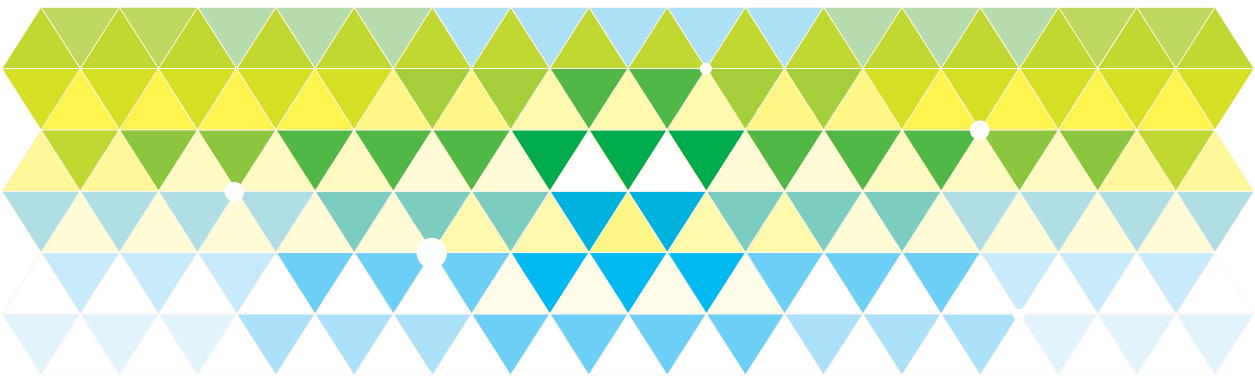




GUIDELINES FOR DEBATE

WHAT IS DUE PROCESS?






BY MARIANA VELASCO RIVERA*

Recently, we have read and heard much on the subject of due process. Nonetheless, we occasionally risk being highly influenced by what we read or hear about a concept without really knowing exactly what it entails or denotes. For this reason, the intent of this *Guideline for Debate* is to contribute towards a better understanding of due process, thus creating a common ground from which to start our debate on the topics that affect us daily as citizens. The importance of due process, when considered a right, stems from its interpretation as the mechanism intended to stymie the arbitrary actions of authorities intended to modify or repress any of our other rights.

The aim of the series **GUIDELINES FOR DEBATE is to influence the formulation, implementation and evaluation of programs and policies through guidelines that foster the debate of ideas from a progressive approach. The collection features a cool exchange of data and theoretical and methodological tools for analysis and action aimed at emerging political generations.**



ACTIVITY 1 PART ONE

Let's begin with an exercise. This task is divided into **TWO PARTS**: one to be completed **BEFORE** reading this *Guideline for Debate*, and the second one **AFTER** having read it. The split structure will give us, first, **AN OVERVIEW** of our initial understanding of the concept at hand, and second, elements to help us realise how close or far we were from having a clear concept of the meaning of due process.

Write down on coloured flashcards **A WORD OR PHRASE** that comes to mind when you hear the term **DUE PROCESS**. Having done this, we can discuss **WHETHER OR NOT THERE IS A GENERAL CONSENSUS** among the ideas expressed on the cards with regard to the meaning of the concept.

OFF WE GO

“The set of conditions and legal and procedural requirements that are necessary to legally affect the rights of the governed.”¹
Humberto Briseño Sierra

Due process consists of the obligation that the authorities in charge of justice have towards citizens to not commit arbitrary acts. That is to say, they are the minimum obligations that the authorities must meet so that if our rights are to be affected, it is done in a just manner and that, moreover, each individual is treated equally, regardless of social or economic status, age, or gender. The fair and equal treatment of citizens by the authorities stems from one basic notion: procedural rules must be equally applied to all. Procedural rules establish the parameters that both judges and parties at a trial must conform to. In other words, they are like **THE RULES OF THE GAME**. At times, these are perceived as less important than those that directly establish or protect a substantive right (e.g. freedom of expression or right to non-discrimination) because they only govern the actions of certain individuals within a specific process. To dispel this erroneous notion it is important to note that both from a regulatory and a hierarchical perspective, substantive and procedural rules are actually on the same level.

Therefore, **ONE CANNOT BE GIVEN MORE IMPORTANCE THAN THE OTHER.**

The Mexican legal system establishes several types of actions² in order to make our rights effective. Each of these actions has specific procedural rules that must be strictly observed in order to ensure equality and fairness in the deliverance of the ruling. Some may argue that, as long as the right in jeopardy is protected (e.g. liberty, or property), procedural rules become less important. However, if we fully understand what the concept of due process entails, we can infer that this, in fact, cannot be the case. In essence, procedural rules and their strict application are what ensure the protection of our rights. How? By guaranteeing no authority acts in an arbitrary manner under any circumstances.

How? By guaranteeing that no authority can act in an arbitrary manner under any circumstance.

Using a specific procedural rule as an example, let's speak of a deadline for filing a Writ of Amparo³ against the final judgment of conviction and imposed imprisonment. Article 17, section II of the new *Ley de Amparo*, establishes an eight hour deadline to file the Amparo suit. Now, imagine two people file an appeal one minute after the deadline granted by the law to file claims. In one case, judge 'A' applies the aforementioned article and does not admit the appeal due to tardiness. However, judge 'B' allows his good mood—after having eaten well—to interfere with his method of applying rules by which he is bound and pities the person who overran the deadline by a margin of one minute, allows the appeal despite the existence of a specific law establishing that he should not.

If we analyse these situations separately we may come to the conclusion that neither judge acted improperly. On the one hand, judge 'A' applied the rule by which he cannot allow the appeal once the deadline has passed - he, therefore, acted with regard for the law. On the other hand, judge 'B' failed to apply the aforementioned rule, for a supposedly 'higher' moral objective (the freedom of the person who filed the Writ of Amparo). However, if we analyse these two cases together the conclusion would likely not be the same. By examining the situation in this manner, we begin to question the way judge 'B' acted. Would he

always behave in the same way? What if next time he is in a bad mood? This would no doubt cause us uncertainty as citizens and as potential defendants due to the subjectivity inherent in his actions.

WHAT IS THE IMPLICATION OF THE SITUATION IN QUESTION? The individuals who filed the Writ of Amparo are in the exact same conditions yet have received different treatment. From this perspective, the result does not seem fair, does it? Why was the appeal from one party accepted - granting them the opportunity to regain their freedom - while the appeal from the other party was rejected? What should have happened in order for us to consider the judges' decisions fair? Should the law have been applied in the same way to both parties?

In effect, the purpose of procedural rules is to place us on a level of equality and judicial certainty. In this case, procedural rules are the only tool that allows us to protect all of our other rights in a just fashion: this is what due process consists of. It ensures that, if our rights risk being restricted or withheld, authorities will in no way act arbitrarily, and that every person will be treated equally when found in the same circumstances.

IT IS ESSENTIAL TO CLARIFY THAT due process is to be perceived as a concept that refers to the full respect of the rules governing the actions of the authorities in procedures intended to affect any and all of our rights.

ON WE GO

WHAT RULES AND RIGHTS IS DUE PROCESS MADE UP OF FROM A CONSTITUTIONAL PERSPECTIVE?

ARTICLE 13

- This article bans private laws and courtrooms: This implies that nobody can be judged by a law or courtroom that has been created solely for the judgment of this person.
- **LAW OF WAR:** This law operates in the case of crimes and offences against military discipline. Military courts can only prosecute individuals in the army and for breaches of military discipline. If a civilian is 'implicated' in this type of crime, a corresponding civil authority must resolve the case.

ARTICLE 14

- **NO RETROACTIVITY OF THE LAW:** Prohibits retroactive criminal legislation in detriment of any person. This implies that crimes should be carried out according to the laws in effect at the time when the wrongful conduct was committed. The exception to this rule is when the retroactive application of criminal law benefits the defendant or convicted.
- No individual can be denied or restricted on his/her liberty, possessions, or rights unless in a fair trial 1) before previously established courts, 2) where the essential procedural formalities are followed, and 3) under laws enacted before the fact.

- **STRICT APPLICATION OF CRIMINAL LAW:** This implies that if we are the defendant in a criminal proceeding, punishment can only be imposed if the behaviour we have carried out perfectly matches the behaviour described by the law. Analogical reasoning and the majority of reason standard of review is forbidden when resolving criminal trials. This means jurisdictional authorities cannot apply a punishment when the conduct under review simply resembles what is described by the law. Meanwhile, banning majority of reason standard of review means that we cannot be judge for a crime that is not established in the law for the simple reason that if one behaviour is considered a crime, similar behaviours should considered crimes as well.

ARTICLE 16

- Any act that is intended to affect any rights (in respect to the person, family, home, documents or possessions) must be pursuant to a **WRITTEN** order issued by the competent authority for this purpose, establishing and motivating the legal cause of the procedure.
- **PROTECTION OF PERSONAL DATA:** everyone has the right to protection, access, rectification and cancelation of personal data. Personal data implies all the information that allows the identification of a person (name, address, emails, racial or ethnic origin, sexual orientation, medical status and/or any kind of information that affects our intimacy). Nevertheless, when national security, public order, security and public health reasons arise, the constitution establishes exceptions to this rule.
- **ARREST WARRANTS:** These can only be issued by judges prior to an accusation or complaint due to the occurrence of an offense punishable by incarceration. This is true provided said judges have evidence to corroborate that the crime has indeed been committed and the accused person has either committed or partaken in the crime.
- **HABEAS CORPUS:** After executing an arrest warrant, the executive authority must, without delay, present the accused person before a judge for a ruling on their legal status.
- Cases in which the *Ministerio Público* (prosecuting authority) is able to order detention: This may only occur in the circumstances of an urgent case in which there is a reasonable risk that the suspect may evade the action of justice and that,

because of the time, place, or circumstances, the prosecuting authority is not able to present he/she before a judge. In such cases, the judge receiving the accusation must either confirm the arrest or order the detainee's release.

- In the case of flagrant crimes or urgent circumstances, the *Ministerio Público* cannot detain the suspect for more than 48 hours. Within this period, the accused must either be granted freedom or be presented before a judge.
- **SEARCHES:** a judicial authority can **ONLY** issue an order to carry out searches upon the request of the *Ministerio Público*. Said order must be specific to the individual case. This implies that the location that is to be inspected, the objects that are to be sought, and the individuals that are to be apprehended must all be noted. In this type of action, the *Ministerio Público* is required to limit the search warrant **STRICTLY TO THE PROVISIONS OF THE ORDER AND MUST PRESENT A REPORT OF SAME IN THE PRESENCE OF TWO WITNESSES.**
- **PROTECTION OF PRIVATE COMMUNICATION:** As a general rule, the right to private communication is inviolable, unless one of the participants voluntarily provides their content during a trial. The judge will be able to take them into account and determine their relevance as evidence, provided they contain information regarding a crime.
- **PRIVATE COMMUNICATION INTERVENTION:** Only a federal judicial authority may authorise such intervention at the request of the Attorney General or of the state Attorney Generals. The authorisation of the intervention in communication can only be granted in the case of serious crimes and must be subjected to the following rules: the requesting authority must establish and justify the reasons for the request, express the type of intervention, its subjects, and its duration. The interception of communications does not apply in matters regarding electoral, fiscal, commercial, civil, labour, or administrative areas, or in the case of the detainee's communications with his/her defender.
- **DOMICILIARY VISITS:** The administrative authority will be able to practice domiciliary visits only to make sure that the sanitary and police regulations, as well as fiscal dispositions, have been fulfilled, provided that the same formalities prescribed for search warrants are complied with.

ARTICLE 17

- **RIGHT TO THE ADMINISTRATION OF JUSTICE:** implies that the tribunals be efficient and remain subject to the deadlines and terms established by laws.
- **PUBLIC DEFENDER SERVICE:** This is the institution in charge of offering defence services to those in need.

ARTICLE 19

- **DETENTION BEFORE A JUDICIAL AUTHORITY:** This cannot be extended for longer than 72 hours, unless the defendant requests an extension. Once this deadline has passed, the judge must settle the individual's legal situation by either issuing an order directing the defendant in a criminal action to be held in custody pending trial or a release order.
- **REMAND:** Remand may only be requested by the *Ministerio Público* when other precautionary measures do not suffice in ensuring the defendant's presence at the trial, is a threat to the community, or has been previously convicted for an intentional felony.

ARTICLE 20

- This article establishes **THE GENERAL BASIS OF THE ADVERSARIAL SYSTEM IN CRIMINAL MATTERS:** Among these, a few stand out include: The presence of the judge is required throughout all the trial hearings, the burden of proof must rest on the plaintiff, procedural equity of the parties to support prosecution and defence, and convicting may only occur when there exists conviction beyond reasonable doubt.
- This article establishes **THE RIGHTS OF THE DEFENDANT**, among which a few to be emphasized include: The presumption of innocence until there is a conviction, the ban on solitary confinement, the right to silence, the right to know what the defendant is accused of, and who is accusing him/her.
- This article also establishes **THE RIGHTS OF THE VICTIM**, including: Assisting with the Ministerio Público, receiving medical and psychological attention, and compensation.

ARTICLE 21

- The **INVESTIGATION OF CRIMES** rests with the Ministerio Público (prosecuting authority) and the police.
- The **ABILITY TO PRESS CHARGES** before judicial authorities is the sole responsibility of the prosecuting authorities.

ARTICLE 22

- Death penalty, torture, excessive fining, or transcendental punishments (life imprisonment) are **FORBIDDEN**.

ARTICLE 23

- No criminal trial can take more than three instances.
- Double jeopardy is in effect, therefore nobody can be tried twice for the same offense.

ACTIVITY 1 PART TWO

Now, write down **A WORD OR SHORT SENTENCE** that expresses what you understand when you hear the term 'due process' on coloured flashcards, once more.

- Are there **ANY CHANGES** compared to your initial response?
- If so, what is **THE MOST NOTICEABLE DIFFERENCE** between the first response and the second?
- How **IMPORTANT** do you believe due process is as a precondition of a State based on the rule of law, or, where appropriate, for building such a State?

ACTIVITY 2

Below you will read a short account in which, based on what we have learned today, you must **IDENTIFY** whether or not there are any violations of our right to due process.

It is Tuesday evening and Juan left work late from his office in the Santa Fe district of Mexico City. On his way back on Constituyentes Avenue, he is stopped at a roadblock held by police detectives (who belong to the Procuraduría General de Justicia del Distrito Federal - the Attorney General's Office of Mexico City). When Juan asks why he was stopped, the police do not answer him. Instead, they make him exit his car and force him into a patrol car, where they do not allow him any form of communication. After three days, they reveal an arrest warrant against him and present him before a judge.

The judge solves Juan's juridical situation a week after his appearance in court. Juan was accused of a home burglary. However, he did not know who was accusing him and throughout the trial he was not allowed to present proof to defend himself against the accusation. The judge sentenced him to ten years in prison.

- What **IRREGULARITIES**, if any, have you identified in the above account?

Now you have a clearer idea of what due process entails on a Constitutional level. Remember that it concerns the lawful nature of the actions and performance of authorities within the legal framework that governs their performance. This is what defines a State under the rule of law. It is worth noting that, as we can see in what the Constitution establishes, due process guarantees that when our rights risk being restricted, the rules of conduct established by the Constitution and the law are maintained.

“[...] application of instrumental law to achieve substantial rights.”⁴


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1. Humberto Briseño Sierra: *Debido Proceso legal, el diccionario jurídico mexicano*, México, D.F., UNAM IJ, 1983, Tomo III, D. Pages 19-21.

2. The right that is going to be affected will determine the type of action to defend it. For example, if two people claim to be the owners of a property, it is through an ordinary civil trial that a judge will have to decide who actually owns this property. In the case in which one of the two parties in this trial is not in agreement with the decision, he/she can appeal the ruling and, once all of the legal remedies established by civil procedural legislation are exhausted, he/she will be able to challenge the definitive ruling through a Writ of Amparo (see note 4 for an explanation of the meaning of this term).

3. Writ of Amparo: called *Juicio de Amparo* or *Juicio de Garantías*, this type of suit is native to the Mexican legal institution, and has no exact equivalent under U.S. law. It is a constitutional remedy through which relief against violation of constitutional rights committed by the government or by a court of law can be obtained. Its purposes include: a) to preserve the rights and freedoms established by the Federal Constitution against legislative and executive acts, governmental acts of authority, and court decisions, and b) to preserve local and federal-state disputes. Relief applies only to the petitioner and the decision serves only as a reference for subsequent cases, but lacks the force and effect of precedent within U.S. judicial system (Becerra, Javier F., *Dictionary of Mexican Legal Terminology*, México, Escuela Libre de Derecho, 1999, P. 488)

4. Pedro Pablo Camargo, *El debido proceso*, Ed. LEYER, Bogotá, Colombia, 2002. Page 25.



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