Commonwealth Law Conference
Zambia, 11 April 2019

A speech on the Commonwealth and the death penalty in Asia: developments, prognosis.

May I begin by thanking the Commonwealth Lawyers Association for including this topic in its program. The death penalty, we must be frank, is a heavy and somewhat miserable topic. Hopefully we can find some gallows humour in our discussion today to lighten our session. It is only by discussing it that we can remember and learn from what has passed, understand what is happening now, and plan for the future. Our other speakers will focus on the Caribbean and Africa, so my purpose is to familiarise you with some issues surrounding the death penalty in the Commonwealth in Asia.

We tend to think of the death penalty from the perspective of regions, sub regions and particular countries, eg South East Asia, China and so on. I regret to say that looking through the Commonwealth prism proves more than a little unsettling, because it turns out every Commonwealth country in Asia, with the laudable exception of Hong Kong, either executes or wants to execute. I put Australia to one side, since we Australians are in an unending discussion, internally and with our neighbours, about whether or not we are part of Asia. For my part, I like to think we are.

A broad perspective

To put developments in the Commonwealth in Asia in perspective, let us start with some broader analysis, then narrow our scope. I am indebted to Amnesty (whose invaluable annual reports have precise numbers) and others for the numbers I quote, using only approximations.

Looked at over the past 70 years, the history of the 'abolition of the death penalty' is a good story. It is a story of successfully challenging, slowing and abolishing the death penalty. However, as we shall see, that trajectory is now meeting with strong turbulence. For the last 12 years, the UN General Assembly has, from time to time, passed a motion calling for a moratorium on the death penalty. Predictably, the voting numbers have steadily improved, so that by the end of 2018 after the most recent vote, 121 countries voted for a moratorium, 35 against, with the rest sitting on the fence. Put another way, 35 countries still say they want to be able to kill prisoners (even if they in fact rarely do so).

Last year, 2018, about 20 countries executed prisoners according to their domestic laws. Excluding China from calculations, slightly less than 700 prisoners were executed. These numbers reflect a steady decline both in the number of countries which execute in any given year, and in the number of prisoners executed. In recent

years, around 23 or 24 countries have collectively executed around 1,000 prisoners in total each year.

So, we have slowly moved from a post WWII reality where all but a few countries executed, or were willing to do so, to a world where less than two dozen countries executed last year. What a good story that is! Yet it is the uncomfortable truth that many of the still executing countries have deeply flawed justice systems.

If we include China, the numbers change dramatically. China unsurprisingly does not publish the number of prisoners it kills. After all, it would be a shocking and embarrassing figure. Based on what experts say, analysing the available data, it seems around 3,000 executions a year is a fair estimate ie 8 or 9 prisoners a day, every day. This is thought to be a great improvement on the numbers killed each year at the turn of the century (when estimates were 8,000 a year or even much more), and that improvement flows in part from major structural criminal law and procedural reforms in 2007. One such reform has forced every capital case from all over China into the Supreme People's Court, the highest national court, for final review. Until recently, there has been good reason for cautious optimism as the Supreme People's Court steadily improved systems, but as the Party's power grows with its increased determination to expand control, I would no longer readily share that optimism.

I spoke of executions according to law. Although not a Commonwealth country, the Philippines is an example of what was on my mind. It is convulsing with so called EJKs, extra judicial killings, carried out in vast numbers with apparent impunity. Last month, in March, High Commissioner Bachelet of the OHCHR reported to the UN that several sources now estimate that up to 27,000 people may have been killed in the context of the campaign against illegal drugs since mid- 2016 (the beginning of President Duterte's incumbency), and that despite serious allegations of extra-judicial killings, only one case – the widely reported killing of a teenage boy – has been subject to investigation and prosecution. That is to say there are on average around 27 EJKs each day. I am aware credible sources put the figure higher than that.

When we consider numbers like 3,000 and 27,000, that of course dampens our relief upon seeing that, on some measurements, the number of prisoners being executed is diminishing. But nevertheless, we must push harder to reduce that number to zero – an achievable goal – and thereby not only end state sanctioned executions but expose and limit other related abuses. After all, this is part of the power, the beauty and the benefit of insisting on and striving for the rule of law. I say an achievable goal, because unlike some human rights goals, abolition is a readily achievable verifiable objective. Each country can become an abolitionist country in law and fact.

Perhaps for another day is the discussion of how related the death penalty is in some places – not all - to deeply entrenched systemic abuses, whether they be one or more of police brutality; torture at the investigation stage; procedural injustices; politically

influenced non independent benches; or corruption at a policing, prosecutorial or judicial level. By fighting the death penalty, and challenging the sentence, one necessarily exposes an entire system to scrutiny. And even the best functioning systems are not without flaws, and are amenable to improvement. Indeed, one of the best arguments against the death penalty is the frank and truthful assessment by experienced judges, politicians and lawyers that, from the basis of their experience, their legal system is too flawed to allow for it to be put to use to kill people. Personally, that is my view for all countries. Every serious lawyer knows that their legal systems need regular, intense scrutiny, if justice is to prevail.

So, I have been looking at the wide horizon. Last year it seems about 2,500 prisoners were sentenced to death (again, all figures exclude China unless stated otherwise), and that the world had around 20,000 people on death row. However, many of those on death row are unlikely to be executed. Many countries keep the death penalty, periodically sentencing prisoners to death, but do not execute. The reasons for that bizarre scenario vary greatly. Some countries have, it seems, lacked sufficient political will to abolish the death penalty, while having sufficient good will never to execute. South Korea may be an example, not having executed since 1998, but often debating the subject. Some countries like to keep the option up their sleeves, eg Thailand executed one person in 2018, the first in 9 years. Sri Lanka has not executed since 1976 but promises to resume very soon.

One of the objectives of the abolition movement is to urge countries to take that final step, of getting the stale or unused option of the availability of state sanctioned killings off the statute books. Otherwise, as history shows, it returns from time to time as an irresistible political option and simplistic solution to meet some supposed law and order imperative. Recent examples of that kind would, in one form or another, include Sri Lanka, the Philippines, and the efforts in India – which executes very rarely - to attach the death penalty to new legislative offences.

With the benefit of 70 years perspective, the story is a good one. About 170 countries do not, and last year did not, in fact execute. And as you know, if we look at the various international courts and ad hoc bodies which have emerged in the last 25 or so years, none of them allow for the penalty of death, despite the atrocities they are set up to investigate. Consider the International Criminal Court and the tribunals for the former Yugoslavia, Rwanda, and Sierra Leone.

The bad news is of course that some countries are holding out against progress and continue to execute, regularly. This progress, or trajectory of history, is not inevitable – it is the product of decades of hard work, whether by elected political leaders or grass roots workers, by people from all continents, all religions, all political systems. It is a trend brought about by the appreciation of people across the world of the ugly futility of state sanctioned killings. It is a trend built upon hard work, which truly reflects the urge of humanity, so poignantly crystallised by the creation of numerous

international institutions and instruments after 1945, to improve our world. But even so, currently China executes seemingly more than fifty people weekly, Iran about five people weekly, Saudi Arabia three weekly, Vietnam one or two weekly, the USA about fortnightly, Singapore one monthly.

With the good news, and the bad news, we have the ugly news.

The Commonwealth and Asia

The ugly news is why we are talking today. For when it comes to the death penalty, the Commonwealth stands out, for the wrong reasons. A review of the Commonwealth in Asia amplifies this.

I spoke earlier of the 35 countries who voted against the 2018 UN moratorium. Nearly half of those 35 countries opposing a moratorium on the death penalty are from the Commonwealth, including the majority of Commonwealth countries in Asia. Looked at this way, a large bloc from the Commonwealth is currently operating as a force to oppose the international call for a moratorium on the death penalty.

Asia could be said to be the executing capital of the world. Of the seven most populous countries in Asia, six execute (China, India, Indonesia, Bangladesh, Pakistan, Japan), and the seventh, the Philippines, wants to. Together, those countries make up almost half the world's population (47%).

Yet for most death penalty purposes, it makes little sense to discuss Asia as a single entity. One can hardly sensibly discuss diverse countries such as Taiwan and Sri Lanka, or Brunei and China, in similar terms. Rather, it makes sense to discuss regions, or groupings, such as the SE Asian grouping of Indonesia, Malaysia, Singapore and Brunei – all executing countries, in law at least. In my experience, the death penalty is not often discussed in Asia through a Commonwealth prism. One reason would perhaps be that there are not appeals to the Privy Council (save for a limited civil exception from Brunei), a pathway which has greatly enlivened the issue in, say, the Caribbean.

Yet what do we see if we discuss the grouping of Commonwealth countries in Asia? It is an interesting grouping precisely because it is the Commonwealth – a shared heritage in so many meaningful ways, and particularly with regard to the rule of law, and for these purposes, criminal law. We see that Pakistan, India, Bangladesh, all neighbours, all execute; their neighbour Sri Lanka is urgently trying to recommence executions. We see neighbours Malaysia, Singapore and Brunei, in vigorous internal debate on the issue. Hong Kong stands apart. Yet, I note in passing, as said today from the floor, no one says "I won't go to Hong Kong because of its law and order problems, because it doesn't continue to execute!" In fact, isn't the opposite true, that others visit Hong Kong because it is so alive, vibrant and dynamic?

So, I will shortly turn to one such regional grouping of Commonwealth countries: Singapore, Malaysia and Brunei.

Personal comment

I cannot pretend to approach this as a disinterested scholar. After some 17 years in the field on this issue, I cannot pretend that the death penalty is anything other than a relic whose time has passed. It is an affront to human rights, cruel, brutal and degrading. It degrades justice systems. It is almost always ultimately political in nature. Scholarship shows that it does not serve as a deterrent. It is vengeance dressed up as justice, and I do not accept that we should serve vengeance up as justice. I have seen cases through numerous systems. Typically, there are politics and/or grave injustices at play. It is so obviously arbitrary. Whether people live or die may depend on what charges - from a range of available options – were laid at first instance, or whether one has good or bad lawyers, or who is on the bench, or whether there is political mileage in having you killed. Its victims are so often the poor or marginalised. This is particularly obvious in Asia, where in recent decades one rarely, if ever (outside China) sees a rich or prominent person or one of their family members being executed. As the Americans say, those without the capital get the punishment.

I have spent many hours over years with prisoners facing execution. I have kissed clients goodbye, then later checked their dead bodies to ensure they died quickly, or without extra wounds. I have been helpless with inconsolable families, watched mothers peeled off sons, watched a few prisoners whom I have known look over their shoulder for that last goodbye.

Long ago, I came into this area simply as a barrister being asked to pick up another brief. I knew precisely nothing about the death penalty. But I have been so appalled as a lawyer by what I have seen, and gradually learnt, that I refuse to be quiet about it. And that is why it seems to me so important for this Commonwealth Law Association to engage with the issue. For we Commonwealth lawyers, as an international group, are in the thick of the death penalty. This may be a good time to mention that in 2009 the Commonwealth Lawyers Association adopted as policy its opposition to all executions under all circumstances – a clear and commanding policy of leadership for which I commend the CLA.

Commonwealth trends

Across the Commonwealth, several trends over 25 years emerge clearly enough. Firstly, we have seen the gradual legal or de facto abolition of the death penalty. Some two thirds of the 53 nations in the Commonwealth are abolitionist in fact or law. Second, we see in those countries which continue to execute, the gradual decline of the mandatory death penalty. For this, we owe a great debt to the lawyers and

scholars who work with the London based Death Penalty Project, led by Saul Lehrfreund and Parvais Jabbar. That team of lawyers and scholars have led the way, they are inspirational, with an extraordinary legacy.

There has emerged in the last 40 years an international jurisprudence on the death penalty. Lawyers might discuss, and judicial benches or scholars refer to, a body of cases from, say, the United States, South Africa, India, the Privy Council, or the European Court of Human Rights, amongst other courts and tribunals.

The mandatory death penalty was invalidated in the USA in 1976 in *Woodson v Nth Carolina*, where the court found that to treat all persons convicted of the one offence as a faceless undifferentiated mass was the opposite of justice. Twenty five years later in 2002 in *Reyes*, the Privy Council found on an appeal from Belize, that to deny an offender the chance to seek to persuade a court that death would be a disproportionate penalty was to deny the offender his basic humanity.

By 1989 the ECHR had found in *Soering v UK* that undue delay and conditions on death row could amount to forbidden cruel and degrading punishment. By 1995 the South African Supreme Court had delivered its majestic decision in *Makwanyane,* bringing an end to the death penalty in South Africa.

These cases and numerous others form an emerging body of cross referential and developing jurisprudence on the death penalty.

Many Commonwealth countries share important provisions in their constitutions, such as a right to life or a prohibition against cruel, inhumane or degrading treatment. In turn, this has meant that Privy Council decisions turning on the application of those provisions to capital cases have had a domino effect in countries sharing such similar provisions. The developing and shared jurisprudence has led in recent decades to change in over a dozen Commonwealth countries, often through cases involving the Death Penalty Project London.

Thus, there has been international change moving away from the mandatory death penalty. It has all but disappeared, in practice, as a sentence leading to an inescapable mandatory death, except in one corner of SE Asia, a Commonwealth corner. (The vagaries of say Iran or Saudi Arabia are not for this talk). In retrospect, it is of course really too obvious – how could we expect our courts, properly exercising judicial power, responsibly to sentence different prisoners for a mercy killing, or a sadistic killing, or a passionate killing, or for trafficking 15 grams rather than 15 kilos of heroin, as if they were all offending meriting the same punishment, and regardless of the prior history of the offender or the circumstances of the case?

This developing body of jurisprudence has had little impact in Commonwealth South East Asia. The death penalty remains mandatory in certain circumstances in Singapore and at least as I stand here today, Malaysia, although change is coming imminently there.

Singapore

Last year Singapore had 13 executions. Despite its extraordinary accomplishments in so many areas, the criminal law in Singapore is, when it comes to brutality, lagging in the past – dragging its knuckles. Prisoners may still be tied to a frame and brutally flogged. Others face mandatory executions for certain crimes. It beggars belief that a society so prosperous and impressive would nevertheless be so stuck in the past on these issues.

We speakers were asked to look at what reforms have occurred in the Commonwealth. In Singapore, so far as I can tell, there have been significant relevant reforms only once since the mid 1970s. Since 1975, offenders have faced a mandatory death penalty for relatively modest amounts of drugs, eg 15 grams of heroin. By the 1990s, Singapore was one of the world's leading executioners, perhaps even the leader, on a per capita analysis.

Neither Singapore nor Malaysia share the Constitutional provisions common to many Commonwealth countries, against cruel, inhuman or degrading punishment. Nor has either country signed the International Covenant for Civil and Political Rights, whose Article 6 has shaped this death penalty debate for decades.

In 1981, the Privy Council ruled, in *Ong An Chuan v DPP* (1981) AC 648, an appeal from Singapore, that the mandatory death penalty did not violate Singapore's Constitution. The Privy Council at that time found that the mandatory death penalty was not unusual, and indeed, that its efficacy as a deterrent may be diminished if it were not mandatory. As noted above, the Privy Council 20 years later was talking about the mandatory death penalty in terms of denying humanity, in *Reyes*. But for Singapore the damage was done. It later abolished appeals to the Privy Council and remains wed to the decision of *Ong An Chuan*, stuck as it were in this regard in 1981, while the rest of the world has moved on. Malaysia later followed the same decision.

Subsequently in Singapore, in a series of cases, its Courts have refused to declare the mandatory death penalty unconstitutional. Relying on different relevant constitutional and legislative provisions, its Courts have considered but been unmoved by international jurisprudence concerning cruel, inhuman or degrading punishment, and a variety of other arguments. Some relevant recent cases include *Ravinthran* (2012) and *Yong Vui Kong* (2010).

However, some significant changes were introduced in Singapore in late 2012, to take effect January 2013. For these purposes, I am now discussing only drug offences, not homicide offences. In the last 25 years, drug offences make up about 70% of execution cases in Singapore. The changes arise under the *Misuse of Drugs Act*, where some sentencing discretion has now been introduced.

The changes provide for a two step process. First, the offender must prove on balance that that the offender has had a limited involvement in the offending, such as being restricted to transporting or delivery, but not manufacturing. Secondly, the prosecutor must proffer a certificate to the judge certifying that the person has 'substantively assisted' the Central Narcotics Bureau in disrupting drug trafficking activities within or outside Singapore. What amounts to 'substantively assisted' is unclear – no reasons or explanation need be given, the decision by the prosecutor whether or not to grant a certificate and why is not reviewable. Without such a certificate, the mandatory death penalty for certain drug offences, involving specified quantities, remains in the particular case. However, if armed with the certificate, the judge may sentence an offender to life with 15 or more lashes, rather than death – a very limited discretion.

There is also a provision relating to abnormality of the mind as a pathway out of mandatory execution.

So the reform is limited and unsatisfactory. The power to kill really resides with the executive, not the court. It is only if and when the prosecutor gives a certificate that the judge acquires a narrow sentencing discretion. The decision to give, or not give a certificate, may on close analysis be unsatisfactory for any number of reasons. It may be influenced (unwittingly) by inappropriate matters – there is no way of testing, unless prosecutorial bad faith or malice is provable (surely an impossible test where review is not available to start with). And yet a life hangs on it. Much of the world engages with judicial review of administrative decisions in other areas of decision making precisely because the executive's decision making process can go wrong. The solution is not of course to give the court the power to review such prosecutorial decisions. There are good reasons why some prosecutorial decisions may best be left not reviewable. The proper answer is to allow Singapore's judges to do what judges elsewhere do – to impose the sentence they (not the prosecutor) deem appropriate.

Of course, one might ask rhetorically, who has the power to most substantially assist the authorities and earn a certificate? The lowly courier, or the more important player with more knowledge, experience and cunning? And if there is no certificate, the judge must sentence to death even if he or she is strongly of the view that in the particular circumstances, it would be otherwise most unjust to do so. Why sentence the quivering youth who trafficked 15 or 30 grams, perhaps to raise funds for family medical bills, in exactly the same manner as the hardened repeat offender trafficking hundreds of kilos? The answers to such questions have led most of the rest of the world away from mandatory sentencing.

One mechanism prosecutors employ, and it has been approved by Singapore's Court of Appeal, is to allege that the offender was trafficking less than the amount the facts actually reveal. So a person carrying say 60 grams may be charged with carrying 14.99 grams, less than the critical amount of 15g of heroin. What factors determine whether a person is charged with trafficking, say, 14.99g as opposed to the true weight the person is carrying? This prosecutorial mechanism, of arbitrarily fixing a 'non capital' weight to the particulars of the charge, is unreviewable. The effect is that the prosecutor is the one who really decides, subject to verdict, whether the penalty of death is going to be applied.

Singapore notionally also has a clemency scheme. However, given the tiny number of times that clemency had been granted in the last 40 years – apparently about 6 times, or less than 1% of execution cases – it is misleading to call it a clemency scheme at all. It is in reality a political option open to the cabinet, almost never exercised. I am not aware of clemency being granted even once in the last 20 years. Is that a clemency scheme?

So in Singapore, in a typical relevant case, once the relevant charge is laid, and found proven, the accused who does not benefit from a prosecutor's certificate must die. Compare this legal and executive rigidity to the jurisprudence which has developed around the world. And, if one might hope that the rigidity of the law is counterbalanced by an executive clemency scheme, that too is only a dream. Clemency is so rare, it should not be dignified by being characterised as a clemency system at all. Yet historically in the common law, the rigidity of a mandatory death penalty has typically been offset by a generous clemency process. For example, in the 20th century in England, almost every woman sentenced to death was reprieved, including about 59 of 60 women mandatorily sentenced to death for killing their infants.

Singapore has long promoted itself as an executing state with the mandatory death penalty. Time has well and truly marched on from when that was acceptable. It has been said that Singapore is now trapped by its decades long rhetoric on this issue. One can only speculate what might lie behind the fact that the 2012 amendments followed only upon the final retirement of Singapore's legendary founding father, former President then Senior Minister Lee Kuan Yew, in 2011.

It is time that Singapore looked forward and in this regard and left behind its past of mandatory hangings and floggings.

Malaysia

The story in Malaysia is a much happier one, albeit also a cause of much concern. However, at least in Malaysia there is currently a moratorium in place. About 1,200 prisoners remain on death row, but there have been significant developments in each of 2017, 2018 and 2019.

In time, the history of Malaysia will probably be considered as history before and after 9 May 2018. The elections in May 2018 were an extraordinary event. In a desperate effort to reclaim their country, the people of Malaysia put aside differences, put aside old wounds and divisions, and joined in a massive operation of people power, with hard work, enthusiasm, courage and good will to democratically put out of office the ruling party, whose leader, former Prime Minister Najib Razak, now faces criminal prosecution for fraud related offences. Given the similar political movements around the globe in the last ten years, including the failed peaceful uprisings, and the toppling of regimes, this was a highlight of the decade – a peaceful transition in accordance with the clear will of the people, in the face of enormous tension and drama.

The death penalty debate in Malaysia now has to be understood in the context of those events.

Both before independence and after, Malaysia has had the death penalty. And as noted, Malaysia's Courts have held the mandatory death penalty constitutional, following the Privy Council in *Ong Au Chuan.*

Despite having many prisoners on death row, Malaysia has tended to execute in relatively small numbers. Perhaps a reason for this, at least in recent years, is because Malaysia has had to rescue Malays abroad from execution. On numerous occasions, it has tended to work hard to do so.

In 2017, Malaysia introduced some discretionary changes to the mandatory death penalty regime, similar to the 2013 changes in Singapore. The changes were the subject of considerable debate, change and finessing, although the details are not relevant here. In short, changes were made introducing some discretion, provided the prisoner had assisted in disrupting drug trafficking.

At the time, the drive in Malaysia from an active NGO community, with particularly strong and courageous leadership from the Malaysian Bar over a long period, (and which continues to this day), seemed to be for incremental change.

However, as discussed, there was a new world opening after the 2018 May election. Part of the election campaign by the then opposition alliances had been a general attitude of reform, particularly to oppressive or unjust and anti-democratic laws. There was, in short, a new and promising rights agenda.

Then, on 10 October 2018, came a powerful announcement: the Minister of Law announced that the Cabinet would be presenting legislation to abolish the death penalty for all crimes, full stop. This was a great breakthrough. It was followed soon after by the 2018 moratorium vote at the United Nations, where for the first time, Malaysia, having always voted against the moratorium resolution, finally voted in favour of the moratorium.

These developments were seen around the world as of great significance both for Malaysia and the region, given the glacial rate of change, and dogged insistence on the merits of execution, which persist in the region.

However, in the face of other voices arising and public campaigns, the government, which had promised to put through the changes in March 2019, has stepped back from its October 2018 promise to abolish the death penalty for all executions. It has instead recently said it would abolish the mandatory death penalty for at least most offences where it remains. The debate is apparently scheduled to go before cabinet in April 2019 or soon thereafter.

Although the backtracking on this reform is most regrettable, what we have seen is the capacity at least to be ready to make significant changes, to lead from the front as a government, and to bring about change in significant steps rather than through small incremental steps.

On 19 March of this year, Malaysia released its response to the UPR recommendations on the death penalty. As you will know, this UN process allows for countries to ask questions of and receive answers from those countries appearing at the Universal Periodic Review at that session. Malaysia has accepted recommendations to establish a de facto moratorium (in fact, it already had one in place since 2018) and to continue to take steps with a view to the abolition of the death penalty

I remain positive and optimistic about change in Malaysia in this regard. The spirit of reform and optimism following the May 2018 elections was so palpable and inspiring that the October 2018 announcements of reform seemed quite in keeping with that spirit. The subsequent faltering is disappointing but leaves room for optimism and change. We live in hope.

Brunei

It is indeed timely that we discuss Brunei.

As many of you will be aware, Brunei has attracted media attention in recent days because of its new penal code, which introduces full sharia law in matters of criminal

offending. Practically, as the world has suddenly learnt, this will mean in Brunei that offenders can be executed by stoning for numerous actions not even considered crimes in many countries.

Brunei is and for over five decades has been governed by Sultan Hassanal Bolkiah, one of the world's richest people. Brunei has a small population, just over 400,000. It does not hold elections. Its wealth is derived from oil.

Perhaps because of the general stability and decent quality of life it enjoys, it attracts little attention in the international media. Perhaps the very lively social exploits of one or two of its prominent citizens are the most regular international news, outside the business pages.

However, since 2013, the tiny country has pronounced and implemented in three stages a new penal code. The final stage of reform, as announced in December 2018, came into force on 3 April 2019. It provides for some shocking penalties. While most of the world have told their governments to very much limit how they as governments regulate or be involved in peoples private and sexual lives, in Brunei the penalty for homosexual sex is now death by stoning. So too for adultery, or abortion, or anal sex (including heterosexual anal sex). Children who have reached puberty can be tried as adults. Other new penalties include amputation for theft.

These regressive steps are of course contrary to international norms and law. They have attracted much attention, perhaps because they are new to Brunei– after all similar laws apply in other countries eg Saudi Arabia, with less international attention. Brunei owns a number of the world's glamorous hotels, and in the last week celebrities have begun to call for a boycott of those hotels. No doubt similar campaigns will soon take off with regard to Royal Brunei Airlines, which flies into England and Australia, amongst other places. Indeed Australia's own Queensland state government is according to media reportedly already scrambling to respond and walk away from a proposed deal it was about to enter with Royal Brunei Airlines. The UK also has a very significant number of defence personnel in Brunei, some 2,000.

So how did this come about? As a small, stable and rich country, Brunei has escaped much attention. The Sultan lives in a vast palace, reputedly of 1,800 rooms. His word is effectively law – public dissent is not part of life in Brunei. Indeed, to challenge the new laws publicly might well attract prosecution for slandering the monarch. Brunei already had the death penalty prior to this new code, although no one has been known to be executed there since the 1950s.

What seems to have escaped the attention of many not from Brunei over the years is that the country is ruled under a heavy ideological blanket. The trilogy of ideas of what it means to be Malay, Islamic and ruled by the Monarch (Melayu Islam Beraja – MIB) permeates the education system, and regular examination of students on this

state ideology is mandatory. It is a state philosophy, formally in place for some 30 years. In recent years, the dual system of inherited British law, dealing with civil laws, co-existing with local and Islamic law, such as in family law and now criminal law, has given way to more Islamic law. For instance, Christmas has been officially banned for public purposes, eg playing Christmas music in public places, although privately in churches and homes it is reportedly fine to continue celebrating Christmas. The state commands what is right, and forbids what is wrong – the familiar authoritarian refrain. Such state control extends to the contents of the Friday sermons in mosques – an area of much controversy in some Islamic countries. And it is widely thought that the monarch himself has become more religious as he grows older, which might explain these developments, hitherto not seen as necessary until now, 50 years into his rule. However, there are other more political theories being spoken of as to why this is happening now.

Where to from here for Brunei? Given its enormous wealth, one cannot imagine the boycotts having much effect, at least initially. Indeed, no doubt they were anticipated. After the arrival of the new laws on 3 April, our own Commonwealth Lawyers Association issued a statement on Brunei, last week on 4th April, of unequivocal, unreserved condemnation of the new laws.

It remains to be seen what the transactional cost will be for Brunei of these new laws, and what effect, if any, such cost will have on the country. It seems very undesirable for any country to attract an enduring reputation in this regard, of extreme brutality with regard to criminal law. And it seems to me that these developments throw up difficult challenges for the Commonwealth.

The inheritance of the rule of law, with the strengths of the common law so well known to those here today, is one of the defining and unifying features of the Commonwealth. Indeed, as the rule of law is flouted or ignored in so many places, it seems to me that one of the likely ongoing tasks and purposes of the Commonwealth will continue to be the promotion of the rule of law, which is so crucial and essential to a stable society where citizens will want to live. That understanding for us here today is founded on the shared inheritance of the common law. But even allowing for flexibility, development, or parallel legal systems operating within one country, how easily can we sit at the table as colleagues in the Commonwealth, discussing law and rights with nations who stone people to death for consensual sexual behaviour? I hope those more experienced with the workings of the Commonwealth can find a pathway forward which serves us all well.

India, Pakistan and Sri Lanka

Time simply does not allow for a review of the changes in the subcontinent over the last 25 years. Perhaps I will make some extremely brief comments, although I cannot even try to adequately summarise developments in Bangladesh.

The Indian Supreme Court has delivered important decisions on capital punishment and developed the restrictive and welcome jurisprudence of limiting executions to the 'rarest of the rare' cases. And even on the 5th of March, just last month, the Court has acquitted a group of six condemned men, after finding their trial was essentially a disgrace. They had spent up to 15 years in jail waiting to be finally acquitted, in circumstances where the Court found the trial to have been unfair, with no forensic evidence, no investigation, and no evidence corroborating the prosecution case. While the Supreme Court's firmness is most welcome, it enlivens another question – how can it possibly be justified that people get sentenced to death in a system which is so clearly overburdened and vulnerable to injustice, at least at the lower levels? For those with interest to read more, I commend the work of the highly regarded team at Project 39A, National Law University, Delhi.

For Pakistan also there is much to be said, for another day. As we sit here today, at least 4,600 prisoners sit on death row in Pakistan. Last year, 14 were executed, but over 500 have been executed in the last 5 years, so hopefully that great reduction in number last year is a sign of the future. Most regrettably, torture at the investigation phase is said to be common, and most cases resolve by confession rather than forensic investigation. For those with the interest to read on the death penalty and criminal justice in Pakistan, I commend the work of the great team at Justice Project Pakistan.

For Sri Lanka, I note briefly that there has not been an execution since 1976, and a moratorium has been operating. As recently as December 2018, Sri Lanka voted for a moratorium at the UN General Assembly. However, in recent months, President Sirisena, having met with President Duterte of the Philippines, has announced he wants to follow the example set there, and re-introduce executions - which remain lawful in Sri Lanka. As I noted earlier, the mass killings in the Philippines are clearly unlawful, and there is much talk of prosecuting the current President for those so called EJK deaths, once he no longer has the power to ride roughshod over criticism. It is so disappointing that a president of another country such as Sri Lanka would find solace in such example and speak of following suit. Of course, although there have been no lawful executions in Sri Lanka since 1976, the country has had its own civil war, not to mention the terrible legacy of the so-called 'white vans', responsible for so many thousands of lethal 'disappearances'.

In February of this year, the government advertised for the position of hangmen, and apparently 47 men have applied.

Once again, one wonders at the transactional cost of reintroducing the death penalty, for instance with the sharing of intelligence from non-executing countries and the EU.

I would hope one lever which may influence future decisions in how Sri Lanka proceeds in this regard is the Commonwealth itself. Given its tragedies and upheavals over the last few decades, which the country has weathered and seemingly emerged from, one can hardly seriously argue that now, suddenly, the death penalty is needed as part of the justice system.

Conclusion

What can we learn from considering the wider picture of the death penalty alongside the Commonwealth? Basically, there is room for satisfaction in some areas, and dismay in others, and much work to be done by the Commonwealth.

Roughly only one third of Commonwealth nations are abolitionist at law; that becomes two thirds when we add those which are de facto no longer executing. In the past, being de facto abolitionist has been a good predictor of likely future total abolition. Today, we cannot say that, as we see that Brunei and Sri Lanka have moved in the opposite direction, back to wanting to execute. That is why we should all urge those countries which are de facto abolitionist to take the final and obvious step of becoming abolitionist at law. This is the way to protect future generations against political maneuverings and the re-introduction of executions.

We haven't discussed so many matters, such as the Second Optional Protocol to the ICCPR today. It is the key instrument to sign to finally abolish the death penalty in your country. However, only a small number of Commonwealth countries, about 20%, have signed it. This may be at least one of the single clearest objectives we can, as the CLA, work on collectively to achieve change – to encourage nations to sign the Second Optional Protocol.

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