

Sir,

Your editorial of 28<sup>th</sup> August 2012 was misleading and mischievous. You seem to think that the only interpretation of the events which led up to the executive action of Sir John Kerr on 11<sup>th</sup> November 1975 is one consonant with the view of the *Labor Party*. This shows a lack of historical sense as of appreciation for ultimate principle. Given the reach of your newspaper and its place as one (of few) that can be relied on to give something approaching the truth on most issues in this country, the opinion expressed was regrettable.

You are aware of the letter I wrote the previous day to your letters editor setting out the ultimate principle. The argument I advanced there was emasculated by the removal in the published version of the letter of all reference to that principle to avoid, apparently, a conflict with your interpretation. The published version also misquoted what I had written.

The chief error in your editorial is the contention that a governor general is bound to follow the advice of the government and those advisers the government appoints only. Quite apart from any other consideration the admonition ignores reality. Every man has his own friends and advisers: you yourself have one or more to whom you will turn on a difficult question. A good argument could be mounted that *you* have more power than any governor. You would not allow yourself to be constrained by a *monitum* against seeking advice from such a source. Why would you think it appropriate to impose such constraint on a governor whose responsibilities, ultimately, are greater than yours?

You mistake subsidiary for ultimate principle because you misunderstand the basis of authority. Authority is *not* derived, as you assert, from the collective will of the people. That thesis, which has its source in the French *philosophes*, is demonstrably foolish. Authority derives from nature, that is, from nature's author, Almighty God. No man gives himself authority, nor do men give society authority. Whatever *authority* there is comes from its *author*—the one word has its source in the other—and no man is the author of himself, as neither is any man (or group of men) the author of society.

And here, of course, is the real issue between us. Your position, whether inchoate or expressed, is atheistic, grounded in the belief that no recourse is needed to a supreme being to explain the majesty and the intricacy of the universe.

Brian Rosner's argument you published in *The Australian* today [*Reason has its place but the human heart yearns for awe*] defending belief in God omits a fundamental. Contrary to what he says atheism is as much a system of belief as any religion, if less logical. What the atheist believes in is 'No God', no explanation for the almost infinite variety of the things of nature or for the abiding stability of their species, no explanation but matter. It cannot—*it dare not*—allow formal causality, for all form

implies the existence of intellect.<sup>1</sup> Once admit a formal cause, i.e., a cause owing nothing to matter, and you are travelling down a slippery road. You must, inevitably, go on to admit you have an *efficient* cause, a maker and, most fearful of all, a *final* cause, an end or reason for your having been made.<sup>2</sup>

Atheism is irrational. It can, as Rosner implies, offer no satisfactory answer to ultimate questions but its irrationality has profound effects for daily life too: it must lead its adherents and those it influences to disorder and, eventually, to destruction.

Assume, for instance, that Sir John Kerr had elected to follow the advice of Mr Enderby or Sir Maurice Byers. We may not know the advice he would have been given but of one thing we can be certain, it would not have included the exercise of the power to dismiss the Government. The inevitable consequence is that the uncertainty and disorder, which by 11<sup>th</sup> November 1975 had reached a critical stage, would have continued well into 1976. The chaos would have produced civil violence and, in all probability, death.

The 'doctrine' of the separation of powers originated with Montesquieu (1689-1755). It is embodied in the Constitution, a convention, means to an end. It is not the ultimate principle of government. The principle, the ultimate end for the sake of which government exists—though you refuse to acknowledge it—is the welfare of the people. Cicero put it succinctly: *Salus populi suprema lex*.<sup>3</sup> The reserve powers exist to protect it. To assert that a governor can only exercise them by observing the restrictions of subsidiary laws or conventions defeats their very purpose.

Hence, the charge of breach of judicial probity levelled in November 1975 at Sir Garfield Barwick and now levelled at Sir Anthony Mason is without foundation. It is simply irrelevant that those to whom Sir John turned for advice should have been judges. The Governor General was bound to take the very best advice he could to preserve the common good of the Australian people and nothing could be allowed to stand in the way of it.

Moreover, the asserted dilemma of a High Court justice advising a governor is nonsense. It never troubled Sir Owen Dixon, Sir Garfield's predecessor, one of the leading jurists of his time and, as a classicist, one who understood the truth embodied in Cicero's aphorism. Sir Owen twice, in 1952 and in 1955, advised Sir Dallas Brooks, the Governor of Victoria, as to his powers when that State's Upper House refused to pass supply bills.<sup>4</sup> Early in 1956, at Sir Dallas's request, he advised Sir Charles Gairdner, Governor of Western Australia, on his duties in the event of an evenly divided election and, in particular, in the event of a refusal of supply

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<sup>1</sup> The world is besotted with Darwinian theory because it pretends, by sleight of hand, to explain the existence of the formal without a formal cause.

<sup>2</sup> It is utterly regrettable, by the way that no adequate public defence of the existence of God is offered by the current hierarchy of the Catholic Church.

<sup>3</sup> *De Legibus*, III, iii, viii

<sup>4</sup> Phillip Ayres, *Owen Dixon*, Melbourne, 2003, pp. 235 et seq.; 249 et seq.

occurring in that State.<sup>5</sup> True it is that, belatedly (in 1960), Sir Owen told his associate, James Merralls, he would not have presumed to advise a governor who was legally qualified, but the precedent remains: a Chief Justice of the High Court, the pre-eminent authority in the country on their powers, gave the governors of two States necessary advice when they asked for it.

Further, that the assertion that a judge so consulted would be in breach of his judicial duties is misguided may be seen from this. In any system of government there has to be an ultimate authority, one beyond the reach of the law or of the judgement of his peers for the simple reason that, as the ultimate authority, *he has no peers*.<sup>6</sup> A governor or governor general is, as the Queen's representative under the Westminster system, at the pinnacle of the legislative and executive arms of government. It is, then, almost impossible to imagine a setting in which the executive action of a governor could be challenged, a point made by Sir Anthony in the course of defending his actions. The corollary of this is obvious: any challenge to the exercise by a governor of his discretion would bring the very structure of government to chaos.

Still further, the assertion reflects adversely on the integrity of a High Court judge whose oath compels him to disqualify himself in the event of a hearing in a matter in which he has already given advice.

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Sir John Kerr was not without his shortcomings but Australia and its people owe him an immense debt for the resolution he showed in standing up for principle against *Labor Party* hubris and the invective of the party's apparatchiks, foresight of which did not prevent him carrying out his duty. Sir Anthony wrote to the point.

"When I said [to him] that the decision was bound to be controversial and attract strong criticism, he said, 'Tony, you don't know these people. I do. It will be much worse than you think'."

The Australian people must hope that should a crisis of similar character befall the country in the future and the best advice the governor general of the day can hope to obtain is from a justice of the High Court, ultimate principle will be observed. They must hope, too, that neither party political ideology nor misguided newspaper editorials will be permitted to obscure the issues.

Yours faithfully,

Michael Baker

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<sup>5</sup> Phillip Ayres, *Owen Dixon*, op. cit., p. 255.

<sup>6</sup> In the government of the Catholic Church this convention is expressed in the maxim *Prima sedes a nemine iudicatur* or, in the argot, 'no one may judge the pope'.