LIONEL MURPHY - BOLD SPIRIT OF THE LAW

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High Court Judge Lionel Murphy died a year ago. Earlier this month Professor MARK COORAY's critical review of his work as a High Court judge was published in The Age. Last night Justice MICHAEL KIRBY delivered the inaugural Lionel Murphy Memorial Lecture for the Lionel Murphy Foundation in Sydney. In this edited version of his lecture, Justice Kirby defends Lionel Murphy against Mark Cooray's criticism of him as "the democrat who overruled the people."

LORD DENNING once classified judges as "bold spirits" and "timorous souls". He put himself, naturally enough, in the first category. So too he would have catalogued Lionel Murphy. But Murphy was no revolutionary or anarchist. He worked within our institutions. He did not stand outside our institutions. From the start, he joined them. He sought office in them. And offered his creative spirit to them. In fact, his life is a complete negation of totalitarian indifference to democracy. Yet, as I shall show, this is a mythology which is now being spread. It must be answered.

The facts give the lie to the accusation. His daily service in the courts of law during his years as a barrister involved the discipline of working within established institutions whose history could be traced back 800 years. Not much room for the revolutionary there. His period as a senator and member of the Federal Parliament saw him at work in enhancing the Parliamentary institution. If anything, he is now blamed for so strengthening the Senate as to give it delusions of grandeur which the Executive Governments that come and go would prefer it did not have.

True it is, in his work as a Minister he showed a certain impatience. So much was there to be done. But after years in Opposition, his powerful mind and ample determination had an agenda. It was coherent and well thought out. It was fully exposed to the people and was part of the mandate of the Government elected in December 1972. Yet the list of achievements is not that of a revolutionary. It is that of a democrat, using the institutions of democracy to accomplish a political program.

Then came the years in the High Court of Australia. Those in this audience who do not know should be told that the life of an appellate judge is arduous and intellectually taxing. It is as if you are a swimmer cast adrift in rough seas. The waves of reserve judgment come crashing down upon your head. Every so often you believe you can perceive a still tide, perhaps even land ahead. But then more waves threaten to swamp you. Usually the revellers and merry-makers on the islands about you are totally ignorant of

your predicament. They do not care about the contribution to humanity involved in your valiant struggle. I am sure it was so for Lionel Murphy. He was not, by his nature, a disciplined, monkish man, well tuned for a lonely struggle amidst the ever-threatening waves. Moreover his companions in the water were not always of his type. In the distance he could hear the merry fiddler and the sound of parties, bold achievements and fun. But he kept swimming to the very end - partly because that was vital for survival, partly because he came to see the intrinsic value of the effort.

TEN "SINS" OF JUSTICE MURPHY

In the Age earlier this month there appeared a full-page feature article, graced by a Spooner cartoon titled "The democrat who overruled the People". The cartoon shows the unmistakeable visage of Lionel Murphy tearing up a rather thick and ancient book - presumably our written laws and constitution. The accompanying text is an attack by Associate Professor Mark Cooray of Macquarie University upon the portrayal of Lionel Murphy as a "democratic judge". On the contrary, Cooray's assessment is that Murphy was fundamentally undemocratic. The tone of the article is as polemical as the allegations are surprising. It finishes with a suggestion that the attempt to "deify" Murphy is a symptom of a "totalitarian trend" to suppress rights of free speech and expression in Australia. It is said that this trend manifests itself in the stifling of debate and in personal attacks against those who have "the temerity to question absolutist trends".

These are Cooray's accusations.

- Murphy died under a cloud of "unresolved charges".
- He suffered from intellectual vanity.
- He was too busy making new law instead of saying what the law was.
- He wrongly usurped the liberal banner.
- He distorted and manipulated the common law.
- He was inconsistent in dealing with the rights of citizens.
- He was a centralist, given to "abdicating his constitutional duty".
- He exhibited totalitarian tendencies.
- He was an ideologue of minority values.
- He was a political judge.

Naturally I would defend Professor Cooray's right to put forward his point of view. But he cannot immure himself from the criticism of his ideas by warning off those who seek to answer his charges by alleging that they are part of a "totalitarian trend" or guilty of personal smears. I say nothing of Professor Cooray. But I contest his assertions about Justice Murphy's philosophy. They are fundamentally flawed and so should be exposed.

UNRESOLVED CHARGES

The first accusation is that Lionel Murphy's "untimely" death left unresolved a number of charges brought against him.

That adjective "untimely" appears, in the light of all that follows, a trifle unconvincing. But let that pass. Let pass also the fact that the Parliamentary Committee and the due process of law in our courts had found Justice Murphy not guilty of the charges brought against him. In these circumstances the reference to allegations of misconduct "left unresolved" by his death may seem somewhat unjust to him. What are these unspecified allegations? Let them be spelt out, lest the casual reader forget the findings of the Senate Committee and the verdicts of the juries at the trials.

Lionel Murphy himself cautioned, in Darby's case, before he himself became embroiled in the criminal law, against undermining of the authority of a jury's verdict as a symbolic means of closing the chapter on a criminal prosecution. Unless a "not guilty" verdict were treated by society as equivalent to a public affirmation of innocence, the presumption of innocence would be set at nought and the value of a public criminal trial would be diminished. Vague and unspecified charges leave a stain on reputation. Lionel Murphy was cleared by a Parliamentary Committee and by his trials. Cannot it rest there?

INTELLECTUAL VANITY

Then it is said that Murphy was "the last person to hope that his views would die with him". The "zealous campaign" of his followers to keep "his philosophy alive" is portrayed by Professor Cooray not as the bid by those who share Lionel Murphy's views to argue for them in the marketplace of a free society, but as something sinister. Only other views - perhaps Professor Cooray's views - can enjoy the privilege of immortality. But why should that be so? Why is it not the very definition of a free society for those who hold to certain views to argue for them before their fellow citizens? That, of course, is possibly the greatest, but unmentioned, sin of Lionel Murphy. There is nothing so powerful as ideas, once unleashed. Novel ideas especially can, by their novelty, attract vigorous supporters, struck by their unexpected attractiveness. So it is in the Judgments of Lionel Murphy. His views on tax avoidance were novel when first propounded. So were his views on the constitutionality of statutes or on a Federal common law. So too were his notions about the Constitution. Our fundamental law may be in writing. But it is one of the least read documents in the nation. Lionel Murphy used to jest that he kept it by his bedside. Certainly he saw in the written lines (and between them) more than some others of more orthodox pursuasion.

CREATING NOT DECLARING LAW

What was unique about Lionel Murphy, the judge, was the frequency with which he propounded dissenting views with opinions reflecting the need for reform of the law.

He dissented in 137 out of 632 decisions in his 11 years on the bench. This figure is high by Australian standards, and even by United States' figures. But his lament at the end of his life was that he did not dissent enough! He was concerned by the extent of "concurrence" not the measure of agreement.

His "brooding spirit" remains for future instruction in his dissents. They may come, like the earlier dissents of Justices Isaacs and Evatt - and to some extent Justice Dixon - to shape the future development of our law. That law is, pace Professor Cooray, not set in stone. It is not vanity for a judge to hope that his ideas may shape the future. This is the very cornerstone of the judicial duty fearlessly to state one's opinion and not simply to go along with the opinions of colleagues for the sake of peace, an easy life or conformity. In adhering to his ideas, putting them on paper and offering them up to the future, Lionel Murphy was doing no less than his judicial duty. It is not an excess of zeal for those who share those ideas to remind others of what was written. Those who reticulate such ideas are exercising no more than their democratic privilege.

'LIBERAL USURPER'

Professor Cooray also asserts that Justice Murphy's legal philosophy involved a "usurpation of the liberal credentials" by one "who professes humane concerns, but (is) fundamentally

"absolutist". It is here that the critic comes to the nub of his objection to Justice Murphy, the judge. He is "a judge who takes it upon himself to ascertain and implement the wishes of the people, bypasses democracy and, in effect, sets himself above democracy".

In fact, of course, Lionel Murphy simply practised openly what has for many years been the orthodox wisdom of the common law. This is that the judges of our system (particularly in the ultimate court), necessarily make laws. Lord Reid gave this reality (long taught in Australia by Professor Julius Stone) the accolade of respectability in 1972. He denounced, as a "fairytale", the old theory that judges merely "find" and "declare" the common law - which is always there to be discovered, if only you have the password.

Lionel Murphy certainly had an activist view of the role of the judge. In many decisions he demonstrated his opinion that the common law was a living instrument apt to permit judges in the highest courts to adapt the judge-made law, inherited from an earlier time, to the needs of the present time.

What judges may do, they may surely undo. What judges of yesterday have denied, the judges of today may grant. The mistake of the opponents of judicial creativity, such as Professor Cooray, is that they would have the wisdom of the judges written in another place, and in other times, frozen forever. The common law which we have inherited in this country is a living, growing, changing and adapting thing. The inclination of judges to adapt it may vary from judge to judge.

With the termination of Privy Council appeals, which Lionel Murphy foresaw, Australian jurisprudence was at last released from the apronstrings of England. Insusceptible to reversal, the High Court of Australia became the ultimate expositer of the common law of this country. This release altered its role. No-one saw that fact more clearly than Lionel Murphy. Now, it is commonly accepted.

DISTORTION OF THE COMMON LAW

The next sin suggested by Professor Cooray is that Murphy, far from being in those footsteps had "contempt for the common law". His jest that "the doctrine of precedent ... (is) a doctrine eminently suitable for a nation overwhelmingly populated by sheep" is solemnly paraded by Cooray as an example of the way in which Murphy "misinterpreted, distorted and misused (the common law) for his own ends".

The difficulty with this view is to be found in acceptance of its premises. It assumes that the common law is unchanging. Yet a glance at its history will show that this is not so. It postulates that what was said by the judges for the village society of England is still appropriate, unaltered, for a new community centuries later and on the opposite side of the earth. It attributes to English judges of the past, who were operating in quite different social conditions, a reflection of "historical

biases" and "historical community attitudes" which this antipodean interloper could not aspire to. This simply cannot be accepted as self evidently true.

Murphy's view in Moffa's case - about the test for the provocation defence in criminal cases is taken to task by Cooray. So far from providing a "body blow to the idea of individual responsibility" and one uncongenial to our society thirsting for "law and order" as Cooray argues, Justice Murphy's opinion alone arguably recognises the tremendous variance of individual reactions. It leaves the assessment of their responses to be determined, where it should be. By the jury of the accused's fellow citizens.

INCONSISTENCY

Another charge, which sits rather ill with the rest of the criticisms, is Professor Cooray's assertion that Justice Murphy was guilty of "inconsistency" in applying the law. Others criticise him for his remorseless consistency and the predictability of his approach to the questions which came before him. How, then, does Professor Cooray make out this charge of inconsistency? He refers to Murphy's suggested lack of sympathy for those accused of tax evasion upon which it was said he was "prepared to stretch the law to the maximum to secure convictions". On the other hand, Murphy's role in respect of tax avoidance and evasion may be seen as nothing more than a corrective to the old laissez faire attitude

formerly adopted by the Court. In this Murphy was simply the forerunner of changes which swept away some of the mythology of tax law. For him, construing the tax statute was simply another task of statutory interpretation. His approach preceded similar changes which have occurred in England and elsewhere. It has been suggested that the previous attitude of the courts to the civic duty to pay tax can be attributed to earlier times when tax was a burden imposed by unrepresentative legislatures on unwilling citizens for uncertain purposes. In the modern State, where all citizens, natural and corporate, are dependent upon the public sector to varying degrees, the judicial attitude to taxes levied by representative Parliaments, required adjustment. Lionel Murphy's attitude to tax liability was not a departure from his philosophy of the criminal law and individual responsibility. Most tax cases coming to the High Court involved no consideration of criminal law. All that was involved was the interpretation and application of the law in a civil case. The criticism of inconsistency is misplaced. In approaching statutory interpretation generally and tax legislation in particular, Murphy as a judge was respectful of the intention of the democratic Parliament in which he had served.

CONSISTENT CENTRALISM

Somewhat inconsistently, leaping from this charge of inconsistency, Professor Cooray then condemns what he sees as the consistent centralism of Lionel Murphy's judgements on matters of constitutional power. To Cooray he was a consistent centralist. His willingness to accord a wide power in the appropriation of funds by Federal Parliament, amounted according to Cooray to "a clear abdication of the Court's constitutional duty".

To accuse a judge performing his constitutional duty according to his conscience, of "abdicating" that duty, is to indulge in the very name-calling which Professor Cooray decries in others. If Justice Murphy, for example, took the view that the appropriation power authorised appropriations for purposes other than those elsewhere listed in the constitution, was it not his constitutional duty to express that view? The fact that Professor Cooray and many others (possibly even a majority) may not agree with it, does not make it any the more an abdication of the judge's duty to give effect to it. The notion of "duty" embraced by that aspertion is a very narrow one. A judge's duty, according to this view, is limited to opinions which please Murphy's critics. It must be confined to an opinion of the constitutional power (including on appropriation) congenial to those of a different pursuasion. The danger of such constitutional name-calling has only to be stated to be perceived.

TOTALITARIAN TENDENCIES

Twice in the article Professor Cooray accuses Murphy and his apologists of totalitarian tendencies. He says that Murphy's attempts to impose "radical reforms" on the community were unprecedented and thereby invited damaging criticism:

> "In pursuing his ideological aims in defiance of community attitudes, Murphy won the admiration of his fellow ideologists but lost the respect of a significant part of the community - he was attacking ideas and institutions which the Roy Morgan Values Study demonstrates enjoy the support of the majority of the people."

There is much that could be said about this paragraph. No evidence is given for the "loss of respect" alleged. The unprecedented congregation which filled the Sydney Town Hall for his Memorial Service and daily experience talking with fellow citizens, suggests the contrary. Even those who differ from some of Murphy's views are usually willing to acknowledge his sincerity and unusual concern for the underprivileged.

MINORITY VALUES

Far from being out of step with the majority of his fellow citizens, it seems likely to me that Lionel Murphy's views on the dangers of circumstantial evidence, the perils of political trials, the need for legal representation in complex cases, the necessity of legal accountability of national security agencies, the interest of citizens to sue to uphold the constitution, the need to contain tax avoidance and to terminate the colonial cringe, all reflect majority opinions in this country. But what if they do not? This does not diminish the legitimacy of his viewpoints and

his duty as an independent judge, where relevant, to express it. Fortunately, we have not surrendered judicial independence (as Professor Cooray would seem to favour) to the tyranny of transient public opinion polls. We leave that to some members of Parliament.

The Roy Morgan Values Study will, like other opinion polls, be only as good as the questions asked. Polling for "values" may be even more perilous - and equally uninstructive - as polling for politicians. To reduce the moral debates of our society to opinion polls is to trivialise them. In a free society moral arguments of the scale that concerned Lionel Murphy are argued for by intellectual disputation. Knee-jerk reactions to pollsters may reduce great issues to banality.

POLITICAL JUDGE

This brings me to the last criticism catalogued by Professor Cooray. People, he says, often criticise the law but rarely criticise judges. But Lionel Murphy was different. "In his hands the judgment became a political act... In the public mind, Murphy never left the political arena. In the final analysis, Murphy is not criticised for his judicial acts but for the political acts he committed under the color of judicial authority."

The naivete of these comments is remarkable. The High Court of Australia is inescapably "political". It is one of the three constitutional Branches of Government. True, it is separated from, and independent of, the other Branches. Its judges are not

"political" in the party political sense. But their function and role is inextricably political. They have to decide where great power in our society lies. Some laws they sustain and some they strike down. These are "political" functions. Only those who still believe the fairytale that the law is always pre-existing - clear and only awaiting discovery by the judges - deny the Realpolitik of the judiciary in a country such as ours.

There are, it is true, conventional limits on the extent to which judges may change, adapt and develop the law. Let Lionel Murphy be criticised for this or that decision - for going too far here or withholding the law's relief there. But to criticise him for engaging in a "political act" by judgment in the highest court of the land is to betray a touching innocence about the nature of the functions of such judges. Citizens may cling to the Aladdin's cave theory of judge-made law and the judicial function. But nowadays one scarcely expects a professor of law to do so. In the age of Denning, Reid, Diplock and Scarman, the debate has become not whether judges make law, but how much, when, and how far, they may go in a particular case. This is where the focus of Professor Cooray's analysis should have been fixed.

Instead, whilst decrying "alleged personal attacks" and "character assassination" of Murphy's apologists, Cooray has himself descended to just such abuse. "Totalitarian socialist", "and advocate of the abdication of the High Court's constitutional duty", "a politician under the color of a judge", "a distorter and a misuser of the common law for his own ends". These are the phrases

of polemics. They are not the language of reasoned debate by a scholar. They appear discordant in a free community, which defends diversity of opinion and lives under the rule of law upheld creatively by Parliament and the courts.

Before Professor Cooray and those of a like mind return to such a fray, let me recommend that they pick up the old text book of Dean Pound and reflect upon the lifetime's teaching in jurisprudence of Julius Stone. Then they would do a better public service by explaining, from the viewpoint of the scholar, the real nature and function of the judicial role in a Federation and in a common law country. By that criterion, Lionel Murphy was certainly exceptional. His particular views doubtless warrant thoughtful criticism. But the criticism would be far more telling if it were based upon a more realistic and sophisticated notion of the judicial function rather than on a now discarded "fairytale".

Such a vigorous, intelligent, and passionate servant of the Australian people deserved a fairer intellectual memorial, one year after his death, than Professor Cooray has seen fit to offer him.

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