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Without equality of arms, there is no justice

by John Carroll

Glasgow criminal lawyer John Carroll, whose comments on the collapse of the legal aid system in Scotland we are pleased to publish below, has had more than one occasion to clash with the British authorities over civil rights for his clients, often people unable to pay for their own defense. A lawyer willing to take a serious criminal case for an impecunious client as far as the European Human Rights Court, will often end up paying several thousand dollars out of his own pocket. Another Scots lawyer, Harry Flowers, also of Glasgow, wrote the following to the London Times *editors in July: "The rate allowed by the court is £40 per hour for preparation or chamber work, and £44 per hour for advocacy. Legal aid rates are £26.10 per hour for work outside the court, and £35.60 for advocacy . . . these are gross rates from which all overheads have to be deducted . . . and legal aid payments are not made until after the end of the case (often in civil cases as much as five years later). Scottish solicitors engaged in this work are unlikely to emulate the income of the janitor of the Bank of England, let alone the Governor."*

For readers unfamiliar with some of the technical terms, we provide the following glossary: Chamber work *means desk work.* Advocacy *means pleading in court.* Precognition on oath *means taking a formal written statement from a witness.* Commission and diligence *means applying to the court for an order for recovery of documents. Note, too, that under the Act of Union, a treaty signed in 1707 by which Scotland was submitted to England and her Parliament dissolved, Scotland was to be allowed to keep her legal system; this is much closer to the French and other continental systems, than to the English common law.*

The "State," no matter which state, is the most powerful and influential litigant in any court. There is no justice when a litigant or an accused person is obliged to face any form of judicial process in a state of inequality in the sense of preparedness or representation. A person could be forgiven for thinking that any civilized nation would recognize this fact and conduct its affairs in such a way as to ensure "equality of arms" in the courts at all times. Unfortunately, this is not always the case, especially where the individual falls foul of the state in a manner which renders him liable to criminal proceedings. Well; who should care about them?—They are only criminals after all. It is so easy to deny justice to those at the bottom of the social heap, and yet it is this very attitude of indifference which is probably the best barometer of a society's lack of respect for itself and lack of foresight for the future. Nations are not judged in terms of humanity and decency by reference to their commercial, land, or tax laws, but by reference to their systems of justice or injustice in dealing with those at the very bottom of the pile, namely criminals—real or alleged.

It is difficult, probably impossible, to imagine how an accused person could properly prepare and present his own defense to any but one of a tiny proportion of the crimes or offences which are recognized in common sense as such or merely created out of a state's desire to control. Would the prosecution provide an accused person with a list of witnesses and would the police stand there while he approaches the various witnesses for precognition? Could anyone seriously think that he would know of the provisions in relation to defense identification parades, precognition on oath, preliminary objections, specification of documents, commission and diligence, relevancy, amendment. . . .

Many of the problems which propel people into the courts are born of poverty. Government policies and other economic factors which affect modern life put ever more people into poverty. It is impossible to accept that those who sleep on the streets or "live" in cardboard boxes really do so of their own choosing—and there are still many other forms of what could be described as "modern poverty." Carpets on the floor, a television in the corner of the room and a refrigerator in the kitchen are not evidence of affluence, and these items, in a modern society, must be looked upon as essential. Should the owners of such "luxuries" be expected to dispose of them to meet emergencies such as legal expenses? The truth is that more and more people cannot afford to pay for legal representation. How many people, on a level of income which accords with the majority of wage earners, as distinct from the "average wage," could afford to pay a motor mechanic, painter, joiner, doctor or many of the other experts

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which are necessary in this day and age? How else could the boom in Do-It-Yourself supply stores be explained? It makes no more sense, let alone justice, to have Do-It-Yourself legal representation, than to have Do-It-Yourself medical care, optical care, and dentistry.

The practice of charging better-off clients to subsidize the poorer clients was probably more a myth than real. The load must be borne by everyone who may need help and it must be channeled through some central body such as the common pool of taxation. Many of the people who need legal assistance cannot afford priate insurance for their property. Many would not be taken on by insurance companies, due to the areas in which they live, the "poverty-traps" in which they find themselves. They certainly would not get insurance to pay for legal representation in criminal matters. A government-funded legal aid scheme is the only answer, but lawyers must be independent of the state; when the state is a party to the legal proceedings, either in the capacity of prosecutor or litigant, it should not have any influence on the preparation and presentation of the legally aided individual's case by reason of a tight-fisted approach to its own legal-aid legislation.

If legal aid is cut back, lawyers who are instructed may feel obliged to cut corners and standards will fall. We will all end up living in a country with a legal set up and a human rights record which would be the laughing stock of Europe. It has been widely reported that the United Kingdom has had more findings against it in the European Court of Human Rights and the European Commission of Human Rights than any other signatory to the European Convention on Human Rights.

The views and opinions which are expressed in the courts, often by the judiciary, do nothing to suggest that there is a diminishing need for legal advice and assistance. In the criminal courts, convictions are often returned on the ground, that there was no reason why the police should have been disbelieved. It raises the question of what happened to the presumption of "innocence" and the assertion, that no witness steps into the witness box automatically carrying a "badge of credibility." During a hearing on a petition presented by the defense, to cite prosecution witnesses for precognition on oath, the following opinion was delivered: "The issue is simple—if the witnesses identify your client, he will be convicted—and if they do not—he will be acquitted."

If the prosecution services do indeed prosecute in the public interest, then a reasonable person may ask if it is in the public interest to secure a conviction of a person by concealing or not disclosing, or preventing disclosure of, exculpatory evidence or information. Such a view cannot be squared with the recent Scottish case *Higgins v. HMA* 1990 SCCR 268 in which it is stated, "there is no obligation on the Crown to provide any list of witnesses other than those which are attached to an indictment and there is no obligation on the Crown to disclose any information in their possession which would tend to exculpate the accused."

The Scottish legal system since the mid-1950s, has lost many of the safeguards which existed to prevent or reduce the risk of wrongful or unsafe conviction in the criminal courts. The appeal provisions which underwent apparently major surgery in the Criminal Procedure (Scotland) Act 1975, and further modification under the Criminal Justice (Scotland) Act 1980, have been interpreted largely out of existence. If anyone has ever tried to explain to the uninitiated in Scots criminal law, that the Criminal Appeal Court regularly sustains convictions after having been satisfied that a "miscarriage of justice" has occurred, then he will appreciate the point. And the point is that an accused person must achieve justice at the very beginning of the proceedings up to and including his trial. If there is a failure here, the prospects of correcting that error or failure are very slim indeed.

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The unnecessarily secretive way in which police and prosecution services operate militates against justice. The accused person or even suspect should be given unrestricted access to legal advice at the very point of contact with the state's investigative authorities. There should be full disclosure to the defense and not just disclosure of those pieces of information the police or prosecution choose to reveal. Of course, all of this takes money, and the police and prosecution will have to do their jobs properly—but why not? Some people might think that people who are accused of crime do not deserve justice. They might even think that the mere accusation, without proof, means that they deserve all they get. When honorable treatment and justice is denied to the so-called "criminal classes" in the interests of economy, then why not move on to other classes or "elements." The next step might be to deny justice in the form of compensation to the victims of crime, on the basis that they have been the authors of their own misfortune by, for example, being in a public house in a "rough area"; or walking down a darkened alley; or allowing a stranger into their home. When real justice is denied to any section of the community, no matter how low or lowly, there is no telling where it will all end, but it is certain that the injustice will spread.