

The essence of equal justice: truly independent counsel for de poor!

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For centuries it has been recognized that the only thing that holds a society together in the long run is the social contract between government and its citizens. And a basic precept of that social contract is that law and the courts will offer equal justice to citizens from different economic and social classes. Outside the courtrooms their lives are very different — some live in mansions, others in hovels, and many in modest housing; some feast on lavish cuisine, others barely survive scavenging for leftovers, and many dine on ordinary foods; and, some enjoy yachts, foreign vacations, and an extravagant lifestyle, while others struggle to survive day to day and can only dream about a better life, and many of the rest must settle for an occasional restaurant dinner or brief vacation.

But when they enter the nation's courts all those citizens, from whatever class, must stand equal before the bar of justice. To do otherwise is to breach the social contract and invite lack of respect for the nation's laws and eventually encourage its disintegration. Those who are unable to enforce the laws that purport to protect them have no reason to obey the laws intended to restrain them. Lawlessness and disorder become the only option and a way of life for the many who no longer have faith in the justice system or the government that structured and supports that system.

And what does it take to provide that equal justice to all classes in a society, when millions cannot afford the lawyers absolutely essential to that goal? The obvious answer that countries of every ideology across the world have adopted is government-paid legal aid for those who can't afford their own.

Less obvious but equally essential is that the lawyer the government funds to represent a citizen must be fully independent of government control and influence. That lawyer must be the poor person's lawyer with absolute loyalty to that person's cause and best interests, not those of the government. To ensure that absolute loyalty to the client requires that the lawyer (or public defenders, when it is the case) enjoy administrative and financial independence from the Executive Branch of government. This need is easier to see when the lawyer is defending an accused in a criminal case, where the Executive Branch, in the form of the prosecutor, is on the other side of the courtroom. But it is equally true in civil cases. In many of those cases, the individual poor person is opposing other parts of the Executive Branch — a public housing administration, a social security department, or the like. But even when the poor person is arrayed against another private person or private entity — a wealthy individual, a business, a bank, a landlord, or the like—both the appearance and the reality of equal justice require the poor person's lawyer to be, and to be seen as, his or her lawyer, loyal to him or her alone, and not to the government that pays the lawyer's salary.

The essential complete separation of the legal aid lawyer (or public defenders, when it is the case) from the Executive Branch has been accomplished in different ways in different countries. After a few years as a part of the Federal government's Executive Branch, the United States decided it was essential to separate the nation's legal aid program from the control of that Branch. So it set up an independent non-profit corporation to take over the legal aid function, a corporation empowered to submit its own budget request to the legislative branch. That non-profit corporation, in turn, does not employ the lawyers who provide legal services to the poor. Rather, it makes grants to local non-profit corporations who hire the lawyers, set the priorities, and serve the

clients. It is not an arrangement I would necessarily recommend to other countries, but it has worked quite well in the U.S.

Brazil has, especially in recent years, found an effective way of achieving the same goal through constitutional (Art. 134, §§ 2º and 3º) and legislative provisions that have begun to carve out a similar level of administrative and budgetary autonomy for the nation's Public Defenders. It would be a tragedy if that nation failed to follow through on that path or retreated in any way from the independence it provides to the public defenders expected to represent the country's many low income citizens. Poor people are entitled to expect the public defenders assigned to them are "their" lawyers, loyal without reservation to them and their interests, not those of the government or anyone who has influence with the government. When such expectations are met, equal justice is served and the social contract is intact. When such expectations are disappointed, justice is not equal and the social contract is threatened.