

Israel & the United States: Due Process and the Right to be Present

I. Introduction

The right of a criminal defendant to be present at his trial is a basic component of due process and the rules of criminal procedure in both the Israeli and American criminal justice systems. The political and legal systems in Israel and the United States (“US”) share common attributes. For example, just as in the US, Israel has an executive, legislative, and judicial branch of government. *Bureau of Justice Statistics, Israel*, Gloria Weisman.¹ Israel’s judicial branch consists of Magistrates’ courts, District courts, religious courts concerning “matters of personal status,” and a Supreme Court. *Id.* Although Israel does not have jury trials, its “criminal legal system is adversarial in nature.” *Id.*

The Israeli version of a constitution was enacted in 1992 and is called the Basic Laws: Human Dignity and Liberty (“Basic Laws”). *Jewish Virtual Library, Human Dignity and Freedom*.² The Basic Laws provide, among other characteristics, that criminal defendants have the right to due process, which includes the right to be present during a criminal proceeding. *Library of Congress*.³ While Israel has constantly struggled to defend its existence since its independence in 1948, it strongly values fairness and due process in its criminal justice system, as evidenced by a recent Supreme Court decision striking a law that violated offenders’ rights to due process granted by the Basic Laws and holding that even offenders suspected of security threats have the right to be present at each stage of the criminal process. *Id.*

¹ <http://bjs.ojp.usdoj.gov/content/pub/ascii/WFBCJISR.TXT>

² http://www.jewishvirtuallibrary.org/jsource/judaica/ejud_0002_0009_0_09304.html

³ [http://www.loc.gov/lawweb/servlet/lloc_news?disp3_1205401838_text, Israel: Supreme Court Repeals Law Authorizing Ex-Parte Detention Hearings of Security Suspects.](http://www.loc.gov/lawweb/servlet/lloc_news?disp3_1205401838_text, Israel: Supreme Court Repeals Law Authorizing Ex-Parte Detention Hearings of Security Suspects)

II. Israel

a. The Criminal Procedure Law 2006

In Israel, the rules of criminal procedure allow the State to detain criminal suspects for 24-48 hours without judicial review. *The Israel Democracy Institute*.⁴ However, after withdrawing from Gaza in 2005, Israel enacted the Criminal Procedure Law (“CPL”) in order to deal with the detention of Gaza residents who were previously handled by military law. *Id.* The CPL allowed “the State to detain suspects charged with security offenses for up to 96 hours without judicial review...; it also allow[ed] hearings to extend detention periods to be conducted in the absence of the detainee (although the detainee must be represented at the Court hearing).” *Id.* While the CPL “was designed to meet the particular challenges associated with the detention and interrogation of detainees from Gaza, its provisions could apply to any individual [...] who [was] charged with a security-related offense.” *Id.* In practice, the law “was almost exclusively applied to Palestinians from the Gaza Strip.” *Addameer.org*.⁵

b. Supreme Court: CPL is Unconstitutional

In 2010, the Supreme Court of Israel declared that Article 5 of the CPL was unconstitutional. *The Israel Democracy Institute*. The Court determined that while the CPL’s purpose was to improve intelligence and investigative efforts in security matters in order to prevent future terrorist attacks, detainees charged under criminal law “should be treated accordingly.” *Id.* The court further explained that “the right of a defendant to be present at his trial...is not only the right of the individual, but also an expression of the general public interest in guaranteeing that the criminal legal system will determine the fate of a person in the

⁴ http://www.idi.org.il/sites/english/ResearchAndPrograms/NationalSecurityandDemocracy/Terrorism_and_Democracy/Newsletters/Pages/14th%20Newsletter/1/1.aspx, Israeli Supreme Court Decision: A Suspect Charged with Security Offenses Must Be Allowed to Attend Judicial Detention Hearings.

⁵ <http://www.addameer.org/etemplate.php?id=12>, ADDAMEER LEGAL UPDATE: Supreme Court of Israel Invalidates “Security” Law Permitting Extension of Detention Hearings Without Detainee Present.

framework of a proper proceeding in which the defendant is afforded full opportunity to present his defense.” *Library of Congress*. Thus, even in the face of real and imminent daily threats to its security, the Israeli Supreme Court recognized that “constitutional order must be protected even in the face of counter-terrorism imperatives, because the rule of law is integral to the strength of democratic societies.” *The Israel Democracy Institute*.

III. The United States

In the US, just as in Israel, due process and the defendant’s right to be present at his trial are Constitutional rights. In *Allen*, the Supreme Court held that the “Confrontation Clause of Amendment VI guarantees the accused’s right to be present in the courtroom at every stage of his trial.” *U.S. Dept. of State, Congressional Research Service*⁶; (*see also Illinois v. Allen*, 397 U.S. 337 (1970)). Furthermore, Federal Rule of Criminal Procedure 43 “prohibits the trial in absentia of a defendant who is not present at the beginning of trial.” *U.S. Dept. of State*⁷; (*see also Crosby v. United States*, 506 U.S. 255, 262 (1993)). Generally, the State may not detain a criminal defendant for more than 48 hours without judicial review. *Cnty. Of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991); (*see also Fourth Amendment to U.S. Constitution*).

As the war on terror continues, the US still debates whether terrorist suspects should be tried in federal criminal court or military tribunals. *U.S. Dept. of State*.⁸ Under the Military Commissions Act, detainees may be held indefinitely without judicial review when no criminal charges have been brought against them. *Rethinking “Preventive Detention” from a Comparative Perspective*, 41 Colum. Hum. Rts. L. Rev. 99 (Fall 2009). In 2011, President Obama signed the National Defense Authorization Act, providing for indefinite detention of

⁶ <http://fpc.state.gov/documents/organization/133509.pdf>, Comparison of Rights in Military Commission Trials and Trials in Federal Criminal Court, Jennifer K. Elsea, November 19, 2009.

⁷ *Id.*

⁸ *Id.*

terror suspects arrested in the US; however, it is still unclear whether the Act permits the government to indefinitely detain US citizens arrested in the US without due process of law. *Abcnews.com*.⁹ Nevertheless, at this point in time, it does not appear that the US enacted or ever attempted to enact a law similar to the CPL in Israel that would deprive a suspect charged under criminal law of the rights of due process, including the right to be present at each stage of the criminal process.

IV. Reflection

I chose this topic because it highlights the emphasis placed on fairness and justice in two separate democracies that, although differ in many respects, also share common values. It amazes me how Israel, a country continuously fighting to defend itself and its citizens, still values the due process of law in criminal proceedings, even when it makes it more difficult to investigate daily, imminent threats to its national security or to defend itself from terrorist attacks. While both countries have their own mechanisms to process security threats under military law, the values of due process concerning criminal charges remain paramount to each nation.

⁹ <http://abcnews.go.com/blogs/politics/2011/12/with-reservations-obama-signs-act-to-allow-detention-of-citizens/>, With Reservations, Obama Signs Act to Allow Detention of Citizens.