

"Herbert Vere Evatt: Politician and Judge - A Centenary Reflection."

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### HERBERT VERE EVATT: POLITICIAN AND JUDGE - A CENTENARY REFLECTION

Peter Crockett, Oxford University Press, Melbourne, 1993, Contents and Acknowledgments i-iv; Text 1-305; Notes 307-373; Bibliography 375-380; Index 381-388; RRP Cloth - \$44.95.

Herbert Vere Evatt is undoubtedly one of the most important Australian lawyers of this century. He won so many glittering prizes. Distinctions at Fort Street High School in Sydney. Presidency of the Sydney University Union and a rare Doctorate in Law at Sydney University. Leading cases and early silk in the 1920s. A Justice of the High Court of Australia at 36 years of age. Federal Attorney General of the Australian War Cabinet in the 1940s. A leader in the establishment of the new world order, which followed the Second World War, culminating in his election as third President of the General Assembly of the United Nations in 1948-9. A champion of civil liberties in his victory against the legislation to ban the Communist Party - first in the High Court in *The Australian Communist Party v The Commonwealth* (1951) 83 CLR 1, and then in the triumphant referendum which he won against all odds. Chief Justice of New South Wales in the twilight of his years. Only the Prime Ministership of Australia, which he so avidly desired, eluded him. Born on 30 April 1894, this new chronicle of the life of Evatt by Dr Peter Crockett provides Australian lawyers with a highly readable reminder of this brilliant but flawed character. The book provokes this centenary reflection about him.

Evatt was an unusual character: with great depths, but terrible human weaknesses. Moreover, he was defeated in many of his ventures in the law, in politics, and in public life. His attempts to prevent the deportation of the "Irish Envoys" failed in 1923. He was unsuccessful in his advocacy in *Trethowan v Peden* (1930) 31 SR (NSW) 183 (FC). He failed miserably before the Privy

Council in the *Bank Nationalisation* case, despite (or perhaps because of) detaining their Lordships for a record 17 days during his argument. (See *The Commonwealth v Bank of New South Wales* (1949) 79 CLR 497 (PC.) His appeal, arising from his doctoral studies, for the classification of the Royal Prerogative during the mid and late 1930s was ignored - only to be revived in the context of recent proposals in Australia to establish a republic. His letter from the High Court to Menzies, war-time Prime Minister, and later his political nemesis - suggesting the appointment of an Australian representative in Washington, was rebuffed with scant acknowledgment. His leadership of the Australian Labor Party saw it split asunder, and cast into the political wilderness federally, for two decades. He was defeated, and even humiliated, by the Royal Commission into Espionage. His last years as Chief Justice of New South Wales were a pathetic failure showing the sharp decline of a once remarkable intellect.

Peter Crockett is not sparing in his analysis of "the Doc". His record contains the hurt criticism of many who gave him faithful loyalty, only to be rewarded with suspicion and accusation. The book is full of legendary stories of H V Evatt's personal failings. He was suspicious, often unattractive, unpleasant, awkward in unfamiliar company, and obsessed by fears of illness and intimations of mortality. Evatt is portrayed as a man with an "egocentric desire for power". His black moods and his growing isolation, born of paranoia, are all carefully recorded in this new biography.

Some of these strange features are traced to the early life of Evatt, where he saw the shocking effects on his mother of the loss of two of his brothers in France during the First World War. It was suggested that this led to a morbid concern about death and illness. His concern sometimes took on bizarre manifestations as Crockett recounts.

In February 1948, at the height of a Melbourne summer, he was appearing in the *Bank Nationalisation* case, before the High Court in

Melbourne. His behaviour before his former judicial brethren was distinctly peculiar. He began to display a morbid fear of catching cold and dying. This was the more remarkable because of the sweltering heat in the courtroom. One day, looking at the windows, he called for one of the clerks to shut them. Chief Justice Latham watched them being shut. But once shut, he sent his tipstaff to open them again. The process of opening and closing the windows went on for a time. But ultimately, Evatt relented, and sent for a rug. A large tartan rug was brought from Myers Department Store, wrapped in brown paper. Evatt undid the parcel on top of the Bar table, slapped open the rug, and wrapped it round his legs as he sat down. This would be an amusing story, except that it displays a peculiarity of the mind, which runs through almost every page of this book. Evatt lost the case before the High Court. See *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 (HC). It is astonishing that he actually thought he could persuade the Court that the intangibles of banking and finance were not part of "trade and commerce" within s 92 of the Australian Constitution. Other strategies might now succeed. But that argument was doomed from the start.

That is not to say that Dr Crockett, a freelance historian, with his PhD from Latrobe University, does not fully recognise Evatt's great contribution to national and international affairs, and his positive characteristics, which attracted a devoted band of supporters and admirers who stuck by him. Although he was a rather unattractive speaker, and given to digression and the kind of disorder that marked his personal and professional life, his intellectual gifts were undoubted. His academic work was exemplary. His incisive logic, brought to bear upon a problem, could produce a speech or written text of great power. He pulled these out of the hat, at moments when they were most important. Thus his speech to the Federal Parliament, condemning the departures from "British justice" involved in the anti-Communism legislation was as compelling as any heard in the old chamber. He insisted that it was the

way of our legal system to sanction people for their deeds, and not for their thoughts. This was not a new idea for Evatt. It was certainly not an idea embraced for momentary political advantage. As it turned out, it was probably highly perilous to him, and for the Labor Party, to take the stand he did. But it was a stand of principle, which reflected an abiding urge to defend justice, liberty, and freedom from oppression.

Those who want to read earlier contributions of Evatt, as a High Court Justice, to similar causes, can find them in *The King v Carter; Ex parte Kisch* (1934) 52 CLR 221, and *The King v Wilson & Anor; Ex parte Kisch* (1934) 52 CLR 234; and *The King v Fletcher & Anor; Ex parte Kisch* (1935) 52 CLR 248. The cases concerned the administration to Igon Kisch of the dictation test in the Scottish Gaelic language, as the means of keeping the Czechoslovak political refugee out of Australia. In the *Wilson* case, the High Court majority, led by Evatt, decided, remarkably enough, that Scottish Gaelic was not "a European language" within the *Immigration Restriction Act* 1901 (Cth). Only Justice Starke dissented. He and Evatt rarely saw eye to eye. Dr Crockett reveals that Starke, knowing of Evatt's dislike for tobacco smoke, took pleasure in blowing cigar smoke into his face. Not conduct designed to enhance the collegiality of the High Court. See C Lloyd, "Not Peace but a Sword - the High Court under J G Latham" (1987) 11 *Adel L Rev* 175.

Instead of taking Evatt's life chronologically, the author has selected a number of themes. Within these, he proceeds to examine Evatt's activities over the span of his diverse career. He starts with an introduction, which gives an outline of the subject's life's chief events. In the first substantive chapter, he offers an overview of Evatt's flawed character. There is then an attempt to evaluate it in a chapter entitled "A Failed Greatness". There follow examinations of Evatt's works and words, under such headings as "Authority", "Obligation and Diversity", "Innovation and Tradition", "A Personal Approach

to the Law", "Integrity", "Freedom and Reform", "Power", "Leadership in Schism", concluding with "Continuity and Decline".

This is an interesting and novel approach to a biography. To someone who keeps the main chronology in mind, it is stimulating, and allows a more intensive exploration of the subject than a mere chronicle might provide. On the other hand, it is disconcerting to come upon Evatt's achievements as a barrister in the 1920s, several chapters after we have left him writing important judgments in the High Court of Australia. I was sometimes left wondering whether, in his life of Evatt, Dr Crockett had not taken on some of Evatt's purported erratic and disordered brilliance. The book seems occasionally to leap from one theme to another, without a clear or apparently logical nexus. But perhaps these are the opinions of an overly orthodox reviewer, too long disciplined to the logic which clocks and chronological time impose on us all. The earlier biography of Evatt by K Tennant: *Evatt - Politics and Justice*, 1970 - follows the orthodox chronological sequence. In Evatt's case this has a particular power because the reader knows how the greatly gifted and powerful man will ultimately be brought low by failure, decline and mental decay.

As a lawyer, and a judge, Evatt was well before his time in his perception in the role of the law in responding to the changing needs of society. He referred to this in his farewell address to the High Court, when he stood down to return to politics, and to take a leading part in Australia's war effort. Long before that though, he was demonstrating his gifts in adapting the law to new knowledge, and new social circumstances. One of the cases of which he was most proud was his dissenting opinion in *Chester v The Council of the Municipality of Waverley* (1939) 62 CLR 1. The majority view in that case has "not worn well with time". See *Jaensch v Coffey* (1984) 155 CLR 549, 590. Justice Evatt's view is now accepted as preferable. But Evatt found the confines of his life in the High Court uncongenial. He probably found judicial

life, with the aspiration to neutrality, emotionally unappealing. Professor Geoffrey Sawyer, in a commentary embraced by Dr Crockett, observes:

*"He had an enormous wealth of legal learning, but intricate logical analysis of legal concepts was not his forte; he was not, as Sir Robert Garran used to say of Chief Justice Dixon, one of the great syllogisers. His forte was a feeling for the social revelations of law, for moulding doctrine, to developing needs and to the value of contemporary men ..."*

At a time of provincial nationalism, Evatt saw the future development of international organisations, and of international human rights law, in a way in which many Australian lawyers, jurisdiction-bound, found it difficult to comprehend. In this, certainly, he was ahead of his time

Perhaps Evatt was an early exemplar of the changing self-conception of the Australian judge, freed from the shackles of English authority, still enforced, in his time, by the appeals to the Privy Council in London.

Yet Evatt is certainly no legal revolutionary. He had a reverence for the law, and specifically for the way in which, after long constitutional struggles, "British justice" generally advanced and protected the liberty of the individual. According to Dr Crockett:

*"Evatt regarded the federal Constitution as a solemn instrument that was charged with a duty to respond to the national interest. He saw it as a technical although flexible statute at once bound and released by its language; it was a 'human' and humane document which represented the aspirations and needs of society; and it was an organiser and dispenser of power. It was to him the spiritual keeper of the people. For the Constitution was invested with the soul of the nation, a manifestation of the people's identities; it was, 'of the people while as a benevolent 'God-figure' it was also 'above' them. His advocacy of its widespread application even contained a preaching quality, as if his 'reverence' and zealotry were*

*fuelled by an assurance that this branch of the law was moral and would be a means to cure the world's ills".*

Naturally enough, this book recounts, in considerable detail, Evatt's political success and failures. In this area, the author strives to overcome a natural abhorrence to some of Dr Evatt's personal failings. He suggests that, throughout his life, Evatt was torn by antagonistic conditions, most notably an overwhelming desire for power, and the unpleasant characteristics which accompanied it, on the one hand, and a desire to use that power to resist oppression, confront conservatism, uphold a large measure of individual freedom and provide support for the disadvantaged in society. Dr Crockett traces this ambivalence back to the early battles which Dr Evatt fought with his formidable mother. He concludes:

*"He obtained psychological purchase on vital political and legal issues of the day as he continually tested liberty. In this he showed a need to be vexed by oppression, which gave identity and equanimity to his ambition. An outsider but not an individual out of his time, he was appropriate to his era, as an unappreciated visionary".*

Some will find this generally favourable conclusion astonishing, against the many faults of Evatt amply displayed throughout the book. To those faults, one can add the opinions of other recent writers, not so charitable as Dr Crockett. For example, Peter Ryan, in his recent *Quadrant* article on Manning Clark, tiring of his assaults on that subject, turned to Evatt, describing him as:

*"[The] miserably failed Labor leader. One must go back to Shakespeare's Iago for so authentic a model of treachery and envy ... It would be hard to think of a figure ever in Australian public life so politically evil and so personally odious, and the evidence is abundant".*

See *Quadrant*, September 1993, 21.



But the strength of Dr Crockett's book on Evatt is that it shows how the over-simplification of character for dramatic purposes fits ill the realities of a life in the law, and in Australian politics. Alas for those who seek a simple view of life, human beings are not so readily stereotyped. To call "politically evil" a leader who fought the *Communist Party Dissolution Act*, and, almost single-handedly, turned around a referendum running heavily for Menzies at the outset of the campaign, seems something of an exaggeration.

If I have a criticism of Dr Crockett's book it is that it fails to analyse, in sufficient depth, and at appropriate length, Evatt's fight against the anti-Communist measure. That was truly a struggle of heroic proportion. A great deal of the motive force behind it arose from Evatt's training as a lawyer, and specifically, his knowledge of constitutional history, and his reverence for the Australian federal compact of divided and controlled governmental power. Repeatedly, he asserted that the oppressive prohibition urged by Menzies envisaged a "blot" on the Constitution, which would stain it forever. It is to his credit that Evatt, the lawyer, saw this simple truth so clearly. He is joined by relatively few other lawyers of the time, although some young Liberal (Alan Missen) and Labor (James Staples) lawyers were exceptions. Most of the leading lawyers (Barwick, Taylor and Menzies himself) lined up behind the referendum. Evatt's defeat of the measure was probably his finest hour, and his greatest personal contribution to the Australian polity. More should have been made of this, for it helps a neutral reader to forgive a great deal, which is otherwise unappealing about this extraordinary man. Cf "H V Evatt, The Anti-Communist Referendum and Liberty in Australia" (1991) 7 *Aust Bar Rev* 93.

Menzies, the record-holding Prime Minister, a man of great achievement and a true Australian patriot, is now largely uncelebrated. But Evatt, so often defeated in his lifetime, and denied the greatest prize of Australian politics, remains a source of continuing fascination. Conferences and monographs analyse his international and national work, legal and political contributions.

As 30 April 1994, the centenary of his birth, approaches, it is likely that we will hear much more about this restless achiever. Dr Crockett's book provides insights into Evatt's achievements and failures, which are the more powerful because he has avoided calumny and panegyric, presenting Evatt to new generations, warts and all, for them to judge for themselves.