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M.D. Kirby

It is not quite true to say that you either loved Lionel Murphy or hated him. But his reforming zeal, his idiosyncratic style and his frequent success did tend to polarise people. Yet not long after his appointment to the High Court of Australia, I saw evidence, in unexpected quarters, of ambivalent attitudes towards him and his novel judicial style. A rather conservative judge of the Victorian Supreme Court was surrounded by barristers, anxious for his good opinion. They denounced Lionel Murphy's judgments. Too short. Not analytical enough. Swept away centuries of precedent. Unlawyerly. "Time will tell", said this wise Judge, since dead. "If his legal principles have internal strength, they will gain ascendancy. Ideas have a tendency to do this".

Whilst this remark was still fresh in my mind, I attended a Sydney judicial dinner party. Another guest was one of Murphy's brother Justices on the High Court. (There were no sisters then). The Sydney judges - as if embarrassed by this renegade rebel judge from Randwick - apologised for him, with downcast eyes. "With the possible exception of the Chief [Sir Garfield Barwick], Lionel is the quickest of us all to see the

essential point of a case in argument. He goes straight to the heart of the matter", said his colleague. There followed an embarrassed silence.

These two books, published so soon after the death of Lionel Murphy, illustrate these anecdotes. The late judge's writing style is certainly atypical in our judicial tradition. Absent is the copious reference to precedent - especially English precedent - for which he had little time. He once said that the doctrine of precedent was "eminently suitable for a nation overwhelmingly populated by sheep". Absent also, as a consequence, is the need to tread the usual meandering judicial path with its milestones marked "neutrality" and "logical consistency". Where issues of important principle were concerned, his judgments demonstrate only the neutrality of a passionate and committed man. He was dedicated, in Tennyson's words, to "sweeter manners purer laws". His consistency was not that of analytical reasoning. It was of his judicial philosophy. It permeates virtually every judgment. It is therefore reflected in virtually every page of both these books. Psychologists tell judges that none of us can escape our preconceptions. Lionel Murphy disdained any pressure to disguise his world view. Thus he wrote simply. Hence the popular appeal evidenced by these two books.

The more substantial of them is that edited by Professor Tony Blackshield and his colleagues. It records the fact that in virtually ten years of active participation in the High Court, Lionel Murphy took part in 632 decisions. In 123 cases he made no separate statement of his own, joining with other Justices. In 105 cases he simply agreed. Thus, he left just 400

cases where he wrote a separate judgment. He dissented in 137 cases in all. This fact prompts Blackshield's comment that his image "as a radically nonconformist Judge" needs to be kept in perspective. In nearly 80% of the cases, he agreed with his colleagues in the result. It is not the quality of dissent that marks him off from other judges whose writings are sadly unknown outside the legal circle. Nor is it an indifference to legal principle. If he could discover an apt case in the United States Supreme Court, it would usually find its way into his judgment. His originality and uniqueness is rather to be found in the uncluttered brevity and directness of his writing style. For this reason his ideas are likely to have a powerful and continuing influence. Through the next generation of lawyers, skimming the tedious law books in law school, they may yet reach their ascendancy.

Each book seeks to classify Murphy's leading cases into fairly predictable categories - democracy and fundamental rights - criminal process and trial by jury - federalism - tax avoidance - marriage - the English connection and "the colonial cringe". Inevitably, the core collection of leading judgments is basically the same in each work. Although organised in differing ways, each collection illustrates six important themes which permeate Lionel Murphy's High Court judgments. The first is his spirited internationalism. This is demonstrated in many cases, perhaps best of all in the Franklin Dam case where he upheld federal power relying on an international treaty. He frequently called on the development of international law in support of Australian law. Although he was a nationalist Australian, he was one of the first Australian lawyers to

perceive the important and urgent development of a harmonious world legal system in the nuclear age.

Secondly, there was his independence of England whose ancient jurisprudence continues to dazzle most other Australian lawyers. His now famous dissent in the McInnes case, where a prisoner was forced to defend himself in a serious criminal trial because his lawyer did not turn up for want of funds, drew on the famous language of the United States Supreme Court in Gideon v Wainwright. Murphy hated the colonial cringe. He took every opportunity to denounce what he saw as an inhibiting link with the Privy Council in London and to look to wider sources.

Thirdly, he was intrigued by science. His first University degree had been in that discipline. He never quite escaped its fascination. His judgments frequently refer to a scientific solution to legal problems. Tape recordings should replace disputes about confessions to police. Probability theory should be used to help resolve disputed versions of events.

Fourthly, he was one of the first judges to acknowledge candidly the influence of public policy issues in resolving evenly balanced legal questions. For example, his new attitude to tax avoidance, in a series of decisions, ultimately carried his brethren with him. This reversed decades of judicial protection for the wealthy, for whom tax paying in Australia was sometimes to become an option.

Fifthly, whilst holding to a robust view of the continuing duty of creativity of the common law judge, he never waived from orthodox adherence to the principles in the

criminal trial. Long before he became himself enmeshed in criminal proceedings, he was upholding trial by jury, declaring the right to legal representation in major criminal trials and stressing, as he did in the Lindy Chamberlain appeal, the central importance of the presumption of innocence to our criminal procedures.

All of these themes are brought out in both books, as is the sixth. This was Lionel Murphy's abundant humanity. He defends the right of Mr. Neil to be an agitator. He defends the rights of Australian Aborigines to come before the courts. He cautions against the dangers of circumstantial evidence. He upholds the legal standing of citizens to enforce the Constitution.

One can criticise each of these publications in various ways. The Elly book, which was the first to be released, lacks an adequate introduction though it has an elegant foreword from Manning Clark. Its index is woefully inadequate. Professor Blackshield and his colleagues have provided seven pages of introduction, but this is also hopelessly insubstantial. At least their index is good. Their layout of the cases, with introductory comments to each case, provides a much better access to Murphy's judicial words that follow.

For all this, presenting Justice Murphy in isolation from his colleagues may do a disservice to him and to them. It fails to demonstrate, by contrast, the simplicity of his style - a quality which he regarded as essential in the nation's highest court. And to provide the dissents without the majority is like playing only the violin piece of a Schubert sonata. It is exquisite and passionate. But listened to in isolation one misses its contribution to the harmony of the whole.

These criticisms said, it will be no bad thing if a wider lay audience is taken by these books into the powerful world of our Federal Supreme Court. There may be no shouting there as there is across the rose garden in Canberra, in the other citadel of democracy. But as these collected judgments show, we ultimately trust our judges to resolve vital issues which help shape the very nature of our society. Analytical and evaluative scrutiny of the contribution to our law of Lionel Murphy lies in the future and in further books. In the meantime, these two collections will take his ideas out of the legal cloister to a wider world where, one suspects, they will be rather more appreciated.

A.R. Blackshield, David Brown, Michael Coper and Richard Krever (eds) The Judgments of Justice Lionel Murphy, Primavera Press, Sydney, 1986.

J. and R. Ely (eds) Lionel Murphy - The Rule of Law, Akron Press, Sydney, 1986.

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