CHAPTER - III

HISTORICAL PERSPECTIVES ON THE THEORY OF

DUE PROCESS OF LAW

The doctrine of Due Process of Law has a long and interesting history. While in the beginning the theory was known as the Theory of Due Process of Law, subsequently it came to be known as ‘Law of the Land’ theory, and much later it was known as the Principle of Rule of Law. All along it has existed as a fundamental principle of law to act as a restraint on arbitrary actions of the administrative agencies. A brief reference is made in this chapter to the various developments through which this well known theory has traversed.

The discussion is presented in three separate sections, Section I is devoted to the Theory of Due Process of Law, and Section II is devoted to the Crime Control Theory and Section III is devoted to the developments at the International level to indicate the international standards of Due Process Theory:

Section I: The Theory of Due Process of Law & the related concepts

(a) The Theory of Due Process of Law

The history of Due Process of Law bears evidence to the effect that right from the earlier days this theory has appeared in the system of criminal justice. John of England in article 39 of Magna Carta assure that the liberated human being shall not be trapped or jailed, held or striked out of their rights or ownership or still prohibited or underprivileged of his rank in any way, no power will be worn in excess of him yet throughout others, except simply during the legal opinion of his generation or by the rule of the earth.”

The concept of Due Process originated in medieval England. Its roots may be sketched Magna Carta (1215) it can plagued King John was compulsory by his rebellious barons to swear that he would not take action against any person Nisi Per Legam Terrae (except by the law of the land).

Although reference was made in this precept to ‘law’ there was no machinery as such at that time to make the law; the ideal system of separating the powers of government into legislative, executive and judicial functions also had not yet taken place.
In the absence of an institutional apparatus to give law to the people on various matters, the courts of the time performed the task of formulating the rules and they acted as an efficient machinery to implement what was promised in the great charter known as the Magna Carta. The then Courts of Common Law thus took upon themselves the task of enforcing the aspirations contained in the glorious instrument.

Though Magna Carta was the product of the 13th Century England, it was saved from oblivion by active judges of the Courts of Common Law. The need for imposing restraints on Royal power was felt more intensely during the Civil War of the Seventeenth Century. In a situation like this, Sir Edward Coke saved the spirit of Magna Carta from obscurity and associated the Latin phrase Nisi Per Legem Terrae by the phrase Due Process according to Common Law. In course of time, the phrase Due Process was developed and improved to the simple expression of ‘Due Process of Law’. In other words, the long phrase ‘Due Process according to Common Law’ was shortened to ‘Due Process of Law’. It was on the basis of this principle that Chief Justice Coke asserted the power of the Common Law Judges to enquire into the Acts of monarchs and Parliament.

 Appropriately the Magna Carta itself became the element of the rule of the earth where article 61 of that licence certified an eA chosen corpse of twenty tycoons by popular ballot that choose the answer that the ruler must offer in case of damage reasoned by him in any esteem against any personality. Hence, in England Magna Carta recognized the regulation of rule not only involves the kingdom to go after the rule of the earth, but also anticipatory how the kingdom can change the rule of the earth. Although, in the thirteenth century these circumstances may perhaps have been referring simply to the human privileges of owners, and not to the villagers or common peasantry.

Much later, it was the Parliament rather than the Courts which brought the Royal Power under control and established parliamentary sovereignty. The rights of the people have come to be protected by political institutions; there is of course the role of Common Law tradition, and a generalized sense of fair play. This particular change is noticed in the replacement of the phrase ‘due process of law’ by ‘law of the land’.

But the phrase Rule of Law has not silenced the voice of Due Process of Law and has not displaced it by a fresh regulation in general. The tradition of preventing arbitrary action and protecting the rights of the individuals has continued in its dormant form. The same system is characterized by the expression ‘act of land’.

The seventeenth as well as eighteenth decade thinkers like John Locke and Sir William Blackstone popularized the notion that the “rights of Englishmen” could be summed up in the words “life, liberty, and property.” The framers of the federal Constitution adopted the phrase ‘Due Process of Law’ as a way of
defending rights of the people to ‘life, liberty and property’ and thus paid homage to the Common Law tradition and maintained the greatness which the expression Due Process of Law enjoyed in the Common Law system all along.

British King then introduced shorter versions for Magna Carta and Clause 39 thereof was renumbered ". The expression ‘due process of law’ was firstly introduced or came into existence in A.D. 1354 in an essential rendition of Magna Carta throughout the supremacy of Edward III, as below:

"No man in whatever condition and from whatever state he is, shall not be thrown out of his lands or place of residence or disinherited, or place to demise, except struggle to response through due process of law."

In the year 1608, the term Magna Carta was argued in thesis written by the English jurist Edward Coke. Coke clarified that no human being shall be underprivileged however by the rule of the earth (legem terrae), i.e. "by way of the act rule, ordinary rule, or practice of England..., (that is, to speak it once and for all) all the way through owed, along with practice of rule....."

In the year 1704 (during the verdict of Queen Anne), both the articles specified in Magna Carta and the orders of 1354 were argued and specifically made clear again by the magistrates eminent as Queen's seat, in the case of Regina v. Paty. In the given casing, John Paty next to some previous confined were underprivileged to implement their right to ballot in an voting by the Home of ordinary, though had jailed them to Newgate Prison merely for captivating any lawful act alongside in the tribunal.

(b) The Concept of Law of the Land

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It is constrained, that by Magna Carta, no human being must be jailed or unavailable, apart from the rule of the earth. though to this I replied, that lex terrae is not reserved to the universal rule, other than takes in every other rules, which are passed in this territory; as the standard law and public law.... By the act of Edward Ed. 3, c. 3, there the phrase lex terrae, which are practical in Mag. Char. are clarified by the appearance, owed practice it means, that all circumstances of penalty should be by a lawfully recognized power.[8]

In this casing, Chief Justice Holt opposed as he supposed that the pledged had not in declaration been given by a lawful power. The Home of ordinary legislated freely, without taking any support of the Home of
rulers, in fact to manage and organize the voting of its connected associates. However the Queen's Seat supposed that the Home of ordinary had not intrude the distorted or exact owed practice, Queen Anne prorogued assembly and at last John Paty was release free.

(c) Salient Features of the Due Process Theory:

The significance of the first theory is that it is based on the principles of Natural Law and has a long chequered history starting with the Magna Carta of the 12th century AD. It was adopted by the United States of America and several other countries since it was Natural Law compliant and in the modern period it won the approval of any legal systems of the world.

The history of Due Process of Law bears evidence right from the early dayst hat the theory has figured in the system of criminal justice. John of England in article 39 of Magna Carta assure that the liberated human being shall not be trapped or jailed, held or striked out of their rights or ownership or still prohibited or underprivileged of his rank in any way, no power will be worn in excess of him yet throughout others, except simply during the legal opinion of his generation or by the rule of the earth."

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(d) English law and American law diverge

All the way through centuries of British olden times, numerous laws and treatise emphasized a various mandates as being component of comprises "rule of the property" otherwise "due process". The vision generally holds consideration question that what can be obligatory by present legislation, as what is fundamentally compulsory by the procedure of the due. However, as in Britain, the United States

Apex Tribunal gives the explanation about the a due process prerequisite did not do "necessary scheme of due process of law in the proceedings and sentence and penalty of offence, although simply alluded to of due process of rule as it essentially subsists in tribunal that it will be regularly employed."

Finally, in English law states that "due process of law" lacks the limitation and the authority and control of the administration; concerning this, American act by the professor John Orth noted down to facilitate "the immense expression disastrous towards the maintain the strength." As in England Orth make a mark states as to, usually authorized by the growth through the principle of legislative dominance and it shall also guided by opposition in the direction of legal review as an inequitable and undemocratic foreign creation.

Lord Coke's judgement has been interpreted by Intellectuals in Dr. Bonham's Trail says that it implements the judicial review, although through the 1870s, judicial review will began by the dismissed by Lord Campbell as "a stupid concept contended to have been practical applicable to unlawfully in Bonham's Case..., a conundrum [that] should be express amusement at."[14] Lacking the superiority of court reconsideration, English tribunal or forum had no options and ways to proclaim government decree or else acts obsolete as a contravention of due process.

As a result, American regulation along with the English regulation move away, through American legislators that does not have any way that can state legal cancellation of act erroneous (Through the one and only exemption of recommending a legitimate modification, that is unusually victorious)
Two comparable perceptions are mentioned in existing English act first the usual fairness that normally is implemented to the judgments of not to the public entities for instance trade unions. British constitutional concepts are regulation of act that is expressed by A. V. Dicey with others. On the other hand, the perception does not match completely by the American idea and notion outstanding procedure, which currently encloses the various implicit basic rights which are established under the modern or ancient perception about the due procedure in England.

(e) Division of the Theory of Due Process of Law

The twentieth century legal analysis divided the concept of due process of Law into substantive due process and procedural due process. Procedural due process insists upon the observance of proper procedure generally and authorizes the judges to fill the gaps left by express procedural guarantees. Substantive due process authorizes the judges to protect the non-procedural rights that are not expressly enumerated in the legal text.

In modern theory, substantive due process is further divided into economic due process, and non-economic due process. Economic due process is concerned with freedom of contract and non-economic or social substantive due process, in regard with the increasing number of legally protected civil liberties.

United States Constitutional amendments 5th and 14th each one encloses a Due Process section. Due process is subject to the supervision of fairness as in regard to the Due procedure section law is a protection through the arbitrary dissent of existence, freedom, or assets through the administration external the authorization of law.

The Apex Court in the US perceives the sections as given protections: due process of procedures, substantive due process, a prevention in opposition to act not clear, or the source of the integration related to the Bill of Rights.

Section II - Crime Control Theory

As against the Theory of Due Process of Law there emerged the Theory of Crime Control in a different context altogether which considered the interests of State as of primary concern and gave secondary
importance to the rights of the individuals. This particular theory was followed at the cost of sacrificing the rights and interests of the individuals at the altar of the State interests.

This particular theory was adopted by the authorities in England when the Star Chamber took charge of administering justice in regard to certain offences. Under this theory what were of primary importance were not given to the basic rights individual do have however the interests of the State for its own survival and for maintaining its own authority against everyone.

Although the Star Chamber was abolished the Theory of Crime Control survived in the form of arbitrary laws enacted in the name of State sovereignty. The laws so enacted by the legislative branch of the State are implemented by the Executive and are honoured by the judicial branch to overcome any threat to the existence of the state.

This is more particularly in the context of crimes relating to public safety, public order and public health. Laws on Crimes of this type are enacted and implemented by the organs functioning even at the international level; therefore we find laws enacted with regard to international crimes, international human trafficking, international currency trafficking etc. which follow the theory of crime control and ignore the basic attribute of the theory of Due Process of law. The net result of such a legislation at the national and international levels is that it has the tendency of causing a setback to the ancient principle of due process of law and affecting the system of criminal justice.

Section III – Developments at the international level concerning Due Process of Law

The Theory of Due Process of Law has since become a part of the International Human Rights law too. Various instruments adopted by the International Organizations and the Local Organizations require the principle of fairness to be followed in conducting the proceedings against individuals. When the United Nations introduced the concept of Human Rights and adopted the principle of Sovereign States being fair in administering justice to the people the standards of Due Process assumed international standards for the nations all over the world. The standards so set by the United Nations may be summarized as follows. Reference may be made to the following important instruments in this regard:-

1. The Universal Declaration of Human Rights, 1948 Recognises that in any of the point given in the Article10 to each person allows the complete right of fair as well as equal opportunity to a reasonable furthermore community trial through any of the self-governing plus neutral court, in the willpower of privileges as well as compulsion furthermore of some illegal lay blame on him’. The authority assumes the
blameless is handled in the Article 11 of the Universal Declaration.

2. The Worldwide convention for Social as well as Political Rights, 1966 lays down the rights of the individuals as international standards of Due Process which are relevant to administration of justice in civil and political matters.

The ICCPR is a bilateral truce assumed through the UN Common Assembly on Sixteen December 1966 and in use since 23 March in the year of 1976. It makes person or group of person dealing with to admiration the universal rights and political ones of individuals, including the right to life, religion, language, liberty of gathering, rights as well as privileges to due procedure as well as a justified examination. Till May 2013, this Covenant had been signed by participant and other related person.  

The ICCPR is ingredient of the worldwide declaration of individual Rights, alongside through the ICESCR along with UDHR.

The ICCPR is observed through the UN Human Rights board it examines the usual informations of state representive lying on the pattern of rights applied in the cases. The specific region has to maintained and submit a declaration primarily for the first year following consent to the agreement as well as afterwards at whatever time the board can call up for the particular declaration(generally each 4years). The board usually assemble in Geneva as well as usually conduct three meetings every year.

The ICCPR has its foundation in the same process that led to the Universal Declarataion of Human Rights. A "Declaration on the necessary Rights of Man" a proposa l had been made at the 1945 San Francisco Conference which was resposible for founding of the United Nations, and the Economic and Social Council was asked to draft it. Early on in the process, the document was split into a declaration setting forth gene ral principles of human rights, and a convention or covenant containing binding com mitments. The former evolved into the UDHR and was adopted on 10 December 1948.

Drafting continued on the convention, but the considerable difference between UN members on the importance of negative Civil and Political versus positive financial, societal as well as Ethical privileges. These eventually caused the convention to be split into two separate covenants, "a individual to enclosed social as well as political liberties plus some includes financial, societal and Ethical privileges."

The two covenants contained as many similar provisions as possible, and mad e available for
signature simultaneously. Each would also contain an article on the right of all peoples to self-determination.

The initial document became the worldwide agreement on financial, societal as well as Ethical privileges plus the second the worldwide agreement on Ethical as well as following privileges. The drafts were presented to the UN General Assembly for discussion in 1954, and adopted in 1966. As a result of diplomatic negotiations the International Agreement of financial, societal as well as Ethical privileges was assumed shortly before the International Covenant on Civil and Political Rights.

(ii) International Standards of Due process

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Article 9

1. Every individual is entitled to the right to freedom and safety of self. No person should be withdrawn from its rights and freedom apart from the basis as well as inside harmony through the trial recognized by act. And thus no person shall be arbitrarily detained or arrested.

2. Every individual at the time of arrest shall be promptly informed of the reason of his arrest and also about the charges against him.

3. Every individual who is arrested shall be produced in front of the adjudicator or any different authorized administrator for the Act to execute the legal authority without any undue delay and shall permit in favour of judicial proceeding inside a rational period or else to discharge. Anyhow that is not mandatory to always detain a person awaiting trial but he may release subject to his guarantee to appear for trial, different stages of proceedings and also if need arise at the implementation of decision.
4. Any individual which is deprived for the right to freedom because of detain otherwise detention should not have right that acquires proceedings in front of judiciary and the judiciary without undue delay shall determine lawfulness of his arrest and detention and if found unlawful, it shall order for his release.

5. Any individual who is subjected to illegal capture and imprisonment should comprise of applicable powers for reimbursement.

**Article 14**

1. In courts and tribunals each and every person shall be treated equally. In the fortitude of criminal accusation in opposition to him, or of his obligations and rights in a case at law, one and all should be allowed to a integrity, fair as well as public trial by an independent, competent and impartial court recognized under law.

The public and the press may be prohibited from all or else part of a judicial trial for the purpose of national security, public order (order public) or morals in a independent democratic and self-governing society, or at the time when the Interest of the personal lives of the parties so needs, or to the point at which it is strictly essential in the judgment of the tribunal in extraordinary situations where promotion would discriminate the interests of integrity and justice; however any decision made in a suit at law or in a criminal case ought to be made open to public apart from the cases where the interest of juvenile i.e. minor individuals or else involves or the procedures concern the guardianship of children or matrimonial disagreement.

2. According to law every person who is charged through an illegal criminal offence has the power and authority to be presumed guiltless i.e. innocent until and unless it is proved guilty.

3. Further, in the procedure of determination of any form of criminal allege or liability against him, every person shall ought to be allowed to the limited assurance, in complete fairness stated as under :

   (a) The person should be notified in detail and promptly in a verbal communication that is recognized as well as can communicate in the cause in addition to nature of incrimination in opposition to him;

   (b) Should be provided by sufficient facilities moreover period intended for training of his protection
furthermore to correspond through advisor of his personal wish;

(c) To settle the case and avoid to extreme stoppage;

(d) To protect or defend himself by the allegation in person or by any other legal assistance of his own choice; if a person does not have any legal assistance it should be informed about it and should be provided by giving the legal assistance. No matter if he cannot pay for legal assistance still he is provided with it for the interest of justice.

(e) To properly scrutinize, inspect or examined the witnesses in opposition to him also to acquire the examination and attendance of eyewitness relying on him in the similar circumstances as observer in opposition to defender;

(f) If a person cannot speak or understand the verbal communication used in court it can demand for free assistance of an interpreter;

(g) A person should not be obliged to admit guilt or else to testify against himself.

4. The modus operandi should be such as will take into account of their age and the desirability of sponsoring their rehabilitation, in the case of juvenile person.

5. According to law, each and every person criminal of an offence has the power to sentence and conviction being reconsidered by a superior court.

6. At the time an individual ultimate judgment has been found guilty of an illegal unlawful crime moreover while consequently an assurance were inverted otherwise the individual is to be excused on the view if fresh piece of evidence shows convincingly that there is an injustice, the individual has to undergone sentence as a consequence certainty could be remunerated as per the Act, except that was confirmed so as to the lack of expose the indefinite evidence in the point of time that is partly or else completely characteristic to that person.

7. No person must be held legally responsible to be punished or tried all over another time intended for a crime that has been previously acquitted or offender in agreement through punitive modus operandi as well as the act of every nation.
Article 15

1. Any individual should not be assumed responsible for any of the illegal crime if the act or omission does not represent under national or international law that the act committed is unlawful, illegal or criminal offence, at the point of time when individual has committed it. Even the penalty and punishment should be imposed same as the punishment were applicable during the time when the crime was committed. The offender shall gain benefits, if provisions under law are been reduced the penalty subsequently after the offence is conducted.

2. As per the universal ideology of regulation established through society of country, Any act or omission which was recognised as criminal offence at the time when it was performed by the offender, the trial and punishment of such person will be fair, integrity and justice under this article. Nothing can prejudice the proceeding of such suit.

This in short is the importance of Due Process in the view of the United Nations Organizations which the sovereign nations have to observe in the administration of criminal justice.