SIR OWEN DIXON AND JUDICIAL METHOD

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[Sir Owen Dixon's loyalty to the reputation, integrity and future development of the law in Australia can be seen through the judicial methods to which he adhered. Dedicated to the concept of 'strict and complete legalism', he strove to balance strict logic, legal scholarship and technique, and objectivity with practicality as required. Aware of the need to maintain public confidence through consistency, but to keep the law responsive and developing, he firmly followed the principle of stare decisis, often at the expense of his own beliefs, but acceded to departure from it when so required for the proper development of legal principle. The authors conclude by noting the decline of such adherence to legalism, the factors contributing to this, and Sir Owen's own predictions on the subject.]

> *The state in commissioning its judges has commanded them to judge, but neither in constitution nor in statute has it formulated a code to define the manner of their judging.*
>
> — *Benjamin N. Cardozo*[1]

This quotation from Cardozo is a useful starting point from which to examine the 'manner of judging' employed by Sir Owen Dixon. It is useful because it serves as a contrast to the approach adopted by Dixon, which drew at every level from the rich resources of the common law in order to provide the judicial method which is exemplified in his judgments. These resources are not available, at all events in the same way, to the American judge, who must rest his authority, not upon an anterior common law, but upon the law of the relevant State which proceeds from its organs of government: statute law from the legislature, unwritten law from the judiciary.[2] Thus it was that Holmes J. said: 'In my opinion the authority and the only authority is the State, and if that be so, the voice adopted by the State should utter the last word.'[3]

From beginning to end, Dixon employed the common law method with rare skill and with an unwavering faith in the capacity of its reasoning processes to reach, not only the just, but also the correct solution to legal problems. His work was predominantly that of an appellate court judge, concerned to discern basic principle and to elaborate it in the decision of particular cases, but the emphasis which he placed upon reason rather than reaction has a

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[1] Cardozo, B.N., *The Paradoxes of Legal Science* (1927) 17-18.
[2] Dixon, O., *Jesting Pilate* (1965) 205.
[3] *Black and White Taxicab and Transfer Co. v. Brown and Yellow Taxicab and Transfer Co.* (1927) 276 U.S. 518, 535; 72 L.Ed. 681, 688.

general application in the exercise of all judicial functions. In common with most judges, Sir Owen Dixon wrote little about the actual task of judging, which he described as hard and unrewarding.[4] For all that, what he has written upon the judicial method is sufficient to indicate the purpose which lay behind his labours and to explain the philosophy which guided him in the judgments that he wrote, first as a puisne judge, and then as Chief Justice, of the High Court of Australia.

The technique which Dixon applied began with the commencement of argument. He was concerned that counsel presenting oral argument to the Court should be heard in full and that the Bench should not unfairly disrupt the submissions. This belief sprung from Dixon's disillusioning, first-hand experiences and observations of the High Court in his early years. He adverted to this when he became Chief Justice:

> I felt that the process by which arguments were torn to shreds before they were fully admitted to the mind led to a lack of coherence in the presentation of a case and to a failure of the Bench to understand the complete and full cases of the parties, and I therefore resolved, so far as I was able to restrain my impetuosity, that I should not follow that method and I should dissuade others from it.[5]

Sir Owen Dixon was clearly aware of the dual functions of the High Court. 'He saw more clearly than most that though litigation must produce its practical results from the points of the litigant . . . the court (also) had a profound duty to the jurisprudence of the country, to its legal scholarship; and that it should make its contribution in both fields.'[6] Dixon's judgments were an honest reflection of such an approach and he himself would be unlikely to complain if they were in part seen as sacrificing ease of comprehension for intellectual and legal correctness. He undoubtedly considered that an intellectual approach to the law was essential in the composition of a judgment and he was in favour of reserving judgments for that reason, despite the increased workload which it created.[7]

But the most significant aspect of Dixon's judicial method was his firm, although realistic, adherence to the principles of what he called 'strict and complete legalism'. In legal technique, this was Dixon's great and lasting contribution, although his mastery of the processes was such that one wonders whether others might find it possible to reach the same high standard, particularly in more pragmatic and iconoclastic times. Sir Owen Dixon was convinced that there was 'no other safe guide to judicial decisions in great conflicts than a strict and complete legalism'.[8] In explaining what he meant by legalism, Dixon invoked the words of Maitland in the introduction to the first volume of the Selden Society's Year Book Series. Maitland found in certain qualities of the common law its capacity to resist in the sixteenth

[4] Dixon C.J., upon retiring from the Bench: (1964) 110 C.L.R. v, x.
[5] Dixon C.J., upon becoming Chief Justice: (1952) 85 C.L.R. xi, xiv-xv.
[6] Menzies, *The Measure of the Years* (1970) 241-242 (Insert added).
[7] Dixon, *op. cit.* 253-254.
[8] Dixon C.J. (1952) 85 C.L.R. xi, xiv.

century a reception of the civil law in England. He said it was 'not vulgar common sense and the reflection of the layman's unanalysed instincts; rather . . . strict logic and high technique, rooted in the Inns of Court, rooted in the Year Books, rooted in the centuries'.[9] It is legalism in this sense of strict logic and high technique which permeates Dixon's judgments. It was in legalism that he sought and found the objectivity without which any exposition of the law is devoid of intellectual satisfaction. Yet for all that, he recognized (at least privately) that occasionally purity must give way to practicality when intrinsic considerations require it.[10]

Legalism, in the sense in which Dixon used the term, was the product of centuries. Notwithstanding its long history, it was an approach which was capable of adaptation to the changing needs of a developing society. It was, Dixon conceded, in our times not a 'just use of the epithet' to describe the judicial method as high technique and he recognized that nowadays logic is not pursued so very strictly.[11] In describing the course pursued by the courts, Dixon adopted[12] the following statement of the 'great James Parke' in *Mirehouse v. Rennell*:[13]

> Our common law system consists in the applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents; and for the sake of attaining uniformity, consistency, and certainty, we must apply those rules, where they are not plainly unreasonable and inconvenient, to all cases which arise; and we are not at liberty to reject them, and to abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as ourselves could have devised.[14]

It is important in understanding the store which Dixon set by the application of the common law judicial method, to recognize that the interpretation of the Constitution demanded, to his mind, the conversion of political questions into legal questions. He rejected any suggestion that political considerations should prevail. 'It is not' he said 'a question whether the considerations are political, for nearly every consideration arising from the Constitution can be so described, but whether they are compelling'.[15] To Dixon it was of particular importance that the technique of the common law should be applied to the construction of what he described more than once as a 'rigid' Constitution, in order to maintain public confidence in the Court's judgments in areas of political conflict.[16]

Obviously, one of the chief attractions of the common law method was its capacity to create and maintain a measure of certainty in the law. This was to Dixon a clear priority in any legal system concerned to avoid the

[9] Dixon, *op. cit.* 153, quoting Selden Society Year Book Series, vol. I, xviii.
[10] Latham Papers NL, Dixon to Latham, 1 June 1937, ref. MS 1009/62/123; Extracted in Bennett, J.M., *Keystone of the Federal Arch* (1980) 67.
[11] Dixon, *op. cit.* 158.
[12] *Ibid.* 159.
[13] (1833) I Cl. & F. 527; 6 E.R. 1015.
[14] (1833) I Cl. & F. 527, 546; 6 E.R. 1015, 1023.
[15] *Melbourne Corporation v. The Commonwealth* (1947) 74 C.L.R. 31, 82.
[16] Dixon C.J. (1952) 85 C.L.R. xi, xiii-xiv.

accusation, once levelled by Bentham, of dispensing 'dog law'. But, as has always been recognized, the maintenance of certainty carries with it the risk that the law will become rigid and unresponsive to a changing society. Dixon did not, however, think that the common law method carried with it any high degree of risk of that kind. In the paper *'Concerning Judicial Method'*, which he delivered at Yale University in 1955,[17] he argued that the greatest period of development of English law was in the nineteenth century, a period which was at the same time one which employed a strict, legalistic approach. Dixon expressed the view that in this period principles 'were not only used, they were developed. There was a steady, if intuitive, attempt to develop the law as a science. But this was done not by an abandonment of the high technique and strict logic of the common law. It was done by an apt and felicitous use of that very technique and, under the name of reasoning, of that strict logic which it seems fashionable now to expel from the system'.[18] Whilst he conceded that it was 'no doubt unsafe to generalize about judicial process',[19] Sir Owen remained faithfully committed to the principle that in general judges should proceed upon the basis that they inherit and develop the corpus juris, but do not make it afresh.[20] For if 'the conscious judicial innovator is bound under the doctrine of precedents by no authority except the error he committed yesterday'[21] the accusations of dog law are apt to be close at hand.

It was not, however, theory alone which supported Dixon's approach. His commitment to legalism lay also in the firm, practically useful and certain basis which it gave for the performance of judicial functions.[22] Dixon was, after all, pre-eminently a working judge and it would have been evident to him, as it has been to other judges,[23] that given 'elementary powers of reasoning it is much easier to apply fixed principles to the decision of a dispute than to devise an ideal solution for each individual case'.[24]

It is necessary to refer to one additional attraction which Sir Owen Dixon found in the common law method, notwithstanding that it has disappeared, or at least bears a different aspect, today. One of the reasons he preferred that method of deciding cases was that it assisted in the preservation of the strength and consistency of the common law throughout the British Commonwealth. He mentioned this in *'Concerning Judicial Method'*,[25] but had expounded it previously in *Wright v. Wright*[26] where he said:

[17] Dixon, *op. cit.* 152.
[18] *Ibid.* 157.
[19] *Ibid.*
[20] *Ibid.* 155, 158-159.
[21] *Ibid.* 159.
[22] *Ibid.* 165.
[23] See Cardozo, B.N., *The Nature of the Judicial Process* (1921) 149; Bray, J.J., 'Law, Logic and Learning' (1979) 3 *University of New South Wales Law Journal* 205, 211.
[24] Bray, *op. cit.* 211.
[25] Dixon, *op. cit.* 152.
[26] (1948) 77 C.L.R. 191.

> I have in the past regarded it as better that this Court should conform to English decisions which we think have settled the general law in that jurisdiction than that we should be insistent on adhering to reasoning which we believe to be right but which will create diversity in the development of legal principle. Diversity in the development of the common law (using that expression not in the historical but in the very widest sense) seems to me to be an evil. Its avoidance is more desirable than a preservation here of what we regard as sounder principle.[27]

When that statement was made, in 1948, it was based upon more than sentiment. However, it expressed a view which even Dixon eventually found impossible to maintain. On 23 May 1963, eleven months before Dixon retired from the Bench, the decision in *Parker v. The Queen*[28] was handed down. With the concurrence of all the other members of the Court, and presumably with some regret, Dixon C.J. said:

> Hitherto I have thought that we ought to follow decisions of the House of Lords, at the expense of our own opinions and cases decided here, but having carefully studied *Smith's Case* [1961] A.C. 290 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.[29]

Notwithstanding the weakening of this reason for Dixon's adherence to strict legalism, in a looser way there remained the objective of the consistent development, where possible, of the common law throughout the common law world. This could never be a compelling consideration, nor was it needed by way of jurisdiction, but it remained a consideration nevertheless. And Dixon had, after all, always maintained that legalism, whilst fundamental, could never be absolute in its practical application. He was realistic and recognized that practicality sometimes required compromise; on occasions strict logic and high technique would not always produce the necessary result, particularly if regard was to be had to another principle which he held to be fundamental, that of stare decisis.

Moreover, there was always the tension between certainty and development of the law. This was something which Cardozo in 1928 described in the following way:

> The law has its formulas, and its methods of judging, appropriate to conservation, and its methods and formulas appropriate to change. If we figure stability and progress as opposite poles, then at one pole we have the maxim of *stare decisis* and the method of decision by the tool of a deductive logic; at the other we have the method which subordinates origins to ends.[30]

For judges, conservation and change are both important goals in the process of judging and it was Cardozo's belief[31] that a wise philosophy was to employ aspects of each extreme in the judicial method. However, in the end it must be a matter of emphasis and there is no doubt that Dixon found his surest guide in the 'method of decision by the tool of a deductive logic'.[32] Nevertheless

[27] *Ibid.* 210.
[28] (1963) 111 C.L.R. 610.
[29] *Ibid.* 632.
[30] Cardozo, B.N., *The Paradoxes of Legal Science* (1927) 8.
[31] *Ibid.*
[32] *Ibid.*

it was his belief that the necessary development of the law could be well accommodated within a strict legalism.[33] Of course, at the heart of that lay the principle of stare decisis and it was in his adherence to this principle that Sir Owen's belief in, and use of, the technique of the common law is most clearly seen.

Probably the clearest and best known example of Dixon's adherence to stare decisis is to be seen in the transport cases decided under s.92 of the Constitution. These cases covered a period of some twenty years and arose out of actions brought by interstate road hauliers challenging the validity of a variety of State Acts directed at the transport industry. The common ground for the challenges was that each of the statutes placed an unjustifiable burden upon interstate trade, commerce or intercourse in contravention of s.92. In the first four of these cases,[34] the High Court upheld as valid all of the State Acts although Dixon J. (and Starke J. in the latter three) dissented for reasons which amounted to a fundamental difference upon the interpretation of s.92. Another transport case[35] came before the Court in 1935 upon facts which were virtually indentical with those of three of the earlier cases.[36] Once again, the High Court upheld the validity of the State Act and on this occasion Dixon J. did not dissent.[37] He said that although he had dissented in those three earlier cases he would not do so here because the facts were entirely covered by precedent. Thus it was that Dixon J. agreed in the decision of the majority entirely upon the basis of stare decisis.

The next significant development in the transport cases occurred in 1950 when the High Court gave its decision in *McCarter v. Brodie*.[38] Once again, by a majority,[39] the Court upheld State Acts which placed a burden, in the form of a licence requirement and licence fees, upon interstate road hauliers. Dixon J. felt able to dissent in this case because in his view the reasoning upon which the earlier transport cases had been decided had largely been destroyed by the Privy Council's decision in the *Banking Case*.[40] For this reason, Dixon J. did not consider himself bound to follow the earlier decisions. Three years later another challenge to the validity of practically identical State legislation requiring transport licences was again before the High Court in the case of *Hughes and Vale Pty. Ltd. v. State of New South Wales*.[41] Again, by a majority,[42] the Court upheld the validity of the Act. This time Dixon C.J. felt constrained to follow the recent decision of the Court in *McCarter*

[33] See generally Dixon, *Concerning Judicial Method, op. cit.* 152, especially 157-158.
[34] *Willard v. Rawson* (1933) 48 C.L.R. 316; *R. v. Vizzard; Ex parte Hill* (1933) 50 C.L.R. 30; *O. Gilpin Ltd. v. Commissioner for Road Transport and Tramways (N.S.W.)* (1935) 52 C.L.R. 189; *Bessell v. Dayman* (1935) 52 C.L.R. 215.
[35] *Duncan and Green Star Trading Co. Pty Ltd v. Vizzard* (1935) 53 C.L.R. 493.
[36] The cases were *Vizzard, Gilpin* and *Bessell*: see *supra* n.34.
[37] However Starke J. once again dissented.
[38] (1950) 80 C.L.R. 432.
[39] Latham, C.J., McTiernan, Williams and Webb JJ., Dixon, Fullagar JJ. dissenting.
[40] (1949) 79 C.L.R. 497; [1950] A.C. 235.
[41] (1953) 87 C.L.R. 49.
[42] Dixon C.J., McTiernan, Williams and Webb JJ., Fullagar, Kitto and Taylor JJ. dissenting.

v. Brodie upon the basis, at least implicitly, of stare decisis. He stated his reasons in the following way:

> On the whole I think that it is now possible to regard the *Transport Cases* as confined in their application to the control by the States of the use of roads provided and maintained by the States as an alternative to the use of railways also provided and maintained by the States. I hope that I have already said enough to make it unnecessary for me to add that I must not be taken as agreeing that such a view of the use of a highway for inter-State trade justifies an interference which otherwise s.92 would not allow. In truth my personal opinion is entirely to the contrary. But that is nothing to the point. The point is that once the decisions are confined to such a situation they do not so govern the general operation of s.92 as to cause an ever recurring difficulty in applying s.92 according to the principles which otherwise would appear now to be established. On the footing that they are so confined I shall act on the authority of *McCarter v. Brodie*.[43]

The extent to which Dixon was prepared to adhere to the doctrine of stare decisis exemplifies his commitment to the judicial method as he saw it. His decision in *Hughes and Vale Pty Ltd v. State of New South Wales* can hardly have been easy, particularly because, had he maintained his position, he could have joined with the three dissenting Justices in overruling the transport cases, the reasoning of which he had not agreed with for twenty years. The considerations which moved him, and especially the importance which he placed upon stare decisis, came to light in a letter which he sent to Sir John Latham on the eve of handing down judgment in *Hughes and Vale Pty Ltd v. State of New South Wales:*

> I am not sufficiently flexibly-minded to repent of my views about the Vizzard cases and I find that not only Fullagar but Kitto and Taylor think that they were wrong and that they have been undermined by the Privy Council decision in the Banking case. However, the point with me is whether, even so, we should overrule a decision so recently and so solemnly given as *McCarter v. Brodie*. . . Of course my attitude is very much influenced by our experience of 1920. It always appeared to me to be very wrong for Knox and Starke to connive with Isaacs and the others at the overruling of the instrumentalities cases, however strongly they felt that they were wrong.[44]

The subsequent history is well known. On appeal, the Privy Council[45] refused to follow the majority views in the transport cases and preferred instead the views of Dixon J.,[46] expressed in dissent, particularly in *McCarter v. Brodie.* In doing so their Lordships adopted the 'unusual course' of answering the questions raised 'not in language of their own but largely in the language of the judges of the High Court of Australia'[47] — to a considerable extent the language of Dixon J. The result must surely have been a satisfying reward to Dixon.

Nevertheless, the principle of stare decisis was not to be carried too far. When the proper development of legal principle demanded it, departure from it would be warranted. In Dixon's view such an attitude was justified by the

[43] (1953) 87 C.L.R. 49, 74.
[44] Latham Papers NL, Dixon to Latham, 15 April 1953, ref. MS 1009/1/9790.
[45] (1954) 93 C.L.R. 1; [1955] A.C. 241.
[46] *Ibid.*, especially 21-23; [1955] A.C. 241, especially 294-296.
[47] *Ibid.* 33-34; [1955] A.C. 241, 307-308.

High Court's position as the ultimate court of review in Australia[48] and the court entrusted with the decision of matters arising under the Constitution. It was clear to Dixon that on occasions the Court would have to refuse to follow previous decisions, including previous decisions of its own.[49] In the end, the law provides a body of doctrine which governs the decision of a given case and even precedent must sometimes give way to the correct development of legal principle.[50] Of course, Dixon was of the opinion that even judges performing the function of review should be reluctant to depart from previous decisions and should rely upon previous decisions for persuasive authority.[51] Yet when a case required departure from precedent he would depart from it, although unwillingly and not always by directly overruling the earlier case.

Clearly Dixon viewed some of the more enthusiastic enunciations of the doctrine posited in the *Engineers' Case*[52] as going too far. His dissatisfaction with the theoretical basis of that decision, or at least some aspects of it, is to be seen in the way in which he was inclined to apply the case more narrowly than others. He himself admitted that 'the Engineers case is one that I have always applied with restraint'.[53] So it was that he succeeded in diverting the course to which that decision may have given rise by demonstrating the necessity of implications to reconcile it with the federal structure which the Constitution erected. He did so, not by confronting the decision but by emphasizing and given prominence to features of the judgment which might appear to others to be ancillary.[54]

Whatever view he may have taken had the matter been res integra, Dixon accepted the decision in the *Engineers' Case* as part of the corpus juris which he inherited upon his elevation to the Bench in 1929 and successfully nurtured the development of a new theory of inter-governmental relations without direct conflict with that decision.

When a previous decision stood in the way of a correct legal conclusion and it could not be read down, confined to its own facts or qualified in some appropriate way, Dixon J. was prepared to join in overruling it. An example may be seen in the *Second Uniform Tax Case*.[55] The questions raised by this case had emerged fifteen years earlier in the *First Uniform Tax Case*[56] and the legislation considered in each case was essentially the same. The High Court unanimously upheld the validity of the basic legislation, applying the

[48] On the point of the High Court as a court of review, as opposed to a court of appeal, see Jolowicz, J.A., *Appeal and Review in Comparative Law: Similarities, Differences and Purposes,* The Southey Memorial Lecture, University of Melbourne, 15 August 1986.
[49] The High Court has had the power to overrule its own prior decisions ever since the decision in *Australian Agricultural Co. v. Federated Engine-Drivers and Firemen's Association of Australasia* (1913) 17 C.L.R. 261.
[50] Dixon, *op. cit.* 155.
[51] *Ibid.*
[52] *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd* (1920) 28 C.L.R. 129.
[53] Latham Papers NL, Dixon to Latham, September 1942, ref. MS 1009/1/6462.
[54] Zines, L., 'Sir Owen Dixon's Theory of Federalism' [1965] 1 *Federal Law Review* 221, 225.
[55] *The State of Victoria v. The Commonwealth* (1957) 99 C.L.R. 575.
[56] *South Australia v. The Commonwealth* (1942) 65 C.L.R. 373.

earlier decision. However, Dixon C.J., with whom Kitto and McTiernan JJ. agreed upon this point, also held that s.221(1)(a) of the Income Tax and Social Services Contribution Assessment Act 1936 must be declared invalid notwithstanding that this meant a departure from the earlier decision. Dixon C.J., in whose judgment Kitto J. concurred, declared that it was an 'exceptional course'[57] not to follow an earlier decision of the Court, but held that the present case justified taking that course. He made two basic points.[58] First, the *First Uniform Tax Case* was an isolated case, unsupported by other decisions and not forming part of a line of authority. Secondly, the question of the validity of s.221(1)(a) raised crucially important points of constitutional law with great and wide consequences for the States. To Dixon C.J. these formed 'ground enough for departing on this point from the authority'[59] of the *First Uniform Tax Case.* It is of interest to note that Fullagar J., with whom Williams J. agreed, took the view upon the question of the validity of s.221(1)(a) that 'if ever there was a case for the application of the rule of *stare decisis,* this is that case'.[60]

Another example may be seen in *The Commonwealth v. Cigamatic Pty Ltd (In Liquidation).*[61] In this case a point which had to be decided was whether a State legislature could control the Commonwealth government's right to priority in the payment of debts owed to it when those debts came into competition with debts of equal degree owed to members of the public. By a majority,[62] the High Court held that the parliament of a State did not have any such power and, in so deciding, specifically overruled that part of *Uther's Case*[63] which had reached the opposite conclusion. The decision gave effect to the opinion of Dixon J. in a dissenting judgment in *Uther's Case.* Dixon C.J. felt compelled to explain why he would not follow the decision of the majority in the earlier case:

> Believing, as I do, that the doctrine thus involved is a fundamental error in a constitutional principle that spreads far beyond the mere preference of debts owing to the Commonwealth, I do not think we should treat *Uther's Case* (1947) 74 C.L.R. 508 as a decisive authority. . .[64]

Yet while Dixon C.J. was prepared to overrule *Uther's Case* upon the point mentioned, he saw no reason for departing from the views expressed by the majority in that case upon other points,[65] even though he agreed with Taylor J. that by so doing difficulties would probably arise in the actual application of the relevant statutory provisions.

[57] (1957) 99 C.L.R. 575, 615.
[58] *Ibid.* 615-616.
[59] *Ibid.* 616.
[60] *Ibid.* 655.
[61] (1962) 108 C.L.R. 372.
[62] Dixon C.J., Kitto, Menzies, Windeyer and Owen JJ., McTiernan and Taylor JJ. dissenting.
[63] *In re Foreman & Sons Pty Ltd; Uther v. Federal Commissioner of Taxation* (1947) 74 C.L.R. 508.
[64] (1962) 108 C.L.R. 372, 377.
[65] *Ibid.* 379.

It is true that Dixon himself observed that the High Court has 'no very definite rule as to the circumstances in which it will reconsider an earlier decision'.[66] Nevertheless, it is possible with reasonable clarity to discern his own approach from the cases. Departure from the doctrine of precedent was an exceptional although available course open to the High Court because of its role in the interpretation of the Constitution and its function as a court of final resort.[67] What may constitute an exceptional case is not capable of precise definition; but Dixon J. found it possible to say in *Attorney-General (N.S.W.) v. Perpetual Trustees Co. Ltd:*

> But there appears to me to be no ground for reconsidering the decision in *Quince's case* (1944) 68 C.L.R. 227 unless it be a sufficient ground simply that the opposite conclusion is to be preferred. It is evident that the decision was reached only after a very full examination of the question. It cannot be said that any compelling consideration or important authority was overlooked or that the decision conflicts with well established principle or fails to go with a definite stream of authority. It is a recent and well considered decision upon what is evidently a highly disputable question. The question stands by itself. The decision does not affect a wider field of law so that its importance goes beyond the matter in hand.[68]

Adherence to legalism does not, perhaps, command the ready acceptance today which it did during the Dixon years. Even Sir Owen Dixon noted its decline[69] but he saw the change as gradual and evolutionary. He was able to say in his time that the High Court had 'had as yet no deliberate innovators bent on express change of acknowledged doctrine'.[70] But others have also noted the decline.[71] In part it has been brought about by legislative reforms which have changed settled procedures and increased the scope of judicial discretion.[72] Dixon did not, however, consider this to be the whole explanation and thought that it was more a matter of philosophic than legislative change.[73] One might wonder how he would have reacted to a judicial call for a policy-orientated, cost-benefit approach to decision making in place of strict legalism.[74] It is almost certain that he would have seen it as the sacrifice of principle for pragmatism and an abandonment of the coherent development of legal doctrine. Nevertheless, Dixon foresaw the future:

> The possession of fixed concepts is now seldom conceded to the law. Rather its principles are held to be provisional; its categories, however convenient or comforting in forensic or judicial life, are viewed as unreal. They are accommodated with a place, it is true, but only as illusory guides formerly treated with undue respect.[75]

That remark was, perhaps, made as much with resignation as with regret.

[66] *Attorney-General for N.S.W. v. Perpetual Trustee Co. (Ltd)* (1952) 85 C.L.R. 237, 243-244.
[67] *Ibid.* 244.
[68] *Ibid.*
[69] Dixon, *op. cit.* 154.
[70] *Ibid.* 158.
[71] For example, Bray, *op. cit.* 206-209; Atiyah, P.S., 'From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law' (1980) 65 *Iowa Law Review* 1249, 1251.
[72] See Bray, *op. cit.* 208; Atiyah, *op. cit.* 1251.
[73] Dixon, *op. cit.* 154.
[74] *Cf.* Kirby, M., *The Judges,* Boyer Lectures 1983, especially at 40.
[75] Dixon, *op. cit.* 154.