

ANGLO-AUSTRALASIAN LAWYERS' ASSOCIATION

LONDON - GREAT HALL, GRAYS INN

FRIDAY 22 JANUARY 1999

**THE TRIAL OF KING CHARLES I - DEFINING MOMENT FOR
OUR CONSTITUTIONAL LIBERTIES^{*}**

The Hon Justice Michael Kirby AC CMG^{}**

PROLOGUE

The contemporary trial of President William Jefferson Clinton before the Senate of the United States of America, on impeachment for high crimes and misdemeanours against the American people, is an event with few antecedents. Everyone knows of the only other such trial - that of President Andrew Johnson, 130 years earlier. But no-one has remarked on the extraordinary trial which took place in

^{*} Text of an address delivered in the Great Hall of Gray's Inn, London on 22 January 1999 in the presence of the Lord Chief Justice and members of the English judiciary and legal profession.

^{**} Justice of the High Court of Australia. Formerly President of the International Commission of Jurists.

the month of January 130 years before the American Revolution which gave rise to the constitutional provisions under which Mr Clinton stands charged. Yet 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' trial in 1649 would have been in the forefront of the thinking 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 the 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, in Hamilton's words in the *Federalist Papers* ¹, against the passing mood of popular opinion that could imperil the office of the head of state and render it susceptible to ill-considered partisan passions.

A REMARKABLE EVENT

It is 350 years exactly since King Charles was tried and beheaded in January 1649². An anniversary of such importance to

1 See *The Federalist*, No 11 (A Hamilton).

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

Footnote continues

3.

the constitutional history of England, and of English-speaking people around the world, should not pass unnoticed. On 30 January 1999 the 350th anniversary of the "martyred king's" death will be remembered. It is appropriate, therefore, to pause and ask what the events meant at the time, and what they mean today.

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 King James II, brother of Charles II, in the Glorious Revolution of 1688, created another revolutionary *interregnum* until William and Mary agreed to take up the throne upon the conditions laid down by a Convention of present and past leaders of the English people³. But the only avowedly republican government established in the history of 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, the United Kingdom, Australia, New Zealand and other dominions of the Queen are

was revised to commence on 1 January. Thus, the King's death, by the reformed calendar, was on 30 January 1649.

³ See D L Keir, *The Constitutional History of Modern Britain* (6th ed 1960) 267ff (hereafter "Keir")

4.

constitutional monarchies whose sovereign comes from a line of English monarchs dating back to William the Conqueror in 1066, broken seriously only in the aftermath of King Charles' execution.

The trial of King Charles is interesting because it illustrates the way in which the King, at the peril of his life, insisted bravely upon his conception of the rule of law and basic English liberties. And it also shows how his fellow countrymen, although bent on the termination of the King's reign, felt obliged to follow certain legal forms. How in some respects they extended to the royal defendant elements of due process of law. But how they breached basic obligations in giving effect to their grand design.

In Australia, New Zealand and doubtless in the United Kingdom, there are citizens who advocate a republican form of government and an end to monarchy. This occasion is not one to explore those themes except to remark that the republic, which the execution of King Charles I ushered in, was so uncongenial that it soon collapsed from within and had few mourners. Monarchy was revived. But the monarchy which was then 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 popular monarchy respectful of the power of Parliament. These remarks are not and are not intended to appear to be, another exercise in reminding our current, most dutiful monarch, of painful events - these ones affecting an ancestor long ago. Instead, they

take advantage of the anniversary to examine the trial which the people in control of the English Parliament felt to be necessary. And to consider, with 350 years hindsight, some of its lessons.

BACKGROUND TO THE TRIAL

I will not offer an elaborate explanation of the events which brought King Charles I into deadly conflict with the army and Parliament and army 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 I⁴. So this was another case of what might have been. There is no doubt that the events that unfolded 350 years ago were greatly influenced by Charles's 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"⁵, Charles, although he had personal virtues, had a greater inflexibility of temper⁶. He had considerably less

4 For a recent discussion of James I's conception of the King's prerogatives, see P Kavanagh, "Mabo and Legal Education Today" (1995) 3 *The Cross-Examiner* 24 at 26.

5 Keir, 158.

6 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.

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. In that ignorance lay great dangers:

"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 English Parliament in 1642⁷. 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

7 For a recent history of the causes of the collision between the King and Parliament see B Coard, *Oliver Cromwell*, Longman, London, 1991. Cromwell, until 1648, sought a compromise with the King. See *ibid*, 60-63, but the Army became the champion of bringing the King as "capital and grand author of all our troubles" to justice.

persistence and attempt to raise a second war, ultimately 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 last 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 ministers⁸. The King, knowing the consequences of refusal, declined the compromise. For him the proposal was more than a censure. It rendered kingship conditional upon Parliament's approval whereas he claimed a higher legitimacy and authority.

This was the context in which negotiations with the King were broken off by the Commons on 13 December 1648. Two days later, the Council of Officers voted that the King be moved from the Isle of

⁸ 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). See also J G Muddiman, *The Trial of King Charles the First* (1928) (Legal Classics).

Wight, where he was prisoner, to Windsor "in order to the bringing of him speedily to justice"⁹. 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. They did not want a long trial. Much debate centred on the description of the monarch. Initially the instrument charging him described him 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 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 laws and liberties of this nation and in their place to introduce an arbitrary and tyrannical government"¹⁰.

⁹ Wedgewood, 44.

¹⁰ Wedgewood, 82. See *Blencowe, Sidney Papers*, London, 1825, 45.

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 plainly that the Parliament which had authorised the action was not lawfully assembled, not having been summoned by the King. This Lord 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 authority¹¹. 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 the first and second readings in the Commons. Needless to say, the Bill did not procure the King's assent. It 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 issued. On Saturday, 6 January 1649, an Act of the Commons was promulgated to establish a High Court of Justice to try the King.

¹¹ Wedgewood, 84.

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 King's trial. All had refused to serve. Their names were therefore omitted. Each judge had long experience in the courts. 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 law and 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"¹². Four

¹² Wedgewood, 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*

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 charge. It was decided that the King should be tried at the South End of Westminster Hall. To permit this to be done the Hall 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 from Windsor to the Palace of St James where he arrived on 19 January 1649.

The High Court of Justice to try the King first assembled on Saturday 20 January 1649. A roll call was conducted. The Commissioners were a motley crew of the Commons - a kind of jury

but a specially selected one¹³. 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 Westminster 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"¹⁴. 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 concluded that he was "A Tyrant, traitor and murderer and a public and implacable Enemy to the Commonwealth of England"¹⁵.

13 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.

14 (1649) 4 *State Trials* 995.

15 (1649) 4 *State Trials* 995. Nalson, 29-32.

King Charles I, like King 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 Lord Chief Justice after the Restoration¹⁶. When called up to answer to the Court asked¹⁷:

"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 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". Charles immediately responded¹⁸:

¹⁶ 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.

¹⁷ (1649) 4 *State Trials* 995.

¹⁸ (1649) 4 *State Trials* 995; (1649) 4 *State Trials* 1074.

"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 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 guilty¹⁹. On the reassembly of the Court, it declared, through Bradshaw, that its members were "fully satisfied with their

¹⁹ 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 of crimes against humanity. Rudolf Hess would not plead and the presiding judge ordered that a plea of not guilty should be entered.

own authority". The King then appealed not to his rights as monarch but to his entitlements as an Englishman²⁰:

"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 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 this. He declared that the Commons of England had never been a court of judicature and asked "how that came to be so"²¹. 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"²².

²⁰ (1649) 4 *State Trials* 998.

²¹ (1649) 4 *State Trials* 998.

²² (1649) 4 *State Trials* 1000, 1084.

The Court withdrew once again, the soldiers shouting in all parts of the Hall "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"²³. 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"²⁴. 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. For the third time Bradshaw ordered the removal of the prisoner. Clearly, the King had addressed with considerable effectiveness the weakness of the proceedings: their dependence on the army which surrounded the

²³ (1649) 4 *State Trials* 1002.

²⁴ (1649) 4 *State Trials* 1003, 1098, 1124.

Hall and their departure from established the courts and laws of England.

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 1649. Their depositions were then read out at a public session of the entire court sitting in the Painted Chamber. On 26 January 1649, 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"²⁵. 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

²⁵ Wedgewood, 153.

upholding their basic liberties. Rumours of invasion from Europe were spreading throughout London.

THE VERDICT & SENTENCE

On Saturday 27 January 1649, to signify the solemnity of the occasion on which the punishment of death would be pronounced, Bradshaw for the first time was dressed in scarlet robes. As the King was brought to the Hall in the soldiers shouted once again for justice and some for execution. There was uproar in the Hall at the King's appearance. Whilst again protesting his claim to defend the liberties of his subjects, the King²⁶ 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. He was proposing a compromise. 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, most of the Commissioners refused. They returned to the Hall, leaving Downes outside. After the Restoration, at the trial of the regicides, other participants asserted

²⁶ (1649) 4 *State Trials* 1006.

that they had stood up for the King. But clearly very few did so. The King's belated attempt at accommodation failed.

Charles was brought back into the Hall²⁷. He was told that his request for a meeting with the Lords and Commons had been 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 Caligula²⁸. 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 which was reciprocal. "If this bond be once broken, farewell sovereignty!"²⁹. 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 sentence of death³⁰.

27 (1649) 4 *State Trials* 1007.

28 (1649) 4 *State Trials* 1011.

29 (1649) 4 *State Trials*, at 1016.

30 (1649) 4 *State Trials* 1017.

The King who was then, in the theory of the law, already dead, demanded a last word. Bradshaw declined to allow it. The guards began to take the prisoner away. The King sought to speak. He was refused the chance. On leaving he was recorded as saying³¹:

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

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

AFTER THE TRIAL

At the Palace of St James, King Charles was permitted to see the two children who had remained in England³². 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

³¹ (1649) 4 *State Trials* 1018.

³² Princess Elizabeth (aged 13) and the Duke of Gloucester (aged 8). See (1649) 4 *State Trials* 1130.

Commons had seriously considered the legal steps that would be necessary to constitute England a republic. The execution had to be delayed a matter of hours so that actions 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 King³³ 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 engagement³⁴. 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. His final words were directed to the law³⁵:

"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

33 (1649) 4 *State Trials* 1143.

34 Wedgewood, 186; *Commons Journals*, 30 January 1649.

35 Cf (1649) 4 *State Trials* 1132.

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".

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 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 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 1650³⁶. Prominent adherents to the

³⁶ Keir, 223.

monarchy were placed under martial law³⁷. 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 new polity, adopted the conception of rule by an aristocracy of the "godly"³⁸. An *Instrument of Government* was drafted by army officers in December 1653. It can now be seen as the progenitor of the French Constitution and those which have followed it. 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 extraordinary supply and over its enactments so far as not inconsistent with the Instrument of Government. The object of the Instrument was to afford a written fundamental law in the place of the conventions by which monarchy had operated. No solution was offered for the resolution of disputed interpretations of the text. Parliament was to be unicameral³⁹.

37 Keir, 223. Severe and drastic punishments were meted out the Royalist plotters during the Commonwealth as for a number in 1658. See Coward, above n 7, at 157.

38 *Ibid*, 224. Coward, above n 7, at 97-104.

39 *Id*, 226.

When Oliver Cromwell died in 1658, his son Richard, in the way of monarchy, succeeded as Lord Protector on his late 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 summoned as the body to bring the republic 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 conscience⁴⁰. 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 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"⁴¹. It was for this that the King's head had been severed. There would be no going back. The

⁴⁰ *Id*, 229. *Gardiner Documents*, 265-267. After the Restoration, the date of the execution of King Charles was marked as a special day of repentance in the calendar of the Anglican Church. The *Book of Common Prayer* incorporated a Service for "King Charles, the Martyr". One of the prayers noted the King's prayers for his murderer's likening them to the example of Jesus. The prayer went on: "Grant that this our land may be freed from the vengeance of his righteous blood". The Service still appears in old forms of the BCP and is exceptionally celebrated in some places to this day, both in England and Australia.

⁴¹ Keir, 230; Holdsworth *History of English Law I*, 127.

people and those who claimed to represent them, had demonstrated to all future monarchies and leaders their ultimate power.

The remains of the regicides Cromwell, Bradshaw and 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 came over to the monarchy. Those who did not were chased to America, as Lord Goff's forbear was, or, if caught, 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 army declared and engaged for; and to that noble principle of preferring the universality, before a particularity, that we sought for 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"⁴².

EPILOGUE

The trial of King Charles I was, by legal standards, a rather discreditable affair⁴³. 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 acceptance with the criminal procedures of the time.

42 Wedgwood, 221; State Trials V, 1265.

43 For a description of the trial and execution of King Louis XVI of France, see S Schama, *Citizens*, (1989, Knopf) 659-674. King Louis was tried by the Convention in December 1792. He was assigned defence counsel who pleaded his cause passionately. On 15 January 1793 the Convention voted nearly unanimously for his guilt. 693 deputies voted yes out of 749. The vote on his execution was much closer. Of 721 present on 16 January 1793, 361 voted unconditionally for death. 319 voted for imprisonment and banishment. Some voted for death and a reprieve. The majority for the King's execution was seventy-five. The King was beheaded by the guillotine on Monday 21 January 1793. Awaiting his trial he sought instruction on the fall of King Charles I of England, reading David Hume's book on the subject. Schama, at 659.

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 of the kingdom 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. 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. Although they were different times with much brutality, it is instructive to notice the extent to which what we now call fundamental rights were extended or denied to the royal prisoner. I

leave aside the large debate as to whether capital punishment is contrary to fundamental human rights⁴⁴. 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 case⁴⁵. His deprivation of liberty, and ultimately of his life, was by the power of a purported Parliament and not by a procedure established by law⁴⁶. He was not informed at the time of his arrest of the charges against him⁴⁷. 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 power⁴⁸. Instead, he was kept in close custody in successive isolated 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 liberty⁴⁹. Although he was treated with courtesy and dignity, he was not treated with humanity⁵⁰. He was

⁴⁴ See *International Covenant on Civil and Political Rights* (ICCPR), Art 7. Cf Art 6.3.

⁴⁵ ICCPR Art 6.4.

⁴⁶ ICCPR Art 9.1.

⁴⁷ ICCPR Art 9.2.

⁴⁸ ICCPR Art 9.3.

⁴⁹ ICCPR Art 9.4.

⁵⁰ ICCPR Art 10.1.

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 land⁵¹. 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 writ, 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"⁵². This was a revolutionary court summoned to perform a revolutionary trial in wholly exceptional circumstances.

The King was expressly denied the presumption of innocence⁵³. His legitimate contest concerning 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

51 ICCPR Art 14.1.

52 ICCPR Art 14.

53 ICCPR Art 14.2.

right to be informed of the charge and to have adequate time and facilities to prepare his defence and to communicate with advisers⁵⁴; the right to be tried without delay⁵⁵; the right to examine or have examined the witnesses against him who gave their testimony before a committee of the Court⁵⁶, and the right not to be compelled to testify against himself or to confess his guilt⁵⁷. He had no right to have his conviction and sentence reviewed by a higher tribunal according to law⁵⁸. 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 itself noteworthy. It is a reflection of the power of the imagery of the trial process upon the imagination of the English people even at that time⁵⁹.

⁵⁴ ICCPR Art 14.3(b).

⁵⁵ ICCPR Art 14.3(c).

⁵⁶ ICCPR Art 14.3(e).

⁵⁷ ICCPR Art 14.3(g).

⁵⁸ ICCPR Art 14.5.

⁵⁹ In France, before the trial of King Louis XVI, Louis-Antoine Saint-Just, Robespierre's acolyte, told the Convention that it was unnecessary to try the King as to do so would be to put in doubt

The trial was conducted in public⁶⁰, at least as to those parts which the King attended. It was known by the judges and the prisoner 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 granted⁶¹. 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. The rump of the Commons at least felt an obligation to observe the outward semblance of legal process. English speaking people, even by 1649, found the metaphor of public trial compelling.

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 English common law - that it is obsessed

the legitimacy and legality of the republic, something which the Convention itself denied. In the end, a trial was conducted. See S Schama, *Citizens*, at 651.

⁶⁰ ICCPR Art 14.1.

⁶¹ Wedgewood, 167.

with procedure and appearances and form and less concerned with substance?

LESSONS

The trial and execution of King Charles I was a critical 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 in our world. Certainly, it is not the exception. But, at the time it happened in England in 1649, this was a truly remarkable event. It shocked the European Continent. Both sides showed strong determination. In their different ways, each displayed 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 which they purported to express.

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 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. King Charles I's second son was driven from the Kingdom precisely 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 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 - 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.

The events which followed the trial and execution of King Charles I demonstrated the uncertainty which affected the English polity when the central feature, the Crown, was removed from it. Yet there were important experiments which were to bear fruit later and far away - most especially with a written constitution, defined institutional 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 places (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 mortal office-holder. The trial and execution of the King demonstrated vividly that the office-holder was, after all, a mere human being whose head could in the end 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 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.

Go then to Banqueting House and stand beneath Rubens great ceiling. Go to the Palace of Westminster. Line up outside. 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 the ancient Westminster Hall. This is the Hall in which the laws of England were fashioned by the judges 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. 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 the ancient royal prerogatives as he conceived them. The republican insisted that sometimes the law must be changed, even radically changed. And that the people are the ultimate source of the law's authority and their will must be done.

Each of these protagonists of 350 years ago has a lesson for our time. The one of the merit of continuity, legitimacy, history, the rule of law and of ancient liberties. The other the message of the sovereignty of the people, the importance of the parliamentary institutions, the legitimacy of democracy and the right of a people even to end an ancient monarchy if that is necessary to defend their own sovereign demands⁶².

Citizens today in Britain, Australia, New Zealand and the many countries which take their constitutional foundations from Britain need to re-learn civics. They need to learn again their constitutional history. It provides the bedrock for their freedoms. 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.

⁶² 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, 243; M D Kirby, "Deakin - Popular Sovereignty and the True Foundation of Australian Constitution" (1998) *Deakin Law Review* 129; H G A Wright, "Sovereignty of the People - A new Constitutional *Grundnorm*" (1998) 26 *Federal Law Review* 165.

ANGLO-AUSTRALASIAN LAWYERS' ASSOCIATION

LONDON - GREAT HALL, GRAYS INN

FRIDAY 22 JANUARY 1999

THE TRIAL OF KING CHARLES I - DEFINING MOMENT FOR

OUR CONSTITUTIONAL LIBERTIES

The Hon Justice Michael Kirby AC CMG