial time and public funds."[2]

Of course, if the complainant's assertions in the second trial were believed, the charge against Anwar Ibrahim, based on section 377A of the Malaysian Penal Code, was not an instance of 'consensual sexual relations'. It was one of a forced and unwelcome intrusion upon the dignity and privacy 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 to be "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.

2 www.malaysianbar.org.my, Lim Chee Wee, Press Release: 'Acquittal on charge of consensual sex between adults is in accord with evidence', 9 January 2012

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 offences of general application. This development led to legislative and judicial reforms of 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. Later, in an important decision of the Delhi High Court in India, in *Naz Foundation v Union of India* [2009] 4 LRC 838, the judges confined the application of section 377 of the Indian Penal Code (upon which the later Malaysian provision was based) solely to cases concerned with underage sexual offences. Although that decision was later reversed by a two-judge bench of the Supreme Court of India in the *Koushal* appeal [2014] 3 LRC 555, a curative petition has been filed. That decision is basically inconsistent with enlightened later decisions on transgender rights decided both in India and Malaysia in 2014. It would have been open to the Federal Court of Malaysia, in a proper case, to prefer the Delhi High Court's approach. However, unfortunately, beyond a small collection of the older overseas possessions that 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 tragedy. 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. This is why leaders of

the United Nations, notable scientists and important citizens (including in Malaysia) have proposed that the offences, like 377A, should be repealed and subsumed in 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 of Anwar Ibrahim, I had the privilege of meeting him at a seminar of lawyers that he attended on the Gold Coast in Queensland, Australia. It was my task to chair his session. It provided an occasion to reflect on the lessons to be derived up to that time, for Malaysia and other countries, from the course and outcome of his first trial.

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 377A 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 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 noncommittal. 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.

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 a further sodomy charge, was an "unwelcome distraction from the serious business of running our country in the interests of the Malaysian people."[3] [p.199]. 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 in July 2012, was the Global Commission on HIV and the Law initiated by the United Nations Development Programme. 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 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

3 *New Straits Times*, 10 January 2012

> 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 an effective (or any) response to these recommendations by 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 Ahmad Badawi. As is revealed, 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 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. Yet, good would 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 that in section 377A were removed and replaced by modern provisions that concentrate on elements of the age of a

complainant, the private 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 sodomy offence does damage that renders even the highest in the land extremely vulnerable, in ways that can never be fully repaired.

The postulate of the prosecution case against Anwar Ibrahim in Sodomy II was that he had committed sexual intercourse, by way of anal penetration, upon the complainant. It was always the accused's assertion that nothing of the kind ever happened. Those who alleged it were "wallowing in filth and foulness". In short, the controversy was a simple one between act or non-act. However, just imagine, for the purposes of argument, that there was such an act as the prosecution claimed. But that it was consensual: an event between two undoubtedly adult persons, happening in private, occurring in a fleeting space of time but subsequently blown up into a crime having a horror name; a criminal charge specially damaging in politics; a peculiar affront to devout religious supporters; and a litigious ordeal and distracting media circus. If that were so, it would still be a tragedy for an accused like Anwar Ibrahim. There would be some evidence, at least, to support such a postulate, although he always denied it. The secluded venue of the events. The opportunity that was afforded. And the still remarkable and poorly explained fact that the complainant came to the fateful meeting armed with lubricant, admitting to have contemplated the possibility of sex. In Sodomy II, everyone was locked into a denial of these postulates at the least because the consent and adult years of the actors and the private occasion of the act were no defence under section 377A. With a name like 'sodomy', evoking religious horror, Anwar Ibrahim could scarcely embrace such a postulate, even if it had been true. Counterfactuals are now big business in history studies. If this

counterfactual were imagined, it would only emphasise the more nuanced tragedy that faced this accused. The defence he could never raise because (in law) it was unavailable and (in politics) it was fatal to his political ambitions. No accused person in Malaysia should be faced with such a dilemma. Even one who, like Icarus, had risen so high as to risk a mighty fall from grace and favour as he approached the sun of triumph.

Those who do not learn from the lessons of history are condemned to repeat its mistakes. The greatest lesson from 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 that 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 *Merdeka*. 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 at last be heeded?

Michael Kirby
Sydney, 18 March 2015

Preface

On the sultry and overcast morning of Wednesday, 3 February 2010, Malaysia's opposition leader Datuk Seri Anwar Ibrahim sat in the dock in the High Court of Malaysia to stand trial for the criminal offence of carnal intercourse against the order of nature. He was alleged to have sodomised a young male member of his staff 18 months earlier at a private condominium in Kuala Lumpur.

Anwar claimed that the accusation was false and part of a political conspiracy to discredit him. Many feared that it was simply a replay of the police investigation and criminal trials of 1998, which resulted in his imprisonment for six years until released on appeal, and another attempt to finish him politically.

Following his convictions for sodomy and corruption, many observers within Malaysia and from the international community expressed significant concern that the proceedings were patently unjust and tainted by significant errors of law. The prosecution maintained Anwar was not above the law and it was doing no more than bringing to trial allegations of a serious crime.

It was a long trial lasting almost two years. The trial was subject to many delays while Anwar's lawyers lodged several appeals relating to issues which they claimed affected the fairness of his trial. These included the prosecution's refusal to disclose a list of the witnesses it intended to call at trial and evidence it would rely upon to prove its case. The defence also

challenged the trial judge's refusal to strike out the prosecution for what it claimed was an obvious abuse of process and his refusal on two occasions to disqualify himself from hearing the trial because of actual bias. None of the defence appeals succeeded.

During the trial many events occurred which, although not directly relevant to the proceedings, illustrated that the political impact and ramifications of the trial were complex and significant. It was at times portrayed as a contest between the government and the opposition. It also brought into sharp focus the Malaysian justice system and, particularly, whether the judiciary could act in an impartial and independent way.

Finally, on the morning of Monday, 9 January 2012, Justice Datuk Mohamad Zabidin Mohamad Diah delivered his decision to a packed courtroom on the fifth floor of the High Court complex at Jalan Duta. In a few brief sentences, he announced that he was not satisfied the charge had been proved and he acquitted Anwar.

Very few had anticipated an acquittal. Anwar told the large contingent of media outside the court complex that he welcomed the decision, declaring he was "vindicated at last". He added that "a decision to the contrary would have put Malaysia in a disastrous light". The government was quick to claim that the verdict confirmed judicial independence.

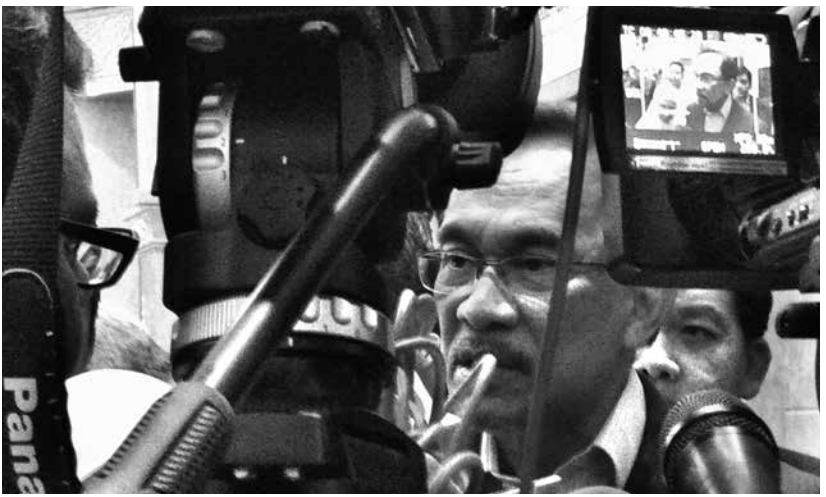
Some commentators saw the verdict as a potential 'game-changer' in the forthcoming national election. It nearly proved to be so when the opposition led by Anwar almost defeated the government at the polls on 5 May 2013 taking 50.87 per cent of the popular vote. The government narrowly scraped back into power taking 60 per cent of parliamentary seats even though it won only 47.38 per cent of the popular vote.

It was a devastating result for the government and it was only widespread gerrymandering that kept it in office. Anwar had proved to be a formidable opponent and capable of toppling the ruling party.

But Anwar's legal struggle was far from over. The prosecution immediately challenged the acquittal. The appeal process was to last more than another three years until the Federal Court finally delivered its decision on Tuesday, 10 Feburary 2015. It upheld the verdict of the Court of Appeal convicting Anwar of the offence of sodomy and sentencing him to a term of five years' imprisonment.

This is the story of how that all came about, documenting the dramatic and often sensational twists and turns as the trial and appeal process played out in the courts.

Mark Trowell
March 2015



About the author

Mark Trowell is a leading criminal lawyer from Perth, Western Australia. He was appointed Queen's Counsel in 2000. Despite some time in commercial and common law, he was ultimately attracted to the challenge of the criminal law.

He has prosecuted criminal cases for the Director of Public Prosecutions and has also appeared as counsel at two Royal Commissions. In December 2006, he was appointed by the Australian Government to undertake a review of the legislation governing the *Australian Crime Commission*.

He is co-chair of the criminal law standing committee of LAWASIA. In recent years, he has been an international observer reporting on behalf of LAWASIA, the Australian Bar Association, the International Commission of Jurists, the Commonwealth Lawyers Association and the Union Internationale des Advocats. He has also represented the interests of the Geneva-based Inter-Parliamentary Union at the criminal trials and appeals of opposition leaders Anwar Ibrahim in Malaysia and General Sarath Fonseka in Sri Lanka.