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OWEN DIXON

By Philip Ayres
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Phillip Ayres' biography of Owen Dixon[1] is a welcome addition to the sparse collection of biographies of prominent Australian jurists. For this reason alone we should be thankful to Ayres. While this book is not in the class of, say, Robert Caro's life of President Johnson[2] either in length or depth of analysis, it is by any standard a fine piece of work.

Lawyers and non-lawyers alike should find this an entertaining and informative book. It is full of insights into the leading politicians, political events, lawyers and legal disputes associated with Dixon's working life from the early years of the twentieth century till the mid 1960s. Dixon was not only the leading barrister in Australia from the early 1920s, he was also a close friend of Robert Menzies, Australia's longest serving Prime Minister. Apart from being a member of the Australian High Court from 1929 until 1964 (and Chief Justice from 1952), Dixon was also Australia's representative in Washington between 1942 and 1944 as well as a United Nations mediator between India and Pakistan over the (still) disputed territory of Kashmir. Ayres has certainly filled a gap that needed filling and allows this and succeeding generations to appreciate the qualities and importance of a great Australian.

However, Ayres' book does raise some questions about Dixon the man and the jurist that could have been further explored. Chief Justice Spigelman, in a recent review of this book, notes Ayres' acknowledgment that Dixon's attitudes to race and class were not those acceptable to polite society today.[3] Given the importance accorded to the former in contemporary Australia, this issue was one that could have done with further investigation and analysis. Spigelman cites another aspect of Dixon's character that Ayres fails to illuminate. How could such a learned, inquisitive man get bored so easily in New York, when it was, to use Spigelman's

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1 Philip Ayres, *Owen Dixon* (2003).

2 Robert Caro, *The Years of Lyndon Johnson: vol 1, The Path to Power* (1982); *vol 2, Means of Ascent* (1990); *vol 3, Master of the Senate* (2002).

3 Chief Justice Spigelman, 'Australia's Greatest Jurist: Phillip Ayres' *Owen Dixon*' *Quadrant*, July/August 2003, 44, 45–6.

words, 'at that time the cultural capital of the world'? [4] Is Spigelman right in saying that Dixon's intellectual depth came at the expense of breadth of interest and experience?[5] One could go further and ask whether an immersion in the common law is antithetical to a broad intellectual development.[6] It is a pity that Ayres did not explore this aspect of Dixon's character in more depth.

Similar criticism could be made of Ayres' treatment of Dixon's personal life. Ayres provides a sound enough picture of Dixon's life but fails to explore his personal relationships in any detail. In particular I was left wondering about the nature of his relationship with his wife. We are told that he was a devoted and caring husband, but what could this mean in the context of a man who worked the hours the Dixon did and who devoted what free time he had to long walks with friends? My interest in this is not, I hope, prurient. I would like to know what costs, especially to family and friends, come with the public success and duties associated with a career like that of Dixon. It would have been nice to know if Dixon, at the end, thought that the price of his success in personal terms was worth it? Did his wife think so? Are there any lessons there for us today, both in crass human resources terms, and in more human ones? Does success come at too high a price and should we try to reassess what we expect of public figures? Was Dixon driven by ambition or duty? Why did he devote so much of his life to a task that he found unpleasant?[7]

How successful was Dixon in public life? In at least one area there is reason to doubt Ayres' treatment. In a lengthy chapter dealing with his time as, effectively, Australia's ambassador to the United States from 1942 to 1944, Ayres gives the impression that Dixon was a respected and influential representative in the United States. Respected he may have been but was he influential? Spigelman notes that Dixon's close relationships to men such as Dean Acheson, a future US Secretary of State, did not necessarily link him to the 'true focus of power in Washington' during the war.[8] David Day, in his exhaustive treatment of the political history of Australia in World War II is similarly sceptical, arguing that

> the appointment of Dixon had not given Australia a particularly forthright representative in the American capital, with the Anglophile Dixon having a

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4 Ibid 45.

5 Ibid.

6 See Patrick Atiyah, *Pragmatism and Theory in English Law* (1987); Meir Dan-Cohen, 'Listeners and Eavesdroppers: Substantive Legal Theory and its Audience' (1992) 63 *University of Colorado Law Review* 569; Richard Posner, 'Legal Scholarship Today' (1993) 45 *Stanford Law Review* 1647.

7 Justice Peter Young, 'Melbourne Gentleman of the 30s: Owen Dixon – Book Review' (2003) 77 ALJ 685, 685–6.

8 Spigelman, above n 3, 45.

> reserved and reflective nature that suited him as a High Court justice but hampered him as a diplomat in wartime Washington.[9]

But it is his work as a jurist that is Dixon's main claim to fame. How does Ayres' biography deal with this aspect of Dixon? In the main, quite well. If we remember that the book has been written primarily for a broad audience there can be little reason to complain about the depth or quality of the analysis. As Ayres makes clear, he has had the help of several distinguished lawyers in discussing Dixon's legal work. I would imagine that non-lawyers would not find this part of the book too heavy going. But there is one aspect of his treatment that raises questions about a contemporary issue in Australian law. Put simply, was Dixon a Dixonian strict legalist? Despite Ayres' belief that he was his biography raises doubts whether this was the case. This doubt arises for two reasons.

First, Dixon's links with politicians and his strong interest and involvement in political affairs raises in my mind, at least, questions about how these could be squared with the practice of strict legalism, as Dixon defined it in his extrajudicial writing. As noted above, Dixon was a longstanding friend of Robert Menzies and it is clear that throughout their careers both continued to discuss law and politics. Whilst Ayers does not make any specific claim that the two discussed any live cases while both were in public life, even a general discussion between a leading politician (and oftentimes Prime Minister) and a leading judge of the High Court must raise doubts about the disinterestedness of Dixon's judging. I do not claim that Dixon was not disinterested, merely that serious questions could be raised about his close connections to those in political power. But, Dixon's links to politics went beyond friendship. Dixon, especially before he became Chief Justice, was interested in and intimately involved in political affairs in a practical sense. He essentially invited himself into the administration of the war effort from the early days of the war and then served in perhaps the most sensitive diplomatic posting that Australia had in those perilous times. Again, one has to ask whether this close involvement in practical political affairs rests easily with the notion of strict legalism.[10] It might be that Dixon was able to compartmentalise his mind and keep his governmental activities distant from his legal reasoning during and after his war work but it is not unfair to suggest that this would be a difficult job.[11]

Second, Ayres' description of Dixon's attitude to precedent seems inconsistent with the strict legalism that Dixon advocated in his extrajudicial writing. According to Ayres, Dixon's attitude to precedent was that of a sceptic.

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9 David Day, *The Politics of War* (2003) 380. Footnote omitted.

10 See, for example, Frank Carrigan, 'A Blast from the Past: The Resurgence of Legal Formalism' (2003) 27 *Melbourne University Law Review* 163.

11 Dixon himself seems to have come to such a view by 1955. Ayres, above n 1, 250.

> If a case was right, it was right and its value depended on the calibre of the judge or judges who decided it and the quality of its reasoning. If it was wrong he tended to ignore it or avoid it by subtle means. He valued knowledge rather than precedent.[12]

In other words, Ayres reports that Dixon favoured the metaphor of the 'pure, clear stream' of authority.[13] This suggests an attitude to cases which emphasises the individual judgment of a judge (in this case Dixon) with far less importance given to the weight of tradition and authority. It is not clear, for example, whether the stream was broad with only the occasional diversion by a few, erring judges or whether it was narrow and to be discerned only by the few of greater learning and intelligence? Ayres' portrait of Dixon suggests the latter. It is difficult to see how such an attitude fits with the following description of judging in 'Concerning Judicial Method'.

> It is one thing for a court to seek to extend the application of accepted principles to new cases or to reason from the more fundamental of settled legal principles to new conclusions or to decide that a category is not closed against unforeseen instances which in reason might be subsumed thereunder. It is an entirely different thing for a judge, who is discontented with a result held to flow from a long accepted legal principle, deliberately to abandon the principle in the name of justice or of social necessity or of social convenience.[14]

Why would adherence to logic, for example, be any different to abandoning a principle in the name of justice, social necessity or of social convenience? Dixonian strict legalism would have, of course, accepted the necessity of correcting errors (or getting rid of unfortunate doctrines). But, it appears to me, Ayres' description of Dixon's attitude and method go far beyond this into the realm of individual judges picking and choosing amongst the cases, driven in this case by a self-imposed notion of logic and doctrinal purity. If anything, it is an attitude that is closer to civil law traditions than those of the common law. If, and it is a big if, Ayres is right, skeptics of strict legalism or of Dixon's adherence to it, will be entitled to ask whether Dixon was a strict legalist according to his own definition of the term.

The only way in which the matter can be settled was not open to Ayres. What we need is a sustained analysis of Dixon's judgments to see if, indeed, he practised what he preached. This would be a daunting task, given the number of judgments that he handed down during his 35 years on the High Court. Of course, this was not

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12 Ibid 232.

13 Ibid.

14 Sir Owen Dixon, 'Concerning Judicial Method' in Judge Woinarski (ed), *Jesting Pilate and Other Papers and Addresses* (1965), 152, 158.

open to Ayres because he was not equipped to do the task and a biography of Dixon was not the place to do it. But if we are to deal seriously with one of the most contentious constitutional issues facing us today, the existence or possibility of Dixonian strict legalism, someone will have take on this task. Until it is done much of the discussion surrounding this topic will be, essentially, speculation.[15]

[15] Leslie Zines' analysis of Dixon's treatment of federalism is primarily concerned with establishing an underlying theory to explain Dixon's judgments in this area rather than in examining whether Dixon followed his own notions of strict legalism. Leslie Zines, 'Sir Owen Dixon's Theory of Federalism' (1965) 1 *Federal Law Review* 221.