



## Advocate-General's Basic Principles for Governance – and the Judiciary

### *Due Process and Fairness in Criminal Cases*

### Is justice a worthwhile pursuit?

#### *Aim high, fly low!*

Justice is a noble but elusive cause, and pursuing it too vigorously may come at a high price. Many justice issues are political, and some are highly controversial – like criminal justice (capital punishment, severe sentences, the rights of victims), abortion rights, the environment, the rights of minorities, and much more.

Being a non-political organization, International Legal Association does not seek to advocate any particular issue or cause. While aiming high towards justice, we fly low as far as our methods.

By emphasizing due process, we focus on the formal side of the matter: Whether adequate safeguards are in place to protect fundamental rights, whether important contracts are in order, whether commitments are being fulfilled.

To address fairness, the Court of Ethics continuously strives to elaborate useful principles of philosophy, then resolve what constitutes ethical and unethical conduct. The Court takes some theoretically complex issues on its docket. As it completely lacks formal powers, the Court of Ethics' sole source of authority is its ability to produce findings based upon sound reasoning, complete impartiality, and a fundamental grasp of what is fair.

We at ILA do believe that tangible improvements to the justice system are achievable by such pragmatic means.



At first glance, Basic Principles for Governance were apparently not designed with criminal cases in mind. Terms like “Provider,” “services,” and “Client” appear ill-suited to the kind of punitive acts the government imposes upon prison inmates, although certain “services” like food, beverages, and literature are provided. Basic Principles for Governance does not mention the right to a fair trial – it does not specifically mention trials, whether criminal or civil. Similarly, it does not contain any provisions about the right to legal representation, ensuring independence of the judiciary, or the like.

In spite of these omissions, Basic Principles for Governance can contribute to a clearer understanding of what due process means within the criminal justice system.

Transparency, Article I: Laws, administrative guidelines, and official procedures should be transparent. The Law of the Land should be clearly laid out, and those who run afoul the law should be informed about their rights.

If a prison decides to cut down Inmate A's daily exercise allowance from 30 to 15 minutes, then Inmate A has the right to know the reason. The decision should be clearly communicated in an appropriate format (Section 1.01), and the decision should clearly spell out all the underlying reasons as well as the correlation between the alleged offense and the punishment (Section 1.02). The prison's stated reasons for its decisions should be balanced (Section 1.03). The decision should clearly inform Inmate A about any negative or positive implications associated with the decision (like how long the restrictions will remain in place; whether longer exercise periods may be granted during weekends) (Section 1.06). As a countermeasure against corruption, Inmate A should not be allowed to resume his regular exercise schedule by performing an act not clearly displayed in the decision (Section 1.04).

Furthermore, the decision should state clearly who is responsible for implementation of the measures (Section 1.05), and Inmate A should be made fully aware of his right to appeal the decision to an independent review board, with no fees or other undue restrictions being imposed (Section 1.07 and 1.08). The decision should be: free from errors, free from ambiguities, up-to-date, comprehensible, accompanied by adequate references to relevant material such as

internal policies, and accompanied by other relevant information in Inmate A's own language (Section 1.09-1.14).

If all of the above safeguards concerning transparency are observed, Inmate A should enjoy a fair opportunity to mull over his alleged wrongdoing, what the prison is going to do to him as a consequence, and whether he ought to file an appeal.

However, Basic Principles for Governance does not stop at this, as it provides other fundamental safeguards.

Article II, Non-discrimination: Restrictive measures should be applied in a non-discriminatory fashion, which would prohibit the prison from cutting down Inmate A's exercise privileges due to his color, race, religious beliefs, or whatever.

Article III, Consistency: The decision against Inmate A should be consistent both with internal policies and regulations ("so-called subjective consistency") and with "broadly accepted policy objectives and regulatory standards" (so-called "objective consistency"). Furthermore, the prison authorities would have an obligation to ensure that all like situations are handled equally.

Article IV, Proportionality: The decision should be no more restrictive than what is necessary to fulfill the stated objectives (so-called "subjective proportionality,") nor should it be "more burdensome than broadly accepted policy objectives and regulatory standards would permit" (so-called "objective proportionality.") Such safeguards seem well-suited to prevent prison authorities from applying harsh punishment against a prisoner for minor offenses, and would seemingly also yield an inmate protection against cruel and unusual punishment. Under the circumstances, punishment must even be preceded by a fair warning. Punishment should be applied in such a manner so as to avoid "disproportionate or undisclosed side effects" – such as if cutting down a prisoner's exercise privileges would cause serious health problems.

Article V, Efficiency and effectiveness: The authorities should only impose measures that are efficient and effective in producing their intended result, which should discourage prison authorities from imposing harassment disguised as sanctions. Measures that are "legally unenforceable, ambiguous, or open-ended" are to be avoided, which should discourage prison officials from taking a prisoner's privileges indefinitely without, at the very least, ensuring automatic review within specified time intervals.

Under Article VI, the authorities may be excused from non-fulfillment of their responsibilities "where this is a direct consequence of unavoidable

circumstances or obligations imposed... by others, notably an official act of government" – a prison would be well within its rights to temporarily revoke all exercise privileges during a state of emergency declared by the Governor during a prison riot. In contrast, certain forms of behavior – including "repeated non-fulfillment of obligations and responsibilities" and "unethical conduct" – may be aggravating factors.

In conclusion, while Basic Principles for Governance aim to protect the right of citizens against poor governance, they also contain the caveats that are often necessary to strike an appropriate balance between the rights and interests of the government and its subjects. Concerns for due process and fairness are thus considered in tandem.

