



## Due process of law in India and United States of America: Debates on theory and practice of laws

Shweta Sharma

Assistant Professor, Department of Political Science, Nalanda Mahila College, Biharsharif, Bihar, India

### Abstract

India has legacy of its institutional experiences from its past political systems. Indian political thinkers have commented on the political obedience India has shown towards various political systems like monarchy, colonialism and democracy but fortunately Post - independence period adopted democracy which has experiences of British colonial rule. Magna Carta 1215 gave direction to many countries of the world like United States of America India etc. to adopt Due process of law which lays the foundation of the principle of rule of law. Post colonial thinkers have drawn our attention towards the nature of law and order which India has adopted from British rule. Although India has established law and order system keeping rule of law in mind, there is still lacunae in practical application of laws which can be seen by the role by police in handling law and order in India. And similar experiences are shared by American political thinkers who comment that Due process of law adopted after Civil War in America is losing its meaning by the misuse of power at the hands of police. This reveals misuse of rule of law in US as well as India but also parliamentary interference into judicial matters. This happens because police is a state subject and has been given powers to control law and order by the state. Due to poor criminal justice system India fails to give real meaning to the due process of law which was adopted from British system. US multicultural society experiences population from Africa, Asia, Middle East etc. Most of the immigrants are facing fake encounters and cruelty through strict police investigations in the name of crime control in US. It needs to be checked and both societies must together as largest democracies of the world must re-interpret the Due Process of law.

**Keywords:** Due process of law, rule of law, British colonial rule, police misuse, criminal justice system

### Introduction

The Fourth and Fifteenth Amendment and insertion of the due process law to the Constitution of United States of America has given vast powers to the American judiciary over federal and state legislatures. Although the Constitution of India, 1950 does not explicitly mention the familiar constitutional expression of 'due process of law' in any part of it, there has been efforts made by the the Supreme Court of India in interpreting the two Articles of the Constitution, namely Articles 14 and 21 which makes due process of law visible in the Constitution of India. However both democratic societies somewhere face problems at the hands of state agencies e.g police violating the due process of law. and parliamentary control in maintaining law and order overlook Judicial supremacy. Hence it leads to the failure of Due process of law.

The history of democratic nations have witnessed the need for a Just society which can be expected only when there is a quality legal system in a country. Indeed the nation's quality of legal system is measured by its commitment to the rule of law, fairness of laws and respect for human rights<sup>[1]</sup>. One of the major reasons why institutions are compared cross nationally is to appropriate them or to adapt them to different contexts<sup>[2]</sup>. Analysing and borrowing institutions in the United States is at least as old as Madison's study and appropriation of Montesquieu is as new as recent efforts to adapt<sup>[3]</sup> administrative structures of other nations to American organisations of various kind. However Due process of Law is one such law which has proven its role in upholding rule of law to in American and Indian political systems.

Due process has ancient history which is traceable from the *Magna Carta*. *Magna Carta* was not a statute but was merely a personal treaty between King John and the enraged upper classes<sup>[4]</sup>. Section 39 of the *Magna Carta* of 1215 has led the foundation for the terminology of due process which runs as follows:

"No freeman shall be taken and imprisoned or diseased or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers and by the law of the land<sup>[5]</sup>."

Magna Carta of 1215 brought this law as a torchbearer for not just English society but also left its influence on various nations which made the constitution makers of especially United States of America as well as India implement Due process of law into their Constitutions.

Indian understanding of Due process of law suggests that the due process of law has strengthened procedure of law, but this is the half truth. Similarly commentators have underemphasised that due process has from the beginning been bound up with the division the authority to deprive subjects of life, liberty, or property between independent political institutions<sup>[6]</sup>.

### Comparing Due process laws in India and USA

Its meaning is derived from the word 'the law of the land used in the Section 39 of *Magna Carta* of 1215. A must respect all of the legal right that is owed to him or her is the the basis principle on which Due process of law works. Due process holds the government subservient to the law of the land and protects individuals from the excesses of state. It is either procedural or substantive.

The element of violation by a government gets involved when a person is harmed without following the exact course of the law. Then it constitutes a due process violation that goes against the rule of law. "It may involve the review of the general fairness of a procedure authorized by legislation. Substantive due process means the judicial determination of the compatibility of the substances of a law with the Constitution. The court is concerned with constitutionality of the underlying rule rather than the fairness of the process of the law. Therefore, every form of review other than that involving procedural due process is a form a substantive review."<sup>[7]</sup>

Indian Constitution advocates due process in India by 'procedure established by law' under Article 21 and its interactions with Articles 14, 19 and 21. In other form Indian constitution protects due process is by showing inter relationships among Articles 20, 21 and 22. Article 21 of the Constitution provides that: "No person shall be deprived of his life or personal liberty except according to procedure established by law". Constituent Assembly Debates on Draft Article 15 acted as a catalyst and with such willingness amendments was moved over the Article 15 and article 15 became article 21. Efforts of Kazi Syed Karimuddin, a Constituent Assembly member contented that if the words 'according to procedure established by law' are retained it would open a sad chapter in the history of constitutional law. The Advisory Committee on Fundamental Rights appointed by the Constituent Assembly had endorsed Kazi Sayed Karimuddin's opinion by suggesting that no person shall be deprived of his life or liberty without due process of law<sup>[8]</sup>. Words 'except according to procedure established by law' got replaced by words 'without due process of law'. Dr. B.R. Ambedkar also opined that due process of law show relation between Judiciary and legislature.

As far as judicial interpretation of the expression 'procedure established by law', it is understood that it is procedure laid down by statute or procedure prescribed by the law of the state. But these hard earned efforts could not harness much output in present post - independence period. Due poor criminal justice system Indian understanding of Due process of law faces lots of challenges in the form of draconian laws like Preventive Detention laws. 'without due process of law' have been derived from the American Constitution and they have come to acquire a strong connotation. Though B.N. Rao, the Constitutional Advisor to the Constituent Assembly did not believe in adopting American concept of without due process of law, with years have tested times since past till present. Still common mass hold faith on Judiciary. There is utter need to control parliamentary legislations when it comes to protect life, liberty and property of people.

Ryan William argues that historical evidence. argues that Founding thought that due process applied to the legislature, but between the Founding and the Civil War developed a version of "substantive due process. He concludes that the original understanding of Amendment did not have a "substantive due process" component to the original understanding of the Fourteenth. This intriguing possibility that, as a matter of original understanding, due process is legitimate as applied to state but not to federal understanding<sup>[9]</sup>.

There is a problem in practical applications in this law. However it is the responsibility of the state to make this law happen with the ultimate protection of individual rights of life, liberty and property.

## Conclusion

Democratic nations at present are experiencing various trajectories coming in this challenging era. Laws meant to be protecting life, liberty and property are harnessing benefits to elite sections of society. Money and muscle power is restricting the real meaning of laws. Laws are protecting few influencing sections of society. Due process of law is violated in the name of constitutional amendments to favour a few. Police as a state agency is one such state body which spreads political violence by manipulating laws. There are various practical problems on ground level which cannot be the orised and protect ted in the name of Rule of law. Hence, one can say there is utter need to reinterpret the constitutional provisions and improve our criminal justice system. India and United States of America both face this problem of violation of Rule of laws at the hands of state agencies. Research is a tool to reach out to various aspects of society in bringing changes as well as providing betterment through developmental agendas by influencing policy making. Hence, the argument and debates discussed in the proposal highlights the problems existing in India and United States of America. Both being democratic nations will together try to find common solutions to the problems existing with the Due process of law. It is the need of the hour to raise questions over these issues. Hence a high quality research would definitely bring the real meaning of just laws into practice.

## References

1. Hawaldar AH. Evolution of Due Process in India, Bharati Law Review, India, 2014, 107.
2. Fairchild, Erika S., National Culture and Police Organization in Germany and the United States, Public Administration Review, Wiley on behalf of the American Society for Public Administration, Sep. - Oct., 1989:49(5):454.
3. Ibid.
4. Mott, Due Process of Law 4 (New York: Da Capo Press 1973) in Hawaldar, A.H., Evolution of Due Process In India, Bharati Law Review, Oct., 2014, 108.
5. Ibid.
6. Chapman, Nathan S. And McConnell Michael W., Due Process as Separation of Powers, The Yale Law Journal, The Yale Law Journal Company, Inc., 2012:21(7):1681.
7. Hawaldar, A.H., Evolution of Due Process in India, Bharati Law Review, Oct. - Dec., India, 2014, 109.
8. Ibid.
9. Ryan C. Williams, The One and Only Substantive Due Process Clause, 120 Yale L (2010).