

MEDIA SUMMARY

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KIRBY CALLS FOR GREATER AWARENESS OF AUSTRALIA'S CONSTITUTIONAL HISTORY

SYDNEY, THURSDAY

Justice Michael Kirby of the High Court has called on Australians to relearn their constitutional history, including the way in which constitutional rights have been inherited in Australia from Britain.

Justice Kirby was speaking at a dinner at Parliament House, Sydney organised jointly by the Australia-Britain Society and the Anglo-Australasian Lawyers' Society. A large audience was present at the dinner to hear Justice Kirby's description of the events leading to the trial and execution of King Charles I of England in 1649 and to relate those events to contemporary Australia. His talk was followed by one by Mr Geoffrey Robertson QC of *Hypotheticals* fame, who accepted the brief for the regicides (the killers of King Charles I) and defended their conduct in putting on trial a king who had waged war against Parliament and the people.

Modern relevance

In his address, Justice Kirby referred to the modern relevance of the trial of King Charles I, 350 years ago. He pointed out that, earlier in 1999, two Presidents, President Clinton of the United States and President Yeltsin of Russia had been charged by the elected legislators with offences against their countries' constitutions. Whereas in May 1999 Mr Yeltsin was not impeached by the Russian Duma, in January 1999, Mr Clinton was charged with high crimes and misdemeanours, tried and acquitted by the United States Senate. Justice Kirby pointed out that the provisions in the American Constitution which gave the Congress of the United States the power to try and remove the President from office had been based on the precedent which arose in the trial and execution of King Charles I of England in 1649.

"In the land of the two Carolinas and where the Charles River makes its icy way to the Atlantic past Boston - the dramatic events of King Charles's trial in 1649 would have been in the collective memory of the Founders who wrote the American impeachment clauses. The trial of the king provided for them a demonstration of the need to have a constitutional procedure to remove an elected head of state who was to inherit so many of the then powers of the British monarch. But it also stood as a warning ... against the changing mood of popular opinion which would imperil the office of the head of state and render it susceptible to ill-considered partisan passions, distorting the law and due process".

Australian constitutional change

Justice Kirby said his talk was not concerned with the debate about whether Australia should become a republic. That question will be submitted to a referendum to the Australian people in November 1999.

Nonetheless, he said that the trial provided a context in which it was relevant to remember "the only time that monarchy was ended in England, three and a half centuries ago". Although the republic introduced after the execution of King Charles I by Oliver Cromwell and his followers was short lived, Justice Kirby pointed out that the monarchy which was revived in England in 1660 was very different from the one that had preceded it:

"Monarchy was revived. But the monarchy which was restored was a different kind of monarchy: a monarchy over which the people had asserted their will in a most telling and unmistakable way. In a sense the Cromwellian republic laid the ground for, and thus ensured the survival of, a constitutional monarchy respectful of the power of Parliament ... 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".

Impact on Australia's Constitution

Justice Kirby said that Australians were the "beneficiaries of the rights of the people" that could be traced to the "turbulent events" in England in 1649. He said that it was important for Australian citizens to re-learn their constitutional history because it revealed "the bedrock of their freedoms". He said that this was specially relevant as Australia was about to celebrate the centenary of the Australian Commonwealth. He instanced the significance of the trial of the king in 1649 for the development of Australia's constitutional law and practice. Amongst the matters which he mentioned were:

- Although the court set up to try the king was irregular and illegal, it illustrated the need which was accepted by the House of Commons

in 1649 to accord the king an open public trial where his wrongs could be demonstrated to the public who were his ultimate judges.

That the republic which had followed the execution of the king adopted a written constitution which, in turn, afforded the precedent for the American revolutionaries in 1776 and influenced the drafting of the Australian written Constitution adopted in 1901.

That the principle of popular sovereignty had been reinforced. When an attempt was made in 1688 by King James II to re-assert the rule of absolute monarchy, he was deposed, expelled from England and replaced by monarchs who consented to a Bill of Rights proposed by the Commons and to the independence of the judiciary. These features became the mainstays of British, American and Australian constitutional law ever since.

Justice Kirby concluded:

"Without the trial of ... King [Charles I] it is inconceivable that the ... revolution of 1688 would have taken place. Yet it is that revolution which finally established the system of limited or constitutional monarchy as a conditional and generally symbolic form of government, always ultimately answerable to the will of the people. ... Without [that] revolution there would probably have been no American revolution in 1776. 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 exercised - in the trial and execution of the King for high treason and high misdemeanours cannot therefore be overstated. It gives the basic shape and content to the constitutional principles of Britain, the United States and most countries of the Commonwealth of Nations to this day".

Committed republican

In his address, Mr Geoffrey Robertson said that the trial of King Charles I was to be seen as a precedent for the modern efforts to put tyrants from the Nazi leaders of Germany and General Pinochet of Chile on public trial to answer for their crimes. According to Geoffrey Robertson, the "real hero" of the trial of King Charles I was not the king but the committed republican, John Cook. He was the barrister who presented the case against the king and who later paid with his life as a regicide for having accepted that brief for the republicans.

Further information

For further information on the dinner at Parliament House, Sydney, the addresses and the Anglo-Australasian Lawyers' Society, contact Mr Malcolm Young, barrister, telephone: 02 9235 1019; email: mdyoung@bigpond.com

The full text of Justice Kirby's address is found on the High Court Home Page: www.hcourt.gov.au