

May 10, 2022

To: MK Gilad Karib, Chairman of the Constitution, Law, and Justice Committee and committee members

Zulat's Comments on Proposed Basic Law: Rights in Criminal Proceedings

This position paper is submitted to the Knesset's Constitution, Law, and Justice Committee by Zulat for Equality and Human Rights, ahead of the discussion to be held tomorrow, 11 May 2022, on the proposed Basic Law: Rights in Criminal Proceedings. It was compiled by a steering committee composed of Dr. Rawia Aburabia, Prof. Aeyal Gross, Prof. Naomi Hazan, Prof. Frances Raday, and Dr. Adam Shinar, while the suggested amendments to the law were drafted by Attorney Eitay Mack.

In this paper, Zulat proposes a number of amendments to the law in order to strengthen and anchor the right to equality, based on the concept that enshrining this right in all relevant laws, especially in a Basic Law, is essential to the viability of a democratic regime in Israel.

The right to equality is recognized as "first among equals" and a key right, without which all other human rights have no meaning or *raison d'être*. The right to equality is particularly important in criminal proceedings due to the fact that the balance of power between the state and the defendant is inherently skewed.

Accordingly, Zulat proposes to amend the provisions of Basic Law: Rights in Criminal Proceedings in a manner that will strengthen the right to equality therein, given the fear that otherwise the proposed law might enable discrimination on the grounds of race, sex, gender, sexual orientation, disability, language, socio-economic status, party affiliation, political views, place of residence, ethnic affiliation, ethnic origin, nationality, or religion.

These are Zulat's recommended amendments to the proposed law:

- Equality as a Basic Principle: Equality is a fundamental value that prevents arbitrariness in criminal proceedings and is a prerequisite for public confidence in the prosecution. Absence of equality creates the infrastructure for the unequal use of prosecutorial power, which undermines the deterrent power of criminal law. For reasons of justice and fairness, the law of all democratic countries aspires to demonstrate equality (for example, see Ruling 10/69 of former Supreme Court President Justice Shimon Agranat, Rachel Boronovsky v. Israel's Chief Rabbi Nissim, and Ruling HCJ 935/89 of former Supreme Court President Aharon Barak, Uri Ganor v. Attorney General). Therefore, Zulat proposes to explicitly add the principle of equality to Article 1 (Basic Principles).
- Equality in Eligibility for a Fair Trial: Every person is entitled to a fair trial, as stipulated in Article 10 of the Universal Declaration of Human Rights (1948) and Article 14 of the International Covenant on Civil and Political Rights (1966). The wording of the proposed law refers only to "bias;" in other words, it bans partiality but not discrimination or selective enforcement (regarding the ban on selective enforcement, see Supreme Court Justice Yitzhak Zamir's Ruling HCJ 6396/96, Zakin v. Mayor of Beersheba. Therefore, Zulat proposes to add to Article 3 (Fair Proceedings) a phrase explicitly stating that a person is entitled to fair proceedings "deriving from the absolute equality of all human beings."
- Equality in Legal Representation: The issue of legal representation in criminal proceedings is a major issue that tends to reflect the economic, social, and political inequality that exists between defendants, suspects, and interrogees belonging to different population groups. Lack of legal representation violates the right to a fair trial and may result in unfair interrogations or false incriminations and confessions. The right to legal representation before a governmental authority has been recognized in Israeli case law as a fundamental right with constitutional status. Therefore, in the proposed law, Zulat proposes to delete "without delay" from subsection (a) of Article 4 (Legal Representation), as these words might lend themselves to interpretation and might hinder or preclude legal representation from underprivileged populations.

In addition, stipulating eligibility for legal representation without specifying that this will be funded by the state when necessary is insufficient. Therefore, in accordance with the principle of equality and Article 14 of the International Covenant on Civil and Political Rights, Zulat proposes to add to Article 4 a subsection (c) stipulating that "a suspect or defendant is entitled to engage a lawyer of their choice or one will be assigned to them by the state, free of charge, if they lack the means to pay for their services."

- Equality in Detention Proceedings: In accordance with the principle of equality and Article 9(d) of the International Covenant on Civil and Political Rights, Zulat believes that the wording proposed in Article 8 with regard to detention proceedings is too concise to prevent a situation where detainees with financial means may secure their rapid release from custody by someone acting on their behalf, whereas detainees from underprivileged populations have to remain in custody until the police can bring them before a judge. Therefore, Zulat proposes to replace the wording in Article 8(c) with a phrase that will anchor the principle that "anyone deprived of their liberty by detention shall be brought before a court and shall be entitled to take proceedings before it, in order that the court may decide without delay on the lawfulness of their detention and order their release if the detention is not lawful."

In addition, Zulat proposes to add a subsection (d), stipulating that "the court to which a detainee is brought shall ensure

that the interrogation and detention are carried out in a manner that safeguards their dignity, body, and rights under any law."

- Equality Concerning Rights in Interrogation Proceedings: In accordance with the principle of equality and the provisions of Article 7(a) of the International Covenant on Civil and Political Rights, Article 5 of the Universal Declaration of Human Rights, and Article 2 of the International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), Zulat proposes to add to Article 9 (Rights in Interrogation Proceedings) a subsection (a), whereby "a person undergoing interrogation

shall not be subjected to any treatment, punishment, or action liable to inflict cruel or inhuman physical or mental pain or suffering."

In addition, to prevent the violation of the fairness of the interrogation, false incriminations and confessions, or other distortion of the criminal proceeding, and in accordance with the principle of equality and the provisions of Article 14(c)(1) of the International Covenant on Civil and Political Rights, Zulat proposes to add a subsection (c), stipulating that the interrogation shall be conducted in a language that is understood by the interrogee.

- Equality in the Rights of Victims of Crime: In accordance with the principle of equality and to prevent discrimination between victims of crime of different population groups, Zulat proposes to explicitly add to Article 10 (Rights of Victims of Crime) the right of victims of crime to voice a position on delaying legal proceedings, a plea bargain, or an arrangement to close the case.

- Equality in Stability of the Law: In accordance with the principle of equality and the provisions of Article 4(a) of the International Covenant on Civil and Political Rights, Zulat proposes to add to Article 17 (Stability of the Law) the phrase "provided that the denial or restriction shall not be inconsistent with the obligations of the State under international law and shall not entail discrimination based on race, sex, gender, sexual orientation, disability, language, socio-economic status, party affiliation, political opinion, place of residence, ethnic affiliation, ethnic origin, nationality, and religion."

As stated, the purpose of these recommendations is to anchor the value of equality in the proposed Basic Law, based on Zulat's view that protecting the values of equality and human rights and increasing the number of Israel's Basic Laws are of paramount importance toward strengthening the democratic character of the state and correcting its social injustices.

Thank you for your attention,

Einat Ovadia, Executive Director of Zulat for Equality and Human Rights

Legal consultant: Attorney Eitay Mack