

*Lionel Murphy — The Rule of Law* by J. & R. Ely (eds) (Akron Press, Arncliffe, N.S.W., 1986) pages 1-312 (including index). Price \$17.95 (soft cover) ISBN 0 9590666 24, ISBN 0 9590666 32.

*The Judgments of Justice Lionel Murphy* by A. R. Blackshield, D. Brown, M. Coper, R. Graycar & R. Krever (Primavera Press, Sydney, 1986) Pages 1-332 (including index). Price \$29.95 (softcover) ISBN 0 9589494 33.

When Justice Lionel Murphy died on 21 October 1986, Australia lost one of its most prominent and individual jurists. It is true that history will judge his legal method and controversial career, as Chief Justice Sir Harry Gibbs has stated, but Justice Murphy has definitely made an impression on our present — he has been a leading figure in our *milieu* of expanding perceptions. Justice Kirby spoke for those of us who knew Justice Murphy only through his judgments when he said:

Where other lawyers were blinded in their search for legal principle by the dazzling jurisprudence of England, Lionel Murphy roamed over a wider field. His sources were deeper and even richer. They helped liberate his mind . . .

When lesser spirits were indifferent to injustice in the law, he spoke out with abundant humanity. He was an authentic oracle not for all it is true — but for the opinion of the tolerant, liberal, civilised and caring members of the Australian community.<sup>1</sup>

*Lionel Murphy — The Rule of Law* and *The Judgments of Justice Lionel Murphy* are edited collections of some of Justice Murphy's outstanding judgments; not in the formalistic style of N. H. Dooley's *The Judgments of Sir Owen Dixon*<sup>2</sup> but in a publicistic style befitting their inspiration. Production of these books commenced before Justice Murphy's death. When even after acquittal Justice Murphy was accused of impropriety, the editors sought to publicise his efforts to advance justice. Neither work suggests that the quality of the judgments determines the question of whether he was guilty of misbehaviour, but Professor Blackshield finds confirmation in the judgments of faith in Justice Murphy's character:

The more one appreciates the deep sense of institutional integrity pervading these judgments, the more improbable the recent allegations must seem.<sup>3</sup>

In their preface, Doctors Jean and Richard Ely present a very interesting, more personal biographical note drawn partly from interviews. It is interesting to consider Justice Murphy's educational background in science, and speculate about the influence of this international discipline on his wide-ranging jurisprudence. Professor Blackshield's note tends to concentrate on Justice Murphy's professional and political achievements. In the first chapter, 'Justice in the Democratic Mode', Doctors Jean and Richard Ely seek to place Justice Murphy's method in an intellectual tradition of 'the democratic mode'. Clearly judicial accountability requires description, explanation, argument, and address to the real circumstances and issues between the parties. However, in the argument of the authors there seems to be a regrettable circularity: the democratic mode is drawn from Justice Murphy and then applied to him to prove that he is within it.

Professor Blackshield's introduction concentrates on issues of civil liberties arising from the judgments. He points out the co-existence of Justice Murphy's undoubted commitment to institutions and his desire for the lawmaking process to ' . . . embody a genuinely radical perception of human welfare'.<sup>4</sup> To mediate this paradox, Professor Blackshield emphasises 'the strong legalistic basis' appreciated by the editors in Justice Murphy's judgments. More productively, Professor Blackshield produces statistics of judgments delivered by Justice Murphy between February 1975 and February 1985. In a mere one-fifth Justice Murphy presented a solitary dissent. As Professor Blackshield

<sup>1</sup> 'Lionel Murphy — Jurist and Man,' State Memorial Service, Sydney Town Hall, 27 October 1986. Reproduced from (1986) 19 *The Australian Journal of Forensic Sciences* 51.

<sup>2</sup> (1973).

<sup>3</sup> *The Judgments of Justice Lionel Murphy* p. xvi.

<sup>4</sup> *Ibid.* p. xvi.

notes, '[Y]et again, the image of Murphy as a radically non-conformist judge needs to be kept in perspective'.<sup>5</sup> We should appreciate that this one-fifth of his judgments represents 137 cases in 10 years: that is, about 14 every year, or more than one characteristic innovative, expansive and broad ranging juristic essay every month for ten years. This is an achievement in academic production alone, and it is a credit to his research and support staff over those years, and to his family.

Editorial text in the body of each of the books differs in style. Doctors Jean and Richard Ely have composed succinct introductory essays. These frequently draw comparison to other judgments of Justice Murphy and his academic works<sup>6</sup> to demonstrate a 'Murphy view.' Reference is also made to some academic publications of other authors. The essays generally summarize the judgments of colleagues hearing the case and perceptively describe the conflict of principles at the heart of the case. At times the style slips into questionable intellectualization, perhaps pedantry:

Either the legal order will be adapted by legislators and judges to those social changes which make hard cases hard, and thereby grow in strength and repute; or else the guardians of the legal order will resist the challenge to adapt, thereby inciting society at large to the Hobbesian nightmare of endless war between every man and every man.

General readers might not guess that the authors mean a state of extreme alienation or civil war and perhaps are alluding to the seventeenth century revolutionary period of English legal history in which Hobbes played a part. These aspects of the text suggest that while *Lionel Murphy — The Rule of Law* is directed to an audience which includes non-legal readers, it might not be directed to a general audience. At this point it differs from *The Judgments of Justice Lionel Murphy*, the editorial text of which is swift and direct; appealing to the general reader even if a lot of academic scenery is missed.

This departure of the books is reflected in editorial decisions. Professor Blackshield *et. al.* have routinely deleted citations to other decided cases (but not all), quotations from other judgments and sources, detailed analyses, qualifications not essential to main argument, 'and sometimes very elaborate discussions of other legal issues'.<sup>7</sup> The omissions have not been indicated by (. . .). The result is not unfair or misrepresentative. It has been done with sensitivity to enhance readability and the reader's understanding of the issues in judgment. Doctors Jean and Richard Ely have not taken this approach. References are retained and omissions indicated. These are equally valid but quite different editorial decisions. The former detracts from the wide reference and research drawn upon by Justice Murphy. The latter, it might be thought, risks intimidating lay audiences. For me, the breadth of reference and documentation of the judgments was a great strength of the intellectual commitment of their author, raising him from legal technician to the league of the jurist: but then, this might be regarded as scenery.

In the exercise of an obviously difficult editorial discretion, Doctors Jean and Richard Ely have not included some of Justice Murphy's landmark judgments and important High Court decisions which Professor Blackshield *et. al.* have at least noted. It is surprising that *Attorney General (N.S.W.) (ex rel. McLeod) v. Grant*,<sup>8</sup> *Southern Centre of Theosophy Inc. v. South Australia*<sup>9</sup> and *Church of the New Faith v. Commissioner of Payroll Tax (Vic.)*<sup>10</sup> have been omitted, considering the editorial importance attached to *Attorney General (Vic.) (ex rel. Black) v. Commonwealth*<sup>11</sup> which concerned the constitutional guarantee of religious freedom. *F.A.I. Insurances Ltd v. Winneke*<sup>12</sup> and *R. v. Toohey; ex parte Northern Land Council*<sup>13</sup> concerning judicial review of political decisions have been omitted. So too, *Hackshaw v. Shaw*<sup>14</sup> concerning landowners' duties to trespassers, and *Perry v. R.*<sup>15</sup> concerning similar fact evidence in a case of alleged multiple arsenic poisoning. There is no

<sup>5</sup> *Ibid.* p. xix.

<sup>6</sup> See for instance, 'The Responsibility of Judges' in Evans, G., (ed.) *Law, Politics and the Labor Movement* (1980).

<sup>7</sup> *The Judgments of Justice Lionel Murphy* p. xvii.

<sup>8</sup> (1976) 135 C.L.R. 587.

<sup>9</sup> (1979) 145 C.L.R. 246.

<sup>10</sup> (1983) 154 C.L.R. 120.

<sup>11</sup> *The State Aid case* (1981) 146 C.L.R. 559.

<sup>12</sup> (1982) 151 C.L.R. 342.

<sup>13</sup> (1981) 151 C.L.R. 170.

<sup>14</sup> (1984) 155 C.L.R. 614.

<sup>15</sup> (1982) 150 C.L.R. 580.

reference to *R. v. Pearson*; *ex parte Sipka*<sup>16</sup> concerning constitutional guarantees of the right to vote, nor the foreboding *Victoria v. Australian Building Construction Employees & B.L.F.*<sup>17</sup> questioning quasi-trials by tribunals other than courts.

While *The Judgments of Justice Lionel Murphy* presents 43 more cases than *Lionel Murphy — The Rule of Law*, it omits some very relevant decisions which Doctors Jean and Richard Ely have included. The absence of *A. v. Hayden*<sup>18</sup> and *Church of Scientology Inc. v. Woodward*<sup>19</sup> concerning the powers of security and intelligence organisations is regretted. Also omitted are *Hammond v. Commonwealth*<sup>20</sup> *Pyneboard Pty Ltd v. Trade Practices Commission*<sup>21</sup> and *Sorby v. Commonwealth*<sup>22</sup> concerning the privilege against self-incrimination in which Justice Murphy sought to develop a common law of human rights. *Griffiths v. R.*<sup>23</sup> is absent. In this case Justice Murphy questioned the efficacy of imprisonment in the light of international doubts. *Victoria v. The Commonwealth and Hayden*<sup>24</sup> examining the scope of the appropriation power to organise social welfare, and *Cocks v. Sheppard*<sup>25</sup> and *Taouk v. Bunt*<sup>26</sup> in which Justice Murphy considered the rights and duties of road users, are also omitted. Without criticizing the difficult discretions exercised very well in both editions, gains made in readability for general audiences have been lost by the bulk of 43 additional cases and the finer print employed to reduce it. In addition, the inclusion by Professor Blackshield *et. al.* of some technical subject areas, such as excise duties, possibly diverts attention from or camouflages more popular issues.

The organization of the editions raises the same issues. The organizational basis of the volumes is similar although Doctors Jean and Richard Ely strive for classifications such as 'Law and Social Change' while Professor Blackshield *et. al.* organize on a more legal disciplined subject basis. It is interesting to surmise other viable bases. After reading many judgments together and recalling the circumstances of the relentless accusations, one is tempted to suggest classification of judgments on the basis of great and powerful interests offended. Generally, *The Judgments of Justice Lionel Murphy* is better indexed and its table of contents better reveals the issues for which the cases stand. Commencing with 'Democracy And Fundamental Rights' has appeal and perhaps this edition is better organized, but then the scholarly posture of the book carries its own intimidation.

It is virtually impossible to rate one collection above the other, and given their divergent intentions, it would be unfair to do so. Both are highly commendable and do justice to the vital judgments which they present. It is regrettable that it took the controversy and trauma of the jurist's last years to inspire readily accessible publication of his judgments in cases such as *Attorney General (Cth) (ex rel. McKinlay) v. Commonwealth*,<sup>27</sup> supporting the equal value of votes, and *Neal v. R.*<sup>28</sup> reviewing the sentence of an Aboriginal man to six months hard labour for spitting by the Queensland Court of Criminal Appeal. This long overdue task has now been fulfilled with great skill and diligence by both *Lionel Murphy — The Rule of Law* and *The Judgments of Justice Lionel Murphy*. Let us hope that through publication these judgments will stand against attempts to pervert the course of history.

MURRAY RAFF\*

<sup>16</sup> (1983) 152 C.L.R. 254.

<sup>17</sup> (1982) 152 C.L.R. 25.

<sup>18</sup> (1984) 56 A.L.R. 82.

<sup>19</sup> (1982) 43 A.L.R. 587.

<sup>20</sup> (1982) 152 C.L.R. 188.

<sup>21</sup> (1983) 152 C.L.R. 328.

<sup>22</sup> (1983) 152 C.L.R. 281.

<sup>23</sup> (1977) 137 C.L.R. 293.

<sup>24</sup> *The A.A.P. case* (1975) 134 C.L.R. 338.

<sup>25</sup> (1979) 25 A.L.R. 325.

<sup>26</sup> (1976) 9 A.L.R. 383.

<sup>27</sup> (1975) 135 C.L.R. 1.

<sup>28</sup> (1982) 149 C.L.R. 305.

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*Family Law* by Anthony Dickey (The Law Book Company Limited 1985) pp. i-xxxvii, 1-642; select bibliography 643-659, index 661-685. Price \$60 (hard-back) \$45.00 (soft cover) ISBN 0 455 20307 5; ISBN 0 455 20308 3 (soft).

In the last few years Australia has seen the publication of an increasing number of text and casebooks dealing with its family law situation. This is not surprising given that the Family Law Act 1975 (Cth) has now entered its second decade. The development of case law, which inevitably suffers from an initial lag when new legislation commences operation, is now at a stage where academics and professionals can analyse and discuss the state of the law with 'some confidence.' (As no doubt practitioners dealing with the Family Law Act and its wide judicial discretion would agree, rarely can the subject be discussed with 'certainty'!).

One of the most striking aspects of this work of Dickey's is his valuable and interesting selection of historical material which he uses to lay a basis for a good understanding of the current law and the policies behind it. In Part I, the introductory section, he begins by drawing on ecclesiastical law and old statutes and cases to demonstrate to the reader the development of family law in Australia. In Parts II and III, the beleaguered area of constitutional powers and the jurisdictional aspects in the Australian federal system relevant to family law receives thoughtful analysis and uncharted areas to be drawn to the readers' attention. (See, for example, his comments on sections 119, 120 of the Family Law Act and section 111A of the Marriage Act 1961 (Cth)). Altogether, Chapters 3, ('Commonwealth and State Jurisdiction in Family Law'), 4 ('Introduction to the Family Law Act') and 5 ('The Family Court') give the reader a most satisfactory overview of our unique Australian system under the Family Law Act.

Part IV ('Marriage, Nullity and Divorce') contains, among other things, the author's novel but quite effective manner of addressing the question of validity of marriage. (As Dickey states at p. 96 'the law on what constitutes marriage is to a large extent the law on what does not constitute marriage'). Here too he briefly considers vexed problems such as the status of unions concerning homosexuals and transsexuals and issues of lack of consent due to duress, fraud or mistake.

The author's fascinating touches of history can be found again enhancing the subject-matter of Part V which deals with the consequences of marriage ('The Effects of Marriage'). Under this heading he comments on the doctrine of unity, civil liability of spouses, conspiracy and domicile. Further to his discussion in this Part on a wife's implied consent to sexual intercourse with her husband, readers should note that the Victorian Legislature was forced recently to act quickly to reverse the effect of a notorious 1985 case in the Victorian County Court in order to ensure that there would no longer be immunity for a husband from prosecution for rape or indecent assault of his wife where the spouses are living together.<sup>1</sup>

The issues of children within the family are canvassed in Part VI which contains chapters on legitimacy and the status of children, on guardianship and custody under the states and territories legislation and under the Family Law Act, and on the various adoption laws of the states and territories including the Adoption Act 1984 (Vic.).<sup>2</sup> Relevant to his discussions in this Part dealing with children are the recent Registration of Births, Deaths and Marriages (Amendment) Act 1985 (Vic.) (names and name changes) and the Commonwealth Powers (Family Law — Children) Act 1986 (Vic.) (particularly with reference to issues of maintenance, custody and access to ex-nuptial and step-children).

In Part VII ('Maintenance and Property') Dickey has *inter alia* comprehensively examined the complex area of property proceedings between parties to a marriage emphasizing the adamant stance of the High Court of Australia in *Mallet v. Mallet*<sup>3</sup> that each case must be decided on its own merits and that the Family Court's broad discretion must remain unfettered.

<sup>1</sup> Crimes Act 1958 (Vic.) s. 62(2) as amended.

<sup>2</sup> Some major provisions of which apparently some still have not been proclaimed. (The author noted in his 'Preface' that some of the legislation mentioned in his book had not actually been proclaimed at the time of writing.).

<sup>3</sup> (1984) 156 C.L.R. 605.