CHAPTER I Delimitation of the Problem

Fiat justitia ne pereat mundus*

A. Due Process in Criminal Proceedings

Humanity is engulfed in “a new order of threat.” It is living in the age of a global battle against terrorism, a war, as it is often called, that it did not necessarily choose to fight. 21st century civilization is living in a bizarre “world where the name of God is sometimes associated with vengeance or even a duty of hatred and violence.” Barely one day passes by without bomb blasts somewhere on this planet, and their innocent victims making the headline news. Communities keep counting their dead. In the midst of this turmoil, society, in all of its layers, reacts and passes judgments of right and wrong, both morally and legally. These reactions not only differ from one individual to another, but, most of the time, they also diverge from group to group. Undoubtedly, one of these layers of society, the law makers and the legal profession, bears a heavy burden in that struggle. Torn between the ends of public security and effective administration of justice on one side, and the interests of the individual justly or unjustly accused on the other side, they become key actors in the search for fruitful approaches to adequately regulate the natural imbalance of power in criminal proceedings, this confrontation of the lone accused with the vast machinery of the state. While most of society’s sentiments and apprehension, augmented by the media, rest with the victims in fear of the heightened potency of terrorism, the legal profession*

* Latin for “Let justice be done lest the world should perish.” G. W. F. Hegel, GRUNDLINJEN DER PHILOSOPHIE DES RECHTS [Elements of the Philosophy of Right] (1821), para. 130. This formulation appropriately adjusts the Latin maxim fiat justitia ruat coelum which means “Let justice be done, though the heavens fall.”


3 For comments on a victim-oriented approach as a contributing factor to potential denial of due process, and the influence of media as an important agent in this respect, see SUSAN MARKS & ANDREW CLAPHAM, INTERNATIONAL HUMAN RIGHTS LEXICON 160 (2005). See also PETER JUDSON RICHARDS, EXTRAORDINARY JUSTICE: MILITARY TRIBU-
has to be fully preoccupied not only with the victim, but also with the victimizer. This seeming paradox, that might baffle the lay person, does in fact constitute the axis of a lawyers’ work in a democratic society, where the standards of conduct are “the law” for all, where the rights, be they grounded in natural law⁴ or granted by positive law, belong to all, and where the lawyers’ job and professional duty is to achieve justice for their clients through effective legal representation, in the process adding a measure of justice to society.⁵

Due process of law is one of these rights, which is as important as it is most easily and most extensively violated. In order to be able to evaluate the process due an accused in today’s war against terror, one should first know the basic legal guarantees, both domestic and international, as well as the standards that have already been set in this regard and the evolving trends and tendencies. It is widely accepted that justice can only be served through fair trials, and the prejudgment of guilt should be curbed at its inception. No matter how dedicated the justice system is in its search for truth, the legal process is run by humans, and thus cannot help but yield imperfections and deficiencies. The modern-day community, on a global scale, has, by and large, moved forward to accept and develop procedures that may benefit any accused, even the guilty one, and as it does so, it looks at the judicial infirmities of the past, which tell cautionary stories for the present and the future.

Once a crime has been reported or even suspected, and depending on its prima facie nature, type and scale, it immediately might become the central focus of interest of the political, social, and, most of all, the legal community. However, often in dis-

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⁴ Rights essentially do not derive from the state or any other external authority, consequently may not be taken away. They “derive from the inherent dignity of the human person,” as noted in the Helsinki Final Act, Principle VII. Thus, any official behavior that affronts human dignity should be considered a violation of the rights of the person. Within the topic of our discussion, for example, it is incompatible with respect for inherent human dignity to punish detained persons by psychological or physical means that would humiliate them by ridiculing their beliefs, their origins or their way of life, or to deny them the capacity to assert claims to basic rights. For a detailed analysis of human dignity as a normative concept, the meaning of the inherent dignity of the human person, the conduct incompatible with it, as well as the relation of human dignity to human rights, see Oscar Schachter, Human Dignity as a Normative Concept, in Human Rights Law 101-107 (Philip Alston ed., 1996). See also Eckart Klein, Human Dignity in German Law, in The Concept of Human Dignity in Human Rights Discourse 145-159 (David Kretzmer & Eckart Klein eds., 2002).