

Australian National Anthem

## **The Court System**

- **Chapter III guarantees**
- **Appointment and removal- Lionel Murphy J**
- **Definition of judicial power**
- **Court administrative arrangements**
- **Comparisons of court systems**
- **Sustainable Justice**

# The judiciary change the law

- Changing the basis of common law of land ownership- terra nullius to native title
- The common law being used to imply freedom of speech in political matters
- S. 116: Freedom of and non establishment of religion
- S. 51(xx): The Corporations power- A small power in *Huddart Parker v Moorehead*, over ruled in *Concrete Pipes Case* and now the *Industrial Relations (Work cover) Case* changes the Federal/State balance
- S. 51(xxiv): The external affairs power
- *Mabo (no. 2)*

# Why have Courts?

- **Courts have no power: they only authorise the use of State power to enforce civil obligations or impose criminal penalties**
- **Conflict threatens power and wealth**
- **The purpose of Courts is to make the exercise of power consistent and just so that conflict can be avoided and is resolved in a fair and just way**
- **Consistent = Rule of Law : Independent = Fair and Just**
- **The alternative is tyranny- eg USSR/ Third Reich – the less consistency and independence the more tyranny is necessary to maintain order**

# Independence

- **Chapter III Guarantees:**
  - **Security of income**
  - **Security of tenure**
  - **Separation of judicial power**
- **The Lionel Murphy story**
  - **Attorney-General for Whitlam government**
  - **Stellar legislative career**
  - **Appointed direct to High Court**
  - **Likely Chief Justice**
- **“What about my little mate?”**
- **Address to both Houses of Parliament**

# **Some lessons from Murphy**

## **Methods of appointment**

- **Elections**
- **Judicial career**
- **Appointment by politicians**
- **Barrister merit pool**
- **Independent selection panel**

# **Independent administrative arrangements**

- **Single line budget- High Court, Federal Court, Family Court**
- **Courts Administrative Authority**
- **Irish model- civilian involvement**
- **The budget process**

# **Define judicial power**

- **Real power exercised in a principled way**
- **Too personal to the fairness view of the judge, then not judicial**
- **Too rigid in application of rules, then not judicial**
- **Binding result is essential**

# Definition of a court

- **It must have institutional independence**
- **It must observe procedural fairness**
- **It must adjudicate between parties**
- **In accordance with known principles (laws), and**
- **Result in a binding decision**



# THE CODE OF HAMMURABI

## 1750 BC



# **Courts are not a construct of the Nation State**

- **They are a way the powerful legitimise their power and contain conflict**
- **In the past: Guild Courts, Church Courts, feudal courts**
- **In the future: international courts, Walmart courts, banking courts etc**
- **The role of courts should be achieve social harmony rather than rights based compensation**

# The Australian Court system- 2 courts



# **The Australian Court system**

- **Federal: High Court/ Federal Court and Family Court/ Federal Magistrates Service/ HREOC/ Tribunal system**
- **State: Supreme Court/ District Court/ ERD Court/ Magistrates Court/ Tribunal system/ Ombudsmen**

# Per 100,000 population

|                         | The Netherlands | North Rhine Westphalia | South Australia |
|-------------------------|-----------------|------------------------|-----------------|
| Judges                  | 12              | 24                     | 9               |
| Lawyers                 | 51              | 110                    | 161             |
| Civil claims            | 2,258           | 3.535                  | 2,601           |
| Civil claims per judge  | 188             | 147                    | 289             |
| Civil claims per lawyer | 44              | 32                     | 16              |

# **Cost shifting policies**

- **Cost shifting encourages settlement: Florida experience**
- **Activity based scales encourage overservicing, Northern Island, UK, Shepherd research USA**
- **SA Magistrates Court**
- **Need to have some barriers to use of courts**

# Common Law adversary system

- Abuses of the judicial system around the parliamentary rebellion and restoration
- Hanging Judge Jeffries
- Right to counsel and details of charges
- Lawyer control: highly technical rules of evidence and procedure
- Langbein: the *combat* effect and the *wealth* effect

# **Essentials of adversary systems**

- **The parties are entitled to be served**
- **The parties define the dispute**
- **The parties can end the dispute by agreement**
- **The parties nominated the evidence to be brought to court**
- **The parties can question witnesses**
- **Proceedings are conducted in open court with legal advisors**
- **Reasons are given, are subject to appeal and have effect as res judicata**



# Differences

- **Jury trial method- climatic, oral, technical, lawyer controlled**
- **Discovery but not to the court**
- **Whether evidence is disclosed to the court**
- **Control over the delivery of evidence**
- **Expert evidence**
- **Formality and technicality**
- **Different nature and role of statutes**
- **Therapeutic Jurisprudence**

# **Courts don't just do trials**

- Adversary processes were developed to make sure we have fair trials**
- Civil cases: 26,000 commenced, 3,000 defended, 800 to trial= 96% have no trials**
- Criminal cases: 56,000 prosecutions, 17,000 withdrawn, 2,252 trials (6%) and 500 not guilty**
- i.e. managing civil conflict and debt and managing the consequences of antisocial behaviour**

# **Problems with the Common Law adversary system**

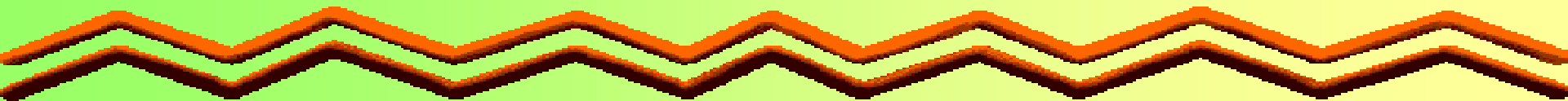
- Adversarial processes sow discord and conflict**
- Wealth buys a better counsel/result**
- Monetaring justice devalues it and encourages greed and dishonesty**
- Focusing backwards on what went wrong preserves and magnifies the harm**
- Having the judge decide removes responsibility from the participants**
- The media and politicians use fear of crime to legitimise punishment and their control**

# **Social Sustainability**

- **Club of Rome and sustainability**
- **Quality of life and humane relationships**
- **Social harmony and balance**
- **Focus on an improved future**
- **People being responsible and accountable for their behavior**
- **Minimal use of power for optimal results**

# Towards Sustainable Justice

- **Therapeutic jurisprudence:**
  - **Drug courts, family violence courts, mental health courts addressing the causes of crime**
- **Restorative justice systems giving victims a voice in repairing harm not just as witnesses**
- **Mediation influencing judicial methods so that courts resolve conflict by healing relationships rather than making people winners or losers**
- **Community Courts – Redhook NY, Neighbourhood Justice Centre and Nunga and First people courts**



# Sustainable Justice

- Stimulate litigants to develop their highest potential, supporting them to solve their problems themselves
- encourage respect and a sense of responsibility between everyone involved in a conflict
- improve mutual relationships and the general capacity to deal with conflicts constructively
- contribute to solving social wrongs and abuses in society rather than responding to crime just with punishment
- Decision-making remains as a minor, subsidiary and undesirable last resort duty for Courts.
- <http://www.sustainablejustice.org/>





**The journey from confusion and conflict at the bottom right through a Drug Court in the middle to peace and harmony on the top left (Irene Allen)**

# **Power: the dangerous drug**

- **That seduces those who have it into believing they are indispensable; so...**
- **We make them stand for election: and**
- **Power is divided between the Legislators who define the law, the Judiciary who interpret, develop and apply the law and the Executive who exercise authority in accordance with the law**
- **The judiciary are only the gatekeepers to State Power**
- **They must be consistent so that people can avoid conflict but they must exercise independent reasoned judgment so that they are credible**



# Essentials of democracy

**“It is difficult for any regime to live up to the democratic ideal that the strong should treat the weak well and that any abuse of power should be genuinely and unreservedly condemned.**

**There are five necessary criteria: open elections; the existence of an organised, free political opposition; acceptance of the principle that power can change hands; the existence of an independent judicial system; and media freedom”**

**Ignacio Ramonet (translated by Donald Hounam) “Democracy to Order” in *Le Monde Diplomatique* March 2006 page 1.**



<photo>

*Ice House, Great Southern Land,  
Primitive Man album*

**der Schluss**