1507

AN END OF MONARCHY

A REFLECTION ON THE TRIAL OF KING CHARLES I

The Hon Justice Michael Kirby AC CMG

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ANNIVERSARIES

Anniversaries crowd upon us. Scarcely a day goes by but we are reminded of events taking place in Australia a century ago. Conventions and referenda at that time took the Australian people to federation under a 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 approved by the Australian settlers who were entitled to vote. In the sixty-fourth year of her reign, Queen Victoria, at the Court at Balmoral[2] commanded

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* Justice of the High Court of Australia.

1 64 and 64 Victoria, Chapter 12.

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).

that the sign manual be attached to the proclamation 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 on 6 October 1903 in the Banco Court of the Supreme Court of Victoria in Melbourne.

Each of these centenary events will be celebrated in Australia, 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 institutions fully, 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 completely in the great stream of the legal history of England. Our common law is the gift of the common law of England[4]. The statutory inheritance, upon which is superimposed our own legislation, is that enacted by the Parliament at Westminster. The Royal Prerogative, in so far as it is still part of the law of Australia, is that of the royalty of the Sovereign of the United Kingdom, now Queen of Australia. The conventions of

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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.

4 *Oceanic Sun Line Special Shipping Company Inc v Fay* (1988) 165 CLR 197 at 263 per Gaudron J.

our Constitution are, in large measure, the constitutional conventions of the United Kingdom. When I was at law school, these verities were taught as matters of pride and in no way as an embarrassment. At a time when the rewriting of history is fashionable in some quarters, it is all too easy to forget, and in some circles common to deny, the continuity of our legal tradition. But continuity there is. It is a remarkable story. It gives strength and legitimacy to Australia's legal and political institutions. Such continuity has a mighty social and economic value. One has only to look to other countries and different legal traditions fully to appreciate our blessings. The Australian legal tradition is not one that has been broken repeatedly by war, revolution, 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 propose 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 undertake this task for three reasons. First, the King's trial took place exactly 350 years ago[5]. The King was tried in January 1649. He

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5 It is necessary to explain the reform of the English calendar. At the time of the trial and execution of King Charles, 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

Footnote continues

was executed on 30 January of that year[6]. On 30 January 1999 the 350th anniversary of the "martyred King's" death will be remembered.

Secondly, in Australia, a Constitutional Convention was held in 1997 to consider proposals to sever Australia's remaining constitutional links with the Crown. The anniversary of King Charles' death therefore comes as a reminder of the last time in the continuous legal history to which Australians are connected that actual termination of the Crown was effected by a pretended legal process. It is true that the entire time from the death of King Charles I through the Commonwealth in which 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 James II, brother of Charles II, in the Glorious Revolution of 1688[7], created another revolutionary interregnum until William and Mary

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English dating, it was 30 January 1648. Subsequently, with the reform of the calendar, the month and date remained 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.

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

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

agreed to take up the throne upon the conditions laid down by a Convention of present and past leaders of the English people[8]. But the only avowedly republican government established in England was that which followed the execution of King Charles I. Whilst other English speaking polities, by revolutionary and evolutionary means, have severed their links with the Crown and established republican and other constitutions, Australia, from the beginning of British settlement has been a constitutional monarchy whose sovereign came from a line of English Kings and Queens dating back to William the Conqueror in 1066, broken seriously only in the aftermath of King Charles' execution.

Thirdly, the trial is interesting because it illustrates the way in which King Charles, at the peril of his life, insisted bravely upon his conception of the rule of law and his version of basic English liberties. And how his fellow countrymen, although bent on the termination of Charles' reign, felt obliged to follow legal forms. How in some respects they extended to the royal defendant elements of due process of law but breached basic obligations in giving effect to their grand design. Perhaps in this story there are lessons for Australians. No one accuses Queen Elizabeth II of wrongs against the Australian people. Far from it. By common acceptance she has

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

been a most dutiful, modern and constitutional monarch. But just as King Charles I's conception of monarchy was considered by the revolutionaries of the time to be out of harmony with the needs of the people, so Australian republicans today assert a need for change. As we celebrate so many local Australian anniversaries, it is appropriate for us to remember this one as well. For although it concerns events that happened long ago in England, it is an anniversary in our legal history. It had profound consequences for the notion of popular government, for the ultimate power of the people, for the limitations of arbitrary power and for the assertion of government by an elected Parliament.

BACKGROUND TO THE TRIAL

This is not the occasion to offer an elaborate explanation 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[9]. So this was another case of what might have been, for there is no doubt that the events that unfolded were greatly influenced by Charles'

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9 For a recent discussion of James I's conception of the King's prerogatives, see P Kavanagh, "Mabo and Legal Education Today" (1995) 3(1) *The Crossexaminer* 24.

personality. James I, as King James VI of Scotland, had succeeded Queen Elizabeth I upon her death without heirs of the body in 1603 after she had reigned for forty-four years. Whereas James enjoyed what Keir has described as a "genial if slightly ridiculous amiability"[10], Charles had a greater inflexibility of temper[11]. He had considerably less ability than his father 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 was largely ignorant about the people and about many of the problems with which he had to deal[12]:

> "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 were not among the initial objects of the Civil War which broke out between the King and the

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10 Keir, 158.

11 For an account of Charles' difficult relations with his judges see W Prest, "Politics and Profession in Early Stuart England: the Diary of Sir Richard Hutton" (1988) 6 *Parergon* 163 at 175.

12 *Loc cit.*

English Parliament in 1642. But to defend his powers, the King began raising forces for war to challenge the army raised by Parliament. To this end he enlisted foreign support just as Parliament enlisted a Scottish army. Parliament was asserting its power of governance; whereas the King conceived it as no more than an advisory body. The defeat of the King's army and the King's persistence and attempt to initiate a second war, rendered him a prisoner of the parliamentary forces. Those forces were dominated by puritans who regarded the King 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, after the King's military defeat, 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[13]. The King well knowing the consequences of refusal, declined the compromise.

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13 C V Wedgwood, *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).

This was the context in which negotiations with the King 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 Wight, where he was prisoner, to Windsor "in order to the bringing of him speedily to justice"[14]. In the middle of December 1648, the King was therefore brought to Windsor Castle. At Whitehall, in London, the plans for his trial began in earnest.

There were urgent debates in the House of Commons about the manner of bringing the King to trial. A committee advised that a special court should be appointed for the purpose. It should 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. In the instrument charging him, he was described as a person "entrusted with the government of the Kingdom". This self-serving claim was later shortened to "Charles Stuart the now King of England". The Ordinance expressing the offences 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 laws and liberties of

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14 Wedgwood, 44.

this nation and in their place to introduce an arbitrary and tyrannical government"[15].

When the Ordinance was sent from the Commons to the House of Lords, only twelve Lords could be found to consider it. One of them, who had led forces against the King, said bluntly that the Parliament which had authorised the action, was not lawfully assembled, not having been summoned by the King. He declared that it was absurd to accuse the King of treason, having regard to the King's ultimate position as the font of all legal authority[16]. The House of Lords unanimously rejected the Ordinance.

In this revolutionary situation, the House of Commons, upon receiving the news from the Lords, resolved to take sole responsibility for the King's trial. The Commons declaring their right to proceed without further reference to the Lords, removed the names of Peers from the King's judges and hurried the Bill for the trial through its readings in the Commons. Needless to say, the Bill did 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"

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15 Wedgwood, 82. See Blencowe, *Sidney Papers,* London, 1825, 45.

16 Wedgwood, 84.

formerly issued. On Saturday, 6 January 1649, the Act was promulgated to establish a High Court of Justice to try the King.

THE TRIAL

The first problem was to get judges, or at least a sufficient number of judges, to preside over this irregular court. The initial drafts of the Bill had named the two Chief Justices (of the King's Bench and of Common Pleas), Henry Rolle and Oliver St John as well as Lord Chief Baron Wilde of the Exchequer Court, to preside at the trial. All had refused to serve. Their names were therefore 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 courts. Each regarded the new "High Court of Justice" as outside the law because of the axiom of English law, universally accepted at the time, that all justice proceeded from the sovereign.

In the absence of 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. He had recently been appointed the Presiding Judge in Chester and a Judge in Wales. Bradshaw protested the insufficiency of his experience for

so great a task. But he was eventually persuaded to take the chair. He accepted the title of "Lord President"[17]. Four lawyers were chosen to prosecute the King. The most vigorous of these was the Solicitor-General, 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 reform. He was assisted by a distinguished scholar from the Netherlands, Dr Isaac Dorislaus, who had once been Professor of Ancient History at Cambridge University where he had expressed views subversive of monarchy. Cook and Dorislaus took great pains, and much time, in drafting the charges. It was decided that the King should be tried at the South End of Westminster Hall. To permit this 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 on 19 January 1849.

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17 Wedgwood, 107. See Nalson's Trial of Charles I (1684), 5 now reported (1649) 4 *State Trials* 1045ff. See also Manuscripts of the House of Lords (ed M F Bond), xi, London, 1962, 476. The record of the Trial also appears in Cobbett's *Complete Collection of State Trials,* Vol IV, covering 1640-1649 published in London in 1809 (hereafter 4 *State Trials*).

The High Court of Justice assembled on Saturday 20 January 1849. A roll call was conducted. The Commissioners were a motley crew of the Commons - a kind of jury but a specially selected one[18]. Many absentees were noted at the first roll call. Mr 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 to the King. It charged him with "high treason and high misdemeanours ... in the name of the commons of England"[19]. The King tried to interrupt. Bradshaw directed that the charge be read. The full instrument 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

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18 The tribunal was composed of three hereditary peers; four aldermen of the city of London; twenty-two baronets and knights; three generals; thirty-four colonels; the twelve judges of the High Court (who all declined to serve); three sergeants-at-law and representative members of various principalities and the House of Commons. J De Morgan, "The Most Notable Trial in Modern History" in H W Fuller (ed), *The Green Bag,* vol xi, 1899, Boston, 307 at 308.

19 (1649) 4 *State Trials* 995.

concluded that he was "a Tyrant, Traitor and Murderer, and a public and implacable Enemy to the Commonwealth of England"[20].

King Charles I, like the present Queen's father George VI, had a speech impediment. He 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. It is said that he was secretly instructed by Sir Mathew Hale, later to be Chief Justice after the Restoration[21]. When called up to answer to the Court he said[22]:

> "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 highways .... 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; I will not betray it, to answer to a new unlawful authority: therefore resolve me that, and you shall hear more of me".

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20 (1649) 4 *State Trials* 995. Nalson, 29-32.

21 J De Morgan, "The Most Notable Trial in Modern History" (supra). For a subject, the proper plea to have entered (at least in modern criminal procedure) would have been a "Plea to the Jurisdiction". See 2 Hale 268; 4 Bl Cm 333; Archbold, *Criminal Pleading, Evidence and Practice,* (43rd ed) Vol I 1988, 348 (par 4-63); cf *R v Johnson* (1805) 6 East 583.

22 (1649) 4 *State Trials* 995-996.

Cook exhorted the King to answer "in the name of the people of England, of which you are elected King". Charles immediately responded[23]:

> "England was never an elective kingdom, but an 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 authority warranted ... by the Constitutions of the kingdom and I will answer."

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

On the following morning sixty-two 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[24]. On the reassembly of the Court, it declared,

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23 (1649) 4 *State Trials* 996; (1649) 4 *State Trials* 1074.

24 Note, in this respect, the difference of approach taken in 1946 at the International Military Tribunal established by the successful Allies to try the leaders of Nazi Germany accused

Footnote continues

through Bradshaw, that its members were "fully satisfied with their own authority". But the King then appealed not to his rights as monarch but to his entitlements as an Englishman[25]:

> "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 Liberties 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 somewhat ineffectual protest given that Charles was on trial for his life for treason and for murder. The King asked for "one precedent" to justify his predicament. He knew enough of the methodology of the common law to require a precedent. He declared that the Commons of England had never been a court of judicature and asked "how that came to be so"[26]. 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"[27].

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of crimes against humanity. Defendant Rudolf Hess would not plead and the presiding judge ordered that a plea of not guilty should be entered.

25 (1649) 4 *State Trials* 999.

26 (1649) 4 *State Trials* 1000.

27 (1649) 4 *State Trials* 1000, 1084.

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 speak for the Liberties of the people of England"[28]. Bradshaw told him to "make the best defence you can". The King declared that he could not answer unless he was satisfied that the fundamental law of the kingdom warranted the lawfulness of the trial, for he was sworn "to the maintenance of the liberties of my people"[29]. On Bradshaw's instructions, the Clerk of the Court demanded that the King give answer "by way of confession or denial of the charge". The King's 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 the King had written his meaning as to those privileges "in bloody characters throughout the whole kingdom". After this, the King was prevented from saying more. "I see I am before a power", said the King and rose to go[30]. For the third time Bradshaw ordered the removal of the prisoner. Clearly, the King had addressed with considerable effectiveness the weakness of the

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28 (1649) 4 *State Trials* 1002.

29 (1649) 4 *State Trials* 1003, 1098, 1124.

30 (1649) 4 *State Trials* 1004.

proceedings: their dependence on the army which surrounded the Hall and their departure from established courts and laws.

What followed took place in the King's absence. Thirty-three witnesses were heard by an appointed committee comprising some only of the "judges" who assembled for that purpose on 24 and 25 January 1849. Their depositions were then read out at a public session of the entire court 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, murderer and a public enemy to be put to death by the severing of his head from his body"[31]. 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. Meanwhile, an element of urgency had entered into the proceedings. Diplomatic representations were hurriedly 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. This was a most uncongenial prospect for the committed republicans. The London crowds were becoming restive at the reports of the King's plucky defence and his appeal to

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31 Wedgwood, 153.

upholding their basic liberties. Rumours of armed incursions from Europe were spreading.

On Saturday 27 January 1649, to signify the solemnity of the occasion on which the punishment of death would be pronounced, Bradshaw appeared robed in red. As the King was brought in the soldiers shouted once again for justice and some for execution. There was uproar in the Hall at the appearance of the monarch. Whilst again protesting his claim to defend the liberties of his subjects, the King[32] requested that he be granted a hearing "before any sentence be passed". He asked that he be heard 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 at that moment there was an outcry from amongst the Commissioners. An adjournment was called. In the private meeting that followed one of the Commissioners, John Downes, urged that the King's offer should be accepted. Led by Cromwell, the Commissioners refused. They returned to the Hall, leaving Downes outside. At the trial of the regicides after the Restoration, other participants asserted that they had stood up for the King. But clearly very few did so. The belated attempt at compromise failed.

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32 (1649) 4 *State Trials* 1006.

Charles was brought back into the Hall[33]. 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[34]. 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. "If this bond be once broken, farewell sovereignty!"[35]. The speech by Bradshaw, which lasted forty minutes, concluded with the 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 their concurrence in the act[36].

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.

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33 (1649) 4 *State Trials* 1007-1008.

34 (1649) 4 *State Trials* 1011.

35 (1649) 4 *State Trials* 1013.

36 (1649) 4 *State Trials* 1017.

The King sought to speak. He was refused the chance. On leaving he was recorded as saying[37]:

> "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

At the palace of St James, King Charles I was permitted to see his two children who had remained in England[38]. He warned them repeatedly not on any account to agree to 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 Whitehall where he was housed until his execution.

The scaffold for the King's execution was ready by 30 January 1649 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 had to be

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37 (1649) 4 *State Trials* 1018.

38 Princess Elizabeth (aged 13) and the Duke of Gloucester (aged 8).

delayed a matter of hours so that action could be taken before the King's head was severed. An "Act" was passed by the Commons to make it an offence to proclaim a new King[39] 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[40]. He was then taken through the Banqueting Hall with its ceiling painted by Reubens 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 tuition to his enemies that they should learn to know their duty to God, the King - "that is my successors" and the people. His final words were directed to the law[41]:

> "Truly I desire [the people's] liberty and freedom as much as anybody whomsoever; but I must tell you their liberty and freedom consists in having of government, those laws by which their life and their goods may be most their own. It is not for having a share in government ... A subject and a sovereign are clear different things ... If I would have given way to an arbitrary way, for to have all laws changed according to the power of the sword, I needed not to have come here; and therefore I tell you ... that I am the Martyr of the people".

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39 (1649) 4 *State Trials* 1143.

40 Wedgwood, 186; *Commons Journals*, 30 January 1649.

41 cf (1649) 4 *State Trials* 1132.

The King asked the executioner to wait for a 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 arose 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 the Parliament: the House of Lords and the King.

King Charles I's prediction that others would suffer as he had from arbitrary and lawless power was, at least partly, born out. The High Court of Justice in 1649 sentenced several royalist peers to death. Many enemies to the Commonwealth were subjected to this extra-judicial tribunal in 1650[42]. Prominent adherents to the monarchy were placed under martial law[43]. A new treason law was passed by the Commons exacting an oath of obedience to the Commonwealth. The army leaders, who were the real power in the

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42 Keir, 223.

43 Keir, 223.

new polity, adopted the conception of rule by an aristocracy of the "godly"[44]. An Instrument of Government was drafted by army officers in December 1653. It was a practical document binding Oliver Cromwell (by then designated 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 of America, was to afford a written fundamental law in the place of the conventions by which monarchy operated. No solution was offered for the resolution of disputed interpretations of the text. Parliament was to be unicameral[45].

When Oliver Cromwell died in 1658, his son Richard, in the way of monarchy, succeeded as Lord Protector 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 therefore summed as the body to bring the republic

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44 *Ibid,* 224.

45 *Id,* 226.

to a close. King Charles II by a wise Royal Declaration of Breda promised pardon to offenders, safeguards for property, satisfaction of arrears of remuneration to the army, and liberty of conscience[46]. The age of written constitutions was temporarily brought to a close. Yet in its place the monarchy which was restored was clearly established as one obliged to operate with an elected Parliament. That Parliament would henceforth be much more than as an advisory body. It was 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"[47]. It was for this that the King's head had been severed. There would be no going back. The people and those who claimed to represent them, had demonstrated to all future monarchies and leaders their ultimate power.

The remains of Cromwell, Bradshaw and the other regicide Ireton, all of whom had been interred in Westminster Abbey, were removed from their graves. Their corpses were displayed at the gallows of Tyburn. Later their heads were exposed at the top of Westminster Hall where they had led the trial of the King. Thirty-one of the fifty-nine Commissioners who had signed the death warrant were living at the Restoration. Pardons were offered to those who

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

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

came over to the monarchy. Those who did not were tried but in the regular courts and by procedures more orthodox than those in which they had participated. In the end, nine of the regicides suffered the punishment then provided by English law for traitors: hanging, drawing and quartering. Cook, the leading prosecutor, was executed. His enthusiastic adviser, Dr Dorislaus, had been murdered in the Hague in 1649 by English royalist soldiers.

With the restoration of the monarchy, few in England would associate themselves with the republican cause. Cook, however, 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 APrmy 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"[48].

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48 Wedgwood, 221; State Trials V, 1265.

EPILOGUE

The trial of King Charles I was, by legal standards, a 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 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 by acquaintance with the criminal 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 regular courts and to due process of law were designed to strike a chord in the minds and hearts of his hearers and of the English people who came thereafter to read of them. He was aware of the popular newspapers which would bring his 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. This was an object lesson in the

rule of law; but taught by a flawed teacher who conceived of himself as the sole, ultimate and legitimate source of law.

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[49]. Now, by international law, anyone sentenced to death has the right to seek pardon or commutation of the sentence. The King was denied the chance to appeal to a true Parliament, the only body that might have been relevant in his case[50]. His deprivation of liberty, and ultimately of his life, was by the power of a purported Parliament and not by a procedure established by law[51]. He was not informed at the time of his arrest of the charges against him[52]. Indeed, until the trial began, he was not informed of the precise accusations. Nor was he brought promptly before a judge or other officer authorised by law to exercise the judicial power[53]. Instead, he was kept in close custody in successive isolated places of detention whilst his accusers decided

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49 See *International Covenant on Civil and Political Rights* (ICCPR), Art 7; cf Art 6.3.

50 ICCPR Art 6.4.

51 ICCPR Art 9.1.

52 ICCPR Art 9.2.

53 ICCPR Art 9.3.

what they would do with him. He had no access to a court to invoke the Great Writ to secure his liberty[54]. Although he was treated with courtesy and dignity, he was not treated with humanity[55]. He was kept away from his family, friends and advisers. He was surrounded by guards, informers and pimps engaged by the army for surveillance.

In his trial, King Charles I 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[56]. If this was because the proper court in question was that of the King's Bench, to which he could not be easily summoned except by his own process, at least there was nothing in the law that authorised the strange collection of Commissioners, save for the vote of the rump of the House of Commons which was determined to secure his end. The "justice" was not "competent, independent and impartial". Nor was it "established by law"[57]. This was a revolutionary court summoned to perform a revolutionary trial in wholly exceptional circumstances.

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54 ICCPR Art 9.4.

55 ICCPR Art 10.1.

56 ICCPR Art 14.1.

57 ICCPR Art 14.

The King was expressly denied the presumption of innocence[58]. His legitimate contest to the constitution of the court was turned into an acceptance of guilt. Many other rights of due process which we take for granted were denied to him. The right to be informed of the charge and to have adequate time and facilities to prepare his defence and to communicate with advisers[59]; the right to be tried without delay[60]; the right to examine or have examined the witnesses against him who gave their testimony before a committee of the Court[61] and the right not to be compelled to testify against himself or to confess his guilt[62]. He had no right to have his conviction and sentence reviewed by a higher tribunal according to law[63]. The only higher tribunal to which he ultimately appealed was the English people to whom he spoke directly from the scaffold.

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.

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58 ICCPR Art 14.2.

59 ICCPR Art 14.3(b).

60 ICCPR Art 14.3(c).

61 ICCPR Art 14.3(e).

62 ICCPR Art 14.3(g).

63 ICCPR Art 14.5.

It was conducted in public[64], 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, that they 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[65]. 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 and many other kingdoms this century and earlier. The rump of the Commons at least felt an obligation to observe the outward semblance of English 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 addressed to the English common law - that it is obsessed with procedure and compliance with form and less concerned with substance?

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64 ICCPR Art 14.1.

65 Wedgwood, 167.

LESSONS

The trial and execution of King Charles I was a crucial turning point in English constitutional history. Nowadays, with 350 years of further experience, we are not so astonished at the end of monarchy, even the murder of kings. The revolutionary overthrow of governments is almost the norm rather than the exception in the modern world. But at the time it happened, this was a truly remarkable event in European history. It shocked the known world. Both sides showed strong determination and, in their different ways, a high measure of courage. The King for his obvious insistence on certain principles in which he believed, even in the face of death. 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 purported to represent.

Without the trial of the King, 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 and generally symbolic form of limited government always ultimately 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 absolutist ideas of his father. Most importantly, from the point of view of the law, his banishment secured the first Bill of Rights and the assurance of judicial tenure which 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 a substantially different form. The importance of the assertion of parliamentary power - even so irregularly - in the trial and execution of the King cannot therefore be overstated. It gives the basic shape and content to Australia's constitutional principles.

The events which followed the trial and execution of King Charles I demonstrated the uncertainty which affected the English polity when the central feature of the Crown was removed from it. There were important experiments which were to bear fruit later and far away - most especially with a written constitution, defined powers and formal guarantees of civil rights. Since that time, there have been acts of orderly transition, by law, from monarchy to republic. But in few of those, with the possible exception of Ireland, 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 temporary office-holder. The trial and execution of the King demonstrated vividly that the office-holder was, after all, a mere mortal whose head could quite easily be struck from his body. The notion of the Crown and its permeating influence in the law is something rather more difficult to

remove. 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 in contemplation of this that the House of Commons kept King Charles waiting that bitterly cold day in January 1649 for six hours whilst they passed the first republican "Act" in English history. 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 steps. It is not as simple as turning scissors and paste upon the text of the Constitution.

When I served in the United Nations Cambodia[66] I saw, in microcosm, many of the kinds of perils that were faced in England under King Charles I. War, revolution, mass death and destruction cause fearful dislocation. They sever the links of continuity and legitimacy and leave the land unsettled. We in Australia have been free of the war and revolution. We have an unbroken chain of authority and legitimacy. When you see the chaos, cruelty and autocracy that came in the train of the revolutionary disturbance of fundamentals, you tend to value continuity and stability. Of course, even fundamentals may change; that is the lesson of history. But what follows should clearly be in the line of continuity and, where it

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66 As the Special Representative of the Secretary-General of the United Nations for Human Rights.

exists, consistency with the legitimacy of unbroken constitutional traditions.

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, lost in a fire centuries ago. But there on the left, as you approach the Parliament, is Westminster Hall. This is the Hall in which the law of England was fashioned over many centuries. It is the Hall that was cleared 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. Outside, 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 the ancient royal 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 the protagonists of 350 years ago had a lesson for our time. The one, of the merit of continuity, legitimacy, history, the rule of law and of ancient liberties available to protect everyone, high and low. 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 to defend their own sovereign demands[67].

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

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67 For a discussion of the notion of popular sovereignty as the fundamental basis (*Grundnorm*) of the Australian Constitution see *McGinty v Western Australia* (1996) 186 CLR 140 at 243; M D Kirby, "Deakin - Popular Sovereignty and the True Foundation of Australian Constitution" (1996) 3(2) *Deakin Law Review* 129; H G A Wright, "Sovereignty of the People - A new Constitutional *Grundnorm*" (1998) 26 *Federal Law Review* 165.