The Canons and Contours of Rule of Law and Due Process- (Overview of the Origin, Evolution, Theory and Practice and the Present Indian and Global Scenario)

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Abstract

Rule of law is the legal principle signifying that law should govern a nation, as opposed to being governed by arbitrary decisions of individual government officials. It implies that every citizen is subject to the law, including law makers themselves. The concept, if not the phrase, was familiar to ancient philosophers such as Aristotle, who wrote "Law should govern". The Rule of law dates back to 16th century Britain, and in the following century the Scottish theologian Samuel Rutherford used the phrase in his argument against the divine right of kings. It was further popularized in the 19th century by British jurist A.V. Dicey. **Due process** and rule of law are intertwined and supplementary and complimentary to each other. It can also be said the due process is the "sine qua non" of the rule of law. When a government harms a person without following the exact course of the law, it constitutes the violation of due process, which offends the rule of law. Rule of Law and Due process has origins in the **Magna Carta** in England. When English and American law gradually diverged, due process was not upheld in England, but did get incorporated in the Constitution of the United States. Almost all the modern and progressive countries across the world are practicing the principles of due process and rule of law. This paper deals with the genesis, developments, prevailing Global/Indian scenario, problems, principles and practices, in the spheres of due process and rule of law.

KEYWORDS: Bill of Rights**,** Due Process, Judicial review, Jurisprudence, Magna Carta, Moral Law, Rule of Law and Stare Decisis.

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1. RULE OF LAW- MEANING, GENESIS AND HISTORY:

1.1 ***Aristotle said more than two thousand years ago, "The rule of law is better than that of any individual."*** The term rule of law is a term that is often used commonly but difficult to define. Rule of law implies that every citizen is subject to the law, including law makers themselves. In this sense, it stands in contrast to an autocracy, collective leadership, dictatorship, or oligarchy where the rulers are held above the law. Government practicing the rule of law is called ***nomocracy***, originating from the Greek *nomos* (law) and *kratos* (power or rule). The *Oxford English Dictionary* has defined "rule of law" as "The authority and influence of law in society, esp. when viewed as a constraint on individual and institutional behaviour; (hence) the principle whereby all members of a society (including those in government) are considered equally subject to

publicly disclosed legal codes and processes. . ***UN Secretary-General Kofi Annan*** in his 2004 report says: "The 'rule of law' refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency." There are two principal conceptions of the rule of law as per modern legal theorists namely a formalist or ***"thin" definition***, (entailing procedural restraints on governmental conduct), and a ***substantive*** or ***"thick" definition***; (conception involving the theories about the "good", "right", and "just") sometimes one also encounters a third ***"functional"*** conception. Formalist definitions of the rule of law define specific ***procedural*** attributes that a legal framework must have to comply with the rule of law. Substantive conceptions of the rule of law go beyond this and include certain ***substantive rights*** that are said to be based on, or derived from, the rule of law. The principle was also discussed by Montesquieu in *The Spirit of the Laws* (1748). In 1776, the notion that no one is above the law was popular during the founding of the United States. In 1780, John Adams enshrined this principle in the Massachusetts Constitution by seeking to establish "a government of laws and not of men."

1.2.1 History- Although credit for popularizing the expression "the rule of law" in modern times is usually given to A. V. Dicey a constitutional scholar and lawyer, the roots of development of the legal concept can be traced to many ancient civilizations, including ancient Greece, China, Mesopotamia, India and Rome. The Code of Hammourabi, promulgated by the King of Babylon around 1760 BC, is one of the first examples of the codification of law. In the West, the ***ancient Greeks*** initially regarded the best form of government as rule by the best men. Plato advocated a benevolent monarchy ruled by a king, who was above the law and hoped that the best men would be good at respecting established laws. During the ***Roman Republic***, controversial magistrates might be put on trial when their terms of office expired. Under the Roman Empire, the sovereign was personally immune (*legibus solutus*), but those with grievances could sue the treasury. In ***China,*** members of the ***school of legalism*** during the 3rd century BC argued for using law as a tool of governance, but they promoted ***"rule by law"*** as opposed to ***"rule of law"***, meaning that they placed the ***aristocrats and emperor above the law***. In contrast, the ***Huang-Lao school of Daoism*** rejected legal positivism in favor of a natural law that even the ruler would be subject to. The concept of ***rule of law*** has been distinguished from ***rule by law***, by Professor of Political Science Li Shuguang: "The difference....is that, under the rule of law, the law is preeminent and can serve as a check against the abuse of power. Under rule by law, the law is a mere tool for a government that suppresses in a legalistic fashion." Some scholars try to relate the influence of the ***Bible*** on western constitutional law as the Old Testament, contained some language in Deuteronomy imposing restrictions on the Jewish king.

1.2.2 ***Middle Ages***- In Islamic jurisprudence rule of law was formulated in the seventh century, so that no official could claim to be above the law, not even the ***Caliph***; however

this was with reference to Islamic religious law i.e. Sharia law. In 1215, Archbishop Stephen Langton gathered the Barons in England and forced King John and future sovereigns and magistrates back under the rule of law, preserving ancient liberties by ***Magna Carta*** in return for exacting taxes. This foundation for constitution was carried into the Constitution of the United States. ***Early modern Era-*** The first known use of this English phrase occurred around 1500 A.D. Another early example of the phrase "rule of law" is found in a petition to James I of England in 1610, from the House of Commons which run as "Amongst many other points of happiness and freedom which your majesty's subjects of this kingdom have enjoyed under your royal progenitors, kings and queens of this realm, there is none which they have accounted more dear and precious than this, to be guided and governed by the certain *rule of the law* which giveth both to the head and members that which of right belongeth to them, and not by any uncertain or arbitrary form of government....". In 1607, English Chief Justice Sir Edward Coke said in the *Case of Prohibitions* "that the law was the golden metwand and measure to try the causes of the subjects; and which protected His Majesty in safety and peace: with which the King was greatly offended but Sir Edward Coket affirmed Bracton saith, *quod Rex non debed esse sub homine, sed sub Deo et lege* (That the King ought not to be under any man but under God and the law)."

1.3 Magna Carta-1215, Bill of Rights-1689 and Rule of Law- Magna Carta and the Bill of Rights are the major sources of the constitution of Great Britain. Different eras have left different influences on the English society like- Anglo Saxon period, Norman period, Angevin or Plantagenet period, Tudor period, Stuart period and Hanover period. ***Magna Carta relates to the Angevin or Plantagenet period.*** The Plantagenet dynasty and Magnum Concilium was found by Henry II who was a man of legal temperament adroit and energetic. In 1213 John King John called a meeting of "Four Good Knights' at Great Council at Oxford. He was a tyrant, illiterate, wicked, a despot and did not want to give any rights of representation to the people. On 15th June 1215, the powerful sections of the country, the Barons presented to King John the great charter "Magna Carta" and threatened a civil war if he refused to assent it. King John had no choice but to assent to it. "Magna Carta" is regarded as the charter of civil liberties to the British people. It prohibited the King to do certain acts without the consent of the Great Council. ***Bill of Rights-1689 relates to the Hanover period.*** To prevent any recurrence between the King and the Parliament the latter proceeded to make the terms of acceptance of Hanover dynasty watertight by reducing it in writing and causing the sovereign to accept it. The Parliament in its second session held in February 1689 incorporated a declaration of Rights in a statute and adopted it as Law which came to be known as Bill of Rights. This document laid down the basic principles of British Government and proclaimed the legislative supremacy of the Parliament and denied the Crown several rights without the consent of the Parliament. Thus "Magna Carta" and "Bill of Rights" had great influence on Rule of Law in the sense that both these documents recognized the supremacy of the Parliament and clearly established that the King is not above law.

2. RULE OF LAW- SCOPE, INTERPRETATION AND GLOBAL SCENARIO:

2.1 The concept, if not the phrase, was familiar to ancient philosophers such as Aristotle, who wrote "Law should govern". The scope of rule of law according to Upendra Baxi Professor of Law in Development, University of Warwick, - extends to the

realms of international development, economic, strategic and even military international orders, new human rights and global social policy. ROL has become so-called "judicial globalization". Some experts have suggested that rule of law be viewed in three different percepts. **Rule according to Law**-The rule of law requires the government to exercise its power in accordance with well-established and clearly written rules, regulations, and legal principles ***sans*** unfettered discretion. **Rule under the Law**- ROL also requires the government to exercise its authority under the law which in simple words means "no one is above the law." During the seventeenth century, the English monarch was vested with absolute sovereignty; including the prerogative ignore rulings made by the House of Lords but in the eighteenth century, absolute sovereignty was transferred from the British monarchy to Parliament. **Rule according to higher Law-** When the carefully written codes, rules and regulations are unambiguous or interpreted to produce negative results, the matter needs to put under the higher law though the government acts in strict accordance with well-established and clearly defined legal rules.

2.2 The Rule of law is interpreted in three different ways the "formal" interpretation, the

"substantive" interpretation and the 'functional" interpretation. The "formal" interpretation is more widespread than the "substantive" interpretation. Formalists hold that the view that law must be prospective, well-known, and have characteristics of generality, equality, and certainty. The substantive interpretation holds that the rule of law intrinsically protects some or all individual rights. According to the functional view, a society in which government officers have a great deal of discretion has a low degree of "rule of law", whereas a society in which government officers have little discretion has a high degree of "rule of law". Upholding the rule of law can sometimes require the punishment of those who commit offenses that are justifiable under natural law but not statutory law. The rule of law is thus somewhat at odds with flexibility, even when flexibility may be desirable under certain circumstances. There are no standard norms for the ideal interpretation and it is decided only by the situations.

2.3 ***Global Scenario-*** Though it is claimed that the Rule of Law originated in England, but its traces can be found in the histories of other civilizations too. Nevertheless in the modern times most of the countries have the rule of law firmly incorporated in their constitutions and the Judiciary often abides by it.

- **Europe**- The preamble of the ***European Convention*** for the Protection of Human Rights and

Fundamental freedom firmly believes in the principle of rule of law, it says "the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law".

- ***Finland***- The constitution explicitly requires rule of law by stipulating that "the exercise of

public powers shall be based on an Act. In all public activity, the law shall be strictly observed."

- **UK-** The rule of Law is the product of centuries of struggle of the British people for the

recognition of their Fundamental rights; For them it means (i) 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 Courts of the land." (ii) no man is above law, not

even the crown, and (iii) the rights of citizens do not flow from the constitution but from the judicial decisions. However there are certain exceptions, firstly the discretionary powers should be used judiciously, secondly the judges and certain public authorities (like Diplomats) have immunity, and thirdly the Queen enjoys the immunity.

- **United States**- All government officers, the President, Justices of the Supreme Court, State

Judges and legislators, and all members of Congress while taking oaths affirm that the rule of law is superior to the rule of any human leader. However whether the U.S. Constitution adopted a particular interpretation of the "rule of law," is being hotly debated by the scholars. While John Harrison asserts that the word "law" in the Constitution is simply defined meaning which is legally binding and therefore judges do not have discretion to decide that laws fail to satisfy such unwritten and vague criteria. Frederick Mark Gedicks Professor of Law disagrees- stating that the framers of the U.S. Constitution believed that an unjust law was not really a law at all.

- **Asia-** Most Asian cultures are influenced by two schools of thought, ***Confucianism***, which

advocated good governance as rule by leaders who are benevolent and virtuous, and ***Legalism,*** which emphasized strict adherence to law. According to Awzar Thi, a member of the Asian Human Rights Commission only ***South Korea, Singapore, Japan, Taiwan and Hong Kong*** have societies that are robustly committed to a law-bound state throughout East Asia, but the rule of law in ***Thailand, Cambodia***, ***Pakistan*** and most of the other Asian countries is weak or nonexistent. In Thailand the rule of law is more of a principle than actual practice, and the police force seems like an organized crime gang. In Cambodia, judges are proxies for the ruling political party and a judge may harbor political prejudice or may not apply the law judiciously or consistently. In ***China and Vietnam*** the rule of law has come into prominence due to market economy because it is important to foreign investors and to economic development. The ***Japanese judicial system*** before the world war was completely continental and the Anglo Saxon Jurisprudence had no place therein. Further before the Meiji Constitution there Japan had no well established system of courts. After 1947 the continental system was replaced by Anglo Saxon Jurisprudence. According to Dr Yanaga though Japanese are non-litigious people, overall rule of law is observed in Japan.

3. RULE OF LAW- INDIAN PERSPECTIVE AND RECENT DEVELOPMENTS:

3.1 ***The Indian*** Constitutional scheme is based upon the concept of Rule of Law no one is

above the law howsoever powerful and rich he/ she may be but in reality we encounter an altogether different scene. *Rule of Law in British Regime*- ROL was not implemented by Britishers' with honesty and sincerity despite Lofty ideal of Western philosophy. The annals of British era are overflowing with infinite examples suggesting there was one law for the colonizers, and another for colonized. In the present times also ROL in India appears to have failed to uphold the aspirations of people and is on the verge of losing its grip and ground as a potent instrument of social order. We can clearly see lot of discontent and anger among the people about the legal system because a large number of people either deprived from justice or it is delivered too late. Rampant and brazen discrimination, favouring the influential people like politicians, celebrities, business

tycoons has become the order of the day. Large scale corruption in politics, bureaucracy and judiciary, white collar crimes, bribes, scams, plundering national/natural resource in the country have raised a question mark on the very sustainability of 'rule of law' its utility and efficacy. The NDA government today has proved ineffective and the PM seems to be marching gradually towards autocracy. Upendra Baxi [Professor of Law in Development, University of Warwick] feels that time is apt to realise the horror of betrayal of the "Rule of Law" in India.

3.2 Recent developments and Modern Scenario- ***Role of various organizations in promoting the rule of law:-***

- **International Bar Association (IBA) -** The Council of the International Bar Association

passed an resolution in 2009 endorsing a substantive or ***"thick"*** definition of the rule of law: An independent, impartial judiciary; the presumption of innocence; the right to a fair and public trial without undue delay; a rational and proportionate approach to punishment; a strong and independent legal profession; strict protection of confidential communications between lawyer and client; equality of all before the law; these are all fundamental principles of the Rule of Law. Accordingly, arbitrary arrests; secret trials; indefinite detention without trial; cruel or degrading treatment or punishment; intimidation or corruption in the electoral process, are unacceptable.

- **International Commission of Jurists-** In 1959 an international gathering of over 185 Judges

Lawyers and law professors from 53 countries, in Delhi made a declaration as to the fundamental principle of the rule of law stating that it implies certain rights and freedoms, that it implies an independent judiciary, and that it implies social, economic and cultural conditions conducive to human dignity. The Declaration of Delhi did not, however, suggest that the rule of law requires legislative power to be subject to judicial review.

- **United Nations-** UN has defined the ***rule of law*** as:- a principle of governance in which

all persons, institutions and entities, public and private, including the State itself, are accountable to laws……. legal certainty, avoidance of arbitrariness and procedural and legal transparency". [Report of the Secretary General: "The Rule of Law and transitional justice and post-conflict societies" 2004] The General Assembly has considered rule of law as an agenda since 1992, with renewed interest since 2006 and has adopted resolutions at its last three sessions. The Security Council has held a number of thematic debates on the rule of law, and adopted resolutions emphasizing the importance of these issues in the context of human rights, women, peace and security, children in armed conflict and the protection of civilians in armed conflict.

- **World Justice Project -** World Justice Project, a non -profit organization committed to

advancing the rule of law around the world advocates that the rule of law refers to a rules-based system in which the following ***four universal principles*** are upheld- 1. The government and its officials are accountable under the law; 2. The laws are clear, publicized, stable, fair, and protect fundamental rights, including the security of persons and property; 3. The process by which the laws are enacted, administered, and enforced is accessible, fair, and efficient; 4. Access to justice is provided by competent, independent,

and ethical adjudicators, attorneys or representatives, and judicial officers who are of sufficient number, have adequate resources, and reflect the face of the communities they serve. The World Justice Project has ***developed an Index*** to measure the extent to which countries adhere to the rule of law in practice.

- **The International Development Law Organization (IDLO) –** has experience of working in

>170 countries around the world to empower people and communities to claim their rights, and provides governments with the know-how to realize them. It supports emerging economies and middle-income countries to strengthen their legal capacity and rule of law framework for sustainable development and economic opportunity. ILDO has given a holistic definition of the rule of law as "More than a matter of due process, the rule of law is an enabler of justice and development". It is head-quartered in Rome with a branch office in The Hague and has Permanent Observer Status at the United Nations General Assembly in New York.

4. GENESIS AND MEANING OF DUE PROCESS:

4.1 Due Process is a term which cannot be defined precisely. There are two types of due process

Procedural and Substantial (i) Procedural- relates to legal proceedings carried out regularly and in accordance with established rules and principles and (ii) Substantive- a judicial requirement that enacted laws may not contain provisions that result in the unfair, arbitrary, or unreasonable treatment of an individual. Due process is not used in contemporary English law, though two similar concepts are natural justice (which generally applies to decisions of administrative agencies) and natural rights. ***Magna Carta and Due Process***- The original Magna Carta, issued in 1215, though related mostly with Rule of Law, but a careful reading between the lines will make it amply clear that it also dealt with the Due Process. Shorter versions of Magna Carta were subsequently issued by British Monarchs, and Clause 39 of Magna Carta was renumbered as "29." The phrase ***due process of law*** first appeared in a statutory rendition of Magna Carta in A.D. 1354 during the reign of Edward III of England, as follows: "No man of what state or condition he be, shall be put out of his lands or tenements nor taken, nor disinherited, nor put to death, without he be brought to answer by due process of law." In 1608, the English jurist Edward Coke wrote a treatise in which he explained the meaning of Magna Carta- "no man shall be deprived but by *legem terrae*, the law of the land, "that is, by the common law, statute law, or custom of England.... (that is, to speak it once and for all) by the due course, and process of law..." In the case *Regina v. Paty* the House of Commons had deprived John Paty and certain other citizens of the right to vote in an election, and had committed them to Newgate Prison merely for the offense of pursuing a legal action in the courts. Both the clause in ***Magna Carta*** and the later ***Statute of 1354*** were explained in 1704 by the Queen's Bench, in this case as "due process of law" as follows: It is objected, that by Mag. Chart. c. 29, no man ought to be taken or imprisoned, but by the law of the land. But to this I answer, that lex terrae is not confined to the common law, but takes in all the other laws, which are in force in this realm; as the civil and canon law.... By the 28 Ed. 3, c. 3, there the words lex terrae, which are used in Mag. Char. are explained by the words, due process of law; and the meaning of the statute is, that all commitments must be by a legal authority; and the law of Parliament is as much a law as any, nay, if there be any superiority this is a superior law. Chief Justice Holt dissented in

this case, because he believed that the commitment had not in fact been by a legal authority.

4.2 United States- In the United States earlier the terms *law of the land* and *due process* were used somewhat interchangeably. The 1776 Constitution of Maryland used the language of Magna Carta, including the *law of the land* phrase. In New York, a statutory ***Bill of Rights*** was enacted in ***1787***, and it contained four different due process clauses. However the U.S. Constitution which took effect in ***1789*** contained a Clause about due process that not only restrains the executive and judicial branches, but also the legislative branch where a person is deprived of liberty by a process that is in conflict with the Constitution. By the middle of the nineteenth century, "due process of law" was interpreted by the U.S. Supreme Court to mean that " The due process article 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 of law' by its mere will."

4.3 English law vs. American law- The annals of British history reveal that many laws and treatises avowed various requirements as a part of "due process". Although the concept of due process is enshrined in both the constitutions (UK & USA) but according to the experts there is considerable difference. As the U.S. Supreme Court has explained, a due process requirement in Britain was not "essential to the idea of due process of law in the prosecution and punishment of crimes, but was only mentioned as an example and illustration." This view gains strength because in UK the scope for judicial review is limited as the doctrine of parliamentary supremacy reigns. In sharp contrast in USA due process deals with the administration of justice and thus it acts as a safeguard from arbitrary denial of life, liberty or property by the Government outside the sanction of law. As a consequence, English law and American law have divergent view with American legislators possessing no means by which to declare judicial invalidation of statutes incorrect (except proposing a constitutional amendment, which is rarely successful).

5. INTERPRETATION IN THE GLOBAL PERSPECTIVE:

The term “Due Process” cannot be defined precisely but its scope is vast and wider. It therefore poses certain questions such as what exactly is the due process, whether process followed is due, when the process is due etc.

5.1 Whether the process is due- There is no cut and dry formula to gauge whether the process is due as the Constitution does not require “due process” for establishing laws. The due process provision applies “in each case and individual grounds” when the state acts against individuals. In other cases where many citizens may be affected the courts will have to look differently. Further For instance one person kills another in a fracas due to grave and sudden provocation without any preplanning and the same person kills fifty people over a period of time in a planned way (Serial Killings) the due process will differ. Again a distinction has to be made between “rights” and “privileges.” As in former the process will be different than the latter where the state could act as it pleased in relation to privileges. There may also be threshold cases what is called in law as ***“positivist trap"*** where again the due procedure will vary.

5.2 When the process is due- This is best explained with the help of ***Goldberg v. Kelly,* 1970;** where New York was seeking to terminate the enrolment of Kelly and others in a state welfare program and suspend payments pending the full and formal hearing, a question in effect of timing. A federal statute mandated a full hearing before an officer

prior to terminating their enrolment and even anticipating the new property "entitlement" approach the Due Process Clause required such a hearing. For this limited purpose New York employed a more informal process and gave Mrs. Kelly & others opportunity to confer with responsible social workers and to submit written views before suspension, but it gave no "hearing" in the judicial sense before the suspension was put into effect.

5.3 What process is due- This is probably the hardest analytic question arising under the procedural aspect of "due process" to which there cannot be a single answer. As seen earlier the state has to provide "some kind of a hearing," giving the citizen "the right to support his allegations by arguments however brief and, if need be, by proof however informal". Further the state must provide a hearing before an impartial judicial officer with right to get help from lawyer/attorney's, the right to present evidence and argue orally, the chance to examine all materials that would be relied on, to confront and cross-examine adverse witnesses etc.

5.4 Whether uniformity in due process is possible- The ruling in ***Matthews v. Eldridge*** case disposed the question to considerable extent. **First,** it emphasizes the variability of procedural requirements rather than create a standard list of procedures that is "due". It allows "some kind of hearing." when a person's interests are to be protected by the due process clause. **Second,** that assessment is to be made both concretely, and in a holistic manner; not as a matter of approving particular element/s of a procedural matrix in isolation, but of assessing the suitability of the ensemble in context. **Third**, in its implications for litigation seeking procedural change, the assessment is to be made at the level of operation, rather than in terms of the particular needs of the particular litigants involved in the matter before the Court. Thus tailor made/one size fits all approach is not possible due process.

5.5 International due process- Various countries recognize some form of due process under customary International Law and most of them agree that they should guarantee foreign visitors/investors minimum level of justice and fairness but no more than what is enjoyed by their own citizens. This has gained importance with the growth of international human rights law and the frequent use of treaties to regulate treatment of foreign nationals abroad. In order to achieve this goal the countries may enter into bi-lateral treaties as suggested by UNO.

6. PROCEDURAL DUE PROCESS AND SUBSTANTIVE DUE PROCESS:

6.1.1 Procedural due process- basics: The term "due process" is usually comprehended as closely related only to the procedure to be followed in the court cases. Procedural due process is essentially based on the concept of "fundamental fairness." As construed by the courts, it includes an individual's right to be adequately notified of charges or proceedings, and the opportunity to be heard at these proceedings. In the United States, criminal prosecutions and civil cases are governed by explicit guarantees of procedural rights under the Bill of Rights, most of which have been incorporated under the Fourteenth Amendment. Procedural due process has also been construed to protect the individual so that statutes/regulations and executive actions must ensure that no one is deprived of "life, liberty, or property" without a fair opportunity of hearing i.e. principles of natural justice. This protection extends to all government proceedings that can result in an individual's deprivation, whether civil or full blown criminal trials. In 1934, the United States Supreme Court held that due process is violated "if a practice or rule

offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental".

6.1.2 Procedural due process VS. "Some Kind of Hearing"- US Supreme Court Judge Henry Friendly in his hugely admired article, "Some Kind of Hearing," has generated a ***10 points*** list that acquired high significance, as to both content and relative priority in procedural due process. # An unbiased tribunal, # Notice of the proposed action and the grounds asserted for it, # Opportunity to present reasons why the proposed action should not be taken. # The right to present evidence, including the right to call witnesses. # The right to know opposing evidence. #The right to cross-examine adverse witnesses. # A decision based exclusively on the evidence presented. # Opportunity to be represented by counsel # Requirement that the tribunal prepare a record of the evidence presented #Requirement that the tribunal prepare written findings of fact and reasons for its decision.

6.2.1 Substantive due process- Development and use of substantive due process as legal doctrine-Most courts in UK, USA have viewed the due process clause of the Constitution as embracing the fundamental rights which are explicit & implicit. Some experts feel that modern substantive due process doctrine is based on the theories of ***natural rights and natural justice*** and protects the right to privacy, property and personal liberty. However it may be interesting to note that the phrase *substantive due process* was not used until the twentieth century and only after the Fourteenth Amendment (security against unreasonable searches) interpretations on due process clause began in the US Supreme Court.

6.2.2 Criticisms of substantive due process- Critics of the doctrine of substantive due process argue that judges are importing the meaning not supported/ implied in the Constitution and trying to expand the liberty of some people at the expense of other people's liberty (such as in the Dred Scott case), or addressing substance instead of process. Oliver Wendell Holmes, Jr., a formalist, felt that the Court was overstepping its boundaries. Originalists, like Supreme Court Justice Thomas, who rejects substantive due process doctrine, and Supreme Court Justice Scalia, who has also questioned the legitimacy of the doctrine, call substantive due process a ***"judicial usurpation"*** or an ***"oxymoron".*** Many non-originalists, like Justice Byron White, have also been critical of substantive due process. As propounded in his dissents in *Moore v. East Cleveland* and *Roe v. Wade*, as well as his majority opinion in *Bowers v. Hardwick*, White argued that the doctrine of substantive due process gives the judiciary too much power over the governance of the nation and takes away such power from the elected branches of government. Another non-originalist John Hart Ely criticized "substantive due process" as a glaring non-sequitur.

6.2.3 Judicial review of substantive due process violations- Notwithstanding the divergent view points on the efficacy of the substantive due process theory, its violation is subject to judicial review. When a law or any act of the state is challenged as an infringement of individual's liberty under the Due Process Clause, courts nowadays primarily use two forms of scrutiny, or judicial review, i] ***strict scrutiny***- if the executive action infringes upon a fundamental right and ii] ***rational basis review*** in all other cases. There is also a middle level of scrutiny, ***intermediate scrutiny***, but it is primarily used in Equal Protection cases rather than in Due Process cases as the standards of intermediate scrutiny have yet to make any headway.

6.3 Indian scenario- The Constitution of India implicitly and explicitly deals with both the aspects of due process i.e. ***procedural and substantive due process***. The constitution guarantees certain *fundamental rights* to the citizens which cannot be infringed by executive actions without following the due process. However the fundamental rights are not absolute and the legislature and executive have powers to impose certain restrictions through delegated legislation in the public interest and matters of public policy but it must follow the rule of law and due process. Further an elaborate procedure has been prescribed covering all the aspects of *procedural and substantive due process* in the ***Civil Procedure Code (CPC)*** and the ***Criminal Procedure Code (CrPC)*** which deal with the civil and criminal matters before the court and the affected party has a right to go into appeal to the higher court/tribunal raising the question of *procedural and substantive due process.*

7. SUMMARY AND CONCLUSIONS:

The ***Rule of Law*** and Due Process are most vital for the protection of the right to privacy, property and liberty. Though these terms have originated and evolved in Great Britain and USA of course with some time lag, they are incorporated in modern constitutions of most of the countries across the world. The theory and practice however may vary from slightly to considerably depending upon the forms of sovereign power i.e. democracy, communism, dictatorship etc. At global level The UNO is working to support a rule of law framework and >40 UN entities major being **UNDP, UNICEF, UNHCR, UNIFEM** and **UNODC** are engaged in over 110 countries with the largest presence in Africa. In the words of Upendra Baxi "the Indian ROL stands normatively not just as a *sword* against State domination, but also as a *shield*, empowering a "progressive" state intervention in civil society. The Rule of Law is the foundation of a civilized society and most crucial for Economic Development. ***Due process*** is an offshoot of ROL and we cannot imagine the just and fair trial in civil/criminal cases before the court of law and also the executive actions without the due process. Like ROL due process also finds a place in the modern constitution of most countries in the world may be with some exceptions.

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