

JUSTICES MURPHY AND KIRBY: REVIVING SOCIAL DEMOCRACY AND THE CONSTITUTION

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Abstract

This article examines the judicial method of Justices Kirby and Murphy. It suggests that their legacy to Australian jurisprudence is profound and needs to be examined in the context of their desire to revive social democracy and the judicial role in interpreting the Constitution in light of current social and political climates.

Introduction

More than twenty years after his death, Justice Lionel Murphy remains one of the most controversial legal figures in Australian history. Only now is the extent of his legacy beginning to be recognised and recorded. His life is a story of a reformer and social democrat and a judge who was strongly committed to civil liberties. It is partly because of this that he has attracted so much controversy. This is similarly the case for Justice Michael Kirby. The purpose of this article is to reinstate Justice Lionel Murphy as one of the great dissenting judges in the same vein as Justice Michael Kirby. Both judges were significant dissenters and radical social democratic thinkers (committed to civil liberties). Yet, in many ways their methodologies or legal argumentation was very different, even if it did lead them to the same legal or constitutional conclusion. This article examines the jurisprudential similarities of Justices Murphy and Kirby in the context of their interpretivist methodology of judicial reasoning and their concept of the role of a Justice of the High Court.

A Lionel Murphy

Lionel Murphy's early history

Lionel Murphy was admitted to the Bar in New South Wales in 1947.¹ He took silk in 1958 and in 1961 was elected to the Senate in 1962.² In 1972 he was appointed

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¹ Jenny Hocking, *A Political Biography* (1997), ch 8.

² Michael Kirby, *Lionel Murphy and the Power of Ideas* Sydney Lionel Murphy Foundation, 1995, 3.

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Attorney-General and Minister for Customs. Finally, on 10 February 1975 he was appointed a Justice of the High Court of Australia.³ Whilst practising at the Bar he became a keen student of American constitutional jurisprudence provisions and adopted them as a key tenet that continued to underlie his advocacy and subsequent judgments. As Justice Kirby noted, Justice Murphy:

... became a keen student of American constitutional jurisprudence where a constitutional provision has been the subject of judicial interpretation and has subsequently adopted by another legislature, it is reasonable to infer the legislative intention that the provision be accorded the same construction. ...⁴

This somewhat unconventional approach prompted academics of the time to predict that there would be controversy and ideological divisiveness on the bench as a result of his appointment. For example, Professor Barbara Hocking perceived a 'sense of inevitability' about the downfall of Justice Murphy.⁵ Similarly Professor Tony Blackshield commented that:

The Murphy appointment left a deep impact on the Liberals. There are all manner of them today still working against Murphy and prepared to money that he would not survive the High Court Bench.⁶

Nevertheless such comments may simply in hindsight be able to be interpreted as the identification of a judge with the personal idiosyncrasy of a brilliant mind. A legal mind which had a flair for creativity and which was reflected in many of his creative and imaginative High Court judgments. In particular, where he used the concept of democracy as a basis for implying rights into the constitution. As will be shown, much the same can be seen in Justice Kirby's judgments which, indeed, extended the Murphy corpus of judgments and provided practical legal reasoning to support it. As Justice Kirby has argued in relation to Justice Murphy:

He was a witty, interesting, idiosyncratic man. He had flaws and human weaknesses, as which of us does not? He had a streak of larrikinism. But with it went the creative flair of originality not always present in the high offices in which he held. In the view of some he damaged the judicial institution by controversy. Others would answer that he held fast to the judicial

³ See generally Jenny Hocking, *A Political Biography* Cambridge: Cambridge University Press, 1997, chs. 1-5.

⁴ Michael Kirby *Lionel Murphy and the Power of Ideas: The Dissenter's View Begin to Prevail* Sydney: Lionel Murphy Foundation, 1995.

⁵ Hocking, op cit, p 10.

⁶ Tony Blackshield 'The Murphy Affair' in J Scutt (ed) *Lionel Murphy: A Radical Judge* (1987) 232.

independence and to the consequences of his assertions of innocence. He refused to be driven from office by the media or by controversy. ... In the end he suffered a painful death which few who remembered his robust life will not ascribe at least, in part, to the stress of that unhappy time.⁷

As Lisbeth Campbell notes, it is difficult to evaluate Justice Murphy as a judge, advocate and politician in the present socio-legal and cultural context. As she notes, 'if there is a Murphy legacy it is a complex and elusive one with many varied strands'.⁸ What has undoubtedly assisted in reinstating Justice Murphy as one of the pre-eminent judges and great dissenters in Australian legal history was the presence of a more activist and interventionist Mason Court. The Mason Court was prepared to imply rights within the Constitution. This is in contrast with its predecessors, the Dixon and Barwick Courts,⁹ which adopted an unduly legalistic and technical interpretation to the law and which adhered strictly to the doctrine of precedent.¹⁰ In all, Murphy was involved 632 judgments, of which 404 were separate judgments. Importantly, even when in support of the majority Justice Murphy's reasoning was often quite different to those of those of the other majority judgments.¹¹ Whether Justice Murphy's distinctive reasoning or legal methodology was more to do with the particular substance of the cases he was dealing with or whether it was more to do with his own distinct style of legal reasoning remains unclear. What is clear is that he had his own judicial method which is regarded as an interpretative method.

Murphy's interpretative method

Most of the published analyses of Justice Murphy's work were undertaken in the immediate aftermath of the dramatic attempts to discredit him which surfaced in 1984 and continued until his sudden death in 1986.¹² Hence, the contemporary work inevitably lacked perspective and balance and was often little more than a brief

⁷ Justice Michael Kirby 'Murphy: Bold Spirit of the Living Law', Address to the Sydney University Law School, 28 October 1987.

⁸ Lisbeth Campbell 'Lionel Murphy and the Jurisprudence of the High Court' 15 (1) *University of Tasmania Law Review* 22, 26.

⁹ In this context, see P D Connolly 'Should the Courts Determine Social Policy' in AMEC, *The High Court of Australia in Mabo*, p 1.

¹⁰ See generally AF Mason 'The Role of Constitutional Court in a Federation' (1986) 16 *Federal Law Review*, 1, 5.

¹¹ Hocking, above n 4, p 26.

¹² See Brian Toohey 'Little People to Chip in to Help Murphy the Property Millionaire' *Sydney Morning Herald*, 6 October 1984, 10-14; P Samuel 'The Final Murphy Time Bomb' *Bulletin* 15 February 1975, 27; David Marr 'Seven Seats of Real Power' *Bulletin* 5 July 1975, 18-20; P McCarthy 'Mr Justice Murphy Picks a Mar' *National Times*, January 1983, 15.

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commentary by way of introduction to excerpts from Murphy J's most striking opinions.¹³ There have been few recent studies and these do not provide full and considered assessments of Justice Murphy's judicial work.¹⁴ Hence, as Campbell¹⁵ alludes to, there is no consideration of Justice Murphy's opinions to be found in the judgments of in *Cole v Whitfield*¹⁶ even though the justices in the case came close to adopting Justice Murphy's dissenting judgment in *Buck v Bavonne*.¹⁷

Further, in the context of Justice Murphy's 'implied rights'¹⁸ judgments and those rendered in the 1990s Justice Kirby, suggests that the, 'lack of candid acknowledgment in the recent free-speech'¹⁹ cases is remarkable. This is particularly so given the apparent similarity between the majority's judgments and dissenting opinions of Justice Murphy in *Ansett Transport Industries (Operations) Pty v Commonwealth*,²⁰ *McGraw Hinds (Aust) Pty Ltd v Smith*²¹ and *Miller v TCN Channel Nine Pty Ltd*.²² Similarly there is little positive acknowledgment of the manifestation of Justice Murphy's influence in the 'implied rights' cases of *Theophanous v Herald and Weekly Times*²³ and *Stephens v Western Australian Newspapers*.²⁴

There are various reasons for this judicial and academic neglect, the main one being that Justice Murphy did not accord overriding priority to the doctrine of precedent as did the then dominant figure of the High Court, Chief Justice Sir Garfield Barwick.²⁵ The explicit disregard for precedent, argues Graham Fricke, 'must have seemed threatening and unprofessional to judges, even those not imbued with the spirit of literalism'.²⁶ Justice Murphy's legal skill also needs to be seen through the lens of Chief Justice Barwick who was both dismissive and overtly critical of Justice Murphy's

¹³ Michael Kirby 'Lionel Murphy and the Power of Ideas' (1993) 18 *Alternative Law Journal*, 253.

¹⁴ See George Williams 'Engineers is Dead, Long Live Engineers?' (1995) 17 *Sydney Law Review*, 62.

¹⁵ Campbell, above n12, p 10.

¹⁶ (1988) 165 CLR 360.

¹⁷ (1976) 135 CLR 110.

¹⁸ *Buck v Bavonne* (1976) 135 CLR 110.

¹⁹ Kirby, above n 17, 254.

²⁰ (1977) 139 CLR 54.

²¹ (1979) 144 CLR 633.

²² (1986) 161 CLR 556.

²³ (1994) 68 ALJR 713.

²⁴ (1994) 68 ALJR 765.

²⁵ Graham Fricke Seminar: *The Lionel Murphy Legacy in Troubled Time- A Tale of Two Maverick Judges* College of Law, Australian National University, 21 October 2006.

²⁶ *Ibid*, p 24.

interpretative approach, as can be seen in these dicta by his Honour in *Clark King v Australian Wheat Board*:

One of the majority justices, Murphy J, took a ground which has never been accepted by any Justice of the Court in any case and which, as I pointed out in my own reasoning for the judgement in *Clark King* is, in my opinion, insupportable on a reading of the Constitution itself. It is inconsistent with every decision of the Privy Council and of this Court upon the meaning and operation of s 92 of the Constitution: see, in particular, *Commonwealth v Bank of New South Wales*. ... Further, it is noticeable that no party to the argument of the present case has attempted to support these reasons of my brother Murphy. The views of Murphy J were not shared by the other Justices forming the majority: nor did Murphy J support the reasons of the other justices.²⁷

A more simplistic or benign reason why Justice Murphy's reputation continues to suffer neglect is predicated on the thesis that Justice Murphy simply asserted his position rather than arguing from past decisions or using precedent in an orthodox manner.²⁸ Justice Kirby, in this respect and by contrast, predicated his decisions on an array of cases to support his distinctive position. Insofar as Justice Murphy's judgments lack judicial authority because they were not in fact predicated on precedent they were therefore so-called not truly 'authentic' positions or 'judgment'. Justice Murphy simply presented a proposition in his judgment as being self-evident without requiring further explanation or justification.²⁹ This had led to the argument that whilst his judgments comprised quite advanced substantive propositions, they did not comprise an inherent logic or a distinctive system of reasoning whereby his legal methodology was manifested. For example, B Edgeworth points out that in the decision of *Calverley v Green*³⁰ Justice Murphy's points are not developed or applied in detail or historically justified by legal precedent:

With some justification it could be said that his judgements were so short that his critical insights were not more rigorously applied to the body of his constitutional law which were discussed more amply by the majority. It is this tendency which has made it all the more easier for Murphy's critics to see some of his judgements as more of the nature of social commentary than legal reasoning.³¹

²⁷ (1980) 145 CLR 266 at 276.

²⁸ 'Come Back Lionel' (1992) *Alternative Law Journal*, 206.

²⁹ For example, see *Commonwealth v State of Tasmania (The Tasmanian Dams Case)* (1983) 153 CLR 168.

³⁰ (1984) 155 CLR 242.

³¹ B Edgeworth, 'Murphy on Property' in J Scutt (ed) *Lionel Murphy: a Radical Judge* (1987) 184.

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This not only applied to his judgment in *Calverley v Green*³² but also to his dissenting judgment in *Clunies-Ross v Commonwealth*.³³

Even, it must be conceded, that Justice Kirby focuses less on Murphy's legal methodology, reasoning and his structuring of his judgement in preference to the substantive impact of his legal ideas and concepts.³⁴

Yet, Justice Murphy did support many of his decisions through past authority and did adhere to the doctrine of precedent. The difficulty was that this precedent was often international, either from the United States, Canada, New Zealand or South Africa³⁵ which at the time Australian jurisprudence was not prepared to accept as 'authentic' and 'relevant'. It is interesting to note in the academic writings of the time that scholars were looking to overseas models on which to establish a Bill of Rights.³⁶

In short, Justice Murphy's interpretative methodology is rather unique and requires further substantive attention insofar as it relies on extra-legal factors and bypasses, in many cases, the doctrine of precedent. In that respect, it appeals directly to social, political and public considerations (much as the American legal realists and critical legal studies movement did in the immediate pre-and post- World War II years of which he was keen to take note of).³⁷ As Campbell argues, 'He thereby detaches [himself] from the judicial mainstream and renders his opinions of little value for the purposes of a precedent-respecting discourse.'³⁸

In this respect, Murphy's focus on the substantive *sociological details* of the case thereby precluded him from developing an overall legal interpretative methodology as echoed in the judgments of his predecessor, Justice HV Evatt. Justice Evatt's judgments demonstrated a keen concern to take account of the social/sociological context in which the matter occurred. This approach was, at that time, entirely antithetical to Justice Dixon's commitment to a 'strict and complete legalism' and this led Justice Evatt to some extent unduly to empathise frequently with the position and the circumstances of the under-privileged and the disempowered.³⁹ Nevertheless,

³² (1984) 155 CLR 242.

³³ (1984) 155 CLR 193.

³⁴ A J Brown 'The Inevitable Judge? A Biographer's Note' in Ian Freckleton and Hugh Selby (eds) *Appealing to the Future* (Sydney 2009) 51.

³⁵ There is no better example than this than the *Tasmanian Dams Case* (1983) 158 CLR 1.

³⁶ See George Williams, *Human Rights Under the Australian Constitution* (2002).

³⁷ See Roscoe Pound, *Interpretations of Legal History* (1948).

³⁸ Edgeworth, above n 35 p 185.

³⁹ P Crockett, 'Mr Justice and the Constitution' 3 (1968-9) *Federal Law Review* 153.

despite Justice Murphy and Justice Evatt's fine constitutional minds, Leslie Zines has highlighted shortcomings in Justice Evatt's constitutional judgments.⁴⁰

Shortcomings

As Zines argues, Justice Evatt's as well as Justice Murphy's concern to focus on the substantive issues of the case at hand meant that their Honours, in effect, neglected to develop a guiding or overarching approach to the Constitution and its constitutional interpretation. Zines also points out that Justice Evatt never reached a settled view on precisely *what* should be the appropriate constitutional balance between the Commonwealth and the States and *how*, indeed, power should, in fact, be shared between the two tiers of government. This is a critique that can be levelled also at Justice Murphy's judgments. Jocelyn Scutt argues that Murphy was firmly committed to the centralisation of economic power only insofar as it did not trench on individual rights.⁴¹

In addition to being critical of this teleological approach to constitutional interpretation Zines also criticises Justice Murphy and Justice Evatt's preparedness to utilise non-judicial documents as well as comparative constitutional opinions in overseas jurisdictions, such as North America, where the differences between the Australian and North American Constitutions were considerable.⁴² As alluded to above, academic and judicial writings (particularly on the Mason Court) has diminished this criticism to a certain extent.

Justice Murphy did adopt the hallowed North American principle that where a statutory or constitutional provision had been the subject of judicial interpretation and had subsequently been adopted by another legislature, it was reasonable to infer that the legislature intended that the provision should be accorded the same construction. In *Attorney-General; Ex rel Black v Commonwealth*⁴³ for example, Justice Murphy engaged in an elaborate analysis of North American authority dealing with the provision on which s 116 of the Australian Constitution was modelled, to support his dissenting construction of s 116. In *Attorney-General (Vic); Ex rel. Black v Commonwealth*⁴⁴ Justice Murphy commented:

The guarantee of personal freedom against the imposition of any religious observance and the prohibition of the free exercise of any [in s 116] should be

⁴⁰ Leslie Zines, 'Mr Justice Evatt and the Constitution' 3 (1968-9) *Federal Law Review* 153.

⁴¹ Scutt, above n 6.

⁴² P Crockett, *Evatt: A Life* (1993) 72-3.

⁴³ *Attorney-General (Vic); Ex rel. Black v Commonwealth* (1981) 146 CLR 559 at 565 (*DOGS Case*).

⁴⁴ (1981) 146 CLR 559 at 565 (*DOGS Case*).

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read widely, consistently with their brevity and with constitutional usage. As I said in *Attorney-General (Cth); Ex rel McKinlay v Commonwealth*, “Great rights are often expressed in simple phrases”. It would detract greatly from the freedom of religion guaranteed by those clauses if they were to be read narrowly.⁴⁵

Justice Murphy took this approach in several other constitutional cases.⁴⁶

Murphy and constitutional interpretation

The tendency to abbreviate his judgments was particularly pronounced in relation to issues pertaining to statutory and constitutional interpretation. As Justice Kirby has conceded, Justice Murphy’s judgments were unhelpfully brief insofar as he would adopt a teleological approach which would go straight to the evident meaning of the text when read in the light of its purpose. In this respect, Justice Murphy demonstrated impatience with senior Australian judges who poured over English jurisprudence to arrive at an answer. If Justice Murphy had a technique, it was one predicated on Australian scholarship and jurisprudence as well as comparative jurisprudence if necessary. As Justice Kirby has argued:

On matters of judicial technique, some of what Lionel did would still be regarded as controversial. Not every Australian lawyer – not every 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 to local jurisprudence and then to the great treasures 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.⁴⁷

In this respect, Justice Murphy’s interpretative approach originated from his commitment to democracy. Justice Murphy was a passionate advocate of the democratic process. It was therefore somewhat ironic then that in his first year on the High Court Justice Murphy was confronted indeed with the issue of ‘one-vote-one-value’ and, in this particular respect, he was favourably disposed to the challenger. The case was *Attorney-General (Cth); ex rel McKinlay v Commonwealth*⁴⁸ where the applicant, Mr McKinlay, a voter in the electoral division of Diamond Valley, brought

⁴⁵ *Attorney-General (Vic); Ex rel. Black v Commonwealth* (1981) 146 CLR 559 at 565 (*DOGS Case*).

⁴⁶ *Attorney-General (Cth); ex rel McKinlay v Commonwealth* (1975) 7 ALR 593.

⁴⁷ Michael Kirby, ‘Judicial Activism?’ (2004) 24 *Australian Bar Review* 249, 254.

⁴⁸ *Ibid.*

proceedings as a relator against the Commonwealth on the basis that the inequality in electoral sizes meant that his voting rights had effectively been diluted.

Justice Murphy, in dissent, had no difficulty in finding that Mr McKinlay had the requisite standing to sue and in respect of the substantive issue, he pointed to the fact that s 24 of the Constitution which provided that that the House of Representatives 'shall be composed of members directly chosen by the people of the Commonwealth' was clearly taken from the Constitution of the United States, Article 1, Section 2 as he noted which provides:

1. The House of Representatives shall be composed of members chosen ... by the people of the several States ...
3. Representatives ... shall be appointed among the several States which may be included within the Union, according to their respective numbers.⁴⁹

Concluding that it was appropriate to have regard to United States authority, he examined the decision of the United States Supreme Court in *Wesberry v Saunders*⁵⁰ in which a similar argument had been upheld and quoted at length from the majority opinion which included his mentors Justices Brennan and Douglas. Justice Murphy also considered Justice Marshall's judgment from the decision of *White v Register* where Justice Marshall opined:⁵¹

It is important to understand that the demand for precise mathematical equality [of electoral populations] rests neither on scholastic obsession with abstract numbers nor a rigid insensitivity to the political realities of the reapportionment process. Our paramount concern has remained an individual and personal right – the right to an equal vote...We have demanded equality in district population precisely to insure that the weight of a person's vote will not depend on the district in which he lives.

In another dissent, *Attorney-General (Victoria); ex rel Black v Commonwealth*⁵² Justice Murphy had to consider whether State aid to church schools in fact breached the establishment clause of s 116 of the Constitution. He sought support for the conclusion that the provision had been breached from a passage in an opinion of Justice Douglas in which the latter opined that, 'In common understanding there is no surer way of "establishing" an institution than by financing it.'⁵³ In the course of his judgment Justice Murphy quoted passages from opinions of Justice Douglas in

⁴⁹ *Attorney-General (Cth); ex rel McKinlay v Commonwealth* (1975) 7 ALR 593, 664.

⁵⁰ 376 US 1 (1964).

⁵¹ 412 US 755 at 780-1 (1971).

⁵² (1981) 146 CLR 559.

⁵³ *Wheeler v Barrera* 417 US 402 at 430 (1974).

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Tilton v Richardson,⁵⁴ *Zorach v Clauson*⁵⁵ and *Walz v Tax Commissioner of New York*.⁵⁶ Likewise in the case of *Lia Chia Tsing v Rankin*,⁵⁷ dealing with the right to trial by jury, Justice Murphy drew comfort and support from a joint opinion of Justices Black and Douglas in *Baldwin v New York*.⁵⁸ Justice Douglas's curial opinions had a strong influence on Justice Murphy's thinking.

The circumstances of the *Alister v R*⁵⁹ (the *Ananda Marga Case*) also attracted Justice Murphy's concern. Three members of the *Ananda Marga* cult were convicted of conspiracy to murder and of the attempted murder of police officers when a bomb exploded in Sydney. In the 1983 appeal, Justice Murphy was joined by Chief Justice Gibbs and Justice Brennan in granting leave to appeal and adjourning the appeal pending the production of documents, if they existed, by the Australian Security and Intelligence Organisation (ASIO). Chief Justice Gibbs and Justice Brennan considered the cross-examination defective in crucial respects, but they did not deem it so grossly bad as to be improper. Justice Murphy alone considered it irregular and improper. In the 1984 appeal only Justice Murphy considered the documents produced by ASIO to be irrelevant. In the course of his judgment in the 1983 appeal, Justice Murphy quoted from Justice Douglas's autobiography where he wrote, 'I know of no more serious danger to our legal system than occurs when ideological trials take place behind the façade of legal trials.'⁶⁰ Later events vindicated Justice Murphy as the principal Crown witness, Richard Seary, made admissions that rendered his testimony suspect, and the three accused were released.

In another case, which involved the right to counsel and the right to a fair trial, Justice Murphy was once again in dissent, although his views subsequently prevailed.⁶¹ In *McInnis v the Queen*⁶² Justice Murphy upheld the right to a fair trial, such that an unrepresented accused should not be forced to undergo a serious trial. In the course of his judgment, Justice Murphy cited Justice Douglas on two occasions. He also quoted from the joint dissenting opinion of Justices Black and Douglas in

⁵⁴ 403 US 672 at 695-6 (1971).

⁵⁵ 343 US 306 at 312 (1952).

⁵⁶ 397 US 664 at 714 (1970).

⁵⁷ (1978) 141 CLR 182.

⁵⁸ 399 US 66 at 76 (1970).

⁵⁹ (1983) 154 CLR 404.

⁶⁰ W O Douglas, *The Court Years 1939-75* (1980) 377.

⁶¹ *Dietrich v The Queen* (1992) 177 CLR 292.

⁶² (1979) 143 CLR 575 at 587.

*Betts v Brady*⁶³ in which they expressed a view which prevailed in a subsequent decision of Justice Murphy's. The judgment expressed the following view:

Denial to the poor of the request for counsel in proceedings on charges of serious crime has long been regarded as "shocking" to the "universal sense of justice" throughout this country. In 1854, for example, the Supreme Court of Indiana said: "It is not to be thought of in a civilised community, for a moment, that any citizen should be debarred of counsel because he was too poor to employ such aid. No court should be respected or respect itself to sit and hear such a trial. The defence of the poor, in such cases is a duty resting somewhere which will be at once conceded as essential to the accused to the Court, and to the public."⁶⁴

Later in his judgment, Justice Murphy cited an extra-judicial dictum of Justice Douglas (thereby revealing the quite significant width of Justice Murphy's serious interest in Justice Douglas's writings) to the effect that putting an accused on trial in a serious case without a lawyer is 'barbarous'.⁶⁵

Further, Justice Murphy's dissenting view in *O'Reilly v Commissioner of the State Bank of Victoria*⁶⁶ became orthodox doctrine a year or so later. In that case the majority of the Court had held that legal professional privilege was only available during the actual course of judicial proceedings.

The issue of legal professional privilege arose again in *Baker v Campbell*⁶⁷ when a member of the Australian Federal Police attempted to seize documents held by a firm of solicitors. This time the majority of the Court, including Justice Murphy, decided that the privilege was not so confined. In the course of his judgment, Justice Murphy cited the decisions of Justice Douglas in *Couch v United States*⁶⁸ and *Granello v United States*⁶⁹ concerning the constitutional basis of the privilege.

Like Justice Kirby, apart from the above cases dealing with democratic rights (such as the right to vote), Justice Murphy often expressed views concerning 'human rights'. For example, *Gratwick v Johnson*⁷⁰ is usually considered as a case dealing with section 92 of the Constitution. However, Justice Murphy saw the dispute in terms of an

⁶³ 316 US 455.

⁶⁴ *Betts v Brady* 316 US 455 at 476-7 (1942).

⁶⁵ WO Douglas, 'The Great Rights: The Bill of Rights is Not Enough' (1963) 38 *New York University Law Review* 207.

⁶⁶ (1982) 153 CLR 1.

⁶⁷ (1983) 153 CLR 52

⁶⁸ 409 US 322 (1973).

⁶⁹ 386 US 1019 (1967).

⁷⁰ (1945) 70 CLR 1.

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implied freedom of movement. In *Buck v Bavonne* this idea was further developed when Justice Murphy commented:

The right of persons to move freely across or within State borders is a fundamental right arising from the union of the people in an indissoluble Commonwealth. ... I think that freedom to move across State borders arises from the fundamental implication of the Constitution, and not, as held in *Gratwick v Johnson*, from section 92.⁷¹

Similarly, in 1979 in the case of *McGraw Hinds Ltd v Smith*⁷² he conceptualised an implied freedom of communication. Justice Murphy found that, amongst other matters, a Queensland law prohibiting the sending of unsolicited mail in certain circumstances could be struck down because it was in conflict with a fundamental right to communication, as well as with s 92 in the context of relating to freedom of trade and commerce.

There are few explicitly expressed guarantees in the Constitution but one guarantee Justice Murphy identified was in s 116 of the Constitution. In *Attorney-General (Vic); Ex rel Black v The Commonwealth*⁷³ Justice Murphy declared:

The guarantees of personal freedom against the imposition of any religious observance and the prohibition of free exercise of any religion and the requirement of any religious test should be read widely consistently with their brevity and with constitutional usage. As I said in *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (91) "Great rights are often expressed in simple phrases." It would detract greatly from the freedom of and from religion guaranteed by those clauses if they were to be read narrowly.⁷⁴

Further, in *Victoria v The Australian Building Construction Employees' and Builders' Labourers Federation*⁷⁵ he found the right to trial by jury contained in s 80 of the Constitution should be read with a constitutional principle that a person cannot be convicted by of a crime through a process which is not part of that procedure. Therefore, it was held that a provision in a Federal Act establishing a Royal Commission which directed the Commissioner to report upon the question of whether persons had been convicted of crimes was invalid.

⁷¹ (1976) 135 CLR 110 at 126.

⁷² (1979) 144 CLR 633.

⁷³ *Attorney-General (Vic); Ex rel. Black v Commonwealth* (1981) 146 CLR 559 at 565.

⁷⁴ *Attorney-General (Vic); Ex rel. Black v Commonwealth* (1981) 146 CLR 559 at 623.

⁷⁵ (1982)152 CLR25 at 66.

Moreover, an Act in identical terms passed by the Victorian Parliament was also invalid (*The Queen v Davey*)⁷⁶ even though the Victorian Parliament was not subject to the restrictions in the Constitution. Justice Murphy was able to reach this conclusion by development of the idea that the States owe their existence, in constitutional terms, to the Commonwealth Constitution. In a later case⁷⁷ Justice Murphy expanded this view when he said that the Western Australian Constitution (and presumably also the Constitutions of the other States):

... originally derived its authority from the Western Constitution Act 1898 (Imp) but now derives its authority from section 106 of the Australian Constitution ...⁷⁸

There is little to be gained from a scrutiny of Justice Murphy's reasoning because there is so little of it. In more critical terms, one academic has termed Justice Murphy's judgments as the 'hollow corpus of the Murphy corpus'.⁷⁹ Other commentators have termed it the 'plurality of rights'.⁸⁰ His later judgments, however, became more legalistic and less focused on the implication of rights.

Judicial development

The American Realist and subsequent critical legal studies approaches⁸¹ may be cited as two aspects of Justice Murphy's anticipation of the current trend in Australian jurisprudence. These American traditions were ones that conceptualised that the judges could do much more than just to increase knowledge of the law and to protect citizen rights and liberties. This was manifested in Justice Murphy's view that the common law was an insufficient protector of the Bill of Rights and that a consequent constitutional Bill of Rights was needed to counter the growth in legislation. This view that legislative power needed to be combated, not merely by the common law (and equity) courts but in other instruments, was articulated a century ago in 1910 by Sir Harrison Moore when he remarked:

It is not merely that the legislature may not constitute itself or any other body unauthorised by the Constitution, or by or account of justice with judicial

⁷⁶ (1980) 50 FLR 57.

⁷⁷ *Western Australia v Wilsmore* (1982) 149 CLR 67 at 79.

⁷⁸ *Ibid.*

⁷⁹ Graham Fricke Seminar: *The Lionel Murphy Legacy in Troubled Time- A Tale of Two Maverick Judges* College of Law, Australian National University, 21 October 2006.

⁸⁰ Annual National University, Lionel Murphy Foundation, Annual Lionel Murphy Lecture, Lionel Murphy Lecture 10 Years On.

⁸¹ Brian Leiter, *American Legal Realism*, University of Texas Public Law Research Paper, No. 42.

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function, that might be by validly performed by a court regularly constitutionally to be the determinant after hearing of rights according to law. If this were all that is imported by the separation of power it would be of small import and legally for power of this nature is very widely being usurped. The temptation to which all are liable to which Americans have succumbed and which Americans have not met their allegations of judicial power to apply a new rule to parts, acts or events.⁸²

In this way, Justice Murphy (gaining his support from Justice Douglas's ideas) displayed irreverence for authority. Neither believed that the common law was immutable. Justice Kirby has also strongly adopted this view, perhaps even more so given his antipathy to the tradition of originalism. For example, Justice Murphy poured scorn on the applicability of the ancient doctrine that a felon suffered a 'civil death' so that he was disabled from bringing proceedings. As he put it in *Dugan v Mirror Newspapers*, 'Judges have created the doctrine of civil death and judges can abolish it.'⁸³

This attitude is also highlighted by Justice Murphy's contribution to expanding the scope for national control of economic activity; a theme that has continued in the judgments of Justice Kirby.⁸⁴ As Justices of the High Court Justices Kirby and Murphy argued for the widest possible operation of the corporations power.⁸⁵ As a consequence of Justice Murphy's efforts the Commonwealth potentially then had legislative power to regulate any aspect of a corporation's activities: their internal structure, industrial relations, capital financing, and securities and external dealings and activities.⁸⁶

Equally, Justice Murphy advocated a narrow conception of s 92 and this constituted a vigorous challenge to the laissez-faire or 'individual rights' orthodoxy producing a more rational and more government interventionist reading of the section.⁸⁷ Justice Murphy, for example, used the wide interpretation the corporations power developed under *Strickland v Rocla Concrete Pipes*⁸⁸ and in the *Australian National*

⁸² Sir Harrison Moore, *The Constitution of the Commonwealth of the Australia* (1910) 43.

⁸³ *Dugan v Mirror Newspapers* (1978) 142 CLR 583 at 611.

⁸⁴ E G Whitlam, *The Whitlam Government* (1985) 148.

⁸⁵ Section 51 (xx).

⁸⁶ Peter Hanks 'Murphy on Economic Regulation' in J Scutt (ed) *Lionel Murphy: A Radical Judge*. Carlton: MacMillan, 120 cf *The Incorporation Case* (1990) 169 CLR 482.

⁸⁷ See the jurisprudence of Dixon CJ on the 'individual rights' concept of s 92; cf. *Buck v Bavonne* (1976) 135 CLR 110.

⁸⁸ (1971) 124 CLR 468.

*Airlines v Commonwealth Western Australian Airlines Case*⁸⁹ to set up public instrumentalities that would compete with private ones thereby raising the quality of the service. One consequence of this was the establishment of a Prices Justification Tribunal by the Whitlam Government, a quite innovative mechanism that monitored private sector interstate pricing.

Justice Murphy further adopted a far-reaching interpretation of the interstate trade and commerce power found in s 51 (i) wherein purely intrastate commercial and industrial production (and industrial affairs) could be constitutionally regulated by the Commonwealth on the basis that it facilitate interstate commercial activity.⁹⁰ This could be interpreted on the part of Justice Murphy as a policy recognition of contemporary commercial realities. This 'co-mingling' doctrine was developed in the 1930s in the United States.⁹¹ Despite its adoption by Justice Murphy the High Court has since refused to countenance this American Supreme Court decision. As Chief Justice Dixon declared in *Wragg v New South Wales*⁹² '[t]he distinction which the Constitution makes between the two branches of trade and commerce must be maintained. Its existence makes impossible any operation of the incidental power which would obliterate the distinction.'⁹³

Such a statement highlights why Justice Murphy's interpretative approach was so controversial. It was radically different from that of the other judges on the High Court bench at the time and echoed American realism. For example, in *Gazza v Comptroller of Stamps*⁹⁴ Justice Murphy appeared to endorse the view that the judges hide their real power: that is their 'lawmaking' function. This view was propounded by Chief Justice Mason but not openly conceded by the judiciary until recently. As Lisbeth Campbell argues:

Such open adoption of a radical American-realist approach may be cited as just one more aspect of Murphy J's anticipation of current trends according to which it is acceptable to acknowledge that judges do make laws; this admission did not however endear him to his colleagues in the 1970s and early '80s.⁹⁵

⁸⁹ (1976) 144 CLR 62 at 67. M Crommelin and G Evans 'Explorations and Adventures With Commonwealth Powers' in Gareth Evans (ed) *Labor and the Constitution* (1977) 18.

⁹⁰ See *NLRB v Jones and Laughlin* 391 US (1937); *New South Wales v Commonwealth* (2006) 229 CLR.

⁹¹ See, for example, *NLRB v Jones and Laughlin* 391 US (1937).

⁹² (1953) 88 CLR 352.

⁹³ *Wragg v New South Wales* (1953) 88 CLR 352 at 386.

⁹⁴ (1982) 81 ATC 499.

⁹⁵ Campbell, above n 13, p 25.

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The acknowledgment of the judicial lawmaking function lies at the core of Justice Murphy's conception that the Constitution is underpinned by democratic philosophy. This philosophical position was articulated clearly in his judgment in *Western Australia v Commonwealth*⁹⁶ (*the First Territory Senator's Case*) where he said, '[t]he Constitution is designed for a democratic society. ... It is based on the concept of democracy.'⁹⁷ After considering the arguments for and against the proposition that s 122 of the Constitution should be read separately from the other sections, Justice Murphy concluded that, '[i]t is contrary to the democratic theme of the Constitution that Parliament should not be able to allow democratic representation by membership in either House to the Territories.'⁹⁸

This theme was taken up and developed in *Attorney-General for the Commonwealth; Ex rel McKinlay v Commonwealth*⁹⁹ in 1975 and in 1978 in *Attorney-General (NSW); Ex (NSW); Ex rel McKellar v The Commonwealth*.¹⁰⁰ The cases concerned quotas to be used in determining the number of persons or voters to be included in the electoral divisions for the House of the Commonwealth Parliament. Justice Murphy relied both on the 'democratic theme' of the Constitution and on cases decided by the Supreme Court of the United States of America, to reach his conclusions, one of which was that there should be equality of voting power.

Despite his advocacy for a wide interpretation of the federal constitutional powers he did not believe that there was, indeed, *no* role for the States to perform.¹⁰¹ In 1983 in *Commonwealth v Tasmania*¹⁰² (*the Tasmanian Dams Case*) Justice Murphy was adamant that no law should be passed which prevented the functioning and the existence of the States as States of the Commonwealth.¹⁰³ In this respect, Justice Murphy supported the views of Justice Dixon in *Melbourne Corporation v Commonwealth*¹⁰⁴ the 1947 *State Banking Case* and the sophisticated jurisprudence of Justice HV Evatt.¹⁰⁵ Justice Murphy was of the opinion that there were obvious restrictions on State

⁹⁶ (1975) 137 CLR 201.

⁹⁷ *Western Australia v Commonwealth* (1975) 134 CLR 66 at 67.

⁹⁸ *Ibid.*

⁹⁹ (1975) (135) 1.

¹⁰⁰ (1978) 135 CLR 527.

¹⁰¹ Peter Hanks 'Murphy and the Australian Constitution' in J Scutt (ed) *Lionel Murphy: A Radical Judge* (1987).

¹⁰² (1983) 158 CLR 1.

¹⁰³ *Commonwealth v Tasmania* (1983) 134 CLR 1 at 46-50.

¹⁰⁴ (1947) 74 CLR 1.

¹⁰⁵ *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 at 66. See Guy in 'Herbert Vere Evatt: Jurist, Politician, Person- The Paradox' (2009) 21.1 *Bond LR* 65.

powers, such as the presence of s 109, and that they could not enter into relations with international countries. But, nonetheless, he indicated that he would accord a broad approach to the geographical boundaries.¹⁰⁶ He indicated, however, that s 109 was really redundant since, 'where the Federal law is of a type of dominant federal interest, an intention to legislate exclusively will generally be implied'.¹⁰⁷

Justice Murphy's conception of democracy permeated his conception of the separation of powers. In *Victoria Stevedoring and General Contracting v Dignan*¹⁰⁸ decided in 1931, the High Court held there was no constitutional requirement for a strict separation between legislative power and executive power. J Goldring has stated that in *R v Kirby; Ex parte Boilermakers' Society of Australia (the Boilermaker's Case)*¹⁰⁹ Justice Murphy:

endorsed the idea of the separation of powers, both in cases where he maintained that the executive power of the Federal Parliament was considerably wider in scope than the legislative power of the Federal Parliament and in cases where he considered the judicial power of the Commonwealth. The former cases included *New South Wales v Commonwealth* in 1975 and especially *Commonwealth v Tasmania (Tasmanian Dams Case)*.¹¹⁰

In this respect, Justice Murphy's approach reflected no consistent methodology. Rather, the power and his legal legacy rested with the ideas, as Justice Kirby attests:

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.¹¹¹

The legacy of this is highlighted in the context of his position of dissent on the bench of the High Court.

¹⁰⁶ *Russell v Russell* (1976) 134 CLR 495.

¹⁰⁷ *Australian Broadcasting Commission v Industrial Court of South Australia* (1977) 138 CLR 399 at 478.

¹⁰⁸ (1931)46 CLR73.

¹⁰⁹ *R v Kirby; Ex parte Boilermakers' Society of Australia (Boilermakers' Case)* (1956) 94 CLR 254.

¹¹⁰ John Goldring, 'Murphy and the Australian Constitution' in J Scutt (ed) *Murphy: A Radical Judge* (1987) 65.

¹¹¹ Kirby 'Lionel Murphy and the Power of Ideas' Lionel Murphy Foundation, 7.

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Murphy as a dissenting judge

While Chief Justice Mason was eloquent in his advocacy of judicial restraint, Justice Murphy was equally eloquent in his advocacy for reforming the law and dissenting from majority opinion. In that respect, Justice Murphy's views on a number of matters are reflected in subsequent judgments of the High Court. Examples include reform of the doctrine of the privity of contract in *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd*,¹¹² his disapproval of 'police verbals' as reflected in *McKinney v R*;¹¹³ and his view on the common law doctrine that a husband could not rape his wife in *R v L*.¹¹⁴

Furthermore, Justice Murphy was equally reformist and ahead of his time in terms of his advocacy for freedom of speech and movement¹¹⁵ that has since, in part, formed the 1990s common law.¹¹⁶ His alteration of the law governing the recovery of moneys paid or expended as a result of a mistake of law has also since been reflected in the subsequent High Court decision of *David Securities v Commonwealth*.¹¹⁷ His belief in the right to legal representation as was later reflected in *Dietrich v The Queen*¹¹⁸ and he was an early judicial advocate for the overturning of the doctrine of *terra nullius*.¹¹⁹ As Justice Kirby, who expanded on some of these doctrines, declares:

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.¹²⁰

Certainly Justice Murphy did not adhere strictly to precedent insofar as he perceived the doctrine as one, 'eminently suitable for a nation overwhelmingly populated by

¹¹² (1988) 165 CLR 107.

¹¹³ (1991) 171 CLR 468.

¹¹⁴ *R v L* (1991) 66 ALJR 36.

¹¹⁵ *Buck v Bavone* (1976) 125 CLR 353.

¹¹⁶ *Australian Capital Television v Commonwealth* (1992) 177 CLR 106.

¹¹⁷ *David Securities v Commonwealth* (1992) 66 ALJR 768.

¹¹⁸ *Dietrich v The Queen* (1992) 177 CLR 292.

¹¹⁹ *Mabo and Ors v The State of Queensland* (1992) 66 ALJR 408 (*Mabo No. 2*).

¹²⁰ Kirby, above n p 121, p 7.

sheep'.¹²¹ Given this view, there have been suggestions that Justice Murphy's judgments were therefore 'unprofessional', that he failed to observe the doctrine of precedent, and that he predicated his judgements entirely on policy factors and social values.¹²² However, Justice Murphy's approach can be defended on the basis that he utilised policy arguments, that he was ahead of his time in citing overseas precedent and like the Mason Court he sought to maintain the contemporary relevance of the Constitution.

The Mason Court certainly echoed the characteristics of Justice Murphy's constitutional ideas and methodology. A prominent feature, in this respect, is the implication of rights. Yet it is argued by Hocking that the members of the former Mason Court did so in a manner that, 'was more detailed and more orderly and in many instances more legalistic in presentation'.¹²³ Furthermore, it is arguable that the Mason Court was less deferential to the legislative branch of the government and on balance less concerned with social justice than was the case with Justice Murphy. As Hocking suggests:

With the possible exception of Dawson J, the current and recent justices of the Court echo and develop one or other, of some mix of the multiple strands of reasoning evident in the kaleidoscope of the Murphy corpus.¹²⁴

With respect to Murphy's substantive view, it is clear that he rendered a number of radical judgments dealing with various aspects of the law. In that sense, there were a significant number of important (and for the time radical) judgments. One example of this was in the area of civil liberties where in *The Queen v David*¹²⁵ Justice Murphy viewed a Royal Commission finding as invalidating a criminal judge on the basis of illegal evidence as not being admissible.¹²⁶ As Hocking argues:

The line of cases results in a sustained attempt to provide the main protection for the accused person particularly with those people who are poor and incapable of looking after themselves.¹²⁷

¹²¹ L K Murphy, 'The Responsibility of Judges: in G. Evans' (ed) *Law, Politics and the Labor Movement* Sydney Legal Services Bulletin, 1980, p 5.

¹²² These were common criticisms from former Chief Justice Barwick. See Graham Fricke 'A Tale of Two Maverick Judges' *The Lionel Murphy Legacy in Troubled Times*, 21 October 2006.

¹²³ Hocking, above n 4, 128.

¹²⁴ *Ibid*, p 140.

¹²⁵ (1980) 142 CLR 237.

¹²⁶ *Ibid*, 241.

¹²⁷ Hocking, above n 4, p 56.

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Given such sentiments, it may be suggested that more than twenty years after his death, Justice Murphy remains one of Australia's most unjustly treated legal figures. Only now is the extent of his legacy beginning to be recognised. His life is a story of a passionate reformer and it is partly because of this that he has attracted so much controversy. Further, in the controversy of his trial proceedings, many have lost sight of the achievements he realised as Attorney-General under the Whitlam Government and his passionate commitment to civil liberties. The rationale of this article has been to reinstate Justice Murphy as one of the great dissenting judges in the same vein as figures such as Justice Kirby. As Justice Kirby has concluded:

Murphy did not stand outside our institutions. From the start he joined them. He sought office in them. And he offered his creative spirit to them. In fact, his life is a complete negation of totalitarian indifference to democracy.¹²⁸

These indicators could be equally applied to Justice Michael Kirby's judicial career.

B Michael Kirby

The subsequent Labor appointee and one who, in many respects, resembled Justice Murphy's style in writing judgments was Justice Michael Kirby. Justice Kirby attended Fort Street High School. Like Justice Murphy, he received his Bachelor of Arts (1959) Bachelor of Laws (1962), Bachelor of Economics (1965) and Master of Laws (First Class Hons) (1967) from Sydney University. Like Justice Murphy he too participated in a number of bodies and was elected President of the Students' Representative Council (1962-3) and President of the Sydney Union (1965).

Justice Kirby was admitted to the New South Wales Bar in 1967. His first quasi-judicial appointment was to the Australian Conciliation and Arbitration Commission in 1967 where he adjudicated on labour disputes upon which he served as a Deputy President from 1975 to 1983. From 1983 to 1984 he was a judge in the Federal Court of Australia and the youngest man appointed to the federal judiciary, before an appointment as President of the Court of Appeal of the Supreme Court of New South Wales. He was appointed to the High Court of Australia in February 1996. Justice Kirby received Australia's highest civil honour when he was made a Companion of the Order of Australia in 1991 and in the same year received the Human Rights Medal. Various other medals have been bestowed on Justice Kirby demonstrating his absolute commitment to justice, equality and human rights.¹²⁹ Justice Kirby retired from the High Court on 2 February 2009 and was succeeded by Justice Virginia Bell (the fourth woman to become a member of the High Court). Interestingly, it was said

¹²⁸ Michael Kirby 'Judicial Activism' (2004) 24 *Australian Bar Review*, 1.

¹²⁹ For example, the Australian Privacy Medal.

upon Justice Kirby's retirement that his original appointment to the High Court, 'was an assurance to the then Prime Minister, Mr Keating, that the pro-monarchy judge would have to shut up'.¹³⁰ From this insight then, there is no doubt that Justice Kirby was the inheritor of the Mason's Court 'progressive tradition' and, preceding this, the jurisprudence and interpretative approach of Justice Murphy.

The interpretative tradition of Justice Kirby

Like Justice Murphy, Justice Kirby's judgments are regarded as liberal progressivist and ones that exhibit compassion and the need for some degree of socio-economic equality. This is similar to the approach taken by Justice Murphy. In 2003 at the University of Exeter, Justice Kirby delivered The Hamlyn Lectures¹³¹ and in those lectures rejected the doctrine of strict constructionism or legalism (as articulated by Sir Owen Dixon and Sir Garfield Barwick), declaring that:

Clearly it would be wrong for a judge to set out in pursuit of a personal policy agenda and hang the law. Yet it would also be wrong and futile for a judge to pretend that the solutions to all of the complex problems of the law today, unresolved by incontestably clear and applicably clear texts, can be answered by nothing more than purely verbal reasoning and strict logic to words written by judges in earlier times about the problems then faced. ... contrary to myth, judges do more than apply the law. They have a role in making it and always have.¹³²

Justice Murphy would have, indeed, argued similarly that the Constitution was a framework from which interpretations of its contents could change to meet contemporary circumstances. Its interpreters would have envisaged, according to Justice Murphy, that the provisions of the Constitution would change with the changing of the times. This has been termed 'radical non-originalism' by Professor Jeffrey Goldsworthy.¹³³

¹³⁰ Michael Pelly, 'Kirby Given Court Post to "to shut him up"' *The Australian* (Sydney), 2 February 2009, 2.

¹³¹ M Kirby 'First Hamlyn Lecture 2003: Judicial Activism – Authority, Principle and Policy in the Judicial Method' (19-11-2003). See also Haig Patapan, *Judging Democracy* (2000); Anthony Mason 'The Role of the Courts at the Turn of the Century', (1993) *Journal of Judicial Administration*, 156; George Williams 'Engineers' and Implied Rights' in George Williams (ed) *How Many Cheers for Engineers?* (1997).

¹³² *Ibid.*

¹³³ Jeffrey Goldsworthy, 'Originalism and Constitutional Interpretation' (1997) 25 *Federal Law Review*, 1.

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What Justice Murphy and Justice Kirby's jurisprudence has done then has been to facilitate a debate as to whether judges have the right to interpret the law in the light of its intent and considerations of natural law, or whether judges should simply embrace a mechanistic and legalistic approach by following the letter of the law. Justice Kirby's radical non-originalism¹³⁴ has resulted in a rate of dissent in constitutional cases of more than 50 percent. Andrew Lynch and George Williams have observed that:

even allowing for 2004 as a year in which Kirby had a particularly high level of explicit disagreement, his Honour has long since eclipsed any other Justice in the history of the Court. ... Justice Kirby has broken away to claim a position of outsider on the Court which seems unlikely to pass with future years.¹³⁵

In his writings, Justice Kirby is particularly committed to the constitutive nature of the interpretative process. This actually supports a more dynamic and creative approach to constitutional interpretation and provides a basis for legislation and the authorising of a significant role for judicial interpretation of the Constitution. If constitutional interpretation is a process where meaning is constructed and re-constructed according to the social and the political context in which the Constitution is interpreted then, according to Justice Kirby a discretionary role emerges for the judge to select the interpretation that is most appropriate and sensitive to contemporary conditions.¹³⁶ The judge, then, should according to this interpretative tradition adopt interpretations in such a manner that they are consistent with contemporary norms and standards. This progressivist commitment to ensuring the Constitution's continuing relevance is particularly reflected in Aileen Kavanagh's concept of the 'living constitution' in which she regards the constitutional text as being capable of growth and development over time to meet new social and political realities.¹³⁷ According to Kavanagh:

Judges can develop and change constitutional law through interpretation. It is argued that that judges should interpret the Constitution in a way that it up to date and adapts it to contemporary needs and circumstances.¹³⁸

¹³⁴ See Jeffrey Goldsworthy, 'Interpreting the Constitution in Its Second Century' (2000) 24 *Melbourne University Law Review*, 685.

¹³⁵ Andrew Lynch and George Williams, 'The High Court on Constitutional Law' (2009) *University of New South Wales Law Journal*, 181.

¹³⁶ Cf. Tom Campbell *The Legal Theory of Ethical Positivism*. Aldershot: Dartmouth, 1996.

¹³⁷ Aileen Kavanagh, 'The Idea of a Living Constitution' (2003) 16 *Canadian Journal of Law Jurisprudence*, 55.

¹³⁸ *Ibid.*

A significant element of Justice Kirby's progressivist approach is its rejection of an interpretative method based on the original intention of the framers.¹³⁹ Justice Kirby's 'radical non originalism' is one example of this approach where, 'constitutional interpretation is cut adrift from [its] historical context'.¹⁴⁰ For example, in *Grain Pool of Western Australia v Commonwealth*¹⁴¹ for example, Justice Kirby declared that:

It is inaccurate ... to govern the meaning of the Australian Constitution wholly, or even in part, by reference to what was in the minds of the Imperial Legislators in 1900 or of the Australian colonists who proposed to the Constitution then at that time.¹⁴²

This repudiation of originalism has accorded the judge with considerable room to mould the constitutional text to prevailing social circumstances and affords scope and some degree of judicial interference in (or judicialisation of) the democratic process. It has also provided a theoretical justification for adopting a more dynamic interpretative approach and allowing the Constitution to keep pace with social and economic events. Justice Murphy would no doubt have adopted the same interpretations but (perhaps) without the subtle and nuanced justifications that Justice Kirby has developed in his extra-curial writings. In saying that however, Justice Kirby's approach is similar to Justice Murphy's conception that the Constitution as one constituting or enshrining 'democracy' and one that will, indeed, only countenance democratic values, no matter how far the interpretative process is stretched (and how far it becomes artificial) so long as democratic outcomes follow.

Another feature of Justice Kirby's approach which is similar to Justice Murphy's is the importance attached to the conception of extra-legal values or concepts in constitutional interpretation. The recognition that the interpreter is inherently influenced by contemporary values is once again similar to Justice Murphy's socio-legal approach.¹⁴³ Justice Kirby's radical 'non-originalism' is one example of this approach and has potential to support a dynamic way to approach the constitutional text since according to this view legal meaning is not governed exclusively by the

¹³⁹ See Haig Patapan, 'The Dead Hand of the Framers' 25 *Federal Law Review*, 211; Kirby (1997) above n 138.

¹⁴⁰ Michael Kirby 'Constitutional Interpretation and Original Intent' (2000) 24 *Melbourne University Law Review* 1, 5.

¹⁴¹ (2000) 170 ALR 111 at 140.

¹⁴² (2000) 170 ALR 111 at 140.

¹⁴³ See J Scutt, '*Lionel Murphy v Chilling Effect: When Security Denies Democracy and Human Rights*' In ANU (ed) *The Murphy Legacy in Troubled Times*. Centre for International and Public Law and National Institute and of Social Sciences and Law. Canberra: ANU Press, 1987.

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strict legal terms if the legal text is frequently shaped by surrounding social and discursive contexts. As Justice Kirby has declared:

In giving effect to their choices, judges are influenced not only by legal principles and legal policy. They are affected by their values, sometimes unexpressed. Of course they work within constraints. But to deny the creative function and duty of the judiciary in such cases is absurd. In recent decades, the three debates in the law has shifted from the infantile insistence that judges should merely apply the law to a consideration of when and why a new legal rule should be expressed by a judge.¹⁴⁴

If constitutional interpretation is inevitably value-laden then a contemporary interpretative approach needs to acknowledge the significant policy discretion exercised by judges and to acknowledge the incorporations of explicit political values and morals such as welfare and equality. Such a policy-oriented and purposive approach was one of which Justice Murphy was a keen proponent.

Another feature of Justice Kirby's approach is the commitment to the centralisation of political power which again as a key objective underlying Justice Murphy's jurisprudence.¹⁴⁵ Kirby, who is a leading exponent of progressivism, perceived constitutional interpretation as a means of extending the institutional and regulatory reach of Federal Parliament.¹⁴⁶ The expansion of federal constitutional power is regarded as a worthwhile end in itself and one that is necessitated by the increasingly complex as well as sophisticated nature of the nation.¹⁴⁷ As Professor Greg Craven critically observes, this explicit preference for a centralised and interventionist federal role distinguishes progressivism from the tradition of literalism that was articulated in the *Engineers' Case*¹⁴⁸ and this has the potential to alter significantly the balance of power in favour of the Federal Government.¹⁴⁹

A final element of Justice Kirby's approach is his commitment to ensuring the continuing relevance of the Constitution to modern social conditions and its concern

¹⁴⁴ Michael Kirby 'Judicial activism' (1997) 16 *Australian Bar Review*, 10.

¹⁴⁵ See Craven's discussion of progressivism: Greg Craven 'The Crisis of Constitutional Literalism' in Lee and Winterton (eds) *Australian Constitutional Perspectives* (1992) 24; Murphy's commitment to centralisation in the economic sphere is reflected in his jurisprudence on s 92.

¹⁴⁶ Michael Kirby 'Constitutional Interpretation and Original Intent' (2000) *Melbourne University Law Review* 1.

¹⁴⁷ *Ibid.*

¹⁴⁸ (1920) 28 CLR 129.

¹⁴⁹ Craven, above n 155, p 24.

that constitutional interpretations should be sensitive to the contemporary social and economic context within which they are to operate.¹⁵⁰ According to Craven:

The Australian school of constitutional progressivism will necessarily start from the position that the Constitution, as such, is supreme, but will go on to stress the open-ended nature of many of its terms, and the corresponding necessity that they will be understood in light of constantly changing circumstances.¹⁵¹

Where the constitutional provisions are imprecise, the interpreter should prefer an interpretation of the constitutional text that is most relevant to modern circumstances. Clearly, Justice Kirby's commitment to, or concern with, the Constitution's indeterminacy provides room for the judge to adapt it to modern circumstances and affords significant room for the High Court to effect more progressive or democratic outcomes, especially where these outcomes cannot be realised through more literal interpretations of the Constitution.¹⁵² In short, Justice Kirby's legacy is one of judges having an interpretative role where constitutional meaning is shaped and influenced by contemporary social norms and values. In this respect, it provides a more sophisticated, complex and more nuanced account of constitutional interpretation than that initially articulated by Justice Murphy. In so doing, it authorises or legitimates an active judicial role in constitutional interpretation and provides a foundation for a more active and dynamic judicial interpretative role.

The general conclusion is that the trend under Justice Kirby in High Court jurisprudence adopts a number of the themes and methods similar to that favoured by Justice Murphy. One difference however is that Justice Kirby has sought to provide a rationalisation to this approach and an interpretative methodology that can be utilised by future judicial members and analysed by legal scholars. This is why, for example, Justice Kirby has been more cautious in implying rights into the Constitution than Justice Murphy who, in effect, sought to imply an entire Bill of Rights into the Constitution.

Furthermore, like Justice Murphy, Justice Kirby sought to refer to international instruments so as to grant them legitimacy in Australian law. And further, like Justice Murphy, Justice Kirby has similarly advocated law reform arguing that:

¹⁵⁰ Patapan (2000), above n 149 120, 255; Gereg Williams, *Human Rights Under the Australian Constitution* (2002) p 95.

¹⁵¹ Craven, above n 155, p 17.

¹⁵² Williams, above n 160, 121, pp 76–9.

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Judges have lacked leeway for judicial choice which left its converts singularly dissatisfied with the pre-existing positivist linguistic purely verbal analysis of the law. ... But academic lawyers are often amongst the most brilliant graduates of the era conceptualising the law and much beyond a citation of cases which common law techniques have lacked. ...¹⁵³

Therefore to an important extent Justice Kirby's approach to judicialising the democratic process can be seen in his method in relation to cooperative federalism.

Cooperative federalism and federalism generally

Although not directly, or exclusively, concerned with cooperative federalism, *Re Wakim; Ex parte McNally*¹⁵⁴ (*Wakim*) appears, nevertheless, to have significantly circumscribed the potential operation of cooperative federalism. *Wakim* raised the issue of whether the Federal Court could exercise jurisdiction conferred on it by s 9 (2) of the *Jurisdiction of Courts (Cross-Vesting) Act 1987 (Cth)*. This scheme was regarded, at the time, as a particularly 'ingenious'¹⁵⁵ example of the operation of cooperative federalism, as well as an instance of how this principle could be used to overcome the jurisdictional shortcomings inherent in the federal framework.¹⁵⁶ It was facilitative, in this context, of a more centralised constitutional structure and, by seeking to effect a more uniform judicial structure, was also productive of the wider social democratic objectives of equity and social justice.

It was held, however, (by a majority of six to one) that while the Commonwealth could confer jurisdiction on State courts, the reverse process was not constitutionally permissible and State Parliaments could not refer jurisdiction to Federal Courts.¹⁵⁷ In this respect, it was decided by the majority that neither s 71¹⁵⁸ nor ss 75-77¹⁵⁹

¹⁵³ Kirby, above n 154, p 4.

¹⁵⁴ (1999) 198 CLR 511.

¹⁵⁵ H G Fryberg, 'Cross-Vesting of Jurisdiction' (1987), *Queensland Law Society Journal*, 113. Justice Fryberg described the cross-vesting legislation as 'simple in concept, imperious and breathtaking in its amplitude': Fryberg, (1987), 113.

¹⁵⁶ It aimed to address 'the jurisdictional question, not by abolishing the distinction between federal and State jurisdiction, but by seeking to make the distinction irrelevant':

Commonwealth Parliamentary Debates, House of Representatives, 22 October 1986, 2556.

¹⁵⁷ (1998) 198 CLR 511 per Gleeson CJ, McHugh, Gummow, Hayne, Gaudron and Callinan JJ; Kirby J dissenting.

¹⁵⁸ Section 71 provides that judicial power shall be vested in the High Court.

¹⁵⁹ Section 75 declares that the Court shall have original jurisdiction in certain kinds of matters; Section 76 empowers Federal Parliament to legislate to confer jurisdiction on the Court on certain kinds of matters; and Section 77 (iii) empowers Parliament to vest any State court with federal jurisdiction.

specifically authorised Parliament to consent to the conferral of State jurisdiction.¹⁶⁰ In reaching this conclusion, the majority did not entirely repudiate the principle of cooperative federalism, but they did find, however, that it could *not* be invoked to create federal jurisdiction (enabling the Commonwealth to receive State jurisdiction) where no such jurisdiction existed.¹⁶¹

In his dissenting judgment Justice Kirby held that there was no reason why cooperative federalism could not operate as a *constitutional principle*, particularly in view of the fact that there was no express exclusion of Commonwealth-State cooperation in the constitutional text. In his opinion:

On the face of things, there would not seem to be any reason of constitutional principle or policy to forbid the kind of legislative cooperative scheme between all of the governments and legislatures of Commonwealth instanced by the two legislative systems of cross-vesting.¹⁶²

Underpinning these different approaches (to cooperative federalism) in *Wakim* were even more fundamentally divergent views on the types of federalism upon which the Constitution was based and this appears to have relevance for the future invocation of cooperative federalism as a constitutional mechanism for effecting a more centralised judicial structure.¹⁶³ One view was committed to a ‘coordinated’ approach to federalism. This was particularly reflected in Justice McHugh’s statement that, ‘in a dual political system you do not expect to find either government legislating for the other’,¹⁶⁴ as well as in the declaration by Gummow and Hayne JJ that the ‘constitutional compact is a federal compact with all the attendant advantages and disadvantages’.¹⁶⁵ In contrast, an alternative ‘cooperative’ view was also present and

¹⁶⁰ (1998) 198 CLR 511 at 544 per Gleeson CJ; at 546-7 per Gaudron J; at 556-7 per McHugh J; at 578-81 per Gummow and Hayne JJ; at 625 per Callinan J.

¹⁶¹ In this respect, Gleeson CJ concluded that: ‘It [the purported conferral of jurisdiction] is both a substantial addition to the power, and an attempt to circumvent the limitations imposed upon the power by the Constitution’: (1999) 198 CLR 511 at 544.

¹⁶² (1999) 198 CLR 511 at 556-7 per Kirby J.

¹⁶³ See, for example, Graeme Hill, ‘The Demise of the Cross Vesting-Scheme’ (1999) 27 *Federal Law Review*, 548; Gummow and Hayne JJ, as well as McHugh J, for example, adopted an underlying ‘coordinate’ approach to the federal Constitution, while Kirby J assumed a ‘cooperative’ model: see Graeme Hill ‘*R v Hughes* and the Future of Co-Operative Legislative Schemes’ (2000) 24 *Melbourne University Law Review*, 478. Operative Legislative Schemes (2000) 24, 480.

¹⁶⁴ (1999) 198 CLR 511 at 558.

¹⁶⁵ (1999) 198 CLR 511 at 576-77.

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this was reflected in Justice Kirby's emphasis on the, 'inevitability that the central and local governments area of responsibility'¹⁶⁶ would frequently collide.

Justice Kirby argued, in this context, that the Constitution assumed that the different levels of government would, 'co-operate in a rational, harmonious and generally efficient way,'¹⁶⁷ thereby leading him to uphold the validity of the cross-vesting scheme.¹⁶⁸ This latter view of Justice Kirby's is significant because it would suggest that a High Court of the future could be willing to entertain the principle of cooperative federalism as a distinctively constitutional concept. A concept that could facilitate a centralised jurisdictional structure and one productive of the social democratic objectives of equity and social justice.

Graham Hill argues that the ultimate rejection of the cross-vesting legislation and the majority's refusal to entertain the constitutionality of any particular form of 'cooperative' jurisdictional scheme is explained by the contested conception of federalism that exists.¹⁶⁹ For the majority, in particular, a consequence of the 'coordinated' view was the need to maintain a federal division of State and Commonwealth powers and responsibilities and the need to ensure that State jurisdictional powers could not be exercised by Federal and Family courts.¹⁷⁰

In effect, *Wakim's* coordinated concept of federalism presents significant obstacles for the extension of cooperative federalism to the constitutional realm and effectively militates against a more centralised judicial framework. The possibilities which inhere in cooperative federalism would seem to have been diminished by the majority's reasoning and underlying assumptions in *Wakim*. In this respect, the judgment in *Wakim* could be criticised as being excessively rigid and formalistic and one that ignores the reality of modern policy requirements, which requires a more

¹⁶⁶ (1999) 198 CLR 511 at 557.

¹⁶⁷ (1999) 198 CLR 511 at 557.

¹⁶⁸ Kirby thus declared that: 'It is not as if the polities constituting the Commonwealth are, in relation to each other, foreign States. All of them are parts of an integrated federal nation which the Constitution itself summoned forth': (1999) 198 CLR 511 at 557.

¹⁶⁹ Hill, above n 131. According to Hill: 'This choice of a coordinate or cooperative view of federalism significantly influenced whether the cooperative legislative scheme was regarded as consistent with the federal division of powers': Hill, (2000) op cit 492. Further, as Nicholas Aroney (1999) argues, 'at the heart of *Re Wakim* lies a conception of the Australian federation as consisting of separate, distinct "sovereign" governing distinct spheres': Nicholas Aroney 'The Constitutional Demise of the Cross-Vesting Scheme' (1999) *Insolvency Law Journal*, 130.

¹⁷⁰ Brian Opeskin, 'Cross-Vesting of Jurisdiction and the Federal Judicial System' in Opeskin and Wheeler (eds) *The Australian Federal Judicial System* (2000) 320.

cooperative and coordinated response to contemporary political and legal problems. As George Williams argues:

The decision showed that at least as regards Ch.III, the High Court is no longer willing to positively shape the Constitution to promote Federal-State cooperation. ... The majority in *Re Wakim* interpreted Chapter III [of the Constitution] in a formalistic manner divorced from over-arching concepts or matters of policy (such as the need to create an efficient, non-fragmented justice system).¹⁷¹

In this context, the underlying principle of cooperative federalism, and its *limited* constitutional acknowledgment, may offer scope for an expanding federal role in the existing constitutional structure. It could support a restricted jurisdictional cross-vesting framework and this could, in turn, facilitate national legislative schemes relating to industrial relations, family law and commercial law. Yet, in spite of this, the majority's decision in *Wakim* indicates that the Court will *not* countenance the use of cooperative federalism as an instrument to provide the Commonwealth with *new* or additional federal constitutional power and jurisdiction. Whilst arguing this point however, limits need to be imposed on Justice Kirby's commitment to an activist judicial role and to the *judicialisation* of the public decision-making process which this facilitates.

Limits on judicialising the democratic process

If, as Justice Kirby claims, interpretation is an inherently constitutive activity then it may be legitimate to argue that the constitutional text can support any interpretative construction, even ones that would appear to be unrelated to the constitutional provisions. Justice Kirby's approach could, therefore, authorise *unconstrained or unlimited judicial activism*. According to Neil MacCormick, a desirable interpretative approach needs to emphasise the *bounded* nature of the interpretative process and to highlight the importance of limiting the potential for the *judicialisation* of the democratic process which unconstrained judicial activism has the potential to produce.¹⁷² The underlying justification for limiting the interpretative discretion of judges is the need to effectuate a balance between the political *and* judicial regulation of the democratic process.¹⁷³ This is what Hocking argues Justice Murphy was trying to achieve.¹⁷⁴ If this is the case then MacCormick argues that an interpretative theory requires, at the very least, some connection between the reasons for a particular

¹⁷¹ Williams, above n 160, pp 163, 162.

¹⁷² Neil MacCormick, 'Argumentation and Interpretation in Law' *Ratio Juris* (1993) 6:16, 16.

¹⁷³ See Allan Hutchinson, *Waiting for the Coraf: A Critique of Law and Rights*, (1995) 24.

¹⁷⁴ See Hocking *op cit*, p 67.

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interpretation (or what he terms ('justifying reasons') and the substantive provisions of the Constitution.¹⁷⁵ In this context, he asserts that Justice Kirby's interpretative approach needs to place constraints on the range of interpretations potentially available to the constitutional interpreter.¹⁷⁶ Social liberal legal theorist, Joseph Raz, refers to these reasons as being 'constitutive' in nature, in other words, there must be reasons *for* a particular interpretation.¹⁷⁷

Dynamic or creative understandings of the constitutional text then are constrained by the plain or obvious meaning of the Constitution.¹⁷⁸ According to David Strauss, there are various sections in the Constitution over which there can be little interpretative dispute or contestation.¹⁷⁹ For example, provisions relating to age limits appear to be subject to little or no interpretative argument or disagreement. Similarly, provisions involving time limitations also appear to be subject to little dispute or contention. These provisions impose clear limits on the interpretative discretion and creativity that can be exercised by the judge.

According to Kavanagh, even where the provisions of the Constitution are imprecise, the constitutional text, accompanied by background assumptions and understandings, still serve to limit significantly the range of disagreement and serve to constrain the range of interpretative meanings.¹⁸⁰ Even the most contested and ostensibly imprecise constitutional provisions would seem to have a circumscribed range of meanings when viewed in the context of conventional social norms.¹⁸¹ Clearly, then, despite its indeterminate nature, the constitutional text has a limited or constrained number of meanings and this imposes limits on the interpretative discretion exercised by the judge and the considerations to be taken into account when interpreting the Constitution. It is precisely this 'bounded' theory that Justice Kirby emphasised in order to justify his 'activist'¹⁸² legal method.

¹⁷⁵ MacCormick, above n 182 p 17.

¹⁷⁶ *Ibid.*

¹⁷⁷ Joseph Raz, 'Interpretation Without Retrieval', in Andrei Marmor (ed), *Law and Interpretation* (1995) 171.

¹⁷⁸ See, for example, David Strauss, 'Common Law Constitutional Interpretation', *University of Chicago Law Review* (1996) 63:877.

¹⁷⁹ *Ibid.*

¹⁸⁰ Aileen Kavanagh, 'The Idea of a Living Constitution', *Canadian Journal of Law and Jurisprudence* (2003) 16:55.

¹⁸¹ Robert Lipkin, 'Beyond Skepticism, Foundationalism and the New Fuzziness: The Role of Wide Reflective Equilibrium in Legal Theory', *Cornell Law Review* (1990) 75:811, 814; cf. Jeremy Waldron, 'Vagueness in Law and Language', *Columbia Law Review* (1994) 82:509.

¹⁸² Justice Kirby did not like his interpretive method to be referred to as 'activist'.

According to Goldsworthy, this limited range of meanings cannot be changed without public approval, since the framers provided that the Constitution could only be amended in accordance with s 128 of the Constitution.¹⁸³ In this respect then to adopt an interpretation inconsistent with the prescribed range of textual meanings would be regarded as unconstitutional. In effect, then, to move beyond the limits of a 'bounded'¹⁸⁴ interpretation is essentially to change the meaning of the constitutional provisions and such a change that can only be authorised by the public.

To this extent, Justice Kirby's approach imposes and provides for a judicial role in interpreting and in regulating rights and freedoms. There has been significant debate among constitutional theorists regarding the *precise extent* to which the judiciary should intervene in the democratic and political process and adjudicate on matters of individual rights and public policy. For example, debate has raged over the extent to which the judiciary should be entitled constitutionally to regulate the private market realm and interpret the operation of constitutional rights so as to apply to the private sphere.

Such debates have been particularly evident in Canada where debate has raged over the potential 'horizontal' application of the Canadian *Charter of Rights and Freedoms* to the market sphere. Particular writers have argued that the application of Charter rights to the private realm would, in effect, produce a *judicialisation* of public policy which would, in turn be undemocratic and elitist.¹⁸⁵ In contrast, other writers have argued that the extended or horizontal application and enforcement of Charter rights to the market realm would produce greater equality, democracy and economic welfare since the Canadian Supreme Court would be taking account of, and having regard to, the effects of (private) economic wealth and privilege on the exercise of individual rights and freedoms.¹⁸⁶ In an Australian context, Williams criticises the, 'double standards and unarticulated premises'¹⁸⁷ underpinning narrow and restricted

¹⁸³ Jeffrey Goldsworthy, 'Interpreting the Constitution in Its Second Century', *Melbourne University Law Review* (2000) 24:677, 685.

¹⁸⁴ In this context, see Campbell, above n 2, 132.

¹⁸⁵ Hutchinson above n 183, 56; Ammon Reichman, 'A Charter Free Domain: In Defense of *Dolphin Delivery*', *University of British Columbia Law Review* (2002) 35:329; Brian Slattery, 'The Charter's Relevance of to Private Litigation: Does *Dolphin Deliver*?', *McGill Law Journal* (1996) 32:905.

¹⁸⁶ See, for example, Gary Anderson, 'Social Democracy and the Limits of Rights Constitutionalism' *Cambridge Journal of International Law* (2004) 17:31. In a United States context, see Mark Tushnet, 'Comparative Constitutionalism: State Action, Social Welfare Rights and the Judicial Role' *Chicago Journal of International Law* (2002) 3:435.

¹⁸⁷ Williams, above n 160, 62.

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judicial approaches to individual rights in the Constitution, advocating a wide operation and application of constitutional rights and the adoption of a more explicit progressivist judicial role in facilitating the political process.¹⁸⁸

Justice Kirby's commitment to the wide interpretation of constitutional rights and the judicialisation of the democratic process appears, superficially, capable of promoting a more democratic constitutionalism and facilitating individual rights and freedoms. For example, the wide or 'horizontal' application of constitutional rights to purely private relations in the market realm may have the ultimate effect of promoting the ideals of social equality and economic welfare because an increasing number of private market activities become subject to constitutional (and, by extension, public) regulation. Furthermore, the broad constitutional and judicial application of rights (to, for example, private market relations) could enable the judiciary to take account of such factors as inequalities of wealth and resources and their specific impact on the exercise of liberty and freedoms.¹⁸⁹

Justice Kirby's application of rights to the private market realm was particularly discussed and debated in a leading Canadian Supreme Court decision in *Retail, Wholesale and Department Store v Dolphin Delivery (the Dolphin Delivery Case)*.¹⁹⁰ In this decision, the Court was required to consider whether a court injunction to restrain a union from picketing an employer's premises infringed the constitutional right of freedom of speech.¹⁹¹ The Court held that the injunction did not infringe this constitutional right. In reaching this decision, the Court declared that the provisions of the *Canadian Charter of Rights and Freedoms* were confined to the public realm.¹⁹² They did not apply to disputes involving litigants in the private realm. Because the state was not involved in the action between union and employer, the provisions of the Charter were thus not applicable.¹⁹³ This decision has significant implications for

¹⁸⁸ Williams, above n 160, 53.

¹⁸⁹ Tushnet, above n 196, 151, 435.

¹⁹⁰ *Retail, Wholesale and Department Store v Dolphin Delivery* (1987) 1 WLR 577.

¹⁹¹ *Canadian Charter of Rights and Freedoms*, (1982) s 2(b). See Alan Petter and Peter Monahan, 'Developments in Constitutional Law: The Decision in *Dolphin Delivery*', in RF Devlin (ed), *Critical Legal Studies*, Emond Montgomery, Toronto, 1991. The authors provide a commentary of the decision in *Dolphin Delivery* (1987) 1 WLR 577.

¹⁹² The Supreme Court declared that 'the Charter will apply to the common law, whether in public or private litigation.' But the Court added that: 'It will apply to the common law, however, only insofar as the common law is the basis of some governmental action, which it is alleged, infringes a guaranteed right or freedom': (1987) 1 WLR 577 at p 599.

¹⁹³ Because the injunction was a common law, as opposed to statutory, injunction it was found that there was no relevant 'state' or governmental action that could trigger judicial intervention for infringing Charter rights. This reasoning has been criticised. Anderson

the Canadian Supreme Court's role in interpreting the Charter.¹⁹⁴ As Elliot and Grant contend:

Its further extension into the sphere of private relations would have had profound implications for the role of courts in a society committed to a democratic form of government. If the Charter was found to have governed more relationships, more public policy decisions may well have been placed in the hands of judges and the influence of courts would have expanded at the expense of democratic institutions. This could have imposed a great institutional bureaucracy on the courts. ...¹⁹⁵

This would have been criticised by both Justice Kirby and Justice Murphy because Justice Kirby and Justice Murphy would argue that a central part of the judicial role is to consider policy-oriented issues.

Conclusion

The aim of this paper has been to reinstate Justice Murphy into the pantheon of great Australian jurists. It is unfortunate, indeed, that much of Justice Murphy's jurisprudence has been neglected and remains uncited. For example, in *Buck v Bavonne*¹⁹⁶ Justice Murphy's judgment was really, in effect, a precursor to the eventual method adopted in *Cole v Whitfield*.¹⁹⁷ Reading *Cole v Whitfield*¹⁹⁸ one finds no consideration of Justice Murphy's opinion in *Buck v Bavonne*.¹⁹⁹ This is not an isolated example and little regard has been accorded to Justice Murphy's substantive reasoning. It is clear that there is a significant number of important and radical judgments that need to be revisited with a view to considering them in future cases. Justice Murphy's legacy, notwithstanding this lack of authority, was his activist approach towards the constitutional framework and the need for the law to change for contemporary socio-economic and political conditions. Similarly, implicit in Justice Kirby's approach has been the need to balance the judicialisation and the

(2004) contends that the granting of a common law injunction could be considered as 'state action' for the purposes of applying Charter rights. As he points out, the Court is one of the three branches of government and the granting of a common law intervention could therefore be considered as state action when determining whether the *Canadian Charter of Rights and Freedoms* could apply: Anderson, (2004), above n. 151, 34.

¹⁹⁴ Richard Elliot and Robert Grant, 'The Charter's Application in Private Litigation', *University of British Columbia Law Review* (1988-89) 23:459.

¹⁹⁵ *Ibid.*, 459.

¹⁹⁶ (1976)135 CLR 110.

¹⁹⁷ (1988) 165 CLR 360.

¹⁹⁸ *Ibid.*

¹⁹⁹ *Ibid.*

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politicisation of the democratic process. Justice Kirby certainly supported the latter course with his advocacy of the constitutionalisation of cooperative federalism.

Both justices therefore hinted at the possibilities that inhere in the constitutional framework to produce a more egalitarian and socially just society. Both hinted at new directions for constitutional theory and practice and the need for judges to be conscious of the continuing relevance of the rule of law and judicial review in contemporary Australia. Certainly, Justice Kirby provided more guidance than Justice Murphy in outlining precisely *how* this should be achieved. But then again Justice Murphy was the first judge that widened the parameters, aims and objectives that could be achieved through the Constitution in achieving a social democracy. His emphasis on a Bill of Rights is but one example of this which has already come to fruition in statutory form in Victoria and the Australian Capital Territory. Although keenly concerned with law reform, 'legislative' law reform may not be necessary given the demonstration by both Justice Murphy and Justice Kirby that there is room to manoeuvre within the constraints of the Constitution for the pursuit of a more distinctive progressive political, socio-economic and constitutional agenda.

What set these two judges apart was their focus on the sociology of the law. Their concentration was always on the facts of the case and then the impact of the law later. In this respect they were consistent insofar as they explicated a sociological jurisprudence. Law is not some social construct that has its own internal consistency (as for Chief Justices Dixon and Barwick) but should be used to assist social democratic objectives.