

Proposed Basic Law: The Right to Due Process

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Abstract



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PROPOSED BASIC LAW

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Even though the jurisprudence of the Supreme Court recognized the right to due process as a derivative right of the right to human dignity, which is enshrined in the Basic Law:

ABSTRACT

Human Dignity and Liberty, 1992, and even though these rights had been grounded before then in legislation and Supreme Court rulings, it has never been granted explicit constitutional status in a Basic Law. As a result, this right—which is an important general principle from which a number of derivative rights follow—enjoys only weak and relatively limited constitutional protection, and the guidance provided to law-enforcement agencies on protecting these rights is vague. This situation is liable to lead to disproportionate infringement of these rights through legislation and to insufficient protection of the rights of suspects and defendants by law-enforcement agencies. As we demonstrate in this proposal, this is why it is crucial to explicitly anchor the right to due process and its derivative rights in a Basic Law, rather than relegate them to the status of a derivative result of judicial interpretation of the Basic Law: Human Dignity and Liberty.

In this research, we review how the right to due process is currently protected in Israeli legislation and jurisprudence and explain why there is a vital need for a Basic Law that grants this right explicit constitutional status—in part, given the situation of legal proceedings in Israel, where protection of the right to due process is weak, and in light of its infringement in the past. We survey the history of the proposals for such a basic law and show how other countries have incorporated the right to due process in their constitutions. By way of conclusion, we consider what the Basic Law: The Right to Due Process should look like and propose its text.

INTRODUCTION

Even though the jurisprudence of the Supreme Court recognized the right to due process as a derivative right of the right to human dignity and liberty,¹ as enshrined in the Basic Law: Human Dignity and Liberty, 1992, and even though these rights had been grounded before then in legislation and Supreme Court rulings, it has never been granted explicit constitutional status in a Basic Law. As a result, this right—which is an important general principle from which a number of derivative rights follow—enjoys only weak and relatively limited constitutional protection, and the guidance provided to law-enforcement agencies on protecting these rights is vague. This situation is liable to lead to disproportionate infringement of these rights by in legislation and insufficient safeguarding of the rights of suspects and defendants by law-enforcement agencies. As we demonstrate in this research, this is why it is crucial to explicitly anchor the right to due process and its derivative rights in a Basic Law, rather than relegate them to the status of a derivative of judicial interpretation of the Basic Law: Human Dignity and Liberty. The existing Basic Law does not provide an adequate guarantee that future legislation would not infringe on the rights of due process and

¹ Aharon Barak, *Human Dignity: The Constitutional Right and its Derivatives* 863–879 (2014). As Deputy Supreme Court President Rivlin explained, "the Supreme Court has recognized the right to due process, or at least some elements thereof, as a protected constitutional right. [...] Indeed, the right to due process, with its core elements, is an essential condition for protecting freedom. [...] What is more, the right to due process is intimately linked to the right to dignity. [...] It follows from the aforesaid that the right to due process with its core elements associated with the defense of liberty and dignity is a protected constitutional right." See Criminal Miscellaneous Petitions 8823/07, *Anonymous v. the State of Israel*, 16–17, for Rivlin's ruling (Nevo Feb. 11, 2010).

cannot guide law-enforcement agencies or educate the public. Hence, it seems preferable to work towards passing a new Basic Law that would be the result of an in-depth study, adopting a broad and long-term perspective on the potential threats to these rights.

As will be seen, the constitutional situation in Israel is an anomaly when compared with other countries. In general, the right to due process is explicitly anchored in constitutions and international conventions and is usually detailed and precise. From a historical perspective, due process is one of the most important factors leading to the institution of Bills of Rights all over the world, in response to the long chronicle of systematic violation of the right to due process by authoritarian regimes.² This can be traced to the Middle Ages and the Magna Charta in England; but that is not the only example of the protection of rights, then or later. The centrality of the right to due process in liberal Western culture is demonstrated by the fact that when Franz Kafka wanted to exemplify despair and the trampling of human dignity by the repressive modern state, he chose to focus on a legal proceeding in which the defendant was denied this right.³ In some places, the right to due process was deemed so important that it served as the basis for the development of other fundamental rights. This is why Israel's failure to anchor it in a Basic Law is astonishing (and indeed, embarrassing), and does not seem to be compatible with the general practice around the world and in international law.

² Consider the notorious "telephone justice" meted out in Eastern Europe during the Cold War, when the process was biased to such an extent that judges received instructions by telephone about how they should decide cases before them.

³ Franz Kafka, *The Trial*.

The study examines how the right to due process is currently protected in Israeli legislation and jurisprudence and explains why there is a vital need for a Basic Law that explicitly assigns it constitutional status, in part- given the situation of legal proceedings in Israel, where protection of the right to due process is weak, and in light of the past cases in which it has been infringed upon. Note that there are also drawbacks to excessive constitutional regulation of due process, and therefore some specific arrangements derived from this right should be expressed in primary legislation rather than in a Basic Law.

We survey the history of the proposals for such a Basic Law (various bills and draft constitutions, including the Israel Democracy Institute's Constitution by Consensus document and the proposed Constitution by Broad Consensus advanced by the Knesset Constitution, Law, and Justice Committee), and show how other countries have included the right to due process in their constitutions. By way of conclusion, we consider several questions: What should the Basic Law: The Right to Due Process look like? How should infringement of due process be defined (that is, is the current limitation clause appropriate to all aspects of the right to due process)? Should the definition of the right to due process, and therefore be "minimal" or "maximal"?⁴ What specific rights should be included in the Basic Law? And what is the appropriate relationship of matters that should enjoy constitutional protection as opposed to those that can be included in routine legislation? Finally, we offer a text for the Basic Law: The Right to Due Process.

⁴ Yoav Sapir, "The Appropriate Defense of People who aren't Nice: Notes on the Thin Bill of Rights in the Proposed Constitution," *Mishpat u-mimshal* 10, 571 (2007)

We propose that the right to due process be anchored in a Basic Law. We believe that the law should be relatively detailed, in the spirit of some of the proposals already considered in Israel and of relatively new constitutions elsewhere in the world, such as Canada, South Africa, and Poland. We suggest that several basic principles that apply in all judicial proceedings, as well as administrative proceedings, be included in the law: the right to due process, the right to adjudication, rights associated with the nature of the judicial body and proceeding (such as the right to be heard in public by an independent adjudicator), and the right to legal counsel. We also propose that the right to due process in criminal proceedings be incorporated in detail in the basic law.

SUMMARY

As explained, constitutional protection of the right to due process is essential for strengthening the respect shown to it by the authorities. At the same time, the government authorities must continue to focus on the development of legislation and court rulings that provide specifics of how to implement the right to due process.

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