L. Impetus for change

Justice Geoffrey Davies, of the Queensland appeal court, noted results of rationalisation and self-deception in *The Reality of Civil Justice Reform: Why We Must Abandon the Essential Elements of Our System* (Australian Institute of Judicial Administration, 2002). His remarks apply equally to the criminal system. He said:

> Two related misapprehensions have inhibited change to our civil justice system. The first of these is a belief that our traditional civil justice system has, over time, developed the best means of ascertaining the truth and of achieving fairness between the parties. And the second … is a perception that the civil systems of Europe are so different from ours and so inferior to ours in each of those important respects that nothing can be gained by borrowing from them.

Nonetheless, impetus for change has been growing in recent decades. Warren Burger, later US Chief Justice 1969-86) said in 1967:

> I assume that no one will take issue with me when I say that these North European countries are as enlightened as the United States in the value they place on the individual and on human dignity. [Those countries] do not consider it necessary to use a device like our Fifth Amendment, under which an accused person may not be required to testify. They go swiftly, efficiently and directly to the question of whether the accused is guilty.

Harry Whitmore, Professor of Law at the University of NSW, wrote in *The Sydney Morning Herald* (6 April 1981):

Some distinguished lawyers are indeed ashamed of the system in which they are working … it is a process which is as likely to suppress or distort the truth as to reveal it. The technique is often a charade … It would be quite easy to develop a better system partially based on the European 'inquisitorial' system of justice … … a judge … should be concerned to find the truth.

In 1984, Chief Justice Burger gave the American Bar Association a glimpse of the future:

Trials by the adversarial contest must in time go the way of the ancient trial by battle and blood. Our system is too costly, too painful, too destructive, too inefficient for a truly civilized people.'

Former judge Burton Katz wrote in *Justice Overruled* (1997):

A system that exalts a criminal's rights over the victim's, procedure over substance, and adversarial supremacy over the quest for truth and justice is on the verge of moral bankruptcy. It will not survive, because the people will not support it.

Thomas Babington Macaulay (1800-59), a Whig barrister and historian, said a lawyer 'with a wig on his head and a band round his neck will do for a guinea what he would otherwise think it wicked and

infamous to do for an empire'. In 1837, as legal adviser to the Supreme Council of India, Macaulay drew up a Penal Code based on the lawyer-run adversary system, minus some grosser technicalities. The code, revised by Sir Barnes Peacock (1810-90, Chief Justice of Calcutta 1859-70), became law in 1860.

India today has three-quarters of the 1.6 billion who suffer the injustice of the adversary system. As noted above, India's conviction rate is 16%. Lord Macaulay's system thus puts away one-sixth of guilty accused.

A blue ribbon committee recommended in April 2003 that India change to a truth-seeking criminal system. The chairman was Justice V.S. Malimath, former Chief Justice of the Karnataka and Kerala High Courts. Committee members included D.V. Subba Rao, Chairman of the Bar Council of India, Amitabh Gupta, former Director-General of Police, and Durgadas Gupta, Joint Secretary in the Ministry of Home Affairs.

Justice Malimath said that at the core of the report was the 'duty of the court to search for truth', and that the criminal system was weighted in favour of the accused. The report recommended that judges be given the power to summon and examine anyone they consider appropriate; to examine and cross-examine accused at trial; and to draw adverse inferences from a refusal to answer. At least in India, victims of crime would no longer have to suffer from Blackstone's lie.

By late 2009, however, the Malimath recommendations were still to be passed into law. That may be due to rearguard actions by lawyers and by organisations who wrongly believe that the adversary system protects the innocent, e.g. Amnesty International and civil liberties groups. Or it may be nothing more sinister than that reform in India proceeds at a measured pace. It took 23 years for Lord Macaulay's 'reforms' to be put in place.

In 2004, the Australian Family court began to experiment with a largely lawyer-free investigative system for custody cases.

The Australian (21 March 2005) reported that Mick Keelty, the Federal Police Commissioner, and other experts said a 'system such as the one used in France' would more effectively deal with terror suspects. Commissioner Keelty had stated the obvious, but it was not obvious to Australia's first law officer Philip Ruddock. He told *The Australian* he 'was not currently in favour of a French-style system', because 'that involves a whole lot of principles that if introduced here would create a great deal of problems'.

The United Nations set up the International Association of Prosecutors (IAP) following a sharp increase in transnational organised crime after the collapse of the Soviet Empire in 1991. The IAP now represents 128 countries in both systems. The NSW DPP, Nick Cowdery QC, who is on the IAP's Executive Committee, said on 10 October 2008: 'I've had some discussions about moving towards some aspects of the inquisitorial system too in the context

of the [IAP]. I'm sure these discussions are being held all over the place very often.'

The Australian (31 October 2008) reported the Victorian DPP, Jeremy Rapke QC, as saying 'something very serious is amiss with the manner in which criminal trials are conducted', and that Rob Hulls, the Victorian first law officer, had said that lawyers need to abandon many of their adversarial traditions and join him in a cultural revolution based on an active, problem-solving judiciary.

Also on 31 October, 2008 Emeritus Professor (law) David Flint wrote in *The Australian* that Australia needs a Royal Commission to examine critically the criminal justice system. That is certainly true, but the chairman of any such inquiry should be book-ended by non-lawyers.

M. Convergence fails

Bob Askin, a famously corrupt NSW politician, told colleagues when his party won the 1965 election: 'We're in the tart shop now, boys.' The adversary tart shop provides endless confections for the few who run it. Some lawyers in the investigative system probably gaze wistfully at the tart shop.

Under pressure of change, common lawyers' fallback position is 'convergence' between the two systems, but with lawyers still controlling the evidence (and the money). Convergence is touted as a happy compromise, but a system run by trained judges who search for the truth cannot possibly converge successfully with an anti-truth system run by trained liars, who search for the money.

In 1993, the United Nations foolishly let common lawyers and judges have a slice of the action in dealing with crimes committed in what was Yugoslavia. The International Criminal Tribunal for former Yugoslavia (ICTY) boasts on its website:

> It [ICTY] has created an independent system of law, comprising of elements from adversarial and inquisitory criminal procedure traditions … It has established a unique legal aid system, and groomed a group of defence attorneys highly qualified to represent accused in war crimes proceedings.

The folly of 'convergence' was amply demonstrated at the Milošević farce. Slobodan Milošević (1941-

2006), a Serb, was President of Yugoslavia from 1997 to 2000. He was arrested in March 2001 and eventually sent to The Hague to stand trial at the ICTY on charges of crimes against humanity, violating the laws or customs of war, grave breaches of the Geneva Conventions and genocide in Croatia, Bosnia, and Kosovo.

The farce began on 12 February 2002. Two judges were from the adversary system, Presiding Judge Patrick Robinson, of Jamaica, and Judge Iain Bonomy, of Scotland. One was from the pro-truth system, Judge O-Gon Kwon, of South Korea. Milošević appeared for himself.

It took two years to present no more than the case concerning genocide in Croatia, Bosnia and Kosovo. Milošević, who suffered from a heart condition, asked to be treated in a heart surgery centre in Moscow, but the ICTY refused on the ground that he might escape. He was shortly found dead in his cell of a heart attack on 11 March 2006. The ICTY denied any responsibility. His death was sad news for the 'convergent' lawyers. In more than four years, they had called 300 witnesses and were probably looking forward to many more years of gainful employ, and nice Dutch food.

Dr Radovan Karadzic (b. 1945), a Montenegrin poet, psychiatrist and (Serb) politician, was arrested in Belgrade, Yugoslavia, on 21 July 2008, and sent to The Hague on ICTY charges of genocide and war crimes against Bosnian Muslims and Bosnian Croats.

Amid reports that Karadzic's trial was expected to take 10 years, Geoffrey Robertson QC said (*The*

Independent, 1 August 2008): ' … it may be necessary to abandon the Anglo-American model of adversarial trial and shift instead to the European inquisitorial process'. In that process, judges present only enough evidence to manifest the truth.

The ICTY did not take Robertson's advice, but Reed Stevenson, of Reuters, reported on Tuesday, 9 September 2009, that Judge O-Gon Kwon had urged prosecutors to 'streamline their case'. Stevenson said 'prosecutors said last week they would reduce the number of locations to be mentioned in evidence and cut their witness list by more than a quarter. But Kwon on Monday detailed several more areas for prosecutors to cut'.

Representing himself, Dr Karadzic asked for another 10 months to prepare. Judge Kwon said he had had enough time already. Kwon hoped the trial would start in October 2009 and be over in 2 ½ to three years, in 2012. In what may have been a useful piece of greymail, Dr Karadzic asked for documents from the administration of President Bill Clinton. If they were not forthcoming, the tribunal might find it difficult to convict.

The European Union has 25 members. Only three, the UK, Ireland and Malta, are in the anti-truth tradition. The Milošević and Karadzic trials should remind the other 22 countries that 'convergence' between the two systems would be inimical to justice, and would merely divert huge sums of money to lawyers.

N. The remedy

Professor David Luban said: 'The O. J. Simpson trial has persuaded most Americans that the adversary system is at best grotesque.' This book has sought to identify causes and consequences of the grotesquerie.

Causes. A cartel of lawyers and judges runs the system as a business; the system does not seek the truth; trial lawyers, i.e. trained liars, are in charge of evidence; judges are untrained former trial lawyers.

Consequences. Too many innocent people go to prison; too many criminals get off; civil hearings take too long.

The investigative system is better in every respect. There is no cartel; judges trained separately from lawyers control evidence and search for the truth; lawyers' role is minimal. That is not to say the system is perfect. In France, for instance, the *juge d'istruction* (investigating judge) can detain suspects for lengthy periods, ostensibly for suspects to be available for further questioning as new evidence comes in, but detention can be seen as a softening-up hangover from the old torture days.

Nor would it be helpful to borrow from the new Italian system. That system has tilted towards the adversary system to help members of the Sicilian Mafia escape justice. Alexander Stille explained how it happened in *Excellent Cadavers: The Mafia and the Death of the First Italian Republic* (Pantheon, 1995).

The Sicilian Mafia was virtually the criminal wing of Giulio Andreotti's Christian Democrat party. In February 1986, Giovanni Falcone, an investigating judge, put 475 Mafiosi on trial in Palermo. At national elections in June 1987, the Mafia voted for parties other than Andreotti's on two conditions: investigating judges were to be emasculated and the law changed. This punished Andreotti's party for failing to stop the investigation and the maxi-trial and gained more protection for the Mob.

In December 1987, 344 (72%) of the Mafiosi were found guilty. In 1988, the pool of Mafia-investigating judges was dismantled, and the Parliament passed changes to the criminal code which limited the powers of remaining investigating judges. On 20 September 1988, a tap on a telephone in the Cafe Giardano in Brooklyn recorded a conversation between a heroin-dealer, Joe Gambino, and an anonymous hood just back from Palermo. The dialogue, in Sicilian, indicates that the Mafia sees the function of the US adversary system as being to anally penetrate police:

Hood: Now they've approved the new law, now they can't prosecute as they did in the past ... They can't arrest people when they want. Before they do, they have to have solid proof, they have to convict first and arrest later.

Gambino: Oh, so it's like here, in America.

Hood: No, it's better, much better. Now these bastards, the magistrates and cops, can't even dream of arresting anyone the way they do now.

Gambino: The cops will take it up the ass. And [Falcone] won't be able to do anything either? ... They'll all take it up the ass.

Hood: Yeah, they'll take it in the ass.

Falcone and Judge Paolo Borsellino knew that seriously investigating the Mafia would result in their murders, and they were assassinated in 1992. Their heroism is a reproach to common law academics, prosecutors and judges who are silent in the face of their system's protection of criminals. Procedures in Germany and France at least provide the basis for a truth-seeking system

1. German and French civil procedure

Modern German civil procedure is similar to that used in Britain before lawyers began to get control of the process in the 15th century. The following relies largely on Professor John Langbein's *The German Advantage in Civil Procedure* (1985).

Litigation in Germany begins with a lawyer making a complaint which lays out the key facts, a legal theory, and asks for a remedy. Supporting documents are attached or indicated, and witnesses identified. The defendant does the same. Discovery is virtually non-existent; the judge examines the material and sends for public records and any other documents he needs. He now has the beginning of a

dossier. All subsequent evidence-gathering and submissions go into the dossier. It is continuously open to inspection by the lawyers.

US trial lawyers coach witnesses relentlessly. German lawyers rarely speak to witnesses outside the court. To do so is a serious ethical breach and self-defeating: judges doubt the reliability of witnesses who have discussed the case with lawyers or have been seen consorting with them.

There are no adversary system 'saxophones', i.e. 'expert' witnesses on whom lawyers who hire them play tunes. If there is a technical problem, the judge, in consultation with the lawyers, selects an expert or experts and defines their role.

The judge sits without a jury and does not conceal evidence from himself. He, rather than lawyers, mainly gathers and evaluates evidence over a series of hearings. There is no distinction between pre-trial and trial, between discovering evidence and presenting it. The German approach is called the 'conference method'; the tone is that of a routine business meeting. This lessens tension and theatrics and encourages compromise and settlement. The fact that the loser pays encourages settlement before judgment.

The judge may be able to suggest compromise and resolution in discussions with the lawyers and their clients. If the parties persist, the judge acts as examiner-in-chief of the witnesses. Lawyers for either party can then ask additional questions, but Professor Langbein says that in Germany 'counsel are not prominent as examiners'. He says the judge

ranges over the entire case, 'constantly looking for the jugular - for the issue of law or fact that might dispose of the case'.

Professor Langbein notes that in the adversary system, lawyers are paid by the hour and court reporters by the page. The German incentive is the opposite: evidence is rarely recorded verbatim. The judge periodically pauses to dictate a summary into the dossier; lawyers can suggest improvements. The summaries are useful for refreshers at later hearings, and for the written judgment and the appeal court.

The lawyers can comment orally or in writing when the judge has heard witnesses or procured other evidence, and can suggest further proofs or advance legal theories. Professor Langbein says:

> Thus, non-adversarial proof-taking alternates with adversarial dialogue across as many hearings as necessary. The process merges the investigatory function of our pre-trial discovery and evidence-presenting function of our trial.

Justice Russell Fox wrote in *Justice in the 21st Century*:

> In a civil action [in the adversary system] a large part of the cost is incurred in the pre-trial phase. This comprises pleadings, court directions, compulsory conferences, discovery and interrogatories, and other matters as the case requires … The whole operation is costly to the parties and to the government as well.

He contrasted that with a civil matter in France, where, he said:

> … evidence is customarily assembled in written form by one of a court of three judges, and he or she reports to the court on it. The practice is for the reporting judge to accept the evidence presented by the parties and to do little, if any, separate investigation himself. When a witness is called, he is first examined by the President, and counsel for the parties may examine later ('cross-examination' is not a term known to continental jurisprudence.) Few witnesses are called to give oral evidence. Hearings (the correct term, there being no 'trials') are without juries and are not concentrated, continuous affairs. The first hearing may occupy no more than one hour, whereupon there can be an adjournment, so that one party or the other may produce further evidence, or for a related purpose. The next hearing may be the final one, and commonly does not last longer than an hour of so. The point for present purposes is that the whole case may be disposed of in less than a day overall; relatively few occupy much more. In other continental countries, and in Japan, the position is much the same. This result is greatly helped by the fact that France, in common with other civil law countries, does not have any exclusionary rules of evidence.

After the lawyers and the reporting judge have done the preliminary work, the French system can then dispose of a civil case in a few hours. *Three Rivers District Council v Bank of England* took 10 years. The action, brought by liquidators of the Bank of Credit and Commerce International (BCCI), reminded some of *Jarndyce v Jarndyce.* BCCI, founded in Pakistan in 1973, was involved in bribing, money laundering, supporting terrorism, arms trafficking, selling nuclear technology, tax evasion, smuggling, illegally

buying banks and land, and illegal immigration. When it was closed in 1991, at least US$13 billion of assets had disappeared.

In 1995, the liquidators of BCCI claimed £850 million in compensation from the Bank of England for alleged errors and omissions as a regulatory body. The trial was delayed for nine years by arguments over discovery in the Court to Appeal (twice) and in the House of Lords (once). The trial began in January 2004. The opening speech by Gordon Pollock QC, for Three Rivers, took 80 sitting days; the opening speech by Nicholas Stadlen QC, for the Bank of England, took 119 sitting days. Stadlen's speech, which ended in May 2005, was thought to be the longest in British legal history, but *Jennens* was safe; the liquidators dropped the action in November 2005.

The time and money wasted on pleadings and discovery tends to exclude from civil justice most except wealthy corporations and the rich. The rapidity of European civil litigation gives the poor and middling at least some access.

2. Criminal procedure in France

French pre-trial filters (see below, Two systems compared) show how the innocent can be protected without concealing evidence. Moreover, police are less likely to fabricate because they know evidence will not be hidden, and because, in serious cases, they are supervised by a trained investigating judge (*juge d'instruction*).

Law professor Gordon van Kessel, of UC Hastings College of the Law, San Francisco, observed in *Adversary Excesses in the American Criminal Trial* (*Notre Dame Law Review*, 1992):

> It is arguable that by allowing the defendants full discovery of the state's case, an opportunity to give unsworn narrative testimony, and a right to written reasons supporting the fact-finder's decision, the non-adversary system shows greater respect for the accused.

At the pre-trial stage, an overworked *juge d'instruction* reconstructs the crime, stages a confrontation between suspect and victim or relatives, and builds up a dossier of all relevant evidence for and against the suspect. Despite a right of silence, the suspect generally accepts that he is a proper source of information.

The dossier is made available to the suspect's lawyer in case he can show the truth lies elsewhere. If the lawyer can show there is considerable doubt, that is the end of it.

At the trial, the jurors, if any, sit on the bench with the judge or judges. Guilty pleas are not accepted; judge and jurors are obliged to find the truth for themselves. The accused in not on oath. His life, character and previous convictions are presented. He has a right of silence, but adverse inferences can be drawn if he refuses to give evidence.

The presiding judge uses the dossier to question as many witnesses as necessary for 'the

manifestation of the truth'. Witnesses can tell the whole truth by giving their evidence as a narrative rather than by Yes-No answers. Lawyers for prosecution and defence can question witnesses but in some jurisdictions they are not allowed to cross-examine directly lest they pollute the truth; they can ask questions only through the judge.

Common law jurors find the formula, beyond reasonable doubt, negative and confusing; French jurors understand their formula. Bron McKillop, an Australian authority on the investigative system, says there is probably no real difference between 'beyond reasonable doubt' and the European 'conviction of guilt', what the French call *conviction intime* and Germans call *freie uberzeugung*.

A doubt must be resolved in favour of the accused. Judge(s) and jurors reach the verdict and penalty together and give their reasons. The results automatically go to appeal courts for review. Prosecution as well as defence can formally appeal against not guilty verdicts; there is no double-jeopardy rule.

The dossier helps the appellate court to scrutinise the lower court's reasoning, application of the law and findings of fact. A flaw is that witnesses' trial evidence is not reviewed because it is not recorded in the dossier.

Bron McKillop notes (*Review of Convictions after Jury Trials: The New French Jury Court of Appeal, The Sydney Law Review*, Lawbook Co., June 2006) that since 2001 a jury verdict of guilty in France can be appealed to a court of appeal consisting of three

judges and 12 lay jurors. He wrote of this logical development:

> This may seem strange to anglophones but it shows a faith in the jury court as the ultimate arbiter of guilt in serious criminal cases, without the control of judicial review.

3. The two systems compared

Professor David Luban was plainly correct in saying that every argument for the adversary system fails, but he was not correct in saying that change is not worthwhile because 'the available alternatives are not demonstrably better'. A pro-truth and hence moral system in which trained judges gather and present facts must be superior to an anti-truth and hence immoral system in which trained liars gather and present 'facts'.

The adversary system is inaccurate for innocent and guilty alike, but Justice James Burchett, of the Australian Federal Court, said in 1996:

> My reading suggests that even those comparative lawyers who are critical of the French criminal law do accept that French courts are fair, and that the verdict reached is generally accurate.

The superiority of the investigative system can be demonstrated mathematically in terms of accuracy and cost.

First, accuracy for the innocent. David Rose noted in *In the Name of the Law: The Collapse of Criminal Justice* that one of the first acts of the 1991-

93 Runciman inquiry into the British criminal system 'was to order research into two nearby jurisdictions which broadly follow inquisitorial principles, France and Germany.' That research resulted in *A Report on the Administration of Criminal Justice in the Pre-Trial phase in France and Germany*, by Professor Leonard Leigh and Lucia Zedner (Her Majesty's Stationery Office, 1992). Rose reported: '[They] reached several immediately striking conclusions':

> First, they found that in neither country was it likely that miscarriages of justice such as the Guildford or Birmingham cases would occur. Second, in contrast to the stratified and often vexed relationship between the different actors in the criminal process in England, on the continent this relationship was marked by 'a high degree of confidence, and of co-operation and mutual trust'. Finally, public confidence in both systems remained high in their respective countries.

Further, Professor Leigh and Lucia Zedner said:

> The low acquittal rates in France and Germany and the apparent paucity of cases of unjust convictions are the product of the care taken in the initial stages of the criminal process. A series of pre-trial filters also ensures that the innocent are rarely charged, let alone convicted … At the end of the *instruction* [investigation] the accused's lawyer will be given an opportunity to examine the dossier and to make representations before the prosecutor decides whether or not the matter should proceed further. If the prosecutor, on receipt of the dossier from the examining magistrate, believes that the case should proceed, he will transfer the file to the *chambre*

d'accusation. This court then assesses the correctness of the decision and thus serves as a further filter in the system. It may order that the case proceed, that it be dropped, that the charges be re-assessed … This court also sits in appeal on refusals of pre-trial liberty and on refusals by the examining magistrate to order investigations into matters suggested by the defence.

Doubtful cases have thus been filtered out at the pre-trial stage, but French and German courts err on the side of caution. They give a further benefit of the doubt to 5% of those who face court. Japanese and Indonesian courts may seem not cautious enough; they give the benefit of the doubt to only 1% of those who get to court.

Second, accuracy for victims. As Professor Alan Dershowitz suggests, 99% of accused are guilty. French and German systems convict 95%. Our system convicts fewer than 50% - 16% in India- because of the 24 anti-truth mechanisms, including evidence concealed first by prosecutors and then by judges.

Third, cost. Justice Russell Fox says trials in the adversary system are two to 10 times longer than hearings in the investigative system. In 1994, an International Bar Association conference in Melbourne heard a report which said a French trial costs about a third to a half that of a common law trial. The investigative system thus convicts at least twice as many serious criminals for at least half the cost, and protects the innocent better.

The Hannes case offers a useful contrast between the length and cost of criminal trials in the two systems. Simon Gautier Hannes was an executive director of Macquarie Bank, a Sydney investment bank. He earned about A$2 million a year in salary and bonuses. In 1996, Macquarie Bank was advising Thomas Nationwide Transport (TNT) in connection with a takeover bid by a Dutch company, KPN.

Australian banks must report cash transactions of $10,000 or more. Hannes went to 15 banks on Monday, 9 September 1996. At some banks, he got bank cheques of about $9000. At others he withdrew cash from his own accounts. He then put $90,000 into a new account at stockbrokers Ord Minnett in the name of M. Booth.

On Tuesday, 17 September, 1996, an Ord Minnett broker was instructed by telephone to invest M. Booth's $90,000 in options over shares in TNT. When KPN's takeover bid became public on Wednesday, 2 October, M. Booth made a profit of $2 million.

Hannes was charged with insider trading early in 1997. His defence was that he and a Mr X had set up an investment syndicate, and that Mr X had bought the TNT options without telling him. Hannes did not give evidence and did not produce Mr X, but his lawyers argued that the prosecution could not prove beyond reasonable doubt that Mr X did not exist.

Hannes endured a committal hearing, a 55-day trial over 10 months (guilty), a successful appeal,

and a 75-day re-trial over 11 months (guilty). He was fined $100,000 and sent to prison for 2 ½ years. Elisabeth Sexton reported in *The Sydney Morning Herald* (20 November 2002) that Hannes had spent $3.1 million on legal costs which sometimes reached $13,000 a day. His various court outings cost taxpayers at least $2 million.

Bron McKillop, author of *Anatomy of a French Murder Case* (Hawkins, 1997), lectures each year in France and Germany. Given that Hannes' trials took 130 days, I asked him how the French system would have dealt with Hannes. He replied:

> The investigator (judge, prosecutor or police) would have interrogated Hannes and required 'X' and M. Booth to present themselves for interrogation, failing which the appropriate adverse inference would have been drawn by the investigator, and by the trial court. All the financial transactions would have been established in detail in the dossier. These matters would have been taken on board through the dossier at the trial, confirmed by oral evidence of the material witnesses and probably also through the interrogation of Hannes by the presiding judge. The trial would probably have lasted a day or so, a week tops, with Hanne almost certainly convicted.

The case for change to some improved version of the truth-seeking system is unanswerable.

4. How to get justice

Justice Russell Fox said: 'The public estimate must be correct, that justice marches with the truth.' Once

it is accepted that the public knows best, it is a matter of working out how best to direct everything to finding the truth.

It is not impossible. Common lawyers already use an investigative system – usually quite badly of course – in various inquiries, including inquests.

A system in which trained judges search for the truth will require more judges and fewer lawyers. In 1992, France (pop. 60 million) had 20,000 lawyers while Washington DC (pop. 500,000) had 45,000 lawyers.

In 1983, West Germany had 17,000 judges in a population of 61 million; roughly one judge for 3600 people. In 1997, Australia had 863 judicial officers (including magistrates) in a population of 18,500,000: one judge for every 21,436.

Investigative systems thus need roughly six times as many judges as an adversary system. Common law countries which change to a truth-seeking system would thus need roughly the following numbers of trained judges: India: 280,000, US: 77,000, United Kingdom: 17,000, South Africa: 13,000, Canada: 8900, Australia: 5000, New Zealand: 1100, Ireland: 1100.

Trial lawyers may hope governments would not ask taxpayers to pay for the training and upkeep of the extra judges, but reducing the number of lawyers reduces hidden costs. Justice Russell Fox quotes a 1989 report to the US Congress:

Excessive litigation has an adverse effect on economic growth, not only in direct costs but in the way the tort

system alters individuals' behaviour. One of the primary factors determining economic growth is technological innovation. To the degree that technological innovation is inhibited by the tort system … economic growth suffers. Stephen Magee, professor of finance at the University of Texas at Austin, estimates that the excess supply of lawyers in the USA reduces economic output by [US]$300 billion to [US]$600 billion.

Also, higher costs will be more than offset by a reduction in public legal bills and tax evasion. In the end, a truth-seeking system will deliver more justice at less cost.

As an interim step, lawyers can be made judges and, along with existing judges, given control of evidence. Both can then try to put rules for concealing evidence out of their heads. It will be a novel experience, and they may get to like it.

Academics will have to be retrained to teach techniques of searching for the truth, but they should be happy to be able to burn all those impenetrable tomes on how to hide evidence.

The cartel can then be abolished by training new judges separately from lawyers. Professor Benjamin Barton ended his paper, *Do Judges Systematically Favor the Interests of the Legal Profession?* (December 2007), with a suggestion that would effectively abolish the cartel:

Given the general public distrust and dislike of lawyers, there may be many other objections to their dominant role in the judiciary aside from any bias towards lawyers in general. I do not think it is obvious that all judges should

be lawyers. To the contrary, it may be right that no lawyers should be judges. In many civil law countries [those which use the investigative system] judges are trained and educated separately from lawyers. Perhaps it is a better model.

It is encouraging to learn that Professor Barton has not been run out of the cartel on a rail. I asked him in March 2008 how his paper was received by judges, trial lawyers and fellow academics. He replied:

So far I have received a very favorable response. I received a lovely note from the Honorable Dennis Jacobs, a Federal Appeals Judge here … Interestingly, for a law review article it's drawn some non-lawyer attention, and I've gotten multiple emails, letters, and calls from folks who have their own stories to tell about the phenomenon I noted.

Professor Barton expanded his hypothesis to a book called *The Lawyer-Judge Bias.* It was being peer-reviewed for Cambridge University Press as this was written.

The public knows that justice means truth. Politicians with the courage to determine to change to a truth-seeking system will find that, for the first and last time in their careers, they have the support of more than 90% of the voters.

If there is resistance, reforming politicians might be tempted to hint at a reference to the local anti-cartel authority but, thanks to law schools, lawyers appear to lack the necessary guilty mind, and the parrot-house can be safely ignored: lawyers

are still only 0.2% of the voters, and the public are still 99.8%.

Definitions

Abuse of process. *Butterworths*: 'The misuse or unjust or unfair use of court process and procedure … generally any process that gives rise to unfairness … Criminal contempt of court through abuse of the court's process … includes serious misconduct such as … intentionally deceiving the court …' The definitions imply that the adversary system itself is an abuse of process.

Accusatorial system. A accuses B; B says: 'Prove it'. It was used in Europe and England from the Dark Ages until early in the 13th century. Since then, it has been used only in England and its colonies.

Adversary system. An accusatorial system in which lawyers control the evidence, the process, and the money, and untrained judges control the court. English judges began to let lawyers take control of the civil process in the 15th century and of the criminal process in the 18th century.

Bagman. A collector/distributor of bribes/extortions.

Blackmail. Theft by extortion.

Cartel, The. A syndicate of common lawyers and judges first formed about 1180 to maximize their profits.

Civil Law. (The law of the people). Codified criminal and civil law deriving from Roman law. Used in European countries, their former colonies, and other countries.

Common law. Judge-made law used in England and its former colonies, including the USA, Canada, India, New Zealand and Australia.

Conversion rate. Historian Roy Porter said that multiplying 18th century English pounds by 100 gives a rough equivalent of their value today.

Criminal enterprise. The vehicle through which organised crimes are committed.

Dickens Principle. 'The one great principle of the English law is to make business for itself', i.e. trial lawyers.

Ethics. 'A system of moral principles, by which human actions and proposals may be judged good or bad or right or wrong.' – Macquarie Dictionary. In the adversary system, legal ethics are client-based rather than morality-based.

Investigative System. A truth-seeking system in which trained judges control the court and the process. Used by civil law countries since early in the 13th century.

Justice. This book accepts former Justice Russell Fox's definition: justice means fairness, fairness means truth, truth means reality, and the search for truth gives a justice system its moral face.

Kleptocracy. Rule by thieves.

Law Lords. Lords of Appeal in Ordinary; life peers who were members of England's highest appeal court, the Judicial Committee of the House of Lords.

Legal Fiction. A convenient lie. Australia was deemed to be uninhabited when British took control in 1788.

Legal positivism. Laws are considered in the context of the legal system of which they form a part, without drawing any conclusions about their essential justness or merit.

Lord Chancellor. A politician who was head of the UK judiciary until 2003.

Magnates. The 'great men of the realm'; originally 300 mercenaries who received a large part of England from William the Conqueror after 1066.

Manuel Test. 'A fair go all round'. From a 1971 statement by NSW Conciliation Commissioner Gilbert Manuel.

Master of the Rolls. Head of England's second-highest court, the Court of Appeal.

Organised crime. Systematic criminal activity for money or power.

Organised Criminals. People who engage in systematic criminal activity for money or power. RICO defines an organised criminal as one who exhibits a pattern (over 10 years) of two or more chargeable offences (not necessarily convictions) which carry penalties of at least a year in prison.

Parties. Clients in civil litigation. It is a legal fiction that clients control the process.

Probative. Tending to prove guilt.

RICO. An exception to the rule against evidence of a pattern of criminal behaviour. Racketeer-Influenced and Corrupt Organizations is Title IX of the US Organized Crime Control Act of 1970. RICO applies to all organised criminals, including businessmen, judges and lawyers, and members of the Mafia.

Rule of Law. A legal fiction. It holds that all persons and organisations, including governments, are subject to the same laws.

Saxophones. Expert witnesses on whom lawyers play tunes.

Trial/Litigation/Plaintiff Lawyers. Lawyers who do court work, some 40% of the total, i.e. most barristers and about 30% of solicitors. In this book 'lawyers' usually refers to trial lawyers.

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