BOOK REVIEWS

Sir John Did His Duty by Sir Garfield Barwick (Serendip Publications, Wahroonga, 1983) pp.i-xi, 1-129. ISBN 0 949379 00 X.

A leading silk at the Melbourne Bar remarked to me some years ago that Barwick's judgments read like the arguments of a brilliant advocate. There can be no doubt that Barwick was a brilliant advocate nor could there be much doubt that he made free use of the dictaphone in the preparation of his judgments as a High Court Judge. Unless one was very familiar with the area of the law concerned, a first reading of one of his judgments is often so persuasive as to appear not to admit a contrary viewpoint.

I was reminded of the comment about the nature of Barwick's judgments when reading his book about the 1975 constitutional crisis. This book is indeed a polemic in little more than pamphlet form. It reads — like many of his judgments — as the argument of a brilliant advocate, setting out self-evident truths, any other view being simply untenable.

It is interesting to reflect upon the careers of Sir Garfield Barwick and Sir John Kerr. Barwick, up till 1972, had a firmly established reputation as a former leader of the Bar, the most brilliant advocate of his generation, a successful and imaginative politician, and a forceful and sometimes imaginative Chief Justice of the High Court. By the late 1970's he had become a figure of enormous division and his reputation as a Judge and a lawyer had become a matter of controversy as a result of his judgments delivered in the High Court in the mid 1970's and by his intervention in the constitutional crisis in 1975.

Sir John Kerr, similarly, had been an outstanding member of the Sydney Bar. Prior to his appointment as Governor-General, he had in a short time as Chief Justice of New South Wales created a favourable impression as a creative and imaginative Chief Justice prepared to examine new ideas. Within eighteen months of his appointment his actions had brought about a condition not inflicted on any other person holding public office in Australia — that of exile from his own country.

It is interesting to ponder whether the seeds in the fall from grace of both of these eminent lawyers were in fact constituted by the irresistible temptation to hold a brief, to argue as persuasively as they could a point of view and a desire to achieve a strategic position in the affairs of the country. Barwick had himself held high political office and no doubt had ambitions in greater or lesser measure to be Prime Minister. Most politicians, especially ministers, do. Kerr gave up the important and influential post of Chief Justice of New South Wales, a post he had held only a short time, in order to be Governor-General. These were not men to stand idly by when the chance of intervention in the affairs of the nation came by.

Whether or not these notions are fanciful it is certainly true to say that had each of these men behaved in a cooler, more impartial and less interventionist way on 11th November 1975 and the days preceding it, then the constitutional crisis brought about by the Senate's refusal to pass supply might have unfolded very differently. Kerr's reputation and Barwick's reputation may have been enhanced, Fraser may have been destroyed and Whitlam would not have been a martyr.

The argument put forward in this book is founded on two propositions:

(1) That a government does not need to have the concurrence of the Senate generally but it must have the concurrence of the Senate in the annual grant of supply.

(2) A Prime Minister who cannot secure supply is obliged to resign and if he does not the Governor-General is obliged to dismiss him.

In essence, Sir Garfield says that as soon as it became apparent to Sir John Kerr that the Prime Minister was unable to secure supply, (and he suggests this was on 9th November after he had received advice from the Leader of the Opposition to that effect), then Sir John was obliged to act before time ran out. Sir Garfield thinks that it would have been irresponsible for Sir John to have waited until supply ran out and that 'that form of brinkmanship could have no place in the nation's affairs'.

Sir Garfield devotes some time to justifying his own role in furnishing advice to the Governor-

General. He also defends the Governor-General against the charge of deceiving the Prime Minister as to his intentions by saying that it is his view that there was no duty or necessity for the Governor-General to advise the Prime Minister of what he was contemplating.

I do not in the course of this review propose to argue about the Senate's power to refuse supply or the Governor-General's power to dismiss a Prime Minister. It seems too late to argue that those powers don't exist nor can one any longer argue that there is a convention that they should not be used.

The essence of the affair that has always troubled me is the way in which the Governor-General failed to act on the advice of his Prime Minister, failed to display candour with his ministers, acted on the advice of the Leader of the Opposition and acted prematurely and pre-emptively against his government. It is these features of the affair which caused such deep revulsion in Australians to the point of driving the former Governor-General into exile.

There are many references in the book to the need to be 'objective' about the issues and the need to avoid what Sir Garfield calls 'the disturbing influence of partisanship'. Like most people who claim to be objective and free from the influence of partisanship, Sir Garfield is, if this book is any indication, highly partisan when it comes to the constitutional crisis of 1975. One doesn't decry that. It is almost inevitable. It is, however, somewhat irritating to have to bear repeated assertions of objectivity. The very title of the book is both partisan and dogmatic; we are given the truth of the matter, not a matter for judgment.

As with his black letter approach to the law, Sir Garfield doesn't trouble about half measures. Any attempt to govern without securing supply is not only unconstitutional and undemocratic but it is also a prescription for tyranny.[1] Not only was there no convention in Sir Garfield's view that the Senate should not use its power to reject supply, but in fact there could be no such convention because the legislative power of the Senate could not be foregone. This proposition seems to amount to an assertion that wherever a power exists there cannot be a convention against its use. A novel concept, but again, admirably argued.

But the brilliant advocate cannot stop there.He goes on to argue that indeed the power to reject supply should be positively exercised by the Senate if it is convinced that the electorate has lost confidence in the government and should be given the opportunity to express itself. He goes so far as to say that 'the electorate should not have to wait the effluxion of a Parliament's term to express its dissatisfaction with the executive government and its antipathy to those policies'[2].

The impatience with the duly elected majority of the House of Representatives is barely concealed. Any attempt by the Prime Minister to outlast the resolve of the Senate in deferring supply is an attempt to 'brow beat the Senate into submission' and this would be 'a violation of the Constitution'[3].

In February 1649 Milton wrote that while no Protestant state or kingdom had until that time openly put to death their king, it had been 'the glory of a Protestant king never to have deserved death'. This thought was written a fortnight after the execution of Charles I urging the justice of tyrannicide in arguing that it was indeed lawful to put a king to death. There is much about the quality of that argument that is reflected in Sir Garfield's tract. He argues that whilst the Senate's power had not been used before and whilst rejection of supply by the Senate may previously have been unthinkable, in 1975 its use was all so obvious. Indeed it would have been unreasonable to expect the Senate to have required the electorate to wait until the effluxion of the Parliament's term before it could express its dissatisfaction with the government.

One shouldn't complain, however, about the extremes to which Sir Garfield goes. These extremes are indeed the logical extensions of the only argument that can be put forward to justify Sir John Kerr's action. The robust approach avoids difficult issues such as the corrupted constitution of the Senate after two State governments had refused to replace Senate vacancies with members of the appropriate party; the fact that only some 40% of the annual expenditure was found in the appropriation Bills; the fact that the Treasurer had advised the Governor-General on 6th November that supply would last until 11th December; the fact that the Governor-General informed Senator McClelland that he did not think that

[1] Barwick G., *Sir John Did His Duty* (1983) 61.
[2] *Ibid.* 47.
[3] *Ibid.* 62.

his intervention would be required until the money had run out; the strong evidence that the Governor-General not only failed to tell his ministers what he was contemplating but also actively lulled them into a sense of false security and that he maintained in power a Prime Minister who had suffered a loss on the floor of the House of Representatives of a no confidence motion.

The precedent set by Sir John Kerr in refusing to act on the advice of his ministers and in acting instead on the advice of the Opposition is the truly corrosive feature of the 1975 crisis. It has never been satisfactorily explained why the Governor-General, counselled by the then Chief Justice, acted in dismissing the Prime Minister on 11th November instead of waiting until either supply had run out or was within a day or so of running out. It would be another month in fact before supply ran out. The strategy conceived by the Governor-General was one where he could dismiss the Prime Minister, commission the Leader of the Opposition as Prime Minister, and within a matter of hours obtain the passage of supply through the Senate and prorogue Parliament.

That was something that could have been done on 11th December as easily as 11th November and an election could have been held in late January or early February. Why this course was not open is not explained by Sir Garfield Barwick and has never been satisfactorily explained elsewhere, least of all by Sir John Kerr in his autobiography. In my view the reason why it was not pursued was because the Governor-General and the Chief Justice wanted to be seen to be acting decisively and pre-emptively themselves. Only these men could save the country from the follies of the elected politicians.

Barwick repeatedly argues that a Prime Minister 'unable to secure supply from Parliament' loses any claim to be able to govern the country. What Sir Garfield avoids, even if his formulation is correct, is what is meant by an inability to secure supply. It is apparent on the facts of the 1975 crisis that Sir Garfield's formulation certainly involves a failure to have a guarantee of supply in the future. The fact that Mr Whitlam at the time of his dismissal had a further month's supply is apparently not enough. In order to throw some doubt on the matter Sir Garfield says that there was 'no evidence before the Governor-General as to precisely when supply would run out'.

Yet we have the evidence of Mr Hayden that on 6th November 1975 he advised the Governor-General that supply would not run out till 11th December and that the Treasurer's advance would sustain the government's liability to fund the public service and defence forces' pay-rolls for a few weeks after that. Kerr, in his autobiography, accepts that supply would not run out before the end of November.

The 1975 crisis and its resolution by the Governor-General injected a permanent note of instability into the Australian Constitution. The events provide a clear precedent for capricious rejection of supply at any time when the incumbent government is likely to be defeated at an election brought about as a result of the resignation or dismissal of the government as a result of the rejection of supply. The irony is that had the Governor-General stayed his hand for even another week it is likely that the Senate would have caved in and supply been passed. In that event the office of Governor-General would have been untarnished and the precedent against use of the Senate powers to block supply would have been a strong one. Given the different electoral system for the Senate as distinct from the House of Representatives, it is highly likely that governments with a majority in the House of Representatives will not control the Senate from time to time. This is a feature of our Constitution and the only way to make such a system workable is to see that at least by convention the Senate does not have the power to bring an end to the Government in the Lower House. 1975 denied us the opportunity to confirm that convention although it had been resolved at Westminister in 1911.

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