THE LAST END OF MONARCHY

A REFLECTION ON THE TRIAL OF KING CHARLES 1

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A TIME OF ANNIVERSARIES

Anniversaries crowd upon us. Scarcely a day goes by but we are reminded of the events taking place in Australia a century ago, as conventions and referenda took the Australian people to federation under the Constitution which has governed them ever since. In 1900 the Commonwealth of Australia *Constitution Act* was enacted by the Imperial Parliament[1], substantially in the form of approved by the Australian settlers entitled to vote. In the sixty-fourth year of her reign, Queen Victoria, at the Court at Balmoral[2] commanded that the sign manual be attached to the proclamation

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1 64 and 64 Victoria, Chapter 12 (*Commonwealth of Australia Constitution Act* 1900 (Imp).

2 Proclamation Uniting the People of New South Wales, Victoria, South Australia, Queensland, Tasmania and Western Australia in a Federal Commonwealth. Imperial Statutory Rules and Orders, revised 1948 Vol II, Australia, p 1027 (17 September 1900 at the Court at Balmoral).

bringing into force the Act to constitute the Commonwealth of Australia "on and after the first day of January one thousand nine hundred and one". In 1903 the High Court of Australia, the "keystone of the federal arch"[3] was called into being. The Court sat for the first time in 6 October 1903 in the Banco Court of the Supreme Court of Victoria in Melbourne.

Everyone of these events will be celebrated, and rightly so. But Australia's legal and constitutional history did not begin in the 1890s, still less at federation. To understand our law and our legal institution, it is necessary to go back a thousand years. Leaving aside the legal tradition of the indigenous people of the continent, Australia's legal history merges inescapably in the great river of the legal history of England. Our common law is the gift of the common law of England. Our statutory inheritance upon which is superimposed our own legislation, is that enacted by the parliaments at Westminster. The Royal Prerogative, insofar as it is still part of the law of Australia, is that of the royalty of the Sovereign of the United Kingdom. The conventions of our Constitution are, in large measure, the constitutional conventions of the United Kingdom. When I was young, and at law school, these verities were taught as

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[3] Alfred Deakin (1902) 8 *Commonwealth Parliamentary Debates* 10962 at 10967. See J M Bennett, *Keystone of the Federal Arch*, AGPS 1980, 13.

matters of pride and not embarrassment. At a time when much rewriting of history is underway, it is all too easy to forget, and even in some circles fashionable to deny, the continuity of our legal tradition. But continuity there is. It is a remarkable story. It gives strength and legitimacy to our institutions. These have a might social and economic value which you have only to look to other countries and different legal traditions fully to appreciate. The Australian legal tradition is not one that has been broken repeatedly by wars, revolutions, and constitutional recommencement. Its overwhelming feature is that of unbroken continuity, legitimacy, adaptation and lawful development. Ours has been the constitutional path of evolution, not revolution.

I want in these remarks to examine one of the few moments of constitutional severance which occurred in English legal history. I refer to the end of monarchy with the trial and execution of King Charles I. I do this for three reasons. First, the King's trial took place 350 years ago[4] By the unreformed English calender of the time, the

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[4] It is necessary to explain the reform of the English calendar. At the time of the trial and execution, dates in England were ten days behind the continent. Furthermore, the English year was reckoned to start on 25 March. By European dating, the King died on 9 February 1649. By English dating, it was then 30 January 1648. Subsequently, with the reform of the calendar, the month and date was unchanged but the year was revised to commence on 1 January. Thus the King's death by the reformed calendar was on 30 January 1649.

King was tried in January 1648 and executed on 30 January of that year. With the reform of the calendar this is now given as 30 January 1649[5]. So on 30 January 1999 the anniversary of the martyred King's death will be remembered.

In Australia, in the circumstances of the Constitutional Convention to consider proposals to sever Australia's constitutional links with the Crown, the anniversary comes as a reminder of the last time in the continuous legal history to which we are connected that actual termination of the Crown was affected by a pretended legal process. It is true that the entirety of the time from the death of King Charles First during which the Commonwealth was established, Oliver Cromwell and later Richard Cromwell served as Lord Protector until King Charles II was restored on 29 May 1660 is reckoned as part of the reign of King Charles II. It is also true that the expulsion from the Kingdom of King James II, brother of Charles II, in the glorious revolution of 1688[6], created an interregnum until William and Mary agreed to take up the throne upon the conditions laid down by the English Parliament[7]. But the only avowedly

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5 The date in the Regnal Table is given as 30 January 1649. See eg New South Wales, *Law Almanac*, 1995, Regnal Table p xxxiii.

6 Again, the changes to the calendar mean that the events occurred in 1689 although taken at the time at 1688.

7 See D L Keir, *The Constitutional History of Modern Britain* (6th ed 1960) 267ff (hereafter "Keir")

republican government established in the history of England was that which followed the execution of King Charles I. Whilst other English speaking polities have abolished the Crown and established republican constitutions, Australia, from the beginning of English settlement has been a constitutional monarchy whose sovereign could boast of a line of Kings and Queens back to William the Conqueror in 1066, broken only in the aftermath of Charles' execution.

Thirdly, the trial is interesting because it illustrates the way in which King Charles, at the peril of his life, insisted upon his conception of the rule of law and basic liberties. And how his fellow countrymen, bent on the termination of Charles' reign, felt obliged to follow legal forms, in some respects extended to the King defendant elements of due process of law but breached basic obligation in giving effect to their grand design. Perhaps in this story there are lessons for Australians. Not that anyone accuses Queen Elizabeth II of wrongs against the people. Far from it. By common acceptance she has been a most dutiful, modern and constitutional monarch. But just as Charles' conception of monarchy was considered by the revolutionaries to be out of harmony with the needs of the time, so republicans today assert the need for change. As we celebrate so many local anniversaries, it is appropriate for us to remember this one as well. For it is an anniversary in our legal history whose consequences had profound effects on the notion of popular government, of the ultimate power of the people, of the limitations of

arbitrary power and the assertion of governments by an elected Parliament.

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BACKGROUND TO THE TRIAL

This is not the occasion to give an elaborate story of the events which brought King Charles I into deadly conflict with the army and parliament of his Kingdom. Charles, like many English monarchs, was not the first expected heir. His elder brother Henry died in 1612 during the reign of their father, King James I, who, as King James VI of Scotland had succeeded Queen Elizabeth I upon her death in 1603 after a reign of forty-four years. Whereas James enjoyed what Keir describes as a "genial if slightly ridiculous amiability"[9], Charles had a greater inflexibility of temper with considerably less ability to see facts as they were and to accommodate his conduct to them. He had a great steadiness of purpose about monarchy and his duties as an anointed King. But he had an ignorance about the people and problems with which he had to deal[10]:

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8 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at .....

9 Keir, 158.

10 *Loc cit.*

> "The sincere religious convictions which governed his life, while they shaped a private character of singular purity and simplicity, led him into dilemmas of public conduct from which a baser man would have escaped. To defend the royal authority committed to him became a sacred trust. James might regard the Divine Right of kingship only as a convenient dialectical device, but to Charles it was an imperative principle of action. No obligation inconsistent therewith which he might be obliged to assume could be binding on his conscience."

The trial and execution of the King was not one of the initial objects of the civil war which broke out between the King and Parliament in 1642. But to defend his powers, the King began raising forces for war to counter the army raised by Parliament. Parliament was asserting its power of governance; whereas the King conceived it as an advisory body. The defeat of the King's army rendered him a prisoner of the parliamentary forces. Those forces were dominated by puritans who regarded him as a wicked man who had brought the shedding of blood upon the people and was deserving of the vengeance of god. It is in this context that the demand of the puritan army on 20 November 1648, laid before the House of Commons, called for the King to be brought to trial. Parliamentary Commissioners appointed to negotiate with the King offered to restore him "to a condition of safety, honour and freedom" if he would agree to regular biennial parliaments which would control the army, pay outstanding remuneration and approve the

appointment of the principal ministers[11]. The King, a brave man, knowing the consequences of refusal, declined the compromise. This was the content in which negotiations were broken off by the House of Commons on 13 December 1648. Two days later, the Council of Officers voted that the King be moved from the Isle of White where he was prisoner to Windsor "in order to the bringing of him speedily to justice"[12]. In the middle of December, the King was brought to Windsor Castle. At Whitehall, in London, the plans for the trial began in earnest. There were urgent debates in the House of Commons on the manner of bringing the King to trial. A committee advised that a special court should be appointed for the purpose to consist of men representing the interests of the nation and empowered to act for a space of one month. Much debate centred on the description of the monarch as a person "entrusted with the government of the Kingdom". This was later shortened to "Charles Stuart the now King of England". The ordinance expressing the offence for which the King would be tried was vague - doubtless the product of its drafting by a committee. It accused the king of having "traitorously and maliciously" plotted to enslave the English nation with the "wicked design" to "subvert the ancient and fundamental

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11 C V Wedgewood, *The Trial of Charles I*, Penguin (1964), 28. The texts of the trial are found in *State Trials* vol IV and *Folio Society's Trial of Charles I* (ed R Lockyer 1959).

12 Wedgewood, 44.

laws and liberties of this nation and in their place to introduce an arbitrary and tyrannical government"[13].

When the ordinance was sent from the Commons to the House of Lords, only twelve Lords could be found. One of them, who had led forces against the King, said plainly that the Parliament which had authorised the action was not lawfully assembled, not having been called by the King. He declared that it was absurd to accuse the King of treason, having regard to the King's ultimate legal authority[14]. The House of Lords unanimously rejected the ordinance. In this revolutionary situation, the House of Commons, upon receiving the news, resolved to take sole responsibility for the King's trial. They declared their right to proceed without further reference to the Lords, remove the names of Piers from the King's judges and hurried the Bill for the trial through the first and second reading. Needless to say, it could not procure the King's assent and such was not sought. In a House of Commons with only an intermittent quorum, it was decided to issue "Acts" of Parliament in the place of the "Ordinances" formerly issues. On Saturday 6 January 1649 the Act was promulgated to establish a High Court of Justice to try the King.

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[13] Wedgewood, 82. See *Blencowe, Sidney Papers,* London, 1825, 45.

[14] Wedgewood, 84.

THE TRIAL

The first problem was to get judges, or at least sufficient judges to preside over the irregular court. The initial drafts of the Bill have named the two Chief Justices (of the King's Bench and of Common Pleas), Henry Rolle and Oliver St John and Lord Chief Baron Wilde of the Exchequer Court. All had refused to serve and their names were omitted. Although all of the named judges had lately been appointed by Parliament and were strong opponents of the King, each had long experience in the Court. Clearly each regarded the new "High Court of Justice" as outside the law because of the axiom of English law universally accepted at that time that all justice proceeded from the sovereign.

In the absence of the Lord Chief Justice (St John) the Commissioners chose for the office of President one John Bradshaw. He had been a judge of the Sheriff's Court in London and had recently been appointed the Presiding Judge in Chester and a Judge in Wales. He protested the insufficiency of his experience for so great a task. But he was eventually persuaded to take the chair and to accept the title of "Lord President"[15]. Four lawyers were chosen to

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[15] Wedgewood, 107. See Nalson's Trial of Charles I (1684), 5. See also Manuscripts of the House of Lords (ed M F Bond), xi, London, 1962, 476.

prosecute the King. The most vigorous of them was John Cook, a barrister of Gray's Inn and a man of considerable education. He combined fervent religious faith with convinced republicanism and a considerable interest in moral and social reforms. He was aided by a distinguished scholar from the Netherlands, Isaac Dorislaus, who had one been Professor of Ancient History at Cambridge where he had expressed views subversive of monarchy. Cook and Dorislaus took great pains, and much time, in drafting the charge. It was decided that the King should be tried at the South End of Westminster Hall. To permit that to be done space was cleared by removing the partitions between the Court of King's Bench and the Court of Chancery which had for a long time been sitting there. The rest of the hall was cleared to accommodate the public. The King who had spent his time at Windsor in meditation and prayer was brought in a closed coach to the Palace of St James where he arrived on19 January 1849.

The High Court of Justice to try the King assembled on Saturday 20 January 1849. A roll call was conducted and many absentees were noted. Justice Bradshaw's chair was somewhat raised in the middle of the front row. Cook and his colleagues appeared attired in their black barristers gowns. On the order of Bradshaw, the King was brought into the hall. Until this moment he

did not know who constituted the Court and what were the charges. Cook rose to read the accusation of "high treason and high misdemeanours ... in the name of the commons of England"[16]. The King tried to interrupt. Bradshaw directed that the charge be read. It contended that the King had been "trusted with a limited power to govern by and according to the laws of the land and not otherwise". Instead, he had "traitorously and maliciously levied war against the present Parliament and the people therein represented". The charge concluded that he was "A Tyrant, traitor and murderer and a public and implacable Enemy to the Commonwealth of England"[17].

King Charles I had a speech impediment and was not a good public speaker. However, the records of the trial (which are virtually *verbatim*) and the accounts of many of the observers suggest that he spoke fluently, clearly and with strength. When called up to answer to the Court he said:

> "I would know by what power I am called hither. I would know by what authority, I mean lawful. There are many unlawful authorities in the world, thieves and robbers by the highway .... Remember I am your King, your lawful King, and what sins you bring upon your heads, and the judgment of God upon this land; think well upon it, I say, ... I have a trust committed to me by God, by old and lawful descent; and I will not betray it to answer to

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16 Wedgewood, 129.

17 Wedgewood, 130. Nalson, 29-32.

> a new unlawful authority: therefore resolve me that and you shall hear more of me".

Cook exhorted the King to answer "in the name of the people, of which you are elected King". But Charles responded[18]:

> "England was never an elected Kingdom, but a hereditary Kingdom, for near these thousand years. ... I do stand more for the liberty of my people, than any here that come to be my pretended judges ... I do not come here as submitting to the Court: I will stand as much for the privilege of the House of Commons, rightly understood, as any man here whatsoever I see no House of Lords here that may constitute a parliament. Let me see a legal warrant authorised ... by the constitution of the Kingdom and I will answer."

The King's insistence on authority, legitimacy and what we would now regard as the rule of law obviously unsettled the "court" and the spectators. As if on queue, the soldiers around the hall began to shout "Justice! Justice!". The court adjourned for the day.

On the following morning 62 Commissioners met in the Painted Chamber of the Old Palace of Westminster near to Westminster Hall They agreed that the King should not be permitted to challenge the authority of the Court. If he would not plead to the charge of treason he would be treated as though he had pleaded guilty. On the reassembly of the Court, it declared, through

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[18] Wedgewood, 132.

Bradshaw, that it was "fully satisfied with their own authority". But the King then appealed not to his rights as monarch but as an Englishman:

> "Sir, by your favour. I do not know the forms of law; I do know law and reason, though I am no lawyer professed; but I know as much law as any gentleman in England; and therefore (under favour) I do plead for the liberty to the people of England more than you do: and therefore if I should impose a belief upon any man, without reasons for it, it were unreasonable."

Bradshaw thereupon threatened the King that he would be in contempt of Court: a mild protest given that Charles was on trial for his life for treason and for murder. The King asked for "one precedent". He declared that the Commons of England had never been a court of judicature and asked "how that came to be so"[19]. He required reasons and in answer to the reproof of Bradshaw that it was not for prisoners to require, he answered:

> "I am not an ordinary prisoner".

The Court withdrew once again, the soldiers shouting "justice".

On the third day the King was again required to plead. He protested at the interruptions he had suffered when he desired "to

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[19] Wedgewood, 139.

speak for the liberties of the people of England". Bradshaw told him to "make the best defence you can". The King declared once again that he could not answer unless he was satisfied that the fundamental law of the kingdom warranted the trial for he was sworn "to the maintenance of the liberties of my people". On Bradshaw's instructions, the Clerk of the Court demanded that the King give answer "by way of confession or denial of the charge". His only response was again to deny the legality of the Court in the interests of the privileges of the people of England. Bradshaw responded that he had written his meaning as to those privileges "in bloody characters throughout the whole kingdom". He was prevented from saying more. "I see I am before a power", said the King and rose to go[20]. For the third time Bradshaw ordered the removal of the prisoner because of the King's skilful assertion of the element of the proceedings which was their weakness: their dependence on the army that surrounded the hall and their departure from established law.

What followed was a succession of thirty-three witnesses heard by an appointed committee comprising some only of the "judges" who assembled on 24 and 25 January 1849. Their depositions were then read out at a public session of the entire court

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[20] Wedgewood, 144.

sitting in the painted chamber. On 26 January 1849, sixty-two of the Commissioners re-assembled and the draft sentence was produced, condemning the King as "tyrant traitor, murder and a public enemy to be put to death by the severing of his head from his body"[21]. On the following day sixty-eight of the Commissioners re-assembled, the sentence being produced. They agreed that if the King were to make a last-minute submission to the jurisdiction of the Court they would adjourn to consider what should be done. But meanwhile an element of urgency had entered into the proceedings. Diplomatic representations were being made from Europe for the life of the King. The King's friends were seeking to persuade the Lord General, Thomas Fairfax, head of the army, to find a compromise uncongenial to the committed republicans. The London crowds were becoming restive at the reports of the King's plucky defence and his appeal to the protection of their liberty. Rumours of armed incursions from Europe were spreading.

To signify the solemnity of the occasion, Bradshaw for the first time was robed in red. As the King was brought in the soldiers shouted for justice and some for execution. There was uproar in the Hall. Whilst again protecting his ...(inaudibible) ... to defend the liberties of the subject, he requested that he be granted a hearing

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[21] Wedgewood, 153; State Trials V, 1200.

"before any sentence be passed" before the Lords and Commons in the Painted Chamber. Bradshaw stated that the King had delayed justice for many days by refusing to plead. But there was an outcry from amongst the Commissioners. An adjournment was called. One of the Commissioners, John Downes urged that the King's offer should be accepted. Led by Cromwell, most of the Commissioners refused. They returned to the Hall, leaving Downes outside. Later, at the trial of the Regicides(?), various others asserted that they had stood up for the King.

Charles was brought back into the Hall. He was told that his request for a meeting with the Lords and Commons was rejected. Bradshaw proceeded to pronounce sentence. He declared that a King was "but an officer in trust, established by history and the coronation oath for the protection of the people". He made some rather ill-considered comparisons between King Charles and Caligula. He returned at the end to the assertion that monarchy, as in England understood was, a contract and a bargain between the King and his people, and your oath is taken: and certainly Sir the bond is reciprocal: for as you are the ... (inaudible) ... so they lees subject ... "If this bond be once broken, farewell sovereignty!"[22]. The speech by Bradshaw, which lasted forty minutes, concluded with the

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[22] Quoted Wedgewood, 161.

finding of the Court that the King was guilty. The Clerk was directed to read the sentence of death. When he had concluded, all of the Commissioners rose to their feet to signify concurrence.

The King who was then, in the theory of the law, already dead for all intents and purposes, demanded a last word. Bradshaw declined to allow it. The guards began to take the prisoner away. The King sought to speak. He was declined the chance. On leaving he was recorded to say:

> "I am not suffered for to speak: expect what justice other people will have".

As he was taken out the cries of "Execution!" and "Justice!" filled Westminster Hall.

AFTER THE TRIAL

King Charles I was permitted to see at the Palace of St James the two children who had remained in England[23]. He warned them repeatedly not to permit attempts to put them on the throne as puppet monarchs but to show allegiance to their lawful King, the Prince of Wales, who was in the Netherlands. He was then brought back to

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[23] Princess Elizabeth (aged 13) and the Duke of Gloucester (aged 8).

Whitehall where he was housed until his execution. The scaffold was ready by 30 January 1849 in the afternoon. Until that day, no one in the House of Commons had seriously considered the legal steps that would be necessary to constitute England a republic. The execution was delayed a matter of hours so that action could be taken before the King's head was severed. An "Act" was passed to make it an offence to proclaim a new King and to declare the representatives of the people, the Commons, as the source of all just power. The brief emergency Bill for this purpose was hurriedly passed by the Commons by midday. The King had been kept waiting until nearly two o'clock for his last engagement[24]. He was then taken through the banqueting hall with its ceiling painted by Rubens to a scaffold. His last words were to deny the justice of the sentence upon him and to forgive "even those in particular that have been the chief causes of my death". He gave instruction to his enemies that they should learn to know their duty to God, the King - "that is my successors" and the people. Virtually his ultimate words were directed to the law:

> "Truly I desire [the people's] liberty and freedom as much as anybody whomsoever; but I must tell you their liberty and freedom consists of having of government, those laws by which their life and their goods may be most their own. It is not for having a sharing government ... a subject and a sovereign are clear different things ... If I would have given way to an

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[24] Wedgewood, 186; Commons Journals, 30 January 1649.

> arbitrary way, for to have all laws changed according to the power of the sword, I need not to have come here; and therefore I tell you ... that I am the Martyr of the people".

King Charles I asked the executioner to wait for the sign. The last words he heard were the executioner's assurance "I will, an' it please Your Majesty". With one blow his head was severed from his body and a groan was heard in the small crowd that witnessed the execution.

A week after the King's death, the House of Commons passed an additional Act abolishing the monarchy. Royalists refused to accept it, some on the basis that there could never be a vacancy of the Crown; others on the more legalistic footing that the Act "was that of the Commons alone and did not have the participation of the other elements of Parliament: the House of Lords and the King".

King Charles I's prediction that others would suffer as he had was born out. A High Court of Justice in 1649 sentenced several Royalist Peers to death. All enemies to the Commonwealth was subjected to this tribunal in 1650[25]. Adherents to the Monarchy were put under martial law[26]. A new treason law was passed exacting an

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[25] Keir, 223.

[26] Keir, 223.

oath of fidelity. The army leaders, who were the real power in the Commonwealth, adopted the conception of rule by an aristocracy of the "godly"[27]. An Instrument of Government was drafted by army officers in December 1653. It was a practical document binding the Lord Protector to act only through the Council of State chosen largely by the army. Parliament was to meet at least triennially for five months. Its approval was required for nominations to the highest administrative and judicial posts. It had sole control of extra-ordinary supply and over its enactments so far as not inconsistent with the Instrument of Government. The object of the Instrument, which is undoubtedly the inspiration for the Constitution of the United States, was to afford a written fundamental law in the place of the Conventions of Monarchy. No solution was offered for the resolution of disputed interpretations of the text. Parliament was to be unicapital[28].

After Oliver Cromwell died, in the way of monarchy, his son Richard succeeded on his father's nomination. However, he soon alienated the army and was ousted from office in 1659. By early 1660 it appeared to the army that they could neither govern with Parliament nor without it. A Convention Parliament was summed

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[27] *Ibid,* 224.

[28] *Id,* 226.

without Royal Writ as the body to bring the republic to a close. King Charles II by a wise Royal Declaration of Braidon promised pardon to offenders, safeguards for property, satisfaction of arrears of remuneration to the army, and liberty of conscience[29]. The age of written constitutions was brought to a close. But in its place the monarchy that was restored was clearly established as one obliged to operate with the elected Parliament. Not as an advisory body but as an essential prerequisite to the making of the laws of the kingdom. The restoration of the monarchy in 1660 was "essentially a return to government by law"[30]. It was for this that the King's head had been severed. There would be no going back.

Cromwell, Bradshaw and the other regicide Ireton, all of whom had been interred in Westminster Abbey were removed, the corpses displayed at the gallows of Tyburn and later their heads exposed at the top of Westminster Hall where they had led the trial of the King. Thirty-one of the 59 Commissioners who had signed the death warrant were living. Pardons were offered to those who came over to the monarchy. Those who did not were tried but by procedures and in courts more orthodox than those in which they had participated. In the end, nine of the regicides suffered the

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29 *Id*, 229. *Gardiner Documents*, 265-267.

30 Keir, 230; Holdsworth *History of English Law I*, 127.

punishment then provided by English law for traitors: hanging, drawing and quartering. Cook, the leading prosecutor, was executed. His enthusiastic adviser, Dorislaus, had been murdered in the Hague in 1649 by royalist soldiers. With the restoration of the monarchy, few would associate themselves with the republican cause. But Cook died convinced that he had acted justly. Before his death he wrote to his wife:

> "We are not traitors, nor murderers, nor fanatics, but true Christians and good commonwealth men, fixed and constant to the principles ... which the parliament and army declared and engaged for; and to that noble principle of preferring the universality, before a particularity, that we sought the public good and would have enfranchised the people, and secured the welfare of the whole groaning creation, if the nation had not more delighted in servitude than in freedom"[31].

EPILOGUE

The trial of King Charles I was, by legal standards, a rather discreditable affair. The "Court" had no legal authority. It was the creature of the power of the army The King had no advance notice of the charge. No one was appointed to help him with his defence. The court did not even pretend to be impartial. When the King scored a point in argument, the soldiers around the Hall showed

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[31] Wedgewood, 221; State Trials V, 1265.

where the real power lay. Eventually the King's refusal to answer was deemed not to be a plea of not guilty (requiring the accuser to prove the charge) but a plea of guilty to treason. This can only be understood in the procedures of the time. The King never accepted the authority of the court. He contested its authority from first to last. It is clear enough that his appeals to the rule of law, to the authority of the courts and to due process of law were designed to strike a cord in the minds and hearts of his hearers and of English people who came to read of them. He was aware of the newspapers which would bring those words to the people of England far from Westminster Hall, both in time and space. At the scaffold he addressed his final remarks to the scribblers who were waiting for his last words. Tellingly he made the point that if a King could be put on trial before an irregular tribunal established by power not lawful authority, the same could happen (and would happen) to others in the kingdom. Life and property would not be safe.

By the standards of today, many fundamental rights were breached or ignored in the way King Charles' trial was conducted. I leave aside the large debate as to whether capital punishment is contrary to fundamental human rights[32] Now, by international law, anyone sentenced to death had the right to seek pardon or

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[32] See *International Covenant on Civil and Political Rights* (ICCPR), Art 7. Cf Art 6.3.

commutation of the sentence. The King was denied the chance to appeal to a true Parliament[33]. His deprivation of liberty was by the power of Parliament and not by a procedure established by law[34]. He was not informed at the time of hearing of his arrest of the charges against him[35]. Indeed, to an advanced stage of the trial process, he was not informed of the precise accusations. He was not brought promptly before a judge or other officer authorised by law to exercise the judicial power[36]. Instead, he was kept in close custody in successive places of detention whilst his accusers decided what they would do with him. He had no access to a court to invoke the Great Writ to secure his liberty[37]. Although he was treated with courtesy and dignity, he was not treated with humanity[38]. He was kept from his family, friends and advisers and surrounded by guards, informers and pimps engaged by the army for surveillance.

He was not treated as an equal before the courts in that he was not put on trial in one of the regular courts of the land[39]. If this

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33 ICCPR Art 6.4.

34 ICCPR Art 9.1.

35 ICCPR Art 9.2.

36 ICCPR Art 9.3.

37 ICCPR Art 9.4.

38 ICCPR Art 10.1.

39 ICCPR Art 14.1.

was because the proper court was that of King's Bench, he could not be summoned except by his own Writ, at least there was nothing that authorised the strange collection of Commissioners except the rump of the House of Commons was determined to secure his end. The "justice" was not "competent, independent and impartial", nor was it "established by law"[40]. This was a revolutionary court summoned to perform a revolutionary trial in wholly exceptional circumstances. He was expressly denied the presumption of innocence[41]. His legitimate contest to the constitution of the court turned into an acceptance of guilt. Many other rights of due process which we take for granted were denied to him. To be informed of the charge and to have adequate time and facilities to prepare his defence and to communicate with advisers[42]; to be tried without delay[43]; to examine or have examined the witnesses against him who gave their testimony before a sub-committee of the Court[44] and not to be compelled to testify against himself or to confess his guilt[45]. He had no right to have his conviction and sentence reviewed by a higher

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[40] ICCPR Art 14.

[41] ICCPR Art 14.2.

[42] ICCPR Art 14.3(b).

[43] ICCPR Art 14.3(c).

[44] ICCPR Art 14.3(e).

[45] ICCPR Art 14.3(g).

tribunal according to law[46]. The only higher tribunal to which he appealed was that of the English people to whom he spoke directly.

On the other hand, it is worth noting that the revolutionaries made efforts to give a semblance of justice to the proceedings. The fact that they felt an obligation to conduct a trial at all is noteworthy. It was held as a public hearing[47], at least as to those parts which the King attended. It was known that reporters were present, and in the state of the newspapers of the time, would carry the King's words to the public. The King's repeated objections to the authority of the Court clearly disquieted the tribunal occasioning the several adjournments which were taken. His request for a transcript of the proceedings was granted[48]. The charge was read to him and he was asked to plead to it. If he had consented to the court's jurisdiction, there is little doubt that the proceedings would have been conducted in a different way. This was no chaotic brutality such as brought an end to the monarchy of Russia. The rump of the Commons at least felt an obligation to have the outward semblance of law. But did this make the travesty that followed more palatable. Or by the charade of lawful form, did it simply bear out the oft repeated criticism of the

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46 ICCPR Art 14.5.

47 ICCPR Art 14.1.

48 Wedgewood, 167.

English common law - that it is obsessed with procedure and less concerned with substance?

LESSONS FOR TODAY

The trial and execution of King Charles I was a critical turning point in English constitutional history. Nowadays, with 350 years of experience, we are not so astonished at the end of monarchy, even the murder of kings. Revolutionary overthrow of governments is the norm rather than the exception in the modern world. But at the time, this was a remarkable event, in which both sides showed strong determination and a high measure of courage. The King for his obvious insistence on certain principles even in the face of death. For the regicides, for insisting upon the contract between a monarch and the people and the right of Parliament to uphold that contract and to give effect to the presumed wishes of the people whom they dared to express. Without this trial, it is inconceivable that the glorious revolution of 1688 would have taken place. Yet it is that revolution which finally established constitutional monarchy as a conditional form of government answerable to the will of the people. King Charles I's second son was driven from the kingdom because he tried to resuscitate some of the ideas of his father. Most importantly, from the point of view of the law, his banishment secured the promise of judicial tenure that is the mainstay of judicial independence.

Without the glorious revolution, there would probably have been no American revolution in 1766. Without that revolution the

Australian colonies would probably not have been established for there would have been no real need for them. If they had been, the Australian Constitution, so profoundly influenced by the American model, would have had different form. The importance of the assertion of parliamentary power - even so irregularly - in the trial and execution of the King cannot be overstated. It shapes Australia's constitutional document.

The events which followed the trial and execution of the King demonstrated the uncertainty which affected the English polity when the central feature of the Crown was removed. There was important experiments which were to bear fruit later on and far away - most especially with a written Constitution, defined powers and guarantees of rights. Since that time, there have been many acts of orderly transition, by law, from monarchy to republic. But in few of the places, with the possible exception of Ireland, where this has occurred, has the Crown been such an established and longstanding feature of the governmental system. I refer to the Crown, not the specific person of the monarch. To the system of government, not the office-holder. The trial and execution of King Charles I demonstrated that the office-holder is, after all, a mere mortal whose head can be struck from his body. The notion of the Crown and its permeating influence in our law is something rather more difficult to expel. It is not the same notion as the monarch. It is not the same notion as the state. It is not exactly equivalent to the people. It was on contemplation of this that the House of Commons kept King Charles waiting that bitterly cold day for six hours whilst they passed

the first republican "Act". A lesson of those events is that if a change is to be made, it takes a lot of time and thought and many legal actions. It is not as simple as turning scissors and paste upon the text of the Constitution.

When I served in Cambodia I saw, in microcosm, many of the kinds of peril that were faced in the monarchy of England under King Charles I. War, revolution, mass death and destruction cause fearful dislocation. They sever the links of continuity and legitimacy. We in Australia have been free of the war and revolution. We have an unbroken chain of authority and legitimacy. That is not a reason for holding from further change if its time has come. But it is a reason for reflecting upon what we have, where it came from and what it is proposed we should put in its place. That which follows should clearly be in the line of continuity and with the legitimacy of our unbroken constitutional tradition that is such a strength for the peaceful government of our people.

Go to the Palace of Westminster. Line up outside, preferably on a sunny day. Walk up the steps towards the modern House of Commons. The painted chamber is gone. But there on the left, as you approach the Parliament, is the ancient Westminster Hall. This is the hall in which the law of England was fashioned. It is the hall that was cleared out for the trial of a King. It is empty now. Because of security guards, x-ray machines and the fear of terrorists, it is difficult to go down into that space. But if you do you will find a mark to show where King Charles I was tried. Nearby, in the precincts, the

statute of Cromwell stands sombre guard over the Parliamentary buildings. The two adversaries did what each felt was necessary. The King adhered to law, convention and his ancient prerogatives. The republican insisted that sometimes the law must be changed, even radically changed. And that the people are the ultimate source of the law and their will must be done. Each of these protagonists of 350 years ago had a lesson for our own time. The one of the merit of continuity, legitimacy, history and ancient laws and liberties. The other the message of the sovereignty of the people, the importance of the parliamentary institution, the legitimacy of democracy and the right of a people even to cut off the head of a King for their own sovereign demands.

Just as our people need to learn civics, they need to learn of the constitutional history that provides the bedrock for freedom in Australia. Three hundred and fifty years after the trial and execution of King Charles I, we do well to pause and remember those violent times. For we are the beneficiaries of the rights of the people that can be traced to those turbulent events.