

## CONSTITUTIONAL REFORM

By Alfred M. Sears

©

### PART 6

## PROTECTION OF THE LAW

In a democratic society the right of every person to be secure in the protection of the law is a basic safeguard of the liberty interest of each person. When the liberty interest of a person is threatened by a serious criminal charge, the extent to which the accused can have a fair hearing within a reasonable time, in the face of the enormous resources of the State at the disposal of the prosecution, is the test of a democratic society. The procedural protection for accused persons, under the Constitution, reflects the extent to which the Constitution places the State under the Rule of Law, in balancing the interest of the individual and society. Article 20 of the Constitution provides procedural justice, through the guarantees, for example, of the presumption of innocence, public trials, right to trial by jury, the right to counsel and the right to not incriminate oneself. These rights, based on the principle of fundamental justice, are not exhaustive, because the concept of natural justice, like the Constitution, is an evolving concept. This proposition was supported by Lord Diplock, writing for the Privy Council in the case **Haw v. Public Prosecutor** (1981) 3 All ER 14 at 21-22, who observed that:

**“Their Lordships recognise, too, that what may properly be regarded by lawyers as rules of natural justice change with the times. The procedure for the trial of criminal offences in England at various periods between the abolition of the Court of Star Chamber and High Commission in the seventeenth century and the passing of the Criminal Evidence Act in 1898 involved practices, particularly in relation to the trial of felonies, that nowadays would unhesitatingly be regarded as flouting fundamental rules of natural justice.”**

Similarly, in The Bahamas our concept of fairness must be informed by the evolving standard of decency and fundamental justice under international human rights law. The procedural justice standard to secure the protection of the law for persons in The Bahamas is outlined in Article 20 of the Constitution which provides:

- “(1) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.**
- (2) Every person who is charged with a criminal offence-**
- (a) shall be presumed to be innocent until he is proved or has pleaded guilty;**
  - (b) shall be informed as soon as reasonably practicable, in a language that he understands and in detain, of the nature of the offence charged;**
  - (c) shall be given adequate facilities for the preparation of his defence;**
  - (d) shall be permitted to defend himself before the court in person or, at his own expense, by a legal representative of his own choice or by a legal representative at the public expense where so provided by or under a law in force in The Bahamas;**
  - (e) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court, and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution;**
  - (f) shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the charge; and**
  - (g) shall, when charged on information in the Supreme Court, have the right to trial by jury;**
- and except with his own consent the trial shall not take place in his absence unless he so conducts himself in the court as to render the continuance of the proceedings in his presence impracticable and the court has ordered him to be removed and the trial to proceed in his absence.**
- (3) When a person is tried for any criminal offence, the accused person or any person authorised by him in that behalf shall, if he so requires and subject to payment of such reasonable fee as may be prescribed by law, be given within a reasonable time after judgment a copy of r the use of the accused person of any record of the proceedings made by or on behalf of the court.**
- (4) No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence that is severer in degree or description than the maximum penalty that might have been imposed for that offence at the time when it was committed.**

- (5) **No person who shows that he has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial for that offence, save upon the order of a superior court in the course of appeal or review proceedings relating to the conviction or acquittal.**
- (6) **No person shall be tried for a criminal offence if he shows that he has been pardoned for that offence.**
- (7) **No person who is tried for a criminal offence shall be compelled to give evidence at the trial.**
- (8) **Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time.**
- (9) **All proceedings instituted in any court for determination of the existence or extent of any civil right or obligation, including the announcement of the decision of the court, shall be held in public...**

However, the effectiveness of these constitutional guarantees, such as the presumption of innocence, can be challenged when a person is charged with sensational charges or when the interests of powerful persons and countries are involved. The issue of the secure protection of the law and state action was raised in the case of Samuel Knowles. Mr. Knowles was the subject of extradition requests by the United States, after having been designated by the President of the United States as a drug “kingpin” under the Foreign Narcotics Kingpin Designation Act 1999. Mr. Knowles applied for habeas corpus, based on subsection 7 (1) (c) of the Extradition Act (Ch. 96 of the 2000 Edition of the Statute Laws of The Bahamas). The hearing was assigned to Mr. Justice Lyons who, at a case management meeting with both counsel present, fixed the matter to be heard on the 28<sup>th</sup> September 2006. On the 28<sup>th</sup> August 2006 Mr. Knowles was extradited to the United States. The Bahamian Court of Appeal, in **Knowles v. The Government of the United States of America and another** (2008) 5 BHS J No. 67, made the following, obiter dicta, observations:

**“ We cannot leave this judgment without recording this court’s serious concern about the manner and timing of the order for the removal of the appellant from The Bahamas at a time when the Executive well knew that Lyons J had fixed a date a little over a month away to hear the appellant’s application. Further, the Executive must be taken to know the law and to have understood that by then the statute conferred a right on both sides to appeal to this court from the grant or refusal of habeas corpus on the kingpin ground and that both sides would have had a further right to appeal to the Privy Council from this court’s decision. In those circumstances, to have ordered the surrender of the appellant ten days after the learned judge had fixed a date for hearing the application, is clearly an egregious breach of the statute and is without precedent in this country.”**

Effective and equal access to justice is another issue, under Article 20 (2)(d) of the Constitution, which needs examination. This provision guarantees the right to legal representation for accused persons either at expense of the accused or at the public expense. This provision was intended by the Framers of our Constitution to provide the secure protection of the law for both affluent and poor persons in The Bahamas.

For most people who appear before our courts in The Bahamas the right to counsel is merely a theoretical right, as most poor people cannot afford legal representation. One consequence of our failure to provide a properly funded system of Legal Aid it that the Justice or Magistrate often has to intervene during the conduct of a trial to assist the unrepresented person with court procedure; thus, delaying the administration of justice and causing significant back logs in the system. Further, in criminal matters the Registrar is forced to seek out attorneys from the private bar to accept Crown Briefs, often at short notice; rather than dealing with the administration of the court and other judicial duties.

The Bahamas has no comprehensive national system of Legal Aid for indigent persons in both civil and criminal matters before our courts even though we boast one of the highest per capita incomes in this region. Under Section 191 of the Criminal Procedure Code Act provides:

**“In any case in which it appears to the Supreme Court that an accused person committed for trial has no money wherewith to retain Counsel –**

- (a) **if the accused is charged with an offence for which the punishment is death, the court shall assign Counsel for the defence at public expense; and**
- (b) **in any other case, the court, in its discretion, may assign a Counsel for the defence at the public expense.”**

In practice, the Registrar of the Supreme Court, operating with the limited resources allocated to the Judiciary, tries to find lawyers willing to accept a Crown Brief to represent indigent persons primarily charged with murder. Seldom would the more experienced lawyers from the criminal defence bar accept these Crown Briefs; thus, mostly less seasoned criminal defence lawyers often handle such cases. In other Caribbean countries, such as Jamaica, for example, the more seasoned lawyers, including Queen’s Counsels, from the criminal Defence Bar eagerly accept Crown Briefs and Legal Aid cases, as a part of their professional duty and for the professional challenge. Because of the limited budget, the Registrar cannot offer a Crown Brief in most non-capital cases. Therefore, many poor accused persons who face indictable charges in the Supreme Court are not provided with legal representation, at the public expense, as contemplated by Article 20(2)(d) of the Constitution because The Bahamas has not made any legal provision for a public defence and legal aid system.

This state of affairs raises a serious constitutional concern whether unrepresented poor persons facing serious criminal charges receive the constitutional guarantee of due process and the secure protection of the law.

Discrimination against poor people in legal procedures was addressed by Justice Douglas, writing for the majority of the United States Supreme Court, in the case **Griffin v. Illinois** 351 U.S. 12 (1956):

**“Due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations. In criminal trials, the State can no more discriminate on account of poverty than on account of religion, race, colour ... To deny adequate review to the poor means that many of them may lose their life, liberty and property because of unjust convictions which appellate Courts could set aside. There can be no equal justice where the kind of trial a man gets depends on the amount of money he has...”**

Similarly, the United States Supreme Court in the case **Douglas v. California** 372 U.S. 353 (1963), per Justice Douglas rejected California’s requirement that an indigent defendant had to first show merit in order to qualify for legal aid. Mr. Justice Douglas reasoned that:

**“The discrimination is not between possible good and obviously bad cases, but between cases where the rich man can require the Court to listen to argument of Counsel before deciding on the merits, but the poor man cannot. There is lacking that equality demanded by the Fourteenth Amendment where the rich man enjoys the benefit of counsel while the indigent is forced to shift for himself. The indigent where the record is unclear or errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal.”**

We must ask ourselves in The Bahamas whether, in the absence of a national system of Legal Aid, indigent defendants facing serious criminal charges must shift for themselves and engage in a meaningless ritual compared to more affluent defendants who can afford to retain effective legal representation. I maintain that our collective failure to provide a properly funded system of Legal Aid for indigent defendants and poor persons in criminal and civil matters challenges the constitutional guarantee of procedural justice and fairness.

An effort was made to remedy this situation in 2004 when Prime Minister Christie appointed the Legal Aid Commission, under the chairmanship of Bishop Dr. William Thompson to enquire into the adequacy of the system of legal aid and advice in The Bahamas and to make proposals for the way forward to improve access to justice. However, after the General Elections of 2007, the Government disbanded the Commission.

I recommend therefore that the recommendations of the disbanded Legal Aid Commission be reviewed and used as a guide for the establishment of a Public Defender’s Office and Legal Aid Facility, funded from public and private sources, to balance the power and resources that the Attorney General, the Director of Public Prosecutions and Commissioner of Police bring to the prosecution on behalf of the State and to give the indigent defendant and litigant a fair opportunity to defend her or his life, liberty and property.