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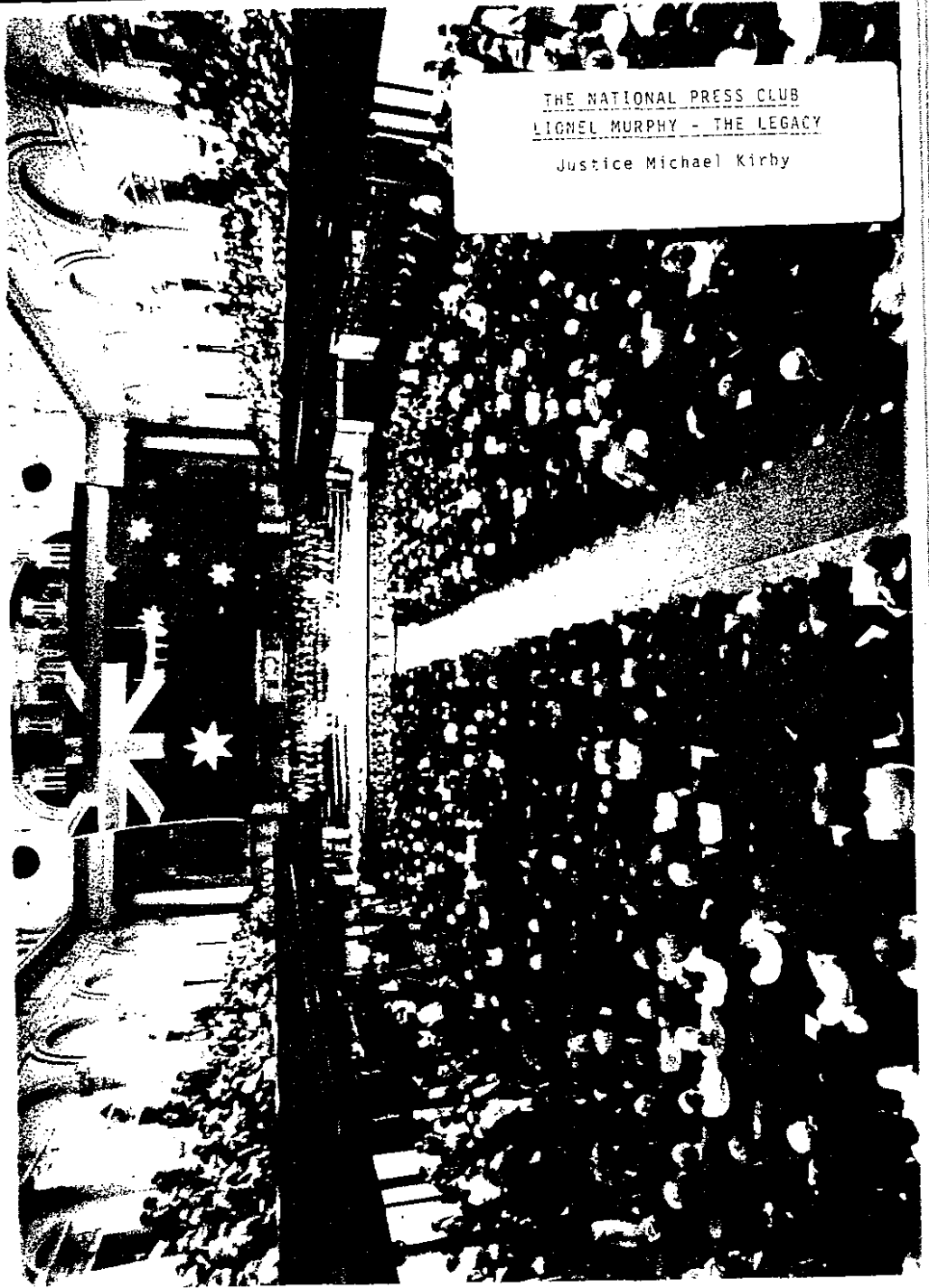
CANBERRA, WEDNESDAY 24 JUNE 1987

ON THE LAUNCH OF THE BOOK EDITED BY DR. JOCELYNNE A SCOTT

LIONEL MURPHY - A RADICAL JUDGE

"LIONEL MURPHY - THE LEGACY"

THE NATIONAL PRESS CLUB  
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MINOR PLAYERS ON THE STAGE OF PUBLIC AFFAIRS

This gathering today is a notable one. Formally, it is to launch the latest book on Lionel Murphy edited by Jocelynn Scutt. I did tell Jocelynn that she should look elsewhere for a "launcher". The two principal book launchers of our nation are Barry Humphries and Gough Whitlam. I once saw Gough launch a book by Phillip Adams. Within days of his launch, the book sold out, the Government changed and Gough was appointed an Ambassador in Paris. I regret to say that I do not expect to be similarly rewarded for my effort today.

In my foreword to this book I tried to capture some of its chief themes. There I pointed out that the elevation of Lionel Murphy to sainthood, so soon after his death, and without the blessing of the Holy Father, would have amazed and amused him. He was no saint. But he was, by any account, a very interesting and creative person. Why else, in a country which largely ignores its judges, should he already have inspired three books? Why else was he the constant subject of media

attention in his own life-time and after his death? Why else would we be here to remember him?

Most judges, indeed most politicians, have a very minor part to play on the stage of public affairs. In their lifetime, they utter a few words. And then shuffle off, largely unnoticed. Whether you liked Lionel Murphy or hated him, he was different. It has to be conceded that some people did hate him. So much is evident from the attacks on him. I will return to these. But it is equally true that many people loved him. I count myself in that group. In my case I was fortunate to get to know him well. I had known him at the Bar and twice was his junior in the Court which he was later to join. I had worked with him when he was Attorney-General. He it was who secured by appointment as the first Chairman of the Law Reform Commission. In the long journey of nine years during which I held that post, and he sat in the High Court, he would telephone me once or twice a week. He would talk about issues. He was a great believer in serendipity. As Mary Gaudron points out in her moving epilogue, which closes this book, his mind operated in a way very unusual for a lawyer. He constantly drew on scientific literature. He constantly challenged received wisdom and long held assumptions. He looked at the legal system, including the judiciary, through critical eyes. His was a roaring spirit: impatient about what he perceived as injustice. He was angry about it. Unwilling to let things be and to accept what more orthodox people considered to be "the inevitable".

#### THE COUNTERPOINT OF CRITICISM

If I have a criticism of this book it is that it does not contain a chapter or two written by Lionel's critics. He

would not have objected. He was always a valiant spokesman for the counterpoint. In this Club, where he spoke twice, he twice defended freedom of the press. Perhaps because of his deep affection for American jurisprudence, he was imbued with a lively appreciation of the free media. He was a champion of freedom of expression. Listen to what he said in the very place at which I now stand, just four years ago:

"Three years ago I said that perhaps the most dangerous use of power by Courts is the contempt power and that its use is contagious. Since then Mr Gallagher was sent to jail for three months for scandalising the Federal court. Such a charge is regarded as obsolete in England and would not be tolerated in the United States in the absence of a clear and present danger to the administration of justice ... I am not here to question the correctness of those decisions but they show that there should be a change in the law ... The usual safeguards in criminal justice are denied to one accused of contempt of court. He is deprived of a jury, generally tried on affidavit so that he is unable to cross-examine witnesses against him before he is required to put his defence. The Court itself may be the prosecutor."

The free press which Lionel Murphy defended was, in some respects at least, to serve him and Australia ill. But let us not indulge in hagiography. Lionel had his faults - as which of us does not? For one thing, he could be very persistent to the point of irritation. He would take you aside at a cocktail party and badger you over the latest judgment he was writing. Sometimes I felt like saying: "Look, Lionel. We all have our

problems". Of course, I never did. He was a member of that most exclusive and powerful college in the nation - the High Court of Australia. He really did agonise about the issues that came before him in that Court. He realised the ripple effect of the decisions influencing as they do the lives of his fellow citizens throughout the continent. And above all he really did care about the state of the law and about his responsibility for it.

In this sense, Lionel Murphy was a long way distant from the community's touching and persisting belief that judges are mere automatons. Press the button and (lo and behold) out comes the relevant law. On many occasions he rejected that notion with contempt, as virtually every knowing person nowadays does. The debate is no longer about whether judges at the level of the High Court make the law. It is rather about how far they should go, what criteria they should use for legal development and what material outside dusty law books they should consult in performing their creative functions. On all of these issues, Lionel Murphy was a radical. Judges should be much more creative - because he knew only too well how uninterested Parliaments and Governments could be in the great body of the law. Judges should use criteria developed from their own experience and state policy choices with greater candour than in the past. Judges should use economic, scientific and sociological material - even (can it be believed?) law reform reports! What a scandal these views were to many.

I say that Lionel Murphy would have welcomed with that robus spirit, a few critical writers in this book. He realised thathis originality, simplicity and clarity shone forth

precisely because he disdained the normal processes of reasoning. It is like the books which have reproduced his judgments without the judgments of his colleagues. Uncritical books resemble a sonata without the passionate violin. In politics and the law, as in other areas of public life, there is light and shade - much shade. Lionel Murphy was often a flash of light. He was an optimistic, energetic, creative, "can do" personality. He was impatient, irritating, sometimes indiscreet. But above all he was a loving and loyal man with a sense of fun and an affection for his fellow creatures. It is unusual in Australia - where we tend to slap down people with such mortal "failings" - for public figures at the top to be noticeably affectionate and warm. To the very end, Lionel Murphy was so. I spoke to him many times in his last months. He voiced absolutely no rancour against those who, on one view, had treated him unfairly. He did not even declaim against cruel fate which had raised him so high only to strike him down prematurely - first with worldly and then with mortal burdens. In fact, his approach to death was similar to his approach to life. He would not give up the struggle. He insisted on returning to the Court. He battled through his final judgments. He practised meditation. He changed his diet - even the supreme sacrifice: he gave away champagne. Yet in the end his struggle subsided and he succumbed - as one day we will all do. The loyalty and love of Ingrid, Cameron and Blake, of Bill and his family, of Neville Wran who was as close as a brother and a few others have been remarked elsewhere. There is no point at this "launch" in going over those things. The solemn procession of

hushed citizens who packed the Sydney Town Hall for his memorial service said it all. Can you imagine another public leader in Australia who, if he died tonight, would attract such a gathering to a secular service called to honour and praise him? I cannot think of one. That congregation, this book and the continuing legacy of Lionel Murphy must demonstrate something. But what is it?

THE ENDURING LEGACY OF IDEAS

He once said to me, in words reminiscent of the Book of Common Prayer, that our mortal frame perishes; but if we are a composer a little piece of our mind is alive every time someone hears a song or symphony we have written. If we are a painter, the dab of paint, later noticed in a gallery, keeps our spirit alive. "My verse your virtues rare shall eternise" was Shakespeare's bold claim. In his case it was true. Lionel Murphy's mortal life has passed. But there is nothing so powerful as ideas faithfully recorded. His ideas are there in the Parliamentary Debates. They are there in the many reforming statutes he piloted through - abolition of capital punishment; reform of Trade Practices; a new Family Court; legal aid; a Law Reform Commission etc. They are there in the arguments that persuaded judges to his view point. And, as a judge, they are there in the judgments of the High Court of Australia. Professor Blackshield has proved that he was no revolutionary. His dissent rate, although high by Australian standards, cannot mask the fact that in the overwhelming majority of cases he concurred with his more "conservative" brethren in the outcome of the appeals in the High Court.

So this is the legacy he has left. Each citizen of



Australia - and even people beyond - are the beneficiaries of his ideas. Many thinking people will pause from time to time to reflect on the continuing relevance of those ideas. I can tell you that I certainly do. Often as I sit there in my court, dressed in the black silken robes and wearing the horse-hair wig which Lionel disdained, I ask myself: "What would Lionel have done in this case"? I do so with increasing frequency and persistence as cases come forward where old legal principles suggest a result which seems unjust or out of tune with today's society. Of course, if there are decisions which bind me, I must apply them. But that is not often the case. Frequently, at least for me, there is a choice. And the thoughts and memory of Lionel Murphy give courage and resolution to many of us to strike out boldly for the right idea - for modernity, for modern relevance, for a more compassionate society living under the Rule of Law - but the Rule of a modern and just Law.

The termination of the last appeals to the Privy Council which so gladdened his heart finally releases us, as Chief Justice Mason has suggested, from the apron strings of our reliance on English jurisprudence. Unthinking application of precedents developed from an earlier time on the other side of the world were, as Lionel Murphy declared a suitable approach for a nation mostly populated by sheep. Criticism, especially self criticism was his watch word. So was optimism and reform - getting things done preferably through Parliament. But getting them done in the courts wherever Parliament failed.

There would be much in the world since his death that would have concerned Lionel Murphy. As a man whose interests rose above the law books he would have despaired - as I do - at

the frightful toll of death and suffering caused by AIDS - not least throughout Africa. There, much of the thin line of educated people will be destroyed before we have a cure or a vaccine. Lionel Murphy would have been alarmed, as I am, at the risk to civil liberties which panic and a few adventurous politicians may cause in many lands as demands are made for "tough measures" on AIDS. This terrible new development demonstrates that we are never entirely safe in our liberties. Even in democracies, liberty is a fragile thing. It can be swept aside by passion. Equally it can be eroded by uncaring people who are unmindful of how much easier it is to destroy freedom than to create and preserve it. That is why Lionel Murphy was such an important voice, consistent, vigilant for freedom and knowledgeable about its modern challenges. I have no doubt that his voice changed the High Court of Australia in many ways. It did so just in time for the acceptance of its role as the unquestioned centrepiece of our autonomous legal system.

#### THE DEATH OF PRIVACY

Recent banner headlines have announced a proposed widening of State police powers to tap telephones. Politicians appear nowadays to fall over each other on the promises of increased powers of official interception of telecommunications. Federal Parliament over recent years, under successive Governments, has enhanced the powers of such interception to such a point that nowadays few citizens in positions of responsibility act on the assumption that their telephones are not "bugged" by public or by private snoops. It is relevant to recall that the so called "Tapes" which

allegedly captured Lionel Murphy's voice, were secured by State police - 70 of them - illegally intercepting the phones of their fellow citizens. It has only to be said - 70 police, sworn to uphold the law, daily engaging in the organised breaking of it - to see what a nadir our country's respect for the Rule of Law had reached.

If American figures on the number of innocent people caught up in authorised telephone intercepts are correct, for every hundred warrants issued (and many more appear to be issued in the average year in Australia) as many as 12,000 different people are recorded engaged in as many as 68,000 conversations. The network of snooping enlarges. Inadequate legal checks are provided to protect the consequent invasions of privacy. Inadequate public accountability is required. No remedy is afforded to citizens whose private lives and thoughts are unnecessarily intruded in this way. Who would trust the telephone system now? In a continental country it is, of course, a necessity. Yet it is a necessity seemingly to be used with great caution lest an indiscreet remark, an indelicate word or a private thought shared with friends be lifted from an imperfect "leaked" transcript and emblazoned over the front page of national journals.

Who now speaks up for privacy in Australia? No national guardian exists in this country, as he does in other countries. The privacy protection proposals of the Law Reform Commission - in a manouvre of which Sir Humphrey Appleby would be proud - became ensnared in the Australia Card proposal. Lionel Murphy's legal travails arose out of a widespread disrespect for the plain letter of the law by people sworn to uphold the law. They

were indemnified. He was put on trial.

UNFORGIVABLE ERRORS OF FACT AND JUDGMENT

The media's part in Lionel Murphy's second last ordeal is taken apart in this book - not by a judge, wise after the events lecturing from the sidelines but by an experienced journalist. I understand that litigation has been threatened so I must be most circumspect: Garry Sturgess lists his criticisms of the media. They are there for the expert consideration of the members of this Club. I will not go into the detail of his charges of unforgivable errors of fact and of judgment. I must leave that to you.

Instead I want to ask why this denigration of our leaders is our most unique national sport? Why does it happen so often that we set out to destroy those who rise high in Australia. Is it a petty streak of envy attributable to the spitefulness of those convict days? Is it an intolerance of intellectuals and of people of ideas, so that only mindless, silent sporting figures and ockers can be the heroes "Down under"? Is it just a meanness of spirit that infects the Australian national character? Whatever it is, I consider that some sections of the Australian media pandered to it. Clawing and grasping at Lionel Murphy - they pulled him down without a care and, apparently, without a passing thought for his daily contributions over thirty years to a juster and kindlier society.

As the media in this country falls into fewer and fewer hands, its destructive potential is enlarged because in diversity lies the protection of freedom. The decision in one group to pursue this or that public figure - like the buying

hounds after the fox - will signal his or her destruction. English-speaking people have traditionally provided checks and balances for great power. Some such checks exist in media law - particularly in respect of the electronic media. But whilst there is scope for the errors of care and judgment of the magnitude which occurred in Lionel Murphy's trial by media, the plaintive call for the entire removal of the legal checks on the media in Australia must be steadfastly ignored. For those that sometimes rampage, there must occasionally be reminders of competing values. Values such as truth, fairness, fair trial, balance, judgment and privacy. Against the concentrated power of the media in Australia it seems that we cannot look to the political process to protect our fellow citizens. Only the judges, and juries of knowing citizens, will do so.

JUDICIAL INDEPENDENCE AND JUDICIAL COURAGE

And that brings me to my final point. I gave character evidence at Lionel Murphy's first trial. It is unusual for a judge in our country to do this. But it was a very unusual case. Even a judge on trial was entitled to place before his jury evidence of his good character. For my pains, I was attacked both in and out of the courtroom. But I am proud that I went there. I did so, not out of any high principle, but because he was my friend and he was in trouble and, as I thought, wrongfully accused.

I took the ever available occasion of a graduation address after his second trial and acquittal and when yet another commission of inquiry had been established, to point to the consequences. Unless the constitutional protection of the independence of judges was safeguarded by Parliament, the risk

was there that our judges will become cringing, pusillanimous, colourless figures - beaten into cowardly submission. I considered it disgraceful that a public call was made to everyone, anywhere, who had any complaint whatsoever against Lionel Murphy to come forward to that Commission. What a world is this in which complaints against the judges - any complaints - are positively provoked. It was a sad moment for the independence of the judiciary and for a fearless and courageous Third Branch of Government in our country.

Of course, Lionel Murphy was a strong man. He was not deterred. But I can tell you that there are many, without his background and driving spirit, who would have wilted under just a fraction of the public and private pressure which was placed upon him in the last years. He did not bend, because he saw, with historical accuracy, not only his own honourable place in our chronicle but also the institution of the judiciary which must withstand attacks of this kind. Once the attacks used to come from an overwhelming king or from an unrepresentative Parliament. Now they come from other quarters. But they must be withstood, just as in the past.

The bitterest legacy of the attacks on Lionel Murphy has been the development of a belief in some quarters in Australia that the judges are now fair game - that they can be belittled, repudiated and castigated for doing no more than their duty. A prime example was the recent attack by a State Minister on a court decision which he did not like. Confusing his own wishes with the letter of the law enacted by Parliament, he indulged an unhistorical and ill-judged denigration of the judicial office. Judges in Australia often have to do unpleasant and

even unpopular things. They are at the hinge where the power and authority of the State meets the citizens. To the extent that we pull down our judges and destroy community confidence in them, we run a terrible risk of damaging an institution which is central to our existence as a free society. I, least of all, would say that judges are beyond criticism and error. But attacks on judges generally (or on individual judges) should be measured by the understanding of the limits on their ability to answer back and the damage to community confidence which may be done when some of the mud sticks.

It may still be possible to redress a few of the wrongs done to Lionel Murphy. Judges, in their daily lives can stimulate their minds with his instruction from the law books. Ministers and legislators can draw courage and inspiration from his long list of achievements -collected and analysed in this book. And ordinary citizens can take heart from the fact that it still is possible in Australia for a small child at the local school to rise to the highest offices in the State and to do many good things on the way.

But the moral of this book remains, sadly, this. If you rise high in Australia - and especially if you set out to be a reformer - you run the risk of being pulled down. I launch this book happy in the knowledge that we are here in this place where the subject of our reflections today always felt at home and whose best values he faithfully defended. Lionel Murphy's ideas and restless spirit will live on, out there in our country, when his critics and detractors are completely forgotten.