SIR JOHN KERR, *THE DISMISSAL* & THE AGE OF FOLLY

The stifling mix of materialism and subjectivism which dominates modern thought has served to blind great numbers to the duties that confronted Sir John Kerr, Governor General of the Commonwealth of Australia, and the principles he followed in exercising them when he sacked the *Labor Party* Government headed by Edward Gough Whitlam on 11th November 1975.

Australia has never come closer to civil war than it did when a Prime Minister, refusing to face the reality that his government was without the funds to govern, sought to continue in power. It is utter folly to suggest—as has been done by a great many—that the Governor General should have allowed himself to be advised by lawyers whose ideological commitment favoured the *Labor Party* over the good of the Australian people.

Law is *an ordinance of reason unto the common good promulgated by him who has the care of the community*.[1] Before ever a city or a state comes into existence men are bound, whether they acknowledge it or not, by a moral law affecting them universally. That unwritten law is summarised—as all reasonable men acknowledge—in the *Ten Commandments*. No legislature, other than one whose members are infected by ideology or false religion, fails to institute posited laws that reflect its precepts. Insofar as the acts of a legislature reflect those precepts they redound to the good of society. Insofar as they detract from, or contradict, them they harm society. When they deviate from right reason as occurs, for example, with a 'law' allowing abortion, they are not laws at all but a *species of violence*[2] and work inevitable harm.

There is a hierarchy among laws. The more a law serves the common good, the higher is it established in that hierarchy; the less it serves that good, the lower its position. The higher it is the more it must be observed even at expense of a lower.

The chief good of man is his union with God, his creator, during his lifetime and thereafter in eternity. Hence the supreme law in the hierarchy is the unwritten law of charity, that one must love God above all things and one's neighbour as oneself.[3] No law or convention, whether unwritten or written, prevails over this.

These truths are hidden from—indeed denied by—an age whose members are pre-occupied with the material. Whether explicitly or implicitly, they are atheistic. They deny the existence of any *extrinsic* causality in nature, whether an *efficient* cause (a creator) or a *final* cause (the end for the sake of which things are brought into existence).[4] Completing this syndrome they refuse to acknowledge the essential

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[1] St Thomas Aquinas, *Summa Theologiae,* I-II, q. 91, 1

[2] *Summa Theologiae,* I-II, q. 93, 1, ad 2.

[3] *Matthew* 22: 37 et seq.

[4] Though, illogically, they maintain the existence of these causes in the works of man.

contribution of the *formal* in the structure of the world as in man's essence as a being endowed with a faculty that owes nothing to matter, intellect.[5]

Following the stupidities of the *philosophes*, Rousseau, Voltaire, and their ilk, materialists think that authority derives from human will manifested in posited laws and conventions. They are blind to the fact that unless these exercises of will are conformed to the demands of the moral law engraved in the heart of man by nature they are not laws at all.[6] Adherence to defective philosophy obscures reality: we do not choose the nature we enjoy so freely; we did not bring ourselves into existence; we do not keep ourselves in existence.

Truth is the identity *between what is asserted and what is*. For the subjectivist, however, truth is the identity *of what is with what is asserted*. Subjectivism has myriad forms in the modern world: it is at the root of all political correctness, of all ideology, of all party propaganda.

Sir Anthony Mason, retired Chief Justice of the High Court of Australia, has recently revealed his involvement in the ruminations of Sir John Kerr prior to the executive action Sir John took on 11th November 1975 to respond to assertions contained in documents under Sir John's hand released by Australia's national archives.[7] He might, with respect, have done better to keep his counsel. Any lawyer worth his salt will advise his client to say as little as possible in a matter of controversy to reduce the opportunity for attack. Sir Anthony's revelations have provided just such opportunities.

The self-interested have used them to pursue the aggrandisement of the *Labor Party*. They have asserted, inter alia, that had Sir Anthony's involvement in the discussions with Sir John been known in 1987 the later *Labor* government headed by Mr Bob Hawke would never have appointed him Chief Justice. In their minds his failure to reveal the discussions can only be regarded as deceitful.

But the charge of breach of judicial probity levelled in November 1975 at the Chief Justice of the High Court, Sir Garfield Barwick, over his advice to Sir John and now levelled at Sir Anthony is without foundation. It is simply irrelevant that those to whom Sir John turned for advice should have been judges. Why? Because the supreme principle, charity, manifest in the common good of the people of the Commonwealth, was at stake and the Governor General was bound to take the very

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[5] Seen in the insouciant adoption of the theory of Darwinian evolutionism that refuses to accept the self-evident truth that the stability of species, testimony to immutable forms, grounds the very stability of the disciplines of science.

[6] A current manifestation of this blindness is the popular contention that, by an exercise of collective will in passing an appropriate 'law', man can alter the precept of nature that marriage is an institution that may only exist between a man and a woman. One might as effectively pass a law that the sun will not rise tomorrow.

[7] Published under the by-line *It was unfolding like a Greek tragedy*, *The Sydney Morning Herald*, 26 August 2012.

best advice he could to preserve it. Nothing was more important than the solution of the crisis and no posited principle or convention such as the doctrine of the separation of powers[8] could be allowed to stand in its way—*salus populi suprema lex*[9].

Sir John showed himself wiser than Sir Anthony when he rejected the latter's advice "that he should warn the prime minister that, if he did not agree to hold a general election, his commission would be terminated"; wiser, too, when he rejected his suggestion "that he should ask the prime minister to obtain the Law Officers' opinion on the Governor General's power to terminate the commission of the prime minister". No one could doubt the intellectual ability of Mr Whitlam, least of all Sir John. His very powers as Governor General would have been compromised had he made such a suggestion. Had not Mr Whitlam already canvassed the prospect? On 16th October 1975 before the state banquet in honour of the prime minister of Malaysia he had remarked jocularly to Sir John, "It could be a question of whether I get to the Queen first for your recall or you get in first with my dismissal".[10]

There can be little doubt Sir John relied on Mr Whitlam's chief shortcoming, an overweening sense of his own importance, as also perhaps on Mr Whitlam's perception that he had Sir John 'in his pocket'. Had he not already managed to compromise the Governor General over the clandestine meeting of the Executive Council held on Friday, 13th December 1974, in which the Minister for Minerals and Energy, Mr Rex Connor, was appointed agent of the Government to borrow for temporary purposes a sum not exceeding $4,000,000,000? That meeting was clearly illegal: neither Sir John nor Mr Frank Stewart, Vice President of the Council, had approved the calling or the holding of it.[11] Yet Mr Whitlam had managed to persuade Sir John that he should approve it after the event.

To offer Mr Whitlam an avenue of escape would be fatal: at the very least the Palace would be embroiled in an unseemly wrangle. Only a *fait accompli* would serve.

Former members of the Whitlam government, incapable of seeing the world other than through the rose-coloured glasses of *Labor Party* ideology, have lined up to condemn Sir Anthony's involvement. Thus Mr Ralph Willis, a former minister, "He deceived two *Labor* governments and hence is every bit as deserving as Kerr of the condemnation of history." Mr Kepler Enderby, Whitlam's Attorney General, "I am horrified that a High Court judge was interfering in political matters like this." And Mr Gareth Evans Attorney General in a later *Labor* government, "[I]n the history books his personal credit will, unhappily, emerge no less tarnished than that of Garfield Barwick and John Kerr himself."[12] Mr Paul Keating, a junior minister in the Whitlam Government, and himself later a Prime Minister, recalled a conversation

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[8] Ascribed to Montesquieu [1689-1755] who divided political power between *the executive, the legislative* and *the judicial*. The convention is assumed to be one of the cornerstones of government.

[9] Cicero, *De Legibus*, III, iii, viii

[10] Sir John Kerr, *Matters for Judgement*, Sydney 1978, p. 258

[11] Cf. *Matters for Judgement*, op. cit., pp. 223 et seq.

[12] *The Weekend Australian*, September 1-2, 2012, p. 5.

with Mr Whitlam after an Executive Council meeting on the Thursday prior to the dismissal. Mr Keating said: "He seems all right." Mr Whitlam replied: "He's entirely proper. He'll do the right thing."[13]

The 'right thing' for Mr Whitlam and Mr Keating was, of course, the right thing by the *Labor Party*, as the 'history' referred to by the various commentators is the *Labor Party* view of history.[14]

Regrettably, even relatively sober commentators now seem to think it appropriate to adopt the *Labor Party* view of the events, witness the editorial in *The Australian* of 28th August 2012 [Appendix A]. When the newspaper's editor penned this opinion piece he had in his hand a copy of a letter from the present writer forwarded by email the previous day [Appendix B]. That he chose not only to ignore but to suppress mention of the principle stated there may be seen in the emasculated, and misquoted, version of the letter published in the same edition [Appendix C].

The asserted dilemma of High Court justices advising a Governor General is nonsense. It never troubled Sir Owen Dixon, Sir Garfield's predecessor, one of the leading jurists of his time. Sir Owen, a classicist, understood the truth embodied in Cicero's aphorism. Whilst he was Chief Justice 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.[15] Early in 1956, at Sir Dallas Brooks' request, Sir Owen 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 occurring in that State.[16]

The assertion, moreover, that a judge consulted would be compromised is misguided and mischievous. First, it is almost impossible to imagine a setting in which the executive action of a Governor General could be challenged. Second, it reflects adversely on the integrity of a High Court judge whose oath would compel him to disqualify himself in the unlikely event of such a hearing.

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:

> "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'."

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[13] *The Weekend Australian*, September 1-2, 2012, p. 5.

[14] Like every other ideology the *Labor Party* has its own version of history. The reader can sample those of Hegel, Marx, and advocates of Feminism in any University library.

[15] Phillip Ayres, *Owen Dixon*, Melbourne, 2003, pp. 235 et seq.; 249 et seq.

[16] Phillip Ayres, *Owen Dixon*, op. cit., p. 255.

The Australian people must hope that should a similar crisis 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 over subordinate convention. They must hope, moreover, that party political ideology will not be permitted to obscure the issue.

Michael Baker
8th September 2012—*Birthday of the Blessed Virgin Mary*

Appendix A

Editorial in *The Australian* on 28th August 2012

THE GOVERNOR-GENERAL, THE JUDGE AND THE DISMISSAL

NO event in Australian politics has been more controversial, and for that matter more analysed, than the dismissal of the Whitlam government on Remembrance Day 1975. The pre-eminent historian of the dismissal, Paul Kelly, says it was the greatest crisis in Australian political history.

At the centre of this political drama was the strategic interplay of key protagonists, the clash of powerful egos and a battle for supremacy as political brinkmanship elevated the dispute to crisis point when the Senate refused to pass the government's supply bills. Since the 20th anniversary of the dismissal in 1995, when a raft of new information came to light in books and documentaries, the story had been largely understood and the history essentially settled. But the revelation that then High Court Justice Anthony Mason had extensively and secretly counseled governor-general John Kerr over several months, discussing the crisis and canvassing the legal options that the governor-general could exercise, is not only a discovery of historical importance, it also sets a dangerous precedent that could undermine our carefully balanced system of government enshrined in the doctrine of the separation of powers and the conventions and precedents that ensure a government draws its authority from the collective will of the Australian people.

The discovery of the extent of Sir Anthony's role, unearthed from Sir John's papers by Whitlam biographer Jenny Hocking, has now been confirmed by Sir Anthony. While Sir Anthony says he advised Sir John to warn Mr Whitlam he would terminate his commission and did not encourage dismissal, this does not excuse the extraordinary level of contact between the two without the knowledge of the prime minister. Sir Anthony may claim he was meeting Sir John only as "a close friend," but he was also a High Court judge, which displays a lack of judgment. The implications should not be underestimated. Sir John asked Mr Whitlam if he could consult the chief justice, Garfield Barwick, but Mr Whitlam declined this request.

While there may be a precedent for such consultation, it is imperative that governors-general follow the advice of the government. Mr Whitlam agreed to Sir John's request to discuss matters with opposition leader Malcolm Fraser, but not with High Court judges. (Mr Fraser, who it must be said cravenly drove this situation to crisis point with his tactics to block supply, must share criticism for his role in the crisis.)

Sir John should have followed Mr Whitlam's instruction and consulted only with the government's chief law officers - attorney-general Kep Enderby and solicitor-general Maurice Byers. Sir John consulted with Sir Garfield anyway, who provided advice supporting the dismissal. Even Sir Garfield was not aware of Sir Anthony's role. If the High Court was asked to adjudicate on the crisis, then Sir Anthony, Sir Garfield and Ninian Stephen - who Sir Garfield said he also consulted - may have been compromised.

This discovery of Sir Anthony's role could, in the future, undermine the clearly delineated roles of the different branches of government - executive, legislative and judicial - and the precedents and conventions between them.

Appendix B

The author's letter to the Letters Editor of *The Australian* conveyed by email on 27th August 2012

Sir,

The claims made by your journalist Troy Bramston about the involvement of judicial officers in the dismissal of the Whitlam government are without foundation. Here are the issues:

1. There was never, nor since the dismissal of the Lang government in New South Wales in the 1930s by Sir Phillip Game has there been, any doubt that a Governor has the reserve power of dismissing a government.
2. The Governor General was faced with a government whose systematic irresponsibility threatened the stability and safety of the Australian people.
3. He was bound to act.
4. He was bound to take the best advice he could get before doing so.
5. The best advice could not be obtained from law officers tarred with the same brush as the then government.
6. He took that advice and he acted.

It matters not in the least how the crisis had been precipitated. It was sufficient that there was a crisis. It matters not that the advisers to whom the Governor General turned had responsibilities as judicial officers. What Bramston and numerous other commentators do not understand is that there is a hierarchy among laws, the supreme law itself being unwritten, namely the law of charity expressed in the aphorism *salus populi suprema lex*.

The assertion that a majority of the Australian people disapproved of the actions of Sir John Kerr is baseless, demonstrated by their actions once they were accorded the opportunity of exercising their democratic rights.

Michael Baker

Appendix C

The above letter as published in *The Australian* on 28th August 2012

Sir,

Claims by Troy Bramston about the involvement of judges in the dismissal of the Whitlam government should be addressed ('Decades on, debate over the dismissal will not die", 27/8).

First, there has never been any doubt that a governor or governor-general has the reserve power to dismiss a government.

Governor-general John Kerr was faced with a Labor government whose irresponsibility threatened national stability. He was bound to act. He was bound to take the best advice he could get before doing so. The best advice could not be obtained from law officers tarred with the same brush as the government. Kerr took judicial advice and acted.

It matters not how the crisis had been precipitated. It matters not that the advisers to whom the governor-general turned had responsibilities as judicial officers.

The assertion that a majority of Australians disapproved of Kerr's actions is baseless.
