

IN PRAISE OF LIONEL MURPHY

Rationalist Society Dinner, Melbourne, 13 November 1987

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From the address by Justice MICHAEL KIRBY, President of the NSW Court of Appeal, to the Lionel Murphy Memorial Dinner of the Rationalist Society Of Australia, Melbourne 13/11/87. JHG.

Michael Kirby recounted how earlier that day, in Canberra, he had launched a book on Aborigines and the Law in the Lionel Murphy Library. This library is in the Attorney-General's Department over which Lionel Murphy had presided during the busy, restless, creative and energetic years as the Attorney-General of this country.

The library was one of the few honours that Lionel accepted. Others were pressed upon him. A supernova was named for him, up there glistening in the universe. But the library was something he consented to be named after him, for he loved the world of books and ideas.

Michael recounted that, as he flicked through this book he launched, he found there recorded the various dissents of Justice Lionel Murphy on Aboriginal questions. One such decision was in *Coe v. the Commonwealth* ten years ago. An application was made to strike out the statement of claim by which Mr Coe was seeking to reverse the legal theory that Australia was acquired by settlement and not by conquest. Justice (now Chief Justice) Mason had struck out the claim in the first instance. There was an appeal to the full High Court. It came before Justices Gibbs, Jacobs, Murphy and Aickin. Gibbs and Aickin upheld Mason and struck it out. Jacobs said he would not strike it out. Murphy said that, though it was an inelegant document, he would not strike it out and moreover that there was evidence that what Mr Coe was asserting was the fact. One of Lionel's strong dissents, said Michael.

One might say, well, there were two for and two against. But under the rules that meant the decision of Justice Mason was upheld. Michael said it would be interesting to contemplate what would happen today if such an application was brought again to challenge the notion that our country was *terra nullius*, an empty continent uninhabited by civilised people when the First Fleet arrived.

Michael apologised for not being able to speak to the Society on the exact anniversary of Lionel's death. He was in Paris attending a conference on the legal and ethical implications of AIDS.

Reminiscences of Lionel

The first time that Michael had association with Lionel was when he had a High Court case with Neville Wran. Michael did then quite a lot of work with Neville. He learned the reason for Nevil's strength as a politician. It was a devotion to detail and to getting the detail into one's mind. This is the strength of the Bar. Barristers are paid a lot of money. It is a taxing obligation because you have at once to be an intellectual and yet a dramatic performer. You must demonstrate intellectual capacities in analysing the case. But you have to do so in a forensic public setting where you are always on show. Therefore you are torn between the stresses of the intellect and of public performance.

Neville Wran was an early morning worker. He would get into his office about 5.30am (Michael still gets into his office at 5.40am). Michael's first obligation as his Junior was to make a cup of tea, not a cup of Lan Choo tea but a tea of exquisite variety. Then they would mull about the case.

That day Wran could not make it as leader of the case. He was just venturing into political life. Every now and then he would be absent at the critical moment. Neville's absences were Michael's opportunities. On this occasion, of a High Court appeals, Michael was sent down the corridor by Neville to Senator Murphy who was still doing occasional briefs.

And here was this extraordinary and (as Michael thought at the time and continues to think) somewhat disorganised man. Lionel would be walking around the chambers, talking about what seemed to Michael quite irrelevant matters, whilst he was getting his papers together. Michael thought this was a very unusual person: a very unusual barrister.

Lionel's genius was to be somewhat disorganised. He was not your ordinary, straight-up-and-down, organised, disciplined, monkish lawyer. He was nothing of that. He was serendipitous in his nature, constantly plucking from here and there ideas and thoughts. The most creative people are thus. They are not usually well organised, disciplined people. They are sometimes people who leap out at ideas and put them together in new combinations, seeing the world in a different fashion. That was Lionel Murphy.

The magic moment came in Lionel's life that would also critically change Michael's. This was December 1972. One did not have to be a Labor supporter to see the affirmation of democracy, that a

revolution, peaceful but profound, had come upon the country. The Whitlam government came into office in a spirit of idealism and unprecedented optimism on the part of Australian people of all political parties. After 23 years a change of government had taken place.

Lionel was no sooner in office as Attorney-General than a trickle of Commonwealth briefs began to come Michael's way. He was then asked to be Junior in a couple of constitutional cases. One in 1974 was to test the requirements of the joint sittings. That was the time of a double dissolution. A number of Bills were purported to be presented to the Joint Sittings. Michael remembered the busy weekend when Lionel Murphy, the Solicitor-General, and other legal counsel (including Michael) were preparing the government's defence in a resultant High Court case. It was expected that the Solicitor-General would present the case but as they swept into the High Court, Lionel Murphy, Attorney-General for the Commonwealth, decided to argue the case personally. He did so, brilliantly. It is not often that the political Attorney-General argues cases nowadays in this country. But Lionel did it. And he won the case.

Shortly before Lionel accepted appointment to the High Court of Australia, Michael had been appointed a Deputy-President of the Arbitration Commission. He said he expected he would see out his days in that capacity. But one day just before Lionel accepted his own appointment, both Lionel and Michael met waiting for the elevator in Temple Court, Sydney. Lionel asked "How are you enjoying the Abattoirs?" He always called the Arbitration Commission that because he vividly remembered inspections of meat works in his early days.

Michael was rather enjoying it, being the Deputy-President in charge of the whole maritime industry at the age of 35. It is, said Michael, still a tremendously important area of operations.

Lionel continued "I want you to come up and see me and I want you to do it now." Michael said "I am sitting in a quarter of an hour." "No, no, I want you to come up now." Lionel was not an easy man to resist, as all who knew him can attest. So Michael went to his office and Lionel said "I want you to be the Chairman of the Law Reform Commission." For fully three or four minutes Michael resisted this notion; "You must have somebody older, wiser, more knowledgeable about the law." The reply was "No, I don't want one of those old fuddy-duddies, I want somebody who will be vigorous and who

will look at the law afresh." Most persistent was Lionel. So after persuasion of this and further consideration Michael accepted this task - the first chairman of the national Law Reform Commission.

Lionel was starting to discuss with Michael the first law reform references when Lionel's chance came with the death of Justice Sir Douglas Menzies. Lionel accepted the appointment to the High Court of Australia. A week before Lionel's acceptance of the High Court - whilst still Attorney-General - he rang from a Labor Party Conference at Terrigal. He said to Michael "I am about to be appointed to the High Court. But I am now giving you over the phone the first programme of references of the Law Reform Commission." Michael tried to say to Lionel that the statute required things to be formal and in writing. Lionel replied "No, no, no; I am about to go. And this is what I want you to do." He listed a challenging set of references, one of them was Technology and the Law (how prescient this was in 1975). Another was the Impact of Transnational Corporations on the Law and on Society.

In the end the view was taken that this typically irregular and unusual (and inspired) series of references from the Attorney-General was not what the Act contemplated. So they had to await formal written statutory references. The reference to Technology did not come in that form. The reference on Transnational Corporations never came at all.

It was when Lionel went to the High Court that Michael got to know Lionel best. Not a week went by but his urgent insistent voice would come upon the phone, talking about this or that case. Michael could be in the midst of the most harrowing debate dealing with the most intricate matters of law reform. But when a Justice of the High Court rings you, starts to talk about this or that case (as is perfectly proper as between judges) - to talk about the nuances, the questions, just to mull them over - you pay attention. There are not many people you can do this with. The questions were insistently pressed. He would come back to them. Sometimes, Michael candidly admitted, he would do so at very inconvenient times. But Lionel was persistent. He was a man who would not be easily brushed aside. All those who knew him know of these endearing qualities.

He was always full of ideas, keen for ideas, keen to debate them, a very rational man, keen to use the instruments of the human intellect, to gnaw away at a problem, believing as he did that there

was no finer instrument in the universe than a good mind applied to problems, and that generally there is a solution.

Lionel and Michael had this telephonic relationship stretching over a decade. Principally it was telephonic because their social activities were somewhat different. Lionel was not a 5.30am at-the-desk starter. He was basically a late person. Michael is an early one. Lionel had the stamina to stay up at all hours whereas Michael soon flagged. So it was a midday telephone relationship - but intense for all that.

Persistent it was and to Michael always a compliment. It was exciting, interesting, in that indirect way, to take a small part in the shaping of the mind of a man who was one of the Justices of the highest court of our country.

Then came the days of the dark shadow when Lionel was denounced, charged, tried. Michael gave evidence at his first trial, of his good fame and character. He did so, of course, without hesitation.

Michael remembered waiting to give evidence in the anteroom of the beautiful old Banquo Court in Sydney. Lionel had practised there with great success as a barrister. He, a man who had risen in the ranks of barristers, who had become a senior politician, a Senator of the Commonwealth, who had revitalised the Senate of our nation, and who become a Minister, and then a Justice of the High Court, serving there for ten years, was on trial.

Michael remembered thinking as he walked to the court of Bach's great cantata "Gladly will I walk to Jerusalem." Gladly he walked there for Lionel.

At the first trial Lionel was acquitted on the first charge, and was found guilty on the second. It may have been forgotten that when they first tried to empanel a jury at the first trial the jury had to be discharged because a woman shouted out "There he is. He is guilty. I know he is. Castrate him." That was not widely publicised. The atmosphere of the time was thus. This servant of the people of Australia, who had given so many hours of his life and energy and imagination to his country, had been brought to this pass.

Michael was criticised in the legal profession and especially in the judiciary, for giving evidence because it is a tradition that judges do not give character evidence. You can understand why. It is somewhat embarrassing. Michael was the President of the Court of Appeal. There was a judge, in terms of the heirarchy lower than Michael, presiding over the trial of another judge. It was a very

unusual circumstance. Normally a judge would not give evidence. But Michael considered even a judge was entitled to have the opinion of his peers. Michael was proud that he took a little part in that enterprise.

Michael said that at the second trial he offered to come again. But Lionel seized the moment and spoke simply to the jury and he was discharged.

Of course this was not the end of his travail. There were some who, in the words of Professor Mark Cooray in a recent article in "The Age", were not willing to let things be. They wished to mull over other charges.

Then Lionel suffered his terminal illness. Lionel faced his greatest trial. He did so with courage and with dignity and surrounded by the affection of his family and friends.

Michael gladly acknowledged the presence at the dinner of Professor Tony Blackshield who was an especially loyal friend and an articulate spokesman for Lionel.

Michael said he will remember as long as he lives the situation of the television camera at the court. It is a strange phenomenon, a man with a camera walking backwards a few feet from your face. Everybody coming out and going in to that court was the subject of this attention on the media; Ingrid, Bill Murphy and his wife Francis, the boys, and above all Lionel, were subjected to this stress, day in, day out, for months, unrelenting.

The Media and the Murphy Affair

"The Murphy Affair" as it was called, or "The Age tapes", were of course to be put into a special historical context. In a sense it began with Watergate and the exposure of the perfidy of President Nixon. This case fuelled the feeling of some Australians, led by Graham Perkins, that the laws in this country were so awful, so restrictive, that we had the "quarter free press".

That was the phrase that Perkins borrowed in 1974 from an expression of Harold Evans, of the Half Free Press. That is what Evans called the British press. By inference the American press was the Wholly Free Press. The Half and Quarter Free Press labored under these above mentioned disabilities.

The Wholly Free Press is not of course entirely wholly free. When Michael went to the conference in Paris on AIDS he looked at the record of the Wholly Free Press in the USA on that vital subject

which is going to affect at least one million American citizens. The Wholly Free Press did not address one question to the US President on the subject of AIDS, its implications, education and prevention, until 1985 by which time about half a million Americans had acquired the virus. Sometimes freedom is squandered. Sometimes it is abused.

The Half or Quarter Free Press in Australia had particular problems in dealing with Lionel Murphy. Earlier they had particular problems in dealing with ministers of the Whitlam Government. Jim Cairns in his book *Oil on Troubled Waters* described the circumstances of those times. According to the book a woman came up to him in a supermarket and said "You used to be Dr Cairns".

This is the tale Dr Cairns tells. The Age paid some L9,000 to obtain copies of telexes sent to England by a man named Shaun Cowes (a man represented by some as a confidence man and a liar). In a statutory declaration soon afterwards Cowes stated that the telexes were untrue and fabrications. There had been banner headlines on the sole basis of these telexes that Phillip Cairns, Jim's son and a member of his personal staff, was to get some \$600,000 out of the deal. But there was no headline at all that the telex were untrue.

The same newspaper featured stories that Dr Cairns was involved in a \$9 million loan project in the Philippines. There was a headline on two pages - when in fact there was no such thing. Whilst The Age claimed to have made attempts to check these matters with Dr Cairns, Dr Cairns asserted that not one of them was ever checked. He did not become aware of them until well after publication. He said "Most of the newspapers acted in a similar way, in an ever rising crescendo impossible for me to even see, let alone correct. The same stories found their way through radio and television about which I was generally unaware." This was the Quarter Free Press.

They call these attacks by catchy names - The Loans' Affair, The Murphy Affair, The Age Tapes.

Seventy policeman in NSW, sworn to uphold the law, were daily in breach of it. They illegally taped hundreds of phone calls. Michael said he wouldn't go over the criticisms of The Age which are recorded in relation to those times in Gary Sturges' chapter in a recent book, edited by Jocelyn Scutt *Lionel Murphy: Radical Judge*.

Michael spoke instead of his own recent experience with that most distinguished newspaper of our country. Some will have seen "The Democrat who overruled the people". It was a banner article published in The Age a month ago on Justice Murphy. It appeared with

a striking, well penned cartoon by the fine artist Spooner. It was written by Professor Mark Cooray of the Macquarie University. It made a number of startling allegations against Murphy. He was, according to the article, a totalitarian, a person who was dedicated to having his own way, a man who ignored the common law, and a centralist who abdicated his judicial responsibilities.

One after the other the charges are made. They were printed in what is a very substantial and vividly arresting article with a full page presentation, top of the mast head.

About a week or so later there was another essay, critical of Lionel Murphy, approximately the same size, (Michael forgot the name of the author - it was a forgettable piece). This time it appeared with a large photograph to capture the eye. It was critical, unrequiting.

Seeing this and being told that the original person to do the Lionel Murphy lecture in Sydney was not available, Michael was asked by Neville Wran would he would step into her place. Michael agreed. He took the occasion to analyse closely the criticisms of Professor Cooray. One by one he took his criticisms apart. He did so partly for presentation at this evening in Sydney. (A shortened version of Michael's presentation was published in "N&V" Dec '87. JHG)

Michael's other reason was that this analysis would be a good way to put to press the the answer to these rather serious contentions - that a man whose whole life had been dedicated to working in courts and in Parliament was not a totalitarian, was not a person who betrayed the people but one who used the institutions of Australia to serve the people.

So Michael rang the features editor of The Age and asked whether they wanted it? The features editor said yes and to send it down. It was telefaxed. Michael was told it would be published.

The Age subsequently published a very small piece, hidden away at the bottom of the page, written by Richard Ely, a good friend of Lionel's. It was a scholarly piece, but it was not, as Michael said, in the same polemical style in which Professor Cooray published his piece, a year after Lionel's death. Michael's effort was not, he thought, polemical. But it was argumentative. It took, one by one, the criticisms, analysed them and showed how there was no substance in them, or at least that there was an arguable alternative point of view that in a free society citizens should hear.

The Age rang Michael and said that they were in a terribly

embarrassing position. Because Richard Ely's book had been mentioned in Couray's article, Richard could have a right of reply. He asked for it. They didn't think they should have two long pieces. They had asked Richard to withdraw but he didn't want to do so. Ely considered that both his and Michael's responses should be published. But The Age wouldn't do so.

At that time Michael had only seen Couray's piece. Since he has seen the other attack on Lionel. He told The Age "You have the editorial responsibility. This is a society of free speech. You are the editor. You have to decide. But your readers are surely entitled to have the other point of view, fully and at least equally expressed. However that's your choice."

Then Michael looked at The Age (he wouldn't miss an issue), The second piece was by Robert Thomson (as advised from the audience). So Michael rang The Age and said that that there would be some who would think (and Michael would be one of them) that in this particular, The Age had not acted with honour. Here in the space of two weeks The Age had published two full or almost full page articles, dramatically presented, in criticism of Justice Morphy. In other contexts The Age had earlier criticised Lionel Murphy and had published the so-called "Age Tapes". The Age had declined to publish anything but a small, bottom of the page, unillustrated, and somewhat scholarly, piece. Michael said that his piece was still available. The Editor-in-chief, Mr Creighton Burns declined to publish it.

To this day Michael has not heard another word about it.

Michael says to the people of Melbourne, whose paper The Age is, whose paper he has always thought to be the most distinguished in the nation, "This is the history of The Age's attention to the opinions of Lionel Murphy one year after his death."

It is the standard of the Quarter Free Press in Australia. A freedom to denounce repeatedly and at length. A freedom, on this occasion, sadly abused.