BOOK REVIEWS

Oasis of Justice or Poisoned Well?
The Trials of King Charles I and the Regicides

THE TYRANNICIDE BRIEF

By Geoffrey Robertson
(Chatto & Windus, 2005 pp 418)

ON 27 January 1649, Charles I, king of England, was convicted of 'high treason and other high crimes' by the High Court of Justice, a kangaroo court established by the House of Commons without statutory authority to try the king for waging war on his subjects. Three days later the king was beheaded in Whitehall. He was the first and only English king to be convicted of high treason and the first and only one to die on the scaffold. His death ushered in a period of republican government which was to last a little over 11 years. It ended shortly after the death of Oliver Cromwell in 1658. In May 1660, Charles II returned from exile in Europe to claim his crown. One of the first orders he gave after he was proclaimed king was to arrest all those who had participated in the trial and execution of his father, Charles I, and to bring them to justice for what they had done.[1] Twenty-nine so-called regicides ('king slayers') were indicted for high treason. Ten were hanged, drawn and quartered; the others were sentenced to life imprisonment or pardoned.

January 1999 was the 350th anniversary of the trial and execution of Charles I. To mark the occasion, a debate, sponsored by the Anglo-Australian Lawyers Association, was held in Gray's Inn, London. Perhaps surprisingly, the two main speakers were both Australian born. The eminent High Court judge Michael Kirby delivered a paper which condemned the trial and execution of the king as 'by legal standards a discreditable affair'.[2] The equally eminent Anglo-Australian advocate, judge, author and TV personality Geoffrey Robertson delivered a reply, which cast the king's trial and execution in a much more favourable light.

1. The Act of Oblivion, 1660, pardoned many of Cromwell's adherents, but not those most closely connected with the trial and execution of Charles I.
2. At p 3.

Out of the speech that Robertson delivered at Gray's Inn came this book, *The Tyrannicide Brief*. For, as he confesses in the Preface, the more he studied the records of the king's trial, the more convinced he became that Kirby's assessment of it was wrong.[3] Far from being discreditable, the king's trial was 'for its time ... an oasis of justice and fairness', the very model of what a criminal trial should be.[4] But not only was that view the exact opposite of Kirby's, it was also the exact opposite of Sir James Fitzjames Stephen's. In his *History of the Criminal Law of England*, Stephen stated: 'The establishment of the High Court of Justice, which tried not only Charles I, but many of his adherents, without a jury, and sentenced them to death, was itself a greater departure from the ordinary practice of English criminal justice than the Star Chamber. It supplies the only case (so far as I know) in English history in which judges sitting without a jury (other than the members of courts-martial) have been entrusted with the power of life and death'.[5]

As Robertson delved deeper into the records of the king's trial, it became clear that, in addition to the king, two other figures had played a central role in the proceedings. One was the presiding judge, John Bradshawe. The other was the man who had undertaken the role of chief prosecutor at the trial. He was an ambitious, 40-year-old lawyer and republican sympathiser named John Cooke. So much had already been written about the king that no purpose would be served by writing another book about him. On the other hand, no one had ever written a book about Cooke and the part he played in the king's downfall. This book fills the vacuum.

The book, however, is not merely a biography of Cooke. Indeed, as Robertson admits, the materials which would be necessary to compile a comprehensive biography of him do not exist.[6] He therefore ekes out the book by giving an account not only of Cooke's life and achievements, but also of the events which led to the Civil War, of the turbulent years known as the Interregnum, and finally of the trials of the regicides (including Cooke) following the Restoration. As the man who had been appointed to prosecute the king, it was inevitable that Cooke would be one of the first to be indicted for high treason by the new regime.[7] He pleaded not guilty to that charge, but was convicted at the Old Bailey and sentenced to death. He was hanged, drawn and quartered at Charing Cross on 16 October 1660.

The centrepiece of the book is the trial of Charles I, and specifically the part Cooke played in it. This is dealt with in chapters 8-11. The trial of the regicides is covered,

3. Ibid.
4. Ibid.
5. JF Stephen *A History of the Criminal Law of England* (MacMillan: London, 1883) vol 1, 358. The Act Erecting a High Court of Justice for the Trial of King Charles I (6 Jan 1649); the indictment of the king; the king's reasons for declining the court's jurisdiction; the court's verdict and sentence; and the death warrant are reproduced in SR Gardiner *Constitutional Documents of the Puritan Revolution 1625-1660* 3rd edn (Oxford: OUP, 1951).
6. At pp 4-5, 364-368.
7. Cooke had been arrested in Ireland some months before the Restoration. In May 1660, he was brought to London under armed guard and held in the Tower pending his trial: see ch 16.

in less detail, in chapters 17-18. There have, of course, been other accounts of these trials, but Robertson gives two reasons for providing a fresh interpretation of them. First, no previous account has focused on Cooke, who was a central figure in both trials. Secondly, in his opinion, other authors have given biased accounts of both trials and have failed to understand the legal issues which arose in them. In the Preface, Robertson writes:

> I am conscious of having tiptoed across historical minefields. But my reading of events that turn so much on trials and their procedures and beliefs about constitutional rights has been informed by a long professional life as a trial lawyer. My sense of what was really happening at the Old Bailey, the Inns of Court and Westminster Hall sometimes differs from that of historians. It is astonishing, for example, that almost all of them ... relate with embroidered detail how Cooke opened the King's trial by reading the charge, when this was in fact done at great length by the court clerk. Such a simple mistake, misreporting the opening of the most significant trial in English history, suggests they may have made more deep-seated errors of analysis and appreciation.[8]

In light of these remarks, it is pertinent to ask whether Robertson's book is itself dispassionate and free from error. Unfortunately it is neither. Far from giving a balanced account of Cooke's life and his undoubted achievements, the book heaps praise on him undeservedly. It portrays Cooke as a devout, idealistic and fearless man who invariably put other people's interests ahead of his own. For example, in the Prologue, Robertson claims that Cooke accepted the brief to prosecute the king not out of self-interest, but in obedience to the so-called cab-rank rule – a longstanding rule of professional ethics which requires that 'an advocate must, once an appropriate fee is proffered, accept any brief that is capable of argument. This principle ... is the kerbstone of the barrister's right to practice, and the guarantee that any party, however unpleasant or unpopular, may have the benefit of counsel learned in the law'.[9] It is hard to believe that the cab-rank rule is the only, or even the main, thing that motivated Cooke to accept the brief. Ambition was probably the key factor. After all, Cooke was not a particularly senior or well-paid barrister, and Cromwell offered to promote him to the lucrative and prestigious position of Solicitor-General of the Commonwealth if he accepted the brief.[10] Shortly after the trial and execution of the king, Cromwell further promoted Cooke to Master of St Cross Hospital and then to Chief Justice of Munster, Ireland,[11] which adds to the suspicion that what prompted him to take the brief was not the cab-rank rule but the hope and expectation of preferment.

Nor is the book free from error. In chapter 4, which gives the reader an overview of criminal law and procedure in the 17th century, Robertson claims that statutes and

8. At p 5.
9. At p 8.
10. At p 11: 'His appointment as "Solicitor-General of the Commonwealth" ... came with acceptance of the brief'.
11. At p 360.

law reports had 'since the Conquest, been written in an archaic Norman-French'. This, he claims, was a deliberate ploy by which lawyers kept 'the public in ignorance of the law' and entrenched their 'professional monopoly'.[12] But whereas statutes of the 13th and 14th centuries were indeed in Norman-French (or Latin), those enacted after the mid-15th century never were; on the contrary, they were always in English.[13] Likewise, his claim that in the 17th century defendants in criminal trials were not entitled to counsel is only a half-truth,[14] and one which is contradicted by his subsequent assertion that while awaiting his trial for high treason, 'John Cooke advised his fellow prisoners that they had a right to counsel to argue any point of law arising on their trial'.[15]

Elsewhere, Robertson heaps praise on Cooke for arguing in *Lilburne's case* (1646) that there should be a right against self-incrimination in criminal trials;[16] however, he fails to mention that five years earlier, the villain of this book, Charles I, had approved legislation abolishing the Courts of Star Chamber and High Commission, together with the 'ex officio' oath, and by doing so had put an end to the use of inquisitorial procedures in the English criminal courts and laid the foundations of the 'right to silence', which still applies in them today.[17] Likewise, Robertson treats the oft-quoted line from Shakespeare's *Henry VI, Part II,* 'The first thing we do, let's kill all the lawyers!'[18] as evidence of the unpopularity of the legal profession, whereas, as ex-High Court judge John Toohey has pointed out, Shakespeare did not intend the line to be understood in that sense.[19]

12. At p 71.
13. T Plucknett *Concise History of the Common Law* 5th edn (London: Butterworths, 1956) 320-321, 324.
14. At pp 72, 79.
15. At p 291.
16. At pp 85-86, 170.
17. 16 Charles I, cc 10 & 11 (1641). The second of these Acts, which abolished the 'ex officio' oath, provided, in part, that no one 'shall be ... obliged ... to accuse him or herself of any crime, delinquency or misdemeanour, or any neglect or thing whereby, or by reason whereof, he or she shall or may be liable or exposed to any censure, pain, penalty or punishment whatsoever....'
18. At p 76.
19. See J Toohey 'Without Fear or Favour, Affection or Ill-Will: The Role of the Courts in the Community' (1999) 28 UWAL Rev 1, 2: 'Sometimes when listening to someone in full flight against the legal profession, reference is made to a passage in Shakespeare's *Henry VI, Part II*, in which the statement is made: "The first thing we do, let's kill all the lawyers". The words are often offered as evidence of the unpopularity of lawyers, even in Shakespeare's day. The irony is that the statement was made to the rebel Jack Cade, in recognition of the fact that if society was to be overthrown the lawyers must go and they must go first. This is not because lawyers are by nature a particularly courageous lot; it is simply that the institution of which they are part exists not only to resolve disputes between individuals but to protect the citizen against excesses of state power. If the protection given by the courts is removed, it is hard to see what limits can be imposed upon the authority of the state'.

The Trial of Charles I

King Charles I (1600–1649)

These errors may perhaps be shrugged off as trifling. More serious are those which appear in Robertson's account of the trial of Charles I, a trial which he describes as 'for its time ... an oasis of justice and fairness'. It is true that the relatively inexperienced and previously unheard of judge, John Bradshawe, who presided at the king's trial extended some minor courtesies to him.[20] For example, Bradshawe allowed the king to keep his hat on during the trial and did not demand that he raise his hand when pleading to the charge, as defendants were normally required to do.[21] But beyond that Bradshawe did little to ensure fairness. Indeed, there was little he could do given that the trial had been rigged by the House of Commons to ensure the king's conviction.[22] As evidence of that, it may be noted that in many important respects the procedure adopted for trying the king was not only novel but deeply prejudicial to him. For example, no grand jury was summoned before the trial to test the evidence against him. Nor was there a petty jury at the trial to whom the king could appeal. In

20. As Kirby has pointed out, the most senior judges of the day had refused to accept the appointment.
21. Equally, the king was not in chains or under physical restraint, as prisoners normally were.
22. The 'Act' of the House of Commons which established the High Court of Justice declared that the king was guilty of 'high and treasonable crimes, ... [which] might long ago have justly been brought to exemplary and condign punishment'. Thus, the House of Commons had already made up its mind that the king was guilty of high treason. The court's function was simply to rubber-stamp that decision. With regard to sentence, the 'Act' directed the court to 'proceed to final sentence according to *justice* and the merit of the cause; and such final sentence to execute, or cause to be executed, impartially and *speedily*' (emphasis added). The use of 'justice', as opposed to 'law', is revealing: it implies that the House of Commons knew that there was no *legal* basis for punishing the king (who was above the law). 'Speedily' is likewise notable: it impliedly ruled out sentences such as exile and imprisonment and left the court with only one sentencing option. Bradshawe took the hint and sentenced the king to death. Finally, it should be noted that although the indictment charged the king with high treason, his acts did not amount to that offence as it was defined in the Treason Act 1351. According to that Act, high treason consisted, inter alia, in levying war against the king in his realm. The gist of Cooke's case, however, was that the king had unlawfully levied war against his subjects and parliament. Since nothing in the Act of 1351 prohibited him from doing so, the court had to manufacture a new definition of high treason to cover his case. This new definition, which had no statutory or common law basis, passed into oblivion at the Restoration.

the 17th century, peers who were indicted for high treason or other 'high crimes' were entitled to be tried in the House of Lords; the king, however, was denied that right and was made to answer before an irregular court established by the House of Commons without the concurrence of the Lords. He was also denied the right to be present when witnesses gave evidence against him.[23] In addition, as Justice Kirby has noted, the proceedings at the king's trial lacked the following basic safeguards:

> Now, by international law, anyone sentenced to death has the right to seek pardon or commutation of sentence. The King was denied the right to appeal to a true Parliament, the only body that might have been relevant in his case. 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. He was not informed at the time of his arrest of the charges against him. 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 judicial power. Instead, he was kept in custody in successive isolated places of detention whilst his accusers decided what to do with him. He had no access to a court to invoke the Great Writ to secure his liberty.[24] Although he was treated with courtesy and dignity, he was not treated with humanity.[25]

This, then, was a kangaroo court headed by a partisan judge who had been directed to find the king guilty. The king refused to plead to the indictment, which Cooke had drafted and signed, arguing that the court had no legal authority to try him. Stephen claims that it was perhaps the only wise decision the king ever made:

> [The king] was, as is known to everyone, condemned principally for refusing to plead to the charges made against him by the High Court of Justice, and this was nearly the only step in the whole of his career in which he was not only well advised, but perfectly firm and dignified in his conduct. If he had pleaded he would, of course, have been convicted.[26]

Robertson does not quote Stephen's view but casts the king's refusal to plead to the charges in a different light. He insists that the king refused to plead 'Not Guilty' because he knew that if he did so, the prosecutor, John Cooke, would have made mincemeat of any defence which he put forward.[27] He says: 'The weakness of the

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23. At pp 170-172.
24. See, however, p 174: Many English judges were 'uncomfortable with the trial and were available to entertain a habeas corpus motion on behalf of the king, had his lawyers been instructed to make it'.
25. M Kirby 'The Trial Of King Charles I: Defining Moment for Our Constitutional Liberties' (paper delivered to the Anglo-Australasian Lawyers Association, London, 22 Jan 1999) <http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_charle88.htm>.
26. Stephen above n 5, 364. A refusal to plead was taken as a confession of guilt. Conviction and sentence followed automatically, but in the king's case the judges insisted on hearing the prosecution's witnesses 'to satisfy their consciences': Robertson p 169.
27. See eg p 168: 'He simply did not dare contest the charge. His best and indeed only realistic tactic was to get in as many attacks on the legitimacy of the court as he could before he was stopped'.

King's case *as he explained it on the scaffold* demonstrates why he was tactically sensible not to make it in the courtroom. His refusal to recognise the jurisdiction of the court served as a cover'.[28] Having made that accusation, it was surely incumbent on Robertson to quote those parts of the king's scaffold speech which, in his view, demonstrate the 'weakness' of the king's case. In fact, Robertson quotes only a handful of sentences from that speech and none of them exposes, or is even directed towards, the strengths or weaknesses of his defence.[29] In other words, the king is accused of cowardice in refusing to plead, but no evidence is presented to substantiate that charge and Stephen's alternative view that the king chose to remain silent because the judges' minds were already made up against him is ignored.

It must also be noted that Robertson's criticism of the king for refusing to defend the charges against him is inconsistent with his advocacy elsewhere in the book of an accused's right to remain silent.

The Trial of John Cooke

Robertson sums up the king's trial as follows: '[It] had been conducted with a fairness and politeness that were unparalleled in criminal proceedings and which set an important precedent'.[30] Having written that, it comes as no surprise to find that he utterly condemns the trials of the regicides, including John Cooke, in October 1660. Each of these trials, he says, was a show trial, a travesty and an abomination.[31] That, unlike the king's trial, they were conducted in an established court (the Old Bailey) and in accordance with the accepted law and procedure of the day is treated as unimportant. That Sir Matthew Hale, perhaps the most brilliant and fiercely independent lawyer of his age, was one of the judges is also seen as irrelevant.[32] Nor does the fact that the bench respited sentence in the case of one of the regicides (Hulet) on the ground that there was insufficient evidence against him dissuade Robertson from his view that in each case guilt was presumed from the start. That some of the lay judges (known as 'commissioners') at Cooke's trial were men who had been imprisoned by Charles I,[33] and might therefore be expected to have had some sympathy for Cooke, is not mentioned in Robertson's account of his trial, though it is mentioned in Stephen's account of it as evidence that it was fair.

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28. At p 187 (emphasis supplied).
29. At pp 186, 196.
30. At p 184. See also p 185: 'The court, after all, looked and acted like a court – a much fairer court, in public memory, than his own Star Chamber'.
31. At pp 3, 287.
32. Robertson (pp 283-284) offers no proof in support of his claim that Hale was 'cowed' by his fellow judges, but seems to infer this from the fact that he remained silent throughout the proceedings.
33. Denzil Holles and the Earl of Manchester: see Stephen above n 5, 370-371. Robertson (p 296) refers to their presence on the bench, but treats them as turncoats and royalist placemen. In fact, Holles' colourful career shows that he was perfectly capable of taking a stand against the king if justice required it.

Cooke was charged under the statute 25 Edward III (1351) with 'compassing the king's death'.[34] There is no doubt he was guilty. He had been promoted to Solicitor-General in exchange for accepting the brief to prosecute the king; he had framed and signed the indictment; he had procured evidence to support the indictment; and he had examined 29 witnesses at the trial, as directed by Bradshawe. (These witnesses were examined 'in camera', in the king's absence.) The evening before sentence was passed on the king, Cooke remarked to a former pupil at Gray's Inn: 'The King must die and monarchy must die with him'.[35]

Nevertheless, at his trial, Cooke claimed in a long and disingenuous argument that he had played no part in the king's death. He had merely laid evidence before the High Court of Justice, as his brief required him to do. It was the court's sentence, rather than anything he did or said at the trial, which had sent the king to the scaffold. Moreover, he had not been actuated by malice towards the king and had acted as he did 'only for his fee'. Robertson describes this defence as skilful and moderate,[36] but Stephen's assessment of it is more convincing:

> Cooke, who had been Solicitor-General at the King's trial, defended himself elaborately and ignominiously, on the ground that, ... he had not ... 'been instrumental' in taking away the life of Charles....
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> > 'I have been told', he [Cooke] said, 'that those that did only speak as counsel for their fee, who were not otherwise contrivers of it, the Parliament did not intend that they should be left to be proceeded against .... I must leave it to your (the jury's) consciences, whether you believe that I had a hand in the King's death, when I did write but only that which others did dictate to me, and when I spoke only for my fee'.
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> By this mean line of defence, he had no chance (as he ought to have known) of saving his life, and only exposed himself to the crushing and unanswerable retort of Sir Heneage Finch (his successor in the office of Solicitor-General): 'He that brought the axe from the Tower was not more instrumental than he'.[37]

The jury found Cooke guilty. The court then sentenced him to be hanged, drawn and quartered. He was taken to his place of execution on 16 October 1660, accompanied by another convicted regicide, Hugh Peters. Who should be executed first? Cooke suggested to the sheriff that he (Cooke) should be first, thus giving his companion Peters 'more time to prepare for the ordeal'.[38] Robertson portrays this as Cooke's last act of selflessness, but that is surely not the only or even the most obvious interpretation of Cooke's suggestion, which the sheriff accepted. Poor

34. At p 11.
35. At p 173. The statement was used at Cooke's trial to prove his treasonable intent.
36. At p 311. There were several strands to Cooke's defence. Robertson gives a skilful summary of each of them in ch 18.
37. Stephen above n 5, 371.
38. At p 327. On the scaffold, Cooke pleaded in vein that the king 'might show some mercy' for Peters.

Hugh Peters, who was executed second, was made to witness the hanging, castration and disembowelling of Cooke at close quarters, before he too suffered the same fate. No one will ever know what went through Cooke's mind when he volunteered to be executed first. But it is characteristic of this book that wherever an act is open to two or more interpretations Robertson always prefers the one which is most favourable to his hero.

It is a constant refrain of the book that the trial of Charles I set an important precedent for the trials of contemporary tyrants like Slobodan Milosevic, Saddam Hussein and Augusto Pinochet.[39] Let it be conceded that each of these four men is or was guilty of 'crimes against humanity'. Nevertheless, it is wrong to see their trials as all of a piece. The king's trial was a show trial, and a mockery of justice. The trials of these other three tyrants, on the other hand, are genuine trials: in each case, the proceedings have a clear legal basis; the accused is given ample notice of the charges against him and may have counsel to defend him; the witnesses are examined not 'in camera' but in public; and the evidence is evaluated dispassionately by highly trained judges. Not surprisingly, these trials enjoy overwhelming international support. It does a disservice to the prosecutors and judges who are involved in them to suggest that the work they are engaged in today is in any way comparable to the work in which Cooke, Bradshawe and the other regicides were engaged in January 1649.

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39. See eg at p 6, 347-355.

* The portrait of King Charles I on page 303 is held in the Archives of Balliol College, Oxford.