The liberty of a person is the hallmark goal endorsed by a genuinely democratic society to express its ultimate regard for the human being and his dignity. In pursuing this objective, its constitutive process has designed the guarantees and the rules of conduct which preclude any unlawful and arbitrary curtailment or deprivation of rights, freedoms and liberties. One of these assurances is the due process of law in criminal proceedings, which now doubles as a central norm of the international law of human rights. As we trace the historical development and the course of legal change in the field of procedural due process, we come to realize that having gone through enormous battles, which continue into the present, due process still has a long way to go. Therefore, it appears cogent that before delineating due process in the era of international terrorism bringing about states of emergency, we focus on the due process guarantees in peacetime,\(^1\) thus explicating the rule before sociopolitical reality brings forth the exception to it.

Due process is a right which society has always considered of fundamental importance, both in terms of the letter of the law or legal text and also of its spirit or intention. This can be evidenced by the enormous changes in meaning that this rule has undergone in the domestic laws of both adversarial and inquisitorial legal systems, as well as in the international law of human rights, and the extensive body of its interpretation by courts and scholars. It can also be illustrated by the fact that the right to due process guaranteed in Article 14 of the International Covenant on Civil and Political Rights (hereinafter ICCPR), was proposed\(^2\) to be included as one of the non-derogable rights under Article 4 (2) of the ICCPR.

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1. In this section, the word “peacetime” is used to refer to situations of “normalcy” and not merely to “the absence of war.” Situations of emergency are dealt with separately, infra, at Chapter III.

When pursuing social safety through an effective system of reasonable deterrence and just retribution, the government automatically is cautioned against treating the accused and the criminals more severely than they deserve to be treated. Sanctions of criminal law, by nature, constitute a radical infringement of fundamental human rights, in a way they fit squarely with the motto: no absolute freedom for the enemies of freedom. Consequently, any government that truly values the human dignity of persons under its jurisdiction, is obliged to employ the least intrusive means in the curtailment of the personal liberty of an accused, and provide the imperative safeguards for the accused in its process of crime punishment, to ensure that even persons accused of a crime are given the respect they are owed as humans. While accountability for any criminal offence is indispensable, it should be rendered through a due process of law, and obviously, it is in the nature of procedural guarantees to require states to undertake extensive positive measures to ensure these safeguards, which ultimately call for a highly developed legal system.

Law and philosophy gave birth to the concept of due process as a guarantee against the abusive power of government, which, like fire, could be a “dangerous servant and a fearful master.” Shaped in domestic courts, through agreements or controversy as to its scope, the due process of law, undoubtedly embraces the fundamental concep-

3 The terms “deterrence” and “retribution” are at the heart of the discussion regarding punishment for crime, and proponents and theories in favor or against each purpose of punishment are numerous. However, it might be of interest here to note Immanuel Kant’s theory on commitment to retribution as distinct from commitment to revenge or vindictiveness, and his opposition to the utilitarian thesis on criminal penalties as deterrence. In his book Metaphysical Elements of Justice, Kant writes, “Judicial punishment can never be used merely as a means to promote some other good for the criminal himself or for society, but instead it must in all cases be imposed on a person solely on the ground that he has committed a crime; for a human being can never be confused with the objects of the law of things. ... He must first be found to be deserving of punishment before any consideration can be given to the utility of his punishment....” Jeffrie G. Murphy & Jules Coleman, Philosophy of Law: An Introduction to Jurisprudence 120 (1990), with further discussion of the philosophy of crime and punishment.


5 Manfred Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary 307, para. 3 (2nd revised ed. 2005). Also, positive steps to be taken by the state are generally required in order to have a proper functioning of the administration of justice. It is the state’s responsibility to set up the necessary legal infrastructure. See Susan Marks & Andrew Clapham, International Human Rights Lexicon 159 (2005).

6 George Washington, quoted in James Crutcherfield, George Washington: First in War, First in Peace (American Heroes) 21 (2005). The full statement goes like that: “Government is not reason; it is not eloquence; it is force! Like fire it is a dangerous servant and a fearful master.”