# *Mr. Justice Murphy: Reformist? Civil Libertarian? or Reactionary?*

*David Lloyd examines the late Mr. Justice Murphy's judgments in several important administrative law cases.*

I was interested to read "A Personal View of Mr. Justice Murphy" by Sir Maurice Byers Q.C. in the Autumn issue of Bar News, in which Sir Maurice discusses the unconventional approach of Murphy J to judicial art and to constitutional law.

It is said by many that Murphy J was a "great reforming judge" and "a civil libertarian". Whilst this may be an accurate assessment of his views on constitutional law and the criminal law, it does not seem to be true when one examines his judgments in administrative law.

In administrative law Murphy J, far from being reformist or libertarian, was conservative and even reactionary in his views. This is illustrated by his sole dissenting judgments in three well-known cases.

In *Re Toohey, ex parte Northern Land Council* (1981) 151 CLR 150, the majority of the Court held that the courts will examine the exercise of a power granted to a representative of the Crown, a minister or some other person by statute and will determine whether that exercise of power is within the scope of the grant. Gibbs CJ expressed the majority view that "the courts have the power and duty to ensure that statutory powers are exercised in accordance with the law. They can, in my opinion, inquire whether the Crown has exercised a power granted to it by statute for a purpose which the statute does not authorise" (at 193). The majority held that a regulation made by the Administrator under the Town Planning Act 1964 (NT) was not made for a town planning purpose but for an ulterior purpose and was, therefore, outside the scope of the statutory power.

Murphy J, however, held that if the regulation is within the scope of the regulation-making power it may not be invalidated on the ground that it was made in bad faith or for an ulterior purpose, on the ground that courts may not inquire into whether the exercise of a delegated or legislative power is invalidated on the basis that the power has been misused.

In *FAI Insurances Limited v. Winneke* (1982) 156 CLR 342, the majority held that the rules of natural justice applied to a decision of the Governor in Council not to approve the renewal of an approval to carry on workers' compensation insurance business. Gibbs CJ expressed the majority view by stating, "I regard it as clear that, in circumstances such as the present, the exercise of the power to grant or refuse a renewal of an approval will be subject to the common law rule whose effect is that a company that would be affected by a refusal to grant a renewal should be given an opportunity to be heard before a decision is made, unless that rule is either excluded by the Act on its proper construction, or is rendered inapplicable by the fact that the power is vested in the Governor in Council" (at 348).

Murphy J, however, held (without giving reasons) that in the absence of any authorising legislation, there is no power in the courts to inquire into questions of good faith or observance of natural justice or other propriety of an act of a Governor in Council which is otherwise within power (at 373).

Finally, in *Clunies-Ross v. The Commonwealth* (1984) 155 CLR 193, the majority held that the power of the Commonwealth "to acquire land for a public purpose" under the Lands Acquisition Act, 1955 (Cth.) is limited to an acquisiton of land which is needed or which it is proposed to use, apply or preserve for the advancement or achievement of a public purpose, and does not extend to the taking of land for the purpose of depriving the owner of it and thereby advance or achieve some more remote public purpose.

Murphy J, in an extraordinary judgment, held that if it was politically and socially desirable to exclude the plaintiff from his land, then that was a sufficient public purpose for the acquisition of the land (at 206). It will be recalled that the case concerned the compulsory acquisition of the ancestral home of the Clunies-Ross family on Cocos Island. Murphy J said, "The record shows what is in any event notorious, that under a species of colonial feudalism the Islands were held by the plaintiff's ancestors and the plaintiff's title to the house and land are the relics of that feudalism" (at 205). Murphy J also said: "The majority says that the political and social desirability or otherwise of the exclusion of the plaintiff and his family from the territory of Cocos (Keeling) Islands is irrelevant to the proceedings in this Court. I disagree. Of course, capricious acquisition of a citizen's home would not be "for a public purpose". That is not the case here. If political and social considerations indicate a rational purpose for the acquisition of the land, then under the Act, the Commonwealth is entitled to acquire it with just compensation' (at 206). His Honour also said, "It was open to the defendants (the Commonwealth) to decide that acquisition of the former feudal manor to extinguish the taint of feudalism and colonialism from an island territory, was for a public purpose" (at 208).

It seems clear that in the *Clunies-Ross* case Murphy J was, in effect, prepared to hold that land could be compulsorily acquired by the Commonwealth for the simple reason that the Commonwealth did not like that person's politics or held some distaste for the manner in which the landowner or his forebears formerly carried on their activities. This judgment and the other two judgments mentioned above suggest that Murphy J was less concerned with the rights of private citizens than with the power of government and in the area of administrative law Murphy J was far from being a civil libertarian.□

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