LIONEL MURPHY *and the* power of ideas

Michael Kirby

The dissenter's views begin to prevail.

Let me begin with the Bible. Lionel, the agnostic, would certainly find that amusing, as indeed, much that has happened since his death.

In the book of *Genesis* it is recorded that the seven years that Jacob served Rachel seemed to him but a few days because of the love which he felt. It is seven years since Lionel Murphy's death on 21 October 1986. Seven is a special number in the Bible. The days of the week. And there are the ages of Man. For most judges, even of a nation's highest court, the passage of seven years would be enough to see them safely interred under seven feet of earth, remembered only in the volumes of the law books – occasionally to be read; but otherwise largely forgotten except by those who loved them.

In his remarks at the ceremonial sitting of the Full High Court in Canberra soon after Lionel Murphy's death, the then Chief Justice of Australia, Sir Harry Gibbs, spoke of Murphy's remarkable achievements as Attorney-General. He spoke of the great band of admirers whom Lionel Murphy had gathered around him and who were steadfast during the dangerous days that preceded his death. Not many judges, not many public figures, could attract such support and sympathy. Accurately, Sir Harry Gibbs recorded Lionel Murphy's desire to continue, as a judge, the process of reform of the law for which he had striven in his years as a barrister, a Parliamentarian and as a Federal Minister. Accurately too, he discerned Murphy's desire to 'bring about a more democratic and equal society' – something he carried over into his judgments ((1986) 160 CLR v, at vii).

It would be hard to conceive a more dramatic contrast in the style of Lionel Murphy and his last Chief, Gibbs. In many ways, Lionel was more similar to Garfield Barwick, whose life had been less cloistered, whose technique was equally robust and whose will was just as determined. The differences between Lionel Murphy and Sir Harry Gibbs during those last years were well known. But in carefully chosen words, Sir Harry Gibbs looked to the future:

> It cannot be denied – and he would not have wished to deny – that he was at times the subject of controversy and that his judicial method was one which did not command universal assent. However, the value of the contribution made by any judge to the law and the extent of his influence upon it cannot be assessed by his contemporaries; judgment on those questions must be left to history. [(1986) 160 CLR at vii]

Seven years is too short a space of history to venture a full retrospect on Lionel Murphy's contributions as a judge. Less than an hour to do it necessarily imposes on the lecturer a measure of the same discipline which informed Lionel Murphy's brief, and usually readable, judgments in his relatively short period of service on the High Court. It is of that service that I wish to speak. Others can review his contributions to the Parliamentary system, the role of the Senate and to legislative reform. What interests me is the way in which so many of the judicial opinions written by Lionel Murphy (often in dissent) are being accepted today in Australia as legal orthodoxy. It interests me because I have been around for an awfully long time. Next year it will be 20 years in various judicial offices. I was there when Murphy was welcomed to the High Court. I was in the Law Reform Commission, where he had appointed me. During his 11 years on the High Court, he wrote 632 decisions. In 137 of them he was in dissent. This is an average of nearly 22% dissenting opinions — hugely higher than that of any other High Court Justice and well up in the league of the American dissenters.[1] I do not pretend that,

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in all of these dissents, Lionel Murphy has been, or will be, vindicated by later judicial authority. But in a great number, the power of his ideas is already being felt.

Three features of this development are worthy of note. The first is that it shows how powerful ideas, simply expressed, can work away within our legal system to plant their seeds of doubt until, in due time, the once dissenting view becomes accepted. This is the beauty of our common law system with its judicial right to dissent. Most lawyers of the civil law tradition are shocked at the right of judicial dissent. It does not typically exist in the more autocratic traditions of the Napoleonic code and in the civil law judiciary.[2] Lionel Murphy, like myself, would have found appointment to a court of single opinions completely uncongenial, and indeed inconsistent with the perceived obligation of judicial and personal integrity. Intellectual integrity was an imperative of Lionel Murphy's life. Let there be no doubt of that.

Second, it is worth noting how the influence of Lionel Murphy's ideas has begun to have its effect despite the almost universal disdain, even contempt and scorn, in which he was held within the established legal profession during his judicial service, and on his death. I can speak of these things because I saw them at first hand in my professional life. Counsel reading a case to me in court would completely ignore Murphy's opinion – even when he was part of a majority and thus part of the binding rule of the High Court. When gently coaxed to venture upon it, counsel would resist or proceed with reluctance and with thinly veiled amusement. This was the intellectual arrogance of a closed society. I never like it when I see it. The power of Lionel Murphy's ideas is the more remarkable because of the positive dislike held for him by most members of the legal establishment in his lifetime. It should not have been so. He had, after all, a brilliant career at university, an outstanding life as a barrister and in high public service. But it was his unorthodoxy which troubled an intensively orthodox profession. Many felt threatened by it. It is therefore not a little pleasant for those of us who knew the power of his intellect and felt the warmth of his personality to see the way in which the scorn previously targeted at him has now been turned, full circle, towards the adoption of many of his ideas.

Third, it is worth noting that full acknowledgment of Murphy's influence is still a reluctant commodity in the Australian legal profession and judiciary. Where his thoughts are accepted, they are often adopted without attribution. The essence of his reasoning finds its way into later judgments without so much as a footnote or citation. This could, of course, be accident. It could be embarrassment in facing squarely past error, or acknowledging openly a change of heart. Or it could be the lingering feeling that full attribution of ideas to Murphy will somehow bring down the wrath of the orthodox and the calumny of the critics. Anyone who doubts the existence of such calumny should reflect on the savage treatment meted out to the majority in the *Mabo* case. The former Justice Peter Connolly, who once delighted his colleagues in Brisbane by vehement attacks on my Boyer lectures on *The Judges*, has now turned his criticism on the High Court.[3] I feel sure that the justices will bear his scorn with the same saintly forbearance that I, earlier, exhibited.

Let me therefore take a few selected cases where Murphy's judicial ideas have been adopted, with or without acknowledgment. My list will not be exhaustive but it will, I hope, be sufficient to bear out my thesis.

True intellectual freedom

A common theme running through many of Lionel Murphy's judgments, and through the techniques which he used to expound his ideas, was the need for Australian lawyers to free themselves from imprisonment in the English line of precedent. Lionel Murphy was specially irritated by the then still surviving links to the Judicial Committee of the Privy Council in London. Those links had persisted for most of his legal lifetime. He did his best, in Parliament, to terminate appeals of a federal character. But appeals from the State Supreme Courts, as an alternative to the High Court of Australia, remained.

The inappropriateness of accepting the legal authority of a court, comprised of judges of another nation, for resolving the practical disputes of concern to Australians was voiced in many of Murphy's judgments. He complained of the intrusion of the Privy Council into Australian constitutional affairs 'even though it has no jurisdiction'. He saw its errors on display in *Oteri and Oteri v The Queen* (1976) 11 ALR 142. He declared the continuance of the participation of English judges in laying down the law of Australia to be unacceptable. In *Viro v The Queen* (1978) 141 CLR 88, in a prolonged critique of the Privy Council, he said in very direct words:

> I should add that no court in Australia is bound by the decisions of the House of Lords or the courts 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.
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> 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 166]

At the time these things were said, they seemed to many to be needless heresies. Or even insubordination. However, Murphy, the former politician, saw clearly the role of the courts in the governmental decision-making of the country. He therefore saw the continued subservience of Australian courts to the ideas of the judges in the English courts, in the exposition of local law, as totally unacceptable. It was not so much a matter of national pride. It was more a reflection of the integrity of our own system and the differing social conditions and community attitudes which existed as between Australia and England.

Whatever unorthodoxy existed when *Viro* was decided, it has been set at rest by the High Court's instruction, to similar effect, in *Cook v Cook* (1986) 162 CLR 376. Justices Mason, Wilson, Deane and Dawson went back over the old authorities of the High Court. In some of that authority, Australian courts had been urged 'as a general rule' to follow decisions of the English Court of Appeal. But by 1986 our highest court was saying:

> Whatever may have been the justification for such statements in times when the Judicial Committee of the Privy Council was the ultimate court of appeal or one of the ultimate courts of appeal of this country, those statements should no longer be seen as binding upon Australian courts. The history of this country and of the common law makes it inevitable and desirable that the courts of this country will continue to obtain assistance and guidance from the learning and reasoning of

> United Kingdom courts just as Australian courts benefit from the learning and reasoning of other great common law courts. Subject, perhaps, to the special position of decisions of the House of Lords given in the period in which appeals lay from this country to the Privy Council, the precedents of other legal systems are not binding and are useful only to the degree of the persuasiveness of their reasoning. [*Cook* at 390]

Lionel Murphy would have seen no reason for exceptions either for the Privy Council or the House of Lords at any time. The force of Lionel Murphy's exposition about the independence of Australian law-making – including the judicial branch – is really unarguable. Yet it is comparatively easy to lay down the rule. It is much more difficult to get judges and lawyers to free their minds from capture by the English case books. In part, this is because those books are still on the shelves of most judges and lawyers in Australia. Indeed, most of them still have an English series in preference to a series from another State of Australia. These physical impediments to true independence of the mind will diminish over time. As the next generation embraces the new information technology, it will be much less likely that Australian lawyers of the future will draw so heavily on English precedent. The growth of statute law will also encourage mental freedom. Already, in the decisions of the High Court and of other Australian courts, we see a turn back to the earlier use of American jurisprudence and the decisions of other common law jurisdictions beyond England. I doubt if, in the future, we will see the same paternalistic rejection of common law decisions outside England as was expressed by the High Court in its review of my judgment in *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656, 668.[4]

On matters of judicial technique, some of what Lionel Murphy did would still be regarded as controversial. Not every Australian lawyer – not every Labor lawyer – would necessarily agree with all of his techniques. But about his notion of the integrity of the Australian legal system within its own internal hierarchy and of the need for the removal of intellectual subservience to the working judicial hierarchy of another country, there can now be no real dispute. Yet the winning of the minds of the legal profession first to local jurisprudence and then to the great treasure house of common law principle that lies overseas, beyond England, remains a battle for the future. It is one which, daily, I fight out in my court.

For every House of Lords decision read to me, I ask whether counsel have looked to the New Zealand Court of Appeal or the Supreme Court of Canada or to other great courts of the common law. This, I believe, is what Lionel Murphy would be doing today, were he alive. I remember that, when he was appointed to the High Court, he gave instructions to the astonished officers of the Attorney-General's Department, who looked after these things, to 'get rid of' the English Reprint Reports housed in the chambers at Darlinghurst which he had inherited from Justice Menzies. In their place, he called for the reports of the Supreme Court of the United States of America. There he found *Gideon v Wainwright* which he was to follow in *McInnis v The Queen* (1979) 143 CLR 575.

There are still lessons to be learned from Lionel Murphy's approach concerning the enduring impact of legal imperialism on the psyche of the Australian legal profession. It is still common to see the English Court of Appeal referred to in Australian cases as 'the Court of Appeal'. It is still frequently the case that decisions, centuries ago in England, are accepted as stating the law for modern Australia, without a moment's hesitation or thought concerning the changed social conditions and community values since those decisions were handed down. Throwing off capture to foreign jurisprudence, Lionel Murphy felt free to discuss more candidly the values of policy and principle which informed his decisions. In this, too, he has had an impact on the reasoning techniques of the High Court of Australia. In that great court, policy is increasingly perceived and sometimes candidly acknowledged, although without mentioning Lionel Murphy's name or admitting the stimulus which he gave to the process.[5]

Constitutional cases

As the guardian of the Constitution, the High Court of Australia enjoys enormous power to influence the nature of the Australian polity.

In his constitutional judgments, Lionel Murphy revealed himself both as a civil libertarian and as a person committed to communalism and the attainment of the communal good, through laws adopted by democratic legislatures.[6] Murphy, the judge, offered a distinct and historically based view of the meaning of s.92 of the Constitution which promises that trade, commerce and intercourse amongst the States of the Commonwealth should be 'absolutely free'. Read in whole, and in context and against the purposes for its introduction, s.92 commanded no more than free trade in the restricted sense of 'freedom from customs duties or similar taxes on trade, commerce and intercourse'. Murphy rejected the then orthodox view of the High Court that s.92 permitted mere regulation of such trade, commerce and intercourse and forbade much else, however rational and beneficial to the community. He expressed his opinion in *Buck v Bavone* (1976) 135 CLR 100; 132 ff. He there called in aid the 'dramatic recantation' by Lord Wright of the judgment which he wrote for the Privy Council in *James v The Commonwealth* (1936) 55 CLR 1; [1936] AC 578. In 1954, Lord Wright had said in a law review article:

> The idea of s.92 as a power in the air brooding and ready in the name of freedom to crush and destroy social and industrial or political experiments in Australian life ought, I think, to be exploded. In truth, as I said, s.92 is both pedestrian and humble, though very essential from the point of view of the founders of the Constitution, who wished to establish internal inter-State free trade in fiscal matters for all time.[7]

This was Murphy's view of s.92. He clung steadfastly to it – often to the derision of others who criticised both his naivete and his rejection of the authority of the court which had long established the contrary view. He persisted.

In *Cole v Whitfield and Anor* (1988) 165 CLR 360, two years after Murphy's death, a unanimous High Court handed down a new principle for the application of s.92 to suggested cases of interference by State law in freedom of interstate trade and commerce. The court held that the object of the section was simply the elimination of protection. It was addressed to discrimination against interstate trade and commerce in the protectionist sense. This was essentially what Murphy had suggested in his long series of opinions about the section. Lord Wright's remarks in his later recantation were reproduced in *Cole* (at 397). The old doctrine was declared to the 'highly artificial' (at 401). Justice Murphy's views in *Buck v Bavone* were criticised (at 407). But the court, like him, turned to embrace an interpretation based on the original history, purpose and context of s.92. It is one

which concentrates on its object of preventing protection and infringing the guarantee of free trade and the absence of protection. In a sense, although Lionel Murphy's thesis was not wholly accepted – it was indeed criticised – its central idea carried the day. Lord Wright's recantation was vindicated. The over-reach of s.92 was cut back. Its true meaning was to be found from the context of all of its words and from its history as a shield against protectionism. Blind adherence to the unsatisfactory judicial doctrine of the past was to be overthrown. A new rule was henceforth to be applied. Both in context and in technique, *Cole v Whitfield* was much influenced by Murphy's ideas, his approach and his persistence, however much the text might suggest otherwise.

There are many other cases in the constitutional field where this influence has been felt. But none is so dramatic as the recent decision on implied constitutional rights. This was one of Lionel Murphy's recurring judicial themes. In fact, he looked at the Constitution as any good lawyer should. It was a written document. Therefore the writing must be given meaning; not only to the words but to the implications to be derived from the words, read in their context. Even more, meaning was to be attributed to the words because of the very nature of the instrument as an enduring Constitution, difficult to amend and meant to govern the political life of the nation, indefinitely. All of this was orthodox lawyering. Yet it was heresy for so long, at least as Lionel Murphy expressed it.

In *Ansett Transport Industries (Operations) Pty Limited v The Commonwealth of Australia and Ors* (1977) 139 CLR 54, Justice Murphy espoused the opinion that the provisions of the Australian Constitution for the election of the Federal Parliament required freedom of movement, speech and other communications not only between the States but in and between every part of the Commonwealth (at 88). He asserted that the system of representative government itself, without more, required the same freedoms between elections. He described such freedoms as 'not absolute, but nearly so'. Although these freedoms were not expressly spelt out in the Constitution, he was of the opinion that they were necessarily implied in the language of the Constitution and in its structure and purpose. In a series of decisions, Murphy expressed and reinforced these views.[8]

His colleagues on the High Court either ignored these opinions as irrelevant heresies or positively objected to them and rejected them. Most pointed was the sharp comment of Justice Mason in *Miller v TCN Channel Nine Proprietary Limited* (1986) 161 CLR 556. He gave short shrift to the argument of implied guarantees:

> There was an alternative argument put by the defendant, based on the judgment of Murphy J in Buck v Bavone, that there is to be implied in the Constitution a new set of freedoms which include a guarantee of freedom of communication. It is sufficient to say that I cannot find any basis for implying a new s.92A into the Constitution. [at 579]

Imagine, then, the surprise of Lionel Murphy's followers when they picked up the eleventh part of the *Australian Law Journal* in November 1992 and read the reports of the High Court's judgments in *Australian Capital Television Pty Ltd v The Commonwealth [No 2]* (1992) 66 ALJR 695 and *Nationwide News Pty Ltd v Wills* (1992) 66 ALJR 658. In both of these decisions, the majority of the High Court upheld the argument that the Federal legislation there attacked was struck down by reference to freedoms embodied in constitutional implications which amounted to implied guarantees of public and political discussion and criticism.

As a number of observers at the time suggested, this was virtually pure Murphy doctrine.[9] Somewhat disappointing to some was the lack of candid acknowledgment of the impact of Lionel Murphy's ideas in the opinions of the majority. Thus, in Chief Justice Mason's opinion there are numerous references to statements about implications in the judgments of earlier justices who, some might feel, did not come nearly as close to the doctrine embraced on this occasion as Lionel Murphy had done. But this point did not escape the eagle eye of Justice Dawson, in dissent. In a careful passage, presumably deriving from the arguments of the Commonwealth relying on the repeated rejections of the Murphy doctrine, Justice Dawson went through each of Justice Murphy's decisions in turn. Turning the knife (figuratively speaking) he quoted back at Chief Justice Mason the scorn which he had earlier directed in *Miller* to the suggestion that a 'new s.92A' should be imported by judicial construction into the Constitution *(Australian Capital Television* at 723).

It is interesting to speculate on what Lionel Murphy would have made of the *Australian Capital Television* case. He would, of course, have been sympathetic to the notion of implied constitutional rights of freedom of expression and criticism. After all, he had repeatedly expressed this idea in a series of decisions where it was derided, as I have shown. But I suspect that he might have been more affected than the majority High Court justices were by his communitarian view and respect for the right of Parliament to regulate broadcasting at the time of elections. Any piece of legislation which, like the limitation on paid political advertising, could get through the divided Australian Senate and introduce a regime not dissimilar to that operating in numerous overseas democracies, might have seemed to Murphy a positive contribution to informed discussion and choice. It might have been thought to be within the margin of appreciation left to a democratic legislature to derogate from completely unrestricted freedom of expression. After all, the Parliament's objectives were arguably tolerable: the reduction of superficial electoral jingles; the enhancement of real news and opinion; and the prevention of people with large pockets manipulating public opinion by trivialising the political debate by paid advertisements. I suspect that he would have affirmed his view about implied rights but denies that this was an occasion where they had been breached. However that may be, as Justice Dawson plainly discerned, this was a most important breakthrough for Murphy's basic idea. Its consequences for the future constitutional law of Australia are potentially enormous.

Perhaps equally important is the decision in *Mabo and Ors v The State of Queensland* (1992) 175 CLR 1. I do not wish to concentrate on the correction of legal error which had long endured in this settler society, where it had earlier been repaired in others. Instead, I want to mention the way Justice Brennan, in the course of his reasoning, embraced the utilisation of international law for the purposes of developing Australian common law and interpreting ambiguous Australian statutes. Justice Brennan referred, in *Mabo*, to the International Covenant on Civil and Political Rights which Australia has ratified without relevant reservations. He went on:

> The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. [at 42]

This passage was written with the concurrence of Chief Justice Mason and Justice McHugh. Years earlier, often alone and usually in dissent, Lionel Murphy had referred to the International Covenant on Civil and Political Rights and other principles of international law in the course of his reasoning. He did so in constitutional cases.[10] He was the most clear sighted in rejecting the narrow construction of the external affairs power under the Australian Constitution. In the *Tasmanian Dams case*[11] he made it plain that, in his view, any other approach to the expression of the power of the Federal Parliament in this regard would permanently cripple Australia's capacity to play its proper role in the community of nations. This is the view which has ultimately prevailed in the High Court of Australia.

An important element of Lionel Murphy's legacy is the heightened interest in international law and in the closer relationship between that body of law and our municipal law in Australia. In my own way, I have been endeavouring to carry on this important legacy.[12] I consider it to be one of the most important lessons to emerge from the insights of Lionel Murphy in his role as a judge. I confess that, at the time, I regarded his attitude of internationalism in law as unorthodox, and even heretical. I now acknowledge that I was wrong. He merely saw a great truth before most others did. But it is encouraging that, in *Mabo*, and in earlier and later decisions of the High Court, there is increasing attention to international law and in particular to universal human rights norms as touchstones for the expression and development of our own common law in Australia.[13]

Lionel and the underdog

In many of his decisions, Lionel Murphy displayed an appreciation of the position of the disadvantaged operating within the legal system of Australia. In *Dugan v Mirror Newspapers Limited* (1979) 142 CLR 583, he rejected the antiquè English law principles held, by the majority, to be suitable for the law of Australia in respect of the rights of prisoners. In *Moffa v The Queen* (1977) 138 CLR 601, he accepted, as a test for the reasonable person in multicultural Australia, a need to have regard to the culpability of the particular accused person and to avoid the stereotype of a single cultural response based on assumptions of the ethnic uniformity of earlier times. In *Neal v The Queen* (1982) 149 CLR 305, he defended, in ringing terms, Mr Neal's right to be an agitator. There is, I am afraid, a natural tendency for courts and lawyers to dislike agitators and to insist on bringing the whole body of the law down on those who do not conform. As Justice Vaisey once put it, to bring into line the 'only man in the regiment out of step'. Lionel Murphy, often himself being the 'only man out of step',[14] had a natural sympathy for such people. He had an instinctive view that the law should protect their rights, for that was when the law was really tested.

I suppose that the most clear-cut example of the adoption of a Murphy dissent as the new binding rule of the High Court of Australia is to be found in *Dietrich v The Queen* (1992) 67 ALJR 1. It was in that case that the court finally overruled its earlier decision in *McInnis v The Queen*. That decision was explained as based on 'the absence of any argument directed to the existence of a right to be provided with counsel' (*Dietrich* at 5). It was said that the court had simply assumed the correctness of the proposition that such a right did not exist. After a review of Australian, overseas and international human rights law, the High Court majority set aside the conviction of Mr Dietrich of a serious charge. It did so because it concluded that such conviction had followed a trial rendered unfair by the lack of legal representation of the accused person. This was a clear rejection of the doctrine of Chief Justice Barwick, which had carried the day in *McInnis*. Yet it was not an inevitable outcome of the examination of the law as a recent, contrary, decision of the Appellate Division of the Supreme Court of South Africa demonstrates (*S v Rudman and Anor* 1992 (1) SA 343). Clearly, it is in tune both with Lionel Murphy's use of international law and of foreign jurisprudence. It is also in harmony with Murphy's repeated perception of problems from a human rights angle, and his open mindedness about the need to throw over old doctrine when it no longer accords with the social conditions and community attitudes of justice and fairness in Australia today.

In the nooks and crannies of the law

A multitude of other cases could be cited to demonstrate the abiding impact of Lionel Murphy's ideas, in dissent, during his period as a Justice of the High Court of Australia. It would be tedious to go over them all. I will mention just a few more.

Lionel Murphy was very familiar with the operation of industrial laws. This was an area in which he had practised and risen to the top of the Bar. He knew only too well the artificialities and the unreality of some of the binding decisions of the High Court which intruded into the field of federal industrial relations. When he had the opportunity, as a Justice of the High Court, he did not hesitate to lend his voice to a removal of artificialities. Thus in *The Queen v Bain and Ors; Ex parte Cadbury Schweppes Australia Limited and Anor* (1984) 159 CLR 163 he expressed his views and expanded the meaning of a 'dispute' for constitutional and legal purposes in words which were regarded as astonishing at the time:

> The Commission has power to determine what in fact is the industrial dispute and is not circumscribed by the procedures for rejection of paper for demands. Thus an industrial dispute may be diminished or ended or enlarged or altered during the course of the proceedings in the Commission. [at 168]

On this occasion, Murphy carried with Justices Brennan and Deane (at 175). In the face of strong precedent to the contrary, his view was later to prevail in *Re Federated Storeman and Packers Union of Australia and Anor; ex parte Wooldumpers (Victoria) Limited* (1989) 166 CLR 311. Chief Justice Mason followed it, in terms, in that case. The new rule encouraged industrial tribunals to concentrate on the concepts of the dispute and ambit of the dispute in the context of general industrial matters. It permitted a gradual enlargement of the power of the federal arbitral body.

In the field of conciliation, too, Lionel Murphy's judgment in *The Queen v Turbet and Ors; ex parte ABCE & BLF* (1980) 144 CLR 335, 354 drew attention to the word 'prevention' in the Constitution. What he said in that case concerning conciliation was also regarded as most radical and even heretical at the time. It challenged many old preconceptions and court holdings. But it was another illustration of Lionel Murphy's capacity to look afresh at old language and to breathe life into the living Constitution. It is now a completely orthodox part of our constitutional and industrial law. (See, for example, *Re Printing and Kindred Industries Union; ex parte Vista Paper Products Pty Ltd* (1993) 113 ALR 421, 433.)

In two cases on which I was recently working, I fell upon Lionel Murphy's lonely dissent concerning the doctrine of presumptions in equity. What clearly began as rules of thumb to assist judges of the Chancery Court in England to determine disputed claims about duties of conscience, settled, quite quickly, in the hands of lawyers, into fairly rigid rules of law. Lionel Murphy rejected such rigidities. He expressed a preference for replacing them with rational evaluation, by the judge, of all of the evidence in the particular case. He gave reasons for this approach which, to my mind, are compelling (*Calverley v Green* (1984) 155 CLR 242):

> As standards of behaviour alter, so should presumptions, otherwise the rationale for presumptions is lost, and instead of assisting the evaluation of evidence, they may detract from it. [at 264]

While bound to the contrary view, I have expressed a clear preference for the opinion voiced by Lionel Murphy.[15] In little and big things, in the large canvas of constitutional law and in the nooks and crannies of the law of equity, Lionel Murphy's original mind can be found at work in the *Commonwealth Law Reports*. He did not accept that the role of the judge was mechanically to apply old rules. Instead, he turned the light of his intellect on those rules, as they were presented to him. If he found them wanting, he did not hesitate to say so and to explain why. It is those explanations which continue to haunt our legal system. They are spirits agitating the minds of lawyers and judges who follow.

The ultimate legacy

The ultimate legacy of Lionel Murphy on the High Court of Australia may be even greater. I believe that he broke the spell of unquestioning acceptance of old rules where social circumstances and community attitudes have changed rendering those rules inappropriate or inapplicable.

The fact that this is so, can be seen by contrasting the earlier and the present approaches of the High Court of Australia to judicial restraint. The last detailed exposition of that restraint was given by Justice Mason, in another case in which Lionel Murphy dissented, *State Government Insurance Commission v Trigwell and Ors* (1979) 142 CLR 617. That was the case about the liability of property owners for sheep straying from adjoining land. In an eloquent passage (at 633), Justice Mason urged the reasons for judicial restraint; the limited legitimacy of the court to alter the law and its limited facilities to decide upon what that altered law should be. Justice Murphy was equally eloquent in his dissenting opinion.

Contrast, if you will, the attitude expressed on that occasion with the recent line of authority in the High Court of Australia where the High Court judges have made new law. Take the decision on privity of contract in *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd (1988)* 165 CLR 107. Take the strong stand adopted on the so-called police verbals in *McKinney v R* (1991) 171 CLR 468. Take the view in that case on prospective over-ruling. Take the unanimous opinion on the abolition of the common law doctrine that a husband could not rape his wife (*R v L* (1991) 66 ALJR 36). It was a doctrine that stood in the common law from 1736 and was assumed to be the law in the expression of several of the criminal statutes of Australia. Take the implied rights to free speech found in the Constitution already mentioned. Take the alteration of the law governing the recovery of moneys paid or expended as a result of a mistake of law (*David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 66 ALJR 768). Take the right to legal representation upheld in *Dietrich*. Take the explosion of the doctrine of *terra nullius* in *Mabo*. These and many other decisions show a High Court of Australia with an approach to its functions quite different from that expressed in *Trigwell*. It could not be more different from the complete and absolute legalism which was the hallmark of the judicial function of the High Court of Australia, accepted and expounded by Chief Justice Dixon.

Perhaps these are simply changes which conform to changing times. Perhaps they are the inevitable result of the release of the High Court of Australia from the apron strings of the Privy Council. Freed from English supervision and accountability to English judges, we are now building our own Australian jurisprudence and our own common law. The other appellate courts of Australia have been encouraged by the High Court to play their part in this regard (*Nguyen and Ors v Nguyen* (1990) 169 CLR 245, 269). Indeed, they are doing so, including in my court.[16]

There remain, of course, important questions of the rule of law, of the separation of powers, of the limit of judicial legitimacy in law making; of the implications of these moves for judicial appointment and tenure of such a creative judiciary; and of the changes that will come about in the future, as the judiciary of Australia examines afresh principles long established and long accepted as binding rules of law.

Until Lionel Murphy came onto the scene and started asking the searching questions, it was comparatively rare in Australia to have expounded such a challenging view of the judicial role. Certainly, it was virtually unheard of at such a high level of the judicial hierarchy. Now, it is not so rare. This may be Lionel Murphy's most enduring legacy. He showed that it could, and should, be done. That it could and should be done within a legal and judicial framework that was far from anarchistic. One which accepted the institutional constraints within which legal reform was to be achieved.

I emphasise that Lionel Murphy was no revolutionary. He was a man who valued the successive institutions within which he worked – the Bar of the legal profession, the Parliament, the Ministry and the nation's highest court. A revolutionary would have disdained these institutions. An anarchist would seek to throw them over and change them. Lionel Murphy was for change: but change for the better, which is the banner of true reform. He was not for change for change's sake. He worked within our Constitution and its institutions. He saw the way in which, with fresh eyes, the Constitution could be adapted and could live as the guardian of basic rights and the protector of a democratic society.

I was proud to be Lionel Murphy's friend. When he was almost alone – and on trial – I was proud to be asked to speak of my high opinion of his fame and character. I will never forget the dislike of him voiced at that time within the law. I hope, therefore, that you will understand how it gives me more than a little satisfaction to see the way in which the powerful ideas of this remarkable man are having their continuing, and even growing, effect on the Australian legal and judicial system. And especially on the thinking of the court upon which he so proudly served for 11 turbulent years.

In my own estimation, it is likely that this process of Lionel Murphy's intellectual influence will continue to expand. Judges and advocates of the future in Australia will reach, without hesitation, into his dissents. There, they will find fresh ideas and questions which should be asked and

answered. But they will also find insights concerning the legitimate creative function of the judiciary of the common law. In lonely dissent, judges will find encouragement. And they will understand how, in the long haul, ideas which have value may one day come to be accepted.

Perhaps it is the ignominious fate, even of the creative lawyers of today, to become the sources of legal orthodoxy of the future – until their ideas, too, are out of date and must be overthrown by a new generation of lawyers and other citizens with new ideas. Lionel Murphy's legacy lives. Though it is seven years, it seems but a few days since he was amongst us.

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13. See, for example, *Dietrich v R* (1992) 67 ALJR 1.
14. *Re Sussex Brick Co Ltd* [1961] Ch 289 (Ch D) at 293; cf *Acron Resources Ltd v Catto and Ors* (1992) 8 ACSR 219 (SC), 230.
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