Trying Times: The Life and Times of a Tyrannicide

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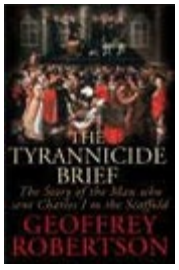
Bruce Buchan, Griffith University

Geoffrey Robertson *The Tyrannicide Brief: The Story of the Man who Sent Charles I to the Scaffold*, London, Chatto and Windus, 2005 (pp. 448). ISBN 0-70117-602-4 (hard cover) RRP $55.00.

The trial of King Charles I of England before the High Court of Justice in 1649 was, in essence, a political contest between a former sovereign and some of his former subjects over the rights of sovereignty. This trial has modern echoes in the repeated attempts to hold former tyrants (such as Slobodan Milosevic or Saddam Hussein), and to find ways to call current tyrants (such as Robert Mugabe), to account. This modern resonance, Geoffrey Robertson argues, invites us reconsider the subject of his book: John Cooke, the man who accepted the brief to prosecute his former King, Charles I.



Throughout the 1630s, Charles faced a combative parliament dominated by MPs incensed by his heavy-handed revenue raising mechanisms, infuriated by his incompetent foreign policies, or mistrustful of his anti-reformist, ultra-orthodox position on church doctrine. Scots Presbyterians, English Puritans, and disaffected nobles within parliament—and a host of more radical groups outside it—voiced an increasingly radical opposition to royal intransigence. The initially indecisive war (1642–1646) was eventually won by parliamentary forces thanks to their New Model Army; a professional army led by commanders committed to winning a crushing military victory.

For the victorious parliament however, the spoils of victory seemed uncertain. They faced a scheming king in custody keen to sow discord among the victors, an unpaid, restive army increasingly under the sway of radical republicans, and charismatic generals like Oliver Cromwell, who could use their new-found prominence as a political platform. When parliamentary moderates dithered over what to do with the King, republicans in the Army and its governing Council acted. Colonel Pride's purge of parliamentary moderates in December 1649 delivered a majority to the radicals who favoured decisive action against their former King.

But this action would not be summary justice, nor a quiet assassination, but a very public trial before a specially convened High Court of Justice sitting in Westminster Hall. Charles refused to recognise the

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legitimacy of the Court by pleading 'not guilty' to the charge of treason, and so, denied his moment in court, Charles delayed the axeman on the scaffold with a final and memorable speech. His cause, he claimed, had always been for the people, but definitely not for popular government (Schama 2001, p. 136). 'A subject and a soveraign' he famously declared, 'are clean different things …' (Project Canterbury n.d.).

A RADICAL PURITAN LAWYER

The charge brought against the King before that Court—of committing treason by waging war against his own subjects—was drawn up by John Cooke, a rather obscure, if learned and conscientious lawyer of Gray's Inn. Cooke emerges in Robertson's spirited biography as a Puritan radical in the best sense of those two much maligned words. As a Puritan Cooke exhibited all the steadfastness of earnest personal faith in a providential god, who seemed to be directing England along the path to righteousness and justice. As a radical law reformer however, Cooke worked for rather more justice for the ordinary folk than most parliamentary leaders were willing to grant. That he found himself in January 1649 playing the role of Chief Prosecutor of the King on behalf of parliament and the army owed much to the fact that all the other more prominent parliamentary law officers feigned illness or fled rather than accept this brief.

Robertson tells the story of Cooke's life, and of his involvement in the momentous events of 1649 with all the verve and élan of a skilled advocate. Robertson's aim in the book, however, is both to rescue Cooke from the obscurity into which he has fallen, and to resuscitate the trial of the King (and of Cooke's role in it) as an important and unjustly neglected precedent for continuing efforts to hold modern tyrants and dictators to account. What makes the trial so important, Robertson contends, is that in no more than two weeks Cooke was able to frame a charge not only against the English King, but against all tyrants: '… that no chief officer or magistrate may hereafter presume traitorously or maliciously to imagine or contrive the enslaving or destroying of the English nation, and expect impunity for so doing …' (p. 12). The charge was aimed at Charles I, but Robertson contends it also aimed at the 'Achilles heel of sovereign impunity' the world over (p. 12).

Much hinges in the book on telling the story of how law triumphed over politics through the person of John Cooke. There is certainly no shortage of incidents in Cooke's life to support this interpretation. He went out of his way, for example, to conspicuously offer support to his former patron, the Earl of Strafford, who was impeached and then executed by Bill of Attainder in 1640, a sacrifice to the growing power of parliament (p. 57). Strafford's trial, Robertson concludes, was a 'sorry affair for both sides' (p. 56), and Cooke's decision to aid his former patron made him a marked man among parliamentary zealots.

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In 1646 Cooke teamed up with another obscure Puritan lawyer, John Bradshawe, to argue for the release from prison of the Leveller firebrand, John Lilburne.

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Robertson (p. 87) argues that this case established in English law the famed 'right to silence'. Cooke's later career as a judge in Ireland under Cromwell's Protectorate was also characterised by a willingness to tackle the establishment in the cause of justice for the oppressed. His most significant contribution however, Robertson claims, was his pivotal role in establishing 'command responsibility' for war crimes in his indictment of Charles I (pp. 15, 149–50).

In telling the story of Cooke's life, Robertson relies very heavily on the series of pamphlets Cooke wrote throughout his career to publicise his suggestions for law reform. Curiously, then, Robertson's biography is less successful in providing a detailed account of the development of Cooke's thought (pp. 125–27). We are told that he was close at different times to some of the leading English republican thinkers and politicians—John Lilburne, John Milton, Edmund Ludlow, Henry Ireton—but Cooke's intellectual development seems a mystery. At times, the treatment is cavalier: 'think of some seventeenth-century Michael Moore, citing Deuteronomy' (p. 104).

TRYING TIMES

Whatever the case, Puritan providentialism and pure chance combined to place Cooke at centre stage in the trial of his former sovereign in 1649. The trial itself, Robertson argues, was 'unprecedented' and 'daring', 'far in advance of the law as it then stood in England or, following the Treaty of Westphalia [1648], in the known world' (p. 133). Conventionally, historians have seen it as little better than a 'show trial' (see Wedgewood 1964, pp. 93–94, 135; Aylmer 1986, p. 99; Kenyon 1988, p. 198). Charles presented a political problem to parliament and its victorious army, he was a source of intrigue and dissension between an already fractious parliament jealous of the power of the army and its council. As the army radicals saw it, 'So long as Charles remained alive … there could be no lasting basis of peace or justice.' (Worden 2001, p. 28). Robertson however, wants to resuscitate the claims of the court. 'The death sentence was not inevitable' (p. 141) if only Charles had deigned to put his case before the court, to plead 'not guilty' to Cooke's charges, and to engage in the courtroom battle of claim and rebuttal.

There are two problems with this argument, as other historians have noted. First, it takes no account of the fact that the Court's claim to legitimacy was based on its being summoned and appointed by parliament but that the parliament had already been 'purged' by the Army of the more moderate MPs who favoured negotiation with Charles.

Second, it assumes that Charles could have had any interest in debating his case before a court. The reality, as Robertson concedes, is that Charles had decided, well before the Court was appointed, to play for longer stakes. Charles' strategy was always to die a martyr to the idea of monarchy, and in doing so strengthen his son's birthright and his chances of restoration. As Robertson's own description of the trial makes clear, Charles stuck to this strategy and denied his accusers the chance to engage him in debate over his 'guilt'. The court responded, as courts often do, by

playing on the 'grandeur' and 'majesty of the law', and out-bullying Charles who was not allowed to question the legitimacy of the court (pp. 158–59).

By refusing to plead, the King's 'silence' was taken as a confession of guilt. Cooke's evidence was still presented before the Court, but it went uncontested (Charles having foregone his right to cross examine by not pleading), and the Court duly found him guilty. On the 27 January 1649, 59 Commissioners led by Court President John Bradshawe and leading parliamentarians such as Oliver Cromwell, Henry Ireton, and Edmund Ludlow signed the death warrant. Public execution was carried out on 30 January. As the poet Andrew Marvell put it, 'This was that memorable hour / Which first assured the forcèd power.' (Marvell 1995 (1650), p. 98).

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Robertson tells a good story and, as a skilled and experienced advocate, he presents a forceful argument. The Court (and its President, John Bradshawe) went out of its way, Robertson argues, to be civil to the King, to give him opportunity to plead, and to take counsel. It was not a show trial. This was not Charles' opinion when he famously reprimanded Bradshawe, 'Well Sir, I find I am before a power' (p. 172).

Herein lies the irony. Cooke later followed Oliver Cromwell to Ireland where Cromwell had been appointed by parliament as Lord-Lieutenant and Commander-in-Chief of parliamentary forces sent to crush the Royalist rebellion there. Cromwell did so with his usual ruthless efficiency (including the well known slaughter of civilians and prisoners of war at Drogheda and Wexford in 1649). Cooke was installed as Chief Justice of Munster in 1650 and served in that post till he resigned in the face of mounting opposition in 1655. Although Cooke seemed to have been a committed and conscientious judge, and an eager advocate for law reform, it also seems that he was not troubled by Oliver Cromwell's own 'sovereign immunity'.

By 1653 Cromwell was the key political figure in the land and, although offered the crown, he refused it. From December 1653, Cromwell ruled as Lord Protector until his death in 1658, which precipitated the Restoration of the Stuart dynasty in 1660. Cromwell, then, never found himself 'before a power' set up to try him.

Cooke, the surviving 'regicides' who signed Charles' death warrant, and even the functionaries of the High Court of Justice were not so lucky. Ten regicides, including Cooke, were condemned in 1660 to be hung, drawn, and quartered (the rigours of which Robertson describes in chilling detail). Three more regicides were lured back to England in 1662 under false pretences to meet the same fate, nineteen were imprisoned for life, one was assassinated, and the rest went into hiding. In 1661 the remains of those who died before the Restoration (Cromwell, Ireton, and Bradshawe), were disinterred and displayed in public as a warning to those who might have been inspired by republican dreams.

As Robertson describes it, Cooke died as he had lived—a Puritan and a radical lawyer. He faced his fate with

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equanimity and courage, determined to keep his faith in providence and to have his day in court. He vainly exchanged some arguments with the regicide court, and then faced the horrors of his death (like many of the other regicides) with an astounding courage. Ultimately however, his professional legacy as lawyer and jurist was overshadowed by the show trials he found himself involved in, as witness for Strafford, as prosecutor of Charles I, and as defendant in the Regicide Trials.

PUTTING TYRANNY ON TRIAL

This book is in part an incitement to the international system of states, to international organisations, and to all concerned citizens to challenge sovereign immunity. This immunity, Robertson rightly points out, is a central plank in the Westphalian system of sovereign states. If this immunity is to be challenged, Robertson contends, it will require strong political commitment from democratic nations to pursue criminals through the mechanisms of international law.

The recent attempt to place the former Chilean dictator, Augusto Pinochet, on trial in the United Kingdom (1998–2000) serves as both a wake-up call and a warning. Pinochet's detention seemed to offer a genuine chance that the (former) dictator would have to answer to a Court, but in the end political considerations (the prospect of the British government wearing the opprobrium if the ailing defendant died before his trial) led to his release.

The imminent removal of sovereign immunity, therefore, seems unlikely. If sovereigns are really to be held to account, they must not, like Saddam Hussein, be selected only for political expediency, but because justice demands it. If so, many more sovereigns, some of them claiming a popular or representative mandate, must be held to account. Herein lies the real problem of Robertson's challenge. No means of holding a sovereign to account can avoid the exigencies of politics. Hitherto, those who have been held to account have been defeated in war, fallen from power, or been selected for their vulnerability to arrest. It is no surprise then that Charles' defiance of Bradshawe's Court had an echo in Goering's defiance to the Nuremburg tribunal, or in Saddam Hussein's question to his accusers: 'by what authority do you put me on trial?' (pp. 155, 363).

The significance of Charles' trial lies both in the legal precedent it established and in its political purpose. It is politically inconceivable that Charles would have been acquitted by Bradshawe's Court, and he was certainly never going to enter a plea of 'not guilty'. Try as they might to find an unimpeachably legal procedure for trying the King, the Court established in 1649 was only ever going to be seen as an organ of an unrepresentative parliament overawed by the power of the army. Charles was tried because he was too dangerous to leave alone, and because the republicans in the army and parliament were now the supreme power in the land. Charles, of course, knew what the outcome of his trial would be, and his strategy was tailored to win the *political*, not the *legal* game. Cooke's own far worse execution, following hard upon the pantomime that hardly deserves to be called a 'trial' underscores this point. Vilified and eviscerated by the restored monarchy, Cooke and his fellow

regicides themselves became victims of victor's justice.

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Robertson sees the lack of political will (internationally) to remove sovereign immunity as a key reason why tyrants and despots continue to rule in relative safety around the world. He finishes his book with an impassioned plea that the United Nations pass a 'convention against tyranny, which would invalidate provisions in national constitutions preventing the prosecution of leaders for crimes' committed while in office (pp. 363–64). Such a convention, Robertson hopes, would end the amnesties currently enjoyed by many former dictators, and might lead to the formation of an international tribunal to try them.

Such a view however, needs to be tempered by an awareness of political considerations. If such a convention were to be passed it would require signatories (national governments) to enforce it. Australia's own record on enforcing UN conventions in recent years raises questions about how governments decide where and when they play or don't play their UN cards.

More importantly, even if such a convention were passed and signatories did enforce it, it might very well happen that it would need to be enforced against non-signatories. The prospect of international police or military action against a dictator in power must give us all pause here. Those who thought (unwisely) that it could easily be done in Iraq have been forced to reconsider. The unpalatable conclusion is that there may be limits to what can be done about (or against) tyranny. John Cooke's legacy is therefore doubly important for us today. His story is one of uncompromising courage—both in struggling for the sanctity of law as a defence against tyranny, and as a victim to the political process that brought him and his struggle undone.

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Dr Bruce Buchan is Lecturer in the School of Arts, Media and Culture at Griffith University. His research interests include liberal and republican political thought and international relations theory.

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