

HUMAN RIGHTS AND DUE PROCESS OF LAW

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Most of us are familiar with at least some of the imperishable and indestructible human rights protected under American constitutional law. While we may not understand the historical background or current judicial construction of the right to trial by jury, the right to counsel, the privilege against self-incrimination, or the right against unreasonable searches and seizures, almost all of us know that these rights do exist and that it is unconstitutional for the government to violate them. However, one of our constitutional rights, the right to due process of law, is terra incognita to most Americans, even though it is one of the most important constitutional rights and, indeed, is arguably the most important constitutional right.

There are two guaranties of due process in the U.S. Constitution. The Fifth Amendment's due process clause (ratified in 1791) provides that no person shall "be deprived of life, liberty, or property, without due process of law ..." This clause prohibits the federal government from violating the due process rights of individuals. The Fourteenth Amendment's due process clause (ratified in 1868) is worded similarly, and prohibits the various state governments from infringing on due process requirements. It provides that no "State [shall] deprive any person of life, liberty, or property, without due process of law ..."

The right to due process of law, which historian Charles McIlwaine called "our greatest constitutional check upon arbitrary infringements of the liberty of the individual," originated in 1215 in Magna Carta, the fountainhead of liberty in Anglo-American history. In section 39, the law of the land clause of Magna Carta, England's tyrannical King John was forced by rebellious barons to promise that henceforth no free man would be arrested, imprisoned, dispossessed, outlawed, or banished "except by the legal judgment of his peers or by the law of the land." By the 14th century Magna Carta's term "law of the land" had been replaced by the synonymous term "due process of law." Thus, in 1354 Parliament declared that "no man ... shall be put out of land or tenement, or arrested or imprisoned, or disinherited, or put to death, without being brought in answer by due process of law." (Section 39 remains binding law in England; it is one of the few provisions of Magna Carta not subsequently repealed by Parliament.)

In the late 18th century, due process of law was elevated from statutory right to the exalted level of constitutional right. Between 1776 and 1789, 8 American states adopted a constitution with a law of the land clause. The first constitutional provision with a due process clause was the federal Bill of Rights, approved in 1791. In the United States, therefore, due process has been a constitutional right for over 200 years, and today almost every state constitution, including Georgia's, has either a due process clause or a law of the land clause.

As interpreted by federal and state courts, due process mandates fundamental fairness. When government agents investigate crime, when they prosecute or try someone for crime, or when (irrespective of whether any alleged crimes have been committed) government agents otherwise impinge upon an individual's freedom or property for any reason whatever, those agents must act in a fundamentally fair manner. In judicial proceedings between the government and

individuals, fundamental fairness means that the individual must be given adequate notice of the proceedings and ample opportunity to be heard and present his or her side of the case, and that the court's judgment must be an impartial decision based on the evidence. Outside the courtroom, fundamental fairness means that the government must not engage in conduct that shocks the conscience or that violates elementary principles of liberty and justice. American courts have therefore definitively held that due process prohibits police from torturing or inflicting physical brutality upon citizens, and that a confession extracted by torture or violence is inadmissible in court, regardless of whether the confession is truthful. Because it bans torture, due process is an incalculable right of inestimable value. Due process makes barbarism by government unconstitutional.

The fairness required by due process of law is not static. What was fair a century ago may very well no longer be deemed fair today; and what is fair today may be deemed unfair in future times. Due process therefore provides a flexible, evolving standard of protection. As civilization progresses, as notions of humaneness and decency become more developed, due process offers increasing protections for the individual.

The establishment of the right to due process of law as a fundamental human right is one of the greatest achievements of Western society. The right to due process is, to paraphrase a U.S. Supreme Court justice, "one of the great landmarks in man's struggle to make himself civilized." It embodies the judgment that governmental interference with individuals must be constrained by basic notions of humanity and fair play. It repudiates the dangerous view that the conduct of those wielding the power of the state is to be judged according to a no-holds-barred approach.