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REVIEWS

John Eldridge and Timothy Pilkington (eds), **Sir Owen Dixon's Legacy**, Sydney: The Federation Press, 2019, 272 pp, hb $150 Aust

Sir Owen Dixon, **Jesting Pilate and Other Papers and Addresses**, 3/e edited by Susan Crennan and William Gummow, Sydney: The Federation Press, 2019, 336 pp, hb $120 Aust.

The last year witnessed renewed interest in Sir Owen Dixon, one of Australia's preeminent jurists, with the publication of an edited volume celebrating *Sir Owen Dixon's Legacy* and a new third edition of his own writings, *Jesting Pilate*. The year 2022 will mark the half century since Dixon's death in 1972. These two books provide timely encapsulations of his legacy for law students, scholars and practitioners in the common law world and wider political domain. Why does Dixon still matter? I would suggest it is because the apex courts of the common law world are under unprecedented political attack. In addition to the long-running situation of destabilisation in the USA, the Australian High Court and UK Supreme Court have recently faced high profile accusations of moving beyond their legal remit. The Brexit debate and mechanisms of departure have been the focus of criticism in the UK; in Australia, the High Court's decision on the citizenship status of indigenous Australians in *Love* v *Commonwealth of Australia; Thoms* v *Commonwealth of Australia* [2020] HCA 3 has been a catalyst. Politicians railed against the judgment and called for judges to be better 'vetted.'

For one hundred and twenty years the Australian High Court has been well-respected and largely free from political attack. A keystone of its durability is Dixon's contribution. Dixon sat on the Court in an earlier period of government over-reach. The then Labor government sought to nationalise the banks in 1948, and the conservative Liberal government sought to ban the Communist Party in 1951. The High Court rejected both incursions. The Constitution was less than fifty years old; Australia had no bill of rights. Yet the Court, under Dixon's intellectual leadership, was able authoritatively to define the limits of the law-making capacity of the Commonwealth, the rule of law, and the independence of the judiciary. It also established the separation of powers theory and practice within the Australian context. These were momentous achievements which have stood the test of time. Current political challenges suggest it is time to reinvigorate Dixon's approach. In 1951, the Commonwealth government did not publicly criticise the High Court after it rejected the attempt to ban the Communist Party. Instead, it sought a referendum to change the Constitution, and lost that public vote. Now, in the charged world of social media, public criticism of courts is being provoked and normalised. This presents superior courts with the challenge of re-articulating their legal decision-making philosophy for

the twenty-first century. One such model of judicial power and responsibility is encapsulated in Dixon's philosophy of 'strict and complete legalism', often counterposed to judicial creativity or activism. The two books under review offer further insights into the tensions between these rival approaches to constitutional judging.

Aptly, the third edition of *Jesting Pilate* is edited by two former justices of the High Court of Australia, Susan Crennan and William Gummow. It is divided into two parts, the first being an extended Introduction comprising six commissioned essays and short reflections addressing 'The Standing of Sir Owen Dixon', including some that illuminate the private person behind the judicial robes. S.E.K. Hulme QC shares the anecdote of Dixon often asking Counsel who appeared in his court: 'Who is the most important person present?' Of course, they answered that it was him. No, replied Dixon, it was the litigant who was going to lose. That party needed to leave the court knowing their case had been fairly heard. The second, more substantial part, styled 'The Dixon Papers', comprises thirty-one of Dixon's own speeches and essays.

Two new editorial chapters contribute heft to issues of legal and contemporary relevance. In his essay, William Gummow salutes the fact that, to this day, Dixon's judgments still routinely provide the starting point for the High Court's deliberations. Dixon's adherence to 'strict and complete legalism' (a phrase he is said to have regretted) establishes a benchmark for judicial method, emphasising an objective standard of fairness constraining personal or subjective considerations more readily characterised as judicial activism. Strict legalism underlines the imperative that all parties to litigation believe they have received a full and fair hearing. In the modern era of legal complexity and ever more burdensome statutory regulation, together with more trenchant political criticism, this philosophy and idealism retain their potency.

In her editorial chapter, Susan Crennan writes about *Australian Communist Party* v *Commonwealth* (1951) 83 CLR 1, in which Dixon J emphatically rejected over-reach by the Commonwealth government in seeking to ban the Communist Party as an organisation and political actor. As current Chief Justice Susan Kiefel notes in her Foreword to this edition, the case did 'much to allow Australian lawyers and judges to navigate a world without a Bill of Rights' and exemplifies Dixon's 'profound influence … on the jurisprudence of the High Court'. Not surprisingly, the same case features prominently in the new edited collection on *Sir Owen Dixon's Legacy*. In his chapter, Matthew Stubbs describes the Communist Party decision as 'the classic case protecting the rule of law in Australia.' (*Legacy*, 90) The case probed the limits of the Commonwealth's legislative power and whether it was constrained by the Constitution. It also called into question the independence of the High Court and its 'position as the ultimate arbiter of the constitutional limits on legislative power' (91). Stubbs argues that Dixon's 'achievements in what we would now call the Ch III jurisprudence remain seminal' (80). In this sense, Dixon was the architect of Australia's evolved separation of powers doctrine, which was inevitably going to be debated and developed within the first century of the Commonwealth, Constitution, and Court's existence. Central to Australia's democratic values, we are now increasingly cognizant of the extent to which

these structures are important bulwarks against government tendencies towards authoritarianism.

Sir Owen Dixon's Legacy, edited by legal scholars John Eldridge and Timothy Pilkington, focuses on the cases central to Dixon's reputation, methodology and impact. The book's thirteen chapters range over judicial method, public and private law issues, with particular attention, in Part Three, to discrete areas of private law, including property, defamation, tort, and contract. Once more on hand to provide a Foreword, Chief Justice Susan Kiefel observes that 'there were some areas of the law in which Dixon was less interested but in which he nevertheless made significant contributions'. The lucidity of the Dixonian judicial method is illustrated in two fascinating chapters vindicating this observation. Tanya Josev revisits *Parker* v *R* (1963) 111 CLR 610, which posed the question whether the Australian High Court was bound by or ought to follow the Privy Council's decision in *DPP* v *Smith* [1961] AC 290 relating to the scope of the defence of provocation in a murder case. Although criminal law was one of those areas outside Dixon's core common law interests, *Parker* marks the moment in time when his principles came into their sharpest focus. At the core of his judicial method were two symbiotic strands. First, was a belief in the 'time-honoured incremental change in developing the English common law' (*Legacy*, 38). Second was that Australian institutions could enjoy an 'interdependence' with British institutions. He was therefore greatly perturbed that the Privy Council was treating case law 'otherwise than as a stream of authority' (*Legacy*, 38). Dixon wrote a dissenting judgment of excoriating power maintaining that 'Smith's Case should not be used as authority in Australia at all' (*Legacy*, 126). It was the moment he insisted that Australian law must reflect Australian conditions. Dixon resigned as Chief Justice just 11 months after delivering his judgment in *Parker*. The case is widely regarded as a 'decisive landmark in the evolution of the High Court's independence in developing Australian law' (*Legacy*, 26) which was eventually confirmed under the Australia Act 1986 (Cth).

Dixon's judicial methodology of 'strict and complete legalism' might be contrasted with Justice Michael Kirby's account of *Judicial Activism* (Hamlyn Lectures, 2004) as an enduring tension in rival conceptions of constitutional judging. Dixon was animated by strict impartiality. Just as the Court blocked excessive legislative zeal of the conservative Liberal administration in 1951, the Labor Government's plan to nationalise the banks was scuppered in *Bank of NSW* v *Commonwealth* (1948) 76 CLR1. But there is room for a more modulated approach, as Radhika Chaudhri shows in her discussion of 'the feminist implications of strict and complete legalism'. Focusing on the High Court's decision in *Yerkey* v *Jones* (1939) 63 CLR 649, Chaudhri excavates the subtly in Dixon's method. Although, she concludes, strict legalism has not propelled 'the feminist objective of deconstructing harmful gender narratives' (181) across the board, there is 'no inherent incompatibility with the development of new law or the evolution of law' (179). A combination of elbowroom to develop, whilst at the same time maintaining impartiality, lies at the heart of the Dixonian method. The High Court's most progressive modern period followed from 1987 to 1995, under the stewardship of Chief Justice Anthony

Mason. It features the landmark decision in *Mabo* v *Queensland (No 2)* (1992) 175 CLR 1, as well as a series of cases developing implied constitutional rights. According to former Justice Gummow, Mason CJ once opined that Dixon's 'legal thinking was so sophisticated and profound it cannot accurately be described by any label' (*Jesting Pilate*, 50). The products of that thinking were, however, clear by the time of Dixon's retirement in 1964: the High Court of Australia was firmly established as an independent institution within the separation of powers doctrine, and as an apex court both independent of 'the mother country,' and highly regarded internationally.

Biographical details of Dixon's life and education presage his judicial approach. His habits of mind and critical capacities were honed through a liberal humanist education, equipping him with the tools for testing and consolidating the law's remit, not simply practicing law within narrow bounds. Read alongside Philip Ayres' biography (*Owen Dixon* (Carlton, Victoria: Melbourne University Press, 2003)), these two new books provide a trove of background context and character testimony. Dixon was born in 1886 when Melbourne was a horse-and-cart town in the middle of the Victorian gold rush; in that decade it became known as Marvelous Melbourne. He went on to study classics and law at Melbourne University where two teachers, Thomas Tucker, chair of classical philology, and Harrison Moore, chair of law, were major influences. As a legal scholar, Dixon provides inspiration to middling law students, having graduated with only a second class law degree (and third class honours in other subjects). His first love was classical literature. He was able to read texts in the original Greek and Latin, and his eclectic tastes included Trollope and Dickens. Dixon's classics teacher, Tucker, advised him that he would find law 'very medieval' (*Jesting Pilate*, 272). Dixon evidently enjoyed a rounded, humanist education placing law within its philosophical and historical contexts.

Dixon's professional career was in three parts, each of them underpinned by his broad intellectual horizons. He excelled at the Victorian Bar, where he revelled in the cut and thrust of advocacy, appearing many times before the High Court. The second and best known phase of his life and career was his tenure on the High Court, spanning nearly half his lifetime from the age of forty-three to retirement at seventy-eight. Dixon was appointed to the High Court in 1929 in the midst of the Great Depression. Several Chief Justices served short terms in quick succession. Then, in 1935, Sir John Latham was appointed Chief Justice and remained in post until Dixon succeeded him in 1952. The Court was riven by conflicting personalities and Dixon assumed the role of go-between. His style was subtle; his intellectual leadership ascendant. Dixon was still there in the evolving conflict of the Vietnam War in the early 1960s, and retired in 1964 as Chief Justice, having led the Court for 12 years. By the numbers alone, his tenure was monumental. In addition to some 1,700 substantive judgments (occupying seventy-one volumes of Commonwealth Law Reports), he was also involved in countless small claims (the High Court had original jurisdiction over claims exceeding just a few hundred pounds). For counsel appearing before Dixon in such cases, quips Hulme, it was 'like employing Bradman to oil a bat' (*Jesting Pilate*, 40). However, Dixon found the work as a justice of the Court wearisome and unrelenting. He compared it to pulling the mold-board on the plough,

turning 'up a long furrow of reserved judgments' (*Jesting Pilate*, 12). Despite the rigours of the work, Dixon led by deploying brevity, charm, and elucidation. His typical style was to listen without interrupting for ten minutes or so, and then come in with a penetrating summary. Was Counsel's point really such and such? Months of work were thereby reduced to a few points of principle.

The final, and perhaps most unusual, aspect of Dixon's career were the two breaks from judging attributable to momentous events of his epoch. During World War II he was appointed as the Australian Minister in Washington, serving there from May 1942 to November 1944. Some six years later the United Nations Security Council appointed him International Mediator in the dispute between India and Pakistan over Kashmir. Whilst he was admired by the parties for his impartiality, erudition and fairness, he was not able to solve what was to become an intractable political issue. In more recent times, such extra-judicial appointments would have come only at the end of a career on the bench, rather than in its midst.

Affirming courts' ability to make decisions free of political influence was an enduring hallmark of Sir Owen Dixon's legacy. In rekindling interest in the career of one of Australia's greatest jurists, these two books remind us of Dixon's skill in navigating the rule of law. As such, they are a valuable resource for judges, and for legal scholars. Dixon's methods have application across the common law world. The vitality of legal scholarship is enhanced by this kind of re-examination. Does Dixon's 'strict legalism' amount to 'a philosophy capable of providing real guidance to those charged with the responsibility of judicial power?'; or is it 'merely a fiction – an exercise in casuistry designed to conceal the role played by policy preferences in adjudication?' (*Legacy*, Introduction, 5–6). Dixon's work as a High Court justice, across nearly four decades, demonstrates that legalism can operate as a steadying influence in turbulent times.

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