DUE PROCESS OF LAW – WITH SPECIAL REFERENCE TO ARTICLE 21 OF THE INDIAN CONSTITUTION

Author - Dr. A. H. HAWALDAR

PRINCIPAL, RAJA LAKHAMGOUDA LAW COLLEGE, BELAGAVI – 590006

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Introduction

Law is one of the great civilizing forces in human society, and that the growth of civilization has generally been linked with the gradual development of system of legal rules together with machinery for their regular and effective enforcement. Man is rational and would like to live in the society as social being. State and law are essential conditions to have peaceful and organized society. Therefore whatever may be imperfections and flaws in the law, the law is indispensable. Most of the Democratic Constitutions have been drafted on the principles of Rule of Law and respect for human rights. Rule of Law embodies the doctrine of supremacy of law. As expounded by Dicey, Rule of Law envisages "the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power and excludes the existence of arbitrariness of prerogative, or even wide discretionary authority on the part of government."[1] The necessary element of rule of law is that the law must not be arbitrary or irrational and it must satisfy the test of reason.[2] One of the important components of rule of law is the doctrine of due process of common law and fifth and fourteenth Amendment of United States Constitution. The ultimate goal of a legal system is the realization of justice or freedom, which is long and complicated, which plays a vital role in society. Plato and Marx have urged that law is an evil thing which mankind would do well to rid itself.[3]

Historical Perspective of Due Process

Rule of law is the unique characteristic of the English Constitution which suggests that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In other words, the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint.[4] Dicey's rule of law is nothing but the due process of a law which has emerged from the customary rules of common law. Due process has ancient history which is traceable to the *Magna Carta*. During the 13th century there was struggle between the barons and the King of the England which led to issue of *Magna Carta* of 1215. *Magna Carta* was not a statute but was merely a personal treaty between King John of England and the enraged upper classes.[5]

The Charter of 1215 had contained sixty three chapters which granted feudal rights to barons of Runnymede and Section 39 had used the words with 'law of the land.' There was no unanimous among the historians in respect of the words used in the Section 39 of the *Magna Carta*.[6] However Mott has quoted the Section 39 of *Magna Carta* of 1215 which has laid the foundation for the terminology of Due Process in the following manner:

> "No freeman shall be taken and imprisoned or disseized or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his pears and by the law of the land."

The terminology, 'law of the land' used in the Section 39 of *Magna Carta* is replaced by the word "due process of law" in the 1354 Charter re-issued by King Edward III. *Magna Carta* was successively reissued by the Monarchy of British.[7] Henry III who re-issued the Charter 1216 of *Magna Carta* reduced the chapters from sixty three to thirty nine and clause related to *per legem terrae* shifted from the Section 39 to 29 which was commonly referred in the later writings even including Sir Edward Coke in the seventeenth century.[8] King Edward III who re-issued *Magna Carta* in 1354 officially used the word "Due Process of law."[9]

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[1] A.V. Dicey, *Introduction to the study of the Law of Constitution,* 3rd edn., (London: Macmillan and Co, 1889), p.181.
[2] *Bachan Singh* v. *State of Punjab*, AIR 1980 SC 898.
[3] Dennis Lloyod, *The Idea of Law,* (Landon: Penguin Books, 1991), p.7.
[4] *Supra* note 2, p.110.
[5] Rodney Mott, *Due Process of Law*, (New York: DA CAPO PRESS., 1973), p. 4.
[6] Mott has quoted the different version of section 39 of *Magna Carta* given by Barrington which stated that "No free-man's body shall be taken or imprisoned, nor disseized, nor outlawed, nor banished, nor any way damaged, nor shall the King send him to prison by force excepting by Judgment of his peers and by the law of land." Further Mott comments that wordings of section 39 were differed in the Law of Henry. See, Rodney L. Mott, *Due Process of Law*, (New York:DA CAPO PRESS,1973), pp. 2-3.
[7] King Henry III reaffirmed the Charter in 1216 which was the first reaffirmation among the thirty reissues of the Charter by the successive British Monarchy during the 14th and 15th century. See, Charles Miller, "The forest of Due Process of law: The American Constitutional Tradition", in NOMOS XVIII, *Due Process*, Roland Pennock and Johan Chapman, (ed.), (New York: New York University Press, 1977), p.5.
[8] Ivor Jennings, "*Magna Carta and Constitutionalism in the Commonwealth*," in, *The Great Charter*, William Dunham, *et al.,* (ed.), (New York: Pantheon Books, 1965), p. 75.
[9] Statute 28 of Edward III stated that "That no man of what estate or condition that he be, shall be put out of land or Tenement, nor taken, nor imprisoned, nor deinherited, nor put to Death, without being bought to Answer by Due Process of the Law." This statute is called as "the statute of Westminster of the Liberties of London. See, Rodney L. Mott, *Due Process of Law*, (New York: DA CAPO PRESS,1973), p. 4.

Magna Carta becomes the basic symbol of British Constitutionalism which was originally applied to the free barons against Monarchy but later it was applied to every Englishman.

The United States of America adopted its Constitution on September 17, 1787 which contained no Article guaranteeing the due process of law to its subjects. However, under the leadership of James Madison twelve proposals were passed for Amendments to Constitution in 1789 but only ten Amendments were ratified by States in December 1791 which are known as Bill of Rights. The Fifth Amendment contains the clause of due process of law. (V Amendment of US Constitution states that "No person shall … be deprived of life, liberty, or property, without due process of law …") The new Federal Government was constituted under the American Constitution which was not having any clause in respect of human right which can limit the power of Federal Government.

Therefore, drafter of the Bill of Rights was designed the amendments as check on the new national Federal Government. Obviously the Supreme Court of USA has held that Bill of Rights historically applicable to newly formed Federal Government but not to state legislatures.[10] Therefore, the Fourteenth Amendment of US Constitution which contained due process clause is made applicable to states legislature. (Section 1 of XIV Amendment of US Constitution states that "… No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of United States, nor shall any State deprive any person of life, liberty, or property, without due process of law ….")

Due Process of Law – Meaning and Kinds

It is very difficult to provide complete definition and meaning of 'due process of law' because it's meaning and scope is far from settled in spite of the great amount of research that has been made by various authors. The word 'due process of law' is ambiguous and has been interpreted and reinterpreted by the courts in different sense under different circumstances at different points of time. Due process unlike some legal rules is not a technical conception with a fixed content unrelated to time, place and circumstances.[11] So, the content and meaning of due process is much related to time, territory, the nature of legislation and nature of right to be deprived.

The Due Process is a legal principle which has been shaped and developed through the process of applying and interpreting written Constitution of America. Due procedure seems to be a right to a procedure, a right to have one's treatment determined according to some prescribed method and the moral basis of such legal or constitutional right which is rested upon the idea that citizens have a right to be treated justly. The concept of due process provides criteria for assessing the justice of procedure. Rodney Mott has viewed the due process as a specific prohibition aimed at a specific abuse.

Due Process of law balances the interest of individual rights and power of state to regulate such rights. Due Process in question is historically sanctioned, or even that it also be fair, it must also be a legal process, one that confirm to the ideal of law, government by rules, and non-arbitrariness.[12] The right to due process is a principle rather than a right; a principle which is used to generate a number of specific rights, procedure and practice. This principle is grounded in a common and public sense of justice which itself is open to philosophic reflection and analysis.[13] Story, J., said "when life and liberty are in question there must, in every instance be judicial proceedings and that requirement implies an accusation, a hearing before an impartial tribunal and with proper jurisdiction and a conviction and judgment before the punishment can be inflicted."[14] Due Process ideas evolved both in and out of courts and are fused into new ideology of higher law. The due process phrase, which had sprung from and had usually, been considered in the context of specific legal rights, acquired philosophical force.[15]

It is the judiciary not the legislators who are empowered by due process clause to decide whether law enacted by the State is fundamentally fair, in accordance with the Constitution and the principles of due process. The word "due" in America has been interpreted as 'reasonable', 'just', and 'proper.'[16] Supreme Court of America first examined the meaning of due process in *Lessee v. Hoboken Land & Improvement Co*.[17] Benjamin, J., *per curium* stated that the phrase 'due process of law' were undoubtedly intended to convey the same meaning of as the words 'by the law of the land' used in *Magna Carta*. Honorable judge further noted that:

> [A]lthough the Constitution did not define 'due process of law,' provided no description of those process which are intended or forbidden and did not declare the principles to be applied: It is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process "due process" by its mere will . . . We must examine the Constitution . . . to see whether this process be in conflict with any of its provision.

Frankfurter, J., had provided a very comprehensive analysis of due process which is as under:

> "Due process" unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstance. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and

[10] *Barron* v. *The Mayor and City Council of Baltimore*, 32 US (7 Pet) 243 (1833).
[11] Durga Das Basu, *Constitution of India*, 8th edn., Vol. 3, (Nagpur: LexisNexis Butterworths Wadhwa, 2009), p. 3084.
[12] Ronald Pennock, *"Introduction"*, in, Nomo's XVIII *Due Process*, (ed.) Roland Pennock and Johan Chapman, (New York: New York University Press, 1977), p.xvi.
[13] David Resnic , *"*Due Process and Procedural Justice*",* in, Nomo's XVIII *Due Process*, (ed.) Roland Pennock and Johan Chapman, (New York: New York University Press, 1977), p.208.
[14] Fraklin Russel, "Due Process of Law", available at http//www.jstor.org/stable/782385. Accessed on June 25, 2013.
[15] Charles Miller, "The Forest of Due Process of Law": The American Constitutional Traditions, in, Nomo's XVIII *Due Process*, (ed.) Roland Pennock and Johan Chapman, (New York: New York University Press, 1977), p.14.
[16] M.P. Jain, *Indian Constitutional Law*, 5th edn., (Nagpur: LexisNexis Butterworths Wadhwa, 2005), p.1080.
[17] 59 U.S. 272 (1856)

> civilization. "Due process" cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between the individual and government, "due process" is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we prefer.[18]

Kinds of Due Process

i. Procedural Due process

American legal system has divided the due process into 'Substantive due process' and 'Procedural due process.' Whenever judiciary adjudicates the matter related to the fairness of procedure of law is called the procedural due process. Procedural due process protects the individual that process adopted by the state to deprive the rights of individual should be fair and non-arbitrary.

Procedural due process is limited in scope. Procedural due process only guarantees that there is a fair decision making process by State. In general procedural due process means that in dealing with individuals, the Government must proceed with 'settled usages and modes of procedure', *e.g.*, that there should be no conviction without hearing.[19] This kind of due process clause does not protect against the use of unjust laws on which the decision of state is based. It only ensures that process of decision making should be just. However it does no ensure that ultimate law on which process of decision is based upon need not be just.[20]

ii. **Substantive Due Process**

Substantive due process ensures that government power of law making must be compatible with constitutional spirit. Under due process of law, the Court determines the justness of substance of law. Therefore every form of review other than involving procedural due process is a form of substantive due process. In a democratic country judicial review of legislations is always considered to be fundamental to legal system.[21]

Judicial review of the legislation under the specific provision or Amendment of the Constitution is not subject matter of debate because Constitution provides specific indication through specific language that certain subject matter of legislation is beyond the power of the legislator or executive. But the court's ability to determine constitutionality of legislation under the due process of law has been subject matter of heavy debate and criticism. The court employs due process clause to control the substance of legislation that certain subject matter of legislation is beyond any proper sphere of government activity. In nutshell, it means that certain legislations are incompatible with democratic system of government and individual liberty. Thus, the court opinion is based upon the premises that any deprivation of life, liberty and property without due process of law is never granted by the Constitution.

Due Process in England

In England the due process of law is mainly referred to the procedural due process rather than substantive. Section 39 of *Magna Carta* of 1215 gave protection to the free barons that they will not be imprisoned by the King except by the law of the land. The nature of Section 39 of 1215 charter was understood in three senses. First, it was aimed at specific prohibition of specific abuse. Second, that specific abuse which Section wanted to curb is that of execution before judgment. Third, the law of the land is quite generally understood in the sense of legality. However the 'law of the land' was replaced by the 'due process of law' in the charter of 1354 by King Edward III which widens the scope of due process. Moreover the protection of due process which was provided to only 'free men' is made available to every man.'[22] The 'law of the land' was capable of conveying the meaning of the positive law. It means that procedure prescribed by the King through law. But it was held that the law of the land meant to be customary laws of the Kingdom.[23]

During the medieval period in England due process was very much related to the procedure of imposition of fines, seizing of land, forfeiture or outlawry. By the end of fifteenth century, it was firmly established in England that no one should lose neither his life nor property without regular trial before the impartial tribunal according to the law of the land which is considered to be greatest contribution of due process of common law to the criminal jurisprudence. The word 'due process of law' used in the Charter 1354 issued by King Edward III constrained even the courts also. Further the due process's scope is wider than law of the land because it does not assure guaranteed a particular procedure but rather the procedure due to according to situation and circumstances. Thus, due process of law in England meant to be a regular procedure for summoning people to trial and adjudicating their liability.

The due process of law in England has not become subject matter of debate among the judges, academicians and politicians because it is very much related procedural due process rather than substantive due process. In British's legal system, due process of law does not put restraint on legislative function of Parliament. In *Dr. Bonham's case,*[24] Sir Edward Coke, who was Chief Justice of the Court of Common Pleas declared, "that in many cases, the common law will control Acts of Parliament,

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[18] *Joint Anti- Fascist Refugee Committee* v. *McGrath,* 341 US 123 (1951).
[19] Acharya Dr. Durga Das Basu, *Commentary on the Constitution of India*, 8th edn., Vol. 3, (Nagpur: LexisNexes Butterworths Wadhwa, 2008), p. 3084.
[20] Johan Nowak, *et al., Constitutional Law*, (St. Paul Minnesota: St. Paul Minn. West Publishing Co. 1978), p.381.
[21] *Keshavananda Bharati* v. *State of Kerala*, AIR 1973 SC 1461.
[22] Edward III made changes to *Magna Carta* that this protection should apply to every 'man of what estate or condition that he be.' Even certain of the American States before the civil war had applied due process protection only to the free man but not to the black slaves. However the Thirteenth and Fourteenth Amendment of US Constitution removed that discrimination. See Mott, *Due Process of Law*, (New York, DA CAPO PRESS, 1973), p. 37.
[23] Joseph Story, *Commentaries on the Constitution of the United States*, Ronald & John Nowak, (ed.), (New York: Carolina Academic Press 1987), p.923.
[24] 8 Co. Rep. 114a, 77 Eng. Rep. 646 (C.P. 1610).

and sometimes adjudge them to be utterly void."[25] Even Rodney Mott had said that there were a considerable number of acts, awards, etc., which were declared void as being against *Magna Carta* or the Fundamental Law. The British Parliament is supreme and judiciary does not enjoy the power of *ultra vires* of legislation. The English attitude towards Parliament is explained by Blackstone as follows,

> [The British Parliament] "... has sovereign and uncontrollable authority in making, confirming, enlarging, restraining, abrogating, repealing, reviving and expounding of laws concerning matters of all possible denominations.'[26]

Nevertheless, the opinion of Sir Edward Coke was short lived. Captain Johan Streater who had been imprisoned by the order of Parliament, pleaded that his imprisonment was illegal because it is contrary to the Law of the Land. The Court answered that it must bow to legislative supremacy.[27] Even Walter Bagehot, the famous British economist and journalist, has commented that "there is nothing the British Parliament cannot do except transforms a man into a woman and woman into a man."[28]

The *Human Rights Act,* 1998 empowers Court to interpret other legislation with compatibility of human rights. However, if the legislation is incompatibility with Human Rights, it can declare legislation is incompatible but cannot invalidate the legislation.[29] It means supremacy of the Parliament of U.K. kept intact even in 21st Century.

Due Process in United States of America

America's independence is considered to be a symbol of victory for civil and political rights of human beings. But irony is that the federal Constitution of United States of America as first adopted did not contain due process clause. Nevertheless that important omission was rectified in the year 1791 by the Fifth Amendment. But eight States of America had already contained the due process clause in their Constitution before the adoption of Fifth Amendment of the federal Constitution.[30] However, the Fifth Amendment did not apply to states. Therefore, the Fourteenth Amendment of USA Constitution obligated the states to adopt due process clause.

Further, American Constitution is highly influenced by the Locke's philosophy of Natural Rights.[31]

Locke said, "The great and chief end … of men uniting into commonwealth, and putting themselves under governments, is the preservation of their property." He use the preservation of property in the broader sense as common good. "The power of the society or legislative constituted by them can never be supposed to extend farther than the common good"[32] Mr. Madison who was the father of the American Constitution in drafting and introducing the Bill of Rights had reasoned that restriction in the form of due process is necessary not only on the executive but also on the legislative power of federal government. Thus the due process provision is intended to serve as a general limitation on tyranny of any kind of government is undisputable.

Two fundamental differences exist between the due process clause of USA and England. Unlike in England, due process in USA puts limitation not only on executive but even on the legislative power of state. It was argued that due process requires only that the process be in conformity with statutes enacted by legislative bodies and put no restrictions on legislative power. However, the Supreme Court of United State of America rebutted the argument and held that:

> "That the warrant now in question is legal process is not denied. It is issued in conformity with an Act of Congress. But is it 'due process of law'? The Constitution contained no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to legislative power to enact any process which might be devised. The article is restrain on the legislative as well as on the executive and judicial powers of the government, and cannot be constrained as to leave Congress free to make any process 'due process' by its mere will."[33]

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[25] Lowell Howe, *The Meaning of "Due Process of Law"* Prior to the Amendment of the Fourteenth Amendment, 18 *Cal. L. Rev.* (1930). p, 583. Available at:http//scholarship.law. barkeley.edu/ Californiala review /vol18/iss6/1., Accessed, on March 17, 2013.

[26] Blackstone, *Commentaries.*

[27] The charge against streater was "publishing seditious phamplates against the State" he argued that Parliament could not make such law as the law of the land. Justice Garmond and Nichols refused to listen to his argument and dismissed it summarily with the remark: "If the Parliament should do one thing, and we do the contrary here things would run round." It is very evident that the whole trial was entirely political in nature and that there was determination to keep Streator in prison to prevent his spreading propagandas against the revolution. As soon as Parliament was dissolved, he was released without trial. See, Rodney L. Mott, *Due Process of Law*, (New York: DA CAPO PRESS,1973), p. 44.

[28] Henry J. Abraham, *The Judicial Process*, 4th edn., (New York: Oxford University Press,1980), p.311.

[29] Section 4 authorizes the Court to declare any legislation as incompatible if it is inconsistent with *Human Rights Act,* 1998. However, section 3 (2) does not empower the court to declare such incompatible legislation null and void.

[30] These were: Maryland (1776) Article XXI, Pennsylvania (1776) Article VIII, North Carolina (1776) Article XII, Virginia (1776) Article VIII, New York (1777) Article XIII, South Carolina (1778) Article XLI, Massachusetts (1780) Article XV, and New Hampshire (1784) Article XV.

[31] Great political philosopher Locke who propagated the idea that person's "Property Rights" were inalienable and cannot be deprived by the government without the consent of the person. The property rights are the gift of nature, therefore government should make effort to promote property rights rather than its restriction and destruction. The concept of "Property Right" includes life, liberty and property. See, Edgar Bodenheimer, *Jurisprudence*, (Delhi: Universal Law Publishing Co.Pvt.Ltd, 2001) .p.50

[32] Edgar Bodenheimer, *Jurisprudence.* (Delhi: Universal Law Publishing Co. Pvt. Ltd., 2001), p.8.

[33] Facts of the case are, an auditor for the federal treasury found that a collector of the customs for the port of New York owed over a million dollars to the government. The solicitor of the treasury issued a distress warrant as authorized by federal statute, which placed a lien on the collector's property. The collector was not provided the opportunity of being heard, when the property was sold to satisfy the obligation. *Murray's Lessee* v. *Hoboken Land & Improvement Co.* (1855) 59 US (18 How.) 272 at 276.

Further due process concept in USA is interpreted in such sense that it puts limitation upon the legislative powers which are not explicitly enumerated in the Constitution.[34]

Due Process in India

The expression 'due process of law' is not used in any provisions of the Indian Constitution. However, the due process can be inferred through the Articles 14, 19, 20, 21 and 22 together. The judiciary has played a creative role in this regard. It has interpreted the 'procedure established by law' in Art.21 to be equivalent of the 'due process of law.' Article 21 in its draft form was Article 15. It provided that "No person shall be deprived of his life or liberty without the due process of law."[35]

But the Drafting Committee at a latter stage proposed the substitution of the expression *"except according to procedure established by law"* for the words "without due process of law." The Drafting Committee justified the amendment because the word due process gives scope for judicial supremacy to determine the content of law which is likely to create confusion and hurdles in the social transformation. Their view was based upon the experience of due process in American legal system. Frankfurter, J., of the United States Supreme Court had expressed that due process clause is undemocratic and burdensome to the judiciary, because it empowered judges to invalidate the legislation enacted by democratic majorities.[36]

The Supreme Court of India in *A.K. Goplan v. Union of India,* held that Article 21 is complete code; procedure established by law need not comply with the principle of natural justice and reasonableness under Article 19.[37] Court decisively rejected the application of due process of law under Article 21 pointing out that as long as a person was detained according procedure established by law, he could not challenge his detention. However the attitude of judiciary gradually shifted from the procedure established by law to procedural due process. The 11 judges bench of Supreme Court in *Bank Nationalization*[38] overruled the view of *Goplan* and opined that each fundamental right is not complete code but interdependent which laid the foundation for due process clause in the Indian legal system.

The 24th and 25th Amendments of the Constitution were adopted by the Parliament with an object to nullify the decision of the Supreme Court given in the *Bank Nationalization* cases respectively. Further the Parliament Amended Articles 13 and 368 gave unlimited power to Parliament to amend, add, vary or repeal any Article of the Constitution which established omnipotent Parliament that is based upon the philosophy of Austin's unlimited sovereign. The worst was insertion of Article 31-C in the Constitution which empowered the Parliament to enact a law with mere declaration that it would give effect to Directive Principles of State Policy, which will insulate that law from judicial scrutiny. Such law would not be challenged on the ground that it would infringe the fundamental rights. The writing was clearly on the wall to the Supreme Court that Parliament was supreme and could do what it wanted. Indeed these amendments destroyed the separation of power and made the judicial review is mere illusory and myth.[39] Even though 13 judges Bench of the Supreme Court in *Kesavananda Bharati* upheld these amendments, it laid down the basic structure theory.[40] Parliament's power to amend the Constitution is permissible to any extent with only limitation of not violating its "basic structure."

The *Menaka Gandhi*[41] is now accepted as the starting point of the introduction of due process clause in India after incorporating the concept of non-arbitrariness articulated in *Royappa*[42] under Article 21. The Court held that it was axiomatic that a law prescribing a procedure for deprivation of life and personal liberty under Article 21 could not be any sort of procedure but it has to be one that is neither arbitrary nor unfair or unreasonable.[43] Justice Bhagawati observed:

> "A law depriving a person of personal liberty and prescribing a procedure for that purpose within the meaning of Article 21 has to stand a test of one or more of the fundamental rights conferred under Article 19 which may be applicable in a given situation. *Ex-hypothesi* it must also be likely to be tested with reference to Article 14. On principle, the concept of reasonableness must, therefore, be projected in the procedure contemplated by Article 21 having regard to the impact of Article 14 on Article 21."[44]

Further the Supreme Court observed that:

> "The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness, pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be "right and just and fair" and not arbitrary, fanciful or oppressive: otherwise it would be no procedure at all and the requirement of Article 21 would not be satisfied."[45]

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[34] http//scholarship.law.barkeley.edu/californialawreview/vol18/iss6/1. Accessed on March 17, 2013.
[35] H.M., Seervai, *Constitutional Law of India*, 4th edn. Vol. 2, (New Delhi: Universal Law Publishing Co. Pvt. Ltd. 2010), p.970.
[36] B.N. Rao had met Justice Felix Frankfurter of the United States Supreme Court for advice in the drafting of the Indian Constitution. Frankfurter told him that he considered the power of judicial review implied in the due process clause both undemocratic – because a few judges could negate legislation enacted by the representatives of a nation and also burdensome to the judiciary. See, Granville Austin, *The Indian Constitution Cornerstone of a Nation*, (New Delhi: Oxford University Press,2010), p103.
[37] *A.K. Goplan* v. *Union of India,* AIR 1950 SC 27.
[38] *Rustom Cavasjee Cooper* v. *Union of India,* (Bank of Nationalization), (1970), 1 SCC 248, 1970 AIR 1970 SC 564.
[39] Abhinav Chandrachud, *Due Process of Law*, (Lucknow: Eastern Book Company, 2012), p. xxxvii.
[40] *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225, AIR 1973 SC 1461.
[41] *Maneka Gandhi* v. *Union of India*, AIR 1978 597; (1978) 1 SCC 248.
[42] *E.P. Royappa* v. *State of T.N.*, (1974) 4 SCC 3; AIR 1974 SC 555.
[43] *Kartar Singh* v. *State of Punjab*, (1994) 2 SCR 375.
[44] (1978) 1 SCC 248 at 252.
[45] *Ibid* at 284.

Thus, Court interpreted that "procedure established by law" meant to be "due process of law" which is emphatically rejected the theory of original intent and embraced a more generic and contemporaneous value of Indian Constitution.[46] In *Sunil Batra v. Delhi Administration,* Krishna Iyer J. explicitly conceded the presence of due process clause as under:

> "[T]rue our Constitution has no 'due process' clause but in this branch of law, after *Cooper* and *Maneka Gandhi*, the consequence is the same.[47]

Procedural prescriptions of Due Process

Due process is considered to be limitation on the enactment of special laws because it makes arbitrary classification of subject that is unacceptable and it is slowly gained the ground in the legal system.80 Indian Constitution drafter had specifically enumerated the doctrine of equality in the Constitution because there should not be any kind of confusion and uncertainty of equality. Moreover, makers of Indian Constitution have not used the word "due process" in the Constitution. Further, it has been held that any law which gives unguided arbitrary power to the executive is likely to be abused by the executive by discriminating one person against another offends the doctrine of equality.[48]

Thus, in India due process concept can be perceived under the theory of basic structure, doctrine of non-arbitrariness under Article 14 and 'just, fair and reasonable' requirement of Article 21. Even Articles 19 (2) to (6), 20, and 22 also insulate the content of due process in the Indian legal system.

Due process holds the government subservient to law of the land and protects individuals from the state. The due process is a command that the government shall not be unfair to the people. Procedural due process determines whether government has taken an individual's life, and liberty without the fair procedure required by the statute. Various Nations have recognized some form of due process under their legal system but specifics are often unclear. The process of government, which deprives a person's life and liberty, must comply with the due process clause.

Largely the following ingredients are considered as part of due process, both substantive and procedural in respect of civil and criminal justice system.

a) Adversary process is fair method to adjudicate the civil dispute and criminal trial of accused.

b) Adequate notice of charges to the accused.[49]

c) Neutral or impartial Judges of Court or Tribunal.[50]

d) Accused is presumed to be innocent until the prosecution proves his guilt beyond reasonable doubt.[51]

e) Right to Jury Trial.[52]

f) Right to speedy and public trial.[53]

g) An opportunity to make oral representation before the Judges or Jury.

h) An opportunity to present evidence or witness.

i) Right to confront and cross-examine the witness.[54]

j) Right to compulsory process of witnesses.[55]

k) Right to pre-trial discovery of evidence.[56]

l) Right to transcript of the proceedings in the language of accused.

m) Right to be represented by an Attorney of an accused's choice.[57]

n) Right not to deny the excessive bail and punishment shall not be cruel.[58]

o) No accused shall be a witness against himself.[59]

p) Right not to be punished twice for the same offence.[60]

q) *Ex post facto* law. Retrospective effect of criminal law.[61]

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[46] Abhinav Chandrachud, *Due Process of Law*, (Lucknow: Eastern Book Company, 2012), p. xxxix.
[47] (1979) 1 SCR 392 at 428.
[48] *E.P. Royappa* v. *State of T.N.*, (1974) 4 SCC 3; AIR 1974 SC 555.
[49] VI Amendment of USA Constitution.
[50] *Ibid*
[51] *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975).
[52] V Amendment of USA Constitution. *Duncan* v. *Louisiana,* 391 U.S. 145(1968).
[53] See, VI Amendment of USA Constitution. *Klopfer* v. *North Carolina*, 386 U.S. 213 (1967).
[54] See, VI Amendment of USA Constitution. *Pointer* v. *Texas* 380 U.S. 400 (1965).
[55] See, VI Amendment of USA Constitution. *Washington* v. *Texas*, 388 U.S. 14 (1967).
[56] *Jencks* v. *United States*, 353 U.S. 657 (1957).
[57] See, VI Amendment of USA Constitution. *Powell* v. *Alabama*, 287 U.S. 45 (1932).
[58] See. VIII Amendment of USA Constitution.
[59] See, V Amendment of USA Constitution. *Malloy* v. *Hogan*, 378 U.S. 1 (1964). *Miranda* v. *Arizona*, 384 U.S. 694 (1966).
[60] See, V Amendment of USA Constitution. *Benton v. Maryland,* 395 U.S. 784 (1969).
[61] See, Section 9 and 10 of Article 1 of USA Constitution. *Lindsey* v. *Washington*, 301 U.S. 397 (1937).

r) Decision of Court must be supported by the reasons, i.e. speaking order.

s) Right to appeal against the error of judgment.

Indian legal system is akin to the American system except jury system. Even though the Indian Constitution does not explicitly uses the word due process but through certain Articles and judicial interpretation has been made due process is integral part of Indian legal system. India also follows the adversary judicial system to adjudicate the civil dispute and criminal trial.[62]

Further the accused has the right not to be held criminally liable unless it is offence at the time of committing act and not to be punished more than what is prescribed at the time of commission of the act. This is known as protection against *Ex Post Facto* Law.[63] Accused has right not be punished twice for the same offence and he cannot be compelled to give evidence against himself.[64] Accused has right to know his arrest and reason for his arrest.[65] Further accused has right to speedy trial,[66] right to be defended by lawyer of his own choice,[67]right to bail,[68]right to be presumed to be innocent and prosecution should prove the guilt of the accused beyond reasonable doubt.[69] Further the trial of accused should be held open and in public place.[70] Accused has right to be heard,[71] by the independent and impartial Tribunal, right to appeal,[72] and accuse has one more right that the punishment awarded by court should not be excessive.[73] The certain ingredients of these rights are discussed in detail.

i. Adversary Judicial System

The adversarial system of law is the system of law, generally adopted in common law countries. This system relies on the skills of each adovacate representing party's position and involves impartial person to adjudicate the matter of litigation. The system followed in India for dispensation of criminal justice is the adversarial system of common law inherited from the British rulers. In the adversarial system truth is supposed to emerge from the respective versions of the facts presented by the prosecution and the defence before the neutral judge.[74] The Adversarial System does not impose a positive duty on judges to discover the truth, he plays a passive role. The system is heavily loaded in favour of the accused and is insensitive to the victim's plight and right.[75] Advantages of the Adversary System are as follows.[76]

a) The judicial officers are highly qualified and having experience

b) Matters are adjudicated on the basis of established rules and procedures

c) The principles applied by the courts are clearly discernable and reasonable

d) Parties are represented by the qualified advocate

e) Natural justice principle is followed in the adjudication process

f) Courts have dignity, authority and attract public confidence

ii. Protection against *Ex Post Facto* Law

The protection against *ex- post-facto* laws is a principle of common law which has emerged from the due process of law. An *ex- post-facto* law imposes penalties retrospectively, that is, upon acts already done, or which increases the penalty for the past acts. Prohibition of *ex post facto* laws is regarded as a human right by the international community.[77] The American legal system has explicitly given statutory recognition to prohibition of *ex post facto* laws.[78] Unlike America, the Indian Constitution has not expressly used that phrase; however, the principle is incorporated in Article 20(1).[79] The object of this doctrine is to prevent the sovereign from abusing the authority to make laws.

The Supreme Court of India opined that retrospective creation of offences is bad as being highly inequitable and unjust.[80] It means the accused can be convicted for only those acts which were offences under the law at the time of their commission. Second part of Article 20(1) protects the accused from being subjected to a penalty which is greater than that to which he might have been subjected at the time of commission of the offence.

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[62] Report of the Committee on *Reforms of Criminal Justice System*, Vol. 1, (Ministry of Home Affairs, Government of India, 2003), p.65.
[63] Article 20(1) of the Indian Constitution.
[64] Article 20(2) and (3) of the Indian Constitution.
[65] Article 22(1) of the Indian Constitution, see further *D.K.Basu* v. *State of W.B,* AIR 1997 SC 610
[66] *Hussainara Khotoon* (I) v. *Home Secretary, State of Bihar*, AIR 1979 SC 1360. *Kadra Pahadiya v. State of Bihar ,* AIR 1982 SC 1167. *Santosh* v. *Archana Guha,* AIR 1994 SC 1229, (1994) Supp 3 SCC 735.
[67] Article 22(1) of the Indian Constitution, *Joginder Kumar* v. *State of Uttar Pradesh*, AIR 1994 SC 1349, *Nandini Satpathy* v. *P.L. Dani*, AIR 1978 SC 1025. (1978) 2 SCC 424.
[68] Sections 436 to 450 under chapter XXXIII of *The Code of Criminal Procedure,* 1973, *Gudikanti Narasimhulu* v. *Public Prosecutor* , AIR 1978 SC 430.
[69] *Dahyabhai Chhaganbhai Thakkur* v. *State of Gujarat,* AIR 1964 SC 1563, *Kali Ram* v. *State of H.P*, AIR 1974 SC 2773. *Ashish Batham* v. *State of M.P.*, AIR 2002 SC 3206.
[70] *Naresh Sridhar Mirjakar* v. *State of Maharastra,* AIR 1967 SC 1, (1966) 3 SCR 744.
[71] *T.Nagappa v. Y.R.Muralidhar*, (2008) 5 SCC 633, Report of the Committee on *Reforms of Criminal Justice System*, Vol. 1, (New Delhi:Ministry of Home Affairs, Government of India, 2003), p.65.
[72] *Sita Ram v. State of UP*, AIR 1979 SC 745, *M.H.Hoskot v. State of Maharashtra*, (1978) 3 SCC 544.
[73] Report of the Committee on *Reforms of Criminal Justice System*, Vol. 1, (New Delhi:Ministry of Home Affairs, Government of India, 2003), p.65.
[74] Report of the Committee on Reforms of Criminal Justice System, Vol. 1, (New Delhi:Ministry of Home Affairs, Government of India, 2003), p. 23.
[75] *Ibid* p. 24.
[76] P.C. Rao, and William Sheffield, *Alternative Dispute Resolution*, (New Delhi: Universal Law Publishing Co. Pvt. Ltd, 2001),p.58.
[77] Article 11 of *Universal Declaration of Human Rights* 1948. Article 15 of *International Covenant on Civil and Political Rights*, 1966.
[78] Section 9 and 10 of Article 1 of the Constitution of United States.
[79] Article 20(1) states that "No person shall be convicted of any offence except for violation of law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence."
[80] *Rao Shiva Bahadur Singh v. State of U.P.* AIR SC 394.

iii. **Protection against *Double Jeopardy***

Another important aspect of due process of law is contained in the common law principle of *nemo debet bis vexari pro una et eadem causa,* which means that no person should be punished twice for the same offence. The International Community has gradually acknowledged that the principle is indispensable in protecting human beings in the legal system.[81] The Indian Constitution has enshrined this principle in Article 20(2) which prescribes that "No person shall be prosecuted and punished for the same offence more than once."

In English Law, the scope of this doctrine is wider; the person can take the defence not against only conviction but even for his former acquittal that is technically known as plea of *autre fois acquit* or *autre fois convict*. Even in the US, the protection is available against acquittal also in the previous trial.[82] This maxim is also incorporated in Section 300 of the *Code of Criminal Procedure,* 1973 and Section 27 of the *General Clauses Act*, 1897. However, the scope of Section 300 of Cr.P.C. is wider than the scope of Article 20(2) because it prescribes that a person cannot be tried for the same offence for which he has already been tried by the competent court irrespective of acquittal or conviction.

iv. **Right against Self Incrimination**

The accused cannot be induced or forced to testify against himself is another notable feature of due process of law. It is now fundamental to international[83] and national legal systems. The Indian Constitution has acknowledged it as a fundamental right under Article 20(3).[84]

Further this right is protected by Article 21 of the Constitution, Cr.P.C. and *Indian Evidence Act,* 1872. Section 24 of *Indian Evidence Act,* 1872 makes a confession inadmissible when it is affected by inducement, threat, and promise. Further, a confession made to police authority or while in the custody of police is inadmissible.[85] At the Common Law, Blackstone said, "*nemo tenebatur prodere seipsum*:, and his fault was not to be wrung out of himself, but rather to be discovered by the other means and other men."[86] The person who claims this protection must be accused of an offence. Accused means the person against whom the formal accusation of commission of an offence is made in the normal course of prosecution.[87] However, it is not necessary that actual trial or enquiry should have commenced before the tribunal.132 In US, the privilege against self-incrimination is wider and not confined to accuse only.[88]

Second, this protection is available only against compulsion "to be witness." In *M.P.Sharma* v. *Satish Chandra,*[89] the Supreme Court interpreted the expression "to be a witness" very broadly to mean, "furnishing any evidence" which could be rendered through "the lips or by production of a thing or of a documents or in other modes". The prosecution stage under Article 20(3) covers not merely trial in the courtroom but also any process of collecting evidence including documents, which is reasonably likely to support the prosecution case against the accused. Relaying on this construction, several High Courts held that even the taking of finger impressions and handwriting samples would violate the rule against self-incrimination.[90]

However, the Supreme Court in *State of Bombay* v. *Kathi Kalu Oghad*,[91] downplayed the phrase "to be a witness" so as not to include the "wider sense of the expression" but merely the imparting of knowledge in respect of a relevant fact, either orally or in writing "by a person who has personal knowledge of the facts to be communicated to a court". It held that "to be a witness" is not equivalent to "furnishing evidence." The Supreme Court in *Nandini Satpathy* v. *P.L. Dani*,[92] has considerably widened the scope of word "compulsion" and has held that compelled testimony means evidence procured not merely by physical threats or violence but by psychological torture, atmosphere of pressure, environment of coercion, tiring interrogations, proximity, overbearing and intimidatory methods. Therefore, confession to the police or during the police custody is conclusively presumed to be obtained under duress or inducement.[93] Further no influence by means of any promises or threats or otherwise, shall be used to an accused person to induce him to disclose or withhold any matter within his knowledge.

v. **Right to Fair Procedure**

Concept of fair trial of an accused is at the foundation of criminal justice process and due process of law. Further it is consolidated by the norms of domestic and international legal orders. The fair trial is a device to protect individuals from the unlawful and arbitrary curtailment or deprivation of basic rights and freedoms, particularly the right to life and liberty of the person.[94]The fair trial is a relative term. The terms of fairness are numerous, complex, and constantly evolving. Fair trial must not be fair only to the accused but also be fair to the prosecution.[95] The test of fairness in a criminal trial must be evaluated on these two yardsticks

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[81] Article 14(7) of *the International Covenant on Civil and Political Rights,* 1966.
[82] V Amendment of US Constitution states that "… nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb…."
[83] Article 11 of *Universal Declaration of Human Rights,* 1948. Article 14 (3) (g) of *International Covenant on Civil and Political Rights,* 1966.
[84] Article 20(3) prescribes that "No person accused of any offence shall be compelled to be witness against himself.""
[85] Sections 25 and 26 of *The Indian Evidence Act,* 1872.
[86] Glanville Williams, *The Proof of Guilt*, 3rd edn., (London: Stevens & Sons, 1963), p.37.
[87] *M.P. Sharma* v. *Satish Chandra*, AIR 1954 SC 300.
[88] Amendment V of the USA Constitution prescribes that "No person… shall be compelled to in any criminal case to be witness against himself…."
[89] 1954 SCR 1077, at 1087.
[90] *Sailendra Nath Shina* v. *State* AIR Cal 247. *State of Kerala* v. *K.K. Sankaran Nair* AIR Ker 392.
[91] AIR 1961 SC 1808.
[92] AIR 1977 SC 1025.
[93] Sections 25 and 26 of *The Indian Evidence Act*, 1882.
[94] Lawyers Committee for Human Rights, *What is a fair trial?* (New York, 2000), p.1.
[95] *Talab Haji Hussain* v. *Madhukar Mondakar*, AIR 1958 SC 376.

In *A.K.Goplan* v. *State of Madras,*[96] the Supreme Court has held that, right to life and personal liberty means nothing more than mere animal existence and Article 21 provides protection only against arrest and detention without authority of law. It held that law means *lex* not *jus*.[97] Nevertheless, the Supreme Court gradually down played the ratio of *Goplan*. Finally, in *Maneka Gandhi v. Union of India* Bhagawati, J., observed,

> "A law depriving a person of personal liberty and prescribing a procedure for that purpose within the meaning of Article 21 has to stand a test of one or more of the fundamental rights conferred under Article 19 which may be applicable in a given situation. *Ex-hypothesi* it must also be likely to be tested with reference to Article 14. On principle, the concept of reasonableness must, therefore, be projected in the procedure contemplated by Article 21 having regard to the impact of Article 14 on Article 21."[98]

In *Sunil Batra* v. *Delhi Administration,* Krishna Iyer J. conceded the presence of due process clause as under:

> "[T]rue our Constitution has no 'due process' clause but in this branch of law, after *Cooper* and *Maneka Gandhi*, the consequence is the same.[99]

Thus inclusion of procedural due process by the Supreme Court of India in Article 21 through interpretation ensured so many rights to the accused, which are not explicitly mentioned in the Constitution.

v.i. Right to know the fact of Arrest and Reasons for Arrest

Fair trial obligates the authority to inform the accused about his arrest and grounds of arrest. Hence Article 22(1) provides that authority must reveal accused's arrest and grounds of his arrest as soon as possible. Article 9(2) of the *International Covenants on Civil and Political Rights,* 1966 (herein after referred as ICCPR) mandates that arrested person shall be informed of his arrest at the time of his arrest and grounds of arrest shall be informed promptly. The Apex Court in *Jogindar Kumar* v. *State of U.P.* has opined that the authority ought to inform the arrest of accused to one of his relatives. Further the accused should be informed of his arrest when he is bought to the police station and it must be recorded in dairy.[100]

In *D.K.Basu* v. *State of W.B.,*[101] the Supreme Court further streamlined these norms and observed that the police has to maintain a memorandum of arrest that must reveal who arrested the person, where he was arrested and the time of his arrest and it must be attested by at least one of his relative or any other respectable person form the same locality.

v. ii. Right to Speedy Trial

"Justice delayed is justice denied" is a trite saying which emphasizes the importance of speedy justice. The procedure of law which does not ensure speedy trial to an accused is denial of human right recognized under international law.[102] Unexplained delay in conducting trial of accused has the ramification of long detention in jail and affects the ability of accused to defend himself due to non-availability, disappearance or death of witnesses.[103]

The Indian Judiciary taking note of pathetic condition of under trial prisoners languishing in jails for indefinite period waiting for their trial, held that 'right to speedy trial' is a fundamental right implicit in the right to life and personal liberty guaranteed under Article 21 of the Constitution.[104] The Supreme Court observed that speedy trial is imperative of fair trial under Article 21; otherwise people's confidence in criminal justice system would be eroded.[105] Law Commission of India has suggested a bench mark of six months for conclusion of a criminal trial.[106] Section 167 of the *Code of Criminal Procedure,* 1973 obligates the authority to complete the investigation of crime within certain period.[107] Further, the investigating authority has statutory obligation to complete the investigation of an offence without unnecessary delay.

Even the Supreme Court has tried to ensure speedy trial to accused by laying down detailed guidelines for speedy trial. However, it declined to fix any time limit for trial of offences because it would leads to rigidity. Obviously, the burden lies on the prosecution to justify and explain the delay because there are various factors responsible for the delay of trial like nature of cases, delay tactics used by the accused, etc.[108]

v. iii. Right to be represented by a Legal Practitioner

The process of justice has to be transparent. Therefore, justice not only to be done but it seen to be done is the cardinal principle of natural justice. The doctrine of natural justice seeks not only to secure justice but also to prevent injustice.

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[96] AIR 1950 SC 27.
[97] AIR 1950 SC 27.
[98] (1978) 1 SCC 248 at 252.
[99] (1979) 1 SCR 392 at 428.
[100] (1994) 4 SCC 260.
[101] AIR 1997 SC 610. The National Human Rights Commission has similarly issued extensive guidelines on the rights to be provided at the time of arrest. *NAT'S HUMAN RIGHTRS COMM'N OF INDIA, GUIDELINES ON ARREST,* NOV 22 1989, http//www.nhrc.nic.in/Documents/sec-3.pdf. Accessed on March 22, 2012.
[102] Article 14(3) (c) of *International Covenants on Civil and Political Rights,* 1966.
[103] *Abual Rehaman Antually* v. *R.S. Nayak*, AIR 1992 SC 1630.
[104] *Hussainara Khotoon* (I) v. *Home Secretary, State of Bihar*, AIR 1979 SC 1360. *Kadra Pahadiya* v. *State of Bihar AI*R 1982 SC 1167.
[105] *Santosh* v. *Archana Guha* , AIR 1994 SC 1229, (1994) Supp 3 SCC 735.
[106] 79th Report of the Law Commission of India on *Delay and Arrears in High Courts and other Appellate Courts*, (New Delhi: Ministry of Law, Justice and Company Affairs, Government of India,1979), p.9.
[107] Section 167(2) (a) (i) and (ii) of *The Code of Criminal Procedure,* 1973 prescribes that the investigation related to offence punishable with not less than 10 years shall be completed in 90 days otherwise accused is entitled to get bail, (ii) prescribes that the investigation related to other offence shall be completed in 60 days otherwise accused is entitled to get bail
[108] *Raghubir Singh* v. *State of Bihar* (1986) 4 SCC 481.

The *audi alteram partem* rule ensures that no one should be condemned unless he is heard. It is imperative rule of just society that a person against whom any action is sought to be taken should be given a reasonable opportunity to defend himself.[109]

An arrested person has been given right to consult and be defended by an advocate of his own choice under Article 22(1) of the Constitution. The right of an arrested person to consult a lawyer privately is inherent in Articles 21 and 22(1) of the Constitution.[110] The Supreme Court has further expanded the scope of right to consult lawyer in *Nandini Satpathy*[111] by observing that Article 22(1) does not mean that a person who is not under arrest can be denied the right to consult an advocate of his choice.

v. iv. Right to Legal Assistance

Fair trial encompasses that an accused who seeks justice from the court should be given the service of lawyers. Judicial process is complex and cumbersome process which requires assistance of experts because it involves the legal submissions and cross examination of evidence; otherwise accused is likely to incur injustice.[112] Most of the litigants in India are uneducated and economically not sound who cannot afford to appoint efficient lawyers. Under such circumstances, it is imperative on the part of State to ensure legal aid to such needy persons.[113] Assistance of lawyers to an accused is a universally acknowledged right.[114]

Section 304 of the *Code of Criminal Procedure,* 1973 obligates the state to provide legal assistance to those accused who have insufficient means to appoint an advocate in a trial before the Sessions Court. The Supreme Court in *M.H.Hoskot* v. *State of Maharashtra*[115] held that the component of fair trial ensures that the poor among the accused must have service of lawyers at the cost of state exchequer. The right to be defended by a counsel is a basic component of fair trial. The trial which fails to meet this minimum standard would definitely amounts to prejudice to an accused. the right of an accused to seek legal assistance at the cost of state commences from the movement he is produced before the magistrate, not from the stage of trial. It is elementary that the jeopardy to his personal liberty arises as soon as a person is arrested and produced before a magistrate.

The Supreme Court has consolidated the right of an accused to have free legal service by holding that lack of financial resources is not a justification for not providing legal services. The State may have its financial constraints and its priorities in expenditure but "the law does not permit any Government to deprive its citizens of constitutional rights on a plea of poverty".[116]

v. v. Right to Bail

The Right to bail is the basic feature of the accusatorial system that generally provides that an accused person shall not to be confined to jail unless he is found to be guilty. The primary purpose of arrest is to secure the presence of an accused during the trial and make sure that he has to undergo the punishment in case he is found to be guilty of an offence. If his presence can otherwise be secured, there is no need to arrest him. Sir James Stephen has observed in respect of an accused's right to be released on bail that "It is as old as the law of England itself and is explicitly recognized by our earliest writers".[117] The *Universal Declaration of Human Rights,* 1948 impliedly endorses the accused's right to bail. Further Article 9(3) of ICCPR explicitly mentions that an accused is entitled to be released on bail subject to the guarantee of appearance during the trial. The US Constitution explicitly acknowledges the right of an accused to have bail.

Unlike US Constitution, Indian Constitution does not contain any Article that explicitly provides right to bail. Nevertheless, the Apex Court has read the right to bail of an accused under Article 21.[118] The Supreme Court in *Hussainra Khatoon (I)* v. *Home Secretary, State of Bihar,*[119] observed "... denying bail to the under trials who are in jail without trial, because of their poverty is a violation of right to life under Article 21. The present law of bail thus operates on what has been described as a property oriented approach. Thus, the need for a comprehensive and dynamic legal service programme is required to make bail system equitable, responsive to the needs of poor prisoner and not to just the rich." V.R.Krishna Iyer J. observes on bail as under:

> "Bail or jail at the pre-trial or post conviction stage belongs to the blurred area of the criminal justice system and largely hinges on the hunch of the Bench. Personal liberty is deprived when bail is refused. The power to negate it is great trust exercisable, not casually but judicially, with lively concern, after all personal liberty of an accused is fundamental".[120]

The Cr.P.C. has categorized offences into bailable and non-bailable. Further Cr.P.C. mandates the investigating authority to complete the investigation within stipulated period and submit the charge sheet to the court. Otherwise the accused is entitled to bail.[121] In case of bailable offences the accused can seek bail as a matter of right but in other cases it is the

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[109] *Powell* v. *Alabams,* 287 U.S. 45 (1932). See, Article VI Amendment of US Constitution and Article 14(3) (d) of *The International Covenant on Civil and Political Rights,* 1966.
[110] *Joginder Kumar* v. *State of Uttar Pradesh*, AIR 1994 SC 1349.
[111] *Nandini Satpathy* v. *P.L. Dani*, AIR 1978 SC 1025. (1978) 2 SCC 424.
[112] *Mohamd Hussain* v. *The State (Govt of NCT*), AIR 2012 SC 750 at 763.
[113] Article 38(1) and 39-A of the Indian Constitution.
[114] Article 14(3) (d) of *The International Covenant on Civil and Political Rights,* 1966.
[115] AIR 1978 SC 1548.
[116] *Mohammad Hussain* v. *The State (Government NCT),* AIR 2012 SC 750 at 763.
[117] Pollock, Sir, F, & Maitland, F.W. *The History of English Law before the time of Edward* I, Vol.2 (Cambridge: Cambridge University Press, 1968), p.584.
[118] *Babu Singh and others* v. *State of Uttar Pradesh*, AIR 1978 SC 527.
[119] AIR 1979 SC 1360, AIR 1979 SC 1369, AIR 1979 SC 1377
[120] *Gudikanti Narasimhulu* v. *Public Prosecutor* , AIR 1978 SC 430.
[121] Section 167(2) (a) (i) and (ii) of *The Code of Criminal Procedure,* 1973 prescribes that the investigation related to offence punishable with not less than 10 years shall be completed in 90 days otherwise accused is entitled to get bail, (ii) prescribes that the investigation related to other offence shall be completed in 60 days otherwise accused is entitled to get bail.

discretionary power of the court to grant bail which has to be exercised judicially subject to such conditions as the Court may deem fit.[122]

v. vi. Presumption of Innocence

The basic tenet upon which criminal justice system is based is that an accused is presumed to be innocent till guilt is proved. It is a rebuttable presumption in favour of accused which is based upon the sound reasoning that most of the people are not criminals. This rebuttable presumption is founded on the Latin Maxim *El incumbit probatio qui dicit, non qui negat* which means the "proof lies on him who asserts, not onhim who denies."[123] Further, this maxim is built upon another Latin Maxim *Cum per rerum naturam factum negates probation nulla sit* that means, "Since by the nature of things, he who denies a fact cannot produce any proof". Sir Blackstone further consolidated this principle by articulating further to the effect "better that ten guilty persons escape than that one innocent suffer"

In Roman law, the presumption was based on fairness, good sense, and practical utility[124] that has become part of Common Law. Lord Viscount Sankey L.C. in *Woolmington* v. *Director of Public Prosecutions* lucidly restated that principle in the following words:

> "Throughout the web of the English criminal law, one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guilt, subject to what I have already said as to defence of insanity and subject also to any statutory exception. If at the end of, and on the whole of the case, there is reasonable doubt created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention the prosecution has not made out the case, and the prisoner is entitled to acquittal".[125]

In US Constitution there is no express provision about the doctrine of presumption of innocence. Nonetheless, the US Supreme Court has read it under "Due Process" clause of the Fifth Amendment of the Constitution.[126] The Indian Constitution like US Constitution is silent on the doctrine of presumption of innocence of an accused. The Supreme Court has read that principle as part of the Indian criminal justice system in *Dahyabhai Chhaganbhai Thakkur* v. *State of Gujarat.*[127] The Apex Court has often reminded that "[O]ne of the cardinal principle which has always to be kept in view in our system of administration of justice for criminal cases is that a person arraigned as an accused is presumed to be innocent unless the presumption is rebutted …."[128]

v. vii. Public and Open Trial

Process of delivering justice must be transparent and open. Therefore the conduct of criminal trial in public place is an indispensable character of fair trial in democratic countries which are based upon the rule of law. The phrase, 'open court' means a Court to which the public have a right to be admitted. Common man's observance of process of justice undoubtedly enhances the people's confidence or respect for the judiciary in the administration of justice.

Lord Shaw in *Scott v. Scott* emphasized the open conduct of trials as a 'sound and very sacred part of the constitution of the country and the administration of justice'.[129] Lord Atkinson admitted that public trial would cause some kind of inconvenience to the parties and witnesses of the case "but all this is tolerated … because it is felt that in public trial is to be found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect." Great utilitarian Jeremy Bentham has encapsulated it as follows: "By publicity, the temple of justice is converted into a school of the first order, where the most important branches of morality are enforced, by most impressive means …"[130]

Public Trial ensures the transparency and accountability of judiciary. Justice should not only be done but it should also be seen to be done is a component of procedural due process. Obviously the Public Trial has been acknowledged as human right of accused universally.[131] The Supreme Court in *State of Punjab* v. *Sarwan Singh* observed that fair trial is an essential component of procedure established by under Article 21 which includes public and open trial.[132]

In *Naresh Sridhar Mirjakar* v. *State of Maharastra,*[133] a nine judge Bench of the Supreme Court emphasized the importance of the public trial. Gajendragadakar C.J., speaking for the majority held that:

> "Public trial in open court is essential for the healthy, objective and fair administration of justice. Trial held subject to the public scrutiny and gaze naturally acts as a check against judicial caprice or vagaries, and servers as a powerful instrument for creating confidence of the public in the fairness, objectivity and impartiality of the administration of justice. Public confidence in the administration of justice is of such great significance that there can be no two opinions on the broad proposition that in discharging their functions as a Judicial

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[122] Sections 436 to 450 under Chapter XXXIII of *The Code of Criminal Procedure,* 1973.
[123] http://en.wikipedia.org/wiki/Presumption-of-innocence. Accessed on September 2, 2012.
[124] Report of the Committee on *Reforms of Criminal Justice System*, Vol. 1, (New Delhi: Ministry of Home Affairs, Government of India, 2003), p.65.
[125] (1935) AC 462 (HL).
[126] *Taylor* v. *Kentucky*, 436 U.S. 478. (1945), *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975).
[127] AIR 1964 SC 1563.
[128] *Kali Ram* v. *State of H.P*, AIR 1974 SC 2773. *Ashish Batham* v. *State of M.P.*, AIR 2002 SC 3206.
[129] *Scott* v. *Scott*, (1913), AC 417.
[130] Quoted by Joseph Jaconelli, *Open Justice*: *A Critique of the Public Trial*, (New Delhi: Oxford University Press, 2002), p.43.
[131] Article 10 of the *Universal Declaration of Human Rights,* 1948, Article 14 of *The International Covenant on Civil and Political Rights,* 1966. Article 6(1) of *The European Convention on Human Rights* 1950.
[132] AIR 1981 SC 1054, (1981) 3 SCC 34. *Police Commissioner Delhi* v. *Registrar Delhi High Court*, AIR 1997 SC 95.
[133] AIR 1967 SC 1, (1966) 3 SCR 744.

Tribunals, Courts must generally hear causes in open and must permit the public admission to the court-room."

Therefore, courts must hold their proceedings publicly. In *Vineet Narian* v. *Union of India*,[134] the Supreme Court emphatically reiterated that, requirement of public hearing in courts, is part of the fair trial under Article 21 of the Constitution.

Ray J. has pointed out that though public trial or trial in open court is a rule, yet in cases where the ends of justice would be defeated if the trial is held in public, the court has inherent jurisdiction to hold the trial *in camera*.[135]

v. viii. Right of Hearing

Audi alteram partem component of natural justice is an essential component of fair trial. Article 14 of the *International Covenant on Civil and Political Rights,* 1966 guarantees every accused a fair and public hearing. The procedure of determining the guilt of an accused without opportunity of being heard would not satisfy test of procedural due process.[136] On another occasion the Supreme Court has held: "The principles of natural justice constitute the basic elements of a fair hearing, having their roots in the innate sense of man for fair play and justice, which is not the preserve of any particular race or country but is shared in common by all men."[137]

The Supreme Court has reiterated that the accused has a right to fair trial, he has a right to defend himself as part of his human right as also fundamental right as enshrined in Article 21 and the right to fair trial includes fair and proper opportunities allowed by law to prove innocence.[138] The right of hearing has important components which are as follows,

1. Notice of Allegations
2. Opportunity to defend
3. Testimony in the presence of accused
4. Summons to witnesses
5. Right to cross adverse witnesses

v. ix. Notice of Allegations

Doctrine of natural justice ensures that an accused must have the notice of allegations to prepare his defense before the commencement of trial.[139] Notice is a *sine qua non* of fair trial. Further, the notice of hearing should provide adequate or reasonable period to an accused to prepare his defense otherwise formal notice of hearing would become a myth.[140] Another important basic feature of notice is that the content of notice must be given in the language which accused understands.[141] VI Amendment to US Constitution takes note of this principle and provides a constitutional right to an accused that he has right to know the nature and cause of accusation. However, the Indian Constitution does not provide explicitly the right of hearing to an accused. Nonetheless, such right can be read under Article 21 of the Constitution.

Moreover, the Cr.P.C. which regulates the process of trial provides in unambiguous terms that when an accused is brought before the court for trial, the particulars of the offence of which he is accused of shall be stated to him.[142] Section 207 of Cr.P.C. obligates the Magistrate to furnish to the accused, free of cost, a copy of the police report, the first information report recorded under Section 157, statements recorded by the police under sub-Section (3) of Section 161 of all persons whom the prosecution proposes to examine as its witnesses, and confessional statements if any recorded under Section 164 of Cr.P.C.

v. x. Opportunity to Defend

Fair trial commends that before an accused is condemned, he ought to be given opportunity to defend himself. There is no fixed rules or modes of providing hearing because; hearing is a relative term which depends upon facts of each case. Therefore, modes of hearing may be oral or written and it may be personal or through his advocate.[143] Section 303 of Cr.P.C. recognizes the right of any person brought before the criminal courts to answer any charges or accusation through a lawyer of his choice.

v. xi. Testimony in the presence of accused

The conduct of trial and taking of testimony in the presence of accused would certainly ensure that trial would be transparent and impartial. Further it would enable the accused to understand the prosecution case properly and he can make preparation to defend himself. In *Union of India* v. *Tulsiram Patel,* the Supreme Court has held that this rule in its fullest amplitude means that a person against whom an order to his prejudice may be passed, has also *inter alia*, the right to have the witness, who

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[134] AIR 1998 SC 889, (1988) 1 SCC 323.
[135] *Naresh Sridhar Mirajakar* v. *State of Maharashtra*, AIR 1967 SC 1 (Para 106), (1966) 3 SCR 744.
[136] *Zahira Habibullah Sheikh* v. *State of Gujarat*, AIR 2006 SC 1367.
[137] *Union of India* v. *Tulsi Ram,* AIR 1985 SC 1416, at 1456; *Inderpreet Sing Kahlon* v. *State of Punjab*,(2006) 11 SCC 356.
[138] *T.Nagappa* v. *Y.R.Muralidhar*, (2008) 5 SCC 633.
[139] Paragraph 3(1) of Article 14 of *The International Covenant on Civil and Political Rights,* 1966.
[140] Paragraph 3(b) of Article 14 of *The International Covenant on Civil and Political Rights,* 1966.
[141] Paragraph 3(a) of Article 14 of *The International Covenant on Civil and Political Rights,* 1966.
[142] Section 228, 240, 246, and 251 of *The Code of Criminal Procedure,* 1973.
[143] Paragraph 3(d) of Article 14 of ICCPR.

are to give evidence against him, examined in his presence and has the right to cross-examine them and lead his own evidence, both oral and documentary.[144]

The requirement of the presence of the accused during his trial can be implied from the provisions that allow the court to dispense with the personal attendance of the accused person under certain circumstances. Therefore, taking the evidence in the presence of the accused is imperative. Failure to do so would vitiate the trial and the fact that no objection was taken by the accused is immaterial.[145]

v. xii. Right to Cross-Examine and Summon Witnesses

It is the duty of prosecution to prove the guilt of an accused beyond reasonable doubt, not the duty of accused to prove his innocence. The accused has right to cross examine the evidence produced by the prosecution to find out the credibility of evidence and prove before the court that such evidence is not worthy. Cross-examination of witnesses is a very potent weapon of an accused to bring out the truth and expose the falsehood of evidence.[146] Therefore the Apex Court in *T.Nagappa* v. *Y.R.Muralidhar* held that the accused has a right to fair trial which is a fundamental right as enshrined in Article 21 and that fair trial includes fair and proper opportunities allowed by law to prove innocence.[147] The right of an accused to cross-examine the witness is the norm of procedural due process which ensures fair justice. Unlike the U.S. Constitution, the Indian Constitution does not explicitly guarantee the right to cross examines the witnesses.

The Supreme Court has unequivocally stated that failure to allow the accused to cross-examine the witnesses called on behalf of the prosecution would definitely be bellow the standard of fair and procedural due process.[148] The cross- examination is an acid-test of the truthfulness of the statement made by a witness on oath in examination-in-chief.[149] The objects of cross-examinations are:[150]

i. to destroy or weaken the evidentiary value of the witnesses of adversary,

ii. to elicit facts in favour from the mouth of the witnesses of the adversary party,

iii. to show that the witness is unworthy of belief by impeaching the credit of the witness.

Sections 137 and 138 of the *Indian Evidence Act,* 1872 prescribe that the witnesses are subjected to cross-examination once the chief-examination by the prosecution is over. Though the burden of proving the guilt of accused is entirely on the prosecution, yet a criminal trial in which the accused is not permitted to give evidence to disprove the prosecution case, or to prove any special defence available to him, cannot, by any standard, be considered as just and fair trial.[151]

v. xiii. Right to an Impartial and Independent Tribunal

The entitlement of the accused to be heard by an impartial and independent tribunal established by law is indispensable component of fair trial that is akin to the *Nemo judex in causa sua principle* of the Natural Justice. *Nemo judex in causa sua* means the authority that is deciding the matter should be free from bias.[152] The two requirements of independence and impartiality are interlocked, and Courts often consider them together. The tribunal must be independent of both executive and the parties. Independence of tribunal depends upon the manner of appointment of presiding officers, the duration of their office, and the existence of guarantee against outside pressures.[153] The separation would ensure the independent functioning of the judiciary free from all suspicion of executive influence or control.

The judges of High Courts and Supreme Court are appointed by the President with concurrence and consultation of "a collegiums of four senior-most judges of the Supreme Court" which gives supremacy to the opinion of judiciary over that of the executive.[154] In India the adversarial system is followed for dispensation of criminal justice. In the adversarial system truth is supposed to emerge from the respective versions of the facts presented by the prosecution and defence before a neutral judge. In the adversarial system, the Judges adequately assure fairness of trial maintaining a position of neutrality and accord each party the full opportunity of adducing evidence and cross-examining the witnesses.[155]

v. xiv. Right to Appeal

"Everyone convicted of a crime shall have right to his conviction and sentences being reviewed by a higher tribunal according to law." The right to appeal is aimed at ensuring at least two levels of judicial scrutiny of a case, the second of which must take place before a higher tribunal. The Supreme Court has held that a single right of appeal is more or less a universal requirement under the right to life and liberty rooted in the conception that men are fallible, that judges are men, and that making it necessary to be doubly sure before irrevocable deprivation of life or liberty is effected, by a full-scale reexamination of

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[144] AIR 1985 SC 1416.
[145] *Ram Singh* v. *Crown,* (1951) 52 *Cri LJ* 99. AIR 1951 Punjab 178.
[146] *Jawar Singh* v. *State of M.P.*, AIR 1981 SC 373.
[147] (2008) 5 SCC 633.
[148] *Zahira Habibullah Sheikh* v. *State of Gujarath*, AIR 2006 SC 1367, *H.K. Sathisha* v. *State,* 2006 (4) *Cri. LJ* 3756.
[149] *Mohd Hussain* v *State (Govt of NCT) Delhi*, AIR 2012 SC 750 at 761.
[150] *Kartar Singh* v. *State of Punjab*, (1994) 3 SCC 569, *Jayendra Vishnu Thakkur* v. *State of Maharashtra* (2009) 7 SCC 104.
[151] *Manu Sharma* v. *State (NCT of Delhi)*, (2010) 6 SCC 1.
[152] M.P. Jain, & S.N. Jain, *Principles of Administrative Law*, 6th edn., (Nagpur: LexisNexis Butterworth's Wadhwa, 2010), p.283.
[153] Nuala Mole and Catharina Harby, *The Right to a Fair Trial*, (Belgium: Directorate General of Human Rights Council of Europe, 2006), p.30.
[154] *S.C. Advocate-on-Record Association* v. *Union of India*, (1993) 4 SCC 441. *Re Presidential Reference*, AIR 1999 SC 1.
[155] Report of the committee on *Reforms of Criminal Justice Systems,* Vol. I, (New Delhi:Ministry of Home Affairs, Government of India, 2003), p. 26.

the facts and the law is made an integral part of fundamental fairness or procedure.[156] The first appeal as provided in the Cr.P.C. manifestly upholds the above value in Article 21.[157] The review undertaken by tribunal must be genuine.[158]

Right to appeal is a constitutional and a statutory right in India. Chapter XXIX of Cr.P.C. containing Sections 372 to 394 provide and regulate the right of appeal before various courts including High Courts and Supreme Court. Article 134 empowers the accused to make an appeal to the Supreme Court against the order of High Courts. Further, Article 136 also empowers the accused to prefer special leave petition to Supreme Court against any order passed by any court or tribunal. The accused may even file a writ petition under Articles 32 or 226 to correct the flaws in the findings of the lower courts.

Conclusion

The word due process is originated from the *Magna Carta*. Further the concept was developed by the common legal system through customary mode. It is American Constitution which gives the statutory recognition to the due process of law. The word due process is limitation on the power of legislator because whatever legislation they enact must confirm with principles of natural law and justice. The word 'due process of law' is ambiguous and has been interpreted and reinterpreted by the courts in different sense under different circumstances at different points of time. Thus, due process can be said to be relative term rather than absolute which is dynamic and flexible.

The Due Process obligates the state to respect the rights of people which are owed to them and any deprivation of such right shall not be arbitrary, unreasonable and capricious. The word "due" in America has been interpreted as 'reasonable', 'just', and 'proper.' American legal system has divided the due process into 'Substantive due process' and 'Procedural due process.' Procedural due process protects the individual that process adopted by the state to deprive the rights of individual should be fair and non-arbitrary. The due process of law in England has not become subject matter of debate among the judges, academicians and politicians because it is very much related procedural due process rather than substantive due process.

[156] *Sita Ram* v. *State of UP*, AIR 1979 SC 745..
[157] *M.H.Hoskot* v. *State of Maharashtra*, (1978) 3 SCC 544
[158] *Mayur Panabhai Shah* v. *State of Gujarat*, AIR 1983 SC 66.

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