Federalism and Sir Owen Dixon

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Sir Owen Dixon is noted for his advocacy of a pure legalism in interpreting the Australian Constitution, and any consideration of his attitude to federalism has to start with that fact. On taking the oath of office as Chief Justice of the High Court of Australia in 1952, he said that:

"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".[1]

Note that Dixon was a *legalist*, not a *literalist*, when it came to interpreting the Constitution. This was because he believed that the Common Law was the ultimate constitutional foundation, and that to the interpretation of the Constitution one properly applied the principles of the Common Law. It was Sir Isaac Isaacs who advocated literalism – finding the meaning of the Constitution purely in its *words* – but Dixon read the Constitution also through its federalist *implications.*

It is almost doctrine today that every judge is political in his judgments, however much a legalist he may believe himself to be. This concept of the political is as vague as the sociological or psychological connotations one chooses to give it. It is insisted upon at great length, but never really proved, in Brian Galligan's interesting book, *Politics of the High Court*.[2] The truth is that it would be hard to find a less politically influenced judge than Dixon, though politicisers like Galligan would call him "establishment", adding "QED". A classicist in spirit, a pessimist by inclination, sceptical, agnostic in religious matters, he had a profoundly logical mind, and his pronouncements on Australian federalism, to which he gave more serious thought than any of his contemporaries on the bench, are as disinterested as one could want.

It is probably true to say that Dixon did not believe federalism to be the ideal system. He once joked that in England they had the Constitution flexible and the judges rigid, in the United States they had the Constitution rigid and the judges flexible, and that in Australia we had the Constitution rigid and the judges rigid too. This suggests that he saw the British system as the best of the three, or at least better than the Australian system. However, he would have believed that if you *had* a federal system, then it should be made to work as it was meant to work.[3]

Dixon often spoke on federalism, in the United States and Canada as well as in Australia, exploring the connections between the American model and ours, measuring the influence of John Marshall and other American judges on constitutional interpretation in Australia.[4] In these speeches he traced the history of Australian federal-State relations in a very objective fashion.

What he objectively saw, of course, was a gradual expansion of the federal sphere and diminution in the power of the States. But he does not barrack for one side against the other, as his one-time pupil Sir Robert Menzies barracks for centralism in his 1967 University of Virginia lectures, collectively and triumphally titled *Central Power in the Australian Commonwealth: An Examination of the Growth of Commonwealth Power in the Australian Federation*—a collection dedicated to Dixon.[5] The *Engineers' Case* (1920), which threw

out the old doctrine of implied mutual immunities of Commonwealth and State instrumentalities, along with the previous understanding of the reserve powers of the States, was Menzies' first victory for centralism but not his last.[6] By contrast, Dixon did much to wind back *Engineers'* principles (particularly on implied immunity of instrumentalities), reading them down, as will be seen, in judgment after judgment through the 1930s, '40s and '50s, and taking the Court with him; not because he was a States'-righter, but because he was concerned to read the Constitution logically as a federalist document with necessary implications for the protection of the States against discriminatory federal legislation that threatened to infringe their powers.

There is no evidence that anyone viewed Dixon as a centralist during his thirty-five years on the High Court bench, from 1929 to 1964. The Court of the *Engineers' Case* soon changed complexion. Sir Isaac Isaacs, the arch centralist, left it within two years of Dixon's appointment. The other radical nationalist and centralist on the Court, Henry Bournes Higgins, had died in 1929. Sir Frank Gavan Duffy, who had dissented in *Engineers'*, was still there and would soon be elevated to Chief Justice. H V Evatt, appointed in 1930, was a noted States'-righter. The High Court by 1931 was a very different body from what it had been in 1920.

Because it was a federal body the Court was seen by many as *ipso facto* a threat to the States. In mid-1935 there was talk in Melbourne of Dixon being appointed Chief Justice of Victoria, but in September Eugene Gorman, a prominent Melbourne silk, told him that Victorian Premier Albert Dunstan's anti-federal bias was the reason for Dixon not in fact being offered the position.[7] This does not mean that Dunstan saw Dixon as a centralist—that Dixon was a federal judge at all would have been enough to put Dunstan off him. Dixon greatly admired NSW Chief Justice Sir Frederick Jordan, a States'-righter, though not his later stridency in that cause, which Dixon referred to as Jordan's "queer views about federalism"—queer because unbalanced.[8]

Dixon was Australian Minister to Washington from 1942 to 1944, during Roosevelt's third Presidency, and most (though not all) of his American contacts and friendships there were with Roosevelt Democrats, who were undoubtedly centralists. His best friend in Washington was Justice Felix Frankfurter, no States'-righter. Dixon could joke at the expense of American States'-righters. For example, there was the time he visited a court in California, probably in August, 1939. As he tells it:

"The Judge was hearing a suit of an ordinary character and a point was before him to which we are not accustomed. There was a requirement of notice before action. The notice had been given to the wrong authority. The Judge said that it was very hard to take such an objection, a very hard case indeed; he would not like to give effect to the objection that notice before action had been given to the wrong body. Counsel said, 'I have authority. There is a decision of the Supreme Court that you must', and he read the decision. The Judge said, 'What Supreme Court is that, is that Roosevelt's Supreme Court?'. 'No', said the Counsel, 'that is the Supreme Court of California'. 'Oh', said the Judge, 'then I will have to take notice of that' ".

But Dixon could also jest at the expense of the *Engineers' Case*. He detested the style of that judgment, which was written by Isaacs in his usual manner, full of superfluous rhetorical flourishes, and he despised much of its reasoning, including the way it minimised the influence of the American model on the Australian Constitution and trumpeted to the skies the British elements of unity of the Crown and responsible government. In Dixon's

paper on *Marshall and the Australian Constitution*, delivered at Harvard in 1955, he openly ridiculed, in typically dry wit, much of the logic of *Engineers'*, its irrelevancies, and its lack of appropriate sequencing:

"The reasons the Court gave combined many elements, not all of them satisfactory. But first and foremost it was insisted that you could find nothing compatible with State immunity in the principle which the High Court had adopted from *McCulloch v. Maryland* and formulated [in a previous judgment throwing out Tasmanian stamp duty on federal officers' salaries] . . . Then came passages in the judgment containing protests against resort to implications; against the desertion of the golden rules of construction enshrined in English law; and against an endeavour, as the judgment described it, to find one's way through the Australian Constitution by the borrowed light of the decisions and at times the *dicta* that American institutions and circumstances had drawn from the distinguished tribunals of the United States. We are next exhorted by the judges to bear in mind two cardinal features of our political system, namely the unity of the Crown and the principle of responsible government, and these are said radically to distinguish it from the American Constitution. And so of course they do; but in no relevant respect. For they do not touch the federal structure of the Constitution or its consequences. The warning against the use of light borrowed from the United States does not deter the judges giving it from resorting once more to Marshall as an authority for the interpretation upon which they rely in deciding that the States are subject to the federal legislative power concerning industrial disputes. . . ."

And so it goes on, with Dixonian irony, for another page.

As Sir Robert Garran pointed out in 1923: Dixon's reading down of *Engineers'* was examined 34 years ago by Leslie Zines in an article I will not attempt to replicate.[9] A survey of the pertinent sections of the relevant judgments will suffice. One does not want to overstate the degree of revisionism involved, and Dixon certainly did nothing towards reinstating the old doctrine of the reserve powers of the States. He took *Engineers'* to be a valid check not only to that doctrine, but to the excesses (as he saw them) of the "implied immunities" of Commonwealth and State instrumentalities, both doctrines enshrined in earlier judgments of the High Court, particularly in the *Railway Servants' Case* (1906).[10] Isaacs, in his *Engineers'* judgment, had heralded a new age of constitutional interpretation in which only the words of the Constitution itself, not their alleged implications, would be examined by the Court. Although the States received *Engineers'* as a revolutionary blow to their sovereign rights and powers, it was evident to some constitutional lawyers that one could not read a federal Constitution for long without considering its implications.

"No rule of construction can ignore the truth that what is necessarily implied is as much part of the Constitution as that which is expressed; the only question is, whether the implication is necessary".[11]

In late 1930, his second year on the Court, in *Australian Railways Union v. Victorian Railways Commissioners*, Dixon wrote that, as he read it, the central principle in *Engineers'* was that:

"…..unless, and save in so far as, the contrary appears from some other provision of the Constitution, or from the nature or the subject matter of the power or from the terms in which it is conferred, every grant of legislative power to the Commonwealth should be interpreted as authorizing the Parliament to make laws affecting the operations of the States and their agencies *if the State is not acting in the exercise of the Crown's prerogative and if the Parliament confines itself to laws which do not discriminate against the States or their*

agencies".[12]

He added that:

"During the argument of this case it appeared that the judgment of the majority of the Court in the *Engineers' Case* ought not to be understood as laying it down that over a State the power of the Parliament is as full and ample as over the subject and allows the same choice of remedies, measures and expedients to secure fulfilment of the legislative will".[13]

These exceptions and reservations which Dixon understood to be contained or inferred in the *Engineers'* decision were further elaborated by him in *West v. Commissioner of Taxation (NSW)* in 1937, and he boldly affirmed the validity of implications:

"Since the *Engineers' Case* a notion seems to have gained currency that in interpreting the Constitution no implications can be made. Such a method of construction would defeat the intention of any instrument, but of all instruments a written Constitution seems the last to which it could be applied. I do not think that the judgment of the majority of the court in the *Engineers' Case* meant to propound such a doctrine. It is inconsistent with many of the reasons afterwards advanced by Isaacs J. himself for his dissent in *Pirrie v. McFarlane*. Indeed, he there refers to 'the natural and fundamental principle that where by the one Constitution separate and exclusive governmental powers have been allotted to two distinct organisms, neither is intended, in the absence of distinct provision to the contrary, to destroy or weaken the *capacity* or *functions* expressly conferred on the other'. He adds: 'Such attempted destruction or weakening is prima facie outside the respective grants of power'. There is little justification for seeking to find in the *Engineers' Case* authority for more than was decided".[14]

Dixon then repeated the two reservations he had mentioned in the 1930 case: no Commonwealth legislation should affect "the exercise of a prerogative of the Crown in right of the States", and federal Parliament would not seem to be authorized "to enact legislation discriminating against the States or their agencies".[15]

Then, in *Essendon Corporation v. Criterion Theatres Ltd* (1947), in a judgment heavy with American citations, he added a third reservation: that the States could not tax the Commonwealth in respect of the exercise of its powers and functions.[16] But this immunity Dixon regarded as mutual, as we see in his judgment in the *State Banking Case* (1947), where we get his most extended consideration of the implications of federalism. Section 114 of the Constitution provides that a State:

"…..shall not, without the consent of the Parliament of the Commonwealth, raise or maintain any naval or military force, or impose any tax on property of any kind belonging to the Commonwealth, nor shall the Commonwealth impose any tax on property of any kind belonging to a State".

In the *Essendon Corporation Case*, as Zines points out, Dixon gives this clause its maximalist reading:

"It could be argued that as the Constitution makes express the immunity of property of a government from tax by another government no other tax immunity is contemplated by the Constitution: *expressio unius est exclusio alterius*. This approach was rejected by Dixon J. He maintained, in effect, that s.114 extended rather than narrowed the tax immunity that the Constitution would have otherwise granted. The 'implied' immunity is immunity from being taxed in respect of any function. The immunity granted by s.114 is based merely on ownership and does not depend on the nature or purpose of the use or on who is using it".[17]

At issue in the *State Banking Case* was the Commonwealth's attempt, by way of s.48 of the

Banking Act (1945), to prevent the State Governments and their agencies from using any but Government trading banks – in effect, the Commonwealth Bank. In his judgment rejecting the legislation as discriminatory against the States, Dixon takes the opportunity to set out clearly his own views on federalism. (I prefer not to call them a theory, though Zines does – Dixon was not really a theorist).

Dixon wrote that:

"The federal power of taxation will not support a law which places a special burden upon the States. They cannot be singled out and taxed as States in respect of some exercise of their functions . . . The objection to the use of federal power to single out the States and place upon them special burdens does not spring from the nature of taxation. . . . The federal system itself is the foundation of the restraint upon the use of the power to control the States. The same constitutional objection applies to other powers, if under them the States are made the objects of special burdens or disabilities. . . . The foundation of the Constitution is the conception of a central government and a number of State governments separately organized. The Constitution predicates their continued existence as independent entities. Among them it distributes powers of governing the country".

Dixon went on to point out that:

"The position of the federal government is necessarily stronger than that of the States. The Commonwealth is a government to which enumerated powers have been affirmatively granted. The grant carries all that is proper for its full effectuation".

And he stressed that:

"The considerations upon which the States' title to protection from Commonwealth control depends arise not from the character of the powers retained by the States [that is, the old reserve powers doctrine] but from their position as separate governments in the system exercising independent functions".

This, he made clear, was implicit in "the very frame of the Constitution".[18]

So the implications of a federal Constitution involve the "continued existence" of the States "as independent entities". The federalist system of government is guaranteed not by doctrines of reserve powers, but by "the very frame of the Constitution", that is, the federal nature of the compact. One may think this is stating the obvious, but Dixon was stating it during Chifley's period of government, and he was the only one clearly stating it when it needed to be said. By finding what he saw as significant exceptions to the overthrow of the implied immunities doctrine, he had in fact given that doctrine some new life, though he continued to refer to it as something that had been overturned *qua* doctrine.

Dixon of course gave full weight to s.109 – that, "When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid", though even that he saw as subject to the implications resting in the federal frame of the compact. The Commonwealth was clearly advantaged by a Constitution which gave it a range of express powers. Partly for this reason, and because he believed that the States had almost no legislative power over the Commonwealth, in the *Second Uniform Tax Case* (1957), and in *Commonwealth v. Cigamatic Pty Ltd* (1962), Dixon as Chief Justice, along with his Court, ruled that the Commonwealth had priority over States in respect to payment of debts in company bankrupcy proceedings[19] – something he had argued in dissent as early as 1947 in *Uther v. Federal Commissioner of Taxation*.[20]

In 1943 Dixon addressed the annual banquet of the Law Club at the University of Toronto

on "Aspects of Australian Federalism". In his conclusion he reiterated his point that "the story as I have narrated it shows a continual decline in the authority of the States and a growth in the predominance of the federal power", but he added that "like all developments it is irregular and its end is not yet. The only lessons to be gained from it perhaps are that all is flux and that you never can tell".[21] How true that is. Who could predict that in 1978, for instance, the Fraser Government under its New Federalism would endeavour to wind back the Commonwealth's powers in favour of the States, not only by transferring significant government programmes from the Commonwealth to the States, as they did, but by offering to return the income-taxing power – and that the States would decline the offer?[22] Fiscal power of a kind basic to sovereign existence – no longer wanted. The fear of freedom.

One can guess what Dixon would have thought of the recent tide of judicial activism. He would have despised it as an overt politicizing of the law. His own reading of federalist *implications* into the Constitution might seem, on a superficial view, to foreshadow the finding of other implications in the Constitution, including the "implied rights" established by the High Court in decisions of the early 1990s such as *Nationwide News Pty Ltd v. Wills* and *Australian Capital Television Pty Ltd v. Commonwealth*,[23] both to do with implied freedom of communication. It is highly unlikely, though, that Dixon would have agreed with the judgments in those cases. The Constitution is manifestly federalist, and thus full of federalist implications; it is not manifestly full of implied rights.

Dixon was deeply sceptical; perhaps even, secretly, of his own stated view that if one applied a pure legalism to the Constitution and its federal implications one could always come up with the "correct" reading, even of s.92 – where, incidentally, he gave the words "absolutely free" in regard to trade, commerce and intercourse between the States their maximalist reading, applying them as he did to affirming the *individual's* right to trade across borders unrestricted by government regulation, limiting the powers of both Commonwealth *and* State governments in this important area.

His general scepticism was so great that in 1937, in an address to the University of Melbourne's Law Students' Society, he even doubted the most fundamental of legal assumptions, that of causation. He was depressed with his work on the High Court at the time, strongly advising others against becoming a judge. In this most interesting speech he made passing glosses on Descartes and Malebranche (referring to Descartes' "distinction of mind from body"), Leibnitz, Hume (referring to Hume's "radical scepticism, discontinuity"), Kant, Mill (citing the view of "phenomena as causes, volition merely an antecedent"), F. H. Bradley (mentioning Bradley's notion that "Separate 'causes' may have sufficient 'truth' to be practically reliable, but cause and effect are irrational appearance, not reality"), and Quantum Theory. Lawyers, Dixon told his impressionable young audience, are sublimely ignorant of the epistemological abysses they skirt. Each and every kind of causation – and he listed "Immediate", "Direct", "Proximate" – "all are illusionary in point of logic", he insisted, calling them " 'broken links', or worse".[24]

Dixon would not allow the Law Students' Society to publish the address, perhaps because he thought it might seem controversial coming from a High Court judge. But the Dixon who could write like that on the subject of causation may also have been somewhat sceptical of his own view that a pure legalism would always and necessarily guide you to the right judgment on constitutional matters. He sympathised with Pontius Pilate, Prefect of Judaea, who asked the most philosophical of questions, "What *is* truth?". Dixon ended one of his speeches by reference to that question.[25] It is true, as Francis Bacon says, that Pilate "would

not stay for an answer", but Dixon CJ would not have presumed to offer him one.

Dixon knew, however, that in interpreting the Australian Constitution, legalism was a lot safer than its alternatives, and we can see that today as we survey some of the results of recent constitutional interpretation in this country. In that context, the recent cross-vesting decision might be welcomed as a shift back towards the Dixonian position.

Endnotes:

1. Sir Owen Dixon, *Address upon taking the oath of office in Sydney as Chief Justice of the High Court of Australia on 21st April, 1952*, in *Jesting Pilate and Other Papers and Addresses*, ed. Woinarski J, Melbourne (1965), p.247.
2. Brian Galligan, *Politics of the High Court: A Study of the Judicial Branch of Government in Australia*, Brisbane (1987).
3. I am grateful to Sir John Young, a former Associate of Sir Owen Dixon's, for the point about Dixon's probable preference for a non-federal constitutional model, and for his careful reading of this paper.
4. See, *inter alia*, *The Law and the Constitution* (1935), *Two Constitutions Compared* (1942), *Aspects of Australian Federalism* (1943), and *Marshall and the Australian Constitution* (1955), in *Jesting Pilate, op.cit.*, pp.38, 100, 113 and 166.
5. Sir Robert Menzies, *Central Power in the Australian Commonwealth: An Examination of the Growth of Commonwealth Power in the Australian Federation*, London (1967).
6. *Amalgamated Society of Engineers v. Adelaide Steamship Co Ltd* (1920) 28 CLR 129.
7. Dixon, Diary, Friday, 20 September, 1935.
8. Dixon, speech on retirement from the High Court, 13 April, 1964. Typescript copy, p. 7.
9. Leslie Zines, *Sir Owen Dixon's Theory of Federalism* (1965), *Federal Law Review* 220.
10. *Federated Amalgamated Government Railway & Tramway Service Association v. NSW Railway Traffic Employees' Association* (1906) 4 CLR 488.
11. Sir Robert Garran, address delivered at the University of London (1924), 40 *Law Quarterly Review*, 202 at 216.
12. *Australian Railways Union v. Victorian Railways Commissioners* (1930) 44 CLR 319 at 390. Italics added.
13. *Ibid.*, at 391.
14. *West v. Commissioner of Taxation (NSW)* (1936–1937) 56 CLR 657 at 681–682.
15. *Ibid.*, at 682.
16. *Essendon Corporation v. Criterion Theatres Ltd* (1947) 74 CLR 1 at 22.
17. Zines, *op.cit.*, p.227.
18. *Melbourne Corporation v. the Commonwealth* (1947) 74 CLR 31 at 81–83.
19. *Second Uniform Tax Case* (1957) 99 CLR 575 at 611–612; *Commonwealth of Australia v. Cigamatic Pty Ltd* (1962) 108 CLR 372 at 376–379.
20. *Uther v. Federal Commissioner of Taxation* (1947) 74 CLR 509.
21. Dixon, *Aspects of Australian Federalism*, delivered 18 March, 1943, in *Jesting Pilate, op.cit.*, p.122.
22. *Income Tax (Arrangements with the States) Act 1978.*
23. *Nationwide News Pty Ltd v. Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v. Commonwealth* (1992) 177 CLR 106.
24. Dixon, *Causation and the Law*, address to the Law Students' Society of the University

of Melbourne, 22 March, 1937. It survives only in the form of Dixon's manuscript notes, and a précis written by a student member of the audience, John Kinnear. My quotations are an amalgam of the manuscript notes and the précis notes, which Dixon solicited from Kinnear.

25. *Jesting Pilate*, George Aldington Syme Oration to the Royal Australasian College of Surgeons, 20 August, 1957, printed in *Jesting Pilate, op.cit.*, p.10.