less robust than it'. In her view, if the purpose of a law 'is to restrict those freedoms', the law is invalid; and questions of 'compelling justification, necessity and proportionality' are merely instruments for ascertaining its purpose. If a law directly interferes with those freedoms, that will be taken to be its purpose, unless the interference is 'necessary for the attainment of some overriding public purpose' or to satisfy what Deane had referred to in *Cunliffe v Commonwealth* (1994) as some 'pressing social need'. On that basis, the relevant provisions were invalid.

Brennan and **Gummow** held that even if there were such an implication, the ostensible purposes of the Aboriginals Ordinance were not incompatible with it. Accordingly, the question whether such an implication existed was one they did not need to decide. However, both of them made it clear that they would be cautious about such an implication.

In *Levy v Victoria* (1997), Gaudron reaffirmed her view that the Constitution implies freedom of movement as an 'aspect of freedom to engage in political communication or as a subsidiary to that freedom'. In that case, again relying on her notions of 'overriding public purpose' or 'pressing social need', she found that regulations which prevented a person approaching within five metres of a duck hunter had not infringed freedom of movement because they were reasonable restrictions in the interests of public safety.

More recently, in *AMS v AIF* (1999), the High Court cautioned the Family Court to take into account, in framing any custody orders it might make, the need not to impose upon the freedom of interstate movement of either parent 'an impediment greater than that reasonably required to achieve the objects of the applicable legislation' (see **Family law**). The Court based this enjoinder primarily on the freedom of movement envisaged by section 92, noting that this is 'an aspect of s 92 doctrine which is being developed from case to case'.

Though on uncertain ground, members of the High Court, particularly Gaudron, have sown the seeds for an implied freedom of movement. However, the uncertainty points to the vulnerability of any rights dependent on implication, and to the need for more formal structures, such as a **Bill of Rights**, to provide a better framework of protection.

Larissa Behrendt

Murphy, Lionel Keith (*b* 30 August 1922; *d* 21 October 1986; Justice 1975–86), as a lawyer, politician, Commonwealth **Attorney-General**, and High Court Justice, was an advocate of reform for Australia's legal and political institutions. His career was studded with achievement and dogged with controversy. No other member of the Australian judiciary has provoked such divided opinions. Whether this was a product of the message, or of the colourful nature of the messenger, remains an open question. Whatever the case, as Ross McMullin has observed, 'Murphy polarised people'.

Murphy was the youngest son of Lily and William Murphy, and grew up in Sydney. Through the 1910s, his parents entered a period of gradual estrangement from the Catholic Church. Murphy's primary education was at Kensington Public School, of which he was dux in 1935. From there, he went to Sydney Boys High, where he demonstrated some athletic aptitude. In 1941, he arrived at the University

Lionel Murphy, Justice 1975–86

of Sydney, where he studied organic chemistry, graduating with honours in 1945. The next year, he commenced his study of law, ultimately graduating with honours in 1949. Two years into his degree, Murphy took the unusual decision to sit the NSW Bar exam before he had taken out his degree. He passed, and was admitted on 2 May 1947, establishing himself initially at University Chambers and then at Wentworth Chambers.

The fourth floor of Wentworth Chambers had among its ranks a number of rising labour lawyers including Neville Wran, Bill Fisher, Jack Sweeney, and Tony Bellanto. Murphy, however, with his command of the law and his industriousness, was its leader. His extensive personal library, and devotion to books, made his chambers a meeting place for the floor.

While not exclusively in an industrial practice, Murphy became involved in some of the critical trade union struggles of the **Cold War** period. His professional association with left-wing members of the Federated Miscellaneous Workers Union of Australia in their battles against the incumbent industrial group helped to establish not only his legal reputation but also his political base. In a series of cases representing Jack Dwyer and Ray Gietzelt, Murphy tested his legal capacities against advocates such as John Kerr and Hal Wootten.

Murphy's first High Court appearance was in 1953, as a junior in a **taxation** case before **Kitto** in *Berry v FCT* (1953). He was unsuccessful. In July 1954, Murphy married Nina Morrow at St John's Church in Darlinghurst. Their daughter, Lorel Katherine, was born in 1955 at a time when Murphy's career was burgeoning.

In 1959, Murphy made his first attempt to enter federal politics, but was unsuccessful in gaining preselection for the Australian Labor Party (ALP) in the seat of Phillip. A year later, he succeeded in securing the second position on the NSW ALP Senate ticket behind Joe Fitzgerald. In the same year, he was appointed as a QC after 13 years at the Bar.

Murphy was elected at the 1961 federal election, taking up his Senate seat in 1962. His time in Parliament can be divided into three periods. From 1962 to 1967, he was a backbencher. From 1967 onwards, he was elected Leader of the Opposition in the Senate. In the same year, his marriage to Nina ended in divorce. In 1969, Murphy married Ingrid Gee (Grzonkowski) with whom he had two sons, Cameron and Blake. With the election of the **Whitlam** government in 1972, he became Leader of the Government in the Senate, Attorney-General, and Minister for Customs and Excise. He held these ministries until his resignation from the Commonwealth Parliament on 10 February 1975.

As a backbencher, he interested himself in issues of censorship, the role of the UN, human rights, **Aboriginal** health, and **discrimination**. As Leader of the Opposition in the Senate, he was influential in changing the Labor Party's traditional hostility to the role of the Senate. Murphy realised that the Senate could be used as a key institution of change in Australian governance. To this end, he obtained caucus approval for a full system of Senate Standing Committees. Senator Reg Withers, a critical figure in the events of 1975 in which the Senate played a key role (see **Dismissal of 1975**), no doubt appreciated the irony that (as Withers had acknowledged in 1973) it was Murphy who administered the 'kiss of life' to the 'sleeping beauty' that was the Australian Senate before 1970.

As Attorney-General, Murphy was, as his Senate colleague Jim McClelland recalled, a 'passionate and indefatigable promoter of his reforms'. Reflecting on Murphy's contribution, Whitlam—who was not always an enthusiastic supporter—told the Parliament in 1975 that Murphy 'has been unquestionably the most creative and effective legislator that we have ever had as an Australian Attorney-General'. During his time as Attorney-General, he secured the passage through Parliament of 20 Acts, including the *Death Penalty Abolition Act* 1973 (Cth), the *Law Reform Commission Act* 1973 (Cth), and the *Trade Practices Act* 1974 (Cth). Other legislation that he introduced included the Corporation and Securities Industry Bill, the Family Law Bill, the Racial Discrimination Bill, the Human Rights Bill, the Superior Court of Australia Bill, and the legislation establishing the Australian Legal Aid Office.

His time as Attorney-General involved his politically damaging 'ministerial visit' in March 1973 to the Melbourne offices of the Australian Security and Intelligence Organisation (ASIO). He also argued, with Maurice Byers and Elly Lauterpacht, the legality of French nuclear testing in the Pacific before the International Court of Justice in July 1974.

Murphy's **appointment** to the High Court was far from extraordinary. He was not the first Commonwealth parliamentarian to be appointed to the High Court; **Barton**, **O'Connor**, **Isaacs**, **Higgins**, **McTiernan**, **Latham**, and **Barwick** had all crossed the constitutional divide. Yet the event, as with so many things related to Murphy, was controversial. His elevation to the Bench after the death of Douglas **Menzies** was greeted with predictable disquiet. **Chief Justice** Barwick declared privately to Whitlam that Murphy was 'neither competent nor suitable for the position'. Whatever the facts and speculation of the appointment, it was obvious to all that the Senate and the High Court would not be the same again.

Murphy joined a Bench that included Barwick, McTiernan, **Gibbs**, **Stephen**, **Mason**, and **Jacobs**. It was a High Court that was entering a period of transition. By the time of his death in 1986, the High Court would be freed of oversight by the **Privy Council**, and be confirmed as the ultimate court of appeal for Australia.

At first glance, Murphy's methodological approach would appear to be contradictory. He was a staunch nationalist, yet consistently acknowledged the importance of international trends in the law. He argued for the rights of the individual, yet had an expansive approach to the power of the Commonwealth Parliament and a more deferential attitude to the executive government than his fellow Justices.

His judgments, especially his constitutional ones, usually involved discussion of, or reference to, fundamental principles of governance. Within a republican tradition, Murphy conceived of the Constitution in Jeffersonian terms. He frequently quoted Thomas Jefferson's enjoinder: 'Our peculiar security is the possession of a written Constitution. Let us not make it a blank paper by construction' (see, for example, *Li Chia Hsing v Rankin* (1978)).

In terms of judicial method, Murphy was scornful of the doctrine of *stare decisis* when rigid adherence to it would result in what he considered to be an unfair, irrational, inhumane, or unjust decision. Slavish adherence to **precedent**, he suggested, was 'a doctrine eminently suitable for a nation overwhelmingly populated by sheep'. He argued with great passion against the binding nature of precedent when it compelled conclusions that were irrational or unjust (*Dugan v Mirror Newspapers* (1978)) or simply outmoded (*State Government Insurance Commission v Trigwell* (1979)).

Murphy conceived of the Constitution as a document 'designed for a democratic society' (*First **Territory Senators Case*** (1975)). Within the fabric of the Constitution, he argued, there were 'silent constitutional principles' that informed its operation (*Sillery v The Queen* (1981)). His focus on rights and their protection was one of the hallmarks of his time on the Court. In terms of the few express guarantees in the Constitution, he took a robust interpretation. He alone held that section 41 of the Constitution provided a right to vote, a right that was 'so precious that it should not be read out of the Constitution by implication' (*R v Pearson; Ex parte Sipka* (1983)). He agreed with the view expressed by **Dixon** and **Evatt** in *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) that section 80 was more than just a 'mere procedural provision' (*Beckwith v The Queen* (1976)). On the basis of the freedom of and from religion protected by section 116, Murphy would have constructed an impressive wall between **church and state** following the First Amendment jurisprudence of the **United States Supreme Court** (***DOGS Case*** (1981)).

It was in the area of **implied constitutional rights** that Murphy was at his most adventurous. He argued that some

'implications arise from consideration of the text; others arise from the nature of the society which operates the constitution' (*McGraw-Hinds v Smith* (1979)). The nature of Australian society was such that guarantees could be found against 'slavery or serfdom' (*R v Director-General of Social Welfare (Vic); Ex parte Henry* (1975), against 'cruel and unusual punishment' (*Sillery*), and in favour of a right to 'freedom of **movement**, speech and other communications' (*Ansett Transport Industries v Commonwealth* (1977)). No Justice, before or since, has been so expansive in the articulation of an implied **Bill of Rights**.

Murphy was a judicial nationalist. He argued that Australia had been an independent sovereign state from 1 January 1901 (*Bistricic v Rokov* (1976)). This view has scant historical or judicial support and is generally regarded as untenable. However, consistent with such a view of judicial and national independence was his forthright opinion of the paramount authority of the High Court. State courts, according to Murphy, should in all cases follow the authority of the High Court rather than the Privy Council, which he described as 'an eminent relic of **colonialism**' (***Viro v The Queen*** (1978)).

While Murphy asserted Australia's **sovereignty**, he remained committed to an internationalisation of Australian law. He drew heavily on other jurisdictions and renewed interest in US precedents.

Murphy supported the constitutional capacity of the Commonwealth Parliament, subject to restrictions protecting individual and democratic rights. He often noted that as an 'authentic expression of the will of the people' there was 'a strong **presumption of constitutionality** or validity of every Act' (***Tasmanian Dam Case*** (1983)).

Within the tradition of the ***Engineers Case*** (1920), he was ever vigilant against any perceived backsliding that would keep 'the pre-Engineers ghosts walking' (*A-G (WA); Ex rel Ansett Transport Industries v Australian National Airlines* (1976)). Thus, he expressed broad interpretations of the **trade and commerce power**, the **corporations power**, and the **external affairs power**. The last was essential to Australia's ability to fulfil its international obligations. A narrow reading of the section, he cautioned, would leave Australia 'an international cripple unable to participate fully in the emerging world order' (*Seas and Submerged Lands Case* (1975)).

While sceptical about arguments predicated upon the notion of a federal balance, Murphy remained a democrat. The state parliaments, like the Commonwealth, had electoral commitments and required the ability to implement them. His view of section 90 (see **Excise duties**), which would have increased the ability of the states to raise revenue, would have strengthened the federalist principle in the Constitution (*HC Sleigh v SA* (1977); *Logan Downs v Queensland* (1977)).

As with so many things about Murphy, his legacy is hotly debated. Many of the constitutional notes struck by Murphy, from the freedom of **political communication** to the rights of the accused, have resonated through contemporary jurisprudence (*Australian Capital Television v Commonwealth* (1992); ***Dietrich v The Queen*** (1992)). Yet subsequent High Court Justices who have moved in similar directions rarely start with Murphy, and often fail even to acknowledge his precursory views. It may be that Murphy's greatest legacy was his ability to increase the category of the possible.

His legacy has, to a greater or lesser degree, been affected by the events relating to the so-called **'Murphy affair'**. The publicity surrounding his trial, conviction, and ultimate acquittal further stamped his career as being extraordinary. His decision to return to the Court after stepping aside for the period of his trial brought him into conflict with Chief Justice Gibbs. Murphy, who was terminally ill, maintained that it was his constitutional right to sit; he did so for one week in August 1986. The two cases argued during that week were *King v The Queen* (1986) and *Miller v TCN Channel Nine* (1986). In order that Murphy's judgments could be delivered (the convention is that when a Justice dies any undelivered judgment dies with him), the other Justices expedited the preparation of their judgments, and both cases were listed for judgment on Wednesday 22 October. At lunchtime on the Tuesday, Ingrid Murphy telephoned the Court to say that Murphy would not live until then. At 3.00 pm, Gibbs and **Brennan** constituted a special **Full Court** to hand down the judgments in both cases. At 4.00 pm, Murphy died.

Murphy came to the High Court with a comprehensive outlook on the law and its operation. He laid down, rather than developed, his view of the law while on the Court. In grappling with fundamental concepts, he eschewed many of the traditional strictures of judicial methods. His judgments were usually short, with sparse reasoning. This, combined with reactions of discomfort if not outright disapproval to his **judicial style**, would make it difficult to replicate the 'Murphy view'. He remains inimitable.

JOHN WILLIAMS

Further Reading

Tony Blackshield et al. (eds), *The Judgments of Justice Lionel Murphy* (1986)

Michael Coper and George Williams (eds), *Justice Lionel Murphy: Influential or Merely Prescient?* (1997)

Jenny Hocking, *Lionel Murphy: A Political Biography* (1997)

Jocelynne Scutt (ed), *Lionel Murphy: A Radical Judge* (1987)

John Williams, 'Revitalising the Republic: Lionel Murphy and the Protection of Rights' (1997) 8 *PLR* 27

'Murphy affair' refers to the series of investigations and criminal trials, relating to alleged improprieties by **Murphy**, that began with the publication of the '*Age* tapes' on 2 February 1984, and ended with Murphy's death on 21 October 1986.

'*Age* tapes' was itself a misnomer. The reference was to a large body of material, allegedly transcribed from tapes of telephone conversations illegally recorded by the NSW police, and allegedly containing evidence of widespread corruption in NSW. Tangentially, the material included excerpts from Murphy's telephone conversations with Sydney solicitor Morgan Ryan, obtained through a tap on Ryan's telephone.

Murphy had been briefed by Ryan during the 1950s and 1960s. In 1979, their acquaintance was renewed when Ryan acted as solicitor for Murphy's co-defendant Dr Jim Cairns in the ***Sankey v Whitlam*** prosecution. The tap on Ryan's phone was placed a month after that prosecution failed, and the transcripts included alleged conversations between Ryan