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The Judgements of Lionel Murphy, Edited by A R Blackshield, David Brown, Michael Coper and Richard Krever
Primavera Press

Lionel Murphy: The Rule of Law, Edited by Jean and Richard Ely
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The Judgments of Lionel Murphy, Edited by A.R. Blackshield, David Brown, Michael Coper and Richard Krever, Pages i - xx, 1 - 324, Index 325-332, 1986, Australia: Primavera Press, Sydney. PRICE: LIMP $29.95.

Lionel Murphy: The Rule of Law, Edited by Jean and Richard Ely, Pages i - xx, 1 - 310, Index 311 - 312, 1986, Australia: Akron Press, Sydney. PRICE: CLOTH $40.00, LIMP $17.95

These two books, published soon after the death of Lionel Murphy, illustrate his unique qualities as a judge. As every lawyer knows, his writing style was quite atypical for 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. His consistency was not that of analytical reasoning. It was of his judicial philosophy. That philosophy permeates virtually every judgment. It is therefore reflected in virtually every page of both these books. Psychologists tell judges that none can escape their basic preconceptions. Lionel Murphy rejected pressures to disguise his world view. Thus he wrote simply. Hence the popular appeal, evidenced by these two books and by others on the way.

The more substantial of the books is that edited by Professor A.R. Blackshield and his colleagues. It records the fact that in virtually 11 years of active participation in the High Court, 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 dissents that mark him off from other judges whose writings are virtually 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 law books in law school, they may yet reach their ascendency.

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 internationalism. This is demonstrated in many cases, perhaps best of all in the Franklin Dam case, (1983) 57 ALJR 450, 505, 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, he followed Latham, Dixon, Evatt, Spender and Sir Kenneth Bailey as an Australian lawyer who perceived the growing importance of international law - a development made more urgent by the needs of the post nuclear, technological age.

Secondly, there was his independence of England whose jurisprudence still largely continues to prevail in Australia. For example his now famous dissent in McInnes v The Queen (1979) 143 CLR 575, 583 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 372 US 335 (1963) in rejecting the more complacent approach of Anglo Australian law.

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 a legal problem. For example, in TNT Management Pty Ltd v Brooks (1979) 53 ALJR 267, 270 he even urged that probability theory 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 in resolving evenly balanced legal questions. For example, his controversial

attitude to tax avoidance, in a series of decisions, ultimately carried his brethen to a similar conclusion.

Fifthly, whilst holding to a robust view of the continuing duty of creativity of the common law judge, he never waivered from orthodox adherence to principle in the criminal trial. Long before he became himself enmeshed in his own criminal proceedings, he was upholding trial by jury, declaring the right to legal representation in major criminal trials and stressing, as he last did in the Chamberlain appeal (1984) 58 ALJR 133, 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 humanity. He defends the right of Mr. Neal to be an agitator, (1982) 149 CLR 305, 310. He defends the standing of Australian Aboriginals in the Onus case (1981) 140 CLR 27, 43. He cautions against the dangers of circumstantial evidence in the Chamberlain case. He upholds the legal standing of citizens to enforce the Constitution in McKinlay (1975) 135 CLR 1, 63 and in the ACF case (1981) 146 CLR 493, 553.

One can criticise each of these publications in various ways. The Ely book, which was the first to be released, lacks a satisfactory introduction, although it has an elegant foreword written by Professor Manning Clark. Its index is very limited. Professor Blackshield and his colleagues have provided seven pages of introduction, but this is also insubstantial given the subject. On the other hand, the index to that book is very good and its layout of the cases, with introductory comments to each

case, provides a better access to Murphy's judicial words which 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 extreme simplicity of his style - a quality which he regarded as essential in the nation's highest court. 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, it may at times seem strident and one may miss 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 Parliament. 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 may be rather more appreciated.

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