



FORENSIC STUDY OF THE PRINCIPLE OF DUE PROCESS IN LATIN AMERICA

Estudo forense do princípio do devido processo legal na América Latina

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ABSTRACT

Due process is a judicial concept, which summarizes a set of judicial principles that ensure prompt, transparent, and impartial delivery of justice. This work shows how this figure has been understood and used from the procedural and substantive aspects and thus to demonstrate its republican importance in the institutions of Latin America.

Keywords: *Due process, constitution, legality, justice, juridical safety.*

RESUMO

O devido processo legal é um conceito judicial, que resume um conjunto de princípios judiciais que asseguram uma entrega rápida, transparente e imparcial da justiça. Este trabalho mostra como esta figura tem sido compreendida e utilizada a partir dos aspectos processuais e substantivos e assim demonstrar a sua importância republicana nas instituições da América Latina.

Palavras-chave: *Devido processo legal, constituição, legalidade, justiça, segurança jurídica.*

INTRODUCTION

Due process is a fundamental right of individuals, composed of various principles that together form part of it. Its content is therefore not independent, but rather that its nature is intrinsic to the development and respect of each of the principles that make it up.

Also, due process has been seen as a normative principle resulting from the enforcement of previously established laws and rights, in which the functional conduct of public authority is warned and stated as it should be. Furthermore, the principle of due process is a test of control carried out by the court, in which it is analyzed and verified whether the rights of individuals have been observed and respected; may confirm the work of the authority, revoking the act for the total or partial violation of the functions assigned in the law, and/or modifying the breach, caused by the act or omission of the authority. Another aspect of due process is the qualification and verification of public acts, as stipulated by the rule.

This procedural operation is essential to impose a parameter of conduct, control and action on the authorities, weighing the behavior of the server with what the regulation establishes, and establish if I act according to the norm. That is, analyze and decide whether due process was taken. Thus, the due process becomes a matter of jurisdictional or administrative analysis and control over what is done by the authority.

For this reason, this research will explain laconically what are the conceptions of due process in the doctrine and jurisprudence of various countries. Later, its nature will be observed, to note its function and importance. Due process, like any public institution, has an objective, and its role in a democratic rule of law will be presented.

This section will also discern the parts that integrate it, deconstructing its role from the particular to the general. As a result of the above, we will see the classification of due process. It will be completed with a set of conclusions highlighting the role of due process as an institution of legal certainty for the individual and society as a whole. All this will come from various jurisdictions, to provide diverse opinions that collectively reiterate the transcendence and validity of due process at present.

A. NATURE

The accepted origin of due process is the 5th amendment to the Constitution of the United States of America, which establishes the rights of every citizen to have a judicial process; and it is also contained in the 14th amendment, as a restriction on the power of the State to decide on the fate of persons without due process.¹ In other words, the importance of judicial action is highlighted. It is for the judges to preserve the guarantees of the process, and to apply the principle of reasonableness in each of the decisions they make.

Due process as a legal or constitutional instrument analyzes and examines the work done by the authority, and, on the other hand, is a mechanism that tends to redeem an action or omission, if the authority that performed or issued the act, adhered to current regulations.

The guarantee to due process considered in abstract terms constitutes an application of the principle of legality in judicial or administrative proceedings. Such a definition, even without the need to determine the content and scope of the right, has a fundamental impact: to guarantee to individuals that the activity of State authorities will follow a set of procedural rules established in advance.

This right, thus formulated, affords individuals security from State activity, and ensures that such rules apply equally to all, as a consequence of the general and abstract nature of procedural law. It thus implements three fundamental legal principles: legal certainty, legality of proceedings and equality of persons before the law. As a general rule, the right to due process has a place, both in procedures followed by administrative or judicial authorities, and only exceptionally in the proceedings of individuals.²

In this way, due process becomes a control mechanism that serves to re-establish the rights of the person concerned, or, where appropriate, to consider that the violations of the process were vital and, therefore, that cause cannot be continued (i.e. a case of torture and the unlawful manner in which the evidence was obtained), without this meaning absolving the person, but the previous acts are an irreparable wrong, and therefore, it is not possible to restore the conditions for a sentence to be issued in which their rights can be safeguarded. The nature of due process is therefore an instrument for observing the conduct of the person responsible for the act. Considering the parties, to decide if they acted in accordance or if the rights of the affected party were violated, and therefore that it must be carried out.

¹ Diccionario de derecho procesal constitucional y convencional, Tomo I, Ed. UNAM, México, 2014, pp.297-299.

² Sentencia T-546/00 de la Corte Constitucional de Colombia.

"[...] [T]he role of due process is to ensure the fundamental rights enshrined in the State Political Constitution, giving every person the possibility of having recourse to the courts in order to obtain judicial protection of individual rights through a legal procedure giving him a reasonable and sufficient opportunity to be heard, to exercise his right of defense, to produce evidence and to obtain a judgment that decides the case within a time limit set by procedural law [...]."³

Now, it is essential to note that due process is not a formula or a legal panacea. Rather, it is a normative mechanism that observes and qualifies each case, so it cannot be generalized in referring to the violation of due process. It should be clearly stated where and how the failure to comply with the process was in each case, and therefore there will also be a response for each business. The Colombian Constitutional Court has stated that the nature of due process extends to all judicial and administrative proceedings:

"According to constitutional jurisprudence, the process is due when it conforms to the legal provisions, conforms to the specific forms of each trial and guarantees the right of defense of the associates. . By guaranteeing due process, the State is able to prevent legal disputes from being dealt with at the whim of the officials responsible for resolving them, but it also seeks to ensure that the administration of justice is carried out according to homogeneous criteria that guarantee legal certainty and the principle of equality".⁴

In Brazil, the importance of due process has been expressed as a consequence of laws previously issued by the legislature and the enforcement of regulations by the administration:

““The clause of due process of law – the object of express proclamation by art.5º, LIV, of the Constitution - must be understood, in the scope of its conceptual notion, not only under the merely formal aspect, which imposes ritual character trials to the performance of the Public Power, but, above all, in its material dimension, which acts as a decisive obstacle to the editing of legislative acts of arbitrary content. The essence of the "substantive due process of law" lies in the need to protect people’s rights and freedoms against any form of legislation that proves oppressive or devoid of the necessary reasonableness coefficient. This means, from the perspective of the extension of the theory of the deviation of power to the plan of the legislative activities of the State, that it does not have the competence to legislate limitlessly, immoderately and irresponsibly, generating, with its institutional behavior, normative situations of absolute distortion and even sub-version of the purposes governing the performance of the state function. Compliance with the contested legal provisions of the constitutional clause of the "substantive due process of law" (Nunes. A relativização das nulidades absolutas no processo penal brasileiro e o princípio do devido processo legal".⁵

The Colombian Constitutional Court proposes the nature for a due process:

"It is a trial and it is lawful insofar as it implies an act of justice. And, as is evident from the procedural nature, three conditions are required for a process to be due: First, that it proceeds from a bias for justice; Second, that it comes from the competent authority; Third, that in accordance with the correct reason for

³ Recurso de Casación N° 1772-2010, Sala Civil Transitoria (Lima).

⁴ Sentencia T-945/99 de la Corte Constitucional de Colombia.

⁵ Diario de justicia de la Unión del 27 de abril de 2001.

prudence, in this case, all claims should be fully checked, so that the right of defense is always present, and that the judge at no time arrogates to himself prerogatives that are not regulated by law, nor does it also require extralegal requirements. Whenever these conditions, or any of them, are lacking, the trial will be vicious and illegal".⁶

In addition, and supplementing the previous paragraph, it has been established that due process is the set of procedures and forms that govern the investigation and resolution of a case, in any of the jurisdictions, is a guarantee for the proper protection and recognition of the rights of individuals.⁷

From what is discovered, there are new variables to consider in due process: impartiality, independence and objectivity.

Isabel Trujillo values, in the first instance, impartiality from the legal point of view: "Impartiality has traditionally been configured as a structural characteristic of law. It is situated within the judgment of authority and constitutes an internal criterion of articulation, connected with a demand for justice in relation to the subjects involved".⁸ This author believes that there are two primary concepts of impartiality: "the first has to do with the objectivity of the trial and considers impartial those who judge objectively, without prejudices or distortions; the second has to do with balance when opposing interests are confronted, emphasizing a collateral sense of impartiality: the absence of favoritism or partisanship".⁹

Three concepts of this principle must therefore be distinguished: "1) from the point of view of the virtuous man, impartiality would consist in the ability to deliberate well; 2) impartiality would consist in the ability to deliberate well on subjective relations connected with the operation of distribution; that is, the virtue of the one who makes a good judgment of justice and, 3) impartiality would be a feature of the law concerning his justice and wisdom".¹⁰

The raw materials for a fair trial are: the independence, legality and stability of the judge's position. The principle of independence will therefore be analyzed in two ways, as an institutional principle and as a guarantor of the system of administration of justice.

Judicial independence is the note that can only be achieved with the security in the performance of the judges, with the certainty of appointment and of knowing themselves subject to promotion and with adequate remuneration and stimuli, to provide them with personal tranquility, which, taken as a whole, shall mean the existence of a Judiciary which is not dependent in any

⁶ Sentencia T-158/93 de la Corte Constitucional de Colombia.

⁷ Sentencia No. T-445/92 de la Corte Constitucional de Colombia.

⁸ Trujillo, Isabel, *Imparcialidad*, op. cit., p.2.

⁹ *Ídem*, p.3. Vid, Saldaña, Javier, *Virtudes del juzgador*, UNAM, México, 2000, pp.48-51.

¹⁰ *Ídem*, p.30.

sense, let alone in any hierarchical relationship, on the other officials of the other public authorities, in order to be in a position to fulfil the role that the Constitution has assigned to them.¹¹

This principle ensures that judges are not subject to any hierarchical, political, administrative, economic, bureaucratic or other authority, because the essence of the exercise of its function is the freedom to act, without taking into account any element other than the law.¹² The purpose of this judicial guarantee is to maintain the impartiality of the judiciary and to avoid any influence on the judiciary.¹³

The purpose of the independence of the judiciary is to provide a "system of mutual guarantees, to avoid the possibility of an actor being able to unilaterally manipulate the rules of the political system".¹⁴

One of the pillars of the rule of law is the application of the norm to the case, which allows citizens to have judgments based on previously established laws, generating security for the petitioners of justice, which is known as the principle of legality. It limits the action of the authorities in a constitutional government and, at the same time, should serve as a foundation for the entire structure of the state.¹⁵

The concept of law proper to the rule of law requires that the government be the one subject to the law, before the law is submitted by the government; in which legality will be the crux of all activities of public power and, their action must therefore be justified and justified by law.¹⁶

To continue with the elements for due process, the principle of objectivity will be analyzed.

Ronald Dworkin considers objectivity to be the sufficient and full quality of the interpretation of the law and the verification of the facts verified by the parties, released to the extent humanly possible from any hint of subjectivity or relativity that might hinder the judge's function, in violation of the administration of justice.¹⁷

In judicial matters, this principle means "that the authority must base its action on duly proven and tangibly admitted facts, without the possibility of its members acting on the basis of subjective impulses or assessments, therefore requires elements of verification for any external observer".¹⁸

¹¹ Herrendorf, Daniel, *el poder de los jueces*, Adelob, Buenos Aires, 2004, pp.97-109.

¹² Melgar Adalid, Mario, *El consejo de la judicatura federal*, Porrúa, México, 2000, p.29.

¹³ Guarnieri, Carlo y Pederzoli, Patrizia, op. Cit., p.17.

¹⁴ Negreto, Gabriel y Ungar, Mark, "Independencia del Poder Judicial y Estado de Derecho en América Latina", CIDE, México, 2006, p.83.

¹⁵ Hamilton, Alexander, Madison, James, y Jay, John, *El Federalista*. FCE, México, 2006, p.22.

¹⁶ Wade, H.W., *Estudio del derecho administrativo*, Instituto de Estudios Políticos, Madrid, 1971, p.18.

¹⁷ Dworkin, Ronald, *Los Derechos en serio*, Ariel, 2003, Barcelona, pp.154 y ss.

¹⁸ Cienfuegos, David, *Justicia y democracia*, UNAM, México, 2005, p.101

The principle of objectivity relates to an institutional and personal task based on a global, coherent and reasoned recognition of the reality on which action is taken and consequently, the obligation to perceive and interpret the facts over and above partial or unilateral views and opinions, especially if these may alter the expression or consequence of the institutional work of the Tribunal.¹⁹

Finally, it can be deduced that the nature of due process is an instrument that ensures the other guarantees and rights of individuals, and that serves to observe and qualify whether the authority that judged, did so in accordance with the norm and various principles.

B. CONCEPT

Due process is born as a mechanism to control the role of the authorities in the exercise of power. The first responsibility of an official is to act on the basis of the rule, which comes from legislation, an administrative act or even a judicial determination.

Then it should be noted that the server has no room to improvise, its actions must be the materialization of a previous heteronomous act, which has as object some object of the State. Judicial proceedings may be viewed as:

"The fulfilment of the requirements laid down by the Constitution and the laws, in order to ensure to all persons subject to legal process their fundamental right to a public hearing, with due guarantees and without undue delay, before an independent and impartial authority empowered by law to exercise jurisdiction in the specific case. The principles and rules of due process should apply to both judicial and administrative proceedings".²⁰

The proceeding is a trial and is lawful insofar as it involves an act of justice. And, as is evident from the procedural nature, three conditions are required for a process to be due: First, that it proceed from a bias for justice; Second, that it proceed from the competent authority; Third, that in accordance with the correct reason for prudence, in this case, all claims should be fully checked, so that the right of defense is always present, and that the judge at no time arrogates to himself prerogatives that are not regulated by law, nor does it also require extralegal requirements. Whenever these conditions, or any of them, are lacking, the trial will be vicious and unlawful.²¹

The principle of due process is found in many legislations. In some, they resemble the right of defense; others relate it to judicial guarantees, and the most current trend is to complete the design of what it means to have "due process", with the conditions that arise from treaties and conventions

¹⁹ TEPJF, *El Sistema mexicano de justicia electoral*, op. Cit., p.15.

²⁰ Para Desarmar la Palabra. Corporación Medios para la Paz. Bogotá, 1999, p.81.

²¹ Sentencia No. T-158/93 de la Corte Constitucional de Colombia.

that add requirements of validity and effectiveness (for example, the right to a remedy and the reasonable period of time, among others).

In general, due process responds in constitutionalism to the formal concept of how a procedure should be conducted, even if at the same time it recognizes a substantial aspect, declared as a principle of reasonableness. The adverb "due" does not appear in many of the American constitutional letters, a significant fact if we consider the idea that arises immediately when we speak of "due process".

In Bolivia, article 115 of the Constitution guarantees the right to due process, defense and plural, prompt, timely, free, transparent and prompt justice. The Supreme Court has also stated that due process is:

"The right of everyone to a fair and equitable trial, in which his or her rights are consistent with the provisions of general legal provisions applicable to all persons in a similar situation...", "includes all the requirements that must be observed in the procedural bodies, so that persons can defend themselves adequately against any type of act emanating from the State that may affect their rights".²²

The Constitutional Court of Colombia defines due process as the basis for guaranteeing other constitutional rights: "Due process reinforces the guarantee that all other rights recognized in the Charter will be rigorously respected by the judge when deciding matters within his jurisdiction, as the only way to ensure the realization of justice, ultimate goal and *raison d'être* of positive ordering".²³

In Peru, the doctrine has recognized due process or fair trial as:

"A human or fundamental right that every person has by the mere fact of being a person, and that empowers him to demand an impartial and fair trial from the State before a responsible, competent and independent judge, since the State is not only under the duty to provide the jurisdictional benefit to legitimate parties or third parties, but also to provide it under certain minimum guarantees that ensure such an impartial and fair trial".²⁴

C. OBJECTIVE

For the Colombian Constitutional Court, the Constitution considered that the fundamental right to due process was part of the proper administration of justice:

"The set of guarantees that seek the protection of the individual involved in a judicial or administrative action, so that during its processing the formalities specific to each trial are respected. The Constitution establishes this rule for all types of proceedings, so that the situations of dispute that arise in any proceedings are previously regulated in the legal system, which should indicate the guidelines for ensuring respect for the rights and obligations of the parties to the proceedings,

²² Sentencia SC 418/2000 R y 1276/2001 de la Corte Constitucional de Colombia.

²³ Sentencia C-252/01 de la Corte Constitucional de Colombia.

²⁴ CAS 2544-2005 Sala civil transitoria de la Corte Suprema.

so that no action by the authorities originates in their own discretion, but obeys the procedures described in the law and regulations. Due process promotes the proper administration of justice, which, in turn, constitutes one of the most important guarantees for the protection of the legitimate interests of the community and contributes to the permanence of the social State based on the rule of law".²⁵

It follows that due process is an instrument of regularity of the actions of the authorities, which serves to ensure that all the rights of the person are protected and that the judicial authorities protect the guarantees of the individual.

Due process is the guideline and rationale that the server has the obligation to do, give or not do in its performance. As soon as the person concerned considers that any of his or her rights (whether substantive or adjective) have been infringed, he or she has the right to request a higher authority or the judiciary to examine whether the server who performed the act has acted in accordance with the regulations. Access to jurisdiction should be framed within basic guidelines, such as respect for the right to due process and the principles embodied therein:

"In turn, the duty of the State, as head of the administration of justice, arises once it has been made available, in accordance with the provisions of the Constitution, for its decisions to be public and permanent, with the prevalence of the substantive right, as well as observing in court proceedings the procedural terms with diligence. From this then arise principles that must be complied with in judicial proceedings, such as efficiency, publicity, permanence and speed. In this case, therefore, there is an unjustified delay in the process and an undue and delayed obstruction of effective access to the administration of justice".²⁶

The weighting of the acts of authority is one of the objectives of due process, and to determine whether, in the manner in which the conduct was carried out, it respected and protected the rights of the person concerned. The purpose of this decision is to evaluate the process carried out, and secondarily, to confirm or invalidate (in whole or in part), based on the process done against the established norms.

Due process guarantees the rights of the individual, which means that the authorities must conduct themselves as the law and other legal bodies warn. It also serves as a function of functional control and to restore the violated rights of the individual, i.e. the assistance of a lawyer in court hearings. It enables the performance of the authority to be known and examined. This involves inquiring and pondering whether the server acted or responded according to the content of its obligations. This means that any action or omission outside the process violates the rights of the individual, which is an improper process.

²⁵ Sentencia T-073/97 de la Corte Constitucional de Colombia.

²⁶ Sentencia No. T-572/92 de la Corte Constitucional de Colombia.

One of the objectives of due process as a guarantee is to validate or stop the server act. Through consideration of the manner in which the proceedings were conducted, it will be possible to decide whether the authority carried out its work effectively, and safeguarding the rights of the person concerned. But in the event that it has not adhered to the legal framework, the act that harmed the aggrieved person must be replaced or annulled; This means that not only is it enough to recognize a bad or improper process, but that the affectation to the justiciable is repaired, reestablishing the rule of law.

Due process is a normative instrument that provides legal certainty to the individual, and determines when a server has violated the rights of the person. Legal certainty becomes the foundation of the existence of the State, and due process is the sum of all its rights having been protected, which gives it security from State action.

The conduct that causes harm to the person must be repaired, but also that improper, mistaken or ineffective act or omission of the server must be punished. The server is subject to the rule that specifies what its tasks are, and its failure to comply generates injury or damage to a third party, so it must also be violated, punished or penalized when there is an improper process.

Also, when the authority has warned that there was no due process, a mechanism for redress of damage by the administration must be put in place. The strict liability of the State is the instrument available to individuals to sue for the damage caused by the irregular activity of a public official.

The Constitutional Court of Colombia relates the concept of due process to the civil service. In this way, he understands that due process is a tool for legitimizing public action.

"In a social State governed by the rule of law, all public functions must be subject to pre-existing legal regulations guaranteeing the right of defense to the individual receiving the action. And for the exercise of this right, it is not enough to make the final decision known to that person, but it is necessary to give him the possibility of showing to the competent decision-making body his truth, his arguments, in short, his vision of the events".²⁷

In this decision, due process appears as an indispensable element to regulate action between the citizen and the authority. The strictly procedural scope is extended to allow for due process also in the procedure.

The fundamental right to due process is immediately applicable, binding on all authorities and constituting a guarantee of procedural legality to protect freedom, legal certainty, nationality and the substantiation of judicial decisions.

"Once the right to due process has been specified, it acquires the status of a fundamental constitutional right for the benefit of those who make up the

²⁷Sentencia No. T-584/92 de la Corte Constitucional de Colombia.

procedural relationship. In this way, anyone who feels threatened or violated by any act or omission of the authority or subjects of the procedural relationship may invoke and enforce the rights implicitly part of due process".²⁸

To continue, it should be mentioned that the right to due process is mandatory for all types of judicial and administrative proceedings.

"The process of recognition, delivery of subsidies or refunds is not exempt from the observance of due process. A manifest expression of this is the existence of a variety of legal remedies - reinstatement and appeal - within the governmental channel that allows decisions of the administration to be heard and contested when they are contrary to the interests of the applicant. The margin of discretion required for the performance of public functions is limited internally by equality of treatment and opportunity. The right to due process guarantees equality before the law by requiring the authority to treat all persons equally, without favoritism or discrimination".²⁹

In another decision, the Colombian Constitution made progress in analyzing the scope of due process and establishing its functions.

"The right to due process refers to a complex set of circumstances (for example, the definition of the status of persons, or the consecration of acts, stages, opportunities and exchanges), referred to in the Constitution and the law as "protecting citizens under any legal process", ensuring throughout the proceedings the possibility of defending its interests by expressly indicating the requirements and obligations it must comply with and the remedies available to it for challenging the decisions of the authority. But the existence of such a principle also refers to the need to implement a sequence of acts, directly or indirectly related to each other, which pursue an additional objective: the rationalization of the exercise of power in such a way as to recognize in the law, and not in the will, in the force, or in the arbitrariness, the form of resolution of legal contentions. So, as the court has so often said, "the actions of judicial officials or administrative authorities must at all times observe and respect the rules governing the procedures to be followed, in order to preserve the guarantees -rights and obligations- of persons in a legal relationship, in all cases where the act leads to the creation, modification or extinction of a right or to the imposition of a penalty".³⁰

Finally, the Court of Human Rights in Latin-America gives a definition of the objective of due process is set forth:

"This right implies, on the one hand, a formal and procedural scope to ensure access to the competent body to determine the right that is claimed in accordance with due process (such as the presentation of pleadings and the provision of evidence). On the other hand, this right covers an area of material protection that implies that the State ensures that the decision made through the procedure satisfies the purpose for which it was conceived. The latter does not mean that it should always be welcomed, but that its ability to produce the result for which it was conceived must be ensured".³¹

In short, due process can be considered to mean substantial fairness and impartiality.³²

²⁸ Sentencia No. T-572/92 de la Corte Constitucional de Colombia.

²⁹ Sentencia No. T-463/92 de la Corte Constitucional de Colombia.

³⁰ Sentencia T-945/01 de la Corte Constitucional de Colombia.

³¹ Caso Barbani Duarte y otros vs. Uruguay. Sentencia del 13 de octubre del 2011, párrafo 122.

³² Black's Law Dictionary, Sixth Edition, p.500. Vaughn v State, 3 Tenn.Crim.App. 54, 456 S.W.2d 879, 883.

D. CONTENT

The first thing to understand in terms of the content of due process is that it depends on each subject, and on each subject. Therefore, there cannot be a single point to a single content, but it will depend on the case of due process that is examined. However, there is a certain content that places the context that this institution should contain.

With regard to the content of the guarantees of due process, understood as the requirements set forth in the law, and rationally drawn from the principles that constitute and must include a process to be appropriate or due, In order to protect subjective rights positively and negatively, it must be emphasized that it is diverse and so varied as required by the specific case, so that there is no specific catalog and if it exists it is not an all-inclusive one for all possible circumstances.

The Constitutional Court of Costa Rica establishes the nature and elements of due process:

"... the right of defense guaranteed by Article 39 of the Constitution and therefore the principle of due process, contained in Article 41 of our Fundamental Charter, or as it is often called in doctrine, has been violated, principle of bilaterality of the hearing of due process of law or principle of contradiction and which for a better understanding has been summarized as: a) Notification to the interested party of the character and purposes of the procedure; b) right to be heard, and opportunity for the interested party to present the arguments and produce the evidence that he understands relevant; c) opportunity for the person concerned to prepare his claim, which necessarily includes access to information and administrative background, related to the issue in question; d) right of the administrator to be represented and advised by lawyers, technicians and other qualified persons; e) adequate notification of the decision of the administration and of the grounds on which it is based and f) right of the person concerned to appeal the decision rendered..."³³

In Mexico, the Supreme Court of Justice has instituted a theory called "hard core", which contains the requirements for considering whether the essential elements of due process were respected:

The essential procedural formalities are: (i) the notification of the commencement of the proceedings; (ii) the opportunity to offer and dismiss the evidence in which the defense is fabricated; (iii) the opportunity to plead; and, (iv) a decision settling the issues under discussion and the challenge to which has been considered by this Chamber as part of this formality. However, the other core is commonly identified with the minimum range of guarantees that must be available to any person whose legal sphere seeks to be modified through the punitive activity of the State.³⁴

The fundamental right to due process is self-executing, binding on all authorities and constituting a guarantee of procedural legality to protect freedom, legal certainty, the nationality and substantiation of judicial decisions.

³³Sentencia 15-90 de la Corte Suprema de Costa Rica.

³⁴ Derecho al debido proceso. su contenido, Suprema Corte de Justicia de México.

"The right to due process comprises a set of material and formal principles, including the principle of legality, the principle of the natural or legal judge, the principle of criminal favorability and the principle of presumption of innocence, all of which respond better to the legal structure of genuine fundamental rights. Once the right-guarantee of due process has been specified, it acquires the character of a fundamental constitutional right for the benefit of those who make up the procedural relationship. In this way, anyone who feels threatened or violated by any act or omission of the authority or subjects of the procedural relationship may invoke and enforce the rights implicitly part of due process".³⁵

The North American doctrine has stated the following on the content of due process:

Embodied in the due process concept are the basic rights of a defendant in criminal proceedings and the requisites for a fair trial. These rights and requirements have been expanded by Supreme Court decisions and include, timely notice of a hearing or trial which informs the accused of the charges against him or her the opportunity to confront accusers and to present evidence on one's own behalf before an impartial jury or judge; the presumption of innocence under which guilt must be proven by legally obtained evidence and the verdict must be supported by the evidence presented; the right of an accused to be warned of constitutional rights at the earliest stage of the criminal process; protection against self-incrimination; assistance of counsel at every critical stage of the criminal process; and the guarantee that an individual will not be tried more than once for the same offense (double jeopardy).³⁶

With regard to the content of due process, the Colombian Constitutional Court has considered:

"The need to rationalize the exercise of public and private power requires a process that guarantees (i) the definition of the basic elements that structure any legal relationship, noting both the relevant assumptions for recognising conduct as legally significant, and the effects (consequences or sanctions) of non-compliance, (ii) the identification of the authority that is the impartial third party competent to take decisions on disagreements in the legal relationship, (iii) the existence of legal means (actions or remedies) which may be used in cases where those who are part of a particular legal relationship consider the intervention of a third party (the competent authority) to be necessary in order to resolve possible differences arising from such a legal relationship, (iv) knowledge by all interested parties of both the elements that structure the legal relationship that is established and its concrete effects, as of the legal remedies enjoyed by the parties to protect their interests, and finally (v) the effective exercise of the legal tools by which the interested party can advance his defense before the authorities or third parties. These elements, both procedural and substantial, structure the guarantee of due process".³⁷

In Bolivia, the Supreme Court of Justice established that due process could be seen as a right and as a guarantee:³⁸

"1) Fundamental right: To protect the citizen from possible abuses by the authorities, which originate not only in procedural actions or omissions but also in the decisions they take through the various decisions issued to resolve legal or

³⁵ Sentencia T-572/92 de la Corte Constitucional de Colombia.

³⁶ Black's Law Dictionary, Sixth Edition, 1990, USA, p.500.

³⁷ Sentencia T-945/01 de la Corte Constitucional de Colombia.

³⁸ Sentencia 0486-2010 R de la Corte Constitucional de Colombia.

administrative situations affecting fundamental rights, constituting the instrument of the subjection of the authorities to the rules established by the legal system.

2) Judicial guarantee: It also constitutes a guarantee as it is a means of protecting other fundamental rights which are contained as elements of due process; such as the grounds for decisions, defense, relevance, consistency, appeal, among others, which apply to all types of judicial and administrative proceedings, constituting the various jurisdictional guarantees inherent in due process, guiding standards to which the authorities but also the parties involved in the process must adhere, in application and safeguarding of the principle of equality".

The Supreme Court of Justice of Argentina establishes a first catalog on the content of due process: "Observance of the substantive forms of the trial relating to the accusation, defense, evidence and sentence, and the right of the accused to an impartial and competent tribunal before which to defend himself, constitute the constitutional guarantee of due process -article 18 of the Constitution National- (Dissidence of Drs. Adolfo Roberto Vázquez and Juan Carlos Maqueda)".³⁹ It also emphasizes precisely the question of the suitability of judges: "The guarantee of the natural judge, as well as of due process and of the defense at trial, requires both that the court be established by law prior to the event of the case, as long as there are judges who make it possible for the latter to act in cases in which he is legally required and to which he is entitled".⁴⁰

The constitutional guarantee of the defense in trial and due process is not exhausted by the formal completion of the procedures provided for in the adjective laws, but extends to the need to obtain a prompt and effective judicial decision to put an end to conflicts and situations of uncertainty, avoiding, within the limits of reason and according to the circumstances of each case, a wasteful and possibly useless jurisdictional activity; this, moreover, is required by the purpose of "strengthening justice".⁴¹

The Supreme Court of Bolivia in case 0486/2010-R established that due process is composed of several elements that make it up; among them, "the relevance, consistency, reasoning and assessment of the evidence in the decisions; although the latter is not expressly stated in the case law cited above; however, in international instruments as in constitutional doctrine has been widely developed. Elements that undoubtedly constitute presuppositions of the rules of due process".

In Peru, the right to effective judicial protection has a complex and omni-comprehensive content and is composed of the right of access to jurisdiction and process, the right to due process and the effectiveness of final judicial decisions: "

³⁹ 30/09/2003. T.326, p.3842 de la Corte Suprema de Justicia de Argentina.

⁴⁰ 14/06/2001. T.324, p.1884 de la Corte Suprema de Justicia de Argentina.

⁴¹ 10/10/1996. T. 319, P. 2215 de la Corte Suprema de Justicia de Argentina.

(...) Due process, in this perspective, has two dimensions: a procedural, adjective or formal dimension; and another substantive or material dimension. The procedural dimension, in turn, includes other specific rights, also of a fundamental nature, such as: a) the legal procedure and previously established; b) the judge determined by the Constitution and predetermined by law (natural judge); c) to be served in civil proceedings, or to be informed of the charge or charge under criminal law; d) to be heard or to be heard in civil proceedings, and not to be convicted in absentia from criminal proceedings; e) to defense and assistance of counsel; f) the right to take evidence; g) to use one's own language and, if necessary, to an interpreter; h) not to testify against oneself and not to confess guilt; i) to a trial of reasonable duration, without undue delay; j) to the presumption of innocence; k) to the publicity of the proceedings, except in exceptional cases; l) that the judge who investigates or investigates is different from the judge who judges or sentences in criminal matters; m) to a congruent sentence, adequately and sufficiently reasoned; n) to the plural body and constitutional control of the process; o) to the prohibition of pejorative reform, reform in worse or "*reformatio in peius*"; p) to res judicata with a minimum content of justice with immutable character; q) not to be judged twice for the same fact: *Ne bis in idem*. In so far as due process, in its material or substantive dimension, requires that the judicial decision be reasonable; and nevertheless, in view of the characteristic of fundamental rights that has come to be called specificity, progressivity and expansiveness, due process in its material dimension must be interpreted as requiring an objective and materially just judicial judgment, in conjunction with the other values and principles recognized by the Political Constitution of the State, so that the judgment concretizes such values and principles, essentially the superior value of the legal system, such as justice".⁴²

In another jurisdiction, the Brazilian Supreme Court of Justice has stipulated the basic content of due process:

"Imposes on the Judiciary the duty to ensure, even to the defendant foreigners domiciled in Brazil, the basic rights that result from the postulate of due legal process, notably the prerogatives inherent to the guarantee of the broad defense, the guarantee of the contradictory, the equality between the parties operating the natural judge and the guarantee of the impartiality of the presiding magistrate. The essentiality of the postulate of due legal process, which qualifies as the legitimating requirement of persecution *Criminis* itself. The review of the clause regarding the due process of law allows us to identify some essential elements to its configuration as an expressive guarantee of constitutional order, highlighting whether, among them, due to their importance, the following prerogatives: (a) right to the procedure (guarantee of access to the judiciary); (b) right to be served and to prior knowledge of the contents of the accusation; (c) right to a public and speedy trial, without undue delay; (d) right to legal proceedings and to full defence (the right to self-defence and to technical defence); (e) the right not to be prosecuted and tried on the basis of *ex post facto* laws; (f) the right to equality between the parties; (g) the right not to be prosecuted on the basis of evidence covered by illegality; (h) the right to gratuitousness; (i) the right to observe the principle of the natural judge; (j) the right to silence (privilege against self-incrimination); (l) the right to proof; and (m) right of presence and active participation in the acts of judicial questioning of other litigants with passive criminal raffles, when existing, the right of the defendant to the observance, by the State, of the guarantee relevant to the due process of law, in addition to translating concrete expression of the right of defense, also in legitimate support in

⁴² Casación Number 864-2007 Huaura, Sala Civil Transitoria de la Corte Suprema.

international conventions proclaiming the essentiality of such procedural relief, which constitutes the very constitutional status of the right of defense, in terms of the complex principles and norms that support any accused in the course of criminal prosecution, even if the defendant is a foreign defendant, with no eyelash in Brazilian territory, here sued for assuming this practice of crimes attributed to him" (Celso de Mello. 16-9-2008, Segunda Turma. 2009. HC 94.016".⁴³

Now, it should be mentioned that the effectiveness of the constitutional guarantee does not depend on the law as it does not come from it, and another very different, the verification of the content of due process in relation to each case, which shall always have as a comparator the provisions of the relevant law.

This implies that, although the constitutional right to due process does not require a legal statute that makes it immediately and fully enforceable, it must always be seen, in order to deduce whether this right has been respected or is violated, what are the procedural rules applicable in the specific event, that is, the general and abstract rules, in force before and members of the law provided for each process.⁴⁴

There is an issue that is paramount in due process, the time it takes to resolve the case. The Colombian Constitutional Court has stated in this regard that:

"The judicial officer, the judge, must ensure the prompt and effective application of justice. The procedural terms are non-renewable and binding on both the parties and the judges. An official who fails to comply with the procedural terms or who unreasonably delays the processing of a complaint, request, investigation or a proceeding without reasoned cause shall be guilty of misconduct. Abuse in the use of procedural remedies and mechanisms, which lead to delays in judicial proceedings, runs counter to this principle. The institutionalization of arrears as a cause of misconduct should therefore be strengthened, to oblige the judge to comply strictly with the procedural terms and to give a swift and effective course to the requests that citizens submit to the judicial administration, within the guarantee of due process".⁴⁵

Likewise, the principles enshrined in the American Convention on Human Rights (better known as the Pact of San José of Costa Rica) and the United Nations Covenant on Civil and Political Rights require their Member States to enshrine "due process of law", which not only indicates the existence of an impartial judiciary that grants effective protection to human rights, and as a basic element, a "reasonable" duration of judicial proceedings.⁴⁶

For the Inter-American Court of Human Rights (IACHR) the concept of due process of law has been interpreted from two perspectives, the obedience of norms and the role of the judge: "Article 8 of the Convention, which refers to judicial guarantees, establishes the guidelines for so-

⁴³ HC 94.016, Rel. Min. Celso de Mello, julgamento em 16-9-2008, Segunda Turma, DJE de 27-2-2009.

⁴⁴ Sentencia C-217/96 de la Corte Constitucional de Colombia.

⁴⁵ Sentencia T-572/92 de la Corte Constitucional de Colombia.

⁴⁶ Art. 7°, Pacto de San José de Costa Rica.

called due process of law, which is inter alia the right of everyone to a fair hearing within a reasonable time by a competent, independent and impartial judge or tribunal previously established by law, in the conduct of any criminal charges against him".⁴⁷

In conclusion, we would like to comment on the complexity of proposing a single or universal content on due process; as Colombian jurisprudence mentions its complex structure, it does not allow validation or conceptualization in a single voice, conception or determination.

"Due process is a complex right of structure that is composed of a set of rules and principles that, articulated, ensure that the State's punitive action is not arbitrary. Some of the constitutional rules that make up this right are immediately applicable and annul any rule that limits or restricts them. Thus, for example, the right to the legality of the crime and the penalty does not allow any restriction, nor the principle of non reformatio in pejus, or the principle of favorability (Political Constitution, art. 29)". However, other elements of due process have the logical structure of standards or rules that must be applied *prima facie*, and admit useful weightings or limitations, necessary and proportionate to ensure the effectiveness of another fundamental right or a constitutional interest of the same entity. In particular, the right of defence is one of those rights that sets parameters of action that must be regulated by the legislator guaranteeing its maximum application, but taking care to affect other constitutionally valuable rights or assets that are at stake in the criminal or administrative trial".⁴⁸

The classifications that have been developed around due process will now be presented.

E. CLASSIFICATION

Due process of law can be classified into an adjective and a substantive aspect: "Due process of law (*lato sensu*) is a set not only of legislative, judicial and administrative procedures that must be legally enforced in order for a law, judgment or administrative decision relating to individual freedom is formally valid (adjective aspect), but also to ensure that due justice is provided as long as it does not unduly harm a certain dose of legal freedom budgeted as intangible for the individual in the State concerned (substantive aspect)".⁴⁹

Agustín Gordillo warns that due process of law, which functions as a guarantee of reasonableness, applies in the same way to decisions, both general and particular, coming from any organ of the State. "For a decision to meet a basic criterion of reasonableness, it must have at least: a) sufficient factual substantiation; b) proportionality of the intended purpose to the facts supporting

⁴⁷Caso Yvon Neptune vs. Haití. Sentence 6 May of 2008, paragraph 79.

⁴⁸ Sentencia C-475-97 de la Corte Constitucional de Colombia.

⁴⁹ Linares, Juan Francisco, *Razonabilidad de las leyes. El debido proceso como garantía innominada en la Constitución Argentina*, Ed. Astrea, Buenos Aires, 1970, p.11.

it; and, c) consistency and proportionality of the means employed both for the purpose reasonably pursued and with the sufficient factual substantiation upon which they are based".⁵⁰

The North American doctrine has considered that substantive due process is an aspect that comes out of the proceedings, and that it should be protected in the same way as legal rights. So sometimes formality is confused with substance. In the *Slaughterhouse* case, Judge Field, in his dissenting vote, advocated defending rights not contained in the Constitution, as substantial rights to individuals.⁵¹

In Peru, due process has been classified as:

"[...] the fundamental right to due process cannot be understood from a formal perspective alone; that is, its protection cannot be reduced to the mere observance of formal procedural guarantees. Precisely, this perspective distorts the validity and effectiveness of fundamental rights, and deprives them of content. Due process not only manifests itself in an adjective dimension, which refers to the procedural guarantees that guarantee fundamental rights, but also in a substantive dimension that protects fundamental rights from arbitrary laws and acts emanating from any particular authority or person. Consequently, the observance of the fundamental right to due process is not satisfied only when due process is respected, but also when the very acts of any authority, official or person do not become arbitrary".⁵²

The Supreme Court of Justice of the Nation (SCJN) in Mexico, has developed a classification on due process seen as a Human Right:⁵³

"This right has been an element of constant and progressive interpretation in the jurisprudence of this Supreme Court of Justice of the Nation, of which a review of its component elements can be made to date in two aspects: 1) concerning the essential formalities of the procedure, which, in turn, can be observed from two perspectives, namely: a) from whom he is a taxable person in the procedure and may suffer a privative act, in which case the above-mentioned formalities relating to the notification of the initiation of the procedure and its consequences, the right to adduce and offer evidence, and the issuance of a decision resolving the questions discussed become applicable and, b) calling for the jurisdictional function to claim a right as an active subject, from which it is protected that the parties have an effective and equal opportunity to defend their views and offer evidence in support of their claims, dimension closely linked to the right of access to justice; and, 2) listing certain constitutionally protected substantive assets, through the essential procedural formalities, such as: freedom, property, and possessions or rights. Therefore, before assessing whether there is a violation of the right to due process, it is necessary to identify the modality in which the respective claim is located".⁵⁴

The following is a set of conclusions outlining the most relevant topics in this monograph.

⁵⁰ Gordillo, Agustín, *Tratado de derecho administrativo*, t. 1, Parte General, 8ª ed., cap. VI, § 11, FDA, Buenos Aires, 2003, pp.34-35.

⁵¹ https://www.law.cornell.edu/wex/substantive_due_process Consulted 21 september of 2021.

⁵² Exp. N° 3421-2005-HC/TC, FJ. 5.

⁵³ <http://www.corteidh.or.cr/tablas/a9760.pdf> Consulted 21 september of 2021.

⁵⁴ Derecho humano al debido proceso. elementos que lo integran. SCJN.

F. CONCLUSIONS

1. The first element for considering that there was due process is to analyse whether that process contains the procedural elements necessary to consider that they allow its objective.
2. Due process is a legal institution which serves as a guarantee to the person concerned that access to justice will be provided in accordance with the development of standards.
3. One of the fundamental principles of due process is legality. This principle provides a guideline for the conduct of the process. This will allow to observe what and how all the formalities have been carried out, in which the way it establishes the adjective code.
4. The other fundamental principle of due process is that of impartiality, which guarantees the independent, objective and professional conduct of the judge. In the event that either party was favoured, the principle of procedural equality would be violated, leading to partial jurisdiction and improper exercise as a public servant.
5. Due process is a lens that allows procedural parties to estimate whether the proceedings were conducted in accordance with adjective law. And in any case request what suits you from the procedural reinstatement to the annulment of the process. It must therefore be understood that due process depends on each case and on what one wishes to obtain when referring to and requesting it.
6. Due process is a responsibility of the authority in diligently conducting each proceeding. This will bring as a consequence certainty and legal certainty to the justiciable; resulting in the legitimization of the process before society, as the instrument to obtain justice and at the same time, generate judicial effectiveness. In which society will see its aspirations reflected with the laws.
7. In the event that due process has not been followed, a number of procedural perspectives can be envisaged, which have already been mentioned (procedural reinstatement or annulment), but there are other implications that will only be stated (as a separate issue from the main one) as would reparation for the damage, the strict liability of the State and the liability of the judge as a public servant.
8. Impartiality is related to independence, because if the judge is impartial, it is due to his independence, which allows him to issue decisions without a burden, favouritism or indication. Thus, it can be observed that independence is a condition for a judge to be impartial.⁵⁵ The publicity of public events makes it possible to monitor the actions of the authorities, at the same time, to ensure that judges are subject only to the principle of legality, when justifying and motivating their

⁵⁵*Vid.* Orozco Henríquez, Jesús, “Judicialización de la política y legitimidad judicial”, en Vázquez, Rodolfo (compilador), *Corte, jueces y política*, Fontamara, México, 2003, p.106.

actions and, that their actions are public to the public; since their work is known, whether they have adhered to the legal framework.⁵⁶

9. The discretionary power of the judge on a number of occasions makes it possible for him to intervene in a culpable or intentional manner rather than to direct the proceedings or to sentence them accordingly. This power is a power according to its function, but it must certainly be used in accordance with an impartial, honest and professional performance. If this discretion is misused, it leaves the individuals concerned without certainty or legal certainty.⁵⁷

10. The judge must be responsible for his or her unlawful conduct by misusing public authority by exercising a capricious irregularity or negligence. In which the alleged injured will have the burden of proof and argue, because the order, decision or sentence of the judge causes him a grievance.⁵⁸

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⁵⁶ Cabo de la Vega, *Lo público como supuesto*, Ed. UNAM, México, 1996, p.89.

⁵⁷ Fernández, Tomás-Ramón, *Arbitrariedad y discrecionalidad*, Cuadernos, Ed. Civitas, Madrid, 1991, p. 17.

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