By What Power am I Called Hither? The Impunity of Kings and Presidents

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By Geoffrey Robertson

The trial of Charles I in 1649 secured the historic gains of the English civil war – the supremacy of parliament, the independence of judges, individual freedom guaranteed by Magna Carta and the common law. From a modern perspective, it was the first war crimes trial of a head of state. The arguments in Westminster Hall resonate today in the courtrooms at the Hague and even in the Iraqi Special Tribunal – Saddam Hussein's opening words to his judge were, in translation, a paraphrase of those of Charles I: "By what power am I called hither… I would know by what authority, lawful I mean…."

Charles I

Three centuries before the rulings against Pinochet and Milosevic, this was a compelling argument. Charles had the purest form of sovereign immunity: he was a sovereign, both by hereditary and (as many believed) by divine right. Judges had always said that the King, as the source of the law, could do no wrong (rex is lex is how they had put it, when deciding that Charles could impose a tax without Parliament's approval).

As for international law, the ink was hardly dry on its modern foundation, the Treaty of Westphalia (October 1648), which guaranteed immunity to every prince, however Machiavellian. The best thing about the Treaty of Westphalia, however, was that England was not a party to it. On January 6th, 1649, the purged House of Commons passed an "Act" to establish a High Court of Justice, "to the end that no chief officer or magistrate may hereafter presume traitorously or maliciously to imagine or continue the enslaving or destroying of the English nation, and expect impunity for so doing…"

Signing of the Treaty of Westphalia

This was the origin of "impunity" in the sense that Kofi Annan and Amnesty International now use the word, to refer to the freedom that tyrants should never have to live happily ever after their tyranny. Parliament's brief to end impunity was sent to a puritan barrister at Gray's Inn, John Cooke, one of the very few counsel prepared to risk his life by accepting it. He devised a new offence – the crime of tyranny - for which not even a monarch could claim immunity. "Tyranny" was an apt description of what today would include crimes against humanity and war

crimes: Cooke used it to describe the conduct of leaders who destroy law and liberty or who bear command responsibility for the killing of their own people or the plunder of innocent civilians or the torture of prisoners of war.

John Cooke

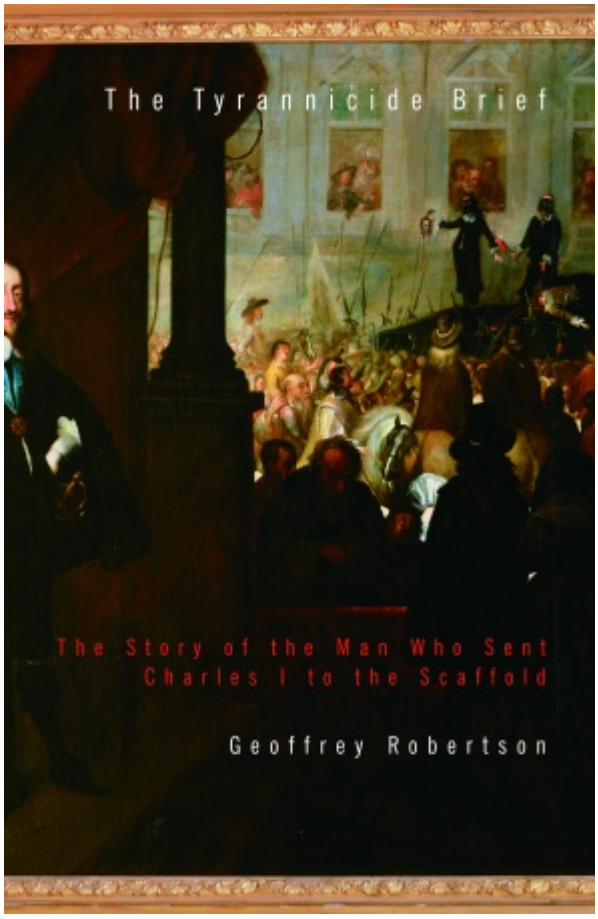
By opting for a public trial, Oliver Cromwell and the parliamentarians were taking an enormous risk – they were providing the King with a political platform as well as an opportunity to contest his guilt (for this very reason, Churchill strenuously opposed the trial of Nazi leaders at Nuremberg). But these puritan lawyers and MPs were determined that the King should have justice – whether he wanted it or not. More justice, indeed, than given to ordinary prisoners, who were automatically deemed guilty if, like Charles, they refused to plead. Before the King was convicted, however, the court required the prosecutor to prove his guilt. Eye-witnesses testified that he had directed the plunder of towns, supervised the torture of prisoners and was planning to make war again.

The execution of Charles I was not preordained. Most of those later dubbed "regicides" did not at first want to kill the King. John Cooke certainly believed at the outset that the proceedings would end with some form of reconciliation - a limited constitutional monarchy or abdication in favor of the King's youngest son. But justice has its own momentum: on the opening day (January 20th, 1649) the seventy judges (who sat, in effect, as a jury) were shocked by the defendant's arrogance and his insouciant demeanour. He laughed loudly while the court clerk read Cooke's charge which detailed the carnage of the civil war. Then he sealed his fate by telling his guards that he cared nothing for casualties on either side.

This confession was reported to the prosecutor and to the judges and it influenced their minds: it helped to convince Cooke, for instance, that "the King must die and monarchy with him." Charles Stuart had no remorse, so he deserved to die. This was Cromwell's fatal mistake: the King's execution made him a martyr, and paved the way in public sentiment for the restoration of the monarchy eleven years later. (It is a mistake about to be repeated: the execution of Saddam Hussein will most likely tip Iraq into full-blooded civil war.)

Saddam Hussain and Donald Rumsfeld in 1983

The consequence of the King's trial was a republic – the Commonwealth of England, declared on 17th March 1649. The House of Commons was henceforth "the supreme authority of this nation, the representatives of the people in parliament." It was to be the only authority – the House of Lords was abolished as a "useless and dangerous body." With abolition of the Star Chamber, the King's own "kangaroo court," came the end of torture: it was never again inflicted.



The republic of England, argued into existence in 1649 by the sermons of Hugh Peters (Cromwell's chaplain), the final speech of John Cooke (never delivered but widely published) and the elegant sarcasm of John Milton (The Tenure of Kings and Magistrates) was a construct of justice and right reason (nobody should be above the law) supported by the Puritans' biblical interpretation that kings were graven images – rivals to, rather than anointed by, God. The regicides did not hark back to Rome or model their republic on the existing city-states of Geneva and Venice. The road to their new Jerusalem was paved by the demand for justice on the man they held responsible for the death of one in ten Englishmen in the civil wars.

The influence of the American colonists on the English republican movement is often overlooked. Hugh Peters, the first minister at Salem, and a leading founder of Harvard College, was a key influence on Cooke and Cromwell, as was Sir Harry Vane, an early governor of Massachusetts. Harvard graduates became influential advisors to Cromwell – the first, George Downing (who gave his name to Downing Street) ran the republic's foreign policy.

Come the Restoration, it was the regicides who were offered up as human sacrifices: 49 were brought to the Old Bailey, where vetted juries were directed to convict. John Cooke and Hugh Peters were dragged from Newgate Prison to Charing Cross, to be disembowelled in the presence of Charles II. Their courage so astounded London that the onlookers began to turn sympathetic and the government dared not bring the other republicans up for sentence. So the King's lawyers hit on the idea of having them detained indefinitely on off-shore islands to which the writ of habeas corpus would not run – a device that the Bush administration later borrowed for Guantanamo Bay.

The leading republicans were men of principle. John Cooke, for example, devoted much of his life to making poverty history. At the end of the civil wars he had published "The Poor Man's Case" – a passionate and prescient plea for social justice and redistribution of wealth which envisaged a national health service, identified poverty as a cause of crime and argued for limits to the death sentence and abolition of imprisonment for debt. Later, as a judge in Ireland, he shocked the great landlords by his rulings in favour of their tenants. He even urged fellow barristers to devote 10% of their practice to pro bono work, a plea that still falls on deaf ears.

In a letter written from the Tower of London, shortly before his execution, John Cooke explained "the good old cause": "We are not traitors or murderers or fanatics, but true Christians and good commonwealthsmen, fixed and constant in that noble principle of preferring the universality before particularity. We fought 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."

John Cooke and the King's judges were tyrannicides, who pushed England to where logic ("right reason") led, where law (Magna Carta) pointed and where God (the first book of Samuel) approved. It was a point that no other nation at the time or for another century would reach: a proto-democratic republic with constitutional safeguards for civil liberties.

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