

Book Reviews

Lionel Murphy: A Political Biography

by Jenny Hocking, Cambridge University Press, Cambridge, 1997, xii pp, 314 pp, notes 315–337 pp, bibliography 338–353 pp, index 354–359 pp. Price: soft cover \$39.95.

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The life of High Court Justice Lionel Murphy is a story that has been told before. In particular, many scholars have advocated reconsideration of Murphy's judgments in light of recent developments in Australian jurisprudence.¹ Alternatively, much was written between 1983 and 1986 about the 'Age Tapes' and other controversies that dominated Murphy's public life during his final years.

In the context of this material Jenny Hocking's account in *Lionel Murphy: A Political Biography* is novel. Hocking's description draws attention from the finer points of Murphy's jurisprudence and questions of impropriety — which included allegations of misbehaviour and charges of attempting to pervert the course of justice — to offer a more balanced consideration of his life. The result is a detailed depiction of Murphy's rise as a young barrister in the Australian Labor Party and his activities as Senator and Attorney-General. His role as High Court Justice and the events surrounding the final three years of his life are discussed at some length, but this is done in the context of Murphy's career as a whole, rather than as the work's focal point. The result is a biography in its true sense and is of interest to lawyers for a number of reasons.

I. A political biography

Hocking's account is aptly named. In approaching his career in a balanced and chronological order the work conveys a strong sense of the political being that Murphy was, both before and after his appointment to the bench. The effect is heightened by frequent detailed historical comment on the broader context in which Murphy's activities took place. These comments range from analysis of constitutional issues (such as the role of the Senate) to depictions of ALP factional politics and the personalities involved in them. The technique leaves the reader with a strong impression of the political landscape that Murphy traversed as well as the significance of his effect upon it.

The seeds of this impression are sown early in the work. Hocking begins by identifying Murphy's family with the strong Irish-Australian working class movement of the early twentieth century. From there, brief details of Murphy's childhood and education are offered before more serious attention is turned to his early legal career. Murphy's rise as a young barrister during the 1950s is given detailed examination. In particular, his emergence as a prominent industrial advocate through involvement in internal union disputes is treated with some significance. Hocking pays close attention to the personal

¹ For example see Winterton G, 'Murphy: A Maverick Reconsidered' (1997) 20(1) *University of New South Wales Law Journal* 204; Campbell L, 'Lionel Murphy and the Jurisprudence of the High Court Ten Years On' (1996) 15(1) *University of Tasmania Law Review* 22; Kirby M, 'Lionel Murphy and the power of ideas' (1993) 18(6) *Alternative Law Journal* 253.

and political alliances that this involvement gave rise to, including Murphy's close working relationships with left-wing stalwarts Ray and Arthur Gietzelt.

As the biography turns to examine Murphy's entrance to the formal political arena the importance of these alliances is revealed. Murphy's stance on the left-wing of the ALP is made clear and Hocking details the personal and ideological conflicts that surrounded his rise to the posts of Leader of the Senate, then Attorney-General and Minister for Customs and Excise. For example, the conflict between Murphy and Gough Whitlam (both before and during Whitlam's term as Prime Minister) over the democratic legitimacy of the Senate is discussed, as is Murphy's infamous ASIO raid of 1973. His activities as Attorney-General are outlined largely by reference to the substantial body of reforming legislation that he sponsored, although some mention is made of significant cases in which he made key decisions about the conduct of litigation. The *Nuclear Tests Case*² is of particular interest as Australia's first appearance before the International Court of Justice.

Following this detailed account of Murphy's formal political career the controversy surrounding his appointment to the High Court in 1975 can be better understood. Similarly, the peculiar approach to judicial reasoning and method adopted by Murphy is portrayed as a natural development of his personal, legal and political philosophies. Hocking discusses Murphy's work on the High Court in terms of the continuities between it and the previous stages of his life, drawing attention to key judgments that typify his jurisprudence. The well-documented personal conflicts between Murphy and other members of the Court are also discussed.

Perhaps the sections of the work that most clearly demonstrates its emphasis on the political, however, are the chapters that deal with the 'Age Tapes' controversy and the final years of Murphy's life. Whilst details are given of the progress of investigations and their personal effect on Murphy and his family the account steers well away from asserting guilt or innocence. Hocking instead chooses to concentrate on issues arising from the procedures used to investigate Murphy's conduct. Much is made of the evidentiary and procedural questions raised by the methods of inquiry that were used to investigate Murphy's conduct such as Senate Select Committees.³ Hocking explains that the Senate Select Committee on the Conduct of a Judge chose to adopt the civil (rather than the more stringent criminal) standard of proof in considering whether or not Murphy had engaged in conduct that constituted misbehaviour for the purposes of s.72 of the Constitution. The approach is effective in creating a sense of irony, the contrast being made clear between Murphy's own staunch advocacy of civil rights (such as trial by jury) and the nature of the forums in which his conduct was ultimately investigated. Similarly, the contrast between Murphy's longstanding opposition to policing methods such as phone tapping (including his animosity towards ASIO), and the evidence relied upon to prosecute him contributes to this sense of irony. Issues of infringement of the separation of powers doctrine are also raised by Hocking and in this way the implications of the affair for Australia's political system are clearly drawn out for the reader to consider.

II. A political biography for lawyers?

Whilst ostensibly a political history the work is of interest to lawyers for a number of reasons. On a practical level the account draws attention to the ideals behind much of the significant legislation that emerged during the term of the Whitlam Government. This includes the *Trade Practices Act 1974*, *Family Law Act 1975* and the *Racial Discrimination*

² *Nuclear Tests Case (Australia v. France)* [1974] ICJ Rep 253.

³ Two different Senate Select Committees were established to investigate Murphy's conduct. The first, the Senate Select Committee on the Conduct of a Judge, was established in March 1984. The second, the Senate Select Committee on Allegations Concerning a Judge, was established in September 1984.

Act 1975. The establishment of the Australian Legal Aid Office and the Law Reform Commission are also considered. In discussing these developments Hocking places Murphy's contribution within the context of surrounding debate, thereby offering a useful insight into the rationale and immediate political motivations that underpinned them. For example, Murphy's criticisms of the *Matrimonial Causes Act 1959* (that had been drafted while Sir Garfield Barwick had been Attorney-General) and the Opposition's response to these criticisms are explained by Hocking as she details the controversy surrounding the passage of the *Family Law Act 1975*. Such an account may be of particular interest to lawyers who deal with these developments in their contemporary form and who may have cause to ponder or even debate their role within Australian society.

More theoretically, an idea of the political attitudes underpinning Murphy's jurisprudence may prove helpful in coming to terms with many of his judgments. This is particularly applicable to those judgments that deal with highly political topics, such as the federal-state balance or issues involving democracy or civil rights. A common critique of Murphy's judgments is that they are of little use to practising lawyers, as much of his reasoning is not stated in the judgment itself. A more complete understanding of the source of Murphy's jurisprudence may alleviate this problem to some degree, by suggesting the assumptions upon which his reasoning was built.

Further interest for lawyers may be found in the detailed observations of key periods of change within significant constitutional institutions. Murphy's personal involvement in the establishment of the Senate's standing committee system allows Hocking to discuss both Murphy's and his opponents' views of the role of the Senate at a time when its activities were drawing Australia towards the constitutional crisis of 1975. Similarly, an insider's view is given of the workings of responsible government in passages where Hocking recalls the various intrigues and procedural problems that arose during Murphy's time as a Cabinet Minister. These intrigues include not only the lead up to the constitutional crisis of 1975 but also the 'duumvirate' arrangement whereby Whitlam established an interim Ministry of only two Ministers (himself and his Deputy Lance Barnard) to administer the government until a full Ministry could be appointed and the Petroleum and Minerals Authority loan affair — in which a private prosecution was brought against Whitlam, Murphy and two other Ministers of the Whitlam Government because of attempts to borrow large sums of money outside the workings of the Loans Council.⁴ The inner workings of the High Court are also discussed. Again, attention focuses on a time of change in the institution, with Murphy's service spanning the Court's move to its permanent residence in Canberra and significant personnel changes in the early 1980s.

A final source of interest for lawyers may be the personal tale of Murphy's remarkable rise from young barrister to controversial High Court Justice. In this respect the biography is characteristically comprehensive, with the motivations and mechanisms behind each of Murphy's career moves being thoroughly examined. The presentation is far from tedious, however, as Hocking's detailed analysis serves to create a strong sense of the profound triumphs and defeats that characterised Murphy's career as well as the deep personal friendships and rivalries that it created. As a successful narrative the biography owes no small debt to the subject himself, whose extraordinary life makes for a compelling tale.

One leaves the work with a sense that there may be more to Murphy's legacy of legislation and judgments than is easily gleaned from the minute analysis that practising law demands, and that there is something to be gained from approaching these texts from a wider perspective. In this sense the work rewards reading by lawyers, particularly those interested in the broader concerns of public law.

4 *Sankey v. Whitlam and Others* (1978) 142 CLR 1.