NOTE

MURPHY: A MAVERICK RECONSIDERED*

I. INTRODUCTION

Evaluation of a High Court justice's career involves assessment of two distinct but related facets. First, since a judge's duty is to determine legal disputes justly, by a reasoned application of the law, the quality of those judgments must be evaluated both in respect of their results and of the process of reasoning by which they were reached. Secondly, as judges at the higher echelons of the judicial hierarchy - especially the High Court, which is at the apex - are expected to contribute to the development of the law, evaluation of a judicial career at that level must assess the judge's legacy; in other words, the judge's impact upon contemporary judges and lawyers, and on succeeding generations.

While the quality of judicial reasoning can be assessed with some objectivity, the other criteria are more difficult to evaluate. This is especially so with Justice Lionel Murphy.

Some critics discount his judicial career as largely worthless, but many others have formed a very different assessment. Justice Fitzgerald, President of the Queensland Court of Appeal, for example, considers him "one of the most important members of the High Court in the last twenty-five years", and remarks

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that "some other High Court judges in that period who were acknowledged legal technicians have already been almost forgotten".[1]

II. BACKGROUND

In a sense, the deck was stacked against Justice Murphy from the beginning - a fact which he seems later to have overlooked to his great detriment. His two years as Attorney-General in the Whitlam Government were remarkably successful, his legacy in law reform including such significant measures as the *Family Law Act* 1975 (Cth), the *Trade Practices Act* 1974 (Cth), the *Racial Discrimination Act* 1975 (Cth) and the Australian Law Reform Commission.

But his appointment to the High Court on 10 February 1975 was greeted with considerable hostility in the legal 'establishment'. The snub of a Victorian Bar boycott of his official welcome to the Court, for example, was averted only through the intervention of Chief Justice Barwick, no fan of Murphy.

Several factors seem to have contributed to this hostility. First, by 1975 conservatives were openly hostile to the Whitlam Government, whose legitimacy they had never accepted. Secondly, although no radical but merely a moderate progressive reformer, Murphy appears to have enjoyed taunting his opponents with his supposed radicalism and flaunted his somewhat unconventional lifestyle and associates.

However, most significant was the justifiably strong criticism of what was seen as a political appointment to our highest court. Sir Garfield Barwick's appointment to the High Court from the Cabinet in 1964 was cited as a precedent, but the appointments were not analogous. Barwick had been Australia's pre-eminent advocate for more than a decade when elected to Parliament in 1958, and was an obvious candidate to succeed Sir Owen Dixon as Chief Justice. Murphy's legal accomplishments, while substantial, were simply not comparable.

III. MURPHY'S JUDGMENTS

Had Murphy adopted a more conventional approach to his judicial work, the antagonism surrounding his appointment may have dissipated in time, as occurred with the 'political' appointments of Justices Evatt and McTiernan in 1930. But Murphy was perceived as a radical judge, both in the methodology and outcomes of his judgments, and was hailed as such by his acolytes. Consequently conservative derision continued to simmer and provided a fertile field when allegations of impropriety emerged in 1984.

In retrospect, any radicalism in Murphy's judgments was principally methodological. Murphy wrote briefly, in simple language, and used sub-

1 Justice Fitzgerald, "'Lift While You Climb': QUT Graduation Speech 8 May 1995" (1995) 11 *QUTLJ* 1 at 3.

headings. He made greater reference to American cases and to legal and non-legal literature than his colleagues, but his reference to academic legal writing is comparable with current High Court practice. The stylistic differences are to some extent attributable to Murphy's philosophy regarding the writing of judgments, especially his view that they should be accessible to the general public, an opinion shared by Lord Denning.

However, Murphy's judgments were unorthodox in more troubling ways: conclusions were frequently merely asserted, rather than reached by reasoned argument; the reasoning was occasionally sloppy, with essential steps omitted; and social and policy considerations sometimes appeared to constitute the sole foundation for conclusions, rather than being cited in support of legal argument, which is unexceptionable. There is a take-it-or-leave-it quality to many of Murphy's judgments, little effort being made to persuade others to his point of view. Perhaps he considered his colleagues too unenlightened to be converted, but overall his judgments can hardly have impressed such master craftsmen as Gibbs, Stephen and Mason. Moreover, taking so little notice of his colleagues' views, Murphy could hardly expect them to respect his.

Murphy was also openly derisory of the doctrine of precedent, quipping that it was appropriate for a nation populated largely by sheep. Consequently, he did not share his colleagues' reluctance to abandon by mere judicial fiat obsolete, but well-established, common law doctrines, such as a convicted felon's legal incapacity to sue for a civil wrong.[2] However, current High Court practice, dramatically demonstrated by *Mabo v Queensland (No 2.)*,[3] supports Murphy's approach and highlights how significantly the Court's approach to the common law has changed in less than 20 years.

Murphy's constitutional philosophy was grounded in a commitment to Australian independence, popular sovereignty, civil rights and social justice. Hence he:

- denied British power to legislate for Australia (finally abolished by the *Australia Act* 1986 (UK));
- interpreted express constitutional rights liberally (ss 80 and 116), supported the principle of one vote, one value and readily implied constitutional rights;
- questioned the *terra nullius* doctrine finally overthrown in *Mabo*;
- supported criminal process rights, such as free legal aid in trials for serious offences;
- facilitated public power to advance social justice by liberal interpretations of both Commonwealth and State powers, narrow interpretations of ss 90 and 92, and by opposing tax avoidance.

2 *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583.
3 (1992) 175 CLR 1.

IV. MURPHY'S LEGACY

Murphy espoused many of these views in sole dissent, yet the High Court has now adopted some of them and a related position in others, all without acknowledging Murphy's contribution. Is this explicable as unacknowledged influence, as Justice Kirby has suggested?[4]

Influence is difficult to prove, especially since it can operate indirectly through the medium of other judges and lawyers, such as Justice Kirby himself. The High Court which adopted views analogous to Murphy's was constituted differently from that of Murphy's time, although the principal catalysts - Sir Anthony Mason and Sir William Deane - did serve with Murphy, the former throughout Murphy's term. One can only speculate regarding Murphy's influence on Deane. But Mason's adoption of positions earlier rejected when Murphy espoused them might suggest the opposite of Justice Kirby's explanation, namely that the identity of their propounder hindered serious consideration of Murphy's views.[5]

This may well have been the case, for example, with the interpretation of "excise" in s 90 of the Constitution. Since Murphy's death, Justice Dawson and former Chief Justice Gibbs have belatedly adopted Murphy's view. Had they supported him while on the Court, they may well have secured a majority for a narrow interpretation of "excise", which they have long favoured. Indeed Murphy's excise judgments illustrate why his influence appears to be so slight. His view was similar to that expounded earlier by leading justices including Sir Wilfred Fullagar, yet Murphy barely mentioned that. Had he emphasised the precedents supporting his interpretation, he may have attracted the support of other justices.

An irony of Murphy's judicial career is that a former politician should have failed so dismally to appreciate the significance of the greatest of all political skills - the art of persuasion.

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4 M Kirby, "Lionel Murphy and the Power of Ideas" (1993) 18 *Alt LJ* 253.

5 For more detailed consideration of this issue, see G Winterton, "Constitutionally Entrenched Common Law Rights: Sacrificing Means to Ends?" in C Sampford and K Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (1996) p 121 at 128-131.