SIR OWEN DIXON: GIANT WHO ENRICHED THE LAW*

BY COLIN HOWARD**

The register of births for the district of Hawthorn in the Colony of Victoria for 1886 records that on 29 May of that year a certain Mr Edward Serpell made an entry to the effect that on 28 April there had been born to Joseph William Dixon and Edith Annie Dixon a son. The mother's maiden name was Owen and the father's profession barrister-at-law. It is unlikely to have been a coincidence that the boy was christened Owen and in due course became a barrister himself.

Long before the Right Honourable Sir Owen Dixon, O.M., G.C.M.G., resigned from the office of Chief Justice of the High Court of Australia on 13 April 1964, two weeks before his 78th birthday, he had become a byword throughout the English-speaking legal world for his deep understanding of the common law and his erudition on its content. The young Owen Dixon was called to the Bar in Melbourne on 1 March 1910, just 9 years and 2 months after the Commonwealth of Australia itself came into existence. He entered his chosen profession less than 7 years after the creation of the High Court of Australia, which he was later to dominate, and a mere 5 years after the publication of the first volume of the Commonwealth Law Reports, wherein is to be found the greater part of his life's work.

His is not only the longest but also the most enduring contribution to the development of legal principle made by any Australian judge. During his period as Chief Justice from 1952 to 1964 the High Court attained a level of intellectual prestige in the common law world unparalleled in its history before or since. Yet it was on the occasion of his appointment as Chief Justice that Dixon gave utterance to a point of view which, although it does much to explain his commitment to the ideal of judicial impartiality and the neutrality of the law in the settlement of disputes, has been criticized as failing to acknowledge realities.

Reflecting upon the High Court's role in deciding federal issues he observed that it might be thought that the court was excessively legalistic in its approach. He then continued: '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.'

This observation has often been criticized on the ground that strict and complete legalism is a myth, for it implies that every law ultimately has one

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meaning and one meaning alone and that with sufficient care and skill this meaning can be discovered, which is simply not the fact. It is said also that strict and complete legalism implies an indifference to the outcome of a case except in purely technical terms, and that this is to narrow the judicial function to less than its proper scope, which ought to be justice between the parties in a rather wider sense than a technical exercise.

Such objections are beside the point because they attack ideas which Dixon did not hold. He was as aware as anyone else that the judicial function is not confined to abstract debate about grammatical nuances. There are notable instances in his judgments of refusals to be bound by formal symmetry or nitpicker's logic if the tradition and spirit of the law said otherwise. It is moreover a commonplace, from which he did not dissent, that the exercise within reasonable limits of a discretion to do as the court sees best between the parties has been part of the judicial function for many centuries, indeed throughout the whole development of the common law system.

What he was getting at was not adherence to a desiccated technique detached from the facts of life but the profound social value of the judiciary maintaining complete impartiality between contending parties, above all in politically motivated litigation. He was concerned that the judicial function, especially in a federation, should be kept separate and apart from passing political passions and ephemeral social theories. In the Anglo-Australian common law tradition this view of the law is strongly held.

The practical difficulty with it is that its sensible application depends upon a level of ability which is not common. Dixon was one of its outstanding exponents. In lesser hands it tends to decline into a literal-minded technique which prefers to draw fine distinctions between shades of meaning rather than undertake the task of developing legal concepts of the intellectual strength and flexibility needed to preserve both order and justice in a world which changes with increasing speed every day.

In his retirement address Dixon remarked of his 35 year career of thinking about the law as a judge that he had reached no conclusion except that it was hard, unrewarding work. Nevertheless he never shirked it and as a nation we are the richer for his efforts.

Sir Owen Dixon died where he was born, in Hawthorn, on 7 July, 1972, at the age of 86.