

AUSTRALIAN NATIONAL UNIVERSITY

LIONEL MURPHY FOUNDATION

10th ANNUAL LIONEL MURPHY MEMORIAL LECTURE

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LIONEL MURPHY - TEN YEARS ON

The Hon Justice Michael Kirby AC CMG

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IN THE SENATE CHAMBER

I am here, in this historic Chamber, to remember a most important citizen of our country, an elected member of the Australian Parliament, a Justice of the High Court of Australia and a warm, inquisitive, generous-spirited human being.

It does not seem ten years since Lionel Murphy was in our midst. Yet the calender says that it is so. It is a feature of his strong personality, engaging iconoclasm, richly textured voice and unforgettable visage that it seems just yesterday that we

* Justice of the High Court of Australia.

were mourning his passing. We gathered in the Sydney Town Hall, packed to the rafters, with the great and good and with ordinary citizens who came to mourn his loss.

Lionel Murphy would have applauded the decision to hold this Tenth Annual Memorial Lecture in this Chamber. Somehow, I feel that he was more at home here than in the building across the rose garden; with its unrelenting labour of opinion-writing and its unyielding conventions which tend to stamp out personal idiosyncrasies. In the less sombre atmosphere of this Chamber, Senator Murphy came into his own as a public figure, a leading member of his political party, a parliamentarian and eventually a most creative Minister.

The affirmations of allegiance and of office were administered to him in this place on Tuesday, 7 August 1962 by His Excellency General Sir Dallas Brookes, who was then administering the Commonwealth. Lionel Murphy had been elected a senator on 9 December 1961. He made his maiden speech (as we were then unembarrassed to call it) on 29 August 1962¹ in the resumed debate on the Estimates and Budget Papers for 1962-63. Let thirty-three years roll away. Try to

1 *Commonwealth Parliamentary Debates (Senate)* 29 August 1962 at 514.

imagine that deep, strong voice. It was the voice of a citizen with a strong concept of the Australian nation. It was the voice of an internationalist. Of a man concerned about development at home and assistance abroad²:

"Mr President, as a member of the Australian Labour Party I have been elected by the people of New South Wales to represent them in this Chamber. It is a great privilege for any man to become a member of the Senate. The Senate is recognised as the foremost debating Chamber in the Commonwealth of Australia and has achieved an international reputation for its supervision and control of delegated legislation. In this respect the Senate has been held up as a model for other legislative bodies."

In his first sentence, Lionel Murphy mentioned the Senate Committees. It was in those committees that he was to make his early mark. He was always very clear sighted about the way ahead and about his part in it.

In tackling the shortcomings of the budget, as he saw them, Lionel Murphy singled out for attention³:

"... The failure to make adequate provision for the development of Australia. All over the world the long-term view is being taken of national development - all over the world, except in Australia."

2 *Ibid* at 514-515.

3 *Id* at 515.

The governments of Africa and Asia are planning their national development not on an annual but on a long-term basis."

He then cited assistance given by Australia under the Colombo Plan including (it now seems remarkable) to the developing nations of Singapore and Malaysia. Other assistance was given to Korea which clearly put it to good use. He went on⁴:

"We are deeply conscious of the fact that our north and west must be developed. The people of Australia would be staggered to learn that Australia has no national development plan. The Menzies Government, by its participation in the plans for the development of other nations, can see the virtue of planning for them but apparently cannot see the virtue of a plan for Australia."

Lionel Murphy always saw himself as a servant of rationality⁵:

"We must bring into existence a plan which will set out the picture of Australia we hope to have in ten or fifteen years time. We must determine the number of persons we hope to have in this country, whether it be 12 million or 15 million. We must decide how the population should be distributed and what industries we want in the north of Australia and the west and elsewhere. We must determine what roads, ports, housing and other facilities will be needed and where they will be needed. We must have as clear a picture as we can of the Australia that we want to achieve at the end of that time."

4 *Id* at 515.

5 *Id* at 517.

Reflecting his lawyerly interest in the Constitution he went on⁶:

"There are no insuperable constitutional difficulties. Where there is a will there is a way. And this must be the way not of compulsion but of cooperation ... No government and no plan can succeed without it."

He cited the growth of unemployment and the shortage of facilities such as sewerage even in the great cities. He lamented the neglect of education "all over the Commonwealth"⁷. He put the blame for Australia's very low educational retention rate upon the federal government "which has the power of the purse"⁸. The human side of Lionel Murphy was evidenced in his criticism of the government for attracting migrants and:

"Not even [taking] the elementary precaution of achieving⁹ a balance of the sexes amongst the migrants".

In words that are still relevant he concluded:

"One feature of our life that is very evident is the apathy of most young persons, which in extreme cases is manifested as delinquency. There is a feeling of an absence of a future, of belonging to

6 *Id* at 517-518.

7 *Id* at 518.

8 *Id* at 519.

9 *Id* at 519.

nothing worthwhile. Our people want to create something. They want to build a future for themselves in a society they believe in. They want to have a national goal that they can achieve. That was the spirit of the pioneers who came to Australia and whose who opened up the west of America. That is the spirit abroad in Asia today. It is the spirit of those who feel that they are participating in the creation of something great - the building of their own nation. ... This is more than a question of money or economics. The people want to share in something more than the material rewards of life, and to talk in terms of increasing the national product is not enough. The Australian people want to help build this country into a great nation. ... [T]his budget ... has not realised the capacity of the Australian people.¹⁰ It has underestimated them. It has let us down"¹⁰.

Often, new members pour into their first speech the pent up thoughts which propelled them into public life. There, in Lionel Murphy's first speech, is a clue to the thinking of the man who gave it. An Australian nationalist. But one who saw our future in relation to the world. A forward thinker who saw the developments of Asia and elsewhere and reckoned that we had things to learn from them as well as to contribute. He was a man of logic, with optimism about his fellow citizens and their capacity to improve themselves and their society by rational government action stimulating self-interest. As a lawyer, he was an optimist about the Constitution. For him, where there was a will there was always a way.

¹⁰ *Id* at 519.

Lionel Murphy served, uninterrupted, as a Senator in this Chamber until Tuesday 11 February 1975. On that day the President of the Senate, his friend, Senator Justine O'Byrne signified his receipt of a letter of resignation on 9 February 1975 following Lionel Murphy's appointment to the High Court of Australia¹¹. Senator Wood sought leave to make a statement; but leave was not granted. Senator Wriedt, Senator for Tasmania and Leader of the Government in the Senate, stood in this place to inform the Senate of the Ministerial changes which had followed Lionel Murphy's departure. There was no retirement speech. There was no time for a nostalgic look back to the exciting days of successes and failures in this Parliament. Suddenly a metamorphosis had occurred. The highly individualistic; creative, restless Senator for New South Wales and Minister of the Government was gone. Henceforth, that voice of his would rarely be heard outside the court room and never again in this Chamber. From now on, for the most part, his contributions had to be in writing. He had a little more than a decade to make his mark on the High Court before his death on 21 October 1986, ten years ago.

11 *Commonwealth Parliamentary Debates (Senate)* 11 February 1975.

On the day after his death the President (Senator Douglas McClelland) announced, in this Chamber, the death of "The Honourable Mr Justice Murphy ... former Senator for the State of New South Wales"¹². Senator John Button, as Leader of the Government, recounted his many achievements. He acknowledged that there would be differences and criticisms but also certain undeniable things about his character:

"First of all he was a lateral thinker of a very big kind. One of the most fascinating discussions I have ever had with anybody I think was with Lionel Murphy where he explained to me at great length the changes that he felt would be brought about in society by the invention of the photocopy machine"¹³.

If only Lionel Murphy had lived to see the Internet, the Human Genome Project and the other marvels of science which, unusually for a lawyer, had endless fascination to him!

Senator Chaney, Leader of the Opposition in the Senate, supported the motion of condolence:

"He was a man who inspired great admiration and affection as well as strong opposition. [We found]

¹² *Commonwealth Parliamentary Debates (Senate)* 22 October 1986 at 1691.

¹³ *Id* at 1692.

common ground with him on issues such as the development of the Senate Committee system"¹⁴.

Senator Chaney noted that in the High Court Lionel Murphy had:

"brought an approach which was significantly different from that adopted by most judges of the past, not least because of his strong interest in United States precedents. I have no doubt that future legal scholars will study his influence on the Court and that by his judgments he will be seen to have made a contribution which is quite out of the ordinary"¹⁵.

Senator Janine Haines, Leader of the Australian Democrats observed:

"The Senate was a moribund place when he entered it and he did a great deal to revive it. He was a great believer in effective parliamentary supervision over the administration of government. That continued when he moved from the Opposition benches to the Government benches. He strongly supported the Committee system which is so valuable a part of the Senate today... As a Judge on the High Court he showed a willingness to set aside precedent to achieve a just result, and a determination to use the sort of language in his judgments that made the Court's work more understandable and hence more accessible to the people. As a small part of making the courts more human, he went wigless for all but the most ceremonial occasions and, essentially, remained his own man even on the highest court of the land. ... Because he wore his political and social heart on his sleeve, his appointment to the High Court was

14 *Id* at 1692.

15 *Id* at 1692.

described as too political. Apart from the fact that he was eminently suited for the appointment, his openness about his convictions was in fact a great virtue and put pay to the ridiculous notion that other appointments to the High Court, or indeed to any other court in Australia, are politically neutral. Of course, with the passage of time, his more liberal values came to be shared by many of his fellow Judges"¹⁶.

The Senators referred, virtually with one voice, to his great personal charm¹⁷, to his impact on our institutions and on them personally; to his passion for reform and the intelligence and breadth of learning which he brought to bear in all his works. And of the terrible times he had endured at the end of his life as he was submitted to inquiries, trials, appeals and the harsh gaze of the media. Gareth Evans, then speaking in this place, talked of his "sheer boisterousness and gregariousness of his personality" and the "energy he put here and everywhere else, into his personal and social relationships"¹⁸. He accurately captured, in his speech in this Chamber, the Lionel Murphy I knew:

"When he got his teeth into an idea or argument he would worry at it, work at it and pursue it for hours on end, into the small hours of the morning. When the hospitality had been flowing, as it often did, I

¹⁶ *Id* at 1693

¹⁷ eg Senator Grimes, *id* at 1695.

¹⁸ *Id* at 1697.

remember very well sitting around with others in what is now Senator Button's offices, looking with all of us for matchsticks to prop up our eyelids while Lionel Murphy would be exuberantly, boisterously going strong, spinning off ideas like sparks from a Catherine wheel"¹⁹.

Senator Gietzelt recounted Lionel Murphy's decent humanitarianism and concern for the rights of Aborigines, for reform of the Constitution and for the modernisation of the law. But it fell to Senator Harradine, who confessed to having been "a political enemy of Lionel Murphy", to conclude the debate:

"In no way can it be said that I was a personal enemy of his. Perhaps that was due more to his magnanimous and gregarious character than to any characteristic of mine. As I recall, there was at no stage a personal animosity. In fact, we shared some policies in common - for example ... abolition of capital punishment ... I admired his mental agility, his intellectual capacity and his restless passion for good and justice as he saw it. ... He undoubtedly had a great mind which was oriented to the search for truth. Standing here, I cannot logically conceive, just because his body was riddled with cancer and he has died, that his mind is no longer active, that he is no longer in existence. After all, his mind gave searching considering to such non-material and abstract concepts as justice"²⁰.

Interestingly, I have learned recently from Dr Thom Knoles, a teacher of transcendental meditation, of how, at the last,

¹⁹ *Id* at 1696.

²⁰ *Id* at 1702.

Lionel Murphy became a faithful pupil of meditation. And how he puzzled his mind about the possibility of continuation of the intelligence even after death. He became quite spiritual - in a non-religious sense - at the end. He was open-minded, even for a life long sceptic and agnostic. His own sad and painful end, he bore with acceptance but puzzlement.

It was with these speeches in this place that Lionel Murphy was remembered a decade ago tomorrow. In the other Chamber, the Prime Minister (Mr Hawke) made a formal speech on behalf of the Government. Mr John Howard, then Leader of the Opposition, acknowledged the past political differences but paid tribute to the changes in the law of this country and the stoicism with which he and his family bore the terrible illness that ultimately claimed his life²¹. The liveliest speeches were made by Mr Ian Sinclair and Mr Andrew Peacock. Mr Hayden, then Minister for Foreign Affairs, made a telling point:

"Murphy was a fair and just man, and not just for the battler, as I have heard said in recent hours. Fairness, justice and tolerance were a universal imperative for him but he tempered his understanding of these things with an understanding of the wrongs which a rigid and unvarying application of law and rights would impose"²².

21 *Commonwealth Parliamentary Debates (House of Representatives)* 22 October 1986 at 2490.

22 *Id* at 2495.

We do well, who have been considering Lionel Murphy's contribution to the law and to the High Court, to remember as we meet in this historic place at this time, his multi-faceted contribution to our nation's public life. It is a commentary on the social reformer in Australia that many of the things that he or she does, and which seem so radical (even revolutionary) at the time, often come with the passage of years, to be seen as perfectly logical. Even natural and inevitable. Until eventually, it is absorbed into the mainstream and the readers of history wonder what all the fuss and passion was about. So it is with most, if not yet all, of Lionel Murphy's Parliamentary and legislative achievements fashioned in this room. So it is with many, if not yet all, of his works as a Justice of the High Court of Australia.

A CHANGING COURT

The High Court of Australia which Lionel Murphy entered was a very different Court, in many ways, from that which he left. Some of the changes, he contributed to. Others were in harmony with his own approach to the law and his view of the role of the Court.

Lionel Murphy was one of the last of the "lifers". He was appointed before the *Constitutional Alteration (Retirement of Judges)* 1977 which finally put a cap on the age to which

Justices could serve. Had he not been struck down by cancer, it is possible that his restless spirit would have continued in service in the High Court into his nineties, as did his colleague, Sir Edward McTiernan. Chief Justice Barwick was the last Chief Justice with life tenure as such. There were, of course, many similarities between Barwick and Murphy. Each of them had served in the Parliament. Each was born of the people. Each had a very strong will. It was Barwick's will which established the High Court in Canberra. Justice Murphy embraced the move with enthusiasm. It brought him back to work in the national capital.

I have always thought that the move of the High Court to Canberra had a profound effect upon the psychology and self-conception of the Justices. No longer were they traipsing around the Commonwealth as a kind of circuit court, staying in clubs and mixing with trial judges and the local Bar. Now they were positioned clearly in the constitutional triangle. The symbolism of the geography could not be lost upon any of them. Henceforth, they were clearly seen (and to be seen) as part of the government of the country. I am not sure that Chief Justice Barwick foresaw all of the changes that would come from his geographical move. But I have little doubt that Lionel Murphy did. He was never in doubt that the High Court was part of the constitutional trinity of the nation. This fact emphasised the Court's limited, but real, role in lawmaking in the high tradition of the common law.

Another development which reinforced this self-perception in the High Court was the termination of the surviving links to the Judicial Committee of the Privy Council in London. Those links had persisted for most of Lionel Murphy's legal lifetime. I know from conversing with him how they upset and irritated him. He saw, earlier than most lawyers, that until all lines of appeal to the Privy Council were terminated, it would remain an alternative (and in the view of many Australian lawyers, a superior) source of legal authority to compete with, and put a check on, the role of the High Court as the apex of the nation's legal system. At a time when most Australian jurists continued to regard the Privy Council, the House of Lords and even the Court of Appeal (ie the English Court of Appeal) as the true font of legal doctrine for Australia, Lionel Murphy lost no opportunity in the High Court to criticise their Lordships and to demonstrate what he saw as their basic lack of acquaintance with Australian law. Thus in *Oteri and Oteri v The Queen*²³, he complained about the intrusion of the Privy Council into Australian constitutional affairs "even though it has no jurisdiction." He declared that the continuance of the participation of English

23 (1976) 11 ALR 142.

judges in laying down the law of Australia was unacceptable. He repeated these views in *Viro v The Queen*²⁴:

"[N]o court in Australia is bound by the decisions of the House of Lords or the court below it in the English system. The expression 'not technically bound' is often used, but it should be clear that Australian courts are not bound by such decisions, however persuasive they may be.

In times of rapid social change, the creative role of appellate courts naturally expands to adapt decisional law to the new social environment. The Australian judicial system is not assisted in the definition and development of Australian law by the existence of a tribunal acting as a rival to the High Court. The members of the Privy Council have not been appointed by Australians, are not responsible to anyone in Australia and cannot be removed by any Australian procedure. ... The lesson of cases such as *Oteri* is that Australian courts should not be encouraged to look to the Privy Council for guidance on Australian law."

At the time that may have seemed severe. To some it appeared as heresy. But by 1986, the year of his death, it had become the orthodoxy of the High Court of Australia. In *Cook v Cook*²⁵ Justices Mason, Wilson, Deane and Dawson said quite clearly that:

"The precedents of other legal systems are not binding and are useful only to the degree of the persuasiveness of their reasoning."

24 (1978) 141 CLR 88 at 166.

25 (1986) 162 CLR 376 at 390.

Lionel Murphy's pride in the capacity of the Australian legal system to respond to the particular legal needs of Australia can be seen in his resistance to the Privy Council but also in his conviction that the High Court of Australia should be the sole institution at the apex of the nation's legal system. By the termination of Privy Council appeals from the Australian Supreme Courts in 1986²⁶, the last link with that venerable institution ended. The alternative source of jurisprudence and the inhibitions which it tended to graft onto the Australian legal system were finally concluded. I think that the events since 1986, including quite recently, have demonstrated the truth of Lionel Murphy's vision. The shaking off of Privy Council supervision (direct and indirect) meant that the Australian Court could proceed to fashion rules suitable to Australia's independent nationhood.

In part, this development was to be achieved by the kind of exploration of the text of the Australian Constitution which would have gladdened Lionel Murphy's heart. He often told me that he left a copy of the Constitution beside his bed at night lest sleeplessness should strike him and he should have yet another

26 *Australia Act* 1986 (Cth), s 11(1).

chance to look at the pregnant language of the Constitution. Many cases since his death have seen the High Court exploring the text of the Constitution for words and implications the significance of which earlier generations of Justices had not perceived. A good illustration is *Street v Queensland Bar Association*²⁷, delivered three years after his death. But there are many others such as *Cheatle v The Queen*²⁸, on trial by jury; *Polyukhovich v The Commonwealth*²⁹, the war crimes case; and the many judgments suggesting that the ultimate repository of the legitimacy of the Australian Constitution lies now in the people of this country (who approved the text and who alone can approve its amendment) and not the Imperial Parliament which was but the midwife for its original enactment³⁰.

For the final despatch of Privy Council influence in Australia, Lionel Murphy was not there. But a passage in *Kirmani v Captain Cook Cruises*³¹, which described the residual

²⁷ (1989) 168 CLR 461.

²⁸ (1991) 171 CLR 541.

²⁹ (1991) 172 CLR 501.

³⁰ eg *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 138. Cf *McGinty v Western Australia* (1996) 70 ALJR 200 at 239.

³¹ (1985) 159 CLR 351.

jurisdiction of the Privy Council, still reserved by s 74 of the Constitution, as a vestige never to be used again and only of historical interest, would have left Lionel Murphy's spirit smiling.

Various other changes have come about since Lionel Murphy's time on the High Court. These include the decline and fall of the declaratory theory of the judicial function which Lord Reid³² had described in 1972 as a "fairy story" and which more recent Justices³³ have demonstrated to be a fiction and a myth. Sir Anthony Mason lately described it as a "quaint" view which common law (as distinct from equity) lawyers held about the way judges decided cases where a statute was ambiguous or no precedent provided an easy solution³⁴. Yet many of those who now reject the declaratory theory were, in earlier times, ostensible servants to its constraints. Never Lionel Murphy.

32 Lord Reid (1972) 12 JPTL 22.

33 M H McHugh, "The Law-Making Function of the Judicial Process" (1988) 62 ALJ 15 at 116. See also B Horrigan, "Is the High Court Crossing the Rubicon? A Framework for Balanced Debate" (1995) 6 PLR 284; J J Doyle, "Implications of Judicial Law-Making" in C Saunders (ed) *Courts of Final Jurisdiction*, Federation, 1996 at 84; J J Doyle, "Judicial Lawmaking - Is Honesty the Best Policy" (1995) 17 Adel LR 161.

34 A F Mason, Foreword to P Parkinson (ed) *The Principles of Equity*, LBC, 1996, v at vi.

THE IMPACT ON THE COURT

Murphy was far too much the realist to pretend to himself, or anyone else, that in the highest court, evenly balanced cases called forth no policy considerations to resolve the conflict of case law authority or of legislative ambiguity. I have a feeling that, had Lionel Murphy come to office later, many of the theories which he espoused and the techniques he embraced would have seemed less shocking to lawyers than they did at the time. It was his fate to come to the office of a Justice of the High Court during the last period of the ascendancy of the declaratory theory. His own clear rejection of it, and his refusal to pretend that his decisions originated only from the application of logic and analogous reasoning to past authority, offended many purists then, and possibly some today. Unfortunately, he did not contribute to the provision of an alternative theory of the judicial function which is needed to ensure that we do not replace the mythology of the declaratory theory with the uncontrolled, idiosyncratic opinions of unelected judges. Some of Lionel Murphy's critics assert that this was the technique which he embraced. But even if he did not assist in the provision of a coherent alternative theory, by his actions shall you know him. He refused to condone what he saw as serious injustices dressed up as legal precedent. Many of his lonely dissents, have now come, directly or indirectly, to influence later decisions of the High Court.

In *State Government Insurance Commission v Trigwell*³⁵, Lionel Murphy rejected, as inapplicable to Australian conditions, the English legal principles of liability for animal trespass. In *Dugan v Mirror Newspapers Limited*³⁶ he rejected the notion that prisoners convicted of capital felonies, lost all civil rights. In *McInnis v The Queen*³⁷ he rejected the assertion that Australian law offered no assurance of a fair trial of a prisoner facing a serious criminal charge, including, where necessary, that legal representation should be provided to him. The techniques displayed by the majority Justices in this trinity of cases contrast vividly with decisions of the High Court in many areas of public and private law following the death of Lionel Murphy. It is not necessary to single out more than *Dietrich v The Queen*³⁸ to demonstrate the magnitude of the change that has come about. The judges who have succeeded Lionel Murphy have generally adopted a technique different to this. They have usually attended more closely to the Australian, English and other authorities. They have explained in greater detail the steps in the reasoning that took them from the apparently settled law to the new doctrine stated as the law of Australia. But this much can

³⁵ (1979) 142 CLR 617.

³⁶ (1979) 142 CLR 583.

³⁷ (1979) 143 CLR 575.

³⁸ (1992) 177 CLR 292.

be said, at least generally, of the influence which Lionel Murphy's opinions had:

- (1) There is now much more use of international law, of the kind that Lionel Murphy was prone to cite. At the time he did so, virtually as a single voice in a sea of sceptical dismissal. But no longer³⁹.
- (2) There is a greater willingness to look to source materials in casebooks outside the traditional appellate courts of England. There has been a return to the use of United States precedent which marked the early years of the High Court. There is also a greater willingness to look to other jurisdictions, particularly Canada, New Zealand and other countries of the common law. Lionel Murphy was catholic in his use of such precedent seeing it as a rich treasury, not to be overlooked.
- (3) There is also much more interest in human rights materials of a kind which Lionel Murphy quite frequently utilised but which were definitely disparaged at the time. In *Mabo v*

39 K Walker, "Treaties and the Internationalisation of Australian Law" in Saunders (ed), above n 33, at 204.

*Queensland [No 2]*⁴⁰ Justice Brennan, in the leading judgment, explained how the jurisprudence of the *International Covenant on Civil and Political Rights* is bound to influence the development of Australia's domestic law. Many of the decisions of the High Court in recent years have been influenced by the reasoning of the European Court of Human Rights and other international bodies as a source of ideas and stimulus. This process had to begin somewhere. There is no doubt that Lionel Murphy gave it a great impetus.

- (4) The increased use of law reform reports, Second Reading speeches and other background and explanatory material has now been sanctioned by statute and is increasingly regarded as perfectly orthodox in the work of legislative construction. Yet I recall that, at the time that Lionel Murphy's judgments included reference to this material, they were often criticised by Bench and Bar as legally irrelevant and purely political.
- (5) Freed of the supervision of English judges in the Privy Council, the High Court of Australia has now come to play

40 (1992) 175 CLR 1 at 42.

the part in the Australian hierarchy of courts which Lionel Murphy espoused. This involves, amongst other things, encouragement to the appellate courts of Australia under the High Court, to play their own part as the creative courts of the common law. The High Court encouraged this process in *Nguyen and Ors v Nguyen*⁴¹. It was a logical outgrowth of the fresh approach to the hierarchy of the Australian legal system which Lionel Murphy advocated. No longer a single link in the Imperial chain but courts of an independent country applying, restating and developing the law for a free people answerable to none other on earth for their law.

In an earlier essay about "Lionel Murphy and the Power of Ideas"⁴² I expressed the opinion that more than Murphy's influence on particular legal subjects (of which there is much) his ultimate judicial legacy lies in his contribution to breaking the spell of unquestioning acceptance of old rules where social circumstances and community attitudes have changed so much as to make those rules inappropriate or inapplicable⁴³. It is only

41 (1990) 169 CLR 245 at 269.

42 (1993) 18 Altern LJ 253.

43 *Ibid* at 253.

necessary to contrast the attitude expressed by the High Court in recent years in a wide range of areas of the law to see the difference which has come about. Take *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd*⁴⁴ on privity of contract. Take the strong stand adopted with respect to so-called "police verbals" in *McKinney v The Queen*⁴⁵. Take the unanimous abolition of the common law doctrine that a husband could not, in law, rape his wife in *The Queen v L*⁴⁶. Take the alteration of the law governing the recovery of moneys paid or expended as the result of a mistake of law in *David Securities Pty Ltd v Commonwealth Bank of Australia*⁴⁷. Take the abolition of the doctrine of *terra nullius* in *Mabo [No 2]*⁴⁸ - a doctrine which had endured for nearly a hundred and fifty years of Australian case law. Take the more recent abolition of the rule in *Rylands v Fletcher* expressed in *Burnie Port Authority v General Jones Pty Ltd*⁴⁹. Or the extinguishment of the rule earlier propounded by the High Court in *Beautesert Shire Council v*

44 (1988) 165 CLR 107.

45 (1991) 177 CLR 468.

46 (1991) 174 CLR 379.

47 (1992) 175 CLR 353.

48 (1992) 175 CLR 1.

49 (1994) 179 CLR 520.

*Sneddon*⁵⁰ in *Northern Territory of Australia v Mengle*⁵¹. The quest for unifying principles and for a conceptual approach to the law of tort and of contract can be seen in many decisions of which *Papatonakis v Australian Telecommunications Commission*⁵² is but one illustration.

Commentators suggest occasional retreats. Of course every case depends upon its own facts and principles. But the number, variety and boldness of the decisions of the High Court of Australia in challenging and rethinking basic legal principles, as they are found to be suitable for operation in the Australian legal system, reflects something of Lionel Murphy's spirit. Rare is the acknowledgment of his intellectual contributions. But the fact is that, until he came along, there had been a general unwillingness on the part of the Court to question, revise and still more to overthrow old doctrine. He alone did not make the difference. He was part of an historical process which included the end of Privy Council appeals, the demise of the declaratory theory, the end of life tenure in the Court, the shift to its permanent home and the growing impact of international and domestic debate

⁵⁰ (1991) 172 CLR 501.

⁵¹ (1993) 177 CLR 541.

⁵² (1985) 156 CLR 7.

upon the law and the Court. But Lionel Murphy, by his open-mindedness, intellectual curiosity and willingness to challenge old doctrine opened up possibilities which others, later, with their own techniques and interests came to pursue with only marginally less enthusiasm and energy.

Lionel Murphy's influence may have been more subconscious or subliminal than direct. His techniques of opinion writing and reasoning undoubtedly offended some of the orthodox. Indeed, they are unique. They are, for example, different in many ways from my own. But his example and his insistence burrowed away in the subconsciousness of those who have followed. I have no doubt that he was an early herald to an important creative period in the work of the High Court of Australia.

Every Justice makes a contribution to the intellectual life of the Court, and thus to the law of this nation. But Lionel Murphy's contributions, because so very different, were greater than most. I suspect that he would have been delighted by the discovery, in the mention in the Australian Constitution of the State Supreme Courts, that this brought with it limitations upon the functions which executive governments and State

Parliaments could assign to those courts: *Kable v Director of Public Prosecutions New South Wales*⁵³. Perhaps other Justices have now followed his lead. Perhaps they leave the Constitution by their bedsides as a source of constant delight in the long evening hours when sleeplessness attacks the dew of sleep and takes the waking Justice into the generous unfathomed language of the Constitution.

I had planned in these remarks to refer at some length to Lionel Murphy's contribution to constitutional law. I offered some comments on this in my earlier essay, pointing to the remarkable way in which his views about section 92, expressed in *Buck v Bavone*⁵⁴ (to which he clung steadfastly often to the derision of others), came ultimately, in substance, to be embraced by a unanimous Court in *Cole v Whitfield and Anor*⁵⁵.

Even more remarkable was the way in which his opinions about implied constitutional guarantees, expressed for example in *Miller v TCN Channel 9 Pty Ltd*⁵⁶, in *Ansett Transport Industries*

⁵³ *Kable v State of New South Wales*, High Court of Australia, unreported, 12 September 1996.

⁵⁴ (1976) 135 CLR 100.

⁵⁵ (1988) 165 CLR 360.

⁵⁶ (1976) 161 CLR 556.

*Operations Pty Ltd v The Commonwealth and Ors*⁵⁷ and in other cases, at the time seen as arrant heresy, came to be accepted as an orthodox approach to constitutional interpretation in this country: *Australian Capital Television Pty Ltd v The Commonwealth [No 2]*⁵⁸; *Nationwide News Pty Ltd v Wills*⁵⁹; *Theophanous v Herald and Weekly Times Ltd*⁶⁰; and *Stephens v West Australian Newspapers*⁶¹.

You will understand my reticence in discussing this topic in light of the fact that an application has been made to reopen the authority of the Court on the implied guarantees of free expression. Obedient to convention, I must withhold my opinion until it can be influenced by argument in court and expressed in the pages of the *Commonwealth Law Reports*.

One of the greatest pleasures I have enjoyed in my appointment to the High Court has been to follow in the footsteps of Lionel Murphy. In very many ways I am quite

⁵⁷ (1977) 139 CLR 54.

⁵⁸ *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106.

⁵⁹ *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

⁶⁰ (1994) 182 CLR 104.

⁶¹ (1994) 182 CLR 211.

different. I confess that I was always somewhat puzzled about what it was about me that he liked. We were, in a sense, children of the contrasting communities of Ireland. He: ebullient, gregarious, a lover of parties and champagne, light of touch and quick of mind. I: serious, dutiful, applied - more at home in a library than at a party. Yet like me he certainly did. He undoubtedly gave me chances in my career, particularly by the appointment to the Law Reform Commission, without which I would not be standing in this place honouring his memory tonight.

So it is for personal as well as professional and national reasons that I remember the life of Lionel Murphy. I am proud to honour him as a Justice of the High Court of Australia. I am proud to honour him in this Chamber where he did so much as a legislator of the Commonwealth, questing to interpret the soul and will of our people. And I am proud to speak to his memory as his fellow citizen and as a friend.

But if Lionel were here, pacing around this Chamber with the restless stride we, who knew him, remember, he would have none of this solemnity. He would be striding out the door, to the Australia he loved, calling "Jeeez. Where's the party? Open the champagne. Did you read the *Scientific American* this week?".

Lionel Murphy was a change agent in Australia. After him, nothing was ever quite the same again.