

MCCULLOCH PUBLISHING



MACMILLAN AUSTRALIA

LIONEL MURPHY - A RADICAL JUDGE

EDITED BY DR JOCELYNNE SCUTT

FOREWORD

MCCULLOCH PUBLISHING  
MACMILLAN AUSTRALIA

LIONEL MURPHY - A RADICAL JUDGE  
EDITED BY DR. JOCELYNNE SCUTT

FOREWORD  
Michael Kirby

Judicial hagiography

Judicial hagiography is a new industry in our Commonwealth. Until now, save for a few (usually dull) books on the lives of the more notable High Court judges, most members of the Australian judiciary were uncelebrated. They came upon the stage of public life, uttered their lines in muted undertones, and then departed, unnoticed by the great audience of public affairs. This cannot be said of the life of Lionel Murphy. He died in a year that Halley's Comet reappeared in the firmament, disappointingly inconspicuous. His life was like a comet. It was bright, dazzling, dangerous and disruptive to the settled universe. He liked it that way. That is doubtless why, within months of his death, four books have emerged about him. More are planned. His life was interesting. It had some failures and mistakes. But it also had many triumphs and lasting contributions to the common weal. His warm, generous spirited and optimistic personality attracted friends of like conviction. They were many. They were evident in the hundreds, from all walks of life, who soberly filed into the Sydney Town Hall to participate in the State Memorial Service summoned to

honour him. Of course, there were enemies, critics and denigrators too. Between the extremes, there were those (some of them represented in this book) who saw basic contradictions in his actions and philosophy but felt an irresistible attraction to his dynamic optimism and an admiration for his determination to get things done.

A basic contradiction?

A basic contradiction is suggested in a number of the chapters of this book. It deserves to be noticed at the very outset of any consideration of Lionel Murphy's life's work. Gordon Bryant points to the fact that Lionel Murphy had strangely little faith in popular referenda. He had much more faith in our ability to achieve constitutional and legal change in Australia by the techniques of legal activism. By going back to the language of the constitution itself. By finding in its words, which rarely command one answer only, solutions which would justify legal initiatives for the betterment of society. By determination and imagination on the part of law-makers.

The apparent clash between Lionel Murphy's principled dedication to democratic values and his assertion of the rights of unelected judges to effect reform according to their values and predilections is also noted by Professor John Goldring. It is illustrated by some of the initiatives recorded by Laurence Maher in his essay on Murphy the Attorney-General. As Jocelyne Scutt writes in her chapter on Murphy and Women's Rights, Lionel Murphy recognised the great power of the judges. Indeed, in Gazzo v. Comptroller of Stamps, he actually suggested that the scales would one day fall away when "the other branches of government and the public understand the real, as distinct from the apparent, role of the judiciary ..."

So here was a man who, by his origins and upbringing, his liberal instincts and his politics, was a committed democrat. He was, as Peter Hanks asserts, committed to the democratic process. Individual human rights, and respect for the essential worth of every human being, were at the core of his philosophy. He recognised, and participated in, the least imperfect system of social organisation which has yet been devised to maximise and advance those rights: Parliamentary democracy. Yet, as a judge, appointed to the nation's highest court for life, he had a golden opportunity to "do his own thing".

His was then the responsibility to interpret the Constitution, finding in the generality of its enduring language where power lay in modern Australia. As inheritor to 800 years of a judicial tradition which practised the "noble lie" of complete and absolute legalism, his was the responsibility, as a High Court Justice, to express and expound the constitution and the common law of Australia. The ultimate power of exposition, development and change of the law accorded to such a small group of unelected persons is essentially non-democratic in character. That such power can be undemocratically and conservatively used - to prop up special interests, to sustain established power, to perpetuate discarded morality and to endorse persisting injustice, was all too clearly recognised by Lionel Murphy. Why otherwise would he foresee the time when the "real" as distinct from the "apparent" role of the judiciary would become known? Yet if it was good enough for him to advance his perceptions of the constitution and of our laws, exercising the power of a judge in the nation's final court, would it not equally be the

entitlement of fellow Justices, exercising identical power, to do likewise? Given that those Justices have, in the past, typically been drawn from people with a background and attitudes quite different from those which Lionel Murphy had, might not his notion of judicial activism, unbridled, undermine democratic ideals? Might it not even frustrate the will of the people expressed in Parliament? Might it not tend to remove the protections for individuals which, at least sometimes, can be found in the neutral application of legal principles, checking the personal opinions of current judges?

Rational persuasion, over and over

The resolution of this apparent contradiction between Lionel Murphy's often proclaimed and sincerely held democratic ideals and the vigorous, self confident activism of Murphy the judge should be searched for in this book. One clue to the answer may be found in Neville Wran's extended vignette about Lionel Murphy the Barrister. From that pen picture emerges a man, who was also the Lionel I knew. Supremely self confident and self assured in his mastery of legal principle. Not plagued by troublesome doubts or obfuscating precedents. Convinced that actions speak louder than words. Motivated by a sense of urgency to right wrongs and not just to talk about reform. And above all dedicated to the notion that people are basically rational and can be persuaded to a point of view by argument if administered with a due amount of persistence.

Who were those judges, whom Neville Wran quotes, in their judgment in Re Bellanto, who said that "Mr. Murphy, senior counsel for the applicant emphasised over and over ..."? In that phrase "over and over", they neatly encapsulated an

unforgettable aspect of Lionel Murphy's personality. He was certainly persistent. He was dogged. He was even irritating, at times. He would gnaw at a point. He would take you to one side at a social function, when your only thought was how to escape the cocktail tedium. And his mind would share with you his anxiety about the failure of this judge or that to see what, to him, was crystal clear. If only he could get his message over - as a person, as a politician and later as a judge - he was convinced that others would come to see the truth, as he saw it.

This characteristic shows a deep conviction on the part of Lionel Murphy in the rational processes of human thought. He had an enduring faith in the logical exercise of political and judicial power and in the abiding honesty and decency of his fellow human beings. It was an optimism about humanity which not all of his friends could bring themselves fully to share.

Subversive or conservative?

A second explanation for the contradiction is possibly offered by Professor Goldring's comment. This calls attention to the limits which must be placed on the suggestion that Lionel Murphy was some kind of legal anarchist. Nothing could be further from the truth. As Goldring emphasises "he was an inheritor of and participant in the same legal culture as the other judges". For this reason, according to Goldring "it is not surprising that, in some ways, his approach was not markedly different from that of other members of the High Court". A similar comment is made by Professor Blackshield in one of the other books recently published, which collects Lionel Murphy's judgments in the High Court. The extent of his "radicalism" as a "radical judge" must be put in context. As

Blackshield points out he took part in more than 600 decisions in the eleven years he sat on the bench. He dissented in 137 of them, ie just over one-fifth of the total. That is a high proportion by Australian standards, and even by United States figures, where robust dissent is more commonplace than here. Yet it should not mask the fact that in the vast majority of cases, Lionel Murphy agreed with the other judges - often participating with them, writing a short concurrence or simply agreeing, without more. Brendan Edgeworth records the concern he expressed to university students - not that he was so often the dissenter but that he was so often with the majority! Blackshield's conclusion: "Towards the law's authoritative trappings, Justice Murphy is almost subversive; towards its fundamental principles and true institutional values, he is almost conservative".

Whatever the judgment on this assertion, the fact remains that Lionel Murphy's conviction that he could help achieve a better society - through Parliament, the Executive Government and the highest court, displays a public figure who was no anarchist. He did not reject the institutions. Rather he worked within them. He worked them to social advantage, as he saw it. It is important to understand this feature of Lionel Murphy's life, in order to put the extent and nature of his radicalism into its proper context. It is, of course, a very Australian context.

A third explanation of the suggested contradiction is offered by some words in the chapter by Peter Hanks. A commitment to the democratic process was Lionel Murphy's major preoccupation. He pursued it fully in his time as a Senator and

Minister. But his judicial activism also served the same ultimate end. By giving a broad and modern interpretation to the Constitution, he enabled the people's representatives in Federal Parliament to effect, without frustration, the national will of the Australian people, expressed through them. By giving a purposive rather than a strictly literalist construction to legislative language, he was not asserting his own function. He was simply ensuring that the will of the people, expressed in Acts of Parliament, would be capable of achievement. Nowhere is this insistence more clearly illustrated than in Richard Krever's chapter on Lionel Murphy's approach to tax avoidance. In the remaining field of common law, he encouraged development of the law, invention and reform because he regarded himself as an authentic voice of the Australian common people: with strengths and weaknesses which derived from his manifest humanness. This, I suspect, is the way Lionel Murphy would have resolved the suggested contradiction between his commitment to democracy and his unabashed activism as an unelected judge.

Murphy and Barwick

An interesting analogy is brought out in Laurence Maher's chapter between the lives of Sir Garfield Barwick and Lionel Murphy. Each was a self made man, educated in public schools. Each was a barrister turned politician. Each was Attorney-General in a Cabinet dominated by a lawyer politician. Each had an ambivalent relationship with his Prime Minister. Each was an achiever who got things done despite the grinding wheels of the bureaucracy. Each achieved reform of divorce law to reflect changing times. Although Lionel Murphy's was the

more radical, and still controversial reform in this regard, Garfield Barwick's was the first national divorce law. Each was ultimately appointed to the High Court. Each, one suspects, was bade farewell there with not a little relief by the party machine and Prime Minister. Each, in different circumstances, might himself have become Prime Minister. As a judge, each went back to the text of the Constitution. Neither was unduly troubled by the gloss which judicial predecessors had put upon its words.

True it is, their basic preconception about our polity and our society were notably different. But even these differences should not be exaggerated. I suspect that, through the values of each, ran a similar methodist-like belief in John Wesley's vision of a better world. For all that there were profound divergences in the goals they pursued and the values they cherished.

I once heard Barwick describe his life as divisible, almost neatly, into four different phases - the barrister, the politician, the minister and the judge. So too was Lionel Murphy's life. Their public careers ended together in the smallest, most powerful, most stable institutional college in Australia. Barwick, looking back said that the happiest times of his life were when he was a young barrister - dashing from court to court, learning his craft and getting into the mind of the judge by persuasion and advocacy.

The wellsprings of his motivation

I suspect that Lionel Murphy's happiest time was neither as a barrister nor as a judge. He was impatient. His persuasion was addressed to a wider audience. His concerns were macro, not

micro. His radicalism required many changes. He wanted to achieve them at once, urgently and the list of his achievements is now legendary. Matrimonial reform, trade practices law, a Law Reform Commission established, legislative drafting to be simplified, a national criminology institute, the freedom of information law inquiry set in train, a Bill introduced for a superior court which heralded the Federal Court of Australia, further restriction of Privy Council appeals, and so on. The list is long. It cannot be gainsaid that it is both remarkable and honourable. His achievements are collected in this book. When we look at other times, and at our own times, and we contrast our own achievements (and those of our contemporaries) with the achievements of this considerable man, the reflection on the comparison is humbling.

And it raises (or should raise) in the mind of every reader who opens this book some basic questions. What was it, in the life of this Sydney science graduate turned barrister, that inspired him to throw off the blinkers and bridles that generally come with the wig and silk gown, as part of the accoutrements of legal office? What was it in the class room at Randwick Public School, or at his mother's knee, that inspired and motivated this dedicated activist and successful reformer? What was it in his make-up that sustained his optimism, when all of the constitutional, institutional, Parliamentary, bureaucratic and social pressures pushed him in the opposite direction: to inertia, to inactivity, to accept the status quo? Doubtless as with the motivations of all of us, the answers to these questions are long and complex. Some fellow Celts would doubtless say that one answer was genetic: a kind of turbulent

larrikinism that tends to be a feature of many of the descendants from that rain swept island off the coast of Britain. Others would say it was experience: the small boy in a public school, seeing others less gifted and less privileged for whom he had respect and for whom he always felt a sense of responsibility. So when he gained office he wanted to do good and noble things and to do them quickly because he realised, only too well, the dominance in Australia of the forces of inaction.

Still others would ascribe his abiding optimism to that early training in science. Even in the nuclear age, scientists tend to be supremely confident that they are on the high road which leads ever upwards to greater knowledge and a clearer understanding of reality. Lionel Murphy never quite threw off the enduring optimism of the scientist. He never embraced the cold cynicism or tolerance of injustice which can sometimes result from a lifetime in the law.

Love, optimism and a sense of urgency

Still other observers will ascribe the well spring of his life as love. Lionel Murphy had that precious emotion in abundance. He shared it generously. With him, it was not confined to the narrow circle of his family: the prison of the love of most people. Nor was it confined to a circle of attractive people - though he was gregarious and was often surrounded by them. In his case, the warmth of his affections stretched out, as Neville Wran points out (and as I can aver) to young colleagues whom, tirelessly, he would help and encourage. It extended, as Gordon Bryant shows, to his political friends and foes. As Laurence Maher demonstrates, it

certainly embraced the national bureaucracy which worked with him and which he cajoled into a new and unfamiliar sense of urgency, importance and relevance. Jocelynn Scutt shows how it extended too to people not blessed with a stable family life and was especially sensitive to the disadvantaged women and children of our society.

Marcus Einfeld shows how it embraced a subject matter even larger than the Australian nation. For Lionel Murphy, though a nationalist, was an internationalist too. His concern for human rights was not confined only to the human rights of Australians. His initiative in the World Court, to challenge the French nuclear tests in the South Pacific, was a characteristically bold and unconventional step taken in defence of a world legal order. At stake was, ultimately, nothing less than the future of humanity.

The definition of all of the considerations which influenced Lionel Murphy's life must await further analysis. All that can be offered in this book is a series of perspectives of his life and work. The chapters are, as it were, the reflections of a diamond. To understand the light from within, which is the source of the fascination of this particular diamond, we must await a biography. Material there is for such a biography, for his fortunes rose and fell and rose again.

Meanwhile, this book will do the public service of collecting perspectives of the achievements of a notable and controversial Australian. His life can stand at least for this much. Given the right person and opportune conditions, a determined reformer can use the institutions of Australian

society to effect change for the better. He or she can do so in an entirely constitutional way. The reformer in Australia needs no resort to guns. The enemies are mainly inertia, complacency, greed and selfishness. The institutions for change are there, beckoning. They can be found in Parliament, in the bureaucracy, in the Cabinet room, in the courts, in the trade union movement, in the media and in society's countless groups. For all the weaknesses of our society, we can still produce public figures who translate idealism and love into action and reform. That is one lesson that emerges from a reflection on the life of Lionel Murphy. And it is a message of optimism: a quality which he had in abundance to the very end, and which he shared with us.

Court of Appeal, Sydney

M.D. KIRBY

17 March 1987