LITERATURE REVIEW

On the subject of Due Process Theory the Crime Control Theory volumes have been written by the Indian and foreign writers. Those who have written on these two theories have written from the point of view of the significance of these theories in the system of criminal justice. They have covered either the whole system of criminal justice or they have touched on one particular aspect of the system of criminal justice.

In recent years the trend in the system of criminal justice is that it is affecting the functioning of various units of criminal justice system with the result that either the law is harsh or the enforcement officials have arbitrary powers to exercise, and all these have their adverse effect on the rights of the individuals. Such a change is reflected in the literature which has come up in recent years. Learned writers on the system of criminal justice have pointed out the change very nicely which go to establish the need for reverting to the system of due process and halting the system of crime control. In certain cases the judges dealing with the cases pointed out the emerging trend; even the enquiry commissioners who had to suggest changes in the law pointed out the need for such a change. The following are a few of the writers whose works have been reviewed by the researcher:

Herbert Packer, a Stanford University law Professor, constructed two models, on the system of criminal justice, the Crime Control model and the Due Process Model, to represent the two competing systems of values operating within criminal justice. The tension between the two accounts for the conflict and disharmony that now is observable in the criminal justice system.

The following assertions are the key concerns of the crime control model:

1. The repression of crime should be the most important function of criminal justice because order is a necessary condition for a free society.
2. Criminal justice should concentrate on vindicating victims' rights rather than on protecting defendants' rights.
3. Police powers should be expanded to make it easier to investigate, arrest, search, seize, and convict.
4. Legal technicalities that handcuff the police should be eliminated.
5. The criminal justice process should operate like an assembly-line conveyor belt, moving cases swiftly along toward their disposition.
6. If the police make an arrest and a prosecutor files criminal charges, the accused should be presumed guilty because the fact-finding of police and prosecutors is highly reliable.
7. The main objective of the criminal justice process should be to discover the truth or to establish the factual guilt of the accused.

Packer's due process model is a counterproposal to the crime control model. It consists of these arguments:

1. The most important function of criminal justice should be to provide due process, or fundamental fairness under the law.
2. Criminal justice should concentrate on defendants' rights, not victims' rights, because the Bill of Rights expressly provides for the protection of defendants' rights.
3. Police powers should be limited to prevent official oppression of the individual.
4. Constitutional rights aren't mere technicalities; criminal justice authorities should be held accountable to rules, procedures, and guidelines to ensure fairness and consistency in the justice process.
5. The criminal justice process should look like an obstacle course, consisting of a series of impediments that take the form of procedural safeguards that serve as much to protect the factually innocent as to convict the factually guilty.
6. The government shouldn't hold a person guilty solely on the basis of the facts; a person should be found guilty only if the government follows legal procedures in its fact-finding.

In 1977, an English political science professor explained the present situation in England for the benefit of American lawyers. He said,

An American constitutional lawyer might well be surprised by the elusiveness of references to the term 'due process of law' in the general body of English legal writing.
Today one finds no space devoted to due process in Halsbury’s Laws of England, in Stephen’s Commentaries on Anson’s Law and Customs of the Constitution. The phrase rates no entry in such work as Stroud’s Judicial Dictionary or Wharton’s Law Lexicon.¹

Two similar concepts in contemporary English law are natural justice (which generally applies only to decisions of administrative agencies and some types of private bodies like trade unions and the British constitutional concept of the Rule of Law as articulated by A. V. Dicey and others. However, neither concept lines up perfectly with the American conception of the process which presently contains many implied rights not found in the ancient or modern concepts of due process in England.²

During World War II, Judge Louis E. Goodman dismissed the case against native Californian Masaaki Kuwabara and 25 other draft resisters from Tule Lake Segregation Center on due process grounds. His decision for the defense was unique among the Japanese-American draft resistance cases, and foreshadowed the cases on the Japanese evacuation and California’s anti-Japanese Alien Land Law yet to be tried before the Supreme Court:

Defendant was at all times with which we are concerned, in actual confinement pursuant to the President's Order. Whether such confinement is lawful or not, is beside the question.

It does not follow that because the war power may allow the detention of defendant at Tulelake, the guarantees of the Bill of Rights and other Constitutional provisions are abrogated by the existence of war.... The defendant cannot be denied the protection of the guaranty of due process because of the war or danger to national security but only upon a valid declaration of martial law.... It is shocking to the conscience that an American citizen be confined on the ground of disloyalty, and then,

¹ Geoffrey Marshall, ‘Due Process in England’ in Nomos XVIII;

while so under duress and restraint, be compelled to serve in the armed forces, or be prosecuted for not yielding to such compulsion.

Certainly "fair and just" compulsory military training in a "free society" is wholly inconsistent with the instant proceeding.

The issue raised by this motion is without precedent. It must be resolved in the light of the traditional and historic Anglo-American approach to the time-honored doctrine of "due process." It must not give way to overzealousness in an attempt to reach, via the criminal process, those whom we may regard as undesirable citizens.

The research scholar reviewed the Canadian Due Process Law in the book titled as Due Process & Victims'Rights::the New Law and Politics of Criminal Justice by Kent Roach, University of Toronto Press Canada.

The author, Kent Roach has condemned the Canadian “Due Process Law” as unfair. The law gives right to police to kill a ‘fleeing felon’ even if the suspect does not pose danger to the life of the police officer and the other members of the public. The police in Canada have been raising “self defence” issue and simultaneously attacked the character of the black (negro) victim who just stole bread from a shop because he was perhaps jobless and hungry. The Canadian due process law is against the blacks. The Ontario Commision said that blacks are vulnerable to police violence.3

The research scholar reviewed yet another book by Black Author Rodney King titled "The Riot Within: My Journey from Rebellion to Redemption." The author was himself a victim of Los Angeles Police brutality. The traffic police beat him up just because he was black guy and broke traffic rule. King was beaten by the Los Angeles Police Department following a 1991 traffic stop. The violent beating, during which four

---

3 Roach Kent Due Process & Victims’Rights::the New Law and Politics of Criminal , University of Toronto Press Canada. P-230,231
cops hit and kicked Rodney King more than 50 times, was filmed by a man who saw the incident from his home. The tape was given to a Los Angeles TV station, and quickly became a national phenomenon. The case came to trial in 1992, but the white policemen involved in King's beating were acquitted, igniting deadly riots in Los Angeles. The book condemns the American Due Process Law, it being soft on white community and harsh on black community.\(^4\)

The research scholar has also reviewed the article written by Y.P. Singh, former IPS officer and currently an advocate practicing in Bombay High Court who is in lime light due to his bold and investigative advocacy, in Tehelka Magazine Vol.7 Issue 03 Dated 23 January 2010 the shocking revelation of specific cases of gross misuse of MCOCA by Tehelka Magazine should bring any nation governed by just, equitable and liberal principles close to despair. In 1791, the Fifth Amendment to the Constitution of the United States was enacted. It stated that no person would be deprived of life, liberty or property without the “due process of law”. When the Indian Constitution was drafted, its Article 21 used analogous words: “No person shall be deprived of his life or personal liberty except according to procedure established by law.”

The difference between “due process of law” and “procedure established by law” is that under the American system, a law must satisfy the criteria of a liberal democracy. Our “procedure established by law”, on the other hand, means a law duly enacted is valid even if it’s contrary to principles of justice and equity

Not only that a lawful agency should be there to prosecute and punish any citizen or alien but the law enacted must be fair and must have safeguards for innocent citizens and aliens. Hundreds of foreign nationals are languishing in Tihar Jail under draconian laws of Indian States like Maharashtra and Chhattisgarh.

\(^4\) King Rodney The Riot Within: My Journey from Rebellion to Redemption