BOOK REVIEW

JOHN ELDRIDGE AND TIMOTHY PILKINGTON (EDS), *SIR OWEN DIXON'S LEGACY* (FEDERATION PRESS, 2019)

The Hon Robert French has observed that Australian judges are, generally, subject of much depersonalised academic writing with individuals only occasionally 'singled out for praise or criticism as evanescent heroes, disappointments, or villains'.[1] Indeed, judicial biography in Australia has been described as 'an undeveloped branch of scholarship'[2] and as having 'received little academic attention'.[3] Against this are, for example, the observations of Justice Bell who has — in responding to calls for increased 'visibility over who authors the decisions of the High Court'[4] — cautioned that we should 'be careful what [we] wish for'.[5]

These various observations raise the following question: what is the utility, or otherwise, in the systematic study of the judge as *an individual*, particularly their judgments and perhaps also their extra-curial writing?[6] That is to say, the individual judge as a mode of enquiry distinct from the generally depersonalised doctrinal, critical, and empirical approaches of which many would be more familiar. Despite the relative dearth of judicial biography in Australia, this question has been considered from time to time by commentators. For example, James Thomson in 1985 opined:

> [D]oes [the] nurturing of … [judicial] biographical scholarship matter? Yes — if beneath the rhetoric of judicial neutrality and autonomy lurk personal values and preferences … [and] revelation of previously undisclosed information concerning important cases might enhance understanding of judges' decision-making processes.[7]

From this statement, we can identify one of the insights to be gained from a more *personalised* approach to legal scholarship: that is, it can reveal undisclosed

1 Robert French, 'Foreword' (2017) 40(2) *University of New South Wales Law Journal* 665, 665.

2 Stuart Macintyre, 'What Makes a Good Biography?' (2011) 32(1) *Adelaide Law Review* 7, 16, quoted in Tanya Josev, 'Judicial Biography in Australia: Current Obstacles and Opportunities' (2017) 40(2) *University of New South Wales Law Journal* 842, 842 ('Judicial Biography in Australia').

3 Sarah Burnside, 'Griffith, Isaacs and Australian Judicial Biography: An Evolutionary Development?' (2009) 18(1) *Griffith Law Review* 151, 151, quoted in Josev, 'Judicial Biography in Australia' (n 2) 842.

4 Andisheh Partovi et al, 'Addressing "Loss of Identity" in the Joint Judgment: Searching for "The Individual Judge" in the Joint Judgments of the Mason Court' (2017) 40(2) *University of New South Wales Law Journal* 670, 673.

5 Justice Virginia Bell, 'Examining the Judge' (Speech, Launch of Issue 40(2) of the *University of New South Wales Law Journal*, 29 May 2017) 4.

6 Not, perhaps, their extrajudicial life.

7 James A Thomson, 'Judicial Biography: Some Tentative Observations on the Australian Enterprise' (1985) 8(2) *University of New South Wales Law Journal* 380, 381–2 (citations omitted).

explanations or motivations for a particular legal outcome which can thereby enhance our understanding of the judicial function and of legal principles.[8] In addition, such an approach — examining the *individual* judge and their 'legacy' — may be useful to the following: first, and related to the preceding, advancing our understanding of the judge and the judicial function within our theoretical conception of common law; second, as a point of analysis and a methodological aid for developing historical narratives in legal history; and third, as a lens through which to illuminate and scrutinise the law's abundant complexity, including identifying principles that are of relevance to present-day legal problems.

The essays collected in *Sir Owen Dixon's Legacy*, edited by John Eldridge and Timothy Pilkington, provide examples of each of these.[9] Indeed, each of the essays and the theses proposed by the authors who have contributed, demonstrate how shifting the focus of enquiry from the judge *as a generally anonymous agent* to the judge *as an individual* — here, Sir Owen Dixon[10] — can offer up some novel and stimulating insights. Indeed, insights that might otherwise go unobserved.

This focus on Dixon helps to situate judges, and the judicial function, within a positivist theoretical conception of the common law. This is demonstrated by Ruth CA Higgins' essay at Chapter 1 of the collection, 'Sir Owen Dixon and the Common Law Method'. Higgins asks whether 'legalism' — that method adopted by Dixon, self-avowedly, 'strict and complete'[11] — is a method of decision-making that is well-suited to the common law.[12] Higgins' central thesis is that there exists 'a peculiar harmony between the historical development of the common law and legalism as the conscientious adoption of a kind of reasoning that moves forward only in increments, evolving through example and analogy'.[13] In so doing, Higgins advances a comprehensive response to one of the lasting criticisms of legalism: the 'presupposition of the existence of law as a system of knowledge or thought independent of its exposition'.[14] This is a thesis that, if not directly then indirectly, necessarily takes colour from Dixon's own judicial individuality. After

8 Though, this may be overstating — at least in Australia as compared to in other jurisdictions, particularly perhaps as compared to the United States of America. For example, Justice Bell has opined extra-curially that '[t]he declaratory theory of the common law has been dead for longer than I have been in practice. But to acknowledge that judges are involved in making law is *not to accept that they have a free hand to mould the law according to their personal views*': Justice Bell (n 5) 7 (emphasis added).

9 John Eldridge and Timothy Pilkington (eds), *Sir Owen Dixon's Legacy* (Federation Press, 2019).

10 As in the text, this author, in the interests of brevity and without intending disrespect, refers to Sir Owen Dixon as 'Dixon' throughout.

11 See Sir Owen Dixon, 'Swearing in of Sir Owen Dixon as Chief Justice' (1952) 85 CLR xi, xiv. This was reprinted in Sir Owen Dixon, 'Address on Taking Office as Chief Justice of the High Court' in Sir Owen Dixon, *Jesting Pilate and Other Papers and Addresses*, ed Susan Crennan and William Gummow (Federation Press, 3rd ed, 2019) 287, 289.

12 Ruth CA Higgins, 'Sir Owen Dixon and the Common Law Method' in John Eldridge and Timothy Pilkington (eds), *Sir Owen Dixon's Legacy* (Federation Press, 2019) 8, 9.

13 Ibid 10.

14 Ibid 23, quoting Stephen Gageler, 'Legalism' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 429, 429.

all, it is Dixon who has had, more than any other judge, the greatest influence on the development of 'legalism' as a bounded process of reasoning restraining judges and limiting recourse to considerations other than, what John Gava has elsewhere described as, the relevant 'legal grounds'.[15] Meanwhile, in Chapter 10, 'Sir Owen Dixon and *Yerkey v Jones*: Considering the Feminist Implications of Strict and Complete Legalism', Radhika Chaudhri asks whether 'Dixonian legalism's commitment to framing judgments [in order] to *cohere with existing law* perpetuates power structures and stymies the disruption required for feminist reform'.[16] Chaudhri contends, with reference to Dixon's seminal judgment in *Yerkey v Jones*,[17] that a strict adherence to legalism is, indeed, 'fundamentally incompatible with the feminist objective of deconstructing harmful gender narratives'.[18] This thesis makes for some powerful potential criticisms of that process of reasoning to which Dixon adhered and the significance of Dixon's pronouncements on which endure to the present day.[19] In so doing, Chaudhri identifies some potential deficiencies in prevailing positivist conceptions of common law in itself. That this individualised focus can add colour to how we conceive, in the theoretical sense, of common law might be unsurprising to some readers. After all, a principal objective of analytical jurisprudence and legal formalism is to situate, and critique, the role of the judge within the wider system of law. Nevertheless, the insights offered up in each of these chapters are quite clearly illuminated by the central focus on Dixon as the individual, rather than as the generally depersonalised agent of the judicial function.

This focus on Dixon throws light upon historical narratives of evolution in the law. Many may be unable to recall the significance of *Parker v The Queen*.[20] Dixon CJ's dissent in that case included the following dicta:

> Hitherto I have thought that we ought to follow decisions of the House of Lords, at the expense of our own opinions … but having carefully studied *Smith's Case* I think that we cannot adhere to that view or policy. … I wish there to be no misunderstanding on the subject. I shall not depart from the law on the matter as … laid … down in this Court and I think *Smith's Case* should not be used as authority in Australia at all.[21]

15 John Gava, 'When Dixon Nodded: Further Studies of Sir Owen Dixon's Contracts Jurisprudence' (2011) 33(2) *Sydney Law Review* 157, 158.

16 Radhika Chaudhri, 'Sir Owen Dixon and *Yerkey v Jones*: Considering the Feminist Implications of Strict and Complete Legalism' in John Eldridge and Timothy Pilkington (eds), *Sir Owen Dixon's Legacy* (Federation Press, 2019) 163, 163 (emphasis added).

17 (1939) 63 CLR 649.

18 Chaudhri (n 16) 181.

19 For example, '[s]ince 1987, no fewer than nine written High Court judgments [contain] an explicit reference to Dixon's "*Concerning Judicial Method* speech" to support the development of the common law': Tanya Josev, *The Campaign against the Courts: A History of the Judicial Activism Debate* (Federation Press, 2017) 104.

20 (1963) 111 CLR 610 ('*Parker*').

21 Ibid 632 (citations omitted).

This passage was a turning point in the development of Australian law.[22] It is the subject of '*Parker v The Queen* and Dixon's Diminishing Confidence in the Privy Council' by Tanya Josev which is at Chapter 2 of the collection. As Josev observes, the above statement is extraordinary not least because at the time of the judgment an avenue of appeal to the Privy Council remained open.[23] Further still, Dixon CJ did not seek to limit this obiter to the facts and even noted that his Honour had been authorised to issue it on behalf of all of the members of the Court.[24] Josev advances a compelling thesis, supported by substantial archival research, as to what brought Dixon to this point: less the burgeoning of an individual Australian legal identity than a 'disappointment with the British judiciary';[25] antipathy towards judicial 'innovators', principally Lord Denning, and a growing concern about the institutional ability and integrity of the Privy Council.[26] Through this thesis, Josev casts Dixon as 'the judge that helped — even if under sufferance, and even if out of despair — to give Australian law her liberty'.[27] Similarly, in Chapter 11 'Sir Owen Dixon and the Law of Contract', John Eldridge examines in some detail Dixon CJ's seminal judgment in *Masters v Cameron*[28] — now one of the most frequently cited cases in the law of contract[29] — and considers its enduring impact to the present-day. Eldridge advances the argument that 'Dixon's stature, and the widespread tendency to elevate his pronouncements to a status akin to that of statutory prescription, have contributed directly to the confusion surrounding the status of the *Masters v Cameron* categories'.[30] As do other contributors, Eldridge offers up a thought-provoking analysis which raised, at least for this author, stimulating questions concerning the extent to which individual jurists may distort — or perhaps indeed, have distorted — the development of the law in ways that might often go overlooked.

Finally, this focus on Dixon — and again, his own reasons for judgment in the key cases across particular areas — illuminates principles that remain relevant

22 Former High Court Justice Michael Kirby described it thus: '[t]he declaration of judicial independence': Justice Michael Kirby, 'The Old Commonwealth: (a) Australia and New Zealand' in Louis Blom-Cooper, Brice Dickson and Gavin Drewry (eds), *The Judicial House of Lords 1876–2009* (Oxford University Press, 2009) 339, 341, quoted in Tanya Josev, '*Parker v The Queen* and Dixon's Diminishing Confidence in the Privy Council' in John Eldridge and Timothy Pilkington (eds), *Sir Owen Dixon's Legacy* (Federation Press, 2019) 25, 26.

23 Josev, '*Parker v The Queen* and Dixon's Diminishing Confidence in the Privy Council' (n 22) 25.

24 *Parker* (n 20) 633.

25 Josev, '*Parker v The Queen* and Dixon's Diminishing Confidence in the Privy Council' (n 22) 26.

26 Ibid.

27 Ibid 39.

28 (1954) 91 CLR 353 ('*Masters v Cameron*').

29 See, eg, Daniel Reynolds and Lyndon Goddard, *Leading Cases in Contract Law: A Guide to the 100 Most Frequently Cited Judgments in Contract and Related Subjects* (Federation Press, 2017) 17–18.

30 John Eldridge, 'Sir Owen Dixon and the Law of Contract' in John Eldridge and Timothy Pilkington (eds), *Sir Owen Dixon's Legacy* (Federation Press, 2019) 182, 188. Similarly, Bret Walker SC has described a tendency for the *Masters v Cameron* (n 28) categories to be 'regarded with the usual reverence given to Dixonian scripture': Bret Walker, 'The Fourth Category of *Masters v Cameron*' (2009) 25(2) *Journal of Contract Law* 108, 108.

and useful to resolving present-day legal problems. In Chapter 4 'Sir Owen Dixon and the Concept of "Nationhood" as a Source of Commonwealth Power', Peter Gerangelos traces the extent to which Dixon's judgments, and influence, in the seminal Cold War-era decisions have impacted the relatively recent recognition — culminating in *Pape v Federal Commissioner of Taxation*[31] — of 'nationhood' as a source of Commonwealth executive power.[32] In doing so, Gerangelos identifies various threads linking Dixon's reasoning in those early authorities — each concerned with Commonwealth *legislative* power — with the emerging s 61 'nationhood' jurisprudence.[33] Following a detailed exposition and analysis, Gerangelos offers the conclusion that, while the High Court of Australia is yet to decide from where precisely the nationhood power is derived, '[w]hatever the outcome may be, the starting point must be the reasoning of Sir Owen Dixon'.[34] Similarly, Timothy Pilkington in Chapter 9 'Advance Payments and the Border of Contract and Restitution: *McDonald v Dennys Lascelles* Revisited' examines Dixon's contribution to the then developing jurisprudence relating to recovery of unconditionally accrued rights and, following, the contemporary application of these concepts.[35] This particular issue is of real contemporary significance — for example, at the time of writing, the High Court of Australia had only just handed down judgment in the appeal from *Mann v Paterson Constructions Pty Ltd*.[36]

Sir Owen Dixon's Legacy is a formidable collection. John Eldridge and Timothy Pilkington have succeeded in collating a text which contributes not only to our understanding of Dixon and his legacy but also more generally to some particular areas of legal doctrine, to legal theory, and to narratives of legal history. Additionally, and while this author does not necessarily avert from Justice Bell's caution regarding a preponderance of new judicial biographies,[37] it ought be observed that the essays in the collection throw up interesting insights gleaned from an approach to legal scholarship that is less often seen in academic literature — specifically, a focus on the judge, and their judging, as an individual personality within the broader system of common law.

STEPHEN PUTTICK*

31 (2009) 238 CLR 1.

32 Peter Gerangelos, 'Sir Owen Dixon and the Concept of "Nationhood" as a Source of Commonwealth Power' in John Eldridge and Timothy Pilkington (eds), *Sir Owen Dixon's Legacy* (Federation Press, 2019) 56.

33 Ibid.

34 Ibid 79.

35 Timothy Pilkington, 'Advance Payments and the Border of Contract and Restitution: *McDonald v Dennys Lascelles* Revisited' in John Eldridge and Timothy Pilkington (eds), *Sir Owen Dixon's Legacy* (Federation Press, 2019) 144.

36 [2018] VSC 119.

37 See Justice Bell (n 5) 4.

* Adjunct Research Fellow, Law School, The University of Western Australia; Solicitor, New South Wales.