

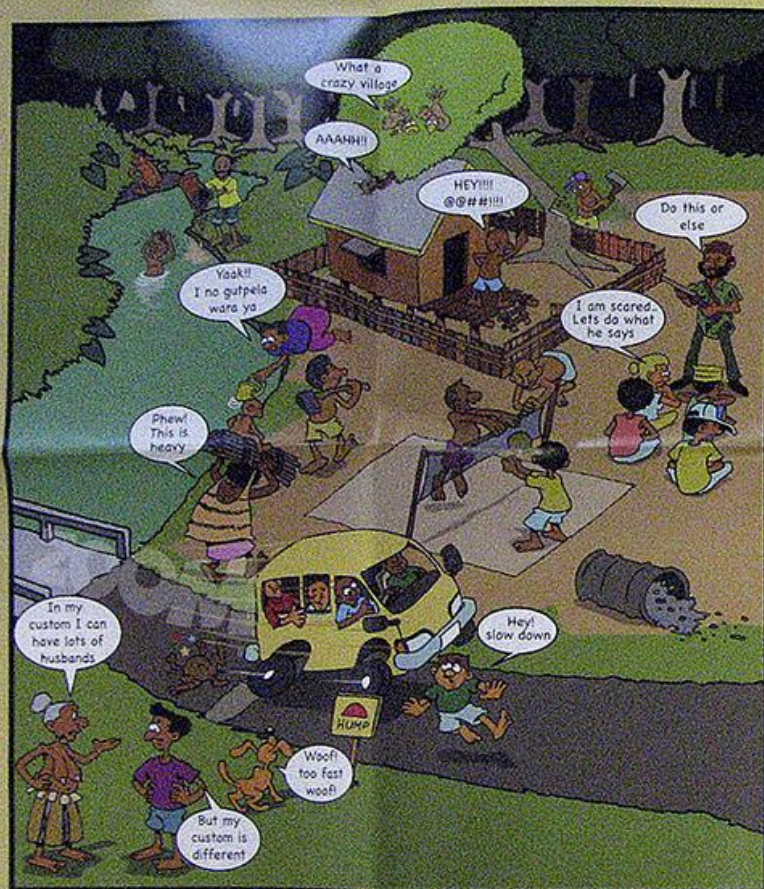
RULE OF LAW – SYNDICATE 1



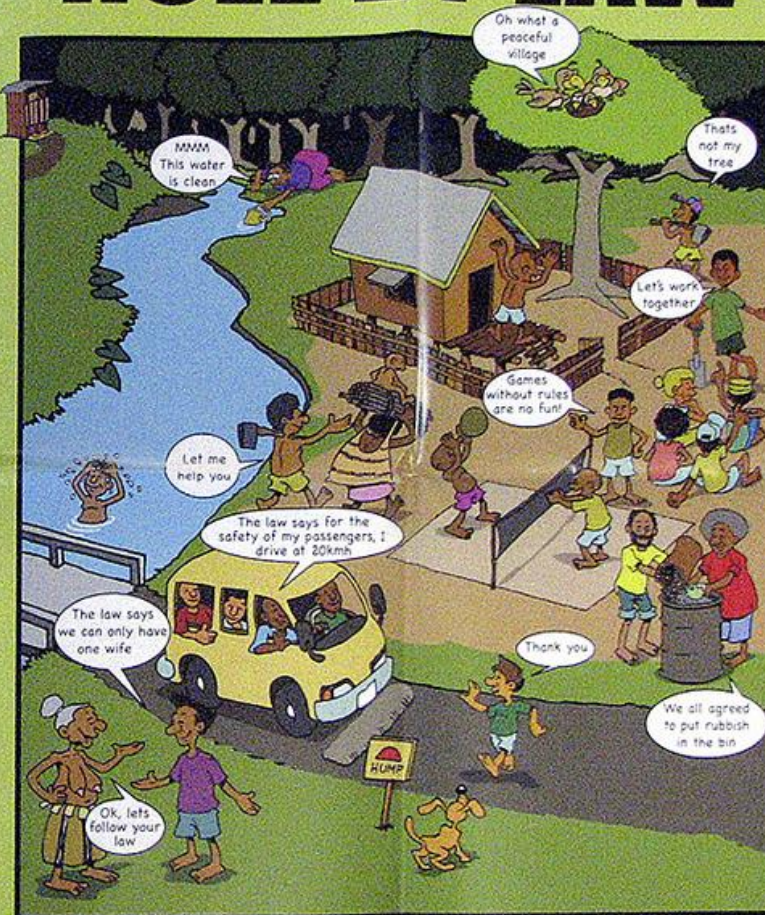
STRUCTURE

- Introduction
- Diceian principle
- Informal to formal Justice
- Rule of law in Indian context
- Role of Indian Judiciary
- United Nations organizations
- Economic case study
- Criticism and challenge
- ROL arid legal doctrine or foundation of fair and just society?
- Questions ?

RULE BY MAN



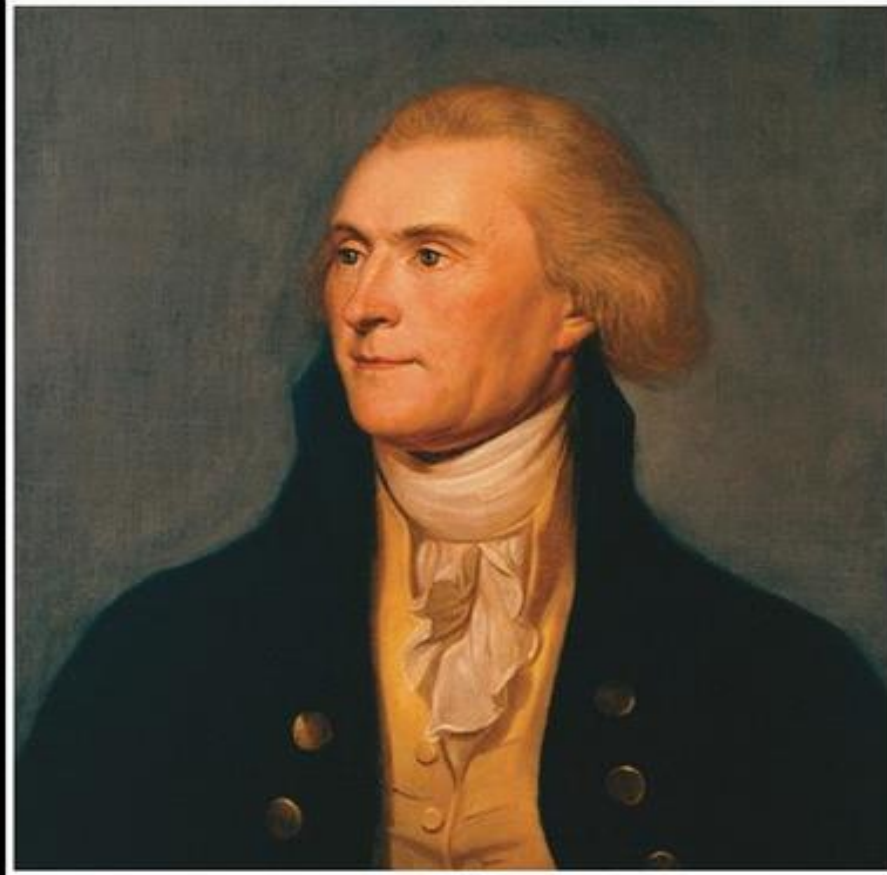
RULE BY LAW



INTRODUCTION

- ✗ Meaning of the doctrine:
- ✗ Aristotle – “laws should govern”
- ✗ In reality it is neither a rule or law
- ✗ It is a doctrine of political morality that aims at ensuring the correct balance of rights and powers between individuals and the state
- ✗ “Only in a country where the rule of law means more than formal, legal validity will subjects enjoy real protection from official tyranny and abuse” *Mathews*

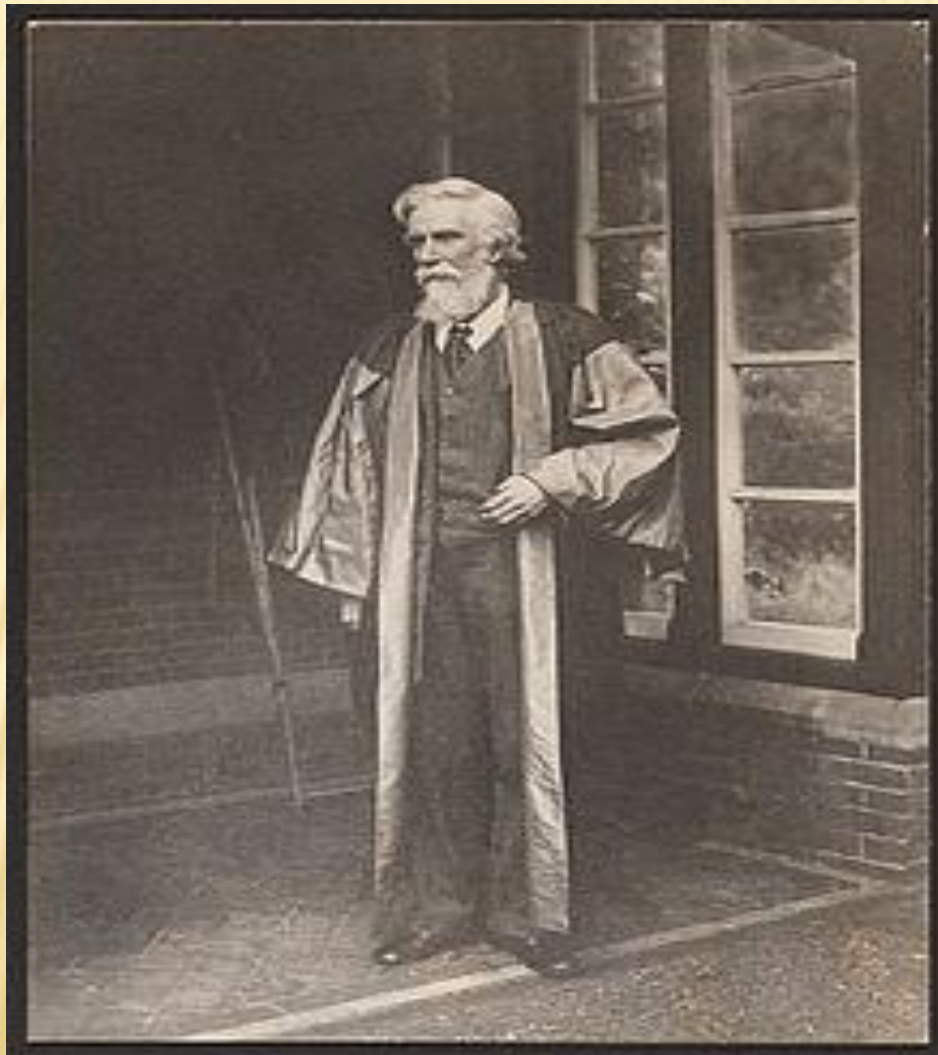
THOMAS JEFFERSON



RULE OF LAW

“In questions of power, then, let no more be said of confidence in man, but bind him down from mischief by the chains of the Constitution”

A.V.DICEY



RULE OF LAW

- ✖ As per Prof. A.V.Dicey, "the rule of law means the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power and excludes the existence of arbitrariness or even of wide discretionary authority on the part of Government" (The Law of Government)

A.V.DICEY'S CONCEPT

- ✗ 1. Supremacy of Law
- ✗ 2. Equality before Law
- ✗ 3. Predominance of Legal spirit.

1. SUPREMACY OF LAW

- ✘ 'Supremacy of Law' is the central and most characteristic feature of Common Law.
- ✘ Law is the absolute supreme and predominant as opposed to influence of arbitrary power or discretionary power.
- ✘ English men are ruled by the Rule of Law and law alone.
- ✘ A man can be punished by rule of law, and by nothing else.

2. EQUALITY BEFORE LAW

- ✗ There must be equality before law or equal subjection of all classes to the ordinary law.
- ✗ All people should be subject to one and the same law.
- ✗ There is no need for extraordinary tribunals or special courts to deal with cases of Government and its servants (such as the one seen in *Droit Administratif*).
- ✗ Of course, Dicey accepted that administrative authorities are exercising 'judicial' functions though they are not 'courts'.
- ✗ Lord Denning: "Our English law does not allow a public officer to shelter behind a *driot administratif*."

3. PREDOMINANCE OF LEGAL SPIRIT

- ✗ Rights (such as right to personal liberty, freedom from arrest etc.) are the result of judicial decisions in England.
- ✗ The rights are a result of court judgements rather than from being enshrined in the Constitution.
- ✗ The Constitution is a consequence (and not the source) of the rights of the individuals.
- ✗ During emergency *adm jabalpur vs shivkant shukla*.
- ✗ Thus, Courts are the guarantors of the liberty
- ✗ Rights would be secured more adequately if they were enforceable in courts rather than just being written in the Constitutional document.
- ✗ Mere incorporation in a written constitution is of no use in the absence of effective remedies of protection and enforcement.

Wade: Government is a subject of the Rule of Law, rather than the law being a subject of the Government.

ADVANTAGES OF DICEY THESIS

- ✖ Helped to make administrative authorities confine to their limits.
- ✖ Became a yard stick to test administrative actions.
- ✖ Helped for the recognition and the growth of the concept of administrative law.

DISADVANTAGES/LIMITATIONS OF DICEY THESIS

- ✗ Dicey thesis was not completely accepted even in his era.
Even at this time, there was a long list of statutes which permitted the exercise of discretionary powers of the Crown which could not be called to the Court.
- ✗ He misunderstood the real nature of *droit administratif* which was successful in France.
- ✗ Even courts having discretionary powers
- ✗ Dicey instead of not just disallowing arbitrary powers has also insisted that administrative authorities should not be given discretionary powers.
- ✗ Conclusion it is his philosophy not rep. the english law

INFORMAL TO FORMAL JUSTICE

- ✗ From ancient times aristotle plato
- ✗ Various civilizations
- ✗ Modern time magna carta



England, June 15,
1215: King John
confirms *Articles of the
Barons*, which were
then proclaimed as
*Magna Carta
Libertatum*



The scene looks a bit different in this picture...

MAGNA CARTA

The Magna Carta was a government document that limited the power of the king of England and protected the rights of the nobility. It was written by the English nobility in 1215.



Big Ideas:

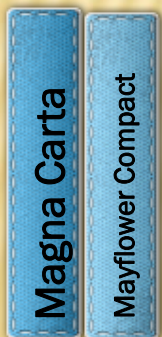
- Limited Government
- Rights
- Rule of Law
- Due Process

MAYFLOWER COMPACT

The Mayflower Compact was an agreement between individuals that created a government that would provide order and protect the rights of the colonists. It was written by a group of English Puritans as they traveled to Massachusetts in 1620.

Big Ideas:

- Self Government
- Rule of Law

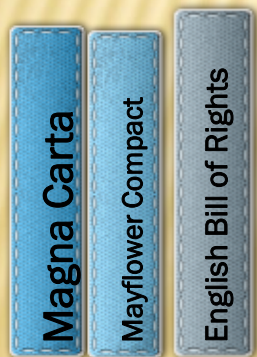


ENGLISH BILL OF RIGHTS

The English Bill of Rights was a government document that expanded the powers of the English Parliament and expanded the rights of the people, as well as further limited the rights of the king. It was written by the members of the English Parliament in 1689.

Big Ideas:

- Limited Government
- Rights
- Due Process
- Rule of Law



CATO'S LETTERS

Cato's Letters were made up of a collection of newspaper articles published to convince people to support the freedom of expression and to fight against the heavy handed rule of the British government. They were written by two anonymous English journalists in the 1720's.

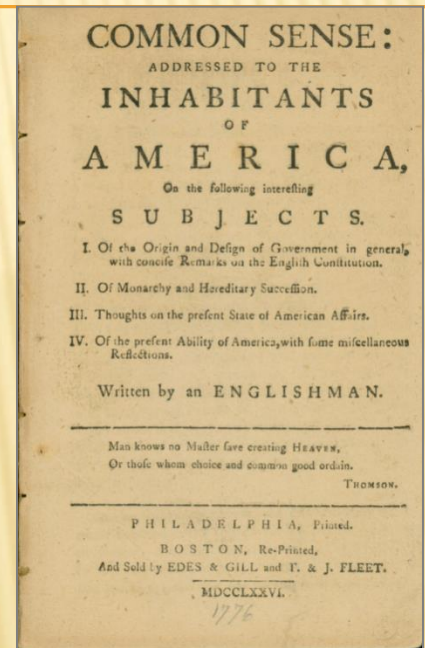
Big Ideas:

- Rights
- Rule of Law



COMMON SENSE

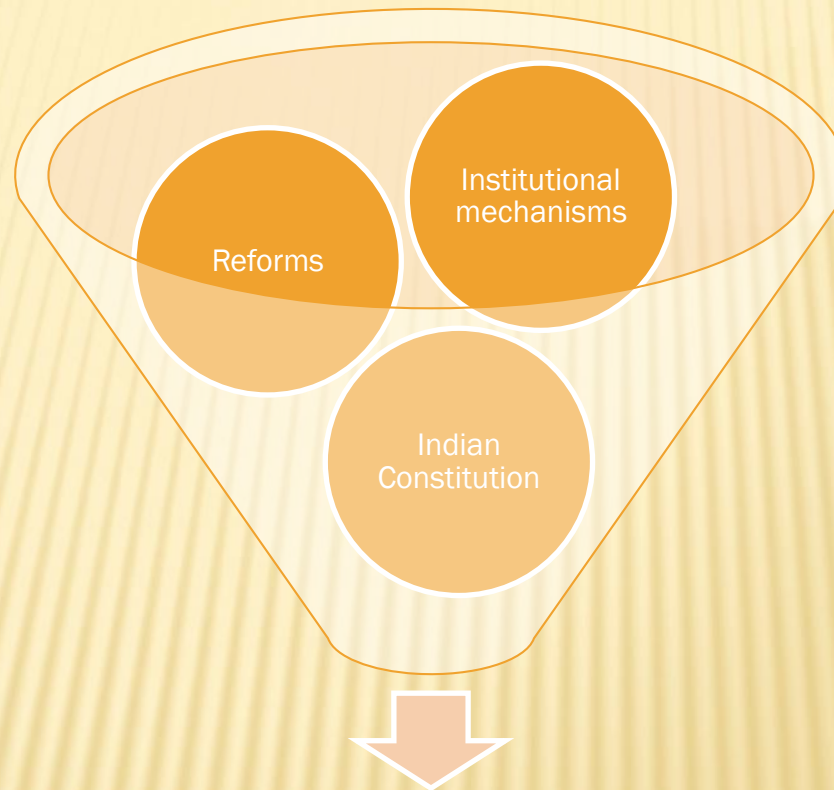
Common Sense was a pamphlet written to convince the American colonists to support becoming independent from England. It was written by Thomas Paine, a colonial journalist, and circulated in 1776.



Big Ideas:

- Self Government
- Rights

INDIAN CONTEXT



Rule of Law

PREAMBLE

WE THE PEOPLE OF INDIA having solemnly resolved to constitute India into a **SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC** and to secure to all its citizens

JUSTICE, social, economic and political
LIBERTY of thought, expression, belief, faith and worship
EQUALITY of status and of opportunity and to promote among them all.

FRATERNITY assuring the dignity of individual and the unity and integrity of the nation.

IN OUR CONSTITUENT ASSEMBLY the twenty-day of November, 1949, do, **HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION**



INDIAN CONTEXT



REFORMS



INSTITUTIONAL MECHANISMS

- ✗ Independent Judiciary
- ✗ Separation of Power
- ✗ Constitutional Watch dogs: CAG, CEC,
- ✗ Institutional Mechanisms: CIC, NHRC.
- ✗ Active Media
- ✗ Citizens Participation

ROLE OF INDIAN JUDICIARY IN ROL

- *A.K. Kraipak v. Union of India [(1969)]*
- Supreme Court observed: “In a welfare State like ours it is inevitable that the organ of the State under our Constitution is regulated and controlled by the Rule of law.”
- *Indira Nehru Gandhi v. Raj Narain [(1975)]* Rule of law was a basic feature of the Indian Constitution.
- Supreme Court in *Veena Sethi v. State of Bihar [1982]* “Rule of law does not exist merely for those who have the means to fight for their rights and very often do so for the perpetuation of the status quo, which protects and preserves their dominance and permits them to exploit a large section of the community.”
- Social Action Litigation/ Public Interest Litigation
- Lok Adalat system

KESHAVANDA BHARTI V/S STATE OF KERALA 1967

- ✘ Amendability of Constitution by Parliament under Article 368 is not absolute
- ✘ Judicially innovated doctrine of *Basic Structure of Indian Constitution*
- ✘ Amendments by Parliament could not destroy the 'basic structure' of the Constitution
- ✘ Diluted its judgement in the *Golak Nath* case that Parliament could not amend or alter any fundamental right.

POLITICO- LEGAL RIGHTS

- Hussainara Khatoon v. State of Bihar (AIR 1979) **Right to a speedy trial of under trials**
- M.H. Hoskot v. State of Maharashtra (1978) **Right to free legal aid**
- S.R. Bommai Vs Union of India 1994 - Guidelines for **imposition of President's rule** under Article 356
- ✗ PUCL VS UOI NOTA (2013) **Right to negative vote.**
- ✗ Lily Thomas vs Union of India (2013) Any MP/MLA /MLC who is convicted of a crime with more than two year sentence, will be **disqualified as an elected representative on the date of conviction.**

DIGNITY OF WOMEN AND THEIR RIGHTS

- ✗ **Shah Bano Case 1985-**
- ✗ The Supreme Court invoked Section 125 of Code of Criminal Procedure providing Shah Bano with maintenance money, similar to alimony
- ✗ **Vishaka & Ors vs State Of Rajasthan 1997**
- ✗ Sexual harassment was explicitly and legally defined as an unwelcome sexual gesture.
- ✗ Every instance of sexual harassment is a violation of fundamental rights.
- ✗ **Om Prakash Vs Dil Bahar 2006**
Supreme Court held that a rape accused could be convicted on the sole evidence of the victim, even if medical evidence did not prove rape.
- ✗ **The Nirbhaya Case 2012**
Rape law was amended to go beyond penile-vaginal intercourse. The new definition penalizes penetration of any orifice of the woman with any part of the man's body or with any object.

LGBT RIGHTS

- ✘ ***Naz Foundation v. Govt. of NCT of Delhi*** (Delhi High Court)
- ✘ Treating consensual homosexual sex between adults as a crime is a violation of fundamental rights protected by India's Constitution.
- ✘ Decriminalisation of consensual homosexual sex under sec 377 of Indian Penal Code 1960
- ✘ ***NALSA V/S UOI 2014***
- ✘ Supreme Court of India decided to recognise the transgender community as a third gender, availing them of basic human rights of education, jobs and voting.

UN AND RULE OF LAW

- **Charter of the United Nations** : In its Preamble, one of the aims of the UN is *“to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained”*
- **Primary purpose of the organisation**: *“to maintain international peace and security... and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.”*
- **Universal Declaration of Human Rights 1948**: *“... it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law...”*

ORGANS OF UNITED NATIONS

- ✖ General Assembly: It is a deliberative body where all the member countries enjoy equal voting rights.
- ✖ Security Council: Responsible for maintenance of international peace and security. Permanent member enjoy veto power.
- ✖ International Court of Justice: Decides disputes among nations recognise its jurisdiction according to international law.

AGENCIES OF UNITED NATIONS

- ✘ **UNHCR:** Providing assistance and protection to refugees and IDPs, their sustainable return to native places.
- ✘ **UN Women:** Promote gender equality and the empowerment of women.
- ✘ **UNODC:** Seeks to achieve justice and security for all by helping member states and its people to protect them against threats posed by Drugs, Crime and Terrorism.
- ✘ **UNDEF:** Support projects that strengthen the voice of civil society, promote rule of law and encourage participation of all groups in democratic process.

CRITICISM

- ✘ Recommendation made by General Assembly to the Security Council are non-compulsory.
- ✘ Security Council resolutions are subjected to veto powers of the five permanent members.
- ✘ International Court of Justice is alleged to have biased approach when it comes to human right violations by NATO forces.
- ✘ UN functions are allegedly controlled by USA and its European allies through budgetary support.

REFORMS

- ✘ Security council should be expanded to include countries like India as a permanent member.
- ✘ Veto powers of the P5 should be quashed.
- ✘ General Assembly should work as a democratic deliberative body with its recommendation binding on other UN organs and agencies.
- ✘ ICJ should be made truly independent to enforce international law without any bias among member states.

HUTCH AND VODA STORY



Hutch
without
her puppy

Poor Voda
in love

Vodafone wished to buy Hutchinson Essar in 2007,
including all its assets and liabilities in India

VODAFONE BRAINSTORMS

Poor Voda

Merger
expert

Tax expert

Strategy
expert



AND THEY TO GO TO CAYMANS



And ahem...they merge!

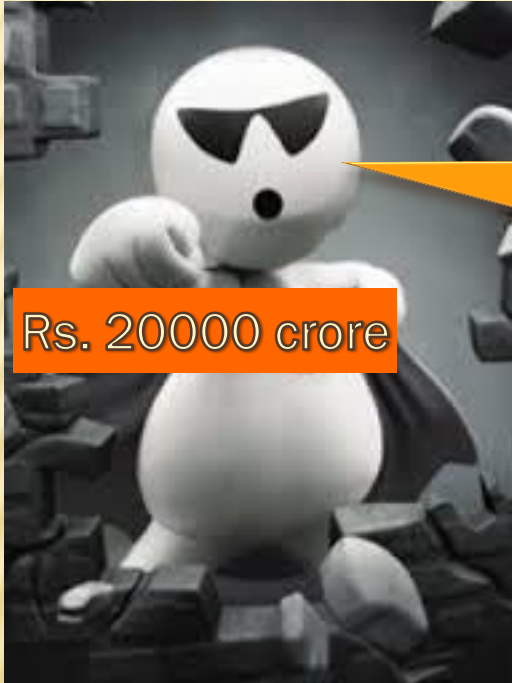


INDIAN TAX AUTHORITIES ARE NOT HAPPY



I cracked the
civils. You no
fool me!!!





This is the tax
demand with
penalty...pay up for
your overseas
honeymoon

MOOT POINTS

- ✖ IT department invokes General Anti Avoidance Rules to look through the merger. GAAR was not yet notified at that time (it is not yet, keeps getting postponed).
- ✖ IT department was correct to the extent that probably the deal was done in Cayman islands to avoid taxes.

-
- ✖ Significant confusion in the market
 - ✖ GAAR can be used to open up closed cases dating back to 1965
 - ✖ New investments are held back and all players watch the progress with interest and caution
 - ✖ Was it an administrative overreach breaching rule of law?

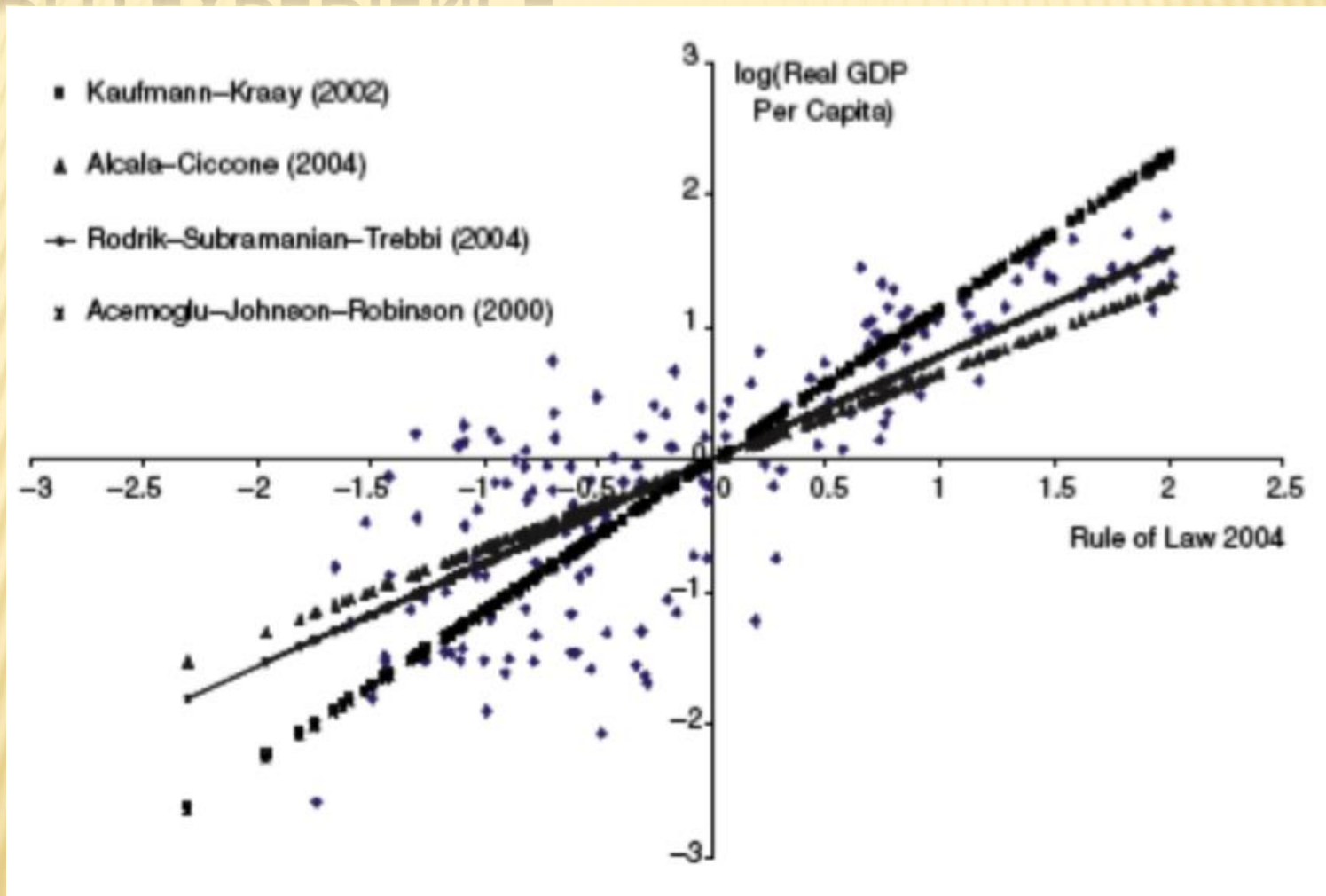
SC STATEMENTS ABOUT RULE OF LAW AND GAAR IN THE VODAFONE CASE

...FDI flows towards location with a strong governance infrastructure which includes enactment of laws and how well the legal system works. **Certainty is integral to rule of law....**

...But for the **Courts to try to stretch the law to meet hard cases** (whether the hardship appears to bear on the individual taxpayer or on the general body of tax-payers as represented by the Inland Revenue) **is not merely to make bad law but to run the risk of subverting the rule of law itself....**

(Extracted from the judgement CIVIL APPEAL NO.733 OF 2012 Vodafone Vs Union of India)

RULE OF LAW VS GDP PER CAPITA – THE WORLD EXPERIENCE





CRITICISM OF ROL



Laws grind the poor, and rich men rule the law.

(Oliver Goldsmith)

CRITICISM OF ROL

- ✗ Rule of law is **merely a method** by which ruling class can justify their rule because they are in charge of determining which laws get passed which not.
- ✗ It emphasizes on prevention of arbitrary action while giving legitimacy to all actions performed 'according to law' even when most people will oppose this action.

-
- ✘ **Inherent Ambiguity**: Laws made in the parliament by majority. What about minority? In a way majority given arbitrary powers.
 - ✘ What if **Parliament enacted bad law**?
 - ✘ By focusing on procedures used to create law, one loses sight of the content and consequences of law.

CHALLENGES

× Governance:

- + Insufficient institutional and procedural safeguards against corruption

× Criminal Justice

- + Lack of adequately strong, independent and fair justice system at national level
- + Inadequate mechanisms to support effective cooperation in addressing transnational/ trans departmental organized justice.

✖ Law enforcement agencies

- + Weak capacity of law enforcement agencies
- + Patchy cooperation among member states, if any

We do have the
Jungle Law...



U.S. v. Nixon (1974)

Case name: *U.S. v. Nixon (1974)*.

Holding: The President is not above the law.

Background: The special prosecutor in the Watergate affair subpoenaed audio tapes of Oval Office conversations. President Nixon refused to turn over the tapes, asserting executive privilege. The Supreme Court ruled that the defendants' right to potentially exculpatory evidence outweighed the President's right to executive privilege if national security was not compromised.



vs



A fair, functioning system of laws is the foundation of communities of opportunity and equity. In the absence of the rule of law, violence, poverty, corruption, sickness, and ignorance flourish.



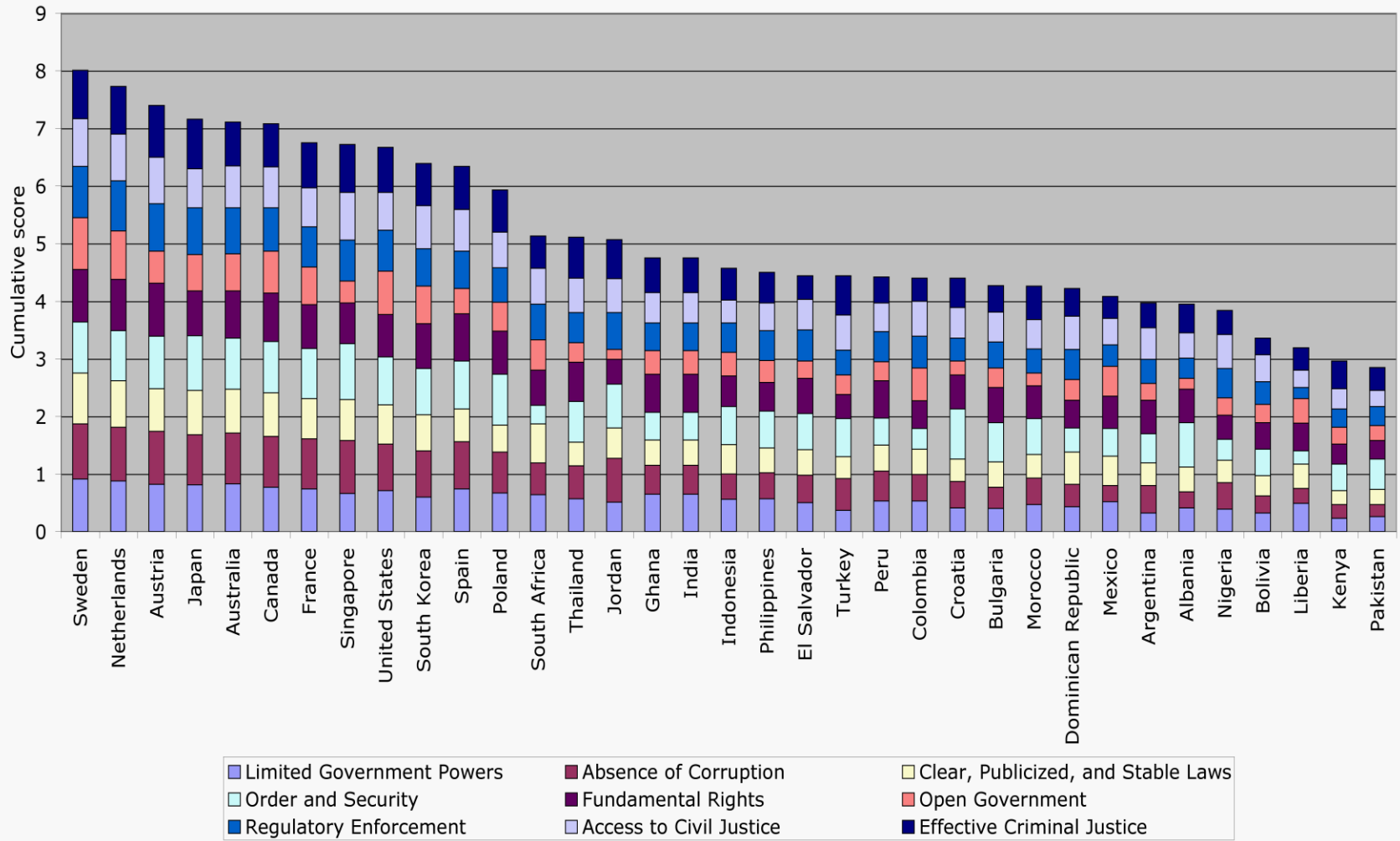
RULE OF LAW INDEX WORLD JUSTICE PROJECT

- ✗ The government and its officials and agents are accountable under the law.
- ✗ The laws are clear, publicized, stable and fair, and protect fundamental rights, including the security of persons and property.
- ✗ The process by which the laws are enacted, administered, and enforced is accessible, efficient, and fair.
- ✗ Justice is delivered by competent, ethical, and independent representatives and neutrals who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.
- ✗ <http://data.worldjusticeproject.org/#/groups/IND>

PARAMETERS OF RULE OF LAW INDEX

1. Constraints on government powers;
2. absence of corruption;
3. order and security;
4. fundamental rights;
5. open government;
6. regulatory enforcement;
7. civil justice;
8. criminal justice.

Rule of Law Index 2010





No man is above the law and no man is below it: nor do we ask any man's permission when we ask him to obey it.

(Theodore Roosevelt)

izquotes.com

THANK YOU

- 1) Shri . Rishikesh Meena (CFC-01)
- 2) Ms. Anjali Ahuja (CFC-11)
- 3) Dr.A.Koan (CFC-21)
- 4) Shri .Abishek Singh (CFC-41)
- 5) Shri. Umesh Udai Verma (CFC-51)
- 6) Shri. K V Tirumala (CFC-61)
- 7) Shri. Chandrasekar (CFC-71)
- 8) Ms Aparna Goyal (CFC-81)
- 9) Shri Dhammajyoti (CFC-91)

??????????