SIR OWEN DIXON AND THE CONSTITUTION

By COLIN HOWARD*

The magnitude of Sir Owen Dixon's contribution to and influence upon the interpretation of the Australian Constitution is not altogether easy to grasp nowadays because so much of it is taken for granted. He was on the High Court for such a long time, thirty-five years extending from 1929 to 1964, for twelve of which he was Chief Justice, that he came to have an intellectual dominance over the Court which towards the end of his career made him seem to be part of the fabric of federation itself. It became difficult to believe that there was not a section in the Constitution somewhere, most probably in Chapter III, which started 'Until Sir Owen Dixon otherwise provides . . .'.

His influence on the High Court in constitutional matters was surpassed only by his apparent command, at least since the end of the Second World War, of the Privy Council. No doubt this was an easier task because in the course of time the Privy Council established an unassailable reputation for ignorance of the Australian Constitution. Nevertheless the extent to which such a judgment as that of their Lordships in *Hughes and Vale Pty Ltd v. New South Wales (No. 1)*,[1] which finally overruled the *Transport* cases[2] of the 1930s on the application of section 92 to interstate road transport, was made up of quotations either directly from Dixon C.J. or from views identical with his own is both remarkable and probably unparalleled. One such quotation from Dixion C.J. himself extends from page 28 to page 31 of the report. It is immediately preceded by an even longer extract from a judgment of Fullagar J., between pages 23-8. Of all the other judges of the High Court, it is Fullagar J. who approached closest to Sir Owen Dixon in his manner of analysing a constitutional question, his style of reasoning and his substantive views.

It is easy to be sidetracked into fascination with the reasons why Dixon C.J. attained the dominating position which he did. Well-worn stories abound. Mostly they purport to illustrate an almost supernatural capacity for tricking anyone in any situation. They are undoubtedly apocryphal, pallid reflection of the difficulty of outmatching a superior intellect. His judgments in constitutional cases display two outstanding qualities: subtlety

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[1] (1954) 93 C.L.R. 1.

[2] Collected in Howard, *Australian Federal Constitutional Law* (2nd ed. 1972) 270, n. 48.

and logical strength. This is a formidable combination and no doubt accounts for the appearance of inevitability which his reasoning so often presented. But such matters as these have little relevance to an assessment of Dixon C.J.'s constitutional contribution. They go to means, not ends.

A marked feature of developments in constitutional interpretation in his time which are particularly associated with Dixon C.J. is their tendency to be of a fundamental character. Three come to mind at once: the theory that the High Court should be legalistic and not policy-oriented in its approach, the long process of refining the *Engineer's* case[3] which led to *Commonwealth v. Cigamatic Pty Ltd*,[4] and the *Boilermakers'* case.[5] The first of these was perhaps the most fundamental of all, for it dictated the court's overt attitude to constitutional questions of every kind.

The legalism theory, which tends to pervade High Court thought throughout its history but which was certainly powerfully reinforced by Sir Owen Dixon, received its most explicit statement in a much-quoted passage from his address on being sworn in as Chief Justice in 1952. He said:[6] 'close adherence to legal reasoning is the only way to maintain the confidence of all parties in Federal conflicts. It may be that the court is thought to be excessively legalistic. I should be sorry to think that it is anything else. There is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism.' In other words, that an essential of the judicial function is disinterestedness, that this is attainable only if what appears to laymen to be the substance of the matter is subordinate in the court's reasoning to the application of purely legal principles, and that such an approach is particularly desirable in the politically highly-charged atmosphere of federal conflicts.

In recent times one has only to recollect the political explosiveness of such cases as the *State Banking* case,[7] on Commonwealth control of State finances, the *Bank Nationalization* case,[8] on the power of a Commonwealth government to nationalize industry, the *Communist Party* case,[9] on freedom of speech, *Grannall v. Marrickville Margarine Pty Ltd*,[10] on power to restrict industrial production in favour of the dairy industry, and the

[3] *Amalgamated Society of Engineers v. Adelaide Steampship Co. Ltd* (1920) 28 C.L.R. 129.

[4] (1962) 108 C.L.R. 372. On this whole development see Howard, *op. cit.* pp. 64-132.

[5] *R. v. Kirby, ex parte Boilermakers' Society of Australia* (1956) 94 C.L.R. 254 (H.C.), *Attorney-General of Commonwealth v. R.* (1957) 95 C.L.R. 529 (P.C.). On this see Howard, *op. cit.* pp. 137, 144-54.

[6] (1952) 85 C.L.R. xiv.

[7] *Melbourne Corporation v. Commonwealth* (1947) 74 C.L.R. 31.

[8] *Bank of New South Wales v. Commonwealth* (1948) 76 C.L.R. 1 (H.C.), *Commonwealth v. Bank of New South Wales* (1949) 79 C.L.R. 497 (P.C.).

[9] *Australian Communist Party v. Commonwealth* (1951) 83 C.L.R. 1.

[10] (1955) 93 C.L.R. 55.

New South Wales Airlines cases,[11] on the respective powers of Commonwealth and State governments to promote the interests of their favoured nominees in intra-state aviation, in order to appreciate the force of this approach to constitutional litigation. These cases were chosen as examples because they all arose during Sir Owen Dixon's time on the High Court. Since then one can cite the *Payroll Tax* case,[12] on the power of the Commonwealth to tax the States, and *Strickland v. Rocla Concrete Pipes Ltd,*[13] on the scope of the power of the Commonwealth to legislate with respect to corporations, with implications for restrictive trade practices, price control and regulation of the stock exchanges. Well before Sir Owen's time one can recall the immunity of instrumentalities battles,[14] which aroused great passions.

The legalism theory has however considerable defects. The fact that little, if any, judicial attention is paid to them no doubt reflects the absence of an intellect of Sir Owen Dixon's calibre on the bench at the present day who happens to be of a different opinion. The fundamental criticism of the theory, and one which Dixon C.J. never gave us the benefit of his reactions to, is that it leads the High Court to decide issues of high moment to the community without, or with very little, consideration of the context: of factors which anyone but a lawyer convinced of the correctness of pure legalism would regard as relevant. Perhaps the most outstanding example in our whole constitutional history occurred in the *Bank Nationalization* case.[15]

The question whether the Commonwealth Parliament, in effect the government, could nationalize the banks, and therefore by implication any other occupation within the subjects of Commonwealth legislative power, is treated throughout the judgments in this case (at enormous length: in the High Court the judgments occupy 249 pages of the C.L.R. report, even though there was one joint judgment and one short one) as a matter of textual interpretation of the relevant sections of the Constitution and judicial glosses upon them. One might have thought that a relevant question was whether the desirability of nationalization as a measure of social or economic development was more apt for the judiciary or the elected representatives of the people. Since the answer to that question undoubtedly is that it is for the politicians and their electors to decide on the desirability of any proposed measure of social or economic change, it can be argued that the High Court should have asked itself whether the Constitution, in the absence of some such section as 'There shall never be nationalization',

[11] *Airlines of New South Wales Pty Ltd v. New South Wales* (1964) 113 C.L.R. 1; *Airlines of New South Wales Pty Ltd v. New South Wales (No. 2)* (1965) 113 C.L.R. 54.

[12] *Victoria v. Commonwealth* (1971) 45 A.L.J.R. 251.

[13] (1971) 45 A.L.J.R. 485.

[14] Howard, *op. cit.* pp. 47-63.

[15] *Supra* n. 7.

ought to be interpreted in any way which prevented them from doing so. An inquiry of this kind however is incompatible with strict legalism. The result is that in such a case the High Court decides an important governmental, social and economic issue without overt regard to the substance of what it is doing.

There is of course much more to be said on both sides of this question. For present purposes the point is that by his espousal, and formidable use, of the legalism principle Sir Owen Dixon had a profound impact on the life of the country of which most people are unaware. It is to be noted in passing that there is no greater weakness in the armoury of politics in this country than the apparent inability of politicians to understand the fundamental importance of the High Court in the scheme of things. This was not a mistake made in reverse by Dixon C.J. He understood well enough that the High Court outlasts all governments and parliaments and that everyone depends on the High Court to say what the Constitution means.

Apart from more fundamental matters, there are many specific sections of the Constitution which now bear Sir Owen Dixon's imprint. The best-known is section 92, the one section of the Constitution which almost everyone has heard of because it has become, under benign judicial encouragement, a virtual guarantee of free enterprise in many areas of the national life. This development,[16] it is no exaggeration to say, has been the single-handed invention of Dixon C.J.

Starting in the early thirties from a position in which he often found himself in solitary dissent, he evolved, persisted in and finally brought to general acceptance a theory of the interpretation of section 92 which has had great influence on the national life and has produced vested interests which have swayed governments. It has also played a significant part in the decline of the States. Another specific area in which Dixon C.J. left a great mark was the much-disputed, and financially and governmentally important one, of the definition of excise duty.[17] This he steadily broadened, to the incidental benefit of the Commonwealth and the distress of the States.

Inevitably one approaches the end of a brief comment on such a vast subject with a sense of having presented a hopelessly inadequate picture. So many things have not been mentioned. The more one looks into and contemplates Sir Owen Dixon's contribution, through his constitutional doctrines, to the life and development of this country, the more extensive and enduring it seems to be. I should like to end by recording two instances of his powerful sense of the independence and dignity of the High Court and of the importance of maintaining respect for these qualities by the assertion if necessary of the Court's authority.

[16] Howard, *op. cit.* pp. 263-86.

[17] Howard, *op. cit.* pp. 373-89.

In *Parker v. R.*[18] in 1963 Dixon C.J., in a passage with which the rest of the High Court associated itself, departed from the long-standing practice of following decisions of the House of Lords even if they were at variance with previous decisions of the High Court itself. At that date the High Court of Australia commanded a respect in other jurisdictions for its expositions of common law which exceeded that of any other superior court. This position of intellectual pre-eminence it owed in no small measure to the personal prestige of Sir Owen Dixon. It was perhaps inevitable in this situation that the question of the High Court's relationship with a House of Lords which could not match it should become critical. In *Parker v. R.*,[19] in the suitably serious context of a fundamental principle of the criminal law, the matter came to a head. The offending decision was *Director of Public Prosecutions v. Smith.*[20] Dixon C.J. refused to follow this case in the following passage, which I have always thought to be one of striking dignity, reflecting both pride in his own court and deep commitment to the maintenance of its high standards.[21]

> I think it forces a critical situation in our (Dominion) relation to the judicial authority as precedents of decisions in England. Hitherto I have thought that we ought to follow decisions of the House of Lords, at the expense of our opinions and cases decided here, but having carefully studied *Smith's Case* I think that we cannot adhere to that view or policy. There are propositions laid down in the judgment which I believe to be misconceived and wrong. They are fundamental and they are propositions which I could never bring myself to accept . . . I wish there to be no misunderstanding on the subject. I shall not depart from the law on the matter as we had long since laid it down in this Court and I think *Smith's Case* should not be used as authority in Australia at all.

Since 1963 there have been many other instances of departure from English precedent.

The other, even more striking, occasion under Sir Owen Dixon of the assertion of the High Court's independence and authority had occurred the year before, 1962, in *Tait v. R.*[22] Great excitement had been aroused in Melbourne by the unexpected determination of the State government to hang a convicted murderer when the general belief had been that the death penalty had fallen into disuse. All kinds of legal manoeuvres had been made in the Supreme Court of Victoria to delay or prevent the hanging. They had all failed and in the course of events the government had manifested a good deal of contempt for the judicial process. At the time when the matter came before the High Court, Tait was due to be executed the following morning. This arrangement ignored the established proprieties, whereby no execution date is set until the defendant has exhausted all his

[18] (1963) 111 C.L.R. 610.
[19] *Ibid.*
[20] [1961] A.C. 290.
[21] (1963) 111 C.L.R. 610, 632.
[22] (1962) 108 C.L.R. 620. For the frenetic background to this case see Howard, 'Time and the Judicial Process' (1963) 37 *Australian Law Journal* 39.

legal remedies, and wore the appearance of bringing pressure to bear on the Court by obliging it to reach its decision in a hurry on the basis of inadequately prepared arguments. The same procedure had succeeded before the Supreme Court of Victoria. It did not succeed before the High Court.

There was no waste of words. The Chief Justice simply said:[23] 'We are prepared to grant an adjournment of these applications without giving any consideration to or expressing any opinion as to the grounds upon which they are to be based, but entirely so that the authority of this Court may be maintained and we may have another opportunity of considering it.' An order was made accordingly that the execution be not carried out. The Victorian government obeyed it for the good reason that not to do so would as a matter of law have been murder.[24]

[23] (1962) 108 C.L.R. 620, 624.

[24] In the end Tait was not executed but imprisoned for life and the applications to the High Court withdrawn.