Precedent in the Southern Hemisphere, by THE RT HON. SIR GARFIELD BARWICK, (Magnes Press, The Hebrew University, Jerusalem, distributed in the British Commonwealth by the Oxford University Press, 1970), pp. 1-45.

In the *University of Chicago Law Review,* Professor Kurland[1] commented on the increasing readiness of distinguished American Judges to discuss in the public forum important aspects of legal controversies. He cited Mr Justice Black who observed that '[i]n a country like ours, where the people have a voice in their government, public lectures about the Constitution and government can doubtless stimulate, and even help to clarify, discussion of vital constitutional issues that face our society'.[2]

The address (originally given by Sir Garfield Barwick in Jerusalem, now happily reprinted in a separate booklet) on the attitudes towards judicial precedent of appellate courts in Australia and New Zealand, is not primarily devoted to matters of the Constitution and government. However, its subject is directly relevant to lawyers. It is stimulating that the Chief Justice should have set forth his own explanation of the changed views of these courts—both to their own precedents, and to the decisions of the House of Lords and the English Court of Appeal. His Honour joins a select and eminent, though limited, group of Australian judges (including Sir Owen Dixon, Sir Isaac Isaacs, Sir Victor Windeyer and Sir Douglas Menzies) who have given, in lectures and writings, valuable insights into the basic principles the High Court applies to certain trends in curial thinking.

Because he was speaking to an audience unfamiliar with Australian legal history, Sir Garfield Barwick traced elaborately the course of decisions that culminated in such cases as *Skelton v. Collins,*[3] *Uren v. Fairfax,*[4] *M.L.C. v. Evatt,*[5] and that led to the acceptance of the general proposition by the Privy Council itself that uniformity is not an overriding necessity. The highest courts now all agree that sufficient *unity* can be preserved in the common law world by a common adherence to principles while allowing for diversity in application. 'Cohesion' and 'independence' do not necessarily conflict.

In the last decade the Australian courts have moved a long way towards 'self expression'. One naturally is now led to seek the criteria they may employ in future in exercising this freedom. The reasons for diversity given so far by the judges have been the obvious ones: where a previous court has manifestly erred, where social conditions are divergent, where there has been established a peculiarly Australian tradition (for example, 'unreasonableness' of subordinate legislation as not being a separate ground of invalidity) or where a matter arises involving interpretation of the Commonwealth Constitution. Yet other criteria may interfere: only recently (in the *Geelong Harbour Trust* case[6]) the High Court (by a majority) confirmed an early decision of its own, which it now disliked, rather than follow a later and very carefully considered opinion of the House of Lords—simply on the ground that the 'unsatisfactory' Australian decision was now settled law. Moreover, the decision of the Privy Council in the *Evatt* case, reversing the High Court's decision (on the pleadings) shows the inevitable differences as to the *applying* of principles laid down and accepted by all the judges in the High Court, the Privy Council and the House of Lords.[7] Of course, complications may arise if the Privy Council, on a particular matter on appeal, should happen to be constituted by the same persons who have already declared their own opinion in the House of Lords.

1 Kurland, 'Toward a Political Supreme Court' (1969) 3 *University of Chicago Law Review* 19.
2 Black, *A Constitutional Faith* (1968) xvi; cited in Kurland, *op. cit.* 36.
3 (1966) 115 C.L.R. 94.
4 (1966) 40 A.L.J.R. 124.
5 (1968) 42 A.L.J.R. 316.
6 *Geelong Harbour Trust Commissioners v. Gibbs, Bright and Co.* (1971) 45 A.L.J.R. 205.
7 *Hedley Byrne v. Heller* [1964] A.C. 465; *M.L.C. v. Evatt* (1968) 42 A.L.J.R. 316 (H.C.); *M.L.C. v. Evatt* [1971] 2 W.L.R. 23 (P.C.).

On these potential difficulties Sir Garfield is wisely not prophetic; he is content to tell his audience what happened and explain why it so happened. However, in the process, he makes many illuminating comments. For example, his reminder that '*stare decisis* is more properly addressed, as it seems to me, to a court which is technically free to depart from existing decisions'. He rightly stresses that it does not apply to a court which is somehow 'bound' by other courts—or by itself (p. 6). In a similar vein, his insistence that

> Australian courts must follow a decision of the High Court and do so even if a decision not definitive of the subject matter or reasoning of the Privy Council might appear inconsistent with that decision of the High Court. The question of consistency or inconsistency will not be one for the State Court. (p. 40)

(This will give more food for debate among jurists as to what exactly in a precedent *is* binding—the *decision* or the *reasoning*?) However, he does not indicate that dramatic reversals or innovations by the 'Barwick Court' (to copy an American abbreviation) will be any more likely than they were under the 'Dixon Court'. Admittedly it has already gone a step further on one aspect of damages for nervous shock (in *Mount Isa Mines v. Pusey*[8]) that the House of Lords has been prepared to go (though there were similar *dicta* in lower English courts); and one New South Wales judge has found sufficient support in the outlook of the High Court to radically modify accepted House of Lords rules on liability for animals wandering on the highway.[9] Nor is the effect of *Parker's* case[10] yet fully worked out. These, however, are relatively rare exceptions to the general agreement on legal principle.

Meanwhile, this Lionel Cohen Lecture will have lasting value, both as a thorough historical survey and as an indication that our judiciary will continue its course of self-expression—summed up in the Chief Justice's own words about the High Court:

> The Court's task therefore is to declare the common law in this respect for Australia. There are indicative decisions in the courts of England; these are to be regarded and respected. With the aid of these and of any decisions of courts of other countries which follow the common law and of its own understanding of the common law, its history and its development, the court's task is to express what is the law on this subject *as appropriate to current times in Australia.* (p. 11, italics mine.)

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The Sexual Dilemma: Abortion, Homosexuality, Prostitution and The Criminal Threshold, by PAUL WILSON, (University of Queensland Press, Australia, 1971), pp. i-viii, 1-172. Australian Price $1.95.

Paul Wilson's purpose in writing this book is admirable. He aligns himself with those who subscribe to 'the new sociology' and discards the traditionalist's pretence of ethical neutrality. He intends a 'critical examination of criminal laws dealing with deviant behaviour' (p. 11). Australian criminal legislation is a splendid target for such a critic. Unfortunately Mr Wilson is not sufficiently well-informed, or sufficiently critical, to make the most of his opportunities.

He examines three examples of the overreach of the criminal law: the prohibition of abortion; the laws relating to prostitution and the prohibition of homosexual congress between men. He argues that behaviour prohibited by these laws falls within the 'criminal threshold' and suggests liberalization of the law in all three areas.

8 (1971) 45 A.L.J.R. 88.
9 *Reyn v. Scott* (1968) 2 D.C.R. (N.S.W.) 13 *per* Cross D.C.J.
10 (1963) 111 C.L.R. 610, 632 *per* Dixon C.J.
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