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LIONEL MURPHY - THE RULE OF LAW¹
The Hon. Justice Michael Kirby,
President of the Court of Appeal, Sydney

REMARKABLE ASSEMBLY - REMARKABLE CAREER

A remarkable torrent of words has flowed since the death of Lionel Murphy. I say remarkable, because the death of judges (even Justices of the High Court of Australia) is typically marked by a formal ceremonial sitting of the court, stylised speeches and private mourning by family and a few friends. Lionel Murphy was always unusual. In his death, as in so many things, he was consistent.

He died, as he had lived, in the midst of controversy. But then an amazing thing happened. An unprecedented and secular demonstration of appreciation of the man and his life took place in the Sydney Town Hall. Thousands of his fellow citizens walked silently, and with reverence, into that great civic arena. I have never before seen such an assembly of Australian leaders. The Governor-General and the Governor, the Prime Minister and most of the Cabinet, leading members of the Opposition, every remaining Justice of the High Court, most of the Judges of Appeal and many Supreme Court Judges, Heads of Departments, scientists, school children and citizens. Summoned by the majestic music of Sibelius, they came together. What were these Australian citizens - most of whom were there out of

love and not duty - trying to say about the life of this unusual man?

It was not that he was a saint. I agree with James McClelland that it is a serious mistake to indulge in his case in super human sanctification.² On the other hand, Lionel Murphy did show many spiritual values in his life. The greatest of them was a respect and love for his fellow man and woman. In a very real sense, his charity towards those who pursued him, sometimes with venom, was an object lesson in practising the injunction to forgive one's enemies and to turn the other cheek. Perhaps he acquired these basic spiritual values at his mother's knee - before agnosticism. Perhaps they were a natural part of his developed philosophy. Though he was a humanist and a secularist, he was definitely an evangelist with a mission. He had a vision of a better world, with kindlier people. It was because he demonstrated this vision in an unconventional and loving way that he made so many friends in his lifetime.

That is an unusual thing, in my experience, in a judge. Most judges, weighed down by burdens in their work, the pressure of decision making, the pain of denouncing untruths and sentencing criminals, tend to acquire a certain coldness and reserve. In a sense, these are the good manners and accepted conduct of the Club. Lionel Murphy never allowed the Club rules to dampen his passionate, generous spirited, loving qualities. We are so hard on our public figures in Australia, that we do not expect them to be sensitive and caring people. We are sometimes embarrassed when we see it. We even try to discourage it. In my experience of him, Lionel Murphy was a warm, outgoing, affectionate man. His affection spilled over

from the narrow prison of most people's affections: their family and its circle. It embraced a nation and was even extended to humanity itself.

So that, in my estimation, is the reason why Lionel Murphy's death left a special scar on our national psyche. It is the reason why so many genuine mourners - thousands of fellow citizens - at the Town Hall and beyond - came together to honour his memory. The knowledge of the trials he had gone through in recent years added an edge of horror to the untimeliness of his death: so soon after his acquittal at his second trial. But he was the sort of man who attracted passionate enemies as well as loving friends. Not all of the enemies were wicked or cruel people. Many of them simply disagreed fundamentally with his vision of society. His enemies tended to be those who, in the face of great technological and social changes, tried to cling the old familiar verities which, for good or ill, were crashing and shattering around them.

I sometimes spoke to Lionel Murphy about his enemies. He simply chuckled. It was a humour born of a supreme confidence that he had seen the Light and that they were simply barking up the wrong unlit tree. It was not the humour of condescension; let alone derision or contempt. It was just a well-meaning self assurance. This was yet another signal that Lionel was a kind of modern evangelist. As the old morality of what he called the "desert religions" continued to lose its grip on citizens, Murphy was constantly looking about for a New Ethic - a humanist morality which could take the place of the old.

The torrent of words about him continues. Time Magazine declared him to be "a champion of human rights". Sir Richard

Eggleston said it was difficult to assess him. He suggested he would be better known for his achievements as Attorney-General than as a judge.⁴ James McClelland called him a "great flawed character". Malcolm Turnbull, writing in the Bulletin suggested that history would look kindly on his achievements - more kindly than upon his critics, forgotten "because of their insignificance".⁶ The Melbourne Herald called his life "an Australian tragedy".⁷ Peter Costigan declared that he had left an enduring legacy and that his fundamental strength was that he never forgot his origins.⁸ B.A. Santamaria saw his life as the triumph of a "tyrannical domination of the nihilist 'New Class' which rules society today".⁹ I fear that Mr. Santamaria's criticism of him would probably have brought joy to Lionel's spirit. I am not so sure what his response would have been to the massive obituary in the London Times - the largest I have ever seen for an Australian. Mr. Murdoch's flagship and revamped Imperial Thunderer concluded thus:

"Murphy was a charming, gregarious man, whose zeal won him many admirers as well as making him plenty of enemies. His face, with its magnificent nose, was memorable to friend and foe alike."¹⁰

That is true. But it is his spirit that is most memorable. Fortunately that lives on in the law books and in memory - for friend and foe alike.

THE LEAST DANGEROUS BRANCH

This book, which I have to launch, is the most authentic record of Lionel Murphy's thoughts. Here are recorded the hours of toil upon which he laboured as a judge. With a politician, you can never be sure. His speech may have been written by a

brilliant speech writer. Nowadays, the Grahams Freudenberg can get into the cadences of the politicians - but often the words belong to speechwriters. Justice Brandeis once said that the reason for the high quality of the writing of the United States Supreme Court Judges was that they were the only people in Washington still doing their own work. Whether that is still true of that Supreme Court, after the Brethren, is unknown. But it is certainly still true of the Australian judiciary.

Judges have a wonderful opportunity to grasp, however fleetingly, at immortality. In the superior courts, their words are recorded and are handed down to be read by students, lawyers, citizens and judges in future times. Every week, I sit in court and hear, read to me, the generally wise and sensible, (though often outdated) judgments of men who fashioned their written sentences years ago. So it will be with Lionel Murphy.

Nowadays, few judges last. Their efforts are like wine - put down for a future time. Towering figures are sickled away by the passing years. Only a few of the bottles last really well. Even Sir Owen Dixon, who was next to a deity when I was at law school, is rarely read to the Court of Appeal today. The reasons are many. They include the great shift of judicial activity to interpreting legislation, upon which earlier judgments will be of relatively little use. They also include changing tastes and styles, and changing attitudes and problems in an increasingly technological society.

This temporary hold on immortality did not trouble Lionel Murphy. But what did trouble him was that his fellow citizens, who were affected by the judgments of the highest courts, knew precious little about what went on within their walls. The

courts are open. Judges perform most of their duties in public. They have been doing so for centuries. But few citizens attend. Some would not understand what goes on, even if they did attend. One of the basic problems is the acoustics of courts and the intimate whispering which passes between the priestly caste practising in those temples.

Lionel Murphy often complained to me of the lack of critical discussion of the judgments of the High Court of Australia. He lavished such energy and enthusiasm upon his judicial duties, that he was constantly disappointed at the apparent lack of scholarly and public attention. This especially anguished him where (as was so often the case) he was in dissent. He expected his dissents to enliven public appreciation of the clash of policies between himself and his brethren. All too often, it was not so. Judgments were delivered. They were scantily reported. And then they sank like a stone. Unremedied injustice caused actual pain to Lionel Murphy.

The judiciary has been called the "least dangerous branch of government" - when compared to Parliament and the Ministeries. But it is still a powerful branch. Our citizens know precious little about it. I share Lionel Murphy's concern at the lack of public appreciation of the importance of higher court decisions in Australia for the lives of ordinary citizens. I also share disquiet that the sharp controversies, and vigorous debates, disguised behind the elegant penmanship of the judgments, so often get passed over. They are unnoticed because to find them it is so often necessary to plough between the mountains of words, usually topped with a heavy lacing of precedent.

Years ago Sir Ninian Stephen, when a Justice of the High Court, urged that that Court, at least, should have a press officer with skills to summarise and explain important judgments. I entirely agree. Such an officer now exists in the United States and Canadian Supreme Courts. The cost would be miniscule. The increase in accurate copy about the decisions of the highest courts would more than repay a modest budget. It may be hoped that the High Court will pick up this idea. After all, we are talking about the third branch of Government. There should be much more news and analysis in the electronic and print media, of the decisions of the highest courts, particularly of the High Court of Australia. The people, who are bound by the law and deemed to know the law, have a right to be informed. That right goes beyond the legal profession and the readers of specialist journals. It goes beyond the right to attend court which precious few citizens exercise. Although there have been notable improvements in public communications, the courts themselves have a responsibility here which they have not, so far, discharged. Open justice means more, nowadays, than a court attendant pushing the doors open at 10.00 a.m.

THE SIX THEMES

Meanwhile, this book fulfills an important function. It brings the writings of Justice Lionel Murphy directly to the reader. It thereby provides an insight into his mind. There is some little analysis - not enough for my liking. Mostly it is the pen of Lionel Murphy. There are some clues as to the competing opinions of the other judges - usually to an opposite viewpoint. Again, there is not enough of that to my liking, for

the counterpoint of Lionel Murphy is better understood by the contrast of the writing and opinions of his judicial colleagues. But, for all that, this is an excellent, well compiled, analytically presented and well indexed compilation of this unique Australian judge's curial offerings.

At the Memorial Service I listed six virtues which took Lionel Murphy out of the class of the ordinary judge. Especially in aggregate, they put him in a class of his own. All of these virtues are demonstrated in the judgments in this book.

First, his internationalism is illustrated in the Franklin Dam case¹¹, with its reference to the development of a world heritage, protected by international law. It is also demonstrated in the Dugan case¹² relevant to the rights of prisoners - with its references to the busy international developments in human rights.

Secondly, his independence of England and of English cases is shown throughout so many judgments. Whereas most Justices appeal to the dazzling jurisprudence of England, Lionel Murphy continuously looked elsewhere - particularly to the courts of United States. His applauded decision in the McInnes case¹³ on the right to legal assistance when facing a serious criminal trial, was grounded ultimately in the ideas in the famous language of the United States Supreme Court in Gideon v Wainwright.¹⁴ His approach in Moffa's case to the modern definition of the "reasonable man" in multicultural Australia demonstrates his sensitivity to our changing society.¹⁵ He hated the colonial cringe, to some extent forced on Australia by the umbilical link to the Privy

Council. He took every opportunity to denounce it.¹⁶ It remains to be seen whether, the chord having finally been broken in 1986, true intellectual independence can at last be achieved by Australian jurisprudence.

Thirdly, his fascination with science and technology was demonstrated in many cases. In the Burns case, concerning confessions to police, he drew attention to the desirability of tape recording¹⁷ as a guarantee of fair police practices. He was particularly interested in and applied probability theory derived from his undergraduate days as a science student. This interest has drawn the praise of Sir Richard Eggleston.¹⁸ The obverse side of his fascination with science and technology was his passionate belief both in freedom of religion and freedom from religion. This shines through his decision in the so called DOGS case.¹⁹

Fourthly, his candid acknowledgement of public policy was at first unique. But it stimulated his fellow Justices. And there is no doubt that the High Court is nowadays much more frank in its reference to the policy choices which must inevitably be made by our highest court in developing the law. Nowhere was this more clearly demonstrated than in the series of taxation cases collected here - now so influential.²⁰ But it can also be seen in the Gallagher case on contempt²¹ and in the sheep case.²² It is in the last mentioned offering that is recorded his famous disdain for mechanical perception of the judicial role. Such an attitude to precedent was, he said, appropriate to a country whose population was mostly comprised of sheep.²³

Fifthly, he never allowed rules of procedure to blind him from the path of justice and principle. Whether it was in upholding trial by jury²⁴; upholding the right to legal representation in a major criminal trial²⁵, upholding the standing of citizens to enforce the Constitution²⁶ or reforming the law of animal trespass - he overcame precedents, inherited from earlier times, holding a robust view of the continuing duty of creativity of the common law judge.

Sixthly, he had an abundant humanity. It springs forth from virtually every page of this book. He defended the right of Mr. Neal to be an agitator.²⁷ He defended the rights of Aboriginal Australians before the courts.²⁸ He approached with great caution the law of conspiracy which ironically was later to enmesh him.²⁹ He cautioned against the dangers of circumstantial evidence in the Chamberlain case.³⁰ In the common law rights of accused persons, he was always a supreme traditionalist.

CONCLUSIONS

In the ceremonial sitting of the High Court to mark his death, Chief Justice Gibbs, in carefully chosen words, suggested that his judicial method was "one which did not command universal assent".³¹ What an understatement is there. The Chief Justice said that it would be left to history to evaluate his judgments. That is true of all of us.

I believe that history will appreciate Lionel Murphy's great importance in the contemporary High Court of Australia. By the force of his personality and ideas, he influenced others. He caused them to question their basic premises and sometimes to change them. We have lost a burr under the

national judicial saddle. But the judicial cloister will never be quite the same again.

It was my privilege to know Lionel Murphy. I worked with him as a barrister and as Attorney-General. As a judge, he often discussed with me issues of judicial policy and that was a great privilege which I have now lost. I was proud to give evidence for him at his first trial. I told him that, unhesitatingly, I would come again in his second trial if he so wished. He was a good and caring man who loved his family and his friends. And he had enough love left over for his fellow citizens and indeed for humanity.

This book does the service of bringing his thoughts to a wider circle of the people whom he loved and served. There is no force in the world so powerful as the force of ideas. I commend the editors and the publisher for bringing the ideas of Lionel Murphy, judge and international agitator, to an audience beyond the legal profession. Just as they solemnly came to his Memorial Service, I believe that they will soberly read these pages and appreciate even more the life and work of this very special man.

FOOTNOTES

1. J. and R. Ely, (eds) Lionel Murphy: The Rule of Law, Sydney, Akron Press, 1986, xx 307 pp, index (311-12), price cloth \$40.00, paper \$17.95 RRP. (hereafter "Ely").
2. J. McClelland, Sydney Morning Herald, 6 November 1986, 12.
3. P. Chubb, in Time, 3 November 1986, 21.
4. R. Eggleston, "A Defender of Agitators" in The Age, 22 October 1986, 13.
5. McClelland, *ibid.*
6. M. Turnbull, The Bulletin, 4 November 1986, 39-40.
7. The [Melbourne] Herald, 22 October 1986, 6.
8. P. Costigan, "Murphy's Brilliant Career", [Melbourne] Herald, 22 October 1986, 6.
9. B.A. Santamaria, "Lionel Murphy - a Personal Viewpoint", The Weekend Australian, 1 November 1986, 23. See also R. Ackland, "The Murphy I Knew", National Times on Sunday, 2 November 1986, 13.
10. "Mr. Justice Murphy: Controversial Australian Lawyer and Politician", The Times (London), 22 October 1986, 22.
11. Commonwealth of Australia & Anor v State of Tasmania & Ors (1985) 158 CLR 1; (1983) 46 ALR 625, 721; Ely 259.
12. Dugan v Mirror Newspapers Limited (1979) 142 CLR 583, 606; Ely, 139.
13. McInnis v The Queen (1979) 143 CLR 575, 583; Ely 54.
14. 372 U.S. 335 (1963); Ely 59.
15. Moffa v The Queen (1977) 138 CLR 601, 623; Ely 184.
16. Viro v The Queen (1977) 141 CLR 88, 158; Ely 174;
Bisticic v Rokov (1976) 135 CLR 552, 556; Ely 259.
17. Burns v The Queen (1975) 132 CLR 258, 265; Ely 44.

18. Eggleston, op cit n 4, ibid.
19. Attorney-General v Victoria (at the Relation of Black & Ors) and Black & Ors v The Commonwealth & Ors (1981) 146 CLR 559, 619; Ely 289.
20. Commissioner of Taxation v Everett (1979-80) 28 ALR 179, 188; Ely 199; Commissioner of Taxation v Westraders Pty Limited (1979-80) 144 CLR 55, 76; Ely 204.
21. Gallagher v Durack (1983) 152 CLR 238, 245; Ely 27.
22. State Government Insurance Commission v Trigwell & Ors (1979), 142 CLR 617, 642; Ely 157 ff.
23. L.K. Murphy, "The Responsibility of Judges" cited Ely, 173.
25. McInnis v The Queen (1979) 143 CLR 575, 583.
26. Attorney-General of the Commonwealth (at the Relation of McKinlay) v Commonwealth of Australia & Anor (1975) 135 CLR 1, 63; Ely 97.
27. Neal v the Queen (1982) 149 CLR 305, 310; Ely 123.
28. Koowarta v Bjelke-Petersen & Ors (1982) 153 CLR 168, 236; Ely 116.
29. R v Murphy (1985) 4 NSWLR 42.
30. Chamberlain v The Queen (1984) 153 CLR 521; (1984) 51 ALR 225, 265; Ely 36.
31. Sir Harry Gibbs as reported in Sydney Morning Herald, 6 November 1986, 1.