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AWAY FROM UTTER DARKNESS: DUE PROCESS AND THE RIGHT TO A HEARING, AN AMPLE DEFENSE, AND CROSS-EXAMINATION IN MEXICO, BRAZIL, AND THE UNITED STATES[1]-[2]

FORA DA ESCURIDÃO: DEVIDO PROCESSO E DIREITO DE AUDIÊNCIA, AMPLA DEFESA E CONTRA-INTERROGATÓRIO NO MÉXICO, BRASIL E ESTADOS UNIDOS

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RESUMO: Para além da reflexão geral sobre o conceito central que intitula este trabalho, os capítulos seguintes estudarão os direitos a uma audiência no México e a uma ampla defesa, associada a um contra-interrogatório, no Brasil. Metodologicamente, isso será realizado não somente em abstrato, mas também avaliando a forma como estes direitos se desenrolam concretamente, com foco num processo judicial proeminente e possivelmente crucial. A discussão empregará nomes típicos do common-law para denotar o acórdão focal em cada exemplo: (1) Melgar Castillejos v. Presidente da República e (2) Villarinho v. União Brasileira de Compositores. Na controvérsia mexicana, os juízes federais de todos os níveis desenvolveram agressivamente o devido processo de uma forma que se assemelha aos grandes desenvolvimentos ao norte da fronteira. Notavelmente, aplicaram-no, para além do seu âmbito de aplicação criminal original, à esfera de julgamento civil e pré-julgamento. Na segunda disputa, o Brasil transportou a garantia para um terreno até então desconhecido ou, na verdade, fora dos limites dos Estados Unidos: o setor puramente privado. Em suma, estes precedentes

[1] Artigo recebido em 16/12/2021, sob dispensa de revisão.
[2] The author himself has translated the quoted non-English texts and vouches for the accuracy of the translation. He would like to thank Emily Byrnes, Chris Hyde, and Claudia Schubert for their invaluable contribution to the development of the ideas of this article.
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parecem indicar que pode ter chegado o momento de a direção das influências transcontinentais se deslocarem para o norte, pelo menos ocasionalmente.

PALAVRAS-CHAVE: Direito à audiência; ampla defesa; direito costumeiro; devido processo; inquirição de testemunhas.

ABSTRACT: Beyond generally reflecting on the core concept that titles this piece, the succeeding sections will study in turn the rights to a hearing in Mexico and to an ample defense, coupled with a cross-examination, in Brazil. They will do so not in the abstract but rather by evaluating how these entitlements play out concretely and by pinpointing a prominent and possibly pivotal lawsuit. The discussion will employ common-law-style names to denote the focal opinion in each instance: (1) Melgar Castillejos v. President of the Republic and (2) Villarinho v. Brazilian Union of Composers. In the Mexican controversy, the federal judges at all levels aggressively developed due process in a manner that parallels major developments north of the border. Remarkably, they applied it, beyond its original criminal realm of application, to the subsequently salient sphere of civil and pretrial adjudication. In the second dispute, their colleagues from Brazil transported the guaranty to a terrain thus far unknown or in fact off-limits in the United States: that of the purely private sector. In all, these precedents seem to signal that the time might have arrived for the direction of transcontinental influences to shift northward, at least occasionally.

KEYWORDS: Right to a hearing; ample defense; common law; due process; cross-examination.

1. RUNUP

Due process assumes the role of the doorkeeper in Franz Kafka's seemingly adjudicatory

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allegory.[4] It may either show or block the way from utter "darkness [to the] inextinguishable radiance that bursts from the doorway of the law,"[5] or, more prosaically, to the legal assurance of people's entitlements. The rights to a hearing and to an ample defensive rejoinder constitute key emanations from this wide-ranging notion. They will occupy the pages that follow.

The principle under the microscope, together with its strict ban on legally arbitrary impairments of (1) life, (2) liberty, or (3) property,[6] its holy trinity, has evolved into a nuclear component of the constitutional configuration everywhere in Latin America. It departed from the United States southbound two hundred years ago and eventually reached every nook of the vast austral continent.[7]

The language of the Latin American provisions on point bears the imprint of the source, alongside that of homegrown elaborations or emphases. Primevally, the 1791 Fifth Amendment to the Constitution of the United States proclaims: "No person shall . . . be deprived of" the iconic triad of valued items enumerated earlier "without due process."[8] Despite dropping the famous closing phrase quoted, Article 14 of Mexico's 1917 charter echoically disallows

[4] *See* FRANZ KAFKA, DER PROZEß 155-56 (Fischer Bücherei: Frankfurt am Main 1960) (1925).
[5] *Id.* at 156 ("Wohl aber erkennt [der Mann vom Lande] jetzt im Dunkel einen Glanz, der unverlöschlich aus der Türe des Gesetzes bricht.").
[6] *See generally* THOMAS M. SCANLON, *Due Process* (Ch. 3), *in* THE DIFFICULTY OF TOLERANCE: ESSAYS IN POLITICAL PHILOSOPHY 42, 44 (2003) ("Due process . . . aims to provide some assurance of nonarbitrariness by requiring those who exercise authority to justify their intended actions in a public proceeding by adducing reasons of the appropriate sort and defending these against critical attack."); *see also id.* at 69 ("[M]uch of what seems to fall under [a general account of due process] can be traced to a single intuitive idea—the unacceptability of arbitrary power—which constitutes its moral foundation.").
[7] The District Court on Civil and Labor Matters for the State of Nuevo Leon in Mexico, for example, has observed that "the notion of due process of law, which has its origins in Anglo-American law, was exported to Mexico" and that, in this respect, "the United States and Mexico honor the same principle." Juzgado Primero de Distrito en Materias Civil y de Trabajo en el Estado de Nuevo León, Oct. 19, 2010, Expediente Judicial [Judicial Record] 32/9009-II at 22-23 (Mex.) (on file with author) (footnotes omitted) ("[L]a garantía de audiencia es una de las formalidades esenciales del debido proceso cuyo origen es el derecho anglosajón, y que se exportó a México . . . . Entonces, . . . tanto en Estados Unidos de América como en México se consagra el mismo principio . . . ."); *see* CONST. art. 160 (Venez.) (1811). This safeguard has penetrated every single constitution in Iberian America. *See* CONST. art. 18 (Arg.); CONST. arts. 115(II), 117, 180 (Bol.); CONST. art. 5(LIV) (Braz.); CONST. art. 19(3) (Chile); CONST. art. 29 (Colom.); CONST. art. 39 (Costa Rica); CONST. art. 94 (Cuba); CONST. art. 69 (Dom. Rep.); CONST. art. 76 (Ecuador); CONST. arts. 14-15 (El Sal.); CONST. arts. 12, 267 (Guat.); CONST. arts. 90, 94 (Hond.); CONST. art. 14 (Mex.); CONST. art. 33 (Nicar.); CONST. art. 32 (Pan.); CONST. art. 17 (Para.); CONST. art. 139(3) (Peru); CONST. art. 2(7) (P.R.); CONST. art. 7 (Uru.); CONST. art. 49 (Venez.).
[8] U.S. CONST. amend. V.

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divesting anybody of a valorized fivesome, expanding the shield beyond the archetypical threesome to an additional duo of classifications: "possessions" and "rights."[9] To boot, it spells out what the safeguard commands: "a trial in a regular tribunal, respectful of the essential procedural formalities, and under laws passed a priori."[10]

The Brazilian 1988 governance instrument itself textually preserves the Anglo-American amendatory clause's memorable culminating words. Further, it insures not scarcely proprietary but spaciously *all* "goods."[11] Finally, the document does not expressly address undue takings of someone's flesh-and-blood existence probably because it generally bans the "death penalty."[12]

On top of variations such as those inventoried, the basic theme has persisted identical throughout. The divestiture of somebody's precious belongings or freedoms calls for an appropriate antecedent procedure. It becomes constitutionally legitimate only upon discharging this requirement.

Inevitably, the processing owed may vary from one national system to the next. In many of them, though, it involves a chance for those concerned to appear personally and make their case. That is, the authorities must (1) hear them and (2) permit them to defend themselves broadly and perhaps even to cross-examine adverse witnesses.[13]

Unequivocally, the Mexican Supreme Court has linked this duet's commitments. It has announced that the guaranty of such an oral exchange "requires compliance with" compulsory adjective rituals for "an opportune and adequate defense prior to an act of deprivation."[14] In the

[9] CONST. art. 14 (Mex.) ("Nadie podrá ser privado de la vida, de la libertad o de sus propiedades, posesiones o derechos, sino mediante juicio seguido ante los tribunales previamente establecidos, en el que se cumplan las formalidades esenciales del procedimiento y conforme a las leyes expedidas con anterioridad al hecho.").
[10] *Id.*
[11] Const. art. 5(LIV) (Braz.) (Assim, "ninguém será privado da liberdade ou de seus bens sem o devido processo legal . . . .").
[12] *See id.* art. 5(XLVII) (Portanto, "não haverá penas de morte, salvo em caso de guerra declarada . . . .").
[13] *See infra*.
[14] Suprema Corte de Justicia de la Nación [Sup. Ct.] [Supreme Court], Pleno [Plenum], Nov. 29, 1999, "José Melgar Castillejos," Amparo en revisión [Review on a Writ of Protection] 579/99, Registro [Register] Digital 6229, at 8, Semanario Judicial de la Federación y su Gaceta [Weekly Judicial Journal and Its Gazette], Novena Época [Ninth Epoch], Tomo [Tome] XI, Enero [January] de [of] 2000, página [Page] 108, at 119 (Mex.) (on file with author) [hereinafter *Melgar Castillejos*] (Consideration VII) ("[L]a garantía de audiencia prevista en el artículo 14, párrafo

same connection, the justices have equally zeroed in on the need "to furnish" the interested individual "the opportunity" to shield herself "amply."[15]

The succeeding sections will study in turn the entitlements to a face-off in Mexico and to formal self-protection or an interrogative confrontation in Brazil. They will do so not in the abstract but rather by evaluating how these prerogatives play out concretely and pinpointing a prominent and possibly pivotal lawsuit. The discussion will employ common-law-style monikers to denote the focal opinion in each instance: (1) *Melgar Castillejos v. President of the Republic* and (2) *Villarinho v. Brazilian Union of Composers*.[16]

In the Mexican controversy, the federal judges at all levels aggressively developed the core concept, which titles this piece, in a manner that parallels major developments north of the border. Remarkably, they applied it, beyond its original criminal realm of application, to the subsequently salient sphere of civil and pretrial adjudication. In the second dispute, their colleagues from Brazil transported the guaranty to a terrain thus far unknown or in fact off-limits in the United States: that of the purely private sector. In all, these precedents seem to signal that the time might have arrived for the direction of transcontinental influences to shift northward, at least occasionally.

2. HEARING

In its crack at the guiding notion, the Mexican judicial intermediary of ultimate resort explored the contours. At the outset, Rosalba Melgar Rolón proceeded for the confinement of her male parent as psychologically unstable. Preliminarily, the trier apparently assigned him a guardian and issued a consignment decree under the capital's Code of Civil Procedure.

segundo de la Constitución, implica el seguimiento de las formalidades esenciales del procedimiento que garanticen una oportuna y adecuada defensa previa al acto de privación . . . .").

[15] *Id.* at 10, Semanario Judicial at 121 ("[E]l juzgador [debe] brindarle [al directamente afectado] la oportunidad de defensa con la amplitud requerida . . . .").

[16] *Id.*; Supremo Tribunal Federal [Sup. Trib. Fed.] [Federal Supreme Tribunal], Segunda Turma [Second Chamber], Oct. 11, 2005, [União Brasileira de Compositores (UBC) v. Villarinho], Recurso Extraordinário [Extraordinary Appeal] 201.819-8-Rio de Janeiro [RE 201819/RJ] (Braz.) (on file with author) [hereinafter *Villarinho*].

The assignee collaterally contested the preliminaries, arguing that they did not afford him a verbal interchange as mandated by constitutional Article 14. He sought a protective injunction before a federal forum, which ruled for him. The Commander in Chief of the land, as defendant, "appealed" and defended the constitutionality of the formal rules, promulgated under his purview.[17]

In a dramatic twist, the offspring trekked back to the courthouse and rescinded her earlier entreaty for review. She submitted a statement: "In moments of improved health, my father . . . has repeatedly asked me to withdraw this appeal. . . . For affective and moral reasons, I approach [these] honorable [chambers] to retract [my] motion . . . . "[18]

Despite sustaining her "withdrawal,"[19] the justices umpired based on the presidential petition. With Mariano Azuela Güitrón as their speaker, they affirmed and pronounced the regimen unconstitutional for denying the claimant his right to have himself heeded.[20] At the opposite corner of the courtroom, a juristic contingent composed of Olga María del Carmen Sánchez Cordero, Guillermo I. Ortiz Mayagoitia, and Sergio Salvador Aguirre Anguiano vigorously rejected the affirmance.[21]

The codification's apposite Article 904 reads:

> The declaration of mental incapacity shall occur in an ordinary suit in which the applicant and the judicially selected interim tutor shall participate.
> The [adjudicating organ] shall implement these [preparatory] measures:
> I. Upon receiving the . . . complaint, it shall adopt tutelage mechanisms to secure the allegedly incapacitated person as well as his resources. It shall support its determination either [(A)] by demanding that whoever is in his charge bring him to the relevant [specialized or psychiatric professionals] or [(B)] on the basis of a reliable report from his caretakers or other means of

[17] Sup. Ct., Pleno, *Melgar Castillejos*, Amparo en revisión 579/99, at 3, Semanario Judicial at 112 (Consideration V) ("[E]l presidente de la República [interpuso] recurso de revisión . . . .").
[18] *Id.* at 1, Semanario Judicial at 109 (Consideration II) ("[M]i señor padre . . . , en los momentos de mejoría en su estado de salud, me ha solicitado reiteradamente que formulara desistimiento del recurso de revisión . . . , por razones de carácter afectivo y moral, comparezco a este H. Tribunal a formular desistimiento del recurso de revisión mencionado.").
[19] *Id.* at 12, Semanario Judicial at 125 (Resolution II) ("Se tiene por desistida a la tercero perjudicada del recurso de revisión que interpuso.").
[20] *See id.* at 5-12, Semanario Judicial at 1154 (Consideration VII).
[21] *Id.* at 1-6, Semanario Judicial at 125-31 (Sánchez Cordero, Ortiz Mayagoitia, Aguirre Anguiano, JJ., dissenting) (separately paged opinion, jointly published in the Semanario Judicial).

> proof.
> II. It shall designate physicians, preferably psychiatrists or other specialists, to carry out the examinations in its presence and upon notification to the [litigants].
> III. If the expert [accounts] confirm[] the incompetence of the subject or question[] his capacity, it shall . . . :
> a) appoint a pro tempore . . . guardian for him . . . ;
> b) charge the appointee[s] with administering his assets, apart from community property, which his spouse shall manage; and
> c) legally transfer his paternal authority or the guardianship over anybody under his custody.
> There [may] be [an appellate revision], without stay, of the decisions [undertaken].
> IV. After the issuance of the prescriptions previously referred to, a second evaluation shall unfold with different [consultants]. In the event of discrepancy, the [adjudicator] shall prescribe a meeting of reconciliation between the two [expertizing] teams or call upon a third one to settle the matter.
> V. Consecutively, [he] shall preside over a hearing and, if the tutor and the Public Ministry agree with the filer, decide on commitment. If any of the parties opposes the request, [a] trial on the merits shall follow with the [prosecutors'] intervention.[22]

[22] *Id.* at 6-7, Semanario Judicial at 117 (majority opinion) (Consideration VII) (quoting Código de Procedimientos Civiles [Cd. Pro. Civ.] [Code of Civil Procedures] art. 904 (Federal District [Fed. Dist.]) (Mex.)) ("La declaración de incapacidad por causa de demencia, se acreditará en juicio ordinario que se seguirá entre el peticionario y un tutor interino que para tal objeto designe el Juez.
Como diligencias prejudiciales se practicarán las siguientes:
I. Recibida la demanda de interdicción, el Juez ordenará las medidas tutelares conducentes al aseguramiento de la persona y bienes del señalado como incapacitado; ordenará que la persona que auxilia a aquel cuya interdicción se trata, lo ponga a disposición de los médicos alienistas o de la especialidad correspondiente o bien, informe fidedigno de la persona que lo auxilie u otro medio de convicción que justifique la necesidad de estas medidas.
II. Los médicos que practiquen el examen deberán ser designados por el Juez y serán de preferencia alienistas o de la especialidad correspondiente. Dicho examen se hará en presencia del Juez previa citación de la persona que hubiere pedido la interdicción y del Ministerio Público.
III. Si del dictamen pericial resultare comprobada la incapacidad, o por lo menos hubiere duda fundada acerca de la capacidad de la persona cuya interdicción se pide, el Juez proveerá las siguientes medidas.
a) Nombrar tutor y curador interinos . . . .
b) Poner los bienes del presunto incapacitado bajo la administración del tutor interino. Los de la sociedad conyugal, si la hubiere, quedarán bajo la administración del otro cónyuge.
c) Proveer legalmente de la patria potestad o tutela a las personas que tuviere bajo su guarda el presunto incapacitado.
De la resolución en que se dicten las providencias mencionadas en este artículo procede el recurso de apelación en el efecto devolutivo.
IV. Dictadas las providencias que establecen las fracciones anteriores se procederá a un segundo reconocimiento médico del presunto incapacitado, con peritos diferentes, en los mismos términos que los señalados por la fracción II. En caso de discrepancia con los peritos que rindieron el primer dictamen se practicará una Junta de avenencia a la mayor brevedad posible y si no la hubiere el Juez designará peritos terceros en discordia.

"In spite of the [tutorial] representation," pursuant to Article 905(II), "the supposedly incompetent individual shall be heard . . . if he or she so requests."[23] To boot, Subsection V enunciates that "[t]he designation of the permanent [guardian] and the definition of his or her duties shall transpire after the . . . judgment becomes executable . . . ."[24]

This regulatory framework facilitates speculation on the specifics of the story: The ostensibly distraught daughter litigated at the onset for the internment of her beloved begetter. Initially, the adjudicative body consulted with medical advisors, who backed her demands, and approved a tutorship for the management of his belongings. Then, it scheduled supplemental psychological appraisals, which corroborated its findings on his instability, and had him interned inasmuch as nobody raised an objection.

Patently, all the controls available might not suffice to compensate for the lack of a viva voce exchange. Self-evidently, the primarily concerned but excluded could, if integrated, supply crucial information beyond that derived from the allegations of prosecuting attorneys, the testimony of the plaintiffs or counselors, or any other evidence. As described, the whole setup sounds illegitimate insofar as it does not invite those at peril (of losing their autonomy) to express themselves at or even witness the proceedings.

The parliamentary framers might have refused the clamored-for and rather minor extra step—of constraining the decision-maker to listen—out of concern that doing so might cause excessive delay. They might have worried about further complicating or slowing down an intrinsically intricate adjective setting. The legislated scheme might also reflect a failure to appreciate fully the probatory or fairness benefit of incorporating those branded as psychically

V. Hecho lo anterior el Juez citará a una audiencia, en la cual, si estuvieren conformes el tutor y el Ministerio Público con el solicitante de la interdicción, dictará resolución declarando o no ésta. Si en dicha audiencia hubiere oposición de parte, se sustanciará en juicio ordinario con la intervención del Ministerio Público.).

[23] *Id.* at 7, Semanario Judicial at 118 (quoting Cd. Pro. Civ. art. 905(II) (Fed. Dist.) (Mex.)) ("El presunto incapacitado será oído en juicio, si él lo pidiera, independientemente de la representación atribuida al tutor interino.").

[24] *Id.* at 3, Semanario Judicial at 128 (Sánchez Cordero, Ortiz Mayagoitia, Aguirre Anguiano, JJ., dissenting) (quoting Cd. Pro. Civ. art. 905(V) (Fed. Dist.) (Mex.)) ("Luego [de] que cause ejecutoria la sentencia de interdicción se procederá a nombrar y discernir el cargo de tutor definitivo que corresponda conforme a la ley . . . .").

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infirm by the petitioners.

In contrast, the top tribunal deemed the transitory limitations on proprietorial protections sufficiently burdensome to warrant entitling the mainly interested person to appear.[25] Curiously, it did not home in on the oppressive effects of having her confined. Thus, its concurrent constituents articulated on its behalf an approach resembling that of their discordant colleagues.[26] Perhaps they wanted to underscore that the proprietary restraints inflicted enough of an onus and avert a dispute on whether the legislation actually authorized such a confinement.

Successively, the dissenting ensemble evaded this final issue entirely. Of course, it conceded that the legislative intent consisted in "temporarily restricting the free movement" of the purportedly "disabled individual" or "keeping [her] in place."[27] Still, the dissenters never directly acknowledged that she could end up locked up. Nor did they exhaustively examine the implications of this possibility. Toward the close of its own deliberations, the majority expressly recognized that "the challenged statute" "permit[ted]" an "absolute" containment of "legal capability."[28] Regardless, it did not dwell on this recognition, which might subliminally comprise that of the prospect of commitment.

The enactment itself unquestionably dictates "the securement" of the subject.[29] In addition,

[25] *See generally id.* at 9, Semanario Judicial at 121 (majority opinion) (Consideration VII) ("By appointing an interim tutor to administer all assets, except those that constitute community property and that, as such, are in the spouse's charge, the judge implicitly curtails, undermines, and suppresses the rights of the individual in question in favor of the administrator.") ("[L]a circunstancia de autorizar el nombramiento de un tutor interino, para la administración y disposición de la totalidad de sus bienes, salvo los relativos a la masa patrimonial afecta a la sociedad conyugal, que recaerá en su cónyuge, implica una limitación, menoscabo o supresión de los derechos inherentes a la capacidad de disposición del afectado, los cuales serán llevados a cabo por el administrador de sus bienes . . . .").

[26] *See id.* at 1-6, Semanario Judicial at 125-31 (Sánchez Cordero, Ortiz Mayagoitia, Aguirre Anguiano, JJ., dissenting).

[27] *Id.* at 3, Semanario Judicial at 128 ("[L]as . . . medidas precautorias provisionales decretadas [tienen como] objeto [de] restringir de modo provisional la libre manifestación de voluntad del presunto incapaz . . . .") (Se trata "en realidad [de] medidas tutelares de aseguramiento de la persona . . . del presunto incapacitado . . . .").

[28] *Id.* at 10, Semanario Judicial at 122 (majority opinion) (Consideration VII) ("[L]a citada norma legal permite que se tomen determinaciones que restringen de manera absoluta la capacidad de ejercicio del señalado incapaz . . . .").

[29] *Id.* at 4, Semanario Judicial at 129 ("[L]as . . . fracciones [del artículo 904 del Código de Procedimientos Civiles para el Distrito Federal] detallan las medidas tutelares conducentes al aseguramiento de la persona . . . del presunto incapacitado . . . .").

it contemplates having her committed after this primary phase in the absence of opposition.[30] Ergo, the bench does seem to possess the prerogative to have her provisionally restrained without allowing her to speak up.

During its inquiry, the highest adjudicatory institution distinguished governmental (1) "acts of inconvenience" from (2) those "of deprivation."[31] It clarified that the guaranty of a give-and-take attaches to the latter yet not to the former type, which respectively fall under constitutional Articles 14 (priorly excerpted) and 16. This last provision establishes that: "No one may be inconvenienced—nor may his family, residence, papers, or possessions—without a written authorization from the responsible officers explaining and justifying" themselves.[32] The question of which standard or corresponding category should come into play divided the competing camps. It helped to structure yet obviously did not solve their disagreement.

The outvoted deliberators protested that the potential short-term consignment would at most saddle an inconvenient load upon the consigned. They stressed that such a direction would set off a full and fair trial, constitute barely an antecedent to the eventual resolution, and operate exclusively during the pendency of the lawsuit.[33] Their prevailing peers, for their part, resolved that the regime had dispossessed the appellee of an elementary entitlement. They emphasized that such a dispossession, albeit preliminary, partial, or provisional, went far beyond inconveniently bothering him and could not stand without those sanctioning it welcoming his views.[34]

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[30] *See, e.g.*, *id.* at 7, Semanario Judicial at 118; *id.* at 4, Semanario Judicial at 129 (Sánchez Cordero, Ortiz Mayagoitia, Aguirre Anguiano, JJ., dissenting) (quoting CD. PRO. CIV. art. 904 (Fed. Dist.) (Mex.)) ("[T]he Judge shall preside over a hearing and, if the tutor and the Public Ministry agree with the filer, decide on commitment.") ("[E]l Juez citará a una audiencia, en la cual, si estuvieren conformes el tutor y el Ministerio Público con el solicitante de la interdicción dictará resolución declarando o no ésta.").

[31] *Id.* at 8, Semanario Judicial at 120 (majority opinion) (Consideration VII) ("[T]his Plenary Chamber has established caselaw . . . distinguishing acts of inconvenience from those of deprivation.") ("[L]a jurisprudencia sustentada por este Tribunal Pleno . . . establece la distinción entre actos de molestia y de privación . . . .").

[32] CONST. art. 16 (Mex.) ("Nadie puede ser molestado en su persona, familia, domicilio, papeles o posesiones, sino en virtud de mandamiento escrito de la autoridad competente que funde y motive la causa legal de procedimiento.").

[33] *See* Sup. Ct., Pleno, *Melgar Castillejos*, Amparo en revisión 579/99 (Sánchez Cordero, Ortiz Mayagoitia, Aguirre Anguiano, JJ., dissenting).

[34] *See generally id.* (majority opinion) (Consideration VII). *But cf.* Sup. Ct., Primera Sala [First Chamber], Apr. 21, 2004, Contradicción de tesis 141/2002-PS, at 41, Semanario Judicial de la Federación y su Gaceta, Novena Época,

Correlatively, the consensus collapsed on the enacted edict's interpretation. The minority vehemently quarreled with its opponents' casual conclusion that the judge could have someone permanently detained so long as the wardens and lawyering procurators failed to except. It insisted that she bore an obligation to try the case thoroughly irrespective of whether she encountered any exceptions at this juncture.[35]

Indeed, the codified regulations (reproduced at length supra) indicate that the interlocutory internment may remain untried and chalk up permanence absent any protestations.[36] "Whenever" somebody with standing "objects," she palpably forces "a trial."[37] When nobody does, this dispositive showdown evidently does not happen.

In retort, the dissent postulates that the substantive stage must ensue upon the docketed filings anyway. It reasons that: "Clearly, an agreement among [the litigants] does not automatically trigger a definitive order. . . . [Upon a] temporary detention . . . , the trial must start . . . because [the pleadings have] already been filed and [someone] has been engaged to represent the presumed incapable."[38]

Certainly, one might anticipate that the litigation would normally continue after the original

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Tomo XIX, Junio [June] de 2004, página 139, [Fourth v. Fifth Civil Panel of the Third Circuit] (Mex.) (on file with author) ("A preliminary measure [in a custody dispute] is temporary and transitory. The trier . . . does not have to hear the minor before deciding on it . . . .") ("[L]a medida precautoria es precaria y transitoria, el Juez de la causa [no] tiene la obligación de escuchar al menor . . . antes de emitir la resolución que decida si procede o no dicha providencia . . . .").

[35] *See generally* Sup. Ct., Pleno, *Melgar Castillejos*, Amparo en revisión 579/99, at 4, Semanario Judicial at 129 (Sánchez Cordero, Ortiz Mayagoitia, Aguirre Anguiano, JJ., dissenting) ("The hearing mentioned in [Article 904(V)] necessarily takes place as part of the litigation that begins with the filing of the complaint.") ("[L]a audiencia señalada en la fracción indicada . . . necesariamente ocurre en el juicio porque éste inicia precisamente con la presentación de la demanda de interdicción. . . . .").

[36] *See generally id.* at 6-7, Semanario Judicial at 117-18 (majority opinion) (Consideration VII) (quoting CD. PRO. CIV. art. 904 (Fed. Dist.) (Mex.)).

[37] *Id.* at 7, Semanario Judicial at 118; *id.* at 4, Semanario Judicial at 129 (Sánchez Cordero, Ortiz Mayagoitia, Aguirre Anguiano, JJ., dissenting) ("[S]i en la audiencia . . . hubiere oposición de parte se sustanciará en juicio ordinario . . . .").

[38] *Id.* at 5, Semanario Judicial at 129-30 (Sánchez Cordero, Ortiz Mayagoitia, Aguirre Anguiano, JJ., dissenting) ("[D]e ninguna manera puede interpretarse que una especie de acuerdo o convención entre el tutor y el Ministerio Público con el solicitante de la interdicción . . . dará lugar a la declaración de interdicción y a la firmeza de la misma. En cambio, si el Juez dictara provisionalmente la interdicción, el juicio habrá de proseguirse de modo necesario, porque la demanda ya está presentada y también definido el tutor interino que deba representar en juicio al presunto incapaz.").

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ruling until a conclusive adjudication. Nevertheless, the institutional opinion pertinently notes "the want of a deadline" to try the cause "after the pretrial" pronouncement of incapability.[39] In an undertone, it sensibly concludes that "this nonfinal disposition" may stay put "indefinitely."[40]

Along somewhat similar lines, the United States Supreme Court has professed that the "fundamental requisite of due process" boils down to the occasion "to be heard."[41] It has stated that the concession of such a chance "before" condemning somebody "to suffer grievous loss of any kind, even though" she does not hazard "the stigma [or] hardships of a criminal conviction, is a principle basic to...society."[42] *Mathews v. Eldridge* weighs three factors to determine whether to requisition the administration to offer her special defensive devices ahead of burdening her:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous [denial] through the procedures used, and the probable value, if any, of additional or substitute . . . safeguards; and finally, the Government's [stake], including the function involved and the fiscal [or clerical] burdens that the . . . procedural requirement would entail.[43]

"Applying this test," the supremely decisional entity "has usually" necessitated "a hearing before the State deprives a person" of her due.[44]

"In some circumstances, however, . . . a statutory provision for a [post-deprivation encounter] . . . satisfies" the constitutionalized constraints.[45] The just cited precedent itself ponders "whether [to] require[] that prior to the termination of Social Security disability . . .

[39] *Id.* at 10, Semanario Judicial at 121 (majority opinion) (Consideration VII) ("[S]e advierte que tampoco existe ninguna disposición que establezca un plazo perentorio para el ejercicio de la acción relativa al juicio ordinario de interdicción, una vez dictada la resolución de las diligencias prejudiciales que declare la incapacidad de una persona . . . .").
[40] *Id.* ("[S]e posibilita que la decisión del procedimiento prejudicial se prolongue de manera indefinida . . . ."); *see also id.* at 10, Semanario Judicial at 122 ("[T]he absolute limitation on [the] legal capacity [of the person found incapable] may be prolonged indefinitely . . . in light of the law's failure to establish a peremptory deadline for the occurrence of an ordinary trial . . . .") ("[L]a limitación absoluta de [la] capacidad de ejercicio [del señalado como incapaz] puede prolongarse indefinidamente . . . ante la omisión de la ley de establecer un plazo perentorio para el ejercicio de la acción en juicio ordinario . . . .").
[41] Ford v. Wainwright, 477 U.S. 399, 413 (1986) (quoting Grannis v. Ordean, 234 U.S. 385, 394 (1914)).
[42] Paul v. Davis, 424 U.S. 693, 708 (1976) (quoting Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)).
[43] Mathews v. Eldridge, 424 U.S. 319, 335 (1976).
[44] Zinermon v. Burch, 494 U.S. 113, 127 (1990).
[45] *Id.* at 128.

payments[,] the recipient be [accorded] an opportunity for an [oral] evidentiary" probe.[46] Ultimately, it controversially adjudges (1) this probative ascertainment *not* necessary in advance of terminating such disbursements "and" (2) the applicable "administrative" arrangement abundantly adequate.[47]

In all likelihood, the judiciary at work northerly of the frontier would have embraced the holding from Mexico, as dissected. It would have probably deployed the parameters posited in the previous paragraphs and found the interest of the suitor overwhelming, that of the polity comparatively negligible, and the danger of a mistaken divestiture substantial. After all, the complainant had risked his vital freedom to go about his business, the prosecution scarcely needed to add his name to the list of witnesses, and the assessor of fact had assessed his mentality without minding him at all.

3. AMPLE DEFENSE

In *Villarinho v. Brazilian Union of Composers*, the secondly named litigant, "a . . . nonprofit organization . . . , expelled [the first] from its membership."[48] It "did not [let him] defend himself" or present proofs.[49] He sued it and finally convinced the intermediate and the highest adjudicating organs that it had robbed him of his "ample defense, cross-examination, and . . . due process."[50]

The judges of last recourse debated fierily. Among them, Joaquim Barbosa, the sole African

[46] Mathews v. Eldridge, 424 U.S. at 323.
[47] *Id.* at 349.
[48] Sup. Trib. Fed., Segunda Turma, *Villarinho*, RE 201819/RJ at 580 (Northfleet, J., dissenting) ("A recorrente, União Brasileira de Compositores —UBC, é sociedade civil sem fins lucrativos, dotada de personalidade jurídica de direito privado. [A] recorrente excluiu o recorrido de seu quadro de sócios, em procedimento assim narrado no acórdão da origem . . . .").
[49] *Id.* (quoting "the appellate court") ("[A] sociedade . . ." deixou de cumprir princípio constitucional, não ensejando ao apelado oportunidade de defender-se das acusações e de realizar possíveis provas em seu favor.").
[50] *Id.* at 607 (Mendes, J., writing for the majority) ("Destarte, a exclusão de sócio do quadro social da UBC, sem qualquer garantia de ampla defesa, do contraditório, ou do devido processo constitucional, onera consideravelmente o recorrido . . . .").

descendant ever to have locally landed a supreme judgeship,[51] chronicled their in-house quarrels:

> During the Second Chamber's session on June 8, 2004, the rapporteur, . . . Ellen Gracie Northfleet, [the lone sworn-in woman then and a pioneer for her gender,] declared that [privately founded] associations . . . were free to organize themselves and design their rules of operation or interaction as they thought fit. . . .
> Therefore, she voted to admit and grant the appeal.
> [Afterward,] Gilmar Mendes called for reexamination. [O]n November 16, 2004, he opined that the present controversy dictated the application of fundamental rights to private relations. . . .
> Despite Mendes's [incursion], Northfleet maintained her position . . . .
> To analyze the cause more carefully, [the chronicler himself] also asked [to have it reexamined].[52]

In a typical fashion, the selected reporter prepared a report and an opinion, which habitually carries the day in the deliberations.[53] On this occasion, Mendes exceptionally demanded that his colleagues reassess the petition. His argumentative exertions notwithstanding, he could not move Northfleet to change her mind.

Subsequently, Barbosa requested a reassessment too. He and most of his fellows sided with Mendes, who ended up writing for them all. Barbosa verbalized his own standpoint separately. So did Celso de Mello. [54]

[51] Shasta Darlington, An Ex-Justice In Brazil Says He Won't Run For President, *N.Y. Times*, May 9, 2018, at A8 ("Joaquim Barbosa [was] Brazil's first black Supreme Court justice . . . .").
[52] Sup. Trib. Fed., Segunda Turma, Villarinho, RE 201819/RJ at 618-619 (Barbosa, J., concurring) ("Na sessão da Segunda Turma do dia 08/06/2004, a Ministra Relatora Ellen Gracie afirmou que as associações privadas, como a sociedade civil União Brasileira de Compositores, têm liberdade para se organizar e estabelecer normas de funcionamento e de relacionamento. . . . Assim, votou pelo conhecimento do recurso e no mérito deu-lhe provimento. Pediu vistas dos autos o Ministro Gilmar Mendes. Na sessão da Segunda Turma do dia 16/11/2004, o Ministro Gilmar Mendes proferiu voto no sentido de que o presente caso retrata um típico exemplo de aplicação de direitos fundamentais nas relações privadas. . . . Diante do voto do ministro Gilmar Mendes, manteve a ministra relatora seu voto . . . . Diante do voto do ministro Gilmar Mendes, manteve a ministra relatora seu voto . . . . No intuito de proceder a uma análise mais detida do caso, pedi vista dos autos."). *See also* Brazil's First Female Supreme Court Justice Sworn in, Associated Press, Dec. 14, 2000 ("Brazil's Supreme Court gained its first female member Thursday with the swearing in of Ellen Northfleet, a former federal court judge.").
[53] *See, e.g.*, Sup. Trib. Fed., Pleno, Oct. 19, 2000, [Banco do Brazil v. Botelho,] Recurso Extraordinário 165.304-3-Minas Gerais [165304/MG] (Braz.).
[54] Sup. Trib. Fed., Segunda Turma, *Villarinho*, RE 201819/RJ (De Mello, J., concurring).

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Neither Northfleet nor any of her peers specified or explicated the supposedly "irrelevant"[55] motives behind the controverted expulsion. Indubitably, such a specification or explication would have better rounded out the story recounted. In parallel, it might have aided in grasping how the notional constructs conjured by the claimant might have impacted his allegations.

The appellate adjudicators delineated the associational procedures that doomed the eventually ejected associate:

> The . . . board appointed a special commission to consider [his] alleged violation of the bylaws. The appointees . . . did not permit [him to shield] himself against the accusations or to introduce evidence. They merely met, examined the documents tendered by the [organizational] secretary, and resolved to penalize him. . . .[56]

The disputed regimen denies those inculpated before it a hearing together with any opportunity to offer documental or testimonial support for themselves.

Ultimately, Northfleet based her analysis on associational autonomy and freedom.[57] She reasoned that: "Disputes concerning the dismissal of a member of a [privately chartered] entity should be settled in accordance with [internal regulations] and the legislation in force. They do not have the constitutional dimension attributed to them [in the disposition below]."[58] In reply, Barbosa criticized her for indiscriminately importing the dated theory of "state action" from the United States to repudiate the relevance of constitutionalized adjective entitlements to the lawsuit under review.[59] Appositely, the Constitution's operative provisions do not expressly

[55] *Id.* at 580 (Northfleet, J., dissenting) ("Por motivos irrelevantes para a solução do presente extraordinário, a recorrente excluiu o recorrido de seu quadro de sócios . . . .").
[56] *Id.* (quoting "the appellate court") ("Embora a sociedade tivesse . . . designado uma comissão especial para apurar as possíveis infrações estatutárias atribuídas ao autor, tal comissão . . . deixou de cumprir princípio constitucional, não ensejando ao apelado oportunidade de defender-se das acusações e de realizar possíveis provas em seu favor. [A] comissão simplesmente reuniu-se e, examinando a documentação fornecida pelo secretário da sociedade, concluiu pela punição do autor.").
[57] *See id.*
[58] *Id.* at 581 ("A controvérsia envolvendo a exclusão de um sócio de entidade privada resolve-se a partir das regras do estatuto social e da legislação civil em vigor. Não tem, portanto, o aporte constitucional atribuído pela instância de origem . . . .").
[59] *See id.* at 621-622 (Barbosa, J., concurring) ("[A] eminente relatora, em seu voto, adotou sem nuances a doutrina da *state action* do direito norte-americano, segundo a qual as limitações impostas pelo *bill of rights* se aplicam prioritariamente ao Estado e a quem lhe faz as vezes, jamais aos particulares.").

limit their reach to the officialdom.[60]

Northfleet might have responded to Barbosa's charge by recalling the parameters she originally invoked. In other words, her argumentation might have harked back to the petitioner's prerogatives. Besides, she might have accentuated that the core concept had traveled to Brazil from the United States and that, as a result, it often tended to work similarly in both countries.

In his retort, Barbosa marshaled reasons of import for interpreting the precept differently today. He affirmed that in this current age: "Foundational" guaranties have penetrated "the private realm as a consequence of various factors" pertaining to legally contemporary praxes.[61] An amplification of his affirmation followed:

> For starters, the barrier that separated [the publicly and the privately legal domains] until the end of the nineteenth century has gradually crumbled. Moreover, [a transnational movement] has launched toward the "constitutionalization of private (specifically civil) law." Traditionally, [this normative edifice] regulated solely [privately characterized interchanges]. Of late, publicly legal [benchmarks] emanating predominantly from rulings issued by constitutional courts have begun descending upon this field.[62]

"In certain areas," he observed, the Brazilian charter itself renders elemental "rights explicitly binding on private persons."[63] Within the province of societal entitlements, per his "example," it imposes on "labor relations" a number of safeguards "for workers."[64]

He asserted that his proffered construction had found favor elsewhere. He trained his attention toward "Western" trends: "In Europe and even in the United States, where

[60] *See* CONST. art. 5(LIV) (Braz.).
[61] Sup. Trib. Fed., Segunda Turma, *Villarinho*, RE 201819/RJ at 622 (Barbosa, J., concurring) ("O fato é que, entre nós, a aplicabilidade dos direitos fundamentais na esfera privada é consequência de diversos fatores, muitos deles observáveis na prática jurídica contemporânea . . . .").
[62] *Id.* ("O primeiro deles, o paulatino rompimento das barreiras que separavam até final do século XIX o direito público e o direito privado. Por outro lado, um fenômeno facilmente observável em sistemas jurídicos dotados de jurisdição constitucional —a chamada "constitucionalização do direito privado", mais especificamente do direito civil. Noutras palavras, as relações privadas, aquelas que há até bem pouco tempo se regiam exclusivamente pelo direito civil, hoje sofrem o influxo dos princípios de direito público, emanados predominantemente das decisões proferidas pelos órgãos de jurisdição constitucional.")
[63] *Id.* at 622-623 ("Em algumas áreas, a incidência dos direitos fundamentais nas relações entre particulares decorre de imposição explícita da própria Constituição federal.").
[64] *Id.* at 626-627 ("É o que ocorre, por exemplo, no campo dos direitos sociais, em que a Constituição impõe às pessoas que travam relações de natureza privada, como a trabalhista, a observância de um catálogo de direitos concebidos com vistas à proteção do trabalhador.").

considerable efforts to overcome the state-action doctrine are underway," the dealings of those who relate to each other privately "no longer fall entirely outside" the scope of basic guaranties.[65]

Undoubtedly, the federal justices headquartered in Washington, District of Columbia, have decreed due process applicable to nongovernmental engagement.[66] Nonetheless, they have retained the prerequisite of responsibility of the state itself "for the specific conduct[s]" complained about.[67] Ordinarily, it can be held accountable "for . . . private decision[s] only when it has exercised coercive power[s] or has provided such significant encouragement[s], either overt or covert, that the choice[s] must . . . be" ascribed to it.[68] Certainly, the dismissed lyricist from Brazil could not have fulfilled such a steep standard. Apparently, Barbosa and his likeminded brethren extended the norm under investigation much farther than their northern cousins.

The reconstituted majority highlighted that the complainant had to rely on the body before it to make a living, capitalizing on his "liberty" to engage in his "profession."[69] Thereby, it implied that the applicability of the commitments at issue hinged on the professional indispensability of his affiliation. Unfortunately, no precise exploration ensued of how the appellant assisted in the enforcement of his copyrights.

Mendes, conjointly with the cohort behind him, might have displayed less punctiliousness in protecting people who belonged to social groups. He might have altogether exempted these from liability insofar as they did not sustain the critical right to practice an occupation, or any other one. Nonetheless, they would seem to scream for some regimentation as vehicles for the

[65] *Id.* at 623 ("Na Europa e até mesmo nos Estados Unidos, onde são feitos grandes esforços hermenêuticos visando à superação da doutrina da *state action*, as relações privadas não mais se acham inteiramente fora do alcance das limitações impostas pelos direitos fundamentais.").
[66] *See* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 172 (1972) ("[T]he impetus for the forbidden discrimination need not originate with the State if it is state action that enforces privately originated discrimination.").
[67] Blum v. Yaretsky, 457 U.S. 991, 1004 (1982).
[68] *Id.*
[69] Sup. Trib. Fed., Segunda Turma, *Villarinho*, RE 201819/RJ at 609 (Mendes, J., writing for the majority) ("[A] integração a essas entidades configura, para um número elevado de pessoas, quase que um imperativo decorrente do exercício de atividade profissional.").

realization of the autonomy to affiliate. Hence, the procedural protection to which he alludes might cover them to varying degrees depending on the importance of the entitlements at risk.

Surely, his assessment shows concern for the guaranty to assemble; yet mostly for that of the assembly, not the assemblers. In this manner, he might have been partly reacting to and echoing Northfleet. His unabridged reaction might have reverberated in tune with these correlative reflections of his:

> Plainly, an association [may autonomously] run its business and affairs. Furthermore, [its] freedoms . . . comprise that to choose whom to associate with or to exclude. Still, they do not operate absolutely, necessitating certain restrictions so that they do not undermine other [focal tenets].[70]

Given his stance in this dialogic exchange, he expectedly neglected to mention that an associate likewise boasts, at a minimum, congregational privileges, including those meant to shelter her from arbitrary exclusion.

In their respective pronouncements, (1) Mendes and (2) Barbosa insinuated that the Union nearly constituted an instrumentality. The latter of the pair flagged that: "In light . . . of the quasi-public status" of the defensive party, the referenced formal rights attached against it when it strove to "exclude any of its [constituents]."[71] The former of the two regarded as "decisive" that it played "a primary part" in the "vindication" of "intellectual proprietorial" guaranties.[72] For him: "[It] might [have] even perform[ed] *public service by legislative delegation*. [Such] activities [waved in] the *direct application* [against it] of [essential] entitlements . . . during [its] proceedings to oust [insiders]. [T]he facts at bar . . . support[ed] the invocation of [these liberties]."[73]

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[70] *Id.* at 610 ("É certo que a associação tem autonomia para gerir a sua vida e a sua organização. É certo, ainda, que, no direito de se associar, está incluída a faculdade de escolher com quem se associar, o que implica poder de exclusão. O direito de associação, entretanto, não é absoluto e comporta restrições, orientadas para o prestígio de outros direitos também fundamentais.").

[71] *Id.* at 627 (Barbosa, J., concurring) ("[E]m virtude da natureza peculiar da associação em causa (que tem natureza 'quase pública'), . . . os princípios constitucionais da ampla defesa e do devido processo legal no caso têm plena aplicabilidade para fins de exclusão do sócio da sociedade.").

[72] *Id.* at 612 (Mendes, J., writing for the majority) ("[A] entidade associativa . . . exerce uma atividade essencial na cobrança de direitos autorais . . . .").

[73] *Id.* at 621 ("[A] entidade associativa . . . poderia até configurar um *serviço público por delegação legislativa*. Esse caráter *público* ou *geral* da atividade parece decisivo aqui para legitimar a *aplicação direta* dos direitos fundamentais concernentes ao devido processo legal, ao contraditório e à ampla defesa . . . ao processo de exclusão

On an initial impression, both jurists would appear to have viewed the commitments at stake as enforceable exclusively against the government or its surrogates. Accordingly, they would have been buying into some version of the Anglo-American approach. Upon deeper inspection, though, the excerpted statements cry for contextualization. When read in their contexts, they seemingly suggest that an outfit of this genre must respect the discussed strictures when it facilitates its affiliates' exercise of cardinal rights or when it functions virtually publicly.

Implicitly, the tribunal opened the door to deploying the primordial principle (1) substantively as well as (2) procedurally vis-à-vis privately instituted entities.[74] For sure, it may normally embark upon the latter species of deployment against them more readily than upon the former. As Tim Scanlon summarizes, "if the cost[] . . . of the misuse of [their clout is] high, . . . there will be a prima facie case for [a] procedural due process safeguard[]" within them.[75] In regard to the substantive variant, he denominates the extent of their involuntariness "crucial."[76]

> The authority that truly voluntary institutions have over their members can plausibly be seen as derived from consent, and their . . . general [justifiability] lies simply in the value of [their] allowing [an] individual[] to associate for whatever purpose[].
> But as [they] cease[] to be [genuinely optional] and come[] to be . . . mechanism[s] [to deliver an] important good, . . . further justification for [their] power [over it] is required. [They] typically [justify themselves through their] role in [its delivery], and [their authoritative prerogatives and distributive methods] must . . . be [legitimated] as . . . rational and acceptable . . . . Thus, [as to] nonvoluntary [institutional bodies, a foundation] for criticism on substantive . . . grounds [arises].[77]

The dispensed "valuable" might amount to the effective enjoyment of an elementary entitlement, such as the earlier evoked copyright. Consequently, the prevailing camp in the depicted disputation might have justifiably applied the key guaranty procedurally plus

de sócio de entidade. [A]s particularidades do caso concreto legitimam a aplicabilidade dos direitos fundamentais referidos . . . .").

[74] *See generally* Erwin Chemerinsky, *Substantive Due Process*, 15 TOURO L. REV. 1501, 1501 (1999) ("Procedural due process . . . asks whether the government has followed the proper procedures when it takes away life, liberty or property. Substantive due process looks to whether there is a sufficient substantive justification, a good enough reason for such a deprivation.").

[75] *See* SCANLON, supra note 3, at 55.

[76] *Id.* at 59.

[77] *Id.* at 59-60.

substantively to the defendant. Probably, it would not have done so without a request from the respondent to have the rationale behind his removal scrutinized.

Because an almost public organ stood as the accused (and had appealed), any comments about rigorously nonpublic, albeit fairly nonoptional, ones would appear to boil down to dicta from a common-law prism. In civil-law regimes with no stare decisis,[78] however, an adjudicative forum may theoretically produce persuasive precedents yet not mandatory ones. It might influence legal development barely by persuading with its reasoning or awing with its prestige. Presumably, all its assertions essentially carry the same weight.

Consistent with the interpretation he had previously propounded, Barbosa confessed that he did not favor obliging all organizations to comply with the probed procedural proscription. He proposed that the judiciary determine whether it kicked in on a "deliberate and case-by-case

[78] *See, e. g.*, Const. art. 5(II) (Braz.) ("Nobody shall bear an obligation to do or not to do something except by virtue of the law.") (Assim, "ninguém será obrigado a fazer ou deixar de fazer alguma coisa senão em virtude de lei . . . ."); CÓDIGO CIVIL [CD. CIV.] art. 19 (Fed. Dist.) (Mex.) ("Civil judicial controversies shall be resolved in accordance with the letter or interpretation of the law. In the absence of a law, they shall be resolved in accordance with general legal principles.") ("Las controversias judiciales del orden civil deberán resolverse conforme a la letra de la ley o a su interpretación jurídica. A falta de ley se resolverán conforme a los principios generales de derecho."); *see also* CD. CIV. art. 3 (Chile) ("Only the legislature may explain and interpret the law in a generally binding manner. Judicial decisions are binding only with respect to the immediate cause of action.") ("Sólo toca al legislador explicar o interpretar la ley de un modo generalmente obligatorio. Las sentencias judiciales no tienen fuerza obligatoria sino respecto de las causas en que actualmente se pronunciaren."); CD. CIV. art. 17 (Colom.) ("Judicial decisions are binding only with respect to the immediate cause of action.") ("Las sentencias judiciales no tienen fuerza obligatoria sino respecto de las causas en que fueron pronunciadas."); *id.* art. 25 ("Only the legislature may authoritatively interpret an obscure law in a general manner.") ("La interpretación que se hace con autoridad para fijar el sentido de una ley oscura, de una manera general, sólo corresponde al legislador."); CD. CIV. art. 5 (Dom. Rep.) ("Judges may not make general and regulatory pronouncements in the causes of action before them.") ("Se prohíbe a los jueces fallar por vía de disposición general y reglamentaria las causas sujetas a su decisión."); CD. CIV. art. 3 (Ecuador) ("Only the legislature may explain and interpret the law in a generally binding manner.") ("Sólo al legislador toca explicar o interpretar la ley de un modo generalmente obligatorio"); CODE CIVIL art. 5 (Fr.) ("Judges may not make general and regulatory pronouncements in the causes of action before them.") ("Il est défendu aux juges de prononcer par voie de disposition générale et réglementaire sur les causes qui leur sont soumises."); CD. CIV. art. 3 (Hond.) ("Only the legislature may explain and interpret the law in a generally binding manner.") ("Sólo toca al legislador explicar o interpretar la ley de un modo generalmente obligatorio."); CD. CIV. FED. art. 19 (Mex.); L. 16603, CD. CIV. art. 12 (Uru.) ("Only the legislature may explain and interpret the law in a generally binding manner.") ("Sólo toca al legislador explicar o interpretar la ley de un modo generalmente obligatorio."). *But cf.* CONST. (Braz.) art. 103(A) ("After reiterated prior constitutional decisions on point and with a two-thirds majority, the Supreme Court may . . . issue an authoritative holding with a binding effect.) ("O Supremo Tribunal Federal poderá . . . , mediante decisão de dois terços dos seus membros, após reiteradas decisões sobre matéria constitucional, aprovar súmula que . . . terá efeito vinculante . . . .").

basis, with prudence."[79] Alas, his proposal did not dole out detailed criteria for such a determination. Evidently, he expected the progressive erection of a comprehensive analytic apparatus through adjudication.

In all, the diverse ensemble that won out in the courtroom debate perhaps disagreed on how far to march into the private sector. Nevertheless, it seemed to converge on the imperativeness of advancing past the strictly or constructively governmental sphere. Effectively, the judicial intermediary of ultimate resort wound up renouncing any requirement of official participation and espousing one of impact on a weighty commitment. In actuality, it edged toward jurisprudential perspectives that ostensibly no one on its counterpart in the United States has envisioned and that could very well inspire some fruitful comparative contemplation.

4. RUNDOWN

Ultimately, due process may lead the way not to a redeeming light but away from obscurity. It may empower someone to avoid losing her previously attained substantive entitlements rather than to gain any additional ones. The procedural rights to a hearing or to an ample defense, as part of the wider guaranty behind them, render such empowerment vividly possible. They figured prominently in the preceding discussion.

As expounded in the Runup, the notion at stake, in conjunction with its interdiction of arbitrary divestitures, spread to Latin America from the United States. It has undergone modifications en route while conserving its central tenor. The underlying constitutionalized commitment compels powerful parties to traverse through an appropriate procedure before divesting vulnerable ones of capital freedoms or goods.

Without doubt, the processing owed varies contextually. In many jurisdictions, however, it must vouchsafe the person concerned a chance to show up and speak up. As demonstrated, those

[79] Sup. Trib. Fed., Segunda Turma, *Villarinho*, RE 201819/RJ at 622 (Barbosa, J., concurring) ("No campo das relações privadas, a incidência das normas de direitos fundamentais há de ser aferida caso a caso, com parcimônia . . . .").

in charge must hear or listen to her and allow her to defend herself amply and maybe even to cross-examine unfavorable witnesses.

The foregoing sections correspondingly investigated the right to a face-off of the sort in Mexico and to such formal self-protection and interrogation in Brazil. They did so not abstractly but instead by ascertaining how these entitlements ended up illuminating a couple of concrete, controversial, and crucial lawsuits, one from each of these nations: (1) *Melgar Castillejos v. President of the Republic* and (2) *Villarinho v. Brazilian Union of Composers*.

In the Mexican dispute, the justices deployed the core concept in a manner that calls to mind and enhances key developments north of the Rio Grande. Significantly, they applied it, beyond its original criminal sphere of application, in a realm that has become relevant relatively recently: namely, that of civil and pretrial law. The complainant eventually scored the guaranty to have himself hearkened to prior to his precautionary confinement for psychic inability.

In the controversy from Brazil, the Supreme Court pushed the norm to a terrain thus far uncharted or proscribed within the United States regimen: that of privately based deportments. It reckoned that when discernibly threatened there, personal liberties required sufficient safeguards for their survival. The pleading musician achieved protection to shield himself extensively against a nongovernmental professional outfit that had enabled him to merchandise his lyrics and that resolved to sack him.

As a whole, these cases signify that across the Americas, the tide of influences on these issues should perchance turn. Every now and then, it might as well head northward. Fatefully, such change would demand new attitudes along with further investigative undertakings.

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