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Book Review

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ANTHONY W. BRADLEY *

It has been “described as an ‘unavoidable paradox in English history, a patently unconstitutional act which stands as perhaps the greatest monument to the victory of English constitutionalism.’”¹ The constitutional conflicts in England which ran through much of the seventeenth century were fueled by an extreme religious division between Roman Catholics and the Protestants, who wished to maintain the Church of England’s independence from Rome.² The conflicts reached their height in a dramatic period in 1688–89 when the Catholic James II was forced out of the country, leaving behind a short-lived vacuum in which there was, in effect, no monarch on the English throne and no legitimately convened Parliament at Westminster.³ This period has attracted many scholars, including the great F. W. Maitland who summarized the course of events in 1688–89 and continued:

[n]ow certainly it was very difficult for any lawyer to argue that there had not been a revolution. Those who conducted the revolution sought, and we may well say were wise in seeking, to make the revolution look as small as possible, to make it as like a legal proceeding, as by any stretch of ingenuity it could be made. But to make it out to be a perfectly legal act seems impossible.⁴

In his book, Professor Richard Kay has reminded us of the intense discussions that took place as events in England moved to their early conclusion. While the eventual outcome of those events may be seen over the course of the eighteenth and later centuries, Kay is to be congratulated on having made an original study of this crucial period. The main argument in the book is given life with a remarkable collection of

* Emeritus Professor of Constitutional Law, University of Edinburgh; Visiting Fellow, Institute of European and Comparative Law, University of Oxford.

¹ RICHARD S. KAY, *THE GLORIOUS REVOLUTION AND THE CONTINUITY OF LAW* 14 (2014) (quoting HOWARD NENNER, *BY COLOUR OF LAW: LEGAL CULTURE AND CONSTITUTIONAL POLITICS IN ENGLAND, 1660–1689*, at 173 (1977)).

² KAY, *supra* note 1, at 35–36.

³ *Id.* at 54.

⁴ F. W. MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 284 (Cambridge Univ. Press 1955) (1908).

contemporary illustrations, including apposite quotations from the speeches, debates, pamphlets, and diaries of the parliamentarians of the late seventeenth century. Kay guides us skillfully through the wealth of original material that has survived for some 350 years and is accessible to scholars today.

In a broad sense, the book is a contribution to studies on the nature of revolutions, the foundations of legal systems, and transitional justice. It examines how a fundamental change in the basic structure of government, the law, and justice could take place in England that would cause the least possible damage to the established institutions of the monarchy, Parliament, and the legal system. Thus the ‘glorious revolution’ was the outcome of a struggle for power in which the major actors wished to achieve their aims as far as possible through institutional means, and without bringing on a period of conflict that might lead to a popular, or republican, form of government. While a break with aspects of the immediate past proved unavoidable, this did not require an axe to be taken to all existing institutions, and it proved possible for these bodies to resume their accustomed authority with a minimum of interruption. As Kay puts it, while the opponents of James II ultimately prevailed in the struggle for power, “to preserve one aspect of the constitution—the indispensable role of Parliament—they were obliged to breach another—the hereditary right of the king.”⁵ Having “accomplished [the physical revolution] with relative ease[,] . . . [t]heir task now was to reconstruct the English constitution. Since, however, a principal feature of that constitution was its historical continuity, they had an incentive to leave no trace of what they had done.”⁶

A crucial stage of the revolutionary process was the period between the ending of the legal authority of James II and the beginning of a new period of monarchical government. Kay defines this as the period between December 11, 1688, when James II could be taken (at least in political terms) as having abdicated the government, and February 13, 1689, when William and his wife Mary were proclaimed as a joint monarchy.⁷ In Kay’s view,⁸ this period of “[t]he Revolution created a true interregnum for the

⁵ KAY, *supra* note 1, at 53.

⁶ *Id.* at 54.

⁷ *Id.* at 234–35.

⁸ This view is not shared by Sir Stephen Sedley, who reviewed Kay’s book in the *London Review of Books* and emphasised that there must have been an interregnum during the period of the civil war and Cromwell’s government, starting either from 1642 when the Long Parliament began to legislate without royal assent or at latest from 1649 when Charles I was executed, and continuing until the restoration of Charles II in 1660. Stephen Sedley, *Smuggled in a Warming Pan*, 37 LONDON REV. BOOKS 1, 5 (2015). This disagreement may depend on the meaning of the term, ‘true interregnum.’ Sedley’s position is not reflected in two other reviews of the book: James Allan, *The Glorious Revolution & The Rule of Recognition*, 30 CONST. COMMENT. 509, 511 (2015) and Nicolás Figueroa García-Herreros, Richard S. Kay, *The Glorious Revolution and the Continuity of Law*, 65 AM. J. COMP. L. 724, 727 (2017) (book review).

first time in English legal history.”⁹ But during those two months there was necessarily an exciting pattern of events which made it possible for the successful protagonists to cross the chasm in two leaps. Kay explains the paradox by emphasizing that “legal regularity may itself comprise a significant social-political value.”¹⁰ “Such a revolution subverts its legitimacy by its own example,” and it was “a well-established political tradition and . . . [a] particular craving for stability and constitutional order” that caused “the revolutionaries to employ the rhetoric, if not the reality, of legal regularity.”¹¹

Kay describes in detail how Prince William of Orange was asked by the Lords and a gathering of commoners, including those who had sat in the Parliaments of Charles II, to summon not a Parliament but a Convention; circular letters from the Prince were issued to enable a form of election to be adopted to create a Convention, but when the Convention met on January 22, 1689, the assembly “was acutely conscious of the absence of a legal foundation for its meeting.”¹² After much division of opinion, it was declared that King James II had “endeavoured to subvert the constitution” and, “having violated the fundamental laws,” had “abdicated the government” and the throne was vacant.¹³ This cleared the way for a second clutch of difficult questions to be answered before action could be taken to fill the vacuum in government; “[t]he prospect of a true dissolution of the constitution and an entirely new beginning was terrifying to the men of the Convention.”¹⁴ Should power be exercised by the people outside Parliament? “William Attwood, referring to a kind of law behind the law, thought there were situations when a king could lose his power without descent to a ‘confused multitude without order or connection.’”¹⁵

In an impressive chapter at the heart of the book, Kay discusses difficulties for the continuity of the Crown that confronted the move to declare William and Mary a dual monarch,¹⁶ these included: the need to amend the traditional parliamentary formula that sought divine blessings upon the monarch and royal family, the drafting of a new oath to be sworn during the coronation service, and the choice of title of the joint monarchs (the phrase that was adopted referred to them as the “undoubted king and queen of this realm”).¹⁷ Underlying these matters was the thorny question of succession when one or both of the joint monarchs died: it was quickly

⁹ KAY, *supra* note 1, at 234.

¹⁰ *Id.* at 19.

¹¹ *Id.*

¹² *Id.* at 74.

¹³ *Id.* at 76.

¹⁴ *Id.* at 114.

¹⁵ *Id.* at 116.

¹⁶ *Id.* at 124, 126–30.

¹⁷ *Id.* at 132.

seen that joint tenancy at common law would not provide an appropriate answer. The question of the oaths to the new King and Queen proved even more difficult: Kay demonstrates why acceptance of their *de facto* authority was not considered to provide an affirmative justification of the Revolution.¹⁸ A posthumously published paper by Chief Justice Matthew Hale contained a prophetic remark: “The competition for the crown is a tender matter and interest and successes and reasons of state carry parties beyond the limits of settled rules, . . . not only where the right heir prevails but even where the usurper or intruder carries the day.”¹⁹ Kay argues that the controversy over the oaths revealed “the intensity” with which the statesmen in 1689 “wished to maintain, even in the teeth of insuperable obstacles, the continuity of the rule of law.”²⁰ Once the reign had been proclaimed and it was possible for the first Parliament of the reign to meet, much time was spent on formulating a statute that recognized the authority of the joint monarchs and confirming the acts of the Convention Parliament.²¹ It proved to be impossible to avoid the conclusion that, in Kay’s words, “[t]he Convention did not act because of the authority of law; the authority of law is inferred from the Convention’s acts.”²² But notwithstanding the Recognition Act, there continued to be issues relating to executive authority during the transition and to the machinery for vesting the new regime with legitimacy; and these were seen in the debates around what became the Validation Act of 1690. But even this further attempt did not overcome “[t]he contradictions involved in attempting to establish a revolutionary Crown and Parliament while maintaining the pretense of legal continuity.”²³

The disabling effect of such contradictions was moderated by the steps taken by William in reconstructing the existing judiciary, many of whom had been appointed to hold their office at the King’s pleasure. Thus supporters of James II were replaced as Chief Justice of King’s Bench by Sir John Holt,²⁴ and as Chief Baron of the Exchequer by Sir Robert Atkyns. These appointments “demonstrated a shrewd combination of judicial competence and political prudence.”²⁵ Kay comments: “If Holt represents the most successful elision of the contradictions of law and revolution, Atkyns may represent the plainest instance of their inevitability.”²⁶ The new judges were needed on political grounds, and in

¹⁸ *Id.* at 150.

¹⁹ *Id.* at 151 (referencing Lincoln’s Inn Library MS 579 f.25).

²⁰ *Id.* at 153.

²¹ *Id.* at 154–55.

²² *Id.* at 175.

²³ *Id.* at 180.

²⁴ *Id.* at 192–94.

²⁵ *Id.* at 195.

²⁶ *Id.* at 199.

office they were faced with pending cases that had arisen from everyday transactions that had been affected by the change of regime. One issue raised by those cases was the need for Cambridge University to be permitted to award degrees retrospectively.²⁷ But in a time of political tension, more difficult questions arose in respect of maintaining public order and the authority of criminal law. Cases arose regarding matters such as James's disputed holdings in the East India Company and the Royal African Company,²⁸ and whether in 1693 privateers on the high seas could rely on commissions signed by James.²⁹ As for the Church of England, which had to enforce a modified form of oath declaring allegiance to the new regime, most clergy took the oath, but the bishops were not united.³⁰ Sancroft, Archbishop of Canterbury, refused to preside at the coronation service for William and Mary,³¹ and left his residence in Lambeth palace to make way for his successor only when the Attorney-General sought to exclude Sancroft by obtaining a writ of intrusion against him.³²

Kay concludes that "every legal system originates in events that are not, themselves, authorized by law,"³³ but at some point thereafter the new regime comes to be accepted and arguments of fundamental illegality lose their force. The demagogic utterances of Sacheverell in 1709, and the degree of public support he received at a time when there was "a rising tide of Tory and high church sentiment against the Whig Junto government,"³⁴ led to the preacher's impeachment for condemning those who had in 1689 exercised justified resistance to an oppressive king—an impeachment which renewed the debate on the issues of principle that separated Whigs from Tories. On the case for a popular rebellion, Sir Robert Walpole accepted that resistance "ought never to be thought of, but when an utter subversion of the laws of the realm threaten the whole frame of a constitution and no redress can otherwise be hoped for."³⁵

The past is of course another country but, surprisingly, Kay cites a House of Commons debate in 1988 to demonstrate that even with the passing of time, which may have reduced discussion of the Revolution to the level of historical curiosity, "all of the tensions at the center of the revolutionary decisions were still there—between change and tradition,

²⁷ *Id.* at 235.

²⁸ *Id.* at 246.

²⁹ *Id.* at 265–71 (discussing the legality of a commission issued by King James after his abdication).

³⁰ *Id.* at 215–16.

³¹ *Id.* at 131.

³² *Id.* at 225–26.

³³ *Id.* at 272.

³⁴ *Id.* at 275.

³⁵ *Id.* at 277.

theory and history, the exhilaration of unconfined action, and the comfort of constraining law.”³⁶

Is it fanciful to observe that this conclusion is not without some application to the remarkable decision of the United Kingdom’s Supreme Court in September 2019?³⁷ Then the eleven Justices held unanimously that advice from Prime Minister Johnson to the Queen that Parliament should be prorogued was unlawful; that Parliament could resume its deliberations forthwith; and that Johnson’s attempt to end the session of Parliament prematurely and without reasonable justification was of no effect.³⁸ Reliance on earlier precedents could well have excluded any attempt by the Justices to interfere with this act under the royal prerogative.³⁹ But against this there were two principles—parliamentary sovereignty and parliamentary accountability—which did not permit recourse to royal power without reasonable justification if this would restrict the ability of Parliament to carry out its constitutional functions.⁴⁰ The 2019 decision by the Supreme Court did not indeed amount to a revolution. But the legal debate in and about the case brings to mind an insightful passage⁴¹ in which Kay defines two classes of lawyers dealing with events in 1689:

[T]hose who wished the fewest changes in constitutional arrangements tended to refer to positive law which was specific, concrete, and historically identifiable—statutes, judgments, precedents. Advocates of more far-reaching changes in the distribution of constitutional authority were more likely to cite a vaguer and more abstract kind of law - natural law, broad principles, and the practices of an immemorial and thus unverifiable past.⁴²

Since the British constitution remains uncodified, it continues to develop 350 years after the Glorious Revolution; and fundamental questions that arise today may be resolved in a manner that would have been impossible in earlier times but which displays a parallel divergence between the need for change and the continuity of law.

³⁶ *Id.* at 281.

³⁷ *See* R (Miller) v. Prime Minister/Cherry v. Advocate Gen. for Scotland [2019] 41 UKSC 3, 3 (considering whether “the advice given by the Prime Minister to Her Majesty the Queen . . . that Parliament should be prorogued from a date between . . . was lawful”).

³⁸ *Id.* at 22, 24.

³⁹ *Id.* at 3, 12, 16.

⁴⁰ *Id.* at 16–18.

⁴¹ James Allen, *Glorious Revolution & the Rule of Recognition*, 30 CONST. COMMENT. 509, 512 (2015) (reviewing KAY, *supra* note 1).

⁴² KAY, *supra* note 1, at 57–58.